

# PUBLIC SUBMISSION

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**Docket:** FTC-2023-0064  
Trade Regulation Rule on Unfair or Deceptive Fees

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

**Document:** FTC-2023-0064-3263  
Comment from Flex Association

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## General Comment

Comments of the Flex Association.

## Attachments

Flex Association - Comments - Docket No. FTC-2023-0064 - Unfair or Deceptive Fees NPRM R207011

The attachment is restricted to restrict all because it contains personally identifiable information data

Flex Association - Comments - Docket No\_ FTC-2023-0064 - Unfair or Deceptive Fees NPRM R207011\_Redacted

**Before the  
FEDERAL TRADE COMMISSION  
Washington, D.C. 20580**

In the Matter of	)	Docket No. FTC-2023-0064
	)	
Trade Regulation Rule on Unfair or Deceptive Fees	)	Unfair or Deceptive Fees NPRM, R207011
	)	

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February 7, 2024

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**COMMENTS OF THE FLEX ASSOCIATION**

**I. INTRODUCTION AND SUMMARY**

The Flex Association (“Flex”)<sup>1</sup> respectfully submits these comments in response to the Federal Trade Commission’s (“Commission”) *Notice of Proposed Rulemaking* on unfair or deceptive practices related to fees for goods and services.<sup>2</sup> App-based delivery platforms make food, groceries, and other goods available to consumers via on-demand delivery through easy-to-use mobile applications. These innovative platforms facilitate convenient, safe, and beneficial services and earning opportunities for countless Americans. Consumers have many choices in this highly competitive landscape, where they can quickly compare offerings across platforms (and beyond). The Commission has not pointed to evidence of any prevalent consumer harm that justifies imposing new pricing and disclosure rules on app-based delivery platforms.

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<sup>1</sup> The Flex Association (<https://www.flexassociation.org>) (“Flex”) is the voice of the app-based economy, representing America’s leading app-based rideshare and delivery platforms and the people who count on them. Our member companies—DoorDash, Grubhub, HopSkipDrive, Instacart, Lyft, Shipt, and Uber—help provide access to crucial goods and services to customers safely and efficiently, offer flexible earning opportunities to workers, and support economic growth in communities across the country. Together, we advocate for policies that enable our industry to continue delivering for the people who count on our platforms.

<sup>2</sup> Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77,420 (Nov. 09, 2023) (“*NPRM*”). The *NPRM* proposes new rules, 16 C.F.R. §§ 464.1-464.4 (“Proposed Rules”).

As an industry, we are committed to fee transparency and appreciate the opportunity to comment on these issues. Transactions using app-based delivery platforms differ from transactions in which one entity sets a static price and/or fee(s) that the consumer pays. On app-based delivery platforms, merchants generally set their own prices for their goods, while the platform sets the fees for their services, including facilitating on-demand delivery. The two most common fees collected by platforms—service and delivery fees—provide consumers with important information to use in deciding whether, what, and where to purchase and how to receive their goods. These fees are transparently disclosed to customers prior to placing their order. In addition, app-based delivery platforms use pricing models to set fees that best reflect fluctuating order contents and market conditions and expand consumer choice.

In such transactions, “all-in” pricing requirements are unnecessary and impractical, and imposing these requirements would negatively impact consumers and businesses alike.

Therefore, Flex respectfully recommends the following:

*First*, rather than impose sweeping rules across numerous industries with significant differences, Flex urges the Commission to consider the downsides of its Proposed Rules if applied to app-based delivery platforms. Many of the Commission’s proposals would be burdensome and impractical for app-based delivery platforms. The Commission should instead tailor any new rules to industries for which the need for and effectiveness of these rules has been demonstrated. Doing so would avoid the unintended effect of stifling the platform economy and harming the millions of small businesses, consumers, and workers who have benefited from it.

*Second*, the Commission should not mandate bundling the price of the underlying goods sold by a third-party merchant with the fees charged by a delivery platform into one “all-in”

price, as the Proposed Rules could be construed to require under one interpretation.<sup>3</sup> An “all-in” price requirement would give consumers *less* information in a space where multiple actors (*i.e.*, a merchant, an app-based delivery worker, a platform) actively make their own economic decisions, often on a real-time basis. Here, the *food or retail item* and the *service* (*i.e.*, facilitation of delivery) are separate offerings, and bundling together the item price and the fees charged by the platform neither makes sense nor would accomplish the Commission’s goals of protecting consumers and competition. A potential alternative that would better reflect the app-based delivery industry’s structure while promoting transparency would be a policy regarding disclosures of fees associated with an order prior to placing the order.

