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VIA REGULATIONS .GOV

FTC Commissioners
600 Pennsylvania Avenue NW
Washington, DC 20580

RE: Unfair or Deceptive Fees NPRM, R207011, Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77420 (Nov. 9, 2023), Docket FTC-2023-0064

Dear Commissioners,

On behalf of the Competitive Enterprise Institute, I respectfully submit the following comments in response to the Federal Trade Commission’s proposed rulemaking concerning a trade regulation rule entitled “Rule on Unfair or Deceptive Fees.” Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy from a pro-market perspective.

The focus of these comments is not on the quality or benefits of the proposed rule, but instead on its lawfulness. In short, the proposed rule goes beyond the power of the FTC, because it prohibits conduct that is not deceptive or unfair and is protected by the First Amendment.

I. The Proposed Rule is Beyond the Statutory Authority of the FTC

Under the authority of Section 18 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 57a(b)(2), the proposed rule purports to define with specificity “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce,” which are prohibited by Section 5(a)(1) of the FTC Act, 15 U.S.C. §45(a)(1). Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77420 (proposed Nov. 9, 2023) (to be codified at 16 C.F.R. pt. 464). However, as shown below, the proposed rule goes beyond the authority authorized by Section 5(a)(1) as it prohibits conduct that is not unfair or deceptive.

The specific part of the rule that is unlawful is the entirety of proposed section 16 C.F.R. § 464.2. This section has two parts:

- (a) It is an unfair and deceptive practice and a violation of this part for any Business to offer, display, or advertise an amount a consumer may pay without Clearly and Conspicuously disclosing the Total Price.
- (b) In any offer, display, or advertisement that contains an amount a consumer may pay, a Business must display the Total Price more prominently than any other Pricing Information.

88 FR 77484.

The key relevant definitions used are:

- “Pricing Information means any information relating to an amount a consumer may pay.” *Id.*
- “Total Price means the maximum total of all fees or charges a consumer must pay for a good or service and any mandatory Ancillary Good or Service, except that Shipping Charges and Government Charges may be excluded.” *Id.*

The proposed rule will go beyond the FTC’s authority and into First Amendment-protected speech when applied in a number of predictable contexts. Consider the application of the proposed rule to five hypothetical types of advertisements described just below: in each case, application of the rule would unlawfully prohibit advertising that is neither unfair nor deceptive. The five types of advertisements are:

Type 1: A business advertises some information concerning how much a consumer needs to pay, but also makes clear that there are other mandatory fees that are not presented.

Type 2: A business advertises some information concerning how much a consumer needs to pay, but does not display the total price and makes clear what is shown is not the total price.

Type 3: A business advertises pricing information that is dependent on the particulars of the consumer, such as a consumer’s credit rating or party size.

Type 4: A business advertises pricing information that is dependent on future facts and thus cannot present a total price.

Type 5: A business advertises pricing information in a form other than a single total price, even if all of the constituent parts are disclosed (such as in a set amount of monthly payments).

The fundamental problem with the proposed rule is that in the above contexts, each of the given advertisements is neither deceptive nor unfair and is thus beyond the ability of the FTC to regulate pursuant to Section 5(a)(1). In addition, prohibition of such advertisements would violate the First Amendment to the U.S. Constitution, as will be discussed in the next section.

The advertisement is not deceptive to the consumer: it presents only truthful and accurate information that would not cause a consumer to believe any inaccurate information. In short, the consumer cannot be tricked or deceived by the advertisement.

The advertisement is also not unfair in any respect that the FEC may permissibly address. With respect to the meaning of “unfair” in this context, there is a notable limitation on the FTC’s authority, specifically:

The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice 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.

15 U.S.C. § 45 (n).

The five types of advertisements discussed above do not cause substantial injury to consumers, nor are they likely to cause substantial injury to consumers. They cause no injury of any kind to consumers. After watching such an advertisement, the consumer is better informed after watching the advertisement than they are before watching the advertisement. Such a consumer is not harmed by accurate, non-deceptive information.

