

Modifying Order

117 F.T.C.

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9071. Consent Order, Oct. 12, 1976--Modifying Order, May 12, 1994*

This order reopens the proceeding and modifies the Commission's 1976 consent order by deleting the administrative provisions that required the respondent to distribute a copy of the 1976 order to its funeral homes and affected employees; provide prior notice to the Commission of certain changes in its corporate organization; and periodically notify the Commission regarding the acquisition or sale of any funeral homes. The Commission concluded that these provisions were no longer warranted or were essentially duplicative of requirements in provisions in more recent Commission orders against the respondent and therefore, warranted reopening and modifying the order.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On January 12, 1994, Service Corporation International ("SCI") filed a petition to reopen the proceeding in Docket No. 9071, *Service Corp. Int'l.*, 88 FTC 530 (1976), pursuant to Section 5(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, to modify the order by deleting Parts III, VI, and VII.

On October 12, 1976, a final order was issued as a result of a consent agreement between SCI and the Commission, to resolve allegations that SCI violated Section 5 of the FTC Act in connection with the marketing of funeral services and merchandise. Part I of the order prohibits certain misrepresentations and practices in connection with the marketing of funeral services and merchandise. Part II provided for consumer redress. Part III requires SCI to transmit copies of the order to all of its funeral homes and to notify all affected employees of the order's requirements. Part IV required SCI to file a compliance report. Part V required SCI to maintain records adequate to disclose its compliance with the order and to furnish such records to the Commission upon request after reasonable notice. The record retention requirements in Part V lasted three years. Part VI

requires SCI to notify the Commission at least thirty days prior to any proposed change in SCI such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in corporate organization which may affect compliance obligations arising out of this order. Part VII requires SCI to notify the Commission by the 10th day of each month as to the acquisition or sale of any funeral homes, occurring in the immediately preceding month. Under Part VIII of the order, paragraphs A(4), B, and E of Part I were automatically deleted from the order seven years after its effective date and paragraphs A(1)-(3), C, and D of Part I were automatically amended to conform to the parallel provisions of the Commission's Funeral Rule on the date the Rule became effective.

The petition was placed on the public record on February 3, 1994. The comment period ended on March 4, 1994. The Commission did not receive any comments regarding the petition. For the reasons stated below, the Commission has determined to grant the petition and modify the order by deleting Parts III, VI, and VII.

I. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the FTC Act, 15 U.S.C. 45(b) provides that the Commission shall reopen an order to consider whether it should be modified or vacated if a respondent files a petition that makes a satisfactory showing that changed conditions of law or fact require the order to be modified or vacated. A satisfactory showing sufficient to require reopening pursuant to Section 5(b) is made when a petition to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order, or make continued application of the order inequitable or harmful to competition. Tarra Hall Clothes, Inc., Docket No. C-2797 (October 27, 1992) at 4.

In addition, Section 2.51 of the Commission's Rules invites petitioners to demonstrate in their petitions how the public interest warrants the requested reopening and modification or vacation. In considering whether modification or vacation of an order is warranted on public interest grounds, the Commission balances the reasons favoring the requested modification against any reasons not to make the modification. For example, the Commission has vacated

orders where the reasons for doing so outweighed the reasons for retaining them. *Albertson's, Inc.*, 110 FTC 1, 2 (1987); *see also Redman Industries, Inc.*, 110 FTC 636, 640 (1988) (four orders vacated on public interest grounds because they contained remedies contemplated and rejected as not beneficial to consumers in connection with a proposed rulemaking).

Regardless of whether the modification or vacation is sought because of changed conditions of law or fact or because the public interest warrants it, the burden is on the petitioner to make a satisfactory showing for the Commission to reopen the order. *See* S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). This burden is a heavy one in view of the public interest in repose and finality of Commission orders. *Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394 (1981).

II. THE COMMISSION'S DISPOSITION OF SCI'S ARGUMENTS

SCI argues that changed conditions of law and fact, and the public interest, warrant modification of the order through the deletion of Parts III, VI, and VII of the order. SCI points out that Part I of the order does not impose any conduct prohibitions on SCI different from those imposed by the Funeral Rule. SCI argues that the only order provisions that continue to impose obligations different from those imposed by the Funeral Rule are administrative provisions designed to ensure order compliance (*i.e.*, distribution of the order, notification of corporate status changes, and monthly reports of SCI's funeral home acquisitions and sales). In addition, SCI notes that it is subject to three antitrust orders that require it to report funeral home acquisitions on an annual basis for the next ten years and to notify the Commission of corporate status changes.¹

In its petition, SCI appears to argue that the promulgation of the Funeral Rule is a change of law or fact warranting modification of the order. In support, it relies upon *Kroger Co.*, 113 FTC 772 (1990), a case in which the Commission modified an order to eliminate costly

¹ *See* Service Corp. Int'l., Docket No. C-3440 (June 15, 1993); Service Corp. Int'l., Docket No. C-3372 (February 25, 1992); Sentinel Group, Inc., Docket No. C-3348 (October 23, 1991) (SCI agreed to be bound by the provisions of this order in the consent agreement arising from SCI's acquisition of Sentinel).

compliance procedures where an amendment to a trade regulation rule imposed less onerous compliance requirements than those contained in the order. SCI's reliance on Kroger is misplaced. In Kroger, the Commission modified the order because the amendments to the Retail Food Store Advertising and Marketing Practices Rule ("Unavailability Rule"), which Kroger could not have foreseen when it agreed to the order, brought the terms of the order into conflict with the Unavailability Rule and deprived Kroger of defenses that its competitors could invoke. *Id.* at 775-76.

