

FEDERAL TRADE COMMISSION

16 CFR Part 464

RIN 3084-AB77

Trade Regulation Rule on Unfair or Deceptive Fees

AGENCY: Federal Trade Commission

ACTION: Initial notice of informal hearing; final notice of informal hearing; list of Hearing Participants; requests for submissions from Hearing Participants.

SUMMARY: The Federal Trade Commission (“FTC” or “Commission”) recently published a notice of proposed rulemaking (“NPRM”) in the *Federal Register*, titled “Rule on Unfair or Deceptive Fees,” which would 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. The NPRM announced the opportunity for interested parties to present their positions orally at an informal hearing. Seventeen commenters requested to participate at the informal hearing. The Commission’s Chief Presiding Officer, the Chair, has appointed an Administrative Law Judge for the Federal Trade Commission, the Honorable Jay L. Himes to serve as the presiding officer of the informal hearing.

DATES: *Hearing date:* The informal hearing will be conducted virtually on April 24, 2024, at 10:00am Eastern.

Participation deadline: If you are a Hearing Participant and would like to submit your oral presentation in writing or file a supplementary documentary submission, you must do so on or before **[INSERT DATE 14 DAYS AFTER PUBLICATION IN THE**

FEDERAL REGISTER].

ADDRESSES: Hearing Participants may submit their oral presentations in writing or file supplementary documentary submissions, online or on paper, by following the instructions in Part IV of the **SUPPLEMENTARY INFORMATION** section below.

Write “Unfair or Deceptive Fees Rule (16 CFR Part 464) (R207011)” on your submission and send it electronically to *electronicfilings@ftc.gov*, with a copy to *OALJ@ftc.gov*. If you prefer to file your submission on paper, mail it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H-144 (Annex J), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Janice Kopec or Spencer Jackson-Kaye, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 202-326-2550 (Kopec), 202-975-8671 (Jackson-Kaye), *jkopec@ftc.gov*, *sjacksonkaye@ftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Following public comment on an advance notice of proposed rulemaking, 87 FR 67413 (Nov. 8, 2022), the FTC published a notice of proposed rulemaking (“NPRM”), 88 FR 77420 (Nov. 9, 2023), entitled “Rule on Unfair or Deceptive Fees,” in the *Federal Register*, proposing to add part 464 to 16 CFR, 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. A month before the NPRM was published in the *Federal Register* for a 90-day public comment period, the Commission released a

preliminary copy of the NPRM in a press release on October 11, 2023.

In accordance with Section 18(b)(1) of the FTC Act, 15 U.S.C. 57a(b)(1), which requires the Commission to provide the opportunity for an informal hearing in Section 18 rulemaking proceedings, the NPRM also announced the opportunity for interested persons to present their positions orally at an informal hearing. Eight of the commenters requested the opportunity to present their position orally or participate at an informal hearing. Nine additional commenters requested the opportunity to participate in a hearing if one were held but did not request a hearing themselves.

II. The Requests for an Informal Hearing; Presentation of Oral Submissions

Section 18 of the FTC Act, 15 U.S.C. 57a, as implemented by the Commission's Rules of Practice, 16 CFR 1.11(e),¹ provides interested persons with the opportunity to present their positions orally at an informal hearing upon request.² To make such a request, a commenter must submit, no later than the close of the comment period for the NPRM, (1) a request to make an oral submission, if desired; (2) a statement identifying the interested person's interests in the proceeding; and (3) any proposal to add disputed issues of material fact to be addressed at the hearing.³

The following eight commenters requested an informal hearing generally in accordance with the requirements of 16 CFR 1.11(e):⁴

¹ The FTC Act provides that "an interested person is entitled to present his position orally or by documentary submission (or both)." 15 U.S.C. 57a(c)(2)(A).

² 16 CFR 1.11(e).

³ 16 CFR 1.11(e)(1)–(3).

⁴ In addition to this list, the Commission received a request from the Towing and Recovery Association of America, Inc. on February 23, 2024, more than two weeks after the close of the comment period, requesting an opportunity to make an oral presentation. Because any such requests must be submitted no later than the close of the comment period, 16 CFR 1.11(e), this request did not meet the requirements to be allowed an opportunity to present at an informal hearing.

1. ACA Connects – America’s Communication Association (“ACA Connects”)⁵
2. American Bankers Association and Consumer Bankers Association (“Bankers Associations”)⁶
3. U.S. Chamber of Commerce (“the Chamber”)⁷
4. NCTA – The Internet & Television Association (“NCTA”)⁸
5. International Franchise Association (“IFA”)⁹
6. BattleLine LLC¹⁰
7. IHRSA, the Global Health and Fitness Association¹¹

⁵ ACA Connects “represents approximately 500 small and medium-sized independent companies . . . that provide broadband, phone, and video services to nearly 8 million customers and offer services to 18 percent of households nationwide.” ACA Connects, Cmt. on NPRM at n. 1 (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3143>.

⁶ The American Bankers Association represents “the nation’s \$23.6 trillion banking industry, which is composed of small, regional and large banks.” Bankers Associations, Cmt. on NPRM at n.1 (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3139>. The Consumer Bankers Association is a “national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses.” *Id.* at n.2.