*Finally*, given the *NPRM*’s myriad legal, policy, and economic infirmities, the Commission should conduct further studies and analyses before proceeding at all.

## **II. APP-BASED DELIVERY IS A UNIQUE OFFERING CHARACTERIZED BY TRANSPARENT FEES SET SEPARATELY FROM THE PRICES OF THE UNDERLYING GOODS.**

App-based delivery platforms empower local merchants large and small—such as grocery stores, restaurants, and other small independent businesses—to make their products easily available to consumers with a smartphone or computer, in their community and beyond. In using app-based delivery platforms, consumers benefit from convenient access to groceries, prepared food, and other goods that can be delivered wherever and whenever they want them. App-based delivery workers who choose to deliver with these platforms can avail themselves of flexible, income-earning opportunities for themselves on their own schedules.

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<sup>3</sup> The Commission’s Proposed Rules would require businesses to display the “total price” a consumer must pay, defined as “the maximum total of all fees or charges a consumer must pay for a good or service.” § 464.2; 464.1. The *NPRM* also discusses requiring “all-in” pricing. *See e.g.*, *NPRM* at 77421.

Unlike many other industries discussed in the *NPRM*, transactions on app-based delivery platforms have at least two distinct components: (1) the cost of the underlying goods generally set and offered by a third-party merchant; *and* (2) the fees for logistics and services related to facilitating on-demand delivery or pickup of the underlying goods facilitated by app-based delivery platforms. App-based delivery platforms clearly disclose both components so that consumers can easily understand the costs associated with a particular transaction.

Merchants generally set their own prices for their goods on their menu through their virtual storefront on these platforms. Setting these prices is a key business decision and a material factor in a business's operation (impacting financials, brand, and reputation), a decision on which the platforms themselves often have no direct involvement. App-based delivery platforms separately collect fees for their services. These fees help app-based delivery platforms develop and support user-friendly apps and platforms that facilitate transactions, process payments, provide compensation to app-based delivery workers for fulfilling consumers' orders, cover logistics expenses, provide customer support, and support restaurant and retail partners (through efforts like marketing, demand generation, and data analytics). In other words, separate entities are each pricing their respective components of a transaction in a manner that reflects their distinct business models.

The fees associated with using app-based delivery platforms are typically displayed to consumers as **delivery fees** and **service fees**.

1. **Delivery fees** often reflect many of the costs associated with the service of having an app-based delivery worker procure and deliver an order to a consumer. They may vary based on real-world factors such as time of day or the distance from the merchant to the customer.

2. **Service fees** often help cover operational costs, including insurance; delivery worker onboarding costs such as background checks; safety resources; refunds; and customer service for consumers and merchants, among others. To spread these costs to consumers equitably, the service fees are generally determined as a percentage of the final order subtotal. This ensures that customers with larger orders pay proportionally more than customers with smaller orders.

App-based delivery platforms such as our members disclose these fees prior to consumers finalizing an order.

To best serve all sides of the transaction (the merchants, app-based delivery workers, and consumers), app-based delivery platforms must have the flexibility to reflect changing market conditions and consumer choices, which are often out of the platforms' control. As mentioned above, delivery fees may vary based on a variety of factors such as the specifics of the order (*e.g.*, the time of day), and service fees may vary based on the size of the order. Some fees cannot be calculated at the start of a transaction, as the fees and total price would change after the item is added to the shopping cart. For example, a “two-for-one” offer cannot be activated until two eligible items are added to a shopping cart. And, self-evidently, fees based on the final subtotal cannot be presented while the size of the order remains in flux. Static, upfront flat fees—which could be a consequence of the Proposed Rules—do not make sense in the context of app-based delivery platforms.

Such pricing models—and the transparency of displaying both merchant-set prices and platform-set fees—benefit consumers. Fees that account for consumer choice spread the costs of a service more fairly than one-size-fits-all pricing. Percentage-based fees are a fair way to spread costs: those who order more, pay more. Cost-sensitive customers who are only looking to



buy a few items will generally pay fewer fees than those with larger subtotals because fees scale with the subtotal value. Furthermore, the pricing information already displayed on app-based delivery platforms helps consumers make informed choices about their delivery options, helps ensure that consumers have options for obtaining the products they want, when they want them, and gives merchant partners the opportunity to make these sales. It is also easy for consumers to comparison-shop between available merchants, supporting competition among app-based delivery platforms.

