

# TRANSPARENCY IN THE FUNERAL INDUSTRY: CAN THERE BE TOO MUCH OF A GOOD THING?

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## INTRODUCTION

The Federal Trade Commission has the authority to regulate unfair acts and practices under Section 5 of the FTC Act.<sup>1</sup> With this and its authority to promulgate trade regulation rules under 16 C.F.R. § 1.8, the Commission established the Funeral Rule in 1984, and it is currently the subject of a proposed rulemaking by the Commission.<sup>2</sup>

The Funeral Rule is a price disclosure regulation, designed to ensure transparency for consumers shopping for funeral goods and services.<sup>3</sup> The Rule states:

[I]t is an unfair or deceptive act or practice for a funeral provider to fail to furnish accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and

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1. Federal Trade Commission (FTC) Act § 5, 15 U.S.C. § 45(a).

2. FTC Funeral Industry Practices Rule, 47 Fed. Reg. 42260 (proposed Sept. 24, 1982) (codified as amended at 16 C.F.R. pt. 453); Lesley Fair, *Proposed Funeral Rule Changes Under Consideration at September Workshop*, FED. TRADE COMM'N (May 17, 2023), <https://perma.cc/Z9RR-Q2LU>.

3. See *The FTC's Funeral Rule: Helping Consumers Make Informed Decisions During Difficult Times*, FED. TRADE COMM'N (July 20, 2024) [hereinafter *The FTC's Funeral Rule*], <https://perma.cc/2RXC-CVGR>.

funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals.<sup>4</sup>

The disclosures required by the Funeral Rule aim to increase price transparency—and they do.<sup>5</sup> Still, questions remain. What exactly *is* transparency under the FTC Act? How does the Funeral Rule, along with its required price disclosures, serve the goal of transparency? What sort of benefits and tradeoffs are made in this effort? And what do the discussions surrounding the current round of revisions to the Funeral Rule reveal about transparency in the deathcare industry?

This Essay considers the growing need for transparency in the deathcare sphere over the last 150 years and the Federal Trade Commission's responses to that need. First, we will explain the history of the funeral industry at a broad level, including reasons why establishing greater transparency—in the form of the Funeral Rule—was necessary. Next, we will explain the broader meaning of transparency under Section 5 of the FTC Act and the Funeral Rule. We will evaluate how the FTC has used the Funeral Rule to promote transparency through enforcement actions. Finally, we will apply these lessons to evaluate key issues that arose during the current rulemaking process.

### I. WHY TRANSPARENCY WAS NEEDED IN DEATH CARE

Consumer transparency is commonly defined as the practice of commercial businesses being open and truthful to consumers regarding their business activities.<sup>6</sup> This expansive concept includes the pricing of services and products, the collection of data from consumers, business practices, data usage, and many other issues affecting all areas of commerce.<sup>7</sup> Without transparency, businesses could mislead customers by charging unfair prices or engaging in unfair practices without accountability or repercussion. Unscrupulous businesses could trade consumer information, sell consumer data, and otherwise profit from information obtained from consumers without their knowledge. Greater transparency protects consumers by providing them with more detailed information about a business's products, services, and business practices, which in turn allows the consumer to make more informed and thoughtful

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4. FTC Funeral Industry Practices Rule, 16 C.F.R. § 453.2 (2024).

5. See *The FTC's Funeral Rule*, *supra* note 3.

6. Akileish Ramanathan, *A Detailed Guide on Customer Transparency in 2024*, DEVREV (Sept. 24, 2024), <https://perma.cc/LHC5-UDWA>.

7. *Id.*

decisions.<sup>8</sup> It promotes the relationship between consumers and businesses, because transparency builds trust.<sup>9</sup> A business that is straightforward with consumers about its prices is also more likely to be honest and ethical in other aspects of its dealings.

The type of transparency most relevant to death care is price transparency. Price transparency simply means that consumers have clear information regarding what products and services a business offers, as well as the actual cost to purchase those products and services.<sup>10</sup> This seems simple, but—as anyone who has stayed in a hotel, bought a plane ticket, or purchased a product online knows—the advertised price is not always the actual price. If you have ever canceled an online order because what seemed like a great deal turned out to be overly expensive after additional fees and costs showed up in your cart, you know exactly what a lack of price transparency feels like.

