

determine whether they are met or it is unreasonable to meet one or more of them. Today's final action does not establish a new regulation.

F. Review Under Executive Order 13132

Executive Order 13132, Federalism, 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's determination and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Because DOE is determining that a private and local government fleet AFV program is not "preemptive," DOE's

preemptive AFV program is not "preemptive" (for giving notice and opportunity for)TjT*(timely

Issued in Washington, DC, on March 6, 2008.

Alexander A. Karsner

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. E8-5143 Filed 3-13-08; 8:45 am]

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²⁸ Statement of Basis and Purpose (of the Rule), 47 Fed. Reg. 42260, 42261-42262, 42285 (1982). Indeed, the FTC Improvements Act of 1980 prohibited the Commission from expending funds during fiscal years 1980-82 to promulgate a rule that, *inter alia*, applied to persons that sold funeral goods or funeral services. Pub. L. 96-252, 94 Stat. 374 (codified as amended in scattered sections of 15 U.S.C.).

²⁹ A Final Staff Report describing the evidence was prepared by staff in the Bureau of Consumer Protection in 1990. See Final Staff Report to the Federal Trade Commission and Proposed Amended Rule ("1990 Staff Report") at 109-20.

³⁰ *Id.*

³¹ *Id.*

³² See generally, Valerie Kellogg, *Who Says This is a Dying Business?*, Long Island Voice, Mar. 31, 1999, at 6; Liz Johnson, *The Retail Way to Go: Casket Sellers Latest Factor in Death Care Industry*, Asbury Park Press (Neptune, NJ), June 5, 1998, at B8; Greg Hardesty, *Cremation, Casket Stores are Options for Those Trying to Cut Funeral Costs*, Buffalo News, Nov. 10, 1997, at 2C.

Recent news reports suggest that increased competition continues to flourish. See generally, Craig Harris, *Funeral Co-op Offers Lower Cost Than Traditional Facilities*, The Seattle Post-Intelligencer, July 11, 2007; Scott Simonson, *Tusconan Offers Alternative to Expensive Caskets*, The Associated Press State & Local Wire, April 7, 2006; Tom Long, *Casket Sellers Think Outside the Box*, The Boston Globe, March 23, 2006, at 1; Eddie North-Hager, *The Last Discount You Will Ever Need*, Copley News Service, January 7, 2006; Laguna Niguel, *At Costco, Bargains for the Bereaved*, The Washington Post, December 18, 2005, at A23; Tommy Fernandez, *Funeral Homes Dig In; Discounters Pose Grave New Threat; Putting An End To Cheap Burials*, Crain's New York Business, October 17, 2005, at 3. See also Melissa Bean Sterzick, *Casket Retailers Provide Cheaper Options*, Dallas Morning News, Aug. 6, 2000, at 4A; *Death Goes Discount with Casket Sales*, Associated Press State & Local Wire, June 7, 2000; *Casket Business Breaks Out of*

the Box, Patriot Ledger (Quincy, MA), June 2, 2000, at 25.

³³ AARP, Comment A-55, at 10; NSM, Comment A-54, at 6 (stating that cemeteries now sell all types of funeral merchandise). See also *Are Consumers Getting Fair Funeral Deals?*, Consumers' Research Magazine, May 1, 2000, at 16.

³⁴ AARP, Comment A-55, at 10 (citing National Casket Retailers Association Newsletter, April 1999). See also B. Brown, Comment A-75, at 1 (stating there are approximately 500 third-party casket retail stores throughout the United States and Canada).

³⁵ FR Notice, 64 FR at 24251, 24252-24253.

³⁶ See generally, TR at 22-78.

³⁷ To qualify as a funeral provider, an entity must offer funeral goods and two types of funeral services. 16 CFR 453.1(i). The two types of funeral services the Rule requires are those 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 CFR 453.1(j).

³⁸ See ICFA, Comment A-38, at 18 & Ex. 13 (presenting a survey of state regulatory boards). See also GAO Report, *Death Care Industry, Regulation Varies Across States and by Industry Segment* ("GAO Report"), August 2003, at 11-12 (New York

requires all cemeteries to be not-for-profit corporations); Carpenter, Comment A-30, at 1; Burke, Comment 6, at 1.

