



June 12, 2020

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex B)
Washington, DC 20580

Re: Funeral Rule Regulatory Review, 16 CFR Part 453, Project No. P034410

Truth in Advertising, Inc. (TINA.org) welcomes the opportunity to submit comment on whether the Federal Trade Commission (“Commission” or “FTC”) should make changes to its Funeral Industry Practices Rule (“Funeral Rule” or “Rule”).¹ As explained below, TINA.org urges the FTC to update the Funeral Rule to require funeral service providers who advertise online to post their General Price List, Casket Price List, and Outer Burial Price List (collectively, “Price List”) on their websites.

BACKGROUND

More than 35 years ago, before the World Wide Web became publicly available, the FTC enacted the Funeral Rule to protect consumers from unfair and deceptive practices in an industry that puts consumers at a unique disadvantage: the funeral products and services industry. Not only are transactions in this industry inherently fraught with emotion and stress,² but they are also ones with which consumers tend to have very little experience or familiarity³ and ones that require making important and costly decisions under tight time constraints.⁴

This perfect storm of factors creates one of the greatest disparities of power in any consumer service industry. As a result, and to protect consumers from price gouging and haggling in a time of crisis, the FTC made the decision to require funeral service providers to commit their prices to writing, affirmatively hand the Price List to consumers at the beginning of discussions, and alert consumers to certain rights through mandatory disclosures.⁵

Decades later, in the age of the internet and social media, the stark imbalance of power between seller and consumer is still present in the funeral industry, but the manner of shopping and purchasing has drastically changed. In 1994, when the Funeral Rule was last revised, just under 5 percent of Americans were using the internet.⁶ By 2019, that number skyrocketed to more than 90 percent of American adults using the internet.⁷

The last update to the Funeral Rule also came six years before the Census Bureau began tracking e-commerce, which hit \$5.3 billion in 2000.⁸ In 2019, that number was \$601.7 billion.⁹ The proliferation of internet use is not an isolated trend. It also affects consumer behavior, particularly how they shop. The majority of consumers now conduct research online prior to buying in stores,¹⁰ a practice especially prevalent when the purchase is relatively expensive.¹¹

The Funeral Rule, last revised 26 years ago, has demonstrated inherent limitations that have prevented it from fulfilling its original purpose. Those deficiencies can be remedied, however, by modernizing the rule and requiring funeral service providers to post their Price List online.¹²

ONLINE PRICE LIST

Requiring all funeral service providers to post their Price List online would provide a great benefit to consumers, as well as the FTC, with minimal costs to funeral service providers.

A. Benefits to Consumers

Not only would the provision of online funeral Price Lists conform to consumers' shopping behavior, but it would also allow them to meaningfully price-shop before committing to a purchase. This is particularly important in the funeral services industry, where individuals dealing with grief and sorrow face intense time-pressure to make decisions. What would otherwise take days or hours of engaging with strangers in the marketplace could be accomplished in minutes from the comfort of home.

Moreover, consumers would be apprised of the Rule's informative disclosures at a much earlier stage in the process. As it stands now, consumers do not receive all of the disclosures required on a Price List by phone, and are only informed of their rights and options when they visit a funeral home in person.

In addition to improving the shopping experience, online Price Lists would improve market efficiency and create price competition. The easier it is to obtain price information the more price competition exists. Increased price competition, in turn, decreases arbitrary price discrepancies¹³ and lowers prices overall.¹⁴

The State of California demonstrates this point clearly. In 2013, California passed a law requiring funeral homes to either (a) post Price Lists on their websites, or (b) list the services provided with a "statement that the general price list is available upon request."¹⁵ Unsurprisingly, funeral homes that posted their prices on their websites charged much more homogenized and lower prices than those that merely indicated that their Price List was available upon request for substantially the same services.¹⁶ By way of example, those that chose not to display their prices charged, on average, 31 percent more for direct cremations (\$1,695 versus \$1,295) and 37 percent more for an immediate burial

without a casket (\$2,595 versus \$1,900) than those funeral homes that posted their Price List online.¹⁷

These data highlight the direct impact that online Price Lists can have on pricing and overall consumer fairness.

