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February 7, 2024

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, D.C. 20580

Re: "Unfair or Deceptive Fees NPRM, R207011"

To Whom it May Concern:

TechNet appreciates the opportunity to provide comments on the Federal Trade Commission's (FTC) proposed rule on Unfair or Deceptive Fees. We are concerned that this proposed rule, as drafted, reflects a fundamentally transformed regime for regulating the way innovative companies communicate and provide value to their customers and will ultimately harm consumers and stifle innovation across our nation's economy.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over 4.2 million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance.

TechNet's member companies recognize the importance of transparency in the sale of consumer goods and services. This consumer-focused approach is the hallmark of the continued innovation taking place in our nation's economy. However, the FTC's sweeping proposed rule would undermine these pro-consumer efforts through a costly and unworkable regime for regulating the communication of pricing to consumers. We urge the FTC to withdraw the proposed rule until more analysis of its consequences are undertaken and the rules' deficiencies are addressed. If the FTC decides to proceed, we further urge the FTC to protect the pricing models that provide benefits to consumers and refine the rule to preserve current liability protections for platforms under Section 230 of the *Communications Decency Act of 1996*.

Under federal law, Congress authorized the FTC to propose a rule defining unfair or deceptive acts or practices when it "has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent."[1] A determination about prevalence can be made either on the basis of "cease-and-desist" orders regarding such acts or practices that the FTC has previously issued, or when it has "any other information" that "indicates a widespread pattern of unfair or deceptive acts or practices."[2] A practice is unfair if (1) it causes or is likely to cause substantial injury, (2) the injury is not reasonably avoidable by consumers, and (3) the injury is not outweighed by benefits to consumers or competition.

Here, the FTC has failed to meet its burden under Section 18 of the *FTC Act* to "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of the *FTC Act*. TechNet believes the FTC's proposed rule on unfair or deceptive fees is unworkable in its current form. As drafted, the proposed rule does not clearly and conspicuously outline the unfair or deceptive acts it aims to address, which will ultimately harm a variety of companies across various sectors of the economy, all without providing countervailing benefits for consumers.

Moreover, the FTC's analysis estimates total quantified compliance costs of more than $13 billion over a 10-year period, but by its own admission does not include data on the "exact costs firms not presently compliant will incur to comply with the proposed rule."[3] By excluding these costs and significantly discounting specific types of compliance costs such as attorneys' fees, the FTC is attempting, but failing, to demonstrate that the benefits of this rulemaking will significantly outweigh its costs.

In addition, given the scope of this proposed rule, we believe that the Commission is exercising a claim of authority that concerns an issue of "vast economic and political significance" and could therefore implicate the Major Questions Doctrine as held by the Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), and other cases. We do not believe the record demonstrates that Congress sought to empower the Commission to fundamentally transform how innovative companies communicate pricing with their customers.

The FTC's proposed rule seeks to prohibit offering, displaying, or advertising a price for a good or service without "clearly and conspicuously" disclosing the "Total Price," defined as the "maximum total of all fees or charges a consumer must pay for a good or service." While intended to target pricing tactics that misrepresent

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[1] The Commission's authority is subject to the requirements of Section 18 of the FTC Act, originally adopted in the Magnuson-Moss Act. In response to criticism that the Commission was exceeding its rulemaking authority, Congress subsequently enacted additional procedural safeguards through the Federal Trade Commission Improvements Act of 1980.

[2] 15 U.S.C. § 57a(b)(3)

[3] 88 Fed. Reg. 77448 (November 9, 2023)

total costs by omitting mandatory fees, it would complicate the communication of pricing in situations where the "total price cannot practically be determined" in advance.[4] We urge the FTC to recognize, as it describes in the proposed rule, the full scope of necessary exemptions for such situations, or alternatively include a general exception to the definition of "Total Price" in Section 464.1(g), alongside the "Shipping Charge and Government Charge" exceptions, for any other fees that are variable or unknowable. For clarity, this element introduces particular complexity for e-commerce marketplaces that cannot practically know the precise fee or cost a consumer selling an item on the marketplace will incur until a cart is final. Similar challenges are raised for online marketplaces where service providers set their own rates, discuss the scope of services directly with their prospective clients, and may choose to adjust or negotiate the total price based on their discussions about scope or how long the service takes to complete.

