Informal Hearing on Proposed Trade Regulation Rule on Unfair or Deceptive Fees | April 24, 2024

Judge Himes:

Good morning. I'm Judge Himes. I'm the designated presiding officer for this informal hearing on the FTC's proposed trade regulation rule on unfair and deceptive fees, which would prohibit unfair or deceptive practices relating to fees for goods or services. Specifically misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees. This informal hearing is being conducted virtually and is available for the public to watch live on the Commission's website. A transcript of the informal hearing will be placed in the rulemaking record. The FTC's vendor, OpenExchange, will be managing the hearing logistics. A court reporter will be transcribing the hearing. Will the court reporter please identify yourself?

Suzanne Bergling:

Suzanne Bergling with For The Record Court Reporters.

Judge Himes:

Thank you. After reviewing the comments that were submitted in response to the notice of proposed rulemaking issued in November of last year, the commission identified no disputed issues of material fact necessary to be resolved at this informal hearing. Because of that, this hearing will include no cross-examination and no rebuttal submissions. And as the presiding officer, I will make no recommended decision. My role is to preside over and ensure the orderly conduct of this hearing including selecting the sequence in which oral statements will be heard. In the final notice of proposed rulemaking issued in March, the commission identified 17 interested persons who requested to make an oral presentation at this hearing. The list of those persons has been published on the FTC's website. We will follow the list in the same order today with one exception made to accommodate a participant's conflict. Each speaker should first identify themselves by name and the organizations they represent, if any, and state their interest in the proceeding.

Each speaker is limited to 15 minutes. At the end of the allotted time, the speaker's audio and video will be terminated by OpenExchange. Each speaker's oral presentation also is limited to the topic of the proposed trade regulation rule on unfair and deceptive fees, which would prohibit unfair or deceptive practices relating to fees or services. If a speaker raises any other topics, I retain the discretion to direct OpenExchange to cut the audio and video feed of that speaker. Now, if you do the math, 17 speakers times 15 minutes is roughly 4+ hours. Therefore, I will call a 15 minute recess around 12 noon, maybe a little before, a little after, once the speaker at that time concludes. Speakers will not have the ability to display material during their presentation. Interested parties were given the opportunity to provide written submissions and the time for doing so is now closed.

Today's informal hearing is solely to allow oral presentations from the 17 groups identified by the commission. OpenExchange will inform me when the next speaker is set up and ready. OpenExchange will then turn on the audio and video of the designated speaker and will then announce each speaker by their designated number and name. If any speaker is unavailable when contacted by OpenExchange, OpenExchange will go to the next speaker. The unavailable speaker will be called on again at the end of the scheduled presentations. For each speaker, I remind you to first identify yourself by name and the organizations you represent, if any, and then to state your interest in this proceeding. With these instructions covered, it's time for the first speaker. OpenExchange, is the first speaker ready?

OpenExchange:

Yes, they are ready.

Judge Himes:

Okay. Please announce the speaker's number and name.

OpenExchange:

We have speaker one, Ariel Nelson from the National Consumer Law Center.

Judge Himes:

Thank you. Again please identify yourself by name, your organization, and your interest in the proceeding. Go right ahead.

Ariel Nelson:

Good morning, your Honor. My name is Ariel Nelson and I'm an attorney at the National Consumer Law Center. I speak today on behalf of our low income clients. NCLC is a nonprofit organization that works for consumer justice and economic security for low income and other disadvantaged people. Our clients often live paycheck to paycheck, facing tight budgets with no room for error. Unexpected junk fees can mean the difference between being able to pay their expenses that month versus being thrown into financial turmoil or incurring expensive debt. As noted in the notice of informal hearing, NCLC filed four sets of comments in response to the notice of proposed rulemaking. We strongly support the FTC's overall approach to regulating junk fees across the economy. We also urge the FTC to strengthen the rule. Today I'll first describe five key things that the rule should do. Then I'll discuss the prevalence of rental housing junk fees and junk fees affecting justice-involved people the focus of two of our comments. Before diving in. I also want to note that our comments provide additional and more specific recommendations that I'll be able to discuss here.

Judge Himes:

Excuse me-

Ariel Nelson:

Turning to our high level recommendations... Yeah.

Judge Himes:

Would you like to turn on your video? I don't think anybody's seeing you.

Ariel Nelson:

It is on, but please let me know if it is not working.

Judge Himes:

I'm not seeing you. Is anybody else? OpenExchange? This is an audio link even for the Teams meeting you mean? I see. Okay. I apologize. I'm sorry to interrupt you.

Ariel Nelson:

No, thank you Judge Himes. I will first turn to our high level recommendations. We first urge the commission to promulgate a final rule that's industry neutral. Second, we urge the commission to finalize a rule that prohibits hidden and misleading fees as well as excessive fees. Both consumers and industry players have recognized the benefits of transparency. For example, in the rental housing context, the CEO of one rental listing platform described how transparency allows renters to better assess their ability to afford an apartment and to budget effectively. Landlords in turn get qualified applicants who can afford the unit.

Suzanne Bergling:

Excuse me.

Speaker 1:

[inaudible 00:08:13] hospitals and doctors-

Suzanne Bergling:

Excuse me.

Speaker 1:

[inaudible 00:08:13].

Suzanne Bergling:

This is the court reporter.

Speaker 1:

[inaudible 00:08:18] issue.

Suzanne Bergling:

Excuse me. This is the court reporter. There's two different tracks of audio coming through for me.

Ariel Nelson:

It sounds like it has been resolved now.

Suzanne Bergling:

Okay. If you could start back with your, "for example, in the rental housing."

Ariel Nelson:

Sure. For example, in the rental housing context, the CEO of Run rental listing platform described how transparency allows renters to better assess their ability to afford an apartment and to budget effectively. Landlords in turn get qualified applicants who can afford the unit. The White House has also emphasized the need for transparency announcing in July of 2023 that it had secured commitments from three major rental listing platforms to provide consumers with total upfront cost information. They now do provide this information, examples of which we included an Appendix B of our comments focusing on rental housing fees. At the same time, a rule mandating disclosure of fees alone would not curb many of the abusive junk fees practices incurring in many markets. For example, again, in the rental housing market, disclosure alone would not prevent practices like the collection of fees for services not ultimately provided, fees with vague names and unclear purposes and fees that far exceed the cost of providing a service.

Thus, the FTC should not only finalize the prohibition on hidden fees, but also on misleading fees. Vague descriptions of fees that are not understandable to a reasonable consumer should violate the prohibition on misleading fees. The FTC should also prohibit excessive fees, as I'll talk about a little more in a minute. Third, the FTC should clarify the definition of total price. As currently proposed it is not totally clear how the definition would apply to two types of fees, mandatory fees that vary based on usage such that the exact amount that a consumer would be required to pay is not necessarily knowable upfront, and fees that become mandatory for only some people. But this issue can be easily addressed. It is not a reason to exclude certain industries from the final rule or to decline to finalize a rule. The FTC can address this issue by clarifying that businesses must disclose all fees either under Section 464.2(a) as part of the total price or under 464.3(b) because they are any amount a consumer may pay that is excluded from the total price.

Fourth, the rule should provide that state law afford its consumers greater protections than the FTC rule are consistent with the rule. That proposal appropriately recognizes both the importance of setting a nationwide regulatory floor and the rule that states can play in reigning in junk fees. Fifth and finally, we urge the FTC to commit to issuing advisory opinions and staff interpretations. We recognize that the proposed rule consists of general standards with broad applicability. It also regulates fees primarily through disclosure mechanisms and in our experience disclosure regimes sometimes require clarification or refinement over time with respect to specific circumstances to answer questions from regulated businesses and to help facilitate compliance. The FTC should include a discussion in the statement of basis and purpose stating that it will answer such questions with formal advisory opinions or informal staff opinion letters. To the extent clarifications or refinements are warranted because of other federal or state regulation of an industry, they can be adopted using opinions like these.

This type of guidance is not unprecedented. For example, the FTC issued four formal advisory opinions under the Fair Debt Collection Practices Act prior to the Dodd-Frank amendments and the staff issued hundreds of informal staff opinion letters under the credit practices rule and under the Fair Credit Reporting Act before that authority was transferred to the consumer financial protection Bureau. I now want to turn to two specific types of junk fees, rental housing junk fees and junk fees affecting justice involved people. Rental housing junk fees are prevalent. About 44 million households live in rental housing. These households face an array of unavoidable fees during their search for housing throughout the duration of their lease and at the end of their lease. These fees place additional burdens on renters, many of whom are struggling with increasingly high rents and an ongoing shortage of affordable housing. Landlords may not disclose mandatory fees upfront.

As a result until someone begins the lease signing process at which point they've probably already paid a non-refundable, excuse me, application fee, excuse me, and possibly other fees. Renters may not know the true amount they owe at the start of their lease term and then on a monthly basis. Junk fees can add hundreds of dollars per month to the rent. These junk fees threaten renter's ability to budget and to remain housed. Just last month, the White House emphasized the prevalence of these fees pointing to new research from the Council of Economic Advisors on apartment applications. The council estimated that after accounting for the cost of background checks, the excess burden of apartment application fees alone is $276 million each year. Our comments also speak to the prevalence of rental housing fees. We conducted a survey of legal services and non-profit attorneys between November and December of 2022. The survey asked people to indicate whether they've seen certain fees.

We got 95 responses. 89% of respondents reported that landlords imposed rental application fees. 87% stated that landlords charge excessive late fees. Well over half of respondents observed utility-related fees, processing or administrative fees, convenience fees, insurance fees and notice fees. Respondents also reported seeing a laundry list of other fees including high-risk fees, pet fees, trash fees, valet trash fees, pest control fees, technology package fees, fees to hold an apartment, January fees and more. The Council of Economic Advisors' research in our survey are far from the only sources of data on these fees. As detailed in our comments, state enforcement actions in Pennsylvania, Maryland, Colorado and Ohio, investigative reports on fees in various cities, private litigation and comments from individuals and non-profits submitted as part of this rulemaking all indicate the prevalence of these fees. We recognize that it might seem complicated to apply the proposed rule to some fees like those that very based on usage, but that's no reason to exclude the rental housing industry from the rule.

We've provided specific recommendations around how to strengthen the rule to more clearly account for such circumstances such as clarifying the definition of total price as I mentioned earlier, but in any event, the proposed rule is workable As written. Appendix A of our comments specifically describes how the proposed rule would apply to 26 different fees showing how compliance is possible even without change. And as I mentioned, three rental listing platforms already provide consumers with upfront cost information, further demonstrating that requiring fee disclosure is workable. Given the prevalence and harm of these fees, we urge the commission to finalize a rule that encompasses rental housing. Finally, I want to turn to junk fees affecting justice-involved people. These fees are prevalent and predatory. Private companies sell consumer goods and services to or for the benefit of justice-involved people including people in prisons and jails. We call this industry the correctional consumer services industry.

The market for correctional consumer services impacts a large number of consumers. Nearly 2 million people are incarcerated in this country. Correctional consumer services companies also extract money from families of justice-involved people whose numbers are harder to quantify but greatly expand the figure. Consumers in this market are particularly vulnerable, including because they have especially limited financial resources. The median income around people entering prison is 41% less than the national average, and people have virtually no ability to earn meaningful wages while incarcerated people. Leaving incarceration are worse off financially. Private companies in this market impose hidden, misleading, excessive and unavoidable fees from the time a person is arrested through their period of incarceration, after release and everywhere in between.

Some examples of these fees include fees for post-arrest or pre-trial diversion programs, fees for money transfer services that allow people to send money to incarcerated people so they can buy basic necessities like hygiene products and food, fees to send open and reopen electronic messages, fees for e-books and content on tablets and an array of fees associated with prepaid debit cards on which people get their money back upon release and fees for private probation. Our comments and appendices include data from the prison policy initiative, excuse me, on the amount and type of fees charged for many of these goods and services across the 50 states. A rule that covers this industry would benefit vulnerable consumers who desperately need it.

Excuse me. Nevertheless, we emphasize that a disclosure-focused tool would not address many of the junk fees plaguing the market for correctional consumer services. There the primary issue is that companies charge excessive fees for essential services to literally captive consumers with no alternative. Companies often hold a monopoly for particular services within a given correctional facility. Accordingly, even if a company clearly disclosed all fees, it wouldn't facilitate price comparisons, increased competition among sellers, or put downward pressure on prices as the FTC intends because there's no comparison to be made or competition to be had. This problem is made worse because correctional facilities don't have a lot of options when deciding which private company to award contracts to. The lack of choice further limits competition and limits the potential of the rule. For these reasons, prohibitions on excessive fees and fees that provide little or no value to consumers are essential for alleviating financial harm to justice-involved consumers and their families. To conclude junk fees are prevalent across industries.

Voluntary measures by industry to increase transparency can benefit consumers. Such measures also demonstrate that upfront fee disclosure is doable. However, voluntary measures in some industries haven't been enough to stop abusive fee-related practices that harm consumers and make it hard for honest businesses to compete. According to the Council of Economic Advisers, consumers pay $90 billion in junk fees every year. We need enforceable, uniform requirements to curb these fees and protect consumers. We therefore urge the FTC to promulgate a rule that's industry neutral and therefore encompasses rental housing and correctional consumer services. Thank you for the opportunity to speak and for the consideration of our many comments. Thank you.

Judge Himes:

Thank you Ms. Nelson. OpenExchange, can you announce the next speaker please?

OpenExchange:

Speaker number two is Brian Hurley with ACA Connects. Brian, go ahead.

Brian Hurley:

Thank you. Good morning. My name is Brian Hurley and I'm here in my capacity as Chief Regulatory Council of ACA Connects, America's Communications Association. ACA Connects is a trade association representing small and mid-sized communications providers whose businesses would potentially be subject to regulation adopted in this proceeding. Thank you for the opportunity to participate in this informal hearing on the proposed trade regulation rule on unfair or deceptive practices. As discussed in ACA Connects' prior comments, the FTC should not apply any final rule to providers of communication services. Such a move would be unlawful as well as unwise as a matter of policy. ACA Connects' members include more than 500 small and medium-sized communication service providers. Our member companies provide an array of services including broadband, cable TV and voice telephony. They operate primarily in rural and smaller suburban markets across America, enabling their communities to enjoy advanced services and high-speed connectivity that rivals that of any metropolitan area.

As small businesses that would be subject to the proposed rule, our members have a strong stake in the outcome of this proceeding. They share the commission's goal of ensuring that prices and fees for broadband, cable TV and other communication services are clear, transparent and not deceptive or misleading. Indeed, they live by these principles. As community-based providers, our members maintain high standards of honesty and transparency in their dealings with customers and potential customers who are often neighbors, friends and family. That means disclosing sufficient information about their offerings so that customers can select services that are right for them and within their budget. Also in today's competitive marketplace, ACA Connects members and other broadband providers have every incentive to avoid bill shock or other negative experiences that could induce customers to take their business elsewhere. They're also eager to tout low prices, new technologies or speed tiers and other aspects of their offerings that may differentiate them from their competitors.

The proposed rule would take the unwarranted step of imposing prescriptive obligations on ACA Connects members and other communications service providers regarding how they advertise and display prices for their services. This would be a mistake for several reasons. First, the rule would be unlawful because it fails to satisfy the requirements of the Magnuson Moss Warranty-Federal Trade Commission Commission Improvements Act. Under that statute, the FTC may not advance a rulemaking unless it has reason to believe that the unfair or deceptive acts or practices which are subject to the proposed rulemaking are prevalent. There's no basis for such a belief, at least with respect to the communications industry, and the MPRM and the comment record do not show otherwise. On the contrary, the MPRM makes its case primarily on the basis of examples plucked from a handful of industries unrelated to the communications sector. For the FTC to impose intrusive and burdensome new regulations on communication services without evidence of a prevalent problem in this industry would flout the requirements of Magnuson Moss. This the commission cannot do.

