

Prepared Statement of the Federal Trade Commission

For the Special Committee on Aging, United States Senate

April 11, 2000

Mr. Chairman and members of the Committee, I am Eileen Harrington, Associate Director for Marketing Practices in Federal Trade Commission's Bureau of Consumer Protection. On behalf of the Commission, I appreciate this opportunity to provide information to the Committee on the Commission's law enforcement activities regarding the funeral industry.⁽¹⁾

Congress has charged the Federal Trade Commission with protecting American consumers -- including consumers who find themselves in need of funeral goods or services -- from "unfair methods of competition" and "unfair or deceptive acts or practices" in the marketplace. The cornerstone of the Commission's statutory authority in fulfilling this mandate is the Federal Trade Commission Act.⁽²⁾

In enforcing the FTC Act, the agency's mission is to ensure that consumers benefit from a vigorously competitive marketplace. The Commission does not seek to supplant competition with regulation. The Commission is, first and foremost, a law enforcement agency. The Commission's work is rooted in a belief that free markets work -- that competition among producers and truthful information in the hands of consumers brings the best products at the lowest prices for consumers, spurs efficiency and innovation, and strengthens the economy.

The Commission promotes healthy competition in the marketplace through both its competition and consumer protection missions. First, for consumers to have a choice of products and services at competitive prices and quality, the marketplace must be free from anticompetitive business practices. Thus, the Commission's antitrust mission seeks to prohibit anticompetitive mergers or other anticompetitive business practices without interfering with the legitimate activities of businesses.

Second, for competition to thrive, curbing deception and fraud is critical. Through its consumer protection activities, the Commission seeks to ensure that the information companies provide to consumers is accurate, not false or misleading. The Commission's primary activity in pursuing its consumer protection mission as to the funeral industry is the enforcement of the Funeral Industry Practices Trade Regulation Rule, 16 C.F.R. Part 453, ("Funeral Rule").

Antitrust Enforcement in the Funeral Industry

The Commission is concerned about activities in the funeral industry that may lessen

competition and result in noncompetitive prices or lower quality of services for consumers. Conduct or transactions that raise antitrust concerns are anticompetitive agreements among competitors, attempts to monopolize a market, and mergers and acquisitions that threaten a substantial lessening of competition. The Commission's staff is constantly on the look-out for such activities, and they work closely with state attorneys general in their monitoring and enforcement efforts.

In recent years, the principal antitrust enforcement efforts in the funeral industry have involved potentially anticompetitive mergers and acquisitions. These cases generally are resolved through consent orders that require the acquiring firm to divest one or more acquired properties in order to prevent a lessening of competition. In 1999, for example, the FTC secured a consent decree with Service Corporation International (SCI), the largest owner of funeral homes and cemeteries in the world, to divest funeral service and cemetery properties in 14 local geographic markets in connection with its acquisition of Equity Corporation International, the fourth largest funeral home and cemetery company in the United States.⁽³⁾ The complaint alleged that the acquisition would raise significant competitive concerns in six local markets for funeral services, with total annual sales of approximately \$36.6 million for funeral services, and in eight local markets for cemetery services, with total annual sales of approximately \$47.3 million.

An important aspect of the antitrust analysis of mergers in this industry is that the markets for funeral and cemetery services are very localized. This means that, from an antitrust perspective, a merger or acquisition raises antitrust concerns only to the extent that the transaction will reduce the number of firms in a particular geographic area to such a level that the remaining firm or firms could raise prices or otherwise adversely affect consumers. An acquisition that involves funeral homes or cemeteries in many cities may raise antitrust concerns in only a few, or in none. Even when relatively few firms remain, competition will not necessarily be lessened, because other factors, such as the potential for new firms to enter the market, may keep the market competitive. The Commission remains vigilant for the relatively few transactions that raise serious concerns.

Consumer Protection Enforcement in the Funeral Industry

The Funeral Rule

The Funeral Rule was adopted by the Commission in 1982 and became fully effective in 1984. It has the force and effect of law, and it may be enforced through civil penalty actions in the federal courts. The FTC Act authoriz4 435 62orI88.56 197.64 Tm [(a)81-2(

pre-planned.⁽⁵⁾

The Rule requires funeral providers to furnish consumers with three basic types of information, which, taken together, enable consumers to select the goods and services they want and to comparison shop for them. First, the Rule ensures that consumers receive itemized price information for the various goods and services that make up a funeral. If a consumer inquires about price over the telephone, funeral providers must give accurate price and other reasonable information about the goods and services they offer. If a consumer visits a funeral home in person, the Rule requires that the funeral director provide the consumer with a general price list that itemizes prices of each of the funeral goods and services offered by the funeral home. The Rule also requires funeral providers to show consumers a casket price list and an outer burial container price list, if the home's offerings of those items are not itemized on the general price list. At the beginning of any discussion of funeral arrangements, funeral directors must provide a copy of the general price list for the consumer to keep, and must show the casket price list and outer burial container price list before showing the consumer those items. These requirements apply for both at-need and pre-need situations when funeral arrangements are being made.

