



February 7, 2024

Via electronic submission: <http://www.regulations.gov>

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue, NW  
Mail Stop H-144 (Annex J)  
Washington, DC 20580

**Re: Unfair or Deceptive Fees NPRM, R207011**

To Whom it May Concern:

The U.S. Chamber of Commerce (“Chamber”) appreciates the opportunity to comment to the Federal Trade Commission (“FTC” or “Commission”) regarding its proposed “Rule on Unfair or Deceptive Fees” (“Proposed Rule” or “NPRM”). The NPRM proposes imposing an economy-wide rule to regulate and prohibit so-called “hidden fees” and “misrepresented fees.”

The Chamber supports transparency in pricing. Businesses cannot be allowed to misrepresent the total cost of a product or service, or to charge consumers for products or services they did not agree to purchase. Consumers should understand what they are purchasing, and the costs associated with the purchase. However, the Proposed Rule lacks clarity regarding its application, and as written, would be technically impossible for some industries to implement, and has the potential to chill legitimate pricing practices in an attempt to cure consumer frustrations with fees.

Several factors underlie the Chamber’s assessment that the proposed rulemaking is potentially unlawful. Specifically, the NPRM implicates the Major Questions Doctrine, which requires a clear grant of rulemaking authority that Congress has not yet provided and fails to comport with the FTC Act’s Section 18 rulemaking procedures. Aside from legal considerations, the Chamber is concerned the NPRM’s economy-wide scope raises several practical issues including the risk of duplicative and overlapping regulatory regimes for certain sectors, and chilling or even prohibiting legitimate business practices. Moreover, the Commission has crafted a rule without an existing enforcement record to test the Commission’s conclusions about harmful practices or indicate limits around deceptive disclosures or incomplete pricing information.

The structure of pricing, and the level of prices, should be determined by competition in the marketplace. Competition over pricing structures is more likely to satisfy consumer preferences than overbroad regulatory requirements. Consequently, the Chamber believes that the FTC should withdraw this rulemaking. If the FTC is unwilling to withdraw the rulemaking, the Chamber identifies several areas that need further clarification and offers revisions to the Proposed Rule to better reflect the rulemaking record.

## I. The Proposed Rule Implicates the Major Questions Doctrine

The Supreme Court's *West Virginia v. Environmental Protection Agency* decision reaffirmed that federal agencies may act only within their constitutional and statutory authority.<sup>1</sup> The Court held that the "Major Questions Doctrine" requires a clear grant of authority to a federal agency promulgating certain regulations.<sup>2</sup>

The NPRM is likely to implicate the Major Questions Doctrine because (1) consumer fees and pricing are of major economic and political significance, (2) the Commission is claiming unprecedented and sweeping authority, and (3) Congress has not clearly authorized a comprehensive unfair and deceptive fees rulemaking.

### A. An Economy-Wide Rule on "Hidden Fees" or "Misleading Fees" Has Major Economic and Political Significance

The claims made by the Commission in the NPRM support the notion that a rulemaking in this area would have major economic and political significance. The NPRM itself acknowledges the significance that pricing strategies have on our economy and the sweeping application and widespread use of multi-component pricing models, partitioned pricing, differentiated pricing models, and legitimate variable pricing.

The NPRM proposes to address the prevalence and disclosure of "hidden fees," which as written, would broadly cover any fees or charges a consumer must pay for a good or service not disclosed in advertisements or at the start of a consumer's purchase. If an advertisement includes information relating to an amount a consumer may pay, the NPRM regulates how and what pricing information must be conveyed to consumers. The NPRM appears to require all-in pricing and mandates the timing and

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<sup>1</sup> *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2022) ("Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'").

<sup>2</sup> *Id.* at 2608-09.

placement of pricing disclosures.<sup>3</sup> The Commission claims that fees disclosed at a later stage of the purchasing process are deceptive “whether or not the fees are described as corresponding to goods or services that have independent value to the consumer.”<sup>4</sup> Strategies for setting, advertising, and marketing prices are core components of a functioning free-market economy and encompass nearly every aspect of consumer-facing economic activity.

Moreover, the expansive scope of the rulemaking would regulate broad swaths of the U.S. economy. The NPRM cites only a limited set of industries as alleged support for the promulgation of a rule, but the proposal is not narrowly tailored to those industries and regulates across the entire economy. In some sectors, the fees the Proposed Rule would seek to target account for a significant percentage of revenue. Moreover, the FTC’s own notice makes clear that many of these fees serve legitimate purposes and consumers are aware of applicable fees before making purchases.

#### **B. The Breadth and History of the Asserted Authority Show the NPRM Addresses Major Questions**

The breadth of the Commission’s declared authority in the NPRM implicates the Major Questions Doctrine. As noted in the proceeding section, the NPRM seeks to regulate pricing practices across a wide range of sectors and products, implicating significant political and economic questions. The FTC has never attempted to claim the advertising of price, when it is a truthful representation of a product’s price, is deceptive unless it includes all mandatory fees and charges for ancillary services. Moreover, the agency has never attempted to dictate how companies can advertise or compete on price across the entire economy.

Differing pricing strategies pursued by businesses present significant trade-offs that are more appropriately addressed by Congress than the Commission. The NPRM contemplates exempting some industries in whole or in part or allowing certain

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<sup>3</sup> See Fed. Trade Comm’n, Notice of Proposed Rulemaking: Rule on Unfair and Deceptive Fees, 88 Fed. Reg. 77420, 77483-77484 (2023), *available at* <https://www.federalregister.gov/documents/2023/11/09/2023-24234/trade-regulation-rule-on-unfair-or-deceptive-fees#citation-152-p77432>.

<sup>4</sup> Fed. Trade Comm’n, Advance Notice of Proposed Rulemaking: Unfair or Deceptive Fees Trade Regulation Rule, 87 Fed. Reg. 67413, 67413 (Nov. 8, 2022), *available at* <https://www.federalregister.gov/documents/2022/11/08/2022-24326/unfair-or-deceptive-fees-trade-regulation-rule-commission-matter-no-r207011>.

types of pricing practices.<sup>5</sup> Contemplating these trade-offs at such a fundamental level is more appropriate for the legislature, not agency rulemaking.

Similarly, the NPRM exempts some taxes and government-imposed charges from the calculation of Total Price. Without advancing any compelling policy distinction between government-imposed fees and those imposed by private sellers, the FTC decided that consumer's understanding of Total Price can exclude taxes and government-imposed fees. But while Total Price excludes government charges, companies are required to disclose "Clearly and Conspicuously," and must not misrepresent, the nature and purpose of any amount a consumer may pay, including government charges.<sup>6</sup> Businesses will be subject to civil penalties if they do not adequately disclose fees set by and defined by the government.<sup>7</sup> The consideration of taxes and government-imposed fees is Congress' domain, and in fact, Congress has pursued legislative efforts on the disclosure of sector-specific taxes and fees.<sup>8</sup>

### **C. There Is No Clear Congressional Authorization for A Comprehensive "Hidden Fees" and "Misleading Fees" Rulemaking**

An agency is required to "point to 'clear congressional authorization'" when it seeks to regulate major questions.<sup>9</sup> The NPRM notes that the Commission can seek redress for hidden or misleading fees through certain statutes enforced by the Commission, addressing pricing practices as part of telemarketing,<sup>10</sup> online sales,<sup>11</sup> subscription services,<sup>12</sup> or the funeral rule.<sup>13</sup> Thus, the Commission turns to Section 5 of the FTC Act, which it claims allows it to address deceptive or unfair acts or practices involving hidden or misleading fees.<sup>14</sup> But, Section 5 does not provide the

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<sup>5</sup> The NPRM considers whether the rule should be limited to businesses in the live-event ticketing and/or short-term lodging industries. 88 Fed. Reg. at 77441, 77481. The NPRM also considers whether to narrow the rule to focus on online-only transactions or to exempt small businesses. 88 Fed. Reg. at 77441-77442.

<sup>6</sup> 88 Fed. Reg. at 77439-77440.

<sup>7</sup> 88 Fed. Reg. at 77439.

<sup>8</sup> The Full Fare Advertising Rule, 14 CFR § 399.84.

<sup>9</sup> *West Virginia v. EPA*, 142 S. Ct. at 2614 (referencing *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

<sup>10</sup> Telemarketing Sales Rule, 16 C.F.R. § 310.

<sup>11</sup> Restore Online Shoppers' Confidence Act (ROSCA), 15 U.S.C. § 8401 et seq.

<sup>12</sup> Negative Option Rule, 16 C.F.R. § 425.

<sup>13</sup> Funeral Rule, 16 C.F.R. §453.

