Prepared Statement of the Federal Trade Commission

For the Committee on Health, Education, Labor and Pensions

Subcommittee on Children and Families

United States Senate

April 26, 2002

Mr. Chairman and members of the Committee, I am Eileen Harrington, Associate Director for Marketing Practices in the Federal Trade Commission's Bureau of Consumer Protection. On behalf of the Commission, I appreciate this opportunity to provide information to the Subcommittee on the Commission's Funeral Rule, including the Commission's law enforcement activities regarding the funeral industry.[1] Congress has charged the Federal Trade Commission with protecting American C

[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.

[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 governs the privacy, fairness, and accuracy of certain sensitive consumer 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 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]In recent years, the FTC's antitrust enforcement efforts in the funeral industry have involved potentially anticompetitive mergers and acquisitions. These cases generally have been resolved through consent orders that required the acquiring firm to divest one or more acquired properties in order to prevent a lessening of competition. In May 2000, for example, the FTC obtained a consent decree with Service Corporation International (SCI), the largest owner of funeral homes and cemeteries in the world, to divest one of its two funeral homes in Roswell, New Mexico, in settlement of antitrust charges regarding SCI's 1994 acquisition of LaGrone Funeral Home. The FTC alleged that the 1994 acquisition, which was brought to the FTC's attention well after it took place, gave SCI a monopoly in the provision of funeral services in Roswell, New Mexico. There had been no new entry into the provision of funeral services in Roswell since the acquisition, and prices for funeral services had increased. *Service Corporation International,* FTC Docket No. C-3959 (Consent Order, June 29, 2000).

Likewise, in 1999, the FTC secured a consent decree with SCI to divest funeral service and cemetery properties in 14 other local geographic markets in connection with its acquisition of Equity Corporation International, the fourth largest funeral home and cemetery company in the United States. The complaint alleged that the acquisition would raise significant competitive concerns in six local markets for funeral services. *Service Corporation International*, FTC Docket No. C-3869 (Consent Order, May 4, 1999). *See also*

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").

Recent Instances of Serious Offenses in the Death Care Industry

The Commission shares the concern, expressed in your letter requesting the Commission to testify at this hearing, about the recent shocking incidents in Georgia, Florida and elsewhere. These incidents involve sellers who provide funeral services – cremation and burial – but not funeral goods, such as caskets. Thus the FTC's Funeral Rule is not applicable. In fact, the conduct involved in these incidents appears to be essentially criminal in nature -- not the sort of conduct normally remedied by the civil penalties available under the FTC Act for violation of a trade regulation rule. Like much criminal activity, the conduct at issue conceivably could be attacked under Section 5 of the FTC Act as unfair or deceptive practices. However, compared to the criminal sanctions available under state law, the equitable sanctions available to the FTC as a civil law enforcement agency[4] would likely have significantly less impact in punishing or deterring this conduct. It appears that these

[4]The Commission may enforce Section 5 by means of administrative litigation, with the ultimate goal of issuing a cease and desist order, or it may seek and obtain preliminary and permanent injunctive relief (including the full range of equitable remedies) in federal district court. 15 U.S.C. § 53(b). The Commission may seek and obtain orders imposing civil penalties only in federal district court cases where violations of either a Commission trade regulation rule or a litigated administrative cease and desist order are alleged. 15 U.S.C. § 45(m)(1)(A).

situations are being investigated appropriately by state criminal law enforcement authorities. The FTC is monitoring these situations in the event there is a role for federal civil law enforcement.

The Funeral Rule

The Funeral Rule was adopted by the Commission in 1982 and became fully effective in 1984.[5] It has the force and effect of law, and it may be enforced through civil penalty actions in the

---

[5] Section 18 of the FTC Act, 15 U.S.C. § 75a, 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. . . " In addition, the Funeral Rule's substantive requirements and prohibitions are circumscribed by Section 19 of the FTC Improvements Act of 1980 (Public Law 96-525, 94 Stat.391, 15 U.S.C. § 57a note). That section, in relevant part, provides that:

> (c)(1) the Commission shall have authority to use the funds . . . to issue the funeral trade regulation rule in final form only to the extent that the funeral trade regulation rule (in its final form) --
>
> (A) requires persons, partnerships, and corporations furnishing goods and services relating to funerals to disclose the fees or prices charged for such goods and services in a manner prescribed by the Commission; and
>
> (B) prohibits or prevents such persons, partnerships, and corporations from --
>
> (i) engaging in any misrepresentation;
>
> (ii) engaging in any boycott against, or making any threat against any other person, partnership, or corporation furnishing goods and services relating to funerals;
>
> (iii) conditioning the furnishing of any such goods or services to a consumer upon the purchase by such consumer of other such goods or services; or
>
> (iv) furnishing any such goods or services to a consumer for a fee without obtaining the prior approval of such consumer."