In addition, communication service providers are already subject to regulation of their pricing disclosures at the federal, state and local levels. Our comments cite numerous examples of state and local requirements and at the federal level, the Federal Communications Commission has not been shy in recent years about asserting authority in this area. In 2022, the FTC adopted requirements that all broadband providers display nutrition labels for their broadband offerings at all points of sale. And just last month, it imposed all-in pricing disclosure mandates on cable and satellite TV providers, which are layered on top of point of sale and billing disclosures required under the Television Viewer Protection Act of 2019. Now, all of these mandatory disclosures conflict, albeit in differing ways, with the FTC's proposed total price disclosure. The newest of these, the FCC's All-In Pricing rule for cable and satellite TV adopted in March, directs these providers to disclose an all-in price for video programming on customer bills and on any advertisement or promotion that includes pricing information.

This all-in price includes all costs attributable to carriage of video programming on cable systems or satellite TV systems, but all other costs are excluded from its scope, making it narrower in scope than the FTC's total price. Also, as previously noted, cable and satellite TV providers are already operating under the Television Viewer Protection Act of 2019, which requires them to disclose, at the point of sale, the total monthly charge for the covered video service. This total monthly charge indeed must include a good faith estimate of any taxes assessed on the consumer in contrast to the FTC's total price, which would exclude so-called "government charges." Moving on to the FCC's broadband label requirements, they would require disclosure of a base monthly price for service and in addition to that, an itemized list of both one-time and recurring fees.

Now, this approach reflects the FCC's conscious and deliberate choice to have providers break out the component costs of their service offerings on the labels to help consumers understand these costs in a more nuanced way. The total price disclosure contemplated by the FTC is incompatible with this approach. And moreover, additional FCC regulation and communication service fees and fee disclosures is not only possible, but is the subject of multiple open rulemaking proceedings.

When the FCC adopted broadband label rules, it sought common at the same time on whether to layer on additional requirements including with respect to pricing disclosures. That inquiry has not come to a conclusion. In a separate proceeding, the FCC has issued a proposed rule that would restrict early termination fees for cable and satellite TV service and require providers to give credits when customers cancel service in the middle of a billing cycle. Finally, there's a pending FCC proceeding that is considering new truth and billing disclosures for phone services, including voice over internet protocol, a type of voice service that's commonly provided by cable and broadband providers.

Now, these proceedings and any others, the agency may launch in the future create the potential for further conflict with the FTC's proposed rule. And to make matters even more complicated, communication service offerings can have complex pricing structures that include variation in pricing from one geographic market to the next. Often because of input costs such as broadcast programming fees and franchise fees that are beyond the provider's direct control. This variation can make it difficult or even impossible to calculate a total price that a provider could use in advertisements shown to all consumers in a market or that it would be relevant to consumers shopping for different combinations of services. At minimum, the operational burdens would be immense. The smaller providers represented by ACA Connects would find it particularly difficult to absorb such burdens, especially since the required disclosures would be more likely to confuse and frustrate consumers than to improve the customer experience.

ACA Connects members would be strongly inclined to avoid these disclosures if at all possible. Even if that meant omitting all pricing information from advertisements. This would only weaken the ability of consumers to compare some shop and make informed purchasing decisions, not strengthen it, so it would frustrate the very purpose of the rule. For the foregoing reasons, ACA Connects urges the commission to exclude providers of broadband voice and cable communication services from any final rule it may adopt in this proceeding. We appreciate the opportunity to participate today and we urge the commission to take our comments into account in developing any final rule. Thank you so much.

Judge Himes:

Thank you, Mr. Hurley. OpenExchange, I understand that the next group is foregoing their opportunity to present at the hearing, so would you go on to number four? Thank you.

OpenExchange:

I don't believe we have a representative from the US Chamber of Commerce. If we do, could they please speak up? All right. We'll move on to speaker number five, is Joni Lupovitz with the NCTA.

Joni Lupovitz:

Good morning Judge Himes. I'm Joni Lupovitz, vice President and Associate General Counsel of NCTA, the Internet and Television Association. NCTA members include the nation's largest cable TV and broadband providers and cable TV program networks. Our members also provide home and mobile phone services. NCTA submitted comments raising a number of issues in this rulemaking, and we appreciate the opportunity to participate today. My statement this morning, like ACA connects just before me, underscores one key point. NCTA members are already heavily regulated on the very same issues the FTC's proposed rule would address. A growing number of federal and state laws regulate the disclosure of price and fees in the communications industry. In addition, the Federal Communications Commission, or FCC, regulates price displays on bills and promotional materials for a range of services in this area. And, in the past few months, the FCC has proposed an adopted even more rules in this area.

Simply put, when it comes to the communications industry, including cable TV, broadband, and telephone providers, Congress and the FCC already cover the landscape and extensively regulate price and fee disclosures. To be clear, NCTA supports the FTC's goal of protecting consumers from unfair and deceptive prices and fee practices. The FTC proposed rule, however, would directly overlap and conflict with specific price disclosure requirements already on the books for our industry. Because the FTC's proposal differs from existing rules in some significant respects, it would add unnecessary complexity to an increasingly crowded regulatory field. The FTC rule would potentially flood consumers with inconsistent and confusing price and fee disclosures for the same services contrary to the FTC's goals. It would also create huge compliance challenges for communication services. With that in mind, my statement this morning will begin by outlining the existing laws and regulations for the communications industry.

Then explain how the FTC proposal is inconsistent with the existing requirements, and finally, I'll end by providing several options for the FTC to avoid an unwanted result. Let me begin with the existing laws and regulations for cable TV, broadband, and telephone providers. First, the Television Viewer Protection Act, which Congress enacted in 2019, requires cable and satellite TV providers to disclose the total monthly charge for a video programming service at the points of sale before entering into a contract with a customer. The total monthly price includes all related administrative fees, equipment fees, and other charges, and a good faith estimate of all government taxes, fees, and charges. This federal law also requires itemization of all these charges on subscriber's monthly bills. Second, last month, the FTC adopted its All-In Pricing rule, which requires cable and satellite TV services to provide an all-in price for video programming in their advertising and other promotional materials and on customer bills. More on this rule in a minute.

Third, the FCC recently proposed the Cable Operator and Direct Broadcast Satellite Provider Billing Practices rule, another new rule for cable TV that would restrict early termination fees and other practices. Fourth, the FCC's new Broadband Label rule took effect a couple weeks ago, modeled after FDA nutrition labels for food products. Now in consumer shop for broadband service, providers display standard labels with information about prices, fees, introductory rates, data allowances, broadband speeds, and more. And fifth, the FCC Truth in Billing rule requires full and non misleading descriptions of charges on telephone bills, and the FCC has proposed to expand this rule to voice over internet protocol or VoIP telephone services too. Finally, in addition to these federal statutes and FCC regulations, there are numerous state and local requirements for our industry as well.

Bottom line, the Commission's proposed rule is not only unnecessary in this highly regulated space, it would add conflicting requirements that would complicate compliance and confuse consumers about the price of communication services. Consider cable TV. The FTC proposed rule is inconsistent with the FCC's new All-In Pricing rule. Cable operators attempting to comply with the two agency's different definitions and disclosure requirements would have to present at least two very different, prominent prices in the same ad for the same service. First, per the FTC

Ms. Lupovich:

... [inaudible 00:34:00] rule there would be a clear and conspicuous total price. That's the maximum total of all mandatory fees or charges, excluding only shipping and government charges that are imposed on consumers. Then per the FCC rule, the cable TV ad would display a different prominent all-in price. That includes all mandatory program-related fees such as broadcast fees, and regional sports fees, but excludes amounts beyond the cost of the video programming itself, excluding taxes, equipment fees, cable franchise, and access fees, and other such charges. Notably, unlike the FTC proposal, the FCC rule does not distinguish between government charges imposed directly on consumers, and government charges the provider passes through to consumers.

Also, unlike the FTC proposal, the FCC All-In rule recognizes that fees may vary by location. The FCC permits the price presented in an ad to be a starting at price, or a range of prices to account for local variations, and if that's the case, that ad must direct consumers to a website or customer service number to obtain their subscriber-specific, all-in price. Ultimately, the two agencies' different requirements would mystify consumers who wouldn't understand why an ad is showing two or even more prices, a price that complies with the FTC Total Price requirement, and a price that complies with the FCC All-In price requirement, both prices for the very same service.

Similarly, turning to broadband service, if the FTC rule is adopted, the FTC-required total price in ads may be different from the monthly base price displayed on FCC broadband labels. On the FCC-required broadband labels, the base monthly price is the cost of the broadband plan before additional fees and taxes are added. Each fee must be listed out and described lower down on the label, including itemized monthly fees such as equipment rentals, one-time fees at purchase, early termination fees, government taxes, and pass-through fees related to government programs such as universal service, or regulatory fees. In other words, the FCC rule provides for a separate disclosure of costs that the FTC rule would roll into the total price. Consumers would see an FTC price in ads, but a different monthly price for the same service on the broadband label, again, causing more confusion than clarity.

The National Taxpayers Union Foundation, another hearing participant this morning filed comments that also pointed out that the FTC's treatment of government charges is a departure from case law, and federal and state tax laws. The FTC's distinction between government charges imposed on consumers and pass-through fees fails to recognize that many government fees are expected to be passed forward to consumers, and this is especially true in the communications industry. If the FTC adopts a rule that covers communications providers, in effect, the FTC would be substituting its judgment for that of the expert regulator of communication services. The FTC would impose a broad blunt rule that's inconsistent with the FCC's tailored approach for the communication sector. So NCTA's recent filing offers four options for the FTC to avoid a costly, conflicting, and confusing outcome for communications industry, and its customers. Option one, the FTC rule could exempt communications providers subject to FTC price disclosure rules like the FTC's proposed treatment of motor vehicle dealers, and the FTC's done this in other regulations too. Option two, the FTC rule could deem compliance with the applicable FCC price disclosure rules to be in compliance with the FTC rule. This approach is consistent with regulatory practice, and other areas with overlapping requirements.

Option three, the FTC rule could focus narrowly on the industries that its rulemaking notice focused on, where it was able to quantify estimated costs and benefits of the proposed rule, without resorting to highly speculative assumptions for the rest of the economy. Option four, the FTC could harmonize its requirements with FCC price disclosure rules to ensure consistent federal standards and enforcement in the communications sector, and this is required by a long-standing memorandum understanding between the FTC and FCC. In sum, before adopting a new rule, the commission should give serious consideration to the existing regulatory landscape, and appropriately weigh the significant costs of compliance on both industry and consumers, and should avoid adopting duplicative, overlapping, or conflicting rules for communication services by pursuing one of these recommended options. Thank you for the opportunity to speak today.

Judge Haimes:

Thank you Ms. Lupovich for your remarks. We'll go to the next speaker, but I want to advise everybody participating that I now understand the video situation is resolved. So if when you speak you make sure that your video is enabled, you will be seen. OpenExchange, would you please announce the next speaker?

OpenExchange:

Speaker number six is Sarah Davies with the International Franchise Association. Please go ahead.

Judge Haimes:

Thank you. I think you need to enable audio now.

Sarah Davies:

How's that?

Judge Haimes:

That's better. Good.

Sarah Davies:

Okay. Good morning, Judge Haimes. My name is Sarah Davies, and I'm honored to testify on behalf of the International Franchise Association, the world's oldest and largest organization representing franchising. Our membership is comprised of franchisors, franchisees and suppliers to franchise companies. In 2023, franchising accounted for over 850 billion in economic output, and almost 3% of the country's GDP, with over 800,000 franchise establishments supporting nearly 8.7 million jobs across over 300 industries. Notwithstanding the collective impact of franchising, more than 80% of franchisees operate a single franchise establishment, and over 1/2 of franchise brands make less than 5 million per year. In short, franchising is small business. As is always the case, small businesses are disproportionately affected by regulations, rather than larger firms that have the legal and executive firepower to navigate significant administrative and operational changes. The potential for disparate negative impact on small businesses is the very purpose of the Regulatory Flexibility Act enacted by Congress to address adverse effects to competition, and stifled innovation resulting from the failure of federal agencies to recognize the differences in the scale and resources of regulated entities when engaging in rulemaking. The use of franchising is varied throughout the economy, including many industries that would be subject to the FTC's proposed unfair and deceptive fees rule like short-term lodging, restaurants, health and fitness, and personal wellness. Franchise businesses across industries support accurate and transparent pricing, and invest significant resources in engendering trust in consumers to drive repeat business, and brand loyalty. But the characteristics of brand-consumer relationships vary widely across industries.

The proposed rule has different effects on those varying industries depending on the nature of the goods and services sold by the industry, demand for the goods and services, and a myriad of other factors, but in promulgating a one-size-fits-all rule, the commission failed to consider the differences across industries. Taking the restaurant industry as an example, and globalizing anecdotal accounts of abuse of ancillary fees, and restaurants generally treating fees charged to a consumer by full-service, dining restaurants at the end of a meal, and fees charged the consumer before the menu items are purchased, that are purchased or provided, and the transaction complete as the same, the commission failed to meet its burden of proof that the proposed rule will not have a significant impact on a substantial number of small entities as required under the Regulatory Flexibility Act.

To further illustrate the commission's failure to meet its burden, I want to discuss today the adverse impact of the proposed rule to the quick-service restaurant industry, hurting both consumers and small businesses from a service offering and financial perspective. There are nearly 200,000 franchise quick-service restaurants operating in the U.S. that support nearly 4 million jobs. These franchise small businesses weathered the COVID-19 pandemic by relying on delivery, a feature of quick-service restaurant dining that continues to be a mainstay for consumers, particularly in the current economic climate, with consumers opting for low-cost dining options and convenience. As quick-service restaurants battle rising labor and supply chain cost, meeting consumer demand for delivery is essential to their sustainability.

The FTC's broad-brush proposed rule threatens the sustainability by rendering meeting consumer demand for delivery untenable. The proposed rule is unclear as to whether delivery fees charged by restaurants are mandatory fees, thus requiring those delivery fees to be included in the price presented to consumers. Considering delivery fees as mandatory fees is unworkable in the restaurant industry. Using, as an example, a randomly selected franchise quick-service restaurant in the Los Angeles area, a consumer currently may order via the brand's mobile application a cheeseburger for 3.39, and medium fries for 3.99. Although the restaurant is operated under a global brand, the prices for this restaurant are set by its owner, an independent franchisee. If the consumer elects to have its order of cheeseburger and fries delivered, the consumer pays sales tax of a 1.39, a delivery fee of 2.99, and a small order fee of 3.50 for a grand total of $15.26.

The small order fee is assessed by the restaurant owner to offset the delivery charge of $6 charged by third-party delivery service providers, over which the restaurant owner has no control. Absent the small order fee assessed on a small delivery order, the restaurant owner will lose money on the transaction when considering its operating expenses, because the restaurant doesn't know whether the consumer will place a small order or large order until the order is complete. The small order fee is not assessed until the consumer elects to check out its cart.

Consumers that do not place a small order are not assessed a small order fee. Without clarifying that the proposed rule specifically clearly specifies that delivery fees are not mandatory, the commission's proposed rule would require this restaurant owner to present bifurcated pricing within the brand's mobile app for menu items offered at its restaurant, with one set of pricing for menu items picked up at the restaurant, and a separate set of pricing from menu items delivered to the consumer, thereby robbing consumers of price transparency. Because delivery fees would be considered mandatory without clarification, the proposed rule would further require that all menu items offered for delivery reflect the price including the delivery cost on an a la carte basis. To account for small orders that some consumers may elect to have delivered, all menu items would have to be increased to cover both the delivery fee and the small order fee resulting in a 90% increase of menu item prices. In my example, the cheeseburger would now be priced at $6.44, and the medium fries at $7.58 for all consumers, even those consumers that currently would not be assessed a small order fee. The market simply will not support a 90% increase of menu item prices. So the restaurant owner is forced to either decline consumer requests for small order deliveries, or lose money on those transactions. With small business owners of quick-service restaurants already operating on razor-thin margins, turning away consumers, and risking the loss of repeat business is not an option. This example highlights one of the myriad of obstacles to compliance with the proposed rule for franchise quick-service restaurants, multiplied across 200,000 restaurants operating nationally by small business owner franchisees.

