April 10, 2024

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Washington, DC 20580

Via Email: electronicfilings@ftc.gov, with a copy to *OALJ@ftc.gov*

**Re: Unfair or Deceptive Fees Rule (16 CFR part 464) (R207011)**

Dear Chair Khan:

Thank you for the opportunity to submit supplementary written materials regarding the proposed rule on unfair or deceptive practices relating to fees for goods or services. We represent a coalition of organizations focused on a range of health and consumer protection issues, including medical debt, disability rights, health equity, and economic justice.[1]

We commend the FTC for promulgating a proposed rule that includes the health industry. In particular, we focus on the application of the proposed rule to "facility fees," which are charges that ostensibly cover operational expenses of hospitals.[2] As hospitals acquire physician practices and other previously independent providers, patients are seeing more facility fee charges. The Biden Administration has expressed concern about such facility fees.[3]

We also emphasize that facility fees may impose the greatest burden on historically disadvantaged communities. For instance, Hispanic, American Indian and Alaska Native, and Black individuals are most likely to be uninsured[4] and therefore bear the full cost of facility fees. Further, Black and Hispanic individuals are *less* likely to report having a primary care provider and *more* likely to report receiving routine healthcare in an emergency department,[5] where facility fees are significant and unpredictable.[6] Addressing facility fees is an important step in the direction of health equity.

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[1] Comment from Community Catalyst and 32 other organizations focused on health care and consumer protection issues, FTC Regulations FTC-20230064-3191, February 2024, https://www.regulations.gov/comment/FTC-2023-0064-3191.

[2] *See* Georgetown University, "Protecting Patients from Unexpected Outpatient Facility Fees: States on the Precipice of Broader Reform," July 2023, https://georgetown.app.box.com/v/statefacilityfeereport.

[3] White House, "FACT SHEET: President Biden Announces New Actions to Lower Health Care Costs and Protect Consumers from Scam Insurance Plans and Junk Fees as Part of 'Bidenomics' Push," July 7, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/07/fact-sheetpresident-biden-announces-new-actions-to-lower-health-care-costs-and-protect-consumers-from-scam-insurance-plans-and-junk-fees-as-part-of-bidenomics-push/ ("The Administration is also concerned about an increase in patients being charged "facility fees" for health care provided outside of hospitals, like at a doctor's office.").

[4] KFF, Key Facts about the Uninsured Population, https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/#.

[5] Parast L, Mathews M, Martino S, Lehrman WG, Stark D, Elliott MN. Racial/Ethnic Differences in Emergency Department Utilization and Experience. J Gen Intern Med. 2022 Jan;37(1):49-56. doi: 10.1007/s11606-021-06738-0. Epub 2021 Apr 5. PMID: 33821410; PMCID: PMC8021298.

[6] Vox, "Emergency rooms are monopolies. Patients pay the price." Dec. 4, 2017, https://www.vox.com/health-care/2017/12/4/16679686/emergency-room-facility-fee-monopolies.

Notably, facility fees are increasing faster than other categories of health care spending.[7] Since we submitted our comments, news reports have continued to document egregious individual stories of facility fee bills and concerning patterns. For instance:

- An Ohio patient was billed $348 for his visit to an ear, nose and throat specialist at a clinic. Then, he received a second bill for a $645 facility fee – *just for the use of the office where he met his physician.*[8]
- In Ohio and Maine, facility fees are added to around 80 percent of bills for heart-disease screening sent to each state's largest insurer.[9]

Since we filed our comments, President Biden released a budget proposal that included a partial prohibition on facility fees. Specifically, the budget includes "an allowance to ban unwarranted 'facility fees' for telehealth and certain outpatient services in commercial insurance."[10] This provision is expected to reduce the cost of health care.[11]

As explained more fully in our comments, we urge the FTC to protect patients from hidden, misleading, and excessive facility fees. In this supplementary submission, we first provide a brief background on facility fees, including examples that were published after our original comments. Second, we outline how the FTC's proposed rule applies to facility fees for various services. Finally, we conclude that the FTC should move forward with this rule.

## I. Background on Facility Fees

### a. Facility fees are imposed <u>in addition to</u> fees for professional services.

Hospitals typically bill separately for: (1) professional claims; and (2) facility claims. Professional claims cover care provided by health care professionals, such as physicians and nurses. The facility claim is intended to cover the additional costs of providing care in the hospital, such as the cost of staffing an emergency room 24 hours a day and maintaining emergency medical equipment.