⁷ The Chamber did not fulfill the requirement to identify its interest in an informal hearing proceeding. *See* 16 CFR 1.11(e)(2) (containing requirements for requesting an informal hearing); U.S. Chamber of Commerce, Cmt. on NPRM (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3127>. Nevertheless, on its website, the Chamber describes itself as “the world’s largest business organization [whose] members range from the small businesses and chambers of commerce across the country that support their communities, to the leading industry associations and global corporations that innovate and solve for the world’s challenges, to the emerging and fast-growing industries that are shaping the future.” U.S. Chamber of Commerce, <https://www.uschamber.com/about>. Based on this description, the Commission will allow the Chamber to participate in the informal hearing if it so chooses.

⁸ NCTA “represents network innovators, content creators, and voice providers that connect, entertain, inform, and inspire consumers nationwide. NCTA is the principal trade association for the U.S. cable industry, . . . [which] is also the nation’s largest residential broadband provider.” NCTA, Cmt. on NPRM at n.1 (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3233>.

⁹ IFA represents “franchise companies in over 300 different industries, individual franchisees, and companies that support those franchise companies in marketing, law, technology, and business development.” IFA, Cmt. on NPRM at 1 (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3294>.

¹⁰ Jeremy Roseberry, of BattleLine LLC, is “a professional with expertise in financial market structure and technological solutions for fee transparency.” BattleLine LLC, Cmt. on NPRM at 2 (Dec. 5, 2023), <https://www.regulations.gov/comment/FTC-2023-0064-2574>.

¹¹ IHRSA is a trade association that represents “health and fitness clubs, gyms, studios, sports and aquatic facilities, and industry partners.” IHRSA, Cmt. on NPRM at 1–2 (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3269>.

8. National Taxpayers Union Foundation¹²

Gibson Dunn & Crutcher LLP (“Gibson Dunn”) also submitted a comment that referenced an informal hearing but did not identify the law firm’s interests in the proceeding as required by 16 CFR 1.11(e)(2).¹³ The comment nevertheless identified a list of three questions as disputed issues of material fact and recommended that the Commission permit expert testimony if it proceeds with an informal hearing. While the Commission does not find that Gibson Dunn is an interested party that requested an informal hearing,¹⁴ the Commission, in its discretion, addresses Gibson Dunn’s purported issues of material fact herein.

In addition, while the following commenters stated that an informal hearing was not necessary, they requested the opportunity to make an oral presentation if the Commission held an informal hearing at others’ requests:

1. A coalition of 52 national and state consumer advocacy groups submitted by the Consumer Federation of America (“CFA”) (collectively, “CFA consumer advocacy coalition”).¹⁵

¹² NTUF is an organization of experts and advocates who “engage in in-depth research projects and informative, scholarly work pertaining to taxation in all aspects” and have worked to develop “responsible tax administration for nearly five decades.” NTUF, Cmt. on NPRM at (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3258>.

¹³ *See generally* Gibson Dunn, Cmt. on NPRM (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3238>. Gibson Dunn also contends that any informal hearing would be constitutionally infirm. *Id.* at 10.

¹⁴ Unlike the Chamber of Commerce, Gibson Dunn’s interest in this proceeding is not readily apparent through publicly available information. The Commission has made clear that lawyers should make plain who they are representing or if they are representing their own interests. 88 FR 19024 n.14 (“The Commission reserves the right to decline any request for participation that fails to disclose the requester’s identity and interest in the proceeding. Lawyers and others who act on behalf of clients or other individuals or entities should expressly identify those whom they are representing with an interest in the proceeding—or disclaim. . .that they are acting on behalf of any client.”).

¹⁵ The comment was authored by American Economic Liberties Project, Consumer Action, Consumer Federation of America, National Association of Consumer Advocates, National Consumer Law

2. CFA, National Consumer Law Center (“NCLC”) on behalf of its low-income clients, and the National Association of Consumer Advocates (“NACA”) (“CFA Auto Comment”).¹⁶
3. A coalition of 33 health and consumer protection advocacy groups submitted by Community Catalyst (“Health and Consumer Protection Coalition”).¹⁷
4. A coalition of 39 housing justice advocacy organizations submitted by the National Housing Law Project (“NHLP”).¹⁸
5. NCLC on behalf of its low-income clients, Prison Policy Initiative (“PPI”), and Stephen Raher.¹⁹
6. Formerly Incarcerated, Convicted People and Families Movement (“FICPFM”).²⁰

Center, National Consumers League, U.S. Public Interest Research Group and signed by 52 “national and state consumer advocacy groups” including the comment’s authors. CFA consumer advocacy coalition, Cmt. on NPRM at 1–2 (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3160>.

¹⁶ While CFA, NCLC, and NACA submitted additional coalition comments, this comment was limited to the proposed rule’s coverage of auto dealers. CFA Auto Comment, Cmt. on NPRM (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3270>.

¹⁷ The coalition consists of 33 groups that “focus on a range of health and consumer protection issues, including medical debt, disability rights, health equity, and economic justice.” Health and Consumer Protection Coalition, Cmt. on NPRM at 1 (Feb. 7, 2024), <https://www.regulations.gov/docket/FTC-2023-0064/comments?filter=FTC-2023-0064-3191>.

¹⁸ The comment was submitted on behalf of 39 “organizations engaged in housing justice advocacy” including the National Housing Law Project, whose “mission is to advance housing justice for people living in poverty and their communities” and the Housing Justice Network, which is a “field network of over 2,000 community-level housing advocates and resident leaders. . . committed to protecting affordable housing and residents’ rights for low-income families across the country.” NHLP, Cmt. on NPRM at 1 (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3235>.

