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Trade Regulation Rule on Unfair or Deceptive Fees

Comment On: FTC-2023-0064-0001
Trade Regulation Rule on Unfair or Deceptive Fees

Document: FTC-2023-0064-3133
Comment from National Multifamily Housing Council and National Apartment Association

Submitter Information

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General Comment

See attached file(s)

Attachments

NMHC_NAA - FTC Comment Draft re_ Rule on Unfair and Deceptive Fees (FINAL)(240986234.1)
The attachment is restricted to restrict all because it contains personally identifiable information data
NMHC_NAA - FTC Comment Draft re_ Rule on Unfair and Deceptive Fees (FINAL)(240986234_1)_Redacted



Submitted electronically via www.regulations.gov

February 7, 2024

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

**Re: National Multifamily Housing Council and National Apartment Association's
Comment to the Notice of Proposed Rulemaking for the Trade Regulation Rule on
Unfair or Deceptive Fees – R207011.**

Dear Secretary Tabor:

On behalf of the nearly 100,000 combined members of the National Multifamily Housing Council (“NMHC”)¹ and the National Apartment Association (“NAA”)², we submit these comments in response to the Federal Trade Commission’s (“FTC”) Notice of Proposed Rulemaking and Request for Public Comment for the Proposed Trade Regulation Rule on Unfair or Deceptive Fees – R207011 (“NPRM”).

NMHC and NAA members are committed to creating thriving communities for our residents, employees and guests. Over one-third of American households rent, and over 20 million U.S. households live in apartment homes (buildings with five or more units). NMHC and NAA represent small, medium and large for-profit and non-profit owners, operators, developers, property managers, and service providers involved in the provision of rental housing, across all segments, including conventional, affordable, military, student and seniors. Our members strongly support efforts to improve housing access, affordability, and the experience of applicants and residents. NMHC and NAA members are acutely aware of the impact of housing costs on renters and strive to improve housing affordability every day while committing to working with their residents in the most equitable and transparent manner. Therefore, we appreciate the opportunity

¹ Based in Washington, D.C., NMHC is a national nonprofit association that represents the leadership of the apartment industry. Our members engage in all aspects of the apartment industry, including ownership, development, management and finance, who help create thriving communities by providing apartment homes for 40 million Americans, contributing \$3.4 trillion annually to the economy. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living.

² The NAA serves as the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of 141 state and local affiliates, NAA encompasses over 93,000 members representing more than 11 million apartment homes globally. NAA believes that rental housing is a valuable partner in every community that emphasizes integrity, accountability, collaboration, community responsibility, inclusivity and innovation.

to share our perspective on the impact of the NPRM on our members' efforts to create and maintain successful communities for the nation's renters.

BACKGROUND ON PROPOSED RULE

On November 9, 2023, the FTC issued the NPRM entitled "Rule on Unfair or Deceptive Fees"³, which seeks to "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."⁴

In connection with the NPRM, the FTC issued a press release⁵ noting that the intent of the NPRM is to ban "junk fees" and "bogus fees" that can harm consumers and undercut honest businesses. On this point, the FTC specifically notes:

"These provisions are aimed at ensuring businesses will no longer be able to lure consumers with artificially low prices that they later inflate with mandatory fees or to deceive consumers about the nature and purpose of fees. In addition, the proposed rule would provide a level playing field for honest businesses by requiring all businesses to quote total prices at the start of the purchasing process and to remove false or misleading information about fees from the marketplace."

This NPRM invites written comments on the proposed rule, including all issues raised, and seeks answers to the specific questions set forth in Section X of the NPRM. All comments are due on or before February 7, 2024.

NMHC AND NAA'S STATEMENT OF INTEREST: REQUEST FOR RELIEF FROM THE NPRM

At the outset, it must be noted that NMHC and NAA's members work tirelessly to provide consumers with housing that is affordable and have championed many efforts to expand the housing market to provide more options for consumers. NMHC and NAA members believe that transparency in the cost of rental housing is positive for renters and housing providers alike. This transparency extends to full disclosure of housing costs and fees.

