FEDERAL TRADE COMMISSION

16 CFR Part 453

Request for Comments Concerning Trade Regulation Rule on Funeral Industry Practices

AGENCY: Federal Trade Commission.

ACTION: Request for public comments.

SUMMARY: The Federal Trade Commission (the ''Commission'') is requesting public comments on its Trade Regulation Rule on Funeral Industry Practices (''the Funeral Rule'' or ''the Rule''). The Commission requests comments about the overall costs and benefits of the Rule and its overall regulatory and economic impact as a part of its systematic review of all current Commission regulations and guides. Also requested are comments on whether the Rule should be modified to broaden its scope to include non-traditional providers of funeral goods or services; revise or clarify the prohibition on casket handling fees; or prohibit non-declinable funeral fees. All interested persons are hereby given notice of the opportunity to submit written data, views and arguments concerning the Rule.

DATES: Written comments will be accepted until July 12, 1999.

ADDRESSES: Written comments should be identified as ''16 CFR Part 453'' and submitted to: Secretary, Federal Trade Commission, Room H–159, 600 Pennsylvania Ave., NW, Washington, DC 20580. The Commission requests that commenters submit the original plus five copies, if feasible. To enable prompt review and public access, all written comments should also be submitted, if possible, in electronic form. To submit in electronic form, provide the comment on either a 5¼″ or a 3½″ computer disk. The disk should be labeled with the commenter's name and the name and version of the word processing program used to create the document. (Programs based on DOS or Windows are preferred. Files from other operating systems should be submitted in ASCII text format). Alternatively, the Commission will also accept comments submitted to the following E-Mail address: ''*FUNERAL@ftc.gov*.'' Individual members of the public who will be filing comments need not submit multiple copies and need not submit their comments in electronic form.

All comments will be placed on the public record and will be available for public inspection in accordance with the Freedom of Information Act, 5 U.S.C. 552, and the Commission's Rules of Practice, 16 CFR 4.11, during normal business days from 8:30 a.m. to 5 p.m., at the Public Reference Room, Room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW Washington, DC 20580. In addition, comments will be posted on the Internet at the FTC's web site: ''*www.ftc.gov*''.

Notification of interest in the Public Workshop-Conference should be submitted in writing to Mercedes Kelley, Division of Marketing Practices, Federal Trade Commission, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Myra Howard, (202) 326–2047, or Mercedes Kelley, (202) 326–3665, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The current request for comments on the Funeral Rule is part of the Commission's regulatory review program which has been implemented to review Rules and guides periodically. The regulatory review program seeks information about the costs and benefits of the Commission's Rules and guides and their regulatory and economic impact. The information obtained will assist the Commission in identifying Rules and guides that warrant modification or rescission.

A. Background

The Commission adopted the Trade Regulation Rule entitled Funeral Industry Practices (the ''Funeral Rule'') on September 24, 1982. It became fully effective on April 30, 1984.[1] The essential purposes of the Funeral Rule were to ensure that consumers receive information necessary to make informed purchasing decisions, and to lower existing barriers to price competition in the market for funeral goods and services.[2] Subsequently, the Funeral Rule was amended as a result of a regulatory review and amendment proceeding that began on December 9, 1987.[3] The Commission published the amended Funeral Rule on January 11, 1994.[4] The amendments to the Rule took effect July 19, 1994.

The Rule, as it stands today, specifies that it is an unfair or deceptive act or practice for a funeral provider to: (1) Fail to furnish consumers with accurate price information disclosing the costs of each funeral good or service used in connection with the disposition of dead bodies; (2) require consumers to purchase a casket for direct cremations; (3) condition the provision of any funeral good or service upon the purchase of any other funeral good or service; or (4) embalm the deceased for a fee without authorization. The Rule also specifies that it is a deceptive act or practice for funeral providers to misrepresent the legal or local cemetery requirements for: (1) Embalming; (2) caskets in direct cremations; (3) outer burial containers; or (4) any other funeral good or service, and to misrepresent that cash advance purchases are the same as the cost to the funeral provider when such is not the case. The Rule sets forth preventive requirements in the form of price and information disclosures to ensure funeral providers avoid engaging in the unfair or deceptive acts or practices described above.

B. Issues for Comment

This review is part of a regularly scheduled review which generally seeks information about the costs and benefits of the Commission's rules and guides and their regulatory and economic impact. The information obtained will assist the Commission in identifying aspects of the Funeral Rule that warrant modification or rescission. Accordingly, the Commission is generally soliciting comments on, among other things, the economic impact of and the continuing need for the Funeral Rule; possible conflict between the Rule and state, local, or other federal laws; and the effect on the Rule of any technological, economic or other industry changes.