The franchisee has the autonomy to establish menu prices based on market forces and consumer preferences where the restaurant is located. Some franchisees may elect to provide visibility into the rising cost of third-party delivery services, credit card payment processing, or swipe fees, and locally imposed labor costs for transparency to the consumer. Other franchisees may elect to include those costs in the menu price. These choices are vested with the small business owner that operates its quick-service restaurant. Franchisees respond based on how those costs vary for their individual restaurant, and what the market demands. The commission's proposed rule deprives these small business owners of the autonomy to make those choices. Additionally, many franchise quick-service restaurant systems offer limited time offer pricing on menu items. Consider National Pizza Day, but this year coincided with Super Bowl Sunday, where franchisees of franchise pizza chains could participate in national advertising campaigns offering discounts to consumers for bundled orders.

Franchisees received the benefit of national advertising, and consumers received the benefit of discounted menu offerings that they could elect at their option to be delivered to their doors. The commission's proposed rule renders such national advertising impossible, as individual restaurants must factor into the advertised menu price the delivery cost, and other charges that vary on a restaurant by restaurant basis. Regional and national advertising are one of the key reasons many quick-service restaurant franchisees elect to invest in a franchise system, rather than operate a non-franchise restaurant. The proposed rule threatens am industry that generates nearly 287 billion for the U.S. economy last year. The commission concedes that consumers, "May mistakenly make inefficient purchases while adjusting to the new regime of all-in pricing," and may, "underconsume products and services." Quick-service restaurants simply cannot sustain the increased cost of labor, and supply chain, and decreased sales, because consumers are deterred by exorbitant price increases to accommodate the commission's proposed rule that fails to consider the impact to the 200,000 small entities operating in the quick-service restaurant industry.

Yet the commission concludes based on its review of over 60,000 public comments in a short 6 weeks, of which only 3,000 have been published, that there are no disputed issues of material fact as to its analysis, and the NPRM of the impact of the proposed rule on small entities, an analysis based on limited data, not representative of the quick-service restaurant industry, and not considering the unique impact on franchise quick-service industry restaurants that operate within the industry. To make such a conclusion is nonsensical, and IFA urges Your Honor to hold the commission accountable for its rulemaking obligations under the Mag-Moss Act, and the Regulatory Flexibility Act, and require the commission to conduct a small business regulatory impact analysis to determine how the proposed rule will impact small businesses. Our members are also deeply concerned about the economic impact to their small businesses due to cost incurred in complying with the proposed rule.

The cost-benefit analysis conducted by the FTC was simply inadequate, and failed to consider numerous costs. With respect to the restaurant industry, the commission estimates that restaurants not currently in compliance will incur 5 to 10 hours of legal advice to understand the impact of the proposed rule, and 5 to 10 hours of legal advice to come into compliance with the proposed rule at an estimated rate of $88.88 per hour. The commission relying on data over a decade old further estimates the cost to restaurants in manager time spent optimizing menu pricing at 5 to 10 hours at a rate of $31.47 cents an hour. Both the commission's estimates of time and cost are materially understated. Our quick-service restaurant industry members estimate incurring hundreds of hours in legal advice at the brand level, in addition to the hours incurred at the individual restaurant level, which varies depending upon the jurisdiction in which the restaurant is located, and implication of existing state laws, all in an estimated rate of 500 an hour.

The commission's flawed cost-benefit analysis is further detailed in IFA's comment, including flawed estimates specific to the restaurant industry, such as estimates to update menu boards at $715, when the current cost for menu boards are commonly over 4,000. The commission's cost-benefit analysis also fails to consider the era in which quick-service restaurants and companies generally operate. With most engaging with consumers via a mobile app, the proposed rule necessitates wide-scale changes to a quick-service restaurant brand's mobile app, that must be completed at the brand level to provide for continuity across all restaurants operating in the system from a consumer-facing perspective, yet provide the ability for each individual restaurant owner to make changes to its menu offer and pricing. Setting aside that brands with locations in California grappling with this issue to comply with the state Junk Fee law that is effective July 1st of this year still have not been able to confirm with mobile app developers that modifying the app to meet the requirements of the Junk Fee law is possible, the estimated cost to update the mobile app with respect to a single state ranged from 250,000 to $400,000.

The commission's proposed rule does not preempt state law, but rather allows them to coexist, as long as the state law is not less protective than the proposed rule. So brands seeking to comply with the proposed rule will incur cost to modify their mobile apps across all states on a state-by-state basis. Accordingly, notwithstanding the commission's conclusory determination that no disputed issues of material fact exist as to cost of compliance, these examples highlight that the commission's determination is unfounded, and further research and analysis is warranted. The FTC concedes that the total cost of the proposed rule are uncertain, and that it is unable to quantify economy-wide benefits. The FTC further admits that there is a lack of reliable information on how fees affect search and decision-making at the economy level.

As to the restaurant industry specifically, the FTC admits that it lacks data to quantify the benefits of the proposed rule within the restaurant industry. Yet the commission commenced with promulgating its one-size-fits-all unfair and deceptive fees rule nonetheless, with disregard for the disparate impact on an industry level, and the significant adverse impact to small entities. The commission further concludes without providing any substantiation for its conclusion that the public comments submitted in response to its proposed rule yielded no disputed issues of material fact warranting an evidentiary hearing. We urge Your Honor to require the FTC to conduct a small business regulatory impact analysis to determine how the proposed rule will impact small businesses, and to conduct a cost-benefit analysis consistent with the FTC's rulemaking requirements under Mag-Moss. Without such analysis, agency rules have been vacated. This flawed rulemaking approach appears pervasive throughout the FTC's recent rulemaking efforts. We believe the commission must engage with all of the facts available to it, and avoid making rules for the exception. Thank you again for the opportunity to appear.

Judge Haimes:

Thank you Ms. Davies. Right down to the wire there. OpenExchange, would you bring in the next speaker please?

OpenExchange:

Speaker number seven is Jeremy Roseberry with Battleline. Please go ahead.

Jeremy Roseberry:

Thank you, Your Honor. Good afternoon, ladies and gentlemen of the Federal Trade Commission. My name is Jeremy Roseberry. I'm here before you representing Battleline LLC's Investor Protection Initiative, and over 160 million Americans who were adversely impacted by hidden fees just last week. I'm also the CEO of a FinTech company called FairShares. I stand before you to strongly advocate for the FTC's proposed trade regulation rule for unfair or deceptive fees. I want to begin by highlighting an additional estimated $100 billion in hidden fees annually, significantly undermining the retirement security of over 100 million hardworking Americans. While about 160 million Americans depend on the stock market for retirement, they remain largely unaware of the hidden fees eroding their investment. In stark contrast, Wall Street insiders are not only aware of these fees, but they have a name for them. They call these hidden fees buying a dividend.

To help you understand buying a dividend, let's look at a simple example. Imagine you deposit $100 into your bank account. A few days later, you withdraw $3. This $3 withdrawal isn't taxable income. It's simply part of your initial deposit that you've taken back from the bank. Initially, you had 100, and after the withdrawal, you still have 100, 97 in the bank, and 3 in your pocket. The same principle applies when you purchase an income producing security such as a stock, investment fund, raise dividends and capital gains. Please consider this scenario. You buy a stock for $100 per share knowing it will soon pay a $3 dividend. Out of your $100 investment, $97 goes towards buying the stock, and $3 is allocated to buying the upcoming dividend that is included in the $100 price you paid.

When the dividend is paid, the stock price adjusts by dropping from 100 to 97 reflecting the payout. Simultaneously, you receive $3 as a dividend. After receiving a dividend, you're left with $97 worth of stock, and $3 in cash, summing back to your initial $100 investment. Again, no income has been earned. Unfortunately, as it stands now, this dividend is fully taxed by financial institutions as if it were income, despite merely being a redistribution of part of your initial investment. This results in over taxation, because you're taxed on money that is not new income. Rather, it is just the return of part of your original investment. Every time investors buy a stock, or fund that pays dividends, or capital gains, they face this unjust and unwarranted taxation. To levy an income tax, there must be income. As you can see from this example, there is no income to be found, and according to the Internal Revenue Code, this transaction is not taxable.

Here's a mathematical example of the hidden costs associated with the securities purchase. Suppose an investor purchased 1,000 shares of the $100 security in my previous example, assuming they have a combined state and federal tax rate of 33%. In that case, they will pay $333 in hidden fees, and receive a tax return that overstates their income. To calculate the tax loss from buying a dividend, multiply the number of shares purchased by the dividend per share, and then multiply the result by a combined state and federal tax rate. For the purpose of this testimony, the FTC needs to understand that due to Wall Street's backward accounting practice of dividends and capital gains, an undisclosed tax liability is attached to every income producing security in the country except for money market funds. This is not a problem with our tax code, nor do we need new legislation to fix this issue.

Instead, the industry needs to follow existing laws, and create accurate tax forms, by deducting non-taxable distributions from taxable income. The industry is aware of this process, as it is already being done in the individual bond markets. Over the past five years, I have worked tirelessly for the American people, meeting with hundreds of senior executives and industry gatekeepers throughout the U.S. financial industry, including major stock exchanges, asset managers, security issuers, and countless others. Our discussions focused on promoting the adoption of technology that reveals these hidden costs to investors before they purchase and addresses the underlying over-taxation to prevent them from losses. While all industry gatekeepers admitted to the stated risks and the ongoing harm to investors, they expressed zero interest in making these risks transparent, or in protecting their clients from these ongoing losses. Furthermore, over the past several years, I have engaged extensively with various SEC commissioners and staff across multiple divisions fulfilling all of their requests for documents and meetings.

The SEC understands the problem, its solutions, and the scale of investor harm involved. To illustrate, consider Sam Bankman-Fried's recent prison sentence for an 8-billion-dollar fraud spanning 4 years. By comparison, the annual financial damage from buying a dividend is orders of magnitude larger than the 4-year FTX fraud, and investors, and the investor harm continues daily. I sincerely appreciate the SEC's time and effort in addressing these critical issues. The SEC's fundamental mission to protect investors, and ensure fair and efficient markets is more crucial now than ever. I urge the SEC to accelerate its actions. Without immediate and decisive intervention, we risk the same adverse outcomes next year affecting another 160 million people. The SEC must act promptly to further prevent harm, and fulfill its mission effectively. I stand ready to help them in any way I can. In addition to the SEC, my outreach has also included over 100 members of Congress, 30 state attorneys generals, state securities regulators, key IRS and treasury officials.

Coordinating these wide-ranging efforts remains a significant challenge. I'm here today to seek the FTC's crucial assistance. While I hope the SEC is spearheading this initiative, the FTC's unique position and authority are essential for facilitating broader inter-agency collaboration. Given the vast scale of hidden costs, this issue clearly warrants urgent scrutiny, and multi-agency action. As the FTC advances the drafting of this essential regulation, I'm submitting the following key points for your consideration. Point number one, unjust taxation is not a government charge. The unjust taxation arising from buying a dividend in the financial services industry should be classified as a cost to consumers, and not a government charge. This classification is crucial, because the excess taxes levied are not legally owed, arising instead from the industry's failure to adopt commercially available technology that could prevent these tax losses, or make them transparent to investors. Those firms who voluntarily choose not to protect their investors despite their fiduciary duty to do so, should be forced to disclose this fact to their investors.

Point number two, the technology to provide real-time disclosure is available now. Technology exists that can provide real-time disclosure of hidden costs, which can be displayed on trade confirmation screens, or assessed through a website. This feature allows investors to see potential losses before completing transactions, aiding in an informed decision-making, and helping the industry comply with FTC regulations. The FTC should dismiss claims that such technology is unavailable, overly complex, or prohibitively expensive. Point number three, the FTC lacks the authority to grant Wall Street exemptions from this regulation. The FTC cannot exempt Wall Street from adhering to federal securities laws such as the Securities Act of 1933, which requires clear and truthful disclosure of investment risks. Efforts by financial service industry to secure exemptions from federal laws could result in serious legal consequences, and are ethically questionable. Point four, the regulation must specifically mandate disclosure of costs related to buying dividends.

The FTC must precisely practice regulation, eliminating ambiguities, and closing potential loopholes. This clarity will prevent Wall Street lawyers from exploiting any gaps to avoid compliance, particularly regarding practices like buying a dividend. The language must be clear and definitive to ensure full legal compliance, and withstand scrutiny. Point number five, immediate industry-wide enforcement action is required. It is crucial that the FTC vigorously enforce this regulation from day one. Prompt, rigorous, and sustained enforcement is essential to protect millions from continuing to suffer. The FTC must demonstrate to Wall Street that lax practices and insufficient disclosures will no longer be tolerated. Point seven, investors have a legal right to be reimbursed for their losses. Technology is available to accurately create future tax forms, and calculate historical tax overpayments for investors. Investors are legally entitled to reimbursement for such overpayments, and this technology facilitates the process, ensuring that investors are made whole.

Lastly, point seven, the industry has been fully informed of this pending FTC regulation. The financial services industry has been thoroughly briefed on the upcoming FTC regulation. Last fall, I contacted all 15,266 chief compliance officers who are registered with the SEC informing them of this regulation's details, enforcement penalties, disclosure issues, ongoing investor harm, and related SEC involvement. I also offer direct scheduling links to discuss compliance in ways they can protect their investors now. Therefore, any industry claims of unpreparedness are unfounded. In closing, ladies and gentlemen of the Federal Trade Commission, I ask you to consider the plight of a single mother of two, who tirelessly works two jobs to make ends meet. With the little she has left after paying bills and expenses, she seeks to invest responsibly for her family's future and retirement. Yet, every time she invests, she's unwittingly penalized by hidden fees and overtaxation.

This stark reality underscores the utter unfairness of our current system, and the urgent need for change. I also want to underscore the government's fundamental obligation under the United States Constitution to enforce the laws of our land, and to safeguard citizens from being unjustly deprived of their property. The due process clauses of the 5th and 14th Amendments explicitly mandate governmental action to prevent arbitrary or unfair practices that would strip individuals of their property. The government's role is not merely administrative, but rather a fundamental legal obligation to uphold justice, and the rule of law, and to guarantee that all individuals receive protection guaranteed by the constitution.

Therefore, immediate government intervention is not merely appropriate, but it is compelled by law. As we conclude today, I'm going to express my profound gratitude for the FTC's dedication to addressing issues that profoundly affect millions of Americans. Today's discussion is not merely about regulatory reform. It is a critical step towards restoring fairness and transparency on our financial system, which is currently riddled with punitive hidden tax liabilities, that undermine the very essence of a fair and efficient market. My door remains open, and I'm ready to assist in this critical work. Together, let us stand on the right side of history by correcting these profound injustices, and reaffirming our commitment to a truly fair and just marketplace. Thank you. This concludes my testimony.

Judge Haimes:

Thank you. Mr. Roseberry. OpenExchange, would you please bring in the next speaker?

OpenExchange:

Speaker number eight is Mike Goscinski with the Health and Fitness Association. Please go ahead.

Mike Goscinski:

Good morning, Your Honor. My name is Mike Goscinski, and I have the honor of representing the Health and Fitness Association. Today, I am here to convey the concerns and perspectives of the health and fitness industry regarding the proposed rule on unfair and deceptive fees. The Health and Fitness Association is the leading trade association dedicated to enhancing mental and physical health in the United States, by increasing access to physical activity. From health and fitness clubs, gyms, studios, sports and aquatic facilities to our industry partners, we work tirelessly to promote and protect the industry, ensuring diverse options that keep Americans moving. The health and fitness industry is not merely a collection of gyms and studios.

It's a vital component of the nation's well-being and economy. From small studios to large clubs, we offer services that provide physical and mental health benefiting millions of Americans each year. Our industry isn't just about exercise. It's about fostering communities, promoting diversity, and enhancing overall happiness. Our industry's reach is extensive, with millions of Americans actively engaging in health and fitness activities. Membership numbers continue to rise, reflecting our commitment to inclusivity and accessibility. We cater to diverse demographics, with significant

Speaker 2:

... keen growth being observed among Hispanic and African-American populations. Moreover, our services attract individuals of all ages with both younger and older demographics actively participating in health and fitness activities. When crucial distinction is the physical presence of health and fitness facilities, unlike other businesses or digital services or those operating online, our industry operates brick and mortar establishments where consumers actively engage with services and interact with staff and fellow members. The in-person nature of our services provides tangible benefits that go beyond mere transactions. Our primary concern lies in the broad application of the proposed rule to brick and mortar health and fitness facilities. While we acknowledge the necessity of consumer protective measures, we believe that our industry's unique characteristics warrant special considerations, and that a broadly applied rule is flawed.