The Commission's promulgation of the Funeral Rule was anticipated at the time the Commission issued the SCI order. Indeed, pursuant to its own terms, the order was automatically modified as a result of the Funeral Rule's promulgation. As a result, there is no conflict between the SCI order and the Funeral Rule and hence no change in law or fact warranting modification of the SCI order.

SCI further argues that the costs of Parts III, VI, and VII of the order outweigh their benefits and that for this reason modification of the order would serve the public interest. SCI cites KKR Associates, L.P., Docket No. C-3253 (May 13, 1993), in support of this proposition. SCI argues that while the three provisions it seeks to delete were intended to impose compliance obligations on SCI funeral homes that were not imposed on other funeral homes, these additional obligations are no longer warranted. SCI submits that Part III originally served a useful purpose because the Commission had an interest in having each SCI funeral home advised of the unique obligations imposed by the order. Similarly, SCI recognizes that Part VII served a useful purpose because the Commission had an interest in being apprised of changes in SCI's ownership of funeral homes so that Commission staff knew which homes were subject to the unique obligations imposed by the order. SCI further acknowledges that the Commission had an interest in being notified of extraordinary changes in SCI's corporate structure to ensure that such changes did not operate to relieve SCI funeral homes of the order's unique requirements. SCI contends, however, that these three administrative provisions no longer serve a useful purpose because the order's conduct prohibitions no longer impose any obligations different from those imposed by the Funeral Rule.

Part III provides that SCI shall "transmit copies of this order to all of respondent's funeral homes and notify, orally and in writing, all

affected employees of the requirements of this order.” The order’s conduct prohibitions were automatically amended to conform to the parallel provisions of the Commission’s Funeral Rule on the date the Rule became effective. As a result, the order cannot be understood standing alone, for it is not possible to determine what conduct the order prohibits without consulting the parallel provisions of the Funeral Rule. Accordingly, Part III of the order is no longer warranted.

Part VI provides: “That respondent notify the Federal Trade Commission at least thirty days prior to any proposed change in Service Corporation International such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in corporate organization which may affect compliance obligations arising out of this order.” This provision is perpetual and nearly identical to parallel, perpetual provisions set forth in three other Commission orders to which SCI is subject.² Therefore, it is no longer warranted.

Part VII of the order provides: “That respondent notify the Federal Trade Commission by the 10th day of each month as to the acquisition or sale of any funeral homes, occurring in the immediately preceding month.” This provision imposes on SCI a perpetual obligation to submit monthly reports of its funeral home acquisitions and sales. SCI estimates that its compliance with this requirement entails an annual cost to its legal department of about \$840, in addition to the corporate development time involved in assisting the legal department. The Commission notes that SCI’s total cost of complying with this requirement in perpetuity clearly exceeds the cost of complying with it for a limited number of years. This requirement also imposes costs to the extent that it exposes SCI to civil penalty liability if it fails to file the required monthly reports in a timely fashion.

The Commission is unaware of any other administrative order requiring monthly reports of asset acquisitions and sales. Moreover, SCI is already obliged to submit annual reports of its funeral home acquisitions until the years 2001-2003 pursuant to three antitrust consent orders, all of which require annual reports of all funeral home

² Service Corp. Int’l., Docket No. C-3440, Part XII at 9; Service Corp. Int’l., Docket No. C-3372, Part XI at 9; Sentinel Group, Inc., Docket No. C-3348, Part X at 7.

acquisitions for ten years.³ The Commission recognizes that respondent's obligation to report all acquisitions in accordance with the three outstanding antitrust orders essentially makes the reporting requirement contained in Part VII duplicative. As the Commission's needs are adequately served by receiving acquisition reports until the year 2003, Part VII is no longer warranted.⁴

III. CONCLUSION

The Commission concludes, in the public interest, that the petition should be granted to modify the order by deleting Parts III, VI, and VII.

It is therefore ordered, That the proceeding is hereby reopened and the order issued on October 12, 1976, is hereby modified to read as follows:

ORDER

DEFINITIONS

The term "*alternative container*" means, with respect to each of respondent's funeral homes owned on May 26, 1976, any receptacle or enclosure, made of any material, which is of sufficient strength and retentiveness to hold and transport human remains, and which is made available to customers at a price that does not exceed 60 percent of the retail price charged for the lowest line casket regularly offered by that funeral home as of May 26, 1976; provided, that commencing July 1, 1977, and thereafter annually, the maximum prices for alternative containers that are initially established pursuant to this order shall be adjusted to reflect changes in the Bureau of Labor Statistics' Consumer Price Index subsequent to April 1976; provided further, that with respect to each of respondent's funeral homes that is acquired after May 26, 1976, (1) respondent shall

³ Service Corp. Int'l., Docket No. C-3440, Part X at 8; Service Corp. Int'l., Docket No. C-3372, Part IX at 8; Sentinel Group, Inc., Docket No. C-3348, Part VIII at 6.