There are a number of other material issues on which the Commission is also seeking comment. The Commission recognizes that change is occurring in the funeral industry at a rapid pace and that several issues have arisen since the Rule was amended in 1994 which may warrant additional modification or rescission of the Funeral Rule.

First, the Funeral and Memorial Societies of America (''FAMSA''), has requested that the Commission consider making a number of amendments and additions to the Rule. Among these are: (1) The elimination of any non-declinable fee; (2) the addition of four items to the required itemization on the General Price List—namely, the price for private viewing without embalming, the price for body donation to a medical school, the price for the cremation process itself,[5] and the price for rental

[1] The Rule had two effective dates. The portions of the Rule that prohibit certain oral or written representations became effective on January 1, 1984. 48 FR 45537. The remainder of the Rule (the portions imposing affirmative obligations on funeral providers) became effective on April 30, 1984.

[2] 47 FR 42260.

[3] 52 FR 46706.

[4] 59 FR 1592.

[5] Despite the fact that § 453.1(g) of the Rule defines ''direct cremation'' as ''a disposition of

caskets; (3) a requirement that the cost of the cremation process be included in the charge for an immediate or ''direct'' cremation; (4) a requirement that any mark-up on cash advance items be disclosed with the actual amount to be charged; and (5) that the scope of the Rule be expanded to bring cemeteries, monument dealers, and casket sellers within coverage of the Rule.[6]

Second, members of Congress, industry representatives, and members of the general public have expressed concerns about the changing nature of the industry and the competition between traditional providers of funeral services and the non-traditional providers.

1. The Definition of ''Funeral Provider''

The Funeral Rule applies only to ''funeral providers.''[7] The Rule defines a funeral provider as ''any person, partnership or corporation that sells or offers to sell funeral goods *and* funeral services to the public.''[8] Accordingly, persons that sell or offer to sell *only* funeral goods or *only* funeral services are not considered ''funeral providers.'' In other words, the non-traditional members of the funeral industry, such as cemeteries and casket retailers, do not meet the definition of ''funeral provider'' and are thus not subject to the Rule's provisions. The Commission considered expanding the definition of funeral provider in the mandatory review that culminated in the 1994 amended Rule. At that time, the non-traditional sellers had only just begun to enter the market for funeral goods and services. Accordingly, the Commission determined not to expand coverage to other segments of the funeral industry at that time. Since then the Commission has stayed abreast of the increased entry of non-traditional entities into the sale of both funeral goods and services. As competition has been increasing in the sale of caskets and other funeral goods and services, the Commission believes that it is time to reconsider whether it would be in the public interest to expand the coverage of the Funeral Rule to include non-traditional providers of funeral goods and services. Therefore, the Commission solicits comments on whether it is now desirable to revise the Rule's definition of ''funeral provider.''

2. Casket Handling Fees Clarification

Section 453.4(b)(2)(i)(A) of the Rule mandates a specifically-worded disclosure informing the consumer that ''(y)ou may choose only the items you desire.'' The general purpose of this provision is to make it possible for consumers to freely select funeral goods and services. In other words, consumers should pay for only those goods and services they select. Funeral providers are required to ''unbundle'' their offerings and allow for selection of individual funeral goods and services.

When the Rule was amended in 1994, § 453(b)(2)(i)(A) was augmented by the addition of § 453.4(b)(1)(ii), which specifies that it is an unfair or deceptive practice for funeral providers to:

> Charge any fee as a condition to furnishing any funeral goods or funeral services to a person arranging a funeral, other than the fees for: (1) Services of funeral director and staff, permitted by § 453.2(b)(4)(iii)(C); (2) other funeral services and funeral goods selected by the purchaser; and (3) other funeral goods or services required to be purchased, as explained on the itemized statement in accordance with § 453.3(d)(2).

Therefore, funeral providers are prohibited from charging any fee that is not for the services of the funeral director, or the items selected by the consumer. Placing such a limitation on permissible fees was specifically intended, in part, to prohibit a funeral provider from charging consumers a fee for using a casket purchased from some source other than that funeral provider. The Commission, in amending the Rule, determined that ''substantial 'casket handling fees' are imposed on consumers by a significant proportion of providers wherever third-party casket sellers exist, and, as a result, frustrate the Rule's 'unbundling' requirements and result in the reduction of potential competition.''[9] The Commission found that some providers implemented casket handling fees ''because of their competitive reluctance to shift overhead costs and profit from the casket mark-up to professional services fees,'' while other providers used handling fees as a ''direct response to third'party competition.''[10] The Commission determined that ''the Rule should require providers to recoup costs and profits lost to third-party casket sales in ways that do not violate the intent of the Rule's 'unbundling' provision.''[11]

