

# FUNERAL CONSUMERS ALLIANCE

A nonprofit protecting your right to choose a meaningful, dignified, and affordable funeral

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## **Response to Federal Trade Commission Request for Comments re: Funeral Industry Practices Rule 16 CFR Part 453**

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### **I. Consumer benefits of the Funeral Rule**

The Funeral Rule is a crucial regulation that helps address the imbalance between the buyer, who is grieving, and the vendor, who is in a rational and business-like frame of mind. Funeral Consumers Alliance believes it must be both preserved and updated.

Buying a funeral is an example of a “distress purchase”; something no one wants to buy, but that one must buy. Because most Americans will only ever arrange a funeral for another person *once* during their lives, this is not a transaction at which consumers can “practice.”

A funeral is among the most expensive purchases the average household will make during any given year. In 2017, the last year for which data is available, the median cost of a full-service funeral in the United States exceeded \$7,000.<sup>1</sup> This does not include cemetery costs, which Funeral Consumers Alliance recognizes from the reports given to us by consumers often add an additional \$2,000 to \$3,000.

The Commission’s groundbreaking research during the 1970s culminated in a report more than 500 pages long.<sup>2</sup> This report formed the evidence base for the implementation of the Funeral Rule in 1984. Researchers found widespread deception, hidden prices, and extortionate sales tactics aimed at convincing the grieving to show their love for their dead through the purchase of costly funeral goods and services.

Among the report’s findings:

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<sup>1</sup> National Funeral Directors Association, 2017 statistics. Found at <https://www.nfda.org/news/statistics>. Note: the content at this link changes over time. Like many websites, NFDA’s does not provide a permanent, static link that displays stable content. The researcher may have to go further than merely visiting this link.

<sup>2</sup> Funeral Industry Practices, Final Staff Report to the Federal Trade Commission and Proposed Trade Regulation Rule (16 CFR Part 453). June, 1978.

- Funeral homes routinely refused to disclose their prices, or to offer consistent prices in writing to grieving families.
- Funeral homes compelled families to buy all-inclusive packages, what the industry refers to as a “traditional” funeral.
- Consumers were not permitted to buy services such as embalming, calling hours, a graveside service, and others item by item. The cost of the casket often included “all our customary services”.
- Funeral home staff frequently mislead consumers by falsely claiming, for example, that embalming was a legally required purchase when that was not the case.

Most households will buy many automobiles, refrigerators, computers, and home repair services during the course of a lifetime. These are familiar transactions that are informed by our experience in pricing, buying, and using these goods and services. We discuss them with our friends over lunch, we trade information, and we rate quality openly. But the social taboo against talking about dollars and cents with regard to the funerals we give our loved ones ensures this is rarely, if ever, discussed, even within the family. This conversational silence prevents American consumers from comparing with each other price, service, and value with regard to funerals the way they do with other, more common and less emotional purchases.

The death of a loved one is, plainly, one of the most stressful life events. The Holmes and Rahe Stress Scale, an index of stressful life events, rates the death of a spouse as the most stressful event a person will experience.<sup>3</sup> These factors—the shock of grief, the lack of prior “practice”, and the need to quickly make decisions about what to do with a dead body—combine to put the funeral consumer in a uniquely disadvantaged position in relation to the seller.

The Funeral Rule is a necessary minimum “floor” of protection that helps to redress this imbalance. Funeral directors are required to affirmatively hand a General Price List to grieving families at the beginning of a funeral arrangements discussion. This list not only discloses prices, it also alerts consumers to their rights through the mandatory disclosures required by the FTC:

- the right to purchase item by item
- the right, usually, to decline embalming
- the right to purchase simple services such as immediate burial and direct cremation, which are substantially less expensive than full-service ceremonial

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<sup>3</sup> See <https://www.stress.org/holmes-rahe-stress-inventory>

funerals

- the right to purchase a modest, inexpensive cardboard container for use in cremation rather than a costly and adorned casket, among other rights

Death is a universal human experience; no one can “opt out”. Also universal is the temporary deranging effect of grief on the mind’s ability to make rational cost and service decisions as we are able to do in less sensitive transactions. There are no marketplace changes that can have the slightest effect on this human psychological reality. Death will always be with us, as will its effects on our decision-making capacity.

The Funeral Rule must be preserved and brought up to date in order to fulfill its potential to give consumers a greater ability to compare prices and services on funerals. Written in a world prior to the Internet, the Rule’s true potential has been constrained by the practical limitations imposed by the need to physically visit a funeral home in order to be handed a piece of paper. Grieving families cannot be expected to visit three, four, or five funeral homes during the short window of time available to decide what to do with a dead body.

One of the most important benefits of the Funeral Rule is the requirement to give consumers accurate information about what goods and services are, and are not, required by law. Despite widespread misperceptions among consumers, very few goods and services are universally required by law, or required by law at all. In addition, few adult consumers are aware that funeral providers have a legal obligation to disclose prices in writing, and to refrain from making false statements about non-existent “legal requirements” that might persuade the consumer to buy goods and services he or she would not otherwise choose.<sup>4</sup> A substantial number of Americans incorrectly believe that embalming is usually or always required by law for funerals with a viewing (this is not true in any US state), or to cross state lines for a distant burial (only true in two US states).