Unlike many other businesses, health and fitness establishments operate physical locations where consumers actively engage with services and interact with their fellow members and consumer service representatives. For instance, online booking services or virtual platforms operate much differently than these brick and mortar fitness facilities where engagement with customer service is far more reduced. These platforms typically involve digital transactions that may not have the same level of face-to-face interaction as fitness facilities. Therefore, applying the proposed rule without distinction to our industry could inadvertently subject fitness facilities to regulatory measures more suited for online service providers, creating unnecessary burdens and compliance challenges.

Given the fundamental differences between brick and mortar health and fitness facilities and online services, we advocate for a clear exemption for our industry from the proposed rule. This exemption would recognize the distinct nature of operations, the regulatory framework that already exists, addressing consumer protections in our sector, and existing state statutes that already regulate price disclosure and consumer protections. By providing tailored regulations that align with the unique characteristics of our industry, the FTC can ensure effective consumer protection without imposing undue burdens on health and fitness businesses.

While we understand the FTC's intention of enhancing price transparency, we believe that the application of the total price requirement to our industry requires careful consideration. Health and fitness memberships often entail a combination of recurring charges in ancillary services such as various payment types, frequency options, personal training sessions, family, couple, or single memberships, nutrition and dietitian services, tiered membership options with access to multiple locations or a singular location and consumer product goods purchased that are available for purchase by the member.

Unlike transactions with hidden fees, our industry provides comprehensive explanations of the cost during the initial face-to-face agreement process. However, the inclusion of ancillary services introduces variables that can complicate the calculation of the total price. Consumers may be left uncertain about whether optional fees or adjustments such as additional personal training sessions, family membership upgrades or nutrition consultations are included in the advertised price leading to potential misunderstandings and increased dissatisfaction.

To address this challenge, we recommend that FTC provide explicit guidance on what components should be included in a total price, particularly for continuous service contracts. By offering clarity and specificity, the FTC can ensure that consumers have a clear understanding of their financial obligations when entering into membership agreements, therefore, enhancing transparency and consumer confidence.

The term hidden fees has the potential to create a misleading perception that certain costs are intentionally obscured or not fully disclosed by health and fitness providers. In reality, our industry is committed to transparent pricing and upfront disclosure of all relevant charges to consumers. Rather than focusing on prohibiting certain fees, we believe that the emphasis should be on clarifying disclosure to ensure that consumers are fully informed before making purchasing decisions. By shifting the focus towards comprehensive disclosure, businesses can provide consumers with the information they need to make informed choices, thus fostering transparency and trust. This approach aligns with the overarching goal of the proposed rule to enhance consumer protection and empowerment, while understanding that consumers will receive all necessary information before initial purchase in a brick and mortar environment. The vague definitions of total price requirement could have significant implications on advertising within the health and fitness industry. Ambiguous regulations may deter businesses from effectively communicating pricing information to consumers, leading to confusion and more dissatisfaction. Moreover, the lack of clarity may result in legal disputes between consumers and health and fitness providers further undermining consumer trust and industry reputation. Additionally, the proposed rule may hinder the industry's growth and innovation by discouraging businesses from introducing new services or adopting to evolve to consumer preferences. The complexity introduced by varying ancillary services and the inability to provide a precise total price could impede the industry's ability to attract and retain customers, ultimately undermining efforts to promote public health and well-being.

In light of these concerns, we urge FTC to carefully consider the implications of the proposed rule on industry advertising and to provide clear guidance that enables businesses to effectively communicate pricing information to consumers while ensuring transparency and consumer protection. Lastly, we urge the commission to carefully consider the impact the proposed rule has on small businesses within the health and fitness industry, especially given the unique operating nature of many establishments. The majority of health and fitness businesses, including franchisees, operate as small independent entities often owned by individual entrepreneurs or small groups of owners.

For example, one prominent US franchise brand in the health and fitness sector boasts approximately 2,300 franchise locations nationwide with nearly 800 of these single units owned by individual franchisees. That means that almost 800 owners operate only one location each highlighting the prevalence of small scale operations within the industry. These small business owners, including franchisees are the backbone of the health and fitness industry and the American economy, playing a vital role in providing accessible wellness services to communities across the country, however they may face significant disruptions to their economic models if subjected to overly burdensome regulatory measures. Therefore, a comprehensive analysis of the impact of the proposed rule on small businesses is essential to ensure that the regulatory actions do not inadvertently favor large operators or create unfair advantages in advertising and operations.

In conclusion, we respectfully seek a clear exemption for the health and fitness industry recognizing our commitment to collaboration with consumer welfare. We just get a balanced approach that protects consumers without imposing unnecessarily regulatory burn-ins on businesses vital to the nation's well-being and economy. Thank you for your attention and the opportunity to speak today.

Speaker 3:

Thank you, Mr. Kaczynski. Open Exchange, would you bring in our next speaker?

Speaker 4:

Speaker number nine is Joe Bishop-Henchman with the National Taxpayers Union Foundation, please go ahead.

Joe Bishop-Henchman:

Good morning, my name is Joe Bishop-Henchman, I'm an attorney with the National Taxpayers Union Foundation, thank you Judge Hines. National Taxpayers Union Foundation represents taxpayers, we've been around for half a century and among other things, we engage in in-depth research on tax issues, informative and scholarly work on taxation in all aspects and work to develop responsible tax administration. And I in particular have done a lot of work in state tax policy over the years, both at a nonprofit and in the private sector as well as in reforming various state sales tax structures and state entertainment tax structures. We're here to raise two significant concerns with the proposed regulation, and I'll go into some detail on them and of course we go into detail in our written submission as well.

First concern is the definition of taxes, government charges used in the regulation is inconsistent with state law and in many respects would undermine the goals of the regulation itself. And second, the cost benefit analysis is inadequate and in both areas, we identify several disputed issues of material fact. Starting with the definition of taxes, the regulation defines government charges as all fees or charges imposed on consumers by a federal state or local government agency unit or department, and that this definition covers only fees or charges imposed by the government on consumers and does not encompass fees or charges the government imposes on a business and the business chooses to pass on to consumers.

I've never seen a definition of taxes or fees like that before. I've written a book on the definition of tax and fees and looked at the definitions adopted by the highest courts of all 50 states in the District of Columbia by the circuit courts and of course by the US Supreme Court and in most federal statutes, it's a frankly bizarre definition that is both over-broad and under-inclusive in a lot of different ways, and I can give a couple of examples. First, just taking hotels, which I think everyone understands is a special focus of this regulation, most local hotel tax ordinances, there's a couple state ones, but most of them are local, but most of them are defined as imposed on the amounts received by the hotel operator. It's only a minority of states, I think it's just like six states that impose it on the amounts paid by the consumer, for the most part it's what's received by the operator and then the operator is permitted to pass that forward to the person staying there, the traveler, which most of them obviously do.

But because this regulation excludes government charges imposed on consumers and it doesn't cover imposed by the government on consumers where there's a choice on whether to pass it forward, it actually wouldn't include hotel taxes in the definition of government charges, which is counterintuitive, it would be certainly be confusing to a lot of people and it certainly, I would argue, undermines a major goal of the regulation, which is to get hotel taxes in the category of government charges and to get other hotel fees and stuff on the final receipt. And that's a big inconsistency there, it's just how hotel taxes operates, it's also how gas taxes operate, gas taxes are imposed on wholesalers, not on consumers, and then are passed forward at the pump on the receipt.

And then probably most significantly, the general sales taxes in four states also operate that way, and those are Arizona, California, Hawaii, and New Mexico. In those four states, the sales tax is not a tax on consumers, it's a tax on the business, which the business may and most businesses do pass forward on to consumers, but because there's a choice there, that would mean it wouldn't fall within this definition of government charges and we find that very strange. And again, it would be confusing and counter intuitive to not have the general sales tax of a state included within the tax line on a receipt.

I should note, the US Supreme Court has upheld the authority of the states to structure their taxes this way, and so a federal regulation attempting to tell states not to do this or to direct businesses to defy state law on how they're supposed to do this may violate the 10th amendment. One final note on sales taxes for all of the other states generally, the businesses are prohibited from absorbing the sales tax, you're required by state law to pass it forward to consumers and state it separately on the receipt and you can't advertise that you are paying the sales tax or that you're including it in price. And admittedly, that's not how Europe does it, that's not how value added taxes work, but it is how state sales taxes work and there is no business choice involved there, it's a requirement of state law, you will be prosecuted by state officials if you don't separately state it, don't include a price and pass it forward.

There is an inconsistency here because what state law requires will be in conflict with what this regulation will require on government charges, and that the regulation should not put sellers in such an impossible situation to figure that out. There is a solution here, California has adopted a very similar pricing transparency regulation as the one being considered here and they have a much more standard definition of government charges that is obviously consistent with California law and it's consistent with how taxes and fees are defined more generally and would avoid a lot of these problems. So we did raise this on our written submission, we did not see a response by the FTC in their subsequent federal register publication, but we see it as a big material issue and a significant concern that we wanted to raise.

The second concern that I wanted to raise, as I noted, was the inadequacy of the cost-benefit analysis, some of these points have been raised by other commenters already, so I'll be very brief on them. The main focus of the cost-benefit analysis seemed to be on the ticketing hotel and restaurant industries and maybe that's the impetus for what the problem the FTC is attempting to solve here. But obviously, ticketing hotel and restaurants are not most of the economy and this regulation is not narrowly tailored to just those industries, it applies to everyone and everything who sells in the economy. So the cost-benefit analysis really should be beyond, either you're going to analyze these three industries for a regulation on these three industries or you've got to analyze all industries for regulation on all industries.

It's already been noted earlier that the estimates of compliance seem understated both in hours and in dollars. So for instance, the estimate that a cost of a compliance lawyer would be $88 an hour, just pulling up US News and World Report's average lawyer hourly cost in the United States is $327 an hour, so we see there a four-fold disputed issue of material fact. And if the cost of this regulation are actually four times what the FTC is calculating, then that really throws off the balance of the benefit-cost analysis.

Second is, there are sections that are just not clear on what exactly they are directing sellers to do. One of them is clarity on the requirement that any fee has to describe what it includes, that's incredibly vague and needs further direction and further clarity to avoid excessive compliance costs as well as the description of the mandatory ancillary fees that a consumer chooses. There has to be a better structure than that because just even saying it like that makes it sound like it's contradicting itself.

Third and final point under this is, I mentioned the California regulation and that raises another big issue is, if California is directing sellers to do one thing, especially with respect to how to treat government charges and this federal regulation is now directing them to do something else, what are sellers supposed to do? Is this regulation preempting that California regulation? And if it is, if that's the goal, it should clearly state that that's what we're doing. Are we directing sellers to have two different receipts, one to comply with the state requirement and one to comply with the federal requirement? And if that's what we're doing, then that should be reflected in the compliance costs.

There's no analysis on whether this regulation is consistent with California law, I've given examples of how it's not, so that's another indication that the cost benefit analysis is inadequate. So these are significant concerns that we've raised, we have more detail in our written testimony and we're certainly happy to communicate going forward with staff on detailing any of these and solutions that we see to some of them. Thank you for your time today.

Speaker 3:

Thank you, Mr. Bishop-Henchman. Open Exchange, next speaker please?

Speaker 4:

Speaker number 10 is Erin Witte with the Consumer Federation of America, please go ahead.

Erin Witte:

Good afternoon, Judge Hines, my name is Erin Witte, and I'm the director of Consumer Protection for Consumer Federation of America, a national nonprofit advocacy organization. I'm here today on behalf of CFA and 51 other national and state advocacy groups that signed onto a comment letter supporting the FTC's notice of proposed rulemaking on unfair deceptive fees. Many of these groups also signed on to a comment letter in response to the FTC's advanced notice of proposed rulemaking highlighting the fees and practices that really underscore the need for a strong, effective, and durable rule from the commission.

Thank you for inviting us to participate in this hearing. We agree with the commission that there are no issues of disputed material fact at this stage, but we appreciate the opportunity to participate today and to be a voice for the tens of thousands of consumers who are fed up with hidden and misleading junk fees. My comments today will first address the pervasiveness of junk fees and the harm that they cause to consumers and competition. Second, I'll discuss the hurdles that currently prevent the FTC and consumers from addressing junk fees in the absence of a strong rule. And third, I'm going to talk about how the rule can be strengthened and clarified, which is set out in much more detail in our written comment.

Hidden and misleading fees cost consumers tremendous amounts of time and money, two of their most valued resources. The government-wide crackdown on junk fees has resonated strongly with consumers across the country and it's abundantly clear that consumers are tired of having money drained from their pockets through unfair and deceptive practices. This coalition has provided numerous examples of junk fee conduct in our comments like drip pricing techniques that withhold key elements of pricing information until the consumer has expended valuable time in the transaction using deceptive terms to mislead consumers about the purpose of a fee, like a service fee that the company says pays its workers when it doesn't.

Auto dealers failing to disclose mandatory doc fees, pre-installed add-ons, price markups, and an endless iteration of add-on products. Using pre- checked boxes, default mechanisms or other dark patterns to automatically add fees or services, then requiring consumers to have to opt out often using a convoluted process. Using terminology that deceptively makes fees look like they're a tax or they're imposed by a government entity when they're not. Conduct that makes fees look like they're mandatory when they're actually optional. Imposing fees without express informed consent like manipulating an electronic signature process or rushing through fine print disclosures and actually imposing true junk fees that don't provide any benefit to a consumer.

We attached over a thousand stories from consumers to our comments that were gathered by consumer reports, these stories describe things like restaurants that impose environmental impact fees, wellness fees, worker insurance fees, COVID fees, facility recovery fees and service fees without adequate explanations of what those fees do or actually misrepresenting what those fees do. Some consumers complained about fees to receive paper copies of their billing statements, while others said that they were charged fees for creating an online portal to access electronic billing statements.

One particular story about a short-term rental describes the bill for a consumer's stay, which includes a reservation fee and electronic processing fee, a damage waiver fee, cleaning fees, and of course a service fee all in a single bill. You're going to hear from lots of groups today about fees and medical facilities, housing, education and others, it is clear that this is an increasingly widespread problem that urgently needs a rule from the FTC. Junk fees are not only annoying and aggravating, they're also actively harmful for many consumers.

For low-income consumers, these fees represent a disproportionately high costs quickly destabilizing household budgets and creating an unmanageable financial burden for consumers living paycheck to paycheck. These fees can have cascading effects for vulnerable consumers on the other necessaries of living like housing and education where costs are also increasingly expensive. It can push people into a cycle of debt that is a very real risk as junk fees continue to proliferate in the absence of a strong rule. Junk fees can price low-income consumers out of certain markets, it can force them to make unimaginable decisions between food for their families, being late on bills, and additional fees and penalties, even the choice to have the ability to enjoy entertainment events.

Hidden fees have been a major contributor to the decline of the American middle class and the alarming rise in income inequality. These fees also particularly impact limited English proficiency consumers, even when fees are disclosed or if companies describe the circumstances under which they may be charged, then information can be lost on someone for whom English is not their first language. The deceptive conduct that we've described is usually nuanced and woven throughout the transaction further obscuring the nature of these junk fees. It's critical for the FTC to account for these populations of consumers in this rulemaking, junk fees harm competition, they distort markets, they prevent price comparisons on which market competition relies. Hidden and misleading fees cause consumers to pay more than they otherwise would in a transparent marketplace, they unfairly direct consumers away from honest, transparent businesses to those with less transparent and more deceptive practices.

