Compendium of Recent FTC Policy Statements, Advisory Opinions, and Final Rules

Federal Trade Commission

January 17, 2025

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning

January 17, 2025

In the last four years, the FTC has published policy statements and rulemakings on a wide variety of topics pertaining to competition and consumer protection. The FTC staff has compiled these policy statements and final rules into the attached compendium. They reflect our work on a wide array of important and popular priorities, ranging from restoring robust enforcement of corporate accountability laws to protecting Americans from discrete unlawful practices like junk fees, subscription traps, noncompetes, and much more.

We share these materials in case they are useful to states and advocates as they work in the years ahead to promote fair, honest, and competitive markets. For example, they may be useful as models for policy initiatives like state legislation or rulemakings. Additionally, many states have "mini FTC Act" statutes that provide state attorneys general and private plaintiffs with legal tools similar to the FTC Act's prohibitions on unfair methods of competition and unfair or deceptive acts or practices. Accordingly, these materials may also be useful for efforts to enforce existing state laws.

We believe these policy statements and the explication of our legal authorities in the statements of basis and purpose accompanying these rulemakings reflect the best interpretation of the FTC Act and other statutes the FTC administers, and they may also be the best interpretation of parallel "mini FTC Acts." We note that under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), what matters is the "best reading" of a statute, *id.* at 373, regardless of whether an agency adopts it. We believe that the interpretations set forth in these documents reflect the best reading of the laws and that the reasoning provided therein will therefore prove to be durable.

We further note that the statements of basis and purpose in the enclosed final rulemakings describe in detail the extensive evidence supporting the FTC's rules, as well as our fulsome analysis of the significant benefits the rules would provide for consumers, businesses, workers, and the economy. States and advocates may find this evidentiary record and analysis useful as they contemplate future policy initiatives.

Finally, we thank states and advocates for your partnership over the years. States and advocates have always played a vital role in protecting consumers and competition, and they have been an invaluable partner to our work at the FTC. We hope these materials can be helpful as they continue to carry out our shared mission of promoting fair, honest, and competitive markets.

Hannah Garden-Monheit
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Federal Trade Commission

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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

STATEMENT OF THE COMMISSION
On the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act

July 9, 2021

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce."[1] In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (hereinafter "2015 Statement"), which established principles to guide the agency's exercise of its "standalone" Section 5 authority.[2] Although presented as a way to reaffirm the Commission's preexisting approach to Section 5 and preserve doctrinal flexibility,[3] the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC's standalone authority out of existence. In our view, the 2015 Statement abrogates the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using "a framework similar to the rule of reason," by only challenging actions that "cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]"[4] The 2015 Statement advised that the Commission is "less likely" to raise a

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[1] 15 U.S.C. § 45(a)(1).

[2] FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015) [hereinafter "2015 Statement"], https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[3] Address by Chairwoman Edith Ramirez, Competition Law Center, George Washington University Law School, 3 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf ("Our aim in adopting this policy statement is to reaffirm the principles that guide our enforcement decisions, leaving for future generations the flexibility to do the same.").

[4] 2015 Statement, *supra* note 2. Chairwoman Ramirez and Commissioners Julie Brill, Terrell McSweeny, and Joshua Wright voted in favor of the statement. Commissioner Maureen Ohlhausen dissented. FTC Press Release, FTC Issues Statement of Principles Regarding Enforcement of FTC Act as a Competition Statute (Aug. 13, 2015), https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act.

standalone Section 5 claim "if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm."[5]

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be "aligned with" the Sherman and Clayton Acts and thus subject to "the 'rule of reason' framework developed under the antitrust laws[.]"[6] In a speech announcing the statement, Chairwoman Ramirez noted that she favored a "common-law approach" to Section 5 rather than "a prescriptive codification of precisely what conduct is prohibited."[7] She also acknowledged that the Commission's policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission's historic approach and more constraining than the prevailing case law.[8] She added, "[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century."[9]

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement.[10]

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission's core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission's institutional strengths.

In 1914, Congress enacted the Federal Trade Commission Act to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust

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[5] 2015 Statement, *supra* note 2.

[6] FTC, Statement on the Issuance of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, at 2 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf; *see also* Chairwoman Ramirez, *supra* note 3, at 10 ("Today's policy statement reaffirms that this same framework governs standalone Section 5 claims no less than claims arising under the Sherman and Clayton Acts.").

[7] Address by Chairwoman Ramirez, *supra* note 3, at 2.

[8] *Id.* at 4-5.

[9] *Id.* at 2.

[10] *See* Federal Trade Commission's Complaint for Equitable Relief, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017), [hereinafter "Qualcomm Complaint"], https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf. Even in *Qualcomm*, the Commission primarily relied on arguments under the Sherman Act; the standalone theory was not a core focus of the litigation.

laws.[11] After the Supreme Court announced in *Standard Oil* that it would subject restraints of trade to an open-ended "standard of reason" under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.[12] For instance, Senator Newlands complained that *Standard Oil* left antitrust regulation "to the varying judgments of different courts upon the facts and the law"; he thus sought to create an "administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction."[13] Likewise, a 1913 Senate committee report lamented that the rule of reason had made it "impossible to predict" whether courts would condemn many "practices that seriously interfere with competition, and are plainly opposed to the public welfare," and thus called for legislation "establishing a commission for the better administration of the law and to aid in its enforcement."[14] These concerns spurred the passage of the FTC Act, which created an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided.[15]

At the heart of the statute was Section 5, which declares "unfair methods of competition" unlawful.[16] By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law.

The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act's remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of "unfair methods of competition," and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.[17]

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of "unfair methods of competition" rather than attempt to define through statute the various unlawful practices, given that "there were too many unfair practices

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[11] *See* Neil Averitt, *The Meaning of 'Unfair Methods of Competition' in Section 5 of the FTC Act*, 21 B.C. L. REV. 227, 229-240 (1980).

[12] *Id*. at 232-237. *See Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

[13] *See* 47 CONG. REC. 1225 (1911) (statement of Sen. Newlands).

[14] S. REP. NO. 1326, 62d Cong., 3d Sess., at xiv (1913).

[15] *See* Averitt, *supra* note 11, at 232-37.

[16] 15 U.S.C. § 45(a).

[17] William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 932 (2010).

to define, and after writing 20 of them into the law it would be quite possible to invent others."[18] Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws.[19] For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was "to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law."[20]

The Supreme Court has repeatedly affirmed this view of the agency's Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws.[21] The Court, recognizing the Commission's expertise in competition matters, has given "deference"[22] and "great weight"[23] to the Commission's determination that a practice is unfair and should be condemned.

Although the Commission suffered a few notable defeats under Section 5 in the early 1980s, those decisions in no way support the 2015 Statement's decision to tether Section 5 to the Sherman and Clayton Acts. For example, in *Boise Cascade*, the Ninth Circuit ruled that the evidence did not support the Commission's factual finding that the defendants' conduct had an adverse effect on prices.[24] In *Ethyl*, the Second Circuit explicitly held that the FTC's Section 5 authority is broader than the Sherman or Clayton Acts, but it required the Commission to show that the challenged conduct is "collusive, coercive, predatory, or exclusionary," or has an "anticompetitive purpose," or "cannot be supported by an independent legitimate reason."[25] In short, these decisions confirm that Section 5 empowers the Commission to prohibit conduct that does not violate other antitrust laws, so long as it clearly explains why the practice is illegitimate and bases that ruling on substantial evidence.

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[18] S. REP. NO. 597, 63d Cong., 2d Sess., 13 (1914) ("The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.").

[19] *See* Averitt, *supra* note 11, at 251-252.

[20] 51 CONG. REC. 11, 236 (1914) (statement of Sen. Cummins).

[21] *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986); *FTC v. Sperry & Hutchinson Co*., 405 U.S. 233, 244 (1972); *FTC v. Brown Shoe Co.,* 384 U.S. 316, 321 (1966); *FTC v. Motion Picture Advert. Serv. Co.,* 344 U.S. 392, 394-95 (1953); *FTC v. R.F. Keppel & Bros., Inc.*, 291 U.S. 304, 309-310 (1934).

[22] *Ind. Fed'n of Dentists*, 476 U.S. at 454.

[23] *Atl. Ref. Co. v. FTC*, 381 U.S. 357, 368 (1965) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 720 (1948)).

[24] *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 577-82 (9th Cir. 1980).

[25] *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136-40 (2d Cir. 1984). *See also Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927-28 (2d Cir. 1980) (holding that while courts must give "great weight" to the Commission's judgment that a practice is unfair, the Commission could not condemn a monopolist's refusal to deal where it "has no purpose to restrain competition or expand [its] monopoly, and does not act coercively").

III. The 2015 Statement Overlooks the Unique Features of Section 5, Ratifies an Unadministrable Approach, and Perpetuates Uncertainty in the Law

In addition to flouting a clear congressional mandate, the 2015 Statement fails to consider or even recognize the unique features of or limits on Section 5. By instead confining Section 5 to the framework that presently governs the Sherman and Clayton Acts, the 2015 Statement willfully surrenders the Commission's key institutional advantages as an administrative agency with the power to adjudicate cases, issue rules and industry guidance, and conduct detailed marketplace studies.[26]

The Commission's efforts to constrain Section 5 in this way have only hindered the agency's enforcement efforts. Coupling Section 5 to the Sherman Act has led courts to bind the FTC to liability standards created by generalist judges in private treble-damages actions under the Sherman Act, despite the striking differences in institutional contexts and the Commission's unique role as an expert public body.[27] Aside from invitations to collude—which the agency has long treated as a violation of Section 5[28]—the Commission has pled a standalone Section 5 claim just once since the issuance of the 2015 Statement.[29] In practice, the Statement has doubled down on the Commission's longstanding failure to investigate and pursue "unfair methods of competition."

Moreover, by subjecting Section 5 to a framework similar to the rule of reason, the Commission hamstrings its enforcement mission with an approach that poses significant administrability concerns. The current iteration of the rule of reason invites courts to assess whether particular business conduct is "unreasonable," including through determining whether the "procompetitive" effects of the conduct outweigh any "anticompetitive" effects.[30] Famously unwieldy, the standard leads to soaring enforcement costs, risks inconsistent outcomes, and has been decried by judges as unadministrable or exceedingly difficult to meet.[31]

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[26] *See, e.g.*, Professor Daniel A. Crane, Comments at FTC Workshop on Section 5 of the FTC Act as a Competition Statute, 73-74 (Oct. 17, 2008), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf, ("What I want to suggest is that, in many ways, by marrying the meaning of Section 5 to the Sherman Act, the FTC is losing many, many of its institutional advantages, as both a norm creator and an enforcer of antitrust law.").

[27] *See id.* at 76 ("[B]y coupling the Sherman Act to the FTC Act, the FTC gets saddled with a rule that was created in a completely different institutional context with different considerations."); *id.* at 77 ("I think this is a huge mistake in terms of the institutional context. You're taking baggage you don't have to take and you shouldn't take and it leads to weakened liability norms in the FTC.").

[28] *See, e.g.*, Oregon Lithoprint, Inc.; Analysis to Aid Public Comment, 83 Fed. Reg. 11529, 11531 (Mar. 15, 2018) ("The Commission has long held that an invitation to collude violates Section 5 of the FTC Act even where there is no proof that the competitor accepted the invitation.").

[29] *See Qualcomm* Complaint, supra note 10.

[30] *See, e.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283-84 (2018).

[31] *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 916 (2007) (Breyer, J., dissenting) ("How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*."); Richard A. Posner, *The Rule of Reason and the*

In practice, courts have also used the weaknesses of the rule of reason as a basis for restricting private antitrust plaintiffs.[32] As the Supreme Court recently pointed out, scholars have found that the defendant prevailed in "nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect."[33] Indeed, lawmakers' concerns about the infirmities of the rule of reason standard were partly why Congress enacted Section 5 in the first place.[34] Tying Section 5 back to this framework offends the plain text, structure, and legislative history of Section 5 and needlessly constrains the Commission from taking action to safeguard the public from unfair methods of competition.

The 2015 Statement is also rife with internal contradictions that may effectively read the Commission's standalone Section 5 authority out of the statute altogether. First, although the Statement recognizes that Section 5 prohibits conduct that would violate the Sherman or Clayton Acts "if allowed to mature or complete," it then requires the Commission to prove "likely" anticompetitive effects under the rule of reason.[35] Importing the rule of reason's likelihood requirement would abrogate the Commission's statutory mandate to combat incipient wrongdoing *before* it becomes likely to harm consumers or competition. As the Supreme Court has held, Section 5 "was designed to supplement and bolster the Sherman Act and Clayton Act—to stop in their incipiency acts and practices which, when full blown, would violate those Acts."[36]

Second, although the 2015 Statement declares that the Commission will apply a "framework similar to the rule of reason," it then suggests that the Commission will typically refrain from bringing a standalone Section 5 case where the Sherman or Clayton Acts already apply. But it is hard to imagine what, if any, cases could ever meet both of these criteria: With the exception of invitations to collude, almost every practice that is unlawful under the rule of reason will already be subject to the Sherman or Clayton Acts and thus (according to the 2015 Statement) be improper targets for standalone Section 5 enforcement. The 2015 Statement may have hinted at a broader reading of Section 5 by embracing an undefined "framework *similar to*" the rule of reason, but if that was the Commission's intent, the reference was far too vague to provide any meaningful guidance. By both wedding Section 5 to the Sherman Act's legal

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Economic Approach: Reflections on the Sylvania Decision, 45 U. CHI. L. REV. 1, 14 (1977) ("The content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability.").

[32] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1383, 1423, 1471 (2009).

[33] *NCAA v. Alston*, No. 20-512, slip op. at 25 (June 21, 2021) (citing Brief for 65 Professors of Law, Business, Economics, and Sports Management as Amici Curiae 21, n. 9); *see also* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009).

[34] *See supra* pp. 2-3.

[35] 2015 Statement, *supra* note 2.

[36] *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95 (1953) (citing *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 463, 466 (1941)); *see also FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966).

standard *and* signaling that Section 5 won't be pursued if the Sherman Act already applies, the 2015 Statement effectively turns standalone Section 5 into a dead letter.

More generally, the 2015 Statement assumes a case-by-case approach to "unfair methods of competition," despite widespread recognition that this adjudication-only approach often fails to deliver clear guidance.[37] Without explanation, the Statement fails to address the possibility of the Commission adopting rules to clarify the legal limits that apply to market participants.

The Commission's inability, after a century of commanding this statutory authority, to deliver clear Section 5 principles suggests that the time is right for the Commission to rethink its approach and to recommit to its mandate to police unfair methods of competition even if they are outside the ambit of the Sherman or Clayton Acts. The task will require careful and serious work, but it is one that our enabling statute expected and required.

IV. Looking Ahead

Withdrawing the 2015 Statement is only the start of our efforts to clarify the meaning of Section 5 and apply it to today's markets. Section 5 is one of the Commission's core statutory authorities in competition cases; it is a critical tool that the agency can and must utilize in fulfilling its congressional mandate to condemn unfair methods of competition. In the coming months, the Commission will consider whether to issue new guidance or to propose rules that will further clarify the types of practices that warrant scrutiny under this provision. In the meantime, the Commission will exercise responsibly its prosecutorial discretion in determining which cases are appropriate under Section 5, consistent with legal precedent.

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[37] *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 359-63 (2020); Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 668-70 (2017); Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO. MASON L. REV. 1287, 1288, 1304-05 (2014); Kovacic & Winerman, *supra* note 17, at 933-34; C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 674-80 (2009); Crane, *supra* note 26, at 78-79.

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers

In 2019, the Federal Trade Commission ("Commission") called for public comment and empirical research on repair restrictions, which culminated in the Commission's "Nixing the Fix" report to Congress.[1] The Commission is now issuing this policy statement regarding its enforcement policy with respect to repair restrictions.

Restricting consumers and businesses from choosing how they repair products can substantially increase the total cost of repairs, generate harmful electronic waste, and unnecessarily increase wait times for repairs. In contrast, providing more choice in repairs can lead to lower costs, reduce e-waste by extending the useful lifespan of products, enable more timely repairs, and provide economic opportunities for entrepreneurs and local businesses.

In 2019, the Commission convened a workshop on "Nixing the Fix" and sought input from consumers, independent businesses, manufacturers, and others. Through this work, the Commission uncovered evidence that manufacturers and sellers may, without reasonable justification, be restricting competition for repair services in numerous ways, including: imposing physical restrictions (e.g., the use of adhesives); limiting the availability of parts, manuals, diagnostic software, and tools to manufacturers' authorized repair networks; using designs that make independent repairs less safe; limiting the availability of telematics information (i.e., information on the operation and status of a vehicle that is collected by a system contained in the vehicle and wirelessly relayed to a central location, often the manufacturer or dealer of the vehicle); asserting patent rights and enforcement of trademarks in an unlawful, overbroad manner; disparaging non-OEM parts and independent repair; using unjustified software locks, digital rights management, and technical protection measures; and imposing restrictive end user license agreements.

The Commission's report on repair restrictions explores and discusses a number of these issues and describes the hardships repair restrictions create for families and businesses. The Commission is concerned that this burden is borne more heavily by underserved communities, including communities of color and lower-income Americans.[2] The pandemic exacerbated these effects as consumers relied more heavily on technology than ever before.[3]

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[1] Federal Trade Commission. *Nixing the Fix: An FTC Report to Congress on Repair Restrictions*. (May 2021) https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

[2] *See id.* at 3-4.

[3] *Id.* at 4-5.

While unlawful repair restrictions have generally not been an enforcement priority for the Commission for a number of years,[4] the Commission has determined that it will devote more enforcement resources to combat these practices.[5] Accordingly, the Commission will now prioritize investigations into unlawful repair restrictions under relevant statutes such as the Magnuson-Moss Warranty Act[6] and Section 5 of the Federal Trade Commission Act.[7]

First, the Commission urges the public to submit complaints and provide other information to aid in greater enforcement of the Magnuson-Moss Warranty Act and its implementing regulations. While current law does not provide for civil penalties or redress, the Commission will consider filing suit against violators of the Magnuson-Moss Warranty Act to seek appropriate injunctive relief. The Commission will also closely monitor private litigation to determine whether the Commission may wish to investigate a pattern of unfair or deceptive acts or practices or file an amicus brief. Further, the Commission will explore rulemaking, as appropriate.

Second, the Commission will scrutinize repair restrictions for violations of the antitrust laws. For example, certain repair restrictions may constitute tying arrangements or monopolistic practices—such as refusals to deal, exclusive dealing, or exclusionary design—that violate the Sherman Act.[8] Violations of the Sherman Act also violate the prohibition on unfair methods of competition codified in Section 5 of the Federal Trade Commission Act.

Third, the Commission will assess whether repair restrictions constitute unfair acts or practices, which are also prohibited by Section 5 of the Federal Trade Commission Act. In addition, the Commission will analyze any material claims made to purchasers and users to ascertain whether there are any prohibited deceptive acts or practices, in violation of Section 5 of the Federal Trade Commission Act.

Finally, the Commission will bring an interdisciplinary approach to this issue, using resources and expertise from throughout the agency to combat unlawful repair restrictions. The FTC will also closely coordinate with state law enforcement and policymakers to ensure compliance and to update existing law and regulation to advance the goal of open repair markets.

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[4] The Commission has brought only one case alleging a violation of the Magnuson-Moss Warranty Act in the past decade. *In the Matter of BMW of North America, LLC*, No. 132-3150 (October 2015). During this period, the Commission's efforts have included issuing several warning letters to companies that appeared to be engaged in warranty tying in violation of the Magnuson-Moss Warranty Act. *See FTC Staff Warns Companies that It Is Illegal to Condition Warranty Coverage on the Use of Specified Parts or Services*, https://www.ftc.gov/news-events/press-releases/2018/04/ftc-staff-warns-companies-it-illegal-condition-warranty-coverage.

[5] In conjunction with the Nixing the Fix Workshop, the Commission sought public comments and submissions of empirical research concerning repair restrictions. The full docket of public comments and empirical research submissions is available at https://www.regulations.gov/docket/FTC-2019-0013/document and https://www.regulations.gov/document/FTC-2019-0013-0001/comment.

[6] 15 U.S.C. § 2301 *et. seq.* The Magnuson-Moss Warranty Act prohibits, among other things, tying arrangements that condition a consumer product's warranty on the use of a third-party service provider or on the use of a particular product, unless the warrantor provides the services or products for free or obtains a waiver from the FTC. 15 U.S.C. § 2302(c).

[7] 15 U.S.C. § 45. Section 5 of the Federal Trade Commission Act prohibits unfair or deceptive actors or practices, as well as unfair methods of competition, in or affecting commerce. Section 5 also encompasses violations of the Sherman Act, which prohibits certain exclusionary and other anticompetitive conduct.

[8] *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451 (1992); *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

UNITED STATES OF AMERICA
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Office of the Chair

STATEMENT OF THE COMMISSION
On Breaches by Health Apps and Other Connected Devices

September 15, 2021

In recognition of the proliferation of apps and connected devices that capture sensitive health data, the Federal Trade Commission is providing this Policy Statement to offer guidance on the scope of the FTC's Health Breach Notification Rule, 16 C.F.R. Part 318 ("the Rule").[1]

The FTC's Health Breach Notification Rule helps to ensure that entities who are not covered by the Health Insurance Portability and Accountability Act ("HIPAA") nevertheless face accountability when consumers' sensitive health information is compromised. Under the Rule's requirements, vendors of personal health records ("PHR") and PHR-related entities must notify U.S. consumers and the FTC, and, in some cases, the media, if there has been a breach of unsecured identifiable health information, or face civil penalties for violations. The Rule also covers service providers to these entities. In practical terms, this means that entities covered by the Rule who have experienced breaches cannot conceal this fact from those who have entrusted them with sensitive health information.

The Rule was issued more than a decade ago, but the explosion in health apps and connected devices makes its requirements with respect to them more important than ever. The FTC has advised mobile health apps to examine their obligations under the Rule,[2] including through the use of an interactive tool.[3] Yet the FTC has never enforced the Rule, and many appear to misunderstand its requirements. This Policy Statement serves to clarify the scope of the Rule, and place entities on notice of their ongoing obligation to come clean about breaches.

The Rule covers vendors of personal health records that contain individually identifiable health information created or received by health care providers. The Rule is triggered when such entities experience a "breach of security."[4] Under the definitions cross-referenced by the Rule, the developer of a health app or connected device is a "health care provider" because it "furnish[es] health care services or supplies."[5] When a health app, for example, discloses

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[1] The Rule implements the requirements of the American Recovery & Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, codified at 42 U.S.C. § 17937.
[2] *Mobile Health App Developers: FTC Best Practices*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/business-center/guidance/mobile-health-app-developers-ftc-best-practices (last visited on Sept. 15, 2021).
[3] *Mobile Health Apps Interactive Tool*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/business-center/guidance/mobile-health-apps-interactive-tool (last visited on Sept. 15, 2021).
[4] *See* 16 C.F.R. § 318.2(a)
[5] *See id.* § 318.2; 42 U.S.C. § 1320d(6), d(3).

sensitive health information without users' authorization, this is a "breach of security" under the Rule.[6]

The statute directing the FTC to promulgate the Rule requires that a "personal health record" be an electronic record that can be drawn from multiple sources. The Commission considers apps covered by the Rule if they are capable of drawing information from multiple sources, such as through a combination of consumer inputs and application programming interfaces ("APIs"). For example, an app is covered if it collects information directly from consumers and has the technical capacity to draw information through an API that enables syncing with a consumer's fitness tracker. Similarly, an app that draws information from multiple sources is covered, even if the health information comes from only one source. For example, if a blood sugar monitoring app draws health information only from one source (e.g., a consumer's inputted blood sugar levels), but also takes non-health information from another source (e.g., dates from your phone's calendar), it is covered under the Rule.

In addition, the Commission reminds entities offering services covered by the Rule that a "breach" is not limited to cybersecurity intrusions or nefarious behavior. Incidents of unauthorized access, including sharing of covered information without an individual's authorization, triggers notification obligations under the Rule.

As many Americans turn to apps and other technologies to track diseases, diagnoses, treatment, medications, fitness, fertility, sleep, mental health, diet, and other vital areas, this Rule is more important than ever. Firms offering these services should take appropriate care to secure and protect consumer data. The Commission intends to bring actions to enforce the Rule consistent with this Policy Statement. Violations of the Rule face civil penalties of $43,792 per violation per day.

[6] *Id*. § 318.2(a) (defining "breach of security" as "acquisition of [PHR identifiable health information] without the authorization of the individual.").

Enforcement Policy Statement Regarding Negative Option Marketing

I. Introduction and Background

The Federal Trade Commission ("FTC" or "Commission") issues this Policy Statement to provide guidance regarding its enforcement of various statutes and FTC regulations addressing negative option marketing and operating.[1] This Statement is intended to assist the business community and practitioners by providing specific guidance on the Commission's interpretation of existing law as it applies to negative option practices. This Statement may also assist the courts in developing an appropriate framework for interpreting and applying the various statutes and regulations addressing negative option marketing discussed herein.

Negative option offers come in a variety of forms, but all share a central feature: each contains a term or condition under which the seller may interpret a consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement as acceptance or continuing acceptance of the offer.[2] Typically, negative option arrangements include, but are not limited to, automatic renewals, continuity plans, free-to-pay or fee-to-pay conversions, and prenotification plans. Automatic renewals allow sellers (*e.g.*, a magazine publisher) to

[1] This Policy Statement elaborates on principles annunciated by the Commission in individual cases and rules issued over the course of many years. This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates one or more existing statutory or regulatory requirements. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act or other statutes. Pursuant to the Congressional Review Act (5 U.S.C. § 801 *et seq.*), the Office of Information and Regulatory Affairs designated this Policy Statement as not a "major rule," as defined by 5 U.S.C. § 804(2).
[2] The Commission's Telemarking Sales Rule (16 C.F.R. Part 310) defines a negative option feature as a provision in an offer or agreement to sell or provide any goods or services "under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. § 310.2(w).

unilaterally renew consumers' subscriptions when they expire, unless consumers affirmatively cancel their subscriptions by a certain date. Continuity plans allow consumers to agree in advance to receive periodic shipments of goods or provision of services (*e.g.*, bottled water delivery), which they continue to receive until they cancel the agreement. Free trial marketing (*e.g.*, free-to-pay conversions) provides consumers the opportunity to receive goods or services for free (or at a nominal fee) for a trial period. After the trial period, sellers can automatically begin charging a fee (or higher fee) unless consumers affirmatively cancel or return the goods or services. Finally, under prenotification plans[3] (*e.g.*, book-of-the-month clubs), sellers provide periodic notices offering goods to participating consumers and then send—and charge for—those goods only if the consumers take no action to decline the offer. The periodic announcements and shipments can continue indefinitely.[4]

Negative option programs are widespread in the marketplace and can provide substantial benefits for sellers and consumers. At the same time, consumers suffer costs when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible. Over the years, unfair or deceptive negative option practices have remained a persistent source of consumer harm, often saddling shoppers with recurring payments for products and services they did not intend to purchase or did not want to continue to purchase.[5] To address this problem, the Commission and states regularly bring cases

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[3] The Commission's Rule on the "Use of Prenotification Negative Option Plans" (16 C.F.R. Part 425) only covers this type of negative option marketing.

[4] In addition, some negative option offers include upsell or bundled offers, where sellers use consumers' billing data to sell additional products from the same seller or pass consumers' billing data to a third party for their sales. An upsell occurs when a consumer completes a first transaction and then receives a second solicitation for an additional product or service. A bundled offer occurs when a seller packages two or more products or services together so that they cannot be purchased separately.

[5] See, *e.g.*, n. 6 *infra*.

challenging a variety of harmful negative option practices. These matters involve a range of deceptive or unfair practices, including inadequate disclosures of hidden charges in ostensibly "free" offers and other products or services, enrollment without consumer consent, and inadequate or overly burdensome cancellation and refund procedures.[6] In addition, the Commission receives thousands of complaints each year related to negative option marketing. The number of ongoing cases and high volume of complaints demonstrate there is prevalent, unabated consumer harm in the marketplace.

The FTC's enforcement actions primarily rely on Section 5 of the FTC Act (15 U.S.C. § 45(a)), the Restore Online Shoppers' Confidence Act ("ROSCA") (15 U.S.C. §§ 8401-8405), and the Telemarketing Sales Rule (16 C.F.R. Part 310). However, the Rule on the Use of Prenotification Negative Option Plans (16 C.F.R. Part 425), the Electronic Fund Transfer Act ("EFTA") (15 U.S.C. §§ 1693-1693r), and the Postal Reorganization Act (*i.e.*, the Unordered Merchandise Statute) (39 U.S.C. § 3009) also address various aspects of negative option marketing.

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[6] Recent examples of these matters include: *FTC v. JDI Dating, Ltd.*, No. 1:14-cv-08400 (N.D. Ill. 2014); *FTC, State of Illinois, and State of Ohio v. One Technologies, LP*, No. 3:14-cv-05066 (N.D. Cal. 2014); *FTC v. Health Formulas, LLC*, No. 2:14-cv-01649-RFB-GWF (D. Nev. 2016); *FTC v. BunZai Media Group, Inc.*, No. 2:15-cv- 04527-GW-PLA (C.D. Cal. 2015); *FTC v. NutraClick LLC*, No. 2:16-cv-06819-DMG-JPR (C.D. Cal. 2016) (NutraClick I); *FTC v. DOTAuthority.com, Inc.*, No. 0:16-cv-62186-WJZ (S.D. Fla. 2016); *FTC v. XXL Impressions*, No. 1:17-cv-00067-NT (D. Me. 2017); *FTC v. AAFE Products Corp.*, No. 3:17-cv-00575 (S.D. Cal. 2017); *FTC v. RevMountain, LLC*, No. 2:17-cv-02000-APG-GWF (D. Nev. 2017); *FTC v. Pact, Inc.*, No. 2:17-cv-01429 (W.D. Wash. 2017); *FTC v. Tarr*, No. 3:17-cv-02024-LAB-KSC (S.D. Cal. 2017); *FTC v. Credit Bureau Center, LLC*, No. 17-cv-00194 (N.D. Ill. 2017); *FTC v. AdoreMe, Inc.*, No. 1:17-cv-09083 (S.D.N.Y. 2017); *FTC v. Triangle Media Corp.*, No. 3:18-cv-01388-LAB-LL (S.D. Cal. 2018); *In re: UrthBox, Inc.*, No. C-4676 (FTC 2019); *FTC v. Elite IT Partners, Inc.*, No. 2:19-cv-00125-RJS (D. Utah 2019); *FTC v. Apex Capital Group, LLC*, No. 2:18-cv-09573-JFW-JPR (C.D. Cal. 2018); *FTC v. AH Media*, No. 3:19-cv-04022-JD (N.D. Cal. 2019); *FTC v. Age of Learning, Inc.*, No. 2:20-cv-07996 (C.D. Cal. 2020); *FTC v. NutraClick, LLC*, No. 2:20-cv-08612 (C.D. Cal. 2020) (NutraClick II).

<u>*Section 5 of the FTC Act*</u>: Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, is the core consumer protection statute enforced by the Commission, and therefore, has traditionally served as the primary mechanism for addressing deceptive negative option claims.[7] In its guidance and cases, the FTC has highlighted four basic Section 5 requirements that negative option marketing must follow to comply with Section 5.[8] First, marketers must clearly and conspicuously disclose the material terms of a negative option offer including, at a minimum, key terms such as the existence of the negative option offer, the offer's total cost, and how to cancel the offer.[9] Second, sellers must disclose these material terms before consumers agree to the purchase.[10] Third, marketers must obtain consumers' express informed

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[7] Section 5 specifically states that "unfair or deceptive acts or practices in or affecting commerce . . . are . . . declared unlawful." The FTC Act defines "unfair or deceptive acts or practices" to include such acts or practices involving foreign commerce that cause or are likely to cause reasonably foreseeable injury within the United States or involve material conduct occurring within the United States (15 U.S.C. § 45(a)(4)(A)). It also defines "unfair" practices as those that cause or are likely "to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition" (15 U.S.C. § 45(n)).

[8] *See Negative Options: A Report By the Staff of the FTC's Division of Enforcement*, 26-29 (Jan. 2009), *https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff/p064202negativeoptionreport.pdf*. In discussing the principal Section 5 requirements related to negative options, the report cites to the following pre-ROSCA cases, *FTC v. JAB Ventures*, No. CV08-04648 (C.D. Cal. 2008); *FTC v. Complete Weightloss Center*, No. 1:08cv00053 (D.N.D. 2008); *FTC v. Berkeley Premium Nutraceuticals*, No. 1:06cv00051 (S.D. Ohio 2006); *FTC v. Think All Publ'g*, No. 4:07cv11 (E.D. Tex. 2006); *FTC v. Hispanexo*, No. 1:06cv424 (E.D. Va. 2006); *FTC v. Consumerinfo.com*, No. SACV05-801 (C.D. Cal. 2005); *FTC v. Conversion Mktg.*, No. SACV04-1264 (C.D. Cal. 2004); *FTC v. Mantra Films*, No. CV03-9184 (C.D. Cal. 2003); *FTC v. Preferred Alliance*, No. 103-CV0405 (N.D. Ga. 2003); *United States v. Prochnow*, No. 1:02-CV-0917 (N.D. Ga. 2002); *FTC v. Ultralife Fitness, Inc.*, No. 2:08-cv-07655-DSF-PJW (C.D. Cal. 2008); *In the Matter of American Isuzu Motors*, No. C-3712 (FTC 1997); *FTC v. Universal Premium Services*, No. CV06-0849 (C.D. Cal. 2006); *FTC v. Remote Response*, No. 06-20168 (S.D. Fla. 2006); and FTC's <u>Dot Com Disclosures</u> guidance.

[9] *See, e.g.*, *FTC v. JAB Ventures*; *FTC v. Complete Weightloss Center*; *FTC v. NutraClick, LLC I.*

[10] *See, e.g.*, *FTC v. JAB Ventures*; *Complete Weightloss Center*; *FTC v. Berkeley Premium Nutraceutical*; *FTC v. Think All Publ'g*. Disclosures earlier in the transaction may be necessary to avoid deception. *See e.g.*, FTC's <u>Dot Com Disclosures</u> guidance.

consent to such offers.[11] Finally, marketers must not erect unreasonable barriers to cancellation or impede the effective operation of promised cancellation procedures, and must honor cancellation requests that comply with such procedures.[12] Although these basic guidelines are useful, the legality of a particular negative option depends on an individualized assessment of the advertisement's net impression and the marketer's business practices.[13]

ROSCA: Enacted by Congress in 2010 to address ongoing problems with online negative option marketing, ROSCA prohibits charging or attempting to charge consumers for goods or services sold on the Internet through any negative option feature[14] unless the marketer: (1) clearly and conspicuously discloses all material terms of the transaction[15] before obtaining the consumer's billing information; (2) obtains a consumer's express informed consent before

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[11] *E.g.*, *FTC. v. Neovi, Inc.*, 604 F.3d 1150, 1157-59 (9th Cir. 2010), *amended by* 2010 WL 2365956 (9th Cir. June 15, 2010); *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 WL 10654030, at *8 (W.D. Wash. Apr. 26, 2016); *FTC v. Ideal Fin. Sols., Inc.*, No. 2:13-CV-00143-JAD, 2015 WL 4032103, at *8 (D. Nev. June 29, 2015); *FTC v. BunZai Media Group, Inc.*

[12] *See, e.g.*, *FTC v. Universal Premium Services*; *FTC v. Remote Response*; *FTC v. Berkeley Premium Nutraceuticals*; *FTC v. Hispanexo*; *FTC v. Age of Learning, Inc*.

[13] *See*, *e.g.*, *Negative Options: A Report By the Staff of the FTC's Division of Enforcement*, 28.

[14] 15 U.S.C. § 8403. ROSCA incorporates the definition of "negative option feature" from the Commission's Telemarketing Sales Rule, 16 C.F.R. § 310.2(w). ROSCA also contains a finding that "Third party sellers used a free trial period to enroll members, after which they periodically charged consumers until consumers affirmatively canceled the memberships. This use of "free-to-pay conversion" and "negative option" sales took advantage of consumers' expectations that they would have an opportunity to accept or reject the membership club offer at the end of the trial period." 15 U.S.C. § 8401(8). Finally, in addition to addressing negative option marketing, ROSCA contains provisions related to third party "post transaction" offers. *See, e.g.*, 15 U.S.C. § 8402.

[15] The Commission has brought several cases alleging a failure to disclose adequately the terms of the negative option feature. *See, e.g.*, *FTC v. NutraClick II*; *FTC v. Triangle Media Corporation*; *FTC v. AAFE Products Corp*. The Commission recently alleged that failure to disclose a material term of the underlying service that was necessary to prevent deception violated this provision of ROSCA. *In re: MoviePass, Inc.,* No. C-4751 (October 5, 2021).

charging the consumer's account; [16] and (3) provides simple mechanisms for the consumer to stop recurring charges.[17]

ROSCA also addresses offers made by, or on behalf of, third-party sellers during, or immediately following, a transaction with an initial merchant. Specifically, ROSCA prohibits post-transaction, third-party sellers[18] from charging or attempting to charge consumers unless the seller: (1) before obtaining billing information, clearly and conspicuously discloses the offer's material terms; and (2) receives the consumer's express informed consent by obtaining the consumer's name, address, contact information, as well as the full account number to be charged, and requiring the consumer to perform an additional affirmative action indicating consent.[19] ROSCA also prohibits initial merchants from disclosing billing information to any post-transaction third-party seller for use in any Internet-based sale of goods or services.[20]

Furthermore, ROSCA provides that a violation of that Act is a violation of a Commission trade regulation rule under Section 18 of the FTC Act.[21] Thus, the Commission may seek a variety of remedies for violations of ROSCA, including civil penalties under Section 5(m)(1)(A) of the FTC Act;[22] injunctive relief under Section 13(b) of the FTC Act;[23] and consumer redress,

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[16] *See, e.g.*, *FTC v. BunZai Media Group, Inc.*; *FTC v. Health Formulas, LLC*; and *FTC v. JDI Dating, Ltd*.
[17] *See, e.g.*, *FTC v. Age of Learning, Inc.*; *FTC v. AdoreMe, Inc.*; and *FTC, State of Illinois, and State of Ohio v. One Technologies*.
[18] ROSCA defines "post-transaction third-party seller" as a person other than the initial merchant who sells any good or service on the Internet and solicits the purchase on the Internet through an initial merchant after the consumer has initiated a transaction with the initial merchant. 15 U.S.C. § 8402(d)(2).
[19] 15 U.S.C. § 8402(a).
[20] 15 U.S.C. § 8402(b).
[21] 15 U.S.C. § 8404. Section 18 of the FTC Act is 15 U.S.C. § 57a.
[22] 15 U.S.C. § 45(m)(1)(A).
[23] 15 U.S.C. § 53(b).

such as damages, and other relief under Section 19 of the FTC Act.[24] Although Congress charged the Commission with enforcing ROSCA, it did not direct the FTC to promulgate implementing regulations.[25]

<u>*Telemarketing Sales Rule*</u>: The TSR prohibits deceptive telemarketing acts or practices, including those involving negative option offers, and certain types of payment methods common in deceptive negative option marketing. Specifically, the TSR requires telemarketers to disclose all material terms and conditions of the negative option feature, including the need for affirmative consumer action to avoid the charges, the date (or dates) the charges will be submitted for payment, and the specific steps the customer must take to avoid the charges. It also prohibits telemarketers from misrepresenting such information and contains specific requirements related to payment authorization.[26] Finally, the TSR prohibits the use of payment methods often used in deceptive marketing, including negative options, such as remotely created checks.[27] The Rule, however, only applies to negative option offers made over the telephone.

<u>*Prenotification Plan Rule*</u>: The Commission promulgated the "Use of Prenotification Negative Option Plans" Rule ("Prenotification Plan Rule") (16 C.F.R. Part 425).[28] The Prenotification Plan Rule requires sellers of such plans to clearly and conspicuously disclose

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[24] 15 U.S.C. § 57b(a)(1) and (b).
[25] ROSCA states that a violation "of this chapter or any regulation prescribed under this chapter shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices." 15 U.S.C. § 8404(a).
[26] 16 C.F.R. Part 310.3(a).
[27] 80 Fed. Reg. 77520 (Dec. 14, 2015). The TSR Notice of Proposed Rulemaking (78 Fed. Reg. 41200 (July 9, 2013)) noted negative option cases where the defendants used unauthorized remotely created checks. *E.g.*, *FTC v. FTN Promotions*, *Inc.*, Civ. No. 8:07-1279 (M.D. Fla. Dec. 30, 2008) (Stip. Perm. Inj.) (defendants allegedly caused more than $171 million in unauthorized charges to consumers' accounts for bogus travel and buyers' clubs in part by using unauthorized remotely created checks).
[28] The Commission issued the Rule after finding some negative option marketers committed unfair and deceptive practices that violated Section 5 of the Act, 15 U.S.C. § 45.

their plan's material terms before consumers subscribe. It enumerates seven material terms sellers must disclose: (1) how subscribers must notify the seller if they do not wish to purchase the selection; (2) any minimum purchase obligations; (3) the subscribers' right to cancel; (4) whether billing charges include postage and handling; (5) that subscribers have at least ten days to reject a selection; (6) that, if any subscriber is not given ten days to reject a selection, the seller will credit the return of the selection and postage to return the selection, along with shipping and handling; and (7) the frequency with which announcements and forms will be sent.[29] In addition, sellers must provide particular periods during which they will send introductory merchandise, give consumers a specified period to respond to announcements, provide instructions for rejecting merchandise in announcements, and promptly honor written cancellation requests.[30]

The Prenotification Plan Rule applies only to plans like book-of-the-month clubs in which sellers provide periodic notices offering goods to participating consumers and then send—and charge for—those goods only if the consumers take no action to decline the offer. These types of plans, however, account for only a small fraction of current negative option marketing. Therefore, the Rule does not reach most modern negative option marketing.[31]

[29] 16 C.F.R. § 425.1(a)(1)(i)-(vii).
[30] 16 C.F.R. §§ 425.1(a)(2) and (3); § 425.1(b).
[31] The Prenotification Plan Rule defines "negative option plan" narrowly to apply only to prenotification plans. 16 C.F.R. § 425.1(c)(1). In 1998, the Commission clarified the Rule's application to such plans in all media, stating that it "covers all promotional materials that contain a means for consumers to subscribe to prenotification negative option plans, including those that are disseminated through newer technologies . . . ." 63 Fed. Reg. 44555, 44561 (Aug. 20, 1998). In 2017, the Commission estimated that fewer than 100 sellers ("clubs") were subject to the current Rule's requirements. 82 Fed. Reg. 38907, 38908 (Aug. 16, 2017).

Other Relevant Requirements: EFTA[32] and the Unordered Merchandise Statute[33] also contain provisions relevant to negative option marketing. EFTA prohibits sellers from imposing recurring charges on a consumer's debit cards or bank accounts without written authorization. The Unordered Merchandise Statute provides that mailing unordered merchandise, or a bill for such merchandise, constitutes an unfair method of competition and an unfair trade practice in violation of Section 5 of the FTC Act.

II. Principles For Negative Option Marketing

Given the number of applicable statutory and regulatory requirements and the ongoing problems in the marketplace, the Commission now issues the following enforcement guidance based on its enforcement history.[34] This guidance covers three areas commonly addressed by the Commission in its negative option cases: disclosures, consent, and cancellation. These principles convey the Commission's current views on the application of relevant statutes and regulations to negative option marketing and, as such, should help marketers in their compliance efforts and better understand how the Commission enforces the law.

Disclosures: ROSCA[35] requires marketers to clearly and conspicuously disclose the material terms of the transaction.[36] Pursuant to longstanding precedent, any express claim or

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[32] 15 U.S.C. §§ 1693-1693r.
[33] 39 U.S.C. § 3009.
[34] In an October 2, 2019 Notice (84 Fed. Reg. 52393), the Commission sought comment on the need for amendments to the "Rule Concerning the Use of Prenotification Negative Option Plans" (*i.e.*, "Negative Option Rule" (16 CFR Part 425)) to help consumers avoid recurring payments for products and services they did not intend to order and to allow them to cancel such payments without unwarranted obstacles. The Commission will continue to closely monitor compliance with the rules and laws applicable to negative option marketing, and is still considering various options in the rule review proceeding for the Negative Option Rule.
[35] Any reference to ROSCA in these principles applies only to Internet transactions, consistent with that statute's coverage.
[36] Of course, sellers fail to disclose adequately material terms if the disclosed terms are not truthful and substantiated.

deliberately implied claim is presumed to be material.[37] Moreover, the FTC's cases for failure to disclose under Section 5 of the FTC Act are generally consistent with ROSCA.[38] Those terms at minimum should include:

- Any material terms related to the underlying product or service that are necessary to prevent deception, regardless of whether that term directly relates to the terms of the negative option offer;[39]
- That consumers will be charged[40] for the good or service, or that those charges will increase after any applicable trial period ends, and, if applicable, that the charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such charges;
- Each deadline (by date or frequency) by which the consumer must act in order to stop the charges;
- The amount (or range of costs) the consumer will be charged or billed and, if applicable, the frequency of such charges a consumer will incur unless the consumer takes timely steps to prevent or stop those charges;

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[37] *See, e.g.*, *FTC Statement on Deception*, 103 F.T.C. 174, 182 (1984) *(appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)); *Thompson Medical Co.*, 104 F.T.C. 648, 816 (1984).

[38] The Commission has consistently brought cases for deceptive and pure omissions of material fact. *See*, *e.g.*, *FTC v. Roca Labs, Inc.*, 345 F. Supp. 3d 1375, 1390 (M.D. Fla. 2018); *FTC v. NPB Advert., Inc.*, 218 F. Supp. 3d 1352, 1361 (M.D. Fla. 2016); *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1088 (C.D. Cal. 1994); *FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 241 (2d Cir. 2014). *But see*, *In re International Harvester*, 104 F.T.C. 949, 1059 (1984) (Not all omissions are deceptive or unfair. "The number of facts that may be material to consumers-and on which they may have prior misconceptions-is literally infinite.")

[39] The Commission recently alleged that a negative option seller's failure to disclose that it was impeding access to its movie subscription service violates ROSCA. *MoviePass, Inc*.

[40] "Charge," "Charged," or "Charging," for the purposes of this Policy Statement, means any attempt to collect money or other consideration from a consumer, including but not limited to causing Billing Information to be submitted for payment, including against the consumer's credit card, debit card, bank account, telephone bill, or other account.

- The date (or dates) each charge will be submitted for payment; and
- All information necessary to cancel the contract.

These disclosures must be clear and conspicuous.[41] To meet this standard, offers should be difficult to miss (*i.e.*, easily noticeable) or unavoidable and easily understandable by ordinary consumers, including:

- In any communication that is solely visual or solely audible, the disclosure should be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure should be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.
- A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, should stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
- An audible disclosure, including by telephone or streaming video, should be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.
- In any communication using an interactive electronic medium, such as the Internet or software, the disclosure should be unavoidable. A disclosure is not clear and conspicuous if a consumer needs to take any action, such as clicking on a hyperlink or hovering over an icon, to see it.

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[41] *Supra* at nn. 9 and 15.

- The disclosure should use diction and syntax understandable to ordinary consumers and should appear in each language in which the representation that requires the disclosure appears.
- The disclosure should comply with these requirements in each medium through which it is received, including all electronic devices and face-to face communications.
- The disclosure should not be contradicted or mitigated by, or inconsistent with, anything else in the communication.[42]
- When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

Additionally, if the disclosures are in writing (including on the Internet), they should:

- if related to the negative option feature, appear immediately adjacent to the means of recording the consumer's consent for the negative option feature;
- if not related to the negative option feature, appear before consumers make a decision to buy (*e.g.*, before they "add to shopping cart"); and
- not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to read and understand the

[42] An example of an inadequate disclosure is one where the consumer sees an offer upfront, in an electronic or written advertisement or on the landing page of a website, which is materially different from the terms of the offer presented in later stages, such as later web pages, of the ordering process. *See*, *e.g.*, *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 633 (6th Cir. 2014); *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SA-CV-09-401-CJC (MLGx) (C.D. Cal. 2010); *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1214 (D. Nev. 2011).

disclosures, including any information not directly related to the material terms and conditions of any negative option feature.

For all telephone and other oral offers, the disclosures should not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to understand the disclosures, including any information not directly related to the material terms and conditions of any negative option feature.

Consent:[43] ROSCA, judicial decisions applying Section 5, and cases brought by the Commission under those laws make clear marketers should obtain the consumer's express informed consent before charging the consumer.[44] To attain express informed consent, the negative option seller should:

- obtain the consumer's acceptance of the negative option feature offer separately from any other portion of the entire transaction;
- not include any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent to the negative option feature;[45]
- obtain the consumer's unambiguously affirmative consent to the negative option feature;[46]

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[43] Negative option sellers covered by the Telemarketing Sales Rule should also ensure that they are complying with the consent requirements in 16 C.F.R. § 310.4 specifically applicable to transactions involving a free-to-pay conversion and preacquired account information.
[44] *Supra* at nn. 11 and 16.
[45] Such information could appear on the product page itself (*e.g*., extraneous language that interferes with the consumer's ability to provide consent) or in another location (*e.g.*, a separate webpage containing information materially contradicting the information on the consent page).
[46] A "pre-checked box" does not constitute affirmative consent. In addition, the seller should clearly disclose the name of the billing entity authorized by the consumer's consent.

- obtain the consumer's unambiguously affirmative consent to the entire transaction; and
- be able to verify the consumer's consent.

Cancellation: ROSCA requires negative option sellers to provide a simple, reasonable means for consumers to cancel their contracts.[47] To meet this standard, negative option sellers should provide cancellation mechanisms that are at least as easy to use as the method the consumer used to initiate the negative option feature. For example, to ensure compliance with this simple cancellation mechanism requirement, negative option sellers should not subject consumers to new offers or similar attempts to save the negative option arrangement that impose unreasonable delays on consumers' cancellation efforts.[48] In addition, negative option sellers should provide their cancellation mechanisms at least through the same medium (such as website or mobile application) the consumer used to consent to the negative option feature. The negative option seller should provide, at a minimum, the simple mechanism over the same website or web-based application the consumer used to purchase the negative option feature. If the seller also provides for telephone cancellation, it should provide, at a minimum, a telephone number, and answer all calls to this number during normal business hours, within a short time frame, and ensure the calls are not lengthier or otherwise more burdensome than the telephone call the consumer used to consent to the negative option feature.

Finally, to comply with Section 5, a seller's cancellation procedures for negative option features should be effective. Sellers should not impede the effective operation of promised

[47] *Supra* at 17.

[48] While a request to consider an offer or discount would not amount to an unreasonable delay, multiple requests for a consumer to listen to additional offers, lengthy pitches, or ignoring a consumer's request to decline further offers could amount to an unreasonable delay.

cancellation procedures, and should honor cancellation requests that comply with such procedures. In implementing effective cancellation procedures, marketers should not, among other things: hang up on consumers who call to cancel; place them on hold for an unreasonably long time; provide false information about how to cancel; or misrepresent the reasons for delays in processing consumers' cancellation requests.[49] If ROSCA applies, sellers must comply with both that statute and Section 5 of the FTC Act.

[49] *See, e.g.*, *FTC v. Universal Premium Services*; *FTC v. Remote Response*; *FTC v. Hispanexo*; *FTC v. Berkeley Premium Nutraceuticals*.

Policy Statement of the Federal Trade Commission on Education Technology and the Children's Online Privacy Protection Act

The Federal Trade Commission ("Commission") is committed to ensuring that education technology ("ed tech") tools and their attendant benefits do not become an excuse to ignore critical privacy protections for children. When Congress enacted the Children's Online Privacy Protection Act[1] ("COPPA"), it empowered the Commission with tools beyond administering compliance with notice and consent regimes. The Commission's COPPA authority demands enforcement of meaningful substantive limitations on operators' ability to collect, use, and retain children's data, and requirements to keep that data secure. The Commission intends to fully enforce these requirements—including in school and learning settings where parents may feel they lack alternatives.

Protecting children's privacy online has been a priority for the Commission since 1998, when the Commission recommended "that Congress develop legislation placing parents in control of the online collection and use of personal information from their children."[2] Thereafter, Congress enacted COPPA and charged the Commission with enforcing the law, entrusting the FTC to take the lead in protecting children's privacy just as the country was entering the Internet age. To implement COPPA, the Commission issued the COPPA Rule, which became effective in 2000.[3]

In the decades since COPPA's enactment, there has been a steady proliferation of technologies that allow, and business models that depend on, the online collection and monetization of consumers' personal information. The development of ever more sophisticated targeting practices, in some cases based on comprehensive collection of users' activities across the Internet, has raised concerns that businesses might engage in harmful conduct and led to calls for strengthening children's privacy protections. Partly in response to these concerns, the Commission revised the COPPA Rule[4] in 2013, including to hold third parties such as advertising networks liable for collection of children's personal information from child-directed sites in violation of the Rule[5] and to expand the definition of personal information to include

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[1] 15 U.S.C. §§ 6501–6505.

[2] FED. TRADE COMM'N, PRIVACY ONLINE: A REPORT TO CONGRESS, at 42 (June 1998). *See also* Complaint, *In re Liberty Fin. Cos., Inc.*, FTC File No. 982-3522 (Aug. 12, 1999)(alleging that website operator falsely represented that personal information collected from children in a survey would be maintained anonymously and that participants would be sent an e-mail newsletter and prizes); Complaint, *In re GeoCities*, FTC File No. 982-3015 (Feb. 5, 1999) (alleging that website operator misrepresented which entity collected and maintained personal identifying information collected from children).

[3] 16 C.F.R. Part 312. As discussed below, the Commission strengthened the COPPA Rule through amendments that became effective in 2013. *See* Children's Online Privacy Protection Rule, 78 Fed. Reg. 3,972 (Jan. 17, 2013) (Final Rule amendments codified at 16 C.F.R. Part 312).

[4] *See id*.

[5] *See id.* at 4,010. *See also* Complaint, *United States v. OpenX Techs., Inc.*, Case No. 2:21-cv-09693 (C.D. Cal. Dec. 15, 2021) (alleging that online advertising platform collected and transmitted location information and persistent identifiers from users of child-directed apps without complying with COPPA); Complaint, *FTC and the State of New York v. Google LLC and YouTube, LLC*, Case No. 1:19-cv-2642 (D.D.C. Sept. 4, 2019) (alleging that YouTube

persistent identifiers used to target advertising to children.[6] Since that time, companies' information collection practices have continued to become more extensive, and concerns remain that children's information may be used to target them.

Concerns about data collection are particularly acute in the school context, where children and parents often have to engage with ed tech tools in order to participate in a variety of school-related activities. School-issued personal computing devices and online learning services have provided substantial benefits to students, particularly as the COVID-19 pandemic closed schools and forced families to switch from in-person to remote learning for their children. At the same time, parents may have reasonable questions and concerns about the personal information that ed tech providers collect and how they use and potentially share that information with third parties, including for marketing purposes. And parent groups, among others, have expressed concern that children are a captive audience in the school setting and should not be targeted with advertising as they pursue their educations.[7] School-issued devices and applications also enter families' homes, potentially allowing for even more private information to be collected and shared. Commission staff has provided extensive guidance[8] on COPPA's application to ed tech providers to address these concerns.

In investigating potential violations of COPPA by providers of ed tech and other covered online services, the Commission intends to scrutinize compliance with the full breadth of the substantive prohibitions and requirements of the COPPA Rule and statutory language. In particular, the Commission will focus on:

- **Prohibition Against Mandatory Collection:** COPPA-covered companies, including ed tech providers, must not condition participation in any activity on a child disclosing more information than is reasonably necessary for the child to participate in that activity.[9] These businesses cannot stop students from engaging in an ed tech activity if they do not provide information beyond what is reasonably needed to administer the students'

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collected persistent identifiers used for targeted advertising from users of child-directed channels without complying with COPPA); Complaint, *United States v. InMobi Pte Ltd.*, Case No. 3:16-cv-3474 (N.D. Cal. June 22, 2016) (alleging that mobile advertising network collected geolocation information from users of apps directed to children under the age of 13 without complying with COPPA).

[6] 78 Fed. Reg. 3,972, 4,009. *See also* Complaint, *United States v. HyperBeard, Inc.*, Case No. 3:20-cv-3683 (N.D. Cal. June 3, 2020) (alleging that app developer allowed third-party ad networks to use persistent identifiers to track users of its child-directed apps without complying with COPPA); Complaint, *FTC and the State of New York v. Google LLC and YouTube, LLC*, Case No. 1:19-cv-2642 (D.D.C. Sept. 4, 2019); Complaint, *United States v. Retro Dreamer*, Case No. 5:15-cv-2569 (C.D. Cal. Dec. 17, 2015) (alleging that app developer allowed third-party advertisers to collect persistent identifiers through its child-directed apps without complying with COPPA); Complaint, *United States v. LAI Sys., LLC*, Case No. 2:15-cv-9691 (C.D. Cal. Dec. 17, 2015).

[7] *See, e.g.*, COPPA Rule Review, FTC-2019-0054 (Project No. P195404), Comments of Campaign for a Commercial-Free Childhood, et al., Comment No. 117343, at 8 (Dec. 11, 2019) ("In many cases, parents and students are not even aware of what data is being collected, why it is being collected, who is collecting it, or where it is being stored. This data is often used to build behavioral profiles that allow third parties to create more effective marketing campaigns, targeted advertisements, and, ultimately, psychological manipulation of other children.").

[8] *See Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N (July 2020) § N, https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions#N.%20COPPA%20AND%20SCHOOLS.

[9] 16 C.F.R. § 312.7. *See also* Complaint, *United States v. Looksmart Ltd.*, Civ. Action No. 01-606-A (E.D. Va. Apr. 19, 2001); Complaint, *United States v. BigMailbox.com, Inc.*, Civ. Action No. 01-605-A (E.D. Va. Apr. 19, 2001).

participation in the activity.[10] For example, if an ed tech provider does not reasonably need to be able to email students, it cannot condition the student's access to schoolwork on students providing their email addresses.[11] Students must not be required to submit to unnecessary data collection in order to do their schoolwork.

- **Use Prohibitions:** COPPA-covered companies, including ed tech providers, are strictly limited in how they can use the personal information they collect from children. For example, operators of ed tech that collect personal information pursuant to school authorization[12] may use such information only to provide the requested online education service. In this context, ed tech companies are prohibited from using such information for any commercial purpose, including marketing, advertising, or other commercial purposes unrelated to the provision of the school-requested online service.[13]

- **Retention Prohibitions:** COPPA-covered companies, including ed tech providers, must not retain personal information collected from a child longer than reasonably necessary to fulfill the purpose for which it was collected.[14] It is unreasonable, for example, for an ed tech provider to retain children's data for speculative future potential uses.

- **Security Requirements:** COPPA-covered companies, including ed tech providers, must have procedures to maintain the confidentiality, security, and integrity of children's personal information.[15] For example, even absent a breach, COPPA-covered ed tech providers violate COPPA if they lack reasonable security.[16]

Such limitations on collection, use, and retention, along with security requirements, place significant responsibility on COPPA-covered businesses to implement strong privacy protections, in addition to the notice and consent requirements of the COPPA Rule. The responsibility for COPPA compliance is on businesses, not schools or parents—and agreements must reflect that.

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[10] The text of the COPPA Rule addressing prohibitions against conditioning access (16 C.F.R. § 312.7), which is described here, restates nearly verbatim the text of the statutory language (15 U.S.C. § 6502(b)(1)(C)). As part of its ongoing rule review, the Commission is carefully analyzing this provision to ensure that operators are aware of their obligations. *See* Request for Public Comment on the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule, 64 Fed. Reg. 35,842, 35,846 (July 25, 2019).

[11] *See* Children's Online Privacy Protection Rule, 64 Fed. Reg. 22,750, 22,758 (proposed Apr. 27, 1999) (codified at 16 C.F.R. § 312) (discussing email address example).

[12] Children's Online Privacy Protection Rule, 64 Fed. Reg. 59,888, 59,903 (Final Rule released Nov. 3, 1999) (codified at 16 C.F.R. § 312).

[13] *Complying with COPPA: Frequently Asked Questions*, FED. TRADE COMM'N § N, https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions#N.%20COPPA%20AND%20SCHOOLS (last visited May 18, 2022).

[14] 16 C.F.R. § 312.10. *See also* Complaint, *United States v. Kurbo, Inc. and WW Int'l, Inc.*, No. 3:22-cv-00946 (N.D. Cal. Feb. 16, 2022). Complaint, *United States v. Musical.ly*, Case No. 2:19-cv-1439 (C.D. Cal. Feb. 27, 2019).

[15] 15 U.S.C. § 6502(b)(1)(D); 16 C.F.R. § 312.8. *See also* Complaint, *In re Retina-X Studios, LLC*, FTC File No. 1723118 (Mar. 26, 2020). Complaint, *United States v. Unixiz, Inc. d/b/a/ iDressup.com*, No. 5:19-cv-02222-NC (N.D. Cal. April 24, 2019); Complaint, *United States v. VTech Elecs. Ltd.*, Case No. 1:18-cv-114 (N.D. Ill. Jan. 8, 2018); Complaint, *United States v. RockYou, Inc.*, No 3:12-cv-01487-SI (N.D. Cal. Mar. 26, 2012).

[16] 16 C.F.R. § 312.10.

Children should not have to needlessly hand over their data and forfeit their privacy in order to do their schoolwork or participate in remote learning, especially given the wide and increasing adoption of ed tech tools. Going forward, the Commission will closely scrutinize the providers of these services and will not hesitate to act where providers fail to meet their legal obligations with respect to children's privacy.

Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products

American families and businesses should never pay higher prices for medicine due to unlawful business practices. For this reason, challenging healthcare industry conduct that may raise prices and stifle innovation is a top priority for the Federal Trade Commission ("FTC" or "Commission"), and the Commission will use its full authority under the FTC Act to do so. The FTC has long pursued a comprehensive agenda to address unlawful conduct in the healthcare and pharmaceutical industries.[1]

For many years, the Commission has received complaints about rebates and fees paid by drug manufacturers to pharmacy benefit managers (PBMs) and other intermediaries to favor high-cost drugs that generate large rebates and fees that are not always shared with patients.[2] These rebates and fees may shift costs and misalign incentives in a way that ultimately increases patients' costs and stifles competition from lower-cost drugs, especially when generics and biosimilars are excluded or disfavored on formularies.

[1] For an overview of FTC healthcare actions generally, *see* MARKUS H. MEIER ET AL., OVERVIEW OF FTC ACTIONS, FED. TRADE COMM'N (Apr. 2022).

[2] *See* H. Rep. 16-456, 116th Cong., (2021), www.congress.gov/116/crpt, (that accompanied H.R. 7668, Fin. Serv's and General Gov't Appropriations Bill, (2021)). The Report states: "The Committee urges the FTC to prioritize investigations into manufacturers that erect rebate walls to block competition from new branded therapies, biosimilars, generics, and other innovative products." *Id* at 67; *see also* FED. TRADE COMM'N, REP. ON REBATE WALLS, at 1 n. 3. Previous discussions of the potential for pharmaceutical rebate agreements to foreclose competition were discussed at an FDA/FTC Workshop on a Competitive Marketplace for Biosimilars and an FTC workshop on prescription drug markets. *See Public Workshop: FDA/FTC Workshop on a Competitive Marketplace for Biosimilars*, U.S. FOOD AND DRUG ADMIN. (Mar. 9, 2020), https://www.fda.gov/drugs/news-events-human-drugs/public-workshop-fdaftc-workshop-competitive-marketplace-biosimilars-03092020-03092020#event-materials; *Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics*, FED. TRADE COMM'N (Nov. 8, 2017), https://www.ftc.gov/news-events/events/2017/11/understanding-competition-prescription-drug-markets-entry-supply-chain-dynamics. The FTC has been aware of the issues surrounding drug rebate practices since at least 1999. *See* ROY LEVY, THE PHARMACEUTICAL INDUSTRY: A DISCUSSION OF COMPETITIVE AND ANTITRUST ISSUES IN AN ENVIRONMENT OF CHANGE, BUREAU OF ECON. STAFF REP., FED. TRADE COMM'N (Mar. 1999).

The Commission is issuing this Policy Statement to explain its enforcement policy with respect to these practices.[3] We do so by highlighting insulin, which many have cited as one prominent example of a prescription drug impacted by high rebates and fees to PBMs and other intermediaries.[4] Insulin is a life-sustaining treatment for roughly 8 million Americans who rely on it to control diabetes.[5] Research indicates that the wholesale price of insulin nearly tripled between 2009 and 2017,[6] increasing out-of-pocket costs for both insured[7] and uninsured patients.[8] The list price for a year's supply of insulin has risen to nearly $6,000, with out-of-pocket costs for insulin alone averaging $1,288 for uninsured patients and $613 for insured patients as of 2017.[9]

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[3] This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates one or more existing statutory or regulatory requirements. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act or other statutes. Pursuant to the Congressional Review Act (5 U.S.C. § 801 *et seq*.), the Office of Information and Regulatory Affairs designated this Policy Statement as not a "major rule," as defined by 5 U.S.C. § 804(2).

[4] U.S. SEN. FINANCE COMM., STAFF REP., INSULIN: EXAMINING THE FACTORS DRIVING THE RISING COST OF A CENTURY OLD DRUG, at 71 (Jan. 2021) ("certain contracting and business practices may create incentives for PBMs to favor drugs with high rebates and, in turn, discourage manufacturers from competing to lower WAC prices."). *See also* Karen Von Nuys et al., *Estimation of the Share of Net Expenditures on Insulin Captured by US Manufacturers, Wholesalers, PBMs, Pharmacies, and Health Plans from 2014 to 2018*, 2 J. AM. MED. ASSOC. H. FORUM 1, 3 (2021) (suggesting business practices of intermediaries may influence rising list prices for insulin).

[5] *See* CARDINAL H., 2022 BIOSIMILARS REPORT: THE U.S. JOURNEY AND PATH AHEAD, at 18 ("over eight million people use insulin daily to effectively manage their diabetes"); William T. Cefalu et al., *Insulin Access and Affordability Working Group: Conclusions and Recommendations*, 41 DIABETES CARE 1299 (2018).

[6] *See* Brian Sable-Smith, *How Much Difference Will Eli Lilly's Half Price Insulin Make*, KAISER FAMILY FOUNDATION (Mar. 12, 2019), https://khn.org/news/how-much-difference-will-eli-lillys-half-price-insulin-make/ ("Between 2009 and 2017 the wholesale price of a single vial of Humalog . . . nearly tripled — rising from $92.70 to $274.70.").

[7] Cefalu et al., *supra* note 5, at 1302; Samantha Willner et al., "*Life or death": Experiences of insulin insecurity among adults with type 1 diabetes in the United States,* 11 SSM POPULATION H. 1, 3 (2020).

[8] *See* Cefalu et al., *supra* note 5, at 1308 (explaining uninsured patients pay the full list price without financial assistance).

[9] *See* Sherry Glied & Benjamin Zhu, *Not so sweet: Insulin Affordability over Time*, THE COMMONWEALTH FUND (Sept. 25, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/sep/not-so-sweet-insulin-affordability-over-time; Chien-Wen Tseng et al, *Impact of Higher Insulin Prices on Out-of-Pocket Costs in Medicare Part D,* 43 J. DIABETES CARE 50 (2020) ("From 2014 to 2019, the average annual insulin price rose 55% from $3,819 to $5,917… the projected yearly out-of-pocket cost for insulin increased 11% from $1,199 to $1,329."). These studies note significant heterogeneity in patient out-of-pocket costs depending on several factors including which insulin product(s) is used, the amount of insulin needed, and whether the patient has commercial insurance, Medicare, Medicaid or is uninsured.

Patients with diabetes have described how rising insulin costs have rendered this essential product unaffordable and harmed them in different ways.[10] The increased cost of insulin has caused many patients to ration it,[11] causing suffering, severe illness, and death.[12] During the Commission's Open Meeting in October 2021, one commenter discussed the death of her son who was forced to ration insulin due to high costs.[13] Others have described how insulin costs and the fear of losing health insurance have dissuaded them from leaving their current jobs and limited their ability to pursue other opportunities[14] For example, one small business owner expressed the fear of expanding his business because of insulin costs.[15] High insulin costs also have an outsized impact on those least able to absorb or avoid these additional costs, including patients from historically underserved communities.[16]

In addition to other factors, some have suggested that high rebates and fees to PBMs and other intermediaries may incentivize higher list prices for insulin and discourage coverage of the

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[10] Willner et al., *supra*, note 7; Fed. Trade Comm'n, Tr. of Open Comm'n Meeting, at 14-15, 19-20 (Oct. 21, 2021), www.ftc.gov/openmeetingtranscript.pdf.

[11] *See* Darby Herkert et al., *Cost-Related lnsulin Underuse Among Patients With Diabetes*, 179 J. AM. MED. ASSOC. INTERN MED. 112-114 (2019) (finding one of every four patients rations insulin due to cost within one sample); INSULIN SENATE REP., *supra* note 4, at 14.

[12] *See* FTC Open Meeting Tr., *supra* note 10, at 14 -15, 18-19 (public commenters Matthew Dinger, Anna Squires, and Nicole Smith Holt); *see also* S. Vincent Rajkumar, *The High Cost of Insulin in the U.S.: An Urgent Call to Action,* 95 MAYO CLINIC PROC. 22 (Jan. 2020) ("Alec Smith was 23 when he was diagnosed with type 1 diabetes.… At age 26, he could no longer stay on his mother's health care insurance plan and needed to find his own coverage. …The insurance available to him came with a $7600 deductible and a monthly premium of approximately $440. Because he could not afford this, Alec decided to temporarily forego insurance coverage and purchase insulin with cash. Unfortunately for him, the cash price of insulin was far beyond his means. He decided to try and ration the amount of insulin he took till he had enough savings to purchase insurance. Sadly, on June 27, 2017, he was found dead in his apartment of diabetic ketoacidosis.").

[13] FTC Open Meeting Tr., *supra* note 10, at 18-19 (public commenter Nicole Smith Holt describes the death of her son, Alec Smith, and others from rationing insulin).

[14] *See* Willner et al., *supra* note 7, at 6 ("the only reason that I'm working my job currently … is because I'm afraid to get off of it because there goes my insurance, there goes my method to get any kind of insulin or supplies for anything); *see also* FTC Open Meeting Tr*., supra* note 10, at 14-15; *see also* COLORADO ATT'Y GEN., PRESCRIPTION INSULIN DRUG PRICING REP., at 53 (2020) ("Many survey respondents reported they feel hostage to jobs they would like to leave but need to keep for the insurance because they could not afford insulin and supplies without it.").

[15] *See, e.g.,* COLORADO ATT'Y GEN. INSULIN REP., *supra*, note 14, at 53 ("One survey respondent expressed the fear of expanding his small business because of high insulin costs and overall expensive insurance costs.").

[16] *See* Herkert, et al., *supra* note 11 ("Patients with lower incomes were more likely to report cost-related underuse…").

lowest-cost insulin products.[17] As the Commission's previous Report on Rebate Walls explained, most consumers have insurance that covers a portion of their prescription costs.[18] Health plans, usually through PBMs, use formularies to define which drugs are covered. Drug manufacturers commonly pay PBMs and other intermediaries rebates and fees to have their drugs included on formularies or placed on preferred formulary tiers.[19] Some rebates and fees are conditioned on the sales volume of specific drugs or the exclusion of competing drug products from the same formulary tier.[20]

These rebate and fee agreements may incentivize PBMs and other intermediaries to steer patients to higher-cost drugs over less expensive alternatives.[21] This practice could lead to increased costs for both patients and payers, including increased out-of-pocket costs at the point of sale. It may also insulate more expensive drugs from competing with less expensive alternatives. Nothing prevents drug manufacturers, PBMs, and health plans from negotiating good-faith rebates and fees for legitimate services that increase value to payers and patients. However, when dominant drug manufacturers or intermediaries stifle or foreclose competition from significantly less expensive generic and biosimilar alternatives, the Commission has the

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[17] Cefalu et al., *supra* note 5, at 1309 ("The current pricing and rebate system encourages high list prices. . . PBMs negotiate rebates from manufacturers using formulary placement as leverage. PBMs often exclude from formularies the insulins made by the manufacturer who offers the lowest rebate. . . People with diabetes are financially harmed by high list price and high out of pocket costs."); INSULIN SENATE REP., *supra* note 4, at 71 ("Information collected for this investigation suggests that certain contracting and business practices may create incentives for PBMs to favor drugs with high rebates and, in turn, discourage manufacturers from competing to lower WAC prices.").
[18] *See* FTC REBATE WALL REP., *supra* note 2, at 2.
[19] *Id.* at 2; INSULIN SENATE REP., *supra* note 4, at 67 ("manufacturers offer substantial rebates to PBMs and their clients for the purposes of securing preferred formulary placement for their products").
[20] *See id*., at 68 ("Manufacturers have increased their rebates in order to win preferred formulary placement and block competitors.").
[21] *See e.g*., Stacie Dusetzina et al., *Patient and Payer Incentives to Use Patented Brand-Name Drugs vs Authorized Generic Drugs in Medicare Part D*, 181 J. AM. MED. ASSOC. INTERN. MED. 1605, 1611 (2021) (describing Part D plans' use of high-list price brand insulins, including insulin lispro (Humalog), and insulin as part (Novolog) over 50% lower-list price authorized generic versions).

legal authority to investigate these practices and take enforcement action against unlawful conduct.[22]

The Commission has several legal authorities that may apply to these practices, including Section 5 of the FTC Act, Section 3 of the Clayton Act, Section 2 of the Robinson-Patman Act, and the Sherman Act.[23]

Exclusionary rebates that foreclose competition from less expensive alternatives may constitute unreasonable agreements in restraint of trade under Section 1 of the Sherman Act; unlawful monopolization under Section 2 of the Sherman Act; or exclusive dealing under Section 3 of the Clayton Act.[24] Moreover, inducing PBMs or other intermediaries to place higher-cost drugs on formularies instead of less expensive alternatives in a manner that shifts costs to payers and patients may violate the prohibition against unfair methods of competition or unfair acts or practices under Section 5 of the FTC Act.

Finally, paying or accepting rebates or fees in exchange for excluding lower-cost drugs may violate Section 2(c) of the Robinson-Patman Act, which prohibits payments to agents, representatives, and intermediaries who represent another party's interests in connection with the purchase or sale of goods.[25] At least one court has held that this provision may reach rebates paid

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[22] At the request of Congress, the FTC has previously investigated certain PBM business practices. *See* FED. TRADE COMM'N, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (Aug. 2005).

[23] The Commission's authority to address unfair methods of competition under Section 5 of the FTC Act include, but are not limited to, conduct that would violate the Sherman Act. *See, e.g.*, *Oregon Lithoprint, Inc.*, Analysis to Aid Public Comment, 83 Fed. Reg. 11529, 11531 (Mar. 15, 2018) ("The Commission has long held that an invitation to collude violates Section 5 of the FTC Act even where there is no proof that the competitor accepted the invitation.").

[24] *See* Fed. Trade Comm'n Act, 15 U.S.C. § 45; Sherman Act §§ 1 and 2; Clayton Act, 15 U.S.C. § 14.

[25] 15 U.S.C. § 13(c) ("It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.").

by drug manufacturers to PBMs.[26] The Commission has a long history of addressing commercial bribery and will continue to do so.[27]

The FTC intends to closely scrutinize the impact of rebates and fees on patients and payers to determine whether any of these provisions have been violated. In addition, the Commission will monitor private litigation and file amicus briefs where it can aid courts in analyzing unlawful conduct that may raise drug prices. The Commission will also continue to study this issue to understand the full range of practices and implications.

The Commission recognizes the life-and-death stakes of this work and is committed to acting expeditiously. As it has done throughout its history, the FTC will bring an interdisciplinary approach, using resources and expertise from throughout the agency to combat unlawful practices in the prescription drug industry.

See also PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ⁋ 2362i (4th & 5th ed. 2015-2021) (collecting and discussing cases involving commercial bribery under Section 2(c)); JOSEPH BAUER ET AL., KINTNER'S FEDERAL ANTITRUST LAW § 26.12 (2021).

[26] *In re Warfarin Sodium Antitrust Litig.,* Civ. No. 97-659 (D. Del.)1998 WL 883469, at *16 (D. Del. Dec. 7, 1998), *rev'd on other grounds,* 214 F.3d 395 (3d Cir. 2000).

[27] *See* Hon. Garland S. Ferguson, Jr., Chairman of FTC, Commercial Bribery: An Address to the Conf. on Com. Bribery to the Comm. Standards Council and the Better Bus. Bureau of N.Y .City (Oct. 17, 1930), www.ftc.gov/systemstatementsferguson_commercial_bribery (explaining the Commission's focus on commercial bribery as an unfair method of competition even before it gained authority under the Robinson-Patman Act); *see also* Donald S. Clark, Sec'y of FTC, Remarks Regarding The Robinson-Patman Act: Annual Update, Before the Robinson Patman Act Comm., Section of Antitrust Law, 46th Annual Spring Meeting (Apr. 2, 1998), www.ftc.gov/public-statements/1998/04/robinson-patman-act-annual-update (recognizing the Robinson-Patman's prohibition on commercial bribery).

FTC Policy Statement on Enforcement Related to Gig Work

American workers deserve fair, honest, and competitive labor markets. Over the past decade, internet-enabled "gig" companies have grown exponentially, and gig work now composes a significant part of the United States economy.[1] One study suggests the gig economy will generate $455 billion in annual sales by 2023.[2] The rapid growth of the gig economy is made possible by the contributions of drivers, shoppers, cleaners, care workers, designers, freelancers, and other workers. Protecting these workers from unfair, deceptive, and anticompetitive practices is a priority, and the Federal Trade Commission ("FTC" or "Commission") will use its full authority to do so.[3] As the Commission's past work and current initiatives illustrate, the agency's broad-based jurisdiction and interdisciplinary approach to market harms make it well positioned to confront the challenges this model can pose to workers.[4]

[1] *See, e.g.*, Ben Zipperer et al., Econ. Pol'y Inst., *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, at 1 (June 1, 2022) ("While the concept of nontraditional, short-term, and contract work has been around since well before the digital age, it wasn't until the 2010s that digital platform companies like Uber, DoorDash, Instacart, and TaskRabbit began to rise to prominence and shape the way we define gig work today.").
[2] Mastercard & Kaiser Assocs., *Mastercard Gig Economy Industry Outlook and Needs Assessment*, at 2 (May 2019).
[3] While this Statement focuses on potential harms to gig workers and how the Commission might address them, misconduct against any consumer—customers who use services offered through the platform, workers who supply labor, and businesses on or off the platform—is prohibited. *See, e.g.*, Decision & Order, *In re Uber Techs., Inc.*, Dkt. No. C-4662 (FTC Oct. 25, 2018) (requiring Uber to implement a comprehensive privacy program to protect personal data collected from both riders and drivers); Decision & Order, *Amazon.com.*, Dkt. No. C-4746 (FTC June 10, 2021) (requiring Amazon to refund Amazon Flex drivers $61.7 million in tips that Amazon promised drivers but failed to pay); Compl. ¶¶ 61–69, *In re HomeAdvisor, Inc.*, Dkt. No. 9407 (FTC Mar. 11, 2022) (FTC challenging a lead-generation platform's alleged misrepresentations to small businesses about the platform's effectiveness); *see also* Letter from Protect Our Rests. to Fed. Trade Comm'n (July 21, 2021) (explaining how various practices that result in diners paying higher prices to food delivery platforms also harm small businesses).
[4] This Policy Statement elaborates on principles adopted by the Commission in individual cases and rules over the course of many years. This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates at least one existing statutory or regulatory requirement. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action. Pursuant to the Congressional Review Act, 5 U.S.C. §§ 801 *et seq*., the Office of Information and Regulatory Affairs designated this Policy Statement as not a major rule, as defined by 5 U.S.C. § 804(2).

I. Background on Gig Work

The gig economy touches nearly every aspect of American life, from food delivery to transportation to household services. Gig work involves activity where people earn income providing on-demand work, often through a digital service like an app.[5] Ride-hailing companies recruit workers to drive customers in the worker's personal vehicle. Food delivery services find workers to deliver items from restaurants, grocery stores, and other merchants to customers. Service apps connect workers with customers seeking help with cleaning, home repair, and other temporary jobs. The gig work model is expanding into healthcare, retail, and other segments of the economy.[6] Demand for some services gig workers provide grew during the COVID-19 pandemic.[7] Demand for other gig services, particularly transportation, decreased during that same time and caused financial struggles for some workers, illustrating the precarious nature of gig work.[8]

Sixteen percent of Americans report earning money through an online gig platform.[9] Gig workers live throughout the United States, in urban, suburban, and rural areas.[10] As highlighted

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[5] *See, e.g.*, Internal Revenue Serv., *Gig Economy Tax Center* (last updated Mar. 15, 2022); Elka Torpey & Andrew Hogan, *Working in a Gig Economy*, U.S. Bureau of Labor Stat. (May 2016). Gig work also may be referred to as "crowdwork," contract work, on-call arrangements, or temporary work. *See* Gallup, Inc., *Gallup's Perspective on the Gig Economy and Alternative Work Arrangements*, at 7 (2018).

[6] *See, e.g.*, Fiona Greig & Daniel M. Sullivan, *The Online Platform Economy Through the Pandemic* JPMorgan Chase Inst. (Oct. 2021) (reporting that some gig workers "transport people or goods" while other workers "offer a growing variety of services including dog walking, home repair, telemedicine, and many others"); *see also* U.S. Census Bureau, *Selected Industries That Contributed to the U.S. Gig Economy: 2019* (June 30, 2022).

[7] *See, e.g.*, Accenture, *Platforms Work*, at 21 & ex.4 (2021) (showing with Uber data that "COVID-19 suppressed demand for rideshare and enabled strong growth in delivery").

[8] *See, e.g.*, Greig & Sullivan, *The Online Platform Economy Through the Pandemic* (noting that drivers for rideshare platforms were "most likely to have received unemployment insurance" during the COVID-19 pandemic).

[9] Anderson et al., *The State of Gig Work in 2021*, at 3, 16; *see also* Fed. Rsrv. Sys. Bd. of Governors, *Report on the Economic Well-Being of U.S. Households in 219, Featuring Supplemental Data from April 2020*, at 18 (May 2020) ("Nearly one in three adults earned money from gigs."); *cf.* Katherine G. Abraham et al., Nat'l Bureau of Econ. Rsch. Working Paper 24950, *Measuring the Gig Economy: Current Knowledge and Open Issues* (Aug. 2018) (explaining why precisely measuring the number of gig workers in the U.S. economy is so difficult).

[10] *See* Anderson et al., *The State of Gig Work in 2021*, at 24 (noting that comparable percentages of adults in urban, suburban, and rural areas have earned money through an online gig platform in the past year); *see also* Ctr. for Rural Innovation & Rural Innovation Strategies, Inc., *The Growing Gig Economy in Rural America*, at 4 (Nov. 2021).

in the FTC's *Serving Communities of Color* report, gig workers are disproportionately people of color[11]: 30% of Latino adults, 20% of Black adults, and 19% of Asian adults report having engaged in gig work, compared to only 12% of White adults.[12] Many gig workers have lower incomes and, because they may not be covered by wage and hour laws, can earn less than the minimum wage.[13] More than half of American gig workers report that the money they earn through the gig economy is essential or important for meeting their basic needs.[14]

Gig workers are paid in different ways, including weekly, in "batches" after completing multiple gigs, or immediately upon completing a gig (for a fee).[15] Many workers are heavily dependent on customer tips.[16] Gig companies may generate revenue from multiple sources, including a "take rate"[17] (a percentage of customer payments for workers' services), customer fees, and commissions charged to merchants.

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[11] Fed. Trade Comm'n, *Serving Communities of Color: A Staff Report on the Federal Trade Commission's Efforts to Address Fraud and Consumer Issues Affecting Communities of Color*, at 19 & n.70 (Oct. 2021).
[12] Anderson et al., *The State of Gig Work in 2021*, at 5; *see* DoorDash, *2021 DoorDash ESG Report: Growing and Empowering Local Economies*, at 41 (Apr. 19, 2022) (nearly 40% of DoorDash gig workers identify as people of color, 58% are women, and 15% are veterans); Uber, *2021 ESG Report*, at 28 (July 2021) (about half of Uber's U.S. delivery personnel identify as people of color).
[13] *See* Zipperer et al., *National Survey of Gig Workers*, at 1 ("[A] survey of gig workers reveals that these workers often are paid low wages, in some instances less than the minimum wage [and] they face economic insecurity at high rates . . . ."); *see also* Anderson et al., *The State of Gig Work in 2021*, at 4–5, 7, 23; Gallup, *Gallup's Perspective on the Gig Economy and Alternative Work Arrangements*, at 8.
[14] *See* Anderson et al., *The State of Gig Work in 2021*, at 31 (reporting that 58% of current or recent gig workers said that money earned via gig jobs has been "essential or important for meeting their basic needs").
[15] *See, e.g.*, DoorDash, *What Is Fast Pay?* (2020); Grubhub for Drivers, *What Is Instant Cashout?* (2020); Uber Techs., Inc., *Your Money When You Need It* (2022).
[16] *See* Chris Benner, UC Santa Cruz, *On-Demand and On-the-Edge: Ride-Hailing and Delivery Workers in San Francisco*, at 28 (May 5, 2020) ("Delivery workers are particularly dependent on tips, which account for 30% of their estimated earnings.").
[17] *See* Cong. Rsch. Serv., R44365, *What Does the Gig Economy Mean for Workers?*, at 3 (Apr. 28, 2017); *see also* Aaron Gordon & Dhruv Mehrotra, *Uber and Lyft Take a Lot More from Drivers Than They Say*, Jalopnik (Aug. 26, 2019, 12:04 PM).

II. The Market for Gig Workers

As with any evolving sector of the economy, the Commission is attuned to gig work's promises and pitfalls. This Statement focuses on three market features that implicate the Commission's consumer protection and competition missions:

Control Without Responsibility. Companies frequently promote gig work as a flexible opportunity for people to set their own hours and work on their own terms.[18] These companies often categorize their workers as independent contractors. Yet in practice these firms may tightly prescribe and control their workers' tasks in ways that run counter to the promise of independence and an alternative to traditional jobs. This tension has contributed to litigation across the country over allegations that gig workers are being misclassified as independent contractors rather than employees.[19] When misclassification occurs, workers are often deprived of critical rights to which they are entitled under law (such as the right to organize, overtime pay, and health and safety protections), and saddled with inordinate risks (such as unclear and unstable pay, or responsibility for a vehicle, equipment, or supplies) and business expenses that employers commonly bear (such as insurance, gas, maintenance, and taxes).[20] At the same time,

[18] *See, e.g.*, Cong. Rsch. Serv., *What Does the Gig Economy Mean for Workers?*, at i ("The apparent availability of gig jobs and the flexibility they seem to provide workers are frequently touted features of the gig economy.").
[19] *See, e.g.*, *Lawson v. Grubhub, Inc.*, 13 F.4th 908 (9th Cir. 2021); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020); *Razak v. Uber Techs., Inc.*¸ 951 F.3d 137 (3d Cir. 2020); *Hood v. Uber Techs., Inc.*, Case No. 1:16-CV-998, 2019 WL 93546 (M.D.N.C. Jan. 3, 2019).
[20] *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (protecting, among other rights, employees' rights to act together to address working conditions); U.S. Dep't of the Treasury, *The State of Labor Market Competition*, at 12 ("Classifying workers as independent contractors can especially reduce costs by shifting non-wage costs typically paid by employers (e.g. healthcare benefits) onto the employee. These costs are non-trivial—approximately 30 percent of per-hour employer costs come from costs other than wages and salaries."); *see also* Ken Jacobs & Michael Reich, Inst. for Rsch. on Labor & Emp., *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage*, at 2, Univ. Cal. Berkeley. (Sept. 2021) (estimating the financial impact of undisclosed terms of work for rideshare drivers); James A. Parrott & Michael Reich, *An Earnings Standard for New York City's App-Based Drivers: Economic Analysis and Policy Assessment*, at 49 (July 2018) (noting the large amount of unpaid "idle" time for rideshare drivers). Moreover, high inflation and other economic shocks may cause certain worker-borne costs to rise without any corresponding increase in pay. *See* Gerrit De Vynck et al., *Inflation Is Helping Gig Companies Like Uber—and Hurting Their Workers*, Wash. Post (Aug. 7, 2022, 6:00 AM EDT).

gig companies may use nontransparent algorithms to capture more revenue from customer payments for workers' services than customers or workers understand.[21] This dynamic calls for scrutiny of promises gig platforms make, or information they fail to disclose, about the financial proposition of gig work.

Diminished Bargaining Power. Gig workers often do not have the information they need to know when work will be available, where they will have to perform it, or how they will be evaluated.[22] Behind the scenes, ever-changing algorithms may dictate core aspects of workers' relationship with a given company's platform, leaving them with an invisible, inscrutable boss.[23] Workers have little leverage to demand transparency from gig companies: A decentralized work environment, the potential lack of legal protections to organize, and a high turnover rate driven by companies' treatment of workers as replaceable all contribute to workers' diminished bargaining power.[24] Mandatory arbitration and class-action waivers are also increasingly common among gig workers, meaning that most efforts to vindicate worker rights occur in nonpublic, isolated proceedings.[25] This power imbalance may leave gig workers more

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[21] *See, e.g.*, Compl. ¶¶ 30–34, *In re Amazon.com, Inc.*, Dkt. No. C-4746 (alleging that Amazon adopted a "variable base pay" model for Amazon Flex so it could capture drivers' tips); Dan Calacci, MIT Media Lab, *Bargaining with the Algorithm: Pooling Worker Data to Estimate Gig Economy Worker Pay* (Oct. 15, 2020).

[22] *See, e.g.*, Compl. ¶¶ 35–47, *Amazon.com*, Dkt. No. C4746 (alleging that Amazon concealed changes to an algorithm by falsely telling workers that no change had actually occurred).

[23] *See, e.g.*, Hatim A. Rahman, *The Invisible Cage: Workers' Reactivity to Opaque Algorithmic Evaluations*, 66 Admin. Sci. Q. 945, 976 (2021); Spencer Soper, *Fired by Bot at Amazon: "It's You Against the Machine"*, Bloomberg (June 28, 2021, 5:00 AM); *see also* Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers' Buttons*, N.Y. Times (Apr. 2, 2017).

[24] *See* U.S. Dep't of the Treasury, *The State of Labor Market Competition*, at 11 ("By removing the immediate nexus between workers and the firm for which they provide services, workers are prevented from bargaining directly with the entity that has the economic power."); Christopher Mims, *In a Tight Labor Market, Gig Workers Get Harder to Please*, Wall St. J. (May 4, 2019) (noting "[t]he unusually high rate of turnover [of workers] in the gig economy"); *see also* Zipperer et al., *National Survey of Gig Workers*, at 7.

[25] *See, e.g.*, Elizabeth C. Tippett & Bridget Schaaf, *How* Concepcion *and* Italian Colors *Affected Terms of Service in the Gig Economy*, 70 Rutgers U. L. Rev. 459, 461 (2018) (analyzing the high prevalence of mandatory arbitration and class-action waivers in the gig economy even before *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)).

exposed to harms from unfair, deceptive, and anticompetitive practices and is likely to amplify such harms when they occur.

Concentrated Markets. Markets populated by businesses that run online platforms are often concentrated, resulting in reduced choice for workers, customers, and businesses. As a platform grows by attracting more users (e.g., riders), it can become more valuable to users on the other side of the platform (e.g., drivers) by generating so-called "network effects." Because network effects can lock in a dominant player's market position, these businesses can be incentivized to pursue tactics designed to quickly capture a large share of the market, leading the market to "tip" and raising significant barriers to entry. Gig companies in concentrated markets may be more likely to have and exert market power over gig workers or engage in anticompetitive unilateral or coordinated conduct. Such conduct may eliminate or further weaken competition among existing gig companies for workers' services or prevent new gig companies from getting off the ground or being able to enter the market. The resulting loss in competition may enable gig companies to suppress wages below competitive rates, reduce job quality, or impose onerous terms on gig workers.[26] In the absence of robust competition among gig companies, unfair and deceptive practices by one platform can proliferate across the labor market, creating a race to the bottom that participants in the gig economy, and especially gig workers, have little ability to avoid.

III. FTC Enforcement Priorities

The FTC plays a vital role in addressing these and other challenges facing gig workers, including practices directed toward customers, workers, and honest businesses. As the only federal agency dedicated to enforcing consumer protection and competition laws in broad sectors

[26] *See, e.g.*, Exec. Order No. 14,036, Promoting Competition in the American Economy, § 1, 86 Fed. Reg. 36,987, 36,987 (July 14, 2021); U.S. Dep't of the Treasury, *The State of Labor Market Competition*, at i.

of the economy, the FTC examines unlawful business practices and harms to market participants holistically, complementing the efforts of other enforcement agencies with jurisdiction in this space. This integrated approach to investigating unfair, deceptive, and anticompetitive conduct is especially appropriate for the gig economy, where law violations often have cross-cutting causes and effects.

While online gig platforms may seem novel, traditional legal principles of consumer protection and competition apply.[27] And the manifold protections enforced by the Commission do not turn on how gig companies choose to classify working consumers.[28] The Commission will use the full portfolio of laws it enforces to prevent unfair, deceptive, anticompetitive, and otherwise unlawful practices affecting gig workers.

A. Holding Gig Companies Accountable for Their Claims and Conduct Concerning Gig Work's Costs & Benefits

Gig companies that classify their workers as independent contractors may seek to retain control over their workforce while simultaneously shifting costs and risks onto workers. So classified, workers may be deprived of the protections of an employment relationship to, for example, insist on minimum pay and recordkeeping standards,[29] understand what comprises an hour of payable work,[30] or share information about their income with coworkers to assess unfair compensation practices or organize for higher compensation.[31] A range of FTC authorities can apply when gig companies seek to exploit this vulnerability by disclosing pay and costs in an

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[27] For example, the Commission regulates earnings claims made to gig workers just as it would in any other business or money-making opportunity. *See* Advance Notice of Proposed Rulemaking: Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13,951, 13,953 & n.26 (Mar. 11, 2022) [hereinafter "Earnings Claims ANPRM"].
[28] "The use of the word 'consumer'" in the FTC Act "is to be read in its broadest sense." S. Rep. No. 93–151, at 27 (1973); *see, e.g.*, Decision & Order, *Amazon.com*, Dkt. No. C-4746 (FTC recovering $61.7 million in unpaid tips to Amazon Flex drivers, regardless of the drivers' employment classification); Compl. ¶ 5, *Uber Techs.*, Dkt. No. C-4662 ("Uber Drivers are consumers who use the [Uber] App to locate Riders in need of transportation.").
[29] *See* 29 U.S.C. §§ 206–07 (minimum pay and overtime), 211(c) (recordkeeping).
[30] *See id*. § 203(o) (defining "[h]ours worked" for purposes of calculating minimum pay and overtime pay).
[31] *See id*. § 157.

unfair or deceptive manner. The Commission also recognizes that misleading claims about the costs and benefits of gig work can impair fair competition among companies in the gig economy and elsewhere.

Deceptive or Unfair Pay Practices. False, misleading, or unsubstantiated claims about earnings may violate Section 5 of the FTC Act,[32] the Franchise Rule, or the Business Opportunity Rule,[33] and can trigger civil penalties.[34] Likewise, withholding money owed to workers without consent can violate Section 5's prohibition against unfairness.[35] Gig companies often advertise hourly pay to prospective workers or promise a specific amount or range of pay to existing workers for completing a gig.[36] Yet fewer than half of gig workers understand how their pay is determined, and misleading or unsupported claims about their earnings can leave workers in a financial bind.[37] Deceptive earnings claims and opaque compensation criteria can also impede competition by preventing workers from accurately comparing opportunities presented by gig companies.

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[32] 15 U.S.C. § 45. Unfortunately, the Commission's ability to refund consumers for violations of Section 5 is hampered following the U.S. Supreme Court's decision in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), which stripped the Commission of its most potent tool to recover money for consumers. Indeed, *AMG* would have prevented recovery of more than $81 million in consumer redress obtained in two of the Commission's recent victories for gig workers. *See* Decision & Order, *Amazon.com*, Dkt. No. C-4746 (recovering $61.7 million for Section 5 violations); Stipulated Order, *FTC v. Uber Techs., Inc.*, Case No. 3:17-cv-261-JST (N.D. Cal. Jan. 19, 2017) (recovering $20 million for Section 5 violations).

[33] 16 C.F.R. pts. 436 (Franchise Rule), 437 (Business Opportunity Rule). Whether the Franchise Rule or the Business Opportunity Rule applies to a particular gig arrangement requires a case-by-case factual analysis. *See id.* § 436.1(h) (defining a franchise); *id.* § 437.1(c) (defining a business opportunity). The Commission may seek civil penalties and consumer redress from companies that violate FTC rules. *See* 15 U.S.C. §§ 45(m)(1)(A), 57b(a)–(b).

[34] *See* Fed. Trade Comm'n, Press Release, FTC Puts Businesses on Notice That False Money-Making Claims Could Lead to Big Penalties (Oct. 26, 2021); *see also* 15 U.S.C. § 45(m)(1)(B).

[35] *Cf.* Decision & Order, *Amazon.com*, Dkt. No. C-4746 (requiring a gig company to obtain workers' "express informed consent" before changing how workers' tips are distributed).

[36] *See, e.g.*, Compl. ¶¶ 21–22, *Uber Techs.*, Case No. 3:17-cv-261-JST (FTC alleging that Uber made various hourly earnings claims targeted to multiple U.S. cities that did not align with what drivers in those cities actually earned); *see also* Compl. ¶¶ 30–34, *Amazon.com*, Dkt. No. C-4746 (alleging that Amazon promised that workers would keep 100% of their tips, but instead used tips to reduce workers' base pay).

[37] *See* Anderson et al., *The State of Gig Work in 2021*, at 35 ("Overall, 44% of people who have ever earned money through online or delivery platforms say they at least somewhat understand how the companies that run these apps or sites determine how much they get paid . . . ."); *see also* Zipperer et al., *National Survey of Gig Workers*, at 6–7 (describing high rates of financial hardship among gig workers).

The Commission has initiated rulemaking proceedings to strengthen its ability to detect and deter deceptive earnings claims and has sought comment on the prevalence of deceptive earning claims relating to gig work.[38] In the meantime, misleading earnings claims remain prohibited by Section 5 of the FTC Act.[39] Likewise, pursuant to the Franchise Rule or the Business Opportunity Rule, gig companies that require new participants to make required payments may need to disclose any claims they make about potential earnings and have a reasonable basis for, and written materials on hand to support, those claims.[40] The Commission has also issued Notices of Penalty Offenses related to earnings claims and testimonials[41] to place gig companies, among others, on notice that the Commission is working to deter misleading representations throughout the gig economy, including by seeking civil penalties where appropriate.[42]

Undisclosed Costs or Terms of Work. By the same token, deceptive claims or nondisclosures about startup costs, training fees, other expenses, or other material terms can violate Section 5,[43] and the failure to make required disclosures can violate the Franchise Rule or Business Opportunity Rule.[44] When a firm requires consumers to make one or more required payments to sign up for a work opportunity, that arrangement may fall under the Franchise Rule

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[38] *See* Earnings Claims ANPRM, 87 Fed. Reg. at 13,955–56.
[39] *See id*. at 13,951–52 (describing the FTC's extensive history of prior enforcement actions against a wide variety of companies offering employment and other work opportunities with misleading earnings claims).
[40] *See* 16 C.F.R. § 436.5(s) (describing the disclosures that franchisors must make to franchisees about financial performance); *id*. § 437.4 (explaining how sellers of business opportunities must substantiate any earnings claims regarding the opportunity, including when claims are presented in the general media).
[41] *See* Fed. Trade Comm'n, Notice of Penalty Offenses Concerning Money-Making Opportunities (Oct. 26, 2021); Fed. Trade Comm'n, Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct Around Endorsements and Testimonials (Oct. 26, 2021).
[42] *See* FTC Press Release, FTC Puts Businesses on Notice That False Money-Making Claims Could Lead to Big Penalties (announcing that Notices of Penalty Offenses were sent to more than 1,100 businesses and advising that violating the Notices could result in civil penalties that now amount to $46,517 per violation, *see* 16 C.F.R. § 1.98(e)).
[43] *See, e.g.*, Compl. ¶¶ 31–33, 38, *Uber Techs.*, Case No. 3:17-cv-261-JST (alleging that Uber violated Section 5 by understating the price and overstating the advantages of its auto financing program for drivers).
[44] *See* 16 C.F.R. §§ 436.2, 437.2.

or the Business Opportunity Rule.[45] The Rules require accurate, upfront disclosures—including information about the franchise or business opportunity, other workers, and prior lawsuits—before consumers make any commitment.[46]

B. Combating Unlawful Practices and Unlawful Constraints Imposed on Gig Workers

Gig workers may lack key information about their working conditions, and can be subject to onerous contract terms and arbitrary evaluation requirements. Increasingly, gig workers are managed by algorithms, which use extensive data collected from workers and other consumers to make important management decisions using undisclosed criteria. Multiple laws enforced by the Commission may apply when these practices are deceptive, unfair, anticompetitive, or otherwise unlawful.

Unfair or Deceptive Practices by an Automated Boss. Section 5 of the FTC Act prohibits unfair or deceptive practices in any form, including practices involving artificial intelligence ("AI") tools or algorithm-based decision-making.[47] In the gig economy, companies may employ algorithms to govern how gigs are made available to workers, how workers are paid, how worker performance is rated, and when workers are suspended or terminated from the platform. Firms may deploy surveillance technology to monitor workers' every move without

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[45] *See id*. § 436.1(h) (defining a franchise); *id*. § 437.1(c) (defining a business opportunity).

[46] *See id*. §§ 436.2(a), 436.4, 436.5 (requiring franchisors to provide a disclosure document in business relationships that qualify as franchises covered by the Franchise Rule); *id*. §§ 437.3, 437.4, apps. A–B (requiring a disclosure document for business opportunities and providing templates).

[47] Running these algorithms requires collecting troves of sensitive data from workers, which heightens the importance of FTC rules governing data security, *see, e.g.*, 16 C.F.R. pt. 314 (Safeguards Rule), and gig companies' obligation under Section 5 to safeguard collected information in line with their promises, *see* Compl. ¶¶ 28–32, *Uber Techs.*, Dkt. No. C-4662 (alleging that, despite public representations, Uber failed to monitor internal access to drivers' personal information and failed to provide reasonable security against potential data breaches). Workers are also entitled under the Fair Credit Reporting Act to know when a gig platform uses a background screening or other consumer report to take an adverse action against them, whether through an algorithm or otherwise. *See* 15 U.S.C. § 1681m(a). If information in a consumer report results in a worker being denied the requested opportunity, the consumer must receive notice that the denial was based on a consumer report and a chance to view the report and request any needed corrections. *See id*.

transparency about how it impacts worker pay or performance evaluation.[48] Workers report unexpected drops in their performance ratings,[49] unexplained changes in their pay,[50] assignment of impossible or dangerous delivery routes,[51] or other arbitrary evaluations that could lead to wrongful terminations.[52] Companies are responsible for fulfilling their promises to their workers, even if they use automated management technologies.[53] Gig companies that employ algorithmic tools to govern their workforce should ensure that they do so legally.[54]

Unfair Contractual Terms & Restrictions on Mobility. Restrictive contract terms may constitute unfair or deceptive acts and practices in violation of Section 5 of the FTC Act if they unfairly harm workers, render a gig company's representations misleading, or prevent fair competition for workers. Gig companies often present workers with nonnegotiable contracts that may include lopsided provisions.[55] Such take-it-or-leave-it provisions may, for example, hinder workers from seeking other jobs during or after their time with a company, bar negative reviews,

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[48] *See* Advance Notice of Proposed Rulemaking: Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51,273, 51,274 (Aug. 22, 2022) (noting the lack of transparency and informed consent around increasingly extensive data collected from workers).
[49] *See, e.g.*, Soper, *Fired by Bot at Amazon: "It's You Against the Machine"*; *see also* Rahman, *The Invisible Cage*, 66 Admin. Sci. Q. at 964; Pierre Bérastégui, Eur. Trade Union Inst., *Exposure to Psychosocial Risk Factors in the Gig Economy: A Systemic Review*, at 47 (Jan. 2021) (noting that workers "are unsure about what data is gathered from them and how it is used to compute wages and ratings," leading to "frustration about not being rated on the basis of 'true' performance").
[50] *See, e.g.*, Alina Selyukh, *At the Mercy of an App: Workers Feel the Instacart Squeeze*, NPR (Nov. 25, 2019, 9:15 AM) (reporting that multiple gig platforms use "ever-changing pay structures" governed by algorithms); *see also* Calacci, *Bargaining with the Algorithm* (describing a gig platform's pay structure as a "black-box algorithm").
[51] *See* Eve Livingston, *Food Delivery Drivers Fired After "Cut Price" GPS App Sent Them on "Impossible" Routes*, Guardian (July 2, 2022, 2:39 PM EDT).
[52] *See, e.g.*, Madhumita Murgia, *Workers Demand Gig Economy Companies Explain Their Algorithms*, Fin. Times (Dec. 12, 2021).
[53] *See* Compl. ¶ 32, *Amazon.com*, Dkt. No. C-4746 (alleging that Amazon Flex changed the algorithm governing delivery drivers' base pay, allowing Amazon to capture a greater portion of customer tips than it had disclosed).
[54] Elisa Jillson, Fed. Trade Comm'n, *Aiming for Truth, Fairness, and Equity in Your Company's Use of AI* (Apr. 19, 2021).
[55] *See* U.S. Dep't of the Treasury, *The State of Labor Market Competition*, at 14, 18 (noting that "restrictive employment agreements can both result from and reinforce employer market power," while other clauses can reduce workers' options "within the legal system"); Fed. Trade Comm'n, *Strategic Plan for Fiscal Years 2022-2026*, at 19 (Aug. 26, 2022) (announcing FTC interest in "non-compete and other potentially unfair contractual terms resulting from power asymmetries between workers and employers").

or waive fundamental protections.[56] If those provisions cause substantial injury that is not reasonably avoidable and not outweighed by countervailing benefits, they may constitute an unfair act or practice under Section 5(n) of the FTC Act.[57] The Commission has used its unfairness authority to prohibit certain one-sided clauses in credit contracts,[58] to stop abusive use of a one-sided clause allowing a financing entity to obtain uncontested judgments against small businesses,[59] to prevent contractual clauses suppressing negative consumer reviews,[60] and to invalidate illusory choice-of-law and venue-selection clauses that, in very fine print, left the forum state undetermined.[61] The Commission will continue to scrutinize potentially unfair terms companies impose on gig workers or other consumers.

Certain unfair terms may also implicate the antitrust laws and raise concerns about unfair methods of competition with respect to gig labor markets. The Commission will continue to investigate the effects on workers and competition of any non-compete clauses in the gig economy. Non-compete provisions may undermine free and fair labor markets by restricting workers' ability to obtain competitive offers for their services from existing companies, resulting in lower wages and degraded working conditions.[62] These provisions may also raise barriers to

[56] *See, e.g.*, Exec. Order No. 14,036, 86 Fed. Reg. at 36,987–88; *FTC v. Roca Labs, Inc.*, 345 F. Supp. 3d 1375, 1393–97 (M.D. Fla. 2018); U.S. Dep't of the Treasury, *The State of Labor Market Competition*, at 18.
[57] 15 U.S.C. § 45(n); FTC Unfairness Policy Statement, Letter from the FTC to Hon. Wendell Ford & Hon. John Danforth, S. Comm. on Commerce, Sci. & Transp. (Dec. 17, 1980), *appended to In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).
[58] *See* FTC Trade Regulation Rule; Credit Practices, 49 Fed. Reg. 7,740, 7,744 (Mar. 1, 1984) (codified at 16 C.F.R. pt. 444).
[59] *See* 1st Am. Compl. ¶¶ 24–28, 39–41, *FTC v. RCG Advances, LLC*, Case No. 20-CV-4432 (S.D.N.Y. June 10, 2021).
[60] *See Roca Labs*, 345 F. Supp. 3d at 1393; *see also* 15 U.S.C. § 45b; *FTC v. World Patent Mktg., Inc.*, Case No. 17-cv-20848-GAYLES, 2017 WL 3508639, at *15–16 (S.D. Fla. Aug. 16, 2017) (preliminarily enjoining a defendant's "consumer complaint suppression practices" as unfair).
[61] *See* Compl. ¶¶ 18, 32–33, *FTC v. NorVergence, Inc.*, Civil Action No. 04-5414 (D.N.J. Nov. 4, 2004).
[62] *See* Exec. Order No. 14,036, 86 Fed. Reg. at 36,987 (noting that non-compete agreements can "mak[e] it harder for workers to bargain for higher wages and better work conditions"); Matthew S. Johnson et al., The Labor Market Effects of Legal Restrictions on Worker Mobility, at 2 (Oct. 12, 2021) ("We find that increases in [non-compete clauses] decrease workers' earnings and mobility."); Evan P. Starr et al., *Noncompetes in the U.S. Labor Force*, 64 J.L. & Econ. 53, 81 (2021) (finding that non-compete provisions imposed in employment contracts "appear to be

entry for new companies.[63] Such provisions may violate Section 1 of the Sherman Act[64] and the FTC Act's prohibition on unfair methods of competition.[65] The Commission will also investigate contractual limitations, such as liquidated damages clauses[66] or nondisclosure agreements,[67] that may be excessive or overbroad and effectively operate as non-compete provisions. Moreover, the Commission recognizes that companies may be able to effectuate the same harmful results through imposing a variety of other restraints that restrict worker mobility.

C. Policing Unfair Methods of Competition That Harm Gig Workers

Anticompetitive mergers or practices may prevent gig workers from obtaining competitive compensation or more favorable terms or working conditions. Such conduct may also lead to higher prices or fees, diminished service, or less favorable contractual terms for customers or businesses. Firms that undertake such conduct may run afoul of the antitrust laws, and the Commission will focus its resources on investigating potential unlawful conduct by or

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linked to lower job satisfaction" and do not correlate with greater pay or training); *see also* FTC Comm'r Noah J. Phillips, Prepared Remarks at FTC Workshop on Non-compete Clauses in the Workplace, at 2–3 (Jan. 9, 2020) ("When you can exit a job, you have greater leverage to improve the terms of your employment."); FTC Comm'r Rebecca Kelly Slaughter, Prepared Remarks at FTC Workshop on Non-Compete Clauses in the Workplace, at 5 (Jan. 9, 2020) (prioritizing investigation into "potential restraints that may be inhibiting competition for labor" and noting that non-compete clauses can "affect people's livelihoods and ability to earn a living").

[63] *See, e.g.*, Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry … and Exit?*, 12 Innovation Pol'y & Econ. 39, 51 (2012) ("Non-competes assist in preserving the firm's competitive position by discouraging entry."); *see also* U.S. Dep't of the Treasury, *The State of Labor Market Competition*, at 16 ("Lower worker mobility increases recruitment costs for all firms as fewer workers are seeking to switch jobs than otherwise would, absent the post-employment restrictive employment agreement.").

[64] 15 U.S.C. § 1.

[65] *See, e.g.*, Statement of Interest of the United States at 6, *Beck v. Pickert Med. Grp., P.C.*, Case No. CV21-02092 (Nev. Dist. Ct. Feb. 25, 2022) ("Non-compete agreements between employers and employees constitute concerted action properly subject to scrutiny under Section 1 of the Sherman Act."); *see also* U.S. Dep't of the Treasury, *The State of Labor Market Competition*, at 16 ("[R]estrictive employment agreements can both result from and reinforce employer market power.").

[66] *See, e.g.*, *Wegmann v. London*, 648 F.2d 1072, 1073 (5th Cir. Unit A 1981) ("The contract clauses to which plaintiff object are, given the prohibitive magnitudes of liquidated damages they specify, de facto covenants not to compete . . . .").

[67] *See, e.g.*, *Brown v. TGS Mgmt. Co.*, 271 Cal. Rptr. 3d 303, 319 (Cal. Ct. App. 2020) ("Collectively, these overly restrictive [confidentiality] provisions operate as a de facto noncompete provision . . . .").

among gig companies, from wage-fixing to the unlawful consolidation or exercise of market power.[68]

Wage-Fixing & Coordination. The Commission will investigate evidence of agreements between gig companies to fix wages, benefits, fees, or other terms relating to gig work that should be subject to competition.[69] The Commission will also investigate evidence of no-poaching agreements, where companies agree not to solicit or hire each other's workers, and agreements to share competitively sensitive information that might suppress compensation for workers.[70] The Commission may further examine any use by gig companies of technology-enabled methods of collusion or exclusion. Agreements among gig companies that anticompetitively harm workers violate Section 1 of the Sherman Act and may be challenged by the Commission directly, and, in the case of wage-fixing or no-poaching agreements, may be referred to the U.S. Department of Justice ("DOJ") for potential criminal prosecution.[71]

Market Consolidation & Monopolization. The Commission will review and, as appropriate, challenge mergers and other combinations of gig companies that may substantially

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[68] At least one court has ruled that the labor-dispute exemption under Section 1 of the Sherman Act applies to workers regardless of whether they are classified as employees or independent contractors. *See Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños*, 30 F.4th 306, 314–15 (1st Cir. 2022). Commission enforcement therefore will not focus on organizing efforts undertaken by gig workers. Despite past efforts, the Commission will also refrain from other enforcement or policy efforts that might undermine the ability of gig workers to organize. *See, e.g.*, Brief for the United States & FTC as Amici Curiae Supporting Appellant at 2, 8, *Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018) (No. 17-35640), 2017 WL 5166667, at *2, *8 (arguing that the state action doctrine did not apply to shield a municipal ordinance allowing drivers to organize from antitrust scrutiny).
[69] *See, e.g.*, Compl. ¶¶ 11–27, *In re Your Therapy Source, LLC*, Dkt. No. C-4689 (FTC July 31, 2018) (alleging an agreement and invitation to collude among staffing agencies to lower payments to their independent contractors).
[70] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals*, at 4–5 ("[P]eriodic exchange of current wage information in an industry with few employers could establish an antitrust violation because, for example, the data exchange has decreased or is likely to decrease compensation."); U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors*, at 15 (Apr. 2000) ("[T]he sharing of information related to a market in which the collaboration operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output, or other competitively sensitive variables.").
[71] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals*, at 3–4 (explaining that naked wage-fixing agreements are *per se* illegal and DOJ intends to proceed criminally against naked wage-fixing).

lessen competition between or among gig companies.[72] The Commission will also investigate any exclusionary or predatory conduct by dominant firms that may unlawfully create or maintain a monopoly (a dominant seller) or a monopsony (a dominant buyer or employer), resulting in harm to customers or reduced compensation or poorer working conditions for gig workers. Such conduct may include the use of exclusive contracting, predatory pricing, or other forms of monopolization, and may be subject to legal action by the Commission as a violation of Section 2 of the Sherman Act.[73]

IV. Policy, Partnerships, & Outreach

In addition to robust enforcement, the Commission addresses issues in the gig economy through policy work, outreach, and partnerships with other law enforcement agencies.

Governmental Collaboration. The FTC's Regional Offices have spearheaded the agency's efforts to identify law violations, develop policy, and collaborate with government partners in this space. The Commission is also partnering with other agencies on broad labor initiatives and individual enforcement actions. In December 2021, the FTC and DOJ hosted a workshop to promote competitive labor markets and worker mobility.[74] And in July 2022, the FTC and National Labor Relations Board signed a Memorandum of Understanding that deepens the agencies' collaboration around issues facing gig workers through sharing information, conducting cross-training for staff at each agency, and partnering on investigative efforts within each agency's authority.[75]

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[72] *See* Exec. Order No. 14,036, § 1, 86 Fed. Reg. at 36,988 (directing federal attention "to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in labor markets").
[73] 15 U.S.C. § 2.
[74] Fed. Trade Comm'n, *Making Competition Work: Promotion Competition in Labor Markets* (Dec. 6–7, 2021).
[75] Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest (July 19, 2022).

Ensuring Equity. The FTC's Equity Action Plan reaffirms the Commission's commitment to protecting the public, including meaningfully addressing barriers that historically underserved communities face in participating in and benefiting from a fair and thriving marketplace.[76] As outlined in the Equity Action Plan, the FTC's Bureau of Consumer Protection is focusing resources to aid staff in assessing whether certain communities are disproportionately affected or targeted by unfair or deceptive practices, including in the gig economy.[77] Similarly, the Equity Action Plan outlines the FTC's Bureau of Competition's commitment to consider more explicitly the impact of mergers and anticompetitive conduct on workers, particularly low-wage workers.[78] The FTC will address any such harms through robust law enforcement, community outreach, and new initiatives to better understand and address the impact of emerging technologies in the gig economy and elsewhere on historically underserved communities.

Public Participation. The Commission continues to seek input from consumer and labor groups, industry, and experts on challenges facing gig workers through monthly Open Commission Meetings[79] as well as targeted workshops like those on dark patterns[80] and labor-market competition.[81] Gig workers harmed by unlawful practices should continue to file reports at ReportFraud.ftc.gov so the Commission and other governmental agencies can promptly identify and take action against deceptive, unfair, and otherwise unlawful acts and practices.

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[76] *See* Fed. Trade Comm'n, *Federal Trade Commission (FTC) Equity Action Plan*, at 1 (Apr. 14, 2022) (promulgated pursuant to Executive Order No. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7,009 (Jan. 25, 2021)).
[77] *See id*. at 4–5.
[78] *See id*. at 6–7.
[79] *See* Fed. Trade Comm'n, *Open Meetings*.
[80] Fed. Trade Comm'n, *Bringing Dark Patterns to Light: An FTC Workshop* (Apr. 29, 2021) (exploring how user interfaces can, intentionally or not, obscure, subvert, or impair consumer autonomy, decision-making, or choice).
[81] FTC Workshop, *Making Competition Work* (exploring recent developments at the intersection of antitrust and labor, as well as implications for efforts to protect and empower workers through enforcement and rulemaking).

V. Conclusion

Successfully addressing the range of consumer protection and competition challenges associated with the gig economy requires innovative and collaborative approaches by governmental enforcers that are responsive to the public's concerns and input. The Commission will continue to capitalize on its broad jurisdiction and interdisciplinary expertise to combat unlawful practices that harm gig workers.

Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202

November 10, 2022

Section 5 of the Federal Trade Commission Act (FTC Act) prohibits "unfair methods of competition in or affecting commerce."[1] On July 1, 2021, the Federal Trade Commission (FTC) rescinded its 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act.[2] This statement supersedes all prior FTC policy statements and advisory guidance on the scope and meaning of unfair methods of competition under Section 5 of the FTC Act.

I. Introduction

Pursuant to the FTC's analysis of the decided cases and prior enforcement actions, this policy statement describes the key principles of general applicability concerning whether conduct is an unfair method of competition. Consistent with the Supreme Court's interpretation of the FTC Act in at least twelve decisions, this statement makes clear that Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions.[3]

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[1] Pub. L. No. 63-203, 38 Stat. 717; 15 U.S.C. § 45(a)(1).

[2] Fed. Trade Comm'n, Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/legal-library/browse/statement-commission-withdrawal-statement-enforcement-principles-regarding-unfair-methods.

[3] *See, e.g. Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (holding that "[t]he standard of "unfairness" under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws"); *Fed. Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972) (holding that "the Commission has broad powers to declare trade practices unfair."); *Fed. Trade Comm'n v. Texaco*, 393 U.S. 223, 262 (1968) (holding that "[i]n large measure the task of defining "unfair methods of competition" was left to the [FTC]. . . and that the legislative history shows that Congress concluded that the best check on unfair competition would be [a practical and expert administrative body] . . . [that applies] the rule enacted by Congress to particular business situations"); *Fed. Trade Comm'n v. Brown Shoe*, 384 U.S. 316, 321 (1966) (holding that the FTC "has broad powers to declare trade practices unfair[,] particularly . . . with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts"); *Atlantic Refining Co. v. Fed. Trade Comm'n,* 381 U.S. 357, 369 (1965) (holding that all that is necessary is to discover conduct that runs counter to the public policy declared in the Act. . ." and that "there are many unfair methods of competition that do not assume the proportions of antitrust violations"); *Fed. Trade Comm'n v. Colgate-Palmolive et al*., 380 U.S. 377, 384-85 (1965) (noting that the proscriptions in section 5 are flexible); *PAN AM v. United States*, 371 U.S. 296, 306 -308 (1963) ("[Section 5] was designed to bolster and strengthen antitrust enforcement[,] and the definitions are not limited to precise practices that can readily be catalogued. They take their meaning from the facts of each case and the impact of particular practices on competition and monopoly"); *Fed. Trade Comm'n v. Nat'l Lead Co*., 352 U.S. 419, 428-29 (1957) (affirming past rulings finding that the commission is clothed with "wide discretion in. . . [bringing] an end to the unfair practices found to exist[;]. . . [is] 'the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed[;] . . . has wide latitude for

This statement is intended to assist the public, business community, and antitrust practitioners by laying out the key general principles that apply to whether business practices constitute unfair methods of competition under Section 5 of the FTC Act. In considering whether conduct, either in a specific instance or as a category, constitutes an unfair method of competition, the Commission will directly consult applicable law. This statement does not pertain to any other statutory provision within the FTC's jurisdiction.[4]

II. Background and Legislative History of Section 5 of the FTC Act

A. The text, structure, and legislative history of Section 5 show that its mandate extends beyond the Sherman and Clayton Acts and reaches unfair conduct with a tendency to negatively affect competitive conditions

As the Commission explained in its July 2021 withdrawal of the previous policy statement, the text, structure, and history of Section 5 reaches more broadly than the antitrust laws.[5] Congress passed the FTC Act to push back against the judiciary's adoption and use of the open-ended rule of reason for analyzing Sherman Act claims,[6] which it feared would deliver inconsistent and unpredictable results and "substitute the court in the place of Congress."[7]

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judgment and[;]. . . [that] to attain the objectives Congress envisioned, [the FTC] cannot be required to confine its road block to the narrow lane the transgressor has traveled"); *American Airlines, Inc. v. North American Airlines, Inc*., 351 U.S. 79, 85 (1956) (finding that "[u]nfair or deceptive practices or unfair methods of competition". . . are broader concepts than the common-law idea of unfair competition"); *Fed. Trade Comm'n v. Motion Picture Advertising Service Co*., 344 U.S. 392, 394-95 (1953) (noting that "Congress advisedly left the concept [of unfair methods of competition] flexible . . . [and] designed it to supplement and bolster the Sherman Act and the Clayton Act[,] [so as] to stop . . . acts and practices [in their incipiency] which, when full blown, would violate those Acts[,]. . . as well as to condemn as "unfair methods of competition" existing violations of them"); *Fed. Trade Comm'n v. Cement Institute*, 333 U.S. 683, 708 (1948) (holding that conduct that falls short of violating the Sherman Act may violate Section 5); *Fed. Trade Comm'n v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 310 (1934) (finding that unfair methods of competition not limited to those "which are forbidden at common law or which are likely to grow into violations of the Sherman Act").

[4] This statement does not address the Commission's authority to prevent unfair or deceptive acts or practices in 15 U.S.C. §§ 45(a),(n). This statement is limited to the scope of standalone unfair methods of competition Section 5 violations. Such standalone unfair methods of competition Section 5 claims may be brought under one or more of the theories set forth in this policy statement and combined with claims under other parts of the FTC Act or other statutes enforced by the Commission as warranted.
This statement does not address the language of 15 U.S.C. § 45(b), which states that the Commission will act when it has reason to believe such action is in the public interest. *See generally Hills Bros. v. Fed. Trade Comm'n*, 9 F.2d 481, 483–84 (9th Cir. 1926) ("the interest of the public, like the question whether the commission has reason to believe that any person, partnership, or corporation has been or is using any unfair method of competition in commerce, is committed to the discretion of the commission, is to be determined by the commission before proceedings are instituted, and is not thereafter a subject of controversy either before the commission or before the court, except in so far as the question of public interest is necessarily involved in the merits of the case, and, if the commission finds that the method of competition in question is prohibited by the act, no other or further finding on the question of public interest is required."); *see also Parke, Austin & Lipscomb, Inc., et al. v. Fed. Trade Comm'n*, 142 F.2d 437, 441 (2d Cir. 1944).

[5] Statement of Commission, *supra* note 2.

[6] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60 (1911).

[7] S. REP. NO. 62-1326, at 10 (1913) ("Cummins Report"). Senator Francis Newlands, one of the chief sponsors of the bill that became the FTC Act, expressed concern that *Standard Oil* left antitrust regulation "to the varying judgments of different courts." 47 CONG. REC. 1225 (1911). After analyzing a series of Supreme Court decisions

Congress therefore determined it would "establish[ ] a commission for the better administration of the law and to aid in its enforcement."[8] This led to the creation of the FTC in 1914 and to the enactment of a prohibition of "unfair methods of competition," a new standard in federal competition law.[9]

In enacting Section 5, Congress's aim was to create a new prohibition broader than, and different from, the Sherman and Clayton Acts. Congress purposely introduced the phrase, "unfair methods of competition," in the FTC Act to distinguish the FTC's authority from the definition of "unfair competition" at common law.[10] It also made clear that Section 5 was designed to extend beyond the reach of the antitrust laws.[11] Concluding that a static definition would soon become outdated,[12] Congress wanted to give the Commission flexibility to adapt to changing circumstances.[13]

The key function of the FTC in applying its mandate to combat unfair methods of competition, according to Congress, would be to identify *unfair* forms of competition.[14] The legislative record demonstrates that Congress enacted Section 5 to protect against various types of unfair or oppressive conduct in the marketplace.[15] During debates over the meaning of unfair

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interpreting the Sherman Act, a Senate committee feared that the rule of reason resulted in a situation where, "in each instance it [would be] for the court to determine whether the established restraint of trade is a due restraint or an undue restraint." Cummins Report, at 10. It lamented that the rule of reason had made it "impossible to predict with any certainty" whether courts would condemn the many "practices that seriously interfere with competition" and found it inconceivable that "the courts . . . be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve." *Id*. at 10, 12. The committee believed this would result in a loss of confidence by the public in the courts and eventually lead to a "repudiat[ion] [of] the fundamental principles of representative government." *Id*. at 11.

[8] *Id*. at 12.

[9] Federal Trade Commission Act of 1914, Pub. L. No. 63-203, 38 Stat. 717 (codified as amended at 15 U.S.C. § 41–58). *See* 51 CONG. REC. 12146 (1914) (statement of Sen. Hollis) ("The Sherman Act is adequate for the abolition of monopoly; it is, however, but imperfectly adequate for the regulation of competition. The present Congress is charged with the duty of supplying the defect in the law").

[10] *See* 51 CONG. REC. 12936 (1914) (statement of Sen. Reed) ("It is my opinion that if we employ the term "unfair competition" as it is employed in this bill, without adding anything to it, the courts will adopt as the meaning of Congress that meaning which has been affixed to the term by all of the law dictionaries and by a great many legal authorities."). *See also* 51 CONG. REC. 12814 (1914) (statement of Sen. George Sutherland).

[11] *See E.I. du Pont de Nemours v. Fed. Trade Comm'n* (*Ethyl)*, 729 F.2d 128, 136 (2d Cir. 1984) ("Congress' aim was to protect society against oppressive anti-competitive conduct and thus assure that the conduct prohibited by the Sherman and Clayton Acts would be supplemented as necessary and any interstices filled") (citing H.R. REP. NO. 63-1142, at 19 (1914) (Conf. Rep.)); 51 CONG. REC. 11236 (1914) (statement of Sen. Cummins) (stating that the purpose of Section 5 was "to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law").

[12] H.R. REP. NO. 63-1142, at 19.

[13] *See id.* at 18–19.

[14] *Id*. at 19.

[15] *Id*. at 2 (declaring "unfair and oppressive competition to be unlawful"); S. REP. NO. 63-597, at 17 (1914) (citing a previous version of the bill, S. 2941, which would allow the commission to revoke the registration of any corporation using "materially unfair or oppressive methods of competition"); 51 CONG. REC. 8861 (1914) (statement of Rep. Hinebaugh) (seeking to prevent "unfair or oppressive competition" and proceeding to list examples); *id*. at 8979 (statement of Rep. Murdock) (seeking to protect to protect "smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals"); *id*. at 13117 (statement of Sen. Reed) ("intended to reach unfair, dishonest, crooked, oppressive, coercive acts. It is not intended to cover mere mistakes").

methods of competition, members of Congress had no difficulty identifying concrete examples.[16] One congressman noted that when it comes to unfair methods of competition, "[t]here is that in the common sense of fairness and right dealing which indicates plainly the distinction between close bargaining and oppression."[17] Both the House and Senate also expressed a common understanding that unfair methods of competition encompassed conduct that tended to undermine "competitive conditions" in the marketplace.[18]

Congress evinced a clear aim that "unfair methods of competition" need not require a showing of current anticompetitive harm or anticompetitive intent in every case. First, the legislative history is replete with statements to the effect that Congress wanted the FTC to stop monopolies in their "incipiency."[19] Requiring the FTC to show current anticompetitive effects,

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[16] For instance, a Senate report referenced practices "such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition." S. REP. NO. 63-597, at 13. In considering what conduct should be prohibited, the House distinguished between "artificial bases" of monopolistic power and "natural bases." *See* H.R. REP. NO. 63-533, at 23–25. The House viewed artificial bases of monopolistic power to include, for instance, the acceptance of rates or terms of service from common carriers not granted to other shippers; price discrimination not justified by differences in cost or distribution; procuring the secrets of competitors by bribery or any illegal means; procuring conduct on the part of employees of competitors inconsistent with their duties to their employers; making oppressive exclusive contracts; the maintenance of secret subsidiaries or secretly controlled agencies held out as independent; the destruction or material lessening of competition through the use of interlocking directorates; and the charging of exorbitant prices where the seller has a substantial monopoly. *Id*. Natural bases included control of natural resources, transportation facilities, financial resources, or any other economic condition inherent in the character of the industry, such as patent rights. *Id*. *See also* 51 CONG. REC. 11084–86 (1914) (statement of Sen. Newlands) (discussing jurisprudence on unfair competition); *id*. at 14928-14931 (statement of Rep. Covington) (discussing jurisprudence on unfair competition); *id*. at 11108 (statement of Sen. Newlands) (providing specific examples of unfair competition, such as local price cutting and organizing "bogus independent concerns . . . for the purpose of entering the field of the adversary and cutting prices with a view to his destruction[,]" among other things); *id*. at 11230 (statement of Sen. Robinson) (providing examples of unfair competition).

[17] 51 CONG. REC. 8979 (statement of Sen. Murdock).

[18] *See* S. REP. NO. 1326, at 3–4 (stating that "Congress should maintain the policy established by the anti-trust law" to "'maintain[ ] competitive conditions," and that "every possible effort to create and preserve competitive conditions should be made"); *id.* at 2, 3-4, 11, & 13; S. REP. NO. 63-597, at 10 ("a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law"); H.R. Rep. No. 63-533, at 2 (1914) (reported by Rep. Covington) ("The administration idea and the idea of business men generally, is for the preservation of proper competitive conditions in our great interstate commerce."). The FTC Act's legislative history makes it clear that Congress intended the statute to protect a broad array of market participants including workers and rival businesses. *See* 51 CONG. REC. 13312 (1914) (statement of Sen. Reed) ("it is not required to show restraint of trade or monopoly, but that the acts complained of hinder the business of another, or prohibit another from engaging in business, or restrain trade"); *id*. (statement of Sen. White) ("one of the main objects of this legislation is to prevent a rival in business from using unfair competition to drive his competitor out of business and to prevent this before the business is destroyed"); 51 CONG. REC. 8979 (1914) (statement of Rep. Murdock) (purpose of new Commission "is to protect the smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals"). The goals of "protecting consumers against the high prices and [guarding] the interests of employees" were expressed by the House. *See* H.R. REP. NO. 533, 63d Cong., 2d Sess. 14 (1914) (quoting from the Preliminary Report of the Industrial Commission, submitted to Congress in 1900). *See also* 51 CONG. REC. 8854 (1914) (statement of Rep. Morgan) (among goals of Section 5 "to secure labor the highest wage, the largest amount of employment under the most favorable conditions and circumstances").

[19] H.R. REP. NO. 63-1142, at 19 ("[t]he most certain way to stop monopoly at the threshold is to prevent unfair competition"); 51 CONG. REC. 13118) (1914) (statement of Sen. Reed) ("the same class of conspiracies exactly as the Sherman Antitrust Act deals with, except that we propose to strike those acts in their incipiency instead of after

which are typically seen only after the monopoly has passed the "embryonic" stage, would undercut Congress's hope to prohibit unfair business practices prior to, or near, monopoly power.[20] In addition, many of the practices listed by Congress as patently unfair do not automatically carry with them measurable effects.[21] Second, in considering and rejecting a definition of "unfair methods of competition" that would have required a showing of intent, legislators noted that such a requirement would inappropriately restrict the new provision to the metes and bounds of the antitrust laws and place an undue burden on the Commission in proving its cases.[22]

Congress struck an intentional balance when it enacted the FTC Act. It allowed the Commission to proceed against a broader range of anticompetitive conduct than can be reached under the Clayton and Sherman Acts, but it did not establish a private right of action under Section 5, and it limited the preclusive effects of the FTC's enforcement actions in private antitrust cases under the Sherman and Clayton Acts.[23]

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they have been actually worked out into a complete system of monopoly or restraint of trade"); *id*. at 14941 (statement of Rep. Stevens) (noting that section five "[would] give to this commission the power of preventing in their conception and in their beginning some of these unfair processes in competition which have been the chief source of monopoly"); *id*. at 12030 (statement of Sen. Newlands) (remarking that a commission would "check monopoly in the embryo"); *id*. at 11455 (statement of Sen. Cummins) (stating that the new law would "seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have"); *id*. at 11087 (statement of Sen. Newlands) (citing the Cummins Report, which anticipated that a commission "could be vastly more effectual than through the courts alone, which in most cases will take no cognizance of violations of the law for months or years after the violation occurred, and when the difficulty of awarding reparation for the wrong is almost insurmountable").

[20] 51 CONG. REC. 13118 (statement of Sen. Reed) (declaring that Congress intended "to do something that will strike a death blow to monopoly. . . to arrest it in its infancy . . . [and] to strike those acts in their incipiency instead of after they have been actually worked out into a complete system of monopoly or restraint of trade."); *id*. at 14927 (statement of Rep. Covington) ("the best and most, effective way to deal with the various practices of unfair or destructive competition which, if permitted to go on unchecked and uncontrolled, become potential for restraint of trade or monopoly"); *id*. at 14929 (statement of Rep. Covington) ("We are seeking . . . to deal, with those practices of unfair trade in their incipient stages which if left untrammeled and uncontrolled become the acts which constitute in their culmination restraint of trade and monopoly and the groundwork of the trusts which have menaced us industrially").

[21] 51 CONG. REC. 12217 (statement of Sen. Newlands) ("all you would have to prove would be an unfair method whose tendency was to stifle competition."); 51 CONG. REC. 13312 (statement of Sen. White) (stating that "one of the main objects of this legislation is to prevent a rival in business from using unfair competition to drive his competitor out of business and to prevent this before the business is destroyed" and that "the unfair acts and practices had to have the effect to destroy or unreasonably hinder the business of another would neutralize this useful feature of the enactment"); 51 CONG. REC. 13311 (statement of Sen. Cummins) ("if the effect is to restrain trade or to create a monopoly[,] we have a complete and perfect prohibition in the antitrust law"); 51 CONG. REC. 13312 (1914) (statement of Sen. Reed) ("it is not required to show restraint of trade or monopoly, but that the acts complained of hinder the business of another, or prohibit another from engaging in business, or restrain trade"); 51 CONG. REC. 8979 (statement of Rep. Murdock) (purpose of new Commission "is to protect the smaller, weaker business organizations from the oppressive and unfair competition of their more powerful rivals.").

[22] 51 CONG. REC. 13311 (1914) (statement of Sen. Cummins) ("[t]here can be unfair competition in which the public is interested without any intent as described in the amendment"); *id*. ("[i]f the effect is to restrain trade or to create a monopoly we have a complete and perfect prohibition in the antitrust law"); *id*. at 13312 (statement of Sen. White) ("but we will have to carry the additional burden of proving the specific intent . . . [t]he proof of the specific intent with which an act was done is, as all lawyers know difficult to make").

[23] Treble damages are not available under the FTC Act. Civil penalties and Section 19's monetary remedies are limited to unfair and deceptive acts or practices. *See* 15 U.S.C. § 45(m)(1)(A); 15 U.S.C. § 57b. A finding that

The Supreme Court has affirmed this same broad view of the scope of Section 5 on numerous occasions.[24] It has condemned coercive and otherwise facially unfair practices that have a tendency to stifle or impair competition.[25] The federal circuit courts have likewise consistently held that the FTC's authority extends not only to "the letter," but also to "the spirit" of the antitrust laws.[26]

B. Congress created the FTC as an expert body charged with elucidating the meaning of Section 5

Congress was careful and deliberate when it created the FTC, an independent agency. The five Commissioners would serve for terms of seven years, which would "give them an opportunity to acquire the expertness" needed to determine what constitutes an unfair method of competition.[27] The Commission would provide guidance to the business community on the legality of business practices (including by issuing advisory opinions),[28] serve as an aid to the courts,[29] and act as an enforcer against unfair methods of competition.[30] Congress gave the Commission powers to conduct quasi-judicial hearings,[31] directly seek injunctive relief in federal court,[32] pursue investigations, prepare reports, and make rules.[33] To balance the Commission's powers, Congress created checks to ensure that the FTC would be accountable to it[34] and that the

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conduct is an unfair method of competition under Section 5 is not given collateral estoppel effect in subsequent private antitrust actions. *Holloway v. Bristol-Myers Corp*., 485 F.2d 986 (D.C. Cir. 1973) (holding that private litigants cannot sue for violations of the FTC Act). *See also* 51 CONG. REC. 13115 (1914) (statement of Sen. Newlands) ("I do not believe in the principle, of assessing threefold damages."); *id*. at 11317 (statement of Sen. McCumber) (moving to strike treble damages provision).

[24] *See supra*, note 3.

[25] *Texaco*, 393 U.S. at 225–26 (citing *Atlantic Refining Co.,* 381 U.S. at 376).

[26] *Ethyl*, 729 F.2d at 136–37 (citing *Sperry & Hutchinson*, 405 U.S. at 239); *Grand Union Co. v. Fed. Trade Comm'n,* 300 F.2d 92, 98–99 (2d Cir. 1962)). *Cf.*, *Chuck's Feed & Seed Co. v. Ralston Purina Co*., 810 F.2d 1289, 1292–93 (4th Cir. 1987) (describing Section 5 "as a kind of penumbra around the federal antitrust statutes").

[27] S. REP. NO. 63-597 at 11. *See also id*. at 11 (anticipating that the Commission would "build up a comprehensive body of information for the use and advantage of the Government and the business world"); *id*. at 22 ("we want trained experts; we want precedents; we want a body of administrative law built up.").

[28] *See id*. at 6–7 (citing an address by President Wilson, stating that "the business men of the country . . . desire the advice, the definite guidance and information which can be supplied by an administrative body."); *id*. at 10 (anticipating that the Commission would "aid the business public.").

[29] *See* H.R. REP. NO. 63-533, at 8 (anticipating that the commission would use its investigatory powers in "aid of the courts.").

[30] S. REP. NO. 63-597, at 10 (anticipating that the Commission would have "sufficient power ancillary to the Department of Justice to aid materially and practically in the enforcement of the Sherman law and to aid the business public as well, and, incidentally, to build up a comprehensive body of information for the use and advantage of the Government and the business world"). *See also* H.R. REP. NO. 63-533, at 9.

[31] 15 U.S.C. § 45(b) (providing for adjudicatory hearings).

[32] 15 U.S.C. § 53(b).

[33] *Id*. § 46(a),(b) (authorizing the Commission to investigate corporations and require reports); *id*. § 46(g) (authorizing the Commission to "make rules and regulations for the purpose of carrying out the provisions of this subchapter"); *Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n*, 482 F.2d 672, 673 (D.C. Cir. 1973) (holding that "the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent").

[34] *See, e.g.*, 15 U.S.C. § 46(d),(f),(h) (requiring reports to Congress); *Id*. § 57a(f)(7) (requiring annual reports to Congress); *Id*. § 57b-2(d)(1)(A) (providing for disclosure of protected information to Congress). Congress also holds

FTC's decisions would be reviewable by federal courts of appeal.[35] In the ensuing years, Congress has conducted vigorous oversight of the FTC and the courts have not hesitated to review Commission decisions.[36]

Congress intended for the FTC to be entitled to deference from the courts as an independent, expert agency.[37] Over the years, courts have consistently held that FTC determinations as to what practices constitute an unfair method of competition deserve "great weight,"[38] recognizing that the Commission is an expert agency, rather than "a carbon copy of the Department of Justice."[39]

Even when courts have rejected the Commission's factual conclusions, they have consistently reaffirmed the scope of its Section 5 authority.[40] For example, *Ethyl*, *Boise*, and *OAG* cited prior decisions of the Supreme Court that affirm the distinctive scope of Section 5,[41] but ultimately found that the particular facts at issue lacked evidence of unfairness, either "some indicia of oppressiveness"[42] or some evidence that the conduct tended to negatively affect the market.[43] All three appellate decisions reiterated the well-accepted principle that the Commission "is not confined to [the] letter" of the antitrust laws, and that "[i]t may bar incipient violations of

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the FTC accountable though the budgetary, appointment, and oversight processes, and through numerous statutory enactments and amendments relating to the FTC's powers over the course of the hundred-plus years since the passage of the Federal Trade Commission Act.

[35] 15 U.S.C. § 45(b). Respondents in adjudicative proceedings may receive judicial review of the Commission's decision in their circuit of residence or any circuit where they committed the conduct underlying the alleged violation: an unusually expansive form of judicial oversight. *See, e.g.,* J. Thomas Rosch Commissioner, Fed. Trade Comm'n, Three Questions About Part Three: Administrative Proceedings at the FTC, Remarks Before the American Bar Association Section of Antitrust Law Fall Forum, Washington, D.C. 18 (Nov. 8, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/three-questions-about-part-three-administrative-proceedings-ftc/121108fallforum.pdf.

[36] *See* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 623–27 (1982). *See also Ethyl*, 729 F.2d at 137; *Boise Cascade Corp. v. Fed. Trade Comm'n*, 637 F.2d 573, 581–82 (9th Cir. 1980); *Official Airline Guides, Inc. v. Fed. Trade Comm'n (OAG)*, 630 F.2d 920, 927 (2d Cir. 1980).

[37] S. REP. NO. 63-597 at 11, 22.

[38] *OAG*, 630 F.2d at 927 (quoting *Cement Inst*itute, 333 U.S. at 720); *Atlantic Refining Co.*, 381 U.S. at 368; *Fed. Trade Comm'n v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934). *See also Ind. Fed'n of Dentists*, 476 U.S. at 455; *Texaco,* 393 U.S. at 226; *Motion Picture Advert. Serv. Co*., 344 U.S. at 396.

[39] *Fed. Trade Comm'n v. Dean Foods Co*., 384 U.S. 597, 618–19 (1966) (Fortas, J., dissenting). *See also* 51 CONG. REC. 12146 (statement of Sen. Henry Hollis) (observing that the DOJ would be able to focus on "the great task of prosecuting suits for the dissolution of monopolies, leaving to the trade commission the important service of policing competition, so as to protect small business men, keep an open field for new enterprise, and prevent the development of trusts").

[40] *See, e.g., Ethyl*, 729 F.2d at 128; *Boise*, 637 F.2d at 573; *OAG*, 630 F.2d at 920.

[41] *Boise,* 637 F.2d at 581; *Ethyl,* 729 F.2d at 136–37; *OAG,* 630 F.2d at 927.

[42] *Ethyl*, 729 F.2d at 139 (holding that "before business conduct in an oligopolistic industry may be labelled "unfair" within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist"); *OAG,* 630 F.2d at 927–28 (finding that the monopolist had "no purpose to restrain competition or to enhance or expand his monopoly, and [did] not act coercively").

[43] *Boise*, 637 F.2d at 581 (finding that "without proof of anticompetitive effects" it could not assume that there was a "deliberate restraint on competition"). *Boise*'s applicability to cases outside the realm of delivered pricing is limited – the court's decision was driven by the Commission's inconsistent position on delivered pricing practices in prior statements, its shifting litigation strategy, and the Commission's failure to meets its own standard. *Id*. at 575–77, 582.

those statutes."[44] They also agreed that Section 5 reaches "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit,"[45] and further recognized the importance of deference to the Commission where it acts against conduct that is unfair.[46]

III. Unfair Methods of Competition

Relying on the text, structure, legislative history of Section 5, precedent, and the FTC's experience applying the law, this statement describes the most significant general principles concerning whether conduct is an unfair method of competition under Section 5 of the FTC Act.[47]

1. The conduct must be a method of competition

Conduct must be a "method of competition" to violate Section 5. A method of competition is conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace, not of the respondent's making, such as high concentration or barriers to entry.[48] The conduct must implicate competition, but the relationship can be indirect. For example, misuse of regulatory processes that can create or exploit impediments to competition (such as those related to licensing, patents, or standard setting) constitutes a method of competition.[49] Conversely, violations of generally applicable laws by themselves, such as environmental or tax laws, that merely give an actor a cost advantage would be unlikely to constitute a method of competition.

2. That is unfair

The method of competition must be unfair, meaning that the conduct goes beyond competition on the merits. Competition on the merits may include, for example, superior products or services, superior business acumen, truthful marketing and advertising practices,

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[44] *Ethyl,* 729 F.2d at 136. *See also Boise,* 637 F.2d at 581.
[45] *Ethyl,* 729 F.2d at 136–37.
[46] *Ind. Fed'n Dentists*, 476 U.S. at 454.
[47] Whether the conduct violates accepted norms of unfairness derived from external standards expressed in statutes, common law, and regulations outside of the federal antitrust laws may also be relevant to whether the conduct is an unfair method competition. *See Ind. Fed'n of Dentists*, 476 U.S. at 454 ("The standard of "unfairness" under the FTC Act …encompass[es] not only practices that violate the Sherman Act and the other antitrust laws. . . but also practices that the Commission determines are against public policy for other reasons."). *See also Sperry & Hutchinson*, 405 U.S. at 244; *Motion Picture Advertising Co.,* 344 U.S. at 395; *R.F. Keppel & Bro.*, 291 U.S. at 313. This framework will not be used to analyze matters that constitute a violation of the letter of the antitrust laws.
[48] *See Ethyl*, 729 F.2d at139.
[49] Statement of the Federal Trade Commission In the Matter of Google Inc., FTC File No. 121-0120 (Jan. 3, 2013), https://www.ftc.gov/system/files/documents/public_statements/410931/130103googlemotorolastmtofcomm.pdf; Statement of the Federal Trade Commission In the Matter of Robert Bosch GmbH, FTC. File No. 121-0081 (Apr. 24. 2013); Analysis of Proposed Consent Decree to Aid in Public Comment: In the Matter of Negotiated Data Solutions, LLC, FTC File No. 051-0094 (Jan. 23, 2008); *In re Dell Computer Corp*., 121 F.T.C. 616 (1996) (consent order). *Cf.*, *Walker Process Eqpt., Inc. v. Food Machinery Corp.*, 382 U.S. 172 (1965) (fraud on the patent office may constitute antitrust violation).

investment in research and development that leads to innovative outputs, or attracting employees and workers through the offering of better employment terms. [50]

There are two key criteria to consider when evaluating whether conduct goes beyond competition on the merits. First, the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature.[51] It may also be otherwise restrictive or exclusionary, depending on the circumstances, as discussed below. Second, the conduct must tend to negatively affect competitive conditions.[52] This may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice, or otherwise harm consumers.

These two principles are weighed according to a sliding scale. Where the indicia of unfairness are clear, less may be necessary to show a tendency to negatively affect competitive conditions.[53] Even when conduct is not facially unfair, it may violate Section 5.[54] In these circumstances, more information about the nature of the commercial setting may be necessary to determine whether there is a tendency to negatively affect competitive conditions. The size, power, and purpose of the respondent may be relevant, as are the current and potential future effects of the conduct.

The second principle addresses the tendency of the conduct to negatively affect competitive conditions—whether by affecting consumers, workers, or other market participants. In crafting Section 5, Congress recognized that unfair methods of competition may take myriad forms and hence that different types of evidence can demonstrate a tendency to interfere with competitive conditions. Because the Section 5 analysis is purposely focused on incipient threats to competitive conditions,[55] this inquiry does not turn to whether the conduct directly caused

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[50] *See generally U.S. v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) *(*distinguishing unlawful acquisition or maintenance of monopoly power from consequences of "a superior product, business acumen, or historic accident"); *U.S. v. Alum. Co. of America,* 148 F.2d 416, 430 (2d Cir. 1945) (distinguishing conduct based on "superior skill, foresight and industry.").

[51] *See e.g., Sperry & Hutchinson*, 405 U.S. at 905 (construing Section 5 to reach conduct shown to exploit consumers, citing *R.F. Keppel & Bro.*, 291 U.S. at 313); *Atlantic Refining Co.*, 381 U.S. at 369 (finding an unfair method of competition where the defendant "utilize[ed] … economic power in one market to curtail competition in another," which was "bolstered by actual threats and coercive practices")*; Texaco*, 393 U.S. at 228-29 (finding an unfair method of competition where the defendant used its "dominant economic power … in a manner which tended to foreclose competition")*; Ethyl, 729 F.2d* at 140 (finding that unfair methods of competition includes practices that are "collusive, coercive, predatory, restrictive, or deceitful" as well as "exclusionary").

[52] *See, e.g.,* S. REP. NO. 1326, at 3–4 (1913) (stating that "Congress should maintain the policy established by the anti-trust law" to "'maintain[ ] competitive conditions," and that "every possible effort to create and preserve competitive conditions should be made"). *Id.* at 2, 3-4, 11, & 13; *see also* H.R. Rep. No. 63-533, at 2 (1914) (reported by Rep. Covington) (The administration idea and the idea of business men generally, is for the preservation of proper competitive conditions in our great interstate commerce").

[53] *Ethyl*, 729 F.2d at 137-39.

[54] *Hastings Mfg. Co. v. Fed. Trade Comm'n*, 153 F.2d 253, 257 (6th Cir. 1946).

[55] *See generally supra* notes 11 & 18. *See also Fashion Originators' Guild Am. v. Fed. Trade Comm'n (FOGA)*, 312 U.S. 457, 466 (1941) (holding that it was not determinative that petitioners had not yet "achieved a complete monopoly"; rather it was "sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition").

actual harm in the specific instance at issue.[56] Instead, the second part of the principle examines whether the respondent's conduct has a tendency to generate negative consequences; for instance, raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, or reducing the likelihood of potential or nascent competition. These consequences may arise when the conduct is examined in the aggregate along with the conduct of others engaging in the same or similar conduct,[57] or when the conduct is examined as part of the cumulative effect of a variety of different practices by the respondent.[58] Moreover, Section 5 does not require a separate showing of market power or market definition when the evidence indicates that such conduct tends to negatively affect competitive conditions.[59] Given the distinctive goals of Section 5, the inquiry will not focus on the "rule of reason" inquiries more common in cases under the Sherman Act, but will instead focus on stopping unfair methods of competition in their incipiency based on their tendency to harm competitive conditions.

IV. Potential Cognizable Justifications

In the event that conduct *prima facie* constitutes an unfair method of competition, liability normally ensues under Section 5 absent additional evidence. There is limited caselaw on what, if any, justifications may be cognizable in a standalone Section 5 unfair methods of competition case, and some courts have declined to consider justifications altogether.[60] In instances where a party chooses to assert justifications as an affirmative defense, the FTC can

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[56] *See Sperry & Hutchinson*, 405 U.S. at 244 (explaining that "unfair competitive practices [are] not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws"); *Ethyl*, 729 F.2d at 138 (finding that evidence of actual harm can be "a relevant factor in determining whether the challenged conduct is unfair" but is not required); *Boise*, 637 F.2d at 581-82. *In re Coca-Cola Co.*, 117 F.T.C. 795, 915 (1994) (rejecting argument that Section 5 violation requires showing "anticompetitive effects"). *See also supra* notes 19-21 and accompanying text (explaining that a showing of an actual anticompetitive injury is unnecessary to prove a violation of Section 5 because that section was designed to stop in their incipiency acts and practices that could lead to violations of the Sherman and Clayton Acts).

[57] *Motion Picture Advertising*, 344 U.S. at 395.

[58] Consent Order, Statement in Support of Consent, *In the Matter of Intel Corp*., File No. 061-0247 (Dkt. 9341) (July 28, 2010); *The Vons Co.*, FTC Complaints and Order, 1987-1993 Transfer Binder, Trade Reg. Rep. (CCH) ¶ 23,200 (Aug. 7, 1992).

[59] *Atlantic Refining Co.,* 381 U.S. at 371 ("unnecessary to embark upon a full scale economic analysis of competitive effects."); *Texaco*, 393 U.S. at 230 (holding that "[i]t is enough that the Commission found that the practice in question unfairly burdened competition for a not insignificant volume of commerce."); *L.G. Balfour Co. v. Fed. Trade Comm'n*, 442 F.2d 1, 19-20 (7th Cir. 1971) (No proof of foreclosure necessary in an exclusive dealing contract case under Section 5 (citing *Brown Shoe*).

[60] *Atlantic Refining Co.*, 381 U.S. at 371 (considering the defendant's argument that the distribution contracts at issue "may well provide Atlantic with an economical method of assuring efficient product distribution among its dealers" and nonetheless holding that the "Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves"); *Texaco*, 393 U.S. at 230 (following the same reasoning as *Atlantic Refining* and finding that the "anticompetitive tendencies of such system [were] clear"); *Balfour*, 442 F.2d at 15 (while relevant to consider the advantages of a trade practice on individual companies in the market, this cannot excuse an otherwise illegal business practice). For provisions of the antitrust laws where courts have not accepted justifications as part of the legal analysis, the Commission will similarly not accept justifications when these claims are pursued through Section 5.

draw on the Commission's long experience evaluating asserted justifications when enforcing Section 5, as well as its review of decided cases and past enforcement actions.[61]

First, it would be contrary to the text, meaning, and case law of Section 5 to justify facially unfair conduct on the grounds that the conduct provides the respondent with some pecuniary benefits.[62] At the same time, some practices may impact competitive conditions in a manner that both harms and benefits market participants other than the party; at times, the harms and benefits may redound to the same participants, and at times they may be disparately distributed – that is, a practice may harm some market participants while simultaneously providing legitimate benefits to others.

If parties in these cases choose to assert a justification, the subsequent inquiry would not be a net efficiencies test or a numerical cost-benefit analysis. The unfair methods of competition framework explicitly contemplates a variety of non-quantifiable harms, and justifications and purported benefits may be unquantifiable as well. The nature of the harm is highly relevant to the inquiry; the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind.[63] In addition, whether harmed parties share in the purported benefits of the practice may be relevant to the inquiry.

Some well-established limitations on what defenses are permissible in an antitrust case apply in the Section 5 context as well. It is the party's burden to show that the asserted justification for the conduct is legally cognizable,[64] non-pretextual,[65] and that any restriction used to bring about the benefit is narrowly tailored to limit any adverse impact on competitive

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[61] *See supra* § II (B) (discussing Congressional intent to create an expert Commission entitled to deference for its determinations).

[62] *Supra* note 51.

[63] *See FOGA*, 312 U.S. at 467-68 (finding the Commission did not need to hear evidence of justifications where "[t]he purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts").

[64] *See, e.g. Ind. Fed. Dentists*, 476 U.S. at 463 (making clear that justifications that run directly counter to the "basic policy of the Sherman Act," in this instance, limiting consumer access to relevant information because "an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise, and even dangerous, choices" are not cognizable); *id.* at 464 (affirming Commission's finding that there was insufficient evidence that the restraint conferred the claimed benefit at all). *See also Fed. Trade Comm'n v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423-24 (1990); *NCAA v. Board of Regents*, 468 U.S. 85, 113-15 (1984); *United States v. Addyston Pipe Steel Co.* 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899).

[65] Pretextual justifications include those that are not set forth in documents prior to, or contemporaneous with, the introduction of the conduct, or not plausibly based on the known facts. *See, e.g. Ind. Fed'n of Dentists*, 476 U.S. at 464 (affirming the Commission's finding that there was insufficient evidence that the restraint conferred the claimed benefit at all). *See also United States v. Microsoft Corp.*, 253 F.3d 35, 62-64, 72, 74, 76-77 (D.C. Cir. 2001); *Eastman Kodak Co. v. Image Technical Tech. Svcs*, 504 U.S. 541, 472, 484-85 (1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-10 (1985); *Texas Specialty Physicians v. Fed. Trade Comm'n*, 528 F.3d 346, 368-70 (5th Cir. 2008); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 196-97 (3d Cir. 2005). *See also* Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaboration Among Competitors §3.36a (2000) (2000 Collaboration Guidelines) ("Efficiency claims are not considered if they are vague or speculative or otherwise cannot be verified by reasonable means").

conditions.[66] In addition, the asserted benefits must not be outside the market where the harm occurs.[67] Finally, it is the party's burden to show that, given all the circumstances, the asserted benefits outweigh the harm and are of the kind that courts have recognized as cognizable in standalone Section 5 cases.[68]

V. Historical Examples of Unfair Methods of Competition

For the purpose of providing further guidance, the FTC lists here a non-exclusive set of examples and citations of past decisions and consent decrees based on Section 5, and, where applicable, other antitrust laws, focusing on conduct that constitutes an incipient violation of the antitrust laws or that violates the spirit of the antitrust laws. These illustrative examples are drawn from case law and from FTC experience.

A non-exclusive set of examples of conduct that have been found to violate Section 5 include:

- Practices deemed to violate Sections 1 and 2 of the Sherman Act or the provisions of the Clayton Act, as amended (the antitrust laws).[69]

- Conduct deemed to be an incipient violation of the antitrust laws. Incipient violations include conduct by respondents who have not gained full-fledged monopoly or market power, or by conduct that has the tendency to ripen into violations of the antitrust laws.[70] Past examples of such use of Section 5 of the FTC Act include:

    - invitations to collude,[71]

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[66] *NCAA v. Alston*, 141 S. Ct. 2141, 2162-64 (2021); *Polygram Holding, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29, 38 (D.C. Cir. 2005); 2000 Collaboration Guidelines § 3.36b.

[67] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370-71 (1963); 2000 Collaboration Guidelines § 3.36a.

[68] At all times, the burden of persuasion would remain with the Commission in administrative proceedings pursuant to 5 U.S.C. §556(d).

[69] *Motion Picture Advertising*, 344 U.S. at 395 (conduct fell "within the prohibitions of the Sherman Act and is therefore an unfair method of competition within the meaning of s. 5(a)."); *Cement Institute*, 333 U.S. at 683; *FOGA,* 312 U.S. at 463; *Fed. Trade Comm'n v. Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1926).

[70] *FOGA*, 312 U.S. at 466 (FTC may challenge combinations "not merely in their fruition, but also in their incipiency combinations which could lead to . . .trade restraints and practices deemed undesirable"); *Motion Picture Advertising*, 344 U.S. at 394-95 ("[i]t is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman and the Clayton Act. . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts."); *Cement Institute*, 333 U.S. at 708; *Triangle Conduit & Cable Co. v. Fed. Trade Comm'n*, 168 F.2d 175, 181 (7th Cir. 1948).

[71] The Commission has challenged both public and private invitations to collude as unfair methods of competition. This type of conduct, if consummated would constitute a per se violation of the antitrust laws. Invitations to collude, even if unaccepted, represent both an incipient violation as well as a violation of the spirit of the antitrust laws within the meaning of the 2022 Section 5 policy statement. Under either theory, an invitation to collude constitutes an unfair method of competition under Section 5. *In Re Quality Trailer Products Corp.,* 115 F.T.C. 944 (1992) (consent); *In re Valassis Communs*., Dkt. C-4160, 2006 FTC LEXIS 25 (2006) (consent); *In re A.E. Clevite*, 116 F.T.C. 389 (1993) (consent); *In re YKK (USA)*, 108 F.T.C. 628 (1993) (consent); *In re Precision Moulding Co.*, 122 F.T.C. 104 (1996) (consent); *In re Stone Container Corp.*, 125 F.T.C. 853 (1998) (consent); *In re U-Haul Int'l, Inc.*, File No. 081-0157, 6 (2010) (consent); *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 245 F.Supp. 2d 1343,

- mergers, acquisitions, or joint ventures that have the tendency to ripen into violations of the antitrust laws,[72]

- a series of mergers, acquisitions, or joint ventures that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws,[73] and

- loyalty rebates, tying, bundling, and exclusive dealing arrangements that have the tendency to ripen into violations of the antitrust laws by virtue of industry conditions and the respondent's position within the industry.[74]

- Conduct that violates the spirit of the antitrust laws. This includes conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a "gap" in those laws.[75] As such, the analysis may depart from prior precedent based on the provisions of the Sherman and Clayton Acts. Examples of such violations, to the extent not covered by the antitrust laws, include:

  - practices that facilitate tacit coordination,[76]

  - parallel exclusionary conduct that may cause aggregate harm,[77]

1369-70 (N.D. Ga. 2017), *aff'd sub. Nom.*, *Siegel v. Delta Air Lines, Inc.*, 714 F. App'x 986 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 827 (2019). Depending on the circumstances, an invitation to collude may also constitute attempted monopolization under Section 2 of the Sherman Act, *United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984), or wire fraud, *United States v. Ames Sintering*, 927 F.2d 232 (6th Cir. 1990).
Under appropriate circumstances, the Commission will refer evidence of per se illegal cartel agreements to the Department of Justice for criminal prosecution. *See* Commission Statement Regarding Criminal Referral and Partnership Process, File No. P094207 (Nov. 18, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598439/commission_statement_regarding_criminal_referrals_and_partnership_process_updated_p094207.pdf.

[72] *Yamaha Motor Co. v. Fed. Trade Comm'n*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[73] *Vons*, 1987-1993 Transfer Binder ¶ 23,200. Such series of acquisitions or related conduct may also constitute an unfair method competition as a violation of the spirit of the antitrust laws. *See infra* note 82 and cases cited therein.

[74] *Luria Bros. v. Fed. Trade Comm'n*, 389 F.2d 847, 864 (3d Cir. 1968), *cert. denied*, 393 U.S. 829 (1968).

[75] Remarks of Jon Leibowitz, Comm'r, Fed. Trade Comm'n, "Tales from the Crypt" Episodes '08 and '09: The Return of Section 5 ("Unfair Methods of Competition in Commerce are Hereby Declared Unlawful"), Section 5 Workshop, at 4 (Oct. 17, 2008), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/jleibowitz.pdf ("Simply put, consumers can still suffer plenty of harm for reasons not encompassed by the Sherman Act as it is currently enforced in the federal courts.").

[76] *Cement Institute*, 333 U.S. at 709-21 (multiple basing point pricing system contributed to unlawful coordinated pricing); Analysis to Aid Public Comment, *In re BMG Music et. al*, 65 Fed. Reg. 31,319 (2000), Docket No. C-3973 (2000) (Decision & Order) (distributors of pre-recorded music, acting in parallel but without agreement, impose identical coercive limits on retailer advertising of discounts). *See generally* William E. Kovacic, *Antitrust Policy and Horizontal Collusion in the 21st Century*, 9 LOY. CONSUMER L. REV. 97, 107 (1997) ("[T]he FTC remains perhaps the best vehicle for articulating standards designed to discourage anticompetitive coordination among competitors.").

[77] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 897 (2007) (holding that the extent of adoption of resale price maintenance across the industry is relevant to legality); *Motion Picture Advertising*, 344 U.S. at 395

- conduct by a respondent that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market,[78]

- fraudulent and inequitable practices that undermine the standard-setting process or that interfere with the Patent Office's full examination of patent applications,[79]

- price discrimination claims such as knowingly inducing and receiving disproportionate promotional allowances against buyers not covered by Clayton Act,[80]

- de facto tying, bundling, exclusive dealing, or loyalty rebates that use market power in one market to entrench that power or impede competition in the same or a related market,[81]

- a series of mergers or acquisitions that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws,[82]

- mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition,[83]

("respondent and the three other major companies have foreclosed to competitors 75 percent of all available outlets."); *Standard Oil Co. of California v. United States*, 337 U.S. 293, 309, 314 (1949) (taking into account extent of industry use of similar practices). *See also* C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1243-45 (2012) ("parallel exclusion is a suitable subject for FTC enforcement under Section 5 of the FTC Act.").

[78] Intel Consent Order at 9341; *Vons*, 1987-1993 Transfer Binder ¶ 23,200.

[79] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 6 (2017); *In re American Cyanamid Co.*, 72 F.T.C. 623, 684-85, *aff'd sub nom*, *Charles Pfizer & Co*., 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969) (actual or attempted enforcement of patents obtained by inequitable conduct falling short of fraud).

[80] *Alterman Foods v. Fed. Trade Comm'n*, 497 F.2d 993 (5th Cir. 1974); *Colonial Stores v. Fed. Trade Comm'n*, 450 F.2d 733 (5th Cir. 1971); R.H. *Macy & Co. v. Fed. Trade Comm'n*, 326 F.2d 445 (2d Cir. 1964); *American News Co. v. Fed. Trade Comm'n*, 300 F.2d 104 (2d Cir. 1962); *Grand Union Co. v. Fed. Trade Comm'n*, 300 F.2d 92 (2d Cir. 1962); *In re Foremost-McKesson, Inc*., 109 F.T.C. 127 (1987).

[81] *Atlantic Refining Co.*, 381 U.S. at 357; *Texaco, Inc*., 393 U.S. at 223; *Shell Oil Co. v. Fed. Trade Comm'n,* 360 F.2d 470 (5th Cir. 1966); *Brown Shoe*, 384 U.S. at 316.

[82] *The Vons Cos.,* 1987-1993 Transfer Binder ¶ 23,200. Section 5 has also been used to challenge individual transactions that do not meet the technical requirements of Section 7. *In re Beatrice Foods*, 67 F.T.C. 473 (1965), supplemented, 68 F.T.C. 1003 (1965), modified, 71 F.T.C. 797 (1967); *In re Dean Foods, Co.*, 70 F.T.C. 1146 (1966); *In re Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962).

[83] *See, e.g., Fed. Trade Comm'n v. Facebook*, 581 F.Supp. 3d 34 (D.D.C. 2022) (denying motion to dismiss challenging acquisition of WhatsApp and Instagram); Analysis of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of Novartis AG, File No. 141-0141 (consent decree requiring divestiture in transaction eliminating future competition in oncology compounds); Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of Össur Americas Holdings, Inc*., File No. 191-0177 (consent decree requiring divestiture in transaction eliminating future competition in myoelectric elbows). *See also Fed. Trade Comm'n v. Procter & Gamble Co*., 386 U.S. 568 (1967) (barring acquisition of leading firm where acquirer was most likely potential entrant). *See generally* PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 701at p. 200 (4th ed. 2015) (acquisition of "an

- using market power in one market to gain a competitive advantage in an adjacent market by, for example, utilizing technological incompatibilities to negatively impact competition in adjacent markets,[84]

- conduct resulting in direct evidence of harm, or likely harm to competition, that does not rely upon market definition,[85]

- interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act,[86]

- commercial bribery and corporate espionage that tends to create or maintain market power,[87]

- false or deceptive advertising or marketing which tends to create or maintain market power,[88] or

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actual or likely potential competitor is properly classified, for it tends to augment or reinforce the monopoly by means other than competition on the merits."); C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020).

[84] *Eastman Kodak*, 504 U.S. at 451; *Newcal Industries v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978); *LePage's v. 3M Co.*, 324 F.3d 141 (3d Cir. 2003) (en banc).

[85] *Ind. Fed'n of Dentists*, 476 U.S. at 460-61 (finding of sustained effects legally sufficient even in absence of elaborate market analysis); *Toy's "R" Us v. Fed. Trade Comm'n*, 221 F.3d 928, 937 (7th Cir. 2000) (finding "sufficient proof of anticompetitive effects [such] that no more elaborate market analysis was necessary"). *Cf.*, *Fed. Trade Comm'n v. Staples, Inc.*, 970 F.Supp. 1066, 1075-6 (D.D.C. 1997) (relying in part on direct evidence that pricing for key products from office superstores lower where three such stores exist in same metropolitan area and higher where only one or two such stores present).

[86] *Perpetual Federal Savings & Loan*, 90 F.T.C. 608 (1977) (complaint dismissed due to subsequent legislation). *Cf.*, *TRW, Inc. v. FTC,* 647 F.2d 942 (9th Cir. 1981) (noting automatic nature of liability under Clayton §8 when prerequisites of statute established).

[87] *See* Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products (2022), at 6 n. 27 ("The Commission has a long history of addressing commercial bribery and will continue to do so."), https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-rebates-fees-exchange-excluding-lower-cost-drug-products; See Hon. Garland S. Ferguson, Jr., Chairman, Fed. Trade Comm'n, Commercial Bribery: An Address to the Conf. on Com. Bribery to the Comm. Standards Council and the Better Bus. Bureau of N.Y. (Oct. 17, 1930) (explaining the Commission's focus on commercial bribery as an unfair method of competition even before it gained authority under the Robinson-Patman Act); *see also* Donald S. Clark, Sec'y, Fed. Trade Comm'n, Remarks Regarding The Robinson-Patman Act: Annual Update, Before the Robinson Patman Act Comm., Section of Antitrust Law, 46th Annual Spring Meeting (Apr. 2, 1998), *See e.g.*, *In re Lockheed Corp.*, 92 F.T.C. 968 (1978) (commercial bribery).

[88] *In re Coleco Industries*, 111 F.T.C. 651 (1989) (consent decree barring claims of product availability unless actually available or company has reasonable basis for such claim); *In re Xerox Corp.*, 86 F.T.C. 364 (1975) (repeated publicizing release date of new products with knowledge that products would not be available by that date); Analysis of Proposed Consent Order to Aid Public Comment: *In the Matter of Intel Corp*., Dkt No. 9341 at 5-6 (describing acts of deception in Commission complaint). *Cf, Microsoft*, 253 F.3d at 76-77 (acts of deception relating to compatibility of Microsoft version of Java with competing software applications as unlawful monopoly maintenance under the Sherman Act). *See generally* Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823 (2010). *See also* DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT 138 (2011) (The Commission is on strongest ground when challenging market power created by fraud or deception).

- discriminatory refusals to deal which tend to create or maintain market power.[89]

VI. The Path Forward

The FTC is committed to faithfully discharging its statutory obligations, including through enforcing and administering the prohibition against "unfair methods of competition" on a standalone basis, as laid out in Section 5 of the FTC Act, or in conjunction with its other statutory authorities.

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[89] *Aspen*, 472 U.S. at 610-11 (affirming antitrust liability for termination of joint venture where no legitimate business justification present for such conduct); *Eastman Kodak*, 504 U.S. at 483-85 (denying summary judgment where defendant manufacturer of copiers refused to deal with third party service providers); *In re Grand Caillou Packing Co*., 65 F.T.C. 799 (1964), *aff'd in part and rev'd in part sub nom*., *LaPeyre v. Fed. Trade Comm'n*, 366 F.2d 117 (5th Cir. 1966) (violation of Section 5 for monopoly manufacturer of shrimp peeling machines to lease machines at substantially different rates in different regions of the US); Analysis of Proposed Consent Order to Aid Public Comment: In the Matter of Intel Corp., Dkt No. 9341 at 4 (describing alleged threatens of refusal to deal with customers who purchased non-Intel CPUs). *See generally* Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1 (2008).

Policy Statement of the Federal Trade Commission on Biometric Information and Section 5 of the Federal Trade Commission Act[1]

The increasing use of consumers' biometric information and related marketing of technologies that use or purport to use biometric information ("biometric information technologies")[2] raise significant concerns with respect to consumer privacy, data security, and the potential for bias and discrimination. The Federal Trade Commission is committed to combatting unfair or deceptive acts related to the collection and use of consumers' biometric information and the marketing and use of biometric information technologies.

As used in this document, the term "biometric information" refers to data that depict or describe physical, biological, or behavioral traits, characteristics, or measurements of or relating to an identified or identifiable person's body. Biometric information includes, but is not limited to, depictions, images, descriptions, or recordings of an individual's facial features, iris or retina, finger or handprints, voice, genetics, or characteristic movements or gestures (e.g., gait or typing pattern). Biometric information also includes data derived from such depictions, images, descriptions, or recordings, to the extent that it would be reasonably possible to identify the person from whose information the data had been derived. By way of example, both a photograph of a person's face and a facial recognition template, embedding, faceprint, or other data that encode measurements or characteristics of the face depicted in the photograph constitute biometric information.

Recent years have seen a proliferation of biometric information technologies. For instance, facial, iris, or fingerprint recognition technologies collect and process biometric information to identify individuals. Other biometric information technologies use or purport to use biometric information in order to determine characteristics of individuals, ranging from the individuals' age, gender, or race to the individuals' personality traits, aptitudes, or demeanor. Many biometric information technologies are developed using machine learning or similar data-driven processes that require large quantities of biometric information for "training" or testing purposes.

The Commission has been analyzing consumer protection issues related to biometric information for over a decade. Among other examples,[3] in 2011, as the commercial use of facial

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[1] This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates one or more existing statutory or regulatory requirements. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act or other statutes. Pursuant to the Congressional Review Act (5 U.S.C. § 801 et seq.), the Office of Information and Regulatory Affairs designated this Policy Statement as not a "major rule," as defined by 5 U.S.C. § 804(2).

[2] In some contexts, the terms "biometrics" or "biometric technologies" have been used to refer specifically to technologies that are used to identify individuals. We use the term "biometric information technologies" to refer to the broader category of all technologies that use or purport to use biometric information for any purpose.

[3] *See, e.g.*, Press Release, FTC, *FTC to Host Identity Authentication Workshop* (Feb. 21, 2007) https://www.ftc.gov/news-events/news/press-releases/2007/02/ftc-host-identity-authentication-w (announcing a public workshop on topics including biometrics and other emerging authentication technologies); *You Don't Say: An FTC Workshop on Voice Cloning Technologies*, FTC (Jan. 28, 2020), https://www.ftc.gov/news-events/events/2020/01/you-dont-say-ftc-workshop-voice-cloning-technologies.

recognition technology began to take off, the FTC hosted a public workshop, "Face Facts: A Forum on Facial Recognition Technology."[4] The workshop brought together stakeholders from government, academia, and industry to discuss the then-current capabilities and commercial uses of facial recognition technology, as well as potential consumer benefits of and privacy and security concerns about such technology. Following the workshop, in 2012, the FTC published a report entitled "Facing Facts: Best Practices For Common Uses of Facial Recognition Technologies."[5]

Since 2012, some biometric information technologies, such as facial recognition technology, have made significant advances. For example, NIST found that between 2014 and 2018, facial recognition became 20 times better at finding a matching photograph from a database.[6] Such improvements are due in significant part to advancements in machine learning,[7] along with data collection, storage, and processing capabilities sufficient to support the use of these technologies.[8] Simultaneously, many biometric information technologies have become less expensive to deploy.[9] Owing in part to these developments, the use of biometric information technologies is increasingly pervasive. For example, the use of facial recognition and other biometric information technologies in physical locations – such as retail stores, arenas, airports, and other venues – is reportedly growing.[10]

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[4] FTC, FACE FACTS: A FORUM ON FACIAL RECOGNITION TECHNOLOGY (Dec. 8, 2011), https://www.ftc.gov/news-events/events/2011/12/face-facts-forum-facial-recognition-technology.

[5] FTC, FACING FACTS: BEST PRACTICES FOR COMMON USES OF FACIAL RECOGNITION TECHNOLOGIES (Oct. 2012), https://www.ftc.gov/reports/facing-facts-best-practices-common-uses-facial-recognition-technologies. Recommendations in this report remain relevant, such as reasonable data security protections for biometric information and appropriate data retention and disposal policies and procedures.

[6] NAT'L INSTITUTE FOR STANDARDS AND TECH., FACE RECOGNITION VENDOR TEST (FRVT) PART 2: IDENTIFICATION 6 (2018), https://nvlpubs.nist.gov/nistpubs/ir/2018/NIST.IR.8238.pdf; *See also* NIST, Press Release, *NIST Evaluation Shows Advance in Face Recognition Software's Capabilities* (Nov. 30, 2018) https://www.nist.gov/news-events/news/2018/11/nist-evaluation-shows-advance-face-recognition-softwares-capabilities.

[7] *See id.*

[8] *See* A.K. Jain et al., 50 years of biometric research: Accomplishments, challenges, and opportunities, Pattern Recognition Letters 79 (2016) 100 (stating that "exponential improvements in computing and storage have enabled the deployment of more powerful algorithms to process the captured biometric data" and discussing how, "cloud-based biometrics can facilitate rapid analytics (e.g., recognizing a face using a smartphone camera, where the phone accesses the cloud).")

[9] *See id.* ("[E]xponential improvements in the performance and cost of processors and memory have already played a dominant role in the development of better biometric sensors. . . . In the case of biometric recognition, the direct impact of the rapid improvements in [integrated circuits] is the development of smaller, cheaper, and higher quality biometric sensors.").

[10] *See*, *e.g.*, National Retail Federation and Loss Prevention Research Council, *2022 Retail Security Survey: The State of National Retail Security and Organized Retail Crime*, 17, https://nrf.com/research/national-retail-security-survey-2022 (stating that 12.3% of respondents were implementing or planning to implement facial recognition for loss prevention); *Fast, Frictionless Biometric Payments Gaining Ground in Grocery Stores*, PYMNTS (May 24, 2022) https://www.pymnts.com/news/retail/2022/grocery-stores-will-be-big-winners-this-holiday-season/; Aaron Mok, *These 16 US airports are reportedly testing facial recognition technology on passengers that could roll out nationwide next year*, BUSINESS INSIDER (Dec. 6, 2022) https://www.businessinsider.com/these-16-us-airports-are-reportedly-testing-facial-recognition-tech-2022-12; Kashmir Hill and Corey Kilgannon, *Madison Square Garden Uses Facial Recognition to Ban Its Owner's Enemies*, NYTIMES (Dec. 22, 2022) https://www.nytimes.com/2022/12/22/nyregion/madison-square-garden-facial-recognition.html; Randy Wimbley and David Komer, *Black teen kicked out of skating rink after facial recognition camera misidentified her*,

During this same time period, the use of facial recognition and other biometric information technologies and the risks they pose have been the focus of significant public scrutiny and concern both in the U.S.[11] and abroad.[12] U.S. states and localities have passed laws specifically focused on regulating the commercial use of facial recognition and other biometric information technologies.[13] The requirements in these laws vary – for example, banning the use of facial recognition in certain locations,[14] requiring signs at the entrances of commercial establishments that collect biometric identifiers,[15] or requiring consent to collect biometric information.[16] In 2019 and 2021, the Commission also brought enforcement actions against companies that allegedly misrepresented their use of facial recognition technology.[17]

Consumers, businesses, and society now face new and increasing risks associated with the collection and use of biometric information. For example, biometric information can be used for the production of counterfeit videos or voice recordings (so-called "deepfakes") that would allow bad actors to convincingly impersonate individuals in order to commit fraud or to defame or harass the individuals depicted.[18] Large databases of biometric information may also be attractive targets for malicious actors because of the information's potential to be used for other

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FOX2DETROIT (July 14, 2021) https://www.fox2detroit.com/news/teen-kicked-out-of-skating-rink-after-facial-recognition-camera-misidentified-her.

[11] *See*, *e.g.*, *Privacy in the Age of Biometrics: Hearing Before the Subcomm. On Investigations and Oversight of the H. Comm. On Science, Space, and Technology* (2022), https://www.congress.gov/event/117th-congress/house-event/114964?s=1&r=8; *Facial Recognition Technology (Part III): Ensuring Commercial Transparency & Accuracy: Hearing Before the House Committee on Oversight and Government Reform* (2020), https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=110380; Rebecca Koenig, *New Advocacy Campaign Calls for Banning Facial Recognition on College Campuses*, EDSURGE (Jan. 22, 2020), https://www.edsurge.com/news/2020-01-22-new-advocacy-campaign-calls-for-banning-facial-recognition-on-college-campuses.

[12] *See*, *e.g.*, *Proposal for a Regulation Laying Down Harmonized Rule on Artificial Intelligence*, European Commission, 2021 O.J. (C 206), https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence; Global Privacy Assembly, *Adopted Resolution on Facial Recognition Technology*, (2020), https://edps.europa.eu/sites/default/files/publication/final_gpa_resolution_on_facial_recognition_technology_en.pdf

[13] *See*, *e.g.*, Washington Biometric Privacy Protection Act, Wash. Rev. Code § 19.375 (2022) (effective July 23, 2017); Prohibit the Use of Face Recognition Technologies by Private Entities in Places of Public Accommodation in the City of Portland, PORTLAND, OR., CITY CODE Chapter 34.10 (2022) (effective Jan. 1, 2021); Biometric Identifier Information, NEW YORK, N.Y., ADMIN. CODE §§ 22-1201 – 1205 (2023) (effective July 9, 2021). Even prior to 2012, two states, Illinois and Texas, had enacted biometric privacy laws. *See* Illinois Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14 (effective Oct. 3, 2008); Texas Capture or Use of Biometric Identifier, Tex. Bus. & Com. Code § 503.001 (effective Apr. 1, 2009). Additionally, states' comprehensive privacy laws address biometric information. *See, e.g.*, Colorado Privacy Act, 2021 Colo. Legis. Serv. Ch. 483 (S.B. 21-190) (West) (effective July 1, 2023).

[14] PORTLAND, OR., CITY CODE Chapter 34.10 (prohibiting use of face recognition technologies by private entities in places of public accommodation).

[15] NEW YORK, N.Y., ADMIN. CODE § 22-1202(a).

[16] 740 Ill. Comp. Stat. 14/15(b).

[17] Complaint, *In re Everalbum*, FTC File No. 1923172 (May 6, 2021); Complaint, *United States v. Facebook*, No. 19-cv-2184 (D.D.C. July 24, 2019).

[18] For example, in 2020, the Commission hosted a workshop to address the potential benefits and risks to consumers of technology that allows researchers to create a near-perfect voice clone with less than a five second recording of a person's voice. FTC, You Don't Say: An FTC Workshop on Voice Cloning Technologies (Jan. 28, 2020), https://www.ftc.gov/news-events/events/2020/01/you-dont-say-ftc-workshop-voice-cloning-technologies.

illicit purposes, including to achieve further unauthorized access to devices, facilities or data.[19] These issues pose risks not only to individual consumers, but also to businesses and society.[20]

Even outside of fraud, uses of biometric information or biometric information technology can pose significant risks to consumers. For instance, using biometric information technologies to identify consumers in certain locations could reveal sensitive personal information about them—for example, that they have accessed particular types of healthcare, attended religious services, or attended political or union meetings.[21] Moreover, without clear disclosures and meaningful choices for consumers about the use of biometric information technologies, consumers may have little way to avoid these risks or unintended consequences of these technologies.[22]

Some technologies using biometric information, such as facial recognition technology, may perform differently across different demographic groups in ways that facilitate or produce discriminatory outcomes. For example, research published by the National Institute of Standards and Technology (NIST) found that many facial recognition algorithms produce significantly more false positive "matches" for images of West and East African and East Asian faces than for images of Eastern European faces.[23] The research also found rates of false positives to be higher

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[19] *See*, *e.g.*, Joseph Cox, *How I Broke Into a Bank Account With an AI-Generated Voice*, Motherboard, VICE (Feb. 23, 2023), https://www.vice.com/en/article/dy7axa/how-i-broke-into-a-bank-account-with-an-ai-generated-voice; Parmy Olson, *Faces Are the Next Target for Fraudsters*, WALL STREET JOURNAL (July 7, 2021), https://www.wsj.com/articles/faces-are-the-next-target-for-fraudsters-11625662828 (reporting, among other things, the successful hack of a Chinese facial recognition system by fraudsters who uploaded videos they had created from high-definition photographs purchased on the black market). Researchers have reportedly demonstrated techniques for replicating and using non-face biometric identifiers such as fingerprints to circumvent access controls. *See*, *e.g.*, Alex Hern, *Hacker fakes German minister's fingerprints using photos of her hands*, THE GUARDIAN (Dec. 30, 2014), https://www.theguardian.com/technology/2014/dec/30/hacker-fakes-german-ministers-fingerprints-using-photos-of-her-hands. Unauthorized access could also be achieved using synthetic identifiers created by combining biometric information about a large number of individuals. *See* Philip Bontrager et al., *DeepMasterPrint: Generating Fingerprints for Presentation Attacks* (2017), https://www.researchgate.net/publication/317061803_DeepMasterPrint_Generating_Fingerprints_for_Presentation_Attacks.

[20] *See, e.g.*, 50 years of biometric research: Accomplishments, challenges, and opportunities, Pattern Recognition Letters 79 (2016) 80–105 (discussing that "biometric system[s] may be vulnerable to a number of security threats . . . which may eventually affect the security of the end application."); Bobby Chesney and Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security,* 107 California Law Review 1753, 1758 (2018) (discussing that some harms of deepfakes may be "distortion of policy debates, manipulation of elections, erosion of trust in institutions, exacerbation of social divisions, damage to national security, and disruption of international relations.").

[21] *See* FTC, FACING FACTS: BEST PRACTICES FOR COMMON USES OF FACIAL RECOGNITION TECHNOLOGIES, *supra* n.4, at ii (recommending that businesses consider the sensitivity of information that may be collected by facial recognition systems in light of the locations in which the systems operate).

[22] *See generally* FTC, FACING FACTS: BEST PRACTICES FOR COMMON USES OF FACIAL RECOGNITION TECHNOLOGIES, *supra* n.4, at iii (summarizing recommendations about providing clear notice and choices to consumers about the use of facial recognition technology).

[23] *See* FRVT Demographic Effects in Face Recognition, NAT'L INSTITUTE FOR STANDARDS AND TECH., https://pages.nist.gov/frvt/html/frvt_demographics.html (last accessed Aug. 31, 2022); NAT'L INSTITUTE FOR STANDARDS AND TECH., FACE RECOGNITION VENDOR TEST (FRVT) PART 8: SUMMARIZING DEMOGRAPHIC DIFFERENTIALS (2022), https://pages.nist.gov/frvt/reports/demographics/nistir_8429.pdf; NAT'L INSTITUTE FOR STANDARDS AND TECH., FACE RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS 2 (2019), https://nvlpubs.nist.gov/nistpubs/ir/2019/nist.ir.8280.pdf.

in women than men, and in the elderly and children compared to middle-aged adults.[24] Demographic differentials may be even more pronounced when analyzed intersectionally (e.g., when comparing light-skinned males to dark-skinned females, rather than simply males to females and light-skinned subjects to dark-skinned subjects).[25] Similarly, some biometric information technologies, such as those that process facial images or voice recordings, may be particularly prone to error when the subject of the analysis is a person with a disability.[26] In light of this potential for bias, such technologies can lead or contribute to harmful or unlawful discrimination. This is particularly concerning when such technologies are used to determine whether consumers can receive important benefits and opportunities or are subject to penalties or less desirable outcomes. For example, if biometric information technologies are used to provide access to financial accounts, a false negative may result in the consumer being denied access to their own account, whereas a false positive may result in an identity thief gaining access to the account.[27] If biometric information technologies are used for security surveillance, false positives may result in individuals being falsely accused of crimes, subjected to searches or questioning, or denied access to physical premises.

In light of the evolving technologies[28] and risks to consumers, the Commission sets out below a non-exhaustive list of examples of practices it will scrutinize in determining whether companies collecting and using biometric information or marketing or using biometric information technologies are complying with Section 5 of the FTC Act.[29]

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[24] *Id.*

[25] *See, e.g.,* Joy Buolamwini and Timnit Gebru, Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification, 81 Proceedings of Machine Learning Research 1, 11 (2018) (assessing commercial gender classification systems and finding that all three performed worst for females with darker skin tones).

[26] *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2022-2, THE AMERICANS WITH DISABILITIES ACT AND THE USE OF SOFTWARE, ALGORITHMS, AND ARTIFICIAL INTELLIGENCE TO ASSESS JOB APPLICANTS AND EMPLOYEES (2022), https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence (noting the potential that technologies analyzing the voice will be less accurate for individuals with speech impediments); SELIN E. NUGENT ET AL., INST. FOR ETHICAL A.I., RECRUITMENT AI HAS A DISABILITY PROBLEM: QUESTIONS EMPLOYERS SHOULD BE ASKING TO ENSURE FAIRNESS IN RECRUITMENT 12 (2020) (noting practical considerations that may affect the accuracy of facial analysis technology for individuals with certain disabilities).

[27] *See generally*, Joseph Cox, *How I Broke Into a Bank Account With an AI-Generated Voice*, Motherboard, VICE (Feb. 23, 2023), https://www.vice.com/en/article/dy7axa/how-i-broke-into-a-bank-account-with-an-ai-generated-voice.

[28] In some instances, biometric information technologies may utilize algorithms and/or artificial intelligence. The guidance below is consistent with and builds on previous publications by the Commission and Commission staff on those topics. *See, e.g.*, FTC, COMBATTING ONLINE HARMS THROUGH INNOVATION (June 2022); FTC, BIG DATA A TOOL FOR INCLUSION OR EXCLUSION? UNDERSTANDING THE ISSUES (Jan. 2016); Elisa Jillson, *Aiming for truth, fairness, and equity in your company's use of AI*, FTC: BUS. BLOG (Apr. 19, 2021) https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai; Andrew Smith, *Using Artificial Intelligence and Algorithms,* FTC: BUS. BLOG (Apr. 8, 2020), https://www.ftc.gov/business-guidance/blog/2020/04/using-artificial-intelligence-algorithms.

[29] Other laws and regulations enforced by the Commission, including but not limited to the Children's Online Privacy Protection Act (15 U.S.C. §§ 6501–6506) and its implementing Rule (16 C.F.R. Part 312), the Health Breach Notification Rule (16 C.F.R. Part 318), and the Gramm-Leach-Bliley Act's Safeguards Rule (16 C.F.R. Part 314) and Regulation P (12 C.F.R. Part 1016), may also govern the collection, use, or storage of biometric information.

Deception

- ***False or unsubstantiated marketing claims relating to the validity, reliability, accuracy, performance, fairness, or efficacy of technologies using biometric information***

As with other types of technologies, false or unsubstantiated marketing claims relating to the validity, reliability, accuracy, performance, fairness, or efficacy of technologies using biometric information constitute deceptive practices in violation of Section 5 of the FTC Act.[30] These claims can mislead both individual consumers and businesses that use these technologies. If prospective users rely on false or unsubstantiated claims in choosing one product over another, honest technology vendors who do not oversell their product's capabilities may be placed at a competitive disadvantage. Moreover, if business customers rely on these claims to use technologies that don't work as promised, they may ultimately harm consumers by, for instance, wrongly denying them benefits and opportunities. Thus, the Commission intends to carefully scrutinize claims about these technologies.

As with all marketing claims, the law requires that representations about biometric information technologies be substantiated when made—that is, persons or individuals making such claims must have a reasonable basis for their claims.[31] For example, businesses should be careful not to make false or unsubstantiated claims that technologies are unbiased. Claims of validity or accuracy are deceptive if they are true only for certain populations and if such limitations are not clearly stated.[32] Further, businesses must not make false or unsubstantiated claims about real-world validity, accuracy, or performance of biometric information technologies when the claims are based on tests or audits that do not replicate real-world conditions or how the technology will be operationalized by its intended users.[33] Businesses also should not make false or unsubstantiated claims that the technologies will deliver particular results or outcomes, such as reductions in rates of theft, violent incidents, fraud, or the elimination of bias in hiring.[34]

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[30] *See* Complaint, *FTC v. Aura Labs, Inc.*, No. 8:16-cv-2147 (C.D. Cal. Dec. 2, 2016) (alleging company's representations that mobile application measured blood pressure with accuracy comparable to a traditional blood pressure cuff were false, misleading, or unsubstantiated); Complaint, *FTC v. New Consumer Solutions, LLC*, No. 1:15-cv-01614 (N.D. Il. Feb. 23, 2015) (alleging company's representations that a mobile application could detect melanoma by analyzing pictures of consumers' skin were false or unsubstantiated).

[31] *See, e.g.*, FTC Policy Statement Regarding Advertising Substantiation, appended to *In re Thompson Med. Co., Inc.,* 104 F.T.C. 648, 839 (1984), *aff'd,* 791 F.2d 189 (D.C. Cir. 1986). Where a company's claims of accuracy, efficacy, or lack of bias refer to specific facts or figures, they must generally be supported by a high level of substantiation, such as scientific or engineering tests. *See also Thompson Med.*, 104 F.T.C. at 822.

[32] *See, e.g.*, Complaint, *In re Everalbum*, FTC File No. 1923172 (May 6, 2021) (alleging company's representations that it was not using facial recognition unless user enabled it were deceptive, where the representations were true only for users in Texas, Illinois, Washington, and the European Union, and users outside of those locations were not provided a setting to turn off facial recognition); *In re J.B. Williams Co., Inc.*, 68 F.T.C. 481, 1965 WL 92965, *5 (1965), *aff'd*, 381 F.2d 884 (6th Cir. 1967) (claims that product could reduce fatigue were deceptive, where product was efficacious only in a small minority of cases where tiredness symptoms were due to an iron deficiency, and was of no benefit in all other cases).

[33] *See* Opinion of the Commission at 43-46, *In re ECM Biofilms, Inc.*, FTC File No. 1223118 (Oct. 19, 2015) (laboratory tests performed under aerobic conditions were not competent and reliable evidence of biodegradation in landfills, which are anaerobic environments), *aff'd*, 851 F.3d 599 (6th Cir. 2017).

[34] Claims that "significantly involve. . . safety," as well as claims relating to the performance or other central characteristics of a product or service, are generally material. FTC Policy Statement on Deception (Oct. 14, 1983), appended to *Cliffdale Associates, Inc.,* 103 F.T.C. 110, 174 (1984). *See also* Complaint, *In re Tapplock*, FTC File

- ***Deceptive statements about the collection and use of biometric information***

False or misleading statements about the collection and use of biometric information constitute deceptive acts in violation of Section 5 of the FTC Act, as does failing to disclose any material information needed to make a representation non-misleading. In recent years, the Commission has taken action against businesses that it charged with engaging in deceptive practices related to the collection and use of biometric information.[35] The Commission will continue to carefully scrutinize businesses' conduct in this area to ensure they are not misleading consumers. Businesses should not make false statements about the extent to which they collect or use biometric information or whether or how they implement technologies using biometric information.[36] Businesses also must ensure that they are not telling half-truths—for example, a business should not make an affirmative statement about some purposes for which it will use biometric information but fail to disclose other material uses of the information.[37]

Unfairness

The use of biometric information or biometric information technology may be an unfair practice within the meaning of the FTC Act. Under Section 5, a practice is unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.[38] As discussed above, the collection and use of biometric information can create a serious risk of harm to consumers. Such harms are not reasonably avoidable by consumers if the collection and use of such information is not clearly and conspicuously disclosed or if access to essential goods and services is conditioned on providing the information. For instance, if businesses automatically and surreptitiously collect consumers' biometric information as they enter or move through a store, the consumers have no ability to avoid the collection or use of that information.

Our past cases illustrate that collecting, retaining, or using consumers' personal information in ways that cause or are likely to cause substantial injury, or disseminating

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No. 1923011 (May 18, 2020) (alleging that representations that smart padlock was secure were deceptive, where padlock had foreseeable information security vulnerabilities and could be quickly unlocked by unscrewing the back panel); Complaint, *FTC v. Lifelock, Inc.*, No. 2:10-cv-00530-MHM (D. Az. Mar. 8, 2010) (alleging that representations that service provided complete protection against all forms of identity theft were deceptive).

[35] *See* Complaint, *In re Everalbum*, FTC File No. 1923172 (May 6, 2021) (alleging that the company misrepresented that it was not using face recognition unless the user enabled it or turned it on); *See also* Complaint, *United States v. Facebook*, No. 19-cv-2184 (D.D.C. July 24, 2019) (alleging that the company misrepresented that users would have to "turn[ ] on" facial-recognition technology, violating a provision of a prior Commission order that prohibited misrepresenting the extent to which users could control the privacy of their data).

[36] *Id.*

[37] *See* Complaint, *United States v. Twitter*, No. 3:22-cv-03070 (N.D. Cal. May 25, 2022) (alleging that statements that users' telephone numbers provided for two-factor authentication would be used for security purposes were deceptive when the company failed to adequately disclose that such numbers would also be used for targeted advertising); Complaint, *In re Sears Holdings Mgmt. Corp.*, FTC File No. 082 3099 (Aug. 31, 2009) (alleging that respondents' statement that they would track consumers' "online browsing" was deceptive in light of failure to adequately disclose tracking of nearly all of the Internet behavior occurring on consumers' computers as well as certain non-Internet related activities taking place on those computers).

[38] 15 U.S.C. § 45(n); *see also* Letter from the FTC to Hon. Wendell Ford & Hon. John Danforth, Ranking Minority Member, S. Comm. on Com., Sci. & Transp., Consumer Subcomm., Comm'n Statement of Pol'y on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984) (the "Unfairness Policy Statement").

technology that enables others to do so without taking reasonable measures to prevent harm to consumers can be an unfair practice in violation of Section 5 of the FTC Act.[39] For example, the FTC has previously charged that businesses have engaged in unfair practices by failing to protect consumers' personal information using reasonable data security practices; by engaging in invasive surveillance, tracking, or collection of sensitive personal information that was concealed from consumers or contrary to their expectations;[40] by, in certain circumstances, implementing privacy-invasive default settings;[41] by disseminating an inaccurate technology that, if relied on by consumers, could endanger them or others;[42] and by offering for sale technologies with the potential to cause or facilitate harmful and illegal conduct like covert tracking, and failing to take reasonable measures to prevent such conduct.[43] Additionally, the FTC has charged that certain discriminatory practices can be unfair.[44] Though many biometric information technologies are new, businesses must continue to abide by longstanding legal requirements and obligations.

In order to avoid liability under the FTC Act, businesses should implement reasonable privacy and data security measures to ensure that any biometric information that they collect or maintain is protected from unauthorized access—whether that access stems from an external

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[39] *See generally, Privacy and Security*, FTC (last visited Mar. 29, 2023 11:28 AM), https://www.ftc.gov/business-guidance/privacy-security (collecting the FTC's published business guidance related to data privacy and security).

[40] *See, e.g.*, Complaint, *In re Lenovo, Inc.,* FTC File No. 1523134 3134 (Dec. 20, 2017) (alleging that preinstallation of ad-injecting software that, without adequate notice or informed consent, acted as a man-in-the-middle between consumers and all websites with which they communicated was unfair; and that failure to take reasonable measures to assess and address security risks created by the preinstalled software was unfair); Complaint, *FTC v. Vizio, Inc.* Case No. 2:17-cv-00758 (D.N.J. Feb. 6, 2017) (alleging that collection of sensitive television viewing activity without consent and contrary to consumer expectations, and sharing of such information with third parties, was an unfair practice); Complaint, *In re Showplace, Inc*., FTC File No. 1123151, (Apr. 11, 2013) (alleging that rent-to-own store's use of monitoring and tracking software installed on rented computers was an unfair practice).

[41] *See* Complaint, *United States v. Epic Games, Inc.*, Case No. 5:22-CV-00518 (E.D.N.C. Dec. 19, 2022) (alleging that developing and operating a ubiquitous, freely-available, and internet-enabled video game directed at children and teens that publicly broadcasted players' display names while putting children and teens in direct, real-time contact with others through on-by-default lines of voice and text communication (even after instituting an age gate on the service) was unfair); *see also*, Complaint, *FTC v. Frostwire LLC*, Case No. 111-cv-23643 (S.D. Fla. Oct. 11, 2011) (alleging that distributing an application with default settings that caused or were likely to cause consumers to unwittingly publicly share files already present on, or subsequently saved on, the consumers' mobile devices, including, among others, consumers' pictures, videos, and documents, was an unfair practice).

[42] *See* Complaint, *FTC v. Breathometer, Inc.*, No. 3:17-cv-314 (N.D. Cal. Jan. 23, 2017) (alleging that failing to notify consumers or take corrective action upon learning that device measuring blood alcohol levels was inaccurate was an unfair practice).

[43] *See, e.g.*, Complaint, *In re Support King*, *LLC*, FTC File No. 1923003 (Dec. 20, 2021) (alleging that the provider of software called "Spyfone," which allowed users to surreptitiously monitor and track others' devices, unfairly failed to take reasonable steps to ensure that the purchasers use the monitoring products and services only for legitimate and lawful purposes); Complaint, *In re Retina-X Studios, LLC*, FTC File No. 1723118 (Mar. 26, 2020) (alleging a failure to take reasonable steps to ensure that monitoring products and services that required circumventing certain security protections on mobile devices would be used only for legitimate and lawful purposes by the purchaser); Complaint, *In re DesignerWare, LLC*, FTC File No. 1123151 (Apr. 11, 2013) (alleging that furnishing rent-to-own stores with monitoring and tracking software to be installed on rented computers was an unfair practice).

[44] *See* Complaint, *FTC v. Passport Automotive Group*, Case. No. 8:22-cv-02670-GLS (D. Md. Oct. 18, 2022) (alleging that imposing higher costs on Black and Latino consumers than on similarly situated non-Latino White consumers was unfair); *see also* Elisa Jillson, *Aiming for truth, fairness, and equity in your company's use of AI*, FTC: BUS. BLOG (Apr. 19, 2021), https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai.

cybersecurity intrusion or an internal incursion by unauthorized employees, contractors, or service providers.[45] Businesses must also take care that their own collection and use of biometric information is not likely to cause substantial consumer injury.

Determining whether a business's use of biometric information or biometric information technology violates Section 5 requires a holistic assessment of the business's relevant practices. In making such assessments, the Commission will draw on applicable lessons that can be derived from its past work—including, but not limited to, in privacy and data security matters. Importantly, in some situations, the adoption of a contemplated practice may be unjustifiable when weighing the potential risks to consumers against the anticipated benefits of the practice. For example, if more accurate, less risky alternatives are available, using a technology that is proven to have high error rates may present unjustifiable risk to consumers, even if the technology is more convenient, more efficient, or more profitable for the business considering implementing the technology. The Commission's assessment will take into account factors including, but not limited to, the following:

- ***Failing to assess foreseeable harms to consumers before collecting biometric information.***[46] Prior to collecting consumers' biometric information, or deploying a biometric information technology, businesses should conduct a holistic assessment of the potential risks to consumers associated with the collection and/or use.[47] For example, assessments should take into account the context in which the collection or use will take place and the extent to which the specific biometric information technologies to be used have been tested by the business or a third party.[48] The results of testing should be evaluated in light of how well the testing environment mirrors real world implementation and use, including the particular context in which the technology will be deployed. Assessments should also consider the role of human operators. Businesses should not conclude without evidence that the involvement of a human operator is sufficient to mitigate risks to consumers. Businesses should assess whether deploying a biometric information technology system leads to or contributes to outcomes that disproportionately harm particular demographics of consumers. These assessments should take into account

[45] Collecting or retaining biometric information without any legitimate business need or keeping that information indefinitely creates an increased risk of harm to consumers. *See, e.g.*, Complaint, *In re BJ's Wholesale Club, Inc.*, FTC File No. 0423160 (Sept. 20, 2005) (alleging a failure to employ reasonable and appropriate data security measures where, among other things, the company created unnecessary risks to sensitive financial information by storing it for up to 30 days when it no longer had a business need to keep the information); Complaint, *In re Residual Pumpkin Entity, LLC*, FTC File No. 1923209 (June 23, 2022) (alleging that company created unnecessary risks to personal information by storing it indefinitely on its network without a business need).
[46] *See, e.g.*, Complaint, *In re EPN, Inc.*, FTC File No. 1123143 (Oct. 3, 2012) (alleging a failure to assess risks to consumer personal information it collected and stored online.)
[47] *See, e.g.*, Complaint, *In re Lenovo, Inc.*, FTC File No. 1523134 (Dec. 20, 2017) (alleging that respondent's failure to take reasonable measures to assess and address security risks created by third-party software it installed on laptops it offered to consumers was an unfair practice); Complaint, *In re SettlementOne Credit Corp.*, FTC File No. 0823208 (Aug. 17, 2011) (alleging that respondents failed to assess the risks of allowing end users with unverified or inadequate security to access consumer reports through respondents' portal).
[48] *See, e.g.*, Complaint, *In re Upromise, Inc.*, FTC File No. 1023116 (Mar. 27, 2012) (alleging unfair conduct, where defendant allegedly engaged a service provider to develop software that it distributed to consumers but failed, among other things, to assess and address risks posed by the software by testing, post-deployment monitoring, or other means).

whether technical components of the system, such as algorithms, have been specifically tested for differential performance across demographic groups—including intersectionally.

- ***Failing to promptly address known or foreseeable risks,***[49] including by failing to identify and implement readily available tools for reducing or eliminating risks.[50] For instance, if there is evidence that a particular biometric information technology is often prone to certain types of errors or biases, businesses should proactively take appropriate measures to reduce or eliminate the risk that such errors could lead to consumer injury. Steps taken to address risks may include organizational measures, such as policies and procedures to appropriately limit access to biometric information.[51] They may also include technical measures. For example, businesses should timely update relevant systems, including both software components like algorithms and hardware components that are used to capture, process, or store biometric information, in order to ensure that the systems operate effectively and do not put consumers at risk.[52]

- ***Engaging in surreptitious and unexpected collection or use of biometric information.***[53] In some situations, such conduct may be unfair in and of itself. For instance, businesses may violate the law if they use or facilitate the use of biometric information or biometric information technology to surreptitiously identify or track a consumer in a manner that exposes the consumer to risks such as stalking, exposure to stigma, reputational harm, or

[49] *See, e.g.*, *FTC v. Wyndham Worldwide Corp.*, 10 F.Supp.3d 602, 624-26 (D.N.J. Apr. 7, 2014) (holding that the FTC's complaint adequately stated a claim for unfair data security practices where it alleged, among other things, defendant permitted its hotels to connect insecure servers to its network, including servers with outdated operating systems that could not receive patches to address known security vulnerabilities), *aff'd*, 799 F.3d 236 (3d Cir. 2015); Complaint, *FTC v. Equifax, Inc.*, No. 1:19-cv-03297-TWT (N.D. Ga. July 22, 2019) (alleging failure to implement reasonable procedures to detect, respond to, and timely correct critical and other high-risk security vulnerabilities across Defendant's systems); Complaint, *In re Lookout Services, Inc.*, FTC File No. 1023076 (June 15, 2011) (alleging respondent's failure to adequately assess or address the vulnerability of its web application to widely-known security flaws).

[50] *See*, *e.g.*, Complaint, *In re Residual Pumpkin Entity, LLC*, FTC File No. 1923209 (June 23, 2022) (alleging a failure to implement readily available protections against well-known and reasonably foreseeable vulnerabilities); Complaint, *In re Compete, Inc.*, FTC File No. 1023155 (Feb. 20, 2013) (alleging a failure to use readily available, low-cost measures to assess/address the risk that data collection software would collect sensitive consumer information it was not authorized to collect).

[51] *See, e.g.*, Complaint, *In re Residual Pumpkin Entity, LLC*, FTC File No. 1923209 (June 23, 2022) (alleging that Residual Pumpkin failed to establish or enforce rules sufficient to make user credentials hard to guess and failed to implement patch management policies and procedures to ensure the timely remediation of critical security vulnerabilities and use of obsolete versions of database and web server software that no longer received patches); Complaint, *FTC v. Equifax, Inc.*, No. 1:19-cv-03297-TWT (N.D. Ga. July 22, 2019) (alleging failure to implement or enforce reasonable access controls to prevent unauthorized access to sensitive personal information).

[52] *See, e.g.*, Complaint, *In re Residual Pumpkin Entity, LLC*, FTC File No. 1923209 (June 23, 2022) (alleging failure to implement patch management policies and procedures to ensure the timely remediation of critical security vulnerabilities and use of obsolete versions of database and web server software that no longer received patches).

[53] *See, e.g.*, Complaint, *In re Aaron's, Inc.*, FTC File No. 1223264 (Mar. 10, 2014) (alleging that allowing franchisees to install software facilitating surreptitious collection of private information on rented computers was an unfair practice, and noting that consumers were unable to avoid harm because collection was surreptitious).

extreme emotional distress.[54] Additionally, as discussed above, failing to clearly and conspicuously disclose the collection and use of biometric information makes such collection and use unavoidable by the consumer. Injuries to consumers may also be compounded if there is no mechanism for accepting and addressing consumer complaints and disputes related to businesses' use of biometric information technologies.

- ***Failing to evaluate the practices and capabilities of third parties,*** including affiliates, vendors, and end users, who will be given access to consumers' biometric information or will be charged with operating biometric information technologies. Businesses should seek relevant assurances and contractual agreements that require third parties to take appropriate steps to minimize risks to consumers. They should also go beyond contractual measures to oversee third parties and ensure they are meeting those requirements and not putting consumers at risk.[55] Such oversight may include organizational and technical measures (including taking steps to ensure access to necessary information) to supervise, monitor or audit the third parties' compliance with any requirements.

- ***Failing to provide appropriate training for employees and contractors*** whose job duties involve interacting with biometric information or technologies that use such information.[56]

[54] *See, e.g.*, Complaint, *In re Support King*, FTC File No. 1923003 (Dec. 20, 2021) (alleging that respondents' SpyFone monitoring products and services substantially injure device users by enabling purchasers to stalk them surreptitiously); Complaint, *In re Retina-X Studios, LLC*, FTC File No. 1723118 (Mar. 26, 2020) (similarly alleging respondent's products and services substantially injure device users by enabling purchasers to surreptitiously stalk them); Complaint, *FTC v. EMP Media, Inc.*, No. 2:18-cv-00035 (D. Nev. Jan. 9, 2018) (alleging that defendants published consumers' intimate images without consent in a manner enabling the public to identify or contact the individuals depicted, causing a number of harms to consumers including an unwarranted invasion of privacy into consumers' lives, depression, anxiety, loss of reputation, safety fears, medical and legal costs, and lost time, was unfair)).
[55] *See, e.g.*, *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 241 (3d Cir. 2015) (affirming denial of motion to dismiss FTC's complaint alleging unfair data security practices, which included allegations defendant allowed hotel property management systems to connect to its network without taking appropriate precautions, such as ensuring that the hotels implemented adequate information security policies and procedures); Complaint, *In re GeneLink, Inc.*, FTC File No. 1123095 (May 8, 2014) (alleging that company unfairly failed to employ reasonable and appropriate measures to prevent unauthorized access to consumers' personal information because, among other things, it failed to provide reasonable oversight of service providers); *See, e.g.*, Complaint, *In re Upromise, Inc*., FTC File No. 1023116 (Mar. 27, 2012) (alleging failure to take adequate measures to ensure that its service provider employed reasonable and appropriate measures to protect consumer information and to implement the information collection program in a manner consistent with contractual provisions designed to protect consumer information).
[56] *See, e.g.*, Complaint, *In re SkyMed Int'l , Inc*., FTC File No. 1923140 (Jan. 26, 2021) (alleging a failure to provide adequate guidance or training for employees or third-party contractors regarding information security and safeguarding consumers' personal information); Complaint, *In re Zoom Video Communc'ns, Inc.*, FTC File No. 1923167 (Jan. 19, 2021) (alleging that failure to implement a training program on secure software development principles contributed to unfair conduct).

- ***Failing to conduct ongoing monitoring of technologies that the business develops, offers for sale,[57] or uses[58] in connection with biometric information*** to ensure that the technologies are functioning as anticipated, that users of the technology are operating it as intended, and that use of the technology is not likely to harm consumers.

The Commission notes that a practice need not be equally likely to harm all consumers in order to be considered unfair. In determining what constitutes reasonable practices to protect consumers from potential harms associated with the use of biometric information, therefore, the Commission will—and businesses should—consider the practices from the perspective of any population of consumers that is particularly at risk of those harms.[59]

Finally, the Commission wishes to emphasize that—particularly in view of rapid changes in technological capabilities and uses—businesses should continually assess whether their use of biometric information or biometric information technologies causes or is likely to cause consumer injury in a manner that violates Section 5 of the FTC Act. If so, businesses must cease such practices, whether or not the practices are specifically addressed in this statement.

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[57] *See, e.g.*, Complaint, *In re ASUSTeK Computer Inc.*, FTC File No. 1423156 (July 18, 2016) (alleging a failure to perform vulnerability and penetration testing on software that respondent offered for sale, including for well-known and reasonably foreseeable vulnerabilities that could be exploited to gain unauthorized access to consumers' sensitive personal information and local networks).

[58] *See, e.g.*, Complaint, *FTC v. Equifax, Inc.*, No. 1:19-cv-03297-TWT (N.D. Ga. July 22, 2019) (alleging failure to implement reasonable procedures to detect, respond to, and timely correct critical and other high-risk security vulnerabilities across Defendant's systems); Complaint, *In re SettlementOne Credit Corp.*, FTC File No. 0823208 (Aug. 19, 2011) (alleging that respondents failed to implement reasonable steps to maintain an effective system of monitoring access to consumer reports by end users).

[59] *See, e.g.*, Unfairness Policy Statement, *supra* n. 36, at 1074 ("[S]ome may exercise undue influence over highly susceptible classes of purchasers, as by promoting fraudulent 'cures' to seriously ill cancer patients."); Complaint, *In re Philip Morris, Inc.*, 82 F.T.C. 16 (1973) (alleging respondent engaged in an "unfair and deceptive act and practice" by distributing free-sample razor blades in home-delivered newspapers, which posed a particular hazard to young children).

Merger Guidelines

U.S. Department of Justice and the Federal Trade Commission

Issued: December 18, 2023

1. Overview

These Merger Guidelines identify the procedures and enforcement practices the Department of Justice and the Federal Trade Commission (the "Agencies") most often use to investigate whether mergers violate the antitrust laws. The Agencies enforce the federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; and Sections 3, 7, and 8 of the Clayton Act,[1] 15 U.S.C. §§ 14, 18, 19.[2] Congress has charged the Agencies with administering these statutes as part of a national policy to promote open and fair competition, including by preventing mergers and acquisitions that would violate these laws. "Federal antitrust law is a central safeguard for the Nation's free market structures" that ensures "the preservation of economic freedom and our free-enterprise system."[3] It rests on the premise that "[t]he unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."[4]

Section 7 of the Clayton Act ("Section 7") prohibits mergers and acquisitions where "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Competition is a process of rivalry that incentivizes businesses to offer lower prices, improve wages and working conditions, enhance quality and resiliency, innovate, and expand choice, among many other benefits. Mergers that substantially lessen competition or tend to create a monopoly increase, extend, or entrench market power and deprive the public of these benefits. Mergers can lessen competition when they diminish competitive constraints, reduce the number or attractiveness of alternatives available to trading partners, or reduce the intensity with which market participants compete.

Section 7 was designed to arrest anticompetitive tendencies in their incipiency.[5] The Clayton Act therefore requires the Agencies to assess whether mergers present risk to competition. The Supreme Court has explained that "Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect '*may be* substantially to lessen competition'" or to tend to create a monopoly.[6] Accordingly, the Agencies do not attempt to

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[1] As amended under the Celler-Kefauver Antimerger Act of 1950, Pub. L. No. 81-899, 64 Stat. 1125 (1950), and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

[2] Although these Guidelines focus primarily on Section 7 of the Clayton Act, the Agencies consider whether any of these statutes may be violated by a merger. The various provisions of the Sherman, Clayton, and FTC Acts each have separate standards, and one may be violated when the others are not.

[3] *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 502 (2015).

[4] *NCAA v. Board of Regents*, 468 U.S. 85, 104 n.27 (1984) (quoting *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4-5 (1958)); *see also NCAA v. Alston*, 141 S. Ct. 2141, 2147 (2021) (quoting *Board of Regents*, 468 U.S. at 104 n.27).

[5] *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 318 nn.32-33 (1962); *see also United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019) (Section 7 "halt[s] incipient monopolies and trade restraints outside the scope of the Sherman Act." (quoting *Brown Shoe*, 370 U.S. at 318 n.32)); *Saint Alphonsus Medical Center-Nampa v. St. Luke's*, 778 F.3d 775, 783 (9th Cir. 2015) (Section 7 "intended to arrest anticompetitive tendencies in their incipiency." (quoting *Brown Shoe*, 370 U.S. at 322)); *Polypore Intern., Inc. v. FTC*, 686 F.3d 1208, 1213-14 (11th Cir. 2012) (same). Some other aspects of *Brown Shoe* have been subsequently revisited.

[6] *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (quoting 15 U.S.C. § 18 with emphasis) (citing *Brown Shoe*, 370 U.S. at 323).

predict the future or calculate precise effects of a merger with certainty. Rather, the Agencies examine the totality of the evidence available to assess the risk the merger presents.

Competition presents itself in myriad ways. To assess the risk of harm to competition in a dynamic and complex economy, the Agencies begin the analysis of a proposed merger by asking: how do firms in this industry compete, and does the merger threaten to substantially lessen competition or to tend to create a monopoly?

The Merger Guidelines set forth several different analytical frameworks (referred to herein as "Guidelines") to assist the Agencies in assessing whether a merger presents sufficient risk to warrant an enforcement action. These frameworks account for industry-specific market realities and use a variety of indicators and tools, ranging from market structure to direct evidence of the effect on competition, to examine whether the proposed merger may harm competition.

How to Use These Guidelines: When companies propose a merger that raises concerns under one or more Guidelines, the Agencies closely examine the evidence to determine if the facts are sufficient to infer that the effect of the merger may be to substantially lessen competition or to tend to create a monopoly (sometimes referred to as a "prima facie case").[7] **Section 2** describes how the Agencies apply these Guidelines. Specifically, Guidelines 1-6 describe distinct frameworks the Agencies use to identify that a merger raises prima facie concerns, and Guidelines 7-11 explain how to apply those frameworks in several specific settings. In all of these situations, the Agencies will also examine relevant evidence to determine if it disproves or rebuts the prima facie case and shows that the merger does not in fact threaten to substantially lessen competition or tend to create a monopoly. **Section 3** identifies rebuttal evidence that the Agencies consider, and that merging parties can present, to rebut an inference of potential harm under these frameworks.[8] **Section 4** sets forth a non-exhaustive discussion of analytical, economic, and evidentiary tools the Agencies use to evaluate facts, understand the risk of harm to competition, and define relevant markets.

These Guidelines are not mutually exclusive, as a single transaction can have multiple effects or raise concerns in multiple ways. To promote efficient review, for any given transaction the Agencies may limit their analysis to any one Guideline or subset of Guidelines that most readily demonstrates the risks to competition from the transaction.

Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market. Market concentration is often a useful indicator of a merger's likely effects on competition. The Agencies therefore presume, unless sufficiently disproved or rebutted, that a merger between competitors that significantly increases concentration and creates or further consolidates a highly concentrated market may substantially lessen competition.

Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms. The Agencies examine whether competition between the merging parties is substantial since their merger will necessarily eliminate any competition between them.

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[7] *See, e.g.*, *United States v. AT&T, Inc.*, 916 F.3d at 1032 (explaining that a *prima facie* case can demonstrate a "reasonable probability" of harm to competition either through "statistics about the change in market concentration" or a "fact-specific" showing (quoting *Brown Shoe*, 370 U.S. at 323 n.39)); *United States v. Baker Hughes*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).
[8] These Guidelines pertain only to the Agencies' consideration of whether a merger or acquisition may substantially lessen competition or tend to create a monopoly. The consideration of remedies appropriate for mergers that pose that risk is beyond the Merger Guidelines' scope. The Agencies review proposals to revise a merger in order to alleviate competitive concerns consistent with applicable law regarding remedies.

Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination. The Agencies examine whether a merger increases the risk of anticompetitive coordination. A market that is highly concentrated or has seen prior anticompetitive coordination is inherently vulnerable and the Agencies will infer, subject to rebuttal evidence, that the merger may substantially lessen competition. In a market that is not highly concentrated, the Agencies investigate whether facts suggest a greater risk of coordination than market structure alone would suggest.

Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market. The Agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant.

Guideline 5: Mergers Can Violate the Law When They Create a Firm That May Limit Access to Products or Services That Its Rivals Use to Compete. When a merger creates a firm that can limit access to products or services that its rivals use to compete, the Agencies examine the extent to which the merger creates a risk that the merged firm will limit rivals' access, gain or increase access to competitively sensitive information, or deter rivals from investing in the market.

Guideline 6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position. The Agencies examine whether one of the merging firms already has a dominant position that the merger may reinforce, thereby tending to create a monopoly. They also examine whether the merger may extend that dominant position to substantially lessen competition or tend to create a monopoly in another market.

Guideline 7: When an Industry Undergoes a Trend Toward Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly. A trend toward consolidation can be an important factor in understanding the risks to competition presented by a merger. The Agencies consider this evidence carefully when applying the frameworks in Guidelines 1-6.

Guideline 8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series. If an individual transaction is part of a firm's pattern or strategy of multiple acquisitions, the Agencies consider the cumulative effect of the pattern or strategy when applying the frameworks in Guidelines 1-6.

Guideline 9: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform. Multi-sided platforms have characteristics that can exacerbate or accelerate competition problems. The Agencies consider the distinctive characteristics of multi-sided platforms when applying the frameworks in Guidelines 1-6.

Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers. The Agencies apply the frameworks in Guidelines 1-6 to assess whether a merger between buyers, including employers, may substantially lessen competition or tend to create a monopoly.

Guideline 11: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition. The Agencies apply the frameworks in Guidelines 1-6 to assess if an acquisition of partial control or common ownership may substantially lessen competition.

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This edition of the Merger Guidelines consolidates, revises, and replaces the various versions of Merger Guidelines previously issued by the Agencies. The revision builds on the learning and experience reflected in those prior Guidelines and successive revisions. These Guidelines reflect the collected experience of the Agencies over many years of merger review in a changing economy and have been refined through an extensive public consultation process.

As a statement of the Agencies' law enforcement procedures and practices, the Merger Guidelines create no independent rights or obligations, do not affect the rights or obligations of private parties, and do not limit the discretion of the Agencies, including their staff, in any way. Although the Merger Guidelines identify the factors and frameworks the Agencies consider when investigating mergers, the Agencies' enforcement decisions will necessarily continue to require prosecutorial discretion and judgment. Because the specific standards set forth in these Merger Guidelines will be applied to a broad range of factual circumstances, the Agencies will apply them reasonably and flexibly to the specific facts and circumstances of each merger.

Similarly, the factors contemplated in these Merger Guidelines neither dictate nor exhaust the range of theories or evidence that the Agencies may introduce in merger litigation. Instead, they set forth various methods of analysis that may be applicable depending on the availability and/or reliability of information related to a given market or transaction. Given the variety of industries, market participants, and acquisitions that the Agencies encounter, merger analysis does not consist of uniform application of a single methodology. The Agencies assess any relevant and meaningful evidence to evaluate whether the effect of a merger may be substantially to lessen competition or to tend to create a monopoly. Merger review is ultimately a fact-specific exercise. The Agencies follow the facts and the law in analyzing mergers as they do in other areas of law enforcement.

These Merger Guidelines include references to applicable legal precedent. References to court decisions do not necessarily suggest that the Agencies would analyze the facts in those cases identically today. While the Agencies adapt their analytical tools as they evolve and advance, legal holdings reflecting the Supreme Court's interpretation of a statute apply unless subsequently modified. These Merger Guidelines therefore reference applicable propositions of law to explain core principles that the Agencies apply in a manner consistent with modern analytical tools and market realities. References herein do not constrain the Agencies' interpretation of the law in particular cases, as the Agencies will apply their discretion with respect to the applicable law in each case in light of the full range of precedent pertinent to the issues raised by each enforcement action.

2. Applying the Merger Guidelines

This section discusses the frameworks the Agencies use to assess whether a merger may substantially lessen competition or tend to create a monopoly.

2.1. Guideline 1: Mergers Raise a Presumption of Illegality When They Significantly Increase Concentration in a Highly Concentrated Market.

Market concentration and the change in concentration due to the merger are often useful indicators of a merger's risk of substantially lessening competition. In highly concentrated markets, a merger that eliminates a significant competitor creates significant risk that the merger may substantially lessen competition or tend to create a monopoly. As a result, a significant increase in concentration in a highly concentrated market can indicate that a merger may substantially lessen competition, depriving the public of the benefits of competition.

The Supreme Court has endorsed this view and held that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market[,] is so inherently likely to lessen competition substantially that it must be enjoined in the absence of [rebuttal] evidence."[9] In the Agencies' experience, this legal presumption provides a highly administrable and useful tool for identifying mergers that may substantially lessen competition.

An analysis of concentration involves calculating pre-merger market shares of products[10] within a relevant market (see Section 4.3 for a discussion of market definition and Section 4.4 for more details on computing market shares). The Agencies assess whether the merger creates or further consolidates a highly concentrated market and whether the increase in concentration is sufficient to indicate that the merger may substantially lessen competition or tend to create a monopoly.[11]

The Agencies generally measure concentration levels using the Herfindahl-Hirschman Index ("HHI").[12] The HHI is defined as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated, reaching 10,000 in a market with a single firm. Markets with an HHI greater than 1,800 are highly concentrated, and a change of more than 100 points is a significant increase.[13] A merger that creates or further consolidates a highly

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[9] *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963); *see, e.g.*, *FTC v. v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 172-73 (3d Cir. 2022); *United States v. AT&T, Inc.*, 916 F.3d at 1032.

[10] These Guidelines use the term "products" to encompass anything that is traded between firms and their suppliers, customers, or business partners, including physical goods, services, or access to assets. Products can be as narrow as an individual brand, a specific version of a product, or a product that includes specific ancillary services such as the right to return it without cause or delivery to the customer's location.

[11] Typically, a merger eliminates a competitor by bringing two market participants under common control. Similar concerns arise if the merger threatens to cause the exit of a current market participant, such as a leveraged buyout that puts the target firm at significant risk of failure.

[12] The Agencies may instead measure market concentration using the number of significant competitors in the market. This measure is most useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure shares in the relevant market.

[13] For illustration, the HHI for a market of five equal firms is 2,000 ($5 \times 20^2 = 2{,}000$) and for six equal firms is 1,667 ($6 \times 16.67^2 = 1667$).

concentrated market that involves an increase in the HHI of more than 100 points[14] is presumed to substantially lessen competition or tend to create a monopoly.[15] The Agencies also may examine the market share of the merged firm: a merger that creates a firm with a share over thirty percent is also presumed to substantially lessen competition or tend to create a monopoly if it also involves an increase in HHI of more than 100 points.[16]

Indicator	Threshold for Structural Presumption
Post-merger HHI	Market HHI greater than 1,800 AND Change in HHI greater than 100
Merged Firm's Market Share	Share greater than 30% AND Change in HHI greater than 100

When exceeded, these concentration metrics indicate that a merger's effect may be to eliminate substantial competition between the merging parties and may be to increase coordination among the remaining competitors after the merger. This presumption of illegality can be rebutted or disproved. The higher the concentration metrics over these thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it.

2.2. Guideline 2: Mergers Can Violate the Law When They Eliminate Substantial Competition Between Firms.

A merger eliminates competition between the merging firms by bringing them under joint control.[17] If evidence demonstrates substantial competition between the merging parties prior to the

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[14] The change in HHI from a merger of firms with shares *a* and *b* is equal to 2*ab*. For example, in a merger between a firm with 20% market share and a firm with 5% market share, the change in HHI is 2 x 20 x 5 = 200.

[15] The first merger guidelines to reference an HHI threshold were the merger guidelines issued in 1982. These guidelines referred to mergers with HHI above 1,000 as concentrated markets, with HHI between 1,000 and 1,800 as "moderately concentrated" and above 1,800 as "highly concentrated," while they referred to an increase in HHI of 100 as a "significant increase." Each subsequent iteration until 2010 maintained those thresholds. *See* Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines § 1.51 (1997); Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines § 1.51 (1992); U.S. Dep't of Justice, Merger Guidelines § 3(A) (1982). During this time, courts routinely cited to the guidelines and these HHI thresholds in decisions. *See, e.g.*, *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 431 (5th Cir. 2008); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1211 (11th Cir. 1991). Although the Agencies raised the thresholds for the 2010 guidelines, based on experience and evidence developed since, the Agencies consider the original HHI thresholds to better reflect both the law and the risks of competitive harm suggested by market structure and have therefore returned to those thresholds.

[16] *Phila. Nat'l Bank*, 374 U.S. at 364-65 ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").

[17] The competitive harm from the elimination of competition between the merging firms, without considering the risk of coordination, is sometimes referred to as unilateral effects. The elimination of competition between the merging firms can also lessen competition with and among other competitors. When the elimination of competition between the merging firms

merger, that ordinarily suggests that the merger may substantially lessen competition.[18]Although a change in market structure can also indicate risk of competitive harm (see Guideline 1), an analysis of the existing competition between the merging firms can demonstrate that a merger threatens competitive harm independent from an analysis of market shares.

Competition often involves firms trying to win business by offering lower prices, new or better products and services, more attractive features, higher wages, improved benefits, or better terms relating to various additional dimensions of competition. This can include competition to research and develop products or services, and the elimination of such competition may result in harm even if such products or services are not yet commercially available. The more the merging parties have shaped one another's behavior, or have affected one another's sales, profits, valuation, or other drivers of behavior, the more significant the competition between them.

The Agencies examine a variety of indicators to identify substantial competition. For example:

Strategic Deliberations or Decisions. The Agencies may analyze the extent of competition between the merging firms by examining evidence relating to strategic deliberations or decisions in the regular course of business. For example, in some markets, the firms may monitor each other's pricing, marketing campaigns, facility locations, improvements, products, capacity, output, input costs, and/or innovation plans. This can provide evidence of competition between the merging firms, especially when they react by taking steps to preserve or enhance the competitiveness or profitability of their own products or services.

Prior Merger, Entry, and Exit Events. The Agencies may look to historical events to assess the presence and substantiality of direct competition between the merging firms. For example, the Agencies may examine the competitive impact of recent relevant mergers, entry, expansion, or exit events.

Customer Substitution. Customers' willingness to switch between different firms' products is an important part of the competitive process. Firms are closer competitors the more that customers are willing to switch between their products. The Agencies use a variety of tools, detailed in Section 4.2, to assess customer substitution.

Impact of Competitive Actions on Rivals. When one firm takes competitive actions to attract customers, this can benefit the firm at the expense of its rivals. The Agencies may gauge the extent of competition between the merging firms by considering the impact that competitive actions by one of the merging firms has on the other merging firm. The impact of a firm's competitive actions on a rival is generally greater when customers consider the firm's products and the rival's products to be closer substitutes, so that a firm's competitive action results in greater lost sales for the rival, and when the profitability of the rival's lost sales is greater.

Impact of Eliminating Competition Between the Firms. In some instances, evidence may be available to assess the impact of competition from one firm on the other's actions, such as firm choices

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leads them to compete less aggressively with one another, other firms in the market can in turn compete less aggressively, decreasing the overall intensity of competition.

[18] *See also United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665, 669-70 (1964) (per curiam) ("[I]t [is] clear that the elimination of significant competition between [merging parties] constitutes an unreasonable restraint of trade in violation of § 1 of the Sherman Act. . . . It [can be] enough that the two . . . compete[], that their competition [is] not insubstantial and that the combination [would] put an end to it."); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568-70 (6th Cir. 2014), *cert. denied*, 575 U.S. 996 (2015).

about price, quality, wages, or another dimension of competition. Section 4.2 describes a variety of approaches to measuring such impacts.

***Additional Evidence, Tools, and Metrics*.** The Agencies may use additional evidence, tools, and metrics to assess the loss of competition between the firms. Depending on the realities of the market, different evidence, tools, or metrics may be appropriate.

Section 4.2 provides additional detail about the approaches that the Agencies use to assess competition between or among firms.

2.3. Guideline 3: Mergers Can Violate the Law When They Increase the Risk of Coordination.

The Agencies determine that a merger may substantially lessen competition when it meaningfully increases the risk of coordination among the remaining firms in a relevant market or makes existing coordination more stable or effective.[19] Firms can coordinate across any or all dimensions of competition, such as price, product features, customers, wages, benefits, or geography. Coordination among rivals lessens competition whether it occurs explicitly—through collusive agreements between competitors not to compete or to compete less—or tacitly, through observation and response to rivals. Because tacit coordination often cannot be addressed under Section 1 of the Sherman Act, the Agencies vigorously enforce Section 7 of the Clayton Act to prevent market structures conducive to such coordination.

Tacit coordination can lessen competition even when it does not rise to the level of an agreement and would not itself violate the law. For example, in a concentrated market a firm may forego or soften an aggressive competitive action because it anticipates rivals responding in kind. This harmful behavior is more common the more concentrated markets become, as it is easier to predict the reactions of rivals when there are fewer of them.

To assess the extent to which a merger may increase the likelihood, stability, or effectiveness of coordination, the Agencies often consider three primary factors and several secondary factors. The Agencies may consider additional factors depending on the market.

2.3.A. Primary Factors

The Agencies may conclude that post-merger market conditions are susceptible to coordinated interaction and that the merger materially increases the risk of coordination if any of the three primary factors are present.

Highly Concentrated Market. By reducing the number of firms in a market, a merger increases the risk of coordination. The fewer the number of competitively meaningful rivals prior to the merger, the greater the likelihood that merging two competitors will facilitate coordination. Markets that are highly concentrated after a merger that significantly increases concentration (see Guideline 1) are presumptively susceptible to coordination. If merging parties assert that a highly concentrated market is not susceptible to coordination, the Agencies will assess this rebuttal evidence using the framework

[19] *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 229-30 (1993) ("In the § 7 context, it has long been settled that excessive concentration, and the oligopolistic price coordination it portends, may be the injury to competition the Act prohibits.").

described below. Where a market is not highly concentrated, the Agencies may still consider other risk factors.

Prior Actual or Attempted Attempts to Coordinate. Evidence that firms representing a substantial share in the relevant market appear to have previously engaged in express or tacit coordination to lessen competition is highly informative as to the market's susceptibility to coordination. Evidence of failed attempts at coordination in the relevant market suggest that successful coordination was not so difficult as to deter attempts, and a merger reducing the number of rivals may tend to make success more likely.

Elimination of a Maverick. A maverick is a firm with a disruptive presence in a market. The presence of a maverick, however, only reduces the risk of coordination so long as the maverick retains the disruptive incentives that drive its behavior. A merger that eliminates a maverick or significantly changes its incentives increases the susceptibility to coordination.

2.3.B. Secondary Factors

The Agencies also examine whether secondary factors demonstrate that a merger may meaningfully increase the risk of coordination, even absent the primary risk factors. Not all secondary factors must be present for a market to be susceptible to coordination.

Market Concentration. Even in markets that are not highly concentrated, coordination becomes more likely as concentration increases. The more concentrated a market, the more likely the Agencies are to conclude that the market structure suggests susceptibility to coordination.

Market Observability. A market is more susceptible to coordination if a firm's behavior can be promptly and easily observed by its rivals. Rivals' behavior is more easily observed when the terms offered to customers are readily discernible and relatively observable (that is, known to rivals). Observability can refer to the ability to observe prices, terms, the identities of the firms serving particular customers, or any other competitive actions of other firms. Information exchange arrangements among market participants, such as public exchange of information through announcements or private exchanges through trade associations or publications, increase market observability. Regular monitoring of one another's prices or customers can indicate that the terms offered to customers are relatively observable. Pricing algorithms, programmatic pricing software or services, and other analytical or surveillance tools that track or predict competitor prices or actions likewise can increase the observability of the market.

Competitive Responses. A market is more susceptible to coordination if a firm's prospective competitive reward from attracting customers away from its rivals will be significantly diminished by its rivals' likely responses. This is more likely to be the case the stronger and faster the responses from its rivals because such responses reduce the benefits of competing more aggressively. Some factors that increase the likelihood of strong or rapid responses by rivals include: (1) the market has few significant competitors, (2) products in the relevant market are relatively homogeneous, (3) customers find it relatively easy to switch between suppliers, (4) suppliers use algorithmic pricing, or (5) suppliers use meeting-competition clauses. The more predictable are rivals' responses to strategic actions or changing competitive conditions, and the more interactions firms have across multiple markets, the greater the susceptibility to coordination.

Aligned Incentives. Removing a firm that has different incentives from most other firms in a market can increase the risk of coordination. For example, a firm with a small market share may have

less incentive to coordinate because it has more to gain from winning new business than other firms. The same issue can arise when a merger more closely aligns one or both merging firms' incentives with the other firms in the market. In some cases, incentives might be aligned or strengthened when firms compete with one another in multiple markets ("multi-market contact"). For example, firms might compete less aggressively in some markets in anticipation of reciprocity by rivals in other markets. The Agencies examine these and any other market realities that suggest aligned incentives increase susceptibility to coordination.

Profitability or Other Advantages of Coordination for Rivals. The Agencies regard coordinated interaction as more likely to occur when participants in the market stand to gain more from successful coordination. Coordination generally is more profitable or otherwise advantageous for the coordinating firms the less often customers substitute outside the market when firms offer worse terms.

Rebuttal Based on Structural Barriers to Coordination Unique to the Industry. When market structure evidence suggests that a merger may substantially lessen competition through coordination, the merging parties sometimes argue that anticompetitive coordination is nonetheless impossible due to structural market barriers to coordinating. The Agencies consider this rebuttal evidence using the framework in Section 3. In so doing, the Agencies consider whether structural market barriers to coordination are "so much greater in the [relevant] industry than in other industries that they rebut the normal presumption" of coordinated effects.[20] In the Agencies' experience, structural conditions that prevent coordination are exceedingly rare in the modern economy. For example, coordination is more difficult when firms are unable to observe rivals' competitive offerings, but technological change has made this situation less common than in the past and reduced many traditional barriers or obstacles to observing the behavior of rivals in a market. The greater the level of concentration in the relevant market, the greater must be the structural barriers to coordination in order to show that no substantial lessening of competition is threatened.

2.4. Guideline 4: Mergers Can Violate the Law When They Eliminate a Potential Entrant in a Concentrated Market.

Mergers can substantially lessen competition by eliminating a potential entrant. For instance, a merger can eliminate the possibility that entry or expansion by one or both firms would have resulted in new or increased competition in the market in the future. A merger can also eliminate current competitive pressure exerted on other market participants by the mere perception that one of the firms might enter. Both of these risks can be present simultaneously.

A merger that eliminates a potential entrant into a concentrated market can substantially lessen competition or tend to create a monopoly.[21] The more concentrated the market, the greater the magnitude of harm to competition from any lost potential entry and the greater the tendency to create a monopoly. Accordingly, for mergers involving one or more potential entrants, the higher the market concentration, the lower the probability of entry that gives rise to concern.

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[20] *See H.J. Heinz Co.*, 246 F.3d at 724.
[21] *United States v. Marine Bancorp.*, 418 U.S. 602, 630 (1974). A concentrated market is one with an HHI greater than 1,000 (See Guideline 1, n.15).

2.4.A. Actual Potential Competition: Eliminating Reasonably Probable Future Entry

In general, expansion into a concentrated market via internal growth rather than via acquisition benefits competition.[22] Merging a current and a potential market participant eliminates the possibility that the potential entrant would have entered on its own—entry that, had it occurred, would have provided a new source of competition in a concentrated market.

To determine whether an acquisition that eliminates a potential entrant into a concentrated market may substantially lessen competition,[23] the Agencies examine (1) whether one or both[24] of the merging firms had a reasonable probability of entering the relevant market other than through an anticompetitive merger, and (2) whether such entry offered a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects.[25]

Reasonable Probability of Entry. The Agencies' starting point for assessment of a reasonable probability of entry is objective evidence regarding the firm's available feasible means of entry, including its capabilities and incentives. Relevant objective evidence can include, for example, evidence that the firm has sufficient size and resources to enter; evidence of any advantages that would make the firm well-situated to enter; evidence that the firm has successfully expanded into similarly situated markets in the past or already participates in adjacent or related markets; evidence that the firm has an incentive to enter; or evidence that industry participants recognize the company as a potential entrant. This analysis is not limited to whether the company could enter with its pre-merger production facilities, but also considers overall capability, which can include the ability to expand or add to its capabilities on its own or in collaboration with someone other than the acquisition target.

Subjective evidence that the company considered entering absent the merger can also indicate a reasonable probability that the company would have entered without the merger. Subjective evidence that the company considered organic entry as an alternative to merging generally suggests that, absent the merger, entry would be reasonably probable.

Likelihood of Deconcentration or Other Significant Procompetitive Effects. New entry can yield a variety of procompetitive effects, including increased output or investment, higher wages or improved working conditions, greater innovation, higher quality, and lower prices. If the merging firm had a reasonable probability of entering a highly concentrated relevant market, this suggests benefits that would have resulted from its entry would be competitively significant, unless there is substantial direct evidence that the competitive effect would be *de minimis*. To supplement the suggestion that new entry yields procompetitive effects, the Agencies will consider projections of the potential entrant's

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[22] *See Ford Motor Co. v. United States*, 405 U.S. 562, 587 (1972) (referring to the "typical[]" competitive concern when "a potential entrant enters an oligopolistic market by acquisition rather than internal expansion" as being "that such a move has deprived the market of the pro-competitive effect of an increase in the number of competitors").

[23] Harm from the elimination of a potential entrant can occur in markets that do not yet consist of commercial products, even if the market concentration of the future market cannot be measured using traditional means. Where there are few equivalent potential entrants, including one or both of the merging firms, that indicates that the future market, once commercialized, will be concentrated. The Agencies will consider other potential entrants' capabilities and incentives in comparison to the merging potential entrant to assess equivalence.

[24] *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) (holding that a merger between two firms, each or both of which might have entered the relevant market, could violate Section 7).

[25] *See id.* at 175-76; *Marine Bancorp.*, 418 U.S. at 622, 633 ("[T]he proscription expressed in § 7 against mergers 'when a "tendency" toward monopoly or [a] "reasonable likelihood" of a substantial lessening of competition in the relevant market is shown' applies alike to actual- and potential-competition cases." (quoting *Penn-Olin*, 378 U.S. at 171)); *see also Yamaha Motor Co. v. FTC*, 657 F.2d 971, 980-981 (8th Cir. 1981) (acquisition of potential entrant violated Section 7).

competitive significance, such as market share, its business strategy, the anticipated response of competitors, or customer preferences or interest.

A merger of two potential entrants can also result in a substantial lessening of competition. The merger need not involve a firm that has a commercialized product in the market or an existing presence in the same geographic market. The Agencies analyze similarly mergers between two potential entrants and those involving a current market participant and a potential entrant.

2.4.B. Perceived Potential Competition: Lessening of Current Competitive Pressure

A perceived potential entrant can stimulate competition among incumbents. That pressure can prompt current market participants to make investments, expand output, raise wages, increase product quality, lower product prices, or take other procompetitive actions. The acquisition of a firm that is perceived by market participants as a potential entrant can substantially lessen competition by eliminating or relieving competitive pressure.

To assess whether the acquisition of a perceived potential entrant may substantially lessen competition, the Agencies consider whether a current market participant could reasonably consider one of the merging companies to be a potential entrant and whether that potential entrant has a likely influence on existing competition.[26]

Market Participant Could Reasonably Consider a Firm to Be a Potential Entrant. The starting point for this analysis is evidence regarding the company's capability of entering or applying competitive pressure. Objective evidence is highly probative and includes evidence of feasible means of entry or communications by the company indicating plans to expand or reallocate resources in a way that could increase competition in the relevant market. Objective evidence can be sufficient to find that the firm is a potential entrant; it need not be accompanied by any subjective evidence of current market participants' internal perceptions or direct evidence of strategic reactions to the potential entrant. If such evidence is available, it can weigh in favor of finding that a current market participant could reasonably consider the firm to be a potential entrant.

Likely Influence on Existing Rivals. Direct evidence that the firm's presence or behavior has affected or is affecting current market participants' strategic decisions is not necessary but can establish a showing of a likely influence. Even without such direct evidence, circumstantial evidence that the firm's presence or behavior had an effect on the competitive reactions of firms in the market may also show likely influence. Objective evidence establishing that a current market participant could reasonably consider one of the merging firms to be a potential entrant can also establish that the firm has a likely influence on existing market participants. Subjective evidence indicating that current market participants—including, for example, customers, suppliers, or distributors—internally perceive the merging firm to be a potential entrant can also establish a likely influence.

2.4.C. Distinguishing Potential Entry from Entry as Rebuttal

When evaluating a potentially unlawful merger of current competitors, the Agencies will assess whether entry by other firms would be timely, likely, and sufficient to replace the lost competition using the standards discussed in Section 3.2. The existence of a perceived or actual potential entrant may not meet that standard when considering a merger between firms that already participate in the relevant market. The competitive impact of perceived and actual potential entrants is typically attenuated

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[26] *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-36 (1973); *Marine Bancorp.*, 418 U.S. at 624-25.

compared to competition between two current market participants. However, because concentrated markets often lack robust competition, the loss of even an attenuated source of competition such as a potential entrant may substantially lessen competition in such markets. Moreover, because the Agencies seek to prevent threats to competition in their incipiency, the likelihood of potential entry that could establish that a merger's effect "may be" to substantially lessen competition will generally not equal the likelihood of entry that would rebut a demonstrated risk that competition may be substantially lessened.

2.5. Guideline 5: Mergers Can Violate the Law When They Create a Firm that May Limit Access to Products or Services That Its Rivals Use to Compete.

The Agencies evaluate whether a merger may substantially lessen competition when the merged firm can limit access to a product, service, or route to market[27] that its rivals may use to compete. Mergers involving products or services rivals may use to compete can threaten competition in several ways, for example: (A) the merged firm could limit rivals' access to the products or services, thereby weakening or excluding them, lessening competition; (B) the merged firm may gain or increase access to rivals' competitively sensitive information, thereby facilitating coordination or undermining their incentives to compete; or (C) the threat of limited access can deter rivals and potential rivals from investing.

These problems can arise from mergers involving access to any products, services, or routes to market that rivals use to compete, and that are competitively significant to those rivals, whether or not they involve a traditional vertical relationship such as a supplier and distributor relationship. Many types of related products can implicate these concerns, including products rivals currently or may in the future use as inputs, products that provide distribution services for rivals or otherwise influence customers' purchase decisions, products that provide or increase the merged firm's access to competitively sensitive information about its rivals, or complements that increase the value of rivals' products. Even if the related product is not currently being used by rivals, it might be competitively significant because, for example, its availability enables rivals to obtain better terms from other providers in negotiations. The Agencies refer to any product, service, or route to market that rivals use to compete in that market as a "related product."

The Agencies analyze competitive effects in the relevant market in which the merged firm competes with rivals that use the related product. The Agencies do not always define a market around the related product, although they may do so (see Section 2.5.A.2).

2.5.A. The Risk that the Merged Firm May Limit Access

A merger involving products, services, or routes to market that rivals use to compete may substantially lessen competition when the merged firm has both the ability and incentive to limit access to the related product so as to weaken or exclude some of its rivals (the "dependent" rivals) in the relevant market.

The merged firm could limit access to the related product in different ways. It could deny rivals access altogether, deny access to some features, degrade its quality, worsen the terms on which rivals

[27] A "route to market" refers to any way a firm accesses its trading partners, such as distribution channels, marketplaces, or customers.

can access the related product, limit interoperability, degrade the quality of complements, provide less reliable access, tie up or obstruct routes to market, or delay access to product features, improvements, or information relevant to making efficient use of the product. All these ways of limiting access are sometimes referred to as "foreclosure."[28]

Dependent rivals can be weakened if limiting their access to the related product would make it harder or more costly for them to compete; for example, if it would lead them to charge higher prices or offer worse terms in the relevant market, reduce the quality of their products so that they were less attractive to trading partners, or interfere with distribution so that those products were less readily available. Competition can also be weakened if the merger facilitates coordination among the merged firm and its rivals, for example by giving the merged firm the ability to threaten to limit access to uncooperative rivals.

Rivals or potential rivals may be excluded from the relevant market if limiting their access to the related product could lead them to exit the market or could deter them from entering. For example, potential rivals may not enter if the merged firm ties up or obstructs so many routes to market that the remaining addressable market is too small. Exclusion can arise when a new entrant would need to invest not only in entering the relevant market, but also in supplying its own substitute for the related product, sometimes referred to as two-stage entry or multi-level entry.

Because the merged firm could use its ability to limit access to the related product in a range of ways, the Agencies focus on the overall risk that the merged firm will do so, and do not necessarily identify which precise actions the merged firm would take to lessen competition.

2.5.A.1. Ability and Incentive to Foreclose Rivals

The Agencies assess the merged firm's ability and incentive to substantially lessen competition by limiting access to the related product for a group of dependent rivals in the relevant market by examining four factors.

1. Availability of Substitutes. The Agencies assess the availability of substitutes for the related product. The merged firm is more able to limit access when there are few alternative options to the merged firm's related product, if these alternatives are differentiated in quality, price, or other characteristics, or if competition to supply them is limited.

2. Competitive Significance of the Related Product. The Agencies consider how important the related product is for the dependent firms and the extent to which they would be weakened or excluded from the relevant market if their access was limited.

3. Effect on Competition in the Relevant Market. The Agencies assess the importance of the dependent firms for competition in the relevant market. Competition can be particularly affected when the dependent firms would be excluded from the market altogether.

4. Competition Between the Merged Firm and the Dependent Firms. The merged firm's incentive to limit the dependent firms' access depends on how strongly it competes with them. If the dependent firms are close competitors, the merged firm may benefit from higher sales or prices in the relevant market when it limits their access. The Agencies may also assess the potential for the merged

[28] *See Illumina, Inc. v. FTC*, No. 23-60167, slip op. at 17 (5th Cir. Dec. 15, 2023) ("[T]here are myriad ways in which [the merged firm] could engage in foreclosing behavior . . . such as by making late deliveries or subtly reducing the level of support services.").

firm to benefit from facilitating coordination by threatening to limit dependent rivals' access to the related product. These benefits can make it profitable to limit access to the related product and thereby substantially lessen competition, even though it would not have been profitable for the firm that controlled the related product prior to the merger.

The Agencies assess the extent of competition with rivals and the risk of coordination using analogous methods to the ones described in Guidelines 2 and 3, and Section 4.2.

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In addition to the evidentiary, analytical, and economic tools in Section 4, the following additional considerations and evidence may be important to this assessment:

Barriers to Entry and Exclusion of Rivals. The merged firm may benefit more from limiting access to dependent rivals or potential rivals when doing so excludes them from the market, for example by creating a need for the firm to enter at multiple levels and to do so with sufficient scale and scope (multi-level entry).

Prior Transactions or Prior Actions. If firms used prior acquisitions or engaged in prior actions to limit rivals' access to the related product, or other products its rivals use to compete, that suggests that the merged firm has the ability and incentive to do so. However, lack of past action does not necessarily indicate a lack of incentive in the present transaction because the merger can increase the incentive to foreclose.

Internal Documents. Information from business planning and merger analysis documents prepared by the merging firms might identify instances where the firms believe they have the ability and incentive to limit rivals' access. Such documents, where available, are highly probative. The lack of such documents, however, is less informative.

Market Structure. Evidence of market structure can be informative about the availability of substitutes for the related product and the competition in the market for the related product or the relevant market. (See Section 2.5.A.2)

2.5.A.2. Analysis of Industry Factors and Market Structure

The Agencies also sometimes determine, based on an analysis of factors related to market structure, that a merger may substantially lessen competition by allowing the merged firm to limit access to a related product.[29] The Agencies' assessment can include evidence about the structure, history, and probable future of the market.

Structure of the Related Market. In some cases, the market structure of the related product market can give an indication of the merged firm's ability to limit access to the related product. In these cases, the Agencies define a market (termed the "related market") around the related product (see Section 4.3). The Agencies then define the "foreclosure share" as the share of the related market to which the merged firm could limit access. If the share or other evidence show that the merged firm is

[29] *See Brown Shoe*, 370 U.S. at 328-34; *Illumina*, slip op. at 20-22 ("There is no precise formula when it comes to applying these factors. Indeed, the Supreme Court has found a vertical merger unlawful by examining only three of the *Brown Shoe* factors." (cleaned up)); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 353 (2d Cir. 1979); *U.S. Steel Corp. v. FTC*, 426 F.2d 592, 599 (6th Cir. 1970).

approaching or has monopoly power over the related product, and the related product is competitively significant, those factors alone are a sufficient basis to demonstrate that the dependent firms do not have adequate substitutes and the merged firm has the ability to weaken or exclude them by limiting their access to the related product. (See Considerations 1 and 2 in Section 2.5.A.1).[30]

Structure of the Relevant Market. Limiting rivals' access to the related product will generally have a greater effect on competition in the relevant market if the merged firm and the dependent rivals face less competition from other firms. In addition, the merged firm has a greater incentive to limit access to the dependent firms when it competes more closely with them. Market share and concentration measures for the merged firm, the dependent rivals, and the other firms, can sometimes provide evidence about both issues.

Nature and Purpose of the Merger. When the nature and purpose of the merger is to foreclose rivals, including by raising their costs, that suggests the merged firm is likely to foreclose rivals.

Trend Toward Vertical Integration. The Agencies will generally consider evidence about the degree of integration between firms in the relevant and related markets, as well as whether there is a trend toward further vertical integration and how that trend or the factors driving it may affect competition. A trend toward vertical integration may be shown through, for example: a pattern of vertical integration following mergers by one or both of the merging companies; or evidence that a merger was motivated by a desire to avoid having its access limited due to similar transactions among other companies that occurred or may occur in the future.

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If the parties offer rebuttal evidence, the Agencies will assess it under the approach laid out in Section 3.[31] When assessing rebuttal evidence focused on the reduced profits of the merged firm from limiting access from rivals, the Agencies examine whether the reduction in profits would prevent the full range of reasonably probable strategies to limit access. When evaluating whether this rebuttal evidence is sufficient to conclude that no substantial lessening of competition is threatened by the merger, the Agencies will give little weight to claims that are not supported by an objective analysis, including, for example, speculative claims about reputational harms. Moreover, the Agencies are unlikely to credit claims or commitments to protect or otherwise avoid weakening the merged firm's rivals that do not align with the firm's incentives. The Agencies' assessment will be consistent with the principle that firms act to maximize their overall profits and valuation rather than the profits of any particular business

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[30] *See Brown Shoe*, 370 U.S. at 328 ("If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated . . . ."). The Agencies will generally infer, in the absence of countervailing evidence, that the merging firm has or is approaching monopoly power in the related product if it has a share greater than 50% of the related product market. A merger involving a related product with share of less than 50% may still substantially lessen competition, particularly when that related product is important to its trading partners.

[31] A common rebuttal argument is that the merger would lead to vertical integration of complementary products and as a result, "eliminate double marginalization," since in specific circumstances such a merger can confer on the merged firm an incentive to decrease prices to purchasers. The Agencies examine whether elimination of double marginalization satisfies the approach to evaluating procompetitive efficiencies in Section 3.3, including examining: (a) whether the merged firm will be more vertically integrated as a result of the merger, for example because it increases the extent to which it uses internal production of an input when producing output for the relevant market; (b) whether contracts short of a merger have eliminated or could eliminate double marginalization such that it would not be merger-specific, and (c) whether the merged firm has the incentive to reduce price in the relevant market given that such a reduction would reduce sales by the merged firm's rivals in the relevant market, which would in turn lead to reduced revenue and margin on sales of the related product to the dependent rivals.

unit. A merger may substantially lessen competition or tend to create a monopoly regardless of the claimed intent of the merging companies or their executives. (See Section 4.1)

If the merged firm has the ability and incentive to limit access to the related product and lessen competition in the relevant market, there are many ways it could act on those incentives. The merging parties may put forward evidence that there are no reasonably probable ways in which they could profitably limit access to the related product and thereby make it harder for rivals to compete, or that the merged firm will be more competitive because of the merger.

2.5.B. Mergers Involving Visibility into Rivals' Competitively Sensitive Information

If rivals would continue to access or purchase a related product controlled by the merged firm post-merger, the merger can substantially lessen competition if the merged firm would gain or increase visibility into rivals' competitively sensitive information. This situation could arise in many settings, including, for example, if the merged firm learns about rivals' sales volumes or projections from supplying an input or a complementary product; if it learns about promotion plans and anticipated product improvements or innovations from its role as a distributor; or if it learns about entry plans from discussions with potential rivals about compatibility or interoperability with a complementary product it controls. A merger that gives the merged firm increased visibility into competitively sensitive information could undermine rivals' ability or incentive to compete aggressively or could facilitate coordination.

Undermining Competition. The merged firm might use visibility into a rival's competitively sensitive information to undermine competition from the rival. For example, the merged firm's ability to preempt, appropriate, or otherwise undermine the rival's procompetitive actions can discourage the rival from fully pursuing competitive opportunities. Relatedly, rivals might refrain from doing business with the merged firm rather than risk that the merged firm would use their competitively sensitive business information to undercut them. Those rivals might become less-effective competitors if they must rely on less-preferred trading partners or accept less favorable trading terms because their outside options have worsened or are more limited.

Facilitating Coordination. A merger that provides access to rivals' competitively sensitive information might facilitate coordinated interaction among firms in the relevant market by allowing the merged firm to observe its rivals' competitive strategies faster and more confidently. (See Guideline 3.)

2.5.C. Mergers that Threaten to Limit Rivals' Access and Thereby Create Barriers to Entry and Competition

When a merger gives a firm the ability and incentive to limit rivals' access, or where it gives the merged firm increased visibility into its rivals' competitively sensitive information, the merger may create entry barriers as described above. In addition, the merged firm's rivals might change their behavior because of the risk that the merged firm could limit their access. That is, the risk that the merger will give a firm the ability and incentive to limit rivals' access or will give the merged firm increased visibility into sensitive information can dissuade rivals from entering the market or expanding their operations.

Rivals or potential rivals that face the threat of foreclosure, or the risk of sharing sensitive information with rivals, may reduce investment or adjust their business strategies in ways that lessen competition. Firms may be reluctant to invest in a market if their success is dependent on continued supply from a rival, particularly because the merged firm may become more likely to foreclose its

competitor as that competitor becomes more successful. Firms may use expensive strategies to try to reduce their dependence on the merged firm, weakening the competitiveness of their products and services. Even if the merged firm does not deliberately seek to weaken rivals, rivals or potential rivals may fear that their access will be limited if the merged firm decides to use its own products exclusively. These effects may occur irrespective of the merged firm's incentive to limit access and are greater as the merged firm gains greater control over more important inputs that those rivals use to compete.

2.6. Guideline 6: Mergers Can Violate the Law When They Entrench or Extend a Dominant Position.

The Agencies consider whether a merger may entrench or extend an already dominant position. The effect of such mergers "may be substantially to lessen competition" or "may be . . . to tend to create a monopoly" in violation of Section 7 of the Clayton Act. Indeed, the Supreme Court has explained that a merger involving an "already dominant[] firm may substantially reduce the competitive structure of the industry by raising entry barriers."[32] The Agencies also evaluate whether the merger may extend that dominant position into new markets.[33] Mergers that entrench or extend a dominant position can also violate Section 2 of the Sherman Act.[34] At the same time, the Agencies distinguish anticompetitive entrenchment from growth or development as a consequence of increased competitive capabilities or incentives.[35] The Agencies therefore seek to prevent those mergers that would entrench or extend a dominant position through exclusionary conduct, weakening competitive constraints, or otherwise harming the competitive process.

To undertake this analysis, the Agencies first assess whether one of the merging firms has a dominant position based on direct evidence or market shares showing durable market power. For example, the persistence of market power can indicate that entry barriers exist, that further entrenchment may tend to create a monopoly, and that there would be substantial benefits from the emergence of new competitive constraints or disruptions. The Agencies consider mergers involving dominant firms in the context of evidence about the sources of that dominance, focusing on the extent to which the merger relates to, reinforces, or supplements these sources.

Creating or preserving dominance and the profits it brings can be an important motivation for a firm to undertake an acquisition as well as a driver of the merged firm's behavior after the acquisition. In particular, a firm may be willing to undertake costly short-term strategies in order to increase the chance that it can enjoy the longer-term benefits of dominance. A merger that creates or preserves dominance may also reduce the merged firm's longer-term incentives to improve its products and services.

A merger can result in durable market power and long-term harm to competition even when it initially provides short-term benefits to some market participants. Thus, the Agencies will consider not just the impact of the merger holding fixed factors like product quality and the behavior of other industry participants, but they may also consider the (often longer term) impact of the merger on market

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[32] *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577-578 (1967); *see, e.g.*, *Fruehauf*, 603 F.2d at 353 (the "entrenchment of a large supplier or purchaser" can be an "essential" showing of a Section 7 violation).

[33] *Ford*, 405 U.S. at 571 (condemning acquisition by dominant firm to obtain a foothold in another market when coupled with incentive to create and maintain barriers to entry into that market).

[34] *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (acquisitions are among the types of conduct that may violate the Sherman Act).

[35] *See*, *e.g.*, *id.* at 570-71.

power and industry dynamics. Important dynamic competitive effects can arise through the entry, investment, innovation, and terms offered by the merged firm and other industry participants, even when the Agencies cannot predict specific reactions and responses with precision. If the ultimate result of the merger is to protect or preserve dominance by limiting opportunities for rivals, reducing competitive constraints, or preventing competitive disruption, then the Agencies will approach the merger with a heightened degree of scrutiny. The degree of scrutiny and concern will increase in proportion to the strength and durability of the dominant firm's market power.

2.6.A. Entrenching a Dominant Position

Raising Barriers to Entry or Competition. A merger may create or enhance barriers to entry or expansion by rivals that limit the capabilities or competitive incentives of other firms. Barriers to entry can entrench a dominant position even if the nature of future entry is uncertain, if the identities of future entrants are unknown, or if there is more than one mechanism through which the merged firm might create entry barriers. Some examples of ways in which a merger may raise barriers to entry or competition include:

- *Increasing Switching Costs.* The costs associated with changing suppliers (often referred to as switching costs) can be an important barrier to competition. A merger may increase switching costs if it makes it more difficult for customers to switch away from the dominant firm's product or service, or when it gives the dominant firm control of something customers use to switch providers or of something that lowers the overall cost to customers of switching providers. For example, if a dominant firm merges with a complementary product that interoperates with the dominant firm's competitors, it could reduce interoperability, harming competition for customers who value the complement.

- *Interfering With the Use of Competitive Alternatives.* A dominant position may be threatened by a service that customers use to work with multiple providers of similar or overlapping bundles of products and services. If a dominant firm acquires a service that supports the use of multiple providers, it could degrade its utility or availability or could modify the service to steer customers to its own products, entrenching its dominant position. For example, a closed messaging communication service might acquire a product that allowed users to send and receive messages over several competing services through a single user interface, which facilitates competition. The Agencies would examine whether the acquisition would entrench the messaging service's market power by leading the merged firm to degrade the product or otherwise reduce its effectiveness as a cross-service tool, thus reducing competition.

- *Depriving Rivals of Scale Economies or Network Effects.* Scale economies and network effects can serve as a barrier to entry and competition. Depriving rivals of access to scale economies and network effects can therefore entrench a dominant position. If a merger enables a dominant firm to reduce would-be rivals' access to additional scale or customers by acquiring a product that affects access such as a customer acquisition channel, the merged firm can limit the ability of rivals to improve their own products and compete more effectively.[36] Limiting access by rivals to customers in the short run can lead to long run entrenchment of a dominant position and tend to create monopoly power.

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[36] The Agencies' focus here is on the artificial acquisition of network participants that occurs directly as a result of the merger, as opposed to future network growth that may occur through competition on the merits.

> For example, if two firms operate in a market in which network effects are significant but in which rivals voluntarily interconnect, their merger can create an entity with a large enough user base that it may have the incentive to end voluntary interconnection. Such a strategy can lessen competition and harm trading partners by creating or entrenching dominance in this market. This can be the case even if the merging firms did not appear to have a dominant position prior to the merger because their interoperability practices strengthened rivals.