Independent physician offices do not charge facility fees. When physician offices are acquired by hospitals or health systems, however, those offices may begin adding a facility fee on top of the regular physician charges. This additional fee often results in confusion for patients when they visit a longstanding provider that has been acquired by a health system, many times unbeknownst to the patient.[12] Indeed, the Biden Administration has emphasized: "These fees are often a surprise for consumers."[13]

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[7] Georgetown University, "Protecting Patients from Unexpected Outpatient Facility Fees: States on the Precipice of Broader Reform," at 8, July 2023.
[8] Wall Street Journal, "Hospitals Are Adding Billions in 'Facility' Fees for Routine Care," March 25, 2024, https://www.wsj.com/health/healthcare/hidden-hospital-fees-cost-patients-hundreds-of-dollars-0024cd95.
[9] *Id.*
[10] White House, "Budget of the U.S. Government, Fiscal Year 2025," at 6, 78, https://www.whitehouse.gov/wp-content/uploads/2024/03/budget_fy2025.pdf.
[11] *Id.* at 143.
[12] *Id.* at 6.
[13] White House, "FACT SHEET: President Biden Announces New Actions to Lower Health Care Costs and Protect Consumers from Scam Insurance Plans and Junk Fees as Part of 'Bidenomics' Push," July 7, 2023,

Patients are also frequently surprised by facility fees for services or visits that do not involve specialized equipment.[14] In addition to the examples from our comments, news organizations and advocates have recently reported:

- One patient visited a pain clinic for an injection to her back, which generated a facility fee of $399.[15]
- A California patient visited a dermatologist and spoke with a medical student and physician to confirm her prescription. In addition to the charges for the treatment, she received a separate bill for a $160 facility fee.[16]
- A Maine patient visited an emergency room after he sliced off a portion of his thumb. He received only bandaging and painkilling drugs, but he was charged a $510 facility fee.[17]

**b. Facility fees encourage health care consolidation.**

Patients are increasingly exposed to facility fees because of vertical integration in health care. For instance, between July 2012 and January 2018, hospital ownership of physician practices grew by 124 percent.[18] By 2022, over half of all physicians in the country were employed by hospitals or health systems.[19]

When a hospital acquires a physician practice, the hospital may then impose facility fee charges for services at the physician offices – on top of the regular professional charges. For instance, when one patient received her annual steroid injection in 2021, which previously cost her about $30, she was shocked to find that her bill now included a $1,262 "facility fee."[20] The only change from previous years was that the hospital had "moved" the infusion clinic from an office-based practice to a "hospital-based setting" – even though the services were provided in the *same medical office building*, which was not a hospital.[21]

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https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/07/fact-sheetpresident-biden-announces-new-actions-to-lower-health-care-costs-and-protect-consumers-from-scam-insurance-plans-and-junk-fees-as-part-of-bidenomics-push/.

[14] Georgetown University, "Protecting Patients from Unexpected Outpatient Facility Fees: States on the Precipice of Broader Reform," at 8, July 2023.

[15] U.S. PIRG Education Fund, "Outpatient Outrage: Hospitals Charge Fees for Care at the Doctor's Office," at 4, March 2024, https://publicinterestnetwork.org/wp-content/uploads/2024/03/USP-Outpatient-Report-3.26.24-FINAL.pdf.

[16] *Id.*

[17] Portland Press Herald, "Task force calls for reforms to regulate hidden hospital fees," Feb. 2, 2024, https://www.pressherald.com/2024/02/02/task-force-calls-for-reforms-to-regulate-hidden-hospital-fees/.

[18] Georgetown University, "Protecting Patients from Unexpected Outpatient Facility Fees: States on the Precipice of Broader Reform," at 8, July 2023.

[19] Physicians Advocacy Institute, "COVID-19's Impact on Acquisitions of Physician Practices and Physician Employment in 2019-2021," at 12, April 2022, https://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/PAI-Research/PAI%20Avalere%20Physician%20Employment%20Trends%20Study%202019-21%20Final.pdf?ver=ksWkgjKXB_yZfImFdXlvGg%3d%3d.

[20] KFF Health News, "Her Doctor's Office Moved One Floor Up. Her Bill Was 10 Times Higher." March 6, 2021, https://kffhealthnews.org/news/article/bill-of-the-month-hospital-facility-fee-outpatient-arthritis-injections/.