We noted in our comments that drift and partition pricing tactics take advantage of cognitive biases that occur when consumers are impatient to complete the purchase. Consumers are already committed to the purchase because they've expended time searching for the good or service they want and they're frustrated, they don't like having that information withheld from them. Spreading out this consumer price can cost as much as 22% of the consumer surplus, do you see this conduct also represents the consumer instance of search costs and frictions for buyers in all markets, and it undermines competition by preventing buyers from seeking out the lowest price and the best quality product. Markets work to the benefit of everyone, buyers, sellers, consumers and workers, only if all participants are playing by a set of fair rules. Honest business people who make investments and innovations to grow their companies provide consumers with better and cheaper services and should be able to expand their workforce and permitted to participate in a fair marketplace.

With respect to the hurdles that are currently in place for the FTC and consumers are second point, the ruling in AMG capital currently prevents the FTC from fulfilling its mission to protect consumers. The FTC details the cases that have historically brought against companies engaging in unfair and deceptive junk fee conduct using his 13 B authority, but that was wiped down in 2021 by the Supreme Court when it ruled that it could not rely on this authority to provide key restitution to consumers returning that money back to defrauded people. The FTC's rule will ensure that when companies hide their fees or make misrepresentations about them, the FTC can hold those companies accountable, they can get money back for people, they can provide that restitution, and they can make sure that companies don't get to keep the results of their ill-gotten gains due to the AMG capital holding. Without a rule, the AMG capital holding means that the FTC is fighting with one hand tied behind its back against junk fees.

Consumers are also precluded from resolving these problems on their own due to forced arbitration provisions, the FTC is uniquely situated to help here. In nearly all of the industries that we're talking about, consumers are bound by forced arbitration provisions and class action bans of hidden in fine print traps. These traps effectively deny consumers the ability to seek recovery for junk fees because they'd be forced to bring somewhat small-dollar cases on an individual basis. They should be able to band together and bring class actions, but they can't do it because they're almost uniformly precluded from doing so through these fine print traps. It's almost impossible, it's cost prohibitive for consumers to challenge these fees on an individual basis, the FTC should finalize and move forward with this rule to address these harms that consumers are restricted from resolving on their own.

Third, I'd like to talk about some of the ways that we have suggested the rule should be strengthened, interpreted, and enforced to prevent harm to consumers. This coalition is very supportive of the FTC's efforts, we were thrilled to see this rule and we look forward to continuing to work with the FTC to get this rule across the finish line and provide some real relief for people, but it does need to be strengthened and it does need to be clarified.

First, a lot of folks here have already talked about this distinction between mandatory and optional fees. This is really a key component of the FTC's rule, is this distinction between what's mandatory and what's optional because of whether it's included in the total price and how the information about the fee itself is disclosed to consumers. The rule that's written does not sufficiently clarify that the total price includes all fees which are not reasonably avoidable and all fees that a consumer would reasonably expect to be included within the purchase. The FTC should amend the definition of ancillary fees and it should add a definition for mandatory fees to ensure that the total price includes fees for goods or services which are not reasonably avoidable and that a reasonable consumer would expect to be included within that purchase. We've set forth in our written comments exact amended language that we proposed and we'd encourage the FTC to adopt it.

With respect to mandatory and optional fees, the FTC should also take care to prohibit businesses from using a default selection method or dark patterns that automatically add the purchase of a truly optional good over the course of a consumer's purchasing process. The rule does not really address this potential problem and we've seen that arise in FinTech and other contexts. Putting the onus on the consumer to then opt out of a permitted default selection has a significant impact on consumer behavior and it leads to the selection of products without truly consenting to them or actively even considering them. It can also lead to a very convoluted and difficult opt out process, sometimes that requires access to internet when not all consumers even have that. It can be very difficult to figure out how to opt out of something, especially if you didn't even know that you opted in due to the use of dark patterns or other deceptive conduct.

We have some other considerations for the rule as well, the timing of the disclosure should be strengthened. Currently, the rule wouldn't require disclosure of the amounts which are excluded from the total price or a description of their nature and purpose until before the consumer consents to pay, which we think is not early enough. Those amounts that are excluded can add up and a description of their nature and purpose can be really important information that should be provided to the consumer, we suggest before they provide their billing or payment information to avoid investing all of this time before they've provided sensitive financial information.

The FTC should also take care to address this issue of companies imposing worthless fees that don't provide any benefit. We know this is a huge pain point for consumers and we've seen it time and time again with auto dealers, which we believe should be included in this rule. The FTC should ensure that the rule and its enforcement address this problem. We think that compliance with the proposal's requirements to disclose the nature and purpose of an amount that a consumer may pay should dis-incentivize imposing worthless fees, but the FTC should ensure that its own interpretations, anything publicly that it states and its application of the rule account for this concept because we've seen it occur.

Excessive fees are also a huge problem and they exploit an un level playing field between consumers and businesses. The FTC should 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 rule makings that may prohibit specific practices or industries where we see excessively high prices persist. Restaurant and food delivery companies have become prime examples of junk fee offenders through things like service fees, delivery fees, extended range fees, small order fees. This conduct frustrates consumers, it undermines the financial health of delivery workers and it puts honest companies at a disadvantage. The FTC should carefully consider putting future guidance out to address this particular issue in a manner that promotes and form consumer choice, but also does not harm workers that rely on gratuities as income. The last category of clarifications and strengthening that the rule needs is with respect to clear and conspicuous disclosures. This rule is transparency focused, the FTC relies heavily on clear and conspicuous disclosures to address unfair and deceptive junk fee conduct. To that end, the FTC should especially ensure that these disclosure requirements are as strong as possible. As we said before, junk fee practices disproportionately harm vulnerable consumers, including those with limited English proficiency. The definition of clearly and conspicuously can be easily amended to include limited English proficiency consumers as an example of where enhanced disclosure is required, they should reference LAP consumers in that definition.

The FTC should also require businesses to ensure that when the disclosures are made electronically, they're provided in a form that's capable of being printed and saved as many consumers wish to do so. The FTC should also ensure that each part of the required disclosures be simple, understandable, and accurate, a facet of easily understandable is the concept of being concise. Businesses shouldn't be permitted or incentivized to bury consumers in complex descriptions of hundreds of optional fees at one time. The FTC should ensure that the final rule is interpreted and enforced in a manner that ensures this method of disclosure facilitates the abilities of consumers to truly choose which goods and services they want.

Finally, the FTC should not grant exemptions from the rule, this is an industry-wide problem that needs an industry- wide response. We strongly encourage the FTC to maintain its intent that this be industry-neutral with which all businesses are required to comply. This is necessary to ensure accurate comparison shopping, encourage competitive prices, promote informed choice, and reduce frustration for consumers and confusion. It will ensure that everyone plays by the same rules and that consumers have a baseline expectation when participating in the marketplace no matter who they're dealing with. Thank you for moving forward with this rule, for allowing us to participate today on behalf of CFA and the 51 other organizations that signed on to our comment, we look forward to working with the commission going forward, thank you.

Speaker 3:

Thank you, Ms. Witte. Open Exchange, our next speaker please?

Speaker 4:

Speaker number 11 is Christine Hines with the National Association of Consumer Advocates, please go ahead.

Christine Hines:

Good morning, my name is Christine Hines, I'm Senior Policy Director at the National Association of Consumer Advocates or NACA. NACA is a national nonprofit organization engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest needs. Thank you for holding this hearing on the FTC's Unfair or Deceptive Fees Rulemaking. NACA joined with our organizational partners in strong support

Ms. Hines:

... Support of the commission's move to reign in unfair or deceptive fees presented in the advance notice and the notice of proposed rulemaking. In these, we especially applauded the FTC's effort to pursue this rule as a way to seek consumer redress and ensure that the perpetrators of junk fee practices return their ill-gotten gains. We commented on the importance of this rulemaking, which addresses a systemic practice that cannot be effectively addressed on an individual basis, but should be tackled broadly to benefit groups of harmed consumers. Due to the terms and conditions used by most big businesses in these sectors that restrict consumers' ability to seek recourse on behalf of themselves and others, the FTC's rulemaking to curb unfair and deceptive fees and its anticipated enforcement of this rule are even more crucial. With Consumer Federation of America and the National Consumer Law Center, NACA also commented separately regarding this rule making's applicability to auto sales.

This proposed rule on unfair or deceptive fees is a clear right-line rule that covers the marketplace across industries and sectors, but it excludes automobile sales. Auto dealers are specifically exempted in the proposed rule and they shouldn't be. We're asking the FTC to reconsider this decision and include auto sales in this market-wide rulemaking. As a commission is aware, hidden and deceptive fees are notorious in auto sales. What are vehicle prep fees, delivery fees, pre-delivery service fees, inspection fees, reconditioning fees, additional destination fees? What are they? In our view, the FTC has not presented just reasons to exclude this sector from the rulemaking. This proposed rule merely sites the recently issued combating auto retail scams or the CARS rule, which was not finalized at that time and states that the FTC does not intend to include auto dealers as a result. The CARS rule is final, yet its effective date has been stayed pending an industry court challenge.

The existence of the CARS rule is not sufficient reason to exclude dealers from this rulemaking. In fact, the goals and requirements of both are entirely consistent and complementary. They require transparency in pricing and they would eliminate deceptive and hidden fees in auto sales and across all other markets.

Both rules even use terms with identical definitions such as the required price to be disclosed to a consumer. The offering price in the CARS rule and the total price in the junk fee proposed rule must be disclosed and must be provided clearly and conspicuously. Both seek to ensure that consumers know and understand what they're electing to purchase. The only distinction between these two rulemaking is this proposed rules requirement to identify the refundability of a fee. Applying this requirement to auto sales is appropriate. Add-on products in auto sales are a perfect example where this information would be helpful to consumers.

In addition, this rulemaking applies to industries that are also subject to other similar and consistent requirements, particularly relating to pricing transparency such as the telemarketing sales rule and the negative option rule. The auto dealers should be treated the same and held to the same standard. Every other requirement in the CARS rule is separate from and does not conflict with this rulemaking on unfair and deceptive fees.

The auto dealer industry has been successful at lobbying for exemptions that have benefited it and in certain respects have harmed consumers After the financial crisis of 2008, the auto dealer industry, although much of their business is in extending credit and financing and selling and leasing vehicles, it successfully lobbied to be from the oversight of the Consumer Financial Protection Bureau. A law was also passed that now protects dealers rights against big auto manufacturers. Under this law, dealers can no longer be subject to contract terms with auto manufacturers that would force them into secret arbitration to resolve disputes.

Meanwhile, many dealers use very similar terms in their sales and credit contracts that force their customers out of the public court system and into private arbitration to get their legal claims heard. No one should be subject to non-negotiable terms with forced arbitration clauses, not dealers, and definitely not car buyers. So here again, this proposal would cover dealers with an exemption. We urge the commission to revisit this decision by removing this exemption it is considering for auto sales in this rulemaking. This rulemaking on unfair or deceptive fees is consistent with the car's rule and the consumer protections provided in each will complement the other. Thank you for listening to my views.

Speaker 5:

Thank you Ms. Hines, I think we will do one more before the brief recess. So open office please, I'll bring in our next speaker.

Speaker 6:

Speaker number 12 is Miriam Straus with Community Catalyst.

Miriam Straus:

Thank you for the opportunity to testify regarding the FTC's proposed rule on unfair or deceptive fees. My name is Miriam Straus and I'm a senior policy analyst at Community Catalyst. We represent a coalition of advocacy groups focused on medical debt, disability rights, health equity, and racial and economic justice. We support the FTC's proposed rule and we urge the agency to move forward quickly with this rulemaking. In particular, we focus on the application of this proposed rule to a type of junk fees in the healthcare industry known as facility fees. This rule will protect patients from misleading unnecessary facility fees for telehealth services and require that facility fees be disclosed before they are charged for other services. Finally, the proposed rule on misleading fees would also prohibit excessive facility fees that are unrelated to costs. First, let me explain what facility fees are.

Hospitals typically bill separately for professional claims and facility fees. Professional claims cover care provided by healthcare professionals such as physicians and nurses. The facility fee is intended to cover the additional costs of providing care in the hospital such as the cost of staffing and emergency room and maintaining emergency medical equipment. However, these facility fees often function as junk fees. Independent physician offices do not charge facility fees. When physician offices are acquired by hospitals or health systems, however, patients may begin to see a facility fee on top of the regular physician charges. This is not because the physician office now has specialized equipment or operates in emergency room. The patient who visits the physician office does not receive additional services because the hospital now owns the practice. Instead, the patient just pays more for the same services because the physician office is now owned by a hospital.

For instance, when one patient received her annual steroid injection in 2021, which had previously cost her $30, she was shocked to find that her bill now included a $1,262 facility fee. The only change from previous years was that the infusion clinic had changed from an office-based practice to a so-called hospital-based setting even though the services were provided in the same medical office building, which was not a hospital. Today, patients are seeing facility fees more frequently for care provided outside a hospital. As consumer reports explained, this is because hospitals are rapidly building or buying up not only doctor practices but also urgent care centers, walk-in clinics, and standalone surgery complexes pretty much all the places one might go to get healthcare.

Hospital ownership of physician practices has been increasing for years. Between July 2012 and January 2018, hospital ownership of physician practices grew by 124%. In fact, a report released after we filed our comments stated that by January 2024 over 55% of physicians were employed by hospitals or health systems.

Another news report published after we filed our comments noted that in Charlotte, North Carolina, about 80% of oncologists work for a hospital up from about half of oncologists 10 years ago. For instance, Lake Norman Oncology in suburban Charlotte was acquired by Novant Health in 2020. After the acquisition, one breast cancer survivor visited the practice for routine monitoring, which had previously cost her $76. Now that the oncology practice was owned by a hospital system, however, the patient was billed about $400 for the same monitoring.

Addressing facility fees is in line with the FTC's focus on consolidation and rising healthcare costs significantly facility fees encourage hospitals who acquire previously independent physician practices. In fact, the opportunity to charge a facility fee is one incentive for hospitals to acquire these practices, which then leads to higher prices for patients, employers, and insurers, the Healthcare Cost Institute explained. For instance, an ultrasound costs $164 on average in a setting where facility fees are not charged. An ultrasound costs over twice as much, $339 on average, when a facility fee is added.

Notably, facility fees are increasing faster than other categories of healthcare spending and contributing to our country's medical debt crisis, where 4 in 10 individuals have outstanding healthcare bills. One study found that facility fees for outpatient surgery increased by 53% between 2011 and 2017 with no change in professional fees during that time. Facility fees are also rising sharply for emergency services. Regardless of the services provided to the patient, most emergency departments also charge a facility fee, which is often described as the cost for walking in the door. From 2004 to 2021, emergency department facility fees for evaluation and management services grew by 531% as compared to a growth rate of 132% for professional fees during this time. These facility fees are particularly concerning because patients cannot comparison shop when they're facing medical emergencies.

In our written comments, we provided numerous examples of facility fees that were unrelated to the goods or services provided by the hospital. For instance, a telehealth evaluation of a three-year-old at his home during which the specialists appeared to be calling from their homes as well, resulted in a facility fee of $847. In another case, a 45-minute consultation with a child's psychologist resulted in a $503 facility fee. There were no vital signs, there were no titanium screws, there was no surgery. This was literally just a lamp and a couch the child's father noted. A mother took her toddler to the emergency room for a burn where a nurse took the toddler's vital signs and said that a surgeon would inspect the burn more closely. The surgeon did not appear for over an hour so the mother and toddler left the hospital. They were billed $820 in facility fees. Another patient visited the emergency room for sharp lower back pain. During the 20-minute visit, the physician checked the patient's blood pressure and asked about the pain and then gave him a muscle relaxant. The patient was billed $2,426 in facility fees.

Since we submitted our comments, there have been additional reports of egregious facility fees. For instance, an Ohio patient was billed $348 for his visit to an ear, nose, and throat specialist at a clinic. Then he received a second bill for $645 in facility fees just for the use of the office where he met his physician. In Maine, a patient visited an emergency room for what she thought could be appendicitis. She spent only a few minutes in the exam room where she received an IV with antibiotics and some Tylenol. She received a facility bill of over $4,600 in addition to other charges.

Significantly, facility fees may impose the greatest burden on historically disadvantaged communities. For example, Hispanic, American Indian, Alaskan native, native Hawaiians and other Pacific Islanders and Black individuals are most likely to be uninsured and therefore bear the full cost of facility fees. Further, Black and Hispanic individuals are less likely to report having a primary care provider and more likely to report receiving routine healthcare in an emergency department where facility fees are significant and unpredictable. Addressing facility fees is an important step in the direction of health equity and economic justice.