⁴ The Commission recognizes that there is not a complete overlap between Part VII of the order and the reporting requirements of the antitrust orders, in that the latter pertain only to acquisitions, while Part VII covers both sales and acquisitions. We note that the sections of the antitrust consent orders, referenced in footnote two, herein, require respondent to report certain corporate sales. We find this sufficient to meet the Commission's needs.

establish a maximum price for alternative containers at a price not exceeding the mean maximum price for alternative containers chargeable in respondent's funeral homes as of the date of acquisition, and (2) a maximum price established pursuant to (1) shall be adjusted to reflect changes in the Consumer Price Index subsequent to the date of acquisition as provided above.

The term "*casket*" means a rigid container which is designated for the encasement and burial of human remains and which is usually constructed of wood or metal, ornamented, and lined with fabric.

The term "*customer*" means the person making arrangements for the care and disposition of the body of a deceased person.

The term "*discount*" means, with regard to the sale of a particular item, a price adjustment, commission or allowance which is openly and regularly made available by third parties to respondent's funeral homes and to other similarly situated funeral homes and which would not regularly be made available to customers who sought to order that item directly from such third parties; provided, that a price adjustment, commission or allowance made available on the basis of prompt payment shall be considered a "discount" even if such an adjustment, commission or allowance would regularly be made available to customers.

The term "*effective date of this order*" means the date on which this order becomes a final order.

The term "*funeral home*" means an establishment primarily engaged in preparing the dead for final disposition and conducting funeral services.

The term "*funeral services*" means funerals in which the funeral home provides the customary services, necessary facilities and equipment, a casket and other selected merchandise.

The term "*immediate cremation service*" means the removal and disposition by cremation of the remains without embalming, viewing (except for purposes of identification) or visitation and without any pre-cremation service with the body present, which service is arranged by the funeral home.

The term "*item*" refers to both merchandise and services.

The term "*mark-up*" means the excess of the amount charged by respondent to a customer of one of respondent's funeral homes for crematory or cemetery services, pallbearers, public transportation, clergy honoraria, musicians or singers, nurses, gratuities, flowers, or

obituary notices over the net amount actually advanced, paid or owed by respondent to the third party, when such items were furnished by the third party, and when the charges for such items were listed or described as "cash advances," "accommodations," or words of similar import on the contract, final bill, or other written evidence of agreement or obligation submitted to the customer by the funeral home; provided, that it shall not be considered a mark-up when one of respondent's funeral homes charges a customer an amount for an item which exceeds the total amount of the additional or marginal costs to respondent and its subsidiaries for such items when the amount charged to the customer is a fixed and consistent amount for the entire item not exceeding \$20 and when the item consists of services rendered in whole or in part by employees of respondent or any of its subsidiaries while on duty and thereby earning other compensation from respondent or any of its subsidiaries that is not included in the additional or marginal cost described above; provided further, that any excess attributable to a discount shall not be considered a mark-up.

The term "*prescribed time period*" means the five-year period immediately preceding the effective date of this order or, with respect to any funeral home acquired by respondent or any subsidiary thereof during that five-year period, the period beginning with the date of acquisition of such funeral home and ending on the effective date of this order.

The term "*public transportation*" means nonlimousine (including as "limousines" hearses, flower cars and other funeral vehicles) transportation by common carriers for hire which is regulated by Federal or State regulatory agencies.

The term "*respondent's funeral homes*" refers to funeral homes owned or hereafter acquired and owned by respondent or a subsidiary thereof and located in the United States.

I.

It is ordered, That Service Corporation International, a corporation, and its officers, representatives, agents and employees, its successors and assigns, directly or through any corporation, subsidiary, or other device in connection with the sale or offering for sale of funeral services and funeral merchandise by and through its

funeral homes, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. When one of respondent's funeral homes arranges with a third party (including one of respondent's subsidiaries) on behalf of a customer for items to be furnished by such third party and not by the funeral home itself:

1. Charging of the customer by the funeral home for items listed or described as "cash advances," "accommodation" or words of similar import on the contract, final bill or other written evidence of agreement or obligation submitted to the customer by the funeral home, more than the amount actually advanced, paid or owed by the funeral home to such third party on behalf of the customer for such items;

2. Misrepresenting to the customer in any other respect the actual amount advanced, paid, or owed by the funeral home to such third party on behalf of the customer for items represented by the funeral home as having been furnished to the customer by such third party;

3. Listing or describing items to be furnished by the funeral home itself (or any of its employees while on duty) as "cash advances," "accommodations" or words of similar import on the contract, final bill or other written evidence of agreement or obligation submitted to the customer by the funeral home;

4. Charging of the customer by the funeral home for the following items, when furnished by such third party and not by the funeral home itself, more than the amount advanced, paid or owed by the funeral home to such third party for such items:

- a. Cemetery or crematory charges
- b. Pallbearers
- c. Public Transportation
- d. Clergy Honoraria
- e. Musicians or singers
- f. Nurses
- g. Gratuities
- h. Flowers
- i. Obituary notices

Provided, that paragraphs A(1)-(4) shall not require any of respondent's funeral homes to pass on to a customer any discount received by the funeral home if the fact that the funeral home does or may receive such discounts is disclosed to the customer in writing before the customer becomes legally obligated to pay for the funeral arrangements.