[21] *Id.; see also* Wall Street Journal, "Hospitals Are Adding Billions in 'Facility' Fees for Routine Care," March 25, 2024, https://www.wsj.com/health/healthcare/hidden-hospital-fees-cost-patients-hundreds-of-dollars-0024cd95 (after an oncology practice was acquired by a health system, one breast cancer survivor was charged $400 for

Addressing facility fees is consistent with the FTC's renewed focus on consolidation and rising health care costs.[22] Significantly, facility fees *encourage* hospitals to acquire previously independent practices. "In fact, the opportunity to charge a facility fee is one incentive for hospitals to acquire these [physician] practices, which then leads to higher prices for patients, employers, and insurers," the Health Care Cost Institute explained.[23]

## II. Application of the Proposed Rule to Specific Facility Fees

### A. Telehealth Services

The proposed rule would prohibit facility fees for telehealth services. The proposed rule provides: "It is an unfair and deceptive practice and a violation of this part for any Business to misrepresent the nature and purpose of any amount that a consumer must play, including...*the identity of any good or services for which fees are charged*."[24] Patients who receive health care advice by phone or video call in their homes are not using any hospital facility. For telehealth services, charges for "facility fees" do not accurately identify the goods or services received.

Prohibiting facility fees for telehealth services is consistent with the FTC's commentary on the proposed rule. For instance, the FTC highlighted similar examples of "pricing structures that misrepresented information about the nature and purpose of fees and charges,"[25] including a "cleaning fee" for a vacation rental where the consumer was also required to conduct extensive cleaning[26] and "maintenance fees" that did not correspond to the actual maintenance of a product.[27] Similarly, charging "facility fees" when a patient speaks to a doctor from home without using any hospital facilities is a misrepresentation of the nature and purpose of the fee.

### B. Freestanding Hospital-Owned Physician Offices, Clinics, and Surgery Centers

The proposed rule would mandate disclosure of facility fees for services provided at health care offices or facilities that are not located on the hospital's campus. The proposed rule

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monitoring – compared to the $76 she was charged prior to the acquisition); Consumer Reports, "The Suprise Hospital Fee You May Get Just for Seeing a Doctor," June 13, 2019, https://www.consumerreports.org/fees-billing/surprise-hospital-fee-just-for-seeing-a-doctor-facility-fee/ (describing a patient who received an X-ray and a cortisone shot at his doctor's office in less than 30 minutes - but was charged a $1,375 facility fee because - unbeknownst to the patient - the doctor was working for a hospital).

[22] FTC, "FTC, DOJ and HHS Work to Lower Health Care and Drug Costs, Promote Competition to Benefit Patients, Health Care Workers," Dec. 7, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-doj-hhs-work-lower-health-care-drug-costs-promote-competition-benefit-patients-health-care.

[23] Health Care Cost Institute, "Facility Fees and How They Affect Health Care Prices," June 2023, https://healthcostinstitute.org/images/pdfs/HCCI_FacilityFeeExplainer.pdf; see also Consumer Reports, "The Suprise Hospital Fee You May Get Just for Seeing a Doctor," June 13, 2019, https://www.consumerreports.org/fees-billing/surprise-hospital-fee-just-for-seeing-a-doctor-facility-fee/ (noting that patients are increasingly charged facility fees for care provided *outside* a hospital "because hospitals are rapidly building or buying up not only doctor practices but also urgent-care centers, walk-in clinics, and standalone surgery complexes - pretty much all the places one might go to get healthcare").

[24] Proposed 16 C.F.R. 164.3(a) (emphasis added).

[25] 88 Fed. Reg. 216 at 7734.

[26] *Id.*

[27] *Id.* at n.186. Other examples include: (1) a "convenience fee" to purchase a ticket when the purchasing method was *not* more convenient to the consumer than any alternative; (2) "service fees" for water and other services, when water was not provided; and (3) "amenity fees" for amenities that were not available. *Id.*

provides: "A Business must disclose Clearly and Conspicuously *before the consumer consents to pay* the nature and purpose of any amount a consumer must pay that is excluded from the Total Price, including…the identity of any good or service for which fees are charged."[28] Thus, patients who schedule appointments at freestanding hospital-owned physician offices, clinics, and surgery centers must be informed about facility fees *before* they consent to pay for services at these locations.

Many patients do not realize that a freestanding physician office, health clinic, or surgery center may impose a facility fee if they are owned by a hospital. These health care offices or facilities are often located far from a hospital campus and do not appear to be a part of the hospital. Further, most patients do not track health care acquisitions, and they may not realize that a hospital has acquired a previously independent practice.

