



January 17, 2023

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

Re: Funeral Rule ANPR, Project No. P034410

Truth in Advertising, Inc. (“TINA.org”) welcomes the opportunity to submit the following in conjunction with the Federal Trade Commission’s (“Commission,” “Agency” or “FTC”) November 2, 2022 request for comments regarding whether to initiate a rulemaking proceeding to amend its Funeral Industry Practices Rule (“Funeral Rule” or “Rule”).¹ TINA.org supports amending the Funeral Rule, and reincorporates by reference its June 12, 2020 Comment to the FTC regarding regulatory review of the Rule.²

INTEREST OF COMMENTER

TINA.org is a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, independent experts, synergy organizations, self-regulatory bodies and government agencies to advance countermeasures that effectively prevent and stop deception in our economy. At the center of TINA.org’s efforts is its website, www.tina.org, which provides information about common deceptive advertising techniques, consumer protection laws, and alerts about specific deceptive marketing campaigns—such as nationally advertised “Built in the USA” vans manufactured abroad;³ pillows and essential oils falsely marketed as being able to treat chronic diseases;⁴ and a delivery meal kit service that falsely advertises free meals.⁵

The website functions as a clearinghouse, receiving consumer complaints about suspicious practices, which TINA.org investigates and, when appropriate, takes up with businesses and regulatory authorities. The website is also a repository of information relating to consumer protection lawsuits and regulatory actions. Through its collaborative approach and attention to emerging issues and complexities, TINA.org has become a trusted source of expertise on matters relating to consumer fraud, and has testified before Congress on issues related to consumer protection, deceptive marketing and economic justice.⁶

TINA.org regularly draws on its expertise to advocate for consumer interests before the FTC and other governmental bodies and appears as amicus curiae in cases raising important questions of consumer protection law.⁷ Since its inception, TINA.org has filed legal actions against hundreds of companies and entities, published more than 1,200 ad alerts, written over 900 news articles, and tracked more than 4,000 federal class actions alleging deceptive marketing. Notably, since 2015, state and federal agencies have obtained more than \$250 million from wrongdoers based on TINA.org legal actions and evidence, and returned millions in ill-gotten gains to consumers.

THE FUNERAL RULE MUST BE MODERNIZED

Forty years ago, before the World Wide Web became publicly available, the FTC issued 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,⁸ but they are also ones with which consumers tend to have very little experience or familiarity⁹ and ones that require making important and costly decisions under tight time constraints.¹⁰

This perfect storm of factors creates one of the greatest illustrations of informational asymmetry 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.¹¹

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, five percent of Americans were using the internet.¹² By 2021, that number skyrocketed to more than 90 percent of American adults using the internet.¹³ 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 2000.¹⁴ Since then, e-commerce has experienced explosive growth, and in 2021, that number grew to \$5.2 trillion, a figure that is forecasted to grow by 56 percent over the next several years, reaching more than \$8 trillion by 2026.¹⁵ The proliferation of internet use is not an isolated trend. It also affects consumer behavior, particularly how they shop. The overwhelming majority of consumers now conduct research online prior to buying in stores.¹⁶

The Funeral Rule, last revised 28 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.

I. Online Price Lists

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 discrepancies¹⁷ and lowers prices overall.¹⁸

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."¹⁹ 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.²⁰ 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.²¹

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 20 percent of the reviewed funeral homes to be non-compliant with the

Rule.²² 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.²³ In each sweep, the FTC reviewed less than one percent of the more than 18,800 funeral homes in the country.²⁴ Indeed, the most funeral homes reviewed in any sweep was 175 in 2009.²⁵

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 three percent of funeral homes appeared to be in violation of the state's online posting requirements.²⁶

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.

II. Additional Modifications to 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.²⁷ Not disclosing these fees, typically ranging between \$250 and \$600,²⁸ 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,²⁹ 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.

Sincerely,



Bonnie Patten
Laura Smith
Truth in Advertising, Inc.

¹ Funeral Industry Practices Rule, <https://www.federalregister.gov/documents/2022/11/02/2022-23832/funeral-industry-practices-rule>.

² TINA.org's June 12, 2020 Comment to FTC regarding Funeral Rule Regulatory Review, <https://truthinadvertising.org/wp-content/uploads/2020/06/TINA-Funeral-Rule-Comment.pdf>.

³ TINA.org's Mercedes-Benz Investigation, <https://truthinadvertising.org/brands/mercedes-benz>.

⁴ TINA.org's MyPillow Investigation, <https://truthinadvertising.org/brands/mypillow/>;
TINA.org's doTerra Investigation, <https://truthinadvertising.org/brands/doterra/>;
TINA.org's Young Living Investigation, <https://truthinadvertising.org/brands/young-living/>.

⁵ TINA.org's HelloFresh Investigation, <https://truthinadvertising.org/brands/hellofresh/>.