All the fees discussed above are disclosed to consumers before they place their orders. Transparency is key to consumer satisfaction, which, in turn, is critical to app-based delivery platforms' success.

### **III. NO COMMISSION ACTION IS NEEDED OR APPROPRIATE FOR THE TRANSPARENT AND COMPETITIVE APP-BASED DELIVERY MARKETPLACE.**

App-based delivery platforms are different from the other market sectors identified in the *NPRM* in ways that are material to the Commission's stated goals. Compared to the economic studies and previous agency enforcement actions that the *NPRM* references for some sectors, it does not properly recognize the unique traits of the app-based delivery industry or demonstrate that app-based delivery platforms engage in any of the unfair or deceptive practices that the Proposed Rules are ostensibly designed to address. Indeed, the *NPRM* barely mentions app-based delivery platforms at all.

Consumers, merchants, app-based delivery platforms, and app-based delivery workers are served—not harmed—by the existing pricing and fee model used by app-based delivery

platforms.<sup>4</sup> There is no need for Commission regulation or prohibition of fees in this context, as these fees are far from “unfair” or “deceptive.”<sup>5</sup> Specifically:

- The nature and purpose of fees are clearly explained;
- Fees are clearly disclosed and described;
- Users can easily comparison-shop between platforms in a matter of minutes; and
- There is no “lock-in” in the browsing or checkout process.

In addition, the highly competitive nature of the app-based delivery market is an additional protection for consumers. Consumers have many app-based choices for delivery, which incentivizes app-based delivery platforms to differentiate themselves by making their platforms more user-friendly, affordable, and transparent for customers throughout the ordering process.

App-based delivery platforms also compete with restaurants and retail partners that have their own delivery services, meal delivery kits, and many other services and offerings.

Additionally, if consumers consider app-based platform fees or traditional delivery fees to be too high, they have additional choices. They can place an order for pickup (including via the platforms themselves) or opt to place their order directly with the restaurant or merchant. App-based delivery platforms also depend on consumers returning often, unlike in some other industries. Thus, the industry has strong incentives to ensure that fees are affordable, fair, and clearly disclosed.

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<sup>4</sup> *See supra* Section II.

<sup>5</sup> The Federal Trade Commission Act (“FTC Act”) gives the Commission authority to promulgate rules that “define with specificity acts or practices that are unfair or deceptive in or affecting commerce.” FTC Act, Section 18; 15 U.S.C. § 57a(b)(2).

#### **IV. IF THE COMMISSION WERE TO ADOPT ANY “ALL-IN” PRICING RULES, APP-BASED DELIVERY PLATFORMS SHOULD BE EXEMPT.**

The price of the underlying goods sold by a third-party merchant and the fees for facilitating on-demand delivery of the underlying goods reflect independent components to the consumer. Although susceptible to multiple interpretations, the Proposed Rules could be construed to require bundling the fees for these distinct deliverables into one “all-in” price on an item-by-item basis. The *NPRM* defines “Total Price” as “the maximum total of all fees or charges a consumer must pay for a good or service.”<sup>6</sup> Section 464.2 of the Proposed Rules would make it an unfair or deceptive trade practice and rule violation for “any Business to offer, display, or advertise an amount a consumer may pay without Clearly and Conspicuously disclosing the Total Price.”<sup>7</sup> This section further states that “[i]n 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.”<sup>8</sup> Together, these provisions, while vague in their application to app-based delivery platforms, could be interpreted to require that such platforms display “all-in” pricing upfront to the customer, even on an item-by-item level as the customer adds items to their cart.

Such an application of the Proposed Rules would have numerous negative outcomes. For example, it would give consumers *less* information in a space where multiple distinct parties (*i.e.*, a merchant, an app-based delivery worker, a platform) actively make economic decisions, often on a real-time basis. It would also frustrate the Commission’s aims to increase

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<sup>6</sup> See *NPRM* at 77484, § 464.1.

<sup>7</sup> *NPRM* at 77484, § 464.2(a).

<sup>8</sup> See *NPRM* at 77484, § 464.2(b).

transparency and stoke competition; impose costly and unnecessary burdens on businesses; impede app-based delivery platforms' flexibility to offer pricing that reflects customer choices, real-world variables, and promotional opportunities; and lead to other substantial harms in the app-based delivery context.

