

**Before the
FEDERAL TRADE COMMISSION
Washington, DC 20554**

**Notice of Proposed Rulemaking
Unfair or Deceptive Fees Trade Regulation Rulemaking**

16 CFR Part 464

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Authored By:

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Consumer Action
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Dear Commissioners:

These comments are submitted by the undersigned 52 national and state consumer advocacy groups. We appreciate the opportunity to comment on the Federal Trade Commission's (FTC or Commission) Notice of Proposed Rulemaking (NPRM) addressing unfair and deceptive practices relating to fees, following its Advance Notice of Proposed Rulemaking (ANPR) in October 2022. We welcome this proposal and encourage the FTC to adopt a rule that mandates transparent pricing, promotes informed consumer choice, and stimulates economic competition for the benefit of honest businesses and consumers alike. Additionally, to best protect the marketplace, we recommend a number of revisions to strengthen the noticed rule.¹

I. The FTC Should Adopt an Unfair and Deceptive Fees Trade Practices Rule.

The issue of junk fees has resonated with consumers across the country. Multiple surveys of consumers across political parties have shown strong support for efforts to rein in junk fees – upwards of 75% of those polled indicated support or strong support.² This data clearly weighs in favor of the FTC's rulemaking efforts and serves as a reminder that much work needs to be done. It is overwhelmingly clear that Americans are tired of having money drained from their pockets through deceptive practices that allow businesses to hide and deceive consumers about fees, inflate costs, and force vulnerable consumers into a cycle of debt by penalizing them with disproportionately high fees. Small businesses who provide competition for America's mega corporations have also been outspoken proponents of efforts to require fee transparency. We commend the FTC for fulfilling its mission to protect consumers and competition by pursuing an industry-neutral rulemaking to prohibit hidden and misleading fees.

As the FTC has set forth in the NPRM and as many of the groups on this letter have previously articulated³, the *AMG Capital* decision renders this rule appropriate and necessary. It is painfully clear that many of the practices which the FTC captures through its proposed rule constitute unfair, deceptive and abusive practices as defined by the Commission and consumer protection laws across the country. However, without an effective enforcement mechanism, the FTC is unable to protect the public from these widespread illegal practices. The Supreme Court's erroneous holding in *AMG Capital* leaves the Commission without its tools to separate defendants from their ill-gotten gains by providing refunds to consumers and enjoining further illegal conduct in traditional unfair and deceptive conduct cases through Section 5 of the FTC Act. Instead, the FTC must pivot to its other statutory tools, including rulemakings which clearly provide authority to pursue refunds and injunctions for violations. With this rule, the FTC will be

¹ This comment includes two appendices. **Appendix A** is a compilation of the suggested changes to the rule with notations that reference this comment where the changes are discussed. **Appendix B** is a compilation of consumer stories and experiences with junk fees, obtained and provided by Consumer Reports at this website:

<https://www.consumerreports.org/stories?questionnaireId=291>.

² <https://www.dataforprogress.org/blog/2023/12/12/voters-support-initiatives-to-lower-drug-costs-ban-junk-fees-and-strengthen-supply-chains>

³ See Comments of Consumer Groups in response to Unfair and Deceptive Fees ANPR, available at <https://www.regulations.gov/comment/FTC-2022-0069-6112>.

able to serve its purpose and continue its mission to prevent, punish and deter unfair and deceptive conduct in the form of junk fees.

A. The FTC’s approach will have substantial benefits for the marketplace.

The FTC’s rule will save consumers time and money, arguably two of their most valuable commodities. The all-in pricing disclosures in proposed § 464.2 will help to ensure that consumers are not wasting time responding to inaccurate offers and deceptively low prices that exclude mandatory fees. These disclosures will also stimulate competition by forcing each marketplace participant to accurately display their total price, with the realistic possibility of lowering prices overall. The disclosures in § 464.3 will allow consumers to make informed choices about whether to purchase certain goods or services based on an accurate description of their nature and purpose and with the clear understanding that they are not mandatory.

While these proposed disclosure requirements (and transparency generally) are important for consumers in their own right, the FTC’s total price requirements will also have important behavioral effects that will actually lower consumer prices. It is important to understand why so many businesses have turned to junk fees and deceptive pricing tactics like drip pricing or partitioned pricing in the first place. By splitting out the purchase into several sets of fees that one only sees over the course of the buying process, sellers are taking advantage of cognitive biases that occur when consumers are impatient to complete the purchase: consumers are already committed to the purchase because they have expended time looking around for the good or service they want, and they are frustrated. Research indicates that spreading out the price of a consumer good such that it adds up over the course of the purchase – drip pricing – can wipe out as much as 22% of consumer surplus.⁴ In short, consumers are willing to pay more out of frustration and commitment, even when the total price is disclosed to them later in the process but prior to final purchase. These represent the consumer instance of search costs and frictions for buyers in all markets, and they typically undermine competition by preventing buyers from seeking out the lowest price and best quality product.⁵

The all-in pricing approach of the Commission’s proposed rule will simply eliminate this pricing tactic. If consumers know the full price of a good or service up front – regardless of whether a later itemized receipt or form displays that the price is in fact decomposed into a confusing array of miscellaneous fees – consumers will still be comparison shopping *between merchants* on the basis of the total price that is displayed from the outset. While there are additional important disclosures that should be enhanced under the proposed rule, as we outline below, the total price disclosure is meant to, and will, change market and pricing behavior in favor of consumers, going beyond principles or requirements of simply avoiding deception through lack of disclosure prior to a final transaction.

⁴ Steffen Huck & Brian Wallace, “The impact of price frames on consumer decision making: Experimental evidence,” University College London, (Oct. 2015), available at <https://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf>.

⁵Office of Information and Regulatory Affairs Office of Management and Budget, “Guidance on Accounting For Competition Effects When Developing And Analyzing Regulatory Actions,” (Oct. 2023) available at <https://www.whitehouse.gov/wp-content/uploads/2023/10/RegulatoryCompetitionGuidance.pdf>

Another substantial benefit of the FTC’s proposed rule is its “industry-neutral” approach,⁶ which would require a single, bright-line rule for all businesses. We support this approach, as it adds predictability for compliance, enforcement, and consumer expectations. As compliance with the rule continues, marketplace dynamics will shift, resulting in increased competition, transparency and consumer choice. These goals are much more attainable with a rule that is free from exemptions and confusing conditions.

B. The status quo is no longer working.

Such a transformative rule has not come without criticism from industry representatives that benefit financially from the deceptive practices the FTC seeks to end. Unsurprisingly, opponents of the NPRM suggest that the status quo should be maintained when it comes to junk fee practices. In fact, when discussing potential regulatory options to address drip pricing, one economist noted that businesses will always argue that increased price information is undesirable even if that is what consumers desire.⁷ Some industry participants have also argued that these practices are not prevalent. One hotel trade association claimed that “only 6% of hotels nationwide charge a mandatory resort/destination/amenity fee.”⁸ Even if this statistic is accurate, these resort fees dramatically (and often unexpectedly) increase prices for consumers. Hotels are just one industry that would be impacted by the Rule, but hotel junk fees and unfair charges inflate hotel costs as high as 11%, and extract approximately three billion dollars from consumers each year with 80 to 90 percent profitability.⁹ At the level of an individual business, Marriott withdrew over \$206 million from consumers via hidden resort fees in a period spanning less than three years.¹⁰ The time to end this backwards incentive structure of rewarding companies for deceiving consumers is long overdue.