The FTC claims that the failure to display the total price up front increases the search costs that consumers must bear to find products. But this harm is not caused by the advertisements. Consumers who are looking for a product and price bear a search cost before viewing any advertisement. If the advertisement includes some price information, but not the total price, and the advertisement further makes clear that it is not the total price so that it is non-deceptive, the consumer’s search costs decrease from watching the advertisement. The consumer benefits from such an advertisement, rather than being harmed. While consumers might benefit more if the total price were disclosed, failing to provide additional benefits is not a harm. At worst, the consumer bears the same search costs after watching the advertisement as before.

Sometimes, such an advertisement may cause a consumer to spend time or money investigating the advertiser’s total price, but the consumer behaves this way because gains in new information lead the consumer to the conclusion that the business is more likely to have the product and price that is desired as compared to other vendors. In a world without such an advertisement, the consumer would have to search more inefficiently and, therefore, would have to spend even more time finding the business with the best price and product. Therefore, even when a consumer spends time or money investigating the advertiser’s total price, the consumer does this because the advertisement helps narrow the potential range of vendors with the desired products and prices sought. This means that even when a consumer chooses to spend time and money investigating the advertiser’s total price, the advertisement is a benefit and not a harm.

The FTC claims, “When sellers advertise prices that are artificially low because they do not include mandatory fees that are disclosed only later in the purchasing transaction, consumers end up transacting with those sellers under false pretenses.” 88 Fed. Reg. at 77432. That may be true when the consumer is deceived into believing a stated price lacks any other fees, but when consumers are made aware of the existence of such other mandatory fees, there is no such false

pretense. The FTC cannot use a clearly deceptive practice, misleading consumers into believing a given price does not include other fees, to justify prohibiting advertisements that use no such deceptive practice and that make clear that other such fees exist.

The practice that the FTC calls “price partitioning” does not meet the statutory requirements for regulatory action. The FTC claims that when two components of a price are presented separately, consumers undervalue the total price. The FTC rests this claim on a study that presented the price separately to individuals and then (after no longer showing the price information) asked those individuals what the price was. Some individuals did so accurately, adding the two together, and others believed the total was lower; on average, therefore, the people asked believed the price was lower.

The problem with this FTC claim is that the study’s conclusion—that consumers didn’t understand the total price—doesn’t follow from the study. The respondents might have misunderstood the question rather than the price. The people who stated a lower number may have known the total price but misunderstood the question. It’s far easier to misunderstand what price the question was referring to (for instance: did the price include shipping costs?), which would cause an inherent bias towards lowering the figures. People who get the question right are always going to have a higher figure, and mistakes are always going to lower that figure. Thus, all that the study proves is that people make mistakes, not what mistakes those are.

To analyze this issue in more depth, consider one example of price partitioning presented by the FTC: resort fees. As the FTC notes, the American Hotel & Lodging Association states that only 6% of hotels charge resort fees. 88 Fed. Reg. at 77461. The FTC responds that such fees don’t include Airbnb, VRBO, or foreign hotels with U.S.-facing websites, and those that do have a resort fee have one that constitutes a large percentage of the cost of the room. *Id.* But the FTC’s response misses the point.

The pertinent question, overlooked by the FTC’s response, is why only 6% of hotels charge resort fees. According to the FTC, separating such resort fees decreases what consumers think the total price is. Why wouldn’t 100% of the hotels use this strategy if that were true? The reality is that:

Resort hotels are different from other hotel properties because among other things, they offer extensive ancillary facilities, amenities and services, such as large and/or extensive exercise gymnasiums, large and/or unusual swimming pools, entertainment, transportation, concierge and tour services, and other recreational amenities. Many resort owners often consider these broad and expansive offerings to be supplemental to the guest room provided. Managers want to provide amenities to their guests in a hospitable fashion without having to police guests throughout the resort property to make certain every person using these amenities has compensated the resort for the expense of providing and maintaining them. As a result, many operators charge a daily resort fee to cover the ancillary cost.

