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

Office of Policy Planning
Bureau of Economics
Bureau of Competition
Bureau of Consumer Protection

October 20, 2015

The Honorable Robert W. Godshall
Majority Chairman, House Consumer Affairs Committee
Pennsylvania House of Representatives
150 Main Capitol Building
P.O. Box 202053
Harrisburg, PA 17120-2053

Dear Chairman Godshall:

The staffs of the Federal Trade Commission's ("FTC") Office of Policy Planning and the Bureaus of Economics, Competition, and Consumer Protection[1] appreciate the opportunity to respond to your invitation for comments on several legislative proposals that would further regulate the pre-need sales of cemetery and funeral merchandise and services. At the time of your request, no bills had been introduced in the Pennsylvania General Assembly, and you had requested that we comment on SB 1491, a proposed bill from the 2014 legislative session, as well as on alternative provisions being considered.[2] After we received your request for comments, two separate, but similar, bills were introduced in the Pennsylvania General Assembly: SB 874 and HB 1364 ("bills").[3] Both bills would amend the current Pennsylvania law, known as the "Cemetery and Funeral Merchandise Trust Fund Law."[4] The bills, if enacted, appear to impose additional restrictions and requirements on cemeteries that engage in the pre-need sale of cemetery goods. These provisions could lessen competition, resulting in potentially higher prices and fewer options for consumers, without countervailing benefits to consumers.

[1] This letter expresses the views of the Federal Trade Commission's Office of Policy Planning and Bureaus of Economics, Competition, and Consumer Protection. The letter does not necessarily represent the views of the Federal Trade Commission ("FTC" or "Commission") or of any individual Commissioner. The Commission, however, has voted to authorize staff to submit these comments.

[2] Letter from Rep. Robert W. Godshall, Pennsylvania House of Representatives, to Marina Lao, Director, FTC Office of Policy Planning (Apr. 7, 2015) [hereinafter Rep. Godshall's Request Letter].

[3] S.B. 874, 2015-2016 Gen. Assemb., Reg. Sess. (Pa. 2015), *available at* http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2015&sessInd=0&billBody=S&billTyp=B&billNbr=0874&pn=1314 (introduced on June 4, 2015, as amended on October 13, 2015); H.B. 1364, 2015-2016 Gen. Assemb., Reg. Sess. (Pa. 2015), *available at* http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2015&sessInd=0&billBody=H&billTyp=B&billNbr=1364&pn=1990 (introduced on June 29, 2015).

[4] 63 PA. STAT. ANN. §§ 480.1−.11 (West 2015). We use the terms "funeral goods," "funeral merchandise," "cemetery goods," cemetery merchandise," and "death care goods and services" interchangeably to cover the same types of merchandise and services.

## I. INTEREST AND EXPERIENCE OF THE FTC

The FTC is charged with enforcing Section 5 of the FTC Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.[5] Competition is at the core of America's economy, and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation.[6] For competition to flourish in a free-market economy, however, consumers must be able to make intelligent and well-informed decisions based on truthful and non-deceptive information.[7]

Pursuant to its statutory mandate, the FTC seeks to identify business practices that may harm consumers or unreasonably impede competition. In 1972, the FTC began investigating funeral industry practices and found widespread unfair and deceptive practices by funeral homes, which led to the promulgation of the Funeral Industry Practices Rule ("Funeral Rule").[8] "The essential purposes of the Funeral Rule are to ensure that consumers receive information necessary to make informed purchasing decisions, and to lower existing barriers to price competition in the market for funeral goods and services."[9] The FTC's Funeral Rule applies only to "Funeral Providers," defined as "any person, partnership or corporation that sells or offers to sell funeral goods *and* funeral services to the public."[10] During the most recent regulatory review of the Funeral Rule in 2008, the FTC noted that it "has observed an increase in competition in the sale of funeral goods and services. Traditional entities in the death care industry such as cemeteries and monument dealers are now selling goods outside of their traditional product line."[11]

The Funeral Rule promotes competition and deters deceptive or unfair practices by mandating that, at the outset of discussions of funeral arrangements, funeral providers disclose itemized prices for funeral goods and services. The Funeral Rule also prohibits a number of specific misrepresentations that the FTC found were prevalent in the funeral industry.[12] Importantly, the FTC noted, "the record evidence did not establish that [other] sellers, particularly cemeteries and crematories, engaged in the

[5] FTC Act, 15 U.S.C. § 45.
[6] Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").
[7] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976) ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.").
[8] Trade Regulation Rule on Funeral Industry Practices, 16 C.F.R. § 453 (2015).
[9] *See* Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg. 13,740, 13,741 (Fed. Trade Comm'n Mar. 14, 2008).
[10] 16 C.F.R. § 453.1(i). Although the funeral rule primarily applies to funeral homes, it also applies to for-profit cemeteries with funeral homes on the premises. *See infra* Section II.C, discussing the Funeral Rule.
[11] 73 Fed. Reg. at 13,744.
[12] *See* 16 C.F.R. § 453, enumerating specific unfair or deceptive acts or practices in the funeral industry and the requirements to remedy them.

types of abuses addressed by the rule."[13] The FTC conducts annual undercover inspections to ensure industry compliance with the Funeral Rule.[14]

The FTC monitors other activities in the funeral industry that may result in higher prices or lower quality of services due to a reduction in competition, such as potentially anticompetitive mergers and acquisitions.[15] The FTC also provides guidance on the proper interpretation of the Funeral Rule,[16] and advocates in favor of policies that promote competition and consumer protection in the funeral industry at both the federal[17] and state[18] levels.

