U.S. Chamber of Commerce

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April 10, 2024

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Notice of Proposed Rulemaking, Federal Trade Commission; Unfair or Deceptive Fees Rule; Commission Matter No. R207011 (88 Fed. Reg. 67413, November 9, 2023)

Dear Madam Secretary:

The U.S. Chamber of Commerce submits these comments regarding the Federal Trade Commission's ("FTC" or "Commission") proposed Unfair or Deceptive Fees Rule and the Commission's initial notice of informal hearing and final notice of informal hearing for the proposed rule ("Informal Hearing"). We have an interest in the Informal Hearing because the proposed rule will have significant consequences for our members and a substantial impact on the American economy.

The rule that the FTC has proposed exceeds the agency's rulemaking authority and fails to comply with the procedural requirements of the Federal Trade Commission Act ("FTC Act"), the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975, and the Administrative Procedure Act. These problems are compounded by the agency's brazen attempts, including in its notice of informal hearing, to sideline public commenters and curtail their ability to engage in the rulemaking process. Most critically, the FTC has arbitrarily and incorrectly determined that there are no disputed issues of material fact concerning the many mistaken conclusions on which the agency justifies this rulemaking, and in so doing seeks to turn the informal hearing scheduled for April 24, 2024, into a meaningless, pro forma exercise. It is clear from the administrative record that there are serious factual disputes concerning key aspects of the proposed rule. Those disputes should be aired in a meaningful, adversarial hearing, as required by law.

I. The Proposed Rule Exceeds the Commission's Statutory Authority

To begin, we reiterate the concerns that we expressed in our public comment on the agency's November 9, 2023, notice of proposed rulemaking that the proposed rule would, if finalized, be unlawful because the FTC lacks statutory authority to promulgate it. Nowhere in the FTC Act has Congress clearly delegated authority to the FTC to issue a rule with economic consequences as significant and far reaching as the rule the agency has proposed. Indeed, the FTC has estimated the overall cost of its proposed rule will be at least $13 billion, and acknowledges that there are a variety of additional costs associated with the rule that it could not quantify.[1] Further, the FTC's proposal does not satisfy the requirements set by the FTC Act for the agency to undertake a rulemaking concerning unfair and deceptive acts and practices. Any final rule that the agency may issue would therefore be invalid. The FTC should abandon this misguided and unlawful exercise of its rulemaking authority.

"[I]n certain extraordinary cases . . . something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 723 (2022). In particular, to authorize rulemakings of substantial "economic and political magnitude," *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), Congress must "speak clearly" and bestow upon the agency the authority that the agency claims in unequivocal terms, *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014). Thus, if an agency asserts an "extravagant statutory power over the national economy," but the statute speaks in only "oblique or elliptical language," the agency's action is unlawful. *West Virginia*, 597 U.S. at 723–24 (quoting *Utility Air*, 573 U.S. at 324).

The proposed Unfair or Deceptive Fees Rule is a paradigmatic example of a rulemaking that "would bring about an enormous and transformative expansion in [the FTC's] regulatory authority without clear congressional authorization." *Utility Air*, 573 U.S. at 324. As the FTC was compelled to acknowledge in its notice of proposed rulemaking, "[b]ecause the proposed rule is sector-neutral and economy-wide, *all firms* will be affected to some degree." *Trade Regulation Rule on Unfair or Deceptive Fees*, 88 Fed. Reg. 77420, 77448 (Nov. 9, 2023) (emphasis added).

What's more, the business decisions that the rule would regulate—how companies set and present prices to consumers—are central to how firms compete against one another in the marketplace. Indeed, Chair Khan has noted that in some industries the so-called "hidden fees" that the FTC seeks to regulate account for billions of dollars in commercial transactions and represent a significant proportion of

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[1] *See Trade Regulation Rule on Unfair or Deceptive Fees*, 88 Fed. Reg. 77420, 77451 (Nov. 9, 2023).

businesses' total revenue. *Unfair or Deceptive Fees Trade Regulation Rule*, 87 Fed. Reg. 67413, 67422 (Nov. 8, 2022) (Statement of Chair Lina M. Khan). Likewise, to justify its proposal, the FTC relies on survey data from 2019 that suggests that "eighty-two percent" of consumers "had spent money on hidden fees in the previous year." *Id*. at 67414[2]. The sheer number of businesses and consumers whose business practices and spending habits would be affected by the FTC's proposal puts it beyond doubt that the FTC could only take the action it proposes if Congress had given the agency plain, unmistakable authorization to do so. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2369 (2023) (holding unlawful agency action creating "a new program affecting 43 million Americans and $430 billion in federal debt" without clear statutory authority).

