Paragraph V of the proposed order prohibits PHA from acting as an agent for physicians, or from entering into any type of messenger arrangement between physicians and payors, for thirty (30) months after the proposed order becomes final. It also prohibits PHA from entering into any type of messenger arrangement, other than acting as a simple transmitter of offers and responses between payors and individual physician practices, for an additional twenty-four (24) months—*i.e.*, until fifty-four (54) months after the proposed order becomes final.[6]

The first ''cooling off'' period—of 30 months—eliminates PHA involvement between physicians and payors, to facilitate payors' ability to deal directly with individual physician practices and increase physicians' incentive to deal directly with payors (or deal through other arrangements that do not have PHA's alleged history of fostering anticompetitive agreements). The second, 24-month-long prohibition on all but strictly limited-in-form messenger arrangements—*i.e.*, the prohibition on arrangements that might involve, for example, PHA's collection and maintenance of price and other information on physicians' terms of dealing—is intended to permit PHA to re-enter the physician contracting business, but with additional safeguards against recurrence of the abuses, under the guise of ''modified messenger model,'' that the complaint alleges. Should PHA ultimately engage in a standing offer or similar messenger arrangement, the physician services market will have had at least four and one-half years to restore—with little or no PHA involvement—the competitive balance allegedly lost due to the conduct charged in the complaint.

Paragraph VI of the proposed order requires PHA to provide the Commission with prior notice before entering into any messenger arrangement permitted by Paragraph V of the proposed order.

Paragraph VII requires PHA to distribute the complaint and order, within 30 days after the order becomes final: to every hospital, physician, or other provider that participates in PHA; to each officer, director, manager, and employee of PHA; and to each payor with which PHA has had any contact since January 1, 1997, but with which PHA does not currently have a contract. For a period of five years after the order becomes final, PHA also must distribute a copy of the order and complaint to new members and officials of PHA, and any new payors with which it commences doing business.

With regard to payors with which PHA currently has a contract for the provision of physician services, Paragraph VII of the proposed order contains provisions concerning the termination of the contracts, which, according to the complaint, embody price-fixed physician fees. Paragraph VII.A requires PHA to provide the payors with which it has a contract with a copy of the order and complaint, as well as a notification letter apprising the payors of certain contract termination rights regarding their contracts with PHA. For payors that have preexisting ''bonus plan'' contracts with PHA, which are listed in Confidential Appendix A to the proposed order, the notification letter informs the payors that they may terminate their existing contracts with PHA, upon written request, without any penalty or charge. With regard to payors holding contracts with PHA, other than the payors with bonus plan contracts, the notification letter likewise informs the payors that they may terminate their contracts without penalty, upon providing written request. However, the letter also apprises payors with non-bonus-plan contracts that, if they do not voluntarily terminate their contracts within six months after the order becomes final (or the contract does not reach its scheduled termination date by that time), then the contract will terminate as of six months after the order becomes final. With regard to certain employers that have preexisting, non-bonus-plan direct contracts with PHA, and which are identified in Confidential Appendix B of the proposed order, in order to help minimize any possible disruption to their health benefits programs, Paragraph V of the proposed order permits PHA to serve as a simple messenger for any subsequent contract offers by these payors to PHA's physician members.

Termination of the contracts between PHA and payors for the provision of physician services is required to eliminate the payment to PHA's physician members of what the complaint alleges are collectively negotiated, price-fixed fee levels. The provision allowing payors six months during which they may request voluntary termination of their contracts with PHA is intended to provide them with flexibility and facilitate their making alternative arrangements to provide the services now provided through their contracts with PHA.

The mandatory termination date also obviates the risk that any payor would face competitive disadvantage by voluntarily terminating a PHA contract—and not have a physician network in place—before rival payors have terminated their contracts. Establishing a mandatory termination date provides an incentive for all payors to act promptly to make alternative arrangements for a physician network before the termination date, makes clear to PHA's physician members that they promptly must begin to deal directly (or outside of PHA) with the payors if they wish to continue being in the payors' networks, and eliminates the possible disincentive for a payor to be the first to voluntarily terminate its contract with PHA because it would be the first payor in the market not to have a contracted network of physicians.