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[13] 73 Fed. Reg. at 13,744 (examples of the abuses the rule was intended to address include the lack of price disclosures, forced bundling of goods and services, and misrepresentations of funeral goods and services).

[14] Funeral homes found to have significant violations, such as failing to provide a required price list, can enter a training program designed to improve compliance. If a funeral home declines to take the training or is a repeat offender after taking the training, the FTC can refer an enforcement action to the Department of Justice for filing in federal court. The 2014 undercover investigation of 100 funeral homes found 27 funeral homes had failed to disclose pricing information to consumers as required by the Funeral Rule. *See* Press Release, Fed. Trade Comm'n, Undercover Inspections of Funeral Homes in Six States Prompt Compliance with Funeral Rule Disclosure Requirements (May 5, 2015), https://www.ftc.gov/news-events/press-releases/2015/05/undercover-inspections-funeral-homes-six-states-prompt-compliance.

[15] For example, in 2014, the FTC approved an application by Service Corporation International (SCI) to divest certain funeral and cemetery assets, as required under the FTC's December 2013 proposed order settling charges that SCI's acquisition of Stewart Enterprises, Inc. would be anticompetitive. In total, the proposed order required the combined SCI/Stewart to divest 53 funeral homes and 38 cemeteries to ensure competition is maintained in 59 communities throughout the United States. StoneMor Partners purchased divested assets in several states, including Pennsylvania. Petition of Respondents for Approval of Proposed Divestiture, *In re* Serv. Corp. Int'l & Stewart Enters. (F.T.C. 2014) (No. 131 0163), https://www.ftc.gov/system/files/documents/cases/140326scipetition.pdf.

[16] *See, e.g.*, *Legal Resources*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/business-center/legal-resources?type=advisory_opinion&field_industry_tid=315 (filtered by "Type: Advisory Opinions" and "Industry: Funerals") (Funeral staff advisory opinions responding to specific questions about the interpretation of the Funeral Rule); Amicus Curiae Brief on Behalf of the United States Federal Trade Commission in Support of Neither Party, St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013) (No. 11-30756), *available at* https://www.ftc.gov/sites/default/files/documents/amicus_briefs/st.joseph-abbey-et-al.v.castille-et-al./111216stjosephamicusbrief.pdf; FTC Advisory Opinion to Dan Flynn, Representative, Tex. House of Representatives (July 7, 2005), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-advisory-opinion-hon.dan-flynn-concerning-lawful-construction-term-cash-advance-ftcs-funeral-rule/050707funeralruleadvoopin.pdf (concerning the lawful construction of the term "cash advance item" in the FTC's Funeral Rule).

[17] *See, e.g.*, *The Bereaved Consumer's Bill of Rights: Hearing on H.R. 3655 Before the Subcomm. on Commerce. Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*, 111th Cong. 16–25 (2010) (prepared statement of Fed. Trade Comm'n), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-commission-law-enforcement-activities-regarding-funeral/100127funeraltestimony.pdf [hereinafter 2010 FTC Congressional testimony] (discussing the FTC's activities involving the funeral industry, including cemeteries, in connection with proposed legislation to address the types of egregious behavior that occurred at the Burr Oak cemetery in Alsip, Illinois); *Oversight of Cemeteries and Other Funeral Services: Who's in Charge?: Hearing Before the Subcomm. on Commerce. Trade, & Consumer Protection of the H. Comm. on Energy & Commerce*, 111th Cong. 36–43 (2009) (prepared statement of Fed. Trade Comm'n), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-commission-activities-and-authority-regard-funeral/090727funeraltestimony.pdf [hereinafter 2009 FTC Congressional testimony] (same).

[18] *See, e.g.*, FTC Staff Comment to Joanne C. Benson, Delegate, Md. House of Delegates (Apr. 2, 2004), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-joanne-c.benson-concerning-maryland-h.b.795-regarding-corporate-ownership-funeral-homes/0404mdfuneralhomes.pdf (concerning Maryland H.B. 795 regarding corporate ownership of funeral homes); FTC Staff Comment to David Wright, Representative, Pa. House of Representatives (Mar. 28, 1994), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.david-wright-concerning-pennsylvania-h.b.2347-regulate-sellers-pre-need-cemetery-or-funeral-goods-or-services/v940010-2.pdf [hereinafter 1994 FTC staff comment on PA HB 2347] (on Pennsylvania H.B. No. 2347 concerning pre-need sales); FTC Staff Comment to Kirby Holmes, Senator, Michigan Senate

## II. ANALYSIS OF PROPOSED PROVISIONS

FTC staff was asked to analyze various proposals for possible effects on competition and consumers. In this section we analyze these potential approaches, which appear in SB 1491 (2014), SB 874, or HB 1364, or are otherwise suggested in your letter.

Legislative proposals, such as those under consideration by the Pennsylvania General Assembly and discussed in more detail below, may reduce or eliminate pre-need sales of cemetery merchandise and could inhibit innovative business models and lessen competition between cemeteries and funeral homes, as well as competition between pre-need and at-need providers. This not only could reduce the range of choices available to consumers, but also may increase prices for those consumers interested in prearranging their own funeral. Higher prices could have a disproportionate impact on older and lower-income consumers, some of whom may find it particularly beneficial to pay for their funeral expenses over time pursuant to a pre-need purchase contract.[19]

Available data suggest strong and growing consumer demand for pre-need products and services. For example, according to a 2010 survey, 66 percent of respondents said they would prefer to prearrange their own funeral services versus 27 percent who would prefer to allow friends or relatives to arrange the service at need. Twenty-five percent of these survey respondents said they had made some prearrangements for themselves, and of those respondents who had some prearrangements, 65 percent said they had prepaid for some of those arrangements. In 2010, 30 percent of those who had prepaid for funeral arrangements had paid for "everything,"[20] compared to 28 percent in 2004 and only five percent in 1999.[21] Moreover, 49 percent of those who had not made prearrangements responded that they were likely to do so within five years of the 2010 survey.[22]

The following sections address three main issues raised by the legislative proposals: (1) prohibitions on the pre-need delivery and installation of cemetery merchandise; (2) requirements for merchandise trust funds and refunds when a consumer breaches a pre-need contract; and (3) compliance with the FTC's Funeral Rule requirements for the sale of merchandise versus specifying state-specific requirements governing such sales.