Next, I will discuss how the proposed rule on unfair or deceptive fees would apply to facility fees. First, facility fees for telehealth services would be prohibited. The proposed rule provides it is an unfair and deceptive practice and a violation of this part for any business to misrepresent the nature and purpose of any amount that the consumer must pay, including the identity of any good or service for which fees are charged. Patients who receive healthcare advice by phone or video calls in their homes are not using any hospital facility. For telehealth services, charges for facility fees do not accurately identify the goods or services received. Prohibiting facility fees for telehealth services is consistent with the FTC's commentary on the proposed rule.

For instance, the FTC highlighted similar examples of pricing structures that misrepresented information about the nature and purpose of the fees and charges, including amenity fees for amenities that were not available and maintenance fees that did not correspond to the actual maintenance of a product. Similarly, charging facility fees when a patient speaks to a doctor from home without using any hospital facilities is a misrepresentation of the nature and purpose of the fee. Second, the proposed rule would mandate disclosure of facility fees for the services provided at healthcare offices or facilities that are not located on the hospital's campus. The proposed rule provides a business must disclose clearly and conspicuously before the consumer consents to pay the nature and purpose of any amount that a consumer must pay that is excluded from the total price, including the identity of any good or service for which fees are charged. Thus, patients must be informed about the facility fee before they consent to pay for services at these locations.

Many patients do not realize that a freestanding physician office or health clinic may impose a facility fee if they're owned by a hospital. These healthcare offices or facilities are often located far from a hospital campus and do not appear to be part of the hospital. Further, most patients do not track healthcare acquisitions and they may not realize that a hospital acquired a previously independent practice. Under the proposed rule, the hospital owned physician office, health clinic or other off-campus facilities must disclose the facility fee before the patient agrees to pay for services at that location. When scheduling a patient for treatment, the staff member scheduling the appointment would be required to explain that the patient may be charged an additional facility fee on top of the professional charge. As the FTC has explained, this information is necessary for the consumer to understand what they are purchasing and decide whether to consent to the charge.

Third, the proposed rule would mandate the disclosure of facility fees for services provided at hospitals. Again, the proposed rule provides a business must disclose clearly and conspicuously before the consumer consents to pay the nature and purpose of any amount that the consumer must pay that is excluded from the total price, including the identity of any good or service for which fees are charged. Thus, patients must be informed about facility fees before they schedule an appointment at a hospital or register for services at a hospital. When hospital staff schedule appointments by phone or register patients at the front desk, they would be required to disclose that the hospital will charge a facility fee.

Of course, some patients facing medical emergencies, patients in rural communities or patients in areas with so much consolidation that there are a few other options may be unable to choose a different medical facility. However, other patients such as those who visited the emergency room and ultimately left because the wait was too long, might decide not to register at the front desk if they understand these potential charges. For instance, patients should be aware that many emergency rooms are charging hundreds or even thousands of dollars just for walking through the door.

Finally, the proposed rule on misleading fees would also prohibit excessive facility fees are unrelated to costs. Specifically the prohibition on misrepresenting the nature and purpose of the fees would prohibit the imposition of facility fees in amounts that are not related to the use of facilities. That said, we urge the FTC to clarify this prohibition on excessive fees in the final rule or through other guidance. As explained more fully in our comments, we applaud the FTC's proposed rule to protect the public from unfair or deceptive fees. The proposed rule will prohibit the imposition of facility fees for patients that do not enter any healthcare facilities such as telehealth patients. The proposed rule will also require disclosure of the existence of facility fees for patients that schedule appointments at hospitals or hospital-owned physician offices, outpatient clinics, or other off-campus facilities. We urge the FTC to move forward with this rule. Thank you for your time today.

Speaker 5:

Thank you, Ms. Straus. It is now two minutes after 12. We will go into recess until 12:15 and then reconvene. During this time, OpenExchange will temporarily suspend the video and audio feed to participants and the audio feed to the public. We stand in recess. Thank you. Good afternoon. We're back on the record to continue this informal hearing. We still have a series of speakers left. OpenExchange, would you announce the next speaker, please?

Speaker 6:

Speaker number 13 is Marie Claire Tran Leung with the National Housing Law Project. Please go ahead.

Marie Claire Tran Leung:

Good afternoon, your Honor. My name is Marie Claire Tran Leung, and I'm a senior staff attorney at the National Housing Law Project. The National Housing Law Project's mission is to advance housing justice for people living in poverty and their communities. NHLP achieves this by strengthening and enforcing the rights of tenants and increasing housing opportunities for underserved communities. NHLP also hosts the National Housing Justice Network, a field network of over 2000 legal services attorneys and other community level housing advocates. HJN member organizations are committed to protecting affordable housing and resident rights for low-income families across the country, the National Housing Law Project, members of the Housing Justice Network, and 39 Housing Justice advocacy organizations submitted a comment letter

Ms. Translong:

There in strong support of the FTC's proposed trade regulation on hidden and misleading fees and its application to the rental housing industry in particular. This proposed rule is much needed to curb unfair and deceptive practices and to protect tenants in the rental housing industry. In addition to the rule, the NHLP strongly recommends that the FTC issue interpretive guidance specific to this industry upon publication of the final trade regulation. And NHLP does not believe that there are any disputed issues of fact for this proposed rule.

Today, my comments will fall into three categories. First, I'll talk about how rental housing junk fees impact tenants, why the rental housing industry should be covered in the final role, and talk about how certain fees require the FTC's attention. First, junk fees make housing unaffordable, especially for low-income renters. Today's rental market is deeply unaffordable for many families. In 2021, 26.1 million renter households spent more than 30% of their income on rent and were considered cost burden. For 11.6 million of these households, rent eats up more than half of their income, making them severely cost burdened. The cost burdens are particularly pronounced for renters of color, in part because of both historical and present day discrimination that limits their access to housing. Whereas 45% of white households were cost burdened in 2021. That share rises to 57% and 53% of Black and Hispanic households respectively.

While many renters are impacted by high costs, renters with the lowest incomes are more acutely harmed. This harm is intensified by a widening gulf between the housing costs that renters pay for and the wages they earn. Between 2001 and 2021, median rents increased by nearly 18%, whereas household income increased by only 3%. In the United States, a renter working full-time at the prevailing minimum wage cannot afford to pay the fair market rent of a modest two bedroom apartment. Only a small percentage would be able to afford the fair market rent of a one bedroom apartment.

For families living in poverty, the problem is dire. Though federally subsidized housing programs exist to help low-income renters only one out of four households that qualify actually receive this benefit. The rest must navigate the private rental market. And for households with incomes of less than $15,000, three out of four spend more than half of their income on rent, leaving little to no room for essentials such as food, medicine and transportation. For low income families whose budgets are buckling under the weight of these housing costs, every dollar counts. Junk fees divert the limited income that families would otherwise use to pay their rent and add significant stress to households struggling to make ends meet. By making housing unaffordable, junk fees also increase a tenant's risk of eviction for non-payment of rent, in part because of the practice of some landlords to apply rental payments to junk fees before they apply them to rent. Non-payment of rent is the most common grounds for evictions which landlords can often leverage against low-income tenants. In 2017, 77.3% of evictions were for nonpayment of rent.

The ease with which landlords can evict for nonpayment of rent also exposes tenants to abuse and mistreatments. Part of this is due to a power imbalance that allows landlords to evict in the legal system that will also condition a tenant's ability to exercise their rights on their ability to pay rent. The threat of eviction due to rental rearages leaves low-income tenants vulnerable and subverts many policies intended to protect them. In considering the impact of junk fees on the rental housing market, therefore, the FTC should balance both the needs of landlords to collect their rent in a timely matter, with the needs of tenants made vulnerable by the threat of eviction for non-payment of rent. Junk fees can also hinder a tenant's ability to obtain rental housing in the future. Junk fees increase the likelihood that tenants will accumulate rental debt, which can show up on a tenant's credit report even if the fees and charges were not technically rent. And many landlords often deny applicants on the basis of these past debts. Second junk fees can lead to an eviction court record. An eviction court record similarly pose a housing barrier for renters. In summary, if left unchecked junk fees harm tenants by significantly risking their ability to afford rents, maintain current housing without threat of eviction and obtain future housing without eviction record screening.

Now next I'll talk about why we think businesses in the rental housing industry should be included in the definition of business, to protect tenants from the harms of junk fees. Landlords hold immense power over throughout tenancy from start to finish. During the application process, they can tack on junk fees knowing that the applicant is very likely to be trapped in a transaction if they have invested time, money, and other resources into pursuing that unit. Faced with limited housing options, many tenants will accept a unit that may not meet all of their standards, or agree to surprise fees tacked onto already skyrocketing rents rather than risk homelessness.

During a tenancy, if a renter falls behind on paying their rent due to inflated junk fees, landlords can easily weaponize the threat of eviction for non-payment of rents, leading renters to put up with problematic practices to avoid the eviction. And even once a landlord has followed through with initiating the eviction process, they can and have still continue to charge fees racking up a tenant's rental debt and harming their future housing prospects. Given this power imbalance, renters are simply not in a position to walk away from the many rental housing fees that landlords impose. And on a systematic level, landlords also hold significant power to undermine legislation that regulates rental housing fees On a piecemeal basis.

Tenant advocates who have successfully fought for local regulation of rental housing junk fees often discover that in the aftermath, landlords will find another way to assess the intended charge against the tenant. Most often by rebranding the fee with a new name. In Chicago for example, landlords have generally stopped requiring security deposits and instead charged tenants with a non-refundable move-in fee thereby bypassing the tenant protections that a security deposit triggers under the Chicago Residential Landlord Tenant Ordinance. The FTC's effort to take an industry- wide approach is a necessary federal complement to the whack-a-mole game that localities and tenant advocates often engage in when attempting to regulate rental housing junk fees.

So with that, I'm going to just spend the rest of my time talking about a few specific fees in the rental housing space that we'd like to highlight. First is application fees and especially problematic kind of junk fee that is widespread in the rental housing industry are rental application fees, which are fees that prospective tenants pay just to be considered for admission to a rental housing property. These fees, which typically range from $35 to $50 per adult applicant are less significant in connection with a single rental application. But renters with marginal credit worthiness or other significant admission barriers such as eviction records or criminal history must often pay these fees repeatedly to pay for housing with different landlords. Rental application fees arose alongside the growth of third-party tenant screening reports which landlords would purchase from consumer reporting agencies. When a prospective tenant would apply for admission, the landlord would purchase a tenant screening report about that applicant and over time landlords began charging application fees to cover the cost of those reports.

Those fees however, have since expanded and now are substantially ubiquitous in most rental housing markets. Already these origins reveal the exploitative nature of rental application fees. Admission screening has no benefit for applicants, only landlords. Hence, there's no moral justification for passing the costs along to applicants. Landlords are able to do so only as a function of their superior bargaining position and the widespread dominance of application fees. Application fees therefore would fit squarely under more general prohibition on fees for which a consumer receives little to no value or no value in return. However, if FTC intends to cover application fees in this manner, it should make clear in the comments that accompanying the role that landlords who charge application fees commonly contend that an applicant does receive value in exchange for the fee, the chance to be offered rental housing. Of course, this amounts to no more than gambling. An applicant who is rejected by the landlord has nothing to show for this expenditure.

Despite paying the costs for the reports, tenants rarely have a choice or influence over the screening product that's used. Landlords generally choose the screening products they prefer. Landlords have the standing contracts with the specific screening companies they use for every application. And landlords have little to no incentive to minimize the cost of the specific screening report used as they are not the ones paying for the report. Some landlords take profits from rental application fees. One way is by charging applicants more to apply than the landlords pay for the screening reports.

So just moving ahead to make sure that we have time for some other fees. Rental application fees are anti-competitive, produce adverse public policy consequences, are prone to fraud, and in their least harmful form still shift to rental applicants the cost of products from which only landlords benefit. There are ample grounds on which to declare the charging of rental application fees to be an inherently unfair and abusive practice. At the very least, the agency should recognize that charging rental application fees to applicants who offer portable tenant screening reports forcing them instead to occur new fees for substantially duplicative reports containing essentially the same information is an unfair and anti-competitive process that stifles innovation and thwarts market forces that would otherwise reward efficiency.

I'll also just note one other type of fee that we note in our comment is our high risk and discriminatory fees. These are fees that, according to section five of the FTC Act, an act or practice is unfair if it causes or is likely to cause substantial injury to consumers, cannot be reasonably avoided by consumers and is not outweighed by countervailing benefits to consumers or to competition. Discriminatory housing rental fees likely fall under this definition of fairness because they cause monetary harm to renters. Renters are not in a position to avoid that discriminatory harm. And the discriminatory harm of such fees as unlikely to be outweighed by the countervailing benefits to consumers or competition. So an example is the high risk fee which landlords often assess against applicants and tenants who seemingly have negative information that would likely raise fair housing concerns. We also see where a person has negative credit history and negative eviction history, where this causes problems for tenants. And we also see landlords charging survivors of gender-based violence for processing orders of protection or agreeing to call the police even though those acts are protected by state law.

So in summary today, we strongly urge the FTC to include the rental housing industry and the final rule because of the wide impact that it has on tenants. And we lift up certain fees for the FTC's attention, application fees and high risk and other discriminatory fees. And in addition, we highly recommend that the FTC issue interpretive guidance specific to the rental housing industry upon publication of the final trade regulation. Thank you so much for your time today.

Speaker 7:

Thank you Ms. Translong. Open Exchange, will you identify the next speaker for us?

Speaker 8:

Speaker number 14 is Steven Reher with the Prison Policy Initiative. Go ahead.

Steven Reher :

Thank you, Your Honor. My name is Steven Reher. I'm appearing today on my own behalf and on behalf of the National Consumer Law Center and Prison Policy Initiative. We collectively filed joint comments concerning the pool. My comments today focus on communications financial and other services sold by private firms to people in prisons and jails. These services are often paid for by the end-user's family members. Our joint comments refer to these transactions under the label Correctional Consumer Services, and Ms. Nelson also provided some great comments on these services earlier in proceeding. This definition as we use it as limited to services sold by non-governmental actors as opposed to goods sold by correctional agents. So some examples of correctional consumer services which we provide data in our comments include money transfer services which send funds to incarcerated people, release cards, which are a type of prepaid debit card issued to people on their release from prison or jail, and which are loaded with the balance of the [inaudible 02:31:29] prison-based bank account [inaudible 02:31:34].

Electronic messaging, which is a currently unregulated communication service that functions like a rudimentary email system but without features that associate [inaudible 02:31:46]. Limited function computer tablets for used by incarcerated people often incurring a rental purchase fee. And fees for actual correctional supervision. This can include amounts paid to a non-governmental probation or parole contractor, fees for electronic monitoring devices, fees for home detention or fees paid to bail bonds. One of the largest correctional consumer service sub-sectors by revenue is telecommunications, and Your Honor heard some testimony from the communications [inaudible 02:32:24] earlier in the proceeding. I would point out that as it relates to incarcerated people, telecommunication services, regulated services, voice video calling in particular, which are regulated by the FTC and Utility Commission, the FTC uses the term Incarcerated People's Communication Services or IPCS-

Speaker 7:

Pardon me, Mr. Reher, pardon me. Sometimes you're hard to hear. Is there any microphone adjustment you can make? Perhaps turn it louder?

Steven Reher :

I apologize for that and I will speak closer to the mic if this is better and remember to speak loudly. Thank you for that. As I was saying, the telecommunications is divided into regulated services referred to as IPCS or Incarcerated People Communication Services by the FTC, or unregulated services like electronic messaging. As relates to the comments that Your Honor heard previously, the FTC does regulate certain types of fees that can be charged in connection with IPCS, but the FTC does not currently have any meaningful disclosure rules as relates to IPCS. I would note that the disclosure requirements are currently under consideration as part of a pending FTC rulemaking, and there have been proposals for disclosure requirements in that proceeding. But I think very importantly, no party has put forth a disclosure regime that would be inconsistent with the rule proposed by the FTC in this proceeding.