<sup>14</sup> 88 Fed. Reg. at 77431.

specific Congressional authority necessary to occupy the entire field of price disclosure for the entire U.S. economy, as the Commission proposes to regulate.

To the contrary, when Congress has acted to address pricing practices, it has done so expressly, often on a sectoral basis. This indicates that Congress prefers to keep pricing regulation narrow and not economywide. For example, Congress has granted the FTC narrow and targeted authority to regulate specific pricing practices.<sup>15</sup> Moreover, the NPRM seeks to regulate in some areas where it specifically lacks authority, such as insurance products or consumer financial products, which are generally regulated by the states or the Consumer Financial Protection Bureau. In addition, Congress has enacted industry-specific laws focusing on pricing practices in the airline industry,<sup>16</sup> ocean shipping,<sup>17</sup> and consumer finance sectors.<sup>18</sup> Congress has also held oversight hearings on various pricing and fee practices.<sup>19</sup> Importantly, Congress has opted not to pass legislation on specific types of pricing practices, such as live event pricing or hotels, sectors noted in the NPRM.<sup>20</sup>

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<sup>15</sup> Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102(a)(3)(c). *But see* ROSCA, 15 U.S.C. § 8403 (granting the FTC enforcement authority to regulate deceptive internet sales practices, but not granting the agency rulemaking authority to prescribe related rules). And when the FTC imposes pricing restrictions, they have done so to address practices in specific industries. *See* Funeral Rule, 16 C.F.R. § 453.2(a).

<sup>16</sup> The Full Fair Advertising Rule, 14 C.F.R. § 437.

<sup>17</sup> Ocean Shipping Reform Act of 2022, Public Law 117-146.

<sup>18</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203; The Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq.; The Credit Card Accountability Responsibility and Disclosure Act of 2009 (Card Act), Pub. L. No. 111-24, 123 Stat. 1734 (2009); the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 et seq.; Truth in Savings Act, 12 U.S.C. § 4301 et seq.

<sup>19</sup> *Proposals to Enhance Product Safety and Transparency for Americans Before the Subcomm. On Innovation, Data, and Commerce of the H. Comm. On Energy and Commerce*, 118th Cong. (2023); *Protecting Consumers from Junk Fees Before the Subcomm. On Consumer Protection, Product Safety and Data Security of the H. Comm. on Commerce, Science, and Transportation*, 118th Cong. (2023); *That's the Ticket: Promoting Competition and Protecting Consumers in Live Entertainment Before the S. Judiciary Comm.*, 118th Cong. (2023).

<sup>20</sup> Congress has introduced numerous bills to address fee disclosure issues but has not passed legislation. *See* The Hotel Fees Transparency Act of 2023, S. 2498 (2023); No Hidden FEES Act of 2023, H.R. 6543, 118th Cong. (2023); The Transparency in Charges for Key Events Ticketing Act, H.R. 3950, 118th Cong. (2023); The Better Oversight of Stub Sales and Strengthening Well Informed and Fair Transactions for Audiences of Concert Ticketing Act of 2023, H.R. 3660, 118th Cong. (2023); The Junk Fee Prevention Act, H.R. 2463 and S. 916, 118th Cong. (2023); Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act, H.R. 3248, 116<sup>th</sup> Cong. (2019).

Congress is abundantly aware of its ability to direct the Commission to promulgate specific rulemakings as well as the Commission’s limitation to seek civil penalties.<sup>21</sup> If Congress wanted the Commission to issue an economy-wide rulemaking on fees and fee disclosures, Congress would have instructed the agency to do so.

## II. The NPRM Violates the Federal Trade Commission Act

The NPRM proposed use of Section 18 to address “unfair and deceptive acts or practices” falls short of the FTC’s statutory requirements for such a rulemaking.

### A. The FTC Has Not Shown Specificity and the Rule Prohibitions Are Not Clear

Section 18 establishes several procedural requirements for the FTC to meet, including that an NPRM must state with particularity the text of the rule.<sup>22</sup> While the NPRM includes the language of the proposed rule, the standards and practices captured by the proposal lack clarity. This lack of clarity around key terms makes commenting on the Proposed Rule challenging. Below is a list of terms the Proposed Rule does not define, and which are not clear from the text of the NPRM.

#### i. *Hidden Fee Standard Lacks Clarity*

The NPRM indicates that “Total Price” includes all “mandatory” ancillary goods or services. The Commission does not define “mandatory.” The NPRM indicates that “mandatory” fees are “all fees or charges that are not reasonably avoidable” but the Proposed Rule fails to indicate what the Commission would consider “not reasonably avoidable.” Are fees that must be paid but, for which consumers can negotiate rates, reasonably avoidable or outside the Total Price? Are fees that must be paid, but vary based on region, reasonably avoidable or outside of Total Price? Are fees that must be paid, but vary based on a consumer’s choices, order volume or transaction type, reasonably avoidable such that they can be listed outside of Total Price? For example, companies may charge different processing fees depending on whether the consumer pays by ACH or credit card. But until the consumer decides how they are going to pay; the business cannot determine the mandatory processing fee. Additionally, certain types of service-related fees imposed by restaurants, delivery services, and other service providers reasonably vary based on the size or value of a consumer’s order and therefore cannot be determined until a consumer finalizes their order. Numerous fees are mandatory but variable for numerous legitimate and common-sense reasons, including for the benefit of consumers, and the NPRM does not provide clarity on how

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<sup>21</sup> *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1352 (2021).

<sup>22</sup> 15 U.S.C. § 57a(b)(1).

companies can incorporate such variable fees into the Total Price in advertising and marketing materials.

The NPRM also indicates that a “mandatory” ancillary good or service would render the primary good or service fit for its intended use.<sup>23</sup> Stated differently, businesses cannot treat a feature as optional if it is necessary to enjoy the product or service. But the Commission does not note when and how they will determine what products are required for intended use. If the majority of consumers opt into an optional feature, would that mean the feature is not truly optional? Consider a hotel that charges a nightly rate for parking but over 90% of guests opt to pay for parking. Is that charge truly optional as defined by the NPRM? It is not clear. Printers require ink to work. Does the Proposed Rule now require the price of printers to include the price of ink?<sup>24</sup>

The NPRM also indicates that Total Price captures all “fees or charges for goods or services that a reasonable consumer would expect to be included with the purchase.”<sup>25</sup> But such a definition is subjective and lacks sufficient clarity to provide the public with notice about what types of fees the NPRM seeks to address. And the NPRM does not introduce any research, workshops, case findings, or surveys to adequately cabin consumer expectations.

## *ii. Misrepresentation Standards Lack Clarity*

The NPRM similarly fails to meet the statutory requirements in its definition of “misrepresented fees.” The NPRM makes clear that businesses must disclose before a purchasing decision any amount a consumer may pay that is excluded from the Total Price. But “any fees” could be expansively large. The NPRM notes additional fees include shipping charges, government charges, voluntary gratuities, and *optional charges*. But the NPRM provides no details about what “optional charges” would be covered and if the rule requires disclosure of all customization and optional costs, even if a consumer shows no interest in specific features or offerings.

For example, would a hotel have to affirmatively disclose in a clear and conspicuous manner the cost of cancellation, room service, menu prices, internet charges, mini bar charges, spa services, parking, early check-in fees, late check-out fees, or faxing and copying services? If the hotel lists rooms online, such disclosures must be presented in an unavoidable manner before a consumer can reserve a room.

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<sup>23</sup> 88 Fed. Reg. at 77438-77439.

<sup>24</sup> It is also worth noting that the Commission has decided, arbitrarily, that one mandatory ancillary service, shipping, does not need to be disclosed upfront. The Commission did not provide an explanation for why they chose to exempt this mandatory charge versus other similar mandatory charges, like delivery.

<sup>25</sup> 88 Fed. Reg. at 77482.

Would an internet service provider have to functionally advertise the costs for services or features that a consumer has indicated they do not want to purchase because they offer bundles of telephone, internet, and television services? As companies offer more customization, it is unclear why companies must disclose all potential fees and costs for ancillary features a consumer may not even want to purchase in a “clear and conspicuous” manner. Such a requirement would greatly increase the cost to companies to disclose the additional information to consumers on websites, in-person (which would require training), over the phone (which would require training), and in writing available at different points of sale all while deluging consumers in a sea of forced disclosures that most will not find helpful or relevant. Moreover, the NPRM ignores that detailed disclosures about optional fees may create customer confusion and undermine price shopping or consumer understanding of costs.<sup>26</sup>

As drafted, the NPRM sweeps in disclosures about costs or services that may not be of interest to consumers. As discussed above, optional charges are prohibitively broad. The Proposed Rule does not attempt to differentiate between ancillary fees material to the total cost of a product over its lifecycle, versus optional features or costs that allow for product customization. The NPRM provides no clarity on the limits of optional charges that must be disclosed. The NPRM would be strengthened by studying, industry-by-industry, the types of fees that can add additional costs over a product lifecycle, consumer understanding of such fees, and effective disclosures of such fees.