While it is one thing to nix an online purchase because you do not want to pay quite *that* much for those cute shoes, the average consumer shopping for deathcare services is in an entirely different position. A funeral is one of the most expensive purchases most consumers will ever make. It is also one that the average consumer will only make a time or two in their lifetime, so the average purchaser lacks experience and familiarity with their options. It is also often made during one of the most difficult times in the consumer's life—when they are grieving the loss of a loved one. As such, consumer transparency in death care is a sensitive and important topic that has been discussed for many decades.<sup>11</sup>

The American funeral industry began to develop in the mid-1800s.<sup>12</sup> Prior to that time, American families who experienced the death of a loved one primarily cared for the deceased on their own, in their own homes.<sup>13</sup> Over time, instead of using shrouds or homemade, hand-hewn caskets, families began to seek out local cabinet and furniture makers to build more professional, custom caskets in which to bury their loved ones.<sup>14</sup> Seeing a new market opportunity, many cabinet and furniture makers began to offer premade caskets and, eventually, embalming and mortuary services.<sup>15</sup> For a number of years, it was common to conduct all these businesses under one

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8. See Bhavya Mohan et al., *Lifting the Veil: The Benefits of Cost Transparency*, 39 MKTG. SCI. 1105, 1105 (2020).

9. *See id.*

10. *See id.* at 1106.

11. *See, e.g.*, JESSICA MITFORD, *THE AMERICAN WAY OF DEATH* 23 (1963).

12. Jennifer DiCamillo Lares & Kruti Lehenbauer, *Funeral Services: The Silent Oligopoly*, 3 RAIS J. FOR SOC. SCIS. 18, 19 (2019).

13. *Id.*

14. *Id.*

15. *Id.*

rooftop.<sup>16</sup> Wakes, now commonly called “viewings,” took place at home, and services were primarily conducted in churches, so few of these businesses needed gathering space.<sup>17</sup> Over time, however, fewer families chose to have wakes at home, and the modern funeral home was born.<sup>18</sup> By the mid-1900s, the American funeral industry was up and running.<sup>19</sup> The funeral industry had fully commercialized—and like any other industry, there were good and bad players.<sup>20</sup>

In 1963, Jessica Mitford wrote a famous exposé of the American funeral industry called *The American Way of Death*. In this book, she explained why the funeral industry operating like other commercial sectors raised core vulnerabilities.<sup>21</sup> Mitford explained: “Because of the nature of funerals, the buyer is in a quite different position from one who is, for example, in the market for a car.”<sup>22</sup> While a reasonable car consumer might solicit advice from friends or consult a consumer’s bulletin, a funeral consumer is “completely at sea without a recognizable landmark or bearing to guide him.”<sup>23</sup> Considering this discrepancy in light of the reality that a typical funeral consumer is often under emotional duress when seeking funeral services, Mitford’s book brought the power imbalance between provider and consumer to the public eye, spurring calls for consumer transparency in the American funeral industry.<sup>24</sup>

## II. SECTION 5 OF THE FTC ACT AND PRICE TRANSPARENCY

In 1890, Congress passed the Sherman Antitrust Act in an early attempt to rein in the excesses of Standard Oil.<sup>25</sup> It took another twenty years for Theodore Roosevelt’s Department of Justice to finally break apart this corporate leviathan and several more (such as Northern Securities Co. and American Tobacco).<sup>26</sup> During the process, it became clear to the Roosevelt administration that monopolies were not the only corporations putting corporate profit

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16. Virginia R. Beard & William C. Burger, *Change and Innovation in the Funeral Industry: A Typology of Motivations*, 75 OMEGA J. DEATH & DYING 47, 49–51 (2017).

17. Mattie Agüero, *Evolution of American Funerary Customs and Laws*, LIBR. OF CONG. BLOGS (Sept. 28, 2022), <https://perma.cc/4GG6-PW7N>.

18. *Id.*

19. See Joshua L. Slocum, *The Funeral Rule: Where It Came From, Why It Matters, and How to Bring It to the 21st Century*, 8 WAKE FOREST J.L. & POL’Y 89, 92–94 (2018).

20. *See id.*

21. *See generally* Mitford, *supra* note 11.

22. *Id.* at 28.

23. *Id.*

24. *Id.* at 27–28.

25. *Sherman Anti-Trust Act (1890)*, NAT’L ARCHIVES (March 15, 2022), <https://perma.cc/AD35-T74F>.

26. See Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* 7–8 (Harvard Bus. Sch., Working Paper No. 19-110, 2019).

over consumer fairness.<sup>27</sup> As a result, Roosevelt expanded the Board of Corporations to create the Federal Trade Commission in 1914.<sup>28</sup> Signed into law by Woodrow Wilson, the FTC Act was intended to prevent two core problems: (1) unfair acts of competition, and (2) unfair or deceptive acts or practices.<sup>29</sup> While the FTC Act does not give consumers a private right to sue, it provides the agency broad rulemaking and enforcement authority on their behalf.<sup>30</sup>

Section 5 of the FTC Act, which reaches further than antitrust laws such as the Sherman and Clayton Acts, focuses specifically on prohibiting unfair and deceptive trade practices.<sup>31</sup> Section 5 broadly defines an unfair practice as one that “causes or is likely to cause substantial injury to consumers” that is neither “reasonably avoidable” by such consumers nor “outweighed by countervailing benefits to consumers or to competition.”<sup>32</sup> Further, an act or practice is “deceptive” if it involves a “material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances.”<sup>33</sup> These descriptions are intentionally vague, and Congress acknowledged that the application of Section 5 would need to evolve with changing markets and business practices.<sup>34</sup>

The Supreme Court has also repeatedly held that Section 5 “does not apply only to practices that violate the Sherman Act or other antitrust laws,” but also to practices that violate Section 5 on their own.<sup>35</sup> Therefore, the FTC has the discretion to deem an act as unfair

27. *See id.*

28. *See id.* at 10–11.

