



February 8, 2023

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

Re: Advance Notice of Proposed Rulemaking, Federal Trade Commission; Unfair or Deceptive Fees Trade Regulation Rule (87 Fed. Reg. 67,413-67,424, November 8, 2022)

To Whom it May Concern:

The U.S. Chamber of Commerce (“the Chamber”) appreciates the opportunity to comment to the Federal Trade Commission (“FTC” or “Commission”) regarding its proposed “Trade Regulation Rule on Unfair or Deceptive Fees” (“Proposed Rule” or “ANPR”).¹ The ANPR proposes imposing an economy-wide rule to regulate and prohibit so-called “junk fees” and “hidden fees.”

Several factors underlie the Chamber’s concern that the proposed rulemaking is potentially unlawful. Specifically, the ANPR implicates the Major Questions Doctrine, which requires a clear grant of rulemaking authority that Congress has not yet provided, fails to comport with the FTC Act’s Section 18 rulemaking procedures, and seems to slide into a competition rulemaking, where the FTC lacks such authority. Aside from legal considerations, the Chamber is concerned the ANPR’s economy-wide scope raises several practical issues including the risk of duplicative and overlapping regulatory regimes for certain sectors, and chilling or even prohibiting legitimate business practices.

Consequently, the Chamber believes that the FTC should withdraw this rulemaking.

The Proposed Rule Implicates the Major Questions Doctrine

Last year, the Supreme Court’s *West Virginia v. Environmental Protection Agency* decision reaffirmed that federal agencies can act only within their

¹ Unfair or Deceptive Fees Trade Regulation Rule, Advance Notice of Proposed Rulemaking, 87 Fed. Reg. 67413 (Nov. 8, 2022).

constitutional and statutory authority.² The Court held that the “Major Questions Doctrine” requires a clear grant of authority to a federal agency for promulgating certain regulations.³

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

An Economy-Wide Rule on “Junk Fees” and “Hidden Fees” Has Major Economic and Political Significance

The claims made by the Commission in the ANPR support the notion that a rulemaking will have major economic and political significance. The ANPR itself acknowledges the significance that pricing strategies have on our economy and the sweeping application and widespread use of multi-component pricing models (“junk fees” as well as legitimate variable pricing).⁴

The ANPR purportedly seeks to address the prevalence and disclosure of “junk and hidden fees,” which as written, would broadly cover all types of “fees, interest, charges or costs” and comprehensively regulate the advertising of all prices.⁵ For example, the ANPR focuses on the timing and placement of pricing disclosures and display of all-in pricing (relating to the concerns with “drip pricing”).⁶ Strategies for setting, advertising, and marketing prices are core components of a functioning free-market economy and encompass nearly every aspect of consumer-facing economic activity. If the Commission attempts to broadly prohibit practices in this space, its action will have a substantial effect on the pricing decisions of consumer-facing companies, which impact more than 68% of U.S. gross domestic product.⁷

Moreover, the expansive scope of the rulemaking would regulate broad swaths of the U.S. economy. The ANPR cites the following sectors’ practices and products as alleged support for the promulgation of a rule: payday loans, automobile financing, telecommunications, live entertainment, hospitality, higher education, car rental, cruises, funeral services, academic publishing, insurance, membership programs, and

² *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2002).

³ *Id.* at 2608

⁴ 87 Fed. Reg. at 67414.

⁵ *Id.* at 67416.

⁶ *Id.* at 67420

⁷ See J.P. Morgan (June 12, 2022), <https://am.jpmorgan.com/sg/en/asset-management/per/insights/market-insights/market-updates/on-the-minds-of-investors/all-eyes-on-us-consumers-this-holiday-season/> (private consumption accounts for 68% of nominal GDP).

discounting programs.⁸ In some of these sectors, the fees the rule would seek to target account for a significant percentage of revenue.⁹

The Breadth and History of the Asserted Authority Show the ANPR Addresses Major Questions

The breadth of the authority the FTC claims in the ANPR implicates the Major Questions Doctrine. As noted in the preceding section, the ANPR seeks to regulate pricing practices across a wide range of sectors and products, implicating significant political and economic questions. The Commission has never before claimed the authority to undertake such pricing regulation, for good reason.