Since the amendment of the Rule, the Commission is aware that some funeral providers may employ certain practices that may undermine the benefit to consumers and to competition intended by the Rule's unbundling provisions. Although the Rule limits permissible fees, it does not regulate the prices that funeral providers may charge, nor does it prohibit the offering of funeral packages.[12] Neither the Commission nor staff hitherto has interpreted the Rule to prohibit the offering of such packages at a discount—that is, offering combinations of funeral goods and services which, if purchased together, are offered at a lower price in aggregate than if the consumer was to purchase each good and service individually. Even though the Third Circuit has noted that the Commission, in drafting its casket handling fee prohibition, drew a distinction between a direct ''fee'' and a ''discount,''[13] as a practical matter, the distinction between a ''fee'' as it is used by the Rule, and a ''discount'', as offered by funeral providers, may be blurred. For example, the prices of itemized goods and services (appearing on the General Price List) may in some instances be inflated to the point of fictitiousness. Thus, virtually all consumers would choose to purchase ''discount packages,'' resulting in a situation where the discount package represents the *de facto* prices for the goods and services. Such a scenario may restrict consumer choice in a manner that frustrates the intended purpose of the Rule. Further, some members of the funeral industry have alleged that because such ''discount packages'' are often conditioned on the purchase of a casket, these packages are artificially constructed by certain funeral providers in order to eliminate competition in casket sales.

As a result of the differing views that have emerged in the funeral industry with respect to the reach of the casket handling fee prohibition and its effect on certain types of discount packaging, the Commission is concerned about the effectiveness of the casket handling fee prohibition. Even at the time of the 1994

human remains by cremation (*i.e.*, 'a heating process which incinerates human remains,' § 453.1(e)), without formal viewing, visitation, or ceremony with the body present,'' FAMSA suggests that some funeral providers may charge a fee for the actual cremation of a body that may not be reflected on the General Price List item price for a ''direct cremation'' under § 453.2(b)(4)(ii)(C).

[6] September 24, 1997 FAMSA letter.

[7] 16 CFR 453.1(i).

[8] *Id.* (Emphasis added). Funeral goods are, ''the goods which are sold or offered for sale directly to the public for use in connection with funeral services.'' Funeral services are, ''any services which may be used to: (1) Care for and prepare deceased human bodies for burial, cremation or other final disposition; and (2) arrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies.'' 16 CFR 453.(1)(h)&(j).

[9] 59 FR at 1604.

[10] *Id.*

[11] *Id.*

[12] ''You [the funeral provider] may still offer funeral packages, as long as they are offered in addition to, not in place of, itemized prices.'' *Complying with the Funeral Rule, a Business Guide Produced by the Federal Trade Commission (''Compliance Guide'')* at p. 24.

[13] *Pennsylvania Funeral Dirs. Ass'n., Inc.* v. *FTC*, 41 F.3d 81, 90 (3rd Cir. 1994) (noting that ''the FTC distinguishes direct handling fees from offering discounts to people who buy caskets from the funeral home'').

Funeral Rule amendment, the Commission staff report reflected a level of uncertainty regarding funeral packages as they relate to the casket handling fee prohibition when it stated:

> Of course, enforcement issues might arise if, as a result of those package prices, consumers' choices were being restricted or additional fees above the itemized cost of caskets or services were being assessed.[14]

Accordingly, the Commission specifically seeks comments on the casket handling fee prohibition, its effectiveness, and the impact it has had on consumers and funeral providers.

3. Non-declinable Fees Currently Allowed Under § 453.2(b)(4)(iii)(C)(1) or (C)(2)

As noted above, the only fee that funeral providers can require consumers to pay under the Funeral Rule is the fee for ''basic services.'' The ''basic services fee'' is defined as the charge for the services of the funeral director and staff.[15] The effect of this definition is to permit funeral directors to charge one, and only one, non-declinable fee to cover the basic services of the funeral director and staff. The Commission solicits comments on the efficacy of this provision in ensuring consumers the greatest amount of choice with respect to goods and services. The Commission also seeks comment on the effect of this provision upon funeral providers, and upon competition among them.

Revision of the ''General Price List''

4. Revision of the ''General Price List''

The Commission also seeks comments on revisions, additions or deletions that should be made to the required disclosures for the ''General Price List'' (as described in § 453.2(b)(4)), including those advanced by FAMSA, as described above.