We believe that the FTC's efforts to mandate the disclosure of "Total Price," or "All-In Pricing," will raise costs to consumers and undermine consumer choice. In practice, many innovative companies utilize dynamic pricing models that vary based on the location of the customer as well as items selected throughout the ordering process. These models provide many consumer benefits. App-based delivery platforms are just one example of an industry that utilizes dynamic pricing models. These platforms have provided consumers with expanded offerings and convenience, have benefited partner merchants with expanded reach and a significantly broadened customer base, and have created income opportunities for Americans seeking to work independently and on preferred schedules. The global food-delivery market is projected to grow to $810 billion by 2027, up from $424 billion today.[5]

The reason these platforms have grown tremendously over the years is because they provide significant value and benefits for all their stakeholders, including their customers. Pricing information is clearly disclosed and described on these platforms pre-checkout, and there is no evidence that consumers suffer an injury from dynamic pricing. On the contrary, dynamic pricing is the most effective way to equitably spread costs to consumers based on the characteristics of their order, including size and location. These same dynamics are applicable to the shipping industry, where in many cases the amount of a shipping fee is not determined until the destination and size of an order is ascertained. A dynamic pricing model also effectively communicates the costs of service accurately to consumers and is consistent with consumer expectations, compared to an all-in pricing model.

To be sure, pricing models that require all fees to be calculated in advance of a consumer providing key information pertaining to an order's characteristics risks raising costs for the average consumer or limiting options, specifically those with shorter delivery distances or smaller orders. It is impractical to know the exact

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[4] Id. at 77439
[5] Morgan Stanley, "Food-Delivery Companies Show Appetite for Growth," (July 7, 2023)

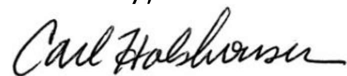
costs of servicing an order prior to a consumer finalizing their order. In many cases, these costs will vary. By mandating the disclosure of total price, the FTC may force app-based delivery platforms to either limit options, or to spread the costs across consumers evenly, regardless of the actual costs to service a particular order. Unfortunately, a cost-spreading model will cause actual harm to consumers in the form of higher prices, by forcing consumers with smaller order sizes to effectively subsidize costs for consumers ordering a larger (or more expensive) set of items.

Moreover—to the extent the proposed rule's "Total Price" requirement is interpreted to require online marketplaces to combine their fees with underlying product prices set by independent product sellers or service providers, this interpretation would risk consumer confusion and less transparency as to which party is imposing costs in the transaction. As part of that confusion, in marketplaces where sellers and people offering services set their rates and engage with their prospective customers pre-transaction, we are concerned that these individual workers, sole proprietors, and small businesses will become vulnerable to downward negotiations. That will in turn compromise their ability to be compensated at the rate they believed was fair to charge customers and introduce new tension in their relationships with their customers.

The FTC's proposed rule also poses significant harm to online marketplaces by potentially creating liability for platforms that merely display pricing advertised by others. As publishers, such platforms are likely protected from such responsibility by Section 230 of the *Communications Decency Act of 1996*. However, because the proposed rule appears to conflict with this existing law, it has the potential to create unnecessary ambiguity that could lead to litigation. To avoid such uncertainty, we suggest that the Commission refine the proposed rule to specify that such platforms are not "covered businesses" or by specifying that where Section 230 clearly exempts certain businesses from liability, the rule is not applicable.

Thank you for your attention to our views on this matter. We appreciate the opportunity to submit comments and provide feedback on the FTC's proposed rule on Unfair or Deceptive Fees and stand ready to serve as a resource to you in your examination of this important issue.

Sincerely,



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