As of this comment, the FTC has already received over 60,000 responses to its proposed rule and broad public support. Therefore, industry arguments that the persistence of junk fees is evidence of consumers’ preference for deceptive pricing structures because they do not choose competitors with more honest business practices, are wholly misguided. This argument assumes that consumers can and do recognize that the prices they are about to pay are unusually high and that a competitor may be less costly, which is not the case currently. Drip and partitioned pricing into

⁶ With the exception of exempting auto dealers. We strongly disagree with this decision, as set forth in section IV.B of this comment.

⁷ https://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/mwaldman.pdf

⁸ American Hotel & Lodging Association Statement (Dec. 1, 2023), available at <https://www.ahla.com/news/ahla-statement-support-no-hidden-fees-act>.

⁹ Bjorn Hanson, “U.S. Lodging Industry Fees and Surcharges Forecast to Increase to a New Record Level in 2018 - \$2.93 Billion, and Another Record Anticipated for 2019 - the Newest Emerging Category is “Resort Fees” for Urban Luxury and Full Service Hotels,” (August 27, 2018) available at <https://bjornhansonhospitality.com/fees-%26-surcharges>.

¹⁰ Bailey Schultz, “Think resort fees are too high? A lawsuit claims the fees made Marriott tens of millions,” *USA Today*, (October 20, 2021), available at <https://www.usatoday.com/story/travel/hotels/2021/10/19/marriott-hotel-resort-fees-lawsuit-dc-attorney-general/8527991002/>

multiple fees cause buyers to underestimate the final price, inhibiting and discouraging accurate comparison shopping.¹¹

Once consumers approach the final steps of a sale, there are psychological reasons that inhibit their abandoning of the transaction, even if they are hit by junk fees later in the process. Advertising and web design lead to anchoring effects, alongside other subconscious preferences and pressures, that may cause a buyer to complete a purchase they would otherwise forfeit. Consumers also may finalize a transaction despite an unexpected total cost as they made the mental commitment to purchase much earlier in the process. Accurate comparison shopping between competitors who use junk fees is time-consuming and difficult. Doing so requires consumers to proceed through multiple steps of a transaction process for each possible option and likely involves arithmetic—understandably a burden that few consumers choose to (or are able to) undergo.¹²

Should a buyer overcome these barriers and decide to seek alternatives, they may still end up paying for junk fees. As best exemplified with the live event industry, once a competitor begins using deceptive fee structures, other market participants face intense pressure to employ the same practices. Decades of industry consolidation compounds this issue, which has simply reduced the total number of viable competitors—deceptive or not.¹³ In regional markets, there may be only one business operating, despite the existence of multiple competitors on paper at the national level (e.g. telecommunications and airlines, particularly when examining specific city-to-city routes). Given all of these factors, FTC action is necessary to correct what market forces cannot.

II. The FTC Should Acknowledge Its Willingness to Issue Future Guidance.

The breadth of the FTC’s proposed rule will lead to questions about its applicability to certain businesses or industry practices. The Commission should explicitly state in the statement and basis of purpose in the final rule that it will answer questions with formal advisory opinions or staff opinion letters. These comments focus on application of the rule generally and particular practices that will affect overall marketplace behavior, but we acknowledge that future interpretation by the Commission may be necessary and helpful to ensure compliance without granting broad exemptions from the rule.

¹¹ For instance, if a product is disclosed with a price of \$15 plus a mandatory fee of \$7, it looks cheaper to a consumer than a product disclosed with a total price of \$22. The FTC’s rule would require all businesses to disclose the all-in price of \$22 in this example, facilitating accurate comparison shopping. *See also* Santana, Dallas, and Morwitz. “Consumer Reactions to Drip Pricing,” *Marketing Science*, January 15, 2020. <https://pubsonline.informs.org/doi/10.1287/mksc.2019.1207>

¹² Rasch, Thöne, and Wenzel. “Drip pricing and its regulation: Experimental evidence,” *Journal of Economic Behavior & Organization*, August 2020. <https://www.sciencedirect.com/science/article/abs/pii/S0167268120301189>

¹³ Grullon, Larkin, and Michaely. “Are U.S. Industries Becoming More Concentrated?” *Swiss Finance Institute Research Paper No. 19-41*, May 31, 2015. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047

III. The Proposed Rule Should Be Strengthened, Interpreted, and Enforced to Prevent Harm to Consumers.

The Commission has identified two major categories of harmful fees being charged to consumers: hidden fees and bogus misleading fees, with many junk fees falling into both categories. Hidden fees are those that are not included in the initial price shown to consumers or are only revealed to a consumer after a product or service has been delivered to them, leaving the consumer no choice but to pay it.¹⁴ Misleading fees are those that are deceptively structured or named in order to convince a consumer to pay them. The Commission's proposal to ban hidden and misleading fees will bring transformative changes to the marketplace and will have significant benefits for consumers and honest businesses. We set forth below our consideration of the FTC's proposal, how it will prevent some of the worst practices, and how it can be improved to preempt gamesmanship and evasion by nefarious actors.

A. Timing of § 464.3 Disclosures

The proposed rule would require the total price in § 464.2 to be disclosed early in the process: in any advertisement, offer or display where the amounts a consumer may pay are included. The total price includes all mandatory fees and charges. By contrast, Section § 464.3(b) only requires the disclosure of all amounts **not included** in the Total Price "before the consumer consents to pay." This timing is not ideal and opens the door to a new pathway for drip and partitioned pricing. Barred from adding new, useless mandatory fees for the main good or service, businesses could instead tack on a chain of deceptive and meaningless fees to ancillary purchases for goods and services that most consumers will, in fact, want to buy and string out the disclosure until much later in the process. The Total Price also excludes government taxes and shipping costs¹⁵, which can significantly increase the overall price for a consumer and should be disclosed as early as possible in the process.

The FTC can help curb this practice by requiring businesses to identify and describe the nature and purpose of the fees provided through the disclosures in § 464.3(b) earlier in the process. Identification of these fees before the payment page in an electronic transaction,¹⁶ and ideally as soon as the option for an ancillary good or service is presented, is superior for two reasons. First, because the payment page represents the last stage of the shopping journey, a consumer's search costs are at their peak. A data point in the FTC's proposed rule estimates consumers spent an average of 23 minutes selecting room accommodation on a popular platform. This finding is more than descriptive - it underscores an important point about the shopper's commitment. The

¹⁴ Complaint, *Zakheim et al. v. Curb Mobility, LLC* (Case No. 2:22-cv-04594), class action alleging that a taxi hailing service failed to disclose a service fee until after passengers had completed their ride and processed their payment. <https://storage.courtlistener.com/recap/gov.uscourts.paed.602944/gov.uscourts.paed.602944.1.0.pdf>

¹⁵ We are pleased to see the FTC's clear statement that the costs for shipping should be limited to those which reasonably reflect what a business incurs to ship goods and prohibiting inflated shipping costs. The FTC should be sure to enforce this limitation to prevent businesses from artificially inflating these costs and passing them on to consumers.

¹⁶The FTC asks in Question 27(a) whether it should consider requiring the 464.3(b) disclosures before a consumer provides their billing information. Our answer is yes, and ideally even earlier than this.

perceived cost in time invested to make a choice becomes an asset that works for the business and against the consumer.