The *NPRM* acknowledges that “there may be unintended consequences of the proposed rule on some industries,”<sup>9</sup> which is the case for app-based delivery platforms. If the Commission adopts a “Total Price” requirement, it should exempt app-based delivery platforms.

**A. A Total Price requirement for app-based delivery platforms would be contrary to the Commission’s transparency goals by providing users *less* information about the costs associated with facilitating these services.**

An interpretation of the *NPRM* that requires app-based delivery platforms to display an item-by-item level Total Price would obscure both the price of underlying goods *and* the services provided and facilitated by the platform, making it more difficult for consumers to comparison-shop for either component of a prospective delivery order. Keeping merchants’ prices for the underlying items separate from the fees charged by app-based delivery platforms gives consumers useful information, empowering consumers to choose which items to purchase and which platform to use to get the best overall value based on their unique needs and preferences.

An item-by-item level Total Price requirement could lead to perverse outcomes. For example, if a consumer is ordering meal delivery on a platform and adds a single hamburger to their cart, a Total Price requirement may require the platform to build its fees into the price of the hamburger. The consumer could easily: (a) be confused about the seemingly high cost of a particular restaurant’s hamburger; (b) think that they have to pay such fees for each item ordered

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<sup>9</sup> *See id.* at 77441, n. 247.

rather than for the total order; or (c) erroneously believe that the merchant is setting significantly higher prices for app-based orders.

This issue is exacerbated if a consumer is adding multiple items to their cart, as is often the case. As a consumer adds items to their cart, requiring a platform to display the “all-in” price by item, including all fees, would make it even more difficult to assess the incremental cost of the items. For example, the consumer adding one hamburger to their shopping cart may see the pricing as \$12 with all fees included. But adding a second, identical burger to the cart would not automatically double that sum to \$24. The total might instead be \$18, for example (the underlying, merchant-set cost of two burgers plus a platform’s fees). So how should the total price for the second burger be advertised? The originally displayed price of the first hamburger would no longer be accurate, and the second burger would misleadingly appear to be far cheaper than the first burger, because fees had already been attached to the first burger. Thus, the total price of the item would not reflect upfront the fact that fees are spread across the total number of items in a consumer’s cart.

As demonstrated, this requirement has the practical effect of obfuscating both the price of the services and the price of the underlying goods, making the total cost harder for consumers to understand. The resulting consumer confusion and frustration would likely have negative effects on both merchants and app-based delivery platforms. At the very least, as the California legislature did, the Commission should recognize that the prices for goods from a merchant and those for services through an app-based delivery platform should not be combined, both as a matter of policy and to most accurately represent the cost of these separate goods and services to consumers. California’s SB 478 makes explicit that app-based delivery platforms need not incorporate the price of services into the price of goods listed on a merchant’s menu or product

list.<sup>10</sup> Although there may be other concerns with the California law, the Commission should, at minimum, similarly carve-out app-based delivery platforms if the rules proposed in the *NPRM* are adopted.

**B. A Total Price requirement could render the pricing models and promotions used by app-based delivery platforms impossible, harming businesses and consumers.**

Even if the *NPRM* does not require an item-by-item “all-in” price, mandating a “Total Price” that includes the calculation of all fees upfront does not make sense in our industry.

While some companies in other industries can charge a flat fee for each item you buy, that is not how third-party delivery works. To comply with the Proposed Rules, app-based delivery platforms may find themselves forced to change the way they price entirely—moving from variable, often percentage-based fees to static fees. In addition to being administratively unworkable, charging static fees would not benefit consumers.

Further, a Total Price requirement would decrease the ability of app-based delivery platforms to provide consumer-friendly offerings such as subscription promotions and discounts (*e.g.*, for new members or Supplemental Nutrition Assistance Program benefit recipients). Many app-based delivery platforms offer subscriptions that lower the costs of services for consumers who pay an upfront fee to cover multiple orders in a given timeframe. Under a Total Price requirement, it would become difficult, if not impossible, for app-based delivery platforms to show subscribed consumers that the appropriate fees—and no others—are being waived under the terms of the subscription.