The need for clear statutory authorization of the regulatory power that the FTC seeks to exert over the economy is underscored by the unprecedented nature of the proposed rule. There are also First Amendment implications from such a rule. As we stressed in our comment on the FTC's notice of proposed rulemaking, never before in the agency's nearly 110-year history has it sought to tell companies across all industries how they may advertise or compete on prices in their day-to-day commercial transactions. "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism." *Utility Air*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159). Here, such skepticism is amply warranted.

Thus, the proposed rule, if finalized, would bring about a fundamental and "unheralded" "restructur[ing]" of vast swaths of the economy. *West Virginia*, 597 U.S. at 724. Such a consequential transformation of how markets operate across all industry sectors plainly requires clear congressional authorization. And the FTC Act provides no such authorization. Where Congress has acted to regulate or provide the FTC with the power to regulate prices and pricing practices, it has done so in specific, detailed terms, and often on a sectoral basis. *See, e.g.*, 15 U.S.C. § 6102; 15 U.S.C. § 6102 *et. seq.*; 46 U.S.C. § 6102 *et. seq*. Here, by contrast, the FTC seeks to extract from the "modest words" and "vague terms" of Section 5 of the FTC Act an expansive authority to regulate the pricing behavior of all firms in all sectors of the entire U.S. economy. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). Such a reading of the statute is indefensible, and certainly cannot sustain the tremendous assertion of regulatory power the FTC wishes to exercise.

[2] It is worth noting the skewed nature of the audience, as the "eighty-two percent" of consumers reflects the views of those consumers that responded to a request for information about consumer experience with "junk fees."

Even leaving aside the absence of statutory authorization for the rule that the FTC proposes, the agency's proposal also flounders on the FTC Act's procedural requirements for rulemakings concerning unfair and deceptive acts or practices. Under Section 18, the FTC must "define with specificity acts or practices which are unfair or deceptive acts or practices" that it seeks to regulate and may only issue a regulation "where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent." 15 U.S.C. § 57a. Yet the FTC's proposed fee rule satisfies neither requirement.

As to the first requirement, the standards the FTC proposes for what count as impermissible hidden fees or misrepresentations are irremediably indeterminate. In particular, the proposed rule's definition of the "Total Price"—including "all fees or charges that are not reasonably avoided"—of goods or services that, under the rule, must be disclosed to consumers raises more questions than it answers. 87 Fed. Reg. at 77484 For example, the proposed rule does not specify whether variable fees that may change depending on region or customer preferences are part of the "Total Price." Similarly, nowhere in its proposed regulatory text does the rule explain what it means for a firm to "misrepresent the nature and purpose of any amount a consumer may pay." *Id*. For the FTC to define the practices it seeks to prohibit with "specificity," its rules should inform regulated parties with "reasonable definiteness of the type of acts or practices." *LabMD, Inc. v. Fed. Trade Comm'n*, 894 F.3d 1221, 1235 (11th Cir. 2018) (quoting 16 C.F.R. § 3.11). But the proposed Unfair or Deceptive Fees Rule does no such thing.

The FTC has also failed to comply with the second procedural requirement that it must determine that an unfair or deceptive practice is prevalent before it proceeds by rulemaking. Indeed, the agency is undertaking this rulemaking without any substantial enforcement record concerning "drip pricing." Opinions expressed at workshops and conferences do not suffice. On the one hand, the FTC claims unfair and deceptive drip pricing practices run rampant across the entire economy, yet, the Commission has a dearth of enforcement actions to show for it, and also claims 90% of firms are already in compliance with proposed disclosure obligations. The Commission cannot have its cake and eat it too.