¹⁹ NCLC, PPI, and Raher, Cmt. on NPRM at 1 (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3283>.

²⁰ The FICPFM comment was signed by a coalition of 55 members and allies of FICPFM and prepared in collaboration with the Partnership for Just Housing. FICPFM “is a national movement of directly impacted people speaking in our own voices about the need to end mass incarceration, America’s current racial and economic caste system.” FICPFM, Cmt. on NPRM at 1 (Feb. 7, 2024), <https://www.regulations.gov/docket/FTC-2023-0064/comments?filter=FTC-2023-0064-3199>.

7. Truth in Advertising, Inc. (“TINA.org”).²¹
8. NCLC (“NCLC Housing Comment”).²²
9. Fair Price, Fair Wage Coalition.²³

The Commission finds these requests were generally adequate²⁴ and therefore will hold an informal hearing. These commenters will have the opportunity to make oral presentations during the informal hearing. The Commission does not find it necessary to identify any group of interested persons with the same or similar interest in the proceeding.²⁵

III. Disputed Issues of Material Fact; Final Notice

In the NPRM, the Commission did not identify any disputed issues of material fact that needed to be resolved at an informal hearing. However, the Commission may

²¹ TINA.org is “a nonpartisan, nonprofit consumer advocacy organization whose mission is to combat deceptive advertising and consumer fraud; promote understanding of the serious harms commercial dishonesty inflicts; and work with consumers, businesses, independent experts, synergy organizations, self-regulatory bodies and government agencies to advance countermeasures that effectively prevent and stop deception in our economy.” TINA.org, Cmt. on NPRM at 1 (Feb. 6, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3104>. TINA.org filed an addendum to its original comment clarifying that while it believes there are no disputed issues of material fact, it nevertheless requests participation in any hearing if the Commission determines that such disputes exist. TINA.org, Cmt. Addendum on NPRM (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3136>.

²² While NCLC submitted additional coalition comments, this comment was limited to the proposed rule’s relationship to rental housing fees. NCLC Housing Comment, Cmt. on NPRM (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3218>.

²³ This comment was submitted by DC Jobs With Justice, Jews United for Justice, Metro DC Democratic Socialists of America, National Women’s Law Center, Restaurant Opportunities Center of DC, United Planning Organization, Max Hawla, consumer and tipped worker, and Trupti Patel, consumer and tipped worker, who are “consumers, tipped professionals, grassroots organizations, policy organizations, and advocates in the District of Columbia that form part of the District of Columbia Fair Price, Fair Wage coalition.” Fair Price, Fair Wage Coalition, Cmt. on NPRM at 1, 6 (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3248>.

²⁴ The Commission notes that two commenters, the Chamber of Commerce and the IFA, did not specifically request the opportunity to present orally at an informal hearing.

²⁵ 16 CFR 1.12(a)(5) requires the initial notice of informal hearing to include a “list of the groups of interested persons determined by the Commission to have the same or similar interests in the proceeding.” 16 CFR 1.12(d) explains that the Commission “will, if appropriate, identify groups of interested persons with the same or similar interests in the proceeding.” Doing so facilitates the Commission’s ability to “require any group of interested persons with the same or similar interests in the proceeding to select a single representative to conduct cross-examination on behalf of the group.” *Id.*

still do so in this initial notice of informal hearing, either on its own initiative or in response to a persuasive showing from a commenter.²⁶ A number of commenters proposed potential disputed issues of material fact for the Commission’s consideration.

ACA Connects identified the following purported disputed issues of material fact:

1. “Do CSPs [(an abbreviation for “communications service providers”)] engage in a widespread pattern of deceiving consumers through deceptive or misleading fee disclosures?”
2. “Will consumers be confused by duplicative and/or conflicting disclosure requirements?”
3. “Will the Proposed Rule impose significant costs on CSPs?”
4. “Will the costs imposed by the Proposed Rule result in decreased competition in the communications marketplace?”
5. “Will the Proposed Rule as applied to CSPs result in less transparency or greater consumer confusion about prices, terms, and conditions?”
6. “Will the Proposed Rule effectively reduce consumer “search time” for broadband, voice, and cable services?”²⁷

The **NCTA** identified the following purported disputed issues of material fact:

1. “Do 90% of firms (exclusive of the live-event ticketing, short-term lodging, and restaurant industries) already comply with the proposed rule?”

²⁶ See 16 CFR 1.12(a)(3); 15 U.S.C. 57a(c)(2)(B); *see also* 88 FR 77420, 77440 (Nov. 9, 2023).

²⁷ ACA Connects, Cmt. on NPRM at 15–16.

2. “Will the proposed rule reduce consumers’ search costs? Will the proposed rule facilitate the ability to accurately compare products?”
3. “Do reasonable consumers expect the ‘total price’ ‘exclusive of government charges’ to exclude only government charges imposed directly on consumers?”²⁸

The **Bankers Associations** argued that “there appears to be a ‘disputed issue of material fact’ . . . concerning the relationship between the disclosures required by the Proposed Rule and the disclosures required under other federal consumer financial law.”²⁹

The **Chamber** did not articulate the disputed issues in the form of questions but recommended “an informal hearing with an opportunity for cross-examination of witnesses or workshop to explore”:

1. “consumer expectations about fees or charges consumers expect to be included with the purchase of a product or service,”
2. “how displaying Total Price more prevalent than any other pricing information will impact consumer’s understanding of and access to cost-saving discounts and rebates,”
3. “the impact of extensive fee disclosures early in the purchasing process on consumer’s understanding of fees most likely to generate additional costs post-purchase or most relevant to the consumer’s purchasing decision,”
4. “the procompetitive impacts or efficiencies of partitioned or drip pricing,”
and

²⁸ NCTA, Cmt. on NPRM at 31–32.