Eliminating a Nascent Competitive Threat. A merger may involve a dominant firm acquiring a nascent competitive threat—namely, a firm that could grow into a significant rival, facilitate other rivals' growth, or otherwise lead to a reduction in its power.[37] In some cases, the nascent threat may be a firm that provides a product or service similar to the acquiring firm that does not substantially constrain the acquiring firm at the time of the merger but has the potential to grow into a more significant rival in the future. In other cases, factors such as network effects, scale economies, or switching costs may make it extremely difficult for a new entrant to offer all of the product features or services at comparable quality and terms that an incumbent offers. The most likely successful threats in these situations can be firms that initially avoid directly entering the dominant firm's market, instead specializing in (a) serving a narrow customer segment, (b) offering services that only partially overlap with those of the incumbent, or (c) serving an overlapping customer segment with distinct products or services.

Firms with niche or only partially overlapping products or customers can grow into longer-term threats to a dominant firm. Once established in its niche, a nascent threat may be able to add features or serve additional customer segments, growing into greater overlap of customer segments or features over time, thereby intensifying competition with the dominant firm. A nascent threat may also facilitate customers aggregating additional products and services from multiple providers that serve as a partial alternative to the incumbent's offering. Thus, the success and independence of the nascent threat may both provide for a direct threat of competition by the niche or nascent firm and may facilitate competition or encourage entry by other, potentially complementary providers that may provide a partial competitive constraint. In this way, the nascent threat supports what may be referred to as "ecosystem" competition. In this context, ecosystem competition refers to a situation where an incumbent firm that offers a wide array of products and services may be partially constrained by other combinations of products and services from one or more providers, even if the business model of those competing services is different.

Nascent threats may be particularly likely to emerge during technological transitions. Technological transitions can render existing entry barriers less relevant, temporarily making incumbents susceptible to competitive threats. For example, technological transitions can create temporary opportunities for entrants to differentiate or expand their offerings based on their alignment with new technologies, enabling them to capture network effects that otherwise insulate incumbents from competition. A merger in this context may lessen competition by preventing or delaying any such beneficial shift or by shaping it so that the incumbent retains its dominant position. For example, a dominant firm might seek to acquire firms to help it reinforce or recreate entry barriers so that its dominance endures past the technological transition. Or it might seek to acquire nascent threats that might otherwise gain sufficient customers to overcome entry barriers. In evaluating the potential for entrenching dominance, the Agencies take particular care to preserve opportunities for more competitive markets to emerge during such technological shifts.

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[37] The Agencies assess acquisitions of nascent competitive threats by non-dominant firms under the other Guidelines.

Separate from and in addition to its Section 7 analysis, the Agencies will consider whether the merger violates Section 2 of the Sherman Act. For example, under Section 2 of the Sherman Act, a firm that may challenge a monopolist may be characterized as a "nascent threat" even if the impending threat is uncertain and may take several years to materialize.[38] The Agencies assess whether the merger is reasonably capable of contributing significantly to the preservation of monopoly power in violation of Section 2, which turns on whether the acquired firm is a nascent competitive threat.[39]

2.6.B. Extending a Dominant Position into Another Market

The Agencies also examine the risk that a merger could enable the merged firm to extend a dominant position from one market into a related market, thereby substantially lessening competition or tending to create a monopoly in the related market. For example, the merger might lead the merged firm to leverage its position by tying, bundling, conditioning, or otherwise linking sales of two products. A merger may also raise barriers to entry or competition in the related market, or eliminate a nascent competitive threat, as described above. For example, prior to a merger, a related market may be characterized by scale economies but still experience moderate levels of competition. If the merged firm takes actions to induce customers of the dominant firm's product to also buy the related product from the merged firm, the merged firm may be able to gain dominance in the related market, which may be supported by increased barriers to entry or competition that result from the merger.

These concerns can arise notwithstanding that the acquiring firm already enjoys the benefits associated with its dominant position. The prospect of market power in the related market may strongly affect the merged firm's incentives in a way that does not align with the interests of its trading partners, both in terms of strategies that create dominance for the related product and in the form of reduced incentives to invest in its products or provide attractive terms for them after dominance is attained. In some cases, the merger may also further entrench the firm's original dominant position, for example if future competition requires the provision of both products.

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If the merger raises concerns that its effect may be to entrench or extend a dominant position, then any claim that the merger also provides competitive benefits will be evaluated under the rebuttal framework in Section 3. For example, the framework of Section 3 would be used to evaluate claims that a merger would generate cost savings or quality improvements that would be passed through to make their products more competitive or would otherwise create incentives for the merged firm to offer better terms. The Agencies' analysis will consider the fact that the incentives to pass through benefits to customers or offer attractive terms are affected by competition and the extent to which entry barriers insulate the merged firm from effective competition. It will also consider whether any claimed benefits are specific to the merger, or whether they could be instead achieved through contracting or other means.

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[38] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

[39] *See id*. at 79 ("[I]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will. . . .").

2.7. Guideline 7: When an Industry Undergoes a Trend Toward Consolidation, the Agencies Consider Whether It Increases the Risk a Merger May Substantially Lessen Competition or Tend to Create a Monopoly.

The recent history and likely trajectory of an industry can be an important consideration when assessing whether a merger presents a threat to competition. The Supreme Court has explained that "a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be."[40] It has also underscored that "Congress intended Section 7 to arrest anticompetitive tendencies in their incipiency.[41] The Agencies therefore examine whether a trend toward consolidation in an industry would heighten the competition concerns identified in Guidelines 1-6.

The Agencies therefore closely examine industry consolidation trends in applying the frameworks above. For example:

***Trend Toward Concentration*.** If an industry has gone from having many competitors to becoming concentrated, it may suggest greater risk of harm, for example, because new entry may be less likely to replace or offset the lessening of competition the merger may cause. Among other implications, in the context of a trend toward concentration, the Agencies identify a stronger presumption of harm from undue concentration (see Guideline 1), and a greater risk of substantially lessening competition when a merger eliminates competition between the merging parties (see Guideline 2) or increases the risk of coordination (see Guideline 3).

Trend Toward Vertical Integration. The Agencies will generally consider evidence about the degree of integration between firms in the relevant and related markets and whether there is a trend toward further vertical integration. If a merger occurs amidst or furthers a trend toward vertical integration, the Agencies consider the implications for the competitive dynamics of the industry moving forward. For example, a trend toward vertical integration could magnify the concerns discussed in Guideline 5 by making entry at a single level more difficult and thereby preventing the emergence of new competitive threats over time.

***Arms Race for Bargaining Leverage*.** The Agencies sometimes encounter mergers through which the merging parties would, by consolidating, gain bargaining leverage over other firms that they transact with. This can encourage those other firms to consolidate to obtain countervailing leverage, encouraging a cascade of further consolidation. This can ultimately lead to an industry where a few powerful firms have leverage against one another and market power over would-be entrants or over trading partners in various parts of the value chain. For example, distributors might merge to gain leverage against suppliers, who then merge to gain leverage against distributors, spurring a wave of mergers that lessen competition by increasing the market power of both. This can exacerbate the problems discussed in Guidelines 1-6, including by increasing barriers to single-level entry, encouraging coordination, and discouraging disruptive innovation.

[40] *United States v. Pabst Brewing*, 384 U.S. 546, 552-53 (1966).
[41] *Phila. Nat'l Bank*, 374 U.S. at 362 (quoting *Brown Shoe*, 370 U.S. at 317).

***Multiple Mergers*.** The Agencies sometimes see multiple mergers at once or in succession by different players in the same industry. In such cases, the Agencies may examine multiple deals in light of the combined trend toward concentration.

2.8. Guideline 8: When a Merger is Part of a Series of Multiple Acquisitions, the Agencies May Examine the Whole Series.

A firm that engages in an anticompetitive pattern or strategy of multiple acquisitions in the same or related business lines may violate Section 7.[42] In these situations, the Agencies may evaluate the series of acquisitions as part of an industry trend (see Guideline 7) or evaluate the overall pattern or strategy of serial acquisitions by the acquiring firm collectively under Guidelines 1-6.

In expanding antitrust law beyond the Sherman Act through passage of the Clayton Act, Congress intended "to permit intervention in a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition, even though this effect may not be so far-reaching as to amount to a combination in restraint of trade, create a monopoly, or constitute an attempt to monopolize."[43] As the Supreme Court has recognized, a cumulative series of mergers can "convert an industry from one of intense competition among many enterprises to one in which three or four large [companies] produce the entire supply."[44] Accordingly, the Agencies will consider individual acquisitions in light of the cumulative effect of related patterns or business strategies.

The Agencies may examine a pattern or strategy of growth through acquisition by examining both the firm's history and current or future strategic incentives. Historical evidence focuses on the strategic approach taken by the firm to acquisitions (consummated or not), both in the markets at issue and in other markets, to reveal any overall strategic approach to serial acquisitions. Evidence of the firm's current incentives includes documents and testimony reflecting its plans and strategic incentives both for the individual acquisition and for its position in the industry more broadly. Where one or both of the merging parties has engaged in a pattern or strategy of pursuing consolidation through acquisition, the Agencies will examine the impact of the cumulative strategy under any of the other Guidelines to determine if that strategy may substantially lessen competition or tend to create a monopoly.

2.9. Guideline 9: When a Merger Involves a Multi-Sided Platform, the Agencies Examine Competition Between Platforms, on a Platform, or to Displace a Platform.

Platforms provide different products or services to two or more different groups or "sides" who may benefit from each other's participation. Mergers involving platforms can threaten competition, even when a platform merges with a firm that is neither a direct competitor nor in a traditional vertical relationship with the platform. When evaluating a merger involving a platform, the Agencies apply Guidelines 1-6 while accounting for market realities associated with platform competition. Specifically,

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[42] Such strategies may also violate Section 2 of the Sherman Act and Section 5 of the FTC Act. Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, at 12-14 & nn.73 & 82 (Nov. 10, 2022) (noting that "a series of . . . acquisitions . . . that tend to bring about the harms that the antitrust laws were designed to prevent" has been subject to liability under Section 5).
[43] H.R. Rep. No. 81-1191, at 8 (1949).
[44] *See Brown Shoe*, 370 U.S. at 334 (citing S. Rep. No. 81-1775, at 5 (1950); H.R. Rep. No. 81-1191, at 8 (1949)).

the Agencies consider competition *between* platforms, competition *on* a platform, and competition to *displace* the platform.

Multi-sided platforms generally have several attributes in common, though they can also vary in important ways. Some of these attributes include:

- Platforms have multiple sides. On each side of a platform, platform participants provide or use distinct products and services.[45] Participants can provide or use different types of products or services on each side.
- A platform operator provides the core services that enable the platform to connect participant groups across multiple sides. The platform operator controls other participants' access to the platform and can influence how interactions among platform participants play out.
- Each side of a platform includes platform participants. Their participation might be as simple as using the platform to find other participants, or as involved as building platform services that enable other participants to connect in new ways and allow new participants to join the platform.
- Network effects occur when platform participants contribute to the value of the platform for other participants and the operator. The value for groups of participants on one side may depend on the number of participants either on the same side (direct network effects) or on the other side(s) (indirect network effects).[46] Network effects can create a tendency toward concentration in platform industries. Indirect network effects can be asymmetric and heterogeneous; for example, one side of the market or segment of participants may place relatively greater value on the other side(s).
- A conflict of interest can arise when a platform operator is also a platform participant. The Agencies refer to a "conflict of interest" as the divergence that can arise between the operator's incentives to operate the platform as a forum for competition and its incentive to operate as a competitor on the platform itself. As discussed below, a conflict of interest sometimes exacerbates competitive concerns from mergers.

Consistent with the Clayton Act's protection of competition "in any line of commerce," the Agencies will seek to prohibit a merger that harms competition within a relevant market for any product or service offered on a platform to any group of participants—i.e., around one side of the platform (see Section 4.3).[47]

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[45] For example, on 1990s operating-system platforms for personal computer (PC) software, software developers were on one side, PC manufacturers on another, and software purchasers on another.

[46] For example, 1990s PC manufacturers, software developers, and consumers all contributed to the value of the operating system platform for one another.

[47] In the limited scenario of a "special type of two-sided platform known as a 'transaction' platform," under Section 1 of the Sherman Act, a relevant market encompassing both sides of a two-sided platform may be warranted. *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2280 (2018). This approach to Section 1 of the Sherman Act is limited to platforms with the "key feature . . . that they cannot make a sale to one side of the platform without simultaneously making a sale to the other." *Id.* Because "they cannot sell transaction services to [either user group] individually . . . transaction platforms are better understood as supplying only one product—transactions." *Id.* at 2286. This characteristic is not present for many types of two-sided or multi-sided platforms; in addition, many platforms offer simultaneous transactions as well as other products and services, and further they may bundle these products with access to transact on the platform or offer quantity discounts.

The Agencies protect competition *between* platforms by preventing the acquisition or exclusion of other platform operators that may substantially lessen competition or tend to create a monopoly. This scenario can arise from various types of mergers:

A. Mergers involving two platform operators eliminate the competition between them. In a market with a platform, entry or growth by smaller competing platforms can be particularly challenging because of network effects. A common strategy for smaller platforms is to specialize, providing distinctive features. Thus, dominant platforms can lessen competition and entrench their position by systematically acquiring firms competing with one or more sides of a multi-sided platform while they are in their infancy. The Agencies seek to stop these trends in their incipiency.

B. A platform operator may acquire a platform participant, which can entrench the operator's position by depriving rivals of participants and, in turn, depriving them of network effects. For example, acquiring a major seller on a platform may make it harder for rival platforms to recruit buyers. The long-run benefits to a platform operator of denying network effects to rival platforms create a powerful incentive to withhold or degrade those rivals' access to platform participants that the operator acquires. The more powerful the platform operator, the greater the threat to competition presented by mergers that may weaken rival operators or increase barriers to entry and expansion.

C. Acquisitions of firms that provide services that facilitate participation on multiple platforms can deprive rivals of platform participants. Many services can facilitate such participation, such as tools that help shoppers compare prices across platforms, applications that help sellers manage listings on multiple platforms, or software that helps users switch among platforms.

D. Mergers that involve firms that provide other important inputs to platform services can enable the platform operator to deny rivals the benefits of those inputs. For example, acquiring data that helps facilitate matching, sorting, or prediction services may enable the platform to weaken rival platforms by denying them that data.

The Agencies protect competition *on* a platform in any markets that interact with the platform. When a merger involves a platform operator and platform participants, the Agencies carefully examine whether the merger would create conflicts of interest that would harm competition. A platform operator that is also a platform participant may have a conflict of interest whereby it has an incentive to give its own products and services an advantage over other participants competing on the platform. Platform operators must often choose between making it easy for users to access their preferred products and directing those users to products that instead provide greater benefit to the platform operator. Merging with a firm that makes a product offered on the platform may change how the platform operator balances these competing interests. For example, the platform operator may find it is more profitable to give its own product greater prominence even if that product is inferior or is offered on worse terms after the merger—and even if some participants leave the platform as a result.[48] This can harm competition in

[48] However, few participants will leave if, for example, the switching costs are relatively high or if the advantaged product is a small component of the overall set of services those participants access on the platform. Moreover, in the long run few participants will leave if scale economies, network effects, or entry barriers enable the advantaged product to eventually gain market power of its own, with rivals of the advantaged product exiting or becoming less attractive. After these dynamics play

the product market for the advantaged product, where the harm to competition may be experienced both on the platform and in other channels.

The Agencies protect competition to *displace* the platform or any of its services. For example, new technologies or services may create an important opportunity for firms to replace one or more services the incumbent platform operator provides, shifting some participants to partially or fully meet their needs in different ways or through different channels. Similarly, a non-platform service can lessen dependence on the platform by providing an alternative to one or more functions provided by the platform operators. When platform owners are dominant, the Agencies seek to prevent even relatively small accretions of power from inhibiting the prospects for displacing the platform or for decreasing dependency on the platform.

In addition, a platform operator that advantages its own products that compete *on* the platform can lessen competition *between* platforms and to *displace* the platform, as the operator may both advantage its own product or service, and also deprive rival platforms of access to it, limiting those rivals' network effects.

2.10. Guideline 10: When a Merger Involves Competing Buyers, the Agencies Examine Whether It May Substantially Lessen Competition for Workers, Creators, Suppliers, or Other Providers.

A merger between competing buyers may harm sellers just as a merger between competing sellers may harm buyers.[49] The same—or analogous—tools used to assess the effects of a merger of sellers can be used to analyze the effects of a merger of buyers, including employers as buyers of labor. Firms can compete to attract contributions from a wide variety of workers, creators, suppliers, and service providers. The Agencies protect this competition in all its forms.

A merger of competing buyers can substantially lessen competition by eliminating the competition between the merging buyers or by increasing coordination among the remaining buyers. It can likewise lead to undue concentration among buyers or entrench or extend the position of a dominant buyer. Competition among buyers can have a variety of beneficial effects analogous to competition among sellers. For example, buyers may compete by raising the payments offered to suppliers, by expanding supply networks, through transparent and predictable contracting, procurement, and payment practices, or by investing in technology that reduces frictions for suppliers. In contrast, a reduction in competition among buyers can lead to artificially suppressed input prices or purchase volume, which in turn reduces incentives for suppliers to invest in capacity or innovation. Labor markets are important buyer markets. The same general concerns as in other markets apply to labor markets where employers are the buyers of labor and workers are the sellers. The Agencies will consider whether workers face a risk that the merger may substantially lessen competition for their labor.[50] Where a merger between

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out, the platform operator could advantage its own products without losing as many participants, as there would be fewer alternative products available through other channels.

[49] *See, e.g.*, *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) ("The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.").
[50] *See, e.g.*, *Alston*, 141 S. Ct. 2141 (applying the Sherman Act to protect workers from an employer-side agreement to limit compensation).

employers may substantially lessen competition for workers, that reduction in labor market competition may lower wages or slow wage growth, worsen benefits or working conditions, or result in other degradations of workplace quality.[51] When assessing the degree to which the merging firms compete for labor, evidence that a merger may have any one or more of these effects can demonstrate that substantial competition exists between the merging firms.

Labor markets frequently have characteristics that can exacerbate the competitive effects of a merger between competing employers. For example, labor markets often exhibit high switching costs and search frictions due to the process of finding, applying, interviewing for, and acclimating to a new job. Switching costs can also arise from investments specific to a type of job or a particular geographic location. Moreover, the individual needs of workers may limit the geographical and work scope of the jobs that are competitive substitutes.

In addition, finding a job requires the worker and the employer to agree to the match. Even within a given salary and skill range, employers often have specific demands for the experience, skills, availability, and other attributes they desire in their employees. At the same time, workers may seek not only a paycheck but also work that they value in a workplace that matches their own preferences, as different workers may value the same aspects of a job differently. This matching process often narrows the range of rivals competing for any given employee. The level of concentration at which competition concerns arise may be lower in labor markets than in product markets, given the unique features of certain labor markets. In light of their characteristics, labor markets can be relatively narrow.

The features of labor markets may in some cases put firms in dominant positions. To assess this dominance in labor markets (see Guideline 6), the Agencies often examine the merging firms' power to cut or freeze wages, slow wage growth, exercise increased leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit.

If the merger may substantially lessen competition or tend to create a monopoly in upstream markets, that loss of competition is not offset by purported benefits in a separate downstream product market. Because the Clayton Act prohibits mergers that may substantially lessen competition or tend to create a monopoly in *any* line of commerce and in *any* section of the country, a merger's harm to competition among buyers is not saved by benefits to competition among sellers. That is, a merger can substantially lessen competition in one or more buyer markets, seller markets, or both, and the Clayton Act protects competition in any one of them.[52] If the parties claim any benefits to competition in a relevant buyer market, the Agencies will assess those claims using the frameworks in Section 3.

Just as they do when analyzing competition in the markets for products and services, the Agencies will analyze labor market competition on a case-by-case basis.

[51] A decrease in wages is understood as relative to what would have occurred in the absence of the transaction; in many cases, a transaction will not reduce wage levels, but rather slow wage growth. Wages encompass all aspects of pecuniary compensation, including benefits. Job quality encompasses non-pecuniary aspects that workers value, such as working conditions and terms of employment.

[52] Often, mergers that harm competition among buyers also harm competition among sellers as a result. For example, when a monopsonist lowers purchase prices by decreasing input purchases, they will generally decrease sales in downstream markets as well. (See Section 4.2.D)

2.11. Guideline 11: When an Acquisition Involves Partial Ownership or Minority Interests, the Agencies Examine Its Impact on Competition.

In many acquisitions, two companies come under common control. In some situations, however, the acquisition of less-than-full control may still influence decision-making at the target firm or another firm in ways that may substantially lessen competition. Acquisitions of partial ownership or other minority interests may give the investor rights in the target firm, such as rights to appoint board members, observe board meetings, influence the firm's ability to raise capital, impact operational decisions, or access competitively sensitive information. The Agencies have concerns with both cross-ownership, which refers to holding a non-controlling interest in a competitor, as well as common ownership, which occurs when individual investors hold non-controlling interests in firms that have a competitive relationship that could be affected by those joint holdings.

Partial acquisitions that do not result in control may nevertheless present significant competitive concerns. The acquisition of a minority position may permit influence of the target firm, implicate strategic decisions of the acquirer with respect to its investment in other firms, or change incentives so as to otherwise dampen competition. The post-acquisition relationship between the parties and the independent incentives of the parties outside the acquisition may be important in determining whether the partial acquisition may substantially lessen competition. Such partial acquisitions are subject to the same legal standard as any other acquisition.[53]

The Agencies recognize that cross-ownership and common ownership can reduce competition by softening firms' incentives to compete, even absent any specific anticompetitive act or intent. While the Agencies will consider any way in which a partial acquisition may affect competition, they generally focus on three principal effects:

First, a partial acquisition can lessen competition by giving the partial owner the ability to influence the competitive conduct of the target firm.[54] For example, a voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, influence capital budgets, determine investment return thresholds, or select particular managers, can create such influence. Additionally, a nonvoting interest may, in some instances, provide opportunities to prevent, delay, or discourage important competitive initiatives, or otherwise impact competitive decision making. Such influence can lessen competition because the partial owner could use its influence to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm.

Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete.[55] Acquiring a minority position in a rival might blunt the incentive of the partial owner to compete aggressively because it may profit through dividend or other revenue share even when it loses business to the rival. For example, the partial owner may decide not to develop a new product feature to win market share from the firm in which it has acquired an interest, because doing so will

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[53] *See United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) ("[A]ny acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of [Section 7 of the Clayton Act] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce.").

[54] *See United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 860-61 (6th Cir. 2005).

[55] *See Denver & Rio Grande v. United States*, 387 U.S. 485, 504 (1967) (identifying Section 7 concerns with a 20% investment).

reduce the value of its investment in its rival. This reduction in the incentive of the acquiring firm to compete arises even when it cannot directly influence the conduct or decision making of the target firm.

Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can substantially lessen competition through other mechanisms. For example, it can enhance the ability of the target and the partial owner to coordinate their behavior and make other accommodating responses faster and more targeted. The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the investor to the target firm. Even if coordination does not occur, the partial owner may use that information to preempt or appropriate a rival's competitive business strategies for its own benefit. If rivals know their efforts to win trading partners can be immediately appropriated, they may see less value in taking competitive actions in the first place, resulting in a lessening of competition.

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The analyses above address common scenarios that the Agencies use to assess the risk that a merger may substantially lessen competition or tend to create a monopoly. However, they are not exhaustive. The Agencies have in the past encountered mergers that lessen competition through mechanisms not covered above. For example:

A. A merger that would enable firms to avoid a regulatory constraint because that constraint was applicable to only one of the merging firms;

B. A merger that would enable firms to exploit a unique procurement process that favors the bids of a particular competitor who would be acquired in the merger; or

C. In a concentrated market, a merger that would dampen the acquired firm's incentive or ability to compete due to the structure of the acquisition or the acquirer.

As these scenarios and these Guidelines indicate, a wide range of evidence can show that a merger may lessen competition or tend to create a monopoly. Whatever the sources of evidence, the Agencies look to the facts and the law in each case.

Whatever frameworks the Agencies use to identify that a merger may substantially lessen competition or tend to create a monopoly, they also examine rebuttal evidence under the framework in Section 3.

3. Rebuttal Evidence Showing that No Substantial Lessening of Competition is Threatened by the Merger

The Agencies may assess whether a merger may substantially lessen competition or tend to create a monopoly based on a fact-specific analysis under any one or more of the Guidelines discussed above.[56] The Supreme Court has determined that analysis should consider "other pertinent factors" that may "mandate[] a conclusion that no substantial lessening of competition [is] threatened by the acquisition."[57] The factors pertinent to rebuttal depend on the nature of the threat to competition or tendency to create a monopoly resulting from the merger.

Several common types of rebuttal and defense evidence are subject to legal tests established by the courts. The Agencies apply those tests consistent with prevailing law, as described below.

3.1. Failing Firms

When merging parties suggest the weak or weakening financial position of one of the merging parties will prevent a lessening of competition, the Agencies examine that evidence under the "failing firm" defense established by the Supreme Court. This defense applies when the assets to be acquired would imminently cease playing a competitive role in the market even absent the merger.

As set forth by the Supreme Court, the failing firm defense has three requirements:

A. "[T]he evidence show[s] that the [failing firm] face[s] the grave probability of a business failure."[58] The Agencies typically look for evidence in support of this element that the allegedly failing firm would be unable to meet its financial obligations in the near future. Declining sales and/or net losses, standing alone, are insufficient to show this requirement.

B. "The prospects of reorganization of [the failing firm are] dim or nonexistent."[59] The Agencies typically look for evidence suggesting that the failing firm would be unable to reorganize successfully under Chapter 11 of the Bankruptcy Act, taking into account that "companies reorganized through receivership, or through [the Bankruptcy Act] often emerge[] as strong competitive companies."[60] Evidence of the firm's actual attempts to resolve its debt with creditors is important.

C. "[T]he company that acquires the failing [firm] or brings it under dominion is the only available purchaser."[61] The Agencies typically look for evidence that a company has made unsuccessful good-faith efforts to elicit reasonable alternative offers that pose a less severe danger to competition than does the proposed merger.[62]

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[56] *See United States v. AT&T, Inc.*, 916 F.3d at 1032.
[57] *See United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974); *Baker Hughes*, 908 F.2d at 990 (quoting *General Dynamics* and describing its holding as permitting rebuttal based on a "finding that 'no substantial lessening of competition occurred or was threatened by the acquisition'").
[58] *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 138 (1969).
[59] *Id.*
[60] *Id.*
[61] *Id.* at 136-39 (quoting *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930)).
[62] Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. Parties must solicit reasonable alternative offers before claiming that the business is failing.

Although merging parties sometimes argue that a poor or weakening position should serve as a defense even when it does not meet these elements, the Supreme Court has "confine[d] the failing company doctrine to its present narrow scope."[63] The Agencies evaluate evidence of a failing firm consistent with this prevailing law.[64]

3.2. Entry and Repositioning

Merging parties sometimes raise a rebuttal argument that a reduction in competition resulting from the merger would induce entry or repositioning[65] into the relevant market, preventing the merger from substantially lessening competition or tending to create a monopoly in the first place. This argument posits that a merger may, by substantially lessening competition, make the market more profitable for the merged firm and any remaining competitors, and that this increased profitability may induce new entry. To evaluate this rebuttal evidence, the Agencies assess whether entry induced by the merger would be "timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern."[66]

Timeliness. To show that no substantial lessening of competition is threatened by a merger, entry must be rapid enough to replace lost competition before any effect from the loss of competition due to the merger may occur. Entry in most industries takes a significant amount of time and is therefore insufficient to counteract any substantial lessening of competition that is threatened by a merger. Moreover, the entry must be durable: an entrant that does not plan to sustain its investment or that may exit the market would not ensure long-term preservation of competition.

Likelihood. Entry induced by lost competition must be so likely that no substantial lessening of competition is threatened by the merger. Firms make entry decisions based on the market conditions they expect once they participate in the market. If the new entry is sufficient to counteract the merger's effect on competition, the Agencies analyze why the merger would induce entry that was not planned in pre-merger competitive conditions.

The Agencies also assess whether the merger may increase entry barriers. For example, the merging firms may have a greater ability to discourage or block new entry when combined than they would have as separate firms. Mergers may enable or incentivize unilateral or coordinated exclusionary

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Liquidation value is the highest value the assets could command outside the market. If a reasonable alternative offer was rejected, the parties cannot claim that the business is failing.

[63] *Citizen Publ'g*, 394 U.S. at 139.

[64] The Agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless: (1) applying cost allocation rules that reflect true economic costs, the division has a persistently negative cash flow on an operating basis, and such negative cash flow is not economically justified for the firm by benefits such as added sales in complementary markets or enhanced customer goodwill; and (2) the owner of the failing division has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its assets in the relevant market and pose a less severe danger to competition than does the proposed acquisition. Because firms can allocate costs, revenues, and intra-company transactions among their subsidiaries and divisions, the Agencies require evidence that is not solely based on management plans that could have been prepared for the purpose of demonstrating negative cash flow or the prospect of exit from the relevant market.

[65] Repositioning is a supply-side response that is evaluated like entry. If repositioning requires movement of assets from other markets, the Agencies will consider the costs and competitive effects of doing so. Repositioning that would reduce competition in the markets from which products or services are moved is not a cognizable rebuttal for a lessening of competition in the relevant market.

[66] *FTC v. Sanford Health*, 926 F.3d 959, 965 (8th Cir. 2019).

strategies that make entry more difficult. Entry can be particularly challenging when a firm must enter at multiple levels of the market at sufficient scale to compete effectively.

Sufficiency. Even where timely and likely, the prospect of entry may not effectively prevent a merger from threatening a substantial lessening of competition. Entry may be insufficient due to a wide variety of constraints that limit an entrant's effectiveness as a competitor. Entry must at least replicate the scale, strength, and durability of one of the merging parties to be considered sufficient. The Agencies typically do not credit entry that depends on lessening competition in other markets.

As part of their analysis, the Agencies will consider the economic realities at play. For example, lack of successful entry in the past will likely suggest that entry may be slow or difficult. Recent examples of entry, whether successful or unsuccessful, provide the starting point for identifying the elements of practical entry barriers and the features of the industry that facilitate or interfere with entry. The Agencies will also consider whether the parties' entry arguments are consistent with the rationale for the merger or imply that the merger itself would be unprofitable.

3.3. Procompetitive Efficiencies

The Supreme Court has held that "possible economies [from a merger] cannot be used as a defense to illegality."[67] Competition usually spurs firms to achieve efficiencies internally, and firms also often work together using contracts short of a merger to combine complementary assets without the full anticompetitive consequences of a merger.

Merging parties sometimes raise a rebuttal argument that, notwithstanding other evidence that competition may be lessened, evidence of procompetitive efficiencies shows that no substantial lessening of competition is in fact threatened by the merger. This argument asserts that the merger would not substantially lessen competition in any relevant market in the first place.[68] When assessing this argument, the Agencies will not credit vague or speculative claims, nor will they credit benefits outside the relevant market that would not prevent a lessening of competition in the relevant market. Rather, the Agencies examine whether the evidence[69] presented by the merging parties shows each of the following:

Merger Specificity. The merger will produce substantial competitive benefits that could not be achieved without the merger under review.[70] Alternative ways of achieving the claimed benefits are considered in making this determination. Alternative arrangements could include organic growth of one of the merging firms, contracts between them, mergers with others, or a partial merger involving only those assets that give rise to the procompetitive efficiencies.

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[67] *Phila. Nat'l Bank*, 374 U.S. at 371; *Procter & Gamble Co.*, 386 U.S. at 580 ("Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition.").
[68] *United States v. Anthem*, 855 F.3d 345, 353-55 (D.C. Cir. 2017) (although efficiencies not a "defense" to antitrust liability, evidence sometimes used "to rebut a prima facie case"); *Saint Alphonsus Medical Center-Nampa*, 778 F.3d at 791 ("The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate.").
[69] In general, evidence related to efficiencies developed prior to the merger challenge is much more probative than evidence developed during the Agencies' investigation or litigation.
[70] If inter-firm collaborations are achievable by contract, they are not merger specific. The Agencies will credit the merger specificity of efficiencies only in the presence of evidence that a contract to achieve the asserted efficiencies would not be practical. *See Anthem*, 855 F.3d at 357.

Verifiability. These benefits are verifiable, and have been verified, using reliable methodology and evidence not dependent on the subjective predictions of the merging parties or their agents. Procompetitive efficiencies are often speculative and difficult to verify and quantify, and efficiencies projected by the merging firms often are not realized. If reliable methodology for verifying efficiencies does not exist or is otherwise not presented by the merging parties, the Agencies are unable to credit those efficiencies.

Prevents a Reduction in Competition. To the extent efficiencies merely benefit the merging firms, they are not cognizable. The merging parties must demonstrate through credible evidence that, within a short period of time, the benefits will prevent the risk of a substantial lessening of competition in the relevant market.

Not Anticompetitive. Any benefits claimed by the merging parties are cognizable only if they do not result from the anticompetitive worsening of terms for the merged firm's trading partners.[71]

Procompetitive efficiencies that satisfy each of these criteria are called cognizable efficiencies. To successfully rebut evidence that a merger may substantially lessen competition, cognizable efficiencies must be of a nature, magnitude, and likelihood that no substantial lessening of competition is threatened by the merger in any relevant market. Cognizable efficiencies that would not prevent the creation of a monopoly cannot justify a merger that may tend to create a monopoly.

[71] The Agencies will not credit efficiencies if they reflect or require a decrease in competition in a separate market. For example, if input costs are expected to decrease, the cost savings will not be treated as an efficiency if they reflect an increase in monopsony power.

4. Analytical, Economic, and Evidentiary Tools

The analytical, economic, and evidentiary tools that follow can be applicable to many parts of the Agencies' evaluation of a merger as they apply the factors and frameworks discussed in Sections 2 and 3.

4.1. Sources of Evidence

This subsection describes the most common sources of evidence the Agencies draw on in a merger investigation. The evidence the Agencies rely upon to evaluate whether a merger *may* substantially lessen competition or tend to create a monopoly is weighed based on its probative value. In assessing the available evidence, the Agencies consider documents, testimony, available data, and analysis of those data, including credible econometric analysis and economic modeling.

Merging Parties. The Agencies often obtain substantial information from the merging parties, including documents, testimony, and data. Across all of these categories, evidence created in the normal course of business is more probative than evidence created after the company began anticipating a merger review. Similarly, the Agencies give less weight to predictions by the parties or their employees, whether in the ordinary course of business or in anticipation of litigation, offered to allay competition concerns. Where the testimony of outcome-interested merging party employees contradicts ordinary course business records, the Agencies typically give greater weight to the business records.

Evidence that the merging parties intend or expect the merger to lessen competition, such as plans to coordinate with other firms, raise prices, reduce output or capacity, reduce product quality or variety, lower wages, cut benefits, exit a market, cancel plans to enter a market without a merger, withdraw products or delay their introduction, or curtail research and development efforts after the merger, can be highly informative in evaluating the effects of a merger on competition. The Agencies give little weight, however, to the lack of such evidence or the expressed contrary intent of the merging parties.

Customers, Workers, Industry Participants, and Observers. Customers can provide a variety of information to the Agencies, ranging from information about their own purchasing behavior and choices to their views about the effects of the merger itself. The Agencies consider the relationship between customers and the merging parties in weighing customer evidence. The ongoing business relationship between a customer and a merging party may discourage the customer from providing evidence inconsistent with the interests of the merging parties.

Workers and representatives from labor organizations can provide information regarding, among other things, wages, non-wage compensation, working conditions, the individualized needs of workers in the market in question, the frictions involved in changing jobs, and the industry in which they work.

Similarly, other suppliers, indirect customers, distributors, consultants, and industry analysts can also provide information helpful to a merger inquiry. As with other interested parties, the Agencies give less weight to evidence created in anticipation of a merger investigation and more weight to evidence developed in the ordinary course of business.

Market Effects in Consummated Mergers. Evidence of observed post-merger price increases or worsened terms is given substantial weight. A consummated merger, however, may substantially lessen competition even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and is therefore moderating its conduct.

Consequently, in evaluating consummated mergers, the Agencies also consider the same types of evidence when evaluating proposed mergers.

Econometric Analysis and Economic Modeling. Econometric analysis of data and other types of economic modeling can be informative in evaluating the potential effects of a merger on competition. The Agencies give more weight to analysis using high quality data and adhering to rigorous standards. But the Agencies also take into account that in some cases, the availability or quality of data or reliable modeling techniques might limit the availability and relevance of econometric modeling. When data is available, the Agencies recognize that the goal of economic modeling is not to create a perfect representation of reality, but rather to inform an assessment of the likely change in firm incentives resulting from a merger.

Transaction Terms. The financial terms of the transaction may also be informative regarding a merger's impact on competition. For example, a purchase price that exceeds the acquired firm's stand-alone market value can sometimes indicate that the acquiring firm is paying a premium because it expects to be able to benefit from reduced competition.

4.2. Evaluating Competition Among Firms

This subsection discusses evidence and tools the Agencies look to when assessing competition among firms. The evidence and tools in this section can be relevant to a variety of settings, for example: to assess competition between rival firms (Guideline 2); the ability and incentive to limit access to a product rivals use to compete (Guideline 5); or for market definition (Section 4.3), for example when carrying out the Hypothetical Monopolist Test (Section 4.3.A).

For clarity, the discussion in this subsection often focuses on competition between two suppliers of substitute products that set prices. Analogous analytic tools may also be relevant in more general settings, for example when considering: competition among more than two suppliers; competition among buyers or employers to procure inputs and labor; competition that derives from customer willingness to buy in different locations; and competition that takes place in dimensions other than price or when terms are determined through, for example, negotiations or auctions.

Guideline 2 describes how different types of evidence can be used in assessing the potential harm to competition from a merger; some portions of Guideline 2 that are relevant in other settings are repeated below.

4.2.A. Generally Applicable Considerations

The Agencies may consider one or more of the following types of evidence, tools, and metrics when assessing the degree of competition among firms:

Strategic Deliberations or Decisions. The Agencies may analyze the extent of competition among firms, for example between the merging firms, by examining evidence of their strategic deliberations or decisions in the regular course of business. For example, in some markets, the firms may monitor each other's pricing, marketing campaigns, facility locations, improvements, products, capacity, output, input costs, and/or innovation plans. This can provide evidence of competition between the merging firms, especially when they react by taking steps to preserve or enhance the competitiveness or profitability of their own products or services.

Prior Merger, Entry, and Exit Events. The Agencies may look to historical events to assess the presence and substantiality of direct competition between the merging firms. For example, the Agencies may examine the impact of recent relevant mergers, entry, expansion, or exit events on the merging parties or their competitive behavior.

Customer Substitution. Customers' willingness to switch between different firms' products is an important part of the competitive process. Firms are closer competitors the more that customers are willing to switch between their products, for example because they are more similar in quality, price, or other characteristics.

Evidence commonly analyzed to show the extent of substitution among firms' products includes: how customers have shifted purchases in the past in response to relative changes in price or other terms and conditions; documentary and testimonial evidence such as win/loss reports, evidence from discount approval processes, switching data, customer surveys, as well as information from suppliers of complementary products and distributors; objective information about product characteristics; and market realities affecting the ability of customers to switch.

Impact of Competitive Actions on Rivals. When one firm takes competitive actions to attract customers, this can benefit the firm at the expense of its rivals. The Agencies may gauge the extent of competition among firms by considering the impact that competitive actions by one firm have on the others. The impact of a firm's competitive actions on a rival generally depends on how many sales a rival would lose as a result of the competitive actions, as well as the profitability of those lost sales. The Agencies may use margins to measure the profitability of the sale a rival would have made.[72]

Impact of Eliminating Competition Between the Firms. In some instances, evidence may be available to assess the impact of competition from one or more firms on the other firms' actions, such as firm choices about price, quality, wages, or another dimension of competition. This can be gauged by comparing the two firms' actions when they compete and make strategic choices independently against the actions the firms might choose if they acted jointly. Actual or predicted changes in these results of competition, when available, can indicate the degree of competition between the firms.

To make this type of comparison, the Agencies sometimes rely on economic models. Often, such models consider the firms' incentives to change their actions in one or more selected dimensions, such as price, in a somewhat simplified scenario. For example, a model might focus on the firms' short-run incentives to change price, while abstracting from a variety of additional competitive forces and dimensions of competition, such as the potential for firms to reposition their products or for the merging firms to coordinate with other firms. Such a model may incorporate data and evidence in order to produce quantitative estimates of the impact of the merger on firm incentives and corresponding choices. This type of exercise is sometimes referred to by economists as "merger simulation" despite the fact that the hypothetical setting considers only selected aspects of the loss of competition from a merger. The Agencies use such models to give an indication of the scale and importance of competition, not to precisely predict outcomes.

[72] The margin on incremental units is the difference between incremental revenue (often equal to price) and incremental cost on those units. The Agencies may use accounting data to measure incremental costs, but they do not necessarily rely on accounting margins recorded by firms in the ordinary course of business because such margins often do not align with the concept of incremental cost that is relevant in economic analysis of a merger.

4.2.B. Considerations When Terms Are Set by Firms

The Agencies may use various types of evidence and metrics to assess the strength of competition among firms that set terms to their customers. Firms might offer the same terms to different customers or different terms to different groups of customers.

Competition in this setting can lead firms to set lower prices or offer more attractive terms when they act independently than they would in a setting where that competition was eliminated by a merger. When considering the impact of competition on the incentives to set price, to the extent price increases on one firm's products would lead customers to switch to products from another firm, their merger will enable the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. Some of the sales lost because of the price increase will be diverted to the products of the other firm, and capturing the value of these diverted sales can make the price increase profitable even though it would not have been profitable prior to the merger.

A measure of customer substitution between firms in this setting is the diversion ratio. The diversion ratio from one product to another is a metric of how customers likely would substitute between them. The diversion ratio is the fraction of unit sales lost by the first product due to a change in terms, such as an increase in its price, that would be diverted to the second product. The higher the diversion ratio between two products made by different firms, the stronger the competition between them.

A high diversion ratio between the products owned by two firms can indicate strong competition between them even if the diversion ratio to another firm is higher. The diversion ratio from one of the products of one firm to a group of products made by other firms, defined analogously, is sometimes referred to as the aggregate diversion ratio or the recapture rate.

A measure of the impact on rivals of competitive actions is the value of diverted sales from a price increase. The value of sales diverted from one firm to a second firm, when the first firm raises its price on one of its products, is equal to the number of units that would be diverted from the first firm to the second, multiplied by the difference between the second firm's price and the incremental cost of the diverted sales. To interpret the magnitude of the value of diverted sales, the Agencies may use as a basis of comparison either the incremental cost to the second firm of making the diverted sales, or the revenues lost by the first firm as a result of the price increase. The ratio of the value of diverted sales to the revenues lost by the first firm can be an indicator of the upward pricing pressure that would result from the loss of competition between the two firms. Analogous concepts can be applied to analyze the impact on rivals of worsening terms other than price.

4.2.C. Considerations When Terms Are Set Through Bargaining or Auctions

In some industries, buyers and sellers negotiate prices and other terms of trade. In bargaining, buyers commonly negotiate with more than one seller and may play competing sellers off against one another. In other industries, sellers might sell their products, or buyers might procure inputs, using an auction. Negotiations may involve aspects of an auction as well as aspects of one-on-one negotiation. Competition among sellers can significantly enhance the ability of a buyer to obtain a result more favorable to it, and less favorable to the sellers, compared to a situation where the elimination of competition through a merger prevents buyers from playing those sellers off against each other in negotiations.

Sellers may compete even when a customer does not directly play their offers against each other. The attractiveness of alternative options influences the importance of reaching an agreement to the

negotiating parties and thus the terms of the agreement. A party that has many attractive alternative trading partners places less importance on reaching an agreement with any one particular trading partner than a party with few attractive alternatives. As alternatives for one party are eliminated (such as through a merger), the trading partner gains additional bargaining leverage reflecting that loss of competition. A merger between sellers may lessen competition even if the merged firm handles negotiations for the merging firms' products separately.

Thus, qualitative or quantitative evidence about the leverage provided to buyers by competing suppliers may be used to assess the extent of competition among firms in this setting. Analogous evidence may be used when analyzing a setting where terms are set using auctions, for example, procurement auctions where suppliers bid to serve a buyer. If, for some categories of procurements, certain suppliers are often among the most attractive to the buyer, competition among that group of suppliers is likely to be strong.

Firms sometimes keep records of the progress and outcome of individual sales efforts, and the Agencies may use these data to generate measures of the extent to which customers would likely substitute between the two firms. Examples of such measures might include a diversion ratio based on the rate at which customers would buy from one firm if the other one was not available, or the frequency with which the two firms bid on contracts with the same customer.

4.2.D. Considerations When Firms Determine Capacity and Output

In some markets, the choice of how much to produce (output decisions) or how much productive capacity to maintain (capacity decisions) are key strategic variables. When a firm decreases output, it may lose sales to rivals, but also drive up prices. Because a merged firm will account for the impact of higher prices across all of the merged firms' sales, it may have an incentive to decrease output as a result of the merger. The loss of competition through a merger of two firms may lead the merged firm to leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, lay off or stop hiring workers, or eliminate pre-existing production capabilities. A firm may also divert the use of capacity away from one relevant market and into another market so as to raise the price in the former market. The analysis of the extent to which firms compete may differ depending on how a merger between them might create incentives to suppress output.

Competition between merging firms is greater when (1) the merging firms' market shares are relatively high; (2) the merging firms' products are relatively undifferentiated from each other; (3) the market elasticity of demand is relatively low; (4) the margin on the suppressed output is relatively low; and (5) the supply responses of non-merging rivals are relatively small. Qualitative or quantitative evidence may be used to evaluate and weigh each of these factors.

In some cases, competition between firms—including one firm with a substantial share of the sales in the market and another with significant excess capacity to serve that market—can prevent an output suppression strategy from being profitable. This can occur even if the firm with the excess capacity has a relatively small share of sales, as long as that firm's ability to expand, and thus keep prices from rising, makes an output suppression strategy unprofitable for the firm with the larger market share.

4.2.E. Considerations for Innovation and Product Variety Competition

Firms can compete for customers by offering varied and innovative products and features, which could range from minor improvements to the introduction of a new product category. Features can include new or different product attributes, services offered along with a product, or higher-quality services standing alone. Customers value the variety of products or services that competition generates, including having a variety of locations at which they can shop.

Offering the best mix of products and features is an important dimension of competition that may be harmed as a result of the elimination of competition between the merging parties.

When a firm introduces a new product or improves a product's features, some of the sales it gains may be at the expense of its rivals, including rivals that are competing to develop similar products and features. As a result, competition between firms may lead them to make greater efforts to offer a variety of products and features than would be the case if the firms were jointly owned, for example, if they merged. The merged firm may have a reduced incentive to continue or initiate development of new products that would have competed with the other merging party, but post-merger would "cannibalize" what would be its own sales.[73] A service provider may have a reduced incentive to continue valuable upgrades offered by the acquired firm. The merged firm may have a reduced incentive to engage in disruptive innovation that would threaten the business of one of the merging firms. Or it may have the incentive to change its product mix, such as by ceasing to offer one of the merging firms' products, leaving worse off the customers who previously chose the product that was eliminated. For example, competition may be harmed when customers with a preference for a low-price option lose access to it, even if remaining products have higher quality.

The incentives to compete aggressively on innovation and product variety depend on the capabilities of the firms and on customer reactions to the new offerings. Development of new features depends on having the appropriate expertise and resources. Where firms are two of a small number of companies with specialized employees, development facilities, intellectual property, or research projects in a particular area, competition between them will have a greater impact on their incentives to innovate.

Innovation may be directed at outcomes beyond product features; for example, innovation may be directed at reducing costs or adopting new technology for the distribution of products.

4.3. Market Definition

The Clayton Act protects competition "in any line of commerce in any section of the country."[74] The Agencies engage in a market definition inquiry in order to identify whether there is any line of commerce or section of the country in which the merger may substantially lessen competition or tend to create a monopoly. The Agencies identify the "area of effective competition" in which competition may be lessened "with reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country.')."[75] The Agencies refer to the process of identifying market(s) protected by the Clayton Act as a "market definition" exercise and the markets so defined as "relevant antitrust markets,"

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[73] Sales "cannibalization" refers to a situation where customers of a firm substitute away from one of the firm's products to another product offered by the same firm.

[74] 15 U.S.C. § 18.

[75] *Brown Shoe*, 370 U.S. at 324.

or simply "relevant markets." Market definition can also allow the Agencies to identify market participants and measure market shares and market concentration.

A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements. The outer boundaries of a relevant product market are determined by the "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[76] Within a broad relevant market, however, effective competition often occurs in numerous narrower relevant markets.[77] Market definition ensures that relevant antitrust markets are sufficiently broad, but it does not always lead to a single relevant market. Section 7 of the Clayton Act prohibits any merger that may substantially lessen competition "in any line of commerce" and in "any section of the country," and the Agencies protect competition by challenging a merger that may lessen competition in any one or more relevant markets.

Market participants often encounter a range of possible substitutes for the products of the merging firms. However, a relevant market cannot meaningfully encompass that infinite range of substitutes.[78] There may be effective competition among a narrow group of products, and the loss of that competition may be harmful, making the narrow group a relevant market, even if competitive constraints from significant substitutes are outside the group. The loss of both the competition between the narrow group of products and the significant substitutes outside that group may be even more harmful, but that does not prevent the narrow group from being a market in its own right.

Relevant markets need not have precise metes and bounds. Some substitutes may be closer, and others more distant, and defining a market necessarily requires including some substitutes and excluding others. Defining a relevant market sometimes requires a line-drawing exercise around product features, such as size, quality, distances, customer segment, or prices. There can be many places to draw that line and properly define a relevant market. The Agencies recognize that such scenarios are common, and indeed "fuzziness would seem inherent in any attempt to delineate the relevant . . . market."[79] Market participants may use the term "market" colloquially to refer to a broader or different set of products than those that would be needed to constitute a valid relevant antitrust market.

The Agencies rely on several tools to demonstrate that a market is a relevant antitrust market. For example, the Agencies may rely on any one or more of the following to identify a relevant antitrust market.

A. Direct evidence of substantial competition between the merging parties can demonstrate that a relevant market exists in which the merger may substantially lessen competition and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the metes and bounds of the market are only broadly characterized.

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[76] *Id.* at 325.

[77] *Id.* ("[W]ithin [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes."). Multiple overlapping markets can be appropriately defined relevant markets. For example, a merger to monopoly for food worldwide would lessen competition in well-defined relevant markets for, among others, food, baked goods, cookies, low-fat cookies, and premium low-fat chocolate chip cookies. Illegality in any of these in any city or town comprising a relevant geographic market would suffice to prohibit the merger, and the fact that one area comprises a relevant market does not mean a larger, smaller, or overlapping area could not as well.

[78] *United States v. Cont'l Can Co.*, 378 U.S. 441, 449 (1964); *see also FTC v. Advoc. Health Care Network*, 841 F.3d 460, 469 (7th Cir. 2016) ("A geographic market does not need to include all of the firm's competitors; it needs to include the competitors that would substantially constrain the firm's price-increasing ability." (cleaned up)).

[79] *Phila. Nat'l Bank*, 374 U.S. at 360 n.37.

B. Direct evidence of the exercise of market power can demonstrate the existence of a relevant market in which that power exists. This evidence can be valuable when assessing the risk that a dominant position may be entrenched, maintained, or extended, since the same evidence identifies market power and can be sufficient to identify the line of commerce and section of the country affected by a merger, even if the metes and bounds of the market are only broadly characterized.

C. A relevant market can be identified from evidence on observed market characteristics ("practical indicia"), such as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.[80] Various practical indicia may identify a relevant market in different settings.

D. Another common method employed by courts and the Agencies is the hypothetical monopolist test.[81] This test examines whether a proposed market is too narrow by asking whether a hypothetical monopolist over this market could profitably worsen terms significantly, for example, by raising price. An analogous hypothetical monopsonist test applies when considering the impact of a merger on competition among buyers.

The Agencies use these tools to define relevant markets because they each leverage market realities to identify an area of effective competition.

Section 4.3.A below describes the Hypothetical Monopolist Test in greater detail. Section 4.3.B addresses issues that may arise when defining relevant markets in several specific scenarios.

4.3.A. The Hypothetical Monopolist Test

This Section describes the Hypothetical Monopolist Test, which is a method by which the Agencies often define relevant antitrust markets. As outlined above, a relevant antitrust market is an area of effective competition. The Hypothetical Monopolist/Monopsonist Test ("HMT") evaluates whether a group of products is sufficiently broad to constitute a relevant antitrust market. To do so, the HMT asks whether eliminating the competition among the group of products by combining them under the control of a hypothetical monopolist likely would lead to a worsening of terms for customers. The Agencies generally focus their assessment on the constraints from competition, rather than on constraints from regulation, entry, or other market changes. The Agencies are concerned with the impact on economic incentives and assume the hypothetical monopolist would seek to maximize profits.

When evaluating a merger of sellers, the HMT asks whether a hypothetical profit-maximizing firm, not prevented by regulation from worsening terms, that was the only present and future seller of a group of products ("hypothetical monopolist") likely would undertake at least a small but significant and non-transitory increase in price ("SSNIP") or other worsening of terms ("SSNIPT") for at least one

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[80] *Brown Shoe*, 370 U.S. at 325, *quoted in United States v. U.S. Sugar Corp.*, 73 F.4th 197, 204-07 (3d Cir. 2023) (affirming district court's application of *Brown Shoe* practical indicia to evaluate relevant product market that included, based on the unique facts of the industry, those distributors who "could counteract monopolistic restrictions by releasing their own supplies").

[81] *See FTC v. Penn State Hershey Med. Center*, 838 F.3d 327, 338 (3d Cir. 2016). While these guidelines focus on applying the hypothetical monopolist test in analyzing mergers, the test can be adapted for similar purposes in cases involving alleged monopolization or other conduct. *See, e.g.*, *McWane, Inc. v. FTC*, 783 F.3d 814, 829-30 (11th Cir. 2015).

product in the group.[82] For the purpose of analyzing this issue, the terms of sale of products outside the candidate market are held constant. Analogously, when considering a merger of buyers, the Agencies ask the equivalent question for a hypothetical monopsonist. This Section often focuses on merging sellers to simplify exposition.

4.3.B. Implementing the Hypothetical Monopolist Test

The SSNIPT. A SSNIPT may entail worsening terms along any dimension of competition, including price (SSNIP), but also other terms (broadly defined) such as quality, service, capacity investment, choice of product variety or features, or innovative effort.

Input and Labor Markets. When the competition at issue involves firms buying inputs or employing labor, the HMT considers whether the hypothetical monopsonist would undertake at least a SSNIPT, such as a decrease in the offered price or a worsening of the terms of trade offered to suppliers, or a decrease in the wage offered to workers or a worsening of their working conditions or benefits.

The Geographic Dimension of the Market. The hypothetical monopolist test is generally applied to a group of products together with a geographic region to determine a relevant market, though for ease of exposition the two dimensions are discussed separately, with geographic market definition discussed in Section 4.3.D.2.

Negotiations or Auctions. The HMT is stated in terms of a hypothetical monopolist *undertaking* a SSNIPT. This covers settings where the hypothetical monopolist sets terms and makes them worse. It also covers settings where firms bargain, and the hypothetical monopolist would have a stronger bargaining position that would likely lead it to extract a SSNIPT during negotiations, or where firms sell their products in an auction, and the bids submitted by the hypothetical monopolist would result in the purchasers of its products experiencing a SSNIPT.

Benchmark for the SSNIPT. The HMT asks whether the hypothetical monopolist likely would worsen terms relative to those that likely would prevail absent the proposed merger. In some cases, the Agencies will use as a benchmark different outcomes than those prevailing prior to the merger. For example, if outcomes are likely to change absent the merger, e.g., because of innovation, entry, exit, or exogenous trends, the Agencies may use anticipated future outcomes as the benchmark. Or, if suppliers in the market are coordinating prior to the merger, the Agencies may use a benchmark that reflects conditions that would arise if coordination were to break down. When evaluating whether a merging firm is dominant (Guideline 6), the Agencies may use terms that likely would prevail in a more competitive market as a benchmark.[83]

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[82] If the pricing incentives of the firms supplying the products in the group differ substantially from those of the hypothetical monopolist, for reasons other than the latter's control over a larger group of substitutes, the Agencies may instead employ the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market. This could occur, for example, if the candidate market is one for durable equipment and the firms selling that equipment derive substantial net revenues from selling spare parts and service for that equipment. Analogous considerations apply when considering a SSNIPT for terms other than price.

[83] In the entrenchment context, if the inquiry is being conducted after market or monopoly power has already been exercised, using prevailing prices can lead to defining markets too broadly and thus inferring that dominance does not exist when, in

Magnitude of the SSNIPT. What constitutes a "small but significant" worsening of terms depends upon the nature of the industry and the merging firms' positions in it, the ways that firms compete, and the dimension of competition at issue. When considering price, the Agencies will often use a SSNIP of five percent of the price charged by firms for the products or services to which the merging firms contribute value. The Agencies, however, may consider a different term or a price increase that is larger or smaller than five percent.[84]

The Agencies may base a SSNIP on explicit or implicit prices for the firms' specific contribution to the value of the product sold, or an upper bound on the firms' specific contribution, where these can be identified with reasonable clarity. For example, the Agencies may derive an implicit price for the service of transporting oil over a pipeline as the difference between the price the pipeline firm paid for oil at one end and the price it sold the oil for at the other and base the SSNIP on this implicit price.

4.3.C. Evidence and Tools for Carrying Out the Hypothetical Monopolist Test

Section 4.2 describes some of the qualitative and quantitative evidence and tools the Agencies can use to assess the extent of competition among firms. The Agencies can use similar evidence and analogous tools to apply the HMT, in particular to assess whether competition among a set of firms likely leads to better terms than a hypothetical monopolist would undertake.

To assess whether the hypothetical monopolist likely would undertake at least a SSNIP on one or more products in the candidate market, the Agencies sometimes interpret the qualitative and quantitative evidence using an economic model of the profitability to the hypothetical monopolist of undertaking price increases; the Agencies may adapt these tools to apply to other forms of SSNIPTs.

One approach utilizes the concept of a "recapture rate" (the percentage of sales lost by one product in the candidate market, when its price alone rises, that is recaptured by other products in the candidate market). A price increase is profitable when the recapture rate is high enough that the incremental profits from the increased price plus the incremental profits from the recaptured sales going to other products in the candidate market exceed the profits lost when sales are diverted outside the candidate market. It is possible that a price increase is profitable even if a majority of sales are diverted outside the candidate market, for example if the profits on the lost sales are relatively low or the profits on the recaptured sales are relatively high.

Sometimes evidence is presented in the form of "critical loss analysis," which can be used to assess whether undertaking at least a SSNIPT on one or more products in a candidate market would raise or lower the hypothetical monopolist's profits. Critical loss analysis compares the magnitude of the two offsetting effects resulting from the worsening of terms. The "critical loss" is defined as the number of lost unit sales that would leave profits unchanged. The "predicted loss" is defined as the number of unit sales that the hypothetical monopolist is predicted to lose due to the worsening of terms. The worsening of terms raises the hypothetical monopolist's profits if the predicted loss is less than the

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fact, it does. The problem with using prevailing prices to define the market when a firm is already dominant is known as the "Cellophane Fallacy."

[84] The five percent price increase is not a threshold of competitive harm from the merger. Because the five percent SSNIP is a minimum expected effect of a hypothetical monopolist of an *entire* market, the actual predicted effect of a merger within that market may be significantly lower than five percent. A merger within a well-defined market that causes undue concentration can be illegal even if the predicted price increase is well below the SSNIP of five percent.

critical loss. While this "breakeven" analysis differs somewhat from the profit-maximizing analysis called for by the HMT, it can sometimes be informative.

The Agencies require that estimates of the predicted loss be consistent with other evidence, including the pre-merger margins of products in the candidate market used to calculate the critical loss. Unless the firms are engaging in coordinated interaction, high pre-merger margins normally indicate that each firm's product individually faces demand that is not highly sensitive to price. Higher pre-merger margins thus indicate a smaller predicted loss as well as a smaller critical loss. The higher the pre-merger margin, the smaller the recapture rate[85] necessary for the candidate market to satisfy the hypothetical monopolist test. Similar considerations inform other analyses of the profitability of a price increase.

4.3.D. Market Definition in Certain Specific Settings

This Section provides details on market definition in several specific common settings. In much of this section, concepts are presented for the scenario where the merger involves sellers. In some cases, clarifications are provided as to how the concepts apply to merging buyers; in general, the concepts apply in an analogous way.

4.3.D.1. Targeted Trading Partners

If the merged firm could profitably target a subset of customers for changes in prices or other terms, the Agencies may identify relevant markets defined around those targeted customers. The Agencies may do so even if firms are not currently targeting specific customer groups but could do so after the merger.

For targeting to be feasible, two conditions typically must be met. First, the suppliers engaging in targeting must be able to set different terms for targeted customers than other customers. This may involve identification of individual customers to which different terms are offered or offering different terms to different types of customers based on observable characteristics.[86] Markets for targeted customers need not have precise metes and bounds. In particular, defining a relevant market for targeted customers sometimes requires a line-drawing exercise on observable characteristics. There can be many places to draw that line and properly define a relevant market. Second, the targeted customers must not be likely to defeat a targeted worsening of terms by arbitrage (e.g., by purchasing indirectly from or through other customers). Arbitrage may be difficult if it would void warranties or make service more difficult or costly for customers, and it is inherently impossible for many services. Arbitrage on a modest scale may be possible but sufficiently costly or limited, for example due to transaction costs or search costs, that it would not deter or defeat a discriminatory pricing strategy.

If prices are negotiated or otherwise set individually, for example through a procurement auction, there may be relevant markets that are as narrow as an individual customer. Nonetheless, for analytic convenience, the Agencies may define cluster markets for groups of targeted customers for whom the

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[85] The recapture rate is sometimes referred to as the aggregate diversion ratio, defined in Section 4.2.B.

[86] In some cases, firms offer one or more versions of products or services defined by their characteristics (where brand might be a characteristic). When customers can select among these products and terms do not vary by customer, the Agencies will typically define markets based on products rather than the targeted customers. In such cases, relevant antitrust markets may include only some of the differentiated products, for example products with only "basic" features, or products with "premium features." The tools described in Section 4.2 can be used to assess competition among differentiated products.

conditions of competition are reasonably similar. (See Section 4.3.D.4 for further discussion of cluster markets.)

Analogous considerations arise for a merger involving one or more buyers or employers. In this case, the analysis considers whether buyers target suppliers, for example by paying targeted suppliers or workers less, or by degrading the terms of supply contracts for targeted suppliers. Arbitrage would involve a targeted supplier selling to the buyer indirectly, through a different supplier who could obtain more favorable terms from the buyer.

If the HMT is applied in a setting where targeting of customers is feasible, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the targeted group would undertake at least a SSNIPT on some, though not necessarily all, customers in that group. The products sold to those customers form a relevant market if the hypothetical monopolist likely would undertake at least a SSNIPT despite the potential for customers to substitute away from the product or to take advantage of arbitrage. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.

4.3.D.2. Geographic Markets

A relevant antitrust market is an area of effective competition, comprising both product (or service) and geographic elements. A market's geography depends on the limits that distance puts on some customers' willingness or ability to substitute to some products, or some suppliers' willingness or ability to serve some customers. Factors that may limit the geographic scope of the market include transportation costs, language, regulation, tariff and non-tariff trade barriers, custom and familiarity, reputation, and local service availability.

4.3.D.2.a. Geographic Markets Based on the Locations of Suppliers

The Agencies sometimes define geographic markets as regions encompassing a group of supplier locations. When they do, the geographic market's scope is determined by customers' willingness to switch between suppliers. Geographic markets of this type often apply when customers receive goods or services at suppliers' facilities, for example when customers buy in-person from retail stores. A single firm may offer the same product in a number of locations, both within a single geographic market or across geographic markets; customers' willingness to substitute between products may depend on the location of the supplier. When calculating market shares, sales made from supplier locations in the geographic market are included, regardless of whether the customer making the purchase travelled from outside the boundaries of the geographic market (see Section 4.4 for more detail about calculating market shares).

If the HMT is used to evaluate the geographic scope of the market, it requires that a hypothetical profit-maximizing firm that was the only present or future supplier of the relevant product(s) at supplier locations in the region likely would undertake at least a SSNIPT in at least one location. In this exercise, the terms of sale for products sold to all customers at facilities outside the region are typically held constant.[87]

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[87] In some circumstances, as when the merging parties operate in multiple geographies, if applying the HMT, the Agencies may apply a "Hypothetical Cartel" framework for market definition, following the approach outlined in Section 4.3.A, n.81.

4.3.D.2.b. Geographic Markets Based on Targeting of Customers by Location

When targeting based on customer location is feasible (see Section 4.3.D.1), the Agencies may define geographic markets as a region encompassing a group of customers.[88] For example, geographic markets may sometimes be defined this way when suppliers deliver their products or services to customers' locations, or tailor terms of trade based on customers' locations. Competitors in the market are firms that sell to customers that are located in the specified region. Some suppliers may be located outside the boundaries of the geographic market, but their sales to customers located within the market are included when calculating market shares (see Section 4.4 for more detail about calculating market shares).

If prices are negotiated individually with customers that may be targeted, geographic markets may be as narrow as individual customers. Nonetheless, the Agencies often define a market for a cluster of customers located within a region if the conditions of competition are reasonably similar for these customers. (See Section 4.3.D.4 for further discussion of cluster markets.)

A firm's attempt to target customers in a particular area with worsened terms can sometimes be undermined if some customers in the region substitute by travelling outside it to purchase the product. Arbitrage by customers on a modest scale may be possible but sufficiently costly or limited that it would not deter or defeat a targeting strategy.[89]

If the HMT is used to evaluate market definition when customers may be targeted by location, it requires that a hypothetical profit-maximizing firm that was the only present or future seller of the relevant product(s) to customers in the region likely would undertake at least a SSNIPT on some, though not necessarily all, customers in that region. The products sold in that region form a relevant market if the hypothetical monopolist would undertake at least a SSNIPT despite the potential for customers to substitute away from the product or to locations outside the region. In this exercise, the terms of sale for products sold to all customers outside the region are held constant.[90]

4.3.D.3. Supplier Responses

Market definition focuses solely on demand substitution factors, that is, on customers' ability and willingness to substitute away from one product or location to another in response to a price increase or other worsening of terms. Supplier responses may be considered in the analysis of competition between firms (Guideline 2 and Section 4.2), entry and repositioning (Section 3.2), and in calculating market shares and concentration (Section 4.4).

4.3.D.4. Cluster Markets

A relevant antitrust market is generally a group of products that are substitutes for each other. However, when the competitive conditions for multiple relevant markets are reasonably similar, it may be appropriate to aggregate the products in these markets into a "cluster market" for analytic convenience, even though not all products in the cluster are substitutes for each other. For example, competing hospitals may each provide a wide range of acute health care services. Acute care for one health issue is not a substitute for acute care for a different health issue. Nevertheless, the Agencies may

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[88] For customers operating in multiple locations, only those customer locations within the targeted region are included in the market.

[89] Arbitrage by suppliers is a type of supplier response and is thus not considered in market definition. (See Section 4.3.D.3)

[90] In some circumstances, as when the merging parties operate in multiple geographies, the Agencies may apply a "Hypothetical Cartel" framework for market definition, as described in Section 4.3.A, n.81.

aggregate them into a cluster market for acute care services if the conditions of competition are reasonably similar across the services in the cluster.

The Agencies need not separately analyze market definition for each product included in the cluster market, and market shares will typically be calculated for the cluster market as a whole.

Analogously, the Agencies sometimes define a market as a cluster of targeted customers (see Section 4.3.D.1) or a cluster of customers located in a region (see Section 4.3.D.2.b).

4.3.D.5. Bundled Product Markets

Firms may sell a combination of products as a bundle or a "package deal," rather than offering products "*a la carte*," that is, separately as standalone products. Different bundles offered by the same or different firms might package together different combinations of component products and therefore be differentiated according to the composition of the bundle. If the components of a bundled product are also available separately, the bundle may be offered at a price that represents a discount relative to the sum of the *a la carte* product prices.

The Agencies take a flexible approach based on the specific circumstances to determine whether a candidate market that includes one or more bundled products, standalone products, or both is a relevant antitrust market. In some cases, a relevant market may consist of only bundled products. A market composed of only bundled products might be a relevant antitrust market even if there is significant competition from the unbundled products. In other cases, a relevant market may include both bundled products and some unbundled component products.

Even in cases where firms commonly sell combinations of products or services as a bundle or a "package deal," relevant antitrust markets do not necessarily include product bundles. In some cases, a relevant market may be analyzed as a cluster market, as discussed in Section 4.3.D.4.

4.3.D.6. One-Stop Shop Markets

In some settings, the Agencies may consider a candidate market that includes one or more "one-stop shops," where customers can select a combination of products to purchase from a single seller, either in a single purchase instance or in a sequence of purchases. Products are commonly sold at a one-stop shop when customers value the convenience, which might arise because of transaction costs or search costs, savings of time, transportation costs, or familiarity with the store or web site.

A multi-product retailer such as a grocery store or online retailer is an example of a one-stop shop. Customers can select a particular basket of groceries from a range of available goods and different customers may select different baskets. Some customers may make multiple stops at specialty shops (e.g., butcher, baker, greengrocer), or they may do the bulk of their shopping at a one-stop shop (the grocery store) but also shop at specialty shops for particular product categories.

There are several ways in which markets may be defined in one-stop shop settings, depending on market realities, and the Agencies may further define more than one relevant antitrust market for a particular merger. For example, a relevant market may consist of only one-stop shops, even if there is significant competition from specialty shops; or it may include both one-stop shops and specialty shops. When a product category is sold by both one-stop shops and specialty suppliers (such as a type of produce sold in grocery stores and produce stands), the Agencies may define relevant antitrust markets for the product category sold by a particular type of supplier, or it may include multiple types of suppliers.

4.3.D.7. Market Definition When There is Harm to Innovation

When considering harm to competition in innovation, market definition may follow the same approaches that are used to analyze other dimensions of competition. In the case where a merger may substantially lessen competition by decreasing incentives to innovate, the Agencies may define relevant antitrust markets around the products that would result from that innovation if successful, even if those products do not yet exist.[91] In some cases, the Agencies may analyze different relevant markets when considering innovation than when considering other dimensions of competition.

4.3.D.8. Market Definition for Input Markets and Labor Markets

The same market definition tools and principles discussed above can be used for input markets and labor markets, where labor is a particular type of input. In input markets, firms compete with each other to attract suppliers, including workers. Therefore, input suppliers are analogous to customers in the discussions above about market definition. In defining relevant markets, the Agencies focus on the alternatives available to input suppliers. An antitrust input market consists of a group of products and a geographic area defined by the location of the buyers or input suppliers. Just as buyers of a product may consider products to be differentiated according to the brand or the identity of the seller, suppliers of a product or service may consider different buyers to be differentiated. For example, if the suppliers are contractors, they may have distinct preferences about who they provide services to, due to different working conditions, location, reliability of buyers in terms of paying invoices on time, or the propensity of the buyer to make unexpected changes to specifications.

The HMT considers whether a hypothetical monopsonist likely would undertake a SSNIPT, such as a reduction in price paid for inputs, or imposing less favorable terms on suppliers. (See Section 4.2.C for more discussion about competition in settings where terms are set through auctions and negotiations, as is common for input markets.)

When defining a market for labor the Agencies will consider the job opportunities available to workers who supply a relevant type of labor service, where worker choice among jobs or between geographic areas is the analog of consumer choices among products and regions when defining a product market. The Agencies may consider workers' willingness to switch in response to changes to wages or other aspects of working conditions, such as changes to benefits or other non-wage compensation, or adoption of less flexible scheduling. Depending on the occupation, alternative job opportunities might include the same occupation with alternative employers, or alternative occupations. Geographic market definition may involve considering workers' willingness or ability to commute, including the availability of public transportation. The product and geographic market definition may involve assessing whether workers may be targeted for less favorable wages or other terms of employment according to factors such as education, experience, certifications, or work locations. The Agencies may define cluster markets for different jobs when firms employ workers in a variety of jobs characterized by similar competitive conditions (see Section 4.3.D.4).

4.4. Calculating Market Shares and Concentration

This subsection further describes how the Agencies calculate market shares and concentration metrics.

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[91] *See Illumina*, slip op. at 12 (affirming a relevant market defined around "what . . . developers reasonably sought to achieve, not what they currently had to offer").

As discussed above, the Agencies may use evidence about market shares and market concentration as part of their analysis. These structural measures can provide insight into the market power of firms as well as into the extent to which they compete. Although any market that is properly identified using the methods in Section 4.3 is valid, the extent to which structural measures calculated in that market are probative in any given context depends on a number of considerations. The following market considerations affect the extent to which structural measures are probative in any given context.[92]

First, structural measures may be probative if the market used to estimate them includes the products that are the focus of the competitive concern that the structural inquiry intends to address. For example, the concentration measures discussed in Guideline 1 will be most probative about whether the merger eliminates substantial competition between the merging parties when calculated on a market that includes at least one competing product from each merging firm.

Second, the market used to estimate shares should be broad enough that it contains sufficient additional products so that a loss of competition among all the suppliers of the products in the market would lead to significantly worse terms for at least some customers of at least one product. Markets identified using the various tools in Section 4.3 can satisfy this condition—for example, all markets that satisfy the HMT do so.

Third, the competitive significance of the parties may be understated by their share when calculated on a market that is broader than needed to satisfy the considerations above, particularly when the market includes products that are more distant substitutes, either in the product or geographic dimension, for those produced by the parties.

4.4.A. Market Participants

All firms that currently supply products (or consume products, when buyers merge) in a relevant market are considered participants in that market. Vertically integrated firms are also included to the extent that their inclusion accurately reflects their competitive significance. Firms not currently supplying products in the relevant market, but that have committed to entering the market in the near future, are also considered market participants.

Firms that are not currently active in a relevant market, but that very likely would rapidly enter with direct competitive impact in the event of a small but significant change in competitive conditions, without incurring significant sunk costs, are also considered market participants. These firms are termed "rapid entrants." Sunk costs are entry or exit costs that cannot be recovered outside a relevant market. Entry that would take place more slowly in response to a change in competitive conditions, or that requires firms to incur significant sunk costs, is considered in Section 3.2.

Firms that are active in the relevant product market but not in the relevant geographic market may be rapid entrants. Other things equal, such firms are most likely to be rapid entrants if they are already active in geographies that are close to the geographic market. Factors such as transportation

[92] For simplicity, the discussion in the text focuses on the case where concerns arise that involve competition among the suppliers of products; analogous considerations may also arise for suppliers of services, or when concerns arise about competition among buyers of a product or service, or when analyzing market shares in certain specific settings (see Section 4.3.D).

costs are important; or for services or digital goods, other factors may be important, such as language or regulation.

In markets for relatively homogeneous goods where a supplier's ability to compete depends predominantly on its costs and its capacity, and not on other factors such as experience or reputation in the relevant market, a supplier with efficient idle capacity, or readily available "swing" capacity currently used in adjacent markets that can easily and profitably be shifted to serve the relevant market, may be a rapid entrant. However, idle capacity may be inefficient, and capacity used in adjacent markets may not be available, so a firm's possession of idle or swing capacity alone does not make that firm a rapid entrant.

4.4.B. Market Shares

The Agencies normally calculate product market shares for all firms that currently supply products (or consume products, when buyers merge) in a relevant market, subject to the availability of data. The Agencies measure each firm's market share using metrics that are informative about the market realities of competition in the particular market and firms' future competitive significance. When interpreting shares based on historical data, the Agencies may consider whether significant recent or reasonably foreseeable changes to market conditions suggest that a firm's shares overstate or understate its future competitive significance.

How market shares are calculated may further depend on the characteristics of a particular market, and on the availability of data. Moreover, multiple metrics may be informative in any particular case. For example:

- Revenues in a relevant market often provide a readily available basis on which to compute shares and are often a good measure of attractiveness to customers.
- Unit sales may provide a useful measure of competitive significance in cases where one unit of a low-priced product can serve as a close substitute for one unit of a higher-priced product. For example, a new, much less expensive product may have great competitive significance if it substantially erodes the revenues earned by older, higher-priced products, even if it earns relatively low revenues.
- Revenues earned from recently acquired customers (or paid to recently acquired buyers, in the case of merging buyers) may provide a useful measure of competitive significance of firms in cases where trading partners sign long-term contracts, face switching costs, or tend to re-evaluate their relationships only occasionally.
- Measures based on capacities or reserves may be used to calculate market shares in markets for homogeneous products where a firm's competitive significance may derive principally from its ability and incentive to rapidly expand production in a relevant market in response to a price increase or output reduction by others in that market (or to rapidly expand its purchasing in the case of merging buyers).
- Non-price indicators, such as number of users or frequency of use, may be useful indicators in markets where price forms a relatively small or no part of the exchange of value.

Federal Trade Commission Statement Concerning Brand Drug Manufacturers' Improper Listing of Patents in the Orange Book

I. Introduction

Brand drug manufacturers may be harming generic competition through the improper listing of patents in the Food and Drug Administration's ("FDA") Approved Drug Products with Therapeutic Equivalence Evaluations, known as the "Orange Book."[1]

Generic competition for brand-name drugs results in lower prices, increased access, and significant cost savings for consumers and the healthcare system. The Hatch-Waxman Act and FDA regulations set forth the criteria for listing patents in the Orange Book.[2] The Orange Book puts generic companies on notice of certain types of patents that a brand company claims cover its product. Patents listed in the Orange Book must claim the reference listed drug or a method of using it. By listing patents, brand drug manufacturers may benefit from a 30-month stay of FDA approval of generic drug applications, regardless of whether a court ultimately finds the patent at issue is valid or infringed by the competing product.

Brand drug manufacturers are responsible for ensuring their patents are properly listed. Yet certain manufacturers have submitted patents for listing in the Orange Book that claim neither the reference listed drug nor a method of using it. When brand drug manufacturers abuse the regulatory processes set up by Congress to promote generic drug competition, the result may be to increase the cost of and reduce access to prescription drugs.

The goal of this policy statement[3] is to put market participants on notice that the FTC intends to scrutinize improper Orange Book listings to determine whether these constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.[4]

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[1] The Orange Book is the FDA's official source for listing prescription (and nonprescription) drug products approved in an application under Section 505 of the Federal Food, Drug, and Cosmetic Act ("FDCA"), codified at 21 U.S.C. §301, *et seq*., related patent and exclusivity information, and other important information including therapeutic equivalence.

[2] 21 U.S.C. §§ 355(b)(1)(A)(viii), 355(c)(2); 21 C.F.R. § 314.53(b)(1).

[3] This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates one or more existing statutory or regulatory requirements. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act or other statutes. Pursuant to the Congressional Review Act (5 U.S.C. § 801 *et seq*.), the Office of Information and Regulatory Affairs designated this Policy Statement as not a "major rule," as defined by 5 U.S.C. § 804(2).

[4] Although this statement focuses on unfair methods of competition, the Commission may also investigate such conduct under the Commission's authority to prevent unfair or deceptive acts or practices. *See* 15 U.S.C. §§ 45(a), (n).

II. Statutory and regulatory background

In 1984, Congress passed the Hatch-Waxman Act[5] to encourage generic drug competition, establishing an abbreviated regulatory pathway for speedy approval of generic equivalent drugs through the filing of an abbreviated new drug application ("ANDA").[6] Alternately, a company seeking to market a modified ("follow-on") version of an existing brand drug—such as with a "new indication or new dosage form"—can file an application pursuant to Section 505(b)(2).[7]

As part of the Hatch-Waxman framework, brand drug manufacturers are required to submit information to the FDA about certain types of patents covering the products described in their new drug application ("NDA"). "The purpose of listing a patent in the Orange Book is to put potential generic manufacturers on notice that the brand considers the patent to cover its drug."[8] The Orange Book patent list is the statutory mechanism for identifying and potentially resolving certain patent disputes while 505(b)(2) applications[9] and ANDAs are still under review by the FDA.

Under 21 U.S.C. § 355, as amended by the Orange Book Transparency Act of 2020,[10] the brand manufacturers must submit for listing a patent that:

> (I) claims the drug for which the applicant submitted the application and is a drug substance (active ingredient) patent or a drug product (formulation or composition) patent; or
>
> (II) claims a method of using such drug for which approval is sought or has been granted in the application.[11]

"Patent information that is not the type of patent information required by subsection (b)(1)(A)(viii) shall not be submitted. . . ."[12]

A drug company that seeks to market a generic or follow-on version of a brand drug for which there are patents listed in the Orange Book must provide a "certification" with respect to each listed patent "which claims the listed drug . . . or which claims a use for such listed drug for

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[5] Pub. L. No. 98-417, 98 Stat. 1585 (1984). *See also* H.R. REP. NO. 98-857, at 14–15 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2647, 2647–48.
[6] *See* 21 U.S.C. § 355(j)(2)(A)(iv).
[7] *Fed. Trade Comm'n v. AbbVie Inc*., 976 F.3d 327, 339 (3d Cir. 2020) (discussing 21 U.S.C. § 355(b)(2)). Like an ANDA applicant, a 505(b)(2) applicant can rely on the FDA's finding of safety and effectiveness for the brand drug product and need only "produce some data, including whatever 'information [is] needed to support the modification(s).'" *Id.* (quoting 21 C.F.R. § 314.54(a)).
[8] *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig*., 333 F. Supp. 3d 135, 149 (E.D.N.Y. 2018).
[9] As used herein, "505(b)(2)" refers to Section 505(b)(2) of the FDCA, codified at 21 U.S.C. § 355(b)(2).
[10] Pub. L. No. 116-290, 134 Stat. 4889 (2021).
[11] 21 U.S.C. § 355(b)(1)(A)(viii). *See also* 21 U.S.C. §§ 355(c)(2), 21 C.F.R. § 314.53 (submission of patent information). Only the patent information submitted under section §355(c)(2) is listed in the Orange Book. A patent that is identified as claiming a method of using such drug shall be filed pursuant to section §355(c)(2) for listing in the Orange Book only if the patent claims a method of use approved in the application.
[12] 21 U.S.C. § 355(c)(2).

which the applicant is seeking approval."[13] If the Orange Book listed patents are not expired, the generic company can file a "paragraph IV" certification stating the generics' view that the brand company's patent is "invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted."[14] A paragraph IV certification generally triggers an immediate right for the brand company to sue for infringement,[15] which if done timely, generally results in an automatic, 30-month stay of any approval of the generic company's ANDA or 505(b)(2) application by the FDA.[16]

NDA holders[17] are responsible for ensuring that Orange Book patent information is consistent with the listing requirements in 21 C.F.R. § 314.53, and subsection (c)(2)(ii)(R) requires the person who submits the patent information to attest under penalty of perjury that the submission complies with this regulation.[18]

III. Improper listing of patents in the Orange Book may harm competitive conditions in pharmaceutical markets

Brand manufacturers' listing in the Orange Book patents that do not meet the statutory listing criteria undermines the competitive process and may constitute an unfair method of competition in violation of Section 5 of the FTC Act.

Improper Orange Book listings may have played a role in distorting pharmaceutical markets for decades. The Supreme Court has observed that since the late 1990s there has been evidence that some brand drug companies were exploiting the Orange Book listing process "to prevent or delay the marketing of generic drugs."[19] The FTC examined the potential anticompetitive effect of improper Orange Book listings as part of a 2002 study, in which it identified numerous instances in which the 30-month stay was used to block competition.[20] The same year, the FTC charged Biovail Corporation for, among other things, wrongfully listing a

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[13] *Id*. at § 355(j)(2)(A)(vii).
[14] *Id*. at § 355(j)(2)(A)(vii)(IV). If the generic is not contending the patents are invalid or not infringed, it would simply file a "paragraph III" certification signifying it will wait to come to market until patent expiry. *Id*.
[15] There is no right to file an infringement suit in response to a paragraph IV certification if the patent was obtained by fraud on the United States Patent and Trademark Office or if the infringement suit would be objectively baseless. *See*, *e.g*., *AbbVie Inc.*, 976 F.3d at 361 ("[W]e must not immunize a brand-name manufacturer who uses the Hatch-Waxman Act's automatic, 30-month stay to thwart competition. Doing so would excuse behavior that Congress proscribed in the antitrust laws.").
[16] 21 U.S.C. § 355(j)(5)(B)(iii).
[17] For purposes of this statement the terms "brand drug manufacturer" and "NDA holder" are used synonymously.
[18] According to 21 C.F.R. § 314.53(c)(2)(ii)(R), NDA holders are required to submit a signed verification as part of Form FDA 3542 that states:

> The undersigned declares that this is an accurate and complete submission of patent information for the NDA, amendment, or supplement pending under section 505 of the Federal Food, Drug, and Cosmetic Act. This time-sensitive patent information or response to a request under 21 C.F.R 314.53(f)(1) is submitted pursuant to 21 C.F.R. 314.53. I attest that I am familiar with 21 C.F.R. 314.53 and this submission complies with the requirements of the regulation. I verify under penalty of perjury that the foregoing is true and correct.

[19] *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 408 (2012).
[20] FED. TRADE COMM'N., GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY 39-52 (2022) www.ftc.gov/sites/default/files/documents/reports/generic-drug-entry-prior-patent-expiration-ftc-study/genericdrugstudy_0.pdf.

patent in the Orange Book to block generic competition in violation of the FTC Act.[21] Over the years, the FTC has filed amicus briefs in private litigations relating to the anticompetitive effects of improper Orange Book patent listings, including most recently in *Jazz Pharms., Inc. v. Avadel CNS Pharms.*[22]

Improper Orange Book patent listings may disincentivize investments in developing a competing product and increase the risk of delayed generic and follow-on product entry, reducing patient access to more affordable prescription drugs and increasing costs to the healthcare system. Given the enormous profit margins of many branded drugs, even small delays in generic competition can generate substantial additional profits for brand companies at the expense of patients.

In the Hatch-Waxman framework, Congress struck a careful balance between preserving financial incentives for innovative drug development and accelerating the availability of follow-on lower-priced generics.[23] When brand companies improperly list patents in the Orange Book that do not meet the statutory criteria, it undermines the pro-competitive goals of Congress and risks significantly harming patients. By improperly listing a patent and timely filing an infringement suit, a brand can generally rely on the automatic stay to block FDA approval of a competing drug product, generally for 30 months, regardless of the validity or scope of the patent and regardless of whether the patent meets the statutory listing criteria. As a result, a generic company with a competing product facing an infringement suit based on a patent that was improperly listed in the Orange Book cannot launch its product because the automatic stay would prevent the FDA from granting approval to market the product. Patients suffer because they are deprived of the ability to choose between competing products and may be forced to pay inflated prices.[24]

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[21] Decision and Order, *In re Biovail Corp*., FTC Dkt. No. C-4060 (Oct. 2, 2002).

[22] *See* Brief for Fed. Trade Comm'n as *Amicus Curiae*, *Jazz Pharms., Inc. v, Avadel CNS Pharms*. No. 1:21-cv-00691 (D. Del. Nov. 10, 2022) (Doc. No. 22-3) (arguing that a patent covering a system for implementing a REMS was not properly listed), https://www.ftc.gov/system/files/ftc_gov/pdf/P163500JazzPharmaAmicusBrief.pdf; Mem. of Law of the Federal Trade Commission as *Amicus Curiae*, *SmithKline Beecham Corp. v. Apotex Corp*., No. 99-cv-4304 (E.D. Pa. January 28, 2003), https://www.ftc.gov/sites/default/files/documents/amicus_briefs/smithkline-beechamcorp.v.apotex-corp./smithklineamicus.pdf; Mem. of Law of *Amicus Curiae* the Federal Trade Commission In Opposition to Defendant's Motion to Dismiss, *In re: Buspirone Patent Litig.*, MDL Docket No. 1410 (S.D.N.Y. Jan. 8, 2002), https://www.ftc.gov/sites/default/files/documents/amicus_briefs/re-buspirone-antitrust-litigation/buspirone.pdf; Brief for Fed. Trade Comm'n as *Amicus Curiae*, *American Bioscience, Inc. v. Bristol-Myers Squibb Co*., No. 00-cv-08577 (C.D. Cal. September 7, 2000), https://www.ftc.gov/sites/default/files/documents/amicus_briefs/american-bioscience-v.bristol-myers/amicusbrief.pdf.

[23] The FDA has noted that these requirements "reflect an attempt to balance two competing interests: Promoting competition between 'brand name' or 'innovator drugs' and 'generic' drugs and encouraging research and innovation." Applications for FDA Approval to Market a New Drug: Patent Submission and Listing Requirements and Application of 30-Month Stays on Approval of Abbreviated New Drug Applications Certifying That a Patent Claiming a Drug Is Invalid or Will Not Be Infringed, 68 Fed. Reg. 36,676 (June 18, 2003) (codified at 21 C.F.R. pt. 314).

[24] *See* Fed. Trade Comm'n Generic Drug Entry Study, *supra* note 20.

IV. The FTC will enforce the law against those companies and individuals who continue to improperly list patents in the Orange Book

The FTC intends to use its full legal authority to protect patients and payors, including Medicare and Medicaid, from business practices that tend to negatively affect competitive conditions. This includes taking actions against companies and individuals that improperly list patents in the Orange Book that do not meet the statutory listing criteria.

Listing patents in the Orange Book that do not meet the statutory listing criteria may constitute an unfair method of competition in violation of Section 5 of the FTC Act.[25] First, the Commission views the improper listing of patents in the Orange Book as a method of competition. It is undertaken by a brand drug manufacturer and is not an inherent market condition.[26] Second, improperly listing patents in the Orange Book can be unfair because it is not competition on the merits of drug quality or price, and it tends to negatively affect competitive conditions by impeding opportunities for generic rivals to compete, thus limiting consumer choice.[27] Further, recognizing that improperly listing patents in the Orange Book can be an unfair method of competition is consistent with the FTC's historical use of Section 5, which has reached "conduct resulting in direct evidence of harm, or likely harm to competition, that does not rely upon market definition."[28] Accordingly, the FTC intends to scrutinize whether brand drug companies and responsible individuals are improperly listing patents in violation of Section 5.

The improper listing of patents in the Orange Book may also constitute illegal monopolization. Monopolization requires proof of "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[29] This requires proof that "the defendant has engaged in improper conduct that has or is likely to have the effect of controlling prices or excluding competition,"[30] and courts have recognized that improperly listing patents in the

[25] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.
[26] *Id*. at 8 ("The conduct must implicate competition, but the relationship can be indirect. For example, misuse of regulatory processes that can create or exploit impediments to competition (such as those related to licensing, patents, or standard setting) constitutes a method of competition."). *See Charles Pfizer & Co. v. FTC,* 401 F.2d 574, 585 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969) (affirming Commission order holding that defendants violated Sec. 5 of the Federal Trade Commission Act where substantial evidence supported the Commission's findings that misrepresentations and withholding of material information misled Patent Office officials into granting a patent on tetracycline).
[27] Fed. Trade Comm'n Unfair Methods of Competition Policy Statement, *supra* note 25 at 8-9.
[28] *Id.* at 15 n.85 (citing *Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (finding of sustained effects legally sufficient even in absence of elaborate market analysis); *Toys "R" Us v. Fed. Trade Comm'n*, 221 F.3d 928, 937 (7th Cir. 2000) (finding "sufficient proof of anticompetitive effects [such] that no more elaborate market analysis was necessary"). *Cf. Fed. Trade Comm'n v. Staples, Inc.,* 970 F. Supp. 1066, 1075-6 (D.D.C. 1997) (relying in part on direct evidence that pricing for key products from office superstores lower where three such stores exist in same metropolitan area and higher where only one or two such stores present).
[29] *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).
[30] *PepsiCo, Inc. v. Coca-Cola Co*., 315 F.3d 101, 108 (2d Cir. 2002).

Orange Book may constitute an "improper means" of competition.[31] Accordingly, improperly listing patents in the Orange Book may also be worthy of enforcement scrutiny from government and private enforcers under a monopolization theory. Additionally, the FTC may also scrutinize a firm's history of improperly listing patents during merger review.[32]

Individuals who submit or cause the submission of improper Orange Book patent listings, including those who certify compliance under 21 C.F.R. § 314.53(c)(2)(ii)(R), may be held individually liable.[33] Further, if the FTC encounters false certifications filed under 21 C.F.R. § 314.53(c)(2)(ii)(R) that may constitute a potential criminal violation for the submission of false statements,[34] the Commission may refer such cases to the U.S. Department of Justice for further investigation.

NDA holders must ensure that submitted patent information complies with all applicable Orange Book requirements under the law. Accordingly, NDA holders that currently have patents listed in the Orange Book must ensure that those listings comply with the law and should immediately remove any patents that fail to meet listing requirements. Failure to remove improperly listed patents from the Orange Book promptly may result in legal liability under the FTC Act. The FTC may also dispute patent listings through the FDA process set out in 21 C.F.R. 314.53(f)(1), which allows any interested person to request correction of patent information published in the Orange Book.

Patents improperly listed in the Orange Book can significantly undermine fair competition and harm the American public. The FTC will continue to use all its tools to halt unlawful business practices that contribute to high drug prices.

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[31] *In re Lantus Direct Purchaser Antitrust Litig*., 950 F.3d 1, 7 (1st Cir. 2020) (quoting *Town of Concord v. Bos. Edison Co*., 915 F.2d 17, 21 (1st Cir. 1990)). In *In re Lantus*, the First Circuit found a device patent covering an injector pen drive mechanism that drugmaker Sanofi submitted for listing in the Orange Book was improperly listed because the patent did not claim insulin glargine or the Lantus SoloSTAR product. *Id. See also United Food & Com. Workers Local 1776 v. Takeda Pharm. Co*., 11 F.4th 118, 134-136 (2d Cir. 2021).

[32] 15 U.S.C. § 18. *See also* Michael A. Carrier, *et al*., *Prior Bad Acts and Merger Review,* 111 GEO. L. J. 106 (2023).

[33] *See Fed. Trade Comm'n v. Shkreli*, 581 F. Supp. 3d 579, 637 (S.D.N.Y. 2022) (citing *Hartford-Empire Co. v. United States*, 323 U.S. 386, 407 (1945)); *Lorain Journal Co. v. United States*, 342 U.S. 143, 145 n.2 (1951) (officers and directors "participated in the conduct alleged to constitute the attempt to monopolize").

[34] 18 U.S.C. § 1001. FDA Form 3542—the form used by NDA holders to submit their patent information for listing in the Orange Book—warns those submitting patents for listing that "[a] willfully and knowingly false statement is a criminal offense under 18 U.S.C. 1001" directly beneath the declaration certifying to the accuracy and completeness of the submission. *See* FDA Form 3542, Section 6, https://www.fda.gov/media/133512/download.

Policy Statement of the Federal Trade Commission on Franchisors' Use of Contract Provisions, Including Non-Disparagement, Goodwill, and Confidentiality Clauses[1]

I. Introduction

The Federal Trade Commission ("Commission" or "FTC") is charged with protecting franchisees from unfair methods of competition and unfair and deceptive practices.[2] Communications with franchisees are essential for the Commission to accomplish this statutory mandate. The FTC is concerned that franchisees are reluctant or unwilling to voluntarily discuss or file reports about their experiences with franchisors, even if the franchisees believe a law violation has occurred.[3] The Commission is issuing this Policy Statement to make clear its view that provisions included in franchise agreements or other contractual documents between franchisors and franchisees[4] may not restrict franchisees' communications with the Commission or any other state or federal law enforcer or regulator about potential law violations.[5]

In 2022, after hearing that franchisees may have had difficulty filing reports using the Commission's reportfraud.ftc.gov portal, the Commission streamlined the reporting process.[6] Since then, the number of reports has increased but the FTC remains concerned that some franchisees continue to report that they feel chilled or even contractually prohibited from

[1]This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates one or more existing statutory or regulatory requirements. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act or other statutes.

[2]15 U.S.C. 41-58, as amended; Franchise Rule, 16 C.F.R. pt. 436. The Franchise Rule is a pre-sale disclosure rule, which requires franchisors to provide prospective franchisees with material information to help prospective franchisees determine whether a franchise deal is in his or her best interest. 72 FR 15444 (Mar. 30, 2007).

[3] This concern is not unique to franchising. *See, e.g.*, Contracts that Impede Bureau of Competition Investigations, FED. TRADE COMM'N (June 15, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/Formal-Analysis.pdf.

[4] Typically, a written contractual agreement – often called a "franchise agreement" – is entered into between a franchisee and franchisor. (That agreement also typically references, incorporates, or attaches the franchisor's Operating Manual.) Once signed, the franchise agreement remains in effect for a specified period of time stated in the agreement. As part of the Franchise Disclosure Document required by the FTC's Franchise Rule, franchisors must provide prospective franchisees with copies of all contracts, including the franchise agreement, at least fourteen days before the prospect signs any contract or makes any payment to the franchisor or an affiliate.

[5] The Commission does not intend to provide legal advice to any potential report filers or witnesses and advises anyone with concerns about liability to consult an attorney. The Commission takes no issue with a company's legitimate interest in protecting its intellectual property rights. The Commission notes that it will continue to analyze, on a case-by-case basis, whether contract provisions, such as confidentiality clauses, are unfair or deceptive under Section 5.

[6] *ReportFraud*, FED. TRADE COMM'N, https://reportfraud.ftc.gov (last visited June 6, 2024); Lesley Fair, *Franchise Fundamentals: Reducing the risks – and reporting if things go awry*, FED. TRADE COMM'N (Sept. 5, 2023), https://consumer.ftc.gov/consumer-alerts/2023/09/franchise-fundamentals-reducing-risks-and-reporting-if-things-go-awry (describing how to file a report via reportfraud.ftc.gov).

reporting to the FTC.[7] Franchisee reports and voluntary interviews are a critical part of FTC investigations. If franchisees are unwilling or unable to file reports and discuss their experiences, the FTC's ability to protect franchisees is weakened. Furthermore, the competitive and consumer protection benefits that flow from the franchise business model are undermined.

II. Responses to Request for Information

For several years, the Commission has been concerned that current and former franchisees are reluctant to file reports or speak with Commission staff about their experiences with particular franchises. Franchisee advocates have stated that franchisees fear retribution for speaking out against the franchisor.[8] Franchisees may even be worried about speaking with regulators anonymously.[9]

In 2023, the Commission issued a Request for Information ("RFI") related to franchise agreements and franchisor business practices in order to explore the ways in which franchisors may exert control over franchisees and their workers, including the effect certain contractual provisions have on franchisees' ability to file reports with regulators.[10] The RFI sought public comment on several topics, including whether non-disparagement, goodwill, and similar clauses inhibit franchisees from filing reports with regulators or from providing information to prospective franchisees or third parties about their experience with a franchise system.[11]

The Commission posted approximately 2,200 public comments in response to the RFI.[12] Among the commenters who addressed the question of whether such clauses impact franchisees' ability to speak with regulators, some expressed concerns that such clauses are likely to impede franchisees from speaking with the government.[13] Some of those commenters filed their

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[7] *See infra* n.13 (comments filed in response to the Request for Information); FED. TRADE COMM'N, CONSUMER SENTINEL NETWORK BOOK 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Annual-Data-Book-2023.pdf. Of the 110,504 reports related to business and job opportunities, 3,232 pertained to franchises.

[8] *See e.g, Federal Trade Commission: Actions Needed to Improve Education Efforts and Awareness of Complaint Process for Franchise Owners*, GOVERNMENT ACCOUNTABILITY OFFICE (Apr. 5, 2023), https://www.gao.gov/assets/gao-23-105338.pdf.

[9] *See infra* n.13.

[10] Fed. Trade Comm'n, Solicitation for Public Comments on Provisions of Franchise Agreements and Franchisor Business Practices, https://www.ftc.gov/system/files/ftc_gov/pdf/Franchise-RFI.pdf.

[11] *Id*.

[12] The Commission received 5,291 comments. Of those, 2,216 were publicly posted on the docket; the remainder were nonresponsive.

[13] FTC-2023-0026-0042, filed by Anonymous ("Even submitting comments such as this one, to a governmental agency, is fraught due to the non-disparag[e]ment clauses included in all Franchise Agreements."); FTC-2023-0026-0049, filed by Anonymous ("Furthermore, the non-disparagement and goodwill clauses are concerning. Franchisors often enforce these clauses to prevent franchisees from filing complaints about unfair or deceptive conduct. This not only harms franchisees but also consumers and workers."); FTC-2023-0026-0167, filed by Caroline Fichter ("The mere presence of a non-disparagement clause in the franchise agreement has an immediate and devastating effect on the franchisee's behavior. It prevents them from providing honest feedback to prospective franchisees and from reporting unfair and deceptive practices to federal or state authorities."); FTC-2023-0026-1034, filed by Coalition of Franchisee Associations ("Non-disparagement clauses contained in the FA further prohibit franchisees from

comments anonymously.[14] At least one commenter stated that a franchisor threatened to terminate franchisees who spoke with regulators.[15] Some noted a fear of retaliation for filing reports or otherwise communicating with regulators about their experience.[16] Commenters disagreed about the extent to which franchisors use non-disparagement clauses, but agreed that confidentiality clauses are often included in settlement agreements and that goodwill clauses are very common. For example, one commenter noted that, while historically common in settlement agreements, non-disparagement and goodwill clauses are routinely included in franchise agreements and have expanded dramatically over the past several years.[17] Others noted that, in their experience, specific non-disparagement clauses are uncommon, but clauses that prohibit the franchisee from doing anything that reflects negatively on the franchisor's goodwill are very

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discussing their concerns with prospective franchisees or anyone at all - including government agencies."); FTC-2023-0026-1093, filed by Maryland State Bar Association ("[W]e encourage the FTC to make a clear distinction between clauses that prohibit disparaging the franchisor or the brand in consumer-facing public forums, as opposed to clauses that inhibit franchisee communications with prospective franchisees, their fellow active franchisees, or with governmental agencies or in courts with regard to the franchise relationship."); FTC-2023-0026-1557, filed by Anonymous ("Non-disparagement, goodwill or similar clauses, by their very nature, ABSOLUTELY inhibit franchisees from filing complaints with state, local, or federal agencies related to unfair or deceptive conduct by franchisors. As a franchisee, the fear of retribution and legal action is too great to justify risking a complaint that can be tied back to them."); FTC-2023-0026-2104, filed by North American Securities Administrators Association ("Nondisparagement and goodwill clauses are also ubiquitous in franchising. Those agreements that limit franchisees' ability to complain to government agencies are of particular concern. One such agreement states that the franchisee 'must covenant never to commence any action or proceeding against [the franchisor], file any complaint with any regulatory authority concerning [the franchisor] or otherwise assert any claim against [the franchisor].'"); FTC-2023-0026-2062, filed by National Owners Association ("The nondisparagement clause, paired with systemic threats, intimidation, and retaliation, significantly inhibits franchisees from filing complaints with state, local, or federal agencies related to unfair or deceptive conduct by franchisors, or even from speaking publicly or participating in franchisee-only organizations designed to protect and pursue franchisee interests.").

[14] FTC-2023-0026-0042, filed by Anonymous; FTC-2023-0026-0049, filed by Anonymous; FTC-2023-0026-1557, filed by Anonymous.

[15] FTC-2023-0026-1952, filed by Thomas Ayres, Warner, Federico & Ryan LLP ("The franchisor has threatened to terminate franchisees that sought clarification from regulators on new policies and that were quoted in trade publications because such actions falsely stating [sic] that the comments reflected materially and unfavorably upon the operation and reputation of the system and disclosed sensitive and confidential information.").

[16] FTC-2023-0026-2062, filed by National Owners Association; FTC-2023-0026-2123, filed by North American Subway Association of Franchisees ("Franchisees, anecdotally, are and have been fearful of retribution for launching complaints to proper authorities."); FTC-2023-0026-2170, filed by American Association of Franchisees and Dealers ("Many franchise agreements now consider anything said negatively about the brand, no matter who it is said to, a violation of the non-disparagement clause. This includes between franchisees that are part of a chapter or franchisee association or a franchisee post on their private discussion groups. Often any negative discussion is followed by a threatening legal letter to the franchisee which quickly silences them. But it often does not stop there; increased inspections follow and amazingly, these franchisees are found in default for another reason. The retaliation is obvious, but often hard to prove, especially since in many businesses it is not that hard to find some level of default."); FTC-2023-0026-1943, filed by Independent Association of Home Instead Franchisees, Inc ("We are aware of at least one case in our network where a franchisee was sanctioned for communications with government regulatory authority but will not provide additional details for fear of further retaliation against the franchisee.")

[17] FTC-2023-0026-1941, filed by Bundy & Fichter; *see also* FTC-2023-0026-2104, filed by North American Securities Administrators Association ("Non-disparagement and goodwill clauses are also ubiquitous in franchising").

common.[18] A few commenters stated that, while franchise agreements may include non-disparagement or goodwill clauses, the franchisors either do not enforce them or such provisions do not inhibit franchisees' ability to communicate with regulators.[19]

III. Analysis

The Commission has seen contract provisions that may restrict current and former franchisees from speaking about potential law violations. These provisions may take the form of non-disparagement clauses ("franchisee shall not disparage the brand in any way"), confidentiality or non-disclosure clauses ("franchisee is prohibited from sharing *any* information about the franchise or their experience"), goodwill clauses ("franchisee shall not engage in any conduct that may tarnish the goodwill of the brand"), and similar clauses. They are sometimes included in franchise agreements or may be entered into post-sale, including at termination of the relationship.[20]

Generally, case law establishes that clauses that impair or prohibit free communication about potential law violations with an administrative agency acting within its statutory mandate are void and unenforceable. For example, courts have struck down contractual clauses that otherwise prevent a government agency from seeking and obtaining complete, candid information in

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[18] FTC-2023-0026-1093, filed by Maryland State Bar Association ("It is our experience that these clauses are not usually present in Franchise Agreements, other than a general clause that the Franchisee does not do anything that can reflect negatively on the Franchisor's goodwill."); FTC-2023-0026-1936, filed by Lathrop GPM, LLP ("We are aware of very few instances where non-disparagement provisions are used in standard franchise agreements, with such provisions appearing in approximately 6% of the FDDs we surveyed. Such clauses are generally used in termination, release, and settlement agreements to resolve disputes and prevent adverse actions by both parties. It is not clear what is meant in the RFI by "goodwill" clauses. If this is intended to mean that the trademark goodwill arising from the franchisee's use of the franchised brand inures to the benefit of the franchisor, then such clauses are likely universal in franchising…").

[19] FTC-2023-0026-1724, filed by Wyndham Hotels & Resorts ("The existence of the goodwill provision in our franchise agreements does not inhibit franchisees from pursuing claims they feel they may have relating to unfair or deceptive conduct or from providing non-confidential, non-trade secret information to prospective or current franchisees or third parties."); FTC-2023-0026-2152, filed by International Franchise Association ("IFA believes that franchisees generally support such clauses and that the clauses do not inhibit franchisees from sharing information with other franchisees, prospective franchisees or with regulators."); FTC-2023-0026-2129, filed by Domino's Pizza, Inc. ("The SFA contains a non-disclosure provision which is intended, in part, to prohibit franchisees from disclosing non-public information about Domino's or the Domino's system to others outside the Domino's system, including financial analysts, or from disparaging Domino's or the Domino's system in the manner that would harm the Domino's brand. The provision is not intended to prohibit franchisees from communicating with other franchisees, prospective franchisees, or federal, state, or local government agencies, nor has Domino's sought to enforce this provision to prevent any such communication.").

[20] The Franchise Rule requires franchisors to disclose the use of confidentiality clauses, and nothing in this Statement alters that requirement. *See* 16 C.F.R. § 436.5(t)(7). To the extent, however, such clauses, as drafted, impair or prohibit the free communication about potential law violations with a government agency acting within its statutory mandate, the Commission views such clauses as void and unenforceable and in violation of Section 5 of the FTC Act. To the extent such clauses narrowly articulate a company's legitimate interest in protecting its intellectual property rights, however, they raise no concern under this Statement. *See supra* n.5.

furtherance of a statutory mandate.[21] Such clauses cannot operate to inhibit a franchisee from reporting potential law violations to the government.

Similarly, the FTC has challenged companies' use of tactics, including non-disparagement clauses, that discourage purchasers from speaking or publishing truthful or non-defamatory negative comments or reviews as unfair practices under the FTC Act. For example, in *FTC v. Roca Labs, Inc.*, the court found on summary judgment that Defendants' use of gag clauses to prohibit purchasers from speaking or publishing truthful or non-defamatory negative comments or reviews about the Defendants, their products, or their employees was an unfair practice in violation of Section 5 of the FTC Act.[22]

A practice is unfair if it causes or is likely to cause substantial consumer injury, which consumers cannot reasonably avoid, and which is not outweighed by benefits to consumers or competition.[23] Clauses that prohibit a franchisee from reporting potential law violations to the government are unfair. Similarly, implicit or explicit threats of retaliation, by legal action or otherwise, against a franchisee for reporting potential law violations to the government are unfair.

By suppressing reports of potential legal violations by franchisors to the government, franchisors impede the flow of franchisee reports and voluntary interviews that are critical to government

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[21] *See, e.g.*, EEOC v. Astra USA, 94 F.3d 738, 744–45 (1st Cir. 1996) (holding that employers may not use confidentiality agreements to interfere with or restrict law enforcement agencies' ability to interview their employees); FTC v. AMG Services, Inc., No. 2:12-cv-00536-GMN-VCF, 2013 WL 12320929, at *2 (D. Nev. Aug. 20, 2013) ("[T]he court finds that the confidentiality agreements at issue before the court are unenforceable to prohibit former employees from willingly cooperating with the FTC."); Sparks v. Seltzer, No. 05-CV-1061 (NG) (KAM), 2006 WL 2358157, at *4 (E.D.N.Y. Aug. 14, 2006) ("Indeed, agreements restricting former employee revelation of events in the workplace which are not privileged but may involve violations of federal law have the effect of hindering implementation of the Congressionally mandated duty to enforce the provisions of federal statutes.") (internal quotations and citation omitted); EEOC v. Int'l Profit Assocs., No. 01 C 4427, 2003 U.S. Dist. LEXIS 6761 at *6 (N.D. Ill. Apr. 21, 2003) ("[A]ny contractual impairment of present or former [] employees' ability to communicate freely with the EEOC is void as against public policy."); Hoffman v. Sbarro, Inc., No. 97 CIV. 4484(SS), 1997 WL 736703, at *1 (S.D.N.Y. Nov. 26, 1997) ("To the extent that the [nondisclosure] agreement might be construed as requiring an employee to withhold evidence relevant to litigation designed to enforce federal statutory rights, it is void.").

[22] FTC v. Roca Labs, Inc*.*, 345 F. Supp. 3d 1375, 1393-96 (M.D. Fla. 2018); *see also* FTC v. World Patent Mktg., *Inc.*, No. 17-CV-20848-DPG (S.D. Fla. May 25, 2017) (in entering a preliminary injunction, court found that "by intimidating, threatening, and coercing consumers from reporting Defendants' misrepresentations, Defendants are able to hinder competition and harm legitimate competitors in the marketplace."), 2017 WL 3508639, Preliminary Injunction entered August 16, 2017; *id.*, Compl. ¶ 36 (alleging that "if consumers do complain to the BBB or law enforcement about Defendants' business practices, Defendants and their lawyers often make legal threats against the complainants until they retract their complaints.").

The Consumer Review Fairness Act (CRFA), 15 U.S.C. § 45b, makes it illegal for companies to include standardized contract provisions that threaten or penalize people for posting honest reviews. Regardless of whether the franchisor/franchisee relationship would fall outside of the CRFA, the Commission is of the view that any contract provision that directly or indirectly restricts or chills communications between franchisees and law enforcers or regulators is an unfair or deceptive act or practice, or an unfair method of competition under Section 5 of the FTC Act. To the extent a contract provision chills communications outside of law enforcers or regulators, the Commission will evaluate its legality on a case-by-case basis.

[23] 15 U.S.C. § 45(n); *see also* Federal Trade Commission Policy Statement on Unfairness, appended to *Int'l. Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984).

investigations.[24] Suppressing such information undermines the government's ability to learn about practices that violate the Franchise Rule, the FTC Act, and other laws. It also impedes the ability of franchisees to demand lawful conduct from the franchisor by exposing such conduct to the government. These limitations undermine the government's ability to police the marketplace and the ability of prospective and existing franchisees to protect themselves, and are thus likely to cause substantial harm. For example, prospective franchisees may not learn about deceptive practices before they invest. Such harm, resulting from the franchisor's contract provisions or communications, is not reasonably avoidable. Most prospective and existing franchisees would need to seek legal counsel on such contractual terms to understand that they are illegal, thus effectively chilling truthful communication with government agencies.[25] No benefits flow from the suppression of truthful information to the government. Indeed, the competitive and consumer protection benefits that flow from the franchise business model are compromised.[26]

Other federal agencies, including the Securities and Exchange Commission, the National Labor Relations Board, the Federal Aviation Administration, and the National Highway Traffic Safety Administration, have determined that such contractual provisions can impede agencies' ability to conduct lawful investigations and, as a result, run contrary to public policy.[27]

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[24] *See also supra* n.22.

[25] *C.f.* Complaint, United States v. Square One Dev. Grp., (E.D. Mo. Nov. 21, 2022) (No. 4:22-cv-01243) (complaint alleged unfairness where defendants induced consumers into signing contracts for timeshare exit services containing non-negotiable and unenforceable terms). *See also* Complaint ¶¶ 30-34, 56-58, United States v. Asset Acceptance Corp. (M.D. Fla. Jan. 30, 2012) (No. 8:12-cv-182-T-27-EAJ), https://www.ftc.gov/sites/default/files/documents/cases/2012/01/120130assetcmpt.pdf (alleging deception where defendant failed to disclose in debt collection activities that it cannot require that consumers pay debts beyond the statute of limitations).

[26] To be clear, this Statement is focused on clauses that restrict or inhibit franchisees from discussing their experience with law enforcers and regulators. The concern is that these types of contract provisions are obstructing the Commission's statutory mandate to protect consumers, including franchisees, from unfair methods of competition and unfair or deceptive acts or practices. This issue is distinct from the potential harm analyzed by the Commission as part of the 2007 rulemaking proceeding for the Franchise Rule focused on whether such clauses would inhibit prospective franchisees' ability to conduct due diligence regarding particular franchise opportunities. 72 Fed. Reg. 15444, 15454-55, 15504-07 (Mar. 30, 2007). Notably, in the amended Franchise Rule, the Commission limited the definition of "confidentiality clause" in a way that it would apply only to restricted speech to *prospective franchisees* and not to regulators. 16 C.F.R. § 436.1(c). At least one commenter noted in the rulemaking that the use of confidentiality clauses may restrict franchisees' willingness to talk to regulators, but the Commission's analysis focused on the harm such clauses would have on prospective franchisees. 72 Fed. Reg. at 15505 ("In addition, one franchisee representative, contended that the harm flowing from confidentiality provisions goes beyond individual franchise sales, noting that such provisions intimidate franchisees into not testifying before legislative committees and public agencies, such as the Federal Trade Commission.").

[27] The U.S. Securities and Exchange Commission adopted Rule 21F-17, which prohibits enforcing or threatening to enforce a confidentiality agreement that would impede communications with the agency. 17 C.F.R. § 240.21F-17. The National Highway Transportation Safety Administration has stated that it is unlawful to use confidentiality and non-disclosure provisions to impede oversight and enforcement-related regulatory obligations. *See, e.g.*, Neal Boudette, *Tesla Model S Suspension Failures Under Scrutiny by Safety Agency*, N.Y. TIMES, June 9, 2016, https://www.nytimes.com/2016/06/10/business/tesla-model-s-nhtsa-suspension-failure.html; *see also* Fed. Aviation Admin., Impact of Non-Disclosure and Confidentiality Covenants on Agency Investigations, https://www.faa.gov/sites/faa.gov/files/about/office_org/headquarters_offices/agc/Non_Disclosure_Guidance.pdf; Complaint and Consent Decree, EEOC v. Baker & Taylor, Inc., No. 13-cv-03729 (N.D. Ill. May 20, 2013), ECF

IV. Conclusion

The FTC takes seriously its statutory obligation to enforce the FTC Act. Whether the contract includes a non-disparagement, non-disclosure, goodwill, or similar clause, the caselaw is clear that such clauses cannot operate to inhibit a franchisee from reporting potential law violations to the government. Clauses prohibiting franchisees from reporting potential law violations to the government are considered unfair and unenforceable. Further, the use of implicit or explicit threats to sue or otherwise retaliate against a franchisee who reports potential law violations to the government is also an unfair practice.

For purposes of this policy statement, it is immaterial when the contract containing the provision was entered, and it is immaterial whether the clause is in a binding contract or any other document. In addition, the principles set forth in this policy statement apply to any communications invoking or referencing the types of clauses described in this statement. Accordingly, any such communications must be consistent with this policy statement.

Nos. 1, 14 (requiring that employee agreements include language protecting the right to communicate with the EEOC and comparable regulatory agencies).

Staff Guidance on the Unlawfulness of Undisclosed Fees Imposed on Franchisees[1]

The Franchise Rule requires franchisors to disclose fees in a Franchise Disclosure Document (FDD) so that prospective franchisees are advised of their likely purchase obligations while operating the franchise.[2] The issue of franchisors imposing and collecting fees from franchisees that were not disclosed in their FDDs recently has been raised with the FTC in various forums, including comments submitted in response to the FTC's Request for Information Related to Franchisors' Business Practices,[3] at an event Chair Khan attended with franchisee associations,[4] and elsewhere. We've heard that one way franchisors may impose previously undisclosed fees is by making changes to the Operating Manual. Within the past year, Washington's Department of Financial Institutions[5] and California's Department of Financial Protection and Innovation[6] have opined on whether franchisors may impose fees on franchisees that were not disclosed in the franchisor's FDD. Given the recent interest in this issue, staff is releasing this guidance regarding the unlawful imposition of undisclosed fees.[7]

The Franchise Rule requires franchisors to disclose in the FDD certain fees.[8] If a franchisor fails to disclose those fees in the FDD, such failure is a violation of the Franchise Rule and Section 5 of the FTC Act.[9]

Furthermore, if a franchisor imposes or collects a new fee, through its operating manual or otherwise, that was not disclosed in the FDD and included in the franchise agreement, the franchisor may be engaging in an unfair act or practice in violation of Section 5 of the FTC Act.[10] Courts have upheld the FTC's view that unilateral changes to contract terms are an unfair act or practice. For example, in *FTC v. Orkin Exterminating Co.*, the 11th Circuit upheld the FTC's finding that Orkin had engaged in an unfair act or practice by increasing the fee it charged customers above the amount provided in their contracts. The company had entered into agreements with consumers to provide lifetime termite protection services for a fixed annual

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[1] This document represents the views of FTC staff and is not binding on the Commission.
[2] 72 Fed. Reg. 15444 (Mar. 30, 2007).
[3] *E.g.,* Comment from Anonymous, FTC-2023-0026-0464; Comment from AAHOA, FTC-2023-0026-1938.
[4] Is Franchising Fair? Franchisee Conversations and the Federal Trade Commission (May 2, 2023), https://register.gotowebinar.com/recording/recordingView?webinarKey=8052325513814056792®istrantEmail=landscooter%40gmail.com.
[5] Wash. State Dep't of Fin. Insts., Franchise Act Interpretive Statement – FIS-09 (Nov. 1, 2023), https://dfi.wa.gov/industry/franchise-act-interpretive-statements/franchise-act-interpretive-statement-fis-09.
[6] *Franchises – Frequently Asked Questions and Answers*, CAL. DEP'T OF FIN. PROT. & INNOVATION, https://dfpi.ca.gov/franchise-investment-law/franchises-frequently-asked-questions-and-answers/#b15 (last visited June 10, 2024).
[7] Staff does not intend to provide legal advice to any franchisor or franchisee and advises anyone with concerns about liability regarding particular practices to consult an attorney.
[8] *E.g.*, 16 C.F.R. § 436.5(e) (initial fees); 16 C.F.R. § 436.5(f) (other fees). Also, Item 9 provides a Table to facilitate finding references to fees throughout the FDD. 16 C.F.R. § 436.5(i).
[9] 16 C.F.R. § 436.6(a).
[10] An act or practice is unfair if it causes or is likely to cause substantial consumer injury, which consumers cannot reasonably avoid, and which is not outweighed by benefits to consumers or competition. 15 U.S.C. § 45(n); *see also* Federal Trade Commission Policy Statement on Unfairness, appended to *Int'l. Harvester Co.*, 104 F.T.C. 949, 1070-76 (1984). We also note that state law may offer additional protections for franchisees against the imposition of undisclosed fees. *E.g.*, Wash. Rev. Code § 19.100.170(2).

fee.[11] Years after entering the contracts, Orkin unilaterally modified the contracts and raised the amount of the annual fee.[12] The Commission found that although there was no deception in the formation of the contracts, the practice was unfair because it caused substantial, unavoidable consumer injury that was not outweighed by benefits to consumers or competition.[13]

Any determination of whether a franchisor is engaged in violations of the Franchise Rule or the FTC Act will be fact specific, and staff is not taking a position on whether any particular company is currently violating the Franchise Rule or Section 5. Nevertheless, franchisors should review their practices to ensure compliance with the law.

[11] 108 F.T.C. 263 (1986), *aff'd*, Orkin Exterminating Co. v. FTC, 849 F.2d 1354 (11th Cir. 1988).
[12] *Id.*
[13] *Id.*

Joint Statement on Competition in Generative AI Foundation Models and AI Products

Margrethe Vestager, Executive Vice-President and Competition Commissioner, European Commission
Sarah Cardell, Chief Executive Officer, U.K. Competition and Markets Authority
Jonathan Kanter, Assistant Attorney General, U.S. Department of Justice
Lina M. Khan, Chair, U.S. Federal Trade Commission

Working in the interests of fair, open, and competitive markets

As competition authorities for the European Union, the United Kingdom and the United States of America, we share a commitment to the interests of our people and economies. Guided by our respective laws, we will work to ensure effective competition and the fair and honest treatment of consumers and businesses. This is grounded in the knowledge that fair, open, and competitive markets will help unlock the opportunity, growth and innovation that these technologies could provide.

Sovereign decision-making

Our legal powers and jurisdictional contexts differ, and ultimately, our decisions will always remain sovereign and independent. However, if the risks described below materialize, they will likely do so in a way that does not respect international boundaries. As a result, we are working to share an understanding of the issues as appropriate and are committed to using our respective powers where appropriate.

A technological inflection point

We have all, in a variety of documents and fora, recognized the transformational potential of artificial intelligence, including foundation models. At their best, these technologies could materially benefit our citizens, boost innovation and drive economic growth. Although there are many unknowns about the precise trajectory these tools will take, generative AI has rapidly evolved in recent years, potentially becoming one of the most significant technological developments of the past couple of decades.

Technological inflection points can introduce new means of competing, catalyzing opportunity, innovation, and growth. Accordingly, we must work to ensure the public reaps the full benefits of these moments. This requires being vigilant and safeguarding against tactics that could undermine fair competition. For example, there are risks that firms may attempt to restrict key inputs for the development of AI technologies; that firms with existing market power in digital markets could entrench or extend that power in adjacent AI markets or across ecosystems, taking advantage of feedback and network effects to increase barriers to entry and harm competition; that lack of choice for content creators among buyers could enable the exercise of monopsony power; and that AI may be developed or wielded in ways that harm consumers, entrepreneurs, or other market participants.

Given the speed and dynamism of AI developments, and learning from our experience with digital markets, we are committed to using our available powers to address any such risks before they become entrenched or irreversible harms.

Risks to competition

While we recognise the great potential benefits from the new services that AI is helping bring to market, we also see risks requiring ongoing vigilance. Key to assessing these risks will be focusing on how the emerging AI business models drive incentives, and ultimately behaviour.

1. **Concentrated control of key inputs**. Specialized chips, substantial compute, data at scale, and specialist technical expertise are critical ingredients to develop foundation models. This could potentially put a small number of companies in a position to exploit existing or emerging bottlenecks across the AI stack and to have outsized influence over the future development of these tools. This could limit the scope of disruptive innovation, or allow companies to shape it to their own advantage, at the expense of fair competition that benefits the public and our economies.
2. **Entrenching or extending market power in AI-related markets.** Foundation models are arriving at a time when large incumbent digital firms already enjoy strong accumulated advantages. For example, platforms may have substantial market power at multiple levels related to the AI stack. This can give these firms the ability to protect against AI-driven disruption, or harness it to their particular advantage, including through control of the channels of distribution of AI or AI-enabled services to people and businesses. This may allow such firms to extend or entrench the positions that they were able to establish through the last major technological shift to the detriment of future competition.
3. **Arrangements involving key players could amplify risks.** Partnerships, financial investments, and other connections between firms related to the development of generative AI have been widespread to date. In some cases, these arrangements may not harm competition but in other cases these partnerships and investments could be used by major firms to undermine or coopt competitive threats and steer market outcomes in their favour at the expense of the public.

Principles for protecting competition in the AI ecosystem

Our experience in related markets suggests that, while competition questions in AI will be fact-specific, several common principles will generally serve to enable competition and foster innovation:

1. **Fair dealing**. When firms with market power engage in exclusionary tactics, they can deepen their moats, discourage investment and innovation by third parties, and undermine competition. The AI ecosystem will be better off the more that firms engage in fair dealing.
2. **Interoperability**. Competition and innovation around AI will likely be greater the more that AI products and services and their inputs are able to interoperate with each other. Any claims that interoperability requires sacrifices to privacy and security will be closely scrutinized.
3. **Choice**. Businesses and consumers in the AI ecosystem will benefit if they have choices among diverse products and business models resulting from a competitive process. This means scrutinizing ways that companies may employ mechanisms of lock-in that could prevent companies or individuals from being able to meaningfully seek or choose other options. It also means scrutinizing investments and partnerships between incumbents and newcomers, to ensure that these agreements are not sidestepping merger enforcement or handing incumbents undue influence or control in ways that undermine competition. For content creators, choice among buyers could limit the exercise of monopsony power that can harm the free flow of information in the marketplace of ideas.

Other competition risks associated with AI

We are mindful of other risks that can arise where AI is deployed in markets. These include, for instance, the risk that algorithms can allow competitors to share competitively sensitive information, fix prices, or collude on other terms or business strategies in violation of our competition laws; or the risk that algorithms may enable firms to undermine competition through unfair price discrimination or exclusion. We will be vigilant of these and other risks that might emerge as AI technology develops further.

In light of these risks, we are committed to monitoring and addressing any specific risks that may arise in connection with other developments and applications of AI, beyond generative AI.

Consumer risks associated with AI

AI can turbocharge deceptive and unfair practices that harm consumers. The CMA, DOJ and the FTC, which have consumer protection authority, will also be vigilant of any consumer protection threats that may derive from the use and application of AI.

Firms that deceptively or unfairly use consumer data to train their models can undermine people's privacy, security, and autonomy. Firms that use business customers' data to train their models could also expose competitively sensitive information. Furthermore, it is important that consumers are informed, where relevant, about when and how an AI application is employed in the products and services they purchase or use.

Federal Trade Commission Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability[1]

I. Introduction

Congress enacted the Clayton and Norris-LaGuardia Acts in significant part to protect the ability of workers to organize and to collectively bargain over wages and labor conditions. Several provisions of these acts prevent courts from enjoining qualifying labor activity and shield such activity from antitrust liability. Collectively, these provisions are known as the labor exemption to the antitrust laws, and they shield from antitrust liability the conduct of bona fide labor organizations engaged in labor disputes—*i.e.*, organizing and bargaining over the terms and conditions of employment.

It has long been clear that employees who are directly hired by an employer are protected from antitrust liability by the labor exemption when they are organizing or bargaining with that employer over their compensation and/or working conditions. More recently, however, the rise of independent contracting, and of "gig work" in particular, has presented questions about the labor exemption's application to the organizing and bargaining of workers who are classified—or potentially misclassified—by a firm as independent contractors.[2] Particularly as gig workers contemplate efforts to organize or bargain collectively with platforms for the first time, they face a patchwork of cases regarding the exemption's application.

In this enforcement policy statement, the Commission clarifies its view that the labor exemption's application does not turn on whether a worker is formally classified by a firm as an independent contractor under the Fair Labor Standards Act ("FLSA"), the National Labor Relations Act ("NLRA"), tax law, state common law, or any other law. Rather, workers' organizing and collective bargaining activity may be protected from antitrust liability when what is at issue is the compensation for their labor or their working conditions. Workers engaged in such protected activity are not categorically beyond the scope of the labor exemption from antitrust liability simply because they do not have a formal employer-employee relationship with the firm with whom they seek to negotiate over the compensation for their labor or their working conditions.

II. Background

A. Enactment of the Labor Exemption from the Antitrust Laws

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[1] This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates one or more existing statutory or regulatory requirements. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act or other statutes. Pursuant to the Congressional Review Act (5 U.S.C. § 801 et seq.), the Office of Information and Regulatory Affairs designated this Policy Statement as not a "major rule," as defined by 5 U.S.C. § 804(2).

[2] *See, e.g.,* Rebecca K. Slaughter, Comm'r, Fed. Trade Comm., Comment Letter on Dep't of Labor Notice of Proposed Rulemaking re: Independent Contractor Status under the Fair Labor Standards Act (Oct. 26, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582178/comment_of_commissioner_rebecca_kelly_slaughter_on_the_department_of_labor_proposed_rule_on_0.pdf.

The labor exemption from the antitrust laws stems from several enactments in which Congress sought to broadly protect workers' ability to organize and to negotiate for better pay and working conditions. After Congress passed the Sherman Act in 1890, employers used the Act to challenge and disrupt the activities of labor unions. Indeed, twelve of the first thirteen successful antitrust lawsuits under the Sherman Act were brought against labor unions, not corporations.[3] In what was popularly known as the "Danbury Hatters' Case," the Supreme Court in 1908 enjoined employees of a Danbury, Connecticut hat manufacturer from unionizing, unanimously holding that organizations of laborers were not exempt from the Sherman Act.[4]

In response to such uses of the Sherman Act against organizing workers, Congress enacted Sections 6 and 20 of the Clayton Act in 1914,[5] creating what is known as the labor exemption to the antitrust laws. Section 6 of the Clayton Act provides that the "labor of a human being is not a commodity or article of commerce" and that the antitrust laws shall not be "construed to forbid the existence and operation of labor . . . organizations" or "to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects" of those organizations.[6]

Section 20 of the Clayton Act prohibits "restraining order[s] or injunction[s] . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment," unless necessary to protect certain property interests.[7] It further prohibits "restraining order[s] or injunctions" that "prohibit any person or persons" from engaging in certain protected activities, including "ceasing to perform any work or labor," peacefully persuading others to "abstain from working," "ceasing to patronize" parties to a dispute, peacefully persuading others not to patronize parties to a dispute, peacefully and lawfully assembling, providing strike benefits, and "doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."[8] Senator Ashurst referred to the labor provisions of the bill as the "laborer's bill of rights."[9]

Despite the broad language of the Clayton Act, courts construed Sections 6 and 20 narrowly and continued to issue injunctions and impose antitrust liability on labor unions'

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[3] Edward Berman, LABOR AND THE SHERMAN ACT 3 (1930). *See also* Kate Andrias, Beyond the Labor Exemption: Labor's Antimonopoly Vision and the Fight for Greater Democracy 6 (2023) ("By one count, at least 4,300 injunctions were issued against union activity between 1880 and 1930.").

[4] *Loewe v. Lawlor*, 208 U.S. 274 (1908).

[5] Senator Ashurst specifically noted the "Danbury Hat" case as one of many "strained and harsh" judicial interpretations of the Sherman Act that militated for the adoption of explicit exemptions in the Clayton Act to protect laborers from antitrust enforcement. 51 Cong. Rec. 13663 (1914) (statement of Sen. Henry Ashurst). Senator Hollis similarly remarked that the Sherman Act had been "tortured into a meaning" that transformed a law "intended for the relief of the plain people . . . into an instrument for their oppression." *Id*. at 13967 (statement of Sen. Henry Hollis). *See generally* Alvaro M. Bedoya & Bryce Tuttle, *"Aiming at Dollars, Not Men": Recovering the Congressional Intent Behind the Labor Exemption to Antitrust Law,* 85 ANTITRUST L.J. 805, 809-13 (2024).

[6] 15 U.S.C. § 17 (1914).

[7] 29 U.S.C. § 52 (1914). Section 20 generally prohibits restraining orders or injunctions in cases "growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury" to specific property interests. The statute also enumerates a number of protected activities for which restraining orders or injunctions may not issue.

[8] *Id.*

[9] 51 Cong. Rec. 13663 (1914) (statement of Sen. Henry Ashurst).

organizing and collective bargaining activity.[10] In response, Congress passed the Norris-LaGuardia Act in 1932, which expanded the labor exemption.[11] As the Supreme Court has explained, "[t]he underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction."[12]

The Norris-LaGuardia Act states that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment."[13] Specifically, Section 2 of the Norris-LaGuardia Act declares "the public policy of the United States" as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.][14]

Section 1 of the Norris-LaGuardia Act strips federal courts of jurisdiction "to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute" except in limited cases where necessary to prevent "substantial and irreparable injury to complainant's property" flowing from "unlawful acts."[15] It further provides that "nor

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[10] *See, e.g.,* 3 Julian O. von Kalinowinski, ANTITRUST LAWS AND TRADE REGULATION § 54.02(1) (collecting cases) ("[D]espite the statutes' broad terminology and the intent of Congress to exempt labor organizations from the antitrust laws, the courts strictly construed Sections 6 and 20 of the Clayton Act and continued to hold labor unions and their members liable under the Sherman Act," thus "weaken[ing]" Section 20 of the Clayton Act and "virtually nullify[ing]" Section 6 of the Act); *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 712 (1982) (noting that the Supreme Court "unduly restricted the Clayton Act's labor exemption" after it was created).

[11] *See United States v. Hutcheson,* 312 U.S. 219, 231 (1941) ("whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct"); 15 U.S.C. § 17 (1914); 29 U.S.C. §§ 101–14 (1932).

[12] *Hutcheson*, 312 U.S. at 235-36. Congressman LaGuardia himself explained that judicial opinions following enactment of the Clayton Act had "willfully disobeyed the law," "emasculated it," "took out its meaning as intended by Congress," and "made the law absolutely destructive of the very intent of Congress." 75 Cong. Rec. 5478 (1932) (Statement of Rep. Fiorello LaGuardia).

[13] 29 U.S.C. § 102 (1932).

[14] *Id*.

[15] *Id.* §§ 101, 107.

shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy" quoted above.[16] Section 113(c) of the Act then defines "labor dispute" to include:

> any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.[17]

The Norris-LaGuardia Act further explains that in addition to encompassing disputes involving "employees of the same employer" and other scenarios, "[a] case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests therein."[18]

Although the Norris-LaGuardia Act is phrased as a bar on judicial injunctions, the Supreme Court has long read it in conjunction with the Clayton Act provisions as establishing a labor exemption that operates as a general shield from antitrust liability.[19]

B. The Rise in Independent Contracting and Gig Work and Confusion Regarding the Labor Exemption's Application

Across the U.S. economy, firms are turning to independent contracting models to accomplish work previously performed under traditional direct hire employment models.[20] In particular, online gig platforms often seek to categorize their workers as independent contractors, even though in practice these firms may tightly prescribe their workers' tasks and compensation in ways that run counter to the promise of independence.[21] Additionally, many gig workers have lower incomes and may earn less than the minimum wage.[22] More than half of American gig

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[16] *Id.* § 101.

[17] *Id.* § 113(c); *see, e.g., Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n,* 457 U.S. 702, 709 (1982) (observing that the term "labor dispute" is defined "broadly" in Section 113(c)).

[18] 29 U.S.C. § 113(a) (1932); *see also id.* § 113(b).

[19] *United States v. Hutcheson*, 312 U.S. 219, 235 (1941) ("[I]t would be strange indeed" if Congress's "elaborate efforts to permit [activities related to labor disputes] failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness."); *see also id. at* 231 (noting that "whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text").

[20] *See, e.g.,* David Weil, Preparing for the Future of Work Through Understanding the Present of Work: A Fissured Workplace Perspective, Testimony before the U.S. House of Representatives Committee on Education and Labor Subcommittee on Workforce Protections and Subcommittee on Health, Employment, Labor, and Pensions, at 2 (Oct. 23, 2019).

[21] *See* FTC Policy Statement on Enforcement Related to Gig Work, at 4 (Sept. 15, 2022), https://www.ftc.gov/legal-library/browse/policy-statement-enforcement-related-gig-work.

[22] *See* Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider, and Kristen Harknett, Econ. Pol'y Inst., *National Survey of Gig Workers Paints a Picture of Poor Working Conditions*, at 1 (June 1, 2022) ("[A] survey of gig workers reveals that these workers often are paid low wages, in some instances less than the minimum wage [and] they face economic insecurity at high rates . . . ."); *see also* Monica Anderson, Colleen McClain, Michelle

workers report that the money they earn through the gig economy is essential or important for meeting their basic needs.[23]

Against this backdrop, some gig workers have begun contemplating forming unions to bargain with online gig platforms, giving rise to questions about the protections afforded to such activity under federal law. To date, courts have not addressed whether organizing and bargaining activities of gig workers are shielded from antitrust liability by the labor exemption, and there is a patchwork of cases addressing whether independent contractors are excluded from the exemption's protections against antitrust liability. The Commission accordingly seeks to clarify its enforcement policy relating to the labor exemption from antitrust liability.

The Commission notes that while this enforcement policy statement reflects its view of the correct application of the labor exemption, it does not bind other potential antitrust litigants, such as private plaintiffs or other enforcement agencies. Accordingly, the Commission's policy not to challenge labor organizing or bargaining activity by independent contractors that the Commission believes to be properly protected under the labor exemption does not provide workers any guarantee against antitrust claims by others. Additionally, the Commission notes that this enforcement policy statement addresses only the labor exemption from antitrust liability. This policy statement thus does not address the legal status of organizing, bargaining, or other labor activity by independent contractors under the National Labor Relations Act or any other statute.

III. Analysis

The protection of all workers from antitrust liability when they are engaged in protected labor activities is firmly grounded in the statutory text of the Clayton and Norris-LaGuardia Acts, is consistent with existing case law, and constitutes sound enforcement policy reflective of the original meaning of the labor exemption.

A. Workers Engaged in Protected Labor Activity Are Exempt from Antitrust Liability Even If Classified (or Misclassified) as Independent Contractors

The Supreme Court has explained that the labor exemption's definition of a protected "'labor dispute' must not be narrowly construed because the statutory definition itself is extremely broad and because Congress deliberately included a broad definition to overrule judicial decisions that had unduly restricted the Clayton Act's labor exemption from the antitrust laws."[24] Indeed, several aspects of the plain text of the labor exemption make clear that the

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Faverio, and Risa Gelles-Watnick, Pew Research Center, *The State of Gig Work in 2021*, at 4–5, 7, 23 (Dec. 8, 2021); Gallup, *Gallup's Perspective on the Gig Economy and Alternative Work Arrangements*, at 8 (2018).

[23] *See* Anderson et al., *supra* n. 22, at 31 (reporting that 58% of current or recent gig workers said that money earned via gig jobs has been "essential or important for meeting their basic needs").

[24] *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 712 (1982); *see also Bowater SS Co. v. Patterson*, 303 F.2d 369, 383 (2nd Cir. 1962) (cautioning against allowing formal legal distinctions imported from other areas of law to undermine the public policy set forth in Norris-LaGuardia, even though those legal distinctions might be accorded deference in other legal settings: "the policy behind the Norris-LaGuardia Act was a strong one; we cannot think Congress would have meant this to be defeated by" technical legal distinctions between corporate entities, "however much these might properly be respected for other purposes").

exemption's protections are not limited to workers who are formally classified as the direct employee of an employer.

First, the original Clayton Act labor exemption provisions protect not only "employees," but also "any person or persons."[25] And the subsequently enacted Norris-LaGuardia labor exemption provisions extend to the "individual unorganized worker,"[26] and to "persons engaged in the same industry, trade, craft, or occupation."[27] As the Supreme Court has explained in another context, "'workers' [is] a term that everyone agrees easily embraces independent contractors."[28]

In any event, even were the labor exemption limited to "employees," as used in statutes enacted in the early 20th century, that term often had a broader meaning than that used in the common law to differentiate employees from independent contractors.[29] For that reason, when interpreting the term "employee" in the original versions of the NLRA and the FLSA, the Supreme Court construed the term to be broader than the workers who would have constituted employees under the common law.[30] For example, interpreting the term "employee" in the original version of the NLRA, the Court rejected the argument that newsboys classified as independent contractors under common law tests were unprotected.[31] Rather, it held that where "the economic facts of the relation make it more nearly one of employment than of independent business enterprise . . . those characteristics may outweigh technical legal classification for purposes unrelated to [the NLRA's] objectives and bring the relation within its protections."[32]

Congress later overruled the Court's expansive interpretation of "employee" in the NLRA (but not the FLSA) by expressly exempting "independent contractors" from the definition of "employee" in the NLRA in 1947.[33] Congress similarly amended the Social Security Act to expressly exclude independent contractors.[34] However, never in the intervening decades did it adopt such a limitation on the labor exemption to the antitrust laws.

Second, the definition of "labor dispute" adopted in the Norris-LaGuardia Act expressly provides that the exemption's application does not turn on formalistic "employer and employee" relationships between the disputants. Instead, disputes are covered "regardless of whether or not the disputants stand in the proximate relation of employer and employee."[35] The definition of

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[25] 29 U.S.C. § 52 (1914).
[26] *Id.* § 102 (declaring public policy); *see also id.* § 101 (precluding orders "contrary to the public policy declared").
[27] *Id.* § 113(a).
[28] *New Prime Inc. v. Oliveira,* 586 U.S. 105, 116 (2019).
[29] *See NLRB v. Hearst Publications*, *Inc.*, 322 U.S. 111, 120 (1944).
[30] *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (holding that definitions of "employee," "employer," and "employ" in the FLSA were "comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category"); *Hearst Publications*, 322 U.S. at 126 (holding that "[t]he mischief at which the [National Labor Relations] Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors'").
[31] *Hearst Publications*, 322 U.S. at 120-26.
[32] *Id.* at 128.
[33] Labor Management Relations Act (Taft-Hartley Act) § 2(3), 29 U.S.C. § 152(3) (1947).
[34] Social Security Act of 1948, ch. 468, § 1(a), 62 Stat. 438 (1948).
[35] 29 U.S.C. § 113(c) (1932).

"labor dispute" thus "establishe[s] that the allowable area of union activity was not to be restricted to an immediate employer-employee relation."[36]

The Supreme Court has accordingly held exempt from antitrust liability the labor organizing activities of persons who were not employees of the firm whose labor practices they sought to change. For example, in *New Negro Alliance v. Sanitary Grocery Co*., the Court found that alliance members who picketed a grocery store to press the store to hire Black workers were "persons interested" in a "labor dispute" despite the fact that they were not employees of the store.[37] And in *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, the Court held that the labor exemption protected members of a drivers' union who picketed dairies that did not use union labor, because the drivers were "engaged in the same industry, trade, craft, or occupation" as the dairies, "namely the milk industry."[38]

Third, the labor exemption's use of the phrase "terms or conditions of employment" to define covered labor disputes further indicates that its protections do not categorically exclude independent contractors, because the original meaning of "employment" in the early 20th century did not categorically exclude independent contracting arrangements.

In *New Prime Inc. v. Oliveira*, the Supreme Court considered whether the Federal Arbitration Act ("FAA") applied and required arbitration of a dispute over alleged failure to pay the minimum wage to a driver labeled by the parties' contracts as an independent contractor.[39] The Court analyzed the original meaning of the phrase "contracts of employment" in an exception to the FAA—which Congress enacted in 1925, just seven years before the Norris-LaGuardia Act. The Court explained that although "[t]o many lawyerly ears today, the term 'contracts of employment' might call to mind only agreements between employers and employees (or what the common law sometimes called masters and servants)[,] . . . this modern intuition isn't easily squared with evidence of the term's meaning at the time of the Act's adoption in 1925."[40] Rather, examining dictionaries spanning from 1891 and 1933, the Court held that the original meaning of "contracts of employment" referred to "agreements to perform work," and was not limited to "agreements between employers and employees (or what the common law sometimes called masters and servants)."[41] Accordingly, the Court held that the exception to the FAA for certain "contracts of employment" applied to exempt the wage dispute from arbitration, even though the parties assumed that the relevant contract "establish[ed] only an independent contractor relationship."[42]

By the same reasoning, the original meaning of "terms or conditions of employment" in the labor exemption encompasses disputes over wages or job conditions, irrespective of whether the worker is classified (or misclassified) as an independent contractor. Nothing in the legislative history of the Clayton and Norris-LaGuardia Acts suggests Congress intended the phrase to have anything other than its ordinary meaning at the time and, as elaborated above, several other

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[36] *Am. Fed'n of Musicians v. Carroll*, 391 U.S. 99, 106 (1968).
[37] 303 U.S. 552, 560-61 (1938).
[38] 311 U.S. 91, 97 (1940).
[39] 586 U.S. 105, 108-09 (2019).
[40] *Id.* at 114.
[41] *Id.*
[42] *Id.* at 113-14, 121.

aspects of the labor exemption's plain text also indicate that the exemption is not limited to disputes involving formal, direct employer-employee relationships.

The First Circuit recently reached a similar conclusion and held that the labor exemption does not categorically exclude independent contractors from its protections.[43] In *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, the First Circuit considered claims by horse owners alleging that thirty-seven horse jockeys' refusal to race constituted a group boycott in violation of federal antitrust laws.[44] Examining the text and history of the labor exemption, the First Circuit held that "[t]he district court erred when it concluded that the jockeys' alleged independent-contractor status categorically meant they were ineligible for the [labor] exemption," reasoning that "by the express text of the Norris-LaGuardia Act, a labor dispute may exist 'regardless of whether or not the disputants stand in the proximate relation of employer and employee.'"[45] The First Circuit further noted Supreme Court cases rejecting "interpretation of the exemption limited to employees alone."[46] The court concluded that, notwithstanding that the jockeys were independent contractors, they "sought higher wages and safer working conditions, making this a core labor dispute [to which] the labor-dispute exemption applies."[47]

The Commission agrees with the First Circuit. The Commission acknowledges that some cases have held particular independent contractors or other third-parties are unprotected by the labor exemption. However, such cases do not hold that all independent contractors are *categorically* beyond the scope of the labor exemption due to their formal status as independent contractors. Rather, they examine the specific facts of a given dispute and the trade relationships involved and reject application of the exemption where the core of the dispute does not involve the wages or working conditions of a worker who provides labor services.

For example, in *Columbia River Packers Assoc. v. Hinton*, the Supreme Court rejected application of the exemption to a group of independent contractor fishermen who were "an association of commodity sellers," holding that the Norris-LaGuardia Act "was not intended to have application to disputes over the sales of commodities."[48] Courts have similarly rejected application of the labor exemption to disputes regarding the sale of other commodities,[49] or regarding the terms of sale of a finished product.[50]

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[43] *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.,* 30 F.4th 306, 314 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023).
[44] *Id.* at 311.
[45] *Id.* at 314.
[46] *Id.* (citing *New Negro Alliance v. Sanitary Grocery Co*., 303 U.S. 522, 560-61 (1938); *Am. Fed'n of Musicians v. Carroll*, 391 U.S. 99, 111-14 (1968); *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 718, 721-22 (1981)).
[47] *Id.*
[48] 315 U.S. 143, 145 & n.3 (1942).
[49] *L.A. Meat & Provision Drivers Union, Loc. 626 v. United States*, 371 U.S. 94, 101-02 (1962) ("as in *Columbia River Assn*., the grease peddlers were sellers of commodities"; they were businessmen who attempted to "immunize themselves from [the antitrust laws] by the simple expedient of calling themselves . . . a labor union").
[50] *Ring v. Spina*, 148 F.2d 647, 652 (2d Cir. 1945) (dispute concerned "the terms at which a finished product or certain rights therein may be sold. And no wages or working conditions of any group of employees are directly dependent on these terms.").

Courts have also rejected application of the exemption where the party seeking the exemption was best characterized as an independent business pursuing its business interests, rather than as a worker who provides labor services seeking to improve his or her compensation or labor conditions. For example, courts have rejected application to disputes involving "an entrepreneur, not a laborer,"[51] to "a businessman organization" seeking a better "return on capital investment,"[52] and to "an association of individual practitioners each exercising his calling as an independent unit."[53] These cases are all consistent with the First Circuit's holding that the core question is "whether what is at issue is compensation for [a worker's] labor" or working conditions.[54] As such, owners of independent businesses that sell finished products or are primarily concerned with a return on capital investments are often appropriately characterized as independent contractors and will generally be outside the labor exemption's protections. For example, highly paid professionals who operate their own businesses would often be more appropriately characterized as entrepreneurs pursuing business interests as opposed to workers who provide labor services. However, that does not mean that the labor exemption's application stands or falls with whether a worker is formally classified (or misclassified) as an independent contractor.

To further dispel confusion, two other cases bear mention. In *H.A. Artists & Associates, Inc. v. Actors' Equity Assoc.*, the Supreme Court held that the Equity actors' union was protected by the labor exemption when it sought to regulate the conduct of independent contractor agents in order to protect actors' compensation.[55] In a footnote, the Court stated, "[o]f course, a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur."[56] However, this statement was mere dicta because, as the Court explained, there was "no dispute" that the Equity union seeking the labor exemption's protections was a bona fide labor group.[57] In any event, the Commission does not read this dicta as opining on whether *workers* who provide labor services would be unprotected by the labor exemption if classified (or misclassified) as independent contractors. Rather, in referring to "independent contractor or entrepreneur[s]," the Commission believes the Court was referring to the types of business entities and interests discussed above that would indeed be beyond the scope of the labor exemption because they do not reflect a worker who provides labor services seeking better compensation or working conditions (*e.g.*, businesses negotiating over finished

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[51] *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 463-464 (1949) (holding labor exemption inapplicable to stitching contractors who turned fabric supplied by jobbers into completed garments and shipped them directly to the customer, because "although he furnishes chiefly labor, [he] also utilizes the labor through machines and has his rentals, capital costs, overhead, and profits"); *see also United States v. Nat'l Ass'n of Real Est. Bds.*, 339 U.S. 485, 490 (1950) (real estate board members were "entrepreneurs . . . each is in business on his own").
[52] *U.S. Steel Corp. v. Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1049 (3d Cir. 1970) (holding labor exemption inapplicable to truck owner-operators who were "demand[ing] . . . a more profitable operation of [their] equipment" rather than "a raise [that] goes to the driver").
[53] *Am. Med. Ass'n v. United States*, 317 U.S. 519, 536 (1943) (holding that independent physician practices who operated on a fee-for-service model not protected by labor exemption where they objected to a nonprofit hospital's "method of doing business" using a risk-sharing prepayment model; independent physician practices "were interested in the terms and conditions of the employment only in the sense that they desired wholly to prevent Group Health from functioning by having employes").
[54] *Confederación Hípica de Puerto Rico v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 314 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023).
[55] 451 U.S. 704, 720 (1981).
[56] *Id.* at 717 n.20.
[57] *Id.*

products or highly paid professionals who operate their own businesses furthering other non-labor interests).

In another case, *Taylor v. Local No. 7, International Union of Journeymen Horseshoers of the United States & Canada (AFL-CIO)*, the Fourth Circuit held the labor exemption did not protect the conduct of "independent businessmen" horseshoers who charged an agreed-upon fixed price for shoeing a horse (for both the horseshoe and the service) and who boycotted those who did not use union horseshoers.[58] The Fourth Circuit reversed the district court's holding that the horseshoers were protected by the labor exemption because they were employees. In rejecting the district court's reasoning, the Fourth Circuit applied the NLRA's test for independent contractor status—*i.e.*, the test Congress adopted when it enacted an express exemption to the NLRA for independent contractor status.[59] The Fourth Circuit found the horseshoers to be independent contractors because, among other things, they controlled when and how much to work, controlled their own horseshoeing process, chose and owned their own tools, controlled their own prices and the risk of profit and loss, did not work regular hours for one employer, chose whether to hire their own employees, and regarded themselves as independent contractors.[60]

The Fourth Circuit did not, however, find the horseshoers' independent contractor status under the NLRA test dispositive of the labor exemption's application, acknowledging that the exemption can apply to disputes in which the parties to the dispute do not themselves stand in the relationship of employer and employee.[61] Instead, the court went on to reject application of the exemption to the horseshoers' conduct because it found that there was no employer-employee relationship involved in the dispute—whether extant or prospective.[62] The Fourth Circuit explained, "the horseshoers are not attempting to force the owners and trainers to use any of them as employees, nor are the unions attempting to organize any employees of the trainers or owners."[63] Rather, "[t]he only interests [they] sought to . . . advance[]" through their boycott and price-fixing were "of those independent horseshoers who render services to trainers and owners for a certain fee, unilaterally fixed, per horse."[64]

Accordingly, *Taylor* did not confront a scenario, like that in *Confederación Hípica de Puerto Rico*, in which independent contractors who provide labor services engage in a dispute over their compensation and job conditions. Nor did *Taylor* hold that the conduct of a worker currently classified (or misclassified) as an independent contractor can never be protected by the labor exemption. To the contrary, the Fourth Circuit's decision implied that it would have found the horseshoers' conduct protected were they organizing for the purpose of becoming directly hired union employees.[65] Moreover, although *Taylor* applies the NLRA test for independent contractor status in the course of rejecting the district court's reasoning, it never addressed the fact that the Clayton and Norris-LaGuardia Acts lack the express independent contractor

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[58] 353 F.2d 593, 595-606 (4th Cir. 1965).
[59] *See id.* at 595-601 (applying test from *NLRB v. A.S. Abell Co.*, 327 F.2d 1 (4th Cir. 1964)).
[60] *Id.* at 599-600.
[61] *Id.* at 605-06.
[62] *Id.*
[63] *Id.* at 606.
[64] *Id.*
[65] *Id.* ("[T]he horseshoers are not attempting to force the owners and trainers to use any of them as employees . . . .").

exemption present in the NLRA.

For the forgoing reasons, the Commission believes that the First Circuit's decision in *Confederación Hípica de Puerto Rico* is correct and that workers who provide labor services and that are engaged in protected labor activities can be shielded by the labor exemption, even if formally classified (or misclassified) as independent contractors. As the First Circuit explained, this understanding is consistent with the plain text and original meaning of the Clayton and Norris-LaGuardia Acts, as well as with judicial decisions applying the labor exemption.[66]

B. Proper Application of the Labor Exemption

As explained above, the labor exemption's application does not turn on how a worker is classified (or misclassified) under other laws. Rather, applying Supreme Court precedents, the Commission assesses whether the exemption applies based on "whether this is a 'case involving or growing out of any labor dispute,'" which is "broadly defin[ed] . . . to include 'any controversy concerning terms or conditions of employment.'"[67] A dispute concerning "the hours, wages, job security, and working conditions" of workers who provide labor services qualifies as "concerning terms or conditions of employment."[68] In contrast, disputes concerning the price of commodities or other finished products are not protected.[69] Accordingly, with respect to organizing or bargaining by workers who provide labor services classified (or misclassified) as independent contractors, "the key question" is generally "whether what is at issue is compensation for their labor" or their working conditions.[70]

Note that for a labor organization such as a union to be protected under the labor exemption, it must be acting in its self-interest and not in combination with non-labor groups.[71] Formal recognition as a union is not necessary for a labor group to be considered a bona fide labor organization.[72] Moreover, the protected conduct of a labor organization such as a union does not lose its protected status merely because the labor organization seeks to work with independent contractors. Independent contractors can constitute "labor groups" such that when a union works in concert with them on legitimate labor interests (such as compensation and/or job

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[66] For this reason, the Commission would exercise its enforcement discretion not to pursue actions inconsistent with this policy statement even if another circuit court (or district court) were in the future to disagree with the First Circuit.

[67] *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 709 (1982) (quoting 29 U.S.C. § 113(c)).

[68] *Am. Fed'n of Musicians v. Carroll*, 391 U.S. 99, 106 (1968).

[69] *See, e.g.*, *Columbia River Packers Ass'n v. Hinton*, 315 U.S. 143, 145, 147 (1942) (explaining that the Norris-LaGuardia Act "was not intended to have application to disputes over the sale of commodities" and that a dispute "relating solely to the sale of fish," did not qualify for protection because it "does not place in controversy the wages or hours or other terms and conditions of employment").

[70] *Confederación Hípica de Puerto Rico v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 314 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 631 (2023).

[71] *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

[72] *See, e.g., New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 522, 555(1938) (applying labor exemption to actions by a non-union organization founded for the "mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises"); *Brady v. NFL*, 644 F.3d 661, 670-73 (8th Cir. 2011) (rejecting argument that the labor exemption applies only to disputes involving recognized labor organizations); *see also NLRB v. Wash. Aluminum Co.,* 370 U.S. 9, 14-15 (1962) (finding a walkout by unorganized workers who lacked a formal bargaining representative to be protected activity related to a "labor dispute" under the National Labor Relations Act).

conditions), the union's activity can still be protected by the labor exemption.[73] The test for whether the "independent contractors [are] a 'labor group' and party to a labor dispute" is "the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors."[74] In contrast, "antitrust immunity is forfeited when a union combines with one or more employers in an effort to restraint trade."[75]

IV. Conclusion

The Commission believes that workers who provide labor services are not subject to antitrust liability when engaging in protected collective action—such as seeking better compensation and job conditions—even if the firm whose labor practices the workers seek to improve classifies (or misclassifies) them as independent contractors. This view is not only the best reading of the labor exemption's text and history, but it is also sound policy. As the Norris-LaGuardia Act recognizes, workers must be free to organize and to bargain collectively as a counterbalance to the power of "owners of property . . . organize[d] in the corporate and other forms of ownership association."[76] That is no less true simply because a firm seeks to classify such workers as independent contractors; for example, many gig workers face significant power imbalances in securing adequate compensation and safe, secure working conditions.[77]

Reading the labor exemption as categorically excluding all independent contractors would give employers both the incentive and the opportunity to exploit such asymmetries. Under such a reading, firms could absolve themselves of responsibilities under employment and labor laws by classifying their workforce as independent contractors. Firms could also simultaneously wield antitrust law to prevent those same workers from organizing to attain the rights afforded to employees under such laws. Additionally, businesses would have an opportunity and incentive to classify (or misclassify) their workers as independent contractors to suppress wages and to gain an unfair advantage against competitors who provide better compensation and job conditions to workers.[78] Just as Congress did nearly a century ago, the Commission emphasizes that the antitrust laws should not be used to disrupt collective action by workers who provide labor services to improve their terms and conditions of employment. Accordingly, the Commission will not challenge collective action by independent contractors who provide labor services and are seeking better compensation and job conditions because such activities are exempted under the Clayton Act and the Norris-LaGuardia Act.

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[73] *See H. A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 707 (1981) (holding actors' union did not forfeit immunity by combining with a non-labor group when independent contractor theatrical agents agreed to become franchised by the union; franchise restrictions protected the wage structure the union negotiated with theatre producers)*; Am. Fed'n of Musicians,* 391 U.S. at 105 (holding that "involvement of the orchestra leaders" who were "employers and independent contractors" did not "create[] a combination or conspiracy with a 'non-labor' group which violates the Sherman Act").

[74] *Am. Fed'n of Musicians,* 391 U.S. at 105-106.

[75] *H. A. Artists*, 451 U.S. at 716.

[76] 29 U.S.C. § 102 (1914).

[77] *See* FTC Policy Statement on Enforcement Related to Gig Work, at 5-6 (Sept. 15, 2022), https://www.ftc.gov/legal-library/browse/policy-statement-enforcement-related-gig-work.

[78] Alvaro Bedoya & Max M. Miller, *"Overawed": Worker Misclassification as a Potential Unfair Method of Competition*, 44 YALE L. & POL'Y REV. 333, 345-348 (Fall 2024 forthcoming).

Antitrust Guidelines for Business Activities Affecting Workers

U.S. Department of Justice and the Federal Trade Commission

Revised: January 2025

Overview[1]

These Guidelines explain how the U.S. Department of Justice's Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") (collectively, the "Agencies") assess whether business practices affecting workers violate the antitrust laws. The Agencies enforce the nation's antitrust laws, which include the Sherman Act, Clayton Act, and Federal Trade Commission Act. These laws provide "a central safeguard for the Nation's free market structures" by promoting open and fair competition.[2]

The antitrust laws protect competition for labor, just as they protect competition for goods and services that companies provide.[3] They protect the freedom of working people to choose the best job for them and their families. Just as vibrant competition for goods and services benefits consumers, competition among employers benefits workers through better wages, benefits, and other terms and conditions for working people. Business practices may violate the antitrust laws when they harm the competitive process, especially if they deprive labor markets of independent centers of decisionmaking[4] or they create or abuse employers' monopsony power.[5] By interfering with free and fair competition for workers, such practices can lead to fewer job opportunities, lower wages, and worse working conditions.[6] Similarly, businesses should be free to hire the right person for a job. Vibrant, open markets to recruit and retain workers create market opportunities that are conducive to new business formation, innovation, and productivity. Conversely, when companies act in ways that harm competition for workers, that behavior might lead to fewer job opportunities for workers, lower wages, and worse job quality. That is why the antitrust laws prohibit certain practices that harm competition for workers.

How to Use These Guidelines: These Guidelines are intended to promote clarity and transparency for the public about how the Agencies identify and assess business practices affecting workers that may violate the antitrust laws.[7] The following sections explain how the Agencies approach

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[1] This document replaces the Antitrust Guidance for Human Resource Professionals (2016). It should not be construed as legal advice, and it has no force or effect of law. It is not intended to create any substantive or procedural rights enforceable at law by any party. Nothing in this statement should be construed as mandating a particular outcome in any specific case, and nothing in this statement limits the discretion of any U.S. government agency to take any action, or not to take action, with respect to matters under its jurisdiction.

[2] *N. Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 502 (2015).

[3] *See generally Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69 (2021); *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948); *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359 (1926).

[4] *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010) ("[C]oncerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." (internal quotation marks and citations omitted)).

[5] *Alston*, 594 U.S. at 90 (concluding that the NCAA used its monopsony power to impose restraints that "can (and in fact do) harm competition" for student-athletes' labor).

[6] *See Alston*, 594 U.S. at 110 (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.").

[7] The 2023 Merger Guidelines provide guidance to the public about how agencies consider the effects of business transactions such as mergers and acquisitions on workers. *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *Merger Guidelines* (2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

particular antitrust issues affecting labor. Sections 1–5 discuss specific types of agreements or business practices that may violate the antitrust laws. Certain agreements and other activities may give rise to criminal liability. Other types of agreements may be subject to civil liability rather than criminal prosecution. Section 6 explains that the antitrust laws apply to relationships between businesses and independent contractors. For example, an agreement between businesses to fix the compensation that each pays to independent contractors may violate the antitrust laws, just as an agreement between businesses to fix the wages each pays to workers may violate the antitrust laws. Section 7 explains that false claims about workers' potential earnings may violate federal laws against unfair, deceptive, or abusive practices. Section 8 provides information about reporting potential antitrust violations to the Agencies.

As discussed further in Sections 1–5, the Agencies may investigate certain types of agreements or business practices as potential violations of the antitrust laws. Examples of such agreements include:

1. **Agreements between companies not to recruit, solicit, or hire workers, or to fix wages or terms of employment, may violate the antitrust laws and may expose companies and executives to criminal liability.** Where appropriate, DOJ exercises its authority to bring felony criminal charges against companies and individuals who participate in these conspiracies.

2. **Agreements in the franchise context not to poach, hire, or solicit employees of the franchisor or franchisees may violate the antitrust laws.** No-poach and similar agreements are subject to antitrust scrutiny even if they are between a franchisor and a franchisee or, for example, among the franchisees of the same franchisor.

3. **Exchanging competitively sensitive information with companies that compete for workers may violate the antitrust laws.** This includes exchanges of information about compensation or other terms or conditions of employment, and other exchanges of information that harm competition for workers. Exchanging such information with competitors may be illegal even if companies use a third party or intermediary—including a third party using an algorithm—to share such information.

4. **Employment agreements that restrict workers' freedom to leave their job may violate the antitrust laws.** These include non-compete provisions that prevent workers from leaving their job to join a competing or potentially competing employer; that prevent workers from leaving their job to start a new business; or that require workers to pay a penalty upon leaving their job.

5. **Other restrictive, exclusionary, or predatory employment conditions that harm competition may violate the antitrust laws.** These include overly broad non-disclosure agreements, training repayment agreement provisions, non-solicitation agreements, and exit fee or liquidated damages provisions.

This list is not exhaustive. Listed activities may or may not be an antitrust violation. The Agencies encourage anyone with information about these activities or other potential antitrust violations to report them to the Agencies. See Section 8 below for further information.

General Principles for Analyzing Agreements that Impact Workers: In many of these circumstances, the Agencies will focus on whether there is an agreement between businesses that harms competition for workers. An agreement need not be explicit or written down in order to violate the antitrust laws. Agreements—sometimes called conspiracies, gentleman's agreements, handshake agreements, or shared or mutual understandings—that violate the antitrust laws can be formal or

informal; express or implicit; and need not be written down or talked about at all. Such agreements are illegal even if they are never carried out. In assessing whether businesses have entered into an illegal agreement, the Agencies consider direct and circumstantial evidence. For example, they may consider whether a business has discussed with another company wages or other potential terms of employment; engaged in parallel behavior that demonstrates a shared understanding; invited another company to participate in a plan to restrict competition for workers followed by action consistent with that plan; or used a common intermediary to obtain competitively sensitive information.

If the Agencies identify an agreement between companies relating to workers, they assess its impact on competition and the competitive process. Some types of agreements are illegal regardless of their effects. In other cases, the Agencies perform a deeper analysis, examining the impact of the agreement on workers by impairing the competitive process, suppressing competition, or the actual or likely effects of the conduct in the affected labor market.[8]

The Agencies also focus on whether the participants in a potential agreement compete for workers. Businesses can compete to hire or retain workers even if they make different products or offer different services. Accordingly, when assessing agreements that affect workers, the Agencies will focus on whether the businesses compete in the same labor markets even if they do not compete as sellers of products or services.

Companies can be labor market competitors even if they have some other collaborative or cooperative relationship, such as a joint venture that produces a good or provides a service. Companies can also be competitors in a labor market even if they are not competitors in downstream markets to produce a good or service. For example, airplane manufacturers and their part suppliers may both hire from the same market for engineers.

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[8] *United States v. Am. Airlines Grp. Inc.*, 121 F.4th 209, 220 (1st Cir. 2024).

1. Some types of agreements, including wage-fixing and no-poach agreements, may violate the antitrust laws and can lead to criminal charges

Businesses that compete with each other for workers may be committing an antitrust crime if they enter into an agreement not to recruit, solicit, or hire workers or to fix wages or terms of employment. Even if criminal charges are not pursued, these agreements may also be subject to civil liability.[9] Such agreements can violate the antitrust laws whether they are informal or formal, written or unwritten, or spoken or unspoken.[10]

Examples include:

- agreements between businesses, or between individuals at different businesses, about workers' salaries or other terms of compensation, such as bonuses, benefits, or other terms of employment, either at a specific level or within a range (sometimes called "wage-fixing agreements"); and
- agreements between businesses, or between individuals at different businesses, not to hire, solicit, and/or otherwise compete for current, former, or potential workers (sometimes called "no-poach" agreements, which may also be referred to as "no-hire" or "no-solicit"[11] or "market allocation" agreements).

The Agencies focus on the substance of a wage-fixing or no-poach agreement regardless of its precise form. If companies agree to align, stabilize, or otherwise coordinate the wages they set, including by agreeing to a range, ceiling, or benchmark for calculating wages, it does not matter if they do not agree on a specific wage.[12] Similarly, if a company agrees to restrict its ability to hire another

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[9] *See United States v. Lucasfilm Ltd.*, No. 10-02220 RBW (D.D.C. June 3, 2011); *United States v. Adobe Sys., Inc.*, No. 1:10-CV-01629-RBW (D.D.C. Mar. 17, 2011); *United States v. eBay, Inc.*, No. 12-CV-05869-EJD-PSG (N.D. Cal. 2014); *In re: Guardian Service Industries, Inc.*, No. 241 0082 (F.T.C. Dec. 4, 2024).

[10] *See United States v. Jindal*, No. 4:20-CR-00358, 2021 WL 5578687, at *4–5 (E.D. Tex. Nov. 29, 2021); *United States v. DaVita Inc.*, No. 1:21-CR-00229-RBJ, 2022 WL 266759, at *9 (D. Colo. Jan. 28, 2022); *United States v. Manahe,* No. 2:22-CR-00013-JAW, 2022 WL 3161781, at *6 (D. Me. Aug. 8, 2022).

[11] In this context, the term "no-poach agreement" refers to the types of market-allocation agreements that affect employees' attempts to get other jobs, such as an agreement between two competitors not to try to hire or solicit each other's employees, or an agreement to request permission from the other company before trying to hire an employee. These no-poach agreements are different than, for example, agreements between an employer and its workers that prevent the workers from soliciting clients or vendors at a future employer or for a future competing business. Non-solicitation agreements are discussed below.

[12] *See Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 348 (1982) (holding, in a civil case, that an agreement among doctors fixing maximum rates that the doctors could receive for their services was a per se violation of the antitrust laws); *Plymouth Dealers' Ass'n of No. Cal. v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) (holding, in a civil case, that an agreement to fix the starting point for prices is a per se violation of the antitrust laws); Plea Agreement, *United States v. Topkins*, No. CR-15-201 (N.D. Cal. Apr. 30, 2015) (defendant pled guilty to price-fixing conspiracy implemented through conspirators' joint use of specific pricing algorithms), available at https://www.justice.gov/atr/case-document/file/628891/dl; Press Release, U.S. Dep't of Just., *Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division's First Online Marketplace Prosecution* (Apr. 6, 2015), https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace.

company's workers, it does not matter if the agreement does not completely prohibit hiring the other company's workers. For example, an agreement not to "cold call" workers is considered a no-solicit agreement regardless of whether the firms are allowed to hire the workers who applied for a position without first being solicited.[13]

When formed between competing or potentially competing employers, these types of agreements—whether entered into directly or through an intermediary[14]—are illegal even if they did not result in actual harm such as lower wages.[15] Nor does it matter if the agreement does not include specific pay rates. For example, an agreement to set a starting point for compensation may be a form of wage fixing under the law.[16]

The DOJ may criminally investigate and, where appropriate, bring felony charges against the participants in these agreements, including both individuals and companies.

The Criminal Antitrust Anti-Retaliation Act (CAARA) provides whistleblower protections for employees, contractors, subcontractors, and agents who report antitrust crimes, including no-poach and wage-fixing agreements.[17]

2. Franchise no-poach agreements may violate the antitrust laws

No-poach clauses in franchise agreements are also subject to antitrust scrutiny. Often, franchisors compete with franchisees for workers.[18] Franchisors sometimes enter into agreements with franchisees in which the franchisor and franchisee agree not to compete for workers. Such an agreement can be *per*

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[13] *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) (in private civil damages case following Department of Justice consent decree, holding that plaintiffs plausibly alleged that five no-cold-call agreements were per se violations of the antitrust laws); *In re Animation Workers Antitrust Litigation*, 123 F. Supp. 3d 1175, 1213 (N.D. Cal. 2015) (in private civil damages case following Department of Justice consent decree, holding that plaintiffs had plausibly alleged that anti-solicitation agreements were per se violations of the antitrust laws); Final Judgment, *United States v. Ass'n of Fam. Prac. Residency Dirs.*, No. 95-0575-CV-W-2 (W.D. Mo. Aug. 15, 1996) (entering consent decree in a civil case to resolve allegations that defendants established policies prohibiting the use of certain practices for recruiting medical residents, which restrained price and other forms of competition), available at https://www.justice.gov/atr/case-document/file/628591/dl.

[14] *See* Final Judgment, *United States v. Ariz. Hosp. and Healthcare Ass'n*, No. CV07-1030-PHX (D. Ariz. Sept. 12, 2007), available at https://www.justice.gov/atr/case-document/file/487106/dl (entering consent decree to resolve allegations that association of hospitals violated the antitrust laws by setting a uniform bill rate schedule that member hospitals would pay for temporary and per diem nurses).

[15] Such agreements may require a fuller analysis of their effects, however, when the restraint is subordinate and collateral to a broader business collaboration, such as a joint venture, and is reasonably necessary to achieve the procompetitive potential of that collaboration. *See Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021)*; see also, e.g., In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 345–46 (3d Cir. 2010)*; Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986)*; United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898).

[16] *See Plymouth Dealers' Ass'n*, 279 F.2d at 132–34 (holding that an agreement between car dealers to fix list prices was price fixing, although the dealers often used the list price as a starting point).

[17] *See* 15 U.S.C. § 7a-3.

[18] *See, e.g.*, *Arrington v. Burger King Worldwide, Inc.*, 47 F.4th 1247, 1250 (11th Cir. 2022) (noting that Burger King "compete[s] . . . for employees" against "its separate and independent franchise restaurants").

se illegal under the antitrust laws.[19] In other words, the agreement itself may be illegal regardless of whether it actually harms workers.

Similarly, a franchisor may violate the antitrust laws by organizing or enforcing a no-poach agreement among franchisees that compete for workers.[20] Agreements among franchisees, either written or unwritten, not to poach, hire, or solicit each other's workers may violate other federal and state laws.[21]

3. Sharing competitively sensitive information—including wage information—with competitors may violate antitrust laws

Sharing competitively sensitive information with competitors about terms and conditions of employment may violate the antitrust laws.[22] Exchanging competitively sensitive compensation or other employment information with a competitor may be unlawful when the information exchange has, or is likely to have, an anticompetitive effect, whether or not that effect was intended.[23] An information exchange may be explicit or it may be implied from the conduct of parties who share competitively sensitive information (for example, information about compensation, benefits, or the terms of an employment contract). In addition, information exchanges may indicate the existence of a wage-fixing conspiracy.

Providing competitively sensitive information through an algorithm or through a third party's tool or product may also be unlawful. For example, the DOJ obtained a court-ordered settlement with a group of poultry processing companies and a data consulting company to resolve allegations that they (i) directly exchanged competitively sensitive information about current and future wages and benefits for plant workers; and (ii) did so through a third-party firm that facilitated the exchange of competitively sensitive compensation information.[24]

Information exchanges facilitated by or through a third party (including through an algorithm or other software) that are used to generate wage or other benefit recommendations can be unlawful even if the exchange does not require businesses to strictly adhere to those recommendations.[25] An agreement

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[19] *See, e.g.*, *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 705 (7th Cir. 2023).

[20] *See United States v. Apple Inc.*, 791 F.3d 290, 325 (2d Cir. 2015).

[21] *See, e.g.*, Wash. Rev. Code Ann. § 49.62.060 ("No franchisor may restrict, restrain, or prohibit in any way a franchisee from soliciting or hiring any worker of a franchisee of the same franchisor."); Minn. Stat. Ann. § 181.99.

[22] *See Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 410–12 (1921).

[23] *See* Final Judgment, *United States v. Utah Soc. for Healthcare Hum. Res. Admin.*, Civ. A. No. 94-C-282G (D. Utah Sep. 12, 1994), available at https://www.justice.gov/atr/case-document/file/628496/dl (entering consent decree to resolve allegations that a society of HR professionals conspired to exchange nonpublic prospective and current wage information about registered nurses, which enabled hospitals to keep nurses' wages artificially low).

[24] Final Judgment, *United States v. Cargill Meat Solutions Corp.*, No. 1:22-CV-01821 (D. Md. June 5, 2023), available at https://www.justice.gov/d9/2023-11/418169.pdf; *see also Jien v. Perdue Farms, Inc.*, No. 1:19-CV-2521-SAG, 2020 WL 5544183 (D. Md. Sept. 16, 2020).

[25] *See Duffy v. Yardi Sys., Inc.*, No. 2:23-CV-01391-RSL, 2024 WL 4980771, at *5 (W.D. Wash. Dec. 4, 2024).

to use shared wage recommendations, lists, calculations, or algorithms can also still be unlawful even where co-conspirators retain some discretion or cheat on the agreement.

Companies can sometimes work together as part of a transaction or collaboration (like a joint venture) in ways that are not illegal. Even if companies are parties to a legitimate transaction or are otherwise involved in a joint venture or other collaborative activity, an agreement between the companies to share information about wages or other terms of employment, including company data regarding worker compensation, may violate the antitrust laws.

4. Non-compete clauses can violate antitrust and other laws

Non-compete clauses that restrict workers from switching jobs or starting a competing business can violate the antitrust laws.[26] By preventing workers from leaving jobs to pursue better employment opportunities, non-competes decrease competition for workers. Non-competes may also harm competition by preventing other businesses from obtaining enough workers to enter a market or prevent potential competitors from forming, thereby blocking competitors from competing effectively with the original employer.

The Agencies may investigate and take action against non-competes and other restraints on worker mobility that limit competition. For example, in 2020, the DOJ entered into a deferred prosecution agreement in which a medical oncology practice admitted to conspiring to allocate chemotherapy and radiation treatments for cancer patients.[27] To remediate the harm and increase competition in the treatment of cancer patients going forward, the criminal resolution required the defendant to waive and not enforce non-compete provisions in contracts with its current or former employees who open or join an oncology practice in the region.

In 2021, the FTC pursed several enforcement actions charging the use of non-competes as unfair methods of competition under Section 5 of the Federal Trade Commission Act. These actions resulted in orders requiring the firms to eliminate non-competes for thousands of workers.[28] The FTC has also

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[26] *See, e.g.*, *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911) (holding that several tobacco companies violated both Section 1 and Section 2 of the Sherman Act because of the collective effect of six of the companies' practices, one of which was the "constantly recurring" use of non-compete clauses); *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977) ("[E]mployee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act."); Decision and Order, *In re Ardagh Group S.A., et al.*, No. C-4785 (F.T.C. Feb. 21, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110182-c4785-ardagh-decision-and-order.pdf; Decision, *In re: O-I Glass, Inc.*, No. C-4786 (F.T.C. Feb. 21, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110182_c4786-o-i-glass-inc-decision-and-order.pdf; Decision, *In re: Prudential Security, Inc.*, No. C-4787 (F.T.C. Feb. 23, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/c47872210026prudentialsecurityfinalconsent.pdf; Decision and Order, *In re Anchor Glass Container Corp.*, No. C-4793 (F.T.C May 18, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/211_0182_c4793_anchor_glass_final_order_with_appendices.pdf.

[27] Deferred Prosecution Agreement, *United States v. Fla. Cancer Specialists & Rsch. Inst., LLC*, No. 2:20-cr-00078-TPB-MRM (M.D. Fla. Apr. 30, 2020), available at https://www.justice.gov/atr/case-document/file/1281681/dl; Press Release, U.S. Dep't of Just., *Leading Cancer Treatment Center Admits to Antitrust Crime and Agrees to Pay $100 Million Criminal Penalty* (Apr. 30, 2020), https://www.justice.gov/opa/pr/leading-cancer-treatment-center-admits-antitrust-crime-and-agrees-pay-100-million-criminal.

[28] Decision and Order, *In re Ardagh Group S.A., et al.*, No. C-4785 (F.T.C. Feb. 21, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110182-c4785-ardagh-decision-and-order.pdf; Decision, *In re: O-I Glass, Inc.*, No. C-4786 (F.T.C. Feb. 21, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110182_c4786-o-i-glass-inc-

taken action against non-competes when reviewing mergers. In multiple final orders settling charges that certain mergers violated federal antitrust laws, the FTC has required the parties to cease using, enforcing, and/or entering into non-compete clauses.[29]

In April 2024, the FTC issued a final rule banning most non-compete agreements, including provisions that function as non-competes.[30] That rule was scheduled to take effect on September 4, 2024. However, on August 20, 2024, the District Court for the Northern District of Texas issued an order setting aside the rule.[31] The order is currently on appeal.[32] The latest information regarding the status of the non-compete final rule is available at ftc.gov/noncompetes. Regardless, the FTC retains the legal authority to address non-competes through case-by-case enforcement actions under the FTC Act, as it has done in the past.

Non-competes may also violate other federal laws, such as the National Labor Relations Act[33] and the Packers and Stockyards Act.[34] Non-competes can also violate state laws, including laws banning unfair methods of competition and unfair or deceptive practices, as well as statutes banning or restricting some or all non-competes.[35]

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decision-and-order.pdf; Decision, *In re: Prudential Security, Inc.*, No. C-4787 (F.T.C. Feb. 23, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/c47872210026prudentialsecurityfinalconsent.pdf; Decision and Order, *In re Anchor Glass Container Corp.*, No. C-4793 (F.T.C May 18, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/211_0182_c4793_anchor_glass_final_order_with_appendices.pdf.

[29] Decision and Order, *In the Matter of Zimmer Holdings, Inc.*, No. C-4534 (F.T.C. Aug. 11, 2015), available at https://www.ftc.gov/system/files/documents/cases/150820zimmerdo.pdf; Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Requiring Divestitures of Hundreds of Retail Gas and Diesel Fuel Stations Owned by 7-Eleven, Inc.* (Nov. 10, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-approves-final-order-requiring-divestitures-hundreds-retail-gas-diesel-fuel-stations-owned-7; Decision and Order at 12–14, *In the Matter of Davita Inc. and Total Renal Care, Inc.*, No. C-4752 (F.T.C. Jan. 10, 2022), available at https://www.ftc.gov/system/files/documents/cases/211_0056_c4752_davita_utah_health_order.pdf; Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Restoring Competitive Markets for Gasoline and Diesel in Michigan and Ohio* (Aug. 9, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-approves-final-order-restoring-competitive-markets-gasoline-diesel-michigan-ohio.

[30] Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024).

[31] *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024).

[32] *See* Notice of Appeal, Ryan LLC et al. v. FTC, No. 3:24-CV-00986-E (N.D. Tex. Oct. 18, 2024), available at https://www.uschamber.com/assets/documents/FTC-Notice-of-Appeal-Ryan-LLC-v.-FTC-Fifth-Circuit.pdf.

[33] *See* Nat'l Lab. Rels. Bd., *Filing an Unfair Labor Practice Charge with the National Labor Relations Board* (2024), https://www.nlrb.gov/sites/default/files/attachments/pages/node-184/info-for-workers-subject-to-noncompetes-or-stay-or-pay-provisions.pdf.

[34] Final Judgment, *United States v. Koch Foods Inc.*, No. 1:23-CV-15813 (N.D. Ill. Feb. 12, 2024), available at https://www.justice.gov/atr/media/1377131/dl; Press Release, U.S. Dep't of Just., *Justice Department Files Lawsuit and Proposed Consent Decree to Prohibit Koch Foods from Imposing Unfair and Anticompetitive Termination Penalties in Contracts with Chicken Growers* (Nov. 9, 2023), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-and-proposed-consent-decree-prohibit-koch-foods-imposing.

[35] For example, non-competes have been void in California and North Dakota for over a century. *See* Cal. Bus. & Prof. Code § 16600 *et seq.*; N.D. Cent. Code § 9-08-06.

5. Other restrictive, exclusionary, or predatory employment conditions can also be unlawful

The Agencies may also investigate and take action against other restrictive agreements that impede worker mobility or otherwise undermine competition.

The following examples illustrate how restrictive conditions could potentially violate the antitrust laws or other federal or state laws.

- **Non-disclosure agreements** can violate the antitrust laws when they span such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their job. For example, a non-disclosure agreement drafted so broadly as to prohibit disclosure of any information that is "usable in" or "relates to" an industry may be unlawful.[36] Non-disclosure agreements can also violate federal law when they are worded so broadly as to suggest that workers who report potential violations of law to state or federal law enforcement or regulators, or who cooperate with a government investigation, could face lawsuits and adverse employment consequences.[37]
- **Training repayment agreement provisions** are requirements that a person repay any training costs if they leave their employer. Depending on the facts and circumstances, these provisions can be anticompetitive, such as if they function to prevent a worker from working for another firm or starting a business.[38]
- **Non-solicitation agreements** that prohibit a worker from soliciting former clients or customers of the employer similarly can, depending on the facts and circumstances, be anticompetitive, such as if they are so broad that they function to prevent a worker from seeking or accepting another job or starting a business.
- **Exit fee and liquidated damages provisions** require workers to pay a financial penalty for leaving their employer. Depending on the facts and circumstances, these provisions can be anticompetitive,[39] such as if they prevent workers from working for another firm or starting a business.

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[36] *See Brown v. TGS Mgmt.*, 57 Cal. App. 5th 303, 316–19 (2020).

[37] *See, e.g.*, *EEOC v. Astra USA*, 94 F.3d 738, 744–45 (1st Cir. 1996); *FTC v. AMG Services, Inc.*, No. 2:12-CV-00536-GMN-VCF, 2013 WL 12320929, at *4 (D. Nev. Aug. 20, 2013); *Sparks v. Seltzer*, No. 05-CV-1061 (NG) (KAM), 2006 WL 2358157, at *4 (E.D.N.Y. Aug. 14, 2006); *EEOC v. Int'l Profit Assocs.*, No. 01 C 4427 (N.D. Ill. Apr. 23, 2003) (unpublished); *Hoffman v. Sbarro, Inc.*, No. 97 CIV. 4484(SS), 1997 WL 736703, at *1 (S.D.N.Y. Nov. 26, 1997).

[38] *See* Statement of Interest of the United States of America at 20, *Mizell v. Univ. of Pittsburgh Med. Ctr.*, No. 1:24-CV-00016-SPB (W.D. Penn. Sept. 30, 2024), ECF No. 50 [hereinafter *Mizell* Statement of Interest], available at https://www.justice.gov/atr/media/1371576/dl.

[39] *See* Final Judgment, *United States v. Koch Foods Inc.*, No. 1:23-CV-15813 (N.D. Ill. Feb. 12, 2024), available at https://www.justice.gov/atr/media/1377131/dl (consent decree resolving allegations that termination payment provisions in poultry grower contracts violated Section 1 of the Sherman Act and Section 202(a) of the Packers and Stockyards Act in which the defendant poultry processor agreed to repay all termination payments it had received from farmers and to refrain from including termination payment obligations in future poultry grower contracts).

These types of restrictions can harm labor market competition by preventing workers from seeking better, higher-paying jobs. When firms hold monopsony power in a labor market, they may exploit their bargaining power to impose restrictive, exclusionary, or predatory employment terms that deprive workers of fair competitive pay and of the ability to bargain for better working conditions.[40] These restrictions can also harm competition for goods and services by raising entry barriers for new businesses, and by depriving existing businesses of the opportunity to hire the talent necessary to compete. Such provisions raise many of the same antitrust concerns as non-competes, and the Agencies may investigate if there are indications that such a restrictive condition on workers is harming competition.

Other federal agencies have their own authorities to address unfair methods of competition, including practices that undermine labor market competition.[41] Many of these agencies have enforced against restraints on worker mobility.[42] State law also sets limits on training repayment requirements and NDA restrictions.[43]

6. The antitrust laws apply to agreements that businesses reach with independent contractors

The antitrust laws prohibit anticompetitive conduct directed at workers, which includes both employees and independent contractors. Many businesses hire workers as independent contractors rather than as employees. Independent contractors typically are hired to perform discrete jobs, are not under the direct supervision of the firm, and often use their own tools.[44] With the growth of technology platforms such as smartphone apps, some firms use independent contractors rather than employees to match workers who provide labor with consumers seeking their services.

The antitrust laws also apply to these kinds of platform businesses, with respect to both their employees and independent contractors seeking work through their platform. For example, an agreement between two or more competing platforms to fix the compensation of independent contractors offering their services via the platforms may constitute the type of *per se* violation of the antitrust laws that the exposes the platforms to criminal liability.

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[40] *See Mizell* Statement of Interest at 1.

[41] *See*, *e.g.*, 7 U.S.C. § 192 (U.S. Department of Agriculture's Section 202 authority under the Packers and Stockyards Act); 29 U.S.C. §§ 157, 158 (National Labor Relation Board's Section 7 and 8(a)(1) authorities under the National Labor Relations Act); 49 U.S.C. § 41712 (U.S. Department of Transportation's authority under the Federal Aviation Act).

[42] *See, e.g.*, Consumer Fin. Prot. Bureau Office for Consumer Populations, Issue Spotlight: Consumer Risks Posed by Employer-Driven Debt (July 20, 2023), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-consumer-risks-posed-by-employer-driven-debt/full-report; Nat'l Lab. Rels. Bd., *Region 9-Cincinnati Secures Settlement Requiring Juvly Aesthetics to Rescind Unlawful Non-Compete and Training Repayment Agreement Provisions (TRAPs) and Pay Over $25,000 to Employees* (Feb. 6, 2024), https://www.nlrb.gov/news-outreach/region-09-cincinnati/region-9-cincinnati-secures-settlement-requiring-juvly; *Su v. Advanced Care Staffing, LLC*, 23-CV-2119 (E.D.N.Y. March 20, 2023) (suing to enjoin enforcement of a training repayment agreement as a violation of the Fair Labor Standards Act).

[43] *See*, *e.g.*, Colo. Rev. Stat. § 8-2-113(3)(a)-(b).

[44] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 Fed. Reg. 1638, 1639 (Jan. 10, 2024) (codified at 29 C.F.R. 780).

7. False earnings claims can violate the law

The Agencies may investigate and take action against businesses that make false or misleading claims about potential earnings that workers (including both employees and independent contractors) may realize. For example, the FTC has taken action against an online retailer,[45] a ride-sharing company,[46] a customer service gig work platform,[47] and a food delivery company[48] for allegedly falsely advertising that workers would earn substantially more in compensation and/or tips than they did in reality. When workers are lured to these businesses by false earnings promises, honest businesses are less able to fairly compete for those workers.

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[45] Complaint, Fed. Trade Comm'n, *In the Matter of Amazon.com, Inc. and Amazon Logistics, Inc.*, No. 1923123 (Feb. 2021), available at https://www.ftc.gov/system/files/documents/cases/amazon_flex_complaint.pdf.

[46] Complaint, *FTC v. Uber Technologies, Inc.*, No. 3:17-CV-00261 (N.D. Cal. Jan. 19, 2017), available at https://www.ftc.gov/system/files/documents/cases/1523082ubercmplt.pdf.

[47] Complaint, *FTC v. Arise Virtual Solutions, Inc.*, No. 0:24-CV-61152 (S.D. Fla. July 2, 2024), available at https://www.ftc.gov/system/files/ftc_gov/pdf/arise_complaint.pdf.

[48] Complaint, *FTC v. Grubhub Inc.*, No. 1:24-CV-12923 (N.D. Ill. Dec. 17, 2024), available at https://www.ftc.gov/system/files/ftc_gov/pdf/2024-12-17-GrubhubComplaint.pdf.

8. Report violations

The Department of Justice's Antitrust Division and the Federal Trade Commission encourage anyone who notices any of the above activities or other suspicious behavior and believes that there has been an antitrust violation to report it to either or both offices.

Contact the Antitrust Division's Complaint Center	**Contact the FTC's Bureau of Competition Complaint Intake**
E-mail: antitrust.complaints@usdoj.gov	Online complaint portal: https://www.ftc.gov/enforcement/report-antitrust-violation
Phone: 202-307-2040; 888-647-3258	
Mail: Complaint Center, U.S. Department of Justice, Antitrust Division 950 Pennsylvania Avenue NW Room 3322 Washington, DC 20530	Mail: Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission 600 Pennsylvania Avenue NW Washington, DC 20580

The Antitrust Division and the FTC encourage anyone seeking to submit a complaint to provide the following types of information with your complaint:

- What are the names of companies, individuals, or organizations that are involved?
- How have these companies, individuals, or organizations potentially violated federal antitrust laws?
- What examples can you give of the conduct that you believe may violate the antitrust laws?
- Who is affected by this conduct?
- How do you believe competition may have been harmed?
- How did you learn about the situation?

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

January 18, 2022

Commission Statement on the Holder Rule and Attorneys' Fees and Costs

This advisory opinion addresses the Federal Trade Commission's Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 16 C.F.R. § 433.2, commonly known as the Holder Rule, and its impact on consumers' ability to recover costs and attorneys' fees. This issue has arisen repeatedly in court cases, with some courts correctly concluding that the Holder Rule does not limit recovery of attorneys' fees and costs when state law authorizes awards against a holder,[1] and others misinterpreting the Holder Rule as a limitation on the application of state cost-shifting laws to holders.[2]

Background on the Rule. The Commission adopted the Holder Rule to protect consumers when they purchase goods or services on credit. The Commission identified multiple practices that sellers use to "cut off" consumers' rights so that the holder of the loan may demand full payment from the consumer despite misconduct by the seller.[3] The Commission determined that

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[1] *See, e.g.*, *In re Stewart*, 93 B.R. 878 (Bankr. E.D. Pa. 1988); *Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134 (Tex. 1987); *Kish v. Van Note*, 692 S.W.2d 463 (Tex. 1985); *Reliance Mortg. Co. v. Hill-Shields*, No. 05-99-01615-CV, 2001 Tex. App. LEXIS 140 (Tex. App. Jan. 10, 2001); *Oxford Fin. Cos. v. Velez*, 807 S.W.2d 460 (Tex. App. 1991); *Green Tree Acceptance, Inc. v. Pierce*, 768 S.W.2d 416 (Tex. App. 1989); *see also Pulliam v. HNL Auto. Inc.*, 60 Cal. App. 5th 396, 274 Cal. Rptr. 3d 547, 559-67 (Cal. Ct. App. 2021), *review granted*, 484 P.3d 564, 277 Cal. Rptr. 3d 323 (Cal. Apr. 28, 2021) (No. S267576) (concluding that Holder Rule does not limit attorney fee recovery from holder; rejecting contrary position attributed to FTC and ruling that such an agency interpretation would not be entitled to deference).

[2] *See, e.g.*, *Spikener v. Ally Fin., Inc.*, 50 Cal. App. 5th 151, 162, 263 Cal. Rptr. 3d 726, 735 (Cal. Ct. App. 2020) (concluding statements by the Commission in 2019 (84 Fed. Reg. 18,711, 18,713 (May 2, 2019)) demonstrate "clear intent" to preempt attorney fee recovery "regardless of whether state claim being asserted pursuant to the Holder Rule contains fee-shifting provisions", but declining to express opinion on whether costs are preempted for the same reason); Order on Motion, *Reyes v. Beneficial State Bank*, No. BCV-17-100082 (Cal. Sup. Ct., Kern Co., Dec. 5, 2019), *appeal docketed,* No. F080827 (Cal. Ct. App. Feb. 13, 2020) (ruling state statute is preempted by Commission statements on application of Holder Rule to attorney's fees); *see also Lafferty v. Wells Fargo Bank, NA,* 25 Cal. App. 5th 398, 414-16, 275 Cal. Rptr. 3d 842, 855-57 (Cal. Ct. App. 2018) (concluding that second sentence of the Holder Rule Notice caps attorneys' fees claim against defendant-holder unless "another state or local cause of action can be found to support such a claim," but that costs are not subject to the same cap).

[3] *See* 40 Fed. Reg. 53,506, 53,507-08 (1975) (use of promissory notes and waiver of defense clauses in seller-financed sales); *Id.* at 53,514-15 (use of "vendor-related" or "direct" loans by

sellers' use of these practices to foreclose consumer claims and defenses constitutes an unfair practice under Section 5 of the FTC Act.[4] To preserve consumers' claims and defenses, the Holder Rule requires a seller that finances sales to include in credit contracts the following provision, also known as the "Holder Rule Notice":

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2(a). Where the seller is not the creditor, but receives payment from the proceeds of a loan by a creditor that has a referral or business relationship with the seller (defined in the Rule as a "Purchase Money Loan"), the consumer credit contract must have the same provision, except the words "PURSUANT HERETO OR" are omitted. *Id.* § 433.2(b). A creditor or assignee of credit contracts with the Holder Rule Notice is thus subject to any claims or defenses that the consumer could assert against the seller.

Analysis. The Holder Rule does not eliminate any rights the consumer may have as a matter of separate state, local, or federal law. Consequently, whether costs and attorneys' fees may be awarded against the holder of the credit contract is determined by the relevant law governing costs and fees.[5] Nothing in the Holder Rule states that application of such laws to holders is inconsistent with Section 5 of the FTC Act or that holders should be wholly or partially exempt from these laws.

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third party) (1975); *see also* FTC, Statement of Enforcement Policy, 41 Fed. Reg. 34,594, 34,596 (1976). (explaining affiliation and referral standards applicable to "transactions in which a seller accepts the proceeds of a loan extended directly from a lender to a purchaser.").

[4] 40 Fed. Reg. at 53,523.

[5] States have passed varying laws regarding recovery of attorneys' fees and costs under which responsibility to pay fees may depend a variety of factors. *Compare* ALASKA R. CIV. P. 82(a) (2021) ("Except as otherwise agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule"); WASH. REV. CODE § 4.84.330 (2021) (if a contract provides for fees to one party, the prevailing party is entitled to fees); KY. REV. STAT. Ann. § 367.220(1) (West 2015) (court may award attorneys' fees and costs to prevailing party in any action under Kentucky Consumer Protection Act), *with* WASH. REV. CODE § 4.84.185 (court may award fees incurred in opposing claims or defenses that court finds were "frivolous and advanced without reasonable cause"); COLO. REV. STAT. § 6-1-113(2)(b) (2021) (in successful action to enforce liability, "person who is found to have engaged or caused another to engage in" deceptive trade practice is liable for costs and attorney fees).

Further, if the applicable law requires or allows costs or attorneys' fee awards against a holder, the Holder Rule does not impose a cap on such an award. The sentence in the Holder Rule Notice that limits recovery to "amounts paid by the debtor" applies only to monetary recovery against holders based on the Holder Rule Notice (*i.e.*, recovery on the claims or defenses the debtor could assert against the seller); the Rule places no cap on a consumer's right to recover from the holder for other reasons. Thus, for example, in an action between a consumer and a holder, if the applicable law authorizes the consumer to recover costs or fees from parties that unsuccessfully oppose the consumer's claims or defenses, a prevailing consumer's right to recovery against the holder is not restricted by the Holder Rule Notice. In this scenario, the cost or fee award is separate and supported by a law that is independent of the Holder Rule. Thus, the Holder Rule Notice does not limit costs or attorneys' fees that the applicable law directs or permits a court to award against a holder because of its role in litigation.

In a situation where the applicable law permits assessing costs or attorneys' fees exclusively against the seller, the seller's liability for such costs and fees may be raised against the holder because of the Holder Rule Notice. The holder's obligation to pay costs or fee awards available exclusively against the seller, however, would be limited to the amount paid by the consumer. Thus, for example, if a consumer is awarded fees in a suit solely against the seller, or the law allows awards only against a seller that has engaged in specified conduct, the Holder Rule Notice authorizes the consumer to recover such an award from the holder up to the amount paid. The consumer also may rely on a claim against the seller for costs or attorneys' fees to offset an obligation to the holder.

Some courts have read the Commission's statements in a 2019 Rule Confirmation notice regarding the Holder Rule as mandating a different result.[6] Insofar as these decisions conclude that the Holder Rule precludes state law from providing for costs or attorneys' fees against the holder, they misconstrue the Commission's statements. Neither the Rule itself nor the 2019 Rule Confirmation notice say that the Holder Rule invalidates state law or that there is a federal interest in limiting state remedies. To the contrary, the 2019 Rule Confirmation says that nothing in the Holder Rule limits recovery of attorneys' fees if a federal or state law separately

[6] *Supra* note 2.

provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct.[7]

By direction of the Commission.

April J. Tabor
Secretary

[7] We have previously observed that the Holder Rule Notice does not limit the availability of injunctive relief against a holder: "The final sentence of the Holder Rule Notice does not restrict the types of remedies available when a claim or defense is preserved; it simply states that the money that a consumer may obtain from a holder based on the Notice may not exceed amounts paid. The Commission affirms that the plain language of the Rule does not limit the types of relief a court may award against a holder." 84 Fed. Reg. at 18,713 n.32.

information directly to the manager of the certification office, send it to the attention of the person identified in Related Information. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Civil Aviation Authority of Israel (CAAI) Israeli AD ISR–I–24–2021–6–6R1, dated June 27, 2021, for related information. This MCAI may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–0566.

(2) For more information about this AD, contact Brian Hernandez, Aerospace Engineer, Systems and Equipment Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3535; email: *Brian.Hernandez@faa.gov.*

(k) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) IAI-Aviation Group Alert Service Bulletin 368–24–098, Revision 1, dated June 2021.

(ii) [Reserved]

(3) For service information identified in this AD, contact Israel Aerospace Industries, Ltd., Ben Gurion Airport, Israel 70100; telephone 972–39359826; email *tmazor@iai.co.il.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on July 8, 2021.

Gaetano A. Sciortino,

Deputy Director for Strategic Initiatives, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–15026 Filed 7–12–21; 11:15 am]

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FEDERAL TRADE COMMISSION

16 CFR Part 323

[3084–AB64]

Made in USA Labeling Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') issues a final rule related to ''Made in USA'' and other unqualified U.S.-origin claims on product labels.

DATES: This final rule is effective August 13, 2021.

FOR FURTHER INFORMATION CONTACT: Julia Solomon Ensor (202–326–2377) or Hampton Newsome (202–326–2889), Attorneys, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room CC–9528, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

On July 16, 2020, the Commission published a Notice of Proposed Rulemaking (''NPRM'') (85 FR 43162) seeking comments on a new rule regarding unqualified U.S.-origin claims (''MUSA claims'') on product labels. The NPRM was preceded by a review of the Commission's longstanding program to prevent deceptive MUSA claims.[1] The review included a 2019 public workshop and public comment period, where stakeholders expressed nearly universal support for a rule addressing MUSA labels.[2]

The Commission published a new rule in the NPRM pursuant to its authority under 15 U.S.C. 45a (''Section 45a''). Section 45a declares: ''[t]o the extent any person introduces, delivers for introduction, sells, advertises, or offers for sale in commerce a product with a 'Made in the U.S.A.' or 'Made in America' label, or the equivalent thereof, in order to represent that such product was in whole or substantial part of domestic origin, such label shall be consistent with decisions and orders of the Federal Trade Commission.'' The statute authorizes the agency to issue rules to effectuate this mandate and prevent unfair or deceptive acts or practices relating to MUSA labeling.[3] Specifically, under the statute, the Commission ''may from time to time issue rules pursuant to section 553 of title 5, United States Code'' requiring MUSA labeling to ''be consistent with decisions and orders of the Federal Trade Commission issued pursuant to [Section 5 of the FTC Act].'' The statute authorizes the FTC to seek civil penalties for violations of such rules.[4]

Consistent with these statutory provisions, the NPRM proposed a rule covering labels on products that make unqualified U.S.-origin claims. Consistent with the Commission's MUSA Decisions and Orders since the 1940s,[5] the NPRM proposed to codify the established principle that unqualified U.S.-origin claims imply to consumers no more than a *de minimis* amount of the product is of foreign origin.[6]

[1] This program consisted of compliance monitoring, counseling, and targeted enforcement pursuant to the FTC's general authority under 15 U.S.C. 45 (''Section 5'' of the FTC Act). Section 5 prohibits unfair or deceptive acts or practices in or affecting commerce. An act or practice is deceptive if it is likely to mislead consumers acting reasonably under the circumstances and is material—that is, likely to affect a consumer's decision to purchase or use the advertised product or service. A claim need not mislead all—or even most—consumers to be deceptive under the FTC Act. Rather, it need only be likely to deceive some consumers acting reasonably. *See FTC Policy Statement on Deception,* 103 F.T.C. 174 (1984) (*appended to Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 177 n.20 (1984) (''A material practice that misleads a significant minority of reasonable consumers is deceptive.''); *see also FTC* v. *Stefanchik,* 559 F.3d 924, 929 (9th Cir. 2009) (''The FTC was not required to show that all consumers were deceived . . . .'').

[2] Commenters argued such a rule could have a strong deterrent effect against unlawful MUSA claims without imposing new burdens on law-abiding companies. *See generally* Transcript of Made in USA: An FTC Workshop (Sept. 26, 2019) at 63–72, *available at https://www.ftc.gov/news-events/events-calendar/made-usa-ftc-workshop;* FTC Staff Report, Made in USA Workshop (June 2020) (''MUSA Report''), *available at https://www.ftc.gov/system/files/documents/reports/made-usa-ftc-workshop/p074204_-_musa_workshop_report_-_final.pdf.*

[3] *See* Section 320933 of the Violent Crime and Law Enforcement Act of 1994, Public Law 103–322, 108 Stat. 1796, 2135, codified in relevant part at 15 U.S.C. 45a. Section 45a also states: ''This section shall be effective upon publication in the **Federal Register** of a Notice of the provisions of this section.'' The Commission published such a notice in 1995 (60 FR 13158 (Mar. 10, 1995).

[4] Under the statute, violations of any rule promulgated pursuant to Section 45a ''shall be treated by the Commission as a violation of a rule under section 57a of this title regarding unfair or deceptive acts or practices.'' For violations of rules issued pursuant to 15 U.S.C. 57a, the Commission may commence civil actions to recover civil penalties. *See* 15 U.S.C. 45(m)(1)(A).

[5] *See, e.g., Vulcan Lamp Works, Inc.,* 32 F.T.C. 7 (1940); *Windsor Pen Corp.,* 64 F.T.C. 454 (1964) (articulating this standard as a ''wholly of domestic origin'' standard).

[6] This principle was incorporated into the Commission's 1997 *Enforcement Policy Statement on U.S. Origin Claims* (the ''Policy Statement'') following consumer research and public comment, as the ''all or virtually all'' principle. Specifically, the Policy Statement provides a marketer making an unqualified claim for its product should, at the time of the representation, have a reasonable basis for asserting ''all or virtually all'' of the product is made in the United States. FTC, *Issuance of Enforcement Policy Statement on ''Made in USA'' and Other U.S. Origin Claims,* 62 FR 63756, 63766

The NPRM, consistent with the Commission's prior rulings and consumer perception surveys, proposed a rule prohibiting marketers from including unqualified U.S.-origin claims on labels unless: (1) Final assembly or processing of the product occurs in the United States; (2) all significant processing for the product occurs in the United States; and (3) all or virtually all of the product's ingredients or components are made and sourced in the United States. By codifying existing guidance, the proposed rule sought to impose no new obligations on market participants.

To avoid confusion or perceived conflict with other country-of-origin labeling laws and regulations, the NPRM contained a provision specifying the rule does not supersede, alter, or affect any other federal or state statute or regulation relating to country-of-origin labels, except to the extent a state country-of-origin statute, regulation, order, or interpretation is inconsistent with the proposed rule.[7]

In response to the NPRM, the Commission received hundreds of comments, discussed *infra* Section II. Although some raised concerns or recommended changes to the Commission's proposal, the majority supported finalizing the rule as drafted. Accordingly, the Commission adopts the proposed rule with limited modifications as discussed below.[8] The rule will take effect August 13, 2021.

II. Response to Comments

The Commission received more than 700 comments [9] in response to the NPRM from individuals, industry groups, consumer organizations, and members of Congress. Commenters generally supported the rule,[10] stating it provided much-needed clarity [11] and would deter bad actors [12] without imposing new burdens on marketers.[13] Most commenters agreed the rule should incorporate the longstanding ''all or virtually all'' standard.[14] Additionally, the majority of commenters addressing the issue agreed the proposed rule represented a proper exercise of the Commission's rulemaking authority under Section 45a.

Although the Commission received mostly supportive comments, some commenters raised concerns with the Commission's proposal to codify the ''all or virtually all'' guidance through rulemaking, suggesting the standard may not reflect current consumer perception. Others proposed specific additions to the rule, including additional definitions, guidance on implied claims, and an effective date. Members of the beef and shrimp industries requested specific guidance for their industries. A few stakeholders proposed changes outside the scope of the FTC's Section 45a rulemaking authority. For example, some commenters proposed making country-of-origin labeling mandatory in all instances. Finally, some raised miscellaneous concerns about particular businesses' practices or claims.[15] As discussed below, these comments do not provide a compelling basis to change the substantive requirements of the rule proposed in the NPRM.

A. Rulemaking Authority Regarding Mail Order Advertising

Eleven stakeholders filed comments addressing the FTC's rulemaking authority under Section 45a, with the majority agreeing the proposed rule is consistent with that grant of authority.[16] As described in Section I, Section 45a authorizes the Commission ''[to] issue rules pursuant to section 553 of title 5 [of the U.S.C.]'' to govern the use of '' 'Made in the U.S.A.' or 'Made in America' label[s], or the equivalent thereof'' when a person ''introduces, delivers for introduction, sells, advertises, or offers for sale [a product] in commerce.'' The statute provides such labels must be ''consistent with decisions and orders of the Federal Trade Commission issued pursuant to [Section 5 of the FTC Act].'' [17]

1. Comments

Eleven commenters addressed the Commission's authority under Section 45a. The majority asserted the proposed rule was within the scope of Section 45a's grant of rulemaking authority, and the proposed rule appropriately covered labels in mail order (electronic) advertising.[18] For example, *TINA.org* argued the Commission properly interpreted Section 45a as authorizing coverage of electronic labels because Section 45a does not limit the term ''labels'' to physical labels, and physical and digital labels are ''functionally equivalent'' in terms of providing product information to consumers.[19] *TINA.org* further noted ''[w]hen Congress seeks to limit 'labels' to the physical, it knows how . . . [and here] the statute makes no attempt to restrict the definition or distinguish physical labels from digital labels.'' [20] Moreover, *TINA.org* explained, limiting the proposed rule to physical labels without addressing electronic labels

(Dec. 2, 1997). The Commission first used the ''all or virtually all'' language in *Hyde Athletic Industries,* File No. 922–3236 (consent agreement accepted subject to public comment Sept. 20, 1994) and *New Balance Athletic Shoes, Inc.,* Docket 9268 (complaint issued Sept. 20, 1994). In the 1997 **Federal Register** Notice requesting public comment on Proposed Guides for the Use of U.S. Origin Claims, the Commission explained the ''all or virtually all'' standard merely rearticulated longstanding principles governing MUSA claims. FTC, *Request for Public Comment on Proposed Guides for the use of U.S. Origin Claims,* 62 FR 25020 (May 7, 1997). The Commission has routinely applied this standard in its MUSA Decisions and Orders since 1997. *See* Compilation of cases at *https://www.ftc.gov/tips-advice/business-center/legal-resources?type=case&field_consumer_protection_topics_tid=234.*

[7] *See, e.g.,* Textile Fiber Products Identification Act (15 U.S.C. 70b); Wool Products Labeling Act (15 U.S.C. 68); American Automobile Labeling Act (49 U.S.C. 32304); Agricultural Marketing Act (7 U.S.C. 1638a); Buy American Act (41 U.S.C. 10a–10c); and implementing rules.

[8] As discussed in Section III of this Notice, the Commission has added a provision (section 323.6) in the final Rule related to petitions for exemption.

[9] Comments appear on FTC Docket FTC–2020–0056 and are available at *www.regulations.gov.* For purposes of this Notice, all comments are referred to by their short docket number (*e.g.,* ''1''), rather than long docket number (*e.g.,* ''FTC–2020–0056–0001'').

[10] *See, e.g.,* Senators Sherrod Brown, Tammy Baldwin, Christopher Murphy, and Richard Blumenthal (''Senators'') (373); North American Insulation Manufacturers (631); *see also* Letter from Representative Frank Pallone, Jr., Chairman, and Representative Jan Schakowsky, Chair, Subcommittee on Consumer Protection and Commerce, U.S. House of Representatives (Oct. 15, 2020). *But see* Retail Industry Leaders Association (''RILA'') (570) (arguing low levels of enforcement activity suggest codifying the guidance into a rule is unnecessary).

[11] UIUC Accounting Group A13 (5); Delphine MUREKATETE, iMSA Program, University of Illinois at Urbana Champaign (21); Anonymous Anonymous (24); UIUC–BADM 403–A02 (25); Nirma Ramirez (26); Jaymee Westover (358); Joy Winzerling (419); United Steelworkers (526); Anonymous Anonymous (533); R–CALF USA (588).

[12] Chris Jay Hoofnagle (613) (advocating use of civil penalties to deter MUSA fraud).

[13] UIUC Accounting Group A13 (5); Chris Posey (7); Family Farm Action Alliance (543).

[14] See, *e.g.,* United Steelworkers (526); Alliance for American Manufacturing (''AAM'') (611).

[15] Honey Boynton (32); Holly Mastromatto (33); Doug Thompson (123); Lucilla Rinehimer (702).

[16] UIUC Accounting Group A13 (5); UIUC Group A06 Anonymous (22); Truth in Advertising, Inc. (''*TINA.org*'') (369); Senators (373); Southern Shrimp Alliance (380); Council for Responsible Nutrition (''CRN'') (569); Personal Care Products Council (''PCPC'') (587); Anonymous Anonymous (592); Alliance for AAM (611); National Association of Manufacturers (''NAM'') (623); Coalition for a Prosperous America (625).

[17] 15 U.S.C. 45a.

[18] UIUC Accounting Group A13 (50); UIUC Group A06 (22); *TINA.org* (369); Senators (373); Southern Shrimp Alliance (380); AAM (611); Coalition for a Prosperous America (625).

[19] *TINA.org* (369) (emphasis in original) (also arguing the Commission may draw support from the dictionary definition of ''labels,'' which includes digital labels).

[20] Id. at 2. *TINA.org* also suggested ''courts regularly interpret laws expansively in the face of technological innovation,'' and the ''possibility that Congress may not have anticipated the application of the term label to apply online does not change [the] outcome.''

would ''leave American consumers unprotected.'' [21] Accordingly, *TINA.org* concluded, ''[a]s a matter of statutory interpretation, the Commission *can* regulate digital MUSA labels. As a matter of consumer protection, the Commission *ought* to regulate digital MUSA labels.'' [22]

The Southern Shrimp Alliance (''SSA'') and AAM agreed, arguing Congress made an affirmative decision to defer to the FTC when it removed a definition of ''labels'' that appeared in initial drafts of the legislation.[23] Moreover, AAM argued the text of Section 45a specifically authorizes coverage of electronic labels because of the words ''the equivalent thereof'' in the phrase authorizing coverage of products introduced into commerce ''with a 'Made in the U.S.A.' or 'Made in America' label, or the equivalent thereof.'' [24] AAM argued the phrase refers to the ''equivalent'' of introducing a product into commerce with a label, *i.e.,* making a claim on a website.[25]

In contrast, four commenters asserted the proposed rule exceeds the scope of the Commission's rulemaking authority under Section 45a.[26] CRN and PCPC argued Section 45a's consistent use of the term ''label'' demonstrates Congress's intent to authorize a rule limited to labels on products, not one that would cover advertising generally.[27] An anonymous commenter argued Section 45a does not provide authority to regulate claims in mail order advertising materials as proposed in Section 323.3, so the proposed rule ''should be revised to only cover labels on products.'' [28] Should the FTC finalize a rule that purports to cover more than labels on products, NAM warned, the result could be ''lengthy litigation [, which would leave] manufacturers and consumers alike . . . without clear guidance at a time when manufacturers need as much regulatory certainty as possible.'' [29] Given these concerns over the scope of the Commission's rulemaking authority, Shirley Boyd stated the Commission should proceed pursuant to the Magnuson Moss Warranty-Federal Trade Commission Improvements Act to issue a broader rule covering MUSA advertising generally.[30]

2. Analysis

After reviewing the comments, the Commission has concluded proposed Section 323.3 falls within the scope of its authority under Section 45a. As described above, Section 45a authorizes the Commission to issue rules to govern labeling of products as ''Made in the U.S.A.'' or ''Made in America,'' or the equivalent thereof. Section 45a specifies: ''[t]o the extent any person introduces, delivers for introduction, sells, advertises, or offers for sale in commerce a product with a 'Made in the U.S.A.' or 'Made in America' label, or the equivalent thereof, in order to represent that such product was in whole or substantial part of domestic origin, such label shall be consistent with decisions and orders of the Federal Trade Commission.'' The Commission is empowered to ensure such labels are consistent with decisions and orders of the Federal Trade Commission defining unfair or deceptive acts or practices under Section 5. The Commission agrees with SSA and AAM that Congress's removal of a definition of ''label'' from Section 45a before its passage strongly suggests Congress deliberately chose to defer to the FTC's interpretation of the term in the context of MUSA claims.[31] Moreover, the Commission agrees with *TINA.org* that digital and physical labels are functionally equivalent, especially with the growth of e-commerce, and a failure to cover labels in print or electronic mail order catalogs or promotional materials would leave consumers without much-needed protection.[32]

The final rule does not cover MUSA claims in all advertising. Instead, as Section 323.3 explains, the rule covers *labels* appearing in all contexts, whether, for example, they appear on product packaging or online. With this clarification, the Commission adopts Section 323.3 as proposed.

B. ''All or Virtually All'' Standard

As described in Section I above, the NPRM proposed to codify the Commission's longstanding interpretation of Section 5's requirements governing substantiation of unqualified MUSA claims. This interpretation was first articulated in Commission cases dating back to the 1940s [33] and was formalized in the 1997 Policy Statement. Specifically, the NPRM proposed to prohibit unqualified MUSA claims on labels unless: (1) Final assembly or processing of the product occurs in the United States, (2) all significant processing that goes into the product occurs in the United States, and (3) all or virtually all ingredients or components of the product are made and sourced in the United States.

Although many commenters, particularly those with interest in food products, supported the decision to incorporate the ''all or virtually all'' guidance, others raised concerns. In particular, commenters questioned whether the ''all or virtually all'' standard represents current consumer understanding of MUSA claims. Some proposed alternative standards for consideration.

After analyzing these comments, as discussed below in Section II.B.3., the Commission has determined it has a reasonable basis to adopt the longstanding ''all or virtually all'' standard, and the rule provides appropriate and clear guidance to marketers.

1. Consumer Perception Testing

Six commenters argued the FTC should conduct new consumer perception testing before codifying the ''all or virtually all'' guidance into a rule.[34] They noted the Commission has not conducted comprehensive testing since the 1990s. CRN explained ''codifying a standard for unqualified U.S.-origin claims that is based on consumer perception data that has not been reanalyzed by the Commission in over 20 years'' is potentially problematic because ''[g]iven significant changes to the global economy, consumer perceptions of U.S.-origin claims are very likely to have changed over time and consumer perception in 1997, and even 2013, could be very different from how consumers perceive U.S.-origin claims today.'' [35] CTA agreed and asserted that proposing to codify the ''all or virtually standard'' without conducting new consumer perception

[21] *Id.* at 5.

[22] *Id.* at 3 (emphasis in original).

[23] Southern Shrimp Alliance (380); AAM (611).

[24] AAM (611). Coalition for a Prosperous America (625) agreed Section 45a's plain language permits coverage of electronic claims (arguing coverage is authorized where a ''substantial part'' of the product is of domestic origin) (citing Section 45a (''To the extent any person introduces, delivers for introduction, sells, advertises, or offers for sale in commerce a product with a 'Made in the U.S.A.' or 'Made in America' label, or the equivalent thereof, in order to represent that such product was in whole or substantial part of domestic origin, such label shall be consistent with decisions and orders of the Federal Trade Commission issued pursuant to section 45 of this title (emphasis added).'')).

[25] AAM (611).

[26] CRN (569); PCPC (587); Anonymous Anonymous (592); NAM (623).

[27] PCPC (587); CRN (569).

[28] Anonymous Anonymous (56).

[29] NAM (623) at 5.

[30] Shirley Boyd (6).

[31] Southern Shrimp Alliance (380); AAM (611).

[32] See *TINA.org* (369).

[33] See, *e.g.,* In re Vulcan Lamp Works, Inc., 32 F.T.C. 7 (1940).

[34] CRN (569); Consumer Technology Association (''CTA'') (579); Global Organization for EPA and DHA Omega-3s (604); American Association of Exporters and Importers (''AAEI'') (605); NAM (623); Pharmavite LLC (695).

[35] CRN (569).

testing ''put the cart before the horse.'' [36] NAM also encouraged the FTC to undertake a comprehensive review similar to the Commission's process in the 1990s before promulgating any rule.[37]

2. Alternative Standards

In addition to requesting the FTC conduct new perception testing, numerous commenters proposed alternatives to the ''all or virtually all'' standard. These proposals, which were based on policy arguments and were not accompanied by supporting consumer perception evidence, fell into two groups. On one hand, more than twenty commenters, mostly individual consumers, suggested unqualified MUSA claims should be limited to products 100% made in the United States. On the other hand, other commenters, mostly manufacturers, argued ''all or virtually all'' is too strict, and by incorporating it into a rule, the FTC could chill unqualified claims, discourage innovation, and harm industries where parts or ingredients are not available in the United States.[38] To address these concerns, this second group of commenters suggested alternatives: (1) Introducing a percentage-of-costs standard; (2) adopting a standard that makes allowances for imported parts or materials not available in the United States; (3) aligning with U.S. Customs and Border Protection's (''CBP'') substantial transformation standard; or (4) adding a safe harbor for ''good faith'' efforts to comply.

i. Percentage-Based Standards

Several commenters argued the Commission should provide marketers greater certainty by promulgating a ''bright line'' rule outlining a specific percentage of manufacturing costs that must be attributable to U.S. costs to substantiate an unqualified claim.[39] For example, NFI suggested the FTC could align the rule with California state law,[40] which permits manufacturers to make unqualified MUSA claims for products with up to 5% of the final wholesale value of the product attributable to articles, units, or parts of the merchandise obtained from outside the USA.[41]

RILA agreed a rule providing a bright-line percentage would help marketers comply, and suggested the FTC consider ''analogous federal regulations that incentivize U.S. manufacturing,'' and incorporate a 70% threshold for unqualified claims.[42] Alternatively, one commenter suggested a rule that would permit an unqualified claim for a product assembled in the United States where more than 50% of its value is based on components of U.S.-origin.[43]

Two representatives of the dietary supplement industry, the Global Organization for EPA and DHA Omega-3s (''GOED'') and Pharmavite LLC, made an alternative percentage-based proposal with different standards for active and inactive ingredients. Specifically, they argued consumers likely interpret an unqualified MUSA claim to mean 100% of a dietary supplement's active ingredients are made and sourced in the United States. They claimed, however, consumers care less about the origin of inactive ingredients. Accordingly, they contended the rule should incorporate a 10% tolerance for foreign-made or sourced inactive ingredients.[44]

ii. Unavailability Exemption

Other commenters argued the rule should allow marketers to make unqualified MUSA claims for products that include imported content only if the imported components are not available in the United States.[45] Some argued there should be a blanket exemption for such content. For example, Bradford White Corporation (''BWC'') suggested the rule broadly allow marketers to exclude foreign parts from the analysis if those parts cannot be ''reasonably sourced'' from a domestic manufacturer.[46] Others agreed the rule should permit unqualified claims for products that contain foreign content that cannot be sourced in the United States, but argued this exemption should be capped at a certain percentage of manufacturing costs. In NAM's view, a rule permitting marketers to incorporate an appropriate percentage of imported components or labor, not otherwise unavailable domestically, ''would give manufacturers clear and predictable rules and play a significant role in helping to encourage manufacturers to increase domestic investments in order to meet an attainable standard.'' [47]

iii. Substantial Transformation Analysis

Several commenters suggested the FTC adopt a ''substantial transformation'' standard for unqualified claims.[48] Three commenters from U.S. trade associations [49] explained harmonizing the FTC's rule with the CBP standard for determining foreign country of origin pursuant to the Tariff Act, 19 U.S.C. 1304, would provide clarity and alleviate the burden on U.S. companies that ''must navigate a number of different country of origin requirements.'' [50] AAFA explained adopting the ''substantial transformation'' standard would result in a ''clear, simple, and easy-to-understand rule.'' [51] The People's Republic of China (''China'') also argued, to avoid uncertainties and bias, the FTC should incorporate CBP's ''change in Tariff Classification'' analysis, as suggested in Article 9 of the World Trade Organization's (''WTO'') Agreement on Rules of Origin.[52]

iv. Good Faith Efforts To Comply

PCPC and RILA recommended the Commission provide safe harbors for two types of good-faith efforts to comply. PCPC, a trade association

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[36] CTA (579).

[37] NAM (623).

[38] See, *e.g.,* CTA (579) (arguing the ''all or virtually all'' guidance deters innovation because many electronic product components are only made internationally); Personal Care Products Council (587) (guidance deters manufacturers from using maximum levels of U.S. parts and materials); AAEI (605) (guidance negatively impacts U.S. companies that will not risk making the claim).

[39] National Fisheries Institute (''NFI'') (628); RILA (570); TRAVIS HEDSTROM (600); Acuity Brands (609); NAM (623); American Coatings Association (''ACA'') (666) (stating marketers need guidance on percentage values or other guidance on how to deal with trace components of foreign/unknown origin).

[40] NFI (628).

[41] See Cal. Bus. & Prof. Code § 17533.7 (as revised in 2015).

[42] RILA (570).

[43] TRAVIS HEDSTROM (660).

[44] GOED (604); Pharmavite LLC (695).

[45] The California law makes such an allowance, although it is not unlimited. Specifically, California permits up to 10% (instead of 5%) of costs to be attributable to imported content if that content cannot be made or obtained in the USA for reasons other than cost. Cal. Bus. & Prof. Code § 17533.7.

[46] BWC (622). Indeed, BWC argued, given consumer expectations and current supply chains, rather than analyzing the percentage of costs attributable to U.S. versus foreign costs, it might be more appropriate to analyze the proportion of an entity's overall manufacturing workforce in the U.S. *Id.*

[47] NAM (623). See also Glenda Smith (612) (requesting more detail on how to handle raw materials not capable of being sourced in the USA).

[48] CBP defines ''substantial transformation'' as a manufacturing process that results in a new and different product with a new name, character, and use different from that which existed before. This standard does not take into account the origin of materials or parts. *See* 19 CFR part 134; *Energizer Battery, Inc.* v. *United States,* 190 F. Supp. 3d 1308 (Ct. Int'l Tr. 2016) (holding a substantial transformation occurs when a product emerges from a manufacturing process with a new name, character, and use, and the ''simple assembly'' of a limited number of components does not constitute a substantial transformation).

[49] International Precious Metals Institute, Inc. (''IPMI'') (520); AAEI (605); American Apparel and Footwear Association (''AAFA'') (675).

[50] AAEI (605). See also BWC (622) (raising concerns about increased regulatory burden).

[51] AAFA (675) (also suggesting the FTC ''eliminate'' qualified claims for any products that do not meet the ''substantial transformation'' threshold).

[52] China (699).

representing manufacturers, distributors, and suppliers of personal care products, suggested incorporating a safe harbor for ''good actors who are trying to overcome the difficulties in sourcing domestic components and materials.'' [53] PCPC explained, ''[a] safe harbor provision for unqualified claims would not dilute the purpose of the FTC's goal with this proposed rule—to deter bad actors from making false claims. Rather, such a provision would provide businesses who in good faith make every reasonable effort to make as much of their product as possible in the U.S. the flexibility to comply with any new regulations.'' [54]

Alternatively, RILA suggested that to avoid deterring retailers and marketplaces from offering products with MUSA labels the final rule should ''include an express statement . . . that allows retailers and marketplaces that have exercised reasonable due diligence to rely on documented supplier and vendor certifications to substantiate MUSA labeling claims.'' [55]

3. Analysis

The Commission has concluded it is not necessary to undertake additional consumer perception testing before adopting the proposed Rule. Accordingly, the Commission adopts the ''all or virtually all standard'' to govern unqualified claims as proposed in the NPRM. Although some commenters speculated consumer perception may have shifted over time, or argued the Commission should adopt a new standard for unqualified claims, there is no evidence on the record disputing the Commission's past findings that at least a significant minority of consumers expect a MUSA-advertised product to be ''all or virtually all'' made in the United States. Nor is there evidence suggesting new perception testing would find otherwise.

Indeed, the limited survey evidence submitted in conjunction with the 2019 workshop on MUSA claims suggested consumer perception has remained stable since the 1990s. Specifically, one panelist, Mark Hanna of Richline Group, Inc. submitted a survey, conducted in 2013, which found almost 3 in 5 Americans (57%) agree ''Made in America'' means all parts of a product, including any natural resources it contains, originated in the United States.[56] Additionally, the survey found 33 percent of consumers thought 100 percent of a product must originate in a country for that product to be labeled as ''Made'' in that country.[57] These findings are consistent with the FTC's 1995 survey, which found roughly 30 percent of consumers would be deceived by an unqualified MUSA claim for a product where 70 percent of the cost was incurred in the United States.[58] As Hanna explained during the workshop, ''at least 25% of the consumers were skeptical that if there's something introduced to that finished product other than something that originated in the US now, they didn't think it should be made in the USA.'' [59] Accordingly, the Commission has a reasonable basis to conclude the ''all or virtually all'' standard accurately represents current consumer perception regarding unqualified MUSA claims. Should future consumer research clearly establish the ''all or virtually all'' standard is inapplicable to a specific class of products, entities may petition the Commission for an exemption from the Rule's requirements, as discussed in Section III of this document.

While commenters proposed alternative standards that might promote certain policy goals, the Commission declines to adopt these alternative proposals for the reasons discussed below. Section 45a authorizes the Commission to issue rules to ensure products labeled as ''Made in the U.S.A.,'' or the equivalent thereof, comport with the requirements of Section 5 of the FTC Act that prohibit unfairness or deception. The ''all or virtually all'' standard is designed to prevent consumer deception and, therefore, the Commission declines to: (1) Adopt a bright-line, percentage-based standard; (2) include a broad carve-out for inputs not available in the United States; (3) incorporate CBP's ''substantial transformation'' standard; or (4) provide a safe harbor for good-faith efforts to comply.

First, percentage-based, bright-line rules could allow deceptive unqualified claims in circumstances where the low cost of the foreign input does not correlate to the importance of that input to consumers. For example, the Commission's enforcement experience has established unqualified U.S.-origin claims for watches that incorporate imported movements may mislead consumers because, although the cost of an imported movement is often low relative to the overall cost to manufacture a watch, consumers may place a premium on the origin and quality of a watch movement and consider the failure to disclose the foreign origin of this component to be material to their purchasing decision. Under those circumstances, the foreign movement likely is not a *de minimis* consideration for consumers, and an unqualified U.S.-origin claim for a watch containing an imported movement would likely deceive consumers.[60] The Policy Statement has instructed marketers since the 1990s that the cost of foreign versus U.S. parts and labor is only one factor to consider in determining how material a part may be to consumers.[61] Accordingly, the Commission declines to adopt a percentage-based standard because the ''all or virtually all'' standard is better tailored to prevent unqualified U.S.-origin claims that will mislead consumers in making purchasing decisions. By maintaining this precedent, the rule accounts for the likelihood consumers interpret MUSA claims somewhat differently for different product categories.

Second, the record similarly does not support excluding foreign content unavailable in the United States from the ''all or virtually all'' analysis. Specifically, as described above, consumer perception testing has consistently shown consumers expect products labeled as MUSA to contain no more than a *de minimis* amount of foreign content. There is no evidence this takeaway varies in scenarios where some parts or inputs are not available in the United States. Indeed, the Policy Statement explains unqualified claims for such products could be deceptive, for example, ''if the [nonindigenous] imported material constitutes the whole or essence of the finished product (*e.g.,* the rubber in a rubber ball or the coffee

[53] PCPC (587). Although not specifically advocating for a good-faith claim safe harbor, the Family Farm Action Alliance similarly argued the FTC should continue its practice of counseling inadvertent offenders into compliance (543).

[54] PCPC (587) at 3.

[55] RILA (570).

[56] Commission staff considered this study previously as part of a request for a staff advisory opinion on unqualified MUSA claims for recycled gold jewelry products. See Response to Request for FTC Staff Advisory Opinion (Sept. 9, 2014), *https://www.ftc.gov/system/files/documents/closing_letters/made-usa/140909madeisusajvc.pdf* (declining to provide an opinion stating MUSA claims for recycled jewelry do not deceive consumers based on perception evidence provided by Richline Group).

[57] See also Hanna, Transcript of *Made in USA: An FTC Workshop* (Sept. 26, 2019) (hereinafter, ''MUSA Tr.'') at 14 (study showed ''25% or 30% of [American consumers] really did feel that everything, including the natural resource, including the gold, had to be part of the final product in order to say it was made in the USA'').

[58] 62 FR 25020, 25036.

[59] Hanna, MUSA Tr. at 15.

[60] *See, e.g.,* FTC Staff Closing Letter to Niall Luxury Goods, LLC (Nov. 20, 2015), *available at https://www.ftc.gov/system/files/documents/closing_letters/nid/151120niall_letter.pdf.*

[61] *See* Policy Statement, 62 FR 63756, 63768.

beans in ground coffee).'' [62] However, the flexibility inherent in the ''all or virtually all'' analysis accounts for the possibility a marketer could substantiate an unqualified claim for a product containing nonindigenous raw materials if the manufacturer has evidence demonstrating the specific claim in context does not deceive consumers.[63]

Third, the record also does not support adopting government standards developed for other purposes (*e.g.,* the CBP substantial transformation standard developed for the imposition of tariffs) as part of the rule. Based on its enforcement experience, the Commission is concerned the standards adopted by CBP for purposes of calculating tariffs are not an appropriate fit for the Commission's regulation of MUSA claims on product labels for purposes of consumer disclosure. For example, there is ample evidence consumers care deeply about the source of the components used to manufacture drywall for construction projects. Under a substantial transformation analysis, drywall made wholly of materials from one nation, but substantially transformed in a different country, would be labeled as originating from the country where those materials were ultimately transformed into a final product. Marketers would not need to disclose the origin of the inputs other than labor (information highly material to many consumers). Thus, employing such a standard would in some cases conflict with the Rule's purpose of ensuring consumers have the material information necessary to make informed purchasing decisions.

Finally, the rule does not include an explicit carve-out for businesses that act in good faith. Courts have long held good faith is not a defense for a violation of Section 5 of the FTC Act,[64] and the Commission intends to enforce the rule consistent with this precedent. Violative claims made in good faith can still deceive and cause significant harm to consumers. However, the FTC clarifies it will continue to: (1) Advise marketers that, if provided in good faith, marketers can rely on information from suppliers about the domestic content in the parts, components, and other elements they produce; [65] (2) generally conserve enforcement resources for intentional, repeated, or egregious offenders; and (3) provide informal staff counseling where appropriate.

C. Requests for Additional Definitions and Other Clarifications

The Commission received several comments arguing the proposed Rule was unclear or provided insufficient guidance for marketers. To remedy these asserted problems, several commenters urged the FTC to add definitions for particular terms, including ''all or virtually all'' and ''significant processing.'' Other commenters expressed concern the Rule was not sufficiently clear about the range of claims it would cover, suggesting the FTC list additional synonyms for ''Made in USA'' to which the rule would apply. Finally, others requested a delayed effective date to allow marketers to update materials and come into compliance.

1. Definitions

More than twenty commenters recommended adding definitions or providing more information to clarify the rule. Without definitions, the commenters feared marketers would ''lack clear guidance for verifying MUSA claims'' and thus ''may be deterred from'' making them altogether.[66] Some of these commenters offered clarifying edits or proposed definitions, often as fallback positions to their main arguments advocating alternative standards entirely.[67]

In particular, in addition to commenters who recommended specifying percentage thresholds for ''all or virtually all,'' several commenters requested the Commission generally define the phrase, without providing specific information on what that definition should include (*e.g.,* factors considered, etc.).[68] As AAEI elaborated: ''One of the FTC's stated reasons for this proposed rulemaking is to 'provide more certainty to marketers about the standard for making unqualified claims on product labels.' Yet, the proposed 'all or virtually all' standard does not provide that certainty . . . It simply codifies the FTC's already existing ambiguous standards.'' [69] Two commenters specifically asked the Commission to incorporate information on whether marketers should consider the origin of product packaging into such a definition.[70]

Similarly, three commenters requested the Commission define ''significant processing.'' [71] As Pacific Coast Producers explained, the ''significant processing'' and ''all or virtually all'' ''terms have always been ambiguous, and the proposed rule does not help to remove the ambiguity or provide any meaningful guidance to industry.'' [72]

Finally, more than thirty commenters, primarily representing the domestic shrimp industry, argued the Commission should clarify that the definitions of ''mail order catalog'' and ''mail order promotional material'' include restaurant menus. As the Louisiana Shrimp Association (''LSA'') explained, ''inappropriate practices by some restaurants in offering menu items that falsely indicate to customers that imported shrimp is domestic, such as 'Gulf Shrimp'. . . not only confuse consumers, but fatally undermine the marketing efforts of restaurants that do carry domestic shrimp.'' [73] To solve this problem, SSA urged the Commission to ''exercise jurisdiction over 'Made in U.S.A.' statements on restaurant menus, as a form of 'Mail order promotional material' or 'mail order catalog.' '' [74]

2. Covered Claims

Several commenters suggested the Rule was not sufficiently clear about which U.S.-origin claims it covers. In particular, commenters requested a longer list of claims the Commission considers equivalent to ''Made in USA,'' as well as a specific statement that the Rule covers implied claims.

One commenter suggested adding ''constructed,'' ''fabricated,'' and ''assembled'' to the list.[75] Another

[62] *Id.* at 63769 n.117.

[63] The Policy Statement explains in some cases ''where [a raw] material is not found or grown in the United States [and that raw material does not constitute the whole or essence of the finished product], consumers are likely to understand that a 'Made in USA' claim on a product that incorporates such materials (*e.g.,* vanilla ice cream that uses vanilla beans, which, the Commission understands, are not grown in the United States) means that all or virtually all of the product, except for those materials not available here, originated in the United States.'' *Id.* The Policy Statement provides that this guidance applies only to raw materials, not manufactured inputs.

[64] *See, e.g., FTC* v. *World Travel Vacation Brokers, Inc.,* 861 F.2d 1020, 1029 (7th Cir. 1988).

[65] *See* FTC, ''Complying with the Made in USA Standard,'' at 7–8 (Dec. 1998), *available at https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf* (also providing an example of a certification a marketer could request from a supplier that generally would constitute an acceptable basis for determining the appropriate country-of-origin designation for a product).

[66] RILA (570).

[67] *E.g.,* AAEI (605) (advocating adoption of the ''substantial transformation'' standard).

[68] See, *e.g.,* Shirley Boyd (6); Pacific Coast Producers (27); RILA (570); Vietnam (577); AAEI (605); NFI (628); ACA (666); AAFA (675).

[69] AAEI (605).

[70] Deontae Lafayette (20); Jaymee Westover (358).

[71] Shirley Boyd (6); Pacific Coast Producers (27); RILA (570).

[72] Pacific Coast Producers (27).

[73] LSA (404).

[74] SSA (380) (further explaining menus should fall under this definition because they are used in the direct sale or offer for sale of a product, are disseminated in print or can be delivered by electronic means, and are solely disseminated to solicit the purchase of a product).

[75] Frost Brown Todd LLC (522).

proposed ''processed,'' ''fabricated,'' and ''packaged.'' [76] Finally, one commenter suggested, to deter unscrupulous marketers effectively, the list should include claims that products are ''Distributed by:'' a company name followed by a U.S. address.[77]

Several commenters also asked the Commission to clarify that the Rule covers implied claims.[78] As AAM explained, ''the use of iconography, such as the American flag, used in the promotion of products should also be considered for its potential to evoke the positive qualities consumers associate with 'Made in USA,' as well as the prospect of such iconography being used in a deceptive manner.'' [79]

3. Effective Date

Finally, two commenters requested the FTC provide an extended compliance period before the rule's effective date. Specifically, ACA and McKenna Walsh argued companies would need time to come into compliance with the Rule. In their view, the FTC should delay implementation to give companies the opportunity to generate new marketing materials and run out old stock.[80]

4. Analysis

After analyzing the comments, the Commission finds the rule and its coverage clear on its face, with sufficient flexibility to address a changing marketplace. Therefore, as discussed further below, the Commission issues the rule without additional definitions or clarifications, or a delayed effective date.[81]

i. Definitions

The Commission declines to adopt definitions of ''all or virtually all'' and ''significant processing,'' or to expand the existing definition of ''mail order catalog'' or ''mail order promotional material.'' The Commission has issued extensive guidance to help marketers understand the ''all or virtually all'' standard. As the Policy Statement explains, ''A product that is all or virtually all made in the United States will ordinarily be one in which all significant parts and processing that go into the product are of U.S. origin.'' In other words, where a product is labeled or otherwise advertised with an unqualified claim, it should contain only a *de minimis,* or negligible, amount of foreign content. Although there is no single ''bright line'' to establish when a product is or is not ''all or virtually all'' made in the United States, there are a number of factors to consider in making this determination. First, in order for a product to be considered ''all or virtually all'' made in the United States, the final assembly or processing of the product must take place in the United States. Beyond this minimum threshold, the Commission will consider other factors, including but not limited to the portion of the product's total manufacturing costs attributable to U.S. parts and processing; how far removed from the finished product any foreign content is; and the importance of the foreign content to the form or function of the product. Accordingly, the Commission's existing guidance and enforcement documents, including the Policy Statement, decisions and orders enforcing the ''all or virtually all'' standard, and staff closing letters, together provide ample guidance to marketers.

As discussed above in Section II.B.3., ''all or virtually all'' and ''significant processing'' intentionally incorporate flexibility to allow marketers to substantiate their claims consistent with consumer perception of their particular products. The Commission's enforcement program has long recognized the need for such flexibility as described in the Policy Statement, which was based on the Commission's decisions and orders. The Commission has continued to follow this flexible approach, and incorporated it into its post-Policy Statement decisions and orders. Adding specific definitions for these terms may increase clarity for marketers in the short term because the rule covers so many product categories across a range of circumstances, but the Commission has determined adding further specificity also increases the risk the rule would chill certain non-deceptive claims. Marketers seeking additional guidance may look to the Policy Statement, decisions and orders, and other Commission guidance to understand how the FTC has analyzed ''all or virtually all'' and ''significant processing.'' [82]

The Commission also declines to adopt a definition of ''mail order catalog'' or ''mail order promotional material'' that specifically incorporates restaurant menus. The Commission has not reviewed perception evidence regarding consumer understanding of MUSA claims on restaurant menus, and therefore declines to define such claims as covered ''labels'' for purposes of Section 45a.

ii. Covered Claims

The Commission also concludes it is unnecessary to revise the definitions to provide an expanded list of synonyms for the term ''Made in U.S.A.,'' or provide further clarification the rule covers implied claims. Section 323.1 as proposed already defines ''Made in U.S.A.'' as ''*any unqualified representation, express or implied,* that a product or service, or a specified component thereof, is of U.S. origin, including, but not limited to, a representation that such product or service is 'made,' 'manufactured,' 'built,' 'produced,' 'created,' or 'crafted' in the United States or in America, *or any other unqualified U.S.-origin claim*'' (emphasis added).[83]

The list of equivalents to ''Made in USA'' set forth in Section 323.1 is not exhaustive because the means of communicating U.S. origin are too numerous to list. The Commission believes the non-exhaustive list of examples given provide sufficient guidance on the scope of covered express and implied claims. These examples are based on the Commission's decades of enforcement experience addressing MUSA claims. For other claims, the Commission will analyze them in context, including the terms used, their prominence, and their proximity to images and other text.

iii. Effective Date

Lastly, the Commission declines to delay the rule's effective date. As discussed above in Section I, the rule codifies the FTC's longstanding guidance on MUSA claims. The FTC has incorporated the ''all or virtually all'' standard into decisions and orders and guidance for industry and the public since the 1990s.[84] Because the rule merely codifies these longstanding enforcement principles and imposes no new requirements on marketers, the Commission concludes a delayed effective date is unnecessary.

[76] R–CALF USA (588).

[77] Salvatore J. Versaggi (496).

[78] See, *e.g.,* Shirley Boyd (6); Power Planter Inc. (325); AAM (611); American Shrimp Processors Association (''ASPA'') (633).

[79] AAM (611).

[80] ACA (666); McKenna Walsh (581).

[81] As discussed in Section III, the Final Rule contains a provision clarifying that, in appropriate circumstances, covered entities may petition the Commission for an exemption from the Rule's requirements.

[82] See Policy Statement, 62 FR 63756, 63768 (Dec. 2, 1997).

[83] 16 CFR 323.1.

[84] *See generally https://www.ftc.gov/tips-advice/business-center/advertising-and-marketing/made-in-usa.* The Commission has explained that prior to the 1990s, this standard was described as the ''wholly domestic'' standard, and both ''wholly domestic'' and ''all or virtually all'' refer to the concept that ''unqualified claims of domestic origin have been treated as claims that the product was in all but *de minimis* amounts made in the United States.'' 62 FR 63756 (Dec. 2, 1997).

D. Guidance for Specific Industries

Some commenters requested tailored guidance for specific industries. Specifically, representatives of the beef and shrimp industries requested guidance on whether the Rule would apply to their products, and specific guidance on how to apply ''all or virtually all'' in these contexts.

1. Beef

The Commission received more than 450 comments urging the Commission to clarify that the rule applies to beef products. These stakeholders, primarily U.S. ranchers and industry groups representing domestic ranchers, generally supported the rule and argued it should supersede United States Department of Agriculture (''USDA'') guidance on using ''Product of USA'' claims on beef product labels. Although they acknowledged the USDA's longstanding authority over beef labeling, they expressed concern USDA's Food Safety Inspection Service (''FSIS'') Food Standards and Labeling Policy Book currently authorizes producers to place ''Product of USA'' labels on beef products processed in the USA but comprised of cattle born, raised, and slaughtered overseas. These commenters argued such labels deceive consumers, and ''put U.S. family farmers and ranchers at an unfair disadvantage in the marketplace, because they are not able to differentiate their domestically produced meat and meat products from foreign produced meat and meat products.'' [85] Accordingly, they argued the ''all or virtually all'' standard should apply to beef products, and beef products should only bear a ''Product of USA'' label if they derive from animals born, raised, slaughtered, and processed in the United States.[86]

In contrast, five commenters argued Congress granted the USDA generally, and the FSIS specifically, authority to address country-of-origin labeling for meat and meat food products. Therefore, they argued, the FTC should defer to the USDA on this issue.[87] The North American Meat Institute and the Meat Importers' Council of America submitted a joint comment stating beef commenters' concerns ''are misplaced because they fail to recognize that the [USDA's FSIS] has primary jurisdiction over the meat and poultry labeling through the authority provided in the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA).'' [88] The Montana Stockgrowers Association agreed, explaining that even though it ''supports USA beef as being defined as born, raised, harvested, and processed in the USA . . . [its members] think the [USDA] should be the lead agency to address enforcement of labels that include all meat products.'' [89] Moreover, some commenters raised concerns applying the FTC's rule to beef products could lead to challenges in, or even sanctions by, the WTO, given past proceedings relating to beef labeling.[90]

2. Shrimp

The Commission also received dozens of comments from representatives of the domestic shrimp industry. Most of these expressed general support for the proposed rule, and recommended the FTC allow MUSA labels only for shrimp caught, harvested, and processed in the United States.

Although they expressed enthusiasm for the potential application of the proposed MUSA rule's ''all or virtually all'' standard in shrimp labeling, commenters acknowledged that USDA's Country of Origin Labeling (''COOL'') regulations [91] have primary authority in this space. The COOL regulations require ''retail establishments'' to provide country-of-origin information for wild and farm-raised fish and shellfish,[92] and incorporate specific standards under which marketers can label shrimp as MUSA.[93] However, commenters identified a possible gap in regulatory coverage, explaining that, pursuant to USDA Agricultural Marketing Service (''AMS'') regulations governing country-of-origin labeling for fish and shellfish, COOL does not apply to processed shrimp products, including breaded or marinated shrimp.[94] In addition, as described above in Section II.C.1., these commenters noted that USDA COOL regulations do not apply to claims regarding shrimp or shrimp products on restaurant menus.[95] Thus, these commenters urged the FTC to ''us[e] its authority to enforce the MUSA rule [with respect to these categories of shrimp products, thereby] . . . filling a void in federal labeling accountability and providing certainty to the seafood market during this time of widespread economic instability.'' [96]

3. Analysis

The FTC shares jurisdiction over country-of-origin claims for agricultural products with the USDA and, in some instances, the Food and Drug Administration (''FDA''). USDA and FDA have primary jurisdiction over labeling issues for the food products within their purview.[97] Section 45a specifically provides that ''Nothing in this section shall preclude the application of other provisions of law relating to labeling.'' [98] Accordingly, Section 323.5(a) of this rule makes clear that the rule does not supersede, alter, or affect the application of any other federal statute or regulation relating to country-of-origin labeling requirements, including but not limited to regulations issued under the FMIA, 21 U.S.C. 601 *et seq.;* the Poultry Products Inspection Act, 21 U.S.C. 451 *et seq.;* or the Egg Products Inspection Act, 21 U.S.C. 1031 *et seq.*

Congress has granted the USDA's FSIS specific authority to regulate agricultural products, including, among others, beef and chicken products. The USDA regulates labels on meat products sold at retail pursuant to the FMIA, which prohibits misleading labels.[99] Although FSIS's Policy Book has permitted voluntary claims of ''Product of USA'' for imported products under FSIS's jurisdiction, including beef products, processed in the USA, FSIS recently explained this guidance ''may be misleading to consumers and may not meet consumer expectations of what 'Product of USA' signifies.'' [100] Accordingly, the USDA announced plans to initiate a rulemaking to alleviate any potential confusion in the

[85] North Dakota Farmers Union (412).

[86] The Commission also received more than 150 comments stating country-of-origin labeling should be mandatory for beef products.

[87] See, *e.g.,* Mexico's National Confederation of Livestock Organizations (431); North American Meat Institute and Meat Importers' Council of America (508); National Cattlemen's Beef Association (589); Montana Stockgrowers Association (635); Embassy of Canada (637). Some of these stakeholders argued the FTC should specifically exempt meat labeling from the Rule's coverage.

[88] North American Meat Institute and the Meat Importers' Council of America (508). *See also* National Cattlemen's Beef Association (589) (''remind[ing] FTC that the Federal Meat Inspection Act of 1906 (21 U.S.C. 601 *et seq.*) grants the U.S. Department of Agriculture (USDA) primary jurisdiction over all meat food product oversight activities, including the approval and verification of geographic and origin labeling claims.'').

[89] Montana Stockgrowers Association (635).

[90] Mexico's National Confederation of Livestock Organizations (431); National Cattlemen's Beef Association (589); see also Embassy of Canada (637) (stating, in light of 2015 WTO proceedings, the Government of Canada ''will continue to closely monitor the development of the proposed'' Rule).

[91] 7 CFR part 60.

[92] 7 U.S.C. 1638(1).

[93] 7 CFR 60.128.

[94] ASPA (633) (citing 7 CFR 60.119).

[95] See, *e.g.,* Southern Shrimp Alliance (380).

[96] ASPA (633), at 2.

[97] See Memorandum of Understanding between Federal Trade Commission and the Food and Drug Administration, 36 FR 18539 (Sept. 16, 1971).

[98] 15 U.S.C. 45a.

[99] 21 U.S.C. 601(n)(1); 9 CFR 317.8(a) (prohibiting labels that convey ''any false indication of origin'').

[100] *See* R. Edelstein Letter to E. Drake (Mar. 26, 2020).

marketplace.[101] As that proceeding unfolds, the Commission remains committed to engaging with the USDA to ensure American consumers receive truthful and accurate information about the beef products they buy.

Under its COOL regulations, USDA's AMS has primary authority over country-of-origin labels for most fish and shellfish products.[102] Because Section 45a's general grant of rulemaking authority does not authorize the Commission to issue regulations that would preclude the application of existing statutes and regulations addressing agricultural product labeling, the FTC defers to AMS's regulatory scheme for COOL for fish and shellfish. Section 323.5 makes clear the rule does not supersede, alter, or affect any other federal statute or regulation relating to country-of-origin labeling requirements. However, to the extent certain, limited categories of agricultural products fall outside USDA's jurisdiction, the Commission will analyze claims on a case-by-case basis and consult with other agencies as appropriate.[103]

E. Other Proposals

Some commenters proposed a series of other amendments, arguing variously that the Rule should preempt state law entirely; [104] cover MUSA advertising generally; [105] make country-of-origin labeling mandatory for all products; [106] incorporate provisions relating to qualified U.S.-origin claims; [107] and include language specifically correlating penalties to firm sizes.[108] The Commission declines to adopt these changes, which are inconsistent with its rulemaking mandate under Section 45a. As discussed above, Section 45a grants the Commission authority to issue rules to prevent unfair or deceptive acts or practices relating to MUSA labeling. Specifically, Section 45a authorizes the Commission to issue rules to require MUSA labeling to ''be consistent with decisions and orders of the Federal Trade Commission issued pursuant to [Section 5 of the FTC Act].'' The FTC may seek civil penalties for violations of such rules.

1. Preemption

The Commission intends to preempt state statutes or regulations that are inconsistent with the Commission's rules only to the extent of the inconsistency.[109] When it enacted Section 45a, Congress declined to expressly preempt state regulation or otherwise demonstrate a clear intent for federal law to occupy the field of regulation in question.[110] Accordingly, Section 323.5 of the Rule preempts a state statute, regulation, order, or interpretation ''to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.'' Moreover, the rule makes clear that a state statute, regulation, order, or interpretation is not inconsistent with the rule if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided by the rule.

2. MUSA Advertising Generally

Some commenters encouraged the Commission to expand the proposed rule to cover all advertising that includes any U.S.-origin claim, rather than focusing as proposed on MUSA labeling.[111] Section 45a, however, is directed at labels on products declaring that a product is ''in whole or substantial part of domestic origin'' and thus may be labeled ''Made in the U.S.A.,'' or the equivalent thereof. The statute does not explicitly address general advertising claims beyond the context of labeling. Accordingly, in enacting this rule, the Commission has not focused on advertising more generally, but retains the proposed rule's focus on MUSA claims on labels or in mail order or catalog advertising, including in online marketplaces, that depict a product label. However, the FTC's general authority under Sections 5 and 12 of the FTC Act covers advertising, including advertising of qualified and unqualified MUSA claims.[112]

3. Mandatory Country-of-Origin Labeling

Other commenters recommended the Commission make country-of-origin labeling mandatory. For example, the Made in USA Foundation proposed that the Rule should require that all advertisements for specified categories of products, including all products advertised for sale on the internet, disclose the country of origin of the products in a clear and prominent manner.[113] While the Commission acknowledges that many consumers may find such information to be valuable in many circumstances, Section 45a does not authorize the Commission to establish a mandatory country-of-origin labeling scheme. The statute grants the Commission authority to issue rules to ensure that Made in USA claims are not deceptive and are consistent with the Commission's decisions and orders defining unfair or deceptive acts or practices under Section 5. Accordingly, the Commission lacks authority under Section 45a to enact this proposal.

4. Qualified U.S.-Origin Claims

Some commenters also argued that the rule should also address qualified U.S.-origin claims. The United Steelworkers asserted that, ''[a]s firms with global supply chains seek to benefit from the value consumers place in products with American content, we must ensure that qualified claims accurately represent the level of value creation in the United States.'' [114] Section 45a, however, is directed to labels on products declaring that a product is ''in whole or substantial part of domestic origin,'' and therefore the Rule is directed to unqualified claims, rather than more varied qualified claims. Accordingly, the FTC will continue to address deceptive qualified U.S.-origin claims under its general

[101] *Id.*

[102] 7 U.S.C. 1638(1); 7 CFR 60.128.

[103] The FTC notes deceptive claims on restaurant menus appear to be largely a regional issue, and therefore are being addressed through state legislation. *See, e.g.,* La. R.S. § 40:5.5.4 (requiring food service establishments to provide notice to consumers if crawfish or shrimp is imported); La. R.S. § 56:578.14 (''No owner or manager of a restaurant that sells imported crawfish or shrimp shall misrepresent to the public, either verbally, on a menu, or on signs displayed on the premises, that the crawfish or shrimp is domestic.''). FTC staff will continue to monitor this issue.

[104] BWC (622); AAFA (675). Additionally, PCPC (589) argued the Rule should specifically preempt a private right of action. However, two commenters agreed with the section as drafted as a means to ''ensure regulatory certainty and consistency of product U.S. origin labels nationwide.'' RILA (570). See also NAM (623) (recognizing the ''value of utilizing preemption to create a uniform MUSA standard'').

[105] UIUC Accounting Group A13 (5); Shirley Boyd (6); UIUC—BADM 40—A02 (22); Senators (373); United Steelworkers (526); Women Involved in Farm Economics/Pam Potthoff Beef Chairman (672).

[106] The Commission received 30 comments arguing country-of-origin labeling should be mandatory for all products. See, *e.g.,* J R. Brookshire (9). Additionally, six commenters argued specifically in favor of mandatory country-of-origin labeling for all products sold online. See, *e.g.,* Made in USA Foundation (2).

[107] Twelve commenters requested coverage of qualified claims. See, *e.g.,* Shirley Boyd (6); United Steelworkers (526); AAM (611); CPA (625).

[108] Six commenters argued civil penalties should be linked to company size. *See, e.g.,* Chris Posey (7).

[109] *See City of New York* v. *FCC,* 486 U.S. 57, 64 (1988) (''The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.'').

[110] *See, e.g., Mozilla* v. *FCC,* 940 F.3d 1, 74–75 (D.C. Cir. 2019).

[111] *See, e.g.,* Shirley Boyd (6) (''The FTC's final rules should apply to labeling, advertising and other promotional and marketing materials in addition to labels and mail order catalogs/ promotional materials.'').

[112] 15 U.S.C. 45(a), 52.

[113] Made in USA Foundation (2).

[114] United Steelworkers (526).

authority in Section 5 of the FTC Act.[115] Marketers should continue to consult the Policy Statement for guidance on the application of the Commission's Section 5 analysis to such claims including, but not limited to, ''Assembled in USA,'' claims indicating the amount of U.S. content (*e.g.,* ''60% U.S. Content''), claims indicating the parts or materials that are imported (*e.g.,* ''Made in USA from imported leather''), or claims about specific processes or parts (*e.g.,* claims a product is ''designed,'' ''painted,'' or ''written'' in the United States).

5. Civil Penalties

Some commenters argued that larger businesses may not be sufficiently deterred by the current maximum civil penalty amounts for violations of Commission rules and recommended that civil penalties should be increased for larger firms.[116] The Commission lacks authority, however, to establish civil penalty maximums that depart from the levels provided by statute. Civil penalty amounts for violations of the Commission's rules are established by the FTC Act.[117] Nonetheless, the Commission believes that its civil penalty authority generally provides an effective deterrent against rule violations, and notes that civil penalties for violations of a rule are assessed per violation. Moreover, the FTC Act establishes a series of factors for courts to consider in assessing appropriate civil penalty amounts in individual enforcement matters, including ''the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.'' [118] To the extent firm size is an appropriate consideration within one or more of these factors, the Commission will take that factor into account in seeking civil penalties.

III. Final Rule

For the reasons described above, the Commission has determined to adopt the substantive provisions of the rule as initially proposed. Specifically, the rule covers labels on products that make unqualified MUSA claims. It codifies the Commission's previous MUSA Decisions and Orders and prohibits marketers from making unqualified MUSA claims on labels unless: (1) Final assembly or processing of the product occurs in the United States, (2) all significant processing that goes into the product occurs in the United States, and (3) all or virtually all ingredients or components of the product are made and sourced in the United States. The rule also covers labels making unqualified MUSA claims appearing in mail order catalogs or mail order advertising.

To avoid confusion or perceived conflict with other country-of-origin labeling laws and regulations, the rule specifies that it does not supersede, alter, or affect any other federal or state statute or regulation relating to country-of-origin labels, except to the extent that a state country-of-origin statute, regulation, order, or interpretation is inconsistent with the rule.

Finally, the Commission has adopted a new Section, 323.6, to address commenter concerns about the applicability of the ''all or virtually all'' standard across product categories. This provision allows marketers and other covered persons to seek full or partial exemptions if they can demonstrate application of the rule's requirements to a particular product or class of product is not necessary to prevent the acts or practices to which the rule relates. The Commission's rules of practice governing petitions for rulemaking provide the procedures for submitting such petitions.[119] Pursuant to this process, interested persons may file relevant consumer perception evidence and data with the Commission. If the Commission deems the petition sufficient to warrant further consideration, it will follow the procedures outlined in Section 1.25 of its rules.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.,* requires federal agencies to seek and obtain Office of Management and Budget (''OMB'') approval before undertaking a collection of information directed to ten or more persons. The Commission has determined that there are no new requirements for information collection associated with this final rule.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires that the Commission provide an Initial Regulatory Flexibility Analysis with a proposed rule, and a Final Regulatory Flexibility Analysis with the final Rule, unless the Commission certifies that the proposed Rule will not have a significant impact on a substantial number of small entities.[120]

The Commission recognizes some affected entities may qualify as small businesses under the relevant thresholds. However, the Commission anticipates that the final Rule will not have the threshold impact on small entities. First, the rule includes no new barriers to making claims, such as reporting or approval requirements. Second, the rule merely codifies standards established in FTC enforcement Decisions and Orders for decades. Therefore, the Rule imposes no new burdens on law-abiding businesses.

Accordingly, the Commission certifies that the final rule will not have a significant economic impact on a substantial number of small businesses. Although the Commission certifies under the RFA that the amendment will not have a significant impact on a substantial number of small entities, the Commission has determined, nonetheless, that it is appropriate to publish a Final Regulatory Flexibility Analysis in order to explain the impact of the amendments on small entities as follows:

A. Description of the Need for and Objectives of the Rule

The Commission proposed the MUSA Labeling Rule for two primary reasons: To strengthen its enforcement program and make it easier for businesses to understand and comply with the law. Specifically, by codifying the existing standards applicable to MUSA claims in a rule as authorized by Congress, the FTC will be able to provide more certainty to marketers about the standard for making unqualified claims on product labels, without imposing any new obligations on market participants. In addition, enactment of the Rule will enhance deterrence by authorizing civil penalties against those making unlawful MUSA claims on product labels.

B. Issues Raised by Comments in Response to the IRFA

The Commission received six comments specifically related to the impact of the Rule on small businesses.[121] Of those six, all

[115] 15 U.S.C. 45(a).

[116] Chris Posey (7).

[117] *See* 15 U.S.C. 45(m)(1)(A) (establishing civil penalties for violations of Commission rules); *see also* 16 CFR 1.98 (stating currently applicable maximum civil penalty amounts).

[118] 15 U.S.C. 45(m)(1)(C).

[119] *See* 16 CFR 1.25.

[120] 5 U.S.C. 603–605.

[121] Anonymous (24) (commenter is unaware of small entities affected by the NPRM); UIUC—BADM 403—A02 (25) (commenter is unaware of small entities affected by the NPRM); Family Farm Action Alliance (543) (anticipating positive economic outcomes for small business entities as a result of the rule); Leo McDonnell (578) (anticipating benefits for small businesses, including ranchers and feeders); McKenna Walsh (581) (stating the Rule will be helpful for small businesses lacking resources to engage in MUSA litigation); Natural

Continued

anticipated the rule would benefit small businesses, with the exception of the Natural Products Association, which argued that the Rule would impose costs on dietary supplement manufacturers that would have to relabel products.[122] The FTC notes that the rule imposes no new requirements on dietary supplement manufacturers, and that products requiring relabeling as a result of the FTC's rule were likely deceptively labeled prior to the Rule's publication. The Chief Counsel for Advocacy of the Small Business Administration did not submit comments.

C. Estimate of Number of Small Entities to Which the Rule Will Apply

The Small Business Administration estimates that in 2018 there were 30.2 million small businesses in the United States. The rule will apply to small businesses that make MUSA claims on product labels. The Commission estimates the rule will not have a significant impact on these small businesses because it does not impose any new obligations on law-abiding businesses; rather, it merely codifies standards established in FTC enforcement Decisions and Orders for decades.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Covered Small Entities and Professional Skills Needed To Comply

The rule imposes no affirmative reporting or recordkeeping requirements. The rule's compliance requirements, consistent with the Policy Statement and longstanding Commission case law, require that marketers may not make unqualified U.S.-origin claims on product labels unless final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and all or virtually all ingredients or components of the product are made and sourced in the United States. The small entities potentially covered by the rule will include all such entities that make MUSA claims on product labels. The rule codifies the standard for MUSA claims established in Commission Decisions and Orders, and no new obligations are anticipated.

