Prepared Statement of the Federal Trade Commission

For the Committee on Energy and Commerce

Subcommittee on Commerce, Trade, and Consumer Protection

United States House of Representatives

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Mr. Chairman and members of the Subcommittee, I am Charles A. Harwood, Deputy Director of the Federal Trade Commission's Bureau of Consumer Protection. The Commission appreciates this opportunity to provide comments to the Subcommittee on H.R. 3655 and information on the Commission's law enforcement activities regarding the funeral industry.[1]

The Commission remains committed to working with the Subcommittee to identify ways in which the Commission's rulemaking, law enforcement, and outreach experience can be of assistance in considering solutions to the problems highlighted by the horrific events that took place at the historic Burr Oak Cemetery in Alsip, Illinois. In particular, the Commission is grateful to have an opportunity to discuss H.R. 3655, a Bill that would, among other things, give the Commission the authority to regulate cemeteries nationwide.

The Commission commends your leadership in responding to the problems highlighted by the tragic events at Burr Oak Cemetery, as well as the efforts of local and state law enforcement and regulatory authorities in responding to this tragedy. By addressing the problems aggressively, you have clearly signaled the public's resolute unwillingness to tolerate the abusive and appalling behavior that occurred. We are hopeful that your combined efforts have brought some comfort to families with loved ones interred at Burr Oak.

PROPOSED LEGISLATION: H.R. 3655

We strongly support the goals of H.R. 3655, which are to provide more effective consumer protection against fraud and abusive practices in connection with the provision of funeral goods and funeral services. H.R. 3655 would direct the Commission to conduct a rulemaking within one year of enactment to extend the key consumer protections in the

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[1] The views expressed in this statement represent the views of the Commission. My oral statement and responses to any questions you may have are my own and do not necessarily reflect the views of the Commission or any individual Commissioner.

Commission's Funeral Industry Practices Trade Regulation Rule ("Funeral Rule")[2] – now principally applicable to funeral homes[3] – to cemeteries, crematories and retailers of caskets, urns, monuments, and markers. The Bill would mandate that a final rule require these members of the funeral industry to provide pre-sale price disclosures, prohibit misrepresentations and required purchases, and mandate clear contracts that itemize the goods and services purchased and their prices, just as funeral providers must now do under the Funeral Rule.

H.R. 3655 also would go beyond the current provisions of the Funeral Rule to: (1) mandate that a final rule require all pre-paid funeral contracts to disclose any future fees and costs that purchasers may incur, and any penalties for cancellation or transfer of the contract to another provider; (2) require cemeteries to disclose their written rules and regulations in a timely manner, and provide purchasers with a clear written explanation of the burial rights they have purchased, including any repurchase option by the cemetery and any resale rights available to the consumer; (3) mandate that cemeteries retain all extant burial records and maps, accurately record and retain burial records after the rule takes effect, and make these records available to federal, state and local governments; and (4) authorize states to bring enforcement actions for violations of any of these rules.

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[2] 16 C.F.R. Part 453.

[3] The Rule applies to "funeral providers" who sell or offer both "funeral goods" and "funeral services." 16 C.F.R. §§ 453.1(i); 453.2(a). "Funeral goods" are goods sold or offered in connection with funeral services. 16 C.F.R. § 436.1(h). "Funeral services" are any services that may be used to care for and prepare bodies for burial, cremation or other final disposition and arrange, supervise or conduct the funeral ceremony or other final disposition. 16 C.F.R. § 436.1(j). Thus, both funeral goods and funeral services are offered by funeral homes, but both also may be offered by crematories that sell urns or other goods, and by cemeteries with mortuary facilities on their premises that care for and prepare bodies for final disposition.

This testimony focuses on four aspects of H.R. 3655:

- Expansion of the Commission's jurisdiction to include rulemaking and enforcement responsibilities with respect to non-profits in the funeral industry;
- Application of the proposed law and resulting rule to retailers of caskets, urns, monuments, and markers;
- Proposed new disclosures concerning the portability, refundability, and potential future fees and costs of pre-paid funeral and burial contracts; and
- Authorization to use Administrative Procedures Act rulemaking authority.

First, the rulemaking and enforcement jurisdiction provided for the Commission in H.R. 3655 would, for the first time, include non-profit members of the funeral industry, including most cemeteries. Because the vast majority of cemeteries are organized as non-profits, owned or operated by non-profit religious organizations or states and municipalities, such entities are estimated to outnumber the nation's approximately 7,500 for-profit cemeteries by at least 3 to 1.[4] As you know, the Federal Trade Commission Act generally excludes non-profit companies from the Commission's jurisdiction.[5] Indeed, in the Funeral Rule review proceeding concluded in 2008, the Commission declined to amend the Rule to cover only for-profit cemeteries, in part, because of concerns about likely consumer confusion and the limited benefit of such an effort

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[4] *Compare* ROBERT G. E. SMITH, THE DEATH CARE INDUSTRIES IN THE UNITED STATES, McFarland & Co., Inc., at 23 (1996) (citing estimates of 7,500 commercial cemeteries) *with* ELIZABETH G. & JAMES D. KOT, UNITED STATES CEMETERY ADDRESS BOOK 1994 - 95, Indices Publ. (1996) (providing addresses of "more than 25,000 cemeteries"). A number of states prohibit for-profit cemeteries, including New York, New Jersey, Massachusetts, Wyoming, Connecticut, and Maine. 73 Fed. Reg. 13740, 13744 & n.38 (Mar. 14, 2008).