²⁹ Bankers Associations, Cmt. on NPRM at 8.

5. “whether a fee disclosure that complies with the Commission’s ‘Total Price’ requirements is easier for a consumer to navigate, understand, and comparison shop than (1) disclosures that provide item price information separate from dynamic or variable fees or (2) where dynamic or variable fees vary, similar to shipping and carriage costs, depending on characteristics of the order not ascertainable until the consumer provides information or makes order selections.”³⁰

The **IFA** did not independently identify any disputed issues of material fact in its request for an informal hearing, but it appeared to endorse those raised by the Chamber.³¹

Finally, **Gibson Dunn** stated that “[a]mong others, there are factual questions relating to (1) whether the practices are ‘deceptive’ or ‘unfair,’ (2) whether such unfair or deceptive practices are ‘prevalent,’ and (3) the extent to which the Proposed Rule’s substantial costs outweigh the relatively marginal benefits, given disputes over what costs the Rule would impose, what benefits it would present, and how those costs and benefits would be reflected in various industries.”³² Although Gibson Dunn failed to meet the requirements of 16 CFR 1.11(e) in several respects, the Commission will nevertheless address these purported issues of material fact in this Notice.

To be appropriate for cross-examination or rebuttal, a disputed issue of material fact must raise “specific facts” that are “necessary to be resolved”³³ and not “legislative

³⁰ Chamber, Cmt. on NPRM at 19–21.

³¹ IFA, Cmt. on NPRM at 13. The IFA noted that “in the Chamber Comment and IHRSA [comments], there are disputed issues of material fact needing to be resolved and requiring an informal hearing.” However, IHRSA did not raise any disputed issues of material fact in their comment filed in this proceeding.

³² Gibson Dunn, Cmt. on NPRM at 10 (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3238>.

³³ See, e.g., 16 CFR 1.13(b)(1)(i) (issues that “must” be considered for cross-examination or rebuttal are only those disputed issues of fact the Commission determines to be “material” and “necessary to resolve”).

facts.”³⁴ Unlike specific facts, legislative facts “help . . . determine the content of law and of policy” and do not need to “be developed through evidentiary hearings” because they “combine empirical observation with application of administrative expertise to reach generalized conclusions.”³⁵ The relevant legislative history explains that “disputed issues of material fact necessary to be resolved” should be interpreted narrowly.³⁶ In this context, “disputed” and “material” are given the same meaning as in the standard for summary judgment.³⁷ As in summary judgment, the challenging party must do more than

³⁴ 16 CFR 1.12(b)(1) (“An issue for cross-examination or the presentation of rebuttal submissions, is an issue of specific fact in contrast to legislative fact.”). “The only disputed issues of material fact to be determined for resolution by the Commission are those issues characterized as issues of specific fact in contrast to legislative fact. It was the judgment of the conferees that more effective, workable and meaningful rules will be promulgated if persons affected by such rules have the opportunity afforded by the bill, by cross-examination and rebuttal evidence or other submissions, to challenge the factual assumptions on which the Commission is proceeding and to show in what respect such assumptions are erroneous.” H.R. Rep. No. 93-1606, at 34 (Dec. 16, 1974) (Conf. Rep.). Further, as explained in *Association of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1164 (D.C. Cir. 1979), the distinction between “specific fact” and “legislative fact” grew out of a recommendation from the Administrative Conference of the United States (ACUS):

Conference Recommendation 72-5 is addressed exclusively to agency rulemaking of general applicability. In such a proceeding, almost by definition, adjudicative facts are not at issue, and the agency should ordinarily be free to, and ordinarily would, proceed by the route of written comments, supplemented, perhaps, by a legislative-type hearing. Yet there may arise occasionally in such rulemaking proceedings factual issues which, though not adjudicative, nevertheless justify exploration in a trial-type format because they are sufficiently narrow in focus and sufficiently material to the outcome of the proceeding to make it reasonable and useful for the agency to resort to trial-type procedure to resolve them. These are what the Recommendation refers to as issues of specific fact.

Id. at 1164.

³⁵ *Ass’n of Nat’l Advertisers*, 627 F.2d at 1161–62.

³⁶ *See, e.g.*, H.R. Rep. No. 93-1107, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 7702, 7728; *Ass’n of Nat’l Advertisers*, 627 F.2d at 1163 (quoting H.R. Rep. No. 93-1606, at 33 (1974) (Conf. Report)).