The FTC relies on anecdotal, non-representative claims from various consumer groups to justify the regulation of the rental housing industry, and NMHC and NAA are not aware of any data-

³ 16 CFR Part 464: Trade Regulation Rule on Unfair or Deceptive Fees (NPRM): <https://www.federalregister.gov/documents/2023/11/09/2023-24234/trade-regulation-rule-on-unfair-or-deceptive-fees>.

⁴ This NPRM came on the heels of the FTC's June 2022 proposed rulemaking entitled "Motor Vehicle Dealers Trade Regulation Rule", which sought to "prohibit motor vehicle dealers from making certain misrepresentations in the course of selling, leasing, or arranging financing for motor vehicles, require accurate pricing disclosures in dealers' advertising and sales discussions, require dealers to obtain consumers' express, informed consent for charges, prohibit the sale of any add-on product or service that confers no benefit to the consumer, and require dealers to keep records of advertisements and customer transactions." On December 12, 2023, the FTC finalized the new rule entitled "Combating Auto Retail Scams (CARS)."

⁵ <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-proposes-rule-ban-junk-fees>

driven justification for the purported claims of consumer harm on a macro level relating to the imposition of fees in the rental housing industry. In reality, housing providers use fees in rental housing transactions to facilitate necessary business practices and to provide residents with concierge-type services or benefits throughout the lifecycle of the lease term, with many fees covering conditional costs that would escape reasonable, good faith efforts of expression as “total cost of housing” under this rule. As such, we encourage the FTC (and other policymakers) to study the utility (and function) of fees in the housing market as well as the impact of layers of state and local laws that already regulate the rental housing industry before extending regulatory burdens onto the rental housing industry.

With the NPRM, the FTC aims to end “bait and switch” tactics that have long plagued certain industries, such as automotive and hospitality, and, more recently, electronic event ticket sales. While the FTC’s prior effort to tackle “fees” was strategic and industry-specific – aimed at the automotive industry and the car buying experience – the FTC’s current effort with the NPRM is breathtakingly broad. The FTC identifies nearly a dozen different industries and sectors that it seeks to uniformly regulate with the NPRM. These industries and sectors include “Hotel and Short-Term Lodging”, “Live-Event Ticket”, “Rental Housing” and various others. Despite its prior strategic and focused rulemaking efforts, the Commission diverges toward a one-size-fits-all rulemaking approach to address what it perceives as a singular, problematic behavior that pervades the American economy in a multitude of materially different and distinct industries. Further, the Commission takes the position that notwithstanding these materially different and distinct industries, there is no difference in kind, only in degree of regulatable economic behavior, which NMHC and NAA strenuously challenge regarding the rental housing industry.

NMHC and NAA’s membership greatly appreciate the FTC’s thought leadership in connection with the protection of consumers – particularly, traditionally marginalized consumer groups. However, we believe that the public policy considerations and concerns that are presented by typical consumer purchasing experiences in connection with many of the industries that may be plagued with “bait and switch” tactics are entirely absent from or inapplicable to the rental housing industry.

Stated simply, the rental housing customer experience is materially different from the other consumer transactions referenced in the NPRM. Specifically, as set forth in detail below, the rental housing transaction fundamentally differs from a typical hotel or live event ticket transaction because the landlord-tenant relationship involves an ongoing contractual relationship, typically at least a year-long commitment. It is subject to extensive regulation at the state and local level and is uniquely characterized by a series of transactions as opposed to a single-point transaction. This is where the proposed rule’s requirements become inapposite given the operational realities of the rental housing industry.

It is virtually impossible to foreseeably predict the total price of a rental unit, inclusive of the maximum total of all fees and any mandatory charges that a renter may pay throughout the lifecycle of the lease, for the purposes of disclosure in an advertisement. Applicants and residents are informed of concierge-type services and benefits that could require changes to their housing costs in the lease and throughout the entire leasing process – which is vastly different than other industries identified in the NPRM that focus on quick, usually unassisted consumer transactions.