## **II. The Funeral Rule should be amended to require conspicuous online posting of General Price Lists**

While FCA believes that all three required price lists are important (the General Price List, the Casket Price List, and the Outer Burial Container Price List), we recognize that the General Price List is the most important among them, and will concentrate our attention on the GPL.

The basis, purpose, and goals of the Funeral Rule aim to correct several related but distinct problems in the funeral transaction. The most important goals are:

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<sup>4</sup> Steven W. Kopp and Elyria Kemp. *Consumer Awareness of the Legal Obligations of Funeral Providers*. The Journal of Consumer Affairs. September 14, 2007. Volume 41, no. 2.

- giving consumers access to prices that have historically been difficult to obtain when trying to plan for and *control* funeral costs
- giving consumers the means to control funeral costs not only *within* one funeral home, but *among various providers*
- encouraging price competition among funeral providers through the discipline enforced by consumers exercising free choice among goods, services and providers

The original Funeral Rule, in effect since 1984, offered these protections through the technology available at the time. Funeral providers were required, for the first time, to write down their prices on a standard document called a General Price List. FTC and consumer research showed that adjusting prices verbally, and varying prices according to the apparent wealth and means of the customer, were common practices.

Also for the first time, funeral providers were required to affirmatively hand consumers a General Price List at the beginning of the arrangements discussion, and also to give price quotes by phone to consumers on request.

The documentary record behind the Rule's genesis indicates that FTC staff were aware that while these requirements were a necessary minimum, they had only a limited ability to correct marketplace distortions that harmed consumers. The provision of a General Price List is good so far as it goes, but only the most dedicated consumers would make the effort to physically visit more than one funeral home. It is unrealistic to expect grieving families to physically visit three, four, or five funeral homes during a time of grief, and with a clock ticking in the background while the body awaits disposition.

Likewise, while the requirement to disclose prices by phone to consumers on request is a necessary minimum protection, it has limited practical utility for consumers. Since our founding in 1963, FCA's federation of nonprofit consumer information groups has spoken to countless thousands of consumer families. What was true historically remains true today: few Americans understand the range of choices at funeral homes. The most common question consumers ask? "How much does a funeral cost"?

But what is "a funeral"? This question, posed to a funeral provider, usually begets a price quote for a full-service funeral with embalming, public viewing of the body, funeral ceremony, graveside service, and a number of other goods and services. The consumer has no idea that there are less expensive options, and a la carte options, when calling a funeral home cold.

It is not until the consumer encounters the actual General Price List that they are made aware of:

- the right to buy a la carte
- the fact that embalming is not usually legally required, that cost-effective, simpler options such as immediate burial and direct cremation are available
- that a casket is not required for cremation

Commission staff and researchers recognized this limitation in the 1970s and 1980s. Earlier drafts of the Funeral Rule included proposals to mandate that providers mail a copy of the General Price List through the US postal service.<sup>5</sup> Funeral industry opponents argued that these requirements were unduly burdensome and costly, and they were dropped from the Rule that was enacted in 1982.

The Internet can solve this problem for both consumers and funeral providers. The Internet is an “on-demand” platform. It does not require the time or expense of an individual staff member to “provide” information in a bespoke, person-to-person interaction. Once a party uploads information to a website, any web-visitor can access this at any time without having to make a request that costs a business time or money.

Market research confirms what most of us already know anecdotally and from our own lives; a large majority of consumers turn to Internet search when comparing prices for products and services<sup>6</sup>, especially costly ones.<sup>7</sup> The Internet is, actually, something new under the sun. Consumers have instant access to a wealth of information that would have been impossible to access or view 25 years ago.

The Funeral Rule will be able to reach its full potential to empower consumers and to enforce marketplace competition if it is amended to require all funeral providers to post their General Price Lists clearly and conspicuously on the provider’s website.

This will have far-reaching effects:

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<sup>5</sup> See the original draft of the Funeral Rule published in The Federal Register, August 29, 1975-40 F. R. 39901. Excerpt: “§ 453.3 Price disclosures—In connection with the sale or offering for sale of funeral services and/or merchandise to the public. . . it is an unfair or deceptive act or practice for any funeral service industry member to . . . fail to furnish to each customer who inquires in person about the arrangement, purchase, and/or prices of funeral goods and services, prior to any agreement on such arrangement or selection by the customer, **or to any customer who by telephone or letter** requests written price information, a printed or typewritten list, which the customer may retain, containing the prices. . .[emphasis added].”