³⁹ The FTC Act gives the Commission authority over "corporations," which is defined as "any company . . . which is organized to carry on business for its own profit or that of its members." 15 U.S.C. 44, 45(a)(2).

⁴⁰ AARP, Comment A-55, at 15; AIFDF, Comment A-70, at 2; BAFS, Comment 64, at 1; Infinity, Comment A-23; Bean, Comment 24, at 1; C. Brown, *Rule 1641*, 16 FR 3, 832370, at 59ul3338, at30lso 9AIFDF9 93.7396 5

partnership or corporation that sells or offers to sell funeral goods *and* funeral services to the public," the playing field is level.⁴² While it has been the traditional province of funeral homes to operate in the manner described by the Rule, the Rule is broad enough to encompass commercial cemeteries, crematories, or other businesses that market funeral goods and both types of funeral services to the public.⁴³

Another group of commenters asserted that cemeteries engage in the "tying" and "bundling" of burial goods and funeral services, that they fail to make adequate price disclosures, or that they engage in other practices prohibited by the Rule. These comments urged the expansion of the Rule to cover cemeteries by changing the definition of funeral provider to anyone who sells or offers to sell "funeral goods or funeral services to the public." In particular, the comments argued that a number of cemeteries refuse to permit consumers to purchase monuments and grave markers from another party, refuse to permit the installation of monuments and grave markers by third parties, or, alternatively, charge a "handling" fee for monuments and grave markers purchased from or installed by third parties.⁴⁴ Another comment further stated that some cemeteries require consumers to purchase grave liners, urn vaults, or expensive cremation containers.⁴⁵ AARP's comment provided statistics indicating that 29% of consumers it surveyed reported that cemeteries made representations regarding the protective or preservation qualities of certain burial goods.⁴⁶ Another comment argued that cemeteries engage in unfair practices in the sale of pre-need arrangements.⁴⁷

Other commenters opposed expansion of the Rule to cover cemetery practices, asserting that there is no evidence of widespread abuse in the cemetery industry.⁴⁸ ICFA accurately observed

that the Commission received very few complaints concerning cemeteries in the four years preceding this review, and pointed to survey data showing that consumers view cemeteries very favorably.⁴⁹ It also noted that unlike funeral homes which are run almost exclusively as for-profit businesses, many cemeteries are not-for-profit organizations run by religious groups, municipalities, and fraternal organizations.⁵⁰ Other commenters suggested that the cemetery industry is adequately regulated, or should be exclusively regulated, by the states.⁵¹

The Commission does not believe that the record developed during the regulatory review would justify initiating a rule amendment proceeding to expand the scope of the Rule to cover commercial cemeteries not operating as "funeral providers." First, there is insufficient evidence that *commercial* cemeteries are engaged in widespread practices that injure consumers. Second, even if expanding the scope of the Rule would benefit consumers who use commercial rather than non-profit cemeteries, the lopsided application of the Rule to some, but not all, cemeteries would likely prove unduly costly. There would be confusion among the general public as to what type of information they could expect to receive and what rights they have to purchase goods from third parties. To the extent additional requirements are intended to allow consumers to compare costs among cemeteries, the inconsistent application of the Rule to some cemeteries and not others could make such comparisons impossible or impractical. Thus, on the basis of this record, the Commission declines to embark on a proceeding to expand the scope of the Rule to cover cemeteries that currently are not covered.

b. Third-Party Sellers of Funeral Goods

Nearly all of the regulators, funeral providers, and consumer organizations commenting on this issue suggested that the Rule should be expanded to cover third-party sellers of funeral goods, e.g., casket retailers and monument dealers.⁵² More specifically, some

commenters advocated that third-party sellers be required to provide price lists, based on an argument that the Commission should "level the playing field."⁵³ Third-party sellers, on the other hand, argued that they already provide price lists.⁵⁴ Furthermore, they argued that there is no evidence of widespread consumer abuse in this part of the industry that would warrant such expansion of the Rule.⁵⁵

As discussed below, the Commission concludes that expansion of the Rule to cover third-party sellers is not warranted. The record is bereft of evidence indicating significant consumer injury caused by third-party sellers. Indeed, third-party retailers have a strong economic incentive to display their prices to the public at large because offering a lower price is the primary way they compete, they offer prealers.