Paragraph VII also requires PHA, for five years, annually to publish a copy of the order and complaint in a report or newsletter sent to its participating providers, and file certain compliance reports with the Commission. Paragraphs VIII, IX, and X provide for various compliance reports and notifications by PHA and the Physician Respondents. Paragraph XI obligates the Respondents to cooperate in certain ways with any Commission inquiry into their compliance with the order.

The proposed order will expire in 20 years.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 04–19444 Filed 8–24–04; 8:45 am]

BILLING CODE 6750–01–P

[6] The time periods for these prohibitions are based on the requirement in Paragraph VII.D of the proposed order that all of PHA's contracts, with the identified exceptions, be terminated no later than six (6) months after the date the order becomes final.

FEDERAL TRADE COMMISSION

[File No. 041 0014]

Virginia Board of Funeral Directors and Embalmers; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before September 13, 2004.

ADDRESSES: Comments should refer to ''Virginia Board of Funeral Directors and Embalmers, File No. 041 0014,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, as explained in the Supplementary Information section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form (except comments containing any confidential material) should be sent to the following e-mail box: *consentagreement@ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Robert Davis, FTC, Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3530.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission's Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for August 16, 2004), on the World Wide Web, at *http://www.ftc.gov/os/2004/08/index.htm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. Written comments must be submitted on or before September 13, 2004. Comments should refer to ''Virginia Board of Funeral Directors and Embalmers, File No. 041 0014,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled ''Confidential.'' [1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form should be sent to the following e-mail box: *consentagreement@ftc.gov.*

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC Web site, to the extent practicable, at *www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Proposed Consent Order To Aid Public Comment

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.

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

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 section 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.

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

[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).

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 section 65–30–50(C), the effect of which regulation would be to prevent licensees from notifying potential customers of prices or discounts through the use of truthful and non-misleading advertising. As discussed below, the proposed Order does not prohibit the Board from adopting and enforcing reasonable rules to prohibit advertising that the Board reasonably believes to be materially fraudulent, false, deceptive, or misleading.

Paragraph III of the proposed Order requires the Board to eliminate any regulation, the effect of which regulation would be to prevent licensees from notifying potential customers of prices or discounts through the use of truthful and nonmisleading advertising.

Paragraph IV of the proposed Order requires the Board to prominently publish the proposed Order along with a letter explaining the terms of the proposed Order in the Board's newsletter. Paragraph V of the proposed Order requires the Board to send to its licensees the proposed Order, along with a letter explaining the terms of the proposed Order. Paragraph VI of the proposed Order requires that the Board prominently publish the proposed Order on its World Wide Web site. Each of the methods of publishing the proposed Order is intended to make clear to licensees that they are not restricted from engaging in truthful and non-misleading price-related advertising, including the advertising of discounts.

Paragraphs VII and VIII of the proposed Order require the Board to inform the Commission of any change that could affect compliance with the proposed Order and to file compliance reports with the Commission for a number of years. Paragraph IX of the proposed Order states that it will terminate in twenty years.

III. The Conduct Prohibited Under the Order

The proposed Order prohibits the Board from discouraging its licensees from using truthful and non-misleading advertisements of prices and discounts. The proposed Order does not prohibit the Board from adopting and enforcing reasonable rules to prohibit advertising that the Board reasonably believes to be materially fraudulent, false, deceptive, or misleading. Because such a rule would not violate the proposed Order, and because the issues raised by this case arise frequently, it is appropriate to address the analysis required in some detail, focusing on the current restraint of the Board.

A. Antitrust Analysis of the Legality of Competitive Restraints

The Board's regulation was an agreement among competitors not to advertise price discounts. The fundamental question regarding the legality of restraints agreed upon between competitors is ''whether or not the challenged restraint enhances competition.'' [2] A framework for analysis of the competitive impact of such agreements was described recently by the Commission in *PolyGram Holdings.*[3] Under that framework, the plaintiff has the initial burden of showing that the restriction is ''inherently suspect'' in that it has a likely tendency to suppress competition.[4] A restraint is shown to be inherently suspect when ''past judicial experience and current economic learning have shown [that conduct] to warrant summary condemnation.'' [5] If the plaintiff can sustain that burden, the practice will be condemned unless the defendant can articulate a valid justification for the restriction.[6] A legitimate justification must be ''cognizable'' in the sense that the benefits that the defendant proposes from the restraint must be consistent with the goals of the antitrust laws.[7] A justification, to be legitimate, must also be plausible in the sense that the defendant can ''articulate the specific link between the challenged restraint and the purported justification to merit a more searching inquiry into whether the restraint may advance procompetitive goals, even though it facially appears of the type likely to suppress competition.'' [8] Once the defendant has overcome the presumption of the anticompetitive effect 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

[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.