Under the FTC's proposed rule, the hospital-owned physician office, health clinic, or surgery center must disclose the facility fee before the patient agrees to pay for services at that location. When scheduling a patient for treatment, the staff member scheduling the appointment would be required to explain that the patient may be charged an additional facility fee on top of the professional charge.[29] As the FTC explained, "This information is necessary for a consumer to understand what they are purchasing and to decide whether to consent to the charge."[30]

### C. Hospitals

The proposed rule would mandate disclosure of facility fees for services provided at hospitals. The proposed rule provides: "A Business must disclose Clearly and Conspicuously *before the consumer consents to pay* the nature and purpose of any amount a consumer must pay that is excluded from the Total Price, including…the identity of any good or service for which fees are charged."[31] Thus, patients must be informed about facility fees *before* they schedule an appointment at a hospital or register for services at a hospital.

Since 2021, hospitals have been required to post online charges for common health services and procedures.[32] However, facility fees are not currently posted in a manner that allows patients to easily understand and compare charges for facility fees from different hospitals.[33] We applaud the FTC's proposed rule because they would require that patients are clearly informed about facility fees *before* they agree to receive services at a hospital.

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[28] Proposed 16 C.F.R. 464.3(b) (emphasis added).
[29] *See* proposed 16 C.F.R. § 164.3(b); see also § 464.1(c)(1) (disclosures of additional fees must be made in the same manner as other communications).
[30] 88 Fed. Reg. 216 at 77439.
[31] Proposed 16 C.F.R. 464.3(b) (emphasis added).
[32] Peterson-KFF Health System Tracker, "Ongoing Challenges with Hospital Price Transparency," Feb. 10, 2023, https://www.healthsystemtracker.org/brief/ongoing-challenges-with-hospital-price-transparency/#Percent%20of%20acute-care%20hospitals%20with%20at%20least%20one%20negotiated%20rate%20for%20MS-DRGs.
[33] *Id.* (noting that the current data does not always clarify whether the charge is a facility fee or professional charge, and it is difficult to compare charges without knowing this information).

The proposed rule would require that, when hospital staff schedule appointments by phone or register patients at the front desk, they must disclose that hospital will charge a facility fee.[34] [35] Of course, some patients facing medical emergencies may be unable to choose a different medical facility. However, other patients – such as those who visited the emergency room and ultimately left because the wait was too long[36] – might decide not to register at the front desk if they understand these potential charges.[37] For instance, patients should be aware that many emergency rooms are "charging patients hundreds or even thousands of dollars [just] for walking through the door."[38]

### D. Excessive Facility Fees

The proposed rule on misleading fees would also prohibit excessive facility fees that are unrelated to costs. Specifically, the prohibition on misrepresenting the nature and purpose of the fees would prohibit the imposition of facility fees in amounts that are not related to the use of facilities. That said, we urge the FTC to clarify this prohibition on excessive fees in the final rule or through Advisory Opinions or Staff Interpretations.

## III. Conclusion

As explained more fully in our comments, we applaud the FTC's proposed rule to protect the public from unfair or deceptive fees. The proposed rule will prohibit the imposition of facility fees for patients that do not enter any health care facilities, such as telehealth patients. The proposed rule will also require additional disclosure of the existence of facility fees for patients that schedule appointments at hospitals or at hospital-owned physician offices, outpatient clinics, or freestanding surgery centers. We urge the FTC to move forward with this rule.

If you have any questions, please feel free to contact Mona Shah at mshah@communitycatalyst.org.

Respectfully submitted,

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[34] *See* proposed 16 C.F.R. § 464.3(b); *see also* § 464.1(c)(1) (disclosures of additional fees must be made in the same manner as other communications).

[35] Note that facility fees that are excessive or otherwise unrelated to the use of facilities by patients may also be misleading under proposed § 464.3(a) ("It is an unfair and deceptive practice and a violation of this part for any Business to misrepresent the nature and purpose of any amount a consumer must pay...").

[36] NPR, "The doctor didn't show up, but the hospital ER still billed $1,012," Jan. 24, 2022 (a mother took her toddler home from the ER after waiting over 1.5 hours for the doctor, but she still received a bill for $820 in facility fees); Vox, "She didn't get treated at the R. But she got a $5,751 bill anyway." (A mother took her four-year-old to the emergency room for a cut on her forehead, but they left after waiting an hour.) https://www.vox.com/2018/5/1/17261488/er-expensive-medical-bill.

[37] NPR, "The doctor didn't show up, but the hospital ER still billed $1,012," Jan. 24, 2022 (noting that the act of registering at the front desk of the hospital initiates the billing process even if treatment is not ultimately rendered).

[38] Vox, "She didn't get treated at the ER. But she got a $5,751 bill anyway." https://www.vox.com/2018/5/1/17261488/er-expensive-medical-bill.