⁴² 16 CFR 453.1(i) (emphasis added). Funeral goods are "the goods which are sold or offered for sale directly to the public for use in connection with funeral services." 16 CFR 453.1(h).

⁴³ See *supra* note 37.

⁴⁴ MBNA, Comment A-57, at 6.

⁴⁵ NSM, Comment A-54, at 16-18. In fact, the Rule acknowledges that some cemeteries require outer burial containers so that the grave will not sink in. See 16 CFR 453.3(c)(2).

⁴⁶ AARP, Comment A-55, at 4. The same AARP study showed that even those covered by the Rule apparently continue to violate it by making representations about the preservative value of a casket. The AARP survey reported that such representations were made to 34% of surveyed consumers who had viewed a casket.

⁴⁷ IFDA, Comment A-34, at 12

⁴⁸ Carpenter, Comment A-30, at 1; ICFA, Comment A-38, at 2; Neel, Comment A-14, at 3-4; WCA, Comment A-72, at 1; VA CB, Comment A-20, at 1.

⁴⁹ ICFA, Comment A-38, at 1-2 & Attachment at 11. As another commenter pointed out, however, other reasons may exist for the lack of complaints. See Bean, Comment 24 at 1.

⁵⁰ See *supra* note 38.

⁵¹ VA CB, Comment A-20 at 1-2; SCI, Comment A-59, at 1-2. According to a report issued by the General Accounting Office in 2003, 34 out of 44 states responding to its survey reported that they regulate cemeteries that are not run by religious organizations or non-profit groups. See *supra* note 38.

⁵² See, e.g., CA C&FP-1, Comment A-11, at 2; NJ DCA, Comment 56, at 1; WI DR&L, Comment 5, at

1; KS OAG, Comment A-77, at 1; Mayor Norquist, Comment A-60, at 2; Senator Schumer, Comment 19, at 1; NFDA, Comment A-56; NSM, Comment A-54, at 2, 20.

⁵³ Stradling, Comment 4, at 1 (expressing concern that consumers have no reasonable basis to compare prices and services of all the different entities in the death care industry).

⁵⁴ Gray, Comment 10b, at 1; Lamb, Comment A-68, at 1; St. George, Comment 2, at 2.

⁵⁵ BABG, Comment A-13, at 1; Oswald, Comment 51, at 1; Rapozo, Comment 18, at 1; Rubin, Comment A-47, at 1. See also Swim, Comment A-61, at 2.

⁵⁶ See 16 CFR 453.4(a)(1).

⁵⁷ 16 CFR 453.4(a)(1).

⁵⁸ CANA, Comment A-58, at 3. CANA's members include crematories and suppliers to the crematory segment of the death care industry. *Id.*

⁵⁹ FAMSA, for example, opined that some funeral providers that also offer cremation services charge a fee for identifying the body prior to cremation, and fail to offer low-cost alternative containers for cremated remains. Comment A-76, at 13-14. See also C. Graham, Comment 42, at 1; Greenlee, Comment 12, at 1; McQueen, Comment 27, at 1; Pinkerton, Comment A-63, at 2; SCI, Comment A-59; Vassar, Comment 62, at 2-3. Finally, a few comments stated that the Rule should be expanded to include all members of the death care industry, expressly or implicitly including crematories that offer only funeral services (but not funeral goods) to the public. FEA, Comment A-10, at 5,7; IFDA of DC, Comment 57, at 1; NSM, Comment A-54, at 2.