Products Association (618) (stating the rule would require small dietary supplement businesses to relabel products).

[122] Natural Products Association (618).

E. Description of Steps Taken To Minimize Significant Economic Impact, if Any, on Small Entities, Including Alternatives

The Commission sought comment and information on the need, if any, for alternative compliance methods that would reduce the economic impact of the rule on such small entities. Several commenters proposed alternatives to the proposed rule including: (1) Introducing a percentage-of-costs standard; (2) adopting a standard that makes allowances for imported parts or materials not available in the United States; (3) aligning with CBP's substantial transformation standard; or (4) adding a safe harbor for ''good faith'' efforts to comply. Other commenters proposed that the Commission provide for a delayed effective date to allow businesses additional time to comply. As discussed above, the Commission has declined to adopt these alternatives because it believes they would undermine the effectiveness of the rule. In addition, the Natural Products Association recommended the FTC incorporate an example specific to dietary supplements.[123] The Commission has declined to include examples specific to any particular industry in the Rule. The rule codifies the standards articulated in Commission enforcement decisions that have been applicable to MUSA claims for decades. FTC guidance and enforcement decisions provide numerous examples demonstrating how to apply the ''all or virtually all'' standard in a variety of industries. Accordingly, the Commission has concluded that it is unnecessary to provide industry-specific examples in the Rule.

As described previously, the rule merely codifies standards already established in FTC enforcement Decisions and Orders. It does not impose new substantive obligations on businesses that have already been complying with their obligations to avoid deceptive claims under Section 5 of the FTC Act. Under these circumstances, the Commission does not believe a special exemption for small entities or significant compliance alternatives are necessary or appropriate to minimize the compliance burden, if any, on small entities while achieving the intended purposes of the rule. Nonetheless, the Commission has adopted a provision allowing covered persons to petition the Commission for an exemption from the Rule if application of the rule's requirements is not necessary to prevent the acts or practices to which the rule relates.

[123] *Id.*

VI. Other Matters

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

VII. Final Rule Language

List of Subjects in 16 CFR Part 323

Labeling, U.S. origin.

■ For the reasons stated in the preamble, the Federal Trade Commission adds part 323 to subchapter C of title 16 of the Code of Federal Regulations as follows:

PART 323—MADE IN USA LABELING

Sec.
323.1 Definitions.
323.2 Prohibited acts.
323.3 Applicability to mail order advertising.
323.4 Enforcement.
323.5 Relation to Federal and State laws.
323.6 Exemptions.

Authority: 15 U.S.C. 45a.

§ 323.1 Definitions.

As used in this part:

(a) The term *Made in the United States* means any unqualified representation, express or implied, that a product or service, or a specified component thereof, is of U.S. origin, including, but not limited to, a representation that such product or service is ''made,'' ''manufactured,'' ''built,'' ''produced,'' ''created,'' or ''crafted'' in the United States or in America, or any other unqualified U.S.-origin claim.

(b) The terms *mail order catalog* and *mail order promotional material* mean any materials, used in the direct sale or direct offering for sale of any product or service, that are disseminated in print or by electronic means, and that solicit the purchase of such product or service by mail, telephone, electronic mail, or some other method without examining the actual product purchased.

§ 323.2 Prohibited acts.

In connection with promoting or offering for sale any good or service, in or affecting commerce as ''commerce'' is defined in section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, it is an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), to label any product as Made in the United States unless the final assembly or processing of the product occurs in the United States, all significant processing that goes into the product occurs in the United States, and

all or virtually all ingredients or components of the product are made and sourced in the United States.

§ 323.3 Applicability to mail order advertising.

To the extent that any mail order catalog or mail order promotional material includes a seal, mark, tag, or stamp labeling a product Made in the United States, such label must comply with § 323.2.

§ 323.4 Enforcement.

Any violation of this part shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a, regarding unfair or deceptive acts or practices.

§ 323.5 Relation to Federal and State laws.

(a) *In general.* This part shall not be construed as superseding, altering, or affecting the application of any other federal law or regulation relating to country-of-origin labeling requirements, including but not limited to the Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.,* the Poultry Products Inspection Act, 21 U.S.C. 451 *et seq.,* and the Egg Products Inspection Act, 21 U.S.C. 1031 *et seq.* In addition, this part shall not be construed as superseding, altering, or affecting any other State statute, regulation, order, or interpretation relating to country-of-origin labeling requirements, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

(b) *Greater protection under State law.* For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part, as determined by the Commission on its own motion or upon the petition of any interested party.

§ 323.6 Exemptions.

Any person to whom this Rule applies may petition the Commission for a partial or full exemption. The Commission may, in response to petitions or on its own authority, issue partial or full exemptions from this part if the Commission finds application of the Rule's requirements is not necessary to prevent the acts or practices to which the Rule relates. The Commission shall resolve petitions using the procedures provided in § 1.25 of this chapter. If appropriate, the Commission may condition such exemptions on compliance with alternative standards or requirements to be prescribed by the Commission.

By direction of the Commission.

April J. Tabor,

Secretary.

The following Appendices will not Appear in the Code of Federal Regulations.

Appendix I: Statement of Commissioner Rohit Chopra Joined by Chair Lina Khan and Commissioner Rebecca Kelly Slaughter

Today, the Commission has voted to adopt a final Made in USA rule. The final rule reflects a substantial number of comments from the public, which overwhelmingly supported this policy change by the Commission. By formally codifying this rule, the Commission has activated a broader range of remedies, including the ability to seek redress, damages, penalties, and other relief from those who lie about a Made in USA label. The rule will especially benefit small businesses that rely on the Made in USA label, but lack the resources to defend themselves from imitators.

Absent this rule, the Commission would be unable to seek this full set of sanctions. Importantly, this is a ''restatement rule,'' which affirms longstanding guidance and legal precedent with respect to Made in USA labels—thereby imposing no new obligations on manufacturers and sellers. Because of the stricter sanctions they trigger, restatement rules such as this one will increase fraud deterrence and ensure that victims can be made whole.

Background on the FTC's Permissive Policy on Made in USA Fraud

For decades, there has been a bipartisan consensus among Commissioners that Made in USA fraud should not be penalized. In my view, this policy posture was in direct contravention of both the letter and spirit of the law Congress enacted.

In 1994, shortly after the North American Free Trade Agreement took effect, Congress enacted legislation to protect the integrity of our national brand by explicitly authorizing the FTC to trigger penalties and other relief for Made in USA fraud, but only after formally codifying a rule.[1] However, the Commission never even proposed one.[2]

Instead, over the past quarter century, Commissioners implemented a highly permissive Made in USA fraud policy, where violators faced essentially no consequences whatsoever. Even in cases of blatant abuse of the Made in USA label, Commissioners routinely voted to allow wrongdoers to settle for no restitution, no forfeiture of ill-gotten gains, no admission or findings of liability, and no notice to victims.[3] In adopting this rule, the Commission acknowledges that this longstanding policy was misguided and agrees that the codification of today's final rule is long overdue.

Noteworthy Provisions of the Final Rule

In 2019, *TINA.org* filed a petition with the Commission to promulgate a rule, given the rampant Made in USA fraud across sectors of the economy. In 2020, the Commission issued a Notice of Proposed Rulemaking and then analyzed a substantial number of comments from producers, consumers, foreign governments, and others.[4] After considering these comments, the Commission has adopted a rule consistent with the authority granted by Congress in 1994. There are several aspects worthy of brief discussion.

First, the Commission has codified the ''all or virtually all'' standard, consistent with the FTC's longstanding Enforcement Policy Statement on U.S. Origin Claims.[5] This standard covers *unqualified* claims. The Commission must protect the public from deception, and the agency declines to adopt alternative approaches, as explained in the final rule.

Second, the Commission has outlined a definition of ''label'' consistent with the Commission's expertise on labeling. While the Commission declines to adopt a definition that includes a list of specific examples, such as restaurant menus, the definition of label does extend beyond labels physically affixed to a product. As described in the rule, other depictions of labels are also covered; in some circumstances, labels appearing online may also be subject to the rule.[6] The Commission declines to cover advertising more broadly, as this is inconsistent with the authority granted by Congress.

Third, there was considerable interest in the rulemaking from farmers, ranchers, and others in the meat and agricultural industry, with the majority of comments arguing in favor of stricter standards. The rule declines to grant an exemption sought by the meatpacking industry, as this would be inconsistent with the Commission's authority prescribed by Congress under the Packers and Stockyards Act.[7] However, contemporaneous with the FTC's vote today, the U.S. Department of Agriculture has announced that it will be conducting a top-to-bottom review of its labeling standard. USDA has previously acknowledged that its

[1] *See* 15 U.S.C. 45a.

[2] *See generally* Statement of Commissioner Rohit Chopra Regarding Activating Civil Penalties for Made in USA Fraud (Apr. 17, 2019), *https://www.ftc.gov/public-statements/2019/04/statement-commissioner-rohit-chopra-regarding-activating-civil-penalties.*

[3] Even without a final rule, Commissioners could have sought more in administrative settlements, given that much of the Made in USA fraud detected by Commission staff met the definition of ''dishonest or fraudulent'' in Section 19 of the FTC Act. 15 U.S.C. 57b. Instead, Commissioners routinely accepted settlements with no meaningful relief at all.

[4] The Commission received over 700 comments in response to its Notice of Proposed Rulemaking on Made in USA labeling. *See FTC Seeks Comments on MUSA Rulemaking, Matter No. P074204,* Docket ID FTC–2020–0056 (July 16, 2020), *https://www.regulations.gov/docket/FTC-2020-0056.*

[5] *See* ''Made in USA'' and Other U.S. Origin Claims, 62 FR 63756 (Dec. 2, 1997).

[6] *See* 16 CFR 323.3.

[7] *See* 7 U.S.C. 227.

''Product of USA'' designation may be deceptive. I am extremely grateful to Secretary Tom Vilsack and USDA staff for the action they are taking.

I hope the USDA will study the FTC's rulemaking record carefully and come to the same conclusion I have: The USDA's Product of USA standard is misleading and distorts competition in the retail market for beef and other products. I also believe that unqualified ''Product of USA'' claims for meat products are only appropriate when the animal was born, raised, and slaughtered in the United States. Given our shared jurisdiction, I expect that the Commission will deepen its partnership with the USDA and closely coordinate on any enforcement proceeding with respect to retail sales of meat and other products.

Conclusion

The Commission appreciates the substantial public interest in protecting the Made in USA brand. The final rule provides substantial benefits to the public by protecting businesses from losing sales to dishonest competitors, and protecting families seeking to purchase American-made goods. More broadly, this long-overdue rule is an important reminder that the Commission must do more to use the authorities explicitly authorized by Congress to protect market participants from fraud and abuse. I thank my fellow Commissioners and members of the Commission staff who contributed to the development of this final rule, as well as members of the public for their thoughtful contributions.

Appendix II: Dissenting Statement of Commissioner Christine S. Wilson

Today the Commission announces a Final Rule with respect to ''Made in USA'' (MUSA) labels. I support the FTC's prosecution of MUSA fraud [1] and supported its consideration of a rule that addresses deceptive MUSA claims on labels, consistent with the authority granted to the FTC by Congress in Section 45a. The Rule announced today, however, exceeds that authority.

Section 45a of the FTC Act—the provision pursuant to which we advance this Rule—authorizes the Commission to issue rules governing MUSA claims on products ''with a 'Made in the U.S.A.' or 'Made in America' label, or the equivalent thereof.'' The provision is titled ''Labels on products'' and repeatedly references ''labels.'' The Commission nonetheless has chosen to promulgate a rule that could be read to cover all advertising, not just labeling.

This Rule is not supported by the plain language of 45a. It is clear Congress intended to extend rulemaking authority over the many potential variations (or ''equivalents'') of ''Made in the U.S.A.'' or ''Made in America'' claims that may be found on labels, not labels and claims made in advertising or marketing. The legislative history for Section 45a supports this interpretation. Specifically, the Conference Report on H.R. 3355 discusses any label characterizing ''a product as 'Made in the U.S.A.' or the equivalent thereof,'' signaling Congress' intent that the statute should cover not just literal invocations of ''Made in the U.S.A.,'' but also equivalents to that claim (*i.e.,* Made in America, American Made, and so on).[2]

The Commission's Rule defines the term far more broadly than any FTC precedent, and in a way that, in my view, exceeds our statutory grant of rulemaking authority.[3] The Rule we issue today will cover not just labels, but all:

> ''materials, used in the direct sale or direct offering for sale of any product or service, that are disseminated in print or by electronic means, and that solicit the purchase of such product or service by mail, telephone, electronic mail, or some other method without examining the actual product purchased'' [4] that include ''a seal, mark, tag, or stamp labeling a product Made in the United States.'' [5]

This language could bring within the scope of the Rule stylized marks in online advertising or paper catalogs and potentially other advertising marks, such as hashtags, that contain MUSA claims.[6]

In the statement I issued when the Commission sought comment on this proposed Rule, I noted that were Congress drafting this statute now, it might choose language to encompass those broader contexts, including online advertising.[7] But there was no plausible argument to be made that the ordinary meaning of the text when enacted in 1994 encompassed online advertising—a period when online shopping was largely unfamiliar to most consumers.[8] As it happens, the Senate recently passed the Country of Origin Labeling Online Act (COOL Act), which prohibits deceptive country-of-origin representations. There Congress did, in fact, specify its application to labeling as well as other forms of online advertising:

> it shall be unlawful to make any false or deceptive representation that a product or its parts or processing are of United States origin in any labeling, advertising, or other promotional materials, or any other form of marketing, including marketing through digital or electronic means in the United States.[9]

This language, in contrast to Section 45a, leaves no doubt it applies to labeling *and* advertising and confirms Congress views ''labeling'' as distinct from ''advertising or other promotional materials,'' including in an online context.

To the extent the Commission seeks to issue a broader prohibition on Made in USA fraud, as Commissioner Chopra asserted when the Commission sought comment on this Rule, it has other options. The Commission can institute a rulemaking proceeding pursuant to Section 18 of the FTC Act. Several commenters suggested that rather than promulgate a limited rule for labeling claims, the Commission should conduct a full proceeding to address all advertising claims.[10] The Commission has not taken this action. The Commission alternatively could work with Congress to effectuate the passage of the COOL Act, which would appear to moot this Rule if enacted.

Accordingly, because this Rule exceeds the scope of authority granted by Congress to the FTC, I dissent. I do not support creatively and expansively interpreting the agency's jurisdiction with respect to rulemaking authority.

The Commission, for more than 80 years, built a comprehensive program to ensure

[1] I have voted to support every MUSA enforcement action recommended to the Commission by staff since joining the Commission. *See* In the Matter of Gennex Media, LLC No. C–4741 (Apr. 2021), *https://www.ftc.gov/system/files/documents/cases/2023122gennexmediafinalorder.pdf;* In the Matter of Chemence, Inc., *et al.,* No. 4738 (Feb. 2021), *https://www.ftc.gov/system/files/documents/cases/2021-02-10_chemence_admin_order.pdf;* In the Matter of Williams-Sonoma, Inc., No. C–4724 (July 2020), *https://www.ftc.gov/system/files/documents/cases/2023025c4724williamssonomaorder.pdf;* U.S. v. *iSpring Water Systems, LLC, et al.,* No. 1:16–cv–1620–AT (N.D. Ga. 2019); *https://www.ftc.gov/system/files/documents/cases/172_3033_ispring_water_systems_-_stipulated_order.pdf;* In the Matter of Sandpiper Gear of California, Inc. *et al.,* No. 182–3095, *https://www.ftc.gov/enforcement/cases-proceedings/182-3095/sandpiper-california-inc-et-al-matter;* Underground Sports d/b/a Patriot Puck, et al., No. 182–3113 (April 2019), *https://www.ftc.gov/enforcement/cases-proceedings/182-3113/underground-sports-inc-doing-business-patriot-puck-et-al;* In the Matter of Nectar Sleep, LLC, No.182–3038 (Sept. 2018), *https://www.ftc.gov/enforcement/cases-proceedings/182-3038/nectar-brand-llc.*

[2] Conf. Rep. on H.R. 3355 (filed in House (8/21/1994)).

[3] Several commenters echoed the concerns I raised in my statement when the Commission sought comment on this proposed Rule and those raised by Commissioner Phillips. *See* Council for Responsible Nutrition Comment; Personal Care Products Council Comment; National Association of Manufacturers Comment; Anonymous Comment 592.

[4] *See* Part 323.1(b).

[5] *See* Part 323.3.

[6] Guidance on the definition of ''label'' can be found in analogous FTC rules and guides in a variety of contexts. There, ''labels'' repeatedly have been defined as a distinct subcategory of advertising (in other words, not coterminous with advertising)1 and have been described as objects attached to a product or its packaging.1 Given both the statutory guidance Congress provided when it drafted this statute, and precedent concerning the term ''label'' in FTC rules and guides, the Commission has ample landmarks to draft a Rule that falls within its jurisdictional boundaries.

[7] Statement of Commissioner Christine S. Wilson Concurring in Part, Dissenting in Part, Notice of Proposed Rulemaking related to Made in USA Claims (June 22, 2020), *https://www.ftc.gov/system/files/documents/public_statements/1577099/p074204musawilsonstatementrev.pdf.*

[8] Report: Americans Going Online . . . Explosive Growth, Uncertain Destinations, Pew Research Center (Oct. 16, 1995) (noting ''most consumers are still feeling their way through cyberspace . . . [and] have yet to begin purchasing goods and services online''), available at: *https://www.people-press.org/1995/10/16/americans-going-online-explosive-growth-uncertain-destinations/.*

[9] U.S. Innovation and Competition Act, S. 1260, Section 2510, 117th Cong. (June 8, 2021), *https://www.democrats.senate.gov/imo/media/doc/DAV21A48.pdf.*

[10] *See* UIUC Accounting Group Comment; Shirley Boyd Comment; UIUC—BADM Comment; Senators Comment; United Steelworkers Comment; Women Involved in Farm Economics/Pam Potthoff Beef Chairman Comment.

consumers can trust ''Made in the USA'' claims.[11] My colleagues believe the Commission's 80 year MUSA enforcement program was a failure and only a rule and the imposition of penalties will deter false MUSA claims. I believe administrative consents, which were an integral part of this program, can be an appropriate remedy to address deceptive MUSA claims, consistent with the views of bipartisan Commissions during the last 25 years. I support seeking monetary relief where appropriate but cannot support acting outside the constraints of our legislative authority.[12]

I fear as well this Commission's desire to promulgate or utilize our regulatory authority in ways that exceed the boundaries of underlying statutes and corresponding Congressional intent will continue. The Supreme Court's recent decision in *AMG*[13] has eliminated the FTC's ability to seek equitable monetary relief under Section 13(b) of the FTC Act to compensate consumers. Thus, the temptation to test the limits of our remaining sources of authority is strong. I urge my colleagues to pause. Previous FTC forays into areas outside its jurisdictional authority have resulted in swift condemnation from the courts and Congress.[14] Expansive interpretations of our rulemaking authority will not engender confidence among members of Congress who have in the past expressed qualms about the FTC's history of frolics and detours.[15]

[11] The FTC has issued over 150 closing letters to companies making misleading U.S.-origin claims. Made in USA Workshop Report at 3 (June 2020). Companies only receive closing letters if they demonstrate to staff they will come into compliance with the FTC's Enforcement Policy Statement on ''Made in the USA.'' The staff's workshop report explains ''companies often produce substantiation for updated claims to the FTC staff, and then present a plan that includes training staff, updating online marketing materials (*e.g.,* company websites and social media platforms), updating hardcopy marketing materials (*e.g.,* product packaging, advertisements, tradeshow materials), and working with dealers, distributors, and third-party retailers to ensure downstream claims are in compliance.'' *Id.* at 3 n.7. The FTC has also settled over 25 enforcement actions, charging that companies refused to come into compliance or engaged in outright fraud. *Id.*

[12] I would note as well that seeking civil penalties for deceptive MUSA claims, as defined under the Commission's Rule, could have adverse market effects. Excessive penalties, divorced from harm, can result in over-deterrence. Importantly, the costs associated with over-deterrence are likely to increase with the expansiveness of the definition of labelling.

[13] *AMG* v. *FTC*, slip op No. 19–508 (Apr. 22, 2021), *https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.*

[14] *See* Federal Trade Commission Improvements Act of 1980, Public Law 96–252, 94 Stat. 374 (1980) (reforming the ability of the FTC to promulgate rules by requiring a multi-step process with public comment and subject to Congressional review). This Act also authorized $255 million in funding for the Commission and was the first time since 1977 the agency was funded through the traditional funding process after the backlash from Congress over its rulemaking activities. *See* Kintner, Earl, *et al.,* ''The Effect of the Federal Trade Commission Improvements Act of 1980 on the FTC's Rulemaking and Enforcement Authority,'' 58 Wash. U. Law Rev. 847 (1980); *see also* J. Howard Beagles III and Timothy J. Muris, FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?, 83 Geo. Wash. L. Rev. 2157 (2015) (describing the ''disastrous failures'' of the FTC in the 1970s and the 1980s from enforcement and regulatory overreach and quoting Jean Carper, The Backlash at the FTC, Wash. Post, C1 (Feb. 6, 1977) (describing the backlash from Congress at the FTC, after a period of intense rulemaking activity culminating in the agency's being dubbed the ''National Nanny'')); *see also* Alex Propes, Privacy and FTC Rulemaking: A Historical Context, IAB (Nov. 6, 2018) (discussing how the FTC's rulemaking history could be influencing Congressional comfort with vesting the FTC with additional privacy authority), *https://www.iab.com/news/privacy-ftc-rulemaking-authority-a-historical-context/.*

[15] *See* Transcript: Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security (May 8, 2019), *available at: https://docs.house.gov/meetings/IF/IF17/20190508/109415/HHRG-116-IF17-Transcript-20190508.pdf.* At this Hearing, Rep. McMorris Rogers stated: ''In various proposals, some groups have called for the FTC to have additional resources and authorities. I remain skeptical of Congress delegating broad authority to the FTC or any agency. However, we must be mindful of the complexities of this issue as well as the lessons learned from previous grants of rulemaking authority to the Commission.'' Transcript at 8–9. Rep. Walden similarly stated: ''it has been a few decades, but there was a time when the FTC, as we heard, was given broad rulemaking authority but stepped past the bounds of what Congress and the public supported. This required further congressional action and new restrictions on the Commission.'' Transcript at 62.

[FR Doc. 2021–14610 Filed 7–13–21; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 573

[Docket No. FDA–2020–F–1289]

Food Additives Permitted in Feed and Drinking Water of Animals; Selenomethionine Hydroxy Analogue

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA, we, or the Agency) is amending the regulations for food additives permitted in feed and drinking water of animals to provide for the safe use of selenomethionine hydroxy analogue as a source of selenium in feed for beef and dairy cattle. This action is in response to a food additive petition filed by Adisseo France S.A.S.

DATES: This rule is effective July 14, 2021. See section V of this document for further information on the filing of objections. Submit either electronic or written objections and requests for a hearing on the final rule by August 13, 2021.

ADDRESSES: You may submit objections and requests for a hearing as follows. Please note that late, untimely filed objections will not be considered. Electronic objections must be submitted on or before August 13, 2021. The *https://www.regulations.gov* electronic filing system will accept objections until 11:59 p.m. Eastern Time at the end of August 13, 2021. Objections received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic objections in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting objections. Objections submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your objection will be made public, you are solely responsible for ensuring that your objection does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your objection, that information will be posted on *https://www.regulations.gov.*

• If you want to submit an objection with confidential information that you do not wish to be made available to the public, submit the objection as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper objections submitted to the Dockets Management Staff, FDA will post your objection, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–F–1289 for ''Food Additives Permitted in Feed and Drinking Water

FEDERAL TRADE COMMISSION

16 CFR Part 314

RIN 3084–AB35

Standards for Safeguarding Customer Information

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is issuing a final rule (''Final Rule'') to amend the Standards for Safeguarding Customer Information (''Safeguards Rule'' or ''Rule''). The Final Rule contains five main modifications to the existing Rule. First, it adds provisions designed to provide covered financial institutions with more guidance on how to develop and implement specific aspects of an overall information security program, such as access controls, authentication, and encryption. Second, it adds provisions designed to improve the accountability of financial institutions' information security programs, such as by requiring periodic reports to boards of directors or governing bodies. Third, it exempts financial institutions that collect less customer information from certain requirements. Fourth, it expands the definition of ''financial institution'' to include entities engaged in activities the Federal Reserve Board determines to be incidental to financial activities. This change adds ''finders''—companies that bring together buyers and sellers of a product or service—within the scope of the Rule. Finally, the Final Rule defines several terms and provides related examples in the Rule itself rather than incorporates them from the Privacy of Consumer Financial Information Rule (''Privacy Rule'').

DATES:

Effective date: This rule is effective January 10, 2022.

Applicability date: The provisions set forth in § 314.5 are applicable beginning December 9, 2022.

FOR FURTHER INFORMATION CONTACT: David Lincicum (202–326–2773), Katherine McCarron (202–326–2333), or Robin Wetherill (202–326–2220), Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

Congress enacted the Gramm Leach Bliley Act (''GLB'' or ''GLBA'') in 1999.[1] The GLBA provides a framework for regulating the privacy and data security practices of a broad range of financial institutions. Among other things, the GLBA requires financial institutions to provide customers with information about the institutions' privacy practices and about their opt-out rights, and to implement security safeguards for customer information.

Subtitle A of Title V of the GLBA required the Commission and other Federal agencies to establish standards for financial institutions relating to administrative, technical, and physical safeguards for certain information.[2] Pursuant to the Act's directive, the Commission promulgated the Safeguards Rule (16 CFR part 314) in 2002. The Safeguards Rule became effective on May 23, 2003.

The current Safeguards Rule requires a financial institution to develop, implement, and maintain a comprehensive information security program that consists of the administrative, technical, and physical safeguards the financial institution uses to access, collect, distribute, process, protect, store, use, transmit, dispose of, or otherwise handle customer information.[3] The information security program must be written in one or more readily accessible parts.[4] The safeguards set forth in the program must be appropriate to the size and complexity of the financial institution, the nature and scope of its activities, and the sensitivity of any customer information at issue.[5] The safeguards must also be reasonably designed to ensure the security and confidentiality of customer information, protect against any anticipated threats or hazards to the security or integrity of the information, and protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.[6]

In order to develop, implement, and maintain its information security program, a financial institution must identify reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, alteration, destruction, or other compromise of such information.[7] The financial institution must then design and implement safeguards to control the risks identified through the risk assessment, and must regularly test or otherwise monitor the effectiveness of the safeguards' key controls, systems, and procedures.[8] The Rule also requires the financial institution to evaluate and adjust its information security program in light of the results of this testing and monitoring, any material changes in its operations or business arrangements, or any other circumstances it knows or has reason to know may have a material impact on its information security program.[9] The financial institution must also designate an employee or employees to coordinate the information security program.[10]

Finally, the current Safeguards Rule requires financial institutions to take reasonable steps to select and retain service providers capable of maintaining appropriate safeguards for customer information and require those service providers by contract to implement and maintain such safeguards.[11]

II. Regulatory Review of the Safeguards Rule

On September 7, 2016, the Commission solicited comments on the Safeguards Rule as part of its periodic review of its rules and guides.[12] The Commission sought comment on a number of general issues, including the economic impact and benefits of the Rule; possible conflicts between the Rule and state, local, or other Federal laws or regulations; and the effect on the Rule of any technological, economic, or other industry changes. The Commission received 28 comments from individuals and entities representing a wide range of viewpoints.[13] Most commenters agreed there is a continuing need for the Rule and it benefits consumers and competition.[14]

On April 4, 2019, the Commission issued a notice of proposed rulemaking (NPRM) setting forth proposed amendments to the Safeguards Rule (the ''Proposed Rule'').[15] In response, the Commission received 49 comments from various interested parties

[1] Pubic Law 106–102, 113 Stat. 1338 (1999).

[2] *See* 15 U.S.C. 6801(b), 15 U.S.C. 6805(b)(2).

[3] 16 CFR 314.2(c).

[4] 16 CFR 314.3(a).

[5] 16 CFR 314.3(a), (b).

[6] 16 CFR 314.3(a), (b).

[7] 16 CFR 314.4(b).

[8] 16 CFR 314.4(c).

[9] 16 CFR 314.4(e).

[10] 16 CFR 314.4(a).

[11] 16 CFR 314.4(d).

[12] Safeguards Rule, Request for Comment, 81 FR 61632 (Sept. 7, 2016).

[13] The 28 public comments received prior to March 15, 2019, are posted at: *https://www.ftc.gov/policy/public-comments/initiative-674.*

[14] *See, e.g.,* Mortgage Bankers Association (comment 39, NPRM); National Automobile Dealers Association (Comment 40, NPRM); Data & Marketing Association (comment 38, NPRM); Electronic Transactions Association (comment 24, NPRM); State Privacy & Security Coalition (comment 26, NPRM).

[15] FTC Notice of Proposed Rulemaking, 84 FR 13158 (April 4, 2019).

including industry groups, consumer groups, and individual consumers.[16] On July 13, 2020, the Commission held a workshop concerning the proposed changes and conducted panels with information security experts discussing subjects related to the Proposed Rule.[17] The Commission received 11 comments following the workshop.[18] After reviewing the initial comments to the Proposed Rule, conducting the workshop, and then reviewing the comments received following the workshop, the Commission now issues final amendments to the Safeguards Rule.

III. Overview of Final Rule

As noted above, the Final Rule modifies the current Rule in five primary ways. First, the Final Rule amends the current Rule to include more detailed requirements for the development and establishment of the information security program required under the Rule. For example, while the current Rule requires financial institutions to undertake a risk assessment and develop and implement safeguards to address the identified risks, the Final Rule sets forth specific criteria for what the risk assessment must include, and requires the risk assessment be set forth in writing. As to particular safeguards, the Final Rule requires that they address access controls, data inventory and classification, encryption, secure development practices, authentication, information disposal procedures, change management, testing, and incident response. And while the Final Rule retains the requirement from the current Rule that financial institutions provide employee training and appropriate oversight of service providers, it adds mechanisms designed to ensure such training and oversight are effective. Although the Final Rule has more specific requirements than the current Rule, it still provides financial institutions the flexibility to design an information security program appropriate to the size and complexity of the financial institution, the nature and scope of its activities, and the sensitivity of any customer information at issue.

Second, the Final Rule adds requirements designed to improve accountability of financial institutions' information security programs. For example, while the current Rule allows a financial institution to designate one or more employees to be responsible for the information security program, the Final Rule requires the designation of a single Qualified Individual. The Final Rule also requires periodic reports to boards of directors or governing bodies, which will provide senior management with better awareness of their financial institutions' information security programs, making it more likely the programs will receive the required resources and be able to protect consumer information.

Third, recognizing the impact of the additional requirements on small businesses, the Final Rule exempts financial institutions that collect information on fewer than 5,000 consumers from the requirements of a written risk assessment, incident response plan, and annual reporting to the Board of Directors.

Fourth, the Final Rule expands the definition of ''financial institution'' to include entities engaged in activities the Federal Reserve Board determines to be incidental to financial activities. This change brings ''finders''—companies that bring together buyers and sellers of a product or service—within the scope of the Rule. Finders often collect and maintain very sensitive consumer financial information, and this change will require them to comply with the Safeguards Rule's requirements to protect that information. This change will also bring the Rule into harmony with other Federal agencies' Safeguards Rules, which include activities incidental to financial activities in their definition of financial institution.

Finally, the Final Rule includes several definitions and related examples, including of ''financial institution,'' in the Rule itself rather than incorporate them from a related FTC rule, the Privacy of Consumer Financial Information Rule, 16 CFR part 313. This will make the rule more self-contained and will allow readers to understand its requirements without referencing the Privacy Rule.

IV. Section-by-Section Analysis

General Comments

The Commission received 49 comments in response to the NPRM for the Proposed Rule, from a diverse set of stakeholders, including industry groups, individual businesses, consumer advocacy groups, academics, information security experts, government agencies, and individual consumers. It also hosted a workshop on the Proposed Rule, which included approximately 20 security experts. Some of the comments simply expressed general support[19] or general disapproval[20] of the Proposed Rule. Many, however, offered detailed responses to specific proposals in the NPRM. In general, industry groups were opposed to most or all of the Proposed Rule, and consumer advocacy groups, academics, and security experts were generally in favor of the amendments. The comments and workshop record are discussed in the following Section-by-Section analysis.

Sec. 314.1: Purpose and Scope

The Purpose and Scope section of the current Rule generally states the Rule implements the Gramm-Leach-Bliley Act and applies to the handling of customer information by financial institutions over which the FTC has jurisdiction. In its NPRM, the Commission proposed adding a definition of ''financial institution'' modeled on the definition included in the Commission's Privacy Rule (16 CFR part 313) and a series of examples providing guidance on what constitutes a financial institution under the Commission's jurisdiction. Other than expanding the definition of ''financial institution'' as discussed below, the new language was not meant to reflect a substantive change to the Safeguards Rule; rather, it was meant to allow the Rule to be read on its own, without reference to the Privacy Rule.[21] The Commission received no comments that addressed this section specifically, and

[16] The 49 relevant public comments received on or after March 15, 2019, can be found at *Regulations.gov. See* FTC Seeks Comment on Proposed Amendments to Safeguards and Privacy Rules, 16 CFR part 314, Project No. P145407, *https://www.regulations.gov/docket/FTC-2019-0019/document.*

[17] *See* FTC, Information Security and Financial Institutions: An FTC Workshop to Examine Safeguards Rule Tr. (July 13, 2020), *https://www.ftc.gov/system/files/documents/public_events/1567141/transcript-glb-safeguards-workshop-full.pdf* [hereinafter Safeguards Workshop Tr.].

[18] The 11 relevant public comments relating to the subject matter of the July 13, 2020, workshop can be found at *https://www.regulations.gov/document/FTC-2020-0038-0001.* This document cites comments using the last name of the individual submitter or the name of the organization, followed by the number based on the last two digits of the comment ID number.

[19] *See* Encore Capital Group (comment 25, NPRM); Justine Bykowski (comment 12, NPRM); ''Peggy from Bloomington, MN'' (comment 13, NPRM); ''Anonymous'' (comment 20, NPRM).

[20] ''Jane Q. Citizen'' (comment 14, NPRM).

[21] In a separate final rule, published elsewhere in this issue of the **Federal Register**, the Commission is amending the Privacy Rule to reflect changes made by the Dodd-Frank Act, limiting that rule to certain auto dealers. Through that proceeding, the Commission is also removing examples of financial institutions from the Privacy Rule that are no longer covered under the rule in the wake of these changes.

the Commission adopts the language of the Proposed Rule in the Final Rule.[22]

Sec. 314.2: Definitions

The Proposed Rule added a number of definitions to § 314.2. The Proposed Rule also retained paragraph (a), which states terms used in the Safeguards Rule have the same meaning as set forth in the Privacy Rule.

The American Council on Education (ACE) suggested all terms from the Privacy Rule, such as ''consumer,'' ''customer,'' and ''customer information,'' be included in the Final Rule in order to make the Final Rule easier for regulated entities to understand.[23] On the other hand, HITRUST recommended no definitions from the Privacy Rule be duplicated in the Safeguards Rule, reasoning that in the event of a need to amend the terms, it would require the amendment of two rules rather than one.[24]

The Commission is persuaded including all terms from the Privacy Rule within the Safeguards Rule will improve clarity and ease of use. Accordingly, the Commission has determined to delete paragraph (a), since it is no longer necessary to state all terms in the Safeguards Rule have the same meaning as in the Privacy Rule. It also adds the Privacy Rule definitions of ''consumer,'' ''customer,'' ''customer relationship,'' ''financial product or service,'' ''nonpublic personal information,'' ''personally identifiable financial information,'' ''publicly available information,'' and ''you'' to the definitions in the Final Rule. No substantive change to these definitions is intended.

Authorized User

The Proposed Rule added a definition for the term ''authorized user'' as paragraph (b). Proposed paragraph (b) defined an authorized user of an information system as any employee, contractor, agent or other person that participates in your business operations and is authorized to access and use any of your information systems and data. This term was used in § 314.4(c)(10) of the Proposed Rule, which required financial institutions to implement policies to monitor the activity of ''authorized users'' and detect unauthorized access to customer information.

The Commission received one comment on this proposed definition from the National Automobile Dealers Association (NADA), which suggested the term ''authorized user'' was used inconsistently and was too vague.[25] NADA pointed out while ''authorized user'' is a defined term, the term ''authorized individual'' was used in proposed § 313.4(c)(1) (addressing access controls for information systems) and (c)(3) (addressing access controls for physical data). NADA also argued the inclusion of ''other person that participates in the business operations of an entity'' within the definition of ''authorized user'' was unclear and created ambiguity in its application.[26]

The Commission agrees with NADA's points, and, in response, modifies the Final Rule in two ways. First, the Final Rule replaces the term ''authorized individual'' with ''authorized user'' in § 313.4(c)(1). As described further below, because the Final Rule combines § 313.4(c)(3) with § 313.4(c)(1), there is no need to make a corresponding change to that section.

Second, because the Commission agrees the ambiguities in the definition of ''authorized user'' from the Proposed Rule could create confusion, it makes several changes to the definition. It deletes the phrase ''other person that participates in the business operations of an entity.'' The Commission agrees this phrase was vague. The Commission had intended it to cover any person the financial institution allows to access information systems or data, including, for example, ''customers'' of the financial institutions. For the purpose of controlling authorized access and detecting unauthorized access (which is where the definition of ''authorized user'' appears), financial institutions should monitor anomalous patterns of usage of their systems, not only by employees and agents, but also by customers and other persons authorized to access systems or data. To clarify this point, the Commission adds ''customer or other person'' to the definition of ''authorized users.''

The Commission intends that the definition of ''authorized users'' should include anyone who the financial institution authorizes to access an information system or data, regardless of whether that user actually uses the data. Thus, for clarity, the Commission has deleted the requirement that the authorized user be authorized *to use* the information system or data. Finally, the definition of authorized user should include users who can access both ''information systems and data'' and users authorized to access either information systems *or* data. Accordingly, for clarification purposes, the Commission modifies the definition of authorized user in the Final Rule as any employee, contractor, agent, customer or other person that is authorized to access any of your information systems or data.

Security Event

In proposed paragraph (c), the Commission defined security event as an event resulting in unauthorized access to, or disruption or misuse of, an information system or information stored on such information system. This term was used in provisions requiring financial institutions to establish a written incident response plan designed to respond to security events. It also appeared in the provision requiring the coordinator of a financial institution's information security program to provide an annual report to the financial institution's governing body; the required report must identify all security events that took place that year.

Commenters expressed three main concerns with this definition. The first relates to whether the term ''security event'' should be expanded to instances in which there is unauthorized access to, or disruption or misuse of, information in physical form, as opposed to electronic form. The Proposed Rule used the term ''security event'' instead of ''cybersecurity event'' to clarify that an information security program encompasses information in both digital and physical forms and that unauthorized access to paper files, for example, would also be a security event under the Rule. The Money Services Round Table (MSRT), however, noted despite the use of the more general ''security'' in the defined term, the definition itself is limited to events involving information systems.[27] The Commission agrees this creates a contradiction. Accordingly, the Final Rule includes the compromise of customer information in physical form in the definition of ''security event.''

Second, some industry groups argued a ''security event'' should occur only when there is ''unauthorized access'' to an information system, not in cases in which there has been a ''disruption or misuse'' of such systems (*e.g.,* a ransomware attack).[28] These

[22] Several commenters addressed the change to the definition of ''financial institution.'' Those comments are addressed in the discussion of the definition of ''financial institution'' below.

[23] American Council on Education (comment 24, NPRM), at 7.

[24] HITRUST, (comment 18, NPRM), at 2.

[25] National Automobile Dealers Association (comment 46, NPRM), at 11–12.

[26] National Automobile Dealers Association (comment 46, NPRM), at 11–12.

[27] Money Services Round Table (comment 53, NPRM), at 5 n.14.

[28] National Independent Automobile Dealers Association (comment 48, NPRM), at 4; National

commenters argued the disruption or misuse of information systems is not directly related to the protection of customer information and is, therefore, outside the Commission's statutory authority.[29] The Commission disagrees. Requiring a financial institution to protect against disruption and misuse of its information system is within the Commission's authority under the GLBA, which directed the Commission to promulgate a rule that required financial institutions to ''to protect against any anticipated threats or hazards to the security or integrity'' of customer information. A disruption or misuse of an information system will be, in many cases, a threat to the ''integrity'' of customer information. In addition, disruption or misuse may also indicate the existence of a security weakness that could be exploited to gain unauthorized access to customer information. For example, an event in which ransomware placed on a system is used to encrypt customer information, rendering it useless, raises the possibility similar software could have been used to exfiltrate customer information. Accordingly, the Final Rule retains the inclusion of ''misuse or disruption'' within the definition of ''security event.''

Third, several commenters suggested the definition of ''security event'' be limited to events in which there is a risk of consumer harm or some other negative effect.[30] Similarly, some commenters argued the definition should exclude events that involve encrypted information in which the encryption key was not compromised or when there is evidence the information accessed has not been misused.[31] The Commission declines to narrow the provision in this manner. It believes a financial institution should still engage in its incident response procedures to determine whether the event indicates a weakness that could endanger customer information and to respond accordingly. The financial institution can then take the appropriate steps in response. Further, § 314.4(h) of the Final Rule, which sets forth the requirement for an incident response plan, requires the incident response plan be designed to respond only to security events ''materially affecting the confidentiality, integrity, or availability of customer information,'' limiting the impact of the definition of ''security event.''

Accordingly, the Final Rule defines security event as an event resulting in unauthorized access to, or disruption or misuse of, an information system, information stored on such information system, or customer information held in physical form. The Proposed Rule placed this definition as paragraph (c), out of alphabetical order. The Final Rule adopts it as paragraph (p), placing it in alphabetical order with the other definitions in § 314.2.

Encryption

Proposed paragraph (e) defined encryption as the transformation of data into a form that results in a low probability of assigning meaning without the use of a protective process or key. This term was used in proposed § 314.4(c)(4), which generally required financial institutions to encrypt customer information. This definition was intended to define the process of encryption while not requiring any particular technology or technique for achieving the protection provided by encryption.

NADA argued this definition should be made more flexible by adding an alternative so it would read ''the transformation of data into a form that results in a low probability of assigning meaning without the use of a protective process or key *or securing information by another method that renders the data elements unreadable or unusable*'' (emphasis added).[32] On the other hand, others argued the Proposed Rule's definition did not sufficiently protect customer information.[33] For example, the Princeton University Center for Information Technology Policy (''Princeton Center'') suggested the Rule should be changed ''to clarify that encryption must be consistent with current cryptographic standards and accompanied by appropriate safeguards for cryptographic key material.'' [34] Similarly, ACE argued the definition should include ''the transformation of data in accordance with industry standards.'' [35]

The Commission agrees the proposed definition should be tethered to some technical standard, without being too prescriptive about what that standard is. Under the proposed definition, as well as NADA's proposed definition, financial institutions could have claimed they were ''encrypting'' data if they were aggregating it, scrambling it, or redacting it in a way that made it possible to re-identify the data through, for example, the application of common algorithms or programs. The Commission does not believe this would have provided consumers with sufficient protection. The Commission also agrees with the commenters who stated the definition should signal that encryption should be cryptographically based.

Accordingly, the Final Rule defines encryption as the transformation of data into a form that results in a low probability of assigning meaning without the use of a protective process or key, consistent with current cryptographic standards and accompanied by appropriate safeguards for cryptographic key material. This definition does not require any specific process or technology to perform the encryption but does require that whatever process is used be sufficiently robust to prevent the deciphering of the information in most circumstances.

Financial Institution

Incidental Activity

The Proposed Rule made one substantive change to the definition of ''financial institution'' it incorporated from the Privacy Rule. The change was designed to include entities ''significantly engaged in activities that are incidental to [] financial activity'' as defined by the Bank Holding Company Act. This proposed change brought only one activity into the definition that was not covered before: the act of ''finding'' as defined in 12 CFR 225.86(d)(1). The proposed revision to paragraph (f) added an example of a financial institution acting as a finder by ''bringing together one or more buyers and sellers of any product or service for transactions that the parties themselves negotiate and consummate.'' This example used the language set forth in 12 CFR 225.86(d)(1), which defines ''finding'' as an activity incidental to a financial activity under the Bank Holding Company Act. The Commission

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Automobile Dealers Association (comment 46, NPRM), at 12–13; Consumer Data Industry Association (comment 36, NPRM), at 3–4.

[29] National Independent Automobile Dealers Association (comment 48, NPRM), at 4; National Automobile Dealers Association (comment 46, NPRM), at 12–13.

[30] HITRUST (comment 18, NPRM), at 3; American Council on Education (comment 24, NPRM), at 7; Mortgage Bankers Association (comment 26, NPRM), at 4–5; Consumer Data Industry Association (comment 36, NPRM), at 3–4; National Automobile Dealers Association (comment 46, NPRM), at 12–13; National Independent Automobile Dealers Association (comment 48, NPRM), at 4.

[31] Mortgage Bankers Association (comment 48, NPRM), at 4–5; National Automobile Dealers Association (comment 46, NPRM), at 12–13; National Independent Automobile Dealers Association (comment 48, NPRM) at 4; American Council on Education (comment 24, NPRM), at 7.

[32] National Automobile Dealers Association (comment 46, NPRM), at 13.

[33] American Council on Education (comment 24, NPRM), at 7; Princeton University Center for Information Technology Policy (comment 54, NPRM), at 4.

[34] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 4.

[35] American Council on Education (comment 24, NPRM), at 7.

adopts this proposal without modification.

The change to the definition of ''financial institution'' brings it into harmony with other agencies' GLB rules.[36] The change is supported by the language of the Gramm-Leach-Bliley Act.[37] The Act defines a ''financial institution'' as any institution ''the business of which is engaging in financial activities as described in section 1843(k) of title 12.'' [38] That section, in turn, describes activities that are financial in nature as those the Board has determined ''to be financial in nature or incidental to such financial activity.'' [39] The Final Rule's definition mirrors this language. The change will not lead to a significant expansion of the Rule coverage as it expands the definition only to include entities engaged in activity incidental to financial activity, as determined by the Federal Reserve Board. The Board has determined only one activity to be incidental to financial activity—''acting as a finder.'' [40]

Several commenters who addressed this issue supported the inclusion of activities incidental to financial activities.[41] Other commenters expressed concern the proposed change in the definition would expand the Rule's coverage to businesses that should not be considered financial institutions.[42] They argued the definition of the term ''finder'' is too broad and companies that connect buyers and sellers in non-financial contexts would be swept inappropriately into the definition of ''financial institution.'' The Association of National Advertisers argued advertising agencies could be considered ''finders'' because they play a role in connecting buyers and sellers.[43]

In response, the Commission notes the Federal Reserve Board describes acting as a finder as ''bringing together one or more buyers and sellers of any product or service for transactions that the parties themselves negotiate and consummate.'' [44] The Board sets forth several activities within the scope of acting as a finder, such as ''[i]dentifying potential parties, making inquiries as to interest, introducing and referring potential parties to each other, [] arranging contacts between and meetings of interested parties'' and ''[c]onveying between interested parties expressions of interest, bids, offers, orders and confirmations relating to a transaction.'' [45]

Although this language is somewhat broad, its scope is significantly limited in the context of the Safeguards Rule. First, the Safeguards Rule applies only to transactions ''for personal, family, or household purposes.'' [46] Therefore, only finding services involving consumer transactions will be covered. Second, the Safeguards Rule applies only to the information of customers, which are consumers with which a financial institution has a continuing relationship.[47] Therefore, it will not apply to finders that have only isolated interactions with consumers and do not receive information from other financial institutions about those institutions' customers. This significantly narrows the types of finders that will have obligations under the Rule, excluding, the Commission believes, most advertising agencies and similar businesses that generally do not have continuing relationships with consumers who are using their services for personal or household purposes.

The Commission believes entities that perform finding services for consumers with whom they have an ongoing relationship are properly considered ''financial institutions'' for purposes of the Rule. Accordingly, the Commission adopts the changes to the definition of ''financial institution'' as proposed.

Other Changes to Definition of ''Financial Institutions''

Other commenters suggested modifying the definition of ''financial institution'' [48] in different ways. The Electronic Privacy Information Center (EPIC) argued the definition should be expanded by treating more activities as financial activities.[49] EPIC pointed out information shared with social media companies, retailers, apps, and devices generally is not covered under the Safeguards Rule. The Commission understands the concern that many businesses fall outside the coverage of the Safeguards Rule, despite handling sensitive consumer information, but the Commission's authority to regulate activity under the Safeguards and Privacy Rules is established by the GLBA. The Rule's application is limited to financial institutions as defined by that statute and cannot be extended beyond that definition.[50] The institutions discussed by EPIC, however, are still covered by the FTC Act's prohibition against deceptive or unfair conduct, including with respect to their use and protection of consumer information.[51]

The National Federation of Independent Business (NFIB) argued individuals and sole proprietors should be excluded from the definition of ''financial institution'' because an individual cannot be an ''institution.'' [52] When the Privacy Rule was promulgated in 2000, commenters also suggested the definition should exclude sole proprietors.[53] The Commission noted there was no basis to exclude sole proprietors and ''[w]hether or not a

[36] *See* 12 CFR 1016.3(l) (defining ''financial institution'' for entities regulated by agencies other than the FTC). *See also* 17 CFR 248.3(n) (defining ''financial institution'' to include ''any institution the business of which is . . . incidental to . . . financial activities'' for Security and Exchange Commission's rule implementing GLBA's safeguard provisions.).

[37] 15 U.S.C. 6801 *et seq.*

[38] 15 U.S.C. 6809(3).

[39] 12 U.S.C. 1843(k).

[40] 12 CFR 225.86.

[41] Electronic Privacy Information Center (comment 55, NPRM), at 9; Independent Community Bankers of America (comment 35, NPRM), at 3; National Automobile Dealers Association (comment 46, NPRM), at 13–16.

[42] Association of National Advertisers (comment, Workshop), at 4–5; internet Association (comment, Workshop*),* at 4–5; *see also* Anonymous (comment 15, NPRM) (questioning whether any governing body would oversee any future determinations by the Federal Reserve Board that activities are incidental to financial activity).

[43] Association of National Advertisers (comment 5, Workshop), at 5.

[44] 12 CFR 225.86 (d).

[45] 12 CFR 225.86 (d)(1)(i).

[46] *See* Final Rule 16 CFR 314.2(b)(1).

[47] 16 CFR 314.1; Final Rule 16 CFR 314.2(c).

[48] National Pawnbrokers Association (comment 32, NPRM), at 5–6 (arguing that transaction-reporting vendors be included in definition); National Consumer Law Center and others (comment 58, NPRM), at 5 (arguing that consumer reporting agencies be included explicitly in the definition); *see also* American Escrow Association (comment, Workshop), at 2–3 (requesting that the Rule specifically set out the duties of real estate settlement operations and other businesses that handle but do not maintain sensitive information); Beverly Enterprises, LLC (comment 3, NPRM), at 3–4 (requesting that the Rule specifically set out duties related to online notarizations); Yangxue Li (comment 5, NPRM) (asking whether Rule would set forth specific guidelines for different industries); Slobadon Raybolka (comment 17, NPRM) (suggesting that companies that perform online background checks be covered by the rule); The Clearing House (comment 49, NPRM) (suggesting a separate set of more stringent rules for fintech companies).

[49] Electronic Privacy Information Center (comment 55, NPRM), at 9.

[50] *See* 15 U.S.C. 6801 (requiring agencies to promulgate Rule establishing standards for financial institutions); 15 U.S.C. 6809(3) (defining ''financial institutions'' as an ''institution the business of which is engaging in financial activities as described'' in the Bank Holding Company Act).

[51] In the Matter of *Facebook, Inc.,* Docket No. C–4365 (Apr. 28, 2020); *FTC* v. *Wyndham Worldwide Corporation,* 799 F.3d 236 (3d Cir. 2015); FTC v. *D-Link Systems, Inc.,* Case No. 3:17–cv–00039–JD (N.D. Cal. July 2, 2019); In the Matter of *Twitter, Inc.,* Docket No. C–4316 (Mar. 11, 2011).

[52] National Federation of Independent Business (comment 16, NPRM), at 2–3.

[53] Privacy Rule, Final Rule, 65 FR 33645 (May 24, 2000) at 33656.

commercial enterprise is operated by a single individual is not determinative'' of whether the enterprise is a financial institution. The Commission has not changed its position on this matter and declines to make this change to the definition of ''financial institution.''

The Final Rule adopts this definition as proposed without change.

Information Security Program

Paragraph (i) of the Final Rule adopts the existing Rule's paragraph (c) and does not alter the definition of ''information security program.'' The Commission received no comments on this definition, and accordingly, adopts the current definition in the Final Rule.

Information System

Proposed paragraph (h) defined information system as a discrete set of electronic information resources organized for the collection, processing, maintenance, use, sharing, dissemination or disposition of electronic information, as well as any specialized system such as industrial/process controls systems, telephone switching and private branch exchange systems, and environmental control systems. The term ''information system'' was used throughout the proposed amendments to designate the systems that must be covered by the information security program.

The MSRT suggested this definition was too narrow in some respects and too broad in others.[54] It argued the definition of ''information system'' was too narrow because it did not include physical systems or employees and would exclude them from some of the provisions of the Rule. Specifically, the MSRT argued that based on this definition, the penetration tests required by § 314.4(d)(2) would not be required to test ''potential human vulnerabilities'' such as social engineering or phishing.[55] The Commission does not agree. Penetration testing, as defined by the Final Rule, is a process through which testers ''attempt to circumvent or defeat the security features of an information system.'' [56] One way such security features are tested is through social engineering and phishing.[57] The fact that the testing involves employees with access to the information system, rather than just the system itself, does not exclude such tests from the definition of ''penetration testing.'' Attempted social engineering and phishing are important parts of testing the security of information systems and would not be excluded by this definition.

The MSRT also argued the definition was too broad, and was joined by other commenters in this concern.[58] These commenters shared a concern the proposed definition would include systems that are in no way connected to customer information and would require financial institutions to include all systems in their possession, regardless of their involvement with customer information. The Commission agrees the definition should be limited to those systems that either contain customer information or are connected to systems that contain customer information, and adds that limitation to the Final Rule. The Rule does not limit the definition to only those systems that contain customer information, because a common source of data breaches is a vulnerability in a connected system that an attacker exploits to gain access to the company's network and move within the network to obtain access to the system containing sensitive information.[59] Accordingly, the definition of information system in the Final Rule is modified to a discrete set of electronic information resources organized for the collection, processing, maintenance, use, sharing, dissemination or disposition of electronic information containing customer information or any such system connected to a system containing customer information, as well as any specialized system such as industrial/process controls systems, telephone switching and private branch exchange systems, and environmental controls systems, that contains customer information or that is connected to a system that contains customer information.

Multi-Factor Authentication

Proposed paragraph (i) defined multi-factor authentication as authentication through verification of at least two of the following types of authentication factors: Knowledge factors, such as a password; possession factors, such as a token; or inherence factors, such as biometric characteristics. This term was used in proposed § 314.4(c)(6),[60] which required financial institutions to implement multi-factor authentication for individuals accessing networks that contain customer information.

Several commenters argued the definition should explicitly include SMS text messages as an acceptable example of a possession factor or otherwise to be explicitly allowed.[61] The Proposed Rule did not include SMS text messages as an example of a possession factor.[62] Most commenters who addressed this issue interpreted this exclusion from the examples as forbidding financial institutions from using SMS text messages as a possession factor for multi-factor authentication. That is not the effect of this exclusion, however. The language of the definition neither prohibits nor recommends use of SMS text messages. Indeed, SMS text messages are not addressed at all. In some cases, use of SMS text messages as a factor may be the best solution because of its low cost and easy use, if its risks do not outweigh those benefits under the circumstances.[63] In other instances, however, the use of SMS text messages may not be a reasonable solution, such as when extremely sensitive information can be obtained through the access method being controlled, or when a more secure method can be used for a comparable price. A financial institution will need to evaluate the balance of risks for its situation. If, however, the Commission were to explicitly allow use of SMS text messages, this could be considered a safe harbor that would not require the company to consider risks associated with use of SMS text as a factor in a particular use case. Accordingly, the Final Rule does not include SMS text

[54] Money Services Round Table (comment 53, NPRM), at 5–6.

[55] *Id.* at 5.

[56] Final Rule § 314.2(j).

[57] Indeed, Workshop participant Scott Wallace noted, in conducting penetration testing, ''the first thing [he does]'' is generally to ''prepare for the phishing campaign.'' Remarks of Scott Wallace, Safeguards Workshop Tr., *supra* note 17, at 131–32.

[58] Money Services Round Table (comment 53, NPRM), at 5; Consumer Data Industry Association (comment 36, NPRM), at 4; American Council on Education (comment 24, NPRM), at 7–8.

[59] *See* Remarks of Serge Jorgensen, Safeguards Workshop Tr., *supra* note 17, at 58–59 (noting cybersecurity attacks can take advantage of systems that are connected to the systems in which sensitive information is stored); Remarks of Tom Dugas, Safeguards Workshop Tr., *supra* note 17, at 138 (noting a vulnerability in one system can result in the exposure of information maintained in another system); *see also* Remarks of Rocio Baeza, Safeguards Workshop Tr., *supra* note 17, at 106–07 (noting the heightened importance of encryption in a context where numerous systems are connected); Remarks of James Crifasi, Safeguards Workshop Tr., *supra* note 17, at 107–08 (same).

[60] Section 314.4(c)(5) in the Final Rule.

[61] Electronic Transactions Association (comment 27, NPRM), at 4; U.S. Chamber of Commerce (comment 33, NPRM), at 9; CTIA (comment 34, NPRM), at 7–9; Global Privacy Alliance (comment 38, NPRM), at 9; National Automobile Dealers Association (comment 46, NPRM), at 29; National Independent Automobile Dealers Association (comment 48, NPRM), at 6.

[62] *See, e.g.,* NIST Special Publication 800–63B, Digital Identity Guidelines, 5.1.3.3 (restricting use of verification using the Public Switched Telephone Network (SMS or voice) as an ''out-of-band'' factor for multi-factor authentication).

[63] *See, e.g.,* Remarks of Wendy Nather, Safeguards Workshop Tr., *supra* note 17, at 231–32.

messages in the examples of possession factors.

The final Rule adopts the proposed definition of ''multi-factor authentication'' without change as paragraph (k) of this section.

Penetration Testing

Proposed paragraph (j) defined penetration testing as a test methodology in which assessors attempt to circumvent or defeat the security features of an information system by attempting penetration of databases or controls from outside or inside your information systems. This term was used in proposed § 314.4(d)(2), which required financial institutions to continually monitor the effectiveness of their safeguards or to engage in annual penetration testing. The Commission received no comments concerning this definition. The Final Rule adopts the definition from the Proposed Rule as paragraph (m) of this section.

Personally Identifiable Financial Information

To minimize cross-referencing to the Privacy Rule, as noted above, the Commission is adding several definitions to the Final Rule. One of these definitions is ''personally identifiable financial information,'' which is identical to the definition currently contained in the Privacy Rule. This term is included within the ambit of ''customer information,'' in both the existing Rule and the Final Rule.

The Princeton Center suggested expanding the definition of ''personally identifiable financial information'' from the Privacy Rule to include ''aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses.''[64] The Princeton Center further suggested clarifying that, for information to not be considered ''personally identifiable financial information,'' the financial institution must be required to demonstrate the information is not ''reasonably linkable'' to individuals.

The Commission does not believe this amendment is necessary. The definition of ''personally identifiable financial information'' is already a broad one.[65] It includes not just information associated with types of personal information such as a name or address or account number, but also information linked to a persistent identifier (''any information you collect through an Internet 'cookie' (an information collecting device from a web server'')).[66] While there may be some merit to limiting the exception for aggregate information or blind data to data that cannot be reasonably linkable to an individual, for purposes of a rule that can be periodically updated to keep up with changing technology, the current approach is more concrete and enforceable, and less subject to differences in interpretation.

Service Provider

Proposed paragraph (k) adopted the existing Rule's definition and does not alter the definition of ''service provider.'' The Commission received no comments on this definition and adopts it as paragraph (q) of the Final Rule.

Sec. 314.3: Standards for Safeguarding Customer Information

Proposed § 314.3, which required financial institutions to develop an information security program (paragraph (a)) and set forth the objectives of the Rule (paragraph (b)), was largely identical to the existing Rule. It changed only the requirement that ''safeguards'' be based on the elements set forth in § 314.4, by replacing ''safeguards'' with ''information security program.'' The Commission received no comments on this proposal and adopts it without change in the Final Rule.

Sec. 314.4: Elements

Proposed § 314.4 altered the current Rule's required elements of an information security program and added several new elements.

General Comments

The Commission received many comments addressing the new elements, both in favor of the changes and opposed to them. The comments in favor of the changes generally argued these changes would protect consumers by improving the data security of institutions that hold their information.[67] Most of the comments opposed to the proposed elements fell into several categories, objecting: (1) The proposed changes were too prescriptive and did not allow financial institutions sufficient flexibility in managing their information security; (2) the proposed amendments would be too expensive for financial institutions, particularly smaller institutions, to adopt; and (3) some of the requirements should not apply to all customer information but should be limited to some subset of especially ''sensitive'' customer information. The Commission does not agree with these comments for the reasons discussed below, and accordingly, retains the general approach of the Proposed Rule in the Final Rule.

Flexibility

Many industry groups argued the new proposed elements were too prescriptive, lacked flexibility, would quickly become outdated, and would force financial institutions to engage in activities that would not enhance security.[68] For example, the Electronics Transactions Association argued the Proposed Rule would ''limit the ability of industry to develop new and innovative approaches to information security.''[69] Similarly, CTIA commented the Proposed Rule would create a ''prescriptive core of requirements that covered businesses must follow, irrespective of whether risk assessments show they are necessary.''[70]

The Commission, however, believes the elements provide sufficient flexibility for financial institutions to adopt information security programs suited to the size, nature, and complexity of their organization and information systems. The elements for the information security programs set forth in this section are high-level principles that set forth basic issues the

[64] Princeton University Center for Information Technology Policy (comment 54, NPRM) at 9–10.

[65] *See* 16 CFR 313.3(o)(1).

[66] 16 CFR 313.3(o)(2)(i)(F).

[67] *See, e.g.,* New York Department of Financial Service (comment 40, NPRM), at 1 (arguing the Proposed Rule would ''further advance efforts to protect financial institutions and consumers from cybercriminals.''); Princeton University Center for Information Technology Policy (comment 54, NPRM), at 1 (stating the Proposed Rule ''would significantly reduce data security risks for the customers of financial institutions.''); National Consumer Law Center and others (comment 58, NPRM), at 2 (stating requirements of Proposed Rule are ''reasonable and common-sense measures that any company dealing with large amounts of consumer personal information should take.'').

[68] *See, e.g.,* HITRUST (comment 18, NPRM), at 1–2; American Council on Education (comment 24, NPRM), at 2–4; Cristian Munarriz (comment 21, NPRM); Electronic Transactions Association (comment 27, NPRM), at 1–2; National Pawnbrokers Association (comment 32, NPRM), at 3; CTIA (comment 34, NPRM), at 5; Consumer Data Industry Association (comment 36, NPRM), at 2; Wisconsin Bankers Association (comment 37, NPRM), at 1–2; Global Privacy Alliance (comment 38, NPRM), at 5–6; Bank Policy Institute (comment 39, NPRM), at 2; American Financial Services Association (comment 41, NPRM), at 4; National Association of Dealer Counsel (comment 44, NPRM), at 1; ACA International, (comment 45, NPRM), at 4; National Automobile Dealers Association (comment 46, NPRM), at 11; National Independent Automobile Dealers Association (comment 48, NPRM), at 2–3; Money Services Round Table (comment 53, NPRM), at 1–4; Software & Information Industry Association (comment 56, NPRM), at 1–3; Gusto and others (comment 11, Workshop), at 2; Association of National Advertisers (comment 5, Workshop), at 1–3; internet Association (comment 9, Workshop), at 2–3.

[69] Electronic Transactions Association (comment 27, NPRM), at 1–2.

[70] CTIA (comment 34, NPRM), at 5.

programs must address, and do not prescribe how they will be addressed. For example, the requirement that the information security program be based on a risk assessment sets forth only three general items the assessment must address: (1) Criteria for evaluating risks faced by the financial institution; (2) criteria for assessing the security of its information systems; and (3) how the identified risks will be addressed. Other than meeting these basic requirements, financial institutions are free to perform their risk assessments in whatever way they choose, using whatever method or approach works best for them, as long as the method identifies reasonably foreseeable risks. The other elements are similarly flexible. The two elements that are more prescriptive, encryption and multi-factor authentication, allow financial institutions to adopt alternative solutions when necessary. Comments concerning individual elements are addressed separately in the more detailed analysis below.

Cost

Another common theme among the comments from industry groups was the proposed information security program elements would be prohibitively expensive, especially for smaller businesses.[71] Commenters argued the Proposed Rule would have required financial institutions to implement expensive changes to their systems and hire highly-compensated professionals to do so.[72] Industry groups were particularly concerned about the requirement that financial institutions designate a single qualified individual to coordinate their information security programs, arguing this would require hiring professionals that were both expensive, with salaries of more than $100,000 suggested by some, and in limited supply.[73] Overall, several commenters argued some financial institutions would be unable to afford to bring themselves into compliance with the Proposed Rule.[74]

The Commission recognizes properly securing information systems can be an expensive and technically difficult task. However, the Commission believes the additional costs imposed by the Proposed Rule are mitigated for several reasons and, ultimately, those costs are justified in order to protect customer information as required by the GLBA.[75]

First, for almost 20 years, financial institutions have been required under the current Safeguards Rule to have information security programs in place. The current Safeguards Rule requires financial institutions to ‘‘develop, implement, and maintain a comprehensive [written] information security program . . . appropriate to [the financial institutions'] size and complexity, the nature and scope of [their] activities, and the sensitivity of any customer information at issue.'' [76] This comprehensive program must be coordinated by one or more individuals and based on a risk assessment.[77] As such, financial institutions complying with the current Rule will not be required to establish an information security program from scratch. Instead, they can compare their existing programs to the revised Rule, and address any gaps. The Commission believes many of the requirements set forth in the Final Rule are so fundamental to any information security program that the information security programs of many financial institutions will already include them if those programs are in compliance with the current Safeguards Rule.

Second, a number of commenters who raised concerns about the costs imposed by the Rule believed the Proposed Rule would have required the hiring of a highly-compensated expert to serve as a Chief Information Security Officer (CISO).[78] It is correct the Proposed Rule would have modified the current requirement of designating an ‘‘employee or employees to coordinate your information security program'' by requiring the designation of a single qualified individual responsible for

[71] American Council on Education (comment 24, NPRM), at 13–14; Wisconsin Bankers Association (comment 37, NPRM), at 1–2; American Financial Services Association (comment 41, NPRM), at 4; National Association of Dealer Counsel (comment 44, NPRM), at 1; National Automobile Dealers Association (comment 46, NPRM), at 11; National Independent Automobile Dealers Association, (comment 48, NPRM), at 3; Gusto and others (comment 11, Workshop), at 2–4; National Pawnbrokers Association (comment 3, NPRM), at 2; *see also* Remarks of James Crifasi, Safeguards Workshop Tr., *supra* note 17, at 72–74 (describing study that found compliance would be expensive for automobile dealers).

[72] *See, e.g.,* Slides Accompanying Remarks of James Crifasi, FTC, ‘‘NADA Cost Study: Average Cost Per U.S. Franchised Dealership,'' Event Materials, Information Security and Financial Institutions: An FTC Workshop to Examine Safeguards Rule (July 13, 2020) *https://www.ftc.gov/system/files/documents/public_events/1567141/slides-glb-workshop.pdf* (hereinafter Safeguards Workshop Slides), at 25 (estimating an upfront cost of $293,975 per dealership, and an recurring annual cost of $276,925); *see also* Remarks of James Crifasi, Safeguards Workshop Tr., *supra* note 17, at 72–75; Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 78 (estimating the average annual salary of a CISO can range from $180,000 to upwards of $400,000); Slides Accompanying Remarks of Lee Waters, ‘‘Estimated Costs of Proposed Changes,'' Safeguards Workshop Slides, at 26 (estimating the annual costs of a security program to include: Multi-factor authentication, $50 for smart card readers, and $10 each for smart cards; a CISO, either an in-house CISO, $180,000, an in-house cybersecurity analyst, $76,000, or an outsourced cybersecurity contractor, between $120,000 and $240,000; penetration testing, average cost $4,800; and physical security, $215,000 for construction, and $10,000 to $20,000 for new or upgraded locks)*; see also* Remarks of Lee Waters, Safeguards Workshop Tr., *supra* note 17, at 75–76.

[73] *See, e.g.,* Slides Accompanying Remarks of Lee Waters, ‘‘Estimated Costs of Proposed Changes,'' Safeguards Workshop Slides, *supra* note 72, at 26 (estimating costs of an in-house CISO to be $180,000 annually, and an in-house cybersecurity analyst to be $76,000 annually; and estimating an outsourced cybersecurity contractor would cost between $120,000 to $240,000 annually); *see also* Remarks of Lee Waters, Safeguards Workshop Tr., *supra* note 17, at 75–76; Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 78 (estimating that the average annual salary of a CISO can range from $180,000 to upwards of $400,000).

[74] *See* Remarks of Lee Waters, Safeguards Workshop Tr., *supra* note 17, at 119–20 (noting when small businesses have to spend money to hire third-party vendors and security experts to comply with regulations, that affects consumer prices and small business profit margins); Slides Accompanying Remarks of James Crifasi, ‘‘NADA Cost Study: Average Cost Per U.S. Franchised Dealership,'' Safeguards Workshop Slides, *supra* note 72, at 25*; see also* Remarks of James Crifasi, *supra* note 17, at 73 (noting the requirements ‘‘start becoming a little bit unaffordable here.'').

[75] The Small Business Administration's Office of Advocacy commented it was concerned the FTC had not gathered sufficient data as to either the costs or benefits of the proposed changes for small financial institutions. Office of Advocacy, U.S. Small Business Administration (comment 28, NPRM), at 3–4. The FTC shares the Office of Advocacy's interest in ensuring that regulatory changes have an evidentiary basis. Many of the questions on which the FTC sought public comment, both in the regulatory review and in the proposed Rule context, specifically related to the costs and benefits of existing and proposed Rule requirements. Following the initial round of commenting, the Commission conducted the FTC Safeguards Workshop and solicited additional public comments with the explicit goal of gathering additional data relating to the costs and benefits of the proposed changes. *See* Public Workshop Examining Information Security for Financial Institutions and Information Related to Changes to the Safeguards Rule, 85 FR 13082 (Mar. 6, 2020). As detailed throughout this document, the Commission believes there is a strong evidentiary basis for the issuance of the final Rule.

[76] 16 CFR 314.3.

[77] 16 CFR 314.4.

[78] Several speakers at the Safeguards Workshop also raised this concern. *See, e.g.,* Slides Accompanying Remarks of James Crifasi, ‘‘NADA Cost Study: Average Cost Per U.S. Franchised Dealership,'' in Safeguards Workshop Slides, *supra* note 72, at 25 (estimating appointing a CISO to increase program accountability would be a one-time, up-front cost of $27,500, with a recurring annual cost of $51,000); Remarks of James Crifasi, Safeguards Workshop Tr., *supra* note 17, at 72–75; Slides Accompanying Remarks of Lee Waters, ‘‘Estimated Costs of Proposed Changes,'' in Safeguards Workshop Slides, *supra* note 72, at 26 (estimating costs of an in-house CISO to be $180,000 annually, and an in-house cybersecurity analyst to be $76,000 annually; and estimating that an outsourced cybersecurity contractor would cost between $120,000 to $240,000 annually); Remarks of Lee Waters, Safeguards Workshop Tr., *supra* note 17, at 75–76; Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 78 (estimating that the average annual salary of a CISO can range from $180,000 to upwards of $400,000).

overseeing and implementing the security program. This individual was referred to in the Proposed Rule as a Chief Information Security Officer or ''CISO.'' As discussed in detail below, the Final Rule does not use this term, though the concept is the same: The person designated to coordinate the information security program need only be ''qualified.'' No particular level of education, experience, or certification is prescribed by the Rule. Accordingly, financial institutions may designate any qualified individual who is appropriate for their business. Only if the complexity or size of their information systems require the services of an expert will the financial institution need to hire such an individual.[79]

Finally, the Commission believes while large financial institutions may well incur substantial costs to implement complex information security programs, there are much more affordable solutions available for financial institutions with smaller and simpler information systems. For example, there are very low-cost or even free vulnerability assessment programs available: ''virtual CISO'' services enable a third party to provide security support for many companies, splitting the cost of information security professionals among them; many applications and hardware have built-in encryption requirements; [80] and there are affordable multi-factor authentication solutions aimed at businesses of various sizes.

Considering these points, although there will undoubtedly be expenses involved for some, or even many, financial institutions to update their programs, the Commission believes these expenses are justified because of the vital importance of protecting customer information collected, maintained, and processed by financial institutions. Congress recognized the importance of securing consumers' sensitive financial information when it passed the GLBA, which required the FTC to promulgate the Safeguards Rule. The importance, as well as the difficulty, of protecting customer information has only increased in the more than twenty years since the passage of the GLBA. The Commission believes the amendments to the Safeguards Rule are necessary to ensure the purposes of the GLBA are satisfied, and so consumers can have confidence financial institutions are providing reasonable safeguards to protect their information.

''Sensitive'' Customer Information

Several industry groups also suggested significant portions of the Proposed Rule should not apply to all customer information, but rather only to some subset of particularly ''sensitive'' customer information, such as account numbers or social security numbers.[81] These commenters generally argued the definition of ''customer information'' is too broad, as it will include information the commenters felt is not particularly sensitive, such as name and address, and does not justify extensive safeguards.[82]

The Commission does not agree that some portion of customer information is not entitled to the protections required by the Final Rule. The Safeguards Rule defines ''customer information'' as ''any record containing nonpublic personal information'' about a customer handled or maintained by or on behalf of a financial institution.[83] The Final Rule defines ''nonpublic personal information'' as ''personally identifiable financial information,'' but does not include information that is ''publicly available.'' Although this definition is broad, the Commission believes information covered by it is rightfully considered sensitive and should be protected accordingly. The businesses regulated by the Safeguards Rule are not just any businesses, but are financial institutions and are responsible for handling and maintaining financial information that is both important to consumers and valuable to attackers who try to obtain the information for financial gain. Even the fact that a consumer is a customer of a particular financial institution is generally nonpublic and can be sensitive. For example, the revelation of a customer relationship between a consumer and a particular type of financial institution, such as debt collectors or payday lenders, may make those customers' information more vulnerable to compromise by facilitating social engineering or similar attacks. The nature of the relationship between customers and their financial institutions makes all nonpublic information held by the financial institution inherently sensitive and worthy of the level of protection set forth in the Rule.

Although the Commission believes all customer information should be safeguarded by financial institutions and declines to exclude any portion of that information from protection under any of the provisions of the Rule, it notes the Rule does contemplate financial institutions will consider the sensitivity of particular information in designing their information security programs and safeguards. The elements required by this section are generally flexible enough to allow financial institutions to treat various pieces of information differently. For example, paragraph (c)(1) requires information security programs to include safeguards that address access control of customer information. The paragraph requires financial institutions to develop measures to ensure only authorized users access customer information, but does not prescribe any particular measures that must be adopted. When designing these measures, a financial institution may design a system in which more sensitive information is protected by more stringent access controls. Even in the more specific provisions of the Rule, there is flexibility to address the relative sensitivity of information. For example, in § 313.4(c)(5)'s requirement that customer information be protected by multi-factor authentication, financial institutions have flexibility to implement the multi-factor authentication depending on the sensitivity of the information. The financial institution may select factors such as SMS text messages to access less sensitive information, but determine more sensitive information should be protected by other, more secure, factors for authentication.

Third-Party Standards and Frameworks

In addition, in the NPRM, the Commission asked whether the Safeguards Rule should incorporate outside standards, such as the National Institute of Standards and Technology (''NIST'') framework, either as required elements of an information security program or as a safe harbor that would

[79] *See, e.g.,* Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 89–90 (noting the size of a financial institution and the amount and nature of the information it holds factor into an appropriate information security program)*; see also* Slides Accompanying Remarks of Rocio Baeza, ''Models for Complying to the Safeguards Rule Changes,'' in Safeguards Workshop Slides, *supra* note 72, at 27–28 (describing three different compliance models: In-house, outsource, and hybrid, with costs ranging from $199 per month to more than $15,000 per month); Remarks of Rocio Baeza, Safeguards Workshop Tr., *supra* note 17, at 81–83 (describing three compliance models in more detail).

[80] *See* Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 78 (describing virtual CISO services).

[81] *See, e.g.,* Electronic Transactions Association (comment 27, NPRM), at 2–4; CTIA (comment 34, NPRM), at 10; Global Privacy Alliance (comment 38, NPRM), at 7–8; American Financial Services Association (comment 41, NPRM), at 5; ACA International (comment 45, NPRM), at 13; Money Services Round Table (comment 53, NPRM), at 6–7.

[82] *See, e.g.,* Electronic Transactions Association (comment 27, NPRM), at 2; Global Privacy Alliance (comment 38, NPRM), at 7.

[83] 16 CFR 314.2(b).

treat compliance with such a standard as compliance with the Safeguards Rule. Some commenters advocated for the adoption of an outside standard into the Safeguards Rule.[84] Cisco Systems, Inc. suggested the Safeguards Rule should be connected to NIST guidance, arguing this would allow the Rule to evolve as NIST's guidance evolves.[85] An anonymous commenter suggested the Rule should comply with ''international standard ISO/IEC 27001.'' [86] The National Consumer Law Center argued certain financial institutions with particularly sensitive customer information should be required to comply with guidelines issued by NIST and the Federal Financial Institutions Examination Council (FFIEC).[87] Other commenters acknowledged the value of outside standards but were opposed to the Rule requiring compliance with them.[88]

Some commenters suggested while compliance with outside standards should not be required, compliance should serve as a ''safe harbor'' for compliance with the Rule.[89] On the other hand, Consumer Reports noted while such standards can be helpful guidance, they should not be a safe harbor for compliance with the Rule because financial institutions must take steps to ensure they are responding to changing information security threats regardless of the requirements of an outside framework.[90]

The Commission declines to change the Rule to incorporate or reference a particular security standard or framework for a variety of reasons. First, it is not clear the more detailed frameworks would apply well to financial institutions of various sizes and industries. In addition, mandating companies follow a particular security standard or framework would reduce the flexibility built into the Rule. Similarly, the Commission declines to make compliance with an outside standard a safe harbor for the Rule. In such a scenario, the use of safe harbors would not greatly enhance regulatory stability or predictability for financial institutions because the Commission would be required to actively monitor whether those standards continued to provide equivalent protections for Safeguards compliance and modify the Rule if a standard became inadequate. In addition, in investigating possible violations of the Rule, the Commission would be required to independently verify whether the financial institution had in fact complied with the outside framework, which would require substantial effort and expense on the part of the Commission and the target of the investigation.

Specific Elements

In addition to these generally applicable comments, commenters addressed many of the individual elements set forth by this section. These elements are discussed in more detail below.

Paragraph (a)—Designation of a Single Qualified Individual

Proposed paragraph (a) changed the current requirement that institutions designate an ''employee or employees to coordinate your information security program'' to instead require the financial institution to designate ''a qualified individual responsible for overseeing and implementing your information security program and enforcing your information security program.'' [91] This individual was referenced in the Proposed Rule as a Chief Information Security Officer or ''CISO.''

The notice of proposed rulemaking for the Proposed Rule emphasized the use of the term ''CISO'' was for clarity in the Proposed Rule.[92] Despite the use of the term ''CISO,'' the Proposed Rule did not require financial institutions to actually grant that title to the designated individual. Commenters that responded to this proposal, however, generally assumed the person designated to coordinate and oversee a financial institution's information security program would be required to have the qualifications, duties, responsibilities, and accompanying pay of a CISO as that position is generally understood in the information security field.[93] The position of CISO is generally limited to large companies with fairly complex information security systems, so the salary of this position is often very high.[94] Accordingly, many commenters argued hiring a CISO would be prohibitively expensive for many financial institutions.[95] Additionally, commenters argued the hiring of such an in-demand professional would be difficult because of a general shortage of such professionals available for hiring.[96]

By using the term ''CISO,'' the Commission did not intend to require all financial institutions hire a highly qualified professional with an extremely high salary, regardless of the financial institutions' size or complexity. The Proposed Rule required only that financial institutions designate a ''qualified individual'' to oversee and enforce their information security program, without specifying any particular level of experience, education, or compensation, or requiring any particular duties outside of overseeing the financial institution's information security program and other requirements specifically set forth in the Rule.[97] The use of the term ''CISO'' in the Proposed Rule, however, caused confusion about the requirements of this section. Accordingly, the Final Rule replaces the term ''CISO'' with ''Qualified Individual'' to refer to the individual designated under this section of the Rule.

The use of the term ''Qualified Individual'' is meant to clarify the only requirement for this designated individual is that he or she be qualified to oversee and enforce the financial institution's information security program. What qualifications are necessary will depend upon the size and complexity of a financial institution's information system and the volume and sensitivity of the customer information the financial institution

[84] Cisco Systems, Inc. (comment 51, NPRM), at 4; National Consumer Law Center and others (comment 58), at 2; Anonymous (comment 2, Workshop).

[85] Cisco Systems, Inc. (Comment 51, NPRM), at 4.

[86] Anonymous (comment 2, Workshop). The ISO/IEC 27001 standard is an information security standard issued by the International Organization for Standardization. *See* ISO/IEC 27001 Information Security Management, ISO, *https://www.iso.org/isoiec-27001-information-security.html* (last accessed 15 Dec. 2020).

[87] National Consumer Law Center and others (comment 58, NPRM), at 2.

[88] HITRUST (comment 18, NPRM), at 2; *see also* Consumer Reports (comment 52, NPRM), at 6–7 (discouraging the adoption of outside standards as a safe harbor for companies).

[89] Mortgage Bankers Association (comment 26, NPRM), at 2 (suggesting Rule be modified so financial institutions that use the NIST Cybersecurity Framework would be in de facto compliance with the Rule); *see also* National Pawnbrokers Association (comment 32, NPRM), at 6–7 (advocating for the adoption of safe harbors for small financial institutions without detailing what should be required to qualify for the safe harbor).

[90] Consumer Reports (comment 52, NPRM), at 6–7.

[91] Section 314.4(a).

[92] 84 FR 13165.

[93] U.S. Chamber of Commerce (comment 33, NPRM), at 10; National Automobile Dealers Association (comment 46), at 17–19; National Independent Automobile Dealers Association (comment 48, NPRM), at 5; ACA International (Comment 45, NPRM), at 8.

[94] *See. e.g.,* Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 78 (estimating the average annual salary of a CISO can range from $180,000 to upwards of $400,000).

[95] National Automobile Dealers Association (comment 46, NPRM), at 17–19; National Independent Automobile Dealers Association (comment 48, NPRM), at 5; U.S. Chamber of Commerce (comment 33, NPRM), at 10; ACA International (comment 45, NPRM), at 8.

[96] National Automobile Dealers Association (comment 46, NPRM), at 18–19; U.S. Chamber of Commerce (comment 33, NPRM), at 10; ACA International (comment 45, NPRM), at 8.

[97] 84 FR 13175.

possesses or processes. The Qualified Individual of a financial institution with a very small and simple information system will need less training and expertise than a Qualified Individual for a financial institution with a large, complex information system. The exact qualifications will depend on the nature of the financial institution's information system. Each financial institution will need to evaluate its own information security needs and designate an individual with appropriate qualifications to meet those needs.

The Commission believes, in many cases, financial institutions' current coordinators, whether their own employees or third-party contractors, may be qualified for this role.[98] Because the current Safeguards Rule requires financial institutions to designate an ''employee or employees to coordinate your information security program,'' financial institutions in compliance with that Rule will already have one or more information security coordinators. Although the current Rule does not expressly require that these coordinators be qualified for that position, the current Rule requires a financial institution to maintain ''appropriate'' safeguards, regularly test those safeguards, and evaluate and adjust the information security program in light of that testing.[99] In order to effectively comply with these ongoing requirements, a financial institution's coordinator must have some level of information security training and knowledge and, therefore, will likely be an appropriate Qualified Individual under the Final Rule. Accordingly, in many cases this amendment to the Rule will not require any additional hiring expenses.

In addition to explicitly requiring that the information security program coordinator be qualified for the role, the Commission proposed to require the designation of a single employee, as opposed to the multiple coordinators allowed by the existing Rule. Some commenters objected to this proposal on the grounds that it would interfere with financial institutions' flexibility in organizing their information security personnel.[100] For example, the Consumer Data Industry Association (''CDIA'') commented the designation of a single coordinator would interfere with financial institutions' ability to organize their program ''to share responsibilities among different personnel with different strengths.'' [101] Similarly, ACA International argued this requirement would prevent financial institutions from having multiple staff members share responsibilities for information security programs.[102]

Other commenters argued the designation of a single individual as the coordinator of the information security program provides no proven benefits over the use of multiple coordinators.[103] Similarly, NADA argued that, while the appointment of a single qualified individual might improve accountability, improving accountability does not improve security.[104] On the other hand, a group of consumer and advocacy groups including the National Consumer Law Center (''NCLC'') argued appointing a single individual as the coordinator of the information security program can increase security and prevent security events based on lack of accountability and poor coordination.[105]

The Commission retains the requirement to designate a single qualified individual, because it believes there are clear benefits to the designation of a single coordinator. Designating a single coordinator to oversee an information security program clarifies lines of reporting in enforcing the program, can avoid gaps in responsibility in managing data security, and improve communication.[106]

The Commission disagrees with the commenter who stated improved accountability does not lead to improved security. The goal of improving accountability is to ensure information security staff and financial institution management give the necessary attention and resources to information security. In addition, an individual that has clear responsibility for the strength of a financial institution's information security program will be accountable to improve the program and ensure it protects customer information.[107]

The major breach that occurred at national consumer reporting agency Equifax in 2017 demonstrates the importance of clear lines of reporting and accountability in management of information security programs. The U.S. House Committee on Oversight and Government Reform issued a report on the breach that identified Equifax's organization as one of the major causes of the breach.[108] The report indicated Equifax's division of responsibility for information security between two individuals that reported to two different company officers contributed to failures of communication, oversight, and enforcement that led to millions of consumers' data being compromised.[109] Increasing accountability for individuals and organizations can directly lead to improved security for customer information.

Finally, the Commission does not believe the requirement to designate a single Qualified Individual would

[98] Remarks of James Crifasi, Safeguards Workshop Tr., *supra* note 17, at 74 (stating car dealerships can rely on existing staff for this role); Remarks of Lee Waters, Safeguards Workshop Tr., *supra* note 17, at 78–79 (stating any dealership with any IT staff at all would have someone who could assume the role of ''qualified individual,'' perhaps requiring some additional research or outside help); Remarks of Rocio Baeza, Safeguards Workshop Tr., *supra* note 17, at 81–82 (stating companies may use an existing employee for the role and ''for any areas where there may be skill gaps, that can be supplemented with either certifications or some type of education.'').

[99] 16 CFR 314.4.

[100] National Independent Automobile Dealers Association (comment 48, NPRM), at 5; Consumer Data Industry Association (comment 36, NPRM), at 5; National Association of Dealer Counsel (comment 44, NPRM), at 2; ACA International (comment 45, NPRM), at 7–8; Money Services Round Table (comment 53, NPRM), at 10; Gusto and others (Comment 11, Workshop), at 2; *see also* Remarks of James Crifasi, Safeguards Workshop TR, *supra* note 17, at 74 (stating ''when we're talking about a small and medium business [. . .] we really need to see that 'qualified individual' be a mix of folks'').

[101] Consumer Data Industry Association (comment 36, NPRM), at 5.

[102] ACA International (comment 45, NPRM), at 7–8. NPA raised similar concerns. National Pawnbrokers Association (comment 3, Workshop), at 2.

[103] Consumer Data Industry Association (comment 36, NPRM), at 5; National Automobile Dealers Association (comment 46, NPRM), at 19; ACA International (comment 45, NPRM), at 8.

[104] National *Automobile Dealers Association* (comment 46, NPRM), at 19.

[105] National Consumer Law Center and others (comment 58, NPRM), at 3 (arguing that a clear line of reporting with a single responsible individual could have prevented the Equifax consumer data breach).

[106] Remarks of Adrienne Allen, Safeguards Workshop Tr., *supra* note 17, at 182–84 (stating that without a single responsible individual, information security staff ''can fall into traps of each relying on someone else to make a hard call . . . [In a program without a single coordinator] issues can sometimes fall through the cracks.''); Remarks of Michele Norin, Safeguards Workshop Tr., *supra* note 17, at 184–85 (''I think it's extremely important to have a person in front of the information security program. I think that there are so many components to understand, to manage, to keep an eye on. I think it's difficult to do that if it's part of someone else's job. And so I found that it's extremely helpful to have a person in charge of that program just from a pure basic management perspective and understanding perspective.'').

[107] *See, e.g.,* Federal Trade Commission Staff Comment on the Preliminary Draft for the NIST Privacy Framework: A Tool for Improving Privacy through Enterprise Risk Management (Oct. 24, 2019), at 12–14 (suggesting NIST clarify that one person should be in charge of the program). *https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-preliminary-draft-nist-privacy-framework/p205400nistprivacyframeworkcomment.pdf.*

[108] U.S. House, Committee on Oversight and Government Reform, Majority Staff Report, The Equifax Data Breach, at 55–62, 115th Congress (Dec. 2018).

[109] *Id.*

prevent the approach of having multiple people responsible for different aspects of the program, as some commenters asserted. While the Qualified Individual appointed as the coordinator of the information security program would have ultimate responsibility for overseeing and managing the information security program, financial institutions may still assign particular duties and responsibilities to other staff members.[110] A financial institution may organize its personnel in teams or share decision making between individuals. Moreover, the Rule does not require this be the Qualified Individual's sole job—he or she may have other duties. The Rule requires only that one individual assume the ultimate responsibility for overseeing and enforcing the program.

Accordingly, the Final Rule requires designation of a single Qualified Individual, as proposed, but no longer uses the term ''CISO.''

Third-Party Coordinators

The Proposed Rule stated that the Qualified Individual would not need to be an employee of the financial institution, but could be an employee of an affiliate or a service provider. This change was intended to accommodate financial institutions that may prefer to retain an outside expert, lack the resources to employ a qualified person to oversee a program, or decide to pool resources with affiliates to share staff to manage information security. The Proposed Rule required, however, that to the extent a financial institution used a service provider or affiliate, the financial institution must still: (1) Retain responsibility for compliance with the Rule; (2) designate a senior member of its personnel to be responsible for direction and oversight of the Qualified Individual; and (3) require the service provider or affiliate to maintain an information security program that protects the financial institution in accordance with the Rule.

The Commission received one comment on this aspect of the provision. NADA argued that, because a senior member of a financial institution's personnel must be responsible for the oversight of a third-party Qualified Individual, the supervising individual would need to be an expert in information security, and the financial institution would still be required to hire an expensive employee to supervise the third-party Qualified Individual.[111] The Rule, however, does not require individuals responsible for overseeing third-party Qualified Individuals to be information security experts themselves. The senior personnel that oversees the third-party Qualified Individual is charged with supervising and monitoring the third-party so the financial institution is aware of its data security needs and the safeguards being used to protect its information systems. This person does not need to be qualified to coordinate the information security program him or herself. Technical staff are frequently supervised by employees or officers with limited technical expertise.[112] The Rule requires only the same responsibilities a supervisor would have in overseeing an in-house information security coordinator of a financial institution. Accordingly, the Commission adopts the proposed paragraph without modification.

Proposed Paragraph (b)

The NPRM proposed amending paragraph (b) to clarify a financial institution must base its information security program on the findings of its risk assessment by adding an explicit statement that financial institutions' ''information security program [shall be based] on a risk assessment.'' [113] In addition, the Proposed Rule removed existing § 314.4(b)'s requirement that the risk assessment must include consideration of specific risks [114] because these specific risks are set forth elsewhere in the Proposed Rule.[115] The Commission received no comments on this paragraph and adopts paragraph (b) as proposed.

Written Risk Assessment

Paragraph (b)(1) of the Proposed Rule required the risk assessment be written and include: (1) Criteria for the evaluation and categorization of identified security risks or threats the financial institution faces; (2) criteria for the assessment of the confidentiality, integrity, and availability of the financial institution's information systems and customer information, including the adequacy of the existing controls in the context of the identified risks or threats to the financial institution; and (3) requirements describing how identified risks will be mitigated or accepted based on the risk assessment and how the information security program will address the financial institution's risks. Commenters raised several concerns about the Proposed Rule's provisions on risk assessment, none of which merit changes to the Proposed Rule.

First, some commenters objected to the level of specificity of the Proposed Rule, with some arguing the requirements were too specific, and others arguing the requirements were not specific enough. With respect to the Proposed Rule being too specific, commenters such as ACA and U.S. Chamber of Commerce argued it removed financial institutions' flexibility in performing risk assessments.[116] The U.S. Chamber of Commerce contended, because the criteria are too specific, a risk assessment performed using them would not be ''sufficiently risk based.'' [117] CDIA expressed concern it was unclear ''what level of specificity is required'' in the written risk assessment and if detailed risk assessments are required, they ''could themselves become a roadmap for a security breach.'' [118]

In contrast, several other commenters recommended the Rule set forth more specific criteria for risk assessments. Inpher suggested the Commission add a requirement that risk assessments require financial institutions to examine ''technologies that are deployed by [financial institutions'] information security systems, and evaluate the feasibility'' of adopting ''privacy enhancing technologies'' that would better address vulnerabilities and thwart threats.[119] Inpher also recommended the Rule require financial institutions to conduct privacy impact assessments with ''specific guidelines to review internal data protection standards and adherence to fair information

[110] *See* Remarks of Adrienne Allen, Safeguards Workshop Tr., *supra* note 17, at 189–90 (noting that, even where there is a single point person, decision makers rarely operate ''in a vacuum.'').

[111] National *Automobile Dealers Association* (comment 46, NPRM), at 18.

[112] *See* Remarks of James Crifasi, Safeguards Workshop Tr., *supra* note 17, at 79–80 (stating that, in his work as a third-party information security service provider, he is often overseen by executives without technical backgrounds); *see also* Remarks of Rocio Baeza, Safeguards Workshop Tr., *supra* note 17, at 105–06 (noting distinction in how executives and technical staff may understand their organizations' use of encryption); Remarks of Karthik Rangarajan, Safeguards Workshop Tr., *supra* note 17, at 196 (discussing challenges inherent in discussing technical issues with board members who lack a technical background)and at 211 (noting organizations can successfully manage their relationships with third-party service providers without ''becom[ing] experts'' in the services provided).

[113] Proposed 16 CFR 314.4(b).

[114] Proposed 16 CFR 314.4(b)(1), (2), and (3).

[115] *See, e.g.,* Proposed 16 CFR 314.4(c)(2) and (10) and (e).

[116] ACA International (comment 45, NPRM), at 12; U.S. Chamber of Commerce (comment 33, NPRM), at 10.

[117] U.S. Chamber of Commerce (comment 33, NPRM), at 10.

[118] Consumer Data Industry Association (comment 36, NPRM), at 5.

[119] Inpher, Inc. (comment 50, NPRM), at 4.

principles.'' [120] The Princeton Center suggested the Rule require risk assessments to include threat modeling and adopt the concept of defense in depth.[121] HALOCK Security Labs recommended the Rule specifically require ''a) That risk assessments should evaluate the likelihood of magnitudes of harm that result from threats and errors, b) That risk assessments should explicitly estimate foreseeable harm to consumers as well as to the covered financial institutions, c) That risk mitigating controls are commensurate with the risks they address, [and] d) That risk assessments estimate likelihoods and impacts using available data.'' [122]

The Commission believes the Proposed Rule's provisions on risk assessment strike the right balance between specificity and flexibility. The amendments provide only a high-level list of criteria the risk assessment must address. They essentially require that the financial institution identify and evaluate risks to its systems, evaluate the adequacy of its existing controls for addressing these risks, and identify how these risks can be mitigated. These are core requirements of any risk-assessment.[123] The Rule does not require any specific methodology or approach for performing the assessment. Financial institutions are free to perform the risk assessment using the method most suitable for their organization as long as that method meets the general requirements set forth in the Rule. [124] And while the Commission agrees the additional requirements suggested by some commenters may be beneficial in many, or even most, risk assessments, it believes a more flexible requirement will better allow financial institutions to find the risk assessment method that best fits their organization and will better accommodate changes in recommended approaches in the future.

In response to CDIA's concern about the risk assessment providing a roadmap for bad actors, certainly, the written risk assessment will include details about a financial institution's systems that could assist an attacker if obtained by the attacker. Accordingly, the risk assessment should be protected as any other sensitive information would be. The Commission does not view this concern as a reason not to create such a document. Indeed, the concern would apply to any written document that provides information regarding a financial institution's information security procedures, from a network diagram to written security code.

Second, some commenters argued implementing the risk-assessment provision as proposed would be too expensive and difficult for financial institutions.[125] For example, NADA argued the contemplated risk assessment would be very costly because the criteria set out in paragraph (b)(1) are ''well outside the scope of expertise of anyone but the most sophisticated IT professionals.'' [126] In response, although the Commission declines to modify the provision, it addresses NADA's concern in § 314.6 by exempting financial institutions that maintain information concerning fewer than 5,000 consumers from the specific requirements of paragraph (b)(1), and from the requirement to memorialize the risk assessment in writing. For those financial institutions that do not qualify for this exemption, the Commission believes they will be able to perform the required risk assessment in a manner that is practical and affordable for their institution. There are many resources available to financial institutions to aid in risk assessment, including service providers that can assist institutions of various sizes.[127]

While acknowledging there will be some cost to conducting a risk assessment, the Commission believes a properly conducted risk assessment is an essential part of a financial institution's information security program. The entire Safeguards Rule, both as it currently exists and as amended, requires that the information security program be based on a risk assessment. An information security program cannot properly guard against risks to customer information if those risks have not been identified and assessed.[128] The Commission believes this requirement properly emphasizes the importance of robust risk assessments, while providing financial institutions sufficient flexibility in performing these assessments. Finally, the Commission notes, because the current Rule also requires that a risk assessment be performed, financial institutions that have complied with the current Rule have already conducted a risk assessment. And, even if that risk assessment was not memorialized in writing, the work conducted for that risk assessment should be useful in performing future risk assessments.

Third, NADA objected to the requirement that the risk assessment describe how each identified risk will be ''mitigated or accepted,'' arguing it is not clear when it is appropriate to ''accept a risk.'' [129] NADA argued that documenting a decision to accept a risk would ''create a record that can be distorted and second guessed after the fact,'' and ''context is lost when it is written and reviewed after an incident has occurred.'' [130] The Rule does not require a financial institution to mitigate every risk identified, no matter how remote or insignificant. Instead, the Rule allows a financial institution to accept a risk, if its assessment of the risk reveals that the chance it will produce a security event is very small, if the consequences of the risk are minimal, or the cost of mitigating the risk far outweighs the benefit. In those cases, the financial institution may choose to accept the risk. A financial institution concerned that its decision to accept a risk will later be questioned may choose to set forth whatever context or

[120] *Id.*

[121] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 2.

[122] HALOCK Security Labs (comment 4, Workshop) at 2. *See* Rocio Baeza (comment 12, Workshop) at 2–3 (suggesting a detailed list of requirements for the risk assessment).

[123] *See, e.g.,* Remarks of Chris Cronin, Safeguards Workshop Tr., *supra* note 17, at 25 (stating that evaluating the likelihoods and impacts of potential security risks and evaluating existing controls is an important component of a risk assessment); Remarks of Serge Jorgensen, Safeguards Workshop Tr., *supra* note 17, at 29–30 (emphasizing the importance of risk assessments as tools for adjusting existing security measures to account for both current and future security threats); Nat. Inst. of Sci. & Tech., U.S. Dept. of Com., Special Publication 800–30 Rev. 1, Guide for Conducting Risk Assessments 1 (2012) (describing the purpose of risk assessments as the identification of and prioritization of risk in order to inform decision making and risk response).

[124] ACA International further argued because risk assessment criteria are generally understood, they do not need to be included in the Final Rule. ACA International (comment 45, NPRM). The Commission believes it is helpful to be clear about the criteria the risk assessment must contain, even if those criteria are commonly understood.

[125] National Association of Dealer Counsel (comment 44, NPRM), at 3; National Automobile Dealers Association (comment 46, NPRM), at 20.

[126] National Automobile Dealers Association (comment 46, NPRM), at 20.

[127] *See, e.g.,* Slides Accompanying Remarks of Rocio Baeza, in Safeguards Workshop Slides, *supra* note 72, at 27–28 (describing three different compliance models: In-house, outsource, and hybrid, with costs ranging from $199 per month to more than $15,000 per month); Slides Accompanying the Remarks of Brian McManamon, ''Sample Pricing,'' in Safeguards Workshop Slides, *supra* note 72, at 29 (estimating the cost of cybersecurity services based on number of endpoints: $2K–$5K per month for 25–250 endpoints; $5K–$15K for 250–750 endpoints; $15K–$30K for 750–1,000 endpoints; and $30K–$50K for 1,500–2,500 endpoints); *see also* Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 83–85.

[128] *See* Remarks of Chris Cronin, Safeguards Workshop Tr., *supra* note 17, at 48–49 (noting all information security frameworks and guidelines are based on risk analysis).

[129] National Automobile Dealers Association (comment 46, NPRM) at 20.

[130] *Id.*

explanation it sees fit in the written assessment.

Finally, while several commenters supported the idea of conducting ''periodic'' risk assessments as required by the Proposed Rule,[131] NADA objected it is unclear how often financial institutions need to conduct risk assessments under this section. [132] In order to be effective, a risk assessment must be subject to periodic reevaluation to adapt to changes in both financial institutions' information systems and changes in threats to the security of those systems. The Commission declines, however, to set forth a specific schedule for risk assessments. The Commission believes it would not be appropriate to set forth an inflexible schedule for periodic risk assessments because each financial institution must set its own schedule based on the needs and resources of its institution.

The Final Rule adopts § 314.4(b) as proposed.

Paragraph (c)

Proposed paragraph (c) retained the existing Rule's requirement for financial institutions to design and implement safeguards to control the risks identified in the risk assessment. In addition, it added more detailed requirements for what the safeguards must address (*e.g.,* access controls, data inventory, disposal, change management, monitoring). These specific requirements represent elements of an information security program that the Commission views as essential and should be addressed by all financial institutions.[133]

As a preliminary matter, Global Privacy Alliance (GPA) argued all of these elements should be made optional and financial institutions should be required only to take these elements ''into consideration'' when designing their information security programs.[134] While the Commission agrees it is important that the Rule allow financial institutions flexibility in designing their information security programs, these elements are such important parts of information security that each program must address them. For example, an information security program that has no access controls or does not contain any measures to monitor the activities of users on the systems cannot be said to be protecting the financial institution's systems. The Final Rule, therefore, continues to require each information security program to contain safeguards that address these elements, with modifications described below.

Access Controls

Proposed paragraph (c)(1) required financial institutions to ''place access controls on information systems, including controls to authenticate and permit access only to authorized individuals to protect against the unauthorized acquisition of customer information and to periodically review such access controls.''

Commenters suggested a number of modifications to this provision. First, GPA argued this provision should require controls on access to information, rather than on information systems.[135] Second, several commenters suggested adding further safeguards to the ''access control'' requirement. For example, the Princeton Center argued the Rule should adopt the ''Principle of Least Privilege,'' a principle that no user should have access greater than is necessary for legitimate business purposes.[136] Reynolds and Reynolds Company (Reynolds) suggested the Rule clarify that financial institutions must ''vet, control, and monitor user access to sensitive information.'' [137] Consumer Reports argued paragraph (c)(1) should be amended to control access not just to authorized users, but to further limit access to when such access is reasonably necessary.[138] ACE argued that any requirement for physical access control allow financial institutions to determine which locations should have restricted access, rather than limiting physical access to every building and office within, say, a college campus.[139] Finally, some commenters argued the proposed language was too vague,[140] particularly as it applied to vendor-supplied services.[141]

In response to the comments, the Commission makes a number of changes to this provision in the Final Rule. First, the Commission clarifies that the Rule requires access controls, not just for information systems, but for all customer information, whether it is housed in information systems or in physical locations. To streamline the Rule, the Final Rule combines the separate physical access controls requirement found in proposed paragraph (c)(3) with this paragraph. Physical access controls will generally be most important in situations in which sensitive customer information is kept in physical form (such as hard-copy loan applications, or printed consumer reports). It may also require physical restrictions to access machines that contain customer information (*e.g.,* locked doors and/or key card access to a computer lab).[142] The Commission declines to make any changes in response to ACE's concern that every physical location will need to be protected—as the Rule states, physical controls must be implemented to protect unauthorized access to customer information. Where no customer information exists, the Rule would not require physical controls.

Second, the Commission agrees with the commenters who advocated that the Rule implement the principle of least privilege. The Commission does not believe it is appropriate, for example, for larger companies to give all

[131] Inpher*, Inc.* (comment 50, NPRM), at 3; Global Privacy Alliance (comment 38, NPRM), at 11.

[132] National Automobile Dealers Association (comment 46, NPRM), at 20.

[133] NADA disagreed with the Commission's statement in the NPRM for the Proposed Rule that ''most financial institutions already implement'' the specific requirements in paragraph (c), stating that many financial institutions ''do not currently implement some or all of these measures.'' National Automobile Dealers Association (comment 46, NPRM), at 20. The Commission continues to believe most financial institutions institute some form of most of these measures, such as access control, secure disposal, and monitoring authorized users, based on its enforcement and business outreach experience. While NADA's statement that some financial institutions implement none of the measures may be true, this underlines the necessity of making these elements explicit requirements under the Rule, as these elements are necessary for a reasonable information security program for all financial institutions. Indeed, a financial institution that utilizes none of these elements and exercises no access control, no secure disposal procedures, and does not monitor users of its systems is unlikely to be in compliance with the current Rule.

[134] Global Privacy Alliance (comment 38, NPRM), at 6.

[135] Global Privacy Alliance (comment 38, NPRM), at 9–10.

[136] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 4–5.

[137] Reynolds and Reynolds Company (comment 7, Workshop), at 7.

[138] Consumer Reports (comment 52, NPRM), at 7.

[139] American Council on Education (comment 24, NPRM), at 10.

[140] National Automobile Dealers Association (comment 46, NPRM), at 23; National Independent Automobile Dealers Association (comment 48, NPRM), at 5; American Council on Education (comment 24, NPRM), at 10;

[141] National Independent Automobile Dealers Association (comment 48, NPRM), at 5; American Council on Education (comment 24, NPRM), at 10.

[142] NIADA suggested instituting physical access controls would cost a dealership $215,000 because each computer would need to have its own lockable cubicle and there would need to be lockable offices for all desks. *See* Remarks of Lee Waters, Safeguards Workshop Tr., *supra* note 17, at 76. As originally promulgated, the Rule already requires financial institutions implement ''physical safeguards that are appropriate to your size and complexity.'' 16 CFR 314.3. The Final Rule's requirement is consistent with that longstanding requirement. If computers have technical safeguards preventing unauthorized users from accessing customer information, they usually will not need to be in a lockable area, particularly if they are not generally left unattended and are not likely to be stolen. Similarly, desks would need to be in lockable offices only if they contain accessible paper records. A lockable file cabinet may be a more economical solution.

employees and service providers access to all customer information. Such overbroad access could create additional harm in the event of an intruder gaining access to a system by impersonating an employee or service provider. Accordingly, the Commission clarifies this in the Final Rule by adding a requirement that not only must a financial institution implement access controls, but it should also restrict access only to customer information needed to perform a specific function.

As to the suggestion the Commission impose monitoring requirements for access, that requirement exists in paragraph (c)(8). And as to the suggestion the requirement is too vague as to service providers, the Commission believes the Final Rule is clear: When a vendor accesses the financial institution's data or information systems, the financial institution must ensure appropriate access controls are in place. Separately, under paragraph (f), the financial institution must reasonably oversee the vendor's safeguards, which would necessarily include access controls for the vendor's system.

Finally, as to the suggestion the provision is vague generally, as discussed above, the Final Rule seeks to preserve flexibility in its provisions, both so that financial institutions can design programs appropriate for their systems and so that changes in technology or security practices will not render the Rule obsolete. The Commission believes maintaining less prescriptive requirements is the best way to achieve the goal of flexibility and protecting customer information.[143]

Accordingly, the Commission combines paragraphs (c)(1) and (3) from the Proposed Rule into revised paragraph (c)(1) of the Final Rule, which requires implementing and periodically reviewing access controls on customer information, including technical and, as appropriate, physical controls to (1) authenticate and permit access only to authorized users to protect against the unauthorized acquisition of customer information and (2) limit authorized users' access only to customer information that they need to perform their duties and functions, or, in the case of customers, to access their own information.[144]

System Inventory

In the NPRM, the Commission proposed to require the financial institution to ''[i]dentify and manage the data, personnel, devices, systems, and facilities that enable [the financial institution] to achieve business purposes in accordance with their relative importance to business objectives and [the financial institution's] risk strategy.'' [145] This requirement was designed to ensure the financial institution inventoried the data in its possession, inventoried the systems on which that data is collected, stored, or transmitted, and had a full understanding of the relevant portions of its information systems and their relative importance.[146] The Commission retains this provision in the Final Rule without modification.

Commenters raised two general objections to this provision. First, some commenters argued it was too vague and that it was not clear how such an inventory should be conducted or what systems should be included.[147] The Commission believes the language provides effective guidance while still allowing a variety of approaches by financial institutions in identifying systems involved in their businesses. This provision requires a financial institution to identify all ''data, personnel, devices, systems, and facilities'' that are a part of its business and to determine their importance to the financial institution. This inventory of systems must include all systems that are a part of the business so the financial institution can locate all customer information it controls, the systems connected to that information, and how they are connected. This inventory forms the basis of an information security program because a system cannot be protected if the financial institution does not understand its structure or know what data is stored in its systems.

Second, ACE suggested the scope of this provision should be limited to systems ''directly related to the privacy and security of 'customer information.' '' [148] The Commission declines to make this change because the purpose of this provision is to allow financial institutions to obtain a clear picture of their systems and to identify where customer information is kept and how it can be accessed. An inventory must examine all systems in order to identify all systems that contain customer information or are connected to systems that do. If a financial institution does not first examine all systems and instead limits the inventory to systems it considers to be directly related to security, it could give an incomplete picture of the financial institution's systems and could result in some customer information or ways to connect to that information being overlooked.[149]

The Commission adopts paragraph (c)(2) of the Proposed Rule as final, without modifications.

Access to Physical Location

Proposed paragraph (c)(3) would have required that financial institutions restrict access to physical locations containing customer information only to authorized individuals. The Final Rule combines this section with proposed paragraph (c)(1) in order to eliminate redundancy and clarify that access controls must consider both electronic and physical access.

Encryption

Proposed paragraph (c)(4) required financial institutions to encrypt all customer information, both in transit over external networks and at rest. The Proposed Rule allowed financial institutions to use alternative means to protect customer information, subject to review and approval by the financial institution's Qualified Individual.

Several commenters supported the inclusion of an encryption requirement.[150] In fact, some suggested

[143] NPA expressed concern about the effect of the Rule on pawnbrokers who the commenter stated are required by law to allow law enforcement access to their physical records. National Pawnbrokers Association (comment 32, NPRM), at 7. Nothing in the Rule conflicts with any such requirements. Law enforcement appropriately accessing customer information under a law that requires that access would be considered authorized use under those circumstances.

[144] As noted above, the Commission is also changing the term ''authorized individuals'' to ''authorized users.''

[145] Proposed 16 CFR 314.4(c)(2).

[146] *See, e.g.,* Complaint at 11, *FTC* v. *Wyndham Worldwide Corp.,* No. CV 2:12–cv–01365–SPL (D. Ariz. June 26, 2012) (alleging company failed to provide reasonable security by, among other things, failing to inventory computers connected to its network).

[147] National Automobile Dealers Association (comment 46, NPRM), at 23–24; American Financial Services Association (comment 41, NPRM), at 5; American Council on Education (comment 24, NPRM), at 10.

[148] American Council on Education (comment 24, NPRM), at 10.

[149] Another commenter criticized proposed paragraph (c)(2) because some financial institutions ''have no control'' over which networks they transmit customer information. National Pawnbrokers Association (comment 32, NPRM), at 7. Paragraph (c)(2) does not require a financial system to identify all networks over which it may transmit customer information. *See also, infra,* this document's discussion of NPA's comments on § 314.4(f) of the Final Rule, noting financial institutions are generally not required to oversee other entities' service providers over which they have no control.

[150] Inpher, Inc. (comment 50, NPRM), at 4; Princeton University Center for Information Technology Policy (comment 54, NPRM), at 3; Electronic Privacy Information Center (comment 55, NPRM), at 8; National Consumer Law Center and others (comment 58, NPRM), at 3.

the Proposed Rule did not go far enough in requiring encryption. Inpher suggested the Rule should require encryption of customer information when in use, in addition to when in transit or at rest.[151] The Princeton Center suggested requiring encryption of data while in transit over internal networks, in addition to requiring it for external networks, noting the blurring of the distinction between internal and external networks.[152]

In contrast, others argued encryption could be too expensive and technically challenging for some financial institutions and should not be required in all cases.[153] Indeed, GPA argued the Rule should not require encryption at all, financial institutions should be free to adopt other protective measures for customer information, and the Rule should allow financial institutions to ''determine the controls that are most appropriate for protecting the sensitive information that they handle.'' [154] Similarly, some commenters argued financial institutions should be required to encrypt customer information only when the risk to the customer information justifies it.[155] Others suggested encryption in more limited circumstances, such as on systems ''to which unauthorized individuals may have access,'' [156] for sensitive data,[157] or for data in transit.[158] The Mortgage Bankers Association argued encryption at rest is unnecessary because customer information at rest in a financial institution's system is sufficiently protected by controlling access to the system.[159] Two commenters stated guidelines issued by the Federal Financial Institutions Examination Council (FFIEC) do not require most banks to encrypt data at rest, unless the institution's risk assessment indicates such encryption is necessary.[160]

The Commission declines to modify the encryption requirement from the Proposed Rule. As to the comments that suggest the requirement should be relaxed, the Commission notes there are numerous free or low cost encryption solutions available to financial institutions, particularly for data in transit,[161] that make encryption a feasible solution in most situations. For data at rest, encryption is now cheaper, more flexible, and easier than ever before.[162] In many cases, widely used software and hardware have built-in encryption capabilities.[163]

In response to the argument that the Rule should not require encryption at rest because FFIEC guidelines do not require it, the Commission notes the Safeguards Rule is very different from the guidelines issued by the FFIEC. The depository financial institutions regulated by the banking agencies are subject to regular examinations by their regulator. The guidelines created by the FFIEC are designed to be used by the examiner, as part of those examinations, to evaluate the security of the financial institution; the examiner thus has a direct role in regularly verifying the financial institution has taken appropriate steps to protect its customer information. In contrast, the Safeguards Rule regulates covered financial institutions directly and must be usable by those entities to determine appropriate information security without any interaction between the financial institution and the Commission. The Commission does not have the ability to examine each financial institution and work with that institution to ensure their information security is appropriate. Therefore, a requirement that institutions encrypt information by default is appropriate for the Safeguards Rule, as the Commission believes encryption of customer information at rest is appropriate in most cases.

Finally, while some commenters suggested eliminating the encryption requirement for certain types of data (*e.g.,* non-sensitive) or certain categories of data (*e.g.,* data at rest), the Commission notes, as discussed in more detail above, the fact that an individual is a customer of a financial institution alone may be sensitive. In any event, the Rule provides financial institutions with flexibility to adopt alternatives to encryption with the approval of the Qualified Individual.

Similarly, the Commission declines to *extend* the encryption requirement to data in use or to data transmitted over internal networks, as some commenters suggested. The Commission does not believe the technology that would encrypt data while in use (as opposed to in transit or at rest) has been adopted widely enough at this time to justify mandating its use by all financial institutions under the FTC's jurisdiction. As to encryption of data transmitted over internal networks, the Commission acknowledges, due to changes in network design and the growth of cloud and mobile computing, the distinction between internal and external networks is less clear than it once was. However, the Commission believes requiring all financial institutions to encrypt all communications over internal networks would be unduly burdensome at this

[151] Inpher, Inc. (comment 50, NPRM), at 4.

[152] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 3.

[153] National Pawnbrokers Association (comment 32, NPRM), at 3; U.S. Chamber of Commerce (comment 33, NPRM), at 11; CTIA (comment 34, NPRM) at 10; Wisconsin Bankers Association (comment 37, NPRM), at 2.

[154] Global Privacy Alliance (comment 38, NPRM), at 7–8.

[155] Bank Policy Institute (comment 39, NPRM), at 14; Mortgage Bankers Association (comment 26, NPRM), at 6; Global Privacy Alliance (comment 38, NPRM), at 7–8.

[156] Bank Policy Institute (comment 39, NPRM), at 14.

[157] U.S. Chamber of Commerce (comment 33, NPRM), at 11; American Financial Services Association (comment 41, NPRM), at 5; ACA International (comment 45, NPRM), at 13; CTIA (comment 34, NPRM), at 10.

[158] Mortgage Bankers Association (comment 26, NPRM), at 6; Wisconsin Bankers Association (comment 37, NPRM), at 2; American Financial Services Association (comment 41, NPRM), at 5; Ken Shaurette (comment 19, NPRM), (suggesting the Commission consider whether ''databases, applications and operating systems are prepared to fully support full encryption without significant performance impact or ability to continue to function.''); National Automobile Dealers Association (comment 46, NPRM), at 25–26 (arguing the terms ''at rest'' and ''in transit'' are unclear).

[159] Mortgage Bankers Association (comment 26, NPRM), at 6.

[160] Wisconsin Bankers Association (comment 37, NPRM), at 2 (discussing FFIEC Information Technology Booklet); American Financial Services Association (comment 41, NPRM), at 5 (discussing FFIEC Cybersecurity Assessment Tool).

[161] *See* Remarks of Matthew Green, Safeguards Workshop Tr, *supra* note 17, at 225 (noting website usage of encryption is above 80 percent; ''Let's Encrypt'' provides free TLS certificates; and costs have gone down to the point that if a financial institution is not using TLS encryption for data in motion, it is making an unusual decision outside the norm); Remarks of Rocio Baeza, Safeguards Workshop Tr., *supra* note 17, at 106 (''[T]he encryption of data in transit has been standard. There's no pushback with that.''); *see also* National Pawnbrokers Association (comment 3, Workshop), at 2 (''[I]n states that allow us to use technology for the receipt of information from consumer customers and software to print our pawn tickets and store information, we believe our members have access through their software providers to protections that comply with the Safeguards Rule.'').

[162] *See* Remarks of Wendy Nather, Safeguards Workshop Tr., *supra* note 17, at 267 (''we have a lot more options, a lot more technologies today than we did before that are making both of these solutions, both encryption and MFA, easier to use, more flexible, in some cases cheaper, and we should be encouraging their adoption wherever possible.''); Remarks of Matthew Green, Safeguards Workshop Tr., *supra* note 17, at 265–66 (''I think that we're in a great time when we've reached the point where we can actually mandate that encryption be used. I mean, years ago—I've been in this field for 15, you know, 20 years now, I guess. And, you know, encryption used to be this exotic thing that was very, very difficult to use, very expensive and not really feasible for securing information security systems. And we've reached the point where now it is something that's come to be and we can actually build well. So I'm really happy about that.'').

[163] *See* Remarks of Randy Marchany, Safeguards Workshop Tr., *supra* note 17, at 229–30 (noting encryption is already built into the Microsoft Office environment and a number of Microsoft products, such as Spreadsheets, Excel, Docs, and PowerPoint, support that encryption feature). Other applications that have encryption built in include database applications; app platforms iOS and Android; and development frameworks for web applications on banking sites.

time. There remain significant costs and technical hurdles to encrypting transmissions on internal networks that would not be reasonable to impose on all financial institutions, especially smaller institutions with simpler systems that might realize less benefit from this approach. While the Commission encourages financial institutions to consider whether it would be appropriate for them to encrypt the transmission of customer information over internal networks, it declines to require this for all financial institutions.[164]

Commenters pointed to three additional concerns about encryption, none of which the Commission finds persuasive. First, the Bank Policy Institute commented the encryption requirement would in fact weaken security by blocking surveillance of the information by the financial institution and requiring the ''broad distribution'' of encryption keys.[165] The Commission does not believe an encryption requirement would weaken security. Encryption is almost universally recommended by security experts and included in most security standards.[166] Further, new tools have been developed to address the issue the Bank Policy Institute has raised. Many financial institutions have monitoring tools on the edge of their networks to monitor data leaving the network. It used to be the case these network monitoring tools could not see the content of encrypted data as it left the corporate network and was transmitted to the internet. However, there are now tools available that can see the data as it departs the network, even if the data is encrypted.[167] Any marginal security costs of encryption are far outweighed by the benefits of rendering customer information unreadable.

Second, some commenters argued financial institutions should be able to implement alternatives to encryption without obtaining approval from the Qualified Individual.[168] The New York Insurance Association expressed concern financial institutions might feel they need to encrypt all customer information because of the risk that the alternative controls approved by the Qualified Individual would be ''second guessed'' in the event unencrypted data is compromised.[169] The Commission, however, believes this concern is a core element of information security based on risk assessment. Every aspect of an information security program is based on the judgment of the financial institution and its staff. The Qualified Individual's decision concerning alternate controls, like other decisions by the financial institution and its staff, will be subject to review in any enforcement action to determine whether the decision was appropriate. If the Qualified Individual is not required to make a formal decision, it is much more likely a decision not to encrypt information will be made even if there is no compensating control, or even made without the Qualified Individual's knowledge.

Third, the National Pawnbrokers Association (''NPA'') expressed concern that if pawnbrokers are required to encrypt customer information they may fall out of compliance with state and local regulations concerning transaction reporting.[170] NPA stated pawnbrokers are often required by state or local law to report every pawn transaction, along with nonpublic personally identifiable consumer information, to law enforcement, and the agencies that receive this information ''prefer to take this information electronically and in unencrypted forms.'' [171] The Commission believes if transmitting the information in unencrypted form is a preference of the agencies and not a requirement, then pawnbrokers can comply with both the Safeguards Rule and these laws by encrypting any transmissions that include customer information. If there are cases where a required transmission of customer information cannot be encrypted for technical reasons, then the pawnbroker's Qualified Individual will need to work with the law enforcement agency to implement alternative compensating controls to ensure the customer information remains secure during these transmissions.[172]

The Final Rule adopts this paragraph as paragraph (c)(3) without revision.

Secure Development Practices

Proposed paragraph (c)(5) required financial institutions to ''[a]dopt secure development practices for in-house developed applications utilized'' for ''transmitting, accessing, or storing customer information.'' In this paragraph, the Commission proposed requiring financial institutions to address the security of software they develop to handle customer information, as distinct from the security of their networks that contain customer information.[173] In addition, the Proposed Rule required ''procedures for evaluating, assessing, or testing the security of externally developed applications [financial institutions] utilize to transmit, access, or store customer information.'' This provision required financial institutions to take steps to verify that applications they use to handle customer information are secure.[174]

Some commenters argued evaluating the security of externally developed software would be too expensive or impractical for some financial institutions,[175] while others raised different concerns. The American Council on Education suggested, in cases in which a financial institution cannot obtain access to a software provider's code or technical

[164] The Commission believes transmissions of customer information to remote users or to cloud service providers should be treated as external transmissions, as those transmissions are sent out of the financial institution's systems.

[165] Bank Policy Institute (comment 39, NPRM), at 13–14.

[166] *See, e.g., Payment Card Industry (PCI) Data Security Standard Requirements and Security Assessment Procedures Version 3.2.1,* PCI Security Standards Council (May 2018), *https://www.pcisecuritystandards.org/document_library* (last accessed 30 Nov. 2020) (Requirement 4 encrypt transmission of cardholder data across open, public networks).

[167] *See, e.g., Encrypted Traffic Management,* Broadcom Inc., *https://www.broadcom.com/products/cyber-security/network/encrypted-traffic-management* (last accessed 30 Nov. 2020); *SSL Visibility,* F5, Inc., *https://www.f5.com/solutions/application-security/ssl-visibility* (last accessed 30 Nov. 2020).

[168] Bank Policy Institute (comment 39, NPRM), at 14; New York Insurance Association (comment 31, NPRM), at 1.

[169] New York Insurance Association (comment 31, NPRM) at 1.

[170] National Pawnbrokers Association (comment 3, Workshop), at 2–3.

[171] *Id.* at 2.

[172] NADA suggested it is not clear how the encryption requirement will apply to customer information held on a service provider's system or on the systems of the subcontractors of the service provider. National Automobile Dealers Association (comment 46, NPRM), at 21–22. The Commission believes the Final Rule lays out a financial institution's obligations in this situation: It requires customer information be encrypted unless infeasible. Section 314.4(e), in turn, requires financial institutions to require service providers to implement and maintain appropriate safeguards by contract and to periodically assess the continued adequacy of those measures. A financial institution that uses a service provider to store and process customer information must require that service provider to encrypt that information and periodically determine whether it continues to do so. If it is infeasible for the service provider to meet these requirements then the financial institution's Qualified Individual must work with the service provider to develop compensating controls or cease doing business with the service provider.

[173] *See, e.g.,* Complaint, *FTC* v. *D-Link Systems, Inc.,* No. 3:17–CV–00039–JD (N.D. Cal. March 20, 2017) (alleging company failed to provide reasonable security when it failed to adequately test the software on its devices).

[174] *See, e.g.,* Complaint, *Lenovo,* FTC No. 152–3134 (January 2, 2018) (alleging company failed to provide reasonable security by failing to properly assess and address security risks caused by third-party software).

[175] American Council on Education (comment 24, NPRM), at 11; National Automobile Dealers Association (comment 46, NPRM), at 26–27.

infrastructure, then evaluating the security of its software is infeasible.[176] NADA further suggested in order to evaluate the security of software, financial institutions would need to hire an expensive IT professional.[177]

The Commission does not agree with these assertions. Evaluating the security of software does not require access to the source code of that software or access to the provider's infrastructure. For example, a provider can supply the steps it took to ensure the software was secure, whether it uses encryption to transmit information, and the results of any testing it conducted. In addition, there are third party services that assess software. An institution can also set up automated searches regarding vulnerabilities, patches, and updates to software listed on the financial institution's inventory. The exact nature of the evaluation required will depend on the size of the financial institution and the amount and sensitivity of customer information associated with the software. If the software will be used to handle large amounts of extremely sensitive information, then a more thorough evaluation will be warranted. Likewise, the nature of the software used will also affect the evaluation. Software that has been thoroughly tested by third parties may need little more than a review of the test results, while software that has not been widely used and tested will require closer examination.

The Commission adopts proposed paragraph (c)(5) as paragraph (c)(4) of the Final Rule.

Multi-Factor Authentication

Proposed paragraph (c)(6) required financial institutions to ''implement multi-factor authentication for any individual accessing customer information'' or ''internal networks that contain customer information.'' [178] The Proposed Rule would have allowed financial institutions to adopt a method other than multi-factor authentication that offers reasonably equivalent or more secure access controls with the written permission of its Qualified Individual. In the Final Rule, the Commission retains the general requirements of proposed paragraph (c)(6) as paragraph (c)(5), with some modifications described below.

Although several commenters expressed support for including a multi-factor authentication requirement in the Final Rule,[179] others opposed such a requirement. For example, ACE argued a blanket requirement mandating multi-factor authentication for all institutions of all sizes and complexities is not the best solution.[180] The National Independent Automobile Dealers Association (NIADA) commented the costs of multi-factor authentication would be too high for some financial institutions because it would need to be built into their information systems from scratch.[181] NIADA also argued adopting multi-factor authentication would disrupt a financial institution's activities as employees had to ''jump through multiple hoops to log in.'' [182] Cisco Systems, Inc. argued that while multi-factor authentication is an effective safeguard, it should not be specifically required by the Rule because, while it is currently good security practice, in the future multi-factor authentication may become outdated, and that allowing financial institutions to satisfy the Rule in this way could result in inadequate protection.[183]

Other commenters did not dispute the benefits of multi-factor authentication generally, but argued the Rule should limit the multi-factor authentication requirement. Some of these commenters stated the Rule should only require multi-factor authentication when the financial institution's risk assessment justifies it.[184] Others argued there should be a distinction between internal access and external access. For example, some commenters argued the Rule should not require multi-factor authentication when a user accesses customer information from an internal network,[185] because there are other controls on internal access that make multi-factor authentication unnecessary.[186] Another commenter stated requiring multi-factor authentication when a customer accesses their information from an external network could create problems for some institutions.[187] Finally, the Princeton Center argued the Rule should be amended to clarify that multi-factor authentication should be required for internal and external networks.[188]

Finally, CTIA took issue with the proposed requirement that the Qualified Individual be permitted to approve ''reasonably equivalent or more secure'' controls if multi-factor authentication is not feasible, suggesting instead that Qualified Individuals be permitted to approve ''effective alternative compensating controls.'' [189]

The Commission disagrees with the commenters who stated the Rule should not include a multi-factor authentication requirement. As to costs, many affordable multi-factor authentication solutions are available in the marketplace.[190] Most financial institutions will be able to find a solution that is both affordable and workable for their organization. In the cases when that it is not possible, the

[176] American Council on Education (comment 24, NPRM), at 11.

[177] National Automobile Dealers Association (comment 46, NPRM), at 26–27.

[178] Proposed 16 CFR 314.4(c)(6).

[179] Justine Bykowski (comment 12, NPRM); Princeton University Center for Information Technology Policy (comment 54, NPRM), at 6–7; Electronic Privacy Information Center (comment 55, NPRM), at 8; National Consumer Law Center and others (comment 58, NPRM), at 2; *see also* Remarks of Wendy Nather, Safeguards Workshop Tr., *supra* note 17, at 240–41 (discussing the security poverty line).

[180] American Council on Education (comment 24, NPRM), at 11–12.

[181] National Independent Automobile Dealers Association (comment 48, NPRM), at 6; *see also* Ken Shaurette (comment 19, NPRM) (questioning whether multi-factor authentication is appropriate for all financial institutions).

[182] National Independent Automobile Dealers Association (comment 48, NPRM), at 6.

[183] Cisco Systems, Inc. (comment 51, NPRM), at 2–4.

[184] Bank Policy Institute (comment 39, NPRM), at 11–13; Global Privacy Alliance (comment 38, NPRM), at 8.

[185] Electronic Transactions Association (comment 27, NPRM), at 3 n.1; U.S. Chamber of Commerce (comment 33, NPRM), at 11; CTIA (comment 34, NPRM), at 11; Global Privacy Alliance (comment 38, NPRM), at 8; Bank Policy Institute (comment 39, NPRM), at 12; National Automobile Dealers Association (comment 46, NPRM), at 28; National Independent Automobile Dealers Association (comment 48, NPRM), at 6; New York Insurance Association (comment 31, NPRM), at 1.

[186] CTIA (comment 34, NPRM), at 11; Electronic Transactions Association (comment 27, NPRM), at 3 n.1; U.S. Chamber of Commerce (comment 33, NPRM), at 11.

[187] American Council on Education (comment 24, NPRM), at 11.

[188] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 6–7; *see also* Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 102 (stating his company TECH LOCK supports requiring multi-factor authentication for users connecting from internal networks).

[189] CTIA (comment 34, NPRM), at 11–12; *see also* Electronic Transactions Association (comment 27, NPRM) at 3 (suggesting use of the term ''alternative compensating controls'').

[190] *See, e.g.,* Slides Accompanying Remarks of Brian McManamon, ''MFA/2FA Pricing (Duo),'' in Safeguards Workshop Slides, *supra* note 72, at 30 (setting forth prices for multi-factor/two-factor services from Duo, including free services for up to ten users); Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 102–03; Slides Accompanying Remarks of Lee Waters, ''Estimated Costs of Proposed Changes,'' in Safeguards Workshop Slides, *supra* note 72, at 26 estimating costs of MFA to be $50 for smartcard or fingerprint readers, and $10 each per smartcard); Slides Accompanying Remarks of Wendy Nather, ''Authentication Methods by Industry,'' in Safeguards Workshop Slides, *supra* note 72, at 37 (chart showing the use of MFA solutions such as Duo Push, phone call, mobile passcode, SMS passcode, hardware token, Yubikey passcode, and U2F token in industries such as financial services and higher education); Remarks of Wendy Nather, Safeguards Workshop Tr., *supra note 17,* at 233–34.

Rule allows financial institutions to adopt reasonably equivalent controls.[191]

As to potential disruptions requiring multi-factor authentication may cause, the Commission notes that many organizations, both financial institutions and otherwise, currently require employees to use multi-factor authentication without major disruption.[192] Many multi-factor authentication systems are available that do not materially increase the time it takes to log into a system as compared to the use of only a password.[193] In short, multi-factor authentication is an extremely effective way to prevent unauthorized access to a financial institution's information system,[194] and its benefits generally outweigh any increased time it takes to log into a system. In those situations when the need for quick access outweighs the security benefits of multi-factor authentication, the Rule allows the use of reasonably equivalent controls.

Finally, although the Commission agrees the Rule should not lock financial institutions into using outmoded or obsolete technologies, the basic structure of using multiple factors to identify a user is unlikely to be rendered obsolete in the near future. The Rule's definition of multi-factor authentication addresses only this principle and does not require any particular technology or technique to achieve it. This should allow it to accommodate most changes in information security practices. In the event of an unforeseen change to the information security environment that would discount the value of multi-factor authentication, the Commission will adjust the Rule accordingly.[195]

The Commission agrees with the commenter who stated multi-factor authentication is justified both when external users, such as customers, and internal users, such as employees, access an information system. Multi-factor authentication can prevent many attacks focused on using stolen passwords from both employees and customers to access customer information. Other common attacks on information systems, such as social engineering or brute force password attacks, target employee credentials and use those credentials to get access to an information system.[196] These attacks can usually be stopped through the use of multi-factor authentication. Accordingly, the Final Rule requires multi-factor authentication whenever any individual—employee, customer or otherwise—accesses an information system. If a financial institution determines it is not the best solution for its information system, it may adopt reasonably equivalent controls with the approval of the Qualified Individual.

The Commission recognizes the language of the Proposed Rule may have created some confusion by its use of the term ''internal networks'' to define the systems affected by the multi-factor authentication requirement, instead of the term ''information systems'' as used other places in the Rule.[197] In addition, the Commission agrees with commenters that argued separating the multi-factor authentication into two sentences created confusion.[198] Accordingly, the Commission modifies paragraph (c)(5) of the Final Rule, which was proposed as paragraph (c)(6), to require financial institutions to ''[i]mplement multi-factor authentication for any individual accessing any information system, unless your Qualified Individual has approved in writing the use of reasonably equivalent or more secure access controls.''

Finally, the Commission declines to adopt CTIA's proposed alternative that would allow Qualified Individuals to approve ''effective alternative compensating controls,'' even if they are not ''reasonably equivalent or more secure'' than multi-factor authentication. Given the important role multi-factor authentication has in access control, any alternative measure should provide at least as much protection as multi-factor authentication.[199]

Audit Trails

Proposed paragraph (c)(7) required information security programs to include audit trails designed to detect and respond to security events.[200] Audit trails are chronological logs that show who has accessed an information system and what activities the user engaged in during a given period.[201]

Some commenters supported this requirement.[202] The Princeton Center noted audit trails are ''crucial to designing effective security measures

[191] *See also* Remarks of James Crifasi, Safeguards Workshop Tr., *supra* note 17, at 103–04 (noting even where legacy systems do not support multi-factor authentication, alternative measures can be used and ''it's things that can easily be done.'')

[192] *See, e.g.,* Remarks of Randy Marchany, Safeguards Workshop Tr., *supra* note 17, at 236–38 (describing how Virginia Tech implemented multi-factor authentication in 2016 for its more than 156,000 users); Slides Accompanying Remarks of Wendy Nather, ''Authentication Methods by Industry,'' in Safeguards Workshop Slides, *supra* note 72, at 37 demonstrating the types of multi-factor authentication used by health care, financial services, higher education and the Federal Government); Remarks of Wendy Nather, Safeguards Workshop Tr., *supra* note 17, at 233–35.

[193] *See* Remarks of Wendy Nather, Safeguards Workshop Tr., *supra* note 17, at 234 (describing how a phone call to a landline is popular in some segments).

[194] *See, e.g.,* Remarks of Matthew Green, Safeguards Workshop Tr., *supra* note 17, at 266 (explaining passwords are not enough of an authentication feature but when MFA is used and deployed, the defenders can win against attackers); *id.* at 239 (describing how because smart phones have modern secure hardware processors, biometric sensors and readers built in, increasingly consumers can get the security they need through the devices they already have by storing cryptographic authentication keys on the devices and then using the phone to activate them).

[195] The Mortgage Bankers Association expressed concern the Proposed Rule would not allow the use of a single-sign on process, where a user is given access to multiple applications with the use of one set of credentials. Mortgage Bankers Association (comment 26, NPRM), at 7. The Commission does not view the Rule as preventing such a system, if the user has used multi-factor authentication to access the system and the system is designed to ensure any user of a given application has been subjected to multi-factor authentication.

[196] *See* Remarks of Pablo Molina, Safeguards Workshop Tr., *supra* note 17, at 30 (mentioning ''phishing,'' or social engineering, as a common type of cybersecurity attack); Remarks of Lee Waters, Safeguards Workshop, *supra* note 17, at 91 (same); Remarks of Michele Norin, Safeguards Workshop Tr., *supra* note 17, at 179 (same); *see also* Cyber Div., Fed. Bureau of Investigation, *Private Industry Notification No. 20200303–001, Cyber Criminals Conduct Business Email Compromise through Exploitation of Cloud-Based Email Services, Costing U.S. Businesses Over Two Billion Dollars,* (March 2020), *https://www.ic3.gov/media/news/2020/200707-4.pdf,* at 1–2, (last accessed 1 Dec. 2020) (''Between January 2014 and October 2019, the Internet Crime Complaint Center (IC3) received complaints totaling over $2.1 billion in actual losses from [Business Email Compromise (''BEC'')] scams targeting the largest [cloud-based email] platforms. Losses from BEC scams overall have increased every year since IC3 began tracking the scam in 2013 and have been reported in all 50 states and in 177 countries.'').

[197] Consumer Data Industry Association (comment 36, NPRM), at 6–7; Cisco Systems, Inc. (comment 51, NPRM), at 3–4.

[198] Bank Policy Institute (comment 39, NPRM), at 11.

[199] NADA argued, for financial institutions that have appointed a third party to act as their information security coordinator, this provision would require the institution to turn over decisionmaking to someone ''with no stake in the business outcome.'' National Automobile Dealers Association (comment 46, NPRM), at 29–30. This concern misinterprets the role of the Qualified Individual. Whether the Qualified Individual is inside the company or at a third-party company, that individual will report to and be supervised by senior management of a financial institution (unless the Qualified Individual is the head of the financial institution). If a Qualified Individual recommends a safeguard that would not be practical for the business, the financial institution is not required to adopt this safeguard but can use an alternative adequate safeguard that will be functional. Indeed, when it comes to third parties, the Rule specifically requires someone in the financial institution direct and oversee the third party.

[200] Proposed 16 CFR 314.4(c)(7).

[201] *See* Information Technology Laboratory Computer Security Resource Center, *Glossary,* National Institute of Standards and Technology, *https://csrc.nist.gov/glossary/term/audit-trail* (last accessed Dec. 2, 2020).

[202] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 8; Electronic Privacy Information Center (comment 55, NPRM), at 8.

that allow institutions to detect and respond to security incidents.'' [203] It also stated audit trails ''help understand who has accessed the system and what activities the user has engaged in.'' [204]

Other commenters argued this requirement imposed unclear obligations or would not improve security.[205] For example, GPA commented the Proposed Rule conflated the use of logs to reconstruct past events and the active use of logs to monitor user activity.[206] The American Financial Services Association argued adding logging capabilities to some legacy systems would be expensive and difficult.[207] Another commenter argued the increased use of cloud storage would mean that financial institutions might not have access to any audit trails.[208] In addition, NADA argued it did not believe maintenance of logs would increase security but would instead create records that could be sought by parties ''seeking to place blame'' for breaches.[209]

The Commission believes logging user activity is a crucial component of information security because in the event of a security event it allows financial institutions to understand what was accessed and when. However, the term ''audit trails'' may have been unclear in this context. In order to clarify that logging user activity is a part of the user monitoring process, the Final Rule does not include paragraph (c)(7) of the Proposed Rule and instead modifies the user monitoring provision to include a requirement to log user activity.[210] By putting the ''monitoring'' and ''logging'' requirements together, the Final Rule provides greater clarity on the comment raised by the GPA: Financial institutions are expected to use logging to ''monitor'' active users and reconstruct past events.

Disposal Procedures

Proposed paragraph (c)(8) required financial institutions to develop procedures for the secure disposal of customer information that is no longer necessary for their business operations or other legitimate business purposes.[211] The Proposed Rule allowed the retention of information when retaining the information is required by law or where targeted disposal is not feasible.

Some commenters supported the inclusion of a disposal requirement as proposed or suggested that the disposal requirements should be strengthened.[212] Consumer Reports argued financial institutions should be required to dispose of customer information when it is no longer needed for the business purpose for which it was gathered.[213] The Princeton Center suggested the Rule require disposal after a set period unless the company can demonstrate a current need for the data and that financial institutions periodically review their data practices to minimize their data retention.[214]

Several other commenters opposed the disposal requirement as set forth in the Proposed Rule. Some argued the requirement to dispose of information goes beyond the Commission's authority under the GLB Act.[215] NADA argued the GLB Act does not ''contain[ ] any authority to require financial institutions to delete any information'' and a requirement to have procedures to delete information for which a company has no legitimate business purpose would constitute a ''new privacy regime.'' [216] The American Financial Services Association (AFSA) stated the requirement was too prescriptive and the Rule should allow financial institutions to retain information as long as that retention complies with the retention policy created by the financial institution.[217] AFSA further argued the proposed requirement exceeds the Federal banking standards, pointing to the FFIEC Cybersecurity Assessment Tool, which sets disposal of records ''according to documented requirements and within expected time frames'' as a baseline requirement for access and data management.[218]

Yet other commenters suggested modifying the requirement. NADA argued that if there was to be a disposal requirement, then it should be modeled after the Disposal Rule, which requires businesses to properly dispose of consumer reports, but does not have an explicit requirement to dispose of information on any particular schedule.[219] ACE suggested modifying the Proposed Rule to require disposal of information only where there is no longer any ''legitimate purpose'' rather than any ''legitimate business purpose.'' [220] It argued in some cases a financial institution may have legitimate purposes for retaining information that are not readily defined as ''business'' purposes, such as the retention of data by educational institutions for institutional research or student analytics.[221]

The Commission believes requiring the disposal of customer information for which the financial information has no legitimate business purpose is within the authority granted by the GLB Act to protect the security of customer information. The disposal of records, both physical and digital, can result in exposure of customer information if not performed properly.[222] Similarly, if records are retained when they are no longer necessary, there is a risk those records will be subject to unauthorized access. The risk of unauthorized access may be reasonable where the retention of data provides some benefit. In situations where the information is no longer needed for a legitimate business purpose, though, the risk to the customer information becomes unreasonable because the retention is no longer benefiting the customer or financial institution. Disposing of unneeded customer information, therefore, is a vital part of protecting customer information and serves the purpose of the GLB Act.[223]

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[203] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 8.

[204] *Id.*

[205] National Automobile Dealers Association (comment 46, NPRM), at 30–31; National Independent Automobile Dealers Association (comment 48, NPRM), at 6; American Financial Services Association (comment 41, NPRM), at 6; Global Privacy Alliance (comment 38, NPRM), at 11.

[206] Global Privacy Alliance (comment 38, NPRM), at 11.

[207] American Financial Services Association (comment 41, NPRM), at 6.

[208] American Council of Education (comment 24, NPRM), at 12.

[209] National Automobile Dealers Association (comment 46, NPRM), at 30–31.

[210] *See* Final Rule, 16 CFR 314.4(c)(8).

[211] Proposed 16 CFR 314.4(c)(8).

[212] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 8; Electronic Privacy Information Center (comment 55, NPRM), at 8; Consumer Reports (comment 52, NPRM), at 7.

[213] Consumer Reports (comment 52, NPRM), at 7–8.

[214] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 8–9.

[215] National Automobile Dealers Association (comment 46, NPRM), at 31; National Independent Automobile Dealers Association (comment 48, NPRM), at 6.

[216] National Automobile Dealers Association (comment 46, NPRM), at 31–32.

[217] American Financial Service Association (comment 41, NPRM), at 6.

[218] *Cybersecurity Assessment Tool,* FFIEC, *https://www.ffiec.gov/pdf/cybersecurity/FFIEC_CAT_May_2017_Cybersecurity_Maturity_June2.pdf* at 37 (last visited December 3, 2020).

[219] National Automobile Dealers Association (comment 46, NPRM), at 32.

[220] American Council on Education (comment 24, NPRM), at 12.

[221] *Id.*

[222] *See, e.g.,* Complaint, *Rite Aid Corp.,* FTC No. 072–3121 (November 22, 2010) (alleging company failed to provide reasonable data security when it failed to implement policies and procedures to dispose securely of personal information).

[223] As to the Princeton Center's suggestion financial institutions periodically review their disposal practices (Princeton University Center for Information Technology Policy (comment 54, NPRM), at 8–9), the Commission believes this

Continued

The Commission disagrees with commenters who suggested narrowing the disposal requirement or doing away with it altogether. As noted above, although no disposal requirement appears in FFIEC guidelines, those guidelines represent a different regulatory approach and are not an appropriate model for the Safeguards Rule.

Finally, as to setting retention periods or narrowing the legitimate business purposes for which financial institutions may retain customer information, the Commission recognizes financial institutions need some flexibility. Whereas customers may want to, for example, access and transfer older data in some circumstances, in other circumstances, retaining such data would not be consistent with any legitimate business purpose. The Commission believes the Princeton Center's recommendation that companies be required to delete information after a set period unless the information is still needed for a legitimate business purpose properly balances the needs of financial institutions with the need to protect customer information. Thus, the Commission modifies proposed paragraph (c)(6) to require the deletion of customer information two years after the last time the information is used in connection with providing a product or service to the customer unless the information is required for a legitimate business purpose as paragraph (c)(6)(i) of the Final Rule. In addition, paragraph (c)(6)(ii) of the Final Rule requires financial institutions to periodically review their policies to minimize the unnecessary retention of information.

Change Management

Proposed paragraph (c)(9) required financial institutions to adopt procedures for change management.[224] Change management procedures govern the addition, removal, or modification of elements of an information system.[225] This paragraph required financial institutions to develop procedures to assess the security of devices, networks, and other items to be added to their information system, or the effect of removing such items or otherwise modifying the information system. For example, a financial institution that adds additional servers or other machines to its information system would need to evaluate the security of the new devices and the effect of adding them to the existing network.

Some commenters supported this requirement,[226] while others stated it was too broad and would impose unnecessary burdens on financial institutions.[227] In particular, NADA argued financial institutions that have not made changes in their systems ''for some time'' should not be required to create procedures for change management.[228] ACE argued including a change management requirement is unnecessary because such a requirement is ''generally incorporated into an organization's IT operations'' for non-security purposes and the security considerations of those changes will be considered as part of those procedures.[229]

Alterations to an information system or network introduce heightened risk of cybersecurity incidents;[230] thus, it is important to expressly require change management to be a part of an information security program. The Commission agrees with ACE that many financial institutions will already have change management procedures in place. If those procedures adequately consider security issues involved in the change, then they may satisfy this requirement.

As to the comment a financial institution that has not made changes to its environment in some time should not be required to have change management processes, the Commission disagrees. Few information systems can remain unchanged for a significant period of time, given the changing technical requirements for business and security. Indeed, NADA acknowledges financial institutions will need to ''adapt[] their programs to keep up with changes in data security.''[231] For this reason, all financial institutions must have procedures for when the changes occur. As with all of the requirements of the Rule, though, the exact nature of these procedures will vary depending on the size, complexity and nature of the information system. A simple system may have equally simple change management procedures.

The Commission adopts this proposed paragraph as paragraph (c)(7) of the Final Rule without change.

System Monitoring

Proposed paragraph (c)(10) required financial institutions to implement policies and procedures designed ''to monitor the activity of authorized users and detect unauthorized access or use of, or tampering with, customer information by such users.''[232] The Proposed Rule required financial institutions to take steps to monitor those users and their activities related to customer information in a manner adapted to the financial institution's particular operations and needs.

NADA stated this requirement would create unnecessary expense because it would require financial institutions to ''continually monitor all authorized use'' and would mean ''yet more new employees or third-party IT consultants.''[233] The Commission disagrees, however, noting that monitoring of system use can be automated.[234] There is no requirement a separate staff member would be required to exclusively monitor system use.

In addition, one commenter stated monitoring the use of paper files is impossible and should be excluded from this provision.[235] The Commission acknowledges monitoring of paper records is qualitatively different than the monitoring of electronic records. This requirement goes hand in hand with limiting access to documents, whether electronic or paper. For example, if an institution has a file room and access to the room is limited to particular employees (*e.g.,* the payroll office), the institution should have measures in place to ensure those access controls are in fact being utilized (*e.g.,* sign in with front desk, logging of key card access, security camera).

As discussed above, this paragraph is amended to also require the logging of user activity, but is otherwise adopted as proposed as paragraph (c)(8).

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requirement is already encompassed in the requirement contained in § 314.4(g) to periodically review their safeguards overall.

[224] Proposed 16 CFR 314.4(c)(9).

[225] *See, e.g., Change Management,* Rutgers OIT Information Security Office, *https://rusecure.rutgers.edu/content/change-management* (last accessed 1 Dec. 2020).

[226] Electronic Privacy Information Center (comment 55, NPRM), at 8; National Consumer Law Center and others, (comment 58, NPRM) at 3.

[227] American Council on Education (comment 24, NPRM), at 12–13; National Automobile Dealers Association (comment 46, NPRM), at 33.

[228] National Automobile Dealers Association (comment 46, NPRM), at 32–33.

[229] American Council on Education (comment 24, NPRM), at 12.

[230] *See* Remarks of Rocio Baeza, Safeguards Workshop Tr., *supra* note 17, at 95 (''[E]very time there is a change to any of these [network] environments, that is creating additional risk.''); Remarks of Scott Wallace, Safeguards Workshop Tr., *supra* note 17, at 147–48 (giving an example of an incident in which network changes led to the exposure of sensitive information); Remarks of Matthew Green, Safeguards Workshop Tr., *supra* note 17, at 252 (noting it is ''a little dangerous'' to make ''major changes'' to an information system at a time of heightened stress).

[231] National Automobile Dealers Association (comment 46, NPRM), at 33 n.96.

[232] Proposed 16 CFR 314.4(c)(10).

[233] National Automobile Dealer Association (comment 46, NPRM), at 33.

[234] *See* Remarks of Nicholas Weaver, Safeguards Workshop Tr., *supra* note 17, at 124–25.

[235] American Financial Services Association (comment 41, NPRM), at 6.

Proposed Paragraph (d)

Proposed paragraph (d)(1) retained the current Rule's requirement that financial institutions ''[r]egularly test or otherwise monitor the effectiveness of the safeguards' key controls, systems, and procedures, including those to detect actual and attempted attacks on, or intrusions into, information systems.''

Proposed paragraph (d)(2) provided further detail to this requirement by stating the monitoring must take the form of either ''continuous monitoring'' or ''periodic penetration testing and vulnerability assessments.'' The proposal explained continuous monitoring is any system that allows real-time, ongoing monitoring of an information system's security, including monitoring for security threats, misconfigured systems, and other vulnerabilities.[236] For those who elected to engage in periodic penetration testing and vulnerability assessment, the proposal required penetration testing at least once annually (or more frequently if called for in the financial institution's risk assessment) and vulnerability assessments at least twice a year.[237]

Some commenters thought the proposal went too far in requiring continuous monitoring or penetration and vulnerability testing, while others thought the proposal did not go far enough. On one hand, ACE argued continuous monitoring is too burdensome and difficult for some financial institutions,[238] particularly those with ''highly decentralized systems,'' such as colleges and universities, which could be required to monitor their entire system.[239] ACE further suggested the Rule should not prescribe any particular testing methodology or schedule and should allow financial institutions to develop a testing approach appropriate for the financial institution.[240] The NPA commented penetration and vulnerability testing would be too expensive for small pawnbrokers with small staffs and a small customer base, where their members would be ''likely to notice a penetration of our records.'' [241] One commenter stated the requirements for monitoring and testing were ''overlapping and confusing'' and suggested the Commission avoid confusion by including continuous monitoring, penetration testing, vulnerability scanning, periodic risk assessment reviews, and logging as optional components of an information security program to be included on an as-needed basis.[242] Some commenters recommended the testing requirement be limited to electronic data and exclude monitoring of physical data.[243] The American Financial Services Association argued the testing of physical safeguards required by paragraph (d)(1) ''would be impossible.'' [244] Finally, CTIA argued, for entities that choose the approach of penetration and vulnerability testing, these tests should be required less regularly.[245]

On the other hand, the Princeton Center suggested, rather than requiring either continuous monitoring or penetration testing, the Rule should require both. It noted continuous monitoring is very effective at detecting problems with, and threats to, ''off-the-shelf systems'' but penetration testing is better at ''for checking the interaction between systems, proprietary systems, or subtle security issues.'' [246] Similarly, the MSRT was concerned that the Proposed Rule suggested annual penetration testing alone could protect financial institutions, rather than serve as a supplement to proper monitoring.[247]

The Commission agrees with commenters who pointed out the difficulty of applying certain testing requirements to physical safeguards. Although the general testing requirement set forth in paragraph (d)(1) should apply to physical safeguards (*e.g.,* testing effectiveness of physical locks), the continuous monitoring, vulnerability assessment, and penetration testing in paragraph (d)(2) is not relevant to information in physical form. Accordingly, the final version of paragraph (d)(2) is limited to safeguards on information systems.

The Commission also agrees biannual vulnerability testing may not be sufficient to detect new threats. Thus, given the relative ease with which vulnerability assessments can be performed, it modifies the Final Rule to require financial institutions to perform assessments when there is an elevated risk of new vulnerabilities having been introduced into their information systems, in addition to the required biannual assessments.

Beyond these modifications, the Commission believes the proposal struck the right balance between flexibility and protection of customer information, and adopts the proposed provision as final. For commenters concerned about costs of testing and continuous monitoring, the Commission notes the Rule requires one, not both. Although many financial institutions may choose to use both, the Commission agrees the costs of requiring both for all financial institutions may not be justified. [248] As to arguments that the testing required by the Rule is too frequent and will therefore be too costly, the Commission does not agree vulnerability assessments will be costly. Indeed, there are resources for free and automated vulnerability assessments.[249] And although the Commission acknowledges penetration testing can be a somewhat lengthy and costly process for large or complex systems,[250] a longer period between penetration tests will leave information systems vulnerable to attacks that exploit weaknesses normally revealed by penetration testing.

Two other portions of the Final Rule should help financial institutions concerned about the costs of monitoring and testing. First, because the Commission is limiting the definition of ''information system'' in the Final Rule, financial institutions will be able to limit this provision's application by segmenting their network and conducting monitoring or testing only of systems that contain customer information or that are connected to such systems. Second, this requirement does not apply to those institutions that

[236] Financial institutions that choose the option of continuous monitoring would also be satisfying § 314.4(c)(8).

[237] Proposed 16 CFR 314.4(d)(1) and (2).

[238] American Council on Education (comment 24, NPRM), at 13–14.

[239] American Council on Education (comment 24, NPRM), at 13.

[240] American Council on Education (comment 24, NPRM), at 14.

[241] National Pawnbrokers Association (comment 3, Workshop), at 2.

[242] Global Privacy Alliance (comment 38, NPRM), at 10–11.

[243] National Independent Automobile Dealers Association (comment 48, NPRM), at 6; American Financial Services Association (comment 41, NPRM), at 6.

[244] American Financial Services Association (comment 41, NPRM), at 6.

[245] CTIA (comment 34, NPRM) at 12–13 (arguing penetration testing should be required only once every two years and vulnerability testing be required only once a year).

[246] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 5.

[247] Money Services Round Table (comment 53, NPRM), at 9; *see also* Gusto and others (Comment 11, Workshop), at 2 (arguing penetration testing and vulnerability assessments both have their weaknesses and financial institutions should develop a testing program that it is appropriate for them).

[248] The Commission believes a system for continuous monitoring will include some form of vulnerability assessment as part of monitoring the information system.

[249] Remarks of Frederick Lee, Safeguards Workshop Tr., *supra* note 17, at 139–40.

[250] *See id.* at 129–30 (noting the cost of a penetration test can increase significantly depending on the complexity of the system to be tested and the scope of the test).

maintain records on fewer than 5,000 individuals. Accordingly, for example, it should not apply to businesses small enough for staff to personally know a majority of customers.

Finally, the Commission does not believe the testing requirements are duplicative of other provisions of the Final Rule. The provision relating to additional risk assessments, § 314.4(b)(2), requires a financial institution to reevaluate its risks and to determine if safeguards should be modified or added—it does not require testing to detect threats and technical vulnerabilities in the existing system. Section 313.4(c)(8)'s requirement that financial institutions monitor users' activity in an information system is focused on one aspect of information security—detecting and preventing unauthorized access and use of the system. The requirement of this paragraph, on the other hand, is focused on testing the overall effectiveness of a financial institution's safeguards. It is broader than paragraph (c)(8)'s requirement and is necessary to ensure financial institutions test the strength of their safeguards as a whole.

Accordingly, the Final Rule requires financial institutions to perform vulnerability assessments at least once every six months and, additionally, whenever there are material changes to their operations or business arrangements and whenever there are circumstances they know or have reason to know may have a material impact on their information security program.

Proposed Paragraph (e)

Proposed paragraph (e) set forth a requirement that financial institutions implement policies and procedures ''to ensure that personnel are able to enact [the financial institution's] information security program.'' This requirement included four components: (1) General employee training; (2) use of qualified information security personnel; (3) specific training for information security personnel; and (4) verification that security personnel are taking steps to maintain current knowledge on security issues.

General Employee Training

Proposed paragraph (e)(1) required financial institutions to provide their personnel with ''security awareness training that is updated to reflect risks identified by the risk assessment.'' [251]

While one commenter specifically supported the inclusion of this training requirement,[252] the U.S. Chamber of Commerce argued the Rule should not have any specific training requirements at all.[253] NADA stated the requirement that the training be ''updated to reflect risks identified by the risk assessment'' will require companies to develop individualized training programs to suit their financial institution and that such a process would be expensive and unnecessary because ''general security awareness'' is generally enough for most financial institutions.[254]

Given the current Rule includes a similar training requirement and training remains a vital part of effective information security, the Commission declines to eliminate it. The Commission believes the Final Rule's training requirement retains the same flexibility as the existing Rule and allows financial institutions to adopt a training program appropriate to their organization.

The Commission disagrees with NADA's concern the requirement to update training programs would be too expensive. Without a requirement that the training program be updated based on an assessment of risks, employees may be subject to the same training year after year, which might reflect obsolete threats, as opposed to addressing current ones. The Commission interprets this provision to require only that the training program be updated as necessary based on changes in the financial institution's risk assessment. The provision also gives financial institutions the flexibility to use programs provided by a third party, if that program is appropriate for the financial institution. In order to clarify updates are required only when needed by changes in the financial institution or new security threats, though, the Final Rule states training programs need to be updated only ''as necessary.''

Information Security Personnel

Proposed paragraph (e)(2) required financial institutions to ''[u]tiliz[e] qualified information security personnel,'' employed either by them or by affiliates or service providers, ''sufficient to manage [their] information security risks and to perform or oversee the information security program.'' [255] This proposed provision was designed to ensure information security personnel used by financial institutions are qualified for their positions and information security programs are sufficiently staffed.

Some commenters argued this provision was too vague because it does not define what personnel are necessary and what ''qualified'' means.[256] NADA argued hiring additional staff to meet this requirement could be prohibitively expensive.[257]

As discussed in relation to the appointment of a ''Qualified Individual,'' the Commission believes a more specific definition of ''qualified'' would not be appropriate because each financial institution has different needs and different levels of training, experience, and expertise will be appropriate for the information security staff of each institution. The term ''qualified'' conveys only that staff must have the abilities and expertise to perform the duties required by the information security program.[258] The Commission declines to include a more prescriptive set of qualification requirements in the Final Rule.[259]

As to the concern about expense, the Commission acknowledges hiring employees or retaining third parties to maintain financial institutions' information security programs can be a substantial expense. But the expense is necessary to effectuate Congressional intent that financial institutions implement reasonable safeguards to protect customer information. The Rule requires only that a financial institution have personnel ''sufficient'' to manage its risk and to maintain its information security program. A financial institution is required only to have the staff necessary to maintain its information security. An information security program that is not properly maintained cannot offer the protection it is designed to provide. A financial institution that

[251] Proposed 16 CFR 314.4(e)(1).

[252] Electronic Privacy Information Center (comment 55, NPRM), at 8.

[253] U.S. Chamber of Commerce (comment 33, NPRM), at 12; *see also* American Financial Services Association (comment 41, NPRM), at 6 (stating the Commission should acknowledge that a training program for a small financial institution will be different than a program for a larger program).

[254] National Automobile Dealers Association (comment 46, NPRM), at 34.

[255] Proposed 16 CFR 314.4(e)(2).

[256] National Automobile Dealers Association (comment 46, NPRM), at 35; National Independent Automobile Dealers Association (comment 48, NPRM), at 7.

[257] National Automobile Dealers Association (comment 46, NPRM), at 35.

[258] NADA also asks whether this provision would require financial institutions to hire more personnel if they do not have enough qualified staff. *Id.* The Final Rule does require the hiring of additional personnel if existing personnel are not enough to maintain the financial institution's information security program.

[259] One commenter, on the other hand, approved of the decision not to define ''qualified'' in the Proposed Rule, but argued the requirement in its totality was unclear because it did not set forth ''how the Commission would hold covered entities accountable.'' American Council on Education (comment 24, NPRM) at 14. The Commission believes the term ''qualified'' provides a clear enough requirement to allow a financial institution's compliance to be evaluated.

does not comply with this requirement, by definition, has insufficient staffing, and thus, cannot reasonably protect customer information.

Although the expense is necessary, the level of expense is mitigated by several factors. First, existing financial institutions should already have information security personnel (either in the form of employees or third-party service providers) qualified to perform the duties necessary to maintain reasonable security in order to comply with the requirements of the current Rule. Depending on the skills of those employees, additional staffing may not be necessary to meet the demands of the Final Rule. Second, the required staffing will vary greatly based on the size and complexity of the information system. A financial institution with an extremely simple system may not require even a single full time employee. Finally, the Rule allows the use of service providers to meet this requirement. This can significantly reduce costs as services exist to share the expense of qualified personnel and offer information security support at significantly less than the cost of employing a single qualified employee.[260] The Commission continues to believe utilizing qualified and sufficient information security personnel is a vital part of any information security program and accordingly, adopts proposed paragraph (e)(2) in the Final Rule without modification.

Training of Security Personnel

The Proposed Rule also required financial institutions to ''[p]rovid[e] information security personnel with security updates and training sufficient to address relevant security risks.'' [261] This is separate from paragraph (e)(1)'s requirement to train all personnel generally.

Some commenters argued providing ongoing training could be too costly for some financial institutions.[262] The Commission disagrees. Maintaining awareness of emerging threats and vulnerabilities is a critical aspect of information security. In order to perform their duties, security personnel must be educated on the changing nature of threats to the information systems they maintain. There are resources that will allow smaller institutions to meet this requirement at little or no cost, such as published security updates, online courses, and educational publications.[263] For financial institutions that utilize service providers to meet information security needs, the service provider is likely to include assurances that provided personnel will be trained in current security practices. The Commission views the use of such a service provider as meeting this requirement, as the financial institution is ''providing'' the service as part of the price it pays to the service provider. Thus, the Final Rule adopts paragraph (e)(3) as proposed.[264]

Verification of Current Knowledge

Proposed paragraph (e)(4) required financial institutions to ''[v]erify[ ] that key information security personnel take steps to maintain current knowledge of changing information security threats and countermeasures.'' [265] This requirement was intended to complement the proposed requirement regarding ongoing training of data security personnel, by requiring verification such training has taken place.

NADA argued this requirement should not apply to smaller financial institutions, stating the examples set forth in the Proposed Rule would be difficult for some smaller financial institutions to perform.[266] The examples provided with the Proposed Rule were that a financial institution could: (1) Offer incentives or funds for key personnel to undertake continuing education that addresses recent developments, (2) include a requirement to stay abreast of security research as part of their performance metrics, or (3) conduct an annual assessment of key personnel's knowledge of threats related to their information system. The Commission believes smaller financial institutions can take advantage of any of these methods, particularly ''requiring key personnel to undertake continuing education'' as part of that personnel's duties. If they outsource responsibility for data security to service providers, they can simply include these requirements in their contracts.

The Commission believes the rapidly changing nature of information security mandates this requirement, in order that information security leadership can properly supervise the information security program. Accordingly, the Final Rule adopts proposed paragraph (e)(4) without change.

Proposed Paragraph (f)

Proposed paragraphs (f)(1) and (2) retained the current Rule's requirement, found in existing paragraphs (d)(1) and (2), to oversee service providers, and added a paragraph (f)(3), requiring financial institutions also periodically assess service providers ''based on the risk they present and the continued adequacy of their safeguards.'' [267] The current Rule expressly requires an assessment of service providers' safeguards only at the onboarding stage; proposed paragraph (f)(3) required financial institutions to monitor their service providers on an ongoing basis to ensure they are maintaining adequate safeguards to protect customer information they possess or access.[268]

Several commenters argued it would be costly and difficult for some financial institutions to periodically assess their service providers.[269] These commenters were particularly concerned with smaller financial institutions' ability to ''monitor'' larger service providers.[270] The Internet Association commented the requirement to periodically assess service providers would be too onerous for the service providers themselves, arguing the requirement would place ''service providers under constant surveillance by their financial institution clients.'' [271] HITRUST suggested the Rule should state the periodic assessment requirement may be satisfied by requiring service providers to obtain and maintain information

[260] *See, e.g.,* Slides Accompanying Remarks of Rocio Baeza, ''Models for Complying to the Safeguards Rule Changes,'' in Safeguards Workshop Slides, *supra* note 72, at 27–28 (describing three different compliance models: In-house, outsource, and hybrid, with costs ranging from $199 per month to more than $15,000 per month); *see also* remarks of Rocio Baeza, Safeguards Workshop Tr., *supra* note 17, at 81–83; slides Accompanying Remarks of Brian McMamanon, ''Sample Pricing,'' in Safeguards Workshop Slides, *supra* note 72, at 29 (estimating the cost of cybersecurity services based on number of endpoints); Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 83–85.

[261] Proposed 16 CFR 314.4(e)(3).

[262] National Automobile Dealers Association (comment 46, NPRM), at 35.

[263] *See, e.g.,* Federal Trade Commission, *Cybersecurity for Small Business, https://www.ftc.gov/tips-advice/business-center/small-businesses/cybersecurity* (last accessed 1 Dec. 2020); Remarks of Kiersten Todt, Safeguards Workshop Tr. at 86–88 (describing the resources of the Cyber Readiness Institute).

[264] The Clearing House suggested the Rule should require background checks on employees. The Clearing House (Comment 49, NPRM) at 19.

[265] Proposed 16 CFR 314.4(e)(4).

[266] National Automobile Dealers Association (comment 46, NPRM), at 35–36.

[267] Proposed 16 CFR 314.4(g).

[268] The Clearing House wrote in support of this element of the Proposed Rule, noting it would bring the Safeguards Rule's provisions relating to service provider oversight into better alignment with security guidelines for banks. The Clearing House (comment 49, NPRM), at 14.

[269] National Automobile Dealers Association (comment 46, NPRM), at 37; National Independent Automobile Dealers Association (comment 48, NPRM), at 7; *see also* Wangyang Shen (comment 3, Privacy Rule) (noting difficulty of supervising cloud services).

[270] National Automobile Dealers Association (comment 46, NPRM), at 22; National Association of Dealer Counsel (comment 44, NPRM), at 3.

[271] Internet Association (comment 9, Workshop), at 3–4.

security certifications provided by third parties and based on proper information security frameworks.[272] In contrast, Consumer Reports took issue with the Rule requiring only ''assessment'' of service providers, and argued financial institutions should be required to monitor their service providers for compliance.[273] Yet other commenters expressed confusion over the term ''service provider,'' asking whether it would cover national consumer reporting agencies that smaller financial institutions would be hard-pressed to assess.[274]

The Commission retains the service provider oversight requirement from proposed paragraph (f) without modification. Some high profile breaches have been caused by service providers' security failures,[275] and the Commission views the regular assessment of the security risks of service providers as an important part of maintaining the strength of a financial institution's safeguards.

The Commission disagrees with the commenters who expressed concerns this provision, and particularly the assessment requirement, would impose undue costs on financial institutions. The Rule would require financial institutions only to assess the risks service providers present and evaluate whether they continue to provide the safeguards required by contract, which need not include extensive investigation of a service provider's systems. In the case of large service providers, this oversight may consist of reviewing public reports of insecure practices, changes in the services provided, or security failures in the services provided. In other circumstances, such as where a large company hires a vendor to secure sensitive customer information, certifications, reports, or even third-party audits may be appropriate. The exact steps required depend both on the size and complexity of the financial institution and the nature of the services provided by the service provider. For this reason, the Commission declines to adopt the suggestion to allow a financial institution to accept an information security certification from the service provider to satisfy the service provider oversight requirement. The fact that a company maintains an information security certification may be a significant part of assessing the adequacy of a service provider's safeguards, but the Commission declines to prescribe a one-size-fits all approach, given the variation in size and complexity of financial institutions and their service providers.

To avoid imposing undue costs on financial institutions, the Commission declines to require ongoing monitoring, rather than periodic assessment, as recommended by Consumer Reports. The Commission believes periodic assessment strikes the right balance between protecting consumers and imposing undue costs on financial institutions. The Commission acknowledges financial institutions may have limited bargaining power in obtaining services from large service providers and limited ability to demand access to a service provider's systems. In those cases, any sort of hands-on assessment of the provider's systems may not be possible.

As to the concern the assessment requirement will impose undue burdens on the service providers themselves, the Commission does not believe this concern justifies a modification to the proposed requirement. First, the Rule does not require ''constant surveillance'' by financial institutions—they are required only to ''periodically assess'' the risks presented by service providers. Second, as discussed above, the supervision of service providers is a vitally important aspect of information security, and while there may be some burdens on the service providers associated with being supervised, these are necessary burdens. A financial institution must be sure a service provider is protecting the information of its customers, and any expenses this involves are a necessary part of fulfilling this duty.

Finally, as to concerns about potential ambiguities in the definition of service provider, the amendments preserve the definition in the current Rule. Thus, entities subject to this requirement under the Final Rule will remain the same as under the existing Rule and may include consumer reporting agencies. As discussed above, even larger service providers such as national CRAs can be subjected to some form of review by financial institutions.[276]

The Commission adopts proposed paragraph (f) in the Final Rule without modification.

Proposed Paragraph (g)

Paragraph (g) of the Proposed Rule retained the language of existing paragraph (e) in the current Rule, which requires financial institutions to evaluate and adjust their information security programs in light of the result of testing required by this section, material changes to their operations or business arrangements, or any other circumstances they know or have reason to know may have a material impact on their information security program. The Commission received no comments on this paragraph and adopts the language of the Proposed Rule.

Proposed Paragraph (h)

Proposed paragraph (h) required financial institutions to establish written incident response plans that addressed (1) the goals of the plan; (2) the internal processes for responding to a security event; (3) the definition of clear roles, responsibilities and levels of decision-making authority; (4) external and internal communications and information sharing; (5) identification of requirements for the remediation of any identified weaknesses in information systems and associated controls; (6) documentation and reporting regarding security events and related incident response activities; and (7) the evaluation and revision as necessary of the incident response plan following a security event.

Several commenters supported the proposal to require an incident response plan.[277] The Credit Union National Association observed an incident response plan ''helps ensure that an entity is prepared in case of an incident by planning how it will respond and what is required for the response.''[278] Consumer Reports noted a rapid response to a security event can limit damage caused by the event.[279] The

[272] HITRUST (comment 18, NPRM), at 3–4.

[273] Consumer Reports (comment 52, NPRM) at 7.

[274] American Financial Services Association (comment 41, NPRM), at 7.

[275] For example, in 2013, attackers were reportedly able to use stolen credentials obtained from a third-party service provider to access a customer service database maintained by national retailer Target Corporation, resulting in the theft of information relating to 41 million customer payment card accounts. Kevin McCoy, *Target to pay $18.5M for 2013 data breach that affected 41 million consumers,* USA Today, May 23, 2017, *https://www.usatoday.com/story/money/2017/05/23/target-pay-185m-2013-data-breach-affected-consumers/102063932/.*

[276] The National Pawnbrokers Association expressed concern they cannot control vendors of local law enforcement agencies to whom they are required to provide customer information. National Pawnbrokers Association (comment 32, NPRM), at 2. However, the Rule does not require financial institutions oversee service providers employed by other entities over which they have no control.

[277] Consumer Reports (comment 52, NPRM), at 6; Princeton University Center for Information Technology Policy (comment 54, NPRM), at 7; Electronic Privacy Information Center (comment 55, NPRM), at 8; Credit Union National Association (comment 30, NPRM), at 2; Heartland Credit Union Association (comment 42, NPRM), at 2; National Association of Federally-Insured Credit Unions (comment 43, NPRM), at 1; HITRUST (comment 18, NPRM), at 2.

[278] Credit Union National Association (comment 30, NPRM), at 2.

[279] Consumer Reports (comment 52, NPRM), at 6.

Princeton Center commented ''a written incident response plan is an essential component of a good security system.'' [280] HITRUST commented incident response plans can help organizations ''to better allocate limited resources.'' [281] The South Carolina Department of Consumer Affairs suggested the provision go further by requiring the incident response plan include a process for notifying senior information security personnel of the event.[282]

Other commenters opposed requiring an incident response plan or objected to particular aspects of the requirement. Some commenters suggested requiring financial institutions to have incident response plans is outside the Commission's authority under the GLB Act.[283] NADA argued the requirement for an incident response plan was overbroad in light of the broad definition of security event,[284] and the requirement was vague as to what the plan should include.[285]

Other commenters argued the requirement was too burdensome. ACE argued ''the range of security events that might occur and their potential impacts on institutional capacity to recover'' make establishing an incident response plan that will allow an institution to ''respond to, and recover from, *any* security event materially affecting . . . customer information'' impossible.[286] The Mortgage Bankers Association (''MBA'') suggested ''institutions of smaller sizes may not necessarily be capable of addressing all seven of the proposed goals.'' [287] Further, the MBA argued an incident response plan requirement had ''the potential to cripple small businesses under the pressure of repeatedly checking the boxes for potentially harmless events.'' [288]

Finally, some commenters raised questions about what it means for customer information to be in a financial institution's ''possession'' for purposes of the incident response plan requirement. ACE argued the requirement does not adequately account for customer information held in cloud storage operated by third parties, asserting such information is not technically within the financial institution's possession.[289] ACE suggested the provision should apply to customer information for which the financial institution is responsible, instead.[290] Relatedly, the NPA expressed concern pawnbrokers might be subject to liability under the Proposed Rule when law enforcement agencies or their third-party vendors make public disclosures of customer information pawnbrokers are obligated to report.[291]

The Commission retains the requirement for financial institution to develop and implement an incident response plan, with one modification described below. The Commission believes the creation of an incident response plan is directly related to safeguarding customer information and is within its authority under the GLBA. The requirement to create an incident response plan focuses on preparing financial institutions to respond promptly and appropriately to security events, and mitigating any weaknesses in their information systems in the process. By responding quickly and promptly mitigating weaknesses, financial institutions can stop ongoing or future compromise of customer information.[292] A well-organized response to a security event can limit the number of consumers affected by an outside attacker by promptly identifying the attack and taking steps to stop the attack.

The Commission disagrees with the commenters who stated this requirement was too burdensome. The Final Rule requires incident response plans address ''security event[s] materially affecting the confidentiality, integrity, or availability of customer information in [a financial institution's] control.'' Significantly, the plan must address events that ''materially'' affect customer information. Thus, the required incident response plan does not require a plan to address every security event that may occur. The plan need not include minute details or all possible scenarios. Instead, the Rule requires the plan to establish a system—for example, by laying out clear lines of responsibility, systems for information sharing, and methods for evaluating possible solutions—that will facilitate a financial institution's response to security events regardless of the nature of the event. A detailed approach may be appropriate for some financial institutions, such as those with especially complicated systems or personnel hierarchies, but the Rule is designed to give financial institutions the flexibility needed to develop plans that best suit their needs.[293]

Moreover, the Commission believes the requirement is clear as to what an incident response plan should include. The seven listed requirements for the incident response plans provide sufficient guidance to financial institutions designing incident response plans while giving them flexibility to design a plan suited to their organization. In addition, there are many resources for designing incident response plans available for financial institutions, as well as service providers that can assist with the design process.[294] Individual institutions can determine the exact details of the plans.

To address questions about whether information is in the financial institution's ''possession,'' the Commission is revising paragraph (h) of the Final Rule to require financial institutions develop incident response plans ''designed to promptly respond to, and recover from, any security event materially affecting . . . customer information in your *control.*'' (emphasis added) Replacing the term ''possession'' with ''control'' resolves the questions raised by ACE and the NPA regarding

[280] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 7.

[281] HITRUST (comment 18, NPRM), at 2.

[282] South Carolina Department of Consumer Affairs (comment 47, NPRM), at 2.

[283] National Automobile Dealer Association (comment 46, NPRM), at 38; National Independent Automobile Dealers Association (comment 48, NPRM), at 7.

[284] National Automobile Dealer Association (comment 46, NPRM), at 38.

[285] National Automobile Dealer Association (comment 46, NPRM), at 12, 38–39. NPA also asked for greater detail on what constitutes an ''incident.'' National Pawnbroker Association (comment 32, NPRM), at 4.

[286] American Council on Education (comment 24, NPRM), at 15.

[287] Mortgage Bankers Association (comment 26, NPRM), at 4.

[288] Mortgage Bankers Association (comment 26, NPRM), at 4.

[289] American Council on Education (comment 24, NPRM), at 15.

[290] *Id.*

[291] National Pawnbroker Association (comment 32, NPRM), at 4.

[292] *See* Remarks of Serge Jorgenson, Safeguards Workshop Tr., *supra* note 17, at 52 (observing a prompt response to an incident can prevent a ''threat actor running around in my environment for days, months, years, and able to access anything they want.'').

[293] Although the Commission agrees with the South Carolina Department of Consumer Affairs that notification of senior personnel is valuable, the requirement that the plan address ''the definition of clear roles, responsibilities and levels of decision-making authority'' will almost always result in communication of decision-making to senior personnel authorized to make decisions about the security response. Coupled with the requirement the Qualified Individual report to the board or equivalent body on material events affecting security, the Commission does not see the need to make this change.

[294] *See, e.g.,* FTC, Data Breach Response: A Guide for Business (2019), *www.ftc.gov/tips-advice/business-center/guidance/data-breach-response-guide-business;* NIST, Guide for Cybersecurity Event Recovery (2016), *nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-184.pdf;* Orion Cassetto, *Incident Response Plan 101: How to Build One, Templates and Examples, Exabeam: Information Security Blog* (November 21, 2018), *www.exabeam.com/incident-response/incident-response-plan/* (last visited December 2, 2020).

whether financial institutions must plan for security events affecting data that has been transferred to various kinds of third parties. Where a financial institution has voluntarily opted to store its customer information in the cloud, to whatever extent the information is no longer in the ''possession'' of the financial institution, it is certainly within the institution's ''control.'' By contrast, customer information that has been obtained by a third party such as a law enforcement agency, over whom a financial institution has no authority and of whose actions the financial institution has no knowledge, cannot fairly be said to be in the financial institution's control. Consequently, the financial institution need not account for possible disclosures of that information by the third party.[295]

Notification of Security Events to the Commission

The Commission also requested comment on whether the Rule should require financial institutions to report security events to the Commission. Several commenters supported this requirement.[296] The Princeton University Center for Information Technology Policy noted such a reporting requirement would ''provide the Commission with valuable information about the scope of the problem and the effectiveness of security measures across different entities'' and ''help the Commission coordinate responses to shared threats.'' [297] The National Association of Federally-Insured Credit Unions argued requiring financial institutions to report security events to the Commission would provide an ''appropriate incentive for covered financial companies to disclose information to consumers and relevant regulatory bodies.'' [298] NAFCU also suggested notification requirements are important because they ''ensure independent assessment of whether a security incident represents a threat to consumer privacy.'' [299]

Other commenters opposed the inclusion of a reporting requirement.[300] ACE argued such a requirement ''would simply add another layer on top of an already crowded list of federal and state law enforcement contacts and state breach reporting requirements.'' [301] ACE also suggested any notification requirement should be limited to a more restricted definition of ''security event'' than the definition in the Proposed Rule, so financial institutions would only be required to report incidents that could lead to consumer harm.[302]

The Commission agrees with commenters that stated a requirement financial institutions report security events to the Commission would have many benefits, including allowing the Commission to identify emerging threats and assisting the Commission's enforcement of the Rule. In addition, such a requirement would be unlikely to create a significant burden on financial institutions because a security event that leads to notification to the Commission is very likely to create breach notification obligations under various state laws, and the financial institution will thus already be engaged in notifying consumers and state regulators. The addition of a notification to the FTC would not require any significant additional preparation or effort. However, because the notice of proposed rulemaking did not set forth a detailed proposal for a notification requirement, the Final Rule does not include such a requirement. Instead, the Commission is issuing a supplemental notice of proposed rulemaking (SNPRM) that proposes adding a requirement financial institutions notify the Commission of detected security events under certain circumstances.[303]

Proposed Paragraph (i)

Proposed paragraph (i) required a financial institution's CISO to ''report in writing, at least annually, to [the financial institution's] board of directors or equivalent governing body'' regarding the following information: (1) The overall status of the information security program and financial institution's compliance with the Safeguards Rule; and (2) material matters related to the information security program, addressing issues such as risk assessment, risk management and control decisions, service provider arrangements, results of testing, security events or violations and management's responses thereto, and recommendations for changes in the information security program.[304] For financial institutions that did not have a board of directors or equivalent, the proposal required the CISO to make the report to a senior officer responsible for the financial institution's information security program.

One commenter supported this requirement.[305] Additionally, several workshop participants emphasized the value of communication between information security leaders and corporate boards or their equivalent. For example, workshop participant Michele Norin stated it is ''important'' for the topic of information security to be discussed at the level of the board or senior leadership regularly, and at least once per year.[306] Participant Adrienne Allen agreed annual reporting made sense as a requirement, but noted for some financial institutions, particularly those with an online presence, even more frequent communication could be beneficial.[307]

ACE argued the Proposed Rule created too much emphasis on a single annual report and should instead focus on regular reporting to the Board or equivalent.[308] It also expressed concern the report required by the Proposed Rule would be too detailed and would not allow the Board to see ''the forest for the trees,'' [309] the requirements for the report were too prescriptive, and the requirements focused too much on compliance rather than security.[310] Similarly, NADA argued the report would not improve security but would instead create ''unnecessary liability exposure for the board/leadership of the entity.'' [311] HITRUST suggested

[295] NADA further argued the incident response plan constitutes a de facto consumer notification requirement. National Automobile Dealer Association (comment 46, NPRM), at 39. Financial institutions have an independent obligation to perform notification as required by state law, whether or not they have an incident response plan in place. The fact that the Rule requires a plan that sets forth procedures for satisfying that requirement does not impose any independent notification requirement on the financial institution.

[296] Consumer Reports (comment 52, NPRM), at 6; Princeton University Center for Information Technology Policy (comment 54, NPRM), at 7; Credit Union National Association (comment 30, NPRM), at 2; Heartland Credit Union Association (comment 42, NPRM), at 2; National Association of Federally-Insured Credit Unions (comment 43, NPRM), at 1–2.

[297] Princeton University Center for Information Technology Policy (comment 54, NPRM), at 7.

[298] National Association of Federally-Insured Credit Unions (comment 43, NPRM), at 1.

[299] National Association of Federally-Insured Credit Unions (comment 43, NPRM), at 1–2.

[300] National Independent Automobile Dealers Association (comment 48, NPRM), at 7; American Council on Education (comment 24, NPRM), at 15.

[301] American Council on Education (comment 24, NPRM), at 15.

[302] *Id.*

[303] Standards for Safeguarding Customer Information, SNPRM, published elsewhere in this issue of the **Federal Register**.

[304] Proposed 16 CFR 314.4(i).

[305] Rocio Baeza (comment 12, Workshop), at 3–8 (supporting requirement and providing sample report form and compliance questionnaire); *see also* The Clearing House (comment 49, NPRM), at 15–16 (arguing that Rule should require more involvement from Board and senior management).

[306] Remarks of Michele Norin, Safeguards Workshop Tr., *supra* note 17, at 194.

[307] Remarks of Adrienne Allen, Safeguards Workshop Tr., *supra* note 17, at 199–200.

[308] American Council on Education (comment 24, NPRM), at 16.

[309] *Id.*

[310] *Id.*

[311] National Automobile Dealer Association (comment 46, NPRM), at 41. NADA also argued the

Qualified Individuals should be able to meet this reporting requirement by submitting a report from an information security certification program to the Board or equivalent body.[312]

The Commission adopts the proposal as final, with one modification discussed below. This provision is intended to ensure the governing body of the financial institution is engaged with and informed about the state of the financial institution's information security program. Likewise, this will create accountability for the Qualified Individual by requiring him or her to set forth the status of the information security program for the governing body.[313] This will help financial institutions to ensure their information security programs are being maintained appropriately and given the necessary resources. Written reports will create a record of decisions made and the information upon which they were based, which may aid future decision-making.[314] Management involvement in information security programs can improve the strength of those programs and help to reduce breaches.[315]

The Commission disagrees with the commenters who stated the reporting requirement would be too prescriptive. In fact, the language only requires reporting of (1) the overall status of the information security program and its compliance with this Rule; and (2) material matters related to the information security program. The language includes examples of what material matters might include, such as risk assessments and security events, but does not require all of them be included. The financial institution and the Qualified Individual will be responsible for determining what is material for their organization. The Commission does not believe these requirements call for overly detailed reports.[316]

Although the Commission agrees a certification report from a Qualified Individual could be a part of the annual report and may cover many material matters, it may not suffice in all cases; thus, the Commission declines to include such a one-size-fits-all requirement.

As to the suggestion to require ''regular'' reporting, the Commission agrees more regular reporting may be the best approach for many financial institutions. To this end, the Commission modifies the requirement in the final rule to say ''regularly, and at least annually.'' [317] Beyond this modification, the Final Rule adopts proposed paragraph (i) as proposed.

Board Certification

The Commission specifically sought comment on whether the Board or equivalent should be required to certify the contents of the report. The two commenters who addressed this question stated they should not.[318] ACE noted ''governing boards generally will not have the knowledge and expertise to independently certify'' the technical aspects of the report and certification might require the employment of outside auditors.[319] The Commission agrees senior management of financial institutions will often lack the technical expertise to personally attest to its validity. In addition, the primary purpose of the required report is to encourage communication between information security personnel and senior management, not to show compliance with the Rule. Requiring the governing board to certify the contents of the report would likely transform the report into a compliance document and might reduce its efficacy as a communication between the Qualified Individual and the Board. Accordingly, the Commission declines to adopt this requirement in the Final Rule.

§ 314.5: Effective Date

The Proposed Rule set a new effective date for some portions of the Rule. Proposed § 314.5 provided certain elements of the information security program would not be required until six months after the publication of a final rule, rather than immediately upon publication. The paragraphs that would have a delayed effective date were: § 314.4(a), related to the appointment of a Qualified Individual; § 314.4(b)(1), relating to conducting a written risk assessment; § 314.4(c)(1) through (8), setting forth the new elements of the information security program; § 314.4(d)(2), requiring continuous monitoring or annual penetration testing and biannual vulnerability assessment; § 314.4(e), requiring training for personnel; § 314.4(f)(3), requiring periodic assessment of service providers; § 314.4(h), requiring a written incident response plan; and § 314.4(i), requiring annual written reports from the Qualified Individual. All other requirements under the Safeguards Rule would remain in effect during this six-month period. These remaining requirements largely mirrored the requirements of the existing Rule.

All commenters that addressed this provision noted the difficulty of complying with some of the provisions of the Proposed Rule, and argued financial institutions should be given more time to comply with them. ACE suggested financial institutions be given one year to create a plan for compliance and two years to come into actual compliance.[320] AFSA suggested compliance not be required for two

reports by third-party Qualified Individuals might not include useful information and were ''more likely to be filled with platitudes and/or efforts to 'upsell' the dealership on additional CISO services.'' *Id.* at 42. NADA provided no support for this claim. The Commission notes such a report would not meet the requirements of this provision, and the financial institution would be justified in terminating their relationship with that provider or, at least, demanding a revised report that did meet those requirements.

[312] HITRUST (comment 18, NPRM), at 4.

[313] *See* Remarks of Karthik Rangarajan, Safeguards Workshop Tr., *supra* note 17, at (''If quarter over quarter, year over year, this watermark isn't reducing, then board of directors should be able to challenge us and say maybe you're not mapping your risks correctly, or vice versa if it's reducing but we're seeing more incidents, we're seeing potential breaches, things like that, then the board of directors should be able to say maybe you don't have the right risk quantification framework or the right risk management framework.'').

[314] Workshop participants Adrienne Allen, Karthik Rangarajan, and Michele Norin each emphasized this point. *See* Safeguards Workshop Tr., *supra* note 17, pp. 201–09.

[315] *See* Juhee Kwon Jackie Rees Ulmer, & Tawei Wang, *The Association Between Top Management Involvement and Compensation and Information Security Breaches,* Journal of Information Systems, Spring 2013, at 219–236 (''. . . the involvement of an IT executive decreases the probability of information security breach reports by about 35 percent . . .''); Julia L. Higgs, Robert E. Pinsker, Thomas Joseph Smith, & George Young, *The Relationship Between Board-Level Technology Committees and Reported Security Breaches, Journal of Information Systems,* Fall 2016, at 79–98 (''[A]s a technology committee becomes more established, its firm is not as likely to be breached. To obtain further evidence on the perceived value of a technology committee, this study uses a returns analysis and finds that the presence of a technology committee mitigates the negative abnormal stock returns arising from external breaches.'').

[316] Indeed, workshop participants discussed a variety of strategies for meaningful communication between security personnel and senior leadership. Participants noted the proper content, style, and cadence of reporting (beyond the minimum annual report) will vary depending on, among other things, the type of financial institution in question and the level of familiarity of leadership with the relevant technical issues. *See* Safeguards Workshop Tr., *supra* note 17, at 194–200.

[317] NADA argued reports required by this provision would be expensive because the Proposed Rule stated they would need to be prepared by a ''CISO,'' which NADA takes to mean a highly compensated expert of the type retained by the most sophisticated large institutions. National Automobile Dealer Association (comment 46, NPRM), at 41. As discussed above, however, the Rule does not require all financial institutions to retain such an expert. Instead, the report will be made by the Qualified Individual, whose expertise and compensation will vary according to the size and complexity of a financial institution's information system.

[318] National Automobile Dealer Association (comment 46, NPRM), at 41 n.126; American Council on Education (comment 24, NPRM), at 16.

[319] American Council on Education (comment 24, NPRM), at 16.

[320] American Council on Education (comment 24, NPRM), at 4–5.

years.[321] ACA International requested the effective date be one year after publication of the Rule.[322]

The Commission agrees some financial institutions may need longer to modify their information security programs to comply with the new requirements in the Final Rule, especially given the current pandemic and the strains it is placing on businesses. Accordingly, the Final Rule extends the effective date for these enumerated provisions to one year after the publication of this document.

Proposed § 314.6: Exceptions

Proposed § 314.6 exempted financial institutions that maintain customer information concerning fewer than five thousand consumers from certain requirements of the Proposed Rule, namely § 314.4(b)(1), requiring a written risk assessment; § 314.4(d)(2), requiring continuous monitoring or annual penetration testing and biannual vulnerability assessment; § 314.4(h), requiring a written incident response plan; and § 314.4(i), requiring an annual written report by the CISO (as revised, the Qualified Individual).[323] This proposed section was designed to reduce the burden on smaller financial institutions.

The Commission sought comment on whether it was appropriate to include such an exemption, whether the specific exemptions were appropriate, whether the use of the number of customers concerning whom the financial institution retains customer information is the most effective way to determine which financial institutions should be exempted and, if so, whether five thousand customers was an appropriate number. After reviewing the comments received, the Commission retains the exemption for financial institutions with fewer than 5,000 customers as proposed.

Several commenters supported the inclusion of an exemption for small financial institutions. Consumer Reports supported the exemption as proposed.[324] NPA supported the decision to base this exemption on the number of customers whose information the financial institution maintains, but questioned how the number of customers would be determined.[325] NPA asked whether the number of customers would be counted on an annual basis or include all records the financial institution maintains. It also asked if each transaction with a customer would be counted separately.[326]

Some commenters argued the number of customers whose records a financial institution maintains was the wrong measure by which to assess whether the exemption should apply. For example, commenters suggested the Rule should take into account businesses with revenue beneath a certain threshold,[327] the number of students enrolled at covered educational institutions,[328] or the number of individuals employed by the financial institution.[329]

Additionally, some commenters argued the threshold for application of the exemption should be higher. ACA International suggested the exemption should apply to all financial institutions maintaining records concerning fewer than 10,000 customers.[330] AFSA suggested a 50,000 customer threshold.[331] NADA [332] and NIADA [333] argued the threshold should be raised to 100,000 customers. Without proposing a specific alternative, NPA expressed concern the 5,000-customer threshold may be too low, noting pawnbrokers who accept firearms as collateral are required to keep customer records related to certain transactions for twenty years.[334]

As to the substance of the exemption, some commenters felt it did not go far enough to relieve the burden of the rule for small financial institutions. ACA International proposed eligible financial institutions should also be exempt from the requirement to designate a single qualified individual to oversee their information security programs.[335] The National Federation of Independent Business argued businesses with 15 or fewer employees should be exempted from the Rule entirely and instead held only to a requirement to take ''commercially reasonable steps'' to safeguard customer information.[336] The Small Business Administration Office of Advocacy suggested, in the absence of additional information regarding the impact of the proposed changes on small businesses, the Rule should ''maintain the status quo'' for small entities as defined by the Small Business Administration's size standards.[337]

On the other hand, other commenters opposed the inclusion of any exemption. The Independent Community Bankers of America noted the Federal Financial Institutions Examination Council Interagency Guidelines Establishing Standards for Safeguarding Customer Information (''FFIEC Guidelines''), which detail how depository institutions are required to protect customer information, include no exemption for smaller institutions and suggested the Rule should also have no exemption and apply equally to all financial institutions.[338]

Under the existing Rule, there is no exception for smaller entities. Still, the Commission continues to believe it is appropriate to exempt small businesses from some of the revised Rule's requirements. Although the FFIEC Guidelines do not exempt small businesses from its requirements, the FFIEC Guidelines regulate only depository financial institutions subject to an entirely different regulatory regime, including supervision by their regulatory agencies. While the provisions from which eligible financial institutions are exempt have significant benefits for the security of customer information and other sensitive data,[339]

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[321] American Financial Services Association (comment 41, NPRM), at 7.

[322] ACA International (comment 45, NPRM), at 10–11.

[323] Proposed 16 CFR 314.6.

[324] Consumer Reports (comment 52, NPRM), at 6; *see also* Credit Union National Association (comment 30, NPRM), at 2 (noting the exemption will be helpful for smaller businesses, but suggesting other changes to the Proposed Rule so the exemption is not required).

[325] National Pawnbrokers Association (comment 32, NPRM), at 6.

[326] *Id.; see also* National Independent Automobile Dealers Association (comment 48, NPRM), at 3.

[327] ACA International (comment 45, NPRM), at 11–12.

[328] American Council on Education (comment 24, NPRM), at 5.

[329] Ahmed Aly (comment 22, NPRM).

[330] ACA International (comment 45, NPRM), at 11–12.

[331] American Financial Services Association (comment 41, NPRM), at 3–4.

[332] National Automobile Dealers Association (comment 46, NPRM), at 43–44. NADA also suggested information about customers for which the nonpublic information has been removed should not be counted to the total. If the information is anonymized or otherwise transformed so it is no longer reasonably linkable to a customer, that information will not count towards the exemption. NADA's example of retaining only ''name, phone number, address, and VIN of the vehicle they own,'' would still count as customer information under the Rule.

[333] National Independent Automobile Dealers Association (comment 48, NPRM), at 3.

[334] National Pawnbrokers Association (comment 32, NPRM), at 6.

[335] ACA International (comment 45, NPRM), at 12.

[336] National Federation of Independent Business (comment 16, NPRM), at 4.

[337] Small Business Administration Office of Advocacy (comment 28, NPRM), at 6.

[338] Independent Community Bankers of America (comment 35, NPRM), at 4; *see also* American Escrow (comment 6, Workshop), at 3 (arguing even small companies may need to comply with all portions of the Rule to maintain consumer confidence); *see also* Caiting Wang (Comment 6, Privacy) (suggesting exempted provisions should be optional for smaller businesses, or the Commission create a fund to enable small businesses to comply with these provisions).

[339] *See, e.g.,* Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 85 (noting continuous monitoring allows organizations

those provisions may be less necessary in situations where the overall volume of retained data is low. This is true in part because the potential for cumulative consumer harm is less where fewer consumers' information may be exposed as the result of a security incident.[340]

For similar reasons, the Commission finds the number of individuals concerning whom a financial institution maintains customer information is the appropriate measure of whether the exemption should apply to a particular financial institution. The application of the exemption should take into account both the potential burden of compliance to financial institutions and the risk to consumers when standards are relaxed—in other words, the purpose of the exemption is to avoid imposing *undue* burden while assuring customer information is subject to necessary protections. Even a very small financial institution, depending on its business model, may retain very large quantities of sensitive customer information.[341] Adequate security is necessary to protect such information, which may constitute an attractive target for bad actors such as identity thieves; the value of the target is correlated with the volume of information maintained.[342] While a business's revenue or number of employees may provide a measure of the burden of compliance for that business, these figures do not capture consumer risk. By contrast, the number of individuals about whom a financial institution maintains customer information is a proxy for the level of security necessary in light of both the risk of attack and the potential consumer harm should a security incident occur.[343] In addition, basing the exemption on the number of individuals concerning whom a financial institution maintains customer information provides an incentive to financial institutions to reduce the amount of information they retain. A financial institution may choose to dispose of information so it holds information on few enough consumers to qualify for exemption.[344]

The Final Rule adopts this section as proposed. The Commission continues to believe the cutoff for financial institutions maintaining information concerning 5,000 consumers appropriately balances the need for security with the burdens on smaller businesses. The requirements to which exempted financial institutions would still be required to adhere are tailored to balance the importance of adequately securing customer information against the need to limit financial burdens for small businesses. Many of these requirements were already in force as part of the existing Rule—for example, covered financial institutions were already required to design and implement a written information security program, conduct risk assessments, perform an initial assessment of their service providers, and designate one or more employees to oversee information security. For reasons discussed elsewhere in this document, the new requirements that apply to exempted financial institutions, such as the requirement to designate a single qualified individual to oversee information security rather than one or more individuals, will ensure financial institutions of all sizes continue to adequately protect customer information in an environment of increasing cybersecurity risk, while avoiding the imposition of undue burden.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 35, requires Federal agencies to seek and obtain Office of Management and Budget (OMB) approval before undertaking a collection of information directed to ten or more persons.[345] A ''collection of information'' occurs when ten or more persons are asked to report, provide, disclose, or record information in response to ''identical questions.''[346] Applying these standards, neither the Safeguards Rule nor the amendments constitute a ''collection of information.''[347] The Rule calls upon affected financial institutions to develop or strengthen their information security programs in order to provide reasonable safeguards. Under the Rule, each financial institution's safeguards will vary according to its size and complexity, the nature and scope of its activities, and the sensitivity of the information involved. For example, a financial institution with numerous employees would develop and implement employee training and management procedures beyond those that would be appropriate or reasonable for a sole proprietorship, such as an individual tax preparer or mortgage broker. Similarly, a financial institution that shares customer information with numerous service providers would need to take steps to ensure such information remains protected, while a financial institution with no service providers would not need to address this issue. Thus, although each financial institution must summarize its compliance efforts in one or more written documents, the discretionary balancing of factors and circumstances the Rule allows—including the myriad operational differences among businesses it contemplated—does not require entities to answer ''identical questions'' and therefore does not trigger the PRA's requirements.

The amendments to the Rule do not change this analysis because they retain the existing Rule's process-based approach, allowing financial institutions to tailor their programs to reflect the financial institutions' size, complexity, and operations, and to the

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to detect and quickly respond to threats); Remarks of Frederick Lee, Safeguards Workshop Tr., *supra* note 17, at 126–28 (Frederick Lee) (discussing benefits of penetration testing); Remarks of Tom Dugas, Safeguards Workshop Tr., *supra* note 17, at 143 (noting the importance of vulnerability scans); Remarks of Michele Norin, Safeguards Workshop Tr., *supra* note 17, 194–95 (asserting annual reporting by the Qualified Individual to an organization's board or equivalent is beneficial); Remarks of Adrienne Allen, Safeguards Workshop Tr., *supra* note 17, at 201.

[340] *See* Remarks of James Crifasi, Safeguards Workshop Tr., *supra* note 17, at 91–92 (noting companies that control large amounts of consumer data should in most instances implement the full range of data security safeguards, whereas small businesses with less data may need to focus on cybersecurity basics); *see also* Remarks of Lee Waters, Safeguards Workshop Tr., *supra* note 17, at 91 (''[T]he amount of data [that a business holds] would definitely have an influence on whether a business is even going to be attacked.''); Remarks of Rocio Baeza, Safeguards Workshop Tr., *supra* note 17, at 94 (citing the volume of consumer records held by an organization as an important factor in assessing cybersecurity risk).

[341] *See, e.g.,* Remarks of James Crifasi, Safeguards Workshop Tr., *supra* note 17, at 91–92 (noting small businesses with an enormous amount of consumer records need to follow all of the safeguards and ''can't get away with just doing the basics''); *see also* ACA International (comment 45, NPRM) at 11 (''Many small financial institutions, including a number of ACA members, have objectively limited operations in terms of number of employees and revenues, but handle large volumes of consumer account data for each of their clients on whose behalf they are collecting debts.'').

[342] *See. e.g.,* Remarks of Rocio Baeza, Safeguards Workshop Tr., *supra* note 17, at 94 (opining ''the better indicators for cybersecurity risk are going to be two things: The volume of consumer records that a financial institution holds and also the rate of change.''); Remarks of Lee Waters, Safeguards Workshop Tr., *supra* note 17, at 91 (noting the amount of data a company holds influences whether it is going to be attacked).

[343] *See* Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 89–90 (noting the size of a financial institution and the amount and nature of the information it holds factor into an appropriate information security program).

[344] The Commission understands this provision to count all individual consumers about which a financial institution maintains customer information, including both current and former customers. The exemption counts consumers rather than transactions so a financial institution that had 100 transactions with a single customer would count only a single consumer.

[345] 44 U.S.C. 3502(3)(A)(i).

[346] *See* 44 U.S.C. 3502(3)(A).

[347] *See* Standards for Safeguarding Customer Information, 67 FR 36484, 36491 (May 23, 2002).

sensitivity and amount of customer information they collect. For example, amended § 314.4(b) would require a written risk assessment, but each risk assessment will reflect the particular structure and operation of the financial institution and, though each assessment must include certain criteria, these are only general guidelines and do not consist of "identical questions." Similarly, amended § 314.4(h), which requires a written incident response plan, is only an extension of the preexisting requirement of a written information security plan and would necessarily vary significantly based on factors such as the financial institution's internal procedures, which officials within the financial institution have decision-making authority, how the financial institution communicates internally and externally, and the structure of the financial institution's information systems. Likewise, the proposed requirement for Qualified Individuals to produce annual reports under proposed § 314.4(i) does not consist of answers to identical questions, as the content of these reports would vary considerably between financial institutions and Qualified Individuals are given flexibility in deciding what to include in the reports. Finally, the modification of the definition of "financial institution" to include "activities incidental to financial activities" and therefore bring finders under the scope of the Rule do not constitute a "collection of information," and therefore do not trigger the PRA's requirements.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to either provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed Rule, or certify that the proposed Rule will not have a significant impact on a substantial number of small entities.[348] The Commission published an Initial Regulatory Flexibility Analysis in order to inquire into the impact of the Proposed Rule on small entities. In response, the Commission received comments that argued the revision to the Safeguards Rule would be unduly burdensome for smaller financial institutions. The discussion below summarizes these comments and the Commission's response to them.

1. Description of the Reason for Agency Action

The Commission issues these amendments to clarify the Safeguards Rule by including a definition of "financial institution" and related examples in the Safeguards Rule rather than incorporating them from the Privacy Rule by reference. The amendments also expand the definition of "financial institution" in the Rule to include entities engaged in activities incidental to financial activities. This change would bring "finders" within the scope of the Rule. This change harmonizes the Rule with other agencies' rules and requires finders that collect consumers' sensitive financial information to comply with the Safeguards Rule's process-based approach to protect that data.

In addition, the amendments modify the Safeguards Rule to include more detailed requirements for the information security program required by the Rule.

2. Issues Raised by Comments in Response to the IRFA

As stated above, the Commission received several comments that argued the revised Safeguards Rule would impose unduly heavy burdens on smaller businesses. The Small Business Administration's Office of Advocacy commented it was concerned the FTC had not gathered sufficient data as to either the costs or benefits of the proposed changes for small financial institutions. The FTC shares the Office of Advocacy's interest in ensuring regulatory changes have an evidentiary basis. Many of the questions on which the FTC sought public comment, both in the regulatory review and in the proposed rule context, specifically related to the costs and benefits of existing and proposed Rule requirements. Following the initial round of commenting, the Commission conducted the FTC Safeguards Workshop and solicited additional public comments with the explicit goal of gathering additional data relating to the costs and benefits of the proposed changes.[349] As detailed throughout this document, the Commission believes there is a strong evidentiary basis for the issuance of the Final Rule.

The Office of Advocacy also argued the Proposed Rule's requirements were unduly prescriptive and should not be enacted as they apply to small businesses until the Commission can "ascertain the quantitative impact on small entities." [350] The Office of Advocacy, along with other commenters, argued the amendments taken together would create a large burden on smaller financial institutions. In particular, commenters pointed to the requirements that financial institutions appoint a chief information security officer, customer information be encrypted, financial institutions utilize multi-factor authentication, and financial institutions regularly update training programs. These comments and the Commission's response are discussed at length above. Most commenters did not provide any specific estimates of these expenses, but two commenters did provide a summary of their expected expenses.

As discussed in the document, the Commission believes any burden imposed by the revised Rule is substantially mitigated by the fact the Rule continues to be process-based, flexible, and based on the financial institution's size and complexity. In addition, the amendments exempt institutions that maintain information on fewer than 5,000 consumers from certain requirements that require additional written product and might pose a greater burden on smaller entities. The Commission believes most of the entities covered by the exemption will be small businesses. Finally, the Commission believes all financial institutions, including small businesses, that comply with the current Safeguards Rule will already be in compliance with most of the new provisions of the revised Rule as part of their current information security program.

In addition, in response to the comments concerned about the burden of the amendments, the Commission extended the effective date from six months after the publication of the Final Rule to one year after the publication to allow financial institutions additional time to come into compliance with the revised Rule. In addition, in response to comments that argued hiring a chief information security officer would be prohibitively expensive for small financial institutions, the Commission amended the rule to clarify such an employee was not required for all financial institutions. The Final Rule is modified to clarify a financial institution need only appoint an individual who is qualified to coordinate its information security program, and those qualifications will vary based on the complexity of the program and size and nature of the

[348] 5 U.S.C. 603 *et seq.*

[349] See Public Workshop Examining Information Security for Financial Institutions and Information Related to Changes to the Safeguards Rule, 85 FR 13082 (Mar. 6, 2020).

[350] Small Business Administration Office of Advocacy (comment 28, NPRM), at 6.

financial institution. The Commission also clarified employee training programs need to be updated only as necessary, to respond to a comment regular updating would be difficult for smaller financial institutions.

3. Estimate of Number of Small Entities to Which the Amendments Will Apply

As previously discussed in the IRFA, determining a precise estimate of the number of small entities [351]—including newly covered entities under the modified definition of financial institution—is not readily feasible. Financial institutions already covered by the Rule as originally promulgated include lenders, financial advisors, loan brokers and servicers, collection agencies, financial advisors, tax preparers, and real estate settlement services, to the extent they have ''customer information'' within the meaning of the Rule. Finders are also covered under the Final Rule. However, it is not known whether any finders are small entities, and if so, how many there are. The Commission requested comment and information on the number of ''finders'' that would be covered by the Rule's modified definition of ''financial institution,'' and how many of those finders, if any, are small entities. The Commission received no comments that addressed this question.

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The Rule does not impose any reporting or any specific recordkeeping requirements as discussed earlier. *See supra* Section IV (Paperwork Reduction Act). With regard to other compliance requirements, the addition of definitions and examples from the Privacy Rule is not expected to have an impact on covered financial institutions, including those that may be small entities. (The preceding section of this analysis discusses classes of covered financial institutions that may qualify as small entities.) The addition of ''finders'' to the definition of financial institutions imposes the obligations of the Rule on entities that engage in ''finding'' activity and also collect customer information.

The addition of more detailed requirements may require some financial institutions to perform additional risk assessments or monitoring, or to create additional safeguards as set forth in the Proposed Rule. These obligations may require institutions to retain employees or third-party service providers with skills in information security, but, as discussed above, the Commission believes most financial institutions will have already complied with many parts of the Rule as part of their information security programs required under the existing Rule. There may be additional related compliance costs (*e.g.,* legal, new equipment or systems, modifications to policies or procedures), but, as discussed above, the Commission believes these are limited by several factors, including the flexibility of the Rule, the existing safeguards in place to comply with the existing Rule, and the exemption for financial institutions that maintain less consumer information.

Although two commenters provided summaries of the expected expenses for some financial institutions to comply with the Rule, those estimates did not provide sufficient detail to fully evaluate whether they were accurate or representative of other financial institutions and appeared to be based, at least in part, on a misunderstanding of the requirement to appoint a Qualified Individual. The Commission believes, for most smaller financial institutions, there are very low-cost solutions for any additional duties imposed by the Final Rule. This view is supported by the comments of several experts at the Safeguards Rule Workshop.[352]

The Commission believes the protection of consumers' financial information is of the utmost importance and the cost of the safeguards required to provide that protection is justified and necessary. The Commission carefully balanced the cost of these requirements with the need to protect consumer information and has made every effort to ensure the Final Rule retains flexibility so financial institutions can tailor information security programs to the size and complexity of the financial institution, the nature and scope of its activities, and the sensitivity of any customer information at issue.

5. Description of Steps Taken To Minimize Significant Economic Impact, if Any, on Small Entities, Including Alternatives

The standards in the Final Rule allow a small financial institution to develop an information security program appropriate to its size and complexity, the nature and scope of its activities, and the sensitivity of any customer information at issue. The amendments include certain design standards (*e.g.,* a company must implement encryption, authentication, and incident response) in the Rule, in addition to the performance standards (reasonable security) the Rule currently uses. As discussed, while these design standards may introduce some additional burden, the Commission believes many financial institutions' existing information security programs already meet most of these requirements. In addition, the requirements in the Final Rule, like those in the existing Rule, are designed to allow financial institutions flexibility in how and whether they should be implemented. For example, the requirement encryption be used to protect customer information in transit and at rest may be met with effective alternative compensating controls if encryption is infeasible for a given financial institution.

In addition, the amendments exempt financial institutions that maintain relatively small amounts of customer information from certain requirements of the Final Rule. The exemptions would apply to financial institutions that maintain customer information

[351] The U.S. Small Business Administration Table of Small Business Size Standards Matched to North American Industry Classification System Codes (''NAICS'') are generally expressed in either millions of dollars or number of employees. A size standard is the largest a business can be and still qualify as a small business for Federal Government programs. For the most part, size standards are the annual receipts or the average employment of a firm. Depending on the nature of the financial services an institution provides, the size standard varies. By way of example, mortgage and nonmortgage loan brokers (NAICS code 522310) are classified as small if their annual receipts are $8.0 million or less. Consumer lending institutions (NAICS code 522291) are classified as small if their annual receipts are $41.5 million or less. Commercial banking and savings institutions (NAICS codes 522110 and 522120) are classified as small if their assets are $600 million or less. Assets are determined by averaging the assets reported on businesses' four quarterly financial statements for the preceding year. The 2019 Table of Small Business Size Standards is available at *https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf.*

[352] *See, e.g.,* Remarks of Brian McManamon, Safeguards Workshop Tr., *supra* note 17, at 78 (describing virtual CISO services); Matthew Green, Safeguards Workshop Tr., *supra* note 17, at 225 (noting website usage of encryption for data in motion is above 80 percent; ''Let's Encrypt'' provides free TLS certificates; and costs have gone down to the point that if a financial institution is not using TLS encryption for data in motion, it is making an unusual decision outside the norm); Rocio Baeza, Safeguards Workshop Tr., *supra* note 17, at 106 (''[T]he encryption of data in transit has been standard. There's no pushback with that.''); Slides Accompanying the Remarks of Lee Waters, ''Information Security Programs and Smaller Businesses,'' in Safeguards Workshop Slides, *supra* note 72, at 26 (''Estimated Costs of Proposed Changes,'' estimating costs of multi-factor authentication to be $50 for smartcard or fingerprint readers, and $10 each per smartcard); Slides Accompanying Remarks of Wendy Nather, Safeguards Workshop Slides, *supra* note 72, at 37 (chart showing the use of multi-factor authentication solutions such as Duo Push, phone call, mobile passcode, SMS passcode, hardware token, Yubikey passcode, and U2F token in industries such as financial services and higher education).

concerning fewer than ten thousand consumers. The Commission believes exempted financial institutions are generally, but not exclusively, small entities. Such financial institutions are not required to perform a written risk assessment, conduct continuous monitoring or annual penetration testing and biannual vulnerability assessment, prepare a written incident response plan, or prepare an annual written report by the Qualified Individual. These exemptions are intended to reduce the burden on smaller financial institutions. The Commission believes the obligations subject to these exemptions are the ones most likely to cause undue burden on smaller financial institutions.

Exempted financial institutions will still need to conduct risk assessments, design and implement a written information security program with the required elements, utilize qualified information security personnel and train employees, monitor activity of authorized users, oversee service providers, and evaluate and adjust their information security program. These are core obligations under the Rule any financial institution that collects customer information must meet, regardless of size.

The Commission considered allowing compliance with a third-party data security standard, such as the NIST framework, to act as a safe harbor for compliance with the Rule. The Commission, however, determined any reduction of burden created by allowing such safe harbors is offset by issues they would cause. For example, such safe harbors would require the Commission to monitor the third-party standard or standards to determine whether they continued to align with the Safeguards Rule. In addition, the Commission would still have to investigate a company's compliance with the outside standard in any enforcement action. The Commission also does not agree compliance with an outside standard is likely to be less burdensome than complying with the Safeguards Rule itself.

VI. Other Matters

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 314

Consumer protection, Credit, Data protection, Privacy, Trade practices.

For the reasons stated above, the Federal Trade Commission amends 16 CFR part 314 as follows:

PART 314—STANDARDS FOR SAFEGUARDING CUSTOMER INFORMATION

■ 1. The authority citation for part 314 continues to read as follows:

Authority: 15 U.S.C. 6801(b), 6805(b)(2).

■ 2. In § 314.1, revise paragraph (b) to read as follows:

§ 314.1 Purpose and scope.

* * * * *

(b) *Scope.* This part applies to the handling of customer information by all financial institutions over which the Federal Trade Commission (''FTC'' or ''Commission'') has jurisdiction. Namely, this part applies to those ''financial institutions'' over which the Commission has rulemaking authority pursuant to section 501(b) of the Gramm-Leach-Bliley Act. An entity is a ''financial institution'' if its business is engaging in an activity that is financial in nature or incidental to such financial activities as described in section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k), which incorporates activities enumerated by the Federal Reserve Board in 12 CFR 225.28 and 225.86. The ''financial institutions'' subject to the Commission's enforcement authority are those that are not otherwise subject to the enforcement authority of another regulator under section 505 of the Gramm-Leach-Bliley Act, 15 U.S.C. 6805. More specifically, those entities include, but are not limited to, mortgage lenders, ''pay day'' lenders, finance companies, mortgage brokers, account servicers, check cashers, wire transferors, travel agencies operated in connection with financial services, collection agencies, credit counselors and other financial advisors, tax preparation firms, non-federally insured credit unions, investment advisors that are not required to register with the Securities and Exchange Commission, and entities acting as finders. They are referred to in this part as ''You.'' This part applies to all customer information in your possession, regardless of whether such information pertains to individuals with whom you have a customer relationship, or pertains to the customers of other financial institutions that have provided such information to you.

■ 3. Revise § 314.2 to read as follows:

§ 314.2 Definitions.

(a) *Authorized user* means any employee, contractor, agent, customer, or other person that is authorized to access any of your information systems or data.

(b)(1) *Consumer* means an individual who obtains or has obtained a financial product or service from you that is to be used primarily for personal, family, or household purposes, or that individual's legal representative.

(2) For example:

(i) An individual who applies to you for credit for personal, family, or household purposes is a consumer of a financial service, regardless of whether the credit is extended.

(ii) An individual who provides nonpublic personal information to you in order to obtain a determination about whether he or she may qualify for a loan to be used primarily for personal, family, or household purposes is a consumer of a financial service, regardless of whether the loan is extended.

(iii) An individual who provides nonpublic personal information to you in connection with obtaining or seeking to obtain financial, investment, or economic advisory services is a consumer, regardless of whether you establish a continuing advisory relationship.

(iv) If you hold ownership or servicing rights to an individual's loan that is used primarily for personal, family, or household purposes, the individual is your consumer, even if you hold those rights in conjunction with one or more other institutions. (The individual is also a consumer with respect to the other financial institutions involved.) An individual who has a loan in which you have ownership or servicing rights is your consumer, even if you, or another institution with those rights, hire an agent to collect on the loan.

(v) An individual who is a consumer of another financial institution is not your consumer solely because you act as agent for, or provide processing or other services to, that financial institution.

(vi) An individual is not your consumer solely because he or she has designated you as trustee for a trust.

(vii) An individual is not your consumer solely because he or she is a beneficiary of a trust for which you are a trustee.

(viii) An individual is not your consumer solely because he or she is a participant or a beneficiary of an employee benefit plan that you sponsor or for which you act as a trustee or fiduciary.

(c) *Customer* means a consumer who has a customer relationship with you.

(d) *Customer information* means any record containing nonpublic personal information about a customer of a financial institution, whether in paper, electronic, or other form, that is handled

or maintained by or on behalf of you or your affiliates.

(e)(1) *Customer relationship* means a continuing relationship between a consumer and you under which you provide one or more financial products or services to the consumer that are to be used primarily for personal, family, or household purposes.

(2) For example:

(i) *Continuing relationship.* A consumer has a continuing relationship with you if the consumer:

(A) Has a credit or investment account with you;

(B) Obtains a loan from you;

(C) Purchases an insurance product from you;

(D) Holds an investment product through you, such as when you act as a custodian for securities or for assets in an Individual Retirement Arrangement;

(E) Enters into an agreement or understanding with you whereby you undertake to arrange or broker a home mortgage loan, or credit to purchase a vehicle, for the consumer;

(F) Enters into a lease of personal property on a non-operating basis with you;

(G) Obtains financial, investment, or economic advisory services from you for a fee;

(H) Becomes your client for the purpose of obtaining tax preparation or credit counseling services from you;

(I) Obtains career counseling while seeking employment with a financial institution or the finance, accounting, or audit department of any company (or while employed by such a financial institution or department of any company);

(J) Is obligated on an account that you purchase from another financial institution, regardless of whether the account is in default when purchased, unless you do not locate the consumer or attempt to collect any amount from the consumer on the account;

(K) Obtains real estate settlement services from you; or

(L) Has a loan for which you own the servicing rights.

(ii) *No continuing relationship.* A consumer does not, however, have a continuing relationship with you if:

(A) The consumer obtains a financial product or service from you only in isolated transactions, such as using your ATM to withdraw cash from an account at another financial institution; purchasing a money order from you; cashing a check with you; or making a wire transfer through you;

(B) You sell the consumer's loan and do not retain the rights to service that loan;

(C) You sell the consumer airline tickets, travel insurance, or traveler's checks in isolated transactions;

(D) The consumer obtains one-time personal or real property appraisal services from you; or

(E) The consumer purchases checks for a personal checking account from you.

(f) *Encryption* means the transformation of data into a form that results in a low probability of assigning meaning without the use of a protective process or key, consistent with current cryptographic standards and accompanied by appropriate safeguards for cryptographic key material.

(g)(1) *Financial product or service* means any product or service that a financial holding company could offer by engaging in a financial activity under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)).

(2) *Financial service* includes your evaluation or brokerage of information that you collect in connection with a request or an application from a consumer for a financial product or service.

(h)(1) *Financial institution* means any institution the business of which is engaging in an activity that is financial in nature or incidental to such financial activities as described in section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k). An institution that is significantly engaged in financial activities, or significantly engaged in activities incidental to such financial activities, is a financial institution.

(2) Examples of financial institutions are as follows:

(i) A retailer that extends credit by issuing its own credit card directly to consumers is a financial institution because extending credit is a financial activity listed in 12 CFR 225.28(b)(1) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)(4)(F)), and issuing that extension of credit through a proprietary credit card demonstrates that a retailer is significantly engaged in extending credit.

(ii) An automobile dealership that, as a usual part of its business, leases automobiles on a nonoperating basis for longer than 90 days is a financial institution with respect to its leasing business because leasing personal property on a nonoperating basis where the initial term of the lease is at least 90 days is a financial activity listed in 12 CFR 225.28(b)(3) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(F).

(iii) A personal property or real estate appraiser is a financial institution because real and personal property appraisal is a financial activity listed in 12 CFR 225.28(b)(2)(i) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(F).

(iv) A career counselor that specializes in providing career counseling services to individuals currently employed by or recently displaced from a financial organization, individuals who are seeking employment with a financial organization, or individuals who are currently employed by or seeking placement with the finance, accounting or audit departments of any company is a financial institution because such career counseling activities are financial activities listed in 12 CFR 225.28(b)(9)(iii) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(F).

(v) A business that prints and sells checks for consumers, either as its sole business or as one of its product lines, is a financial institution because printing and selling checks is a financial activity that is listed in 12 CFR 225.28(b)(10)(ii) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(F).

(vi) A business that regularly wires money to and from consumers is a financial institution because transferring money is a financial activity referenced in section 4(k)(4)(A) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(A), and regularly providing that service demonstrates that the business is significantly engaged in that activity.

(vii) A check cashing business is a financial institution because cashing a check is exchanging money, which is a financial activity listed in section 4(k)(4)(A) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(A).

(viii) An accountant or other tax preparation service that is in the business of completing income tax returns is a financial institution because tax preparation services is a financial activity listed in 12 CFR 225.28(b)(6)(vi) and referenced in section 4(k)(4)(G) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(G).

(ix) A business that operates a travel agency in connection with financial services is a financial institution because operating a travel agency in connection with financial services is a financial activity listed in 12 CFR 225.86(b)(2) and referenced in section 4(k)(4)(G) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(G).

(x) An entity that provides real estate settlement services is a financial institution because providing real estate settlement services is a financial activity

listed in 12 CFR 225.28(b)(2)(viii) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(F).

(xi) A mortgage broker is a financial institution because brokering loans is a financial activity listed in 12 CFR 225.28(b)(1) and referenced in section 4(k)(4)(F) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(F).

(xii) An investment advisory company and a credit counseling service are each financial institutions because providing financial and investment advisory services are financial activities referenced in section 4(k)(4)(C) of the Bank Holding Company Act, 12 U.S.C. 1843(k)(4)(C).

(xiii) A company acting as a finder in bringing together one or more buyers and sellers of any product or service for transactions that the parties themselves negotiate and consummate is a financial institution because acting as a finder is an activity that is financial in nature or incidental to a financial activity listed in 12 CFR 225.86(d)(1).

(3) *Financial institution* does not include:

(i) Any person or entity with respect to any financial activity that is subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*);

(ii) The Federal Agricultural Mortgage Corporation or any entity chartered and operating under the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*);

(iii) Institutions chartered by Congress specifically to engage in securitizations, secondary market sales (including sales of servicing rights) or similar transactions related to a transaction of a consumer, as long as such institutions do not sell or transfer nonpublic personal information to a nonaffiliated third party other than as permitted by §§ 313.14 and 313.15; or

(iv) Entities that engage in financial activities but that are not significantly engaged in those financial activities, and entities that engage in activities incidental to financial activities but that are not significantly engaged in activities incidental to financial activities.

(4) Examples of entities that are not significantly engaged in financial activities are as follows:

(i) A retailer is not a financial institution if its only means of extending credit are occasional ''lay away'' and deferred payment plans or accepting payment by means of credit cards issued by others.

(ii) A retailer is not a financial institution merely because it accepts payment in the form of cash, checks, or credit cards that it did not issue.

(iii) A merchant is not a financial institution merely because it allows an individual to ''run a tab.''

(iv) A grocery store is not a financial institution merely because it allows individuals to whom it sells groceries to cash a check, or write a check for a higher amount than the grocery purchase and obtain cash in return.

(i) *Information security program* means the administrative, technical, or physical safeguards you use to access, collect, distribute, process, protect, store, use, transmit, dispose of, or otherwise handle customer information.

(j) *Information system* means a discrete set of electronic information resources organized for the collection, processing, maintenance, use, sharing, dissemination or disposition of electronic information containing customer information or connected to a system containing customer information, as well as any specialized system such as industrial/process controls systems, telephone switching and private branch exchange systems, and environmental controls systems that contains customer information or that is connected to a system that contains customer information.

(k) *Multi-factor authentication* means authentication through verification of at least two of the following types of authentication factors:

(1) Knowledge factors, such as a password;

(2) Possession factors, such as a token; or

(3) Inherence factors, such as biometric characteristics.

(l)(1) *Nonpublic personal information* means:

(i) Personally identifiable financial information; and

(ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.

(2) *Nonpublic personal information* does not include:

(i) Publicly available information, except as included on a list described in paragraph (l)(1)(ii) of this section; or

(ii) Any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived without using any personally identifiable financial information that is not publicly available.

(3) For example:

(i) Nonpublic personal information includes any list of individuals' names and street addresses that is derived in whole or in part using personally identifiable financial information (that is not publicly available), such as account numbers.

(ii) Nonpublic personal information does not include any list of individuals' names and addresses that contains only publicly available information, is not derived, in whole or in part, using personally identifiable financial information that is not publicly available, and is not disclosed in a manner that indicates that any of the individuals on the list is a consumer of a financial institution.

(m) *Penetration testing* means a test methodology in which assessors attempt to circumvent or defeat the security features of an information system by attempting penetration of databases or controls from outside or inside your information systems.

(n)(1) *Personally identifiable financial information* means any information:

(i) A consumer provides to you to obtain a financial product or service from you;

(ii) About a consumer resulting from any transaction involving a financial product or service between you and a consumer; or

(iii) You otherwise obtain about a consumer in connection with providing a financial product or service to that consumer.

(2) For example:

(i) *Information included.* Personally identifiable financial information includes:

(A) Information a consumer provides to you on an application to obtain a loan, credit card, or other financial product or service;

(B) Account balance information, payment history, overdraft history, and credit or debit card purchase information;

(C) The fact that an individual is or has been one of your customers or has obtained a financial product or service from you;

(D) Any information about your consumer if it is disclosed in a manner that indicates that the individual is or has been your consumer;

(E) Any information that a consumer provides to you or that you or your agent otherwise obtain in connection with collecting on, or servicing, a credit account;

(F) Any information you collect through an internet ''cookie'' (an information collecting device from a web server); and

(G) Information from a consumer report.

(ii) *Information not included.* Personally identifiable financial information does not include:

(A) A list of names and addresses of customers of an entity that is not a financial institution; and

(B) Information that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses.

(o)(1) *Publicly available information* means any information that you have a reasonable basis to believe is lawfully made available to the general public from:

(i) Federal, State, or local government records;

(ii) Widely distributed media; or

(iii) Disclosures to the general public that are required to be made by Federal, State, or local law.

(2) You have a reasonable basis to believe that information is lawfully made available to the general public if you have taken steps to determine:

(i) That the information is of the type that is available to the general public; and

(ii) Whether an individual can direct that the information not be made available to the general public and, if so, that your consumer has not done so.

(3) For example:

(i) *Government records.* Publicly available information in government records includes information in government real estate records and security interest filings.

(ii) *Widely distributed media.* Publicly available information from widely distributed media includes information from a telephone book, a television or radio program, a newspaper, or a website that is available to the general public on an unrestricted basis. A website is not restricted merely because an internet service provider or a site operator requires a fee or a password, so long as access is available to the general public.

(iii) *Reasonable basis.* (A) You have a reasonable basis to believe that mortgage information is lawfully made available to the general public if you have determined that the information is of the type included on the public record in the jurisdiction where the mortgage would be recorded.

(B) You have a reasonable basis to believe that an individual's telephone number is lawfully made available to the general public if you have located the telephone number in the telephone book or the consumer has informed you that the telephone number is not unlisted.

(p) *Security event* means an event resulting in unauthorized access to, or disruption or misuse of, an information system, information stored on such information system, or customer information held in physical form.

(q) *Service provider* means any person or entity that receives, maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to a financial institution that is subject to this part.

(r) *You* includes each ''financial institution'' (but excludes any ''other person'') over which the Commission has enforcement jurisdiction pursuant to section 505(a)(7) of the Gramm-Leach-Bliley Act.

■ 4. In § 314.3, revise paragraph (a) to read as follows:

§ 314.3 Standards for safeguarding customer information.

(a) *Information security program.* You shall develop, implement, and maintain a comprehensive information security program that is written in one or more readily accessible parts and contains administrative, technical, and physical safeguards that are appropriate to your size and complexity, the nature and scope of your activities, and the sensitivity of any customer information at issue. The information security program shall include the elements set forth in § 314.4 and shall be reasonably designed to achieve the objectives of this part, as set forth in paragraph (b) of this section.

* * * * *

■ 5. Revise § 314.4 to read as follows:

§ 314.4 Elements.

In order to develop, implement, and maintain your information security program, you shall:

(a) Designate a qualified individual responsible for overseeing and implementing your information security program and enforcing your information security program (for purposes of this part, ''Qualified Individual''). The Qualified Individual may be employed by you, an affiliate, or a service provider. To the extent the requirement in this paragraph (a) is met using a service provider or an affiliate, you shall:

(1) Retain responsibility for compliance with this part;

(2) Designate a senior member of your personnel responsible for direction and oversight of the Qualified Individual; and

(3) Require the service provider or affiliate to maintain an information security program that protects you in accordance with the requirements of this part.

(b) Base your information security program on a risk assessment that identifies reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, alteration, destruction, or other compromise of such information, and assesses the sufficiency of any safeguards in place to control these risks.

(1) The risk assessment shall be written and shall include:

(i) Criteria for the evaluation and categorization of identified security risks or threats you face;

(ii) Criteria for the assessment of the confidentiality, integrity, and availability of your information systems and customer information, including the adequacy of the existing controls in the context of the identified risks or threats you face; and

(iii) Requirements describing how identified risks will be mitigated or accepted based on the risk assessment and how the information security program will address the risks.

(2) You shall periodically perform additional risk assessments that reexamine the reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information that could result in the unauthorized disclosure, misuse, alteration, destruction, or other compromise of such information, and reassess the sufficiency of any safeguards in place to control these risks.

(c) Design and implement safeguards to control the risks you identity through risk assessment, including by:

(1) Implementing and periodically reviewing access controls, including technical and, as appropriate, physical controls to:

(i) Authenticate and permit access only to authorized users to protect against the unauthorized acquisition of customer information; and

(ii) Limit authorized users' access only to customer information that they need to perform their duties and functions, or, in the case of customers, to access their own information;

(2) Identify and manage the data, personnel, devices, systems, and facilities that enable you to achieve business purposes in accordance with their relative importance to business objectives and your risk strategy;

(3) Protect by encryption all customer information held or transmitted by you both in transit over external networks and at rest. To the extent you determine that encryption of customer information, either in transit over external networks or at rest, is infeasible, you may instead secure such customer information using effective

alternative compensating controls reviewed and approved by your Qualified Individual;

(4) Adopt secure development practices for in-house developed applications utilized by you for transmitting, accessing, or storing customer information and procedures for evaluating, assessing, or testing the security of externally developed applications you utilize to transmit, access, or store customer information;

(5) Implement multi-factor authentication for any individual accessing any information system, unless your Qualified Individual has approved in writing the use of reasonably equivalent or more secure access controls;

(6)(i) Develop, implement, and maintain procedures for the secure disposal of customer information in any format no later than two years after the last date the information is used in connection with the provision of a product or service to the customer to which it relates, unless such information is necessary for business operations or for other legitimate business purposes, is otherwise required to be retained by law or regulation, or where targeted disposal is not reasonably feasible due to the manner in which the information is maintained; and

(ii) Periodically review your data retention policy to minimize the unnecessary retention of data;

(7) Adopt procedures for change management; and

(8) Implement policies, procedures, and controls designed to monitor and log the activity of authorized users and detect unauthorized access or use of, or tampering with, customer information by such users.

(d)(1) Regularly test or otherwise monitor the effectiveness of the safeguards' key controls, systems, and procedures, including those to detect actual and attempted attacks on, or intrusions into, information systems.

(2) For information systems, the monitoring and testing shall include continuous monitoring or periodic penetration testing and vulnerability assessments. Absent effective continuous monitoring or other systems to detect, on an ongoing basis, changes in information systems that may create vulnerabilities, you shall conduct:

(i) Annual penetration testing of your information systems determined each given year based on relevant identified risks in accordance with the risk assessment; and

(ii) Vulnerability assessments, including any systemic scans or reviews of information systems reasonably designed to identify publicly known security vulnerabilities in your information systems based on the risk assessment, at least every six months; and whenever there are material changes to your operations or business arrangements; and whenever there are circumstances you know or have reason to know may have a material impact on your information security program.

(e) Implement policies and procedures to ensure that personnel are able to enact your information security program by:

(1) Providing your personnel with security awareness training that is updated as necessary to reflect risks identified by the risk assessment;

(2) Utilizing qualified information security personnel employed by you or an affiliate or service provider sufficient to manage your information security risks and to perform or oversee the information security program;

(3) Providing information security personnel with security updates and training sufficient to address relevant security risks; and

(4) Verifying that key information security personnel take steps to maintain current knowledge of changing information security threats and countermeasures.

(f) Oversee service providers, by:

(1) Taking reasonable steps to select and retain service providers that are capable of maintaining appropriate safeguards for the customer information at issue;

(2) Requiring your service providers by contract to implement and maintain such safeguards; and

(3) Periodically assessing your service providers based on the risk they present and the continued adequacy of their safeguards.

(g) Evaluate and adjust your information security program in light of the results of the testing and monitoring required by paragraph (d) of this section; any material changes to your operations or business arrangements; the results of risk assessments performed under paragraph (b)(2) of this section; or any other circumstances that you know or have reason to know may have a material impact on your information security program.

(h) Establish a written incident response plan designed to promptly respond to, and recover from, any security event materially affecting the confidentiality, integrity, or availability of customer information in your control. Such incident response plan shall address the following areas:

(1) The goals of the incident response plan;

(2) The internal processes for responding to a security event;

(3) The definition of clear roles, responsibilities, and levels of decision-making authority;

(4) External and internal communications and information sharing;

(5) Identification of requirements for the remediation of any identified weaknesses in information systems and associated controls;

(6) Documentation and reporting regarding security events and related incident response activities; and

(7) The evaluation and revision as necessary of the incident response plan following a security event.

(i) Require your Qualified Individual to report in writing, regularly and at least annually, to your board of directors or equivalent governing body. If no such board of directors or equivalent governing body exists, such report shall be timely presented to a senior officer responsible for your information security program. The report shall include the following information:

(1) The overall status of the information security program and your compliance with this part; and

(2) Material matters related to the information security program, addressing issues such as risk assessment, risk management and control decisions, service provider arrangements, results of testing, security events or violations and management's responses thereto, and recommendations for changes in the information security program.

■ 6. Revise § 314.5 to read as follows:

§ 314.5 Effective date.

Section 314.4(a), (b)(1), (c)(1) through (8), (d)(2), (e), (f)(3), (h), and (i) are effective as of December 9, 2022.

■ 7. Add § 314.6 to read as follows:

§ 314.6 Exceptions.

Section 314.4(b)(1), (d)(2), (h), and (i) do not apply to financial institutions that maintain customer information concerning fewer than five thousand consumers.

By direction of the Commission, Commissioners Phillips and Wilson dissenting.

April Tabor,

Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix—Statements Issued on October 27, 2021

Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding Regulatory Review of the Safeguards Rule

Today the FTC is significantly strengthening the Safeguards Rule,[1] first promulgated by the FTC twenty years ago pursuant to a Congressional directive to protect personal information that is stored by financial institutions. This revamping—the first time in the Rule's history—is sorely needed. In the twenty years since the Rule was first issued, the complexity of information security has increased drastically, the use of computer networks in every aspect of life has expanded exponentially, and, most notably, an unending chain of damaging data breaches caused by inadequate security have cost Americans heavily.[2] The amendments adopted today require financial institutions to develop information security programs that can meet the challenges of today's security environment.

For Americans, the harms stemming from the types of security vulnerabilities that this Rule addresses are all too real. Victims of breaches have their most sensitive information exposed, making them more vulnerable to identity theft, phishing attacks, and other forms of fraud.[3] In 2018, almost 10 percent of Americans suffered some form of identity theft, costing many of them hundreds of dollars and dozens of hours of time, an experience that many describe as distressing.[4] For some, the cost is much higher, with victims losing tens of thousands of dollars.[5]

The Rule amendments the FTC is issuing today are strongly supported by the evidence in the record.[6] The evidence gathered from information security experts, industry associations, and consumer groups—those with hands-on experience in the area and knowledge of the field—decisively show that the amendments are necessary. Of course, all of this information supplements the experience that Commission staff has obtained over twenty years of enforcing the Rule, and gained through investigations of companies' data security practices under the FTC's deception and unfairness authority.

The dissent's conclusion that these amendments are unnecessary is belied by both the reality of rampant data security breaches as well as the robust evidentiary record. The recent history of major data breaches affecting millions of consumers shows that more needs to be done to protect consumers' sensitive information. Despite the increasing sophistication of cyberattacks, many businesses continue to offer inadequate security.[7] In particular, the massive Equifax breach, which the FTC alleged was caused by inadequate data security that could have been easily corrected by the company, is a glaring example of how a financial institution's lax security practices can have devastating consequences for Americans.[8] The dissent's suggestion that our current framework is sufficient falls flat in the face of such a stark example of the harm that can arise from avoidable lax security practices by covered financial institutions. Moreover, the dissent's complaint that the rule is also informed by evidence arising from breaches and practices occurring in other types of industries misses the mark. Not only is there substantial evidence in the rulemaking record clearly illustrating security lapses of financial institutions that are covered by the Rule,[9] but the implication that we shouldn't use our broader knowledge of common security pitfalls is unwise.

The record evidence also shows that the amendment's requirements track bedrock principles of data security and represent proven elements of effective data security programs that reduce the risk of breaches.[10]

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[1] 16 CFR part 314. Pursuant to the Gramm Leach Bliley Act (''GLB'' or ''GLBA''), Public Law 106–102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 and 15 U.S.C.), the Commission promulgated the Safeguards Rule in 2001.

[2] *See, e.g.*, 2020 Internet Crime Report, Fed. Bur. Investigations,at 20 (Mar. 2021) (reporting consumer loss of over $128 million resulting from corporate data breaches to those who filed complaints in 2020 alone); Int'l Bus. Mach, Cost of a Data Breach, at 4 (2021) (estimating that the average cost of single data breach has risen to $4.24 million).

[3] 2013 Identity Fraud Report: Data Breaches Becoming a Treasure Trove for Fraudsters, Javelin Strategy, at 1 (Feb. 2013) (reporting that 1 in 4 recipients of a data breach notification become victims of identity theft); Michelle Singletary, *Your online profile may help identity thieves, Washington Post* (Feb. 28, 2012), *https://www.washingtonpost.com/business/economy/michelle-singletary-your-online-profile-may-help-identity-thieves/2012/02/28/gIQAXFjygR_story.html* (reporting that recipients of data breach letters are 9.5% more likely to suffer identity theft).

[4] *See* Erika Harrell, *Victims of Identity Theft, 2018,* U.S. Dep't of Just., at 1 (Apr. 2021), *https://bjs.ojp.gov/content/pub/pdf/vit18.pdf.*

[5] *See* 2021 Consumer Aftermath Report, Identity Theft Resource Center (2021), at 6 (finding that in a study of 427 identity crime victims, 21% of them suffered losses of over $20,000).

[6] The Commission first sought public comments on the proposed amendments in April 2019. *See* Privacy of Consumer Financial Information Rule Under the Gramm-Leach-Bliley Act, 84 FR 13150; Standards for Safeguarding Customer Information, 84 FR 13158 (April 4, 2019). The agency received almost 50 comments from consumer groups, industry associations, and data security experts. *See* FTC Seeks Comment on Proposed Amendments to Safeguards and Privacy Rules, 16 CFR part 314, Project No. P145407, (FTC–2019–0019) (''2019 Safeguards and Privacy NPRM ''), *https://www.regulations.gov/docket/FTC-2019-0019/document.* Further, the Commission conducted a workshop discussing the proposed amendments with information security professionals and experts, including IT staff from financial institutions covered by the Safeguards Rule. *See* Transcript, Information Security and Financial Institutions: An FTC Workshop to Examine Safeguards Rule, Fed. Trade Comm'n (July 13, 2020) (''Safeguards Workshop''), *https://www.ftc.gov/system/files/documents/public_events/1567141/transcript-glb-safeguards-workshop-full.pdf.* Connected with the workshop, the Commission sought and received another round of public comments on the amendments. The eleven relevant public comments relating to the subject matter of the July 13, 2020, workshop can be found here: Postponement of Public Workshop Related to Proposed Changes to the Safeguards Rule, 85 FR 23354 (FTC–2020–0038) (Apr. 27, 2020) (''Workshop Comment Docket''), *https://www.regulations.gov/document/FTC-2020-0038-0001.*

[7] *See, e.g.,* Electronic Privacy Information Center, Comment Letter No. 55 on 2019 Safeguards and Privacy NPRM (FTC–2019–0019), at 3 (Aug. 1, 2019) (citing dramatic increase in data breaches at financial services firms affecting millions of consumers), *https://www.regulations.gov/comment/FTC-2019-0019-0055;* Consumer Reports, Comment Letter No. 52 on 2019 Safeguards and Privacy NPRM (FTC–2019–0019) (Aug. 2, 2019), *https://www.regulations.gov/comment/FTC-2019-0019-0052* (noting several high profile data breaches at financial institutions as evidence for the need for stronger regulation); Inpher, Inc., Comment Letter No. 50 on 2019 Safeguards and Privacy NPRM (FTC–2019–0019), at 1 (Aug. 1, 2019), *https://www.regulations.gov/comment/FTC-2019-0019-0050* (pointing to major breaches at financial institutions as evidence for the need of stronger security regulations); Independent Community Bankers of America, Comment Letter No. 35 on 2019 Safeguards and Privacy NPRM (FTC–2019–0019) (Aug. 2, 2019), *https://www.regulations.gov/comment/FTC-2019-0019-0035* (noting that FTC-regulated financial institutions are subject to less stringent security requirements than those regulated by banking agencies, even though many handle the same types of information as those financial institutions); National Consumer Law Center et al., Comment Letter No. 58 on 2019 Safeguards and Privacy NPRM (FTC–2019–0019) (Aug. 2, 2019), *https://www.regulations.gov/document/FTC-2019-0019-0058* (arguing that the recent Equifax breach showed the need for strengthening the Safeguards Rule); Cisco Systems, Inc., Comment Letter No. 51 on 2019 Safeguards and Privacy NPRM (FTC–2019–0019) (Aug. 2, 2019), *https://www.regulations.gov/document/FTC-2019-0019-0051* (noting that sophisticated hacking techniques used in state sponsored attacks are likely to be adopted by ''more garden variety, less sophisticated hackers.''); Safeguards Workshop, at 24–26 (July 13, 2020) (remarks of Chris Cronin) (stating that many companies do not conduct complete or adequate risk assessments). *Id.* at 38–39 (remarks of Serge Jorgensen) (noting that businesses' understanding of the need for security has improved, but that they continue to struggle to implement controls across business units). *Id.* at 39–41 (remarks of Chris Cronin) (stating that, ''as a rule,'' businesses of all sizes are ''behind'' on cybersecurity, attributing this in part to consultants whose advice about reasonable security is motivated by a desire to ''make the clients happy''). *Id.* at 43 (remarks of Pablo Molina) (citing ''the mounting losses that come from cybercrime'' as evidence that many businesses are ''falling behind'' cybercriminals). *Id.* at 114 (remarks of Brian McManamon) (noting that ''the proposed changes are the minimum necessary to have an effective security program in place.''). *Id.* at 44 (remarks of Sam Rubin) (noting that, in his experience, companies make significant investments in technical security measures but that investment in personnel to oversee and use those measures is ''a huge shortcoming that I'm seeing in the field.''); The Clearing House Association LLC, Comment Letter No. 49 on 2019 Safeguards and Privacy NPRM (FTC–2019–0019), at 7–9 (Aug. 2, 2019), *https://www.regulations.gov/comment/FTC-2019-0019-0049* (citing a 2018 study by the Center for Financial Inclusion that showed widespread data security failures among financial technology companies around the globe).

[8] Press Release, Fed. Trade Comm'n, Equifax to Pay $575 Million as Part of Settlement with FTC, CFPB, and States Related to 2017 Data Breach, (July 22, 2019), *https://www.ftc.gov/news-events/press-releases/2019/07/equifax-pay-575-million-part-settlement-ftc-cfpb-states-related.*

[9] *See infra,* note 7.

[10] *See, e.g.,* for Single Qualified Individual Requirement: National Consumer Law Center et al.,

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supra note 7, at 3 (arguing that a clear line of reporting with a single responsible individual could have prevented the Equifax consumer data breach); Safeguards Workshop, at 182–84 (remarks of Adrienne Allen) (stating that without a single responsible individual, information security staff ''can fall into traps of each relying on someone else to make a hard call . . . [In a program without a single coordinator] issues can sometimes fall through the cracks.''). *Id.* at 184–85 (remarks of Michele Norin) (''I think it's extremely important to have a person in front of the information security program. I think that there are so many components to understand, to manage, to keep an eye on. I think it's difficult to do that if it's part of someone else's job. And so I found that it's extremely helpful to have a person in charge of that program just from a pure basic management perspective and understanding perspective.''); Risk Assessment Requirement: *Id.* at 25 (remarks of Chris Cronin) (stating that evaluating the likelihoods and impacts of potential security risks and evaluating existing controls is an important component of a risk assessment). *Id.* at 29–30 (remarks of Serge Jorgensen) (emphasizing the importance of risk assessments as tools for adjusting existing security measures to account for both current and future security threats); Encryption Requirement: Princeton University Center for Information Technology Policy, Comment Letter No. 54 on 2019 Safeguards and Privacy NPRM (FTC–2019–0019), at 3 (Aug. 2, 2019), *https://www.regulations.gov/document/FTC-2019-0019-0054* (noting the effectiveness of encryption); Inpher, *Inc., supra* note 7, at 4; Safeguards Workshop, at 225 (remarks of Matthew Green) (noting website usage of encryption is above 80 percent; ''Let's Encrypt'' provides free TLS certificates; and costs have gone down to the point that if a financial institution is not using TLS encryption for data in motion, it is making an unusual decision outside the norm). *Id.* at 106 (remarks of Rocio Baeza) (''[T]he encryption of data in transit has been standard. There's no pushback with that.''); Multifactor Authentication Requirement: Princeton University Center for Information Technology Policy, *supra* note 10, at 6–7; Electronic Privacy Information Center, *supra,* note 7, at 8; National Consumer Law Center et al., *supra* note 7, at 2; Safeguards Workshop, at 102 (remarks of Brian McManamon) (stating that his company TECH LOCK supports requiring multi-factor authentication for users connecting from internal networks). *Id.* at 266 (remarks of Matthew Green) (explaining that passwords are not enough of an authentication feature but when MFA is used and deployed, the defenders can win against attackers). *Id.* at 239 (describing how because smart phones have modern secure hardware processors, biometric sensors and readers built in, increasingly consumers can get the security they need through the devices they already have by storing cryptographic authentication keys on the devices and then using the phone to activate them); Incident Response Plan: Credit Union National Association, Comment Letter No. 30 on 2019 Safeguards and Privacy NPRM (FTC–2019–0019), at 2 (Aug. 1, 2019), *https://www.regulations.gov/document/FTC-2019-0019-0030* (noting that that an incident response plan ''helps ensure that an entity is prepared in case of an incident by planning how it will respond and what is required for the response.''). Consumer Reports, *supra* note 7, at 6 (observing that ''a written incident response plan is an essential component of a good security system.''); HITRUST, Comment Letter No. 18 on 2019 Safeguards and Privacy NPRM (FTC–2019–0019), at 2 (July 1, 2019), *https://www.regulations.gov/document/FTC-2019-0019-0018* (commenting that incident response plans can help organizations ''to better allocate limited resources.). Safeguards Workshop, at 52 (remarks of Serge Jorgenson) (observing that a prompt response to an incident can prevent a ''threat actor running around in my environment for days, months, years, and able to access anything they want.''); Board Reporting Requirement: Workshop participants Adrienne Allen, Karthik Rangarajan, and Michele Norin each emphasized that such reporting can aid decision making. *See* Safeguards Workshop, at 201–09; *see also* Rocio Baeza, Comment Letter No. 12 on Workshop Comment Docket (FTC–2020–0038), at 3–8 (Aug. 12, 2020), *https://www.regulations.gov/comment/FTC-2020-0038-0012* (supporting requirement and providing sample report form and compliance questionnaire); Juhee Kwon et al., *The Association Between Top Management Involvement and Compensation and Information Security Breaches,* J. L. Info. Sys., at 219–236 (2013) (''. . . the involvement of an IT executive decreases the probability of information security breach reports by about 35 percent . . .''); Julia L. Higgs et al., *The Relationship Between Board-Level Technology Committees and Reported Security Breaches,* J. L. Info. Sys., at 79–98 (2016) (''[A]s a technology committee becomes more established, its firm is not as likely to be breached. To obtain further evidence on the perceived value of a technology committee, this study uses a returns analysis and finds that the presence of a technology committee mitigates the negative abnormal stock returns arising from external breaches.'').

The amended Rule requires that financial institutions' information security plans address such core concepts as controlling who is accessing their system,[11] understanding their system,[12] monitoring what users do in their system,[13] and protecting the information contained in their system.[14] More particularly, it also requires encryption of customer information and the use of multifactor authentication. Adopting these practices will reduce the chances of a breach occurring.

In fact, it is likely that the massive breach at Equifax could have been prevented or mitigated by adopting practices required by these amendments. For example, the Commission's complaint alleged that the vulnerability that led to the breach was not detected for four months because Equifax's automated vulnerability scanner was not configured to scan all of the networks in the system, something that could have been prevented if Equifax had performed an adequate inventory of its system as required by § 314.4(c)(2) of the amended Rule.[15] Equifax allegedly did not encrypt the data of 145 million consumers as required by § 314.4(c)(3) of the amended Rule; such encryption might have prevented the intruders from misusing individuals' sensitive information, even if they were able to obtain it.[16] In addition, the complaint charged that Equifax did not adequately monitor activity on its network, which allowed intruders to access and use their network undetected for months; such monitoring will be required by § 314.4(c)(8).[17] Finally, and perhaps most importantly, Equifax split authority over its information security program between two people, which caused failures of communications and oversight.[18] Indeed, the U.S. House Committee on Oversight and Government identified Equifax's organization as one of the major causes of the breach.[19] Appointing a single Qualified Individual as the coordinator of Equifax's information security system, as required by § 314.4(a) of the amended Rule, could have helped prevent or limit the scope of one of the largest breaches in American history. By implementing the measures required in the amended Rule, financial institutions will prevent or mitigate many future breaches, protecting consumers and their information.

There is also no support for the dissent's notion that the amendments eliminate financial institutions' flexibility in a way that will hurt smaller businesses. The amendments require that information security programs address certain aspects of security, but do not prescribe any particular method for doing so. Specifically, the amended Rule requires that the information security program address areas such as access control, change management, information disposal, and monitoring user activity, but it does not require that financial institutions take any particular action in those areas. In fact, the Rule recognizes the concerns of small businesses and adopts appropriate flexibilities. Section 314.6 of the revised Rule exempts financial institutions that maintain information concerning fewer than 5,000 consumers from certain requirements. In addition, financial institutions with smaller and simpler systems may determine that minimal procedures are required in those areas, and they retain flexibility under these amendments to follow that route. Moreover, the record contains significant evidence that there are free and low-cost solutions for smaller businesses with more modest data security needs.[20]

[11] 16 CFR 314.4(c)(1).

[12] 16 CFR 314.4(c)(2).

[13] 16 CFR 314.4(c)(8).

[14] 16 CFR 314.4(c)(3) and 314.4(c)(5).

[15] Compl. for Permanent Injunction & Other Relief., *FTC* v. *Equifax, Inc.,* No. 1:19–mi–99999–UNA (N.D. Ga. July 22, 2019) ¶ 17.

[16] *Id.* ¶ 22.E.

[17] *Id.* ¶ 22.F.

[18] While the dissent questions the requirements in the Rule regarding elevating security issues to the top levels of the corporate structure, research supports these requirements. Boards are becoming increasingly involved in cybersecurity governance, as demonstrated by surveys of practitioners and the growth of literature aimed at educating board members on cybersecurity. Some studies suggest that Board attention to data security decisions can dramatically improve data safeguarding. For example, one study found a 35% decrease in the probability of information security breaches when companies include the Chief Information Security Officer (or equivalent) in the top management team and the CISO has access to the board. *See* Juhee Kwon et al., *supra* note 10. *see also* Safeguards Workshop, at 201–09.

[19] U.S. H. Rep. Comm. on Oversight and Gov. Reform, Majority Staff Report on The Equifax Data Breach, 115th Cong., at 55–62 (Dec. 2018).

[20] *See, e.g.,* Safeguards Workshop, at 267 (remarks of Wendy Nather) (''we have a lot more options, a lot more technologies today than we did before that are making both of these solutions, both encryption and MFA, easier to use, more flexible, in some cases cheaper, and we should be encouraging their adoption wherever possible.''). *Id.* at 265–66 (remarks of Matthew Green) (''I think that we're in a great time when we've reached the point where we can actually mandate that encryption be used. . . . And we've reached the point where now it is something that's come to be and we can actually build well.''). *Id.* at 229–30 (remarks of Randy Marchany) (noting that encryption is already built into the Microsoft Office environment and that a number of Microsoft products, such as

We believe that these amendments represent a much-needed step forward in protecting Americans' data security. Given growing recognition that the requirements captured in the Rule represent best practices, some financial institutions seem to have already taken appropriate steps to protect customers' data and meet the requirements set out in the amended Rule. It is important, though, to require those that lag behind to strengthen their security and prevent future breaches *before* they occur, rather than in the wake of a devastating breach after the damage has already been done.

Joint Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson in the Matter of the Final Rule Amending the Gramm-Leach-Bliley Act's Safeguards Rule

In 1999, Congress passed the Gramm-Leach-Bliley Act, which charged the Federal Trade Commission (the ''Commission'') with promulgating and enforcing a regulation to ensure that financial firms take care to safeguard the information they collect from consumers.[1] The Safeguards Rule [2] has established more data security obligations for consumer financial data than for data collected by non-financial firms, a gap that underlies our view—shared by our colleagues—that congressional data security legislation is warranted.

One hallmark of the Safeguards Rule is its recognition that, in a world of continuously evolving threats and standards, a one-size-fits-all approach to data security may not work. Under Democratic and Republic leadership, the Commission has repeatedly emphasized this principle.[3] We have traditionally eschewed an overly prescriptive approach, both to data security in general and to the Safeguards Rule itself.[4] The FTC has never demanded ''perfect'' security because the Commission has recognized that data security is neither cost- nor consequence-free, and often requires tradeoffs.[5] At the same time, during our tenure, the Commission has continued to enforce data security standards vigorously, including those embodied in the Safeguards Rule.[6]

In March 2019, the Commission approved a Notice of Proposed Rulemaking (''NPRM'') proposing additional requirements to the Safeguards Rule. While we recognize the value in regularly reviewing our rules and updating them as needed, we dissented then because the proposal lacked data demonstrating the need for and efficacy of the proposed amendments.[7]

We appreciate Staff's diligent work on this rule and many of the modifications made to the original proposal. The **Federal Register** Notice does a commendable job of presenting the full panoply of comments that the Commission received. The FTC is at its best when it seeks input from experts, industry, and consumer groups; this rulemaking process reflects a commitment to that approach. But the comment period did not produce data demonstrating that the previous iteration of the rule was inadequate, or that the costs and consequences of the new prescriptive obligations will translate into actual consumer safeguards. That was our concern, and the comments did not allay it.

In fact, as several commenters observed, the new prescriptive requirements could weaken data security by diverting finite resources towards a check-the-box compliance exercise and away from risk management tailored to address the unique security needs of individual financial institutions. It is ironic that the revisions mandate a risk assessment and then order firms to prioritize specified precautions ahead of the risks and needs counseled by that assessment. The revisions also impose intrusive corporate governance obligations wholly unsupported by record evidence of prevalent failures at the senior managerial level.

For these reasons, which we explain more fully below, we dissent.

The Record Fails To Provide a Basis for the New Requirements

We expressed concern in March 2019 that some of the proposals in the NPRM tracked issues that arose in cases involving firms not covered by the Safeguards Rule. That is, those failures occurred at companies to which the Safeguards Rule did not apply. And heightened obligations imposed in a settlement context, when a company has engaged in risky and allegedly illegal behavior, may not be appropriate for all market participants. We did not see evidence that covered firms had a systematic problem—*i.e.,* that the Rule was not

Spreadsheets, Excel, Docs, and PowerPoint, support that encryption feature). *Id.* at 225. *Id.* at 106 (Remarks of Rocio Baeza) (''[T]he encryption of data in transit has been standard. There's no pushback with that.''). *Id.* at 74 (remarks of James Crifasi) (stating that car dealerships can rely on existing staff for the role of Qualified Individual). *Id.* at 78–79 (remarks of Lee Waters) (stating that any dealership with any IT staff at all would have someone who could assume the role of ''qualified individual,'' perhaps requiring some additional research or outside help). *Id.* at 81–82 (remarks of Rocio Baeza) (stating that companies may use an existing employee for the role and ''for any areas where there may be skill gaps, that can be supplemented with either certifications or some type of education.''). *Id.* at 89–90 (remarks of Brian McManamon) (noting that the size of a financial institution and the amount and nature of the information that it holds factor into an appropriate information security program); Presentation Slides, Inf. Security & Fin. Inst.: An FTC Workshop of GLB Safeguards, at 27–28 (July 13, 2020) (slides Accompanying remarks of Rocio Baeza, ''Models for Complying to the Safeguards Rule Changes) (''Safeguards Workshop Presentation Slides'') *https://www.ftc.gov/system/files/documents/public_events/1567141/slides-glb-workshop.pdf* (describing three different compliance models: In-house, outsource, and hybrid, with costs ranging from $199 per month to more than $15,000 per month). Safeguards Workshop, at 81–83 (remarks of Rocio Baeza) (describing three compliance models in more detail); Safeguards Workshop Presentation Slides, at 29 (remarks of Brian McManamon, ''Sample Pricing'') (estimating the cost of cybersecurity services based on number of endpoints). *Id.* at 83–85.

[1] Public Law 106–102, 113 Stat. 1338 (1999). Notably, even as it transferred authority for other consumer financial regulation to the Consumer Financial Protection Bureau in the Dodd-Frank Act, Congress left this rulemaking authority with the Commission, a vote of confidence in our approach. 15 U.S.C. 6804(a)(1).

[2] 16 CFR part 314.

[3] *See, e.g.,* Federal Trade Commission, Statement Marking the FTC's 50th Data Security Settlement, at 1 (Jan. 31, 2014), *https://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf* (''FTC Data Security Statement'') (''Through its settlements, testimony, and public statements, the Commission has made clear that it does not require perfect security; reasonable and appropriate security is a continuous process of assessing and addressing risks; there is no one-size-fits-all data security program; and the mere fact that a breach occurred does not mean that a company has violated the law.''); *see also* Prepared Statement of the Federal Trade Commission: Before the Committee on Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations, 116 Cong. 3 (2019) (statement of Andrew Smith, Director, Bureau of Consumer Protection) (''[t]here is no one-size-fits-all data security program . . .''), *https://www.ftc.gov/system/files/documents/public_statements/1466607/commission_testimony_re_data_security_senate_03072019.pdf.* Federal Trade Commission, *Stick with Security: A Business Blog Series* (Oct. 2017), *https://www.ftc.gov/news-events/blogs/business-blog/2017/10/stick-security-ftc-resources-your-business.*

[4] FTC Notice of Proposed Rulemaking, 84 FR 13158 (Apr. 4, 2019), *https://www.federalregister.gov/documents/2019/04/04/2019-04981/standards-for-safeguarding-customer-information* (''The Commission continues to believe that a flexible, non-prescriptive Rule enables covered organizations to use it to respond to the changing landscape of security threats, to allow for innovation in security practices, and to accommodate technological changes and advances.'').

[5] Under the FTC's unfairness authority, the Commission brings cases when companies under its jurisdiction fail to employ ''reasonable'' security. FTC Data Security Statement, *supra* note 3 (''The touchstone of the Commission's approach to data security is reasonableness: a company's data security measures must be reasonable and appropriate in light of the sensitivity and volume of consumer information it holds, the size and complexity of its business, and the cost of available tools to improve security and reduce vulnerabilities.'').

[6] *See, e.g., In the matter of Ascension Data & Analytics, LLC,* FTC File No. 1923126 (2020), *https://www.ftc.gov/enforcement/cases-proceedings/192-3126/ascension-data-analytics-llc-matter; U.S.* v. *Mortgage Solutions FCS, Inc.,* Civ. Action No. 4:20–cv–110 (N.D. Cal 2020), *https://www.ftc.gov/enforcement/cases-proceedings/182-3199/mortgage-solutions-fcs-inc; FTC* v. *Equifax, Inc.,* Civ. Action No. 1:19–cv–03297–TWT (N.D. Ga. 2019), *https://www.ftc.gov/enforcement/cases-proceedings/172-3203/equifax-inc.*

[7] Dissenting Statement of Commissioner Noah Joshua Phillips and Commissioner Christine S. Wilson, Review of Safeguards Rule (Mar. 5, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1466705/reg_review_of_safeguards_rule_cmr_phillips_wilson_dissent.pdf; See, e.g.,* Noah Joshua Phillips (@FTCPhillips), Twitter (Mar. 5, 2019, 3:08 p.m.), *https://twitter.com/FTCPhillips/status/1103024596247289867* (''A reexamination of the Rule may indeed be appropriate and necessary; but, before we borrow from other existing schemes, we must first understand whether the existing Rule is inadequate for its purpose and whether the data supports the efficacy of the alternatives.''); Christine S. Wilson, Remarks at NAD 2020, One Step Forward, Two Steps Back: Sound Policy on Consumer Protection Fundamentals 7–8 (Oct. 5, 2020), *https://www.ftc.gov/system/files/documents/public_statements/1581434/wilson_remarks_at_nad_100520.pdf.*

working.[8] The Commission can—and does—promote best practices and reasonable care requirements through speeches, guidance, reports, and the like, to help financial firms evaluate whether they are taking proper precautions.[9] But new rules that set concrete standards for all companies, regardless of risk, require more justification. Such rules make companies liable for penalties, and could focus efforts on compliance to address penalty deterrence rather than risk.