B. (1) Requiring customers of respondent's funeral homes who express interest in an immediate cremation service to purchase a casket for such a service, and failing to make available to such customers an alternative container; and (2) failing to affirmatively disclose, at the time the arrangements are made and before agreement, the availability and price of an immediate cremation service and of an alternative container to customers who (i) express interest in an immediate cremation service, (ii) inquire as to the least expensive means of disposition available at the funeral home, or (iii) inquire as to the full range of options respecting disposition of the deceased unless such customer affirmatively expresses an interest in any merchandise or service inconsistent with an immediate cremation service or with the use of an alternative container either at the time of making the inquiry or after the alternative of cremation is presented. Provided, that where one of respondent's funeral homes complies with the foregoing requirements, any of respondent's funeral homes located within two miles of such complying funeral home need not comply with the foregoing requirements if it (i) informs each customer who expresses an interest in an immediate cremation service of the availability and price of such a service at the complying funeral home, and (ii) if it has already received the body of the deceased, offers to arrange for the transfer of the remains to the complying funeral home at no extra charge to the customer for the transfer.

C. Suggesting to customers, directly or by implication, that purchase of a casket for cremation is required by State law or by crematory rule, if such is not the case.

D. Misrepresenting, by statements or suggestions, directly or by implication, the extent to which any casket, including a sealer casket, will be airtight or watertight or will prevent natural processes of decomposition or provide long-term preservation of human remains; provided, that this paragraph shall not prevent respondent's funeral homes from accurately describing, displaying or otherwise making

available to customers the written warranty or claims of the manufacturer or supplier of such casket, to the extent that such may be required for compliance with Federal Trade Commission regulations or other applicable laws.

E. Furnishing embalming or other services or merchandise in connection with readying deceased bodies for burial without obtaining prior written or oral authorization therefor; provided, that furnishing embalming or other services or merchandise to avoid irreparable deterioration of the remains or offensive odor (after having made a good faith effort to obtain permission) or to satisfy the requirements of applicable laws and regulations shall not be regarded as a violation of this order.

II.

It is further ordered,

A. That respondent shall obtain from its funeral home managers or such other persons as would reasonably be expected to be most knowledgeable of the billing practices of respondent's funeral homes a separate statement for each such funeral home which shall indicate whether during the prescribed time period the funeral home had any policy or practice of charging a mark-up, and if so, the time period during which any such policy was in effect or any such practice was utilized and the type(s) of items which were the subject of such policies or practices. For purposes of Part II of this order, a mark-up that is determined (based upon a consideration of other comparable transactions) to be attributable to an estimation error (including discrepancies attributable solely to a consistent practice of rounding off) shall not be considered to be the result of a policy or practice of charging a mark-up.

B. That respondent shall cause a firm of independent certified public accountants to perform a statistical evaluation of the accuracy of the information compiled pursuant to paragraph II(A), which evaluation shall be based on sufficient sampling(s) of respondent's documentation (including but not limited to customer contracts and funeral bills, invoices of cash advance vendors, regular and special checks paid to such vendors, "add-on and delete" forms, computer summaries of income from or expenses for individual cash advance

items, if available, and computer summaries of amounts paid to specific vendors of cash advance items, if available) for funerals contracted for during the prescribed time period to permit said accountants to conclude, with a 98 percent confidence factor, that the information compiled pursuant to paragraph II(A) and the information obtained as a result of the sampling(s) made by said accountants in performing the statistical evaluation have identified not less than 98 percent of all funerals contracted for during the prescribed time period which involved the purchase of an item which was in fact the subject of a policy or practice of charging a mark-up.

C. That respondent shall thereafter examine its files and thereby identify each customer of its funeral homes who contracted for a funeral during the prescribed time period and purchased an item which was the subject of a policy or practice of charging a mark-up; provided, that respondent shall not be required to examine its files for any funeral home for which the information compiled pursuant to paragraphs II(A) and II(B) does not disclose a policy or practice of charging any mark-ups; provided further, that with respect to each of respondent's funeral homes for which the information compiled pursuant to paragraphs II(A) and II(B) discloses a policy or practice of charging a mark-up, respondent shall be required to examine only the documentation relating to the type(s) of items disclosed in said information as having been the subject of such a policy or practice, and, for each such type(s) of item, shall be required to examine such documentation only for the time period during which said information discloses that such type of item was the subject of such a policy or practice.

D. That respondent shall cause a letter to be sent within four (4) months of the effective date of this order, by first class mail, to each customer identified pursuant to paragraph II(C), which customer as of that date has paid or caused to be paid a bill or bills in which total mark-ups in excess of \$10 were included; said letter shall advise the customer of his right to a refund as set forth below, the approximate date when such a refund will be made, and the need to inform respondent of any future change of residence or address where such refund can be delivered; provided, that with respect to customers entitled to a refund under this part of this order whose letters are returned to respondent undelivered, respondent's obligation to make

refunds to such customers shall terminate six (6) months after the effective date of this order.