[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

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 restrictions'' at issue on their face were aimed at deceptive advertising, they might have the effect of promoting competition by ''reducing the occurrence of unverifiable and misleading across-the-board discount advertising.'' [12]

The current restriction of the Board is inherently suspect.[13] The regulation is the type of restriction that has been found inherently suspect by the Commission in the context of the optometry profession,[14] and is well understood in the economic literature as having anticompetitive effects in the context of professional services.[15] Studies show that advertising restrictions harm competition in the market for funeral services.[16] The importance of price information to funeral service consumers, especially when they receive that information early in the process, is a well-accepted fact of the industry.[17]

Thus, restrictions on price advertising in the funeral industry are likely to suppress competition and will be condemned in the absence of a legitimate efficiency justification.

C. The Order Permits Reasonable Regulation of Advertising

In *CDA,* the Supreme Court concluded that, before the type of restrictions at issue there could be condemned as anticompetitive, a more searching analysis was required. *See* 526 U.S. at 779–81. Several distinctions between the rule of the Board and the rules at issue in CDA are instructive, and further support the conclusion that there is reason to believe a violation of the FTC Act has occurred:

- Unlike in *CDA,* the restriction at issue here was a total ban on price discount advertising in the relevant market (that for preneed funeral services).
- Whereas in *CDA* the restrictions on their face purported to be aimed at limiting false or misleading advertising, here the fact that the restriction was imposed only on the sale of preneed services (where price competition is most 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 inquire 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 state as sovereign, the state action defense protects those acts.[23] When the courts have determined that the allegedly anticompetitive acts were committed by subordinate agents of state governments, rather than the state itself, the state action defense could still apply if the acts were ''pursuant to a state policy to displace competition with regulation or monopoly public service.'' [24] Finally, when the allegedly anticompetitive act was committed by a private party, the state action defense can only apply if that action was pursuant to a clearly articulated state policy and the actions of the private party were ''actively supervised by the state.'' [25]

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 *http://www.cremationassociation.org/docs/attitude.pdf* (''Wirthlin Survey'') (Cost is one of the top factors influencing funeral home selection); *Id.* at 4 (Most often mentioned change recommended by consumers in funeral industry is to ''see costs kept down.'').

[18] *Id.* at 771–776.

[19] 16 CFR 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 section 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.'').

[23] *Hoover* v. *Ronwin,* 466 U.S. 558 (1984) (''Hoover'') (action of state supreme court regulating entry into the legal profession is state action exempt from liability under the Sherman Act).

[24] *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34, 39 (1984) (''*Hallie*'') (Municipality is not the state, but is exempt from liability for anticompetitive actions that were pursuant to a state policy to displace competition, when the conduct was a foreseeable result of the policy), quoting *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 413 (1978) (plurality opinion); *Southern Motor Carriers Rate Conference Inc.* v. *U.S.,* 471 U.S. 48, 57 (1984) (''*Southern Motor Carriers*'').

[25] *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980) (''*Midcal*''). The ''active supervision'' test requires that ''the State has established sufficient independent judgment and control so that the details of the [restraint] have been established as a product of deliberate state intervention, not simply by agreement among private parties.'' *Ticor Title Ins. Co.,* 504 U.S. at 634–35. The Supreme Court has held that municipalities, unlike private parties, are not subject to the active supervision requirement and are protected by the state action doctrine if they are acting pursuant to a clearly articulated state policy. *Town of Hallie,* 471 U.S. at 46–7. The Court indicated in dicta that ''it is likely that active state supervision would also not be required'' when the relevant actor is a ''state agency,'' but declined to resolve the issue. *Id.* at 46 n. 10. Thus, the role of active supervision for the myriad varieties of governmental and quasi-governmental entities, including state regulatory boards, remains unclear. *See* FTC, Office of Policy Planning, Report of the State Action Task Force 15–19, 37–40, 55–56 (Sept. 2003) (''2003 FTC Staff Report''). Because the