#### **B. The FTC has Not Shown Widespread Misconduct that Requires or Justifies the Proposed Rule**

Under Section 18, the Commission can only initiate a rulemaking if “it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.”<sup>27</sup> Prevalence can be assessed based on previous FTC cease-and-desist orders targeting the act or practice at issue or other information indicating a “widespread pattern” of that conduct.<sup>28</sup> The Commission does not meet the standard here.

The NPRM indicates that disclosing mandatory add-on charges after the initial offer is deceptive or unfair. But the FTC lacks an enforcement record, including any case or settlement, that determined failure to disclose Total Price, as defined in the NPRM, was deceptive or unfair. The Commission has not cited to case holdings that disclosing certain fees “later” but before purchasing decisions is unfair or deceptive,

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<sup>26</sup> Disclosures of optional fees may be perceived as a potential upsell, which the agency has often viewed as a negative consumer shopping experience.

<sup>27</sup> 15 U.S.C. § 57a(b)(3).

<sup>28</sup> *Id.*



nor have courts required companies to provide all-in pricing in all transactions, as the NPRM proposes to do.

The Commission points to a limited number of settlements where the FTC alleged that companies misrepresented the costs of goods and services because certain marketing materials did not reflect all mandatory fees. None of the cases cited, however, alleged that a company's failure to disclose the total price for a product up-front was deceptive or unfair. Instead, the cases focused on the failure of companies to disclose certain applicable fees at all or adequately prior to purchase. For example, in *FTC v. LendingClub Corp.*, the FTC alleged that the loan company offered applicants specific loan amounts with "no hidden fees," but actually deducted hundreds or even thousands of dollars of loan origination fees, which were mentioned in government mandated disclosures but not in the advertisements.<sup>29</sup> In considering the summary judgment motion, the court determined it could not conclude that every reasonable trier of fact would find the net impression of the "no hidden fees" representation was likely to mislead a reasonable consumer because the company did include information about origination fees before a consumer purchased the product.<sup>30</sup> Most of the cases the Commission cites relate to allegations that companies failed to provide any disclosures, not that those disclosures came too late.

Section 5 also does not require companies to disclose all fees that might foreseeably be assessed in connection with the sale of a product or service. Section 464.3(b) of the Proposed Rule would require that all potential fees or costs must be disclosed to consumers before they consent to pay, and in the online space, such disclosures must be unavoidable. Such disclosures would not only be burdensome for businesses, but they would be equally confusing and burdensome for consumers. To support the Commission's findings that failure to "clearly and conspicuously" disclose all optional charges is deceptive or unfair, the Commission points to a few enforcement matters. Most of the cases indicate that *material terms* of the product or service were not adequately disclosed, not that all *optional fees* were not disclosed.<sup>31</sup>

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<sup>29</sup> Compl., *FTC v. LendingClub Corp.*, No. 3:18-cv-02454 (N.D. Cal. filed Apr. 25, 2018).

<sup>30</sup> Order re: Cross Motions for Summary Judgment at 13-14, 31, *FTC v. LendingClub Corp.*, No. 3:18 cv 02454 (N.D. Cal. Filed June 1, 2020).

<sup>31</sup> Compl. ¶¶ 42-50, *United States v. Funeral Cremation Grp. of N. Am., LLC* ("Legacy Cremation Servs."), No. 0:22-cv-60779 (S.D. Fla. filed Apr. 22, 2022) (alleging defendants charged consumers fees for undisclosed goods and services such as death certificates, permits, filing fees, heavy duty vinyl pouches despite representing such items were included in service package price quotes); Compl. ¶¶ 24-25, 40-42, *FTC v. AT & T Mobility LLC*, No. 3:14-cv-04785 (N.D. Cal. filed Oct. 28, 2014) (alleging defendant did not adequately disclose the limitations of defendant's data plan offerings); Compl. ¶¶ 1, 26, 39-40, *FTC v. Millennium Telecard, Inc.*, No. 2:11-cv-02479 (D.N.J. filed May 2, 2011) (alleging defendants deceptively marketed prepaid credit calling cards by failing to adequately disclose fees that substantially limited the number of minutes consumers had purchased).

Moreover, most cases identified in the NPRM are settlements. Settlements are of interest, but they do not establish facts or findings of deceptive or unfair acts or practices because defendants do not admit or deny any of the FTC's claims.

The Commission also points to State cases to support arguments for prevalence of unfair or deceptive fee practices. While State deceptive fee cases are certainly interesting, States have different legal standards for unfairness and deception. Some State UDAP laws do not require materiality when alleging deceptive practices. Some States still incorporate a public interest or unconscionable standard, rejected by Congress when they codified the FTC's unfairness standard. Relying on State cases to demonstrate prevalence of deceptive or unfair practices would allow the Commission to codify rules based on legal standards not available to the Commission.

The Commission also notes that the FTC has engaged with the public through a series of conferences and workshops as evidence of prevalence. The 2012 Bureau of Economics Conference ("2012 Conference") studying drip pricing and its impact on the market, concluded that "participants were hesitant to recommend a broad effort to regulate drip pricing because the practice is used in many industries, making it unlikely that a single policy would be optimal for all markets."<sup>32</sup> Further, the 2012 Conference indicated that firms use drip pricing for a variety of reasons, and the practice can be harmful, benign, or efficient.<sup>33</sup> The conference did not recommend regulatory strategies but instead recommended additional "empirical studies to identify disclosures that will reduce harm from drip pricing and interventions that can induce firms to use transparent pricing."<sup>34</sup>

The warning letters following the workshop that the Commission references in the NPRM focused on hotels that failed to disclose mandatory fees, such as resort fees, when quoting the reservation rate or total price. The letters did not assert that it was deceptive to advertise nightly room rates without other costs such as taxes or other fees. Moreover, since issuing those warning letters, the Commission has never brought an enforcement action alleging drip pricing was deceptive despite indicating continued use of the practice by the short-term lodging industry.

The NPRM also references a 2017 literature review on drip pricing and partitioned pricing, but that review focused only on the disclosure of resort fees. The 2019 Workshop referenced in the NPRM only addressed drip pricing related to live-entertainment ticket sales. The ticket market is unique in that it has both a primary

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<sup>32</sup> Howard A. Shelanski et al., Economics at the FTC: Drug and PBM Mergers and Drip Pricing 21 (2012), [https://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-drug-and-pbm-mergers-and-drip-pricing/shelanskietal\\_rio2012.pdf](https://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-drug-and-pbm-mergers-and-drip-pricing/shelanskietal_rio2012.pdf).

<sup>33</sup> *Id.* at 16, 17, 23-24.

<sup>34</sup> *Id.* at 24.

and secondary market for products that complicate price comparison shopping. As noted in the 2012 Conference, extrapolating the impact of pricing practices from a single industry is unlikely to be optimal for all markets.<sup>35</sup>

Instead of relying on an enforcement record of cease-and-desist orders or extensive empirical research, the Commission turns to anecdotal evidence to support its argument that deceptive and unfair fee practices are prevalent in the economy. Consumer complaints and anecdotal evidence fail to take into account the size of the market for which complaints relate. That is why the Commission has traditionally turned to enforcement records, studies and empirical data to demonstrate prevalence.

### **C. The Commission Has Not Shown Unfairness**

The FTC cannot prohibit an act or practice as unfair unless it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or to competition.”<sup>36</sup> The Commission conducts a cursory cost-benefit analysis of fees disclosed later in the purchase flow, concluding that partitioned or drip pricing does not benefit consumers or competition. But the conclusion ignores many pro-consumer and pro-competitive justifications for pricing practices that display certain fees later in the transaction.

All-in upfront pricing would likely prohibit the use of variable or dynamic pricing strategies. The distinct pricing method that alters the price of a product based on existing and relevant levels of supply and demand has the potential to adjust fees more closely to the costs for consumers. This comment will discuss variable and dynamic pricing in more depth later, but it is worth noting that the NPRM provides no reason to think that variable or dynamic pricing is necessarily deceptive or unfair across all industries and sectors of the economy. The NPRM does not adequately engage with the many contexts in which such pricing schemes may benefit consumers by allowing ultimate prices to scale with the price of the goods or services purchased. The benefits of lower prices from variable costs may justify the increase search costs associated with the partitioned pricing practices required by variable pricing strategies.