C. Request for Comment

The Commission is interested in receiving data, surveys and other empirical evidence to support comments submitted in response to this Notice. Without limiting the scope of issues it is seeking comment on, the Commission is particularly interested in receiving comments and supporting data on the following questions:

(1) Is there a continuing need for the Funeral Rule?

(a) What benefits, if any, has the Rule provided to purchasers of funeral goods and services?

(b) Has the Rule imposed costs on purchasers?

(2) What changes, if any, should be made to the Rule to increase the benefits of the Rule to purchasers?

(a) How would these changes affect the costs the Rule imposes on the funeral providers subject to its requirements?

(3) What significant burdens or costs, if any, including costs of compliance, has the Rule imposed on funeral providers subject to its requirements?

(a) Has the Rule provided benefits to such funeral providers?

(4) What changes, if any, should be made to the Rule to reduce the burdens or costs imposed on funeral providers subject to its requirements?

(a) How would these changes affect the benefits provided by the Rule?

(5) Does the Rule overlap or conflict with other federal, state, or local laws or regulations?

(6) Since the Rule was issued, what effects, if any, have changes in relevant technology or economic conditions had on the Rule?

(7) What significant burdens or costs, if any, including costs of compliance, has the Rule imposed on small funeral providers subject to its requirements?

(a) How do these burdens or costs differ from those imposed on larger funeral providers subject to the Rule's requirements?

(8) To what extent are the burdens or costs that the Rule imposes on small funeral providers similar to those that small funeral providers would incur under standard and prudent business practices?

(9) What changes, if any, should be made to the Rule to reduce the burdens or costs imposed on small funeral providers?

(a) How would these changes affect the benefits of the Rule?

(b) Would such changes adversely affect the competitive position of larger funeral providers?

(10) How, if at all, has the Rule affected the relative number of consumers who contact more than one funeral home before deciding which one to use?

(11) How, if at all, has the Rule benefitted consumers by:

(a) Alerting consumers to the importance of price information and ensuring that they obtain such information at the critical point of choosing a provider?

(b) Providing information about different purchase options?

(c) Protecting consumers from injurious misrepresentations?

(d) Requiring authorization prior to embalming?

(e) Prohibiting providers from conditioning the purchase of a wanted item on the purchase of an unwanted item?

(12) How have prices changed (in total and for specific funeral goods and services) since the Rule was amended in 1994? To what extent, if at all, are these changes attributable to the Rule?

(13) Have the relative prevalence of: (a) Ground burials; (b) cremations; (c) above-ground entombment; or (d) other dispositions, increased or decreased since the Rule was amended in 1994? To what extent, if at all, has the Rule influenced these changes?

(14) How, if at all, since the Rule was amended in 1994, have the following factors changed?

(a) The number, size, and type of providers of funeral goods and services in the industry?

(b) The ability of new providers, both traditional and non-traditional, to enter the industry?

(c) What types of non-traditional entrants have appeared in the industry, and how are they different from traditional providers?

(d) Mergers and other types of consolidation in the funeral industry?

(e) Profits of funeral industry members?

(15) How, if at all, has the Rule affected the cremation industry? Should the Rule be amended to include within its scope unfair and deceptive practices by crematories, if any?

(16) To what extent are providers of funeral goods and services complying with the Rule overall, and with each of its component requirements?

(17) What difficulties, if any, are providers of funeral goods and services experiencing in complying with the Rule?

(18) How has the National Funeral Directors Association's Funeral Rule Offenders Program (''FROP'') affected compliance with the Rule, if at all?

(19) Do consumers who receive itemized price information at the inception of the arrangements conference tend to spend less on funerals than those who receive such information later?

(20) Do consumers who make pre-need arrangements spend less on funerals than those who do not? If so, why? Does receiving price information at the inception of a pre-need arrangements conference contribute to decreased spending? Does it encourage or facilitate comparison shopping?

(21) Should the requirement that itemized price lists be given to

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[14] Final Staff Report, at 39 n. 76.

[15] 16 CFR 453,1(p). The *Compliance Guide*, at 15, explains, ''this basic services fee should include services that are common to virtually all forms of disposition or arrangements (offered), such as conducting the arrangements and coordinating the arrangements with the cemetery, crematory, or other third parties. The basic services fee should *not* include charges related to other items that must be separately listed on the General Price List and that the customer may decline to purchase.''

consumers at the beginning of discussions about funeral arrangements be modified? If so, how? What would be the relative costs and benefits of such a modified provision?

(22) Should the Commission expand the definition of ''funeral provider'' in order to bring non-traditional members of the funeral industry within the scope of the Funeral Rule's coverage? Are consumers being harmed by the current limitation on the scope of the Rule's coverage?