Second, in an online setting, the advancement by a consumer through each page triggers a cookie, resulting in the transmission of information to the business. This information is useful for understanding a consumer's "willingness to pay." This information can be tracked by third parties as well. Search engines use this information in their algorithms, allowing them to identify customer intent and sell this information to search phrase bidders. Relatedly, if a consumer is required to provide their billing information before receiving this information, they will have expended even more time and provided sensitive financial information that presents a risk to consumers.

Therefore, we propose that § 464.3(b) be revised to read as:

(b) A Business must disclose Clearly and Conspicuously *before the consumer provides their billing or payment information* the nature and purpose of any amount a consumer may pay that is excluded from the Total Price, including the refundability of such fees and the identity of any good or service for which fees are charged.

B. Worthless and Excessive Fees

The FTC's proposed rule prohibits hidden and misleading fees by requiring transparency and disclosures at various points in the purchase process about all amounts a consumer may pay. Section 464.2(a) of the proposed Rule addresses hidden fees, and states that it would be "an unfair and deceptive practice and a violation of this part for any Business to offer, display, or advertise an amount a consumer may pay without Clearly and Conspicuously disclosing the Total Price." Section 464.3 prohibits a business from making any misrepresentations about fees, and affirmatively requires businesses to clearly and conspicuously disclose the "nature and purpose" of all amounts not included in the Total Price.

These transparency measures will bring sorely needed changes to the marketplace and will address some of the harm to consumers which the Commission has been aware of for over a decade. These harms include 1) consumers paying more than they are led to believe they will for a product or service, 2) consumers paying fees for worthless products, and 3) fees which are disproportionately high when compared with the good or service they are tied to.

Rather than explicitly prohibiting worthless or excessive fees altogether, the FTC's proposed rule requires transparency and disclosure about the cost and the nature of the fees on a market-wide scale in an effort to disincentivize these fees. Consumer advocates generally emphasize that increased disclosure is not an adequate regulatory solution when it does not address the underlying harm to consumers. In fact, disclosure may even cause further harm by inundating consumers with superfluous information which reduces overall understanding of the

transaction.¹⁷ The FTC’s all-in pricing approach will likely curb many worthless and excessive fees, but some consumers may not be able to avoid these fees altogether.

While excessive and worthless fees are problematic for all consumers, it is important to acknowledge that they represent a more substantial problem for consumers in vulnerable populations, including low-income consumers. These consumers feel the effects of junk fees more acutely, as they represent a larger burden and portion of their income. Higher fees are likely to create and contribute to a cycle of debt that is increasingly difficult to escape. Low-income and credit challenged consumers who are captive to certain providers or industries may not realize the benefits of increased comparison shopping. Black and Hispanic consumers are more likely to be credit invisible, which means they also have (or perceive that they have) fewer options available to them for purposes of comparison shopping. These consumers may feel captive to a particular business or industry which then has an opportunity to take unreasonable advantage of those consumers who are less likely to decline to pay a fee which is excessive or worthless.

1. Worthless Fees

The FTC should ensure that the rule and its enforcement of the rule address the problem of businesses imposing mandatory and/or optional fees for worthless products and services that do not provide any value to a consumer. In this regard, the proposed rule prohibits misrepresentations about “the nature and purpose of any amount a consumer may pay” in § 464.3(a). The FTC should interpret “any amount a consumer may pay” to include mandatory **and** optional fees. The FTC also affirmatively requires businesses to provide **accurate** information about optional fees by describing “the nature and purpose of any amount a consumer may pay that are excluded from the Total Price” to consumers in § 464.3(b). It would be difficult to comply with these disclosures and still impose a fee that provides no value to a consumer. Compliance with these sections will provide consumers with more information about the amounts they are or may be charged and provide them with some ability to decline to pay optional fees that they perceive do not provide value to that consumer.

While the result of effectively disincentivizing worthless fees is likely with compliance, the FTC should ensure that its own interpretations and application of the rule take this concept into account. This requires consideration of the context by the Commission through enforcement actions, additional rulemakings or policy statements. Notably, the FTC has included in its definition of “clear and conspicuous” a provision which requires the business to account for the consumers it targets. Section 464.1(c)(8) requires that “When the representation or sales practice targets a specific audience... ‘ordinary consumers’ includes reasonable members of that group.” The relative “worth” of a fee and the supposed benefits that it provides can be subjective for consumers. For example, online retailers that position themselves as environmentally friendly may partner with a service like EcoCart to charge consumers an optional carbon offset fee on

¹⁷ Karen Bradshaw Schulz, “Information Flooding,” *Indiana Law Review* (2015) available at <https://mckinneylaw.iu.edu/ilr/pdf/vol48p755.pdf>.

orders.¹⁸ While such a fee does not provide a concrete benefit to all consumers, those who place value on sustainability may not perceive such a fee as worthless.

In this regard, the FTC could consider certain factors, such as whether the fee is mandatory or optional. The Commission could also consider whether the fee can be directly tied to a benefit to the consumer or is it primarily for the benefit of the business. When businesses face rising costs, they may choose to charge consumers additional fees to cover their increased expenses rather than raise their base prices. One notable example is restaurants charging mandatory “service fees” that may help pay for a variety of operational costs but do not provide any additional services for consumers.

Both the Total Price disclosure and the prohibition against misleading fees would require strong and consistent enforcement by the Commission to curb the conduct that leads to higher prices and worthless fees. Without strong enforcement of the rule and continued clarification through public statements or case law that this type of conduct is not permissible, it becomes ineffective and any market-wide economic consequences cannot be achieved.

2. Excessive Fees

The Commission has also asked whether it should prohibit excessive fees and if so, how such a limitation should be defined in the rule.¹⁹ The proposed rule includes various “safeguards” which may have the effect of lowering prices overall and curbing some excessive fees. The breadth of the rule in conjunction with the Total Price disclosures in § 464.2 will require businesses to compete in a more transparent marketplace. As price is the most important component for consumers, it is highly likely that this will force businesses to advertise and display lower prices over time. Defining Total Price to include mandatory fees and exclude optional fees removes some of the deceptive tactics businesses may utilize to benefit from shrouding higher true prices.²⁰ Section 464.3’s requirements to provide accurate information about the price, nature and intent of all amounts excluded from the Total Price may also allow consumers to evaluate the price of the fee in connection to the good or service.

Despite these safeguards, excessive prices may persist. A blanket prohibition against excessive prices could prove difficult to administer without becoming a form of price control. Excessively high prices therefore may be indicative of other problems or violations, and these occurrences should prompt investigation and enforcement by the Commission. Exploiting a lack of consumer choice,²¹ noncompliance with the Rule, unfair or deceptive conduct generally, discriminatory

¹⁸ <https://ecocart.io/how-it-works/>

¹⁹ Question No. 25.

²⁰ Federal Trade Commission, Economics at the FTC: Drug and PBM Mergers and Drip Pricing (“FTC Drip Pricing Report”), at 15 (Dec. 2012), available at http://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-drug-and-pbm-mergers-and-drip-pricing/shelanskietal_rio2012.pdf (last visited July 20, 2022) (“there are regressive welfare consequences of shrouding because the welfare losses are likely to be borne by consumers with low levels of economic literacy”).