The second type of information the Rule requires is a disclosure on the general price list that a consumer may choose only the items he or she desires. Thus, the Rule empowers consumers with the knowledge that they can pick and choose what they want to buy from the itemized general price list. Consumers do not have to purchase a package funeral at a pre-determined price that may include items or services that the consumer does not want but must pay for in order to get the other items in the package. To ensure that consumers' choices are honored by the funeral director, once funeral arrangements are made, funeral directors must give consumers an itemized statement of goods and services selected, listing each good or service selected along with the price for each item and the total cost of arrangements made.

Regulatory Review and Amendment of the Rule

charges of law violations revealed by the investigation through consent negotiations prior to filing a complaint to initiate an enforcement action.⁽¹²⁾

Seeking to increase industry compliance with the Rule, the Commission's staff adopted a new approach that combined increased industry education and stepped-up enforcement. To improve industry education, the Commission's staff prepared and distributed concise, easy-to-understand Compliance Guidelines to help funeral providers comply with the amended Rule. A copy of the Guidelines was mailed to virtually every industry member throughout the nation in June 1994.

To step up our enforcement effort, in late 1994 the Commission's staff initiated an industry "sweeps" approach -- simultaneous law enforcement actions targeting numerous industry members in a particular region, state, or city. Sweeps cases are investigated and prosecuted cooperatively by the Commission staff and the state Attorneys General. The sweeps methodology was designed to boost the overall compliance level with the Funeral Rule's core requirements: giving consumers itemized price lists.

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sufficiently high among those funeral providers shopped. Second, the new, more aggressive enforcement approach prompted a new awareness on the part of the funeral industry of the need for a more direct and appropriate response. Thus, in September 1995, the National Funeral Directors Association (NFDA) submitted a proposal to the Commission, which the Commission subsequently approved and implemented, for an industry self-certification and training program designed to increase Rule compliance. NFDA's action represented a turn of events in the Commission's relationship with the funeral services industry. Ever since the inception, back in the mid-1970's, of the proposal that the FTC regulate the funeral industry, the NFDA had consistently opposed the Commission at every step, both in rulemaking proceedings and litigation,⁽¹⁵⁾ and did little or nothing to assist the Commission to promote compliance with the Funeral Rule. NFDA's action in advancing its certification and training proposal represented a meaningful commitment to self-regulation that promised to do more to benefit consumers than would continued reliance only on case-by-case enforcement.

The chief component of the NFDA-sponsored program as submitted to and approved by the Commission was the Funeral Rule Offenders Program ("FROP"),⁽¹⁶⁾ which offers a non-litigation alternative for correcting "core" Funeral Rule violations -- where test-shopping reveals that funeral homes have failed to provide the price lists required by the Rule. FROP is designed to encompass only violations of these core Rule provisions, and the Commission in its sole discretion may choose not to offer the FROP alternative to a particular provider. Violations of other Rule provisions, such as embalming without consent or imposing illegal tying arrangements, are outside the scope of FROP, to be addressed through conventional Commission law enforcement procedures.

If an initial test shop reveals that a funeral provider failed to comply with one or more of the core requirements, a second test shop is conducted. When two separate test shops show that a funeral provider failed to comply, the FTC may give 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 by thmuon T /TT-6(s)]T5or-2(i 350.04-2(e)4(nt)-2(a)-6(c)4 de)4(ro)-2(h

resulting in reduced legal fees; (2) in lieu of a civil penalty, a payment to the Treasury that may be lower than a civil penalty resulting from an enforcement action; (3) certainty of outcome; and (4) less public exposure. As a deterrence from violating the Rule, FROP includes payments to the Treasury that are substantial enough to be treated as more than a mere cost of doing business, as well as five years of compliance training and monitoring.