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The clear articulation requirement ensures that, if a State is to displace national competition norms, it must replace them with specific state regulatory standards—a State may not simply authorize private parties to disregard federal laws,[26] but must genuinely substitute an alternative state policy.[27]

Because of federalism concerns at the heart of the state action doctrine, the policy to displace competition must be articulated by an entity that can be identified as the state rather than a subordinate agency of the state.[28] Here, it is clear that the Board is not the state.[29] Therefore, the Board, to modify the proposed Order, must show that its conduct would be pursuant to a clearly articulated policy by the state. An agency or subdivision of the state, like the Board here, will be protected by the doctrine only where the conduct is both legally authorized by the state and that conduct is pursuant to an ''authority to suppress competition.'' [30] With respect to the question of legal authority to act, an agency or municipality satisfies that requirement for the purposes of the state action defense if it can show that it has the authority to engage in that conduct when it does so in the substantively and procedurally correct manner, whether or not the agency actually did engage in the conduct in the substantively and procedurally correct manner in pursuing its allegedly anticompetitive conduct.[31]

Whether an articulated policy by the state is pursuant to an ''authority to suppress competition'' depends on the form of the statement of the state policy.[32] When the state has replaced some dimension of competition with a regulatory structure and gives an agency the discretion to determine how to implement that structure, as in *Southern Motor Carriers,* no more detail than a clear intent to displace competition is required.[33] When the state does not displace competition with a regulatory structure, but simply gives some entity the authority to displace competition, as in *Omni* or *Hallie,* the question is whether the ''suppression of competition is the 'foreseeable result' of what the statute authorizes.'' [34] At present, the Board cannot demonstrate clear articulation under Virginia statutes by either means.

First, it does not appear, from the current statute granting the Board the authority to act, that the state intended that there be a broad displacement of price competition with regulation in the market for preneed funeral services.[35] Unlike the case of Mississippi in Southern Motor Carriers, the Virginia General Assembly did not single out price determination and assign responsibility for that determination to the agency rather than the market. Instead, the legislature was silent on how prices and price-related advertising were to be determined in the funeral services market, aside from emphasizing that ''general advertising and preneed solicitation, other than in-person communication, shall be allowed.'' [36]

Therefore, as in *Omni,* the question will be whether the type of anticompetitive regulation at issue is foreseeable from the Commonwealth's grant of authority to the Board. Unlike either *Hallie* or *Omni,* the regulation is not a foreseeable consequence of the Board's existing grant of authority. Instead, the relationship of the Board's regulation to its grant of authority—to ''establish standards of service and practice for the funeral service profession''—''is one of precise neutrality.'' [37] Further, a review of Virginia's overall statutory scheme demonstrates that this type of restriction is not foreseeable. First, the General Assembly, in passing the statutory scheme, showed no indication of a state policy to restrict price competition or advertising. Second, the Virginia statute itself prohibited in-person solicitation relating to preneed services, but made it clear that ''general advertising and preneed solicitation, other than in-person communication, shall be allowed.'' Finally, the 1989 Act did not change the Virginia statutory requirement that an itemized statement and general price list of funeral expenses be furnished to consumers, which is a similar requirement to that prescribed by the FTC Funeral Rule.[38]

Board's policy lacks clear articulation, it is unnecessary to resolve this issue here. The lack of clear articulation also renders unnecessary any analysis of possible preemption of the state law by federal antitrust law. *See Freedom Holdings, Inc.* v. *Spitzer,* 357 F.3d 205, 222–24 (2d Cir. 2004).

[26] *Parker,* 317 U.S. at 351; *see generally State Action Task Force Report* at 8, 25–26.

[27] *See New York* v. *United States,* 505 U.S. 144, 168–69 (1992); *see also Ticor,* 504 U.S. at 636 (State Action ensures that ''particular anticompetitive mechanisms operate because of a deliberate and intended state policy.'').

[28] *Southern Motor Carriers,* 471 U.S. at 62–63 (Public service commissions could not establish the clearly articulated policy of the state to displace competition needed to invoke the doctrine.).