²¹ The CFPB has evaluated this conduct in the context of overdraft fees and credit card late fees and, in particular, that the amount of the fee far exceeds the cost to the business. Consumers cannot always reasonably avoid these charges or lower the amounts imposed, and these fees often serve as penalties that disproportionately impact low-

conduct, and evasive tactics to skirt the provisions of the Rule could all create situations where consumers are being charged excessively high prices. The FTC should also consider future policy or interpretive statements that identify and explain the harms of excessively high fees, factors to consider in enforcement actions that target excessive fees, and future rulemakings to prohibit specific practices or industries where excessively high fees persist. In any future action by the FTC addressing excessive fees, the Commission should ensure that any disclosures provided to consumers are not used as a weapon against consumers to argue that they consented to such high fees.

It is clear that the current state of drip pricing and deceptive fee practices have had a negative impact on competition and prices overall. The rule will provide significant improvements to the marketplace, but excessively high fees should be viewed seriously and investigated promptly by the Commission.

C. Mandatory and Optional Fees

The proposed rule makes important distinctions between mandatory and optional fees, including how they are disclosed and offered to consumers. The FTC requires mandatory fees to be included in the Total Price, and it asks whether its Rule sufficiently clarifies that the Total Price includes (1) all fees or charges that are not reasonably avoidable and (2) all fees or charges for goods or services that a reasonable consumer would expect to be included with the purchase.²² The answer to both questions is no, and we suggest several changes to ensure better protections from deceptive practices in mandatory and optional fees.

1. Mandatory Fees

The Rule requires businesses to include all mandatory fees in the Total Price, which we fully support. Effectively, if a fee is unavoidable and mandatory, it is difficult to separate the fee from the price of the good itself. While the business may ascertain its own price by calculating the total of all mandatory fees, to a consumer, the end result (i.e., the total price) is the same. We therefore especially support the requirement that the Total Price be made more prominently than any other pricing information in § 464.2(b). However, to the extent that businesses attempt to manipulate this Total Price disclosure in an effort to partition out the actual base price into a list of confusing fees, this conduct is deceptive and has the potential to confuse consumers. For example, a consumer may see two separate advertisements for a similar product listed at the same Total Price, but one advertisement stratifies the price into a list of several fees while the other includes the base price and a single fee. This consumer may question whether the goods advertised are actually comparable, costing time to make this determination.

income consumers and consumers of color. *See* Notice of Proposed Rulemaking on Credit Card Penalty Fees, 88 FR 18906, and “Overdraft and Nonsufficient Fund Fees” Report, December 2023, available at https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-report_2023-12.pdf.

²² Question No. 19.

We acknowledge and expect that the all-in pricing structure will disincentivize some of this conduct. Opacity of pricing information simply does not serve a business trying to sell a good in a marketplace that requires full transparency. A company complying with the provisions of § 464.2 may, however, attempt to make their product look more comprehensive by deceptively listing numerous fees in addition to the Total Price. Section 464.3(a) prohibits misrepresentations about “the nature and purpose of any amount a consumer may pay.” The FTC can guard against this deceptive mandatory fee/base price partitioning conduct by making clear that the “prohibited misrepresentations” provision in § 464.3(a) applies to mandatory **and** optional fees – not just the “nature and purpose” disclosures in § 464.3(b).

2. Optional Fees

The rule, however, does not only target fees that are absolutely unavoidable and mandatory, but it also addresses fees for goods and services which are genuinely optional purchases. The FTC should amend the Rule to prohibit these optional purchases from being advertised or included in a deceptive manner to induce consumers to purchase more than they otherwise would have (add-on goods or services that are automatically selected for purchase), or deceptively advertised at a lower price because they exclude some “add-on” that is reasonably expected as part of the good or services itself (e.g. a phone charger with a phone). The three key areas the FTC should address in this regard are (a) offering bona fide ancillary goods or services for an additional fee, (b) circumstances where optional goods or services are included by default, and (c) tips and gratuities, which should be considered separately and subject to somewhat different criteria. We suggest changes to the rule to appropriately address the problems with each of these three of these contexts.

a. Fees for Bona Fide Ancillary Goods or Services

Mandatory fees are broadly addressed through all-in pricing. As we acknowledge above, for a fixed product or service, businesses will have little incentive to create various junk fees, through deceptive pricing tactics like “drip” or “partitioned” pricing, if they are required to clearly and conspicuously display the total, “all-in” price for that product or service up front and more prominently than other pricing information, and if they do so in a manner that is free from the misrepresentations identified in Section C.1 above. This will allow a consumer or other buyer to easily price compare with other sellers. In this context, sellers will have little to no economic incentive to create these fees in the first place, and price competition for customers should win out.

However, the situation is different in the case of add-on or “ancillary” purchases, which the proposed rule only partially addresses. Businesses should, of course, be permitted to offer add-on purchases as options for consumers, such as headphones to pair with a smartphone or extra collision insurance with a car rental. However, businesses should *not* be permitted to deceptively partition out different parts of the core good or service into separate purchases, effectively diminishing the original purchase that a consumer is making, only to make the remaining portions of the good or service into extra “ancillary” purchases. Consider, for example, how

airlines suddenly converted checked-bag fees from an included part of a ticket price to be instead an additional fee.²³ Or, consider the possibility that a hotel, in order to take advantage of the price increases possible through partitioned pricing,²⁴ begins selling housekeeping services as an ancillary “add-on” service for a week-long stay. The FTC’s current proposal defines “Ancillary Good or Service” to include “any additional good or service offered to a consumer as part of the same transaction.” § 464.1(a). In other words, “ancillary” can mean mandatory **or** optional. The Total Price disclosure requires businesses to include all “mandatory ancillary goods or services” in their price (§ 464.2(a)), and the FTC has indicated that these mandatory fees are those which are “necessary to render the good or service fit for its intended use.”²⁵

Because businesses can still pursue deceptive partitioned pricing tactics with genuinely optional purchases, this all-in pricing disclosure, on its own, does not address the deceptive tactic of unbundling or partitioning the good or service into separate ancillary purchases. For instance, an included USB-C charger is not “intrinsically necessary” for a Bluetooth speaker, as many consumers have such chargers already. Housekeeping is not, strictly speaking, “intrinsically necessary” to a hotel stay. Both of these fees are those which a reasonable consumer would expect to be included in the advertised Total Price, however. The proposed rule does not make clear that the cost of a purportedly optional good or service meets the “must pay” or “mandatory” standard if a reasonable consumer would expect it to be included with the purchase.

For this reason, we propose that the Commission make several changes to the Rule, to incorporate the well-established “reasonable consumer standard” into the rule and its determination as to what goods or services are or are not ancillary. Adapted for this purpose and the context of junk fees, the reasonable consumer standard would broadly state that if a reasonable consumer would expect a given good or service to be included in the all-in price for a good or service, then it must be included in the all-in price.²⁶ In short, extra fees for ancillary goods or services can only be levied for goods and services that reasonable consumers would expect to be extra add-on fees.

The Consumer Financial Protection Bureau (CFPB) has adopted this type of tailored approach to its unfairness standard: “In determining whether an act or practice is misleading, one also must consider whether the consumer’s interpretation of or reaction to the representation, omission, act, or practice is reasonable under the circumstances. In other words, whether an act or practice is deceptive depends on how a reasonable member of the target audience would interpret the

²³ Letter from Senator Blumenthal to Robert Isom, CEO for American Airlines, Nov. 19, 2023, available at <https://www.hsgac.senate.gov/wp-content/uploads/2023-11-19-Blumenthal-Request-to-American-Airlines.pdf>

²⁴ Mary Sullivan, FTC Bureau of Economics, “Economic Analysis of Hotel Resort Fees” Jan. 2017, available at https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf

²⁵ NPRM at 77440.