<sup>6</sup> Nielsen Global Connected Commerce Survey, <https://www.nielsen.com/us/en/insights/article/2016/what-are-connected-shoppers-doing-and-not-doing-online/>

<sup>7</sup> Maarten C.W. Janssen, Jose Luis Moraga-Gonzalez, Matthijs R. Wildenbeest, “Consumer Search and Pricing Behavior in Internet Markets” (online 2009), <https://doi.org/10.1017/CBO9780511493201.016>

- ‘At-need’ consumers who begin funeral planning only after the death has occurred will be able to effectively compare prices for service among providers. Within a few hours, without leaving their home, a person can quickly see the local range of prices on comparable services among as many funeral homes as they wish to browse.

They will receive the full benefit of the Funeral Rule’s informative disclosures about their rights and options, which they are not receiving today when getting price quotes by phone, or having access to only one General Price List when they show up in person at a funeral home.

- Consumers who plan final arrangements in advance of the death will also benefit in the same way.
- Researchers and volunteer consumer advocates, such as those in Funeral Consumers Alliance, will be able to complete in days what takes them months under the current Rule. For decades, FCA’s federation of local groups has labored to collect the General Price Lists of funeral homes in order to produce our most important offering—simple spreadsheets that compare prices on apples to apples services.

Currently, our researchers must rely on the voluntary cooperation of funeral homes. Providers are not mandated to mail, email, or fax a General Price List (except in Arizona). Funeral providers are often resistant to doing so; they can and do sometimes say, “You will have to drive to my location to pick it up in person.” It took the FCA national office more than two months to collect the price lists from the mere 70 funeral homes in the state of Vermont because of this resistance.

- FTC and other government researchers could easily monitor compliance, as well as scrutinize the General Price Lists for accuracy and compliance with the Rule. The cost-savings of not having to physically travel are obvious.

Such a mandate would impose no costs on funeral providers. Placing a General Price List conspicuously on a provider’s website requires no new development or revision of funeral home literature. Every funeral home in America already has a General Price List, and in this day and age, nearly every such provider writes and stores this GPL electronically. The “cost” of pressing a virtual button to upload a document to a website is minimal.

Since 2015, Funeral Consumers Alliance and Consumer Federation of America have conducted and publicized five comprehensive studies of the pricing and disclosure practices of California funeral homes. This state is a natural laboratory, as it is the only state with any requirements relating to online price disclosure for funeral providers. California law offers both a positive model and a cautionary example. It requires that all funeral providers with a website (this is nearly all providers in the state) must do one of two things:

1. Place a link to the General Price List on the homepage of the website.

~or~

2. Providers who do not wish to disclose their prices online may simply describe the kinds of goods and services they offer (this derives from the Funeral Rule's enumerated 16 categories of goods and services) with a note that a "General Price List is available on request".

Our studies note the positive effect the law has had for California consumers, while also illustrating the unfortunate self-defeating effect that this "legal loophole" offers for price-hiders. Among the findings:

- Of 203 California funeral homes studied, 45 percent prominently linked their General Price List on the homepage of the provider's website.
- An additional 25 percent linked their GPLs on their websites, but did so in a way that obscured the information or made it more difficult for consumers to find.
- The remainder took advantage of the state's legal loophole and chose option 2, as described above. It is important to note the full negative consequences of this legal loophole. California law does not define *how* a provider fulfills its promise to "make available on request" a General Price List. In practice, these funeral homes are free to compel consumers and researchers to physically visit the funeral home in order to get the GPL.

Our joint studies confirmed what researchers expected, as well. There is a clear correlation between price and the provider's propensity to disclose or hide their prices. Note the consequences of this loophole for researchers; we sometimes had to make multiple phone calls to persuade these non-disclosing providers to send us their GPLs. Nearly all of our email requests were ignored.

The February, 2020 study of 120 California funeral homes found that "price-hiders" charged substantially more for the same services as compared to funeral providers who prominently disclosed their prices.<sup>8</sup>

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<sup>8</sup> Joshua Slocum and Stephen Brobeck, The Relationship between Funeral Price Disclosures and Funeral Prices: A California Case Study-February 2020. Accessed at: <https://funerals.org/wp-content/uploads/2020/02/California-Funeral-Home-Pricing-Report-2-10-20.docx>

- Funeral homes that charged the highest prices were most likely to “opt out” of disclosing online.
- Price-hiders charged a median price 31 percent higher for a direct cremation (\$1,695) than those who prominently disclosed their prices online (\$1,295)
- Price-hiders charged a median price 37 percent higher for an immediate burial (\$2,595) than prominent disclosers (\$1,900)
- Price-hiders charged a median price 36 percent higher for the basic services of funeral director and staff (\$1,835) than prominent disclosers (\$1,348)

The nation’s largest funeral home and cemetery chain, Service Corporation International (SCI), also known by its brand-name “Dignity Memorial”, was among the most expensive of the price-hiders. Our 2017 study, *Death with Dignity? A Report on SCI/Dignity Memorial High Prices and Refusal to Disclose These Prices*, found that these chain-owned locations charged substantially more than independent funeral homes for directly comparable services. For example, the median price for a direct cremation at an independent provider was \$1,562; SCI-owned funeral homes charged a median of \$2,700. This spread went across the board from the simplest direct cremation to a more involved full-service funeral. Claims of “higher quality,” especially for simple, standard services like direct cremation that do not vary much between providers, cannot fully explain this.