So with respect to incarcerated people's telecommunication services, the proposal here would provide beneficial information to consumers and would not pose serious implementation to [inaudible 02:34:20] service providers. Now as we explain in our comments, the proposed rule here is a step in the right direction and we support it. We respectfully intend that it does not go far enough in the context of correctional consumer services. The proposed rule's reliance on clear and conspicuous disclosure of total price is helpful in settings where consumers have multiple market options for which to choose. This is not always the case, however, in most correctional consumer service transactions. Service providers tend to hold a monopoly contract with a correctional agency and particularly importantly, a lot of times the correctional agency that issued the contract receives a portion of the fees that are levied on and used. So if a consumer ends up paying for a service over which they have no choice, they're not only paying fees, many of which don't provide any benefit and over which they have to make a [inaudible 02:35:23], but oftentimes a portion of that fee is collected for the financial benefit of the agency that is incarcerating consumer or their loved one.

Fair and conspicuous disclosure as proposed in the rule could definitely provide some benefit. And I speak personally here, as a researcher, I've often had difficulty gathering pricing information for certain correctional consumer services. And so the role would presumably ameliorate this lack of this information in the [inaudible 02:35:54] to some extent and would provide benefit. With the prevalence of online marketing and purchasing, it's understandable that the commission may be inclined to rely on disclosure exclusively [inaudible 02:36:07] both rule, but this having a reliance on market forces does not help consumers who have no choice. It's important to keep in mind that correctional consumer services transactions often involve particularly needed and necessary services, which highlights the power imbalance that payment consumer and service provider. A consumer might be literally purchasing their own bodily autonomy in the case of a probation or parole fee, or they might be paying to maintain critical contact with family members which will also make necessary.

So our proposed modification is that we would respectfully advocate for a prohibition on excessive fees. We believe that such a proposed rule, I'm sorry, we believe as we set forth in our comments that the proposed rule should include such a prohibition. It could even be tailored to apply specifically to non-competitive markets like the market consumer services where companies, service providers have excessive power. So I would give a couple of examples of clearly excessive fees in the context of consumer services.

First I would start with the release cards, the prepaid debit cards I mentioned previously. Some of these cards impose a fee on the consumer when a debit card transaction is declined at the point of sale. Declining a purchase when the account holds insufficient funds is a core component of the service that is offered, and the card issuer incurs no material costs when [inaudible 02:37:41] decline. Recall again that most correctional agencies that contract with a release card issuer do not offer an alternative method or at least a reasonable alternative method to claim one's funds. So the consumer is faced with a choice of either accepting the release card or parting ways with their own money. So this is a reason why we believe such fees like this should be prohibited rather than allowed subjects to incur a conspicuous disclosure.

The second example I would cite and we include a sense of data on this collected by policy [inaudible 02:38:18], money transfer services, sending money to an incarcerated person often charge up to fees of up to 37% of the amount transferred for simple money transfer. Fees average around 20% across the whole country. This is a service very similar to PayPal or Venmo where there are no fees or very low fee payment processing transactions for credit card transactions for the most expensive tend to be around three to 4%, but yet in this context we're seeing fees of average 20%. These fees are far in excess of the apparent cost of providing services and are likely attributable either rent seeking by the service provider or a division of profits between the service provider and the correctional facility that issues them out the contract or perhaps both dynamics are play. Again, our comments, we would prefer to see a prohibition rather than a disclosed system.

Finally, I would echo Ms. Nelson's comments and support of staff interpretations or advisory opinions regarding the final rule. This type of interpretive assistance has worked very well at Consumer Financial Protection Bureau. They have issued staff interpretations for the Electronic Transfer Act and various divisions of the Dodd-Frank Act. And these interpretations provide valuable guidance consumers and to service providers, and we would support a similar system that related to this. I thank the Commission and Your Honor for the opportunity to participate in this hearing. And that concludes my conference.

Speaker 7:

Thank you Mr. Reher. Open Exchange, our next speaker?

Speaker 8:

Speaker number 15 is Bruce Riley with the Formerly Incarcerated Convicted People and Families movement. Please go ahead.

Bruce Riley :

Thank you, Judge. My name is Bruce Riley. I'm the Deputy director of Voice of the Experience in Louisiana and a founding board member of the Formerly Incarcerated Convicted People in Families Movement. We're national coalition of grassroots organizations led by people directly impacted by mass incarceration. I myself am formerly incarcerated and been subjected to the various fees that have nickel and dime people back into prisons across America. Over a hundred million American adults have a criminal record and housing discrimination impacts entire families. A few things could have a greater negative impact on America as a housing industry that utilizes subtle gimmicks to negatively impacts such a broad swath of our nation. People with criminal records get more denials and must submit more applications and pay more application fees. Due to policing patterns and structural discriminations at each stage of the criminal legal system, we are disproportionately Black, Latino, Indigenous American people with disabilities, military veterans, people struggle with mental health and LGBTQ people. Having multiple identities only multiplies the discrimination and the hurdles faced to live a decent life.

We're often single parents struggling with the poverty line, attempting to use housing vouchers and may have conviction histories, and often paying fees and fines to courts, probation and parole. We are the people to whom a junk or misleading fee carries the greatest negative impacts. Unless you're impacted or close to someone who is, it can be difficult to grasp the feeling of hopelessness and despair that comes in navigating our economy with a criminal record. And we appreciate the FTC taking up this issue of misleading junk and hidden fees even if the impetus is not in regards to our specific population.

We've been simultaneously been working with HUD and PHAs for over a decade to reform their many policies which contribute to evictions, denials, homelessness, and recidivism. And over that time we've seen considerable progress. In fact, a multi-year effort produced a recently proposed HUD rule takes on a comprehensive approach to our housing discrimination. Initially we pay fees on top of our fees. For example, an out-of-state company facilitates probation parole fees here in Louisiana. There's no way to pay the fee without also paying a processing fee, which is as high as $7 per transaction. Phone and video calling services have a cascade of fees on top of fees. There's even a fee to return unused balances put onto prepaid accounts. Jails and prisons charge a fee to deposit money and a fee to withdraw funds after being discharged, neither of which are charged by banks in the free world. Despite the constitutional mandate to provide healthcare while incarcerated and having no alternatives, many jails and prisons charge medical co-pays at the equivalent of a week's salary.

Despite the Constitution requirement of access to the courts, some institutions charge money to make copies so that people can even read the law that forms the basis of their detention or the pathways to release. On top of that, the prices for commissary items are typically more expensive than ordering the same items from a local grocery store, even with delivery fees included. Transitional work programs keep as much as 75% of a person's earnings, while incarcerated laborers paid rates ranging from 2 cents to 50 cents an hour. This sets the foundation of the financial situation of the millions of people released from prisons and jails.

Now, rental application fees are deceptive, misleading, hidden junk fees that goes to the heart of our societal stability, our homes. We interpret the FTC proposed rule as applicable to rental housing application fees, and we encourage the FTC to issue guidance on applying the rule in this context. These fees typically range from $40 to over a hundred dollars are illegitimate, excessive, deceptive, deterrent and steering people into certain neighborhoods. Now they're totally illegitimate because what products or services charge an application fee for something they don't receive? Jobs? No colleges? There's low-income waivers. Purchasing a house? No. There's no background checks at hotels, none to rent cars or to buy homes. In this case, we're perversely subsidizing our own discrimination and exclusion. It's important to keep in mind that some of us have serious crimes from decades ago while others have lesser crimes from last week. Whether we completed our prison sentence or released on parole or given an alternative to incarceration, the criminal legal system has considered us able to live in the free world. And to do that, we need a place to live. These fees are excessive.

Police will charge $5 for a background check if you're going to volunteer at a school. $50 a year can get you an unlimited service for background checks. Predatory profiteering is an entirely unregulated area here, and some members of our organization suspected their units open simply to accept application fees. At a hundred dollars an applicant, processing one per day will yield more than collecting a monthly rent. One member reported that even after moving in, the landlord brought up their drug conviction from years ago was grounds for charging four times the security deposit. This was after being denied by dozens of places, paying dozens of fees, and even getting the refundable security deposits returned only after several months of pestering. These fees are deceptive. The housing industry refuses to be transparent with the admissions and denial matrix. Even lotteries must post your odds of being a winner.

Consumer protection laws exist to inform us prior to making a spending decision for goods and services. How can we make an informed decision without knowing how far back a housing provider will look for criminal record? What types of crimes they look for? Will they differentiate between being sentenced to prison or probation? Will they allow us an opportunity to present mitigating information? What are their hardline rules? In lieu of that we get, "You might be a winner." No certainty it is even being used as such because some might just use a Google search, or they simply putting our application in the trash as soon as we check the box for a conviction history, thus collecting a processing fee for this ten-second task. Landlords will receive 20 to $30,000 a year in rent. Some will pay staff on a realty service to fill a vacant apartment and those are either paid hourly, annually or as a portion of that rent. So these fees are just land YAP income.

A study done by the Fair Housing Action Center in Louisiana did a study of the landlords in the New Orleans metro region. Of 56 landlords tested only five could even explain what criminal records would mean denial. Cost can be over a hundred dollars for an application. One allow a refund when someone's denied, the rest denied. On top of the application fees are pet fees, cleaning fees, move-in fee, fees to put utilities in our names, repainting fees and much more, all while holding a security deposit at the end, which is rarely returned, despite the landlord providing zero upkeep on the property over the years. These fees are a deterrent. We have to apply to over 40 landlords and many have done this and be rejected by all. All while being charged fees.

By comparison, I personally applied to 32 law schools years after being released and received a fee waiver for each. I was accepted by one school and ultimately paid them roughly $200,000. If not for the fee waivers, I definitely would not have applied to so many schools and likely would not have applied to my alma mater. At some point people run out of money to apply for an apartment, which they need two to three months rent up front. People stop trying, and so this discourages assimilation. So this is also potentially steering. It is unclear to what degree criminal records are serving as a proxy for race or just how segregated our communities are based on this gatekeeping practice. We're hopeful that HUD will begin putting testers in the field who have actual criminal records, and research may begin looking into the potential of an industry steering us into some of the unhealthiest parts of our communities, which may be food deserts, black public transportation, have under-resourced schools, beating our toxic waste emissions amidst decaying infrastructure.

These landlords are not following the Fair Credit Reporting Act. People are not receiving notice that the report was used. There's no opportunity for one Mike Brown to say that I'm not that Mike Brown. And we deserve notice as to why we're denied and deserve a refund of our fee if not an overall ban on collecting such a fee. These background check companies as we know are inaccurate. Expungements often are not taken off of our records. Many states have a first offender pardon, meaning if you get convicted the first time, it automatically will roll off your record. But that has to be something that's done by the background check company as well. The exonerations are often not taken off people's records, arrests sit on people's records. And there's no evidence that criminal records are an indicator of our success as a tenant. And these background checks are being marketed under false pretenses. There is evidence however that housing instability is a prime indicator of recidivism.

And we've challenged practice in this industry on many fronts and courts and state houses and policy and some of their lobbying entities will openly threaten that any additional regulations such as forcing transparency in their exclusion policies will result in higher rents. This recently happened in Louisiana in response to our state bill that we required notice prior to paying a fee and return to the fee when someone's denied. We pursued this three years in a row. Many of these industry actors who rent to low-income people who engage in some of the most predatory practices are also receiving subsidies and tax breaks from the public. We're unaware of anyone who has dropped out of the program due to renters with conviction histories or based on regulations in this regard. Ultimately, we can't have a housing market driven by threats as a response to demands of fairness and opportunity.

So in summary, people with convictions are treated as a captive market subjected to monopolies and predatory practices. And once a family becomes trapped in a lifetime status of criminally convicted, it can be nearly impossible to evade the discriminations and added impacts of fees. And while we can't escape, more Americans join our ranks every day. If people have money and can't rent an apartment, people that have jobs, well what are we going to do with the people who are struggling even more? This is only creating more segregation and apartheid system. And how

Mr. Riley:

... will we ever find stability across our country? The digital age has allowed for this type of discrimination on a granular level, driving us deeper into poverty through piles of endless fees and pushed us further and further from shore till eventually we lose sight of safety altogether. This does not increase our public safety. It increases stress, anxiety, drug use and crime. Many amongst us are complicit in destabilizing America, all for the sake of profit. The housing industry is commerced. It needs to be regulated and predatory profiteering must be eliminated. I'm unsure how many legislators, commissioners and regulators are also housing investors, but if we can regulate food, drugs, stocks, ticket pricing, hotel fees and enforce contracts, we definitely need to pay extremely close attention to a commodity as precious as people's homes.

Thank you for hearing me today. That's all for my remarks.

Jay L. Himes:

Thank you, Mr. Riley. OpenExchange, would you announce our next speaker?

Speaker 9:

Speaker number 16 is Laura Smith with Truth in Advertising. Please go ahead.

Laura Smith:

Thank you, Your Honor. I'm Laura Smith, Legal Director for Truth in Advertising, or TINA.org for short. TINA.org is a non-profit, non-partisan consumer advocacy organization whose mission is to combat false and deceptive advertising. We do this by working with consumers, business, independent experts, synergy organizations, self-regulatory bodies and government agencies to advance counter measures that effectively prevent and stop deception in our economy.

During this rulemaking process, industry representatives have argued that there are disputed issues that need to be resolved, as well as making general arguments for why this rulemaking should not proceed. Their claims are without merit. None of the opponents have provided information that meets the standard for establishing that there are disputed issues of material fact with respect to the proposed rulemaking that are appropriate for cross examination or rebuttal.

Just like with summary judgment motions, the challenging parties must do more than simply assert there is a dispute regarding the commission's findings. They must come forward with sufficient evidence to show there is a genuine, bona fide dispute over material facts that will affect the outcome of the proceeding. This has not been done here. At best, industry has simply posited unsupported facts and proposed made-up, hypothetical scenarios in an effort to shut down the proposed rulemaking.

While I don't have time today to address the multitude of kitchen sink arguments industry has made, I would like to spend my time addressing a few of them. TINA.org has dedicated a significant resources trying to protect consumers from unfair and misleading junk fees, from ad alerts published on our website educating consumers about various marketing campaigns that omit fees from advertised prices, to complaints filed with regulators regarding companies that use deceptive pricing tactics, hidden and misleading fees have been a frequent target of TINA.org's education and advocacy work. Through this work, it has become painfully clear that junk and hidden fees are a widespread and pernicious problem in the US economy.

In the last year alone, TINA.org has published ad alerts regarding a wide range of companies that omit various fees from advertised pricing including, among others, the largest self storage company in the US, the world's largest ticket marketplace, a gym company with more than 450 locations worldwide and over two and half million members, a telecommunications company with over one million customers across more than 10 states and a mobile phone service provider owned by the largest private broadband company in America.

And that's just scratching the surface of this serious issue as the multitude of other posts on our website show. We've also investigated the use of junk fees by a gas savings app, a national moving company, a coupon app, an e-cigarette company, a national department store and several supplement companies among many others. And in addition to our own investigations, TINA.org tracks thousands of private class action lawsuits filed around the country, many of which allege companies charge hidden and junk fees. In the last 12 months alone, TINA.org has tracked lawsuits against cable operators, a national fast food chain with over 2,000 locations in the US, entertainment apps, the largest video game retailer in the world, a communications technology company that experienced exponential growth as a result of the COVID-19 pandemic, numerous entertainment venues, one of the largest wireless carriers in the US, several movie theater companies and a multinational hospitality company with thousands of hotels and resorts in the US. To be clear, what I've just rattled off is only what TINA.org has investigated and tracked. This does not include the FTCs or any other agencies or advocacy groups' work in this area. In other words, there can be no doubt that junk and hidden fees are indeed prevalent all across the US marketplace. In fact, surveys have reported that significant portions of the American population encounter junk fees from telecommunications provides, gas and electric utility providers, banks and credit cards, loan providers, rental car companies, educational institutions and investment services among other industries.