³⁷ As explained in the legislative history:

The words ‘disputed issues of material fact’ are intended to describe and limit the scope of cross-examination in a rulemaking proceeding. Thus, the right of participants in the proceeding to cross-examine Commission witnesses does not include cross-examination on issues as to which there is not a bona fide dispute. In this connection, the Committee considers the rules of summary judgment applied by the courts analogous. Where the weight of the evidence is such that there can be no bona fide dispute over the facts, summary judgment is proper. Similarly, in such a situation cross-examination would not be permitted; neither is a participant entitled to cross-examination where the disputed issues do not involve material facts. This language in the bill is used to distinguish facts

simply assert there is a dispute regarding the Commission’s findings. If those findings are otherwise adequately supported by record evidence, the challenging party must come forward with sufficient evidence to show there is a genuine, *bona fide* dispute over material facts that will affect the outcome of the proceeding.³⁸

The purported disputed issues of material fact described above fall generally into several categories: the Commission’s determination of unfair or deceptive practices, the Commission’s finding of prevalence, the relationship between the proposed rule’s obligations and those imposed by existing rules and regulations, and the Commission’s cost-benefit analysis. In addition, one commenter raised questions about the scope of the proposed rule’s definition of Government Charges.

First, two commenters raised questions regarding the Commission’s findings that pricing structures that do not initially disclose the total mandatory cost of a good or service are deceptive or unfair.³⁹ These arguments do not raise disputed issues of material fact because they are legal and legislative issues rather than specific issues of

which might be relevant to the proceeding but not of significant enough import to rise to the level of materiality. The word material is used here with the same meaning it is given under the common law rules of evidence. Also of importance is the word ‘fact.’ Cross-examination is not required regarding issues in rulemaking proceedings which are not issues of fact. Examples of such issues are matters of law or policy or matters whose determination has been primarily vested by Congress in the Federal Trade Commission. Thus, unless the subject matter with regard as to which cross-examination is sought relates to disputed issues, which are material to the proposed rule and which are fact issues, there is no right to cross-examination on the part of any party to the proceeding.

H.R. Rep. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7702, 7728.

³⁸ *Id.*; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (explaining the standard as “[o]nly disputes over facts that might affect the outcome”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

³⁹ *See* Chamber, Cmt. on NPRM at 20 (recommending a hearing with evidentiary procedures on “consumer expectations about fees or charges consumers expect to be included with the purchase of a product or service” and “the impact of extensive fee disclosures early in the purchasing process on consumer’s [sic] understanding of fees most likely to generate additional costs post-purchase or most relevant to the consumer’s purchasing decision”); Gibson Dunn, Cmt. on NPRM at 10 (disputing “(1) whether the practices are ‘deceptive’ or ‘unfair’”).

fact. Whether the practices of misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees are unfair or deceptive are legal questions. The Commission established the unfairness and deceptiveness of these practices through legal analysis in Section III.A–B of the NPRM.⁴⁰ Even if these questions were questions of specific fact, they do not raise *bona fide* disputes because the Commission has supported its findings with evidence, and the commenters have not introduced their own evidence to contradict the Commission.⁴¹

Second, two commenters argued that the Commission’s finding that bait-and-switch pricing practices are prevalent was a disputed fact.⁴² The Commission must make two findings regarding prevalence if it promulgates a rule under Section 18. First, the NPRM must set forth the Commission’s “reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.”⁴³ The Commission articulated its reasons to believe bait-and-switch pricing practices are prevalent in Section III of the NPRM, particularly Section III.C, which discusses the comments received in response to the ANPR, the Commission’s history of enforcement actions, and other complementary work that demonstrate the prevalence of these

⁴⁰ NPRM, 88 FR at 77432 nn.146–47 (citing long-held FTC positions that misleading door openers are deceptive and caselaw recognizing that it is a violation of the FTC Act if a consumer’s first contact is induced through deception, even if the truth is clarified prior to purchase). The Commission also cited evidence demonstrating harm from unfair and deceptive fee practices, specifically the practice of advertising only part of a product’s price upfront and revealing additional charges later as consumers go through the buying process (drip pricing) and the practice of dividing the price into multiple components without disclosing the total (partitioned pricing). *See, e.g., id.* at n.153.

⁴¹ The comments received in response to the ANPR, in addition to the Commission’s history of enforcement actions, demonstrated that advertising misrepresentation and unlawful practices related to pricing and added fees are a chronic problem confronting consumers.

⁴² ACA Connects, Cmt. on NPRM at 15 (“Do CSPs engage in a widespread pattern of deceiving consumers through deceptive or misleading fee disclosures?”); Gibson Dunn, Cmt. on NPRM at 10 (disputing “(2) whether such unfair or deceptive practices are ‘prevalent’”).

⁴³ 15 U.S.C. 57a(b)(3).

practices. Second, the Commission must include “a statement as to the prevalence of the acts or practices treated by the rule”⁴⁴ in the statement of basis and purpose to accompany any final rule. Ultimately, the Commission’s prevalence findings need only have “some basis or evidence” to show “the practice the FTC rule seeks to regulate does indeed occur.”⁴⁵

Third, two commenters raised issues regarding the proposed rule’s interaction with other rules, regulations, or statutes.⁴⁶ In the NPRM, the Commission solicited input “to determine if compliance with the proposed rule along with the specific disclosure provisions for certain types of sectors or transactions would be impossible, overly burdensome, or beneficial.”⁴⁷ The Bankers Associations in particular provided detailed views regarding the interplay between the requirements of the proposed rule and a number of rules and regulations that contain pricing disclosure requirements applicable to certain consumer financial services products. The Commission appreciates the views of the Bankers Associations regarding these important questions and will give them careful consideration. However, determining the appropriate scope of the proposed rule and its interaction with other legal obligations is a quintessential question of legal interpretation

⁴⁴ 15 U.S.C. 57a(d)(1)(A).