²⁶ See, e.g., *Fanning v. FTC*, 821 F.3d 164, 170-71 (1st Cir. 2016) (Under the reasonable consumer standard, “if ‘a[] [claim] conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if nonmisleading interpretations are possible.”); *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228-29 (9th Cir. 2019) (in California, “the reasonable consumer standard requires a probability ‘that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.’”); *Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 475 (7th Cir. 2020) (same).

representation.”²⁷ The CFPB also clarified that it would not be necessary for a majority of consumers, even within a narrowly defined audience, to be misled for a representation to qualify as misleading.

By tailoring their expectations for representations to conform to differences in target market characteristics, the FTC will better align the standard to its purpose. A standard for “reasonably avoidable” will differ for products serving sophisticated consumer segments compared to those aimed at vulnerable populations. If the expectations for the definition of a “reasonable consumer” were context-specific, it would advance the ability of the proposed definitions to express “Total Price.”

We propose three changes to the proposed rule’s definitions to incorporate this standard. First, the definition of “ancillary good or service”²⁸ should be changed in order to (a) only include optional (and not mandatory) purchases, and (b) define ancillary fees relative to the reasonable consumer standard. If a fee is mandatory, it is not ancillary, and if a reasonable consumer would expect it to be included, it is not ancillary. We propose that “Ancillary Good or Service” be defined in Section 464.1 as “any optional, additional good(s) or service(s), offered to a consumer as part of the same transaction, that a reasonable consumer would not expect to be included with the purchase of the advertised good or service.” Correspondingly the rulemaking comments on this definition should be amended to reflect and elaborate on these changes. Section 464.1(a) should be revised to read as follows:

Ancillary Good or Service means any *optional*, additional good(s) or service(s), offered to a consumer as part of the same transaction, *that a reasonable consumer would not expect to be included with the purchase of the advertised good or service.*

The FTC should add in its Statement of Basis and purpose that this definition would include goods or services which are not necessary to render the primary good or service fit for its intended use but are nevertheless offered as part of the same transaction. An Ancillary Good or Service must be an optional purchase. For example, if a hotel offers a consumer the option to purchase or decline trip insurance with a room reservation, the insurance would be an ancillary service. If a housing rental agreement includes a fee for a trash valet service that is not reasonably avoidable, it would be a mandatory service and thus not ancillary. If a business includes a fee the consumer cannot reasonably avoid to process the payment for any good or service, such payment processing would be a mandatory service, and thus not ancillary.

²⁷ Consumer Financial Protection Bureau, “Unfair, Deceptive, or Abusive Acts or Practices (UDAAPs) Examination Procedures,” p. 6. (Oct. 2012), available at https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures_2023-09.pdf

²⁸ The current proposed rule defines *Ancillary Good or Service* as “any additional good(s) or service(s) offered to a consumer as part of the same transaction.” This is insufficiently specific to address these problems.

Second and correspondingly, because we proposed that ancillary good or service be redefined to not include mandatory goods and services, the definition for Total Price in § 464.1(g) should be revised to read:

“Total Price means the maximum total of all mandatory fees or charges a consumer must pay for a good or service ~~and any mandatory Ancillary Good or Service~~, except that Shipping Charges and Government Charges may be excluded.”

Third, to make these distinctions clear, we also recommend that the rule include a new definition in § 464.1 for mandatory fees so that rules for mandatory fees and fees for ancillary purchases both cover the universe of possibilities and do not overlap. Therefore, we propose the following definition:

“Mandatory fee includes but is not limited to:

(1) Any fee or surcharge that must be paid in order to purchase the advertised good or service;

(2) A fee or surcharge that is not reasonably avoidable; or

(3) A fee or surcharge for any good or service that a reasonable consumer would expect to be included with the purchase of the advertised good or service.”

b. Optional Fees Included Automatically or by Default

The second circumstance to be considered is where businesses, through a default selection, automatically add the purchase of an ancillary (optional) good or service over the course of a consumer’s purchasing process. The proposed rule should be amended to entirely prohibit this and should make clear that fees for ancillary goods or services included by default are not reasonably avoidable. The FTC should clarify that a fee or charge is not reasonably avoidable where the business uses design elements or other dark patterns that prevent a reasonable consumer from noticing the fee or from easily avoiding the fee. Businesses should not be allowed to advertise one price and then charge another price, putting the onus on the consumer to navigate a complex array of default selections in order to pay the advertised price for the good or service.

It is well established that defaults have a significant impact on consumer behavior and lead many consumers to accept the default option without actively considering it. A large body of literature highlights and shows the effects that default selections can have on consumer an individual behavior, predisposing consumers to make purchases they otherwise would not have chosen to do, whether by biasing the cognitive processes of consumer decision making or through deception, where a consumer, strained for time, does not notice they are consenting to an extra

purchase which they did not affirmatively select.²⁹ Likewise, research has shown that default selection across a range of contexts is effective at biasing consumer and individual choices, irrespective of whether individuals were informed of the defaults, and the reasons they were selected as defaults.³⁰

An example of how default selection impacts consumer behavior is in the context of tips in fintech cash advance products. A growing number of these products disclose “no interest” and “no mandatory fees” but include a default “tip” in the cost of the advance. While the tips are purportedly voluntary, the California Department of Financial Protection and Innovation (DFPI) found that 73% of transactions included tips and other purportedly optional fees.³¹ DFPI observed:

Even though tip-based financing is a young market, the DFPI has already identified multiple strategies that lenders use to make tips almost as certain as required fees and these charges can be quite costly. These approaches include:

- 1) Disabling a service if a borrower does not tip;
- 2) Setting default tips and using other user interface elements to making tipping hard to avoid;
- 3) Making it difficult to set a \$0 tip or not advertising that a particular payment is optional; and
- 4) Claiming that tips are used to help other vulnerable consumers or for charitable contributions.

A longer discussion of the use of “tips” to disguise the cost of fintech cash advances can be found in comments to the CFPB regarding junk fees filed by consumer advocacy groups.³²

²⁹ Tom Baker & Peter Siegelman “‘You Want Insurance with That?’ Using Behavioral Economics to Protect Consumers from Add-on Insurance Products,” Connecticut Insurance Law Journal (2013), available at https://scholarship.law.upenn.edu/faculty_scholarship/441/;

Cass R. Sunstein “Deciding by Default,” University of Pennsylvania Law Review (2013), available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1000&context=penn_law_review;

N. Craig Smith et al., “Choice Without Awareness: Ethical and Policy Implications of Defaults,” Journal of Public Policy & Marketing (Fall 2013), available at <https://www.jstor.org/stable/2696456>;

Brigitte C. Madrian and Dennis F. Shea, “The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior,” The Quarterly Journal of Economics, (Nov. 2001), available at <https://www.jstor.org/stable/43305780>;

Gila E. Fruchter, et al. “Fee or free? How much to add on for an add-on,” Marketing Letters (April 2020), available at <https://link.springer.com/article/10.1007/s11002-010-9112-3>.