Dozens of commenters have shared their views on the Safeguards proposal, and FTC Staff held a workshop to evaluate the need to change the Rule. While there is no shortage of *opinions* as to the need and benefits of the proposed changes (nor is there a shortage of opinions critiquing the new requirements), this process failed to provide evidence of market failure or other systemic problems[10] necessitating the proposed changes for firms already governed by the requirements of the Rule. In fact, one commenter that generally supported the rule changes noted that it was not clear that the new rules would have prevented the alleged lapses that led to the Equifax breach, the largest Safeguards case on record.[11]

That these proposals may constitute best practices appropriate to certain firms or situations does not justify imposing them on every firm and in every situation.[12] The FTC historically has been appropriately cautious in mandating specific security practices, and we see no sound basis in the rulemaking record to change that approach.[13]

The Revised Safeguards Rule Is Premature

In our 2019 statement, we expressed concern that the proposals in the NPRM were premature. They are based in large part on the New York Department of Financial Service data security rules,[14] adopted in 2016. At the same time, Congress and the Executive Branch were evaluating new privacy and data security legislation that may overlap with the proposed amendments.[15]

Since our original statement, we have been provided with no additional information on the impact and efficacy of the NYDFS rules.[16] Without this critical input, we do not believe adopting wholesale the NYDFS approach is the prudent course.[17] We would have been better served by monitoring the efficacy, costs and unintended consequences of the NYDFS rules during this ramp-up period. Imposing similar rules on far more firms across a broader array of industries makes even less sense.

Congress, with the encouragement of the Commission, has continued to consider legislative initiatives in this area. Throughout 2019, 2020 and 2021, we saw the release of several draft bills addressing data security, as well as privacy.[18] And other developments, such as data security requirements of the General Data Protection Regulation[19] and new cybersecurity incidents[20] ensure that

[8] Commenters on the proposed rules reflected these same concerns. *See, e.g,* CTIA (comment 34, NPRM) at 4, *https://www.regulations.gov/comment/FTC/2019-0019-0034* (observing that most examples cited in the NPRM are from non-financial firms and arguing that the FTC's action in Equifax demonstrated that the agency is able to use to the current framework effectively); Global Privacy Alliance (comment 38, NPRM) at 4, *https://www.regulations.gov/comment/FTC/2019-0019-0038* (the changes to the rules started not from FTC experience but rather from state laws); Electronic Transactions Association (comment 27, NPRM), *https://www.regulations.gov/comment/FTC/2019-0019-0027* (the current rule is effective and there are no harms that warrant these changes); National Automobile Dealers Association (comment 46, NPRM) at 6, *https://www.regulations.gov/comment/FTC/2019-0019-0046* (''[N]ew requirements for *all* financial institutions should not be based on unrelated enforcement actions that may not be generally applicable to all financial institutions subject to the Rule.'').

[9] Federal Trade Commission, *Data Security, https://www.ftc.gov/datasecurity.*

[10] One study cited by commenters pointed toward widespread problems among fintech firms ''including misuse of cryptography, use of weak cryptography, and excessive permission requirements.'' The Clearing House Association LLC (comment 49, NPRM) at 7–9, *https://www.regulations.gov/comment/FTC/2019-0019-0049* (citing a 2018 study by the Center for Financial Inclusion, *https://content.centerforfinancialinclusion.org/wp-content/uploads/sites/2/2018/09/CFI43-CFI_Online_Security-Final-2018.09.12.pdf*). This study included firms from around the world and did not indicate that this limited set of issues arose in U.S. firms covered by the Safeguards Rule. *See also* National Automobile Dealers Association (comment 46, NPRM) at 46, *https://www.regulations.gov/comment/FTC/2019-0019-0046* (''These requirements have largely not been proven to be necessary or effective.''). Participants at the FTC's July 2020 Workshop generally agreed that companies could invest more in security, but the fact of under-investment does not mean that these changes to the Safeguards Rule constitute the best course of action. FTC, Information Security and Financial Institutions: An FTC Workshop to Examine Safeguards Rule Tr. at 23–70 (July 13, 2020), *https://www.ftc.gov/system/files/documents/public_events/1567141/transcript-glb-safeguards-workshop-full.pdf* (''Safeguards Workshop'').

[11] Consumer Reports (comment 52, NPRM), *https://www.regulations.gov/comment/FTC/2019-0019-0052* at 2. Not all the commenters agreed with this perspective, and some felt that these rules would have prevented the Equifax breach. *See* National Consumer Law Center and others (comment 58, NPRM), *https://www.regulations.gov/comment/FTC/2019-0019-0058.* Chair Khan and Commissioner Slaughter focus on the Equifax breach to justify the adoption of prescriptive and complex data security measures, measures that match the sophistication and complexity of the consumer financial data managed by one of the largest credit bureaus. But even assuming the new rules would have prevented it, one (albeit) high-profile breach, without more, should not be extrapolated to an entire industry with diverse business models housing varied consumer financial data. Reasonable safeguards for a company like Equifax, based on its size and complexity, the nature and scope of its activities, and the sensitivity of the information involved, would likely outpace procedures that would be appropriate or reasonable for a sole proprietorship or small business.

[12] While the Final Rule is based on proposals from New York State Department of Financial Services (''NYDFS''), the FTC imposes its requirements much more broadly than the NYDFS Cybersecurity Requirements for Financial Services Companies, 23 NYCRR Pt. 500. The NYDFS requirements exempt a much larger cross-section of organizations from the most onerous, prescriptive, and expensive provisions in their rule. 23 NYCRR § 500.19. Nor do the exceptions in the Final Rule, while helpful, suffice.

[13] Unfortunately, this is not the first time this Commission has emphasized what we *can* do over what we *should* do. *See, e.g.,* Joint Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, *In the matter of Resident Home LLC,* Commission File No. 2023179 (Oct. 7, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1597270/resident_home_dissenting_statement_wilson_and_phillips_final_0.pdf;* Joint Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson, *U.S.* v. *iSpring Water Systems, LLC,* Commission File No. C4611 (Apr. 12, 2019), *https://www.ftc.gov/system/files/documents/public_statements/1513499/ispring_water_systems_llc_c4611_modified_joint_statement_of_commissioners_phillips_and_wilson_4-12.pdf.*

[14] Cybersecurity Requirements for Financial Services Companies, 23 NYCRR Pt. 500 (2016).

[15] *See* Consumer Data Industry Association (comment 36, NPRM) at 2, *https://www.regulations.gov/document?D=FTC-2019-0019-0036* (noting that the NY rule is too recent and Congress is debating new legislation that should be left to Congress to resolve); National Automobile Dealers Association (comment 46, NPRM) at 46, *https://www.regulations.gov/comment/FTC-2019-0019-0046* (The new rules ''are premature as they are based on untested and new standards in a rapidly changing environment, and in a context where federal debate is ongoing.''); New York Insurance Association (comment 31, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0031* (it is premature to adopt these rules without the benefit of the state's experience).

[16] We appreciate the time and resources the NYDFS invested in commenting on our proposed rule. Though the NYDFS does say that its rules have ''enhanced cybersecurity protection across the financial industry and fostered an environment in which the threat of a cyber attack is taken seriously at all levels of New York's financial services firms,'' it offers no supporting data. New York State Department of Financial Services (comment 40, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0040.*

[17] As several commenters pointed out, the NYDFS rules are more nuanced that the amendments introduced today. For instance, under the NYDFS regulations, certain additional requirements only apply to a category of sensitive data, a limitation not carried through to the Safeguards Rule. *See, e.g.,* U.S. Chamber of Commerce (comment 33, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0033;* CTIA (comment 34, NPRM), *https://www.regulations.gov/comment/FTC/2019-0019-0034;* Electronic Transactions Association (comment 27, NPRM), *https://www.regulations.gov/comment/FTC/2019-0019-0027.* These distinctions only raise more questions and concerns about basing our regulations on the New York rules.

[18] *See, e.g.,* Fourth Amendment is Not for Sale Act, S. 1265, 117th Cong. (2021); Data Care Act of 2021, S. 919, 117th Cong. (2021); Data Protection Act of 2021, S. 2134, 117th Cong. (2021); SAFE DATA Act, S. 2499, 117th Cong. (2021); Consumer Online Privacy Rights Act, S. 2968, 116th Cong. (2019). *See also,* California Privacy Rights Act of 2020, Cal. Civ. Code § 1798.100 *et seq.;* Virginia Consumer Data Protection Act, Va. Code § 59.1–575 *et seq.*; and Colorado Privacy Act, 2021 Colo. ALS 483, 2021 Colo. Ch. 483, 2021 Colo. SB. 190.

[19] Council Directive 2016/679, art. 32 2016 O.J. (L119).

[20] *See, e.g.,* Joseph Menn and Christopher Bing, *Hackers of SolarWinds stole data on U.S. sanctions policy, intelligence probes,* Reuters (Oct. 8, 2021), *https://www.reuters.com/world/us/hackers-solarwinds-breach-stole-data-us-sanctions-policy-intelligence-probes-2021-10-07/;* Stephanie Kelly and Jessica Resnick-ault, *One password allowed hackers to disrupt Colonial Pipeline, CEO tells senators,* Reuters (June 8, 2021), *https://www.reuters.com/business/colonial-pipeline-ceo-tells-senate-cyber-defenses-were-compromised-*

these issues will continue to draw congressional attention. The decisions about tradeoffs in this space are complex and significant for consumers, business, and government; intrusive mandates are best left to the people's representatives rather than to the vagaries of the administrative rulemaking process.[21]

The Revised Rules Inhibit Flexibility and Impose Substantial Costs

The Safeguards Rule originally drafted and evaluated by the Commission embraced a flexible approach, emphasizing protections targeted to a company's size and risk profile.[22] As we wrote in 2019, these new rules move us away from that approach; that loss of flexibility will impose costs without necessarily improving safeguards for consumer data, which should be the point of this exercise.

Commenters and the Commission itself have noted that there are financial impacts to these new requirements.[23] The Small Business Administration's Office of Advocacy stated its belief that the Commission itself does not appear to understand fully the economic impact of the proposed changes to the Safeguards Rule.[24]

The burden of these new rules may also reduce competition and innovation, as smaller firms less able to absorb the financial costs cede ground to larger firms better equipped to handle new regulatory mandates.[25]

Security itself may also suffer. A series of specific rules can incentivize companies to move from a thoughtful assessment of risk and precautions to a check-the-box exercise to ensure that they are complying with regulatory mandates—in other words, from a focus on real security to an emphasis on rule compliance.[26] One commenter cited data demonstrating that when security personnel are busy with compliance and regulatory response, they have less time to focus on a firm's actual security needs.[27] Further, without the flexibility to prioritize, finite resources may be diverted to areas of lower risk but higher regulatory scrutiny; [28] commenters noted the irony of mandating a risk assessment and then ordering firms to prioritize specified precautions ahead of the risks and needs counseled by that assessment.[29] And potentially innovative security practices that address changing threats and needs may be discouraged.[30] As

ahead-hack-2021-06-08; Carly Page, *The Accellion data breach continues to get messier,* TechCrunch (July 8, 2021), *https://techcrunch.com/2021/07/08/the-accellion-data-breach-continues-to-get-messier/;* Peter Valdes-Dapena, *Volkswagen hack: 3 million customers have had their information stolen,* CNN (June 11, 2021), *https://www.cnn.com/2021/06/11/cars/vw-audi-hack-customer-information/index.html.*

[21] Sen. Roger Wicker, Rep. Cathy McMorris Rodgers, & Noah Phillips, *FTC must leave privacy legislating to Congress,* Wash. Examiner (Sept. 29, 2021), *https://www.washingtonexaminer.com/opinion/op-eds/ftc-must-leave-privacy-legislating-to-congress.* Substance aside, businesses and consumers need confidence to plan around new rules. As the recent—and perhaps future—debate about net neutrality rules has demonstrated, agency rules are subject to disruptive swings that undermine such confidence.

[22] The Commission itself acknowledges the importance of flexibility in issuing the Final Rule. *See, e.g.,* Final Rule at 27 (''The Commission, however, believes that the elements provide sufficient flexibilityfor financial institutions to adopt information security programs suited to the size, nature, and complexity of their organization and information systems.'')

[23] *See* Final Rule; American Council on Education (comment 24, NPRM) at 13–14, *https://www.regulations.gov/comment/FTC-2019-0019-0024;* Wisconsin Bankers Association (comment 37, NPRM) at 1–2, *https://www.regulations.gov/comment/FTC-2019-0019-0037;* American Financial Services Association (comment 41, NPRM) at 4, *https://www.regulations.gov/comment/FTC-2019-0019-0041;* National Association of Dealer Counsel (comment 44, NPRM) at 1, *https://www.regulations.gov/comment/FTC-2019-0019-0044;* National Automobile Dealers Association (comment 46, NPRM) at 11, *https://www.regulations.gov/comment/FTC-2019-0019-0046;* National Independent Automobile Dealers Association, (comment 48, NPRM) at 3, *https://www.regulations.gov/comment/FTC-2019-0019-0048;* Gusto and others (comment 11, Workshop) at 2–4, *https://www.regulations.gov/comment/FTC-2019-0019-0011;* National Pawnbrokers Association (comment 3, NPRM) at 2, *https://www.regulations.gov/comment/FTC-2019-0019-0032; See also* Remarks of James Crifasi, Safeguards Workshop, *supra* note 10, Tr. at 72–74, *https://www.ftc.gov/system/files/documents/public_events/1567141/transcript-glb-safeguards-workshop-full.pdf* (study showing that compliance costs are unaffordable for small businesses).

[24] Small Business Administration Office of Advocacy (comment 28, NPRM) at 3–4, *https://www.regulations.gov/comment/FTC-2019-0019-0028* (''An agency cannot consider alternatives that minimize any significant economic impact if the agency does not know what the economic impact of the proposed action is.'').

[25] *See* CTIA (comment 34, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0034* (noting the need for more study on the costs to competition); U.S. Chamber of Commerce (comment 33, NPRM) at 4, *https://www.regulations.gov/comment/FTC-2019-0019-0033* (''Some private organizations can absorb the added costs, while others cannot.''). *See also* Christine S. Wilson, Remarks at the Future of Privacy Forum, A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation 13 (Feb. 6, 2020), *https://www.ftc.gov/system/files/documents/public_statements/1566337/commissioner_wilson_privacy_forum_speech_02-06-2020.pdf* (''Importantly, the legislative framework should also consider competition. Regulations, by their nature, will impact markets and competition. GDPR may have lessons to teach us in this regard. Research indicates that GDPR may have decreased venture capital investment and entrenched dominant players in the digital advertising market.''); Noah Joshua Phillips, Prepared Remarks at internet Governance Forum USA, Keep It: Maintaining Competition in the Privacy Debate (July 27, 2018), *https://www.ftc.gov/system/files/documents/public_statements/1395934/phillips_-_internet_governance_forum_7-27-18.pdf* (discussing the competition impacts of new privacy rules).

[26] *See* U.S. Chamber of Commerce (comment 33, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0033;* Consumer Data Industry Association (comment 36, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0036;* Global Privacy Alliance (comment 38, NPRM), *https://www.regulations.gov/comment/FTC/2019-0019-0038.* While some parts of the rule, such as encryption requirements, allow security officials to make a written determination that a different precaution is appropriate, it seems unlikely that any individual security official will risk liability to make such a determination and the specific requirements here will likely become the default rule. American Council on Education (comment 24, NPRM) at 12, *https://www.regulations.gov/comment/FTC-2019-0019-0024* (''In the absence of a clear delineation by the Commission of what alternatives an institutional information security executive might approve that the Commission considers reasonably equivalent, and assurance that they are reasonably applicable in our contexts, that pressure release valve in the requirement seems unlikely to release much pressure.''); Software Information & Industry Association (comment 29, NPRM) at 3, *https://www.regulations.gov/comment/FTC-2019-0019-0056* (''The mere threat of a *per se* law violation will chill these approvals except in the most ironclad circumstances, thereby potentially thwarting industry-wide adoption of new and better security standards.''); New York Insurance Association (comment 31, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0031* (''This runs the risk that companies might feel compelled to encrypt all consumer data regardless of whether the CISO's compensating controls would be second guessed in the event a company were to lose unencrypted customer information.''); Mortgage Bankers Association (comment 26, NPRM) at 4, *https://www.regulations.gov/comment/FTC-2019-0019-0026* (noting the obligation to prepare an incident response plan had ''the potential to cripple small businesses under the pressure of repeatedly checking the boxes for potential harmless events.'').

[27] Bank Policy Institute (comment 39, NPRM) at 6, *https://www.regulations.gov/comment/FTC-2019-0019-0039* (''When the sector surveyed its information security teams in late 2016, CISOs reported that approximately 40% of their cyber team's time was spent on compliance related matters, not on cybersecurity. Due to one framework issuance, in particular, the reconciliation process delayed one firm's implementation of a security event monitoring tool intended to better detect and respond to cyber-attacks by 3–6 months. With respect to another issuance, another firm stated that 91 internal meetings were held to determine how that issuance aligned with its program and in gathering data for eventual regulatory requests.'').

[28] *See* U.S. Chamber of Commerce (comment 33, NPRM) at 4, *https://www.regulations.gov/comment/FTC-2019-0019-0033* (''the proposed requirements would increasingly divert company resources toward compliance and away from risk management activities that are tailored to businesses' unique security needs.''); Software Information & Industry Association (comment 29, NPRM) at 3, *https://www.regulations.gov/comment/FTC-2019-0019-0056* (''The effect of a prescriptive approach in this enforcement structure is to place companies in the position of forced compliance with potentially unnecessary or inapplicable requirements without the appropriate process for these covered entities to explain to a supervisory authority why it is unnecessary.''); American Financial Services Association (comment 41, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0041.* In some cases, asking too much of small businesses for whom all this is a substantial undertaking may lead them to fail at even the basic protections. Safeguards Workshop, *supra* note 10, Tr. at 118–19 (July 13, 2020), *https://www.ftc.gov/system/files/documents/public_events/1567141/transcript-glb-safeguards-workshop-full.pdf.*

[29] *See* Bank Policy Institute (comment 39, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0039;* Money Services Round Table (comment 53, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0053.*

[30] *See* Consumer Data Industry Association (comment 36, NPRM) at 7–8, *https://www.regulations.gov/comment/FTC-2019-0019-*

Continued

one commenter noted, ''[e]ven today's best practices will be overtaken by future changes in both technology and the capabilities of threat actors,'' [31] and these proscriptive rules lose the ''self-modernizing'' nature of flexible requirements,[32] locking in place the primacy of current practices.[33]

The reduction in flexibility and imposition of these costs must be justified by a significant reduction in risk or some other substantial consumer benefit. But the record provides scant support for these tradeoffs. Or as one commenter put it:

[A]s with many of these requirements, we do not take issue with the notion that there is merit to this step [requiring monitoring], and that many financial institutions will implement some version of this control. However, by making this an explicit, stand-alone requirement, the Commission is enshrining costs and efforts that will be extensive and will likely not be needed in all circumstances.[34]

The Rules Involve the FTC in the Internal Governance Decisions of Covered Firms

The specifics of the proposals also raise issues, as we expressed in 2019, with regard to mandating the appropriate level of board engagement,[35] hiring and training requirements,[36] and program accountability structures.[37] We wrote then, and remain concerned now, that the Commission is substituting its own judgement about governance decisions for those of private companies covered by this Rule.

In certain extraordinary cases involving clear evidence of management failure, we have imposed prescriptive governance obligations on respondents.[38] Those rare and egregious instances cannot justify a similar approach in a broad rulemaking absent a real record of widespread corporate mismanagement or failure at the senior management level.

The Commission has elected to proceed with most of these governance requirements, forcing the hand of management and shifting their priorities to avoid the risk of regulatory action,[39] without clear evidence of their need or efficacy.

Conclusion

Regularly reviewing our rules to ensure that they address the current environment is an important part of the FTC's regular process. But rules have far-reaching and frequently unintended impacts in the real world; when imposing additional legal obligations in the rulemaking context, we must do so with great care. The amended Safeguards Rule replaces a rule that has worked well for 20 years, a rule that took a principle-based approach in order to provide financial institutions flexibility to determine the appropriate and realistic security safeguards for their organizations. The record before us at best fails to convince that the changes are necessary and at worst raises concern about the substantial costs and risks in imposing these amendments. Accordingly, we dissent.

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0036 (minimization requirement can impact innovative uses more broadly).

[31] *See* Cisco Systems Inc. (comment 51, NPRM) at 3, *https://www.regulations.gov/comment/FTC-2019-0019-0051* (noting also in the context of multi-factor authentication that there will come a time when it is no longer the ''appropriate baseline'' and ''covered entities could find themselves in full compliance with the rule as long as they use access control technology no less protective than MFA as defined in the Proposed Amendments.'').

[32] National Automobile Dealers Association (comment 46, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0046.*

[33] *See* CTIA (comment 34, NPRM) at 3–5, *https://www.regulations.gov/comment/FTC-2019-0019-0034* (flexibility in the rule allowed it to keep up with evolving threats, whereas new rule could limit innovation); HITRUST Alliance (comment 18, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0018* (expressing concern about creating outdated requirements); The American Financial Services Association (comment 41, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0041.*

[34] National Automobile Dealers Association (comment 46, NPRM) *https://www.regulations.gov/comment/FTC-2019-0019-0046* (arguing that the Commission needs additional study into the costs and benefits); *See* also Consumer Data Industry Association (comment 36, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0036* (benefits of new rule not justified by tradeoffs).

[35] American Council on Education (comment 24, NPRM) at 16, *https://www.regulations.gov/comment/FTC-2019-0019-0024;* National Automobile Dealers Association (comment 46, NPRM) at 41, *https://www.regulations.gov/comment/FTC-2019-0019-0046.*

[36] U.S. Chamber of Commerce (comment 33, NPRM) at 12, *https://www.regulations.gov/comment/FTC-2019-0019-0033;* National Automobile Dealers Association (comment 46, NPRM) at 34–36, *https://www.regulations.gov/comment/FTC-2019-0019-0046.*

[37] *See* Final Rule. *See* also American Council on Education (comment 24, NPRM) at 14, *https://www.regulations.gov/comment/FTC-2019-0019-0024* (critiquing the intrusion on personnel practices).

[38] *U.S.* v. *Facebook, Inc.,* Civ. Action No. 19–cv–2184 (D.D.C. July 24, 2019), *https://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc.*

[39] These governance rules may not even promote security. *See* Consumer Data Industry Association (comment 36, NPRM), *https://www.regulations.gov/comment/FTC-2019-0019-0036* (arguing that the annual reporting will become a checkbox exercise).

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ASO GA D Eastman, GA [Amended]

Heart of Georgia Regional Airport, GA
(Lat 32°12′59″ N, long 83°07′43″ W)

That airspace extending upward from the surface to and including 2,500 feet MSL within a 4.6-mile radius of the Heart of Georgia Regional Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Air Missions. The effective date and time will thereafter be continuously published in the Chart Supplement.

* * * * *

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASO GA E5 Eastman, GA [Amended]

Heart of Georgia Regional Airport, GA
(Lat 32°12′59″ N, long 83°07′43″ W)

That airspace extending upward from 700 feet above the surface within a 7.1-mile radius of Heart of Georgia Regional Airport.

* * * * *

Issued in College Park, Georgia, on November 7, 2023.

Lisa E. Burrows,

Manager, Airspace & Procedures Team North, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023–25016 Filed 11–9–23; 8:45 am]

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FEDERAL TRADE COMMISSION

16 CFR Part 314

RIN 3084–AB35

Standards for Safeguarding Customer Information

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is issuing a final rule (''Final Rule'') to amend the Standards for Safeguarding Customer Information (''Safeguards Rule'' or ''Rule'') to require financial institutions to report to the Commission any notification event where unencrypted customer information involving 500 or more consumers is acquired without authorization.

DATES: The amendments are effective May 13, 2024.

FOR FURTHER INFORMATION CONTACT: David Lincicum (202–326–2773), Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

Congress enacted the Gramm Leach Bliley Act (''GLBA'') in 1999.[1] The GLBA provides a framework for regulating the privacy and data security practices of a broad range of financial institutions. Among other things, the GLBA requires financial institutions to provide customers with information about the institutions' privacy practices and about their opt-out rights, and to implement security safeguards for customer information.

Subtitle A of Title V of the GLBA required the Commission and other Federal agencies to establish standards for financial institutions relating to administrative, technical, and physical safeguards for certain information.[2] Pursuant to the GLBA's directive, the Commission promulgated the Safeguards Rule in 2002.[3] The Safeguards Rule became effective on May 23, 2003.[4]

II. Regulatory Review of the Safeguards Rule

On April 4, 2019, the Commission issued a notice of proposed rulemaking (''NPRM'') setting forth proposed amendments to the Safeguards Rule.[5] In response, the Commission received 49 comments from various interested parties including industry groups, consumer groups, and individual consumers.[6] On July 13, 2020, the Commission held a workshop concerning the proposed changes and conducted panels with information security experts discussing subjects related to the proposed amendments.[7] The Commission received 11 comments following the workshop. After reviewing the initial comments to the NPRM, conducting the workshop, and then reviewing the comments received following the workshop, the Commission issued final amendments to the Safeguards Rule on December 9, 2021.[8]

In the NPRM, the Commission explained that its proposed amendments to the Safeguards Rule were based primarily on the cybersecurity regulations issued by the New York Department of Financial Services, 23 NYCRR 500 (''Cybersecurity Regulations'').[9] The Commission also noted that the Cybersecurity Regulations require covered entities to report security events to the superintendent of the Department of Financial Services.[10] Relatedly, for many years, some other Federal agencies enforcing the GLBA have required financial institutions to provide notice to the regulator, and in some instances notice to consumers as well.[11] Although the Commission did not include a similar reporting requirement in the NPRM, it did seek comment on whether the Safeguards Rule should be amended to require that financial institutions report security events to the Commission. Specifically, the Commission requested comments on whether such a requirement should be added and, if so, (1) the appropriate deadline for reporting security events after discovery, (2) whether all security events should require notification or whether notification should be required only under certain circumstances, such as a determination of a likelihood of harm to customers or that the event

[1] Public Law 106–102, 113 Stat. 1338 (1999).

[2] *See* 15 U.S.C. 6801(b), 6805(b)(2).

[3] 67 FR 36483 (May 23, 2002).

[4] *Id.*

[5] 84 FR 13158 (Apr. 4, 2019).

[6] The 49 relevant public comments received on or after March 15, 2019, can be found at *Regulations.gov. See FTC Seeks Comment on Proposed Amendments to Safeguards and Privacy Rules, 16 CFR part 314, Project No. P145407, https://www.regulations.gov/docket/FTC-2019-0019/comments.* The 11 relevant public comments relating to the subject matter of the July 13, 2020, workshop can be found at: *https://www.regulations.gov/document/FTC-2020-0038-0001/comment.* This notice cites comments using the last name of the individual submitter or the name of the organization, followed by the number based on the last two digits of the comment ID number.

[7] *See* FTC, *Information Security and Financial Institutions: FTC Workshop to Examine Safeguards Rule Tr.* (July 13, 2020), *https://www.ftc.gov/system/files/documents/public_events/1567141/transcript-glb-safeguards-workshop-full.pdf.*

[8] 86 FR 70272 (Dec. 9. 2021).

[9] 84 FR 13158, 13163 (Apr. 4, 2019).

[10] *Id.* at 13169.

[11] *See* Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice, 70 FR 15736, 15752 (Mar. 29, 2005) (originally issued by the Office of the Comptroller of the Currency; the Board of Governors of the Federal Reserve System; the Federal Deposit Insurance Corporation; and the Office of Thrift Supervision) (''At a minimum, an institution's response program should contain procedures for the following: . . . Notifying its primary Federal regulator as soon as possible when the institution becomes aware of an incident involving unauthorized access to or use of *sensitive* customer information, as defined below; . . . [and notifying] customers when warranted''), *https://www.occ.treas.gov/news-issuances/federal-register/2005/70fr15736.pdf* (emphasis in original).

affects a certain number of customers, (3) whether such reports should be made public, (4) whether events involving encrypted information should be included in the requirement, and (5) whether the requirement should allow law enforcement agencies to prevent or delay notification if notification would affect law-enforcement investigations.[12]

The final rule, which the Commission published in the **Federal Register** on December 9, 2021, did not include a reporting requirement.[13] However, on the same date, the Commission published a supplemental notice of proposed rulemaking (''SNPRM'') in the **Federal Register**, which proposed further amending the Safeguards Rule to require financial institutions to report to the Commission certain security events as soon as possible, and no later than 30 days after discovery of the event.[14] Specifically, the Commission proposed to require financial institutions to notify the Commission electronically through a form located on the FTC's website about any security event that resulted or is reasonably likely to result in the misuse of customer information affecting at least 1,000 consumers. The Commission proposed that the notification include a limited set of information, consisting of (1) the name and contact information of the reporting financial institution, (2) a description of the types of information involved in the security event, (3) the date or the date range of the security event, if it can be determined, and (4) a general description of the security event. In response to the SNPRM, the Commission received 14 comments from various interested parties, including industry groups, consumer groups, and individual consumers.[15]

After reviewing the comments, the Commission now finalizes the proposed amendments with minor changes.

III. Overview of Final Rule

The Final Rule requires financial institutions to report notification events, defined as the unauthorized acquisition of unencrypted customer information, involving at least 500 customers to the Commission. The notice to the Commission must include: (1) the name and contact information of the reporting financial institution; (2) a description of the types of information that were involved in the notification event; (3) if the information is possible to determine, the date or date range of the notification event; (4) the number of consumers affected; (5) a general description of the notification event; and, if applicable, whether any law enforcement official has provided the financial institution with a written determination that notifying the public of the breach would impede a criminal investigation or cause damage to national security, and a means for the Federal Trade Commission to contact the law enforcement official. The notice must be provided electronically through a form located on the FTC's website, *https://www.ftc.gov.*

IV. Detailed Analysis

The following section discusses the comments that the Commission received in response to the SNPRM.

General Comments

Several commenters generally supported the inclusion of a notification requirement in the Rule.[16] Some of these commenters pointed to frequent data breaches as an indication that companies' data security practices are inadequate and stated that requiring companies to provide notice to the Commission would enable the Commission to more easily enforce the Rule.[17] The Clearing House argued that the requirement is appropriate because it would place financial institutions covered by the Rule in the same position as banks, which are required to report data breaches to their prudential regulators.[18] The Electronic Privacy Information Center (''EPIC'') suggested that the amendment would incentivize ''use of strong data security measures by financial institutions, bring additional accountability and transparency to the handling of security events, and enhance the data security and privacy of all consumers.'' [19]

Other commenters opposed the proposal.[20] Many of these commenters argued that the proposed notification requirement would be duplicative of State breach notification laws and is, therefore, unnecessary.[21] The Commission, however, disagrees that requiring financial institutions to provide notice to the Commission is redundant because of State breach notification laws. State breach notification laws provide notice to consumers and in some cases also to State regulators, while the notice requirement of the Final Rule requires notice to the Commission and is designed to ensure that the Commission receives notice of security breaches affecting financial institutions under the Commission's jurisdiction. Notice to consumers or to State regulators does not achieve this purpose. Receipt of these notices will enable the Commission to monitor for emerging data security threats affecting financial institutions and to facilitate prompt investigative response to major security breaches. CTIA argued that the Commission could achieve this goal by accessing and reviewing regulated entities' reports to consumers and State authorities under State notification laws.[22] The Commission disagrees that this indirect method would be as efficient or effective as requiring regulated financial institutions to directly notify the Commission.[23] Such an approach would be extremely burdensome on the Commission and would require the diversion of resources from enforcement to search for and collect information about breaches involving regulated financial institutions. Also, as some of the commenters noted,[24] State laws vary in what types of incidents must be

[12] *Id.*

[13] 86 FR 70272 (Dec. 9. 2021).

[14] *See* 86 FR 70062, 70067 (Dec. 9, 2021).

[15] The 14 relevant public comments received can be found at *Regulations.gov. See* FTC Seeks Comment on Proposed Amendments to Safeguards and Privacy Rules, 16 CFR part 314, Project No. P145407, *https://www.regulations.gov/docket/FTC-2021-0071/comments.*

[16] *See* Anonymous (Comment 2); Briggs (Comment 4); Clearing House Association L.L.C. (''Clearing House'') (Comment 11); Anonymous (Comment 14); Securities Industry and Financial Markets Association (''SIFMA'') and Bank Policy Institute (''BPI'') (''SIFMA/BPI'') (Comment 15) (supporting notification requirement for financial institutions that are not regulated by non-FTC financial agencies); American Council on Education (Comment 18) (supporting proposed notice requirement with revisions); Electronic Privacy Information Center (''EPIC'') (Comment 19).

[17] *See, e.g.,* Anonymous (Comment 2); Briggs (Comment 4); The Clearing House (Comment 11) at 2 (describing breaches in the fintech industry).

[18] Clearing House (Comment 11) at 1–2.

[19] EPIC (Comment 19) at 2.

[20] *See* American Financial Services Association (''AFSA'') (Comment 12); Consumer Data Industry Association (''CDIA'') (Comment 13); American Escrow Association (Comment 16); CTIA (Comment 20); National Automobile Dealers Association (''NADA'') (Comment 21); U.S. Chamber of Commerce (Comment 22).

[21] *See, e.g.,* AFSA (Comment 12) at 3; CDIA (Comment 13) at 2–3; CTIA (Comment 20) at 2–4; NADA (Comment 21) at 2–3; U.S. Chamber of Commerce (Comment 22) at 3.

[22] CTIA (Comment 20) at 6–7.

[23] While some States that require notification to a State agency make companies' breach notifications public, *see, e.g.,* N.H. Dep't of Just., Off. of Attorney Gen., *Security Breach Notifications, https://www.doj.nh.gov/consumer/security-breaches/,* other States do not make notifications public, and as noted above, not all States require notice to a State government agency. Some non-governmental sources report breach notifications, but there is no guarantee that such sources are comprehensive as they depend in part on reporting by consumers who received a breach notification letter. Thus, the Commission could not obtain comprehensive data relating to breaches at regulated financial institutions by compiling reports of breaches from other sources.

[24] *See, e.g.,* Clearing House (Comment 11) at 8; CDIA (Comment 13) at 3; CTIA (Comment 20) at 4.

reported and to whom.[25] The Safeguards Rule notice requirement will establish a uniform reporting requirement for all regulated financial institutions, assisting the Commission in getting consistent information about notification events affecting those financial institutions regardless of which State's consumers are affected. This benefit is not offset by the cost to financial institutions because the burden on individual financial institutions is minimal, as the Final Rule does not require an extensive report and, in many instances, financial institutions will already be preparing notices to consumers and State agencies.

Some commenters argued that the notification requirement would not improve financial institutions' data security.[26] Other commenters disagreed with this assertion, arguing that the notification requirement would further incentivize financial institutions to protect customer information.[27] The Commission agrees with these commenters that the notification requirement will increase the efficiency and effectiveness of the Commission's enforcement of the Rule. As noted above, while State breach notification laws require notice to consumers, some States do not require that such notices be provided to State regulators as well, and not all State regulators that do receive such notices publish them. By requiring financial institutions to provide notice directly to the Commission, the Commission will not have to devote resources to continually search for breach notifications posted by other sources in order to know that a financial institution has experienced a breach. Without a notification, the Commission would have no guarantee that it has found all breaches in its searches. The required notices will enable the Commission to identify breaches that merit investigation more quickly and efficiently. Also, receiving notice of breaches will allow the Commission to develop better awareness of emerging risks to financial institutions' security. The Commission expects that these benefits will enable more efficient enforcement of the Rule, which will in turn increase financial institutions' incentive to comply. In addition, as discussed below, making the notices public will enable consumers to make more informed decisions about which financial institutions they choose to entrust with their information, providing financial institutions with an additional incentive to comply with the Rule.

The National Automobile Dealers Association (''NADA'') argued that a requirement for financial institutions to report events in order to facilitate enforcement against them is ''unprecedented'' [28] and ''raises serious questions,'' including ''potential First Amendment and potentially even Fifth Amendment concerns.'' [29] The Commission disagrees. Far from being unique, the requirement to report security events to law enforcement agencies that might result in enforcement actions against the notifying company is common. Many Federal agencies [30] require regulated entities to report data breaches to them, and most States require that companies report breaches to State attorneys general or other State law enforcement and have done so for years.[31]

NADA also argued that requiring reporting security events to assist the Commission to enforce the Safeguards Rule is inappropriate because not every breach is the result of a failure to comply with the Safeguards Rule.[32] NADA suggested that the reporting requirement should only ''apply after a series of security events,'' because only multiple events can be ''suggestive of compliance failures,'' while any single breach ''certainly . . . is not.'' [33] While the Commission acknowledges that not every notification event is necessarily the result of a failure to comply with the Safeguards Rule, it disagrees that a single breach cannot be ''suggestive of compliance failures.'' [34] Indeed, the fact that an institution has not experienced a breach does not necessarily mean that the institution is in compliance with the Rule's requirements. The Commission believes that taking action to correct a potential Safeguards Rule violation before additional security events can harm consumers is appropriate and desirable. The American Financial Services Association (''AFSA'') contended that ''the FTC should clarify what factors in a report could lead to enforcement concerns,'' arguing that otherwise ''institutions may seek to minimize all risks associated with a report.'' [35] The Commission does not believe that providing a guide to when a report could possibly lead to enforcement is either possible or desirable because the reports are unlikely to contain all of the information that the Commission would need to determine that law enforcement is appropriate or necessary. Such determinations are typically made following investigations that afford entities the opportunity to provide context and information.

In addition, the Commission notes that requiring a financial institution to report an event is not suggesting that every notification event is the result of a violation of the Rule and will result in an enforcement action or even investigation. Rather, the reporting requirement will provide the Commission with valuable information about security threats to financial institutions and assist in the determination of whether any individual event should be investigated further. This will improve the Commission's ability to respond to data breaches and may enable the Commission to issue business and

[25] *See, e.g.,* Tex. Bus. & Com. Code 521.053(i) (requiring companies to notify Texas Attorney General if a breach affects at least 250 Texas residents); Va. Code Ann. 18.2–186.6(E) (requiring companies to notify Virginia Attorney General if a breach affects at least 1,000 Virginia residents); Fla. Stat. 501.171(3) (requiring businesses to notify the Florida Department of Legal Affairs if a breach affects at least 500 individuals in Florida).

[26] *See, e.g.,* AFSA (Comment 12) at 1; CDIA (Comment 13) at 2–3; American Escrow Association (Comment 16) at 2; CTIA (Comment 20) at 3–6; NADA (Comment 21) at 2–3; U.S. Chamber of Commerce (Comment 22) at 2–3.

[27] *See* EPIC (Comment 19) at 2, *see also* Anonymous (Comment 2); Briggs (Comment 4).

[28] NADA argues that banking regulations are not relevant examples because they are designed ''to protect depositors and to ensure the public interest in the safety and soundness of banks,'' rather than to facilitate enforcement. NADA (Comment 21) at 4–5, n.8. The banking regulations, however, are also designed to facilitate enforcement. In addition, the Safeguards Rule is also designed to protect customers of financial institutions and ensure the public interest in the safety of consumer's financial information.

[29] NADA (Comment 21) at 4–5, n. 9.

[30] *See, e.g.,* Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice, 70 FR 15736, 15752 (Mar. 29, 2005) (originally issued by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision); 45 CFR 164.408 (requiring covered entities to report breaches affecting 500 or more individuals to the Secretary of Health and Human Services); 12 CFR 53.3 (requiring banking organizations to report security events to the Office of the Comptroller of the Currency); 12 CFR 225.302 (requiring Board-supervised banking organization to report certain breaches to the Board); 12 CFR 304.23 (requiring certain bank organizations to report breaches to the FDIC); *see also* 87 FR 16590 (Mar. 23, 2022) (proposed rule requiring companies to report security incidents to the SEC).

[31] *See, e.g.,* Tex. Bus. & Com. Code 521.053(i) (requiring companies to notify Texas Attorney General if a breach affects at least 250 Texas residents); Va. Code Ann. 18.2–186.6(E) (requiring companies to notify Virginia Attorney General if a breach affects at least 1,000 Virginia residents); Fla. Stat. 501.171(3) (requiring businesses to notify the Florida Department of Legal Affairs if a breach affects at least 500 individuals in Florida).

[32] NADA (Comment 21) at 3–5.

[33] NADA (Comment 21) at 4.

[34] *See, e.g., FTC* v. *Equifax,* 1:19–cv–03297–TWT (N.D. Ga., July 22, 2019), *available at https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3203-equifax-inc.*

[35] AFSA (Comment 12) at 1.

consumer education about emerging threats.

Other commenters argued that the reporting requirement would be unduly burdensome.[36] Some of these commenters suggested that because the Rule's requirement may differ from State notification laws' requirements, complying with the Rule will be burdensome.[37] Other commenters disagreed, noting that the information required is limited to basic information about the company and the notification event.[38] The Commission agrees with these commenters. The information required to be reported is minimal and is very similar to the information required by many State notification laws.[39] The company will have this information as the result of even a basic investigation of the security event, an investigation that would be required in any event to comply with the Rule and basic security practices. The fact that some State laws may be triggered under different circumstances and may require different information does not render this simple report burdensome.

In addition to addressing the proposed amendment in general, commenters also addressed specific elements of the proposed amendments. These comments are addressed in the following detailed discussion.

Triggering Event

The Commission adopts proposed § 314.4(j) as originally proposed, with minor changes. Proposed paragraph (j) would have required financial institutions that become aware of a security event to promptly determine the likelihood that customer information has been or will be misused. Under the provision as originally proposed, financial institutions would have been required to make a report to the Commission upon determining that, among other conditions, ''misuse of customer information ha[d] occurred or . . . [was] reasonably likely [to occur].'' However, upon consideration of the comments, Commission is clarifying the triggering language by adding a new paragraph (m) in § 314.2, which defines the term ''notification event'' as the ''acquisition of . . . [unencrypted customer] information without the authorization of the individual to which the information pertains.'' Section 314.2(m) further clarifies that: (1) ''[c]ustomer information is considered unencrypted . . . if the encryption key was accessed by an unauthorized person;'' and (2) ''[u]nauthorized acquisition will be presumed to include unauthorized access to unencrypted customer information unless you have reliable evidence showing that there has not been, or could not reasonably have been, unauthorized acquisition of such information.''

Several commenters addressed whether becoming aware of a security event is an appropriate trigger for the notification process. In a joint comment, the Securities Industry and Financial Markets Association (''SIFMA'') and the Bank Policy Institute (''BPI'') argued that the notification process should not begin when a financial institution becomes aware of an event, but instead begin when the financial institution ''determines'' a security event has occurred. SIFMA and BPI suggested that ''determination'' takes place sometime after ''discovery,'' and that financial institutions should have 30 days to notify the Commission after making this determination rather than after discovery. SIFMA and BPI argued that ''determination'' ''connotes a higher standard of certainty than 'discovery,' '' and would include determining whether any further requirements for notice, such as number of consumers affected, had been met. The Commission disagrees that 30 days after discovery of a notification event is insufficient time to determine whether the event meets the requirements for notification and to prepare the notice. The Commission expects that companies will be able to decide quickly whether a notification event has occurred by determining whether unencrypted customer information has been acquired and, if so, how many consumers are affected, so there will not be a significant difference between ''determination'' and ''discovery.''[40] In addition, the notification to the Commission requires minimal details and will not take significant time to prepare and, as discussed above, many States require reports containing similar information, so the financial institutions will need to prepare such a report in any event.

Other commenters argued the term ''security event'' is too broad a term to act as a trigger for the notification process, stating that the term encompasses types of incidents that pose little risk of consumer harm and for which notification is unnecessary.[41] Some commenters felt notification should be required only when harm to consumers has occurred or is likely to occur, rather than when ''misuse'' has occurred or is reasonably likely.[42] Some commenters argued a trigger that requires consumer harm would be more in accord with State notification laws.[43] Similarly, several commenters argued the notification requirement should exclude security events that involve only encrypted customer information, because there is little chance of consumer harm in such cases.[44] Others argued requiring financial institutions to report breaches that do not involve possible harm to consumers would be unduly burdensome on financial institutions and would produce an overwhelming number of reports to the Commission.[45] Conversely, EPIC argued notice should be required for all security events regardless of whether misuse had occurred or was likely.[46] EPIC argued that removing the analysis of whether misuse was likely would lower the burden of determining whether a report should be made and would prevent attempts by financial institutions to avoid reporting to the Commission.[47]

The Commission agrees with EPIC that the trigger for notification requires clarification. The meaning of the term ''misuse'' in the proposed rule was ambiguous. It was not clear if acquisition of customer information alone constituted misuse, or if other forms of misuse, such as alteration of data, would fall within the notification requirement. Given this ambiguity, financial institutions would have had difficulty evaluating the likelihood of misuse of customer information that has been acquired without authorization. At the same time, the ambiguity could have

[36] CDIA (Comment 13) at 2–3; SIFMA/BPI (Comment 15) at 8; ETA (Comment 17) at 2–3; CTIA (Comment 20) at 3–6; NADA (Comment 21) at 2–3; U.S. Chamber of Commerce (Comment 22).

[37] CDIA (Comment 13) at 2–3; CTIA (Comment 20) at 6; NADA (Comment 21) at 2–3.

[38] American Escrow Association (Comment 16) at 2; ACE (Comment 18) at 2, 7–8; EPIC (Comment 19) at 6–7.

[39] *See, e.g.,* Ala. Code 8–38–5(d); Ariz. Rev. Stat. 18–552(E); Cal. Civ. Code 1798.82(d); Fla. Stat. 501.171(3)(b); Mich. Comp. Laws 445.72(6); Mo. Rev. Stat. 407.1500(2)(4); N.H. Rev. Stat. Ann. 359–C:20(IV); N.Y. U.C.C. Law 899–AA(7); and Or. Rev. Stat. 646A.604(5).

[40] As discussed below, the Final Rule no longer requires the financial institution to determine whether misuse had occurred or was likely.

[41] *See, e.g.,* SIFMA/BPI (Comment 15) at 8–9; CTIA (Comment 20) at 11–12; NADA (Comment 21) at 2–3.

[42] *See* CDIA (Comment 13) at 4–5; SIFMA/BPI (Comment 15) at 9–10; American Escrow Association (Comment 16) at 2–3; ETA (Comment 17) at 2; CTIA (Comment 20) at 11–14.

[43] *See, e.g.,* CDIA (Comment 13) at 4–5.

[44] AFSA (Comment 12) at 2; CDIA (Comment 13) at 6; SIFMA/BPI (Comment 15) at 9; ACE (Comment 18); CTIA (Comment 20) at 12; NADA (Comment 21) at 3; U.S. Chamber of Commerce (Comment 22) at 4.

[45] SIFMA/BPI (Comment 15) at 9; ETA (Comment 17) at 2; CTIA (Comment 20) at 11.

[46] EPIC (Comment 19) at 4.

[47] *Id.*

been used as an opportunity to circumvent the reporting requirement. Specifically, because the proposed rule required the financial institution to assess the likelihood of misuse, it would have allowed financial institutions to underestimate the likelihood of misuse, and, thereby, the need to report the security event.

Accordingly, the Final Rule requires notification where customer information has been acquired, rather than when misuse is considered likely. Specifically, the Commission is adding a new § 314.2(m) that defines the term ''[n]otification event'' to mean the acquisition of unencrypted customer information without the authorization of the individual to which the information pertains. Section 314.2(m) also provides that unauthorized access of information will be presumed to result in unauthorized acquisition unless the financial institution can show that there has not been, or could not reasonably have been, unauthorized acquisition of such information. This rebuttable presumption is consistent with the Health Breach Notification Rule. See 16 CFR 318.2(a) (''Unauthorized acquisition will be presumed to include unauthorized access to unsecured PHR [personal health record] identifiable health information unless the vendor of personal health records, PHR related entity, or third party service provider that experienced the breach has reliable evidence showing that there has not been, or could not reasonably have been, unauthorized acquisition of such information.'').[48] Here, too, the presumption is ''intended to address the difficulty of determining whether access to data (*i.e.,* the opportunity to view the data) did or did not lead to acquisition (*i.e.,* the actual viewing or reading of the data).''[49]

The Commission also agrees notification should not be required when harm to consumers is rendered extremely unlikely because the customer information is encrypted. Accordingly, the Final Rule does not require notification if the customer information acquired is encrypted, so long as the encryption key was not accessed by an unauthorized person. *See* § 314.2(m). By requiring notice relating to unauthorized acquisition only of unencrypted customer information, this change brings the Rule into accord with most State breach notification laws. If customer information was encrypted but the encryption key was also accessed without authorization, then the customer information will be considered to be unencrypted. Someone who has both the encrypted information and the encryption key can easily decrypt the information.[50]

In summary, the Final Rule requires notification if the financial institution discovers that *unencrypted* customer information has been acquired without authorization. *See* § 314.2(m). Unlike under the proposed rule, notification is not conditioned on the assessment of likelihood of misuse. The Commission believes that determining whether acquisition has occurred simplifies the requirement and will enable financial institutions to more speedily determine whether a notification event has occurred. In addition, the Commission believes this change will reduce the number of notifications by excluding events where encrypted information was acquired, while ensuring it receives notice of events that are more likely to result in harm. As noted earlier, the Rule also includes a rebuttable presumption stating that when there is unauthorized access to data, unauthorized acquisition will be presumed unless the entity that experienced the breach ''has reliable evidence showing that there has not been, or could not reasonably have been, unauthorized acquisition of such information.'' *See* § 314.2(m).

Some commenters argued the notification requirement should trigger only when especially ''sensitive'' information is involved.[51] These commenters argue that requiring notification when any kind of customer information is involved would result in notifications when there is no risk of harm to consumers.[52] The Commission disagrees with this contention. The definition of ''customer information'' in the Rule does not encompass all information that a financial institution has about consumers. ''Customer information'' is defined as records containing ''non-public personal information'' about a customer.[53] ''Non-public personal information'' is, in turn, defined as ''personally identifiable financial information,'' and excludes information that is publicly available or not ''personally identifiable.''[54] The Commission believes security events that trigger the notification requirement—where customers' non-public personally identifiable, unencrypted financial information has been acquired without authorization—are serious and support the need for Commission notification.

In the SNPRM, the Commission asked whether, rather than having a stand-alone reporting requirement, the Rule should require reporting only when another State or Federal statute, rule, or regulation requires a financial institution to provide notice of a security event or similar event to a governmental entity. Some commenters supported this suggestion, arguing that such a requirement would reduce duplicative notice and consumer confusion.[55] Other commenters opposed it, arguing that because of the varied nature of State notification laws, this would produce inconsistent reporting to the Commission.[56] The Commission agrees that a stand-alone requirement will help ensure the Commission receives consistent information regarding security events.

Determination of Scope of Security Event

After a financial institution becomes aware of a security event, the proposed rule would have required it to determine whether at least 1,000 consumers have been affected or reasonably may be affected and, if so, to notify the Commission.

A number of commenters expressed views pertaining to the minimum threshold for the number of affected customers. Some commenters agreed that notification of security events should not be required if the number of consumers that could be affected fell below the proposed threshold (1,000

[48] *See also* 74 FR 42962, 42966 (Aug. 25, 2009). Examples of this rebuttable presumption cited in that rulemaking, and equally relevant here, included a circumstance where ''an unauthorized employee inadvertently accesses an individual's PHR and logs off without reading, using, or disclosing anything. If the unauthorized employee read the data and/or shared it, however, he or she 'acquired' the information, thus triggering the notification obligation in the rule.'' Another example related to a lost laptop: ''If an entity's employee loses a laptop in a public place, the information would be accessible to unauthorized persons, giving rise to a presumption that unauthorized acquisition has occurred. The entity can rebut this presumption by showing, for example, that the laptop was recovered, and that forensic analysis revealed that files were never opened, altered, transferred, or otherwise compromised.'' *Id.* at 42966.

[49] *Id.*

[50] *See, e.g.,* Ala. Code 8–38–2(6)(b)(2); Alaska Stat. 45.48.090(7); Colo. Rev. Stat. 6–1–716 (2)(a.4); 815 Ill. Comp. Stat. 530/5 (''Personal Information'' definition); NY Gen. Bus. Law 899–aa(b); Tex. Bus. & Com. Code 521.053(a).

[51] AFSA (Comment 12) at 2; CDIA (Comment 13) at 5–6; ETA (Comment 17) at 2; CTIA (Comment 20) at 11–12.

[52] AFSA (Comment 12) at 2; CDIA (Comment 13) at 5–6; ETA (Comment 17) at 2; CTIA (Comment 20) at 11–12.

[53] 16 CFR 314.2(d).

[54] 16 CFR 314.2(l).

[55] CTIA (Comment 20) at 9–10; NADA (Comment 21) at 7.

[56] Clearing House (Comment 11) at 9; ACE (Comment 18) at 7; EPIC (Comment 19) at 6–7.

consumers).[57] The Clearing House, however, suggested that notification should be required in all cases, regardless of the number of consumers potentially affected.[58]

AFSA suggested there should be a higher threshold of affected consumers before notice is required.[59] AFSA argued that the thousand consumer threshold was too low because of ''the large number of financial institutions with many more customers.'' [60] The Commission disagrees that the fact that some financial institutions hold the information of millions of consumers suggests a higher threshold is appropriate. The Clearing House, conversely, argues the Rule should require that the Commission receive notice whenever any consumer is affected, because otherwise consumers whose information was involved in smaller breaches would have no notice of the breach and would be ''without the benefit of important notices'' if financial institutions were not required to report breaches affecting fewer consumers.[61] The Commission does not agree that setting a minimum threshold of consumers affected before requiring notification would leave consumers involved in smaller breaches without notice, as consumers will typically receive direct notification under State breach notification laws, regardless of whether notice to the Commission is required. In determining the proper threshold, the Commission notes that numerous State laws require notification of breaches either with no minimum threshold, or with a threshold of 250 or 500 people. The Commission's own Health Breach Notification Rule, and the Health Insurance Portability and Accountability Act (HIPAA) Breach Notification Rule,[62] also require notification of breaches involving 500 or more people. The Commission concludes that a lower threshold than in the proposed rule is appropriate. Accordingly, the Commission is adopting a minimum threshold of 500 consumers, rather than the minimum threshold of 1,000 consumers that was in proposed § 314.4(j). The Commission believes a security event that involves the acquisition of unencrypted customer information involving at least 500 consumers is significant enough to warrant notification of the Commission, regardless of the size of the financial institution.

Time To Report

The proposed Rule would have required Commission notification within 30 days from discovery of the notification event. Some commenters that addressed this deadline agreed that this would provide financial institutions sufficient time to make the required determinations and to notify the Commission.[63] Other commenters argued that financial institutions should be given significantly less time to notify the Commission.[64] Other commenters argued that financial institutions should be given more time to notify the Commission.[65] The Commission believes that a 30-day deadline properly balances the need for prompt notification with the need to allow financial institutions to investigate a security event, determine whether the information was acquired without authorization and how many consumers were affected, and learn enough about the event to make the notification to the Commission meaningful. Accordingly, finalized § 314.2(j)(1) retains the 30-day deadline from the SNPRM.

Some commenters argued that financial institutions should be permitted to delay or withhold notification of a security event to the Commission at the request of a law-enforcement agency or if notification would interfere with a law enforcement investigation.[66] Alternatively, EPIC suggested the Commission should not allow companies to delay reporting in cases of a law enforcement investigation, but should instead delay publication of the notice in cases where publication would interfere with an investigation.[67] The Commission agrees that, while notifications to the Commission should not be made public if law enforcement has requested a delay, there is no reason to delay notice to the Commission itself on that basis. This conclusion is consistent with the approach taken by the Securities and Exchange Commission and by other Federal financial regulators in rulemakings that require notice of cyber incidents to a regulator, as opposed to notice directly to consumers.[68] Accordingly, § 314.4(j)(1)(vi) of the Final Rule provides that a financial institution's notice must (1) indicate whether any law enforcement official has provided the institution with a written determination that public disclosure of the breach would impede a criminal investigation or cause damage to national security, and (2) provide a means for the Commission to contact the law enforcement official. In order that notice to the public is not delayed indefinitely, the provision also provides that a law enforcement official may request an initial delay of up to 30 days following the date when the disclosure is filed with the Commission. The delay may be extended for an additional period of up to 60 days if the law enforcement official seeks such an extension in writing. Additional delay may be permitted only if the Commission staff determines that public disclosure of a notification event continues to impede a criminal

[57] CDIA (Comment 13) (suggesting a requirement of notification when a security event affects at least 1,000 consumers and may cause substantial harm); American Escrow Association (Comment 16) at 2 (supporting 1,000 consumer requirement while suggesting other changes to the notice requirement); ACE (Comment 17) at 2 (stating that requiring notice when 1,000 consumers are affected would be appropriate, if notices were required only when there was a risk of substantial harm); EPIC (Comment 19) at 4 (suggesting that notice be required whenever an event involves the information of at least 1,000 consumers regardless of the likelihood of misuse).

[58] Clearing House (Comment 11) at 4–5 (suggesting a requirement for notice for any security event involving sensitive customer information, regardless of the number of consumers potentially affected by the event).

[59] AFSA (Comment 12) at 2; *see also* Anonymous (Comment 2) (arguing that threshold should be proportional to the size of the financial information).

[60] *Id.*

[61] Clearing House (Comment 11) at 5. While the Rule requires direct notice of breaches only to the Commission, consumers affected by smaller breaches could learn of those breaches when the Commission makes the notices public. Also, the Rule does not limit State consumer notification laws that require direct notification of consumers.

[62] 45 CFR 164.400 through 164.414.

[63] *See, e.g.,* CDIA (Comment 13) at 7; ACE (Comment 18) at 8; U.S. Chamber of Commerce (Comment 22) at 4.

[64] Anonymous (Comment 2) (suggesting a two-week deadline); Clearing House (Comment 11) at 6 (recommending a 36-hour deadline).

[65] *See* SIFMA/BPI (Comment 15) at 8 (arguing that 30 days should not begin until financial information has determined that security event meets notification requirements); CTIA (Comment 20) at 14 (same).

[66] *See* SIFMA/BPI (Comment 15) at 10; ACE (Comment 18) at 4–5; CTIA (Comment 20) at 15; U.S. Chamber of Commerce (Comment 22) at 5.

[67] EPIC (Comment 19) at 5–6.

[68] *See* Securities and Exchange Commission, *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure,* 88 FR 51896, 51898 (Aug. 8, 2023) (allowing delay of required disclosure of material cybersecurity incidents if the United States Attorney General determines that immediate disclosure would pose a substantial risk to national security or public safety and notifies the Commission of such determination in writing); Office of the Comptroller of the Currency, Federal Reserve System, Federal Deposit Insurance Corporation, *Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers,* 86 FR 66424 (Nov. 23, 2021) (adopting regulations that require banking organizations to notify their primary Federal Regulator of any ''computer security incident'' that rises to the level of a ''notification incident,'' as soon as possible and no longer than 36 hours after the banking organization determines that a notification incident has occurred).

investigation or cause damage to national security.

The proposed § 314.4(j) did not address when a security event should be treated as discovered. The Commission believes adding such a provision will clarify the rule and prevent confusion. Accordingly, under the Final Rule, a notification event shall be treated as discovered as of the first day on which such event is known. Financial institutions will be deemed to have knowledge of a notification event if the event is known to any person, other than the person committing the breach, who is the financial institution's employee, officer, or other agent. Therefore, in instances where an employee, officer, or other agent of the financial institution accesses customer information without authorization, a financial institution will be deemed to have knowledge of a notification event if the event is known to another employee, officer, or other agent of the financial institution.

Contents of Notice

The proposed Rule required that a notice be made electronically on a form on the FTC's website,[69] and that such notice must include the following information: (1) the name and contact information of the reporting financial institution; (2) a description of the types of information that were involved in the notification event; (3) if the information is possible to determine, the date or date range of the notification event; and (4) a general description of the notification event.

Several commenters supported these elements as an appropriate level of detail.[70] However, NADA was opposed to the requirement that the report include a description of the security event,[71] while EPIC suggested the Rule should require a more detailed description of the security event.[72] EPIC argued that financial institutions should also be required to provide a comprehensive description of the types of information involved in the security event and a comprehensive description of the security event, because ''it is critical that financial institutions provide a sufficiently detailed account of each security event to enable the FTC and affected consumers to assess whether and how personal information is at risk.'' [73] The Commission believes that, with the exception noted below, the proposed elements generally provide sufficient information to the Commission and the public without imposing undue burdens on reporting financial institutions. If the Commission determines more information is needed, it will obtain that information from the financial institution. The Commission believes, however, that knowing the number of consumers affected or potentially affected by the notification event would allow it to better evaluate the impact of a particular event. Providing this information, which financial institutions will typically determine in the course of responding to a breach, will not significantly add to the burden to financial institutions. Accordingly, the Final Rule retains the proposed elements, while adding a requirement to provide the number of consumers affected or potentially affected by the notification event.[74]

Publication of Notices

The SNPRM requested public comment on whether submitted reports should be made public. Several commenters argued that making the reports public would benefit consumers by helping them to make informed decisions about which financial institutions to entrust with their financial information or to determine whether they might have been affected by a security event.[75] Other commenters argued the reports should be confidential and not shared with the public.[76] Some commenters argued that making the reports public could encourage further cybersecurity attacks on affected financial institutions by making potential attackers aware of vulnerabilities that have not been remedied by the time the notice is made public.[77] NADA argued that the description of the event in particular should not be made public, suggesting the description provided no benefit to consumers and would not improve data security.[78] The Commission disagrees that making the reports public will increase risk to financial institutions' data security. As discussed above, most financial institutions are already subject to State breach notification laws, many of which require notification to a State agency that then makes the notification public. In addition, the general nature of the information required to be included in the report is unlikely to provide potential attackers any advantage in comprising the financial institution's security.

Other commenters argued that publication of the notices could create undue media coverage and that the information would be too general to assist consumers in making informed decisions.[79] Similarly, CDIA argued that because State law requires direct consumer notification to those affected by the breach, making the information public to all consumers would cause ''consumer confusion and angst about whether the consumer's information has been compromised.'' [80] CTIA also argued that financial institutions that have suffered a security event should not be subject to the punishment of ''name and shame.'' [81] SIFMA and BPI suggested that making the reports public would limit the information financial institutions are willing to share in the reports in order to avoid public revelation of the details of the breach.[82]

As discussed above, the Commission acknowledges not all security events at financial institutions are the result of a failure to comply with the Safeguards Rule. Nevertheless, the Commission believes providing more information to consumers about these events will both benefit consumers and incentivize companies to better protect that information. The Commission is not persuaded that attention given to breaches is ''undue'' or otherwise inappropriate, as suggested by some commenters. Apart from providing

[69] SIFMA/BPI argued that financial institutions should be allowed to notify the Commission by phone because that ''could foster confidentiality.'' SIFMA/BPI (Comment 15) at 7. Similarly, the U.S. Chamber of Commerce suggested that financial institutions should be allowed to notify the Commission by alternative means, such as mail, ''where covered entities may lack access to the internet.'' U.S. Chamber of Commerce (Comment 22) at 4. The Commission believes that notification should be limited to the form on the Commission's website, as this will ensure that all notifications are received and recorded in the same way. The Commission believes that it is not likely that a financial institution that has suffered a notification event will not be able to access the internet for the entirety of the 30-day reporting window.

[70] *See* AFSA (Comment 12) at 2; ACE (Comment 18) at 2; U.S. Chamber of Commerce (Comment 22) at 4.

[71] NADA (Comment 21) at 6.

[72] EPIC (Comment 19) at 3.

[73] *Id.*

[74] As noted above, if applicable, financial institutions would also inform the Commission whether any law enforcement official has provided a written determination that notifying the public of the breach would impede a criminal investigation or cause damage to national security, and a means for the FTC to contact the law enforcement official.

[75] Briggs (Comment 4); Clearing House (Comment 11) at 10; EPIC (Comment 19) at 5–6.

[76] AFSA (Comment 12) at 2–3; CDIA (Comment 13) at 7; SIFMA/BPI (Comment 15) at 5–7; ACE (Comment 18) at 5–7; CTIA (Comment 20) at 15–16; NADA (Comment 21) at 5–6; U.S. Chamber of Commerce (Comment 22) at 5.

[77] SIFMA/BPI (Comment 15) at 7; ACE (Comment 18) at 5–7; CTIA (Comment 20) at 15–16; NADA (Comment 21) at 6.

[78] NADA (Comment 21) at 6.

[79] AFSA (Comment 12) at 2–3; NADA (Comment 21) at 5.

[80] CDIA (Comment 13) at 7; *see also* SIFMA/BPI (Comment 15) at 6 (suggesting that publication of the reports could cause confusion for consumers and investors); ACE (Comment 18) at 5–7.

[81] CTIA (Comment 20) at 16.

[82] SIFMA/BPI (Comment 15) at 6.

actionable information for individuals who are directly affected, reporting provides a broader value to the general public to consider proactive measures, such as implementing a credit freeze, prioritizing methods to secure their own data, and determining where to do business. The Commission does not believe a confidential reporting system is needed in order to incentivize more comprehensive reporting by financial institutions. The general level of detail required to be reported under § 314.4(j)(1) will not compromise a financial institution's security posture going forward—the report requires only the most general information and cannot provide a meaningful roadmap for attackers. Accordingly, the Commission intends to enter notification event reports into a publicly available database.

The SNPRM also asked for comment on whether the Commission should require financial institutions that suffer a security event to directly notify affected consumers, as well as the Commission. Some commenters were in favor of requiring consumer notification, at least when notification of the Commission was required.[83] Most commenters who addressed the issue, however, opposed such a requirement, pointing to the existing regime of State consumer notification laws and arguing that a separate FTC notification requirement would be duplicative and unduly burdensome.[84] The Commission agrees that, because all States have some form of consumer notification requirement, a direct consumer notification requirement in the Safeguards Rule would be largely duplicative of those State laws. Therefore, the Commission has not included such a requirement in the Final Rule.

Finally, the Commission is revising § 314.4(c) to correct a typographical error. As originally promulgated, that section required a financial institution to ''[d]esign and implement safeguards to control the risks you identity through risk assessment. . . .'' Actually, a financial institution must ''[d]esign and implement safeguards to control the risks you identify through risk assessment. . . .'' In the Final Rule, this error is corrected.

Section 314.5: Effective Date

The proposed rule revised § 314.5 so that the reporting requirement in § 314.4(j) would not go into effect until six months after the publication of a final rule. As proposed, finalized § 314.5 provides that § 314.4(j) will become effective on May 13, 2024.

V. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.,* requires Federal agencies to obtain Office of Management and Budget (''OMB'') approval before undertaking a collection of information directed to ten or more persons. Pursuant to the regulations implementing the PRA (5 CFR 1320.8(b)(3)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement, unless it displays a currently valid OMB control number.

The amendment requiring financial institutions to report certain security events to the Commission discussed above constitutes a ''collection of information'' for purposes of the PRA.[85] As required by the PRA, the FTC submitted the proposed information collection requirement to OMB for its review at the time of the publication of the SNPRM. OMB directed the Commission to resubmit the requirement at the time the Final Rule is published. Accordingly, FTC staff has estimated the information collection burden for this requirement as set forth below.

The amendment will affect only those financial institutions that suffer a security event in which unencrypted customer information affecting at least 500 consumers is acquired without authorization. Although the SNPRM proposed a 1,000-consumer cut-off for notification, the Commission believes that the reducing the reporting threshold by 500 consumers will likely make only a small difference in the number of breaches reported.[86] Assuming that reducing the reporting threshold by 500 individuals will lead an additional 5% of financial institutions to report—a generous estimate—FTC staff estimates the reporting requirement will affect approximately 115 financial institutions each year.[87] FTC staff anticipates the burden associated with the reporting requirement will consist of the time necessary to compile the requested information and report it via the electronic form located on the Commission's website. FTC staff estimates this will require approximately five hours for affected financial institutions, for a total annual burden of approximately 575 hours (115 responses × 5 hours).

The Commission does not believe the reporting requirement would impose any new investigative costs on financial institutions. The information about notification events required by the reporting requirement is information the Commission believes financial institutions would acquire in the normal course of responding to a notification event. In addition, in many cases, the information requested by the reporting requirement is similar to information entities are required to disclose under various States' data breach notification laws.[88] As a result, FTC staff estimates the additional costs imposed by the reporting requirement will be limited to the administrative costs of compiling the requested information and reporting it to the Commission on an electronic form located on the Commission's website.

FTC staff derives the associated labor cost by calculating the hourly wages necessary to prepare the required reports. FTC staff anticipates that required information will be compiled by information security analysts in the course of assessing and responding to a notification event, resulting in 3 hours of labor at a mean hourly wage of $57.63 (3 hours × $57.63 = $172.89).[89] FTC staff

[83] Clearing House (Comment 11) at 8–9; EPIC (Comment 19); *see also* Anonymous (Comment 14) (stating that if there is a data breach, consumers ''need to know what happened to their information.''

[84] *See* AFSA (Comment 12) at 3; CDIA (Comment 13) at 8; SIFMA/BPI (Comment 15) at 10; CTIA (Comment 20) at 16–17; NADA (Comment 21) at 7; *see also* American Council on Education (Comment 18) at 8 (stating that the Commission should engage with covered financial institutions about existing notification requirements before establishing a consumer notification requirement).

[85] 44 U.S.C. 3502(3)(A)(i).

[86] According to the Identity Theft Resource Center, 108 entities in the ''Banking/Credit/Financial'' category suffered data breaches in 2019, which affected more than 100 million consumers. 2019 End-of-Year Data Breach Report, Identity Theft Resource Center at 2, available at *https://www.idtheftcenter.org/wp-content/uploads/2020/01/01.28.2020_ITRC_2019-End-of-Year-Data-Breach-Report_FINAL_Highres-Appendix.pdf.* On average, each breach would have involved more than 930,000 consumers, far over both the 500 and the 1,000 consumer thresholds.

[87] According to the Identity Theft Resource Center, 108 entities in the ''Banking/Credit/Financial'' category suffered data breaches in 2019. *2019 End-of-Year Data Breach Report,* Identity Theft Resource Center at 2, *available at https://www.idtheftcenter.org/wp-content/uploads/2020/01/01.28.2020_ITRC_2019-End-of-Year-Data-Breach-Report_FINAL_Highres-Appendix.pdf.* Although this number may exclude some entities that are covered by the Safeguards Rule but are not contained in the ''Banking/Credit/Financial'' category, not every security event will trigger the reporting obligations (*e.g.,* breaches affecting less than 500 people). Therefore, Commission staff estimated in the SNPRM that 110 institutions would have reportable events. Because of the change in the reporting threshold the Commission expects an additional 5 entities to have reporting obligations.

[88] *See, e.g.,* Cal. Civil Code 1798.82; Tex. Bus. & Com. Code 521.053; Fla. Stat. 501.171.

[89] This figure is derived from the mean hourly wage for Information security analysts. See

also anticipates that affected financial institutions may use attorneys to formulate and submit the required report, resulting in 2 hours of labor at a mean hourly wage of $78.74 (2 hours × $78.74 = $157.48).[90] Accordingly, FTC staff estimates the approximate labor cost to be $330 per report (rounded to the nearest dollar). This yields a total annual cost burden of $37,950 (115 annual responses × $330).

The Commission is providing an online reporting form on the Commission's website to facilitate reporting of qualifying notification events. As a result, the Commission does not anticipate covered financial institutions will incur any new capital or non-labor costs in complying with the reporting requirement.

Pursuant to Section 3506(c)(2)(A) of the PRA, the FTC invited comments on: (1) whether the disclosure requirements are necessary, including whether the information will be practically useful; (2) the accuracy of our burden estimates, including whether the methodology and assumptions used are valid; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of providing the required information to the Commission. Although the Commission received several comments that argued that the required notifications would be burdensome for businesses, none addressed the accuracy of the Commission's burden estimate.[91] Other commenters argued that the reporting requirement would create little burden.[92] For the reasons discussed above, the Commission agrees with these commenters and does not believe that reporting requirement will create a significant burden for businesses.

''Occupational Employment and Wages—May 2022,'' Bureau of Labor Statistics, U.S. Department of Labor (April 5, 2023), Table 1 (''National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2023''), *available at https://www.bls.gov/news.release/pdf/ocwage.pdf.*

[90] This figure is derived from the mean hourly wage for Lawyers. See ''Occupational Employment and Wages—May 2019,'' Bureau of Labor Statistics, U.S. Department of Labor (March 31, 2020), Table 1 (''National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2019''), *available at https://www.bls.gov/news.release/pdf/ocwage.pdf.*

[91] CDIA (Comment 13) at 2–3; SIFMA/BPI (Comment 15) at 8; ETA (Comment 17) at 2–3; CTIA (Comment 20) at 3–6; NADA (Comment 21) at 2–3; U.S. Chamber of Commerce (Comment 22).

[92] American Escrow Association (Comment 16) at 2; ACE (Comment 18) at 2, 7–8; EPIC (Comment 19) at 6–7.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') [93] requires that the Commission provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule, and a Final Regulatory Flexibility Analysis (''FRFA'') with the final rule, unless the Commission certifies that the Rule will not have a significant economic impact on a substantial number of small entities.[94] As discussed in the IRFA, the Commission does not believe this amendment to the Safeguards Rule has the threshold impact on small entities. The reporting requirement will apply to financial institutions that, in most cases, already have an obligation to disclose similar information under certain Federal and State laws and regulations and will not require additional investigation or preparation.

In this document, the Commission adopts the amendments proposed in its SNPRM with only minimal modifications. In its IRFA, the Commission determined that the proposed rule would not have a significant impact on small entities because of the minimal information being requested. Although the Commission certifies under the RFA that the rule will not have a significant impact on a substantial number of small entities, and hereby provides notice of that certification to the Small Business Administration, the Commission nonetheless has determined that publishing a FRFA is appropriate to ensure that the impact of the rule is fully addressed. Therefore, the Commission has prepared the following analysis:

1. Need for and Objectives of the Final Rule

The need for and the objective of the Final Rule is to ensure the Commission is aware of notification events that could suggest a financial institution's security program does not comply with the Rule's requirements, thus facilitating Commission enforcement of the Rule. To the extent the reported information is made public, the information will also assist consumers by providing information as to notification events experienced by various financial institutions.

2. Significant Issues Raised in Public Comments in Response to the IRFA

Although the Commission received several comments that argued that the required notifications would be burdensome for businesses,[95] none argued specifically that smaller businesses in particular would be subject to special burden. Other commenters argued that the reporting requirement would create little burden.[96] One commenter specifically argued that the requirement would not create significant burden for small businesses.[97] As discussed above, the Commission does not anticipate that covered financial institutions will incur any new capital or non-labor costs in complying with the reporting requirement. Additionally, the average annual labor costs per covered financial institution are de minimis because most entities, including small entities, will only infrequently be required to file a report. Thus, the Commission does not believe that the reporting requirement will create a significant burden for financial institutions in general, including small businesses.

The Commission did not receive any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (''SBA'').

3. Description and an Estimate of the Number of Small Entities to Which the Final Rule Will Apply, or Explanation Why No Estimate Is Available

As explained in the IRFA, determining a precise estimate of the number of small entities [98] that would

[93] 5 U.S.C. 601–612.

[94] 5 U.S.C. 603–605.

[95] CDIA (Comment 13) at 2–3; SIFMA/BPI (Comment 15) at 8; ETA (Comment 17) at 2–3; CTIA (Comment 20) at 3–6; NADA (Comment 21) at 2–3; U.S. Chamber of Commerce (Comment 22).

[96] American Escrow Association (Comment 16) at 2; ACE (Comment 18) at 2, 7–8; EPIC (Comment 19) at 6–7.

[97] American Escrow Association (Comment 16) at 2 (stating that the reporting requirement ''does not appear to be onerous as a reporting matter and we also agree with the FTC's conclusion that there would not be a significant impact on small business'').

[98] The U.S. Small Business Administration Table of Small Business Size Standards Matched to North American Industry Classification System Codes (''NAICS'') are generally expressed in either millions of dollars or number of employees. A size standard is the largest that a business can be and still qualify as a small business for Federal Government programs. For the most part, size standards are the annual receipts or the average employment of a firm. Depending on the nature of the financial services an institution provides, the size standard varies. By way of example, mortgage and nonmortgage loan brokers (NAICS code 522310) are classified as small if their annual receipts are $15 million or less. Consumer lending institutions (NAICS code 52291) are classified as small if their annual receipts are $47 million or less. Commercial banking and savings institutions (NAICS codes 522110 and 522120) are classified as small if their assets are $850 million or less. Assets are determined by averaging the assets reported on businesses' four quarterly financial statements for the preceding year. The 2023 Table of Small Business Size Standards is available at *https://www.sba.gov/document/support--table-size-standards.*

have to report a notification event in a given year is not readily feasible. No commenters addressed this issue. Both small entities and larger ones experience security incidents involving disclosure of consumer information.[99] However, other factors complicate the analysis. There are no estimates available reflecting the percentage of financial institutions under the Commission's jurisdiction that would be considered small entities, and small entities may be more likely to experience notification events that fall below the notification threshold, for example. Such factors are not reflected in industry and economic sector data, and, therefore, it is not possible to estimate the number of small entities covered by the Rule from such data. Projecting from entities' past experiences of actual breaches, however, as discussed in the section discussing the PRA, FTC staff estimates the Rule's reporting requirement would affect approximately 115 entities per year in the future. Accordingly, even if every financial institution required to report in a given year were a small entity, the reporting requirement would affect only approximately 115 such entities. Regardless, as discussed above, these amendments will not add any significant additional burdens on any covered small businesses.

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The notification requirement imposes reporting requirements. As outlined above, the amendment will affect only those financial institutions that suffer a notification event in which unencrypted customer information affecting at least 500 consumers is acquired without authorization. If such an event occurs, the affected financial institution may expend costs to provide the Commission with the information required by the reporting requirement. As noted in the PRA analysis above, the total estimated annual cost burden for all entities subject to the reporting requirement will be approximately $37,950.

5. Description of Steps Taken To Minimize Significant Economic Impact, If Any, on Small Entities, Including Alternatives

The Commission did not propose any specific small entity exemption or other significant alternatives because the burden imposed upon small businesses is minimal. In drafting the reporting requirement, the Commission has made every effort to avoid unduly burdensome requirements for entities. The reporting requirement only mandates that affected financial institutions provide the Commission with information necessary to assist it in its regulatory and enforcement efforts. The rule minimizes burden on all covered financial institutions, including small businesses, by providing for reporting through an online form on the Commission's website. In addition, the rule requires that only notification events involving at least 500 consumers must be reported, which will reduce potential burden on small businesses that retain information on fewer consumers. Therefore, the Commission does not believe that any alternatives for small entities are required or appropriate.

VII. Other Matters

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 314

Consumer protection, Computer technology, Credit, Privacy, Trade practices.

For the reasons stated above, the Federal Trade Commission amends 16 CFR part 314 as follows:

PART 314—STANDARDS FOR SAFEGUARDING CUSTOMER INFORMATION

■ 1. The authority citation for part 314 continues to read as follows:

Authority: 15 U.S.C. 6801(b), 6805(b)(2).

■ 2. In § 314.2:
■ a. Redesignate paragraphs (m) through (r) as paragraphs (n) through (s), respectively; and
■ b. Add a new paragraph (m). The addition reads as follows:

§ 314.2 Definitions.

* * * * *

(m) *Notification event* means acquisition of unencrypted customer information without the authorization of the individual to which the information pertains. Customer information is considered unencrypted for this purpose if the encryption key was accessed by an unauthorized person. Unauthorized acquisition will be presumed to include unauthorized access to unencrypted customer information unless you have reliable evidence showing that there has not been, or could not reasonably have been, unauthorized acquisition of such information.

* * * * *

■ 3. In § 314.4, revise the introductory text of paragraph (c) and add paragraph (j) to read as follows:

§ 314.4 Elements.

* * * * *

(c) Design and implement safeguards to control the risks you identify through risk assessment, including by:

* * * * *

(j) Notify the Federal Trade Commission about notification events in accordance with paragraphs (j)(1) and (2) of this section.

(1) *Notification requirement.* Upon discovery of a notification event as described in paragraph (j)(2) of this section, if the notification event involves the information of at least 500 consumers, you must notify the Federal Trade Commission as soon as possible, and no later than 30 days after discovery of the event. The notice shall be made electronically on a form to be located on the FTC's website, *https://www.ftc.gov.* The notice shall include the following:

(i) The name and contact information of the reporting financial institution;

(ii) A description of the types of information that were involved in the notification event;

(iii) If the information is possible to determine, the date or date range of the notification event;

(iv) The number of consumers affected or potentially affected by the notification event;

(v) A general description of the notification event; and

(vi) Whether any law enforcement official has provided you with a written determination that notifying the public of the breach would impede a criminal investigation or cause damage to national security, and a means for the Federal Trade Commission to contact the law enforcement official. A law enforcement official may request an initial delay of up to 30 days following the date when notice was provided to the Federal Trade Commission. The delay may be extended for an additional period of up to 60 days if the law enforcement official seeks such an extension in writing. Additional delay may be permitted only if the Commission staff determines that public disclosure of a security event continues to impede a criminal investigation or cause damage to national security.

(2) *Notification event treated as discovered.* A notification event shall be treated as discovered as of the first day on which such event is known to you. You shall be deemed to have knowledge

[99] *See, e.g.,* 2023 Verizon Data Breach Investigations Report at 65, available at *https://www.verizon.com/business/resources/reports/dbir/* (reporting cybersecurity incidents and confirmed data disclosures for companies with fewer than or more than 1000 employees).

of a notification event if such event is known to any person, other than the person committing the breach, who is your employee, officer, or other agent.

■ 4. Revise § 314.5 to read as follows:

§ 314.5 Effective date.

Section 314.4(j) is effective as of May 13, 2024.

By direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2023–24412 Filed 11–9–23; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2023–0882]

Special Local Regulations; San Diego Parade of Lights, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the San Diego Parade of Lights special local regulations on the waters of San Diego Bay, California on December 10, 2023 and December 17, 2023. These special local regulations are necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from anchoring, blocking, loitering, or impeding within this regulated area unless authorized by the Captain of the Port Sector San Diego or a designated representative.

DATES: The regulations in 33 CFR 100.1101 will be enforced from 5 p.m. through 8 p.m. on December 10, 2023, and from 5 p.m. through 8 p.m. on December 17, 2023, for Item 5 in Table 1 of Section 100.1101.

FOR FURTHER INFORMATION CONTACT: If you have questions about this publication of enforcement, call or email Lieutenant Shelley Turner, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1101 for the San Diego Parade of Lights in San Diego Bay, CA in 33 CFR 100.1101, Table 1, Item 5 of that section from 5 p.m. until 8 p.m. on December 10, 2023, and on December 17, 2023. This enforcement action is being taken to provide for the safety of life on navigable waterways during the event. The Coast Guard's regulation for recurring marine events in the San Diego Captain of the Port Zone identifies the regulated entities and area for this event. During the enforcement periods and under the provisions of 33 CFR 100.1101, persons and vessels are prohibited from anchoring, blocking, loitering, or impeding within this regulated area, unless authorized by the Captain of the Port, or his designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

In addition to this document in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners, marine information broadcasts, and local advertising by the event sponsor.

J.W. Spitler,

Captain, U.S. Coast Guard, Captain of the Port Sector San Diego.

[FR Doc. 2023–25028 Filed 11–9–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2023–0871]

Special Local Regulation; Marine Events Within the Eleventh Coast Guard District—Mission Bay Parade of Lights

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the special local regulation on the waters of Mission Bay, CA, during the Mission Bay Parade of Lights on December 10, 2022. This special local regulation is necessary to provide for the safety of the participants, crew, sponsor vessels of the event, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from entering into, transiting through, or anchoring within this regulated area unless authorized by the Captain of the Port Sector San Diego or their designated representative.

DATES: The regulations in 33 CFR 100.1101 for the location described in Item 6 in Table 1 to § 100.1101, will be enforced from 5:30 p.m. through 8 p.m. on December 10, 2023, and December 17, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email Lieutenant Shelley Turner, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1101 for the location identified in Item No. 6 in Table 1 to § 100.1101, from 5:30 p.m. until 8 p.m. on December 10, 2023, and December 17, 2023, for the Mission Bay Parade of Lights in Mission Bay, CA. This action is being taken to provide for the safety of life on the navigable waterways during the event. Our regulation for recurring marine events in the San Diego Captain of the Port Zone, § 100.1101, Item No. 6 in table 1 to § 100.1101, specifies the location of the regulated area for the Mission Bay Parade of Lights, which encompasses portions of Mission Bay. Under the provisions of § 100.1101, persons and vessels are prohibited from entering into, transiting through, or anchoring within this regulated area unless authorized by the Captain of the Port, or his designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

In addition to this document in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners and marine information broadcasts.

J.W. Spitler,

Captain, U.S. Coast Guard, Captain of the Port Sector San Diego.

[FR Doc. 2023–25027 Filed 11–9–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0870]

RIN 1625–AA00

Safety Zone; APEC 2023 Fireworks; San Francisco Bay, San Francisco, CA

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary final rule.

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U.S. GOVERNMENT
INFORMATION
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FEDERAL TRADE COMMISSION

16 CFR Part 463

RIN 3084–AB72

Combating Auto Retail Scams Trade Regulation Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is issuing this Combating Auto Retail Scams Trade Regulation Rule (''CARS Rule,'' ''Rule,'' or ''Final Rule'') and Statement of Basis and Purpose (''SBP'') related to the sale, financing, and leasing of covered motor vehicles by covered motor vehicle dealers. The Final Rule, among other things, prohibits motor vehicle dealers from making certain misrepresentations in the course of selling, leasing, or arranging financing for motor vehicles, requires accurate pricing disclosures in dealers' advertising and sales communications, requires dealers to obtain consumers' express, informed consent for charges, prohibits the sale of any add-on product or service that confers no benefit to the consumer, and requires dealers to keep records of certain advertisements and customer transactions.

DATES: This rule is effective July 30, 2024.

ADDRESSES: Copies of this document are available on the Commission's website, *www.ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Daniel Dwyer or Sanya Shahrasbi, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 202–326–2957 (Dwyer), 202–326–2709 (Shahrasbi), *ddwyer@ftc.gov, sshahrasbi@ftc.gov.*

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(i) Keeping Cash Down Payments or Trade-in Vehicles, Charging Fees, or Initiating Legal Process or Any Action If a Transaction Is Not Finalized or If the Consumer Does Not Wish To Engage in a Transaction
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I. Background

A. Statutory Authority

The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') was signed into law in 2010.[1] Section 1029 of the Dodd-Frank Act authorizes the FTC to prescribe rules with respect to unfair or deceptive acts or practices by motor vehicle dealers.[2] The FTC is authorized to do so under the FTC Act and in accordance with section 553 of the Administrative Procedure Act (''APA'').[3] The grant of APA rulemaking authority set forth in section 1029 of the Dodd-Frank Act became effective as of July 21, 2011—the designated ''transfer date'' established by the Treasury Department.[4]

B. Commission Actions Following the Dodd-Frank Act and the Rulemaking Process

Following enactment of the Dodd-Frank Act, the Commission published in the **Federal Register** a notice discussing its authority to prescribe rules with respect to unfair or deceptive acts or practices by motor vehicle dealers and announcing that it would be hosting a series of public roundtables to explore consumer protection issues pertaining to motor vehicle sales and leasing, including what consumer protection issues, if any, exist that could be addressed through a possible rulemaking.[5] The Commission sought participation from regulators, consumer advocates, industry participants, and other interested parties and ultimately held three such public roundtables.[6]

The Commission subsequently focused on enforcement and business guidance in the motor vehicle dealer marketplace. As discussed in SBP II.C,[7] however, certain unfair and deceptive acts or practices have persisted, despite more than a decade of enforcement and education. Accordingly, on June 23, 2022, the Commission announced a notice of proposed rulemaking (''NPRM'') addressing unfair or deceptive acts or practices by motor vehicle dealers.[8] That notice was published in the **Federal Register** on July 13, 2022.[9] The NPRM, among other things, proposed to (i) prohibit motor vehicle dealers from making certain misrepresentations, (ii) require accurate pricing disclosures, (iii) prohibit the sale of any add-on product or service that confers no benefit to the consumer, (iv) require express, informed consent for add-ons and other charges, and (v) impose certain recordkeeping requirements. The comment period for the NPRM closed on September 12, 2022.

In response to the NPRM and proposed rule, the Commission received more than 27,000 comments from stakeholders representing a wide range of viewpoints.[10] These stakeholders included numerous individual consumers who described deceptive practices during recent car purchases and many who discussed current or former military service and deceptive and predatory practices common near military installations.[11] Commenters

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] 12 U.S.C. 5519(d). *See* 12 U.S.C. 5519(f)(1) and (2) for definitions of the terms ''motor vehicle'' and ''motor vehicle dealer'' under section 1029 of the Dodd-Frank Act, respectively.

[3] *See* 12 U.S.C. 5519(a) (discussing the authority over ''motor vehicle dealer[s] that [are] predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both''); 12 U.S.C. 5519(d) (''Notwithstanding section 57a of title 15, the Federal Trade Commission is authorized to prescribe rules under sections 45 and 57a(a)(1)(B) of title 15[ ] in accordance with section 553 of title 5, with respect to a person described in subsection (a).''); 5 U.S.C. 553. Because the Commission has authority to promulgate this Rule in accordance with the APA, it is not required to include a statement as to the prevalence of the acts or practices treated by the Rule under section 18(d) of the FTC Act. *Compare* 12 U.S.C. 5519(d) and (a) (providing the FTC with APA rulemaking authority for purposes of section 1029 of the Dodd-Frank Act), *with* 15 U.S.C. 57a(b)(3) (requiring a statement as to prevalence for certain rulemaking proceedings by the Commission under non-APA procedures), *and* 15 U.S.C. 57a(b)(1) (establishing that certain rulemaking proceedings by the Commission under non-APA procedures are subject to requirements in addition to those under the APA).

[4] *See* 12 U.S.C. 5411(a).

[5] 76 FR 14014, 14015 (Mar. 15, 2011).

[6] *See* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Apr. 12, 2011), *https://www.ftc.gov/news-events/events/2011/04/road-ahead-selling-financing-leasing-motor-vehicles* (providing materials from roundtable in Detroit, Michigan); Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Aug. 2, 2011), *https://www.ftc.gov/news-events/events/2011/08/road-ahead-selling-financing-leasing-motor-vehicles* (providing materials from roundtable in San Antonio, Texas); Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Nov. 17, 2011), *https://www.ftc.gov/news-events/events/2011/11/road-ahead-selling-financing-leasing-motor-vehicles* (providing materials from roundtable in Washington, District of Columbia).

[7] As used herein, references to the ''Statement of Basis and Purpose'' or ''SBP'' refer to the portions of this document that precede the regulatory text of the Final Rule. References to the ''Rule,'' ''Final Rule,'' or ''CARS Rule'' refer to the text in part 463—Combating Auto Retail Scams (''CARS'') Trade Regulation Rule. Because the Final Rule is narrower than the proposed Motor Vehicle Dealers Trade Regulation Rule in the NPRM, the Commission has modified the Rule title to reflect the more limited scope.

[8] *See* Press Release, Fed. Trade Comm'n, ''FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers'' (June 23, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers.*

[9] *See* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Motor Vehicle Dealers Trade Regulation Rule, 87 FR 42012 (released June 23, 2022; published July 13, 2022) [hereinafter NPRM], *https://www.govinfo.gov/content/pkg/FR-2022-07-13/pdf/2022-14214.pdf.*

[10] The Commission received 27,349 comment submissions filed online in response to its NPRM. *See* Gen. Servs. Admin., Dkt. No. FTC–2022–0046, Proposed Rule, Motor Vehicle Dealers Trade Regulation Rule (July 13, 2022), *https://www.regulations.gov/document/FTC-2022-0046-0001* (noting comments received). To facilitate public access, over 11,000 such comments have been posted publicly on *Regulations.gov* at *https://www.regulations.gov/document/FTC-2022-0046-0001/comment* (noting posted comments). As explained at *Regulations.gov*, agencies may choose to redact or withhold certain submissions (or portions thereof) such as those containing private or proprietary information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. *See* Gen. Servs. Admin., *Regulations.gov* Frequently Asked Questions, Find Dockets, Documents, and Comments FAQs, ''How are comments counted and posted to *Regulations.gov?*,'' *https://www.regulations.gov/faq?anchor=downloadingdata* (last visited Dec. 5, 2023). The Commission has considered all timely and responsive public comments it received in response to its NPRM.

[11] *See, e.g.,* Individual commenter, Doc. No. FTC–2022–0046–4648 (''As a young Marine stationed in

Continued

also included dealerships and their employees, industry groups, consumer and community groups, and Federal and State lawmakers and law enforcement agencies. Many commenters, such as consumers, some dealers and dealer employees, consumer groups, and lawmakers and enforcers, were supportive of the proposed rule in whole or in part. Many of these commenters also urged the FTC to include additional protections for consumers and law-abiding businesses, while others, such as industry groups, dealers, and dealer employees, asked questions or criticized the proposal.[12] These comments and responses to comments are discussed primarily in the discussion of the Final Rule in SBP III.

The Commission notes that it has undertaken careful review and consideration of each of the comments it received in response to its NPRM. The Commission has dedicated the majority of its section-by-section analysis to descriptions of, and responses to, comments or portions thereof that were critical of the Commission's proposal or that urged the Commission to adopt additional requirements. Thus, to ensure that this document also reflects the many comments in the public record from stakeholders who supported the proposal as is, the Commission has excerpted a number of such comments in portions of its SBP.

II. Motor Vehicle Financing and Leasing

A. Overview of the Motor Vehicle Marketplace

For many consumers, buying or leasing a motor vehicle is essential, expensive, and time-consuming.[13] Americans rely on their vehicles for work, school, childcare, groceries, medical visits, and many other important tasks in their daily lives.[14] These vehicles have become increasingly costly: the average price of a new vehicle sold at a new car dealership in 2022 was more than $46,000,[15] while the average price of a used vehicle sold at such dealerships was more than $30,000.[16] By the second quarter of 2023, the average monthly payment for used cars reached $533, and the average monthly payment for new cars reached $741—both record highs.[17] Vehicles are now many consumers' largest expense—on a par with housing, child care and food, and accounting for 16% of the median annual household income before taxes.[18] In 2022 alone, Americans spent more than $720 billion on motor vehicles and vehicle parts.[19]

Given these costs, many consumers who purchase a motor vehicle rely on financing to complete their purchases. According to public reports, 81% of new motor vehicle purchases, and nearly 35% of used vehicle purchases, are financed.[20] By the first quarter of 2023, Americans had more than 107 million outstanding auto financing accounts and owed more than $1.56 trillion thereon,[21] making auto finance the third-largest source of debt for U.S. consumers, and the second-largest for U.S. consumers ages 40 and over.[22] Servicemembers have an average of twice as much auto debt as civilians—particularly young servicemembers, who generally require vehicles for transportation while living on military bases.[23] By the age of 24, around 20

a military town I was taken advantage of by a dealership when purchasing my first car. It set me back financially for years. I know of many young military people who purchased vehicle[ ]s and we[ ]re instantly so far upside down after leaving the dealership with thousands of dollars in add on junk charges . . . .''); Individual commenter, Doc. No. FTC–2022–0046–0542 (''As a former member of the Military, the amount of scams and horror stories I have heard regarding young service members buying cars is absurd. . . . Someone shouldn't have to do hours of research on how to buy a car so they don't get taken advantage of.''); Individual commenter, Doc. No. FTC–2022–0046–0637 (''As a small business owner and active duty military member I have played the role of both a buyer, toiling for hours to just reach fair deals on vehicles, as well as that of an advocate for my Sailors who have been preyed upon by local dealerships. Nowhere else in our society do so many average citizens have to mentally prepare for a battle over fair pricing and treatment for something that is realistically a modern necessity.''); Individual commenter, Doc. No. FTC–2022–0046–9840 (''I can't list the number of times I have either seen, or have stepped in a situation, where car dealers have either attempted to take, or have successfully taken, advantage of a young military member or their family by baiting and switching when it came to the price of a car, or stated that the price was one amount, only to be charged, and over-charged a higher amount. These dealers have even attempted to pull unethical tricks on me and my wife, even after they found out that I was a military member, a combat veteran, that was serving this great nation.''); Individual commenter, Doc. No. FTC–2022–0046–0845 (''Predatory practices like [bait-and-switch pricing] are common near military installations . . . .'').

[12] Industry commenters claimed that many of the areas covered by the proposed rule are already addressed in industry guidance. The Commission notes that, although industry guidance can provide helpful information to dealers, dealers who choose not to follow such guidance, or who engage in deceptive or unfair practices, subject their customers to significant harm. The Rule addresses such practices, thus protecting consumers and law-abiding dealers.

[13] Unless otherwise indicated, the terms ''auto,'' ''automobile,'' ''car,'' ''motor vehicle,'' and ''vehicle,'' as used in this SBP and the Commission's final regulatory analysis, refer to ''Covered Motor Vehicle'' as defined in this part.

[14] During 2017 to 2022, an average of 91% of American workers who did not work from home drove to work. *See* U.S. Census Bureau, ''American Community Survey: Means of Transportation to Work by Selected Characteristics, 2022: ACS 1-Year Estimates Subject Tables'' (2023), *https://data.census.gov/table?q=Commuting&tid=ACSST1Y2022.S0802* (reporting 110,245,368 workers 16 years and over who drove alone to work in a car, truck, or van, and 13,881,067 workers 16 years and over who drove by carpool to work in a car, truck or van, together accounting for 91% of the total of 136,196,004 workers 16 years and over who did not work from home); U.S. Census Bureau, ''American Community Survey: Means of Transportation to Work by Selected Characteristics, 2021: 2017–2021 ACS 5-Year Estimates Subject Tables'' (2022), *https://data.census.gov/table?q=Commuting&tid=ACSST5Y2021.S0802* (reporting 113,724,271 workers 16 years and over who drove alone to work in a car, truck, or van, and 13,340,838 workers 16 years and over who drove by carpool to work in a car, truck or van, together accounting for 91% of the total of 140,223,271 workers 16 years and over who did not work from home).

[15] Nat'l Auto. Dealers Ass'n, ''NADA Data 2022'' 7, *https://www.nada.org/media/4695/download?inline* (noting average retail selling price of $46,287 for new vehicles sold by dealerships in 2022).

[16] *Id.* at 10 (noting average retail selling price of $30,736 for used vehicles sold by new-vehicle dealerships in 2022).

[17] Lydia DePillis, ''How the Costs of Car Ownership Add Up,'' N.Y. Times (Oct. 6, 2023), *https://www.nytimes.com/interactive/2023/10/07/business/car-ownership-costs.html* (citing average monthly payment figures from TransUnion).

[18] *Id.* (citing data from AAA and the U.S. Census Bureau).

[19] Bureau of Econ. Analysis, ''National Data: National Income and Product Accounts, Personal Consumption Expenditures by Major Type of Product'' tbl. 2.3.5, *https://apps.bea.gov/iTable/?reqid=19&step=2&isuri=1&categories=survey#eyJhcHBpZCI6MTksInN0ZXBzIjpbMSwyLDNdLCJkYXRhIjpbWyJjYXRlZ29yaWVzIiwiU3VydmV5Il0sWyJOSVBBX1RhYmxlX0xpc3QiLCI2NSJdXX0=* (last revised July 27, 2023) (listing estimated annual expenditure rates of between $713.1 billion and $737.1 billion in 2022).

[20] Melinda Zabritski, Experian Info. Sols., Inc., ''State of the Automotive Finance Market Q4 2020'' 5, *https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf* (on file with the Commission).

[21] Fed. Rsrv. Bank of N.Y., ''Quarterly Report on Household Debt and Credit, 2023: Q1'' 3–4 (May 2023), *https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2023Q1;* Fed. Rsrv. Bank of N.Y., ''Data Underlying Report'' on ''Page 3 Data'' and ''Page 4 Data'' tabs, *https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/HHD_C_Report_2023Q1* (last visited Dec. 5, 2023) (listing number of open ''Auto Loan'' accounts and total outstanding balance in such accounts).

[22] Fed. Rsrv. Bank of N.Y., ''Quarterly Report on Household Debt and Credit, 2023: Q1'' 3, 21 (May 2023), *https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2023Q1;* Fed. Rsrv. Bank of N.Y., ''Data Underlying Report'' on ''Page 3 Data'' and ''Page 21 Data'' tabs, *https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/xls/HHD_C_Report_2023Q1* (last visited Dec. 5, 2023) (listing total ''Auto Loan'' debt balance compared to other product type categories).

[23] *See* Consumer Fin. Prot. Bureau, ''Financially Fit? Comparing the Credit Records of Young Servicemembers and Civilians'' 27 (July 2020), *https://files.consumerfinance.gov/f/documents/cfpb_financially-fit_credit-young-servicemembers-civilians_report_2020-07.pdf.*

percent of young servicemembers have at least $20,000 in auto debt, which equates to nearly two-thirds of an enlisted soldier's typical base salary at that age.[24]

In addition to the expense, the process of buying or leasing a vehicle is often time-consuming and arduous. It can take several hours or days to finalize a transaction,[25] on top of the hours it can take, particularly in rural areas, to drive to a dealership.[26] Consumers may need to take time off work or arrange childcare, and families with a single vehicle may be forced to delay other important appointments due to the length of the vehicle-buying or -leasing process.

Most consumers—approximately 70%—finance vehicle purchases through a motor vehicle dealer,[27] using what is known as dealer-provided ''indirect'' financing.[28] This financing is typically offered through dealers' financing and insurance (''F&I'') offices, which may also offer leasing and add-on products or services. In the dealer-provided financing scenario, the dealer collects financial information about the consumer and forwards that information to prospective motor vehicle financing entities. These financing entities evaluate this information and, in the process, determine whether, and on what terms, to provide credit.[29] These terms include the ''buy rate'': a risk-based finance charge that reflects the interest rate at which the entity will finance the deal.[30] Dealers often add a finance charge called a ''dealer reserve'' or ''markup'' to the buy rate.[31] Unlike the buy rate, the markup is not based on the underwriting risk or credit characteristics of the applicant, and dealers retain the markup as profit.[32] New vehicle dealers average a gross profit of about $2,444 per vehicle,[33] more than half of which comes from the dealers' F&I offices. Independent used vehicle dealers averaged a gross profit of more than $6,000 per vehicle, as of 2019.[34] While some used vehicle dealerships do not have a separate F&I office, more than half of such dealerships sell add-on products.[35]

Six to eight percent of financed vehicle purchases use what is called ''buy here, pay here'' dealers.[36] In this scenario, consumers typically borrow from, and make their payments directly to, the dealership.

The remainder of financed vehicle transactions use what is commonly referred to as ''direct'' financing, provided by a credit union, bank, or other financing entity.[37] In this scenario, consumers typically receive an interest rate quote from the financing entity prior to arriving at a dealership to purchase a vehicle, and use the financing to pay for their chosen vehicle.[38] Dealerships do not profit on the financing portion of the vehicle sale transaction when a consumer arranges financing directly.

Finally, consumers may choose to lease a vehicle from a dealership rather than purchase one. In this scenario, consumers may drive a vehicle for a set period of time—typically around three years[39]—and for a certain maximum number of miles—typically 10,000–15,000 miles per year—in exchange for an upfront payment, a monthly payment, and fees before, during, and at the end of the lease, including for excess wear and usage over the mileage limit.[40] When consumers lease a vehicle, they do not own it, and they must return the vehicle when the lease expires, though they may have the option to purchase

[24] *See* Consumer Fin. Prot. Bureau, ''Protecting Servicemembers from Costly Auto Loans and Wrongful Repossessions'' (July 18, 2022), *https://www.consumerfinance.gov/about-us/blog/protecting-servicemembers-from-costly-auto-loans-and-wrongful-repossessions/.*

[25] Mary W. Sullivan, Matthew T. Jones & Carole L. Reynolds, Fed. Trade Comm'n, ''The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research'' 15 (July 2020) [hereinafter Auto Buyer Study], *https://www.ftc.gov/system/files/documents/reports/auto-buyer-study-lessons-depth-consumer-interviews-related-research/bcpreportsautobuyerstudy.pdf* (noting that the purchase transactions in the FTC's qualitative study often took 5 hours or more to complete, with some extending over several days); *Cf.* Cox Auto., ''2020 Cox Automotive Car Buyer Journey'' 6 (2020) [hereinafter 2020 Cox Automotive Car Buyer Journey], *https://b2b.autotrader.com/app/uploads/2020-Car-Buyer-Journey-Study.pdf* (reporting average consumer time spent shopping for a vehicle at 14 hours, 53 minutes); Cox Auto., ''2022 Car Buyer Journey: Top Trends Edition'' 6 (2023) [hereinafter 2022 Car Buyer Journey], *https://www.coxautoinc.com/wp-content/uploads/2023/01/2022-Car-Buyer-Journey-Top-Trends.pdf* (reporting average consumer time spent shopping for a vehicle at 14 hours, 39 minutes).

[26] For example, consumers have complained about going to a dealership based on an offer that the dealer refuses to honor only after they have spent hours driving there and additional time on the lot. *See, e.g.,* Complaint ¶¶ 23–26, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–0169 (N.D. Ill. Mar. 31, 2022) (alleging that many consumers drive hours to dealerships based on the advertised prices; that test-driving and selecting a vehicle, and negotiating the price and financing terms, is an often hours-long process; and that, after this time, dealers falsely told consumers that add-on products or packages were required to purchase or finance the vehicle, even though they were not included in the low prices advertised or disclosed to consumers who called to confirm prices).

[27] Unless otherwise indicated, the terms ''dealer,'' ''dealership,'' and ''motor vehicle dealer'' as used in this SBP and the Commission's final regulatory analysis refer to '' 'Covered Motor Vehicle Dealer' or 'Dealer' '' as defined in this part.

[28] *See* Nat'l Auto. Dealers Ass'n, ''Dealer-Assisted Financing Benefits Consumers,'' *https://www.nada.org/autofinance/[https://web.archive.org/web/20220416131718/https://www.nada.org/autofinance/]* (Apr. 16, 2022) (noting that 7 out of 10 consumers finance through their dealership). This is also known as ''dealer financing,'' because consumers obtain financing through the dealer that partners with other entities in the financing process.

[29] Dealers often originate the contract governing the extension of retail credit or retail leases and then sell, or otherwise assign, these contracts to unaffiliated third-party finance or leasing sources, including such third parties the dealer may have contacted in the course of arranging dealer-provided ''indirect'' financing. *See* Consumer Fin. Prot. Bureau, ''Automobile Finance Examination Procedures'' 3 (Aug. 2019), *https://files.consumerfinance.gov/f/documents/201908_cfpb_automobile-finance-examination-procedures.pdf.*

[30] *See* Nat'l Auto. Dealers Ass'n, Nat'l Ass'n of Minority Auto. Dealers & Am. Int'l Auto. Dealers Ass'n, ''Fair Credit Compliance Policy & Program'' 2 (2015), *https://www.nada.org/media/4558/download?inline.* (defining ''buy rate'' as ''the rate at which the finance source will purchase the credit contract from the dealer'').

[31] *See, e.g., id.* at 1 n.4 & accompanying text.

[32] *Id.* (describing this as the amount dealers earn for arranging financing, measured as the difference between the consumer's annual percentage rate (''APR'') and the wholesale ''buy rate'' at which a finance source buys the finance contract from the dealer, and noting that finance sources typically permit dealers to retain the dealer participation).

[33] Nat'l Auto. Dealers Ass'n, ''Average Dealership Profile'' 1 (2020), *https://www.nada.org/media/4136/download?attachment[http://web.archive.org/web/20220623204158/https://www.nada.org/media/4136/download?attachment]* (June 23, 2022).

[34] Nat'l Indep. Auto. Dealers Ass'n, ''NIADA Used Car Industry Report 2020'' 21 (2020).

[35] *Id.* at 8, 10.

[36] Melinda Zabritski, Experian Info. Sols., Inc., ''State of the Automotive Finance Market Q2 2020'' 8 (2020), *https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-q2-safm-final.pdf* [*http://web.archive.org/web/20201106002015/https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-q2-safm-final.pdf*] (Mar. 6, 2023).

[37] Consumer Fin. Prot. Bureau, ''Automobile Finance Examination Procedures'' 4 (Aug. 2019), *https://files.consumerfinance.gov/f/documents/201908_cfpb_automobile-finance-examination-procedures.pdf.*

[38] Consumer Fin. Prot. Bureau, ''Consumer Voices on Automobile Financing'' 5 (June 2016), *https://files.consumerfinance.gov/f/documents/201606_cfpb_consumer-voices-on-automobile-financing.pdf.*

[39] Melinda Zabritski, Experian Info. Sols., Inc., ''State of the Automotive Finance Market Q4 2020'' 26 (2020), *https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf* [*http://web.archive.org/web/20210311174922/https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf*] (Mar. 6, 2023).

[40] *See* Fed. Trade Comm'n, ''Financing or Leasing a Car,'' *https://www.consumer.ftc.gov/articles/0056-financing-or-leasing-car* (last visited Dec. 5, 2023) (''The annual mileage limit in most standard leases is 15,000 or less.''); Consumer Fin. Prot. Bureau, ''What should I know about the differences between leasing and buying a vehicle?,'' *https://www.consumerfinance.gov/ask-cfpb/what-should-i-know-about-the-differences-between-leasing-and-buying-a-vehicle-en-815/* (last visited Aug. 24, 2023) (''Most leases restrict your mileage to 10,000–15,000 miles per year.'').

the vehicle at the end of the lease period. Nearly 27% of new vehicles are leased, as are just over 8% of used vehicles.[41]

B. Deceptive and Unfair Practices in the Motor Vehicle Marketplace

Section 5 of the Federal Trade Commission Act (''FTC Act''), as amended (15 U.S.C. 45), authorizes the FTC to address deceptive or unfair acts or practices in or affecting commerce, including in the motor vehicle marketplace.

An act or practice is deceptive if there is a representation, omission, or other practice that is likely to mislead consumers acting reasonably under the circumstances and is material to consumers—that is, it is likely to affect consumers' conduct or decisions with regard to a product or service.[42] Deceptive conduct can involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading.[43]

An act or practice is considered unfair under section 5 of the FTC Act if: (1) it causes, or is likely to cause, substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.[44]

In each of the past four years, the FTC received more than 100,000 complaints regarding motor vehicle sales, financing, service and warranties, and rentals and leasing.[45] This industry is also consistently at or near the top of private sources of consumer complaints.[46] Many of these complaints concerned deceptive or unfair acts or practices affecting U.S. consumers. Complaints about motor vehicle transactions are regularly in the top ten complaint categories tracked by the FTC.[47] For military consumers as well, auto-related complaints are among the top 10 complaint categories outside of identity theft.[48]

Moreover, law enforcement experience shows that complaints are just the tip of the iceberg.[49] The Commission's recent enforcement action against a large, multistate dealership group is illustrative of this point in the motor vehicle marketplace: in that matter, the Commission received 391 complaints—about add-ons and other issues—over a several-month period prior to filing a complaint against the thirteenth largest dealership group in the country by revenue as of 2020.[50] However, in a survey of the dealer's customers over the same time period, 83% of respondents—or at least 16,848 customers—indicated they were subject to the dealer's unlawful practices related to add-ons alone.[51]

Similarly, in other contexts where companies were charged with making misrepresentations or engaging in misconduct regarding add-on products, information obtained after filing has shown widespread harm far beyond the initial consumer complaint volumes reported prior to filing.[52]

As examined in greater detail in the paragraphs that follow, consumers in the motor vehicle marketplace are confronted with chronic deceptive or unfair practices, including bait-and-switch tactics and hidden charges.[53]

1. Bait-and-Switch Tactics

Advertisements for motor vehicles are often consumers' first contact in the vehicle-buying or -leasing process. Dealers utilize a variety of means to

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[41] Melinda Zabritski, Experian Info. Sols., Inc., ''State of the Automotive Finance Market Q4 2020'' 5 (2020), *https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf* [*https://www.experian.com/content/dam/marketing/na/automotive/quarterly-webinars/credit-trends/2020-quarterly-trends/v2-2020-q4-state-automotive-market.pdf*] (Mar. 6, 2023).

[42] *See* Fed. Trade Comm'n, ''FTC Policy Statement on Deception'' 2, 5, 103 F.T.C. 174 (1984) [hereinafter FTC Policy Statement on Deception] (*appended to Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 183 (1984)), *https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.*

[43] *Id.*

[44] 15 U.S.C. 45(n).

[45] *See, e.g.,* Fed. Trade Comm'n, ''Consumer Sentinel Network Data Book 2022'' app. B3 at 85 (Feb. 2023) [hereinafter Consumer Sentinel Network Data Book 2022], *https://www.ftc.gov/system/files/ftc_gov/pdf/CSN-Data-Book-2022.pdf* (reporting complaints about new and used motor vehicle sales, financing, service & warranties, and rentals & leasing, collectively, of more than 100,000 in 2020, 2021, and 2022); Fed. Trade Comm'n, ''Consumer Sentinel Network Data Book 2021'' app. B3 at 85 (Feb. 2022) [hereinafter Consumer Sentinel Network Data Book 2021], *https://www.ftc.gov/system/files/ftc_gov/pdf/CSN%20Annual%20Data%20Book%202021%20Final%20PDF.pdf* (reporting complaints about new and used motor vehicle sales, financing, service & warranties, and rentals & leasing, collectively, of more than 100,000 in 2019, 2020, and 2021).

[46] According to commenters, complaints to the Better Business Bureau about new and used auto dealers, when combined, have been either the first or second highest regarding any industry in the U.S. for the past twenty years. *See* Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC–2022–0046–7607 at ii; *see also* Better Bus. Bureau, ''BBB Complaint and Inquiry Statistics,'' *https://www.bbb.org/all/bbb-complaint-statistics* (last visited Dec. 5, 2023) (listing complaint statistics from 2010 through 2022, sorted by industry). In addition, for the past seven years annual surveys of State and local consumer protection agencies have reported that auto-related complaints were the top complaint received from consumers. *See* Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC–2022–0046–7607 at 13; Consumer Fed'n of Am., ''2022 Consumer Complaint Survey Report'' 4–5 (May 2023), *https://consumerfed.org/wp-content/uploads/2023/05/2022-Consumer-Complaint-Survey-Report.pdf* (''For the seventh year in a row, auto sales, leases and repairs are the #1 complaint category. Consumers filed complaints about add-on products and services, bait and switch pricing, and mechanical condition issues.'').

[47] *See* Consumer Sentinel Network Data Book 2021, *supra* note 45, at 8 (listing vehicle-related complaints as the seventh most common report category, outside of identity theft, in 2021); Consumer Sentinel Network Data Book 2022, *supra* note 45, at 8 (listing motor vehicle-related complaints as the fifth most common report category, outside of identity theft, in 2022).

[48] *See* Consumer Sentinel Network Data Book 2021, *supra* note 45, at 18 (listing vehicle-related complaints as the eighth most common complaint category for military consumers, outside of identity theft categories, in 2021); Consumer Sentinel Network Data Book 2022, *supra* note 45, at 18 (listing vehicle-related complaints as the ninth most common complaint category for military consumers, outside of identity theft categories, in 2022).

[49] *See, e.g., United States* v. *Brien,* 617 F.2d 299, 308 (1st Cir. 1980); *United States* v. *Offs. Known as 50 State Distrib. Co.,* 708 F.2d 1371, 1374–75 (9th Cir. 1983); Keith B. Anderson, Fed. Trade Comm'n, ''Consumer Fraud in the United States: An FTC Survey'' 80 (2004), *https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-ftc-survey/040805confraudrpt.pdf* (staff report noting consumers who reported they were victims of fraud complained to an official source only 8.4 percent of the time, filing complaints with the BBB in 3.5 percent of incidents and to a Federal agency, including the FTC, in only 1.4 percent of cases).

[50] *See* Complaint, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–0169 (N.D. Ill. Mar. 31, 2022); *see also* WardsAuto, ''WardsAuto 2020 Megadealer 100,'' *https://www.wardsauto.com/dealers/wardsauto-2020-megadealer-100-industry-force* (last visited Dec. 5, 2023) (listing Napleton Automotive Group as the 13th-ranked dealership group by total revenue).

[51] Complaint ¶ 27, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–0169 (N.D. Ill. Mar. 31, 2022) (alleging that defendants buried charges for add-ons in voluminous paperwork, making them difficult to detect); *see* Press Release, Fed. Trade Comm'n, ''FTC Returns Additional $857,000 To Consumers Harmed by Napleton Auto's Junk Fees and Discriminatory Practices'' (Nov. 20, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-returns-additional-857000-consumers-harmed-napleton-autos-junk-fees-discriminatory-practices.*

[52] For example, in a recent action involving deceptive pre-approval claims, the FTC had received roughly 30 complaints about the company's pre-approval conduct in the five-year period prior to announcing its action. But in the five months following announcement of the action, more than 900 additional consumers came forward with complaints about the conduct. *See* Press Release, Fed. Trade Comm'n, ''FTC Announces Claims Process for Consumers Harmed by Credit Karma 'Pre-Approved' Offers for Which They Were Denied'' (Dec. 5, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-announces-claims-process-consumers-harmed-credit-karma-pre-approved-offers-which-they-were* (''[W]ithin five months of that announcement, the agency received nearly 900 more such complaints'').

[53] While other issues exist in the motor vehicle sales, financing, and leasing space, including issues involving discrimination, financing application falsification, data privacy and security, and yo-yo financing, this Rule's core focus is on misrepresentations and add-on and pricing practices.

reach consumers, including social media and online advertisements, television and radio commercials, and direct mail marketing. New vehicle dealers spend an average of more than $700 on advertising per vehicle sold[54]—more than two-thirds of which goes toward online advertising.[55]

The FTC has brought many law enforcement actions involving motor vehicle dealers' deceptive advertising and other unlawful tactics. Such actions have charged dealers with, *inter alia,* making misrepresentations regarding the price of a vehicle, the availability of discounts and rebates, the monthly payment amount for a financed purchase or lease, the amount due at signing, and whether an offer pertains to a purchase or a lease.[56] Other such actions have charged dealers with misrepresentations regarding whether the dealer or consumer is responsible for paying off ''negative equity,'' *i.e.,* the outstanding debt on a vehicle that is being ''traded in'' as part of another vehicle purchase.[57] And in other FTC actions, some dealers have lured potential buyers through financial incentives incidental to the purchase, such as deceptive promises of a valuable prize that is redeemable only by visiting the dealership.[58]

Deceptive tactics can cause significant consumer harm and impede competition, competitively disadvantaging law-abiding dealers. When dealerships advertise prices, discounts, or other terms that are not actually available to typical consumers, consumers who select that dealership instead of others spend time visiting the dealership or otherwise interacting with the dealership under false pretenses.

2. Unlawful Practices Relating to Add-On Products or Services and Hidden Charges

Another key consumer protection concern is the sale of add-on products or services in a deceptive or unfair manner. Add-ons in connection with the sale or financing of motor vehicles include extended warranties, service and maintenance plans, payment programs, guaranteed automobile or asset protection (''GAP'') agreements, emergency road service, VIN etching and other theft protection devices, and undercoating. Individual add-ons can cost consumers thousands of dollars and can significantly increase the overall cost to the consumer in the transaction.[59] Moreover, in the past two years, dealers have substantially increased prices for these add-ons, notwithstanding that such products or services largely are not constrained by supply.[60]

A significant consumer protection concern is consumers paying for add-ons without knowing about, or expressly agreeing to, these products or services.[61] This type of payment packing has been a particular concern in the military community.[62] The protracted and paperwork-heavy vehicle-buying or -leasing process can make it difficult for consumers to spot add-on charges, particularly when advertised prices or payment terms do not mention add-ons.[63] If consumers are financing or leasing the vehicle, they undergo a separate financing process after selecting a vehicle, which can include wading through a thick stack of dense paperwork filled with fine print.[64] For example, according to an FTC law enforcement action, consumers visiting one large dealership group were required to complete a stack of paperwork that ran more than sixty pages and required more than a dozen signatures.[65] This paperwork can include hidden charges for add-on products or services, causing consumers

[54] Nat'l Auto. Dealers Ass'n, ''NADA Data 2022'' 15, *https://www.nada.org/media/4695/download?inline* (listing average dealership advertising per new vehicle sold of $718 in 2022, and $602 in 2021).

[55] *Id.* at 16 (listing 68.2% of estimated advertising expenditures by medium as internet expenditures).

[56] *See, e.g.,* Complaint, *Timonium Chrysler, Inc.,* No. C–4429 (F.T.C. Jan. 28, 2014) (alleging dealership advertised internet prices and dealer discounts that were only available through rebates not applicable to the typical consumer); Complaint, *Ganley Ford West, Inc.,* No. C–4428 (F.T.C. Jan. 28, 2014) (alleging dealership advertised discounts on vehicle prices, but failed to disclose that discounts were only available on the most expensive models); Complaint, *Progressive Chevrolet Co.,* No. C–4578 (F.T.C. June 13, 2016) (alleging deceptive failure to disclose material conditions of obtaining the lease monthly payment in their online and print advertising); Complaint ¶¶ 38–46, *Fed. Trade Comm'n* v. *Tate's Auto Ctr. of Winslow, Inc.,* No. 3:18–cv–08176–DJH (D. Ariz. July 31, 2018) (alleging that company issued advertisements for attractive terms but concealed that the terms were only applicable to lease offers); Complaint ¶¶ 36–38, *United States* v. *New World Auto Imports, Inc.,* No. 3:16–cv–02401–K (N.D. Tex. Aug. 18, 2016) (alleging misrepresentation that terms were for financing instead of leasing); Complaint ¶¶ 85–87, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging that dealerships claimed consumers could finance the purchase of vehicles with attractive terms and buried disclosures indicating that such terms were applicable to leases only).

[57] Complaint ¶¶ 82–84, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging misrepresentation that dealer would pay off a consumer's trade-in when in fact consumers were still responsible for outstanding debt on trade-in vehicles); Complaint ¶¶ 17–19, *TXVT Ltd. P'ship,* No. C–4508 (F.T.C. Feb. 12, 2015) (alleging misrepresentation in leasing advertising that the dealership would pay off the negative equity of a consumer's trade in vehicle, when in fact, it was merely rolled into the financed amount for the consumer's newly financed vehicle).

[58] *See, e.g.,* Complaint ¶¶ 12, 17–19, *Traffic Jam Events, LLC,* No. 9395 (F.T.C. Aug. 7, 2020); Complaint ¶¶ 4, 7–9, *Fowlerville Ford, Inc.,* No. C–4433 (F.T.C. Feb. 20, 2014).

[59] *See, e.g.,* Complaint ¶¶ 25, 27–28, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–0169 (N.D. Ill. Mar. 31, 2022).

[60] *See* Ben Eisen, ''Car Dealer Markups Helped Drive Inflation, Study Finds,'' Wall St. J., Apr. 23, 2023, *https://www.wsj.com/articles/car-dealer-markups-helped-drive-inflation-study-finds-7c1d5a2d;* U.S. Bureau of Labor Statistics, ''Automotive Dealerships 2019–2022: Dealer Markup Increases Drive New-Vehicle Consumer Inflation'' (Apr. 2023), *https://www.bls.gov/opub/mlr/2023/article/automotive-dealerships-markups.htm.*

[61] *See* Nat'l Consumer L. Ctr., ''Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Arbitrary, and Discriminatory Pricing'' (Oct. 1, 2017), *https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf;* Adam J. Levitin, ''The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses,'' 108 Geo. L.J. 1257, 1265–66 (2020), *https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/05/Levitin_The-Fast-and-the-Usurious-Putting-the-Brakes-on-Auto-Lending-Abuses.pdf* (discussing ''loan packing'' as the sale of add-on products that are falsely represented as being required in order to obtain financing); Complaint ¶¶ 12–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 59–64, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015) (alleging misrepresentations regarding prices for added features); *see also* Auto Buyer Study, *supra* note 25, at 14 (''Several participants who thought that they had not purchased add-ons, or that the add-ons were included at no additional charge, were surprised to learn, when going through the paperwork, that they had in fact paid extra for add-ons. This is consistent with consumers' experiencing fatigue during the buying process or confusion with a financially complex transaction, but would also be consistent with dealer misrepresentations.'').

[62] Consumers for Auto Reliability and Safety, Comment Letter on Motor Vehicle Roundtables, Project No. P104811 at 2–3 (Apr. 1, 2012), *https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00108/00108-82875.pdf* (citing a U.S. Department of Defense data call summary that found that the vast majority of military counselors have clients with auto financing problems and cited ''loan packing'' and yo-yo financing as the most frequent auto lending abuses affecting servicemembers).

[63] Complaint ¶¶ 17–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020); Complaint ¶ 60, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016); Carole L. Reynolds & Stephanie E. Cox, Fed. Trade Comm'n, ''Buckle Up: Navigating Auto Sales and Financing'' (2020) [hereinafter Buckle Up], *https://www.ftc.gov/reports/*buckle-navigating-auto-sales-financing.

[64] *See, e.g.,* Buckle Up, *supra* note 63, at 10–11 (noting the long, complex transaction process); Complaint ¶¶ 23–28, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022) (same).

[65] Complaint ¶ 24, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022); *see also* Buckle Up, *supra* note 63, at 10–11.

to purchase those add-ons without knowing about or agreeing to them, or without knowing or agreeing to their costs or other key terms.[66] Unscrupulous dealers are able to slip the often considerable additional costs for these items past consumers unnoticed and into purchase contracts through a variety of means, including by not mentioning them at all,[67] or by focusing consumers' attention on other aspects of the complex transaction, such as monthly payments, which might increase only marginally with the addition of prorated add-on costs, or may even be made to decrease if the financing term is extended.[68] This type of conduct can target immigrants, communities of color, and servicemembers.[69] In other instances, dealers might wait until late in the transaction to mention add-ons, and then do so in a misleading manner. For example, participants in an FTC qualitative study on consumers' car-buying experiences cited situations where dealers waited until the financing stage to mention add-ons, after consumers believed they had agreed on terms, and even though many add-ons have nothing to do with financing and were not mentioned at all during the sales process or when prices were initially negotiated.[70] According to FTC enforcement actions, dealers also have represented that add-ons are required when in fact they are not,[71] have misrepresented the purported benefits of add-ons, and have failed to disclose material limitations.[72]

[66] Complaint ¶¶ 25, 27, 29–32, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022); *see also* Complaint ¶¶ 17–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020); Dale Irwin, Slough Connealy Irwin & Madden LLC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00060 (Dec. 29, 2011), *https://www.regulations.gov/comment/FTC-2022-0036-0051* (consumer protection lawyer noting ''payment packing'' among problems ''that cry out for scrutiny and regulation''); Michael Archer, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00041 at 3 (Aug. 6, 2011), *https://www.regulations.gov/comment/FTC-2022-0036-0014* (workshop panelist stating, ''I have seen cases wherein the dealer uses financing to pack in extra costs or to wipe out trade-in value.''); Dawn Smith, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00027 (July 27, 2011), *https://www.regulations.gov/comment/FTC-2022-0036-0043* (''Confusing or misleading sales terms[.] Extra fees was [sic] added at the time of purchase and to this day I still do not understand what the fee was for; it made the payment higher.''); Carrie Ferraro, Legal Servs. of N.J., Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00061 (Dec. 29, 2011), *https://www.regulations.gov/comment/FTC-2022-0036-0059* (citing ''[d]ealers engage[d] in packing'' as an example of the common consumer complaints of car-sales-related fraud received by LSNJ's legal advice hotline); Rosemary Shahan, Consumers for Auto Reliability and Safety, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00069 at 3 (Jan. 31, 2012), *https://www.regulations.gov/comment/FTC-2022-0036-0069* (noting that ''[m]any common auto scams do not generate complaints in proportion to how pervasive or costly the practices are, simply because the consumers generally remain unaware they have been scammed,'' including as a result of ''[l]oan packing''); Mary W. Sullivan, Matthew T. Jones & Carole L. Reynolds, Fed. Trade Comm'n, ''The Auto Buyer Study: Lessons from In-Depth Consumer Interviews and Related Research,'' Supplemental Appendix: Redacted Interview Transcripts at 525 (2020) [hereinafter Auto Buyer Study: Appendix], *https://www.ftc.gov/system/files/documents/reports/buckle-navigating-auto-sales-financing/bcpstaffreportautobuyerstudysuppappendix.pdf* (Study participant 169810: consumer had ''additional items'' charges on contract that consumer could not identify); *id.* at 730, 740–42 (Study participant 188329: dealer did not tell consumer about GAP or service contract but consumer was charged $599 and $1,950 for those add-ons, respectively); Press Release, N.Y. State Att'y Gen., ''A.G. Schneiderman Announces Nearly $14 Million Settlement with NYC and Westchester Auto Dealerships for Deceptive Practices that Resulted in Inflated Car Prices'' (June 17, 2015), *https://ag.ny.gov/press-release/2015/ag-schneiderman-announces-nearly-14-million-settlement-nyc-and-westchester-auto* (''This settlement is part of the [New York] attorney general's wider initiative to end the practice of 'jamming,' unlawfully charging consumers for hidden purchases by car dealerships.'').

[67] Under the Truth in Lending Act (''TILA'') and its implementing Regulation Z, required add-on products or services must be factored into the APR and the finance charge disclosed during the transaction. *See* 15 U.S.C. 1605, 1606, 1638; 12 CFR 226.4, 226.18(b), (d), (e), and 226.22. It is legally impermissible for dealers to include charges for such products in a consumer's contract without disclosing them. *See, e.g.,* Complaint ¶¶ 57–60, *Fed. Trade Comm'n* v. *Stewart Fin. Co. Holdings, Inc.,* No. 1:03–CV–2648 (N.D. Ga. Sept. 4, 2003) (alleging violations for failure to include the cost of required add-on products in the finance charge and annual percentage rate disclosed to consumers).

[68] *See, e.g.,* Buckle Up, *supra* note 63, at 6; Fed. Trade Comm'n, Military Consumer Financial Workshop, Panel 1, Tr. 19:25–41 (July 19, 2017), *https://www.ftc.gov/news-events/events-calendar/military-consumer-workshop;* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles,'' Public Roundtable, Session 2, Tr. at 40–41 (Aug. 2 2011), *https://www.ftc.gov/news-events/events/2011/08/road-ahead-selling-financing-leasing-motor-vehicles* (noting that optional products and services are often already included in the monthly payment prices advertised or quoted); Christopher Kukla, Ctr. for Responsible Lending, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00071 at 10 (Feb. 1, 2012), *https://www.regulations.gov/comment/FTC-2022-0036-0068* (discussing how dealers conceal packing by expressing an increase in price in terms of monthly payment); Att'ys General of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00112 at 5 (Apr. 13, 2012), *https://www.regulations.gov/comment/FTC-2022-0036-0124* (discussing the ''age-old auto salesperson's trick'' of quoting monthly payment prices without disclosing that the quote includes the cost of optional items that the customer has not yet agreed to purchase).

[69] *See, e.g.,* Complaint ¶¶ 9, 26, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (charging defendants with discriminating on the basis of race, color, and national origin by charging higher interest rates and inflated fees); Press Release, N.Y. State Att'y Gen., ''Attorney General James Delivers Restitution to New Yorkers Cheated by Auto Dealership'' (Nov. 17, 2020), *https://ag.ny.gov/press-release/2020/attorney-general-james-delivers-restitution-new-yorkers-cheated-auto-dealership* (dealership targeted Chinese speakers for unlawful payment packing or ''jamming''); Military Consumer Financial Workshop, Tr. 19:21 (July 19, 2017), *https://www.ftc.gov/news-events/events/2017/07/military-consumer-workshop* (panelist discussing servicemembers experiencing payment packing); *see also* Fed. Trade Comm'n, ''Staff Perspective: A Closer Look at the Military Consumer Financial Workshop'' 2–3 (Feb. 2018), *https://www.ftc.gov/system/files/documents/reports/closer-look-military-consumer-financial-workshop-federal-trade-commission-staff-perspective/military_consumer_workshop_-_staff_perspective_2-2-18.pdf* (explaining the unique situation of servicemembers whose steady paychecks make them attractive customers for dealers, while having no or minimal credit history, meaning they qualify for less advantageous credit terms and higher interest rate financing).

[70] *See, e.g.,* Buckle Up, *supra* note 63, at 6 (observing that the introduction of ''add-ons during financing discussions caused several participants' total sale price to balloon from the cash price''); *id.* at 9 (observing that, for most consumers in the study, ''add-ons did not come up until the financing process, if at all, after a long car-buying process and at a time when the consumer often felt pressure to close the deal''); *id.* (noting that most study participants' contracts included add-ons charges, but that many ''were unclear what those add-ons included, and sometimes did not realize they had purchased any add-ons at all''); *id.* at 7 (explaining situations where the consumer reached the financing office after negotiating with the sales staff and were then told that the agreed upon price was not compatible with key financing terms—for example, a promised rebate or discount could not be combined with an advertised interest rate).

[71] Complaint ¶¶ 12–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 59–64, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 6, 9, *TT of Longwood,* No. C–4531 (F.T.C. July 2, 2015) (alleging misrepresentations regarding prices for added features); *see also* Auto Buyer Study, *supra* note 25, at 14.

[72] Complaint ¶¶ 4–14, *Nat'l Payment Network, Inc.,* No. C–4521 (F.T.C. May 4, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims in advertisements); Complaint ¶¶ 4–13, *Matt Blatt Inc.,* No. C–4532 (F.T.C. July 2, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims); Buckle Up, *supra* note 63, at 10 (noting that some Auto Buyer Study participants did not fully understand material aspects of extended warranties or service plans they purchased and ''were surprised to discover during the interview that their plans had unexpected limitations'' or that ''they had to pay out-of-pocket for repairs or services that were not covered''; for example, one ''consumer purchased a 'Lifetime' maintenance plan, only to discover later that he received a one-year plan that covered periodic oil changes''). *Cf.* Consent Order ¶¶ 10–16, *Santander*

Indeed, as previously noted, in a recent FTC enforcement action, the Commission cited a survey finding that 83% of consumers from the named dealers were charged for add-on products or services that they did not authorize or as a result of deceptive claims.[73]

One participant in an FTC qualitative study of consumers' car-buying experiences summed up these issues during an interview after having purchased a vehicle.[74] The consumer purchased a $2,000 service contract that the dealer falsely said was free, and a $900 GAP agreement that the dealer falsely said was mandatory. The consumer only learned about these purchases during the study interview. This consumer remarked:

> I feel I've been taken advantage of, to be honest with you. Even though I thought that I was getting a great deal with the interest rate, but I know [sic] see that they're also very sneaky about putting stuff on your paperwork. They only let you skim through the paperwork that you have to sign and they just kind of tell you what it is. This is this, this is that, this is this, and then you just sign it away. You're so tired, you're so worn down, you don't want to be there no more. You just want to get it done and over with. They take advantage of that. Yes, they still play this friendly card, you know, thank you for your business card kind of thing. Like I said, they never lose. They never lose.[75]

Similarly, in response to the Commission's notice of proposed rulemaking, thousands of commenters described issues they faced when purchasing, financing, or leasing a vehicle. Many comments the Commission received in support of the NPRM were from self-identified military consumers and dealership employees. Examples of supportive comments include the following:

- As a young Marine stationed in a military town I was taken advantage of by a dealership when purchasing my first car. It set me back financially for years. I know of many young military people who purchased vehicle[]s and we[]re instantly so far upside down after leaving the dealership with thousands of dollars in add on junk charges . . . . Please make it more difficult for dishonest dealers like these to financially burden young Americans and Americans of any age for that matter.[76]
- Imagine going to a restaurant franchise and order[ing] a burger and fries for $10 and the franchise employees say[,] 'Sorry that will be $25 dollars, there is a $10 restaurant adjustment price due to market conditions and $5 for us to place and document your order.' You would walk away without hesitation because that would [be] absolutely ridiculous. Yet, dealerships are allowed to do exactly that. . . . IT IS TIME TO CHANGE AND PROTECT CONSUMERS[.][77]
- As in many other areas, it is the vulnerable in our society who are probably most affected by such deceptive practices. . . . Sadly, it is often these very people who desperately need a dependable, affordable car for transportation to work, school, shopping, or medical care. To entice, pressure, or trick people into buying a car that is more than they can afford sets them up for financial failure, not only in possibly having a needed car repossessed, but in long-term damage to their credit. . . . In closing, I would be extremely happy to see rules such as those described above enacted, and don't think these could come a day too soon. It's a step in the right direction for the protection of the consumer.[78]
- None of us working here at the dealership in sales benefit from [unfair and deceptive practices]. We cringe as much as every customer and have to show up to work every[ ]day and hope we are not forced to screw someone with these BS products. . . . I would hope when [t]he regulators are making their decisions, they understand the positive implications this would have for dealership employees both financially and mentally.[79]
- Generally, I'm not a person in favor of government regulation. However, as a potential customer and cash buyer, I feel there is certainly a need to bring car dealers back into check. I'm just looking for a more honest and transparent process. I don't want to be taken advantage of. I certainly don't want my family members or [s]oldiers to be taken advantage of. Therefore, I feel it is in the best interest of future customers to support this regulation.[80]
- I cannot stress enough my support for these new rules. Currently, dealerships across the US, including the one I work for, have made the car buying process needlessly confusing, expensive, and frustrating by engaging in false advertising and hidden add-on products.[81]
- I can tell you after many years of car buying I have NEVER walked out of a dealership feeling good. Even worse, I've never purchased a car feeling like I fully understood what I was getting. . . . Looking forward to seeing the change happen SOON![82]
- When I buy a gallon of milk from the store, the price is written next to the milk. When I go pay, I pay the price advertised next to the milk. Would it be OK if I go up to pay and that gallon of milk had anywhere between 1% and 1,200% markup depending on the day, what you look like, what you drove to the store in, if you're a man or a woman?[83]
- We ended up having to drive 3 hours to the [vehicle we] wanted. Upon arriving to pick[ ]up the car we were told there was a [$]4,300 increase over MSRP. We were told if we didn't take it they had someone else waiting to purchase it. We needed the car and didn't have time to hunt down another one so ended up purchasing it. Very disappointed in the long and awful process.[84]
- The worst is dealing with car dealers. You never know what the real price is on a vehicle until you spend a few hours with them. Mandatory add[-] on[ ]s, market availability surcharges, doc fees that vary from dealer to dealer. . . . Then dealing with the finance manager who tr[ie]s to sell you everything you don't[ ]need. They high pressure the consumer on purchasing extend[ed] warranties. There

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Consumer USA, Inc., CFPB No. 2018–BCFP–0008 (Nov. 20, 2018) (finding that defendant sold GAP product allegedly providing ''full coverage'' to consumers with loan-to-value ratios (''LTVs'') above 125%, when in fact coverage was limited to 125% of LTV).

[73] Complaint ¶ 27, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022).

[74] The study is described in the Commission's reports: Auto Buyer Study, *supra* note 25, and Buckle Up, *supra* note 63. Some industry commenters critiqued the FTC's reliance on this qualitative study. The Commission notes that the study provides helpful qualitative insight from consumer interviews regarding their recent motor vehicle purchases and is one of the many sources the Commission has considered, including consumer complaints, enforcement actions, outreach and dialogue with stakeholders and consumer groups, among others, as described in this SBP and in the NPRM.

[75] Auto Buyer Study: Appendix, *supra* note 66, at 130 (Study participant 152288); *see also id.* at 202–03 (Study participant 180267: dealership included a charge for GAP in the final paperwork but not in retail sales contract); *id.* at 296 (Study participant 146748: consumer learned during interview with FTC that consumer purchased GAP: ''maybe they're just throwing that in there without telling you'').

[76] Individual commenter, Doc. No. FTC–2022–0046–4648.

[77] Individual commenter, Doc. No. FTC–2022–0046–0016.

[78] Individual commenter, Doc. No. FTC–2022–0046–1216.

[79] Individual commenter, Doc. No. FTC–2022–0046–3615.

[80] Individual commenter, Doc. No. FTC–2022–0046–7366.

[81] Individual commenter, Doc. No. FTC–2022–0046–3693.

[82] Individual commenter, Doc. No. FTC–2022–0046–3678.

[83] Individual commenter, Doc. No. FTC–2022–0046–1479.

[84] Individual commenter, Doc. No. FTC–2022–0046–1878.

needs [to be] some sort of policing [of] these unscrupulous car dealers to protect the buyers.[85]

• This is a good start to making car purchasing a better experience. . . . I remember looking at a Lexus and being told by the dealership, the only one in the state, that [S]cotchguard and undercoating were mandatory and they refused to sell any vehicles without them. There were two Acura dealerships in town and one of them included 'free' lifetime oil changes that I didn't learn about until negotiating the price and had already spent two hours in negotiations. All of these services/price adjustments were not disclosed at the start of the negotiation and were only revealed either in the manager's office or when the purchase agreement was presented to me by the salesperson. After spending time on the test drive and negotiating the price, it felt that these last minute price adjustments were being revealed that late in the process so that I wouldn't leave.[86]

• Please enact and enforce these regulations to protect vulnerable consumers from predatory business practices enjoyed by dealers. Our family experienced such practices when trying to purchase a vehicle in early 2022. It was only after five hours at the dealership that we discovered the dealer had added on a $3,000 market adjustment and $3,100 in other add-ons (nitrogen-filled tires, LoJack, paint protection) to MSRP. This raised the price by about $6,000 and caused us to use extra PTO over that week to find a new vehicle at a price within our budget. Greater transparency in the car-buying process is desperately needed to protect vulnerable consumers—who usually lack any bargaining power—against power dealer networks and their special interest groups. . . .[87]

C. Law Enforcement and Other Responses

The Commission has taken action to protect consumers from deceptive and unfair acts or practices in the motor vehicle marketplace. As noted in the NPRM, the Commission has brought more than 50 auto law enforcement actions;[88] led two law enforcement sweeps, including one that involved 181 State enforcement actions;[89] published two reports on a qualitative study of consumer experiences while purchasing motor vehicles; and held workshops with various stakeholders to discuss the motor vehicle marketplace.[90]

[85] Individual commenter, Doc. No. FTC–2022–0046–0825.

[86] Individual commenter, Doc. No. FTC–2022–0046–4833.

[87] Individual commenter, Doc. No. FTC–2022–0046–1690.

[88] Complaint, *Fed. Trade Comm'n* v. *Rhinelander Auto Ctr., Inc.,* No. 3:23–cv–00737 (W.D. Wis. Oct. 24, 2023); Complaint, *Fed. Trade Comm'n* v. *Passport Auto. Grp., Inc.,* No. 8:22–cv–02670–GLS (D. Md. Oct. 18, 2022); Complaint, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022); Complaint, *Traffic Jam Events, LLC,* No. 9395 (F.T.C. Aug. 7, 2020); Complaint, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020); Complaint, *Federal-Mogul Motorparts LLC,* No. C–4717 (F.T.C. May 12, 2020); Complaint, *LightYear Dealer Techs., LLC,* No. C–4687 (F.T.C. Sept. 3, 2019); Complaint, *Fed. Trade Comm'n* v. *Passport Imports, Inc.,* No. 8:18–cv–03118 (D. Md. Oct. 10, 2018); Complaint, *Fed. Trade Comm'n* v. *Tate's Auto Ctr. of Winslow, Inc.,* No. 3:18–cv–08176–DJH (D. Ariz. July 31, 2018); Complaint, *Cowboy AG, LLC,* No. C–4639 (F.T.C. Jan. 4, 2018); Complaint, *Fed. Trade Comm'n* v. *Norm Reeves, Inc.,* No. 8:17–cv–01942 (C.D. Cal. Nov. 3, 2017); Complaint, *Asbury Auto. Grp., Inc.,* No. C–4606 (F.T.C. Mar. 22, 2017); Complaint, *CarMax, Inc.,* No. C–4605 (F.T.C. Mar. 22, 2017); Complaint, *West-Herr Auto. Grp., Inc.,* No. C–4607 (F.T.C. Mar. 22, 2017); Complaint, *Fed. Trade Comm'n* v. *Volkswagen Grp. of Am., Inc.,* No. 3:16–cv–01534 (N.D. Cal. Jan. 31, 2017); Complaint, *Fed. Trade Comm'n* v. *Uber Techs., Inc.,* No. 3:17–cv–00261 (N.D. Cal. Jan. 19, 2017); Complaint, *Gen. Motors LLC,* No. C–4596 (F.T.C. Dec. 8, 2016); Complaint, *Jim Koons Mgmt. Co.,* No. C–4598 (F.T.C. Dec. 8, 2016); Complaint, *Lithia Motors, Inc.,* No. C–4597 (F.T.C. Dec. 8, 2016); Complaint, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sep. 29, 2016); Complaint, *United States* v. *New World Auto Imports, Inc.,* No. 3:16–cv–02401–K (N.D. Tex. Aug. 18, 2016); Complaint, *Progressive Chevrolet Co.,* No. C–4578 (F.T.C. June 13, 2016); Complaint, *BMW of N. Am., LLC,* No. C–4555 (F.T.C. Oct. 21, 2015); Complaint, *United States* v. *Tricolor Auto Acceptance, LLC,* No. 3:15–cv–3002 (N.D. Tex. Sept. 15, 2015); Complaint, *JS Autoworld, Inc.,* No. C–4535 (F.T.C. Aug. 13, 2015); Complaint, *TC Dealership, L.P.,* No. C–4536 (F.T.C. Aug. 13, 2015); Complaint, *Matt Blatt Inc.,* No. C–4532 (F.T.C. July 2, 2015); Complaint, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015); Complaint, *Fin. Select, Inc.,* No. C–4528 (F.T.C. June 2, 2015); Complaint, *First Am. Title Lending of Ga., LLC,* No. C–4529 (F.T.C. June 2, 2015); Complaint, *City Nissan Inc.,* No. C–4524 (F.T.C. May 4, 2015); Complaint, *Jim Burke Auto., Inc.,* No. C–4523 (F.T.C. May 4, 2015); Complaint, *Nat'l Payment Network, Inc.,* No. C–4521 (F.T.C. May 4, 2015); Complaint, *TXVT Ltd. P'ship,* No. C–4508 (F.T.C. Feb. 12, 2015); Complaint, *Fed. Trade Comm'n* v. *Regency Fin. Servs., LLC,* No. 1:15–cv–20270–DPG (S.D. Fla. Jan. 26, 2015); Complaint, *United States* v. *Billion Auto, Inc.,* No. 5:14–cv–04118–MWB (N.D. Iowa Dec. 11, 2014); Complaint, *Fed. Trade Comm'n* v. Ramey Motors, Inc., No. 1:14–cv–29603 (S.D. W. Va. Dec. 11, 2014); Complaint, *Fed. Trade Comm'n* v. *Consumer Portfolio Servs., Inc.,* No. 14–cv–00819 (C.D. Cal. May 28, 2014); Complaint, *Nissan N. Am., Inc.,* No. C–4454 (F.T.C. May 1, 2014); Complaint, *TBWA Worldwide, Inc.,* No. C–4455 (F.T.C. May 1, 2014); Complaint, *Bill Robertson & Sons, Inc.,* No. C–4451 (F.T.C. Apr. 11, 2014); Complaint, *Paramount Kia of Hickory, LLC,* No. C–4450 (F.T.C. Apr. 11, 2014); Complaint, *Fed. Trade Comm'n* v. *Abernathy Motor Co.,* No. 3:14–cv–00063–BRW (E.D. Ark. Mar. 12, 2014); Complaint, *Fowlerville Ford, Inc.,* No. C–4433 (F.T.C. Feb. 20, 2014); Complaint, *Infiniti of Clarendon Hills, Inc.,* No. C–4438 (F.T.C. Feb. 20, 2014); Complaint, *Luis Alfonso Sierra,* No. C–4434 (F.T.C. Feb. 20, 2014); Complaint, *Mohammad Sabha,* No. C–4435 (F.T.C. Feb. 20, 2014); Complaint, *Norm Reeves, Inc.,* No. C–4436 (F.T.C. Feb. 20, 2014); Complaint, *Ganley Ford West, Inc.,* No. C–4428 (F.T.C. Jan. 28, 2014); Complaint, *Timonium Chrysler, Inc.,* No. C–4429 (F.T.C. Jan. 28, 2014); Complaint, *Courtesy Auto Grp., Inc.,* No. 9359 (F.T.C. Jan. 7, 2014); Complaint, *Franklin's Budget Car Sales, Inc.,* No. C–4371 (F.T.C. Oct. 3, 2012); Complaint, *Fed. Trade Comm'n* v. *Matthew J. Loewen,* No. 2:12–cv–01207–MJP (W.D. Wash. July 13, 2012); Complaint, *Key Hyundai of Manchester, LLC,* No. C–4358 (F.T.C. May 4, 2012); Complaint, *Billion Auto, Inc.,* No. C–4356 (F.T.C. May 1, 2012); Complaint, *Frank Myers AutoMaxx, LLC,* No. C–4353 (F.T.C. Apr. 19, 2012); Complaint, *Ramey Motors, Inc.,* No. C–4354 (F.T.C. Apr. 19, 2012); Complaint, *Fed. Trade Comm'n* v. *Hope for Car Owners, LLC,* No. 2:12–cv–00778–GEB–EFB (E.D. Cal. Mar. 27, 2012); Complaint, *Fed. Trade Comm'n* v. *NAFSO VLM, Inc.,* No. 2:12–cv–00781–KJM–EFB (E.D. Cal. Mar. 27, 2012); Complaint, *Fed. Trade Comm'n* v. *Stewart Fin. Co. Holdings, Inc.,* No. 1:03–CV–2648 (N.D. Ga. Sept. 4, 2003); Complaint, *Pacifico Ardmore, Inc.,* No. C–3920 (F.T.C. Feb. 7, 2000).

[89] Operation Steer Clear and Operation Ruse Control, brought with State law enforcement partners around the nation and Canada, encompassed 252 enforcement actions. *See* Press Release, Fed. Trade Comm'n, ''Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing'' (Mar. 26, 2015), *https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown.*

[90] For example, the FTC has held public workshops: (1) in conjunction with the National Highway Traffic Safety Administration to examine the consumer privacy and security issues posed by automated and connected motor vehicles, *see* Fed. Trade Comm'n, ''Connected Cars: Privacy, Security Issues Related to Connected, Automated Vehicles'' (June 28, 2017), *https://www.ftc.gov/news-events/events-calendar/2017/06/connected-cars-privacy-security-issues-related-connected;* (2) to explore competition and related issues in the U.S. motor vehicle distribution system including how consumers and businesses may be affected by State regulations and emerging trends in the industry, *see* Fed. Trade Comm'n, ''Auto Distribution: Current Issues & Future Trends'' (Jan. 19, 2016), *https://www.ftc.gov/news-events/events-calendar/2016/01/auto-distribution-current-issues-future-trends;* (3) on military consumer financial issues, including automobile purchases, financing, and leasing, *see* Fed. Trade Comm'n, ''Military Consumer Workshop'' (July 19, 2017), *https://www.ftc.gov/news-events/events-calendar/military-consumer-workshop;* and (4) through a series of three roundtables on numerous issues in selling, financing, and leasing automobiles, *see* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Apr. 12, 2011), *https://www.ftc.gov/news-events/events-calendar/2011/04/road-ahead-selling-financing-leasing-motor-vehicles;* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Aug. 2, 2011), *https://www.ftc.gov/news-events/events-calendar/2011/08/road-ahead-selling-financing-leasing-motor-vehicles;* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing & Leasing Motor Vehicles'' (Nov. 17, 2011), *https://www.ftc.gov/news-events/events-calendar/2011/11/road-ahead-selling-financing-leasing-motor-vehicles; see also* Consumers for Auto Reliability and Safety, Comment Letter on Motor Vehicle Roundtables, Project No. P104811, at 6 (Apr. 1, 2012), *https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00108/00108-82875.pdf* (stating that the Director of the Navy-Marine Corps Relief Society in San Diego indicated before the California Assembly Committee on Banking and Finance that ''the number one issue they are confronted with is used car dealers who are taking advantage of military personnel''). These events, and others, have included speakers representing consumers, dealers, regulators, and other industry stakeholders.

As discussed in the NPRM, the Commission's law enforcement partners have also brought actions addressing unfair, abusive, and deceptive practices in the motor vehicle industry. For example, the Consumer Financial Protection Bureau (''CFPB'') has taken action against third-party motor vehicle financing entities in matters that raise similar, and sometimes identical, claims of deceptive and unfair acts or practices as have been at issue in FTC enforcement actions.[91]

In addition, States have engaged in enforcement actions alleging similar dealer misconduct in the motor vehicle dealer marketplace, and have implemented legislative and regulatory measures to address corresponding consumer protection issues. With regard to law enforcement, State regulators and Attorneys General have participated in law enforcement sweeps with the FTC, and have filed hundreds of actions alleging unlawful conduct by motor vehicle dealerships across the country.[92] Furthermore, with regard to legislative and regulatory efforts, at least four States have enacted consumer protection measures relating to pricing or add-ons by motor vehicle dealers.[93] For example, to ''ensure that dealers do not add in hidden or undisclosed costs after the price for a vehicle has been advertised,'' Oregon promulgated a rule that requires dealerships to state an ''offering price'' that is the actual offer and amount the consumer can pay to own the vehicle, excluding only taxes and other specific items.[94] California and Wisconsin have similarly enacted laws that make it unlawful for dealerships to advertise a total price without including additional costs to the purchaser outside the mandatory tax, title, and registration fees.[95] Other States, such as Indiana, have enacted codes that prohibit the sale of add-ons in certain circumstances.[96]

The Commission and its law enforcement partners also regularly provide business guidance and consumer education regarding the motor vehicle marketplace. The Commission has compiled its motor vehicle business guidance into a portal on its website, with links to guidance documents, frequently asked questions, and legal resources.[97] Likewise, the Commission provides a web page for consumers to learn more about buying, financing, and leasing motor vehicles.[98] Several States have published similar such guidance manuals for motor vehicle dealers,[99]

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[91] The CFPB has brought at least 23 enforcement actions involving motor vehicles, financing, or add-on products or services. *See* Consent Order ¶¶ 3, 13–57, *Toyota Motor Credit Corp.,* CFPB No. 2023–CFPB–0015 (Nov. 20, 2023) (finding auto lender engaged in unfair or abusive acts or practices by making it unreasonably difficult for consumers to cancel unwanted add-ons; failing to ensure consumers received refunds of payments they had made for certain add-ons that had become void and worthless; and failing to provide refunds owed to consumers who canceled their vehicle service agreements);

Complaint ¶¶ 75–104, *CFPB* v. *USASF Servicing, LLC,* No. 1:23–cv–03433–VMC (N.D. Ga. Aug. 2, 2023) (alleging auto loan servicer illegally disabled and repossessed consumers' vehicles, wrongfully double-billed consumers, misapplied payments, and failed to ensure refunds of unearned GAP premiums to which consumers were entitled); Consent Order ¶¶ 7–33, *TMX Finance LLC,* CFPB No. 2023–CFPB–0001 (Feb. 23, 2023) (finding auto lender understated and inaccurately disclosed the finance charge and annual percentage rate on loans and unfairly charged borrowers for a product that provided no benefit); Complaint ¶¶ 33–135, 171–226, *CFPB* v. *Credit Acceptance Corp.,* No. 1:23–cv–00038 (S.D.N.Y. Jan. 4, 2023) (alleging indirect auto lender misrepresented key terms of loans provided to subprime and deep-subprime consumers and substantially assisted dealers in the deceptive sale of add-on products); Consent Order ¶¶ 7–22, *Wells Fargo Bank, N.A.,* CFPB No. 2022–CFPB–0011 (Dec. 20, 2022) (finding bank incorrectly applied borrowers' auto loan payments, erroneously assessed fees and interest, wrongly repossessed borrowers' vehicles, and failed to ensure borrowers received refunds of unearned GAP fees at early payoff); Consent Order ¶¶ 4–55, *Hyundai Capital America,* CFPB No. 2022–CFPB–0005 (July 26, 2022) (finding auto finance company furnished inaccurate information about consumers to credit reporting agencies); Consent Order ¶¶ 4–14, *3rd Generation, Inc.,* CFPB No. 2021–CFPB–0003 (May 21, 2021) (finding subprime auto loan servicer charged interest on late payments of fees without the knowledge or consent of consumers); Consent Order ¶¶ 8–50, *Santander Consumer USA Inc.,* CFPB No. 2020–BCFP–0027 (Dec. 22, 2020) (finding auto finance company provided inaccurate reports to credit reporting agencies); Consent Order ¶¶ 11–52, *Nissan Motor Acceptance Corp.,* CFPB No. 2020–BCFP–0017 (Oct. 13, 2020) (finding auto finance company misrepresented financing extension agreements, repossessions, and limitations to consumer bankruptcy protections); Consent Order ¶¶ 8–22, *Lobel Fin. Corp.,* CFPB No. 2020–BCFP–0016 (Sept. 21, 2020) (finding auto-loan servicer unfairly charged delinquent consumers add-on charges in the form of Loss Damage Waiver premiums); Consent Order ¶¶ 6–30, *Santander Consumer USA Inc.,* CFPB No. 2018–BCFP–0008 (Nov. 20, 2018) (finding auto finance company sold GAP to consumers with LTV over 125%, misrepresenting that such consumers would be fully covered with total loss);

Consent Order ¶¶ 27–39, *Wells Fargo Bank, N.A.,* CFPB No. 2018–BCFP–0001 (Apr. 20, 2018) (finding bank imposed duplicative or unnecessary forced-placed auto loan insurance on consumers); Consent Order ¶¶ 12–23, *Toyota Motor Credit Corp.,* CFPB No. 2016–CFPB–0002 (Feb. 2, 2016) (finding auto finance company engaged in discriminatory pricing markup for motor vehicle financing, without regard to creditworthiness); Consent Order ¶¶ 73–75, *Y King S Corp.,* CFPB No. 2016–CFPB–0001 (Jan. 21, 2016) (finding used car dealer failed to disclose mandatory add-ons as financing charges); Consent Order ¶¶ 12–51, *Interstate Auto Grp., Inc.,* CFPB No. 2015–CFPB–0032 (Dec. 17, 2015) (finding dealership and financing company reported information they knew or had reasonable cause to believe was inaccurate to credit reporting entities, harming consumer credit); Consent Order ¶¶ 7–90, *Westlake Servs., LLC,* CFPB No. 2015–CFPB–0026 (Sept. 30, 2015) (finding indirect auto financing entity used illegal debt collection tactics); Consent Order ¶¶ 8–23, *Fifth Third Bank,* CFPB No. 2015–CFPB–0024 (Sept. 28, 2015) (finding discrimination against loan applicants in credit applications based on characteristics such as race and national origin); Consent Order ¶¶ 9–24, *Am. Honda Fin. Corp.,* CFPB No. 2015–CFPB–0014 (July 14, 2015) (same);

Consent Order ¶¶ 4–60, *DriveTime Auto. Grp., Inc.,* CFPB No. 2014–CFPB–0017 (Nov. 19, 2014) (finding buy-here-pay-here dealership made harassing debt collection calls and provided inaccurate credit information to credit reporting agencies); Consent Order ¶¶ 4–37, *First Investors Fin. Servs. Grp., Inc.,* CFPB No. 2014–CFPB–0012 (Aug. 20, 2014) (finding auto financing company provided inaccurate records to credit reporting agencies); Consent Order ¶¶ 7–27, *Ally Fin. Inc.,* CFPB No. 2013–CFPB–0010 (Dec. 20, 2013) (finding auto lender engaged in discriminatory pricing); Consent Order ¶¶ 14–29, *U.S. Bank Nat'l Ass'n,* CFPB No. 2013–CFPB–0004 (June 26, 2013) (finding bank failed to properly disclose all the fees charged to participants in the companies' Military Installment Loans and Educational Services auto loans program, and misrepresented the true cost and coverage of add-on products financed along with the auto loans); Consent Order ¶¶ 10–22, *Dealers' Fin. Servs., LLC,* CFPB No. 2013–CFPB–0004 (June 26, 2013) (finding financing company made deceptive statements regarding the cost of add-on products and the scope of coverage of the vehicle service contract).

[92] Operation Steer Clear and Operation Ruse Control, brought with State law enforcement partners around the nation and Canada, encompassed 252 enforcement actions. *See* Press Release, Fed. Trade Comm'n, ''Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing'' (Mar. 26, 2015), *https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown.* Separately, the California Attorney General's office sued a dealership chain under State consumer protection laws for deceiving consumers about add-on product charges and misrepresenting consumers' income on credit applications; the alleged practices specifically targeted low-income consumers with subprime credit. Complaint ¶¶ 37–86, *People* v. *Paul Blanco's Good Car Co. Auto Grp.,* No. RG–19036081 (Cal. Super. Ct. Sept. 23, 2019).

[93] *See, e.g.,* Cal. Veh. Code 11713.1(b), (c); Or. Admin. R. 137–020–0020(3)(c); Wis. Admin. Code Trans. 139.03(3); Ind. Code 24–4.5–3–202.

[94] Or. Admin. R. 137–020–0020(3)(c); Official Commentary, Or. Admin. R. 137–020–0020(3)(c).

[95] Cal. Veh. Code 11713.1(b), (c); Wis. Admin. Code Trans. 139.03(3).

[96] Ind. Code 24–4.5–3–202(3)(e)(ix) (prohibiting the sale of any GAP coverage when the LTV is less than 80%); Cal. Civ. Code 2982.12(a)(5)(B) (prohibiting the sale of any GAP waiver in three scenarios, including when the amount financed for the vehicle exceeds the amount covered by the GAP waiver).

[97] *See* Fed. Trade Comm'n, Business Guidance, ''Automobiles,'' *https://www.ftc.gov/business-guidance/industry/automobiles* (last visited Dec. 5, 2023).

[98] *See* Fed. Trade Comm'n, ''Buying and Owning a Car,'' *https://consumer.ftc.gov/shopping-and-donating/buying-and-owning-car* (last visited Dec. 5, 2023).

[99] *See, e.g.,* Ill. Sec'y of State Police, Dealer Handbook (Apr. 2022), *https://www.ilsos.gov/publications/pdf_publications/sos_dop66.pdf;* Wis. DOT—Div. of Motor Vehicles, Motor Vehicle Salesperson Manual—2020, *https://wisconsindot.gov/Documents/dmv/shared/salesmanual-20.pdf;* Enf't Div. of the Tex. Dep't of Motor Vehicles, Motor Vehicle Dealer Manual (2017), *https://www.txdmv.gov/sites/default/files/body-files/Motor_Vehicle_Dealer_Manual.pdf.*

while others have provided online consumer education resources.[100]

While some commenters stated that existing Federal and State efforts are sufficient, recent Commission and partner actions indicate that misconduct has persisted despite prior law enforcement and other efforts, and despite the NPRM's detailed description of chronic problems relating to bait-and-switch tactics and hidden add-on and other charges. For example, in a recent enforcement action, filed after publication of the NPRM, the Commission charged several auto dealer locations in an auto dealership group with misrepresenting the price of vehicles. According to the complaint, the dealers advertised one price to lure consumers to their dealerships, then charged them hundreds to thousands of dollars more than the advertised price by tacking on bogus extra fees for inspection, reconditioning, preparation, and certification.[101] The action also addressed the practice of dealers charging Black and Latino consumers these fees more often and in higher amounts.[102]

Multiple actions by partners since publication of the Commission's NPRM have involved auto add-ons. The Commission and the State of Wisconsin alleged that a dealership group, its current and former owners, and its general manager deceived consumers by tacking on hundreds or even thousands of dollars for add-ons without those consumers' authorization or by leading the consumers to believe the add-ons were mandatory, and doing so disproportionately more frequently with American Indian customers.[103] The CFPB and the New York State Office of the Attorney General alleged that a subprime auto lender knew or recklessly disregarded that dealers were tricking borrowers into purchasing add-on products without their knowledge or consent and had incentivized such behavior.[104] In addition, the Commonwealth of Massachusetts has brought two recent cases involving unfair add-on pricing practices.[105] In one such case, Massachusetts emphasized the dynamics of auto transactions that frequently lead to deceptive and unfair practices, particularly with respect to add-ons, noting that add-on products "are often sprung on consumers in the final steps of completing a transaction" after "multiple rounds of negotiation on the price of a car and/or car financing." [106]

Efforts to combat deceptive and unfair practices in the motor vehicle industry since the NPRM have gone beyond enforcement actions. The CFPB announced that it uncovered several unlawful practices through supervisory examinations, including auto loan servicers charging for add-ons that provide no benefit to the consumer [107] and failing to ensure consumers received refunds for add-on products that no longer offered any benefits.[108] In addition, the State of California enacted new legislation that regulates a particular type of add-on product—GAP agreements.[109] A press release introducing the legislation cited concerns about unfair practices in the sale of GAP agreements, stating that this add-on has little value and is often targeted at consumers with lower incomes and subprime credit.[110] California's law requires several disclosures related to GAP agreements, including disclosures pertaining to their financed cost and informing consumers that such products are optional.[111] The law also prohibits the sale of GAP agreements that will not actually cover consumers' debt.[112]

Despite the array of actions by the Commission and its partners, unfairness and deception continue in the motor vehicle marketplace, including (1) deceptive or unfair sales and advertising tactics and (2) hidden charges, particularly with respect to add-on products or services. To address the harm these issues inflict on consumers and on law-abiding dealers, the Final Rule, in general:

- Prohibits dealers from making misrepresentations regarding material information, including about the cost of the vehicle, the financing terms, and the availability of rebates or discounts;
- Requires dealers to disclose the offering price of the vehicle—its full cash price, provided that dealers may exclude required government charges; that optional add-ons are not required; the total of payments for the vehicle when making a representation about monthly payment; and that a discussed lower monthly payment will increase

[100] *See, e.g.,* Cal. Dept. of Just., "Buying and Maintaining a Car," *https://oag.ca.gov/consumers/general/cars* (last visited Dec. 5, 2023); Fla. Highway Safety & Motor Vehicles, "Buying from a Licensed Dealer," *https://www.flhsmv.gov/safety-center/consumer-education/buying-vehicle-florida/buying-licensed-dealer* (last visited Dec. 5, 2023); Or. Dep't of Just., "Buying a Vehicle," *https://www.doj.state.or.us/consumer-protection/motor-vehicles/buying-a-vehicle/* (last visited Dec. 5, 2023).

[101] Complaint ¶ 17, *Fed. Trade Comm'n* v. *Passport Auto. Grp., Inc.,* No. 8:22–cv–2670 (D. Md. Oct. 18, 2022).

[102] *Id.* ¶ 18. Recent actions outside the auto marketplace, even in transactions that may not be as complex and time consuming as motor vehicle transactions, further illustrate unfair and deceptive practices related to advertising, add-ons, and hidden charges. In one such action, the court noted "the realities of the disparate bargaining power" between the corporate defendant and its customers, adding that customers "might have believed the [add-on] fees were mandatory," and "might not have had the time" to negotiate or complain about them. *Fed. Trade Comm'n* v. *FleetCor Techs., Inc.,* 1:19–cv–5727, 2022 WL 3350066, at *13 (N.D. Ga. Aug. 9, 2022) (granting the Commission's motion to exclude the defendant's expert testimony); *see also Fed. Trade Comm'n* v. *FleetCor Techs., Inc.,* 620 F. Supp. 3d 1268, 1337 (N.D. Ga. 2022) (finding on summary judgment that (1) defendants did not tell consumers about fees at sign-up; (2) disclosures about fees in contractual documents were inadequate; and (3) defendants failed to get consent to add-on charges); *id.* at 1334 (concluding that defendants had "charged a slew of fees that: were never discoverable to customers [and] were obscured by undecipherable language"); Complaint ¶¶ 41–43, *Fed. Trade Comm'n* v. *Harris Originals of NY, Inc.,* No. 2:22–cv–4260 (E.D.N.Y. July 20, 2022) (alleging that a jewelry company charged military consumers for add-on products without their consent or under false pretenses); Complaint ¶¶ 61–73, *Fed. Trade Comm'n* v. *Benefytt Techs., Inc.,* No. 8:22–cv–1794 (M.D. Fla. Aug. 8, 2022) (alleging illegal add-on charges by healthcare companies); Complaint ¶¶ 1–4, *Fed. Trade Comm'n* v. *First Am. Payment Sys., LP,* No. 4:22–cv–654 (E.D. Tex. July 29, 2022) (alleging that a payment processing company misrepresented the terms and costs of its services, resulting in unexpected and unauthorized fees); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Trade Regulation Rule on Unfair or Deceptive Fees, 88 FR 77420, 77435–37 (released Oct. 11, 2023; published Nov. 9, 2023), *https://www.govinfo.gov/content/pkg/FR-2023-11-09/pdf/2023-24234.pdf.*

[103] Complaint ¶¶ 3–5, 11–18, 33–43, 48–51, *Fed. Trade Comm'n* v. *Rhinelander Auto Ctr., Inc.,* No. 3:23–cv–00737 (W.D. Wis. Oct. 24, 2023).

[104] Complaint ¶¶ 128–30, *CFPB* v. *Credit Acceptance Corp.,* No. 1:23–cv–38 (S.D.N.Y. Jan. 4, 2023).

[105] Complaint ¶ 3, *Massachusetts* v. *Jaffarian's Serv., Inc.,* No. 2277–cv–881 (Mass. Super. Ct. Sept. 15, 2022); Assurance of Discontinuance ¶¶ 7–9, *In re Hometown Auto Framingham, Inc.,* No. 2384–cv–116 (Mass. Super. Ct. Jan. 17, 2023).

[106] Complaint ¶ 5, *Massachusetts* v. *Jaffarian's Serv., Inc.,* No. 2277–cv–881 (Mass. Super. Ct. Jan. 17, 2023).

[107] Consumer Fin. Prot. Bureau, "Supervisory Highlights: Issue 24, Summer 2021" 3–4 (June 2021), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf* (finding servicers added and maintained unnecessary collateral protection insurance (CPI) when consumers had adequate insurance and thus the CPI provided no benefit to the consumers, and also when consumers' vehicles had been repossessed even though no actual insurance protection was provided after repossession).

[108] Consumer Fin. Prot. Bureau, "Supervisory Highlights: Issue 28, Fall 2022" 4–5 (Nov. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf* (finding consumers paid off their vehicle financing early but servicers failed to ensure consumers received refunds for unearned fees related to add-on products which no longer offered any possible benefit to consumers after payoff).

[109] Cal. Civ. Code 2982.12.

[110] Press Release, Off. of the Att'y Gen. of Cal., "Attorney General Bonta and Assemblymember Maienschein Announce Legislation to Strengthen Protections for Car Buyers" (Feb. 16, 2022), *https://oag.ca.gov/news/press-releases/attorney-general-bonta-and-assemblymember-maienschein-announce-legislation.*

[111] Cal. Civ. Code 2982.12.

[112] *Id.*

the total amount the consumer will pay, if true;

- Prohibits dealers from charging for add-on products or services that provide no benefit to the consumer; and
- Requires dealers to obtain express, informed consent from the consumer for any charge.

As discussed in the section-by section analysis in SBP III and in response to comments, the Commission is declining to finalize certain provisions proposed in the NPRM, including the provision that dealers must disclose a list of prices for all optional add-on products or services, and the provision that dealers must obtain certain signed declinations from consumers prior to charging for optional add-on products or services. The Commission also is finalizing the defined terms ''Covered Motor Vehicle'' and ''Covered Motor Vehicle Dealer'' to reflect edits to narrow the scope of these definitions compared to the scope of the terms ''Motor Vehicle'' and ''Motor Vehicle Dealer'' in the NPRM.

III. Section-by-Section Analysis

The following discussion provides a section-by-section analysis that states the provisions proposed in the NPRM, and discusses the comments received, the Commission's responses to comments, and the provisions adopted in the Final Rule.[113]

A. § 463.1: Authority

Section 463.1 states that the Final Rule is promulgated pursuant to section 1029 of the Dodd-Frank Act, and that it is an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the FTC Act to violate, directly or indirectly, any provision of the Final Rule, including the recordkeeping requirements, which are necessary to prevent such unfair or deceptive acts or practices and to enforce this Rule.[114] The prohibition against violating any applicable provision ''directly or indirectly'' applies to each section of part 463. As discussed in SBP I.A, section 1029 authorizes the FTC to prescribe rules under Sections 5 and 18(a)(1)(B) of the FTC Act with respect to motor vehicle dealers predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.[115]

[113] Regarding the thousands of comments received, the Commission notes that many commenters raised similar concerns or addressed overlapping issues. To avoid repetition, the Commission has endeavored to respond to issues raised in similar comments together. Responses provided in any given section apply equally to comments addressing the same subject in the context of other sections. Moreover, throughout the SBP, the Commission discusses justifications for the Final Rule that are informed by its careful consideration of all comments received, even where that discussion is not linked to a particular comment.

[114] The proposed authority provision in the NPRM omitted the second reference to ''unfair'' acts or practices with regard to the proposed recordkeeping requirements; the Final Rule consistently refers to both ''unfair'' and ''deceptive'' acts or practices together.

[115] One industry group argued that the proposed rule violated the APA because it did not comply with the FTC's rule requiring publication of an Advance Notice of Proposed Rulemaking (''ANPR''), 16 CFR 1.10. Section 1.10, however, like the rest of subpart B of part 1 of the Commission's Rules of Practice, applies only to ''proceedings for the promulgation of rules as provided in section 18(a)(1)(B) of the Federal Trade Commission Act.'' 16 CFR 1.7. The ANPR requirement in section 1.10 implements section 18(b)(2) of the FTC Act, which requires an ANPR when the Commission promulgates rules under the procedures set forth in that section. In this case, the FTC is acting under statutory authority under section 1029(d) of the Dodd-Frank Act, *see* NPRM at 42031, which authorizes the Commission to promulgate rules using the APA's informal notice-and-comment procedure, *see* 5 U.S.C. 553, notwithstanding the additional procedural requirements set forth in section 18. Accordingly, this rulemaking is governed by subpart C of part 1 of the Commission's Rules of Practice, which ''sets forth procedures for the promulgation of rules under authority other than section 18(a)(1)(B) of the FTC Act.'' 16 CFR 1.21. Neither subpart C nor the APA requires publication of an ANPR.

This is consistent with Commission practice in prior notices to issue or amend regulations, including with the Made in USA Labeling Rule, the Children's Online Privacy Protection Act Rule, and the Telemarketing Sales Rule. *See, e.g.,* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Made in USA Labeling Rule, 85 FR 43162 (July 16, 2020), *https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-13902.pdf* (issuing original notice of proposed rulemaking that was not preceded by an advance notice of proposed rulemaking); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 64 FR 22750 (Apr. 27, 1999), *https://www.govinfo.gov/content/pkg/FR-1999-04-27/pdf/99-10250.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 60 FR 8313 (Feb. 14, 1995), *https://www.govinfo.gov/content/pkg/FR-1995-02-14/pdf/95-3537.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 78 FR 41200 (July 19, 2013), *https://www.govinfo.gov/content/pkg/FR-2013-07-09/pdf/2013-12886.pdf* (issuing notice of proposed rulemaking for rule amendment that was not preceded by an advance notice of proposed rulemaking); Fed. Trade Comm'n, Proposed Rule, Children's Online Privacy Protection Rule, 76 FR 59804 (Sept. 27, 2011), *https://www.govinfo.gov/content/pkg/FR-2011-09-27/pdf/2011-24314.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 74 FR 41988 (Aug. 19, 2009), *https://www.govinfo.gov/content/pkg/FR-2009-08-19/pdf/E9-19749.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 70 FR 2580 (Jan. 14, 2005), *https://www.govinfo.gov/content/pkg/FR-2005-01-14/pdf/05-877.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 69 FR 67287 (Nov. 17, 2004), *https://www.govinfo.gov/content/pkg/FR-2004-11-17/pdf/04-25470.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 69 FR 7330 (Feb. 13, 2004), *https://www.govinfo.gov/content/pkg/FR-2004-02-13/pdf/04-3287.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Telemarketing Sales Rule, 67 FR 4492 (Jan. 30, 2002), *https://www.govinfo.gov/content/pkg/FR-2002-01-30/pdf/02-1998.pdf* (same); Fed. Trade Comm'n, Notice of Proposed Rulemaking, Children's Online Privacy Protection Rule, 66 FR 54963 (Oct. 31, 2001), *https://www.govinfo.gov/content/pkg/FR-2001-10-31/pdf/01-27390.pdf* (same). This is also true of regulation amendments pursuant to the authority under which this Final Rule is promulgated—that which Congress granted to the Commission under section 1029 of the Dodd-Frank Act, 15 U.S.C. 5519, pertaining to motor vehicle dealers. *See, e.g.,* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Used Motor Vehicle Trade Regulation Rule, 77 FR 74746, 74748 (Dec. 17, 2012), *https://www.govinfo.gov/content/pkg/FR-2012-12-17/pdf/2012-29920.pdf* (''Because the Dodd-Frank Act authorized the Commission to use APA procedures for notice and public comment in issuing or amending rules with respect to motor vehicle dealers, the FTC will not use the procedures set forth in Section 18 of the FTC Act, 15 U.S.C. 57a, with respect to these proposed revisions to the Used Car Rule and the Used Car Buyers Guide. Accordingly, the Commission is publishing this Notice of Proposed Rulemaking pursuant to Section 553 of the APA.''); *see also* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Privacy of Consumer Financial Information Rule Under the Gramm-Leach-Bliley Act (''Privacy Rule''), 84 FR 13150 (Apr. 4, 2019), *https://www.govinfo.gov/content/pkg/FR-2019-04-04/pdf/2019-06039.pdf* (issuing notice of proposed rulemaking for rule amendment that was not preceded by an advance notice of proposed rulemaking).

This same commenter argued the FTC had not complied with the ''Principles of Regulation'' enumerated in section 1(b) of Executive Order 12866. *See* Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 34–36 & n.123; E.O. 12866 3(b) (defining ''Agency'' to mean an authority of the United States ''other than those considered to be independent regulatory agencies''). This provision of the Executive Order does not apply to independent agencies such as the FTC. Regardless, the Commission did take into account the principles set forth in section 1(b), as is evident throughout the NPRM. *See, e.g.,* NPRM at 42015–17 (identifying problems in the marketplace); *id.* at 42028–42031 (soliciting comments on alternative approaches); *id.* at 42036–42044 (assessing costs and benefits).

The same commenter also argued that the Commission's denial of its request to extend the comment period prejudiced the commenter's ability to collect and provide data pertaining to the proposed rule and was inconsistent with the Commission's grant of extensions in other rulemakings. As described in its letter, the Commission also received requests opposing an extension of the comment period. *See* Letter, Fed. Trade Comm'n, ''Duration of the Public Comment Period in Matter No. P204800'' (Aug. 23, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20204800%20-%20Letter%20re%20Extension%20for%20publication.pdf.* In the letter, the Commission noted its ongoing engagement with stakeholders on issues relating to the sale, financing, and lease of motor vehicles, since before its 2011 **Federal Register** notice inviting stakeholder feedback on these issues and continuing since that time. *See* Fed. Trade Comm'n, Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, 76 FR 14,014 (Mar. 15, 2011), *https://www.federalregister.gov/documents/2011/03/15/2011-5873/public-roundtables-protecting-consumers-in-the-sale-and-leasing-of-motor-vehicles.* The Commission determined that a sixty-day comment period, along with an additional twenty days following the public announcement and release of the NPRM and prior to its publication in the **Federal Register**, provided meaningful opportunity to comment. *See also* Steven J. Balla, ''Public Commenting on Federal Agency Regulations: Research on Current Practices

Continued

The Final Rule defines with specificity certain unfair or deceptive acts or practices; the Final Rule provisions are also ''prescribed for the purpose of preventing such acts or practices.'' [116]

B. § 463.2: Definitions

1. Overview

The proposed rule included definitions for the following terms: ''Add-on'' or ''Add-on Product(s) or Service(s)''; ''Add-on List''; ''Cash Price without Optional Add-ons''; ''Clearly and Conspicuously''; ''Dealer'' or ''Motor Vehicle Dealer''; ''Express, Informed Consent''; ''GAP Agreement''; ''Government Charges''; ''Material'' or ''Materially''; ''Motor Vehicle''; and ''Offering Price.'' In the definition-by-definition analysis in SBP III.B.2, the Commission discusses each definition proposed in the NPRM, relevant comments that are not otherwise addressed in the discussion of the corresponding substantive provisions of the Final Rule, and the definition the Commission is finalizing.

2. Definition-by-Definition Analysis

(a) Add-On or Add-On Product(s) or Service(s)

The proposed rule defined ''Add-on'' or ''Add-on Product(s) or Service(s)'' as ''any product(s) or service(s) not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer and for which the Motor Vehicle Dealer, directly or indirectly, charges a consumer in connection with a vehicle sale, lease, or financing transaction.'' This term appeared in the following definitions and substantive provisions of the rule proposal: the definitions of ''Add-on List'' and ''Cash Price without Optional Add-ons''; the Prohibited Misrepresentations provision at proposed § 463.3(b); the add-on list disclosure provision at proposed § 463.4(b); the requirement to disclose that add-ons are not required at proposed § 463.4(c); the prohibition against charging for add-ons that provide the consumer no benefit at proposed § 463.5(a); and the proposed provision relating to undisclosed or unselected add-ons at § 463.5(b). As discussed in the following paragraphs, in response to stakeholder comments, the Commission declines to finalize certain of these provisions; in the Final Rule, this term appears in paragraph (a) of the Prohibited Misrepresentations section (§ 463.3); the Disclosure Requirements provision in paragraph (c) of § 463.4; and the provision in § 463.5(a) titled ''Dealer Charges for Add-ons and Other Items'' and subtitled ''Add-ons that provide no benefit.''

For the following reasons, the Commission adopts the definition of ''Add-on'' or ''Add-on Product(s) or Service(s)'' largely as proposed, with conforming modifications to reflect changes to the defined terms '''Covered Motor Vehicle' or 'Vehicle''' and '''Covered Motor Vehicle Dealer' or ''Dealer''' as described in more detail in the discussion of § 463.2(e) and (f), in SBP III.B.2(e) and (f).

The Commission received several comments relating to the scope of its proposed definition for ''Add-on'' or ''Add-on Product(s) or Service(s).'' Industry association and other commenters recommended that the Commission broaden the definition to include manufacturer-provided products or services, expressing concern that exclusion of such products or services would put other companies that provide such items at a competitive disadvantage. Products or services provided by manufacturers, however, are already covered by several provisions of the Final Rule. Under the substantive provisions the Commission is finalizing, dealers are prohibited from making misrepresentations regarding material information, including about the ''costs or terms of purchasing, financing, or leasing a Vehicle'' (§ 463.3(a)); must disclose the vehicle's true ''Offering Price,'' which includes any amounts dealers charge for items already installed or provided by the manufacturer (§§ 463.4(a) and 463.2(k)); and are required to obtain ''Express, Informed Consent'' for charges for any item (§§ 463.5(c) and 463.2(g)). The additional substantive add-on-specific provisions [117] address harms associated with products or services not provided to the consumer or installed on the vehicle by the motor vehicle manufacturer. Commenters did not provide evidence that the proposed provisions covering manufacturer-provided products or services would be insufficient to address consumer harm. Accordingly, the Commission has determined not to include manufacturer-provided products or services within this defined term. The Commission will continue to monitor this issue to determine whether additional action is warranted.

One individual commenter expressed concern that, under the Commission's proposed definition, dealers could raise the price of a vehicle by advertising additional products or services, such as ''free lifetime benefits'' with the vehicle, and that dealers could mislead consumers by charging more for the vehicle based on a supposedly ''free'' add-on.[118] The Commission notes that the Rule the Commission is finalizing contains several provisions relating to this concern. For example, dealers are prohibited from making misrepresentations under § 463.3, including misrepresentations regarding ''*costs,* limitation, benefit, or any other aspect'' of add-ons.[119] Furthermore, dealers are required to disclose a vehicle's offering price, which must include charges for required add-ons; this disclosure will allow consumers to know the true price of the vehicle and comparison shop before selecting and visiting a particular dealership.[120]

Several dealership association commenters expressed concern that the proposed definition was too broad, contending that it might apply to hundreds of items and include fees, such as a processing or document fee, that a dealer charges a consumer. As discussed in SBP III.B.2(b), III.D.2(b), and III.E.2(b), upon careful review of comments, including comments regarding the breadth of this requirement, the Commission has determined not to finalize the provision that would have required listing all optional add-ons—the ''Add-on List'' definition and the associated requirement that dealers disclose such a list—as well as proposed § 463.5(b) relating to undisclosed or unselected add-ons.[121] The remaining substantive provisions that use the term ''Add-ons'' prohibit misrepresentations (§ 463.3(b)); require dealers to disclose, if true, that add-ons are not required (§ 463.4(c)); and prohibit charges for add-ons that provide the consumer no benefit (§ 463.5(a)). The law already prohibits misrepresentations, regardless of the product or service at issue; dealers that offer consumers additional products or services are already required to ask

and Recommendations to the Administrative Conference of the United States'' App. A (2011), *https://www.acus.gov/sites/default/files/documents/Consolidated-Reports-%2B-Memoranda.pdf* (reporting data from a pool of 703 comment periods associated with actions by dozens of Federal agencies, and finding that the average duration of comment periods for proposed agency actions was 38.7 days, and 45.1 days for actions that are economically significant).

[116] 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

[117] §§ 463.3(b), 463.4(c), 463.5(a).

[118] Individual commenter, Doc. No. FTC–2022–0046–7445 at 10–11.

[119] § 463.3(b) (emphasis added).

[120] *See* §§ 463.2(k) (defining Offering Price), 463.4(a) (requiring disclosure of Offering Price); *see also* § 463.3(p) (prohibiting misrepresentations regarding the disclosures required by the Final Rule).

[121] *See* NPRM at 42044, 42046 (proposed §§ 463.2(b), 463.4(b), 463.5(b)).

consumers if they want such products, rather than suggesting that such products or services are mandatory, when they are not; and any hardship associated with refraining from charging for products or services that provide consumers no benefits are outweighed by the harms to consumers and competition from permitting this practice, as explained in the analysis of § 463.5(a).

Commenters including an industry association suggested limiting the definition to products or services sold at the ''point of vehicle purchase'' to clarify that indirect charges, such as the inclusion of a one-year subscription to a satellite radio service, need not be separately itemized.[122] The industry association commenter suggested that, as proposed, the definition would include charges for which dealers and consumers ''would otherwise not account.'' [123] The Commission has determined not to finalize the add-on list and form requirements in proposed §§ 463.4(b) and 463.5(b). For the provisions being finalized, excluding subscription charges, or including only items added to the vehicle at the ''point of vehicle purchase,'' would narrow the definition of ''Add-on'' and the corresponding requirements in a manner that would allow for deceptive or unfair practices, including by allowing dealers to represent a price that is not the offering price, or to deceptively state that add-ons are required. In the example provided by the commenter, if the satellite radio subscription service is mandatory, it needs to be included in the offering price of the vehicle, as required by § 463.4(a) of the Final Rule; if it is not mandatory, the dealer needs to disclose, when making any representations about the service, that it is not required under § 463.4(c). Further, regardless of whether such a product or service is mandatory or optional, dealers must follow other aspects of the Final Rule, including by not making any misrepresentations about the subscription under § 463.3 and by obtaining the express, informed consent of the consumer for the associated charges under § 463.5(c).

Another industry association commenter contended that add-ons sold in the marine industry are typically different than those offered in the context of automobile sales and described in the NPRM. While all motor vehicle dealers must refrain from engaging in deceptive or unfair conduct relating to add-ons, the Commission is excluding recreational boats and marine equipment from the Final Rule's definition of '' 'Covered Motor Vehicle' or 'Vehicle,' '' as discussed in additional detail in the definition-by-definition analysis of § 463.2(e) in SBP III.B.2(e).

An industry association commenter and comments from a number of dealership associations noted that certain State laws already regulate the sale of add-ons, including, for example, laws in many States that regulate vehicle sales contracts or deceptive sales practices generally or that regulate insurance products. To the extent that the Final Rule's add-on provisions may duplicate State law, commenters have provided no evidence that any such duplication in the provisions that incorporate this defined term—which prohibit misrepresentations, require disclosures in the event add-ons are not required, and prohibit charges for add-ons from which the consumer would not benefit—will harm consumers or competition. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer's violation of the rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Under the Final Rule, State laws may provide more or less specific requirements as long as such requirements are not inconsistent with part 463, as set forth at § 463.9, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.[124]

A few dealership association commenters expressed concern that the proposed definition of ''Add-on Products or Services'' would include insurance-related products, such as credit life and credit disability insurance, and as such, could implicate the McCarran-Ferguson Act's reverse-preemption of certain Federal laws that ''invalidate, impair, or supersede'' State laws enacted ''for the purpose of regulating the business of insurance.'' [125] Commenters have provided no evidence that the Rule will invalidate, impair, or supersede State laws enacted for the purpose of regulating the business of insurance.[126] To the contrary, the Final Rule addresses deceptive or unfair conduct—it prohibits dealers, *inter alia,* from making misrepresentations regarding material information about add-ons, from failing to disclose when add-ons are not required, and from charging for add-ons from which the consumer would not benefit. Nor has the Commission been presented with evidence that the Rule's other substantive provisions (prohibiting misrepresentations; requiring disclosures of a vehicle's offering price and about total of payments; and requiring consumers' express, informed consent before charging them) invalidate, impair, or supersede State laws enacted for the purpose of regulating insurance.[127]

A number of industry and dealership association commenters contended that, as proposed, this definition may extend to products or services that are provided by the manufacturer but that are installed by a distributor of motor vehicles, or alternatively, by the dealer, at the instruction of the manufacturer. Relatedly, a State governmental association commenter expressed concern that the proposed definition could create confusion with regard to the sale of used vehicles, where a prior owner of a vehicle may have added a product to the vehicle. The commenter contended that a motor vehicle dealer selling the used vehicle may be unaware of the added product, and further, that listing any such items may confuse buyers.

To the extent the commenters' concerns stem from the proposed provisions related to add-on lists and proposed § 463.5(b)'s provisions related to separate disclosures, the Commission is not finalizing those provisions. Under the provisions being finalized, if a product is provided to the dealer by the manufacturer or another entity, and a consumer chooses to have the product

[122] Comment of Serv. Cont. Indus. Council, Guaranteed Asset Prot. All., & Motor Vehicle Prot. Prods. Ass'n, Doc. No. FTC–2022–0046–8113 at 13–14.

[123] *Id.* at 13.

[124] *See, e.g., English* v. *Gen. Elec. Co.,* 496 U.S. 72, 79 (1990).

[125] *See* 15 U.S.C. 1012(b).

[126] *See Union Labor Life Ins. Co.* v. *Pireno,* 458 U.S. 119, 129 (1982) (setting forth test for whether an activity constitutes the ''business of insurance''); *Humana Inc.* v. *Forsyth,* 525 U.S. 299, 307–08 (1999) (establishing criteria for whether a Federal law operates to ''invalidate, impair, or supersede'' State law).

[127] The Supreme Court has refused to interpret the McCarran Ferguson Act to invalidate Federal law when applied to remedy a misrepresentation and undo the harm caused by alleged deception. *See SEC* v. *Nat'l Sec., Inc.,* 393 U.S. 453, 462 (1969). Moreover, lower courts have rejected precisely the concern raised by the commenter about credit life insurance. *See Fed. Trade Comm'n.* v. *Dixie Fin. Co.,* 695 F.2d 926, 930 (5th Cir. 1983) (McCarran Ferguson Act does not preclude FTC investigation of ''whether the sale of insurance is a precondition to the arrangement of credit''); *Fed. Trade Comm'n* v. *Mfrs. Hanover Consumer Servs., Inc.,* 567 F. Supp. 992, 94 (E.D. Pa. 1983) (same).

installed and pay for it, the dealer may install it and charge for it, as long as the dealer complies with the provisions of the Final Rule, including by disclosing that the product is not required and by obtaining the consumer's express, informed consent for the charge. If the manufacturer requires the dealer to install the product or if the dealer chooses to install the product, and the dealer requires any consumer to pay charges for it, the amount of the charge must be included in the vehicle's offering price, and the dealer must comply with other aspects of the Final Rule, including the express, informed consent requirement. Relatedly, regarding used vehicles, if a prior owner of such a vehicle installed an add-on, and the dealer that subsequently sells such a vehicle requires any consumer to pay charges for the add-on, the amount of those charges must be included in the vehicle's offering price and the dealer must comply with other aspects of the Final Rule, including the express, informed consent requirement at § 463.5(c). If, alternatively, the dealer does not require any consumers to pay for the pre-installed add-on, then the dealer does not have to add that amount to the vehicle's offering price, and there is no charge for that add-on for which the dealer must obtain express, informed consent. Thus, the definition of ''Add-on'' and the Rule requirements being finalized address deceptive or unfair price and add-on disclosures and hidden charges without requiring dealers to list or itemize charges that they do not impose on consumers. For the reasons explained in this section, the Commission is finalizing the definition of ''Add-on'' or ''Add-on Product(s) or Service(s)'' largely as proposed, with conforming modifications to reflect changes to the defined terms '''Covered Motor Vehicle' or 'Vehicle''' and '''Covered Motor Vehicle Dealer' or 'Dealer''' as described in more detail in the discussion of § 463.2(e) and (f), in SBP III.B.2(e) and (f).

(b) Add-On List

The NPRM proposed defining the term ''Add-on List,'' which appeared in the associated Add-on List disclosure provision at proposed § 463.4(b), as well as in the recordkeeping provision at proposed § 463.6(a)(2). Based on the following, the Commission has determined not to include this definition in its Final Rule.

Several commenters supported the substantive add-on list proposal and its associated definition, and commenters including consumer advocacy organizations urged the Commission to finalize additional related restrictions or disclosures, such as requiring add-on prices to be fixed and non-negotiable, or requiring a distinct add-on list for each vehicle sold. Other commenters, including dealership associations, raised concerns that, as proposed, the add-on list definition could impose significant economic burdens on dealerships for a disclosure that, in some circumstances, might be too voluminous to be optimally meaningful to consumers, or permit price ranges that could be too broad to prevent abuses and effectively inform consumers.

After careful consideration, and in light of the concerns raised by commenters, the Commission has determined not to include the add-on list disclosure provision at proposed § 463.4(b) or the recordkeeping provision at proposed § 463.6(a)(2) in its Final Rule, and therefore will not include a definition of the term ''Add-on List'' in its Final Rule. Here, as elsewhere, the Commission remains committed to promoting fair, non-deceptive, and competitive markets for consumer products and services; it will continue to monitor the marketplace for add-on-related acts or practices that are unfair or deceptive, and will evaluate whether to propose additional measures pertaining to such products and services.

(c) Cash Price Without Optional Add-Ons

The NPRM proposed defining the term ''Cash Price without Optional Add-ons,'' which appeared in the proposed provision addressing undisclosed or unselected add-ons at § 463.5(b). Based on the following, the Commission is declining to finalize this definition.

A number of commenters favored the proposed provision and definition, and several, including consumer advocacy organizations, urged the Commission to include additional requirements, such as requiring the proposed disclosure documents associated with this proposed definition to be available in different languages, while others, including a dealership association, raised concerns that the definition and relevant provision were burdensome or confusing for dealers.

As explained in additional detail in SBP III.E.2(b) with respect to § 463.5(b), in light of commenter concerns that the proposed provision using this term would increase costs for legitimate dealers and add to the time and paperwork for consumers in an already lengthy, paperwork-heavy transaction, the Commission has elected not to include a Cash Price without Optional Add-ons disclosure requirement in its Final Rule. Thus, after careful consideration, and in light of the concerns raised by commenters, the Commission has determined not to include a definition of ''Cash Price without Optional Add-ons'' in its Final Rule.

(d) Clearly and Conspicuously

The proposed rule defined the term ''Clearly and Conspicuously'' as ''in a manner that is difficult to miss (*i.e.,* easily noticeable) and easily understandable,'' including in all of seven enumerated ways, listing proposed requirements for ''any communication that is solely visual or solely audible,'' ''[a] visual disclosure,'' ''[a]n audible disclosure,'' and ''any communication using an interactive electronic medium,'' and providing, *inter alia,* that such disclosures ''must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears'' and ''must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.'' Based on the following, the Commission is finalizing this definition largely as proposed, with a modification to clarify that the definition applies whether the term appears as an adjective or an adverb, by adding the parentheses in the following manner to the defined term: ''Clear(ly) and Conspicuous(ly).''

Some consumer advocacy organization commenters favored the Commission's proposed definition while also suggesting that the Commission include a provision requiring translation of any deal consummating documents, including buyer's orders and retail installment sales contracts, into the language in which the negotiations were conducted. This issue, however, is addressed by § 463.5(c) of the Rule, which requires express, informed consent for each item charged.[128] As explained in additional detail in the paragraph-by-paragraph analysis of § 463.5(c) in SBP III.E.2(c), if a deal-consummating document is provided in a language that the consumer does not understand, and the document's contents are not otherwise clearly understood by the consumer, then the consumer is in no position to give unambiguous assent to the charges described therein. The Commission therefore has determined not to add

[128] The language requirements, as they relate to obtaining express, informed consent, are further explained in the discussion of § 463.5(c) in SBP III.E.2(c).

such a provision to its ''Clear(ly) and Conspicuous(ly)'' definition. However, the Commission will continue to monitor the marketplace and determine whether further language requirements or additional measures are warranted to address deceptive or unfair practices—particularly those that target or otherwise disproportionately impact language-minority communities.

Commenters, including consumer advocacy organizations, expressed concern that proposed § 463.2(d)(5) may be read to apply only to certain disclosures with triggering representations and only to disclosures that are in writing. These commenters also requested that the Commission incorporate into its Final Rule the FTC's policy statement regarding foreign language advertising and sales materials, which is separately codified at 16 CFR 14.9.[129] In response, the Commission notes that to be clear and conspicuous, the disclosure must be ''easily understandable,'' as stated in the definition. If a disclosure is being made in a language the consumer does not understand, it does not meet this requirement. Further, the disclosures highlighted by the commenters are indeed subject to the language requirements of § 463.2(d)(5), which requires that disclosures ''appear in each language in which the representation that requires the disclosure appears.'' With regard to the offering price disclosure in § 463.4(a)(1), the applicable ''representation that requires the disclosure'' is the ''advertisement that references . . . a specific Vehicle''; thus, for example, if an advertisement that references a specific vehicle is in Spanish, the offering price disclosure must also be in Spanish. Similarly, in § 463.4(a)(2), the applicable representation that requires the disclosure is an ''advertisement that represents . . . any monetary amount or financing term for any Vehicle.'' In § 463.4(a)(3), the applicable representation is ''any communication . . . that includes a reference . . . regarding a specific Vehicle, or any monetary amount or financing term for any Vehicle.'' In § 463.4(c) and (d), ''any representation'' regarding an add-on product or service or a monthly payment for any vehicle, respectively, triggers the language requirement of § 463.2(d)(5). The monthly payments comparison disclosure in § 463.4(e) is required when there is a ''comparison between payment options . . . that includes discussion of a lower monthly payment.'' Thus, the language requirements in § 463.2(d)(5) apply.

In response to this concern regarding the applicability of § 463.2(d)(5) to disclosures that are not in writing, the Commission notes that its use of the word ''appear'' in § 463.2(d)(5) incorporates common meanings, such as ''to show up,'' ''to come into existence,'' or ''to become evident or manifest,'' which cause this provision to apply whether the representation requiring the disclosure appears visually, orally, or otherwise.[130] Where the Commission instead intended a provision to be limited to a visual disclosure, as in § 463.2(d)(2), the Rule states so explicitly.

In response to the request that the Commission incorporate into this Rule its policy statement regarding foreign language advertising and sales materials, separately codified at 16 CFR 14.9, the Commission emphasizes that the enforcement statement sets out what is already impermissible under current law and is consistent with the requirements the Commission is finalizing. To the extent dealers take actions that are inconsistent with Commission statements about such law, they are risking enforcement proceedings by the Commission or others. Accordingly, the Commission has determined not to add to the Rule further requirements regarding foreign language advertising. The Commission will continue to monitor the market to determine whether further action is warranted.

Industry association commenters raised concerns about how the Commission's proposed definition interacts with other Federal laws, such as Regulations Z and M, which implement the Truth in Lending Act and the Consumer Leasing Act, respectively, and contended that it conflicts with a clear and conspicuous definition in Commodity Futures Trading Commission regulations.[131] Industry and dealership association commenters contended that State advertising standards already address what constitutes ''clear and conspicuous'' advertising and provide guidance on disclosures, such that the FTC's proposal will cause confusion or possible conflict with State law.

The Commission's definition of ''Clear(ly) and Conspicuous(ly)'' is not inconsistent with the existing Federal legal requirements raised by these commenters. Dealers can comply with these laws to the extent they apply as well as with the requirements that follow from the Commission's definition. Regarding State law, commenters did not provide examples of actual conflicts. Further, to the extent there is truly an inconsistency between the operation of the Commission's definition and any State law, the Commission notes that the definition is based on decades of Commission experience policing deceptive and unfair conduct; addresses harmful practices including those related to hidden disclosures and charges; and that § 463.9 of the Final Rule sets out the Rule's relation to State laws.

Other industry association commenters also contended that the proposed definition of ''Clearly and Conspicuously'' would be overly broad and challenging for compliance, but did not explain why or suggest alternative language. In addition, some dealership association commenters requested more guidance to understand the definition. The Commission's definition spells out, in seven subparts, what clear and conspicuous means, using simple terms that provide additional information about how dealers can make a disclosure in a manner that is easily understandable and easily noticeable to the consumer. The definition elaborates basic, common-sense principles, including that visual disclosures be in a size that consumers will easily notice and that audible disclosures be in a volume, speed, and cadence such that consumers will easily hear it. Thus, for example, disclosures in an illegible font, or that consumers cannot hear, are not clear and conspicuous. The Commission also notes that it did not mandate specific fonts, volumes, or other prescriptive measures. Thus, dealers have the flexibility to determine the best way to meet the definition's requirements for their consumers under the circumstances.

A dealership association commenter contended that the proposed definition does not include a reasonableness standard and may be interpreted as prohibiting any limitations and exclusions, given the requirement in proposed § 462.3(d)(7) that a disclosure must not be contradicted or mitigated by or inconsistent with anything else in the communication. The commenter further asked whether a statement such as ''with approved credit'' would

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[129] 16 CFR 14.9 is an enforcement policy statement that provides information to advertisers about clear and conspicuous disclosures in foreign language advertisings and sales materials, including ensuring the language of the disclosure matches the language in the publication. *See* 16 CFR 14.9.

[130] *See Appear* (defs. 1b, 4, 6), Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/appear* (last visited Dec. 5, 2023); *see also* Order ¶¶ 2–3, *Asbury Auto. Grp., Inc.,* No. C–4606 (F.T.C. Mar. 22, 2017) (identical usage in definition provision); Order ¶ 2, *Lithia Motors, Inc.,* No. C–4597 (F.T.C. Dec. 8, 2016) (same); Order ¶¶ 2–3, *Jim Koons Mgmt. Co.,* No. C–4598 (F.T.C. Dec. 8, 2016) (same).

[131] 17 CFR 162.2.

impermissibly mitigate an offer of low financing under this proposed definition.[132] The Commission responds as follows. The standard is an objective one, evaluated from the perspective of a reasonable consumer.[133] The definition does not prohibit all advertising that contains limitations and exclusions, but it does provide that if dealers are advertising offers that are limited in some way, they may not misrepresent such offers. Thus, if a dealer presents consumers with an unqualified representation of low financing terms, those terms must be available to typical consumers. Alternatively, a dealer may offer low financing terms to consumers with particular credit characteristics if that requirement is presented in a manner that does not deceive reasonable consumers. For example, a dealer may offer ''0% annual percentage rate (APR) for consumers with a credit score above 800.'' By contrast, it would be deceptive if the dealer offered ''0% APR,'' and then separately disclosed in fine print that such terms are only available to consumers with a credit score above 800, because the qualifying disclosure is inconsistent with an offer of ''0% APR'' that contained no limitations and thus indicated that 0% APR is available to the typical consumer regardless of credit score.[134] Further, the Commission notes that to qualify as clear and conspicuous, ''disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.'' [135]

Lastly, another dealership association commenter asked how the proposed definition translates to visual, audible, and electronic media disclosures and expressed concern about subjectivity, characterizing the terms ''easily'' understood and ''unavoidable'' within the proposed definition as subjective and open to different interpretations, particularly in the context of websites and internet promotions. Here, the Commission declines to mandate more prescriptive language regarding, for example, font sizes, what volumes are to be used, and where exactly the language should appear on a website, such as on an overlay with mandated color, size, and location.[136] As courts [137] have recognized, whether a disclosure is clear and conspicuous is an objective standard rather than a subjective one. While more prescriptive language would provide additional objective criteria, the Commission is concerned such language might constrain dealers from determining the best way to meet the definition's requirements for their consumers under the circumstances involved, and might require dealers that are already making clear and conspicuous disclosures to change their existing disclosure materials.

The Commission reiterates that the definition of ''Clear(ly) and Conspicuous(ly)'' elaborates basic, common-sense principles, such as requiring visual disclosures in a size consumers can see and audible disclosures in a volume they can hear. Regarding the requirement that internet disclosures be unavoidable, this language requires evaluating an objective standard—whether or not consumers could have avoided the disclosure. In addition, the disclosure must be easily noticeable and easily understandable, as set forth expressly in the definition. Disclosures that do not meet this standard include those that are buried in other text, including as illustrated by many FTC actions against dealers.[138] Regarding the requirement that disclosures be ''easily'' noticeable and understandable, the standard is also an objective one, evaluated from the perspective of a reasonable consumer. Determining how reasonable consumers are likely to respond may be resolved on the basis of the advertisement, context, or disclosure itself, or based on extrinsic evidence, such as consumer complaints.[139] To this end, as noted previously, the definition enumerates in seven subparts the meaning of clear and conspicuous using simple terms that provide additional guidance on how dealers may make disclosures that are easily understandable and easily noticeable to the consumer.

After carefully considering the comments, the Commission adopts § 463.2(d) with a modification to clarify, through the addition of parentheses—''Clear(ly) and Conspicuous(ly)''—that the definition applies whether the term is used as an adjective or adverb. Consistent with the Commission's experience addressing unfair or deceptive conduct, the Commission has defined the term ''Clear(ly) and Conspicuous(ly)'' to include disclosures that are easily understandable and easily noticeable, while also providing dealers with additional information on how to meet those requirements.[140]

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[132] Comment of Ohio Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–6657 at 4.

[133] *See* FTC Policy Statement on Deception, *supra* note 42, at 2–5.

[134] Complaint ¶¶ 5–7, *Progressive Chevrolet Co.,* No. C–4578 (F.T.C. June 13, 2016) (alleging ads touting attractive terms deceptively failed to disclose high credit score requirement).

[135] *Removatron Int'l Corp.* v. *Fed. Trade Comm'n,* 884 F.2d 1489, 1496–97 (1st Cir. 1989); *see also Fed. Trade Comm'n* v. *Brown & Williamson Tobacco Corp.,* 778 F.2d 35, 42–43 (D.C. Cir. 1985) (finding that a disclosure in virtually illegible form, placed in an inconspicuous corner of Barclay advertisements, did not eliminate deception); *see Fed. Trade Comm'n* v. *Cap. Choice Consumer Credit, Inc.,* 2003 U.S. Dist. LEXIS 29086, at *5 (S.D. Fla. June 2, 2003) (finding that, where advertisements promised a general purpose credit card, such as VISA or MasterCard, ''fine print on reverse side'' of ad clarifying that the credit card was a ''merchandise card and not a major bank card'' was inadequate to modify net impression); *Fed. Trade Comm'n* v. *Cyberspace.com LLC,* 453 F.3d 1196, 1200 (9th Cir. 2006) (rejecting defendant's argument that truthful fine print notices on reverse side of checks, invoices, and marketing inserts cured deception that check/invoice was a refund rather than offer for services); *Fed. Trade Comm'n* v. *Alcoholism Cure Corp.,* No. 3:10–cv–266–J–34JBT, 2011 WL 13137951, at * 51 (M.D. Fla. Sept. 16, 2011) (finding that ''not MD'' disclaimers were inadequate to dispel net impression regarding professional qualifications of defendant and other employees as advertised); *Fed. Trade Comm'n* v. *Wash. Data Res.,* 856 F. Supp. 2d 1247, 1274–75 (M.D. Fla. 2012) (rejecting defendants' argument that retainer agreement contained sufficient disclaimer to dispel a misrepresentation about whether a home loan was guaranteed).

[136] The Commission has included such requirements elsewhere. *See, e.g.,* Order ¶ 6, *United States* v. *Sunkey Publ'g, Inc.,* No: 3:18–cv–1444–HNJ (N.D. Ala. Sept. 6, 2018).

[137] *See. e.g., Palmer* v. *Champion Mortg.,* 465 F.3d 24, 28 (1st Cir. 2006) (applying an objective standard in evaluating Truth in Lending Act claim regarding clear and conspicuous disclosure); *Smith* v. *Check-N-Go of Ill., Inc.,* 200 F.3d 511, 515 (7th Cir. 1999) (same); *Zamarippa* v. *Cy's Car Sales, Inc.,* 674 F.2d 877, 879 (11th Cir. 1982) (same); *Bustamante* v. *First Fed. Sav. & Loan Ass'n,* 619 F.2d 360, 364 (5th Cir. 1980) (same); *see also Herrera* v. *First N. Sav. & Loan Ass'n,* 805 F.2d 896, 900 (10th Cir. 1986) (resolving question of clear and conspicuous disclosure under Truth in Lending Act as a legal, rather than factual, matter); *Dixey* v. *Idaho First Nat'l Bank,* 677 F.2d 749 (9th Cir. 1982) (same).

[138] Complaint ¶¶ 6–14, *Jim Burke Auto., Inc.,* No. C–4523 (F.T.C. May 4, 2015); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015); Complaint ¶ 13, *City Nissan Inc.,* No. C–4524 (F.T.C. May 4, 2015); Complaint ¶¶ 17–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020); Complaint ¶¶ 4–9, 12–15, 18–20, *Billion Auto, Inc.,* No. C–4356 (F.T.C. May 1, 2012) (alleging false ads promising to pay off consumers' existing motor vehicle debt and failing to disclose legally required financing and leasing terms); *see also* Complaint ¶¶ 57–60, *Fed. Trade Comm'n* v. *Stewart Fin. Co. Holdings, Inc.,* No. 1:03–CV–2648 (N.D. Ga. Sept. 4, 2003) (alleging violations for failure to include the cost of required add-on products in the finance charge and annual percentage rate disclosed to consumers).

[139] *See* FTC Policy Statement on Deception, *supra* note 42, at 2–5 (describing application of reasonable consumer standard).

[140] *See, e.g.,* Decision and Order, JS Autoworld, Inc., No. C–4535 (F.T.C. Aug. 13, 2015); Decision and Order, Nat'l Payment Network, Inc., No. C–4521 (F.T.C. May 4, 2015); Decision and Order, Matt Blatt Inc., No. C–4532 (F.T.C. July 2, 2015); Decision and Order, Ganley Ford West, Inc., No. C–4428 (F.T.C. Jan. 28, 2014).

(e) Motor Vehicle (Finalized as '' 'Covered Motor Vehicle' or 'Vehicle' '')

The proposed rule defined the term ''Motor Vehicle'' as ''(1) any self-propelled vehicle designed for transporting persons or property on a street, highway, or other road; (2) Recreational boats and marine equipment; (3) Motorcycles; (4) Motor homes, recreational vehicle trailers, and slide-in campers, as those terms are defined in §§ 571.3(b) and 575.103(d) of title 49, Code of Federal Regulations, or any successor thereto; and (5) Other vehicles that are titled and sold through Dealers.'' The Commission has determined to finalize the definition with the modifications discussed in the following paragraphs.

The Commission received several comments regarding the substance and scope of this proposed definition. A number of industry association commenters requested that certain vehicle types, including marine vehicles, motorcycles, RVs, and other recreational vehicles be excluded from coverage. These commenters contended that the dealerships that sell such vehicles function differently from automobile dealerships, and that recreational vehicles are discretionary, rather than essential, purchases. After careful consideration, the Commission is excluding recreational boats and marine equipment; motorcycles; and motor homes, recreational vehicle trailers, and slide-in campers from the definition of '' 'Covered Motor Vehicle' or 'Vehicle.' '' Moving forward, the Commission will continue to monitor for unfair and deceptive practices to determine whether further action is warranted to protect consumers, through law enforcement, a future rulemaking, or other measures. The Commission notes that no dealer may misrepresent material terms; deceive customers about prices, add-ons, or payments; charge for products that provide no benefit; or charge consumers without express, informed consent. To the extent that dealers engage in such conduct, they are in violation of the FTC Act.

Another commenter contended it was unclear whether all-terrain vehicles, go-carts, snowmobiles, scooters, electric bicycles, and golf carts were covered by the proposed definition. In response, the Commission has modified the first enumerated subpart of the definition to refer only to vehicles designed for use on a ''public'' street, highway, or road, and to expressly exclude scooters, electric bicycles, and golf carts. The definition of '' 'Covered Motor Vehicle' or 'Vehicle' '' in the Final Rule does not cover all-terrain vehicles, go-carts, or snowmobiles because such vehicles are not designed for use on a ''public'' street, highway, or road.[141]

A number of industry association commenters claimed that the proposed definition conflicts with definitions of motor vehicle under various State laws, and one such commenter requested that, rather than finalize a definition of ''Motor Vehicle,'' the Commission defer to the definitions promulgated by each State's department of motor vehicles. The commenters did not explain how the Rule's definition may actually conflict with any laws, or how any alleged duplication would harm consumers or competition. To the extent that States have broader or narrower definitions, it is not clear why motor vehicle dealers covered by the Rule cannot comply with the Rule's provisions and applicable State laws. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer's violation of the rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Section 463.9 provides further discussion of State laws.

Thus, after careful consideration of the comments, the Commission is finalizing the definition of ''Motor Vehicle'' with modifications, including adding the word ''Covered'' to the definition to reflect the fact that the definition is narrower than the term ''Motor Vehicle'' in the NPRM and adding ''or Vehicle'' to the definition to clarify that all references in the Rule to the term ''Covered Motor Vehicle'' and ''Vehicle'' refer to the defined term.

(f) Dealer or Motor Vehicle Dealer (Finalized as '' 'Covered Motor Vehicle Dealer' or 'Dealer' '')

The proposed rule defined the term ''Dealer'' or ''Motor Vehicle Dealer'' as ''any person or resident in the United States, or any territory of the United States, that: (1) Is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles; (2) Takes title to, holds an ownership interest in, or takes physical custody of motor vehicles; and (3) Is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.'' Based on the following, the Commission is finalizing this definition in the Final Rule with modifications for clarity.

Many stakeholders commented in support of the proposed rule and expressed no concern over this definition. Other commenters expressed views that the Commission examines in the following paragraphs.

A few industry association commenters contended that parts of the proposed definition may have captured certain financial entities, such as financial entities that maintain licenses to engage in the sale of motor vehicles, and requested that the Commission make clear that any rule does not apply to such entities. In response, the Commission notes that only entities that meet all three components of the definition are covered ''Dealers.'' Thus, an entity that maintains an applicable license to engage in the sale of Covered Motor Vehicles but is not, for example, predominantly engaged in the sale or leasing of motor vehicles would not be a covered ''Dealer.''

Another industry association commenter similarly requested a ''carve-out'' from any definition of ''Dealer'' for trusts and trusts' investors.[142] This commenter asserted that trusts and their investors do not satisfy two of the definition's components and did not describe how any part of the definition creates concerns or is unclear. The Commission reiterates that if an entity meets the three parts of the ''Covered Motor Vehicle Dealer'' definition, then it is covered; if an entity does not meet these three parts, it is not covered. The Commission sees no benefit to adding language stating that entities that do not meet the definition are not covered.

Other commenters, including vehicle association commenters, claimed that dealerships specializing in RV, marine, motorcycles, and other recreational vehicles, including certain high-end recreational vehicles,[143] should be excluded from coverage, generally contending that such dealerships operate differently from automobile dealerships, and that these types of vehicles are used for different purposes than are automobiles. As explained in the section-by-section analysis of the definition of ''Covered Motor Vehicle'' in SBP III.B.2(e), after considering stakeholder comments, the Commission

[141] According to the National Highway Traffic Safety Administration, ''Public road means any road under the jurisdiction of and maintained by a public authority and open to public travel.'' 23 CFR 1300.3.

[142] Comment of Structured Fin. Ass'n, Doc. No. FTC–2022–0046–7646 at 3.

[143] The Marine Retailers Association of the Americas requested that transactions in excess of $70,000 be excluded from coverage, as an alternative to excluding marine transactions altogether. *See* Comment of Marine Retailers Ass'n of the Ams., Doc. No. FTC–2022–046–9291 at 4.

is removing marine, motorcycle, RV, and certain other vehicles from the definition in § 463.2(e), and to reflect this change, finalizing the defined term as "'Covered Motor Vehicle' or 'Vehicle,'" thereby excluding from the Final Rule entities who otherwise would have qualified as "Dealers" solely based on their sale and servicing, or leasing and servicing, of such vehicles. The Commission underscores that, regardless of the definition of "Covered Motor Vehicle" under the Final Rule, unfair and deceptive practices remain unlawful under the FTC Act. The Commission will continue to monitor all vehicle markets to determine whether additional action is warranted to protect consumers.

Some dealership association commenters argued that, under the Commission's proposal, this definition exempted dealers subject to the jurisdiction of the CFPB. Other such commenters similarly contended that, under the proposal, used car dealers that do not engage in extensive post-sale repairs do not "service" vehicles or that do not have separate service departments may have been excluded from coverage, contending further that excluding such dealers would put other dealers at a competitive disadvantage. Contrary to these commenters' assertions, the definition does not contain such exclusions. By its plain terms, the definition applies to dealers that meet its three enumerated components. Nowhere does the definition limit coverage of dealers based on CFPB jurisdictional considerations. Likewise, the definition does not condition coverage on whether a dealership has a service department or include any other requirement or limitation beyond those enumerated in § 463.2(f). By its plain meaning, the term "servicing" covers, for instance, "checking and repairing a vehicle, machine, etc. to keep it in good condition." [144] As the Commission has previously stated, the term "servicing" "captures activities undertaken by essentially all used car dealers." [145] Thus, the definition does not place dealers with separate servicing departments at a competitive disadvantage, and the Commission need not remove the term "servicing of motor vehicles" from the Final Rule.

One such commenter further contended that the proposed definition did not cover certain entities, including certain direct sellers or manufacturers or others not licensed in a particular State, or lenders who offer add-on products such as GAP agreements and debt suspension products. As previously discussed, the Final Rule applies to all dealers that meet the three parts of this definition.[146] To the extent that the definition does not apply to specific entities, this reflects the scope and bounds of the rulemaking authority Congress delegated to the Commission under the Dodd-Frank Act.[147]

Finally, some industry and dealership association commenters posited that the proposal conflicted with Federal and State law or duplicated the regulatory authority of State enforcement agencies. These commenters did not provide information regarding how duplicative laws prohibiting misrepresentations, requiring disclosures, or prohibiting charges for items that would not benefit the consumer or for items without express, informed consent would create harmful consequences, and the Commission is not aware of any laws that allow such conduct by those that the Rule defines as "Covered Motor Vehicle Dealer[s]." Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer's violation of the Rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. To the extent the Rule may overlap with State law, dealers can comply with these laws and also with the requirements that follow from the operation, in the Rule, of the Commission's definition. To the extent there is truly an inconsistency between the provisions of the Final Rule and a State law, § 463.9 sets out the Rule's relation to State laws.

Thus, after careful consideration of the comments, the Commission is finalizing the definition of "'Covered Motor Vehicle Dealer' or 'Dealer'" with modifications for clarity. The definition in the Final Rule incorporates the phrase "including any individual or entity" to confirm that the term "person," like all undefined terms in this part, is used according to its ordinary meaning and includes individuals and corporate entities and adds the word "Covered" to the definition to reflect the narrowed scope of "Covered Motor Vehicle." [148]

(g) Express, Informed Consent

The proposed rule defined the term "Express, Informed Consent" as "an affirmative act communicating unambiguous assent to be charged, made after receiving and in close proximity to a Clear and Conspicuous disclosure, in writing, and also orally for in-person transactions" of "(1) What the charge is for" and "(2) The amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service." The proposed rule also included in this definition three examples of what does not constitute express, informed consent: "(i) A signed or initialed document, by itself; (ii) Prechecked

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[144] The Oxford Advanced American Dictionary defines "servicing" as "the act of checking and repairing a vehicle, machine, etc. to keep it in good condition"; *see also* 15 U.S.C. 5519(b)(3) (referring to "the sale, financing, leasing, rental, repair, refurbishment, maintenance, or other servicing of motor vehicles, motor vehicle parts, or any related or ancillary product or service").

[145] Used Motor Vehicle Trade Regulation Rule ("Used Car Rule"), 81 FR 81664, 81667 (Nov. 18, 2016).

[146] *See* 12 U.S.C. 5519(a), (f).

[147] Section 1029(d) of the Dodd-Frank Act defines "motor vehicle dealer" as "any person or resident in the United States, or any territory of the United States, who—(A) is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of motor vehicles; and (b) takes title to, holds an ownership in, or takes physical custody of motor vehicles." 15 U.S.C. 5519(f)(2).

Parts (A) and (B) of this definition are identical to parts (1) and (2) of the definition of "'Covered Motor Vehicle Dealer' or 'Dealer'" in the Final Rule.

Section 1029(d) of the Dodd-Frank Act states that the Commission "is authorized to prescribe rules under sections 5 and 18(a)(1)(B) of the Federal Trade Commission Act in accordance with section 553 of title 5, United States Code, with respect to a person described in subsection (a)." 15 U.S.C. 5519(d). Section 1029(a) in turn, provides the CFPB "may not exercise any rulemaking, supervisory, enforcement or any other authority . . . over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both." 15 U.S.C. 5519(a). The last clause is identical to part (3) of the definition in the Final Rule.

Several commenters requested that the Commission allow consumers to buy vehicles directly from manufacturers. Nothing in the Rule prohibits consumers from doing so.

[148] *See, e.g., Person,* Black's Law Dictionary (11th ed. 2019) (defining "person" to include "[a] human being" and "[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being."); *Person,* Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/person* (last visited Dec. 5, 2023) (defining "person" to include "human" and "one (such as a human being, a partnership, or a corporation) that is recognized by law as the subject of rights and duties"); *see also* 12 U.S.C. 5481(19) (Dodd-Frank Act statutory authority for the Final Rule defining "person" as "an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity"); 1 U.S.C. 1 (Dictionary Act defining "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). The application of covered motor vehicle dealer and dealer to entities also is consistent with these terms' use in the NPRM and commenter understanding of these terms in the course of public comment.

boxes; or (iii) An agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice.'' In both the NPRM and in the provisions the Commission is finalizing, this definition is used exclusively in § 463.5(c). As such, comments regarding the definition are examined in the discussion of that provision in SBP III.E.2(c). As stated therein, the Commission is finalizing this definition substantively as proposed.

(h) GAP Agreement

The proposed rule defined the term ''GAP Agreement'' as ''an agreement to indemnify a vehicle purchaser or lessee for any of the difference between the actual cash value of the insured's vehicle in the event of an unrecovered theft or total loss and the amount owed on the vehicle pursuant to the terms of a loan, lease agreement, or installment sales contract used to purchase or lease the vehicle, or to waive the unpaid difference between money received from the purchaser's or lessee's motor vehicle insurer and some or all of the amount owed on the vehicle at the time of the unrecovered theft or total loss.'' The proposed definition also noted that this included ''products or services otherwise titled 'Guaranteed Automobile Protection Agreement,' 'Guaranteed Asset Protection Agreement,' 'GAP insurance,' or 'GAP Waiver[ ].' '' This term appeared in two sections of the rule proposal: in the provision regarding dealer charges for add-ons from which the consumer would not benefit at proposed § 463.5(a), and in the recordkeeping provision at proposed § 463.6(a)(4). Comments regarding the proposed definition are examined in the discussion of § 463.5(a) in SBP III.E.2(a). As stated therein, the Commission is finalizing this definition substantively as proposed, with typographical modifications to correct a misplaced period in the original proposal and a modification removing the extraneous term ''insured's'' from the phrase ''actual cash value of the insured's Vehicle.'' In addition, the Final Rule capitalizes the defined term ''Vehicle'' to conform with the revised definition of '' 'Covered Motor Vehicle' or 'Vehicle' '' at § 463.2(e).

(i) Government Charges

The proposed rule defined ''Government Charges'' as ''all fees or charges imposed by a Federal, State or local government agency, unit, or department, including taxes, license and registration costs, inspection or certification costs, and any other such fees or charges.'' This term appeared in two provisions of the rule proposal: in the proposed definition of ''Offering Price'' at § 463.2(k), which pertains to the proposed offering price disclosure provision at § 463.4(a); as well as in the proposed provision relating to undisclosed or unselected Add-ons at § 463.5(b). As explained in further detail in the paragraph-by paragraph analysis of § 463.5(b) in SBP III.E.2(b), the Commission has determined not to finalize § 463.5(b), and as such will refrain from examining this proposed definition in relation to that provision. Comments regarding the proposed definition are examined in the discussion of § 463.4(a) in SBP III.D.2(a). As stated therein, the Commission is finalizing this definition substantively as proposed, with a typographical modification to include a serial comma for consistency.

(j) Material or Materially

The proposed rule defined ''Material'' or ''Materially'' as ''likely to affect a person's choice of, or conduct regarding, goods or services.'' This term appeared in the prohibited misrepresentations provisions at § 463.3(b) and (g), and in the recordkeeping provision at § 463.6(a). As described in detail in the section-by-section analysis of § 463.3 in SBP III.C, the Final Rule modifies the introductory paragraph of § 463.3 from the Commission's original proposal to add the word ''Material,'' such that the Commission's materiality standard applies to all subparts of § 463.3. The Final Rule accordingly removes the word ''Material'' from § 463.3(b) and (g) so as to avoid duplication. Based on the following, the Commission is finalizing this definition, now at § 463.2(j), substantively as proposed.

A dealership association commenter noted that the proposed definition did not use the term ''significance,'' and asserted that ''Material'' information should be significant and not ''rooted in personal preference.'' [149] The Commission notes that this definition adopts the meaning of the term as articulated through decades of enforcement actions [150] instead of using a different term such as ''significance,'' and does not use the term ''personal preference'' or rely on ''personal preference'' any more than the phrase ''likely to affect'' or ''significant'' does. Thus, the Commission is finalizing this definition substantively as proposed.

(k) Offering Price

The proposed rule defined ''Offering Price'' as ''the full cash price for which a Dealer will sell or finance the motor vehicle to any consumer, excluding only required Government Charges.'' This term appeared in two provisions of the rule proposal: in the proposed offering price disclosure provision at § 463.4(a), as well as in the proposed provision relating to undisclosed or unselected add-ons at § 463.5(b). As explained in further detail in the paragraph-by-paragraph analysis of § 463.5(b) in SBP III.E.2(b), the Commission has determined not to finalize § 463.5(b), and as such, will refrain from examining this proposed definition in relation to that provision. Comments regarding the proposed definition are examined in the discussion of § 463.4(a) in SBP III.D.2(a).[151] As stated therein, the Commission is finalizing this definition largely as proposed, with a modification to clarify that dealers may, but need not, exclude required government charges from a motor vehicle's offering price. In addition, the definition in the Final Rule substitutes ''Vehicle'' for ''motor vehicle'' to clarify that the term conforms with the revised definition of '' 'Covered Motor Vehicle' or 'Vehicle' '' at § 463.2(e).

C. § 463.3: Prohibited Misrepresentations

1. General Comments

The proposed rule set forth prohibitions against certain misrepresentations by motor vehicle dealers. Based on the following, the Commission has determined to finalize these prohibitions, with minor revisions.

The following paragraphs discuss comments relating to § 463.3 generally and Commission responses to such comments, followed by comments relating to each paragraph of § 463.3 and Commission responses to such comments.

The NPRM proposed prohibiting dealers from making any misrepresentation, expressly or by implication, regarding specific listed categories. The Commission received many comments regarding this

[149] Comment of Ga. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–10806 at 4.

[150] *See* FTC Policy Statement on Deception, *supra* note 42, at 1–2, 5; *see also Fed. Trade Comm'n* v. *Fleetcor Techs., Inc.,* 620 F. Supp. 3d 1268, 1303 (N.D. Ga. 2022); *Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001); *Thompson Med. Co., Inc.,* 104 F.T.C. 648, 816 (1984).

[151] Some commenters, including certain industry associations, requested that the Rule include additional definitions, including for the terms ''charged,'' ''item,'' ''discount,'' ''rebate,'' ''trade-in value,'' and ''online service.'' In response, the Commission notes that for terms not defined in the Rule, the plain meaning of the terms apply.

proposal, including comments supporting such a provision, comments urging the Commission to broaden the provision, and comments urging the Commission to limit or forgo the provision.

Thousands of commenters expressed support for the proposed rule.[152] Many of these commenters specifically expressed concern about misleading advertisements and deceptive pricing. Many individual commenters cited examples of such conduct from their own experiences purchasing or leasing vehicles, and many commenters with experience operating or working for a dealership shared their observations or experiences. For example:

- I have been looking for a car at MSRP and most dealers['] websites will list it at that price. [T]hen when you drive there the[y] will say well there is a market adjustment from 5,000 to 20,000 dollars. [N]ow . . . you need a car and have wasted 3–4 hours and picked out what you thought was your next car.[153]
- I am currently in discussions with two dealerships for a new car. Both assure me there is absolutely no dealer markup, come to find out they are adding 3/5k of ''mandatory'' add-ons respectively once I get in the door.[154]
- The last vehicle I purchased 2 years ago was a nightmare. Drove 5 hrs[.] to a dealer in Southern California. I called the dealer and confirmed the price on their website was what I was going to pay. When I arrived there, they had a list of $2500 [i]n additional charges that were not disclosed when I called and before I started driving. Purchasing a vehicle shouldn't be such a stressful process.[155]
- Most recently I started looking myself for a new lease, and looked at the RAV 4 prime. Went to my local dealer after seeing an ad on their site for $450 a month. Not only did they not honor the deal, but wouldn't even discuss that it was on their own site. I was told the SE model was [$5000] over MSRP and the XSE was [$8000] over.[156]
- I have contacted 10 different car dealerships in the past month looking to purchase a new or used SUV. 9 out of the 10 dealerships I contacted online or visited in-person in California changed or lied about the online advertised price of the vehicle I was inquiring about or said the car was sold or not available and tried to sell me a more expensive vehicle.[157]
- Once I was led to the F&I office I was told that I HAD to buy a $995 paint protection product that I didn[']t want or need. I asked to see the contract for this product which clearly stated in bold letters 'ACCEPTANCE OF THIS CONTRACT IS VOLUNTARY AND DOES NOT AFFECT THE FINANCING OF THE VEHICLE' I pointed this out to the salesman and told him that I didn't want this product[.] [H]e looked me in the eyes with my wife present and said ''You have to buy it[.]'' [158]
- At the dealership, the salesman offered a price of $38,000, over $8,000 more than the advertised price. When I challenged the extra cost, he said the advertisement included every possible rebate and discount and no one could receive them together (some were exclusionary with other discounts).[159]
- While there are good honorable dealerships, far too many play games. Rarely is the price of [a] car advertised online or via mail EVER the actual price. Far too often in the F&I office the finance manager tries to [gloss] over add[-]ons that they just arbitrarily added on without telling you OR state I cannot get your loan approved without an extended warranty as an example I experienced. . . . I worked for a Toyota dealership many years ago and left the industry because it made me sick seeing the games played taking advantage of people. Change is needed and sooner than later.[160]
- I work as a salesperson at a local Nissan dealership. . . . Currently, dealerships across the US, including the one I work for, have made the car buying process needlessly confusing, expensive, and frustrating by engaging in false advertising and hidden add-on products. While these practices are very unscrupulous, they are incredibly effective at what they are designed to do: drive revenue for the store. If these regulations are passed, they would certainly take a significant toll on my personal finances. But the longer I work in my position, the more I realize that no one should be allowed to engage in such exploitative conduct in the course of running a business.[161]
- I am in the auto industry and work at a very transparent and honest dealership. I think most of these rules are great. I hear horror stories about honest people seeing a car advertised for one price, only to be told there are additional a[d]d-ons and markups once they arrive. I think this is unfair. I'm also shocked every time I hear about a dealership charging for mandatory window etching and nitrogen filled tires. I even know of reputable dealerships that add GPS tracking and theft recovery devices to every new car, even though these cars come with GPS theft recovery from the manufacturer. Stopping these practices will help restore consumers' faith in car dealerships, save them money, and lead to a more honest and ethical industry. . . .[162]

Other commenters expressed support for transparent pricing generally, stating, for example:

- A consumer should be able to see a price, walk into a dealership, and pay that price. Plain and simple, just like ANY OTHER RETAILER.'' [163]
- If I walk into Best Buy and see a price they HAVE to sell it to me for that price or cheaper. These rules are long over due.[164]
- I believe if they advertise a car, it should be available for sale—at the advertised price—just as a supermarket can't advertise a price for something they don't have, or add a 'coupon redemption fee' to it. I believe these rules are an extremely reasonable approach to a long-standing problem and urge you to adopt them.[165]
- I used to work in the retail auto industry and these proposed rules will help everyone (including the dealers who are fighting them). Consumers will benefit from the transaction transparency, and over the long term even the shady dealers will benefit by treating consumers fairly and developing long term relations.[166]
- These regulations would be the best thing to happen for consumer protection since the Mo[n]roney Label. I not only have had to navigate and negotiate erroneous fees at dealers, but I've also

[152] *See* Motor Vehicle Dealers Trade Regulation Rule, Comment Docket, *https://www.regulations.gov/document/FTC-2022-0046-0001/comment.*

[153] Individual commenter, Doc. No. FTC–2022–0046–0036.

[154] Individual commenter, Doc. No. FTC–2022–0046–0099.

[155] Individual commenter, Doc. No. FTC–2022–0046–0906.

[156] Individual commenter, Doc. No. FTC–2022–0046–1878.

[157] Individual commenter, Doc. No. FTC–2022–0046–3686.

[158] Individual commenter, Doc. No. FTC–2022–0046–4752.

[159] Individual commenter, Doc. No. FTC–2022–0046–5580.

[160] Individual commenter, Doc. No. FTC–2022–0046–2378.

[161] Individual commenter, Doc. No. FTC–2022–0046–3693.

[162] Individual commenter, Doc. No. FTC–2022–0046–4959.

[163] Individual commenter, Doc. No. FTC–2022–0046–0017.

[164] Individual commenter, Doc. No. FTC–2022–0046–0034.

[165] Individual commenter, Doc. No. FTC–2022–0046–0005.

[166] Individual commenter, Doc. No. FTC–2022–0046–1935.

worked at dealers whose transparency and forthrightness put them at a disadvantage. Many dealers advertise vehicles that can not [sic] be purchased or leased at the advertised price due to deceptive adverts either not disclosed or in a print so fine it can't be read. Please pass this ruling. My grandma shouldn't have to pay more than someone else just because she's not a good negotiator.[167]

Consumer advocacy organization commenters and individual commenters urged the FTC to include additional specific provisions in § 463.3, including a prohibition against misrepresentations regarding the safety, mechanical or structural condition, odometer reading, or history of a vehicle. Similarly, commenters including a municipal regulator urged the Commission to specifically prohibit misrepresentations regarding certification of used vehicles, citing enforcement actions it brought against dealers that misrepresented used vehicles as ''certified pre-owned'' or ''manufacturer certified.'' The FTC takes seriously deception relating to the safety or condition of a vehicle and the practice of charging consumers more based on false claims or reassurances.[168] Depending on the claim made by the dealership and the specific facts at issue, deceptive conduct in either of these areas may be covered by the enumerated misrepresentation paragraphs the Commission is finalizing, such as by § 463.3(a) if it relates to the terms of the purchase, lease, or financing. The FTC will continue to monitor dealer misrepresentations to determine whether additional action is needed.

In addition, a number of credit union commenters requested that the Commission explicitly address misrepresentations involving dealers' refusal to accept outside financing to purchase a vehicle. These commenters cited several examples of consumers being told that they could not use outside financing, that they would not receive a lower interest rate from an outside financial institution, or that a particular interest rate was the best rate the consumer can get. The Rule already covers such conduct. For example, § 463.3(a) of the Rule, which prohibits dealers from misrepresenting the cost or terms of financing a vehicle, covers these and other misrepresentations regarding financing, including the availability of outside or ''indirect'' financing terms, or the costs of such financing as compared to those of any dealer-provided financing.

Two individual commenters posited that any language prohibiting misrepresentations should explicitly include the word ''omissions,'' in order to ensure that dealers do not sneak in additional costs without consumers' consent or understanding. The Commission appreciates this concern, and notes that the Rule has many provisions prohibiting such misconduct, including the required disclosures regarding price, add-ons, and total amount of payments in § 463.4 of the Final Rule, as well as the requirement in § 463.5(c) to obtain consumers' express, informed consent before charging for any items.

Other commenters, including dealership associations, individual commenters, and a United States Representative, questioned whether certain of the proposed misrepresentation provisions were duplicative of other laws, such as the Truth in Lending Act (''TILA''), the Consumer Leasing Act (''CLA''), or State regulations, and in some instances whether compliance with State regulations should act as a safe harbor. The Commission notes that another statute—the FTC Act—already prohibits misrepresentations in or affecting commerce, and to the extent there is duplication between the FTC Act and other existing statutes pertaining to deception, there is no evidence that duplicative misrepresentation prohibitions have harmed consumers or competition.[169] The Commission further notes that the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is otherwise already illegal under Federal law, and will aid law-abiding dealers that lose business to competitors that act unlawfully.[170] State laws may provide more or less specific requirements as long as those requirements are not inconsistent with part 463, as set forth in § 463.9, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. Because dealers are already prohibited from engaging in ''deceptive acts or practices'' under the FTC Act, dealers should be able to comply with these provisions without the need for a safe harbor.

Industry association commenters also claimed that the prohibited misrepresentation proposal ignored the materiality prong of the Commission's deception standard, and further observed that some of the prohibited misrepresentations in the proposed rule explicitly included a materiality requirement,[171] while others did not. As the NPRM made clear, the Commission's proposed misrepresentation section, at § 463.3, addressed misrepresentations that are all material.[172] The Commission need not explicitly specify materiality in its description of these misrepresentations; indeed, the Commission has long considered certain categories of information, express claims, and intended implied claims to be presumptively material.[173] Nevertheless, rather than using the term ''Material'' in certain individual enumerated paragraphs, the Commission has determined to modify the introductory text of § 463.3 from the Commission's original proposal in order

[167] Individual commenter, Doc. No. FTC–2022–0046–10441.

[168] *See, e.g.,* Complaint, *CarMax, Inc.,* No. C–4605 (F.T.C. Mar. 22, 2017) (alleging Defendants misled consumers by representing that the used motor vehicles Defendants sold had been subject to rigorous inspection but omitting important safety information about recalls); Complaint, *West-Herr Auto. Grp., Inc.,* No. C–4607 (F.T.C. Mar. 22, 2017) (alleging Defendants failed to disclose, or disclose adequately, that used motor vehicles it sold were subject to open recalls for safety issues); Complaint, *Asbury Auto. Grp., Inc.,* No. C–4606 (F.T.C. Mar. 22, 2017) (alleging deceptive failure to disclose material information about the safety of used motor vehicles sold by Defendants); Complaint ¶¶ 20–24, *Fed. Trade Comm'n* v. *Passport Imports, Inc.,* No. 8:18–cv–03118 (D. Md. Oct. 10, 2018) (alleging Defendants misled consumers by mailing ''Urgent Recall'' notices that were similar to and had the same color scheme as notices manufacturers are required by the U.S. Department of Transportation's NHTSA to use when sending information about vehicle recalls, even though in the ''vast majority of instances'' the recipients' cars were not subject to an open recall).

[169] One commenter expressed concern that the prohibited misrepresentations would cause dealerships to provide less information, because discussing pricing and quotes would result in providing further documentation for every conversation. However, as the FTC Act already prohibits misrepresentations, and given that pricing and financing information are among the most salient aspects of a consumer's shopping for a vehicle, the Commission considers it unlikely that § 463.3 would result in less information or the creation of additional documentation.

[170] Under section 19(a)(1) of the FTC Act, the Commission may sue in Federal district court ''any person, partnership, or corporation'' that ''violates any rule under [the FTC Act] respecting unfair or deceptive acts or practices.'' 15 U.S.C. 57b(a)(1). Where such liability is found, under section 19(b) a court may ''grant such relief as [it] finds necessary to redress injury . . . resulting from the rule violation,'' including the ''rescission or reformation of contracts, the refund of money or return of property, [or] the payment of damages.'' *Id.* 57b(b).

A few commenters requested that the Rule go further in providing remedies, including by allowing for a private right of action to enforce Rule violations. The Commission notes that, depending on State law, consumers may be able to use State statutes that prohibit unfair or deceptive practices to challenge conduct that violates this Rule.

There is nothing in the FTC Act or this Rule that would preclude consumers from exercising any such legal rights under State law. The Commission will continue to monitor the market to determine whether additional steps are needed.

[171] *See* NPRM at 42045 (proposed § 463.3(b), (g)).

[172] NPRM at 42019.

[173] FTC Policy Statement on Deception, *supra* note 42, at 5 & nn.47–55.

to specifically prohibit misrepresentations regarding material information about the enumerated paragraphs. As such, the Commission is also removing what would otherwise be redundant references to the term ''Material'' within paragraphs (b) and (g) of § 463.3.

A national dealership association incorrectly asserted that this section is problematic because there is no requirement that the representation or omission be material or be viewed from the perspective of a consumer acting reasonably under the circumstances. As adopted in the final rule, this section adds the term ''Material,'' stating that it is an unfair or deceptive practice for any motor vehicle dealer to make any misrepresentation, expressly or by implication, regarding material information about the specific categories enumerated in § 463.3.[174] The Commission is not aware of situations where dealers have made misrepresentations expressly or by implication regarding material information about these specific categories that are not deceptive or unfair, nor did commenters describe any such situations.

The Commission further notes that, by the terms of this section, a court must find that the dealer made an express or implied misrepresentation regarding material information for § 463.3 to be violated. For an express or implied misrepresentation regarding material information to be made in violation of the FTC Act and this Rule, there must be a representation that misleads consumers acting reasonably under the circumstances regarding material information. Whether such a representation has occurred depends on the facts. In the case of implied representations, whether a representation has occurred is often evident from an examination of the representation itself, including, for example, an evaluation of the document in which a representation is made, the juxtaposition of language in that document, the nature of the representation, and the nature of the transaction.[175] In other situations, extrinsic evidence that it is reasonable for consumers to reach the implied representation may be helpful, such as consumer testimony, surveys, or other reliable evidence of consumer interpretation.[176]

For example, if a dealer offers discounted coffee for customers who visit its dealership before 10 a.m. and honors that offer, but makes no representations, expressly or by implication, about discounted cars, the dealer will not have violated § 463.3(d), which prohibits express or implied misrepresentations regarding rebates and discounts, even if a consumer holds an unreasonable belief that the offer was for discounted cars. On the other hand, if a dealership's advertisement depicts a car with a consumer standing next to it holding a cup of coffee, and states, ''10% discount available before 10 a.m.,'' such an advertisement can convey several representations that may mislead reasonable consumers,[177] including that the car is available at a 10% discount.

Commenters including industry associations opined on the term ''implied,'' contending for example that the idea that a misrepresentation can be implied is overly broad, and a dealership association commenter expressed concern that the inclusion of ''implied'' creates too much uncertainty. As has been recognized under the law for decades, however, representations can mislead consumers, even without making express claims.[178] Take, for example, an advertisement that shows a picture of a new sedan for sale. Even if the advertisement does not expressly state that consumers could use the vehicle to drive at speeds higher than 25 miles per hour, there is an implied representation that a product is fit for the purposes for which it is sold.[179] Thus, limiting the Rule to prohibit only express misrepresentations would significantly hamper its usefulness to consumers.

One industry association commenter further argued that the proposed rule created a new deception standard that ignored intent and reliance. This argument, however, misstates the law, which does not require intent[180] or reliance[181] to establish deception.

Thus, the Commission is finalizing the introductory paragraph of § 463.3 largely as proposed, with a modification stating that it applies to misrepresentations regarding material information. For consistency with other parts of the Rule, the Commission is also removing the shorthand ''FTC Act'' that appeared in parentheses after ''the Federal Trade Commission Act'' in the introductory paragraph of the proposed rule. For clarity and consistency with the revised definition of ''Covered Motor Vehicle Dealer'' (at § 463.2(f) and discussed in SBP III.B.2(f)), the Commission is adding the word ''Covered'' to ''Motor Vehicle Dealer'' in the introductory paragraph. Finally, without changing any substantive requirements for covered entities, the Commission is adding the following sentence to the end of § 463.3, at newly designated paragraph (q): ''The requirements in this section also are prescribed for the purpose of preventing the unfair or deceptive acts or practices

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[174] The Final Rule prohibits misrepresentations in specific categories. In contrast, some FTC rules go further by prohibiting misrepresentations of ''any material aspect'' of the transaction. *See, e.g.,* Mortgage Assistance Relief Services Rule, 16 CFR 322.3(b); Telemarketing Sales Rule, 16 CFR 310.3(a)(2)(x).

[175] FTC Policy Statement on Deception, *supra* note 42, at 2 (*citing Am. Home Prods.,* 98 F.T.C. 136, 374 (1981), *aff'd,* 695 F.2d 681, 687 (3d Cir. 1982) (evaluation of the entire document); *Warner Lambert,* 86 F.T.C. 1398, 1489–90 (1975), *aff'd* 562 F.2d 749 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978) (juxtaposition of phrases); *Firestone Tire & Rubber Co.,* 81 F.T.C. 398, 456 (1972), *aff'd,* 481 F.2d 246 (6th Cir.), *cert. denied,* 414 U.S. 1112 (1973) (nature of the claim); *see also Kraft, Inc.* v. *Fed. Trade Comm'n,* 970 F.2d 311, 319 (7th Cir. 1992) (''Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement.'').

[176] FTC Policy Statement on Deception, *supra* note 42, at 2 n.8.

[177] The interpretation or reaction does not have to be the only one; when a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation. *See* FTC Policy Statement on Deception, *supra* note 42, at 3. Further, an interpretation will be presumed reasonable if it is the one the respondent intended to convey. *Id.*

[178] The FTC's Policy Statement on Deception and scores of FTC cases make clear that both express and implied claims can be deceptive. *See, e.g., ECM Biofilms, Inc.* v. *Fed. Trade Comm'n,* 851 F.3d 599 (6th Cir. 2017) (affirming Commission's finding that an additive manufacturer's unqualified biodegradability claim conveyed an implied claim that its plastic would completely biodegrade within five years); *POM Wonderful LLC,* No. C–9344 (F.T.C. Jan. 10, 2013) (Opinion of the Commission), *aff'd as modified, POM Wonderful, LLC* v. *Fed. Trade Comm'n,* 777 F.3d 478 (D.C. Cir. 2015) (finding that company's advertisements would reasonably be interpreted by consumers to contain an implied claim that POM products treat, prevent, or reduce the risk of certain health conditions and for some ads that these effects were clinically proven); *Kraft, Inc.* v. *Fed. Trade Comm'n,* 970 F.2d 311 (7th Cir. 1992) (affirming finding of deception where Kraft ads juxtaposed references to the milk contained in Kraft singles and the calcium content of the milk, the combination of which implied that each Kraft single contained the same amount of calcium as five ounces of milk).

[179] FTC Policy Statement on Deception, *supra* note 42, at 2; *Int'l Harvester Co.,* 104 F.T.C. 949, 1057–58 (1984).

[180] *See Fed. Trade Comm'n* v. *Freecom Commc'ns,* 401 F.3d 1192, 1202 (10th Cir. 2005) (''Because the primary purpose of § 5 is to protect the consumer public rather than punish the wrongdoer, the intent to deceive the consumer is not an element of a § 5 violation.'').

[181] *See Fed. Trade Comm'n* v. *Figgie Int'l, Inc.,* 994 F.2d 595, 605–06 (9th Cir. 1993) (holding that section 19 of the FTC Act does not require proof of individual consumer reliance; rather, there is a ''presumption of actual reliance'' that arises once the Commission has proved that a defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product).

defined in this part, including those in §§ 463.4 and 463.5.''

The Commission examines each paragraph of § 463.3, including by examining related comments and Commission responses to those comments. The Commission then discusses the corresponding provisions of the Final Rule.

2. Paragraph-by-Paragraph Analysis of § 463.3

(a) The Costs or Terms of Purchasing, Financing, or Leasing a Vehicle

Proposed § 463.3(a) prohibited misrepresentations regarding the cost or terms of purchasing, financing, or leasing a vehicle. The Commission is finalizing this provision largely as proposed, with the minor modification of capitalizing the defined term ''Vehicle'' to conform with the revised definition at § 463.2(e) (explained in SBP III.B.2(e)). As previously discussed, the addition of ''material'' to the introductory paragraph of § 463.3 will apply to this paragraph and to all paragraphs of § 463.3 that follow.

A number of commenters expressed support for this proposed provision, contending, *inter alia,* that it would level the playing field for car buyers and address unfair and deceptive practices related to financing terms and conditions.

The Commission received a number of industry association comments requesting that the Commission clarify the operation of proposed § 463.3(a), including for example, by clarifying whether it would require dealers to discuss all purchase, finance, or lease terms, or whether it would require dealers to read aloud all the terms of the buyer's order and finance or lease agreement. Dealership association commenters expressed a related concern that this proposed provision lacked specific guidance on dealer compliance.

To begin, misrepresentations regarding ''costs or terms of purchasing, financing, or leasing a vehicle'' refer to the ordinary plain meaning of the words used in the provision.[182] Second, as the language in the introductory paragraph of § 463.3 makes clear, its paragraphs—including paragraph (a) of § 463.3—prohibit misrepresentations regarding material information. By its terms, this paragraph requires no particular affirmative disclosures, whether written or oral; rather, this paragraph obligates dealers to refrain from misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle.[183]

The Commission received comments from industry associations requesting that the Final Rule provide a safe harbor from liability stemming from dealers' violations of the Rule to vehicle credit contract assignees, who take or receive these contracts subject to all claims and defenses consumers could assert against the dealer under the Commission's Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, also known as the ''Holder Rule.''[184] The Rule, however, does not create liability for these entities under the Holder Rule where it did not previously exist; the Rule addresses conduct that is unfair or deceptive under the FTC Act. When enacting the Holder Rule, the Commission did not include a safe harbor or exceptions involving any specific deceptive or unfair conduct, and the Commission declines to do so through this Rule.

A comment from a motor vehicle industry association argued that this provision would likely be inapplicable, or less impactful, with regard to RV sales because the RV industry rarely offers leases, if at all, and because RV sales are usually not financed through RV manufacturer-controlled financing companies. To the extent that specific provisions do not apply to specific entities, such provisions do not impose any obligations upon those entities. Nevertheless, as explained in the analysis of the ''Covered Motor Vehicle'' definition, § 463.2(e), the Commission is excluding recreational vehicle dealers from the definition of ''Covered Motor Vehicle.''

After carefully considering the comments, the Commission is finalizing paragraph (a) of § 463.3 with the minor modification of capitalizing ''Vehicle.'' This provision prohibits misrepresentations regarding ''[t]he costs or terms of purchasing, financing, or leasing a Vehicle.'' Misrepresentations of the price, discounts, or other terms are likely to cause consumers to waste time pursuing unavailable or inapplicable offers and to spend more money on a vehicle rather than undergoing the hours-long process to begin the vehicle search and shopping process anew at another dealership. Prohibiting these misrepresentations will save consumers time and money and ensure that dealers compete on a level playing field.[185]

(b) Any Costs, Limitation, Benefit, or Any Other Aspect of an Add-On Product or Service

Proposed § 463.3(b) prohibited misrepresentations concerning any costs, limitation, benefit, or any other material aspect of an add-on product or service. Section 463.3(b) of the Final Rule adopts this provision without substantive modification. As described in detail in SBP III.C.1, the Commission

[182] Examples of ''costs or terms of purchasing, financing, or leasing a vehicle'' include, among other things, express or implied representations regarding a vehicle's total cost, down payments, interest rates, repayment schedules, the price for added features, other charges, certainty or finality of terms, and the availability of discounts. The Commission has brought numerous enforcement actions where, for example, dealers have misrepresented the total price a consumer could pay for vehicles, or concealed a required down payment or other restrictions on the offer. *See, e.g.,* Complaint ¶¶ 10–11, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging false ads stating a certain price but charging consumers higher prices); Complaint ¶¶ 38–46, *Fed. Trade Comm'n* v. *Tate's Auto Ctr. of Winslow, Inc.,* No. 3:18–cv–08176–DJH (D. Ariz. July 31, 2018) (alleging false ads touting attractive terms but concealing (i) ads were for lease offers only and required substantial initial payment, (ii) discounts were subject to material limitations, or (iii) other legally required disclosures); Complaint ¶¶ 7–16, *Cowboy AG, LLC,* No. C–4639 (F.T.C. Jan. 4, 2018) (alleging false ads touting attractive terms, but concealing substantial down payments, offers were for leases and not purchases, material eligibility restrictions, and other legally required disclosures).

[183] Some commenters repeat this and similar questions, regarding what types of disclosures are required, through provision (o); the same response applies—provisions (a) through (o) do not affirmatively require particular disclosures. As with all misrepresentations prohibited by the Rule, and under section 5 of the FTC Act, misrepresentations are barred whether they are made expressly or by implication.

[184] *See* Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 16 CFR 433.2 [hereinafter Holder Rule].

[185] The National Automobile Dealers Association commissioned a survey, released in May of 2023, that asserted the Commission's proposed rule would lead to an increase in consumer transaction time. Edgar Faler et al., Ctr. for Auto. Rsch., ''Assessment of Costs Associated with the Implementation of the Federal Trade Commission Notice of Proposed Rulemaking (RIN 2022—14214), CFR part 463'' (2023), *https://www.cargroup.org/wp-content/uploads/2023/05/CAR-Report_CFR-Part-463_Final_May-2023.pdf.* This survey was released more than seven months after the closure of the comment period for the notice of proposed rulemaking on September 12, 2022, and is not part of this rulemaking record. These facts notwithstanding, the Commission observes that each respondent to this survey was presented with a leading statement at the beginning of the survey asserting, *inter alia,* that the proposed rule would impose ''new duties [that] are expected to create additional monitoring, training, forms, and compliance review responsibilities as well as a modification of record keeping systems and coordination with outside IT and other vendors'' and ''increase the time of a motor vehicle transaction, inhibit online sales, limit price disclosures, and increase customer confusion and frustration.'' *Id.* at 34, 36 (introductory instructions on the survey instrument sent to respondents). In addition, this survey did not explain its selection process or criteria for the 60 dealers it surveyed, nor why only 40 such dealerships provided fully completed survey responses. Moreover, the survey report attributed much of this estimated increase to proposed rule provisions that the Commission is not finalizing.

is modifying § 463.3 from the Commission's original proposal to include the term ''Material'' in the introductory paragraph rather than in paragraphs (b) or (g) of § 463.3. Section 463.3(b) of the Final Rule therefore deletes reference to the term ''Material.''

The Commission received a number of comments expressing support for prohibiting misrepresentations about add-ons, including comments that requested specific additional add-on-related misrepresentation prohibitions. For example, an auto dealer commenter expressed support for prohibiting misrepresentations about whether or not a car has add-ons already installed. Consumer advocacy organization commenters recommended that the Commission include a new paragraph in § 463.3 prohibiting misrepresentations regarding the consumer's right to cancel add-on products or services. This provision, however, already covers such conduct: It prohibits misrepresentations regarding material information about any costs, limitation, benefit, or any other aspect of an add-on product or service. ''Material'' means likely to affect a consumer's conduct or choices.[186] A consumer's right to cancel is likely to affect the consumer's conduct regarding an add-on product or service. Thus, § 463.3(b) includes representations about a consumer's right to cancel an add-on product or service.

A number of dealership association commenters argued that the language used in this provision is vague or confusing. The terms ''Material'' and ''Add-on Product or Service,'' however, are specifically defined in § 463.2. The remaining terms in this provision are commonly used and can be understood according to their plain meaning.[187] The NPRM examined misrepresentations regarding the coverage and costs of add-ons, and enforcement actions by the Commission and other agencies have documented many instances of such misrepresentations.[188] Examples of the type of conduct prohibited include misrepresenting whether add-ons are required in order to purchase or lease a vehicle, including by representing that such charges are required when in fact they are not, or misrepresenting that advertised prices do not include fees beyond routine taxes and fees only to subsequently require the purchase of add-ons; misrepresenting what is, or is not, covered by, among others, an extended warranty, service or maintenance plan, or GAP agreement;[189] and misrepresenting that consumers have provided express, informed consent to be charged for add-ons.

Commenters including a number of motor vehicle dealership associations requested that the Commission clarify how extensive disclosures would need to be to satisfy this provision. One such commenter requested that the Commission explain what conduct would be required under this paragraph, and expressed concern that, if the paragraph required disclosures, such a requirement would affect the length of the transaction. Another industry association commenter suggested that, in the event dealers provide consumers with a verbal or written disclosure stating that such products have costs, limitations, or benefits, and stating information about other material aspects, the Commission modify its proposal to shift to consumers the burden of proving any relevant dealer misrepresentation. An individual commenter expressed support for applying § 463.3(a) and (b) to dealer advertisements of free lifetime benefits programs and requiring dealers to make disclosures about any costs, limitations, benefits, or any other aspect of an add-on product or service. The Commission notes that paragraphs (a) and (b) of § 463.3 already apply to free lifetime benefits programs. Regarding disclosures, the Commission is concerned about including additional disclosure requirements beyond the few areas included in the Rule, or shifting the burden to consumers to hunt for and decipher disclosures, given that the auto finance and lease process is already lengthy, complex, document-heavy, and dense. Accordingly, as discussed in regard to § 463.3(a), these provisions do not mandate set disclosures or allow for disclosures to be used as a shield when there are misrepresentations to consumers; rather, they prohibit express or implied misrepresentations.[190]

Several dealership association commenters pointed to State laws that, they contended, may already prohibit misrepresentations about add-ons or may otherwise protect consumers. As discussed previously, to the extent there may be duplication between the provisions the Commission is finalizing and other laws, there is no evidence that duplicative misrepresentation prohibitions have harmed consumers or competition. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Under § 463.9, States may provide more or less specific requirements relating to motor vehicle dealers so long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.

Based on a review of the comments and the responses discussed, the Commission adopts paragraph (b) of § 463.3 without substantive modification. As discussed in SBP III.C.1, the Commission has determined to modify the introductory paragraph of § 463.3 from the Commission's original proposal so that each paragraph of § 463.3 prohibits misrepresentations regarding material information. As such, the Commission is finalizing a version of § 463.3(b) that removes what would

[186] *See* FTC Policy Statement on Deception, *supra* note 42, at 2, 5; *see also Fed. Trade Comm'n* v. *Crescent Publ'g Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001).

[187] *E.g., Cost,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/cost* (''Cost'' is defined as ''the amount of money needed to buy, do, or make something''); *Limitation,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/limitation* (''Limitation'' is defined as ''something that controls or reduces something''); *Benefit,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/benefit* (''Benefit'' is defined as ''a helpful or good effect, or something intended to help'').

[188] *See, e.g.,* Complaint ¶¶ 26–27, 70–71, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022) (alleging deceptive and unauthorized add-on charges; unfair discrimination against minority consumers); Complaint ¶¶ 12–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 59–64, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016) (deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 4–14, *Nat'l Payment Network, Inc.,* No. C–4521 (F.T.C. May 4, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims in advertisements); Complaint ¶¶ 4–13, *Matt Blatt Inc.,* No. C–4532 (F.T.C. July 2, 2015) (alleging failure to disclose fees associated with financing program; misleading savings claims). *Cf.* Consent Order ¶¶ 10–16, *Santander Consumer USA, Inc.,* CFPB No. 2018–BCFP–0008 (Nov. 20, 2018) (finding defendant sold GAP product allegedly providing ''full coverage'' to consumers with loan-to-value ratios (''LTVs'') above 125%, when in fact coverage is limited to 125% of LTV).

[189] *See, e.g.,* Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 12, Summer 2016'' 5 (June 2016), *https://files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_12.pdf* (finding that one or more auto lenders deceptively advertised the benefits of their GAP agreement products, leaving the impression that these products would fully cover the remaining balance of a consumer's loan in the event of vehicle loss when, in fact, the product only covered amounts below a certain loan to value ratio).

[190] It is well-settled that, if one makes a claim that, absent additional information, would mislead a consumer acting reasonably under the circumstances about a material fact, such conduct would violate the law. *See* FTC Policy Statement on Deception, *supra* note 42, at 2; *Int'l Harvester Co.,* 104 F.T.C. 949, 1057–58 (1984).

otherwise be redundant explicit reference to the term ''Material.'' This provision prohibits misrepresentations regarding ''[a]ny costs, limitation, benefit, or any other aspect of an Add-on Product or Service.'' Misrepresentations regarding add-ons are likely to affect a consumer's conduct, including the consumer's decision to purchase the product or service.

(c) Whether Terms Are, or Transaction Is, for Financing or a Lease

Proposed § 463.3(c) prohibited misrepresentations regarding whether the terms are, or the transaction is, for financing or a lease. Upon review and consideration of public comments, the Commission is finalizing paragraph (c) of § 463.3 without modification from the Commission's original proposal.

A few industry association and individual commenters posited that this proposed provision was unnecessary, either because other statutes or regulations, including TILA and some State regulations, address this issue, or because vehicle manufacturers already monitor such misrepresentations. As noted in SBP III.C.1, even given the possibility of overlap between this provision and existing Federal or State law, there is no evidence that duplicative misrepresentation prohibitions have harmed consumers or competition. Further, given that the conduct covered by this provision is already unlawful under the FTC Act and may duplicate other laws, or be prohibited by manufacturer rules, it should not be difficult to follow this provision.[191]

Accordingly, after careful consideration, the Commission adopts paragraph (c) of § 463.3 as proposed. Misrepresentations regarding whether terms are, or a transaction is, for financing or a lease are likely to affect a consumer's conduct, including by causing consumers to enter into a monetary transaction for a product they do not want, or, if the true circumstances are revealed prior to consummation of the transaction, to waste time traveling to, and potentially spending hours at, the dealership.

(d) The Availability of Any Rebates or Discounts That Are Factored Into the Advertised Price but Not Available to All Consumers

Proposed § 463.3(d) prohibited misrepresentations concerning the availability of any rebates or discounts that are factored into the advertised price but not available to all consumers. Upon review and consideration of public comments, the Commission is finalizing paragraph (d) of § 463.3 without modification from the Commission's original proposal.

Comments in support of this proposed provision, including those from a group of State attorneys general and from two United States Senators, generally contended that the proposed provision would increase the transparency of the purchase transaction by requiring dealers to be honest when they advertise the availability of discounts.