An advertised rental price is a base price that is adjusted based on a variety of factors, including the characteristics of a renter's chosen unit and the needs of the renter's household, including unit location, term length, whether the consumer has pets, number of parking spots, service offerings and many other factors that may not be known at the time of required disclosure per the proposed rule.

While there are fees that are ascertainable at the outset of a lease agreement, many are conditional or usage-based and would not be known and able to be disclosed when the rule requires. The timing of disclosure of the total price in displays or advertisements in accordance with the proposed rule makes it extremely difficult to predict with any certainty which mandatory fees would apply to a particular real estate transaction. Moreover, the rule's preventative disclosure requirement of any amount a consumer may pay that is excluded from the total price, including optional fees, before the consumer consents to pay is equally as impracticable.

Due to the nature of the landlord-tenant relationship and state and local landlord tenant laws, the rental housing industry is not generally plagued with many of the consumer protection and deceptive and unfair trade practices that are prevalent in many of the industries adjudged to have "bait and switch" or "drip pricing" concerns. While there are a host of differences, the material differences between the rental housing industries and the other problematic industries include the speed of the transaction (with rental housing transactions being much slower, methodical, and much more deliberate given the series of transactions occurring over the course of the lease term), and multiple opportunities for communication and disclosure throughout the process.

Given these reasons (as well as those included in the Discussion section), NMHC and NAA believe that the FTC should exempt the rental housing industry from the NPRM.⁶

DISCUSSION

I. The NPRM lacks utility in application to the rental housing industry.

While the NPRM seeks to regulate a host of industries, the proposed rule simply lacks utility in application to the rental housing industry. Landlord-tenant relationships present unique issues that should be addressed by states, which are best equipped to address the unique needs of local communities and their housing markets.

To date, all 50 states and the District of Columbia have enacted landlord-tenant laws to protect both parties in real estate transactions—state-specific laws that address a variety of considerations applicable to the landlord-tenant relationship, such as what may constitute "rent"; security deposit and fee regulations; and required lease disclosures including in the event of lease modifications. In particular, states' fee regulations are robust—developed over time to balance the needs of renters, housing providers and local markets. A one-size-fits-all requirement would interfere with

⁶ NMHC and NAA appreciate that the rulemaking process is ongoing, and the FTC will gather and review all comments, including the data and information provided therein, when finalizing the proposed rule. To that end, NMHC and NAA request an opportunity to meet with the FTC to discuss the material differences between the rental housing industry and many of the industries plagued with the "bait and switch" tactics the FTC is seeking to prohibit.

the breadth and differences in states' fee requirements that already cover limitations in amounts of specific types of rental housing fees, refundability, return and disclosure requirements. FTC's proposed rule would be duplicative or conflict with existing requirements, making it difficult for housing providers to understand their compliance responsibilities.

In light of states' existing requirements, NMHC and NAA remain concerned about many of the key aspects of the proposed rule which interfere with state-level compliance responsibilities and generally, are antithetical to property management and operations. For example, the definition of total price and the manner in which the disclosure requirement of total price is structured makes it virtually impossible to foreseeably predict the total rent of a unit, inclusive of the maximum total of all fees and any mandatory charges that a renter may pay throughout the lifecycle of the lease, let alone calculate that in a single total price for the purposes of disclosure in a display or advertisement in accordance with the NPRM.

Rental housing operators may charge a variety of fees and charges that are disclosed to residents in a transparent way throughout the relationship and that are not "junk fees." These fees include remunerations for services, amenities, offerings, and other activities associated with renting and are communicated and fully disclosed to residents in the lease and throughout the leasing process.

Based on resident behavior, these fees and charges may vary. For instance, a resident may initially choose not to have a parking spot or fail to disclose a pet when they sign their lease. At the point in which the preference is made or potential lease noncompliance is discovered, assessed fees would change in a way that could not have been disclosed timely as the proposed rule requires.

Mandatory fees could also include fees that are penalties for lease violations, credit card processing fees, bad check or insufficient funds fees, and late fees. This calls into question whether these fees would be required to be included in the total price in an advertisement even when those resident behaviors have not yet occurred or may never occur.