The NPRM also ignores that all-in upfront pricing requires some consumers to pay for services they do not actually use. Partitioned pricing allows consumers to pick-and-choose what they pay for. Air transportation is one example. Consumers can pay one price for a plane ticket, and pay additional fees to select a seat, check baggage, purchase food, or schedule flight changes. Unbundled prices allow those

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<sup>35</sup> *Id.* at 21.

<sup>36</sup> 15 U.S.C. § 45(b).

who want additional services to obtain it without shifting the costs to others.<sup>37</sup> Separating out fees also can be used to direct consumers to pay attention to attributes and services companies want to highlight. Separating out price can help companies differentiate product offerings because consumers pay closer attention to unbundled products or services.<sup>38</sup>

The NPRM also does not consider certain costs to consumers associated with mandating disclosures of all relevant prices and options, particularly at early stages of the search process. Comprehensive lists of potentially relevant prices and options may obscure information rather than enhance it.<sup>39</sup> Consumers may have trouble determining which information is worth paying attention to. Further, all-in upfront pricing will prevent sellers from deciding what information consumers value most. Sellers will not be able to compete on differentiating product and service fees because of the breadth of fee and cost disclosures the Proposed Rule appears to require.

### **III. The Proposed Remedies Do Not Efficiently Solve the Problems Identified by the Commission**

Commission rules should make clear the effectiveness and impact of proposed remedies. But the Proposed Rule may frustrate, rather than enhance, consumer understanding of total prices and product fees.

#### **A. Confusion from Disclosure Overload**

The Commission has proposed requirements that businesses clearly and conspicuously disclose the nature and purpose of any amount a consumer may pay that is excluded from Total Price. The Commission indicates the rule requirement “helps prevent Businesses from omitting mandatory fees from Total Price and misrepresenting the nature and purpose of fees.”<sup>40</sup> But this proposal fails to address the impact of disclosure overload from fee disclosures.

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<sup>37</sup> Howard Beales and Todd J. Zywicki, *Junkyard Dogs: The Law and Economics of “Junk” Fees* 4 (2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4446501](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4446501).

<sup>38</sup> *Id.* at 5.

<sup>39</sup> For example, in third-party marketplaces where the seller sets the prices (not the platform), consumers expect to see both the seller price and the marketplace charges. All-in upfront pricing could lead to less transparency because consumers will not know which part of the advertised price is imposed by the seller and which part by the marketplace for its services. Such bundled pricing also may make price comparisons harder.

<sup>40</sup> 88 Fed. Reg. at 77439.

Information about *all* optional costs or fees may not be relevant or valuable to consumers. Information is costly; consumers rationally focus on elements of price that are most important to their purchasing decisions. Requirements to disclose all optional fees before the consumer consents to pay and in an unavoidable manner will likely cause confusion that interferes in the shopping process. In the past, the FTC has penalized companies for burying important information among other disclosures. But with the Proposed Rule, the FTC seems to be asking for an unnecessary information overload having the unintended effect of fee obfuscation. Upfront, mandatory, overbroad disclosures may increase search costs, undermine consumer understanding of price, or undermine important information about specific features or options available to consumers. Businesses also may undergo significant costs disclosing optional fees and costs only to have such disclosures confuse or be ignored by consumers. In such a situation, consumers do not benefit from the additional disclosures and businesses bear the burden of disclosing information that undermines effective marketing of key product features and options.

The Chamber agrees that businesses should provide explanations for fees or costs associated with their products. Information about fees and costs can regularly be found in terms and conditions, websites, and through product feature pages. Such readily available information allows consumers to garner information relevant and material to their purchase decisions. But mandatory disclosures in a “Clear and Conspicuous” manner about *all* optional fees and costs, as required in section 464.3(b), could divert consumers from information they are seeking to aid purchasing decisions.

The Chamber agrees that certain fee and cost information may be relevant to most purchasing decisions and would support clear disclosures of such material terms. But the rulemaking record does not assess what fees consumers typically look for when making purchasing decisions, what fees typically add additional costs after purchase, and whether relevant fees or costs differ by industry or shopping channel.

Sellers also should be able to tailor the information they provide to attract consumers’ interest. Businesses have incentives to point out differences in products, through features and optional costs. For example, a credit card geared toward travelers may want to advertise the lack of foreign transaction fees. Mandatory disclosures of all optional costs before purchase may prevent businesses from marketing features important to consumers, undercutting a company’s ability to facilitate product sales to interested consumers.

The Proposed Rule already prohibits companies from omitting mandatory fees from Total Price and misrepresenting the nature and purpose of fees.<sup>41</sup> It is not clear

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<sup>41</sup> The Chamber notes that Total Price, as defined, is not feasible for all industries and transaction types.

from the rulemaking record that the additional obligation to disclose the nature and purpose of any amount a consumer may pay that is excluded from the Total Price drives significant consumer benefits to justify the costs to competition, businesses, or consumers. If the FTC proceeds with the rulemaking, the Chamber recommends eliminating Section 464.3(b) from the rule or limiting the disclosure to a set of material terms, as supported by empirical evidence or Commission research on fees most relevant to consumers purchasing decisions or tied to post-purchase costs paid by a significant minority of consumers.

## **B. Limitations to National Advertising Campaigns**

The Commission's mandate that all mandatory fees, except shipping charges and government fees, must be included in the total advertised price may eliminate the opportunity for national advertising campaigns.

Mandatory fees may vary by location or tie to specific franchisee costs. For example, many multichannel video distributors companies have regional sports fees that vary depending on the customer's region and the cost of local sports in that region. Requiring variable regional fees to be incorporated into a "Total Price" would require disclosure of the highest possible fee, which would be misleading to consumers because it would reflect costs for services that are not accurate.<sup>42</sup> This variation in fees, reflective of local costs, would also severely restrict the ability of companies to advertise nationally. Limitations to national advertising campaigns may result in reduced price promotion, and lead to higher prices.<sup>43</sup>

The definition of "Total Price" already excludes some prices that vary by region, like shipping charges and government charges. To the extent the Commission moves forward with the rule, the FTC should consider revising the definition of "Total Price" to exclude all charges that vary based on geographic region. Such an exception would incentivize continued national advertising campaigns. National advertisements would have to clearly and conspicuously disclose that additional, local, mandatory fees apply. But such an exception recognizes that consumers benefit from national advertising campaigns, especially when it comes to price competition.

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<sup>42</sup> Alternatively, multichannel video distributors could eliminate the regional sports fee and roll the costs of regional sports networks into the national price. If a provider did that, consumers in high-cost regions might pay less because the higher programming costs would be borne by consumers everywhere, conversely costing consumers in low-costs regions more. Forcing a national pricing strategy could undercut market dynamics.

<sup>43</sup> The Commission has previously determined that requiring mandatory fees be included in total advertised price for rental cars would reduce consumer welfare in part by reducing price promotion. FTC Report on NAAG Guidelines on Car Rental Industry Practices (Feb. 24, 1989, letter).

### C. Obscuring Availability of Lower Prices

Discounts are pro-consumer, offering cost savings and lower prices. Discounts are pro-competitive, creating incentives for price competition that can result in lower prices to consumers. Discounts are also truthful information about the price consumers will pay to acquire a product or service. “Total Price” is defined as the maximum total of all fees or charges a customer must pay for a good or service. The NPRM notes that use of the phrase “maximum total” allows companies to “apply discounts and rebates *after* disclosing the Total Price.”<sup>44</sup> The Proposed Rule requires that the Total Price is always the most prominent price information in any advertisement or offer. This construction of mandating disclosure of Total Price before advertising any discounts or rebates, or more prominently than any discounted pricing information, will have the unintended consequence of prohibiting legitimate discount practices. This construction may also have the unintended consequence of obscuring price information about the true cost of a product or service.

The Chamber is concerned that as drafted, the Proposed Rule may impact consumer’s understanding of available discounts and truthful information about lower prices. The Proposed Rule requires that Total Price be displayed more prominently than any other pricing information. That means that the Total Price for a product must be displayed more prominently than any price a consumer may pay because of a discount. If a hotel advertises “stay two nights, get the third night free,” any page reflecting the price for a three-night stay would have to more prominently display the Total Price, i.e., the cost reflective of a room rate for three nights, versus the actual cost of the reservation which only would reflect two nights.<sup>45</sup> If a grocery store advertises three pints of berries for \$10 (when a single pint costs \$5), the shop would have to advertise the maximum total for the berries (\$5 for a single unit or \$15 for three units) before the volume discount.<sup>46</sup>

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<sup>44</sup> 88 Fed. Reg. at 77439 (emphasis added).

