



February 7, 2024

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

Re: Comment to the Notice of Proposed Rulemaking for the Trade Regulation Rule on Unfair or Deceptive Fees – R207011.

Dear Secretary Tabor:

The undersigned national real estate associations represent a broad coalition of housing providers and lenders. 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"). We represent a broad coalition of housing providers and lenders, and our comments focus on the impact of the NPRM on the rental housing market and housing providers alike. We believe that the best thing we can do to ease the burden of housing costs is to boost the supply of quality housing. As such, we are concerned that the NPRM will impose additional regulatory obligations on private rental housing providers without a clear benefit to the rental community. Instead, the FTC and other relevant agencies should work to focus federal resources on boosting the supply of new affordable housing.

We appreciate the opportunity to share our perspective on the impact of the NPRM on our members.

Background of the Proposed Rule

On November 9, 2023, the FTC issued the NPRM entitled “Rule on Unfair or Deceptive Fees”¹, 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.”²

In connection with the NPRM, the FTC issued a press release³ 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.

Preliminary Statement

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 FTC’s prior strategic and focused rulemaking effort, the Commission diverges toward a one-size-fits-all rulemaking approach to address what it perceives is a singular, problematic behavior that pervades the American economy in a multitude of materially different and distinct industries.

Our members strive to create thriving communities and successful resident experiences. We 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. As such, we

¹ 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>.

² 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)”.

³ <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-proposes-rule-ban-junk-fees>

appreciate the importance of federal, state, and local laws and regulations already in place that create rights and responsibilities for residents and housing providers alike. It is our opinion that the FTC's regulatory efforts with the NPRM with respect to the rental housing market is rushed, haphazard, overly broad in application and based upon anecdotal, non-representative claims from various consumer groups (devoid of data-driven statistical support).

The reality is that housing providers use fees in rental housing transactions to facilitate necessary business practices and to provide residents 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 multifamily housing providers and lenders, our members understand that resident rights are a critical part of the rental housing ecosystem and are committed to full transparency in pricing in addition to providing safe, quality housing at a fair price for renters in all of our communities.

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, local and municipal laws that already regulate the rental housing industry before extending additional regulatory burdens onto the rental housing industry.

Pitfalls of the NPRM

We greatly appreciate the FTC's thought leadership in connection with the protection of consumers – particularly, traditionally marginalized consumer groups. However, for the reasons below (in addition to many of the other comments that have been raised in countless other public comment letters) we believe that the NPRM is misguided with respect to the rental housing industry.

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 renters, housing providers and local markets' needs. The FTC's proposed rule would be duplicative of existing requirements and make it difficult for housing providers to understand their compliance responsibilities.

II. The NPRM is overly broad.

The NPRM seeks to regulate a host of industries with minimal reservation or qualification.⁴ At a high level, the NPRM would require all businesses to clearly and conspicuously disclose the "Total

⁴ 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.

Price” for any good or service in all offers or advertisements. And it would make it an unlawful deceptive practice to “misrepresent the nature and purpose of any amount payable by a consumer in connection with a transaction with said business.” 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 in the rental housing industry, which is already heavily regulated at the state and local levels. A one-size-fits-all requirement would interfere with 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.

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.” This claim is simply unsubstantiated. Indeed, market data demonstrates that 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.⁵ 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.

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

The NPRM may be subject to legal challenge on several fronts. Rules promulgated under the FTC Act must be based on “knowledge derived from studies, reports, investigations, hearings, and other proceedings,”⁶ that support the belief that “the unfair or deceptive acts or practices at issue are prevalent.”⁷ The FTC lacks reliable evidence⁸ to show the acts or practices targeted by the proposed rule are prevalent in the rental housing industry, having performed no studies or investigations into fee practices in the rental housing industry.⁹ Because the proposed rule is not based on sufficient facts and data, it may also be challenged in court as arbitrary and capricious

⁵ <https://www.naahq.org/breaking-down-one-dollar-rent-2023>

⁶ 16 C.F.R. § 1.22(a).

⁷ 15 U.S.C. § 57a(b)(3).

⁸ 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”).

⁹ Instead, the FTC relies on a handful of comments submitted by renters (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), a report concerning manufactured housing rentals in Michigan (FTC-2022-0069-6085), and a “national” survey in which there were no responses from 24 states and more than half of all responses came from just five states (FTC-2022-0069-6091).

under the Administrative Procedure Act.¹⁰ 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.¹¹ There is simply no evidence Congress intended to authorize the FTC to enact sweeping economic regulations impacting the national¹² economy, particularly where Congress itself has tended to address regulation of pricing and fees on a sector by sector or industry by industry basis.¹³ With more than 35 percent of the nation's households residing in rental housing, the FTC should engage in further fact-finding and seek out industry-specific expertise rather than pressing forward with a one-size-fits-all approach.

Conclusion

We share the FTC's commitment in protecting consumers. However, imposing additional layers of federal regulation on top of what is already an overly complicated set of regulations and landlord-tenant laws at the state and local levels will only disincentive investors, further exacerbating the supply shortage, ultimately hurting our nation's renters. Inherent in ensuring stability for our nation's renters, is maintaining the current and future viability of the rental housing supply in this country. As such, we respectfully advise the FTC to refrain from imposing the onerous obligations proposed in the NPRM upon the private rental housing providers and instead focus on leveraging federal resources to bolster new affordable housing.

Thank you for the opportunity to comment on this important proposal and for your consideration of our comments. If you have any questions regarding these comments or if we can be of any assistance, please do not hesitate to contact Paula Cino, Vice President for Construction, Development, Land Use and Counsel @ pcino@nmhc.org.

Sincerely,

Building Owners and Managers Association
Council for Affordable and Rural Housing
Housing Advisory Group
Institute of Real Estate Management
Manufactured Housing Institute
National Apartment Association
National Association of Home Builders
National Association of Residential Property Managers
National Leased Housing Association
National Multifamily Housing Council
The Real Estate Roundtable

¹⁰ 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'").

¹¹ See *W. Virginia v. Envtl. Prot. Agency*, 142 S. Ct. 2587, 2609 (2022).

¹² 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. See FTC-2022-0069-6047.

¹³ [string cite to laws regulating pricing in transportation, shipping, air travel, and consumer finance sectors]