This poses a similar challenge when it may be necessary to charge a resident for damages that exceed the amount of their security deposit at the end of the lease term; this mandatory charge would not be known at the time of required disclosure of total price. Moreover, including the maximum total of "any mandatory ancillary good or service" could be interpreted as including the maximum total cost of utilities. The FTC's rule proposes to fundamentally change the way that housing providers market and advertise their rental communities in a way that is infeasible.

The NPRM states that "a Business cannot treat a feature as optional if it is necessary to render the good or service fit for its intended use". NMHC and NAA are concerned that the proposed rule would require inclusion of optional goods or services or apartment amenities that a resident may utilize, making disclosure of an optional fee mandatory or face claims of misrepresentation per the proposed rule.

Examples include parking, bike or personal property storage, reserving event or community spaces, and fitness center access. This seriously calls into question whether these would need to be included in the total price calculation and disclosure, severely artificially inflating the rental price. For the purposes of disclosure of total price, there is no clear delineation to understand

whether an optional fee should be disclosed as mandatory. The NPRM states, “[b]y requiring disclosure of the nature and purpose of fees, this provision helps prevent Businesses from omitting mandatory fees from the Total Price in violation of § 464.2(a) and misrepresenting the nature and purpose of fees in violation of § 464.3(a).”

The proposed rule’s preventative disclosure requirement poses additional challenges and concerns. Specifically, as noted above, it is virtually impossible to predict which optional fees or charges a resident may pay through the lifecycle of the lease. Thus, requiring rental housing providers to furnish prospective customers—before consenting to a lease—with any fee or charge excluded from the total price that the customer may (or may not) have to pay at some point during the lease practically means housing providers will need to disclose all possible fees or charges to all prospective tenants in order to comply with the disclosure requirements of the NPRM.

II. The NPRM creates operational and compliance concerns for rental housing providers.

The NPRM seeks to regulate a host of industries without reservation, qualification or consideration of the intricacies of the industries the FTC intends to regulate.⁷ To justify this broad, blanket regulation, the FTC claims that there are no parallel state laws that capture every aspect of the NPRM. However, this simply is not true for the rental housing industry, which is already heavily regulated at the state and local levels. Adding more regulation to an already heavily regulated industry will only create operational and compliance pitfalls for rental housing providers.

First, states and the District of Columbia already have landlord-tenant laws regulating the relationship between landlords and tenants. And then, in addition to this, most states have a variety of consumer protection laws that regulate advertising, marketing and promotional practices of all businesses in their respective states. These laws apply to landlord-tenant transactions and generally address how “cash price”, “total price” and similar pricing must be disclosed to consumers (along with setting forth lawful advertising and marketing practices). Hence, these laws already provide adequate mechanisms for protecting consumers and addressing deceptive fee practices.⁸

Additional regulation in the rental housing space is, therefore, unlikely to produce the Commission’s objectives, but it will surely result in unduly burdensome compliance management practices as well as possible confusion for housing providers required to comply with various layers of federal, state, and local laws.

By way of example, it is nearly impossible for a housing provider to advertise the “Total Price” of a rental transaction for a number of reasons:

- The primary price advertised is based upon the anticipated monthly base rent by a consumer (not including any additional services or offerings that an individual consumer may select or charges they may incur for failing to comply with the lease terms or property

⁷ The NPRM only provides for an exclusion of businesses in the automotive industry that are already subject to the FTC’s prior rulemaking efforts to combat fees.

⁸ For example, there have been numerous class actions challenging fees charged under existing state laws.

rules);

- The advertised monthly spend typically reflects the lowest or mean amount of monthly available rent for a specific unit type available at the property (*i.e.* “rentals starting at [an advertised price]”); and
- Units may fluctuate in price for a variety of reasons, including location at the property (including floor location, with higher floor or more desirable views being more expensive) and whether tenants elect additional service offerings (such as owning a pet, multiple or additional parking spots, optional appliances, internet, utility and other similar service offerings).

In light of these factors, it would be virtually impossible for a housing provider to include the “Total Price” in its advertisements for any consumer without having prior knowledge of the consumer’s desired selections.

