ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT IN *VIRGINIA BOARD OF FUNERAL DIRECTORS AND EMBALMERS,* FILE NO. 041-0014

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with the Virginia Board of Funeral Directors and Embalmers (the "Board" or "Respondent"). The Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested members of the public. The Agreement is for settlement purposes only and does not constitute an admission by the Board that the law has been violated as alleged in the Complaint or that the facts alleged in the Complaint, other than jurisdictional facts, are true.

I. The Commission's Complaint

The proposed Complaint alleges that Respondent, an industry regulatory board of the Commonwealth of Virginia, has violated Section 5 of the Federal Trade Commission Act. Specifically, the proposed Complaint alleges that the Board has unlawfully restrained or eliminated price competition among the providers of funeral goods and services in Virginia.

The Board is the sole licensing authority for providers of funeral goods and services in Virginia and is authorized by Virginia statute to take disciplinary action against licensees who violate any rule promulgated by the Board. The Board is composed of nine members, seven of whom are required to be funeral service licensees themselves.

The proposed Complaint alleges that the Board has restrained trade by agreeing to, promulgating, and implementing a regulation (18 Va. Admin. Code § 65-30-50(C) (West 2003) ("18 VAC 65-30-50(C)")) that prohibited funeral licensees from advertising the prices of certain products and services they sell.[1] Board regulation 18 VAC 65-30-50(C) read: "No licensee engaged in the business of preneed funeral planning or any of his agents shall advertise discounts; accept or offer enticements, bonuses, or rebates; or otherwise interfere with the freedom of choice of the general public in making preneed funeral plans."

The proposed Complaint further alleges that the Board's conduct was anticompetitive because it had the following effects: the conduct deprived consumers of truthful information about prices for funeral products and services; the conduct prevented licensees from disseminating truthful information about their prices for funeral products and services; the conduct deprived consumers of the benefits of vigorous price competition among Board licensees; and the conduct caused consumers to pay higher prices for funeral products and services than they would have in the absence of that conduct.

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[1] As a result of the investigation, the Board has removed 18 VAC 65-30-50(C) from its regulations. *See* Va. Regs. Reg., vol. 20, issue 21 at 1 (2004).

II. Terms of the Proposed Consent Order

The proposed Order would provide relief for the alleged anticompetitive effects of the conduct principally by means of a cease and desist order barring the Board, either by the enactment or enforcement of a new regulation or by the enforcement of any current regulation, from prohibiting, restricting, impeding, or discouraging any person from engaging in truthful and non-misleading price advertising of at-need or preneed funeral products, goods, or services.

Paragraph II of the proposed Order bars the Board from in any way acting to restrict, impede or discourage its licensees from any truthful and non-misleading price-related advertising. Paragraph II of the proposed Order further bars the Board from enforcing any regulation, including 18 VAC § 65-30-50(C), the effect of which regulation would be to prevent licensees from notifying potential customers of

A. Antitrust Analysis of the Legality of Competitive Restraints

The Board's regulation was an agreement among competitors not to advertise price

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[2] *California Dental Assoc. v. Federal Trade Comm.,* 526 U.S. 756, 779 (1999) ("*CDA*"); *see also Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps promotes competition or whether it is such as may suppress or even destroy competition.").

[3] 2003 WL 21770765 (FTC), slip op. at 29-35 ("*PolyGram Holdings*"). The *PolyGram Holdings* framework is not, of course, the only means of establishing a violation of the antitrust laws, which may also be accomplished by a showing of market power and a restraint likely to harm competition, or by actual competitive effects. *See PolyGram Holdings,* slip op. at 29 n.37; *Schering-Plough Corp.,* Dkt No. 9297, slip op. at 14-15 (FTC Dec. 8, 2003).

[4] *Id.* at 29; *see also Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 19-20 (1979) (In characterizing conduct under the Sherman Act, the question is whether "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output,... or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" (quoting *United States v. United States Gypsum Co.,* 438 U.S. 422, 441 n. 16 (1978))).

[5] *PolyGram Holdings,* slip op. at 29.

[6] *Id.*

[7] *Id.* at 30-31.

[8] *Id.* at 31-32.

of the inherently suspect restraint by asserting legitimate procompetitive justifications for the restriction, then a more in-depth analysis of the specific effects of the restraint is necessary.[9]

B. A Restriction on Price Advertising in the Funeral Industry is Inherently Suspect.

In *CDA*, the Commission challenged a set of restrictions imposed by the California Dental Association. One of the restrictions allowed the advertising of price discounts only where specified additional information was presented in the advertisement, purportedly needed to ensure that the price advertisement was strictly accurate, and another restriction was a flat restriction on the advertisement of quality claims by dentists.[10] The price advertising restriction was challenged as being so burdensome as to be, in effect, a ban on the advertisement of price discounts. The Association defended the restrictions as necessary to avoid false or misleading advertising, but the Commission and the Ninth Circuit held that the likely anticompetitive effects of the restrictions were clear, and that the Association therefore had, and did not sustain, the burden of establishing procompetitive benefits. The Supreme Court reversed, holding that the competitive effect of the restriction needed to be evaluated in light of the professional context in which it occurred, including the articulated justifications for the restriction.[11] The Court, in holding that the Court of Appeals had prematurely shifted the burden to the defendant, focused in particular on two facts: (1) the restriction at issue was "very far from a total ban on price discount advertising," and (2) since "the particular

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[9] *Id.* at 33, fn. 44.

