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Mr. Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

July 12, 2016

Dear Mr. Clark:

On behalf of the Consumer Federation of America and the Funeral Consumers Alliance, we are writing to request that the Federal Trade Commission ("FTC") amend 16 C.F.R. § 453, Funeral Industry Practices Rule ("The Funeral Rule"), specifically to include provisions for price disclosure on the Internet. Due to the substantial importance of this request and the impact on consumers, we request that the FTC review the Funeral Rule by the end of 2016, ahead of the currently scheduled time in 2019.¹ Funerals are not elective activities; everybody dies. Between now and 2019, consumers will likely spend at least \$50 billion on funeral services.² Greater price transparency is absolutely vital for consumers and the FTC has the ability to provide it to one of the most vulnerable groups in the marketplace, the bereaved. **Consumers will be unnecessarily harmed in the process of making funeral arrangements if the FTC does not act on this issue now.**

The main points contained in this petition are as follows:

- The Internet will help bring down inflated funeral prices. Industrial organization research shows that the Internet facilitates price-deflating mechanisms which stem from consumer access to information.
- The Funeral Rule was adopted for a reason. The FTC must not forget that the original Funeral Rule was hard won. Industry opposition was strong, but the Commission fought for over a decade for this important piece of consumer protection.

¹ Fed. Trade Comm'n., Notice Announcing Ten-Year Regulatory Review Schedule and Request for Public Comment on the Federal Trade Commission's Regulatory Review Program, 76 Fed. Reg. 134, 41,153 (July 31, 2011) (to be codified at 16 C.F.R. pt. 1).

² *Bereaved Consumer's Bill of Right Act of 2016: Hearing on H.R. 5212 Before the Subcomm. on Commerce, Manufacturing and Trade of the H. Comm. On Energy and Commerce*, 114th Cong. (2016) (statement of Michael Best, Senior Policy Advocate, Consumer Federation of America).

- Opposition from the industry is disingenuous. This is not a difference of opinion between two equally concerned sides of an issue. Funeral directors' groups oppose updating the Funeral Rule because it could cut into high profits made from vulnerable consumers.
- Point of sale is beside the point. Opponents argue that online pricing is unnecessary, as purchases do not occur online. The Funeral Rule never intended to provide consumers only at the point of sale. An update to the rule should not be governed by such a principle.
- Consumers will be harmed if the FTC waits until 2019 to amend the Funeral Rule. Consumers know using the Internet is the best way to secure a deal, but the funeral industry is able to keep online shoppers in the dark. Internet access has become more readily available as time goes on. The Funeral Rule must be amended early due to a substantial change in technology that greatly affects consumers.

The Internet Will Help Bring Down Inflated Funeral Prices

A general price list (“GPL”) should be made available to consumers who wish to compare prices online. Simply put, all funeral providers who have an online presence should be required to provide accurate pricing to consumers online. Since 1984, The Funeral Rule has protected consumers at a time that is unavoidable, expensive, and when the consumer is at their most vulnerable.³ When the Funeral Rule went into effect in 1984, The New York Times reported a victory for consumers, stating, “For most consumers a funeral is the third largest purchase they will ever make, directly behind their home and car...a funeral is also the purchase about which consumers know the least in advance.”⁴ These basic truths still define the funeral industry in 2016.

In 2014, the median cost of a funeral with a viewing and burial was \$7,181.⁵ Yet, according to a 2011 study, about half of all U.S. households would have difficulty paying an unexpected expense of \$2,000.⁶ These statistics mean that many Americans cannot afford the average funeral as the market functions today. Full information is associated with competitive markets and greater consumer surplus.⁷ To state the obvious: shopping around leads to savings. Research shows price shopping on the Internet yields savings, controlling for other factors such

³ Fed. Trade Comm'n., Funeral Rule, *The FTC's Funeral Rule: Helping Consumers Make Informed Decisions During Difficult Times*, available at <https://www.ftc.gov/news-events/media-resources/truth-advertising/funeral-rule>.

⁴ Barron, James, *Advance Funeral Planning Can Keep Finances Orderly*, New York Times, May 20, 1984, available at <http://www.nytimes.com/1984/05/20/business/advance-funeral-planning-can-keep-finances-orderly.html?pagewanted=all>.