<sup>45</sup> It is also unclear whether companies can advertise a nightly room rate that takes into consideration the discount. For example, a hotel room costs \$300 a night, but the hotel is offering the “stay two nights, get the third night free” promotion. The total cost for a three-night stay is \$600. Consumers may benefit from advertising that shows the nightly cost for the three nights is \$200 instead of \$300. But it is unclear how under the rule’s definition of Total Price, companies can advertise unit prices that reflect a discount without having that price compete against the higher Total Price. While the Chamber has used hotels as an illustrative example, this question would apply to any sale where discounts are conditioned on volume.

<sup>46</sup> Stated differently, a store could not advertise strawberries for \$3.33, with the purchase of three pints, without more prominently advertising that a single pint of strawberries costs \$5.

Emphasizing Total Price over truthful, discounted price information will create a bad outcome for consumers.<sup>47</sup> Consumers may miss savings opportunities, focusing instead on the more prominent Total Price. Consumers may also underestimate the costs savings, again focusing on the Total Price versus the actual price consumers may pay. Indeed, in some cases it will make price comparison more challenging, because companies must emphasize the “Total Price” over the true price a consumer can pay to acquire the good or service. The rulemaking record is silent on how the requirement that Total Price be the most prominent pricing information available in any offer, advertisement, or display will impact consumer’s understanding of discounts and utilization of discounts. It is not clear how the requirement that Total Price be the most prominent pricing information will impact the ability of consumers to accurately comparison shop prices that include discounts. As drafted, the rule requires companies to obscure the availability of truthful, lower prices available to consumers. This is not a good outcome for consumers.

The Chamber also is concerned that as drafted, the Proposed Rule would prohibit pro-consumer and pro-competitive discounts that indicate conditional information about potential prices. For example, many companies regularly advertise savings tied to purchase volume or amount. Companies consistently offer discounts like “Spend \$25, save \$5,” “Stay two nights, get the third night free,” or “Buy One, Get One Free.” The Proposed Rule, however, requires any offer for goods or services to display the Total Price before applying discounts. Would a company offering a “buy one pair of shoes get a second pair free” sale have to display the Total Price for all shoes subject to the discount? The NPRM does not provide any guidance about whether businesses can advertise the availability of discounts generally without also disclosing Total Price. The plain text of the Proposed Rule implies that they cannot.

Finally, the rulemaking record is silent on how the requirement that Total Price be the most prominent pricing information available in any display will impact consumer’s understanding of an invoice, online sales cart, or checkout page. As drafted, the rule would require the most prominent piece of information be the Total Price, not the final cost that a consumer will pay (which could be more when government charges are added or less depending on discounts). It is also not clear whether the Total Price requirements are easier for consumers to navigate, understand, and comparison shop than a disclosure that provides price information separate from fees. The Proposed Rule, as drafted, will introduce confusion at the point a company is trying to convey final pricing information.

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<sup>47</sup> The rule presumes that consumers benefit from understanding the price for a single unit, independent of any volume discounts, and that the prominence of that information supports comparison shopping.



#### IV. The Proposed Rule Should Preempt State Fee Pricing Laws

The FTC has indicated that one of the goals of the Proposed Rule is to create a consistent legal framework governing pricing practices. The NPRM states that “[t]he proposed rule may also provide a benefit to firms in the form of harmonized, nationwide compliance requirements.”<sup>48</sup> The Commission implies that in the absence of a federal rule, individual States may enact their own drip pricing prohibitions, and that such regulations could vary from State to State, creating significant costs to comply with the patchwork of regulation.<sup>49</sup>

But the Proposed Rule preserves state laws – including those that conflict with the rule, so long as they provide “greater protection.” While the FTC does not have the express authority to occupy the entire field of price disclosure practices, an Executive Order does recommend that agencies restrict state law in a manner necessary to achieve the objectives of promulgated regulations.<sup>50</sup> Allowing States to promulgate new rules in conflict with the FTC’s Unfair and Deceptive Fee Rule would frustrate the objective of eliminating a patchwork of regulations. The Commission cannot meet its goal of creating a consistent legal framework or consistent consumer expectations of pricing practices without preempting state up-front fee disclosure laws that are inconsistent with the proposed rule. If the FTC wants to create nationally uniform price disclosures, any final rule should take a broader position on state laws that are inconsistent with the rule. The Chamber would recommend removing Section 464.4(b) from any final rule.

Without preemption, Companies will be required to invest time and resources into programs to comply with state requirements. Further, varied state pricing disclosure laws could severely curtail national advertising campaigns as companies consider how to make varied disclosures. Further, if pricing information varied by State, it would create friction for comparison shopping and harm consumers by not creating predictable pricing information. Such an outcome would undermine the Commission’s asserted goal of harmonizing pricing disclosures.

The adoption of the Commission’s proposal without stronger preemption principles also would encourage the enactment of new state laws with differing standards. The FTC proposal makes clear that any state law affording “greater protection” than the proposed rule is “not inconsistent,” meaning it is preserved. The Commission’s preemption structure, therefore, encourages the enactment of new and more onerous state laws. Introducing variations of pricing disclosure obligations from States would undercut the benefits of a uniform pricing disclosure law.

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<sup>48</sup> 88 Fed. Reg. at 77447.

<sup>49</sup> *Id.*

<sup>50</sup> Exec. Order No. 13132, 64 Fed. Reg. 43255, Sect. 4 (Aug. 4, 1999).

## V. The Proposed Rule Does Not Contain an Adequate Cost-Benefit Analysis

The proposed rule does not provide an adequate record to support its conclusion that the quantified benefits of the proposed rule, on an economy-wide basis, are positive.

In some situations, the proposed analysis may overestimate the benefits of the rule. To estimate the reduction in average short-term lodgings viewed due to drip pricing, the Commission uses the average reduction in listings viewed under upfront pricing from an experiment in the ticketing industry.<sup>51</sup> Basing the time savings on reduction in search in an unrelated industry is unreasonable. Live-event tickets are a simple product with a single feature, access to a specific event. Consumers select hotels based on several features including location, amenities, price, brand, and availability, to name a few factors. The Commission assumes a reduction in search time without any empirical evidence supporting that conclusion, importing evidence or reduction in search time from an unrelated industry selling a markedly different product.<sup>52</sup>

The identified costs associated with the proposal for the live-event ticketing, short-term lodging, and restaurants also greatly underestimates the associated costs. The proposal would require companies to change and update their pricing practices, advertising, sign-up flows, user interfaces, and mandated notices. The times associated with those steps are grossly underestimated in the analysis.

The new disclosure requirements also will entail substantial investments by companies. Companies would have to review and revise disclosures across multiple marketing platforms, as well as test consumer understanding of disclosures to confirm adequacy of the clear and conspicuous nature of fee information. Such costs are iterative.

The analysis also fails to incorporate a number of likely costs associated with rule compliance. The analysis fails to incorporate costs associated with training time necessary to prepare staff to provide mandatory fee disclosures as part of in-person, telephone, and online sales efforts.

The cost-benefit analysis ignores that proposed requirements may limit or eliminate price advertising as companies consider reducing price information to avoid regulatory risk. Advertising of prices is linked to pro-consumer benefits including

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<sup>51</sup> 88 Fed. Reg. 77462.

<sup>52</sup> The NPRM notes that that “drip pricing literature suggests that because time to view one listing is lower under upfront pricing, there may also be a subset of consumers who view more listings because the cost of viewing an additional listing has decreased.” 88 Fed. Reg. at 77462, n. 313. The Commission assumes such additional searches are good searches. But the Commission bases its benefits on a reduced search time, not more efficient or beneficial searches.

price competition. Fewer price advertisements will limit price discovery which, in turn, will require consumers to invest greater time and effort into obtaining price information instead of conducting online research. This has the potential to lead to less informed consumers.

The analysis also ignores the potential costs associated with businesses revising pricing practices to increase product customization or to unbundle optional features in an attempt to lower base prices. The analysis does not consider the potential increase in search time associated with more complex pricing structures. The analysis does not discuss any studies or surveys that consider whether and how businesses may adjust pricing practices to account for up-front all-in pricing. For example, hotels may eliminate resort fees, but instead charge for Wi-Fi, gym access, and other amenities typically included in resort fees. While time searching to ascertain the total price for a room reservation may decrease, time searching optional features of interest to consumers may increase if hotels elect to unbundle features from nightly room rates or resort fees.

## **VI. There Are Disputed Issues of Material Fact That Should Be Resolved at an Informal Hearing.**

The Chamber believes that there are several foundational issues about the proposed rule that require additional consideration and study by the Commission. Identifying the key factual issues that must be resolved depends on the proposed rule's theory. As the ACUS noted, disputed issues of material fact necessary to be resolved can only be identified "after the major issues in the proceeding have been made as clear as possible, and with reference to specific evidence."<sup>53</sup> The Chamber recommends developing baseline information to provide the foundation for assessment of the Rule's effects and determination of potential designated issues.