Finally, the proposed rule is arbitrary and capricious in violation of the Administrative Procedure Act because the FTC makes no effort to justify its universal, one-size-fits-all regulation of pricing practices that would affect businesses across every sector of the economy. Instead, the agency focuses disproportionately on three discrete industries—lodging, live performance ticketing, and restaurants—where, the agency claims, pricing practices have caused problems for consumers. But, even if that

were true, it cannot justify regulating pricing practices in other industries. Overbroad regulatory action is arbitrary and capricious where an agency has failed to justify or explain the scope of the rule. *See, e.g.*, *Delaware Dep't of Nat. Res. & Env't Control v. E.P.A.*, 785 F.3d 1, 17 (D.C. Cir. 2015). Here, the agency has provided no justification whatsoever for its regulation of pricing practices in many of the industries to which its proposed rule would apply. Indeed, an author of the very research on which the agency relies has criticized the proposed rule and explained in detail why the research cannot be used to justify a rule of this magnitude. *See* Comment of Mary Sullivan, FTC-2023-0064-2891 (Jan. 8, 2024). Yet, there is no relevant discussion of this issue in the Commission's informal hearing notice.

II. The FTC Has Undermined and Disregarded the Procedural Safeguards that Ensure Its Rulemakings Are Informed by Robust Public Engagement

The FTC Act "grant[s] unusually broad rights of public participation in agency rulemaking." *Ass'n of Nat. Advertisers, Inc. v. F.T.C.*, 617 F.2d 611, 614 (D.C. Cir. 1979). In general, robust public involvement in rulemaking "is a primary method of assuring that an agency's decisions will be informed and responsive." *State of N. J., Dep't of Env't Prot. v. U.S. Env't Prot. Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). That is especially true in FTC rulemakings for which Congress has imposed important procedural safeguards in addition to those contained in the Administrative Procedure Act.

Instead of encouraging fulsome public involvement in the rulemaking process, and thereby improving the quality and efficacy of any final rule it may issue, the FTC has acted to truncate and undermine interested persons' ability to engage fully in this rulemaking. In so doing, the FTC has violated the spirit, if not the letter, of the statutory guarantees of public participation in the regulatory process. Among other things, the FTC has:

- Failed to allow interested persons an opportunity to submit rebuttal comments after the initial comment period closed, thereby depriving the public of a meaningful opportunity to challenge evidence submitted by other commenters and identify disputed issues of material fact.

- Impeded interested persons' ability to identify disputed issues of material fact by directing commenters to "indicate whether there are any disputed issues of material fact that need to be resolved" in their comments on the notice of proposed rulemaking, thus forcing parties to attempt to identify such issues before the administrative record was complete. 88 Fed. Reg. at 77420.

- Made available for public inspection only approximately 3,300 of the comments it received on the proposed rule—a small fraction of the over 60,000 comments

that were submitted, thereby hamstringing interested persons' ability to prepare adequate submissions in response to the notice of informal hearing.

- Relied on an inapposite standard for determining whether there is a disputed issue of material fact based on the standard for summary judgment under the Federal Rules of Civil Procedure that bears little relationship to the inquiry contemplated by Section 18 of the FTC Act, requiring the agency to assess whether resolution of an issue raised in the rulemaking record "may be aided by the type of adversarial procedures inherent in an evidentiary proceeding with limited cross-examination." *Ass'n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1164 (D.C. Cir. 1979).

- Violated its own rules of procedure, which clearly require separate initial and final notices of an informal hearing so that parties may submit "[r]equests for an opportunity to cross-examine or to present rebuttal submissions" in response to the initial notice before a final notice is issued, 16 C.F.R. § 1.12, by issuing the initial and final notices simultaneously, and thus breaking the basic dictate of due process that an agency must "follow [its] own procedures" "[w]here the rights of individuals are affected," *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

- Failed to provide interested persons with fair notice as to how they should demonstrate the existence of a disputed issue of material fact under the FTC's novel, never before announced, standard.

- Made it impossible for interested persons to prepare any meaningful submissions in response to the notice of an informal hearing by giving interested persons only two weeks, from the publication of the notice in the Federal Register, to submit written submissions —a procedural misstep that almost certainly violates the FTC's obligation to provide a meaningful opportunity for public comment. *Cf. Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 501 F. Supp. 3d 792, 820–21 (N.D. Cal. 2020) (30 day comment period failed to provide public with meaningful opportunity to comment, in violation of the APA).

- Allegedly was able to review and fully analyze the rulemaking record of over 60,000 submitted public comments in just 6 short weeks after the closure of the public comment period, to determine that there were no issues of material issue of fact in any public comment. This itself raises a material question of fact concerning the thoroughness of the agency's review and the correctness of its determination.