John O'Neill and Donna Quadri-Felitti, Resort Fees and Service Fees in the U.S. Hotel Industry: Context and Concepts Related to Partitioned Pricing, 2 ICHRIE Research Reports (2017), available at https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1010&context=ichrie_rr.

Therefore, combining a resort fee with the room price presents a misleading picture to the consumer when a significant part of the product a resort hotel offers is outside the room. One might say that it mixes apples with oranges; these are simply different types of products. By separating the resort fee from the room fee, consumers can judge each part of what is being provided on its own merits.

Other mandatory fees (especially those outside of the seller's control, like airport concession fees) help consumers understand the informational effect of prices (such as price as an indicator of quality). Völckner, F., Rühle, A., & Spann, M., *To divide or not to divide? The impact of partitioned pricing on the informational and sacrifice*, 23 Marketing Letters 719 (2012). Imagine two businesses, one that charges \$30 for a burger and the other that charges \$20. Based only on the price, the consumer would assume the former business is likely to be the higher quality establishment. But if the price of the former business is presented as a \$15 burger and a \$15 dollar airport concession fee, that price makes clear both what the total is and that the quality might be expected to be lower. This information might reasonably lower the expectations of the consumer, thus allowing the consumer to get the product he or she is looking for.

Thus, splitting prices can present substantial benefits to the consumer: the split helps consumers understand additional features not present in other business's offers and helps to lower consumer expectations based on the price due to factors outside of the business's control. Thus, not only is the proposed rule not preventing harm, which is required by the FTC Act, but the proposed rule itself could cause additional harm and fails to consider a countervailing benefit to consumers as required by the FTC Act.

Even if price splitting caused harm, because consumers can't add up the terms as FTC apparently claims, the harm is reasonably avoidable by consumers themselves. Consumers can pick up a calculator and add the terms together if they want the total price; that is a method of easily avoiding any such harms. The FTC is prohibited from acting if any claimed harm is reasonably avoidable by consumers themselves.

In addition to being unauthorized, the proposed rules would harm consumers. The proposed rules not only require a total price to be displayed when the calculation of that total price is trivial, they also prohibit displaying any price information if the total price cannot be determined. This prohibition includes situations where the price may depend on the particular circumstances of the consumer (creditworthiness, usage of the services, total party size, etc.) or upon future facts that cannot be known ahead of time (such as adjustable rate loans). The prohibition eliminates the countervailing benefits to consumers and competition of these products that the FTC hasn't even discussed. If such benefits didn't exist, then consumers would never purchase such products.

Even if these accurate and non-deceptive advertisements caused harm, the FTC must demonstrate that such harms are substantial. It has not done so. Instead, it has tried to use deceptive advertisements that cause substantial harm to justify prohibiting non-deceptive and entirely accurate advertisements. In doing so, the FTC has provided no reason to believe that such non-deceptive advertisements present any harm to consumers, let alone a substantial one.

In short, none of these five types of advertisements are deceptive or unfair, and none cause harm to consumers. All of them have substantial benefits to consumers. This means that the proposed regulations that would prohibit such advertisements are beyond the powers of the FTC's statutory authority.

II. The Proposed Rule Violates the First Amendment as It Is Content-Based Without Passing Strict Scrutiny

The proposed rule presumes that if the public is given only some pricing information, even if it is accurate, it is still harmful. For that reason, the proposed rule prohibits disclosure of any price information unless the total price is disclosed. But that presumption is contrary to First Amendment jurisprudence. Truthful non-deceptive information is not harmful.

This basic rule of First Amendment principles was first made clear in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), which struck down a restriction on advertisements of prescription drug prices. Allegedly, there were some bad actors who cut corners to sell cheap products; by preventing such price advertisements, government could stop those bad actors. The Supreme Court rejected this claim.