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<sup>10</sup> See Consumer Legal Remedies Act: Advertisements, S.B. 478, 2023-24, Reg. Sess. § 14 (C.A. 2023), <http://bit.ly/3vvdht2>

App-based delivery platforms might also stop offering promotions (such as Buy One, Get One Free offers), due to the difficulty of incorporating a Total Price requirement. As a result, restaurants or other business partners that opt in to such promotions would lose the opportunity to participate and potentially lose revenue, while customers would lose on savings. This could also result in increased fees to consumers, as app-based delivery platforms may ultimately have to set their fees upfront at levels that ensure that all costs (including costs subject to change due to consumer choices over the course of the transaction) will be covered.

**C. A Total Price requirement could depress competition and stall economic growth among merchants—with particularly detrimental effects on small businesses.**

For app-based delivery services, requiring the display of “all-in” pricing could decrease competition and even harm small businesses. For example, while larger companies with their own delivery systems could adjust the pricing of items as “loss leaders” to make the Total Price for their goods seem more reasonable, smaller merchants—that may have chosen to use third-party app-based delivery platforms—may not have that flexibility. Larger retailers would also be better positioned to withstand tighter margins to make their offerings cheaper, thereby underpricing small businesses and making it still harder for them to compete. Further, the proposed requirement would likely hurt smaller retailers and restaurants who have been able to grow their businesses by working with app-based delivery platforms, and who do not have the resources to operate their own delivery.

**D. A Total Price requirement may be sensible in some industries, but not for app-based delivery.**

The Proposed Rules’ potential application in other sectors of the economy does not justify a broad, cross-industry rule, nor does it make good policy sense. Different industries

interact with their customers in different ways. A one-size-fits-all rule is not likely to work in practice.

Critically, the Commission has not provided evidence of any prevalent consumer harm that justifies this one-size-fits-all rule. The *NPRM*, in its 66 pages of text and 379 footnotes cites to only a couple of mentions from consumers about the fees charged by app-based delivery platforms.<sup>11</sup> The *NPRM* offers cursory treatment of the issue of whether there are prevalent unfair practices that justify taking the proposed action. Merely charging a fee is not presumptively deceptive, unfair, or otherwise harmful to a consumer. In addition, the Commission has long found that a key element of a deception case is whether a “representation, omission, or practice . . . is likely to mislead the customer,”<sup>12</sup> which is not the case here.

An alternative proposal to a Total Price requirement that would better promote transparency would be a policy regarding disclosures of fees prior to order checkout. This solution could better achieve the Commission’s policy objectives than the *NPRM*’s Total Price requirement (for all the reasons discussed herein) without many of the negative ramifications and unintended consequences previously discussed.

**V. SEVERAL OF THE *NPRM*’S PROPOSALS ARE OVERLY BROAD AND ILL-SUITED FOR THE APP-BASED DELIVERY CONTEXT.**

Several of the proposed requirements and terms used in the *NPRM* are unduly expansive or vague, both across industries and when applied to the app-based delivery context, creating implementation difficulties and compliance uncertainty while potentially introducing

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<sup>11</sup> See *NPRM* n. 18, 66, 221, 222.

<sup>12</sup> *FTC Policy Statement on Deception*, [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf) (Oct. 14, 1983).



unnecessary confusion for consumers. The Commission should revise its proposals and provide guidance on implementation if any new rules are adopted.

**A. A requirement to disclose the “nature and purpose” of a fee is unclear and would create implementation difficulties for app-based delivery platforms.**

The *NPRM* proposes to make it an unfair or deceptive practice and rule violation for any business to “misrepresent the nature and purpose of any amount a consumer may pay.”<sup>13</sup> This requirement to disclose the “nature and purpose” of a fee is vague, and imposing such a requirement would provide no material benefit to consumers. Our members engaged in app-based delivery already disclose and describe each fee assessed, and it is unclear from the Proposed Rules what additional information, if any, might be needed to fulfill this proposed requirement.

It appears that the Commission seeks to require disclosure of the business rationale for imposing a fee and the specific uses to which proceeds of a given fee will go. Even if a business could provide this level of detail, doing so would divulge commercially sensitive information that could seriously alter competition in any given marketplace. Disclosure of such granular information could also result in information overload to the consumer, making it more likely that they will ignore it. Moreover, the Commission’s past practice is inconsistent with the notion that a business needs to identify the underlying motivation or business justification for a price. Section 5 of the FTC Act<sup>14</sup> does not authorize the Commission to require businesses to disclose such sensitive competitive information as a condition for participating in commerce. Any new interpretation of the statute to vest the Commission with this authority would represent a sudden

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<sup>13</sup> *NPRM* at 77482, § 464.3.