B. Benefits to the FTC

In the years since the Funeral Rule was passed, its benefits have become marginalized and compliance with the Rule has been consistently low. As it stands, the FTC enforcement efforts are limited to the burdensome process of conducting on-site visits to funeral homes. From 2000 to 2020 these compliance “sweeps” found an average of approximately 21 percent of the reviewed funeral homes to be non-compliant with the Rule.¹⁸ Despite the regularity of the sweeps, compliance has not increased. Funeral homes know that they are unlikely to come under review in any given year.¹⁹ In each sweep, the FTC has been able to review less than one percent of the more than 19,000 funeral homes in the country.²⁰ Indeed, the most funeral homes reviewed in any sweep was 175 in 2009.

Online Price Lists would drastically improve these statistics. Rather than expending the time and resources to conduct in-person sweeps on a slim minority of funeral homes, the FTC could more easily review the websites of the funeral homes. With considerably less effort, the FTC could conduct wider-ranging, virtual sweeps of every funeral home across the country. Moreover, requiring online Price Lists improves the Rule’s deterrent effect. More funeral homes would come into compliance in the face of the substantial likelihood that a failure to post Price Lists online would be noticed by the FTC. Again, California confirms this result. In 2019, an FCA and CFA survey found that only 3% of funeral homes appeared to be in violation of the state’s online posting requirements.²¹

C. Minimal Burden on Funeral Service Providers

These benefits can be achieved with minimal effort from funeral service providers. The Funeral Rule already requires that funeral homes have and maintain Price Lists. The funeral homes would simply have to move the Price List onto their website. To save key strokes, funeral homes could simply scan their existing Price List and post the image to their webpage. The high compliance rate in California demonstrates that this can easily be done.

ADDITIONAL MODIFICATIONS OF THE FUNERAL RULE

In addition to requiring funeral service providers to post their Price List online, the FTC can further enhance the effects of the Rule by:

Requiring funeral homes to disclose the true cost of cremation. Under the current rule, Funeral Homes may treat crematory fees paid to third parties as “cash advance” items akin to the outside costs of obtaining flowers or catering for the funeral service. Because

these are outside fees, the Rule does not require Funeral Homes to disclose such fees in their Price List. Approximately one-fifth of funeral homes do not.²² Not disclosing these fees, typically ranging between \$250 and \$600,²³ can be deceiving to a reasonable consumer, who would expect the crematory fees to be included within the cost of cremation. The FTC should proscribe this practice. Funeral homes that use the same third-party for cremation should be required to disclose that rate and funeral homes who use a variety of third parties should be required to disclose a price range.

Clarifying the embalming disclosure. The embalming disclosure is designed to alert consumers that they usually have the right to decline embalming services. That disclosure begins with the sentence: “Except in certain special cases, embalming is not required by law.” From this language, consumers may conclude that embalming may be legally required in their specific situation. In fact, no state requires that viewed bodies be embalmed. Such requirements come only from funeral home policy. The FTC should amend the disclosure for clarity by deleting the “special cases” language and changing the first sentence of the disclosure to read: “Embalming is not required by law for viewing the body. The disclosure should also emphasize that any purportedly “mandatory” embalming is imposed by that specific funeral home, not the state.

Standardizing the formatting of the general price list. Without structure, funeral homes can construct their Price List in such a way as to defeat the purpose of the Price List in the first place. For example, the mandatory right-of-selection disclosure and itemized Price List may appear only after pages of packaged funeral offerings, as is the case with many funeral homes’ Price List. To prevent the circumvention of the spirit of the Rule, the FTC should require that the right-of-selection disclosure be prominently displayed and the itemized prices be listed in at least as clear and conspicuous a manner as the package deals.