⁶⁰ For example, the Bay Area Funeral Society ("BAFS"), a San Francisco-based trade organization that represents different members of the death care industry, including some crematories, expressed the view that large corporations are monopolizing the crematory industry. BAFS, Comment 64, at 1. The Commission also received one comment from a consumer complaining about the price paid for cremation. Ordes, Comment A-28, at 1-2.

⁶¹ 16 CFR 453.4(b)(1)(ii). Services of funeral director and staff ("

⁸⁷ See, e.g., St. George, Comment 2, at 2; Rapozo, Comment 18, at 1; Vassar, Comment 62, at 1; Broussard, Comment A-24, at 1; Gray, Comment A-29, at 1; Lamb, Comment A-68, at 1; B. Brown, Comment A-75, at 2; Graham, TR at 109; Nguyen, Comment 16, at 1; NCRA, Comment 48, at 1; Cheris,

¹⁰³ See, e.g., Ceremsak, Comment 13, at 1; FAMSA, Comment A-76, at 22-24; FMS of GKC, Comment A-52, at 8-11; AARP, Comment A-55, at 19-20 (suggesting that GPL include all funeral and burial expenses). *But see* Wells, Comment 31, at 1 (stating that price lists are already too long).

¹⁰⁴ See, e.g.

¹³⁰ The only comment suggesting disclosures are needed to counter deceptive statements came from FMS of GKC. FMS of GKC stated that some funeral providers tell consumers that homemade caskets or those purchased elsewhere must comply with "any applicable state or cemetery requirement" when there are no such requirements. Comment A-52, at 12. The Rule already forbids the practice of misrepresenting any such requirements, and it specifically requires a disclosure that: "If we are required by law or by a cemetery or crematory to use any items, we will explain the reasons in writing below." 16 CFR 453.4(b)(2)(i)(B).

¹³¹ 1990 Staff Report at 144-73.

¹⁴⁴ See, e.g., FCSC, Comment 55, at 6; ICFA, Comment A-38, at 25-26; CANA, Comment A-58, at 13; NFDA, Comment A-56, at 89-90.

¹⁴⁵ See, e.g. See, e.g.

52. *Barry M. Taira*, Caskets & Urns For Less ("Taira") [Comment A-53]
53. *Michael P.A. Cohen*, National Selected Morticians ("NSM") [Comment A-54]*
54. *Jeff Kramer*, AARP [Comment A-55]*
55. *T. Scott Gilligan*, National Funeral Directors Association ("NFDA") [Comment A-56]
56. *John M. Peterson*, Monument Builders of North America ("MBNA") [Comment A-57]*
57. *Harry I. Lapin*, Cremation Association of North America ("CANA") [Comment A-58]*
58. *Service Corporation International* ("SCI") [Comment A-59]
59. *John O. Norquist*, Mayor, City of Milwaukee ("Mayor Norquist") [Comment A-60]
60. *David N. Swim*, Casket Gallery Showrooms ("Swim") [Comment A-61]
61. *David Lew*, The Casket Outlet [Comment A-62]
62. *James O. Pinkerton*, Orion C. Pinkerton Funeral Home, Inc. ("Pinkerton") [Comment A-63]
63. *Robert Prestatt*, [Comment A-64]
64. *Dennis N. Britson*, North American Cemetery Regulators Association ("NCRA") [Comment A-65]
65. *Bill Collier*, Collier Casket Co. ("Collier") [Comment A-66]*
66. *Jed Hendrickson*, Santa Barbara Monumental Co., Inc. ("Hendrickson") [Comment A-67]
67. *Richard Lamb*, Richard Lamb Funeral Service & Resource Center ("Lamb") [Comment A-68]
68. *Larry Chedotal, Sr.*, Restlawn Park Cemetery & Mausoleum, Inc. ("Chedotal") [Comment A-69]
69. *Charles E. Davis*, Association of Independent Funeral Directors of Florida ("AIFDF") [Comment A-70]
70. *Robert C. Caudle*, ("Caudle") [Comment A-71]
71. *William P. Conway*, Western Cemetery Alliance ("WCA") [Comment A-72]
72. *William P. Conway*, Interment Association of California [Comment A-73]
73. *Wanda Upper*, Arborcrest Memorial Park & Chapel Mausoleum [Comment A-74]
74. *Betty Brown*, A-Team Casket Stores & National Casket Retailer's Association ("B. Brown") [Comment A-75]*
75. *Lisa Carlson*, Funeral and Memorial Societies of America ("FAMSA") [Comment A-76]*
76. *Carla J. Stovall*, State of Kansas, Office of the Attorney General ("KS OAG") [Comment A-77]
77. *Kathie Milligan* [Comment A-78]
78. *Carolyn Jacobi*, Eternal Justice ("EJ") [Comment A-79]*
79. *Morris Nilsen*, Minnesota Funeral Directors Association [Comment A-80]
80. *Elmer Feldheim*, [Comment A-81]
81. *Charles E. Evans*, John H. Evans Funeral Home ("Evans") [Comment A-82]
82. *Don Kim*, Rainbow Casket Company ("Kim") [Comment A-83]
83. *Stephanie Lawrence*, [Comment A-84]
84. *Thomas Crean*, Family Funeral Home Association ("FFHA") [Comment A-85]
85. *Robert McAdams*, Twin Cities Cremation ("McAdams") [Comment A-86]
86. *Larry Kaplan*, National Association of Consumer Agency Administrators ("NACAA") [Comment A-87]
87. *Harold Goyette*, Lewis E. Wint and Son Funeral Home [Comment A-88]
88. *Richard F. Cody*, Resthaven Memorial Gardens [Comment A-89]
- * O : Not all referenced attachments are included in electronic form. Copies are available from the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580; 1-800-FTC-HELP.