[29] *See South Carolina State Board of Dentistry,* Dkt No. 9311, slip op. at 16–19 (FTC July 30, 2004) (South Carolina board regulating dentists and dental hygienists and composed largely of dentists is not the state for the purposes of the state action defense and can only claim the protection of the defense if it was acting pursuant to a clearly articulated and affirmatively stated state policy to displace competition found in state statutes); *Mass. Board,* 110 FTC at 612–613 (Massachusetts board regulating optometrists and composed largely of optometrists is not the state for the purposes of the state action defense and can only claim the protection of the defense if it was acting pursuant to a clearly articulated and affirmatively stated state policy to displace competition found in state statutes); *FTC* v. *Monahan,* 832 F.2d 688, 689 (1st Cir. 1987) (Massachusetts Board of Registration in Pharmacy, which was composed of pharmacists and regulated pharmacists was a ''subordinate governmental unit'' which could only claim the state action defense if its actions were pursuant to clearly articulated and affirmatively expressed state policy to displace competition); *see also Hoover,* 466 U.S. at 568 (''Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorizations.''); *Southern Motor Carriers,* 471 U.S. at 62–63 (Public service commissions could not establish the clearly articulated policy of the state needed to invoke the doctrine.).

[30] *City of Columbia* v. *Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 372–373 (1991) (''Omni'').

[31] *Id.* (''[N]o more is needed to establish for *Parker* purposes, the city's authority to regulate than its unquestioned zoning power over the size, location, and spacing of billboards.''). Here, the Board's authority to ''establish standards of service and practice for the funeral service profession'' in Virginia, Va. Code Ann. section 54.1–2803(1) (Michie 2003) (''VC 54.1–2803(1)''), presumably constitutes adequate legal authority to promulgate the regulation at issue sufficient to satisfy the first leg of the test in *Omni. See* 499 U.S. at 370–373.

[32] *Omni,* 499 U.S. at 372.

[33] *See Southern Motor Carriers,* 471 U.S. at 63–64 (Mississippi state statute requiring the public service commission to prescribe just and reasonable rates is a sufficiently clear expression of intent to displace competition for the determination of prices to allow the commission to encourage private firms to engage in collective rate-making and to allow adequately supervised private firms to do so.).

[34] *Omni,* 499 U.S. at 373, *quoting Hallie,* 471 U.S. at 42.

[35] The Board's legal authority to promulgate restrictions on advertising stems from VC 54.1–2803(1), which gives the Board the authority to ''establish standards of service and practice for the funeral service profession in Virginia.''

[36] *See* Va. Code Ann. section 54.1–2806(5) (Michie 2003). By way of contrast to its treatment of advertising and price competition in the market for preneed services, the General Assembly did displace competition with regulation by the Board regarding certain other aspects of the preneed funeral transaction. *See* Va. Code Ann. section 54.1–2803(9) (Michie 2003) (''VC 54.1–2803(9)''). A close look at the regime established by the statute indicates that Virginia intended that certain types of competition be displaced by regulations: (1) the state intended that the forms for preneed contracts be specified by the Board, *Id.; see also* Va. Code Ann. section 54.1–2820 (Michie 2003); (2) the state intended that the disclosures made to consumers purchasing preneed services be established by regulations, VC 54.1–2803(9); and (3) the state intended that ''reasonable bonds'' be required to ensure performance of the preneed contract at-need. *Id.*

[37] *See Community Communications Co., Inc.* v. *City of Boulder,* 455 U.S. 40, 54–56 (1982) (holding that ''the general grant of power to enact ordinances'' does not satisfy the clear articulation requirement.).

[38] Virginia adopted the Rule's requirements of disclosure, including price disclosure by statute, referencing the FTC Funeral Rule explicitly. *See* Va. Code Ann. section 54.1–2812 (Michie 2003). Under Virginia statute the Board may suspend or revoke the license of, or otherwise punish, a licensee for ''[v]iolating or failing to comply with Federal Trade Commission rules regulating funeral industry practices.'' *See* Va. Code Ann. section 54.1–

That section of the Virginia statute requires that ''[a]ll regulations promulgated herewith shall promote the purposes of this section.'' Because the purpose of the Funeral Rule is to increase the availability of information to consumers to improve price competition,[39] and because this section of the statute expressly incorporates that rule, it appears unlikely that the General Assembly 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.

By accepting the proposed Order subject to final approval, the Commission anticipates that the competitive issues described in the proposed Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the proposed Order. It is not intended to constitute an official interpretation of the Agreement and proposed Order or to modify their terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

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2806(19) (Michie 2003). Virginia is one of 18 states that has adopted at least part of the requirements of the Funeral Rule. AARP, *The Deathcare Industry* 7 (Public Policy Institute, May, 2000).