### Disputed Issues of Material Fact Necessary to Be Resolved

- The Commission indicates that the definition for Total Price includes "all fees or charges for goods or services that a reasonable consumer would expect to be included with the purchase."<sup>54</sup> But the NPRM lacks any discussion of what fees or charges a reasonable consumer would expect to be included with the purchase.<sup>55</sup> This standard is subjective but the Commission offers no

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<sup>53</sup> Admin. Conf. of the U.S., Recommendation 79-1: Hybrid Rulemaking Procedures of the Federal Trade Commission 5 (1979), <https://www.acus.gov/sites/default/files/documents/79-1-with-table.pdf>.

<sup>54</sup> 88 Fed. Reg. 77482

<sup>55</sup> See Section II.A.i for additional discussion of concerns about mandatory ancillary fees.

consumer surveys or testing to demonstrate the limits or boundaries associated with consumer expectations around fees or charges. The Commission is also silent on how the agency plans to assess such consumer expectations. The Commission is silent about whether such expectations must be held by a majority of consumers, significant minority of consumers, or some other metric. This silence is compounded by the fact that the Commission lacks an enforcement record determining failure to disclose all-in upfront pricing is deceptive. Determining consumer expectations around fees or charges that must be included with a purchase is necessary foundational information to assess the proposed requirement to include Total Price more prominently than any other pricing information in advertisements, marketing materials, and offers. The Chamber recommends an informal hearing with an opportunity for cross-examination of witnesses or workshop to explore consumer expectations about fees or charges consumers expect to be included with the purchase of a product or service.<sup>56</sup>

- The rulemaking record is silent about the impact displaying Total Price more prevalent than any other pricing information will have on consumer's understanding of discounts and rebates or businesses' willingness to offer or advertise discounts or rebates. The Chamber recommends an informal hearing with an opportunity for cross-examination of witnesses or workshop to explore how displaying Total Price more prevalent than any other pricing information will impact consumer's understanding of and access to cost-saving discounts and rebates. The workshop should also explore whether the Rule's obligations will discourage companies from offering discounts and rebates and the costs to consumers from the restriction of such marketing strategies.
- The Commission assumes that consumers will benefit from pre-purchasing decision disclosures about *all* costs and fees a consumer *may* pay. In past matters, the Commission has found disclosures buried in a litany of information deceptive. The Commission does not discuss how disclosures of all fees versus material fees will aid in consumer understanding of fees or whether disclosure of all potential costs will increase consumer confusion. The Chamber recommends an informal hearing with an opportunity for cross-examination of witnesses or workshop to explore the impact of extensive fee disclosures early in the purchasing process on consumer's understanding of fees most likely to generate additional costs post-purchase or most relevant to the consumer's purchasing decision.

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<sup>56</sup> The Commission has studied consumer expectations for Commission rules and enforcement. For example, the Commission carefully studied consumer perception of "Made in the USA" claims and marketing terms like "free" and "up to".

- The Commission indicates that the practice of advertising prices that are not the full price does not benefit consumers or competition.<sup>57</sup> But partitioned and drip pricing may have pro-competitive and pro-consumer justifications.<sup>58</sup> Such practices may result in efficiencies. The NPRM noted multiple studies that indicate additional research into efficiencies from drip or partitioned pricing are necessary.<sup>59</sup> The Chamber recommends an informal hearing with an opportunity for cross-examination of witnesses or workshop to explore the pro-competitive impacts or efficiencies of partitioned or drip pricing.
- The Commission assumes that Total Price can be easily determined from the start of a transaction in all industries. The Commission ignores the practicality of implementing total up-front pricing in industries that have dynamic pricing and/or sell multiple products or services in a single transaction. For example, consumer charges associated with food delivery platforms generally fall into two distinct categories: (1) those of the food and beverage, with prices set by the restaurant; and (2) those that cover the services provided by the platform that power connecting the restaurant to the consumer and facilitating delivery on demand. The Chamber recommends an informal hearing with an opportunity for cross-examination of witnesses or workshop to explore whether a fee disclosure that complies with the Commission’s “Total Price” requirements is easier for a consumer to navigate, understand, and comparison shop than disclosures that provide item price information separate from dynamic or variable fees or where dynamic or variable fees vary, similar to shipping and carriage costs, depending on characteristics of the order not ascertainable until the consumer provides information or makes order selections.

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<sup>57</sup> 88 Fed. Reg. 77434 (“Even where the undisclosed fees are used to pay for something of value to consumers, omitting that fee from the initial price does not benefit consumers. Nor does this practice benefit competition, as it acts as a hindrance to businesses that opt to disclose the true price, as illustrated by real-world examples.”).

<sup>58</sup> Separating out price can help companies differentiate product offerings because consumers pay closer attention to products or services that have a separate price. Howard Beales and Todd J. Zywicki, *Junkyard Dogs: The Law and Economics of “Junk” Fees* 5 (2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4446501](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4446501).

<sup>59</sup> Howard A. Shelanski et al., *Economics at the FTC: Drug and PBM Mergers and Drip Pricing* 21-24 (2012), [https://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-drug-and-pbm-mergers-and-drip-pricing/shelanskietal\\_rio2012.pdf](https://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-drug-and-pbm-mergers-and-drip-pricing/shelanskietal_rio2012.pdf). The NPRM cites an article on resort fees by Mary Sullivan to support an industry-wide rule. But Sullivan indicated in a more recent publication that careful analysis is needed before adopting industry-wide regulatory action on fee disclosures. Mary Sullivan, *Regulating Junk Fees May Harm Consumers*, *The Regulatory Review* (June 9, 2023), <https://www.theregreview.org/2023/06/09/sullivan-regulating-junk-fees-may-harm-consumers/>.

## VII. Responses to Specific Questions

Below the Chamber provides responses to specific questions.

A. Question 1 asks “Should the Commission finalize the proposed rule as a final rule? Why or why not? How, if at all, should the Commission change the proposed rule in promulgating the final rule?”

As discussed above, the Chamber recommends that the Commission withdraw the rule. The Proposed Rule implicates the Major Questions Doctrine and Congress has not clearly authorized a comprehensive unfair and deceptive fees rulemaking.

Further, the Proposed Rule does not meet the requirements of the FTC Act. The FTC has not shown the requisite prevalence. The FTC cannot point to a single cease and desist order that determined disclosing fees later in the purchasing process was unfair or deceptive. Moreover, the FTC imposes an industry-wide rule based on an FTC record of consumer impact in two markets, live-event ticketing and short-term accommodations. Not only are the competitive dynamics of these markets unique compared to most industries, thereby serving as an inadequate source from which to extrapolate assumptions, but also the FTC’s own record is thin for live-event ticketing and short-term accommodations. The FTC has not brought enforcement cases related to resort fees or partitioned ticket prices, the practices at issue in FTC research, workshops, and conferences.

In addition, the FTC has not shown practices related to failure to disclose up-front all-in fees are unfair. The rulemaking record does not provide evidence that consumers across all industries and all product sales are injured from fees adequately disclosed later in the marketing or purchase process. Additionally, requiring extensive fee disclosures for ancillary fees and costs upfront would harm businesses and consumers and would not necessarily resolve consumer confusion about such ancillary fees and costs.

B. Question 10 asks “Are the proposed definitions clear? Should any changes be made to any definitions? Are any additional definitions needed?”

*i. The Rule Should Exclude Business-to-Business Transactions*

The Chamber recommends that any final rule should not apply to transactions between businesses and should adjust definitions to reflect the exclusion.

Businesses carefully track and consider costs associated with agreements related to the purchase of products and services. Businesses shop for products differently than consumers and often negotiate mandatory fees as part of the

contracting process. Contracts that are the subject of extensive bargaining between companies do not require Commission intervention, as the risk that a business would be unaware of or confused by contract terms relating to product costs and fees is lower relative to the risks posed to consumers. Transactions between businesses for goods and services present less risk than consumer transactions, and any final rule should be clear that business-to-business transactions are excluded from its scope. The NPRM introduces no evidence that partitioned pricing practices or drip pricing practices harm businesses that would justify burdening companies with overly prescriptive requirements governing their agreements with business customers.

Accordingly, the Chamber recommends limiting the coverage of the rule to consumer transactions versus business-to-business transactions by adding a new definition for “Consumer.” Any final rule should define “Consumer” as “an individual who obtains a product or service that is to be used primarily for personal, family, or household purposes.”

*ii. The Rule Should Exclude Delivery Fees and Fees Associated with Delivery Logistics from Total Price*

While fees for facilitating delivery are likely to be optional charges for many businesses, there are some services that require the use of delivery. For example, grocery stores offering delivery charge consumers for facilitating delivery in addition to the prices of grocery items ordered. Furniture stores often require delivery of furniture.