E. That respondent cause a revised bill to be sent within four (4) months of the effective date of this order, by first class mail, to each customer identified in paragraph II(C), which customer as of that date has not yet paid or caused to be paid the bill or bills in which a mark-up was included, deducting the amount of the mark-up from the amount owed respondent by the customer.

F. That six (6) months after the effective date of this order, respondent prepare a list of all the customers to whom letters were sent pursuant to paragraph II(D) who have paid or caused to be paid a bill or bills in which total mark-ups in excess of \$10 were included and whose letters have not at that time been returned to respondent undelivered. The amount of refund due each such customer shall be the total of:

(1) The amount of the mark-ups paid or caused to be paid by the customer; plus

(2) A fractional share of the total amount of mark-ups paid or caused to be paid by customers whose letters sent pursuant to paragraph II(D) were returned to respondent undelivered, and a fractional share of the total amount of mark-ups of \$10 or less paid or caused to be paid by the customers identified pursuant to paragraph II(C); the numerator of each such fractional share to equal the mark-ups paid or caused to be paid by the customer, and the denominator to equal the total amount of mark-ups paid by the customers whose letters were not returned to respondent undelivered.

G. That within ten (10) days following the completion of the list described in paragraph II(F), respondent shall cause to be mailed to each customer on that list a check in an amount computed in accordance with paragraph II(F). Such payments shall complete respondent's obligations with respect to restitution under this order.

III.

It is further ordered, That respondent shall, within 60 days after the service upon it of this order, file with the Commission a report in

writing setting forth in detail the manner in which respondent is complying and intends to comply with this order.

IV.

It is further ordered, That for a period of not less than three (3) years after the effective date of this order, respondent maintain records which are adequate to disclose respondent's compliance with this order, such records to be furnished by respondent to the Federal Trade Commission upon request after reasonable notice.

V.

It is further ordered, That in the event the Federal Trade Commission promulgates a trade regulation rule regarding funeral industry practices:

A. Each provision of paragraphs A(4), B and E of Part I of this order that deals with a practice with respect to which there is no requirement or prohibition in the rule shall be automatically deleted from this order on the date the rule is promulgated, and after the rule is promulgated, each court order or Commission amendment that deletes from the rule a requirement or prohibition with respect to a practice dealt with in paragraphs A(4), B and E of Part I of this order shall, on the date such order or amendment becomes effective, cause to be automatically deleted from this order the provision dealing with the practice with respect to which there is no requirement or prohibition in the rule;

B. Each provision of Part I of this order that deals with a practice for which there are differing requirements or prohibitions in the rule shall be automatically superseded and replaced by such differing requirements or prohibitions on the date the rule becomes effective, and after the rule becomes effective, each amendment to a requirement or prohibition of the rule dealing with a practice dealt with in Part I of this order shall, on the date the amendment becomes effective, cause an identical amendment to be made to Part I of this order; provided, that if the trade regulation rule proceeding regarding funeral industry practices that was commenced on August 28, 1975 is concluded by the Federal Trade Commission without the adoption of the rule in any form, or if said proceeding is not concluded but the

rule is not promulgated in any form within five (5) years after the effective date of this order, or if the rule is promulgated in some form but for any reason does not become effective within seven (7) years after the effective date of this order, the provisions of paragraphs A(4), B and E of Part I shall, on the date the rule proceeding is concluded or at the close of the applicable time period, be automatically deleted from this order; provided further, that no exception or limitation to respondent's obligation to comply with any trade regulation rule hereafter made effective shall be implied from this order.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today grants the petition of Service Corporation International ("SCI") to reopen the order issued against it on October 12, 1976, and to modify it by setting aside paragraphs III, VI and VII. I dissent.

Today's order fails to apply the correct legal standard under which the Commission addresses petitions to reopen and modify its orders. That standard, which is partially summarized in the order is, perhaps, best articulated in *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 4, 1986) (unpublished). *Accord*, *Bulova Watch Co.*, Docket No. C-1887, Letter to Mr. Codraro, 111 FTC 766 (Jan. 19, 1989); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to Messrs. Carlsen and Arthur, 111 FTC 771 (Mar. 9, 1989); *Tarra Hall Clothes Inc.*, Docket No. C-2797, Letter to Mr. Lawrence M. Garten (Nov. 26, 1987) (unpublished) (denying petition to reopen and modify), and Letter to Mr. Garten (Oct. 27, 1992) (unpublished) (granting petition to reopen and modify); *Albertsons, Inc.*, Docket No. C-3064, 110 FTC 1 (July 1, 1987) (order granting petition to reopen and modify in public interest).

As stated in these and numerous other cases, Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified or vacated if a respondent makes a satisfactory showing that changed conditions of law or fact require the order to be modified or set aside. A petition to reopen makes such a satisfactory showing if it identifies significant changes in circumstance and shows that the changes eliminate the need for the order or make continued application of the order

inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); see *Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); Pay Less Drugstores Northwest, Inc., Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); see also *United States v. Swift & Co.*, 286 U.S. 106, 1119 (1932) (“clear showing” of changes that have eliminated reasons for order or such that the order causes unanticipated hardship).