⁴⁵ *Pa. Funeral Dirs. v. FTC*, 41 F.3d 81, 87 (3d Cir. 1994). *ACA Connects* appears to suggest that the Commission must make a determination that a practice is widespread in every individual industry and market in order to support a finding of prevalence. It offers no support for this assertion, which runs contrary to precedent finding that “even where there is a limited record as to the prevalence of a practice on a nationwide basis or where the data reviewed only relates to a few states, the practice can be found to be prevalent enough to warrant a regulation.” *Id.* Furthermore, the NPRM described numerous comments in response to the ANPR and enforcement actions involving these practices in various industries, including the telecommunications industry. *ACA Connects* failed to provide any evidence to demonstrate a *bona fide* dispute as to this question.

⁴⁶ *ACA Connects*, Cmt. on NPRM at 15 (“Will consumers be confused by duplicative and/or conflicting disclosure requirements?”); *Bankers Associations*, Cmt. on NPRM at 8 (describing issues “concerning the relationship between the disclosures required by the Proposed Rule and the disclosures required under other federal consumer financial law.”).

⁴⁷ NPRM, 88 FR at 77480, Section IX.

and policy and is not determined by the resolution of an issue of specific fact. The comment from ACA framed the issue as whether consumers would be confused by duplicative or conflicting disclosure requirements. Here again, whether the disclosure requirements are duplicative or conflicting is a legal question and the question of whether consumers might be confused by multiple disclosure falls more neatly into the category of a legislative fact—“combining empirical observation with application of administrative expertise to reach generalized conclusions”—than a specific fact. The Commission appreciates the views and commentary ACA provided on this topic and will give them careful consideration, but is not persuaded that they present disputed issues of material fact.

Fourth, several commenters challenged the adequacy of the Commission’s cost-benefit analysis, including the impact of the proposed rule on consumer understanding and competition, and assumptions underlying the Commission’s analysis. Section VII of the NPRM contains the Commission’s Preliminary Regulatory Analysis, required under 15 U.S.C. 57b-3(a), setting forth the Commission’s preliminary analysis of the projected benefits and any adverse economic effects (or other effects) for the proposed rule. The Preliminary Regulatory Analysis is supported by substantial evidence, that is, it contains “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁴⁸ The NPRM quantified costs and benefits where it could, and, where costs and benefits could not be quantified, the Commission identified assumptions made to reach its conclusions. If an assumption was needed, the NPRM made clear which quantities were being assumed. The Commission’s preliminary analysis concluded that

⁴⁸ *Pa. Funeral Dirs. Ass’n v. FTC*, 41 F.3d at 85.

there are positive benefits to the proposed rule if the benefit per consumer is at least \$6.65 per year over a 10-year period. For both quantified benefits and costs, the Commission provided a range representing the set of assumptions that resulted in a “low-end” or “high-end” estimate and the \$6.65 benefit threshold assumes the high-end estimate of costs. Ultimately, the Commission’s analysis calculated low-end and high-end estimates of the total quantified economy-wide costs and the necessary “break-even benefit” per consumer.

Several commenters asserted that the Commission failed to consider potential costs to consumers, suggesting that the proposed rule may result in consumer confusion and difficulty comparing prices. ACA Connects argued that the proposed rule “would increase consumer search times if CSPs” opt to “present consumers with multiple pricing formats” or “forgo providing up-front pricing information” to comply with the proposed rule. NCTA similarly raised concerns that the Proposed Rule could result in businesses omitting pricing information from advertising, thereby “undermining the rule’s stated goal of reducing consumers’ search time.” The Chamber argued that there is a disputed issue of material fact concerning the benefits to consumers of the proposed rule’s ‘Total Price’ requirement, as compared to itemized disclosures or variable or dynamic pricing models. The Chamber further suggested that the proposed rule may negatively impact consumers because it will result in consumer confusion and will impact consumer access to “cost-saving discounts and rebates.”⁴⁹ Gibson Dunn contended generally that there is a

⁴⁹ As the Commission indicated in the NPRM, under the proposed rule, businesses would be free to apply discounts and rebates after disclosing Total Price. NPRM, 88 FR at 77439, Section V.A. To the extent that the Chamber is seeking further clarification on the Commission’s understanding of Total Price for consumers that have provided loyalty or discount membership information, the Commission appreciates this comment and will give it careful consideration.

disputed issue of material fact concerning “the extent to which the Proposed Rule’s substantial costs outweigh the relatively marginal benefits, given disputes over what costs the Rule would impose, what benefits it would present, and how those costs and benefits would be reflected in various industries.”

Commenters also questioned the Proposed Rule’s impact on competition. Both ACA Connects and the Chamber argued that a disputed issue of material fact exists as to the impact of the Proposed Rule on competition in the marketplace. ACA Connects asserted that if adopted, the Proposed Rule “may undermine competition among CSPs by giving an unfair competitive advantage to larger firms that can afford to expend the financial resources to take on the legal risk of continuing to advertise pricing to consumers.” The Chamber, for its part, suggested that “partitioned and drip pricing may have pro-competitive and pro-consumer justifications” that the Commission did not consider in its cost-benefit analysis.