⁵ National Funeral Directors Association, Median Cost of an Adult Funeral, available at <http://www.nfda.org/news/statistics#4>.

⁶ Lusardi, Schneider, Tufano, *Financially Fragile Households: Evidence and Implications*, National Bureau of Economic Research Working Paper, May, 2011, available at <http://www.nber.org/papers/w17072.pdf>.

⁷ Don E. Waldman & Elizabeth J. Jensen, *Industrial Organization, Theory and Practice* (2006).

as race and gender.⁸ The mechanisms responsible for lowering the average price paid by consumers are “researching product characteristics, making price comparisons, communicating with sellers, obtaining recommendations from peers,” according to a 2006 study. These are the exact same mechanisms the FTC hoped to inject into the market by adopting the Funeral Rule.

The Funeral Rule is an essential piece of consumer protection because “normal” consumer behavior is not guaranteed in this transaction, due to the immense stress caused by the death of a loved one. **Normally, when making a large purchase (\$500 or more), consumers take an average of 68 days from the start of their research until the purchase is made.⁹ Eighty percent begin online but most ultimately buy in-store.¹⁰ Neither of these luxuries are available to funeral consumers.** The FTC cannot give consumers the ability to take their time when shopping for a funeral, but it can protect consumers who use the Internet. By adding an Internet provision to the Funeral Rule, the FTC ensures more transparency, facilitating competition in an industry marked by information asymmetry. Mandatory price disclosure is the cornerstone of the Funeral Rule and it should be upheld regardless of how consumers first come into contact with funeral homes.

The Funeral Rule currently mandates that any person who asks for a GPL be furnished with complete and accurate price information via telephone or in person.¹¹ This rule ensures that bereaved consumers do not have to physically meet with multiple parties in order to secure the best price. Additionally, it shields consumers from some of the pressures that can come from an in-person sales interaction. One of the goals of the original Funeral Rule was to supply consumers with vital information as early in the transaction as possible. Today, the function of the telephone in the Funeral Rule has been augmented, if not supplanted by the Internet.¹² In fact, the FTC itself recommends on its “Shopping Tips” online resource that consumers compare prices on the Internet to secure the best price.¹³ In general, the Internet allows for easy price comparison and allows the consumer to make slower, more informed decisions.

The Funeral Rule was Adopted for a Reason

Before 1984, state laws provided varied levels of consumer protection in funeral transactions. After exhaustive investigation by the FTC, state laws were found to inadequately protect consumers from harm.¹⁴ In the 1970s and 1980s, the National Funeral Directors Association (“NFDA”) opposed the Funeral Rule so vehemently that the Washington Post reported that the regulation “survived one of the longest challenges from an industry group in

⁸ Florian Zettelmeyer, Fiona Scott Morton, and Jorge Silva-Risso, *How the Internet Lowers Prices: Evidence from Matched Survey and Automobile Transaction Data*, Journal of Marketing Research, May 2006.

⁹ Ronda Slaven and Toni White, *Fourth Annual Major Purchase Consumer Study*, Synchrony Financial, November, 2015.

¹⁰ *Id.*

¹¹ Funeral Rule, *supra*, n. 3.

¹² *Consumer Groups Point to Survey in Efforts to Update the Funeral Rule*, Funeral Service Insider, Nov. 9, 2015.

¹³ Fed. Trade Comm'n., Consumer Information, *Shopping Tips*, available at <https://www.consumer.ftc.gov/articles/0106-shopping-tips>.

¹⁴ Special to The New York Times, *Regulation is Urged for Funeral Homes*, The New York Times, Oct. 31, 1979, at A 18.

commission history.”¹⁵ This is because, despite rhetoric about providing comfort to the bereaved, funeral homes have the same goal as businesses in any other industry: maximize profit. The seminal book by Jessica Mitford, “The American Way of Death,” revealed the consumerist agenda pushed by funeral homes in the 20th Century to extract the maximum sum of money from customers.¹⁶ Mitford characterized the sales experience as a “disastrously unequal battle.” She writes, “...over the years the funeral men have constructed their own grotesque cloud-cuckoo-land where the trapping of Gracious Living are transformed, as in a nightmare, to the trappings of Gracious Dying. The same familiar Madison Avenue language, with its peculiar adjectival range designed to anesthetize sales resistance...has seeped into the funeral industry in a new and bizarre guise...”¹⁷ In 2016, consumers can be lured in by well-designed websites with beautiful photos, interactive features, and much more. Is that not essentially the same as what Mitford described? **Do consumers using a now-ordinary technology not deserve to be protected?**