³⁰ Mary Steffel, et al. “Ethically deployed defaults: Transparency and consumer protection through disclosure and preference articulation.” *Journal of Marketing Research* (2016), available at <https://www.jstor.org/stable/44134922>

³¹ Some consumers may have tipped on one transaction and then not tipped on another one a few days later because they had just tipped. Thus, the percentage of consumers who avoided tips altogether was likely significantly lower than the percent of transactions that had no tips.

³² See [Comments of NCLC et al to CFPB re Request for Information Regarding Junk Fees Imposed by Providers of Consumer Financial Products or Services](#) at 44-52 (May 2, 2022).

Similarly, some high-cost lenders include credit insurance with their loans as a way of avoiding state interest rate limits.³³ These lenders make the credit insurance technically “voluntary” in order to avoid Truth in Lending Act regulations that would otherwise require that cost to be included in the annual percentage rate. But by prechecking the box to elect credit insurance, the lenders ensure that nearly all consumers pay for it, even though the insurance is very low value, most consumers do not realize that they are paying for it, and many would have chosen not to.³⁴

The phrase “must pay” should be interpreted to include any fee or charge that is included by default and that the consumer must pay unless they take affirmative action to opt out or avoid it.³⁵ Any fees or charges that are automatically included in a product should be considered to be part of the Total Price. By including default fees and charges, the Commission would avoid the need to police a wide variety of dark patterns that can make it difficult for the reasonable consumer to avoid those costs.

Therefore, we propose that § 464.2(b) be revised to read:

- “(b) In any offer, display, or advertisement that contains an amount a consumer may pay,
- (1) a Business must display the Total Price more prominently than any other Pricing Information; and
 - (2) a Business must not automatically include Ancillary Goods or Services in the Total Price or automatically select Ancillary Goods or Services for purchase on behalf of the consumer.”

We furthermore suggest an Official Comment stating:

A consumer must pay a fee or charge if the fee or charge is not reasonably avoidable or if the consumer must pay the fee or charge unless they take affirmative action to avoid it. An ancillary

³³ Pew Charitable Trusts “State Laws Put Installment Loan Borrowers at Risk,” Oct. 2018, p. 18, available at https://www.pewtrusts.org/-/media/assets/2018/10/installment-loans_report.pdf.

³⁴ *Id.* at 18-19.

³⁵ Viewing a cost included by default as a mandatory fee is consistent with the “compulsory use” provisions of the Electronic Fund Transfer Act (EFTA): Compulsory use of electronic fund transfers: No person may— (1) condition the extension of credit to a consumer on such consumer’s repayment by means of preauthorized electronic fund transfers; or (2) require a consumer to establish an account for receipt of electronic fund transfers with a particular financial institution as a condition of employment or receipt of a government benefit. Courts have found that if electronic repayment is a “default” method, then that violates the ban on compulsory use even if the consumer can opt out. *See de la Torre v. CashCall, Inc.*, 56 F. Supp. 3d 1073, 1089 (N.D. Cal. 2014) (concluding that a violation of EFTA occurs “at the moment of conditioning—that is, the moment the creditor requires a consumer to authorize EFT as a condition of extending credit to the consumer”), vacated on other grounds, 2014 WL 7277377 (N.D. Cal. Dec. 22, 2014), vacated and remanded on other grounds, 904 F.3d 866 (9th Cir. 2018); *Fed. Trade Comm’n v. Payday Fin., L.L.C.*, 989 F. Supp. 2d 799 (D.S.D. 2013) (lender violated compulsory use provision because loan was conditioned on agreement to repay by EFT despite right to cancel EFT payments even before first payment); *Pinkett v. First Citizens Bank*, 2010 WL 1910520 (N.D. Ill. May 10, 2010); *O’Donovan v. CashCall, Inc.*, 2009 WL 1833990 (N.D. Cal. June 24, 2009) (finding violation of EFTA despite fact that borrowers could cancel authorization before the first payment); *W. Va. ex rel. McGraw v. CashCall, Inc.*, No. 08-C-1964 (W.V. Cir. Ct. Sept. 10, 2012) (same), available at www.nclc.org/unreported; *In re Integrity Advance, L.L.C.*, CFPB No. 2015-CFPB-0029 (Jan. 11, 2021), available at <https://files.consumerfinance.gov>.

good or service is mandatory if a reasonable consumer would expect the good or service to be included with the purchase.

c. Tips and Gratuities

Tips in the fintech context discussed above are different than true tips and gratuities paid to workers, which consumers generally understand are optional. Recent misconduct in the food service industry, however, has deceived consumers and harmed workers who rely on tips as income.³⁶ Restaurants have imposed mandatory “service fees” in a manner that makes the fee appear as a tip being paid to the worker when it is actually a fee paid to the business. Consumers then decline to tip the worker, believing that they have already done so, and the worker has lost much-needed income as a result of this deceptive conduct. Food delivery companies have engaged in similarly deceptive conduct regarding “delivery fees” and “expanded range fees,” where they do not share these fees with the delivery worker. These approaches frustrate consumers, undermine the financial health of delivery workers, and put honest delivery companies at a disadvantage.

The disclosures to consumers about these fees will improve with the FTC’s proposed rule, but the FTC should consider publishing future guidance to address this particular issue in a manner that protects informed consumer choice and does not harm workers who rely on gratuities as income.

D. Clear and Conspicuous Disclosures

The proposed rule requires disclosures to be made clearly and conspicuously in accordance with the definition in §464.1(c). The elements of this definition apply in various contexts (in person, verbal, electronic, etc.) and are used widely in FTC rulemakings and other statements. We make recommendations to amend certain parts of this definition to facilitate consumer understanding of the information provided in these disclosures.

1. Language Translation

The FTC acknowledges that unfair and deceptive junk fee practices disproportionately harm consumers in vulnerable populations, including those with limited English proficiency. According to the U.S. Census, nearly 22% of the U.S. population over the age of five speak a language other than English at home, and, of these, 38.3% have limited proficiency in English, meaning that they speak English less than very well.”³⁷ (These consumers are referred to as

³⁶ Office of the Attorney General for the District of Columbia “Consumer Alert: DC Restaurants are Barred from Charging Deceptive Fees,” (March 7, 2023) available at <https://oag.dc.gov/release/consumer-alert-dc-restaurants-are-barred-charging>

³⁷ American Community Survey DP02 – Selected Social Characteristics in the United States, “Languages Spoken at Home.” Available at <https://data.census.gov/table/ACSDP5Y2021.DP02?hidePreview=true>

limited English proficient, or “LEP.”) Of these LEP consumers, two-thirds speak Spanish as their non-English language.³⁸

The FTC has acknowledged the importance of language translations in consumer transactions, including auto sales, business opportunities, and home solicitation sales. The FTC has also issued an enforcement policy statement in 16 C.F.R. § 14.9 specifically pertaining to advertising practices and language translation:

Where... rules... require ‘clear and conspicuous’ disclosure of certain information in an advertisement or sales material in a newspaper, magazine, periodical, or other publication that is not in English, the disclosure shall appear in the predominant language of the publication in which the advertisement or sales material appears. In the case of any other advertisement or sales material, the disclosure shall appear in the language of the target audience.

Section § 14.9 would apply to the Total Price disclosures, but because it is limited to advertisements and sales materials, it may not apply to (and require translations of) the “nature and purpose” disclosures in § 464.3(b).