Publishing the names of noncompliant funeral homes. Another method of improving compliance would be to publish the names of funeral homes that the Commission has found to be violating the Rule. Doing so would increase the Funeral Rule’s deterrent effect by increasing the cost of violation and causing funeral homes to re-think their cost-benefit analysis of noncompliance. Moreover, publishing the names could reduce the awkward effect of the FTC’s press releases, which announce the results of the Commission’s sweep on a city-by-city basis,²⁴ leaving local consumers aware of violators in the area, but uninformed as to which businesses they should consider researching further before entering into a business relationship with them.

* * *

The Funeral Rule is outdated and largely indifferent to the way consumers shop today. As a result, it sets a necessary, but minimal floor. To achieve its intended purpose, the Rule should be revised to require funeral service providers to post their Price List on their website. Such Price Lists should be ordered in a straightforward fashion, disclose the true

cost of cremation, and contain unambiguous disclosures. Such an update will be minimally burdensome to funeral service providers, but incredibly beneficial to both consumers and the FTC.

Very truly yours,



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¹ Funeral Industry Practices Rule, 85 Fed. Reg. 31, at 8490 (Feb. 14, 2020) [hereinafter, “FTC Notice”].

² See “The Holmes-Rahe Life Stress Inventory,” The American Institute of Stress, <https://www.stress.org/wp-content/uploads/2019/04/stress-inventory-1.pdf>.

³ A 2007 AARP survey found that only 34 percent of those 50 years or older have “engaged in some [funeral] preplanning.” Lona Choi-Allum, “Funeral and Burial Planners Survey,” AARP (November 2007). Surveys by the National Funeral Directors Association (“NFDA”) have found the percentage of adults of all ages who have preplanned funerals is even lower. See, e.g., “Consumer Awareness and Preferences Study,” National Funeral Directors Association (Apr. 2019), at 8, <https://qhi7a3oj76cn9awl3qcqrh3o-wpengine.netdna-ssl.com/wp-content/uploads/2020/02/Funeral-Directors-survey.pdf>.

⁴ FTC Notice, at 8490. In 2017, the National Funeral Directors Association estimated that the median funeral cost is \$7,360. National Funeral Directors Association, 2017 statistics, <https://www.nfda.org/news/statistics>. This estimate does not even include many other expenses commonly associated with a loved one’s passing, such as a vault, burial plot, headstone, flowers, or obituary.

⁵ When the rule was last updated in 1994, it was extended to require funeral service providers to give accurate information from its Price List to anyone who inquires about their services by phone. Though not a cure-all, the Rule addressed some of the issues relating to funeral services transactions and set a necessary floor.

⁶ See <https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=US>.

⁷ See <https://www.pewinternet.org/fact-sheet/internet-broadband/>.

⁸ See <http://money.com/money/3108995/online-shopping-history-anniversary/>.

⁹ “Quarterly Retail E-Commerce Sales 4th Quarter 2019,” U.S. Census Bureau (Feb 19, 2020), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

¹⁰ “Global Connected Commerce,” Nielsen (Jan. 2016), <https://www.nielsen.com/us/en/insights/report/2016/global-connected-commerce/>.

¹¹ See Maarten C.W. Janssen, Jose Luis Moraga-Gonzalez, Matthijs R. Wildenbeest, “Consumer Search and Pricing Behavior in Internet Markets” (2009), <https://doi.org/10.1017/CBO9780511493201.016>.

¹² Given the surge of deaths resulting from the coronavirus pandemic and the fact that hundreds of millions of Americans are forced to stay isolated at home, online searching and shopping for funeral services will undoubtedly increase at an unprecedented rate.