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(Apr. 7, 1986), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.kirby-holmes-concerning-michigan-substitute-h.b.4588-regulate-pre-need-funeral-goods-and-services/p864635.pdf [hereinafter 1986 FTC Staff comment on MI HB 4588] (concerning Michigan Substitute H.B. 4588 to regulate pre-need funeral goods and services); FTC Staff Comment to Ginger Barr, Representative, Kansas House of Representatives (Feb. 14, 1986), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.ginger-barr-concerning-kansas-s.b.499-and-h.b.2715-modify-funeral-laws/p864629.pdf (concerning Kansas S.B. 499 and H.B. 2715 to modify funeral laws).

[19] WirthlinWorldwide, *prepared for* FUNERAL AND MEMORIALIZATION INFORMATION COUNCIL (FAMIC), *Study of American Attitudes Toward Ritualization and Memorialization, Executive Summary* 22 (Jan. 2005; report of 2004 survey) (people who are older or have lower household incomes are more likely to prepay for at least some of their funeral arrangements) [hereinafter 2004 FAMIC study]. FAMIC commissioned the first study of consumer attitudes in 1990, and follow-up studies were conducted in 1995, 1999, 2004, and 2010 (Harris Interactive conducted the 2010 study).

[20] Harris Interactive, *prepared for* FAMIC, *Study of American Attitudes Toward Ritualization and Memorialization* at 22−26, Survey Questions and Responses 14, 14B, 15B, 15B2, 15C (Apr. 2010) [hereinafter 2010 Harris Interactive study].

[21] 2004 FAMIC study, *supra* note 19, at 22.

[22] 2010 Harris Interactive study, *supra* note 20, at 26, Survey Question and Response 16A.

## A. Prohibitions on the Delivery and Installation of Certain Cemetery Merchandise Prior to Need

SB 874, HB 1364, and SB 1491 (2014) would prohibit the delivery of most merchandise or products prior to need. HB 1364 and SB 1491, Section 5(b), specifically state, "[t]here shall be no delivery of merchandise or products prior to need except for mausoleums and markers." SB 874, Section 4(a), states, "[t]here shall be no delivery of merchandise or product, except for mausoleums, cremation gardens, markers and lawn crypts, prior to the death of the person for whose benefit the contract was made."[23] These bills appear to ban the pre-need warehousing (at the cemetery or elsewhere) or installation of outer burial containers.[24]

### 1. Pre-Need Warehousing of Merchandise

The International Cemetery, Cremation and Funeral Association ("ICCFA") has developed model guidelines for various issues that affect the death care industry.[25] One of ICCFA's model

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[23] Neither the bills, nor the Cemetery and Funeral Merchandise Trust Fund Law, 63 PA. STAT. ANN. §§ 480.1−.11 (West 1963), nor the Funeral Directors Law, 63 PA. STAT. ANN. § 479.13(c), defines any of these terms. The International Cemetery, Cremation and Funeral Association ("ICCFA") provides the following definitions:

> BELOW-GROUND CRYPT: A pre-placed enclosed chamber, which is usually constructed of reinforced concrete, poured in place or pre-cast unit installed in quantity, either side by side or multiple depth, and covered by earth or sod and known also as a lawn crypt, turf-top crypt, etc.
> MAUSOLEUM: A chamber or structure used or intended to be used for entombment
> MAUSOLEUM CRYPT: A chamber of a mausoleum of sufficient size for entombment of human remains
> MEMORIAL: Any product, other than a mausoleum or columbarium, used for identifying an interment space or for commemoration of the life, deeds, or career of some decedent including, but not limited to, a monument, marker, niche plate, urn garden plaque, crypt plate, cenotaph, marker bench, and vase.
> OUTER BURIAL CONTAINER: A container which is designed for placement in the grave space around the casket or the urn including, but not limited to, containers commonly known as burial vaults, grave boxes, and grave liners.

*Glossary of Terms*, INT'L CEMETERY, CREMATION & FUNERAL ASS'N, https://www.iccfa.com/government-legal/model-guidelines/glossary-terms (last visited Oct. 5, 2015). The ICCFA is an international trade association originally founded in 1887 to represent the cemetery industry, but it now represents more than 8,900 cemeteries, funeral homes, crematories, memorial designers and related businesses worldwide. According to its website, "ICCFA promotes consumer choices, pre-arrangement and open competition and has created more than two dozen model guidelines advocating state legislation on a variety of consumer-related issues. The association also assists consumers more directly through information resources, as well as through a complaint mediation service." *About ICCFA*, INT'L CEMETERY, CREMATION & FUNERAL ASS'N, https://www.iccfa.com/about-iccfa (last visited Oct. 5, 2015).