A rule requiring an up-front “Total Price” in all multi-family advertising would create a logistical, operational and compliance nightmare.

III. The NPRM is not based upon any statistical data relevant to the rental housing industry.

The NPRM lacks any reasonable factual underpinning as applied to the rental housing and industry because it is not based on any statistical data relevant to the industry. Indeed, the NPRM admits that much of the information relating to rental housing is based upon “individual consumer” and “consumer and policy group” statements regarding purported advertising practices in the industry. The NPRM then goes on to state in a conclusory way that the “rental-related fees [should be] invalid *per se* because they are exploitative” and that “fees make rental housing even more unaffordable and jeopardize access to future housing and financial stability.” 93 cents of every rent dollar cover necessary operational expenses, such as property maintenance, insurance, staffing and go back to the local community through property taxes.⁹

Promulgating an extremely onerous regulation like this based solely upon anecdotal, conclusory, and non-representative justification is reckless and will serve only to regulate rental housing providers out of the market. This outcome runs directly counter to the Commission’s inferred objectives to make rental housing more affordable and to promote access to future housing and financial stability.

The FTC (through the FTC Act) requires that businesses have a “reasonable basis” for their advertising efforts and their consumer policies. Yet, by adopting a regulation like this, FTC would enact a rule impacting an entire industry without such a reasonable basis.

Rather than taking this dangerous path that will threaten the rental housing industry and jeopardize access to housing, the FTC should revisit its educational efforts on the rental housing marketplace and make an informed determination of whether the NPRM is truly necessary to regulate fees in this particular industry. As set forth throughout this comment, NMHC and NAA strongly believe

⁹ <https://www.naahq.org/breakingdown-one-dollar-rent-2023>

that it is not necessary given the extensive patchwork of existing laws that already limit the use of deceptive fees or advertising in these transactions currently.

IV. The NPRM raises material concerns regarding the FTC’s authority to regulate and is subject to legal attack.

In addition to the foregoing policy concerns, NAA and NMHC question whether the economy-wide, one-size-fits-all approach presently reflected in the NPRM is an appropriate exercise of the FTC’s authority to regulate unfair and deceptive conduct. As set forth above, the FTC lacks reliable evidence to show the acts or practices which are the subject of the proposed rule are prevalent in the rental housing industry. Additionally, the NPRM appears to address a major question of economic and political significance for which the FTC has not demonstrated clear congressional authorization to resolve through rulemaking.¹⁰

A. The NPRM is subject to challenge under the FTC Act because the FTC has not demonstrated the practices to be regulated are prevalent in the rental housing industry.

More than 35.2 percent of the nation’s households reside in rental housing. Given the vast scope of this industry sector, NAA and NMHC acknowledge that unfair or deceptive practices may crop up from time to time—as would be expected with any industry of similar size, scope, and diversity. However, the FTC has not identified sufficient evidence of the prevalence of such practices in the rental housing industry beyond anecdotal evidence and a few localized, small-scale studies.

The FTC is only permitted to issue a notice of proposed rulemaking “where it has reason to believe that the unfair or deceptive acts or practices at issue are prevalent.”¹¹ The FTC can satisfy this requirement if “information available to the FTC indicates a widespread pattern of unfair or deceptive acts or practices.”¹² The evidence compiled by the FTC to support the NPRM highlights the impracticality of pursuing a one-size-fits-all rule. For starters, the problematic practices targeted by the NPRM do not occur with the same prevalence, frequency, or severity across all industries and market segments that would be subject to the rule. Additionally, the quantum of information available to the FTC for analysis varies considerably between industries. While the FTC seeks to regulate fee practices for nearly every segment of the American economy, the proposed rule relies on data gathered from, and pertaining to, fee practices for only a handful of industry segments, as well as anecdotal (and largely uncorroborated) comments submitted in response to a rulemaking request.

To compound the problem, the FTC acknowledges in the proposed rule that it does not have any reliable data for many industries, including rental housing.¹³ The limited evidence cited in the NPRM by the agency consists most prominently of: (i) accounts of individual commenters’

¹⁰ See *W. Virginia v. Env’tl. Prot. Agency*, 142 S. Ct. 2587, 2609 (2022).