[39] *See e.g.*, 1990 FTC Staff Report at 12; Comments of AARP on the Commission's Review of the Funeral Rule, 16 CFR Part 453 (September 14, 1999), available at *http://www.ftc.gov/bcp/rulemaking/funeral/comments/*. Comment A–55–AARP Funeral Rule Comments.htm. (''Certainly, one of the intended effects of implementing the Rule was to spur on competition, by making it easier for consumers to make an educated decision.'').

[40] *Indiana Movers Analysis* at 5.

HARRY S. TRUMAN SCHOLARSHIP FOUNDATION

Sunshine Act Meeting: Meeting of the Trustees and Officers of the Harry S. Truman Scholarship Foundation, September 24, 2004, 11 a.m.–12:30 p.m., U.S. Capitol, Room HC–6

I. Call to order, Welcome, Approval of the Minutes of the Meeting of May 7, 2004;

II. Consideration of election of a Vice-President of the Truman Scholarship Foundation;

III. Adoption of a policy and implementation language for Truman Scholars Accountability;

IV. Discussion and Board Action on Proposed Three Year Trial of a Truman Fellows Program providing for a one-year professional experience in Washington following receipt of a baccalaureate degree and prior to graduate school;

V. Reauthorization of the Public Service Law Conference;

VI. Adoption of a Budget and approval of the Bulletin of Information for the 2004–2005 Year for the Foundation;

VII. Old Business;

VIII. New Business;

IX. Adjournment.

Dated: August 18, 2004.

Louis H. Blair,

Executive Secretary.

[FR Doc. 04–19554 Filed 8–23–04; 1:57 pm]

BILLING CODE 6820–AD–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Continuation of the Rabia Balkhi Hospital (RBH) Physician Training and Support Program in Afghanistan

AGENCY: Office of the Secretary, HHS.

ACTION: Notice of intent to fund a single eligibility award.

SUMMARY: The Office of Global Health Affairs (OGHA) announces the intent to allocate fiscal year (FY) 2004 funds for a grant program for services provided by the International Medical Corps (IMC) that will allow the continuation of the Rabia Balkhi Hospital (RBH) Physician Training and Support Program in Afghanistan. The goal of the project is to reduce the maternal and infant mortality rates in Afghanistan through the training of obstetrician-gynecologists (OB-GYNS) and other health care workers at RBH. Forty percent of deaths among women of childbearing age in Afghanistan are caused by preventable complications related to childbirth, and an estimated one in four children dies before reaching their fifth birthday.

A. Purpose

The project's main objectives include: (1) To improve the capacity of the hospital's staff to practice medicine, (2) to improve the quality of care for RBH patients. These services are expected to dramatically improve patient care and to make a substantial reduction in maternal and infant illness and deaths at the hospital.

The Catalog of Federal Domestic Assistance number for this program is 93.003.

B. Eligible Applicant

Assistance will be provided only to International Medical Corps (IMC).

The IMC is the only organization in Afghanistan qualified to collaborate with the Office of Global Health Affairs. IMC is a global humanitarian nonprofit organization, exceptionally well-qualified, with a vast network of health facilities staffed by a dedicated cadre of health care professionals. In Afghanistan, IMC has established a strong foundation for training activities, and the ongoing provision of primary health care services to men, women, and children throughout the country. IMC supported clinics have treated more than 500,000 men, women, and children in Afghanistan since 2001. No other institution in the country has the capacity and expertise to accomplish this task.

C. Funding

Approximately $685,000 is available in FY 2004 to fund this award. It is expected that the award will cover costs for the period February 1, 2004 through September 30, 2004. Funding estimates may change.

D. Where To Obtain Additional Information

For general comments or questions about this announcement, contact: Brian Trent, Management Operations Officer, Office of Global Health Affairs, Department of Health and Human Services, 5600 Fishers Lane, Room 18–101, Rockville, MD 20857, Telephone: 301–443–4560.

For technical questions about this program, contact: Amar Bhat, Office of Global Health Affairs, Department of Health and Human Services, 5600 Fishers Lane, Room 18–101, Rockville, MD 20857, Telephone: 301–443–1410, E-mail: *abhat@osophs.dhhs.gov.*