The FTC does include a provision in its proposed definition of “clear and conspicuous” § 464.1(d)(5) which requires disclosures to “appear”³⁹ in each language in which the representation that requires the disclosure appears. However, this would also not apply to the disclosures in § 464.3(b) because there is no triggering “representation that requires the disclosure(s).”

For these reasons, the FTC’s existing provisions likely do not require translation of the “nature and purpose” disclosures in § 464.3(b). Non-English speaking consumers will constitute a substantial portion of the public that the FTC hopes to assist with this transparency and disclosure-focused rule. It should ensure that the disclosures are as understandable for English speaking consumers as they are for the significant part of the U.S. population with limited-English proficiency.

The FTC can improve this deficiency by amending the definition of Clear and Conspicuous in § 464.1(c)(8), which requires the business to account for the specific audience it targets when it makes any disclosure. The FTC should explicitly add LEP consumers to this provision:

(8) When the representation or sales practice targets a specific audience, such as *limited English proficient consumers*, children, older adults, or the terminally ill, “ordinary consumers” includes reasonable members of that group.

³⁸ *Id.*

³⁹ The FTC recently explained in its Combating Auto Retail Scams Rule that the use of the word “appear” is not intended to apply to written disclosures only and includes verbal disclosures as well. See 89 F.R. 590 at 604.

The effect of this amendment would be that the business is required to translate the disclosures in order to effectuate an “easily understandable” disclosure. This amendment would ensure that the effects of § 14.9 apply to all disclosures, not just those in advertisements and sales materials, and would accordingly require translation in situations where the business targets LEP consumers.

2. Printable and Savable Electronic Disclosures

The proposed rule does not currently require all disclosures to be in writing. Both § 464.2 and 464.3 require the disclosures to be made “clearly and conspicuously,” which contemplates audible and visual methods of disclosure. Many of these transactions will occur online or even over the telephone, making it potentially difficult for consumers to retain the information provided to them in the disclosures, particularly those required in § 464.3, regarding the nature and purpose of the fees. To this end, the FTC should require businesses to ensure that when these disclosures are made electronically, they shall be provided in a form that is capable of being printed and saved, should the consumer wish to do so. Such a requirement would be consistent with the purpose of the rulemaking itself and other analogous consumer financial disclosure regulations.

The Truth in Lending Act provides a useful comparison, as Congress expressly stated a purpose that is similar to the FTC’s goals in this rulemaking: assuring meaningful disclosure of terms and allowing consumers to compare their choices.⁴⁰ A key component of TILA also requires creditors to provide certain disclosures in closed-end credit transactions “in a form that the consumer may keep,” demonstrating the importance of a consumer’s ability to literally take the credit disclosures to another provider and compare the terms. 12 C.F.R. 1026.17(a)(1).

Both Sections 464.2 and 464.3 require disclosure earlier in the consumer purchase process than what is required by TILA, both at the advertising juncture and before the consumer consents to pay. Ensuring that when these disclosures are made in an electronic context, the disclosures are capable of being printed and saved would allow consumers to more easily compare their options. Printing and saving information from a website can be cumbersome and not easily readable. Should a consumer wish to print and save the information contained in these disclosures to compare with other offers, the business should ensure that the consumer is able to do so. Honest businesses would also benefit from this type of disclosure requirement, as it would allow them to easily demonstrate how their prices compare to others’.

The FTC can accomplish this goal by amending § 464.1(c)(4) in the definition of “Clear(ly) and Conspicuous(ly):

In any communication using an interactive electronic medium, such as the internet or software, the disclosure must be unavoidable *and must be capable of being printed and saved in an easily readable format.*”

⁴⁰ 15 U.S.C. 1601(a).

3. Concise Disclosures

Section 464.3 of the proposed rule would prohibit misleading fees and affirmatively require businesses to identify the “**nature and purpose** of any amount a **consumer may pay** that is excluded from the Total Price.” Because the Total Price includes mandatory fees, this section addresses government charges, shipping costs and optional fees, and it would require businesses to describe those fees, including their refundability and the good or service for which the fee is charged. Businesses must make these disclosures clearly and conspicuously, as defined in § 464.1(c).

The definition of clearly and conspicuously would require businesses to disclose information in a manner that is “easily understandable,” a point that should be emphasized and clearly enforced going forward. A facet of “easily understandable” is the concept of conciseness – businesses should not be permitted or incentivized to bury consumers in complex descriptions of hundreds of optional fees at one time. Congress and the Federal Communications Commission (FCC) made this point quite clear in the context of Broadband Nutrition Labeling as part of the 2021 Infrastructure Act.⁴¹ Consumers have long complained about complex and burdensome broadband internet bills that overwhelmed them with perplexing information. As a result, the FCC’s Order requires internet providers to display labels that provide key information to consumers without overwhelming them with information.

Of particular note with respect to this concern is the requirement that businesses honestly identify the “refundability” of the fees. This is another potential area of confusion for consumers, as refund policies can be confusing in and of themselves since they may be conditioned on a number of occurrences.⁴² The CFPB’s recent enforcement action against Toyota Motor Credit Corporation underscores the importance of cancellation and refund policies to consumers buying and leasing motor vehicles.⁴³ The Consent Order indicates that Toyota received approximately 64 calls per day for five years from consumers seeking cancellation and refunds of fees for add-ons products. It withheld information from consumers about its internal policies and procedures regarding cancellations and refunds to the detriment of consumers.

Similarly, the FTC should ensure that any final rule is interpreted and enforced in a manner that ensures that the method of disclosure in § 464.3 facilitates the ability of consumers to choose which goods and services they want. This means that tactics such as listing hundreds of optional fees, identifying fees that would not be applicable to the consumer, providing a description that uses complex jargon, and using unnecessarily lengthy descriptions should not be permitted or incentivized. The FTC should emphasize that each part of the required disclosure be simple, understandable and accurate.

⁴¹ Federal Communications Commission, Report and Order and Further Notice of Proposed Rulemaking FCC 22-86 (Nov. 17, 2022) available at <https://docs.fcc.gov/public/attachments/FCC-22-86A1.pdf>

⁴² Jessie Middis, Yahoo News “Aldi refund policy sparks confusion among shoppers: ‘Wait, what?’” Jan. 12, 2022, available at <https://au.news.yahoo.com/aldi-refund-policy-sparks-confusion-among-shoppers-025750975.html>

⁴³ Consumer Financial Protection Bureau Enforcement Actions, Toyota Motor Credit Corporation (Nov. 20, 2023), available at <https://www.consumerfinance.gov/enforcement/actions/toyota-motor-credit-corporation-2023/>

IV. The FTC Should Not Grant Broad Exemptions from the Rule.

The FTC has asked whether it should consider limiting the rule to certain industries or granting broad exemptions for certain types of businesses. We strongly urge the FTC to maintain its intent that this be an “industry neutral rule,” with which all businesses are required to comply. This approach is necessary to achieve market-wide goals such as comparison shopping, competitive prices, informed consumer choice, and reduced consumer frustration and confusion.

A. Small Businesses

The Commission asks in Question No. 14(c) whether it should exclude small businesses from the rule. The answer is no. In order to effectively promote true informed consumer choice and stimulate competition, small businesses should not be excluded from the rule. Although the FTC has stated in the NPRM that deceptive conduct regarding fees is already prohibited by Section 5 of the FTC Act, exempting certain businesses would send the message that the exemption grants them an effective license to engage in the deceptive conduct that forms the basis for the rule.⁴⁴ This cannot be the intent of the FTC and it should ensure that this is not the outcome.