In years of research on funeral home prices, we have yet to find one SCI funeral home that discloses its prices on its website.

### **Huge price variations**

One would be hard-pressed to find an example of price variation this extreme in many other retail service transactions.

Our February, 2020 study of California funeral homes found:

- Direct cremation ranged from \$525 to \$4,115.
- Immediate burial ranged from \$495 to \$4,715.
- The fee for the basic services of funeral director and staff ranged from \$250 to \$4,370.

The reasons offered by high-priced funeral providers for this discrepancy do not withstand scrutiny. Such providers frequently claim that they “offer a higher level of service,” or “more dignified arrangements,” which they claim accounts for their prices.

But direct cremation and immediate burial are basic, standard services that vary little, if at all, from one provider to another. They include no ceremonies (with the limited exception of a minority of providers who include a graveside service with immediate burial). Families who make these arrangements are not gathering with mourners to meet and make use of the business's viewing or ceremonial facilities. While it is true that some high-priced providers do feature larger or finer facilities or automotive equipment, that is not germane to families who select these simple services. These families simply are not experiencing these facilities. What, then, is this "higher level of service"?

The truth is more prosaic. Providers know that most families are not aware of this huge price variation; whether they find the provider's prices affordable or burdensome, they have no idea how these prices actually compare to what is available elsewhere locally. So, even a very high price is categorized in the consumer's mind as "normal, and just what funerals or cremations cost."

Requiring providers with websites to prominently and conspicuously post their General Price Lists online will give consumers practical and meaningful tools for price comparison. It will also bring a transparency to the funeral marketplace that has never existed as it does in most other competitive industries.

### **III. Funeral providers should be required to conspicuously disclose the true cost of cremation**

The Commission could not have anticipated, in the early 1980s, how the Rule's treatment of 'outside' crematory fees would play out in practice. The Rule permits funeral providers to treat crematory fees—the actual cost of cremation charged to the funeral home by the crematory that performs it—as 'cash advance' items.

The Rule defines cash-advance items as those services a funeral home obtains from a third-party on behalf of the consumer. Common examples include flowers from a florist, catering from a restaurant, or obituary fees from a newspaper.

Because these are not products or services sold directly by the funeral home, the Rule sensibly does not require funeral homes to list these goods and services on the mortuary's own price list. Indeed, how could a funeral home do so, not having control over the selection or prices charged by third-party businesses?

But it has proven to be a mistake to treat crematory fees as traditional cash-advance items. The Rule as currently written gives inappropriate deference to the funeral home's preferred and convenient internal business practices while neglecting the legitimate needs and expectations of the consumer arranging a cremation.

Here is how it works in the real world, from the consumer's point of view. "Johnson Funeral Home" advertises direct cremation for \$995. The consumer, obviously, assumes that this is the price for the cremation he or she has arranged. But

after the arrangements discussion, when it is time to pay the bill, the consumer learns that the actual cost of the cremation is \$1,295.

What accounts for the difference? The fee *for the actual cremation*, which FCA price surveys around the country have found, averages \$300 to \$400.

There is no plainer way to describe this than the way every consumer does who has called FCA to complain about this practice:

“What am I actually buying for \$995 if it doesn’t include cremation? Why is it called ‘direct cremation’ when it does not include cremation?”

This practice does not pass the “reasonable person” test. If car dealers sold automobiles this way, a consumer would respond to an ad for a new sedan priced at \$25,000. But after committing to the purchase, the buyer would learn in the sales office that there will be an additional \$5,000 ‘internal combustion engine fee’. We would recognize this for what it is: fraudulent and deceptive.

It is not “only a few bad apples” who employ this practice. FCA has noted for decades that a substantial minority of funeral homes conceal the true price of cremation. Our 2016 study co-authored by Consumer Federation of America found that 22 percent of California funeral homes did not disclose the true cost of cremation.<sup>9</sup>

Every funeral home in America knows exactly how much it pays to the third-party crematory(ies) for the actual cremation. There is no legitimate reason to conceal that from the consumer in what is close to a bait-and-switch manner. We ask the Commission to recognize the unreasonable nature of this practice and place the responsibility back where it belongs, with the provider.

The Rule should be amended to require all funeral homes that use a third party crematory to:

-Include the actual cost of the cremation/crematory fee within the advertised price for direct cremation on the General Price List and in any other forms of advertisement over which the Rule has jurisdiction.

~or~

-For funeral homes that rotate through multiple third-party crematories that charge different prices, these should be required to include the price range of these crematory fees conspicuously and adjacent to the funeral home’s price for direct cremation with a note indicating that a fee within this price range will be added to the listed cost for direct cremation.