The Funeral Rule as originally proposed included a "market restraints" provision that would have prevented funeral providers from prohibiting, hindering, or restricting other persons from: (1) offering inexpensive funerals; (2) entering into contracts with groups which assist their members in making funeral arrangements; or (3) advertising prices. The provision also would have required funeral providers to place a notice in any advertising or promotional materials advising readers that funeral home prices vary considerably and that price information is available over the phone. Because of federal courts. The FTC Act authorizes courts to impose civil penalties of not more than $11,000 per violation for failure to comply. The Rule covers funeral providers -- that is, industry members that sell both funeral goods and funeral services to the public.[6] Although most funeral providers are funeral homes, other businesses, such as cemeteries and crematories, can also be "funeral providers" within the coverage of the Rule if they market both funeral goods and services. Furthermore, the Rule's requirements apply to both pre-need and at-need funeral arrangements; in pre-need situations, funeral providers must comply with all Rule requirements at the time funeral arrangements are pre-planned.[7]

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. 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

---

Section 19's limitations, however, the Commission determined that "much of the evidence to support [the market restraints] provision related to abuses which could no longer be covered by the rule . . . It related to abuses which are not 'threats' or 'boycotts' or to activities directed against persons or entities other than funeral providers." 47 Fed. Reg. 42290-91 (Sept. 24, 1992). Thus, the market restraints provision was deleted from the Rule's final version.

[6] "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 or the final disposition of deceased human bodies. 16 C.F.R. § 453.1(i)

[7]Federal courts have approved 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., Sept. 13, 1994, $20,000 civil penalty); *U.S. v. Restland Funeral Home, Inc., et al.,* Civil Action No. 3:91CV2576-G (N.D. Tex., Sept. 19, 1996, $121,600 civil penalty).

funeral goods and services offered by the funeral home. Consumers thus are informed that they do not have to purchase a package funeral at a pre-determined price that may include items or services that they do not want. Instead, they know that they can pick and choose what they want to buy from the itemized general price list. 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. Specifically, 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 to 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. Consumers thus are informed that they do not have to purchase a package funeral at a pre-determined price that may include items or services that they do not want. Instead, they know that they can pick and choose what they want to buy from the itemized general price list. 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

[9]The Commission determined that the original Rule was sound and still necessary. The Commission therefore retained the core provisions that required itemization, price, and other material disclosures and that prohibited misrepresentations and other specific deceptive practices. With some "fine tuning," the amended Rule closely tracks the original Rule. For example, the amended Rule retained the requirement for providers to give price information by telephone to all who request it, but eliminated the original Rule's requirement for funeral providers to volunteer to callers that price information is available by telephone. Similarly, the amended Rule makes clear that casket handling

prepare a recommendation to the Commission as to whether the Funeral Rule should be amended. If the Commission decided to amend the Rule, the process would be conducted pursuant to Section 18 of the FTC Act, 15 U.S.C. § 57a. Section 18 mandates multiple steps and provides numerous opportunities for public comment and participation by stakeholders.

Funeral Rule Enforcement

In connection with the first review that ultimately resulted in amendment of the Rule, the Commission's staff confronted the sobering fact that even though the Funeral Rule had been in effect for more than a decade, a low level of industry compliance prevailed. A Commission-sponsored 1987 study and a 1988 study conducted by the Gallup organization for the AARP indicated that at that time funeral providers' compliance with the Rule's core requirement -- *i.e.*, to give consumers an itemized price list at the beginning of the arrangements discussion -- may have been as low as 23 percent.[13] These results raised questions about the effectiveness of the enforcement approach followed up until then -- a reactive strategy that was based upon complaints from consumers or competitors.[14] This approach entailed exhaustive investigation and attempts to achieve

---

[13]*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* (February 1989) at p. 20.

[14] The FTC receives a relatively low number of complaints regarding the death care industry. For example, during calendar year 2001, it received just over 200 complaints on these issues. By comparison, for the same period, it received more than 70,500 complaints about identify theft issues, currently a leading complaint category. In its recent investigation of death-care issues, GAO reported that "[g]enerally across all of the types of organizations we contacted, most officials and representatives said that they received few complaints about death care. Reasons provided for the low number of complaints included the personal or emotional component of the death care situation and the fact that consumers may have been satisfied with the goods and services received." *Funeral-Related Industries* (GAO/GGD-99-156), released by GAO on October 21, 1999.

settlement of charges of law violations revealed by the investigation through consent negotiations prior to filing a complaint to initiate an enforcement action.[15]

Seeking to increase industry compliance with the Rule, the FTC 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 FTC 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.