29. *Federal Trade Commission Act*, FED. TRADE COMM’N (2024), <https://perma.cc/VD6J-J2KA>.

30. *See id.*

31. *See* FED. TRADE COMM’N, FEDERAL TRADE COMMISSION ACT SECTION 5: UNFAIR OR DECEPTIVE TRADE PRACTICES, CONSUMER COMPLIANCE HANDBOOK 1 (2008), <https://perma.cc/U5M6-UT8D>.

32. 15 U.S.C. § 45(n).

33. *See A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM’N (May 2021), <https://perma.cc/MZ6E-KE6B>.

34. *See* Fed. Trade Comm’n, Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act, at 2, 5 (Nov. 10, 2022) [hereinafter FTC Statement], <https://perma.cc/J2TH-TCYJ>.

35. *Id.* at 2; *see, e.g.*, *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (noting that the FTC Act’s “unfairness” standard encompasses antitrust laws and “practices that the Commission determines are against public policy for other reasons”); *Atl. Refin. Co. v. FTC*, 381 U.S. 357, 369 (1965) (holding that all that is necessary is to discover conduct “that runs counter to the public policy declared in the Act” and that “there are many unfair methods of competition that do not assume the proportions of antitrust violations”); *FTC v. Colgate-Palmolive*, 380 U.S. 377, 384–85 (1965) (noting that the proscriptions in Section 5 are flexible); *Pan Am. World Airways v. United States*, 371 U.S. 296, 306–08 (1963) (“[Section

or deceptive, such as a lack of transparency, so long as that interpretation is not outside the bounds of agency authority.<sup>36</sup>

The outcomes of various cases have also demonstrated how the FTC interprets transparency when determining whether a practice is unfair or deceptive, specifically in the context of pricing and advertising. In 2022, the Federal Trade Commission brought suit against Fleetcor Technologies, a company that marketed and sold fuel cards to primarily small and medium-size businesses with employees driving company vehicles.<sup>37</sup> The company failed to disclose numerous add-on fees prior to purchase and “late fees” that were assessed despite bills being paid on time.<sup>38</sup> The company also engaged in various other schemes to charge the purchasers more without their knowledge.<sup>39</sup> The court found that the company made “deceptive representations in advertisements and charged a slew of unauthorized, unfair fees.”<sup>40</sup> The court specifically highlighted the lack of transparency during the sales process.<sup>41</sup> The FTC made clear, by bringing the Fleetcor suit, that it considers a baseline level of pricing transparency necessary under Section 5 of the FTC Act.<sup>42</sup> The Northern District of Georgia agreed, granting summary judgment and injunctive relief in the case.<sup>43</sup>

A classic instance where the court and FTC found that an entity was engaging in deceptive advertising through a lack of transparency is the 1960 case *Giant Food, Inc. v. FTC*.<sup>44</sup> There, the FTC accused Giant Food of engaging in a deceptive practice by advertising an inflated “Regular Price” or “Manufacturer’s List Price,” then selling the item for a substantial “discount” from the supposed “Regular Price.”<sup>45</sup> In fact, Giant Food (and other competing stores) never sold the products at the high prices advertised.<sup>46</sup> As a result, consumers were misled into thinking they were benefiting from a significantly reduced sales price.<sup>47</sup> In fact, the “sale price” was the “regular price”

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5] was designed to bolster and strengthen antitrust enforcement,” and the definitions “are not limited to precise practices that can readily be cataloged. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly.”).

36. See FTC Statement, *supra* note 34.

37. *FTC v. Fleetcor Techs., Inc.*, 620 F. Supp. 3d 1268, 1279–80 (N.D. Ga. 2022).

38. *Id.* at 1285.

39. See *id.* at 1286–87.

40. *Id.* at 1279.

41. *Id.* at 1323.

42. See *id.*

43. *Id.* at 1347.

44. 322 F.2d 977 (D.C. Cir. 1963).

45. *Id.* at 980.