It would also be incongruous to exempt small businesses from compliance with the rule as they will certainly experience its benefits. There is little question that small businesses will benefit from enhanced competition with larger businesses that have historically and deceptively hidden their prices and fees through drip pricing. Small businesses will also benefit from the rule as consumers. Small businesses suffer the harms of hidden and deceptive fee practices, as demonstrated by the FTC’s enforcement actions.⁴⁵ Small business owners also commented in the advance notice proceeding supporting the transparency requirements of rule and describing their inability to budget and plan for their own business.⁴⁶

Exempting small businesses from the rule would hinder the market-wide benefits of transparency through all-in pricing. The FTC’s current proposal would provide confidence to consumers that the prices they see advertised and displayed represent an accurate reflection of the marketplace. Excluding small businesses injects uncertainty into this experience – consumers can no longer be certain that they are evaluating the best and most accurate prices for goods and services and may spend more time chasing down the possibility of better prices due to this uncertainty. This would necessarily impede informed consumer choice and would likely impact the significant benefit of time savings within the rule. Exempting small businesses would create significant consumer

⁴⁴ See also, discussion in Section I regarding the limitations of Section 5 enforcement cases in the wake of *AMG Capital*. Consumers who have suffered harm at the hands of a small businesses are no less deserving of complete equitable relief than those who engage with larger businesses.

⁴⁵ Press Release “FTC Takes Action to Stop Payment Processor First American from Trapping Small Businesses with Surprise Exit Fees and Zombie Charges” July 29, 2022, available at <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-takes-action-stop-payment-processor-first-american-trapping-small-businesses-surprise-exit-fees>.

⁴⁶ Advance Notice of Proposed Rulemaking on Unfair or Deceptive Fees Trade Regulation Rule, Comment No. 2022-0069-5496, available at <https://www.regulations.gov/comment/FTC-2022-0069-5496>.

confusion and adding a layer of unpredictability by exempting small businesses will undermine consumer confidence in the process and inject frustration when they learn that not every business is required to comply with the Rule.

Including small businesses also enables compliance and enforcement. An exemption would need to be extremely clear about who the rule applies to, necessitating a set of standards that would likely evaluate size, revenue, and other performance indicators. Each of these measures will certainly fluctuate for businesses, requiring ongoing analyses and compliance determinations. Adding this extra step of ascertaining whether the rule applies would add compliance costs for businesses. This additional step would also make enforcement by the FTC less efficient. The FTC would have to evaluate each of these standards to determine whether the rule applies, involving a potentially complicated analysis of financial records. A simpler, more predictable and equitable approach would be to ensure that small businesses are not exempt from compliance with the rule.

B. Auto Dealers

At the time the FTC's NPRM was published, it proposed to exclude auto dealers from the rulemaking due to the then-existing proposed Motor Vehicle Dealer Rule. Since the time of publication, the FTC has published its final Combating Auto Retail Scams (CARS) Rule. In the NPRM at hand, the FTC asks in Question No. 13 whether its proposed auto dealer exclusion is appropriate, and the answer is no. Advocates strongly oppose this proposal and urge the Commission to include auto dealers in this rulemaking.

The FTC has not articulated sufficient reasons that would justify this special treatment for auto dealers, other than the proposed rule and comments from auto dealers seeking exemption. The FTC identifies the overlap of this rule with other existing rules and amendment proposals, including the Telemarketing Sales Rule, the Restore Online Shoppers' Confidence Act, the Negative Option Rule, and the Funeral Rule. The rule does not propose to exempt any of the entities that are subject to these rules, yet it proposes to exempt auto dealers based on rule that has not yet taken effect. As stated above when recommending including small businesses, exemptions create confusion for consumers. It is also clear that consumers are particularly tired of hidden and misleading fees in auto sales and financing.⁴⁷

The FTC's CARS Rule proposal similarly requires up front pricing information and prohibits misrepresentations about fees. Auto dealers who comply with the CARS Rule will be able to comply with the Unfair and Deceptive Fees Rule, and there is no reason to permit an exemption.

⁴⁷ Consumer advocacy organizations created a letter writing campaign, telling auto dealer industry lobby groups to cease their efforts to kill the FTC's CARS Rule. Nearly 15,000 letters have been sent. <https://actionnetwork.org/letters/tell-nada-support-the-ftcs-auto-dealer-rule-and-stop-ripping-consumers-off-with-fake-deals-hidden-junk-fees-and-misleading-advertising-now?source=direct> link&

C. Credit and Leasing

We believe that the Total Cost disclosure is consistent with the cost disclosures required by other federal statutes such as the Truth in Lending Act ("TILA"), but the Commission should examine each statute carefully to ensure there is no conflict or confusion. To the extent that the Commission decides to exempt credit, leases or savings, the exemption should be limited to those that are covered by and comply with the relevant disclosure statute, i.e., TILA. Companies should not be allowed, for example, to claim that they are not TILA credit or are otherwise not covered by TILA but permitted to claim a credit exemption from this rule.

In addition, any exemption should be limited to the Total Cost disclosure. The Misleading Fees prohibition, including the requirement to clearly and conspicuously disclose and accurately describe the nature and purpose of any costs that are not included in the Total Price, is compatible with other required disclosures and will enhance consumer protection and pricing transparency.

V. Conclusion

We fully support the FTC's approach to ending hidden and misleading fees. We also do not believe that there are any disputed issues of material fact to be resolved in this rulemaking. To the extent that the FTC does identify such disputed issues, the undersigned would welcome the opportunity to participate in any informal hearing to support the FTC's efforts to ensure that this rule becomes law.

Consumer Federation of America
20/20 Vision
Accountable.US
AKPIRG
American Economic Liberties Project
Americans for Financial Reform Education Fund
Arkansans Against Abusive Payday Lending
Better Markets
CAARMA
Center for Economic Integrity
Center for Economic Justice
Center for Responsible Lending
Consumer Action
Consumer Federation of California
Consumer Protection Policy Center
Consumer Reports
Consumers for Auto Reliability and Safety
Delaware Community Reinvestment Action Council, Inc.
Demand Progress

Economic Action Maryland
Georgia Watch
Indiana Community Action Poverty Institute
Kentucky Equal Justice Center
Legal Aid Justice Center
Maine People's Alliance
Manufactured Home Owners Association of New Jersey
National Association of Consumer Advocates
National Community Reinvestment Coalition
National Consumer Law Center (on behalf of its low-income clients)
National Consumers League
New Economy Project
New Jersey Citizen Action
New Jersey Coalition for Financial Education
New Mexico Center on Law and Poverty
Oregon Consumer Justice
Private Equity Stakeholder Project
Progressive Change Institute
Progressive Leadership Alliance of Nevada
Prosperity Indiana
Public Citizen
Public Good Law Center
RAISE Texas
Revolving Door Project
South Carolina Appleseed Legal Justice Center
Texas Appleseed
THE ONE LESS FOUNDATION
Travelers United
U.S. Public Interest Research Group
UnidosUS
Virginia Citizens Consumer Council
Virginia Poverty Law Center
VOICE (Voices Organized in Civic Engagement)