These procedural errors, and others, not only have warped the rulemaking process, and deprived the FTC and all stakeholders of the robust public engagement that is essential for effective rulemaking, but also make it likely that any final rule promulgated by the agency will be legally defective. By determining incorrectly and through procedural irregularities that there are no disputed issues of material fact, the FTC "has precluded disclosure of disputed material facts which [is] necessary for fair determination by the Commission of the rulemaking proceeding." 15 U.S.C. § 57a(e)(3)(B). That renders the FTC's conduct of this rulemaking process, and any rule produced through this process, arbitrary and capricious and unlawful.

In the words of former minority Commissioners Christine Wilson and Noah Phillips:

> What all this means is that a majority of the Commission can more easily ignore contradictory views by omitting disputed issues from the NPRM and the initial hearing notice. Replacing independent and objective analysis of controversial issues in the agency's rulemaking proceedings with a "majority rules" regime not only makes it less likely that the resulting regulations will benefit consumers, but also less likely that trade regulation rules will survive legal scrutiny.[3]

III. The FTC Applied A Legally Erroneous Standard for Determining Whether There Are Disputed Questions of Material Fact

The FTC's conclusion that there are no disputed issues of material fact, and that interested persons are therefore not entitled to an evidentiary hearing, is marred by critical errors of fact and law. Application of the proper legal standard to the rulemaking record shows that there are a number of significant, disputed material facts on which interested persons are entitled to an evidentiary hearing.

For starters, the FTC's notice of informal hearing draws a false distinction between "legislative facts" and "specific facts," asserting that "[u]nlike specific facts, legislative facts 'help . . . determine the content of law and of policy' and do not need to 'be developed through evidentiary hearings' because they 'combine empirical observation with application of administrative expertise.'" Notice of Informal Hearing (quoting *National Advertisers*, 627 F.2d at 1161-62). The FTC reasons that, because the factual issues raised by interested persons in comments on the notice of

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[3] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), available at https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioners-christine-s-wilson-noah-joshua-phillips-regarding-commission.

proposed rulemaking are supposedly all "legislative facts," the agency is not obligated to hold an adversarial hearing to examine them.

This conclusion is based on a basic misunderstanding of the law.[4] The D.C. Circuit decision on which the FTC relies in its notice of informal hearing makes clear that specific facts *are* legislative facts: "the term 'specific fact' refers to a category of legislative fact." *National Advertisers*, 627 F.2d at 1164. The FTC's attempt to brush aside the factual issues raised by interested parties on the grounds that they concern "legislative facts" thus rests on a red herring, and ignores the relevant inquiry under the FTC Act. Whether an evidentiary hearing should be held turns on whether interested persons have raised factual issues "the resolution of which may be aided by the type of adversarial procedures inherent in an evidentiary proceeding with limited cross-examination"—not on an esoteric distinction between specific and legislative facts. *Id.*; *see also* 15 U.S.C. § 57a(c)(2)(B) ("An interested person is entitled . . . if the Commission determines that there are disputed issues of material fact it is necessary to resolve . . . to conduct . . . such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues."). And in the context of a rulemaking, an evidentiary hearing may be appropriate where the issue in question is "sufficiently narrow in focus and sufficiently material to the outcome of the proceeding." *National Advertisers*, 627 F.2d at 1164. Simply put, the reasoning on which the FTC rests its decision to deny interested persons an evidentiary hearing on this rulemaking has no basis in the statute or caselaw.

The manner in which the FTC has determined whether an issue is sufficiently disputed to warrant an evidentiary hearing is equally flawed. In its notice of informal hearing, the FTC has applied a novel standard that it claims is based on the standard used to assess a motion for summary judgment in federal court. But nowhere does the FTC Act provide for such a standard, and use of that standard—pulled from an adjudicative context—makes little sense in the context of a legislative rulemaking. *See National Advertisers*, 627 F.2d at 1164 ("Nothing in the legislative history or background of section 18 suggests, however, that Congress believed that the use of evidentiary hearings transformed the nature of the proceedings from rulemaking to adjudication or altered the factual predicate of rulemaking from legislative to adjudicative fact."). Instead, as noted, the proper inquiry is whether an evidentiary hearing would aid the resolution of a question about which conflicting evidence has bene introduced.