The sweeps are based on "test-shopping" of large numbers of funeral homes in a given geographical area. The test-shopping is performed by investigators from the FTC and our counterparts at the state and local level, and, in some instances, AARP volunteers. These test shoppers pose as potential customers. A cluster of FTC and/or state enforcement actions in a given

---

[15]Virtually all enforcement actions have been consent decrees negotiated prior to the filing of a complaint. One exception is *U.S. v. Restland Funeral Home, Inc., et al.,* Civil Action No. 3:91CV2576-G, (N.D. Tex., 1996), which was settled after the Department of Justice, on behalf of the Commission, filed a complaint and pursued the litigation for some time.

geographical area are filed and announced after conducting the investigative test-shopping stage of each sweep.

Within the first year of implementing the sweeps strategy in 1994, the FTC, with the assistance of the Tennessee, Mississippi and Delaware Attorneys General, conducted four sweeps, one in each of those states, plus a pilot sweep conducted by FTC alone in Florida. The four initial sweeps, involving test shoppings of 89 funeral homes, resulted in 20 FTC enforcement actions[16] -- nearly half as many as were brought in the previous decade since the Rule went into effect. The sweeps indicated better compliance with the Rule's core provisions among the funeral providers test shopped than was indicated by the surveys performed in the late 1980s; the compliance rate of homes shopped ranged from 60 to 80 percent from sweep to sweep.

Enforcement actions arising from the initial sweeps, like almost all of those brought prior to implementation of the sweeps methodology, were resolved before filing a complaint through consent decrees. Nearly all of the sweeps consent decrees included a civil penalty commensurate with the alleged law violations committed by each funeral home. The deterrent effect of the sweeps, however, derives not only from the amount of the civil penalties in each individual case, but also from the much greater likelihood that non-compliance will be detected.[17]

---

[16]As a result of the Tennessee sweep, the State of Tennessee also brought four additional actions of its own.

[17]The FTC Act provides for the imposition of civil penalties of up to $11,000 for each violation of the Funeral Rule or any other FTC Trade Regulation Rule. 15 U.S.C.§ 45(m)(1)(A). Civil penalties in non-sweeps Funeral Rule cases have ranged from $10,000 to $100,000, with an average of about $30,000. In calculating the civil penalty in each case, a violator's ability to pay is one of the statutory factors that a court must consider in imposing a civil penalty. 15 U.S.C. § 45(m)(1)(C). Other factors that must be considered are the "degree of culpability, history of prior

Industry Self-Regulation

The early sweeps highlighted two points. First, it appeared that although compliance had

indugpassdtseirgh forised)atwore defnsg aitropri gr asng se.Tw (ThhanSeplir num1995,s of NanventioFund alRDreqe orw

m

r

---

such conduct, effect on ability to continue to do business, and such other matters as justice may require." *Id.* Thus, the range and average of penalties necessarily reflect the fact that historically the industry has been composed largely of small businesses. Because the sweeps investigations are streamlined, focusing upon only violations of the "core" Rule provisions, the civil penalties in sweeps cases have been somewhat lower ($1,000 to $35,000) than in conventional cases that entailed a more exhaustive investigation documenting a greater number and range of alleged law violations.

18

action is taken, no individual funeral home is identified. Of course, this information is available under the Freedom of Information Act.

The incentives for funeral homes to participate in FROP, rather than sustain a formal enforcement action by the Commission, include: (1) expedited informal resolution, 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 deterrent to 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,[19] 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 using a conventional approach. FROP's benefits to the public include the lower-cost resolution of basic Rule cases; substantial involvement of an industry partner in bringing about industry compliance; greater emphasis on educating rather than penalizing the mostly

---

[19]Under Section 16 of the FTC Act, the Commission is required to refer to the Department of Justice for filing and litigation any law enforcement action involving imposition of any civil penalty for violation of a Trade Regulation Rule. If the Department of Justice does not act on the referral within 45 days, the Commission is authorized to file and litigate the matter on its own behalf. 15 U.S.C.§ 56.

small-businesses covered by the Rule; and the likelihood of increased compliance by industry members with the Funeral Rule.

Since implementation of the FROP-oriented sweeps program, the Commission and its

20*GAO/358lated Ind itssmall-bus5inesses ce Commdo ncludTjdetail, tinstrTcmionsTj -record k Coing.Revi indiss*

---

[20]*Funeral-Related Industries* (GAO/GGD-99-156), released by GAO on October 21, 1999.

In addition, the Commission's staff periodically performs on-site assessments of NFDA's administration of the FROP program. As a result of one review, Commission staff suggested several improvements to the program to increase its efficiency and effectiveness. For example, staff recommended to NFDA that no more than 30 days elapse between enrollment in FROP and conducting the first training session for the enrollee. Similarly, staff recommended certain improvements in tracking enrollees' progress through the FROP process to ensure that all enrollees meet their requirements in a timely fashion. Also, we are selectively test shopping former FROP enrollees to determine whether the program has been successful in achieving a permanent improvement in 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.

Conclusion

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. I will be pleased to respond to your questions.