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<sup>9</sup> Joshua Slocum and Stephen Brobeck, Cremation Services: Highly Variable and Misleading Pricing, Lack of Disclosure, and Violation of Federal Rules. Accessed: <https://funerals.org/wp-content/uploads/2020/02/2016-9-12-FCA-CFA-Cremation-Report.pdf>

#### **IV. The FTC should eliminate the non-declinable ‘basic-services’ fee**

The non-declinable basic services of funeral director and staff should be eliminated. This fee, which has no cap, has become the second-most expensive item, on average, at American funeral homes (cite NFDA), just behind the cost of a casket. It is the one fee that consumers may not decline.

The fee was added to the initial versions of the Funeral Rule at the industry’s request, in response to the Rule’s requirement for itemization of goods and services. This specifically permitted fee in the Funeral Rule is atypical in American business practice.

In addition, the 1994 amendment to the Funeral Rule allowed funeral homes to include *all* overhead, not just *unallocated overhead*, as the previous version of the Rule had required.

Absent this fee, funeral homes would likely spread out overhead costs and profit margins more widely among the goods and services they sell. This would be in line with the way most other businesses operate.

We believe this would result in pricing that more accurately and fairly reflects the value of the tangible goods and services that consumers select, such as embalming, viewing, and ceremonial services at the funeral home. American consumers who encounter this fee tell FCA that they are confused by it. They do not understand what value they are receiving from this fixed fee—it averages \$2,100—when they compare the fee to the usually much lower prices charged for the goods and services (embalming, the funeral ceremony, the graveside service, etc.) they are freely choosing.

FCA has documented the growth of the basic services fee charged by most funeral homes over the decades since the Rule’s enactment. From 1982 to 1988, the FTC’s research found the average basic services fee rose 73 percent.<sup>10</sup> Research and cost-comparison surveys by FCA and its affiliated member organizations shows that average or median figures do not capture the surprisingly high fees found in regional price surveys.<sup>11</sup>

- The Funeral Consumers Alliance in Raleigh, North Carolina, found fees as high as \$3,000 in 2003
- The FCA of South Carolina found a range from \$500 to \$3,000 in Columbia in 2007

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<sup>10</sup> Cited in Joshua Slocum and Lisa Carlson, *Final Rights: Reclaiming the American Way of Death* (2011, Upper Access Publishers). p. 104.

<sup>11</sup> The price surveys in Connecticut, North Carolina, and South Carolina are cited in Slocum and Carlson, as above.

- In a 2010 survey in Connecticut, a least half the funeral homes had a basic Fee of over \$2,000.
- A 2020 joint study by Funeral Consumers Alliance and Consumer Federation of America of 120 California funeral homes found a basic fee price range from \$250 to \$4,370.<sup>12</sup>

## V. The embalming disclosure should be amended

The Funeral Rule should be amended both to alter the disclosure in general, and to remove the clause, “except in certain special cases”. A revised embalming disclosure must clearly separate the concepts of “legally required” from “the funeral home’s in-house preferences.” The current disclosure does not separate them, and misleads some consumers into believing that state law may require embalming when that is not the case.

The current embalming disclosure reads:

*Except in certain special cases, embalming is not required by law. Embalming may be necessary, however, if you select certain funeral arrangements, such as a funeral with viewing. If you do not want embalming, you usually have the right to choose an arrangement that does not require you to pay for it, such as direct cremation or immediate burial.*

The purpose of the disclosure is to inform consumers that they usually have the right to decline embalming. However, consumer interactions with Funeral Consumers Alliance indicate that many people remain confused, often concluding from *the disclosure itself* that *the law* requires embalming for a viewing. No state in the US requires embalming as a condition of viewing the body.

The disclosure should be rewritten to make clear to all consumers that the only “requirement” for embalming, the only time it is “necessary” for viewing, is when a funeral home’s in-house policy requires it; state law does not. This revision should also de-couple embalming from direct cremation and immediate burial. In its current form, the disclosure leads consumers to believe that the only way to avoid embalming is to choose direct cremation or immediate burial.

Funeral providers should also be required to provide a numerical or statutory citation if there are legal requirements in the provider’s state that mandate embalming in any circumstance.

### 1. For those states with any legal requirements for embalming under any circumstances:

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<sup>12</sup> Funeral Consumers Alliance and Consumer Federation of America. *The Relationship between Funeral Price Disclosures and Funeral Prices: A California Case Study*. 2020. Available at <https://funerals.org/wp-content/uploads/2020/02/California-Funeral-Home-Pricing-Report-2-10-20.docx>

*You have the right to decline embalming except when legally required in [name of state]. Embalming is legally required in [name of state] in the following circumstances: [insert description of circumstances, such as ‘when the body is not refrigerated, buried, cremated, or donated to anatomical science within X days’ for example]. This requirement may be found in [insert statutory or regulatory citation].*

2. For those states that have no legal requirement for embalming:

*Embalming is not required by law in [state], and you have the right to decline this service.*

3. Providers with an in-house policy requiring embalming for public viewing should be required to include the following statement directly below or adjacent to the applicable the embalming disclosure.