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (Mar. 24, 1983), at 2 (hereafter “Damon Letter”) (unpublished). For example, it may be in the public interest to modify an order “to relieve any impediment to effective competition that may result from the order.” *Damon Corp.*, Docket No. 2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. *Damon Letter* at 2; see, e.g., *Chevron Corp.*, Docket No. C-3147, 3 Trade Reg. Rep. (CCH) paragraph 22,239 (Mar. 13, 1985) (public interest warrants modification where potential harm to respondent’s ability to compete outweighs any further need for order). The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. *Damon Letter* at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make “a satisfactory showing” of changed conditions to obtain reopening of the order. See also, *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (petitioner must show “exceptional circumstances, new, changed or unforeseen at the time the decree was entered”). The legislative history also makes clear that the petitioner has the burden of showing, by means other than

conclusory statements, why an order should be modified.¹ If the Commission concludes that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying Bowman Transportation standard to FTC order).

The respondent here does not make the requisite "satisfactory showing" set forth in Section 5(b) of the FTC Act, 15 U.S.C. 45(b), that "changed conditions of law or fact require [the] order to be altered, modified, or set aside, in whole or in part." Even assuming for the sake of argument that the respondent makes a sufficient showing to require reopening and consideration, it does not present changed conditions of fact or law that justify the requested modification.

The order issued today virtually ignores the standard of "affirmative need" ordinarily applied to petitions to reopen in the public interest and articulated in matters such as *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esquire (Mar. 29, 1983), and *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart, (June 5, 1986). In addition, unlike the majority, I do not believe the respondent demonstrates that the public interest in the requested modification outweighs the public interest in repose and finality of commission orders. See *Federated Department Stores v. Moitie*, 425

¹ The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979) states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient. . . . The Commission, to reemphasize, may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

U.S. 394 (1981) (strong public interest considerations support repose and finality).

The petition implies that the order should be reopened and modified because of changed conditions of law or fact, quoting Rule 2.51(b) of the Commission's Rules of Practice, and suggesting in its concluding paragraph that "[a]s set forth above, the proposed modification is warranted by changed circumstances . . ." I agree with the majority that nothing in the petition describes a changed condition of law or fact that rises to the level contemplated by the Commission's standard for reopening orders.

The majority also concludes, however, that reopening and modification are justified in the public interest. In this I cannot agree. The majority first accepts the respondent's argument that the promulgation of the Commission's Trade Regulation Rule governing Funeral Industry Practices, 16 CFR Part 453 (1993) ("Funeral Rule"), has resulted in the modification of the substantive terms of the order to conform to the applicable portions of the Rule. On this basis, the majority concludes that paragraph III of "the order cannot be understood standing alone, for it is not possible to determine what conduct the order prohibits without consulting the parallel provisions of the Funeral Rule."

Although it is true that the Funeral Rule has superseded all of the substantive requirements of the 1976 order, it does not necessarily follow from this alone that the remainder of the order, or even paragraph III, is, or should be made, defunct. Only the first clause of paragraph III is affected by the issuance of the Funeral Rule. That clause requires that the respondent distribute copies of the order to its employees; the second clause, however, requires that the respondent "notify, orally and in writing, all affected employees of the requirements of this order." The issuance of the Funeral Rule may reduce the effectiveness of distribution of the order, but it has no effect on the respondent's duty to notify its employees of the requirements of the order. A petition to reopen and modify the order to delete the distribution requirement might have met the Commission's standard.

The administrative requirements in the order currently provide a means to assess the respondent's compliance with the relevant portions of the Rule rather than the former substantive provisions of the order. They also furnish the Commission with an alternative means of enforcing the law against a respondent that the Commission has alleged violated Section 5 of the FTC Act by engaging in conduct

that, if proven, also would have violated the Funeral Rule had it been in effect. Although the Commission now might well choose to seek enforcement of the Rule rather than the order given the identical penalties available, this does not relieve the respondent of its duty to make a satisfactory showing of affirmative need for the modification sought. The present petition makes no such showing.

The Commission, in 1976, could have issued an order that would have been vacated automatically on promulgation of the Funeral Rule, but it chose not to do so. We should not simply assume, therefore, that issuance of the Rule divested the order of all purpose. Nor, on such an assumption, should we tinker with an order issued by a previous Commission without concluding, based on changed conditions or public interest considerations not presented here, that the need to modify this order outweighs the public interest in finality and repose of Commission orders in general. The question in addressing a petition to reopen and modify a Commission order is not whether today's Commission, by virtue of hindsight or greater experience, or for any other reason, has the ability, or thinks it has the ability, to write a better order than the Commission as it was composed when the order was issued. The question before the Commission is not which order would be better if we were writing on a clean slate. Rather, in assessing whether a petition states adequate grounds for granting the relief sought, the Commission must balance the alleged support for the relief against the strong public interest in finality and repose of its orders. To treat this interest lightly, diminishes the significance of our current law enforcement initiatives.

The majority concludes that "SCI's total cost of complying with [paragraph VII] in perpetuity clearly exceeds the cost of complying with it for a limited number of years" and that paragraph VII "also imposes costs to the extent that it exposes SCI to civil penalty liability if it fails to file the required monthly reports in a timely fashion." Order at 5. Nowhere does the petition or any of its attachments identify costs either to the company or to competition, let alone costs that were not contemplated or foreseeable when the respondent consented to the order in 1976.