¹¹ 15 U.S.C. § 57a(b)(3).

¹² *Id.*

¹³ See, e.g., 88 FR 77420-01, at *77448 (stating that the FTC does not currently have data on costs firms not presently compliant with the proposed rule would incur to comply).

disparate experiences¹⁴ with different fee practices across disparate jurisdictions with little uniformity or connectivity among them; (ii) a limited study of a specific market segment (manufactured housing rental) in a single state¹⁵ (Michigan); and (iii) a National Consumer Law Center (“NCLC”) survey based on 95 responses.¹⁶ In the NCLC survey, for instance, more than half of all responses concerned rental housing practices from just five states—New York, Ohio, Texas, California and Colorado—and 17 of the 26 states from which the NCLC received at least 1 survey response had either 1 or 2 responses total. Accordingly, this limited data simply does not support the conclusion that the fee practices referenced in these anecdotal complaints reflect pervasive (rather than sporadic) conduct. Yet, the Commission relies heavily on this dubious research product to extend its broad, whole-of-economy regulatory action into the rental housing market asserting satisfaction of the prevalence standard.

Prevalence requires a deep understanding of why a practice occurs, the circumstances in which it is used, and the precise conditions under which the practice helps or harms consumers in different situations. It requires more than isolated examples and limited survey evidence.¹⁷ In the past, the FTC has thoroughly developed and presented evidence of the prevalence of consumer harm prior to embarking on rulemaking procedures. Here, contrary to past practice, the FTC has not developed or presented evidence of consumer harm across the universe of industry it wishes to regulate through this rulemaking. Likewise, in other rulemaking procedures, the FTC has been able to present a number of adjudicated cases involving the very practices at issue; here, by contrast, the FTC has not engaged in sufficient enforcement policies and actions to justify abruptly engaging in a rulemaking. Notably, none of the enforcement actions identified by the FTC in the NPRM appears to have involved rental housing industry practices.¹⁸

The FTC has the authority to promulgate rules and regulations where the rules and regulations are “based on facts of which [the FTC] has knowledge derived from studies, reports, investigations, hearings, and other proceedings[.] . . .”¹⁹ Here, the FTC has performed no studies or investigations into fee practices in the rental housing industry. Accordingly, the FTC has failed to show the acts or practices which are the subject of the proposed rule are supported by substantial evidence in the rulemaking record.²⁰ At a minimum, the FTC should engage in further fact-finding to better ascertain and understand the pervasiveness of deceptive or unfair fee practices in each sector or industry affected by the NPRM. In the event the FTC remains committed to pursuing a rule that covers fees in the rental housing industry, it should seek out industry-specific expertise before pressing forward with new rules.

¹⁴ See FTC-2022-0069-2242; FTC-2022-0069-1391; FTC-2022-0069-1677; FTC-2022-0069-1717; FTC-2022-0069-1782; FTC-2022-0069-2858; FTC-2022-0069-3129; FTC-2022-0069-4455.

¹⁵ FTC-2022-0069-6085.

¹⁶ FTC-2022-0069-6091.

¹⁷ See *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 855 (9th Cir. 2017) (confirming FTC’s determination that isolated examples of potentially misleading food labels and “survey evidence concerning consumer confusion over the word ‘natural,’” failed to indicate practices were sufficiently prevalent to justify promulgating regulation).

¹⁸ 88 FR 77420-01, at *77423 n.24; *77428 (discussion of rental housing fees includes no mention of enforcement actions, in contrast to NPRM’s discussion of other industry sectors).

¹⁹ 16 C.F.R. § 1.22(a).

²⁰ See 15 U.S.C. § 57a(e)(3) (providing that reviewing “court shall hold unlawful and set aside the rule” if it determines the rule “is not supported by substantial evidence in the rulemaking record”).