46. *Id.*

47. *Id.*

all along.<sup>48</sup> The lack of transparency in such advertisements could pressure consumers to purchase a product hastily and without price shopping.<sup>49</sup> As a result, consumers might overpay or make spur-of-the-moment purchases they would not otherwise make.<sup>50</sup>

As these cases establish, Section 5 of the FTC Act makes price transparency an important part of sound business practices. The FTC has challenged many unlawful business practices using its administrative authority over the last century, and courts have expressed a willingness to punish an entity's lack of transparency under various consumer protection theories. In 2022, the FTC announced its plan to aggressively enforce Section 5, making consumer transparency and accompanying issues more relevant than ever.<sup>51</sup>

### III. THE FUNERAL RULE AND PRICE TRANSPARENCY

After Jessica Mitford published her book in 1963, many consumers, advocates, and funeral service professionals favored a regulatory solution to the lack of transparency common in the industry.<sup>52</sup> At the time, there was no standardization in how funeral homes presented price information.<sup>53</sup> In response to these pressures, the Federal Trade Commission opened a trade regulation rulemaking on the issue in the mid-1970s.<sup>54</sup> This eventually resulted in the Funeral Rule, which went into effect in 1984.<sup>55</sup>

The FTC used its powers under Section 5 to prohibit unfair and deceptive trade practices in the funeral industry. Technically, this was already the law, as Section 5 already applied to funeral services

48. *See id.* (describing how Giant's "sale price" of \$13.47 was almost identical to the "regular prices" in other stores).

49. *See id.* at 981 n.11 (describing how when manufacturers label items with "retail price[s] substantially higher than the actual price to the consumer," it can lead to the "understandable inability of the price-conscious consumer to control his urge to make a 'good buy'" (quoting *Helbros Watch Co. v. FTC*, 310 F.2d 868, 869 (D.C. Cir. 1962))).

50. *See id.*

51. *See* FTC Statement, *supra* note 34, at 1.

52. *See* Gale B. Robinson, Jr., *Regulating Death: Occupational Licensing and Efficiency in the Deathcare Industry*, 29 *LOY. CONSUMER L. REV.* 343, 349–50 (2017).

53. *See* David Foos, Comment, *State Ready-to-Embalm Laws and the Modern Funeral Market: The Need for Change and Suggested Alternatives*, 2012 *MICH. ST. L. REV.* 1375, 1378 ("Testifying before a congressional committee in 1947, the famous undertaker W.W. Chambers characterized the [funeral] industry as 'the most highly specialized racket in the world.' Chambers testified that funeral homes refused to produce itemized bills because there were 'no standard prices; whatever can be charged and gotten away with is the guiding rule.'").

54. Robinson, *supra* note 52, at 350.

55. *Id.*

broadly.<sup>56</sup> However, the Funeral Rule laid out with a much greater degree of specificity what constitutes an “unfair or deceptive act or practice” in the deathcare industry.<sup>57</sup> It makes clear that price disclosure is an important part of a fair and transparent funeral transaction. Specifically, the Rule states:

In selling or offering to sell funeral goods or funeral services to the public, it is an unfair or deceptive act or practice for a funeral provider to fail to furnish accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals. Any funeral provider who complies with the preventive requirements in paragraph (b) of this section is not engaged in the unfair or deceptive acts or practices defined here.<sup>58</sup>

It further provides that in order to prevent an unfair or deceptive practice, funeral providers must (1) disclose prices to anyone who inquires about price over the telephone; (2) provide a casket price list to anyone who inquires in person about the offerings or prices of caskets or alternative containers; (3) provide an outer burial container price list to persons who inquire in person about outer burial container offerings or prices; and (4) provide an itemized general price list to persons who inquire in person about the funeral goods, funeral services or prices of funeral goods or services offered by the funeral provider.<sup>59</sup>

In addition, a funeral provider must supply the general price list once *anyone* asks about the provider’s funeral goods, services, or prices in person,<sup>60</sup> or once the provider begins to discuss certain aspects of the funeral services it offers.<sup>61</sup> The greater transparency required by the Rule “enables consumers to comparison shop and to purchase, on an itemized basis, only the goods and services they want.”<sup>62</sup>

In sum, the Funeral Rule and Section 5 aim to protect both the heightened vulnerability of the funeral consumer and the provider. The substance of the Rule offers clarity on how funeral homes can adhere to Section 5 and avoid unfair or deceptive trade practices. In doing so, it promotes greater consumer transparency by requiring

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56. See 15 U.S.C. § 45(a)(2) (describing the FTC’s broad powers to regulate unfair trade practices).

57. See FTC Funeral Industries Practices Rule, 16 C.F.R. § 453.2(a) (2024).

58. *Id.*

59. See FED. TRADE COMM’N, COMPLYING WITH THE FUNERAL RULE 2, 13–14, 17 (2019), <https://perma.cc/S2R6-5F6H>.

60. See *id.*

61. See *id.*

62. *Id.*



more price disclosures and prohibiting misleading activities on the part of the provider.

