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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-2023-0064-3296
Comment from Bay Area Apartment Association

Submitter Information

Email: gad@baaahq.org
Organization: Bay Area Apartment Association

General Comment

Please accept the attached comment letter from the Bay Area Apartment Association.

Attachments

24.02.07 - BAAA Letter on FTC Fees Rule

February 7, 2024

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

Dear Secretary Tabor,

I am writing on behalf of the Bay Area Apartment Association (BAAA), the leading membership organization representing owners, operators, and developers of rental housing in the greater Tampa Bay region. Currently, BAAA represents over 1,000 apartment communities with over 260,000 apartment homes. I am writing to share our views 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").

We are greatly concerned with the breadth of the proposed rule, which as it currently stands applies to all entities that sell a good or service, ranging from Fortune 500 companies to a neighborhood lemonade stand. We do not believe the FTC has the capacity to effectively communicate the requirements of the new rule to all affected businesses, let alone enforce a rule that has such far-reaching applicability. We believe this will lead to selective enforcement of the rule to only specific industries and specific businesses in those industries, allowing arbitrary and potentially politically expediate justifications to guide enforcement action decisions. Ultimately, the FTC will not have the capacity to enforce this rule against all businesses in all industries, and likely most businesses will fall outside the scope of the FTC's enforcement efforts, putting those businesses that are subject to enforcement actions at a competitive disadvantage with those the FTC chooses not to prosecute.

Moreover, we have observed that the FTC's premise behind this rulemaking is that it believes some businesses are charging fees to consumers without disclosing the fees prior to the charge, and that these fees are for goods and services that provide little value to consumers. The FTC has derogatorily labeled these as "junk fees." We strongly disagree that this description or moniker applies to fees charged by the professionally managed rental housing providers we represent.

A hallmark of our industry is customer service, which includes regular and transparent communication with our residents and prospective residents, including pricing, fees, and other requirements to lease. Indeed, our members invest heavily in the training of their staff and computer software that includes steps for explaining applicable and knowable fees to residents and prospective residents. As such, our residents and prospective residents are informed of any applicable and knowable fees prior to signing a lease agreement, and any applicable and knowable fees are disclosed in writing in the lease agreement. Further, our members communicate any changes in applicable and knowable fees over the life of a resident's tenancy. Lastly, far from the "junk" label, what fees that

are charged as part of the lease agreement directly or indirectly benefit our residents, mitigate housing provider risks, or are for other legitimate business purposes.

The NPRM cites comments by people who claim not to have been informed by their rental housing providers of one or more fees. Additionally, the NPRM cites comments by organizations speaking for people who have similar complaints. It is our experience, however, that our members communicate information regarding fees to all residents and prospective residents, including pointing out applicable fees covered by the lease agreement before it is signed. It is also our experience that despite these efforts to disclose fee information by our members, some individuals will nevertheless not recall the disclosure and claim that such fee disclosures were not made. Basing a rule on accusations of individuals whose memory of events may be inaccurate, in the face of regular industry practices to communicate and disclose information, including written disclosures in lease agreements, is not justified.

Additionally, the NPRM asks the question of whether covered businesses should "exclude businesses to the extent that they offer or advertise . . . lease . . . products, or to the extent that they extend . . . leases . . . to consumers." In response, we do believe that the rental housing industry should be excluded from the definition of covered business because 1) housing providers cannot practically determine total price (a central element of this rulemaking) and 2) aspects of the ongoing, recurring, and lengthy relationship embodied in rental housing leases do not fit into what seems to be a rule geared towards discrete, one-time transactions.

Housing Providers Cannot Practically Determine Total Price

The proposed rule defines total price as "the maximum total of all fees or charges a consumer must pay for a good or service and any mandatory Ancillary Good or Service." Under the rule, businesses, presumably including housing providers, would be required to disclose this total price in any offer, display, or advertisement for housing made to a consumer. However, the "total price" for rental housing cannot practically be determined because there are multiple costs that may be considered a "mandatory ancillary good or service" which are variable, out of the control of the housing provider, and contingent on the unique circumstances and usage of each resident, rendering these costs unknowable to housing providers at the time of advertisement of a rental unit, or even at lease signing.

For instance, utilities (water, electric, etc.) might be considered a mandatory ancillary good or service offered to a consumer as part of the same transaction, since 1) utilities are often not included in the base rent for a housing unit, 2) are required to make full use of a rental housing unit, and 3) most rental housing lease agreements require the renter to maintain utilities for the unit as a condition of the lease agreement. However, housing providers have no control over the base rates a utility provider charges (i.e., cost per gallon of water used), or how rates may change over the term of a lease agreement. Further, utility usage will vary from one resident to another, and from one month to the next. With factors like these out of the control of housing providers, it is impossible for housing providers to know or disclose what a consumer must pay for this mandatory ancillary good or service as part of the total price, either in an advertisement or in the lease agreement.