An individual commenter suggested that the Commission modify proposed § 463.3(d) to require dealers to disclose all representations regarding rebates or discounts in writing, in a clear and conspicuous manner. The Commission notes this paragraph prohibits misrepresentations regardless of the medium. Further, this paragraph focuses on misrepresentations; disclosures regarding price, add-ons, and total of payments are addressed in the discussion of § 463.4, as is a discussion of why the Commission has determined not to include additional disclosure requirements in this Final Rule. The same commenter also requested that the Final Rule text include examples of situations where discounts or rebates may not be available. The Commission describes examples here rather than adding them to the Final Rule text, as it would be difficult to anticipate all such examples and the text would become unwieldy. Examples include where an advertised rebate or discount applies only to the most expensive version of a particular vehicle make and model or is only available to consumers with high credit scores.

The Commission received comments from a dealership association and an individual commenter asking for additional detail about proposed § 463.3(d), pointing to a State regulation that includes disclosures and asking which types of rebates the provision covers. Here, the Commission notes that, as the language in § 463.3(d) states, this provision applies to ''*any* rebates and discounts'' advertised by dealers, and is not limited to any particular type of rebate or discount.[192] The terms in this provision may be interpreted according to their plain meaning, as they are commonly used and understood.[193] Additionally, the language of this provision, the NPRM, and Commission enforcement actions provide further context. In proposing § 463.3(d) to specifically address the availability of discounts and rebates, the Commission included additional language (''that are factored into the advertised price but not available to all consumers'') to describe the manner in which such misrepresentations often occur: a dealer represents an advertised price which includes a discount or rebate that is not generally available to consumers.[194] The NPRM's discussion of proposed § 463.3(d) described both a scenario in which a dealer advertised a rebate or discount separately, and one in which rebates or discounts are factored into the advertised price but the rebates and discounts are not available to a typical consumer. The conduct in either such scenario would violate this provision and, depending on the circumstances, may violate other provisions the Commission is finalizing, such as paragraph (a) of § 463.3. Enforcement actions cited in the NPRM provide further illustration of deceptive practices involving rebates and discounts.[195] The Commission declines

[191] The FTC has alleged that misrepresentations that particular terms are available for financing or for a lease violate the FTC Act. *See* Complaint ¶¶ 38–39, *Fed. Trade Comm'n* v. *Tate's Auto Ctr.,* No. 3:18–cv–08176–DJH (D. Ariz. July 31, 2018) (alleging false ads touting attractive terms but concealing ads were for lease offers only); Complaint ¶¶ 10, 13, *TC Dealership, L.P.,* No. C–4536 (F.T.C. Aug. 13, 2015) (same); Complaint ¶¶ 9–12, *Cowboy AG, LLC,* No. C–4639 (F.T.C. Jan. 4, 2018) (same); Complaint ¶¶ 36–38, *United States* v. *New World Auto Imports, Inc.,* No. 3:16–cv–02401–K (N.D. Tex. Aug. 18, 2016) (alleging misrepresentation that terms were for financing instead of leasing); Complaint ¶¶ 28–37, 44, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging advertisements with key terms that were not generally available).

[192] Section 463.3(d) (emphasis added).

[193] *See, e.g., Rebate,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/rebate* (last visited Dec. 5, 2023) (defining ''rebate'' as ''an amount of money that is returned to you, especially by the government, for example when you have paid too much tax'' or ''an amount of money that is paid back to you after you have paid too much''); *Discount,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/discount* (last visited Dec. 5, 2023) (''[A] reduction in the usual price'').

[194] *See* NPRM section IV.C, 87 FR at 42020 (proposed § 463.3(d) prohibited misrepresentations concerning ''[t]he availability of any rebates or discounts that are factored into the advertised price but not available to all consumers,'' and the NPRM explained ''[w]hen dealers advertise rebates and discounts, or offer prices that factor in such rebates and discounts, but in fact those rebates and discounts are not available to the typical consumer, but only a select set of customers, such conduct induces the consumer to select and transact with the dealer under false pretenses'').

[195] *See, e.g.,* Complaint ¶¶ 6–13, *Jim Burke Auto., Inc.,* No. C–4523 (F.T.C. May 4, 2015) (alleging promises of prices and discounts not generally available to consumers); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015) (alleging promises of prices and discounts not generally available to consumers); Complaint ¶¶ 8–9, *JS Autoworld, Inc.,* No. C–4535 (F.T.C. Aug. 13, 2015) (alleging false ads touting prices but concealing discounts with material eligibility limitations); Complaint ¶¶ 7–9, *TC Dealership, L.P.,* No. C–4536 (F.T.C. Aug. 13, 2015) (alleging false ads touting attractive prices but concealing

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to add additional requirements, such as disclosure requirements, to its Final Rule, given the already lengthy, complex, and document-heavy nature of auto transactions.

A number of dealership association commenters contended that the proposed paragraph would prohibit dealers from displaying beneficial information to consumers or would prohibit dealers from advertising rebates and incentives of limited availability. In addition, commenters including one such dealership association requested that the Commission adopt an approach the commenter contended is used in some States: allowing dealers to display, below the advertised sales price, a rebate or incentive that is not available to all purchasers. Moreover, a number of industry association and dealership association commenters argued that the proposed paragraph was more stringent than, and inconsistent with, the Commission's prior articulation of the deception standard, further noting the existence of Commission orders that prohibit defendants from representing that a price, discount, rebate, or other incentive is available, unless it is in fact available to all or unless a defendant provides a clear and conspicuous disclosure of any qualifications or restrictions. Section 463.3(d) prohibits misrepresentations; it does not prohibit a dealer from advertising, in a truthful manner, rebates or discounts with limitations. Thus, this paragraph allows for the representation of limited offers, as long as such representation is truthful, and any limitations are clear and conspicuous to consumers. The paragraph is also consistent with the Commission's prior enforcement order practice in this area, which both prohibits misrepresentations regarding rebates and prohibits representations regarding rebates without disclosing any material qualifications or restrictions.[196] The paragraph simply contains one of these prohibitions but not the second.

A dealership association commenter expressed concern that this proposed provision would penalize dealers if consumers were to confuse a rebate or discount offered for one vehicle with a vehicle that does not contain such an offer. As under current law, dealers are prohibited under § 463.3(d) from both express and implied misrepresentations. If, for example, a dealer states or implies that a discount is available on several types of vehicles when, in truth, the discount is only available on one such type of vehicle, such conduct would violate this paragraph. If, alternatively, the dealer does not state or imply that a discount is available for several types of vehicles, and offers a discount for one type of vehicle, this conduct would not violate this paragraph, as long as the dealer makes no other express or implied misrepresentations.

After careful review of the comments, the Commission is adopting paragraph (d) of § 463.3 as proposed. When dealers advertise rebates or discounts in a misleading manner, including when such rebates or discounts are not available to the typical consumer, or apply only to the most expensive versions of the make and model,[197] such conduct induces consumers to select and transact with the dealer under false pretenses.[198]

(e) The Availability of Vehicles at an Advertised Price

Proposed § 463.3(e) prohibited misrepresentations regarding the availability of vehicles at an advertised price. Upon reviewing the comments pertaining to this provision, the Commission is finalizing paragraph (e) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term "Vehicles."

One individual commenter recommended that proposed § 463.3(e) be expanded to prohibit certain specific misrepresentations about advertised vehicle availability, including whether any specific vehicle is already reserved for another consumer; whether the availability is subject to a requirement that the consumer pay a deposit; and regarding the amount of time until the vehicle becomes available. Another individual commenter recommended that the Rule require disclosure of how long each vehicle has been in the dealer's inventory, to prevent dealers from misrepresenting that a vehicle recently became available. Here, the Commission notes that, to the extent any such misrepresentations regarding the availability of vehicles were made with express or implied reference to the price of the vehicle, each would be prohibited by § 463.3(e).[199] Furthermore, to the extent such misrepresentations included reference to the subject of another paragraph of § 463.3, they would be prohibited by the Final Rule. For example, if an advertisement were to make a claim about the monthly payment for a specific vehicle, but the vehicle is not actually available, it would be covered under the bar against misrepresentations regarding costs or terms in paragraph (a) of § 463.3. In addition, under the Final Rule, dealers are also subject to disclosure requirements under § 463.4, including the requirement at § 463.4(a) to disclose the vehicle's offering price in any advertisement that references a specific vehicle, or any monetary amount or financing term for any vehicle. And if a dealer discloses the offering price for a vehicle, but the vehicle is not available to consumers, § 463.3(e) applies. Beyond this, the Commission will continue to monitor whether other misrepresentations regarding availability are being made without reference to price, or to the subject of another paragraph of § 463.3, to determine whether additional action is warranted.

The Commission received comments from a number of dealership associations and individuals requesting that the Final Rule limit dealers' responsibility for unanticipated delays, or otherwise expressing concern about

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discounts were subject to material eligibility limitations and trade-in requirement); Complaint ¶¶ 4–5, *Timonium Chrysler, Inc.*, No. C–4429 (F.T.C. Jan. 28, 2014) (alleging dealership advertised internet prices and dealer discounts but failed to disclose consumer would have to qualify for multiple rebates not generally available to them); Complaint ¶¶ 4–5, *Ganley Ford West, Inc.*, No. C–4428 (F.T.C. Jan. 28, 2014) (alleging dealership advertised discounts on vehicle prices, but failed to disclose discounts were only available on the most expensive models).

[196] *See, e.g.*, Decision and Order, *Timonium Chrysler, Inc.*, No. C–4429 (F.T.C. Jan. 28, 2014).

[197] *See* Complaint ¶¶ 4–5, *Ganley Ford West, Inc.*, No. C–4428 (F.T.C. Jan. 28, 2014) (alleging false ads touting price discount but concealing offer was limited to certain high-end models).

[198] *See* Complaint ¶¶ 8–9, *JS Autoworld, Inc.*, No. C–4535 (F.T.C. Aug. 13, 2015) (alleging false ads touting prices but concealing discounts with material eligibility limitations); Complaint ¶¶ 7–9, *TC Dealership, L.P.*, No. C–4536 (F.T.C. Aug. 13, 2015) (alleging false ads touting attractive prices but concealing discounts were subject to material eligibility limitations and trade-in requirement); Complaint ¶ 14, *TXVT Ltd. P'ship*, No. C–4508 (F.T.C. Feb. 12, 2015) (alleging false ads failed to disclose that it would match consumers' income tax refunds only up to $1,000); Complaint ¶¶ 4–5, *Timonium Chrysler, Inc.*, No. C–4429 (F.T.C. Jan. 28, 2014) (alleging false ads touting pricing and discounts but concealing material qualifications and restrictions); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.*, No. C–4531 (F.T.C. July 2, 2015) (alleging promises of prices and discounts not generally available to consumers); Complaint ¶¶ 6–13, *Jim Burke Auto., Inc.*, No. C–4523 (F.T.C. May 4, 2015) (alleging promises of prices and discounts not generally available to consumers); *see also* Auto Buyer Study, *supra* note 25, at 8 ("A number of [study] participants were attracted by promotional offers in ads that they did not qualify for, but did not realize that they did not qualify until they got to the dealer. Some did not learn that they did not qualify until they got to the financing stage of the transaction.").

[199] The commenter also expressed concern about misrepresentations regarding the refundability of deposits and recommended that the Commission include language in § 463.3(e) addressing this issue. Because representations and practices regarding the refundability of deposits are related to the costs or terms of purchasing, financing, or leasing a vehicle, this issue is covered by § 463.3(a). Thus, the Commission declines to adopt the commenter's recommendation.

how dealers would be able to comply with this proposed provision. One industry association commenter stated that unanticipated delays could result from factors beyond the reasonable control of the dealer, such as shipping or production issues. Other dealership association commenters contended that, because of supply chain disruptions, adjustments to inventory and other information may not always be displayed on a retailer's website instantaneously.

As is the case under current law, under this provision, dealers may not make claims about the availability of vehicles at an advertised price without a reasonable basis at the time the claims are made.[200] Objective claims about products or services represent, explicitly or by implication, that an advertiser has a reasonable basis to support those claims.[201] Consumers would be less likely to be affected by claims for products and services if they knew the advertiser did not have a reasonable basis for believing them to be true.[202] If a dealer has a reasonable basis to make a claim about the availability of vehicles at the time the claim is made, the dealer would not be in violation of the provision if a vehicle later becomes unavailable because of circumstances that a dealer could not reasonably anticipate or control.

A few dealership association commenters claimed that promulgation of § 463.3(e) would cause regulatory confusion because State guidelines or rules already address issues about the availability of vehicles, including, for example, by requiring dealers to note the location of the vehicle.[203] As described in SBP III.C.1, States may provide more or less specific requirements relating to motor vehicle dealers so long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. To the extent there are actual inconsistencies, § 463.9 is clear that this Rule's prohibition against misrepresentations controls.

After careful consideration of the comments, the Commission is adopting paragraph (e) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term ''Vehicles.'' This paragraph prohibits dealers from promoting low prices for specific vehicles, but then later misrepresenting, among other things, that the advertised vehicle is no longer available or no longer available at the advertised price. Such misrepresentations are likely to induce consumers to waste their time traveling to a particular dealership to pursue a specific offer on a specific vehicle when the offer or vehicle itself may not actually be available.

(f) Whether Any Consumer Has Been or Will Be Preapproved or Guaranteed for Any Product, Service, or Term

Proposed § 463.3(f) prohibited misrepresentations regarding whether a consumer has been or will be preapproved or guaranteed for any product, service, or term. Upon reviewing public comments, the Commission is finalizing paragraph (f) of § 463.3 without modification from the Commission's original proposal.

One dealership association commenter recommended that compliance with a State law that prohibits certain misleading statements, such as ''we finance anyone'' and ''no credit rejected'' and similar statements, should function as a safe harbor against liability under this proposed paragraph.[204] Yet, while compliance with the State law cited may require dealers to refrain from using certain frequently misleading statements, as described by the commenter, that law does not generally prohibit all misrepresentations regarding material information about consumer preapprovals or guarantees; even if it did, there is no evidence that duplicative laws prohibiting misrepresentations harm consumers or competition, and no evidence of benefits to consumers or competition in allowing one such law to act as a safe harbor against another such law. Further, given that current law already prohibits deceptive conduct generally, dealers should be able to comply with the Commission's Rule, which provides further protections for consumers and law-abiding dealers. Thus, the Commission declines to adopt the recommended safe harbor.

Therefore, after careful consideration, the Commission is finalizing paragraph (f) of § 463.3. Misrepresentations regarding preapproval or guarantees for a product, service, or term—as with misrepresentations about availability and price, described previously—are likely to impact consumers' conduct with regard to motor vehicle sales, financing, or leasing transactions, including by inducing consumers to waste time pursuing illusory offers.

(g) Any Information on or About a Consumer's Application for Financing

Proposed § 463.3(g) prohibited dealers from misrepresenting any material information on or about a consumer's application for financing. After carefully reviewing public comments, the Commission is adopting paragraph (g) of § 463.3 without substantive modification. As with § 463.3(b), the only adopted modification is the deletion of the term ''Material,'' which nonetheless applies to the operation of each of the misrepresentation paragraphs in § 463.3, including paragraph (g), through the addition of the term in the introductory paragraph of § 463.3.

[200] FTC Policy Statement on Deception, *supra* note 42, at 1 n.5 (''Advertising that lacks a reasonable basis is also deceptive.'') (citing *Firestone Tire & Rubber Co.,* 81 F.T.C. 398, 451–52 (1972) (additional citations omitted)); *see Fed. Trade Comm'n* v. *US Sales Corp.,* 785 F. Supp. 737, 748 (N.D. Ill. 1992) (''Apart from challenging the truthfulness of an advertiser's representations, the FTC may challenge the representation as unsubstantiated if the advertiser lacked a reasonable basis for its claims.''); *see also Fed. Trade Comm'n* v. *Am. Screening, LLC,* 4:20–CV–01021–RLW (E.D. Mo. July 14, 2022) (granting summary judgment for the FTC upon finding that American Screening's claim that its COVID–19 protective equipment was available and would ship quickly was false and lacked a reasonable basis); *Fed. Trade Comm'n* v. *John Beck Amazing Profits, LLC,* 865 F. Supp. 2d 1052 (C.D. Cal. 2012) (finding that the defendants' representations were unsubstantiated in violation of section 5, because Defendants conceded that during the time period in which their infomercial was aired they did not have evidence supporting their representations that consumers who purchased their product would be able to earn money easily and because survey results revealed that less than one percent of consumers actually generated any revenue or profits); *Fed. Trade Comm'n* v. *Elegant Sols., Inc.,* 8:19–cv–01333–JVS–KES (C.D. Cal., July 6, 2020) (finding that defendants made false or unsubstantiated representations, including representing that consumers would be enrolled in a repayment plan that may be forgiven after a specific number of years even though there were no Federal loan forgiveness programs with those repayment terms).

[201] Fed. Trade Comm'n, ''FTC Policy Statement Regarding Advertising Substantiation,'' (appended to *In re Thompson Med. Co., Inc.,* 104 F.T.C. 648, 839 (1984)); *Fed. Trade Comm'n* v. *John Beck Amazing Profits, LLC,* 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012).

[202] Fed. Trade Comm'n, ''FTC Policy Statement Regarding Advertising Substantiation,'' (appended to *In re Thompson Med. Co., Inc.,* 104 F.T.C. 648, 839 (1984)); *see Fed. Trade Comm'n* v. *Am. Screening, LLC,* 4:20–CV–01021–RLW (E.D. Mo., July 14, 2022) (granting FTC's motion for summary judgment and finding that Defendants' representations that it had protective equipment in stock and would ship it to consumers within seven to ten business days were material to consumers seeking such equipment during a global pandemic).

[203] This provision would not prohibit dealers from advertising a vehicle with limitations on availability in a truthful manner, such that any limitations are clear and conspicuous to the consumer. For example, dealers should not affirmatively represent that a vehicle is available on its lot without a reasonable basis that the vehicle is on the lot or without clearly and conspicuously noting that the vehicle will be made available after transfer from an affiliate's lot.

[204] Comment of Tex. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8102 at 21; *see* 43 Tex. Admin. Code 215.247(2) (2023).

The Commission received a number of comments regarding this provision, including comments that expressed support for prohibiting misrepresentations about a consumer's application for financing.

A credit union commenter requested that, in addition to this proposal, the Commission consider implementing a requirement to clearly and conspicuously disclose any potential financing limitations prior to vehicle purchase negotiations, contending that such a measure would better enable consumers to choose a motor vehicle dealer and financing option that best serves their needs. To the extent a dealer misrepresents a consumer's financing options or limitations, including prior to or during the process of selling, leasing, or arranging financing for a vehicle, such conduct is prohibited by this provision, and depending on the circumstances, may also violate other provisions of the Rule. For example, as discussed in this paragraph-by-paragraph analysis, § 463.3(a) of the Final Rule prohibits misrepresentations regarding the cost or terms of financing a vehicle; this prohibition includes misrepresentations about available vehicle financing. Furthermore, this provision pertains to misrepresentations; comments pertaining to proposed disclosures regarding price, add-ons, and total of payments are examined in the Commission's discussion of § 463.4, wherein the Commission explains its determination not to finalize any additional disclosure requirements not included in its NPRM.

An individual commenter, while expressing support for regulation of such misrepresentations, also noted concern for the ''grave consequences of falsifying information on a customer's application for financing,'' and urged the Commission to consult with other law enforcement agencies to further address such problems.[205] The Commission appreciates the concern and the seriousness of falsifying information on a consumer's application for financing, and coordinates regularly with other law enforcement agencies regarding areas of shared jurisdiction and responsibility, including motor vehicle sales and financing. The Commission will continue to monitor financing application falsification issues to determine whether any additional action, beyond § 463.3(g), is needed.

A number of dealership association commenters contended that the proposed language was vague and did not adequately explain the type of behavior this paragraph would prohibit. Relatedly, some dealership association commenters contended that this provision lacked specific guidance about what a motor vehicle dealer must or must not disclose. This provision, however, utilizes terms which are commonly used and understood, and which may be interpreted according to their plain meaning. Read together with the introductory paragraph of § 463.3, § 463.3(g) prohibits misrepresentation . . . regarding material information about ''[a]ny information on . . . a consumer's application for financing.'' By its terms, this prohibition includes any misrepresentations of material information on a financing application. For example, dealers would make misrepresentations in violation of this provision by including, on a consumer's application that is submitted to a third-party financing institution, consumer income information that is different from what the consumers have stated to the dealer that the consumers actually earn, or by representing a different down payment amount than the amount the consumer has actually provided, or by misrepresenting that the vehicle is being sold or leased with certain add-on products.[206] Moreover, as described in detail with regard to other paragraphs of § 463.3, this provision does not require any particular affirmative disclosures, instead obligating dealers to refrain from certain misrepresentations.

One dealership association commenter questioned whether a dealer would be held responsible for a customer's false statement about his or her income. If a consumer falsely states they have a higher income, that consumer would not be misled into thinking he has a higher income. If, however, a consumer's application falsely states a higher income because a dealer has altered the information, that consumer would be misled into thinking that the application they are signing accurately reflects the information the consumer provided, and § 463.3(g) would be violated. Additionally, if a dealer advises a consumer to include other sources of payment as income or advises the consumer to list a higher income in other ways, such conduct may mislead the consumer into thinking that it is proper to calculate income for auto retail installment contracts in a particular way, and there may be a violation of § 463.3(g).

After careful review and consideration of the comments, the Commission adopts paragraph (g) of § 463.3 without substantive modification, prohibiting misrepresentations regarding material information about any information on or about a consumer's application for financing. It is likely to affect a consumer's choices if the consumer knows a dealer is misrepresenting the consumer's income, or other aspects of financing applications. If, for example, a consumer knew the truth—that the dealer is inflating the consumer's income such that the consumer would not otherwise obtain financing for a particular vehicle—the consumer might opt to finance a less expensive car, rather than risking repossession. Material misrepresentations on consumers' financing paperwork are also likely to cause consumers substantial injury, including by causing them to take on debt beyond that which the financing company would have approved, and increasing the risk of repossession and harmful consequences to consumers' credit. Consumers cannot avoid the injury from dealers misrepresenting the information consumers provide them, and this practice provides no countervailing benefits to consumers or competition.

(h) When the Transaction Is Final or Binding on All Parties

(i) Keeping Cash Down Payments or Trade-In Vehicles, Charging Fees, or Initiating Legal Process or Any Action If a Transaction Is Not Finalized or If the Consumer Does Not Wish To Engage in a Transaction

Proposed § 463.3(h) prohibited dealers from misrepresenting when the transaction is final or binding on all parties. Proposed § 463.3(i) prohibited dealers from making misrepresentations about keeping cash down payments or trade-in vehicles, charging fees, or initiating legal process or any action if a transaction is not finalized or if the consumer does not wish to engage in a transaction. After careful review and consideration of the comments, the Commission is finalizing paragraphs (h) and (i) of § 463.3 with the minor modification of capitalizing the defined term ''Vehicles'' in § 463.3(i) to conform with the revised definition at § 463.2(e).

Some commenters, including a group of State attorneys general and consumer

[205] Individual commenter, Doc. No. FTC–2022–0046–7445 at 12.

[206] *See* Complaint ¶¶ 18–36, *Fed. Trade Comm'n* v. *Tate's Auto Ctr. of Winslow, Inc.,* No. 3:18–cv–08176–DJH (D. Ariz. July 31, 2018); Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 30, Summer 2023'' 5 (July 2023), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-30_2023-07.pdf* (finding that dealers ''fraudulently included'' in financing documents add-ons, such as undercoating, that were not actually present on the vehicle, creating ''improperly inflated loan amounts'' that caused consumers to pay improper additional interest).

advocacy organizations, generally supported prohibiting misrepresentations about when the transaction is final or binding on all parties but urged the Commission to include additional requirements or prohibitions. For instance, several commenters, including consumer advocacy organizations and individual commenters, requested that the Commission add to its Final Rule a provision requiring dealers to include, in every consumer credit contract, a finality clause stating that the transaction is final as soon as the consumer credit contract is signed, or alternatively, a provision requiring dealers to include in retail installment contracts a clause prohibiting financing-contingent sales. Commenters including a group of State attorneys general recommended that the Commission require any dealer that does not ultimately secure financing under previously presented terms to unwind the transaction, return any down payment in full, and return any traded-in vehicle. Such commenters also recommended that the Commission implement restrictions, such as requiring dealers to be reasonably certain that a consumer will qualify for quoted financing terms; requiring a written disclosure that the consumer must sign advising the consumer that financing is not final; or setting a short deadline by which the dealer must either arrange financing or cancel the transaction. Other commenters, including a State consumer protection agency, also supported requiring the contractual contingency to be disclosed conspicuously and limiting the contingency to a short period of time. A number of these commenters, including consumer advocacy organizations, provided examples of how spot delivery transactions can harm consumers.

The provision's prohibitions and requirements address many of these commenters' concerns regarding spot delivery and yo-yo financing. Spot delivery and yo-yo financing refer to situations where a dealer delivers a vehicle to a consumer on the spot before the financing or leasing has been finalized, leads a consumer to believe that the transaction is final, and then later directs the consumer to return the vehicle and engages in certain tactics, such as failing to return the consumer's trade-in vehicle while refusing to honor the finance or lease transaction, or pressuring the consumer to enter into a new transaction.[207] Paragraphs (h) and (i) of § 463.3 prohibit misrepresentations regarding the finality of the transaction and return of down payments and trade-in vehicles. Under these provisions, if a consumer is under the impression that the transaction is final, and the dealer subsequently causes the consumer to return the vehicle to the lot because the transaction was not final, or the dealer takes or threatens to take possession of the vehicle but refuses to return the down payment or trade-in vehicle, the dealer has violated either § 463.3(h), by misrepresenting the finality of the transaction, or § 463.3(i), by falsely representing, expressly or by implication, that the dealer has a legal basis to keep the down payment or trade-in vehicle in the event the transaction is not finalized, or both.[208]

Regarding the recommendation to include a requirement that dealers be reasonably certain that consumers will qualify for quoted financing terms, the Rule the Commission is finalizing already contains several provisions in addition to § 463.3(h) and (i) that address this conduct. For example, the Rule prohibits misrepresentations regarding material information about the costs or terms of financing (§ 463.3(a)), or about whether any consumer has been or will be preapproved or guaranteed for any product, service, or term (§ 463.3(f)). As explained in the paragraph-by-paragraph analysis of § 463.3(e) in SBP III.C.2(e), existing law requires dealers to have a reasonable basis for their claims. Objective claims about products or services represent, explicitly or by implication, that an advertiser has a reasonable basis to support those claims.[209] Thus, to avoid misrepresentation, dealers must reasonably believe that consumers will qualify for quoted financing terms, or that the transaction will be finalized on the terms presented, in order to represent such terms to consumers.

Regarding additional provisions that would require certain contractual measures, such as finality clauses or prohibitions against financing-contingent sales, the Commission is concerned that requiring specific contract provisions would obligate dealers that are not engaged in spot delivery to change their contracts even though their customers do not experience harm stemming from spot delivery practices. Before requiring any such changes, the Commission has determined to continue to monitor the market to evaluate whether additional steps are warranted.[210]

Some commenters, including dealership associations, requested that the Commission clarify how dealers could document compliance with these proposed provisions, such as how dealers could establish that appropriate disclosures had been made. One such commenter, for instance, asked whether written agreements required by State law were sufficient to satisfy the requirements of these provisions. As noted elsewhere in this paragraph-by-paragraph analysis of § 463.3 in SBP III.C.2, these provisions do not require any particular affirmative disclosures, instead obligating dealers to refrain from

[207] Complaint ¶¶ 67–72, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016); *State ex rel. Dewine* v. *Dads Car Lot Inc.,* No. 13–cv–4036, 2014 BL 468717, at * 1 (Ohio Com. Pl. June 6, 2014) (finding defendant violated State consumer sales practices act by including ''spot delivery'' document that allowed defendant to keep ''all funds on deposit''); Att'ys Gen. of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00112 at 4 (Apr. 13, 2012), *https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00112/00112-82927.pdf* (recommending, among other rules aimed at deterring yo-yo sales, FTC adopt rules that would require dealers to disclose the consumer's ''right to walk away'' if financing is rejected and, in the context of spot delivery, to disclose financing has not been finalized as well as the responsibilities and potential consequences for consumers); Legal Aid Just. Ctr., Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00066 at 26, 29 (Jan. 30, 2012), *https://downloads.regulations.gov/FTC-2022-0036-0062/attachment_2.pdf* (explaining that in a yo-yo sale the dealer misrepresents to the consumer that credit has been finalized, when in fact the dealer treats the sale as contingent, retaining the ability to call off or seize the vehicle later; a ''yo-yo case can result in substantial distress to the person who has been tricked''; and ''[t]he harm to the marketplace occurs when the consumer believes a credit sale has been completed and stops shopping for a car on credit''); Nat'l Consumer L. Ctr., ''In Harm's Way—At Home: Consumer Scams and the Direct Targeting of America's Military and Veterans'' 41 (May 2003), *https://filearchive.nclc.org/special_projects/military/report-scams-facing-military.pdf* (listing ''Spot Delivery'' or ''yo-yo sales'' among scams commonly aimed at military members).

[208] *See Orkin Exterminating Co., Inc.,* 108 F.T.C. 263 (1986), *aff'd sub nom. Orkin Exterminating Co.* v. *F.T.C.,* 849 F.2d 1354 (11th Cir. 1988) (finding that defendant's practice of unilaterally raising consumers' annual renewal fees where the consumers' contracts contained a ''lifetime guarantee'' as to the amount of the fee was unfair under section 5 of the FTC Act); *see also* First Amended Complaint ¶¶ 59–61, *Fed. Trade Comm'n* v. *BF Labs, Inc.,* No. 4:14–cv–00815 (W.D. Mo. May 14, 2015) (alleging as unfair defendants' practice of unilaterally failing to provide paid-for services while refusing to refund consumers' upfront payments).

[209] Fed. Trade Comm'n, ''FTC Policy Statement Regarding Advertising Substantiation,'' (appended to *In re Thompson Med. Co., Inc.,* 104 F.T.C. 648, 839 (1984)); *Fed. Trade Comm'n* v. *John Beck Amazing Profits, LLC,* 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012).

[210] On May 31, 2023, the Commission received a petition for rulemaking under 16 CFR 1.31 regarding yo-yo financing. Petition for Rulemaking Concerning the Finality of a Car Purchase (Yo-Yo Financing), Doc. No. FTC–2023–0035–0002. The Commission will address this petition separately.

certain misrepresentations. Section 463.6 discusses records dealers need to keep to demonstrate compliance with the requirements of the Final Rule, and enumerates five such categories of records, including copies of finance and lease documents signed by the consumer, whether or not final approval is received for a financing or lease transaction. The Commission declines to include in this Final Rule additional requirements regarding any specific documents dealers must keep in order to demonstrate compliance with § 463.3(h) or (i).

One individual commenter requested that the Commission include in the CFR the examples of harmful conduct related to yo-yo financing that it published in the NPRM.[211] The Commission has determined that each such example describes conduct that violates this rulemaking. Rather than adding them to the text of the Final Rule, the Commission repeats those examples in this paragraph-by-paragraph analysis of § 463.3(h) and (i), in order to avoid voluminous modifications to the Rule text itself.

Commenters including a dealership association asserted that the issue of when a contract is final or binding is one of State law, and thus it is within the purview of each State to determine when a contract is final or binding, arguing that § 463.3(h) therefore should be removed from the Final Rule. Another such commenter contended that even courts experienced in contract interpretation have difficulty determining when an agreement is final, and that dealers therefore are likely to transgress this prohibition in proposed § 463.5(h) accidentally. This provision, however, requires that a dealer's express or implied representations regarding material information be truthful, which is consistent with current law and with the Commission's authority to prohibit unfair or deceptive acts or practices. Moreover, under § 463.9, this Rule does not affect State law pertaining to contracts so long as State law is not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.[212] In the case of § 463.3(h), for example, an inconsistency would include State law allowing material misrepresentations regarding whether transactions are final; the Commission is unaware of any such law. Further, to the extent dealers are concerned they may transgress this prohibition because courts have had difficulty interpreting their contracts, then, as they should be doing under current law prohibiting misrepresentations, dealers should carefully consider the net impression they are conveying with the language they use, both in their contracts and in the context in which these contracts are presented, as such language may confuse consumers as well.

Several dealership association commenters claimed that State law already prohibits misrepresentations about spot delivery transactions or otherwise protects consumers in such transactions. One such commenter asserted that Massachusetts law prohibits spot deliveries, and cautioned the FTC not to create uncertainty with its Rule such that one might think spot deliveries are allowed in Massachusetts. Another such commenter asked whether this provision applies in addition to State law or instead of it. Other commenters, including consumer advocacy organizations, asserted that less than half of the States have statutes, regulations, or administrative pronouncements about yo-yo transactions; that there are significant variations in such law from State to State; and that State regulation often does not provide sufficient protections for consumers. As described throughout the paragraph-by-paragraph analysis of § 463.3 in SBP III.C.2, State law may provide more or less specific requirements than those under the Final Rule as long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. As for any States that prohibit spot delivery, such prohibitions are consistent with the provisions of this Rule. Finally, as to whether additional provisions are warranted to protect consumers, the Commission will continue to monitor the market to make this determination.

Commenters including an industry association contended that the Commission should not take action to disrupt spot delivery transactions to consumers, stating that there may be reasons to keep down payments even when consumers are not permitted to keep the vehicle, or claiming that although abusive spot deliveries have occurred, they are not a systemic problem in the marketplace. The Commission, however, need not show that abusive spot deliveries are systemic in order to finalize these provisions barring misrepresentations.[213] Further, these misrepresentation prohibitions do not alter requirements under current law prohibiting dealers from making express or implied misrepresentations.

After careful consideration of the recommendations and record, the Commission has determined to finalize paragraphs (h) and (i) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term ''Vehicles'' in § 463.3(i). The Commission notes, however, that it has significant concerns about consumer harm due to yo-yo financing and will continue to examine these issues even as it finalizes these prohibitions against certain misrepresentations. Misrepresentations about when the transaction is final or binding on all parties, as well as about keeping down payments or trade-in vehicles, charging fees, or initiating legal process or any action, are likely to affect consumer conduct, including regarding whether to enter into a new transaction with less beneficial terms for the consumer, and are likely to mislead consumers.

(i) Keeping Cash Down Payments or Trade-In Vehicles, Charging Fees, or Initiating Legal Process or Any Action If a Transaction Is Not Finalized or If the Consumer Does Not Wish To Engage in a Transaction

Proposed § 463.3(i) is discussed with § 463.3(h).

(j) Whether or When a Dealer Will Pay Off Some or All of the Financing or Lease on a Consumer's Trade-in Vehicle

Proposed § 463.3(j) prohibited misrepresentations regarding whether or when a motor vehicle dealer will pay off some or all of the financing or lease on a consumer's trade-in vehicle. The Commission is finalizing paragraph (j) of § 463.3 largely as proposed, with minor modifications—substituting ''Dealer'' for ''Motor Vehicle Dealer'' and capitalizing ''Vehicle''—to conform with the revised definitions of '' 'Covered Motor Vehicle' or 'Vehicle' '' and '' 'Covered Motor Vehicle Dealer' or 'Dealer' '' at § 463.2(e) and (f).

The Commission received several comments in response to this paragraph, including from individual commenters who expressed support for prohibiting dealers from misrepresenting whether they would pay off outstanding balances

[211] *See* NPRM at 42020–21. Individual commenter, Doc. No. FTC–2022–0046–9469 at 5–6.

[212] One commenter questioned whether this section would prohibit a dealer from retaining a down payment on a special order vehicle where the customer refuses to take delivery of the vehicle. Comment of Minn. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8670 at 10. Sections 463.3(h) and (i) prevent misrepresentations, including misrepresenting that a dealer can keep a down payment when a dealer does not have a legal basis to do so. If the dealer does not make a misrepresentation, this provision would not be violated.

[213] *See* SBP I.A, n.3.

remaining on a trade-in vehicle.[214] Other commenters, including an industry association and dealership associations, requested that the Commission limit dealer responsibility under this provision for unanticipated delays stemming from circumstances beyond a dealer's reasonable control, arguing that proposed § 463.3(j) made no exception for unanticipated delays such as a previous financing source declining to accept a payoff or refusing to release the vehicle title after receiving a payoff.[215] The Commission notes that, as is the case under current law, under this provision, dealers are not permitted to make claims about whether or when they will pay off some or all of the financing or lease on a consumer's trade-in vehicle if the truth of those claims depends on circumstances outside their control and the dealer does not possess a reasonable basis for such claims.[216]

An individual commenter contended that requiring additional disclosures about this provision would confuse the consumer.[217] This provision, however, does not necessitate any affirmative disclosures from dealers. Instead, it prohibits dealers from misleading consumers about whether or when they will pay off some or all of the financing or lease on a consumer's trade-in vehicle.

One State consumer protection agency commenter requested that the Commission require, in situations where a buyer's credit information or trade-in vehicle are evidently insufficient to support a deal, that the dealer require additional down payment or other security, or affirmatively disclose that the dealer is not responsible for paying off liens.[218] Without further information on the costs and benefits of such a proposal, the Commission declines to add such requirements to this Final Rule. The Commission notes, however, that the Rule prohibits dealers from misleading consumers regarding when trade-in vehicles have negative equity and from otherwise failing to obtain the consumer's express, informed consent prior to charging the consumer for any item, including any amounts associated with trading in a vehicle. The Commission will continue to monitor this area to determine whether any such additional measures are warranted to protect consumers or competition.

The Commission also received a number of comments from dealership associations arguing that existing State and Federal laws address dealers' obligations in connection with informing consumers how much each consumer is responsible for financing. The Commission notes that commenters presented no actual conflicts between this provision and other laws, and to the extent duplicative laws prohibit misrepresentations in this area, the Commission has not observed harmful consequences to consumers or competition. Further, as noted elsewhere in the section-by-section analysis, State laws may provide more or less specific requirements as long as those requirements are not inconsistent with part 463, under § 463.9, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency.

After carefully considering the comments, the Commission is finalizing this provision with the two minor modifications to conform with the defined terms '' 'Covered Motor Vehicle' or 'Vehicle' '' and '' 'Covered Motor Vehicle Dealer' or 'Dealer.' '' This provision prohibits dealers from making misrepresentations about paying off the financing or lease on a trade-in vehicle. Such conduct includes misrepresenting to consumers who trade in a vehicle that the dealer will pay off any outstanding balance owed on the trade-in vehicle when the consumer purchases a vehicle from the dealer. For example, when such a dealer takes a trade-in, if the dealer remits payment to the entity to whom the trade-in payment is owed, as consumers would expect, but also adds this payment to the amount the consumer owes on the vehicle the consumer is purchasing from the dealer, the consumer is the party that has ultimately paid off the trade-in amount, contrary to the impression made by the dealer. This provision also prohibits dealers that are going out of business from representing expressly or by implication that they will pay off liens if they do not, in fact, pay off the liens, or do not pay them off in a timely manner. Such misrepresentations are likely to affect a consumer's choice to visit a particular dealership or select a particular vehicle.

(k) Whether Consumer Reviews or Ratings Are Unbiased, Independent, or Ordinary Consumer Reviews or Ratings of the Dealer or the Dealer's Products or Services

Proposed § 463.3(k) prohibited misrepresentations about whether ''consumer reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings of the Dealer or its products or services.'' Upon careful review and consideration of the comments, the Commission is finalizing paragraph (k) of § 463.3 with one technical clarification to replace ''its'' with ''the Dealer's.'' The Rule's requirements apply to all individuals and entities that meet the definition of ''Dealer.''

An individual commenter recommended that the Commission modify this provision to include language explicitly prohibiting dealers from creating, editorializing, modifying, or removing consumer reviews.[219] Here, the Commission notes that if such acts or practices would result in reviews that are not independent or do not otherwise reflect ordinary consumer experience, they already would violate this provision. For example, if a dealer created a positive review, edited or modified negative reviews to make them sound positive, or removed negative reviews while keeping positive reviews, such practices would violate this provision.

A few individual commenters recommended that the Rule include additional provisions related to consumer reviews, including a requirement for the creation of an online database for consumer reviews and complaints about dealerships, and a requirement for dealers to post consumer reviews online and in the dealership location. The Commission notes that while some reviews are available online, additional information could assist consumers, and the Commission will consider whether such

[214] *See, e.g.,* Individual commenter, Doc. No. FTC–2022–0046–3770 (''I agree that these changes need to take place. No one should have to pay what was owed on a trade in after the dealership said they would pay off the trade in . . . .'').

[215] For example, commenters stated that occasionally the previous finance or lease source will not provide a timely payoff for a traded vehicle or will refuse to accept a payoff claiming more money is due; or a previous finance or lease source may accept a payoff, but will refuse to credit its former customer's account and release the title promptly. In addition, an industry association commenter requested that the Commission narrow this prohibition to specifically address the fact patterns giving rise to it that the Commission sets forth in the NPRM, and, in so doing recognize that it is in a dealer's business interest to pay off the existing loan quickly so that the vehicle can be more easily and quickly retailed.

[216] *See* paragraph-by-paragraph analysis of § 463.3(e) in SBP III.C.2(e) (discussing deception and reasonable basis).

[217] *See* Individual commenter, Doc. No. FTC–2022–0046–7905 at 1.

[218] *See* Comment of State of S.C. Dep't of Consumer Affs., Doc. No. FTC–2022–0046–7891 at 6.

[219] Individual commenter, Doc. No. FTC–2022–0046–2364 (''Many favorable ([*i.e.*] 5 star) Dealer reviews I have read appear suspect with generic, similar wording (or no wording at all) seemingly provided to offset lower Dealer ([*i.e.*] 1 star) ratings. I recommend that for [§ 463.3(k)] the following (or similar) be appended: Additionally, consumer reviews may not be created, editorialized, modified or removed by any Dealer or third party acting at the direction of any Dealer. Consumer reviews should be modifiable or removable by the originating author.'').

measures are needed as it continues to monitor the marketplace, including after the Rule goes into effect.

Several dealership associations asked what type or format of reviews or ratings would be covered by this proposed provision. As proposed, § 463.3(k) applied to all reviews or ratings, in any format or wherever displayed, that are likely to mislead consumers as to whether such reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings. Relatedly, industry and dealership associations contended that the language used in the proposed provision was vague and confusing, and requested that the Commission further define the phrase, ''unbiased, independent, or ordinary consumer reviews or ratings.'' To begin, the operative terms in this phrase are commonly used and understood and may be interpreted according to their plain meaning without further definition. Moreover, the Commission has, for decades, provided information and guidance on avoiding deception through the use of endorsements, testimonials, and online reviews.[220] Enforcement actions by the Commission have documented examples of the types of misrepresentations that would be covered by this provision.[221] For example, dealerships and their employees have posted positive, five-star online reviews that falsely purport to be objective or independent.[222] As these sources make clear, a person who is unbiased, independent, and an ordinary consumer would be someone who was not paid or given something of value to write a review and who has no employment or familial relationship or other unexpected material connection to the dealership.[223]

An industry association commenter expressed concern that this proposed provision did not appear to be limited to misrepresentations that may occur when a dealership, and not an unrelated third party, affirmatively publishes consumer reviews. To the extent an independent third party that does not have a material connection with the dealership makes any such claims, those claims would not be covered by this provision. This provision concerns situations where there is such a relationship between the third party and the dealer. For example, if a dealer were to pay a third party or consumer to post positive reviews that misrepresent their status as unbiased, independent, or ordinary consumer reviews, the dealer would be violating this provision.[224]

One industry association commenter contended that the Consumer Review Fairness Act[225] already prohibits the conduct covered by this provision. The Consumer Review Fairness Act makes it illegal for businesses to have form contracts that disallow or restrict consumers from posting negative reviews. Section 463.3(k) prohibits misrepresentations regarding the authenticity of consumer reviews generally. These provisions are not in conflict, and as discussed in SBP III.C.1, to the extent the provision creates any duplication, the Commission has seen no harm to consumers or competition from duplicative prohibitions of deceptive conduct.

Whether reviews or ratings about a seller or the seller's products or services are from unbiased, independent, or ordinary consumers is material to consumers' decision-making because a consumer is more likely to interact with a particular dealership if the dealership has positive reviews or ratings from unbiased, independent, or ordinary consumers. Thus, after careful review of all the comments, the Commission is finalizing paragraph (k) of § 463.3 without substantive modification from the Commission's original proposal.

(l) Whether the Dealer or Any of the Dealer's Personnel or Products or Services Is or Was Affiliated With, Endorsed or Approved by, or Otherwise Associated With the United States Government or Any Federal, State, or Local Government Agency, Unit, or Department, Including the United States Department of Defense or Its Military Departments

Proposed § 463.3(*l*) prohibited misrepresentations that ''the Dealer or any of its personnel or products or services is or was affiliated with, endorsed or approved by, or otherwise associated with the United States government or any Federal, State, or local government agency, unit, or department, including the United States Department of Defense or its Military Departments.'' Upon careful review and consideration of the comments, the Commission is finalizing paragraph (*l*) of § 463.3 with one technical clarification to replace ''its'' with ''the Dealer's.'' The Rule's requirements apply to all individuals and entities that meet the definition of ''Dealer.''

One individual commenter recommended that the Commission additionally prohibit dealers from ''causing any person to impersonate a police officer for any purpose.''[226] The commenter contended that such a prohibition would address a common yo-yo financing tactic, wherein dealers exert pressure on consumers to return vehicles by calling the consumers on the phone, falsely claiming to be police officers, and falsely representing that there is a warrant for the consumers' arrest or that the dealer has reported the consumers' vehicles as stolen. The Commission is likewise concerned about such conduct, and notes that it would be covered by the language in this paragraph, which applies broadly to misrepresentations of affiliation with, endorsement or approval by, or association with ''any Federal, State, or local government agency, unit, or department,'' including State or local police officials.[227] By misrepresenting

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[220] *See, e.g.,* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 FR 49364 (July 31, 2023) (to be codified at 16 CFR 465), *https://www.govinfo.gov/content/pkg/FR-2023-07-31/pdf/2023-15581.pdf;* Fed. Trade Comm'n, Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 CFR 255; Fed. Trade Comm'n, ''FTC's Endorsement Guides: What People are Asking,'' *https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking;* Fed. Trade Comm'n, ''Soliciting and Paying for Online Reviews: A Guide for Marketers,'' *https://www.ftc.gov/business-guidance/resources/soliciting-paying-online-reviews-guide-marketers;* Fed. Trade Comm'n, ''Disclosures 101 for Social Media Influencers,'' *https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers.*

[221] *See* Complaint ¶¶ 73–78, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016); *see also* Fed. Trade Comm'n, Notice of Proposed Rulemaking, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 FR 49364, 49371–75 (July 31, 2023) (to be codified at 16 CFR 465), *https://www.govinfo.gov/content/pkg/FR-2023-07-31/pdf/2023-15581.pdf* (discussing such enforcement actions).

[222] *See* Complaint ¶¶ 73–78, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16-cv-07329 (C.D. Cal. Sept. 29, 2016).

[223] One commenter conducted a study of Google reviews of U.S. car dealerships from April 2008 to September 2022. The commenter found by examining a 2% sample of these reviews that consumers gave on average 4.47 stars out of 5 stars and made several other conclusions about consumer satisfaction with the auto transaction experience based on that methodology. Comment of Inst. for Regul. Analysis & Engagement, Doc. No. FTC–2022–0046–10164 at 2–5. The Commission notes that, consistent with its enforcement experience, there is no guarantee that those reviews are a genuine reflection of consumer experience. Moreover, the Commission notes that oftentimes consumers do not realize that they have been charged without their authorization. *See* SBP II.B. Thus, such a study that relies on Google star ratings is not conclusive of consumer experience.

[224] *See* § 463.1 (''It is an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) to violate any applicable provision of this part, directly or indirectly . . . .'').

[225] *See* 15 U.S.C. 45b.

[226] Individual commenter, Doc. No. FTC–2022–0046–7445 at 17.

[227] The Commission discussed government impersonation scams in its Notice of Proposed Rulemaking for a Trade Regulation Rule on Impersonation of Government and Business. *See* 87 FR 62741 (Oct. 17, 2022). The Commission observed, *inter alia,* ''ongoing widespread fraud

police involvement in potential vehicle repossession, such conduct would also violate paragraph (o) of § 463.3 of the Final Rule.

A number of dealership association commenters contended that some States address this type of deception.[228] As noted in response to similar commenter contentions regarding other proposed provisions, the Commission has seen no harm to consumers or competition from duplicative misrepresentation prohibitions, and overlap between the Commission's Rule provisions and existing law is indicative of dealers' ability to comply with these provisions. Moreover, including such a provision in the Final Rule additionally benefits consumers who encounter such conduct, and aids law-abiding dealers that otherwise lose business to competitors that act unlawfully. Further, § 463.9 discusses part 463's relation to State laws.

A dealership association commenter claimed that many dealerships in the commenter's State work with military personnel to promote charitable causes, and questioned whether a banner listing a dealership at a charitable military event would be considered a misrepresentation that the dealership is ''associated'' with the military.[229] Here, the Commission notes that a banner that conveys true participation in a charitable military event, and does not deceptively represent an affiliation with, endorsement or approval by, or association with the military, would not violate this provision. The Commission's law enforcement practice provides further guidance on this point: the Commission's many enforcement actions alleging misrepresentation of government affiliation provide examples of the types of conduct that would violate this provision.[230]

Representations about whether a seller or any of its personnel, products, or services is or was affiliated with, endorsed or approved by, or otherwise associated with the government are likely to affect consumers' conduct. Consumers are more likely to visit a dealership and select a vehicle or product if they believe that a specific dealer or a dealer's personnel, products, or services have been approved by a government entity. The Commission thus adopts paragraph (*l*) of § 463.3 without substantive modification from the Commission's original proposal.

(m) Whether Consumers Have Won a Prize or Sweepstakes

Proposed § 463.3(m) prohibited misrepresentations about whether consumers have won a prize or sweepstakes. Upon careful review and consideration of the comments, the Commission is finalizing paragraph (m) of § 463.3 without modification from its original proposal.

Comments from dealership associations contended that some States or municipalities address this type of deception. As discussed in SBP III.C.1, the Commission has not seen harm to consumers or competition from multiple prohibitions against misrepresentations. Furthermore, any significant overlap between the Commission's Rule provisions and existing law is indicative of dealers' ability to comply with these provisions. Finally, § 463.9 discusses part 463's relation to State laws.

Misrepresentations about whether consumers have won a prize or sweepstakes harm consumers by inducing consumers to choose and transact with a particular dealership under false pretenses. Thus, the Commission adopts paragraph (m) of § 463.3 without modification from the Commission's original proposal.

(n) Whether, or Under What Circumstances, a Vehicle May Be Moved, Including Across State Lines or Out of the Country

Proposed § 463.3(n) prohibited misrepresentations regarding whether, or under what circumstances, a vehicle may be moved, including across State lines or out of the country. Upon careful review and consideration of the comments, the Commission is finalizing paragraph (n) of § 463.3 largely as proposed, with the minor modification of capitalizing the word ''State,'' as well as the defined term ''Vehicle'' to conform with the revised definition at § 463.2(e).

The Commission received comments including from dealership associations arguing that proposed § 463.3(n) would pose issues for dealers who must comply with limitations imposed by manufacturers or distributors on the export of new motor vehicles. These commenters requested clarification about liability under this provision in the event dealers communicate any such export limitations to consumers or take other steps to prevent the export of new vehicles. Section 463.3(n), however, does not prohibit dealers from accurately and non-deceptively communicating whether, or under what circumstances, a vehicle may be moved—it instead prohibits representations that mislead consumers about this information.

Commenters including a dealership association objected to this proposed provision by asserting that a State or insurance company may prescribe, and the parties to a contract may agree upon, whether a leased or purchased vehicle may be driven to a particular area. This provision, however, does not prevent parties from discussing and agreeing to whether a vehicle may be moved. Instead, § 463.3(n) prohibits misrepresentations about whether, or under what circumstances, a vehicle may be moved, including regarding any liens or other restrictions that would prevent or hinder consumers' ability to move the vehicle beyond certain boundaries. Furthermore, interaction with State laws is explained in the section-by-section analysis of § 463.9.

Representations about whether, and under what circumstances, a consumer may move a vehicle are material as they are likely to affect a reasonable consumer's decision to purchase a vehicle, including decisions of military consumers who may frequently need to move.[231]

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schemes in which scammers impersonate law enforcement or government officials in attempts to extort money or steal personally identifiable information.'' *See id.* at 62742 (citing announcements on March 7, 2022, and May 20, 2022, by the Federal Bureau of Investigation and the Social Security Administration's Office of the Inspector General, in coordination with other Federal law enforcement agencies, respectively).

[228] One commenter further opined that ''the Department of Defense has itself dealt with this situation in the case of military lending and sales.'' Comment of Kan. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–4510 at 7.

[229] Comment of N.C. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–11223 at 9.

[230] *See, e.g.,* Complaint ¶¶ 5–6, 9–11, 14, *Traffic Jam Events, LLC,* No. 9395 (F.T.C. Aug. 7, 2020) (alleging auto marketer misrepresented that it provided COVID–19 stimulus relief to consumers); Complaint ¶¶ 14–26, *Fed. Trade Comm'n* v. *Ponte Invs., LLC,* No. 1:20–cv–00177 (D.R.I. Apr. 17, 2020) (alleging misrepresentation of government affiliation by company that impersonated the U.S. Small Business Administration with business names ''SBA Loan Program'' and ''SBA Loan Program.com'' and claimed to help businesses obtain access to coronavirus relief programs administered by the agency); Complaint ¶¶ 24–36, *Fed. Trade Comm'n* v. *DOTAuthority.com, Inc.,* No. 0:16–cv–62186 (S.D. Fla. Sept. 13, 2016) (alleging defendants misrepresented affiliation with U.S. Department of Transportation by claiming to be the ''Compliance Unit'' of ''DOTAuthority'' and providing a telephone number with a Washington, DC area code).

[231] *See, e.g.,* Fed. Trade Comm'n, ''The Road Ahead: Selling, Financing, & Leasing Motor Vehicles,'' Public Roundtable, Panel 1: Military Consumers and the Auto Sales and Financing Process, Remarks by Hollister K. ''Holly'' Petraeus, Dir., Off. of Servicemember Affs., CFPB, Tr. at 11 (Aug. 2, 2011), *https://www.ftc.gov/system/files/documents/public_events/52654/080211_ftc_sess1.pdf* (''[S]ervicemembers don't always realize if they buy and finance a car here in the U.S., they can't take it out of the country unless they have a letter of permission from the lienholder to do so. And some of the lienholders won't give that permission. . . . [W]e [heard from] a JAG in Germany saying, 'I see a number of people who end

Continued

Based on a review of the comments and for the reasons previously discussed, the Commission is finalizing paragraph (n) of § 463.3 largely as proposed, with the minor modification of capitalizing ''State'' and the defined term ''Vehicle.''

(o) Whether, or Under What Circumstances, a Vehicle May Be Repossessed

Proposed § 463.3(o) prohibited misrepresentations regarding whether, or under what circumstances, a vehicle may be repossessed. After careful review and consideration of the comments, the Commission is finalizing paragraph (o) of § 463.3 with the minor modification of capitalizing the defined term ''Vehicle'' to conform with the revised definition at § 463.2(e).

A number of commenters, including consumer advocacy organizations and a group of State attorneys general, expressed concern about electronic disablement of vehicles, including through the use of starter interrupt devices, which are sometimes utilized for vehicle repossession. Many of these commenters expressed concern about the potential for harm to consumers if such devices are activated without regard to the location or operational state of the vehicle, and recommended that the Commission restrict their use. Alternatively, one such commenter recommended that the Commission add a provision to part 463 that would require dealers to disclose any such technology, obtain the consumer's express, informed consent to its use, and limit its use to one time, not to exceed 30 days, once a consumer is in default. Finally, the comment from a group of State attorneys general recommended that the Commission require additional disclosures any time a starter interrupt device is installed, provide advance notice to consumers prior to activating such devices, and enable consumers to restart their vehicles in emergency or unsafe situations.[232]

The Commission recognizes the potential for abuse with regard to vehicle disablement technology.[233] It is already illegal under section 5 of the FTC Act to engage in deception, including regarding vehicle disablement technology, and to unfairly cause substantial injury to consumers, such as by disabling a vehicle while it is being operated on the highway.[234] This provision will further provide protection for consumers from unfair or deceptive conduct surrounding the repossession of vehicles. Moving forward, the Commission will continue to monitor the motor vehicle marketplace for developments in this area to determine whether additional restrictions are warranted.

A number of dealership association commenters contended that this provision would inhibit dealers from making representations about their lawful rights to repossess vehicles, positing that, upon making any such representations, this provision might require dealers to carry out repossessions without exception or risk violating this provision. This provision, however, does not prevent dealers from providing accurate information to consumers about when a vehicle can, or will, be repossessed. Even where dealers have a lawful right to repossess a vehicle, current law, as well as this provision, prohibit dealers from misrepresenting whether or when they may take such action. Current law, including at the Federal level, imposes some such restrictions in this regard: for example, the Servicemembers Civil Relief Act prohibits repossession of vehicles during a servicemember's period of military service without a court order, as long as the servicemember either placed a deposit for the vehicle or made at least one installment payment on the contract before entering military service.[235] This provision prevents dealers from representing that they may repossess military consumers' vehicles under such circumstances. However, dealers may still accurately and non-deceptively inform a consumer about the circumstances under which a vehicle can be repossessed or when the dealer may take action. In providing consumers with such information, however, dealers must refrain from representing, including by implication, that repossession is likely when in truth it is not.

After considering the comments, the Commission is finalizing paragraph (o) of § 463.3 largely as proposed, with the minor modification of capitalizing the defined term ''Vehicle.'' This provision prohibits dealers from making misrepresentations regarding material information about repossession of a vehicle. Information about whether, or under what circumstances, a vehicle may be repossessed is likely to affect consumers' conduct, including by impacting military consumers' conduct regarding which payments to prioritize while serving our country.

(p) Any of the Required Disclosures Identified in This Part

Proposed § 463.3(p) prohibited misrepresentations of any of the required disclosures identified in this part. As the Commission noted in its NPRM, this was including but not limited to representations that limit or contradict the required disclosures.[236] Upon careful review and consideration of the comments, the Commission is finalizing paragraph (p) of § 463.3 as proposed.

The Commission received a dealership association comment that contended generally that the proposed prohibited misrepresentations in this provision were already addressed in State statutes and regulations, and asserted that such State measures should suffice given that, according to the commenter, State regulators are more readily available to the public. As discussed in SBP III.C.1, the Commission has seen no harm to consumers or competition from duplicative prohibitions of deceptive conduct, and commenters did not cite State laws that permit misrepresentations or otherwise present a possible conflict with the Rule. Moreover, the Final Rule provides additional remedies that will benefit consumers who encounter conduct that is already illegal under State or Federal law, including by adding a mechanism for the Commission to redress consumers injured by a dealer's violation of the rule, and will assist law-abiding dealers that presently lose business to competitors that act unlawfully. Furthermore, State laws

up having to do what you would call ''voluntary repossession'' on their car because they bought this car, they're excited about it, and . . . the person who made them the loan didn't say ''Oh, by the way, if you go overseas, we're not gonna let you take it with you.''' And . . . sometimes, they'll find that their warranty is no good overseas, either.'').

[232] Comment of 18 State Att'ys Gen., Doc. No. FTC–2022–0046–8062 at 13.

[233] *See, e.g.,* Complaint ¶¶ 10–21, *CFPB* v. *USASF Servicing, LLC,* No. 1:23-cv-03433–VCM (N.D. Ga. Aug. 2, 2023); Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 28, Fall 2022'' 6–7 (Nov. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf* (finding that, in certain instances, auto servicers engaged in unfair acts or practices by activating vehicle disabling devices in consumers' vehicles when consumers were not past due on payment, contrary to relevant contracts and disclosures, including by causing the devices to sound late payment warning beeps and by preventing consumers from starting their vehicles).

[234] *See* 15 U.S.C. 45; *see also, e.g., Int'l Harvester Co.,* 104 F.T.C. 949, 1064–67 (1984) (finding that manufacturer's failure to adequately disclose that its tractors had a serious safety hazard constituted unfair conduct, where the hazard caused serious injury to a small number of consumers, consumers could not have reasonably avoided the harm because the respondent did not adequately disclose the serious risk, and the cost of the respondent disclosing the risk was very small in relation to the substantial injury).

[235] *See* 50 U.S.C. 3952(a).

[236] NPRM at 42022.

may provide more or less specific requirements, as long as those requirements are not inconsistent with part 463, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. Accordingly, the Commission adopts this provision without modification from its original proposal.

The Commission hereby determines it is an unfair or deceptive act in violation of the FTC Act for any dealer to make any misrepresentations, expressly or by implication, regarding material information about the subjects set forth in the paragraphs of § 463.3. Such misrepresentations are likely to cause consumers to waste significant time or money beyond what dealers led them to believe would be necessary to purchase or lease a vehicle. Thus, these misrepresentations are material and are likely to cause substantial injury to consumers. This injury is not reasonably avoidable by consumers themselves because information about the truth or falsity of the dealer's misrepresentations is within the control of the dealer, and there are no countervailing benefits to consumers or to competition from the illegal practice of making misrepresentations. Further, these provisions also serve to help prevent dealers from failing to make disclosures required by § 463.4, and from charging for add-ons that provide no benefit and from failing to obtain express, informed consent for charges, as required by § 463.5, including by prohibiting misrepresentations regarding costs and terms.[237] To reflect this, and without changing any substantive requirements for covered entities, the Commission is adding the following sentence to the end of § 463.3, at newly designated paragraph (q): ''The requirements in this section also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.4 and 463.5.'' Thus, this Rule requires dealers to refrain from making material misrepresentations about the topics enumerated in § 463.3. The prohibitions contained in § 463.3 help protect consumers from deceptive representations and promote the ability of honest dealers to compete on honest terms.

[237] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' such unfair or deceptive acts or practices).

D. § 463.4: Disclosure Requirements

1. Overview

The proposed rule included five disclosure requirements for motor vehicle dealers regarding certain pricing and financing information (in proposed § 463.4(a) through (e)). These provisions proposed to require dealers to disclose a vehicle's offering price; an add-on list with each optional add-on for which the dealer charges consumers and the price of each such add-on; that such add-ons are not required and that the consumer can purchase or lease a vehicle without the add-ons; and information about a vehicle's total of payments when making certain representations about monthly payments.

In its NPRM, the Commission specifically requested comments regarding key aspects of the proposed disclosures. In response, various stakeholder groups and individuals provided comments regarding the proposed provisions. In this section, the Commission discusses the comments, responses to the comments, and any changes made to this section based on the comments.

The Commission received many comments in favor of its proposal, including from consumer groups, financial services groups, dealerships and dealership employees, individual consumers, and others. These comments supported the proposed disclosures as addressing bad actors and unlawful practices in the automotive marketplace while promoting transparency, reducing consumer confusion, and refraining from inhibiting consumer choice or materially increasing the time or paperwork required.

A number of such comments, however, urged the Commission to adopt additional disclosures, both in the areas covered by its proposal and elsewhere. Regarding disclosures covered in the proposal, for example, commenters suggested more detailed requirements, including regarding specific disclosure language and specific placement of disclosures. The Commission agrees with commenters that key information affecting pricing, add-ons, and costs must be disclosed clearly and conspicuously to consumers in order to address consumer deception and unauthorized charges during the motor vehicle buying and leasing process. To provide flexibility for dealers and room for disclosures to be made in a manner that is clear and conspicuous to consumers in particular circumstances, however, the Commission declines to include additional prescriptive language about the form of such disclosures. Further, the Commission emphasizes that, in accordance with the provision being finalized at § 463.3(p), any material misrepresentations regarding the disclosures in the Final Rule violate section 5 of the FTC Act[238] and part 463.

The additional disclosures recommended by commenters included, *inter alia:* a disclosure regarding the installation and use of any electronic disabling devices; a disclosure explaining the fees certain lenders may charge to accept a consumer's loan application; a disclosure of the invoice price, or the price a dealer paid the manufacturer for the vehicle; a disclosure of any potential value gap between a vehicle's price and its appraised value; a disclosure, prior to purchase negotiations, of any potential financing limitations imposed by the dealer; a disclosure of credit characteristics relied upon by the dealer and certain terms; a disclosure that, as with a mortgage loan settlement statement, itemizes all the elements of the sale for car purchases;[239] and disclosure signage in dealership showrooms or on sales desks explaining that add-ons are not required. As for disclosures in additional areas, the Commission recognizes that vehicle purchase and lease transactions are lengthy and document-heavy, and while consumers may benefit from additional information, each additional disclosure requirement could increase the cost to comply with part 463 and would risk crowding out the information in the Commission's proposed disclosures. Accordingly, the Commission has determined not to expand § 463.4 of this Final Rule to include additional disclosures.[240] The Commission will

[238] 15 U.S.C. 45.

[239] Comment of Or. Consumer Just., Doc. No. FTC–2022–0046–8492 at 4; *cf.* Individual commenter, Doc. No. FTC–2022–0046–0144 (recommending the disclosed offering price separately list MSRP, markup, all fees, and add-on costs); Comment of Legal Aid Just. Ctr., Doc. No. FTC–2022–0046–7833 at 2 (''[D]ealers should be required to verbally disclose and explain in a language the customer understands the material terms of the contact [sic] (including APR, total number of monthly payments required, etc.) *before* customers sign[] the contract and receive the customers' consent that they understand these terms. After this verbal disclosure, a consent form should be required. This form should be provided in the language preferred by the customer, and should ensure that the customer was provided with accurate and agreed-upon terms prior to signing.''); Individual commenter, Doc. No. FTC–2022–0046–1641 (''Mortgage lenders are required to give a borrower a disclosure document prior to closing to show all costs and expenses; car dealers should have to do the same thing.'').

[240] In addition to the disclosures noted, a few commenters requested additional provisions to address concerns regarding transparency in pricing,

Continued

continue to monitor the marketplace to evaluate the efficacy and sufficiency of the present disclosures.

In addition, the Commission received a number of comments requesting that it publish forms for the disclosures proposed in this section. These comments requested either that the use of such forms be required or that the Commission provide a ''safe harbor'' from liability under part 463 for dealerships that utilize them.[241] The Commission did not receive, in the course of public comment, evidence sufficient to conclude that uniform formatting for the delivery of such disclosures would be necessary to make them effective. Nor has the Commission received evidence to establish that mandating use of a particular form disclosure would obviate deceptive and unfair conduct in all circumstances. For example, forms that were required or that provided a ''safe harbor'' from liability could be presented (1) with other elements that are distracting or confusing, (2) with information that modifies or contradicts the form disclosures, (3) with instructions, discouragement, or time pressure that causes consumers not to review the forms or that makes such review impracticable or impossible, or (4) through the use of forms that are pre-completed in whole or in part, to the extent this makes the information therein easy for consumers to miss. The end result of such an approach would be to enable deception while also making such deception more difficult to detect. Accordingly, the Commission declines to mandate particular disclosure forms as a requirement across all transactions or to shield against liability even where dealers otherwise engage in deceptive or unfair conduct. The Commission also notes that, because it is not mandating particular disclosure forms, dealers that are already complying with the law will avoid additional compliance costs associated with using a new form, and all dealers will have the flexibility to convey the disclosures in a manner that is clear and conspicuous under the particular circumstances of their transactions.

The Commission also received comments that expressed opposition to this section. Some individual commenters argued that the required disclosures were unduly extensive, prescriptive or untested, or that the substance of these disclosures is already conveyed to consumers before the consummation of the transaction. In response, the Commission stresses that this section is limited in both its scope and its requirements. Each of the disclosures in § 463.4 is focused on one key category of information: vehicle price, add-on optionality, or total of payments. This section requires the clear and conspicuous disclosure of this information but does not include prescriptive requirements. So, for example, a written disclosure would have to be in a size that stands out, but a specific font or font size is not mandated, nor are the specific terms or format used, nor are any particular uses of capitalization, punctuation, ink color, or paper color or size. The proposal refrained from additional formal mandates in order to provide dealers with flexibility, within the bounds of the law, to provide this essential information, including so that dealers already conveying this information in a non-deceptive manner may continue to do so. Accordingly, the Commission also finds that testing of these requirements is unnecessary. Furthermore, each of the disclosure requirements being finalized addresses the unfair or deceptive act or practice of withholding essential information from consumers or presenting such information to them in a deceptive manner. After reviewing comments, including those that contended the proposal was not prescriptive enough, the Commission concludes that this is the correct approach, and as such, has determined not to adopt any additional specifications dictating the form or manner in which the disclosures must be presented to consumers. Here, as elsewhere, the Commission will continue its long track record of working to assist with legal compliance.[242] Further, for dealers already conveying this information clearly and conspicuously, complying with this provision should not be burdensome.

Other commenters, including an industry association, contended that these disclosures would have the effect of limiting the products and services consumers are offered or otherwise restrict lawful sales practices. In response, the Commission reiterates that this section focuses on one of the most foundational pieces of information regarding the sale of vehicles, add-ons, and financing: their cost. Dealers already providing this information in a non-deceptive manner will need to make minimal, if any, changes to their disclosure practices. The Commission has seen no evidence that disclosing cost information has caused dealers to cease offering products.

Some commenters, including dealership associations, contended that the presence of some State standards in this area makes Federal regulation unnecessary or contradictory. In response, the Commission notes that it drew from several State statutory and regulatory provisions in formulating its proposal, and it observes that the existence and functioning of such standards demonstrates the practicability of such disclosure measures. Dealers can comply with any State laws requiring the same conduct as well as this section. Similarly, to the extent a State requires additional disclosures regarding vehicle price, add-ons, or total of payments, nothing prevents dealers from providing those disclosures as well as those required under § 463.4 so long as the State disclosures are not inconsistent with part 463. To the extent there is truly a conflict between this section and State law, § 463.9 provides that part 463 will govern, but only to the extent of the inconsistency, and only if the State statute, regulation, order, or interpretation affords consumers less protection than does the corresponding provision of part 463. Moreover, a number of States do not have existing standards in the areas covered by this part; in such States, the Commission's disclosures will operate as a key safeguard.

Other commenters, including an industry association, argued that requiring disclosures would increase the time and paperwork for consumers to

including related to interest rates, and that the Rule require dealers to maintain a fiduciary relationship to customers. The Commission recognizes the concerns regarding pricing transparency and deceptive conduct related to pricing, and will continue to monitor such issues, including after this provision (§ 463.4(a), offering price disclosure) and the misrepresentation provisions (§ 463.3) are in effect.

[241] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 104, 122; Comment of Ohio Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–6657 at 6, 9; *see* Comment of Compliance Sys., Doc. No. FTC–2022–0046–7836 at 1.

[242] Each year since FY2002, the Small Business Administration's Office of the National Ombudsman has rated the Federal Trade Commission an ''A'' on its small business compliance assistance work. *See* U.S. Small Bus. Admin., ''National Ombudsman's Annual Reports to Congress,'' *https://www.sba.gov/document/report—national-ombudsmans-annual-reports-congress* (providing reports from FY2013–FY2020); Letter from Edith Ramirez, Chairwoman, Fed. Trade Comm'n, to Senator David Vitter, Chairman, Comm. on Small Bus. and Entrepreneurship at 1 (Nov. 16, 2015), *https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-rule-compliance-guides-small-businesses-other-small-entities-commission/eighth_section_212_report_to_congress_july_2014-june_2015.pdf* (citing Commission's ''A'' rating for ''Compliance Assistance'' by the Nat'l Ombudsman from FY2002–FY–2014).

buy or lease a vehicle. In response, the Commission notes that the section includes requirements for the disclosure of salient, material information early in the process, thus eliminating the time consumers would otherwise spend pursuing misleading offers—time which can then be spent pursuing truthful offers in the absence of deception. These measures will further allow consumers to compare dealerships in advance based on truthful terms; thus, dealerships will earn business based on the actual terms offered, and not lose business to dealers who compete by omitting or hiding actual terms. Moreover, the disclosures required by this section are limited to key information affecting pricing, add-ons, and total of payments, needed to address consumer deception and unauthorized charges during the vehicle-buying and leasing process, and are required to be in writing only where the dealer is responding to written consumer communications or already providing consumers with representations in writing.[243] As explained in detail in the paragraph-by-paragraph analysis of § 463.4(e) in SBP III.D.2(e), in order to avoid any additional written disclosure requirements, the Commission is declining to mandate that its required disclosures be made in writing in every instance.

An industry association commenter argued that the proposed disclosure requirements in § 463.4 of the NPRM violate the First Amendment. This commenter contended that the proposed disclosures constituted compelled speech; that they would be subject to intermediate judicial scrutiny were they to be challenged in court; and that, in the event of such a challenge, the Commission's actions would fail to satisfy that standard of scrutiny, or a less stringent one.

The Commission first addresses the applicable First Amendment standard of review for this rulemaking effort in the event of a judicial challenge. If so challenged, the disclosures in § 463.4 would not be subject to intermediate judicial scrutiny, but instead to the less rigorous review standard set forth in *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626, 651 (1985). When, as is the case here, a regulation ''impose[s] a disclosure requirement rather than an affirmative limitation on speech,'' and is ''directed at *misleading* commercial speech,'' *Zauderer* governs.[244]

Under that standard, a commercial speaker's rights ''are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.''[245] In *Zauderer,* the Court upheld a rule requiring attorneys who advertised on a contingency-fee basis to disclose that clients who did not prevail in litigation might nevertheless be liable for significant costs.[246] The Court found that ''the possibility of deception is [] self-evident'' when an advertisement discloses only one type of charge (fees) without mentioning another (costs).[247] In upholding the challenged rule as reasonable, the Court emphasized that the rule merely mandated disclosure of ''purely factual and uncontroversial information about the terms under which . . . services will be available,'' and that the ''constitutionally protected interest in *not* providing [such] information . . . is minimal.''[248]

As in *Zauderer,* § 463.4 requires only ''purely factual and uncontroversial information about the terms under which [commercial goods or services] will be available.''[249] These material facts include the offering price of the motor vehicle; that add-on products or services are not required and the consumer can purchase or lease the vehicle without the add-on, if true; the total amount the consumer will pay to purchase or lease the vehicle and, if that amount assumes the consumer will provide consideration, the amount of such consideration; and when a lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle. As in *Zauderer,* any ''constitutionally protected interest'' a motor vehicle dealer might have ''in *not* providing [this] factual information . . . is minimal.''[250]

Courts applying *Zauderer* have repeatedly affirmed the constitutionality of regulations requiring disclosures of complete information about the cost of a purchase, which are similar to the required disclosures in § 463.4. For example, courts upheld a regulation requiring schools to ''disclose the 'total cost' of . . . tuition, fees, books, and supplies for its programs,'' finding that this information was ''purely factual and uncontroversial.''[251] In another instance, a court upheld under *Zauderer* a rule requiring airlines to prominently disclose the ''total, final price'' of airfare, finding it was ''reasonably related to the government's interest in preventing deception of consumers.''[252] In yet another case, a court upheld a rule requiring hospitals to disclose their rates to consumers, finding they were '' 'factual and uncontroversial' and directly relevant to 'the terms under which [hospitals'] services will be available' to consumers.''[253] The disclosure provisions the Commission is finalizing in § 463.4, like the provisions upheld in these cases, merely require factual and uncontroversial disclosures to provide consumers with accurate and timely pricing and financing information as they consider motor vehicle purchases and leases.[254]

As discussed, *Zauderer* applies here because § 463.4 would ''impose a disclosure requirement rather than an affirmative limitation on speech.''[255] The Commission notes, however, that disclosure requirements in § 463.4 likewise would pass muster even if, as the commenter suggested, they were evaluated under the intermediate scrutiny standard formulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York,* 447 U.S. 557 (1980), and subsequent cases applying that standard.[256] As an initial matter, *Central Hudson* applies not to *disclosure requirements,* such as those the commenter challenges, but to *affirmative limitations* on speech.[257] The *Central Hudson* test requires restrictions on lawful, non-misleading speech to satisfy three remaining criteria. First, there must be a substantial governmental interest in the restriction; second, the restriction must directly advance that interest; and third, the restriction may not be more

[243] *See* § 463.4(a) (stating that Offering Price must be disclosed in writing if the communication with the consumer, or the dealer's response, is in writing); § 463.4(c), (d), (e) (requiring that disclosures be in writing if the dealer's associated representation is in writing).

[244] *Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 559 U.S. 229, 249 (2010) (emphasis original).

[245] *Zauderer* v. *Off. of Disciplinary Couns.,* 471 U.S. 626, 651 (1985).

[246] *Id.* at 652.

[247] *Id.* at 652–53.

[248] *Id.* at 651.

[249] *See id.* at 651.

[250] *Zauderer* v. *Off. of Disciplinary Couns.,* 471 U.S. 626, 651 (1985) (emphasis original).

[251] *Ass'n of Priv. Sector Colls. & Univs.* v. *Duncan,* 110 F. Supp. 3d 176, 199 (D.D.C. 2015), *aff'd,* 640 F. App'x 5 (D.C. Cir. 2016).

[252] *Spirit Airlines, Inc.* v. *U.S. Dep't of Transp.,* 687 F.3d 403, 412–15 (D.C. Cir. 2012) (internal brackets omitted).

[253] *Am. Hosp. Ass'n* v. *Azar,* 983 F.3d 528, 540 (D.C. Cir. 2020) (quoting *Zauderer* v. *Off. of Disciplinary Couns.,* 471 U.S. 626, 650–651 (1985)).

[254] Further, as explained in the paragraph-by-paragraph analysis of § 463.4 in SBP III.D.2, the failure to disclose this information is itself a deceptive or unfair practice.

[255] *Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 559 U.S. 229, 249 (2010).

[256] The commenter attributes the intermediate scrutiny test to *Pagan* v. *Fruchey,* 492 F.3d 766, 771 (6th Cir. 2007), though it was in fact formulated by the Supreme Court in *Central Hudson.*

[257] *Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 559 U.S. 229, 249 (2010).

extensive than necessary to advance the interest.[258] Under the *Central Hudson* test, it is not necessary that ''the manner of restriction is absolutely the least severe that will achieve the desired end.'' [259] Rather, there merely must be a '' 'fit' between the [restriction's] ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable.'' [260] In other words, the restriction should be ''one whose scope is 'in proportion to the interest served.' '' [261]

The disclosure provisions the Commission is finalizing in § 463.4 satisfy these criteria. First, the disclosure provisions serve a substantial governmental interest by requiring motor vehicle dealers to provide accurate terms, and in particular, accurate pricing information, in advertising and sales discussions.[262] As the Supreme Court has made clear, the government's ''interest in ensuring the accuracy of commercial information in the marketplace is substantial.'' [263] And as explained in the paragraph-by-paragraph analysis of § 463.4 in SBP III.D.2, the disclosure requirements set forth there are aimed at ensuring that consumers receive accurate pricing information and other material transaction terms, and that dealers refrain from the unfair or deceptive act or practice of failing to provide this information.[264] The required disclosures directly advance, ''fit'' reasonably with, and are proportionate to, their intended ends of prohibiting and preventing unfair or deceptive conduct in motor vehicle transactions. They prevent dealers from luring consumers to dealerships with unfair or deceptive advertising tactics, from padding prices with unwanted add-on products or services, and from misdirecting consumers about the true cost of a vehicle through discussions of monthly payment amounts. The disclosure requirements effectively ''impose[] no burden on speech other than requiring [motor vehicle dealers] to disclose the total price consumers will have to pay. This the First Amendment plainly permits.'' [265]

After careful consideration of the comments, the Commission has determined to finalize the introductory paragraph of § 463.4 and certain of the disclosure requirements included in its NPRM, with some minor textual changes. The introductory paragraph of the NPRM proposed that it would be ''a violation of this part and an unfair or deceptive act or practice in violation of section 5 of FTC Act for any Motor Vehicle Dealer to fail to make any disclosure required by this section, Clearly and Conspicuously.'' The Commission is finalizing this paragraph with the minor textual change of substituting ''Federal Trade Commission Act'' for ''FTC Act'' for clarity and conformity with other parts of the Rule. The Commission is also adding the word ''Covered'' to the defined term ''Covered Motor Vehicle Dealer'' to conform with the revised definition at § 463.2(f), discussed in SBP III.B.2(f).

The Commission is finalizing the specific disclosure requirements proposed at § 463.4(a), (c), (d), and (e), with modifications noted in the paragraph-by-paragraph analysis in SBP III.D.2(a), III.D.2(c), III.D.2(d), and III.D.2(e).

In the paragraphs that follow, the Commission discusses the disclosure requirements proposed in the NPRM, the comments relating to the specific disclosures, responses to the comments, and the disclosure requirements adopted in § 463.4.

2. Paragraph-by-Paragraph Analysis of § 463.4

(a) Offering Price

The offering price disclosure provision in proposed § 463.4(a) required dealers to disclose a vehicle's offering price in advertisements that reference a specific vehicle or represent a monetary amount or financing term for any vehicle, as well as upon receipt of a consumer communication about a specific vehicle or any monetary amount or financing term for any vehicle. The Commission proposed defining ''Offering Price,'' in § 463.2(k), as ''the full cash price for which a Dealer will sell or finance the motor vehicle to any consumer, excluding only required Government Charges.'' The Commission also proposed defining the term ''Government Charges,'' then in § 463.2(h), to mean ''all fees or charges imposed by a Federal, State or local government agency, unit, or department, including taxes, license and registration costs, inspection or certification costs, and any other such fees or charges.'' For the reasons discussed in the following paragraphs, the Commission is finalizing the offering price disclosure provision at § 463.4(a), as well as the corresponding ''Offering Price'' and ''Government Charges'' definitions in § 463.2 (finalized at § 463.2(k) and (i), respectively), largely as proposed. The Commission is including a modification to the offering price definition to clarify that dealers may, but need not, exclude required government charges from a motor vehicle's offering price, and is substituting ''Vehicle'' for ''motor vehicle'' to conform with the revised definition at § 463.2(e), discussed in SBP III.B.2(e). Additionally, the Commission is including a typographical modification to the ''Government Charges'' definition to include a serial comma for consistency. The Commission also is capitalizing the defined terms ''Vehicle'' throughout, in its singular, plural, and possessive forms, and is adding language to the end of § 463.4(a)(3)(ii) clarifying that the requirements in § 463.4(a) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and 463.5(c).''

The Commission received a significant number of comments on its

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[258] *See Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 566 (1980). Although the Supreme Court in *Central Hudson* treated the question whether regulated speech is truthful and non-misleading as one of four criteria, it has alternately treated this question as a threshold inquiry, after which the three remaining criteria are evaluated. *See Fla. Bar* v. *Went For It, Inc.,* 515 U.S. 618, 623–24 (1995). Because the government is ''free to prevent the dissemination of commercial speech that is false, deceptive, or misleading,'' *Zauderer* v. *Off. of Disciplinary Couns.,* 471 U.S. 626, 638 (1985), if a challenged restriction fails this threshold inquiry, *Central Hudson* does not apply.

[259] *Bd. of Trs. of State Univ. of N.Y.* v. *Fox,* 492 U.S. 469, 480 (1989).

[260] *Id.* (citation omitted).

[261] *Id.* (quoting *In re R.M.J.,* 455 U.S. 191, 203 (1982)).

[262] NPRM at 42012.

[263] *Edenfield* v. *Fane,* 507 U.S. 761, 769 (1993).

[264] Nothing could be more directly relevant to accurate pricing than disclosure of the actual price itself. *See Spirit Airlines, Inc.* v. *U.S. Dep't of Transp.,* 687 F.3d 403, 415 (D.C. Cir. 2012) (substantial governmental interest ''is clearly and directly advanced by a regulation requiring that the total, final price be'' prominently disclosed).

[265] *Id.* Further, the Commission has taken into account prior enforcement work and other initiatives. *See* NPRM at 42022–25 (explaining rationale behind disclosure requirements and extensively citing prior enforcement experience and record evidence); *see also Lorillard Tobacco Co.* v. *Reilly,* 533 U.S. 525, 555 (2001) (''We do not . . . require that empirical data come accompanied by a surfeit of background information. We have permitted litigants to justify speech restrictions by reference to studies and anecdotes . . . or even . . . based solely on history, consensus, and simple common sense.'' (internal quotation marks and alterations omitted)); *Fla. Bar* v. *Went For It, Inc.,* 515 U.S. 618, 628, (1995) (same); *Burson* v. *Freeman,* 504 U.S. 191, 211 (1992) (finding speech restrictions justified even under strict scrutiny based on a ''long history, a substantial consensus, and simple common sense''); *Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 559 U.S. 229, 251 (2010) (''When the possibility of deception is as self-evident as it is in this case, we need not require the State to conduct a survey of the public before it may determine that the advertisement had a tendency to mislead.'' (internal quotation marks and alterations omitted)); *Am. Hosp. Ass'n* v. *Azar,* 983 F.3d 528, 540 (D.C. Cir. 2020) (finding reasonable relationship between rule and governmental interests where ''the Secretary, relying on complaints from consumers, studies of state initiatives, and analysis of industry practices, reasonably concluded that the rule's disclosure scheme will help the vast majority of consumers'').

proposed offering price disclosures. Many commenters supported the Commission's proposal to require dealers to provide uniform, comprehensive, and accurate pricing information. These commenters noted, *inter alia,* that despite laws generally prohibiting unfair or deceptive acts or practices, present market conditions fail to balance the ''playing field'' of information between consumers and motor vehicle dealers, allowing dealers to take advantage of consumers by hiding information about pricing, imposing surprise price increases, or using pricing advertising tactics that systematically deceive consumers.[266] Many consumers also underscored the need for the proposed disclosure requirements. Commenters in support noted, for instance:

• Buying a car has always been a horrible experience for me. The endless driving to dealerships who advertise vehicles for a sale price only to find that the vehicle does not exist, or the price advertised for the specific vehicle is not what they had posted. The salespersons['] tactics, always attempting to put you in a vehicle based on a car payment, along with dancing around the simple question of the actual out the door price of the vehicle. . . . It is such a shame that the dealerships just do not give the customer the price of the vehicle without them wanting to start a ''folder'' and take all of your information, a copy of your drivers license, ect [sic] . . . . Please regulate the automobile dealerships, especially now when it seems they are at their worst with these ridiculous add on fees (paint and upholstery protector, ect [sic] which was not added at the manufacturer) along with adjustments on top of the MSRP.[267]

• Buying a car in the US is now akin to what I used to do in the Army: Before going into the dealership, I have to spend hours conducting ''intelligence prep of the battlefield'' to understand the tactics the dealership's sales and finance & incentives staff will throw at me. . . . It has been made increasingly worse by dealerships that advertise a false price to entice a buyer but ''bait-and-switch'' with Additional Dealer Mark-Ups (ADM), and bogus fees and charges for supposedly dealer-installed items tha[t] the consumer doesn't want in the first place. . . . Unless the FTC passes this proposed rule, things will get worse before they get better.[268]

• Though I am not usually a fan of adding layers of governmental regulations to what should be a simple transaction, there definitely needs to be a change in what is allowed in the car buying process. . . . As consumers we should not have to spend hours reading tiny print in obscure sections of a website in order to validate a posted price. The price should not be elevated at the last minute in a hidden line item such as a mandatory detailing package or service plan you do not want or need to the tune of thousands of dollars. . . . We should not have to spend hours at a dealer and go through mounds of paperwork with a fine tooth comb in order to simply see the ACTUAL price of the vehicle. It is a ridiculous ploy to confuse people into purchasing things they do not want or need.[269]

• I have been trying to buy a new car for the last two years but with unexpected costs I am not able to have a clear written contract on the car and its pricing. I have contacted several dealers in my area and many of them have issues that prevent me from commited [sic] to buying from them. This ranges from them not being able to give me a written sheet of the cost of the car, fees, ect [sic] showing me how much I will be paying in the end. . . . Most of the dealerships I spoke to would not give me a sales sheet of the vehicle I want to purchase to show me how much I will be paying in total. I would have to put a down payment and just trust them over the phone. If I can't get it in writing it is hard to commit to a down payment I could lose.[270]

• Vehicles are typically the second largest purchase made by people. Given the choices available according to respective needs/wants, purchasing a vehicle should be the same as going to any other mass-market retailer and picking that appliance with a set price. So why do we need to haggle or expend additional intellectual and emotional bandwidth towards ensuring that the transaction is as initially stated? There are instances where I'd rather be back conducting combat operations in Iraq than go through the dealer process, as it incenses me that this corrupt way of doing business is given a free pass. . . . If you are a reputable and honest dealership, then there should be no worry; it will be business as usual.[271]

• Think of us, the car buying public. We are mad as hell. Please start fixing this crooked business model where nobody even knows what they are supposed to be paying.[272]

• As a consumer, I fully support this new proposed rules update. The dealership experience has been an anxiety provoking event everytime [sic] I attempt to purchase a car. I have multiple friends and family that all report shady practices, bait and switch, and up charging at point of sale during their car buying process. Please pass these regulations! [273]

• I am writing in FULL support of the FTC rules and regulations. . . . Buyers deserve to know Out the door prices and not be hassled by nonsensical add-ons for the dealership's benefit. People should feel comfortable and excited to buy their 1st car rather than the dread I feel.[274]

• We find the vehicle we came to see and see a sticker beside the manufacture[r] one with added prices. These typically include car alarms, VIN etching, protection packages, floor mats, market adjustment, etc. We go to purchase the vehicle now and they say that none of these can be removed from the price of the car (even though they advertised them without them at a much lower price). We attempt to negotiate them off and find out their [sic] is an additional addon like reconditioning fee. We fail at getting the price of the vehicle down to the advertised price and leave.[275]

• I have financed all of my cars, and the total cost for the vehicle has always been hidden, either physically or through the dealer trying to move focus onto other numbers such as the monthly payment. Since monthly payments will vary due to credit history, down payments, interest rates, taxes, and more, it is not an effective tool for measuring a deal. $300 a month could be a great deal on one car, and a horrible deal on another. I would greatly benefit from the proposal[']s provision to clearly list and advertise the price of the car without additional add[-]ons. It would greatly reduce the work of finding the right car at the right dealership. In each of the 3 cases, I have gone to multiple dealers, wanting to purchase a specific vehicle on their lot, and walked away because of the hidden

[266] *See, e.g.,* Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC–2022–0046–7607 at 17–20.

[267] Individual commenter, Doc. No. FTC–2022–0046–6649.

[268] Individual commenter, Doc. No. FTC–2022–0046–6225.

[269] Individual commenter, Doc. No. FTC–2022–0046–6089.

[270] Individual commenter, Doc. No. FTC–2022–0046–6656.

[271] Individual commenter, Doc. No. FTC–2022–0046–5238.

[272] Individual commenter, Doc. No. FTC–2022–0046–5227.

[273] Individual commenter, Doc. No. FTC–2022–0046–5228.

[274] Individual commenter, Doc. No. FTC–2022–0046–5219.

[275] Individual commenter, Doc. No. FTC–2022–0046–0900.

costs being added to the price of the car.[276]

• I work as a salesperson at a local Nissan dealership. . . . Currently, dealerships across the US, including the one I work for, have made the car buying process needlessly confusing, expensive, and frustrating by engaging in false advertising and hidden add-on products. While these practices are very unscrupulous, they are incredibly effective at what they are designed to do: drive revenue for the store. If these regulations are passed, they would certainly take a significant toll on my personal finances. But the longer I work in my position, the more I realize that no one should be allowed to engage in such exploitative conduct in the course of running a business. . . . Good, ethical dealers will not have to make any changes if these rules are put into place. I also happen to know that several of the comments in opposition to the proposed regulations are solicited by dealerships and their management. The dealership group I work for, for example, sent out a company-wide email encouraging employees to post comments on this site in opposition to these rules. But there's no question: The American people want these regulations. They need these regulations. The only ones that don't want them are crooked auto dealerships across the US. It's been far too long that such dealerships have run amuck with underhanded sales practices and deception. I would urge the FTC to stand strong against . . . dealership groups[]or any lobbyists and get these rules passed! I know there will be stiff resistance but it's of the utmost importance to good dealerships, transparent salespeople, and, most importantly, the average American consumer! [277]

A number of commenters supported the offering price disclosure requirement and associated definitions; some expressed support while urging additional protections. A number of commenters, including consumer advocacy organizations as well as individual commenters, requested that the Commission require a vehicle's offering price to include additional items, such as charges for add-ons attached to the vehicle when it is offered, and charges for add-ons required by the dealer to be sold with the vehicle; to exclude rebate information, including rebates contingent upon the use of a certain financing company or upon qualifying for any other rebate; and to prohibit the exclusion of certain charges, including the advertisement of an offering price that factors out a down payment amount.[278]

To begin, the Commission notes that by the terms of the proposed ''Offering Price'' definition, the only charges a dealer was permitted to exclude from a vehicle's offering price were required *government* charges. Thus, under the proposal, if a dealer were to charge any consumer for a preinstalled add-on, or require any consumer to pay for an add-on to purchase or finance the vehicle, then the charges for such add-ons would be required to be included in the vehicle's offering price.[279] In addition, while the proposed provision did not prevent dealers from presenting consumers with accurate and non-misleading additional information, including terms of limited availability, the required offering price disclosure needed to remain clearly and conspicuously presented to consumers, and could not be based on discounts or rebates that are not available to ''any consumer,'' including rebates contingent upon the use of a certain financing company or upon qualifying for any other rebate. Similarly, under the proposal, if the dealer required a down payment amount to sell or finance the vehicle, the offering price could not factor out such an amount.

With respect to the proposed definition of ''Government Charges,'' which is used in the definition of ''Offering Price,'' a number of consumer advocacy organization commenters contended the definition should be narrow to accomplish the Commission's goal of ensuring that consumers have access to accurate pricing information before they enter a dealership, emphasizing that only charges that are imposed by, and payable to, a government entity should be permitted to be excluded from a vehicle's offering price, and that document fees that some States allow dealers to charge should not be excluded from the offering price. The Commission notes that, as proposed, the term ''Government Charges'' is limited to those charges ''imposed by a Federal, State or local government agency, unit, or department.'' The Commission specified in this proposed definition that such charges need be ''imposed by'' a government entity rather than, for instance, having merely been ''authorized by'' or ''allowed by'' such an entity. This language does not reach charges that are authorized by a government entity but not required, since such charges have not been ''imposed'' [280] by the government. This distinction therefore excludes from the definition of ''Government Charges'' fees, such as dealership document preparation fees that State or local law does not require consumers to pay. Furthermore, the definition of ''Offering Price'' at § 463.2(k) permits only ''required'' government charges to be excluded from a vehicle's offering price. Thus, charges the government does not require consumers to pay, but allows the dealer to charge or to pass along to the consumer, such as document fees, must be included in the disclosed offering price if the dealer requires such charges of any consumer.

Relatedly, an individual commenter suggested that the Commission delete the phrase ''inspection or certification costs'' from the definition of ''Government Charges'' in order to avoid confusion about the status of inspection or certification charges that ''are NOT imposed by the Government,'' as well as explicitly state in the definition that the term does ''not include dealer document or document processing fees (''doc fees''), or electronic titling and registration fees, which are not imposed by the Government.'' [281] Regarding the phrase ''inspection or certification costs,'' such costs that are *not* ''imposed'' by the government are excluded from the definition of ''Government Charges,'' as the plain language makes clear. Similarly, as noted, dealer document or document processing fees and any other fees that are not imposed by the government are excluded from the definition, as the plain language states.

Some commenters, including a group of State attorneys general, likewise recommended that a vehicle's offering price include ''anticipated'' or

[276] Individual commenter, Doc. No. FTC–2022–0046–6490.

[277] Individual commenter, Doc. No. FTC–2022–0046–3693.

[278] A number of these commenters further requested that the term ''Offering Price'' include additional dealer fees that are known to the dealer at the time they are advertised and imposed by the dealer rather than a government entity. These requests are addressed in the discussion of the Commission's definition of ''Government Charges'' in SBP III.B.2(i).

[279] If a dealer does not require any consumer to pay for an add-on, current law, as well as provisions in this Rule, require dealers to refrain from deception in this regard. *See, e.g.,* § 463.3(a), (b) (prohibiting material misrepresentations regarding the costs or terms of purchasing, financing, or leasing a vehicle, as well as any costs, limitation, benefit, or any other material aspect of add-ons); § 463.4(c) (requiring disclosures regarding optional add-ons).

[280] *See, e.g., Impose,* Cambridge Advanced Learner's Dictionary & Thesaurus, *https://dictionary.cambridge.org/us/dictionary/english/impose* (''to officially force a rule, tax, punishment, etc. to be obeyed or received'').

[281] Individual commenter, Doc. No. FTC–2022–0046–7445 at 15–16.

''estimated'' government charges.[282] The Commission agrees that consumers would benefit from knowing this information early on in their shopping experience, and notes that dealers are permitted under this Final Rule to provide additional, truthful information along with a vehicle's offering price. Rather than requiring that anticipated government charges be included in the offering price, the Commission is modifying the definition from its original proposal to make clear that dealers need not exclude any such charges from the offering price. The Commission will evaluate whether the definition, as finalized, as well as its associated disclosure, effectively address deceptive and unfair market conduct, and will consider future modifications as market practices evolve.

Thus, the Commission is finalizing a definition of ''Offering Price'' that clarifies that dealers may, but need not, exclude required government charges from a vehicle's offering price that meets the requirements of § 463.2(k). In particular, the Commission is finalizing a definition of ''Offering Price'' that removes the phrase ''excluding only'' and adds the phrase ''provided that the Dealer may exclude only'' in its place. The definition also substitutes ''Vehicle'' for ''motor vehicle'' to conform with the revised definition of '''Covered Motor Vehicle' or 'Vehicle''' at § 463.2(e), such that the definition reads as follows: ''Offering Price means the full cash price for which a Dealer will sell or finance the Vehicle to any consumer, provided that the Dealer may exclude only required Government Charges.''

Other commenters, including consumer advocacy organizations, proposed additional requirements to the disclosure at § 463.4(a): prescribing formatting, posting, and presentation requirements for offering price information, such as attaching a written offering price to each vehicle, providing written offering price information in response to consumer communications regardless of whether the communications are written, and requiring offering price to be the most conspicuous piece of information displayed to consumers. Regarding the manner in which the offering price must be presented, the Commission proposed that all disclosures under § 463.4, including the offering price disclosure, be presented clearly and conspicuously. As previously discussed, the proposed disclosure provisions were directed at addressing unlawful conduct while providing dealers with flexibility to present such disclosures in a manner that is clear and conspicuous to their consumers under the particular circumstances. Thus, the Commission has determined not to adopt further formatting, posting, or presentation requirements for its offering price disclosure.

Some commenters, including consumer advocacy organizations and a consumer protection agency, proposed that the Commission adopt an additional requirement providing that dealers must accept an offer from a buyer of the offering price. In response, the Commission notes that, under its proposal, if a dealer were requiring any consumer to pay a price that was higher than the disclosed offering price, or adding other conditions—such as requiring the use of a particular finance company or the purchase of an add-on—to obtain the vehicle at the offering price, such practices would violate part 463, including the offering price provision, which requires disclosure of the full cash price for which the dealer will sell or finance the vehicle to any consumer,[283] and the related requirement the Commission is finalizing under § 463.3(p), which prohibits misrepresentations regarding the required disclosures in part 463.[284]

An individual commenter proposed that the Commission adopt additional requirements requiring dealers to itemize and disclose each sub-component of the offering price, including any applicable document fee. The Commission notes that it has not been presented with any evidence that the benefits of such additional disclosure requirements outweigh the costs to consumers and competition. The Commission may consider additional such restrictions or additional guidance in the future, based on stakeholder experience with part 463 and whether it effectively remediates unlawful conduct.

Other individual commenters proposed that the Commission impose limitations on the price of the vehicle—for example, prohibiting dealers from charging more than MSRP for the vehicle—or prohibit or limit particular charges, such as dealer fees, document fees, and destination charges. The Commission notes that several Rule provisions will prohibit hidden charges and deception related to pricing, including § 463.4(a) (offering price disclosure) and § 463.3(a) (prohibition against misrepresenting the costs or terms of purchasing, financing, or leasing a vehicle). Before including additional provisions, the Commission will continue studying the market, including after the Rule is in effect, to determine whether additional steps are needed.

Other commenters opposed the offering price disclosure and related definitions. Commenters including an industry association contended that, by defining ''Offering Price'' in § 463.2(k) as the price ''for which a Dealer will sell or finance the motor vehicle to any consumer,'' the Commission would prohibit dealers from changing vehicle prices as market conditions change, thereby making vehicle pricing less dynamic than under current industry practice.

Section 463.4 and the offering price definition in § 463.2(k), however, do not alter the current status quo on pricing accuracy or pricing changes. Consistent with the law, the offering price—as with a presently advertised price—must be truthful and non-misleading. If the offering price is only available for a certain period of time, the advertisement must convey that fact clearly and conspicuously, and if it is no longer available, the dealer must cease advertising the offering price.[285]

Some commenters expressed a related concern that the Commission's offering price disclosure requirement could require dealers to change their practices when an advertised vehicle is no longer available. For example, one industry commenter asked whether, under such circumstances, a dealer would somehow be obligated to sell some other vehicle

[282] *See, e.g.,* Comment of 18 State Att'ys Gen., Doc. No. FTC–2022–0046–8062 at 7; Comment of Consumer Att'ys & Advocs., Doc. No. FTC–2022–0046–7695 at 2–3 (requesting that the vehicle's offering price include ''an estimate of government fees and charges such as sales tax and registration based on the dealer's location'').

[283] *See* § 463.2(k) (defining ''Offering Price'' as ''the full cash price for which a Dealer will sell or finance the Vehicle to any consumer, provided that the Dealer may exclude only required Government Charges'').

[284] Some commenters described situations in which a dealer may decline to sell or finance a vehicle to a particular consumer, including due to legal requirements, irrespective of whether the dealer otherwise intends to honor its offering price disclosures. These situations include, for example, a consumer who presented identity theft indicia under the Commission's Red Flags Rule, 16 CFR 681; a consumer on the Specially Designated Nationals List maintained by the Office of Foreign Assets Control; a consumer who cannot produce the required proof of insurance or license to complete the transaction; or a consumer who is abusive or violent at the dealership. The Commission's offering price provision is a pricing disclosure; it will not otherwise alter the status quo on whether a given sale or financing transaction must be consummated.

[285] As is the case under current law, under part 463, any qualifying information necessary to prevent deception regarding a material fact must be conveyed clearly and conspicuously. *See* FTC Policy Statement on Deception, *supra* note 42, at 1 n.4, 4.

to that consumer at the offering price. Here, the offering price disclosure requirement does not alter the status quo: Under § 463.4(a), as under current law, if an offer is limited to a particular period of time, the offer must convey that fact, and once a price is no longer available, the dealer must cease advertising that price. Regarding which vehicles to sell at an advertised offering price, under the Commission's proposal, the dealer must disclose the offering price for the vehicles advertised. If the dealer charges a different price, then the dealer has not disclosed the offering price for which the dealer will sell or finance the vehicle, and the dealer has misrepresented the price of the vehicle, in violation of several provisions, including §§ 463.3(b) and (p) and 463.4(a). For example, if a dealer conveys that all vehicles of a certain nature or in a certain category are available at a particular offering price, but charges a higher offering price for any vehicle of that nature or in that category, the dealer has violated the Rule.

Other comments, including from a member of Congress and from dealership associations, raised concerns that the Commission's proposal would limit dealers from advertising rebates, discounts, or incentives of limited availability, including when qualifications for such rebates, discounts, or incentives are identified in the advertising, further contending that such a result would contradict prior FTC practice. Relatedly, commenters including an industry association questioned whether the Commission's proposal prohibited dealers from advertising additional vehicle prices, contending that such a result would conflict with the longstanding obligation under Federal law to disclose a vehicle's Manufacturer's Suggested Retail Price, or MSRP. The Commission notes, however, that the offering price disclosure requirement does not prevent dealers from presenting accurate and non-misleading additional information, including terms of limited availability, so long as the required offering price disclosure remains clearly and conspicuously presented to consumers.[286] If, however, a dealer's disclosure were to give consumers a net pricing impression that is contrary to that which is actually available, then the disclosure would violate § 463.4(a), and the related requirement under § 463.3(p).[287]

Some commenters, including dealership associations, generally concluded the Commission's proposed offering price definition, or its associated disclosure provision, were unnecessary, confusing, burdensome, or likely to hinder comparison shopping. Some commenters, for instance, contended that their respective States already prohibit misrepresenting price terms, rendering the Commission's proposal redundant. The Commission notes, however, that a simple disclosure of the offering price, using the same definition across States, addresses multiple issues, including: the promotion of prices based on dealer discounts, rebates, or other price reductions when such benefits are in fact subject to hidden or undisclosed restrictions that render them unavailable to typical customers; the concealment or omission of additional dealer charges, such as for document preparation fees, amounting to several hundred dollars; the advertisement of a price without disclosing material limitations or additional charges required by the dealer that are fixed and thus can be readily included in the price at the outset; and the inducement to pursue pricing offers that are not actually available or to pay more for a vehicle due to inadequate or nonexistent disclosures. Moreover, this disclosure and the associated definitions should produce the corollary benefit of increasing price competition among dealers, who will be able to compete on truthful, standard terms.[288] The Commission also concludes that the claim that its offering price disclosure requirement would limit comparison shopping appears to follow from the mistaken notion that the offering price disclosure prohibits dealerships from conveying accurate additional information to consumers, including information about rebates, discounts, or other limited-availability incentives.

Relatedly, some dealership association commenters contended there are areas of overlap, or potential conflict, with State law. Pursuant to § 463.9 of part 463, where it is possible for dealers to comply with both State law and the provisions of this regulation, or where State law affords greater consumer protection, part 463 will not displace existing State pricing or disclosure regimes. This addresses many of the commenters' concerns about State law. Some dealership associations, for instance, contend that their respective States require dealers to separately disclose a dealer document fee and not represent that the fee is required by the State, or that they allow dealers, with certain limitations, to incorporate rebates into an advertised price. Regarding document fees, dealers can simultaneously comply with part 463, which requires document fees to be included in the offering price unless they are ''required'' government charges, and with State law that permits but does not require document fees to be excluded from a vehicle's advertised price, or that requires disclosure of the amount of the document fee and that such a fee is not required by the State, by disclosing the offering price and any additional State-required information, such as the amount of the dealer document fee. Similarly, regarding rebates, in addition to the offering price, dealers may provide consumers with additional pricing information, including regarding rebates or other incentive pricing, so long as the offering price remains clear and conspicuous, and any additional information is truthful and non-misleading and otherwise complies with part 463 and existing law.

Another dealership association commenter urged the Commission to consider using an existing definition, including a State-law definition of ''sales price'' or the definition of ''cash price'' under the Truth in Lending Act's Regulation Z, in lieu of its proposed offering price definition.[289] The Commission notes that its offering price definition overlaps substantially with the commenter's suggested State-law ''sales price'' definition, which, according to the commenter, requires that a vehicle's advertised price be one at which ''the dealer must be willing to sell the motor vehicle . . . to any retail

[286] A number of dealership associations expressed a related concern that the Commission, through its offering price proposal, was somehow seeking to restrict competition between dealers to being only about the price of vehicles. The associations described other areas, beyond vehicle price, by which dealerships currently distinguish themselves (*e.g.,* their range of products and services; their service availability; the convenience of their locations; and the nature of their sales staffing and process). In response, the Commission notes that it has long recognized the importance of protecting competition across both price and quality metrics, including providing consumers with truthful, nondeceptive advertising. *See, e.g., Cal. Dental Ass'n* v. *Fed. Trade Comm'n,* 526 U.S. 756, 766–68 (1999) (affirming Commission exercise of law enforcement authority against industry guidelines that unlawfully restricted both price advertising and advertising relating to the quality of dental services). As noted, the offering price disclosure requirement does not prevent dealers from presenting accurate and non-misleading additional information, including information about any such distinguishing characteristics, so long as the offering price is presented clearly and conspicuously.

[287] For reference, § 463.3(p), which the Commission is finalizing, *see* SBP III.C.2(p), prohibits dealers from making material misrepresentations regarding ''[a]ny of the required disclosures'' under the Final Rule.

[288] *See* NPRM at 42023.

[289] Comment of Tex. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8102 at 29–30.

buyer''; which ''must'' include certain additional charges that are fixed and thus can be readily included in the price at the outset, including ''[d]estination and dealer preparation charges''; and which permits only certain categories of costs and charges to be excluded.[290] Based on the commenter's description, unlike the Commission's definition, this State-law definition permits the exclusion of fees ''allowed'' by law or those which the law has ''prescribed.'' [291] Again, the Rule permits only charges that the government *requires* the consumer to pay to be excluded from a vehicle's offering price, by defining ''Offering Price'' to allow only ''required Government Charges'' to be excluded. This difference from the State law described by the commenter, however, creates no conflict—a dealer governed by that State law will be able to comply with both requirements by disclosing an offering price that excludes only required government charges and includes allowable government charges.

Similarly, commenters have not demonstrated any actual conflicts between the proposed offering price definition and TILA's definition of ''cash price.'' [292] Dealers can comply with both requirements by disclosing an offering price that excludes only required government charges. And the Rule's definition addresses specific unfair and deceptive conduct in the auto marketplace. Were offering prices to exclude additional categories, the resulting disclosure provision at § 463.4(a) would permit dealers to lure consumers to dealership lots based on a price that is not actually the price the dealer would require the consumer to pay, a result that would require consumers to spend time traveling to the dealership and time on the lot to attempt to discover the true price, and that would place dealerships that choose to advertise the price truthfully at a competitive disadvantage.

Relatedly, commenters including an industry association contended that no additional regulation of pricing or credit and lease advertising was necessary beyond that provided by existing practice or by the Truth in Lending Act, the Consumer Leasing Act, and their implementing Regulations Z and M, and relatedly, that the Commission's offering price disclosure requirement duplicated, modified, or ignored such existing law. The disclosure requirement, however, is consistent with these existing legal obligations and does not disturb them; dealers can and should make the disclosures required under TILA and other laws as well as the offering price disclosure required by the Final Rule. The provision requires dealers to disclose simple and highly material pricing information under certain circumstances.[293] Providing consumers with accurate and timely pricing and financing information is critical, especially in the context of motor vehicle sales.[294]

Several commenters requested modifications to limit or expand the proposed definition of ''Government Charges,'' or clarification regarding this term's application to certain fees. For example, commenters, including a dealership association, urged the Commission to modify this proposed definition to include charges that are ''allowed to be charged but not required or imposed by a Federal, State, or local government agency, unit, or department.'' [295] One such commenter provided the example of certain registration and title charges, which it described as ''not necessarily imposed or mandatory fees'' and for which ''the amount may vary, depending on the county'' and the dealership, and within a governmentally determined range.[296] Regarding registration and title charges, to the extent such charges are required by a government agency, unit, or department, then they fall within the ''Government Charges'' definition as charges ''imposed by'' such agency, unit, or department. If, however, there are title, registration, or other fees, beyond any title and registration fees required by the government, that dealers are allowed, but not required, to charge, such fees do not fall within the ''Government Charges'' definition, and to the extent a dealer imposes such allowable charges on any consumer, such fees must be included in the offering price. Were the Commission to categorize such allowed, but not required, amounts as ''Government Charges,'' dealers would be allowed to exclude them from a vehicle's offering price but then require consumers to pay them anyway, thereby allowing dealers to lure consumers to their lots based on a price that is not actually the price the dealer would require the consumer to pay—a fact that consumers would not learn until they have spent time traveling to the dealership and time on the lot, if they learn this fact at all.[297] Further, under such circumstances, dealerships that choose to advertise the price truthfully would be at a competitive disadvantage. The Commission therefore declines to finalize the definition with such a modification.

Commenters, including a number of dealership associations, contended there were burdens associated with the Commission's offering price disclosure requirement, claiming it would cause dealers to require documenting every contact with a consumer in which a specific vehicle was mentioned, thereby lengthening the sales process and increasing the recordkeeping burden. Comments regarding recordkeeping requirements, including records that must be created and maintained under this Rule, are addressed in the section-by-section analysis of § 463.6. Here, the Commission notes that accurate pricing communication is already required by law. Section 463.4(a) does not require a complex or lengthy disclosure, is based on similar provisions already in operation in certain States,[298] will operate as a key safeguard in States without such provisions, and, as discussed in the following paragraphs, addresses deceptive and unfair conduct. Further, this offering price requirement will save consumers time when

[290] *Id.; see also* 43 Tex. Admin. Code 215.250(a), (b) (2023).

[291] Comment of Tex. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8102 at 29–30; *see also* 43 Tex. Admin. Code 215.250(b)(3) (2023).

[292] *See* 12 CFR 226.2(a)(9).

[293] The industry association commenter further contended that this provision would apply to dealers based on whether they have a service department, but this is incorrect, as explained in the analysis of the definition of '' 'Covered Motor Vehicle Dealer' or 'Dealer' '' in SBP III.B.2(f).

[294] *See, e.g.,* Buckle Up, *supra* note 63, at 5 (noting consumer confusion about how the vehicle price they were offered was determined and that consumers did not understand they could negotiate price); *id.* at 9 (observing add-on products or services, which typically increase a vehicle's purchase price, were ''the single greatest area of confusion'' in the study); Att'ys Gen. of 31 States & DC, Comment Letter on Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, Project No. P104811, Submission No. 558507–00112–1 at 5–6 (Apr. 13, 2012), *https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00112/00112-82927.pdf.*

[295] Comment of Tex. Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8102 at 14.

[296] *Id.*

[297] Indeed, as the Commission also noted in its NPRM, an entity that induces the first contact through false or misleading representation is liable under the FTC Act, regardless if the buyer later becomes fully informed. See, *e.g., Resort Car Rental Sys., Inc.* v. *Fed. Trade Comm'n,* 518 F.2d 962, 964 (9th Cir. 1975); *Fed. Trade Comm'n* v. *Gill,* 71 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001).

[298] For example, California and Wisconsin have similarly enacted laws that make it unlawful for dealerships to advertise a total price without including additional costs to the purchaser outside the mandatory fees such as tax, title, and registration fees. Cal. Veh. Code 11713.1(b), (c) (2023); Wis. Admin. Code. Trans. 139.03(3) (2023). In Louisiana, the advertised price must be the full cash price for which a vehicle will be sold to any and all members of the buying public. La. Admin. Code tit. 46, pt. V, 719 (2023).

shopping for a vehicle by requiring the provision of salient, material information early in the process and eliminating time otherwise spent pursuing misleading offers. For dealers already disclosing accurate pricing information upfront, this provision allows them to compete on an even playing field.

Another industry association commenter contended that, by requiring offering price to be disclosed when an advertisement references a specific vehicle or represents a monetary amount or financing term ''by implication,'' the Commission's disclosure requirement could apply to advertisements that merely list a dealer's website, on which specific vehicles and their prices appear. Under the Commission's proposal, an advertisement that does not expressly reference a specific vehicle or expressly refer to a monetary amount or financing term would not do so ''by implication'' solely by referring to a website, document, or other destination where such information may otherwise be available, absent evidence that the net impression of a reasonable consumer is that the advertisement implicitly references such terms.[299] The phrasing in the Commission's requirement—''expressly or by implication''—refers to the nature of the claims conveyed by a dealer's advertisement (*i.e.,* whether such claims are made expressly or by implication). For more than three decades, the Commission has explained express and implied claims as follows:

> Express claims directly state the representation at issue. Implied claims are any claims that are not express. They range on a continuum from claims that would be ''virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation.'' [300]

This same industry association commenter contended that its aforementioned concerns—that the disclosure requirement would prohibit dynamic pricing, and that the requirement would extend to advertisements simply by virtue of their referencing a dealer's website—would together cause dealers to curb their pricing representations in advertising, either by limiting such representations to a vehicle's MSRP or by factoring out pricing altogether. As previously discussed, these concerns appear to misunderstand either existing legal requirements or the fact that an offering price disclosure would operate consistent with those requirements. The Commission's requirement simply requires dealers to disclose an offering price and does not alter the current status quo on pricing accuracy. To the extent there is a concern that requiring accurate pricing information limits dealers to advertising MSRP or forgoing advertising pricing information altogether, such concerns apply equally under current law—including in States with pricing disclosure requirements that resemble the Commission's offering price disclosure requirement. The Commission, however, has not been presented with evidence suggesting that dealers will not want to distinguish themselves from other dealers on price, and will instead default to advertising a price that is offered by all of their competitors.

Another concern raised by this same industry association commenter was that, by requiring an offering price ''in the Dealer's first response'' to a consumer communication that references a specific vehicle or a monetary amount or financing term for any vehicle, the requirement would prohibit dealers from explaining the offering price and why it is being provided, and that as a result, consumers may understand the offering price to be non-negotiable. Under § 463.4, however, dealers continue to be permitted to communicate accurate additional information, including the availability of discounts or the dealer's willingness to negotiate, as long as the offering price disclosure remains clear and conspicuous.

The same industry association commenter asserted that mandating the disclosure of the offering price in connection with ''any communication with a consumer'' would result in excessive and non-responsive disclosures. The commenter provided the example of a consumer who contacts a dealership to ask whether the dealership has ''a silver [Ford] F–150 in stock,'' arguing that the Commission's proposal would require the dealer to respond with offering price information for each of the numerous (in the commenter's example, 40) silver F–150 vehicles the dealer has in stock. To begin, if the entire communication simply asks, ''Do you have a silver Ford F–150 in stock?,'' it does not concern a ''specific vehicle''; it concerns a group of vehicles—silver Ford F–150s—and, under § 463.4, the dealer is not required to disclose an offering price, so long as the dealer's reply does not reference either (1) a specific vehicle or (2) a monetary amount or financing term for *any* vehicle, whether a specific vehicle or a group of vehicles.[301] If, however, the dealer chooses to respond by discussing a specific vehicle—whether by describing that vehicle, referring to a stock or VIN number, or using other means—the dealer is required to disclose the offering price for that specific vehicle. If the dealer chooses to respond by discussing several specific vehicles, the offering price disclosure requirement applies for each such vehicle. Finally, the offering price disclosure requirement applies if the dealer's response references a monetary amount or financing term, such as a down payment or monthly payment amount, for a specific vehicle or a group of vehicles. This requirement applies only to the dealer's first response regarding the specific vehicle. It does not apply to subsequent communications about that specific vehicle.

The failure to disclose a vehicle's offering price in an advertisement or other communication that references a specific vehicle, or a monetary amount or financing term for any vehicle, is likely to cause substantial injury to consumers who waste time and effort pursuing offers that are not actually available or end up paying more for a vehicle than they expected or being subject to hidden charges.

Buying or leasing a vehicle is time-consuming and often the most expensive purchase a consumer makes without knowing the actual price of the product at the outset. Consumers can spend hours driving to a dealership.[302] Once at the dealership, it can then take several hours to days to finalize a transaction [303] before the consumer learns the price of the vehicle. And many consumers never learn the true price at all; part of the finalization process includes signing dense paperwork, where information regarding the price of the vehicle and charges for

[299] *See* FTC Policy Statement on Deception, *supra* note 42, at 2, 5 (describing the Commission's ''net impression'' standard for determining the meaning of an advertisement).

[300] *Kraft, Inc.,* 114 F.T.C. 40, 120 (1991) (quoting *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F. 2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987)).

[301] *See Any* (def. 1), Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/any* (defining ''any'' as ''one or some indiscriminately of whatever kind'').

[302] *See, e.g.,* Complaint ¶¶ 23–26, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022) (alleging that many consumers drive hours to dealerships).

[303] *See, e.g.,* Auto Buyer Study, *supra* note 25, at 15 (noting that the purchase transactions in the FTC's qualitative study often took 5 hours or more to complete, with some extending over several days); *Cf.* 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 6 (reporting average consumer time spent shopping for a vehicle at 14 hours, 53 minutes, including 1 hour, 49 minutes visiting dealerships/sellers).

other items is easily obscured, especially if consumers are not provided with baseline price information around which to anchor the lengthy, dense discussions and process. When consumers are not provided with such price information, they are susceptible to hidden charges such as ''junk fees'' or unnecessary add-ons that can cost consumers thousands of dollars and significantly increase their overall expense.[304] These hidden charges substantially injure consumers by increasing their total cost as well as their debt burden in the many instances where vehicle purchases are financed.[305]

Moreover, the consumer injury caused by the lack of price information is not reasonably avoidable. The dealer has sole control over pricing information and the timing of when it is provided to consumers. Even if the consumer learns of the price of the vehicle before finalizing the transaction, the consumer has already spent time and effort traveling to the dealer, on the dealership lot, and in the financing office, and for many, the immediate need for the vehicle for work, school, childcare, groceries, medical visits, and other vital household reasons makes it infeasible to start the process anew at a different dealership. Further, during the lengthy vehicle-buying process and in complex, dense paperwork, it is especially easy to hide or alter price information or include hidden charges when consumers are not provided with baseline price information around which to anchor the discussion of vehicles, monetary amounts, or financing terms.[306]

The injury to consumers from a lack of price information is not outweighed by benefits to consumers or competition from withholding this basic information. Instead, upfront information about the offering price protects consumers from lost time and effort, supracompetitive prices, and unexpected charges while increasing price competition among dealers, who should be able to compete on truthful, standard terms. The costs of providing price information—which the dealer determines and can calculate upfront—are minimal for dealers that are already advertising a specific vehicle, monetary amount, or financing term, especially when compared to the injury to consumers.

Thus, the failure to disclose a vehicle's offering price in an advertisement or other communication that references a specific vehicle, or a monetary amount or financing term for any vehicle is an unfair practice.

The Commission notes that § 463.4(a)(1) and (2) affects only dealers that are already advertising about specific vehicles or monetary amounts or financing terms; it does not affect businesses that do not expend funds on advertising specific vehicles, monetary amounts, or financing terms. The Commission will continue to monitor the market to assess whether this approach is sufficient to address the harms associated with a lack of price and charge information. If not, the Commission will revisit whether additional measures are necessary, such as requiring price information in all advertising, requiring total charge estimates, or prohibiting charges for additional items along with a vehicle sale.

Regarding deception, price is one of the most material pieces of information for a consumer in making an informed purchasing decision.[307] Yet, including as illustrated by the Commission's law enforcement efforts, it can be difficult for consumers to uncover the actual price for which a dealer will sell an advertised vehicle until visiting the dealership and spending hours on the lot. When an advertisement or other communication references a monetary amount or financing term, it is reasonable for a consumer to expect that those amounts and terms are available at other standard terms. If instead, for example, a dealer advertises a low monthly payment based on an unexpectedly long financing term or an unexpectedly high interest rate that results in a higher price than standard terms would have, then the consumer is lured to the dealership based on a misimpression of what they reasonably expect the total price to be.

If a dealer advertises a specific vehicle, it is reasonable for a consumer to expect to learn the true offering price of the vehicle upon visiting the dealership. Consumers are misled when dealers misrepresent or otherwise obscure price information or charge for items beyond the advertised vehicle during the long and complex sales, financing, and leasing process.[308]

If consumers knew that the true price was beyond what was expected or that the prices and charges were for unwanted items, that would likely affect their choice to visit one dealership over another dealership. Thus, misleading consumers about price information is material. *See, e.g., Fed. Trade Comm'n* v. *Windward Mktg., Inc.,* No. Civ.A. 1:96–CV–615F, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) (''[A]ny representations concerning the price of a product or service are presumptively material.'' (citing *Removatron Int'l Corp.,* 111 F.T.C. 206, 309 (1988));

[304] *See* Nat'l Consumer L. Ctr., ''Auto Add-Ons Add Up: How Dealer Discretion Drives Excessive, Arbitrary and Discriminatory Pricing'' (2017), *https://www.nclc.org/wp-content/uploads/2022/09/auto_add_on_charts.pdf;* Complaint ¶¶ 25, 27–28, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022) (alleging defendants charged thousands of consumers hundreds to thousands of dollars each for unauthorized add-ons, totaling in aggregate over $70 million since 2017); Complaint ¶¶ 59, 61, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging unauthorized add-on charges costing thousands of dollars).

[305] According to public reports, 81% of new motor vehicle purchases, and nearly 35% of used vehicle purchases, are financed. *See* Melinda Zabritski, Experian Info. Sols., Inc., ''Automotive Industry Insights: Finance Market Report Q4 2020'' at 4, *https://www.autofinancenews.net/wp-content/uploads/2021/03/2020-Q4-Auto-Finance-News-Industry-Pulse.pdf.*

[306] *See, e.g.,* Complaint ¶¶ 17–19, 44, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (dealers inflated the car price on paperwork in the middle of the sale without the consumer's knowledge or authorization, a practice they internally referred to as adding ''air money''); Complaint ¶¶ 24–27, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022) (alleging that defendants buried charges for add-ons in voluminous paperwork, making it difficult to detect).

[307] *See, e.g., Fed. Trade Comm'n.* v. *Windward Mktg., Inc.,* 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997)) (''[A]ny representations concerning the price of a product or service are presumptively material.''); *Thompson Med. Co., Inc.,* 104 F.T.C. 648, 817 (1984); *see also Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (''Information concerning prices or charges for goods or services is material, as it is 'likely to affect a consumer's choice of or conduct regarding a product.' '').

[308] Consumers who expect particular prices, based on the MSRP or Kelley Blue Book, are also misled when true pricing information is not disclosed upfront. *See, e.g.,* Individual commenter, Doc. No. FTC–2022–0046–1878 (''We ended up having to drive 3 hours to get the [vehicle we] wanted. Upon arriving to pickup the car we were told there was a 4300 increase over MSRP.''); Individual commenter, Doc. No. FTC–2022–0046–1690 (''It was only after five hours at the dealership that we discovered the dealer had added on a $3000 market adjustment and $3100 in other add-ons (nitrogen-filled tires, LoJack, paint protection) to MSRP.''). The average transaction price of a new vehicle exceeded the average manufacturer's suggested retail price (MSRP) for twenty consecutive months between 2021 and 2023. *See* Cox Auto., ''After Nearly Two Years, New-Vehicle Transaction Prices Fall Below Sticker Price in March, According to New Data from Kelley Blue Book'' (Apr. 11, 2023), *https://www.coxautoinc.com/market-insights/kbb-atp-march-2023/; see also* Edmunds, ''8 Out of 10 of Car Shoppers Paid Above Sticker Price for New Vehicles in January, According to Edmunds'' (Feb. 15, 2022), *https://www.edmunds.com/industry/press/8-out-of-10-of-car-shoppers-paid-above-sticker-price-for-new-vehicles-in-january-according-to-edmunds.html;* iSeeCars, ''10 New Cars Priced the Highest Over MSRP, Even as Peak Pricing Eases'' (Mar. 19, 2023), *https://www.yourerie.com/news/10-new-cars-priced-the-highest-over-msrp-even-as-peak-pricing-eases/* (finding the average new car price was 8.8% over MSRP).

Thompson Med. Co., Inc., 104 F.T.C. 648, 817 (1984)); *see also Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (''Information concerning prices or charges for goods or services is material, as it is 'likely to affect a consumer's choice of or conduct regarding a product.' '').[309]

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose the offering price in an advertisement or other communication that references, expressly or by implication, a specific vehicle or any monetary amount or financing term for any vehicle.

Furthermore, this provision also serves to prevent the misrepresentations prohibited by § 463.3—including misrepresentations regarding costs or add-ons—by requiring consumers to be told the true price of the vehicle in advertisements and other communications. It also helps prevent dealers from failing to obtain the express, informed consent of consumers for charges, as addressed by § 463.5(c).[310] Thus, the Commission is requiring dealers to disclose a vehicle's offering price when advertising or otherwise communicating about a specific vehicle or monetary amount or financing term for any vehicle. This provision allows consumers to compare offers based on the same price terms and to select dealers that truly offer the lowest price rather than dealers that advertise deceptively low prices but charge more. When price information in the market is distorted or concealed—especially in document- and time-intensive vehicle transactions—consumers are unable to effectively differentiate between sellers, and sellers trying to deal honestly with consumers are put at a competitive disadvantage.

For the foregoing reasons, and having considered the comments that it received on this proposed provision, the Commission is finalizing the offering price provision at § 463.4(a) with modifications to capitalize the defined term ''Vehicle'' in its singular, plural, and possessive forms, to correspond to the revised definition at § 463.2(e), and to add language clarifying that the provision is also prescribed for the purpose of preventing unfair or deceptive acts or practices defined in this Rule. The Commission is finalizing the corresponding ''Offering Price'' and ''Government Charges'' definitions in § 463.2 largely as proposed, with modifications to the ''Offering Price'' definition to conform with the defined term ''Vehicle'' and to clarify that dealers may, but need not, exclude required government charges from a vehicle's offering price, and a typographical modification to the ''Government Charges'' definition to include a serial comma for consistency.

(b) Add-On List

The Commission's proposed add-on list disclosure provision (proposed § 463.4(b)) required the disclosure, both online and at each dealership, of a list of all optional add-ons for which the dealer charges consumers and the price of each such add-on.[311] As proposed, if the price of the add-on varies based on the specifics of the transaction, the add-on list would have to include the range the typical consumer will pay.[312] Due to space constraints, dealer advertisements presented not online but in another format—such as in print, radio, or television—would not be required to include the add-on list, disclosing instead the website, online service, or mobile application where consumers can access the add-on list.[313]

Many commenters, including consumer advocacy organizations, supported the proposal to require dealers to provide consumers with clear, accurate pricing information for add-on products or services altogether in one list. Some commenters raised concerns that, without significant modification, the Commission's proposal to allow for the disclosure of price range information where the price of an add-on varies based on the specifics of the transaction would allow for significant abuses, including by permitting dealers to disclose ranges so broad they would be meaningless. Such commenters urged the Commission to modify its definition of ''Add-on List'' to require, where a price range is listed for a given add-on, the add-on list further indicate the low, median, and high prices charged to consumers for each such add-on over the preceding two years; or that the Commission require dealers to create individualized add-on lists for each vehicle sold, containing one fixed, non-negotiable price for each add-on. Relatedly, other commenters, including industry organizations, expressed concerns regarding the add-on list proposal, including that the proposal to allow for price range information was vague or confusing, and that certain aspects of the proposed definition, including the scope of add-ons covered, as well as the requirement to keep such add-on lists updated, would impose extensive economic burdens.

After careful review of the comments, the Commission has determined not to finalize its proposed add-on list provision (proposed § 463.4(b)). Here, the Commission believes its proposal would benefit from further review and refinement. The Commission nevertheless emphasizes that, under existing law, dealers are prohibited from misrepresentations regarding material information about any costs, limitation, benefit, or any other aspect of an add-on, and from charging for add-ons without obtaining the express, informed consent of the consumer—conduct which the Final Rule prohibits as well, including in §§ 463.3(b) and § 463.5(c). The Commission also emphasizes that, in addition to the Rule's prohibitions, industry guidance and effective self-regulatory efforts can serve a role in helping prevent problematic dealer behavior in this area. The Commission will continue to monitor the motor vehicle marketplace for issues pertaining to add-ons and will consider implementing additional measures in the future if it determines such measures are warranted to address deceptive or unfair acts or practices related to add-on products or services.

(c) Add-Ons Not Required

For optional add-on products or services, the Commission's proposed § 463.4(c) required dealers to disclose, when making any representation about

[309] Even if some consumers were not misled by the failure to disclose the offering price, to show deception under the FTC Act, ''the FTC need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense. . . .'' *Fed. Trade Comm'n* v. *Amy Travel Serv., Inc.,* 875 F.2d 564, 572 (7th Cir. 1989), *vacated in part on other grounds, Fed. Trade Comm'n* v. *Credit Bureau Ctr., LLC,* 937 F.3d 764 (7th Cir. 2019); *accord Fed. Trade Comm'n* v. *Stefanchik,* 559 F.3d 924, 929 n.12 (9th Cir. 2009).

[310] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

[311] To the extent any add-on charges are required by a dealership, and thus are not optional, such charges would have to be included in the offering price, pursuant to §§ 463.2(k) and 463.4(a).

[312] *See* NPRM at 42044 (noting, in the definition of ''Add-on List'' at proposed § 463.2(b) that ''[i]f the Add-on price varies, the disclosure must include the price range the typical consumer will pay instead of the price''); *see also Fed. Trade Comm'n* v. *Five-Star Auto Club, Inc.,* 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) (''at the very least it would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical Five Star participant''); Complaint ¶¶ 28–50, *Fed. Trade Comm'n* v. Universal City Nissan, Inc., No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging unlawful deception where a dealer's ads list prominent terms not generally available to consumers, including where those terms are subject to various qualifications or restrictions); Complaint ¶¶ 8–10, Progressive Chevrolet Co., No. C–4578 (F.T.C. June 13, 2016) (alleging advertised offer was deceptive because the typical consumer would not qualify for the offer).

[313] Working in tandem, proposed § 463.4(b)(1) and (2) would mean that dealers who engage in advertising and charge for optional add-ons must have a website, online service, or other mobile application by which to disclose an add-on list.

an optional add-on, that the add-on is not required and the consumer can purchase or lease the vehicle without the add-on. For the reasons discussed in the paragraphs that follow, the Commission is finalizing the required disclosure at § 463.4(c) largely as proposed. The Commission is capitalizing the defined term ''Vehicle'' to conform with the definition at § 463.2(e). The Commission also is adding language to the end of § 463.4(c) clarifying that the requirements in § 463.4(c) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and 463.5(c).''

A number of commenters, including a group of State attorneys general, supported this proposed requirement, contending that unscrupulous dealers have exploited the vehicle sales process to saddle consumers with unwanted add-on products or services, and that such a disclosure would importantly help consumers avoid discovering these additional charges only after completing the purchase, assenting to them because they believed the add-ons to be required in order to purchase the vehicle, or paying for them unknowingly because they never uncovered the charges. Many individual commenters also stressed the need for add-on disclosure requirements. For example:

- Salespeople such as myself are responsible for selling the car and all aftermarket/add-on products. This has put me in a unique position to see how these proposed regulations would impact automotive sales. I cannot stress enough my support for these new rules. . . . The payments calculated by management include add-ons, but the price of the add-ons and how they affect the payments are not shown. The add-ons ''packed'' in the first payment often include an extended warranty, GAP insurance, tire and wheel protection, an oil change package, a theft recovery device, and sometimes more depending on the situation.[314]
- Car buying is one of the most miserable consumer experiences in existence. Frankly, I'm disappointed that this issue hasn't been addressed decades ago. It's well past time that the deceptive practices that car dealers use to manipulate and take advantage of customers is made illegal. What other business can legally lie about the price of the product that they sell, and slip extra unwanted products into the deal that they don't reveal and won't remove upon request? These practices are arcane and unfair, especially considering the absurd cost of automobiles today. I wholeheartedly approve of what the proposed rules are attempting to accomplish. Please do not allow a powerful lobbying group to limit or change good legislation that benefits tens of millions of Americans who currently dread the car buying experience for far more reasons than just price.[315]
- . . . I am not against business making a profit, in fact most Americans understand businesses need to make money too, however most dealers will not disclose additional costs to the purchaser until it is time to sign paperwork for purchase. Rather than simply being upfront with what their desired price is and how much they make from the sale rather they are fed lines about ''common practices'', [sic] ''these are normal fees'' or simply not being forthright about additional costs on items only installed on location at the dealerships to drive the price up. Even more insulting is when buyer[s] ask to have options removed from the vehicle dealers stall or flat out refuse to do so.[316]
- It is about time something like this is brought up. This will have no effect on the honest dealers out there. . . . This will really help the consumer. . . . We will be able to compare apples to apples. You won't show up at the dealership with the lowest price only to find out that they have all these other fees that make them the least desirable of the choices. Also, adding stuff like pinstriping for large fees will come to an end. . . . I have no problem with a dealer making money. They are a business and have overhead. I have a problem when they try [to] gloss over everything they are trying to charge you for. This ruling needs to take effect. Anyone posting against it is someone working for a dealer. Like I mentioned before, if you are doing everything on the up and up, not only do you get good reviews and repeat business, but this ruling will not even effect [sic] you.[317]
- I also agree that Enhanced Informed Consent in F & I office is necessary. One of my cohort was almost coerced into non-equivalent decision-making scenarios in the finance office with their car purchases. The finance officer flat out ask[ed] them, ''did you want the 2 year, 30[,000] mile extended warrant[y], or the 4 year 50[,000] mile extended warranty?'' The wife sat there and asked, ''I'm confused. Do I HAVE to pick one of those?'' Her husband said, ''No, he's trying to trick you into buying one. You don't need any at all.'' They then promptly threatened to walk out and the finance manager came out and did their paperwork without further conflict.[318]

Several commenters offered support while also proposing that the Commission adopt additional measures to further ensure that consumers understand that optional add-ons are not required. One dealership group, for example, commenting in support of disclosures that optional add-ons are not required, recommended that dealers be required to include signage on their websites and in their showrooms or on their sales desks that set out both components of the Commission's proposal: that add-ons are not required, and that consumers may purchase or lease the vehicle without add-ons. Other commenters, including a consumer protection agency and a consumer advocacy organization, suggested that the Commission modify the language in proposed § 463.4(c) to strike the ''if true'' language, asserting that all add-ons should be optional and not required to consummate the sale or lease of a vehicle. At least one individual commenter recommended that the Commission prohibit dealers from pre-installing add-ons.

In response to these comments, the Commission notes that, were it to require signage stating, generally, that add-ons are optional, or to strike the ''if true'' language from this disclosure, it would cause consumers to be presented with information that may not be accurate in all circumstances. Some add-ons might already be installed on the vehicle or otherwise required by the dealer. As explained in SBP III.D.2(a) with regard to § 463.4(a), charges for such add-ons must be included in the vehicle's offering price.[319] In such cases, representing that add-ons are categorically optional would mislead

[314] Individual commenter, Doc. No. FTC–2022–0046–3693.

[315] Individual commenter, Doc. No. FTC–2022–0046–5268.

[316] Individual commenter, Doc. No. FTC–2022–0046–1365.

[317] Individual commenter, Doc. No. FTC–2022–0046–9883; *see also* Individual commenter, Doc. No. FTC–2002–0046–9632 (''I was told that GAP insurance was required to be included. . . . I [later] contacted and asked for copies of my contracts. On September 5 [the dealer] sent me an email with a credit contract attached. I am including it here. It says my monthly payment is over $370. It also shows the cash price as close to $17,000.00. I can also see it says the GAP is optional. I never saw this contract. I never signed this contract.'').

[318] Individual commenter, Doc. No. FTC–2022–0046–6816.

[319] In such cases, however, § 463.4(a) of the Final Rule requires these non-optional add-ons to be included in a vehicle's offering price; if the dealer requires the consumer to pay for them, they are part of the full cash price for which a dealer will sell or finance the vehicle to any consumer. *See* SBP III.D.2(a).

the consumer. Relatedly, by requiring that charges for mandatory items be included in the vehicle's offering price, the Final Rule allows dealers to customize the vehicles they are selling while protecting consumers by requiring dealers to disclose the offering price for such customized vehicles. Accordingly, the Commission declines to prohibit the practice of pre-installing add-ons in this Final Rule, but will continue to monitor the market to determine whether pre-installed add-ons require further regulation. At the same time, the Commission emphasizes that the protections contemplated here and elsewhere in this Final Rule prohibit dealers from obscuring price information and whether an add-on is optional, and further require dealers to obtain the express, informed consent of the consumer to charge a consumer for any add-on.

Additionally, several commenters indicated their support for the Commission's proposal while also recommending that the Commission consider further steps to protect consumers from deceptive or unfair practices pertaining to the inclusion of add-ons in consumer vehicle sales or leases. Some commenters, including a group of State attorneys general and a dealership association, requested that the Commission require dealers to disclose any mandatory add-ons and whether those add-ons are required in order to obtain financing, including by requiring such disclosure in an addendum sticker affixed to the motor vehicle. In response, the Commission notes that other provisions of the Final Rule prohibit misconduct in this area, including by requiring, at § 463.4(a), that charges for such add-ons must be included in the vehicle's offering price. While consumers may benefit from repeated or additional disclosures, each additional disclosure requirement would increase both the cost to comply with the regulation and the risk of crowding out other important information. Given these risks, the Commission declines to include additional requirements regarding the content or form of its add-on disclosure at § 463.4(c). The Commission will continue to monitor the market to gather additional information on this issue and will consider whether to modify or expand this or other sections in the future based on stakeholder experience with this provision and whether it effectively halts unlawful conduct.

Other commenters, including consumer advocacy organizations and consumer attorneys and advocates, urged the Commission to adopt a thirty-day ''cooling-off'' period for the sale of vehicle-related add-ons, similar to that required by the Commission for door-to-door and other off-premises sales,[320] which would grant consumers time to review the paperwork after the transaction, and to cancel unexpected or otherwise unwanted add-ons for a full refund. As explained in greater detail in the discussion of § 463.5(c), in SBP III.E.2(c), the Commission also has determined not to include in this Final Rule a ''cooling-off'' period in which add-on products or services may be canceled. In this regard, the Commission would benefit from additional information, including the length of time needed for such ''cooling off'' rights to be effective. The Commission may consider revisiting this decision in the future based on actual stakeholder experience with the provisions of the Final Rule and whether they effectively halt unlawful conduct.

Other commenters presented questions or critiques regarding this proposed disclosure. As with the Commission's proposed disclosures generally, some commenters, including an industry association and a dealership association, contended that existing requirements in a number of States to disclose that add-ons are optional make Federal regulation in this area unnecessary or contradictory. As described in detail in SBP III.D.1, the Commission first observes that the functioning of such standards demonstrates the practicability of its proposed disclosure that add-ons are not required. To the extent a State requires additional disclosures regarding add-ons, nothing prevents dealers from providing those disclosures as well as those required under part 463 so long as the State disclosures are not inconsistent with those required under part 463. To the extent there is truly an inconsistency between this part and State law, § 463.9 provides that part 463 will govern, but only to the extent of the inconsistency, and only if the State statute, regulation, order, or interpretation affords consumers less protection than does the corresponding provision of this part. Finally, a number of States do not have existing standards in this area; in such States, the Commission's disclosures operate as a key safeguard.

Commenters, including dealership associations, argued that dealers would develop and use an additional form to demonstrate compliance with this disclosure requirement, thereby burdening the vehicle sales and delivery process. The Commission begins by noting that any such steps are not required by part 463; on the contrary, the Commission structured this disclosure to provide dealers with flexibility, within the bounds of the law, to provide this essential information in a manner that is clear and conspicuous under the particular circumstances of their transactions. This requirement does not require a complex or lengthy disclosure, is based on similar provisions already in operation in certain States,[321] and for dealers already disclosing accurate add-on information, this provision requires no significant additional burden.

When making a representation about an add-on product or service, the failure to disclose that the add-on is not required and the consumer can purchase or lease the vehicle without the add-on, if true, is likely to cause substantial injury to consumers who end up paying more for a vehicle sales or lease transaction than they expected by being subject to charges of which they are not aware or which they believe are required because they were never told they could decline the charges.

Absent this information, consumers cannot reasonably avoid the injury of being charged for these products because they are not aware that they have an option to begin with. When consumers are presented with motor vehicle transaction documents that include a variety of charges, it is difficult to detect any charges that are added to the contract beyond those that are required or have been agreed upon, especially in a stack of lengthy, complex, highly technical, and often pre-populated documents, at the close of a long sales, financing or leasing process after an already-lengthy process of selecting the vehicle and negotiating over its price or payment terms. Consumers cannot reasonably avoid charges of which they are unaware, or regarding which they do not know they have a choice.

[320] *See* Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429.

[321] *See, e.g.,* California Car Buyer's Bill of Rights, Cal. Civ. Code 2981 (requiring dealers to provide a written list of specified items purchased and their effect on monthly payments, including GAP, theft deterrent devices, and surface protection products); Minn. Stat. 59D.06(b) (requiring any person offering a GAP waiver to disclose that the waiver is not required for a consumer to buy or lease the vehicle); Wash. Rev. Code. 48.160.050(9) (mandating that GAP waivers disclose that ''neither the extension of credit, the terms of the credit, nor the terms of the related motor vehicle sale or lease, may be conditioned upon the purchase of the waiver.''); La. Stat. Ann. 32:1261(A)(2)(a) (declaring it unlawful for a dealer to require, as a condition of sale and delivery, for a consumer to purchase ''special features, appliances, accessories, or equipment not desired or requested by the purchaser.'').

The injury to consumers from a lack of information about add-on optionality is not outweighed by benefits to consumers or competition from withholding this basic information. Instead, information about the optional nature of these products or services protects consumers from lost time and effort, supracompetitive transaction costs, and unexpected charges while increasing competition among dealers, who are able to compete on truthful, standard terms. Moreover, the cost of providing this threshold information is minimal, especially when compared to the injury to consumers, and providing such information is consistent with existing industry guidance.[322]

This provision addresses deceptive conduct as well. Throughout the lengthy vehicle sales, financing, or leasing process, dealers often discuss various different charges at various different times. Such charges include charges the government requires the consumers to pay and financing costs. Dealers then often present consumers a total amount to pay that differs from the advertised or sticker price. Given that some additional charges are required, if a dealer also discusses charges for items that are not required, such as optional add-ons, it is reasonable for consumers to believe that charges for such items are required. In the course of a lengthy transaction involving extensive negotiations, dealers can obscure such products and their associated charges in dense paperwork. Moreover, the omitted information is highly material: if consumers knew that a particular optional add-on was not required to purchase the vehicle, it would likely affect their choice about whether to purchase the add-on.[323]

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose, when making a representation about an add-on product or service, that the add-on is not required and the consumer can purchase or lease the vehicle without the add-on, if true. Further, this provision also serves to prevent the misrepresentations prohibited by § 463.3—including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle, or about any costs, limitations, benefits, or any other aspect of an add-on—by requiring consumers to be told whether represented add-ons are optional. It also helps prevent dealers from failing to obtain the express, informed consent of the consumer for charges, as addressed by § 463.5(c).[324] Thus, the Commission is requiring dealers to disclose, when making representations about add-ons, that the add-ons are not required and the consumer can purchase or lease the vehicle without the add-ons, if true.

For the foregoing reasons, and having considered all of the comments that it received on this proposal, the Commission is finalizing the required disclosure at § 463.4(c) largely as proposed, with the minor modifications of capitalizing the defined term ''Vehicle'' and clarifying that the requirements of § 463.4(c) also are ''prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and 463.5(c).''

(d) Total of Payments and Consideration for a Financed or Lease Transaction

Section 463.4(d) of the Commission's proposed rule required dealers, when making any representation about a monthly payment for any vehicle, to disclose the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled. If the total amount disclosed assumes the consumer will provide consideration, the proposed rule required dealers to disclose the amount of consideration to be provided by the consumer. For the reasons discussed in the following paragraphs, the Commission is finalizing the required disclosure at § 463.4(d) largely as proposed. The Commission is capitalizing the defined term ''Vehicle'' to conform with the definition at § 463.2(e), and making the minor grammatical correction of replacing the semicolon and the word ''and'' at the end of § 463.4(d)(1) with a period. The Commission also is adding language to the end of § 463.4(d), at newly designated (d)(3), clarifying that the requirements in § 463.4(d) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).''

A number of commenters, including consumer advocacy organizations, supported this proposed requirement, contending it would provide essential information to the consumer while not contributing to information overload, and noting the information to be disclosed would have been calculated by the dealer in the process of determining the proposed monthly payment. Many individual commenters also stressed the need for the Commission's proposal:

• Small businesses are a cornerstone of our economy. Automotive dealers, like other retailers, deserve to make a reasonable profit in order to maintain their physical plants, to purchase inventory, and to pay their staff. That being said, some auto dealers have for years used misleading and often out-and-out deceptive sales tactics (*i.e.,* lies) to generate sales. . . . Sometimes the unwary consumer may not even realize that the actual price differs from the quoted price, because the automobile finance agent speaks only in terms of monthly payments rather than the total cost. The consumer may not even realize that he or she has been ''taken'' until a friend with an amortization table runs the numbers.[325]

• At most dealerships, including the one I work at, when a customer asks to see figures on a car after a test drive, management goes out of their way to make sure the customer only sees the monthly payment. The typical numbers presented to the customer initially show the price of the car, the trade-in value, the down payment, and the monthly payment options in bold numbers at the bottom. The payments calculated by management include add-ons, but the price of the add-ons and how they affect the payments are not shown. . . . Compounding this issue of hidden add-ons is that salespeople are instructed to figure out the customer's budget beforehand (*e.g.,* $450 per month). If the monthly payment with the car and add-ons comes out to be less than $450 per month, management will often raise the price of the add-ons to get the payment to $450 or even slightly above.[326]

• I wholeheartedly support the proposed regulation changes for car dealerships and the car buying process.

[322] *See* Nat'l Auto. Dealers Ass'n et al., ''Voluntary Protection Products: A Model Dealership Policy'' 4 (2019), *https://www.nada.org/regulatory-compliance/voluntary-protection-products-model-dealership-policy* (stating dealerships should ''prominently display to customers a poster stating that [add-on products or services] offered by the dealership are optional and are not required to purchase or lease a vehicle or obtain warranty coverage, financing, financing on particular terms, or any other product or service offered by the dealership. . . .'').

[323] *See, e.g., Fed. Trade Comm'n.* v. *Windward Mktg., Inc.*, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997)) (''[A]ny representations concerning the price of a product or service are presumptively material.''); *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 817 (1984); *see also Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (''Information concerning prices or charges for goods or services is material, as it is 'likely to affect a consumer's choice of or conduct regarding a product.' '').

[324] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

[325] Individual commenter, Doc. No. FTC–2022–0046–1216.

[326] Individual commenter, Doc. No. FTC–2022–0046–3693.

As an average consumer who has bought 3 vehicles with financing and 2 without, I can see the obvious benefit these proposed regulations would have on the car buying process. The vast quantities of paperwork and add [-]ons make it easy for car dealers to switch things around to their benefit. I had one dealership . . . change the term of my auto loan from 72 to 84 months in the middle of reprinting the final sales sheet because of another obvious error in the first copy. In the midst of all the distractions and misdirection going on, [I] didn't notice [']til[l] after the fact. I felt powerless and cheated. . . .[327]

- There is no reason that buying a car has to be a chore and so ambiguous on price. The dealer was also so twisted up on getting me to focus on the monthly payment and not the total price of the car and that is where they were able to sneak the price up. Practices like this are also why people have such a disdain for purchasing a new/used car.[328]
- I have experienced many of the ''typical'' tactics that one hears about when negotiati[ng] with an automobile dealership, like the salesperson always wanting to talk about the monthly payment and never the actual trade-in price and sales price. . . . I agree that the whole car buying process could be made easier and I see no reasons that any fair and honest car dealership would object to these proposed changes/rules as they, in my estimation are all things that a fair and honest car dealer should be doing anyway. The only car dealers that should be objecting to these new rules should be the unscrupulous dealers.[329]
- When buying a car dealers try to negotiate the monthly payment, so the actual total cost is hidden from the buyer until they get into the ''financing office'' where all kinds of unexpected add-ons are sprung on the consumer.[330]
- I am trying to buy a new car, from the factory, with no modifications or alterations, is it so much to ask for? The process of figuring out the price of the car is impossible. The sales people are all about the monthly payment, when I asked them what the car price is the answer is always what payment are you looking for.[331]
- They only want to gain the amount you can be ''comfortable'' on your monthly payment so that they can stretch out the term and hammer you with hidden fees and other expenses you won[']t be able to see right away.[332]
- Dealerships always want you to come in so they can manipulate you into a car you can[']t afford and pay for things you don't need by hiding them in a monthly payment.[333]
- If we had to do our grocery shopping the same way dealers want us to buy a car, most Americans would starve before sunset. ''What kind of monthly payment are you looking for in a banana?'' is a conversation I should never be forced to have. . . .[334]

One individual commenter requested that the Commission make clear that handwritten negotiation notes made by a dealer would trigger the requirement that this proposed disclosure be made in writing.[335] In response, the Commission affirms such representations have been made ''in writing,'' [336] and thus, where dealers represent a monthly payment in such notes, this provision requires them to provide the disclosures in § 463.4(d) in writing.

Other commenters, including industry associations and individual commenters, questioned whether the proposal would require a disclosure in every place a monthly payment appears on a dealer's website, or otherwise would be difficult or infeasible given the frequency with which dealers provide consumers with monthly payment information, suggesting that such a requirement could either overwhelm consumers or dissuade dealers from providing monthly payment information, or arguing [337] that the proposal overlapped with other laws such as the Truth in Lending Act or the Consumer Leasing Act. Regarding monthly payment amounts appearing more than once or in multiple places, the Commission notes that, as proposed, this section would require disclosure of the total purchase or lease amount for a vehicle including any assumed consumer-provided consideration, and only when making a representation about the vehicle's monthly payment amount; it would not require a complex or lengthy disclosure. Consumers shop for vehicles and interact with online interfaces, and other advertising in many different ways; thus, it is important for this simple disclosure to accompany a monthly payment representation however a consumer might encounter it. Moreover, the Commission has taken into account existing disclosure obligations.[338] Monthly payment amounts for motor vehicle sales or leases constitute so-called ''triggering terms'' under the Truth in Lending Act, the Consumer Leasing Act, and their implementing Regulations Z and M. As such, dealers currently providing such information, including on their websites or other online interfaces, are bound by existing laws that require providing consumers with additional terms in a clear and conspicuous way: in the case of vehicle credit transaction offers, this includes the terms of repayment, which reflect the repayment obligations over the full term of the loan; [339] in the case of vehicle lease offers, this includes the number, amounts, and due dates or periods of scheduled payments under the lease.[340] The Commission's disclosure requirement takes into account these existing obligations, requiring, specifically: the total amount the consumer will pay to purchase or lease the vehicle at a represented monthly payment amount including any assumed consumer-provided consideration. Similarly, regarding the feasibility of providing this disclosure as often as dealers provide consumers with monthly payment information: once dealers choose to make a representation about a monthly payment, they are capable of disclosing a total of payments for the consumer based on the same inputs needed to arrive at that voluntary monthly payment representation.

The Commission further notes that, in the event a monthly payment is already being disclosed, the associated total of payment would be calculated with the same financing or leasing estimates used

[327] Individual commenter, Doc. No. FTC–2022–0046–5567.

[328] Individual commenter, Doc. No. FTC–2022–0046–2176.

[329] Individual commenter, Doc. No. FTC–2022–0046–4034.

[330] Individual commenter, Doc. No. FTC–2022–0046–4911.

[331] Individual commenter, Doc. No. FTC–2022–0046–5958.

[332] Individual commenter, Doc. No. FTC–2022–0046–8847.

[333] Individual commenter, Doc. No. FTC–2022–0046–6405.

[334] Individual commenter, Doc. No. FTC–2022–0046–3860.

[335] Individual commenter, Doc. No. FTC–2022–046–9469 at 6–7.

[336] *See, e.g., Writing,* Black's Law Dictionary (11th ed. 2019) (defining ''writing'' as ''[a]ny intentional recording of words in a visual form, whether in handwriting, printing, typewriting, or any other tangible form that may be viewed or heard with or without mechanical aids.''); *cf.* Fed. R. Evid. 1001(a) (defining ''writing'' as letters, words, numbers, or their equivalent set down in any form'').

[337] These association commenters made these contentions regarding the monthly payment disclosures at both § 463.4(d) and (e). The Commission responds to these contentions in this section.

[338] One industry commenter, in expressing concern that § 463.4(d) and (e) may conflict with Regulations Z and M, questioned whether the FTC coordinated with the Federal Reserve Board. Several Senators similarly questioned whether the FTC consulted with the Federal Reserve Board, CFPB, or other agencies. Although the Commission cannot comment on specific interactions, it coordinates regularly with other Federal agencies, including the Federal Reserve Board and the CFPB.

[339] *See* 12 CFR 1026.24(b), (d)(2)(ii).

[340] *See* 12 CFR 1013.7(b), (d)(2)(iii).

to calculate the monthly payment. Dealers already must be prepared to calculate such a total to satisfy their obligations under TILA, the CLA, or their implementing regulations.[341]

Regarding § 463.4(d)'s similarity to existing laws, as discussed previously, this provision is indeed consistent with other laws, and commenters have not indicated how providing truthful information about total payment amounts along with information they already provide about monthly payment amounts would unduly burden them or harm consumers, or how providing such information in writing before providing consumers with the contract, if they are already providing monthly payment information in writing prior to the contract, would do so.

Some dealership associations described certain elements of the proposal as vague or unclear, requesting that the Commission clarify its use of the term ''by implication'' with regard to a monthly payment, or alternatively, that the Commission omit the terms ''any'' (as it pertains to ''any representation''), ''by implication,'' and ''indirectly'' from the proposed disclosure provision.[342] Regarding the use of the term ''by implication'' with regard to a monthly payment, as discussed in the section-by-section analysis of § 463.3 in SBP III.C with respect to the prohibition on express or implied misrepresentations, the Commission notes that such language is consistent with longstanding law, and given that representations can mislead reasonable consumers even without making express claims, the provision could be rendered meaningless without it.[343] Variations of the phrase ''expressly or by implication'' appear frequently in existing Commission guides and regulations,[344] and implied claims are treated extensively in the longstanding FTC Policy Statement on Deception, which the Commission issued in 1983 to provide guidance to the public on the meaning of deception.[345] Furthermore, this language serves to help ensure that dealers may not avoid this disclosure requirement by making only implied reference to monthly payments, including by referring to a monthly payment amount that is not explicitly identified as such, or by referring to a regular periodic payment made on a different installment basis (*e.g.,* a biweekly payment) to indirectly illustrate a consumer's monthly payment obligations.

These same reasons also counsel against deleting the terms ''any'' and ''indirectly'' from this proposed disclosure provision. To begin, one dealership association commenter suggested deleting these terms from the regulatory text, but did not explain the nature of its specific concern regarding its use of the term ''any,'' instead claiming generally that the terms with which the commenter took issue were ''broad,'' ''vague,'' and ''imprecise.'' As proposed, the Commission's total payments disclosure would be required when a dealer makes ''any representation . . . about a monthly payment for any vehicle.'' These disclosure circumstances are markedly similar to those under Regulation Z and Regulation M: Regulation Z requires the disclosure of additional payment terms when ''any'' of a number of terms is set forth, including ''[t]he amount of *any* payment''; [346] Regulation M similarly requires the disclosure of additional terms when ''any'' of a number of items is stated, including ''[t]he amount of *any* payment.'' [347] The use of the term ''any'' is consistent with existing law, and thus is not confusing or impracticable. Furthermore, as with representations made ''by implication,'' the Commission has a longstanding practice of regulating representations made ''indirectly'' in the same manner as those made directly,[348]

[341] As is currently the case under Federal law and the Final Rule, the terms must be the terms available to the typical consumer. *See, e.g., Fed. Trade Comm'n* v. *Five Star Auto Club*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) (''[A]t the very least it would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical Five Star participant.''). This is consistent with prior FTC enforcement actions. *See, e.g.,* Complaint ¶¶ 48–53, 82–84, *Fed. Trade Comm'n* v. *Universal City Nissan, Inc.*, No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging unlawful deception where a dealer's advertisements list prominent terms not generally available to consumers, including where those terms are subject to various qualifications or restrictions); Complaint ¶¶ 8–10, *Progressive Chevrolet Co.*, No. C–4578 (F.T.C. June 13, 2016) (alleging advertised offer was deceptive because the typical consumer would not qualify for the offer).

[342] One commenter requested clarification or deletion of ''any,'' ''by implication'' and ''indirectly'' from § 463.4(c) and (e) for the same reasons it articulated with regard to § 463.4(d): that the terms are too vague. The explanation provided in the text pertains to these sections as well.

[343] The FTC Policy Statement on Deception and FTC cases make clear that both express and implied claims can be deceptive. *See, e.g., ECM Biofilms, Inc.* v. *Fed. Trade Comm'n,* 851 F.3d 599 (6th Cir. 2017) (affirming Commission's finding that an additive manufacturer's unqualified biodegradability claim conveyed an implied claim that its plastic would completely biodegrade within five years); *POM Wonderful LLC,* Doc. No. C–9344 (F.T.C. Jan. 10, 2013) (Opinion of the Commission), *generally aff'd by POM Wonderful, LLC* v. *Fed. Trade Comm'n,* 777 F.3d 478 (D.C. Cir. 2015) (finding that company's advertisements would reasonably be interpreted by consumers to contain an implied claim that POM products treat, prevent, or reduce the risk of certain health conditions and for some ads that these effects were clinically proven); *Kraft, Inc.* v. *Fed. Trade Comm'n,* 970 F.2d 311 (7th Cir. 1992) (affirming finding of deception where Kraft advertisements juxtaposed references to the milk contained in Kraft singles and the calcium content of the milk, the combination of which implied that each Kraft single contained the same amount of calcium as five ounces of milk). Further, to be considered reasonable, the interpretation or reaction does not have to be the only one; when a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation. *See* FTC Policy Statement on Deception, *supra* note 42, at 3. Further, an interpretation will be presumed reasonable if it is the one the respondent intended to convey. *Id.*

[344] *See, e.g.,* Telemarketing Sales Rule, 16 CFR 310.3(a)(2) (prohibiting ''[m]isrepresenting, directly or by implication, in the sale of goods or services'' a list of ten categories of material information); 16 CFR 310.2(o) (defining ''debt relief service'' as any program or service ''represented, directly or by implication, to renegotiate, settle, or in any way alter'' certain terms); 16 CFR 310.5(a)(2) (requiring telemarketers to keep records of certain prize and prize-recipient information ''for prizes that are represented, directly or by implication, to have a value of $25.00 or more''); Business Opportunity Rule, 16 CFR 437.1(c) (defining a ''(b)usiness opportunity'' as a commercial arrangement in which, among other criteria, ''[t]he seller, expressly or by implication, orally or in writing, represents that'' it will provide, *inter alia,* business locations, outlets, accounts, or customers); Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436.1(e) (defining ''(f)inancial performance representation'' as any representation to a prospective franchisee that states, ''expressly or by implication, a specific level or range'' of sales, income, or profits); Military Credit Monitoring Rule, 16 CFR 609.3(e) (describing as prohibited materials those that ''expressly or by implication'' represent certain ''interfering, detracting, inconsistent, and/or undermining'' information); Rules and Regulations Under Fur Products Labeling Act, 16 CFR 301.14 (requiring an ''unknown'' origin disclosure when ''no representations are made directly or by implication'' regarding the origin of used furs); 16 CFR 301.18 (regulating the ''passing off'' of domestic furs as imported by prohibiting labeling, invoicing, or advertising that ''represent[s] directly or by implication'' that such furs have been imported); 16 CFR 301.43 (regulating the use of deceptive trade or corporate names by prohibiting any ''representation which misrepresents directly or by implication'' certain information); Power Output Claims for Amplifiers Utilized in Home Entertainment Products, 16 CFR 432.1(a) (defining the regulation's scope when certain amplifier features or characteristics are ''represented, either expressly or by implication, in connection with the advertising, sale, or offering for sale'').

[345] *See* FTC Policy Statement on Deception, *supra* note 42, at 2.

[346] 12 CFR 1026.24(d) (emphasis added).

[347] 12 CFR 1013.7(d) (emphasis added).

[348] *See, e.g.,* Business Opportunity Rule, 16 CFR 437.6 (prohibiting ''any seller, directly or indirectly through a third party'' from engaging in certain prohibited practices); Credit Practices Rule, 16 CFR 444.2 (prohibiting as unfair ''a lender or retail installment seller directly or indirectly'' taking or receiving certain obligations from a consumer); 16 CFR 444.3 (prohibiting as deceptive ''a lender or retail installment seller, directly or indirectly'' misrepresenting cosigner liability, and prohibiting as unfair ''a lender or retail installment seller, directly or indirectly'' obligating a cosigner under certain circumstances); 16 CFR 444.4 (prohibiting as unfair the act or practice of ''a creditor, directly or indirectly'' levying or collecting certain late charges); Telemarketing Sales Rule, 16 CFR 310.3(a)(3) (prohibiting as deceptive the act or practice of ''[c]ausing billing information to be submitted for payment, or collecting or attempting

Continued

and it does so to help ensure that its requirements are effective and not easily avoided. The Commission thus declines to modify their usage in § 463.4(d).

Some commenters, including a dealership association, questioned whether the disclosure requirement would require dealers to obtain individuals' consumer reports before providing monthly payment information. In response, the Commission notes that § 463.4(d) does not alter the status quo regarding the information a dealer must have in order to represent a monthly payment amount. As previously discussed, this provision does not require disclosure of a monthly payment; instead, if a dealer chooses to represent a monthly payment amount, § 463.4(d) requires a corresponding disclosure of ''the total amount the consumer will pay to purchase or lease the vehicle *at that monthly payment.*'' As previously explained in detail, dealers are capable of disclosing a total of payments for the consumer based on such voluntary monthly payment representations. Furthermore, to the extent a dealer may be providing consumers with estimated monthly payment information, the dealer may use the same assumptions used for estimating the monthly payment in order to determine the total of payments. Further, as is required under other law and this Rule, the dealer must refrain from deception, including by avoiding assumptions that the consumer would not reasonably expect or for which the consumer would not reasonably qualify.[349]

When making a representation, expressly or by implication, directly or indirectly, about a monthly payment for any vehicle, the failure to disclose the total amount the consumer will pay, inclusive of any consideration, to purchase or lease the vehicle at that monthly payment after making all payments as scheduled is likely to cause substantial injury to consumers who waste time and effort pursuing offers that are not actually available at reasonably expected terms; or who pay more for a vehicle sales or lease transaction than they expected by being subject to hidden charges or an unexpected down payment or trade-in requirement; or who are subject to the higher financing or leasing costs and greater risk of default associated with an unexpectedly lengthy loan or lease term. Moreover, when a consumer pays for his or her vehicle over a longer period of time, there is an increased likelihood that negative equity will result when the consumer needs or wants to purchase or lease another vehicle, because a vehicle's value tends to decline faster than the amount owed.[350] Longer motor vehicle financing term lengths also have higher rates of default, potentially posing greater risks to both borrowers and financing companies.[351] Even if a consumer eventually learns the true total payment, or later learns that the terms being discussed are based on a previously undisclosed requirement that the consumer provide consideration, such as a down payment, the consumer cannot recover the time spent pursuing the offer that the consumer had expected.

The injury caused by the failure to disclose the total amount and consideration is not reasonably avoidable. As the Commission has observed previously, withholding total payment information enables dealers to focus consumers on the monthly payment amount in isolation. Under such circumstances, dealers may add unwanted, undisclosed, or even fictitious add-on charges more easily, since consumers may not notice the relatively small changes an add-on charge makes when secreted within a monthly vehicle payment, despite the fact that such hidden charges can cost a consumer more than a thousand dollars over the course of an auto financing or lease term.[352] The absence of information concerning the total of payments—which is within the sole control of the dealership—also enables dealers to use claims regarding monthly payment amounts to falsely imply savings or parity between different offers where reduced monthly payments increase the total vehicle cost due to an increased payment term or annual percentage rate.

The injury to consumers from a lack of total payment information is not outweighed by benefits to consumers or competition from withholding this basic information. Instead, the burden of disclosing this information—which the dealer determines and can calculate upfront—is minimal for dealers who are already making representations about a monthly payment for a vehicle, especially when compared to the injury to consumers.

Regarding deception, as detailed in the NPRM and in this SBP, cost is one of the most material pieces of information for a consumer in making an informed purchasing decision.[353] Yet it can be difficult for consumers to uncover the actual costs, and their

to collect payment for goods or services or a charitable contribution, directly or indirectly'' without express verifiable authorization); 16 CFR 310.4(a)(7) (prohibiting as abusive the act or practice of ''[c]ausing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor''); Mail, internet, or Telephone Order Merchandise Rule, 16 CFR 435.1(f) (defining ''Telephone'' as ''any direct or indirect use of the telephone to order merchandise. . . .''); Preservation of Consumers' Claims and Defenses, 16 CFR 433.2 (prohibiting as an unfair or deceptive act or practice ''for a seller, directly or indirectly'' to take or receive a consumer credit contract which does not contain the Commission's ''Holder Rule'' provision); Prohibition of Energy Market Manipulation Rule, 16 CFR 317.3 (declaring ''[i]t shall be unlawful for any person, directly or indirectly'' to engage in certain energy market manipulation practices); Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 CFR 308.7(i) (declaring that regulated persons may not ''report or threaten directly or indirectly to report adverse information'' on a consumer report under certain circumstances).

[349] Importantly, as is the case under current law, a dealer may not mislead the consumer about the likelihood of qualifying for any particular credit or leasing terms in the course of providing this disclosure. Generally speaking, such deception is less likely where the dealer communicates to the consumer any assumptions it may have made, along with the basis for any such assumptions, in a manner in which the consumer understands this information.

[350] Buckle Up, *supra* note 63, at 7.

[351] Consumer Fin. Prot. Bureau, ''Quarterly Consumer Credit Trends: Growth in Longer-Term Auto Loans'' 7–8 (Nov. 2017), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-trends_longer-term-auto-loans_2017Q2.pdf; see also* Zhengfeng Guo et al., Off. of the Comptroller of the Currency, ''A Puzzle in the Relation Between Risk and Pricing of Long-Term Auto Loans'' 2, 4–5, 20 (June 2020), *https://www.occ.gov/publications-and-resources/publications/economics/working-papers-banking-perf-reg/pub-econ-working-paper-puzzle-long-term-auto-loans.pdf* (finding motor vehicle financing with six-plus-year terms have higher default rates than shorter-term financing during each year of their lifetimes, after controlling for borrower and loan-level risk factors).

[352] *See* Auto Buyer Study, *supra* note 25, at 14 (''[T]he dealer can extend the maturity of the financing to reduce the effect of the add-on on the monthly payment, obscuring the total cost of the add-on''); Auto Buyer Study: Appendix, *supra* note 66, at 229, 233 (Study participant 457481) (dealership pitching add-ons at the end of the negotiation, and in terms of consumer's monthly price); Auto Buyer Study: Appendix, *supra* note 66, at 701 (Study participant 437175) (dealership pitching add-ons in terms of monthly price); *see also* Complaint ¶¶ 12–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.*, No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging dealership included deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 21–28, *Fed. Trade Comm'n* v. *Ramey Motors*, No. 1:14–cv–29603 (S.D. W. Va. Dec. 11, 2014) (alleging dealer emphasized attractive terms such as low monthly payments but concealed substantial cash down payments or trade-in requirements); Complaint ¶¶ 38–46, *Fed. Trade Comm'n* v. *Billion Auto, Inc.*, No. 5:14–cv–04118–MWB (N.D. Iowa Dec. 11, 2014) (alleging dealer touted attractive terms such as low monthly payments but concealed significant extra costs).

[353] *See, e.g., Fed. Trade Comm'n* v. *Windward Mktg., Inc.,* No. Civ.A. 1:96–CV–615F, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) (''[A]ny representations concerning the price of a product or service are presumptively material.''); *Removatron Int'l Corp.,* 111 F.T.C. 206, 309 (1988) (''The Commission presumes as material express claims and implied claims pertaining to a product's . . . cost.'' (citing *Thompson Med. Co., Inc.,* 104 F.T.C. 648, 817 (1984)).

actual associated terms, for which a dealer will sell or lease an advertised vehicle until visiting the dealership and spending hours on the lot. When an advertisement or other communication references a monetary amount or financing term, it is reasonable for a consumer to expect that those amounts and terms are available for a vehicle at other standard terms, and, in the absence of information to the contrary, that no down payment or other consideration is required. If instead, for example, a dealer advertises a low monthly payment based on an unexpectedly long financing term or unexpectedly high interest rate that results in a higher total payment than standard terms would have yielded, or based on an expected but undisclosed down payment or other consideration to be provided by the consumer, the consumer will be induced to visit the dealership based on a misimpression of what they reasonably expect the total payment to be.

If consumers knew that the true terms were beyond what was expected, or their transaction included charges for unwanted items, that would likely affect their choice to visit a particular dealership over another dealership. Thus, misleading consumers about cost information is material. A lack of total payment information therefore is likely to affect a consumer's decision to purchase or lease a particular vehicle and is material, and paying an increased total cost causes substantial consumer injury.

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose when making any representation about a monthly payment for any vehicle, the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled, inclusive of assumed consideration. Further, this provision also addresses the misrepresentations prohibited by § 463.3—including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle—by requiring consumers to be provided with the total payment amount associated with any represented monthly payment amount. It also helps prevent dealers from failing to obtain the express, informed consent of the consumer for charges, as required by § 463.5(c).[354] To address these unfair or deceptive acts or practices, the Commission is requiring dealers to disclose, when making any representation about a monthly payment for any vehicle, the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all payments as scheduled, inclusive of assumed consideration. As with a vehicle's price, when cost information in the market is distorted or concealed—especially in document- and time-intensive vehicle transactions—consumers are unable to effectively differentiate between sellers, and sellers trying to deal honestly with consumers are put at a competitive disadvantage.

For the foregoing reasons, and having considered all of the comments that it received, the Commission is finalizing the required disclosure at § 463.4(d) largely as proposed, with the minor modifications of capitalizing the defined term ''Vehicle,'' substituting a period for a semi-colon and the word ''and'' at the end of § 463.4(d)(1), and clarifying that the requirements of § 463.4(d) also are ''prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).''

(e) Monthly Payments Comparison

Proposed § 463.4(e) required dealers, when making any comparison between payment options that includes discussion of a lower monthly payment, to disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true. For the reasons discussed in the following paragraphs, the Commission is finalizing the required disclosure at § 463.4(e) largely as proposed. The Commission is capitalizing the defined term ''Vehicle'' to conform with the definition at § 463.2(e). The Commission also is adding language to the end of § 463.4(e) clarifying that the requirements in § 463.4(e) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).''

A number of institutional commenters supported such a provision, emphasizing that it would provide an appropriate amount of helpful information and help make the true terms of a car deal much clearer to consumers. Many individual commenters also stressed the need for the Commission's proposal:

- My car buying experience involving dealers has include [sic] many of the issues identified, such as: . . . Negotiating a 4 year loan with a known loan payment (did math prior to final steps). Presented paperwork with a similar but lesser monthly payment. Dealer had changed terms to 5 year loan without open disclosure. Happy to hear, ''the bank gave you a better rate, you got a smaller payment,'' almost didn't catch what they'd done.[355]
- I have purchased about 10 new vehicles in my lifetime. . . . They prey on monthly payments as a tool, saying they can lower the monthly payment but not telling customers they added months or years to the term. Anything that forces them to be honest is a great justice for consumers![356]
- Sometimes, when you are in negotiations with a car dealer, they engage in deceptive practices by lowering your monthly payment amount without telling you how they lowered it. They may have increased your down payment or increased your interest rate or increased your term of the loan. This can lead [t]o much higher costs for the consumer. I had reached an agreement with a dealer to lower my monthly payments, but what they didn't tell me until I got into the F & I manager's office is that my deal [was] for 6 years, not 4, and they increased my interest rate.[357]
- . . . I was quoted a payment at 72 months with adding aftermarket warranty but come to find out they extended my term to 76 months in order to meet what I wanted to pay monthly. I did not find this out until after I bought the car. Very dishonest dealership. This last minute bait and switch has to stop.[358]
- I purchased a truck from a Tennessee truck dealer. After agreeing on a monthly payment of $920 for 72 months, I travelled to the dealership to complete the purchase, but the finance office changed the terms to 84 months with the same monthly payment, effectively adding $11,000 to their profit![359]
- I just want to walk in to a dealership, find a car that fits my needs and buy it. And what is up with these RIDUCULOUSLY [sic] long loan terms? 72 MONTHS? If someone cannot afford a car dealers shouldn't extend the loan, they should steer them to a more affordable car![360]

The Commission received numerous comments relating to the scope and

[354] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

[355] Individual commenter, Doc. No. FTC–2022–0046–0141.

[356] Individual commenter, Doc. No. FTC–2022–0046–0985.

[357] Individual commenter, Doc. No. FTC–2022–0046–1652.

[358] Individual commenter, Doc. No. FTC–2022–0046–7569.

[359] Individual commenter, Doc. No. FTC–2022–0046–0115.

[360] Individual commenter, Doc. No. FTC–2022–0046–0050.

terms of its proposed monthly payments comparison disclosure. A number of institutional and individual commenters urged the Commission to require that such disclosures uniformly be provided to consumers in writing. The Commission agrees with commenters that many monthly payment comparisons happen verbally, in the course of discussions with consumers. As proposed, the Commission's monthly payment comparison disclosure made clear that such discussions are covered, and that dealers would be required to inform consumers in the course of such discussions—''[w]hen making any comparison between payment options''—if a represented lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle. The Commission believes there are significant consumer benefits when such disclosures are made verbally, close in time to when monthly payment options are discussed. Given that car-buying and leasing transactions are already lengthy and paperwork-heavy, the Commission believes it must be judicious with any additional written disclosure requirements to avoid crowding out other disclosures or other important information. Accordingly, the Commission has determined not to modify § 463.4(e) from its original proposal in order to mandate that the required disclosure always be made in writing. The Commission will continue to monitor the market for any further developments in this area and will consider whether to modify this or other Final Rule provisions in the future.

Some commenters, including consumer advocacy organizations, urged the Commission to adopt specific proposed language rather than a general disclosure requirement, or a requirement that this disclosure include the total amount the consumer will pay at the lower monthly payment under discussion. Regarding the proposal to require particular, uniform disclosure language, the Commission did not receive, in the course of public comment, evidence sufficient to conclude that uniform formatting for the delivery of such disclosures would be necessary to make them effective. The Commission currently lacks information to evaluate whether any particular form disclosure would effectively communicate the required information to consumers in a manner that in all circumstances obviates deceptive or unfair conduct. Moreover, regarding the proposal to require that the monthly payment comparison disclosure additionally require dealers to disclose the new total amount that the consumer will pay, the Commission emphasizes that part 463 will require such a disclosure without the need to modify this provision from the Commission's original proposal. As noted in the paragraph-by-paragraph analysis of § 463.4(d) in SBP III.D.2(d), the Commission is finalizing § 463.4(d), which requires dealers making any representation about a monthly payment for a vehicle to disclose the total amount the consumer will pay to purchase or lease the vehicle at a given monthly payment amount after making all payments as scheduled, inclusive of assumed consideration, largely as proposed. The monthly payment comparison discussions covered by § 463.4(e) are those that ''include[] discussion of a lower monthly payment.'' To the extent a dealer, in the course of such discussions, makes a representation ''about a monthly payment for any Vehicle,'' § 463.4(d) will require the dealer to disclose the total amount the consumer will pay at that monthly payment amount.

Comments, including those from a number of dealership associations[361] and an individual commenter, characterized the Commission's proposal as burdensome and likely to lead to excessive disclosures while providing little additional assistance to consumers. In response, the Commission emphasizes the streamlined nature of proposed § 463.4(e). In its proposal, the Commission refrained from additional formal mandates in order to provide dealers with flexibility, within the bounds of the law, to provide this essential information—that a given lower monthly payment will increase the total amount the consumer will pay—including so that dealers already conveying this information in a non-deceptive manner may continue to do so.

Thus, after careful review of the comments, the Commission has determined to finalize § 463.4(e) largely as proposed. When making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, the failure to disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true, is likely to mislead consumers regarding the total terms associated with the lower monthly payment amount. When a dealer elects to compare between different monthly payment options, if the lower monthly payment would result in a higher total transaction cost, discussion of this fact is necessary to prevent the comparison from being misleading. Absent this information, it is reasonable for a consumer who is presented with a monthly payment comparison to expect that the lower monthly payment amount would correspond to lower total transaction cost. This is because the opposite can only be true if the dealer has created a so-called ''apples to oranges'' comparison, in which an undisclosed element of the transaction—such as the length of the payment term, or the existence of a balloon payment—has not been kept constant across the two monthly payment scenarios being compared. Under such circumstances, without providing the consumer with further information, the dealer's claims regarding monthly payment amounts falsely imply saving or parity between different offers where reduced monthly payments increase the total vehicle cost. Thus, where a lower monthly payment amount represents a more expensive transaction, the dealer must, at a minimum, disclose this simple but counterintuitive fact to not deceive consumers.[362]

Furthermore, as explained in the NPRM and in the paragraph-by-paragraph discussion of § 463.4(d) in SBP III.D.2(d), cost is one of the most material pieces of information for a consumer in making an informed purchasing decision.[363]

Regarding unfairness, when making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, the failure to disclose that the lower monthly payment will increase the total

[361] As previously indicated, some such association commenters contended generally that the proposed total of payments disclosures at § 463.4(d) and (e) overlapped with the Truth in Lending Act or other laws. The Commission responds to this point in the context of the discussion of § 463.4(d), in SBP III.D.2(d).

[362] Depending on the circumstances, a dealer may need to take additional measures, such as disclosing the specific basis for any increase in total costs, or amount of any such increase, in order to avoid deceiving consumers.

[363] *See, e.g., Fed. Trade Comm'n* v. *Windward Mktg., Inc.,* No. Civ.A. 1:96–CV–615F, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) (''[A]ny representations concerning the price of a product or service are presumptively material.''); *Removatron Int'l Corp.,* 111 F.T.C. 206, 309 (1988) (''The Commission presumes as material express claims and implied claims pertaining to a product's . . . cost.'' (citing *Thompson Med. Co., Inc.,* 104 F.T.C. 648, 817 (1984)); *see also Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (''Information concerning prices or charges for goods or services is material, as it is 'likely to affect a consumer's choice of or conduct regarding a product.' '').

amount the consumer will pay to purchase or lease the vehicle, if true, is likely to cause substantial injury to consumers who waste time and effort pursuing offers that are not actually available at the total payment amount they expect; or who pay more for a vehicle sales or lease transaction than they expected by being subject to hidden charges or an unexpected down payment or trade-in requirement; or who are subject to the higher financing costs and greater risk of default associated with an unexpectedly lengthy loan term.

Furthermore, the injury caused by withholding this information is not reasonably avoidable by consumers. During negotiations, if dealers agree to a lower monthly payment, consumers have no reason to expect that this apparent ''concession'' in fact means an increased total vehicle cost due to an increased payment term or annual percentage rate. Under such circumstances, dealers can also add unwanted, undisclosed, or even fictitious add-on charges more easily, by increasing the payment term enough that including add-on charges would still result in a lower monthly payment as a ''concession'' to the consumer. The injury to consumers from a lack of price information is not outweighed by any benefits to consumers or competition from withholding this basic information. Instead, information about increased cost protects consumers from lost time and effort, and unexpected charges while increasing competition among dealers, who would be able to compete on truthful, standard terms. The costs of stating that the total payment has increased—which the dealer determines and can calculate upfront—are minimal for dealers that are already making representations about a monthly payment for a vehicle, especially when compared to the injury to consumers.

Thus, it is an unfair or deceptive act or practice for dealers to fail to disclose, when making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true. Further, this provision also serves to prevent the misrepresentations prohibited by § 463.3—including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle—by requiring consumers to be given accurate information that the total payment will increase when presented with a lower monthly payment. It also helps prevent dealers from failing to obtain the express, informed consent of the consumer for charges, as addressed by § 463.5(c), including charges relating to the financing or lease of a vehicle.[364] Thus, the Commission is requiring dealers to disclose, when making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle, if true. As with a vehicle's price, when cost information in the market is distorted or concealed—especially in document- and time-intensive vehicle transactions—consumers are unable to effectively differentiate between sellers, and sellers trying to deal honestly with consumers are put at a competitive disadvantage.

For the foregoing reasons, and having considered all of the comments that it received on this proposed provision, the Commission is finalizing the required disclosure at § 463.4(e) largely as proposed, with the minor modifications of capitalizing the defined term ''Vehicle'' additional language clarifying that the requirements in § 463.4(e) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).''

E. § 463.5: Dealer Charges for Add-Ons and Other Items

1. Overview

Proposed § 463.5 prohibited motor vehicle dealers from charging for add-on products or services from which the consumer would not benefit; from charging consumers for undisclosed or unselected add-ons unless certain requirements were met; and from charging for any item unless the dealer obtains the express, informed consent of the consumer for the item.

In response to the NPRM, various stakeholder groups and individuals submitted comments regarding these proposed provisions. Among these were comments in favor of the provisions; comments that urged the Commission to include additional restrictions on add-on charges; and comments questioning or recommending against the proposed provisions.

After careful consideration of the comments, the Commission has determined to finalize § 463.5(a) and (c) without substantive modification and has determined not to finalize § 463.5(b) regarding undisclosed or unselected add-ons. The Commission also is making minor textual edits to the introductory language in § 463.5 for clarity and consistency: substituting ''Federal Trade Commission Act'' for ''FTC Act''; adding ''Covered'' to ''Motor Vehicle Dealer'' to conform with the defined term at § 463.2(f) ('' 'Covered Motor Vehicle Dealer' or 'Dealer' ''), and capitalizing ''Vehicles'' to conform with the defined term at § 463.2(e) ('' 'Covered Motor Vehicle' or 'Vehicle' '').

In the following analysis, the Commission examines each proposed provision in § 463.5; the substantive comments relating to each provision; responses to these comments; and the Commission's final determination with regard to each proposed provision.

2. Paragraph-by-Paragraph Analysis of § 463.5

(a) Add-Ons That Provide No Benefit

Section 463.5(a) of the proposed rule prohibited motor vehicle dealers from charging for add-ons if the consumer would not benefit from such an add-on, including a pair of enumerated examples. For the following reasons, the Commission is finalizing this provision largely as proposed, with modifications to correct a misplaced hyphen; add the word ''that'' before ''are duplicative of warranty coverage''; and capitalize the defined term ''Vehicle'' to conform with the revised definition at § 463.2(e). The Commission also is adding language to the end of § 463.5(a), at newly designated (a)(3), clarifying that the requirements in § 463.5(a) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in § 463.3(a) and (b) and paragraph (c) of this section.'' Relatedly, the Commission is finalizing the definition of the term ''GAP Agreement,'' which is referenced in this provision and defined in § 463.2(h) of the Final Rule, substantively as proposed, with minor modifications to correct a misplaced period, substitute ''Vehicle'' for both ''vehicle'' and ''motor vehicle'' to conform with the revised definition at § 463.2(e), and remove an extraneous term—''insured's''—without changing the definition's operation.

Many commenters, including a number of industry participants and associations, stated that products that provide no benefit to the consumer should not be sold in connection with the sale or financing of vehicles. Many commenters that supported the

[364] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

provision stated, *inter alia,* that the examples the Commission enumerated in this paragraph were obvious[365] and particularly helpful for less-experienced buyers who may be led to believe that a particular product or service would be beneficial.[366] Some individual commenters, for instance, noted that they had no way to confirm whether the ''nitrogen-filled'' tires they purchased with their vehicle actually had more nitrogen than naturally exists in the air, even though they were told the purchase of this service was mandatory.[367] At least one individual commenter described requesting to see the nitrogen tank after such a purchase and being denied by the dealer.

Examples of public comments about add-ons include the following:

- I would argue that this does not go far enough but it [is] a good start. As someone who is trying to purchase a new vehicle, there is a[n] endless supply of ''perk packages'' or ''Family deals'' that I ''must purchase'' if I would like to acquire a car from a dealer. These include a variety of dubious products such as insurance policies that pay out $3,500 if your car is stolen (and can't be found) in the first 90 days of ownership, if your car is totaled by your insurance company in the first 90 days they'll pay $3,500. Nitrogen in the tires (A $196 value). Vin Etching on the windows, plastic stickers on the door handles to prevent scratches. These items are a requirement to bundle with the vehicle and a deal that provides ''over $7,000 in value'' for $2,995. These tricks ignore the obvious, such as your car can not be both stolen (unrecovered) AND totaled so it's impossible to collect on both policies so the cumulative ''value'' of this package is overstated.[368]
- One of the latest scams is to force you to buy a $1,000 gps unit so they can recover the car if you miss payments. This shouldn't be allowed.[369]
- Second vehicle I purchased had a $1,650 ''protection pkg'' plus the usual nitrogen in the tires BS. This time I asked to be shown the nitrogen tank they fill the tires with, they refused saying due to insurance rules customers aren't allowed in the shop. I asked them to take off the paint and fabric protection charge also, they declined at first until I reminded them they just got the vehicle the night before and there was still plastic factory coverings on the seats and strips of plastic on the vehicles body protecting certain areas. This time they mumbled some excuse about the addendum added to the price is put on the vehicle as soon as it arrives and they hadn't had ''time'' to apply all the overpriced add[-]ons.[370]
- I'm a former carsalesperson [sic]. . . . Dealers should be banned from selling . . . special paints to protect from rust . . . . No coatings are added.[371]
- I worked at a Dodge/Ram dealership for three years at the make ready (carwash) department. When new vehicles arrived their tires were rarely deflated and then filled with nitrogen. It is my understanding that the manufacture initially paid for the nitrogen fill and the customer was later charged.[372]
- [O]ne of my previous purchases almost ended . . . with GAP that was so unnecessary, the lender called us a few days later after we already had the car and told us we'd be experiencing a lower monthly payment unless we wanted the price of the product back in a check because of the price we negotiated and the sizable down payment, it was impossible for GAP to ever be required.[373]

A number of individual commenters indicated they did not consider nitrogen tires a valuable purchase and expressed no desire to purchase them. Many commented that, when they informed their respective dealers that they did not want these add-ons, the dealers would represent, *inter alia,* that nitrogen tires were required by law, that their insurance premium would increase without the add-on, that new foreign vehicles coming into the country must have nitrogen-filled tires under the law, or that the consumer needed to purchase nitrogen tires to meet fuel economy standards.

Other commenters supported this proposed provision while also recommending that the Commission broaden its scope to prohibit the sale of add-on products or services that provide only ''minimal'' benefit to consumers.[374] One such commenter, for instance, suggested the provision be expanded to prohibit dealers from charging for an add-on unless it provides a ''substantial, material benefit'' to consumers.[375] Another commenter contended that there are a number of add-ons not meeting such standards being sold in connection with the sale or financing of vehicles, including future servicing packages for vehicle tune-ups and oil changes that are sold to remote or out-of-State consumers who are exceedingly unlikely to return to the dealership for such services; tracking devices that are used almost exclusively for electronic repossession; and ''vendor's single interest'' or ''VSI'' insurance, which protects the financing entity, but not the consumer, in the event that the vehicle is damaged or destroyed.[376]

The Commission acknowledges the considerable consumer harm that results from the sale of such add-ons and notes that several provisions in the Rule it is finalizing will address misconduct related to these and other add-ons, including many of the practices described by those commenters recommending further action. For example, to the extent that dealers make misrepresentations about any benefit of an add-on, such conduct would violate § 463.3(b) of the Final Rule. Thus, were a dealer, for instance, to promote the sale of an add-on—such as a tracking device that is used almost exclusively for electronic repossession—based on its supposed benefit to the consumer, when the product primarily benefits another party, such conduct would violate the Rule even if the product otherwise provides an ancillary or marginal benefit to consumers. And if the add-on provided no benefit to the consumer and only a benefit to another party, § 463.5(a) would prohibit the dealer from charging the consumer for it. Further, to the extent that dealers charge for add-ons without express, informed consumer consent for the charge, such conduct would violate § 463.5(c).

The Commission recognizes that there may be significant consumer benefits from implementing additional restrictions on the sale of add-on products or services. However, without additional information on costs and benefits to consumers or competition associated with such restrictions, the Commission has determined not to implement such restrictions in this Final Rule. The Commission will continue to monitor the motor vehicle

[365] *See, e.g.,* Individual commenter, Doc. No. FTC–2022–0046–1608 at 6.

[366] *See, e.g.,* Comment of 18 State Att'ys Gen., Doc No. FTC–2022–0046–8062 at 9.

[367] *See, e.g.,* Individual commenter, Doc. No. FTC–2022–0046–0565.

[368] Individual commenter, No. FTC–2002–0046–0565.

[369] Individual commenter, No. FTC–2002–0046–4552.

[370] Individual commenter, Doc. No. FTC–2022–0046–0854.

[371] Individual commenter, Doc. No. FTC–2022–0046–1393.

[372] Individual commenter, Doc. No. FTC–2022–0046–5493.

[373] Individual commenter, Doc. No. FTC–2022–0046–6816.

[374] *See, e.g.,* Legal Aid Just. Ctr., Doc. No. FTC–2022–0046–7833 at 3.

[375] Comment of Legal Action Chi., Doc. No. FTC–2022–0046–8097 at 10.

[376] *See also* Consumer Fin. Prot. Bureau, ''What Is Vendor's Single Interest (VSI) insurance? '' (Aug. 16, 2016), *https://www.consumerfinance.gov/ask-cfpb/what-is-vendors-single-interest-vsi-insurance-en-731/.*

marketplace to gather additional information on this issue and will consider whether to modify or expand § 463.5(a) in the future, including on the basis of stakeholder experience with this provision and whether it effectively addresses unlawful conduct.

Commenters also urged the Commission to adopt a number of additional measures regarding the sale of such add-ons. A consumer advocacy organization, for instance, proposed that the Commission require dealers to list coverage limitations for add-ons that may overlap with a vehicle's warranty coverage, observing that consumers commonly are not aware of important limitations until the add-on, such as a warranty or service contract, is needed, and only then does the consumer learn the add-on does not provide the anticipated benefits. A State consumer protection agency recommended that the Commission require affirmative disclosures for the sale of add-ons that may provide only ''nominal'' benefit, offering a list of what they characterized as such products for the Commission to consider in conjunction with this recommendation.

In response, the Commission notes that other provisions in part 463 address misconduct relating to these issues, including by prohibiting misrepresentations regarding material information about add-ons, by requiring disclosures about optional add-ons, and by requiring dealers to obtain the express, informed consent of the consumer for add-on charges. Thus, misrepresenting the coverage limitations of an add-on; making representations regarding an optional add-on without disclosing that it is not required and that the consumer can purchase or lease the vehicle without the add-on; and charging for an add-on under false pretenses or without the consumer's express, informed consent would violate other provisions the Commission is finalizing. The Commission is concerned that requiring additional disclosures may have the effect of reducing the saliency of key information in what is already a lengthy, paperwork-heavy transaction. Accordingly, the Commission has determined not to adopt additional such disclosure measures in this Final Rule.

In addition, at least one consumer protection agency commenter asked the Commission to consider deeming it an unfair or deceptive act or practice to sell any add-on product for a price greater than the value of the product itself. The Commission declines to restrict the sale of add-on products at a price higher than the value of the product itself, absent additional information, including information regarding the costs and benefits to consumers and competition of such a restriction.[377]

A number of industry association commenters claimed the provision was vague and requested the Commission set forth how to calculate the loan-to-value (''LTV'') ratio at which a GAP agreement would be non-beneficial, given that there could be fluctuation of the vehicle value in the future. Some suggested that the Commission adopt a presumption or safe harbor that dealers complying with an LTV calculation set by the Commission be deemed in compliance with the portion of the proposal related to GAP agreements.

Other industry association commenters argued against adopting a set LTV ratio as the basis for determining whether a consumer would benefit from a GAP agreement, claiming that the vehicle financing entity is best positioned to determine whether such an add-on would be beneficial. Relatedly, some industry association commenters contended that certain GAP agreements sold on a low-LTV loan, or that limit benefits based on a consumer's LTV ratio, could still provide additional benefits.

A financing association commenter contended that any final rule should not create rules around the calculation of the LTV ratio. Another financing group proposed that the Commission require dealers to provide disclosures that would inform consumers of any potential value gap between a vehicle's purchase price and its appraised value.

With regard to establishing LTV ratio parameters for the sale of GAP agreements, without further information from commenters regarding the costs and benefits of establishing a particular LTV ratio as the basis for determining whether a consumer would benefit from a GAP agreement, or a particular method for calculating the LTV ratio, and given the Commission's previously stated information saliency concerns about finalizing additional disclosures in an already lengthy transaction, the Commission has determined not to establish in this Final Rule a particular numeric threshold or calculation regarding the sale of GAP agreements to consumers, or to require additional associated disclosures. Regarding the benefits of certain GAP agreements, this provision restricts sales of GAP agreements where the consumer would not benefit. If there are benefits to the consumer, dealers must abide by other provisions in the Final Rule, including the requirements that the dealer represents the extent of those benefits accurately (§ 463.3(b)) and obtains express, informed consent from the consumer for the charges for this item (§ 463.5(c)).

The Commission also received some industry association comments claiming that each State imposes differing requirements as to coverage, disclosures, exceptions, and product terms of GAP agreements. One such commenter asked for guidance on how a bright-line, State-law rule on LTV ratios would interact with the FTC's proposal. Another such commenter requested the FTC reconcile different State-law approaches to the sale of GAP agreements, particularly regarding how this proposed provision would interact with a State law that, according to the commenter, only requires a dealer to have a reasonable belief that the customer may be eligible for a benefit. In response, the Final Rule does not disturb State law unless it is inconsistent with part 463, and then only to the extent of the inconsistency. Where, for example, State laws restrict the sale of GAP agreements if the LTV ratio for the transaction is below a certain threshold, or require that dealers have a ''reasonable belief'' that the GAP agreement would benefit the consumer, dealers in that State can, and must, comply with the State law and with the Rule. Pursuant to such State law, dealers would be prohibited from selling the product if the LTV ratio is below the established threshold or if they do not reasonably believe the GAP agreement would benefit the consumer and, pursuant to the Final Rule, if the LTV ratio would result in the consumer not benefitting financially. To the extent there is an actual conflict between the Commission's Final Rule and a State law—and the Commission is skeptical that there is such a State law that explicitly allows for the sale of a product that does not benefit the consumer—the Commission refers commenters to § 463.9, which sets forth the Rule's relation to State laws.

With respect to the proposed definition of ''GAP Agreement,'' an industry association commenter contended that the phrase ''the actual cash value of the insured's vehicle in the event of an unrecovered theft or total loss'' meant the value of the vehicle at some point in the future, and asserted that future vehicle values cannot be accurately determined at the

[377] One consumer attorney commenter requested that the Commission clarify that warranty disclaimers are not a valid defense to common law fraud and statutory consumer fraud, and that, if fraud is proven, warranty disclaimers are not an allowable defense to UCC actions. In response, the Commission notes that none of the provisions the Commission is finalizing state that warranty disclaimers are a defense to common law fraud or in UCC actions.

time of sale. The proposed definition, however, did not prescribe how dealers must calculate a vehicle's cash value; rather, it explains that the term ''GAP Agreement'' means an agreement to indemnify a vehicle purchaser for any difference between such value, however determined, in the event of an unrecovered theft or total loss, and the amount owed, regardless of what that difference may be. Upon examination of this phrase, however, the Commission has determined to remove the term ''insured's'' because it is extraneous and does not affect the operation of this definition: with or without the term, the phrase describes the manner in which a qualifying GAP agreement determines the amount to indemnify a vehicle purchaser or lessee. In context in this definition, it is clear without the term ''insured's'' that the applicable ''Vehicle'' is the one covered by the GAP agreement. Omitting this unnecessary term thus avoids confusion without substantively changing this definition.

One industry association commenter argued that reference to ''GAP insurance'' should be removed from the definition of ''GAP Agreement'' because of the McCarran-Ferguson Act's reverse-preemption of certain Federal laws that ''invalidate, impair, or supersede'' State laws enacted ''for the purpose of regulating the business of insurance.'' [378] As previously discussed with regard to the definition of ''Add-on,'' however, commenters have provided no evidence that the proposed or Final Rule would invalidate, impair, or supersede State laws enacted for the purpose of regulating insurance. Rather than affecting any State's regulation of insurance, the Final Rule prohibits dealers from making misrepresentations regarding add-ons, from failing to disclose when add-ons are not required, and from charging for add-ons that provide no benefit or for which the consumer has not provided express, informed consent. The Commission therefore finalizes the definition of ''GAP Agreement'' largely as proposed in its NPRM with minor modifications to correct a misplaced period, substitute ''Vehicle'' for both ''vehicle'' and ''motor vehicle'' to conform with the revised definition at § 463.2(e), and remove an extraneous term—''insured's''—without changing the definition's operation.

While acknowledging that products or services that provide no benefit to consumers should not be sold, commenters including an industry association also argued that the Commission's proposed provision was vague and required more research. Some industry association commenters expressed concern regarding how the Commission would determine whether an item would not benefit the consumer. In response, the Commission provides the following information. Proposed § 463.5(a) included enumerated examples of add-ons from which consumers would not benefit: (1) nitrogen-filled tires that contain no more nitrogen than normally found in the air, and (2) products or services that do not provide coverage for the vehicle, the consumer, or the transaction, or are duplicative of warranty coverage for the vehicle, including a GAP agreement if the consumer's vehicle or neighborhood is excluded from coverage or the LTV ratio would result in the consumer not benefitting financially.[379] As these examples illustrate, determining that a consumer would not benefit from an add-on involves analyzing objective standards under the circumstances, such as whether the add-on provides benefits; whether the consumer is eligible to use the add-on; whether the add-on's coverage excludes the vehicle at issue; and whether the add-on is incompatible with the vehicle at issue. Thus, additional examples of add-ons that would be prohibited by this provision include the following: purported rust-proofing add-ons that do not actually prevent rust; purported theft-prevention or theft-deterrent add-ons that do not prevent or deter theft; and add-ons that the vehicle itself cannot support, including engine oil-change services for a vehicle, such as an electric vehicle, that does not use engine oil, or software or audio subscription services for a vehicle that cannot support the software or utilize the subscription.[380]

One association commenter argued that the phrase ''nitrogen-filled tire related-products or services that contain no more nitrogen than naturally exists in the air'' in proposed § 463.5(a)(1) would create a standard with which it may be impossible to comply because ''no individual set of tires could have a higher total quantity of nitrogen than that in 'the air' that stretches around the planet.'' [381] This commenter requested that the Commission clarify to avoid this possible reading. Here, the Commission notes that the phrase does not prohibit such tires if they do not contain a ''higher total quantity of nitrogen than that in the air''; instead, charging for a nitrogen-filled tire would fail by this standard if it contains ''no more nitrogen than'' the proportion that ''naturally exists in the air.''

One industry association commenter requested more explanation from the Commission regarding what would be considered ''duplicative of warranty coverage'' under proposed § 463.5(a)(2), while another contended that vehicle service contracts that overlap with a manufacturer's warranty may still provide additional, beneficial coverage, such as after the manufacturer's warranty expires. In response, the Commission notes that this provision prohibits the sale of warranties that are duplicative. A dealer may offer a warranty add-on that has some overlap in coverage with existing warranty coverage for the vehicle, but the add-on must provide additional protection. Moreover, other provisions of the Final Rule address misconduct relating to warranties, including by prohibiting misrepresentations regarding material information about any costs, limitation, benefit, or any other aspect of the warranty product or service. For example, under the Final Rule, a dealer may not mislead a consumer as to the benefits or conditions of the warranty, including amount or length of coverage (§ 463.3(b)). In addition, under § 463.5(c), the dealer must obtain the express, informed consent of the consumer for the charge for the warranty (§ 463.5(c)).

Other commenters, including an industry association, asserted that this proposed provision would cause dealers to stop offering beneficial products or services. The Commission notes that its proposal did not require such a result and emphasizes that this provision would prevent charges to consumers for products or services that provide them

[378] 15 U.S.C. 1012(b).

[379] See Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 19, Summer 2019'' 3–4 (Sept. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf* (finding instances in which auto lenders sold ''a GAP product to consumers whose low LTV meant that they would not benefit from the product'').

[380] *See, e.g.,* Shannon Osaka, ''Electric vehicles are hitting a road block: Car dealers,'' Wash. Post (Nov. 9, 2023), *https://www.washingtonpost.com/climate-solutions/2023/11/09/car-dealerships-ev-sales* (describing a dealership salesperson offering an electric vehicle-buyer a plan for oil changes and an extended warranty for a gas-powered car); *see also* Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 24, Summer 2021'' 3–4 (June 2021), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf* (finding servicers added and maintained unnecessary collateral protection insurance (CPI) when consumers had adequate insurance and thus the CPI provided no benefit to the consumers, and also when consumers' vehicles had been repossessed even though no actual insurance protection was provided after repossession).

[381] Comment of Competitive Enter. Inst., Doc. No. FTC–2022–0046–7670 at 6.

no benefit. To the extent that a prohibition against charging consumers for items that provide no benefit to the consumer may cause some dealers to discontinue offering beneficial products, consumers would be free to instead visit other dealerships or to seek the same or similar offerings from other providers. Dealers, of course, continue to be free under the Final Rule to offer beneficial add-ons to consumers—consistent with existing law and with other provisions of this Rule.

Some commenters, including industry associations and a dealership association, raised concerns about compliance administrability for this proposed provision in the case of products attached to a vehicle by manufacturers that may provide no benefit, questioning whether, if this proposal went into effect, dealers would be prohibited from charging for such products. In response, the Commission refers commenters to the definition of ''Add-on'' or ''Add-on Product(s) or Service(s)'' in § 463.2(a). Notably, ''Add-on'' is defined, in relevant part, as any ''product(s) or service(s) not provided to the consumer or installed on the Vehicle by the Vehicle manufacturer . . . .'' Thus, if an add-on product or service is installed on the vehicle by the motor vehicle manufacturer, it falls outside the scope of this definition, and concomitantly, outside the scope of the provision at § 463.5(a). Nonetheless, other provisions in the Final Rule address misconduct relating to this issue. For instance, as examined in additional detail in the discussion of § 463.4, in SBP III.D, the offering price for the vehicle would be required to incorporate the charges for any such items if the dealer requires the consumer to pay for them. In addition, as described in additional detail in the discussion of § 463.5(c), in SBP III.E.2(c), a dealer may not charge for any such item unless the dealer obtains the express, informed consent of the consumer for the charge.

Another industry association commenter incorrectly stated that this provision was beyond the FTC's authority and correctly noted that the Commission has the authority to see that products are marketed and advertised fairly and honestly. As the commenter acknowledged, the Commission has the authority to address unfair and deceptive conduct; that is precisely what this provision does. Dealerships charging consumers for add-ons from which the consumers would not benefit is both a deceptive and unfair act or practice in violation of the FTC Act, as discussed in the following paragraphs. To address this deception or unfairness, the Commission is finalizing this provision with minor modifications, including one to correct a typographical error in the placement of a hyphen in a phrase in proposed § 463.5(a)(1). In the NPRM, the relevant phrase appeared as, ''(1) Nitrogen-filled tire related-products or services''; in the Final Rule, the corrected phrase will now read as follows: ''(1) Nitrogen-filled tire-related products or services.'' For clarity, the Commission is also adding the word ''that'' before ''are duplicative of warranty coverage;'' capitalizing the defined term ''Vehicle'' to conform with the revised definition at § 463.2(e); and adding language clarifying that the requirements of § 463.5(a) also are ''prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in § 463.3(a) and (b) and paragraph (c) of this section.''

Dealerships charging consumers for add-ons from which the consumers would not benefit involves deceptive conduct. When a dealer charges consumers for add-ons that would not benefit the consumers, the dealer either (1) discusses the add-on charges or (2) is silent about these items. In the first scenario, if a dealer discusses add-on charges, consumers typically would not agree to pay such charges for additional products from which they could not benefit unless they are led to believe, directly or by omission, that these products would in fact be beneficial to them. Thus, the dealer would be misleading consumers, even in the event the dealer subsequently provides a disclaimer indicating the add-on would not benefit the consumer.[382] In the second scenario, it is reasonable for consumers to believe that the terms they have agreed to are what was negotiated, and do not include additional charges for optional, undisclosed items—particularly items that would not benefit the consumer. If a dealer charges consumers for such items under such circumstances, the dealer is misleading the consumer. Misleading consumers about cost information is material.[383] If consumers knew that a dealership was charging them for items from which they would not benefit, such knowledge likely would affect their commercial choices, including whether to continue with, or ultimately consummate, the vehicle sale or financing transaction.[384]

Such charges are also unfair. When charges for any add-on accompany the already lengthy and complex car-buying process, it is difficult to obtain consent that is truly express and informed.[385] Rather than prohibiting all such charges or taking other measures, as specifically contemplated in the NPRM,[386] however, this provision focuses on charges for add-ons that would not benefit the consumer. Charges for add-ons that would not benefit the consumer can cost consumers thousands of dollars and significantly increase the overall cost to the consumer in the transaction, including by increasing the amount financed and total of payments, thereby increasing the risk the consumer will ultimately default on repayment

[382] *Removatron Int'l Corp.* v. *Fed. Trade Comm'n,* 884 F. 2d 1489, 1497 (1st Cir. 1989) (''Disclaimers or qualifications . . . are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.'').

[383] *See, e.g., Fed. Trade Comm'n* v. *Windward Mktg., Ltd.,* No. Civ.A. 1:96–CV–615F, 1997 WL 33642380, at *10 (N.D. Ga. Sept. 30, 1997) (''[A]ny representations concerning the price of a product or service are presumptively material.''); *Removatron Int'l Corp.,* 111 F.T.C. 206, 309 (1988) (''The Commission presumes as material express claims and implied claims pertaining to a product's . . . cost.'' (citing *Thompson Med. Co., Inc.,* 104 F.T.C. 648, 817 (1984)); *see also Fed. Trade Comm'n* v. *Crescent Pub. Grp., Inc.,* 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (''Information concerning prices or charges for goods or services is material, as it is 'likely to affect a consumer's choice of or conduct regarding a product.' '').

[384] Even under a hypothetical scenario wherein a consumer understood an add-on would not benefit them but wanted to pay extra for the add-on anyway, in the case of an act or practice challenged by the agency as deceptive or unfair, ''the FTC need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense . . . .'' *Fed. Trade Comm'n* v. *Amy Travel Serv., Inc.,* 875 F.2d 564, 572 (7th Cir. 1989), *vacated in part on other grounds, Fed. Trade Comm'n* v. *Credit Bureau Ctr., LLC,* 937 F.3d 764 (7th Cir. 2019); *accord Fed. Trade Comm'n* v. *Stefanchik,* 559 F.3d 924, 929 n.12 (9th Cir. 2009).

[385] *See, e.g.,* Consumer Fin. Prot. Bureau, ''Supervisory Highlights: Issue 19, Summer 2019'' 3–4 (Sept. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-19_092019.pdf* (describing findings, from supervisory examinations, of lenders selling GAP agreements to consumers whose low LTV meant that they would not benefit from the product: ''By purchasing a product they would not benefit from, consumers demonstrated that they lacked an understanding of a material aspect of the product. The lenders had sufficient information to know that these consumers would not benefit from the product. These sales show that the lenders took unreasonable advantage of the consumers' lack of understanding of the material risks, costs, or conditions of the product.'').

[386] *See, e.g.,* NPRM at 42030 (Question 33) (''In particular, the Commission is contemplating whether any final Rule should restrict dealers from selling add-ons (other than those already installed on the vehicle) in the same transaction, or on the same day, the vehicle is sold or leased.''); *id.* (Question 38) (discussing proposed § 463.5(c) and asking ''Does the proposal provide a meaningful way to obtain consent in an already disclosure-heavy transaction? If it would result in too many disclosures, what other measures could be taken to protect consumers from unauthorized charges? '').

obligations.[387] This injury is not reasonably avoidable by consumers when dealers are silent about such charges and simply include them in dense, lengthy contracts, as explained in detail in SBP II.B.2.[388] If a dealer instead describes what the charges are for, such a description either deceptively states or implies that the add-on would benefit the consumer, or acknowledges the add-on would not benefit the consumer, the latter of which would create ''contradictory double meanings'' [389] and, if discovered, would still result in the dealer wasting the consumers' time.[390] Further, there are no benefits to consumers or to competition from charging consumers for add-ons that would not benefit them. Moreover, charging for non-beneficial products is inconsistent with industry guidance,[391] and dealerships that profit from such sales place dealerships that do not at a competitive disadvantage. Thus, it is an unfair or deceptive act or practice for dealers, in connection with the sale or financing of vehicles, to charge for an add-on product or service if the consumer would not benefit from such an add-on product or service. This provision also serves to prevent misrepresentations prohibited by § 463.3 of the Final Rule, including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle, and about any costs, limitation, benefit, or other aspect of an add-on. This provision further helps prevent dealers from failing to obtain express, informed consent for charges, as prohibited by § 463.5(c).[392]

(b) Undisclosed or Unselected Add-Ons

The Commission's proposed provisions relating to undisclosed or unselected add-on products or services, at § 463.5(b), prohibited dealers from charging for optional add-ons before undertaking certain measures. Specifically, proposed § 463.5(b)(1) prohibited dealers from charging for optional add-ons unless the dealers disclosed, and offered to consummate the transaction for, the cash price at which a consumer may purchase the vehicle without such add-ons. This proposed provision also required the consumer to decline to purchase the vehicle for the cash price without the add-on by means of a written declination, with date and time recorded, and signed by the consumer and a manager of the motor vehicle dealer. The proposed requirements of § 463.5(b)(1) applied before the dealer referenced any aspect of financing for a specific vehicle, aside from the offering price, or before consummating a non-financed sale. Proposed § 463.5(b)(2) required similar steps before charging for any optional add-on in a financed transaction, including that the dealer disclose, and offer to consummate the transaction for, a vehicle's cash price without optional add-ons plus the finance charge for such transaction, separately itemizing the components of the offer. This proposed provision also required a written, dated, time-stamped, and signed declination. Finally, proposed § 463.5(b)(3) required dealers to disclose the cost of the transaction, whether financed or not, without any optional add-ons, as well as the charges for the optional add-ons selected by the consumer, separately itemized. Each proposed provision required clear and conspicuous disclosure of specific information relating to optional add-ons and their associated costs.

As discussed in the following paragraphs, the Commission has determined not to finalize the proposed provisions at § 463.5(b) regarding undisclosed or unselected add-ons. Many commenters described the likely benefits of such proposed provisions, and a number of commenters indicated how such provisions would be feasible, including by reference to similar disclosure regimes already in effect at the State or local level. Commenters also credited the Commission's goals for such provisions.

However, other commenters opposed these proposed provisions, contending they would be burdensome and time-consuming. Others similarly expressed concern that, given the duration, complexity, and paperwork-heavy nature of motor vehicle sales and financing transactions, these provisions would not effectively resolve the problem of add-ons being sold without express, informed consumer consent.[393]

Having considered the comments, the Commission declines to include in this Final Rule the proposed provisions relating to undisclosed or unselected add-on products or services at § 463.5(b). The Commission notes that various commenters were concerned about the extent to which this proposal would add documents and time to the transaction. If finalized, this would have been the sole provision in the Final Rule that affirmatively requires the dealer and consumer, in all circumstances, to view and sign additional documentation during the purchase, finance, or lease process, in what is already a document-heavy, time-consuming, and complicated transaction. The Commission further notes that, as a matter of existing law, dealers are already prohibited from engaging in misrepresentations regarding add-ons and from charging for add-ons without express, informed consent—conduct which the Final Rule prohibits as well. Accordingly, the Commission has determined not to include this provision in its Final Rule.

The Commission will continue to monitor the motor vehicle marketplace for issues pertaining to unselected or undisclosed add-ons, and will consider implementing additional measures in the future if it determines such measures are necessary to address deceptive or unfair practices relating to add-ons.

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[387] *See, e.g.,* Complaint ¶¶ 25–28, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022).

[388] *See, e.g.,* Auto Buyer Study, supra note 25, at 13–15, 17–18.

[389] *See Removatron Int'l Corp.* v. *Fed. Trade Comm'n,* 884 F. 2d 1489, 1497 (1st Cir. 1989) (''Disclaimers or qualifications . . . are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.'').

[390] Even in the hypothetical scenario where some consumers could have avoided the injury because they understood that an add-on would not benefit them but wanted to pay extra for the add-on anyway, the dealer's conduct in selling non-beneficial add-ons would still be unfair because it substantially injures other consumers who do not wish to pay for items that would not benefit them and, as discussed in the SBP text, cannot reasonably avoid the harm, and no countervailing benefits outweigh the costs. *See FTC* v. *Amazon.com, Inc.,* 2016 U.S. Dist. LEXIS 55569, *15, *18–21 (W.D. Wash. Apr. 26, 2016) (finding unfairness even though some consumers could have avoided the charge). Additionally, consumers who truly wish to purchase add-ons that do not benefit them may still be able to do so directly from the add-on provider.

[391] See Nat'l Auto. Dealers Ass'n et al., ''Voluntary Protection Products: A Model Dealership Policy'' 5 (2019), *https://www.nada.org/regulatory-compliance/voluntary-protection-products-model-dealership-policy* (explaining that when determining which voluntary protection products to offer to customers, ''the dealership should have confidence in the value that the product offers to customers,'' including that the dealership should understand ''whether its coverage is already provided by another product being purchased by the customer,'' and stating ''[i]t is essential that customers have a clearly defined path to receiving such benefits.'').

[392] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

[393] *See, e.g.,* Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC–2022–0046–7607 at 30–31. Instead, advocates recommended that the Commission require a cooling-off period for add-ons, similar to that required by the Commission for door-to-door and other off-premises sales, which would grant consumers time to review the paperwork after the transaction, and to cancel unexpected or otherwise unwanted add-ons for a full refund. *Id.* This comment is addressed when discussing § 463.5(c) in SBP III.E.2(c).

(c) Any Item Without Express, Informed Consent

Section 463.5(c) of the proposed rule prohibited motor vehicle dealers, in connection with the sale or financing of vehicles, from charging consumers for any item unless the dealer obtains the express, informed consent of the consumer for the charge. Upon careful review and consideration of the comments, the Commission is finalizing this provision with one modification from its original proposal: the addition of language to the end of § 463.5(c) clarifying that the requirements in § 463.5(c) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b), 463.4, and paragraph (a) of this section.'' In addition, the Commission is finalizing the corresponding definition of ''Express, Informed Consent,'' now at § 463.2(g).

Many commenters favored the proposed provision and expressed the need for such a provision. For example:

• In one instance a salesman who appeared busy and trying to help me efficiently navigate the process rushed me to sign a small paper, ''just sign this quickly and we'll be on our way,'' I was told, without disclosure that they were selling me something that I did not want. I found it later and felt cheated.[394]

• They made me sign the sales bill on an electronic device, but the finance guy never pointed to me any number I was getting charge[d] for, and never pointed to me the total amount I was getting billed for. He seem[ed] to be in a hurry and he even told me he had people waiting for him to see. I think it was all planned to push the buyer to blindly sign the bill of sale without explaining anything because he was scrolling the electronic pages in a hurry and going straight to the sign box line. I thought I signed the agreed amount, I trust them, but, instead, they charge me for things I never agreed on. I went back to the dealer in less than 48 hours when I discovered the fraud and asked them to remove the extra fees they charged me for, they refused and they forced me to pay for it, I asked them and requested them to take the car back, they refused it again, at the end, they gave me a little bit of a discount, but, not compared to what I got charged for. . . .[395]

• I am an attorney in private practice in NY representing consumers for 33 years. It never ceases to amaze me how car dealers defraud honest trusting consumers substantial sums of money through various common deceptive and fraudulent practices ranging from altering documents, concealing documents, having consumers sign blank documents, lying about the material terms of the deal, altering the prices, adding on other contracts or items never discussed and selling vehicles with undisclosed damages and defects.[396]

• I have worked in the automotive business for many year[s]. I realize there are plenty of dealers around the US that have deceptive business practices, however this isn't the case for all dealers. I believe there can be laws that can be put in place to help prevent dealers from adding additional backend products without consent or knowledge.[397]

Others supported the proposed provision and urged the Commission to include additional measures, such as a thirty-day ''cooling-off'' period within which consumers would be able to receive a full refund for any add-ons. A number of commenters, including consumer advocacy organizations, contended that such an additional time frame to review, and potentially cancel, any add-ons would counter the high-pressure, confusing environment of the dealership F&I office and undermine any efforts to misrepresent add-on charges and coverage. Such commenters also indicated that such a provision would allow consumers the opportunity to compare prices and providers, and ultimately help increase competition in the marketplace. A few individual commenters requested that the Commission provide a cooling-off period not only for add-ons, but for the full vehicle purchase, and a prohibition on charging non-refundable deposits.

The Commission agrees that a ''cooling off'' provision could offer consumers additional protection from unwanted add-ons; however, additional information would assist the Commission in evaluating the potential benefits of such a provision. Such information might include, for example, what length a cooling-off period would need to be in order to offer adequate protection to consumers and to competition, or how consumers would most effectively be made aware of such a cooling-off period in the course of the complicated, lengthy, and document-heavy vehicle sale or financing transaction. Such information would be particularly relevant given that, in the Commission's law enforcement experience, consumers have paid unauthorized charges on years-long contracts without learning of the charges.[398] Accordingly, the Commission will continue to monitor the market to determine whether, after adoption of this Rule, it appears that a cooling-off period or other measures would be warranted.

Other commenters, including consumer advocacy organizations, emphasized the importance of having disclosures and other documents available in the language used to negotiate the sale or lease. Here, the Commission notes that a dealer does not obtain the express, informed consent of the consumer if the consumer's assent to a charge is ambiguous or based on a disclosure the consumer does not easily understand.[399] Thus, if a dealer uses one language during negotiations and a different language in its contracts, and the consumer does not understand and assent to the charges, the dealer is violating § 463.5(c). Furthermore, the Commission notes that the definition of ''Express, Informed Consent'' it is finalizing at § 463.2(g) requires, *inter alia,* a clear and conspicuous disclosure of what the charge is for and the amount of the charge, and the Commission's definition of ''Clear(ly) and Conspicuous(ly),'' at § 463.2(d)(5), requires disclosures to appear ''in each language in which the representation that requires the disclosure appears.''

Other commenters, including a consumer advocacy organization and a consumer protection agency, recommended the Commission prescribe additional requirements for obtaining express, informed consent for charges, such as boxes for signatures and date-and-time recordings, and a requirement that dealers comply with the E-Sign Act. Other commenters also discussed obtaining consent through electronic signatures. Commenters including consumer advocacy organizations, for instance, reported cases wherein documents that were signed and supposedly provided electronically to consumers, were never actually delivered to the consumer, or delivered days later. According to these commenters, some consumers would sign on a small signature pad where they could not see the terms of the document being signed. Other practitioner commenters reported that

[394] Individual commenter, Doc. No. FTC–2022–0046–0794.

[395] Individual commenter, Doc. No. FTC–2022–0046–0671.

[396] Individual commenter, Doc. No. FTC–2022–0046–0073.

[397] Individual commenter, Doc. No. FTC–2022–0046–9917.

[398] *See* discussion in SBP II.B.2.

[399] *See* § 463.2(g) (defining ''Express, Informed Consent'' to include an affirmative act communicating ''unambiguous assent to be charged''); § 463.2(d) (defining ''Clear(ly) and Conspicuous(ly)'' to include a manner that is ''easily understandable'').

consumers' electronic signatures were applied to contracts with very different terms from what the consumers believed they were accepting. An individual commenter recommended that dealers be required to provide paper documents where requested and consumers be allowed to consent on paper documents only, noting that elderly consumers or those for whom English is a second language may have difficulty with electronic signatures. Another individual commenter expressed the view that anyone needing assistance understanding the sales price or disclosures should be provided independent legal counsel at the dealership's expense.

While the Commission agrees that additional measures to promote express, informed consent could reduce the incidence of unauthorized charges and aid with enforcement efforts, the Commission has determined not to include in this Final Rule provisions that would require new forms during the vehicle sale or financing transaction. This way, law-abiding dealers would not have to change their practices for obtaining express, informed consent. Thus, the Commission declines to add further requirements, including those involving signature boxes or date-and-time recordings. Regarding the E-Sign Act, nothing in the Rule modifies compliance obligations under this Act. Instead, the Final Rule requires that, regardless of whether any given signature may have been obtained through electronic or other means, the dealer must obtain the express, informed consent of the consumer to any item for which the dealer charges the consumer. Furthermore, the Commission notes that a dealer has not obtained express, informed consent if a dealer has consumers sign an electronic keypad without seeing and understanding the terms, or applies their electronic signatures on contracts with terms different from those to which the consumer agreed.[400] In such circumstances, the consumer has not demonstrated informed consent, or unambiguous assent to be charged, including because the signatures are not in close proximity to clear and conspicuous disclosures regarding the charges.

Other commenters, including industry and dealership associations, claimed that the Commission did not provide enough information regarding what would constitute express, informed consent to charges, contending that additional detail was needed, or that the provision and associated definition of ''Express, Informed Consent'' were too vague. The Commission notes, however, that the phrase ''Express, Informed Consent'' is consistent with existing legal standards.[401] Commission enforcement actions over the years have challenged as deceptive or unfair the failure to get express, informed consent to charges, including in actions involving motor vehicle dealers and others:

- Rushing consumers through stacks of auto paperwork more than 60 pages deep and requiring over a dozen signatures, where the paperwork included charges for unwanted add-ons.[402]
- Double charging certain fees without consumers' knowledge or consent in highly technical documents presented at the close of a long financing process after an already lengthy process of selecting a vehicle and negotiating over its price.[403]
- Presenting consumers with preprinted sales and financing forms that included add-ons consumers had not requested, and rushing consumers through the closing process while directing them where to sign forms, including forms that were blank.[404]
- Charging consumers more for a product or service than they agreed to pay.[405]
- Charging consumers for more products than they requested.[406]
- Cramming charges onto consumers' bills for services that the consumers did not request without the consumers' knowledge or consent.[407]

Courts have found the failure to obtain express, informed consent to be a violation of the FTC Act.[408] Other statutes and rules enforced by the Commission include express, informed consent requirements for consumer purchases,[409] and similar provisions have appeared in Commission orders resolving charges that motor vehicle dealers or other sellers have levied unauthorized charges on consumers.[410] In short, the prohibition in § 463.5(c) against charging consumers for products or services without their express, informed consent, and the corresponding definition of ''Express, Informed Consent'' in § 463.2(g) are consistent with existing law in articulating what motor vehicle dealers must do—and already should be doing.

The Commission further notes that the proposed definition of ''Express, Informed Consent'' provided information regarding what was required by § 463.5(c): an affirmative act by the consumer communicating unambiguous assent to be charged, made after receiving and in close proximity to a clear and conspicuous disclosure, in writing, and also orally for in-person transactions, of the following: (1) what the charge is for; and (2) the amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service. As is evident from this language, there

[400] *See* § 463.2(g) (defining ''Express, Informed Consent'' to include requiring clear and conspicuous disclosures of what the charge is for and the amount of the charge).

[401] *See, e.g., Fed. Trade Comm'n* v. *Amazon.com, Inc.,* 71 F. Supp. 3d 1158, 1163 (W.D. Wash. 2014).

[402] Complaint ¶¶ 24–25, 29–49, 76, *Fed. Trade Comm'n* v. *North Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022).

[403] Complaint ¶¶ 17–19, 44, *Fed. Trade Comm'n* v. *Liberty Chevrolet,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020).

[404] Complaint ¶¶ 59–64, 91, *Fed. Trade Comm'n* v. *Universal City Nissan,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016).

[405] *See, e.g.,* Complaint ¶¶ 29, 47, *Fed. Trade Comm'n* v. *Yellowstone Cap. LLC,* No. 1:20–cv–06023–LAK (S.D.N.Y. Aug. 3, 2020).

[406] *See, e.g.,* Complaint ¶¶ 11–14, 21, *Bionatrol Health, LLC,* No. C–4733 (F.T.C. Mar. 5, 2021).

[407] *See, e.g.,* Complaint ¶¶ 8–9, 42, *Fed. Trade Comm'n* v. *T-Mobile USA, Inc.,* No. 2:14–cv–00967–JLR (W.D. Wash. July 1, 2014); Complaint ¶¶ 9, 49, *Fed. Trade Comm'n* v. *AT&T Mobility, LLC,* No. 1:14–cv–03227–HLM (N.D. Ga. Oct. 8, 2014).

[408] *See, e.g., Fed. Trade Comm'n* v. *FleetCor Techs., Inc.,* 620 F. Supp. 3d 1268, 1333–38 (N.D. Ga. 2022); *Fed. Trade Comm'n* v. *Amazon.com, Inc.,* No. C14–1038–JCC, 2016 WL 10654030, at *8 (W.D. Wash. July 22, 2016); *Fed. Trade Comm'n* v. *Inc21.com Corp.,* 745 F. Supp. 2d 975, 1005 (N.D. Cal. 2010), *aff'd,* 475 F. App'x 106 (9th Cir. 2012).

[409] 15 U.S.C. 8402(a)(2), 8403(2) (Restore Online Shoppers' Confidence Act); 16 CFR 310.4(a)(7) (Telemarketing Sales Rule).

[410] The Commission has required express, informed consent provisions in orders against motor vehicle dealers and others. *See* Stipulated Order at Art. IV, *Fed. Trade Comm'n* v. *Passport Auto. Grp., Inc.,* No. 8:22–cv–02670–TDC (D. Md. Oct. 18, 2022); Stipulated Order at Art. II, *Fed. Trade Comm'n* v. *North Am. Auto. Servs., Inc.,* No. 1:22–cv–01690 (N.D. Ill. Mar. 31, 2022) Stipulated Order at Art. II, *Fed. Trade Comm'n* v. *Liberty Chevrolet,* No. 1:20–cv–03945 (S.D.N.Y. May 22, 2020); Stipulated Order at Art. III, *Fed. Trade Comm'n* v. *Consumer Portfolio Servs.,* No. 14–cv–00819 (C.D. Cal. June 11, 2014). Similarly, the Commission has required such provisions in orders in other contexts. *See, e.g.,* Stipulated Order at Art. III, *Fed. Trade Comm'n* v. *Yellowstone Cap. LLC,* No. 1:20–cv–06023–LAK (S.D.N.Y. May 4, 2021); Stipulated Order at Art. IV, *Fed. Trade Comm'n* v. *Prog. Leasing,* No. 1:20–cv–1668–JPB (N.D. Ga. Apr. 22, 2020); Decision and Order at Art. VI, *Bionatrol Health, LLC,* No. C–4733 (F.T.C. Mar. 5, 2021); Stipulated Order at Art. I.E, *Fed. Trade Comm'n* v. *BunZai Media Grp., Inc.,* No. CV 15–4527–GW (PLAx) (C.D. Cal. June 27, 2018); Stipulated Order at Art. I, *Fed. Trade Comm'n* v. *T-Mobile USA, Inc.,* No. 2:14–cv–00967–JLR (W.D. Wash. Dec. 19, 2014); Stipulated Order at Art. I, *Fed. Trade Comm'n* v. *AT&T Mobility, LLC,* No. 1:14–cv–03227–HLM (N.D. Ga. Oct. 8, 2014); Decision and Order at Art. I, *Google, Inc.,* No. C–4499 (F.T.C. Dec. 2, 2014); Consent Order, *Apple Inc.,* No. C–4444 (F.T.C. Mar. 27, 2014); *cf. Fed. Trade Comm'n* v. *Kennedy,* 574 F. Supp. 2d 714, 720–21 (S.D. Tex. 2008) (consumers charged without express, informed consent for web services could not reasonably avoid harm when told that websites were ''free'').

must be an affirmative act that itself conveys the consumer's unambiguous assent to the specific charge: it must clearly and expressly communicate both that the consumer has been *informed* about the charge and *consents* to the charge. This act cannot be susceptible to alternative interpretations, *i.e.,* that the consumer meant to communicate something other than the consumer's authorization to be charged for the specific add-on or other item in question. For example, a consumer might ask, ''how much would it cost to get the car with [a specific add-on]?'' Such a statement does not convey unambiguous assent to be charged for the mentioned add-on; rather, it could merely convey curiosity, interest, or a desire to evaluate options. Similarly, if a consumer responds to a salesperson's description of an add-on by saying ''OK,'' this response may merely confirm that the consumer had heard or understood information and does not indicate the consumer's unambiguous assent to purchase, let alone be charged for, such an item.

Relatedly, some commenters, including dealership associations, suggested that the addition, by the consumer, of a signature or set of initials, accompanied by a corresponding date can be partial evidence of an affirmative, or ''Express,'' act. The Commission notes that the extent to which these, or other, acts indicate ''Express, Informed Consent'' depends on circumstances and context. A consumer signing a lengthy document with pre-checked boxes does not, by itself, demonstrate express, informed consent. This is particularly so at the end of an hours-long transaction, at which point actions that, under other circumstances, may indicate assent are increasingly less likely to do so unambiguously, given that at the close of a transaction, consumers expect to be finalizing previously agreed-upon terms instead of discussing new products or services hours into the deal. For express, informed consent to be effective, the consumer must understand what a charge is for and the amount of the charge, including all costs and fees over the length of the payment period. A signed and dated document would not satisfy the requirement for express, informed consent, for example, if the consumer was directed to sign the final page of a contract or an electronic signature pad and the signed and dated document did not reflect the terms to which the consumer had agreed. In such cases, the signed and dated document does not represent the consumer's unambiguous assent to be charged, made after receiving, and in close proximity to, a clear and conspicuous disclosure of what the charges are for and the amount of the charges.

Some industry association commenters argued that the proposed definition was too prescriptive, and would require, for instance, video records to demonstrate compliance, or that the proposed language was overreaching, and requiring express, informed consent for every item on a contract would be complicated and time-consuming. The Commission notes again that, under current law, dealerships are already required to obtain consumers' express, informed consent to charges. If dealers are already obtaining such consent, as is required by law, they need not take additional steps, such as by using a separate disclosure form or videos, or by spending additional time during the transaction to comply with this provision.

A dealership association commenter requested examples of recordkeeping and best practices evidencing oral disclosures that would satisfy the requirement to obtain express, informed consent. The express, informed consent requirement and definition require the disclosure to be made in *writing* in addition to orally for in-person transactions. Furthermore, under other provisions of the Rule, such as the definition of ''Clear(ly) and Conspicuous(ly)'' at § 463.2(d)(7), dealers are prohibited from contradicting information that is required to be disclosed; thus, for example, dealers' oral representations must be consistent with the written disclosure required for obtaining express, informed consent. Best practices for satisfying the requirement to obtain express, informed consent include presenting key information and finalizing actual terms early in the transaction—for example, by including full cost information, such as estimated taxes, costs of any selections made by the consumer, and any other components of cost, on dealer websites—and maintaining records that this was done. The Commission notes that, as a transaction progresses, consumers expect to be finalizing previously agreed-upon terms instead of discussing new charges and new products or services. In lieu of finalizing additional formal mandates in the Rule regarding recordkeeping and best practices evidencing express, informed consent, the Commission recognizes that industry members and other stakeholders will have significant room to develop self-regulatory programs and guidance tailoring these and other topics to the specifics of their business operations.

Some dealership association commenters expressed concern that such a provision would be inconsistent with State laws and would complicate the car buying experience. While the Commission is not aware of any laws that allow dealers to charge consumers without their express, informed consent, and thus is not aware of any inconsistences with this provision, § 463.9 of the Final Rule specifies what dealers must do in the case of actual conflicts with State law. State laws may provide more or less specific requirements—including requirements that provide greater protection—as long as they do not conflict with the Final Rule, as set forth in § 463.9. The Commission also notes that to the extent there is overlap with existing law, there is no evidence that duplicative prohibitions against deceptive and unfair conduct, including prohibitions against charging consumers without express, informed consent, have harmed consumers or competition.

Commenters, including an industry association, inquired whether the term ''item,'' as used in this proposed provision, differed from the term ''Add-on Product or Service'' defined in § 463.2 of the Commission's proposal. The industry association also argued that requiring express, informed consent is beyond what is required under the Truth in Lending Act. The Commission responds as follows: Consistent with its plain meaning, the term ''item'' is broader than, and thereby encompasses, the term ''Add-on Product(s) or Service(s),'' which is limited by its definition in § 463.2 of the Final Rule.[411] As proposed, § 463.5 addressed ''Dealer Charges for Add-ons and *Other Items.*''[412] It did so in recognition of the fact that add-ons are one type of ''item,'' but that ''*Other Items*'' for which a dealer might charge exist as well. Thus, as proposed, § 463.5 applied to charges generally, whether such charges were for an add-on or for another item. As previously discussed, charging consumers without their express, informed consent to the charge has long been an unfair or deceptive practice under the FTC Act. This has been the case regardless of what the charge is for. Accordingly, dealers already should be obtaining consumers' express, informed

[411] *See* NPRM at 42046. The term ''item'' includes ''a distinct part in an enumeration, account, or series'' as well as ''a separate piece of news or information.'' *See Item* (defs. 1, 3), Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/item* (last visited Sept. 14, 2023).

[412] *See* NPRM at 42046 (emphasis added).

consent for charges, whether it is for an Add-on or any other item, regardless of what may be required under other laws.

Commenters, including this same industry association commenter, also questioned how a dealership would calculate ''the amount of the charge . . . with and without the product or service'' as would be required under proposed § 463.2(g)(2), as well as how this proposed provision would work in a non-financed transaction.[413] Conversely, an individual commenter stated that current F&I practices already routinely disclose the proposed charges with and without the product or service. The Commission notes that its proposed definition of ''Express, Informed Consent'' plainly required disclosure of the ''amount of the charge, including, if the product is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service.''[414] The amount the dealer will charge the consumer over the period of repayment with the product or service is the total charge for that product or service. In the event the charge is for an optional product or service, the amount the dealer will charge the consumer without the product or service is zero; in the event the charge is for a non-optional item, the dealer's disclosure must clearly indicate as such. Regarding non-financed transactions, as with a financed transaction, the amount the dealer will charge the consumer over the period of repayment with the product or service is the total charge for that product or service. If the period of repayment is such that full payment is due upon receipt of the vehicle, the amount required to be disclosed is the total charge for that product or service to be paid upon receipt of the vehicle. The amount the dealer will charge the consumer without the product or service, if it is optional, is zero; in the event the charge is for a non-optional item, the dealer's disclosure must clearly indicate such. Sharing this basic information with consumers—how much they will pay for the item and how much they will pay without it—addresses practices, such as hiding add-on charges, misrepresenting whether such charges are required in connection with the vehicle sale or financing transaction, or misrepresenting how such charges influence the total of payments for the transaction.

An industry association comment stated that, were the Commission's proposal to become final, the Commission would be able to obtain monetary relief from dealers for harmed consumers, and argued that Holder Rule protections for such consumers thus would be unnecessary.[415] Accordingly, it urged the Commission to modify its proposal to include a safe harbor for contract assignees, which it argued would be incapable of detecting deficiencies in sale or lease transactions, such as dealer misrepresentations or a lack of consumer consent, unless those deficiencies were apparent from the face of the contract. Here, the Commission emphasizes that no provision of the Final Rule changes the status quo regarding the responsibilities of assignees or other subsequent holders of motor vehicle financing under the Holder Rule. The Commission did not include, when enacting the Holder Rule, a safe harbor from liability for claims or defenses based on their capability of detection by such assignees or other subsequent holders, and the Commission does not believe on the basis of comments received in the course of this rulemaking that such a change would be warranted as a consequence of finalizing this Rule. The Holder Rule provides important protections for harmed consumers, even when there is law that allows the Commission or other law enforcers to obtain remedies for harmed consumers, including where the consumers are seeking recourse from, or defending themselves against, parties that have not been the subject of law enforcement actions.[416] Furthermore, while the Commission understands that dealers are often in the best position to ensure they have, in the first instance, obtained a consumer's express, informed consent for charges, there are steps an assignee or other subsequent holder of the consumer credit contract, such as a third-party financing entity, can take to address concerns about contracts obtained without express, informed consent. For example, if a financing entity receives complaints from consumers or others that specific charges were obtained without authorization or sees that charges for a particular item are occurring substantially more frequently at a given dealership than at others, the financing company can take steps to make sure the dealer is obtaining express, informed consent. Further, if a financing entity is concerned that a dealership may be acting in violation of the Final Rule, it may arrange its business relationships accordingly, including by altering or withdrawing its business from the dealership.[417]

Another industry association commenter asked for clarification regarding the extent to which particular rules are necessary to obtain customer authorization for charges, thus reflecting what is already necessary under State or Federal law, as opposed to preventative measures that the Commission otherwise deems necessary. The Commission notes that this provision is consistent with the requirements of the FTC Act, which already prohibits charging consumers without express, informed consent, and is needed to address unfair and deceptive conduct. As the Commission set forth in its NPRM, the length and complexity of motor vehicle transactions has created an environment rife with deceptive and unfair conduct. Consumer complaints and the Commission's extensive law enforcement experience, among other sources, indicate that some dealers have added thousands of dollars in unauthorized charges to motor vehicle transactions, including for add-ons consumers had already rejected.[418] Such issues are exacerbated when, for example, preprinted dealer contracts automatically include charges for optional add-ons that the consumer has not selected; when dealers rush consumers through stacks of paperwork with buried charges after a lengthy process; when dealers misinform consumers that the documents they are signing represent agreed-upon terms; or when dealers ask consumers to sign blank documents.

Charging consumers without their express, informed consent causes substantial injury to consumers in the amount of the unauthorized charge. This injury is not reasonably avoidable when dealers do not clearly and conspicuously disclose to the consumer what the charge is for and the amount of the charge, since this information is within the unilateral control of the

[413] This commenter also contended that this provision would result in many disclosures when combined with proposed § 463.5(b). Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 98–99. As discussed previously, the Commission declines to finalize proposed § 463.5(b).

[414] *See* NPRM at 42045.

[415] *See* Holder Rule, 16 CFR 433.2.

[416] *See* Holder Rule, 16 CFR 433.2; *see also* Fed. Trade Comm'n, Advisory Opinion Regarding F.T.C. Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (May 3, 2012), *https://www.ftc.gov/system/files/documents/advisory_opinions/16-c.f.r.part-433-federal-trade-commission-trade-regulation-rule-concerning-preservation-consumers-claims/120510advisoryopinionholderrule.pdf* (last visited Dec. 5, 2023).

[417] *See* Complaint ¶¶ 29–32, *Fed. Trade Comm'n* v. *Tate's Auto Ctr. of Winslow, Inc.,* No. 3:18-cv-08176–DJH (D. Ariz. July 31, 2018) (alleging a financing entity ceased business with Tate's Auto Center after concerns about loan falsification and substantial losses).

[418] *See* SBP II.B.2.

dealer. There are no countervailing benefits to consumers or to competition that outweigh this injury. To the contrary, if all dealers obtained express, informed consent to charges, they would not lose business to dealers who do not do so.

Charging for an item without obtaining the consumer's express, informed consent is also a deceptive practice under section 5 of the FTC Act.[419] When a dealer presents a consumer with whom the dealer has negotiated a finalized sale or financing contract, the dealer is representing that the contract includes only charges that were negotiated and to which the consumer agreed. If the dealer failed to obtain the consumer's express, informed consent, however, such a representation is false or misleading. It is also material: if consumers knew that they had not, in fact, authorized a charge that the dealer nonetheless included in their sales or financing contract, this information likely would have affected the consumers' willingness to continue to engage with the dealership, as well as consumers' willingness to select and pay for any such item. The express, informed consent requirement also serves to prevent the misrepresentations prohibited by § 463.3 of the Final Rule—including misrepresentations regarding material information about the costs or terms of purchasing, financing, or leasing a vehicle, and about any costs, limitation, benefit, or other aspect of an add-on.[420] The requirement also serves to prevent violations of the disclosure requirements in § 463.4 and the prohibition against charging for non-beneficial add-ons in § 463.5(a). By operation of the definition of ''Express, Informed Consent'' at § 463.2(g), this requirement reduces the likelihood that dealers will fail to disclose what a given charge is for and the amount of the charge including all fees and costs to be charged to the consumer over the period of repayment with and without the charged item, thereby making the disclosures of information required by § 463.4 more likely. The same is true regarding the requirements of § 463.5(a): the requirement that dealers obtain informed and unambiguous assent to be charged for each product or service makes it less likely that dealers will charge consumers for items from which they would not benefit; consumers typically do not provide informed, unambiguous assent to be charged for additional products from which they could not benefit unless they are led to believe, directly or by omission, that these products would be beneficial.

Thus, the Commission has determined to finalize proposed § 463.5(c), prohibiting dealers from charging a consumer for any item unless the dealer obtains the express, informed consent of the consumer for the charge, with the addition of language clarifying that the requirements in § 463.5(c) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b), 463.4, and paragraph (a) of this section.'' In addition, the Commission has determined to finalize its definition of ''Express, Informed Consent,'' now at § 463.2(g), substantively as proposed.

F. § 463.6: Recordkeeping

Proposed § 463.6 required motor vehicle dealers to create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with the Final Rule, including those in five enumerated paragraphs. This proposed section further provided that dealers may retain such records in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business, and that failure to keep all required records required will be a violation of the Rule. As examined in additional detail in the following analysis, several commenters supported the proposal; several urged the Commission to adopt broader recordkeeping requirements; and several other commenters argued that the proposed requirements were too broad. After careful consideration, the Commission has determined to adopt these recordkeeping requirements largely as proposed, with two conforming modifications to remove references to proposed provisions not adopted in the Final Rule; one typographical modification to include a serial comma for consistency; and minor textual changes to ensure consistency with the defined terms at § 463.2(e) and (f) by replacing ''Motor Vehicle Dealer'' with ''Covered Motor Vehicle Dealer'' or ''Dealer,'' replacing ''Motor Vehicle'' with ''Vehicle,'' and capitalizing ''vehicle.'' In the following paragraphs, the Commission discusses each proposed recordkeeping requirement, the comments the Commission received on each such requirement as well as the Commission's responses to such comments, and the provisions the Commission is finalizing.

Section 463.6(a) of the proposed rule required motor vehicle dealers to create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with the Final Rule, including (1) copies of materially different advertisements, sales scripts, training materials, and marketing materials regarding the price, financing, or lease of a motor vehicle that the dealer disseminated during the relevant time period; (2) copies of all materially different add-on lists and all documents describing such products or services that are offered to consumers; (3) copies of all purchase orders; financing and lease documents with the dealer signed by the consumer, whether or not final approval is received for a financing or lease transaction; and all written communications relating to sales, financing, or leasing between the dealer and any consumer who signs a purchase order or financing or lease contract with the dealer; (4) records demonstrating that add-ons in consumers' contracts meet the requirements of § 463.5, including copies of all service contracts, GAP agreements, and calculations of loan-to-value ratios in contracts including GAP agreements; and (5) copies of all written consumer complaints relating to sales, financing, or leasing, inquiries related to add-ons, and inquiries and responses about vehicles referenced in § 463.4.

Proposed § 463.6(b) provided that a motor vehicle dealer may keep the required records ''in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business.'' This proposed paragraph also specified that failure to keep all records required under paragraph (a) of this section would be a violation of the Final Rule.

Many commenters, including State regulators, legal aid groups, consumer advocacy organizations, and individual commenters, endorsed the Commission's proposed rule generally, without criticism of its proposed recordkeeping requirements. In addition, one such association commenter expressly stated that it supported each of the proposed recordkeeping provisions, explaining that these proposed provisions were needed to address ''bait and switch'' tactics, provide evidence of whether required disclosures are made, and identify consumers harmed by illegal

[419] *See, e.g., Fed. Trade Comm'n* v. *FleetCor Techs., Inc.,* 620 F. Supp. 3d 1268, 1334–39 (N.D. Ga. Aug. 9, 2022); *Fed. Trade Comm'n* v. *Inc21.com Corp.,* 745 F. Supp. 2d 975, 1001–03 (N.D. Cal. Sept. 21, 2010).

[420] *See* 15 U.S.C. 57a(a)(1)(B) (the Commission ''may include requirements prescribed for the purpose of preventing'' unfair or deceptive acts or practices).

practices.[421] Here, the Commission notes that record retention requirements are necessary to preserve written materials that reflect the transactions between the dealer and purchasing consumers, and to assist the Commission to enforce its Rule by enabling it to ascertain whether dealers are complying with its requirements; to identify persons who are involved in any challenged practices; and to identify consumers who may have been injured. Such requirements are particularly important in the case of complicated, lengthy, and document-heavy vehicle sale or financing transactions, in which law violations may be more difficult for consumers and others to detect. Indeed, the Commission routinely includes recordkeeping requirements in its rules.[422]

Several commenters, including consumer advocacy organizations, consumer protection agencies, a group of State attorneys general, and individual commenters, urged the Commission to consider expanding the proposed twenty-four-month record retention period, noting that the contract period for most retail installment contracts is much longer than twenty-four months, and that State limitations periods for claims relating to the subject matter of the Commission's proposed rule often extend well beyond this proposed timeframe. Numerous such commenters, for instance, recommended a record retention period of the longer of seven years or the length of the consumer's financing contract.

The Commission understands that there would be benefits to a longer period, especially given that vehicle financing repayment terms are often far longer than twenty-four months, and that many dealers likely already maintain, in the ordinary course of business, the types of records set forth in proposed § 463.6. The Commission, however, is also mindful that other commenters raised concerns about the costs associated with record retention, including costs that would increase with any extension of the retention period. Rather than limiting the types of records to be maintained, and thus hampering the Commission's ability to ensure compliance with the Final Rule, the Commission has determined to adopt a retention period that is shorter than the time period of many motor vehicle financing contracts, in order to minimize burdens. In the event the Commission subsequently determines that a twenty-four-month retention period is insufficient to ensure compliance with this Rule, the Commission may consider other measures in the future.

In addition, a number of commenters, including consumer advocacy organizations, recommended additional provisions, including an explicit requirement to retain language-translated versions of required records, and a requirement to make retained records available to consumers upon request. Regarding language-translated versions of required records, § 463.6(a)(3), (a)(4), and (a)(5) require dealers to retain copies of ''all'' listed records, while § 463.6(a)(1) mandates that dealers retain ''Materially different'' copies of records. Thus, for the records listed in § 463.6(a)(3), (a)(4), and (a)(5), any translations are required to be retained; in the case of § 463.4(a)(1), the Rule requires materially different translations to be maintained.[423] The Commission therefore has determined not to add to the recordkeeping section of the Rule a standalone requirement to retain translated versions. The Commission will continue to monitor the marketplace to determine whether additional action or protections are warranted.

The Commission also declines to include in this Final Rule an additional requirement that dealers provide retained records to consumers upon request. Such a requirement may be beneficial; however, it is not clear to what extent dealers currently refuse to provide consumers with such records, and there is insufficient information in the rulemaking record to assess the impact of—or need for—such a modification of the existing requirement to retain and preserve materials in the Rule. The Commission will continue to monitor the motor vehicle marketplace, including issues relating to information access, to determine whether additional action or protections are warranted.

Other commenters—particularly auto industry participants—objected to the proposed recordkeeping requirements.[424] Several such commenters contended that the proposed requirements were new obligations that went beyond specific State recordkeeping requirements. Some dealership associations argued that existing State recordkeeping requirements are sufficient and that a Commission rule was unnecessary. One such commenter argued that the existence of overlapping, but different, State and Federal standards may make compliance difficult for motor vehicle dealers.

In response, the Commission notes that the recordkeeping requirement is necessary to ensure motor vehicle dealer compliance with the Final Rule, and therefore may have different requirements than State standards. To provide dealers with flexibility and to minimize burden, however, the proposed rule permitted dealers to retain records ''in any legible form,'' including ''the same manner, format, or place'' in which records are kept in the ordinary course of business. To the extent dealers have fashioned their ordinary record retention practices around State recordkeeping standards, the proposed rule thus allowed for record retention in the form required by State recordkeeping standards. Additionally, as discussed in the following paragraphs, the Commission is not finalizing recordkeeping requirements that dealers maintain Add-on Lists and Cash Price without Optional Add-ons disclosures and declinations, further reducing burdens.

One industry association commenter suggested that this requirement would increase risks of identity theft and raise privacy concerns. The Commission notes that many dealers already have obligations to retain customer records under State law.[425] Dealers are required to have systems in place to protect this information, given that the failure to adequately protect such information violates existing law, including section 5 of the FTC Act and the Commission's Standards for Safeguarding Customer Information, also known as the

[421] Comment of Nat'l Consumer L. Ctr. et al., Doc. No. FTC–2022–0046–7607 at 48–49; *see also* Comment of N.Y.C. Dep't of Consumer and Worker Prot., Doc. No. FTC–2022–0046–7564 at 6 (noting retention requirements are vital to investigations, particularly with respect to mandatory disclosures).

[422] *See, e.g.,* Telemarketing Sales Rule, 16 CFR 310.5; Business Opportunity Rule, 16 CFR 437.7.

[423] *See* § 463.2(j).

[424] One industry commentor questioned the utility of records in FTC actions. This commenter also stated that the FTC is not a supervisory agency and thus should not be seeking to create a records inspection scheme. As noted previously, recordkeeping requirements are necessary here to prevent unfair and deceptive practices by mandating preservation of written materials that reflect dealer transactions and to enable effective enforcement of the Rule. The Commission has the authority to prescribe rules for the purpose of preventing unfair or deceptive acts or practices. *See* 15 U.S.C. 57a(a)(1)(B). The Commission routinely includes recordkeeping requirements in rules, *see, e.g.,* Telemarketing Sales Rule, 16 CFR 310.5; Business Opportunity Rule, 16 CFR 437.7, and courts have ordered companies to maintain records in FTC orders, *see, e.g.,* Final Judgment at 20–21, *Fed. Trade Comm'n* v. *Elegant Sols., Inc.,* No. 8:19–cv–01333–JVS–KES (C.D. Cal., July 17, 2020); Order for Permanent Injunction and Monetary Judgment at 27–28, *Fed. Trade Comm'n.* v. *Consumer Defense, LLC,* No. 2:18–cv–00030–JCM–BNW (D. Nev. Dec. 5, 2019).

[425] *See, e.g.,* Va. Code sec. 46.2–1529 (requiring retention for five years of ''all dealer records'' regarding, among other things, vehicle purchases, sales, trades, and transfers of ownership).

Safeguards Rule.[426] Thus, to the extent the Final Rule requires dealers to collect personal information beyond that which they are already collecting, they should already have systems in place to protect such information.

Some commenters raised concerns about the requirement in proposed § 463.6(a)(1) to preserve, *inter alia,* materially different advertisements, sales scripts, and marketing materials. One such dealership association commenter argued that dealers should not be required to retain sales scripts, training materials, and marketing materials, while another dealership association commenter argued that dealers should not be required to maintain advertisements, positing that these materials are publicly available and could be requested from advertisers as concerns arise with respect to particular ads. Commenters including two dealership organizations argued that digital advertisements would be difficult to retain, with one such commenter urging the Commission to adopt an approach that would permit dealers to retain a representative example of a vehicle advertisement and the underlying data used to populate vehicle ads. The other such commenter suggested that the proposed recordkeeping requirement could be unduly burdensome because ''all materials'' related to its online inventory ''could be deemed some version of materially different advertisements and marketing materials regarding price or financing of a motor vehicle.'' Another dealership organization commenter raised a similar concern about website listings and questioned whether the term ''advertisement'' includes television ads and email campaigns.

After considering these comments, the Commission has determined that the proposed recordkeeping requirements in § 463.6(a)(1) strike an appropriate balance by requiring the retention of materials needed to enable effective enforcement while only requiring such records to be retained for twenty-four months and in any legible form. Advertisements and marketing materials regarding the price, financing, or lease of a motor vehicle are critical to determining compliance with virtually every provision in the Final Rule, as they are often consumers' first contact in the vehicle-buying or -leasing process, and often contain key representations about pricing, payments, and other terms. Scripts and training materials are important evidence of a dealer's compliance program regarding the Final Rule's requirements, including of the information and instructions that dealership staff are given with respect to the areas that are addressed by the Final Rule. Furthermore, regarding the contention that advertisements are available publicly or could be requested separately, a core purpose of the recordkeeping requirement is to ensure that disseminated representations are preserved for a sufficient period of time to allow for compliance concerns to be addressed. A compliance regime that, contrary to the Commission's proposal, allowed the destruction of advertisements after they have been publicly presented, or that requires the Commission to try to obtain materials from advertisers or third parties, would not serve this purpose.

With respect to the scope of advertisements that must be retained, the recordkeeping requirement does not differ with respect to the form of the advertisement, since the same enforcement concerns are raised regardless of whether an ad is presented in digital, hardcopy, email, audio, televised, or other format. The recordkeeping requirement does not require all advertisements to be retained, however, as § 463.6(a)(1) specifically includes the proviso that ''a typical example of a credit or lease advertisement may be retained for advertisements that include different Vehicles, or different amounts for the same credit or lease terms, where the advertisements are otherwise not Materially different.'' Regarding the commenter's proposal to allow dealers to retain a ''representative'' example of an advertisement with digital data that can recreate different versions of the advertisement, this provision, as proposed, permitted dealers to preserve typical examples of advertisements in this manner so long as such records are already kept in in the ordinary course of business, capture all differences that would be material to consumers, and accurately show how the offers have been presented to consumers. Materially different website listings, television advertisements, and email campaigns must be preserved, consistent with the plain meaning of the terms used in the section.

With respect to proposed § 463.6(a)(2)'s requirement to maintain copies of all materially different add-on lists, an industry association commenter contended that retaining materially different add-on lists would be difficult, given the scope of the term ''Add-on'' and the consequent size of the list as well as its dynamic nature. One dealership association commenter argued that the proposed requirement to retain add-on lists was unnecessary, contending that concerns could be addressed as they arise, and requesting to replace this proposed requirement with a requirement to retain a master copy of each insurance product, service contract, or other add-on in the dealer's general business file. After carefully considering the comments, the Commission has determined not to finalize the proposed requirement at § 463.4(b) to disclose an add-on list, and consequently will not be finalizing the proposed requirement at § 463.6(a)(2) that dealers retain materially different add-on lists.

Several commenters, including industry associations, argued that certain of the proposed requirements to preserve written material, including written communications under proposed § 463.6(a)(3) and written consumer complaints, and inquiries and responses about vehicles referenced in § 463.4, under proposed § 463.6(a)(5), would be unduly burdensome. Generally, these commenters contended that the various ways consumers may communicate with dealers—including chat features on a dealer's website, emails and text messages with salespersons, and social media posts—would require the development of new and onerous preservation systems. A dealership organization commenter raised concerns about retaining text messages and emails, contending that salespeople may use their personal phones and email addresses, even if the dealership has policies against such use. One industry association commenter argued that third parties might have records related to add-ons and that this provision should only apply to ''complaints'' relating to add-ons instead of ''inquiries'' relating to add-ons. One dealership association commenter argued that dealers should not be required to retain consumer complaints, contending it should be the businesses' decision whether to maintain such materials, and also arguing that the Rule should not require, under proposed § 463.6(a)(4), the preservation of materials such as pricing options presented to consumers, contending that such materials should be limited to the two parties to the agreement.

After considering these comments, the Commission has determined to finalize requirements to retain written materials

[426] 15 U.S.C. 45; 16 CFR 314; *see also* Decision and Order, *LightYear Dealer Techs., LLC,* No. C–4687 (F.T.C. Sept. 3, 2019) (consent order); FTC Business Guidance, ''FTC Safeguards Rule: What Your Business Needs to Know,'' *https://www.ftc.gov/business-guidance/resources/ftc-safeguards-rule-what-your-business-needs-know* (last visited Dec. 5, 2023).

under § 463.6(a)(3), (4), and (5), with a limiting modification to § 463.6(a)(4). These requirements are necessary to address unfair and deceptive practices by mandating that dealers preserve written materials that reflect the transactions between the dealer and purchasing consumers, and to assist the Commission in its enforcement of the Rule.[427] Such materials are particularly important given that the vast majority of consumers do not file a complaint, and with hidden charges, many consumers never know about the illegal conduct in the first place.[428] For instance, as explained in SBP II.B, a survey of one dealership group's customers showed that 83% of the respondents were subject to the dealer's unlawful practices related to add-ons. This equals 16,848 consumers—far more than the 391 complaints received against the dealer over the time period covered by the survey.

To minimize burden, as previously noted, the retention requirements are for a period of twenty-four months. Further, as stated previously, § 463.6(b) permits dealers to retain records ''in any legible form,'' which could, for example, include using the backup and export features that already exist in many social media services, email platforms, chat platforms, and text systems, instead of creating entirely new systems. Regarding dealers that use third parties to administer add-ons, commenters did not explain why they cannot access records related to add-ons from these parties.[429] Further, altering the language in the provision to apply to ''complaints'' rather than ''inquiries'' related to add-ons could invite arguments that consumer statements, such as, ''Why was I charged for this add-on that I did not know about?'' are not ''complaints,'' but simply ''inquiries.'' With respect to the use of salespeople's personal devices to conduct motor vehicle dealer activities, including the sale, financing, or leasing of vehicles, as with any business, dealers should ensure that their employees are communicating with consumers through appropriate channels that can be monitored and controlled by the dealership.

Some commenters, including an industry association and a dealership organization, also raised concerns about how to determine what would constitute ''written consumer complaints'' under proposed § 463.6(a)(5). For purposes of the Rule, the Commission refers commenters to the plain meaning of the terms used in the phrase, which terms are commonly used and understood.[430]

Two industry association commenters argued that the proposed requirement to retain written communications would be particularly burdensome for recreational vehicle dealers, contending that that this was particularly so given that many RV dealers are small businesses. In response, the Commission notes that, as explained in the paragraph-by-paragraph analysis of § 463.2(e) and (f) in SBP III.B.2(e) and (f), it has determined not to finalize the Rule with respect to dealers predominantly engaged in the sale, leasing, or servicing of RVs, but it will continue to monitor the marketplace to determine whether modifications or revisions may be warranted in the future.

Finally, one industry association commenter argued that the proposed recordkeeping requirements and costs were unwarranted given that the Commission has brought an average of fewer than four enforcement actions a year against motor vehicle dealers in the past decade. In response, the Commission notes that its experience indicates that the number of enforcement actions is not remotely reflective of the total violations of law in the auto marketplace. To uncover misconduct and bring actions, law enforcement agencies and officials often rely on complaints from affected parties. As previously discussed, however, consumer complaints typically represent just the ''tip of the iceberg'' in terms of actual violations, and the vast majority of consumers who are subjected to unlawful practices in this area may not realize they are being victimized.[431] Further, the Commission has limited law enforcement resources and jurisdiction over a broad range of commerce.[432] The number of actions it brings relating to motor vehicle dealers—as with actions in any area—is necessarily limited by these resource constraints, even when there are ongoing, chronic problems that cause substantial consumer harm. Despite these constraints, the Commission and its law enforcement partners have taken significant action aimed at addressing unfair and deceptive practices in the motor vehicle marketplace, as explained in SBP II.C. Given that problems with bait-and-switch advertising, add-ons, and other aspects of vehicle-buying and -leasing have continued to be a source of consumer harm despite this action, additional measures are warranted. And the Commission has taken steps to minimize burden, including by declining to finalize the add-on list disclosure requirements in proposed § 463.4(b), as well as the itemized disclosures required in proposed § 463.5(b) and their corresponding proposed recordkeeping requirements. Moreover, the recordkeeping provisions permit dealers to retain records in any legible form, providing a flexible standard that permits the use of ordinary and standard forms of data and document retention.

The Commission adopts in the Final Rule recordkeeping requirements largely as they were set forth in the proposed rule, with two substantive modifications. After careful consideration, the Commission is removing the requirements to retain copies of add-on lists required by proposed § 463.6(a)(2) and records showing compliance with the cash price without optional add-ons disclosures and declinations required by proposed § 463.6(a)(4). These changes will reduce record creation and retention burdens for dealers. As previously described, the Final Rule also contains one typographical modification of adding a serial comma and conforming edits for consistency with the defined terms in § 463.2(e) and (f).

The Commission adopts these recordkeeping requirements to promote effective and efficient enforcement of the Rule, thereby deterring and preventing deception and unfairness. As discussed throughout this SBP, the rulemaking record, including the

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[427] As noted previously, a dealership association commenter argued that dealers should not be required to preserve complaints and certain add-on materials, contending that it should be a business decision whether to retain such records. The Commission declines to substantively modify these requirements from the Commission's original proposal, given the importance of these materials in ensuring compliance with the other requirements of the Rule.

[428] *See* SBP II.B (discussing how complaints represent the tip of the iceberg in terms of actual consumer harm).

[429] This is consistent with the Commission's prior enforcement order practice. *See, e.g.,* Stipulated Order at 25, *Fed. Trade Comm'n* v. *N. Am. Auto. Servs., Inc.,* No. 1:22–cv–0169 (N.D. Ill. Mar. 31, 2022) (requiring retention of ''records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response'').

[430] The term ''written'' means ''made or done in writing.'' *See Written,* Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/written* (last visited Dec. 5, 2023). The term ''consumer'' includes ''one that utilizes economic goods.'' *See Consumer* (def. a), Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/consumer* (last visited Dec. 5, 2023). The term ''complaint'' includes an ''expression of grief, pain, or dissatisfaction,'' ''something that is the cause or subject of protest or outcry,'' and ''a formal allegation against a party.'' *See Complaint* (defs. 1, 2a, 3), Merriam-Webster.com Dictionary, *https://www.merriam-webster.com/dictionary/complaint* (last visited Dec. 5, 2023).