#### IV. ENFORCEMENT OF THE FUNERAL RULE BY THE FTC

The FTC has displayed its commitment to enforcing the Funeral Rule in a variety of ways. Most importantly, the FTC engages in yearly fieldwork, where it (along with representatives from state attorney generals' offices) conducts "mystery shops" of funeral homes to test their levels of compliance.<sup>63</sup>

In 2012 and 2013, the FTC brought suit against funeral homes in New York and Alabama for Funeral Rule price list violations. The FTC accused Harrison Funeral Home in New York of noncompliance with the Funeral Rule when it failed to provide itemized price lists and casket price lists to consumers at the start of in person discussions of funeral arrangements.<sup>64</sup> The FTC brought suit against Ross-Clayton Funeral Home of Montgomery, Alabama for similar reasons.<sup>65</sup> The complaint alleged that, on at least two occasions, the funeral home failed to provide a casket price list at the proper time and in the correct manner as described by the Funeral Rule.<sup>66</sup> The FTC brought both of these actions in response to undercover inspections.<sup>67</sup>

A more recent instance of FTC action against funeral providers occurred in January 2024 when the FTC sent official warning letters to thirty-nine funeral homes across the United States.<sup>68</sup> These letters came after an undercover phone sweep, where FTC representatives called more than 250 funeral homes posing as potential customers.<sup>69</sup> The investigation revealed multiple rule violations, with the most common violation being a failure to provide accurate pricing information.<sup>70</sup> In thirty-seven cases, information was provided, but the prices quoted for certain line items were materially different than

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63. See Michael Waters, *The Secret Shoppers Quietly Enforcing Federal Law*, WASH. MONTHLY (Aug. 20, 2019), <https://perma.cc/YU7S-3MYX>; see also *The FTC's Funeral Rule*, *supra* note 3.

64. Complaint, Harrison Funeral Home, Inc., No. 12-cv-3733, at 3–4 (S.D.N.Y. May 10, 2012).

65. Complaint, FTC v. Ross-Clayton Funeral Home, Inc., No. 13-cv-00851-MHT, at 4 (M.D. Ala. Nov. 21, 2013); see also Press Release, Fed. Trade Comm'n, FTC Sues Funeral Home for Failing to Disclose Prices (Dec. 4, 2013), <https://perma.cc/65PY-E8A4>.

66. See Complaint, *supra* note 65, at 4.

67. Press Release, *supra* note 65.

68. Press Release, Fed. Trade Comm'n, FTC Sends Warning Letters to Funeral Homes After First Undercover Phone Sweep (Jan. 25, 2024), <https://perma.cc/L57Q-YHLN>.

69. *Id.*

70. See *id.*

the actual price.<sup>71</sup> In the other two cases, the funeral homes failed to provide the price information as requested.<sup>72</sup>

This is not the only legal action undertaken by the FTC in response to violations of Section 5 and the Funeral Rule.<sup>73</sup> A recent example of the FTC's efforts in this area is the FTC's case against Legacy Cremation.<sup>74</sup> On April 22, 2022, the Department of Justice, on behalf of the FTC, sued the Funeral & Cremation Group of North America, LLC, Legacy Cremation Services, LLC, and their owner, Anthony Joseph Damiano, for failure to comply with the Rule and violation of the FTC Act.<sup>75</sup> The complaint alleges that Legacy Cremation engaged in two non-transparent actions in the past two years. First, Legacy misrepresented its location and prices, and it illegally charged higher prices from customers under the threat of withholding the cremated remains of their loved ones. Second, Legacy failed to provide disclosures required by the Funeral Rule.<sup>76</sup> Specifically, the FTC called out Legacy for "routinely post[ing] prices lower than consumers ultimately paid" and violating the Funeral Rule by "failing to provide consumers with a statement including the total costs of the goods and services and failing to disclose that the prices they charge for cash advance items are higher than defendants' costs for those items."<sup>77</sup>

The director of the FTC's Bureau of Consumer Protection, opining on the funeral home's lack of transparency, described Legacy's acts as "[l]ying to consumers about critical information."<sup>78</sup> The case resulted in a stipulated order for permanent injunction and monetary judgments against Legacy Cremation.<sup>79</sup> The settlement requires Legacy to (1) share important information on its website, including the general price list; (2) disclose its price list upfront; (3) provide information on third-party providers; and (4) pay a civil

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71. *See id.*

72. *See id.*

73. *See* FTC Statement, *supra* note 34, at 1.

74. Complaint, *United States v. Funeral & Cremation Grp. of N. Am., LLC*, No. 22-cv-60779-CIV-SMITH (S.D. Fla. Apr. 22, 2022).

75. *Id.* at 1–2.

76. *See id.* at 6–12.

77. Press Release, Fed. Trade Comm'n, Federal Trade Commission Alleges Funeral and Cremation Services Companies and Their Owner Misled Consumers About Their Location and Prices, and Withhold Remains to Extract Payment (Apr. 22, 2022), <https://perma.cc/SZ82-F5FB>.

78. Press Release, Fed. Trade Comm'n, FTC Action Leads to Civil Penalties, Strict Requirements for Funeral and Cremation Provider That Withheld Remains from Loves Ones to Extract Payment (Apr. 7, 2023), <https://perma.cc/63LC-7VSS>.