⁶ Safeguarding American Consumers: Fighting Fraud and Scams During the Pandemic Before the Subcomm. on Consumer Prot. and Com. of the Comm. on Energy and Com., 117th Congress (Feb. 4, 2021) (testimony of Bonnie Patten, Exec. Dir., Truth In Advertising), <https://truthinadvertising.org/action/house-testimony-2021-summary-action/>; Curbing COVID Cons: Warning Consumers about Pandemic Frauds, Scams, and Swindles Before the Subcomm. on Consumer Prot., Prod. Safety, and Data Sec. of the Comm. on Com., Sci., & Transp., 117th Congress (Apr. 27, 2021), (testimony of Bonnie Patten, Exec. Dir., Truth In Advertising), <https://truthinadvertising.org/action/senate-testimony-2021-summary-action/>.

⁷ For example, TINA.org participated as amicus curiae in *AMG Capital Management, LLC v. Federal Trade Commission*. Brief of Amicus Curiae Truth In Advertising, Inc. In Support of Respondent, *AMG Capital Mgmt., LLC v. Fed. Trade Comm'n*, No. 19-508 (U.S. Dec. 7, 2020), https://www.supremecourt.gov/DocketPDF/19/19-508/162934/20201207192719389_19-508%20brief.pdf. TINA.org also filed an amici curiae brief in *Federal Trade Commission v. Quincy Bioscience Holding Co., Inc.*, which reinstated a Section 13(b) suit against a business falsely marketing a dietary supplement to the elderly as clinically proven to improve memory. Brief of Amici Curiae Truth In Advertising, Inc. et al. in Favor of Appellants and in Support of Reversal, *Fed. Trade Comm'n v. Quincy Bioscience Holding Co., Inc.*, 753 Fed. Appx. 87 (2d Cir. 2019) (No. 17-3745), <https://truthinadvertising.org/wp-content/uploads/2018/03/Prevagen-Amici-Curiae-brief.pdf>.

⁸ 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>.

⁹ 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. See also Proposed Rules, 16 CFR Part 453, Funeral Industry Practices Rule, <https://www.govinfo.gov/content/pkg/FR-2022-11-02/pdf/2022-23832.pdf>, at n. 30.

¹⁰ Funeral Industry Practices Rule, 85 Fed. Reg. 31, at 8490 (Feb. 14, 2020), at 8490. In 2021, the National Funeral Directors Association estimated that the median funeral cost is \$7,848, an increase in 6.6% since 2016. National Funeral Directors Association, 2021 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.

¹¹ 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.

¹² See Individuals using the Internet (% of population) – United States, The World Bank, <https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=US>.

¹³ See Internet/Broadband Fact Sheet, Pew Research, Apr. 7, 2021, <https://www.pewinternet.org/fact-sheet/internet-broadband/>.

¹⁴ See 8 Amazing Things People Said When Online Shopping Was Born 20 Years Ago, Aug. 15, 2014, <http://money.com/money/3108995/online-shopping-history-anniversary/>.

¹⁵ See Retail e-commerce sales worldwide from 2014 to 2026 (in billion U.S. dollars), <https://www.statista.com/statistics/379046/worldwide-retail-e-commerce-sales/>.

¹⁶ New Research Shows Growing Impact Of Online Research On In-Store Purchases, Feb. 8, 2018, <https://www.forbes.com/sites/johnnellett/2018/02/08/new-research-shows-growing-impact-of-online-research-on-in-store-purchases/?sh=5472ab5b16a0>; 38 Statistics Retail Marketers Need to Know in 2023, Sep. 16, 2022, <https://www.invoca.com/blog/retail-marketing-statistics>.

¹⁷ 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 ranges from \$675 to \$6,570, while the price of an “affordable burial,” as defined by the Funeralocity website, ranged from \$975 to \$7,095. See Funeral Homes in Houston, TX, Funeralocity, <https://www.funeralocity.com/search/tx/houston/>. In New Haven, Connecticut, the price of a direct cremation ranges from \$1,055 to \$6,520, while the price of an “affordable burial” ranges from \$1,100 to \$6,000. See Funeral Homes in New Haven, CT, Funeralocity, <https://www.funeralocity.com/search/ct/new-haven/>.

¹⁸ See Nanda Kumar, Karl Reiner Lang, Qian Peng, “Consumer Search Behavior in Online Shopping Environments,” Proceedings of the 38th Hawaii International 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; 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>, at 1.

¹⁹ California Code, Business and Professions Code § 7685(b)(1).

²⁰ 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>.

²¹ *Id.* at 4.

²² 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.

²³ Even if caught, the consequences are minor. The FTC omitted 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.

²⁴ *See* “Statistics,” National Funeral Directors Association, <https://www.nfda.org/news/statistics>.

²⁵ Undercover Inspections of Funeral Homes in Nine States and Washington, D.C. Press Funeral Homes to Comply with Consumer Protection Law, Mar. 16, 2010, <https://www.ftc.gov/news-events/news/press-releases/2010/03/undercover-inspections-funeral-homes-nine-states-washington-dc-press-funeral-homes-comply-consumer>.

²⁶ 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>.

²⁷ *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>.

²⁸ *See id.*, at 5.

²⁹ *See, e.g.*, FTC Undercover Inspections of Funeral Homes in 11 States Test Prompt Compliance with Funeral Rule Disclosure Requirements, Apr. 18, 2018, <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-undercover-inspections-funeral-homes-11-states-test-prompt>.