[431] *See* SBP II.B.

[432] *See* 15 U.S.C. 45(a).

Commission's law enforcement experience, indicates that there are chronic problems confronting consumers in the motor vehicle sales, financing, and leasing process, which include advertising misrepresentations and unlawful practices related to add-ons and hidden charges.[433] The recordkeeping requirements in the Final Rule will assist the Commission in investigating and prosecuting law violations and help the Commission identify injured consumers for paying consumer redress. The recordkeeping requirements are flexible, allowing dealers to retain materials in any legible form, and are limited to a period of twenty-four months from the date the record is created. The recordkeeping requirements are consistent with, and similar to, the recordkeeping requirements in other Commission rules, as tailored to individual industries and markets.[434]

G. § 463.7: Waiver Not Permitted

Proposed § 463.7 prohibited waiver of the requirements of the Final Rule by providing that it constituted a violation of the Rule ''for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under'' the Rule. Comments that addressed this proposed provision generally either supported it or expressed no opinion on it. Comments in support noted that the provision would help provide consistency in the protection it would provide to consumers and emphasized that it would prohibit unscrupulous dealers from causing consumers to sign away their rights. This proposed provision was modeled on a similar provision in the Mortgage Assistance Relief Services (''MARS'') Rule, which was originally promulgated by the Commission and subsequently republished by the CFPB.[435] Moreover, at least one State has a similar waiver provision in its rule covering motor vehicle dealer practices.[436] The Commission concludes that this provision is necessary to prevent circumvention of the Rule, and, after review of the comments, adopts this prohibition as it was originally proposed.

H. § 463.8: Severability

Proposed § 463.8 provided that the provisions of the Final Rule ''are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions will continue in effect.'' This proposed provision was modeled on similar provisions in other rules, including the Commission's Telemarketing Sales Rule and the MARS Rule.[437] A number of commenters, including dealership associations, raised general concerns that the proposed provisions may be too integrated with each other for severability to be possible. Such commenters, however, did not provide examples of any such instances wherein they believed certain provisions could not remain in effect if other provisions were stayed or determined to be invalid. Upon consideration of the comments, the Commission concludes that severability is possible in the event any provision is stayed or determined to be invalid. The Rule the Commission is finalizing includes prohibitions against misrepresentations regarding material information (§ 463.3), required disclosures (§ 463.4), and prohibitions against charging for add-ons that provide no benefit or any item without express, informed consent (§ 463.5)—each of which dealers are capable of abiding by independently, as well as by the provisions that independently support their operation, including Authority (§ 463.1), Definitions (§ 463.2), Recordkeeping (§ 463.6), Waiver not permitted (§ 463.7), and Relation to State laws (§ 463.9). Thus, the Commission has determined to adopt this provision in the Final Rule as it was originally proposed.

I. § 463.9: Relation to State Laws

Proposed § 463.9 provided that the Rule does not supersede, alter, or affect ''any other State statute, regulation, order, or interpretation relating to Motor Vehicle Dealer requirements, except to the extent that such statute, regulation, order, or interpretation is inconsistent with'' the Rule, ''and then only to the extent of the inconsistency.'' Proposed § 463.9 further provided that, for purposes of this provision, a State statute, regulation, order, or interpretation is not ''inconsistent'' if the protection such statute, regulation, order, or interpretation affords any consumer ''is greater than the protection provided under'' the Rule. After carefully considering the comments, the Commission adopts § 463.9 largely as proposed in the Final Rule.

Numerous State regulator commenters contended that the proposed rule would create a uniform baseline of protection that would complement State standards. A comment from a group of eighteen State attorneys general contended that many of the Proposed rule's requirements were similar to, or the same as, requirements that currently exist under State laws or regulations, and highlighted the benefit to law enforcement from establishing a consistent Federal baseline while providing States with flexibility to impose heightened consumer protections.[438]

One municipal licensing entity commenter that expressed general support of the Commission's proposed rule also posited that the Commission should broaden proposed § 463.9 to expressly include municipalities. With respect to the applicability of the provision to municipalities, the Commission notes that State political subdivisions exercise delegated power of their State, and as such, § 463.9 applies to municipal standards as well.[439]

Other commenters, including dealership associations, referred generally to potential conflicts between the Commission's proposed rule and State laws, but such commenters typically did not point to any specific purported conflicts with State law. To the extent some such commenters argued that certain proposed provisions would conflict with State laws, such arguments are addressed in the SBP's corresponding paragraph-by-paragraph analysis of the relevant Rule provision. Generally, the Commission is not aware of State laws that allow dealers to make misrepresentations regarding material information; prohibit the disclosure of

[433] Some enforcement actions have specifically alleged that a defendant failed to maintain documents required under a prior order with the FTC. Complaint ¶¶ 42–45, *Fed. Trade Comm'n* v. *Norm Reeves, Inc.,* No. 8:17–cv–01942 (C.D. Cal. Nov. 3, 2017) (alleging dealer failed to keep records of previous advertisements needed to demonstrate compliance with prior order); Complaint ¶¶ 32–35, *Fed. Trade Comm'n* v. *New World Auto Imports, Inc.,* No. 3:16–cv–22401 at (N.D. Tex. Aug. 18, 2016) (same).

[434] *See, e.g.,* 16 CFR 310.5 (Telemarketing Sales Rule); 16 CFR 437.7 (Business Opportunity Rule); 16 CFR 453.6 (Funeral Industry Practices Rule); 16 CFR 301.41 (Fur Products Labeling Rule).

[435] *See* MARS Rule (Regulation O), 12 CFR 1015.8, previously published by the Commission at 16 CFR 322.1.

[436] *See, e.g.,* Wis. Admin. Code Trans. 139.09 (similar waiver prohibition clause in Wisconsin's Motor Vehicle Trade Practices rule).

[437] *See* MARS Rule, 16 CFR 322.8 (Commission Rule), 12 CFR 1015.11 (CFPB Rule); Telemarketing Sales Rule, 16 CFR 310.9.

[438] Comment of 18 State Att'ys Gen., Doc. No. FTC–2022–0046–8062 at 11.

[439] *See City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.,* 536 U.S. 424, 433 (2002) (''The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'') (quoting *Wis. Pub. Intervenor* v. *Mortier,* 501 U.S. 597, 607–08 (1991)).

accurate information regarding a vehicle's offering price, optional vehicle add-ons, or total payment information; or permit dealers to charge consumers for add-ons that provide no benefit to the consumer or to charge for items without consumers' express, informed consent. To the extent there truly are conflicts, as discussed in the following paragraphs, § 463.9 establishes the framework for addressing any such inconsistencies.

Commenters including dealership associations also argued that existing State standards are sufficient and identified State requirements that the commenters argued would be redundant with, or superior to, one or more provisions in the Commission's proposed rule. To the extent the Rule prohibits conduct that is already prohibited by State laws, the Commission has not seen evidence that State and Federal standards prohibiting the same misconduct has harmed consumers or competition. Moreover, such overlap is indicative of dealers' ability to comply with the relevant provisions in the Rule. To the extent State laws have additional requirements that provide greater protections or are not otherwise inconsistent with part 463, dealers must continue to follow those laws.

Several dealership association commenters expressed concern regarding how to determine whether a State statute, regulation, order, or interpretation affords ''greater protection'' than a provision in the Commission's proposed rule. One such commenter, for example, raised concerns that proposed § 463.5(a) may conflict with a pending California bill that would prohibit the sale of GAP when a vehicle has less than a 70% loan-to-value ratio. An industry association commenter claimed that the Commission's proposed definitions of ''Dealer or Motor Vehicle Dealer'' would conflict with analogous State definitions. In response, the Commission emphasizes that § 463.9 would be triggered only if there were an actual inconsistency between State law and the Final Rule, and in the event of an inconsistency, the Rule only affects such State law to the extent of the inconsistency. The commenter examples did not present any such inconsistencies because it is possible to comply with both the cited State law examples and with the Final Rule. For instance, a dealer operating in a State that prohibits the sale of a GAP agreement when a vehicle transaction involves a loan-to-value ratio below 70% would need to abide by the ratio set forth by State law and also by the Rule's prohibition against charging for the product if the consumer would not benefit from it. Similarly, notwithstanding a commenter's claims that the proposed rule's definition of ''Dealer or Motor Vehicle Dealer'' would conflict with analogous State standards, the commenter did not identify any actual conflicts; nevertheless, to the extent State and Federal standards cover independent areas or actors, each actor must comply with the standards—whether State, Federal, or both—under which the actor is covered.[440] Further discussion of how State laws interact with specific sections of the Rule are explained in the corresponding section-by-section analysis for the relevant sections.

Some such commenters also questioned whether more coordination with States and Federal agencies was needed, without explaining what coordination was needed. In any event, the Commission coordinates regularly with States and Federal counterparts.

Many commenters' concerns focused on the written disclosures proposed in § 463.5(b), which the Commission has determined not to include in this Final Rule. For instance, a substantial number of commenters, including industry associations, argued that proposed § 463.5(b) would have created different Federal and State requirements for written disclosures that would result in duplicative paperwork. A dealership association specifically argued that proposed § 463.5(b) may have conflicted with a State pre-contract disclosure requirement pertaining to six categories of add-ons because it would have required an additional disclosure about a broader category of add-ons. An industry association similarly pointed to this State's pre-contract disclosure requirement as a reason that additional disclosures under this Rule, including those required by proposed § 463.5(b), could result in consumer confusion. At least four commenters, including industry associations and a dealership organization, argued that the proposed rule's requirement under § 463.5(b) to create new documentation may conflict with the ''single document'' requirements, in effect in many States, which mandate that the entire motor vehicle sale, financing, or lease agreement—including any add-on products or services—be within one document. As discussed in the paragraph-by-paragraph analysis of § 463.5 in SBP III.E.2, the Commission has determined not to finalize the written disclosures requirement under this provision.

After carefully considering the comments regarding proposed § 463.9, the Commission is finalizing this section largely as proposed, with one minor modification: the Commission is adding ''Covered'' to the term ''Motor Vehicle Dealer'' in § 463.9(a) to conform with the revised definition in § 463.2(f). Section 463.9 provides a uniform floor of protection with the Commission's Final Rule, while also permitting States to enact stronger protections, using a standard that has been applied in other laws and regulations for several decades.[441] This provision is necessary to address unfair and deceptive practices and to enable the Commission to enforce the Rule.

IV. Effective Date

The Final Rule becomes effective on July 30, 2024. One industry association commenter objected that the NPRM did not include an effective date or inquire into the timing for feasibly implementing the Rule. Another such commenter requested at least 18 months for stakeholders to prepare for Rule compliance, but did not explain why it would take 18 months to refrain from conduct that is already illegal, such as making misrepresentations. Rules are generally required to be published 30 to 60 days before their effective date, though in some circumstances, agencies may cite good cause for the rule to become effective sooner than 30 days from publication.[442] Given the significant harm to consumers and law-abiding dealers from deceptive or unfair acts or practices; and the fact that, for dealers already complying with the law, compliance with the Rule the Commission is finalizing should not be onerous; the NPRM did not propose or contemplate any additional delay. Nevertheless, after a review of comments, the Commission is providing dealers until July 30, 2024 to make

[440] *See, e.g., Pirouzian* v. *SLM Corp.*, 396 F. Supp. 2d 1124, 1131 (S.D. Cal. 2005) (reasoning that the more inclusive definition of ''debt collector'' under California law is not ''inconsistent'' with the Fair Debt Collection Practices Act because by ''enlarging the pool of entities who can be sued'' the State law offered greater protection).

[441] *See, e.g.,* 10 U.S.C. 987(d)(1) (Military Lending Act); 15 U.S.C. 1692n (Fair Debt Collection Practices Act); 12 CFR 1006.104 (Regulation F); 15 U.S.C. 1693q (Electronic Funds Transfer Act); *see also* 21 U.S.C. 387p(a)(1) (Family Smoking Prevention and Tobacco Control Act).

[442] *See* 5 U.S.C. 553(d) (requiring publication of a substantive APA rule ''not less than 30 days before its effective date'' except ''as otherwise provided by the agency for good cause found and published with the rule''). Significant rules defined by Executive Order 12866 and major rules defined by the Small Business Regulatory Enforcement Fairness Act are required to have a 60-day delayed effective date. *See* E.O. 12866, 58 FR 51735 (Oct. 4, 1993); 5 U.S.C. 801(a)(3)).

changes to their operations, if needed, in light of the Rule's requirements.

V. Paperwork Reduction Act

On July 13, 2022, the Commission submitted the NPRM and an accompanying Supporting Statement to the Office of Management and Budget (''OMB'') for review under the Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501–3521. On July 29, 2022, OMB directed the Commission to resubmit its request when the proposed rule was finalized.[443]

The Commission is now submitting the Final Rule and a Supplemental Supporting Statement to OMB. The disclosure and recordkeeping requirements of the Rule constitute ''collection[s] of information'' for purposes of the PRA.[444] The associated burden analysis follows.[445]

In the NPRM, the Commission provided estimates and solicited comments regarding the proposed rule, including regarding (1) the proposed add-on list disclosure requirement; (2) the proposed cash price without optional add-ons disclosure requirement; (3) other proposed provisions prohibiting certain misrepresentations and requiring certain disclosures; (4) the proposed recordkeeping provisions; and (5) estimated capital and other non-labor costs. As previously discussed, after carefully reviewing the comments, the Commission has made certain changes to the relevant provisions in the Final Rule. Specifically, the Commission has determined not to finalize requirements, pursuant to proposed § 463.4(b), that dealers disclose an add-on list or, pursuant to proposed § 463.5(b), that dealers refrain from charging for optional add-ons unless enumerated requirements relating to the vehicle's cash price without optional add-ons are met.

In the NPRM, the Commission estimated that the disclosure and recordkeeping requirements would impact approximately 46,525 franchise, new motor vehicle and independent/used motor vehicle dealers in the U.S.[446] In the NPRM, the Commission explained that this figure was exclusive to automobile dealers, and invited comments regarding market information for dealers of other types of motor vehicles, such as boats, RVs, and motorcycles.[447] In response, one industry association commenter noted the absence of such other motor vehicle dealers from the Commission's estimate. Another commenter also noted the absence of such dealers in the estimate and argued that the Commission's estimate also erroneously included independent used motor dealers which the commenter contended do not perform any servicing work, but stated that the Commission's estimate was fairly accurate numerically. As discussed in the paragraph-by-paragraph analysis of § 463.2(e) in SBP III.B.2(e), the Commission has determined to expressly exclude ''Recreational boats and marine equipment,'' ''Motorcycles, scooters, and electric bicycles,'' ''Motor homes, recreational vehicle trailers, and slide-in campers,'' and ''Golf carts'' from the Final Rule's definition of ''Covered Motor Vehicle.'' Further, as examined in the paragraph-by-paragraph analysis of § 463.2(f) in SBP III.B.2(f), the plain meaning of the term ''servicing'' covers activities that are undertaken by independent used car dealers.[448] Thus, the Commission bases its estimate of the entities covered by the Final Rule on the same North American Industry Classification System (''NAICS'')[449] categories—''new car dealers'' and ''used car dealers''—as it did in the NPRM.[450] As with other figures in this section, the NAICS data assembled by the U.S. Census Bureau have been revised since the publication of the Commission's NPRM with more recent data. Based on these revisions, the Commission now estimates that the Final Rule's disclosure and recordkeeping requirements will impact approximately 47,271 franchise, new motor vehicle and independent/used motor vehicle dealers in the United States.[451]

The estimated overall annual hours burden for the Final Rule's collections of information is 1,595,085 hours. The estimated overall annual labor cost for the Final Rule's collections of information is $51,904,537. The estimated overall annual capital and other non-labor cost for the Final Rule's collections of information is $14,181,300.

A. Add-On List Disclosures

Section 463.4(b) of the proposed rule required motor vehicle dealers that charge for optional add-on products or services to disclose clearly and conspicuously in advertisements and on any website, online service, or mobile application through which they market motor vehicles, and at any dealership, an itemized add-on list of such products

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[443] OMB assigned the rulemaking control number 3084–0172 for PRA review purposes.

[444] 44 U.S.C. 3502(3); 5 CFR 1320.3(c).

[445] One commenter suggested the FTC did not comply with several provisions of the PRA, specifically those contained in 5 CFR 1320.5(a)(1)(iv), 1320.8(d)(1), 1320.11(a), 1320.11(b), and 1320.11(d). The commenter does not explain the basis for the purported deficiencies. These provisions generally relate to the submission of a collection of information to OMB, and solicitation and consideration of public comments. The FTC has complied with these provisions. The FTC submitted an Information Collection Request to Office of Management and Budget on July 13, 2022, concurrently with publication of the NPRM, in accordance with 5 CFR 1320.11(b). *See* Motor Vehicle Dealers Trade Regulation Rule, ICR 202202–3084–001, OMB 3084–0172, *https://omb.report/icr/202202-3084-001*. Because the FTC complied with this requirement, the collection of information proposed in the NPRM is not, as the commenter contends, subject to disapproval under 5 CFR 1320.11(d).

The Commission also did not violate 5 CFR 1320.5(a)(1)(iv) and 1320.11(a), providing for comments to be submitted to OMB, as the commenter contends. Those provisions are limited by 5 CFR 1320.8(d)(3), which provides that the agency need not direct comments to OMB ''if the agency provides notice and comment through the notice of proposed rulemaking . . . for the same purposes as are listed under'' 5 CFR 1320.8(d)(1). The Commission solicited comments in the NPRM on the subjects enumerated in 5 CFR 1320.8(d)(1), *see* NPRM at 42028–31, 42035–43, and it was not necessary for the Commission to also direct these same comments to OMB. The Commission thus did not violate 5 CFR 1320.5(a)(iv) or 1320.11(a).

Further, contrary to the commenter's assertion, the Commission demonstrated throughout the NPRM that the information collection-related requirements it embodies are necessary, offer utility and public benefit, and minimize burdens. *See, e.g.,* NPRM at 42027, 42043. Moreover, the Commission requested comments on the necessity, utility, benefits, and burdens of the proposed rule, *see* NPRM at 42028–31, 42035–43, and has further taken into consideration and addressed comments in this SBP.

[446] NPRM at 42031.

[447] NPRM at 42031 n.154, 42036.

[448] *See also* Used Car Rule, 81 FR at 81668 (noting that the term ''servicing'' used in this same context ''captures activities undertaken by essentially all used car dealers,'' including by preparing vehicles for sale by addressing any obvious mechanical problems and by undertaking the general industry practice of appearance reconditioning).

[449] NAICS is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. North American Industry Classification System, U.S. Census Bureau, *https://www.census.gov/naics/*.

[450] U.S. Census Bureau, ''All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019,'' *https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=44111%3A44112&tid=CBP2019.CB1900CBP&hidePreview=true&nkd=EMPSZES~001,LFO~001* (listing 21,427 establishments for ''new car dealers,'' NAICS code 44111, and 25,098 establishments for ''used car dealers,'' NAICS code 44112). *See* NPRM at 42031.

[451] U.S. Census Bureau, ''All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021,'' *https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001* (listing 21,622 establishments for ''new car dealers,'' NAICS code 44111, and 25,649 establishments for ''used car dealers,'' NAICS code 44112).

or services and their prices. In the NPRM, the Commission estimated costs for the add-on list disclosure and solicited comments on its burden analysis.[452] One industry association made several arguments, including that the Commission underestimated the time and resources required because an add-on list can be lengthy, vary by vehicle and over time, and require working with several third parties. This commenter also argued that periodic revision of such lists would take more than the estimated one hour of clerical time per dealer, per year. The commenter, however, did not offer any specific estimates for such periodic revision activities.

As explained in the section-by-section analysis of § 463.4 in SBP III.D.2, after careful consideration, the Commission has determined not to finalize its proposed add-on list provision at § 463.4(b).

B. Disclosures Relating to Cash Price Without Optional Add-Ons

Section 463.5(b) of the proposed rule required motor vehicle dealers that charge for optional add-on products or services to provide certain itemized disclosures regarding pricing and cost information without such add-ons. In response to the Commission's estimates with respect to this proposed provision, one industry association argued that the Commission did not provide adequate explanation of the assumptions it used to arrive at its cost estimates for this proposed provision, and contended that the Commission underestimated the costs associated with developing, printing, and presenting the proposed disclosures. This commenter also contended that the proposed requirement would have required significant training costs; that multiple forms would have been required for each motor vehicle transaction; and that aspects of the required disclosures would be duplicative of information already provided by dealerships in the ordinary course of business. The commenter estimated that developing a disclosure form for this proposed provision would cost dealers at least $750 and suggested that other attendant costs would be in the hundreds of millions or billions of dollars, without explaining how it arrived at such estimated figures.

As explained in the section-by-section analysis of § 463.5 in SBP III.E, after careful consideration, the Commission has determined not to include in this Final Rule the itemized disclosure provisions at proposed § 463.5(b). The Commission notes that imposing unauthorized charges—including charges buried in lengthy contracts or included in contracts that consumers are rushed through—is a violation of both the Final Rule's § 463.5(c) and of the FTC Act. The Commission will continue to monitor the market to determine whether additional steps are warranted to combat unauthorized charges for add-ons or other items in the motor vehicle marketplace.

C. Prohibited Misrepresentations and Required Disclosures

Section 463.3 of the Final Rule prohibits dealers from making any misrepresentation regarding material information about the categories enumerated in the section.

The provisions in this section have been adopted largely without modification from the NPRM, wherein the Commission estimated that any additional costs associated with the proposed misrepresentation prohibitions would be *de minimis*.[453] One industry association commenter argued that a bar on misrepresentations in the Final Rule would require increased training and compliance costs and result in longer transaction times and costs related to working with vehicle manufacturers about online advertisements. This section, however, does not require any additional disclosures or information collection. Thus, while dealers might elect to enhance their training and compliance,[454] refraining from making misrepresentations does not require additional training or compliance costs or transaction time. The Commission therefore affirms its prior estimate that any additional costs associated with the prohibitions in § 463.3 against making misrepresentations would be *de minimis.*

Section 463.4(a) of the Final Rule requires dealers to clearly and conspicuously disclose a vehicle's offering price in advertisements and other communications that reference a specific vehicle, or any monetary amount or financing term for any vehicle. ''Offering Price'' is defined in § 463.2(k) of the Rule as ''the full cash price for which a Dealer will sell or finance the Vehicle to any consumer, provided that the Dealer may exclude only required Government Charges.'' The information required by § 463.4(a) is necessary to address unfair or deceptive conduct associated with the failure to provide such price information and unfairly charging unexpected prices or for hidden items that can add hundreds or thousands of dollars to a vehicle sale.[455]

This provision is being adopted largely as proposed.[456] In response to the NPRM, one industry association commenter claimed there would be an average of three offering price disclosures per transaction, since, according to the commenter, consumers, on average discuss three specific motor vehicles per transaction. This commenter also contended that the number of required offering price disclosures would obligate dealers to incur additional training costs. As the Commission explained in its NPRM, vehicle pricing activities and representations are usually and customarily performed by dealers in the course of their regular business activities. While this provision may increase the importance of those activities, or alter when in the course of business they are undertaken, the Commission estimates that any additional attendant costs are *de minimis.*[457]

Section 463.4(d) of the Final Rule require dealers, when making any representation about a monthly payment for any vehicle, to disclose the total amount the consumer will pay to purchase or lease the vehicle at that monthly payment after making all

[452] NPRM at 42032–33, 40235, 42040.

[453] NPRM at 42033, 42039.

[454] The Commission produced and considered alternative cost estimate scenarios for the Rule provisions in its preliminary regulatory analysis, *see* NPRM at 42036–44, and its final regulatory analysis in section VII. The Commission also invited comments on the accuracy of its PRA burden estimates, including the validity of the methodology and assumptions used, *see* NPRM at 42035. The Commission provides a single estimate per Rule provision for this separate Paperwork Reduction Act burden analysis in conformity with the PRA. *See* 44 U.S.C. 3506(c)(1)(A)(iv) (providing, for each collection of information, including those arising from rules published as final rules in the **Federal Register**, that agencies shall conduct a review that includes ''a specific, objectively supported estimate of burden'').

[455] Some commenters suggested that providing an Offering Price may be difficult due to pricing changes over time. As explained in SBP III.D.2(a), limited-time offers should be clearly disclosed as such. Advertising prices without disclosing material limitations that would mislead consumers is a deceptive or unfair practice.

[456] As stated in SBP III.B.2(k) and SBP III.D.2(a), the Commission is finalizing this Offering Price definition at § 463.2(k) largely as proposed, with a modification to clarify that dealers may, but need not, exclude required government charges from a vehicle's offering price. In addition, this definition in the Final Rule substitutes ''Vehicle'' for ''motor vehicle'' to clarify that the term is consistent with the revised definition of '''Covered Motor Vehicle' or 'Vehicle' '' at § 463.2(e). The Commission also added language to the end of § 463.4(a) clarifying that the requirements in § 463.4(a) ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and § 463.5(c).''

[457] *See* NPRM at 42033, 42039–40.

payments as scheduled, as well as the amount of consideration to be provided by the consumer if the total amount disclosed assumes the consumer will provide consideration. Section 463.4(e) of the Final Rule requires dealers, when making any comparison between payment options that includes discussion of a lower monthly payment to disclose, if true, that a lower monthly payment will increase the total amount the consumer will pay to purchase or lease the vehicle.

These provisions have been adopted largely as proposed.[458] In response to the Commission's estimates with respect to these proposed provisions, one commenter raised concerns that these disclosures would intrude on existing disclosures, and that any associated paperwork burden would be confusing, duplicative, and unnecessary. The commenter also argued that these disclosures would add time to the transaction process and require additional staff training. No commenters provided alternative estimates of the costs associated with this provision.

Failing to disclose information about the total of payments for a vehicle when representing monthly payment information is deceptive or unfair, as set forth in SBP III.D.2(d). Dealers already generate the required information during the normal course of business, and disclosing this total of payments information provides consumers with fundamental information that is readily available to the dealer when making representations regarding monthly payments, at which time such disclosures are required. Nevertheless, there may be upfront labor costs associated with developing procedures to provide these disclosures consistently at the appropriate point in the transaction and with training employees. The Commission estimates such upfront costs as follows: 8 compliance manager hours per dealer on implementing a template disclosure script that contains the required information and on ensuring sales staff consistently deliver the disclosure at an appropriate time during the transaction, for an upfront hours burden of 378,168 (8 hours × 47,271). Applying labor cost-rates of $31.21 per hour yields $11,802,623.28 ($31.21 × 378,168 hours).[459] After a review of comments, the Commission is adding ongoing training costs. Specifically, the Commission estimates annual ongoing costs of 1 hour of training time for sales and related employees per year, for an annual hours burden of 417,110 (1 hour × 417,110 sales and related employees). Applying labor cost-rates of $29.43 per hour, the total estimated ongoing labor cost burden is $12,275,547.30 across the industry (417,110 sales and related employees × 1 hour × $29.43).

Further, § 463.4(c) of the Final Rule requires dealers that sell optional add-on products or services to disclose to consumers that these add-ons are not required, and that the consumer can purchase or lease the vehicle without these add-ons. This requirement has been adopted largely as proposed, and is necessary to address deceptive and unfair practices regarding these products or services, including misrepresentations that these products are required when they are not, and charging consumers for such products without the consumers' express, informed consent.[460] It requires a simple disclosure of information that is known to the dealer, and the Commission anticipates that the information collection burdens associated with this requirement is *de minimis*.[461]

Similarly, § 463.5(c) of the Final Rule requires dealers to refrain from charging consumers for any item unless the dealer obtains the express, informed consent of the consumer for the charge.[462] In response to the Commission's estimates with respect to these proposed provisions, some commenters generally discussed burdens, as addressed in the section-by-section analysis in SBP III, that they contended would accompany this proposed provision, but none provided sufficient detail for cost estimates. The Commission notes that this provision addresses the unfair or deceptive practice of charging consumers for items they do not know about or to which they have not agreed, or in amounts beyond those to which the consumer has agreed. As dealers must currently have policies in place to prevent charges without consent in order to comply with current law, the Commission anticipates that any burdens associated with this provision will be *de minimis*.[463]

D. Recordkeeping

Section 463.6 of the Final Rule requires dealers to create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with the Rule, including with its disclosure requirements. This provision has been adopted with revisions to account for other changes in the Final Rule, as explained in SBP III.F.[464] These recordkeeping provisions are necessary to promote effective and efficient enforcement of the Rule, thereby deterring dealers from engaging in deceptive or unfair acts or practices.

In the NPRM, the Commission provided cost estimates and solicited comment on its recordkeeping burden analysis.[465] The Commission anticipated that dealers would incur certain incremental costs related to: (i) recordkeeping systems; and (ii) calculations of loan-to-value ratios for contracts with GAP agreements.

Several commenters, including industry associations, dealership organizations, and a dealership

[458] These provisions in the Final Rule capitalize the defined term ''Vehicle'' to conform with the revised definition of '' 'Covered Motor Vehicle' or 'Vehicle' '' at § 463.2(e). The Commission also substituted a period for a semi-colon and the word ''and'' at the end of § 463.4(d)(1), and added language to the end of § 463.4(d) and (e) clarifying that the requirements in these paragraphs ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and § 463.5(c).''

[459] The estimates throughout this section have been updated with more recent data since the publication of the NPRM. Labor rates are based on new data from the Bureau of Labor Statistics. See U.S. Bureau of Labor Statistics, ''May 2022 National Industry-Specific Occupational Employment and Wage Estimates NAICS 441100—Automobile Dealers'' (Apr. 25, 2023), *https://www.bls.gov/oes/current/naics4_441100.htm.* The number of dealerships has been updated to reflect new data from Census County Business Patterns. See U.S. Census Bureau, ''All Sectors: County Business Patterns, including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021,'' *https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001.*

[460] This provision in the Final Rule capitalizes the defined term ''Vehicle'' to conform with the revised definition of '' 'Covered Motor Vehicle' or 'Vehicle' '' at § 463.2(e). The Commission also added language to the end of § 463.4(c) clarifying that the requirements in this paragraph ''also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and § 463.5(c).''

[461] As with § 463.3, § 463.5(a) does not require any additional disclosures or information collection. Thus, while dealers might elect to enhance their training and compliance policies, or to take steps to document compliance with § 463.5(a), any such additional measures are not required by this provision.

[462] *See* SBP III.E.2(c).

[463] In its NPRM, the Commission noted that it anticipated this section would require dealers to provide readily available information to consumers in direct communications with customers, and that dealers complying with existing law have policies in place to prevent charges without consent, thereby estimating minimal additional resulting costs. *See* NRPM at 42033, 42036–44. The Commission did not receive comments discussing attendant burdens in sufficient detail for revised cost estimates, and thus affirms its prior estimate regarding additional costs associated with § 463.5(c).

[464] The Final Rule also contains one typographical modification to § 463.6—adding a serial comma—and minor textual changes to ensure consistency with the defined terms at § 463.2(e) and (f).

[465] NPRM at 42033–34, 42043.

association, generally contended that the Commission underestimated the burdens of compliance relating to the changes dealers would need to make to their existing recordkeeping systems. These commenters, however, did not provide the Commission with alternative estimates regarding such burdens. As explained in the section-by-section analysis of the Recordkeeping section, § 463.6, in SBP III.F, this provision gives dealers the flexibility to retain materials in any legible form, including in the same manner, format, and place as they may already keep such records in the ordinary course of business. The Commission nonetheless has determined, in response to comments, to revise its estimates regarding incremental storage expenses that may be associated with the recordkeeping requirements in the Final Rule, and, as provided in the capital and other non-labor costs discussion in the following paragraphs, the Commission is adding an estimate of incremental additional storage costs to its estimate.

Further, the Commission notes that its initial recordkeeping cost estimates were based on a proposal that required records regarding add-on list disclosures and cash price without optional add-on disclosures—records that the Rule the Commission is finalizing does not require dealers to retain. Given that the Commission is not finalizing these additional record-related requirements, the estimates provided in its NPRM may overestimate attendant costs resulting from the Rule's recordkeeping requirements. Notwithstanding this possibility, the Commission maintains its prior calculations of the time required to modify existing recordkeeping systems.[466] The Commission anticipates that it will take covered motor vehicle dealers approximately 15 hours to modify their existing recordkeeping systems to retain the required records for the 24-month period specified in the Rule. This yields a general recordkeeping burden of 709,065 hours annually (47,271 motor vehicle dealers × 15 hours per year).

The Commission anticipates that programming, administrative, compliance, and clerical staff are likely to perform the tasks necessary to comply with the recordkeeping requirements in § 463.6 of its Rule. In particular, the Commission estimates this 15-hour per-dealer labor hours burden to design, implement, or update systems for record storage and create the templates necessary to accommodate retention of all relevant materials, as follows: 8 hours of time for a programmer, at a cost-rate of $40.24 per hour; 5 hours of additional clerical staff work, at a cost-rate of $20.16 per hour; 1 hour of sales manager review, at a cost-rate of $80.19 per hour; and 1 hour of review by a compliance officer, at a cost-rate of $31.21 per hour.[467] Applying these cost-rates to the estimated per-dealer hours burden described previously, the total estimated initial labor cost burden is $534.12 per average dealership (($40.24 per hour × 8 hours) + ($20.16 per hour × 5 hours) + ($80.19 per hour × 1 hour) + ($31.21 per hour × 1 hour)), totaling $25,248,386.52 across the industry ($534.12 per average dealership × 47,271 dealerships).

The Commission also received comments regarding its cost estimates relating to the records of loan-to-value ratios for transactions that include GAP agreement sales. One industry association commenter argued that this recordkeeping requirement would also require additional training, that creating a loan-to-value calculator template for GAP agreements would be difficult given the variation of loan-to-value ratios, and that this recordkeeping requirement would lengthen the time to conduct vehicle sale or financing transactions.[468] No commenter provided alternative estimates of the costs associated with the Commission's proposed recordkeeping requirements.

As explained in the paragraph-by-paragraph analysis of § 463.5 in SBP III.E.2, the Commission is not mandating a particular LTV threshold or method of calculation, but rather requiring that dealers not charge a consumer for GAP agreements or other products or services if the consumer would not benefit from the product or service. The Commission anticipates that, to the extent dealers do not currently retain any materials used to make such an assessment, dealers may incur certain additional costs. Specifically, the Commission anticipates that dealers will expend one minute per sales or financing transaction for a salesperson to perform the calculation contemplated by this requirement, at a cost rate of $28.41 per hour. The Commission estimates that covered motor vehicle dealers sell approximately 31,562,959 vehicles each year, and that approximately 17% of such sales include GAP agreements, for an estimated total of 5,444,502 covered vehicle sales.[469] While the number of motor vehicles sold will vary by dealership, this yields an average sales volume of 115 sales transactions per average dealership per year that include a GAP agreement (5,444,502 covered vehicle sales/47,271 dealerships). This yields an estimated annual hours burden for all dealers of 90,742 hours (5,444,502 covered transactions × 1/60 hours). Applying the associated labor rates yields an estimated annual labor cost for all dealers of $2,577,980.22 (90,742 hours × $28.41 per hour).

E. Capital and Other Non-Labor Costs

The Commission anticipates that the Final Rule will impose limited capital and non-labor costs. The Commission presented estimates in the NPRM with respect to such costs and solicited comments on its burden analysis. Here, the Commission discusses its estimates for the capital and non-labor costs associated with the Rule's disclosure and recordkeeping requirements. While some commenters generally discussed burdens that they contended would accompany these proposed provisions, none provided any alternative cost estimates regarding capital and other non-labor costs.[470]

1. Disclosures

The Commission anticipates that the Rule's disclosure requirements will impose *de minimis* capital and other non-labor costs. As the Commission noted in the NPRM, dealers already have in place existing systems for providing sales- and contract-related disclosures to buyers and lessees, as well as to consumers seeking information during the vehicle-shopping process.[471] While the Final Rule's disclosure requirements may result in limited additions to the

[466] In its NPRM, the Commission estimated costs to create and implement a loan-to-value calculation process. NPRM at 42034. Such costs are already accounted for in the Commission's estimates for the time required to modify existing recordkeeping systems, and thus are not separately itemized here.

[467] Applicable wage rates are based on data from the Bureau of Labor Statistics. *See* U.S. Bureau of Labor Statistics, ''May 2022 National Industry-Specific Occupational Employment and Wage Estimates NAICS 441100—Automobile Dealers'' (Apr. 25, 2023), *https://www.bls.gov/oes/current/naics4_441100.htm.*

[468] These arguments are addressed in the section-by-section analysis of § 463.5. *See* SBP III.E.

[469] In response to comments, the Commission has revised the number of transactions across the industry from the NPRM to exclude private party and fleet transactions. The estimated percentage of sales including GAP agreements is derived from data provided by an industry commenter. Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 12.

[470] One commenter claimed generally that the Commission underestimated these costs, referring to arguments the commenter made with respect to the Commission's burden analysis of specific disclosure and recordkeeping provisions. The Commission has responded to those arguments in the foregoing analysis, with the exception of recordkeeping storage costs, which are addressed in the following discussion.

[471] NPRM at 42034.

information that must be provided during the transaction process, depending on a dealer's current business operations, the Commission anticipates that these changes will not require substantial investments in new systems.[472] Further, many dealers may elect to furnish some disclosures electronically, further reducing total costs.[473]

The Commission previously estimated non-labor costs for providing disclosures in written or electronic form. This estimate was based on proposed § 463.5(b), which required written disclosures in all transactions in which dealers charge for optional add-ons. As discussed in the paragraph-by-paragraph analysis of § 463.5 in SBP III.E.2, the Commission has determined not to finalize the proposed provision at § 463.5(b). While some commenters generally discussed burden with respect to disclosure requirements being finalized by the Commission, no commenter estimated non-labor costs associated with such requirements. The Commission estimates that the non-labor costs related to disclosures, which relate to fundamental information (the vehicle offering price, that optional add-ons are not required, and regarding the total amount to purchase or lease the vehicle), will be *de minimis.*

2. Recordkeeping

In the NPRM, the Commission observed that dealers already have in place existing recordkeeping systems for the storage of documentation they would retain in the ordinary course of business irrespective of the Rule's requirements.[474] Commenters including industry associations, a dealership organization, and a dealership association argued that the Commission underestimated the burdens associated with the Commission's proposed requirements to retain written communications, as well as the need to develop new systems to capture these materials. The Commission disagrees that the recordkeeping requirements in § 463.6 mandate the creation of new recordkeeping systems. As explained in the section-by-section analysis of § 463.6, this provision gives dealers the flexibility to retain materials in any legible form, including in the same manner, format, or place as they may already keep such records in the ordinary course of business.

The Commission is, however, revising its estimates regarding incremental storage expenses that may be associated with the recordkeeping requirements in the Final Rule to add such recordkeeping storage costs to its estimate. The Commission previously noted, and continues to believe, that dealers that store records in hard copy are unlikely to require extensive additional storage for physical document retention, and, due to the low cost of electronic storage options, that expanding electronic storage capacity would impose minimal costs.[475] The Commission also invited comments on estimated storage costs; while some commenters generally discussed burdens, as addressed in the section-by-section analysis of the recordkeeping requirements in § 463.6, that they contended would accompany the proposed provisions, the Commission did not receive any comments that provided estimates. The Commission nevertheless has conducted additional research, and now estimates that each dealer will need to spend approximately $300 per year in investment in additional IT systems and hardware for additional storage (either on premises or electronically) to retain records, the annual cost for which would be $14,181,300 for all covered dealers ($300 × 47,271 covered dealers).[476]

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996,[477] requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') and Final Regulatory Flexibility Analysis (''FRFA'') of any rule subject to notice-and-comment requirements,[478] unless the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.[479] In the NPRM, the Commission provided an IRFA, stated its belief that the proposal will not have a significant economic impact on small entities, and solicited comments on the burden on any small entities that would be covered.[480] In addition to publishing the NPRM in the **Federal Register**, the Commission announced the proposed rule through press releases, social media posts, and blog articles directed toward businesses and consumers, as well as through other outreach,[481] in keeping with the Commission's history of small business guidance and outreach.[482]

The Commission thereafter received over 27,000 public comments, many of which identified themselves as being from small dealers, industry associations that represent small dealers, and employees of small dealers.[483] The Commission greatly

[472] *Id.*

[473] *Id.*

[474] *Id.*

[475] NPRM at 42034–35.

[476] Our review of dealer transaction records suggests that a typical transaction generates 3.4 MB of data under the status quo. Given the average number of transactions per dealer, this suggests that storing all these records would require dedicated space of roughly 4.2 GB per year. With a two-year retention window, this corresponds to 8.4 GB of storage at any given time. We estimate that the (annual) amount budgeted here should be sufficient to maintain at least 1 TB of storage—either on premises or through a cloud storage vendor—which is sufficient for more than 100 times the data storage capacity necessary to retain all transaction files generated by a typical dealership in a year under the status quo. The Commission anticipates that this amount of data storage capacity will be more than sufficient to also allow for dealers to keep any necessary records of correspondence with consumers who ultimately do not complete transactions at the dealership.

[477] *See* Public Law 104–121 (1996).

[478] 5 U.S.C. 603(a), 604(a).

[479] 5 U.S.C. 605(b).

[480] NPRM at 42035.

[481] *See, e.g.,* Press Release, Fed. Trade Comm'n, ''FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers'' (June 23, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers;* Lesley Fair, ''Proposed FTC Rule Looks Under the Hood at the Car Buying Process,'' Fed. Trade Comm'n Business Blog (June 23, 2022), *https://www.ftc.gov/business-guidance/blog/2022/06/proposed-ftc-rule-looks-under-hood-car-buying-process;* Alan S. Kaplinsky, A Close Look at The Federal Trade Commission's Proposed Rule for Motor Vehicle Dealers, with Special Guests Sanya Shahrasbi and Daniel Dwyer, Staff Attorneys, FTC Bureau of Consumer Protection, Division of Financial Practices, Consumer Finance Monitor (Aug. 11, 2022), *https://www.ballardspahr.com/Insights/Blogs/2022/08/Podcast-The-FTCs-Proposed-Rule-Motor-Vehicle-Dealer-Guests-Sanya-Shahrasbi-and-Daniel-Dwyer.*

[482] Each year since FY2002, the Small Business Administration's Office of the National Ombudsman has rated the Federal Trade Commission an ''A'' on its small business compliance assistance work. *See* U.S. Small Business Administration, ''2013–2020 SBA Nat'l Ombudsman's Ann. Reps. to Cong.,'' *https://www.sba.gov/document/report—national-ombudsmans-annual-reports-congress* (providing reports from FY2013–FY2020); Letter from Joseph J. Simons, Chairman of the Federal Trade Commission, to Senator James Risch, Chairman of the Committee on Small Business and Entrepreneurship, U.S. Senate, and to Congressman Steve Chabot, Chairman of the Committee on Small Business, U.S. House of Representatives, *https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-rule-compliance-guides-small-businesses-other-small-entities-commission/tenth_section_212_report_to_congress_july_2016-june_2017_1_0.pdf* (citing Commission's ''A'' rating for ''Compliance Assistance'' by the National Ombudsman from FY2002–FY2016).

[483] The Commission received 27,349 comment submissions filed in response to its NPRM. *See* Gen. Servs. Admin., Doc. No. FTC–2022–0046–0001, Proposed Rule, Motor Vehicle Dealers Trade Regulation Rule (July 13, 2022), *https://www.regulations.gov/document/FTC-2022-0046-0001* (noting comments received). To facilitate public access, 11,232 such comments have been posted publicly at *www.regulations.gov. Id.* (noting posted comments). Posted comment counts reflect the number of comments that the agency has posted to *Regulations.gov* to be publicly viewable. Agencies may choose to redact or withhold certain

Continued

appreciates, and thoroughly considered, the feedback it received from such stakeholders in developing the Final Rule; made changes from the proposed rule in response to such feedback; and will continue to engage with stakeholders moving forward to facilitate implementation of the Rule.

As previously discussed, after reviewing comments, the Commission has determined, as an alternative to finalizing the proposed rule in its entirety, to finalize a Rule that does not contain the proposed add-on list disclosure requirements at § 463.4(b), or the proposed disclosures and declinations pertaining to a vehicle's cash price without optional add-ons at § 463.5(b). Furthermore, as discussed in the paragraph-by-paragraph analysis of § 463.2(e) in SBP III.B.2(e), in response to public comments and after careful consideration, the Commission has determined to exclude recreational boats and marine equipment; motorcycles; and motor homes, recreational vehicle trailers, and slide-in campers from the Rule's definition of ''Covered Motor Vehicle.'' After careful consideration of the comments and following its determination not to finalize the proposed rule in its entirety, the Commission is certifying that the Final Rule will not have a significant economic impact on a substantial number of small entities. In the following paragraphs, the Commission discusses comments from the public, as well as from the U.S. Small Business Administration Office of Advocacy (''SBA Advocacy''), and the reasons for the Commission's conclusion that the Rule will not have a significant economic impact on a substantial number of small entities.[484] Given, however, that the Commission believes that the vast majority of covered entities are small entities and provided an IRFA in the NPRM, in the interest of thoroughness, the Commission has also performed an FRFA, as described in SBP VI.B.2.

A. Significant Impact Analysis

1. Comments on Significant Impact

In the NPRM, the Commission stated its belief that the proposed rule would not have a significant economic impact on a substantial number of small entities, and invited comments.[485]

Several commenters, including industry associations and a dealership association, generally argued that the Rule would impose substantial economic burdens on small entities, and some suggested that small entities may be disproportionately burdened by the Rule given limited legal and compliance staff. No commenters provided comprehensive alternative empirical cost or revenue data that could be used to put costs in context. Commenters, including an industry association and SBA Advocacy, argued that the Commission did not provide a sufficient factual basis for, or analysis of, the effects on small entities, and that the proposed rule would be unduly burdensome for smaller motor vehicle dealers.[486] The comment from SBA Advocacy further argued that the Commission provided no information about the economic impact of the proposed rule on small entities, but noted that if the total estimated cost of $1,360,694,552 were divided by the number of dealers estimated in the NPRM (46,525), the cost would be roughly $29,000 per such dealer.[487] The comment from SBA Advocacy also argued that the Commission failed to include familiarization and training costs or costs that the Commission could not quantify, such as investments in additional IT systems and hardware.[488]

The Commission has considered these comments carefully and has taken them into account in setting forth the factual basis for the certification in SBP VI.A.2, including by modifying its analysis to add an estimate of familiarization and training costs in response to such concerns.[489] The Commission notes, as

submissions (or portions thereof) such as those containing private or proprietary information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. Gen. Servs. Admin., *Regulations.gov* Frequently Asked Questions, *https://regulations.gov/faq.*

[484] The Office of Advocacy has emphasized that, while it is housed within SBA, it is an independent, stand-alone office that has its own statutory charter, leadership structure, and appropriations account. SBA Advocacy, ''Background Paper: Office of Advocacy 2017–2020'' 111–19 (Jan. 2021), *https://advocacy.sba.gov/wp-content/uploads/2021/02/Background-Paper-Office-of-Advocacy-2017-2020-web.pdf; see also* 15 U.S.C. 634a through 634g. SBA Advocacy's Chief Counsel is appointed from civilian life by the President, with the advice and consent of the Senate, and most of SBA Advocacy's professionals serve at the pleasure of the Chief Counsel. 15 U.S.C. 634a, 634d(1) (empowering Chief Counsel for Advocacy to employ and fix the compensation of additional staff personnel); SBA Advocacy, ''Background Paper: Office of Advocacy 2017–2020'' 95 (Jan. 2021), *https://advocacy.sba.gov/wp-content/uploads/2021/02/Background-Paper-Office-of-Advocacy-2017-2020-web.pdf.* SBA Advocacy does not circulate its work for clearance with the SBA Administrator, OMB, or any other Federal agency prior to publication. 15 U.S.C. 634f.

[485] An industry association commenter argued that the Commission did not make a formal section 605(b) certification, publish the certification in the **Federal Register**, or provide the certification to the Chief Counsel for Advocacy of the Small Business Administration. This comment misunderstands the RFA. The RFA does not require certification when a rule is proposed. *See* 5 U.S.C. 605(b) (providing that the head of the agency may make the certification ''at the time of publication of the final rule''). The Commission's NPRM stated its belief that the proposal would not have a significant economic impact on a substantial number of small entities, invited comment on this issue, and also provided an IRFA. The Commission has carefully reviewed the SBA's and others' comments, is making changes to the proposal, and is now publishing the Final Rule and making a formal certification, as is required by the RFA.

Although the Commission included the NPRM in its Fall 2022 Regulatory Agenda, and explained in its NPRM that the proposed rulemaking was not included in the Commission's Spring 2022 Regulatory Agenda because the Commission first considered the NPRM after the publication deadline for the Regulatory Agenda, *see* NPRM at 42031 n.153, the same commenter argued that the RFA and Executive Order 12866 required the Commission to include it in earlier Regulatory Agendas. As an initial matter, Executive Order 12866 does not apply to independent agencies such as the FTC. Regardless, as discussed in SBP II.C, Commission has engaged in a sustained effort over many years to engage with consumer and dealer groups, and other stakeholders, regarding the issues addressed in the Rule. *See supra* note 90. Neither the RFA nor Executive Order 12866 precludes the Commission from promulgating the Rule regardless of whether it was included in an earlier Regulatory Agenda (or even arguably could have been). Section 602(d) of the RFA explicitly provides that ''[n]othing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda.'' *See Coastal Conservation Ass'n* v. *Locke,* No. 2:09–CV–641–FTM–29, 2011 WL 4530631, at *38 (M.D. Fla. Aug. 16, 2011), *report & recommendation adopted sub nom. Coastal Conservation Ass'n* v. *Blank,* No. 2:09–CV–641–FTM–29, 2011 WL 4530544 (M.D. Fla. Sept. 29, 2011) (denying request for injunction based on allegation of noncompliance with 5 U.S.C. 602(d)). Similarly, Executive Order 12866 explicitly provides that it ''does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States,'' let alone one that would preclude adoption of the Rule. *See* E.O. 12866, 58 FR 51735, 51744 (Sept. 30, 1993); *see also Trawler Diane Marie, Inc.* v. *Brown,* 918 F. Supp. 921, 932 (E.D.N.C. 1995), *aff'd sub nom. Trawler Diane Marie, Inc.* v. *Kantor,* 91 F.3d 134 (4th Cir. 1996) (denying request to invalidate regulation based on allegation of noncompliance with Executive Order 12866).

[486] *See* Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 3.

[487] Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 3.

[488] Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 3.

[489] After additional research, the Commission estimates that each dealer will need to spend approximately $300 per year on storage (either on premises or in the cloud) to store the records the Rule requires them to maintain. Based on a review of the transaction records the Commission has received from dealers through investigations, this amount is likely to be more than sufficient. Commission review suggests that a typical vehicle transaction generates 3.4 MB of data under the status quo. Given the average number of transactions per dealer, this suggests that storing all these records would require dedicated space of roughly 4.2 GB per year. With a two-year retention window, this corresponds to 8.4 GB of storage at any given time. The Commission estimates that the $300 annual amount budgeted here should be sufficient to maintain at least 1 TB of storage—either on premises or through a cloud storage vendor—which is sufficient for more than 100 times the data storage capacity necessary to retain all transaction files generated by a typical dealership in a year under the status quo. The Commission

SBA Advocacy did in its comment, that the NPRM estimated a total cost for the proposed rule of $1,360,694,552. This estimate was for costs over a ten-year time period. Thus, dividing this estimate by the number of affected dealers estimated in the NPRM yields a cost of roughly $29,000 per dealer over a ten-year period—or approximately $2,900 per year per dealer.[490] This figure—$2,900—is slightly more than the average gross profit described in the NPRM for a single vehicle sale by a new vehicle dealer, and less than half of the average gross profit described in the NPRM for a single vehicle sale by an independent used vehicle dealer.[491]

After carefully reviewing the comments, the Commission does not conclude that the Final Rule will impose a significant economic burden on a substantial number of smaller entities.[492] As described in SBP VI.A.2(b), the estimated economic impact of the Final Rule, controlling for firm size based on available census data, is less than or equal to 0.27% of annual sales, 1.49% of the gross margin, and 4.12% of the gross margin minus operating expense for dealerships of all sizes.[493] The Commission further notes that, in response to comments from SBA Advocacy and others, the Paperwork Reduction Act analysis incorporates additional estimates for training and storage costs beyond those estimated in the NPRM.

2. Certification of the Final Rule

The Commission hereby certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

As an initial matter, the Commission believes that a substantial number of small entities are covered by the Rule. New vehicle dealers (NAICS code 44111) are classified as small entities if they have an average of 200 or fewer employees, and used car dealers (NAICS code 44112) are classified as small entities if they have average annual revenues of $30.5 million or less.[494] Census data indicate that the vast majority of dealers classified into these NAICS codes are small entities.[495] There are approximately 47,271 covered dealers in the United States, of which over 93% have fewer than 100 employees. Thus, while the Commission cannot determine the precise number of small entities affected by the Rule, census data suggest that the vast majority of covered dealers are small entities.

The Commission certifies that the Rule will not have a significant economic impact on a substantial number of small entities. The Commission has analyzed the costs of the Rule (1) based on industry averages and (2) accounting for dealer size based on the number of employees. Under either measure, the Rule will not have a significant economic impact on a substantial number of small entities.

(a) Industry Averages

The Commission estimates a total cost for the Final Rule, at the scenario reflecting the Commission's highest cost estimates, of $1.075 billion to $1.270 billion over a ten-year period.[496] Using the highest end of this highest-cost scenario, the Rule will have an estimated cost of $1.270 billion over ten years using a 3% discount rate. This translates to an average estimated per-year cost of $127 million ($1.270 billion × 0.1). Census data show that, in 2021, automobile dealers had annual sales of $1.265 trillion, gross margin of $226.118 billion,[497] and gross margin minus operating expenses of $81.850 billion. Discounting these numbers over a 10-year period using a 3% discount rate equates to average annual sales of $1.079 trillion, gross margin of $192.883 billion, and gross margin minus operating expenses of $69.820 billion. The estimated yearly cost of the Rule therefore is approximately 0.01% of annual sales ($127 million/$1.079 trillion), 0.07% of gross margin ($127 million/$192.883 billion), and 0.18% of gross margin minus operating expenses ($127 million/$69.820 billion) across the industry.[498]

(b) Dealer Size Based on the Number of Employees

In addition to considering industry averages, the Commission has analyzed the cost of the Rule accounting for dealer size based on the number of employees. Certain costs are fixed (*i.e.,* remain the same regardless of the number of employees) while other costs scale with dealer size. We consider both

anticipates that this amount of data storage capacity will be more than sufficient to also allow for dealers to keep any necessary records of correspondence with consumers who ultimately do not complete transactions at the dealership.

[490] NPRM at 42013.

[491] As noted in the NPRM, new vehicle dealers averaged a gross profit of about $2,444 per new vehicle, and about $2,675 per used vehicle, and independent used vehicle dealerships had an average gross profit of more than $6,000 per vehicle. *See* NPRM at 42014 (citing Nat'l Auto Dealers Ass'n, ''Average Dealership Profile'' 1 (2020), *https://www.nada.org/media/4136/download?attachment* [*http://web.archive.org/web/20220623204158/https://www.nada.org/media/4136/download?attachment*] (June 23, 2022) and Nat'l Indep. Auto Dealers Ass'n, ''NIADA Used Car Industry Report 2020'' at 21).

[492] Notably, while many industry commenters claimed that the burden of the Rule would be substantial, none provided data on revenue or profit.

[493] U.S. Census Bureau, ''Annual Retail Trade Survey: 2021'' (Dec. 15, 2022), *https://www.census.gov/data/tables/2021/econ/arts/annual-report.html.* Gross margin minus operating expenses was determined by deducting total 2021 operating expenses ($144,268 million) from 2021 gross margin ($226,118 million). Gross margin represents total sales less the cost of goods sold. Operating expenses include but are not limited to annual payroll, commissions, data processing, equipment, advertising, lease and rental payments, utilities, and repair and maintenance. *See Glossary,* U.S. Census Bureau, *https://www.census.gov/glossary* (last visited Dec. 5, 2023). Note that the operating expenses amount may include some costs—such as payments for deceptive advertising or commissions earned on unauthorized charges—that are not legitimate expenses. If these were excluded, the gross margin minus operating cost figures would be even lower than those described in the text.

[494] *See* North American Industry Classification System, U.S. Census Bureau, *https://www.census.gov/naics/.* These standards are determined by the Small Business Size Standards component of the NAICS, which is available at *https://www.sba.gov/document/support-table-size-standards.*

[495] The census report does not provide sufficient detail to provide a precise numerical estimate of the number of small entities covered by the Rule. The census data provide the number of dealers with fewer than 250 employees, and also provide revenue and gross margin figures for the motor vehicle dealers industry, without further breakdown. For that reason, the census data do not provide sufficient information to calculate the specific number of dealers that are small entities. Nor did commenters provide comprehensive alternative firm size data.

[496] The $1.075 billion figure was determined by summing the unrounded total highest estimated costs associated with the Final Rule's total of payments disclosure requirements ($246 million), offering price disclosure requirements ($46 million), requirements regarding certain add-ons and express, informed consent ($406 million), prohibitions on misrepresentations ($130 million), and recordkeeping requirements ($248 million), using a 7% discount rate. The $1.270 billion figure was determined by summing the unrounded total highest estimated costs associated with the Final Rule's total of payments disclosure requirements ($296 million), offering price disclosure requirements ($46 million), requirements regarding certain add-ons and express, informed consent ($475 million), prohibitions on misrepresentations ($157 million), and recordkeeping requirements ($296 million), using a 3% discount rate.

[497] U.S. Census Bureau, ''Annual Retail Trade Survey: 2021, Sales'' (Dec. 15, 2022), *https://www2.census.gov/programs-surveys/arts/tables/2021/sales.xlsx* (showing $1,264,635 million in estimated annual sales in 2021 for automobile dealers, NAICS code 4411); U.S. Census Bureau, ''Annual Retail Trade Survey: 2021, Gross Margin'' (Dec. 15, 2022), *https://www2.census.gov/programs-surveys/arts/tables/2021/gm.xlsx* (showing $226,118 million in estimated annual gross margin in 2021 for automobile dealers, NAICS code 4411); U.S. Census Bureau, ''Annual Retail Trade Survey: 2021, Total Operating Expenses'' (Dec. 15, 2022), *https://www2.census.gov/programs-surveys/arts/tables/2021/exp.xlsx* (showing $144,268 million in estimated annual operating expenses in 2021 for automobile dealers, NAICS code 4411).

[498] The calculations in this analysis were performed using unrounded inputs in order to maintain accuracy. Nevertheless, for ease of reference, such inputs have been rounded where they are described in the text.

(1) first-year compliance costs and (2) costs in subsequent years.

(1) First-year compliance costs. First-year compliance costs are the sum of: (1) upfront fixed costs; (2) one year of annual ongoing costs that are fixed; and (3) one year of annual ongoing costs that scale.

The Commission estimates the upfront fixed costs per dealer under the highest-cost scenario as follows: $963.44 to update policies and procedures to provide the offering price disclosure required by § 463.4(a) ((8 estimated pricing hours [499] × $80.19 per hour) + (8 estimated programming hours × $40.24 per hour)); $249.68 to design disclosures required by § 463.4(d) and (e) and inform associates of their obligations to provide these disclosures (8 estimated compliance manager hours × $31.21 per hour); $1,783.56 to cull add-ons with no consumer benefit from offerings, develop policies regarding when certain add-ons may or may not be sold, and create nonmandatory disclosures, in response to the requirements of § 463.5 ((16 estimated compliance manager hours × $31.21 per hour) + (12 estimated sales manager hours × $80.19 per hour) + (8 estimated programmer hours × $40.24 per hour)); and $534.12 to upgrade recordkeeping systems and create the templates necessary to accommodate retention of all relevant material under § 463.6 ((8 estimated programmer hours × $40.24 per hour) + (5 estimated clerical hours × $20.16 per hour) + (1 estimated sales manager hour × $80.19 per hour) + (1 estimated compliance manager hour × $31.21 per hour)). These figures total $3,530.80 per dealer.[500]

The Commission estimates the annual fixed ongoing costs per dealer for the first year under the highest-cost scenario as follows: $390.13 to conduct a heightened compliance review of public-facing representations to ensure compliance with § 463.3 (150 estimated documents per year × 5 estimated minutes of review per document × $31.21 per hour of compliance officer review); and $300 estimated for expanded storage to retain records required under § 463.6. These figures total $690.13 per dealer per year.

The Commission estimates annual ongoing costs that scale with dealer size based on number of employees as follows. The Commission estimates that annual costs that scale with dealer size are $76.86 per employee per year. Annual ongoing costs that scale with dealer size include: $26.53 per employee to provide the total of payments disclosures required by § 463.4(d) and (e) (((417,110 sales & related employees × 1 estimated hour for training × $29.43 per hour) + (19,228,256 total covered transactions involving monthly payments or financing × (2/60 estimated disclosure hours per transaction × $28.41 per hour + $0.15 printing costs per disclosure)))/ 1,257,877 total employees); $36.40 per employee for training and the delivery of a disclosure under a regime in which dealers choose to deliver an itemized disclosure to comply with § 463.5 (((417,110 sales & related employees × 1 estimated hour for training × $29.43 per hour) + ((10,343,319 new vehicle sales + 21,219,640 used vehicle sales) × (2/60 estimated disclosure hours per sale transaction × $28.41 per hour + $0.11 physical costs per disclosure)))/ 1,257,877 total employees); and $13.93 per employee to generate and store calculations required to be retained under § 463.6 ((31,562,959 vehicle sales × 1/60 estimated hours per transaction × $28.41 per hour/1,257,877 total employees) + (5,444,502 vehicle sales with GAP agreement × 1/60 estimated hours per transaction × $28.41 per hour/ 1,257,877 total employees)).

Next, the Commission uses census data on the average number of employees at dealerships within different dealer size cohorts to determine the per-dealer cost for each dealer cohort.[501] Multiplying the estimated cost per employee ($76.86) by the average number of employees within different dealer size cohorts yields annual ongoing scaled costs per dealer of: $124.59 per dealer with fewer than 5 employees ($76.86 × 1.62 employees); $499.59 per dealer with between 5 and 9 employees ($76.86 × 6.50 employees); $1,058.73 per dealer with between 10 and 19 employees ($76.86 × 13.77 employees); $2,584.18 per dealer with between 20 and 49 employees ($76.86 × 33.62 employees); $5,343.19 per dealer with between 50 and 99 employees ($76.86 × 69.52 employees); $10,784.88 per dealer with between 100 and 249 employees ($76.86 × 140.31 employees); $24,384.79 per dealer with between 250 and 499 employees ($76.86 × 317.25 employees); $44,623.26 per dealer with between 500 and 999 employees ($76.86 × 580.56 employees); and $147,085.08 per dealer with 1,000 or more employees ($76.86 × 1,913.60 employees).

Thus, the total first-year compliance costs based on dealer size are $4,345.51 ($3,530.80 + $690.13 + $124.59) per dealer with fewer than 5 employees; $4,720.51 ($3,530.80 + $690.13 + $499.59) per dealer with between 5 and 9 employees; $5,279.66 ($3,530.80 + $690.13 + $1,058.73) per dealer with between 10 and 19 employees; $6,805.11 ($3,530.80 + $690.13 + $2,584.18) per dealer with between 20 and 49 employees; $9,564.12 ($3,530.80 + $690.13 + $5,343.19) per dealer with between 50 and 99 employees; $15,005.80 ($3,530.80 + $690.13 + $10,784.88) per dealer with between 100 and 249 employees; $28,605.72 ($3,530.80 + $690.13 + $24,384.79) per dealer with between 250 and 499 employees; $48,844.18 ($3,530.80 + $690.13 + $44,623.26) per dealer with between 500 and 999 employees; and $151,306.01 ($3,530.80 + $690.13 + $147,085.08) per dealer with 1,000 or more employees.

To analyze the economic effect of the costs of the Rule by dealer size, the Commission compares per-dealer costs to per-dealer sales, gross margin, and gross margin minus operating expenses. The Commission does not have data on how sales, gross margin, and operating expenses are apportioned to dealerships based on the number of employees. Accordingly, the Commission assumes that sales, gross margin, and operating expenses are apportioned to dealerships *pro rata* with the number of employees. Dividing the 2021 industry-wide figures for annual sales ($1.265 trillion), gross margin ($226.118 billion), and gross margin minus operating expenses ($81.850 billion) by the total number of

[499] As used here, ''pricing hours'' means time spent by a sales and marketing manager reviewing dealership policies and procedures for determining the public-facing prices of vehicles in inventory.

[500] Applicable wage rates throughout this section are based on data from the Bureau of Labor Statistics. *See* U.S. Bureau of Labor Statistics, ''May 2022 National Industry-Specific Occupational Employment and Wage Estimates NAICS 441100—Automobile Dealers'' (Apr. 25, 2023), *https://www.bls.gov/oes/current/naics4_441100.htm.*

[501] Based on 2021 census data, dealers with fewer than five employees have an average of 1.62 employees (34,616 employees at all dealerships with fewer than five employees/21,356 dealers with fewer than five employees); dealers with 5–9 employees have an average of 6.50 employees (35,794 employees/5,507 dealers); dealers with 10–19 employees have an average of 13.77 employees (52,852 employees/3,837 dealers); dealers with 20–49 employees have an average of 33.62 employees (253,365 employees/7,536 dealers); dealers with 50–99 employees have an average of 69.52 employees (423,351 employees/6,090 dealers); dealers with 100–249 employees have an average of 140.31 employees (386,001 employees/2,751 dealers); dealers with 250–499 employees have an average of 317.25 employees (57,105 employees/180 dealers); dealers with 500–999 employees have an average of 580.56 employees (5,225 employees/9 dealers); and dealers with 1,000 or more employees have an average of 1,913.60 employees (9,568 employees/5 dealers). *See* U.S. Census Bureau, ''All Sectors: County Business Patterns, Including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021,'' *https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=LFO~001.*

employees (1,257,877),[502] each employee represents an additional $1,005,372.54 in sales ($1.265 trillion/1,257,877 employees), $179,761.61 in gross margin ($226.118 billion/1,257,877 employees), and $65,069.96 in gross margin minus operating expenses ($81.850 billion/1,257,877 employees). Multiplying these per-employee figures by the average number of employees of dealers within different size cohorts provides per-dealer sales, gross margin, and gross margin minus operating expenses for each cohort. For instance, dealers with fewer than 5 employees have estimated annual sales of $1,629,611.16 (1.62 employees × $1,005,372.54 sales per employee), annual gross margin of $291,376.10 (1.62 employees × $179,761.61 gross margin per employee), and annual per-dealer gross margin minus operating expenses of $105,472.17 (1.62 employees × $65,069.96 gross margin minus operating expenses per employee).

The Commission then divides first-year compliance costs by these figures to yield cost as a percentage of sales, gross margin, and gross margin minus operating costs. Applying this method to each of the dealer size cohorts, first-year compliance costs are equivalent to: 0.27% of annual sales ($4,345.51/$1,629,611.16), 1.49% of gross margin ($4,345.51/$291,376.10), and 4.12% of gross margin minus operating expenses ($4,345.51/$105,472.07) for dealers with fewer than 5 employees; 0.07% of annual sales ($4,720.51/$6,534,647.69), 0.40% of gross margin ($4,720.51/$1,168,401.53), and 1.12% of gross margin minus operating expenses ($4,720.51/$422,936.98) for dealers with 5–9 employees; 0.04% of annual sales ($5,279.66/$13,848,305.89), 0.21% of gross margin ($5,279.66/$2,476,090.91), and 0.59% of gross margin minus operating expenses ($5,279.66/$896,293.27) for dealers with 10–19 employees; and less than one-half of one percent of the annual sales, gross margin, and gross margin minus operating expenses for the remaining categories of dealers.

(2) Costs in subsequent years. The estimated cost of compliance with the Rule drops after the first year, given the absence of upfront costs, which are not incurred after the first year. Compliance costs in subsequent years—which are limited to annual ongoing costs (both fixed and those that scale with dealer size)—are therefore a smaller percentage of annual sales, gross margin, and gross margin minus operating expenses, equal to less than two percent of these metrics for dealers of all sizes.[503]

The Commission does not find that these compliance costs represent a significant economic burden. The Commission therefore certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities.

B. Initial and Final Regulatory Flexibility Analysis

The NPRM noted the Commission's belief that the proposed rule would not have a significant economic impact on small entities, but nevertheless examined the six IRFA factors, and invited comment on the proposed rule's burdens on small businesses. In the following paragraphs, the Commission discusses comments and then sets forth a FRFA.

1. Comments on the Initial Regulatory Flexibility Analysis

(a) Description of the Reasons Why Action by the Agency Is Being Considered

The IRFA explained that the Commission proposed the Rule to address misleading practices and unauthorized charges to consumers during the vehicle buying or leasing process, and to deter dealer misconduct and remedy consumer harm. The Commission further noted that its law enforcement, outreach and other engagement in this area, and the hundreds of thousands of consumer complaints received by the FTC, indicated that dealership misconduct and deceptive tactics persisted despite Federal and State law enforcement efforts. In response, the comments from SBA Advocacy and one industry group argued that the number of complaints received by the Commission is insufficient to support a rulemaking given the total number of vehicle transactions in the United States.[504] Similarly, the industry group argued that the Commission has not filed enough law enforcement actions against motor vehicle dealers to justify the proposal, and that, where it has brought enforcement actions, the Commission has managed to obtain redress for harmed consumers without the need for an additional monetary remedy. As explained in SBP II.B and in the section-by-section analysis of the recordkeeping requirements in § 463.6 in SBP III.F,

[502] Data on the number of employees comes from the 2021 census. *See* U.S. Census Bureau, ''All Sectors: County Business Patterns, Including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021,'' *https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001.*

[503] Average ongoing compliance costs after the first year equal: 0.05% of annual sales, 0.28% of gross margin, and 0.77% of gross margin minus operating expenses for dealers with fewer than 5 employees, and less than one-half of one percent of annual sales, gross margin, and gross margin minus operating expenses for the remaining categories of dealers.

[504] Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 6. SBA Advocacy also raised concerns that the proposal could make the buying process more cumbersome and confusing, noting that the proposal requires additional disclosures, and the proposal prohibited dealers from relying on a signed or initialed document, by itself, or prechecked boxes to establish express, informed consent. These arguments are addressed in the discussion of disclosures in §§ 463.4, 463.5 and the definition of ''Express, Informed Consent'' in § 463.2.

The industry group also argued that the number of complaints is overstated because it includes: (1) complaints that are not applicable to motor vehicle dealers or conduct addressed by the Rule, and (2) consumers who did not report a loss. This industry group also argued that the Commission failed to take notice of survey data indicating that the majority of consumers are satisfied with their vehicle purchases. *See, e.g.,* Cox Auto., ''2021 Cox Automotive Car Buyer Journey Study'' (2022) [hereinafter 2021 Cox Automotive Car Buyer Journey Study], *https://www.coxautoinc.com/wp-content/uploads/2022/01/2021-Car-Buyer-Journey-Study-Overview.pdf.* First, in the Commission's experience, complaints *understate* harm caused by unlawful conduct in a given category, notwithstanding any inclusion of complaints that may pertain to ancillary or related issues. *See* SBP II.B (discussing how complaints represent the tip of the iceberg in terms of actual consumer harm and citing case where prior to FTC action, there were 391 complaints about add-ons *and other issues* but survey results during the same period indicted that at least 16,848 customers were subject to unlawful practices related to add-ons alone). Moreover, the Commission's reported complaint numbers may be underinclusive of relevant complaints filed by consumers (*e.g.,* complaints about vehicle financing issues may be filed under the ''Banks and Lenders'' category; vehicle repossession issues may be filed under the ''Debt Collection'' category; and complaints about deceptive online vehicle shopping may be filed under the ''Online Shopping and Negative Reviews'' category). With regard to consumers who did not report a loss, the Commission disagrees that such consumers were not harmed or that their experience is not relevant to the Rule. For example, many consumers experience a law violation or other harmful conduct, but choose not to consummate the transaction, including consumers who waste time pursuing misleading offers. Further, survey data indicating that a majority of customers are ''satisfied'' do not indicate whether those customers had hidden charges in their contracts and whether they ever became aware of such charges. Surveys cited by the Commission have identified situations where customers are unaware of add-on charges in their contracts; indeed, in one case, 79% of consumers were unaware of such charges. *See* SBP II.B (discussing hidden charges in auto contracts). Consumers might be satisfied with a purchase until they later learn they are paying for items they did not authorize, if they learn this at all. Further, ''the FTC need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense . . . .'' *Fed. Trade Comm'n* v. *Amy Travel Serv., Inc.,* 875 F.2d 564, 572 (7th Cir. 1989), *vacated in part on other grounds, Fed. Trade Comm'n* v. *Credit Bureau Ctr., LLC,* 937 F.3d 764 (7th Cir. 2019); *accord Fed. Trade Comm'n* v. *Stefanchik,* 559 F.3d 924, 929 n.12 (9th Cir. 2009).

consumer complaints represent the ''tip of the iceberg'' of actual misconduct, as many unlawful practices go undetected or unreported by consumers. Further, the Commission has taken significant action aimed at addressing law violations in the motor vehicle dealer marketplace, despite limited resources and a broad mandate to address unlawful practices across much of the nation's commercial activity,[505] and, particularly given the Supreme Court's 2021 ruling limiting the FTC's ability to obtain redress for consumers, it is difficult to get full redress for consumers.[506] Despite these Commission actions, as well as the hundreds of additional actions brought by other Federal and State regulators, the deceptive or unfair acts or practices addressed by the proposed rule persist.

(b) Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objectives of the Rule and its legal basis, including the specific grant of rulemaking authority under section 1029 of the Dodd-Frank Act, 12 U.S.C. 5519, were set forth in the IRFA.[507] The objectives and legal basis, and comments on these topics, additionally have been discussed throughout this SBP.

(c) Description of and, Where Feasible, Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

In its IRFA, the Commission estimated that there were approximately 46,525 franchise, new motor vehicle, and independent/used motor vehicle dealers.[508] As discussed in the Paperwork Reduction Act analysis in SBP III.V, the Commission received comments from SBA Advocacy and others on this estimate, and the Commission has responded to those comments by making certain changes to the proposal in light of the comments received. The Commission has revised its estimate of covered dealers to 47,271 franchise, new motor vehicle, and independent/used motor vehicle dealers based on newly available NAICS data assembled by the U.S. Census Bureau.[509]

Regarding the estimate of the number of small entities affected by the Final Rule, as noted in the Certification of the Final Rule,[510] while the Commission cannot determine the precise number of small entities, the data the Commission does have reinforce the Commission's initial view that most covered entities are small entities.

(d) Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

An industry association commenter argued that the Commission did not ''accurately'' lay out the proposed rule's projected requirements. The commenter did not provide an explanation of what it alleged to be inaccurate in the Commission's description. This comment notwithstanding, the NPRM described the proposed rule's projected requirements, including by elaborating on the proposed recordkeeping requirements and providing estimates regarding the anticipated recordkeeping time and resource obligations for programmers, clerical staff, sales managers, and compliance officers.[511] The NPRM also provided a detailed description of the recordkeeping requirements for entities to be covered by the Rule.[512]

(e) Duplicative, Overlapping, or Conflicting Federal Rules

An industry association commenter argued that the Commission failed to identify relevant Federal rules that may duplicate, overlap, or conflict with the proposal. This commenter's arguments that the proposed rule conflicts with Federal statutes are addressed in the section-by-section analysis in SBP III. Commenters provided no examples of actual conflicts between the proposals and Federal law. Further, there is no evidence that duplicative laws prohibiting misrepresentations or unfair acts or practices have harmed consumers or competition. Moreover, the additional remedies provided by the Final Rule will benefit consumers who encounter conduct that is already illegal and will assist law-abiding dealers that presently lose business to competitors that act unlawfully.

(f) Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

Statutory examples of ''significant alternatives'' include different requirements or timetables that take into account the resources available to small entities; the clarification, consolidation, or simplification of compliance and reporting requirements under the Rule for small entities; the use of performance rather than design standards; and an exemption from coverage of the Rule, or any part thereof, for small entities.[513] Comments from SBA Advocacy and from a national industry association argued that the Commission did not set forth alternatives to the proposed rule.[514]

In its Regulatory Flexibility Act compliance guidance to Federal agencies, the SBA Office of Advocacy provides that, ''[i]f an agency is unable to analyze small business alternatives separately, then alternatives that reduce the impact for businesses of all sizes must be considered.'' [515] As the

[505] One industry group argued that the majority of the FTC's enforcement actions have pertained to deceptive advertising, and few have alleged unlawful conduct involving add-ons. The Commission agrees that many of its actions have alleged deceptive pricing. In focusing on certain actions that involved allegations that dealers placed unauthorized charges for add-ons, however, the commenter leaves out other unlawful conduct related to add-ons. Such conduct includes, for example, misrepresentations regarding the pricing of add-ons (Complaint ¶¶ 6–12, *TT of Longwood, Inc.*, No. C–4531 (F.T.C. July 2, 2015)), or failing to disclose that mandatory add-ons were included in the cost of credit (Consent Order ¶¶ 73–75, *Y King S Corp.*, CFPB No. 2016–CFPB–0001 (Jan. 21, 2016)). In addition, unauthorized charges are likely to go unnoticed by consumers, which can hamper enforcement efforts. *See, e.g.*, Auto Buyer Study, *supra* note 25, at 14 (describing several study participants who thought they had not purchased add-ons, or that add-ons were free, and only learned during the study that they were charged for add-ons).

[506] *See AMG Cap. Mgmt., LLC* v. *Fed. Trade Comm'n*, 141 S. Ct. 1341 (2021).

[507] NPRM at 42035.

[508] *Id.* at 42035. The Commission explained that, because of the relative size of the automobile market compared to other types of motor vehicle dealers, and the greater availability of relevant information for this market, its NPRM analysis exclusively considered automobile dealers. The Commission invited submissions of market information for other types of motor vehicles such as boats, RVs, and motorcycles that would allow expansion of the scope of its analysis. *See* NPRM at 42035–36.

[509] U.S. Census Bureau, ''All Sectors: County Business Patterns, Including ZIP Code Business Patterns, by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2021,'' *https://data.census.gov/table?q=CB2100CBP&n=44111:44112&tid=CBP2021.CB2100CBP&nkd=EMPSZES~001,LFO~001* (listing 21,622 establishments for ''[n]ew car dealers,'' NAICS code 44111, and 25,649 establishments for ''[u]sed car dealers,'' NAICS code 44112).

[510] *See* SBP VI.A.2.

[511] NPRM at 42035; *see also id.* at 42033–34 (describing recordkeeping requirements and analyzing cost burden). To avoid duplicative or unnecessary analysis, the information required by the IRFA can be provided with or as part of any other analysis required by any other law. 5 U.S.C. 605(a).

[512] *See* NPRM at 42027, 42035 (enumerating records to be retained and time period for retention).

[513] *See* 5 U.S.C. 603(c)(1)–(4).

[514] Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664.

[515] Off. of Advoc., U.S. Small Bus. Admin., ''A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act'' 39 (2017), *https://advocacy.sba.gov/wp-content/uploads/2019/06/How-to-Comply-with-the-RFA.pdf*.

Commission explained in its NPRM, it ‘‘envisioned and drafted this Rule mindful that most motor vehicle dealers are small entities,’’ and drafted its proposal in the first instance to minimize economic impact on all motor vehicle dealers.[516] For example, the Rule prohibits conduct that already violates the FTC Act, but still takes steps to minimize burdens for dealers of all sizes, by, for example, allowing records to be kept in any legible form already kept in the ordinary course of business, and by limiting recordkeeping requirements to twenty-four months from the date the record is created despite the fact that motor vehicle financing terms are generally years longer than this period. Commenters generally appear to understand the relevant market in a similar manner. For instance, the possible alternatives raised by the comment from SBA Advocacy would apply uniformly to both large and small businesses. These alternatives included excluding vehicle dealers that do not sell automobiles, regardless of the size of the dealer, and creating a carve-out for banks and other financing companies that would cover multi-billion dollar institutions.[517] Comments from SBA Advocacy and a national industry association also discussed the proposed rule's disclosure requirements in an industry-wide manner, not limiting their comments to businesses under any particular size threshold.[518] Nevertheless, the Commission has reviewed these comments carefully, has responded to comments on alternatives in the corresponding sections of its section-by-section analysis, and has determined to modify the definition of ‘‘Covered Motor Vehicle’’ at § 463.2(e) and not to finalize the requirements proposed in §§ 463.4(b) and 463.5(b).[519]

2. Final Regulatory Flexibility Analysis

Although the Commission is certifying that the Rule will not have a significant economic impact on a substantial number of small entities, the Commission has prepared the following FRFA with this Final Rule. In the following paragraphs, the Commission provides the information required for a FRFA: (1) a statement of the need for, and objectives of, the Rule; (2) a statement of the significant issues raised by public comments in response to the IRFA, including any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, the Commission's assessment and response, and any resulting changes; (3) a description of and an estimate of the number of small entities to which the Rule will apply or an explanation of why no such estimate is available; (4) a description of the projected reporting, recordkeeping, and other compliance requirements; and (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a discussion of any significant alternatives for small entities.[520]

(a) Statement of the Need for, and Objectives of, the Rule

The FTC issues this Final Rule to address deceptive and unfair acts or practices during the vehicle buying or leasing process, and to provide an additional enforcement tool to remedy consumer harm and assist law-abiding dealers. As detailed in SBP II.B.1, these deceptive and unfair practices include bait-and-switch tactics, such as dealers advertising deceptively low prices or other deceptive terms to induce consumers to visit the dealership, and charging such consumers additional, unexpected amounts, including after the consumers have invested significant time and effort traveling to, and negotiating at, the dealership premises. At present, consumers may never learn that they are paying substantial unexpected charges, given the complexity and length of the motor vehicle sale, financing, or lease transaction and its attendant contracts and other documents. Law enforcement, outreach and other engagement in this area, as well as the number of consumer complaints each year regarding motor vehicle dealer practices, indicate that unlawful conduct persists despite Federal and State law enforcement efforts.

(b) Issues Raised by Comments, Including Comments by the Chief Counsel for Advocacy of the SBA, the Commission's Assessment and Response, and Any Changes Made as a Result

The comments regarding the IRFA are addressed in SBP VI.B, and the comments regarding the other provisions of the NPRM are discussed in the SBP's section-by-section analysis in SBP III. As noted, the Commission has made certain changes to the Rule after carefully reviewing the comments. These changes include modification of the definition of ‘‘Covered Motor Vehicle’’ at § 463.2(e), removal of the add-on list disclosure requirement in proposed § 463.4(b) and the requirements in proposed § 463.5(b), and removal of the corresponding recordkeeping requirements in proposed § 463.6(a)(2) and (a)(4).

(c) Description and Estimate of the Number of Small Entities to Which the Final Rule Will Apply or an Explanation of Why No Such Estimate Is Available

The Final Rule applies to covered motor vehicle dealers, as defined in § 463.2(f), of covered motor vehicles at § 463.2(e): ‘‘any self-propelled vehicle designed for transporting persons or property on a public street, highway, or

[516] NPRM at 42036–37; *see also id.* at 42029–30 (indicating, in Questions for Comment 26.b, 28.a, & 30 that the Commission was considering alternative approaches).

[517] *See* Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 4–6. As addressed in SBP III.C.2(a) and SBP III.E.2(c), in responding to a similar comment by financial institutions, the Final Rule does not change the status quo regarding the responsibilities of contract assignees or other subsequent holders of motor vehicle financing under the Holder Rule, and the Commission declines to create a safe harbor for contract assignees where it did not previously exist.

Similarly, one comment recommended that the Commission add a rule provision authorizing an alternative compliance mechanism, stating that such a provision would aid not just smaller entities but larger entities as well. Under this alternative mechanism, independent accountability organizations could apply to the Commission for authorization to review and assess auto dealers' adherence to a set of rule compliance guidelines that would be created. *See* Comment of BBB Nat'l Programs, Doc. No. FTC–2022–0046–8452 at 1–3. This comment suggested that such an alternative compliance mechanism would have several benefits, including educating industry participants and allowing for industry oversight beyond the capacity of the FTC. The Commission agrees with the goals of educating stakeholders and maximizing resources used to ensure compliance with the Rule but notes that these goals can be furthered without adding alternate mechanisms with as-yet unknown guidelines, that may or may not be sufficient to protect consumers, to the Rule that the Commission is finalizing. The Commission notes that the Rule finalizes certain baseline protections that should already be in place under the law. The Commission encourages stakeholders, such as auto dealer trade associations, BBB, and others, to educate their members and the public about the Rule and encourage compliance, as such groups have done when issuing guidance on other aspects of the law.

[518] Comment of SBA Advocacy, Doc. No. FTC–2022–0046–6664 at 5–6; *see generally* Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368. The National Automobile Dealers Association also argues that the Commission should have considered whether to do a rule in the first instance. The NPRM provides a detailed explanation of why, more than a decade after Congress granted the FTC APA rulemaking authority with respect to motor vehicle dealers, and continued enforcement, outreach, and other initiatives, a rule is needed to address ongoing problems related to bait-and-switch tactics and hidden charges.

[519] Separately, the Commission notes that the NPRM identified and solicited comments on alternatives to every substantive requirement, including the areas specifically addressed by the commenters. *See, e.g.,* NPRM at 42028–30 (Q4–7, Q10, Q16, Q28, Q33, Q36–38); *id.* at 42040–41.

[520] 5 U.S.C. 604(a)(1)-(6).

road,'' and, in light of comments received, excludes specific categories as detailed in § 463.2(e).[521] As explained in the Certification,[522] the Commission cannot determine the precise number of small entities to which the Final Rule applies, but census data indicate that the vast majority of the estimated 47,271 dealers covered by the Rule are small entities according to the applicable U.S. Small Business Administrator's relevant size standards.

(d) Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

The Final Rule prohibits certain unfair or deceptive acts or practices and contains recordkeeping requirements. The Final Rule contains no reporting requirements.

The Final Rule requires covered motor vehicle dealers to clearly and conspicuously disclose the offering price of a vehicle in certain advertisements and in response to consumer communications. It also requires dealers to make certain other disclosures during the sale, financing, or leasing process. To enforce the Rule and prevent the unfair or deceptive practices prohibited by the Rule, the Rule further requires dealers to retain records necessary to demonstrate compliance with the Rule. Such records include advertising materials and copies of purchase orders and financing and lease documents. The Rule requires such records to be retained for a period of twenty-four months from the date they are created and provides that they may be kept in any legible form, and in the same manner, format, or place as they may already be kept in the ordinary course of business. Further details on these provisions are discussed throughout this SBP, including in the section-by-section analysis of the recordkeeping requirements in § 463.6, as well as in the preceding Paperwork Reduction Act analysis.

(e) Description of the Steps the Commission Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

The Final Rule addresses certain unfair or deceptive acts or practices in motor vehicle sales, financing, and leasing. In drafting its NPRM, reviewing public comments, and modifying the Rule from its original proposal, the Commission has taken specific steps to avoid unduly burdensome requirements for small entities. The Commission believes that the Final Rule—including the prohibitions against making specific misrepresentations and against charging consumers for any item unless the dealer obtains the express, informed consent of the consumer for the charge—is necessary to protect consumers, including small-business consumers that purchase, finance, or lease motor vehicles. By addressing these practices, the Rule also will benefit competition by preventing law-abiding dealers, many of which are small businesses, from losing business due to unlawful practices by other dealers.

For each provision in the Rule, the Commission has attempted to reduce the burden on businesses, including small entities. For example, the Commission limited the number of disclosures that dealers are required to make under the Final Rule, and in response to comments, further limited such disclosures by determining not to finalize the disclosures in proposed §§ 463.4(b) and 463.5(b). Similarly, the Commission has limited the duration of the Rule's recordkeeping requirements to twenty-four months from the date the relevant record is created, even though this period is far shorter than the length of many financing contracts.

As previously noted, the Commission does not believe the Final Rule imposes a significant economic impact on a substantial number of small entities. Nonetheless, the Commission has taken care to avoid extensive requirements related to form. For example, the Commission does not specify the form in which records required by the Final Rule must be kept. Moreover, the Rule's disclosure requirements do not mandate specific font sizes. In sum, the Commission has worked to minimize any significant economic impact on small businesses.

VII. Final Regulatory Analysis Under Section 22 of the FTC Act

A. Introduction

The Federal Trade Commission (FTC) is finalizing a Rule to address unfair or deceptive acts or practices by covered motor vehicle dealers when engaging with consumers who are shopping for covered motor vehicles. The Rule contains several provisions targeted at addressing price-related deception and unfairness for consumers with respect to purchasing, leasing, and financing new and used motor vehicles. The Final Rule prohibits misrepresentations regarding material information about certain aspects of motor vehicles and motor vehicle financing. The Final Rule also mandates certain disclosures about vehicle price, payments, and add-ons, while prohibiting charges for add-on products and services that would not benefit the consumer or for any item unless the dealer obtains the express, informed consent of the consumer for the charge.

Section 22 of the FTC Act, 15 U.S.C. 57b–3, requires the Commission to issue a final regulatory analysis when publishing a final rule. The final regulatory analysis must contain (1) a concise statement of the need for, and objectives of, the final rule; (2) a description of any alternatives to the final rule which were considered by the Commission; (3) an analysis of the projected benefits, any adverse economic effects, and any other effects of the final rule; (4) an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and (5) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.

As discussed previously, the FTC issues this Final Rule to address deceptive and unfair acts or practices during the vehicle buying or leasing process, and to provide an additional enforcement tool to remedy consumer harm and assist law-abiding dealers. These deceptive and unfair practices include bait-and-switch tactics, such as dealers advertising deceptively low prices or other deceptive terms to induce consumers to visit the dealership; and charging such consumers additional, unexpected amounts, including after the consumers have invested significant time and effort traveling to, and negotiating at, the dealership premises. At present, consumers may never learn that they are paying substantial unexpected charges, given the complexity and length of the motor vehicle sale, financing, or lease transaction and its attendant contracts and other documents. Law enforcement, outreach, and other engagement in this area, as well as the number of consumer complaints each year regarding motor vehicle dealer practices, indicate that unlawful conduct persists despite Federal and State law enforcement efforts.

In response to public comments, the Commission considered and made a number of revisions from the proposed

[521] The Commission is authorized to prescribe rules with respect to a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both, as defined in 12 U.S.C. 5519(a).

[522] *See* SBP VI.A.2.

rule, which in turn have necessitated revisions to the regulatory analysis, resulting in this final regulatory analysis.[523] The most significant revisions to the proposed rule impacting the regulatory analysis are the removal of proposed §§ 463.4(b) (requiring the disclosure of add-on lists) and 463.5(b) (requiring various itemized disclosures relating to undisclosed or unselected add-ons). As a result of the Commission's determination not to finalize these sections of the proposed rule, costs and benefits associated with those provisions have been excluded from the final regulatory analysis. The Commission also has made revisions in response to public comments, the availability of newer data, the identification of additional relevant data, and the application of newer scholarly research. The final regulatory analysis thus builds upon the preliminary regulatory analysis, while incorporating several updates:

- The analysis of consumer time savings has been revised in response to public comments and changes following the NPRM.
- A section quantifying the reduction in deadweight loss resulting from the Rule has been added, based upon recent research that allows the Commission to quantify both how dealer markups will respond to price transparency and how new and used vehicle quantities will respond to changes in price.
- Training costs have been added for some provisions in response to public comments.
- Information systems costs have been added to the Recordkeeping section in response to public comments, based on estimates of how much data would be required and the cost of cloud or on-premises data storage.
- Wages used to monetize labor costs have been updated to reflect new data from the Bureau of Labor Statistics.
- The number of dealers has been updated to reflect new data from Census County Business Patterns.
- The number of transactions subject to the Rule has been revised in response to public comments, and the Commission's identification of additional data sources that can be used to exclude private party and fleet transactions.

The Final Rule contains requirements in the following areas:

1. Prohibited misrepresentations;
2. Required disclosure of offering price in certain advertisements and in response to inquiry;
3. Required disclosure of total of payments for financing and leasing transactions;
4. Prohibition on charging for add-ons in certain circumstances;
5. Requirement to obtain express, informed consent before any charges; and
6. Recordkeeping.

In the following analysis, we describe the anticipated impacts of the Final Rule. Where possible, we quantify the benefits and costs and present them separately by provision. If a benefit or cost is quantified, we indicate the sources of the data relied upon. If an assumption is needed, the text makes clear which quantities are being assumed.

A period of 10 years is used in the baseline scenario because FTC rules are generally subject to review every 10 years.[524] Quantifiable aggregate benefits and costs across three different sets of assumptions are summarized as the net present value over this 10-year time frame in Table 1.1. Quantifiable benefits include time savings from a more efficient shopping and sales process and a reduction in deadweight loss, both of which ultimately result from greater transparency under the Rule. Quantifiable costs primarily reflect the resources expended by automobile dealers in developing the systems necessary to comply with the provisions of the Rule. In addition, we expect additional benefits and costs that we are presently unable to quantify. Among the unquantified benefits are time savings that accrue to individuals who abandon vehicle transactions entirely; additional time savings on activities that individuals engage in digitally under the status quo; reductions in deadweight loss resulting from direct price effects in the markets for used vehicles or vehicle add-ons; and the benefit of reduced stress, discomfort, and unpleasantness experienced by motor vehicle consumers under the status quo. Among the unquantified costs would be any potential reductions in consumer information resulting from changes in dealers' policies regarding marketing and advertisements. The discount rate reflects society's preference for receiving benefits earlier rather than later; a higher discount rate is associated with a greater preference for benefits in the present. The present value is obtained by multiplying each year's net benefit by a discount factor a number of times equal to the number of years in the future the net benefit accrues.[525]

TABLE 1.1—PRESENT VALUE OF NET BENEFITS (IN MILLIONS), 2024–2033

	Low estimate		Base case		High estimate	
	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate
Benefits:						
Time Savings	$7,463	$6,145	$14,926	$12,290	$24,036	$19,790
Deadweight Loss Reduction	568	468	1,298	1,069	2,307	1,899
Total Benefits	8,031	6,613	16,224	13,359	26,343	21,690
Costs:						
Finance/Lease Total of Payments Disclosure	296	246	296	246	117	98
Offering Price Disclosure	46	46	46	46	0	0
Prohibition re: Certain Add-ons & Express, Informed Consent	475	406	475	406	147	128

[523] These revisions and alternatives the Commission considered are described in detail in the Commission's Statement of Basis and Purpose, as is the Commission's explanation why the Final Rule will attain its objectives in a manner consistent with applicable law.

[524] *See* Fed. Trade Comm'n, Notification of Intent to Request Public Comment, Regulatory Review Schedule, 87 FR 47947 (Aug. 5, 2022), *https://www.govinfo.gov/content/pkg/FR-2022-08-05/pdf/2022-16863.pdf*.

[525] While whole calendar years are used here for ease of reference, this analysis estimates costs and benefits over a ten-year period running from the Rule's effective date. For the purposes of discounting, the Commission assumes that any upfront costs or benefits occur immediately upon the effective date of the Rule and are therefore not discounted. The Commission further assumes that ongoing costs and benefits occur at the end of each period, such that even ongoing costs/benefits that occur in year 1 are discounted.

TABLE 1.1—PRESENT VALUE OF NET BENEFITS (IN MILLIONS), 2024–2033—Continued

	Low estimate		Base case		High estimate	
	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate
Prohibition on Misrepresentations	157	130	157	130	0	0
Recordkeeping	296	248	296	248	296	248
Total Costs	1,270	1,075	1,270	1,075	559	474
Net Benefits	6,761	5,538	14,954	12,284	25,784	21,216

Note: ''Low Estimate'' reflects all lowest benefit estimates and high cost scenarios and ''High Estimate'' reflects all highest benefit estimates and low cost scenarios. ''Base Case'' reflects base case benefit estimates and high cost scenarios. Not all impacts can be quantified; estimates only reflect quantified costs and benefits.

B. Estimated Benefits of Final Rule

In this section, we describe the beneficial impacts of the Rule, by (1) providing quantitative estimates where possible, (2) identifying quantitative benefits that cannot be estimated at this time due to a lack of data, and (3) describing benefits that can only be assessed qualitatively. The benefits cut across multiple areas addressed by the Rule and these benefits are impossible to identify separately by area. As a result, we enumerate the benefits of the Rule not by provision, but by category.

1. Consumer Time Savings When Shopping for Motor Vehicles

Several provisions of the Rule would benefit consumers by saving them time as they complete motor vehicle transactions. Required disclosures of relevant prices and prohibitions of misrepresentations, *inter alia,* would save consumers time when shopping for a vehicle by requiring the provision of salient, material information early in the process and eliminating time spent pursuing misleading offers. The Commission's enforcement record shows that consumer search and shopping is sometimes influenced by unfair or deceptive advertising that draws consumers to a dealership in pursuit of an advertised deal, only to find out at some point later in the process (if at all) that the advertised deal is not actually available to them.[526] This bait-and-switch advertising has the effect of wasting consumers' time traveling to and negotiating with unscrupulous dealerships, time which would otherwise be spent pursuing truthful offers in the absence of deception and unfairness. If consumers are faced with hard constraints on their time or other resources, this wasted time may mean that they are unable to find the deal that best fits their needs and preferences. Additionally, motor vehicle consumers frequently begin the process of shopping for a motor vehicle (*e.g.,* by visiting a dealership in response to an ad or initiating negotiations in response to a quoted price that is incomplete) and then later abandon the nascent transaction entirely when additional information is revealed. In these instances, consumers do not purchase or lease a vehicle at all. The Rule would also save consumers time by avoiding these abandoned transactions. However, because the Commission has been unable to identify data to determine the quantity of such abandoned transactions and the amount of time spent pursuing them, this benefit remains unquantified in the analysis.

Obviously, many consumers end up purchasing and leasing vehicles under the status quo—either because full revelation of prices and terms still results in a mutually beneficial transaction or because full revelation never occurs and consumers are deceived into completing a transaction that is not mutually beneficial. These consumers also spend additional, unnecessary time discovering information that dealers would be required to disclose earlier once the Rule is in effect. The Commission expects the Rule's required disclosures and prohibitions against misrepresentations to improve information flows and consumer search efficiency, including but not limited to, addressing the influence of deception and unfairness on consumer search and shopping behavior.

The Commission's preliminary analysis estimated that the proposed rule would allow consumers to spend 3 fewer hours completing each motor vehicle transaction and result in (quantifiable) overall time savings valued at between $30 billion and $35 billion. In this final regulatory analysis, the Commission takes into account the effects of revisions to the proposed rule and additional data, addresses industry comments, and employs an alternative analytical approach with a sensitivity analysis. This sensitivity analysis reflects a ''high-end'' estimate that consumers will save as many as 3.3 hours per completed transaction; a ''base case'' estimate—representing the most likely scenario—that consumers will save 2.05 hours per transaction; and a possible ''low-end'' savings estimate of 1.02 hours. Using a 7% discount rate, these time savings estimates result in a range of between $6.1 billion and $19.8 billion in total savings, with a base case of $12.3 billion.

In its preliminary analysis, the Commission relied on results from the 2020 Cox Automotive Car Buyer Journey study, which showed that consumers spent roughly 15 hours researching, shopping, and visiting dealerships for each motor vehicle transaction.[527] Based on the proposed rule provisions prohibiting misrepresentations and requiring price transparency, the Commission assumed each consumer who consummated a vehicle transaction would spend 3 fewer hours shopping online, corresponding with dealerships, visiting dealer locations, and negotiating with dealer employees. The 3 hours corresponded to 20% of an average consumer's time spent on such activities in 2019 (pre-COVID).

The Commission received a number of comments emphasizing the unnecessary time consumers must spend to ascertain the price and terms when attempting to consummate a vehicle transaction. One group of commenters, for example, asserted that ''[t]he most important factor for consumers purchasing a vehicle is its price, yet the price is almost impossible to ascertain without spending hours at the dealership.'' [528] Another group of commenters provided a compilation of numerous consumer complaints, including many that described consumers spending hours at a

[526] *See* SBP II.B–C.

[527] NPRM at 42037 & n.180.

[528] Comment of Am. for Fin. Reform et al., Doc. No. FTC–2022–0046–7607.

dealership trying to ascertain the final price and terms of the transaction.[529] The improved information flow under the Final Rule will provide quantifiable benefits for consumers by reducing or eliminating this unnecessary need to spend time penetrating opaque pricing and terms, and will provide qualitative benefits by reducing frustration and stress in the car buying process.

Some industry commenters questioned the appropriateness of the data and assumptions used to quantify the time savings benefit. A number of industry association commenters argued that the 15-hour figure did not represent a reasonable base from which time savings attributable to the Rule could be derived. One such commenter criticism asserted that the publication from which it was sourced only surveyed consumers who used the internet during research and shopping and therefore could not be representative of the time spent by consumers who do not use the internet. Still other commenters noted that additional data from the same organization were available. The Commission disagrees that the 15-hour estimate is an unreasonable base from which to derive time savings from the Rule. While the Cox Automotive Study acknowledges only internet users were surveyed, the study also indicates its ''[r]esults are weighted to be representative of the buyer population.'' [530] Also, while more recent data were available at the time of the analysis for the NPRM, those data were from an extraordinary period (the COVID–19 pandemic). The Commission expects that the data used for the preliminary analysis are more representative of consumer experiences over the analysis window than the more recent data. While not dispositive, the limited data available since the NPRM was published bears this hypothesis out. In the 2021 Cox Automotive Car Buyer Journey Study, consumers spent roughly 12-and-a-half hours researching, shopping, and visiting dealerships for each motor vehicle transaction.[531] In contrast, in the 2022 Car Buyer Journey study, consumers spent roughly 14-and-a-half hours researching, shopping, and visiting dealerships for each motor vehicle transaction.[532] This admittedly short trend suggests that the COVID–19 pandemic had a significant effect on motor vehicle shopping, reducing the amount of time the typical consumer spent on these activities, and that time spent on these activities has already rebounded to previous levels.[533]

Another industry association commenter suggested that the figure included categories of time use that could not conceivably be affected by the proposed rule, such as online research into vehicle features, and that attention should be restricted to time spent shopping. The Commission finds that several provisions in the Rule clearly have the potential to reduce time spent across most categories covered by the 15-hour figure, including the largest category (''Researching and Shopping Online''). This category of time use would include comparing listed vehicle prices across dealerships that, under the Rule, would be transparent and comparable in a way that they were not in the status quo, thus saving consumers time.

Some commenters also noted that the total base of transactions reported in the preliminary analysis appeared to overstate the number of transactions to which the proposed rule would apply. First, commenters asserted that the 62.1 million transactions double-counted new vehicle leases in the data source from which it was obtained (2019 National Transportation Statistics, Table 1–17). Second, commenters asserted that the number included private party transactions that would be entirely unaffected by the proposed rule. Finally, commenters argued that the transactions number contained wholesale and fleet transactions, where the amount of time spent researching, shopping, and visiting dealers is likely to be substantially different relative to a household consumer.

The Commission has verified that the source data were revised to fix the erroneous double-counting of leases between the time they were accessed by the Commission for the drafting of the preliminary analysis and the time that comments were received. The final analysis uses the revised data. In addition, in response to comments that private party transactions should be excluded from the analysis, the Commission is revising its analysis. Additional data would be necessary to quantify any time savings benefits for wholesale and fleet transactions. Accordingly, the Commission has excluded all transactions occurring through non-retail channels from the final analysis.[534]

A number of comments raised concerns about the foundations of the 3-hour time-savings assumption. One industry organization noted that the Cox Automotive study cited in the NPRM does not itself address the proposals in the NPRM (which the survey, of course, predated) and does not estimate time savings.[535] Another organization

[529] Comment of Consumer Reps. et al., Doc. No. FTC–2022–0046–7520 at 3, 11, 12, 16, 38 (including story from Illinois consumer describing ''[spending] about 4 hours at the dealership while the salesman kept changing the terms of the deal . . . .''; story from Connecticut consumer describing how, ''[a]fter nearly three hours of paperwork . . . I was finally presented with the official bill to pay the balance. The price was now higher than the original adjusted sticker.''; story from New Jersey consumer describing how, ''[a]fter 4 hours of negotiations . . . I finally got nearly the same price as the verified offer [for the vehicle] but about $1000 less on my trade-in[ ] (that was also part of the verified offer). The [dealer] also added on Accessories 'other products' [of] $474.00 . . . .''; story from Texas consumer describing how ''[t]he [dealership] finance manager kept me there for two hours, and said the deal was done. I went to get my wife, when we got back the price had gone up $3,000.00.'').

[530] 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 1.

[531] *See* 2021 Cox Automotive Car Buyer Journey Study, *supra* note 504, at 16.

[532] *See* 2022 Car Buyer Journey, *supra* note 25, at 6.

[533] Interestingly, consumer satisfaction with the car buying process, as measured by this same survey, was highest during the COVID–19 pandemic when the time spent on research, shopping, and visiting dealerships was lowest, and has since dropped back to pre-pandemic levels. 2022 Car Buyer Journey, *supra* note 25, at 5.

[534] When the transaction volume from the preliminary analysis is applied to the Commission's current methodology and sensitivity analysis, time savings under the Final Rule ranges from a high-end of $35 billion to a low-end of $11 billion, with a base case of $22 billion (assuming a 7% discount rate). In comparison, the preliminary analysis computed savings under the proposed rule as approximately $31 billion (also assuming a 7% discount rate). The residual difference in base case savings is attributable to less time saved per transaction—partially explained by additional provisions in the NPRM that the Commission is not finalizing—as well as updates to the underlying wages used to monetize the consumer time savings.

[535] This same organization commissioned a study that was recently released asserting the proposed rule would lead to an increase in consumer transaction time. This survey, however, had numerous methodological shortcomings rendering its results unreliable. For example, the survey presented each respondent at the outset with a leading statement telling them the rule would impose ''new duties [that] are expected to create additional monitoring, training, forms, and compliance review responsibilities as well as a modification of record keeping systems and coordination with outside IT and other vendors'' and ''increase the time of a motor vehicle transaction, inhibit online sales, limit price disclosures, and increase customer confusion and frustration.'' Edgar Faler et al., Ctr. for Auto. Rsch., ''Assessment of Costs Associated with the Implementation of the Federal Trade Commission Notice of Proposed Rulemaking (RIN 2022–14214), CFR part 463'' 34–36 (2023), *https://www.cargroup.org/wp-content/uploads/2023/05/CAR-Report_CFR-Part-463_Final_May-2023.pdf* (introductory instructions on the survey instrument sent to respondents). Moreover, the survey started with a sample size of 60 dealers (*id.* at 7) in an industry with an estimated 46,525 dealers, NPRM at 42,031 & n.154, but only 40 dealers actually completed responses to many key questions (*id.* at 29). The survey does not describe how these 40–60 dealers were chosen. Although the survey estimates that the proposed rule would require consumers to spend additional time on motor vehicle transactions, this conclusion is based on the responses of just 40 dealers and included no consumers. *Id.* at 29–32. Moreover, the survey report attributed much of this estimated increase to

Continued

expressed confusion as to whether the assumption was intended as a flat 3-hour time savings or a 20% time savings, asserting that dynamism in automotive retailing will likely lead to evolution in the total amount of time spent shopping.

While the Commission believes its 3-hour time-saving assumption in the NPRM remains reasonable, the Commission has conducted additional analyses, the results of which demonstrate the positive net benefits of the Rule even when applying more conservative assumptions around time savings and adjusting for the removal of certain proposed provisions from the NPRM.[536] Using recent figures from Cox Automotive's Car Buyer Journey 2019 study, the Commission notes that consumers who do various activities in the vehicle buying process digitally (''digital consumers'') save time at the dealership relative to those who do not (''non-digital consumers'').[537] The Commission's revised base case time savings calculation assumes that only the fraction of consumers who are not currently shopping digitally will experience time savings, and that these savings will be proportional to the time savings found in the Car Buyer Journey 2019 study for digital consumers.[538] Because the Commission expects the provisions of the Rule to emulate some of the time-saving features of completing these activities digitally, the time savings benefits of the Rule are assumed to be a proportion of the time saved by status quo digital consumers, with the proportion determined by how closely the status quo digital shopping experience is expected to resemble the shopping experience for all consumers once the Rule is in effect. Additionally, because these numbers only reflect time saved at the dealership of purchase, we assume that these same consumers will also save time on these activities to the extent that they are initiated at dealerships visited prior to the dealership at which they purchase (''non-purchase dealerships''). Based on 2020 data from Cox Automotive, the average consumer visits 1 non-purchase dealership for each transaction.[539] Table 2.1 documents both the fraction of consumers performing activities digitally under the status quo and the time saved at the dealership by these consumers on each activity.

TABLE 2.1—COMPLETING ACTIVITIES DIGITALLY

Activity	% of Consumers digital (2020 digitization)	Time saved at dealership (2019 journey) (minutes)
Negotiating the Purchase Price	20	43
Select F&I Add-Ons	18	33
Discussing and Signing Paperwork	13	45
Get a Trade-In Offer	31	26

Source: Car Buyer Journey 2019 and Digitization of End-to-End Retail.

Based on the description of these activities and the anticipated effects of the Rule, our base case estimates assume that non-digital consumers will save an amount of time negotiating a vehicle purchase price equal to the amount of time saved by those negotiating purchase price digitally under the status quo (43 minutes). For non-digital consumers, it is currently time-consuming to obtain comparable price quotes from dealerships. Many dealerships will not initiate price negotiations in earnest without a competing price quote in writing, which can only be obtained by visiting a dealership for the non-digital consumer. Mandating offering price disclosures—which are comparable across dealerships by definition—early in the shopping process will emulate the price discovery function of negotiating prices online, in which comparable price quotes can be obtained (with effort) via email.[540]

The Commission anticipates that the impact of the Rule on time spent selecting F&I add-ons and discussing and signing paperwork will be moderate. In our base case estimates, non-digital consumers will save an amount of time doing these activities equal to the half the amount of time saved by those doing these activities digitally under the status quo ($33 \times 0.5 = 16.5$ minutes and $45 \times 0.5 = 22.5$ minutes, respectively). Time saved selecting add-ons flows primarily from the prohibitions on various misrepresentations, the mandatory disclosures regarding whether add-ons are required, and the prohibition on charging for add-ons under certain circumstances.[541] Time saved discussing and signing paperwork also flows from the prohibitions on various misrepresentations, several disclosures mandated by the Rule, and the

proposed rule provisions that are not in the Final Rule. *Id.* at 25.

[536] In fact, the sensitivity analysis in Table 2.3 of this final regulatory analysis presents a range of reasonable estimates for time savings that includes the 3-hour time-saving assumption from the preliminary analysis in the NPRM.

[537] Cox Auto. et al., ''Car Buyer Journey 2019'' (2019) [hereinafter Car Buyer Journey 2019], *https://www.coxautoinc.com/wp-content/uploads/2019/06/2019-Car-Buyer-Journey-Study-FINAL-6-11-19.pdf.* While Cox Automotive has released subsequent Car Buyer Journey studies, none of these subsequent studies quantify time savings from shopping digitally. In addition, to the extent that shoppers compensate by spending more time at home on these activities, these time savings should be reduced to reflect *net* time savings from performing these activities digitally. We believe that the nature of performing these activities digitally vs. at the dealership suggests these offsets should be small.

[538] The 2020 Cox Automotive Digitization of End-to-End Retail study reports the fraction of consumers who are already engaging in various activities online under the status quo. Cox Auto., ''Digitization of End-to-End Retail'' (2021) [hereinafter Digitization of End-to-End Retail], *https://www.coxautoinc.com/wp-content/uploads/2021/01/2020-Digitization-of-End-to-End-Retail-Study-FINAL.pdf.* While the activities listed across studies do not match perfectly, we map the activity categories to the closest corresponding activity in the other study and, in our final analysis, exclude from the time savings calculation the percentage of transactions corresponding to the fraction of consumers already engaging in that activity online. While it is likely that consumers shopping digitally under the status quo will also experience some additional time savings under the Rule, there is insufficient data to estimate this marginal savings and so we leave this benefit unquantified in the analysis.

[539] 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 15 (noting an average of 2.2 dealerships visited among new car buyers).

[540] Shoppers who negotiate purchase price digitally under the status quo will likely also obtain time savings from mandatory offering price disclosures, corresponding to the time and effort they put into contacting and exchanging email with dealerships. We lack sufficient data on the time spent on these activities to quantify these benefits, however.

[541] *See* §§ 463.3(a), (b), and (f); 463.4(c); and 463.5(a) and (c). The Commission notes that time savings would likely be higher in this category had it determined to finalize proposed § 463.4(b), which would have required disclosure of an add-on list.

prohibition on charging for items without express, informed consent.[542] For non-digital consumers, considerable time must be spent at the dealership both closely reviewing paperwork (*e.g.,* to ensure that unwanted optional add-ons are not being added to the transaction; to ensure that the financing terms, including monthly payments, total payments, and term length, are as expected; and to confirm that terms in the contract generally conform to what was discussed) and waiting for sales and F&I staff at the dealership to consult with managers and revise paperwork as needed. Digital consumers, however, may have access outside the dealership to add-on menus where they can select their desired F&I products affirmatively without worry that dealership staff will misrepresent the products or pressure them into selecting something unwanted. In addition, digital consumers may receive and review paperwork before arriving at the dealership. This way, any necessary revisions can be performed by the dealership asynchronously so that the consumer is free to spend that time as they wish instead of being stuck in an F&I office. The noted Rule provisions will give consumers confidence that the add-on options presented to them are non-deceptive and the contract paperwork they are asked to review will not yield any unpleasant surprises. As a result, on average they will neither need to engage in such close scrutiny of their contract documents, nor spend as much time waiting for dealership staff to speak to managers or make changes as the first draft will be more likely to conform to their expectations.[543]

The Commission assumes that the Rule will likely not assist consumers much (if at all) in reducing time spent obtaining a trade-in offer. In our base case estimates, we assume non-digital consumers will not save additional time on obtaining a trade-in offer under the Rule. There are various provisions in the Rule that touch trade-in offers made by dealerships[544] and may increase consumer confidence in dealer contracts as discussed previously. In addition, trade-in values are an important piece of transaction pricing, so greater price transparency may save consumers time on the trade-in aspect of transactions that involve them. There is a concern, however, that dealers may spend more time trying to extract maximum value out of any given trade-in opportunity once the Rule is in effect. Because the Commission believes that greater transparency in vehicle pricing and add-ons will lead to reduced markups on these products (*see* ''Reductions in Deadweight Loss''), it is possible that dealers will attempt to make up these lost profits by maximizing trade-in margins, which may lead to increased time spent on negotiations. Since we do not have sufficient data to determine the balance of these two effects, we assume in the base case that they offset. In sensitivity analyses where we explore alternative assumptions, note that time savings from this activity only apply to the roughly 50% (by one estimate) of vehicle purchase transactions at dealerships where consumers trade in a vehicle.[545]

Finally, data from the 2021 Cox Automotive Car Buyer Journey Study reveal that consumer time spent at non-purchase dealerships is roughly 82% of the time spent at the dealership of purchase.[546] Additionally, the average consumer visits 1 non-purchase dealership for each transaction, so under the dual assumptions that (1) the proportions of time spent at dealerships across these activities is consistent across purchase and non-purchase dealerships and (2) the noted time savings are constant as a fraction of time spent, we multiply the time savings numbers by this ratio to obtain the additional time saved at non-purchase dealerships.

Proceeding as in the preliminary analysis, we assume that motor vehicle purchase, financing, and lease transactions will be stable at the 2019 level of 57.9 million transactions per year.[547] As discussed previously, the final analysis excludes private party, fleet, and wholesale transactions. According to Edmunds Automotive Industry Trends 2020, 19.3% of new vehicle sales in 2019 were fleet sales.[548] This fraction of the 17.1 million new vehicle sales and leases in the data are excluded from the analysis. An Automotive News article from January 2023 (citing data from Cox Automotive) states that 48% of all used vehicle sales occurred outside of the retail channel.[549] As with new vehicle sales, this fraction of the 40.8 million used vehicle transactions in the data are excluded from the analysis. Adding up the covered transactions (35 million)[550] and applying the time savings calculated from the base case assumptions, we anticipate that the Rule will generate a total time savings of more than 72 million hours per year. According to the Bureau of Labor Statistics Occupational Employment Statistics, the average hourly wage of U.S. workers in 2021 was $29.76, and recent research suggests that individuals living in the U.S. value their non-work time at 82% of average hourly earnings.[551] Thus, the value of non-work time for the average U.S. worker would be $24.4 per hour. As a result, our final analysis refines the estimate to a present value of between $12.3 billion and $14.9 billion as described in Table 2.2, which translates to savings of roughly $1.75 billion per year.[552]

[542] *See* §§ 463.3; 463.4(c), (d), and (e); and § 463.5(c).

[543] Again, status quo digital shoppers will likely obtain time savings on these activities as well, to the extent that their paperwork will also be less likely to require close scrutiny and revisions. We lack sufficient data on the time spent on these activities to quantify these benefits, however.

[544] *See* §§ 463.3(i) and (j); 463.4(d).

[545] *See* Progressive, ''Consumers embrace online car buying,'' *http://www.progressive.com/resources/insights/online-car-buying-trends/* (last visited Dec. 5, 2023).

[546] *See* 2021 Cox Automotive Car Buyer Journey Study, *supra* note 504, at 16 (noting total time of 2:09 spent ''Visiting Other Dealerships/Sellers'' and total time of 2:37 spent ''With the Dealership/Seller Where Purchased'').

[547] *See* U.S. Dep't. of Transp., Off. of the Sec'y of Transp., Bureau of Transp. Stat., ''National Transportation Statistics 2021, 50th Anniversary Edition'' 21 (2021), *https://www.bts.dot.gov/sites/bts.dot.gov/files/2021-12/NTS-50th-complete-11-30-2021.pdf* (Table 1–17).

[548] *See* Edmunds, ''Automotive Industry Trends 2020'' 7 (2020), *https://static.ed.edmunds-media.com/unversioned/img/industry-center/insights/2020-automotive-trends.pdf.*

[549] *See* Auto. News, ''Used-vehicle volume hits lowest mark in nearly a decade'' (Jan. 13, 2023), *https://www.autonews.com/used-cars/used-car-volume-hits-lowest-mark-nearly-decade* (estimating 19,100,000 of used vehicle sales in the year 2022 occurred within the retail channel). The same Automotive News source reports a total used vehicle sales number of approximately 40 million for 2019. *Id.* The conclusions of the analysis are robust to using this total figure instead.

[550] A recent report by the Center for Automotive Research estimates that there approximately 43 million non-fleet, non-private party sales in 2019 based on privately sourced data. Edgar Faler et al., Ctr. for Auto. Rsch., ''Assessment of Costs Associated with the Implementation of the Federal Trade Commission Notice of Proposed Rulemaking (RIN 2022–14214), CFR part 463'' 5 (2023), *https://www.cargroup.org/wp-content/uploads/2023/05/CAR-Report_CFR-Part-463_Final_May-2023.pdf.* While this would result in a savings estimate approximately 22% higher, the Commission relies on its analysis of the publicly available data described herein.

[551] Daniel S. Hamermesh, ''What's to Know About Time Use? '' 30 J. Econ. Survs. 198, 201 (2016), *https://onlinelibrary.wiley.com/doi/epdf/10.1111/joes.12107.*

[552] Note that we assume only one consumer is involved in each transaction; to the extent that multiple members of a household may visit dealerships for each transaction, these calculations are likely to underestimate the total time savings.

TABLE 2.2—ESTIMATED BENEFITS OF TIME SAVINGS FOR COMPLETED TRANSACTIONS

		2024–2033
Completed Transactions		
Avg. minutes saved at dealership of purchase/other dealers (by activity):[a]		
Negotiating the Purchase Price		34/28
Select F&I Add-Ons		14/11
Discussing and Signing Paperwork		20/16
Get a Trade-In Offer		0/0
Hours saved per transaction		2.05
Number of covered vehicle transactions per year[b]		34,986,253
Value of time for vehicle-shopping consumers[c]		$24.40
Abandoned Transactions		*Unquantified*
Total Quantified Benefits (in millions)	3% discount rate	$14,926
Total Quantified Benefits	7% discount rate	$12,290

Note: Benefits have been discounted to the present at both 3% and 7% rates.
[a] Averages are across all retail transactions; transactions where consumers performed activity digitally under the status quo will have a time savings of 0 for that activity.
[b] For total volume, National Transportation Statistics Table 1–17. For retail/non-fleet fraction, Edmunds Automotive Industry Trends 2020 (for new vehicles), *supra* note 548548, and Cox Automotive via Automotive News (for used vehicles), *supra* note 549549.
[c] BLS Occupational Employment Statistics (May 2022) and Hamermesh (2016).

Due to the uncertainty surrounding how the Rule will translate into time savings for consumers and to which activities it will most strongly apply, we explore a range of alternative assumptions regarding what fraction of the documented time savings digital consumers experience will be received by non-digital consumers under the Rule. In our low-end scenario, we assume that the Rule will result in half the consumer time savings of the base case. In our high-end scenario, we assume that all the time savings experienced by digital consumers under the status quo—including time saved getting a trade-in offer—will be received by non-digital consumers under the Rule. The low-end assumptions correspond to a total time savings of more than 35.85 million hours per year while the upper bound assumptions correspond to a total time savings of more than 115.47 million hours per year. The results of this analysis are presented in Table 2.3. Importantly, over the whole range of these alternative assumptions we find that benefits exceed costs. In fact, holding other benefit and cost estimates constant, the time savings generated by the Rule could be *de minimis* and the implied benefits would still exceed the costs. While there are some activities in the car buying process that the Rule may not affect (*e.g.,* test driving vehicles, etc.), the data discussed suggest that there is ample room for the Rule to eliminate unnecessary time across various activities. And even though digital consumers spend less time on these activities, results across several studies suggest that this reduction in time leads to a better experience for consumers.[553]

TABLE 2.3—SENSITIVITY ANALYSIS OF TIME SAVINGS

		Low end	Base case	High end
Avg. minutes saved at dealership of purchase/other dealers (by activity):[a]				
Negotiating the Purchase Price		17/14	34/28	34/28
Selecting F&I Add-Ons		7/6	14/11	27/22
Discussing and Signing Paperwork		10/8	20/16	39/32
Get a Trade-In Offer		0/0	0/0	18/15
Hours saved per transaction[b]		1.02	2.05	3.3
Total Quantified Benefits (in millions)	3% discount rate	$7,463	$14,926	$24,036
Total Quantified Benefits	7% discount rate	$6,145	$12,290	$19,790

Note: Benefits have been discounted to the present at both 3% and 7% rates.
[a] Averages are across all retail transactions; transactions where consumers performed activity digitally under the status quo will have a time savings of 0 for that activity.
[b] Time savings for ‘‘Get a Trade-In Offer’’ assumed to be zero for lease transactions or sales without trade-ins (estimated at 50%).

2. Reductions in Deadweight Loss

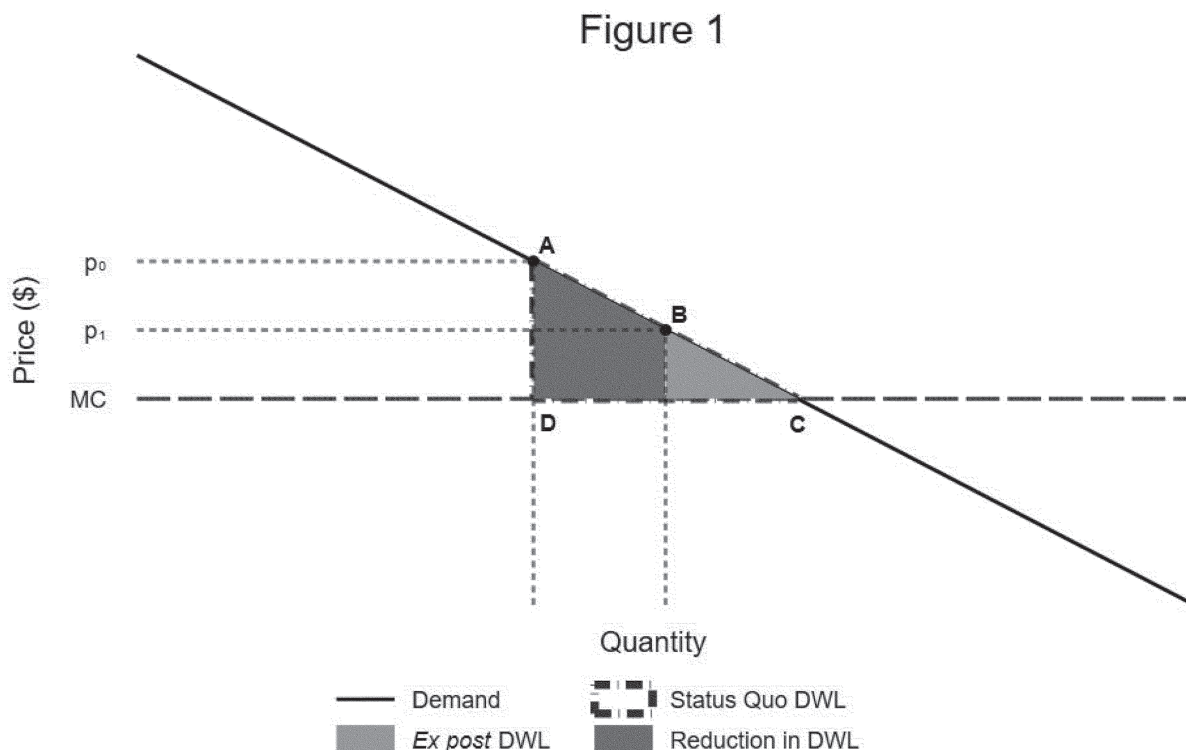
The status quo in this industry features consumer search frictions, shrouded prices, deception, and obfuscation. As a result, dealers likely charge higher prices for a number of products and services than could be supported once the Rule is in effect. Recent research suggests that when

[553] *See* Car Buyer Journey 2019, *supra* note 537, at 9 (Consumers who negotiate (88% vs. 64%) and complete paperwork online (74% vs. 65%) are more satisfied with their dealership experience.); 2022 Car Buyer Journey, *supra* note 25, at 22 (‘‘More [financing] steps completed online = higher satisfaction & less time at the dealership’’); Cox Auto., ‘‘Cox Automotive Car Buyer Journey Study: Pandemic Edition’’ 22 (2021), *https://www.coxautoinc.com/wp-content/uploads/2021/02/Cox-Automotive-Car-Buyer-Journey-Study-Pandemic-Edition-Summary.pdf* (‘‘Heavy Digital Buyers were the Most Satisfied’’).

consumers are able to observe prices for vehicles before visiting dealerships—as is intended by the Rule—prices and dealer profits are likely to fall.[554] When not accompanied by changes in quantity (due to a fixed supply of the good), price adjustments serve to transfer welfare from one side of the market (*e.g.,* dealers) to the other (*e.g.,* consumers), which typically have no net effect on the outcome in a regulatory analysis.[555] A decrease in vehicle prices, however, will likely also lead to an increase in the number sold as the supply is not fixed. As a result, this quantity expansion effect unambiguously increases welfare by reducing the deadweight loss that occurs when firms can charge prices that are marked up over marginal costs.

3. Framework

When a policy reduces the price of a good—either through a reduction in firm costs or, as in this case, a reduction in firm market power—the quantity of the good sold will typically increase. If a distortion exists in the market causing the product in question to be sold at a price above the marginal (social) cost of production (*e.g.,* a tax, an externality, or a markup enabled by market power), this quantity expansion has the effect of reducing deadweight loss in that market. In the simple case where there is one good subject to the policy and that good has no close substitutes or complements, this welfare effect can be easily illustrated as in Figure 1.



The solid line reflects the demand for the good, where some quantity is purchased at a market price of p_0 (point A), which is higher than marginal costs (MC). Because of this wedge between price and marginal costs, there is a reduction in welfare relative to the outcome where prices equal marginal costs; this deadweight loss is illustrated on the graph by the bordered triangle (ACD). Holding everything else constant, when prices fall from p_0 to p_1, this deadweight loss is reduced to some extent. Part of this increase in welfare will go to consumers, and part will go to producers.

Imagine that this graph depicts the market for new automobiles. The Final Rule will increase price competition, thus reducing market power and shifting prices closer to marginal costs in the new automobile market. If this market satisfied the criteria for the simple case described herein (*i.e.,* no close substitutes or complements), the only data we would need to estimate this change in total welfare would be the predicted change in price, the predicted change in quantity (which can be calculated from an estimate of the slope or elasticity of the demand curve for new vehicles), and some information or assumption about the shape of the demand curve between points A and B. Of course, the new automobile market is closely linked to the used automobile market, so this simple picture does not capture the entire story.

When a good has a close substitute (like used versus new vehicles), a price decrease for that good will cause demand for the related good to decrease. Also, in the case of automobiles, there is a long-run link between the new and

[554] Marco A. Haan et al., ''A Model of Directed Consumer Search,'' 61 Int'l J. Indus. Org. 223, 223–55 (2018), *https://doi.org/10.1016/j.ijindorg.2018.09.001;* José Luis Moraga-Gonzalez et al., ''Consumer Search and Prices in the Automobile Market.'' 90 Rev. Econ. Stud. 1394–1440 (2023), *https://doi.org/10.1093/restud/rdac047.*

[555] *See* Off. of Mgmt. & Budget, Exec. Off. of the President, ''Circular A–4'' 38 (2003), *https://www.transportation.gov/sites/dot.gov/files/docs/OMB%20Circular%20No.%20A-4_0.pdf:* ''A regulation that restricts the supply of a good, causing its price to rise, produces a transfer from buyers to sellers. The net reduction in the total surplus (consumer plus producer) is a real cost to society, but the transfer from buyers to sellers resulting from a higher price is not a real cost since the net reduction automatically accounts for the transfer from buyers to sellers.'' To the extent any price changes caused by the Rule result in transfers to consumers from dealers who were in violation of existing laws, such transfers would be consistent with the agency's mission of providing redress to injured consumers and its history of doing so in enforcement actions.

used vehicle markets as a new vehicle purchased today becomes a potentially available used vehicle tomorrow. These linkages between the markets will dampen the demand response to any given price change in the primary market. In practice, this means that our estimates of the responsiveness of new vehicle purchases to price changes (*i.e.,* the price elasticity of demand for new vehicles) will overstate the change in quantity resulting from a change in prices, because such estimates typically assume that all other prices remain constant. In addition, if there are distortions present in the market for related goods (*i.e.,* used vehicles are also sold at a markup over marginal costs) only examining the welfare effect in the primary market will understate the total welfare effect, as there will be an analogous reduction in deadweight loss in the market for the related good. These linkages between markets for related goods become difficult to explain graphically. However, we have included in the technical appendix an algebraic derivation of the total welfare effect in new and used vehicle markets resulting from the finalization of the Rule. The resulting formula requires estimates of seven parameters in order to compute the welfare effect: two ''policy elasticities'' that reflect the responsiveness of quantities of new and used vehicles sold to a change in prices in the new vehicle market after all adjustments have occurred in both markets, two baseline markups that represent the differences between prices and marginal costs for new and used vehicles, two quantities that reflect the aggregate costs of all new and used vehicles sold under the status quo, and the predicted change in prices due to the Rule.

4. Estimation

To obtain ''policy elasticities'' we reference a U.S. Environmental Protection Agency report titled ''The Effects of New-Vehicle Price Changes on New- and Used-Vehicle Markets and Scrappage'' (''EPA Report'').[556] In this report, the authors ''developed a theoretical model of the relationships between new- and used-vehicle markets, scrappage, and total vehicle inventory'' that allows for simulation of prices and quantities in these markets. The model is calibrated using a range of demand elasticity estimates from a review of the relevant literature on auto markets. The resulting simulations examine the long-run ''steady state'' of vehicle inventories and demand, accounting for cross-market demand effects as well as the endogenous supply of used vehicles resulting from changes in demand for new vehicles in previous periods. Importantly, among the outputs of their simulations are the ''policy price elasticities'' required by our welfare change formula. Our base case estimates of deadweight loss reduction use the long-run policy price elasticities that result from calibrating the model with the EPA Report's intermediate values for the aggregate new vehicle and outside option demand elasticities, but we explore sensitivity to other calibration scenarios.

To obtain baseline estimates of new-vehicle markups, we refer to a recent paper entitled ''The Evolution of Market Power in the US Automobile Industry'' by Paul Grieco, Charles Murry, and Ali Yurukoglu.[557] The authors specify a model of the U.S. new car industry to explore trends in concentration and markups. The authors find that markups in the industry have been falling over time generally, but have been fairly stable since the early 2000s.[558] As our baseline, we use their most recent estimate of industry markups, which was 15% in 2018.[559] While this estimate reflects markups over production costs by manufacturers and not markups over wholesale prices paid by dealers, it is the wedge between retail price and production cost that matters for welfare. As we are unaware of any publicly available data measuring used-vehicle markups, we explore two alternatives that we believe reflect the limiting cases: (1) used vehicles have no markup and (2) used-vehicle markups are the same as new-vehicle markups.

We obtain both quantities of new- and used-vehicles sold as well as average prices from National Transportation Statistics, Table 1–17. As before, we exclude private party, fleet, and wholesale transactions. This exclusion is likely to bias our estimate of the total welfare effect downward because, unlike the time savings benefits of the Rule which may be restricted to dealer-consumer transactions, the price effects of the Rule are likely to carry over to private party and fleet transactions. Using these aggregate figures along with an estimate of baseline markups, we estimate the aggregate cost of new- and used-vehicles sold in 2019.[560]

Finally, based on the academic literature on search costs in the automobile market, the Rule is expected to reduce prices of new vehicles by reducing the markup that dealers are able to charge over marginal costs. We have identified two papers that empirically estimate the effect of price transparency or reduced search frictions on auto markups by specifying a structural model of the new-vehicle market, estimating the structural parameters, and then conducting counterfactual simulations where search frictions are reduced. Murry and Zhou (2020) simulate a full information counterfactual in the Ohio automobile market where search frictions are eliminated entirely and find that markups are reduced by $333.[561] Moraga-Gonzalez et al. (2022) simulate a counterfactual in the Dutch automobile market where prices are observed prior to costly consumer search (*i.e.,* visiting dealerships) and find that markups are reduced from 40.52% to 32.59%.[562] For our base case estimates, we use the smaller Murry and Zhou (2020) estimate, primarily because their model is estimated using U.S. data consistent with our setting. However, we note that Moraga-Gonzalez et al. offers evidence to suggest that significantly larger changes in markups may result from the Rule.

Using these parameters obtained from the literature in combination, we implement the formula for the change in total welfare given in the technical appendix. For each market—new and used—the formula multiplies the policy price elasticity by the percent change in price to get the percent change in quantity, and then multiplies this by the aggregate markup (as given by the price-cost markup[563] at baseline times the aggregate cost of baseline transactions) to get the approximate change in total welfare per year. As an example, our base case estimate assumes a policy

[556] Assmt. & Standards Div., Ofc. of Transp. & Air Quality, U.S. Env't Prot. Agency, ''The Effects of New-Vehicle Price Changes on New- and Used-Vehicle Markets and Scrappage'' (2021), *https://cfpub.epa.gov/si/si_public_file_download.cfm?p_download_id=543273&Lab=OTAQ.*

[557] *See* Paul L. E. Grieco et al., ''The Evolution of Market Power in the US Automobile Industry'' (2022), mimeo.

[558] Paul L. E. Grieco et al., ''The Evolution of Market Power in the US Automobile Industry'' 19 (2022), mimeo.

[559] Paul L. E. Grieco et al., ''The Evolution of Market Power in the US Automobile Industry'' 19 (2022), mimeo.

[560] Aggregate cost of good i is equal to $(1-\mu_i) \times p_i \times Q_i$, where μ_i, p_i, and Q_i are the markup, price, and quantity sold of good i, respectively.

[561] Charles Murry & Yiyi Zhou, ''Consumer Search and Automobile Dealer Colocation,'' 66 Mgmt. Sci. 1909–1934 (2020), *https://doi.org/10.1287/mnsc.2019.3307.*

[562] José Luis Moraga-Gonzalez et al., ''Consumer Search and Prices in the Automobile Market,'' 90 Rev. Econ. Stud. 1394–1440 (2022), *https://doi.org/10.1093/restud/rdac047.*

[563] The baseline new vehicle markup estimate of 15% is defined as the ratio of the price-cost margin to unit price, *i.e.* $(p_i - MC_i)/p_i$, and is sometimes referred to as the Lerner index. With knowledge of either price or marginal cost, this can be rearranged to express the price-cost markup, *i.e.* $(p_i - MC_i)/MC_i$, which is used in the formula referenced here.

price elasticity of new-vehicle demand of −0.25, a policy price elasticity of used-vehicle demand (with respect to new-vehicle price) of −0.04, and used car markups equal to new car markups (15%), resulting in the following calculation:

$$\frac{dW(\theta)/d\theta}{\mu} = X_N \tau_N \hat{\varepsilon}_{NN} \frac{d\tau_N/d\theta}{1+\tau_N} + X_U \tau_U \hat{\varepsilon}_{UN} \frac{d\tau_N/d\theta}{1+\tau_N}$$

$$= 18\% \times \$334,115,569,664 \times -0.25 \times -1\% + 18\% \times \$371,555,893,248 \times -0.04 \times -1\%$$

$$= \$152,143,550 \text{ per year}$$

This annual reduction in deadweight loss is then applied to each year of the 10-year analysis period and discounted to the present to yield the total benefit. We highlight this base case (bolded in Table 2.4) but explore several scenarios that vary along two dimensions: (1) the ''policy elasticity'' of new- and used-vehicle demand with respect to the change in price and (2) the existence of baseline markups in the used-vehicle market. In Table 2.4, baseline markups for used vehicles vary across columns while the relevant policy price elasticities vary across rows: Scenario A corresponds to new-/used-vehicle elasticities of −0.14 and 0.01, Scenario B corresponds to new-/used-vehicle elasticities of −0.17 and −0.04, Scenario C corresponds to new-/used-vehicle elasticities of −0.23 and −0.10, and Scenario E corresponds to new-/used-vehicle elasticities of −0.39 and −0.12.

TABLE 2.4—REDUCTION IN DEADWEIGHT LOSS (IN MILLIONS), 2024–2033

Scenario	No used-vehicle markups		Symmetric markups	
	Total @ 3% discount	Total @ 7% discount	Total @ 3% discount	Total @ 7% discount
A	$617	$508	$568	$468
B	749	617	945	778
C	1,014	835	1,504	1,238
D	1,102	907	1,298	1,069
E	1,719	1,415	2,307	1,899

Note: Benefits have been discounted to the present at both 3% and 7% rates. Scenarios correspond to those in Table 7–2 of ''The Effects of New-Vehicle Price Changes on New- and Used-Vehicle Markets and Scrappage.'' New-vehicle demand elasticities range from −0.4 (Scenarios A, B, and C) to −0.8 (Scenario D) to −1.27 (Scenario E). Outside option elasticities vary from 0 (Scenario A) to −0.05 (Scenarios B and D) to −0.14 (Scenarios C and E). New/Used cross-price elasticities are set such that substitution away from new vehicles flows almost entirely to used-vehicles, with only small effects on the total number of vehicles. All scenarios hold scrappage elasticity fixed at −0.7.

5. Benefits Related to More Transparent Negotiation

An additional, albeit difficult to quantify, benefit is the reduction in discomfort and unpleasantness that consumers associate with negotiating motor vehicle transactions under the status quo. According to the 2020 Cox Automotive Car Buyer Journey study, filling out paperwork, negotiating vehicle price, and dealing with salespeople are three of the top four frustrations for consumers at car dealerships.[564] Once the Rule is in effect, all three of these issues will be mitigated somewhat by the transparency facilitated by the Rule's required disclosures and the time that consumers spend shopping and negotiating motor vehicle transactions will be less stressful. While we expect an increase in social welfare through this channel, due to a lack of data allowing this more qualitative benefit to be translated into a quantitative gain, these benefits are left unquantified in the analysis.

C. Estimated Costs of Final Rule

In this section, we describe the costs of the Rule provisions as enumerated in SBP VII.A, provide quantitative estimates where possible, and describe costs that we can only assess qualitatively. Some industry commenters questioned the appropriateness of the data and assumptions used in the NPRM, including the discussion of costs in the preliminary regulatory analysis. The Commission used a variety of data sources in its calculations for the NPRM and in the Rule, including wage data from the Bureau of Labor Statistics Occupational Employment Statistics, establishment counts from U.S. Census County Business Patterns, transaction counts from National Transportation Statistics, and breakdowns of motor vehicle transactions (*e.g.,* by financing, GAP agreement, F&I add-ons) from numerous industry sources. Where such data was not available (*e.g.,* regarding time devoted to compliance tasks), the Commission made assumptions based on a review of previous regulatory analyses that featured similar requirements, with adjustments made based on our understanding of the particulars of motor vehicle dealer operations.[565]

Throughout this section, the cost of employee time is monetized using wages obtained from the Bureau of Labor Statistics Industry-Specific Occupational Employment and Wage Estimates for Automobile Dealers.[566]

[564] 2020 Cox Automotive Car Buyer Journey, *supra* note 25, at 37.

[565] *See, e.g.,* Off. of the Sec'y, Dep't of Transp., Dkt. No. DOT–OST–2010–0140, ''Enhancing Airline Passenger Protections II—Final Regulatory Analysis'' (Apr. 20, 2011), *https://www.regulations.gov/document/DOT-OST-2010-0140-2046.*

[566] Applicable wage rates for the Commission's preliminary regulatory analysis, which was published in its NPRM, were based on data from the Bureau of Labor Statistics' May 2020 National Industry-Specific Occupational Employment and Wage Estimates for NAICS industry category 441100—Automobile Dealers, which is available at

Continued

This is valid under the assumption that the opportunity cost of hours spent in compliance activities is hours spent in other productive activities, the social value of which is summarized by the employee's wage.[567] To the extent that these activities can be accomplished using time during which employees would otherwise be idle under the status quo, our estimates will overstate the welfare costs of the Rule.

1. Prohibited Misrepresentations

In its preliminary analysis, the Commission presented two scenarios that estimated the costs associated with the Rule provisions prohibiting misrepresentations. First, as all the misrepresentations prohibited by the Rule are material and therefore deceptive under section 5 of the FTC Act, one scenario assumed that all motor vehicle dealers are compliant with section 5 under the status quo and will therefore conduct no additional review.

The second scenario allowed for costs incurred by firms because of the enhanced penalty associated with violating the Rule (relative to a *de novo* violation of section 5 of the FTC Act) under the assumption that dealers may expend additional resources to ensure compliance. This ''heightened compliance review'' scenario assumed that each of the 46,525 dealers would have a professional spend 5 additional minutes reviewing each public-facing representation (assumed to be 150 per year on average). At a labor rate of $26.83 per hour for compliance officers employed at auto dealers, this cost was estimated to be $15.6 million per year.

The Commission received comments about the appropriateness of the data and assumptions used to estimate the cost of complying with this provision of the Rule. The most specific criticism contended that the number of documents dealers would need to review would be ''several times'' the 150 assumed and that review would require at least 15 minutes per document because ''dealers typically do not fully control the advertising platforms they use given the direct involvement of the vehicle OEMs . . . and that of other third parties. Also, many dealers, and especially small business dealers do not employ internal compliance officers or attorneys who could conduct marketing reviews.'' [568]

As there is scant empirical evidence provided for these assertions, the Commission's preliminary estimates remain unchanged (with the exception of updates to more recent data where available). However, we have conducted a sensitivity analysis in which all labor hours in the base case analysis are increased by an order of magnitude, in keeping with the spirit of the comments discussed; *see* SBP VII.G. As can be seen in the results from that analysis, the Rule clearly still generates net benefits for society.

TABLE 3.1—ESTIMATED COMPLIANCE COSTS FOR PROHIBITED MISREPRESENTATIONS

		2024–2033
Scenario 1—No Review:		
No Cost		$0
Total Cost		$0
Scenario 2—Heightened Compliance Review:		
Number of dealers [a]		47,271
Number of documents per dealer per year		150
Minutes of review per document		5
Cost per hour of review		$31.21
Total Cost	3% discount rate	$157,310,579
Total Cost	7% discount rate	$129,526,073

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.
[a] County Business Patterns 2021, NAICS Code 4411 (Automobile Dealers, used and new).

2. Required Disclosure of Offering Price in Advertisements and in Response to Inquiry

The Rule requires all dealers to disclose an offering price in any advertisement that references an individual vehicle or in response to any consumer inquiry about an individual vehicle. For this provision, the Commission's preliminary analysis presented two cost scenarios for dealers when complying with the Rule. First, because dealers already price all vehicles in inventory under the status quo, one scenario assumed that there would be no additional cost of complying with this provision. This scenario assumes that the initial pricing and any subsequent re-pricing of vehicles in inventory would take no (or minimal) additional time under the Rule.

As with the prohibition on misrepresentations, the second scenario considers the enhanced penalty associated with violating the Rule and allows for costs given that dealers may expend additional resources to ensure that the prices they disclose conform to the Rule's definition of offering price, thus minimizing the risk of penalties should they fail to conform to that definition. The latter scenario assumed that, in the first year under the Rule, each of the 46,525 dealers would have a sales and marketing manager spend 8 hours reviewing their policies and procedures for determining the public-facing prices of vehicles in inventory. In addition, each dealer would employ a programmer for 8 hours to update any automated systems that need to be updated in accordance with these new policies and procedures. At labor rates of $63.93 per hour and $28.90, respectively, this cost was estimated at $34.5 million. Both scenarios assume that, once calculated, the time required to train employees to include prices in response to consumer inquiries about specific vehicles will either be negligible or be subsumed by training costs included under other provisions. Finally, the time required to deliver the disclosures is also negligible, as prices are already typically disclosed in

https://www.bls.gov/oes/2020/may/oes_nat.htm. Labor rates in the present analysis have been updated based on data from the Bureau of Labor Statistics' May 2022 National Industry-Specific Occupational Employment and Wage Estimates for NAICS industry category 441100—Automobile Dealers, which is available at *https://www.bls.gov/oes/current/naics4_441100.htm.*

[567] This assumption would hold, for example, if both the product and labor markets in this industry were competitive.

[568] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 299–300.

advertisements and in interactions with consumers under the status quo; the Rule just requires the price to conform to a specific definition.

Some commenters raised issues with the assumptions regarding the time and resources necessary to determine compliant prices as well as deliver the required disclosures. The comments asserted that vehicle prices change frequently in response to market conditions, which would make it difficult to ensure that offering prices are accurate. Additionally, comments disputed the notion that delivery of the information to consumers in accordance with the Rule's provisions would not be costly, in terms of employee time and consumer time. One comment suggested that ''there would be an average of three Offering Price disclosures based there [sic] being an average of three dealer-customer discussions regarding three specific motor vehicles, per transaction,'' [569] asserting that the frequency of these disclosures would have implications for the cost estimates that had not been considered in the preliminary analysis.

If indeed the Rule required significant additional employee time spent per transaction, that would have implications for the cost estimates. However, as previously discussed, it is the understanding of the Commission that virtually all dealer-customer discussions regarding specific motor vehicles that occur under the status quo already include time devoted to a discussion of the vehicle's price. The only change under the Rule is that, within that price discussion an offering price (as defined by the Rule) must be provided. The cost of determining this price is included under the second scenario in our preliminary analysis, and sensitivity to the specific assumptions of that scenario have been explored in the Appendix. The results from our analysis indicate that the Rule generates net benefits for society under a wide range of plausible assumptions about the inputs to our cost calculations.

Commenters also raised concerns about the potential for behavioral adjustment by dealerships, choosing to refrain from advertising individual vehicles or responding to consumer inquiries about specific vehicles and thus increasing consumers' costs of search. The Commission, however, has not been presented with compelling evidence that dealers will forego competition with other dealers on price, choosing instead to default to advertising a focal price (such as MSRP). Indeed, the Commission's offering price disclosure requirement is similar to existing requirements in a number of States, and the Commission is not aware of any such behavioral adjustments (*e.g.,* eliminating prices from advertisements, refusing to respond to consumer inquiries, etc.) having occurred in those States. As a result, the Commission's preliminary estimates remain unchanged (with the exception of updates to more recent data where available).

TABLE 3.2—ESTIMATED COMPLIANCE COSTS FOR OFFERING PRICE DISCLOSURES

	2024
Scenario 1—No Review:	
No Cost	$0
Total Cost	$0
Scenario 2—Calculation of Offering Price:	
Number of dealers [a]	47,271
Pricing hours per dealer	8
Cost per hour of pricing	$80.19
Programming hours per dealer	8
Cost per hour of programming	$40.24
Total Cost	$45,542,772

[a] County Business Patterns 2021, NAICS Code 4411 (Automobile Dealers, used and new).

3. Disclosure of Add-On List and Associated Prices

In the NPRM, the proposed rule would have required all dealers to disclose an itemized menu of all optional add-on products and services along with prices, or price ranges, on all dealer-operated websites, online services, and mobile applications as well as at all dealership locations. Various commenters expressed concern that the add-on list requirement would have been too complex and potentially confusing, as discussed in the paragraph-by-paragraph analysis in SBP III.D.2(b). As a result, the Commission has determined not to finalize § 463.4(b) of the proposed rule. While the preliminary analysis estimated compliance costs between approximately $42 million and $43 million for the disclosure of add-on lists and associated prices, those costs are not included in the final analysis.

4. Required Disclosure of Total of Payments for Financing/Leasing Transactions

The Rule requires all dealers to disclose, when representing a monthly payment, the total of payments for the financing or leasing contract. In addition, in any comparison of two payment options with different monthly payments, the dealer is required to disclose that the option with the lower monthly payment features a higher total of payments (if true).

The Commission's preliminary analysis presented two cost scenarios, corresponding to different methods by which dealers may choose to comply with the Rule. In the first scenario, we assumed that dealers would incur a one-time, upfront cost of both designing the required disclosures and informing associates of their obligations to provide the disclosures. Importantly, ongoing costs on a per transaction basis were assumed to be negligible, reflecting a compliance regime where dealers already generate the required information during the normal course of business and must only convey it to consumers at an appropriate point in the transaction. In the second scenario, we assumed that dealers incur an additional ongoing cost per financed or leased transaction in order to communicate the required disclosures

[569] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 300.

to consumers in writing, reflecting a compliance regime where dealers find it necessary to maintain a documentary record of compliance with the Rule.[570]

The upfront costs (and total costs under Scenario 1) of complying with this provision as estimated by the preliminary analysis were limited to 8 hours spent by a compliance manager (at a rate of $26.83) on the creation of a template disclosure script that contains the required information and informing sales staff of their obligations to deliver the disclosure at an appropriate time during the transaction. This cost was estimated at $10 million.

The preliminary estimates of additional ongoing costs—as in Scenario 2—included 2 minutes of sales associate time per financed/leased transaction (at a rate of $21.84) spent on the process of populating and delivering a printed version of the disclosure, with $0.15 per disclosure spent on printing costs. The total additional cost under this scenario is estimated at $213.4 to $249.5 million.

Comments from industry groups asserted that the preliminary analysis underestimated training costs and that it would be difficult to determine the total of payments for financing prior to knowing the details of the transaction. One comment contended that ''these mandates . . . necessarily would involve significant annual training requirements for new employees given that . . . the average dealer experiences an annual sales consultant turnover rate of 67%.'' [571] The comment further asserted that dealers cannot determine the total cost of a financing or leasing agreement without knowing the terms for which consumers qualify and what terms they want. The comment argued that as a result, only the scenario with costs incurred on a per transaction basis should be considered. Finally, the comment argued that the per-transaction costs in Scenario 2 are too low, both because the Commission underestimates the time required to deliver, discuss, and review disclosures and because multiple disclosures would have to be made per transaction (as terms are changed).

These comments misunderstand the Commission's analysis with respect to the costs of complying with this provision. Scenario 1 does not anticipate that the dealer presents a consumer with the total of payments for a financing or leasing contract at the outset of the transaction. It requires only that, at the point where the dealer engages in discussions regarding different monthly payments for financing or leasing arrangements, the information that must be disclosed (*i.e.,* the total of payments and a comparison of these totals across differing monthly payments) is already available to the dealer under the status quo. The only additional cost incurred per transaction would be the delivery of this information to the consumer (the determination of which is contemplated in the costs estimated under Scenario 1).

With respect to the comment regarding insufficient allowance for training costs in light of employee churn in the industry, the Commission has determined this to be a valid critique of the preliminary analysis. As a result, the final regulatory analysis includes an additional ongoing cost for both Scenarios. This ongoing cost includes training for sales staff and budgets 1 hour of training for each of the 417,110 sales and related employees across the industry, at an (average) cost of $29.43 per hour. The resulting additional ongoing costs in both scenarios amounts to $12.3 million per year. Further, as discussed in a previous section, the final analysis excludes private party, fleet, and wholesale transactions.[572] The remainder of the Commission's preliminary estimates remain unchanged (with the exception of updates to more recent data where available). Concerns about underestimates of the time required to review disclosures on a per-transaction basis are addressed by the Commission's sensitivity analyses conducted in the Appendix.

TABLE 3.4—ESTIMATED COMPLIANCE COSTS FOR FINANCING COSTS

		2024 only	2024–2033
Scenario 1—Creation of disclosure and training only:			
Upfront costs:			
Number of dealers		47,271	
Compliance manager hours per dealer		8	
Cost per hour of disclosure creation		$31.21	
Subtotal		$11,802,623	
Ongoing costs:			
Number of sales and related employees [a]			417,110
Training hours per employee			1
Cost per hour of training			$29.43
Subtotal	3% discount rate		$104,712,908
	7% discount rate		$86,218,307
Scenario 1—Total Cost	3% discount rate		$116,515,532
	7% discount rate		$98,020,931
Scenario 2—Disclosures per transaction:			
Covered new vehicle sales per year [b]			10,343,319
% New vehicle sales involving financing [c]			81%
Covered used vehicle sales per year			21,219,640
% Used vehicle sales involving financing			35%
Covered new vehicle leases per year			3,423,294

[570] While disclosures of this nature are already required to be present in the financing contract by the Truth in Lending Act (TILA), the Rule would change the timing of a subset of those disclosures. As a result, the dealer may have to develop and deliver a separate document in the event that the standard TILA disclosure has not yet been generated at the point where disclosure is required under the Rule.

[571] Comment of Nat'l Auto Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 301.

[572] Without cross-tabulations of fleet sales and sales involving financing, we assume that these are independent such that the fraction of covered transactions involving financing is equal to the fraction of covered transaction times the fraction of financed transactions.

TABLE 3.4—ESTIMATED COMPLIANCE COSTS FOR FINANCING COSTS—Continued

		2024 only	2024–2033
Total transactions involving monthly payments/financing.			19,228,256
Disclosure minutes per transaction			2
Cost per hour of disclosure			$28.41
Printing cost per disclosure			$0.15
Subtotal	3% discount rate		$179,930,957
	7% discount rate		$148,151,196
Total Cost	3% discount rate		$296,446,489
	7% discount rate		$246,172,126

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.
[a] Bureau of Labor Statistics Industry-Specific Occupational Employment and Wage Estimates for NAICS Code 441100—Automobile Dealers, May 2021.
[b] For total volume, National Transportation Statistics Table 1–17. For retail/non-fleet fraction, Edmunds Automotive Industry Trends 2020 (for new vehicle) and Cox Automotive via Automotive News (for used vehicles).
[c] Melinda Zabritski, Experian Info. Sols. Inc., ''State of the Automotive Finance Market Q4 2020''.

5. Prohibition on Charging for Add-Ons That Provide No Benefit

The Rule prohibits dealers from charging for add-on products or services from which the targeted consumer would not benefit. Compliance with this provision will require dealers to develop policies and transaction-level rules about when consumers can be charged for add-on products and services. The Rule as proposed in the NPRM also would have included additional provisions relating to add-ons that have not been finalized. These included a prohibition on charging for optional add-on products or services unless dealership employees made a number of disclosures at various points before finalizing a transaction. This provision would have required each dealer to design form disclosures, create a system for populating these forms, train their sales staff on the disclosure requirements, and provide the disclosures in writing, with the appropriate information filled in, to each consumer prior to completing the transaction.

The Commission's preliminary analysis relating to the cost of complying with these disclosure requirements budgeted for 8 hours of compliance manager time (at a cost of $26.83 per hour) and 4 hours of sales manager time (at a cost of $63.93 per hour) to design disclosure forms, and an additional 8 hours of programmer time (at a cost of $28.90) to create a system to populate these forms. The preliminary analysis also budgeted for 2 minutes of sales associate time (at a rate of $21.84 per hour) and $0.11 in printing/electronic delivery costs per disclosure, with the number of disclosures determined by the fraction of transactions involving optional add-ons and/or financing.

In response to numerous comments, the Commission has determined not to finalize the proposal in § 463.5(b), which would have required the delivery of written disclosures and acknowledgement via signature of those disclosures by consumers. Various commenters were concerned that the add-on disclosures would add documents and time to the transaction. In response to these comments, the Commission has determined to omit what would have been the only provision affirmatively requiring the dealer and consumer to review additional documentation during a transaction. As a result, while the preliminary analysis estimated compliance costs between approximately $883 million and $1 billion for the disclosure of total costs for cash and financed transactions with optional add-on products, the cost estimate in the final analysis is on the order of one-tenth to one-half of the preliminary estimate (depending on the scenario).

As a result, the Commission has substantially revised the cost analysis in this section. First, the Commission assumes that each dealer will employ 8 hours of compliance manager time (at a rate of $31.21) and 8 hours of sales manager time (at a rate of $80.19) in the first year under the Rule, to cull add-ons with no value from their offerings and develop policies regarding when certain add-ons may or may not be sold. Second, the Commission budgets for 1 hour of training per year for each of the 417,110 sales and related employees across the industry, to apprise them of these policies and their obligations under the Rule. Finally, the Commission includes a second cost scenario in which dealers will choose to deliver one itemized disclosure to each customer before the finalization of each transaction. Although this is not required under the Final Rule, dealers may wish to have documentation of compliance with the provisions of the Rule. As in the preliminary analysis, the Commission assumes that each dealer will employ 8 hours of compliance manager time and 4 hours of sales manager time creating this disclosure and 8 hours of programmer time creating a system to populate these forms when provided inputs by sales staff. The same occupational wage data have been used, but the rates have been updated to match the most recent data available. We further assume, as in the preliminary analysis, that sales staff will spend 2 minutes per disclosure (at a rate of $28.41 per hour) updating, printing, and delivering these forms to consumers and that the physical costs of delivering the disclosure are roughly $.11 per disclosure.[573] Finally, as discussed in a previous section, the final analysis excludes private party, fleet, and wholesale transactions.

[573] The physical costs are $.15 per paper disclosure and $.02 per electronic disclosure, assuming that 27% are made electronically. This assumption is informed by a consumer survey that indicates 73% of consumers with motor vehicles prefer to receive registration renewal notices by mail as opposed to electronically. *See* Consumer Action, ''Your opinion wanted: Paper vs. electronic bills, statements and other communications'' 4 (2018–2019), *https://www.consumer-action.org/downloads/Consumer_Action_Paper_v_electronic_survey.pdf* (showing that 1800 of 2456 respondents who owned and needed to periodically register a motor vehicle preferred mail notices).

TABLE 3.5—ESTIMATED COMPLIANCE COSTS FOR PROHIBITION ON CERTAIN ADD-ONS

		2024 only	2024–2033
Scenario 1—Policies and Training Only:			
Upfront costs:			
Number of dealers		47,271	
Compliance manager hours per dealer		8	
Cost per hour of compliance manager		$31.21	
Sales manager hours per dealer		8	
Cost per hour of sales manager		$80.19	
Subtotal		$42,127,915	
Ongoing costs:			
Number of sales and related employees			417,110
Training hours per employee			1
Cost per hour of training			$29.43
Scenario 1—Subtotal	3% discount rate		$146,840,824
	7% discount rate		$128,346,223
Scenario 2—Disclosure creation and delivery:			
Number of dealers		47,271	
Compliance manager hours per dealer		8	
Cost per hour of compliance manager		$31.21	
Sales manager hours per dealer		4	
Cost per hour of sales manager		$80.19	
Programmer hours per dealer		8	
Cost per hour of programmer		$40.24	
Subtotal		$42,182,750	
Disclosure delivery (per transaction):			
New vehicle sales per year			10,343,319
Used vehicle sales per year			21,219,640
Minutes per disclosure			2
Cost per hour of disclosure			$28.41
Physical costs per disclosure			$0.11
Subtotal	3% discount rate		$285,904,302
	7% discount rate		$235,407,319
Scenario 2—Total Cost	3% discount rate		$474,927,875
	7% discount rate		$405,936,291

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.

6. Requirement To Obtain Express, Informed Consent Before Any Charges

The Rule requires dealers to obtain express, informed consent before charging any consumer for any product or service in association with the sale, financing, or lease of a vehicle. Because we presume that all dealers who are complying with the law currently have policies in place to prevent charges without consent, we assume that there will be no additional costs imposed by this provision.

7. Recordkeeping

The Final Rule requires dealers to retain records of all documents pertaining to Rule compliance. These recordkeeping requirements include:

• Copies of all materially different marketing materials, sales scripts, and training materials that discuss sales prices and financing or lease terms.

• Records demonstrating that all add-ons charged for meet the requirements stated in the Rule, including calculations of loan-to-value ratios in contracts including GAP agreements.

• Copies of all purchase orders, financing and lease contracts signed by the consumer (whether or not final approval is received), and all written communications with any consumer who signs a purchase order or financing or lease contract.

• Copies of all written consumer complaints, inquiries related to add-ons, and inquiries and responses about individual vehicles.

Most of these documents are already produced in the normal course of business under the status quo, or the costs of creating them have already been accounted for in previous sections. In its preliminary analysis, the Commission assumed that each dealer would incur an upfront cost, employing 8 hours of programmer time, 5 hours of clerical time, 1 hour of sales manager time, and 1 hour of compliance officer time, at hourly rates of $28.90, $18.37, $63.93, and $26.83, respectively, in order to upgrade their systems and create the templates necessary to accommodate retention of all relevant materials. The Commission also assumed that each dealer would employ 1 additional minute of sales staff time per transaction to populate forms and store relevant materials.

One industry commenter contended that the proposed rule would impose substantial and costly recordkeeping mandates, citing primarily the various channels through which dealers would be required to capture and retain communications. The Commission believes the recordkeeping requirements strike an appropriate balance, requiring the retention of materials needed to allow effective enforcement while being mindful of dealer burden. In addition, the recordkeeping requirements are similar to analogous requirements in other Commission disclosure rules, as

tailored to individual industries and markets.[574]

As such, the Commission's final analysis retains its preliminary estimates—appropriately updated where more recent data were available—with a few changes. First, we made adjustments to the cost estimates associated with the required loan-to-value calculations for all transactions with GAP agreements. Based on a comment from one industry group, we revised down the share of covered new and used vehicle sales with a GAP agreement to 17%.[575] As in the preliminary analysis, for these transactions sales staff will spend an additional minute to generate and store the relevant calculations. As discussed in a previous section, the final analysis excludes private party, fleet, and wholesale transactions. In addition, the expansion of the volume of records that dealers are required to retain and manage will likely require investment in additional IT systems and hardware, which was left unquantified in the preliminary analysis. After additional research, the Commission estimates that each dealer will need to spend approximately $300 per year on storage (either on premises or in the cloud) to house the records that the Rule requires them to maintain. Based on a review of the transaction records we have received from dealers through investigations, this amount is likely to be more than sufficient for compliance.[576]

TABLE 3.6—ESTIMATED COMPLIANCE COSTS FOR RECORDKEEPING

		2024 only	2024–2033
Updating systems:			
Number of dealers		47,271	
Programming hours per dealer		8	
Cost per hour of programming		$40.24	
Clerical hours per dealer		5	
Cost per hour of clerical work		$20.16	
Sales manager hours per dealer		1	
Cost per hour of sales manager review		$80.19	
Compliance manager hours per dealer		1	
Cost per hour of compliance review		$31.21	
Subtotal		$25,248,387	
Hardware and Storage (per year):			
Number of dealers			47,271
Cost of hardware/storage			$300
Recordkeeping (per transaction):			
Number of covered motor vehicle sales			31,562,959
% of sales with GAP agreement[a]			17%
Number of motor vehicle sales with GAP agreement.			5,444,502
Sales staff minutes per transaction			1
Cost per hour of recordkeeping			$28.41
Subtotal	3% discount rate		$270,444,391
Subtotal	7% discount rate		$222,677,967
Total Cost	3% discount rate		$295,692,777
Total Cost	7% discount rate		$247,926,354

Note: In scenarios with ongoing expenses, costs have been discounted to the present at both 3% and 7% rates.
[a] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 12 n.43.

D. Other Impacts of Final Rule

As the status quo in this industry features consumer search frictions, shrouded prices, deception, and obfuscation, dealers likely charge higher prices for a number of products and services than could be supported once the Rule is in effect. SBP VII.B discussed the Commission's expectation that prices are likely to adjust in response to the transparency facilitated by the Rule, and quantified the benefits that result when vehicle quantities increase in response to a more transparent and less deceptive equilibrium. The price changes in the new vehicle market discussed in SBP VII.B will also have the effect of transferring $3.4 billion per year from dealers whose conduct under the status quo would not have complied with the Rule to consumers. In addition, other prices may be impacted by the Rule, such as used vehicle prices and add-on prices. As we have insufficient data to predict these price effects, neither the transfers associated with these potential price changes nor the resulting quantity adjustments and deadweight loss reductions are quantified in the current

[574] 16 CFR 310.5 (Telemarketing Sales Rule); 16 CFR 437.7 (Business Opportunity Rule); 16 CFR 453.6 (Funeral Industry Practices Rule); 16 CFR 301.41 (Fur Products Labeling).

[575] Comment of Nat'l Auto. Dealers Ass'n, Doc. No. FTC–2022–0046–8368 at 12 n.43 (indicating 15.3% (18.2%) for new (used) vehicles). These rates were weighted by transactions counts to calculate an overall rate of 17%.

[576] Our review of dealer transaction records suggests that a typical transaction generates 3.4 MB of data under the status quo. Given the average number of transactions per dealer, this suggests that storing all these records would require dedicated space of roughly 4.2 GB per year. With a two-year retention window, this corresponds to 8.4 GB of storage at any given time. We estimate that the (annual) amount budgeted here should be sufficient to maintain at least 1 TB of storage—either on premises or through a cloud storage vendor—which is sufficient for more than 100 times the data storage capacity necessary to retain all transaction files generated by a typical dealership in a year under the status quo. The Commission anticipates that this amount of data storage capacity will be more than sufficient to also allow for dealers to keep any necessary records of correspondence with consumers who ultimately do not complete transactions at the dealership.

analysis. Finally, it may be the case that enhanced transparency of the Rule leads to *fewer* of certain types of transactions relative to the status quo. Recent evidence suggests that price shrouding of the kind that is prevalent in the motor vehicle market results in consumers spending more than they would otherwise.[577] We expect that this phenomenon may extend especially to the motor vehicle add-on market, where the Commission has compiled substantial evidence that individuals frequently inadvertently purchase add-ons that they did not want and ultimately will not use.[578] While much of this effect may ultimately be transfers, we reiterate that to the extent they represent transfers from dishonest dealers to consumers, this may be considered a benefit of the Rule.

In addition, deceptive practices by dishonest dealers lead consumers to engage with those dealers instead of honest dealerships. Once the Rule is in effect, some business that would otherwise have gone to dealers using bait-and-switch tactics or deceptive door opening advertisements will now go to honest dealerships. Again, assuming that the costs of the firms are similar, any one-for-one diversion of sales from one set of businesses to another is generally characterized as a transfer under OMB guidelines. However, in this case, it would represent a transfer from the set of dishonest dealers to honest dealers, which may weigh differently if profits from law violations are not counted towards social welfare in the regulatory analysis.

E. Conclusion

The Commission has attempted to catalog and quantify the incremental benefits and costs of the provisions included in the Final Rule. Extrapolating these benefits over the 10-year assessment period and discounting to the present provides an estimate of the present value for total benefits and costs of the Rule, with the difference—net benefits—providing one measure of the value of regulation.

Using our base case estimates, the present value of quantified benefits for consumers from the Rule's requirements over a 10-year period using a 7% discount rate is estimated at $13.4 billion. The present value of quantified costs for covered motor vehicle dealers of complying with the Rule's requirements over a 10-year period using a 7% discount rate is estimated at $1.1 billion. This generates an estimate of the present value of quantified net benefits equal to $12.3 billion using a discount rate of 7%. Using the best (or worst) case assumptions discussed in the preceding analysis results in net benefits of $21.2 billion (or $5.5 billion) using a discount rate of 7%.

Given that we expect unquantified benefits to outweigh unquantified costs for this Rule, this regulatory analysis indicates that adoption of the Rule would result in benefits to the public that outweigh the costs.

PRESENT VALUE OF NET BENEFITS (IN MILLIONS), 2024–2033

	Low estimate		Base case		High estimate	
	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate	3% Discount rate	7% Discount rate
Benefits:						
Time Savings	$7,463	$6,145	$14,926	$12,290	$24,036	$19,790
Deadweight Loss Reduction	568	468	1,298	1,069	2,307	1,899
Total Benefits	8,031	6,613	16,224	13,359	26,343	21,690
Costs:						
Finance/Lease Total of Payments Disclosure	296	246	296	246	117	98
Offering Price Disclosure	46	46	46	46	0	0
Prohibition Re Certain Add-ons & Express, Informed Consent	475	406	475	406	147	128
Prohibition on Misrepresentations	157	130	157	130	0	0
Recordkeeping	296	248	296	248	296	248
Total Costs	1,270	1,075	1,270	1,075	559	474
Net Benefits	6,761	5,538	14,954	12,284	25,784	21,216

Note: "Low Estimate" reflects all lowest benefit estimates and high cost scenarios and "High Estimate" reflects all highest benefit estimates and low cost scenarios. "Base Case" reflects base case benefit estimates and high cost scenarios. Not all impacts can be quantified; estimates only reflect quantified costs and benefits.

[577] *See* Tom Blake et al., "Price Salience and Product Choice," 40 Mktg. Sci. 619–36 (2021), *https://doi.org/10.1287/mksc.2020.1261.*

[578] *See* Nat'l Consumer Law Ctr., "Auto Add-ons Add Up: How Dealer Discretion Drives Excessive, Inconsistent, and Discriminatory Pricing" (Oct. 1, 2017), *https://www.nclc.org/images/pdf/car_sales/report-auto-add-on.pdf;* Consumers for Auto Reliability and Safety, Comment Letter on Motor Vehicle Roundtables, Project No. P104811 at 2–3 (Apr. 1, 2012), *https://www.ftc.gov/sites/default/files/documents/public_comments/public-roundtables-protecting-consumers-sale-and-leasing-motor-vehicles-project-no.p104811-00108/00108-82875.pdf* (citing a U.S. Department of Defense data call summary that found that the vast majority of military counselors have clients with auto financing problems and cited "loan packing" and yo-yo financing as the most frequent auto lending abuses affecting servicemembers); Adam J. Levitin, "The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses," 108 Geo. L.J. 1257, 1265–66 (2020), *https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/05/Levitin_The-Fast-and-the-Usurious-Putting-the-Brakes-on-Auto-Lending-Abuses.pdf* (discussing "loan packing" as the sale of add-on products that are falsely represented as being required in order to obtain financing.); Complaint ¶¶ 12–19, *Fed. Trade Comm'n* v. *Liberty Chevrolet, Inc.,* No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 59–64, *Fed. Trade. Comm'n* v. *Universal City Nissan,* No. 2:16–cv–07329 (C.D. Cal. Sept. 29, 2016) (alleging deceptive and unauthorized add-on charges in consumers' transactions); Complaint ¶¶ 6, 9, *TT of Longwood, Inc.,* No. C–4531 (F.T.C. July 2, 2015) (alleging misrepresentations regarding prices for added features); *see also* Auto Buyer Study, *supra* note 25, at 14 ("Several participants who thought that they had not purchased add-ons, or that the add-ons were included at no additional charge, were surprised to learn, when going through the paperwork, that they had in fact paid extra for add-ons. This is consistent with consumers' experiencing fatigue during the buying process or confusion with a financially complex transaction, but would also be consistent with dealer misrepresentations.").

F. Appendix: Derivation of Deadweight Loss Reduction

The derivation of the formula for the reduction in deadweight loss from the Rule follows from ''Sufficient Statistics Revisited'' by Henrik Kleven.[579] In the source article, the wedge between costs and prices is tax rates, but here we consider producer markups; the fundamental principles are unchanged.

We have a mass of consumers i with utility function $u^i(x^i_O, x^i_N, x^i_U)$ over new cars, used cars, and the numeraire (good 0) who face the following budget constraint:

$$\sum_j (1+\tau^i_j)x^i_j = Y^i$$

given markups T^i_j for good j and consumer i and income Y^i for consumer i. Pre-markup prices are normalized to one so xi_j is the cost of consumer i's purchase of good j. Total profits from the consumption of consumer i are $T^i = \Sigma_j T^i_j x^i_j$.

Define a policy to be evaluated as θ. Total welfare is defined as:

$$W(\theta) = \int_i v^i(\theta)\,di + \mu \int_i T^i(\theta)\,di$$

Here, $v^i(\theta)$ is the indirect utility function for consumer i, so the first term is consumer surplus and the second term is producer surplus, while μ is the value of a dollar of profit. The change in welfare from policy θ, translated into dollars by dividing by μ, is:

$$\frac{dW(\theta)/d\theta}{\mu} = \int_i \frac{dT^i}{d\theta} - \frac{\partial T^i}{\partial \theta}\,di$$

The first term is the total effect on profit from the reform and the second term is the ''mechanical'' effect; assuming quantities stay constant, how much profits will fall if the policy goes into effect. We can rewrite this as follows:

$$\frac{dW(\theta)/d\theta}{\mu} = \int_i \left[\sum_{j=0}^{J} \tau^i_j x^i_j \frac{d\log x^i_j}{d\theta}\right] di$$

Where

$$\frac{d\log x^i_j}{d\theta}$$

is labelled the ''policy elasticity'' for good and consumer with respect to policy . We make the following additional assumptions/simplifications:

1. The outside good is priced at cost.
2. All consumers face the same markups so $T^i_k = T_k$.
3. For simplicity, all elasticities are assumed to be cost share-weighted averages of individual effects, so

$$X_j = \int_i x^i_j \text{ and } \epsilon_{jk} = \int_i \epsilon^i_{jk} \frac{x^i_j}{X_j}.$$

As a result, the welfare change from the Auto Rule (θ) is:

$$\frac{dW(\theta)/d\theta}{\mu} = X_N \tau_N \frac{d\log X_N}{d\theta} + X_U \tau_U \frac{d\log X_U}{d\theta}$$

Assuming that the Rule affects only markups for new vehicles, we can rewrite the ''policy elasticities'' as a product of a price elasticity and the elasticity of price with respect to the Rule, as follows:

$$\frac{dW(\theta)/d\theta}{\mu} = X_N \tau_N \hat{\varepsilon}_{NN} \frac{d\tau_N/d\theta}{1+\tau_N} + X_U \tau_U \hat{\varepsilon}_{UN} \frac{d\tau_N/d\theta}{1+\tau_N}$$

where

$$\hat{\varepsilon}_{jk} = \frac{d\log X_j}{d\log(1+\tau_k)}$$

is the long-run ''policy price elasticity'' of demand for good w.r.t. the price of good , including the effects that a price change has on the prices of related goods. The formula accounts for demand feedback effects between the new and used car markets but assumes no dynamics in the path from the policy to the long-run steady-state. Computing this formula requires estimates of seven parameters: two ''policy price elasticities'' that reflect the responsiveness of quantities of new and used vehicles sold to a change in prices in the new vehicle market after all adjustments have occurred in both markets, two baseline markups that represent the differences between prices and marginal costs for new/used vehicles, two quantities that reflect the aggregate cost of all new/used vehicles sold under the status quo, and the predicted change in prices due to the Rule. Calibration of these parameters is discussed in the main text.

G. Appendix: Uncertainty Analysis

While the main text uses alternative assumptions to explore sensitivity to a

[579] *See* Henrik J. Kleven, ''Sufficient Statistics Revisited.'' 13 *Annual Rev. Econ.* 515–38. (2021), *https://doi.org/10.1146/annurev-economics-060220-023547.*

number of discrete scenarios, in this appendix we allow variation in most of the assumptions that underlie our model. This Monte Carlo analysis procedure allows us to more fully characterize the uncertainty around our central estimate of net benefits, under the assumption that our basic model is specified correctly. Most of the assumptions in our analysis refer to amounts of time, either amounts of time dealerships employees must spend on a compliance task or amounts of time that consumers save on various activities related to the automobile shopping process. Deviations for these assumptions are centered on the parameters used in the main text. Elsewhere, as with assumptions regarding fractions or proportions, our base case is often an extreme case (*i.e.,* 0 or 1). In these cases, deviations are typically not centered on the base case and are allowed to vary across the whole range as dictated by the parameter. Still, we can expect the average results from this sensitivity analysis to be similar to the result in the main text. The object of interest here is the distribution of estimates, which indicates the expected variation in net benefits if the true parameters deviate from our predictions (with errors of the form modeled).

For most assumptions, we draw from a symmetric, triangular distribution around the base case assumption with a specified upper and lower bound. In this distribution, the probability of drawing particular parameter value increases linearly from the lower bound to the base case assumption before decreasing linearly to the upper bound, such that the area inscribed by the triangle is equal to 1. We emphasize this distribution because it is a parsimonious way to incorporate variation in parameter values over a finite range and incorporates our preferred estimates as the most likely outcome. For a few parameters where we think it is appropriate to de-emphasize the main estimate parameter, we draw from a uniform distribution. Importantly, all draws are independent; there is no correlation between the deviations drawn in any given Monte Carlo trial. An additional sensitivity analysis considers a situation where our errors across all labor time parameters are correlated; specifically, that all of our estimates of the time required for compliance tasks are 1/10th of the true time required.

To incorporate uncertainty in time savings benefits to consumers, we allow the time saved by digital consumers to vary by up to ten minutes more or less than the main analysis parameters. The share of these time savings received by non-digital consumers under the Rule is modeled as uniformly distributed between zero (no savings) and one (savings equivalent to what digital consumers receive in the status quo).

TABLE A.1—ALTERNATIVE PARAMETERS: BENEFITS OF TIME SAVINGS FOR COMPLETED TRANSACTIONS

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
Price Negotiation Time Savings	43	Triangular	33	53
Add-on Negotiation Time Savings	33	Triangular	23	43
Paperwork Time Savings	45	Triangular	35	55
Trade-In Negotiation Time Savings	26	Triangular	16	36
Fraction of Price Time Savings Under Rule	1.0	Uniform	0	1
Fraction of Add-on Time Savings Under Rule	0.5	Uniform	0	1
Fraction of Paperwork Time Savings Under Rule	0.5	Uniform	0	1
Fraction of Trade-In Time Savings Under Rule	0.0	Uniform	0	1

For the deadweight loss reduction component of benefits, we explore sensitivity only to baseline used-vehicle markups, allowing them to vary from 0 to the baseline new-vehicle markup of 15%. In the main text, we explore a number of scenarios for deadweight loss reduction corresponding to greater and lesser demand elasticities as well.

The following tables describe the distributions we model for cost parameters in the simulation exercise. All cost parameters are assumed to be drawn from triangular distributions. The tables follow the same order as the discussion in the main text.

TABLE A.2—ALTERNATIVE PARAMETERS: COSTS OF MISREPRESENTATION PROHIBITION COMPLIANCE

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
Document Review Minutes	5	Triangular	0	10
Documents Reviewed	150	Triangular	100	200

TABLE A.3—ALTERNATIVE PARAMETERS: COSTS OF OFFERING PRICE DISCLOSURES

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
Template Creation Sales Manager Hours	8	Triangular	4	12
Template Creation Web Developer Hours	8	Triangular	4	12

TABLE A.5—ALTERNATIVE PARAMETERS: COSTS OF FINANCING DISCLOSURES

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
Disclosure Creation Compliance Manager Hours	8	Triangular	4	12
Disclosure Training Hours	1	Triangular	0	2
Disclosure Delivery Time Minutes	2	Triangular	0	4
Printing Costs	0.15	Triangular	0.10	0.20

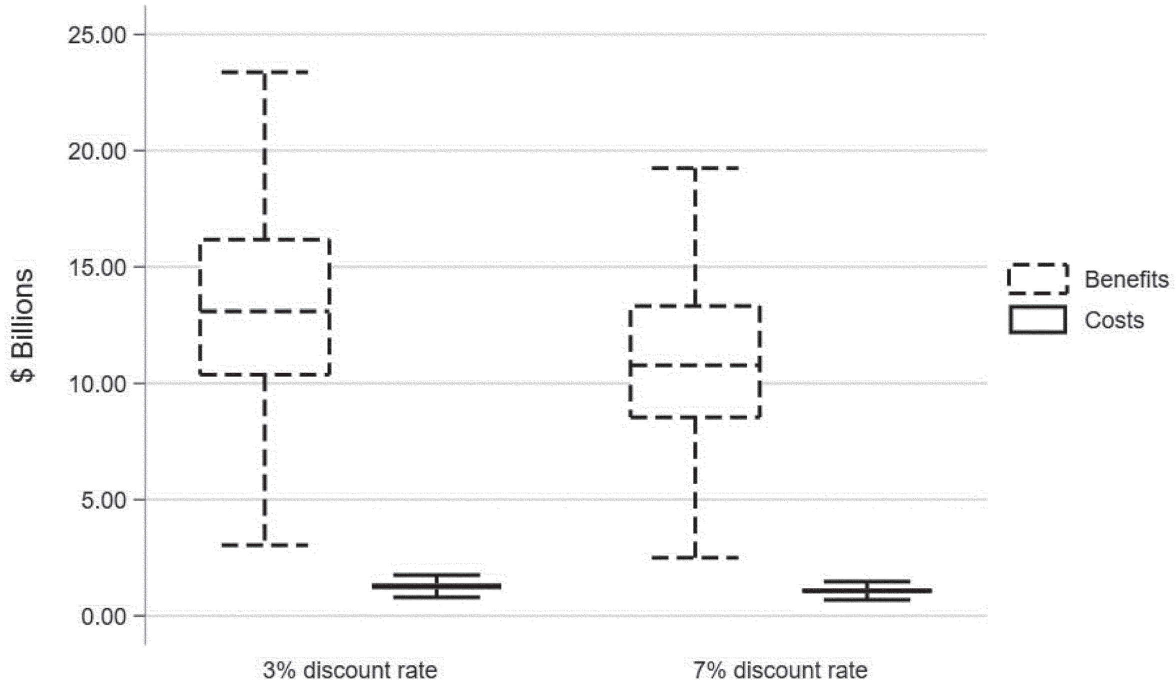
TABLE A.6—ALTERNATIVE PARAMETERS: COSTS OF ITEMIZED DISCLOSURES

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
Electronic Disclosure Share (Scenario 2 only)	0.27	Triangular	0.04	0.50
Upfront Sales Manager Hours (Scenario 1)	8	Triangular	4	12
Upfront Compliance Manager Hours (Scenario 1)	8	Triangular	4	12
Disclosure Training Hours (Scenario 1)	1	Triangular	0	2
Disclosure Creation Sales Manager Hours (Scenario 2 only).	4	Triangular	2	6
Disclosure Creation Compliance Manager Hours (Scenario 2 only).	8	Triangular	4	12
Disclosure Creation Web Developer Hours (Scenario 2 only).	8	Triangular	4	12
Disclosure Delivery Minutes (Scenario 2 only)	2	Triangular	0	4
Printing Costs (Scenario 2 only)	0.15	Triangular	0.10	0.20
Electronic Disclosure Costs (Scenario 2 only)	0.02	Triangular	0	0.04

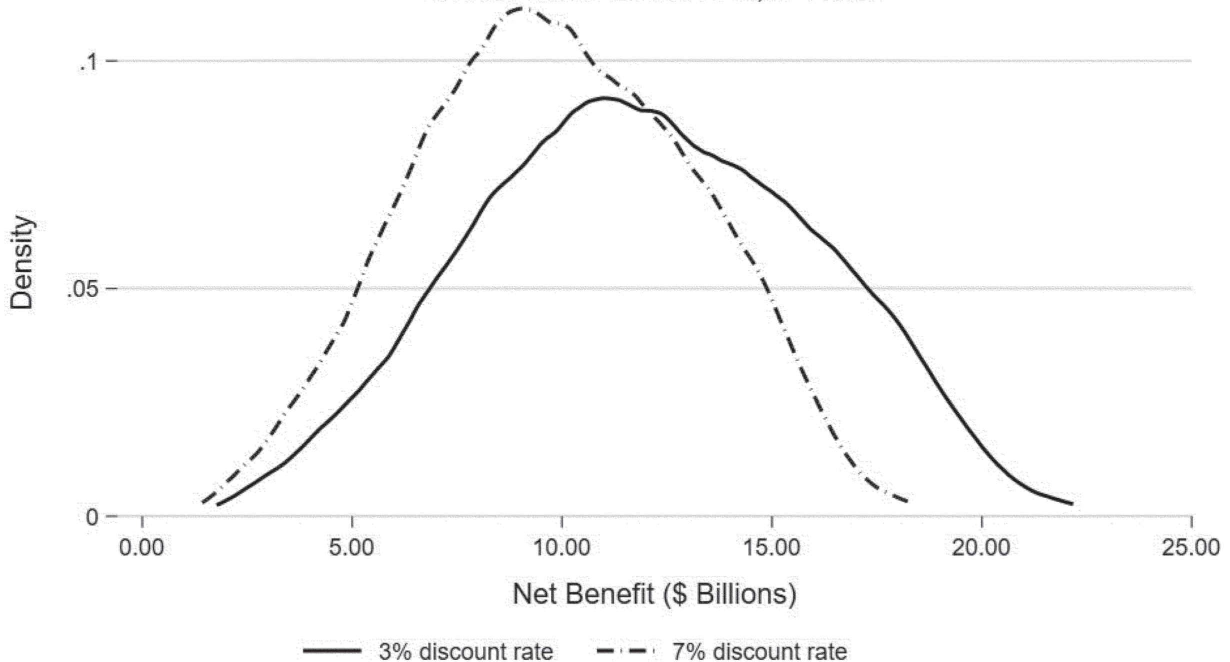
TABLE A.7—ALTERNATIVE PARAMETERS: RECORDKEEPING COSTS

	Base case	Monte Carlo		
Parameter	Parameter value	Modeled distribution	Distribution lower bound	Distribution upper bound
GAP Sales Share	0.17	Triangular	0.07	0.27
GAP Sale Minutes	1	Triangular	0	2
Upfront Web Developer Hours	8	Triangular	4	12
Upfront Clerical Hours	5	Triangular	2	8
Upfront Sales Manager Hours	1	Triangular	0	2
Upfront Compliance Manager Hours	1	Triangular	0	2
IT Hardware Costs	300	Triangular	100	500

We simulate 1,000 scenarios drawing from these parameter distributions, recording the costs and benefits of each potential outcome. The distribution of costs and benefits is plotted in the following table for discount rates of 3% and 7%.



Differencing the costs and benefits from each simulation iteration yields a distribution of net benefits under the various parameter draws. We again plot this distribution under 3% and 7% discount rates.



This exercise finds heterogeneity in net benefits under the alternative parameter distributions, but the Rule still yields positive net benefits in all simulated outcomes.

Finally, to examine the sensitivity of the net benefits conclusions to the possibility of systematic underestimating of labor costs, we calculate costs and benefits in a scenario where all labor costs turn out to be ten

times larger than the parameter values in the main text. All non-labor hours costs (including benefits hours, wage rates, and prevalence counts) are unchanged in this analysis.

TABLE A.8—PRESENT VALUE OF NET BENEFITS (IN MILLIONS), LABOR COSTS × 10, 2024–2033

	Base case	
	3% Discount rate	7% Discount rate
Benefits:		
Time savings	$14,926	$12,290
Deadweight Loss Reduction	1,298	1,069
Total Benefits	16,224	13,359
Costs:		
Prohibition on Misrepresentations	1,573	1,295
Offering Price Disclosure	455	455
Finance/Lease Total of Payments Disclosure	2,743	2,279
Prohibition re: Certain Add-ons & Express, Informed Consent	4,471	3,830
Recordkeeping	1,868	1,583
Total Costs	11,111	9,443
Net Benefits	5,114	3,916

Note: ''Base Case'' reflects base case benefit estimates and high cost scenarios with ten times the labor costs as in the main analysis. Not all impacts can be quantified; estimates only reflect quantified costs and benefits.

VIII. Other Matters

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this Rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 463

Consumer protection, Motor vehicles, Reporting and recordkeeping requirements, Trade practices.

■ For the reasons stated in the preamble, the Federal Trade Commission adds part 463 to subchapter D of Title 16 of the Code of Federal Regulations to read as follows:

PART 463—COMBATING AUTO RETAIL SCAMS TRADE REGULATION RULE

Sec.
463.1 Authority.
463.2 Definitions.
463.3 Prohibited misrepresentations.
463.4 Disclosure requirements.
463.5 Dealer charges for Add-ons and other items.
463.6 Recordkeeping.
463.7 Waiver not permitted.
463.8 Severability.
463.9 Relation to State laws.

Authority: 15 U.S.C. 41 *et seq.;* 12 U.S.C. 5519.

§ 463.1 Authority.

This part is promulgated pursuant to section 1029 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. 5519(d). It is an unfair or deceptive act or practice within the meaning of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) to violate any applicable provision of this part, directly or indirectly, including the recordkeeping requirements which are necessary to prevent such unfair or deceptive acts or practices and to enforce this part.

§ 463.2 Definitions.

(a) ''Add-on'' or ''Add-on product(s) or Service(s)'' means any product(s) or service(s) not provided to the consumer or installed on the Vehicle by the Vehicle manufacturer and for which the Dealer, directly or indirectly, charges a consumer in connection with a Vehicle sale, lease, or financing transaction.

(b)–(c) [Reserved]

(d) ''Clear(ly) and Conspicuous(ly)'' means in a manner that is difficult to miss (*i.e.,* easily noticeable) and easily understandable, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

(4) In any communication using an interactive electronic medium, such as the internet or software, the disclosure must be unavoidable.

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received.

(7) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(e) ''Covered Motor Vehicle'' or ''Vehicle'' means any self-propelled vehicle designed for transporting persons or property on a public street, highway, or road. For purposes of this part, the term Covered Motor Vehicle does not include the following:

(1) Recreational boats and marine equipment;

(2) Motorcycles, scooters, and electric bicycles;

(3) Motor homes, recreational vehicle trailers, and slide-in campers; or

(4) Golf carts.

(f) ''Covered Motor Vehicle Dealer'' or ''Dealer'' means any person, including any individual or entity, or resident in the United States, or any territory of the United States, that:

(1) Is licensed by a State, a territory of the United States, or the District of Columbia to engage in the sale of Covered Motor Vehicles;

(2) Takes title to, holds an ownership interest in, or takes physical custody of Covered Motor Vehicles; and

(3) Is predominantly engaged in the sale and servicing of Covered Motor Vehicles, the leasing and servicing of Covered Motor Vehicles, or both.

(g) ''Express, Informed Consent'' means an affirmative act communicating unambiguous assent to be charged, made after receiving and in close proximity to a Clear and Conspicuous disclosure, in writing, and also orally for in-person transactions, of the following:

(1) What the charge is for; and

(2) The amount of the charge, including, if the charge is for a product or service, all fees and costs to be charged to the consumer over the period of repayment with and without the product or service. The following are examples of what does not constitute Express, Informed Consent:

(i) A signed or initialed document, by itself;

(ii) Prechecked boxes; or

(iii) An agreement obtained through any practice designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice.

(h) ''GAP Agreement'' means an agreement to indemnify a Vehicle purchaser or lessee for any of the difference between the actual cash value of the Vehicle in the event of an unrecovered theft or total loss and the amount owed on the Vehicle pursuant to the terms of a loan, lease agreement, or installment sales contract used to purchase or lease the Vehicle, or to waive the unpaid difference between money received from the purchaser's or lessee's Vehicle insurer and some or all of the amount owed on the Vehicle at the time of the unrecovered theft or total loss, including products or services otherwise titled ''Guaranteed Automobile Protection Agreement,'' ''Guaranteed Asset Protection Agreement,'' ''GAP insurance,'' or ''GAP Waiver.''

(i) ''Government Charges'' means all fees or charges imposed by a Federal, State, or local government agency, unit, or department, including taxes, license and registration costs, inspection or certification costs, and any other such fees or charges.

(j) ''Material'' or ''Materially'' means likely to affect a person's choice of, or conduct regarding, goods or services.

(k) ''Offering Price'' means the full cash price for which a Dealer will sell or finance the Vehicle to any consumer, provided that the Dealer may exclude only required Government Charges.

§ 463.3 Prohibited misrepresentations.

It is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the Federal Trade Commission Act for any Covered Motor Vehicle Dealer to make any misrepresentation, expressly or by implication, regarding Material information about the following:

(a) The costs or terms of purchasing, financing, or leasing a Vehicle.

(b) Any costs, limitation, benefit, or any other aspect of an Add-on Product or Service.

(c) Whether the terms are, or transaction is, for financing or a lease.

(d) The availability of any rebates or discounts that are factored into the advertised price but not available to all consumers.

(e) The availability of Vehicles at an advertised price.

(f) Whether any consumer has been or will be preapproved or guaranteed for any product, service, or term.

(g) Any information on or about a consumer's application for financing.

(h) When the transaction is final or binding on all parties.

(i) Keeping cash down payments or trade-in Vehicles, charging fees, or initiating legal process or any action if a transaction is not finalized or if the consumer does not wish to engage in a transaction.

(j) Whether or when a Dealer will pay off some or all of the financing or lease on a consumer's trade-in Vehicle.

(k) Whether consumer reviews or ratings are unbiased, independent, or ordinary consumer reviews or ratings of the Dealer or the Dealer's products or services.

(l) Whether the Dealer or any of the Dealer's personnel or products or services is or was affiliated with, endorsed or approved by, or otherwise associated with the United States government or any Federal, State, or local government agency, unit, or department, including the United States Department of Defense or its Military Departments.

(m) Whether consumers have won a prize or sweepstakes.

(n) Whether, or under what circumstances, a Vehicle may be moved, including across State lines or out of the country.

(o) Whether, or under what circumstances, a Vehicle may be repossessed.

(p) Any of the required disclosures identified in this part.

(q) The requirements in this section also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.4 and 463.5.

§ 463.4 Disclosure requirements.

It is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the Federal Trade Commission Act for any Covered Motor Vehicle Dealer to fail to make any disclosure required by this section, Clearly and Conspicuously.

(a) *Offering Price.* In connection with the sale or financing of Vehicles, a Vehicle's Offering Price must be disclosed:

(1) In any advertisement that references, expressly or by implication, a specific Vehicle;

(2) In any advertisement that represents, expressly or by implication, any monetary amount or financing term for any Vehicle; and

(3) In any communication with a consumer that includes a reference, expressly or by implication, regarding a specific Vehicle, or any monetary amount or financing term for any Vehicle. With respect to such communications:

(i) The Offering Price for the Vehicle must be disclosed in the Dealer's first response regarding that specific Vehicle to the consumer; and

(ii) If the communication or response is in writing, the Offering Price must be disclosed in writing. The requirements in this paragraph (a) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and 463.5(c).

(b) [Reserved]

(c) *Add-ons not required.* When making any representation, expressly or by implication, directly or indirectly, about an Add-on Product or Service, the Dealer must disclose that the Add-on is not required and the consumer can purchase or lease the Vehicle without the Add-on, if true. If the representation is in writing, the disclosure must be in writing. The requirements in this paragraph (c) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b) and 463.5(c).

(d) *Total of payments and consideration for a financed or lease transaction.* (1) When making any representation, expressly or by implication, directly or indirectly, about a monthly payment for any Vehicle, the Dealer must disclose the total amount the consumer will pay to purchase or lease the Vehicle at that monthly payment after making all payments as scheduled. If the representation is in

writing, the disclosure must be in writing.

(2) If the total amount disclosed assumes the consumer will provide consideration (for example, in the form of a cash down payment or trade-in valuation), the Dealer must disclose the amount of consideration to be provided by the consumer. If the representation is in writing, the disclosure must be in writing.

(3) The requirements in this paragraph (d) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).

(e) *Monthly payments comparison.* When making any comparison between payment options, expressly or by implication, directly or indirectly, that includes discussion of a lower monthly payment, the Dealer must disclose that the lower monthly payment will increase the total amount the consumer will pay to purchase or lease the Vehicle, if true. If the representation is in writing, the disclosure must be in writing. The requirements in this paragraph (e) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and 463.5(c).

§ 463.5 Dealer charges for Add-ons and other items.

It is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the Federal Trade Commission Act for any Covered Motor Vehicle Dealer, in connection with the sale or financing of Vehicles, to charge for any of the following.

(a) *Add-ons that provide no benefit.* A Dealer may not charge for an Add-on Product or Service if the consumer would not benefit from such an Add-on Product or Service, including:

(1) Nitrogen-filled tire-related products or services that contain no more nitrogen than naturally exists in the air; or

(2) Products or services that do not provide coverage for the Vehicle, the consumer, or the transaction or that are duplicative of warranty coverage for the Vehicle, including a GAP Agreement if the consumer's Vehicle or neighborhood is excluded from coverage or the loan-to-value ratio would result in the consumer not benefiting financially from the product or service.

(3) The requirements in this paragraph (a) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in § 463.3(a) and (b) and paragraph (c) of this section.

(b) [Reserved]

(c) *Any item without Express, Informed Consent.* A Dealer may not charge a consumer for any item unless the Dealer obtains the Express, Informed Consent of the consumer for the charge. The requirements in this paragraph (c) also are prescribed for the purpose of preventing the unfair or deceptive acts or practices defined in this part, including those in §§ 463.3(a) and (b), 463.4, and paragraph (a) of this section.

§ 463.6 Recordkeeping.

(a) Any Covered Motor Vehicle Dealer subject to this part must create and retain, for a period of twenty-four months from the date the record is created, all records necessary to demonstrate compliance with this part, including the following records:

(1) Copies of all Materially different advertisements, sales scripts, training materials, and marketing materials regarding the price, financing, or lease of a Vehicle, that the Dealer disseminated during the relevant time period; *Provided that* a typical example of a credit or lease advertisement may be retained for advertisements that include different Vehicles, or different amounts for the same credit or lease terms, where the advertisements are otherwise not Materially different;

(2) [Reserved]

(3) Copies of all purchase orders; financing and lease documents with the Dealer signed by the consumer, whether or not final approval is received for a financing or lease transaction; and all written communications relating to sales, financing, or leasing between the Dealer and any consumer who signs a purchase order or financing or lease contract with the Dealer;

(4) Records demonstrating that Add-ons in consumers' contracts meet the requirements of § 463.5, including copies of all service contracts, GAP Agreements and calculations of loan-to-value ratios in contracts including GAP Agreements; and

(5) Copies of all written consumer complaints relating to sales, financing, or leasing, inquiries related to Add-ons, and inquiries and responses about Vehicles referenced in § 463.4.

(b) Any Dealer subject to this part may keep the records required by paragraph (a) of this section in any legible form, and in the same manner, format, or place as they may already keep such records in the ordinary course of business. Failure to keep all records required under paragraph (a) of this section will be a violation of this part.

§ 463.7 Waiver not permitted.

It is a violation of this part for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under this part.

§ 463.8 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions will continue in effect.

§ 463.9 Relation to State laws.

(a) *In general.* This part will not be construed as superseding, altering, or affecting any other State statute, regulation, order, or interpretation relating to Covered Motor Vehicle Dealer requirements, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

(b) *Greater protection under State law.* For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part.

By direction of the Commission.

Joel Christie,

Acting Secretary.

[FR Doc. 2023–27997 Filed 12–28–23; 8:45 am]

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procedure under 5 U.S.C. 553(b) are unnecessary.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action of amending the using agency information for restricted areas R–2510A and R–2510B, qualifies for categorical exclusion under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) and its implementing regulations at 40 CFR part 1500, and in accordance with FAA Order 1050.1F ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a, which categorically excludes from further environmental impact review rulemaking actions that designate or modify classes of airspace areas, airways, routes, and reporting points (see 14 CFR part 71, Designation of Class A, B, C, D, and E Airspace Areas; Air Traffic Service Routes; and Reporting Points), and paragraph 5–6.5d, which categorically excludes from further environmental impact review the modification of the technical description of special use airspace (SUA) that does not alter the dimensions, altitudes, or times of designation of the airspace (such as changes in designation of the controlling or using agency, or correction of typographical errors). This airspace action is an administrative change to the description of restricted areas R–2510A and R–2510B to update the using agency name. It does not alter the restricted area dimensions, designated altitudes, times of designation, or use of the airspace. Therefore, this airspace action is not expected to result in any significant environmental impacts. In accordance with FAA Order 1050.1F, paragraph 5–2 regarding Extraordinary Circumstances, this action has been reviewed for factors and circumstances in which a normally categorically excluded action may have a significant environmental impact requiring further analysis. Accordingly, the FAA has determined that no extraordinary circumstances exist that warrant preparation of an environmental assessment or environmental impact study.

Lists of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

■ 1. The authority citation for 14 CFR part 73 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 73.25 [Amended]

■ 2. Section 73.25 is amended as follows:

* * * * *

R–2510A El Centro, CA [Amended]

By removing the existing using agency and substituting the following:

Using agency. U.S. Marine Corps, Commanding Officer, Marine Corps Air Station Yuma, Yuma, AZ.

R–2510B El Centro, CA [Amended]

By removing the current using agency and adding the following in its place:

Using agency. U.S. Marine Corps, Commanding Officer, Marine Corps Air Station Yuma, Yuma, AZ.

* * * * *

Issued in Washington, DC, on February 26, 2024.

Frank Lias,

Manager, Rules and Regulations Group.

[FR Doc. 2024–04361 Filed 2–29–24; 8:45 am]

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FEDERAL TRADE COMMISSION

16 CFR Part 461

RIN 3084–AB71

Trade Regulation Rule on Impersonation of Government and Businesses

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: This final rule prohibits the impersonation of government, businesses, and their officials or agents in interstate commerce. This document contains the text of the final rule and the rule's Statement of Basis and Purpose (''SBP''), including a Regulatory Analysis.

DATES: This rule is effective April 1, 2024.

FOR FURTHER INFORMATION CONTACT: Christopher E. Brown (202–326–2825), Attorney, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

A. Advance Notice of Proposed Rulemaking

On December 23, 2021, the Federal Trade Commission (''Commission'' or ''FTC'') published an advance notice of proposed rulemaking (''ANPR'') to address certain deceptive or unfair acts or practices of impersonation.[1] As part of the ANPR, the Commission requested comment on any issues or concerns relevant or appropriate to this rulemaking to combat impersonation of governments, businesses, or their agents, and whether and how to proceed with a notice of proposed rulemaking (''NPRM'').[2] The Commission took comments for 60 days, and received 164 comments from representatives from a broad spectrum of businesses, trade associations, government or law-enforcement organizations, and individual consumers, which are publicly available on this rulemaking's docket at *https://www.regulations.gov/docket/FTC-2021-0077/comments.* Commenters generally expressed support for the Commission's proceeding with the rulemaking. They also voiced deep concerns about the prevalence and harmfulness of both government and business impersonation. No commenter expressed the view that the Commission should not commence the rulemaking. Commenters also offered suggestions for the Commission's consideration in drafting the proposed rule and other recommendations in furtherance of the proposed rulemaking.

B. Notice of Proposed Rulemaking

Based on an extensive review of the comments received in response to the ANPR, the Commission's own history of enforcement, and other considerations that occurred after the ANPR's publication,[3] the Commission published the NPRM on October 17, 2022.[4] In the

NPRM, the Commission stated it has reason to believe impersonation of government, businesses, and their officials or agents is prevalent.[5] The Commission identified no disputed issues of material fact based on the comment record; explained its considerations in developing the proposed rule; solicited additional public comment thereon, including posing specific questions designed to assist the public in submitting comment; and provided interested parties the opportunity to request to present their position orally at an informal hearing.[6] Finally, the NPRM set out the Commission's proposed rule.

In response to the NPRM, the Commission received 78 comments from entities and individuals interested in the proposed rule, discussed in Section III.[7] Although some raised concerns and recommended specific modifications or additions to the Commission's proposal, the majority generally supported the rule proposed in the NPRM. Two commenters timely submitted requests for interested parties to make an oral statement at an informal hearing.[8]

C. Notice of Informal Public Hearing

On March 30, 2023, the Commission published an Initial Notice of Informal Hearing (''Notice of Hearing'').[9] The Notice designated the Commission's Chief Administrative Law Judge, D. Michael Chappell, to serve as the presiding officer of the informal hearing and stated that any member of the public wishing to speak at the informal hearing or make a documentary submission to be placed on the public rulemaking record (or both) should submit a comment on or before April 14, 2023.[10]

On May 4, 2023, Chief Judge Chappell presided over the informal hearing using video conferencing, which enabled the public to watch live from the Commission's website, *https://www.ftc.gov.* Because there were no disputed issues of material fact to resolve, the informal hearing included no cross examination or rebuttal submissions, and the presiding officer made no recommended decision. The informal hearing included oral statements from 14 interested parties.[11] The majority of commenters who presented oral statements at the informal hearing or filed documentary submissions generally expressed strong support for the Commission's proposed rule.[12] Several commenters, however, also expressed concern that the proposed rule language does not explain the circumstances under which the Commission would apply proposed § 461.4, which would prohibit providing the means and instrumentalities to commit violations of government and business impersonation. Some suggested alternative language imposing a scienter requirement to narrow the scope of this provision, discussed in Section III.D.

In crafting the final rule, the Commission has carefully considered the comments received in response to the NPRM and on the rulemaking record, which includes the oral statements and documentary submissions in response to the Notice of Hearing. The final rule contains some changes from the proposed rule. These modifications, discussed in detail in Section III, are based upon input from commenters and careful consideration of relevant law. Section III also discusses commenters' recommendations that the Commission declined to adopt, along with the Commission's reasons for rejecting them. Accordingly, the Commission adopts the proposed rule with limited modifications as discussed below. The rule will take effect April 1, 2024.

II. The Legal Standard for Promulgating the Rule

The Commission is promulgating 16 CFR part 461 pursuant to section 18 of the FTC Act, 15 U.S.C. 57a, the Administrative Procedure Act (''APA''), and Part 1, subpart B of the Commission's Rules of Practice.[13] This authority permits the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

The Commission's Rules of Practice further provide that if the Commission determines to promulgate a rule, it will adopt a SBP, which must address three factors: (1) The prevalence of the acts or practices addressed by the rule; (2) the manner and context in which the acts or practices are unfair or deceptive; and (3) the economic effect of the rule, taking into account the effect on small businesses and consumers.[14] In this section of the preamble, the Commission summarizes its findings regarding each of these factors.

A. Prevalence of Acts or Practices Addressed by the Rule

In its ANPR, the Commission cited public data from the Consumer Sentinel Network database and described its enforcement record, demonstrating government and business impersonation scams are not only highly prevalent but increasingly harmful.[15] In the NPRM, the Commission also took notice of additional indications of prevalence that came after the ANPR's publication.[16] Specifically, the NPRM cited data from a broad spectrum of commenters (businesses, trade associations, and government or law-enforcement organizations) regarding the prevalence of government and business impersonation scams, which echoed the Commission's findings that these schemes are among the most common deceptive or unfair practices affecting U.S. consumers and businesses and continue to be a significant source of consumer injury.[17]

B. Manner and Context in Which the Acts or Practices Are Deceptive or Unfair

A representation, omission, or practice is deceptive if it is material and likely to mislead a consumer acting reasonably under the circumstances.[18] The most frequent allegations in the Commission's enforcement actions involving government and business impersonation pertain to defendants tricking consumers to pay money or disclose personal information by making, expressly or by implication, statements that misrepresent the defendants' identity.[19] Nearly as frequent are allegations of misrepresentations concerning defendants' affiliation with, endorsement or approval by, or other association with a government or business. The Commission has further found false threats of severe consequences and promises of benefits are additional deceptive tactics deployed by government and business impersonators. In the Commission's experience, such claims regarding identity, affiliation, or endorsement are material to consumers making their decision to trust impersonators. The numerous government and business impersonation complaints consumers submit to the Commission each year, as well as comments submitted in connection with this rulemaking proceeding, consistently reference these same concerns. Accordingly, the specific practices described in the preamble to the proposed rule reflect the type of conduct most commonly associated with deceptive and unfair practices pertaining to government and business impersonation.[20]

C. The Economic Effect of the Rule

As part of the rulemaking proceeding, the Commission solicited comment and data (both qualitative and quantitative) on the economic impact of the proposed rule and its costs and benefits.[21] In

issuing the final rule, the Commission has carefully considered the comments received and the costs and benefits of each provision, as discussed in more detail below in Section VI. The record demonstrates the most significant anticipated benefit of the final rule is the Commission's ability to obtain monetary relief. This is particularly critical because that ability was curtailed by the U.S. Supreme Court's decision in *AMG Cap. Mgmt., LLC* v. *FTC,* which holds that equitable monetary relief, including consumer redress, is not available under section 13(b) of the FTC Act.[22] Further, obtaining monetary relief based on violations of the final rule under section 19(b) of the FTC Act will be significantly faster than obtaining such relief under section 19(a)(2) without a rule violation.[23] By enabling the Commission to obtain monetary relief more efficiently, the final rule would also reduce the expenditure of Commission resources.[24] As an additional benefit, the rule enables the Commission to obtain civil penalties against violators.[25] The final rule also provides a benefit to businesses through increased deterrence of business impersonators, which reduces businesses' expenditure of resources associated with monitoring for and addressing impersonation.[26] Moreover, as the record and the Commission's law enforcement experience demonstrate, the final rule is unlikely to impose costs on any honest business, and may increase deterrence of impersonation scams, which would benefit consumers through a reduction in their total financial losses from these schemes.[27]

III. Response to Comments

The Commission received 78 comments in response to the NPRM from a diverse group of individuals, industry groups and trade associations, consumer organizations, and government agencies.[28] The Commission received 28 comments in response to the Notice of Hearing, including oral presentations from 14 commenters.[29] Commenters generally supported the proposed rule, recognizing the Commission's authority to protect consumers from the increasing number of government and business impersonation frauds targeting consumers.

In the NPRM, the Commission invited comment on any issues or concerns the public believes are relevant or appropriate to the Commission's consideration of the proposed rule.[30] The NPRM also posed eight specific questions for the public.[31] Some of these questions relate to the Paperwork Reduction Act (''PRA'') and Regulatory Flexibility Act (''RFA''), and are addressed in Sections V and VI, respectively.[32] The other questions, along with common issues or concerns relevant to the Commission's consideration of the proposed rule outside of the specific questions, are addressed in this section of the preamble.

A. Finalizing the Proposed Rule as a Final Rule

In Question 1 of the NPRM, the Commission asked whether it should finalize the proposed rule as a final rule, and how, if at all, it should change the proposed rule in promulgating the final rule.[33] The majority of commenters did not express a clear view regarding whether the Commission should adopt the proposed rule as final. Many of these commenters, however, did share their experience regarding the prevalence and harmfulness of various kinds of government and business impersonation frauds.[34] Some of these commenters complained more generally about various non-impersonation scams.[35] The majority of commenters that addressed Question 1 of the NPRM were substantially supportive of the proposed rule, but stopped short of urging the Commission to finalize the text of the proposed rule without modification. These commenters typically recommended either broadening or narrowing the scope or text of the rule in response to other specific questions asked in the NPRM or relevant to the Commission's consideration of the proposed rule.[36]

Six commenters explicitly addressed the Commission's question regarding finalizing the proposed rule as a final rule, and without recommending additional modifications to the text of the proposed rule, urged the Commission to do so.[37] Some of these commenters stated the proposed rule is in the public interest because it would allow for civil penalties against government and business impersonators, provide redress for victims of impersonation scams, and deter future bad acts.[38]

Several government agencies and trade associations explained how the proposed rule would benefit them, their members, or the people they serve. The United States Patent and Trademark Office (''USPTO'') described its experience of agency impersonation, and stated that reliance on the FTC's enforcement capabilities through such a rule would allow the USPTO to conserve and allocate its resources to different enforcement efforts that impact the USPTO and its stakeholders.[39] Similarly, the Marine Retailers Association of the Americas (''MRAA''), a trade association representing marine retailers, argued the benefits associated with finalizing the proposed rule would reduce the financial burden on businesses and improve trust among consumers.[40] The United States Copyright Office (''USCO'') expressed support for finalizing the proposed rule, arguing that doing so would allow the Commission to move more quickly to put a stop to impersonation scams.[41] The USPTO and the USCO explained they do not have law enforcement authority to remedy the harms resulting from bad actors impersonating the agencies, and USCO argued the proposed rule would foster public trust in the copyright system.[42] The Cellular Telecommunications and internet Association (''CTIA''), a trade association for wireless service providers, argued in favor of finalizing the proposed rule because its scope is ''targeted and judicious,'' and appropriately focused on the bad actors that harm consumers.[43]

Somos, Inc., which manages registry databases for the telecommunications industry, stated it ''strongly supports the Commission's proposed rules,'' but suggested the Commission explicitly clarify that spoofing a telephone number of a business or government entity to aid in that impersonation violates the rule.[44] The Commission is not persuaded that explicitly stating telephone spoofing, or any specific type of government or business impersonation, constitutes a violation of the rule is necessary.[45] Moreover, the Telemarketing Sales Rule (''TSR'') already bars telemarketers from ''failing to transmit. . .the telephone number and. . .the name of the telemarketer to any caller identification service in use by a recipient of a telemarketing call.'' [46] By definition, a spoofed telephone number is not the number of the telemarketer, and the Commission can rely on this prohibition to bring an enforcement action for violation of the TSR against a telemarketer that uses a spoofed number.

The Commission also received several comments that identified the lack of access to accurate information concerning domain name registrants (commonly known as ''WHOIS'' data) as a significant impediment to combatting the use of domain names to impersonate government and businesses.[47] These commenters expressed support for expanding the text or scope of the final rule to address this issue.[48] In particular, a few commenters urged the Commission to issue a final rule that requires domain name registrars to

collect, verify, maintain, and disclose accurate WHOIS data to the FTC and third-party victims on request for such information based on credible evidence of impersonation fraud.[49] The Coalition for Online Accountability (''COA''), a group advocating for online transparency and accountability, argued ''[t]here is no justification for the redaction of data of legal person registrants or the overwhelming denial of reasonable access to personal WHOIS data for legitimate third-party interests. . . ..'' [50] Both the Messaging Malware Mobile Anti-Abuse Working Group (''M3AAWG'') and the Anti-Phishing Working Group (''APWG'') also suggested the Commission encourage Domain Name System (''DNS'') registries and registrars to engage in DNS mitigation and frequently impersonated entities to participate as ''trusted notifiers'' to address fraudulently registered domain names.[51]

The Commission declines to adopt commenters' suggestion that the final rule expressly reference in accompanying examples the use of domain names in impersonation schemes. Rather, the Commission here repeats what it previously stated in the NPRM and earlier in this SBP, that the following list of examples of conduct covered by the prohibition on the impersonation of government and businesses was intended to be illustrative, not exhaustive: (1) calling, messaging, or otherwise contacting an individual or entity while posing as a government or an officer or agent or affiliate or endorsee thereof, including by identifying a government or officer by name or by implication; (2) sending physical mail through any carrier using addresses, government seals or lookalikes, or other identifying insignia of a government or officer thereof; (3) creating a website or other electronic service impersonating the name, government seal, or identifying insignia of a government or officer thereof or using ''.gov'' or any lookalike, such as ''govusa.com''; (4) creating or spoofing an email address using ''.gov'' or any lookalike; (5) placing advertisements that pose as a government or officer thereof against search queries for government services; (6) using a government seal on a building, letterhead, website, email, vehicle, or other physical or digital place; (7) calling, messaging, or otherwise contacting an individual or entity while posing as a business or an officer or agent or affiliate or endorsee thereof, including by naming a business by name or by implication, such as ''card member services'' or ''the car dealership''; (8) sending physical mail through any carrier using addresses, seals, logos, or other identifying insignia of a business or officer thereof; (9) creating a website or other electronic service impersonating the name, logo, insignia, or mark of a business or a close facsimile or keystroke error, such as ''ntyimes.com,'' ''rnicrosoft.com,'' ''microsoft.biz,'' or ''*carnegiehall.tixsales.com*''; (10) creating or spoofing an email address that impersonates a business; (11) placing advertisements that pose as a business or officer thereof against search queries for business services; and (12) using, without authorization, a business's mark on a building, letterhead, website, email, vehicle, or other physical or digital place.[52] Accordingly, the Commission finds the final rule is drafted with sufficient clarity and flexibility to address the unauthorized use of internet identifiers, including but not limited to domain names.

Only one commenter suggested in response to Question 1 of the NPRM that the proposed rule should not be finalized.[53] The Americans for Prosperity Foundation (''AFPF''), a 501(c)(3) nonpartisan education organization, argued the Commission should ''abandon its Section 18 rulemaking ambitions, instead refocusing its efforts on case-by-case enforcement actions in federal court in cases involving concrete harm to consumers.'' [54]

The Commission disagrees with the AFPF's suggestion that the section 18 rulemaking process is too difficult or unwieldy to address many of the unfair or deceptive acts or practices prevalent in commerce. In 1975, Congress passed the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act laying out specific procedures for the promulgation of ''Trade Regulation Rules'' to protect consumers in a dynamic and changing economic landscape.[55] The Commission's regulations at 16 CFR part 1, subpart B, respect the underlying statutory requirements of section 18, which provide ample transparency and opportunity for public participation in the promulgation of Trade Regulation Rules. The Commission intends therefore to fulfill its mission to protect against unfair or deceptive acts or practices in or affecting commerce and to provide consumers and businesses with due process, clarity, and transparency while crafting the rules to do so. Accordingly, the Commission rightfully responds to Congress's grant of authority by initiating this rulemaking.

The AFPF also expressed various criticisms specific to the language of the proposed rule and recommended several suggested revisions discussed in greater detail in Sections III.C and III.D below.

Following review of all comments and careful consideration of the relevant law, the final rule issued by the Commission contains some minor changes from the proposed rule, as discussed in Section III.

B. Relevant Evidence Regarding Provisions of the Proposed Rule, Prevalence, Impact and Alternative Proposals

In the ANPR, the Commission asked specific questions about the prevalence of impersonation fraud, and requested the data source commenters relied upon for formulating their answer(s).[56] The ANPR also asked specific questions regarding how to craft a proposed rule to maximize the benefits to consumers and minimize the costs to businesses, and what alternatives to regulations the Commission should consider in addressing impersonation frauds.[57] In Question 2 of the NPRM, the Commission posed these same or nearly identical specific questions regarding each different provision of the proposed rule.[58] Six commenters specifically addressed these questions.[59] Each of these commenters described various types of government and business impersonation scams common to their own experience or industry in support of their view that such frauds are highly prevalent.[60] For example, the Toy Association noted various business impersonation scams experienced by its members, including counterfeit or non-compliant toys, falsified documents regarding endorsement and affiliation related to counterfeit toys, false solicitation and phishing schemes collecting customer information, and domain impersonation.[61] Similarly, the USPTO and USCO described several examples of government impersonation scams involving the trademark and copyright registration processes, respectively, and included illustrative examples as attachments with their public comment.[62]

Other commenters particularly concerned with online business impersonation cited data from studies or reports regarding trends in these kinds of impersonation frauds, and recent examples of phishing attacks against consumers through the impersonation of recognized online companies in support of their arguments regarding prevalence.[63] A small number of

commenters addressed the impact (including any benefits and costs) on consumers, governments, and businesses, discussed in more detail in Section VI.

Only one commenter suggested an alternative proposal for the Commission's consideration.[64] Specifically, the M3AAWG recommended as an alternative to the means and instrumentalities provision in proposed § 461.4 that the Commission ''identify best practices or safe harbors to incentivize prompt mitigation efforts and sound verification techniques'' to address the use of domain names in business impersonation schemes.[65] M3AAWG argued this alternative to regulation would avoid the risk of inadvertently imposing ''secondary or intermediary liability against legitimate businesses, technologies or services'' exploited by impersonators.[66]

Upon review of the comments received in response to Question 2 of the NPRM, the Commission concludes such comments support its own findings that government and business impersonation schemes are both prevalent and harmful. The Commission declines at this time to adopt M3AAWG's alternative proposal for § 461.4. As discussed in Section III.D, the Commission is continuing to review comments and records relevant to the means and instrumentalities provision in proposed § 461.4 to determine whether additional action or protections are warranted and is requesting additional public comment through a SNPRM, published elsewhere in this issue of the **Federal Register**.

C. Clarity of Prohibitions Against Impersonation of Government & Businesses

In Question 5 of the NPRM, the Commission solicited comment regarding whether the proposed rule's one-sentence prohibitions against impersonation of government in § 461.2 and against impersonation of businesses in § 461.3 are clear and unambiguous, and how, if at all, they should be improved.[67] The Commission received several comments that addressed this question directly[68] or indirectly.[69] Two commenters considered the one-sentence prohibitions to be clear and unambiguous and/or deferred to the Commission's construction, but suggested certain additions or modifications.[70] For example, the USCO suggested the Commission consider whether the definition of ''officer,'' which covers representatives of both governments and businesses, should be bifurcated into two separate and more specific terms to define representatives of governments and businesses, respectively.[71] No other commenter suggested a revision to the definitions in proposed § 461.1. The USPTO suggested the Commission broaden the exemplary ''list of matter'' used to impersonate a government to specifically reference ''logos.''[72] In support of this recommendation, the USPTO noted ''the use of logos'' was explicitly identified in the NPRM's examples of unlawful conduct that would be covered by the prohibition against business impersonation in proposed § 461.3, but not in the NPRM's examples of unlawful conduct that would be covered by the prohibition of government impersonation in proposed § 461.2. The USPTO further asserted government agencies also ''use logos in addition to official seals and insignia,'' and provided an illustrative example of impersonators misusing the USPTO's logo.[73]

Three commenters indicated the language of proposed §§ 461.2 and 461.3 was vague or provided inadequate guidance, and warranted modification.[74] Some commenters raised constitutional concerns based on the purported overbreadth of the one-sentence prohibitions.[75] These commenters' constitutional arguments addressed two primary considerations: (1) whether the proposed rule provides due process notice;[76] and (2) whether it encroaches upon free speech protected under the First Amendment.[77] The AFPF stated the proposed rule is an ''open-ended regulation,'' arguing it ''fails to provide constitutionally adequate notice of required or prohibited conduct'' and otherwise falls short of section 18's specificity requirements.[78] Other commenters wary of inadvertent intrusions on protected speech asserted any final prohibition should exempt innocent behavior such as parody[79] and non-commercial or otherwise legitimate speech.[80]

In his documentary submission in response to the Notice of Informal Hearing, William MacLeod echoed concerns he previously expressed in response to the NPRM that the language in proposed §§ 461.2 and 461.3 ''depart[s] from the standards of deception that the Commission applies under Section 5.''[81] MacLeod noted that: ''[i]ts terms do not include 'deception' or 'fraud' or critical elements of the FTC's deception policy statement.''[82] He raised additional concerns about ''impersonations and affiliations [that] can be false, but also unbelievable.''[83] MacLeod argued that the prohibitions, as written, are too broad and would proscribe non-deceptive acts or practices, such as ''fictional depictions'' in television advertisements.[84]

Raising First Amendment concerns, the AFPF similarly asserted that the proposed rule's ''falsely pose as'' language, ''read literally,'' would impose civil penalties on ''utterly innocuous conduct'' and ''would appear to make it unlawful for anyone to dress up as an FTC Commissioner, politicians, or . . . a Microsoft executive and attend a Halloween party.''[85] It also expressed concern that the proposed prohibitions did not require ''materiality,'' ''consumer harm,'' or ''connection to interstate commerce.''[86] Several commenters suggested alternative language to cure what they perceived to be the overbreadth of the prohibition provisions. For example, M3AAWG recommended that the final rule adopt a definition of ''impersonation'' that mirrors the definition of ''criminal impersonation'' in 18 U.S.C. Chapter 43.[87] M3AAWG asserted that such a definition would narrow the scope of the rule to cover only those bad actors with ''clear intent and specific knowledge'' of prohibited acts.

MacLeod proposed narrowing the focus of the final rule by adopting language that specifies particular prohibited practices or the *mens rea* of its intended targets.[88] The AFPF agreed with MacLeod and suggested that the Commission revise the proposed rule to ''explicitly incorporate Section 5's statutory prohibition . . . [and] requirements set forth in the Commission's Deception Statement.''[89]

After analyzing and considering the comments, the Commission is persuaded that the language of the final rule should adhere more closely to the language of section 5 of the FTC Act to avoid any potential confusion about the scope of the rule. The Commission believes that these revisions sufficiently address some commenters' concerns that the language of the proposed rule put it in conflict with Due Process requirements and the First Amendment.

The Commission emphasizes that it does not intend for the final rule to regulate non-commercial speech. To adhere more closely to the language of section 5 of the FTC Act and case law, the Commission has revised the final regulatory text to incorporate relevant language from section 5. Specifically, the Commission has replaced ''unlawful'' with ''unfair or deceptive act or practice,'' and added ''materially'' and ''in or affecting commerce'' in §§ 461.2 and 461.3. These changes make it abundantly clear that the scope of the final regulatory text is coterminous with the scope of the FTC's authority under

the FTC Act, and they clearly specify the misconduct prohibited by the final rule. Accordingly, false impersonations or misrepresentations that are not material to a commercial transaction, such as impersonation in purely artistic or recreational costumery or impersonation in connection with political or other non-commercial speech, are not covered by the final rule.

The Commission concludes that it is unnecessary to divide the definition of ''officer'' into two separate terms as suggested by the USCO. Section 461.1 defines ''officer'' to ''include[ ] executives, officials, employees, and agents,'' which the Commission believes appropriately describes and covers both government and business representatives.

As previously stated, the NPRM's list of examples of prohibited conduct covered by the rule is intended to be illustrative, not exhaustive, and therefore, the Commission declines to adopt the USPTO's suggestion that it enlarge that exemplary ''list of matter.'' Rather, the Commission maintains that not including specific prohibitions in the regulatory text provides it with sufficient flexibility to address the many types of ''matter'' (including objects, items, logos, insignia, etc.) used to impersonate governments and businesses alike, which are too numerous to list.

The Commission declines to adopt a definition of ''impersonation'' that reflects a criminal regulatory scheme as proposed by M3AAWG. The FTC Act does not include a *mens rea* requirement, and there is no evidence in the record that the imposition of such a requirement is warranted. Furthermore, while intent is not required under the rule or the FTC Act, in any action seeking civil penalties for violation of the rule, the Commission will need to establish ''actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.'' [90]

The Commission rejects the recommendation by both MacLeod and AFPF to incorporate the FTC Deception Policy Statement into the final rule. Nevertheless, as discussed earlier in this Section III.C, informed by MacLeod's and AFPF's comments, the Commission has revised the regulatory text of §§ 461.2 and 461.3 to mirror the language of section 5 of the FTC Act more closely. In particular, the reference to ''unfair or deceptive act or practice,'' and the inclusion of materiality and interstate commerce requirements should address commenters' concerns that this rule might be read to cover impersonation in connection with artistic costumery, parody, or other non-commercial speech.[91] The Commission further notes that, by the terms of these sections, a court must find that the alleged defendant made an express or implied misrepresentation regarding material information for §§ 461.2 and 461.3 to be violated. For an express or implied misrepresentation regarding material information to be made in violation of the FTC Act and this rule, there must be a representation that misleads consumers acting reasonably under the circumstances regarding material information. Thus, while the Commission rejects the recommendation by both MacLeod and AFPF to incorporate the FTC Deception Policy Statement into the final rule, by incorporating the changes above, the Commission has ensured that the final rule is consistent with the Deception Policy Statement, is consistent with other relevant Commission rules, and provides further specificity regarding the prohibited acts and practices under section 5 of the FTC Act.

D. Prohibition Against Providing Means and Instrumentalities

In Question 6 of the NPRM, the Commission asked whether the final rule should contain the prohibition in proposed § 461.4 against providing the means and instrumentalities for violations against government or business impersonation. The Commission received more than 20 comments that expressly addressed this question.[92] Many of the sentiments reflected in these comments were also echoed by several commenters that presented oral statements in response to the Notice of Informal Hearing.[93]A few commenters arguing for the importance of holding intermediaries accountable for enabling or promoting impersonation schemes encouraged the Commission to finalize the text of the proposed provision without modification.[94] These commenters specifically argued that finalizing the proposed § 461.4 could help to combat impersonation schemes perpetrated by foreign-based scammers—beyond U.S. court jurisdiction—that obtain services from U.S.-based instrumentalities, such as payment processors and internet service providers.[95]

Addressing means and instrumentality liability, both the AFPF and MacLeod reiterated their concerns referenced in Section III.C, regarding section 18's specificity requirements, due process notice, free speech, and conformity to the FTC's Deception Policy Statement.[96] Most commenters who addressed Question 6 expressed support for means and instrumentalities liability, but with some concern or suggested modifications. Some supportive commenters cautioned that the proposed means and instrumentalities provision could be read too broadly.[97] Others expressed the concern that without a specific scienter or knowledge requirement, the proposed rule provision runs the risk of imposing strict liability against innocent and unwitting third-party providers of services or products.[98] Accordingly, several commenters urged the Commission to clarify the scope of means and instrumentalities liability or explicitly include a specific knowledge requirement in the final rule provision.[99]

For example, the Consumer Technology Association (''CTA''), a trade association representing the U.S. consumer technology industry, stated that the Commission's explanation and examples of the ''means and instrumentalities'' provision in the NPRM seem to limit its applicability, but such limitation ''is not squarely reflected in the text of the proposed rule.'' [100] The CTA therefore urged the FTC to clarify that ''means and instrumentalities'' liability applies only ''to entities that have knowledge or consciously avoid knowing that they are making representations being used to commit impersonation fraud.'' USTelecom, a trade association representing the broadband technology industry, argued that a discrepancy exists between the case law, the NPRM's discussion of means and instrumentality liability, and the proposed rule provision. It urged the Commission to ''adjust the proposed language in § 461.4 to codify the requirement that the person *has knowledge or reason to expect* it is providing the means and instrumentalities . . .'' (emphasis in original).[101] Similarly, the American Bar Association Section of Intellectual Property Law suggested that the Commission ''explicitly include [in § 461.4] the language referenced in the [NPRM] from *Shell Oil Co.,* 128 F.T.C. 749 (1999)—acting with 'knowledge or reason to expect that consumers may possibly be deceived as a result.' '' [102]

Other commenters argued that inclusion of a scienter requirement is a necessary but not sufficient modification of the proposed language to impose means and instrumentalities liability. For example, the internet & Television Association (''NCTA''), a trade association for the United States cable television industry, argued that such ''liability requires both providing *deceptive* means and instrumentalities, *e.g.,* providing false or misleading

claims or counterfeit items, and *actual knowledge* that the deceptive representations or goods will be used to commit impersonation violations'' (emphasis in original).[103] Likewise, M3AAWG advocated that, in addition to a ''knowledge or reason-to-know test,'' primary liability under a revised § 461.4 should also require that the provision of such means and instrumentalities be done willfully or in bad faith, and with clear intent and specific knowledge.[104]

A few commenters urged the Commission to adopt a final rule that explicitly recognizes specific or defined ''means and instrumentality'' violations perpetrated in connection with impersonation frauds, such as the use of legal process documents [105] or manipulated media technologies (*i.e.,* deepfakes) [106] or failure to disclose WHOIS data.[107]

Based upon the comments received on the proposed provision regarding means and instrumentalities, the Commission has decided that this specific provision warrants further analysis and consideration; thus, the Commission has decided not to finalize proposed § 461.4. The Commission is not aware of any other rule, whether issued pursuant to section 18 or APA rulemaking authority, that identifies a means and instrumentalities violation. The Commission notes that it has used means and instrumentalities allegations as a type of deception to establish primary liability in the absence of privity between the defendant and the deceived persons, albeit rarely, in connection with matters that involve impersonation.[108] Pending further analysis and consideration, the Commission declines to adopt proposed § 461.4 at this time. The Commission is still considering the provision regarding means and instrumentalities, as well as issues related to the impersonation of individuals or entities other than governments and business in interstate commerce and is requesting public comment through a Supplemental Notice of Proposed Rulemaking (''SNPRM''), published elsewhere in this issue of the **Federal Register**.

E. Inclusion of Prohibition Against Impersonating Nonprofits

In response to the ANPR, the Commission received a number of comments that urged the Commission to include ''nonprofit'' entities in the proposed rule's definition of businesses that can be impersonated.[109] The Commission agreed with these comments, and consequently, defined a ''business'' that may be impersonated to include nonprofits in § 461.1 of the proposed rule, notwithstanding the fact that the Commission is authorized to sue a corporation only when the corporation is ''organized to carry on business for its own profit or that of its members.'' [110] As the Commission explained in the NPRM, the reason for doing so is because for profit businesses may impersonate nonprofit business.[111] In Question 7 of the NPRM, the Commission solicited comment regarding whether any final rule should keep the prohibition against impersonating nonprofit organizations.[112] The Commission received more than a dozen comments that specifically addressed this question, and each of them expressed support for a final rule keeping the prohibition against impersonating nonprofits.[113] None of the comments responding to the NPRM or Notice of Hearing opposed doing so. The vast majority of commenters who addressed this question were themselves nonprofit organizations operating as trade associations, and referenced their own experience with impersonation frauds in support of a final rule keeping the prohibition against impersonating nonprofits.[114] Several commenters expressed the view that nonprofits are often the subject of impersonation scams in the same way as for profit businesses and government agencies.[115] Other commenters asserted that impersonation of nonprofits could be uniquely harmful because bad actors ''prey[ ] on the goodwill of individuals attempting to make donations, and misappropriate[ ] those donations to corrupt private actions.'' [116] Some commenters noted that nonprofits are particularly susceptible to being impersonated in scams involving affiliation or endorsement claims because nonprofits often offer awards or seals of approval.[117]

Finally, two commenters cited trademark law in support of keeping nonprofits in the definition of business and a final rule that includes the prohibition against impersonating nonprofits. Specifically, both INTA and the Toy Association stated that trademark law has ''long recognized that the misuse of names of non-profit organizations can lead to harmful consumer confusion.'' [118] In INTA's and the Toy Association's view, the same applies with respect to impersonation schemes; thus, the final rule should also make no distinction between for profit and nonprofit businesses.

Based upon the record, including public comments in response to Question 7 of the NPRM, the Commission has determined that the final rule will retain the definition of ''business'' in § 461.1 that includes nonprofits and the prohibition against impersonating nonprofit organizations in § 461.3.

F. Inclusion of Individuals or Entities Other Than Government and Business Impersonators

In the NPRM, the Commission asked whether the proposed rule should be expanded to address the impersonation of individuals or entities other than governments and business in interstate commerce.[119] The NPRM identified romance and grandparent impersonation scams as illustrative, but non-exhaustive, examples of other types of impersonation fraud, and solicited further comment regarding their prevalence and impact, and alternative proposals to regulation. Six commenters specifically addressed these questions, and each of them stated that the Commission should expand the reach of the proposed rule to extend beyond government and business impersonators.[120] Some commenters asserted that fraudsters often impersonate individuals in similar ways they impersonate government and businesses.[121] In support of expanding the rule, several commenters argued that romance and grandparent impersonation scams were harmful and prevalent, citing to data from the FTC and other sources showing a steady increase in the number of consumer reports and median individual losses for such scams.[122] A comment submitted by a group of students at Rutgers Law School asserted that older consumers are susceptible to ''interpersonal confidence fraud and romance scams'' and provided relevant data demonstrating that older consumers may be more likely to fall victim to these kinds of impersonation than to government impersonation.[123] Several commenters also stated that while the number of reports of these two types of impersonation scams are not as high as government and business impersonation, they are likely underreported, and that median individual losses are often higher.[124] The AARP stated that, ''[o]f all fraud activity, romance scams and scams impersonating a family member in trouble are the most insidious, given the emotional devastation that combines with often significant financial losses.'' [125] A joint comment submitted by several consumer and privacy advocacy organizations argued that such evidence ''should be sufficient justification'' for the Commission to ''add a subsection to proposed Section 461 to cover 'Impersonation of Individuals.' '' [126]

A few commenters discussed the prevalence and harmfulness of other kinds of impersonation scams as support for expanding the rule beyond government and businesses to include individuals. For example, the NCTA stated that its member companies had observed an increase in sophisticated residential IP address scams that impersonate online subscribers for illegal purposes such as piracy and fraud.[127] NCTA encouraged the Commission to consider a new rule to prohibit impersonation of individuals through ''unauthorized use of an individual's online credentials, accounts, IP addresses, and digital networks.'' [128] The Recording Industry Association of America (''RIAA'') described impersonation scams involving offers of NFTs and mobile apps suggesting affiliation with sound recording artists and phishing scams where third parties claimed to be a music artist's manager or producer.[129] RIAA recommended that the Commission expand the rule to include the following: ''[I]t [is] unlawful to falsely pose as or to misrepresent, directly or by implication, affiliation with, including endorsement or sponsorship by, an individual, for financial gain.'' [130]

The Rutgers Law Students noted the prevalence of social media, and profiles of celebrities and influencers in current modes of online communication, arguing that it would be a ''grave oversight'' to omit persons with such notable identities from a rule prohibiting impersonation.[131] The students also argued that individuals are more likely than government agencies or businesses to suffer direct harm to their identities from impersonation scams and less likely to be able to repair the reputational injuries.[132] Accordingly, they proposed that the Commission add another section to the rule with language prohibiting the impersonation of ''any person'' that parallels the language in §§ 461.2 and 461.3 prohibiting the impersonation of government and businesses, respectively.[133] The students further stated that this additional provision ''closes a loophole'' that proposed §§ 461.2 and 461.3 leave open regarding the impersonation of former government and business officials.[134] Finally, the students concluded that adding such a narrowly drafted provision would not burden honest businesses or individuals, and would benefit consumers because the median individual losses for other kinds of impersonation frauds are often greater than for government and business impersonation.[135] Both the students and the NCTA agreed that expanding the proposed rule to prohibit impersonation of individuals would not impact recreational or comedic impersonations of individuals in television or film.[136]

Upon consideration of the comments received in response to Question 8 of the NPRM and all relevant records and data, the Commission is seeking additional public comment about potentially expanding part 461 to cover impersonation of individuals or entities other than governments and businesses in interstate commerce in a SNPRM published elsewhere in this issue of the **Federal Register**.[137]

G. Requiring Domain Name Registrars To Collect, Verify, Maintain, and Disclose Accurate WHOIS Data

The Commission received several comments that identified the lack of access to accurate information concerning domain name registrants (commonly known as ''WHOIS'' data) as a significant impediment to combatting the use of domain names to impersonate government and businesses.[138] These commenters expressed support for expanding the text or scope of the final rule to protect consumers from this increasingly prevalent impersonation scheme.[139] In particular, a few commenters urged the Commission to issue a final rule that requires domain name registrars to collect, verify, maintain, and disclose accurate WHOIS data to the FTC and third-party victims on request for such information based on credible evidence of impersonation fraud.[140] As previously noted, the COA argued that the redaction or denial of reasonable access to WHOIS data is unjustified.[141] Both M3AAWG and APWG also suggested that the Commission encourage DNS registries or registrars to engage in DNS mitigation and frequently impersonated entities to participate as ''trusted notifiers'' to address fraudulently registered domain names.[142]

Because the deceptive use of internet domain names is already covered under the rule, the Commission declines to adopt commenters' suggestion that the final rule expressly reference in the text or accompanying examples the use of domain names in impersonation schemes. As previously noted in Section III.A, the NPRM's preamble contained a list of examples of conduct covered by the prohibition on the impersonation of government and businesses that was intended to be illustrative, not exhaustive.[143] Such a comprehensive list would be both impossible and would not provide the trade regulation rule with the flexibility to accommodate changes in the marketplace and scammers' behavior. The Commission finds therefore that the final rule is drafted with sufficient clarity and flexibility to address the unauthorized use of internet identifiers, including but not limited to, domain names. Furthermore, the Commission declines to issue a final rule that imposes affirmative requirements upon domain name registrars which is beyond the purview of this rulemaking and doing so arguably would place an impracticable burden upon consumers to know about and verify the trustworthiness of such WHOIS data.

H. Comments Regarding Limitation of Remedies

A small number of commenters urged the Commission to clarify that any final rule regarding impersonation would not limit any rights and remedies already available to businesses and consumers that have been the subject of impersonation.[144] For example, notwithstanding its support of the Commission's rulemaking to address impersonation, the American Bar Association Section of Intellectual Property Law asserted that many government impersonation scams should be referred to the Department of Justice for criminal prosecution, and therefore, cautioned that any regulatory approach ''not dilute the impetus for a criminal law solution.'' [145] Other commenters suggested that the Commission clarify that any final rule is not intended to limit any existing private right of action or civil remedies.[146] Specifically, the Toy Association and INTA both advocated that any final rule on impersonation not be interpreted as limiting the rights and remedies available to trademark owners under the Lanham Act and the Anti-Cybersquatting Consumer Protection Act. INTA further proposed that the Commission issue a clarification that any final rule is intended only to complement—not expand or contract—the legal protections available to private parties under the entire body of federal or state trademark and unfair competition law.[147]

By issuing the final rule regarding government and business impersonation, the Commission does not preempt or intend to preempt action in the same area, which is not inconsistent with this final rule, by any federal, state, municipal, or other local government. This final rule does not annul or diminish any rights or remedies provided to consumers or businesses by any federal, state law, municipal ordinance, or other local regulation, insofar as those rights or

remedies are equal to or greater than those provided by this final rule.

IV. Final Rule

For the reasons described above, the Commission has determined to adopt the provisions of proposed § 461.1 as initially proposed, and the provisions of §§ 461.2 and 461.3 with clarifying modifications. The Commission declines to finalize proposed § 461.4 at this time.

Specifically, the Commission concludes that the proposed definition of ''officer'' is sufficient to cover both government and business representatives, and therefore, need not be divided into two separate terms. Further, the final rule includes a definition of ''materially''—which has been used in other section 18 rules—to avoid potential confusion or potential perceived conflict with non-commercial speech. For these same reasons, the final rule replaces ''unlawful'' with ''unfair or deceptive act or practice'' and adds ''materially'' and ''in or affecting commerce'' in §§ 461.2 and 461.3. Such revised language further clarifies that the rule conforms to the well-established standards for deception and unfairness under the FTC Act. Finally, the Commission declines to finalize the proposed § 461.4 provision regarding means and instrumentalities at this time because further analysis and consideration is warranted based on the record, including comments. The Commission is requesting additional public comment on this provision, and on issues related to the impersonation of individuals or entities other than governments and business in interstate commerce, through a SNPRM, published elsewhere in this issue of the **Federal Register**.

V. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.,* requires federal agencies to seek and obtain Office of Management and Budget (''OMB'') approval before undertaking a collection of information directed to ten or more persons. In Question 3 of the NPRM, the Commission asked commenters whether the proposed rule contained a collection of information.[148] No comments responding to the NPRM or Notice of Hearing addressed this question. While the Commission has revised the rule based on the comments it received, it has not added any new requirements that would collect information from the public. Accordingly, the Commission has determined that there are no new requirements for information collection associated with this final rule.

VI. Regulatory Analysis and Regulatory Flexibility Act Requirements

Under section 22 of the FTC Act, the Commission, when it promulgates a final rule, must issue a ''final regulatory analysis.'' [149] The required contents of this final regulatory analysis are: (1) ''a concise statement of the need for, and the objectives of, the final rule''; (2) ''a description of any alternatives to the final rule which were considered by the Commission''; (3) ''an analysis of the projected benefits and any adverse economic effects and any other effects of the final rule''; (4) ''an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen''; and (5) ''a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.'' [150] Additionally, the Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, requires an agency to provide a Final Regulatory Flexibility Analysis (''FRFA'') with the final rule, if any, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[151]

The NPRM included an Initial Regulatory Flexibility Analysis (''IRFA'') even though the Commission did not expect that the proposed rule would have a significant economic impact on a substantial number of small entities.[152] The Commission invited public comment on the proposed rule's effect on small entities to ensure that no significant impact would be overlooked.[153]

The FTC does not expect that the final rule will have a significant economic impact on a substantial number of small entities, and this SBP serves as notice to the Small Business Administration of the agency's certification of no significant impact. The final rule imposes no disclosure or recordkeeping requirements. As such, both the burdens imposed on small entities and the economic impact of the final rule are likely to be minimal, if any. Furthermore, as noted in the IRFA, the rule does not change the law regarding the legality of government and business impersonation, which are already prohibited by section 5 of the FTC Act.[154] Although the Commission certifies the final rule would not, if promulgated, have a significant impact on a substantial number of small entities, the Commission has determined, nonetheless, it is appropriate to conduct the following FRFA,[155] which incorporates the Commission's initial findings, as set forth in the NPRM,[156] addresses the required contents of the final regulatory analysis, and describes the steps the Commission has taken in the final rule to minimize its impact on small entities.

A. Concise Statement of the Need for, and Objectives of, the Final Rule

Based upon the record, including public comments, the Commission is implementing the rule to expand the remedies available to it to combat government and business impersonation deception. Throughout this rulemaking proceeding, the Commission has described how the U.S. Supreme Court decision in *AMG Cap. Mgmt., LLC* v. *FTC,* 141 S. Ct. 1341, 1352 (2021) overturned how section 13(b) of the FTC Act had historically been understood for 40 years to provide equitable monetary relief, and made it significantly more difficult for the Commission to obtain money for injured consumers.[157] The objective of this final rule is to make available a shorter, faster and more efficient path for recovery of money for injured consumers directly through federal court action in Commission enforcement actions involving impersonation of government or business.[158] Further, the rule would deter illegal impersonation and allow for the imposition of civil penalties, where appropriate.[159]

B. Discussion of Significant Alternatives the Commission Considered That Would Accomplish the Stated Objectives of the Final Rule and That Would Minimize Any Significant Economic Impact of the Final Rule on Small Entities

Through the NPRM, the Commission requested public comment on what impact (including costs) will be incurred by existing and future businesses to comply with the proposed rule, and whether the Commission should consider alternative proposals to the proposed rule.[160] This information was requested by the Commission to minimize the final rule's burden on all businesses, including small entities. As explained throughout this SBP, the Commission has considered the comments and alternatives proposed by commenters and finds the final rule will not create a significant economic impact on small entities.[161] Indeed, the type of deception that will be unlawful under the final rule is already unlawful under the FTC Act, but the final rule would allow the Commission to obtain monetary relief more efficiently than it could solely under section 19(a)(2) of

the FTC Act (*i.e.,* without a rule violation). Accordingly, the Commission does not propose any specific small entity exemption or other significant alternatives.

C. Summary of Significant Issues Raised by the Public Comments in Response to the Preliminary Regulatory Analysis and IRFA

None of the comments received during the public comment period raised any significant issues in response to the preliminary regulatory analysis required pursuant to section 22 of the FTC Act.[162] In the IRFA, however, the Commission sought comment regarding the impact of the proposed rule and any alternatives the Commission should consider, with a specific focus on the effect of the rule on small entities. In the NPRM, the Commission reiterated this request for comment in Question 4, asking whether the proposed rule, if promulgated, would have a significant impact on a substantial number of small entities. Two commenters that specifically addressed the impact of the proposed rule on small entities stated it would have a beneficial economic impact by reducing the time and financial burden small entities expend on fighting impersonation frauds.[163] One commenter urged the Commission not to implement a final rule that would require third-party providers of government filing services to include extensive disclosures in their marketing materials, arguing such disclosure requirements could lead to small businesses declining the offered services and falling out of compliance with government filing obligations.[164] This commenter, however, did not identify any proposed disclosure requirements that were the subject of his concern, nor does the Commission impose any such disclosure requirements in connection with the final rule. None of the comments responding to the NPRM or Notice of Hearing disputed the analysis in the IRFA. Finally, the Small Business Administration did not submit comments.

After reviewing the public comments on the proposed rule, as discussed throughout this SBP, the Commission concludes the final rule will not unduly burden small entities. The Commission's explanation in the IRFA regarding the proposed rule is true of the final rule—it only constitutes a significant economic impact for small entities violating existing law, which are not entitled to procedural protections when agencies consider rulemaking.[165]

D. Analysis of Projected Benefits and Adverse Effects of the Final Rule

In the NPRM, the Commission invited public comment and data on any benefits and costs of proceeding with the rulemaking to inform a final regulatory analysis.[166] In issuing the final rule, the Commission has carefully considered the comments received and the costs and benefits of each provision. As discussed throughout this SBP, the Commission believes, and the record demonstrates, the final rule would provide several benefits to consumers, businesses, and competition, and help preserve agency resources, without imposing any significant adverse effects.

The Commission's explanation in the IRFA regarding the proposed rule is true of the final rule—it is difficult to quantify with precision what all its benefits may be, but it is helpful to begin with the scope of the problem the final rule would address, and then describe the benefits qualitatively. As discussed in the NPRM, reported consumer losses due to government impersonation topped $445 million in 2021; [167] and as anticipated, remained large, and even increased substantially, with total consumer losses of $513 million reported in 2022 and more than $483 million for the first ten months of 2023.[168] Similarly, the annual consumer loss reported due to business impersonation has increased from $453 million in 2021 to $670 million in 2022.[169] Accordingly, the most significant anticipated benefit of the final rule is that it will allow the Commission to provide monetary relief to victims of rule violations and seek civil penalties against violators.[170] Furthermore, the final rule should reduce economic harm resulting from impersonation because its potential deterrent effects make it less likely impersonators get to keep their ill-gotten gains and more likely they must pay civil penalties.

The final rule also would provide the benefit of a shorter path to obtaining consumer redress because the Commission could directly pursue in federal court section 19 remedies in government and business impersonation enforcement actions that do not implicate an existing rule. The availability of more immediate consumer redress in federal court under section 19 would allow the Commission to reduce the expense of litigating and minimize the litigation fora and scope. The Commission could then apply the savings of these enforcement resources to investigating and, where the facts warrant, bringing enforcement actions in additional impersonation matters.

The final rule also would benefit businesses whose brands are harmed by impersonators.[171] As several commenters have mentioned, a final rule that would allow the Commission to bring enforcement actions more efficiently against impersonators would save businesses the time and other resources dedicated to monitoring and combatting these kinds of deception.

The record is devoid of any evidence suggesting the final rule would cause harm or adversely impact economic conditions.

E. Description and an Estimate of the Number of Small Entities to Which the Final Rule Will Apply, or Explanation Why No Estimate Is Available

Small entities engaging in the impersonation of government and business potentially may be found across a variety of industries and economic sectors, but industry and sector data do not identify entities by such conduct. Accordingly, it is not possible to estimate the number of small entities to which the final rule will apply. However, because the Commission finds the final rule will not impose any recordkeeping or other compliance costs on covered entities, the Commission concludes the final rule will not have a significant impact on a substantial number of small entities, notwithstanding the lack of data on how many small entities will be covered by the final rule.

F. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirements of the Final Rule and the Type of Professional Skills That Will Be Necessary To Implement the Final Rule

The final rule does not have any reporting or recordkeeping requirements.[172] As explained previously, the final rule would apply to no small entities other than small entities violating existing law, and therefore, no classes of small entities will be subject to the requirements of the final rule. Finally, no professional skills are necessary for compliance with the final rule other than honesty and integrity.

G. An Explanation of the Reasons for the Determination of the Commission That the Final Rule Will Attain Its Objectives in a Manner Consistent With Applicable Law and the Reasons the Particular Alternative Was Chosen

The Commission's primary objective in commencing this rulemaking was to

expand the remedies available to it in combatting two prevalent categories of impersonation scams most frequently reported by consumers—government impersonators and business impersonators. As explained throughout this SBP, based upon the record, including public comments, the Commission finds the final rule will attain this objective in a manner consistent with applicable law.

The final rule is straightforward and defines with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1). It also avoids novelty by borrowing from existing rules and statutory definitions.[173] At the same time, the final rule is drafted with sufficient flexibility to address the various types of conduct covered by the prohibition on the impersonation of government and businesses. Furthermore, this rulemaking has provided ample transparency and opportunity for public participation in accordance with the underlying statutory requirements of section 18 of the FTC Act, 15 U.S.C. 57a, the Administrative Procedure Act, and Part 1, subpart B of the Commission's Rules of Practice.[174]

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

Endnotes

[1] Fed. Trade Comm'n, Advance Notice of Proposed Rulemaking: Trade Regulation Rule on Impersonation of Government and Businesses, 86 FR 72901 (Dec. 23, 2021), *https://www.federalregister.gov/documents/2021/12/23/2021-27731/trade-regulation-rule-on-impersonation-of-government-and-businesses.*

[2] *See id.* at 72904.

[3] Those included, among others, numerous reports of government impersonation scams reported to federal agencies as reflected in the following public announcements. On March 7, 2022, the Federal Bureau of Investigation issued a Public Service Announcement ''warning the public of ongoing widespread fraud schemes in which scammers impersonate law enforcement or government officials in attempts to extort money or steal personally identifiable information.'' Similarly, on May 20, 2022, multiple federal law enforcement agencies issued a scam alert spearheaded by the Social Security Administration's Office of the Inspector General warning the public of government impersonation scams involving the reproduction of federal law enforcement credentials and badges. On June 3, 2022, the Commission issued a press release noting that in some impersonation scams, fraudsters have instructed consumers to convert cash into cryptocurrency under false threats of government investigations or fraud. *See* Fed. Trade Comm'n, Notice of Proposed Rulemaking: Trade Regulation Rule on Impersonation of Government and Businesses, 87 FR 62741, 62742 (Oct. 17, 2022), *https://www.federalregister.gov/documents/2022/10/17/2022-21289/trade-regulation-rule-onimpersonation-of-government-and-businesses.*

[4] *See id.* at 62741–51.

[5] *See id.* at 62741–42.

[6] *Id.* at 62750.

[7] *See* Fed. Trade Comm'n, Trade Regulation Rule on Impersonation of Government and Businesses, *https://www.regulations.gov/docket/FTC-2022-0064/* comments.

[8] Cindy L. Brown and Raye Mitchell, Cmt. on NPRM at 9 (Dec. 19, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0077* (''Brown Cmt.''); William MacLeod, Cmt. on NPRM at 2 (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0078* (''MacLeod Cmt.'').

[9] Fed. Trade Comm'n, Initial Notice of Informal Hearing: Trade Regulation Rule on Impersonation of Government and Businesses, 88 FR 19024 (Mar. 30, 2023), *https://www.federalregister.gov/documents/2023/03/30/2023-06537/trade-regulation-rule-on-impersonation-of-government-and-businesses.* This Initial Notice of Informal Hearing also served as the Final Notice of Informal Hearing. The Commission determined William MacLeod's comment in response to the NPRM represented an ''adequate request'' for such an informal hearing. The comment from Cindy Brown explicitly requesting to make a presentation at an informal hearing also represented an ''adequate request'' triggering the Commission's obligation to hold an informal hearing but was inadvertently omitted from inclusion in the Initial Notice of Informal Hearing.

[10] Because this informal hearing was the first held in several decades, the Commission allowed interested parties to request the opportunity to make an oral comment in response to the Notice of Informal Hearing as well as the NPRM. However, the Commission noted that in the future it may limit oral statements to those who requested to make an oral statement in response to the NPRM, as provided for in the Rules of Practice. *Id.* at 19025 n.24.

[11] Although Cindy Brown did not submit a request to make an oral statement in response to the Notice of Hearing, she was permitted to make an oral statement at the hearing based upon her prior comment in response to the NPRM in which she explicitly stated her interest ''in making a presentation at an informal hearing.''

[12] The Notice of Informal Public Hearing comments addressing specific provisions of the rule or questions in the NPRM soliciting public comment are discussed in Section III within the substantive discussions on the relevant provisions.

[13] 5 U.S.C. 551 *et seq.;* 16 CFR 1.7–1.20.

[14] Rules of Practice, 16 CFR 1.14(a)(1)(i)–(iii). In addition, in accordance with 16 CFR 1.14(a)(2), the regulatory analysis is provided in Section VI of this SBP.

[15] ANPR, 86 FR at 72901; *see* also Fed. Trade Comm'n, Explore Government Imposter Scams, TABLEAU PUBLIC, *https://public.tableau.com/app/profile/federal.trade.commission/viz/GovernmentImposter/Infographic.*

[16] NPRM, 87 FR at 62742.

[17] *Id.* at 62742–46.

[18] *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174 (1984); *see also In re POM Wonderful LLC,* No. 9344, 2013 WL 268926, at *18 (Jan. 16, 2013).

[19] ANPR, 86 FR at 72901.

[20] NPRM, 87 FR at 62746–47.

[21] ANPR, 86 FR at 72903–04; *see also* NPRM, 87 FR at 62748–49.

[22] *See* AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1352 (2021).

[23] *See* 15 U.S.C. 57b(a) and (b); *see also* NPRM, 87 FR at 62746 (discussing AMG Cap. Mgmt.).

[24] The Commission can recover money for consumers directly through a federal court action or obtain civil penalties directly from a federal court when the Rule has been violated. Without the Rule, the path to monetary relief is longer, and requires the Commission to first issue a final cease-and-desist order—which might not become final until after the resolution of any resulting appeal. Then, to recover money for consumers, the Commission must prove that the violator engaged in fraudulent or dishonest conduct in a second action in federal court. *See* 15 U.S.C. 57b(a) and (b).

[25] *See* section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A) (providing that violators of a trade regulation rule ''with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule'' are liable for civil penalties for each violation). In addition, any entity or person who violates such a rule (irrespective of the state of knowledge) is liable for injury caused to consumers by the rule violation. The Commission may pursue such recovery in a suit for consumer redress under section 19 of the FTC Act, 15 U.S.C. 57b.

[26] NPRM, 87 FR at 62749.

[27] *Id.*

[28] *https://www.regulations.gov/document/FTC-2021-0077-0001/comment.*

[29] *https://www.regulations.gov/docket/FTC-2023-0030/comments.*

[30] NPRM, 87 FR at 62750.

[31] *Id.*

[32] *Id.,* Question 3 (Does the proposed rule contain a collection of information?) and Question 4 (Would the proposed rule, if promulgated, have a significant economic impact on a substantial number of small entities? If so, how could it be modified to avoid a significant economic impact on a substantial number of small entities?)

[33] NPRM, 87 FR at 62750.

[34] *See, e.g.,* Anonymous, Cmt. on NPRM (Nov. 3, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0011* (describing impersonation of accounts payable in medical device industry); Bernadette Padilla, Cmt. on NPRM (Nov. 8, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0014* (describing police impersonation scam involving stolen PII); Anonymous Meeting Planner, Cmt. on NPRM (Dec. 6,

2022), *https://www.regulations.gov/comment/FTC-2022-0064-0030* (describing attendee list and hotel reservation impersonation scams); California IT in Education, Cmt. on NPRM (Nov. 9, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0034* (describing attendee list impersonation scam); Illinois Landscape Contractors Association, Cmt. on NPRM (Dec. 12, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0038* (describing attendee list and hotel reservation impersonation scams).

[35] *See e.g.,* Salina Maddox, Cmt. on NPRM (Oct. 22, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0003* (spam calls); Tatiana Alvarez, Cmt. on NPRM (Nov. 22, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0008* (Romanian mob scam); Tinee Carraker, Cmt. on NPRM (Nov. 4, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0012* (foreclosure scam); Susan Rounsley, Cmt. on NPRM (Nov. 6, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0013* (violations of Do Not Call requirements).

[36] *See, e.g.,* Suhkvir Singh/Rutgers Law School Students, Cmt. on NPRM (Nov. 22, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0019* (''Rutgers Law Students/Singh Cmt.''); AIM, the European Brands Association, Cmt. on NPRM (Dec. 13, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0041* (''AIM Cmt.''); The Messaging Malware Mobile Anti-Abuse Working Group, Cmt. on NPRM (Dec. 15, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0051* (''M3AAWG Cmt.''); The International Trademark Association, Cmt. on NPRM (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0054* (''INTA Cmt.''); Electronic Privacy Information Center, National Consumer Law Center, National Consumers League, Consumer Action, Consumer Federation of America, National Association of Consumer Advocates, and U.S. PIRG, Cmt. on NPRM (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0070* (''EPIC Cmt.''); Recording Industry Association of America, Cmt. on NPRM (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0064* (''RIAA Cmt.'').

[37] United States Patent and Trademark Office, Cmt. on NPRM at 2–3 (Dec. 2, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0026* (''USPTO Cmt.''); INTA Cmt. on NPRM; United States Copyright Office, Cmt. on NPRM (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0067* (''USCO Cmt.''); The Toy Association, Inc., Cmt. on NPRM at 2 (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0069* (''Toy Cmt.''); Cellular Telecommunications and Internet Association, Cmt. on NPRM (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0066* (''CTIA Cmt.''); Marine Retailers Association of the Americas, National Marine Manufacturers Association, National RV Dealers Association, Cmt. on NPRM (Dec. 19, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0076* (''MRAA Cmt.'').

[38] *See, e.g.,* USPTO Cmt. on NPRM at 2–3; USCO Cmt. on NPRM at 2; Toy Cmt. on NPRM at 2; CTIA Cmt. on NPRM at 3; MRAA Cmt. on NPRM at 4. *See also supra,* note 25.

[39] USPTO Cmt. on NPRM at 2–3.

[40] MRAA Cmt. on NPRM at 4.

[41] USCO Cmt. on NPRM at 2–3.

[42] *Id.;* USPTO Cmt. on NPRM at 2.

[43] CTIA Cmt. on NPRM at 5, 7.

[44] Somos, Inc., Cmt. on NPRM at 2–3 (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0068* (''Somos Cmt.'').

[45] In explaining the scope of the proposed rule, the NPRM provided an illustrative, but non-exhaustive, list of unlawful conduct that would be covered by the prohibitions against impersonating government and businesses. NPRM, 87 FR at 62746–47. That list merely provides examples as it would be impracticable to list all possible violative conduct.

[46] 16 CFR 310.4(a)(8).

[47] USTelecom Cmt. on NPRM at 2; M3AAWG Cmt. on NPRM at 3–4; RIAA Cmt. on NPRM at 3; Anti-Phishing Working Group, Cmt. on NPRM at 1–2 (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0073* (''APWG Cmt.''), *https://www.regulations.gov/comment/FTC-2022-0064-0073* (''APWG Cmt.''); Coalition for Online Accountability, Cmt. on NPRM at 1–3 (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0074* (''COA Cmt.''); INTA Cmt. on NPRM at 8–10; Coalition for a Secure & Transparent Internet, Cmt. on NPRM at 1 (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0065* (''CSTI Cmt.'').

[48] *Id.*

[49] M3AAWG Cmt. on NPRM at 3–4; RIAA Cmt. on NPRM at 3–4; AIM Cmt. on NPRM at 1; COA Cmt. on NPRM at 1–3; INTA Cmt. on NPRM at 8–10.

[50] COA Cmt. on NPRM at 2.

[51] M3AAWG Cmt. on NPRM at 3–4; APWG Cmt. on NPRM at 1–2; *see also* APWG, Cmt. on Informal Hearing at 1–2 (Apr. 14, 2023), *https://www.regulations.gov/comment/FTC-2023-0030-0027* (''APWG IH Cmt.'').

[52] *See* NPRM, 87 FR at 62746–47. The example of voice cloning—a relatively new technology—emphasizes the need for an illustrative, but non-exhaustive, list of unlawful conduct. Audio deepfakes, including voice cloning, are generated, edited, or synthesized by artificial intelligence, or ''AI,'' to create fake audio that seems real. *See* Khanjani, et. al., How Deep are the Fakes? Focusing on Audio Deepfake: A Survey, available at *https://arxiv.org/ftp/arxiv/papers/2111/2111.14203.pdf.*

[53] Americans for Prosperity Foundation, Cmt. on NPRM at 1–2 (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0062* (''AFPF Cmt.'').