79. Press Release, U.S. Dep't of Just., Justice Department and FTC Obtain Settlement to Stop Deceptive Marketing Practices Involving the Sale of Funeral Goods and Services (Apr. 7, 2023), <https://perma.cc/6WHB-XRRA>.

penalty of \$275,000.<sup>80</sup> The first two requirements regarding more upfront price disclosures show the FTC's most current approach to increasing transparency and protecting consumers—requiring prices to be posted more clearly, more prominently, and even online (which is not currently required under the Funeral Rule).

Each of these instances shows the FTC's willingness to enforce the Funeral Rule and protect consumers' rights to have price transparency when making funeral or cremation arrangements.

## V. POTENTIAL UPDATES AND CHANGES TO THE FUNERAL RULE

Much has changed in the deathcare profession since the Rule was created. In February 2020, as part of its obligations to review all trade regulation rules every ten years, the FTC solicited comments on the Funeral Rule and its usefulness.<sup>81</sup> The 785 comments received revealed differing opinions among providers and consumer advocates.<sup>82</sup> Some support retention of the Rule as it currently exists, while others advocate for changes that would add to the information already required by the general price list and/or add a requirement that funeral providers to display their pricing information online and through electronic media.<sup>83</sup> A wide range of viewpoints on many issues touching the deathcare sphere were submitted.

The FTC announced in October 2022, through an advance notice of proposed rulemaking, that it would be reviewing the Rule for potential updates and changes.<sup>84</sup> The seven topic areas it sought comments about are as follows:

- (1) whether and how funeral providers should be required to display or distribute their price information online or through electronic media;
- (2) whether funeral providers should be required to disclose third party crematory or other fees on the GPL;
- (3) whether the Rule's requirements regarding reduced basic services fees should be amended;
- (4) whether the Rule

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80. Press Release, *supra* note 7.

81. Press Release, Fed. Trade Comm'n, FTC Seeks Public Comment as Part of Its Review of the Funeral Rule (Feb. 4, 2020), <https://perma.cc/SSM4-XW4N>.

82. Public Workshop Examining Potential Amendments to the Funeral Rule, 88 Fed. Reg. 33011, 33011–12 (proposed May 23, 2023) (to be codified at 16 C.F.R. pt. 453).

83. See Becca Trate, *Comments to the Federal Trade Commission Regarding Proposed Changes to the Funeral Rule*, INFO. TECH. & INNOVATION FOUND. (Jan. 17, 2023), <https://perma.cc/2QWP-KJ4N>; see also Press Release, Xavier Becerra, Att'y Gen., Cal. Dep't of Just., Attorney General Becerra Proposes Changes to the Federal Trade Commission's Funeral Rule to Provide Stronger Consumer Protections Within the Funeral Industry (Apr. 23, 2020), <https://perma.cc/FAW2-LZZU>.

84. Press Release, Fed. Trade Comm'n, FTC Extends Public Comment Period on Potential Funeral Rule Changes to January 17, 2023 (Dec. 21, 2022), <https://perma.cc/ED7V-8X5E>.

should be amended to account for new forms of disposition of human remains; (5) whether the Rule's embalming disclosure requirements should be amended; (6) whether the Rule should be changed to improve the readability of the price lists; and (7) whether changes should be made to the Rule to avoid negatively impacting underserved communities.<sup>85</sup>

In January 2023, the comment period closed.<sup>86</sup> The FTC has since held workshops discussing these comments and potential changes to the Rule, primarily centering around the issue of whether and how funeral providers should be obligated to provide price lists electronically or online.<sup>87</sup>

A few of the key discussions regarding potential changes to price disclosures include: (1) whether providers should be required to include cremation-related "cash advance" fees for the use of a third-party crematory in the price of a direct cremation; (2) whether and in what form funeral providers who maintain an online presence should be required to post their general price lists on their websites; and (3) if the Rule should require all prices to be posted on any and all social media apps on which the funeral provider is present.<sup>88</sup>

The first proposition, which would require the "direct cremation" price listed on the GPL to include third-party fees for using an outside crematory, is beneficial to all. When a consumer asks the price of a "direct cremation," only to find out later that the price does not actually include the cremation itself, they are justifiably upset. It is fundamentally deceptive to be quoted one price for a minimal service and then be presented with a bill that is several hundred dollars higher.

Many funeral homes are also advocating for this change. Firms who own their own crematories do not separate out this charge. Thus, when quoting prices for the consumer, their price is likely to appear substantially higher in comparison. However, their final price is often competitive with the firm leaving out the cost of cremation in their quote. According to the National Funeral Directors Association's 2023 Cremation and Burial Report, the U.S. cremation rate is expected to increase from an already high 60.5% in 2023 to 81.4% by 2025.<sup>89</sup> Given cremation's increasing popularity, greater price transparency will impact many consumers for the better. When consumers purchase a cremation, it should always include the cost of the actual cremation.