[24] The Funeral Rule defines "Outer Burial Container" as "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." 16 C.F.R. § 453.1(n). A number of states, including Pennsylvania under its current law, either permit or do not expressly prohibit the pre-need delivery of outer burial containers through either a transfer of title to and storage on behalf of the purchaser (constructive delivery) or pre-need installation. *See generally Spreadsheet Summarizing Trusting Requirements in the US and Canada*, N. AM. DEATH CARE REGULATORS ASS'N, http://www.nadcra.org/uploads/1/1/5/5/11554126/cemetery_trusting_requirements.pdf (last visited Oct. 5, 2015).

[25] The ICCFA has developed a set of 28 model guidelines setting out general concepts for consideration with respect to state laws and regulations. ICCFA states that the guidelines "combine a sensitivity to consumer protection issues with the need for all industry members, whether for-profit or not-for-profit, cemeteries, funeral homes, retail monument dealers or crematories, to conduct their operations according to sound business principles." *ICCFA Model Guidelines for State Laws and Regulations*, INT'L CEMETERY, CREMATION & FUNERAL ASS'N, https://www.iccfa.com/government-legal/model-guidelines (last visited Oct. 5, 2015).

guidelines covers warehousing, a form of "constructive delivery." Warehousing involves merchandise that is designed to withstand prolonged storage without deterioration and therefore can be purchased in advance of need and stored somewhere. This option provides the purchaser with effective control over the merchandise. For example, the cemetery may certify to the purchaser that it has remitted the wholesale price of the merchandise to the manufacturer, that the merchandise is being stored at the cemetery or in an insured warehouse or similar facility, and that the merchandise will be delivered upon the purchaser's request.[26]

Although there are some costs associated with storage, a warehousing option avoids the risk that inflation will raise the cost of the merchandise at some future date when it is needed. Because sellers are likely to pass this risk of inflation to consumers in the form of higher prices, a prohibition on pre-need warehousing could have adverse effects on competition and consumers.

**2. Pre-Need Installation of Certain Cemetery Merchandise**

Another form of constructive delivery involves the physical attachment or installation of merchandise, such as outer burial containers[27] and monuments, to an interment space owned by the purchaser.[28] Some cemeteries may find that pre-need delivery and installation of outer burial containers is a more efficient and cost-effective business model than delivery and installation at the time of need. If an outer burial container is purchased and installed pre-need at the then-current price, then neither the seller nor purchaser faces the risk that the cost of merchandise will increase in the future. Hedging against inflation could result in lower prices for consumers. Moreover, if the cemetery digs a gravesite, and purchases and installs the outer burial container prior to the purchaser's death, then the seller has performed a significant portion of the contract's requirements. This would eliminate or minimize any risk that funds will not be available in the future to fulfill the contract, and would ensure that this portion of the purchaser's pre-need arrangements is already complete.[29]

Another potential benefit of pre-need installation is that cemeteries with large unsold areas may reduce the amount of space needed per plot by preinstalling rows of burial vaults at one time. According to the National Cemetery Administration ("NCA") in the Department of Veterans Affairs ("VA"):

> traditional burial vaults are placed in a 4-5 foot wide, 10-foot long, by 7 foot deep excavation for each gravesite . . ., with 4 feet of space between excavations. This provides a safe amount of soil between gravesite excavations for burial vault installation without the soil falling back in. By installing a whole row or larger area of burial vaults ahead of time, the whole area is excavated, crushed rock is put in to provide a secure

[26] *ICCFA Model Guidelines, Constructive Delivery/Warehousing*, INT'L CEMETERY, CREMATION & FUNERAL ASS'N, https://www.iccfa.com/government-legal/model-guidelines/alternatives-trusting-constructive-deliverywarehousing (last visited Oct. 5, 2015).
[27] We use the terms "outer burial container" and "vault" or "burial vault" interchangeably in this letter.
[28] *Id.*
[29] According to one cemetery company, consumers in 21 states have chosen the pre-installation option (Alabama, California, Colorado, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, and West Virginia).

base, vaults are placed against each other, and then covered with two feet of soil. Only a 3-foot by 8-foot area is now needed for each gravesite.[30]

This pre-need installation of rows of outer burial containers was nominated for the GreenGov Presidential Award,[31] and is now the standard for military cemeteries, including Arlington National Cemetery.[32] The NCA found that "the preplaced vault process was . . . the most efficient and economic method of completing burial areas."[33] According to the NCA, the "original goal [for preinstalling burial vaults] was to reduce the amount of time required to perform a burial." The "burial of a casket involves approximately 12 labor-hours. With preplaced vaults, this is reduced to 6 labor-hours."[34] In addition, the NCA noted that in "existing cemeteries, preplaced vaults may double the life of the cemetery, enabling additional years of burial space that may have required a new cemetery."[35] The NCA has shared its preplaced vault methodologies with the ICCFA, as well as with the Institute of Cemetery and Crematorium Management (United Kingdom Cemeteries), apparently as a way to encourage others to replicate the NCA's approach.[36]

Based on the NCA's experience, pre-need installation of rows of outer burial containers likely could enable non-military cemeteries to achieve certain efficiencies, including savings in time and labor needed to prepare gravesites, better use of space, and reduced maintenance costs, particularly if the cemeteries are new or have large, as yet undeveloped tracts.[37] A prohibition on the pre-need delivery and installation of burial vaults could therefore prevent the realization of such efficiencies and reduce cemeteries' incentives to engage in pre-need sales of funeral merchandise.[38] This could limit

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[30] Nat'l Cemetery Admin., Dep't. of Vet. Aff, *2012 GreenGov Presidential Award Nomination for NCA Preplaced Burial Vault Program* 2 [hereinafter NCA Preplaced Burial Vault Program].