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[4] The fact that the FTC recently codified its mistaken distinction between specific facts and legislative facts in its rules of practice does not cure the agency's legal error. "[I]f [an agency] [regulation] is based upon a determination of law . . . [the action] may not stand if the agency has misconceived the law." Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 94 (1943).

Further, the FTC mistakenly claims that interested persons have failed to raise disputed facts because they did not "provide any empirical evidence or data challenging the Commission's assumption[s]." Hearing Notice, 89 Fed. Reg. 21216, 21220 (Mar. 27, 2024). Again, the agency's position bears no resemblance to the standard set out in the FTC Act. Under Section 18 of the FTC Act, the term "evidence" "means *any* matter in the rulemaking record." 15 U.S.C. § 57a (emphasis added). And under the Administrative Procedure Act, interested persons may introduce into the administrative record a wide variety of "written data, views, or arguments." 5 U.S.C. § 553(c). They are not limited to introducing empirical data. Thus, the FTC's conclusion that there are no disputed issues of material fact rests on an overly restrictive understanding of what kinds of evidence may show that an evidentiary hearing is necessary to resolve a dispute.

In short, the FTC is required to review interested persons' comments to determine whether they concern issues the resolution of which would "be aided by 'trial-type' factfinding," as the presiding officer at an informal hearing in another recent FTC rulemaking explained. Negative Option Rule, Project No. P064202, Order (Jan. 25, 2024). And to assess whether an issue is disputed, the FTC must take into account all material submitted into the administrative record, and cannot limit its assessment to empirical data. The agency did neither of these things, and its determination that there are no disputed issues of material fact is therefore not in accordance with law.

The Administrative Law Judge should therefore make an independent determination of material facts for this proceeding. 16 C.F.R. 1.13(b) ("The presiding officer may at any time on the presiding officer's own motion or pursuant to a written petition by interested persons, add or modify any issues designated pursuant to Section 1.12(a)").

IV. The Independent Administrative Law Judge Should Designate Material Issues of Fact to Allow for Meaningful Public Participation

Public commenters identified appropriate material questions of fact in response to the notice of proposed rulemaking. The commenters submitted evidence and analysis putting into question the Commission's conclusions. In some cases, the Commission's conclusions were based on assumptions. Public commenters questioned those assumptions. In other cases, public commenters brought forth new data raising questions concerning the Commission's data. These issues raise "bona fide disputes," and do not sound in law or policy issues vested in the Commission, as the Commission asserts. The following chart contains a sample analysis based on the review of public comments:

Sample Material Issue of Fact	Commission's Assumption/Decision	Public Commenter's Position
What percentage of firms comply with existing requirements?	The Commission assumes that 90% of firms (exclusive of live-event ticketing, short-term lodging, and restaurants) are already in compliance. The Commission has no basis for this assumption and in fact concedes that this number may be as low as 50%. *See* 88 Fed. Reg. at 77453.	Ninety percent of firms are not in compliance with proposed rule requirements.
Will the costs imposed by the Proposed Rule result in decreased competition in the communications marketplace?	The Commission does not respond directly to this material issue of fact in the informal hearing notice.	
Will consumers be confused by duplicative or conflicting disclosure requirements?	Whether the disclosure requirements are duplicative or conflicting is a legal question and the question of whether consumers might be confused by multiple disclosure falls more neatly into the category of a legislative fact— "combining empirical observation with application of administrative expertise to reach generalized conclusions"—than a specific fact. The Commission appreciates the views and commentary ACA provided on this topic and will give them careful consideration, but is not	This is a factual question, not a legal or policy issue.