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85. Public Workshop Examining Potential Amendments to the Funeral Rule, 88 Fed. Reg. at 33012.

86. *Id.*

87. *Id.* at 33011.

88. Fair, *supra* note 2

89. *U.S. Cremation Rate Expected to Top 80% by 2045*, NAT'L FUNERAL DIR. ASS'N (Sept. 1, 2023), <https://perma.cc/L7UA-ZQFB>.

Much debate has ensued around the second proposition, which would require funeral providers to post their general price lists online.<sup>90</sup> As it currently stands, the Rule requires providers to distribute a general price list upon request or upon “beginning a discussion” of funeral goods, services, or arrangements.<sup>91</sup> Some funeral directors feel that the Funeral Rule’s timing is insensitive and gives families the impression that all they care about is money. The timing should be modified to permit funeral directors to discuss biographical information, learn about the deceased, and consult the family’s wishes before they discuss pricing. However, consumers should always have full pricing information before they make any purchasing decisions.

Technology has greatly changed since the Funeral Rule was last modified in 1994. Now, most funeral homes have websites or use various forms of social media, such as Facebook, Twitter, Instagram, and LinkedIn. Many deathcare industry advocates, including one of the authors of this Essay, have pointed out the benefits of putting pricing information online.<sup>92</sup> Consumers are used to shopping online and often turn to the internet first when considering a purchase of any kind—from groceries to real estate. A funeral is no different. Some consumers have revealed that they specifically chose a funeral home because it placed its general price list online.<sup>93</sup> Also, many consumers believe that a lack of readily available online pricing suggests that a product or service is very expensive. While a lack of transparent pricing does not always indicate higher expense, a consumer’s belief that it does may lead to lost business for funeral homes that choose not to display prices online.

Although most funeral homes and consumer advocates agree that placing prices online is prudent, they differ over whether and to what extent the federal government should mandate transparent pricing.<sup>94</sup>

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90. See Fair, *supra* note 2.

91. *Review of the Funeral Rule: NFDA’s Comments*, NAT’L FUNERAL DIR. ASS’N (Feb. 21, 2020), <https://perma.cc/35ZG-BRJ6>.

92. See Selected Indep. Funeral Homes, Comment Letter on the Advance Notice of Proposed Rulemaking for the Funeral Industry Practices Rule, 16 C.F.R. pt. 453, Project No. P034410, at 6–7 (Jan. 17, 2023), <https://perma.cc/L6R7-72NV>; see also Wendy Weinberg on behalf of State Att’ys Gens., Comment Letter on the Advance Notice of Proposed Rulemaking for the Funeral Industry Practices Rule, 16 C.F.R. pt. 453, Project No. P034410, at 1–3 (Apr. 22, 2020), <https://perma.cc/LS4U-ARFL>; Ctr. for the Study of Servs., Comment Letter on the Advance Notice of Proposed Rulemaking for the Funeral Industry Practices Rule, 16 C.F.R. pt. 453, Project No. P034410, at 1–2 (Dec. 30, 2022), <https://perma.cc/G9W3-HXBQ>.

93. *2023 NHFA Funeral Consumer Survey Results*, NAT’L HOME FUNERAL ALL. (Oct. 1, 2023), <https://perma.cc/4FMQ-7G9W>.

94. Compare Selected Indep. Funeral Homes, *supra* note 92 (arguing only funeral homes that “operate[] entirely online” should be required to post a price list on their websites), with Wendy Weinberg on behalf of State Att’ys Gens.,

There is almost universal support for the proposition that cremation businesses that do not have a brick-and-mortar presence, but instead conduct business entirely online, should be required to adhere to the Funeral Rule and post their pricing transparently. Many consumer advocates also argue that general price list postings should be mandatory on every funeral provider's website (assuming the provider has one, which most do) and social media outlets.<sup>95</sup> Proponents of this argument believe that such a requirement would support current trends in consumer behavior, mainly the fact that consumers do most of their shopping online, and increase competition in the funeral industry.<sup>96</sup> Supporters purport that mandating general price list disclosures online would allow consumers to compare prices more easily with other funeral providers, including those that are out of state, because they would be able to do so from their own homes.<sup>97</sup>

However, many funeral service advocates argue that this requirement may be unnecessary because online pricing is a problem that the market is solving organically. Various surveys indicate that around half of funeral homes currently post their general price lists on their websites, a number that has risen substantially in recent years.<sup>98</sup> Funeral homes understand that consumers are turning to online shopping, and more and more are choosing to present pricing information in this way.