Only at the request of the staff (at my behest), two days before the statutory deadline for issuing a decision on the petition, did the respondent offer any estimate of the costs of any of the three provisions it seeks to have set aside. Even accepting at face value the

estimate provided for compliance with paragraph VII of the order -- \$840.00 per year² -- this estimate, without more, does not appear to constitute the kind of significant and unforeseeable harm required under the Commission's standard for reopening and modifying final orders, particularly in the context of a company that, according to public sources, posted net income for the first half of 1993 of almost \$52 million and revenues for the same period of about \$441 million.³ This estimate is more than the complete absence of a showing in the respondent's petition, but it is a fragile twig, indeed, on which to hang the decision to reopen and modify a Commission order.

As the finale to its discussion of the costs of the order, the commission asserts that the reporting requirement "also imposes costs to the extent that it exposes SCI to civil penalty liability"

Order at 5. It has long been my impression, in considering a petition to reopen, that the costs of complying with the order were the costs of complying with the order, not the costs of failing to comply. If the specter of the costs of an order violation are to be used to alleviate the terms of that order, I must confess to some confusion about how we will write future orders.

As I understand it, the majority is suggesting that potential liability for violating a final order can be a basis for reopening and setting aside that order. If so, given Section 5(l) of the FTC Act, then the basis for reopening and modification arises the day the order issues. This does not compute. It should go without saying that the potential costs of violating an order, no less than the costs of complying with an order, are foreseeable and contemplated and cannot be the basis for reopening.

If the majority, instead, is focusing on the relative significance of the reporting requirement, in the context of the potential for civil penalties, the point is no less bewildering. Every order contains reporting requirements, such as periodic compliance reports and corporate change-of-form reports, that are essential to enable the Commission to monitor and enforce compliance. Respondents to such orders risk civil penalties for failure to comply with these reporting requirements as well as the conduct provisions of the order.

² Affidavit of James M. Shelger, Senior Vice President and General Counsel of SCI, May 9, 1994, at paragraph 3, submitted subject to a request for confidential treatment that was waived on behalf of the company by letter of May 12, 1994, to Robert Frisby, Esq., Federal Trade Commission, from Michael H. Byowitz, Attorney for SCI.

³ Standard & Poors, Standard Corporation Descriptions 6301 (Sept. 1993).

Never before, to my knowledge, has the Commission treated the potential civil liability for non-compliance as a basis for reopening a final order. If, in a particular case, the Commission should decide to seek penalties for a reporting failure, presumably it would consider that enforcement action sufficiently important to override the potential cost to the respondent of the penalties being sought. To cite these costs as a basis for reopening and setting aside the reporting requirements suggests that the Commission does not trust itself not to bring a frivolous civil penalty suit. Surely that is not the case.

Finally, the Commission concludes that paragraph VI “is perpetual and nearly identical to parallel, perpetual provisions set forth in three other Commission orders to which SCI is subject, and “[t]herefore, it is no longer warranted.”⁴ I agree that if the petition had met the standard for reopening, and had justified the requested setting aside of paragraph III, setting aside the remaining provisions might be considered in the nature of “housekeeping” and, therefore, might have been warranted in the public interest. Because I would not have reopened this order to begin with, I do not reach the question of harmless redundancy. For the same reason, to the extent that paragraph VII is not entirely duplicative of the pending antitrust orders, I do not address whether its setting aside would be appropriate.

The majority’s order also reflects concern over the permanence of the “fencing-in” relief in the underlying order. This concern, although valid, raises the broader issue of when and how it may be appropriate to limit the duration of Commission orders or portions thereof. I often have expressed my interest in changing our policy to “sunset” Commission orders.⁵ Sunsetting of orders, however, is not an issue that should be approached or resolved on an *ad hoc* basis. Rather, the duration of Commission orders, which, over the years, has been the subject of considerable research and contemplation both by the staff and by the Commission, should be addressed formally and deliberately by the agency in a context that will enable it to examine and weigh various approaches. Only in this manner are we likely to reach a conclusion that promotes overall fairness without undermin-

⁴ Service Corp. Int’l, Docket No. C-3440 (June 15, 1993); Service Corp. Int’l, Docket No. C-3372 (Feb. 25, 1992); and Sentinel Group, Inc., Docket No. C-3348 (Oct. 23, 1991).

⁵ E.g., Testimony before the Senate Subcommittee on the Consumer, Committee on Commerce, Science and Transportation, July 28, 1992 at 36-37. See also Letter from the Federal Trade Commission to the Honorable Jack Brooks, Chairman, House Committee on the Judiciary, Jan. 12, 1993.

ing the force and deterrent effect of Commission orders -- past, present and future.

Therefore, whatever the merits of revising the order because its fencing-in provisions have continued for a period that to the majority intuitively seems long enough, there is no justification for deciding that issue in the context of a petition to modify an existing order without insisting that the petitioner show affirmative need for relief. The Commission does so here at its peril.

The order issued today suggests to others subject to "fencing-in" provisions that do not expire by their terms that the Commission now will be more lenient than before in granting relief from those provisions. To the extent that the order conveys this suggestion, it may be expected to generate more petitions seeking to have the Commission vacate or limit similar provisions whether or not those petitioners meet the Damon standard of affirmative need.