[31]. *GreenGov Presidential Awards*, THE WHITE HOUSE, https://www.whitehouse.gov/greengov/presidential-awards (last visited Oct. 5, 2015) ("The GreenGov Presidential Awards celebrate extraordinary achievement in the pursuit of President Obama's Executive Order on Federal Leadership in Environmental, Energy and Economic Performance. They honor Federal civilian and military personnel, agency teams, agency projects and facilities, and agency programs that exemplify [the] charge to lead by example towards a clean energy economy.").

[32] NCA Preplaced Burial Vault Program, *supra* note 30, at 4 ("Preplaced vaults are now specified in all federal veterans' cemeteries and federally funded state veterans' cemeteries.").

[33] *Id.* at 3.

[34] *Id.*

[35] *Id.* at 2. In addition, "[l]and requirements and gravesite construction costs decreased by 50% due to land not purchased and sod and irrigation systems not installed. Annual maintenance costs decreased . . . from reduced mowing, irrigation, pesticide/fertilizer applications, and correcting soil settlement. Burial labor time (and injuries) decreased by 50%, as did total personnel, equipment maintenance, and fuel use/emissions compared to maintaining conventional burial areas." *Id.*

[36] *Id.* at 4. The award nomination includes a section on "Project Replication" and states NCA's approach has been shared with these two organizations.

[37] Non-VA cemeteries that preinstall burial vaults also may likely be able to expedite burials by eliminating any potential delays associated with digging the gravesite or the ordering and delivery of the burial vault at the time of need. At the time of death the cemetery needs to remove only approximately two feet of topsoil and grass or other ground cover, open the vault, lower the casket into the vault, secure the top of the vault, and replace the top soil and grass. *See, e.g., id.* at 2.

[38] Because there are no definitions in the bills, it is unclear whether the exception in SB 874 for "lawn crypts" is meant to allow the mass installation of outer burial containers or burial vaults. If so, this would eliminate some of the inefficiencies discussed, but it would not resolve other concerns with prohibitions on pre-need installation or pre-need warehousing of outer burial containers. Some cemeteries, including Pennsylvania cemeteries, have developed sections with preplaced lawn crypts and sell spaces in these areas pre-need. It is unclear how the proposed legislation would affect the pre-need sales of these already established lawn crypt areas. *See, e.g., Lawn Crypts for Double Depth Burial*, JEFFERSON MEM'L CEMETERY & FUNERAL HOME (Pittsburg, Pa.), http://www.jeffersonmemorial.biz/crypt.php (last visited Oct. 5, 2015). Similarly, some entities, including a company that builds vaults for military cemeteries, refer to pre-need mass installations of rows of multiple vaults in newly developed areas of cemeteries as "lawn crypts," which leads to some confusion as to whether the

competition in the sale of death care goods and services in Pennsylvania between cemeteries that rely on pre-need sales and funeral homes that sell primarily on an at-need basis, potentially leading to higher prices and fewer choices for consumers.[39]

Although FTC staff recognizes there may be some risks, such as damage to the outer burial container, associated with pre-need warehousing or installation of merchandise, there may be other ways to address such risks short of completely prohibiting these practices. States can regulate the pre-need installation of outer burial containers by requiring cemeteries to remain responsible for the merchandise prior to need and to provide consumers with options as to whether to accept the pre-need delivery and/or installation of merchandise. For example, some states mandate a specific disclosure form that advises consumers of their option to have pre-need warehousing or installation. In addition, such a form could explain that the cemetery remains responsible for ensuring the burial vault is intact and not damaged when it is delivered for pre-installation or later opened for placement of a casket. In the unlikely event that the burial vault is damaged, the cemetery could be held responsible for cleaning and repairing, or if necessary replacing, the vault prior to placing the casket in the vault. Holding the cemetery responsible for any damage would appear to address potential consumer protection concerns without creating regulatory disincentives for cemeteries that are responding to consumer demand for pre-need sales contracts.[40]

### B. Trust Fund and Refund Requirements for Pre-Need Sales

A cemetery that collects consumers' payments on pre-need sales contracts is required under Pennsylvania law to place some portion of the collected payments into a trust fund account, which is a deposit account set up with a banking institution authorized to administer trusts. The primary purpose of a trust fund account for pre-need cemetery sales is to ensure the seller has sufficient funds available to fulfill a contract's requirements at some unknown future date. Thus, some type of merchandise trust fund or an alternative, such as a surety or performance bond, likely is appropriate to protect consumers against the risk that funds will not be available at the time of need.[41] Below we discuss the various legislative proposals and suggest issues and alternatives the Pennsylvania General Assembly may wish to consider.

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NCA's program or the Pennsylvania bills are using the terms "outer burial containers," "burial vaults," and "lawn crypts" interchangeably. *See, e.g., Biloxi National Cemetery, Biloxi, Mississippi*, SI CONSTR. SERVS., http://www.siconstructionservices.com/projects/biloxi.aspx (last visited Oct. 5, 2015) (description of work at a cemetery in Biloxi, Mississippi); *Georgia National Cemetery, Canton, Georgia*, SI CONSTR. SERVS., http://www.siconstructionservices.com/projects/canton.aspx (last visited Oct. 5, 2015) (description of work at a cemetery in Canton, Georgia). The ICCFA glossary also refers to "lawn crypts" as an alternative definition for below-ground crypts installed "in quantity." *Glossary of Terms*, INT'L CEMETERY, CREMATION & FUNERAL ASS'N, https://www.iccfa.com/government-legal/model-guidelines/glossary-terms (last visited Oct. 5, 2015).