*[Name of provider]’s policy is to require embalming for public viewing of the body.*

These modifications would also clarify persistent questions raised by the growing segment of funeral providers who do not offer embalming at all. Some of these providers adhere to religious traditions that prohibit embalming, such as Judaism and Islam. Other providers offer only simple arrangements where embalming is not relevant, even by preference or practical circumstances.

Many states either do not require embalming at all, or permit alternatives such as refrigeration that obviate any practical necessity for embalming.<sup>13</sup> Providers in these states have told Funeral Consumers Alliance that they are confused about their duties under the Funeral Rule. These providers tend to err on the side of caution, inserting the current embalming disclosure on their General Price Lists even though their state does not require it, or they do not offer it, or both.

These providers point out that the appearance of the disclosure on their GPL creates confusion among their customer families by sending a contradictory message. Amending the disclosure as we have described would provide relief to this growing market segment.

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<sup>13</sup> Nineteen states do not require embalming under any circumstances. The remainder require embalming only in situations where refrigeration is not available or when burial/cremation cannot happen with a “reasonable” or defined period of time. There is no US state that requires embalming flatly simply because death has occurred, as there is no US state that requires embalming as a condition of viewing the body. These statistics are compiled from Slocum and Carlson, Final Rights: Reclaiming the American Way of Death. 2011 Upper Access Publishers. FCA is not aware of any changes to state laws regarding embalming under these circumstances.

## **VI. The General Price List should be standardized**

FCA and its federation of affiliate organizations have reviewed thousands of GPLs over the years as part of our cost-comparison surveys. We have found that many funeral homes organize their GPLs in such a way as to violate current Funeral Rule provisions, or to effectively negate the Funeral Rule's potential value to consumers.

- Some funeral homes violate the Rule directly by placing the right-of-selection disclosure *after* the GPL features packaged funerals. This means that consumers are not alerted to their right to buy a la carte until after they've been persuaded to view the funeral home's preferred packages. In practice, we suspect consumers who receive such price lists never even notice this disclosure.
- Some funeral homes list their itemized goods and services only after 5-10 pages of packages in what is a clear attempt to distract the consumer and sell a package before the buyer has had a fair chance to contemplate itemized options.
- There is no requirement for disclosures such as the right-of-selection to be set in type of a sufficient size that an average adult would find it legible. Some funeral homes use 8-point type or similar for this disclosure, knowing that it will be overshadowed by the large type and attractive lay-out with which they offer packages.
- Because the Rule is not sufficiently prescriptive about the GPL format, funeral providers often overlook the need to clearly disclose fees directly adjacent to relevant offerings. The failure of many funeral homes to disclose prominently, or at all, the true cost of cremation with third-party crematories is an example discussed above.

## **VII. The Funeral Rule Offender Program (FROP) should be discontinued**

FCA urges the Commission to terminate the Funeral Rule Offender Program, as it inappropriately diverts apparent violators of the Rule away from enforcement actions. In addition, the agreement between the Federal Trade Commission and the National Funeral Directors Association conceals the names of violators from the public.

FROP allows funeral homes that have been found to be in violation of the Funeral Rule to attend educational courses offered by the NFDA instead of being subject to regulatory action. Of most concern to FCA and its affiliates is the FTC's agreement to omit the names of violators in its press releases announcing the results of compliance "sweeps."

FCA member organizations have long complained that these press releases omit information that our member leaders, and grieving consumers, need and are entitled to. Each year when the FTC announces the results of its sweeps, local volunteers contact the FCA national office. These leaders express frustration that the notices do not name the violators.

The most common question from our local leaders: “What is the point of this press release? I can see that there are violators in my town, but I cannot know who they are. How can consumers make wise decisions about which funeral home to use if the government agrees to keep the names of violators a secret?” Neither consumers nor consumer advocates should be compelled to file a Freedom of Information Act Request—and to wait several months for a response—in order to learn these names.

We also note that violators pay fees to NFDA in lieu of fees or enforcement penalties that the FTC might otherwise collect, and that would provide a revenue stream to the government that could be used for enforcement.

Finally, there is no evidence that this approach has improved compliance. In fact, we suspect that this approach to Funeral Rule violators has, instead, encouraged the continuation of violations by removing any financial or reputational penalties that might discipline bad actors.

The list below shows the rate of violations found by FTC compliance sweeps from 2000 to 2017, compiled from the FTC’s press releases. Despite more than 20 years of “sweeps” and FROP, compliance rates are not improving over time.

*(see chart next page)*

	<b>Number of funeral homes swept</b>	<b>Number in violation</b>	<b>Percentage in violation</b>
2000	76	4	5
2001	NO DATA AVAILABLE		
2002	31	11	35
2003	29	12	41
2004	65	5	8
2005	61	14	23
2006	100	12	12
2007	174	26	15
2008	104	26	25
2009	175	52	30
2010	126	35	28
2011	102	23	23
2012	127	23	18
2013	122	30	25
2014	100	27	27
2015-16	133	31	23
2017	134	29	22
<b>AVERAGE</b>			<b>22.5</b>

**VIII. The FTC should expand its investigation of cemetery practices.**

Cemeteries are experienced by consumers as part and parcel of the overall death transaction. Consumers correctly experience cemetery purchases as “funeral goods and services” in the plain, real-world meaning of those terms.