	persuaded that they present disputed issues of material fact.	
What are the disclosure burdens associated with the rule?	The Commission claims, with no supporting evidence, that "the substantial majority" of businesses already provide these required disclosures "as a matter of good business practice." *Id.* Second, again without supporting evidence, the Commission speculates that noncompliant sellers would face an average of just 90 minutes to become compliant: 30 minutes of attorney review and 60 minutes to update a website and price display.	This compliance would not be as simple as updating prices. A business would have to identify noncompliant advertisements and webpages. That would require having knowledgeable employees or outside compliance professionals analyze every single price display, whether physical or digital. A business would then have to replace these noncompliant displays. As the Commission concedes, advertisements and menus would then need to be reprinted, often externally. Even the smallest businesses likely would need more than 60 minutes to redesign advertisements and menus, travel to a printer, physically replace all noncompliant displays, and update their websites. For large businesses, the time investments could be astronomical. Some may need to hire graphic designers to make advertisements look appealing and web designers or software engineers to rebuild entire websites. The largest businesses would need dozens, if not hundreds, of employees to replace thousands of noncompliant print advertisements and webpages. This could involve traveling around the country to replace tens of thousands of billboards, subway advertisements, and the like. That would take thousands of hours, not 60 minutes.
Will this rule increase costs to consumers?	The Commission essentially ignores all costs to consumers. It does not contemplate that the Proposed Rule could reduce	The Commission fails to recognize that price-sensitive consumers may be hurt by the "Total Price" requirement. Consumers would

	consumer surplus. Instead, the Commission claims that "prices are likely to adjust" to the benefit of consumers: "consumer welfare would increase, and producer profits would decrease by the same amount." 88 Fed. Reg. at 77448. The Commission speculates that the "cost of such inefficiencies would be temporary and decrease as consumers adjust to the all-in pricing required by the proposed rule," but it provides no evidence for this prediction that the lower sales would be temporary, especially in the many industries where it concedes to having no data to support this assumption at all.	similarly suffer if firms replace dynamic fee structures, which allocate costs based on the choices of individual consumers, with a one-size-fits-all flat fee.
What are the proposed rule's benefits to consumers?	The Commission never actually quantifies the exact benefits of the Proposed Rule, it claims that the Proposed Rule will have net benefits if the annual per-consumer benefit is $6.65. 88 Fed. Reg. at 77452–53.	The $6.65 figure is flawed for several reasons. The figure purports to measure the "break-even benefit per consumer in terms of minutes saved as the result of the proposed rule." 88 Fed. Reg. at 77453. The Commission's assumptions for this figure are incorrect. A large proportion of consumers, for instance, are unlikely to purchase tickets for live events or rooms at hotels that apply resort fees. Once these adults are excluded from the analysis, the per person value will have to be more than $6.65 to make the Proposed Rule cost justified. The Commission's value of saved time at $24.40 per hour is overstated and not accurate. 88 Fed. Reg. at 77452–53. There are at least 9 separate reasons why the Commission's assumptions

		on this factual issue are incorrect and should be debated at an evidentiary hearing.
How will the lack of preemption impact business costs?	The Commission does not respond to this question of fact in its informal hearing notice.	Businesses will have to comply with both the Proposed Rule and state laws that provide more extensive limitations on fees, thereby increasing the financial burden of compliance, including obtaining legal advice and developing and implementing different solutions to regulatory requirements in different jurisdictions.

Notably, many of these disputed issues are analogous to issues that presiding officers in other FTC rulemaking proceedings determined were disputed issues of material facts on which an evidentiary hearing was necessary to resolve. For example, the presiding officer in the FTC's vocational schools rulemaking proceeding deemed competition issues a material question of fact. *See Advertising, Disclosure, Cooling Off and Refund Requirements Concerning Proprietary Vocational and Home Study Schools*, 40 Fed. Reg. 44582, 44583 (Sept. 29, 1975) ("What is the nature and extent of competition between schools subject to the proposed rule and those schools exempt from its coverage and what would be the impact of the rule upon such competition?"). In another proceeding, the presiding officer determined that questions about the economic effects on consumers and on used motor vehicle dealers of required disclosures of information were disputed issues of material fact. *See Sale of Used Motor Vehicles*, 41 Fed. Reg. 39337, 39338 (Sept. 15, 1976). Similarly, the presiding officer treated the economic effects on small businesses if existing restraints on the dissemination of information pertaining to the cost and availability of ophthalmic goods and services were removed as a disputed issue of material fact. *See Advertising of Ophthalmic Goods and Services*, 41 Fed. Reg. 14194, 14195 (Apr. 2, 1976).