(a) What definition should be used to delineate those entities and individuals subject to the Funeral Rule?

(b) What are the costs and benefits of broader definitions?

(23) Should non-traditional providers of funeral goods and services be subject to only certain provisions of the Funeral Rule?

(a) If so, to which provisions should they be subject?

(24) Does the prohibition on more than one non-declinable fee reduce barriers to competition and increase consumer choice?

(a) Has this prohibition been effective to ensure that consumers can choose and pay for only the individual goods and services that they desire?

(b) Has this prohibition been effective to protect consumers' right to decline unwanted goods and services?

(c) What are the benefits conferred upon consumers or competition by this prohibition?

(d) What costs or other burdens has this provision imposed upon providers of funeral goods and services?

(25) What new fees, prices, goods or services have emerged in the sale of funeral goods and services, since the Rule was amended in 1994?

(26) Have the 1994 amendments been effective in prohibiting casket handling fees? If so, what benefits or costs have resulted from these amendments?

(27) How widespread is it for funeral providers to offer substantial discounts on funeral packages that include a casket from the funeral home?

(a) To what extent does such discounting tend to restrict consumers' choices?

(28) Should the requirement for a General Price List be modified? If so, how?

(a) Are there any new fees, prices, goods or services which should be added to the General Price List requirements?

1. Should the Rule require that the price of private viewing without embalming be included on the General Price List?

2. Should the Rule require that the price of donating a body to a medical school be included on the General Price List?

3. Are the Rule's requirements (§ 453.2(b)(4)(ii)(C)) to disclose on the General Price List the price for direct cremation effective to prevent deception regarding the amount a consumer will pay to have a funeral provider dispose of a body by cremation? Should the Rule also include an express requirement that the disclosed price of ''direct cremation'' include the actual price to have a body cremated?

4. Should the Rule require that the price of renting a casket in connection with a cremation be included on the General Price List?

(b) Are there any fees, prices or services which should be deleted from the General Price List?

(c) Are there any other revisions that should be made to the current provisions in the General Price List?

(d) For any change made in response to this question, what, if any, would be the costs and benefits to consumers and to funeral providers?

(29) The Rule applies to both pre-need and at-need funeral arrangements. Should pre-need and at-need consumers be treated differently? If so, why?

(c) Can a funeral provider readily distinguish between a pre-need and an at-need customer or will this complicate compliance with the Rule?

(30) Are there widespread unfair or deceptive practices occurring with respect to the pre-arrangement of and pre-payment for funerals by consumers? What are these practices? How could these practices be remedied? Are these remedies within the Commission's authority and jurisdiction? Would the benefits to consumers likely to result from such remedies outweigh the likely costs to funeral providers or other industry members?

D. Invitation to Comment

In reviewing the Funeral Rule, Commission staff will consider all comments submitted by July 12, 1999. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and Commission regulations, on normal business days between the hours of 8:30 a.m. and 5 p.m. at the Public Reference Section, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580. In addition, comments will be placed on the Internet at the FTC's web site: <*http://www.ftc.gov*>.

E. Public Workshop Conference

Commission staff will conduct a Public Workshop Conference to discuss written comments received in response to this Request for Comments. The purpose of this conference is to afford Commission staff and interested parties a further opportunity to openly discuss and explore issues raised during the Rule Review, and, in particular, to examine publicly any areas of significant controversy or divergent opinions that are raised in the written comments. Commission staff will consider the views and suggestions made during the conference, in conjunction with the written comments, in formulating its final recommendation to the Commission concerning the review of the Funeral Rule.

Commission staff will select a limited number of parties, from among those who submit written comments and express an interest in participating in the workshop conference, to represent the significant interests affected by the Rule Review. These parties will participate in an open discussion of the issues. It is contemplated that the selected parties might ask and answer questions based on their respective comments. In addition, the conference will be open to the general public. Members of the general public who attend the conference may have an opportunity to make a brief oral statement presenting their views on issues raised in the Rule Review. Oral statements of views by members of the general public will be limited to a few minutes in length. The time allotted for these statements will be determined on the basis of the time allotted for discussion of the issues by the selected parties, as well as by the number of persons who wish to make statements.

Written submissions of views, or any other written or visual materials, will not be accepted during the conference. The discussion will be transcribed and the transcription placed on the public record.

The conference will be held in the fall. A forthcoming announcement will provide the exact date(s) and location. Parties interested in participating must notify the Commission staff by July 12, 1999.

List of Subjects in 16 CFR Part 453

Funerals, Trade practices.

By direction of the Commission.

Donald S. Clark,

Secretary.

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