The Proposed Rule allows companies to exclude shipping charges from the Total Price. Shipping charges reflect the amount a business incurs to send physical goods to consumers and there are savings to consumers from allowing companies to break out the charges from the cost of goods. Like shipping costs, fees associated with delivery logistics<sup>60</sup> also reflect costs to businesses to physically get goods to a consumer.<sup>61</sup> Such charges are challenging to amortize across all items. Accordingly, the Chamber recommends excluding delivery fees and fees for facilitating delivery from the calculation of “Total Cost.”<sup>62</sup>

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<sup>60</sup> The Chamber notes that the reference to delivery fees also include fees associated with courier and on-demand delivery.

<sup>61</sup> It is also worth noting that excluding shipping but not delivery unfairly preferences some companies over others. A national furniture company that ships through UPS, FedEx or the mail does not have to incorporate fees to transport products to the consumer, but a company that offers a white glove delivery service or hires a local company to hand-deliver furniture would have to incorporate transportation costs into any advertised price.

<sup>62</sup> States have passed legislation recognizing the unique costs associated with delivery. California’s SB 478 allows food delivery platforms to list the price of menu items set by a food facility separate from delivery charges.

iii. *The Rule Should Exclude Government Fees that are Permitted to Be Passed to Customers from the “Total Price”*

The Proposed Rule limits “Government Charges” to fees imposed by the government on consumers and does not cover fees or charges that the Government permits but does not require be passed along to customers. But several regulatory fees are explicitly permitted to be passed along to customers.<sup>63</sup> Moreover, various state, county, and local governments characterize their government-imposed charges differently, creating significant variation as to what government charges companies must include in “Total Price” and customer confusion about government charges.

The goal in permitting a pass through of fees is to promote bill transparency for customers and to promote government accountability. Customers should understand when government fees impact the prices they pay for goods and services. Allowing a broader definition of “Government Charges” would create more consistent application of fees excluded from the “Total Price.”

**C. Question 12 asks “Should the proposed definition for “Business” exclude certain businesses, and if so, why?”**

As discussed above, the Chamber recommends that the rule requirements not apply to business-to-business transactions. Businesses are sophisticated consumers, and the rulemaking record does not provide evidence of harm to businesses from partitioned pricing practices that would justify burdening companies with overly prescriptive requirements governing their agreements with business consumers.

Further, the Chamber recommends the definition for “Business” should exclude industries that cannot accurately predict total upfront prices. There are many industries that include mandatory charges for services that cannot be calculated until a consumer expresses preferences, or if added to a Total Price quote would likely raise prices for consumers.

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<sup>63</sup> For example, Section 622(c) of the Communications Act permits cable operators to identify franchise fees, public, educational, and governmental access (PEG) fees, and other fees, taxes, assessments, or other charges imposed by the government “as a separate line item on each regular bill of each subscriber.” 47 U.S.C. § 542(c). In addition, multichannel video programming distributors are required to itemize on subscriber bills the total amount charged for or relating to the provision of the multichannel video programming service, broken down by the amount charged for the provision of the service itself and the amount of all related taxes, administrative fees, equipment fees, or other charges. See 47 U.S.C. §§ 562(a)(1) & (b)(1).



*i. Subscription Services Cannot Accurately Predict Total Upfront Prices*

The Proposed Rule should not cover the advertising of prices for subscription services, or in the alternative, should make clear that it allows for price advertising of subscription services, without requiring recurring fees to reflect adequately disclosed fixed, one-time fees. Examples of fixed, one-time fees include sign-up fees, account initiation fees, and installation fees. It is difficult for companies to estimate how such fees will amortize over a consumer's subscription period. For example, if a cable company charges a \$120 installation fee (a mandatory charge for all consumers) and the company assumes that most consumers remain with the business for a year, the company may elect to add \$10 to the monthly cable bill to cover the installation service. But if the customer remains past a year, they will overpay for the installation. Moreover, if one-time fees must be added to recurring charges, it may result in the increase of termination or cancellation charges so that companies can guarantee recovery of one-time fees. Increased cancellation charges will inevitably create friction for consumers looking to switch services to take advantage of price competition or avoid bad service. The Rule is silent on how Companies are expected to market recurring charges with fixed one-time fees. As such, the Chamber notes the definition of Total Price or the definition of Business must make clear how such charges should be marketed, or in the alternative, should exempt them from the rule.

Additionally, the Proposed Rule requires that businesses provide fee disclosures before a consumer consents to pay for a product or service. It is not clear from the Proposed Rule when and how often businesses offering recurring subscriptions must provide fee disclosures. The rulemaking record is silent on what frequency of fee disclosures associated with recurring subscriptions would benefit consumers, or the costs associated with mandating disclosures on a recurring basis. Accordingly, the Chamber recommends excluding subscription services from the Proposed Rule.

*ii. The Rule Should Exclude Variable Prices from Total Price*

Any final rule should allow companies to advertise price without reflecting variable and dynamic pricing in "Total Price." The exclusion would be reasonable so long as the total purchase price, inclusive of variable or dynamic fees, is adequately disclosed to consumers before purchase. As discussed in Sections A.i and III.B, mandatory fees that vary based on volume, transaction type, and region cannot be assessed until consumers take some action. Requiring that mandatory but variable fees be included in "Total Price" could less efficiently spread costs, undermine consumer choice and eliminate price competition on certain cost inputs.

The NPRM also provides no reason to think that variable or dynamic pricing is necessarily deceptive or unfair across all industries and sectors of the economy. The

NPRM is silent on the many contexts in which variable and dynamic pricing schemes benefit consumers by allowing ultimate prices to scale with the price of goods or services purchased, or to reflect current supply and demand considerations. For example, the fees associated with food delivery reflect a wide variety of dynamic factors including, but not limited to, the number of available delivery drivers, the distance for delivery, the volume of competing delivery requests, and the size of the consumer's order. Consumers benefit when such fees can adjust downwards for a delivery at 3 PM on a sunny day that requires a short distance to be traveled. If fees cannot reflect the dynamic nature of the market, businesses are likely to charge more for such services. Advertised prices cannot reflect dynamic prices until consumers input specific information or make purchasing selections. Accordingly, companies are likely to eliminate dynamic pricing since they cannot accurately or practically predict the costs for inclusion in total upfront costs.

The rulemaking record does not consider the impact from elimination of variable and dynamic prices. Elimination of variable and dynamic prices likely will result in higher base prices as companies add significant margins to cover variable costs. The Proposed Rule eliminates a pro-consumer pricing practice on a nationwide, economy-wide scale without evidence that such pricing is consistently implemented in an unfair or deceptive manner or that the added search time potentially associated with dynamic and variable fees is not outweighed by the benefits of cost savings.

**iii. *The Rule Should Exempt Industries with Pre-existing Advertising Regulations.***

As discussed further below,<sup>64</sup> the Chamber recommends excluding other businesses and industries with price advertising practices heavily regulated at the federal and state level. Examples of industries with heavily regulated pricing practices include advertising and marketing of consumer financial products, commodities, securities, auctions, and investment advisory and brokerage services.

**iv. *The Rule Should Clarify Limitations to the FTC's Legal Authority to Capture Conduits of Pricing Information***

As the Commission recently made clear in the notice for proposed rulemaking for the Trade Regulation Rule on Impersonation of Government and Businesses, Section 5 and 18 of the FTC Act contain no express authorization for assisting-and-facilitating liability.<sup>65</sup> The Chamber recommends that the Commission make clear that publishers, advertisers, marketplace facilitators, and platforms that display prices of

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<sup>64</sup> See discussion *supra* VII.E.

<sup>65</sup> 87 Fed. Reg. 62741, 62747 (2022), <https://www.federalregister.gov/documents/2022/10/17/2022-21289/traderegulation-rule-on-impersonation-of-government-and-businesses>.

goods and services sold or provided by other merchants (operating as conduits by which consumers find available products and services) are excluded from the definition of “Covered Business.” The Chamber respectfully suggests that any final rule similarly make clear the FTC’s limited authority to capture indirect liability under the FTC Act.

**D. Question 14(a) asks if the Commission should add a new definition of “Covered Business” to narrow the businesses covered by the rule requirements “to businesses in the live-event ticketing and/or short-term industries”?**

To the extent that the Commission moves forward with the final rule, the Chamber recommends limiting the definition of “Businesses” or “Covered Businesses” to the live-event ticketing and/or short-term lodging industries. The Commission lacks a rulemaking record to support the prevalence of unfair or deceptive price advertising across all industries. The Commission assumes that price advertising practices, consumer comparison shopping, and consumer expectation and consideration of fees are uniform across all industries. But the FTC’s own economists indicated that there are efficiencies and pro-competitive justifications to partitioned or dripped prices.<sup>66</sup> Imposing economy-wide pricing regulations based on a thin record of harms, costs, and benefits of two industries runs afoul of the FTC Act.