[39] *See* Letter from The Catholic Cemeteries Association of the Diocese of Pittsburgh to Sen. Lisa Boscola, Pennsylvania Senate, Concerning SB 874 (June 9, 2015) (noting a "cemetery generates approximately 80% of its revenue from pre-need sales, while funeral homes generate the majority of their revenue from at-need sales").

[40] *See, e.g.*, ALA. ADMIN. CODE R. 482-3-003 (2015), *available at* http://www.aldoi.gov/PDF/Legal/PN-003-2014.pdf (last visited Oct. 5, 2015) (Alabama Department of Insurance Regulations on Preneed Sales); *Alabama Disclosure Regarding Installation of Vaults or Outer Burial Containers Prior to Need*, ALA. DEP'T OF INS. (Jan. 2015 rev.), *available at* http://www.aldoi.gov/PDF/Preneed/Disclosure%20for%20outer%20burial%20container.pdf (last visited Oct. 5, 2015).

[41] Although the FTC has no reason to believe that such situations are widespread, we are aware, for example, of cemeteries that have gone bankrupt due to the embezzlement of funds.

### 1. Current and Proposed Legislative Provisions

The current law requires cemeteries to deposit 70 percent of the retail price into a merchandise trust account and specifically allows the cemetery to keep 30 percent of the contract price as liquidated damages if a purchaser breaches the contract or defaults on the payments.[42] One version of SB 1491, introduced in 2014, would have required that 100 percent of the retail price of pre-need merchandise be placed in a merchandise trust fund. In addition, this bill would have mandated that the cemetery refund 100 percent of the monies paid, plus interest, if the consumer were to default on his or her payments at any point prior to full performance of the pre-need sales contract and for any reason.[43]

HB 1364 states that the seller must place 70 percent of the retail price of merchandise into the trust account, and refund the entire amount paid into the account if the purchaser defaults at any point prior to final performance of the contract.[44] It is not entirely clear under HB 1364 whether the cemetery would be permitted to keep the 30 percent not deposited in the trust account and whether it would have to refund any interest earned from funds deposited in the account. Clarity on these issues is particularly important because these bills would replace sections of the current law that explicitly allow the seller to keep a certain percentage of the retail price as liquidated damages, including the interest earned from the trust account.[45] HB 1364 would require the seller to refund the total amount in the merchandise trust account, including interest, if a purchaser moves out of state after making his or her final payment and wants to cancel the contract.[46]

In the most recent version of SB 874, Section 2(b) states that the seller must put funds received as payment for a pre-need sale into the trust account on the last day of the month in which the payment is received "after first deducting the percentage to be retained by the seller."[47] This appears to permit the seller to keep the 30 percent not deposited into the merchandise trust account. Similar to HB 1364, however, SB 874 eliminates language specifically allowing the seller to keep any monies as liquidated damages, thus creating the same uncertainty discussed above. SB 874 also allows the seller to keep the interest earned from the trust account if a purchaser moves out of state and chooses to cancel the contract.[48] SB 874 is silent, however, as to whether the seller would have to pay the purchaser the interest on the monies deposited on the trust account if the purchaser defaults.

### 2. Analysis of the Proposals

Cemeteries and other sellers of pre-need burial merchandise may be hesitant to engage in pre-need sales if the law requires that 100 percent of the retail price be deposited into a merchandise trust account. If all funds must be held in trust, then the seller cannot recover its overhead, selling, or administrative expenses and clear a profit until an unknown and possibly distant future date. A 100

[42] 63 PA. STAT. ANN. § 480.2(c) (West 2015).
[43] SB 1491 (2014), Printers Version 2343, Section 2(a).
[44] HB 1364, Section 2(c).
[45] 63 PA. STAT. ANN. § 480.2(c) (West 2015).
[46] HB 1364, Section 5(a).
[47] SB 874, Section 2 requires the seller to deposit 70 percent of the retail price into the merchandise trust fund.
[48] SB 874, Section 5.

percent trust requirement could therefore increase the costs of serving the pre-need market, and deny consumers the lowest possible prices and a full array of pre-need alternatives and pricing options.[49]

These effects could be exacerbated if the seller faces the prospect of having to refund 100 percent of the money collected or any interest earned on the trust account if the consumer defaults for any reason prior to full performance on the contract. For example, the seller might compensate by changing the payment terms of pre-need contracts, such as shortening the period over which 100 percent of the contract price has to be paid or raising the total pre-need price to cover reallocated risks of default. This would have the effect of taxing consumers who do not default to cover the losses from consumers who do default and demand a full refund. Either seller response would appear to disserve one of the purposes of pre-need sales – to provide consumers of modest means a way of assuring that the expenses for their final arrangements are paid. Finally, 100 percent refund requirements may prevent sellers from using trust accounts as assets to secure credit.[50]

FTC staff assumes for purposes of this analysis that the current 70 percent trusting requirement, adopted in 1963 (and included in the current versions of SB 874 and HB 1364), has not inhibited cemeteries in Pennsylvania from engaging in the pre-need sale of funeral goods and cemetery services. Maintaining the current requirement, which allows a cemetery to retain 30 percent of the contract price to cover their costs, would thus preserve cemeteries' existing incentives to engage in pre-need sales. If the General Assembly decides to keep the 70 percent trust requirement, FTC staff respectfully recommends that any proposed legislation clarify that sellers are permitted to retain the 30 percent of funds paid by consumers not deposited into the trust account.