Another example is renter's insurance. Some housing providers may require that residents purchase renter's insurance as a condition of the lease agreement. In some cases, the housing provider may even provide an insurance option to residents that the housing provider has arranged with a third-party company as a convenience to its residents. A renter's insurance requirement could be considered a mandatory ancillary good or service that must be disclosed in the total price. However, the resident can elect to use the insurance option offered by the housing provider (if applicable) or go to the open marketplace to find the same/equivalent insurance product for a different price. Housing providers have no control over the pricing of insurance products on the open market, which could vary based on the time of year and the risk profile of the resident. Housing providers also have no control over which insurance product a renter may ultimately choose, provided it meets the minimum criteria for coverage (i.e., insurable limit) set out in the lease agreement. Because these factors are out of the control of the housing provider and unknowable to the housing provider, it would be impossible for housing providers to disclose in an advertisement or a lease agreement the total price that would include this mandatory ancillary good or service.

Rental Housing Leases Are Different from Transactions

The proposed rule establishes a requirement for any business, including housing providers, to disclose the total price that includes any mandatory ancillary good or service "offered to a consumer as part of the same transaction." Because rental housing is largely based on lease agreements that typically create an ongoing, recurring, and lengthy relationship between housing providers and residents, the term "part of the same transaction" is vague and incompatible with rental housing.

Most professionally managed rental housing providers offer leases with a specific term, typically a 12-month lease, which is payable in 12 monthly installments. Under Florida law, "rent is payable without demand or notice" unless otherwise agreed to by the parties. Once a 12-month lease expires, the relationship may continue either by renewing the lease for another specific term, or it could convert to a month-to-month lease. Over the course of the lease term, if circumstances for the resident change, additional fees may be applied. For instance, if the resident acquires a pet in the middle of their lease term, a pet fee could become applicable. These various scenarios beg the question what is "the same transaction" across this relationship? Just at the point of lease signing? Each month when rent is due and paid (even when no notice is required under State law)? Does it matter if the monthly rent is part of a lease with a specific term, or if the lease is month-to-month? When the resident's circumstances change, leading to a mandatory fee that didn't apply to the resident earlier? What about at lease renewal? These questions illustrate the incompatibility between rental housing and the proposed rule which seems to focus on singular sales of goods and services that occur at a specific point in time.

The Rule is Likely to Have Unintended Consequences for Rental Housing Residents

We believe there are at least two aspects of the proposed rule that could lead to negative unintended consequences for consumers of rental housing.

First, the rule requires businesses to "disclose Clearly and Conspicuously before the consumer consents to pay the nature and purpose of any amount a consumer may pay that is excluded from the Total Price . . ." As we understand how this rule may be applied to rental housing, the disclosure requirement would cover any possible fees that could be charged to any resident, which must be listed in any offer or advertisement for the rental unit. If such a disclosure is required, a prospective resident could easily be confused and presume that all the fees listed are applicable and must be paid. For instance, using the pet fee example from earlier, if a rental housing provider must list out that pet fee in an advertisement, a prospective resident could believe that the pet fee is a blanket charge that applies to all residents, and not just to residents with a pet. This consumer confusion could lead to the belief that the rental unit is more expensive than it really is, undermining a key objective (better consumer awareness of the price of goods and service) the rule is intended to accomplish.

Second, the rule applies to any "offer, display, or advertisement that contains an amount a consumer may pay . . ." As we understand it, the rule would only apply to instances where pricing information is provided in an offer, display, or advertisement. To avoid violations of this rule (whether because the rule is impossible for rental housing providers to comply with, the rule is imprecise on how it is applied to rental housing, or because of selective enforcement of the rule by the FTC), it is not unreasonable to think that at least some rental housing providers will choose not to include pricing information in their advertisements, and instead invite prospective residents to learn about pricing on their website or to call their leasing office. This chilling effect on the content of commercial speech could lead to less pricing information in readily accessible media (i.e., newspapers), requiring consumers to devote additional time to investigate pricing differences between desired rental housing providers. Instead of making it easier and quicker for consumers to determine rental housing prices, it could make price comparisons a much more time-consuming exercise, undermining a key objective (better consumer awareness of the price of goods and service) the rule is intended to accomplish.

Short-Term Lodging

The NRPM invites the public to provide comment on definitions and applicability of the rule to short-term lodging. Short-term lodging is an imprecise term, that could mean different things to different people, and that could be (mis)applied to rental housing that is fundamentally different than hotel or vacation housing.

In the case of rental housing, a subset of the members we represent provide rental housing to residents that may be described as a short-term rental that could last one month to several months. This is common in cases where an apartment community engages in corporate leases to house traveling nurses or construction workers. As noted earlier, it is common for lease agreements to be month-to-month, though such tenancies often extend for years. And, to accommodate the needs of a particular resident, for instance, when the resident is in the process of purchasing a house, a lease agreement could be extended by days, weeks, or months. In all these cases, lease terms (aside from length), community rules, and other aspects of living at the community are the same (or nearly the same) for these residents as compared to other residents who reside at the apartment community under a 12-month lease.

As stated earlier, we do not believe the rule should be applied to the rental housing industry, and this includes situations where the rental term is short in duration like those described above. If the FTC moves forward with a rule that applies to short-term lodging, we believe rental housing providers that engage in the above and similar leasing practices should be excluded from the scope of the rule.

Given the many reasons discussed in this letter, we believe that the FTC should not apply its proposed rule to the rental housing industry.

Thank you for soliciting these comments and considering our views.

Sincerely,

Eric Garduno
Government Affairs Director

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