B. The rule may violate the Major Questions Doctrine recently adopted by the Supreme Court.

NAA and NMHC are concerned the NPRM presents a major question of economic and political significance for which the FTC lacks clear congressional authorization, pursuant to the test adopted by the Supreme Court in *West Virginia v. Environmental Protection Agency*, 597 U.S. ---- (2022). Under this Major Questions Doctrine, agencies must have a clear grant of authority from Congress to promulgate rules that alter major social and economic policy decisions.²¹ Reviewing courts applying the doctrine assume Congress intends to make major policy decisions itself rather than leaving them to agencies.²²

As currently structured, the one-size-fits-all rule is likely to cause significant disruption in the economic status quo across many segments and sectors of the national economy. Thus, the NPRM appears to be exactly the kind of major economic regulation the Major Question Doctrine was adopted to prevent. First, it is clear the proposed rule seeks to regulate a significant portion of the American economy, imposing requirements on pricing practices for all but a handful of industries—without regard for the significant policy and economic upheaval such a one-size-fits-all rule is likely to create. As other trade organizations have pointed out, the NPRM’s ambitious approach sweeps nearly 70% of the total United States gross domestic product within its expansive penumbra.²³ Moreover, pricing their products or services is a core strategic endeavor for most businesses. Accordingly, it is highly likely that courts reviewing challenges to the NPRM will conclude such an economy-wide rule on fees will undoubtedly have major economic, and potentially political, significance.

In addition, the FTC has not identified “clear Congressional authorization” for the proposed rule. The NPRM relies on the FTC’s admittedly broad grant of authority under Section 5 of the FTC Act. However, the authority granted by Section 5 is cabined by the requirements discussed in the previous subsection. Among other things, any rule adopted under Section 5 must define the acts or practices comprising a deceptive trade practice with specificity.²⁴ A rule that seeks to regulate every fee charged by virtually every business, from pass-through charges to user fees for specific amenities, without distinguishing among them, or among industries, or providing exceptions, fails in this basic dimension. There is simply no evidence Congress intended to authorize the FTC to exercise its grant of authority to enact sweeping economic regulations impacting the national economy such as the NPRM, particularly where Congress has tended to address the same subject matter—regulation of pricing and fees—on a sector by sector or industry by industry basis. Some examples include legislation regulating certain fees in the transportation, shipping, and air travel

²¹ See *W. Virginia v. Env’tl. Prot. Agency*, 142 S. Ct. 2587, 2613 (2022).

²² The Supreme Court recently heard arguments in *Loper Bright Enterprises v. Raimondo*, No. 22-451 (2024), which challenges the longstanding doctrine articulated in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), providing for deference when agencies exercise rulemaking authority delegated by Congress to flesh out statutory terms that allow the agency a range of reasonable choices. In the event the Supreme Court limits or abrogates *Chevron*, it may give rise to an additional basis for challenges to the NPRM.

²³ See FTC-2022-0069-6047

²⁴ See 16 C.F.R. § 1.22

sectors, as well as consumer finance products and services.²⁵ Accordingly, without a specific, unambiguous grant of authority to regulate in such a sweeping manner, a reviewing court is likely to find the FTC has exceeded its authority in promulgating the NPRM.

Furthermore, the FTC lacks the experience and “comparative expertise” to effectively regulate every sector of the national economy, particularly through a single rule. It is difficult to envision Congress leaving the universe of particularized, industry-specific policy judgments for the rental housing industry, for instance, to the FTC to handle when another agency with greater subject matter expertise could perform the task more suitably. As it turns out, “[w]hen [an] agency has no comparative expertise” in making certain policy judgments, . . . “Congress presumably would not” task it with doing so.²⁶ Courts will, therefore, presume that Congress did not task the FTC to do so.

In sum, the NPRM is precisely the kind of “assertion of extravagant statutory power over the national economy” reviewing courts treat with a great degree of skepticism.

C. The proposed rule is arbitrary and capricious because it is not based on sufficient data and the regulatory approach lacks a rational connection to the “facts” considered.

In adopting a rule, the FTC is bound by the Administrative Procedure Act (“APA”)’s requirements that its actions, findings, and conclusions must not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Any actions or regulations that do not comport with this requirement must be set aside.²⁷

The proposed rule may be challenged in court as arbitrary and capricious.²⁸

Although the arbitrary and capricious standard is deferential, the FTC is required, at a minimum, to review relevant data and establish a rational connection between the facts found and the choice made.²⁹ Where the record does not support the FTC’s conclusion, the regulation will be struck down.