Notably, while increased transparency is good, the average consumer in the funeral industry may find it difficult to understand the general price lists—even when they are posted online. The price lists on their own are often confusing, and according to the National Funeral Directors Association, they “do not provide information helpful to the consumer.”<sup>99</sup> Further, the words do not have meaning without context; “in order for a consumer to understand the price lists, it is essential to have a funeral director present to explain them.”<sup>100</sup> While consumers might initially appreciate having all costs

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*supra* note 92 (arguing that funeral homes should be required to post a price list on any website on which they advertise at all).

95. *See, e.g.*, Funeral Consumers All., Comment Letter on the Advance Notice of Proposed Rulemaking for the Funeral Industry Practices Rule, 16 C.F.R. pt. 453, Project No. P034410, at 1–2, 4–5 (Nov. 30, 2022), <https://perma.cc/YS96-AELJ>.

96. Ctr. for the Study of Servs., Comment Letter on the Advance Notice of Proposed Rulemaking for the Funeral Industry Practices Rule, 16 C.F.R. pt 453, Project No. P034410, at 1–2 (Dec. 30, 2022), <https://perma.cc/2AZK-WGCE>.

97. *Id.*

98. FTC Proposed Funeral Industry Practices Rule, 87 Fed. Reg. 66096, 66102 (proposed Nov. 2, 2022) (to be codified at 16 C.F.R. § 453).

99. Nat'l Funeral Dirs. Ass'n, Comment Letter on the Advance Notice of Proposed Rulemaking Workshop for the Funeral Industry Practices Rule, 16 C.F.R. pt. 453, Project No. P034410, at 1 (Oct. 12, 2023), <https://perma.cc/MV2Q-VJBC>.

100. *Id.*

in front of them to compare, transparency could have the opposite effect, confusing customers by burdening them with too many choices and not enough context to make an informed decision. In other words, the benefit expected by a requirement to post general price lists online may not be as significant as most people think.

It is also significant that over 76% of funeral homes are independently owned.<sup>101</sup> Most are small, family-run businesses that do not have an IT department maintaining their websites.<sup>102</sup> Instead, they use third-party providers to update and maintain their websites.<sup>103</sup> Thus, requiring general price lists to be posted online could disproportionately impact smaller and more local funeral homes.<sup>104</sup> But the FTC could easily solve this problem by permitting a thirty-day window for funeral homes to update general price lists online after making changes to pricing.

The third proposition, which would require all prices to be posted on any social media apps on which the funeral provider is present, is the least supported across the board. The functionality of social media apps and users' ability to exert control over such functionality is significantly less than that of websites.<sup>105</sup> Funeral providers and businesses in general have less control over their advertisements on social media apps, and such apps have a history of changing user rules and data without notifying those businesses that use their platforms to advertise.<sup>106</sup> In addition, many social media platforms are not built to pin pricing documents to the top of a feed. If anything would give consumers the impression that funeral homes care only about profits, it would be seeing a price list front and center on Facebook, Twitter, and Instagram. In sum, this proposed change does more than just prevent an unfair or deceptive trade practice—it places too high of a burden on funeral providers to post on every social media platform without much benefit, especially if prices are required to be listed on the provider's website.

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101. *Statistics*, NAT'L FUNERAL DIRS. ASS'N (Sept. 24, 2024), <https://perma.cc/6TBD-YXV4>.

102. Selected Indep. Funeral Homes, *supra* note 92.

103. *Id.*

104. Tyler Yamasaki, *Poul LeMasters: How FTC's Funeral Rule Overhaul Will Affect Your Business*, PARTINGPRO (2024), <https://perma.cc/L5WW-GRF4> (exploring the impact of the rule change on small funeral homes); *see also* Cremation Ass'n of N. Am., Comment Letter on the Advance Notice of Proposed Rulemaking Workshop for the Funeral Rule, 16 C.F.R. pt. 453, Project No. P034410 (Dec. 22, 2022), <https://perma.cc/TJ4E-2FMN>.

105. Cremation Ass'n of N. Am., Comment Letter on the Advance Notice of Proposed Rulemaking Workshop for the Funeral Industry Practices Rule, 16 C.F.R. pt. 453, Project No. P034410, at 2–3 (Oct. 13, 2023), <https://perma.cc/8TKV-HJ6Q>.

106. *See id.*

## CONCLUSION

Transparency is good for both consumers and deathcare industry providers. Although the funeral industry of years past needed greater transparency in its business practices, the FTC addressed the core of those problems when it prohibited unfair and deceptive trade practices through Section 5 of the FTC Act.<sup>107</sup> The promulgation of the Funeral Rule in 1984 clarified the meaning of “transparency” within the funeral industry, including required disclosures and requirements that death care providers readily supply pricing information to consumers. In the thirty years since the Funeral Rule was last updated, the death care world has changed greatly—and parts of the Rule have fallen behind the times. Specifically, the Commission must now balance requiring online pricing and other potential benefits of increased transparency against overreach that burdens consumer choice and limits consumers’ options.

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107. 15 U.S.C. § 45.