[54] *Id.* at 1.

[55] Public Law 93–637, 88 Stat. 2183 (1975).

[56] ANPR, 86 FR at 72904.

[57] *Id.*

[58] NPRM, 87 FR at 62750, Question 2.

[59] USPTO Cmt. on NPRM at 3–9; M3AAWG Cmt. on NPRM at 6–9; INTA Cmt. on NPRM at 3–5; Toy Cmt. on NPRM at 3–5; USCO Cmt. on NPRM at 3–7; MRAA Cmt. on NPRM at 2–4.

[60] USPTO Cmt. on NPRM at 3–9; M3AAWG Cmt. on NPRM at 6–9; INTA Cmt. on NPRM at 3–5; Toy Cmt. on NPRM at 3–5; USCO Cmt. on NPRM at 3–7; MRAA Cmt. on NPRM at 2–4.

[61] Toy Cmt. on NPRM at 3–5.

[62] USPTO Cmt. on NPRM at 3–9; USCO Cmt. on NPRM at 3–4;

[63] INTA Cmt. on NPRM at 3; M3AAWG Cmt. on NPRM at 7.

[64] M3AAWG Cmt. on NPRM at 9.

[65] *Id.*

[66] *Id.*

[67] NPRM, 87 FR at 62750, Question 5.

[68] USCO Cmt. on NPRM at 8; USPTO Cmt. on NPRM at 10; INTA Cmt. on NPRM at 6–7; M3AAWG Cmt. on NPRM at 9; MacLeod Cmt. on NPRM at 1–2; AFPF Cmt. on NPRM at 3–6.

[69] NetChoice Cmt. on NPRM at 2; Toy Cmt. on NPRM at 2; ZoomInfo Technologies LLC, Cmt. on NPRM at 1–2 (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0079* (''Zoom NPRM Cmt.'').

[70] USCO Cmt. on NPRM at 8; USPTO Cmt. on NPRM at 10.

[71] USCO Cmt. on NPRM at 8.

[72] USPTO Cmt. on NPRM at 10.

[73] *Id.* at 9–10.

[74] MacLeod Cmt. on NPRM at 2; AFPF Cmt. on NPRM at 3; M3AAWG Cmt. on NPRM at 9.

[75] M3AAWG Cmt. on NPRM at 2; NetChoice Cmt. on NPRM at 2; Toy Cmt. on NPRM at 2; AFPF Cmt. on NPRM at 2, 4; Zoom Cmt. on NPRM at 1; INTA Cmt. on NPRM at 5–6; William MacLeod, Cmt. on Informal Hearing at 5–7 (Apr. 14, 2023), *https://www.regulations.gov/comment/FTC-2023-0030-0019* (''MacLeod IH Cmt.'').

[76] AFPF Cmt. on NPRM at 2, 4; *see also* MacLeod IH Cmt. at 2.

[77] AFPF Cmt. on NPRM at 3, 4. M3AAWG Cmt. on NPRM at 2; NetChoice Cmt. on NPRM at 2; INTA Cmt. on NPRM at 5–6; Toy Cmt. on NPRM at 2; Zoom Cmt. on NPRM at 1; MacLeod IH Cmt. at 5–7.

[78] AFPF Cmt. on NPRM at 2, 6.

[79] NetChoice Cmt. on NPRM at 2; M3AAWG Cmt. on NPRM at 3.

[80] AFPF Cmt. on NPRM at 4; INTA Cmt. on NPRM at 5–6; Toy Cmt. on NPRM at 2; Zoom Cmt. on NPRM at 1; MacLeod IH Cmt. at 5.

[81] MacLeod IH Cmt. at 1; *see also* MacLeod Cmt. on NPRM at 1.

[82] MacLeod IH Cmt. at 2.

[83] *Id.* at 3.

[84] *Id.* at 3.

[85] AFPF Cmt. on NPRM at 3–4.

[86] *Id.* at 3, 5–6.

[87] M3AAWG Cmt. on NPRM at 9.

[88] *Id.* at 1, 5.

[89] AFPF Cmt. on NPRM at 5.

[90] *See* 15 U.S.C. 45(m)(1)(A).

[91] *See Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 563–64 (1980) (''[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.'') (citations omitted); *see also Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626, 638 (1985) (holding it is ''well settled'' that ''[t]he States and the Federal Government are free

to prevent the dissemination of commercial speech that is false, deceptive, or misleading'').

[92] USPTO Cmt. on NPRM; Anonymous, Cmt. on NPRM (Dec. 9, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0033* (''0033 Cmt.''); AIM Cmt. on NPRM; Erik M. Pelton & Associates, PLLC, Cmt. on NPRM (Dec. 14, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0045;* NetChoice Cmt. on NPRM; M3AAWG Cmt. on NPRM; Consumer Technology Association, Cmt. on NPRM (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0073* (''CTA Cmt.''); NCTA—The internet and Television Association, Cmt. on NPRM (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0071* (''NCTA Cmt.''); ASAE Cmt. on NPRM; INTA Cmt. on NPRM; Somos Cmt. on NPRM; CTIA Cmt. on NPRM; USCO Cmt. on NPRM; USTelecom Cmt. on NPRM; American Society of Association Executives, Center for Exhibition Industry Research Destinations International, Exhibition Services & Contractors Association, Exhibitions & Conferences Alliance, Experiential Designers + Producers Association, International Association of Exhibitions & Events, International Association of Venue Managers, PCMA, Society of Independent Show Organizers, UFI, Cmt. on NPRM (Dec 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0060* (''ECA Cmt.''); RIAA Cmt. on NPRM; American Bar Association Section of Intellectual Property Law, Cmt. on NPRM at 3 (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0061* (''ABA–IPL Cmt.''); AFPF Cmt. on NPRM; Zoom Cmt. on NPRM; American Bankers Association, ACA International, American Association of Healthcare Administrative Management, Credit Union National Association, Mortgage Bankers Association National Association of Federally-Insured Credit Unions (the Associations), Cmt. on NPRM (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0080* (''Assocns. Cmt.''); COA Cmt. on NPRM; MacLeod Cmt. on NPRM; Brown Cmt. on NPRM.

[93] A copy of the transcript of the May 4, 2023 Informal Hearing is available at *https://www.ftc.gov/system/files/ftc_gov/pdf/impersonationruleinformalhearingtranscript.pdf.* References to the transcript from the May 4, 2023 Informal Hearing are cited herein as: Name of commenter, May 2023 Tr at page no. (*e.g.,* Doe, May 2023 Tr at #); *see* CTA, May 2023 Tr at 16; MacLeod, May 2023 Tr at 27; USTelecom, May 2023 Tr at 30; Chilson, May 2023 Tr at 34; VON, May 2023 Tr at 36; American Bankers Association (ABA), May 2023 Tr at 39–40; INCOMPAS, May 2023 Tr at 42, 44; NCTA, May 2023 Tr at 51–52.

[94] USPTO Cmt. on NPRM at 10; USCO Cmt. on NPRM at 8; RIAA Cmt. on NPRM at 3; ABA, May 2023 Tr at 39–40.

[95] USPTO Cmt. on NPRM at 10; USCO Cmt. on NPRM at 8; RIAA Cmt. on NPRM at 3; ABA, May 2023 Tr at 39–40.

[96] AFPF Cmt. on NPRM at 3–5; MacLeod IH Cmt. at 6–7; McLeod, May 2023 Tr at 27.

[97] 0033 Cmt. on NPRM; ABA–IPL Cmt. on NPRM at 2; Zoom Cmt. on NPRM at 1.

[98] ABA–IPL Cmt. on NPRM at 1–2; NetChoice Cmt. on NPRM at 2; USTelecom Cmt. on NPRM at 2; *see also* CTA, May 2023 Tr at 16; VON, May 2023 Tr at 36; ABA, May 2023 Tr at 39–40; INCOMPAS, May 2023 Tr at 42.

[99] NetChoice Cmt. on NPRM at 2; CTA Cmt. on NPRM; American Society of Association Executives, Cmt. on NPRM at 1 (Dec. 16, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0057* (''ASAE Cmt.''); INTA Cmt. on NPRM; Somos Cmt. on NPRM; CTIA Cmt. on NPRM at 7; USTelecom Cmt. on NPRM at 2; ECA Cmt. on NPRM at 3; ABA–IPL Cmt. on NPRM at 3; Zoom Cmt. on NPRM at 2; Cmt. on NPRM at 3; *see also* CTA, May 2023 Tr at 16; MacLeod, May 2023 Tr at 27; USTelecom, May 2023 Tr at 30; Chilson, May 2023 Tr at 34; VON, May 2023 Tr at 36; INCOMPAS, May 2023 Tr at 42, 44; NCTA, May 2023 Tr at 51–52.

[100] CTA Cmt. on NPRM at 7.

[101] USTelecom Cmt. on NPRM at 2.

[102] ABA–IPL Cmt. on NPRM at 3.

[103] NCTA Cmt. on NPRM at 2.

[104] M3AAWG Cmt. on NPRM at 10.

[105] Brown Cmt. on NPRM at 8.

[106] M3AAWG Cmt. on NPRM at 3.

[107] COA Cmt. on NPRM at 3; M3AAWG Cmt. on NPRM at 4–5. ''WHOIS data'' is a commonly used internet record listing that identifies who owns a domain and how to get in contact with them.

[108] *See, e.g.,* Compl. at 3–5 & Ex. H, *FTC* v. *Moore,* No. 5:18–cv–01960 (C.D. Cal. filed Sept. 13, 2018) (alleging that a seller of variety of fake but genuine-looking financial documents provided to others the means and instrumentalities with which to make misrepresentations regarding a person's identity).

[109] NPRM, 87 FR at 62746.

[110] *Id.* at 62751; *see also* 15 U.S.C. 44.

[111] NPRM, 87 FR at 62747.

[112] *Id.* at 62750.

[113] Minnesota Nursery & Landscape Association, Cmt. on NPRM at 2 (Dec. 2, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0027;* Louise Nemmers, Cmt. on NPRM (Dec. 5, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0028;* California Landscape Contractors Association, Cmt. on NPRM (Dec. 6, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0029;* Outdoor Power Equipment Institute, Cmt. on NPRM at 2 (Dec. 7, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0032;* AIM Cmt. on NPRM at 2; AARP, Cmt. on NPRM (Dec. 14, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0043* (''AARP Cmt.''); Minnesota Municipal Utilities Association, Cmt. on NPRM (Dec. 14, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0048;* M3AAWG Cmt. on NPRM at 10; CTA Cmt. on NPRM; ASAE Cmt. on NPRM; INTA Cmt. on NPRM; Toy Cmt. on NPRM at 6; RIAA Cmt. on NPRM at 2; National Association of Broadcasters, Cmt. on NPRM (Dec. 19, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0075;* MRAA Cmt. on NPRM at 4.

[114] *See, e.g.,* Toy Cmt. on NPRM at 6; MRAA Cmt. on NPRM at 4; AARP Cmt. at 2; CTA Cmt. on NPRM at 1; ASAE Cmt. on NPRM; RIAA Cmt. on NPRM at 1; INTA Cmt. on NPRM at 2.

[115] AIM Cmt. on NPRM at 2; M3AAWG Cmt. on NPRM at 10; CTA Cmt. on NPRM at 1.

[116] Toy Cmt. on NPRM at 6; INTA Cmt. on NPRM at 6.

[117] Toy Cmt. on NPRM at 6; RIAA Cmt. on NPRM at 3.

[118] INTA Cmt. on NPRM at 6; Toy Cmt. on NPRM at 6.

[119] NPRM, 87 FR at 62750.

[120] Rutgers Law Students/Singh Cmt. on NPRM; AIM Cmt. on NPRM; AARP Cmt. on NPRM; NCTA Cmt. on NPRM; EPIC Cmt. on NPRM; RIAA Cmt. on NPRM.

[121] AIM Cmt. on NPRM at 2; Rutgers Law Students/Singh Cmt. on NPRM at 1.

[122] Rutgers Law Students/Singh Cmt. on NPRM at 1–2; AARP Cmt. on NPRM at 2; EPIC Cmt. on NPRM at 5.

[123] Rutgers Law Students/Singh Cmt. on NPRM at 1–2.

[124] Rutgers Law Students/Singh Cmt. on NPRM at 2–4; AARP Cmt. on NPRM at 1–2; EPIC Cmt. on NPRM at 4–5.

[125] AARP Cmt. on NPRM at 2.

[126] EPIC Cmt. on NPRM at 5.

[127] NCTA Cmt. on NPRM at 3, 8.

[128] *Id.*

[129] RIAA Cmt. on NPRM at 3.

[130] *Id.* at 2.

[131] Rutgers Law Students/Singh Cmt. on NPRM at 2.

[132] *Id.*

[133] *Id.* at 3.

[134] *Id.*

[135] *Id.* at 3–4.

[136] *Id.;* NCTA Cmt. on NPRM at 8, n. 16.

[137] The Commission also is exploring other tools to address the fake endorsement concerns raised by the RIAA and Rutgers Law School Students. Specifically, in the Commission's proposed Rule on the Use of Consumer Reviews and Testimonials, § 465.2 would prohibit businesses from purchasing a consumer review, or from disseminating or causing the dissemination of a consumer testimonial or celebrity testimonial when the business knew or should have known it was false or fake. *See* Fed. Trade Comm'n, Notice of Proposed Rulemaking: Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 FR 49364, 49391 (Jul. 31, 2023), *https://www.federalregister.gov/documents/2023/07/31/2023-15581/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials#sectno-reference-465.2.*

[138] USTelecom Cmt. on NPRM at 2; M3AAWG Cmt. on NPRM at 3–4; RIAA Cmt. on NPRM at 3; APWG Cmt. on NPRM; COA Cmt. on NPRM at 1–3; INTA Cmt. on NPRM at 8–10; CSTI Cmt. on NPRM at 1.

[139] *Id.*

[140] M3AAWG Cmt. on NPRM at 3–4; RIAA Cmt. on NPRM at 3–4; AIM Cmt. on NPRM at 1; COA Cmt. on NPRM at 1–3; INTA Cmt. on NPRM at 8–10.

[141] COA Cmt. on NPRM at 2.

[142] M3AAWG Cmt. on NPRM at 3–4; APWG Cmt. on NPRM at 1–2; *see also* APWG, Cmt. on Informal Hearing at 1–2 (Apr. 14, 2023), *https://www.regulations.gov/comment/FTC-2023-0030-0027* (''APWG IH Cmt.'').

[143] *See also supra,* note 52.

[144] Toy Cmt. on NPRM at 2; M3AAWG Cmt. on NPRM at 2; ABA–IPL Cmt. on NPRM at 3; INTA Cmt. on NPRM at 2.

[145] ABA–IPL Cmt. on NPRM at 3.

[146] Toy Cmt. on NPRM at 2; M3AAWG Cmt. on NPRM at 2; INTA Cmt. on NPRM at 2.

[147] INTA Cmt. on NPRM at 6–7.

[148] NPRM, 87 FR at 62750.

[149] *See* 15 U.S.C. 57b–3(b)(2).

[150] 15 U.S.C. 57b–3(b)(2)(A).

[151] *See* 5 U.S.C. 603–605; *see also* section 22(b) of the FTC Act, 15 U.S.C. 57b–3(b).

[152] NPRM, 87 FR at 62749–50; *see also* 5 U.S.C. 603.

[153] NPRM, 87 FR at 62750.

[154] NPRM, 87 FR at 62749.

[155] *See* 15 U.S.C. 57b–3(b)(3)(A)(ii) (''In order to avoid duplication or waste, the Commission is authorized to . . . whenever appropriate, incorporate any data or analysis contained in a regulatory analysis issued under this subsection in the statement of basis and purpose.'').

[156] NPRM, 87 FR at 62749–50.

[157] *See* ANPR, 86 FR at 72901 & n.24 (discussing AMG Cap. Mgmt.); NPRM, 87 FR at 62746 (same).

[158] *See* ANPR, 86 FR at 72901 & n.24; NPRM, 87 FR at 62746; *see also* 15 U.S.C. 57b(a) and (b).

[159] *See* 15 U.S.C. 45(m)(1)(A).

[160] NPRM, 87 FR at 62750.

[161] Only one commenter suggested an alternative to regulation, which the Commission declines to adopt for the reasons previously stated in Section III.B.

[162] *See supra* note 161.

[163] Toy Cmt. on NPRM at 5–6; MRAA Cmt. on NPRM at 4.

[164] Robert Kamerschen, Cmt. on NPRM at 2 (Nov. 30, 2022), *https://www.regulations.gov/comment/FTC-2022-0064-0023.*

[165] *See* NPRM, 87 FR at 62750.

[166] NPRM, 87 FR at 62748.

[167] *Id.*

[168] *See* Fed. Trade Comm'n, Explore Government Imposter Scams, TABLEAU PUBLIC, *https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/SubcategoriesOverTime* (last visited December 21, 2023).

[169] *Id.*

[170] *See* 15 U.S.C. Secs. 45(m)(1)(A) and 57b.

[171] *See* Toy Cmt. on NPRM at 5–6; MRAA Cmt. on NPRM at 4; *see also* NPRM, 87 FR at 62749.

[172] NPRM, 87 FR at 62750.

[173] *See, e.g.,* TSR, 16 CFR 310.3(a)(2)(vii); R-Value Rule, 16 CFR 460.21; Regulation O (Mortgage Assistance Relief Services), 12 CFR 1015.3(b)(3).

[174] 5 U.S.C. 551 *et seq.;* 16 CFR 1.7 through 1.20.

List of Subjects in 16 CFR Part 461

Consumer protection, Impersonation, Trade Practices.

■ For the reasons set forth above, the Federal Trade Commission amends 16 CFR Chapter I by adding part 461 to read as follows:

PART 461—RULE ON IMPERSONATION OF GOVERNMENT AND BUSINESSES

Sec.
461.1 Definitions.
461.2 Impersonation of Government Prohibited.
461.3 Impersonation of Businesses Prohibited.

Authority: 15 U.S.C. 41 through 58.

§ 461.1 Definitions.

As used in this part:

Business means a corporation, partnership, association, or any other entity that provides goods or services, including not-for-profit entities.

Government includes federal, state, local, and tribal governments as well as agencies and departments thereof.

Materially means likely to affect a person's choice of, or conduct regarding, goods or services.

Officer includes executives, officials, employees, and agents.

§ 461.2 Impersonation of Government Prohibited.

It is a violation of this part, and an unfair or deceptive act or practice to:

(a) materially and falsely pose as, directly or by implication, a government entity or officer thereof, in or affecting commerce as *commerce* is defined in the Federal Trade Commission Act (15 U.S.C. 44); or

(b) materially misrepresent, directly or by implication, affiliation with, including endorsement or sponsorship by, a government entity or officer thereof, in or affecting commerce as *commerce* is defined in the Federal Trade Commission Act (15 U.S.C. 44).

§ 461.3 Impersonation of Businesses Prohibited.

It is a violation of this part, and an unfair or deceptive act or practice to:

(a) materially and falsely pose as, directly or by implication, a business or officer thereof, in or affecting commerce as commerce is defined in the Federal Trade Commission Act (15 U.S.C. 44); or

(b) materially misrepresent, directly or by implication, affiliation with, including endorsement or sponsorship by, a business or officer thereof, in or affecting commerce as commerce is defined in the Federal Trade Commission Act (15 U.S.C. 44).

By direction of the Commission.

April J. Tabor,
Secretary.

Note: The following statement will not appear in the Code of Federal Regulations.

Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya

Today the Federal Trade Commission finalizes its rule prohibiting government and business impersonation schemes and issues a supplemental notice of proposed rulemaking to extend this prohibition to impersonation of individuals. This final rule marks the first time since 1980 that the Commission has finalized a brand-new trade regulation rule prohibiting an unfair or deceptive practice.

Impersonation schemes cheat Americans out of billions of dollars every year. Fraudsters pretending to represent government agencies—like the Social Security Administration or the IRS—tell targets that if they do not hand over money or their sensitive personal information, then they could lose a government benefit, face a tax liability, or even be arrested. Scammers also commonly claim false affiliations with household brand names to bilk consumers for bogus services. This category of fraud skyrocketed during the coronavirus pandemic—with imposters scamming Americans out of reported $2 billion between October 2020 and September 2021, an 85 percent increase year-over-year.[1] Losses remain high: FTC data show that in 2023 consumers reported losing $2.7 billion to reported imposter scams.[2] Impersonation fraud has remained one of the largest sources of total reported consumer financial losses for several years.[3]

Public comments submitted to the Commission provide a snapshot of how impersonation frauds can devastate:

• One commenter reported on how a friend was scammed by someone claiming that they were with Publisher's Clearing House and that she had won a sweepstakes. Her friend was scammed out of a total of $367,000: ''She used all of her savings . . . to help her grandchildren go to college and wiped out her IRA and now is left to pay the

[1] Fed. Trade Comm'n, Fraud Reports: Trends Over Time (2021), *https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/FraudFacts.*

[2] Fed. Trade Comm'n, Consumer Sentinel Network Data Book 2023 (2024), *https://www.ftc.gov/reports/consumer-sentinel-network-data-book-2023.*

[3] Fed. Trade Comm'n, *Fraud Reports: Top Reports, Tableau Public* (last accessed Feb. 8, 2024), *https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/TopReports; see also* Fed. Trade Comm'n, Consumer Sentinel Network Data Book 2020 (2021) at 4–8, *https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-databook-2020/csn_annual_data_book_2020.pdf; see also,* Consumer Sentinel Network Data Book 2023, *supra* note 2.

penalties for depleting it. This woman is now, at age 70, in a position of living only on her social security and has to try to find work. . . .'' [4]

• Another commenter received a call from someone claiming to be with the U.S. Treasury Department, who asserted that her social security number had been compromised. This person lost all her money: ''That money is from my mother's life insurance policy who passed in 2019. My father needs that money to survive. I am devastated.'' [5]

• A third commenter spoke of her mother being scammed by someone pretending to be with a government agency: ''Before we, her family, realized the extent to which the imposters preyed upon her, she had divulged identity and banking information.'' [6]

The rise of generative AI technologies risks making these problems worse by turbocharging scammers' ability to defraud the public in new, more personalized ways. For example, the proliferation of AI chatbots gives scammers the ability to generate spear-phishing emails using individuals' social media posts and to instruct bots to use words and phrases targeted at specific groups and communities.[7] AI-enabled voice cloning fraud is also on the rise, where scammers use voice-cloning tools to impersonate the voice of a loved one seeking money in distress or a celebrity peddling fake goods.[8] Scammers can use these technologies to disseminate fraud more cheaply, more precisely, and on a much wider scale than ever before.

In its supplemental NPRM, the Commission proposes to expand the rule's prohibitions to also cover impersonation of individuals. If adopted, this additional protection will equip enforcers to seek civil penalties and redress when fraudsters impersonate individual people, not just government or business entities. Given the proliferation of AI-enabled fraud, this additional protection seems especially critical. Notably, the supplemental proposal also recommends extending liability to any actor that provides the ''means and instrumentalities'' to commit an impersonation scam. Under this approach, liability would apply, for example, to a developer who knew or should have known that their AI software tool designed to generate deepfakes of IRS officials would be used by scammers to deceive people about whether they paid their taxes. Ensuring that the upstream actors best positioned to halt unlawful use of their tools are not shielded from liability will help align responsibility with capability and control.

By unlocking civil penalties and redress, the final rule, along with the proposed supplemental provisions, will promote both more efficient enforcement and greater deterrence. In 2020, the Supreme Court held that the Commission cannot rely on Section 13(b) of the FTC Act to get money back to defrauded consumers,[9] so rulemakings—while not a substitute for a legislative fix—can help ensure that lawbreakers do not profit from their lawbreaking and that wronged consumers can be made whole.

This rule marks the agency's first brand-new Section 18 rulemaking since 1980. Although the authority to issue rules is clearly laid out in the FTC Act, bureaucratic red tape presented an obstacle to the agency's exercise of this important statutory authority. Thanks to efforts initiated under Commissioner Slaughter's leadership to align the procedural requirements for Section 18 rulemaking with the FTC Act's statutory text, Section 18 rulemakings can now proceed more efficiently.[10] This effort took two years from proposal to final rule, finally putting lie to the old idea that this must be an impossibly long process.

Many thanks to the FTC team for their swift work and dedication. This rule banning government and business impersonation will allow us to more vigorously and effectively protect Americans from fraudsters. And we are eager for public input on the supplemental NPRM that would extend this rule to cover impersonation of individuals. With the rapid rise of voice cloning fraud and other AI-based scams, additional protection for consumers seems especially critical. As these technologies enable more sophisticated and innovative forms of fraud, we will continue to ensure the Commission is activating all the tools Congress has given us and faithfully executing on our statutory mandate.

[4] Comment Submitted by Anonymous, FTC Seek Comments on Advanced Notice of Proposed Rule; Impersonation ANPR, *Regulations.gov* (Feb. 22, 2022), *https://www.regulations.gov/comment/FTC-2021-0077-0131*.

[5] Comment Submitted by Jamila Sherman, FTC Seek Comments on Advanced Notice of Proposed Rule; Impersonation ANPR, *Regulations.gov* (Feb. 22, 2022), *https://www.regulations.gov/comment/FTC-2021-0077-0127*.

[6] Comment Submitted by Susan Frost, FTC Seek Comments on Advanced Notice of Proposed Rule; Impersonation ANPR, *Regulations.gov* (Feb. 16, 2022), *https://www.regulations.gov/comment/FTC-2021-0077-0031*.

[7] Bob Violino, *AI Tools Such As ChatGPT Are Generating A Mammoth Increase In Malicious Phishing Emails,* CNBC (Nov. 28, 2023), *https://www.cnbc.com/2023/11/28/ai-like-chatgpt-is-creating-huge-increase-in-malicious-phishing-email.html*.

[8] Eric Revell, *AI Voice Cloning Scams On The Rise, Expert Warns,* Fox Business (Sept. 23, 2023), *https://www.foxbusiness.com/technology/ai-voice-cloning-scams-on-rise-expert-warns*.

[9] *AMG Cap. Mgmt., LLC* v. *FTC,* 593 U.S. (2021).

[10] Press Release, Fed. Trade Comm'n, FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct (July 1, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger-deterrence-corporate-misconduct*.

[FR Doc. 2024–04335 Filed 2–29–24; 8:45 am]

BILLING CODE 6750–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2022–0279; FRL–10675–02–R6]

Air Plan Approval; Oklahoma; Updates to the State Implementation Plan Incorporation by Reference Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is approving revisions to the Oklahoma State Implementation Plan (SIP) submitted by the State of Oklahoma designee on December 17, 2021, and January 20, 2023. This action addresses the submittal of revisions to the Oklahoma SIP to update the incorporation by reference provision of Federal requirements under Oklahoma Administrative Code (OAC).

DATES: This rule is effective April 1, 2024.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2022–0279. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Adina Wiley, EPA Region 6 Office, Air Permits Section, 214–665–2115, *wiley.adina@epa.gov.* Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

Strategic Infrastructure, Washington, DC 20546.

Nanette Smith,

Team Lead, NASA Directives and Regulations.

[FR Doc. 2024–07421 Filed 4–15–24; 8:45 am]

BILLING CODE 7510–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 310

RIN 3084–AB19

Telemarketing Sales Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') adopts amendments to the Telemarketing Sales Rule (''TSR'') that, among other things, require telemarketers and sellers to maintain additional records of their telemarketing transactions, prohibit material misrepresentations and false or misleading statements in business to business (''B2B'') telemarketing calls, and add a new definition for the term ''previous donor.'' These amendments are necessary to address technological advances and to continue protecting consumers, including small businesses, from deceptive or abusive telemarketing practices.

DATES: The amendments are effective May 16, 2024. However, compliance with 16 CFR 310.5(a)(2) is not required until October 15, 2024. The incorporation by reference of certain material listed in the rule is approved by the Director of the Federal Register as of May 16, 2024.

ADDRESSES: Relevant portions of the record of this proceeding, including this document, are available at *https://www.ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Patricia Hsue, (202) 326–3132, *phsue@ftc.gov,* or Benjamin R. Davidson, (202) 326–3055, *bdavidson@ftc.gov,* Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop CC–6316, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: This document states the basis and purpose for the Commission's decision to adopt amendments to the TSR that were proposed and published for public comment in the **Federal Register** on June 3, 2022 in a Notice of Proposed Rulemaking (''2022 NPRM'').[1] After careful review and consideration of the entire record on the issues presented in this rulemaking proceeding, including 26 public comments submitted by a variety of interested parties, the Commission has decided to adopt, with several modifications, the proposed amendments to the TSR intended to curb deceptive or abusive practices in telemarketing and improve the effectiveness of the TSR.

I. Background

Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act (''Telemarketing Act'' or ''Act'') in 1994 to curb abusive telemarketing practices and provide key anti-fraud and privacy protections to consumers.[2] The Act directed the Commission to adopt a rule prohibiting deceptive or abusive telemarketing practices.[3] The Act also directed the Commission to include, among other provisions, disclosure requirements and to consider recordkeeping requirements in its rulemaking.[4] Pursuant to the Act, the Commission promulgated the TSR on August 23, 1995.[5]

The Rule prohibits deceptive or abusive telemarketing practices, such as misrepresenting several categories of material information or making false or misleading statements to induce a person to pay for a good or service.[6] The Rule also requires sellers and telemarketers to make specific disclosures and keep certain records of their telemarketing activities.[7] The Commission determined that recordkeeping requirements were necessary to ''ascertain whether sellers and telemarketers are complying with the [. . .TSR], identify persons who are involved in any challenged practices, and [ ] identify customers who may have been injured.'' [8]

Since 1995, the Commission has amended the Rule on four occasions: (1) in 2003 to create the National Do Not Call (''DNC'') Registry and extend the Rule to telemarketing calls soliciting charitable contributions (''charity calls''); [9] (2) in 2008 to prohibit prerecorded messages (''robocalls'') in sales calls and charity calls; [10] (3) in 2010 to ban the telemarketing of debt relief services requiring an advance fee; [11] and (4) in 2015 to bar the use in telemarketing of certain payment mechanisms widely used in fraudulent transactions.[12]

Despite making significant amendments to the Rule, the Commission has not updated the recordkeeping provisions since the Rule's inception in 1995.[13] Evolutions in technology and the marketplace have made it more difficult for regulators to enforce the TSR, particularly provisions relating to the DNC Registry.[14] As a result, the Commission solicited comment during its regulatory review process on whether it should update the recordkeeping provisions, and subsequently proposed amending them in the 2022 NPRM.[15]

The 2022 NPRM also proposed applying the TSR's prohibitions on deceptive telemarketing to B2B calls.[16] The original TSR generally excluded

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[1] Notice of Proposed Rulemaking (''2022 NPRM''), 87 FR 33677 (June 3, 2022).

[2] Public Law 103–297, 108 Stat. 1545 (1997) (codified as amended at 15 U.S.C. 6101 through 6108).

[3] 15 U.S.C. 6102(a)(1).

[4] 15 U.S.C. 6102(a)(3).

[5] *See* Statement of Basis and Purpose and Final Rule (''Original TSR''), 60 FR 43842 (Aug. 23, 1995).

[6] *See, e.g.,* 16 CFR 310.3(a); *see also* Original TSR, 60 FR at 43848–51.

[7] *See, e.g.,* 16 CFR 310.3(a)(1), 310.5; *see also* Original TSR, 60 FR at 43846–48, 43851, 43857.

[8] Original TSR, 60 FR at 43857.

[9] *See* Statement of Basis and Purpose and Final Amended Rule (''2003 TSR Amendments''), 68 FR 4580 (Jan. 29, 2003) (adding Do Not Call Registry, charitable solicitations, and other provisions). The Telemarketing Act was amended in 2001 to extend its coverage to telemarketing calls seeking charitable contributions. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (''USA PATRIOT Act''), Public Law 107–56, 115 Stat. 272 (Oct. 26, 2001) (adding charitable contribution to the definition of telemarketing and amending the Act to require certain disclosures in calls seeking charitable contributions).

[10] *See* Statement of Basis and Purpose and Final Rule Amendments (''2008 TSR Amendments''), 73 FR 51164 (Aug. 29, 2008) (addressing the use of robocalls).

[11] *See* Statement of Basis and Purpose and Final Rule Amendments (''2010 TSR Amendments''), 75 FR 48458 (Aug. 10, 2010) (adding debt relief provisions including a prohibition on misrepresenting material aspects of debt relief services in Section 310.3(a)(2)(x)). The Commission subsequently published technical corrections to Section 310.4 of the TSR. 76 FR 58716 (Sept. 22, 2011).

[12] *See* Statement of Basis and Purpose and Final Rule Amendments (''2015 TSR Amendments''), 80 FR 77520 (Dec. 14, 2015) (prohibiting the use of remotely created checks and payment orders, cash-to-cash money transfers, and cash reload mechanisms).

[13] When the Commission decided in 2003 and 2010 to make substantive amendments to the TSR, it declined to modify the Rule's recordkeeping provisions. *See* 2003 TSR Amendments, 68 FR at 4645, 4653–54 (declining to implement any of the suggested recordkeeping revisions that were raised in the public comments); 2010 TSR Amendments, 75 FR at 48502.

[14] 2022 NPRM, 87 FR at 33679–81.

[15] The Commission issued the 2022 NPRM after it had embarked on a regulatory review of the TSR in 2014. In that review, it sought feedback on a number of issues, including the existing recordkeeping requirements. *See* 2014 TSR Rule Review, 79 FR 46732, 46735 (Aug. 11, 2014).

[16] 2022 NPRM, 87 FR at 33682–83.

B2B calls, except those selling office and cleaning supplies, because in the Commission's experience at the time, those calls were ''by far the most significant business-to-business problem area.'' [17] In 2003, the Commission considered extending the TSR's protections to B2B calls selling internet or web services, but decided against doing so for fear of chilling technological innovation.[18] It did, however, note it would ''continue to monitor closely'' B2B telemarketing practices in this area and ''may revisit the issue in subsequent Rule Reviews should circumstances warrant.'' [19] Since then, the Commission has continued to see small businesses harmed by deceptive B2B telemarketing, and the 2022 NPRM proposed extending Section 310.3(a)(2)'s prohibition on misrepresentations [20] and Section 310.3(a)(4)'s prohibition on false or misleading statements [21] to B2B calls.[22]

Finally, the 2022 NPRM proposed adding a definition for ''previous donor.'' In 2008 the Commission amended the TSR to prohibit robocalls, but allowed charity robocalls if the recipient is a ''member of, or previous donor to, a non-profit charitable organization on whose behalf the call is made.'' [23] The Commission intended this narrow exemption to apply only to consumers who had previously donated to the soliciting organization,[24] but the Commission did not define ''previous donor.'' [25] The new definition will clarify that telemarketers are prohibited from making charity robocalls unless the call recipient donated to the soliciting non-profit charitable organization (''charity'') within the last two years.[26]

II. Overview of the Proposed Amendments to the TSR

A. Recordkeeping

The TSR's recordkeeping provisions, which have remained unchanged since the Rule was promulgated in 1995, generally require telemarketers and sellers to keep for a 24-month period records of: (1) any substantially different advertisement, including telemarketing scripts; (2) lists of prize recipients, customers, and telemarketing employees directly involved in sales or solicitations; and (3) all verifiable authorizations or records of express informed consent or express agreement.[27] They may keep the records in any form and in the same manner and format as they would keep such records in the ordinary course of business, and they may allocate responsibilities of complying with the Rule's recordkeeping requirements between the seller and telemarketer.[28]

The telemarketing landscape has changed drastically since 1995. Technological advancements have made it easier and cheaper for unscrupulous telemarketers to engage in illegal telemarketing, resulting in a greater proliferation of unwanted calls.[29] Bad actors hide their identities by using technology to ''spoof'' or fake a calling number, making it more difficult for the Commission to identify the responsible parties or obtain records of their illegal telemarketing activities.[30] Technology also allows these bad actors to operate from anywhere in the world, posing additional challenges to the Commission's law enforcement efforts.[31]

The primary hurdles in enforcing the TSR in the current telemarketing landscape are in: (1) identifying the telemarketer and seller responsible for the telemarketing campaign; (2) obtaining call detail records; and (3) linking the content of the telemarketing calls with the call detail records to determine which TSR provisions might apply to the telemarketing activity.

As explained in more detail in the 2022 NPRM, to identify the responsible parties and obtain evidence of their telemarketing activities, the Commission often must issue civil investigative demands to multiple voice service providers to trace a call from the consumer to the telemarketer's voice provider.[32] In some instances, by the time the Commission has identified the relevant voice provider, the voice provider may not have retained records of the telemarketing calls such as the date, time, call duration, and disposition of each call, or the phone number(s) that placed and received each call (*i.e.* ''call detail records'').[33] As a result, the call detail records either no longer exist or are not available for law

[17] Original TSR, 60 FR at 43867, 43861.

[18] 2003 TSR Amendments, 68 FR at 4663; 2022 NPRM, 87 FR at 33682–83.

[19] 2003 TSR Amendments, 68 FR at 4663; 2022 NPRM, 87 FR at 33682–83.

[20] Section 310.3(a)(2) prohibits, among other things, misrepresenting: the total cost to purchase a good or service, material restrictions on the use of the good or service, material aspects of the central characteristics of the good or service, material aspects of the seller's refund policy, the seller's affiliation with or endorsement by any person or government agency, or material aspects of a negative option feature or debt relief service. *See* 16 CFR 310.3(a)(2)(i)–(x).

[21] Section 310.3(a)(4) prohibits making false or misleading statements to induce any person to pay for goods or services or induce a charitable contribution. *See* 16 CFR 310.3(a)(4).

[22] 2022 NPRM, 87 FR at 33682–83. When the Commission issued the 2022 NPRM, it also issued an Advance Notice of Proposed Rulemaking (''2022 ANPR'') in which it sought public comment on whether to extend all of the TSR's protections to B2B calls. 2022 ANPR, 87 FR 33662 (June 3, 2022). The Commission addresses the public comments submitted in response to the 2022 ANPR in a Notice of Proposed Rulemaking that the Commission is issuing simultaneously with this Final Rule.

[23] *See* 2008 TSR Amendments, 73 FR at 51185. To qualify for this narrow exemption, sellers and telemarketers must also comply with the provisions of Section 310.4(b)(1)(v)(B).

[24] *Id.*

[25] Pursuant to the USA PATRIOT Act, the Commission amended the TSR in 2003 to extend its coverage to charity calls. 2003 TSR Amendments, 68 FR at 4582. As part of that amendment, the Commission defined ''donor'' as ''any person solicited to make a charitable contribution.'' *Id.* at 4590.

[26] 2022 NPRM, 87 FR at 33679.

[27] 16 CFR 310.5(a).

[28] 16 CFR 310.5(b) & (c).

[29] *See, e.g.,* Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on Commerce, Science and Transportation: Abusive Robocalls and How We Can Stop Them (Apr. 18, 2018), *available at https://www.ftc.gov/system/files/documents/public_statements/1366628/p034412_commission_testimony_re_abusive_robocalls_senate_04182018.pdf* (last visited Dec. 11, 2023); *see also* Prepared Statement of the Federal Trade Commission: Oversight of the Federal Trade Commission Before the United States Senate Committee on Commerce, Science, and Transportation (Aug. 5, 2020), *available at https://www.ftc.gov/system/files/documents/public_statements/1578963/p180101testimonyftcoversight20200805.pdf* (last visited Dec. 21, 2023).

From 2019 to 2023, the Commission received on average nearly 4 million Do Not Call complaints per year, and the DNC Registry currently has over 249 million active telephone numbers. FTC, Do Not Call Data Book 2023 (''2023 DNC Databook''), at 6 (Nov. 2023), *available at https://www.ftc.gov/system/files/ftc_gov/pdf/Do-Not-Call-Data-Book-2023.pdf* (last visited Dec. 11, 2023). By comparison, within one year of its launch, the DNC Registry had over 62 million active telephone numbers registered, and the Commission received over 500,000 Do Not Call complaints. *See* Annual Report to Congress for FY 2003 and 2004 Pursuant to the Do Not Call Implementation Act on Implementation of the National Do Not Call Registry, at 3 (Sept. 2005), *available at https://www.ftc.gov/sites/default/files/documents/reports/national-do-not-call-registry-annual-report-congress-fy-2003-and-fy-2004-pursuant-do-not-call/051004dncfy0304.pdf* (last visited Dec. 11, 2023); National Do Not Call Registry Data Book for Fiscal Year 2009, at 4 (Nov. 2009), *available at https://www.ftc.gov/sites/default/files/documents/reports_annual/fiscal-year-2009/091208dncadatabook.pdf* (last visited Dec. 11, 2023). Conversely, technological advancements have also reduced the burden and costs of recordkeeping. 2022 NPRM, 87 FR at 33685 n.95 and 33690–91.

[30] *See supra* note 29. On June 25, 2019, the FTC announced ''Operation Call it Quits,'' which included 94 actions against illegal robocallers, many of which used spoofing technology. *See* Press Release, FTC, Law Enforcement Partners Announce New Crackdown on Illegal Robocalls (June 25, 2019), *available at https://www.ftc.gov/news-events/press-releases/2019/06/ftc-law-enforcement-partners-announce-new-crackdown-illegal* (last visited Dec. 11, 2023).

[31] *See supra* note 29.

[32] 2022 NPRM, 87 FR at 33680–81.

[33] *Id.* at 33680. In other instances, voice providers assert it is cost prohibitive to retrieve because they only maintain records in an easily retrievable format for several months before archiving them in the ordinary course of business.

enforcement purposes, and the Commission cannot identify the bad actor responsible for the spoofed or otherwise illegal calls.[34]

Call detail records are also necessary to ascertain compliance with certain provisions of the TSR such as the DNC Registry.[35] And as detailed in the 2022 NPRM, even when the Commission and other law enforcers are successful in obtaining call detail records, the records alone do not contain sufficient information about the content of the calls for regulators to determine whether the telemarketer or seller has violated the TSR.[36]

The proposed amendments to the recordkeeping requirements addressed the challenges identified above. They included new recordkeeping requirements of telemarketing activity that telemarketers or sellers are in the best position to provide.[37] Specifically, the proposed amendments required the retention of the following new categories of information: (1) a copy of each unique prerecorded message, including each call a telemarketer makes using soundboard technology; [38] (2) call detail records of telemarketing campaigns; [39] (3) records sufficient to show a seller has an established business relationship (''EBR'') with a consumer; [40] (4) records sufficient to show a consumer is a previous donor to a particular charity; [41] (5) records of the service providers that a telemarketer uses to deliver outbound calls; [42] (6) records of a seller or charitable organization's entity-specific do-not-call registries; [43] and (7) records of the Commission's DNC Registry that were used to ensure compliance with this Rule.[44]

The proposed amendments also required the retention of other new records that help identify the nature and purpose of each call including: (1) the identity of the telemarketer who placed or received each call; (2) the seller or charitable organization for which the telemarketing call is placed or received; (3) the good, service, or charitable purpose that is the subject of the call; (4) whether the call is to a consumer or business, utilizes robocalls, or is an outbound call; and (5) the telemarketing script(s) and the robocall recording (if applicable) that was used in the call.[45] The proposed amendments also required the retention of records regarding the caller ID transmitted if the call was an outbound call, including the name and phone number that was transmitted, and records of the telemarketer's authorization to use the phone number and name that was transmitted.[46]

The proposed amendments also modified or clarified existing recordkeeping requirements to delineate more clearly the information telemarketers or sellers must keep to comply with those provisions, and specified what information is required to assert an exemption or affirmative defense to the TSR.[47] Specifically, the proposed amendments modified the recordkeeping provisions to require retention of a customer or prize recipient's last known telephone number and last known physical or email address, and the date a customer bought a good or service.[48] It modified the time period to keep records from two years to five years from the date the record is made, except for advertising materials under Section 310.5(a)(1) and service contracts under Section 310.5(a)(9), which require retention of records for five years from the date the records under those sections are no longer in use.[49]

The proposed amendments clarified that records of verifiable authorizations, express informed consent or express agreement (collectively, ''consent'') include a consumer's name and phone number, a copy of the consent requested in the same manner and format that it was presented to that consumer, a copy of the consent provided, the date the consumer provided consent, and the purpose for which consent was given and received.[50] The NPRM also proposed that if the telemarketer or seller requested consent verbally, the copy of consent requested did not require a recording of the conversation. A copy of the telemarketing script would suffice as a complete record of the consent requested. But the NPRM made clear that this proposal only applies to telemarketing calls where no other provision of the TSR requires a recording of consent.[51]

The proposed amendments also included new format requirements for records containing a phone number, time or call duration; [52] clarified that a

[34] *Id.*

[35] *Id.* at 33681.

[36] *Id.* at 33680–82.

[37] *Id.*

[38] Soundboard technology is technology that allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice. *See* FTC Staff Opinion Letter on Soundboard Technology, at 1 (Nov. 10, 2016), *available at https://www.ftc.gov/system/files/documents/advisory_opinions/letter-lois-greisman-associate-director-division-marketing-practices-michael-bills/161110staffopsound boarding.pdf* (last visited Dec. 11, 2023).

[39] The proposed amendments stated the call detail records include for each call a telemarketer places or receives, the calling number; called number; time, date, and duration of the call; and the disposition of the call, such as whether the call was answered, dropped, transferred, or connected. If the call was transferred, the record should also include the phone number or IP address that the call was transferred to as well as the company name, if the call was transferred to a company different from the seller or telemarketer that placed the call. 2022 NPRM, 87 FR at 33684.

[40] For each consumer with whom a seller asserts it has an established business relationship, the proposed amendments stated a seller must keep a record of the name and last known phone number of that consumer, the date the consumer submitted an inquiry or application regarding that seller's goods or services, and the goods or services inquired about. A seller may also show it has an established business relationship with a consumer if that consumer purchased, rented, or leased the seller's goods or services or had a financial transaction with the seller during the 18 months before the date of the telemarketing call. Another proposed amendment modifies the existing recordkeeping provisions to state that records of existing customers should also include the date of the financial transaction to establish EBR under these circumstances. *Id.* at 33685.

[41] If a telemarketer intends to assert that a consumer is a previous donor to a particular charity, the Commission proposed that for each such consumer the telemarketer must keep a record of that consumer's name and last known phone number, and the last date that consumer donated to the particular charity. The proposed amendments also included a new definition of ''previous donor.'' *Id.* at 33685.

[42] The proposed amendments stated that service providers include, but are not limited to, voice providers, autodialers, sub-contracting telemarketers, or soundboard technology platforms. The Commission did not intend for this provision to include every voice provider involved in delivering the outbound call and limited this provision to the service providers with which the seller or telemarketer has a business relationship. For each such entity, the seller or telemarketer must keep records of any applicable contracts, the date the contract was signed, and the time period the contract is in effect. The proposed amendments also stated that the records should be retained for five years after the contract expires or five years from the date the telemarketing activity covered by the contract ceases, whichever is shorter. *Id.* at 33685–86.

[43] For the entity-specific do-not-call registry, the Commission proposed requiring telemarketers and sellers to retain records of: (1) the consumer's name, (2) the phone number(s) associated with the DNC request, (3) the seller or charitable organization from which the consumer does not wish to receive calls, (4) the telemarketer that made the call; (5) the date the DNC request was made; and (6) the good or service being offered for sale or the charitable purpose for which contributions are being solicited. *Id.* at 33686.

[44] The Commission proposed requiring telemarketers or sellers to keep records of every version of the FTC's DNC Registry the telemarketer or seller downloaded to ensure compliance with the TSR. *Id.* at 33686.

[45] *Id.* at 33684.

[46] *Id.*

[47] *Id.* at 33680–82.

[48] *Id.* at 33686.

[49] *Id.*

[50] *Id.* at 33686–87. The proposed amendment also stated that for a copy of the consent provided under Sections 310.3(a)(3), 310.4(a)(7), 310.4(b)(1)(iii)(B)(1), or 310.4(b)(1)(v)(A), a complete record must include all of the requirements outlined in those respective sections.

[51] 2022 NPRM, 87 FR at 33686–87.

[52] The proposed amendments required records containing international phone numbers to comport

failure to keep each record required under Section 310.5 in a complete and accurate manner constitutes a violation of the TSR; and created a safe harbor for incomplete or inaccurate call detail records where the omission was temporary and inadvertent.[53] Finally, the Commission proposed modifying the compliance obligations in Section 310.5(e) to obligate both telemarketers and sellers to keep records if they fail to allocate recordkeeping obligations between themselves.[54]

B. B2B Telemarketing

The Original TSR exempted B2B calls other than those selling office and cleaning supplies, which the Commission considered the ''most significant business-to-business problem area'' at the time.[55] The Commission stated, however, it would reconsider the B2B exemption if ''additional [B2B] telemarking activities become problems.'' [56] In 2003, the Commission reconsidered the scope of the B2B exemption and proposed requiring B2B calls selling internet or web services to comply with the TSR because they had become an emerging area for fraud.[57] The Commission ultimately decided not to modify the B2B exemption because the Commission wanted to ''move cautiously so as not to chill innovation in the development of cost-efficient methods for small businesses to join in the internet marketing revolution.'' [58] But the Commission again noted it would ''continue to monitor closely'' the B2B telemarketing practices in this area and ''may revisit the issue in subsequent Rule Reviews should circumstances warrant.'' [59]

Since 2003, the Commission has continued to see small business harmed by numerous types of deceptive B2B telemarketing schemes,[60] including those selling business directory listings,[61] web hosting or design services,[62] search engine optimization services,[63] market-specific advertising opportunities,[64] payment processing services,[65] and schemes that impersonate the government.[66] For example, some of these schemes were the subject of a coordinated FTC-led crackdown on scams targeting small businesses, called ''Operation Main Street,'' announced in June 2018.[67]

To address these scams, the 2022 NPRM proposed applying the TSR's prohibitions against misrepresentations, as articulated in Sections 310.3(a)(2) and 310.3(a)(4), to B2B telemarketing. Specifically, sellers and telemarketers would be prohibited from making: (1) several types of material misrepresentations in the sale of goods or services; and (2) false or misleading statements to induce a person to pay for goods or services or to induce a charitable contribution (collectively, ''misrepresentations'').[68] The 2022 NPRM did not propose applying any other provisions of the TSR to B2B calls, such as recordkeeping, DNC Registry, or DNC fee access requirements.[69]

C. New Definition for ''Previous Donor''

The 2022 NPRM proposed adding a new definition for the term ''previous donor'' to clarify that telemarketers are prohibited from making charity robocalls unless the consumer donated to the soliciting charity within the last two years. When the Commission amended the TSR to prohibit robocalls

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with International Telecommunications Union's Recommendation E.164 format and domestic numbers to comport with the North American Numbering plan. The Commission proposed that records containing time and call duration be kept to the closest whole second, and time must be recorded in Coordinated Universal Time (UTC). *Id.* at 33687.

[53] The Commission proposed a safe harbor for temporary and inadvertent errors in keeping call detail records if the telemarketer or seller can demonstrate that: (1) it has established and implemented procedures to ensure completeness and accuracy of its records under Section 310.5(a)(2); (2) it trained its personnel in the procedures; (3) it monitors compliance and enforces the procedures, and documents its monitoring and enforcement activities; and (4) any failure to keep accurate or complete records under Section 310.5(a)(2) was temporary and inadvertent. *Id.* at 33687.

[54] *Id.* at 33687.

[55] Original TSR, 60 FR at 43861.

[56] *Id.; see also* 2002 Notice of Proposed Rulemaking (''2002 NPRM''), 67 FR 4492, 4500 (Jan. 30, 2002); 2014 TSR Rule Review, 79 FR at 46738.

[57] 2002 NPRM, 67 FR at 4500, 4531. ''internet Services'' meant any service that allowed a business to access the internet, including internet service providers, providers of software and telephone or cable connections, as well as services that provide access to email, file transfers, websites, and newsgroups. *Id.* ''Web services'' was defined as ''designing, building, creating, publishing, maintaining, providing, or hosting a website on the internet.'' *Id.* The Commission intended for the term internet services to encompass any and all services related to accessing the internet and the term web services to encompass any and all services related to operating a website. *Id.*

[58] 2003 TSR Amendments, 68 FR at 4663.

[59] *Id.*

[60] A 2018 survey conducted by the Better Business Bureau revealed that the same scams that harm consumers, such as tech support scams and imposter scams, also harm small businesses, and that 57% of scams that impact small businesses are perpetrated through telemarketing. Better Business Bureau, *Scams and Your Small Business Research Report,* at 9–10 (June 2018), *available at https://www.bbb.org/SmallBizScams* (last visited Dec. 11, 2023).

[61] *See, e.g., FTC* v. *Your Yellow Book Inc.,* No. 14–cv–786–D (W.D. Ok. July 24, 2014), *available at https://www.ftc.gov/system/files/documents/cases/140807youryellowbookcmpt.pdf* (last visited Dec. 11, 2023); *FTC* v. *OnlineYellowPagesToday.com, Inc.,* No. 14–cv–0838 RAJ (W.D. Wash. June 9, 2014), *available at https://www.ftc.gov/system/files/documents/cases/140717onlineyellowpagescmpt.pdf* (last visited Dec. 11, 2023); *FTC* v. *Modern Tech. Inc., et al.,* No. 13–cv–8257 (Nov. 18, 2013) *available at https://www.ftc.gov/sites/default/files/documents/cases/131119yellowpagescmpt.pdf* (last visited Dec. 11, 2023); *FTC* v. *6555381 Canada Inc. d/b/a Reed Publishing,* No. 09–cv–3158 (N.D. Ill. May 27, 2009) *available at https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602reedcmpt.pdf* (last visited Dec. 11, 2023); *FTC* v. *6654916 Canada Inc. d/b/a Nat'l. Yellow Pages Online, Inc.,* No. 09–cv–3159 (N.D. Ill. May 27, 2009), *available at https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602nypocmpt.pdf* (last visited Dec. 11, 2023); *FTC* v. *Integration Media, Inc.,* No. 09–cv–3160 (N.D. Ill. May 27, 2009), *available at https://www.ftc.gov/sites/default/files/documents/cases/2009/06/090602goamcmpt.pdf* (last visited Dec. 11, 2023); *FTC* v. *Datacom Mktg. Inc., et al.,* No. 06–cv–2574 (N.D. Ill. May 9, 2006), *available at https://www.ftc.gov/sites/default/files/documents/cases/2006/05/060509datacomcomplaint.pdf* (last visited Dec. 11, 2023); *FTC* v. *Datatech Commc'ns, Inc.,* No. 03–cv–6249 (N.D. Ill. Aug. 3, 2005) (filing amended complaint), *available at https://www.ftc.gov/sites/default/files/documents/cases/2005/08/050825compdatatech.pdf* (last visited Dec. 11, 2023); *FTC* v. *Ambus Registry, Inc.,* No. 03–cv–1294 RBL (W.D. Wash. June 16, 2003), *available at https://www.ftc.gov/sites/default/files/documents/cases/2003/07/ambuscomp.pdf* (last visited Dec. 11, 2023).

[62] *See FTC* v. *Epixtar Corp., et al.,* No. 03–cv–8511(DAB) (S.D.N.Y. Nov. 3, 2003), *available at https://www.ftc.gov/sites/default/files/documents/cases/2003/11/031103comp0323124.pdf* (last visited Dec. 11, 2023); *FTC* v. *Mercury Mktg. of Del., Inc.,* No. 00–cv–3281 (E.D. Pa. Aug. 12, 2003) (filing for an Order to Show Cause Why Defendants Should Not be Held in Contempt), *available at https://www.ftc.gov/sites/default/files/documents/cases/2003/08/030812contempmercurymarketing.pdf* (last visited Dec. 11, 2023).

[63] *See, e.g., FTC* v. *Pointbreak Media, LLC,* No. 18–cv–61017–CMA (S.D. Fla. May 7, 2018), *available at https://www.ftc.gov/system/files/documents/cases/matter_1723182_pointbreak_complaint.pdf* (last visited Dec. 11, 2023); *FTC* v. *7051620 Canada, Inc.* No. 14–cv–22132 (S.D. Fla. June 9, 2014), *available at https://www.ftc.gov/system/files/documents/cases/140717nationalbusadcmpt.pdf* (last visited Dec. 11, 2023).

[64] *See, e.g., FTC* v. *Prod. Media Co.,* No. 20–cv–00143–BR (D. Or. Jan. 23, 2020), *available at https://www.ftc.gov/system/files/documents/cases/production_media_complaint.pdf* (last visited Dec. 11, 2023).

[65] *See, e.g., FTC* v. *First Am. Payment Sys., LP, et al.,* No. 4:22–cv–00654 (E.D. Tex. July 29, 2022), *available at https://www.ftc.gov/system/files/ftc_gov/pdf/Complaint%20%28file%20stamped%29_0.pdf* (last visited Dec. 11, 2023).

[66] *See, e.g., FTC* v. *DOTAuthority.com,* No. 16–cv–62186 (S.D. Fla. Sept. 13, 2016) *available at https://www.ftc.gov/system/files/documents/cases/162017dotauthoriity-cmpt.pdf* (last visited Dec. 11, 2023); *FTC* v. *D & S Mktg. Sols. LLC,* No. 16–cv–01435–MSS–AAS (M.D. Fla. June 6, 2016), *available at https://www.ftc.gov/system/files/documents/cases/160621dsmarketingcmpt.pdf* (last visited Dec. 11, 2023).

[67] *See* Press Release, FTC, BBB, and Law Enforcement Partners Announce Results of Operation Main Street: Stopping Small Business Scams Law Enforcement and Education Initiative (June 18, 2018), *available at https://www.ftc.gov/news-events/press-releases/2018/06/ftc-bbb-law-enforcement-partners-announce-results-operation-main* (last visited Dec. 11, 2023).

[68] 2022 NPRM, 87 FR at 33682–84.

[69] *Id.; see also* 16 CFR 310.5 (recordkeeping requirements); 310.8 (fee for access to the Do Not Call Registry).

in 2008,[70] it included a narrow exemption allowing charity robocalls to prior donors, recognizing a charity's strong interest in reaching consumers with ''whom the charity has an existing relationship—*i.e.* members of, or previous donors to[,] the non-profit organization on whose behalf the calls are made.'' [71] The Commission meant to limit the exemption to consumers with actual relationships to the soliciting organization, because allowing ''telefunders to make impersonal prerecorded cold calls on behalf of charities that have no prior relationship with the call recipients . . . would defeat the amendment's purpose of protecting consumers' privacy.'' [72] But in creating the exemption, the Commission did not update the definition of ''donor'' or include a definition of ''previous donor.'' Because ''donor'' is defined as ''any person solicited to make a charitable contribution,'' [73] the Commission's 2008 Amendment could be misinterpreted as allowing a telemarketer to send robocalls to any consumer it had previously *solicited* for a donation on behalf of a charity, regardless of whether the consumer donated to or has an existing relationship with that charity.

Adding a definition for ''previous donor'' makes clear a seller or telemarketer may only make charity robocalls to a donor who has previously provided a charitable contribution to that particular charity within the last two years.[74]

[70] 2008 TSR Amendments, 73 FR at 51164.

[71] *Id.* at 51193.

[72] *Id.* at 51194.

[73] 16 CFR 310.2(p). The Commission declined to limit the definition of donor to those who have ''an established business relationship with the non-profit charitable organization'' because it wanted the term ''[to] encompass not only those who have agreed to make a charitable contribution but also any person who is solicited to do so, to be consistent with [the Rule's] use of the term 'customer.' '' 2003 TSR Amendments 68 FR at 4590.

[74] The Commission proposed that the definition of ''previous donor'' be limited to those who donated to a charity within the past two years so that consumers will not receive robocalls in perpetuity from organizations to which they have donated. The Commission chose two years to account for the possibility that consumers who donate annually may not necessarily donate exactly one year apart. 2022 NPRM, 87 FR at 33688.

D. Overview of Public Comments Received in Response to the 2022 NPRM

In response to the 2022 NPRM,[75] the Commission received 26 comments [76] representing the views of State governments,[77] consumer groups,[78] consumers,[79] industry trade associations,[80] and businesses.[81] The vast majority of the comments focused on the proposed recordkeeping amendments. Commenters on behalf of government, individual consumers, and consumer advocacy groups generally supported amending the recordkeeping requirements but also submitted suggestions for additional amendments.[82] Industry groups and businesses had mixed comments. Some commenters did not support any recordkeeping amendments, citing the burden they would impose, while others were generally supportive or supportive of specific proposed amendments.[83]

Similarly, industry groups and businesses did not support applying the TSR's prohibitions against deceptive telemarketing to B2B calls; while government, individual consumers, and consumer organizations were supportive. Only three comments touched on the proposed amendment to add a new definition of ''previous donor.'' The comments and the basis for the Commission's adoption or rejection of the commenters' suggested modifications to the proposed amendments are analyzed in Section III below.

[75] The Commission also received 114 unique comments in response to the 2014 Rule Review reflecting the opinions of State and Federal agencies, consumer advocacy groups, consumers, academics, and industry. 2022 ANPR, 87 FR at 33664. The comments addressing whether the Commission should amend the TSR's recordkeeping provisions are summarized in the 2022 NPRM. 2022 NPRM, 87 FR at 33682.

[76] Many commenters filed one comment in response to the 2022 ANPR or 2022 NPRM that addressed issues raised by both documents. Comments regarding the proposals in the 2022 NPRM will be addressed in this Final Rule. Comments regarding the proposals in the 2022 ANPR will be addressed in the Notice of Proposed Rulemaking that the Commission is issuing concurrently with this Final Rule (''2024 NPRM''). We cite public comments by name of the commenting organization or individual, the rulemaking (ANPR comments were assigned ''33'' and the NPRM comments were assigned ''34''), and the comment number. All comments submitted can be found at *www.regulations.gov.*

[77] National Association of Attorneys General on behalf of 43 State Attorneys General (''NAAG'') 34–20.

[78] World Privacy Forum (''WPF'') 34–21; Electronic Privacy and Information Center, National Consumer Law Center (on behalf of its low-income clients), Center for Digital Democracy, Consumer Action, Consumer Federation of America, FoolProof, Mountain State Justice, New Jersey Citizen Action, Patient Privacy Rights, Public Good Law Center, Public Knowledge, South Carolina Appleseed Legal Justice Center, and Cathy Lesser Mansfield (Senior Instructor in Law at Case Western Reserve University School of Law) (''EPIC'') 34–23.

[79] Bradley 34–15; Cassady 34–2; Chen 34–9; Kreutzmann 34–5, Yang 34–12, and 4 Anonymous submitters at 34–3, 34–4, 34–7, and 34–11. Four commenters submitted consumer complaints or were not relevant to the proceeding. *See* Anonymous 34–6, 34–8, and 34–16; and Grener 34–10.

[80] Enterprise Communications Advocacy Coalition (''ECAC'') 34–22; National Federation of Independent Business 33–4 (''NFIB''); Ohio Credit Union League (''OCUL'') 34–19; Professional Association for Customer Engagement 33–15 (''PACE''); Revenue Based Finance Coalition(''RBFC'') 34–13; Third Party Payment Processors Association (''TPPPA'') 34–14; US Chamber of Commerce (''Chamber'') 34–24; and USTelecom—The Broadband Association (''USTelecom'') 33–14.

[81] Rapid Financial Services, LLC and Small Business Financial Solutions, LLC (''Rapid Finance'') 34–17; Sirius XM Radio (''Sirius'') 34–18.

[82] Many of the consumer comments generally stated that they supported the recordkeeping amendments because they would help protect consumers from deceptive telemarketing and with enforcing the TSR. *See, e.g.,* Cassady 34–3; Chen 34–9; and Anonymous 34–11 and 34–3. One commenter generally urged more enforcement and larger penalties. Kowalski 33–7.

[83] One anonymous commenter did not support any recordkeeping because it required collection of too much data, which the commenter believed infringed on a consumer's privacy. Anonymous 34–4.

III. Final Amended Rule

The Commission has carefully reviewed and analyzed the record developed in this proceeding.[84] The record, which includes the Commission's law enforcement experience and that of its State and Federal counterparts, support the Commission's view the proposed amendments in the 2022 NPRM are necessary and appropriate to protect consumers, including small businesses, from deceptive or abusive telemarketing practices and ensure the Commission and other regulators can effectively and efficiently enforce the TSR.[85]

The Final Rule requires sellers and telemarketers to keep additional records of their telemarketing activities, prohibits misrepresentations in B2B telemarketing, and adds a new definition for previous donor. The Final Rule also implements several other clerical modifications as originally proposed in the 2022 NPRM.[86]

In some instances, the Commission has clarified or made modifications to its original proposal in response to the public comments submitted. The

[84] The record includes the 2014 Rule Review, the 2022 NPRM, 2022 ANPR, and the law enforcement cases and experience referenced therein, which are hereby incorporated by reference.

[85] The Commission's decision to amend the Rule is made pursuant to the rulemaking authority granted by the Telemarketing Act to protect consumers, including small businesses, from deceptive or abusive practices. 15 U.S.C. 6102(a).

[86] 2022 NPRM, 87 FR at 33688.

Commission otherwise adopts the amendments proposed in the 2022 NPRM as set forth in Section VII—Congressional Review Act (''Final Rule'') below. The primary modifications and clarifications between the proposed rule published in the 2022 NPRM and the Final Rule are:

- The term ''prerecorded message'' includes telemarketing calls made using ''digital soundboard'' rather than ''soundboard technology'' to make clear the term includes any digital or sound technologies that sellers or telemarketers use to convey a verbal message to a consumer in telemarketing;
- Telemarketers and sellers will have one hundred and eighty days after the Final Rule is published to implement any new systems, software, or procedures necessary to comply with the new requirement that they keep call detail records under Section 310.5(a)(2);
- Sellers and telemarketers need not retain records of the calling number, called number, date, time, duration, and disposition of telemarketing calls under Sections 310.5(a)(2)(vii) and (x) for any calls made by an individual telemarketer who manually enters a single telephone number to initiate a call to that telephone number. Such sellers and telemarketers, however, must still comply with the other requirements under Section 310.5(a)(2);
- Modified Section 310.4(b)(2) to state it is also an abusive telemarketing act or practice and a violation of the TSR for any person to sell, rent, lease, purchase, or use any list established to comply with the TSR's recordkeeping requirements under Section 310.5. This modification makes clear telemarketers and sellers cannot use any consumer lists created for recordkeeping purposes for any other purpose;
- In obtaining written consent to contact a consumer using robocalls on behalf of a ''specific seller,'' the written agreement must identify the ''specific seller'' by its legal entity name to make clear that any agreement to receive robocalls is limited to that legal entity. The seller or telemarketer obtaining consent from the consumer must ensure the consumer understands which legal entity they have authorized to send robocalls;
- Where no provision of the TSR requires a recording of the call, the Final Rule modifies what was proposed in the NPRM and now states a complete record of consent that is verbally requested must include a recording of the consent requested as well as the consent provided, and that recording must make clear the purpose for which consent was provided;
- Service providers referenced under Section 310.5(a)(9) include any entity that provides ''digital soundboard'' technology rather than ''soundboard technology platforms'' to make clear sellers and telemarketers must retain records of any entity that provides any digital or sound technologies sellers or telemarketers use to convey a verbal message to a consumer in telemarketing;
- Sellers and telemarketers must retain records of their service providers under Section 310.5(a)(9) for five years from the date the contract expires;
- For records of the entity-specific DNC list under Section 310.5(a)(10), sellers and telemarketers must retain a record of the telemarketing entity that made the call and not the individual telemarketer;
- Under Section 310.5(a)(11), sellers and telemarketers need only retain records of which version of the FTC DNC Registry they used to comply with the TSR rather than the version itself. A record of which version used includes: (1) the name of the entity which accessed the registry; (2) the date the DNC Registry was accessed; (3) the subscription account number that was used to access the registry; and (4) the telemarketing campaign(s) for which it was accessed;
- The new formatting requirements under Section 310.5(b) apply to new records created after the Final Rule goes into effect;
- The safe harbor to retain call detail records under Section 310.5(a)(2) will grant sellers and telemarketers thirty days to correct any inadvertent errors from the date of discovery, if the seller or telemarketer who made the error otherwise complies with the other provisions of the safe harbor; and
- Under Section 310.5(e), sellers who delegate recordkeeping responsibilities to a telemarketer must also retain access rights to those records so the seller can produce responsive records in the event it has hired a telemarketer overseas.

A. Recordkeeping Requirements

The Final Rule requires sellers and telemarketers to maintain additional records that, in the Commission's law enforcement experience, are difficult for the Commission to obtain but are necessary to ensure compliance with the TSR.[87] The Final Rule also clearly defines the information telemarketers or sellers must retain to comply with existing provisions and specifies the records needed to assert an exemption or affirmative defense to the TSR. In this section, the Commission details the public comments it received in response to each proposed amendment to the recordkeeping requirements, and the Commission's response.

1. Section 310.5(a)(1)—Substantially Different Advertising Materials and Each Unique Prerecorded Message

Section 310.5(a)(1) currently requires sellers and telemarketers to keep records of ''all substantially different advertising, brochures, telemarketing scripts, and promotional materials.'' The 2022 NPRM proposed modifying Section 310.5(a)(1) to require retention of a copy of each unique robocall, including each call a telemarketer makes using soundboard technology.[88]

The Commission received five public comments addressing this proposal. The Enterprise Communications Advocacy Coalition (''ECAC'') and Sirius XM Radio (''Sirius'') object to this proposed amendment, stating it would be overly burdensome. Sirius states requiring the retention of each unique robocall would ''generate massive amounts of data that then needs to be searched, analyzed, secured, and retained, and will be extremely burdensome.'' [89] ECAC claims robocalls are ''typically stored as .wav files that are significantly larger than text files. While storage costs *may* have decreased over time, the expense associated with the storage of these large .wav files will be a significant burden on lawful telemarketers.'' [90]

The National Association of Attorneys General (on behalf of 43 State Attorneys General) (''NAAG''), Professional Association for Customer Engagement (''PACE''), and World Privacy Forum (''WPF'') all state they generally support this amendment.[91] PACE further states their members ''often keep copies of [each unique robocall] despite the TSR currently not requiring businesses to do so. Retaining these records will protect American consumers, who receive countless prerecorded messages, and protect companies, who will be able to prove compliance with the TSR.'' [92]

The Commission is not persuaded by ECAC's and Sirius' arguments. In the Commission's experience, robocalls are typically of short duration and the file sizes are minimal. As ECAC notes, the cost of storage may be decreasing every

[87] The Telemarketing Act authorizes the Commission to include recordkeeping requirements in the Rule. 15 U.S.C. 6102(a)(3).

[88] The 2022 NPRM also proposed changing the records retention period under this provision from two years to five years from the date that the records are no longer in use. *See infra* Section III.A.10 (Time Period to Keep Records).

[89] Sirius 34–18 at 8.

[90] ECAC 34–22 at 2.

[91] NAAG 34–20 at 3–4; PACE 33–15 at 2; WPF 34–21 at 2.

[92] PACE 33–15 at 2.

year. Moreover, the Commission proposed requiring a copy of each *unique* robocall, not *every* robocall used. Finally, as some commenters have stated,[93] businesses typically keep these records in the ordinary course of business. In the FTC's law enforcement experience, records of each unique prerecorded message are necessary for the Commission to ensure compliance with the TSR, and requiring retention of each unique robocall should not impose an undue burden.

With respect to calls utilizing soundboard technology, the Commission sought comment on the burden that may be imposed by requiring sellers or telemarketers to keep each unique prerecorded message involving the use of soundboard technology, including how many telemarketers employ soundboard technology in telemarketing, how many calls they make using soundboard technology, the average duration of each call, and whether the telemarketer typically keeps recordings of such calls in the ordinary course of business.[94] The FTC's law enforcement experience demonstrates the use of soundboard technology is ongoing. The Commission did not receive any public comments regarding this issue. WPF did note, however, the Commission should be mindful of using technological language that is broad enough to encompass a variety of digital and other sound technologies and recommended the use of the term ''digital soundboard'' in lieu of ''soundboard technology.'' [95] In light of this recommendation, the Commission states that the term ''prerecorded message'' includes telemarketing calls made using ''digital soundboard'' rather than ''soundboard technology'' to make clear the term includes any digital or sound technologies that sellers or telemarketers use to convey a verbal message to a consumer in telemarketing. Some digital soundboard technologies allow a seller or telemarketer to mimic or clone the voice of a specific individual and calls using this technology would be subject to this provision of the TSR to the extent that the mimic or cloning creates a prerecorded message that is used in telemarketing.

WPF also ''encourage[s] the FTC to require telemarketers to keep a copy of the full range of materials involved in the advertising campaign, including transcripts.'' [96] The Commission notes the TSR's recordkeeping provisions already require telemarketers and sellers to retain a copy of each substantially different advertising, brochure, telemarketing script, and promotional material.[97] The 2022 NPRM simply clarified telemarketing scripts include robocall and upsell scripts, and the failure to keep one substantially different version of each record under Section 310.5(a)(1) is a violation of the TSR.[98]

2. Section 310.5(a)(2)—Call Detail Records

The 2022 NPRM proposed adding Section 310.5(a)(2) to require retention of call detail records, including, for each call a telemarketer places or receives: the calling number; called number; time, date, and duration of the call; and the disposition of the call, such as whether the call was answered, dropped, transferred, or connected. For transfers, the record included the phone number or IP address the call was transferred to and the company name, if transferred to a company different from the seller or telemarketer that placed the call. The 2022 NPRM also required the retention of other records regarding the nature and purpose of each call including: (1) the telemarketer who placed or received each call; (2) the seller or charity for which the telemarketing call is placed or received; (3) the good, service, or charitable purpose that is the subject of the call; (4) whether the call is to a consumer or business, utilizes robocalls, or is an outbound call; and (5) the telemarketing script(s) and robocall (if applicable) that was used in the call. Finally, the 2022 NPRM required retention of records regarding the caller ID transmitted for outbound calls, including the name and phone number transmitted, and records of the telemarketer's authorization to use that phone number and name.

The Commission received eight comments regarding this proposal. ECAC,[99] the National Federation of Independent Businesses (''NFIB''),[100] and Sirius [101] objected, stating that compliance with this provision would impose enormous expense on businesses engaged in lawful telemarketing.[102] ECAC states its members ''make hundreds of millions of calls each year'' and ''[f]actoring in the size of a CDR file'' multiplied by the number of calls its members make each year, ''the expense associated with this retention . . . would be massive.'' [103] ECAC also argues that, while its members likely keep information regarding the nature and purpose of the calls in the ordinary course of business, associating particular scripts with a particular call is unworkable because ''well-trained telemarketers are able to deviate from scripts or not use them at all'' and ''scripts are constantly changing and evolving to reflect consumer questions and concerns.'' [104]

Sirius argues the Commission's ''overly prescriptive'' approach would impair a business's ability to adapt to

[93] *See, e.g.,* PACE 33–15 at 2.

[94] 2022 NPRM, 87 FR at 33689.

[95] WPF 34–21 at 2.

[96] *Id.*

[97] 16 CFR 310.5(a)(1).

[98] 2022 NPRM, 87 FR at 33684.

[99] ECAC 34–22 at 3.

[100] NFIB 33–4 at 4–5.

[101] Sirius 34–18 at 7.

[102] OCUL also generally objects to the proposed recordkeeping requirements as overly burdensome, stating it would require a significant investment to collect and retain new data points in a constricted time frame. OCUL 34–19 at 2.

Other commenters generally objected to the recordkeeping amendments, arguing that they require telemarketers and sellers to retain more information than they would in the ordinary course of business and are ''contrary to data minimization principles'' articulated by the Commission elsewhere. *See, e.g.,* Sirius 34–18 at 2, 4–6; NFIB 33–4 at 3–4. The Commission interprets these arguments to refer to the new requirement that sellers and telemarketers retain call detail records. NFIB lists other categories in their comment as examples of burden, such as records of established business relationships, customer lists, consent, and entity-specific DNCs or versions of the FTC's DNC Registry. NFIB 33–4 at 3–4. None of these categories, however, is new, and the TSR has always required telemarketers and sellers to keep these records. *See, e.g.,* 16 CFR 310.5(a)(3) and (5) (requiring records of consent and customer lists); 310.4(b)(3)(iii) and (iv) (requiring records of an entity-specific DNC or a version of the FTC's DNC Registry that a seller or telemarketer used to qualify for the safe harbor provisions); *see also* 2015 TSR Amendments, 80 FR at 77554 (stating the seller or telemarketer bears the burden of demonstrating the seller has an existing relationship with a customer whose number is on the DNC).

The Commission notes that the call detail records primarily reflect sellers' and telemarketers' business practices rather than implicate any consumer information. The only new items of consumer information that sellers and telemarketers are required to retain under the new recordkeeping amendments are a consumer's phone number and the option to retain the consumer's last known email address rather than a physical address. *See* proposed amendments under Sections 310.5(a)(2) (call detail records); (a)(3) (prize recipients); (a)(4) (customer records); and (a)(6) (previous donor). As explained in the 2022 NPRM, the Commission believes that telemarketers and sellers likely retain this information in the ordinary course of business. 2022 NPRM, 87 FR at 33684–85. Furthermore, they must already retain consumers' phone numbers to comply with the entity-specific DNC requirements. As discussed in additional detail in Section III.A.3—Prize Recipients and Customer Records, the Commission will prohibit use of any records created to comply with the TSR's recordkeeping requirements for any other purpose.

[103] ECAC 34–22 at 3.

[104] *Id.* at 4. The Commission does not find ECAC's argument persuasive. Even if a telemarketer deviates from a script, fails to use the script, or the company constantly updates the scripts, there is still *a* script associated with a particular call and in the Commission's law enforcement experience, telemarketers typically retain that information in the ordinary course of business.

changing market conditions and a company's ability to innovate. It would also impose ''significant administrative burdens'' and ''substantial transactional costs'' on sellers and telemarketers to establish contracts and systems to capture the information requested.[105] And NFIB argues sellers and telemarketers would ''incur substantial costs to: (1) establish in-house, or purchase from others, systems designed and built to accomplish the newly-mandated, extraordinarily-detailed recordkeeping, and (2) employ personnel to maintain and operate the systems.'' [106] At minimum, Sirius requests the Commission allow a ''phase-in'' period of a few years to allow companies sufficient time to adjust agreements, implement new systems, and build compliance plans.[107]

The Electronic Privacy and Information Center (on behalf of 13 advocacy groups) (''EPIC''), NAAG, WPF, and an individual consumer, all support the proposed amendments.[108] NAAG echoed the Commission's law enforcement experience and agreed the amendments are necessary to ensure compliance with the TSR and should not be overly burdensome to create and maintain these records.[109] EPIC stated they ''strongly support'' the amendment which rectifies ''a major weakness in the existing rule'' of requiring retention of only ''prizes awarded and sales'' which are of ''little use in identifying violations of the do-not-call rule'' without accompanying records of calls.[110] EPIC particularly applauded the amendment requiring retention of any caller ID information transmitted and the telemarketer's authorization to use that caller ID because spoofing has undermined consumers' faith in the U.S. telecommunication system, making it harder for emergency calls to reach consumers.[111] WPF and NAAG also commented that requiring records of call transfers and the identity of the recipient of those transfers is particularly important because it is ''otherwise impossible to trace fraudulent activity'' when transfers typically appear as a separate inbound call to the recipient in the voice provider's call records.[112] The individual consumer stated retaining call detail records was necessary to enforce the TSR and ''a fair compromise'' in comparison to requiring recordings of all telemarketing transactions which would be overly burdensome to small businesses.[113]

PACE notes some of its members are able to maintain the requested records and already do so in the ordinary course of business, but the proposed amendments may not be technically feasible for all members, particularly those who do not use software to engage in telemarketing but use employees in retail locations.[114] PACE members raised particular concerns about the technical capacity to record ''the duration of the call, disposition of the call, and to whom the call was transferred.'' [115]

As explained in the 2022 NPRM, the proposed addition of Section 310.5(a)(2) is necessary for the Commission to determine whether the TSR applies and which sections of the TSR the seller and telemarketer must comply with for a telemarketing campaign.[116] The Commission is cognizant this amendment will require some administrative costs in establishing a new recordkeeping system. In the 2022 NPRM, the Commission provided an estimate of those costs and invited comment about those estimates,[117] but did not receive any public comment specifically disputing its estimates. Nevertheless, in determining whether to implement the proposed amendments, the Commission considers whether the proposed amendments strike an appropriate balance between the goal of protecting consumers from deceptive or abusive telemarketing and the harm from imposing compliance burdens.

To address the concerns raised by the public comments, the Commission will provide a grace period of one hundred and eighty days from the date Section 310.5(a)(2) is published in the **Federal Register** for sellers and telemarketers to implement any new systems, software, or procedures necessary to comply with this new provision. Furthermore, the Commission will modify this amendment and provide an exemption for calls made by an individual telemarketer who manually enters a single telephone number to initiate a call. For such calls, the seller or telemarketer need not retain records of the calling number, called number, date, time, duration, and disposition of the telemarketing call under Sections 310.5(a)(2)(vii) and (x) but must otherwise comply with the other requirements under Section 310.5(a)(2). Making this modification should alleviate the general concerns commenters have raised regarding the feasibility and burden of creating and retaining call detail records. The Commission is not persuaded that requiring sellers and telemarketers to retain call detail records of their telemarketing campaigns would impose an undue burden if the seller or telemarketer can use automated mechanisms to conduct their campaigns instead of placing calls manually. In those situations, as PACE notes, the seller or telemarketer already maintains similar call detail records in the ordinary course of business.[118]

Nor is the Commission persuaded by Sirius' arguments that the proposed amendments are overly prescriptive and requiring retention of these records would stifle innovation. The proposed amendments merely identify the information sellers and telemarketers must retain. It does not dictate the form or ''look and feel'' of business records as Sirius' suggests. As discussed in more detail in Section III.A.11—Format of Records, the Commission believes the amendment to Section 310.5(a)(2) strikes the appropriate balance between providing specificity about the information sellers and telemarketers are required to keep without prescribing how it must do so.

EPIC and WPF's comments also suggested additional modifications to Section 310.5(a)(2). WPF requested the Commission consider requiring sellers and telemarketers to retain records of their use of voice biometrics in call centers, including whether voice biometrics recognition or voice emotion analysis software was used, whether a consumer's records were marked with any inferences from any voice biometric analysis, and whether that analysis was shared with any other parties.[119] The FTC's Policy Statement on Biometric Information notes significant privacy concerns regarding the collection and use of biometric information and the possibility such practices may be considered an ''unfair'' practice under Section 5 of the FTC Act.[120] Furthermore, the collection and use of such information might be considered abusive and violative of a consumer's right to privacy, which Congress gave the Commission the power to regulate

[105] Sirius 34–18 at 7–8.

[106] NFIB 33–4 at 5.

[107] Sirius 34–18 at 8.

[108] Cassady 34–2; EPIC 34–23 at 4; NAAG 34–20 at 5; WPF 34–21 at 2.

[109] NAAG 34–20 at 5.

[110] EPIC 34–23 at 4.

[111] *Id.*

[112] WPF 34–21 at 2; NAAG 34–20 at 6.

[113] Cassady 34–2.

[114] PACE 33–15 at 2.

[115] *Id.*

[116] 2022 NPRM, 87 FR at 33680–82, 33684.

[117] 2022 NPRM, 87 FR at 33690–91.

[118] PACE 33–15 at 2.

[119] WPF 34–21 at 2.

[120] FTC, Policy Statement of the Federal Trade Commission on Biometric Information and Section 5 of the Federal Trade Commission Act (May 18, 2023), *available at https://www.ftc.gov/system/files/ftc_gov/pdf/p225402biometricpolicystatement.pdf* (last visited Jan 24, 2024).

with respect to telemarketing.[121] Although the Commission does not believe it has the evidence now either to require the retention of voice biometric recognition data in telemarketing or place restrictions on its use, it will continue to monitor voice biometric use in telemarketing.

EPIC requested the Commission consider requiring telemarketers and sellers to also retain records of campaign IDs for each call, arguing it is necessary to tie the call detail records to a particular campaign.[122] The Commission recognizes the concern EPIC has raised and addressed it by requiring sellers and telemarketers to retain records that identify, *for each call,* the nature and purpose of that call, such as the seller or soliciting charity for whom the telemarketing call was placed, the good or service sold or the charitable purpose of the call, and the telemarketing script or the robocall recording that was used. This information is at least as comprehensive as a campaign ID. The Commission believes specifying the substantive information sellers and telemarketers are required to retain, rather than identifying a particular data category such as campaign ID that may be subject to change over time, will more effectively enable the Commission and other regulators to enforce the TSR.

Finally, EPIC requested the Commission consider requiring sellers and telemarketers to keep records of the originating or gateway telecommunications provider for each campaign, rather than any service provider the telemarketer is in a business relationship with, as the NPRM proposes.[123] The Commission believes requiring retention of the call detail records and records of the seller or telemarketer's service providers strikes an appropriate balance between the Commission's interest in having sufficient information to enforce the TSR and industry's concerns regarding burden.

3. Sections 310.5(a)(3) and (4)—Prize Recipients and Customer Records

The TSR currently requires telemarketers and sellers to retain the ''name and last known address'' of each prize recipient.[124] The 2022 NPRM proposed requiring sellers and telemarketers to also retain the last known telephone number and physical or email address for each prize recipient. The Commission received three comments regarding this proposal, and all were supportive of the amendment. PACE states it believes this was a ''prudent measure, and many telemarketers and sellers that reward prizes likely already comply with this proposal.'' [125] NAAG agrees, stating the requirement ''reflects current business practices'' and telemarketers and sellers ''likely keep such information in the regular course of their business.'' [126] WPF concurs, but also suggests the Commission consider requiring sellers and telemarketers to retain this data in an encrypted state.[127]

With respect to ''Customer Records'' under Section 310.5(a)(4), the TSR requires sellers or telemarketers to retain the ''name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services.'' [128] Similarly, the Commission proposed modifying this provision to account for current business practices and require the retention of the customer's last known telephone number and the customer's last known physical address or email address. The Commission also proposed adding the date the consumer purchased the good or service to account for the new requirement that telemarketers and sellers keep records of each consumer with whom a seller intends to assert it has an EBR.[129]

The Commission received four comments regarding this amendment. NAAG and PACE support this proposal, and agree it is necessary to establish EBR and likely that telemarketers and sellers already retain this information in the ordinary course of business.[130] EPIC and WPF, however, do not support this amendment unless the Commission concurrently passes commensurate privacy protections.[131]

The Commission notes that, as it recognized in the 2022 NPRM, requiring sellers and telemarketers to retain additional personal identifying information (such as consumers' names, phone numbers, and either their physical or email address, in combination with goods or services they purchased) may raise privacy concerns.[132] The Commission emphasizes once more that sellers and telemarketers have an obligation under Section 5 of the FTC Act to adhere to the commitments they make about their information practices and take reasonable measures to secure consumers' data.[133]

But the Commission also recognizes the concerns raised by the comments. It agrees additional protections, similar to those it incorporated into the TSR when it prohibited the sale or use of any lists established or maintained to comply with the TSR's DNC Registry or entity-specific DNC,[134] should also apply to any lists of consumers that sellers or telemarketers create or maintain in order to comply with the amended recordkeeping provisions.

Thus, the Commission will amend Section 310.4(b)(2) to state it is also an abusive telemarketing act or practice and a violation of the TSR for any person to sell, rent, lease, purchase, or use any list established to comply with Section 310.5. Amending the TSR to specify that the sale or use of a list created to comply with the recordkeeping provisions is consistent with the Telemarketing Act's emphasis on privacy protection. The Act authorizes the Commission to regulate ''calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.'' [135] The Commission agrees with commenters that consumers would consider it coercive and an abuse of their right to privacy if telemarketers or sellers are allowed to use any consumer information they collect and maintain under the TSR's recordkeeping provisions for any other purpose.

4. Section 310.5(a)(5)—Established Business Relationship

The 2022 NPRM proposed adding Section 310.5(a)(5) to further clarify what records a seller must keep to ''demonstrate that the seller has an established business relationship'' with a consumer. Specifically, for each consumer with whom a seller asserts it

[121] 15 U.S.C. 6102(a)(1).

[122] EPIC 34–23 at 5.

[123] *Id.*

[124] 16 CFR 310.5(a)(2).

[125] PACE 33–15 at 4.

[126] NAAG 34–20 at 9.

[127] WPF 34–21 at 3.

[128] 16 CFR 310.5(a)(3).

[129] 2022 NPRM, 87 FR at 33686.

[130] NAAG 34–20 at 9; PACE 33–15 at 5.

[131] EPIC 34–23 at 15; WPF 34–21 at 3. When consumer data is transferred as part of the sale, assignment, or change in ownership, dissolution, or termination of the business, EPIC also urges the Commission to require a successor to acknowledge liability for any TSR violations regarding the calls that those records document. EPIC 34–23 at 15–16. EPIC argues that this will deter a fraudulent seller or telemarketer from shutting their businesses and selling their assets, including customer lists, to a sham successor as a means of evading liability. The Commission does not believe such an amendment is necessary at this time.

[132] 2022 NPRM, 87 FR at 33686.

[133] *See generally* Federal Trade Commission 2020 Privacy and Data Security Update, *available at https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-privacy-data-security-update/20210524_privacy_and_data_security_annual_update.pdf* (last visited Dec. 11, 2023).

[134] 2003 TSR Amendments, 68 FR at 4645.

[135] 15 U.S.C. 6102(a)(3)(A); *see also* 2002 NPRM, 67 FR at 4510–11.

has an established business relationship, the seller must keep a record of the name and last known phone number of that consumer, the date the consumer submitted an inquiry or application regarding that seller's goods or services, and the goods or services inquired about.[136]

The Commission received five comments addressing this proposed amendment. EPIC,[137] NAAG, and PACE all support this amendment, agreeing it is necessary for a seller to establish a business relationship with a consumer and it is likely businesses already retain such records.[138] The Ohio Credit Union League (''OCUL'') made a general objection stating it was unclear when a credit union member's business relationship begins or ends, while Sirius objected on the grounds ''it was unnecessary'' since ''sellers and telemarketers must already collect information sufficient to demonstrate an established business relationship to use as an affirmative defense.'' [139]

The Commission is not persuaded by either OCUL's or Sirius's objections. As the Commission noted in its 2022 NPRM, this requirement only applies if a seller intends to assert it has an established business relationship with a consumer.[140] As Sirius notes, sellers must already collect this information in the ordinary course of business and thus the amendment should not impose an additional burden.

5. Section 310.5(a)(6)—Previous Donor

Similar to the EBR requirements described above, the Commission also proposed adding Section 310.5(a)(6) to clarify that, if a telemarketer intends to assert that a consumer is a previous donor to a particular charity,[141] the telemarketer must keep a record, for each such consumer, of the name and last known phone number of that consumer, and the last date the consumer donated to the particular charity. The Commission received two comments on this proposed amendment. NAAG agreed with this proposed amendment, stating it was akin to the proposed amendment for EBR and should not ''impose any undue burden.'' [142] WPF concurred stating the new recordkeeping provision will ''serve to clarify the exemption for charitable donations.'' [143]

6. Section 310.5(a)(8)—Records of Consent

Section 310.5(a)(5) of the TSR requires sellers or telemarketers to keep records of ''[a]ll verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.'' The Commission proposed modifying this provision to clarify what constitutes a complete record of consent sufficient for a telemarketer or seller to assert an affirmative defense.[144] It wanted to make clear that common practices previously employed by telemarketers or sellers, such as maintaining a list of IP addresses and timestamps as proof of consent, are insufficient to demonstrate that a consumer has, in fact, provided consent to receive robocalls or receive telemarketing calls when the consumer has registered her phone number on the DNC Registry.[145]

Specifically, the 2022 NPRM proposed that for each consumer from whom a seller or telemarketer states it has obtained consent, sellers or telemarketers must maintain records of that consumer's name and phone number, a copy of the consent requested in the same manner and format it was presented to that consumer, a copy of the consent provided, the date the consumer provided consent, and the purpose for which consent was given and received.[146] For a copy of the consent provided under Sections 310.3(a)(3), 310.4(a)(7), 310.4(b)(1)(iii)(B)(1), or 310.4(b)(1)(v)(A), a complete record must also include all of the requirements outlined in those respective sections.[147] The 2022 NPRM also stated if consent were requested verbally, a copy of the telemarketing script of the request would suffice as a copy of the consent requested, and a recording of the conversation was not necessary unless another provision of this Rule required it.[148]

The Commission received four comments regarding this proposed amendment. EPIC, NAAG, PACE, and WPF all generally support the proposed amendment.[149] PACE states it ''welcomes these provisions in order to better ascertain what records are necessary to assert an affirmative defense'' and the proposed records ''flow logically from the TSR.'' [150]

But EPIC, NAAG, and WPF also submitted suggestions on additional amendments, arguing the Commission should implement more stringent requirements. WPF suggests the Commission consider updating how a consumer ''may withdraw or revoke consent, and create responsibilities for telemarketers to provide a clear opportunity to revoke or consent in each communication.'' [151] EPIC asks the Commission to specify that in identifying the ''specific seller'' from whom a consumer has provided written express agreement to receive robocalls, the telemarketer or seller must retain records of the ''legal name of the seller whose goods [or] services are being promoted.'' [152] EPIC believes this will

[136] A seller may also show it has an established business relationship with a consumer if that consumer purchased, rented, or leased the seller's goods or services or had a financial transaction with the seller during the 18 months before the date of the telemarketing call. The Commission is modifying the existing recordkeeping provisions to state that records of existing customers should also include the date of the financial transaction to support the existence of an EBR under these circumstances. *See* Section III.A.3 (Prize Recipients and Customer Records).

[137] EPIC also urged the Commission to modify the EBR requirements to include consumers who purchased a good or service from the seller. EPIC 34–23 at 14. The Commission does not believe this is necessary since sellers and telemarketers must already keep records of customers, which includes consumers who purchased a good or service from the seller. 16 CFR 310.5(a)(3). Furthermore, as discussed in Section III.A.3—Prize Recipients and Customer Records above, the Commission is amending the customer records provision to include the date the consumer purchased the good or service to account for the new EBR recordkeeping requirements.

EPIC also urges the Commission to consider clarifying that EBR may only be asserted as an affirmative defense if the seller or telemarketer intentionally called the consumer *because* it has an established business relationship with the consumer. EPIC 34–23 at 15. The TSR does not currently contemplate the use of EBR in this manner but rather allows telemarketers and sellers to call a consumer if the seller can demonstrate it has an EBR with that consumer and otherwise meets other requirements under the TSR. Making any modifications to this framework would require additional consideration.

[138] EPIC 34–23 at 15; NAAG 34–20 at 7; and PACE 33–15 at 2–3.

[139] OCUL 34–19 at 2; Sirius 34–18 at 5.

[140] 2022 NPRM, 87 FR at 33685.

[141] The Commission also proposed adding a new definition of ''previous donor.'' *See supra* Section II.C.

[142] NAAG 34–20 at 7.

[143] WPF 34–21 at 1.

[144] 2022 NPRM, 87 FR 33686–87.

[145] *Id.* at 33681.

[146] *Id.* at 33686–87.

[147] *Id.* For example, a copy of the consent provided to receive prerecorded sales messages under Section 310.4(b)(1)(v)(A) must evidence, in writing: (1) the consumer's name, telephone number, and signature; (2) that the consumer stated she is willing to receive prerecorded messages from or on behalf of a specific seller; (3) that the seller obtained consent only after clearly and conspicuously disclosing that the purpose of the written agreement is to authorize that seller to place prerecorded messages to that consumer; and (4) that the seller did not condition the sale of the relevant good or service on the consumer providing consent to receive prerecorded messages. The TSR also states that a seller must obtain consent from the consumer, and the Commission reiterates that this means a seller must obtain consent directly from the consumer and not through a ''consent farm.''

[148] 2022 NPRM, 98 FR at 33686–87.

[149] *See* EPIC 34–23 at 10–11; NAAG 34–20 at 10; PACE 33–15 at 5; and WPF 34–21 at 3.

[150] PACE 33–15 at 5.

[151] WPF 34–21 at 3.

[152] EPIC 34–23 at 10–13.

''reduce obfuscation'' on the ''scope of the consumer's consent'' and identify the proper defendant if ''legal action is necessary.'' [153]

The Commission believes WPF's recommendation is primarily applicable to transactions involving a negative option feature [154] where a consumer may wish to cancel a subscription plan and revoke billing authorization. The Commission published a Notice of Proposed Rulemaking regarding the Negative Option Rule (''Negative Option NPRM'') on April 24, 2023, which also addresses telemarketing transactions.[155] Because the proposed Negative Option Rule would apply a more comprehensive and consistent framework for negative option transactions regardless of the sales medium, the Commission declines to make any further amendments to the TSR to address WPF's comment at this time.

With respect to EPIC's request regarding the identification of a ''specific seller,'' the Commission stated in the Statement of Basis and Purpose finalizing the TSR amendments prohibiting robocalls that it used the term ''specific seller'' to ''make it clear that prerecorded calls may be placed only by or on behalf of the specific seller identified in the agreement.'' [156] The Commission wanted to ensure any agreement to receive robocalls would be limited to the seller identified in the agreement and could not be transferrable to any other party.[157] Requiring companies to use the legal entity name to identify the specific seller in the written agreement is a natural extension of the Commission's intention in using the term ''specific seller.'' Thus, the Commission states now that in identifying the specific seller in any written agreement, the seller should use its legal entity name to make clear any agreement to receive robocalls is limited to that specific legal entity. The Commission also states the burden will be on the seller or telemarketer to ensure and prove a consumer understands which specific legal entity would be permitted to send the consumer robocalls. In circumstances where the legal entity's name may not be recognizable to consumers, perhaps because the consumers would recognize a brand or product name but not the legal entity name, the seller or telemarketer may need to take extra steps to ensure the consumer has knowingly agreed to receive robocalls from the specific seller.

EPIC also requests the Commission require sellers and telemarketers to ''retain records regarding the owner of the website where consent was purportedly obtained'' and a record of ''the relevant webform completion, or of some other admissible evidence of the specific consumer providing consent via a specific web page on a specific date/time.'' [158] For telemarketers or sellers who obtain consumer consent via a website, the Commission believes the new recordkeeping provision requiring records of ''a copy of the request for consent in the same manner and format in which was presented to that consumer'' would require a telemarketer or seller to keep a copy of the web page or web pages that were used to request consent from the consumer. The copy of the web page could be maintained as screenshots so long as the screenshot accurately reflects what a consumer viewed in providing consent. Sellers and telemarketers who obtain consent via website will also need to keep ''a copy of the consent provided'' under the new recordkeeping provisions. The Commission believes a screenshot of the web page a consumer completed to provide consent could satisfy this requirement if the screenshot also accurately reflects what a consumer submitted in providing consent. The Commission declines to specify the format a company must use to keep a copy of consent requested or provided to allow businesses the flexibility of retaining records as they would in the ordinary course of business. Rather, it believes specifying the categories of information required to adequately reflect consent will provide sufficient guidance. The Commission cautions, however, an IP address with a timestamp is not sufficient as a record of consent. The Commission does not believe any additional amendments are necessary at this time.[159]

EPIC and NAAG also raised concerns regarding the Commission's statement regarding the records for verbal consent. In the 2022 NPRM, the Commission stated if a seller or telemarketer requests consent verbally, a telemarketing script would suffice as a record of the consent requested as long as no other provision of the TSR required a recording.[160] EPIC requests the Commission make clear the reference to verbal consent only applies to billing authorization under Section 310.4(a)(7), and any authorization required to receive robocalls or to receive telemarketing calls to phone numbers on the DNC Registry must be provided in writing. EPIC also raised concerns over whether the Commission's statement meant that a script is an ''acceptable record of the language the caller used to request consent'' or if ''the Commission is also suggesting that [a script] is an acceptable record of the consumer's grant of consent.'' [161] If the former, EPIC argues using a telemarketing script as a record of the request for consent is insufficient when telemarketers often fail to follow the scripts.[162] If the latter, EPIC argues it would ''eviscerate the recordkeeping requirement'' when the new consent requirements include '' 'a copy of the request provided.' '' [163] EPIC also argues allowing a recording of only the consent provided without the actual request for consent would allow the telemarketer or seller to record a series of the ''word 'yes,' which would be meaningless without any context.'' [164] NAAG takes it a step further and urges the Commission to require recordings of the entire telemarketing transaction whenever consent is requested verbally.[165]

The 2022 NPRM specifies that, with respect to requests for verbal consent where no provision of the TSR requires a recording, a telemarketing script would be sufficient for a copy of the *request* for consent. It did not propose that a telemarketing script would be sufficient as a record of the consent *provided.* But the Commission recognizes the concerns raised by NAAG and EPIC, that without a recording of the consent requested, a recording of the request provided would

[153] *Id.*

[154] A negative option feature is defined as ''an offer or agreement to sell or provide any goods or services, a provision under which a customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.'' 16 CFR 310.2(w).

[155] 88 FR 24716 (Apr. 24, 2023).

[156] 2008 TSR Amendments 73 FR at 51186; *see also supra* note 147.

[157] 2008 TSR Amendments 73 FR at 51186.

[158] EPIC 34–23 at 12.

[159] EPIC also requested that the Commission clarify that the TSR's language regarding consent is similar to the TCPA's language regarding consent or that the consent requirements do not ''lower the bar below the current requirements of the TCPA.'' EPIC 34–23 at 13. The new amendments to the TSR do not alter substantive requirements for consent under the TSR. They merely clarify what records are necessary to maintain proof of consent.

[160] 2022 NPRM, 87 FR at 33687.

[161] EPIC 34–23 at 11.

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] NAAG 34–20 at 10. NAAG has also urged the Commission to require a recording whenever a telemarketing call includes a negative option offer. NAAG 34–20 at 6. It also requests that the Commission require a full refund if a consumer complains of unauthorized charges and the seller is unable to provide a recording of the transaction as proof of consent. *Id.* Since the Commission has issued the Negative Option NPRM, the Commission will not address this comment here.

be meaningless. Given that industry has stated scripts are not ''set in stone'' and ''[w]ell-trained telemarketers are able to deviate from scripts or not use them at all,'' [166] the Commission states that, for a complete record of consent that is requested verbally and where no provision of the TSR requires a recording, a telemarketer or seller must retain a recording of the consent requested as well as the consent provided to comply with proposed Section 310.5(a)(8). In addition, the recording must make clear the purpose for which consent was provided. The Commission does not believe requiring a recording of both the consent requested and provided would result in additional burden to businesses since it believes most businesses would have made a recording of both to comply with the recordkeeping provisions in the ordinary course of business.

In further response to NAAG and EPIC's concern, the Commission does not believe a recording of the entire telemarketing transaction is necessary if it is not otherwise required by another provision of the TSR. To require a recording of the entire transaction whenever consent is requested would effectively require a recording of all telemarketing transactions that are subject to the TSR.[167]

The Commission reiterates that sellers and telemarketers remain obligated to comply with all requirements outlined in other consent provisions in the TSR.[168] For transactions involving preacquired account information, telemarketers and sellers must fulfill the requirements of Section 310.4(a)(7)(i) and (ii), which include recording the entire telemarketing transaction if there is a free-to-pay conversion feature. For consent to receive robocalls or calls to phone numbers on the DNC Registry, telemarketers and sellers must abide by the requirements of Sections 310.4(b)(1)(iii)(B)(1) and (b)(1)(v)(A), respectively, which include obtaining a consumer's written consent.[169] And for telemarketing transactions using certain payment methods, telemarketers and sellers must comply with Section 310.3(a)(3), which includes obtaining a consumer's authorization to be billed in writing or, if verbal consent is requested, a recording of the transaction that evidences a consumer has received specific information. The Commission reiterates this rule amendment does not modify the requirements for consent outlined in the TSR; rather it clarifies what records must be kept to demonstrate compliance with the existing requirements.

7. Section 310.5(a)(9)—Other Service Providers

The Commission proposed requiring sellers and telemarketers to keep records of all service providers the telemarketer uses to deliver an outbound call in their telemarketing campaigns, such as voice providers, autodialers, sub-contracting telemarketers, or soundboard technology platforms. The provision would only apply to the service providers with which the seller or telemarketer has a business relationship, and not to every service provider involved in delivering an outbound call. For each service provider, the seller or telemarketer would keep records of any applicable contracts, the date the contract was signed, and the time period the contract is in effect. The seller or telemarketer would keep such records for five years from the date the contract expires or five years from the date the telemarketing activity covered by the contract ceases, whichever is shorter.

The Commission received four comments on this proposal. EPIC, NAAG, PACE, and WPF all support the proposed amendment, but also suggested some modifications.[170] WPF repeated its request the Commission use broader terminology than ''soundboard technology platforms'' in defining service providers.[171] EPIC repeated its request the Commission require sellers and telemarketers to also keep records of which service provider they used for each telemarketing campaign to ensure those service providers are also complying with the TSR.[172]

The Commission clarifies that service providers referenced under this provision include any entity that provides ''digital soundboard'' technology rather than ''soundboard technology platforms,'' to make clear that sellers and telemarketers must retain records of any entity that provides any digital or sound technologies that sellers or telemarketers use to convey a verbal message to a consumer in telemarketing. This includes, for example, service providers that telemarketers or sellers use to mimic or clone the voice of an individual to deliver live and prerecorded outbound telemarketing calls. With respect to EPIC's concerns of ensuring service providers are also complying with the TSR, as discussed above in Section III.A.2—Call Detail Records, the Commission believes it is not necessary to require records of the service provider used per telemarketing campaign. Requiring retention of all call detail records *and* records of the service providers used in making outbound telemarketing calls would be sufficient for the Commission and other law enforcement agencies to enforce the TSR and strikes an appropriate balance against industry's concerns regarding burden.

PACE requests the Commission limit this provision to the service providers with which sellers and telemarketers have a direct contractual relationship rather than a ''business relationship.'' [173] PACE argues it would be unreasonable to expect a seller to maintain records of its telemarketers' voice providers when the contractual relationship is between the telemarketer and voice provider.[174] PACE also asks the Commission limit the five year retention time period from the date the contract expires rather than when the telemarketing activity covered by the contract ceases.[175] PACE expressed concerned one party to the contract might cease the telemarketing activity without informing the other party and it would be difficult to identify when the retention period is triggered.[176]

The Commission recognizes the potential for uncertainty in the scenario PACE raises and will modify the recordkeeping requirements accordingly to require retention of any records under this provision for five years from the date the contract expires.[177] With respect to PACE's request to limit the recordkeeping requirements to those service providers with whom sellers or telemarketers have a direct contractual relationship, the Commission is not persuaded that requiring records of service providers with which they have a business relationship would cause

[166] ECAC 34–22 at 4.

[167] The TSR states it is an abusive practice to ''cause billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor.'' 16 CFR 310.4(a)(7). This prohibition applies to all telemarketing transactions subject to the TSR. Thus, requiring a recording of every telemarketing call whenever consent is requested would essentially mean that all telemarketing calls subject to the TSR would need to be recorded.

[168] *See* 16 CFR 310.3(a)(3), 310.4(a)(7), 310.4(b)(1)(iii)(B)(1), and 310.4(b)(1)(v)(A).

[169] The Commission reiterates that a seller or telemarketer may not use an oral recording of consent for any provision of the TSR that requires consent to be provided in writing.

[170] EPIC 34–23 at 7–8; NAAG 34–20 at 7–8; PACE 33–15 at 3; WPF 34–21 at 2.

[171] WPF 34–21 at 2; *see also* Section III.A.2 (Call Detail Records).

[172] EPIC 34–23 at 8.

[173] PACE 33–15 at 3.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] If, after the end of a fixed term contract, a service provider continues to provide services and the telemarketer or seller continues to pay for those services, the Commission will consider the contract extended until performance ceases.

additional burden. As explained in more detail in Section III.A.14—Compliance Obligation, the Commission will allow sellers and telemarketers to allocate recordkeeping responsibilities between themselves. In the scenario that PACE raises, a seller can simply require their telemarketer to retain records of all the service providers it uses to make outbound telemarketing calls on the seller's behalf.

8. Sections 310.5(a)(10)—Entity-Specific DNC List

The 2022 NPRM also proposed requiring telemarketers and sellers to maintain for five years records related to the entity-specific DNC list and its corresponding safe harbor provision under Section 310.4(b)(3)(iii).[178] Specifically, the Commission proposed requiring telemarketers and sellers to retain records of: (1) the consumer's name, (2) the phone number(s) associated with the DNC request, (3) the seller or charitable organization from which the consumer does not wish to receive calls, (4) the telemarketer that made the call; (5) the date the DNC request was made; and (6) the good or service being offered for sale or the charitable purpose for which contributions are being solicited.

The Commission received four comments on this proposal. NAAG, PACE, and WPF, generally support the provision, noting that businesses likely retain this information in the ordinary course of business, while ECAC raised concerns.[179] ECAC agrees that businesses likely keep most of the data listed in the proposed provision, but stated the requirements should not include retention of consumer phone numbers or records of the purpose of the call (*e.g.,* the good or service offered for sale or the charitable purpose of contributions solicited) because both are burdensome to retain and irrelevant to the entity-specific TSR provisions.[180] Instead, ECAC argues the Commission should modify the entity-specific DNC requirements so it prohibits calls to specific numbers rather than specific people, similar to how the DNC Registry is applied.[181] PACE also requested the Commission clarify that the new entity-specific DNC recordkeeping provision requires retention of the telemarketing *entity* that made the call rather than the *individual* telemarketer.[182]

The Commission clarifies that the new recordkeeping provision requires retention of the identity of the telemarketing company that made the call and not the individual telemarketer. This requirement is particularly important for sellers or charitable organizations who engage multiple telemarketing entities to sell their good or service or seek a charitable contribution through telemarketing. Sellers or charities already should know which telemarketing entity logged the consumer's request to cease receiving calls on their behalf and ensure all their telemarketers abide by that request.

Similarly, when a telemarketer engages in telemarketing on behalf of multiple sellers or charitable organizations, it is important to require the retention of records of the purpose of the call any time a consumer asks a telemarketer to add them to the entity-specific DNC list. Since the entity-specific DNC prohibition is seller or charitable organization specific, telemarketers already should retain this information in the ordinary course of business because telemarketers must keep track of which seller on whose behalf they cannot contact specific consumers.

With respect to ECAC's concerns that retaining consumer phone numbers is irrelevant and overly burdensome, the Commission notes the safe harbor provision for the entity-specific DNC list is phone-number based and not based on a consumer's name. Section 310.4(b)(3) states that a seller or telemarketer shall not be liable for violating the entity-specific DNC provisions if, among other things, they maintain and record a ''list of telephone numbers the seller or charitable organization may not contact, in compliance with [the entity-specific DNC provision.]'' [183] Telemarketers must already retain a consumer's phone number in the ordinary course of business to comply with the TSR; including it in the new recordkeeping provision would not impose additional burden on businesses.

9. Section 310.5(a)(11)—DNC Registry

The 2022 NPRM also proposed requiring telemarketers and sellers to maintain, for five years, records of every version of the FTC's DNC Registry the telemarketer or seller downloaded in implementing the process referenced in the safe harbor provision of Section 310.4(b)(3)(iv).[184]

The Commission received four comments on this provision. NAAG, PACE, and WPF generally support the proposed provision, but also request some clarifications or modifications, while ECAC generally objects to the requirement.[185] WPF notes it ''strongly support[s]'' the proposed changes, noting they would ensure the ''integrity of the Do Not Call Registry.'' [186] ECAC argues the Commission should not require records of every version of the DNC Registry used because it ''imposes significant costs and burdens'' that ''greatly exceed any marginal benefit'' to the Commission, particularly when many of its members outsource scrubbing responsibilities to third parties and may never download the DNC Registry in the first place.[187]

WPF requests the Commission require telemarketers to keep records of how many times they accessed the DNC Registry or parts of the DNC Registry.[188] PACE requests the Commission clarify how it believes sellers and telemarketers would comply with the proposal that they retain records of ''every version of the registry they have downloaded.'' [189] PACE states it would be ''redundant'' if the Commission is requiring businesses to ''maintain separate versions of the registry apart from the up-to-date one'' since most businesses only ''scrub against the current version'' of the registry in the ordinary course of business.[190] PACE would support requiring them to ''document the version of the registry they used'' since doing so would reduce ''redundancy and data storage costs associated with keeping expired registries.'' [191]

Given the objections raised, the Commission will modify this provision to clarify that sellers and telemarketers need not keep every version of the DNC Registry they accessed to comply with the TSR's safe harbor rules. Instead, sellers and telemarketers must retain records of which version they used by keeping records of: (1) the name of the entity which accessed the registry; (2) the date the DNC Registry was accessed; (3) the subscription account number that was used to access the registry; and (4) the telemarketing campaign(s) for which it was accessed. Amending this provision to retain this information will address ECAC's concerns that the seller or telemarketer may use a third-party service to access the DNC Registry, and PACE's concern that retaining the actual version of the DNC Registry would be

[178] 2022 NPRM, 87 FR at 33686.

[179] ECAC 34–22 at 4; NAAG 34–20 at 8; PACE 33–15 at 3–4; WPF 34–21 at 3.

[180] ECAC 34–22 at 4.

[181] *Id.*

[182] PACE 33–15 at 4.

[183] 16 CFR 310.4(b)(3)(iii).

[184] 2022 NPRM, 87 FR at 33686.

[185] ECAC 34–22 at 4; NAAG 34–20 at 8; PACE 33–15 at 3–4; WPF 34–21 at 3.

[186] WPF 34–21 at 3.

[187] ECAC 34–22 at 4.

[188] WPF 34–21 at 3.

[189] PACE 33–15 at 4.

[190] *Id.*

[191] *Id.*

redundant and burdensome. It would also address WPF's request that sellers and telemarketers should keep records of the number of times they access the DNC Registry. Presumably, sellers and telemarketers only access the DNC Registry to ensure compliance with the TSR's DNC prohibitions since accessing the DNC Registry for any other purpose would be a violation of the TSR.[192]

10. Time Period To Keep Records

The Commission proposed changing the time period that telemarketers and sellers must keep records from two years to five years from the date the record is made, except for Sections 310.5(a)(1) and (a)(9),[193] where the Commission proposed requiring retention for five years from the date that records covered by those sections are no longer in use. The Commission received nine comments on this proposal.[194] EPIC, NAAG, and WPF support the proposal, citing as rationales for their support the amount of time necessary to complete an investigation of TSR violations and that telemarketers fail to comply with litigation holds that are issued while investigations are pending.[195] ECAC, NFIB, OCUL, PACE, Sirius, and the US Chamber of Commerce (''Chamber'') all object, raising burden concerns.[196] PACE stated the Commission cannot assume its proposal would not be unduly burdensome based on the fact that data storage costs have decreased since 2014.[197] This is particularly true for small businesses, according to PACE, when the Commission is simultaneously expanding the number of records that must be retained and the length of time those records must be retained.[198] Sirius and OCUL also argue the FTC should not require retention of records ''beyond the agency's statute of limitations.''[199] Sirius argues the appropriate statute of limitations is three years,[200] and OCUL argues that while the TSR does not ''specify a statute of limitations,'' courts will ''apply the statute of limitations of the state where the case is filed,'' which is two years in Ohio.[201]

The Commission is not persuaded by the general burden concerns commenters have raised. None of the commenters provided any information on what the burden would be and why small businesses would not be able to comply with the new recordkeeping amendments. As mentioned in Section III.A.2—Call Detail Records, the Commission provided an estimate of the additional cost of complying with the new recordkeeping amendments but did not receive any comment or data on why its estimate is inaccurate.

Additionally, the Commission notes the statute of limitations for the FTC to seek civil penalties under the TSR is five years and not two or three years, as some commenters argued. Although the statute of limitations to seek *consumer redress* for TSR violations is three years under Section 19 of the FTC Act,[202] the applicable statute of limitations for *civil penalties* is five years under Section 5 of the FTC Act.[203] As such, the Commission believes it is appropriate and necessary to require the retention of records for five years. This requirement is particularly important when, as EPIC has noted, not all companies will comply with a litigation hold request while an investigation is pending, potentially leaving law enforcement agencies with no recourse in enforcing the TSR.[204]

11. Section 310.5(b)—Format of Records

The 2022 NPRM proposed modifying the formatting requirements to require records that include phone numbers comport with the International Telecommunications Union's Recommendation E.164 format for international phone numbers and North American Numbering plan for domestic phone numbers.[205] For records that include time and call duration, the 2022 NPRM proposed industry keep these records to the closest whole second, and record times in Coordinated Universal Time (UTC). The Commission received two comments on this proposal. Both commenters support the amendments, but also requested clarifications or modifications.

PACE asked the Commission to clarify that the new amendments requiring that time be kept in UTC format applies only to new records moving forward.[206] It also requested the Commission allow businesses a reasonable time to implement the proposed changes since it may require reprogramming software and IT systems.[207] The Commission clarifies that the new formatting requirements apply only to new records created after the proposed amendments go into effect. Additionally, as stated in Section III.A.2—Call Detail Records, the Commission will allow sellers and telemarketers a one hundred eighty-day grace period to implement any new systems, software, or procedures necessary to comply with that new provision. The Commission believes that should provide companies sufficient time to reprogram any software systems necessary to also comport with the new formatting requirements.

EPIC requests the Commission require companies to maintain records in a format that is easily retrievable and inexpensive to produce and make clear the regulated party is responsible for the cost of producing the records.[208] EPIC also requests the Commission impose more specific formatting requirements and require telemarketers and sellers to keep their records in a format that ''is commonly used to work with large data sets'' and ''easily readable'' such as ''separate columns for separate data points rather than every data point within the same single data field.''[209] The Commission considered EPIC's suggestions and declines to impose more specific formatting requirements. Technology is advancing at such a rapid pace that the Commission is concerned more specific formatting requirements might become obsolete in the future. Moreover, in the Commission's experience, companies that use technologies such as an autodialer to make telemarketing calls rather than manual means typically retain records of those calls in an easily retrievable format. The Commission believes allowing companies to retain records as they would in the ordinary course of business strikes an appropriate balance between law enforcement's interest in obtaining the information necessary to enforce the TSR and industry's concerns

[192] 16 CFR 310.4(b)(2).

[193] The records covered by these two sections include advertising materials and a list of the service providers who assisted in outbound telemarketing. *See supra* Sections III.A.1 (Substantially Different Advertising Materials) and III.A.7 (Other Service Providers).

[194] 2022 NPRM, 87 FR at 33686.

[195] EPIC 34–23 at 4–5; NAAG 34–20 at 8–9; WPF 34–21 at 3.

[196] ECAC 34–22 at 6; NFIB 33–4 at 5; OCUL 34–19 at 2–3; PACE 33–15 at 4; Sirius 34–18 at 3; Chamber 34–24 at 1.

[197] PACE 33–15 at 4.

[198] *Id.*

[199] Sirius 34–18 at 3.

[200] *Id.*

[201] OCUL 34–19 at 2–3.

[202] 15 U.S.C. 57b(d).

[203] 15 U.S.C. 45(m); 28 U.S.C. 2462; *see also United States* v. *MyLife.com, Inc.,* 567 F. Supp. 3d 1152, 1166 (C.D. Cal. Oct. 19, 2021) (holding the statute of limitations for civil penalties under the FTC Act is five years); *United States* v. *Dish Network, LLC,* 75 F. Supp. 3d 942, 1004–05 (C.D. Ill. 2014) (holding the three-year statute of limitations in 15 U.S.C. 57b does not apply to claims for civil penalties under Section 5(m) of the FTC Act, and since Section 5(m) is silent, the applicable statute of limitations is five years under 28 U.S.C. 2462). The statute of limitations for a private right of action under the Telemarketing Act is three years. 15 U.S.C. 6104(a).

[204] EPIC 34–23 at 4–5.

[205] 2022 NPRM, 87 FR at 33687.

[206] PACE 33–15 at 5.

[207] *Id.*

[208] EPIC 34–23 at 13.

[209] *Id.*

about burden. Finally, the Commission does not believe it is appropriate to require sellers and telemarketers to affirmatively bear the cost of producing records to private litigants regardless of the outcome of their suits as EPIC requests,[210] when Congress already included a provision in the Telemarketing Act that allows a court to award the cost of the suit and any reasonable attorney or expert witness fees to the prevailing party.[211]

12. Section 310.5(c)—Violation of Recordkeeping Provisions

The 2022 NPRM proposed clarifying that the failure to keep each record required by Section 310.5 in a complete and accurate manner constitutes a violation of the TSR.[212] The Commission received five comments on this proposal. EPIC and NAAG support the proposal, stating it is a ''common-sense approach in deterring deceptive telemarketers/sellers from harming consumers'' [213] and ''inaccurate or incomplete records are of little use.'' [214] PACE also supports the proposed clarification, stating the proposal is ''logical and in line with the spirit of the TSR and its accompanying legislation.'' [215] But PACE raised concerns about the requirement that records be kept in an accurate and complete manner, arguing that companies who fail to keep all or some records in a complete and accurate manner through inadvertent error should not be penalized in the same way as telemarketers and sellers who fail to keep all or some categories of records.[216] Instead, PACE urges leniency for situations where the failure is inadvertent rather than willful and requests the Commission provide ''a 30-day cure period when the alleged violation can be easily corrected.'' [217]

NFIB and Sirius object to this proposal.[218] Sirius proposes the Commission ''count violations by each *type* of record rather than by *each* record, as proposed.'' [219] NFIB argues allowing civil penalties for ''each erroneous error'' is as ''perverse as the evil the FTC states it is addressing, for it would allow the FTC to put a seller or telemarketer out of business for a relatively minor mistake that affected many records.'' [220] NFIB provides an example to illustrate its concerns describing a situation where a company ''made the relatively minor mistake of keeping calls in the time zone of the person called, rather than in Coordinated Universal Time (UTC) format.'' [221] NFIB believes in this situation the company would be facing astronomically high fines for the hundreds of thousands of calls it makes a year.[222] Instead, NFIB argues the FTC should provide a reasonable time period to cure these errors once discovered, such as 90 days, and only commence imposing fines for each week after the reasonable period expires.[223] According to NFIB, this would be a more balanced system that ''avoids both the extreme that a relatively minor design violation yields an astronomical fine that puts the seller or marketer out of business and the opposite extreme that a violation results in such a small fine that a seller or marketer accepts fines as an annoying but manageable cost of doing business.'' [224]

The Commission recognizes NFIB's and PACE's concerns regarding inadvertent errors resulting in large penalties and, thus, included a safe harbor provision for call detail records in the proposed amendments. As discussed in Section III.A.13—Safe Harbor for Incomplete or Inaccurate Records Pursuant to Section 310.5(a)(2) below, the Commission believes it has provided a reasonable grace period for sellers and telemarketers to cure any inadvertent deficiencies in their recordkeeping system before any civil penalties might apply and the proposed example NFIB raises would fall squarely within the safe harbor, provided the company followed the other requirements of the safe harbor.

Regarding Sirius's suggestion that failure to retain each *type* of record equal one violation, the Commission is not persuaded imposing civil penalties for each type of record would provide sufficient incentive for companies to abide by the recordkeeping provisions given the limited number of categories of records sellers and telemarketers are required to retain.[225]

13. Section 310.5(d)—Safe Harbor for Incomplete or Inaccurate Records Kept Pursuant to Section 310.5(a)(2)

The Commission proposed including a safe harbor provision for temporary and inadvertent errors in keeping call detail records pursuant to Section 310.5(a)(2). Specifically, the 2022 NPRM stated a seller or telemarketer would not be liable for failing to keep records under Section 310.5(a)(2) if it can demonstrate that: (1) it established and implemented procedures to ensure completeness and accuracy of its records under Section 310.5(a)(2); (2) it trained its personnel in the procedures; (3) it monitors compliance and enforces the procedures, and documents its monitoring and enforcement activities; and (4) any failure to keep accurate or complete records under Section 310.5(a)(2) was temporary and inadvertent.[226]

The Commission received four comments on this proposal. PACE states a ''safe harbor for maintaining call detail records is necessary'' while Sirius states it would ''provide a good foundation for seller and telemarketer compliance plans.'' [227] WPF states it does not ''object to the safe harbor proposed'' because it was ''narrow enough to allow companies to make the kinds of mistakes that occur in day to day business, and provides incentives to correct the errors.'' [228]

NFIB, however, states it does not deem the safe harbor sufficient because it is ''complex and limited'' and does not provide a ''great source of comfort to sellers and marketers in its current form.'' [229] Because the safe harbor would apply in the scenario NFIB posits above where a company fails to keep call times in UTC format, the Commission believes the safe harbor provides adequate protection against inadvertent and temporary errors. The Commission, however, will revise this provision to provide sellers or telemarketers thirty days to cure an inadvertent error, as PACE suggests.[230]

14. Section 310.5(e)—Compliance Obligations

The Commission proposed modifying the compliance obligations in Section 310.5(e) to state that, in the event the seller and telemarketer failed to allocate responsibility between themselves for

[210] *Id.*

[211] 15 U.S.C. 6104(d).

[212] 2022 NPRM, 87 FR 33687.

[213] NAAG 34–20 at 10.

[214] EPIC 34–23 at 5.

[215] PACE 33–15 at 6.

[216] *Id.*

[217] *Id.* PACE also cites to the example NFIB provided in its comment as an example of why PACE believes the Commission should provide some leniency and an opportunity to cure rather than penalize inadvertent errors.

[218] NFIB 33–4 at 6–7; Sirius 34–18 at 8.

[219] Sirius 34–18 at 8.

[220] NFIB 33–4 at 7.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] Although Sirius did not provide a definition for what it meant by ''type of record,'' the Commission interprets it to mean the categories the Commission has outlined under the amended Section 310.5(a), which would limit the number of categories to eleven.

[226] 2022 NPRM, 87 FR at 33687.

[227] PACE 33–15 at 6; Sirius 34–18 at 8.

[228] WPF 34–21 at 4.

[229] NFBI 33–4 at 8.

[230] PACE 33–15 at 6; *see also* Section III.A.12 (Violation of Recordkeeping Provisions which provides additional discussion about the proposed safe harbor).

maintaining the required records, the responsibility for complying with the recordkeeping requirements would fall on both parties.[231] The Commission received four comments on this proposal. NAAG, PACE, and Sirius supported the proposal.[232] PACE states that ''not only do we consider this fair, but we believe it will encourage parties to negotiate their contracts and cease regarding TSR recordkeeping as an afterthought.'' [233]

EPIC, however, objects to this amendment and strongly urges the Commission to require both telemarketers and sellers to retain records rather than allowing them to allocate responsibilities.[234] Specifically, EPIC raises a concern that a seller may allocate responsibilities to a telemarketer that resides outside the United States and would not be subject to U.S. jurisdiction and process.[235] EPIC argues that if the Commission is inclined to designate only one party, it should be the seller who is responsible because the seller should be accountable for the telemarketers it hires, is less likely to be overseas and undercapitalized compared to telemarketers, and likely receives most of the sales proceeds.[236] But EPIC still believes the Commission should explicitly require both sellers and telemarketers be responsible for recordkeeping to prevent any gamesmanship where sellers move overseas to avoid liability.[237] In the event the Commission is not persuaded, EPIC also argues the Commission should require sellers to audit their telemarketers, including reviewing an actual production of preserved records, and require sellers who hire overseas telemarketers to require those telemarketers to have a U.S.-based agent so their records would be subject to U.S. jurisdiction and process.[238]

The Commission shares EPIC's concerns regarding gamesmanship and the challenges of obtaining records from overseas entities. The Commission is also concerned about sellers hiring unscrupulous telemarketers and disclaiming any responsibility for recordkeeping by allocating the responsibility to those telemarketers. The Commission notes that under the proposed amendment, sellers who allocate recordkeeping responsibilities to their telemarketers would be required to ''establish and implement practices and procedure to ensure the telemarketer is complying with the [TSR's recordkeeping provisions].'' [239] But given the concerns EPIC has raised, the Commission will modify this provision to also require sellers who allocate recordkeeping responsibilities to their telemarketer to retain access rights to those records so the seller can produce responsive records in the event it has hired a telemarketer overseas. Requiring sellers to ensure their telemarketers are abiding by the TSR's recordkeeping provisions and retain access to their telemarketer's records of telemarketing activities on the seller's behalf should not impose onerous obligations, and such access may never be necessary. Sellers likely already take such steps in the ordinary course of business, given that telemarketers are acting as their agents and their telemarketers' violations of the TSR could also expose them to liability under the TSR.

15. Authority To Require Recordkeeping

NFIB argues the new recordkeeping proposals exceed the FTC's statutory authority under the Telemarketing Act.[240] Section 6102(a) of the Telemarketing Act directs the Commission to: (1) prescribe rules prohibiting deceptive or abusive telemarketing acts or practices; [241] (2) include in those rules a definition of deceptive acts or abusive practices that shall include fraudulent charitable solicitations and may include actions that constitute assisting or facilitating such as credit card laundering; [242] and (3) include in those rules a specific list of abusive practices that govern patterns and timing of unsolicited calls, and disclosures of certain material information in sales or charity calls.[243] It also states at the end of Section 6102(a) that ''[i]n prescribing the rules described in this paragraph, the Commission shall also consider recordkeeping requirements.''

NFIB argues the directive to consider recordkeeping requirements applies only to the specific list of abusive practices under Section 6102(a)(3) and, since the other paragraphs are silent as to recordkeeping, the Act affirmatively prohibits the FTC from requiring recordkeeping.[244] The Commission does not agree. The language of the Act shows the directive to consider recordkeeping applies to the Act's mandate to promulgate rules addressing deceptive or abusive telemarketing practices and is not limited to the specific abusive practices identified in Section 6102(a)(3).

Section 6102(a) generally requires the Commission to promulgate rules regarding deceptive or abusive telemarketing acts or practices. Section 6102(a)(1) states: ''[t]he Commission *shall prescribe rules* prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.'' [245] Sections 6102(a)(2) and (a)(3) then identify specific provisions that Congress instructs the Commission to include, or consider including, when it promulgates its rules under Section 6102(a)(1). Section 6102(a)(2) directs the Commission to ''*include in such rules* respecting deceptive telemarketing acts or practices'' a definition of deceptive telemarketing acts or practices, which may include, among other things, credit card laundering.[246] Section 6102(a)(3) directs the Commission to ''*include in such rules* respecting other abusive telemarketing acts or practices'' specific requirements including: (1) ''a *requirement* that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy''; (2) ''*restrictions* on the hours of the day and night when unsolicited telephone calls can be made to consumers''; (3) ''a *requirement* that any person engaged in telemarketing for the sale of goods or services'' make certain disclosures; and (4) ''a *requirement* that any person engaged in telemarketing for the solicitation of charitable contributions'' make certain disclosures.[247] At the end of Section 6102(a)(3), in a separate unnumbered sentence, the Act states ''[i]n *prescribing the rules* described in this paragraph, the Commission shall also consider recordkeeping requirements.'' [248] Thus, Congress directed the Commission to promulgate rules prohibiting deceptive or abusive telemarketing acts or practices under Section 6102(a)(1), and Sections 6102(a)(2) and (a)(3) merely inform what types of acts or practices the Commission should include, or consider including, when it promulgates those rules.[249]

[231] 2022 NPRM, 87 FR at 33687.

[232] NAAG 34–20 at 10; PACE 33–15 at 6; Sirius 34–18 at 8.

[233] PACE 33–15 at 6.

[234] EPIC 34–23 at 8–10.

[235] *Id* at 10.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] 2022 NPRM, 87 FR at 33694.

[240] NFIB 33–4 at 5–6.

[241] 15 U.S.C. 6102(a)(1).

[242] *Id.* 6102(a)(2).

[243] *Id.* 6102(a)(3).

[244] NFIB 33–4 at 6.

[245] 15 U.S.C. 6102(a)(1) (emphasis added).

[246] *Id.* 6102(a)(2) (emphasis added).

[247] *Id.* 6102(a)(3) (emphasis added).

[248] *Id.*

[249] The Commission also notes that the official codification of the Telemarketing Act in the United States Code aligns the indentation of the statement

Continued

NFIB's interpretation of Section 6102(a)(3) improperly divorces that provision from the rest of the statute. As discussed, Section 6102(a)(3) contains Congress's specific guidance regarding the types of rules the Commission must adopt or consider adopting to implement Section 6102(a)(1)'s general grant of authority to ban deceptive or abusive telemarketing practices. Section 6102(a)(3) states when the Commission ''prescrib[es] the rules described'' by Congress, it ''shall also consider recordkeeping requirements.'' This provision thus authorizes the Commission to adopt—or not adopt—recordkeeping requirements and declare violations of such requirements to be an abusive telemarketing practice.

But even if Section 6102(a)(3) did not expressly authorize the Commission to consider recordkeeping requirements, the Commission may still require recordkeeping under Section 6102(a)(1). Congress's purpose in enacting the Telemarketing Act was to prevent deceptive or abusive telemarketing acts or practices.[250] As the Commission has noted over the years, recordkeeping provisions prevent deceptive or abusive telemarketing acts or practices because they are necessary to effectively enforce the TSR.[251] NFIB's assertion that ''the rules for recordkeeping do not prevent or address deceptive or other abusive telemarketing acts or practices'' is not an accurate assertion [252] and it is undermined by the Commission's law enforcement experience and that of other enforcers.[253]

Even if Section 6102(a)(1) could be read as being silent on recordkeeping, that would not prohibit the Commission from including recordkeeping in any rules the Commission promulgates under this section of the Act. Rather, Congress directed the Commission to prescribe rules prohibiting deceptive telemarketing acts or practices and the Commission is granted authority to issue rules, including recordkeeping provisions, for any deceptive or abusive telemarketing acts or practices it identifies in promulgating the TSR.[254] Congress's silence would make sense given the Commission had yet to identify these deceptive or abusive acts or practices in the TSR at the time the Telemarketing Act was passed, and it was unknown whether and what form of recordkeeping would be necessary to ensure compliance.[255] Interpreting the Telemarketing Act to prohibit the Commission from requiring recordkeeping would contradict the Act's stated purpose—to ''enact legislation that will offer consumers necessary protection from telemarketing deception and abuse.'' [256]

Nothing in the text of the Act prevents the Commission from requiring persons to keep records substantiating their compliance with any requirement of the TSR. Nor does NFIB explain why Congress would have intended to deprive the Commission of records essential to the enforcement of the rule. NFIB's interpretation would give telemarketers and sellers a perverse incentive to commit deceptive and abusive practices while destroying any record of those violations.

Finally, even if a court determines the Act only permits recordkeeping for rules that address the specific acts and practices listed in Section 6102(a)(3), the TSR's recordkeeping provisions meet those criteria. The Final Rule requires recordkeeping for eleven general categories of information: (1) advertisements, including telemarketing scripts and robocall recordings; (2) call detail records; (3) prize recipients; (4) customers; (5) customer information to establish a business relationship; (6) previous donors; (7) telemarketers' employees; (8) consent; (9) service providers; (10) entity-specific DNC; and (11) versions of the FTC's DNC. Each of these categories is necessary to ensure compliance with the provisions of the TSR the Commission promulgated to address the specifics acts or practices identified in Section 6102(a)(3).

For example, Section 6102(a)(3)(A) of the Act requires the FTC to prohibit ''a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy.'' [257] Accordingly, the Commission promulgated Section 310.4(b) of the TSR to prohibit certain ''patterns of calls,'' [258] including prohibitions against robocalls, calls to consumers who have asked a specific seller to stop calling, and calls to consumers who have registered their phone numbers on the FTC's DNC Registry.[259] As explained in more detail in Section II—Overview of the Proposed Amendments to the TSR above, the Commission needs all eleven categories of information set forth in the Final Rule, including the requirement that sellers and telemarketers retain call detail records to ensure compliance with these prohibitions.[260]

Similarly, Section 6102(a)(3)(B) of the Act requires the FTC to place restrictions on when telemarketers can make unsolicited calls, while Sections 6102(a)(3)(C) and (D) require the FTC to mandate certain disclosures. The FTC promulgated Section 310.4(c) of the TSR

''In prescribing the rules described in this paragraph, the Commission shall consider recordkeeping requirements'' with Section 6102(a) rather than with Section 6102(a)(3). As such, it supports the Commission's position that the directive to consider recordkeeping refers generally to Section 6102(a) and is not limited to the specific acts and practices listed in Section 6102(a)(3). *See, e.g., https://www.govinfo.gov/content/pkg/USCODE-2011-title15/pdf/USCODE-2011-title15-chap87.pdf* (last visited November 21, 2023).

[250] H.R. Rep. No. 103–20, 103rd Cong., 1st Sess. (''House Report'') at 1; S. Rep. No. 103–80, 103rd Cong., 1st Sess. (''Senate Report'') at 1 (stating the purpose of the bill was ''to prevent fraudulent or harassing telemarketing practices'').

[251] Original TSR 60 FR at 43857; 2003 TSR Amendments, 68 FR at 4653; 2014 TSR Rule Review, 79 FR at 46735.

[252] NFIB 33–4 at 5–6.

[253] *See, e.g.,* NAAG 34–20 at 3–10.

[254] *See. e.g., U.S. Sugar Corp.* v. *EPA,* 830 F.3d 579, 617–18 (D.C. Cir. 2016) (upholding EPA's authority to require recordkeeping in regulating even though Congress was silent on that issue because ''Congress plainly intended EPA to regulate sources burning 'any' solid waste, a goal presumably advanced by the recordkeeping presumption'').

[255] Congress has amended the Telemarketing Act numerous times over the years but made no changes to the recordkeeping provision. *See, e.g., supra* note 13. Given that the TSR has always included recordkeeping requirements since its inception in 1995 and the FTC has reported to Congress on its rulemaking efforts at various congressional hearings, Congress's silence on this issue can be interpreted as agreement with the FTC's statutory construction. *See, e.g., Washington All. of Tech. Workers* v. *U.S. Dep't of Homeland Sec.,* 50 F.4th 164, 182 (D.C. Cir. 2022) (quoting *Jackson* v. *Modly,* 949 F.3d 763, 772–73 (D.C. Cir. 2020)).

[256] 15 U.S.C. 6101(5). The Commission's position is also supported by the legislative history, which demonstrates that Congress intended for the Commission to consider recordkeeping requirements more broadly. *See* Senate Report at 7. The Senate Report references Section 3(a)(5) in an earlier version of the Act that directed the Commission to ''prescribe rules regarding telemarketing activities'' and in prescribing those rules to ''consider the inclusion of . . . (5) recordkeeping requirements.'' Telemarketing and Consumer Fraud and Abuse Prevention Act, S. 568, 103rd Cong. (1993). At minimum, this legislative history supports the position that the Commission may require recordkeeping for all abusive telemarketing acts or practices it identifies in promulgating the TSR and is not limited to those specific acts or practices listed in Section 6103(a)(3).

[257] 15 U.S.C. 6102(a)(3)(A).

[258] 16 CFR 310.4(b).

[259] 16 CFR 310.4(b)(1)(iii) and (b)(1)(v). *See also* Original TSR, 60 FR at 43854 (stating the entity-specific DNC provisions are intended to effectuate the requirements of Section 6102(a)(3)(A) of the Telemarketing Act); 2002 NPRM, 67 FR at 4518 (proposing the DNC Registry to ''fulfill the mandate in the Telemarketing Act that the Commission should prohibit telemarketers from undertaking 'a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy''') (quoting 15 U.S.C. 6102(a)(3)(A)); 2006 Denial of Petition for Proposed Rulemaking, Revised Proposed Rule With Request for Public Comments, Revocation of Non-enforcement Policy, Proposed Rule (''2006 NPRM''), 73 FR 58716, 58726 (proposing adding an express prohibition against [robocalls] pursuant to Section 6102(a)(3)(A) of the Telemarketing Act).

[260] *See supra* Sections II.A (Recordkeeping) and II.C (New Definition for ''Previous Donor'').

to prohibit calls to a person's residence outside of certain hours and Sections 310.4(d) and (e) to require telemarketers to disclose the identity of the seller or charity, the purpose of the call, the nature of the good or service being sold, and that no purchase is required to win a prize or participate in a prize promotion. The TSR's existing and amended recordkeeping requirements are necessary to ensure compliance with these provisions of the TSR. For example, call detail records are needed to ensure telemarketers abide by the call time restrictions, while the requirements to retain records of advertisements, telemarketing scripts, robocalls, consent, customers, prize recipients, and call details regarding the content of the call are required to determine whether a telemarketer has made the necessary disclosures.

B. Modification of the B2B Exemption

The 2022 NPRM proposed narrowing the B2B exemption to require B2B telemarketing calls to comply with Section 310.3(a)(2)'s prohibition on misrepresentations and Section 310.3(a)(4)'s prohibition on false or misleading statements.[261] The Commission received twelve comments on this proposal.[262] Rapid Financial Services, LLC and Small Business Financial Solutions, LLC (collectively, ''Rapid Finance''), EPIC, NAAG, USTelecom—The Broadband Association (''USTelecom''), WPF, and three anonymous commenters all support the proposal.[263] EPIC strongly supports the proposal, stating ''there is no reason to believe that phone-based attempts to exploit small business victims have diminished since the pandemic began.'' [264] NAAG states ''misrepresentations and false or misleading statements, in any form, are harmful to trade and commerce in general.'' [265] WPF argues ''there is no downside to this particular update—the FTC Act already prohibits such activity.'' [266] The anonymous commenters expressed concern over the harm that businesses suffer from deceptive telemarketing.[267]

USTelecom highlights small and medium-sized businesses (''SMBs''), in particular, ''can be disproportionately impacted by malicious B2B telemarketers'' and scammers primarily use phones as the primary means of contacting SMBs.[268] USTelecom also argues bad actors hide behind the B2B exemption and other legal ambiguities to avoid accountability, citing to a particularly pernicious example of a high-volume B2B telemarketing robocall campaign purporting to sell services that help SMBs boost their companies' Google listing that tied up the business's phone lines.[269]

Rapid Finance states, as a general matter, it ''does not oppose, and indeed supports the application of the TSR to B2B calls to prohibit material misrepresentations and false or misleading statements in B2B telemarketing transactions, including prohibiting the specific misrepresentations listed in Section 310.3(a)(2).'' [270] Rapid Finance explains its business customers are ''often the target of telemarketers seeking to peddle so-called debt settlement services to them.'' [271]

NFIB, Revenue Based Finance Coalition (''RBFC''), Third Party Payment Processors Association (''TPPPA''), and PACE all object to this proposed amendment.[272] RBFC argues amending the TSR to apply to deceptive B2B telemarketing would ''undermine the Supreme Court's interpretation of the FTC's authority to impose penalties,'' [273] citing *AMG Capital Management, LLC* v. *FTC*.[274] RBFC's arguments are inapposite because the Supreme Court's decision in *AMG* concerned the FTC's authority to obtain consumer redress under Section 13(b) of the FTC Act; [275] the decision did not address or implicate the Commission's authority to promulgate rules under the Telemarketing Act.

PACE and NFIB argue applying the TSR to B2B telemarketing exceeds the scope of the FTC's authority under the Telemarketing Act.[276] They claim the Telemarketing Act is limited to consumer harm because of its ''consistent use of consumer-oriented language'' and the focus on consumer harm in the statutory text and legislative history. [277] PACE also argues the Telemarketing Act's directive for the Commission to identify deceptive telemarketing practices is also limited to consumer harm, because the Commission itself has historically conceptualized deception from a consumer perspective in its policy statements.[278]

The Commission disagrees. The Telemarketing Act directs the FTC to promulgate a rule that addresses deceptive and abusive telemarketing practices which, in the Commission's law enforcement experience, includes B2B telemarketing. The language of the Act supports the Commission's position.

First, the Act defines ''telemarketing,'' as ''a plan, program, or campaign which is conducted to induce purchases of goods or services . . ., by use of one or more telephones and which involves more than one interstate telephone call.'' [279] The Act exempts from the definition of telemarketing ''the solicitation of sales through the mailing of a catalog'' which meet certain criteria and ''where the person making the solicitation does not solicit *customers* by telephone but only receives calls initiated by *customers* in response to the catalog during those calls. . . .'' [280] The Act only specifies that ''telemarketing'' must involve the use of one interstate telephone call but does not identify who must participate in the call. To the extent it identifies any participant, it uses the term *customers,* which includes businesses.[281]

Second, Section 6102(a)(1) directs the Commission to ''prescribe rules

[261] 2022 NPRM, 87 FR at 33687.

[262] The Commission received an additional ten comments addressing whether the Commission should generally repeal the B2B exemption in its entirety. The Commission addresses those comments in the 2024 NPRM, issued this same day.

[263] Anonymous 34–11, 33–11, and 33–13; EPIC 34–23 at 17; NAAG 34–20 at 10; Rapid Finance 34–17 at 3; USTelecom 33–14 at 3–4; WPF 34–21 at 4.

[264] EPIC 34–23 at 17.

[265] NAAG 34–20 at 10.

[266] WPF 34–21 at 4.

[267] Anonymous 34–11, 33–11, and 33–13.

[268] USTelecom 33–14 at 3–4.

[269] *Id.*

[270] Rapid Finance 34–17 at 3.

[271] *Id.* Rapid Finance also argues that the amendments will close the gap between how B2B sellers and B2B telemarketers are treated under the TSR. *Id.* at 6–7. Rapid Finance appears to be under the misimpression that the B2B exemption only applies to telemarketers and not to sellers. That is incorrect and the Commission clarifies that the exemption under Section 310.6(a)(7) applies to both sellers and telemarketers. The Commission also notes that Rapid Finance raised other issues that the Commission is not addressing because they are unrelated to the focus of this rulemaking. *Id.* at 6.

[272] NFIB 33–4 at 8–12; RBFC 34–13 at 1–4; TPPPA 34–14 at 2; PACE 33–15 at 7–9.

[273] RBFC 34–13 at 3.

[274] *AMG Cap. Mgmt., LLC* v. *FTC,* 141 S. Ct. 1341 (2021).

[275] 15 U.S.C. 53(b).

[276] NFIB 33–4 at 11; PACE 33–15 at 7–9.

[277] PACE 33–15 at 8; *see also* NFIB 33–4 at 11 (arguing all five findings in the Telemarketing Act reference consumer harm and not harm to businesses).

[278] PACE 33–15 at 7–9. NFIB raises separate objections to repealing the B2B exemption based on changing market forces described in the Commission's 2022 ANPR. NFIB 33–4 at 9–10. As explained in the 2024 NPRM that the Commission is issuing concurrently with this Final Rule, the Commission declined to move forward with narrowing the B2B exemption as proposed in the 2022 ANPR. As such, the Commission will not address NFIB's argument here since it is not applicable in requiring B2B telemarketing to comply with the TSR's misrepresentation provisions.

[279] 15 U.S.C. 6106(4).

[280] 15 U.S.C. 6106(4) (emphasis added).

[281] *See, e.g., Customer,* Merriam-Webster Dictionary, *available at https://www.merriam-webster.com/dictionary/customer* (last visited Feb. 1, 2024) (defining customer as ''one that purchases a commodity or service'').

prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.'' [282] Section 6102(a)(2) directs the Commission to include in its rules ''a definition of deceptive telemarketing acts or practices which shall include fraudulent charitable solicitations, and which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering.'' [283] Congress used broad language, similar to the language of the FTC Act, in directing the FTC to promulgate a rule. The Act does not limit the scope of the rule promulgated under the Act to telemarketing that harms natural persons. Nor does the Act prohibit applying the rule to telemarketing that harms businesses or other organizations.

Third, Sections 6102(a)(3)(C) and (D) direct the Commission to require ''any person engaged in telemarketing'' to ''promptly and clearly disclose to the *person* receiving the call the purpose of the call is to'' sell a good or service or solicit a charitable solicitation.[284] Once again, Congress did not specify that the disclosure must be made to a natural person rather than a business. It simply specified that the disclosure be made to the person who received the call.

Although PACE and NFIB argue the Commission's authority is limited to addressing deceptive or abusive telemarketing practices that harm natural persons because of the Act's liberal use of the term ''consumer,'' [285] none of the Act's provisions described above uses the word ''consumer.'' Moreover, the Act never defines the term ''consumer.'' Given the Act's broad language, the most logical reading of the term ''consumer'' is that it encompasses *all*—including businesses—who consume a product or service.

The absence of a definition is notable when Congress *has* defined ''consumer'' in other contexts, such as when it enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act in 1975 (''Magnuson-Moss'').[286] Under Title I of Magnuson-Moss, which extended the Commission's jurisdiction over consumer product warranties, Congress narrowly defined ''consumer'' to mean a buyer of any ''consumer product'' which is ''normally used for personal, family, or household purposes.'' [287] Congress also clarified that the narrow definition of consumer was limited to Title I of the Magnuson-Moss Act and did not apply to Title II, which among other things, codified the FTC's ability to seek consumer redress by filing civil actions in Federal court.[288] Under Title II, Congress stated the term ''consumer'' in the FTC Act should still be construed broadly without the limitations imposed in section 101(3) of title I of S. 356.[289] Here, no such definition exists. If Congress had intended to limit the scope of the Telemarketing Act to those acts and practices directed at individuals rather than businesses, it would have done so.

The Commission's position is also supported by the legislative history. A Senate Report on the Act explained that, in directing the Commission to define ''fraudulent telemarketing acts or practices'' in its rulemaking, that Congress intended the rule ''to encompass the types of unlawful activities that are currently being addressed by the both the FTC and the States in their telemarketing cases.'' [290] The Report also stated Congress intends the ''rule to be flexible enough to encompass the changing nature of [fraudulent telemarketing] activity while at the same time providing telemarketers with guidance as to the general nature of prohibited conduct.'' [291] At the time the Telemarketing Act was passed, the Commission's law enforcement experience included cases against deceptive B2B telemarketing.[292] In promulgating the original TSR, the Commission considered exempting all B2B telemarketing but stated, given its ''extensive enforcement experience pertaining to deceptive telemarketing directed to businesses,'' it did not believe ''an across-the-board exemption for business-to-business contacts is appropriate.'' [293] Instead, the original TSR excluded from the B2B exemption telemarketing schemes that sell nondurable office or cleaning supplies because, in the Commission's law enforcement experience, these B2B schemes ''have been by far the most significant business-to-business problem area [that] such telemarketing falls within the Commission's definition of deceptive telemarketing acts or practices.'' [294] The Commission also stated it would reconsider the scope of the B2B exemption ''if additional business-to-business telemarketing activities become problems after the Final Rule has been in effect.'' [295] Each time the Commission has considered applying the TSR to other B2B telemarketing, it has done so based on its law enforcement experience in keeping with Congress's directive.[296]

But even if the term ''consumer'' is construed more narrowly to exclude businesses, the Act's language still supports the Commission's position that the Act allows it to regulate B2B telemarketing. First, one of the Act's findings states ''[c]onsumers and *others* are estimated to lose $40 billion a year in telemarketing fraud.'' [297] The legislative history makes clear Congress was concerned about telemarketing fraud against small businesses.[298] Second, the Act uses broad language in the definition of telemarketing, in its directives to promulgate rules regarding deceptive or abusive telemarketing under Section 6102(a)(1), and in its directives of what to include in those rules under Sections 6102(a)(2), (a)(3)(C), and (a)(3)(D). These provisions do not contain any reference to a ''consumer.'' [299] If Congress intended to construe consumer narrowly, Congress's *omission* of the term consumer from

[282] 15 U.S.C. 6102(a)(1).

[283] 15 U.S.C. 6102(a)(2).

[284] 15 U.S.C. 6102(a)(3)(C) and (D) (emphasis added).

[285] NFIB 33–4 at 11; PACE 33–15 at 7–9.

[286] Title I of that legislation created the Magnuson-Moss Warranty Act (''Magnuson-Moss''), Public Law 93–637 (1975) (codified as amended at 15 U.S.C. 2301), extending Commission jurisdiction over consumer product warranties. Title II, separately known as the Federal Trade Commission Improvement Act (''FTCIA''), modernized the FTC Act by expanding the Commission's anti-fraud powers, including power to ''redress consumer injury resulting from violations of the [FTC Act]'' by filing civil actions in district court. S. Rep. No. 93–151, at 3 (1973). Public Law 93–637; Public Law 93–153. p. 2533 (1975) (codified as amended at 15 U.S.C. 45 *et seq.*).

[287] 15 U.S.C. 2103(1) and (3).

[288] *See supra* note 286.

[289] S. Rep. No. 93–151, at 27.

[290] Senate Report at 7.

[291] *Id.*

[292] *See* Prepared Statement of the Federal Trade Commission before the United States House of Representatives Committee on Small Business (Sept. 28, 1994) (detailing the Commission's law enforcement actions against telemarketers who have harmed small businesses).

[293] Original TSR, 60 FR at 43861–62.

[294] *Id.*

[295] *Id.* at 43862.

[296] 2022 NPRM, 87 FR at 33682–83. Although the Commission's law enforcement efforts have primarily focused on harms to small businesses, the Commission believes that the Telemarketing Act authorizes the Commission to apply the TSR to B2B telemarketing more broadly for the reasons stated here. Similar to the recordkeeping provision, the Commission notes that Congress has amended the Telemarketing Act numerous times but made no changes to prohibit the TSR's application to some B2B telemarketing. Congress's silence here can also be interpreted as agreement with the FTC's statutory construction. *See supra* note 255.

[297] 15 U.S.C. 6101(3) (emphasis added).

[298] The legislative history supports the Commission's position that, even assuming a narrower definition of consumer, the Telemarketing Act allows the Commission to regulate B2B telemarketing. The Senate Report on the Act explains that telemarketing fraud ''affects a cross section of Americans, including small business.'' Senate Report at 2.

[299] 15 U.S.C. 6102(a) and 6106(4).

these provisions of the Act demonstrates Congress did not intend to limit the TSR to telemarketing that harms only individual consumers.

Finally, RBFC and TPPPA make general objections that prohibiting misrepresentations in B2B telemarketing is unnecessary; that it would ''unduly burden legitimate business activities''; [300] and would not provide small businesses any additional protections when the FTC has authority already to pursue bad actors that harm businesses under the FTC Act.[301] RBFC also argues if the Commission were to prohibit misrepresentations in B2B telemarketing, it should only do so in the areas where there is a history of deception such as the top five scams identified in the Better Business Bureau's research report issued in 2018.[302]

The Commission is not persuaded by these arguments. The Commission notes that requiring B2B telemarketers to comply with the TSR's prohibitions against misrepresentations would provide the Commission with additional tools to obtain monetary redress for those harmed by illegal telemarketing and civil penalties against bad actors who violate the law, creating a deterrent effect. Importantly, the proposed amendment refrains from imposing any burdens on B2B sellers and telemarketers, including recordkeeping requirements. And, as commenters have noted, because businesses must already comply with the FTC Act, which prohibits deceptive or unfair conduct, complying with the TSR should not create significant burden.[303] The Commission also does not believe it should limit the prohibition against misrepresentations to just the five top scams identified in the BBB's 2018 report. The Commission has monitored deceptive telemarketing impacting small businesses since 1995 and has observed not only the increase in deceptive telemarketing but how easily scammers shift tactics and peddle different products or services to small businesses.[304] Given the Commission's extensive law enforcement experience in B2B telemarketing cases—including schemes involving deceptive business directory listings, web hosting or design, search engine optimization services, and government impersonators [305]—the Commission believes applying the TSR's prohibitions against misrepresentations in Section 310.3(a)(2) and 310.3(a)(4) is appropriate.

[300] TPPPA 34–14 at 2.

[301] RBFC 34–13 at 2–3.

[302] RBFC 34–13 at 3; *see also* Better Business Bureau, Scams and Your Small Business Research Report, at 7–8 (2018), *available at https://www.bbb.org/content/dam/bbb-institute-(bbbi)/files-to-save/bbb_smallbizscamsreport-final-06-18.pdf* (last visited Dec. 11, 2023). RBFC argues that any application of the TSR should be limited to the BBB's top five scams impacting small businesses including: ''(1) bank/credit card company imposters, (2) directory listing and advertising services; (3) fake invoice/supplier bills; (4) fake checks; and (5) tech support scams.'' RBFC 34–13 at 3.

[303] RBFC 34–13 at 2–3; WPF 34–21 at 4.

[304] *See* Section II.B (B2B Telemarketing).

C. New Definition of ''Previous Donor''

The 2022 NPRM proposed adding a new definition for the term ''previous donor'' to identify consumers who have donated to a particular charity within the two-year period immediately preceding the date the consumer receives a robocall on behalf of that charity.[306] The Commission proposed including this new definition to make clear that telemarketers are allowed to place charity robocalls only to consumers who have previously donated to that charity within the last two years.[307]

The Commission received three comments on the new definition. WPF supports the new definition, stating it would ''clarify the exemption for charitable donations'' and ''effectively close what has been a fairly significant loophole.'' [308] EPIC also supports the new definition and the clarification that the robocall exemption only applies to consumers who have previously donated to the soliciting charity, but it also urges the Commission to emphasize the limited scope of this exemption from the general prohibition against robocalls.[309] One anonymous commenter objected to this new definition, arguing there should not be an exemption to place robocalls to prior donors in the first place.[310]

The Commission emphasizes the exemption to allow a telemarketer to place charity robocalls is narrow in scope and amending the TSR to add a new definition of ''previous donor'' will ensure the exemption remains narrow. The Commission understands some consumers do not want to receive any robocalls, including from charities they have supported through a donation. In such cases, the Commission notes that a consumer who does not want to receive such robocalls may request to be added to that charity's do-not-call list. If the consumer has done so, the exemption to place robocalls does not apply and it is a violation of the TSR for a telemarketer to place robocalls to the consumer on behalf of that charity.[311]

[305] *Id.*

[306] 2022 NPRM, 87 FR at 33687–88.

[307] To qualify for this narrow exemption, telemarketers must also comply with the provisions of Section 310.4(b)(1)(v)(B).

[308] WPF 34–21 at 1.

[309] EPIC 34–23 at 16.

[310] Anonymous 34–7.

D. Corrections to the Rule

In the 2022 NPRM, the Commission proposed the following five corrections to the Rule:

- In all instances where Sections 310.6(b)(1), (b)(2), and (b)(3) cross-reference Sections 310.4(a)(1), (a)(7), (b), and (c), change these citations so that they cross-reference Sections 310.4(a)(1), (a)(8), (b), and (c).
- Modifying the time requirements in the definition of EBR from months to days as follows:
  - Changing the time requirement to qualify for EBR in Section 310.2(q)(1) from 18 months between the date of the telephone call and financial transaction to 540 days.
  - Changing the time requirement to qualify for EBR in Section 310.2(q)(2) from three months between the date of the telephone call and the date of the consumer's inquiry or application to 90 days.
- Adding an email address to Section 310.7 for State officials or private litigants to provide notice to the Commission that they intend to bring an action under the Telemarketing Act.
- Amending Section 310.5(a)(7) so it is consistent in form with the new proposed additions to Section 310.5(a).
- Amending Section 310.5(f) to remove an extraneous word.[312]

The Commission did not receive any comments on the proposed modifications and will implement the amendments as proposed.

The Commission will also make the following additional non-substantive modifications to the Rule:

- Change all references in the TSR from ''this Rule'' to ''this part.''
- Renumber the footnotes in the TSR so the first footnote starts at one.

Finally, as described in Section III.B—Modification of the B2B Exemption, some commenters did not understand the term ''consumer'' includes businesses. To address any confusion, the Commission will change references to ''consumer'' in the amendments of the recordkeeping requirements and definition of EBR to the defined term ''person.'' [313] The Commission will also modify the references to ''consumer'' and ''business'' in the new recordkeeping requirement to retain call

[311] *See* Section 310.4(b)(1)(v)(B)(iii) (requiring sellers and telemarketers to comply with all other requirements of this part, which include the entity-specific do not call provisions).

[312] 2022 NPRM, 87 FR at 33688.

[313] 310 CFR 310.2(y).

detail records in Section 310.5(a)(2)(iv) to ''individual consumer'' and ''business consumer.'' While these modifications do not substantively alter the scope or application of the TSR, the Commission believes they will resolve any remaining uncertainty.

IV. Paperwork Reduction Act

The current Rule contains various provisions that constitute information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of Management and Budget (''OMB'') regulations implementing the Paperwork Reduction Act (PRA). 44 U.S.C. chapter 35. OMB has approved the Rule's existing information collection requirements through October 31, 2025.[314] The 2022 NPRM's proposed amendments made changes in the Rule's recordkeeping requirements that increased the PRA burden as detailed below.[315] Accordingly, FTC staff submitted the 2022 NPRM and the associated Supporting Statement to OMB for review under the PRA.[316] On June 16, 2022, OMB directed the FTC to resubmit its request when the proposed rule is finalized.[317]

None of the public comments submitted addressed the estimated PRA burden included in the 2022 NPRM, but some commenters did raise general burden concerns.[318] Other commenters concurred that sellers and telemarketers likely retained the required records in the ordinary course of business and that the cost of electronic storage is decreasing.[319] The Commission's responses to those concerns are set forth in more detail in Section III—Final Amended Rule, and in some instances the Commission made modifications to the proposed rule to address the concerns and reduce the estimated PRA burden.

The Final Rule contains new recordkeeping requirements and modifications to existing recordkeeping requirements. The new recordkeeping provisions require sellers or telemarketers to retain: (1) a copy of each unique prerecorded message; (2) call detail records of telemarketing campaigns; (3) records sufficient to show a seller has an established business relationship with a consumer; (4) records sufficient to show a consumer is a previous donor to a particular charitable organization; (5) records regarding the service providers that a telemarketer uses to deliver outbound calls; (6) records of a seller or charitable organization's entity-specific do-not-call registries; and (7) records of which version of the Commission's DNC Registry were used to ensure compliance with this Rule. The Final Rule modifies existing recordkeeping requirements by: (1) changing the time-period for retaining records from two years to five years;[320] (2) clarifying the records necessary for sellers or telemarketers to demonstrate that the person it is calling has consented to receive the call; and (3) specifying the format for records that include phone numbers, time, or call duration.

As explained above and in the 2022 NPRM,[321] the Commission believes that for the most part, sellers and telemarketers already generate and retain these records either because the TSR already requires it or because they already do so in the ordinary course of business. For example, to comply with the TSR, sellers and telemarketers must already have a reliable method to identify whether they have a previous business relationship with a customer or whether the customer is a prior donor. They must also access the DNC Registry and maintain an entity-specific DNC registry. Moreover, sellers and telemarketers are also likely to keep records about their existing customers or donors and service providers in the ordinary course of business. The Final Rule now further requires telemarketers and sellers to keep call detail records of their telemarketing campaigns. Specifically, it requires sellers and telemarketers to keep call detail records of their telemarketing campaigns because in the Commission's experience, sellers and telemarketers use technologies that can easily generate these records. If a seller or telemarketer does not use such technology, however, and an individual telemarketer must manually enter a single telephone number to initiate a call to that number, then the seller or telemarketer does not need to retain records of the calling number, called number, date, time, duration and disposition of the telemarketing call under Sections 310.5(a)(2)(vii) and (x) of the Final Rule for those calls. The Commission made this modification to reduce the anticipated PRA burden for those sellers and telemarketers who manually place telemarketing calls. However, as a matter of caution, the Commission estimates the anticipated PRA burden will stay roughly the same as what was projected in 2022 NPRM, because that estimate was largely based on the use of automated mechanisms. Further, the Commission's enforcement of the Rule and review of the comments shows few sellers and telemarketers manually place telemarketing calls.[322] Thus, the anticipated PRA burden could be significantly lower than the estimates set out below.

A. Estimated Annual Hours Burden

The Commission estimates the PRA burden of the Final Rule based on its knowledge of the telemarketing industry and data compiled from the Do Not Call Registry. In calendar year 2022, 10,804 telemarketing entities accessed the Do Not Call Registry; however, 549 were exempt entities obtaining access to data.[323] Of the non-exempt entities, 6,562 obtained data for a single State. Staff assumes these 6,562 entities are operating solely intrastate, and thus would not be subject to the TSR. Therefore, Staff estimates approximately 3,693 telemarketing entities (10,804—549 exempt—6,562 intrastate) are currently subject to the TSR. The Commission also estimates there will be 75 new entrants to the industry per year.

The Commission has previously estimated that complying with the TSR's current recordkeeping requirements requires 100 hours for new entrants to develop recordkeeping systems that comply with the TSR and 1 hour per year for established entities to file and store records after their systems are created, for a total annual

[314] OMB Control No: 3084–0097, ICR Reference No: 202208–3084–001, available at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202208-3084-001* (last visited Dec. 11, 2023).

[315] 2022 NPRM, 87 FR at 33690–91.

[316] This PRA analysis focuses only on the information collection requirements created by or otherwise affected by these now final rule amendments.

[317] See OMB Control No. 3084–0097, ICR Reference 202204–3084–004, Notice of Office of Management and Budget Action (June 16, 2022).

[318] *See, e.g.,* ECAC 34–22 at 3; NFIB 33–4 at 4–5; Sirius 34–18 at 7–8.

[319] *See, e.g.,* NAAG 34–20 at 9; PACE 33–15 at 2–5.

[320] As described above in Section II.A—Recordkeeping and in the 2022 NPRM, changing industry practice including increased spoofing of Caller ID information has made it more difficult to identify the telemarketers and sellers responsible for particular telemarketing campaigns and has hindered evidence gathering. As a result, two years is no longer always a sufficient amount of time for the Commission to fully complete its investigations of noncompliance and therefore the Commission is increasing the required retention period for recordkeeping under the Rule. Given the decreasing cost of data storage, the Commission does not believe that changing the length of time sellers and telemarketers are required to keep records will be unduly burdensome. 2022 NPRM, 87 FR at 33680–82, 33686.

[321] 2022 NPRM, 87 FR at 33690–91.

[322] *See, e.g.,* PACE 33–15 at 2.

[323] *See* National Do not Call Registry Data Book for Fiscal Year 2022 (''Data Book''), *available at https://www.ftc.gov/system/files/ftc_gov/pdf/DNC-Data-Book-2022.pdf* (last visited Dec. 11, 2023). An exempt entity is one that, although not subject to the TSR, voluntarily chooses to scrub its calling lists against the data in the Registry.

recordkeeping burden of 4,385 hours for established entities and 7,500 hours for new entrants who must develop required record systems.[324]

Because the Final Rule contains new recordkeeping requirements, the Commission anticipates that in the first year after the proposed amendments take effect, every entity subject to the TSR would need to ensure that their recordkeeping systems meet the new requirements. The Commission estimates this undertaking will take 50 hours. This includes 10 hours to verify the entities are maintaining the required records, and 40 hours to create and retain call detail records. This yields an additional one-time burden of 184,650 hours for established entities (50 hours × 3,693 covered entities).

For new entrants, the Commission estimates that the new requirements will increase their overall burden for establishing new recordkeeping systems by 50 hours per year. This yields a total added burden for new entrants of 3,750 hours (50 hours × 75 new entrants per year) in addition to what OMB has already approved.[325]

B. Estimated Annual Labor Costs

The Commission estimates annual labor costs by applying appropriate hourly wage rates to the burden hours described above. The Commission estimates that established entities will employ skilled computer support specialists to modify their recordkeeping systems. Applying a skilled labor rate of $30.97/hour[326] to the estimated 184,650 burden hours for established entities yields approximately $5,718,611 in one-time labor costs during the first year after the amendments take effect.

As described above, the Commission estimates that with the Final Rule new entrants will spend approximately 50 additional hours per year to establish new recordkeeping systems. Applying a skilled labor rate of $30.97/hour to the estimated 3,750 burden hours for new entrants, the Commission estimates that the annual labor costs for new entrants would be approximately $116,138.

C. Estimated Non-Annual Labor Costs

Staff previously estimated the non-labor costs to comply with the TSR's recordkeeping requirements were *de minimis* because most affected entities would maintain the required records in the ordinary course of business. Staff estimated that the recordkeeping requirements could require $50 per year in office supplies to comply with the Rule's recordkeeping requirements. Because the Final Rule requires retention of additional records, Staff estimates that these requirements will increase to $60 per year in office supplies on average for each of the 3,768 covered entities per year in office supplies. This equates to roughly $226,080 in total for all covered entities.

The new recordkeeping requirements also require entities to retain call detail records and audio recordings of prerecorded messages used in calls. Staff estimates the costs associated with preserving these records will also be *de minimis.* The Commission regularly obtains call detail records from voice providers when investigating potential TSR violations, and these records are kept in databases with small file sizes even when the database contains information about a substantial number of calls. For example, the Commission received a 2.9 gigabyte database that contained information about 56 million calls. The Commission also received a 1.2 gigabyte database that contained information about 5.5 million calls. Similarly, audio files of most prerecorded messages will not be very large because prerecorded messages are typically short in duration. Storing electronic data is very inexpensive. Electronic storage can cost $.74 per gigabyte for onsite storage including hardware, software, and personnel costs.[327] Commercial cloud-based storage options are less expensive and can cost around $.20 per gigabyte per year.[328] The Commission estimates the non-labor costs associated with electronically storing audio files of prerecorded messages and call detail records will cost around $5 a year on average for each of the 3,768 covered entities per year for electronic storage. This equates to roughly $18,840 in total for all covered entities.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires that the Commission conduct an analysis of the anticipated economic impact of the proposed amendments on small entities.[329] The RFA requires that the Commission provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA'') with the Final Rule unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of small entities.[330]

As discussed in the 2022 NPRM, the Commission did not believe the proposed amendment requiring additional recordkeeping would have a significant economic impact upon small entities, although it may affect a substantial number of small businesses.[331] In the Commission's view, the proposed amendment would not significantly increase the costs of small entities that are sellers or telemarketers because the proposed amendments primarily require these entities to retain records that they are already generating and preserving in the ordinary course of business. The Commission also did not believe that the proposed amendments requiring small entities that are sellers or telemarketers to comply with the TSR's prohibitions on misrepresentations should impose any additional costs. Therefore, based on available information, the Commission certified that amending the Rule as proposed would not have a significant economic impact on a substantial number of small entities, and provided notice of that certification to the Small Business Administration (''SBA'').[332]

Notwithstanding the certification, the Commission also published an IRFA in the 2022 NPRM and invited comment on the impact the proposed amendments would have on small entities covered by the Rule.[333] The Commission did not receive any comments that provided empirical information on the burden the proposed amendments would have on small entities, but some commenters raised

[324] *See* Information Collection Activities; Proposed Collection; Comment Request 87 FR 23177 (Apr. 19, 2022).

[325] See ''Recordkeeping for new entrants for live & prerecorded calls'' under IC (Information Collection) List, *available at https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=202208-3084-001&icID=185985* (last visited Dec. 11, 2023).

[326] This figure is derived from the mean hourly wage shown for ''Computer Support Specialist.'' *See* ''Occupational Employment and Wages-May 2022'' Bureau of Labor Statistics, U.S. Department of Labor, Last Modified April 25, 2023, Table 1 (''National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2022'') *available at https://www.bls.gov/news.release/pdf/ocwage.pdf* (last visited October 24, 2023).

[327] *See* Gartner, Inc. ''IT Key Metrics Data 2020: Infrastructure Measures—Storage Analysis.'' Gartner December 18, 2019.

[328] Amazon's storage rate for S3 Standard—Infrequent Access storage is $0.0125 per GB per month. *See https://aws.amazon.com/s3/pricing/?nc=sn&loc=4* (last visited Dec. 11, 2023); Google's storage rate for Archive Storage in parts of North America is $0.0012 per GB per month. *See https://cloud.google.com/storage/pricing* (last visited Dec. 11, 2023).

[329] 5 U.S.C. 601–612.

[330] 5 U.S.C. 605.

[331] 2022 NPRM, 87 FR at 33691–92.

[332] 5 U.S.C. 605(b).

[333] *Id.*

general burden concerns, in particular with respect to the recordkeeping requirement that sellers and telemarketers retain call detail records.[334] As discussed in more detail in Section III—Final Amended Rule, the Commission does not believe the Final Rule would impose significant additional burden since the recordkeeping amendments primarily require small entities that are sellers and telemarketers to retain records that they would keep in the ordinary course of business. The Commission also amended the Final Rule so that entities that do not utilize certain technology are not required to retain certain call detail records, to reduce the burden imposed on those entities.[335] Finally, the FTC Act already requires sellers and telemarketers that are small entities to comply with the Final Rule's prohibition against misrepresentations in telemarketing. Thus, the Commission certifies that the Final Rule would not have a significant economic impact on a substantial number of small entities and provides notice of that certification to the Small Business Administration (''SBA'').[336] The Commission has nonetheless deemed it appropriate as a matter of discretion to provide this FRFA.

A. Statement of the Need for, and Objectives of, the Rule

The Final Rule requires telemarketers and sellers to maintain additional records regarding their telemarketing transactions. As described in the 2022 NPRM [337] and in Section II—Overview of the Proposed Amendments to the TSR, the Final Rule updates the TSR's existing recordkeeping requirements so that the requirements comport with the substantial amendments to the TSR since the recordkeeping requirements were first made. The requirements are also necessary in light of the technological advancements that have made it easier and cheaper for unscrupulous telemarketers to engage in illegal telemarketing. The Final Rule also requires B2B telemarketers to comply with the TSR's prohibition on misrepresentations. These amendments are necessary to help protect businesses from deceptive telemarketing practices. The Final Rule also amends the definition of ''previous donor'' to clarify that a seller or telemarketer may not use prerecorded messages to solicit charitable donations on behalf of a charitable organization unless the recipient of the call previously donated to that charitable organization within the last two years.

B. Issues Raised by Public Comments in Response to the IRFA

As stated above, the Commission did not receive any comments relating to the IRFA or that provided empirical information on the burden the proposed amendments would have on small entities, but some commenters raised general burden concerns. The Commission details these concerns and its responses in more detail in Section III—Final Amended Rule.

Commenters stated, in particular, that requiring retention of call detail records and each version of the DNC used for compliance would cause significant burden to businesses. Commenters also argued changing the time period to retain records from two years to five years would also impose additional burdens.

To address concerns regarding the burden of retaining call detail records, the Final Rule provides an exemption for calls made by an individual telemarketer who manually enters a single telephone number to initiate those calls. For such calls, the seller or telemarketer does not need to retain records of the calling number, called number, date, time, duration, and disposition of the call. This modification should address burden concerns raised for small businesses which do not employ software or other technology to automate their telemarketing activity and still use manual operations.

The Final Rule also provides a one hundred and eighty-day grace period from the date Section 310.5(a)(2)—which requires retention of call detail records—is published in the **Federal Register** so sellers and telemarketers can implement any new systems, software, or procedures necessary to comply with this new provision. This modification similarly should alleviate commenters' concerns regarding the time necessary to come into compliance.

The Final Rule also modifies the recordkeeping requirement regarding DNC compliance and now requires records of which version of the DNC rather than each version used for compliance, significantly reducing the burden associated with this requirement. With respect to the time period to retain records, the Commission does not believe changing the time period to retain records would impose a significant burden because many businesses already retain the necessary records in the ordinary course of business.

C. Estimated Number of Small Entities to Which the Final Rule Will Apply

The Final Rule affects sellers and telemarketers engaged in ''telemarketing,'' defined by the Rule to mean ''a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call.'' [338] As noted above, staff estimate 3,693 telemarketing entities are currently subject to the TSR, and approximately 75 new entrants enter the market per year. For telemarketers, a small business is defined by the SBA as one whose average annual receipts do not exceed $25.5 million.[339] Because virtually any business could be a seller under the TSR, it is not possible to identify average annual receipts that would make a seller a small business as defined by the SBA. Commission staff are unable to determine a precise estimate of how many sellers or telemarketers constitute small entities as defined by SBA. The Commission sought comment on this issue but did not receive any information from commenters.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Small Entities and Professional Skills Needed To Comply

The Final Rule contains new recordkeeping requirements and modifications to existing recordkeeping requirements. The new recordkeeping requirements would require sellers or telemarketers to retain: (1) a copy of each unique prerecorded message; (2) call detail records of telemarketing campaigns; (3) records sufficient to show a seller has an established business relationship with a consumer; (4) records sufficient to show a consumer is a previous donor to a particular charitable organization; (5) records regarding the service providers that a telemarketer uses to deliver outbound calls; (6) records of a seller or charitable organization's entity-specific

[334] *See, e.g.,* NFIB 33–4 at 4–5; PACE 33–15 at 2.

[335] *Supra* Section III.A.2 (Call Detail Records).

[336] 5 U.S.C. 605(b).

[337] 2022 NPRM, 87 FR at 33678–84.

[338] 16 CFR 310.2(dd). The Commission notes that, as mandated by the Telemarketing Act, the interstate telephone call requirement in the definition excludes small business sellers and the telemarketers which serve them in their local market area, but may not exclude some small business sellers and telemarketers in multi-state metropolitan markets, such as Washington, DC.

[339] Telemarketers are typically classified as ''Telemarketing Bureaus and Other contact Centers,'' (NAICS Code 561422). *See* Table of Small Business Size Standards Matched to North American Industry Classification System Codes, *available at https://www.sba.gov/sites/sbagov/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf* (last visited October 24, 2023).

do-not-call registries; and (7) records of which version of the Commission's DNC Registry that were used to ensure compliance with this Rule. The proposed modifications to the existing recordkeeping requirements would: (1) change the time period for retaining records from two years to five years; (2) clarify the records necessary for sellers or telemarketers to demonstrate that the person they are calling has consented to receive the call; and (3) specify the format for records that include phone numbers, time, or call duration. The small entities potentially covered by the proposed amendment will include all such entities subject to the Rule. The Commission has described the skills necessary to comply with these recordkeeping requirements in Section IV—Paperwork Reduction Act above.

E. Identification of Duplicative, Overlapping, or Conflicting Federal Rules

The Telephone Consumer Protection Act of 1991, 47 U.S.C. 227, and its implementing regulations, 47 CFR 64.1200 (collectively, ''TCPA'') contain recordkeeping requirements that may overlap with the recordkeeping requirements proposed by the new rule. For example, the proposed provision requiring sellers or telemarketers to keep a record of consumers who state they do not wish to receive any outbound calls made on behalf of a seller or telemarketer, 16 CFR 310.5(a)(10), overlaps to some degree with the TCPA's prohibition on a person or entity initiating a call for telemarketing unless such person or entity has procedures for maintaining lists of persons who request not to receive telemarketing calls including a requirement to record the request. The Final Rule's recordkeeping requirements do not conflict with the TCPA's recordkeeping requirements because sellers and telemarketers can comply with both sets of requirements simultaneously. Moreover, in the Commission's experience, the recordkeeping requirements under the TCPA do not lessen the need for the more robust recordkeeping requirements the Commission is proposing to further its law enforcement efforts. The Commission invited comment and information regarding any potentially duplicative, overlapping, or conflicting Federal statutes, rules, or policies and received one comment about a potential conflict.

OCUL argues the Commission cannot proceed with the proposed amendments until the Federal Communications Commission (''FCC'') has clarified whether it will allow the establishment of a new code that will inform the telemarketer placing the call why its call was blocked.[340] OCUL argues that this would lead to telemarketers and sellers being unable to keep complete or accurate records, subjecting them to violations, if they do not know why a call was blocked.[341] The Commission does not see a conflict between the FCC's ongoing rulemaking and the proposed amendments in the 2022 NPRM. The Final Rule does not require the telemarketer or seller to retain records detailing why a call was blocked. Simply stating that a call was blocked as a record of the disposition of the call will suffice.

F. Description of Steps Taken To Minimize Significant Economic Impact, if any, on Small Entities, Including Alternatives

The Commission has not proposed any specific small entity exemption or other significant alternatives to the proposed rule. The Commission has made every effort to avoid imposing unduly burdensome requirements on sellers and telemarketers by limiting the recordkeeping requirements to records that are both necessary for the Commission's law enforcement and typically already kept in the ordinary course of business. As detailed above in Sections III—Final Amended Rule and IV—Paperwork Reduction Act, the Commission has made additional modifications to the proposed amendments to further reduce the burden on small entities of complying with the Final Rule. These modifications include exempting sellers or telemarketers from retaining some call detail records for calls that are manually placed, and requiring sellers and telemarketers to retain records of which version of the FTC's DNC Registry they used rather than each version used for compliance.

VI. Incorporation by Reference

Consistent with 5 U.S.C. 552(a) and 1 CFR part 51, the Final Rule incorporates the specifications of the following standard issued by the International Telecommunications Union: ITU–T E.164: Series E: Overall Network Operation, Telephone Service, Service Operation and Human Factors (published 11/2010). The E.164 standard establishes a common framework for how international telephone numbers should be arranged so that calls can be routed across telephone networks. Countries use this standard to establish their own international telephone number formats and ensure that those numbers have the information necessary to route telephone calls successfully between countries.

This ITU standard is reasonably available to interested parties. The ITU provides free online public access to view read-only copies of the standard. The ITU website address for access to the standard is: *https://www.itu.int/en/pages/default.aspx.*

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated these rule amendments as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 310

Advertising; Consumer protection; Incorporation by reference; Reporting and recordkeeping requirements; Telephone; Trade practices.

For the reasons discussed in the preamble, the Federal Trade Commission amends title 16 of the Code of Federal Regulations, part 310, as follows:

PART 310—TELEMARKETING SALES RULE

■ 1. The authority for part 310 continues to read as follows:

Authority: 15 U.S.C. 6101–6108.

■ 2. In § 310.2,
■ a. Revise paragraph (q);
■ b. Redesignate paragraphs (aa) through (hh) as (bb) through (ii);
■ c. Add a new paragraph (aa).

The revisions and addition read as follows:

§ 310.2 Definitions.

* * * * *

(q) *Established business relationship* means a relationship between a seller and a person based on:

(1) The person's purchase, rental, or lease of the seller's goods or services or a financial transaction between the person and seller, within the 540 days immediately preceding the date of a telemarketing call; or

(2) The person's inquiry or application regarding a good or service offered by the seller, within the 90 days immediately preceding the date of a telemarketing call.

* * * * *

(aa) *Previous donor* means any person who has made a charitable contribution to a particular charitable organization within the 2-year period immediately preceding the date of the telemarketing

[340] OCUL 34–19 at 3.

[341] *Id.*

call soliciting on behalf of that charitable organization.

* * * * *

§ 310.3 [Amended]

■ 3. In § 310.3, redesignate footnotes 659 through 663 as footnotes 1 through 5.

■ 4. In § 310.4, revise paragraph (b)(2) and redesignate footnotes 664 through 666 as footnotes 1 through 3 to read as follows:

§ 310.4 Abusive telemarketing acts or practices.

* * * * *

(b) * * *

(2) It is an abusive telemarketing act or practice and a violation of this part for any person to sell, rent, lease, purchase, or use any list established to comply with § 310.4(b)(1)(iii)(A) or § 310.5, or maintained by the Commission pursuant to § 310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this part or otherwise to prevent telephone calls to telephone numbers on such lists.

* * * * *

■ 5. Revise § 310.5 to read as follows:

§ 310.5 Recordkeeping requirements.

(a) Any seller or telemarketer must keep, for a period of 5 years from the date the record is produced unless specified otherwise, the following records relating to its telemarketing activities:

(1) A copy of each substantially different advertising, brochure, telemarketing script, and promotional material, and a copy of each unique prerecorded message. Such records must be kept for a period of 5 years from the date that they are no longer used in telemarketing;

(2) A record of each telemarketing call, which must include:

(i) The telemarketer that placed or received the call;

(ii) The seller or person for which the telemarketing call is placed or received;

(iii) The good, service, or charitable purpose that is the subject of the telemarketing call;

(iv) Whether the telemarketing call is to an individual consumer or a business consumer;

(v) Whether the telemarketing call is an outbound telephone call;

(vi) Whether the telemarketing call utilizes a prerecorded message;

(vii) The calling number, called number, date, time, and duration of the telemarketing call;

(viii) The telemarketing script(s) and prerecorded message, if any, used during the call;

(ix) The caller identification telephone number, and if it is transmitted, the caller identification name that is transmitted in an outbound telephone call to the recipient of the call, and any contracts or other proof of authorization for the telemarketer to use that telephone number and name, and the time period for which such authorization or contract applies; and

(x) The disposition of the call, including but not limited to, whether the call was answered, connected, dropped, or transferred. If the call was transferred, the record must also include the telephone number or IP address that the call was transferred to as well as the company name, if the call was transferred to a company different from the seller or telemarketer that placed the call; provided, however, that for calls that an individual telemarketer makes by manually entering a single telephone number to initiate the call to that number, a seller or telemarketer need not retain the records specified in paragraphs (a)(2)(vii) and (a)(2)(x) of this section.

(3) For each prize recipient, a record of the name, last known telephone number, and last known physical or email address of that prize recipient, and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25.00 or more;

(4) For each customer, a record of the name, last known telephone number, and last known physical or email address of that customer, the goods or services purchased, the date such goods or services were purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services; [1]

(5) For each person with whom a seller intends to assert it has an established business relationship under § 310.2(q)(2), a record of the name and last known telephone number of that person, the date that person submitted an inquiry or application regarding the seller's goods or services, and the goods or services inquired about;

(6) For each person that a telemarketer intends to assert is a previous donor to a particular charitable organization under § 310.2(aa), a record of the name and last known telephone number of that person, and the last date that person donated to that particular charitable organization;

(7) For each current or former employee directly involved in telephone sales or solicitations, a record of the name, any fictitious name used, the last known home address and telephone number, and the job title(s) of that employee; provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee;

(8) All verifiable authorizations or records of express informed consent or express agreement (collectively, ''Consent'') required to be provided or received under this part. A complete record of Consent includes the following:

(i) The name and telephone number of the person providing Consent;

(ii) A copy of the request for Consent in the same manner and format in which it was presented to the person providing Consent;

(iii) The purpose for which Consent is requested and given;

(iv) A copy of the Consent provided;

(v) The date Consent was given; and

(vi) For the copy of Consent provided under §§ 310.3(a)(3), 310.4(a)(7), 310.4(b)(1)(iii)(B)(*1*), or 310.4(b)(1)(v)(A), a complete record must also include all information specified in those respective sections of this part;

(9) A record of each service provider a telemarketer used to deliver an outbound telephone call to a person on behalf of a seller for each good or service the seller offers for sale through telemarketing. For each such service provider, a complete record includes the contract for the service provided, the date the contract was signed, and the time period the contract is in effect. Such contracts must be kept for 5 years from the date the contract expires;

(10) A record of each person who has stated she does not wish to receive any outbound telephone calls made on behalf of a seller or charitable organization pursuant to § 310.4(b)(1)(iii)(A) including: the name of the person, the telephone number(s) associated with the request, the seller or charitable organization from which the person does not wish to receive calls, the telemarketer that called the person, the date the person requested that she cease receiving such calls, and the goods or services the seller was offering for sale or the charitable purpose for which a charitable contribution was being solicited; and

(11) A record of which version of the Commission's ''do-not-call'' registry was used to ensure compliance with § 310.4(b)(1)(iii)(B). Such record must include:

(i) The name of the entity which accessed the registry;

[1] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR pt. 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, will constitute compliance with § 310.5(a)(4) of this part.

(ii) The date the ''do-not-call'' registry was accessed;

(iii) The subscription account number that was used to access the registry; and

(iv) The telemarketing campaign for which it was accessed.

(b) A seller or telemarketer may keep the records required by paragraph (a) of this section in the same manner, format, or place as they keep such records in the ordinary course of business. The format for records required by paragraph (a)(2)(vii) of this section, and any other records that include a time or telephone number, must also comply with the following:

(1) The format for domestic telephone numbers must comport with the North American Numbering plan;

(2) The format for international telephone numbers must comport with the standard established in the International Telecommunications Union's Recommendation ITU–T E.164: Series E: Overall Network Operation, Telephone Service, Service Operation and Human Factors, published 11/2010 (incorporated by reference, see paragraph (g)(1) of this section);

(3) The time and duration of a call must be kept to the closest second; and

(4) Time must be recorded in Coordinated Universal Time (UTC).

(c) Failure to keep each record required by paragraph (a) of this section in a complete and accurate manner, and in compliance with paragraph (b) of this section, as applicable, is a violation of this part.

(d) For records kept pursuant to paragraph (a)(2) of this section, the seller or telemarketer will not be liable for failure to keep complete and accurate records pursuant to this part if it can demonstrate, with documentation, that as part of its routine business practice:

(1) It has established and implemented procedures to ensure completeness and accuracy of its records;

(2) It has trained its personnel, and any entity assisting it in its compliance, in such procedures;

(3) It monitors compliance with and enforces such procedures, and maintains records documenting such monitoring and enforcement; and

(4) Any failure to keep complete and accurate records was temporary, due to inadvertent error, and corrected within 30 days of discovery.

(e) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement will govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If by written agreement the telemarketer bears the responsibility for the recordkeeping requirements of this section, the seller must establish and implement practices and procedures to ensure the telemarketer is complying with the requirements of this section. These practices and procedures include retaining access to any record the telemarketer creates under this section on the seller's behalf. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, both the telemarketer and the seller are responsible for complying with this section.

(f) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer must maintain all records required under this section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business must maintain all records required under this section.

(g) The material required in this section is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the Federal Trade Commission (FTC) and at the National Archives and Records Administration (NARA). Contact FTC at: FTC Library, (202) 326–2395, Federal Trade Commission, Room H–630, 600 Pennsylvania Avenue NW, Washington, DC 20580, or by email at *Library@ftc.gov.* For information on the availability of this material at NARA, email *fr.inspection@nara.gov* or go to *www.archives.gov/federal-register/cfr/ibr-locations.html.* It is available from: The International Telecommunications Union, Telecommunications Standardization Bureau, Place des Nations, CH–1211 Geneva 20; (+41 22 730 5852); *https://www.itu.int/en/pages/default.aspx.*

(1) Recommendation ITU–T E.164: Series E: Overall Network Operation, Telephone Service, Service Operation and Human Factors, published 11/2010.

(2) [Reserved]

■ 6. Amend § 310.6 as follows:

■ a. In paragraphs (b)(1), (b)(2), and (b)(3), remove the words ''§§ 310.4(a)(1), (a)(7), (b), and (c)'' and add, in their place, the words ''§ 310.4(a)(1), (a)(8), (b), and (c)''; and

■ b. Revise paragraph (b)(7) to read as follows:

§ 310.6 Exemptions.

* * * * *

(b) * * *

(7) Telephone calls between a telemarketer and any business to induce the purchase of goods or services or a charitable contribution by the business, *provided,* however that this exemption does not apply to:

(i) The requirements of § 310.3(a)(2) and(4); or

(ii) Calls to induce the retail sale of nondurable office or cleaning supplies; *provided,* however, that §§ 310.4(b)(1)(iii)(B) and 310.5 shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

■ 7. Amend § 310.7 by revising paragraph (a) to read as follows:

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a State authorized by the State to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, must serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this part. The notice must be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580, at *tsrnotice@ftc.gov* and must include a copy of the State's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the State or private person must serve the Commission with the required notice immediately upon instituting its action.

* * * * *

§§ 310.3, 310.4, 310.6, 310.8, 310.9 [Amended]

■ 8. In addition to the amendments set forth above, in 16 CFR part 310, remove the words ''this Rule'' and add, in their place, the words ''this part'' in the following places:

■ a. Section 310.3(a) introductory text, (b), (c) introductory text, (d) introductory text, and newly redesignated footnotes 2 and 5.

■ b. Section 310.4(a) introductory text, (a)(2)(ii), (b)(1) introductory text, (b)(2), (c), (d) introductory text, (e) introductory text, and newly redesignated footnotes 1 and 2;

■ c. Section 310.6(a) and (b) introductory text;

■ d. Section 310.8(a), (b), and (e); and

■ e. Section 310.9.

By direction of the Commission.

Joel Christie,

Acting Secretary.

[FR Doc. 2024–07180 Filed 4–15–24; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[TD 9988]

RIN 1545–BQ63

Elective Payment of Applicable Credits

Correction

In rule document 2024–04604, beginning on page 17546, in the issue of Monday, March 11, 2024, the title is corrected to read as set for above.

[FR Doc. C1–2024–04604 Filed 4–15–24; 8:45 am]

BILLING CODE 0099–10–D

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 11, 73, and 74

[MB Docket No. 20–401; FCC 24–35; FR ID 213398]

Program Originating FM Broadcast Booster Stations

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In a Report and Order, the Federal Communications Commission (Commission) finds that allowing FM booster stations to originate content on a limited basis would serve the public interest. The Report and Order adopts rules to allow for the voluntary implementation of program originating FM booster stations, subject to future adoption of processing, licensing, and service rules proposed concurrently in a further notice of proposed rulemaking, published elsewhere in this issue of the **Federal Register**. The rule changes in this document are needed to expand the potential uses of FM booster stations, which currently may not originate programming. The intended effect is to allow radio broadcasters to provide more relevant localized programming and information to different zones within their service areas.

DATES: *Effective date:* May 16, 2024.

FOR FURTHER INFORMATION CONTACT: Albert Shuldiner, Chief, Media Bureau, Audio Division, (202) 418–2721, *Albert.Shuldiner@fcc.gov;* Irene Bleiweiss, Attorney, Media Bureau, Audio Division, (202) 418–2785, *Irene.Bleiweiss@fcc.gov.* For additional information concerning the Paperwork Reduction Act (PRA) information collection requirements contained in this document, contact Cathy Williams at (202) 418–2918, *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (R&O), MB Docket No. 20–401; FCC 24–35, adopted on March 27, 2024, and released on April 2, 2024. The full text of this document will be available via the FCC's Electronic Comment Filing System (ECFS), *https://www.fcc.gov/cgb/ecfs/.* Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. Alternative formats are available for people with disabilities (braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). The Commission published the notice of proposed rulemaking (NPRM) at 86 FR 1909 on January 11, 2021.

Paperwork Reduction Act of 1995 Analysis

This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

Congressional Review Act

The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that these rules are non-major under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of the R&O to Congress and the Government Accountability Office (GAO) pursuant to 5 U.S.C. 801(a)(1)(A).

Synopsis

1. *Introduction.* In the R&O, the Commission expands the potential uses of FM boosters, which are low power, secondary stations that operate in the FM broadcast band. As a secondary service, FM booster stations are not permitted to cause adjacent-channel interference to other primary services or previously-authorized secondary stations. They must operate on the same frequency as the primary station, and have been limited to rebroadcasting the primary station's signal in its entirety (*i.e.,* no transmission of original content). Historically, the sole use of FM boosters has been to improve signal strength of primary FM stations in areas where reception is poor due to terrain or distance from the transmitter. The R&O amends the Commission's rules to allow FM and low power FM (LPFM) broadcasters to employ FM booster stations to originate programming for up to three minutes per hour. This represents a change from current requirements of 47 CFR 74.1201(f) and 74.1231 which, respectively, define FM booster stations as not altering the signal they receive from their primary FM station and prohibit FM boosters from making independent transmissions.

2. GeoBroadcast Solutions, LLC (GBS), the proponent of the rule changes, has developed technology designed to allow licensees of primary FM and LPFM broadcast stations to ''geo-target'' a portion of their programming by using FM boosters to originate different content for different parts of their service areas. Prior to proposing rule changes, GBS tested its technology under different conditions in three radio markets and concluded that the technology could be deployed for limited periods of time within the primary station's protected service contour without causing any adjacent-channel interference, and that any resulting co-channel interference (self-interference to the licensee's own signal) would be manageable and not detrimental to listeners. GBS filed a Petition for Rulemaking (Petition) seeking to allow FM boosters to originate programming. The Petition suggested that geo-targeted broadcasting can deliver significant value to broadcasters, advertisers, and listeners in distinct communities by broadcasting more relevant localized information and advancing diversity. Stations might, for example, air hyper-local news and weather reports most relevant to a particular community. Stations also might air advertisements or underwriting acknowledgements from businesses that are only interested in reaching small geographic areas, thereby enhancing the stations' ability to compete for local support. GBS pointed out that many other types of media, such as online content providers, cable companies, and newspapers are able to differentiate their content geographically, but that no such option has existed for radio broadcasting. On April 2, 2020, the Consumer and Governmental Affairs Bureau issued a

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

FEDERAL TRADE COMMISSION

16 CFR Parts 910 and 912

RIN 3084–AB74

Non-Compete Clause Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: Pursuant to the Federal Trade Commission Act (''FTC Act''), the Federal Trade Commission (''Commission'') is issuing the Non-Compete Clause Rule (''the final rule''). The final rule provides that it is an unfair method of competition for persons to, among other things, enter into non-compete clauses (''non-competes'') with workers on or after the final rule's effective date. With respect to existing non-competes—*i.e.,* non-competes entered into before the effective date—the final rule adopts a different approach for senior executives than for other workers. For senior executives, existing non-competes can remain in force, while existing non-competes with other workers are not enforceable after the effective date.

DATES: The final rule is effective September 4, 2024.

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SUPPLEMENTARY INFORMATION:

I. Background

A. Summary of the Final Rule's Provisions

The Commission proposed the Non-Compete Clause Rule on January 19, 2023 pursuant to sections 5 and 6(g) of the FTC Act.[1] Based on the Commission's expertise and after careful review and consideration of the entire rulemaking record—including empirical research on how non-competes affect competition and over 26,000 public comments—the Commission adopts this final rule addressing non-competes.

The final rule provides that it is an unfair method of competition—and therefore a violation of section 5—for employers to, *inter alia,* enter into non-compete clauses with workers on or after the final rule's effective date.[2] The Commission thus adopts a comprehensive ban on new non-competes with all workers.

With respect to existing non-competes, *i.e.,* non-competes entered into before the final rule's effective date, the Commission adopts a different approach for senior executives[3] than for other workers. Existing non-competes with senior executives can remain in force; the final rule does not cover such agreements.[4] The final rule allows existing non-competes with senior executives to remain in force because this subset of workers is less likely to be subject to the kind of acute, ongoing harms currently being suffered by other workers subject to existing non-competes and because commenters raised credible concerns about the practical impacts of extinguishing existing non-competes for senior executives. For workers who are not senior executives, existing non-competes are no longer enforceable after the final rule's effective date.[5] Employers must provide such workers with existing non-competes notice that they are no longer enforceable.[6] To facilitate compliance and minimize burden, the final rule includes model language that satisfies this notice requirement.[7]

The final rule contains separate provisions defining unfair methods of competition for the two subcategories of workers. Specifically, the final rule provides that, with respect to a worker other than a senior executive, it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause; to enforce or attempt to enforce a non-compete clause; or to represent that the worker is subject to a non-compete clause.[8] The Commission describes the basis for its finding that these practices are unfair methods of competition in Parts IV.B.1 through IV.B.3.

The final rule provides that, with respect to a senior executive, it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause; to enforce or attempt to enforce a non-compete clause entered into after the effective date; or to represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date.[9] The Commission describes the basis for its finding that these practices are unfair methods of competition in Part IV.C.2.

The final rule defines ''non-compete clause'' as ''a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition.''[10] The final rule further provides that, for purposes of the final rule, ''term or condition of employment'' includes, but is not limited to, a contractual term or workplace policy, whether written or oral.[11] The final rule further defines ''employment'' as ''work for a person.''[12]

The final rule defines ''worker'' as ''a natural person who works or who previously worked, whether paid or unpaid, without regard to the worker's title or the worker's status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person.''[13] The definition further states that the term ''worker'' includes a natural person who works for a franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship.[14]

The final rule does not apply to non-competes entered into by a person pursuant to a bona fide sale of a business entity.[15] In addition, the final rule does not apply where a cause of action related to a non-compete accrued prior to the effective date.[16] The final rule further provides that it is not an unfair method of competition to enforce or attempt to enforce a non-compete or to make representations about a non-compete where a person has a good-faith basis to believe that the final rule is inapplicable.[17]

The final rule does not limit or affect enforcement of State laws that restrict non-competes where the State laws do not conflict with the final rule, but it preempts State laws that conflict with the final rule.[18] Furthermore, the final

[1] Non-Compete Clause Rule, NPRM, 88 FR 3482 (Jan. 19, 2023) (hereinafter ''NPRM'').

[2] § 910.2(a)(1)(i) and § 910.2(a)(2)(i).

[3] *See* § 910.1 (defining ''senior executive'').

[4] *See* Part IV.C.3.

[5] § 910.2(a)(1)(ii).

[6] § 910.2(b)(1).

[7] § 910.2(b)(4).

[8] § 910.2(a)(1).

[9] § 910.2(a)(2).

[10] § 910.1.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] § 910.3(a).

[16] § 910.3(b).

[17] § 910.3(c); *see also* Part V.C.

[18] § 910.4.

rule includes a severability clause clarifying the Commission's intent that, if a reviewing court were to hold any part of any provision or application of the final rule invalid or unenforceable—including, for example, an aspect of the terms or conditions defined as non-competes, one or more of the particular restrictions on non-competes, or the standards for or application to one or more category of workers—the remainder of the final rule shall remain in effect.[19] The final rule has an effective date of September 4, 2024.[20]

B. Context for the Rulemaking

1. Growing Concerns Regarding the Harmful Effects of Non-Competes

The purpose of this rulemaking is to address conduct that harms fair competition. Concern about non-competes dates back centuries, and the evidence of harms has increased substantially in recent years. However, the existing case-by-case and State-by-State approaches to non-competes have proven insufficient to address the tendency of non-competes to harm competitive conditions in labor, product, and service markets.

The ability of employers [21] to enforce non-competes has always been restricted, based on public policy concerns that courts have recognized for centuries. For example, in *Mitchel* v. *Reynolds* (1711), an English case that provided the foundation for American common law on non-competes,[22] the court noted that workers were vulnerable to exploitation through non-competes and that non-competes threatened a worker's ability to practice a trade and earn a living.[23] These concerns have persisted. Today, non-competes between employers and workers are generally subject to greater scrutiny under State common law than other employment terms ''because they are often the product of unequal bargaining power and because the employee is likely to give scant attention to the hardship he may later suffer through loss of his livelihood.'' [24] For these reasons, State courts often characterize non-competes as ''disfavored.'' [25]

Furthermore, as ''contract[s] . . . in restraint of trade,'' [26] non-competes have always been subject to our nation's antitrust laws.[27] As early as 1911, in the formative antitrust case of *United States* v. *American Tobacco Co.,* the Supreme Court held that several tobacco companies violated both section 1 and section 2 of the Sherman Act because of the ''constantly recurring'' use of non-competes, among other practices.[28]

Concerns about non-competes have increased substantially in recent years in light of empirical research showing that they tend to harm competitive conditions in labor, product, and service markets. Changes in State laws governing non-competes [29] in recent decades have allowed researchers to better isolate the effects of non-competes, giving rise to a body of empirical research documenting these harms. This research has shown that the use of non-competes by employers tends to negatively affect competition in labor markets, suppressing earnings for workers across the labor force—including even workers not subject to non-competes.[30] This research has also shown that non-competes tend to negatively affect competition in product and service markets, suppressing new business formation and innovation.[31]

Alongside this large body of empirical work, news reports revealed that employers subject even middle-income and low-wage workers to non-competes on a widespread basis.[32] Workers came forward to recount how—by blocking them from taking a better job or starting their own business, and subjecting them to threats and litigation from their employers—non-competes derailed their careers, destroyed their finances, and upended their lives.[33]

Yet despite the mounting empirical and qualitative evidence confirming these harms and the efforts of many States to ban them, non-competes remain prevalent in the U.S. economy. Based on the available evidence, the Commission estimates that approximately one in five American workers—or approximately 30 million workers—is subject to a non-compete.[34] The evidence also indicates that employers frequently use non-competes even when they are unenforceable under State law.[35] This suggests that employers may believe workers are unaware of their legal rights; that employers may be seeking to take advantage of workers' lack of knowledge of their legal rights; or that workers are unable to enforce their rights through case-by-case litigation.[36] In addition, the ability of States to regulate non-competes effectively is constrained by employers' use of choice-of-law provisions, significant variation in how courts apply choice-of-law rules in disputes over non-competes, and the increasingly interstate nature of work. As the public comments attest, this patchwork of laws and legal uncertainty has become extremely burdensome for both employers and workers.[37]

As concern about the harmful effects of non-competes increased, the Commission began exploring the potential for Federal rulemaking on non-competes. In 2018 and 2019, the Commission held several hearings on twenty-first century competition and consumer protection issues, including ''the use of non-competition agreements

[19] § 910.5.

[20] § 910.6.

[21] For ease of reference, the Commission uses the term ''employer'' in this Supplementary Information to refer to a person for whom a worker works. The text of part 910 does not use the term ''employer.''

[22] Harlan Blake, *Employee Agreements Not to Compete,* 73 Harv. L. Rev. 625, 629–31 (1960).

[23] The *Mitchel* court expressed concern that non-competes threaten ''the loss of [the worker's] livelihood, and the subsistence of his family.'' *Mitchel* v. *Reynolds,* 1 P. Wms. 181, 190 (Q.B. 1711). The court likewise emphasized ''the great abuses these voluntary restraints'' are subject to—for example, ''from masters, who are apt to give their apprentices much vexation'' by using ''many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves.'' *Id.*

[24] Restatement (Second) of Contracts sec. 188, cmt. g (1981).

[25] *See, e.g., Navarre Chevrolet, Inc.* v. *Begnaud,* 205 So. 3d 973, 975 (La. Ct. App. 3d 2016); *Eastman Kodak Co.* v. *Carmosino,* 77 A.D.3d 1434, 1435 (N.Y. App. Div. 4th 2010); *Access Organics, Inc.* v. *Hernandez,* 175 P.3d 899, 904 (Mont. 2008); *Bybee* v. *Isaac,* 178 P.3d 616, 621 (Idaho 2008); *Softchoice, Inc.* v. *Schmidt,* 763 NW2d 660, 666 (Minn. Ct. App. 2009).

[26] 15 U.S.C. 1.

[27] *See, e.g., Newburger, Loeb & Co., Inc.* v. *Gross,* 563 F.2d 1057, 1082 (2d Cir. 1977) (''Although such issues have not often been raised in the federal courts, employee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act. When a company interferes with free competition for one of its former employee's services, the market's ability to achieve the most economically efficient allocation of labor is impaired. Moreover, employee-noncompetition clauses can tie up industry expertise and experience and thereby forestall new entry.'') (internal citation omitted).

[28] 221 U.S. 106, 181–83 (1911).

[29] *See* NPRM at 3494 (describing recent legislative activity at the State level).

[30] *See* Parts IV.B.3.a and IV.C.2.c.ii.

[31] *See* Parts IV.B.3.b and IV.C.2.c.i.

[32] *See, e.g.,* Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements,* HuffPost, Oct. 13, 2014, *https://www.huffpost.com/entry/jimmy-johns-non-compete_n_5978180;* Spencer Woodman, *Exclusive: Amazon Makes Even Temporary Warehouse Workers Sign 18-Month Non-Competes,* The Verge, Mar. 26, 2015, *https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts.*

[33] *See, e.g.,* Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In,* N.Y. Times, May 13, 2017, *https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html;* Lauren Weber, *The Noncompete Clause Gets a Closer Look,* Wall St. J., Jul. 21, 2021, *https://www.wsj.com/articles/the-noncompete-clause-gets-a-closer-look-11626872430.*

[34] *See* Part I.B.2. As described therein, this is likely a conservative estimate.

[35] *See* Part IV.B.2.b.i.

[36] *See id.*

[37] *See* Part IX.C.2.

and the conditions under which their use may be inconsistent with the antitrust laws.'' [38] In January 2020, the Commission held a public workshop on non-competes. The speakers and panelists who participated in the workshop—and the hundreds of public comments the Commission received in response to the workshop—addressed a wide range of issues, including statutory and judicial treatment of non-competes; the economic literature regarding the effects of non-competes; and whether the Commission should initiate a Federal rulemaking on non-competes.[39] The Commission also sought public comment on non-competes as part of an August 2021 solicitation for public comment on contract terms that may harm competition and a December 2021 public workshop on competition in labor markets.[40] The Commission has also addressed non-competes in connection with its merger review work.[41]

In 2021, the Commission initiated investigations into the use of non-competes. In 2023, the Commission secured final consent orders settling charges that certain firms engaged in an unfair method of competition in violation of section 5 because their use of non-competes tended to impede rivals' access to the restricted employees' labor, harming workers, consumers, and competitive conditions.[42]

The Commission also secured a final consent order settling charges that another firm violated section 5 by using non-competes with its employees.[43] The Commission's complaint alleged the firm's imposition of non-competes took advantage of the unequal bargaining power between the firm and its employees, including low-wage security guard employees, and thus reduced workers' job mobility; limited competition for workers' services; and ultimately deprived workers of higher wages and more favorable working conditions.[44]

Based on the feedback obtained from years of extensive public outreach and fact-gathering, in January 2023, the Commission published a notice of proposed rulemaking (NPRM) concerning non-competes.[45] The proposed rule would have categorically banned employers from using non-competes with all workers and required rescission of all existing non-competes.[46]

In response to the NPRM, the Commission received over 26,000 public comments.[47] The comments reflected a diverse cross-section of the U.S. The Commission received comments from employers and workers in a wide range of industries and from every State; [48] from small, medium, and large businesses; and from workers with wide-ranging income levels.[49] The Commission also received comments from representatives of different industries through trade and professional groups as well as from academics and researchers. Federal, State, and local governmental representatives also submitted public comments.

Among these comments, over 25,000 expressed support for the Commission's proposal to categorically ban non-competes. Among the public commenters were thousands of workers who described how non-competes prevented them from taking a better job or starting a competing business, as well as numerous small businesses who struggled to hire talented workers. Commenters stated that non-competes have suppressed their wages, harmed working conditions, negatively affected their quality of life, reduced the quality of the product or service their company provided, prevented their business from growing and thriving, and created a climate of fear that deters competitive activity. The following examples are illustrative of the comments the Commission received: [50]

- I currently work in sales for an asphalt company in Michigan. The company had me sign a two year non-compete agreement to not work for any other asphalt company within 50 miles if I decide to resign. After two years with the company I have been disheartened at how poorly customers are being treated and how often product quality is sub-par. I would love to start my own business because I see this as an opportunity to provide a better service at a lower cost. However, the non-compete agreement stands in the way even though there are no trade secrets and too many customers in this market.[51]
- [I] signed a non-compete clause for power-washing out of duress. My boss said that if I didn't sign before the end of the week, not to come in the next week. . . . I'd like to start my own business but I would have to find another job and wait 5 years. All I know is power-washing and these business owners all want me to sign a non-compete clause. It's one big circle of wealthy business owners keeping the little man down. Essentially, non-compete clauses limit an employee's opportunity to excel in whatever skill or trade they're familiar with. In the land of the free, we should be free to start a business not limited by greedy business owners.[52]
- In October 2020, I started working as a bartender at a company called [REDACTED] for $10 an hour. On my first day, I

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[38] Hearings on Competition and Consumer Protection in the 21st Century, Notice, 83 FR 38307, 38309 (Aug. 6, 2018).

[39] FTC, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues* (Jan. 9, 2020), *https://www.ftc.gov/news-events/events/2020/01/non-competes-workplace-examining-antitrust-consumer-protection-issues.*

[40] FTC, *Solicitation for Public Comments on Contract Terms that May Harm Competition* (Aug 5, 2021), *https://www.regulations.gov/document/FTC-2021-0036-0022;* FTC, *Making Competition Work: Promoting Competition in Labor Markets* (Dec. 6–7, 2021), *https://www.regulations.gov/docket/FTC-2021-0057/comments.*

[41] *See* NPRM at 3498–99.

[42] FTC, Press Release, *FTC Approves Final Orders Requiring Two Glass Container Manufacturers to Drop Noncompete Restrictions That They Imposed on Workers* (Feb. 23, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-approves-final-orders-requiring-two-glass-container-manufacturers-drop-noncompete-restrictions;* FTC, Press Release, *FTC Approves Final Order Requiring Anchor Glass Container Corp. to Drop Noncompete Restrictions That It Imposed on Workers* (June 2, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-approves-final-order-requiring-anchor-glass-container-corp-drop-noncompete-restrictions-it.*

[43] FTC, Press Release, *FTC Approves Final Order Requiring Michigan-Based Security Companies to Drop Noncompete Restrictions That They Imposed on Workers* (Mar. 8, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-approves-final-order-requiring-michigan-based-security-companies-drop-noncompete-restrictions.*

[44] FTC, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re Prudential Sec., Inc. et al.* at 1 (Jan. 4, 2023).

[45] NPRM, *supra* note 1.

[46] *Id.* at 3482–83.

[47] The public comments are available online. *See Regulations.gov,* Non-Compete Clause Rule (NPRM), FTC–2023–0007, *https://www.regulations.gov/docket/FTC-2023-0007/comments.* The Commission cannot quantify the number of individuals or entities represented by the comments. The number of comments undercounts the number of individuals or entities represented by the comments because many comments, including comments from different types of organizations, jointly represent the opinions or interests of many.

[48] This reflects information provided by commenters. Commenters self-identify their State and are not required to include geographic information.

[49] Though most commenters identifying as workers did not provide information regarding their income or compensation levels, many provided information about their particular jobs or industries from which the Commission was able to infer a broad range of income levels based on occupational data from the Bureau of Labor Statistics (''BLS''). BLS wage data for each year can be found at Occupational Employment and Wage Statistics, *Tables Created by BLS, https://www.bls.gov/oes/tables.htm* (hereinafter ''BLS Occupational Employment and Wage Statistics''). The Commission used data from the May 2022 National XLS table, generally for private ownership.

[50] To be clear, the Commission does not rely on any particular individual comment submission for its findings, but rather provides here (and throughout this final rule) examples of comments that were illustrative of themes that spanned many comments. The Commission's findings are based on consideration of the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition.

[51] Individual commenter, FTC–2023–0007–2215. Comment excerpts have been cleaned up for grammar, spelling, and punctuation.

[52] Individual commenter, FTC–2023–0007–12689.

unknowingly signed a 2-year non-compete, slipped between other paperwork while my boss rushed me, and downplayed its importance. . . . At [REDACTED], I was sexually harassed and emotionally abused. I needed money, so I searched for a new job while remaining at [REDACTED] for one year. I was eventually offered a bartending job at a family-owned bar with better wages, conditions, and opportunities. Upon resigning, I was threatened with a non-compete I didn't know existed. Still, I couldn't take it anymore, so believing it was an unenforceable scare tactic, I took the new job, thinking our legal system wouldn't allow a massive company with over 20 locations to sue a young entry-level worker with no degree. In December 2021, I was sued for $30,000 in ''considerable and irreparable damages'' for violating the non-compete. . . .[53]

- I am a physician in a rural underserved area of Appalachia. . . . ''[N]on-compete'' clauses have become ubiquitous in the healthcare industry. With hospital systems merging, providers with aggressive non compete clauses must abandon the community that they serve if they chose to leave their employer. . . . Healthcare providers feel trapped in their current employment situation, leading to significant burnout that can shorten their career longevity. Many are forced to retire early or take a prolonged pause in their career when they have no other recourse to combat their employer.[54]
- I am a practicing physician who signed an employment contract containing a noncompete agreement in 2012, entering into this agreement with an organization that no longer exists. My original employer merged with, and was made subsidiary to, a new organization that is run under religious principles in conflict with my own. . . . I would have never signed such an agreement with my new employer, yet I am bound to this organization under threat of legal coercion. To be clear, the forced compromise of my religious principles does direct harm to me. My only recourse to this coercion is to give up medical practice anywhere covered by my current medical license, which is injurious to the patients in my care, and to myself.[55]
- I am the owner of a small-midsize freight brokerage, and non-competes of large brokerages have time and time again constrained talent from my business. Countless employees of [a] mega brokerage . . . have left and applied for our company and we must turn them away. These are skilled brokers that are serving the market and their clients well due to THEIR skillsets. . . . These non-competes affect not just me but the clients they work with as these skilled brokers are forced out of the entire logistics market for an entire year and possibly a lifetime when they pick up a new career in a different field because of these aggressive non-competes. . . .[56]
- I was laid off from my company in 2008 due to the economy, not to any fault of my own. However, when I was offered a job at another company, my former company threatened them and my offer was rescinded. I was unable to find gainful employment for months, despite opportunities in my field, and had to utilize unemployment when I otherwise would not have needed it. To find work, I ultimately had to switch fields, start part time somewhere, and just continue to work my way up. All of this because I was laid off to no fault of my own.[57]
- I was terminated by a large hospital organization suddenly with a thriving, full Pediatric practice. . . . My lawyer and I believe the non-compete does not apply in my circumstances and that the noncompete is overly broad, restrictive and harmful to the public (my patients). I started seeing my patients mostly gratuitously in their homes so they would not go without the care they wanted and needed . . . The judge awarded the order and I was told I cannot talk to patients on the phone, text patients, zoom visits or provide any pediatric care within my non-compete area. Patients are angry and panicked. I'm worried every day about my patients and how I can continue to care for them. . . . Patients have a right to choose and keep their doctor. The trust built between a patient and his doctor is crucial to keeping a patient healthy. It's not a relationship that can or should be replaced. . . . Patients should always come first and that is not happening.[58]
- When I first graduated veterinary school I signed a noncompete clause that was for 7 years. I tried to negotiate it to a more reasonable time period but the employer wouldn't budge. There weren't many job openings for new graduates at the time and I had student loans to pay back so I signed it. . . . I moved back home to a small town and took a job that required a 10-radial-mile, 2-year noncompete (this is currently considered ''reasonable/standard'' in my industry). Unfortunately since it's a rural area the 10 miles blocked me out of the locations of all other veterinary clinics in the county and I had to commute an hour each way to work in the next metropolitan area. This put a lot of stress on my family since I have young children. Some days I didn't even get to see them when they were awake.[59]
- I work for a large electronic health records company . . . that is known for hiring staff right out of college, myself included. I was impressed with their starting salary and well-advertised benefits, so I was quick to accept their offer. After accepting their offer, I was surprised to receive a contract outlining a strict non-compete agreement . . . I feel disappointed that this information was not made apparent to me prior to my acceptance of the position, and now I feel stuck in a job that I've quickly discovered is not a good long-term fit for me. I am certain that many other recent graduates often find themselves in a similar position—they accept shiny offers from a workplace, not knowing whether the company and position will be the right fit for them, and find themselves trapped by such contracts as mine.[60]
- Non competes are awful. I am being sued right now for going into business on my own in Boston, Massachusetts, by my former employer who says I signed a non-compete in 2003, 20 years ago. . . . I am fighting them in court. Hopefully I will prevail. . . . [The] corporation I worked for is a billion-dollar corporation. And they just keep trying scare tactics to make me back down. They went as far as trying to get a preliminary injunction ordered against me. And the judge refused but I still have to spend $1,000 an hour to defend myself.[61]
- I have been working in the field of multi-media in the DC/Baltimore region since the early 2000s. . . . I was 26 when I first became employed, and at that time a requirement was that I sign a non-compete agreement. . . . This means I can't be an entrepreneur- which kills any opportunities for me to grow something of my own- which could potentially provide jobs for others in the future. So what this non-compete does is basically enables businesses to be small monopolies. I could literally have a new lease on my career if non competes were abolished. As of now, when I think of working someplace else I have to consider changing careers altogether.[62]
- A former employer had me sign a non-compete when I started employment at an internship in college. It was a part-time position of 20 hours of work as an electrical engineer, while I finished university. After university, I worked for this employer another 4 years full time, but then found a better job in another state. It was not a competitor, but a customer of my former employer. My former employer waited till the day after my 4-week notice to tell me that I had signed a non-compete agreement and that it [barred] me from working for any competitor, customer or any potential customer up to 5 years after leaving the company with no geographic limitations. This was effectively the entire semi-conductor industry and put my entire career at risk.[63]
- Non-competes serve little more purpose than to codify and entrench inefficiencies. I have seen this firsthand in the context of a sophisticated management consulting environment where company owners provided ever less support in terms of contributing to projects or even to sales of new business while still feeling secure through agreements that substantially limited anyone from working in the relevant industry for two years on a global basis after leaving. . . . The reality is that there are innumerable retention mechanisms (such as good working conditions, compensation, culture, management, growth trajectory and/or strategy) that can contribute to loyal employees without the need for non-competes.[64]

The Commission has undertaken careful review of the public comments

[53] Individual commenter, FTC–2023–0007–8852.

[54] Individual commenter, FTC–2023–0007–0026.

[55] Individual commenter, FTC–2023–0007–9671.

[56] Individual commenter, FTC–2023–0007–6142.

[57] Individual commenter, FTC–2023–0007–15497.

[58] Individual commenter, FTC–2023–0007–14956.

[59] Individual commenter, FTC–2023–0007–0922.

[60] Individual commenter, FTC–2023–0007–10729.

[61] Individual commenter, FTC–2023–0007–10871.

[62] Individual commenter, FTC–2023–0007–10968.

[63] Individual commenter, FTC–2023–0007–16347.

[64] Individual commenter, FTC–2023–0007–3963.

and the entirety of the rulemaking record. Based on this record and the Commission's experience and expertise in competition matters, the Commission issues this final rule pursuant to its authority under sections 5 and 6(g) of the FTC Act.

2. Prevalence of Non-Competes

Based on its own data analysis, studies published by economists, and the comment record, the Commission finds that non-competes are in widespread use throughout the economy and pervasive across industries and demographic groups, albeit with some differences in the magnitude of the prevalence based on industries and demographics. The Commission estimates that approximately one in five American workers—or approximately 30 million workers—is subject to a non-compete.[65]

As described in Part II.F, the inquiry as to whether conduct is an unfair method of competition under section 5 focuses on the nature and tendency of the conduct, not whether or to what degree the conduct caused actual harm.[66] Although a finding that non-competes are prevalent is not necessary to support the Commission's determination that the use of non-competes by employers is an unfair method of competition, the Commission finds that non-competes are prevalent and in widespread use throughout the economy, which is why researchers have observed such significant negative actual effects from non-competes on competitive conditions in labor markets and markets for products and services.[67]

A 2014 survey of workers finds that 18% of respondents work under a non-compete and 38% of respondents have worked under one at some point in their lives.[68] This study has the broadest and likely the most representative coverage of the U.S. labor force among the prevalence studies discussed here.[69] This study reports robust results contradicting the prior assumptions of some that non-competes were, in most cases, bespoke agreements with sophisticated and highly-paid workers. It finds that, among workers without a bachelor's degree, 14% of respondents reported working under a non-compete at the time surveyed and 35% reported having worked under one at some point in their lives.[70] For workers earning less than $40,000 per year, 13% of respondents were working under a non-compete and 33% worked under one at some point in their lives.[71] Furthermore, this survey finds that 53% of workers covered by non-competes are hourly workers.[72] The survey suggests that a large share of workers subject to non-competes are relatively low-earning workers. In addition, a survey from the Federal Reserve Board of Governors found that 11.4% of workers have non-competes, including workers with relatively low earnings and low levels of education. The survey finds some degree of geographic heterogeneity, though it finds that large numbers of workers in all regions of the country have non-competes (including 7.0% of workers in States which broadly do not enforce non-competes).[73]

Furthermore, a survey of workers conducted in 2017 estimates that 24.2% of workers are subject to a non-compete.[74] This survey also finds that non-competes are often used together with other restrictive employment agreements, including non-disclosure agreements (''NDAs'') and non-recruitment and non-solicitation agreements.[75] A methodological limitation of this survey is that it is a convenience sample of individuals who visited *Payscale.com* during the time period of the survey and is therefore unlikely to be fully representative of the U.S. working population. While weighting based on demographics helps, it does not fully mitigate this concern.

Additionally, a 2017 survey of business establishments with 50 or more employees estimates that 49% of such establishments use non-competes for at least some of their employees, and 32% of such establishments use non-competes for all of their employees.[76]

Other estimates of non-compete use cover subsets of the U.S. labor force. One 2022 study is based on National Longitudinal Survey of Youth (NLSY) data.[77] The NLSY is an often-used labor survey conducted by the Bureau of Labor Statistics (''BLS'') that consists of a nationally representative sample of 8,984 men and women born from 1980–84 and living in the U.S. at the time of the initial survey in 1997; it is a subset of the workforce by age of worker.[78] The 2022 study using NLSY data reports prevalence of non-competes to be 18%, in line with the number estimated based on the 2014 survey of workers directed solely at calculating the prevalence of non-competes.[79]

Non-competes are pervasive across occupations. For example, a survey of independent hair salon owners finds that 30% of hair stylists worked under a non-compete in 2015.[80] A survey of electrical and electronic engineers finds that 43% of respondents signed a non-compete.[81] A different study finds that 45% of physicians worked under a non-compete in 2007.[82] One study published in 2021 finds that 62% of CEOs worked under a non-compete between 1992 and 2014.[83] Another, published in 2023, supports that finding and reflects an upward trend in the use of non-competes among executives—specifically, the proportion of executives working under a non-compete rose from ''57% in the early 1990s to 67% in the mid-2010s.'' [84] The 2014 survey reports industry-specific rates ranging from 9% in the Agriculture and Hunting category to 32% in the

[65] This is likely a conservative estimate. Surveys of workers likely underreport the share of workers subject to non-competes, since many workers may not know they are subject to a non-compete. *See, e.g.,* Alexander J.S. Colvin & Heidi Shierholz, Econ. Policy Inst., *Noncompete Agreements,* Report (Dec. 10, 2019) at 3.

[66] *See infra* note 288 and accompanying text.

[67] *See* Parts IV.A through IV.C (describing this evidence).

[68] Evan P. Starr, J.J. Prescott, & Norman D. Bishara, *Noncompete Agreements in the US Labor Force,* 64 J. L. & Econ. 53, 53 (2021).

[69] The final survey sample of 11,505 responses represented individuals from nearly every demographic in the labor force. *Id.* at 58.

[70] *Id.* at 63.

[71] *Id.*

[72] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements,* 68 Mgmt. Sci. 143, 144 (2022) (analyzing data from the Starr, Prescott, & Bishara survey).

[73] Tyler Boesch, Jacob Lockwood, Ryan Nunn, & Mike Zabek, *New Data on Non-Compete Contracts and What They Mean for Workers* (2023), *https://www.minneapolisfed.org/article/2023/new-data-on-non-compete-contracts-and-what-they-mean-for-workers.*

[74] Natarajan Balasubramanian, Evan Starr, & Shotaro Yamaguchi, *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* (Jan. 18, 2024), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403.*

[75] *Id.* at 11 (reporting that if a worker has a non-compete, there is a 70%–75% chance that all three restrictive covenants are present).

[76] Colvin & Shierholz, *supra* note 65 at 1.

[77] Donna S. Rothstein & Evan Starr, *Noncompete Agreements, Bargaining, and Wages: Evidence from the National Longitudinal Survey of Youth 1997,* June 2022 Mthly. Lab. Rev. (2022).

[78] BLS, *NLSY97 Data Overview, https://www.bls.gov/nls/nlsy97.htm.*

[79] Rothstein & Starr, *supra* note 77 at 1.

[80] Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?,* 57 J. Hum. Res. 689, 700 (2022).

[81] Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals,* 76 a.m. Socio. Rev. 695, 702 (2011). Calculated as 92.60% who signed a non-compete of the 46.80% who were asked to sign a non-compete.

[82] Kurt Lavetti, Carol Simon, & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians,* 55 J. Hum. Res. 1025, 1042 (2020).

[83] Omesh Kini, Ryan Williams, & Sirui Yin, *CEO Noncompete Agreements, Job Risk, and Compensation,* 34 Rev. Fin. Stud. 4701, 4707 (2021).

[84] Liyan Shi, *Optimal Regulation of Noncompete Contracts,* 91 Econometrica 425, 447 (2023).

Information category.[85] The Balasubramaian et al. survey reports industry-specific rates ranging from 12% in the Arts, Entertainment, and Recreation category to 30% in the Professional, Scientific, and Technical category.[86] The same survey also reports occupation-specific rates ranging from 8% in the Community and Social Services category to 32% in the Computer and Mathematical category.[87]

In addition, commenters presented survey data on the prevalence of non-competes in various occupations and industries. The Commission does not rely on these surveys to support its finding that non-competes are in widespread use throughout the economy. Because the Commission lacked access to a detailed description of the methodology for these surveys (unlike for the surveys described previously), the Commission cannot evaluate how credible their research designs are. However, they generally confirm the Commission's finding that non-competes are in widespread use throughout the economy and pervasive across industries and demographic groups.

For example, commenters reported that 33% of practitioners in the applied behavioral analysis field reported being subject to a non-compete,[88] along with 68% of cardiologists,[89] 42% of colorectal surgeons,[90] 72% of members of the American Association of Hip and Knee Surgeons,[91] and 31% of wireless telecommunications retail workers.[92] Other commenters cited a 2019 study finding that 29% of businesses where the average wage is below $13 per hour use non-competes for all their workers.[93]

Several trade organizations included information in their comments about the percentage of their members that use non-competes for at least some of their workers, based on surveys of their membership. For the National Association of Wholesaler-Distributors, this figure was 80%; [94] for the Independent Lubricant Manufacturing Association, 69%; [95] for the Michigan Chamber of Commerce, 73%; [96] for the Gas and Welding Distributors Association, 80%; [97] and for the National Association of Manufacturers, 70%.[98] One industry organization said its survey found that 57% of respondents require workers earning over $150,000 to sign non-competes.[99] A survey by the Authors Guild finds that 19.2% of respondents reported that non-competes prevented them from publishing a similar or competing book.[100] The HR Policy Association stated that 75% of respondents indicated they use non-competes for less than 10% of their workers, and nearly one third indicated they use non-competes for less than 1% of their workers.[101] The association stated that its survey covered 3 million workers and argued that its survey finding less usage of non-competes was more representative than studies cited in the NPRM.[102] However, the commenter did not provide the data underlying its claims. The Retail Industry Leaders Association stated that a recent survey of its members indicated that, among members that use non-competes, the majority do so with less than 1% of their workforce and an additional quarter use non-competes with less than 10% of their workforce.[103] Additionally, a commenter referenced a survey of small business owners finding that 48% use non-competes for their own business.[104]

Several commenters misrepresented the Commission's finding related to prevalence as based on ''a single study from 2021'' (Starr, Prescott, and Bishara, 2021), which relied on survey data from 2014. The Commission's finding is not based on a single study. The NLSY study reaches similar conclusions about the prevalence of non-competes across the economy,[105] and the occupation-specific studies indicate that non-competes are pervasive in various occupations.[106] Furthermore, despite its methodological limitations, the data submitted by commenters generally comport with the estimates reported in the academic literature. One commenter stated the respondents to the Starr, Prescott, and Bishara survey were not necessarily representative of the population. The Commission believes that the weighting of the data sufficiently addresses this concern.

Another commenter argued that individuals may misunderstand contracts that they have signed, leading them to mistakenly believe they are bound by a non-compete. The Commission does not find this to be a plausible explanation for the high numbers of workers, businesses, and trade associations that report that non-competes are prevalent.

The Commission appreciates the additional estimates provided by commenters. The comments broadly corroborate the Commission's finding that non-competes are used across the workforce, with some heterogeneity in the magnitude of the prevalence. The

[85] Starr, Prescott, & Bishara, *supra* note 68 at 67.

[86] Balasubramanian et al., *supra* note 74 at 47.

[87] *Id.*

[88] Kristopher J. Brown, Stephen R. Flora, & Mary K. Brown, *Noncompete Clauses in Applied Behavior Analysis: A Prevalence and Practice Impact Survey,* 13 Behavioral Analysis Practice 924 (2020) (survey of 610 workers).

[89] Comment of Am. Coll. of Cardiology, FTC–2023–0007–18077, at 2. The comment did not provide a citation to the survey or the underlying data, including the number of respondents or the time period.

[90] William C. Cirocco. *Restrictive Covenants in Physician Contracts: An American Society of Colon and Rectal Surgeons' Survey,* 54 Diseases of the Colon and Rectum 482 (2011). The survey examined 157 colorectal surgeons who had completed their residency in the prior decade.

[91] Comment of Am. Ass'n of Hip and Knee Surgeons, FTC–2023–0007–21076, at 4. The comment said the internal poll was conducted in early 2023, but the comment did not provide a citation to the survey or the underlying data, including the number of respondents.

[92] Comm. Workers of Am. and Nat'l Employment L. Project, *Broken Network: Workers Expose Harms of Wireless Telecom Carriers' Outsourcing to 'Authorized Retailers'* (Feb. 2023), *https://cwa-union.org/sites/default/files/2023-02/20230206_BrokenNetwork.pdf,* at 12. The survey had 204 respondents.

[93] Colvin & Shierholz, *supra* note 65 at 13.

[94] Comment of Nat'l Assoc. of Wholesaler-Distribs., FTC–2023–0007–19347, at 2. The comment did not provide a citation to the survey or the underlying data, including the number of respondents.

[95] Comment of Indep. Lubricant Mfrs. Ass'n, FTC–2023–0007–19445, at 3. The comment did not provide a citation to the survey or the underlying data, including the number of respondents.

[96] Calculated as 77%*95% (assuming that the 95% reported in their comment applies to the 77% who reported using restrictive covenants). Comment of Mich. Chamber of Com., FTC–2023–0007–20855. The comment did not provide a citation to the survey or the underlying data, including the number of respondents.

[97] Comment of Gas and Welding Distribs. Ass'n, FTC–2023–0007–20934, at 2–3. The comment did not provide a citation to the survey or the underlying data. The comment said the survey took place after the NPRM was proposed and had 161 respondents.

[98] Comment of Nat'l Ass'n of Mfrs., FTC–2023–0007–20939, at 2 (citing Nat'l Ass'n of Mfrs., Noncompete Survey Data Report, *https://www.nam.org/wp-content/uploads/2023/03/Noncompete_Survey_Data_Report.pdf*). The survey had 150 respondents.

[99] Comment of Soc. for Hum. Res. Mgmt., FTC–2023–0007–20903, at 5 n.2. The comment did not provide a citation to the survey or the underlying data, including the number of respondents.

[100] Comment of The Authors Guild, FTC–2023–0007–20854, at 7. The comment did not provide a citation to the survey or the underlying data, but said it had 630 respondents.

[101] Comment of HR Policy Ass'n, FTC–2023–0007–20998, at 8.

[102] *Id.*

[103] Comment of Retail Indus. Leaders Ass'n, FTC–2023–0007–20989, at 6. The comment did not provide a citation to the survey or the underlying data, including the number of respondents or the time period.

[104] Comment of Sm. Bus. Majority, FTC–2023–0007–21093 (citing Small Business Majority, Opinion Poll: Small Business Owners Support Banning Non-Compete Agreements (Apr. 13, 2013), *https://smallbusinessmajority.org/sites/default/files/research-reports/2023-non-compete-poll-report.pdf*).

[105] *See* Rothstein & Starr, *supra* note 77 and accompanying text.

[106] *See supra* notes 80–87 and accompanying text.

Commission finds that this heterogeneity is insufficient to warrant industry-specific exclusions from coverage under the final rule in part because employers' use of non-competes is prevalent across labor markets and for the reasons discussed in Part V.D regarding requests for exclusions.

II. Legal Authority

A. The History of the Commission and Section 5 of the FTC Act

The FTC Act was enacted in 1914.[107] Section 5 of that Act ''declared'' that ''unfair methods of competition in commerce'' are ''unlawful,'' and it ''empowered and directed'' the Commission ''to prevent'' entities subject to its jurisdiction from ''using'' such methods.[108] Congress removed certain enumerated industries, activities, or entities—such as banks [109]—from the Commission's jurisdiction but otherwise envisioned a Commission whose purview would cover commerce across the national economy.

The term '''unfair methods of competition' . . . was an expression new in the law'' when it first appeared in the FTC Act.[110] Congress purposely introduced this phrase to distinguish the Commission's authority from the definition of ''unfair competition'' at common law. Because the ''meaning which the common law had given to ['unfair competition'] was . . . too narrow,'' Congress adopted ''the broader and more flexible phrase 'unfair methods of competition.' '' [111] Using this new phrase also made clear that Congress designed section 5 to extend beyond the reach of other antitrust laws—most notably, the Sherman Act—whose text did not include the term ''unfair methods of competition.'' [112] In particular, Congress wanted the Commission to apply a standard that would reach conduct not captured by other antitrust laws and the rule of reason, which courts applied when interpreting the Sherman Act, making it ''impossible to predict with any certainty'' whether courts would condemn the many ''practices that seriously interfere with competition.'' [113] Allowing the Commission to prevent unfair methods of competition would also help the Commission achieve a core purpose of the Act: to stop ''trade restraints in their incipiency'' before they grew into violations of other antitrust laws.[114]

By design, the new phrase ''unfair methods of competition'' did ''not 'admit of precise definition.' '' [115] Congress intentionally gave the Commission flexibility to adapt to changing circumstances.[116] The Supreme Court has affirmed the more inclusive scope of section 5 on numerous occasions [117] and has affirmed the Commission's power under the Act to condemn coercive and otherwise unfair practices that have a tendency to stifle or impair competition.[118] Federal appellate courts have likewise consistently held that the Commission's authority under section 5 extends beyond ''the letter'' of other antitrust laws.[119]

Congress further expanded the Commission's jurisdiction over time. Congress extended the Commission's authority in 1938 by adding the further prohibition on ''unfair or deceptive acts or practices.'' [120] And in 1975, Congress amended the phrase ''in commerce'' in section 5 to ''in or affecting commerce,'' a change that was ''specifically designed to expand the Commission's jurisdiction . . . to make it coextensive with the constitutional power of Congress under the Commerce Clause.'' [121]

Congress gave careful thought to the structure of the FTC as an independent agency entrusted with this considerable responsibility. The Commission would consist of five members, no more than three of whom could be part of the same political party, who would serve for terms of seven years.[122] The Commission would draw on trained expert staff to develop the body of law regarding what constitutes unfair methods of competition (and, later, unfair and deceptive practices),[123] both through acting as ''a quasi judicial body'' [124] that determines whether conduct is an unfair method of competition in adjudications and through authority to promulgate legislative rules delineating conduct that constitutes an unfair method of competition. Recognizing that the Commission is an expert agency in making such determinations about anticompetitive conduct, courts reviewing Commission determinations as to what practices constitute an unfair method of competition have given the Commission's decisions ''great weight.'' [125]

The FTC Act today reflects a careful balance from Congress. Congress has directed the Commission to proceed

[107] Federal Trade Commission Act of 1914, Public Law 63–203, 38 Stat. 717, 719 (hereinafter ''FTC Act of 1914'').

[108] FTC Act of 1914, 38 Stat. at 719. Section 5 is codified as amended at 15 U.S.C. 45. Congress later amended the term ''in commerce'' to ''in or affecting commerce.'' The Supreme Court has explained that this amended phrase makes section 5 of the FTC Act ''coextensive with the constitutional power of Congress under the Commerce Clause.'' *United States* v. *Am. Bldg. Maintenance Indus.,* 422 U.S. 271, 277 n.6 (1975). For simplicity, this statement of basis and purpose often refers to ''unfair methods of competition'' without the commerce requirement, but the Commission acknowledges that it has power to prevent only such methods that are in or affect commerce as that term is defined in the Act. *See* 15 U.S.C. 44.

[109] *See* 15 U.S.C. 45(a)(2).

[110] *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 532 (1935).

[111] *See FTC* v. *R. F. Keppel & Bro., Inc.,* 291 U.S. 304, 310–11 (1934); *see also Schechter Poultry,* 295 U.S. at 532.

[112] *See E.I. du Pont de Nemours* v. *FTC* (*Ethyl),* 729 F.2d 128, 136 (2d Cir. 1984) (''Congress' aim was to protect society against oppressive anti-competitive conduct and thus assure that the conduct prohibited by the Sherman and Clayton Acts would be supplemented as necessary and any interstices filled.'').

[113] S. Rep. No. 62–1326, at 14 (1913) (hereinafter ''Cummins Report''). After analyzing a series of Supreme Court decisions interpreting the Sherman Act—*e.g., Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 60 (1911)—the Senate committee feared that the rule of reason meant that ''in each instance it [would be] for the court to determine whether the established restraint of trade is a due restraint or an undue restraint'' and that this made it ''imperative to enact additional legislation.'' Cummins Report at 11–12.

[114] *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 322 (1966); *see also FTC* v. *Motion Picture Advert. Serv. Co.,* 344 U.S. 392, 394–95 (1953).

[115] *R.F. Keppel & Bro.,* 291 U.S. at 312.

[116] *Id.* at 311 n.2.

[117] *See, e.g., id.* at 311; *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 532 (1935); *Brown Shoe Co.,* 384 U.S. at 320–22.

[118] *FTC* v. *Texaco,* 393 U.S. 223, 225–26 (1968) (citing *Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 376 (1965)).

[119] *Spiegel, Inc.* v. *FTC,* 540 F.2d 287, 292 (7th Cir. 1976) (quoting *FTC* v. *Sperry & Hutchinson Co.,* 405 U.S. 233, 244 (1972)); *cf., Chuck's Feed & Seed Co.* v. *Ralston Purina Co.,* 810 F.2d 1289, 1292–93 (4th Cir. 1987).

[120] Federal Trade Commission Act, Public Law 447, 75th Cong., 3d Sess. (March 21, 1938) c. 49; 52 Stat. 111 (1938).

[121] *United States* v. *Am. Bldg. Maintenance Indus.,* 422 U.S. 271, 277 n.6 (1975). As noted, the Commission's authority does not reach certain enumerated industries or activities—a list that has also grown over time. *See* 15 U.S.C. 45(a)(2); *see also* Part II.E.1. Some of these industries are statutorily prohibited from engaging in unfair or deceptive practices or unfair methods of competition under different laws overseen by other agencies. *See, e.g.,* 49 U.S.C. 41712(a) (allowing the Secretary of Transportation to ''decide whether an air carrier, foreign air carrier, or ticket agent'' has engaged in such conduct).

[122] 15 U.S.C. 41.

[123] *Id.* (anticipating that the Commission would ''build up a comprehensive body of information for the use and advantage of the Government and the business world''); *id.* at 11,092 (''[W]e want trained experts; we want precedents; we want a body of administrative law built up.'').

[124] *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 533 (1935).

[125] *FTC* v. *Cement Inst.,* 333 U.S. 683, 720 (1948); *Atl. Ref. Co.* v. *FTC,* 381 U.S. 357, 368 (1965); *FTC* v. *Texaco,* 393 U.S. 223, 226 (1968); *Official Airline Guides, Inc.* v. *FTC,* 630 F.2d 920, 927 (2d. Cir. 1980) (quoting *Cement Inst.,* 333 U.S. at 720); *see also FTC* v. *Motion Picture Advert. Serv. Co.,* 344 U.S. 392, 396 (1953); *FTC* v. *Ind. Fed'n of Dentists,* 476 U.S. 447, 454 (1986).

against a broader range of anticompetitive conduct than other antitrust laws like the Sherman and Clayton Acts can reach. On the other hand, Congress has never established a private right of action under section 5,[126] nor has it authorized the Commission to recover civil penalties or other monetary relief from parties who engage in unfair methods of competition.[127] Instead, the Commission may either pursue an adjudication under section 5(b) or seek an injunction in Federal court under section 13(b) against a party that has engaged in an unfair method of competition.[128] As explained below, it may also promulgate rules prohibiting unfair methods of competition. The Commission cannot obtain civil penalties or other monetary relief against parties for using an unfair method of competition, although it can obtain civil penalties in court if a party is ordered to cease and desist from a violation and fails to do so.[129]

B. The Commission's Authority To Promulgate the Rule

Alongside section 5, Congress adopted section 6(g) of the Act, in which it authorized the Commission to ''make rules and regulations for the purpose of carrying out the provisions of'' the FTC Act, which include the Act's prohibition of unfair methods of competition.[130] The plain text of section 5 and section 6(g), taken together, empower the Commission to promulgate rules for the purpose of preventing unfair methods of competition. That includes legislative rules defining certain conduct as an unfair method of competition.

The Commission has exercised its authority under section 6(g) to promulgate legislative rules on many occasions stretching back more than half a century. Between 1963 and 1978,[131] the Commission relied on section 6(g) to promulgate the following rules: (1) a rule declaring it an unfair method of competition (''UMC'') and an unfair or deceptive act or practice (''UDAP'') to mislead consumers about the size of sleeping bags by representing that the ''cut size'' represents the finished size; [132] (2) a rule declaring it a UMC and UDAP to use the word ''automatic'' or similar words to describe household electric sewing machines; [133] (3) a rule declaring it a UMC and UDAP to misrepresent nonprismatic instruments as prismatic; [134] (4) a rule declaring it a UMC and UDAP to advertise or market dry cell batteries as ''leakproof;'' [135] (5) a rule declaring it a UMC and UDAP to misrepresent the ''cut size'' as the finished size of tablecloths and similar products; [136] (6) a rule declaring it a UMC and UDAP to misrepresent that belts are made of leather if they are made of other materials; [137] (7) a rule declaring it a UMC and UDAP to represent used lubricating oil as new; [138] (8) a rule declaring it a UDAP to fail to disclose certain health warnings in cigarette advertising and on cigarette packaging (''Cigarette Rule''); [139] (9) a rule declaring it a UMC and UDAP to fail to disclose certain features of light bulbs on packaging; [140] (10) a rule declaring it a UMC and UDAP to misrepresent the actual size of the viewable picture area on a TV; [141] (11) a rule declaring a presumption of a violation of section 2(d) and (e) of the amended Clayton Act for certain advertising and promotional practices in the men's and boy's clothing industry; [142] (12) a rule declaring it a UMC and UDAP to fail to make certain disclosures about the handling of glass fiber products and contact with certain products containing glass fiber; [143] (13) a rule declaring it a UMC and UDAP to make certain misrepresentations about transistors in radios; [144] (14) a rule declaring it a UDAP to fail to disclose certain effects about inhaling certain aerosol sprays; [145] (15) a rule declaring it a UMC and UDAP to misrepresent the length or size of extension ladders; [146] (16) a rule declaring it a UDAP to make certain misrepresentations, or fail to disclose certain information, about games of chance; [147] (17) a rule declaring it a UMC and UDAP to mail unsolicited credit cards; [148] (18) a rule declaring it a UMC and UDAP to fail to disclose the minimum octane number on gasoline pumps (''Octane Rule''); [149] (19) a rule declaring it a UMC and UDAP to sell finished articles of clothing without a permanent tag or label disclosing care and maintenance

[126] *See, e.g., Holloway* v. *Bristol-Myers Corp.,* 485 F.2d 986, 988–89 (D.C. Cir. 1973); *Liu* v. *Amerco,* 677 F.3d 489, 492 (1st Cir. 2012).

[127] Congress has authorized the FTC to seek civil monetary remedies against parties who engage in unfair or deceptive acts or practices under some circumstances. *See* 15 U.S.C. 45(m); 15 U.S.C. 57b.

[128] *See* 15 U.S.C. 45(b); 15 U.S.C. 53(b).

[129] *See* 15 U.S.C. 45(l).

[130] 15 U.S.C. 46(g).

[131] As explained in more detail later in this Part, Congress added section 18 to the FTC Act in 1975, and that section provides the process the Commission must go through to promulgate rules defining unfair or deceptive acts or practices. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Public Law 93–637, 88 Stat. 2183 (Jan. 4, 1975) (hereinafter ''Magnuson-Moss Act''); 15 U.S.C. 57a. Congress provided, however, that ''[a]ny proposed rule under section 6(g) . . . with respect to which presentation of data, views, and arguments was substantially completed before'' section 18 was enacted ''may be promulgated in the same manner and with the same validity as such rule could have been promulgated had'' section 18 ''not been enacted.'' 88 Stat. 2198; 15 U.S.C. 57a note. This list therefore includes a handful of rules promulgated under section 6(g) but after 1975 because those rules were substantially completed before section 18's enactment.

[132] Advertising and Labeling as to Size of Sleeping Bags, 28 FR 10900 (Oct. 11, 1963), *repealed by* 60 FR 65528 (Dec. 20, 1995).

[133] Misuse of ''Automatic'' or Terms of Similar Import as Descriptive of Household Electric Sewing Machines, 30 FR 8900 (Jul. 15, 1965), *repealed by* 55 FR 23900 (June 13, 1990).

[134] Deception as to Nonprismatic and Partially Prismatic Instruments Being Prismatic Binoculars, 29 FR 7316 (Jun. 5, 1964), *repealed by* 60 FR 65529 (Dec. 20, 1995).

[135] Deceptive Use of ''Leakproof,'' ''Guaranteed Leakproof,'' etc., as Descriptive of Dry Cell Batteries, 29 FR 6535 (May 20, 1964), *repealed by* 62 FR 61225 (Nov. 17, 1997).

[136] Deceptive Advertising and Labeling as to Size of Tablecloths and Related Products, 29 FR 11261 (Aug. 5, 1964), *repealed by* 60 FR 65530 (Dec. 20, 1995).

[137] Misbranding and Deception as to Leather Content of Waist Belts, 29 FR 8166 (Jun. 27, 1964), *repealed by* 61 FR 25560 (May 22, 1996).

[138] Deceptive Advertising and Labeling of Previously Used Lubricating Oil, 29 FR 11650 (Aug. 14, 1964), *repealed by* 61 FR 55095 (Oct. 24, 1996).

[139] Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 FR 8324 (July 2, 1964), *repealed by* 30 FR 9485 (July 29, 1965). As explained in more detail herein, Congress superseded this rule with legislation.

[140] Incandescent Lamp (Light Bulb) Industry, 35 FR 11784 (Jul. 23, 1970), *repealed by* 61 FR 33308 (Jun. 27, 1996).

[141] Deceptive Advertising as to Sizes of Viewable Pictures Shown by Television Receiving Sets, 31 FR 3342 (Mar. 3, 1966), *repealed by* 83 FR 50484 (Oct. 9, 2018).

[142] Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 32 FR 15584 (Nov. 9, 1967), *repealed by* 59 FR 8527 (Feb. 23, 1994).

[143] Failure to Disclose that Skin Irritation May Result from Washing or Handling Glass Fiber Curtains and Draperies and Glass Fiber Curtain and Drapery Fabrics, 32 FR 11023 (Jul. 28, 1967), *repealed by* 60 FR 65532 (Dec. 20, 1995).

[144] Deception as to Transistor Count of Radio Receiving Sets, Including Transceivers, 33 FR 8446 (Jun. 7, 1968), *repealed by* 55 FR 25090 (Jun. 20, 1990).

[145] Failure to Disclose the Lethal Effects of Inhaling Quick-Freeze Aerosol Spray Products Used for Frosting Cocktail Glasses, 34 FR 2417 (Feb. 20, 1969), *repealed by* 60 FR 66071 (Dec. 21, 1995).

[146] Deceptive Advertising and Labeling as to Length of Extension Ladders, 34 FR 929 (Jan. 22, 1969), *repealed by* 60 FR 65533 (Dec. 20, 1995).

[147] Games of Chance in the Food Retailing and Gasoline Industries, 34 FR 13302 (Aug. 16, 1969), *repealed by* 61 FR 68143 (Dec. 27, 1996).

[148] Unsolicited Mailing of Credit Cards, 35 FR 4614 (Mar. 17, 1970), *repealed by* 36 FR 45 (Jan. 5, 1971). This rule was rescinded in response to an amendment to the Truth in Lending Act that prohibited similar conduct. *See* Public Law 91–508, 84 Stat. 1126 (1970).

[149] Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps, 36 FR 23871 (Dec. 16, 1971), *repealed by* 43 FR 43022 (Sept. 22, 1978). This rule was superseded by the Petroleum Marketing Practices Act, Public Law 95–297, 92 Stat. 333 (June 19, 1978). A similar regulation was promulgated under that law at 16 CFR part 306.

instructions;[150] (20) a rule declaring a UMC and UDAP for a grocery store to offer products for sale at a stated price if those products will not be readily available to consumers (''Unavailability Rule'');[151] (21) a rule declaring it a UMC and UDAP for a seller to fail to make certain disclosures in connection with a negative option plan (''Negative Options Rule'');[152] (22) a rule declaring it a UDAP for door-to-door sellers to fail to furnish certain information to buyers;[153] (23) a rule declaring it a UMC and UDAP to fail to make certain disclosures about sound power amplification for home entertainment products;[154] (24) a rule declaring it a UDAP for sellers failing to include certain contract provisions preserving claims and defenses in consumer credit contracts (''Holder Rule'');[155] (25) a rule declaring it a UMC or UDAP to solicit mail order merchandise from a buyer unless the seller can ship the merchandise within 30 days (''Mail Order Rule'');[156] and (26) a rule declaring it a UDAP for a franchisor to fail to furnish a franchisee with certain information.[157]

Some of these rules attracted significant attention. For instance, the Commission began the rulemaking process to require warnings on cigarette packages just one week after the Surgeon General's ''landmark report'' that determined smoking is a health hazard,[158] and that rule was front-page news.[159] Following a lobbying campaign by the tobacco industry,[160] Congress supplanted the Commission's regulation with the Cigarette Labeling and Advertising Act but did not disturb the Commission's rulemaking authority.[161] The Unavailability Rule was likewise front-page news upon its release in 1971, and Congress left it intact.[162]

In *National Petroleum Refiners Association* v. *FTC* (''*Petroleum Refiners*''), the D.C. Circuit expressly upheld the Octane Rule as a proper exercise of the Commission's power under section 6(g) to make rules regulating both unfair methods of competition and unfair or deceptive acts or practices.[163] After construing ''the words of the statute creating the Commission and delineating its powers,'' the court held ''that under the terms of its governing statute . . . and under Section 6(g) . . . the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent.''[164] That interpretation was also ''reinforced by the construction courts have given similar provisions in the authorizing statutes of other administrative agencies.''[165] The Seventh Circuit later agreed with the D.C. Circuit's decision and ''incorporate[d] [it] by reference'' when rejecting a challenge to the Mail Order Rule.[166]

Following such rulemakings and the D.C. Circuit's confirmation of the Commission's rulemaking power in *Petroleum Refiners,* Congress in 1975 enacted a new section 18 of the FTC Act. This new section introduced special procedures, beyond those required under the Administrative Procedure Act, for promulgating rules for unfair or deceptive acts or practices, and it eliminated the Commission's authority to issue such rules under section 6(g).[167] But Congress pointedly chose not to restrict the Commission's authority to promulgate rules regulating unfair methods of competition under section 6(g). That choice was deliberate. While considering this legislation, Congress knew that the Commission had promulgated rules regulating unfair methods of competition and that the D.C. Circuit in *Petroleum Refiners* had confirmed the Commission's authority to do so.[168] And Congress expressly considered—but rejected—an amendment to the FTC Act under which ''[t]he FTC would have been prohibited from prescribing rules with respect to unfair competitive practices.''[169]

Instead, the enacted section 18 confirmed the Commission's authority to make rules under section 6(g). The law expressly preserved ''any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.''[170] Congress also made clear that Section 18 ''shall not affect the validity of any rule which was promulgated under section 6(g).''[171] And it provided that ''[a]ny proposed rule under section 6(g)'' with certain components that were ''substantially completed before'' section 18's enactment ''may be promulgated in the same manner and with the same validity as such rule could have been promulgated had this section not been enacted.''[172] Among the substantially completed rules at the time was the Mail Order Rule, which proposed to define—and upon promulgation did define—certain conduct as both an unfair method of competition and an unfair or deceptive act or practice.[173] The 1975 legislation thus expressly permitted the Commission to promulgate a rule under section 6(g) that defined an unfair method of competition and evinces Congress's

[150] Care Labeling of Textile Wearing Apparel, 36 FR 23883 (Dec. 16, 1971).

[151] Retail Food Store Advertising and Marketing Practices, 36 FR 8777 (May 13, 1971).

[152] Use of Negative Option Plans by Sellers in Commerce, 38 FR 4896 (Feb. 22, 1973).

[153] Cooling-off Period for Door-to-Door Sales, 37 FR 22934 (Oct. 26, 1972).

[154] Power Output Claims for Amplifiers Used in Home Entertainment Products, 39 FR 15387 (May 3, 1974).

[155] Preservation of Consumers' Claims and Defenses, 40 FR 53506 (Nov. 18, 1975).

[156] Mail Order Merchandise, 40 FR 49492 (Oct. 22, 1975) (regulatory text), 40 FR 51582 (Nov. 5, 1975) (statement of basis and purpose). The Mail Order Rule has since been updated to become the Mail, internet, or Telephone Order Merchandise Rule, or MITOR. *See* 79 FR 55619 (Sept. 17, 2014). The updates to the rule were based on the Commission's authority to regulate unfair or deceptive acts or practices.

[157] Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 FR 59614 (Dec. 21, 1978).

[158] Teresa Moran Schwartz & Alice Saker Hrdy, *FTC Rulemaking: Three Bold Initiatives and Their Legal Impact,* 2–3 (Sept. 22, 2004).

[159] *U.S. to Require Health Warning for Cigarettes,* N.Y. Times (June 25, 1964) at 1, 15 (tobacco industry indicating plans to immediately challenge the Commission's authority to issue the regulation), *https://www.nytimes.com/1964/06/25/archives/us-to-require-health-warning-for-cigarettes-trade-commission-orders.html.*

[160] Tobacco Inst., *Tobacco—A Vital U.S. Industry* (1965), *https://acsc.lib.udel.edu/exhibits/show/legislation/cigarette-labeling.*

[161] Public Law 89–92, 79 Stat. 282 (July 27, 1965); *see* 15 U.S.C. 1331 *et seq.*

[162] *FTC Bars Grocery Ads for Unavailable Specials,* N.Y. Times (May 13, 1971) at 1, *https://www.nytimes.com/1971/05/13/archives/f-t-c-bars-grocery-ads-for-unavailable-specials-bars-grocery;* 16 CFR 424.1 and 424.2. The rule was amended after its enactment in 1971 to add an exception and defenses but otherwise remains intact as promulgated. Amendment to Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices, 54 FR 35456–08 (Aug. 28, 1989); *see also* Retail Food Store Advertising and Marketing Practices Rule, 79 FR 70053–01 (Nov. 25, 2014).

[163] *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672 (D.C. Cir. 1973).

[164] *Nat'l Petroleum Refiners,* 482 F.2d at 674, 698; *see also Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 967 (D.C. Cir. 1985) (concluding, after extensive review of the legislative history related to the FTC's rulemaking authority originating in 1914 and extending through amendments to the FTC Act in 1980, that ''Congress has not at any time withdrawn the broad discretionary authority originally granted the Commission in 1914 to define unfair practices on a flexible, incremental basis.'').

[165] *Nat'l Petroleum Refiners,* 482 F.2d at 678.

[166] *United States* v. *JS & A Grp., Inc.,* 716 F.2d 451, 454 (7th Cir. 1983).

[167] Magnuson-Moss Act, 88 Stat. 2183; *see* 15 U.S.C. 57a.

[168] S. Rep. No. 93–151, at 32 (1973).

[169] H.R. Conf. Rep. No. 93–1606, at 30 (1974).

[170] 15 U.S.C. 57a(a)(2).

[171] Magnuson-Moss Act, 88 Stat. 2183.

[172] Magnuson-Moss Act, 88 Stat. 2183.

[173] *See* Undelivered Mail Order Merchandise and Services, 36 FR 19092 (Sept. 28, 1971) (initial NPRM); 39 FR 9201 (Mar. 8, 1974) (amended NPRM); 40 FR 49492 (Oct. 22, 1975) (final regulatory text).

intent to leave in place the Commission's authority to promulgate such rules under section 6(g). As the Seventh Circuit later put it, ''Congress . . . considered the controversy surrounding the Commission's substantive rulemaking power under Section 6(g) to have been settled by the *Octane Rating* case.'' [174]

Congress again confirmed the Commission's authority to promulgate rules regulating unfair methods of competition under section 6(g) when it enacted section 22 of the FTC Act as part of the Federal Trade Commission Improvements Act of 1980.[175] Section 22 imposes certain procedural requirements the Commission must follow when it promulgates any ''rule.'' Section 22(a) defines ''rule'' as ''any rule promulgated by the Commission under section 6 or section 18'' while *excluding* from that definition ''interpretive rules, rules involving Commission management or personnel, general statements of policy, or rules relating to Commission organization, procedure, or practice.'' [176] Thus, by its terms, section 22(a) demonstrates the 1980 Congress's understanding that the Commission maintained authority to promulgate rules under section 6 that are not merely ''interpretive rules, rules involving Commission management or personnel, general statements of policy, or rules relating to Commission organization, procedure, or practice.'' [177] Section 22 envisions rules that will have the force of law as legislative rules and defines ''rule'' based on whether it may ''have an annual effect on the national economy of $100,000,000 or more,'' ''cause a substantial change in the cost or price of goods or services,'' or ''have a significant impact upon'' persons and consumers.[178] Section 22(b) of the Act similarly contemplates authority to make legislative rules by imposing regulatory analysis obligations on any rules that the Commission promulgates under section 6.[179] The specific obligations in section 22(b), such as the requirement for the Commission to conduct a cost-benefit analysis, assume that section 6(g) authorizes substantive and economically significant rules.

Both the 1975 and 1980 amendments to the FTC Act thus indicate that Congress understood the Commission possessed rulemaking power under section 6(g) and chose to leave that authority in place.[180] As the Supreme Court has observed, ''[t]he long time failure of Congress to alter'' a statutory provision, like section 6(g) here, ''after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.'' [181] That is especially true when, as here, ''the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.'' [182] Were there any doubt that the 1914 Congress granted the Commission the authority to make rules under section 6(g) to prevent unfair methods of competition, the Congresses of 1975 and 1980 eliminated such doubt by ratifying the D.C. Circuit's decision holding that the Commission has such authority.

C. Comments and Responses Regarding the Commission's Legal Authority

The Commission received many comments supporting, discussing, or questioning its authority to promulgate the final rule. Numerous commenters supported that the Commission has such authority, including, among others, legal scholars and businesses.[183] In addition, hundreds of small businesses—hailing from 45 States and the District of Columbia—joined a comment by the Small Business Majority supporting the final rule.[184]

Commenters questioning the Commission's authority typically advanced one of three arguments. First, some commenters claimed the FTC Act does not grant the Commission authority to promulgate the rule. Second, some commenters contended that the validity of non-competes is a major question that Congress has not given the Commission the authority to address. And third, some commenters argued that Congress had impermissibly delegated to the Commission authority to promulgate nationwide rules governing methods of competition. A smaller number of comments asserted other, miscellaneous reasons the Commission allegedly lacked authority to promulgate the rule. The Commission has considered these comments and disagrees for the reasons explained below.

1. The Commission's Authority Under the FTC Act

The Commission received numerous comments claiming that it lacks authority under the FTC Act to promulgate rules prohibiting unfair methods of competition. The Commission disagrees. Congress expressly granted the Commission authority to promulgate such rules in the original FTC Act of 1914, Congress enacted legislation in 1975 expressly preserving that authority,[185] and it imposed requirements in 1980 that presumed that authority.

The Commission is not persuaded by commenters' arguments in opposition to its authority. For instance, some commenters argued that Congress's choice to exclude certain industries from the Commission's jurisdiction indicates that Congress did not intend to give the Commission power to pass rules that affect commerce across the national economy.[186] But Congress expressly ''empowered and directed'' the Commission to prevent unfair methods of competition throughout the economy,[187] in any activities ''in or affecting commerce,'' subject only to limited exceptions. The final rule will apply only to the extent that the Commission has jurisdiction under the FTC Act. The Act does not limit the Commission's authority to pursue, for example, industry-specific rulemaking. Where Congress wished to limit the scope of the Commission's authority over particular entities or activities, it did so expressly, demonstrating its intent to give the Commission broad enforcement authority over activities in or affecting commerce outside the scope of the enumerated exceptions.[188] That section 22 of the FTC Act requires the Commission to perform a regulatory analysis for amendments to rules based on, *inter alia,* ''their annual effect on the

[174] *United States* v. *JS & A Grp.,* 716 F.2d 451, 454 (7th Cir. 1983).

[175] Public Law 96–252, 94 Stat. 374 (1980).

[176] *Id.; see* 15 U.S.C. 57b–3(a)(1).

[177] 15 U.S.C. 57b–3(a)(1).

[178] *Id.*

[179] 15 U.S.C. 57b–3(b).

[180] Congress has also amended section 6 since the D.C. Circuit decided *Petroleum Refiners,* but it left section 6(g) untouched. *See* Public Law 109–455, 120 Stat. 3372 (2006).

[181] *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 488 (1940).

[182] *Id.* at 489.

[183] *See, e.g.,* Comment of Lev Menand et al., FTC–2023–0007–20871; Comment of Peter Shane et al., FTC–2023–0007–21024; Comment of Yelp, FTC–2023–0007–20974; Comment of Veeva Systems, FTC–2023–0007–18078.

[184] Comment of Sm. Bus. Majority, FTC–2023–0007–21022.