[5] *See* 15 U.S.C. § 44.

when a minority of cemeteries would be affected.[6] The proposed substantial expansion of jurisdiction would enable the Commission to reach many more of the key members of the funeral industry. At least 17,000 non-profit entities, the vast majority of which are religious organizations or states and municipalities, would be subject to new disclosure and record-keeping requirements and the attendant costs of compliance.[7]

Second, retailers of caskets, urns, monuments, and markers would be covered by the additional rules mandated by H.R. 3655. These retailers would be subject to pre-sale price disclosure and itemized contract requirements as well as the prohibition on misrepresentations

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[6] Fed. Reg. at 13745 (noting that "[t]here would be confusion among the general public as to what type of information they could expect to receive and what rights they have to purchase goods from third parties. To the extent additional requirements are intended to allow consumers to compare costs among cemeteries, the inconsistent application of the Rule to some cemeteries and not others could make such comparisons impossible or impractical.")

The Commission also cited a lack of evidence that commercial cemeteries are engaged in widespread unfair or deceptive practices that injure consumers, as required by the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 57a(b)(3), as a basis for its determination not to proceed with a notice of proposed rulemaking. *Id.*

[7] We also note that applying such requirements to religious organizations requires a careful analysis of the need for such requirements and consideration of possible less burdensome alternatives, and could lead to challenges under the First Amendment.

required in the final rule.[8] The application of the mandated disclosure requirements should provide benefits for consumers, but they will entail additional costs for these retailers.

Third, H.R. 3655 contemplates an expansion of the protections provided by the Funeral Rule for purchasers of pre-need funeral arrangements,[9] requiring contractual disclosures of any additional fees or costs that may be incurred in the future and any penalties for cancellation or transfer of the contract.[10] These additional disclosures represent a means to alert consumers who wish to pre-plan their funeral arrangements to issues involved with prepayment and should provide tangible benefits to them.[11] Such contractual disclosures would supplement requirements for clear, conspicuous, and accurate disclosure of material terms – including costs

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[8] The Commission considered a similar proposal during the rule review to expand the Funeral Rule's price disclosure requirements to retail sellers of funeral goods, such as caskets and monuments, that was suggested to "level the playing field" for consumers. 73 Fed. Reg. at 13745. At that time, the Commission declined to amend the Rule for that purpose after finding insufficient evidence to support a reasonable belief "that third-party sellers of funeral goods are engaged in widespread unfair or deceptive acts or practices" as required under the FTC's rulemaking procedures mandated by the Magnuson-Moss amendments to the FTC Act, and noting that "third-party retailers have a strong economic incentive to display their prices to the public at large because offering a lower price is the primary way they compete against funeral providers for sales of funeral goods, such as caskets." 73 Fed. Reg. at 13745.

[9] Although the Rule does not separately address pre-need arrangements, its price disclosure and other requirements apply equally to pre-need and at-need arrangements. 16 C.F.R. § 453.2; *see also, e.g.,* 73 Fed. Reg. at 13751.

[10] These two disclosures were suggested during the rule review, but the record contained insufficient evidence that abusive practices were prevalent in the sale of pre-need contracts to support initiation of an amendment proceeding, as required by the FTC's Magnuson-Moss rulemaking authority. 73 Fed. Reg. at 13750-51.

[11] Some have expressed concern about loss or theft of pre-paid consumer funds and the adequacy of state laws regulating pre-paid contracts. H.R. 3655 does not address these issues directly, but the Bill's additional disclosures may provide benefits to consumers.

– at the outset when pre-need arrangements are made, which is currently required under the Funeral Rule.

Fourth, H.R. 3655 directs the Commission to conduct a rulemaking within one year of enactment to extend the key consumer protections in Funeral Rule to cemeteries, crematories and retailers of caskets, urns, monuments, and markers. Under the cumbersome FTC Act rulemaking procedures,[12] promulgation of such a rule would likely be a time consuming effort and would require a finding that the practices addressed are "prevalent."[13] The Bill authorizes the use of Administrative Procedures Act rulemaking authority, which should permit the Commission to meet the rule promulgation deadline in H.R. 3655.[14]

The Commission appreciates the Subcommittee's request for comments concerning H.R. 3655 and welcomes the opportunity to work further with Subcommittee staff regarding the proposed legislation.