In addition, the General Assembly may wish to consider, as an alternative approach to protect consumers, a proposal that permits pre-need sellers to provide a performance or surety bond under which a third party guarantor would agree to pay the contract amount if the seller does not deliver at the time of need. Such an alternative would avoid the General Assembly having to take on the difficult task of determining in advance the appropriate level of trust funding for the pre-need industry as a whole. Several states permit pre-need sellers of funeral goods and services to use performance bonds in lieu of establishing trust accounts.[51] Competition among guarantors and other market forces would

[49] FTC 1994 staff comment on PA HB 2347, *supra* note 18, at 5. *See generally* Jerry Ellig, *State Funeral Regulations: Inside the Black Box*, 48 J. REG. ECON. 97, 117 (2015) (study of various death care industry regulations and their effect on price, finding bans on cemetery sales of funeral merchandise are "associated with a $1159−1268 increase in the average receipts per death in the three states [studied] that have this regulation" and that more than half of the increase comes from "demand inducement," such as consumers being persuaded to buy merchandise that they might not otherwise acquire from sellers with different incentives).

[50] *See, e.g.*, 1986 FTC Staff comment on MI HB 4588, *supra* note 18, at 8, n.10 ("A trust requirement can affect prices in less obvious ways. For example, a high trust requirement – combined with a cancellation clause like that found in Section 13 of the bill – will indirectly raise costs. One option that is open to sellers who want more money at the inception of the contract is to borrow the money, using the escrow account as a form of security. . . If the consumer can cancel the agreement at will, the lender will feel less secure and raise the interest rate the seller pays," which could raise the seller's costs, likely resulting in higher prices to consumers.). The FTC staff's knowledge of this industry also suggests that at least some cemeteries' accounting practices treat merchandise trust deposits and interest earnings as assets against which they can borrow.

[51] *See, e.g.*, ALA. CODE § 27-17A-14(a) (2015) ("As an alternative to the trust requirement, . . . a preneed provider may, with the prior approval of the commissioner of the department of insurance, purchase a surety bond in an amount not less than the aggregate value of outstanding liabilities on undelivered preneed contracts for merchandise, services, and cash

then set bond prices and other surety terms. In other words, a surety approach would more efficiently shift the task of determining the appropriate level of trust to be accorded each individual seller on third-party guarantors. For example, one seller may be regarded as a better risk than another seller, perhaps because its fixed-asset base is larger. If the guarantor charged the lower-risk seller a lower premium or subjected it to other terms that were less stringent and hence less costly, the seller could pass that savings on to consumers. In other industries, performance bonds have been used to protect consumers' investments.[52] The General Assembly may therefore wish to consider a proposal permitting pre-need sellers to obtain performance or surety bonds as an alternative and procompetitive consumer protection mechanism to trust accounts. We also suggest that any trusting or surety bond requirement specify that it does not apply to merchandise that is delivered or installed pre-need.

### C. Requirement that Sellers of Pre-Need Sales Contracts Adhere to the FTC's Funeral Industry Practices Revised Rules Regarding the Sale of Merchandise

SB 874 and HB 1364, Section 2.1, state, "A seller must provide a detailed price list and detailed description of the vault and casket and must adhere to [the FTC's Funeral Rule] regarding the sale of the merchandise." For the reasons discussed below, we recommend that the General Assembly consider specifying the disclosures or prohibitions that it deems necessary to address any documented instances of problematic sales tactics by cemeteries engaged in the sale of pre-need contracts. The General Assembly should not merely adopt a blanket application of the FTC's Funeral Rule, which was promulgated to apply to funeral homes and generally does not apply to cemeteries.

The FTC's Funeral Rule applies only to "Funeral Providers" as defined. The Rule defines "Funeral Providers," as ''any person, partnership or corporation that sells or offers to sell funeral goods *and* funeral services to the public."[53] "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."[54] The Funeral Rule generally does not apply to cemeteries that do not have a funeral home on the cemetery grounds because cemeteries do not "care for and prepare deceased human bodies for burial."

During the most recent regulatory review of the Funeral Rule in 2008, the FTC chose not to apply the Funeral Rule to cemeteries based on the rule review record. First, the FTC found that "there is insufficient evidence that commercial cemeteries, crematories, and third-party sellers of funeral

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advances."); IOWA CODE § 523A.405(1) (2015) ("The commissioner shall, by rule, establish terms and conditions under which a seller may, in lieu of trust requirements, file with the commissioner a surety bond issued by a surety company authorized to do business and doing business in this state."); KY. REV. STAT. ANN. § 367.954(7) (West 2015) ("In lieu of the trust fund deposits required herein, the person may post with the Attorney General, Division of Consumer Protection, a good and sufficient bond by a surety company licensed to do business in Kentucky and in an amount sufficient to cover all payments made by or on account of purchasers who have not received the purchased property and services.").

[52] *See, e.g.*, 1994 FTC staff comment on PA HB 2347, *supra* note 18, at 7, n.27 (citing to FTC performance bond requirements in orders against health spa operators charged with, among other things, failing to fulfill their contracts with consumers); 1986 FTC Staff comment on MI HB 4588, *supra* note 18, at 8, n.11 and accompanying text (same).

[53] 16 C.F.R. § 453.1(i).

[54] 16 C.F.R. § 453.1(j) (emphasis added). "Funeral goods are the goods which are sold or offered for sale directly to the public for use in connection with funeral services." 16 C.F.R. § 453.1(h).

goods are engaged in widespread unfair or deceptive acts or practices."[55] The FTC further found that there "is insufficient evidence of widespread unfair or deceptive practices in the sale of pre-need funeral arrangements" and "that such contracts are already regulated by various state laws,"[56] as is the case under current Pennsylvania law.