[10] The restriction on price-related advertisement in *CDA* required that any such advertisement “fully and specifically” disclose “all variables and other relevant factors.” The restriction also prohibited the use of qualitative phrases relating to the cost of dental services like “lowest prices.” Finally, the restriction required that any comparative phrases like “low prices” must be based on verifiable data, and the burden of showing the accuracy of those statements is on the dentist. *CDA,* 526 U.S. at 760, fn. 1.

[11] *See CDA,* 526 U.S. at 771-773 (“The restrictions on both discount and nondiscount advertising are, at least on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient.”).

[12] *Id.* at 773-774.

[13] In *CDA,* the advertising restraint could not be condemned because the FTC had not provided sufficient evidence to show “why the presumption of likely anticompetitive effects

that applies in non-professional markets also applied in the professional setting" at issue there. *PolyGram Holdings,* slip op. at 33, n. 44.

[14] *See Massachusetts Board of Registration in Optometry,* 110 FTC 549, 606-607 (1988) ("*Mass. Board*") ("By preventing optometrists from informing consumers that discounts are available, respondent eliminates a form of price competition."); *see also PolyGram Holdings,* slip op. at 38-39, fn. 52 (citing economic literature).

[15] *See PolyGram Holdings,* slip op. at 38-39, fn. 52.

[16] *See, e.g., Funeral Industry Practices Mandatory Review 16 CFR Part 453: Final Staff Report to the FTC with Proposed Amended Trade Regulation Rule* 64-65 (1990) ("1990 FTC Staff Report").

[17] *See, e.g.,* Wirthlin Worldwide, *Executive Summary of the Funeral and Memorial Information Counsel Study of American Attitudes Toward Ritualization and Memorialization* 3 (January 2000), *available at*

likely to be effective), and was not imposed on at-need services (where, by all accounts, the consumer is most vulnerable), suggests that the regulation restricts price competition rather than eliminates deception.

- In *CDA,* there was a concern that price advertising that provided less than complete information regarding prices would allow dentists to create advertisements that would give the appearance that prices were lower when in fact they were not. This problem arose from the difficulty consumers might have in obtaining price information in the market for dental services.[18] Here, however, each funeral director is required by the FTC's funeral rule to disclose all price information to any consumer who might enquire about those services, including the prices of all products and services not subject to the discount.[19]

- Finally, in *CDA,* the respondent advanced the prevention of false and misleading claims as a justification for general restrictions on advertising. Here, there is a separate regulation that relates to the prevention of false and misleading claims.[20]

IV. Opportunity for Modification of the Order

The Board may seek to modify the proposed Order to permit it to promulgate and enforce rules that the proposed Order prohibits if it can demonstrate that the "state action" defense would shield its conduct from liability. The state action defense stems from *Parker v. Brown.*[21] In *Parker,* the Supreme Court held that Congress had not expressed any intent to apply the Sherman Act to anticompetitive acts of the states. Since *Parker,* the focus of courts evaluating assertions of the state action defense has been on whether the alleged actions were, in fact, acts of the state.[22] When the courts have determined that the alleged anticompetitive acts were acts of the

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18 *Id.* at 771-776.

19 16 C.F.R. § 453.2 (1994).

20 The regulation at issue was the "Solicitation" provision in the Part of the preneed regulations entitled "Sale of Preneed Plans." The Board has a separate set of regulations relating to false advertising generally that does not prohibit price and discount advertising, as long as the representations in the advertisement are not untrue, deceptive, or misleading. *See* 18 Va. Admin. Code § 65-20-500(3) (West 2003).

21 317 U.S. 341 (1943) ("*Parker*").

22 *FTC v. Ticor Title Insurance Co.,* 504 U.S. 621, 636 (1992) ("*Ticor*") (The test under state action is "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy.").

[27] *See New York v. United States,* 505 U.S. 144, 168-69 (1992); *see also Ticor,* 504

intended to authorize a regulation inhibiting price competition as a foreseeable result of the Board's general authority to regulate the funeral industry.[40]

V. Opportunity for Public Comment

The proposed Order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreement and comments received, and will decide whether it should withdraw from the Agreement or make final the Order contained in the Agreement.

[40] *Indiana Movers Analysis* at 5.