Appendix 3

Statements Made On The Public Record

Funeral Rule Review Workshop, November 18, 1999

Sylvia Brown, Greensboro, NC

~~Macmillan, The Dallas Office, Dallas, TX~~ Service Corporation International

Appendix 2

Participant List

Funeral Rule Review Workshop, November 18, 1999

- A-55 Jeffrey A. Kramer, American Association of Retired Persons (AARP)
- A-51 Robert Karlin, California Casket Retailers Association
- A-61 David Swim, Casket Gallery Showrooms
- A-11 G. V. Ayers, Cemetery & Funeral Program of the CA Dept. of Cons. Affairs (CFP-1 of CA)
- A-58 Harvey Lapin, Cremation Association of North America (CANA)
- 54 Bill Seale, Directors Investment Group, Inc. (DIG)
- A-79 Carolyn Jacobi, Eternal Justice
- A-76 Lisa Carlson, Funeral and Memorial Societies of America (FAMSA)
- A-10 Robert Ninker, Funeral Ethics Association (FEA)
Jonathan Siedlecki, FEA
- A-52 Mercedes Bern-Klug, Funeral and Memorial Society of Greater Kansas City
- 49 Pat Graham, Graham Funeral Home (Graham)
- A-38 Paul M. Elvig, International Cemetery and Funeral Association (ICFA)
- 57 Billie Watson Hughes, Independent Funeral Directors Assoc. of the District of Columbia (IFDADC)
- A-27 Randall L. Earl, International Order of the Golden Rule (IOGR)
- A-14 Harry Neel, Jefferson Memorial Cemetery and Funeral Home
- A-57 John M. Peterson, Monument Builders of North America (MBNA)
- A-87 Jennifer L. Rawls, National Association of Consumer Agency Administrators (NACAA)
- 48 Maynard Cheris, National Casket Retailers Association, Inc.
- A-56 John Carmon, National Funeral Directors Association (NFDA)
T. Scott Gilligan, NFDA
- A-54 George W. Clarke, National Selected Morticians (NSM)
- 58 Edith Churchman, Ph.D., National Funeral Directors & Morticians Association (NFDMA)
- A-35 John S. Wallenstein, New York State Monument Builders Association (NYSMB)
- A-63 James Pinkerton, Orion C. Pinkerton Funeral Home, Inc.
- A-59 Glenn McMillen, Service Corporation International (SCI)