Opposition from funeral directors before 1984 mirrors opposition to oversight today. In 1983, a spokesman for NFDA stated, “A widow, who may just have kissed her husband goodbye for the last time, is not in any mood to have all these prices thrown at her.”¹⁸ On May 24, 2016, the president of NFDA testified before a Congressional subcommittee, commenting on a bill that would expand the Funeral Rule. Mr. Arrington said, “...handing a family a price list before speaking with them about their loved one does not demonstrate care and compassion for their loss.”¹⁹ These arguments imply that price disclosure is somehow tacky. Taking advantage of vulnerable consumers is tacky; being up-front and transparent is not. The Holmes and Rahe “Stress Scale” literally uses “Death of a Spouse” as the most stressful life event, assigning a score of 100, to which one should compare all other stressful events.²⁰ These are the conditions under which funerals are planned and purchased; it is unlike any other purchase a consumer will ever have to make. **The FTC must modernize the Funeral Rule so that it continues to work for everyone, and do so as soon as possible.**

Opposition from the Industry is Disingenuous

Another argument commonly used by NFDA is that state laws are sufficient and additional regulation at the national level is unnecessary. Mr. Arrington stated in his testimony, “NFDA works closely with state associations to improve state laws governing the profession, ensuring they reflect the evolving needs of consumers and the funeral professionals who serve

¹⁵ Margaret Engel, *FTC Implements Rules to Protect Consumers in Funeral Arrangements*, The Washington Post, May 1, 1984, available at <https://www.washingtonpost.com/archive/business/1984/05/01/ftc-implements-rules-to-protect-consumers-in-funeral-arrangements/49ffe8f0-f821-495d-9f3f-38e24e2c6d8d/>.

¹⁶ Jessica Mitford, *The American Way of Death*, Simon & Schuster, 1963.

¹⁷ *Id.*

¹⁸ Michael deCourcy Hinds, *A New Try for Truth in Funerals*, The New York Times, Feb. 27, 1983, available at <http://www.nytimes.com/1983/02/27/weekinreview/a-new-try-for-truth-in-funerals.html>.

¹⁹ *Bereaved Consumer’s Bill of Right Act of 2016: Hearing on H.R. 5212 Before the Subcomm. on Commerce, Manufacturing and Trade of the H. Comm. On Energy and Commerce*, 114th Cong. (2016) (statement of Bob Arrington, CCO, Founder and President of Arrington Funeral Directors).

²⁰ Thomas H. Holmes and Richard H. Rahe, *The Social Readjustment Rating Scale*, Journal of Psychosomatic Research, April 12, 1967.

them.”²¹ This statement is disingenuous and misleading, because state associations also work to discourage regulatory reform. In 2011, California passed an amendment to Section 7685 of the Professions and Business Code which required funeral homes with websites to post a GPL or an itemized services list which states that prices are available upon request.²² The California Funeral Directors Association (“CFDA”) represented the sole opposition to this bill. Their official statement read, in part, “[t]he decision as to whether or not the GPL should be on an established website should be left up to the funeral home itself.”²³ Before the Funeral Rule, state laws varied widely and failed to protect consumers from egregious abuse.²⁴ Still, industry interest groups fought against passage of the Funeral Rule by asserting that state-level regulation was not only sufficient, but that federal regulation would be inappropriate. Funeral industry associations’ concerns about federalism are as much a smoke screen today as they were in 1984.