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[12] Section 18 of the FTC Act, 15 U.S.C. § 57a, empowers the FTC to "prescribe rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce . . .."

[13] In rulemaking under Section 18, the Commission may not issue a notice of proposed rulemaking unless it has "reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent." 15 U.S.C. § 57a(b)(3). The Commission may find prevalence where available information "indicates a widespread pattern of unfair or deceptive acts or practices." 15 U.S.C. § 57a(b)(3)(B).

[14] FTC rulemakings pursuant to Magnuson-Moss procedures typically have required from three to ten years to complete. For example, the proceeding to promulgate the FTC's Credit Practices Rule, 16 C.F.R. Part 444, using Magnuson-Moss procedures took almost ten years. In contrast, the proceeding to promulgate the FTC's Telemarketing Sales Rule, 16 C.F.R. Part 310, using APA procedures took one year.

ENFORCEMENT

In developing H.R. 3655, the Subcommittee is seeking to increase consumer protection in connection with the provision of funeral goods and funeral services by expanding coverage to cemeteries and third-party sellers of funeral goods. As both the Subcommittee and the Commission consider how to go forward in this area, the Commission's experience promulgating and enforcing the Funeral Rule is relevant and instructive.

In the first ten years following promulgation of the Funeral Rule, compliance with the cost disclosure provisions was very low – by one estimate only 25% of funeral providers complied.[15] In an effort to improve compliance, the Commission in 1994 initiated annual enforcement Funeral Rule "sweeps" of funeral homes around the country. The sweeps involve staff from the Commission's regional offices, who, posing as consumers, visit all the funeral homes in a particular urban or rural geographic area to determine whether they are in compliance with the Rule's core disclosure requirements.[16] Working in cooperation with the National Funeral Directors Association ("NFDA"), the Commission allows first-time offenders to make a

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[15] The Funeral Rule was promulgated in 1984. A Commission-sponsored 1987 study and a 1988 study conducted by the Gallup organization for AARP indicated that at that time funeral providers' compliance with the Rule's core requirement – *i.e.* to give consumers an itemized general price list at the beginning of the arrangements discussion – may have been as low as 23 percent. *See Federal Trade Commission Bureau of Economics Staff Report – An Analysis of the Funeral Rule Using Consumer Survey Data on the Purchase of Funeral Goods and Services* (Feb. 1989) at 20.

[16] To implement the sweeps, staff members from the Commission's regional offices plan and coordinate each annual sweep and identify the funeral homes in the targeted geographic area. Typically, between two and four staff members conduct the initial sweep, and after a preliminary evaluation of the results, they may return for follow-up test shops. The staff members coordinating the project then review and evaluate the reports of the test shops and the price lists obtained. Staff members prepare letters notifying violators of the violations that were identified, communicate what options the funeral provider has, and follow-up to obtain the information needed to determine the amount of the FROP payment and to enroll the violator in FROP.

voluntary payment to the U.S. Treasury and enter into a training, testing, and monitoring program known as the Funeral Rule Offenders Program ("FROP"). When two separate test-shops show that a funeral provider is violating core Rule requirements, the Commission gives the provider the choice of participating in FROP, or undergoing a conventional investigation and potential law enforcement action resulting in a federal court order and payment of a civil penalty.[17] As a result of these annual sweeps, compliance has risen significantly from what it was prior to 1994.[18] Of course, such efforts necessarily entail enforcement costs and decisions about enforcement priorities.

As the history of the Funeral Rule demonstrates, an active enforcement program will be essential to secure a reasonable level of compliance with any new requirements. Implementing a robust program to enforce such new requirements against several thousand new entities likely will require additional resources or the diversion of current resources away from other important consumer protection missions. Like all government agencies, the Commission understands that resources are scarce and must be used as efficiently as possible. However, increased resources would help us meet the demands of providing more extensive protection for consumers and would help the Commission effectively implement and enforce the requirements of H.R. 3655.

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[17] When two separate sweep test shops show that a funeral provider is violating core Rule requirements, the Commission gives the provider, whether or not a member of NFDA, the choice of a conventional investigation and potential law enforcement action resulting in a federal court order and payment of a civil penalty, or participation in FROP. Funeral providers that enroll in FROP make payments to the U.S. Department of Treasury equal to 0.8% of their average annual gross sales over the prior three years. The NFDA collects a fee from FROP participants for administering the program, maintains records on funeral homes that are enrolled in the FROP program and makes these available for review by Commission staff.

[18] The overall compliance rate is now better than 85 percent. Since the sweeps program began, Commission staff have shopped more than 2200 funeral homes, and referred more than 300 to the FROP program.

CONCLUSION

The Commission appreciates the Subcommittee's interest in enhancing consumer protections in the funeral industry, and wishes to thank the Subcommittee for this opportunity to comment on H.R. 3655. As discussed, the proposed legislation, including its expansion of the Commission's jurisdiction, could entail compliance and enforcement costs and challenges, but it could also provide meaningful benefits to consumers.