Thus, independent presiding officers have found questions pertaining to costs, competition, effects on consumers, effects on small businesses, interactions with state and other regulations as appropriate questions of fact for informal hearings. Take for example, new data calculations in the rulemaking record:

Corrected Cost Tables Using Public Commenter Assumptions

Table 2 – Economy-Wide Compliance Costs

	Firms that Already Comply with Proposed Rule	Firms that Do Not Already Comply with Proposed Rule	
Number of Firms			
Assumed Fraction of Firms in Compliance (Exclusive of Live-Event Ticketing, Short-Terr Lodging, Restaurants)	50%		50%
Number of Firms Exclusive of Live-Event Ticketing, Short-Term Lodging, and Restaurants	2,811,247		2,811,247
Number of Firms Inclusive of Live-Event Ticketing, Short-Term Lodging, and Restaurants	3,073,437		3,067,176
Wages			
Hourly Wage Rate Data Scientist	$59.00		$59.00
Hourly Wage Rate Web Developer	$42.11		$42.11
Hourly Wage Lawyer to Review Compliance	$306.00		$306.00
One-time Hours for Regulatory Familiarization or Compliance		**Low-end Estimate**	**High-end Estimate**
Lawyer Hours	1	5	10
Purchase Process Adjustment Hours	0	40	80
Data Analyst Hours	0	40	80
Recurring (Annual) Hours for Compliance			
Lawyer Hours	0	0	10
One-Time Costs	$860,241,429	$15,671,012,490	$31,342,024,979
Recurring (Annual) Costs	$0	$0	$8,602,414,290
Total Present Value Costs (Annual + One-Time)			
Total @ 7% Discount Rate	$860,241,429	$15,671,012,490	$91,761,783,194
Total @ 3% Discount Rate	$860,241,429	$15,671,012,490	$104,722,363,759
Live-Event Ticketing, Short-Term Lodging, and Restaurants			
Total Present Value Costs (Annual + One Time) for Live-Event Ticketing, Short-Term Lodging, and Restaurants			
Total @ 7% Discount Rate	$47,785,835	$1,555,015,731	$3,692,879,269
Total @ 3% Discount Rate	$47,785,835	$1,555,015,731	$4,065,459,392
Grand Total (All Firms)			
Total @ 7% Discount Rate		$18,134,055,485	$96,362,689,727
Total @ 3% Discount Rate		$18,134,055,485	$109,695,850,415

Table 3 – Per Firm Annualized Costs

	Firms that Already Comply with Proposed Rule	Firms that Do Not Already Comply with Proposed Rule	
All Industries		**Low-End**	**High-End**
Annualized Compliance Cost per Firm @ 7% Discount Rate		$800	$4,431
Annualized Compliance Cost per Firm @ 3% Discount Rate		$658	$4,158
One-Time Cost (Firms Already in Compliance)	$306		

Table 4 – Break-Even Analysis

Break-Even Benefit Per Consumer ($)	Low-End Estimate	High-End Estimate
Full Economy		
Total @ 7% Discount Rate	$9.99	$53.11
Total @ 3% Discount Rate	$8.23	$49.78
Break-Even Time Savings Per Consumer (Minutes)		
Full Economy		
Total @ 7% Discount Rate	32.85	174.57
Total @ 3% Discount Rate	27.05	163.62

If commenters are correct that the FTC has made various errors in its calculation of costs and benefits, the cost estimates the agency has made would have to be revised upwards by substantial amounts. Simply put, the FTC's estimation of costs is based on various assumptions that commenters have questioned, challenged, and undercut. Cross examination in an evidentiary hearing would allow for a full and thorough testing of those assumptions. *Cf. Crawford v. Washington*, 541 U.S. 36, 66 (2004) (explaining that cross examination can be a valuable tool for testing factual assumptions). The agency is thus required by law to allow for such a hearing, and doing so would help ensure that the agency does not finalize a lawless and harmful rule.

The FTC must follow special statutory procedures when it undertakes a rulemaking that are designed to ensure robust public engagement above and beyond what is provided for by the Administrative Procedure Act. The agency's Unfair and Deceptive Fees rulemaking shows why allowing for such engagement is essential.

Commenters have submitted data and analyses that raise serious and material questions about the soundness of the FTC's proposed rule and, in particular, how the FTC has calculated the costs and benefits of the rule. Instead of ignoring and attempting to sideline these commenters, the FTC should, as a matter of sounds rulemaking, and must, as a matter of law, provide for an evidentiary hearing at which these disputed issues of material fact may be examined and resolved.

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We appreciate the FTC's consideration of our concerns and requests.

Sincerely,

Sean Heather
Senior Vice President
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