Because the Funeral Rule does not apply to online price disclosures, consumers are harmed in two ways: 1. Aforementioned benefits of online price comparisons are not made available. 2. Online price information that *is* made available may be inaccurate, unfair or deceptive, which directly contradicts the intent of the Funeral Rule and the mission of the FTC. **In a 2015 study conducted by the Consumer Federation of America and the Funeral Consumers Alliance, data showed that the providers of funeral goods and services who publish prices online routinely show only all-inclusive packages and fail to inform consumers of their right to purchase a la carte services.**²⁵ If a funeral home failed to tell consumers they have the right to choose a la carte on paper, that would be a direct violation of the Rule and its core intent; price-control through consumer choice and itemization. **But it is perfectly legal to deceive consumers this way through pixels on a screen.** Funeral homes today do have websites, but the 2015 study found that only 38 out of 150 surveyed (about one quarter) post price information.²⁶ This is the reality under the regime proposed by the CFDA, in which funeral homes choose whether or not to disclose prices online.²⁷ Consumers who are at their most vulnerable are able to visit funeral home websites and read about the business’s philosophy, staff, and history, but not the prices of its products.

The case for a national rule akin to the California amendment is strong. First, the effort expended by funeral homes is minimal. According to Josh Slocum, director of the Funeral Consumers Alliance, complying with an Internet price provision should take funeral homes around 25 seconds.²⁸ That is the amount of time it takes to upload a PDF of the price list they should already have in order to be in compliance with the current Funeral Rule. The 1984 Funeral Rule represented a much more intensive and involved set of changes to the way funeral homes did business. As discussed previously, the industry fought hard against the 1984 rule. However, in their statement of opposition to the California amendment, the California Funeral

²¹ *Id.*

²² S.B. 658, 2011-2012 Sess. (Ca. 2011).

²³ Bill Analysis, S.B. 658, 2011-2012 Sess., at 4 (Ca. July 5, 2011).

²⁴ James Barron, *supra*, n. 4

²⁵ Funeral Consumers Alliance and Consumer Federation of America, *National Funeral Cost Study*, October 15, 2015, available at <https://www.funerals.org/2015funeralsurvey/>.

²⁶ *Id.*

²⁷ Bill Analysis, *supra*, n. 23.

²⁸ Funeral Services Insider, *supra*, n. 12.

Directors Association wrote, “We strongly support a price list policy that educates the consumer...”²⁹ **The funeral services industry adjusted to the 1984 Funeral rule; it can certainly adjust to an update that is much less burdensome.** Unlike the California law, a national Internet price provision should require funeral homes to post a standard GLP. The FTC should follow California’s lead. National rules on Internet price disclosure are the only way to ensure the Funeral Rule is functioning properly for all Americans in the 21st Century.

Point of Sale is Beside the Point

The FTC never intended the Rule’s provisions to apply only at the actual point and time of sale.³⁰ Instead, the FTC recognized that consumers needed access to price and service information before the commencement of a sales interaction. This allows consumers to comparison shop not only within one funeral home, but among different providers. Recognizing this, the Rule requires providers to affirmatively give GPLs, or specific price quotes, by phone, and to any party discussing funeral arrangements. This applies not only for “at-need” arrangements, but also to funerals that are being planned before the death occurs. The FTC’s own guidance to funeral providers reflects the Commission’s awareness of this consumer need:

You must give the General Price List to anyone who asks, in person, about funeral goods, funeral services, or the prices of such goods or services. You must give the GPL to such individuals to keep. The request for information **does not have to come from a consumer or someone who wants to make funeral arrangements now or in the future.** You must give a GPL to all persons who inquire about funeral arrangements. This may include competitors, journalists, and representatives of businesses, religious societies, government agencies, or consumer groups.

.....

The triggering event for giving out the GPL is a face-to-face meeting. The face-to-face meeting can occur anywhere, not just at the funeral home. **For example, you must give out a General Price List even if the discussion of prices or arrangements takes place in the family's home or while removing the deceased from a hospital or a nursing home. You should tell your employees to carry extra price lists with them.**

—“Complying With the Funeral Rule,” publication of the FTC. Emphasis added.

An illustrative comparison can be made between re-examining the Funeral Rule and the current re-examination of the Magnuson-Moss Warranty Act (“MMWA” or “Warranty Act”).³¹ Whereas the Funeral Rule intends to furnish consumers with prices early on, the Warranty Act ensures that, if a product has a manufacturer warranty, it will be clear and readily available to the

²⁹ Bill Analysis, *supra*, n. 23.

³⁰ Fed. Trade Comm’n., *Complying with the Funeral Rule*, April 2015, available at <https://www.ftc.gov/system/files/documents/plain-language/pdf=0131-complying-with-funeral-rule.pdf>.