Many of the same factors that disadvantage consumers in the funeral home purchase also do so with the cemetery purchase: Lack of knowledge about required purchases, lack of price transparency, grief, and deceptive sales practices. Consumers have long reported to FCA that cemeteries compel bundled package purchases, or misrepresent legal requirements in order to compel consumers to purchase goods that are not required by law. Funeral Consumers Alliance has documented these abuses, and has shared that documentation with the Federal Trade Commission during several prior reviews and comment periods. We will summarize them below.

Cemetery costs and practices affect more than half of all American families who

experience a death each year. Though cremation recently passed the 50 percent mark, about 49 percent of households experiencing a death *have to do* business with a cemetery each year. Families who chose whole-body burial, obviously, cannot “opt out” of the cemetery purchase. 2.8 million Americans died in 2017, the last year for which data is available. That represents nearly 1.4 million whole-body burials per year.

The total figure of American families who do business with cemeteries is certainly higher than 50 percent, though no government agency tracks these figures. It is clear that this is true from plain observation. When consumers choose whole-body burial, a cemetery is obviously a required and universal part of the disposition. That alone represents 49 percent of all deaths in the US. But remember that cremation does not necessarily mean “no cemetery involved”. Many families choosing cremation will also choose to bury the cremated remains in a cemetery, whether that is in-ground or in a columbarium.

The economic impact on households is substantial. Though precise figures are not available (the US Census Bureau does not appear to collect data on cemetery purchases the way it does for funeral home purchases), FCA’s experience shows cemetery fees commonly add \$2,000 to \$3,000 to the final bill for the death of a loved one.

As with funeral homes, buying from cemeteries can be confusing and complicated for the average bereaved person. Consumers usually believe they “just have to buy a grave”, and are surprised at what else they have to purchase. In fact, the following goods and services are typical practical necessities:

- the grave itself (called a ‘right of interment’)
- the opening and closing of the grave
- a concrete graveliner or vault to surround the casket in the grave (never required by law, but almost universally required by cemeteries)
- a marker
- setting and placement fees for the marker

Cemetery consumers do not have the benefit of a Funeral Rule-style list of reasonably standard terms, fully disclosed.

Perhaps the most unique factor that disadvantages consumers is the fact that most people choose a cemetery because deceased family members are already buried there. Once the first Smith family member is buried in a cemetery, each subsequent generation of Smiths will want to be buried “in the family plot.” Nearly every consumer family contacting FCA about cemetery purchases cites prior burial of family members as the number one criterion for cemetery choice.

In a word, consumer families who choose cemetery burial are emotionally constrained by the fact that deceased family members are already buried in one location. This constraint surpasses the constraints consumers experience at funeral homes. Most families feel that they cannot simply “choose another cemetery,” even if they are willing to choose a different funeral home from the one used in the past.

We believe the FTC should mount an investigation of the cemetery sector similar to the investigation it performed on the funeral home sector which led to the enactment of the Rule. We are confident that the FTC would find that these practices are widespread and economically injurious to American households.

## **A. Common cemetery practices that mirror funeral home practices**

### **1. Bundling, or tying the provision of one good or service to another—**

Consumers around the country report to FCA affiliates that cemeteries frequently require consumers to purchase the marker from the cemetery. In some cases, cemeteries also require consumers to purchase the vault/graveliner from the cemetery, even if the consumer would prefer a less expensive vault from a funeral home or third-party retailer.

Some consumers who choose an outside vendor to supply the marker are punished with what we would call a “handling fee” if the purchase took place at a funeral home.

Funeral home owners have noticed similar practices. A Tennessee funeral director wrote to FCA to complain that a cemetery was charging families higher fees to open and close a grave if the family chose a funeral home separate from the one that occupied the cemetery grounds.

*My name is Josh Jennings and I am a funeral home owner in Tennessee. I have a question regarding the FTC's Funeral Rule that I am hoping you can shed light onto.*

*There is a cemetery located in our area that employees family service counselors. Each counselor acts as an agent of a funeral establishment that sits on the cemetery grounds. The cemetery charges consumers a higher fee for opening/closing of the grave if they do not purchase funeral goods and services from the sales agent on a pre-need basis.*

**2. Refusal to disclose prices on paper to consumers or researchers—**FCA affiliates have long wished to offer consumers cost-comparison surveys of cemetery property and prices, as FCA does regularly for funeral homes. Our volunteers are often unable to complete these surveys, or unable to complete them within a reasonable period of time. Because the Funeral Rule does not require cemeteries to have, or to furnish, a General Price List, our volunteers have little leverage with which to persuade cemeteries to disclose this information.