FROP has enabled the Commission to achieve better compliance with the Funeral Rule while expending fewer resources. The Commission's history of Funeral Rule enforcement demonstrates that the process of a full investigation, consent negotiations, referral of both settled and unsettled complaints to the Department of Justice,⁽¹⁸⁾ litigation where required, collection of civil penalties, and monitoring of order compliance demands a high level of resources, limiting the number of enforcement actions the Commission can undertake

compliance by individual homes. FROP enrollees found not to be in compliance will be subject to traditional investigation and law enforcement action.

Finally, to complement the FROP-oriented sweeps program, which has been the primary thrust of the Commission's efforts in this area in recent years, the Commission staff recently has stepped up its efforts to identify appropriate targets for conventional investigations and law enforcement actions. Several non-public investigations are currently underway. By implementing FROP, while continuing to maintain some traditional enforcement presence, we can encourage greater compliance and thus achieve greater protection for consumers.

Thank you again for this opportunity to describe for the Committee the Commission's law enforcement efforts to promote competition and protect consumers in the funeral industry. The Commission will be pleased to provide any further information that may be of assistance to the Committee.

[Endnotes]

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

2. 15 U.S.C. § 45(a). The Commission also has responsibilities under 46 additional statutes, e.g., the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, which establishes important privacy protections for consumers' sensitive financial information; the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* which mandates disclosures of credit terms; and the Fair Credit Billing Act, 15 U.S.C. §§ 1666 *et. seq.* which provides for the correction of billing errors on credit accounts. The Commission also enforces over 30 rules governing specific industries and practices, e.g., the Used Car Rule, 16 C.F.R. Part 455, which requires used car dealers to disclose warranty terms via a window sticker; the Franchise Rule, 16 C.F.R. Part 436, which requires the provision of information to prospective franchisees; and the Telemarketing Sales Rule, 16 C.F.R. Part 310, which defines and prohibits deceptive telemarketing practices and other abusive telemarketing practices.

3. Service Corporation International, FTC Docket No. C-3869 (Consent Order, May 4, 1999). See also, The Loewen Group Inc., FTC Docket Nos. C-3677 and C-3678 (Consent Orders, August 2, 1996) (requiring divestiture of funeral homes in Cameron County, Texas and in Castlewood, Virginia); Service Corporation Int'l, FTC Docket No. C-3646 (Consent Order, March 21, 1996) (requiring divestiture of seven properties, located in Amarillo, Texas, and Brevard and Lee counties, Florida); Service Corporation Int'l, FTC Docket No. C-3579 (Consent Order, May 15, 1995) (requiring divestiture of two funeral homes and a cemetery in Medford, Oregon).

4. "Funeral Goods" are the goods which are sold or offered for sale directly to the public for use in connection with funeral services. 16 C.F.R. § 453.1(g). "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 of the final disposition of deceased human bodies. 16 C.F.R. § 453.1(i).

5. Federal courts have imposed civil penalties in two consent decrees between pre-need funeral providers and the Department of Justice, acting on the Commission's behalf, settling charges that the defendants failed to provide pre-need consumers with price lists and itemized statements of funeral goods and services selected, in violation of the Rule. *U.S. v. Mission Plans, Inc.*, Civil Action No. H94-3053 (S.D. Tex., entered September 13, 1994, \$20,000 civil penalty); *U.S. v. Restland Funeral Home, Inc.*, et al., Civil Action No.

3:91CV2576-G (N.D. Tex., entered September 19, 1996, \$121,600 civil penalty).

entailed a more exhaustive investigation documenting a greater number and range of alleged law violations.

15. NFDA joined with the Pennsylvania Funeral Directors Association in challenging the amendments to the Funeral Rule adopted on January 11, 1994. *Pennsylvania Funeral Directors Inc. v. FTC*, 81 F.3d 81 (3d Cir. 1994).

16. A second component of NFDA's industry self-certification and training program is the Compliance Assurance Program, or "CAP." (This was initially called the Funeral Industry Rule Compliance Assurance Program -- "FIRCAP"). CAP is a voluntary program of compliance review and training, for which the Commission serves solely as an advisor. According to NFDA, any funeral home, including a former FROP participant that has successfully completed that program, is eligible to join CAP, regardless of whether it is a member of NFDA. CAP is designed to encourage industry compliance through continuing training by the NFDA. Participants in CAP certify to NFDA that all licensed funeral directors employed by the participant have completed NFDA's comprehensive Rule training program. Participants also certify that they have adopted a written policy, distributed to all licensed personnel, regarding distribution of price lists and information to consumers. Participation in CAP may become an asset for funeral homes in marketing their