

Dissenting Statement of Commissioner Christine S. Wilson

Advance Notice of Proposed Rulemaking – Junk Fees

October 20, 2022

Today the Commission votes to issue an Advance Notice of Proposed Rulemaking to address how prices are conveyed to consumers. Before discussing the substance of the ANPR, two procedural issues merit attention. First, the ANPR is based on the submission of a petition for rulemaking submitted by the Institute for Policy Integrity. I encourage consumer and industry groups to monitor the FTC’s rulemaking docket and take seriously the public petitions that get published there — yesterday’s petition may very well become today’s ANPR.

Second, I was given less than three weeks to consider a rulemaking effort that, if adopted, could impact billions or even trillions of dollars in commerce, as well as millions of consumers and companies. I posed dozens of questions, many of which went unanswered. Today’s proposal could launch rules that regulate the way prices are conveyed to consumers across nearly every sector of the economy. I understand that President Biden referenced so-called “junk fees” in remarks to the White House Competition Council on September 26, just three weeks ago.¹ Chair Khan sits on that Council. And I recognize that some of these fees may be inadequately disclosed. But manufactured deadlines based on our monthly open commission meeting schedule to demonstrate that the Commission is in lockstep with the Biden Administration should not override our obligation to exercise our significant authority in sober and thoughtful ways. If FTC leadership truly believes that this proposal will result in a rule, then it is irresponsible to shortchange the Commission on the time required to perform our due diligence.

There are kernels of utility in the ANPR that I had hoped to explore with my fellow Commissioners and staff. I agree with ensuring that consumers (1) have access to sufficient information to make informed decisions and (2) are not charged for products or services they did not agree to purchase. I would have looked more favorably on a rulemaking effort narrowly focused on those issues, particularly where we have an enforcement track record. But the version of the ANPR we discuss today is sweeping in its breadth; may duplicate, or contradict, existing laws and rules; is untethered from a solid foundation of FTC enforcement; relies on flawed assumptions and vague definitions; ignores impacts on competition; and diverts scarce agency resources from important law enforcement efforts. For these reasons, I cannot support the issuance of this Notice.

Given my concerns, I would like to highlight issues on which stakeholder input would be constructive.

¹ Remarks by President Biden at the Third Meeting of the White House Competition Council (referencing many industries that do not fall within the FTC’s jurisdiction) (Sept. 26, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/26/remarks-by-president-biden-at-the-third-meeting-of-the-white-house-competition-council/>.

Breadth

- The ANPR explicitly mentions pricing practices in a wide array of industries, including auto financing, phone cards, fuel cards, payday lending, telecommunications, live entertainment, travel (including airlines, hotels, room-sharing, car rentals, and cruises), higher education, financial products and services, telemarketing, funeral services, publishing, insurance, and membership programs. Some of these sectors fall outside the FTC’s jurisdiction. Of course, it is likely that a future rule will cover other industries not explicitly discussed in the ANPR, including e-commerce, retail, food services, healthcare, administration and business support, repair services, dating services, apartment rentals, commercial leasing, warehousing, logistics assistance, and professional and technical services. What other markets or industries could be covered by an omnibus pricing disclosure rule?²
- The GDP of the United States in 2021 totaled roughly \$23 trillion dollars. What percentage of the goods and services for sale in the United States would be covered by the ANPR?
- Given the potential scope of this rule, it appears likely to be exercising a claim of authority that concerns an issue of “vast economic and political significance” and thereby could implicate the Major Questions Doctrine discussed in the recent Supreme Court decision, *West Virginia v. EPA*.³ What precedent would support the perspective that Congress has clearly empowered the FTC to promulgate a rule that would regulate pricing disclosures for the breadth of good and services identified in the ANPR?
- Do pricing practices and fee disclosures vary across industries and markets? How would a rule requiring that marketing materials explain the purpose of any fees, interest, charges, or other costs work with the FTC’s approach to clear and conspicuous disclosures across advertising mediums (e.g., mobile screens or television ads)? Should the FTC mandate that marketing materials aimed at sophisticated business consumers include the same breadth and depth of fee disclosures as marketing materials targeting an individual consumer?
- Do consumer expectations about pricing practices and fee disclosures for repair services differ from those for healthcare? Across what sectors do consumers have homogenous expectations around pricing and fee disclosures?
- Are the harms from inadequately disclosed fees or illegitimate fees the same in all sectors? Do all industries lend themselves to a uniform pricing regime?

Rule Duplication

- The ANPR appears to overlap with several existing regulations related to advertising and disclosures enforced by the FTC and/or other expert agencies. How would industry and markets determine which rule controls should conflicts arise?

² Trade associations and consumer groups should take a close look at this ANPR to determine whether their members’ practices could be impacted by any future rule.