To the extent the FTC has engaged in development of a record related to consumer harm from dripped or partitioned pricing, that thin record has focused on the live-event ticketing and short-term lodging industries. Further, both the live-event ticketing and short-term lodging industries are unique relative to other industries. Live-event ticketing has a robust secondary market. Short-term lodging online shopping sites rank hotels by price, placing unique pressures on businesses to advertise the lowest price to consumers to optimize search outcomes. The unique features of these industries (1) have shaped the FTC research that has attempted to quantify the benefits and costs of up-front all-in pricing and (2) have been major considerations when thinking through proposed remedies. Accordingly, the FTC should limit the rule to sectors where the agency has studied the complex tradeoffs associated with restricting price advertising practices.<sup>67</sup>

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<sup>66</sup> Howard A. Shelanski et al., Economics at the FTC: Drug and PBM Mergers and Drip Pricing (2012), [https://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-drug-and-pbm-mergers-and-drip-pricing/shelanskietal\\_rio2012.pdf](https://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-drug-and-pbm-mergers-and-drip-pricing/shelanskietal_rio2012.pdf).

<sup>67</sup> A rule limited to live-event ticketing and/or short-term lodging industries should apply to all providers in those specific markets. The rules should apply to all companies offering products or services in both the primary and secondary markets for live-event ticketing and should apply to providers of internet websites or platforms related to the accommodations industry.

**E. Question 14(c) asks if the Commission should add a new definition of “Covered Business” to narrow the businesses covered by the rule requirements to “exclude businesses to the extent that they offer or advertise credit, lease, or savings products, or to the extent that they extend credit or leases or provide savings products to consumers?”**

To the extent that the Commission moves forward with the final rule and does not narrow the rule to the live-event ticketing or short-term lodging industries, the Chamber recommends excluding consumer financial products by adopting a broader definition of exempted financial institutions and their applicable products and services. Under Gramm–Leach–Bliley Act (GLBA), a “financial institution” is any institution that engages in activities that are financial in nature or incidental to such financial activities, as determined by Section 4(k) of the Bank Holding Company Act of 1956. 15 U.S.C. § 6809(3)(A). Financial institutions can include banks, securities brokers and dealers, insurance underwriters and agents, finance companies, mortgage bankers, and travel agents. The Chamber recommends adopting a definition similar to the one used in GLBA to exempt financial institutions that offer, advertise, or extend credit, lease, or savings products to consumers. Price advertising of credit, lease, and savings products are heavily regulated at the federal and state level. The Real Estate Settlement Procedures Act and Regulation X, the Truth In Lending Act and Regulation Z, the Card Act, the Truth in Savings Act and Regulation DD, and numerous state laws all focus on guaranteeing the accurate and meaningful disclosure of the costs of consumer credit, leases, and savings products so that consumers can make informed decisions about purchases. The existing credit disclosure laws govern the content, form, and timing of price disclosures. The laws have been structured to make sure consumers have the information they need about costs, material terms, and ancillary fees. Additional regulation of credit, lease and savings product advertising is not needed and is likely to lead to more confusion for consumers and businesses.<sup>68</sup>

In addition to businesses that offer credit, lease, and savings products, the Chamber recommends excluding other businesses and industries with advertising practices heavily regulated at the federal and state level. Examples of other industries with heavily regulated pricing practices include advertising and marketing of

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<sup>68</sup> For example, Section 464.2 of the proposed Rule is unclear with respect to goods that are paid for via an installment contract, such as mobile phones. It is unclear whether “Total Price” means the total monthly cost of the contract or the total amount due over the course of the contract. The Chamber recommends that “Total Price” with respect to goods paid for via an installment contract should mean disclosing the down payment amount (if any) and the installment amount and payment periods (e.g., monthly), which is consistent with how consumers consider the price of such goods.

commodities, securities, auctions, investment advisory<sup>69</sup> and brokerage services<sup>70</sup>. For similar reasons to credit and lease products, Congress and expert agencies have already identified the key problems and carefully weighed potential solutions to ensure consumers have the adequate pricing information they need to make informed purchasing decisions. To the extent that consumer confusion persists, it is best addressed through existing rules crafted by expert agencies. Such an approach will avoid the creation of conflicting federal advertising regulations for industries already subject to comparable regulatory regimes. Accordingly, any final rule should exempt industries with extensively regulated pricing and advertising practices at the federal and state level.

**F. Question 17 asks “does the proposed definition for “Total Price” provide sufficient clarity for industries that calculate charges based on increments of time?”**

Charges tied to increments of time are used lawfully and non-deceptively in a broad array of common transactions, but the NPRM is void of any discussion regarding how companies can advertise a component of Total Price – the hourly charge for a specific service. To the extent businesses want to advertise services that include hourly charges, it is not clear that they can because calculation of Total Price would be challenging. For example, car repair services may want to advertise prices to install new brakes, advertising the cost for the product and noting the total price is subject to an hourly cost. The proposed rule would not permit such an advertisement. Additionally, a car repair shop could face liability under the rule as drafted by

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<sup>69</sup> For example, SEC registered investment advisers serve as fiduciary advisers to clients. Advisers are already required to provide full and accurate information about fees and compensation, including through the Form ADV filed with the SEC, which requires advisers to “[d]escribe how [they] are compensated” for advisory services, including by providing a “fee schedule.” Form ADV, Part 2A, Item 5.A. The Investment Advisers Act of 1940 also includes general antifraud provisions under Section 206 that generally require advisers to disclose material facts regarding the advisory relationship to clients and prospective clients. Investment advisers are also subject to an expansive rule governing marketing materials, including marketing materials that include information about fees. The marketing rule prohibits, among other things, including (i) any untrue statement of a material fact, or omission of a material fact necessary to make a statement not misleading, or (ii) information that would reasonably likely cause an untrue or misleading implication. Advisers Act Rule 206(4)-1(a).

<sup>70</sup> See, e.g., FINRA Rules 2010 and 2210. Rule 2010 requires broker-dealer member firms to “observe high standards of commercial honor and just and equitable principles of trade.” Rule 2210 sets forth certain content standards for communications with the public, such as that communications be “fair and balanced,” not contain any “false, exaggerated, unwarranted, promissory or misleading statement or claim,” and not omit “any material fact . . . if the omission, in light of the context of the material presented, would cause the communications to be misleading.”

providing an estimate for a repair service because they cannot determine the Total Price until completion of the work and a determination of the time spent on the repair. The Proposed Rule does not make clear whether estimates are reasonable when assessing Total Price.

Because the rule lacks clarity around charges based on increments of time, the Chamber recommends allowing price advertising for services covered by an hourly charge, without requiring total upfront costs. Comparison shopping may be easier by considering hourly charges versus total charges. And companies forced to advertise a Total Price based on increments of time are likely to overestimate the time to consumers to ensure they cover potential labor costs, likely leading to inflated prices. So long as businesses are clear about charges based on increments of time and provide a reasonable estimate of total time required to complete a service or an explanation for why such an estimate is not possible, consumers will have the requisite information they need to adequately comparison shop. Additionally, consumers likely expect that charges based on increments of time require a consideration of partitioned or dripped prices.

**G. Questions 24 and 25 ask whether the proposed rule should explicitly prohibit fees that provide little or no value to consumers or fees that are excessive.**

The Chamber agrees with the FTC that the rule should not cover fees that provide little or no value to consumers or fees that are excessive. The FTC has long recognized the challenge in identifying what prices are excessive, and that regulations against excessive pricing may chill incentives to compete or innovate. Further, the FTC has regularly taken the position that regulations against excessive pricing interferes with proper functions of markets and undermines important market signals from price. Price controls are outside the FTC's authority. The FTC should not adopt an alternative rule that bans worthless or excessive fees.

## **VIII. Conclusion**

The Chamber supports the FTC's efforts to enhance price transparency and eliminate misrepresentations about costs and fees associated with products and services a consumer purchases. The Chamber has significant concerns, however, with the FTC's proposal to mandate pricing practices that could restrict legitimate pricing

practices. Given the substantial practical implications raised and potential unlawful authority to pursue rulemaking, the FTC should withdraw this NPRM.

Sincerely,

A handwritten signature in black ink, appearing to read "Sean Heather". The signature is fluid and cursive, with the first name "Sean" and last name "Heather" clearly distinguishable.

Sean Heather  
Senior Vice President  
International Regulatory Affairs & Antitrust  
U.S. Chamber of Commerce