The Court recognized that “people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.” *Id.* at 770. The Court described the choice to limit such pricing advertisements as the “kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.” *Id.* The Court noted that several types of regulation are allowed, specifically including (1) time, place, and manner rules unrelated to the content of the speech, (2) rules restricting false or deceptive speech, or (3) rules that restrict other kinds of unlawful conduct. *Id.* at 771-72.

The proposed rule is not a time, place, or manner rule: it is directly related to the content of the advertisements. The proposed rule does not focus on false or deceptive speech. Nor is there anything else about the speech at issue that is unlawful. Entirely accurate advertisements that are not deceptive in any way—those that explicitly make clear that the total price is not shown—are still prohibited under the proposed rule.

Rather than follow First Amendment precedent, the proposed rule “completely suppress[ed] the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients.” *Id.* at 773. The First Amendment prohibits this. *Id.*

The Supreme Court has repeatedly rejected the claim that deceptive conduct itself allows prohibition of non-deceptive conduct, such as in *Edenfield v. Fane*, 507 U.S. 761 (1993). In that case, Florida attempted to prohibit certified public accountants (CPA’s) from direct, in-person, uninvited solicitation of their services. The CPA “seeks to communicate no more than truthful, non-deceptive information proposing a lawful commercial transaction.” *Id.* at 765. The state “assert[ed] an interest in protecting consumers from fraud or overreaching by CPA’s.” *Id.* at 768. The Supreme Court rejected that such an interest was advanced by this rule, as such a prohibition “threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard.” *Id.* at 766. Instead, “the general rule is that the speaker and the audience, not the government, assess the value of the information presented.” *Id.* at 767.

More recently in *Sorrell v. IMS Health Inc.*, the Supreme Court rejected a prohibition from Vermont that attempted to limit the sale and disclosure of pharmacy records concerning doctors’ prescribing practices. 564 U.S. 552 (2011). The Supreme Court noted, “Speech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont’s statute must be subjected to heightened judicial scrutiny.” *Id.* at 557. The Court recognized that incidental burdens on speech do not violate the First Amendment, but rejected that burdens based on the content of the speech are incidental. *Id.* at 567.

“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

The challenged portion of the proposed rule is only triggered if the content includes “an amount a consumer may pay,” § 464.2, thus showing that it is content-based based on the topic discussed. It further sets requirements of the size, contrast, location, the length of time it appears, and other characteristics concerning the content of the speech. Proposed § 464.1(c). It, thus, directly regulates the message’s expression. Therefore, the proposed rule is content-based and would similarly be subjected to strict scrutiny.

“Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.” *Sorrell*, 564 U.S. at 566 (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000)). “While the burdened speech results from an economic motive, so too does a great deal of vital expression.” *Id.* at 567. The Court recognized that such commercial speech is protected by the First Amendment, “Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs.” *Id.* at 570.

For the proposed rule to be valid, the FTC must show that the “content-based burden on protected expression . . . directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.” *See id.* at 572. With respect to the proposed rule’s prohibition of conduct that is not deceptive, the FTC has failed to demonstrate that the proposed

rule directly advances any substantial governmental interest. Any interest related to deceptive conduct has not been tailored to meet that end, because it includes significant non-deceptive conduct that does not advance any prohibition on deceptive conduct. Even under a lower intermediate scrutiny, the proposed rule must be narrowly tailored to serve a significant governmental interest that the proposed rule has failed to demonstrate, as explained in Section I.

For the reasons specified above, the proposed rule violates the First Amendment.

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The FTC should reconsider the proposed rule and modify it so that it prohibits actually deceptive conduct, and nothing more. Such deceptive conduct would be harmful to consumers. However, the proposed rule as is goes beyond both the FTC's statutory authority and the requirements of the First Amendment and it should not be finalized in its current form.

Respectfully submitted,

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