Differing pricing strategies pursued by businesses present various significant trade-offs that are more appropriately addressed by Congress than the Commission to the extent they present legitimate concerns. The ANPR seems to acknowledge that congressional authorization is required given these trade-offs. It contemplates imposing new requirements to “maximize the benefits to consumers and to minimize the costs to legitimate businesses,” which could potentially exempt some industries in whole or in part, or allow for certain types of pricing practices.¹⁰ Contemplating these trade-offs at such a fundamental level is more appropriate for the legislature, not executive rulemaking.

Similarly, the ANPR asks how a potential rule should address “all-in” pricing and whether taxes and government-imposed fees should be included.¹¹ The consideration of taxes and government-imposed fees is Congress’ domain, and in fact, Congress has pursued legislative efforts on the disclosure of sector-specific taxes and fees.¹²

There Is No Clear Congressional Authorization for Comprehensive “Junk Fees” and “Hidden Fees” Rulemaking

An agency is required to “point to ‘clear congressional authorization’” when it seeks to regulate major questions.¹³ The ANPR states that the “Commission lacks authority...to seek redress for consumers or penalties against violators for everyday junk fees that fall outside those specific prohibitions.”¹⁴ Thus, the Commission turns

⁸ See generally, 87 Fed. Reg. 67413.

⁹ 87 Fed. Reg. at 67414.

¹⁰ *Id.* at 67421.

¹¹ *Id.*

¹² See Dan Reed, *Congress May Let Airlines Go Back To Not Telling Travelers The Full Fare Online Until Purchase*, FORBES (June 13, 2018).

¹³ *West Virginia*, 142 S. Ct. at 2614 (quoting *Utility Air*, 573 U.S. at 324).

¹⁴ 87 Fed. Reg. at 67415.

to Section 5 of the FTC Act, which it claims allows it to address “deceptive or unfair acts or practices involving junk fees.”¹⁵ But, Section 5 does not provide the specific Congressional authority necessary to address the pricing practices that the Commission proposes to regulate.

To the contrary, when Congress has acted to address pricing practices, it has done so expressly, often on a sectoral basis. This indicates that Congress prefers to keep pricing regulations narrow and not economywide. For example, Congress has granted the FTC narrow and targeted authority to regulate specific pricing practices.¹⁶ In addition, Congress has enacted industry-specific laws focusing on pricing practices in the airline industry¹⁷, ocean shipping¹⁸, broadband¹⁹, and consumer finance sectors²⁰. Congress has also held oversight hearings on various pricing and fee practices.²¹ Importantly, Congress has opted not to pass legislation on specific types of pricing practices, such as live event pricing, a sector noted in the ANPR.²²

Congress is abundantly aware of its ability to direct the Commission to promulgate specific rulemakings as well as the Commission’s limitations to seek civil penalties.²³ If Congress wanted the Commission to issue an economy-wide rulemaking on fees and fee disclosures (including “junk fees” and “hidden fees” as well as on legitimate pricing models) Congress would have instructed it to do so.

The ANPR Violates the Federal Trade Commission Act.

The FTC’s issuance of this ANPR violates the FTC Act in several ways. First, the ANPR’s proposed use of Section 18 to address “unfair and deceptive acts or practices” falls short of the FTC’s statutory requirements for such a rulemaking. Second, the statutory basis for an economy-wide rulemaking is unclear and contradicts

¹⁵ *Id.* at 67415-67416.

¹⁶ *See*, 16 CFR 310.3(a)(1)-(2) (“Telemarketing Sales Rule”); 16 CFR 453.2(a) (“Funeral Rule”); 15 U.S.C. 8402(a)(1)-(2) (“Restore Online Shopper’s Confidence Act”).

¹⁷ *See*, JOINT EXPLANATORY STATEMENT OF THE CONSOLIDATED APPROPRIATIONS ACT 2018, 115th Cong. (2018).

¹⁸ *See*, Ocean Shipping Reform Act of 2022, Public Law 117-146.

¹⁹ In the Matter of Empowering Broadband Consumers Through Transparency, Report and Order FCC-22-86 (rel. Nov. 17, 2022).

²⁰ *See*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203.

²¹ *In the Dark: Lack of Transparency in the Live Event Ticketing Industry: Hearing Before the House Commerce Subcommittee on Oversight and Investigations*, 116th Cong. (2020) (statement of Rep. Frank Pallone, Chairman, House Committee on Energy and Commerce).

²² Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act, H.R. 3248, 116th Cong. (2019).

²³ *See*, Leader Rodgers Warns Biden Administration Officials Against Executive Overreach, <https://energycommerce.house.gov/posts/leader-rodgers-warns-biden-administration-officials-against-executive-overreach>.

congressional intent. Third, the FTC lacks authority to pursue a rulemaking under Section 6(g) of the FTC Act addressing “unfair methods of competition.”

The Federal Trade Commission Has Not Shown Brevity and Specificity

Section 18 establishes several procedural requirements for the FTC to meet, including that an ANPR must provide “a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission.”²⁴ The ANPR fails to meet the statute’s test of brevity and specificity in attempting to define a “junk fee” or a “hidden fee”, and thus does not appropriately scope out the parameters of a potential rule. The ANPR proposes to define a “junk fee” as any “unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer, including goods or services that consumers would reasonably assume to be included within the overall advertising price.”²⁵ Further, the ANPR also defines a “hidden fee” as “goods and services that are deceptive or unfair, including because they are disclosed only at a later stage in the consumer’s purchasing process or not at all, whether or not the fees are described as corresponding to goods or services that have independent value to the consumer.”²⁶ The ANPR considers “hidden fees” to be a category of “junk fee.”²⁷

Phrases such as “little or no added value to the consumer” are subjective and are not sufficiently specific to provide the public with notice of what types of fees the ANPR seeks to address. Throughout the ANPR, the FTC references a multitude of sectors and products that could be the subject of the rule but fails to provide any linkage between those practices and its definitions.²⁸ Without concrete definitions to rely upon, the public will not be able to provide effective comments on the existence and alleged harms of “junk fees” and “hidden fees” and the ultimate rule will likely sweep up legitimate pricing practices.

The subjectivity of the Commission’s proposal can also be described in this manner. The vast majority of consumers, who pay in a timely manner and in accord with the terms and conditions of a transaction, may not be subject to paying fees. Put another way, consumers who pay late, or not within the terms and conditions of a transaction may be subject to additional fees. In other words, the Commission may

²⁴ 15 U.S.C. § 57a(b)(2)(A); See Jessica Rich, *The FTC’s Magnuson-Moss Rulemaking Process – Still an Uphill Climb*, KELLEY DRYE & WARREN LLP (Jan. 11, 2022), <https://www.jdsupra.com/legalnews/the-ftc-s-magnuson-moss-rulemaking-7757749/>.

²⁵ 87 Fed. Reg. at 67413.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See generally, 87 Fed. Reg. 67413.

force good paying customers to subsidize bad behavior, through the imposition of higher costs as a result of the ANPR.

Furthermore, what economic analysis has the Commission undertaken to determine the appropriate pricing of goods and services across industries and the economy? How can the Commission substitute its judgment for that of the marketplace. Any such underlying economic analysis that led to the issuance of the ANPR must be released to the public for study and comment.

The ANPR similarly fails to meet statutory requirements in its definition of “hidden fees.” The plain text of that definition covers all “deceptive or unfair” fees. The language following “including” serves only as a subset of the covered class of fees.²⁹ And, even focusing on what the Commission does say about hidden fees, it is left unclear when in the “purchasing process” is “later.”³⁰ Presumably, consumers do not need to be told about every single fee they may face when they walk in the door of a store or browse a retail website, before they are even shown a product. Moreover, it is unclear who (e.g. the retailer, vendor) is responsible for identifying each fee. But the ANPR offers no guidance as to when in the process the Commission will deem a fee “hidden.”

The Federal Trade Commission Has Not Shown Prevalence

Under Section 18, the Commission can only initiate a rulemaking if “it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.”³¹ Prevalence can be assessed based on previous FTC cease-and-desist orders targeting the act or practice at issue or on other information indicating a “widespread pattern” of that conduct. The Commission does not meet that standard here. As dissenting Commissioner Wilson observes, the ANPR bases its assertion that junk and hidden fees are prevalent on “FTC workshops, business guidance, and even investigations, but *not* enforcement actions.”³²

As an initial matter, the Commission has not cited evidence that the practice of junk and hidden fees, as specifically defined in the ANPR, have been found to be unfair or deceptive under Section 5. The FTC “can address only unfair or deceptive practices that [it] could have otherwise found unlawful in the ordinary enforcement of our Section 5 authority on a case-by-case basis.”³³ The Commission’s burden is not met here. Courts have not held that disclosing fees “later” but before purchasing

²⁹ 87 Fed. Reg. at 67413

³⁰ *Id.*

³¹ 15 U.S.C. § 57a(b)(3).