³¹ Fed. Trade Comm’n., Interpretation of Magnuson-Moss Warranty Act, 80 Fed. Reg. 47,710, 42,717 (July 20, 2015) (to be codified at 16 C.F.R. pts. 700, 701, 703).

consumer at the point of sale.³² After a recent review, the FTC released a Federal Register notice, which stated the following:

The Commission...does not agree with the view...that offline sellers can comply with the pre-sale availability rule by advising buyers of the availability of warranties on the warrantor's Web site. The intent of the Rule is to make warranty information available at the point of sale. For brick and mortar transactions, the point of sale is in the store; for online transactions, the point of sale is where consumers purchase the product online. The Commission agrees with the commenter who notes: 'Internet availability, however, is not a substitute for availability as specified in Rule 702 because many consumers make little or no use of the internet, while those who do still need the information at the point of sale as a fallback for when they haven't obtained the information online or when they want to verify that their online information is accurate.'³³

The MMWA "Pre-Sale Availability Rule," noted above as Rule 702, protects the consumer in essentially the same way as price disclosure in the Funeral Rule, but at the opposite juncture in a sales transaction. When manufacturers wished to only disclose warranties online, the FTC found that in-person transactions are not sufficiently covered by online compliance with the MMWA, as it runs counter to the intent of the law.³⁴ **Similarly, funeral homes that operate websites but do not disclose prices are not in compliance with the *intent* of the Funeral Rule, because they are making a virtual sales pitch before providing a GPL.** If the FTC believes that online compliance with the MMWA is insufficient, to be consistent it would have to find that a lack of online disclosure is a violation of the Funeral Rule. The CFDA said in their opposition to the California bill, "[f]uneral homes are not selling their product on the Internet."³⁵ This shows a fundamental lack of understanding about the function of price disclosure and the Funeral Rule generally. **If funeral homes are allowing consumers to "check them out" online, the consumer is beginning the sales interaction and should be furnished with a GPL. The law should reflect reality and mandate price disclosure.**

The Commission also acknowledges in its statement on the MMWA the fact that consumers use various methods and technology to obtain information based on individual preferences.³⁶ After Congress passed the E-Warranty Act in 2015, which effectively contradicted the FTC's conclusion enumerated above, the FTC issued a statement about how sellers should

³² *Id.*

³³ *Id.*

³⁴ Press Release, Fed. Trade Comm'n., FTC Seeks Comment on Proposed Rule Amendments Related to the E-Warranty Act (May 18, 2016).

³⁵ Bill Analysis, *supra*, n. 23.

³⁶ Fed. Trade Comm'n., Interpretation of Magnuson-Moss Warranty Act, *supra*, n. 31.

comply with the new law.^{37, 38} **The FTC was faced with the question: how do we best inform consumers in 2016 and beyond, when both the Internet and traditional methods are integral to how people access information? The answer: Provide consumers with both options and let them choose.**

The MMWA applies to products costing \$15 or more.³⁹ The average funeral costs almost 500 times that amount.⁴⁰ The stakes are high for emotional and vulnerable consumers; the FTC must act as quickly as possible to update the Funeral Rule to reflect changing consumer behavior. **Between now and 2019, the current culture of online shopping will only become more accessible and more entrenched. There is no turning back. The FTC must act now to level the playing field for grieving, vulnerable consumers.**

The Federal Trade Commission has fought hard in the past to guarantee protection for bereaved consumers. Technological progress does not wait for the FTC's regulatory review schedule to catch up. As the world changes, the FTC must change as well, or consumers will be harmed.

For all reasons stated above, we respectfully request that the FTC begin the review process for 16 C.F.R. §453 in 2016 and amend 16 C.F.R. §453 to include online price disclosures.

Sincerely,

A handwritten signature in cursive script that reads "David A. Balto".

David A. Balto

³⁷ *Id.*

³⁸ Press Release, Fed. Trade Comm'n., *supra*, n. 34.

³⁹ Fed. Trade Comm'n., Interpretation of Magnuson-Moss Warranty Act, *supra*, n. 31.

⁴⁰ National Funeral Directors Association, *supra*, n. 5.