Here, as applied to the rental housing industry, the proposed rule is not based on sufficient data as to fee disclosure and pricing practices or existing regulatory compliance requirements that would justify this sweeping, one-size-fits-all approach taken by the FTC. Moreover, with respect to the

²⁵ See, e.g., Ocean Shipping Reform Act of 2022 (setting out new requirements and prohibited conduct for ocean carriers to reduce shipping costs and address concerns relating to supply-chain challenges); 49 U.S.C. § 41501 (requiring air carriers to establish “reasonable prices, classifications, rules and practices related to foreign air transportation”); Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5481 *et seq.* (establishing CFPB with power, *inter alia*, to regulate fees in consumer-facing financial products and services).

²⁶ *Kisor v. Wilkie*, 588 U. S. ----, 139 S.Ct. 2400, 2417 (2019).

²⁷ 5 U.S.C. § 706(2)(A).

²⁸ See 5 U.S.C. § 706(2)(A); see also *Parkervision, Inc. v. Vidal*, 2022-1548, 2023 WL 8658092, at *6 (Fed. Cir. Dec. 15, 2023) (APA requires courts to “set aside any agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law’”).

²⁹ *Pharm. Research & Manufacturers of Am. v. Fed. Trade Comm’n*, 44 F. Supp. 3d 95, 113 (D.D.C. 2014), *aff’d sub nom. Pharm. Research & Mfrs. of Am. v. F.T.C.*, 790 F.3d 198 (D.C. Cir. 2015) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983)).

rental housing industry, there is no rational connection between the highly anecdotal facts relied upon by the FTC and the regulatory choice made.

Uncorroborated commentary concerning certain rental fee disclosure practices experienced by one commenter in Glendale, Arizona³⁰ and different practices experienced by another commenter in Colorado³¹ may support further inquiry or investigative steps to gather additional information from stakeholders. But a small number of unverified statements from commenters is wholly insufficient evidence of systemic or pervasive marketplace conduct to justify imposition of additional and significant regulatory burdens on the entire rental housing industry.

Instead, NAA and NMHC urge the FTC to engage and work cooperatively with industry participants closest to the technical matters at issue to identify less drastic and expensive avenues to achieve the agency's goals.

CONCLUSION

As noted by several industry stakeholders in the automotive and other similarly situated industries, the NPRM is well intentioned to protect consumers' interest; however, the NPRM presents several material pitfalls.

At a high level, the NPRM is overly broad, and if adopted, will have a significant economic impact on a substantial number of business organizations, including small businesses and housing providers. NMHC and NAA encourage the FTC to consider several modifications to the NPRM, including exempting the rental housing industry from the rule.

Finally, while NMHC and NAA understand that the FTC wants to take action against fees, they encourage the FTC to determine if there is a way to target the bad actors using existing regulatory authority rather than adopting this blanket rule which targets entire industries and will have unintended consequences and increased costs for housing providers and consumers alike.

Thank you for the opportunity to comment on this important proposal and for your consideration of NMHC and NAA's comments. We welcome any opportunity for fruitful discussion with the FTC. We believe this will demonstrate that the public policy goals of the NPRM are not served as it relates to the rental housing industry as a whole. If you have any questions regarding these comments or if we can be of any assistance, please do not hesitate to contact Nicole Upano, NAA's Assistant Vice President, Housing Policy & Regulatory Affairs at [REDACTED] or Paula Cino, NMHC's Vice President, Construction, Development, Land Use and Counsel at [REDACTED]

³⁰ FTC-2022-0069-1717

³¹ FTC-2022-0069-2858

Respectfully,

A handwritten signature in cursive script, appearing to read "Sharon Wilson Géo".

Sharon Wilson Géo
President
NMHC

A handwritten signature in cursive script, appearing to read "Bob Pinnegar".

Bob Pinnegar
President and Chief Executive Officer
NAA