The majority all but ignores the Commission's longstanding criteria in issuing its order in this matter. By failing to apply the traditional affirmative need standard in order to reach the public interest question and engaging, instead, in a more arbitrary analysis, today's order may convey another unfortunate message: that changes in the make-up of the Commission automatically open final orders for renegotiation aimed at having those orders vacated or rewritten on little or no empirical basis. The challenge for an enforcement agency with members appointed for staggered terms is to be flexible enough to reflect changing times, yet still to maintain a consistent and coherent legal standard for reopening and modification. The Commission today fails to meet that challenge.

I dissent.

CONCURRING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I write separately to express my view that the Commission has followed a wholly defensible and appropriate approach to the disposition of Service Corporation International's ("SCI's") petition to reopen and modify the order in Docket No. 9071. The straightforward and unencumbered analysis contained in today's Commission order hardly stems from some mere change in Commission membership and scarcely heralds the abandonment of a demonstrably superior method of evaluating petitions to modify orders. Rather, it represents a marked improvement over the labored reasoning that from time to time has plagued the Commission's decisions regarding

the "public interest" element of Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51.

I recognize that the Commission has on occasion expressed the requirement that a petitioner seeking an order modification in the public interest demonstrate, "[a]s a threshold matter . . . some affirmative need to modify the original order."¹ According to this formulation, only after the petitioner has cleared the affirmative need hurdle must the Commission proceed to balance "the reasons favoring the modification" requested against any reasons not to make that modification."² But it is precisely this creation of a separate "affirmative need" component -- not required by any statute, rule of Commission practice, or judicial precedent, and not even articulated with consistency across the spectrum of Commission rulings³ -- that has produced some of the strained decisions in this area. Those decisions have involved a tendency -- to which I have admittedly succumbed -- to find the affirmative need requirement satisfied on the basis of a very marginal showing by the petitioner. It does the Commission no credit to establish a "threshold" and then, in case after case, find that threshold crossed on the flimsiest evidence.

Today's ruling concerning SCI's petition represents an advance. Rather than declare a separate "affirmative need" requirement and then find it satisfied by the most tenuous of showings, the Commission simply balances the costs of retaining Parts III, VI, and VII of the 1976 order against the costs of deleting those provisions. Although our ruling does not expressly dwell on considerations of SCI's affirmative need for the requested order revisions, the decision

¹ Damon Corp., Docket No. C-2916, letter to Joel E. Hoffman, Esquire (March 29, 1983) at 2 ("Damon letter") (italics added); *see also* Louisiana-Pacific Corp., Docket No. C-2956, letter to John C. Hart (June 5, 1986) at 5.

² Damon letter at 2.

³ Whereas many Commission decisions reopening and modifying orders under a public interest standard have held petitioners to the requirement to demonstrate affirmative need, *see, e.g.*, Institut Merieux, S.A., Docket No. C-3301 (Order, April 22, 1994), numerous other Commission rulings have made no mention at all of such a requirement. *See, e.g.*, Tarra Hall Clothes, Inc. and Abraham Cohen, Docket No. C-2797 (Order, October 27, 1992). In fact, the Commission's denial of a petition in *Reader's Digest Association, Inc.*, 111 FTC 758 (letter to Ms. Farquhar and Ms. Blatch, January 6, 1989), constitutes the only instance in recent years in which the Commission has even mentioned Damon in responding to a petition to modify a consumer protection order. Moreover, even the letter issued in *Reader's Digest* made no mention of affirmative need, but simply cited Damon for the proposition that "the Commission may determine that the public interest warrants reopening of an order if respondent demonstrates that the order impedes competition." *Id.* at 759.

integrates affirmative need -- and the interest in the repose and finality of Commission orders -- into the array of costs and benefits that we must consider under the "public interest" rubric of Section 2.51. I cannot help but conclude that this handling of affirmative need portends a clearer, more consistent treatment of petitions to reopen and modify on public interest grounds.

Amended Complaint

117 F.T.C.

IN THE MATTER OF

SYNCHRONAL CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT
AND THE POSTAL REORGANIZATION ACT

Docket 9251. Amended Complaint, Oct. 6, 1993--Decision, May 13, 1994*

This consent order prohibits, among other things, Thomas L. Fenton, a former officer of Synchronal Corporation, from disseminating a purported baldness cure infomercial, for a product called Omexin; from misrepresenting that any commercial is an independent program; and from making unsubstantiated claims for any food, drug or device in the future.

Appearances

For the Commission: *Lisa B. Kopchik, Richard L. Cleland, Lesley A. Fair and Brian A. Dahl.*

For the respondents: *Jeffrey D. Knowles and Edward F. Glynn, Venable, Baetjer, Howard & Civiletti, Washington, D.C.*

AMENDED COMPLAINT

The Federal Trade Commission, having reason to believe that Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation, corporations; Ira Smolev, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; Richard E. Kaylor, individually and as a former officer and director of Synchronal Corporation, Synchronal Group, Inc., Smoothline Corporation, and Omexin Corporation; Thomas L. Fenton, individually and as a former officer and director of Synchronal Corporation and Synchronal Group, Inc.; and Ana Blau a/k/a Anushka, and Steven Victor, M.D., individually, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

* Complaint issued October 28, 1991. published at 116 FTC 989 (1993).