³ 142 S. Ct. 2587 (June 20, 2022).

- How does this ANPR relate to the proposed Motor Vehicle Dealers Trade Regulation Rule, approved by the Commission on June 23, 2022, which focuses on pricing practices and fee disclosures in the automobile industry?
- The Truth in Lending Act (“TILA”) and Regulation Z outline complex credit disclosure requirements for open and closed-end credit, including advertisement terms that trigger disclosures about fees, interest, charges, or other costs. This ANPR considers imposing more stringent requirements by requiring disclosure of all fees, interest, and charges regardless of whether the advertisement contains trigger terms. Are there prevalent unfair or deceptive practices that would support the FTC’s adoption of more stringent advertising requirements on the marketing of consumer products, e.g., an Xbox, than the federal government imposes on the marketing of a home loan or credit card?
- The FTC enforces several laws and rules that govern when and how pricing information should be conveyed to consumers, including the Telemarketing Sales Rule (“TSR”), the Funeral Rule, the Restore Online Shoppers’ Confidence Act (“ROSCA”), and the Rule Concerning the Use of Prenotification Negative Option Plans (“Negative Option Rule”). Is there evidence that we have been unable to address specific types of deceptive and unfair pricing practices, for example in the marketing of negative option transactions, with these marketing-specific rules? Do we need a rule that covers all transactions? If industry-specific rules have not prevented harm from pricing practices, how would additional rules bring about greater compliance?
- The Funeral Rule’s goals are to lower barriers to price competition in the funeral goods and services market and to facilitate informed consumer choice. One way the Funeral Rule helps achieve these goals is to require funeral providers to “unbundle” the goods and services they sell and instead to offer them on an itemized basis. But this ANPR takes the opposite approach by favoring up-front, all-in pricing. How might this ANPR impact price transparency and competition?

Basis for the Rule

- Section 18 rules must be based on “prevalent” deceptive or unfair practices. Notably, this ANPR references several potentially deceptive and unfair fees that have been the subject of FTC workshops, business guidance, and even investigations, but *not* enforcement actions. Can the FTC meet the requisite showing of prevalence without any underlying FTC enforcement?
- What evidence, beyond law enforcement, can be used to demonstrate prevalence? Can a showing of prevalence be satisfied by a workshop or roundtable? News articles?

Flawed Assumptions and Vague Definitions

- The ANPR defines the term “junk fees” to include “fees for goods or services that are deceptive or unfair ... whether or not the fees are described as corresponding to goods or services that have independent value to the consumer.” How should the Commission determine whether fees correspond to goods and services that consumers value? What

percentage of consumers should be the threshold? A majority of consumers? A significant minority?

- Do fees sometimes viewed as unnecessary by consumers reflect attempts by businesses to recover incremental costs? Is it reasonable for businesses to impose fees to recover incremental costs? What percentage of incremental costs can a business recover before it becomes a “junk fee”?
- The ANPR defines “junk fees” to include “goods or services that consumers would reasonably assume to be included within the overall advertised price.” What evidence does the FTC need to demonstrate consumer expectations about what services, products, or fees are covered by a published price? Should the FTC be required to demonstrate quantitative or qualitative measures of consumer expectations?
- The ANPR defines “hidden fees” as fees that “are deceptive or unfair, including because they are disclosed only at a later stage in the consumer’s purchasing process or not at all.” At what point in a transaction should fees be disclosed to consumers? Is disclosing a fee before a consumer makes a purchase too late? Should disclosures occur at the same point in a transaction regardless of the industry or market? Why or why not?
- The ANPR indicates that the Commission is exploring the “costs and benefits of a rule that would require upfront inclusion of any mandatory fees whenever consumers are quoted a price for a good or service.” How would this proposal work for dynamic fees, like shipping and handling, that are based on consumer input?
- The ANPR asserts that “junk fees . . . facilitate inflation.” What evidence points to a connection between fees and inflation?

Impact on Competition

- To what extent does competition discipline suboptimal pricing practices?
- Would a government requirement for all-in pricing facilitate coordination among regulated companies in the same industry?
- Could a potential rule incentivize all-in pricing and the bundling of products and services, which would then require consumers to pay for goods and services they may not want or need?

Opportunity Costs

- In 2022, including proposals that I anticipate will be voted out during the open Commission meeting, the FTC has initiated the rulemaking process for a total of six new rules. These massive regulatory undertakings require substantial FTC resources. To what extent does our current rulemaking agenda divert resources from our primary law enforcement mandate? Are there other risks associated with our apparent attempt to become a powerful legislature?
 - Are there existing or emerging threats to consumers and competition we are not pursuing because resources are focused on rules instead of cases?
 - Will the credibility of the FTC be tarnished if we pursue broad rulemaking efforts without qualitative and quantitative evidence of consumer injury?