These questions about the Commission’s cost-benefit analysis do not constitute disputed issues of material fact. As noted above, the legislative history strongly suggests the term “disputed issues of material fact” should be interpreted narrowly and given the same meaning as in summary judgment.⁵⁰ Further, a challenging party must demonstrate that there is a *bona fide* dispute that will affect the outcome of the rulemaking proceeding.⁵¹ None of the commenters provided competing empirical evidence or data to challenge the Commission’s analysis, and instead offered unsupported statements, predictions about how businesses might respond to the proposed rule, or general requests

⁵⁰ See *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1164 (D.C. Cir. 1979); Kurt Walters, *Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC*, 16 Harv. L. & Pol’y Rev. 519, 544 (2022).

⁵¹ See *Ass’n of Nat’l Advertisers*, 627 F.2d at 1162.

for further analysis.⁵² Summarily disagreeing with the Commission’s analysis does not create a material or disputed issue of fact.

The Commission reaches the same conclusion with respect to NCTA’s challenge to the NPRM’s assumption that 90% of firms (excepting live-event ticketing, short-term lodging, and the restaurant industry) already comply with the proposed rule. The NCTA argues that the 90% assumption is “inaccurate with respect to the communications industry and, in turn, likely invalid for the economy as a whole.” As with other contentions about the Commission’s cost-benefit analysis, NCTA does not provide any empirical evidence or data challenging the Commission’s assumption.⁵³ Further, the Commission makes plain that this assumption is not necessarily material to its break-even analysis as any increase to this number has effects on estimated costs *and* benefits that largely cancel each other out.⁵⁴ If the 90% assumption is an overestimate, costs go up, but so do benefits; if the assumption is an underestimate, costs and benefits both go

⁵² Gibson Dunn attempts to recreate the Commission’s break-even analysis by modifying the rate firms will pay data scientists and attorneys to come into compliance with the proposed rule; but Gibson Dunn offers no contrary evidence to challenge the Commission’s assumptions, other than to say that they are incorrect. Instead, Gibson Dunn’s comment offers a critique of the Commission’s economic analysis, challenging many of the Commission’s estimates as unlikely and contending that the calculations estimating benefits are too high and the calculations estimating costs too low. The Commission is reviewing this analysis carefully.

⁵³ The NPRM contains a break-even analysis, which estimates the break-even point considering both a 90% existing compliance rate with the Proposed Rule *and* a 50% existing compliance rate with the Proposed Rule. The break-even analysis in the NPRM is specific and explains the Commission’s reasoning. Additionally, while the Commission is not required to comply with OMB Circular A-4, the NPRM’s break-even analysis is consistent with OMB guidance. Such break-even analyses are accepted practice by OMB, particularly where “non-monetized benefits and costs are likely to be important.” OMB Circular A-4 at 47–48. (Nov. 9, 2023). Moreover, the assumptions underlying the break-even analysis are precisely the kind of legislative facts “involving expert opinions and forecasts, which cannot be decisively resolved by testimony.” *Ass’n of Nat’l Advertisers*, 627 F.2d at 1162 n.22 (“Because legislative facts combine empirical observation with application of administrative expertise to reach generalized conclusions, they need not be developed through evidentiary hearings.”).

⁵⁴ NPRM, 88 FR at 77452, Section VII.C.2.f.(2) Break-Even Analysis of Economy-Wide Costs and Benefits.

down. Thus, NCTA has failed to demonstrate that the 90% assumption is a disputed issue of specific fact or an issue that is material for the Commission to resolve.

Finally, NCTA identifies as a disputed issue of material fact whether “reasonable consumers expect the ‘total price’ ‘exclusive of government charges’ to exclude only government charges imposed directly on consumers?”⁵⁵ NCTA posits that the “NPRM makes inherent assumptions about the fees or government charges a reasonable consumer would expect to be included or excluded in the Total Price for a good or service.” Record evidence supporting the NPRM demonstrates consumers believe all mandatory charges should be reflected in the total price, in many instances specifically *including* taxes.⁵⁶ Nevertheless, the Commission’s basis for its proposed Government Charges definition was to ensure that all mandatory charges are reflected in the Total Price, including “amounts that the government imposes on a business and that the business chooses to pass on to consumers,” to prevent a business from “artificially inflating taxes that are excluded from the Total Price.” The proposed rule does not prohibit itemization and businesses are free to itemize all government charges or other fees that the Total Price comprises. NCTA also gives the view that other regulatory pricing requirements have made different determinations regarding government charges. The Commission appreciates NCTA’s comparisons and will consider them in its continued analysis of how the proposed rule interacts with other rules and regulations. Again, however, these are questions of law and legislative fact, not specific facts.

⁵⁵ NCTA, Cmt. on NPRM at 32.

⁵⁶ NPRM, 88 FR at 77430–31 n.124.

Thus, the Commission finds that there are no “disputed issues of material fact” to resolve at the hearing⁵⁷ and no need for cross-examination or rebuttal submissions.⁵⁸

This initial notice of informal hearing also serves as the “final notice of informal hearing.”⁵⁹ A final notice of informal hearing is limited in its substance to matters that arise only when the Commission designates disputed issues of material fact: who will conduct cross-examination; whether any interested persons with similar interests will be grouped together for such purposes; and who will make rebuttal submissions.⁶⁰ Because cross-examination and submission of rebuttal evidence are not anticipated to occur in this informal hearing, no separate final notice of informal hearing is necessary.