The White House has even stated that the American economy is overrun with such fees across industries and products, with consumers paying billions of dollars in unnecessary, unavoidable or surprise charges. The breadth of the issue is also shown through FTC actions over the past 50 years in which the commission has pursued marketers that impose deceptive hidden fees in numerous industries, including auto dealers and rentals, travel agencies, mobile telephone services, health insurance, banking and lending, gas and fuel, funeral services, hotels and resorts and publishers.

These fees are not only prevalent, they are also especially pernicious and harmful. TINA.org regularly hears from aggrieved consumers who have been victimized by junk and hidden fees; consumers who are not only blindsided by significant additional costs that were not clearly disclosed to them, but many of whom are also struggling to make ends meet. In fact many consumers are paying hundreds of dollars per year in such deceptive fees and that figure is only expected to grow if the status quo remains unchanged. And as these fees add up, many consumers experience greater difficulty meeting basic financial needs such as rent, utility and food.

Honest business and the economy also suffer when sellers use deceptive advertising in their pricing. The lack of clear and accurate information can lead to market inefficiencies as well as financial harm to honest companies competing with those that hide junk fees.

In short, any argument that junk and hidden fees are not prevalent or harmful is completely without merit. Industry has also argued that enacting a junk fees rule could eliminate national price advertising because certain fees vary depending on the consumer's geographic location. This argument is based on made-up hypotheticals, not on any established set of facts or data. No evidence has been offered that the proposed rule would actually eliminate national advertising campaigns.

Further, national advertisers are already advertising different prices based on location. Ticket sellers and resellers, for example, are required by New York state law to provide consumers with all-in pricing. This means that a consumer looking for concert tickets in New York is presented with the total price, while a consumer looking on the very same website for concert tickets to Massachusetts, may not be presented a total price. And geo targeting, a marketing tool that enables companies to tailor their ads to specific locations is already in widespread use. In 2019, 94% of surveyed mobile marketers in the US say they were already using location data for advertising purposes and last year alone, companies spent more than $20 billion in location targeted mobile advertising.

So while perhaps creative, this argument regarding the hypothetical impact of the proposed rule on national marketing is a red herring. It has also been argued that the proposed rule is unnecessary because there are other rules in place to address junk and hidden fees and the proposed rule would result in conflicting requirements leading to additional burdens and confusion for consumers.

This argument is untenable as the proposed rule would apply the exact same legal standard and cover fees that are not adequately addressed by other rules. The FTC rules that have been cited to support this argument that the proposed rule is unnecessary and conflicting all use the same clear and conspicuous standard for disclosing material information. In fact, the FTC's clear and conspicuous standard, the requirement that marketers must clearly and conspicuously disclose material information is a bedrock principal of the commission, not a new requirement.

Just by way of example, the Truth in Lending Act requires cost information to be clearly and conspicuously disclosed. The telemarketing sales rule requires the clear and conspicuous disclosure of the total cost to purchase the offered goods before a customer consents to pay for goods or services offered. The funeral rule requires that price lists display cost in a clear and conspicuous manner. The Restore Online Shoppers' Confidence Act requires that sellers clearly and conspicuously disclose all material terms of the transaction, including the cost of goods and services, before obtaining consumers' billing information. The rule concerning the use of prenotification negative option plans requires that promotional material clearly and conspicuously disclose material terms of the plan. In addition, the FTC's guides concerning the use of endorsements and testimonials state that advertisers should clearly and conspicuously disclose material information.

10 years ago, in connection with its Operation Full Disclosure in which the commission targeted more than 60 national advertisers in order to improve disclosures including those that pertain to price advertising, the FTC stated, "If the disclosure of information is necessary to prevent an ad from being deceptive, the disclosure has to be clear and conspicuous. That shouldn't be news to any advertiser."

In its .com disclosures publications the FTC states, "Because consumers should not have to click on hyperlinks to understand the full amount they will pay, all cost information including any such additional fees, should be presented to them clearly and conspicuously prior to purchase." And in its seminal 1983 policy statement on deception the FTC stated that a material representation is one that is likely to affect the consumer's conduct or decision with regard to a product or service such as the cost.

In short, the requirement to clearly and conspicuously disclose material information such as the total price of products and services is not in any way new or contradictory. In addition, the FTC's history in this area combined with the undeniable prevalence of hidden and junk fees also negates the opponent's major questions doctrine argument that promulgating a rule to prevent deceptive, hidden fees is somehow an unheralded or newfound power. On the contrary, the proposed rule which is in line with numerous other FTC rules is directly within the FTC's mission and rulemaking authority.

Finally, opponents of the proposed rule have said that the FTC should use alternatives, such as greater enforcement in educational efforts. However, the current and ever-increasing breadth and popularity of junk and hidden fees makes clear that the FTC's efforts to date have not effectively reigned in this deceptive marketing tool. Certainly education is necessary but not sufficient and targeted enforcement actions are not only slow and onerous, as well as a strain on the FTC's limited resources, but extremely limited in power following the Supreme Court's AMG Capital Management decision.

At the same time, there is a strong economic motivation for companies to use junk and hidden fees, as they can be a substantial source of revenue. Each year, such fees account for tens of billions of dollars in revenue for marketers across numerous industries. This extraordinary boon to companies' bottom lines means that companies are all too willing to roll the dice and take the low risk that they will be caught and reprimanded for their deceptive practices. Junk and hidden fees will absolutely remain a prevalent and harmful business tactic until and unless it is no longer economically advantageous for companies to use them.

As the record in this rulemaking proceeding makes abundantly clear, industry groups have simply made unsupported statements and created made-up hypothetical scenarios all in an effort to protect their ability to use a tool that has brought them enormous financial gains to the detriment of consumers and honest businesses.

The established, substantiated and uncontroverted facts in this rulemaking make it patently clear that junk and hidden fees are a widespread, prevalent issue that significantly harms consumers. An issue that has not been successfully addressed with the commission's currently available tools. For these reasons as well as those set forth in our written comments to the FTC, TINA.org supports the commission's proposed rulemaking and respectfully urges Your Honor to allow this proposed rulemaking process to move forward without delay. Each day that goes by, American consumers are paying hundreds of millions of dollars in hidden fees.

Thank you for your time.

Jay L. Himes:

Thank you, Ms. Smith. OpenExchange, our next speaker please.

Speaker 9:

Speaker number 17 is [inaudible 03:04:48]. from Fair Price Fair Wage Coalition.

Jay L. Himes:

Go ahead.

Speaker 10:

Good afternoon. Okay. Good afternoon, judge Himes and OALJ staff. Thank you for inviting me to participate in this hearing. My name is [inaudible 03:05:13] and I am a member of the Fair Price Fair Wage Coalition in the District of Columbia. We are a coalition comprised of consumers, professionals, grassroots organizations, policy organizations and advocates in the District of Columbia that stands firmly behind consumers to professionals and voters in DC and against junk fees. We appreciate the opportunity to participate today.

Our coalition strongly supports this rule and this industry-neutral application, especially as they relate to the restaurant industry. As our coalition specifically seeks to combat any recent proliferation of deceptive and confusing restaurant service charges in the District of Columbia, which harm consumers and threaten to reduce workers' pay.

Current service charge practices in the DC restaurant industry clearly demonstrate the need for the FTC's proposed rule. Some DC [inaudible 03:06:27] charge a mandatory default fee, often described as a service charge or a service fee that is added to a customer's check as a percentage of the total bill. The fees are sometimes small; about 3%; but they are often 20% or even more. These fees are a prime example of drip pricing in that the specific amount a consumer will owe is often not made clear until payment is due.

In addition, as the FTC heard in numerous comments already, restaurants also fail to fully disclose the nature or purpose of these fees. And while such fees help restaurant operators pay for a range of operational costs, they do not actually reflect the provision of any additional services for consumers.

Like other deceptive fees that the FTC proposes to restrict in this rulemaking, restaurant service fees make it difficult for consumers to actively compare prices and a consumer examining menus online before making a decision about where to eat. The adoption of service charges in DC restaurants appears to have accelerated following the passage of a ballot measure known as Initiative 82 in November of 2022 which phases in a one fair wage policy in DC that is an increase in the minimum cash wage that employers are required to pay tipped workers before tips in annual increments, until it matches the district's regular minimum wage in 2027.

While voters overwhelmingly supported Initiative 82 with a 74% approval rate, some restaurant operators vocally opposed the initiative because it requires them to pay higher base wages to their tipped staff. Rather than simply raising menu prices to cover the modest increase in labor costs, some restaurants have turned to service charges, even going so far as to call them as Initiative 82 fee or One Fair Wage Fee to obfuscate their price increases and mislead diners.

We expect these fees to become higher and more pervasive as the DC Council recently adopted a bill pushed by the restaurant lobby that explicitly allows restaurants to add service charges of up to 26 cents to diners' checks which can be used to pay base wages and allow the income from those charges to be excluded for purposes of [inaudible 03:09:11] calculations, encouraging restaurants to capture ore income as service charges and less as standard menu prices.

Service charges harm both consumers and workers, particularly women, who make up the majority of tip workers. Typically, restaurant employers obtain income from service charges and can use that income as they see fit, but they often describe the charge as going entirely to our staff or use similar language that makes the charge sound like a tip, even when the employer is actually using these amounts to pay base wages.

In other cases, when [inaudible 03:09:53] the service charge is very vague, leaving consumers to wonder about its purpose. But many consumers are likely to assume that a restaurant service fee serves the same purpose as a tip. When consumers think they pay a service charge that function as tips, they are less likely to tip as generously or at all on top of the check which in turn threatens to reduce workers' income from tips, which makes them heavily rely on the supplement to their base pay.

Federal regulation is necessary to ensure business compliance and consumer awareness. Recognizing the ways in which service charges can mislead customers, the DC Consumer Protection Procedures Act, the DCCPPA and interpretive guidance from the DC OAG allow such fees only if restaurants disclosure the fee to consumers before they place their orders, and adequately disclosing to consumers how the restaurant will use the service fee. Despite the DC OAG's guidance on service fees exposure, many restaurants continue to confuse and surprise customers with service charges. The DC OAG reports that it has received hundreds of complaints and questions from local consumers about restaurant service fees and the service fees at two DC restaurant [inaudible 03:11:22] have been the subject of recent lawsuits alleging violation of the DCCPPA. But many more remain unchallenged, even as diner frustration grows.

A clear universally applicable thorough ban on the deceptive use of service fees as the FTC has proposed will greatly increase consumer awareness of and business compliance with requirements for fair and transparent pricing practices in the restaurant industry. If finalized, the FTC's proposal will benefit the consumers and workers in DC and nationwide.

The proposed rule will promote informed consumer choice because it bars [inaudible 03:12:08] by requiring all industries to display the total price of any item or service, including any fees that a customer cannot reasonably avoid which, in the restaurant context, includes service fees. Instead, restaurants will be required to display the full cost of their offerings prominently on their menus without any surprise fees. Consumers will know when and whether any gratuity is included in the price they pay for their meals and be able to make an informed decision about how much to tip on top of their bill. They will also be able to make informed choices about where they want to eat out, since they will be able to actively compare menu prices across dining options.

The proposed rule will also protect workers as more jurisdictions are moving towards adopting one fair wage policies and requiring restaurant operators to pay full minimum wage before tips. Following the passage of Initiative 82 in Dc, Chicago passed a one fair wage order in October 2023 and the states of Illinois, Maryland, New York, Connecticut, Michigan, Massachusetts and others are also considering requiring employers to pay tip workers the full minimum wage with tips on top.

The proliferation of deceptive restaurant service charges, however, threaten to undermine the intent of these policies. That is, to provide tipped workers with a fair minimum wage plus tip on top, by creating confusion for consumers that [inaudible 03:13:49] with these tips.

The FTC's proposal, however, will require service fees to be included in total menu prices, making their use far less appealing to restaurant operators. By banning deceptive restaurant practices allowing service fees, the FTC's proposed rule will thus have the additional benefit of ensuring that once fair wage policies have their intended impact and that workers receive customary tips in addition to higher base wages.

The FTC notes [inaudible 03:14:24] in the MPRM that its proposed rule would leave any restaurants that have adopted mandatory service charges in lieu of tipping to return to the traditional tipping model, which in turn could have the unintended consequence of increasing racial/gender disparity in the wait staff labor market due to evidence that Black employees tend to receive lower tips than white employees and women tend to receive lower tips than men. Disparities that can not be explained by differences in service quality.

We do not dispute the existence of the inequality and agree that the traditional tipping model that allow consumer biases to unfairly [inaudible 03:15:07] worker pay. Restaurants that have adopted automatic gratuities in lieu of tipping could at least provide more equitable pay for their workforce. However, the restaurants that wish to use a model with an included gratuity to ensure equitable pay for their staff, the FTC's rule should not pose a barrier. A restaurant can include the total price with gratuity on its menu and explain clearly that gratuity is included. This will benefit workers and is far superior from a consumer's perspective to a base service charge that creates confusion around whether a tip is still expected.

The FTC should amend its proposal to ensure that the final rule achieve the desired transparency for consumers. We suggest changes to ensure better protection from deceptive practices in optional fees. Specifically, the FTC should amend the proposed rule to prohibit business from automatically adding a fee such as a restaurant service fee through a default selection. The final rule should make clear that fees for [inaudible 03:16:17] or services included by default are not reasonably avoidable.

Defaults have a significant impact on consumer behavior and lead many consumers to accept the default option without recognizing it as truly optional. In the example of restaurant service charges, many consumers will reasonably presume that a charge automatically added to their bill is one they must pay and will not ask for [inaudible 03:16:46]. Moreover, even if such a fee is clearly identified as optional, in practical terms it is not reasonable to expect that a diner will feel comfortable asking their server to remove a charge that is ostensibly for a service.

It is important that the final rule not create any loophole for restaurants to continue excluding service charges from total menu prices by adding them to diners' checks by default, but claiming that they are optional. In addition, we recommend that in the final rule or at least in guidance implementing the final rule, the FTC make clear that even if a restaurant is in compliance with the ban on service fees by disclosing the total price of its menu items, it must also comply with the bar on misleading. For example, if a restaurant does display a total price it must [inaudible 03:17:41] prominently on its menu in compliance with the rule, [inaudible 03:17:45] to also denote, for example, that menu prices include a 20% service charge, the restaurant must also disclosure whether it is retaining a service charge or passing it on directly to employees as a tip. If the restaurant will retain the fees it should be required to clearly state that the fee is not a tip. The FTC should not grant broad exemption in the final rule.

We strongly urge the FTC to maintain its industry-neutral approach to this rule so that all businesses are required to comply. This approach is necessary to achieve marketing-wide goals such as informed consumer choice and reduced consumer frustration and confusion. If the final rule were to exempt restaurants and/or small businesses, it will effectively grant the exempted businesses license to engage in these deceptive concepts that form the basis for the rule. For all the reasons I've explained and given the customer frustration [inaudible 03:18:49] service charges, the FTC should not consider excluding restaurants from the final rule and there is no reason to exclude other small businesses either.

A universal standard makes the rule easier for the FTC to enforce and for consumers to understand, while creating a level playing field for businesses. The Fair Price Fair Wage Coalition fully support the FTC's approach to ending hidden and misleading fees. We also do not believe that there are any disputed issue of material fact to be resolved in the ruling.

The following members of the Fair Price Fair Wage Coalition thank you for the opportunity to participate today. DC [inaudible 03:19:36] Justice, Jews United for Justice, Metro DC Democratic [inaudible 03:19:42] of America, National Women's [inaudible 03:19:45], Restaurant Opportunities Center of DC, United Planning Organization, [inaudible 03:19:54], Consumer and Tipped Workers and [inaudible 03:19:56] Consumer and Tipped Workers.

Thank you so much for your time.

Jay L. Himes:

Thank you, Ms. [inaudible 03:20:05]. OpenExchange, am I correct there are no more speakers? I know specifically that I wasn't clear whether the US Chamber of Commerce was foregoing its opportunity here today or not. Have they appeared for you?

Speaker 9:

They have not their numerous speakers.

Jay L. Himes:

Then I can confirm that all persons whom the commission identified to make oral statements at this informal hearing and who indeed appeared today were given the opportunity to speak. Therefore, this informal hearing is concluded. Thank you very much.