<sup>14</sup> 15 U.S.C. § 45(a)(1).

and unwarranted change that likely would implicate the Major Questions Doctrine.<sup>15</sup> The Commission should exempt app-based delivery companies from its Proposed Rules, or at minimum clarify the meaning of the “nature and purpose” language.

**B. The *NPRM* does not sufficiently explain what a “mandatory ancillary service” is and fails to consider the practical realities of our industry.**

The *NPRM* would require “mandatory ancillary good[s] or service[s]” to be included in the Total Price displayed to the consumer.<sup>16</sup> “Ancillary Good or Service” is defined as “any additional good(s) or service(s) offered to a consumer as part of the same transaction.”<sup>17</sup> Although understanding what qualifies as an ancillary service may be clear in some industries, such as where a renter must pay a cleaning fee, it is far less clear in others, like app-based delivery. For app-based delivery, the Commission should clarify that a fee is optional if a consumer’s choice at any point in the ordering process changes the fee. For example, if a consumer can choose between pickup or delivery through a platform, a delivery fee should not be considered a mandatory ancillary service, and costs associated with that option need only be shown after a customer confirms their preference in the app prior to checkout.

**C. App-based delivery platforms already make “clear and conspicuous” disclosures, making regulation unnecessary.**

The *NPRM* proposes to prohibit unlawful conduct by businesses “that offer, display, or advertise an amount a consumer may pay without Clearly and Conspicuously disclosing the

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<sup>15</sup> See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); see also *infra* at Section VI.

<sup>16</sup> See *NPRM* at 77484, §§ 464.1, 464.2(b).

<sup>17</sup> *NPRM* at 77438, § 464.1(a).

Total Price.”<sup>18</sup> Our members transparently disclose all fees to consumers of app-based delivery services, as discussed herein, making a requirement to disclose information “clearly and conspicuously” unnecessary. Moreover, space for information on app-based delivery platforms is limited, and it is unclear whether or how the Proposed Rules would require app-based delivery platforms to display information differently while still achieving the ultimate goal of having users be informed about their transactions.

## **VI. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ADOPT THE PROPOSED RULES.**

The Commission does not have the authority to adopt the Proposed Rules.

*First*, the Commission has not specifically defined an act or practice of app-based delivery platforms that would merit regulatory action. As discussed, app-based delivery is a unique offering characterized by transparent fees set separately from the prices of the underlying goods—to the benefit of consumers and merchants. Instead of taking sweeping, one-size-fits-all action that would apply across nearly all industries, at most, the Commission should consider industry-specific rules in accordance with longstanding practice (*e.g.*, Funeral Rule).<sup>19</sup> Other recent rulemakings, such as the CARS Rule proceeding, show that even with a record of prevalence far more robust than the present one, rules should be as narrowly tailored toward subject industries as possible.<sup>20</sup>

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<sup>18</sup> *NPRM* at 77482, § 464.2(a).

<sup>19</sup> *See* 16 C.F.R. § 453.

<sup>20</sup> *See Proposed Rule – Motor Vehicle Dealers Trade Regulations Rule*, Regulations.gov (July 13, 2022, <https://www.regulations.gov/document/FTC-2022-0046-0001/comment> (reflecting that more than eleven thousand comments were filed as part of the proceeding)).

*Second*, the Proposed Rules implicate the Major Questions Doctrine,<sup>21</sup> which prohibits agency action on significant matters without a clear grant of authority from Congress. Consumer fees and pricing are of vast economic and political significance, and the Proposed Rules would comprehensively regulate the display of prices by entities across vast swaths of the economy. To be sure, the Commission can “promulgate, modify, or repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce.”<sup>22</sup> But Congress did not delegate to the Commission the authority to impose economy-wide regulation of routine business practices such as pricing. Nor did it authorize the Commission to require businesses to disclose commercially sensitive business rationales for the fees they charge. Such sweeping regulation could completely upturn or even decimate marketplaces, in addition to creating barriers to participation. The Proposed Rules would do exactly this.