¹³ While certain funeral homes can add value by providing higher end product or services, there is little value that can be added for certain, basic funeral services that vary little from one funeral home to the next, such as direct cremations and immediate burials without caskets. In a ten-city joint survey conducted by the Funeral Consumers Alliance (the “FCA”) and the Consumer Federation of America (the “CFA”) in 2016, the price ranges for direct cremation were wide-ranging: \$850 to \$3,495 in Atlanta, \$589 to \$2,295 in Tucson, and \$495 to \$2,995 in Seattle. Joshua Slocum, Stephen Brobeck, “Cremation Services: Highly Variable and Misleading Pricing, Lack of Disclosure, and Violation of Federal Rules,” Funeral Consumers Alliance and Consumer Federation of America (September 2016), <https://funerals.org/wp-content/uploads/2020/02/2016-9-12-FCA-CFA-Cremation-Report.pdf>. Similarly, a review of prices on Funeralocity, a third-party aggregator website, show drastic price discrepancies on basic services within the same geographical markets. For instance, in Houston, Texas, the price of a direct cremation ranged from \$675 to \$4,090, while the price of an “affordable burial,” as defined by the Funeralocity website, ranged from \$845 to \$6,200. In New Haven, Connecticut, the price of a direct cremation ranged from \$1,100 to \$6,520, while the price of an “affordable burial” ranged from \$1,100 to \$6,000. See <https://www.funeralocity.com/>.

¹⁴ See Nanda Kumar, Karl Reiner Lang, Qian Peng, “Consumer Search Behavior in Online Shopping Environments,” Proceedings of the 38th Hawaii Internal Conference on System Sciences (2005), 1–3; Kirsten A. Passyn, Memo Diriker, Robert B. Settle, “Price Comparison, Price Competition, and the Effects of ShopBots,” Journal of Business and Economics Research, v. 11 (September 2013), at 40; Janssen, *et al.*, *supra* n.11, at 1.

¹⁵ California Code, Business and Professions Code § 7685(b)(1).

¹⁶ Joshua Slocum and Stephen Brobeck, “The Relationship between Funeral Price Disclosures and Funeral Prices: A California Case Study,” Funeral Consumers Alliance and Consumer Federation of America (Feb. 2020), at 4, <https://funerals.org/wp-content/uploads/2020/02/California-Funeral-Home-Pricing-Report-2-10-20.docx>.

¹⁷ *Id.* at 4.

¹⁸ Statistics are based on FTC press releases announcing compliance results. See, e.g., “FTC Releases Funeral Home Compliance Results, Offers New Business Guidance on Funeral Rule Requirements,” FTC (June 8, 2020), https://www.ftc.gov/news-events/press-releases/2020/06/ftc-releases-funeral-home-compliance-results-offers-new-business?utm_source=govdelivery.

¹⁹ Even if caught, the consequences are minor. The FTC omits the names of non-compliant funeral homes from its press release announcing the results of the sweep and the Funeral Rule Offender Program allows such violators to attend educational courses offered by the NFDA in lieu of regulatory action.

²⁰ See “Statistics,” National Funeral Directors Association, <https://www.nfda.org/news/statistics>.

²¹ Joshua Slocum and Stephen Brobeck, “Hidden Funeral Prices: An Evaluation of California Funeral Home Price Disclosure and Lack of Disclosure,” Funeral Consumers Alliance and Consumer Federation of America (Sept. 2019), at 2, <https://funerals.org/wp-content/uploads/2019/09/California-Funeral-Home-Pricing-Report-9-30-19.docx>.

²² See Joshua Slocum, Stephen Brobeck, “Cremation Services: Highly Variable and Misleading Pricing, Lack of Disclosure, and Violation of Federal Rules,” Funeral Consumers Alliance and Consumer Federation of America (September 2016), at 3, <https://funerals.org/wp-content/uploads/2020/02/2016-9-12-FCA-CFA-Cremation-Report.pdf>.

²³ See *id.*, at 5.

²⁴ See, e.g., “FTC Undercover Inspections of Funeral Homes in 11 States Test Prompt Compliance with Funeral Rule Disclosure Requirements,” FTC (Apr. 18, 2018), <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-undercover-inspections-funeral-homes-11-states-test-prompt>.