³² *See* DISSENTING STATEMENT OF COMMISSIONER CHRISTINE S. WILSON, ADVANCE NOTICE OF PROPOSED RULEMAKING – JUNK FEES, FEDERAL TRADE COMMISSION (2022).

³³ *Id.*

decisions is unfair or deceptive, nor have courts required companies to provide all-in pricing in all transactions, as the ANPR proposes to do. And Section 5 does not require companies to disclose all fees “that might foreseeably be assessed in connection with the sale of a product or service.”³⁴ Such disclosures would not only be burdensome for businesses, but they would be equally confusing and burdensome for consumers. Although the Commission cites a few investigations alleging deceptive and unfair fee practices, most were settled without adjudication.

Second, neither the deceptive nor unfairness prong of the FTC Act allows the Commission to make value judgments on behalf of consumers. The Commission defines “junk fees” as any fees “that have little or no added value to the consumer.”³⁵ The Commission cannot subvert consumer choices by unilaterally deciding what fees have added value to countless purchases made by hundreds of millions of individual consumers.

Third, the ANPR provides no reason to think that variable pricing is necessarily deceptive or unfair across all industries and sectors of the economy. The ANPR does not adequately engage with the many contexts in which such variable pricing schemes may *benefit* consumers by allowing ultimate prices to scale with the price of the goods or services purchased. All-in pricing may be difficult to implement or unclear to consumers in many contexts, and charging everyone the same fee, regardless of how much or how little they purchase, can have significant downsides. Consumers may actually *expect* the end prices they pay to reflect the volume of goods they have purchased. Yet the ANPR claims a need for a nationwide, economy-wide crackdown on variable pricing without evidence (beyond a few workshops and informal studies) that such pricing is consistently implemented in an unfair or deceptive manner in all industries.

Finally, the Commission does not explain how existing rules, such as the Telemarketing Sales Rule and the Restore Shoppers Online Confidence Act, under which the FTC has obtained record-breaking civil penalties, are insufficient from a deterrence or consumer-protection standpoint. Although the Commission laments it lacks authority to seek redress for “everyday junk fees,” that is precisely because Congress did not authorize the FTC to do so under any authorizing statute. The FTC cannot circumvent Congressional choice and utilize Section 18 Magnuson-Moss rulemaking for “every day” practices that are not unfair or deceptive.

The Federal Trade Commission Has Not Shown Unfairness

³⁴ 87 Fed. Reg. at 67418.

³⁵ *Id.* at 67413.

The FTC cannot prohibit an act or practice as unfair unless it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”³⁶ But requiring extensive fee disclosures upfront will impose prohibitive costs on a significant number of businesses in all corners of the economy. Furthermore, those burdens will eventually be passed onto consumers through higher fees (to recoup costs) or fewer goods or services. The negative consumer impacts must also be analyzed by the Commission and provided to the public to comment on.

Before the Commission imposes such a burden on a wide range of sectors, it must show the countervailing benefits to consumers of doing so. The ANPR offers virtually no proof of that effect—certainly not enough to justify the significant impact on the economy that the Proposed Rule will cause by practices (namely, various forms of variable pricing) that in many contexts provide significant value to consumers. In many cases, providing all fees up front will prove unworkable, so companies will have no choice but to abandon variable pricing altogether. The ANPR thus seeks to ban categories of business practices—ones that often benefit consumers—in the guise of a disclosure obligation. Such a result runs counter to both Sections 5 and 18.