Second, the FTC was concerned that expanding the Funeral Rule to cemeteries could lead to consumer confusion. The FTC Act is not applicable to most not-for-profit entities, and only about 7,500 of the approximately 25,000 cemeteries in the United States operate on a for-profit basis.[57] Not-for-profit cemeteries consist primarily of those owned or operated by religious organizations or states and municipalities.[58] The FTC declined to amend the rule to cover for-profit cemeteries, in part, because of concerns that consumers would not understand why some cemeteries would be subject to the rule and others would not, and because of the limited benefit of such an amendment given that only a minority of cemeteries would be covered.[59]

The bills as currently drafted are vague as to the specific Funeral Rule disclosures or prohibitions to which cemeteries must adhere, which could cause confusion for both consumers and businesses. FTC staff recommends that the PA General Assembly examine the requirements of the Funeral Rule and specify the disclosures or prohibitions,[60] if any, with which it wants cemeteries to comply when selling merchandise.

The current legislative language is also problematic because some of the Funeral Rule's specific disclosures would not make sense if a cemetery were required to make them. Certain disclosures were designed to remedy specific findings that funeral providers often misrepresented to consumers that state law or cemeteries required the purchase of certain merchandise. For example, the Funeral Rule requires the following disclosure on the outer burial price list: "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."[61] If a cemetery is selling the outer burial container and requires that all of its gravesites have one, requiring this disclosure could create confusion. On the other hand, if there is evidence that cemeteries are misrepresenting state law requirements, it may make sense to require cemeteries either to disclose that it is not a state law

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[55] 73 Fed. Reg. at 13,742.
[56] *Id.*
[57] *See* 2010 FTC Congressional testimony, *supra* note 17, at 3, *comparing* ROBERT G. E. SMITH, THE DEATH CARE INDUSTRIES IN THE UNITED STATES 23 (McFarland & Co., Inc., 1996) (citing estimates of 7,500 commercial cemeteries) *with* ELIZABETH G. & JAMES D. KOT, UNITED STATES CEMETERY ADDRESS BOOK 1994−95 (Indices Publ., 1996) (providing addresses of "more than 25,000 cemeteries"). In addition, some states prohibit any for-profit cemeteries, including New York, New Jersey, Massachusetts, Wyoming, Connecticut, and Maine. 73 Fed. Reg. at 13,744 & n.38.
[58] 2010 FTC Congressional Testimony, *supra* note 17, at 10.
[59] *Id.* at 3−4, citing to Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg. at 13,745 (noting that "[t]here would be confusion among the general public as to what type of information they could expect to receive and what rights they have to purchase goods from third parties. To the extent additional requirements are intended to allow consumers to compare costs among cemeteries, the inconsistent application of the Rule to some cemeteries and not others could make such comparisons impossible or impractical.")
[60] *See, e.g.*, 16 C.F.R. § 453.3(e) (2) (prohibits representations "that funeral goods have protective features or will protect the body from gravesite substances, when such is not the case").
[61] 16 C.F.R. § 453.3(c)(2).

requirement or to prohibit them from misrepresenting state law requirements. Similar confusion could occur with other Funeral Rule required disclosures.[62] FTC staff believes that an independent state law specifying the desired disclosure or prohibition requirements for cemeteries would be preferable to incorporating the FTC's Funeral Rule by reference.

## III. CONCLUSION

Prohibiting pre-need warehousing and installation of certain funeral merchandise could discourage cemeteries from offering these products to consumers as part of a pre-need sale. This could lessen competition between cemeteries and funeral homes, as well as between pre-need and at-need sellers, which could result in potentially higher prices and less consumer choice, without producing any countervailing benefits for consumers. FTC staff recommends that the Pennsylvania General Assembly consider whether such a prohibition would serve any legitimate need to protect consumers in the Commonwealth, especially in light of the reported economic and environmental benefits associated with the pre-need installation of burial vaults and lawn crypts.

FTC staff also encourages the General Assembly to consider carefully what percentage amounts should be set aside in merchandise trust funds and whether alternatives such as surety bonds may be equally effective in protecting consumers from performance defaults by sellers. We also encourage the General Assembly to consider carefully the role of liquidated damages in protecting sellers from breach by consumers. Specifically, we suggest that the amounts for trusting or surety and for liquidated damages be appropriate both to protect consumers and to avoid creating disincentives for cemeteries to continue offering pre-need sales contracts for those consumers who want them.

Finally, FTC staff encourages the legislature to refrain from adopting a blanket application of the FTC's Funeral Rule. Some of the Funeral Rule's specific disclosures are inappropriate for cemeteries and could cause confusion. Instead, we recommend that the legislation specify any disclosures or prohibitions necessary to address evidence of specific problematic sales tactics by cemeteries engaged in the sale of pre-need contracts.

[62] *See, e.g.*, 16 C.F.R. § 453.3(d)(1) and (2) (this section on general provisions for legal and cemetery requirements remedies one of several deceptive acts or practices engaged in by funeral providers by requiring "that funeral providers must identify and briefly describe in writing . . . 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"). The part requiring a specific cemetery to confirm its own requirements could appear redundant and confusing. *See also* 16 C.F.R. § 453.4(b)(2)(i)(B).

FTC staff appreciates the opportunity to comment on these legislative proposals. We hope the Pennsylvania General Assembly finds these comments helpful as it considers proposed bills to regulate the pre-need sales of funeral goods and services by cemeteries.

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