*Third*, and relatedly, as applied to app-based delivery platforms, the Proposed Rules exceed the Commission’s authority under the FTC Act because the Commission has not established that app-based delivery platforms charge fees that are unfair or deceptive. The Commission can only propose rules where “it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.”<sup>23</sup> Here there is

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<sup>21</sup> See *The Supreme Court’s “Major Questions” Doctrine: Background and Recent Developments*, Congressional Research Service, at 1 (May 17, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10745> (“In a handful of cases involving a challenge to agency actions, the Supreme Court has rejected agency claims of regulatory authority under the major questions doctrine when (1) the underlying claim of authority concerns an issue of ‘vast “economic and political significance,”’ and (2) Congress has not clearly empowered the agency.”).

<sup>22</sup> See 16 C.F.R. § 1.8.

<sup>23</sup> 15 U.S.C. § 57a(b)(3).

no verifiable evidence that establishes that app-based delivery platforms have engaged—or are presently engaged—in sustained problematic conduct that would merit a rulemaking. Instead, the Commission relies on a handful of subjective, anecdotal comments from members of the public in place of valid analysis. It would be unusual, if not unprecedented, for the Commission to proceed with new regulations where, as here, there is a lack of a demonstrated harmful behavior.

*Fourth*, failing to show consumer harm in the app-based delivery platform context will render the agency’s proposed rulemaking arbitrary and capricious under the Administrative Procedure Act.<sup>24</sup> The Proposed Rules could also be invalidated by a court on the grounds that it is not based on “substantial evidence.”<sup>25</sup> The Commission can avoid these issues by narrowing the Proposed Rules to only those sectors or industries on which the data supports Commission intervention.

*Lastly*, the *NPRM* does not reasonably attempt to address the costs and benefits of the Commission’s economy-wide approach to regulation. Federal agencies are required to “conduct an assessment of costs and benefits” for proposed rules that could have a \$100 million effect on the nation’s economy.<sup>26</sup> Section 18 of the FTC Act also requires that Commission rules be

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<sup>24</sup> See 5 U.S.C. § 706(2)(A).

<sup>25</sup> See 15 U.S.C. § 57a(e)(3) (“The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of title 5 . . .”).

<sup>26</sup> Cost-Benefit Analysis in Federal Agency Rulemaking, Congressional Research Service (March 8, 2022), <https://bit.ly/3HawH8X>; <https://crsreports.congress.gov/product/pdf/IF/IF12058>; see also Exec. Order No. 12866, Regulatory Planning and Review, 58 Fed. Reg. 51735, § 6(a)(3)(C) (establishing the requirement for cost-benefit analyses on federal agencies that propose economically significant rules).

accompanied by details of the economic effect of the rule.<sup>27</sup> Rather than conduct the necessary analyses, the Commission only attempts a cost-benefit analysis of three industries, none of which reflect the unique considerations that apply to app-based delivery platforms. To the extent that the *NPRM* estimates compliance costs for “most firms in the economy,” the estimate is immensely understated at “a one-time cost of \$78.74” for firms already in compliance and, for other firms, an annualized cost of \$2,010.<sup>28</sup> The Commission significantly underestimates the Proposed Rules’ compliance costs and impact not only on regulated firms, but on the wider economy. It would take a significant amount of engineering time and design work hours for app-based delivery platforms to redesign their platforms to reflect variable pricing as consumers add and subtract items from their shopping carts. Further, for app-based delivery platforms, complying with the Proposed Rules could require changes to the fundamental nature of their businesses (including by altering pricing structures, finance systems, marketing strategies, etc.). Before adopting rules with such a broad scope, a more rigorous cost-benefit analysis must be conducted.

Each of these issues has the potential to present a significant legal bar to the Commission adopting the proposals as set forth in the *NPRM*.

## **VII. CONCLUSION**

Flex welcomes the opportunity to participate in this proceeding. The app-based delivery market is unique, and the ways that our members’ fees are set and displayed today provide

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<sup>27</sup> 15 U.S.C. § 57a(d)(1)(c) (“The Statement of Basis and Purpose must include . . . (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.”).

<sup>28</sup> See *NPRM* at 77477.

benefits to consumers that merit the industry's exclusion from the Proposed Rules' Total Price requirement. The Proposed Rule, as currently written, features serious policy, economic, and legal infirmities. Even if the Commission has authority to adopt the Proposed Rules, many of the requirements and definitions are overly vague and difficult—if not impossible—for app-based delivery companies to implement. The Commission should reevaluate the scope of its proposals and further study their potential effect on businesses, and consider specific exclusions with respect to app-based delivery platforms.

Respectfully submitted,

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