There Is No Statutory Basis for an Economy-Wide Rulemaking

Congress has not granted any direct authority to the Commission to pursue economywide, cross-sector regulation of pricing practices. In fact, Congress has done the opposite. Congress has granted the Commission authority to regulate only certain sectors and practices.³⁷ The Commission’s acknowledgement that it is pursuing the rule in part because its current remedial authority is limited” due to the Supreme Court’s decision in *AMG Capital Management, LLC v. FTC* and statutory limitations that limit the Commission’s ability to obtain civil penalties should not provide a basis for pursuing a rule.³⁸ A trade rule should be based on whether there is an unfair or deceptive act under Section 5; not a lack of remedies. Moreover, the ANPR seeks to regulate in some areas where it specifically lacks authority, such as insurance products and consumer financial products, which are generally regulated by the states and the Consumer Financial Protection Bureau, respectively.³⁹

The Federal Trade Commission Cannot Pursue An Unfair Methods of Competition Rulemaking

³⁶ 15 U.S.C. § 45(n).

³⁷ See generally, 16 CFR 310.3(a)(1)-(2) (“Telemarketing Sales Rule”); 16 CFR 453.2(a) (“Funeral Rule”); 15 U.S.C. 8402(a)(1)-(2) (“Restore Online Shopper’s Confidence Act”).

³⁸ See *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

³⁹ See generally, 15 U.S.C. §§ 1011-1015 (“McCarran–Ferguson Act”).

The ANPR also exceeds the Commission’s authority by sliding into competition rulemaking. As Commissioner Wilson explained in dissent, the ANPR could significantly affect and impair competition in many markets.⁴⁰ Further, the FTC in its press release announcing the ANPR did little to mask its intent to potentially use this rulemaking as a back door attempt to wade into competition rulemaking. The press release stated a consumer “might be dealing with a company with a monopoly or exclusive rights that can extract fees because there is no competing option.”⁴¹ Such a statement is clearly born from a competition analysis, such that any rule issued in response to such a concern would in fact be an attempt at competition rulemaking. However, the Commission lacks the legal authority to promulgate competition rules.⁴²

The ANPR Raises Significant Practical Implications

As noted above, this ANPR will have economy-wide implications across widely varying industries and markets. Setting aside the serious concerns with the FTC’s lack of authority to create such a rule, as set forth above, there are significant practical issues with the FTC’s attempt to impose a one-size-fits-all directive to all industries and companies about the manner in which they must present prices to consumers. The rule also does not distinguish between fees that are fixed and determinable up-front versus fees that vary based on consumer choice. Any rule of this scope will necessarily impose unintended consequences to legitimate business practices, and in many cases reduce consumer choice. For example, in the ecommerce industry, consumers are often presented with a variety of shipping and delivery options, which may vary in price due to speed and delivery date, the size of the delivery, the type of product being delivered, delivery address, and in some cases the delivery service provider chosen by the consumer. Until the consumer has finalized their product selection, the company will not know the amount of the fees, and in some cases, whether they apply at all.

In addition, an economy-wide rule would likely cause significant overlap with existing sectoral rules. These include insurance, consumer finance, broadband, and telecommunications services. Indeed, in many of these cases, Congress expressly tasked the appropriate sector-specific agency with tailoring an appropriate set of rules for the relevant sector. An economy-wide rule would thus be redundant, confusing, and potentially conflicting with existing sectoral rules.

⁴⁰ See DISSENTING STATEMENT OF COMMISSIONER CHRISTINE S. WILSON, ADVANCE NOTICE OF PROPOSED RULEMAKING – JUNK FEES, FEDERAL TRADE COMMISSION (2022).

⁴¹ FEDERAL TRADE COMMISSION EXPLORES RULE CRACKING DOWN ON JUNK FEES, FEDERAL TRADE COMMISSION (2022)


⁴² See generally Maureen K. Ohlhausen and James Rill, *Pushing the Limits?: A Primer on FTC Competition Rulemaking*, U.S. Chamber of Commerce (Aug. 12, 2021), https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf.

Conclusion

The Chamber appreciates the FTC's consideration of our comments to this ANPR. Given the substantial practical implications raised and potential unlawful authority to pursue rulemaking, the FTC should withdraw this ANPR. We hope to engage with the FTC further to discuss our serious concerns on this ANPR in greater detail.

Please contact Matt Furlow, C_TEC's Director of Policy, at mfurlow@uschamber.com if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Jordan Crenshaw".

Jordan Crenshaw
Vice President
Chamber Technology Engagement Center
U.S. Chamber of Commerce