IV. List of Hearing Participants; Making an Oral Statement; Requests for Documentary Submissions

Pursuant to Commission Rule 1.12(a)(4), 16 CFR 1.12(a)(4), the following is the list of interested persons (“Hearing Participants”) who will have the opportunity to make oral presentations at the informal hearing:

1. ACA Connects – America’s Communication Association
2. American Bankers Association and Consumer Bankers Association
3. U.S. Chamber of Commerce
4. NCTA – The Internet & Television Association
5. International Franchise Association
6. BattleLine LLC

⁵⁷ If any interested person seeks to have additional disputed issues of material fact designated, the person may make such request to the presiding officer pursuant to 16 CFR 1.13(b)(1)(ii).

⁵⁸ 16 CFR 1.12(b).

⁵⁹ 16 CFR 1.12(c).

⁶⁰ *Id.*

7. IHRSA, the Global Health and Fitness Association
8. National Taxpayers Union Foundation
9. The coalition of 52 national and state consumer advocacy groups represented by the Consumer Federation of America
10. National Consumer Law Center (“NCLC”) on behalf of its low-income clients
11. National Association of Consumer Advocates
12. The coalition of 33 health and consumer protection advocacy groups represented by Community Catalyst
13. The coalition of 39 housing justice advocacy organizations represented by the National Housing Law Project
14. Prison Policy Initiative, and Stephen Raher
15. Formerly Incarcerated, Convicted People and Families Movement
16. Truth in Advertising, Inc.
17. Fair Price, Fair Wage Coalition

Oral statements will be limited to 15 minutes, although they may be supplemented by documentary submissions as described below, and the presiding officer may grant an extension of time for good cause shown. Transcripts of the oral statements will be placed in the rulemaking record. Hearing Participants will be provided with instructions as to how to participate in the virtual hearing.

If you are a Hearing Participant and would like to submit your oral presentation in writing or file a supplementary documentary submission, please write “Unfair or Deceptive Fees Rule (16 CFR Part 464) (R207011)” on your submission and send it

electronically to *electronicfilings@ftc.gov*, with a copy to *OALJ@ftc.gov*. If you prefer to file your submission on paper, mail it to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H-144 (Annex J), Washington, DC 20580. If possible, please send your paper submission to the Commission by overnight service.

If you file a documentary submission under this section, your submission—including your name and your state—will be placed on the public record of this proceeding, including on the website *https://www.ftc.gov*. Because your documentary submission will be placed on the public record, you are solely responsible for making sure that it does not include any sensitive or confidential information. In particular, your submission should not contain sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your documentary submission does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your documentary submission should not include any “[t]rade secret or any commercial or financial information which . . . is privileged or confidential”—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including, in particular, competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Documentary submissions containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with Commission Rule 4.9(c), 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the submission must include the factual and legal basis for the confidentiality request and must identify the specific portions to be withheld from the public record. *See* Commission Rule 4.9(c). Your documentary submission will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your documentary submission has been posted publicly at <https://www.ftc.gov>—as legally required by Commission Rule 4.9(b), 16 CFR 4.9(b)—we cannot redact or remove it, unless you submit a confidentiality request that meets the requirements for such treatment under Commission Rule 4.9(c), 16 CFR 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of submissions to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive documentary submissions it receives from the Hearing Participants on or before [INSERT DATE 14 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

Hearing Participants who need assistance should indicate as much in their submissions, and the Commission will endeavor to provide accommodations. Hearing Participants without the computer technology necessary to participate in video

conferencing will be able to participate in the informal hearing by telephone; they should indicate as much in their submissions.

V. Conduct of the Informal Hearing; Role of Presiding Officer

The Commission's Chief Presiding Officer, the Chair, has appointed and designates Administrative Law Judge for the Federal Trade Commission, the Honorable Jay L. Himes, to serve as the presiding officer of the informal hearing. Judge Himes will conduct the informal hearing virtually using video conferencing starting at 10:00 a.m. Eastern on April 24, 2024. The informal hearing will be available for the public to watch live from the Commission's website, <https://www.ftc.gov>, and a recording or transcript of the informal hearing will be placed in the rulemaking record.

Because there are no "disputed issues of material fact" to resolve at the informal hearing, the presiding officer is not anticipated to make a recommended decision.⁶¹ The role of the presiding officer shall include presiding over and ensuring the orderly conduct of the informal hearing, including selecting the sequence in which oral statements will be heard, placing the transcript and any additional written submissions received into the rulemaking record. The presiding officer may prescribe additional procedures or issue rulings in accordance with Commission Rule 1.13, 16 CFR 1.13. In execution of the presiding officer's obligations and responsibilities under the Commission Rules, the presiding officer may issue additional public notices.

⁶¹ See 16 CFR 1.13(d) ("The presiding officer's recommended decision will be limited to explaining the presiding officer's proposed resolution of disputed issues of material fact.").

**VI. Communications by Outside Parties to the Commissioners or Their
Advisors**

Pursuant to Commission Rule 1.18(c)(1), 16 CFR 1.18(c)(1), the Commission has determined that communications with respect to the merits of this proceeding from any outside party to any Commissioner or Commissioner advisor shall be subject to the following treatment. Written communications and summaries or transcripts of oral communications shall be placed on the rulemaking record if the communication is received before the participation deadline. They shall be placed on the public record if the communication is received later. Unless the outside party making an oral communication is a member of Congress, such communications are permitted only if advance notice is published in the Weekly Calendar and Notice of “Sunshine” Meetings.⁶²

By direction of the Commission.

April J. Tabor,

Secretary.

⁶² See 15 U.S.C. 57a(i)(2)(A); 16 CFR 1.18(c).