A minority of states have some legal requirement for cemeteries to make price lists available, but this is inadequate. Federal regulations accomplish things that a piecemeal, state by state approach does not. First and obviously, they have jurisdiction everywhere. They set a minimum standard of consumer protection that will be enjoyed by every American. In addition, they obviate the need for consumer advocates and policy makers to engage in the

arduous task of pleading the same case over and over, for periods of years or decades, in each state.

While consumer protection laws are not partisan issues, they are *political* issues in fact and in practice as any advocate knows. Advocacy groups are vastly underfunded compared to industry lobbying and trade associations. Citizen advocates lose under a system in which the existence of consumer protection rules is framed as a “state’s rights” issue. The moneyed and the well-connected usually prevail if the party in power is sympathetic to industry concerns.

The results are clear in the regulatory landscape. While every state aside from Colorado and Hawaii has a funeral regulatory office created by the state, there are fewer dedicated to regulating cemeteries. What consumer protections exist for cemetery consumers (and they are few and vague in comparison to funeral-home-based state legal protections) are sometimes the responsibility of state agencies with no apparent logical connection to the issue. As an example, the state of Pennsylvania purports to regulate cemeteries—through the state real estate commission.<sup>14</sup>

**3. Misrepresenting legal and sales requirements**—The Funeral Rule prohibits false claims about alleged legal requirements to purchase certain goods and services. This is because the Commission recognized how frequently industry members claimed that services such as embalming or caskets or vaults were “required by law” when that was not true.<sup>15</sup>

But the same false claims are sometimes made by cemeteries:

*Mrs. B, a 70-year-old widow from Virginia, was browsing graves at cemetery near Washington, D.C. “I didn’t want a lot of folderol,” she said. “So I asked if I could be buried in the pine boxes they used next door at King David Memorial Gardens. They told me the federal government wouldn’t let me be buried in a pine box—that was only for the Jews.”*<sup>16</sup>

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<sup>14</sup> See Slocum and Carlson, as above. See especially the chapter ‘Cemeteries: for-profit and non-profit’, pp. 67-79. See also the chapter ‘Pennsylvania’, p. 422.

<sup>15</sup> Funeral Industry Practices, Final Staff Report to the Federal Trade Commission and Proposed Trade Regulation Rule (16 CFR Part 453). June, 1978. See especially Section VI-Misrepresentations, beginning on page 264. Commission staff found that misrepresentations of “the law” were common and found nationwide. Most common were false claims by funeral providers that state law required the purchase of caskets or burial vaults, false claims that sealed caskets or vaults could ‘protect’ the body, and false claims that embalming was required by law in most circumstances. The evidentiary record compiled by Commission staff showed a pervasive pattern throughout the nation.

<sup>16</sup> From a complaint filed with FCA, recounted in *Final Rights: Reclaiming the American Way of Death* (see above footnotes). This complaint is a particularly representative example, but it is not rare or unique. FCA receives questions and complaints regularly from cemetery consumers in which the complainant claims the cemetery stated that ‘state law’ requires the purchase of a vault (not true in any US state), or that ‘state regulations’ require embalming as a condition of burial in an above-ground mausoleum (not true in any US state).

## Conclusion

It is clear that it is time to amend the Funeral Rule. The problems families face getting complete and accurate information, before they make emotional and often costly funeral decisions, have been a feature of the funeral transaction for decades. Technology has changed how we shop, and for the better. But without government regulation, grieving families cannot reap these benefits. The funeral industry's reluctance to operate transparently and competitively will not be remedied without more effective and up to date government regulations.

The revisions to the Rule that we request are fair, they comport with common sense, and they pose little to no financial burden to the industry.

- Extending the paper-based requirement to disclose prices in writing to the online world. Posting a General Price List on a funeral home's website is neither burdensome nor costly for providers.
- Requiring complete and truthful disclosure of cremation costs. The FTC should act on this question to lower the rate (22 percent in one recent study) of funeral homes that advertise prices for cremation that *don't actually include the cost for cremation*.
- Revising the embalming disclosure to clarify for consumers that embalming is entirely their choice, excepting the minority of circumstances where a state law or regulation may require it.
- Removing the non-declinable fee for "basic services of funeral director and staff" would prompt funeral homes to price more reasonably the actual services they perform for consumers. This non-standard business practice, endorsed by the Rule, has allowed funeral homes to thwart the ability of consumers to effectively control costs and services through itemized choice.
- Ending the Funeral Rule Offender Program which has allowed Funeral Rule violators to escape public notice while giving the industry's largest trade association the responsibility of carrying out what ought to be government enforcement.
- Standardizing the General Price List so that consumers have a reasonable chance to see and comprehend important disclosures about their rights without having those obscured by small type and odd placement.
- Mounting an investigation into the common and widespread cemetery sales practices that have evaded regulatory scrutiny, and which deprive grieving families of the same rights to fair dealing and free choice they enjoy with funeral homes.

The Funeral Rule only comes up for potential revision every 10 years; this is an opportunity to protect grieving families that must not be allowed to pass for another decade.

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