[185] Some commenters argued that the 1975 Magnuson-Moss Act, which created additional procedures the Commission must use to promulgate rules regulating unfair or deceptive acts or practices, implies that the Commission entirely lacks authority to promulgate rules regulating unfair methods of competition. The Commission disagrees with these comments and notes the effect of the 1975 legislation, which preserved the Commission's existing rulemaking authority.

[186] *E.g.,* Comment of Fed'n of Am. Hosps., FTC–2023–0007–21034.

[187] 15 U.S.C. 45(a)(2).

[188] 15 U.S.C. 45(a)(2), (3).

national economy'' confirms the same.[189]

Other commenters argued that the Commission is relying on vague or ancillary provisions for its authority and invoked the familiar refrain that Congress ''does not . . . hide elephants in mouseholes.'' [190] None of the provisions on which the Commission is relying are either vague or ancillary. As explained earlier, preventing unfair methods of competition is at the core of the Commission's mandate, the plain text of the Act gives the Commission rulemaking authority to carry out that mandate, and the Commission has exercised this rulemaking authority before.[191] The D.C. Circuit and Seventh Circuits have upheld that exercise of authority, and Congress preserved this authority in subsequent amendments to the Act following the D.C. Circuit's decision.[192]

Additional commenters cited select legislative history from the 1914 FTC Act to suggest the Commission lacks authority to promulgate rules regulating competition.[193] ''[T]here is no reason to resort to legislative history'' when, as here, the text of the statute speaks plainly.[194] Even if that were not the case, however, the legislative history does not unambiguously compel a different conclusion. Faced with similar arguments to those raised by commenters here, in *National Petroleum Refiners,* the D.C. Circuit conducted an exhaustive review of the 1914 FTC Act and concluded ''the legislative history of section 5 and Section 6(g) is ambiguous'' and ''certainly does not compel the conclusion that the Commission was not meant to exercise the power to make substantive rules with binding effect[.]'' [195] As the D.C. Circuit explained, even individual statements by some Congresspeople that might suggest otherwise,[196] when properly contextualized, ''can be read to support substantive rule-making of the kind asserted by the'' Commission.[197]

Statements from the enactment of the 1975 Magnuson Moss Act, which added section 18 to the FTC Act, confirm the Commission's authority to promulgate rules under section 6(g). That legislative history reveals Congress in 1975 made a considered decision to reject an effort to overturn the D.C. Circuit's interpretation of the FTC Act and instead confirmed that section 6(g) authorizes the Commission to promulgate legislative rules concerning unfair methods of competition.[198] More importantly, these sorts of individual statements cannot trump the plain text of the Act that Congress passed,[199] which gave the Commission the authority ''to make rules and regulations for the purpose of carrying out the provisions'' of the FTC Act. Indeed, even if the legislative history were to be selectively read to cut against the Commission's authority, the Commission would still conclude that section 6(g) confers authority to promulgate this final rule because the plain text of the statute (including both the original 1914 Act and subsequent enacted amendments to the FTC Act) unambiguously confers that authority.

In short, neither the legislative history of the FTC Act, nor any of the other arguments commenters raised about the Commission's rulemaking authority overcome the plain meaning of the Act or Congress's ratification of the Commission's power to make rules preventing unfair methods of competition, as discussed in Part II.B.[200]

The Commission acknowledges that individual members of the Commission have, at times, disclaimed the Commission's authority to promulgate rules regulating unfair methods of competition.[201] The statement of an individual Commissioner does not reflect the views of or bind ''[t]he Commission itself,'' which has concluded—just as it did when it issued such rules in the past—that it does possess such authority.[202] In any event, the Commission has reviewed these statements, along with the many comments it received, and does not believe any of the arguments raised in support of that position overcome the plain meaning of the FTC Act provisions.

2. Major Questions Doctrine

Many commenters assert that the Commission lacks the authority to adopt the final rule based on the major questions doctrine. That doctrine, as the Supreme Court recently explained in *West Virginia* v. *EPA,* ''teaches that there are extraordinary cases . . . in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.'' [203] In such cases, ''something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.'' [204] Having considered the factors that the Supreme Court has used to identify major questions, the Commission concludes that the final rule does not implicate the major questions doctrine. And even if that doctrine did apply, the Commission concludes that Congress provided clear authorization for the Commission to promulgate this rule.[205]

[189] 15 U.S.C. 57b–3 (outlining requirements of the Commission's rulemaking process for new rules and amendments); *see also* Part II.E (discussing the Commission's jurisdiction).

[190] *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001); *see, e.g.,* Comment of La. And 12 Other States, FTC–2023–0007–21094.

[191] *See* Part II.B (discussing the Commission's history of using section 6(g) to promulgate rules).

[192] *Id.*

[193] *E.g.,* Comment of Nat'l Ass'n of Mfrs., FTC–2023–0007–20939; Comment of La. And 12 Other States, FTC–2023–0007–21094.

[194] *United States* v. *Gonzales,* 520 U.S. 1, 6 (1997).

[195] *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672, 686 (D.C. Cir. 1973).

[196] *Id.* at 704; *see also, e.g.,* Comment from La. and 12 Other States, FTC–2023–0007–21094 (identifying statements and failed bills that, the commenters say, show the Commission was not intended to possess rulemaking authority).

[197] *Nat'l Petroleum Refiners,* 482 F.2d at 709.

[198] For example, while the Senate was considering amendments to the FTC Act, Senator Hart read excerpts of *Nat'l Petroleum Refiners* into the record. *See* 120 Cong. Rec. 40712 (Dec. 18, 1974). These short excerpts included the court acknowledging that it was considering whether the Commission ''is empowered to promulgate substantive rules'' that would ''give greater specificity and clarity to the broad standard of illegality—'unfair methods of competition' . . .—which the agency is empowered to prevent.'' *Id.* (quoting *Nat'l Petroleum Refiners,* 482 F.2d at 673). Senator Hart then explained that the ''procedural requirements . . . respecting FTC rulemaking'' in the bill under consideration ''are limited to unfair or deceptive acts or practices rules.'' *Id.* ''These provisions and limitations,'' he explained, ''are not intended to affect the Commission's authority to prescribe and enforce rules respecting unfair methods of competition.'' *Id.* ''Rules respecting unfair methods of competition,'' Senator Hart said, ''should continue to be prescribed in accordance with'' the APA. *Id.; see also* Comment of Lev Menand et al., FTC–2023–0007–20871 at 3–6 (recounting legislative history that preceded the 1975 amendments to the FTC Act).

[199] *See Barnhart* v. *Sigmon Coal Co.,* 534 U.S. 438, 457 (2002) (''Floor statements from two Senators [who were sponsors of the bill] cannot amend the clear and unambiguous language of a statute.'').

[200] This includes arguments about the legislative intent, structure, or post-enactment history of the 1914 FTC Act.

[201] *See, e.g., Nat'l Petroleum Refiners,* 482 F.2d at 695–96 & n. 32, 38–39; NPRM at 3544 (dissenting statement of Commissioner Wilson).

[202] *Nat'l Petroleum Refiners,* 482 F.2d at 694; *see also* 16 CFR 4.14(c) (''Commission action'' requires ''the affirmative concurrence of a majority of the participating Commissioners'').

[203] *W. Va.* v. *EPA,* 597 U.S. 697, 721 (2022) (cleaned up).

[204] *Id.* at 723 (cleaned up).

[205] The Commission notes that some commenters either implicitly or explicitly focused on the Commission's rulemaking authority, as opposed to the Commission's authority to define non-competes as an unfair method of competition, as a major question. The Commission has already addressed

The agency authority underlying this final rule rests on firm historical footing. There is nothing novel about the Commission's assertion of authority to promulgate legislative rules under section 6(g).[206] As explained in Part II.B, the Commission has used this authority for more than 60 years to promulgate many rules defining unfair methods of competition and/or unfair or deceptive acts or practices.[207] The Commission's use of this power sometimes garnered significant attention, such as when it made national news by requiring cigarette warnings in the immediate wake of the Surgeon General's groundbreaking report on the health effects of smoking.[208] And the Commission's rulemaking authority was long ago ''addressed''—and affirmed—''by a court.'' [209] Moreover, after that high-profile rulemaking and judicial affirmation, Congress considered—and twice reaffirmed—the Commission's authority to issue legislative rules defining unfair methods of competition under section 6(g).[210] Indeed, even when Congress decided to displace the FTC's Cigarette Rule with legislation, it left the Commission's rulemaking authority in place.[211] Likewise, when Congress added procedural steps the Commission must take when promulgating rules concerning unfair or deceptive acts or practices, it expressly allowed the Commission to complete certain ongoing rulemakings, including one that relied on section 6(g) to define an unfair method of competition.[212] This is not a situation where Congress ''conspicuously and repeatedly'' declined to grant the agency the claimed power.[213]

Nor does the substance of the rule represent any departure from the Commission's past practices. Since its establishment in 1914, the Commission has had the authority to determine whether given practices constitute unfair methods of competition. Rather than trying to define all the many and varied practices that are unfair, Congress empowered the Commission to respond to changing market conditions and to bring specialized expertise to bear when making unfairness determinations.[214] As noted in Part I.B, the Commission has previously secured consent orders premised on the use of non-competes being an unfair method of competition,[215] and there is little question that the Commission has the authority to determine that non-competes are unfair methods of competition through adjudication.[216] Indeed, one commenter who asserted the rule would violate the major questions doctrine expressly agreed that the Commission could determine that a specific non-compete is an unfair method of competition through case-by-case adjudication.[217] The Commission is making the same kind of determination here through rulemaking rather than adjudication.[218] And because the rulemaking process allows all interested parties a chance to weigh in, this process ''may actually be fairer to parties than total reliance on case-by-case adjudication.'' [219] This is thus not a situation where the agency's action would fundamentally change the nature of the regulatory scheme. Determining whether a practice is an ''unfair method of competition'' under section 5 has been a core task of the Commission for more than a century—and, indeed, goes to the heart of its mandate.

Additionally, non-competes have already been the subject of FTC scrutiny and enforcement actions, so subjecting them to rulemaking is a more incremental—and thus less significant—step than it would be for an agency to wade into an area not currently subject to its enforcement authority. And the present rulemaking is consistent with both Congress's intent for the Commission and the Commission's prior practice. Congress ''empowered and directed'' the Commission ''to prevent persons, partnerships, or corporations'' within the Commission's jurisdiction ''from using unfair methods of competition in or affecting commerce.'' [220] Following that directive, the Commission has previously used its section 6(g) authority to promulgate rules that reach industries across the economy. For example, the Mail Order Rule placed restrictions on any sale conducted by mail,[221] and the Negative Option Rule requires certain disclosures for some negative option plans. These rules—promulgated nearly 50 or more years ago—applied across the industries within the FTC's jurisdiction, yet no court has held that they exceeded the Commission's authority.[222] Indeed, the Seventh Circuit upheld the Mail Order Rule as a valid exercise of that authority.[223]

Congress itself recognized that the Commission's authority will sometimes affect firms across the economy. Indeed, addressing unfair methods of competition and unfair and deceptive practices across industries (other than the industries, activities, or entities Congress expressly exempted) is the core of the Commission's mandate—and the Commission has long pursued that mandate through both rulemaking [224] and adjudication.[225] Congress imposed

the source of its rulemaking authority, *see* Part II.B. But to be clear, the Commission concludes that neither its rulemaking authority under section 6(g) nor its authority to use that power to define non-competes as an unfair method of competition implicates the major questions doctrine, and that even assuming either did, Congress has provided express statutory authority for both.

[206] *W. Va.* v. *EPA,* 597 U.S. at 725.

[207] *See* Part II.B (discussing the Commission's history of promulgating rules under section 6(g)).

[208] *See* Part II.B (discussing Cigarette Rule and Holder Rule); *see also* ''U.S. to Require Health Warning for Cigarettes,'' N.Y. Times (June 25, 1964) at 1, 15 (tobacco industry indicating plans to immediately challenge the Commission's authority to issue the regulation).

[209] *W. Va.* v. *EPA,* 597 U.S. at 725; *see* Part II.B (discussing decisions from the D.C. Circuit and Seventh Circuit affirming the Commission's rulemaking power under section 6(g)).

[210] *See* Part II.B (discussing the history and content of sections 18 and 22 of the FTC Act).

[211] *See* Federal Cigarette Labeling and Advertising Act, Public Law 89–92, 79 Stat. 282 (July 27, 1965).

[212] 15 U.S.C. 57a(a)(2); *see* Part II.B (discussing the Mail Order Rule).

[213] *W. Va.* v. *EPA,* 597 U.S. at 724.

[214] *See, e.g., FTC* v. *R.F. Keppel & Bro.,* 291 U.S. 304, 311 n.2, 314 (1934).

[215] In those orders, the party agreed, *inter alia,* to cease and desist from enforcing or attempting to enforce existing non-competes and from entering into or attempting to enter into new ones, and also agreed to provide notice to affected employees that they are no longer subject to a non-compete. *See* Part I.B n.42–44 (citing recent Commission investigations and consent orders involving non-competes).

[216] To the extent that any commenters argued the Commission lacked authority over the entire subject matter of non-compete agreements, the Commission did not see any compelling explanation that an agreement not to compete falls outside the meaning of a ''method of competition.''

[217] Comment of Int'l Ctr. For L. & Econs., FTC–2023–0007–20753, at 75–76.

[218] *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672 at 685 (D.C. Cir. 1973) (recognizing that the Commission may ''choose[ ]to elaborate'' section 5's ''comprehensive statutory standards through rule-making or through case-by-case adjudication'').

[219] *Id.* at 681; *see generally* Part IX.C.2 (discussing the value of rulemaking).

[220] 15 U.S.C. 45(a)(2).

[221] *Mail Order Merchandise,* 40 FR 49492 (Oct. 22, 1975); *see* 16 CFR part 435.

[222] *See* Part II.B (listing rules promulgated by the FTC exercising authority under sections 5 and 6(g)).

[223] *United States* v. *JS & A Grp.,* 716 F.2d 451, 454 (7th Cir. 1983).

[224] *See* Part II.B.

[225] The Commission's adjudicatory power, like its rulemaking power, stretches across the national economy. For instance, the Commission has found companies in a variety of industries participated in price-fixing conspiracies that violated section 5 and ordered them to cease and desist from such practices following an adjudication. *See, e.g., Eugene Dietzgen Co.* v. *FTC,* 142 F.2d 321 (7th Cir. 1944) (scientific instruments); *U.S. Maltsters Ass'n* v. *FTC,* 152 F.2d 161 (7th Cir. 1945) (malt manufacturers); *Keasbey & Mattison Co.* v. *FTC,* 159 F.2d 940 (6th Cir. 1947) (asbestos insulation); *Allied Paper Mills* v. *FTC,* 168 F.2d 600 (7th Cir. 1948) (book paper manufacturers); *Bond Crown & Cork. Co.* v. *FTC,* 176 F.2d 974 (4th Cir. 1949) (bottle cap manufacturers). Price-fixing is just one example. The Commission's adjudicatory power also supported a cease-and-desist order concerning a food manufacturer's resale practices more than 100 years ago. *FTC* v. *Beech-Nut Packing,* 257 U.S. 441 (1922). And it supported a cease-and-desist order

Continued

certain requirements in section 22 on any amendment to a Commission rule promulgated under section 6 (or section 18) that would have certain substantial effects on the national economy, the price of goods or services, or regulated entities and consumers.[226] Congress thus anticipated—and intended—that the Commission's rulemaking power carried the potential to affect the economy in considerable ways, and Congress already considered and specified the necessary steps and checks to ensure the Commission's exercise of that power is appropriate. For all these reasons, the final rule does not involve a ''major question'' as the Supreme Court has used that term.

Even if the final rule does present a major question, the final rule passes muster because the FTC Act provides clear authorization for the Commission's action. In cases involving major questions, courts expect Congress to ''speak clearly'' if it wishes to assign the disputed power.[227] Congress did so when it ''declared unlawful'' in the FTC Act ''[u]nfair methods of competition'' and empowered the Commission ''to make rules and regulations for the purpose of carrying out the provisions of th[e] Act.'' [228] Congress ''[i]n large measure'' left ''the task of defining 'unfair methods of competition' . . . to the Commission.'' [229] That is precisely what the Commission has done here, for the reasons elaborated in Part IV. Finally, there is no doubt that the Commission has expertise in the field (competition) it is regulating here.[230] For these reasons, even if the final rule involves a major question, Congress has clearly delegated to the Commission the authority to address that question.

3. Non-Delegation Doctrine

Some commenters also objected that Congress violated the non-delegation doctrine by empowering the Commission to promulgate rules regulating unfair methods of competition. The Commission disagrees. The non-delegation doctrine provides that ''Congress generally cannot delegate its legislative power to another Branch.'' [231] But the Constitution does not ''prevent Congress from obtaining the assistance of its coordinate Branches.'' [232] ''So long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'' [233] Applying this rule, the Supreme Court has ''over and over upheld even very broad delegations'' including those directing agencies ''to regulate in 'the public interest,' . . . to set 'fair and equitable' prices and 'just and reasonable' rates,'' and ''to issue whatever air quality standards are 'requisite to protect the public health.' '' [234] ''The Supreme Court has'' also ''explained that the general policy and boundaries of a delegation 'need not be tested in isolation' '' and ''[i]nstead, the statutory language may derive content from the 'purpose of the Act, its factual background and the statutory context in which they appear.' '' [235]

Here, Congress ''declared unlawful'' any ''unfair methods of competition in or affecting commerce'' and ''empowered and directed'' the Commission ''to prevent'' entities within its jurisdiction ''from using unfair methods of competition.'' [236] Congress also instructed the Commission to ''make rules and regulations for the purpose of carrying out the provisions'' of the FTC Act.[237] Congress's stated purpose and policy in section 5 provides the Commission with an intelligible principle to guide its section 6(g) rulemaking authority.[238]

Were there any doubt, the Supreme Court has laid it to rest in *A.L.A. Schechter Poultry Corp.* v. *United States.*[239] *Schechter Poultry* marked one of two occasions ''in this country's history'' that the Supreme Court ''found a delegation excessive,'' and ''in each case . . . Congress had failed to articulate *any* policy or standard to confine discretion.'' [240] The Court offered the FTC Act, however, as a counterexample of proper Congressional delegation. The Court recognized that the phrase ''unfair methods of competition'' in the FTC Act was ''an expression new in the law'' without ''precise definition,'' but that Congress had empowered the Commission to ''determine[ ] in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest'' whether a method of competition is unfair.[241] The FTC Act stood in contrast, the Court explained, to the National Industrial Recovery Act (''NIRA''), which the Court held included an unconstitutional delegation.[242]

The Commission recognizes that *Schechter Poultry* approved of the FTC Act's adjudicatory process for determining unfair methods of competition without commenting on the Act's rulemaking provision. But the ''unfair method of competition'' authority the Court approvingly cited in *Schechter Poultry* is the same intelligible principle the Commission is applying in this rulemaking. And just as the adjudication process provides for a ''formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review,'' [243] the APA rulemaking process provides for a public notice of proposed rulemaking, the opportunity to ''submi[t] . . . written data, views, or arguments,'' agency consideration of those comments, and judicial review.[244] If Congress may permissibly delegate the

within the past few years enjoining a pharmaceutical company from entering into reverse payment settlement schemes. *Impax Labs., Inc.* v. *FTC,* 994 F.3d 484 (5th Cir. 2021). In the century between, the Commission has found section 5 violations based on false advertising, monopoly maintenance, exclusive dealing, and more in diverse sectors throughout the country.

[226] 15 U.S.C. 57b–3; *see also* Part II.B.

[227] *W. Va.* v. *EPA,* 597 U.S. 697, 716, 723 (2002).

[228] FTC Act of 1914, 38 Stat. at 721–22; *see* 15 U.S.C. 45(a), 46(g); *see also* Part II.A (discussing the Commission's rulemaking authority).

[229] *FTC* v. *Texaco, Inc.,* 393 U.S. 223, 225 (1968).

[230] *Cf. W. Va.* v. *EPA,* 597 U.S. at 729 (noting the Court's view that the EPA had traditionally lacked the expertise needed to develop the rule at issue); *Ala. Ass'n of Realtors* v. *HHS,* 594 U.S. 758, at 764–65 (2021) (questioning the link between the Center for Disease Control and an eviction moratorium); *see also* Part II.A (discussing Congress's creation of the Commission as an expert body); Parts IV.B and IV.C (discussing the rationale for the rule and explaining the negative effects non-competes have on competition). The Commission also notes that through, *inter alia,* the roundtables and enforcement actions described in Part I.B, and through this rulemaking process, it has acquired expertise on non-competes specifically. The Commission further notes that non-competes are, inherently, a method of competition.

[231] *Mistretta* v. *United States,* 488 U.S. 361, 372 (1989).

[232] *Id.*

[233] *Id.* (alteration in original).

[234] *Gundy* v. *United States,* 139 S. Ct. 2116, 2121 (2019) (citing *Nat'l Broadcasting Co.* v. *United States,* 319 U.S. 190, 216 (1943); *N.Y. Cent. Secs. Corp.* v. *United States,* 287 U.S. 12, 24 (1932); *Yakus* v. *United States,* 321 U.S. 414, 422 (1944); *Fed. Power Comm'n* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944); and *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 472 (2001)).

[235] *TOMAC, Taxpayers of Mich. Against Casinos* v. *Norton,* 433 F.3d 852, 866 (D.C. Cir. 2006) (quoting *Am. Power & Light Co.* v. *SEC,* 329 U.S. 90, 104 (1946)).

[236] 15 U.S.C. 45(a)(1)–(2).

[237] 15 U.S.C. 46(g).

[238] As the D.C. Circuit noted in *Nat'l Petroleum Refiners Ass'n* v. *FTC,* ''the Supreme Court has ruled that the powers specified in Section 6 do not stand isolated from the Commission's enforcement and law applying role laid out in Section 5.'' 482 F.2d 672, 677 (D.C. Cir. 1973) (citing *United States* v. *Morton Salt Co.,* 338 U.S. 632 (1950)).

[239] *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935).

[240] *Gundy,* 588 U.S. at 2129 (internal quotation omitted); *cf. also Panama Refin. Co.* v. *Ryan,* 293 U.S. 388 (1935) (finding impermissible delegation).

[241] *Schechter Poultry,* 295 U.S. at 532–33.

[242] *Id.* at 529–42.

[243] *Id.* at 533.

[244] 5 U.S.C. 553, 702.

authority to determine through adjudication whether a given practice is an unfair method of competition, it may also permit the Commission to do the same through rulemaking.[245]

For these reasons, the Commission concludes that its authority to promulgate rules regulating unfair methods of competition is not an impermissible delegation of legislative authority.

4. Other Challenges to the Commission's Authority

Finally, a handful of comments raised other, miscellaneous arguments contending that the Commission lacks authority to promulgate the rule. The Commission has reviewed and considered these comments and concludes they do not undercut the Commission's authority to promulgate the final rule.

The Commission received several comments about the Commerce Clause. That clause allows Congress ''to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.'' [246] Consistent with that clause, the FTC Act empowers the Commission to prevent unfair methods of competition ''in or affecting commerce,'' which the Act also defines consistently with the Constitution.[247] One commenter wrote to support the rule and emphasized that non-competes restrict the free flow of interstate commerce. Others argued that the proposed rule would violate the Commerce Clause by regulating local commerce. The Commission has considered these comments and concludes that it may promulgate the final rule consistent with the Commerce Clause. The final rule extends to the full extent of the FTC's jurisdiction, which in turn extends no further than the Commerce Clause permits. As the Supreme Court has explained, the phrase ''in or affecting commerce'' in section 5 of the FTC Act is ''coextensive with the constitutional power of Congress under the Commerce Clause.'' [248] In this final rule, the Commission finds the use of non-competes by employers substantially affects commerce as that term is defined in the FTC Act. The final rule is therefore a lawful exercise of Congress's delegated power.[249]

Relatedly, one commenter objected that the rule would violate the Tenth Amendment, which provides that ''[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'' [250] But as just explained, the Constitution grants Congress the power to regulate interstate commerce, and pursuant to that power Congress granted the Commission authority to prevent unfair methods of competition in or affecting commerce. The Commission is not intruding on any power reserved to the States.

Some commenters objected that the rule infringes on the right to contract. One of these commenters acknowledged that the Constitution's Contracts Clause does not apply to the Federal government.[251] Regardless, even assuming the Constitution protects a right to contract that can be asserted against a Federal regulation, that right sounds in substantive due process, and the Commission must offer only a rational basis for the rule.[252] As relevant here, the final rule advances the Commission's congressional mandate to prevent unfair methods of competition and will promote competition and further innovation among its many benefits.[253] There is a rational relationship between regulating non-competes and these legitimate government purposes.

One commenter argued that the proposed rule was unconstitutionally vague. This commenter's objection focused on the proposed provision governing *de facto* non-competes. The Commission is not adopting that proposed language in the final rule. Instead, the Commission has clarified the scope of its definition of non-compete clause. Whether a specific clause falls within the scope of the final rule will necessarily depend on the precise language of the agreement at issue, but the text of the final rule provides regulated parties with sufficient notice of what the law demands to satisfy any due process vagueness concerns.

D. Compliance With the Administrative Procedure Act (''APA'')

Some commenters also contended that the Commission has not complied with the Administrative Procedure Act (''APA'').[254] At a high level, the APA requires prior public notice, an opportunity to comment, and consideration of those comments before an agency can promulgate a legislative rule.[255] The Commission has engaged in that process, which has led to this final rule and the accompanying explanation. Some comments failed to recognize the NPRM was a preliminary step that did not fossilize the Commission's consideration of arguments or weighing of evidence. Moreover, the APA ''limits causes of action under the APA to final agency action.'' [256] It is this final rule, not the NPRM, that constitutes final agency action. Before adopting this final rule, the Commission reviewed and considered all comments received. In many instances, the Commission has made changes relative to the proposed rule to address concerns that commenters raised. In all cases, however, the Commission has complied with the APA.

E. The Commission's Jurisdiction Under the FTC Act

The Commission's jurisdiction derives from the FTC Act. Employers that are outside the Commission's jurisdiction under the FTC Act are not subject to the final rule. The Commission clarifies in the definition of person in § 910.1, that the rule applies only to those within the Commission's jurisdiction. Some commenters sought a more detailed accounting of the

[245] *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672, 685 (D.C. Cir. 1973); *cf. SEC* v. *Chenery Corp.,* 332 U.S. 194, 202–03 (1947) (''Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.'').

[246] U.S. Const. art. I, sec. 8, cl. 3.

[247] 15 U.S.C. 44, 45(a)(1).

[248] *United States* v. *Am. Bldg. Maintenance Indus.,* 422 U.S. 271, 277, n.6 (1975).

[249] *See Nat'l Fed'n of Indep. Bus.* v. *Sebelius,* 567 U.S. 519, 549 (2012) (''Congress's power'' under the Commerce Clause ''is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.''); *see also* Part I.B.2 (discussing prevalence of non-competes) and Part IX.C.2 (addressing the need for a nationwide regulation prohibiting non-competes).

[250] U.S. Const. amend. X.

[251] *See* U.S. Const. art. I, sec. 10, cl. 1.

[252] *See, e.g., L & H Sanitation, Inc.* v. *Lake City Sanitation, Inc.,* 769 F.2d 517, 522 (8th Cir. 1985).

[253] *See* Parts IV.B and IV.C, Part X.F.6.

[254] This includes, for example, a commenter who argued that the NPRM was not the product of reasoned decision-making, asserting that the Commission had failed to consider key aspects of the rule or misconstrued evidence; commenters who argued that the rule was arbitrary and capricious for failing to consider less restrictive alternatives; commenters who argued that the NPRM failed to consider State policy or that the Commission would be acting arbitrarily by not passing a uniform rule; and commenters who argued that the Commission had failed to consider reliance interests. The Commission has addressed the concerns underlying these comments in other parts of this statement of basis and purpose.

[255] 5 U.S.C. 553; *see also Elec. Priv. Info. Ctr.* v. *DHS,* 653 F.3d 1, 5 (D.C. Cir. 2011) (APA ''generally require[s] an agency to publish notice of a proposed rule in the **Federal Register** and to solicit and consider public comments upon its proposal.'').

[256] *Trudeau* v. *FTC,* 456 F.3d 178, 188–89 (D.C. Cir. 2006) (internal quotation marks omitted); *see* 5 U.S.C. 704.

Commission's jurisdiction under the FTC Act. The Commission addresses those comments in this section. Comments seeking an exclusion for entities within the Commission's jurisdiction are addressed in Parts V.D.3 and V.D.4.

1. Generally

Certain entities that would otherwise be subject to the final rule may fall outside the FTC's jurisdiction under the FTC Act. The FTC Act exempts certain entities or activities from the Commission's enforcement jurisdiction, which otherwise applies to ''persons, partnerships, or corporations.'' [257] For example, the Act exempts ''banks'' and ''persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act.'' [258] And the Act excludes from its definition of ''corporation'' any entity that is not ''organized to carry on business for its own profit or that of its members.'' [259] The NPRM explained that, where an employer is exempt from coverage under the FTC Act, the employer would not be subject to the rule.[260] The NPRM also explained State and local government entities—as well as some private entities—may not be subject to the rule when engaging in activity protected by the State action doctrine.[261] Some commenters stated that the Commission should restate, clarify, interpret, or limit the reach of its authority under the FTC Act in the rule.

In response, the Commission explains that the final rule extends to covered persons that are within the Commission's jurisdiction. The Commission does not believe restating or further specifying each jurisdictional limit in the final rule's text is necessary; the FTC Act defines the limits of the Commission's jurisdiction and those limits govern this rule. Moreover, the Commission cannot here provide guidance that applies to every fact and circumstance. Whether an entity falls under the Commission's jurisdiction can be a fact-specific determination. An attempt by the Commission to capture all potential interpretations of the laws governing exclusions from the FTC Act may create confusion rather than clarity. In response to commenters who asked the Commission to affirm that the final rule does not bind agencies that regulate firms outside the Commission's jurisdiction under the FTC Act, the Commission affirms that the Commission applies the final rule only to entities that are covered by the FTC Act.[262]

A State government agency commenter suggested that the Commission explicitly exempt State and local governments from the rule. The commenter pointed to conflicts-of-interest policies used by some State agencies to preclude former employees from working on related projects or jobs in the private sector, which the commenter stated do not implicate the policy concerns the FTC seeks to address in the rule. The commenter also noted the complexity of when the Commission's jurisdiction might extend to State and local governments. The Commission clarifies in the definition of ''person'' in § 910.1 that the final rule applies only to a legal entity within the Commission's jurisdiction. The Commission also explains in Part III.E that the definition of ''person'' is coextensive with the Commission's authority to issue civil investigative demands. Nothing in this rule changes the extent of the Commission's jurisdiction over State and local governments. The Commission declines to specify all circumstances under which a governmental entity or quasi-governmental entity would or would not be subject to the Commission's jurisdiction and, thus, this final rule. In any event, with respect to the government ethics policies referenced by the commenter, to the extent the commenter is referring to traditional ''cooling off'' policies that preclude former government employees from working on discrete, specific projects that fell within the scope of their former official governmental position to address ethical concerns, such policies would not meet the definition of ''non-compete clause'' in § 910.1 because they do not prohibit, penalize or function to prevent a worker from switching jobs or starting a new business.

2. Jurisdiction Over Entities Claiming Nonprofit Status Under the FTC Act or the Internal Revenue Code

Commenters from the healthcare industry argued that the Commission should restate, clarify, interpret, or limit the reach of its authority under the FTC Act specifically for the healthcare industry. They pointed to the prevalence of healthcare organizations registered under section 501(c) of the Internal Revenue Code claiming tax-exempt status as nonprofits. Commenters contended that these organizations are categorically outside the Commission's authority under the FTC Act. In fact, under existing law, these organizations are not categorically beyond the Commission's jurisdiction. To dispel this misunderstanding, the Commission summarizes the existing law pertaining to its jurisdiction over non-profits.

a. Comments Received

Business and trade industry commenters from the healthcare industry, including, for example, hospitals, physician practices, and surgery centers, focused on whether the Commission has jurisdiction over nonprofit organizations registered under section 501(c)(3) of the Internal Revenue Code in light of the FTC Act's definition of ''corporation.'' Section 501(c)(3) exempts from taxation certain religious, charitable, scientific, educational, and other corporations, ''no part of the net earnings of which inure[] to the benefit of any private shareholder or individual.'' [263] An entity is a ''corporation'' under the FTC Act only if it is ''organized to carry on business for its own profit or that of its members.'' [264] Several industry commenters argued the Commission does not have jurisdiction over entities that claim tax-exempt status as nonprofits because they are, by definition, not ''organized to carry on business for [their] own profit or that of [their] members.'' The Commission presumes that commenters self-identifying as or referring to ''nonprofits,'' ''not-for-profits,'' or other similar terms without further explanation are referencing entities claiming tax-exempt status under section 501(c)(3) or other provisions of the Internal Revenue Code. Some commenters contended that, to avoid confusion, the rule should state it does

[257] 15 U.S.C. 45(a)(2); *see also FTC* v. *AT&T Mobility LLC,* 883 F.3d 848, 853–56 (9th Cir. 2018) (*en banc*).

[258] 15 U.S.C. 45(a)(2).

[259] 15 U.S.C. 44.

[260] NPRM at 3510.

[261] *Id.* (citing *Parker* v. *Brown,* 317 U.S. 341, 350–51 (1943)).

[262] For example, a few community bank commenters expressed concern that because the Federal Deposit Insurance Corporation (''FDIC'') can enforce the FTC Act against banks, the rule could be applied by the FDIC to banks. The FTC Act is the Commission's organic statute, and interpretive authority of the FTC Act rests with the Commission. Whether other agencies enforce section 5 or apply the rule to entities under their own jurisdiction is a question for those agencies. At the same time, as discussed in this Part II.E.1, the Commission applies and enforces the rule only to the extent of its jurisdiction.

[263] 26 U.S.C. 501(c)(3). Other, less frequently invoked paragraphs of section 501(c) also identify corporations and organizations that qualify for tax-exempt status. The distinctions between these entities and those claiming tax-exempt status under 501(c)(3) are analyzed under the same standard.

[264] 15 U.S.C. 44.

not apply to entities claiming tax-exempt status as non-profits. At least one commenter stated that the Commission should clarify whether and how the rule would apply to healthcare entities claiming tax-exempt status as nonprofits and then reopen the comment period. One commenter sought clarification on how ownership interest in a for-profit entity or joint venture with a for-profit partner by an entity that claims tax-exempt status as a nonprofit would affect the rule's applicability.

b. The Final Rule

The final rule applies to the full scope of the Commission's jurisdiction. Many of the comments about nonprofits erroneously assume that the FTC's jurisdiction does not capture any entity claiming tax-exempt status as a nonprofit. Given these comments, the Commission summarizes Commission precedent and judicial decisions construing the scope of the Commission's jurisdiction as it relates to entities that claim tax-exempt status as nonprofits and to other entities that may or may not be organized to carry on business for their own profit or the profit of their members.

Congress empowered the Commission to ''prevent persons, partnerships, or corporations'' from engaging in unfair methods of competition.[265] To fall within the definition of ''corporation'' under the FTC Act, an entity must be ''organized to carry on business for its own profit or that of its members.'' [266] These FTC Act provisions, taken together, have been interpreted in Commission precedent [267] and judicial decisions [268] to mean that the Commission lacks jurisdiction to prevent section 5 violations by a corporation not organized to carry on business for its own profit or that of its members.

The Commission stresses, however, that both judicial decisions and Commission precedent recognize that not all entities claiming tax-exempt status as nonprofits fall outside the Commission's jurisdiction. As the Eighth Circuit has explained, ''Congress took pains in drafting § 4 [15 U.S.C. 44] to authorize the Commission to regulate so-called nonprofit corporations, associations and all other entities if they are in fact profit-making enterprises.'' [269] The Commission applies a two-part test to determine whether a corporation is organized for profit and thus within the Commission's jurisdiction. As the Commission has explained, ''[t]he not-for profit jurisdictional exemption under Section 4 requires both that there be an adequate nexus between an organization's activities and its alleged public purposes and that its net proceeds be properly devoted to recognized public, rather than private, interests.'' [270] Alternatively stated, the Commission looks to both ''the source of the income, *i.e.,* to whether the corporation is organized for and actually engaged in business for only charitable purposes, and to the destination of the income, *i.e.,* to whether either the corporation or its members derive a profit.'' [271] This test reflects the Eighth Circuit's analysis in *Community Blood Bank of Kansas City Area, Inc.* v. *FTC* and ''the analogous body of federal law which governs treatment of not-for-profit organizations under the Internal Revenue Code.'' [272] Under this test, a corporation's ''tax-exempt status is certainly one factor to be considered,'' but that status ''does not obviate the relevance of further inquiry into a [corporation's] operations and goals.'' [273]

Merely claiming tax-exempt status in tax filings is not dispositive. At the same time, if the Internal Revenue Service (''IRS'') concludes that an entity does not qualify for tax-exempt status, such a finding would be meaningful to the Commission's analysis of whether the same entity is a corporation under the FTC Act. Administrative proceedings and judicial decisions involving the Commission or the IRS [274] have identified numerous private benefits that, if offered, could render an entity a corporation organized for its own profit or that of its members under the FTC Act, bringing it within the Commission's jurisdiction. For instance, the Commission has exercised jurisdiction in a section 5 enforcement action over a physician-hospital organization because the organization engaged in business on behalf of for-profit physician members.[275] That organization, which consisted of over 100 private physicians and one non-profit hospital, claimed tax-exempt status as a nonprofit.[276] Similarly, the Commission has exercised jurisdiction over an independent physician association claiming tax-exempt status as a nonprofit. The association consisted of private, independent physicians and private, small group practices.[277] That association was organized for the pecuniary benefit of its for-profit members because it ''contract[ed] with payers, on behalf of its [for-profit] physician members, for the provision of physician services for a fee.'' [278] Under IRS precedent in the context of purportedly tax-exempt nonprofit hospitals and other related entities that partner with for-profit entities, where the purportedly nonprofit entity ''has ceded effective control'' to a for-profit partner, ''conferring impermissible private benefit,'' the entity loses tax-exempt status.[279] The IRS has also rejected claims of nonprofit tax-exempt status for entities that pay unreasonable compensation, including percentage-based compensation, to founders, board members, their families, or other insiders.[280]

These examples are illustrative. As has been the case for decades, under Commission precedent and judicial

[265] 15 U.S.C. 45(a)(2). The Commission focuses on coverage as ''corporations'' in this section.

[266] 15 U.S.C. 44.

[267] *In the Matter of Coll. Football Ass'n,* 117 F.T.C. 971, 992–999 (1990).

[268] *California Dental Ass'n* v. *FTC,* 526 U.S. 756, 766 (1999); *Cmty. Blood Bank of Kansas City Area, Inc.* v. *FTC,* 405 F.2d 1011, 1016 (8th Cir. 1969); *FTC* v. *Univ. Health, Inc.,* 938 F.2d 1206, 1214 (11th Cir. 1991).

[269] *Blood Bank,* 405 F.2d at 1018; *see also, e.g., FTC* v. *Nat'l Comm'n on Egg Nutrition,* 517 F.2d 485, 488 (7th Cir. 1975).

[270] *Coll. Football Ass'n,* 117 F.T.C. at 998.

[271] *Id.* at 994 (internal quotation and citation omitted).

[272] *Id.* at 994.

[273] *In the Matter of the Am. Med. Assoc.,* 94 F.T.C. 701, 1979 WL 199033, at *221 (FTC Oct. 12, 1979).

[274] The Commission offers examples of decisions from the IRS and Tax Court as examples that the Commission may deem persuasive. Although ''[r]ulings of the Internal Revenue Services are not binding upon the Commission,'' the Commission has recognized that ''a determination by another Federal agency that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded.'' *Am. Med. Assoc.,* 1979 WL 199033 at *221.

[275] *In the Matter of Preferred Health Servs., Inc.,* FTC No. 41–0099, 2005 WL 593181, at *1 (Mar. 2, 2005).

[276] *Id.* at *1.

[277] *In the Matter of Boulder Valley Individual Prac. Assoc.,* 149 F.T.C. 1147, 2010 WL 9434809, at *2 (Apr. 2, 2010).

[278] *Boulder Valley,* 2010 WL 9434809, at *2. The Commission has similarly exercised jurisdiction where an entity claiming nonprofit tax-exempt status provides pecuniary benefit to for-profit entities or individuals. *See, e.g., In the Matter of Mem'l Hermann Health Network Providers,* 137 F.T.C. 90, 92 (2004); *Preferred Health,* 2005 WL 593181, at *1–*2; *Advoc. Health Partners,* F.T.C. No. 31–0021, 2007 WL 643035, at *3–*4 (Feb. 7, 2007); *Conn. Chiropractic Ass'n,* F.T.C. No. 71–0074, 2008 WL 625339, at *2 (Mar. 5, 2008); *Am. Med. Ass'n* v. *FTC,* 638 F.2d 443 (2d Cir. 1980), aff'd, 455 U.S. 676 (1982).

[279] *Redlands Surgical Servs.* v. *Comm'r,* 242 F.3d 904, 904–05 (9th Cir. 2001); *see also St. David's Health Care Sys.* v. *United States,* 349 F.3d 232, 239 (5th Cir. 2003).

[280] *See Fam. Tr. of Mass., Inc.* v. *United States,* 892 F. Supp. 2d 149, 155–156 (D.D.C. 2012); I.R.S. G.C.M. 39,674 (Oct. 23, 1987); *Bubbling Well Church of Universal Love, Inc.* v. *Comm'r,* No. 5717–79X, 1980 WL 4453 (T.C. June 9, 1980) (''[E]xcessive payments made purportedly as compensation constitute benefit inurement in contravention of section 501(c)(3).'').

decisions construing the scope of the Commission's jurisdiction, any entity satisfying the two-prong test falls within the Commission's jurisdiction. Such entities would thus be bound by the final rule.[281]

F. The Legal Standard for Unfair Methods of Competition Under Section 5

In section 5 of the FTC Act, ''unfair methods of competition in or affecting commerce'' are ''declared unlawful.'' [282] In enacting section 5, Congress intentionally did not mirror either the common law or the text or judicial interpretations of the Sherman Act, but instead adopted this new term.[283] As the Supreme Court has confirmed, this different term reflects a distinct standard.[284] Under section 5, the Commission assesses two elements: (1) whether the conduct is a method of competition, as opposed to a condition of the marketplace, and (2) whether it is unfair, meaning that it goes beyond competition on the merits. The latter inquiry has two components: (a) whether the conduct has indicia of unfairness and (b) whether the conduct tends to negatively affect competitive conditions. These two components are weighed according to a sliding scale.

Indicia of unfairness include the extent to which the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature.[285] Indicia of unfairness may also be present if the conduct is otherwise restrictive or exclusionary, depending on the circumstances, such as the nature of the commercial setting and the current and potential future effects of the conduct.[286] Notably, section 5 does not limit indicia of unfairness to conduct that benefits one or more firms and necessarily disadvantages others. Instead, restrictive and exclusionary conduct may also be unlawful where it benefits specific firms while tending to negatively affect competitive conditions.[287]

The second prong, whether conduct tends to negatively affect competitive conditions, focuses on the nature and tendency of the conduct. It does not turn on whether the conduct directly caused actual harm in the specific instance at issue and therefore does not require a detailed economic analysis or current anticompetitive effects.[288] Instead, the inquiry examines whether the conduct has a tendency to negatively affect competitive conditions, including by raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing or excluding other market participants, reducing the likelihood of potential or nascent competition, reducing labor mobility, suppressing worker compensation or degrading working conditions for workers. These concerns may arise when the conduct is examined in the aggregate along with the conduct of others engaging in the same or similar conduct.[289] Section 5 does not require a separate showing of market power or market definition.[290] Nor does section 5 import the rule-of-reason analysis applied under other antitrust laws, including in some Sherman Act cases.[291]

The Commission weighs the two elements—indicia of unfairness and tendency to negatively affect competitive conditions—on a sliding scale. Where the indicia of unfairness are clear, conduct may be an unfair method of competition with only a limited showing of a tendency to negatively affect competitive conditions.[292] For example, conduct that is coercive and exploitative evinces facial unfairness and weighs heavily as clear indicia of unfairness.[293] Where indicia of unfairness are less clear, conduct may still violate section 5 where it tends to negatively affect

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[281] The Commission cannot predict precisely how many entities claiming nonprofit tax-exempt status may be subject to the final rule. The Commission finds that the benefits of the final rule justify implementing it no matter how many nonprofit entities claiming tax-exempt status it ultimately reaches—including under the unlikely assumption that it does not reach any of them.

[282] 15 U.S.C. 45(a)(1).

[283] The Clayton Antitrust Act (38 Stat. 730, ch. 323, Pub. L. 63–212, Oct. 15, 1914) was signed into law weeks after the FTC Act of 1914, 38 Stat. 717.

[284] *See FTC* v. *Ind. Fed'n of Dentists,* 476 U.S. 447, 454 (1986); *FTC* v. *Sperry & Hutchinson,* 405 U.S. 233, 243–44 (1972); *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 321 (1966); *FTC* v. *Motion Picture Advert. Serv.,* 344 U.S. 392, 394–95 (1953); *FTC* v. *R.F. Keppel & Bro.,* 291 U.S. 304, 309–10 (1934). While some commenters argued the Commission should apply the rule of reason in this rule, as outlined in Parts II.A, II.B, II.C, and II.F, neither the text of section 5, the Supreme Court and other courts' interpretation of section 5, nor the legislative history support the conclusion that the Commission should apply the rule of reason to determine whether conduct violates section 5 as an unfair method of competition. The Commission outlines the legal standard for finding certain uses of non-competes to be unfair methods of competition in the final rule in this Part II.F.

[285] *See e.g., Sperry & Hutchinson Co.,* 405 U.S. at 243 (holding section 5 reaches conduct shown to exploit consumers, citing *R.F. Keppel & Bro.,* 291 U.S. at 313); *Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 369 (1965) (holding that the ''utilization of economic power in one market to curtail competition in another . . . . bolstered by actual threats and coercive practices'' was an unfair method of competition); *FTC* v. *Texaco,* 393 U.S. 223, 228–29 (1968) (finding that use of ''dominant economic power . . . in a manner which tended to foreclose competition'' is an unfair method of competition); *E.I. du Pont de Nemours* v. *FTC (Ethyl),* 729 F.2d 128, 137, 140 (2d Cir. 1984) (finding that unfair methods of competition includes practices that are ''collusive, coercive, predatory, restrictive or deceitful'' as well as ''exclusionary'').

[286] *See, e.g., Motion Picture Advert. Serv. Co.,* 344 U.S. at 395–96; *Luria Bros. & Co.* v. *FTC,* 389 F.2d 847, 860–61 (3d Cir. 1968). As the Supreme Court has made clear, the inquiry into the nature of the commercial setting does not, however, require market definition or proof of market power. *See, e.g., Atl. Refin. Co.,* 381 U.S. at 371 (finding it ''unnecessary to embark upon a full scale economic analysis of competitive effect''). On November 10, 2022, the Commission issued a policy statement describing the key principles of general applicability concerning whether conduct is an unfair method of competition under section 5. FTC, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (Nov. 10, 2022) (hereinafter ''FTC Policy Statement''). The FTC Policy Statement cites a number of cases explaining that section 5 does not require market definition or proof of market power. *Id.* at 10.

[287] *See, e.g., Brown Shoe Co.,* 384 U.S. at 320 (''Thus the question . . . is whether the Federal Trade Commission can declare it to be an unfair practice for Brown, the second largest manufacturer of shoes in the Nation, to pay a valuable consideration to hundreds of retail shoe purchasers in order to secure a contractual promise from them that they will deal primarily with Brown and will not purchase conflicting lines of shoes from Brown's competitors. We hold that the Commission has power to find, on the record here, such an anticompetitive practice unfair . . . .'')

[288] *Atl. Refin. Co.,* 381 U.S. at 371 (It is ''unnecessary to embark upon a full scale economic analysis of competitive effect.''); *Texaco,* 393 U.S. at 230 (''It is enough that the Commission found that the practice in question unfairly burdened competition for a not insignificant volume of commerce.''); *Union Circulation Co.* v. *FTC,* 241 F.2d 652, 657 (2d Cir. 1957) (''The agreements should be struck down if their reasonable tendency, as distinguished from actual past effect, is to injure or obstruct competition. Under the Federal Trade Commission Act, industry agreements and practices have been enjoined without an actual showing of injury to competition . . . .''). *See also Sperry & Hutchinson Co.,* 405 U.S. at 244 (''[U]nfair competitive practices [are] not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws.''); *Ethyl,* 729 F.2d at 138 (finding that evidence of actual harm is not required); *In re Coca-Cola Co.,* 117 F.T.C. 795, 915 n.25 (1994) (rejecting argument that section 5 violation requires showing of ''anticompetitive effects'').

[289] *Motion Picture Advert. Serv. Co.,* 344 U.S. at 395; *Union Circulation Co.,* 241 F.2d at 658 (''The tendency of the 'no-switching' agreements is to discourage labor mobility, and thereby the magazine-selling industry may well become static in its composition to the obvious advantage of the large, well-established signatory agencies and to the disadvantage of infant organizations.'').

[290] *Atl. Refin. Co.,* 381 U.S. at 371; *Texaco,* 393 U.S. at 230; *L.G. Balfour Co.* v. *FTC,* 442 F.2d 1, 19–20 (7th Cir. 1971) (no proof of foreclosure of a relevant market necessary in an exclusive dealing contract case under section 5 (citing *Brown Shoe*)).

[291] *See* Part II.A.

[292] *See, e.g., Ethyl,* 729 F.2d at 137–39; FTC Policy Statement, *supra* note 286, at 9.

[293] *See e.g., Sperry & Hutchinson Co.,* 405 U.S. at 243; *Ethyl,* 729 F.2d at 139, 140 (finding that unfair methods of competition include practices that are ''collusive, coercive, predatory, restrictive, or deceitful'' as well as ''exclusionary''); FTC Policy Statement, *supra* note 286, at 7, 9.

competitive conditions, but a stronger showing of such tendency is required.

In many cases the Commission (and courts) have held conduct to constitute an unfair method of competition by pointing to clear indicia of unfairness, including coercive or exploitative conduct, without conducting a detailed economic analysis of its effects. In *Atlantic Refining Co.* v. *FTC* and *FTC* v. *Texaco, Inc.,* the Supreme Court held that the Commission established an unfair method of competition where an oil company used its economic power over its gas stations to coerce them into buying certain tires, batteries, or accessories only from firms that paid the oil company a commission.[294] The Court determined in *Atlantic Refining* that ''a full-scale economic analysis of competitive effect'' was not required and the Commission needed only to show that the conduct burdened ''a not insubstantial portion of commerce.''[295] The Court reiterated this standard in *Texaco* holding that, even though the impact was less harmful than the conduct in *Atlantic Refining,* ''the anticompetitive tendencies of [the challenged] system are clear, and . . . the Commission was properly fulfilling the task that Congress assigned it in halting this practice in its incipiency.''[296] As the Court observed, ''[t]he Commission is not required to show that a practice it condemns has totally eliminated competition.''[297] In *FTC* v. *R.F. Keppel & Brother, Inc.,* the Supreme Court held that the Commission established an unfair method of competition where a manufacturer exploited the inability of children to protect themselves in the marketplace by marketing inferior goods to them through use of a gambling scheme.[298] The Court considered the extent of the practice and concluded ''[the practice] is successful in diverting trade from competitors'' without engaging in a full-scale economic analysis.[299]

In other cases, the Commission (and courts) have held exclusionary or restrictive conduct was an unfair method of competition based on evidence of the conduct's tendency to negatively affect competitive conditions without focusing on the indicia of unfairness, including whether the conduct is coercive or exploitative. But an evidentiary showing or detailed economic analysis that such conduct generated actual anticompetitive effects or would do so in the future still was not required. For example, in *Union Circulation Company* v. *FTC,* the Second Circuit held the Commission established an unfair method of competition where a group of door-to-door subscription solicitation agencies agreed not to hire workers who were previously employed by another signatory agency.[300] The court looked to whether the ''reasonably foreseeable effect'' of the agencies' conduct would be to ''impair or diminish competition between existing [competitors]'' or prevent potential new rivals.[301] In finding the conduct was an unfair method of competition, the court concluded that ''[t]he tendency of the . . . agreements is to discourage labor mobility, and thereby the magazine-selling industry may well become static in its composition to the obvious advantage of the large, well established signatory agencies and to the disadvantage of infant organizations.''[302] In *FTC* v. *Brown Shoe Co.,* the Supreme Court held that an exclusive dealing arrangement under which the Brown Shoe Company offered shoe retailers ''a valuable consideration . . . to secure a contractual promise from them that they will deal primarily with Brown and will not purchase conflicting lines of shoes from Brown's competitors'' violated section 5 consistent with the Commission's authority ''to arrest trade restraints in their incipiency.''[303] Of course, evidence of actual adverse effects on competition meets the requirement to show a tendency to negatively affect competitive conditions. For example, in *FTC* v. *Motion Picture Advertising Service Co.,* the Supreme Court held that an exclusive dealing arrangement violated section 5 where there was ''substantial evidence'' that the contracts ''unreasonably restrain competition.''[304]

Respondents in unfair method of competition cases sometimes assert purported justifications as an affirmative defense. Some courts have declined to consider justifications altogether. However, where defendants raise justifications as an affirmative defense, the Commission and courts have consistently held that pecuniary benefit to the party responsible for the conduct in question is not cognizable as a justification.[305] Additionally, to the extent justifications are asserted, they must be legally cognizable,[306] non-pretextual,[307] and any restriction used to bring about the benefit must be narrowly tailored to limit any adverse impact on competitive conditions.[308]

[294] *Atl. Refin. Co.,* 381 U.S. at 369–70; *Texaco,* 393 U.S. at 228–29.

[295] *Atl. Refin. Co.,* 381 U.S. at 371. *See also Texaco,* 393 U.S. at 230 (finding that the practice unfairly burdened competition for a not insignificant volume of commerce); *FTC* v. *R.F. Keppel & Bro.,* 291 U.S. 304, 309 (1934) (''A practice so widespread and so far reaching in its consequences is of public concern if in other respects within the purview of the statute.'').

[296] *Texaco,* 393 U.S. at 230 (further noting that ''[i]t is enough that the Commission found that the practice in question unfairly burdened competition for a not insignificant volume of commerce.'').

[297] *Id.* at 230. *See also Shell Oil Co.* v. *FTC,* 360 F.2d 470, 487 (5th Cir. 1966) (''A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord.'').

[298] 291 U.S. 304, 313.

[299] 291 U.S. at 308–09.

[300] 241 F.2d 652, 655 (2d Cir. 1957).

[301] *Id.* at 658. Notably, the court also considered facially coercive conduct by which the door-to-door subscription agencies coerced magazine publishers into not doing business with one of their competitors because the competitor hired their former workers. *Id.* at 655–56. The court upheld the Commission's order concluding this conduct was an unfair method of competition under section 5. The court did not conduct any related economic analysis and simply concluded that the ''illegal scheme of coercion . . . is clearly unjustified.'' *Id.*

[302] *Id.* at 658; *see also Nichols* v. *Spencer Intern. Press, Inc.,* 371 F.2d 332, 334 (7th Cir. 1967) (''Granting that the antitrust laws were not enacted for the purpose of preserving freedom in the labor market, nor of regulating employment practices as such, nevertheless it seems clear that agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also, depending upon the circumstances, impair full and free competition in the supply of a service or commodity to the public.'')

[303] *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 320, 322 (1966).

[304] *FTC* v. *Motion Picture Advert. Serv. Co.,* 344 U.S. 392, 395–96 (1953); *see also L.G. Balfour Co.* v. *FTC,* 442 F.2d 1, 14 (7th Cir. 1971) (holding that a firm's exclusive dealing contracts violated section 5 where such contracts were 'anti-competitive' '').

[305] *Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 371 (1965) (considering that defendant's distribution contracts at issue ''may well provide Atlantic with an economical method of assuring efficient product distribution among its dealers'' and holding that the ''Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves''); *FTC* v. *Texaco,* 393 U.S. 223, 230 (1968) (following the same reasoning as *Atlantic Refining* and finding that the ''anticompetitive tendencies of such system [were] clear''); *Balfour,* 442 F.2d at 15 (while relevant to consider the advantages of a trade practice on individual companies, this cannot excuse an otherwise illegal business practice). For provisions of the antitrust laws where courts have not accepted justifications as part of the legal analysis, the Commission will similarly not accept justifications when these claims are pursued through section 5.

[306] *See, e.g., FTC* v. *Ind. Fed. Dentists,* 476 U.S. 447, 463 (1986); *Fashion Originators' Guild of Am.* v. *FTC,* 312 U.S. 457, 468 (1941); *FTC* v. *Superior Ct. Trial Lawyers Ass'n,* 493 U.S. 411, 423–24 (1990).

[307] *See, e.g., Ind. Fed'n of Dentists,* 476 U.S. at 464. *See also United States* v. *Microsoft Corp.,* 253 F.3d 35, 62–64, 72, 74, 76–77 (D.C. Cir. 2001); *Eastman Kodak Co.* v. *Image Technical Tech. Svcs,* 504 U.S. 541, 472, 484–85 (1992); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U.S. 585, 608–10 (1985).

[308] *NCAA* v. *Alston,* 594 U.S. 69, 100–101 (2021); *Polygram Holding, Inc.* v. *FTC,* 416 F.3d 29, 38

Continued

III. Section 910.1: Definitions

Section 910.1 sets forth definitions of several terms used in the final rule.

A. Definition of ''Business Entity''

The Commission adopts the definition of ''business entity'' as proposed.

1. Proposed Definition

The Commission proposed to define ''business entity'' as ''a partnership, corporation, association, limited liability company, or other legal entity, or a division or subsidiary thereof.'' [309] The term ''business entity'' was used in two places: (1) in proposed § 910.3, which contained an exception for certain non-competes entered into in the context of a sale of a business by a substantial owner of, or substantial member or substantial partner in, the business entity,[310] and (2) in proposed § 910.1(e), which defined ''substantial owner, substantial member, or substantial partner'' as an owner, member, or partner holding at least a 25% ownership interest in a business entity.

The Commission explained in the NPRM that it proposed including divisions and subsidiaries in the definition of ''business entity'' to apply the sale-of-a-business exception where a person is selling a division or subsidiary of a business entity.[311] The Commission stated the primary rationale for the sale-of-business exception—to help protect the value of a business acquired by a buyer—also applies where a person is selling a division or subsidiary of a business entity.[312]

2. Comments Received

Two commenters specifically addressed the definition of business entity. One commenter suggested a new definition using a functional test that the commenter asserted would prevent employers from structuring their businesses as several smaller legal entities in order to fall within the sale-of-a-business exception. Another commenter also suggested that the definition be amended to explicitly include ''general partnerships'' and trusts.

3. The Final Rule

The Commission adopts the definition of ''business entity'' as proposed. The Commission declines to adopt a functional test for the definition of ''business entity.'' As described in greater detail in Part V.A, the sale-of-a-business exception in the final rule does not contain a 25% ownership threshold, so employers will not have an incentive to structure their businesses as several smaller legal entities in order to fall within the sale-of-a-business exception. The Commission also believes replacing the current bright-line definition of ''business entity'' with a functional test would make it more difficult for workers and employers to know whether a given non-compete is enforceable in the context of the sale of a business. The Commission concludes adding the terms ''general partnerships'' and ''trusts'' to the definition is unnecessary, because the phrase ''other legal entity'' already includes those entity types.

B. Definition of ''Employment''

The Commission proposed to define ''employment'' as ''work for an employer, as the term employer is defined in § 910.1(c).'' [313] That provision defined ''employer'' as ''a person, as defined in 15 U.S.C. 57b–1(a)(6) [section 20 of the FTC Act], that hires or contracts with a worker to work for the person.'' [314] Section 20 defines ''person'' as ''any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.'' The Commission intended the proposed definition of ''employer'' to clarify that an employment relationship exists, for purposes of the final rule, regardless of whether an employment relationship exists under another law, such as a Federal or State labor law.[315] The final rule clarifies the definitions to better reflect that intent.

While commenters generally did not address the proposed definition of ''employment,'' many commenters expressed concern that the proposed definition of ''employer'' would exclude workers hired by one entity to work for another, such as workers hired through a staffing agency. To avoid excluding such workers, and consistent with the Commission's intent to cover workers irrespective of whether they are classified as in an ''employer-employee'' relationship under other State and Federal laws, the final rule defines ''employment'' as ''work for a person'' and makes corresponding changes to the definition of ''employer,'' described in Part III.C. This definition of ''employment'' better clarifies that an employment relationship exists, for purposes of the final rule, regardless of whether an employment relationship exists under another law, such as a Federal or State labor law.

C. Proposed Definition of ''Employer''

The Commission proposed to define employer as a ''person, as defined in 15 U.S.C. 57b–1(a)(6) [section 20 of the FTC Act], that hires or contracts with a worker to work for the person.'' [316] Section 20 defines ''person'' as ''any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.'' [317] The Commission clarified in the NPRM that a person meeting the definition of an employer under proposed § 910.1(c) would be an employer regardless of whether the person meets another legal definition of employer, such as a definition in Federal or State labor law.[318] In response to concerns raised by commenters, the final rule does not adopt a definition of ''employer.''

1. Comments Received

Several commenters expressed support for the proposed definition of ''employer.'' A few commenters suggested changes to the definition of ''employer'' to maximize the final rule's coverage and close potential loopholes. Worker and employer advocates noted the proposed definition appeared to exclude certain persons who are commonly understood to be a worker's employer because it assumed that a worker's employer is the same legal entity that hired or contracted with the worker. These commenters contended the proposed definition would not cover arrangements such as when a worker is employed through a contractual relationship with a professional employer organization or staffing agency; under a short-term ''loan-out arrangement,'' during which a worker hired by one employer may work for another employer; under contract with a parent, subsidiary, or affiliate of the business who hired them; or by persons or entities who share common control over the worker's work. A few of these commenters also stated that the proposed definition creates a loophole allowing evasion of the rule through third-party hiring. Most commenters that addressed this issue suggested listing one or more such arrangements in the definition of ''employer'' to

(D.C. Cir. 2005); 2000 Collaboration Guidelines, sec. 3.36b. *See also Union Circulation Co.* v. *FTC,* 241 F.2d 652, 658 (2d Cir. 1957) (''The agreements here went beyond what was necessary to curtail and eliminate fraudulent practices.'').

[309] NPRM, proposed § 910.1(a).

[310] *Id.* at 3508.

[311] *Id.* at 3509.

[312] *Id.*

[313] *Id.,* proposed § 910.1(d).

[314] *Id.,* proposed § 910.1(c).

[315] *Id.* at 3510.

[316] *Id.,* proposed § 910.1(c).

[317] 15 U.S.C. 57b–1(a)(6).

[318] NPRM at 3510.

ensure these kinds of arrangements are covered.

One worker advocacy group argued the term ''hires or contracts'' in the proposed definition of ''employer'' is in tension with the Commission's stated intent to broadly cover all workers, including externs, interns, and volunteers. This commenter suggested the definition of ''employer'' incorporate language from the Fair Labor Standards Act (''FLSA'') definition of ''employ,'' which includes to ''suffer or permit to work.'' [319] The commenter suggested this language because of its breadth, noting the language originated in State laws designed to reach businesses that use third parties to illegally hire and supervise children.

One industry trade organization argued that, to minimize inconsistencies with the FLSA, the Commission should incorporate the FLSA's definition of ''employer.''

2. Final Rule

After considering the comments, the Commission has revised the definitions of ''non-compete clause'' and ''worker'' as described in Parts III.D and III.G. These revisions make the definition of ''employer'' unnecessary, so the Commission is not finalizing a definition of ''employer.''

These revisions clarify that the final rule covers all workers regardless of whether they work for the same person that hired or contracted with them to work. As explained in Part III.D, in the definition of ''non-compete clause,'' the Commission has revised the phrase ''contractual term between an employer and a worker'' to read ''term or condition of employment'' and has revised the phrase ''after the conclusion of the worker's employment with the employer'' to read ''after the conclusion of the employment that includes the term or condition.'' Furthermore, as explained in Part III.G, in the definition of ''worker,'' the Commission has revised the phrase ''a natural person who works, whether paid or unpaid, for an employer'' to read ''a natural person who works or who previously worked, whether paid or unpaid.''

The Commission is adopting this more general language, rather than listing the exact kinds of contractual arrangements and entities (*e.g.,* staffing agencies, affiliates, joint employers, etc.) to avoid unnecessary or confusing terminology, evasion of the final rule through complex employment relationships, and the need to specify myriad fact-specific scenarios. The language is designed to capture indirect employment relationships as a general matter without regard to the label used.

[319] 29 U.S.C. 203(g).

D. Definition of ''Non-Compete Clause''

Based on the comments received, the Commission adopts a slightly modified definition of ''non-compete clause'' in § 910.1. Section 910.1 defines a ''non-compete clause'' as a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (A) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (B) operating a business in the United States after the conclusion of the employment that includes the term or condition. Section 910.1 further provides that, for purposes of the final rule, ''term or condition of employment ''includes, but is not limited to, a contractual term or workplace policy, whether written or oral.'' Similar to the proposed rule, the final rule applies to terms and conditions that expressly prohibit a worker from seeking or accepting other work or starting a business after their employment ends, as well as agreements that penalize or effectively prevent a worker from doing the same.

1. Proposed Definition

The Commission's proposed definition of ''non-compete clause'' consisted of proposed § 910.1(b)(1) and (b)(2). Proposed § 910.1(b)(1) would have defined ''non-compete clause'' as ''a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer.'' Proposed § 910.1(b)(2) would have provided that the definition in proposed § 910.1(b)(1) includes ''a contractual term that is a *de facto* non-compete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer.''

The Commission explained that the proposed definition of non-compete clause would be limited to non-competes between employers and workers and would not apply to other types of non-competes, for example, non-competes between two businesses.[320] The Commission further explained the definition would be limited to post-employment restraints (*i.e.,* restrictions on what the worker may do after the conclusion of the worker's employment) and would not apply to concurrent-employment restraints (*i.e.,* restrictions on what the worker may do during the worker's employment).[321]

[320] NPRM at 3509.

In the NPRM, the Commission noted that, rather than expressly prohibiting a worker from competing against their employer, some non-competes require workers to pay damages if they compete against their employer. The Commission explained that courts generally view these contractual terms as non-competes and that proposed § 910.1(b)(1) encompassed them.[322]

The Commission also expressed concern that workplace policies—for example, a term in an employee handbook stating that workers are prohibited from working for certain types of firms or in certain fields after their employment ends—could have the same effects as a contractual non-compete even if they are not enforceable, because workers may believe they are bound by the policy. The Commission sought comment on whether the term ''non-compete clause'' should expressly include a provision in a workplace policy.[323]

The Commission stated that proposed § 910.1(b)(1) was a generally accepted definition of non-compete clause that covers both express non-competes and terms purporting to bind a worker that have the same functional effect as non-competes.[324] The Commission stated that the definition would generally not apply to other types of restrictive employment agreements that do not altogether prevent a worker from seeking or accepting other work or starting a business after their employment ends and do not generally prevent other employers from competing for that worker's labor.[325] At the same time, the Commission expressed concern about unusually restrictive employment agreements that, while not formally triggered by seeking or accepting other work or starting a business after their employment ends, nevertheless restrain such an unusually large scope of activity that they have the same functional effect as non-competes.[326] The Commission noted judicial opinions finding some such

[321] *Id.*

[322] *Id.*

[323] *Id.* at 3510.

[324] *Id.* at 3509.

[325] *Id.*

[326] *Id.*

restrictive employment agreements to be *de facto* non-competes.[327]

Proposed § 910.1(b)(2) accordingly sought to clarify that the definition in proposed § 910.1(b)(1) includes contractual terms that are *de facto* non-competes because they have the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer. It then provided two illustrative, non-exhaustive examples of contractual terms that may be such functional non-competes: (1) an NDA between an employer and a worker written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer; and (2) a training-repayment agreement (''TRAP'') that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred to train the worker.[328]

2. Coverage of the Definition

a. Comments Received

Most of the comments on the definition of ''non-compete clause'' addressed whether, and under what circumstances, the rule should apply to functional non-competes.[329] Many commenters that generally supported the NPRM agreed the definition of non-compete clause should cover other restrictive employment agreements when they function as non-competes. These commenters argued that, when restraints on labor mobility are banned, companies switch to functionally equivalent restraints. Some commenters asked the Commission to adopt a broader definition of functional non-competes or to expand the rule to ban additional types of restrictive employment agreements altogether. A few commenters asked the Commission to broaden proposed § 910.1(b)(1) and (2) by replacing the terms ''prevent'' and ''prohibit'' with ''restrains'' and ''limits.''

In contrast, many commenters who generally opposed the NPRM stated that proposed § 910.1(b)(2) was overinclusive. Many such commenters also asserted the definition was vague and could lead to confusion and significant litigation. Several comments suggested clarifications, such as including additional examples of functional non-competes; creating safe harbors for certain restrictive employment covenants; replacing proposed § 910.1(b)(2) with a standard based on antitrust law's ''quick look'' test; [330] or revising the provision to focus on the ''primary purpose'' of a restrictive employment covenant. Several commenters argued the Commission failed to cite evidence that functional non-competes are anti-competitive. Other commenters expressed concern that prohibiting functional non-competes would undermine the rule's intent to permit less restrictive alternatives to non-competes.

At least one commenter argued that proposed § 910.1(b)(2) should be removed because it was redundant, as the proposed definition of non-compete clause in proposed § 910.1(b)(1) already captured any term that prevents an employee from seeking alternative employment, without regard to how the term is labeled. Some commenters who generally supported the NPRM also expressed concern that ambiguity in proposed § 910.1(b)(2) could enable employers to intimidate workers by suggesting that restrictive employment agreements used to evade a final rule are not non-competes under the functional test. Other commenters who generally supported the rule asked for greater specificity in proposed § 910.1(b)(2) to prevent adverse judicial interpretations that could undermine the effectiveness of the rule.

Many commenters addressed issues specific to other types of restrictive employment agreements, including NDAs (also sometimes referred to as confidentiality agreements), TRAPs, non-solicitation agreements, and garden leave and severance agreements.

With respect to NDAs, some commenters stated that the Commission rightly identified overbroad NDAs as a potential method of evasion of the rule and supported the Commission's recognition of overbroad NDAs as functional non-competes. In contrast, some commenters contended that by covering functional non-competes, the proposed rule would limit their ability to use NDAs. Some commenters argued that providing that overbroad NDAs may be functional non-competes would be inconsistent with the proposed rule's separate preliminary finding that NDAs are less restrictive alternatives to non-competes. Similarly, some commenters contended that a functional test may frustrate employers' ability to use NDAs to protect legitimate trade secrets or to enjoin a former worker employed with a competitor under the Defend Trade Secrets Act of 2016, in part because they would be concerned about potential legal liability. Some commenters contended that the example of an overbroad NDA in proposed § 910.1(b)(2) would discourage the use of NDAs, including the use of narrowly tailored NDAs, and undermine confidence in their enforceability. Some commenters stated that reference to cases, including *Brown* v. *TGS Management Co.*[331] and similar cases, represent outliers that are likely to cause more confusion than clarity.

Other commenters addressed the proposed definition's application to TRAPs, which are agreements in which the worker agrees to pay the employer for purported training expenses if the worker leaves their job before a certain date. Several commenters asked the Commission to ban all forms of TRAPs. These commenters argued that employers are increasingly adopting TRAPs and that abusive TRAPs are pervasive throughout the economy. Some commenters asserted millions of workers are likely bound by TRAPs. Commenters stated TRAPs may impose penalties that are disproportionate to the value of training workers received or require the worker to pay alleged training expenses for on-the-job training. Some commenters contended TRAPs may be even more harmful than non-competes, because while non-competes prohibit or prevent workers from seeking or accepting other work or starting a business after they leave their job, TRAPs can prevent workers from leaving their job for any reason.

Some commenters expressed concern that the example in proposed § 910.1(b)(2)(ii) of a TRAP that was a functional non-compete was too narrow, and that the Commission should not imply that TRAPs with penalties that *are* reasonably related to an employer's training expenses cannot be functional

[327] *Wegmann* v. *London,* 648 F.2d 1072, 1073 (5th Cir. 1981) (holding that liquidated damages provisions in a partnership agreement were *de facto* non-compete clauses ''given the prohibitive magnitudes of liquidated damages they specify''); *Brown* v. *TGS Mgmt. Co., LLC,* 57 Cal. App. 5th 303, 306, 319 (Cal. Ct. App. 2020) (holding that an NDA that defined ''confidential information'' ''so broadly as to prevent [the plaintiff] in perpetuity from doing any work in the securities field'' operated as a *de facto* non-compete clause and therefore could not be enforced under California law, which generally prohibits enforcement of non-compete clauses).

[328] NPRM, proposed § 910.1(b)(2).

[329] While the NPRM generally used the term ''*de facto* non-competes,'' the final rule uses the term ''functional non-competes.'' The Commission believes this term more clearly conveys that certain terms are considered non-competes under the final rule where they function to prevent workers from seeking or accepting other work or starting a business after their employment ends.

[330] *See, e.g., Cal. Dental Ass'n* v. *FTC,* 526 U.S. 756, 770–71 (1999).

[331] *See supra* note 327 and accompanying text.

non-competes. One commenter asked the Commission to adopt the standard for TRAPs in the Uniform Restrictive Employment Agreement Act.[332] Another commenter suggested that the Commission ban TRAPs below an income threshold of $75,000. Another commenter asked the Commission to clarify that costs that are inherent in any employer-employee relationship—such as time spent by a supervisor training a new employee how to perform routine business procedures typical for their position or role—should not be considered costs that are ''reasonably related to the costs'' of training.

At least one commenter urged the Commission to treat as functional non-competes other employment terms similar to TRAPs such as equipment loans, where employers provide employees with a loan to purchase equipment that the worker needs in order to perform their job, and damages provisions containing open-ended costs related to the employee's departure—including hiring and training replacements or vague harms such as reputational damages, loss of good will or lost profits. In contrast, some commenters argued that TRAPs should be excluded from coverage under proposed § 910.1(b)(2) because they are not unfair or anti-competitive.

Regarding non-solicitation agreements—which prohibit a worker from soliciting former clients or customers of the employer—a few commenters expressed concern that overbroad non-solicitation agreements may be permitted because they were not listed in the regulatory text for proposed § 910.1(b)(2) as examples of functional non-competes (although the Commission described them in the preamble to the proposed rule as restrictive employment agreements that may fall within the definition of non-compete clause if they restrain such an unusually large scope of activity that they are *de facto* non-compete clauses).[333] These commenters asked the Commission to revise proposed § 910.1(b)(2) to expressly cover non-solicitation agreements that prohibit workers from doing business with prospective or actual customers to an extent that would effectively preclude them from continuing to work in the same field or that prevent a worker from doing business with their former employer's client where the client solicits the worker directly. Other commenters, however, expressed concern that the proposed rule could undermine employers' confidence in the enforceability of non-solicitation agreements and asked that the final rule clarify that non-solicitation agreements are generally not prohibited, or exclude them altogether.

Some comments addressed no-hire clauses, which bar former workers from hiring their former colleagues. One employment lawyer stated that these are less restrictive than non-compete clauses. Other commenters stated that no-hire clauses can still limit careers or make it hard for new businesses to find staff. Some commenters expressed concerns with no-business or non-dealing clauses, which bar former workers from doing business with former clients or customers even if the clients or customers sought them out. These commenters stated such agreements limit the options of clients and customers.

Many commenters raised questions about forfeiture-for-competition clauses, which they stated are often a component of deferred compensation arrangements for executives. Commenters stated that deferred compensation plans often include forfeiture clauses, or contingencies on receiving the promised compensation, to incentivize their recipients to act in ways that benefit the employer. These commenters stated that agreements not to compete for a period of time after employment ends are a common feature of forfeiture clauses. Some commenters stated that such forfeiture-for-competition clauses are non-competes and have the same negative effects as non-competes because they are contingent on competition—they require workers to give up bonus pay or other post-employment benefits if they work for a competing employer or start a competing business, and they keep other employers from being able to hire those workers. Other commenters stated forfeiture-for-competition clauses are a common and important component of deferred compensation arrangements for highly compensated employees and senior executives.[334] Other commenters argued the clauses allow workers to choose between receiving the deferred compensation and forfeiting it if they choose to work for a competitor, and thus they are not non-competes. Other commenters urged the Commission to either clarify that forfeiture-for-competition clauses are not non-competes or to carve them out explicitly.

Many commenters also addressed the application of the rule to garden leave agreements. In using the term ''garden leave,'' commenters seemed to be referring to a number of different types of agreements. Some commenters referred to garden leave agreements as those in which, before a worker left their job, they remained employed and received full pay for a specified period of time but their access to co-workers and company facilities was restricted. In contrast, other commenters considered ''garden leave'' an arrangement to make payments to a worker after their employment concluded. Commenters used different terminology to refer to these kinds of agreements, including severance pay, partial pay, and full pay akin to administrative leave, in exchange for an agreement not to compete. Some commenters argued it is coercive for a worker to sign a non-compete in exchange for severance pay and argued garden leave arrangements are non-competes because they limit a worker's options to work for a competitor. Some commenters asked the Commission to adopt a durational limit for garden leave. At least one commenter also urged the Commission to clarify that an employer cannot unilaterally terminate garden leave.

Other commenters requested clarification that garden leave was not a non-compete on the basis that garden leave does not create a legal obligation on the part of the worker to refrain from competing. Some commenters requested a specific exclusion for garden-leave arrangements. They argued that by forcing employers to pay workers, garden leave would reduce the overuse of non-competes. One talent industry commenter argued that the rule should expressly allow for ''fee tails,'' which require talent agents to pay a portion of future commissions to former employers.

b. The Final Rule

After considering the comments, the Commission has slightly modified the definition of non-compete clause to clarify its scope. In the final rule, § 910.1 defines ''non-compete clause'' as a term or condition of employment that either ''prohibits'' a worker from, ''penalizes'' a worker for, or ''functions to prevent'' a worker from (A) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (B) operating a business in the United States after the conclusion of the employment that includes the term or condition.

[332] *See* ULC, *Uniform Restrictive Employment Agreement Act* (2021), sec. 14.

[333] NPRM at 3509.

[334] Commenters also provided purported business justifications for forfeiture-for-competition clauses, which are addressed in Part IV.D.2.

Pursuant to the term ''prohibits,'' the definition applies to terms and conditions that expressly prohibit a worker from seeking or accepting other work or starting a business after their employment ends. Examples of such agreements would be a contractual term between a national sandwich shop chain and its workers stating that, for two years after the worker leaves their job, they cannot work for another sandwich shop within three miles of any of the chain's locations,[335] or a contractual term between a steelmaker and one of its executives prohibiting the executive from working for any competing business anywhere in the world for one year after the end of the executive's employment.[336] The vast majority of existing agreements covered by the final rule fall into this category of agreements that expressly prohibit a worker from seeking or accepting other work or starting a business after their employment ends.

Pursuant to the term ''penalizes,'' the definition also applies to terms and conditions that require a worker to pay a penalty for seeking or accepting other work or starting a business after their employment ends. One example of such a term is a term providing that, for two years after the worker's employment ends, the worker may not engage in any business within a certain geographic area that competes with the employer unless the worker pays the employer liquidated damages of $50,000.[337] Because such an agreement penalizes the worker for seeking or accepting other work or for starting a business after the worker leaves their job, it would be a non-compete clause under § 910.1. Indeed, where an agreement restricts who a worker can work for or their ability to start a business after they leave their job, State courts generally characterize the agreement as a non-compete, regardless of whether the agreement contains an express prohibition or requires the worker to pay liquidated damages.[338]

Another example of a term that ''penalizes'' a worker, under § 910.1, is an agreement that extinguishes a person's obligation to provide promised compensation or to pay benefits as a result of a worker seeking or accepting other work or starting a business after they leave their job. One example of such an agreement is a forfeiture-for-competition clause, which, similar to the agreement with liquidated damages described previously, imposes adverse financial consequences on a former employee as a result of the termination of an employment relationship, expressly conditioned on the employee seeking or accepting other work or starting a business after their employment ends. An additional example of a term that ''penalizes'' a worker under § 910.1 is a severance arrangement in which the worker is paid only if they refrain from competing. The Commission also notes that a payment to a prospective competitor to stay out of the market may also violate the antitrust laws even if it is not a non-compete under this rule.[339]

The common thread that makes each of these types of agreements non-compete clauses, whether they ''prohibit'' or ''penalize'' a worker, is that on their face, they are triggered where a worker seeks to work for another person or start a business after they leave their job—*i.e.,* they prohibit or penalize post-employment work for another employer or business. As elaborated in Part IV, such non-competes are inherently restrictive and exclusionary conduct, and they tend to negatively affect competitive conditions in both labor and product and service markets by restricting the mobility of workers and preventing competitors from gaining access to those workers.

Pursuant to the term ''functions to prevent,'' the definition of non-compete clause also applies to terms and conditions that restrain such a large scope of activity that they function to prevent a worker from seeking or accepting other work or starting a new business after their employment ends, although they are not expressly triggered by these specific undertakings. This prong of the definition does not categorically prohibit other types of restrictive employment agreements, for example, NDAs, TRAPs, and non-solicitation agreements. These types of agreements do not by their terms prohibit a worker from or penalize a worker for seeking or accepting other work or starting a business after they leave their job, and in many instances may not have that functional effect, either. However, the term ''functions to prevent'' clarifies that, if an employer adopts a term or condition that is so broad or onerous that it has the same functional effect as a term or condition prohibiting or penalizing a worker from seeking or accepting other work or starting a business after their employment ends, such a term is a non-compete clause under the final rule.

In response to the comments alleging that covering ''de facto'' or ''functional'' non-competes is overinclusive or vague, the Commission notes that the definition's three prongs—''prohibit,'' ''penalize,'' and ''function to prevent''—are consistent with the current legal landscape governing whether a particular agreement is a non-compete. In addition to generally accepted definitions of non-competes encompassing the ''prohibits'' prong of the definition, terms that ''penalize'' workers for seeking or accepting other work or starting a business after they leave their job (for example, by requiring them to pay liquidated damages) are typically considered non-competes under State law.[340] And the ''functions to prevent'' prong of the definition is likewise consistent with legal decisions holding that restrictive employment agreements other than non-competes may be analyzed under the State law test applicable to non-competes where they function similarly to non-competes.[341] As the First Circuit stated in a recent opinion, ''[O]verly broad nondisclosure agreements, while not specifically prohibiting an employee from entering into competition with the former employer, raise the same policy concerns about restraining competition as noncompete clauses where, as here, they have the effect of preventing the defendant from competing with the plaintiff.'' [342] The fact that whether a given restrictive covenant rises to the level of being a functional non-compete will turn on the facts and circumstances

[335] This example is based on the agreements described in Jamieson, *supra* note 32. The company agreed to remove the non-competes in 2016 as part of a settlement. Office of the Att'y Gen. of the State of N.Y., Press Release, *A.G. Schneiderman Announces Settlement With Jimmy John's To Stop Including Non-Compete Agreements In Hiring Packets* (June 22, 2016), *https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete.*

[336] This example is based on *AK Steel Corp.* v. *ArcelorMittal USA, LLC,* 55 NE3d 1152, 1156 (Ohio Ct. App. 2016).

[337] This example is based on *Press-A-Dent, Inc.* v. *Weigel,* 849 NE2d 661, 668–70 (Ind. Ct. App. 2006) (holding that the agreement was an unlawful non-compete).

[338] *See, e.g., Wichita Clinic, P.A.* v. *Louis,* 185 P.3d 946, 951 (Kan. Ct. App. 2008); *Grayhawk Homes, Inc.* v. *Addison,* 845 SE2d 356 (Ga. Ct. App. 2020); *Salewski* v. *Pilchuck Veterinary Hosp., Inc.,* 359 P.3d 884 (Wash. Ct. App. 2015).

[339] *See, e.g., Palmer* v. *BRG of Ga., Inc.,* 498 U.S. 46, 49–50 (1990) (''[A]greements between competitors to allocate territories to minimize competition are illegal'' (citing *United States* v. *Topco Assocs., Inc.,* 405 U.S. 596 (1972)); *FTC* v. *Actavis, Inc.,* 570 U.S. 136, 154 (2013) (''payment in return for staying out of the market'' may violate the antitrust laws).

[340] *See supra* note 338 and accompanying text.

[341] *See, e.g., Brown* v. *TGS Mgmt. Co., LLC,* 57 Cal. App. 5th 303, 306, 316–19 (Cal. Ct. App. 2020); *Wegmann* v. *London,* 648 F.2d 1072, 1073 (5th Cir. 1981); *TLS Mgmt. & Mktg. Servs.* v. *Rodriguez-Toledo,* 966 F.3d 46, 59–60 (1st Cir. 2020).

[342] *TLS Mgmt. & Mktg. Servs.,* 966 F.3d at 57.

of particular covenants and the surrounding market context does not render this aspect of the final rule overinclusive or vague. Such covenants would be subject to case-by-case adjudication for whether they constitute an unfair method of competition even in the absence of the final rule.

In response to the comments alleging the Commission failed to cite evidence that functional non-competes harm competition, the Commission disagrees. This final rule is based on a robust evidentiary record that includes significant empirical evidence and thousands of public comments, as well as the Commission's longstanding expertise in evaluating competition issues. Based on this record, the Commission finds that non-competes are restrictive and exclusionary conduct that tends to negatively affect competitive conditions in labor markets and markets for products and services.[343] In addition, the Commission finds that, with respect to workers other than senior executives, non-competes are exploitative and coercive.[344] The Commission finds that the functional equivalents of non-competes—because they prevent workers from engaging in the same types of activity—are likewise restrictive and exclusionary conduct that tends to negatively affect competitive conditions in a similar way. In response to the commenters who expressed concern that prohibiting functional non-competes would undermine the rule's intent to permit reasonable substitutes, the Commission stresses that, as described throughout this Part III.D, the ''functions to prevent'' prong of the definition of non-compete clause captures only agreements that function to prevent a worker from seeking or accepting other work or starting a business after they leave their job—not appropriately tailored NDAs or TRAPs that do not have that functional effect.

While many commenters requested the Commission state expressly in the final rule whether various specific restrictive employment agreements satisfy the definition of non-compete clause, the Commission declines to adopt a definition that attempts to capture or carve out every edge case. Rather, the final rule focuses on providing a clear, understandable, and generally applicable definition of non-compete clause that reflects the need for case-by-case consideration of whether certain restrictive covenants rise to the level of being functional non-competes—which is fully consonant with the legal landscape employers generally face today. The Commission nevertheless here responds to comments regarding the restrictive clauses that commenters contended should be expressly addressed in the final rule.

As noted in this Part III.D, restrictive employment agreements other than non-competes—such as NDAs, non-solicitation agreements, and TRAPs—do not by their terms or necessarily in their effect prevent a worker from seeking or accepting work with a person or operating a business after the worker leaves their job. For example, a garden-variety NDA in which the worker agrees not to disclose certain confidential information to a competitor would not prevent a worker from seeking work with a competitor or from accepting such work after the worker leaves their job. Put another way, an NDA would not be a non-compete under § 910.1 where the NDA's prohibitions on disclosure do not apply to information that (1) arises from the worker's general training, knowledge, skill or experience, gained on the job or otherwise; or (2) is readily ascertainable to other employers or the general public.[345]

However, NDAs may be non-competes under the ''functions to prevent'' prong of the definition where they span such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their job. Examples of such an agreement may include an NDA that bars a worker from disclosing, in a future job, any information that is ''usable in'' or ''relates to'' the industry in which they work.[346] Such an agreement would effectively prevent the worker from working for another employer in that industry. A second example would be an NDA that bars a worker from disclosing any information or knowledge the worker may obtain during their employment whatsoever, including publicly available information.[347] These agreements are so broadly written that, for practical purposes, they function to prevent a worker from working for another employer in the same field and are therefore non-competes under § 910.1.

Under the final rule's definition of non-compete clause, the same inquiry applies to non-solicitation agreements. Non-solicitation agreements are generally not non-compete clauses under the final rule because, while they restrict who a worker may contact after they leave their job, they do not by their terms or necessarily in their effect prevent a worker from seeking or accepting other work or starting a business. However, non-solicitation agreements can satisfy the definition of non-compete clause in § 910.1 where they function to prevent a worker from seeking or accepting other work or starting a business after their employment ends. Whether a non-solicitation agreement—or a no-hire agreement or a no-business agreement, both of which were referenced by commenters, as discussed previously—meets this threshold is a fact-specific inquiry. The Commission further notes that—like all the restrictive employment agreements described in this Part III.D—non-solicitation agreements, no-hire, and no-business agreements are subject to section 5's prohibition of unfair methods of competition, irrespective of whether they are covered by the final rule.

Depending on the facts and circumstances, a TRAP can also function to prevent a worker from working for another firm or starting a business. For example, one commenter cited a TRAP that required entry-level workers at an IT staffing agency who were earning minimum wage or nothing at all during their training periods to pay over $20,000 if they failed to complete a certain number of billable hours.[348] The commenter also cited a TRAP requiring nurses to work for three years or else repay all they have earned, plus paying the company's ''future profits,'' attorney's fees, and arbitration costs.[349] These types of TRAPs may be functional non-competes because when faced with significant out-of-pocket costs for leaving their employment—dependent on the context of the facts and circumstances—workers may be forced to remain in their current jobs, effectively prevented from seeking or accepting other work or starting a business.

In response to the comments, the Commission declines at this time to either categorically prohibit all TRAPs related to leaving employment, or to exempt such provisions altogether. The Commission agrees with comments raising substantial concerns about the

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[343] *See* Parts IV.B and IV.C.

[344] *See* Part IV.B.2.b.

[345] This example is based on sec. 9 of the Uniform Restrictive Employment Agreement Act, *supra* note 332.

[346] This example is based on *Brown* v. *TGS Mgmt.,* 57 Cal. App. 5th at 316–19 (''Collectively, these overly restrictive provisions [in the NDA at issue] operate as a de facto noncompete provision; they plainly bar Brown in perpetuity from doing any work in the securities field.'').

[347] This example is based on *TLS Mgmt. & Mktg. Servs.,* 966 F.3d at 57 (holding that the NDA was unenforceable).

[348] Comment of Jonathan F. Harris, Dalié Jiménez, & Jonathan Glater, FTC–2023–0007–20873 at 4.

[349] *Id.* at 6–7.

potential effects of such agreements on competitive conditions. As noted in the summary of the comments, commenters cited TRAPs that impose penalties disproportionate to the value of training workers received and/or that claimed training expenses for on-the-job training. However, the evidentiary record before the Commission principally relates to non-competes, meaning on the present record the Commission cannot ascertain whether there are any legitimate uses of TRAPs that do not tend to negatively affect competitive conditions. When TRAPs function to prevent a worker from seeking or accepting other work or starting a business after the employment associated with the TRAP, they are non-competes under § 910.1.

The Commission notes that clauses requiring repayment of a bonus when a worker leaves their job would not be non-competes under § 910.1 where they do not penalize or function to prevent a worker from seeking or accepting work with a person or operating a business after the worker leaves their job. For example, a provision requiring the repayment of a bonus if the worker leaves before a certain period of time would not be a non-compete under § 910.1 where the repayment amount is no more than the bonus that was received, and the agreement is not tied to who the worker can work for, or their ability to start a business, after they leave their job. Similarly, a term or condition under which a worker loses accrued sick leave when their employment ends would not function to prevent a worker from seeking or accepting work with a person or operating a business after the worker leaves their job.

With respect to garden leave agreements, as noted previously, commenters used the term ''garden leave'' to refer to a wide variety of agreements. The Commission declines to opine on how the definition of non-compete clause in § 910.1 would apply in every potential factual scenario. However, the Commission notes that an agreement whereby the worker is still employed and receiving the same total annual compensation and benefits on a *pro rata* basis would not be a non-compete clause under the definition,[350] because such an agreement is not a post-employment restriction. Instead, the worker continues to be employed, even though the worker's job duties or access to colleagues or the workplace may be significantly or entirely curtailed. Furthermore, where a worker does not meet a condition to earn a particular aspect of their expected compensation, like a prerequisite for a bonus, the Commission would still consider the arrangement ''garden leave'' that is not a non-compete clause under this final rule even if the employer did not pay the bonus or other expected compensation. Similarly, a severance agreement that imposes no restrictions on where the worker may work following the employment associated with the severance agreement is not a non-compete clause under § 910.1, because it does not impose a post-employment restriction.

The Commission declines a commenter's request to replace the term ''prevent'' with ''restrains'' or ''limits.'' Commenters generally did not express concern about the term ''prevent'' and the Commission is concerned that different language could greatly expand the scope of the definition and reduce its clarity.

The Commission also declines to adopt alternative *de facto* tests raised by commenters, such as a version of the ''quick look'' test. As described in Part II.F, the legal standard under section 5 of the FTC Act is distinct from that of the Sherman Act. The Commission also declines to adopt a test that would consider the primary purpose of a restrictive employment agreement. The Commission believes that it can be difficult to establish an employer's subjective ''purpose'' in entering into an agreement. In addition, such a test could allow extremely overbroad agreements that dramatically restrict a worker's ability to compete against the employer—and have the negative effects described in Parts IV.B and IV.C—as long as the employer entered into the agreement without the subjective intent to restrict competition.

The Commission agrees with the commenter who stated that proposed § 910.1(b)(2) was redundant because proposed § 910.1(b)(1) was already a functional definition. In the final rule, the Commission has revised the text of the definition of non-compete clause to address confusion among commenters about whether proposed § 910.1(b)(2) clarified the definition or extended it.

In response to the commenters requesting that the Commission clarify the circumstances under which the definition would apply to various other types of restrictive employment agreements, the Commission declines at this time to enumerate every circumstance that may arise. As noted, a restrictive employment covenant may be a non-compete clause under § 910.1 if it expressly prohibits a worker from, or penalizes a worker for, seeking or accepting other work or starting a business, or if it does not do so expressly but is so broad or onerous in scope that it functionally has the same effect of preventing a worker from doing the same.

3. International Application of the Rule

a. Comments Received

The Commission received several comments expressing concern about whether the final rule would apply to non-competes that restrict work outside the U.S. In response, the final rule's definition of non-compete clause clarifies that it applies only to work in the U.S. or operating a business in the U.S.

Some commenters raised concerns about the cross-border movement of workers. A research center commenter asserted there is a global shortage of science and technology workers and stated that the final rule's adoption could exacerbate the U.S. shortage by allowing other countries to more easily poach U.S. workers. An academic commenter argued that banning non-competes might deter foreign investors from sending workers to the U.S. if the final rule would invalidate their non-competes.

Some commenters argued that legal systems in the People's Republic of China or other jurisdictions provide insufficient protection for U.S. companies' trade secrets, confidential information, or patent rights, and contended employers need non-competes as *ex ante* protection. These commenters generally say that trade secrets litigation is more challenging in some jurisdictions outside the U.S., for example because of less extensive discovery processes, less frequent use of preliminary injunctions, insufficient remedies, and a lower propensity to prosecute criminal intellectual property cases. An academic commenter argued that some courts may have fewer protections for confidential information compared to the U.S., so a suit concerning only a non-compete is less likely to reveal trade secrets through the course of litigation and thus more effectively prevent technologies from leaking to other governments and protecting U.S. national security interests. However, the comments provided limited evidence on non-competes and trade secret protection outside the U.S., and collectively only

[350] The term and practice of ''garden leave'' appears to have a British origin and is recognized by the Government of the United Kingdom. *See Gov.UK, Handing in your notice, https://www.gov.uk/handing-in-your-notice/gardening-leave* (''Your employer may ask you not to come into work, or to work at home or another location during your notice period. This is called 'gardening leave'.'').

discussed evidence from a few jurisdictions. One commenter noted that legal information and data from some jurisdictions may not be fully accurate because not all court decisions are public.

Two commenters highlighted the domestic semiconductor industry and the CHIPS Act of 2022, arguing the Chinese government seeks to acquire IP related to semiconductors and semiconductor experts with relevant knowledge and information. Those comments expressed concern that a ban on non-competes would damage the semiconductor industry, which relies on skilled workers and trade secrets, by weakening trade secrets protection and disincentivizing investment. Another commenter argued the proposed rule would undermine export controls designed to prevent foreign countries from acquiring U.S. technology and knowledge by allowing workers to move to foreign competitors. One commenter argued the proposed rule conflicts with an October 2022 Bureau of Industry and Security (''BIS'') export control rulemaking, stating that the rulemaking limits worker mobility in certain industries from the U.S. to the People's Republic of China. Another commenter suggested the proposed rule would violate the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which requires that persons ''shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent . . . .'' [351] Finally, one commenter argued that by making it more difficult for businesses to protect against international theft of their intellectual property, the rule is at odds with the purposes of the Protecting American Intellectual Property Act of 2022.[352]

Some of these commenters made recommendations for the final rule. A law firm suggested that the final rule prevent evasion by barring employers from selecting the law of non-U.S. jurisdictions to govern employment contracts with U.S.-based workers. A trade association requested that the final rule cover only agreements subject to the law of a U.S. State. An academic commenter suggested revisions to the text of the proposed rule to ensure the final rule applies only within the U.S. The commenter also recommended stating that a non-compete restricting work outside the U.S. is not a *per se* unfair method of competition and providing guidance on how employers should evaluate international non-competes, using factors such as the business justification for the non-compete and the impact on the worker. The commenter recommended applying the law of the jurisdiction where the worker seeks to be employed.

b. The Final Rule

In response to commenters' concerns, in this final rule the Commission adopts changes to the definition of ''non-compete clause'' that expressly limit the definition of non-compete to terms or conditions that prevent workers from seeking or accepting work in the U.S. or operating a business in the U.S. The final rule does not apply to non-competes if they restrict only work outside the U.S. or starting a business outside the U.S.

This revision clarifies for stakeholders the scope of the final rule and confirms it does not prohibit employers from using non-competes that restrict work outside the U.S., in compliance with those jurisdictions' own laws. The Commission understands that, as a commenter noted, some companies operating or competing globally already draft non-competes that comply with the laws of multiple jurisdictions and, thus, amending their non-competes to reflect this application of the final rule would not pose a significant challenge for those entities.

The Commission's revision clarifying the final rule's application to work or starting a business only in the U.S. also addresses the concerns from some commenters about key U.S. workers and technology flowing overseas, because the final rule does not ban non-competes that restrict workers from working or starting a business outside the U.S. It also clarifies that the final rule would not invalidate non-competes entered into by foreign companies with foreign workers unless they restrict a worker's ability to work or start a business inside the U.S. Other questions about the final rule's application to cross-border or non-U.S. employment are also addressed by the Foreign Trade Antitrust Improvements Act, codified at 15 U.S.C. 45(a)(3).

The Commission agrees with the academic commenter that, for non-competes that apply outside the U.S., the law of the relevant jurisdiction should govern any issue other than restricting work or starting a business in the U.S. However, the Commission declines to adopt a balancing test for non-competes restricting a worker's ability to work or start a business outside the U.S., as a bright-line rule that applies only to work or starting a business in the U.S. is more administrable. In addition, the Commission declines to add language in the final rule stating that it does not apply to overseas employers or to non-competes not subject to U.S. State law. The final rule may apply to overseas employers if the non-compete purports to restrict work or starting a business in the U.S. and the reviewing court applies U.S. law.

The empirical evidence cited in the NPRM focused on the U.S., primarily consisting of studies based on the effects of changes in State laws in the U.S. The comments provided limited evidence on non-competes and trade secret protection outside the U.S., leaving many issues and most jurisdictions unaddressed. The Commission also notes, as one commenter did, that legal information and data from some jurisdictions may not be fully accurate because not all court decisions are public. On the current record, the Commission cannot reach conclusions on whether other jurisdictions have sufficient alternatives to non-competes, the scope of any potential risk, and many of the other issues raised. As a result, the Commission limits application of the final rule to work in the U.S., where the Commission has ample evidence on non-competes' negative effects.

One commenter argued the rule conflicts with BIS's October 2022 export control rulemaking, which restricts the ability of U.S. persons to support development or production at certain semiconductor facilities in the People's Republic of China without a license from BIS.[353] While the revision addresses the commenter's underlying concern about protection of sensitive technology from other governments by not banning non-competes that restrict the movement of workers to and in other jurisdictions, neither the NPRM nor the final rule is inconsistent with the BIS rule. The final rule will not affect BIS's ability to grant or decline to grant a license. With respect to the commenter that suggested the rule would violate TRIPS, the Commission has found that U.S. law provides alternative means of protecting trade secrets,[354] and TRIPS does not require enforcement of non-competes.

With respect to the commenter that stated that the final rule should include

[351] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, sec. 7, art. 39, para. 2, 33 I.L.M. 81 (as amended Jan. 23, 2017).

[352] 50 U.S.C. 1709.

[353] Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, Interim Final Rule, 87 FR 62186 (Oct. 13, 2022).

[354] *See* Part IV.D.2.

a choice-of-law provision to prevent evasion, there is an existing body of law in the U.S. governing choice of law and conflict of law issues. Accordingly, the Commission declines to add any provisions concerning choice of law or conflict of law to the final rule. Rather, such questions are left to the relevant jurisdiction, whether that is a U.S. State, the Federal government, or another jurisdiction, as determined by applicable law.

4. Other Issues Relating to the Definition

a. Comments Received

While most commenters focused on the proposed definition's application to functional non-competes or international application, some commenters addressed other issues relating to the proposed definition. Several commenters stated that the definition should cover workplace policies or handbooks, to minimize confusion and make clear that employers are prohibited from including non-competes in workplace policies or handbooks, even if such clauses are unenforceable because they are not formal binding contracts. Some commenters stated that such policies or handbooks can affect a worker's decision to leave their job to work with a competitor or start their own businesses. Others stated the same about oral agreements. One commenter stated that the definition should not cover workplace policies because they apply only during, not after, employment.

A few commenters said the Commission should state explicitly in the definition of ''non-compete clause'' that restrictions on concurrent employment, such as prohibitions on ''moonlighting'' with competitors, are excluded. Other commenters urged the Commission to expand the definition to include restraints on concurrent employment because workers often need to take additional jobs during economic downturns, and low-wage workers generally need to take on additional jobs.

An organized labor commenter argued that no-raid agreements, which the commenter described as agreements between labor organizations not to attempt to organize workers already under representation by another union, should be exempted from the definition. An industry trade organization asked the Commission to clarify whether the definition would apply to non-competes in agreements between motor carriers and brokers in the trucking industry. In addition, a few commenters stated that proposed § 910.1(b)(1) was too broad or potentially ambiguous without pointing to any specific features of the definition.

b. The Final Rule

To address the concerns raised by commenters about workplace policies and handbooks, the definition of non-compete clause in § 910.1 uses the phrase ''a term or condition of employment'' instead of ''contractual term.'' The definition further clarifies that term or condition of employment includes ''a contractual term or workplace policy, whether written or oral.'' The Commission finds that employers have used restrictions in handbooks, workplace policies, or other vehicles that are not formal written contracts to successfully prevent workers from seeking or accepting other employment or starting a new business. The Commission finds, consistent with the views expressed by commenters, that such restrictions in handbooks, workplace policies, or other such vehicles have the same tendency to negatively affect competitive conditions as a formal binding contract term. To provide that such conduct is covered by the definition of non-compete clause, this language clarifies that the definition of non-compete clause is not limited to clauses in written, legally enforceable contracts and applies to all forms a non-compete might take, including workplace policies or handbooks and informal contracts. Given the comments expressing concern about oral representations, the Commission clarifies in the definition of non-compete clause that clauses that purport to bind a worker are covered, whether written or oral, and provides in § 910.2(a)(1) and (2) that it is an unfair method of competition to make representations that a worker is subject to a non-compete. (However, as explained in Part V.C, such representations are not prohibited where the person has a good-faith basis to believe that the final rule is inapplicable.)

The Commission declines to extend the reach of the final rule to restraints on concurrent employment. Although several commenters raised this issue, the evidentiary record before the Commission at this time principally relates to post-employment restraints, not concurrent-employment restraints. The fact that the Commission is not covering concurrent-employment restraints in this final rule does not represent a finding or determination as to whether these terms are beneficial or harmful to competition. The Commission relatedly clarifies that fixed-duration employment contracts, *i.e.,* contracts between employers and workers whereby a worker agrees to remain employed with an employer for a fixed term and the employer agrees to employ the worker for that period, are not non-compete clauses under the final rule because they do not restrain post-employment conduct.

While the final rule does not extend to restraints on concurrent employment, the Commission has made a technical edit to the definition of non-compete to clarify how it relates to seeking and accepting employment. Proposed § 910.1(b) defined non-compete clause as a contractual term that ''prevents the worker from seeking or accepting employment with a person . . . after the conclusion of the worker's employment with the employer.'' Because, as a technical matter, non-competes can also prevent workers from seeking or accepting future employment with another person before their work for their previous employer has concluded, the Commission has clarified the relevant language to read ''that prevents a worker from seeking or accepting work in the United States with a different person *where such work would begin after* the conclusion of the employment that includes the term or condition'' and ''that prevents a worker from operating a business in the United States *after the conclusion of the employment* that includes the term or condition'' (emphases added).

In addition, in response to comments expressing concern about evasion of the rule through third-party hiring,[355] the Commission has revised the phrase ''after the conclusion of the worker's employment with the employer'' to read ''after the conclusion of the employment that includes the term or condition.'' The Commission recognizes that non-competes can cover workers who are hired by one party but work for another, such as workers hired through staffing agencies. The Commission intends for the final rule to apply to such non-competes, and for this revision to eliminate any ambiguity as to whether such clauses are covered by the definition of non-compete clause in § 910.1.

With respect to the comment about union no-raid agreements, the Commission notes that the definition would apply only to the extent the agreement is a ''term or condition of employment'' and only if the agreement ''prevents a worker from seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or

[355] These comments are described in greater detail in Part III.G.

condition'' or ''operating a business in the United States after the conclusion of the employment that includes the term or condition.'' [356] The Commission's understanding is that union no-raid agreements are not terms and conditions of employment that prevent workers from seeking or accepting work or operating a business.

With respect to the comment asking whether the definition would apply to non-competes in agreements between motor carriers and brokers in the trucking industry, the Commission notes as a general matter that the definition would not apply to non-competes between businesses, but the Commission declines to opine on specific factual circumstances.

E. Definition of ''Person''

The proposed rule did not separately define the term ''person.'' Instead, proposed § 910.1(c)—the proposed definition of ''employer''—stated that an employer ''means a person, as defined in 15 U.S.C. 57b–1(a)(6), that hires or contracts with a worker to work for the person.'' The statutory provision cross-referenced in proposed § 910.1(c) is section 20(a)(6) of the FTC Act, which defines ''person'' for purposes of the Commission's authority to issue civil investigative demands. Section 20(a)(6) defines ''person'' as ''any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.'' No comments were received concerning the use of ''person'' in proposed § 910.1(c).

As explained in Part III.C, the Commission has removed the defined term ''employer'' from the regulatory text of the final rule. However, the regulatory text still uses the term ''person.'' For example, § 910.2(a)(1) prohibits a ''person'' from, among other things, entering into a non-compete clause. As a result, the Commission has adopted a separate definition of the term ''person.'' Section 910.1 defines ''person'' as ''any natural person, partnership, corporation, association, or other legal entity within the Commission's jurisdiction, including any person acting under color or authority of State law.'' This text consists of the proposed definition from section 20(a)(6), plus the phrase ''within the Commission's jurisdiction,'' which clarifies that only persons within the Commission's jurisdiction are subject to the final rule.

F. Definitions Related to Senior Executives

With respect to existing non-competes, *i.e.,* non-competes entered into before the final rule's effective date, the Commission adopts a different approach for ''senior executives'' than for other workers. Existing non-competes with senior executives can remain in force; the final rule does not cover such agreements.[357] For workers who are not senior executives, existing non-competes are no longer enforceable after the final rule's effective date.[358] The Commission describes its rationale for the final rule's differential treatment of senior executives in Part IV.C.

Section 910.1 defines the term ''senior executive'' as well as related terms. Because the Commission's rationale for the final rule's differential treatment of senior executives provides important context for these definitions, the Commission describes these definitions in Part IV.C.4.

G. Definition of ''Worker''

1. Proposed Definition

In the NPRM, the Commission proposed to define ''worker'' in proposed § 910.1(f) as ''a natural person who works, whether paid or unpaid, for an employer.'' [359] Proposed § 910.1(f) also stated that ''the term [worker] includes, without limitation, an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer.'' [360]

In the NPRM, the Commission explained it intended the term ''worker'' to include not only employees, but also individuals classified as independent contractors, as well as other kinds of workers.[361] The Commission explained that, under proposed § 910.1(f), the term ''worker'' would include any natural person who works, whether paid or unpaid, for an employer, without regard to whether the worker is classified as an ''employee'' under the FLSA or any other statute that draws a distinction between ''employees'' and other types of workers.[362]

The Commission stated in the NPRM that it was concerned that if the rule were to define workers as ''employees'' according to, for example, the FLSA definition, employers may misclassify employees as independent contractors to evade the rule's requirements.[363] The Commission explained it had no reason to believe non-competes that apply to workers who are treated as independent contractors under the FLSA or interns tend to negatively affect competitive conditions to a lesser degree than non-competes that apply to employees, and that such non-competes may, in fact, be more harmful to competition, given that these other types of workers tend to have shorter working relationships.[364] In addition, the Commission explained that the purported business justifications for applying non-competes to independent contractors would not be different or more cognizable from those related to employees.[365]

Proposed § 910.1(f) also stated the term worker ''does not include a franchisee in the context of a franchisee-franchisor relationship.'' [366] The Commission explained that the relationship between a franchisor and franchisee may in some cases be more analogous to the relationship between two businesses than the relationship between an employer and a worker, and that the evidentiary record before the Commission related primarily to non-competes arising solely out of employment.[367] The Commission therefore stated that it believed it would be appropriate to clarify that a franchisee—in the context of a franchisor-franchisee relationship—is not a ''worker'' for purposes of proposed § 910.1(f).[368]

Proposed § 910.1(f) further clarified, however, that the term worker ''includes a natural person who works for the franchisee or franchisor,'' and that ''non-competes between franchisors and franchisees remain subject to [F]ederal antitrust law as well as all other applicable law.'' [369] The Commission explained that these laws include State laws that apply to non-competes in the franchise context.[370] The Commission also clarified that it was not proposing to find that non-competes between franchisors and franchisees are beneficial to competition.[371]

2. Comments Received

Several commenters stated that they agreed with the proposed definition of ''worker'' because it applies to all workers without regard to their classification. Many of these

[356] § 910.1.

[357] *See* Part IV.C.3.

[358] *See* § 910.2(a)(1)(i).

[359] NPRM, proposed § 910.1(f).

[360] *Id.*

[361] *Id.* at 3511.

[362] *Id.*

[363] *Id.*

[364] *Id.*

[365] *Id.*

[366] *Id.* at 3511, 3520.

[367] *Id.*

[368] *Id.*

[369] *Id.* at 3511.

[370] *Id.*

[371] *Id.*

commenters specifically urged the Commission to adopt a final definition that includes all categories of workers regardless of whether they are classified as employees, including independent contractors, ''gig'' workers, and others. These commenters pointed to the Commission's preliminary finding that non-competes are widely used across the economy. They cited employers' frequent misclassification of workers as independent contractors, agreeing with concerns raised in the NPRM that, if ''worker'' excludes independent contractors, employers may misclassify workers as independent contractors to avoid complying with the rule. Many commenters stated that millions of workers are misclassified as independent contractors, including a disproportionate number of women, people of color, and low-income workers. These commenters expressed concern that, if the rule excluded independent contractors from coverage, it would fail to benefit these groups, for whom non-competes may be particularly exploitative and coercive.

On the other hand, several commenters suggested removing bona fide independent contractors and sole proprietors from the definition of ''worker.'' Two industry groups contended that there is a lack of data regarding the prevalence and effects of non-competes among independent contractors as opposed to other kinds of workers and that, as a legal matter, the evidence is insufficient to justify including independent contractors as ''workers'' under the rule. A few industry organizations also contended that, because they have more control over their work and generally work for more than one employer, independent contractors have greater bargaining power than other workers. One academic commenter suggested that non-competes between employers and independent contractors are more akin to agreements between businesses than agreements between employers and workers. A few of these industry organizations also contended that non-competes are justified because independent contractors provide services outside the scope of their employers' expertise and thus have greater access to sensitive information than other workers. Other industry organizations contended that small businesses employ more independent contractors than their larger rivals. These commenters stated that, to protect small businesses from being impacted disproportionately by the rule, the definition of ''worker'' should exclude independent contractors. Finally, a few industry trade organizations and an academic commenter stated that independent contractors should be excluded from coverage under the rule to avoid ''free riding,'' in which a contractor working for one firm can use that firm's assets—like tools or databases—to benefit another firm.

Several commenters suggested changes to the definition of ''worker'' to maximize the rule's coverage and close potential loopholes. One worker advocacy group noted that, combined with the proposed definition of ''employer,'' the proposed definition of ''worker''—a natural person who works ''for an employer''—appeared to exclude workers who work for a person other than the person who hired or contracted with them to work. The commenter noted that workers are often employed indirectly—by way of a contractual relationship with a staffing agency, an affiliate of their common-law employer, or some entity other than their common-law employer—and that non-competes are often imposed on workers by the non-hiring party. In order to ensure these workers are covered by the rule, the commenter suggested that the definition of ''worker'' should also cover a person who works ''directly or indirectly'' for an employer and that the definition specifically include ''a person who works for the employer under an arrangement with a professional employer organization, statutory employer, wholly owned entity of which the person is the sole or principal employee or service provider, loan-out arrangement or similar arrangement.''

The same commenter also argued that employers often impose non-competes on workers who own a portion of the business while not applying the same restriction to outside investors who do not work for the company, and that such worker-owner non-competes should be treated as employment-related non-competes. In order to ensure these workers are covered by the rule, the commenter suggested that ''worker'' should also include ''a person who holds direct or indirect equity or other interest in the employer and who provides services to or for the benefit of the employer.'' Another commenter suggested that, for clarity, ''worker'' should specifically exclude a ''substantial owner, member or partner'' as defined in the sale-of-business exception.

Several State attorneys general, local government commenters, academic commenters, and a worker advocacy group warned that categorically excluding franchisees from the definition of ''worker'' would lead employers to misclassify workers as franchisees to evade the rule's requirements. Some commenters suggested incorporating the ''ABC'' test—a common law test designed to determine whether a worker is an employee based on fact-specific conditions—into the definition of ''worker'' to prevent evasion.[372]

Some commenters requested that the Commission revise the definition of ''worker'' to exclude or include certain workers from coverage under the rule. These comments are addressed in Part IV.C (comments requesting an exclusion for senior executives) and in Part V.D (comments requesting exclusions for other categories of workers).

3. The Final Rule

After considering the comments, the Commission revised the definition of ''worker'' in three ways to clarify that the term covers all current and former workers, regardless of which entity hired or contracted with them to work, and regardless of a worker's title or status under any other applicable law.

First, the Commission added ''or who previously worked'' to the basic definition of ''worker'' as ''a natural person who works.'' This revision is designed to clarify that former workers are considered ''workers'' under the final rule, such as where an employer is required to notify a former worker that their non-compete is no longer enforceable.[373]

Second, the Commission removed ''for an employer'' from the definition. This revision is designed to ensure that the final rule covers workers who are hired by one party but work for another, closing the unintended loophole identified by commenters regarding third-party hiring.

Third, the Commission added ''without regard to the worker's title or the worker's status under any other State or Federal laws'' prior to the list of examples of different categories of workers that the definition covers. This change is designed to make more explicit that the term ''worker'' includes all workers regardless of their titles, status under other laws, or the details of the contractual relationship with their employer.

The Commission has made two additional changes to the definition for clarity. First, the Commission has revised the phrase ''individual classified as an independent contractor'' to ''independent contractor.'' Second, the Commission has added ''a natural person who works for a franchisee or

[372] *See, e.g., Dynamex Operations W.* v. *Superior Ct.,* 4 Cal. 5th 903, 955–957 (Cal. 2018).

[373] *See* § 910.2(b).

franchisor'' to the non-exclusive list of examples of types of workers that would be covered by the definition. This language is simply moved from elsewhere in the definition. Third, the Commission has removed the sentence reading ''[n]on-competes between franchisors and franchisees would remain subject to Federal antitrust law as well as all other applicable law'' from the definition to avoid the implication that only such non-competes remain subject to Federal antitrust law and other applicable law.

The Commission declines to specify that a ''worker'' includes an owner who provides services to or for the benefit of their business because the definition already encompasses the same.

The Commission is not persuaded by commenters' arguments that independent contractors or sole proprietors are inherently different from other kinds of workers with respect to non-competes, and therefore declines to exclude them from the definition of ''worker.'' Commenters did not present persuasive evidence that non-competes that apply to independent contractors or sole proprietors tend to negatively affect competitive conditions to a lesser degree—or are restrictive, exclusionary, exploitative, or coercive to a lesser degree—than non-competes that apply to other workers. As noted by commenters who supported including independent contractors, non-competes' tendency to negatively affect competitive conditions by restricting workers' ability to change jobs or start businesses is not contingent on whether the worker is an employee or an independent contractor. While some commenters contended that independent contractors have more independence and more access to intellectual property than other workers, commenters did not provide evidence that this is the case. Moreover, even were this to be true, it would not justify an exclusion, because the Commission generally declines to exclude workers based on their access to intellectual capital or their independence for the reasons explained in Part V.D.

Furthermore, whether a worker is an employee or an independent contractor does not impact employers' ability to exploit imbalances of bargaining power or limit employers' ability to use less restrictive alternatives to non-competes to protect their intellectual property. While commenters who supported excluding independent contractors contended that independent contractors have more bargaining power than other workers, this contention is not backed by evidence. While some economists hypothesize that, theoretically, independent contractors may have more bargaining power vis-à-vis employers than employees do, they do not provide empirical evidence to support that assertion. Furthermore, as described by a report from the Treasury Department that was based on an extensive literature review, independent contractors may have less bargaining power than employees in many respects.[374]

The Commission is also not persuaded that non-competes are necessary to prevent ''free riding'' by independent contractors who use one firm's assets to benefit another. The final rule prohibits agreements that restrain a worker from working after the scope of employment has ended and does not prohibit agreements which prevent a worker from working for two firms simultaneously. In addition, any ''free riding'' may be addressed through less restrictive means, including through agreements prohibiting an independent contractor from using assets provided by one firm to benefit another.

Nor is the Commission persuaded that small businesses will be disproportionately harmed by a rule which prohibits non-competes for independent contractors. Commenters did not provide evidence to support their assertion that small businesses employ more independent contractors than larger ones.

The Commission agrees with the commenters who contended that excluding independent contractors may have the effect of excluding misclassified workers, who may be among the most vulnerable to exploitation and coercion. The recent overview by the U.S. Department of Labor (''DOL'') of the evidence on misclassification led it to conclude that although the prevalence of misclassification of employees as independent contractors is unclear, there is evidence that it is nonetheless ''substantial'' and has a disproportionate effect on workers who are people of color or immigrants because of the disparity in occupations most affected by misclassification, which include jobs in construction, trucking, delivery, home care, agriculture, personal care, ride-hailing services, and janitorial and building services.[375] The Commission also agrees with commenters' contentions that excluding independent contractors from the definition of ''worker'' could increase employers' incentive to misclassify workers as independent contractors. Indeed, misclassification is often motivated by attempts to evade the application of laws.

Because there is no reason to believe non-competes that apply to independent contractors or sole proprietors tend to negatively affect competitive conditions to a lesser degree, or are restrictive, exclusionary, exploitative, or coercive to a lesser degree, than non-competes that apply to employees—and in light of substantial evidence of widespread employee misclassification—the Commission declines to exclude independent contractors from the definition of ''worker.'' For this reason, the Commission also declines to incorporate the ''ABC'' test or other tests designed to differentiate between independent contractors and employees.

IV. Section 910.2: Unfair Methods of Competition

A. Introduction

1. Overview of the Commission's Findings and Determinations

In the NPRM, the Commission proposed to categorically ban employers from using non-competes with all workers, including existing agreements. However, the Commission sought comment on whether it should adopt different standards for non-competes with senior executives, and, if so, how it should define senior executives.[376] Based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition, the Commission in this final rule finds that non-competes with all workers are an unfair method of competition—although its rationale differs with respect to workers who are and are not senior executives.

The final rule provides that it is an unfair method of competition—and therefore a violation of section 5—for employers to, *inter alia,* enter into non-competes with workers on or after the final rule's effective date.[377] The Commission thus adopts a comprehensive ban on new non-competes with all workers. With respect to existing non-competes, *i.e.,* non-competes entered into before the final rule's effective date, the Commission adopts a different approach for senior executives [378] than for other workers.

[374] U.S. Treasury Dep't, Report, *The State of Labor Market Competition* (Mar. 7, 2022) (hereinafter ''Treasury Labor Market Competition Report'').

[375] Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 89 FR 1638, 1735 (Jan. 10, 2024).

[376] NPRM at 3519.

[377] *See* § 910.2(a)(1)(i) and § 910.2(a)(2)(i).

[378] *See* § 910.1 (defining ''senior executive'').

Existing non-competes with senior executives can remain in force; the final rule does not cover them.[379] For workers who are not senior executives, existing non-competes are no longer enforceable after the final rule's effective date.[380] Employers must provide such workers with existing non-competes notice that the non-competes will not be enforced after the final rule's effective date.[381]

Specifically, with respect to workers who are not senior executives, the Commission determines that it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause; enforce or attempt to enforce a non-compete clause; or represent to the worker that the worker is subject to a non-compete clause.[382] The Commission finds that with respect to these workers, these practices are unfair methods of competition in several independent ways:

- The use of non-competes is restrictive and exclusionary conduct that tends to negatively affect competitive conditions in labor markets.
- The use of non-competes is restrictive and exclusionary conduct that tends to negatively affect competitive conditions in product and service markets.
- The use of non-competes is exploitative and coercive conduct that tends to negatively affect competitive conditions in labor markets.
- The use of non-competes is exploitative and coercive conduct that tends to negatively affect competitive conditions in product and service markets.

In contrast, with respect to senior executives, the Commission determines that it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause; enforce or attempt to enforce a non-compete clause entered into after the effective date; or represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date. The Commission does not find that non-competes with senior executives are exploitative and coercive. With respect to senior executives, the Commission finds that non-competes are unfair methods of competition in two independent ways:

- The use of non-competes is restrictive and exclusionary conduct that tends to negatively affect competitive conditions in product and service markets.
- The use of non-competes is restrictive and exclusionary conduct that tends to negatively affect competitive conditions in labor markets.

The final rule allows existing non-competes with senior executives to remain in force. Because the harm of these non-competes is principally that they tend to negatively affect competitive conditions (rather than exploiting or coercing the executives themselves), and due to practical concerns with extinguishing existing non-competes for such executives, the final rule prohibits employers only from entering into or enforcing new non-competes with senior executives.

Parts IV.B and IV.C set forth the findings that provide the basis for the Commission's determinations that the foregoing practices are unfair methods of competition under section 5 for these two categories of workers, respectively.[383] In these sections, the Commission also describes and responds to comments regarding the preliminary findings in the NPRM that informed its preliminary determinations related to unfair methods of competition.

2. Analytical Framework for Assessing Empirical Evidence

Before turning to the basis for its findings, the Commission describes the analytical framework it has applied in assessing the empirical evidence on non-competes. In the NPRM, the Commission discussed the existing empirical literature on non-competes and its assessment of those studies, including its preliminary view of which studies were more robust and thus should be given more weight.[384] In response, some commenters argued the Commission gave too much weight to certain studies or too little weight to others.[385]

The Commission notes that the methodologies of empirical studies on the effects of non-competes vary widely. In this final rule, based on the Commission's longstanding expertise assessing empirical evidence relating to the effects of various practices on competition, the Commission gives more weight to studies with methodologies that it finds are more likely to yield accurate, reliable, and precise results. In evaluating studies, the Commission utilized the following five principles that reflect best practices in the economic literature.

First, the Commission gives more weight to studies examining the effects of a change in legal status or a change in the enforceability of non-competes, and less weight to studies that simply compare differences between workers who are subject to non-competes and those who are not. Studies that look at what happens before and after a change in State law that affects the enforceability of non-competes provide a reliable way to study the effects of the change. This is especially true when only the enforceability of non-competes changes, and not other factors affecting firms and workers. If other substantial changes do not also occur around the same time, this study design often allows the researcher to infer that the change caused the effects—since the likelihood that confounding variables are driving the effects or outcomes is minimal.[386]

In contrast, other studies of the use of non-competes compare a sample of workers who are subject to non-competes with a sample of workers who are not subject to non-competes. The shortcoming of these studies is that they cannot easily differentiate between correlation and causation. For example, if such a study shows that workers with non-competes earn more, there could be many confounding reasons for this result. For example, employers may be more likely to enter into non-competes with workers who earn more. In contrast, a study showing that workers' earnings increase or decrease when non-

[379] *See* Part IV.C.3.

[380] *See* § 910.2(a)(1)(ii) and § 910.2(a)(1)(iii).

[381] *See* § 910.2(b).

[382] *See* § 910.2(a)(1).

[383] In addition to the findings described in Parts IV.B and C, the Commission finds that the use of non-competes by employers substantially affects commerce as that term is defined in section 5 and burdens a not insubstantial portion of commerce. The findings in Parts IV.B and C apply with respect to senior executives and other workers, whether considered together or respectively. The evidence establishes that non-competes affect labor mobility, workers' earnings, new business formation, and innovation, including empirical evidence specifically identifying cross-border effects with respect to earnings, *see infra* notes 464–468 and accompanying text, and innovation, *see infra* note 563 and accompanying text.

[384] *See* NPRM at 3484–93.

[385] The Commission discusses comments addressing specific studies in Parts IV.B, IV.C, and IV.D.

[386] In Parts IV.B and C, the Commission describes how these ''enforceability'' studies show that increased enforceability of non-competes results in various harms, such as reduced earnings, new business formation, and innovation. Notably, the available evidence also shows that workers are chilled from engaging in competitive activity even where a non-compete is likely unenforceable—for example, because they are unaware of the law or unable to afford a legal battle against the employer. *See* Part IV.B.3.a.i. The fact that many workers may not adjust their behavior in response to changes in State-level enforceability of non-competes suggests that the final rule could result in even greater effects than those observed in the research, particularly because it would require employers to provide workers with notice that their non-compete is no longer in effect, which would help correct for workers' lack of knowledge of the law. *See* § 910.2(b).

competes are made more or less enforceable provides much stronger evidence regarding the effect of non-competes, in isolation. Researchers studying non-competes are aware of this bias and frequently caution that estimates of the correlation between outcomes and the use of non-competes should not be misinterpreted as causal.[387]

Second, the Commission gives more weight to studies examining the effects of changes in non-compete enforceability and less weight to studies that simply compare economic outcomes between States where non-competes are more enforceable and States where non-competes are less enforceable. This latter category of studies is known as ''cross-sectional studies of enforceability.'' Like studies based on the use of non-competes, these cross-sectional studies of enforceability cannot easily differentiate between correlation and causation. This is because differences between States that are unrelated to non-competes and their enforceability can easily pollute comparisons. For example, non-competes are less enforceable in California than in Mississippi, and the cost of living is higher in California than in Mississippi. However, the difference in the cost of living is likely to be due to underlying differences between the economies and geographies of the two States, rather than being attributable to non-competes. In contrast, studies examining how changes in enforceability of non-competes affect various outcomes—studies that look at what happens within States before and after a change in State law that affects the enforceability of non-competes—allow researchers to infer that the change caused the effects.[388]

Despite having this limitation, the Commission believes that cross-sectional studies of enforceability are still superior to the ''use'' studies described under the first principle. This is because although comparisons of different States may have unreliable results due to confounding variables—depending on which States are compared—''use'' studies are inherently unreliable due to confounding effects. For example, because employers enter into non-competes more often with highly paid workers, all ''use'' studies related to worker earnings are inherently unreliable, although studies that utilize data on the use of non-competes but employ a design that plausibly identifies a causal effect may be less unreliable.

Third, the Commission gives more weight to studies assessing changes in the enforceability of non-competes in multiple States. This reduces the possibility that the observed change in economic outcomes was driven by an idiosyncratic factor unique to a particular State. For example, assume State X changed its laws to make non-competes less enforceable, and new business formation subsequently increased compared with other States. However, around the same time it changed its non-compete law, State X also enacted legislation to provide attractive tax incentives to entrepreneurs. It would be difficult to isolate the effect of the change in non-compete law from the effect of the tax law change. For this reason, the Commission gives more weight to studies that analyze the effects of multiple changes in enforceability. For example, if a study shows that, compared with other States that did not change their non-compete laws, new business formation rose not only in State X, but also in several other States that changed their laws to make non-competes less enforceable, the Commission would be more confident inferring that changes in non-compete law caused these effects.

Fourth, the Commission gives more weight to studies that use sophisticated, nuanced measures of enforceability, such as non-binary measures of non-compete enforceability that capture multiple dimensions of non-compete enforceability. This fourth guiding principle ensures accuracy and granularity in the measurement of non-compete enforceability.

A variety of different factors affect the enforceability of non-competes from State to State, including (among others) the permissible geographic scope and duration of non-competes and how high the employer's burden of proof is to establish that a non-compete is enforceable. Given the different factors involved, the overall level of non-compete enforceability from State to State falls along a spectrum; it is not as simple as whether non-competes are enforceable or not. Thus, scales which use binary measures miss nuance between States. This is true for enforceability overall (*e.g.,* scales which simply assign States to ''enforcing'' or ''non-enforcing'' categories) and for elements of enforceability (*e.g.,* scales which assess whether a non-compete is enforceable if a worker is fired with a yes or no answer). While no scale is perfect, scales which allow for multidimensionality and granularity measure non-compete enforceability (and thus the effects that stem from it) with a higher degree of accuracy.[389]

Fifth, the Commission gives more weight to studies in which the outcome studied by the researchers is the same as the outcome the Commission is interested in or is an effective proxy for the outcome the Commission is interested in. It gives less weight to studies that use ineffective proxies. For example, some outcomes are relatively easy to study. There is extensive data on workers' earnings at the State level, so researchers can simply use this data to study how changes in non-compete enforceability affect workers' earnings in a State. Other outcomes, however, may be more challenging to quantify directly, and thus researchers may use proxies for understanding the effect they are studying. For example, there is no single metric that measures innovation in the economy. For this reason, to learn about how non-competes affect innovation, a researcher might study the effect of changes in non-compete enforceability on the number of patents issued in the State as a proxy for innovation. However, proxies can sometimes be ineffective or inapt. For example, a study that analyzes the effect of non-compete enforceability on the number of patents issued is generally a weaker proxy for innovation than a study that also takes into account the quality of patents issued. For this reason, the Commission gives more weight to studies that measure the exact outcome of interest or studies that use effective proxies.

While these five guiding principles are important indicators of the relative strength of empirical studies evaluated by the Commission for the purpose of this final rule, the Commission's assessment of empirical studies was holistic and relied on its economic expertise. In addition to the guiding principles described in this Part IV.A.2, the Commission's holistic, expert assessment of the empirical evidence also included considering characteristics of studies important in any context, such as data quality, statistical precision, and other factors.

[387] *See, e.g.,* Starr, Prescott, & Bishara, *supra* note 68 at 73 (''Our analysis of the relationships between noncompete use and labor market outcomes . . . is best taken as descriptive and should not be interpreted causally.''); Johnson & Lipsitz, *supra* note 80 at 711 (''These regressions [of firm investment on non-compete use] should be interpreted as correlations rather than causation, since the decisions to make these investments and use [non-competes] are made jointly.'').

[388] Matthew S. Johnson, Kurt J. Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility,* Nat'l Bureau of Econ. Rsch. 2 (2023) (''. . . cross-sectional variation in enforceability might be correlated with other unobserved differences across states.'').

[389] Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes,* 87 U. Chi. L. Rev. 953 (2020).

In some instances, the Commission cites studies beyond those discussed in the NPRM. The Commission cites such studies only where they check or confirm analyses discussed in the NPRM, or where the Commission is responding to comments raising them. The Commission's findings do not rest on these studies, however, and they are not necessary to support its findings.

B. Section 910.2(a)(1): Unfair Methods of Competition—Non-Competes With Workers Other Than Senior Executives

The Commission now turns to the basis for its findings that non-competes with workers other than senior executives are an unfair method of competition. As explained in Part II.F, under section 5, the Commission assesses two elements: (1) whether the conduct is a method of competition, as opposed to a condition of the marketplace, and (2) whether it is unfair, meaning that it goes beyond competition on the merits. The latter inquiry has two components: (a) whether the conduct has indicia of unfairness, and (b) whether the conduct tends to negatively affect competitive conditions. These two components are weighed according to a sliding scale.

Non-competes with workers other than senior executives satisfy all the elements of the section 5 inquiry.[390] As described in Part IV.B.2, such non-competes are facially unfair because they are restrictive and exclusionary, and because they are exploitative and coercive. And as described in Part IV.B.3, such non-competes tend to negatively affect competitive conditions in labor markets and markets for products and services. As explained in Part II.F, the legal standard for an unfair method of competition under section 5 requires only a tendency to negatively affect competitive conditions. The inquiry does not turn on whether the conduct directly caused actual harm in a specific instance. Here, the tendency of non-competes to impair competition is obvious from their nature and function. And even if this tendency were not facially obvious, the evidence confirms that non-competes do in fact have a negative effect on competitive conditions.

The Commission finds that the empirical research described in this Part IV.B supports findings related to workers other than senior executives.[391]

1. The Commission Finds That Non-Competes Are a Method of Competition, Not a Condition of the Marketplace

With respect to the first element, whether the conduct is a method of competition, the Commission preliminarily found in the NPRM that non-competes are a method of competition under section 5 because they are specific conduct undertaken by an actor in a marketplace, as opposed to merely a condition of the marketplace.[392] No commenters disagreed with this finding, and the Commission reaffirms its preliminary finding that non-competes are a method of competition.

2. The Commission Finds That Non-Competes Are Facially Unfair Conduct

The Commission finds that non-competes are facially unfair conduct under section 5 because they are restrictive and exclusionary. The Commission further finds that non-competes are facially unfair under section 5 because they are exploitative and coercive.

a. Non-Competes Are Restrictive and Exclusionary Conduct

Under section 5, indicia of unfairness may be present where conduct is restrictive or exclusionary, provided that the conduct also tends to negatively affect competitive conditions.[393] In the NPRM, the Commission explained that non-competes are restrictive conduct.[394] No commenters disputed this analysis, and the Commission reaffirms its preliminary finding that non-competes are restrictive.

The restrictive nature of non-competes is evident from their name and function: non-competes restrict competitive activity. They do so by restricting a worker's ability to seek or accept other work or start a business after the worker leaves their job, and by restricting competitors from hiring that worker. Because non-competes facially restrict competitive activity, courts have long held they are restraints of trade and proper subjects for scrutiny under the antitrust laws.[395]

The restrictions that non-competes impose on workers are often substantial. Non-competes can severely restrict a worker's ability to compete against a former employer. For most workers, the most natural alternative employment options are jobs in the same geographic area and in the same field. These are the very jobs that non-competes typically prevent workers from taking. Furthermore, for most workers, the most practical entrepreneurship option is starting a business in the same field. This is the very opportunity that non-competes typically prevent workers from pursuing. Moreover, the record before the Commission reflects that non-competes are often so broad as to force a worker to sit out of the labor market altogether.

In the NPRM, the Commission used the term "restrictive" to encompass both restrictive and exclusionary conduct.[396] In this final rule, in addition to finding that they are restrictive conduct, the Commission separately finds that non-competes are exclusionary conduct because they tend to impair the opportunities of rivals. Where a worker is subject to a non-compete, the ability of a rival firm to hire that worker is impaired. In addition, where many workers in a market are subject to non-competes, the ability of firms to expand into that market, or entrepreneurs to start new businesses in that market, is impaired.

For the foregoing reasons, the Commission finds that the use of non-competes with workers other than senior executives is facially unfair under section 5 because it is conduct that is restrictive or exclusionary.

b. Non-Competes Are Exploitative and Coercive Conduct

Conduct may violate section 5 where it is exploitative or coercive and tends to negatively affect competitive conditions.[397] Indeed, where conduct is exploitative or coercive, it evidences

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[390] For the sake of readability, in this Part IV.B, the Commission refers to non-competes with workers other than senior executives as "non-competes."

[391] Some of the studies described in Part IV.B analyze non-competes between employers and workers across the labor force. Other studies analyze non-competes with particular populations of workers. In each of the studies described in Part IV.B, non-competes with workers other than senior executives represented a large enough segment of the sample that the study supports findings related to the effects of non-competes for such workers. Studies that focus primarily on non-competes for senior executives are described in Part IV.C, which explains the Commission's findings related to non-competes with senior executives.

[392] NPRM at 3504.

[393] *See* Part II.F.

[394] NPRM at 3500.

[395] *See, e.g., Am. Tobacco Co.,* 221 U.S. 106, 181–83 (1911) (holding that several tobacco companies violated Sections 1 and 2 of the Sherman Act due to the collective effect of six of the companies' practices, one of which was the "constantly recurring" use of non-competes); *Newburger, Loeb & Co., Inc.,* 563 F.2d 1057, 1082 (2d Cir.) ("Although such issues have not often been raised in the federal courts, employee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act. When a company interferes with free competition for one of its former employee's services, the market's ability to achieve the most economically efficient allocation of labor is impaired. Moreover, employee-noncompetition clauses can tie up industry expertise and experience and thereby forestall new entry.") (internal citation omitted).

[396] NPRM at 3500 ("Non-competes also restrict rivals from competing against the employer to attract their workers.").

[397] *See* Part II.F.

clear indicia of unfairness, and less may be necessary to show a tendency to negatively affect competitive conditions.[398]

In the NPRM, the Commission preliminarily found that non-competes with workers other than senior executives were exploitative and coercive because in imposing them on workers, employers take advantage of their unequal bargaining power.[399] The Commission also preliminarily found that non-competes are exploitative and coercive at the time of the worker's potential departure, because they force a worker to either stay in a job the worker wants to leave or force the worker to bear other significant harms and costs, such as leaving the workforce or their field for a period of time; relocating to a different area; violating the non-compete and facing the risk of expensive and protracted litigation; or attempting to pay the employer to waive the non-compete.[400]

The Commission received an outpouring of comments on the question of whether non-competes were exploitative or coercive. Thousands of workers described non-competes as pernicious forces in their lives that took advantage of their lack of bargaining power and forced them to make choices detrimental to their finances, their careers, and their families. Above all, the predominant themes that emerged from the comments were powerlessness and fear.

Thousands of workers reported feeling powerless to avoid non-competes, either because the worker needed the job or because non-competes were pervasive in the worker's field. Hundreds of workers reported non-competes were unilaterally imposed on them. Workers overwhelmingly reported that they did not bargain over non-competes, did not receive compensation for non-competes, and were not represented by counsel in connection with non-competes, with only rare exceptions.

And hundreds of workers reported that even where they wanted a job with better pay or working conditions, or to strike out on their own, the fear of litigation from a deep-pocketed employer or the fear of being without work prevented them from doing so. Hundreds of workers described how this fear coerced them into remaining in jobs with poor conditions or pay, including dangerous or toxic work environments; into leaving an industry or profession that they invested, trained, studied, or were experienced in, damaging or derailing their careers; into moving away from their home, uprooting or separating their families; or into enduring long-distance commutes, which made it harder to care for and spend precious time with their loved ones. Many workers described how this fear hung above them even if they thought the non-compete was overbroad and probably unenforceable under State law, because having to defend a lawsuit from an employer for any length of time would devastate their finances.

Based on the entirety of the record, for the following reasons, the Commission finds non-competes with workers other than senior executives are exploitative and coercive because they are unilaterally imposed by a party with superior bargaining power, typically without meaningful negotiation or compensation, and because they trap workers in worse jobs or otherwise force workers to bear significant harms and costs.

i. Non-Competes With Workers Other Than Senior Executives Are Unilaterally Imposed

The Commission finds that employers almost always unilaterally impose non-competes, exploiting their superior bargaining power to impose—without any meaningful negotiation or compensation—significant restrictions on workers' abilities to leave for better jobs or to engage in competitive activity.

The Commission finds that employers have significantly more bargaining power than workers. Most workers, especially workers other than senior executives, depend on income from their jobs to get by—to pay their rent or mortgage, pay their bills, and put food on the table. The loss of a job or a job opportunity can severely damage workers' finances and is far more likely to have serious financial consequences for a worker than the loss of a worker or a job candidate would have for most employers.

The Treasury Department, in a report based on an extensive literature review, finds that firms generally have considerable labor market power.[401] The report states that concentration in particular industries and locations can increase employers' labor market power.[402] However, the report explains that, even in the absence of concentration, firms have significant labor market power due to a variety of factors.

As the report notes, some of these factors are inherent in the firm-worker relationship. The report states that workers are at an informational disadvantage relative to firms, often not knowing what other workers earn or the competitive wages for their labor.[403] The report states further that workers often have limited or no ability to switch locations and occupations quickly and may lack the financial resources to support themselves while they search for jobs that pay more and better match their skills and abilities.[404] According to the report, these conditions often enable firms to exert market power even in labor markets that are not highly concentrated.[405]

In addition to factors inherent to the employer-worker relationship, the report concludes that firms use a wide range of practices to restrain competition for workers, including sharing wage information and conspiring to fix wages with other firms; agreeing not to hire other firms' workers; and adopting non-competes, mandatory arbitration agreements, and overbroad NDAs.[406] The report also states that practices such as outsourcing and worker misclassification have further diminished workers' market power.[407] Overall, the report finds that employers' labor market power has resulted in a 20% decrease in wages relative to the level in a fully competitive market.[408]

The Commission finds that employers are able to exploit their considerable labor market power—and indeed routinely do so—with respect to non-competes imposed on workers other than senior executives. Employers are repeat players likely to have greater experience and skill at bargaining than individual workers in the context of negotiating employment terms such as non-competes.[409] Research has found that employers present non-competes in standard-form contracts,[410] which workers are unlikely to read,[411] and that

[398] *See id.*

[399] NPRM at 3502–04.

[400] *Id.* at 3504.

[401] Treasury Labor Market Competition Report, *supra* note 374 at i–ii.

[402] *Id.* at i.

[403] *Id.*

[404] *Id.*

[405] *Id.*

[406] *Id.*

[407] *Id.* at ii.

[408] *Id.*

[409] *See, e.g., Samuel Stores, Inc.* v. *Abrams,* 108 A. 541, 543 (Conn. 1919); *Sunder Energy, LLC* v. *Jackson,* 305 A.3d 723, 753 (Del. Ct. Chancery 2023).

[410] Starr, Prescott, & Bishara, *supra* note 68 at 72 (''Taken together, the evidence in this section indicates that employers present (or employees receive) noncompete proposals as take-it-or-leave-it propositions.'').

[411] *See, e.g.,* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction,* 96 Harv. L. Rev. 1173 (1983); Russell Korobkin, *Bounded Rationality, Standard-Form Contracts, and*

Continued

workers rarely bargain over non-competes and rarely seek the assistance of counsel in reviewing non-competes.[412] Many workers also lack the legal training or legal knowledge necessary to understand whether a particular non-compete is enforceable or the consequences of entering into a non-compete. The available evidence indicates that many workers are not aware of the applicable law governing non-competes or their rights under those laws.[413] Research has also found that employers exploit their power over workers by providing them with non-competes after they have accepted the job offer—and in many cases, on or after their first day of work—when the worker's negotiating power is at its weakest, since the worker may have turned down other job offers or left their previous job.[414]

The comment record provides strong support for the Commission's finding that non-competes are coercive and exploitative because they are typically unilaterally imposed by employers on workers other than senior executives. Illustrative examples of the comments the Commission received include the following:

- I am a practicing OB/GYN physician in Shreveport, LA. . . . I was put into a non-negotiable, vague non-compete with NO expiration date. . . . I needed a job. I was in a large amount of debt with accumulating interest during my four years of residency with a minimal salary. Honestly, I could not afford an attorney. So naively I trusted that the people that had been training me for the past 4 years would not take advantage of me in a contract. I did not have the ability to seek advice on ''how'' to negotiate a contract with my mentors since my mentors were the ones who wrote the contract.[415]
- As [a] physician who recently negotiated a new contract, I support FTC changes to the non-compete rules. . . . All three institutions [I considered working for] had unreasonable and onerous non-competes. Essentially making it impossible to get another job in the entire state of NJ—not just a few mile radius but two thirds of the state. . . . Non-competes are never negotiable even when hiring a lawyer to review and negotiate the contract. Hospitals refused to negotiate on the majority of the contract citing it is [an] across the board provision that cannot be altered.[416]
- I'm a worker that has had to consider whether to take a job that requires signing a no-compete agreement . . . . Several times in my career, after weeks of interviewing and salary negotiation, I've found myself facing a required no-compete agreement that would drastically limit my future career options and negotiating power. Several times I've accepted these agreements because I had already turned down competing offers and found myself with limited options.[417]
- I'm a project manager at an Interior Design & Home Staging company in Manhattan; we're the largest staging company on the East Coast. After I accepted my job offer and went in to file paperwork, I was very briefly walked through what this non-compete means (the details were not made entirely clear; I believe they left it intentionally murky) and it was buried deep in the new employee rules and regulations packet I needed to read and sign at my onboarding. I personally am very against these agreements because, as mine states, I cannot work with ''a competing staging company'' or for any of the clients of my current company. Again, we're the largest staging firm on the east coast and have a lot of clients (we do over 100 stagings per year). Essentially, I am completely shut out of working in the industry in NYC as there are only a handful of other staging companies that can pay me a living wage to do so.[418]
- You might say that we might be able to negotiate out of a non-compete in our contract, but that is simply not true. In my hospital, I was already established, owning a house and having kids in school in a spouse in a career when the Hospital came forward and sit on my next contract renewal that I had no choice, but to sign a noncompete. They had me over a barrel. At my next contract negotiation, I try to negotiate out of the noncompete, with less salary or less benefits, and it was a nonstarter. There is zero tolerance for negotiating out of the noncompete.[419]
- At the end of 2018, as a Manager at a small business (150 employees) in a niche technology industry, I was offered shares in our company as we were acquired by a Private Equity firm. . . . I worked with a company-provided attorney on an Employment Agreement. This agreement offered a 6-month severance with a 1-year non-compete period, which I negotiated down to a 6-month non-compete to match the severance period. Later that month, I was sent an additional, previously unseen 120-page Share Agreement that governed how I would vest the shares I had earned. I didn't realize it at the time, but buried toward the end of this document was another non-compete that had a much longer timeframe dictated—1 year from when I no longer held any shares. As it would potentially take up to 6 years for the company to sell again, that meant an incredibly long and indefinite sounding time period. I was given only one business day to review this agreement, and was sent a signature packet the following day. I honestly thought I was signing my Employment Agreement negotiated with a company attorney, not the share agreement that neither myself nor the attorney had reviewed, and which I had only received the day prior.[420]
- Desperate to obtain an entry level job in the Accounting field in which I am currently obtaining my Associate's degree, I was presented with an offer of employment and a non-compete agreement contract to sign. Because I needed to pay rent, I signed it.[421]
- On the first day of my husband's employment, without prior notice, an extensive 2 year non-compete clause was put in his employment contract and while it was noted within the clause he could seek counsel, when you are in the middle of your first day of work it's not practical. In addition, for most people, if it is your first experience with a non-compete, you likely do not have the funds to pay a $750 per hour lawyer to advise and negotiate on your behalf, nor realize the possible long-term consequences.[422]

Many commenters agreed with the Commission's preliminarily finding that employers generally have considerable labor market power. Even commenters opposing the NPRM did not generally dispute the notion that there is unequal bargaining power between employers and workers. Many workers stated that non-competes are pervasive in their industry, meaning they could not find a job without one. Many commenters stated that high wages or skills do not automatically translate into more bargaining power or sufficiently mitigate the harms from non-competes, especially in concentrated markets or markets where so many employers use non-competes that workers effectively have no choice but to sign them. Commenters also said that underrepresented groups may have even less bargaining power to negotiate non-competes and are less likely to have the resources for litigation, which could have an increased deterrent effect on worker mobility.

Hundreds of commenters stated that workers are rarely, if ever, able to negotiate their non-competes because non-competes are typically presented in a take-it-or-leave-it fashion. These comments spanned both lower-wage workers and workers in high-wage industries.[423] Workers often stated that they were ''forced'' to sign a non-

Unconscionability, 70 U. Chi. L. Rev. 1203, 1217 (2003).

[412] Starr, Prescott, & Bishara, *supra* note 68 at 72.

[413] J.J. Prescott & Evan Starr, *Subjective Beliefs About Contract Enforceability,* Forthcoming, J. L. Stud. 10–11 (2022).

[414] Marx (2011), *supra* note 81 at 706.

[415] Individual commenter, FTC–2023–0007–4414.

[416] Individual commenter, FTC–2023–0007–10547.

[417] Individual commenter, FTC–2023–0007–12428.

[418] Individual commenter, FTC–2023–0007–12480.

[419] Individual commenter, FTC–2023–0007–14706.

[420] Individual commenter, FTC–2023–0007–2347.

[421] Individual commenter, FTC–2023–0007–2600.

[422] Individual commenter, FTC–2023–0007–5933.

[423] Industries that the Commission considered as higher wage industries included but were not limited to engineers, entertainment (namely on-air talent), entrepreneurs, financial services, dentists, physicians, sales workers, tech industry workers, and veterinarians. Industries were assessed as high wage based on BLS occupational wage data. BLS, *Occupational Employment and Wage Statistics, https://www.bls.gov/oes/tables.htm* (based on the May 2022 National XLS table).

compete. Very few workers said they were able to decline signing a non-compete and still be hired or employed. An employment law firm also agreed with the Commission and stated that non-competes are rarely subject to negotiation.

Confirming the research described in this Part IV.B.2.b.i, many workers—including highly paid and highly skilled workers—stated that they did not receive notice that they would be required to sign a non-compete until after accepting a job offer. Some workers said they were told of the non-compete after accepting the job but before starting work. Many workers who described when they were notified of a non-compete said it was on their first day of work or even later. Many workers stated that they were required to sign their non-compete after a merger or acquisition—*i.e.,* after they were already on the job but there was a change in ownership of the company. For example, a trade organization stated that it is common for the purchaser of a business to impose non-competes on its workers, which may trap workers in an organization different from the one they originally agreed to work for. An employment law firm commented that even highly paid or highly skilled workers do not always receive notice of non-competes with the employment offer.

Many workers also stated that non-competes are often hidden or obscured. Several workers said their non-compete was buried in other paperwork or confusingly worded or vague. Some commenters stated that their employer refused to allow them to have a copy of their non-compete. Many workers said their employers gave them misleading or incorrect information about the terms or enforcement of non-competes. Each of the above categories included not only workers from low-wage industries, but also workers from high-wage industries. While these practices appear to be commonplace, based on the comments, the Commission also notes that even workers who knew about non-competes before accepting the job offer—and who did not report being misled about the non-compete—did not report bargaining or negotiating over it.

Only a small number of workers reported any negotiating over non-competes. For example, a sales worker said they were able to negotiate a non-compete, though that worker still supported the proposed rule. A surgeon group stated hospitals were willing to negotiate over non-competes, but that hospitals use the non-competes as a negotiating tactic to drive down surgeon salaries.

Few workers who submitted comments reported being compensated for signing a non-compete. Among those workers who did report receiving compensation, most still said they considered their non-competes to be exploitative or coercive. For example, some workers said they were laid off and then required to sign a non-compete as a condition for receiving severance. A few workers said their employer had threatened to withhold their commissions and/or pay on departure if they did not sign a non-compete. One worker reported never receiving the compensation associated with a non-compete, because they were terminated two months after signing.

In addition, the Commission finds that employers frequently impose non-competes even when they are unenforceable under State law. An economist suggested that non-competes may be used in States in which they are unenforceable because the employer hopes the State's policy might change, or the employer might be able to forum-shop to apply the law of another jurisdiction more favorable to non-competes. Some commenters stated that firms may remind workers they are subject to a non-compete upon departure even when those non-competes are unenforceable because they hope that workers and competitors will abide by them.

These comments that employers often use unenforceable non-competes are supported by research finding that employers frequently use non-competes even when they are unenforceable under State law.[424] This research suggests that employers may believe workers are unaware of their legal rights, or that employers may be seeking to take advantage of workers' lack of knowledge of their legal rights or the challenges workers face enforcing their rights.

A far smaller number of commenters—a group that included many businesses and trade organizations, and very few workers—argued that non-competes were not exploitative or coercive. An industry organization said non-competes are understandable to a layperson with respect to their geographic scope, time in effect, and industry to which they apply, while an alternative trade secret case would be more complex. But even if workers understand the basic terms of non-competes, that does not alter the Commission's core concern that non-competes are exploitative and coercive because they take advantage of unequal bargaining power between employers and workers and force workers to stay in jobs they want to leave or otherwise bear significant harms or costs. It also does not alter the Commission's concern that non-competes tend to negatively affect competitive conditions. Moreover, the Commission notes that the available evidence indicates that many workers are not aware of the applicable law governing non-competes or their rights under those laws.[425] In addition, many commenters stated that non-competes were not disclosed to them before they started their job. Furthermore, the Commission addresses why trade secret law is a less restrictive alternative for protect employers' legitimate interests in Part IV.D.2.

A few commenters stated that unequal bargaining power does not constitute an unfair method of competition. In response, the Commission notes that it does not find that unequal bargaining power itself is an unfair method of competition; rather, unequal bargaining power informs its analysis of exploitation and coercion.

The comment record indicates that while some highly paid workers may seek the assistance of counsel when negotiating non-competes, many do not. Commenters did not present studies or other quantitative evidence that undermines the finding in Starr, Prescott, & Bishara that less than 8% of workers seek assistance of counsel in connection with non-competes.[426] The Commission thus finds that the vast majority of workers lack assistance of counsel in connection with entering non-competes. The Commission believes that its definition of senior executives, discussed in Part IV.C.4, captures those workers who are most likely to seek assistance of counsel. To the extent any other individual workers seek assistance of counsel and/or are able to actually bargain over non-competes sufficient that a given non-compete is not exploitative and coercive, the Commission still finds that such non-competes are unfair methods of competition for the independent reason that they are restrictive and exclusionary conduct that tends to negatively affect competitive conditions.

Overall, the comments provide strong support for the Commission's finding that, with respect to workers other than senior executives, employers almost always unilaterally impose non-competes—exploiting their superior bargaining power to significantly restrict workers' abilities to leave for better jobs or engage in competitive activity.

[424] Starr, Prescott, & Bishara, *supra* note 68 at 81.

[425] *See supra* note 413 and accompanying text.

[426] Starr, Prescott, & Bishara, *supra* note 68 at 72.

ii. Non-Competes With Workers Other Than Senior Executives Trap Workers in Jobs or Force Them to Otherwise Bear Significant Harms and Costs

The Commission finds that non-competes are exploitative and coercive because they force workers to either stay in jobs they want to leave or bear other significant harms and costs, such as leaving the workforce or their field for a period of time; relocating out of their area; or violating the non-compete and facing the risk of expensive and protracted litigation. In addition, the Commission finds non-competes exert a powerful *in terrorem* effect: they trap workers in jobs and force them to bear these harms and costs even where workers believe the non-competes are overbroad and unenforceable, due to workers' fear that having to defend a lawsuit from their employer for any length of time would devastate their finances or ruin their professional reputations.

The comment record provides strong support for this finding. Many workers submitted comments supportive of the Commission's preliminary finding that non-competes coerce workers into remaining in their current jobs. Many workers reported staying in their jobs because they feared harm to their careers if they were forced out of their field; feared having to relocate or endure a lengthy commute due to a non-compete; or feared their non-competes would cause them to be unemployed if they left. Several workers reported they were unable to take a specific desired job because of a non-compete. Many workers recounted how non-competes trapped them in jobs with poor working conditions or where they were subject to illegal conduct, including sexual harassment.[427] Some workers said they were subject to particularly broad, even global, non-competes, meaning leaving their field was their only option if they left their current job. These comments spanned both lower-wage workers and workers in high-wage industries.

Illustrative examples of the comments the Commission received include the following:

- I am a journalist who has been forced to move across the country three times, and leave my field entirely for one year, in order to comply with stringent non-compete agreements. . . . In [one] situation, I was stuck working for abusive management who fostered a toxic and abusive workplace, and I had to work there for more than a year until I could find a job in another city entirely because they had threatened to sue me under the non-compete if I left and worked for another local station. . . . [E]ven if these clauses are unenforceable, as we've all heard before, who can afford the legal representation to go up against a corporation and their lawyers when the lawsuit threat comes? My life would have been very different if I weren't trapped by non-competes at points in my career.[428]
- As a veterinarian I support the elimination of non-compete agreements. In our profession they still are overwhelmingly the normal expectation with contracts. . . . [C]ompanies use the fear of litigation to enforce them. As veterinary medicine very quickly becomes more corporate owned, basically they pit us as a singular employee against large corporations that have substantial means both financially and legally. No reasonable employee wants to take on that battle or even can financially take on that battle. So regardless if the clauses are 'unenforceable' they are enforced via intimidation. . . . When [my] job was a terrible fit and my boss ultimately ended up 'not renewing my contract' I was still left with a noncompete. This basically eliminated my ability to work within a reasonable distance of our home. I ended up commuting an hour and 15 minutes one way for 10 months until my husband, myself, and my very young child were able to move closer to my new job. While it was likely legally unreasonable in nature, I did not have the resources financially to even consider the legal battle that would have had to happen for reconsideration and I desperately needed an income to continue to pay the student debt that comes with being a young doctor. Furthermore I had a baby that needed my focus as well.[429]
- I was fired unjustly 11/2021 for declining the Covid vaccine. My medical and religious exemptions were both denied. In addition to this, I was required by my former employer contract to abide by the two-year 10 mile restrictive covenant. This greatly hindered my ability to find employment, and I was out of work for approximately three months. I could only find part-time work for a fraction of my former salary. Had I not had the noncompete clause, I could have found a full-time job almost immediately.[430]
- Unfortunately, the average dental school graduate has nearly $300,000 in student loan debt, and most new dentists are unable to make their practice-ownership dreams a reality immediately after residency. Thus, we rely on entry-level associate dentist positions to gain experience, pay off debt, and become fiscally/professionally prepared to become practice owners. Much to my dismay, upon interviewing for my first associate dentist position, I quickly realized how non-competes are being used in the dental profession to prevent vulnerable young dentists like myself from taking the next step in our careers. . . . Although dental associate positions come with relatively high compensation, it doesn't make this issue any less problematic.[431]
- My daughter had an inter-state non-compete enforced as a minimum wage medical scribe. Originally she was working with a medical scribe company in Indiana prior to Covid. Due to COVID and graduating from college she then moved to our home in Oregon. She applied for a medical scribe job in Oregon with a company that did not provide any scribe services in Indiana. But her original scribe company had 1 ''office'' they were providing scribe services to in Salem, Oregon. My daughter had applied with the local scribe company to provide services but when examined further found that her original scribe company from Indiana was going to enforce a $5000 non-compete buy-out fee on her to provide the services in Salem, Oregon that were within the sphere of restriction for her ''new'' local scribe opportunity.[432]

Many commenters explained that non-competes forced them to relocate and described the toll the relocation took on their families. Other commenters stated that their families have been forced to live apart, or they had been separated from elderly relatives, due to a non-compete forcing the relocation of one of the family members. Many commenters described how long commutes undertaken to avoid non-competes increased transportation costs and caused the worker to lose precious time with their families.

The comment record bolsters the Commission's finding that employers wield non-competes to coerce and exploit workers into refraining from competitive activity even where non-competes are unenforceable. Many workers explained that they—and others in their industry—abided by non-competes, even where they believed the non-compete was overbroad and likely unenforceable. According to a law firm specializing in executive compensation, even workers who can afford counsel may be unwilling to mount a long and uncertain legal battle to challenge a non-compete. The firm said employers almost always have deeper pockets and more access to counsel than individual workers, making workers more reluctant to litigate. Commenters further stated that employers may be able to deduct litigation costs as a business expense, giving them the wherewithal to enforce their non-competes.

Many workers with non-competes stated that they feared legal action from their employer or enormous legal fees if they left their current job, and most of those workers said they could not afford litigation. Workers also stated that they are reluctant to engage in litigation against an employer because it would harm their reputation in their industry.

Many workers reported being threatened with litigation over a non-

[427] These comments are addressed in greater detail in Part IV.B.3.a.iii.

[428] Individual commenter, FTC–2023–0007–0747.

[429] Individual commenter, FTC–2023–0007–2855

[430] Individual commenter, FTC–2023–0007–7561.

[431] Individual commenter, FTC–2023–0007–8858.

[432] Individual commenter, FTC–2023–0007–15249.

compete when they attempted to leave an employer. Some commenters said their non-competes contained additional clauses making litigation more difficult, such as attorneys' fee-shifting provisions or forced arbitration. Other workers feared having to pay financial penalties or feared having their compensation clawed back if their employer claimed they violated the non-compete. Each of the above comment categories included numerous comments from workers in high-wage industries.

Commenters asserted that employers have several advantages in litigation, further increasing the risk of challenging a non-compete. A commenter said even an extremely overbroad non-compete may be enforceable because a court can modify it to reduce its scope or duration. An employment attorney said employers who use overbroad non-competes to stifle competition suffer few if any negative consequences for doing so. The employment attorney further said that most employers do well even in a legal regime that nominally disfavors non-competes, due to the chilling effect of the threat of litigation. One researcher cited in the NPRM stated that non-competes have a powerful chilling effect because State laws generally do not prohibit employers from requiring employees to sign overbroad non-competes. Accordingly, the researcher recommended that non-competes be banned rather than restricted in scope, thereby preventing the possibility of lawsuits (and the threat thereof).

No commenters submitted studies or empirical evidence to contradict or otherwise call into question the research cited in the NPRM finding employers frequently use non-competes even when they are unenforceable under State law. Many commenters said they perceived non-competes to be a tool used to intimidate workers, and others specifically said they had been intimidated when their employers took legal action against other workers who left. These comments spanned workers in both lower-wage and high-wage industries.

The comments reflected that fields with high compensation levels were not immune from coercion and exploitation, and that, to the contrary, specialization can increase employers' ability to coerce and exploit workers. For example, some commenters said highly trained and/or specialized workers face heightened challenges in finding a job that does not violate a non-compete without relocating or become entirely unemployable, given the smaller number of such specialized jobs available. One commenter said that many workers are compensated highly because they are in a small field or have a niche skillset, meaning non-competes significantly limit their ability to find another job in their field. Some commenters in professions requiring advanced education also submitted comments stating that significant student loan debt decreased their bargaining power or increased the financial risk of attempting to change jobs. An employment law firm stated that highly paid or highly skilled workers in roles that are not limited to a single industry or business, such as finance or human resources, are more likely to be able to find employment in another industry, while those with training and expertise in a particular industry or type of business are at a greater risk of unemployment. Some medical organizations and others pointed out that non-competes can be particularly exploitative and coercive for professions such as physicians that require State licenses, credentials, and insurance, making relocation even more difficult.

A far smaller number of commenters claimed non-competes are not exploitative or coercive and do not trap workers in jobs or force workers to bear significant harms or costs. Several commenters argued that, because non-competes are often not exploitative and coercive at the time of contracting, they are also not exploitative and coercive at the time workers seek to leave their jobs. According to these commenters, to the extent a non-compete is bargained for and fairly compensated, that same non-compete does not become exploitative and coercive at the time of departure. In response, the Commission notes that commenters overwhelmingly reported workers rarely bargain in connection with, or receive compensation for, non-competes,[433] and the mere existence of compensation does not automatically make that compensation fair.

Some business and business association commenters contended that workers with higher earnings can more easily forgo wages to wait out non-competes, and thus do not feel forced to stay in their jobs. These commenters also argued that non-competes for these workers are often tied to equity or severance, which the worker can choose to forego if they want to compete. These comments are contrary to the extensive comment record indicating that even workers with higher earnings cannot afford to forgo compensation and feel forced to stay in jobs they want to leave due to non-competes. To the extent any such individual workers bargained for or received compensation for a non-compete, the Commission still finds that such non-competes are unfair methods of competition for the independent reason that they are restrictive and exclusionary conduct that tends to negatively affect competitive conditions.

Overall, the comments provide strong support for the Commission's finding that non-competes are exploitative and coercive because they trap workers in jobs or force them to bear significant harms and costs.

For the foregoing reasons, the Commission finds that non-competes with workers other than senior executives are exploitative and coercive and thus facially unfair under section 5.

3. The Commission Finds That Non-Competes Tend To Negatively Affect Competitive Conditions

Based on the Commission's expertise and after careful review of the rulemaking record, including the empirical research and the public comments, the Commission finds that non-competes tend to negatively affect competitive conditions in labor markets for the reasons explained in this Part IV.B.3.a. (As explained in Part IV.B.3.b, the Commission further finds that non-competes tend to negatively affect competitive conditions in markets for products and services.)

As explained in Part II.F, the legal standard for an unfair method of competition under section 5 requires only a tendency to negatively affect competitive conditions. The inquiry does not turn on whether the conduct directly caused actual harm in a specific instance. Here, the tendency of non-competes to impair competition is clear from their nature and function. In any event, the evidence confirms that non-competes do in fact have a negative effect on competitive conditions.

The Commission turns now to the significant evidence of harm to competition in labor markets from non-competes, including evidence of suppressed labor mobility, suppressed earnings, and reduced job quality.

a. Non-Competes Tend to Negatively Affect Competitive Conditions in Labor Markets

The Commission finds that non-competes tend to negatively affect competitive conditions in labor markets by inhibiting efficient matching between workers and employers.

Labor markets function by matching workers and employers. In a competitive labor market, workers compete for jobs by offering their skills and time (*i.e.,* their labor services) to

[433] *See* Part IV.B.2.b.i.

employers, and employers in turn compete for those labor services by offering better pay, benefits, or other elements of job satisfaction.[434] A worker who is seeking a better job—more pay, better hours, better working conditions, more enjoyable work, or whatever the worker may be seeking—can enter the labor market by looking for work. Prospective employers can compete for the worker's services, and the worker's current employer may also compete by seeking to retain the worker—*e.g.,* by offering a raise, promotion, or other enticement.[435] Ultimately, the worker chooses the job that best meets their objectives, and the employer chooses the worker who best meets theirs. In general, the more jobs and the more workers that are available—*i.e.,* the more competing options the worker and employer each have—the stronger the match will be.

Thus, a key component of a competitive labor market is voluntary labor mobility. Choice—the ability of market participants to satisfy their preferences where possible—facilitates competition. In the labor market, voluntary labor mobility reflects both the choices or preferences of workers and that of rival competitors.

However, non-competes introduce a major friction that tends to impair the competitive functioning of labor markets. Non-competes inhibit the efficient matching between workers and employers via the competitive process because, even if a competing employer offers a better job and the worker wants to accept that better job, the non-compete will prevent the worker from accepting it if the new job is within the scope of the non-compete (or if the worker is unsure or afraid it may be). Meanwhile, the employer who would like to hire the worker is prevented from competing to attract that talent. The result is less competition among employers for the worker's services and less competition among workers for available jobs. Since the worker is prevented from taking many jobs that would otherwise be available, the worker may decide not to look for a job at all. Or the worker may enter the labor market but take a job in which they are less productive, such as when a non-compete forces a worker to leave their field of expertise and training.

In this way, non-competes frustrate competitive processes in labor markets. In competitive markets, the ''unrestrained interaction of competitive forces'' yields a variety of benefits such as lower prices for consumers, better wages and working conditions for workers, and higher quality products.[436] In contrast, when ''[i]ndividual competitors lose their freedom to compete'' in the labor market, the importance of worker preference in setting the level of wages and working conditions is reduced, which is ''not consistent with [the] fundamental goal of antitrust law.'' [437] The restraint imposed by non-competes on the interaction of competing employers and competing workers directly undercuts the functioning of the competitive process in determining wages and working conditions. Accordingly, non-competes facially harm the competitive process and tend to negatively affect competitive conditions in labor markets. Evidence that non-competes have in fact had actual detrimental impacts on outcomes of the competitive process—such as workers' earnings, new business formation, and innovation—demonstrate that non-competes do in fact harm competition.

The Commission notes that the actual effect of any one individual non-compete on the overall level of competition in a particular labor market may be marginal or impossible to discern statistically. However, as explained in Part I.B.2, non-competes are prevalent across the U.S. labor force. The empirical literature and other record evidence discussed in this section reflect that non-competes, in the aggregate, negatively affect competitive conditions in labor markets—resulting in harm not only to workers subject to non-competes and the employers seeking to hire them, but also workers and employers who lack non-competes.

The Commission finds that evidence of the effects of non-competes on workers' labor mobility and earnings is sufficient to support its finding that non-competes tend to negatively affect competitive conditions in labor markets.[438] In addition, the Commission believes that this finding is further bolstered by strong qualitative evidence that non-competes reduce job quality.[439]

The Commission's findings relating to labor mobility and earnings are principally based on the empirical evidence described in Parts IV.B.3.a.i and ii. However, the comments provide strong qualitative evidence that bolsters these findings. Furthermore, the Commission notes that the legal standard for an unfair method of competition under section 5 requires only a tendency to negatively affect competitive conditions; empirical evidence of actual harm is not necessary to establish that conduct is an unfair method of competition. In the case of non-competes, however, there is extensive empirical evidence, as well as extensive corroborating public comments, that non-competes negatively affect competitive conditions in labor markets.

i. Non-Competes Suppress Labor Mobility

Evidence of Suppressed Labor Mobility

The Commission finds that non-competes tend to negatively affect competitive conditions in labor markets by suppressing labor mobility, which inhibits efficient matching between workers and employers. The evidence indicates that non-competes reduce labor mobility. Several empirical studies find that non-competes limit the movement of workers between firms and reduce the pool of labor available to existing employers and potential entrants.[440]

In the NPRM, the Commission described the empirical research on non-competes and labor mobility.[441] The Commission stated that, across the board, studies of non-competes and labor mobility find decreased rates of mobility, measured by job separations, hiring rates, job-to-job mobility, implicit mobility defined by job tenure, and within-industry and between-industry mobility.[442] Based on that body of empirical evidence and its review of the record as a whole following the comment period, the Commission finds that non-competes reduce labor mobility.

Several empirical studies find that non-competes reduce labor mobility. Some of these studies analyze the effects of non-competes on labor mobility across the labor force.

A study by Johnson, Lavetti, and Lipsitz examined the impact on labor mobility of all legal changes in the enforceability of non-competes from 1991 to 2014 across the entire labor force.[443] This study finds that

[434] *See* Treasury Labor Market Competition Report at 3–4.

[435] *See id.*

[436] *See N. Pac. Ry. Co.* v. *United States,* 356 U.S. 1, 4 (1958).

[437] *See NCAA* v. *Bd. of Regents of Univ. of Okla.,* 468 U.S. 85, 106–07 (1984).

[438] *See* Part IV.B.3.a.i–ii.

[439] *See* Part IV.B.3.a.iii.

[440] As the Commission stated in the NPRM, it does not view reduced labor mobility as a harm in and of itself. *See* NPRM at 3490. Instead, the Commission finds that the empirical evidence showing non-competes reduce labor mobility is powerful evidence that non-competes do indeed restrict labor market competition by inhibiting the movement of workers between firms—and therefore efficient matching between workers and firms.

[441] NPRM at 3489.

[442] *Id.*

[443] Johnson, Lavetti, & Lipsitz, *supra* note 388. This study was updated in 2023. The updated

substantial decreases in non-compete enforceability cause a significant increase in job-to-job mobility in industries that use non-competes at a high rate.[444]

Evan Starr's study comparing workers in occupations that use non-competes at a high versus low rate finds that a State moving from mean enforceability to no enforceability would cause a decrease in employee tenure for workers in high-use occupations of 8.2%, compared with those in low-use occupations. Tenure in this study serves as a proxy for mobility, since tenure is the absence of prior mobility.[445] This use of a proxy means the outcome of interest is not precisely measured, and the study is less robust than those that examine changes in legal enforceability of non-competes. The study's findings are, however, consistent with the other studies finding that non-competes reduce labor mobility.

Starr, Prescott, and Bishara's study of non-compete use likewise finds that having a non-compete was associated with a 35% decrease in the likelihood that a worker would leave for a competitor.[446] While this finding is based on the use of non-competes (and is accordingly given less weight), the authors also survey workers, who report that the cause of their reduced mobility is their non-compete. The study finds that the mechanism underlying reduced mobility is not whether non-competes are legally enforceable or not, but rather, it is the worker's belief about the likelihood that their employer would seek to enforce a non-compete. Workers who did not believe that employers would enforce non-competes in court were more likely to report they would be willing to leave for a competitor.[447] This study thus not only supports the Commission's finding that the use of non-competes impacts labor mobility, but also supports the Commission's finding that non-competes can exert an *in terrorem* effect on labor mobility even where they are unenforceable.[448] This supports the need to ensure that workers are aware of the prohibition on non-competes.[449]

Other studies analyze how non-competes affect the labor mobility of specific populations of workers. A study by Jessica Jeffers finds that decreases in non-compete enforceability were associated with a substantial increase in departure rates of workers, especially for other employers in the same industry.[450] This study's sample is limited to knowledge workers (*i.e.,* workers whose primary asset is applying their mental skills to tasks), and the study uses a binary—rather than continuous—measure of non-compete enforceability. It does, however, examine several changes in the enforceability of non-competes to generate its results, making it fairly robust.

In addition, two recent studies examined subgroups of the population that were affected by State law changes and find major effects on those populations' labor force mobility. Balasubramanian et al., in 2022, focused on Hawaii's ban of non-competes for high-tech workers and find that the ban increased mobility by 12.5%.[451] Lipsitz and Starr, in 2022, focused on Oregon's ban of non-competes for hourly workers and find that mobility increased by 17.3%.[452]

Comments Pertaining to Labor Mobility Evidence and Commission Responses

The Commission's finding that non-competes suppress labor mobility is principally based on the empirical evidence described in this Part IV.B.3.a.i. However, the comments provide strong qualitative evidence that bolsters this finding.

Many commenters agreed with the Commission's preliminary finding that non-competes suppress labor mobility and stated that this reduction in labor mobility leads to less labor market competition and poorer wages and working conditions.

In response to the NPRM's discussion of this literature, some commenters questioned the adequacy of the studies. For example, one commenter stated that the available research is either limited to specific sectors of the economy, limited geographically, or limited by small sample sizes. Some commenters claimed the empirical research lacked appropriate counterfactuals.

The Commission acknowledges that some of the studies focus on specific industries or specific geographies, and that the studies vary in the methodologies the authors rely on. These arguments do not undermine the utility of the studies, particularly given that they all find that non-competes reduce labor mobility. Moreover, the Commission finds that each of the studies discussed in this Part IV.B.3.a.i conduct their analyses against appropriate counterfactuals. And while there may be some variation in the magnitude of the effect on mobility among industries, several of the empirical studies find economy-wide effects. That evidence shows that non-competes restrict the movement of workers to a significant degree.

Additionally, the record is replete with examples of commenters who recounted personal stories that accord with the empirical literature. The Commission received comments from several thousand individual workers stating that their mobility is or has been restricted by a non-compete. While some commenters who opposed the proposed rule disputed that non-competes prevent workers from finding other jobs in their industry, the Commission finds the weight of the evidence clearly demonstrates a significant effect on labor mobility.

The Commission further notes that many commenters' submissions substantiated its finding that non-competes can have an *in terrorem* effect on labor mobility even where they would not ultimately be enforceable in court.[453] As many commenters explained, the high costs and complexities of non-compete litigation can have a chilling effect on workers and thus reduce worker mobility regardless of whether a court would enforce the non-compete. For this reason, the very existence of a non-compete is likely to deter workers from switching jobs or starting their own business, even if it would ultimately not be enforced. This supports the Commission's view that not only should non-competes' enforcement be prohibited, it is also important to provide a readily understandable,

version of the study reports results slightly differently than the 2022 version cited in the NPRM, but the analysis and results themselves do not meaningfully change. Accordingly, the update to Johnson, Lavetti, and Lipsitz does not materially affect the Commission's analysis of the study.

[444] *Id.* at 21.

[445] Evan Starr, *Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete,* 72 I.L.R. Rev. 783 (2019). The value is calculated as 8.2% = 0.56/6.46, where 0.56 is the reported impact on tenure and 6.46 is mean tenure in the sample.

[446] Evan Starr, J.J. Prescott, & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts,* 36 J. L., Econ., & Org. 633, 652 (2020).

[447] *Id.* at 664.

[448] *See* Part IV.B.2.b.ii.

[449] *See* Part IV.E (describing the final rule's notice requirement).

[450] Jessica S. Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship,* 37 Rev. Fin. Stud. 1 (2024). The 2024 version of Jeffers' paper finds a decline in the departure rate of 7% of the sample mean, and a decline in the within-industry departure rate of 10%.

[451] Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan, & Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers,* 57 J. Hum. Res. S349, S351 (2022).

[452] Lipsitz & Starr, *supra* note 72 at 157.

[453] *See* Part IV.B.2.b.ii.

uniform Federal approach, and notice to workers of unenforceability.[454]

Some commenters who generally opposed the rule questioned the virtue of labor mobility, arguing that when colleagues leave, remaining workers can experience increased workloads or harm to their employer. However, this comment ignores the benefits that will also accrue from those same firms having more ready access to incoming potential colleagues as well. The Commission also notes that unfair conduct cannot be justified on the basis that it provides the firm undertaking the conduct with pecuniary benefits.[455]

Some commenters argued labor mobility has generally been increasing in the U.S. labor market. Setting aside whether this is true, it is not probative of whether the practice of using non-competes reduces labor mobility or negatively affects labor market competition.

For these reasons, the empirical evidence that non-competes suppress labor mobility supports the Commission's finding that non-competes tend to negatively affect competitive conditions in labor markets.

ii. Non-Competes Suppress Workers' Earnings

Evidence of Suppressed Earnings

The Commission finds that non-competes suppress workers' earnings as a result, in part, of decreased labor mobility, supporting the Commission's finding that non-competes tend to negatively affect competitive conditions in labor markets. As the NPRM explained, many studies find increased enforceability of non-competes reduces earnings for workers across the labor market generally; for specific types of workers; and even for workers not subject to non-competes.[456] Several major empirical studies of how changes in non-compete enforceability affect workers' earnings show that increased enforceability of non-competes suppresses workers' earnings.

A study conducted by Johnson, Lavetti, and Lipsitz finds that non-competes limit workers' ability to leverage favorable labor markets to receive greater pay.[457] The authors find that when non-competes are more enforceable, workers' earnings are less responsive to low unemployment rates, which workers typically leverage to negotiate pay raises. The authors estimate that a nationwide ban on non-competes would increase average earnings by approximately 3–14%.[458] Of the studies of how non-competes affect earnings, this study has the broadest coverage. It spans the years 1991 to 2014, examines workers across the labor force, and uses all known common law and statutory changes in non-compete enforceability to arrive at its estimates. This study is very robust, as it satisfies all of the principles outlined in Part IV.A.2.

The same study also finds that non-competes increase racial and gender wage gaps by disproportionately suppressing the wages of women and non-White workers. While the study estimates that earnings of White men would increase substantially if a nationwide ban on non-competes is enacted, the comparable earnings increase for workers in other demographic groups would be up to twice as large, depending on the characteristics of the group.[459] The authors estimate that making non-competes unenforceable would close racial and gender wage gaps by meaningful amounts, although the mechanism behind this effect is unclear.[460]

Furthermore, a study conducted by Evan Starr estimates that earnings fall by about 4% where a State shifts its policy from non-enforcement of non-competes to a higher level of enforceability.[461] This study covers a sample which is broadly representative of the entire labor force from 1996 to 2008. Unlike many of the other studies described in this Part IV.B.3, this study does not use a change in enforceability of non-competes to analyze the impact of enforceability. Rather, it examines the differential impact of enforceability on workers in occupations that use non-competes at a high rate versus workers in occupations that use non-competes at a low rate. As described in Part IV.A.2, studies comparing differential usage of non-competes are generally less informative than studies examining changes in enforceability, although in this particular study the comparison between workers in high- and low-use occupations may effectively control for State-level differences between labor markets, lending more credibility to the estimates. More importantly, the Commission notes that the study corroborates the estimates from other studies that rely on more credible research designs, and therefore is appropriately viewed as additional evidence supporting the range of estimated effects on wages across the labor market.

Two additional studies analyze effects of non-competes on earnings for specific populations of workers. A study conducted by Lipsitz and Starr focuses on a natural experiment in Oregon, where non-competes were banned for hourly workers with relatively low earnings. The study estimates that when Oregon stopped enforcing non-competes for hourly workers, their wages increased by 2–3% relative to workers in States that did not experience legal changes. The study also finds a greater effect (4.6%) on workers in occupations that used non-competes at a relatively high rate.[462] The authors additionally find that women's earnings increased at a higher rate, with earnings increases after the non-compete ban of 3.5% for women, versus 1.5% for men.

A study by Balasubramanian et al. focuses on a natural experiment in Hawaii, which banned non-competes for high-tech workers in 2015. The study finds earnings of new hires increased by about 4% after the ban, relative to earnings in other States without bans.[463]

In addition to this research, which shows that increased enforceability of

[454] *See* Part IX.C. *See also supra* note 386 (explaining that studies assessing changes in enforceability of non-competes likely underestimate the effects of non-competes, given that workers may refrain from seeking or accepting work or starting a business even if the non-compete is likely unenforceable, and explaining the importance of notice to workers).

[455] *Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 371 (1965) (considering that defendant's distribution contracts at issue ''may well provide Atlantic with an economical method of assuring efficient product distribution among its dealers'' and holding that the ''Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves''); *FTC* v. *Texaco,* 393 U.S. 223, 230 (1968) (following the same reasoning as *Atlantic Refining* and finding that the ''anticompetitive tendencies of such a system [were] clear''); *L.G. Balfour Co.* v. *FTC,* 442 F.2d 1, 15 (7th Cir. 1971) (''While it is relevant to consider the advantages of a trade practice on individual companies in the market, this cannot excuse an otherwise illegal business practice.''). Justifications that are not cognizable under other antitrust laws are also not cognizable under section 5.

[456] NPRM at 3486–88.

[457] Johnson, Lavetti & Lipsitz, *supra* note 388 at 37.

[458] *Id.* at 3. The NPRM reported an increase in average earnings of 3.3–13.9%. Those numbers were taken from an earlier version of the Johnson, Lavetti, and Lipsitz paper. The updated paper finds an increase in average earnings of 3.2–14.2%. The change does not materially affect the paper's findings or the Commission's analysis of the paper.

[459] *Id.* at 42. The 2023 version of the paper by Johnson, Lavetti, and Lipsitz reports earnings increases of 1.3% for White men, and increases between 1.5–3.2% for workers in other demographic groups, corresponding to a change in non-compete enforceability equal to the difference between the 75th and 25th percentiles. These differences are statistically significant for Black men and non-White, non-Black women.

[460] *Id.* The 2023 version of the paper reports that the earnings gaps would close by 1.5–3.8% given a change in non-compete enforceability equal to the difference between the 75th and 25th percentiles.

[461] Starr, *supra* note 445 at 783.

[462] Lipsitz & Starr, *supra* note 72 at 143.

[463] Balsubramanian et al., *supra* note 451 at S349.

non-competes reduces workers' earnings across the labor market generally and for specific types of workers, two empirical studies find that increased enforceability of non-competes suppresses earnings even for workers who are *not* subject to non-competes.

The Johnson, Lavetti, and Lipsitz study, in a separate analysis, isolates the impact of a State's enforceability policy on workers not directly affected by that policy to demonstrate that non-competes affect not just the workers subject to non-competes, but the broader labor market as well. The study finds that increases in non-compete enforceability in one State have negative impacts on workers' earnings in bordering States, and that the effects are nearly as large as the effects in the State in which enforceability changed (but taper off as the distance to the bordering State increases).[464] The study estimates that a legal change in one State has an effect on the earnings of workers just across that State's border that is 76% as great as for workers in the State in which the law was changed.[465] In other words, when one State changes its law to be more permissive of non-competes and itself experiences a decrease in workers' earnings of 4%, workers just across the border (*i.e.,* workers who share a labor market)[466] would experience decreased earnings of 3%.[467] The authors conclude that, since the workers across the border are not directly affected by the law change (*i.e.,* contracts that they have signed do not become more or less enforceable), this effect must be due to changes in the local labor market.[468] The researchers based their analysis on where workers worked, rather than their residence, so the results are not tainted by workers who worked in the State where the law changed but lived across the border.

The second of these studies, a study conducted by Starr, Frake, and Agarwal, analyzed workers without non-competes who worked in States and industries in which non-competes were used at a high rate.[469] The authors find that, when the rate of use of non-competes in an industry in a State is higher, wages are lower for workers who do not have non-competes but who work in the same State and industry. This study also finds that this effect is stronger where non-competes are more enforceable.[470]

The authors show that the reduction in earnings (and in labor mobility) is due to a reduction in the rate of job offers. Individuals in State/industry combinations that use non-competes at a high rate do not receive job offers as frequently as individuals in State/industry combinations in which non-competes are not frequently used.[471] The authors also demonstrate that decreased mobility and earnings are not due to increased job satisfaction (*i.e.,* if workers are more satisfied with their jobs, they may be less likely to change jobs, and more likely to accept lower pay).[472]

Given some methodological limitations of this study, the Commission views it as supporting the other evidence that non-competes have negative spillover effects on earnings for workers without non-competes and reduce labor mobility. Namely, the research design relies on cross-sectional differences in enforceability of non-competes. Although this study also examines the use of non-competes, it does not compare individuals who are bound by non-competes to individuals who are not. Instead, it examines the rate of use across industries and States, and therefore avoids the statistical biases inherent in studies which compare individuals with and without non-competes. The authors also employ tests to increase confidence in the causal interpretation of these results, but they cannot conclusively rule out explanations outside of the scope of their data.

Several additional studies examine the association between non-compete use—rather than enforceability—and earnings. For the reasons described in Part IV.A.2, the Commission finds that these studies are less credible in measuring how non-competes affect earnings, and accordingly the Commission gives these studies minimal weight.

In one such study, Starr, Prescott, and Bishara examine survey results and find that non-compete use is associated with 6.6% to 11% higher earnings.[473] In another study, using Payscale.com data, Balasubramanian, Starr, and Yamaguchi find that individuals with non-competes (regardless of what other post-contractual restrictions they had) had 2.1–8.2% greater earnings than individuals with no post-contractual restrictions. However, this positive association may be due to non-competes often being bundled with NDAs. The authors find that, compared with individuals subject only to NDAs, non-competes are associated with a 3.0–7.3% *decrease* in earnings, though the authors do not disentangle this effect from the effects of non-solicitation and non-recruitment provisions.[474] Another study, by Lavetti, Simon, and White, finds that use of non-competes among physicians is correlated with greater earnings (by 14%) and greater earnings growth.[475] Finally, Rothstein and Starr find that greater use of non-competes is correlated with higher earnings.[476]

Because these studies merely reflect correlation and are unlikely to reflect causation, the Commission gives them little weight. The NPRM noted that the Lavetti, Simon, and White physician study partially mitigates this methodological flaw by comparing earnings effects in a high- versus a low-enforceability State (Illinois versus California). However, at best, this comparison is a cross-sectional comparison with a minimally small number of States being compared. The study does not consider changes in non-compete enforceability over time. Therefore, it is impossible to disentangle underlying differences in those two States from the effects of non-compete enforceability. The Commission accordingly gives this study, like the other studies reliant on comparisons of populations using non-competes and not using non-competes, little weight, though the shortcoming is slightly mitigated in the case of this study. While this study is specific to physicians, the Commission nonetheless finds that studies employing stronger methodologies (especially studies of

[464] The NPRM cited an earlier version of Johnson, Lavetti, and Lipsitz's study that estimated that a legal change in one State would have an effect on the earnings of workers just across that State's border that was 87% as great as for workers in the State in which the law was changed. NPRM at 3488. The data cited in this final rule reflect an updated version of this study.

[465] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 51. Seventy-six percent is calculated as the coefficient on the donor State NCA score (−.137) divided by the coefficient on own State NCA score (−.181).

[466] See U.S. Econ. Rsch. Serv., Commuting Zones and Labor Market Areas, *https://www.ers.usda.gov/data-products/commuting-zones-and-labor-market-areas/.*

[467] The Commission notes that the estimates in the updated version of Johnson, Lavetti, and Lipsitz's study are slightly different, but qualitatively similar to the earlier estimates noted in the NPRM. The results remain statistically significant and do not materially affect the Commission's analysis.

[468] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 30.

[469] Evan Starr, Justin Frake, & Rajshree Agarwal, *Mobility Constraint Externalities,* 30 Org. Sci. 961 (2019), online ahead of print at *https://pubsonline.informs.org/doi/abs/10.1287/orsc.2018.1252* at 6.

[470] *Id.* at 11.

[471] *Id.* at 10.

[472] *Id.* at 13.

[473] Starr, Prescott, & Bishara *supra* note 68 at 75.

[474] Balasubramanian, Starr, & Yamaguchi, *supra* note 74 at 40. The percentage range is calculated as $e^{-0.030}-1$ and $e^{-0.076}-1$, respectively.

[475] Lavetti, Simon, & White, *supra* note 82 at 1051. The increase in earnings is calculated as $e^{0.131}-1$.

[476] Rothstein & Starr, *supra* note 77 at 1.

workers positioned similarly in the income distribution[477] and studies which broadly represent the U.S. workforce[478]) provide compelling evidence that non-competes significantly suppress wages.

Comments Pertaining to Suppressed Earnings and Commission Responses

The Commission's finding that non-competes suppress earnings is principally based on the empirical evidence described in this Part IV.B.3.a.ii. However, the comments provide strong qualitative evidence that bolsters this finding.

The Commission received thousands of comments from workers describing how non-competes suppressed their earnings. These commenters spanned a wide variety of industries, hailed from across the U.S., and recounted a common experience: a non-compete prevented them from earning more. Illustrative examples of these comments include the following:

• I worked at a TV station. A corporation owned us and forced me to sign a yearly non-compete in order to remain in my position. After a few years, I was offered a management job with a much bigger title and much more money. . . . However, the corporation that owned us wouldn't even talk about letting me out of the non-compete. They wouldn't even discuss a settlement. They totally refused to allow me to pursue a much higher salary and a much higher position, no matter what was offered. I was forced to choose between staying in my current job, and not being able to improve my job or money, or being unemployed for 6 months.[479]

• I have been subject to a non-compete for 11 years in aggregate as a physician. Because of my non-compete, I am unable to take a position with another organization without having to drive much farther outside of my non-compete stipulated geographic restrictions (which would add to the time that I am away from my family, and costs more in fuel and vehicle maintenance). Because of my non-compete, I haven't had a raise in 6 years, because I can't negotiate with my employer because I have no bargaining position to negotiate from if I don't have options of alternate employment within the restrictions of my non-compete.[480]

• I recently received two job offers with better compensation, but I had my non-compete reviewed by an attorney and learned that it would open myself up to a significant lawsuit and potential fines. I most likely have to sit out a year and either work completely outside my field where I have advanced degrees or not work at all. Since I am the primary breadwinner, this is not financially possible for my family, so I have to stick with my current employer who has not given me a pay increase in 2 years.[481]

• I am a Certified Nurse Practitioner and signed [a non-compete]. I live in Minnesota and would be required to travel one hour one way in order to fulfill [the] agreement. . . . My employer increased my responsibilities (on-call hours added) without additional pay using vague language in my binding agreement. I would have to hire a lawyer and spend thousands of dollars to file a lawsuit to get the agreement releasing me. . . . My employer took advantage of my binding agreement and did not increase my [Relative Value Unit] rate in 5 years for my or other Nurse Practitioners in our organization.[482]

• I was just starting out in my career when I finally got a part time job in my field of geology. Unfortunately, it didn't last long and I was let go. But because of a non compete agreement I had to sign I couldn't take another job in my field even though I had a good lead on one. Instead I had to take a job as a waitress making less than minimum wage.[483]

• I work for an IT company, low-level employee just above minimum wage, and I had to sign one of these to get the job even though I don't know any knowledge above what someone could learn in 10 or 15 hours on YouTube, yet I still had to sign this which makes it so I can't compete . . . if they offered me better pay.[484]

• I began working for my employer 10 years ago as a very young and inexperienced single mother. I desperately needed a job that could pay more than minimum wage, and I eagerly accepted my position and non-compete status. I have now been working at almost the same rate of pay (as raises are not readily given to us regardless of recessions or cost of living increases)—for a DECADE. My children are approaching college age, and I will absolutely need a higher income to help fund their educations.[485]

• I am in the laboratory medicine field and was laid off from a job as an implementation rep for an instrument vendor. Other companies were the competition, and I was held to a non-compete. This caused me to go from a six figure salary with great benefits back to the hospital making barely 60k as a single mother with twins and no emergency fund saved! I later went into the UV disinfection field and developed a tremendous amount of knowledge regarding minimizing the spread of infections in hospitals (pre-covid). After 5 years, I was laid off and prevented from continuing in this niche field that I had spent so much time developing a skillset and statistics within. I was only given a 2 week severance (along with a reminder of legal action if I worked for the competition). Companies use this as a bully tactic![486]

In addition to receiving thousands of comments recounting personal stories of non-competes stymieing the commenters' ability to get a better-paying job or a raise, many commenters also described how, over the long term, non-competes can lower wages and diminish career prospects for workers forced to sit out of the market or start over in a new field. The Commission also received numerous comments stating that non-competes exacerbate wage gaps based on gender and race, including by decreasing entrepreneurship and wages to a greater extent for women and people of color and by giving firms more power to engage in wage discrimination.[487]

With respect to the empirical literature, numerous commenters agreed that there is a wealth of empirical evidence to support the Commission's preliminary finding that, by inhibiting efficient matching between workers and employers, the use of non-competes is harming workers by suppressing their earnings. In addition to the literature discussed in the NPRM and in this final rule, some commenters pointed to a 2016 report from the Treasury Department that examines the correlation between non-compete enforceability and both earnings and earnings growth at the State level. The Treasury report finds that a one-standard-deviation increase in State-level enforceability of non-competes is correlated with 1.38% to 1.86% lower earnings, which can be found in both lower earnings upon starting a job and lower earnings growth.[488] The Commission agrees with commenters that this provides additional support for the final rule. However, the Commission gives less weight to cross-sectional studies of enforceability, like the 2016 Treasury report, that examine the correlation between non-compete enforceability and earnings growth.[489] The Commission relies more heavily on the studies that find that non-competes suppress earnings based on examining natural experiments.

Some commenters opposing the rule argued that studies of non-compete use, including the studies described in this Part IV.B.3.a.ii, show a positive association between non-compete use and earnings, especially when early notice of non-competes is provided,

[477] Balasubramanian et al., *supra* note 451.

[478] Johnson, Lavetti, & Lipsitz, *supra* note 388.

[479] Individual commenter, FTC–2023–0007–8067.

[480] Individual commenter, FTC–2023–0007–0616.

[481] Individual commenter, FTC–2023–0007–0651.

[482] Individual commenter, FTC–2023–0007–0857. Relative value units are a component of a methodology that calculates earnings for some healthcare workers.

[483] Individual commenter, FTC–2023–0007–11973.

[484] Individual commenter, FTC–2023–0007–11137.

[485] Individual commenter, FTC–2023–0007–7238.

[486] Individual commenter, FTC–2023–0007–2416.

[487] *See also* Part IV.B.3.a.iii (summarizing comments from workers and worker advocates stating that non-competes increase illegal conduct by employers and make it harder for workers to report illegal conduct).

[488] Dept. of the Treasury, *Non-Compete Contracts: Economic Effects and Policy Implications* (March 2016) at 20.

[489] *See* Part IV.A.2.

while others cautioned against interpreting these relationships as causal. The Commission agrees with commenters who caution against a causal interpretation of these studies, which are unable to determine whether non-compete use causes differences in earnings, whether earnings cause differences in non-compete use, or whether a third factor simultaneously determines both, as discussed in Part IV.A.2.

Some commenters opposing the rule stated that the most comprehensive study of the earnings effects of non-competes (the Johnson, Lavetti, and Lipsitz study described in this Part IV.B.3.a.ii) examines only relatively incremental changes in laws governing the enforceability of non-competes (*i.e.,* changes other than full bans), and claimed that this study thus does not shed light on the effects of a full prohibition. In response, the Commission notes that the analysis in Johnson, Lavetti, and Lipsitz finds that the effects of changes in non-compete enforceability are broadly linear. This means the effect of a change in enforceability twice the size of another change results in a change in workers' earnings that is approximately twice as large. As a result, the Commission finds that it would be appropriate to extrapolate from the effects of incremental changes in non-compete laws to the effects of prohibitions, at least in the context of worker earnings.[490] In other words, if incremental changes in enforceability lead to a certain level of earnings effects, it is reasonable to presume—based on the linearity of the relationship between changes in enforceability and workers' earnings—larger changes will lead to larger effects.

That said, in the regulatory impact analysis, the Commission does not extrapolate from the incremental changes observed in these studies with respect to earnings effects.[491] Instead, the Commission follows a conservative approach and assumes that the prohibition in the final rule, even though it is comprehensive, will have the same effects on earnings as the incremental legal changes observed in these studies. Therefore, even if the effects of changes in non-compete enforceability are not linear, the Commission's analysis of the economic impacts of the final rule is not undermined because, if anything, it underestimates the benefits of the rule.

A commenter argued that the Johnson, Lavetti, and Lipsitz dataset is outdated because it examines enforceability between 1991 and 2014. In response, the Commission finds that while the enforceability measures contained in that dataset do not perfectly reflect current enforceability due to changes in State law in the intervening several years, the measures still reflect the impacts of non-compete enforceability on economic outcomes, and likely still have strong predictive power.

Some commenters opposing the rule asserted that the overall competitiveness of U.S. labor markets undermines the argument that workers suffer from non-competes. In response, the Commission notes that a range of factors have weakened competition in labor markets.[492] In any event, the level of competitiveness of a labor market does not justify use of a practice that tends to negatively affect competitive conditions.

Some commenters opposing the rule pointed to academic writings, including a summary of the research by an FTC economist writing in his personal capacity in 2019, stating that there was limited evidence on the effects of such clauses. The Commission finds that these writings are generally outdated and disagrees with them. As the various explanations of the empirical research in Parts IV.B and IV.C illustrate, much of the strongest evidence on the effects of non-competes has been published in recent years. The Commission notes further that Evan Starr, one expert who voiced concerns over the state of the evidence in the past, submitted a comment that was broadly supportive of the interpretation of the evidence in the NPRM and of the proposed rule.[493]

Other comments opposing the rule stated that the heterogeneity of the impact of a non-compete ban on earnings undermined the Commission's preliminary finding regarding the effects of non-competes on earnings. These commenters asked whether the population-wide average effects noted in certain studies apply across the workforce or only to certain individuals (*e.g.,* at certain points in the income distribution), certain professions, or in certain geographies (*e.g.,* where local labor markets tend to be more concentrated). Another commenter argued that if a ban on non-competes drives up earnings for highly skilled workers, wages might decrease for other categories of workers.[494]

In response to these comments, the Commission finds that, while estimates of the magnitude of the effect of non-competes on earnings vary to some extent across groups of workers, the effects are directionally and qualitatively similar across groups. For example, while Balasubramanian et al. do not report a table with average earnings for workers in their study, workers in the high tech jobs studied tend to be relatively highly paid, and the study finds non-competes suppress these workers' earnings.[495] On the lower end of the earnings spectrum, Lipsitz and Starr report average earnings of $16.41 per hour for workers in their study, which corresponds to annual earnings of approximately $34,133 per year (assuming 2,080 hours worked per year), and their study likewise finds that non-competes suppress the earnings of these workers.[496]

Additionally, Johnson, Lavetti, and Lipsitz's study of workers across the economy shows that, while college-educated workers and workers in occupations and industries in which non-competes are used at a high rate experience relatively larger adverse effects on their earnings from non-compete enforceability, the estimated effect of increased enforceability on other workers is still negative (albeit statistically insignificant in this study).[497] In short, while these studies do not estimate the magnitude of negative effects for every subset of the population, the finding of negative effects on earnings is consistent across dissimilar subsets of the population.

A commenter that opposed the NPRM asserted that a categorical ban could decrease wages for highly paid workers, arguing that such workers could negotiate higher wages in exchange for the non-compete that they would lose with a ban. This speculative assertion is belied by the comment record, which indicates that the highly paid, highly skilled workers who are not senior

[490] *See* Figure 3; Johnson, Lavetti, & Lipsitz, *supra* note 388 at 17.

[491] *See* Part X.F.5.

[492] See Treasury Labor Market Competition Report at i.

[493] Comment of Evan Starr, FTC–2023–0007–20878.

[494] These commenters were generally referring to higher-wage workers, but not senior executives. Comments that focused on senior executives are addressed in Part IV.C.

[495] Workers in the occupation Computer and Information Research Scientists (SOC code 15–1221) in the private sector had median earnings of $156,620 in 2022, while Software Developers (SOC code 15–1252) in the private sector had median earnings of $127,870 in 2022. BLS, Occupational Employment and Wage Statistics, *https://www.bls.gov/oes/tables.htm.* These private-sector data are from the May 2022 National industry-specific and by ownership XLS table (*see* table labeled ''national_owner_M2022_dl'').

[496] Lipsitz & Starr, *supra* note 72 at 148.

[497] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 57.

executives are also unlikely to negotiate non-competes.[498] It is also belied by empirical evidence that non-competes suppress earnings for highly paid workers.[499]

Similarly, commenters opposing the rule questioned whether earnings effects merely result from firms hiring different types of workers after changes in non-compete enforceability (for example, workers with different levels of experience or education). In response to these comments, the Commission first notes that the studies find adverse impacts across the labor force. Therefore, even if a different mix of types of workers were hired due to non-compete enforceability, the evidence shows workers' wages are suppressed across the labor force when non-competes are more enforceable. Additionally, the Commission notes that the study by Lipsitz and Starr compares the earnings growth of individual workers before and after the legal change in Oregon, showing that earnings growth increased after the non-compete ban. This provides some evidence that the effects observed in the literature are not simply due to substitution, since individual workers' earnings trajectories would not be changed if all the effects were simply due to firms substituting one type of worker for another.[500]

Some commenters opposing the rule asserted that enforceability indices are likely measured with substantial error. These commenters argue that the indices are based on qualitative analyses of State laws and not data on how frequently non-competes are actually enforced or the results of these enforcement cases. The Commission finds the enforceability indices are sufficiently reliable, because they are generated through careful analysis of State law that takes into account variation in legal enforceability along multiple dimensions.[501] Moreover, a 2024 study using enforcement outcome data finds that a non-compete ban in Washington increased earnings, consistent with the studies using enforceability indices.[502]

Some commenters opposing the rule asserted that Hawaii's prohibition of non-competes in the technology industry may not have covered the workers claimed (in particular, omitting workers in the broadcast industry).[503] These commenters also asserted that Hawaii simultaneously banned non-solicitation clauses.

The Commission finds the study of Hawaii's non-compete ban to be informative, despite these limitations. First, any workers omitted from coverage by the statute, but considered as affected in the study, would lead to a phenomenon known as "attenuation bias," which causes estimated effects to underestimate the true impact.[504] Second, the non-solicitation agreements banned by the Hawaii law were non-solicitation of coworker agreements (otherwise known as non-recruitment agreements)—agreements under which workers are barred from recruiting former coworkers, as opposed to non-solicitation of client agreements, under which workers are barred from soliciting former clients. While non-solicitation of coworker agreements may have a marginal impact on workers' earnings (*e.g.,* in situations in which workers only find out about job opportunities via past coworkers), the Commission does not find it likely that they have a major effect on workers' earnings. They may prevent some workers from hearing about some job opportunities, but unlike non-competes, they do not prevent workers from taking those opportunities. And unlike non-solicitation of client agreements, they do not frustrate workers' ability to build up a client base after moving to a new employer. The Commission therefore finds it likely that much of the impact identified in the study of the Hawaii law is due to non-competes. The Commission also notes that the Hawaii study is directionally consistent with the results from other more robust studies that use different methodologies.

Some commenters opposing the rule argued that the impact of Oregon banning non-competes for low-wage workers may have been limited because the law did not affect existing non-competes; because non-competes were already disfavored in Oregon before the law change; and because the law included multiple carve-outs. Commenters also argued the negative effects on earnings found in Oregon may have been confounded by the Great Recession.

The Commission finds that those concerns are not a compelling reason to discard the study. The study carefully examines multiple comparisons of workers within Oregon and across States. The results therefore cannot be explained by a differential response of Oregon to the Great Recession, a differential response of hourly workers to the Great Recession, or even a differential response of hourly workers in Oregon to the Great Recession. The Commission also does not believe that the study is undermined because the law did not affect existing non-competes and included multiple carve-outs, or because non-competes were disfavored in Oregon before the law changed. These factors likely mitigated the magnitude of the law's negative effect on earnings, rather than exaggerating it.

Some commenters opposing the rule argued that Johnson, Lavetti, and Lipsitz[505] claim that "[t]he overall effect of [non-compete] enforceability on earnings is ambiguous," and that this undermines the Commission's preliminary findings. However, these commenters take this quote out of context. The authors were referring to a theoretical model, not to the empirical work in their paper. When economists do empirical research, they often begin by constructing a theoretical model and describing what the theory would predict; they then describe their empirical findings, which may show a different result. The authors described that it is unclear, theoretically, whether non-compete enforceability would increase or decrease earnings. However, the empirical findings of the study were clear: as the authors stated, "We find that increases in [non-compete] enforceability decrease workers' earnings."[506] The fact that the authors described the theoretical results of a hypothesized model as ambiguous does not undermine the fact that their study had clear empirical results.

Some healthcare businesses and trade organizations opposing the rule argued that, without non-competes, physician shortages would increase physicians' wages beyond what the commenters view as fair. The commenters provided no empirical evidence to support these assertions, and the Commission is unaware of any such evidence. Contrary to commenters' claim that the rule would increase physicians' earnings beyond a "fair" level, the weight of the evidence indicates that the final rule

[498] *See* Parts IV.B.2.b.i and IV.C.1.

[499] *See, e.g.,* Balasubramanian et al., *supra* note 451.

[500] Lipsitz & Starr, *supra* note 72, Online Appendix at 18.

[501] Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy,* 13 U. Pa. J. Bus. L. 751 (2011); Barnett & Sichelman, *supra* note 389.

[502] Takuya Hiraiwa, Michael Lipsitz, & Evan Starr, *Do Firms Value Court Enforceability of Noncompete Agreements? A Revealed Preference Approach* (2024), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4364674.*

[503] Balasubramanian et al., *supra* note 451.

[504] Attenuation bias occurs when the independent variable (here, whether a worker is covered by the ban) is measured with error.

[505] Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* (2021) at 11; *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381.*

[506] *Id.* at 2.

will lead to fairer wages by prohibiting a practice that suppresses workers' earnings by preventing competition; that is, the final rule will simply help ensure that wages are determined via fair competition. The Commission also notes that it received a large number of comments from physicians and other healthcare workers stating that non-competes exacerbate physician shortages.[507]

One commenter opposing the rule criticized the analysis in the Johnson, Lavetti, and Lipsitz study, suggesting that data on where individuals live are not necessarily indicative of where individuals work, and that identified spillover effects may simply be due to cross-border commuters. The Commission disagrees, because, as noted, the study considers whether the workers are subject to enforceable non-competes based on their work location.

A commenter also argued that if the absence of non-competes helped workers, one would expect California, North Dakota, and Oklahoma to have the highest median incomes among all the States. The Commission believes this expectation is inapt. Given the evidence that non-competes suppress workers' earnings, earnings in California, North Dakota, and Oklahoma are likely higher than they would be if non-competes were enforceable, but there is no reason to expect they would necessarily be higher than all other States.

One commenter opposing the rule asserted that the Commission's citation of one study in the NPRM was insufficient to show that non-competes are directly tied to discriminatory behavior by employers, or that non-competes worsen racial or gender wage gaps. The Commission does not rest its finding in this final rule that non-competes tend to negatively affect competitive conditions on findings of increased discriminatory behavior or exacerbation of gender and wage gaps. The Commission merely notes that there are two empirical studies—described under ''Evidence of suppressed earnings''—that find that non-competes do, in fact, exacerbate earnings gaps.

One commenter opposing the rule stated that closing racial and gender wage gaps may harm racial minorities and women if their wages were to fall in absolute terms. Another commenter argued that the proposed rule would reduce capital investment and output, which would decrease White male workers' wages. In response, the Commission notes that the study by Johnson, Lavetti, and Lipsitz shows that the impact of a decrease in non-compete enforceability on earnings is positive for workers in each of these groups.

The empirical evidence makes clear that, by restricting a worker's ability to leave their current job to work for a competitor or to start a competing business, non-competes reduce workers' earnings, supporting the Commission's finding that non-competes tend to negatively affect competitive conditions in labor markets.

iii. Non-Competes Reduce Job Quality

In the NPRM, the Commission recognized that non-competes may also negatively affect working conditions, *i.e.,* job quality,[508] although this had not been studied in the empirical literature (likely because it is harder to quantify). Competition in labor markets yields not only higher earnings for workers, but also better working conditions.[509] In a well-functioning labor market, workers who are subject to poor working conditions can offer their labor services to an employer with better working conditions. Such workers can also start businesses, giving them more control over working conditions. Non-competes frustrate this competitive process by restricting a worker's ability to switch jobs or start a business. Furthermore, in a well-functioning labor market, employers compete to retain their workers by improving working conditions. Where workers are locked into a job—because their alternative employment options are restricted—those competitive forces are diminished and working conditions can suffer. The Commission accordingly sought comment on this topic.

In response, thousands of workers with non-competes described how, by frustrating these competitive processes, non-competes prevent them from escaping poor working conditions or demanding better working conditions. Based on the large number of comments the Commission received on this issue and the wide variety of negative and severe impacts commenters described, the Commission finds that, in addition to suppressing earnings, non-competes negatively affect working conditions for a significant number of workers.

The Commission finds that the effects of non-competes on labor mobility and workers' earnings are sufficient, standing alone, to support its finding that non-competes with workers other than senior executives tend to negatively affect competitive conditions in labor markets. However, the Commission believes its finding that non-competes are an unfair method of competition is further bolstered by this strong qualitative evidence related to non-competes degrading working conditions.

Numerous workers and worker advocacy organizations described how non-competes compel workers to endure jobs with poor working conditions. Illustrative examples of these comments include the following:

- In March 2018, I was fired from a job in local news for refusing to go into an unsafe situation. I'd recently received a letter from a man threatening to kidnap me. When my boss decided he would still send me out alone in the field, I fought him on it, lost, and was terminated. Three weeks later, I found out I was pregnant. Unable to work in my field because of a noncompete enforced even AFTER I was terminated, I had no choice but to apply for WIC and government assistance, and work at a retail job making half my previous salary. I wanted to work. I wanted money to support my child. I wanted money to move closer to home, to escape a domestic violence situation. My noncompete kept me in a horrible spot, and nearly cost me my life.[510]
- I started my first job as a Nurse Practitioner in 2019. All positions I interviewed for required a non-compete. . . . In my case, I work for an employer that is hostile, discriminated against me during pregnancy and maternity leave and has raised his voice at me in meetings. He told me I was lucky to even have a job after becoming pregnant. I learned after starting at the practice that he has shown this pattern before with previous employees. I say this because all of these above-mentioned reasons are why I have the right to want to quit my job and move on. I desperately want to leave and start another job but I can't because of the non compete. I feel like a prisoner to my job. I feel depressed in my work conditions and I feel like I have no way out.[511]
- I'm a barber and violated a non-compete about 6 months ago. . . . I worked for my previous employer for two years in a toxic environment. I told my employer how work was affecting my home life on more than one occasion and she did nothing. . . . How was I to know that I would be working in a toxic environment when I applied? So ultimately, I decided in order to be happy and make a living wage, I'd have no choice but to violate my non-compete. She came after me in no time flat. Now I'm paying legal fees and at risk of going to court and losing my job for 6 more months. . . . [I]f I'm working in poor working conditions, I should be able to work where I please. For two years, my job and employer affected my mental health. I chose to take anti-depressants after things got bad at work, upped my dosage twice as work

[507] *See* Part IV.B.3.b.iv for a more detailed summary of these comments.

[508] NPRM at 3504.

[509] Treasury Labor Market Competition Report at i.

[510] Individual commenter, FTC–2023–0007–12813.

[511] Individual commenter, FTC–2023–0007–4989.

became progressively worse and since I've left, I've stopped taking my medication.[512]

- I am a commissioned employee in the mortgage world, and I had a non-compete with my former company in Ohio. Near the end of my time at this company, they merged with another company and put the new company in charge of the sales staff. It was miserable. We started having issues, even with having basic supplies, and it went from just harming me to harming my ability to get business complete, which harms the consumer. I left and I was sued for a three year period. . . . I really do not feel that [non-competes] should be allowed. You are stuck at employers and they can treat you in any manner that they please because they know that they can make your life a living hell if you leave them.[513]
- Like many new graduates in the medical field, I signed on with a company that made numerous empty promises. . . . What I was not prepared for, was the company's strategic increase in facilities in which I was to perform services under this contract. In the short span of 2 years, I did neurophysiological monitoring for 24 facilities . . . . When working conditions fell apart regardless of my requests for adequate sleep following 36 hours straight of working on call at my designated stroke hospital, time for meals or breaks within 18+ hour work days, and a reasonable travel distance within the area the company demanded I relocate to, I was met with threats from HR regarding my non-compete if I were to leave. . . . Working conditions became so intense, I was placed on migraine medications at the recommendations of my doctor and required three separate trips in the ER for medical conditions related to stress, inability to eat or drink while tied within tens of hours long surgeries . . . . Again I was met with threats from HR and now their legal team.[514]

Many commenters stated that non-competes harm working conditions for lower-wage workers. However, there were many commenters in higher-wage jobs who also stated that non-competes harmed their working conditions. For example, numerous physicians explained that they were trapped in jobs with poor working conditions because of non-competes. Many of these physicians described how non-competes accelerate burnout in their profession by making it harder for workers to escape bad working conditions or demand better working conditions. Many commenters recounted how they left poor work environments but non-competes harmed them by forcing them to leave their field, move out of the area where they lived, or spend time and money defending themselves from legal action. Many commenters argued that prohibiting non-competes would increase workers' bargaining power and in turn incentivize employers to provide better work environments.

Workers in both high-wage and low-wage professions, as well as worker advocacy groups, stated that by diminishing workers' competitive alternatives, non-competes keep workers trapped in jobs where they experience dangerous, abusive, or toxic conditions; discrimination; sexual harassment; and other forms of harassment. These commenters also described how non-competes trap some workers in jobs where their employer commits wage and hour violations, such as wage theft, as employers that use non-competes can insulate themselves from the free and fair functioning of competitive markets and are thus more likely to be able to steal worker wages with impunity. Several commenters said they were unable to receive benefits because a non-compete rendered them unable to switch to a job with better benefits or rendered them unable to leave their job when their employer took their benefits away. A professional membership network for survivors of human trafficking explained that traffickers masquerading as legitimate businesses use non-competes to prevent trafficking victims from leaving.

Some workers and advocacy organizations stated that non-competes increase the potential for harm from retaliation. These commenters stated that restricting a worker's employment opportunities makes it even harder for workers to find new jobs after experiencing retaliation. These commenters argued that this discourages workers from reporting fraud, harassment, discrimination, or labor violations. A labor union commented that, by making it harder for workers to find new jobs, non-competes can deter unionization and chill activities protected by the National Labor Relations Act, including activities to address unsafe, unfair, or unsatisfactory working conditions. According to a trade organization of attorneys, whistleblower protections may come too late for a fired whistleblower who cannot obtain another job because of a non-compete. Several commenters provided survey or case evidence showing that workers who report sexual harassment, wage theft, or poor working conditions are frequently retaliated against, including by being fired.[515] These commenters stated that, because non-competes make it harder for these workers to find new jobs, non-competes decrease the likelihood that workers report these kinds of harms.

Many workers described how, by limiting their ability to get out of harmful workplace environments, non-competes contributed to stress-related physical and mental health problems. Many commenters, particularly in the healthcare profession, stated that suicide is a major problem in their profession and described non-competes as one of the stressors, because non-competes make it harder to leave jobs with unsustainable demands, leaving workers feeling trapped.

While thousands of commenters described, often in personal terms, how non-competes have negatively affected their working conditions, the Commission received few comments from workers or worker advocates stating that non-competes improved working conditions. The few comments received stated that workers who remain with an employer can be harmed by departing and competing colleagues, via increased workloads or harm to their employer.

Taken together, these comments provide strong qualitative evidence that non-competes degrade working conditions, which supports the Commission's finding that non-competes tend to negatively affect competition in labor markets.

b. Non-Competes Tend to Negatively Affect Competitive Conditions in Product and Service Markets

Based on the Commission's expertise and after careful review of the rulemaking record, including the empirical research and the public comments, the Commission finds that non-competes tend to negatively affect competitive conditions in markets for products and services by inhibiting new business formation and innovation.

New businesses are formed when new firms are founded by entrepreneurs or spun off from existing firms. New business formation increases competition by reducing concentration, bringing new ideas to market, and forcing incumbent firms to respond to new firms' ideas instead of stagnating. New businesses disproportionately create new jobs and are, as a group, more resilient to economic

[512] Individual commenter, FTC–2023–0007–3323.

[513] Individual commenter, FTC–2023–0007–3955.

[514] Individual commenter, FTC–2023–0007–1252.

[515] For example, the National Women's Law Center, which operates and administers the TIME'S UP Legal Defense Fund, reported that among individuals who contacted the Fund to request legal assistance related to sexual harassment in the workplace, 72% reported facing retaliation, and, among those, 36% had been fired. Comment of Nat'l Women's L. Ctr., FTC–2023–0007–20297 at 5 (citing Jasmine Tucker & Jennifer Mondino, *Coming Forward: Key Trends and Data from the TIME'S UP Legal Defense Fund,* 4 (Oct. 2020), *https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf*).

downturns.[516] With respect to spinoffs, research shows that spinoffs within the same industry are highly successful relative to other entrepreneurial ventures.[517]

Non-competes, however, tend to negatively affect competitive conditions in product and service markets by inhibiting new business formation in two ways. First, since many new businesses are formed by workers who leave their jobs to start firms in the same industry, non-competes reduce the number of new businesses that are formed in the first place.[518] Second, non-competes deter potential entrepreneurs from starting or spinning off new businesses—and firms from expanding their businesses—by locking up talented workers.[519] Non-competes thus create substantial barriers to potential new entrants into markets and also stymie competitors' ability to grow by making it difficult for those entrants to find skilled workers.

Innovation refers to the process by which new ideas result in new products or services or improvements to existing products or services. Innovation may directly improve economic outcomes by increasing product quality or decreasing prices, and innovation by one firm may also prompt other firms to compete and improve their own products and services. However, non-competes tend to negatively affect competitive conditions in product and service markets by inhibiting innovation.

Non-competes tend to reduce innovation in three ways. First, non-competes prevent workers from starting businesses in which they can pursue innovative new ideas.[520] Second, non-competes inhibit efficient matching between workers and firms.[521] Where workers are less able to match with jobs that maximize their talents, employers' ability to innovate is constrained. Third, and relatedly, non-competes reduce the movement of workers between firms.[522] This decreases knowledge flow between firms, which limits the cross-pollination of innovative ideas.

As described in Parts IV.B.3.b.i and ii, the Commission finds that the effects of non-competes on new business formation and innovation are sufficient to support its finding that non-competes tend to negatively affect competitive conditions in product and service markets. In addition, as described in Parts IV.B.3.b.iii and iv, the Commission believes this finding is further bolstered by evidence that non-competes increase concentration and consumer prices, as well as evidence that non-competes reduce product quality.

The Commission's findings relating to new business formation and innovation are principally based on the empirical evidence described in Parts IV.B.3.b.i and ii. However, the comments provide strong qualitative evidence that bolsters these findings. Furthermore, the Commission notes that the legal standard for an unfair method of competition under section 5 requires only a tendency to negatively affect competitive conditions; empirical evidence of actual harm is not necessary to establish that conduct is an unfair method of competition. In the case of non-competes, however, there is extensive empirical evidence, as well as extensive corroborating public comments, that non-competes negatively affect competitive conditions in product and service markets.

i. Non-Competes Inhibit New Business Formation

Evidence of Inhibited New Business Formation

The Commission finds that non-competes tend to negatively affect competitive conditions in product and service markets by inhibiting new business formation. The weight of the empirical evidence establishes that when non-competes become more enforceable, the rate of new business formation (*i.e.,* the number of new businesses formed) declines.

Several empirical studies assess the effects of non-competes on the rate of new business formation. A study conducted by Jessica Jeffers examines several State law changes in the technology sector and the professional, scientific, and technical services sector and finds a decline in new firm entry when non-competes become more enforceable. Jeffers finds that as non-competes became more enforceable, the entry rate of new firms decreases substantially.[523] Jeffers' study uses several changes in non-compete enforceability that are measured in a binary fashion. While this study therefore does not satisfy all the principles outlined in Part IV.A.2, it satisfies most of them and is accordingly quite robust and weighted highly.

Another study, conducted by Matt Marx, examines the impact of several changes in non-compete enforceability between 1991 and 2014 on new business formation, and likewise finds a negative effect of non-competes on new business formation.[524] Marx finds that, when non-competes become more enforceable, men are less likely to found a rival startup after leaving their employer, that women are even less likely to do so (15% less likely than men), and that the difference is statistically significant.[525] This study therefore supports both that non-competes inhibit new business formation and that non-competes tend to have more negative impacts for women than for men. Marx uses several changes in non-compete enforceability measured in a continuous fashion. The study therefore satisfies the principles outlined in Part IV.A.2 and is weighted highly.

In addition, Johnson, Lipsitz, and Pei analyze the extent to which non-compete enforceability affects the rate of firm entry in high-tech industries. They find that an average increase in non-compete enforceability decreases the establishment entry rate by 3.2%.[526] Outside of examining only innovative industries, this study's methodology is otherwise strong, and the study is therefore weighted highly. While this study uses multiple changes in a granular measure of non-compete enforceability, a quite robust methodology, the study is limited to high-tech industries.

In addition, a study conducted by Can and Fossen indicates that decreases in enforceability of non-competes in Utah and Massachusetts increased entrepreneurship among low-wage workers.[527] Can and Fossen examine just two changes in non-compete enforceability, measured in a binary fashion, and the study is therefore given slightly less weight than studies which

[516] *See, e.g., The Importance of Young Firms for Economic Growth,* Policy Brief, Ewing Marion Kauffman Foundation (Sept. 24, 2015).

[517] Aaron K. Chatterji, *Spawned With a Silver Spoon? Entrepreneurial Performance and Innovation in the Medical Device Industry,* 30 Strategic Mgmt. J. 185 (2009).

[518] *See, e.g.,* Evan Starr, Natarajan Balasubramanian, & Mariko Sakakibara, *Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms,* 64 Mgmt. Sci. 552 (2018).

[519] *See, e.g.,* Shi, *supra* note 84.

[520] *See* Part IV.B.3.b.i.

[521] *See* Part IV.B.3.a. While the Commission focuses on the most direct negative effects on competition in product and service markets in this Part IV.B.3.b, inefficient matching between workers and firms may have additional negative effects, including on output.

[522] *See* Part IV.B.3.a.i.

[523] Jeffers, *supra* note at 450. The 2024 version of Jeffers' study reports a 7% impact.

[524] Matt Marx, *Employee Non-Compete Agreements, Gender, and Entrepreneurship,* 33 Org. Sci. 1756 (2022).

[525] *Id.* at 1763.

[526] Matthew S. Johnson, Michael Lipsitz, & Alison Pei, *Innovation and the Enforceability of Non-Compete Agreements,* Nat'l. Bur. Of Econ. Rsch. (2023) at 36.

[527] Ege Can and Frank M. Fossen, *The Enforceability of Non-Compete Agreements and Different Types of Entrepreneurship: Evidence From Utah and Massachusetts,* 11 J. of Entrepreneurship and Pub. Pol. 223 (2022).

examine more changes or use a more granular measure of enforceability. The study corroborates the results of studies using these stronger methodologies.

Furthermore, a study conducted by Benjamin Glasner focused on high-tech industries finds that technology workers increased entrepreneurial activity in Hawaii after non-competes were restricted, but finds no effect on entrepreneurial activity from Oregon's restriction on non-competes with low-wage workers.[528] Similar to the study by Can and Fossen, this study by Glasner uses two changes in non-compete enforceability measured in a binary fashion. Additionally, a study published by Stuart and Sorenson shows that increased enforceability of non-competes decreases the amount by which firm acquisitions and IPOs induce additional local business formation.[529] This study uses cross-sectional variation in non-compete enforceability measured in a binary fashion, and studying the amount by which firm acquisitions and IPOs induce additional local business formation does not cover all entrepreneurship. These studies are thus given more limited weight, but generally are in line with other evidence that non-competes reduce new business formation and innovation.

Additionally, a study conducted by Starr, Balasubramanian, and Sakakibara analyzes the effect of non-compete enforceability on spinouts (*i.e.,* when a firm creates a new business by splitting off part of its existing business). The authors find that, when non-compete enforceability increases by one standard deviation, the rate of spinouts within the same industry decreases by 32.5%—a major decrease in new business formation.[530] Research shows that spinouts within the same industry are highly successful, on average, when compared with typical entrepreneurial ventures.[531] This study uses cross-sectional differences in non-compete enforceability, measured in a continuous fashion, though it attempts to avoid problems related to the use of cross-sectional differences in non-compete enforceability by using law firms—which likely do not use non-competes due to ethical limits in the legal profession[532]—as a control group. The Commission therefore gives this study somewhat less weight than studies of changes in non-compete enforceability, though the findings corroborate the findings of the studies by Jeffers and Marx.

In addition, a study by Salomé Baslandze shows that non-competes reduce new business formation, finding that greater non-compete enforceability inhibits entry by spinouts founded by former employees of existing firms.[533] Baslandze notes that spinouts tend to innovate more and are relatively higher quality than other new firms. This study examines changes in non-compete enforceability on a continuous measure but assumes that changes over a 19-year period occur smoothly over time instead of identifying exactly when the legal changes were made. While this study uses changes in non-compete enforceability and corroborates the findings of the aforementioned studies on new business formation, the assumption regarding the timing of changes yields an imprecise measure of non-compete enforceability over time. The Commission therefore gives this study somewhat less weight than studies which precisely identify the timing of changes in non-compete enforceability.

Finally, in a 2011 study, Samila and Sorenson find that when non-competes are more enforceable, rates of entrepreneurship, patenting, and employment growth slow. They find that an increase in venture capital funding creates three times as many new firms where non-competes are unenforceable, compared to where non-competes are enforceable.[534] This study uses cross-sectional variation in non-compete enforceability along two dimensions, both of which are measured in a binary fashion. Due to this measurement, the Commission gives this study less weight, though its results corroborate the findings of the other studies on new business formation.

The Commission gives minimal weight to two additional studies. One of these estimates the job creation rate at startups increased by 7.8% when Michigan increased non-compete enforceability.[535] However, the Commission places less weight on this study than the studies discussed previously because it examines only one legal change in one State and because the change to non-compete enforceability was accompanied by several other simultaneous changes to Michigan's antitrust laws. Thus, it is not possible to isolate the effect of the change in non-compete enforceability standing alone.

The other study finds mixed effects of non-compete enforceability on the entry of businesses into Florida. The study examines a legal change in Florida which made non-competes more enforceable. The authors find larger businesses entered the State more frequently (by 8.5%) but smaller businesses entered less frequently (by 5.6%) following the change.[536] Similarly, Kang and Fleming find that employment at large businesses rose by 15.8% following the change, while employment at smaller businesses effectively did not change.[537] This study examines a single change in non-compete enforceability. However, the Commission gives this study minimal weight because the study does not examine new business formation specifically; instead, it assesses the number of ''business entries,'' which does not necessarily reflect new business formation because it also captures existing businesses moving to the State.

Additional research analyzes the effects of non-competes on the number of jobs created by new businesses.[538]

[528] Benjamin Glasner, *The Effects of Noncompete Agreement Reforms on Business Formation: A Comparison of Hawaii and Oregon,* Econ. Innovation Group White Paper (2023), *https://eig.org/noncompetes-research-note/.*

[529] Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity,* 48 Admin. Sci. Q. 175 (2003).

[530] Starr, Balasubramanian, & Sakakibara, *supra* note 518 at 561. 32.5% is calculated as 0.0013/0.004, where 0.0013 is the coefficient reported in Table 2, Column 6, and 0.004 is the mean WSO entry rate reported in Table 1 for ''nonlaw'' firms.

[531] For reviews of the literature, *see, e.g.,* Steven Klepper, *Spinoffs: A Review and Synthesis,* 6 European Mgmt. Rev. 159 (2009) and April Franco, *Employee Entrepreneurship: Recent Research and Future Directions,* in Handbook of Entrepreneurship Research 81 (2005).

[532] *See* Am. Bar Ass'n, Model Rule 5.6, *https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_6_restrictions_on_rights_to_practice/.*

[533] Salomé Baslandze, *Entrepreneurship Through Employee Mobility, Innovation, and Growth,* Fed. Res. Bank of Atlanta Working Paper No. 2022–10 (2022), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4277191.*

[534] Samila & Sorenson find that a 1% increase in venture capital funding increased the number of new firms by 0.8% when non-competes were enforceable, and by 2.3% when non-competes were not enforceable. Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth,* 57 Mgmt. Sci. 425, 432 (2011). The values are calculated as 0.8% = $e^{0.00755} - 1$ and 2.3% = $e^{0.00755 + 0.0155} - 1$, respectively.

[535] Gerald A. Carlino, *Do Non-Compete Covenants Influence State Startup Activity? Evidence from the Michigan Experiment,* Fed. Res. Bank of Phila. Working Paper No. 21–26 at 16 (2021).

[536] Hyo Kang & Lee Fleming, *Non-Competes, Business Dynamism, and Concentration: Evidence From a Florida Case Study,* 29 J. Econ. & Mgmt. Strategy 663, 673 (2020).

[537] *Id.* at 674. The value is calculated as 15.8% = $e^{0.1468} - 1$.

[538] In the NPRM, the Commission stated that the evidence relating to the effects of non-competes on job creation was inconclusive. However, in the final rule, the Commission does not make a separate finding that non-competes reduce job creation.

While the research described previously shows that non-competes inhibit the rate of new business formation, this research indicates that even where new businesses are created, these new businesses have fewer workers where non-competes are more enforceable. This evidence suggests that non-competes not only prevent small businesses from being formed, but they also hinder entrepreneurship by tending to reduce the number of employees new firms are able to hire.

In addition to analyzing the rate of firm entry in high-tech industries, Johnson, Lipsitz, and Pei analyzes the number of jobs created at newly founded firms in innovative industries.[539] Using evidence from several State law changes, the authors find that increases in non-compete enforceability lead to a reduction in the number of jobs created at newly founded firms in innovative industries (though not necessarily across all industries or all types of firms) by 7.2%.[540]

A study by Starr, Balasubramanian, and Sakakibara finds that increases in non-compete enforceability decreased average per-firm employment at new firms.[541] In the NPRM, the Commission stated that this study found that several increases in non-compete enforceability were associated with a 1.4% increase in average per-firm employment at new firms.[542] However, upon further review of the study, the Commission interprets this study as finding that increases in non-compete enforceability decreased average per-firm employment at new firms—both for spinouts within the same industry and spinouts into a different industry.[543] For spinouts into a different industry, average per-firm employment at the time of founding decreases by 1.4% due to greater non-compete enforceability. For spinouts into the same industry, average per-firm employment decreases by 0.3%.[544] At seven years after founding, the results are similar: spinouts into a different industry have average per-firm employment that is 1.5% lower due to greater non-compete enforceability, while spinouts into the same industry have per-firm employment that is 0.7% lower.[545] The Commission notes that this study compares States with different levels of enforceability, using law firms as a control group, instead of considering changes in non-compete enforceability. It is therefore given less weight than studies with stronger methodologies.[546]

Comments Pertaining to Inhibited New Business Formation and the Commission's Responses

The Commission's finding that non-competes inhibit new business formation is principally based on the empirical evidence described in this Part IV.B.3.b.i. However, the comments provide strong qualitative evidence that bolsters this finding.

Hundreds of commenters agreed with the Commission's preliminary finding that non-competes reduce new business formation. Illustrative examples of comments the Commission received include the following:

• I am a hairstylist . . . and have been with the company for 11 years. Our work conditions have changed drastically over the years and Covid has really sent us on a sharp decline. It is not the same salon I signed on to work for. That being said, a few coworkers want to open a salon and take some of us with them to bring back the caliber of service we want to give our clients. Our non-compete contracts state that we can't work within 30 miles of this salon. We didn't expect that standards would drop so low and they would raise prices so high that we lost so many clients. . . . We have all had enough of the toxic environment and need to be free of this unfair contract.[547]

• I am a veterinarian that has had to suffer under non-compete clauses my entire career. I have had to sell my home and relocate several times including moving out of State due to non-compete clauses. I'm currently stuck in a [non-compete covering a] 30 mile radius of all 4 practices of a group of hospitals I work for. This basically keeps me from working in an enormous area. I had to sign it due to circumstances out of my control and they took advantage of my situation. I recently tried to start my own business, not related to the type of practice that I have the non-compete clause with, and had to abandon the idea because I couldn't get funding without my current employer releasing me from the contract or by relocating again out of the huge area of non-compete.[548]

• We own a small family practice in urban Wisconsin. I previously was employed by a large healthcare organization and burned out. When I left to star[t] my own business, I was restricted from working close by, by a non-compete. I spent $24,000 [in] legal fees challenging this successfully. . . . Now as a business owner for 5 years, we have the opportunity to hire some physician assistants who have been terminated without cause from my prior employer. I am unable to do so because they also had to sign non-competes. I have seen many disgruntled patients who have delayed care because of this.[549]

• I am aesthetic nurse practitioner wanting to start my own business but I am tied to a 2 year 10 mile non compete. I was basically obligated to sign the non-compete when I needed to reduce my hours to finish my master's degree (that I paid for and they wanted me to get). I feel forced to stay at a job that is not paying me what I am worth.[550]

• I am a licensed social worker with a non-compete which is hindering my employment options. . . . I would like to start my own business as the mental health facility I work for is not supportive of mental health. This rule would be a great benefit for mental health professionals and those seeking quality mental health services.[551]

• As a recently graduated physician, I wanted to start my own practice and become a small business owner. However, I also needed a source of income to start out and wanted to work part time at a local hospital for income and benefits. However, due to a non-compete clause in their contracts, I could not start my own business and practice in the same city if I was to work with them. This hindered my ability to work as much as I wanted (ended up having to work as an independent contractor for significantly less

Instead, it cites the research described herein—which relates solely to job creation at newly founded firms—to support its finding that non-competes inhibit new business formation.

539 Johnson, Lipsitz, and Pei, *supra* note 526 at 36.

540 *Id.* While this study satisfies each of the other metrics outlined in Part IV.A.2, the sample is restricted to firms in innovative industries, and therefore the outcome of interest is not reflective of the entire population.

541 Starr, Balasubramanian, & Sakakibara, *supra* note 518 at 552.

542 NPRM at 3488–89.

543 While this study satisfies some of the principles for robust design outlined in Part IV.A.2, the Commission notes that average per-firm employment does not precisely correspond to the economic outcome of interest, which is overall employment or job creation.

544 Calculated as 1.4% − 1.1%, based on the effect for non-within-industry spinouts (1.4%) and the relative impact on within-industry spinouts compared with non-within-industry spinouts (−1.1%). *See* Starr, Balasubramanian, & Sakakibara, *supra* note 518 at 561.

545 Calculated as 1.5% − 0.7%, based on the effect for non-within-industry spinouts (1.5%) and the relative impact on within-industry spinouts compared with non-within-industry spinouts (−0.8%). *See id.* at 563.

546 There are also two studies analyzing how non-competes affect job creation or employment generally. Neither study relates to new business formation specifically. Goudou finds a decreased job creation rate from an increase in non-compete enforceability in Florida. Felicien Goudou, *The Employment Effects of Non-compete Contracts: Job Retention versus Job Creation* (2023), *https://www.jesugogoudou.me/uploads/JMP_Felicien_G.pdf.* This study considers just one change in non-compete enforceability, and is therefore given less weight, though the results corroborate findings in papers which satisfy more of the guideposts in Part IV.A.2. Additionally, the 2023 version of Johnson, Lavetti, & Lipsitz, *supra* note 388, finds that increased non-compete enforceability reduces employment by 1.9%, though they do not estimate the impact on job creation directly. Rather, the authors look only at the closely related metric of changes in overall employment. This study otherwise has a strong methodology, as discussed in Part IV.B.3.a.ii.

547 Individual commenter, FTC–2023–0007–3299.

548 Individual commenter, FTC–2023–0007–1448.

549 Comment of Three Oaks Health, FTC–2023–0007–1397.

550 Individual commenter, FTC–2023–0007–10157.

551 Individual commenter, FTC–2023–0007–11922.

shifts per month and no benefits), and made it more difficult to get my business off the ground due to expenses for providing my own benefits. Banning non-compete clauses would significantly help the ability for citizens to pursue starting small businesses or other work to increase their income and prosperity.[552]

- Mr. Z had worked for a company for over 15 years installing windshields in vehicles. He was a lower-level employee making $18.50 an hour and did not learn any trade secrets or confidential information. After years of working for the company the employer refused to raise his wages despite his experience, so he decided to start his own business. Shortly after giving notice and beginning his new endeavor, he received a letter from his previous employer informing him that he was in breach of his non-compete agreement and the employer would enforce it if he continued with his business plan.[553]
- Non-competes have prohibited me from making a living as a fitness and wellness professional to such an extent, that it hurt me economically. I opened up my own business that was different than my previous employer, even though it was different and I told him I was going to focus on a different area in wellness, my previous employer sued me. I ended up having to hire an attorney to defend myself and when it was all said and done, I spent close to 12,000 in fees and penalties.[554]
- Non compete agreements are detrimental to the average worker, preventing them from pursuing better paying job offers or from starting their own business in the same industry. I am directly affected by a non-compete clause I had signed as part of a job acceptance. I am now forming my own business in the same industry as my employer, and cannot do business within a 50-mile radius of my employer. That radius covers the hometown I live in. Even though we are in the same industry, we have very different target markets.[555]

As these comment excerpts reflect, many potential entrepreneurs wrote to the Commission to describe how they wanted to strike out on their own, but a non-compete preventing them from doing so. These comments indicate that non-competes have deprived communities of homegrown businesses—with respect to everything ranging from tech companies, to hair salons, to physician practices, and many more types of firms. This deprives markets of competing firms that can reduce concentration—which in turn has benefits for lowering prices and raising the quality of products and services, and increasing innovation in bringing new ideas to market—as well as depriving communities of opportunities for new job creation.

Even where entrepreneurs were able to start businesses, they explained how non-competes prevented them from hiring talented workers and made it harder for their nascent businesses to grow and thrive. Many other commenters described personal experiences in which their newly formed businesses were threatened by litigation costs related to non-competes. Other commenters stated that the threat of litigation related to non-competes increases the risk and cost of starting a new business, particularly if that business intends to compete against a large incumbent firm. One commenter stated that incumbent firms can use non-compete litigation as a mechanism to chill startup formation where startups lack the resources to contest a non-compete.

Numerous small businesses and organizations representing small businesses submitted comments expressing support for the proposed rule and describing how it would help small business owners. These commenters contend that categorically prohibiting non-competes will empower small businesses by providing them with new access to critical talent and will drive small business creation as entrepreneurial employees will be free to compete against their former employers. Many small businesses also argued that non-competes can hinder small business formation and can keep small businesses from growing once they are formed. The extensive comments the Commission received from small businesses are also addressed in Part XI.C.

Some small businesses said they spent tens or hundreds of thousands of dollars defending themselves from non-compete lawsuits. A one-person surveying firm said it has to regularly turn down work because of the former employer's threat to sue over a non-compete. A small, five-worker firm said it was sued by a billion-dollar company for violating a non-compete despite the fact that the firm waited out the non-compete period and did not use proprietary information or pursue the former employer's customers; it fears the legal fees will force it out of business. A legal aid organization relayed the story of a client, a self-employed beauty worker who was unable to provide their service during a non-compete lawsuit despite working outside the non-compete geographic radius. The CEO of one small transport and logistics company said a ban would remove a tool used mostly by the largest companies in each industry to maintain their market dominance, as small competitors cannot match their legal budgets. Further, many workers said they would open their own business if non-competes were banned.

Many small businesses shared their experiences of how non-competes have made hiring more difficult. For example, a small physician practice said non-competes made it difficult to compete with larger practices to attract and retain physicians. A small business and a medical association said small businesses could not afford a lawsuit when hiring workers. An IT startup tried to hire an executive who had retired from a large firm, but the large firm sued the startup to enforce what the startup said was an unenforceable non-compete. According to the startup, because a lawsuit would have cost up to $200,000, it was forced to settle and could not work with numerous potential clients, and its growth was significantly slowed. It stated that it continues to turn away many potential hires to avoid being sued over non-competes.

Other commenters raised additional issues relevant to hiring. According to one technology startup organization, the inability to assemble the right team is a major reason startups fail, and small businesses lose opportunities because they must avoid hiring workers who are subject to even unenforceable non-competes. That organization also said startups currently face legal and time costs from navigating the patchwork and complexity of State non-compete laws, especially when trying to determine if a potential hire's non-compete is enforceable; the time and expense of navigating this landscape will thus often cause the startups to forego that hire. That organization said some non-competes prevent experienced workers from counseling, advising, or investing in startups, and such mentoring can double a startup's survival rate.

Several self-identified entrepreneurs commented that because of their non-competes, they feared not being able to operate, build, or expand their business. Numerous workers reported that they wanted to or planned to start their own business, but their non-compete made them too afraid to do so. A public policy organization referenced the Census Bureau's Annual Business Survey to argue that a majority of business owners and an even higher majority of Black business owners view starting their own business as the best avenue for their ideas, and that non-competes may prevent these potential entrepreneurs' ideas from coming to market.

Several commenters stated that non-competes make it harder for new businesses to hire workers with relevant

[552] Individual commenter, FTC–2023–0007–11777.

[553] Comment of NW Workers' Justice Project, FTC–2023–0007–15199 (discussing a client).

[554] Individual commenter, FTC–2023–0007–12904.

[555] Individual commenter, FTC–2023–0007–12697.

experience or industry knowledge. Some commenters argued that non-compete bans, such as in California, have contributed to higher rates of successful start-ups, while new firms in States where non-competes are more enforceable tend to be smaller and are more likely to fail.

In contrast, several commenters opposed to the rule argued that non-competes promote new business formation by protecting small and new firms' investments, knowledge, and workers from appropriation by dominant firms poaching their employees. Commenters also theorized that, while non-competes directly inhibit employee spinoffs, they may encourage businesses to enter the market by enhancing their ability to protect their investments. As described in Part IV.D.2, the Commission finds that firms have viable alternatives for protecting these investments that burden competition to a less significant degree than non-competes. The Commission further notes that these commenters did not provide evidence to support their assertions.

In addition, when assessing how non-competes affect new business formation, the Commission believes it is important to consider the net impact. It is possible that the effects described by these commenters and the effects described by the Commission earlier in this Part IV.B.3.b.i can be occurring at the same time. That is, a non-compete might in some instances be protecting a firm's investments in a manner that is productivity-enhancing holding all else equal. But even that same non-compete can—and certainly non-competes in the aggregate do—inhibit new business formation by prohibiting workers from starting new businesses and by locking up talented workers, preventing the worker from efficiently matching with the job that is the highest and best use of their talents. What the empirical evidence shows is that non-competes reduce new business formation, overall and on net, indicating that the tendency of non-competes to inhibit new business formation more than counteracts any tendency of non-competes to promote new business formation.

Other commenters said non-competes protect firms' value and assets for sale in future acquisitions, which they said drives seed capital investment in start-ups. An investment industry organization commented that private-equity financing, particularly for early-stage companies, often includes non-competes and is used to support growth, in turn increasing competition. In response, the Commission notes that these commenters provided no empirical evidence that decreases in non-compete enforceability have affected seed capital investment and private-equity financing. Moreover, the Commission notes that there is no indication that small businesses or early-stage companies in States that have banned or limited non-competes have been unable to obtain financing. To the contrary, California, where non-competes are unenforceable, has a thriving start-up culture.

Other commenters addressed empirical research related to new business formation. Some commenters similarly argued that research on the average quality of employee spinouts due to changes in non-compete enforceability may imply negative effects of the rule (*e.g.,* if prohibiting non-competes decreases average employment or average survival rates of new firms). Some commenters also noted that the Baslandze study finds that weaker non-compete enforceability increases the rate at which spinouts form but result in a lower proportion of high-quality spinouts.[556]

In response to these comments, the Commission notes commenters primarily referenced Starr, Balasubramanian, & Sakakibara[557] to support this view. The findings in this study have been misinterpreted by commenters. This study actually finds that spinouts that form when non-compete enforceability is stricter are *lower* quality (*i.e.,* create fewer jobs), but that the effect is less drastic for spinouts within the same industry versus spinouts into different industries. Coupled with other evidence discussed in Part IV.B.3.b.i, the weight of which points to increased job creation due to the rule, the Commission finds that empirical studies have not established that non-competes lead to higher-quality startups or higher-quality spinouts. The Commission also notes that the result in the Baslandze study regarding the quality of spinouts is theoretical, and the study does not test this theory empirically.

Commenters also argued that non-competes may have different effects on different types of workers—for example, across different industries, occupations, or levels of pay—and that these differences may affect the impacts of non-competes on new business formation. In response, the Commission notes that the studies show negative effects across a range of industries and are directionally consistent, even if they do not provide results for all subgroups.

[556] Baslandze, *supra* note 533 at 40.

[557] Starr, Balasubramanian, & Sakakibara, *supra* note 518.

Commenters asserted that non-competes may affect job creation through several different mechanisms. The Commission agrees and finds that, regardless of the specific mechanism, the weight of the evidence indicates that non-competes inhibit job creation.

Commenters opposing the rule also questioned the usefulness of studies of Michigan's law change, given that existing non-competes remained enforceable under the Michigan law; they state that as a result, it would take longer for effects from the law to be realized. As noted under ''Evidence of inhibited new business formation,'' the Commission gives minimal weight to this study, but for other reasons.

In an ex parte communication entered into the record, the author of the study of the Michigan law change expressed concern over the Commission's interpretation of the study.[558] In particular, he stated that his methodology mitigated concerns that the study's findings of an increase in the job creation rate may be due to decreases in that rate's denominator (total employment). While the Commission does not agree with this assessment,[559] the Commission places less weight on the study for different reasons, as noted.

Some commenters who opposed the rule also addressed the evidence relating to non-competes and job creation, although these commenters generally did not focus on job creation related to new businesses specifically. Some of these commenters asserted that the studies addressed in the NPRM indicated that non-competes are associated with a greater number of jobs available and increased rates of job creation, rather than decreased rates of job creation. Some asserted that the evidence on job creation is mixed and that the issue is understudied. In the NPRM, the Commission stated that the evidence relating to the effects of non-competes on job creation was inconclusive. However, in the final rule,

[558] Ex Parte Communication: Email from G. Carlino to E. Wilkins (Jan. 30, 2023), *https://www.ftc.gov/system/files?file=ftc_gov/pdf/P201200NonCompeteNPRMExParteCarlinoRedacted.pdf.*

[559] In particular, the long time period and the difference-in-difference methodology used in the study do not mitigate concerns that decreases in employment due to non-compete enforceability could drive increases in the job creation rate. The concern is not that the findings somehow represent effects on anything other than the average job creation rate (as noted by the author in his ex parte communication), but that a rate is comprised of a numerator and denominator, and effects on either may drive effects on the rate as a whole. This concern is shared by at least two empirical studies of non-competes. *See* Johnson, Lavetti, & Lipsitz *supra* note 388 at 19 and Johnson, Lipsitz, & Pei *supra* note 526 at 19.

the Commission does not make a separate finding that non-competes reduce job creation. Instead, it cites the research described herein—which relates to job creation at newly founded firms—to support its finding that non-competes inhibit new business formation.

ii. Non-Competes Inhibit Innovation

Evidence of Inhibited Innovation

The Commission finds that non-competes tend to negatively affect competitive conditions in product and service markets by inhibiting innovation. Three highly reliable empirical studies find that non-competes reduce innovation.

One such study, a study by Zhaozhao He, finds that the value of patents, relative to the assets of the firm, increases by about 31% when non-compete enforceability decreases.[560] In contrast to some other studies of innovation discussed here, He's study focuses on the value of patents, rather than the mere number of patents. The study does so to mitigate concerns that patenting volume may not represent innovation.[561] The study analyzes the impact of several legal changes to non-compete enforceability, using a binary measure of non-compete enforceability. While this study therefore does not satisfy all the principles outlined in Part IV.A.2, it nonetheless satisfies many of them and contains a reasonably strong methodology.

A second study, by Johnson, Lipsitz, and Pei, finds that increased enforceability of non-competes decreases the rate of ''breakthrough'' innovations and innovations which make up the most cited patents. This study lends weight to the finding that non-competes harm both the quantity and the quality of innovation.[562] The authors also show that when non-compete enforceability decreases, patenting increases even in industries where most new innovations are patented. These increases imply that the effect is a true increase in innovation, rather than firms substituting between patents and non-competes.

Johnson, Lipsitz, and Pei also show that State-level changes in non-compete policy do not simply reallocate innovative activity across State lines, which would result in no change in innovation at the national level. Instead, they find that decreasing non-compete enforceability, even in one State, increases innovative activity nationally.[563] Johnson, Lipsitz, and Pei's study uses several legal changes to analyze the impact of enforceability. It also uses several metrics of quality and quantity to mitigate concerns over whether patenting is an accurate reflection of innovation, especially in this context. The study thus satisfies all the principles outlined in Part IV.A.2 and is therefore given substantial weight by the Commission.

A third study, by Rockall and Reinmuth, finds that non-competes have a significant negative impact on innovation. They further find that this effect is not driven solely by the entry of new businesses. Their work suggests a potentially central role for knowledge spillovers, which are hampered when worker mobility is diminished. The study uses many changes to non-compete enforceability quantified on a continuous basis and considers several metrics which represent the quantity and quality of patenting, in order to accurately capture the relationship between non-competes and innovation.[564] Similar to the study by Johnson, Lipsitz, and Pei, this study therefore satisfies all the principles described in Part IV.A.2 and is given substantial weight.

The Commission places the greatest weight on the foregoing three studies, in which factors unrelated to the legal changes at issue are less likely to drive the results. There are additional studies that relate to non-competes and innovation, but the Commission gives them less weight.

A study by Samila and Sorenson finds that venture capital induced less patenting by 6.6 percentage points when non-competes are enforceable.[565] However, the authors note that patenting may or may not reflect the true level of innovation, as firms may use patenting as a substitute for non-competes where they seek to protect sensitive information.[566] Furthermore, this study assesses only the quantity of patents and does not take into account the quality of patents, which would be a better proxy for innovation. For this reason, the Commission gives less weight to this study (although its findings are directionally consistent with the first three studies described herein). This study also uses cross-sectional variation in non-compete enforceability, which is measured along two dimensions in a binary fashion. In addition, a study by Gerald Carlino examined how patenting activity in Michigan was affected by an increase in non-compete enforceability. The study finds that mechanical patenting increased following the change in the law, but that drug patenting fell, and that the quality of computer patents fell.[567] However, the increase in mechanical patenting appears to have primarily occurred approximately 14 years after non-compete enforceability changed. This suggests that some other mechanism may have led to the increase in patenting activity.[568] Moreover, the study uses a single change in non-compete enforceability to generate its results, and it uses only one measure of innovation outside of patent quantity—quality as measured by patent citations. Finally, this study examines a change to non-compete enforceability which was accompanied by several other changes to Michigan's antitrust laws, making it impossible to identify the effect of the change in non-compete enforceability standing alone. For these reasons, the Commission gives less weight to this study.

A study by Clemens Mueller does not estimate the overall impact of non-compete policy on innovation, but instead focuses on career detours of inventors.[569] Mueller shows that inventors are more likely to take ''career detours''—that is, to change industries to avoid the reach of their non-compete—when enforceability of non-competes is stricter. Due to the lower match quality between that inventor and their new industry, the innovative productivity of those inventors suffers after they take career detours. However, the Commission assigns this study less weight because, while its methodology satisfies the principles outlined in Part IV.A.2, the study is only informative of the productivity of individuals taking career detours. It does not address whether innovation in the aggregate increases. Mueller uses several changes in non-compete enforceability to generate results, but those changes are measured in binary—rather than continuous—fashion.

Coombs and Taylor examine the impact of non-compete enforceability on innovation. They find that research

[560] Zhaozhao He, *Motivating Inventors: Non-Competes, Innovation Value and Efficiency* 21 (2023), *https://ssrn.com/abstract=3846964.* Thirty one percent is calculated as $e^{0..272} - 1$.

[561] *Id.* at 17.

[562] Johnson, Lipsitz, & Pei, *supra* note 526.

[563] *Id.*

[564] Emma Rockall & Kate Reinmuth, *Protect or Prevent? Non-Compete Agreements and Innovation* (2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4459683.*

[565] Samila & Sorenson, *supra* note 534 at 432. The value is calculated as $6.6\% = e^{0.0208 + 0.0630} - e^{0.0208}$.

[566] *Id.*

[567] Carlino, *supra* note 535 at 40.

[568] *Id.* at 48.

[569] Clemens Mueller, *Non-Compete Agreements and Labor Allocation Across Product Markets,* Proceedings of the EUROFIDAI-ESSEC Paris December Finance Meeting 2023 (2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4283878.*

productivity, as measured by the number of products in biotechnology firms' prospectuses, was lower in California than other States, which they suggest implies that California's ban on non-competes hampers research productivity.[570] However, this study is purely cross-sectional, and results may be due to other differences between California and other States; the Commission accordingly places less weight on this study.

Two additional studies address firm strategies related to innovation. However, the Commission gives them little weight because the outcomes studied do not inform how non-competes would affect the overall level of innovation in the economy. The first, by Raffaele Conti, uses two changes in non-compete enforceability (in Texas and Florida), and indicates that firms engage in riskier strategies with respect to research and development (''R&D'') when non-compete enforceability is greater.[571] However, this study does not address whether these riskier strategies lead to greater innovation. The second, by Fenglong Xiao, finds that increases in non-compete enforceability led to increases in exploitative innovation (*i.e.,* innovation which stays within the bounds of the innovating firm's existing competences) in the medical device industry.[572] The study finds this increase in exploitative innovation leads to an increase in the rate at which new medical devices are introduced. However, the study also finds that explorative innovation (*i.e.,* innovation which moves outside those bounds) decreased, and explorative innovation is the mode of innovation which the empirical literature has found to be associated with high growth firms.[573] The net impact on innovation from this study is thus unclear. The study examines several changes in non-compete enforceability, measured with a binary indicator of non-compete enforceability.

[570] Porcher L. Taylor, III, and Joseph E. Coombs, *Non-Competition Agreements and Research Productivity in the Biotechnology Industry,* 26 Frontiers of Entrepreneurship Rsch. 1 (2006).

[571] Raffaele Conti, *Do Non-Competition Agreements Lead Firms to Pursue Risky R&D Strategies?,* 35 Strategic Mgmt. J. 1230 (2014).

[572] Fenglong Xiao, *Non-Competes and Innovation: Evidence from Medical Devices,* 51 Rsch. Pol'y 1 (2022).

[573] Alessandra Colombelli, Jackie Krafft & Francesco Quatraro, *High-Growth Firms and Technological Knowledge: Do Gazelles Follow Exploration or Exploitation Strategies?,* 23 Indus. And Corp. Change 262 (2014).

Comments Pertaining to Inhibited Innovation and the Commission's Responses

The Commission's finding that non-competes inhibit innovation is principally based on the empirical evidence described in this Part IV.B.3.b.ii. However, the comments provide strong qualitative evidence that bolsters this finding.

Several academics and economic research groups, among other commenters, agreed with the Commission's preliminary finding that non-competes inhibit innovation. Commenters argued that non-competes reduce knowledge flow and collaboration, force workers to leave their field of expertise, and discourage within-industry spinouts that promote innovation. Many commenters stated that banning non-competes would make it easier for workers to pursue innovative ideas and to hire the best talent to help develop those ideas. Illustrative examples of comments the Commission received include the following:

- I am a geneticist at Stanford University, and I am co-founding a biotech startup that aims to discover new cancer immunotherapies. Many of the most talented geneticists, immunologists, cancer biologists, and other scientists with unique and valuable skillsets for drug development are bound by non-competes that prevent them from leaving jobs at big pharma companies to join biotech startups like mine. The result is artificial scarcity in the market for top scientific talent—a phenomenon that precludes healthy competition between industry incumbents and new entrants. Given that much of our country's most cutting-edge translational research happens within biotech startups, and given that many of the most successful drugs on the market originate in biotech startups, non-competes in pharma and biotech prevent the most talented scientists from working on the most innovative science and obstruct the development of new treatments and cures for human disease—leaving our society worse off.[574]
- As a practicing Physician for over thirty years, and one who trained fellows in pain management, who followed many of their students' careers, I was able to see the detriments of unfair Non-Compete clauses in their contracts. Often a physician would take a job, and if it did not work out, the restrictions were so severe, that they would need to move to a new geographic location in order to be employed. . . . Other scenarios exist as well. Where large institutions can block scientific discovery of their research physicians from moving to other institutions which may be better able to support their research, potentially blocking the promotion of scientific discovery.[575]

[574] Individual commenter, FTC–2023–0007–0198.

[575] Individual commenter, FTC–2023–0007–3885.

- I am an engineer in the orthopedic space. I have an idea for a truly innovative foot and ankle plating system that I believe could become the standard of care for fracture fixation and foot deformity correction. It could save 10–15 minutes of operating room time per surgery, which studies show carries a cost of $1000 (times millions of surgeries annually). It does not directly compete with my former employer's product, but I have to wait a year to start engaging surgeons about it because of a very broad non-compete, for a product that does not even compete.[576]
- I currently work as a mid-level technical employee at a company that enforces long (a year or longer) noncompetes. . . . After working for larger companies for a few years after college, many of my friends started their own companies. Some succeeded massively and some didn't but what was common among most of them was that the companies they started were somewhat related to what they were working on before. They either saw a gap in the industry while working for a larger company, or had a bold idea in their domains that they wanted to quit their jobs and try executing it. All this risk taking has in turn resulted in innovation, more competition, and hundreds of jobs. This would not have been possible if these people were under non-compete agreements from their previous employers. In fact, many of my friends who are currently working for companies that have non-competes have personally told me that they want to try a different approach than the current incumbents in their industry, but they simply can't take this risk because of the long non-competes they are under. Note that non-competes are even more consequential for workers of relatively less experience because sitting out for 1 year while only having 3 to 4 years of experience is a lot more detrimental to one's career when compared to an individual with 20 years of experience. Given that younger workers are more willing to take risks and try new ideas, the impact of non-competes on innovation is far worse than many think.[577]
- I am an engineer who has worked on software and hardware in several domains, including the semiconductor industry. I perceive non-competes to not only be detrimental to free trade but also to be detrimental to American innovation and manufacturing. If the United States is serious about supporting the growth of the semiconductor industry in the U.S., it must ensure that semiconductor companies inside the United States truly act to benefit American innovation. . . . The FTC would act prudently to ban such agreements.[578]
- I am a physician. I have worked for public entities for my entire career. I have worked under non-competes for my entire career. The result of these non-compete clauses is that myself and my colleagues keep our imagination and creativity locked away. We see novel applications of pharmaceuticals and medical devices which our leadership

[576] Individual commenter, FTC–2023–0007–0760.

[577] Individual commenter, FTC–2023–0007–19807.

[578] Individual commenter, FTC–2023–0007–12872.

does not want to pursue, and we are also precluded from pursuing these ideas due to the noncompete. We see new ways to reach people and help people with our unique skill sets, and our noncompete keeps us from being able to reach them. The noncompete allows our employer to own us. They monopolize the talent of their workforce and this deprives the community of the innovation that may stem from the unleashing of the creativity of the physician workforce. I see the direct impact of non-compete clauses. The public has so much to gain by releasing healthcare workers from their noncompete clauses. These talented individuals, once released from their noncompetes, will begin to contribute to their communities with new ideas and innovation that will serve their communities. Many entities have so many reasons to avoid innovation and this stifles the individuals who work for them and oppresses new ideas. Once released from the bureaucracy and burden of non-competes I believe you will see an abundance of community outreach, device innovation and community service from many physicians currently subjugated by their noncompete clauses.[579]

A research organization said a ban on non-competes would increase the value workers realize from creativity and inventiveness, though it also asserted that non-competes can incentivize firms to create and share information. Some workers commented that they had innovative ideas or research that their employer was unwilling to pursue, but the worker could not leave to pursue their ideas elsewhere. A commenter also argued that captive workforces can stifle competition for workers and for clients or patients that leads to innovation. According to several commenters, trapping workers in jobs can also lead to decreased productivity and so-called ''quiet quitting.''

Some commenters contended that California's ban on non-competes helped Silicon Valley and other industries in California thrive. For example, a public policy organization pointed to industry clusters where studies have identified job hopping, which may otherwise be prohibited by non-competes, as the primary mechanism of knowledge diffusion and argued that restricting non-competes for knowledge workers would improve the U.S.'s competitiveness. Other commenters questioned whether non-competes played a role in Silicon Valley's growth. In response, the Commission notes that it does not attribute California's success in the technology industry to its non-compete laws. The Commission merely notes (in Part IV.D) that the technology industry is highly dependent on protecting trade secrets and that it has thrived in California despite the inability of employers to enforce non-competes, suggesting that employers have less restrictive alternatives for protecting trade secrets.

Other commenters opposing the rule argued that non-competes may promote innovation by encouraging firms to make productivity-enhancing investments and by decreasing the risk of workers leaving. These commenters stated that non-competes protect firms' investments in workers, R&D, intellectual capital, and innovation. The Commission does not believe that non-competes are needed to protect valuable firm investments. As described in Part IV.D.2, the Commission finds that firms have less restrictive alternatives that protect these investments adequately while burdening competition to a less significant degree.

In addition, when assessing how non-competes affect innovation, the Commission believes it is important to consider the net impact. It is possible that the effects described by these commenters and the effects described by the Commission earlier in this Part IV.B.3.b.ii can be occurring at the same time. That is, a non-compete might in some instances be protecting a firm's investments in a manner that is productivity-enhancing holding all else equal. But even that same non-compete can—and certainly non-competes in the aggregate do—inhibit innovation by preventing workers from starting new businesses in which they can pursue innovative ideas; inhibiting efficient matching between workers and firms; and reducing the movement of workers between firms. What the empirical evidence shows is that non-competes reduce innovation, overall and on net, indicating that the tendency of non-competes to inhibit innovation more than counteracts any tendency of non-competes to promote innovation.

The Commission addresses the available evidence on the relationship between non-competes and firm investment in Part IV.D.1.

A business commenter contended that worker mobility does not necessarily improve innovation since the new firm may be unable or unwilling to use the worker's knowledge or ideas, or the new start-up may fail and leave consumers with less innovative products and services. In response, the Commission notes that it is certainly possible that some workers switch jobs to firms that are unable or unwilling to use their knowledge or ideas, or to startups that may fail. However, the fact that the empirical evidence shows that reduced non-compete enforceability increases innovation suggests that these effects are outweighed by workers who can switch jobs to firms that make better use of their talents, or to startups that thrive and bring innovative new products to market.

Other commenters stated that non-competes promote the sharing of ideas and information within firms and incentivize risk-taking. The Commission is not aware of evidence that non-competes promote the sharing of ideas within firms specifically, but in any event the Commission explains in Part IV.D.2 that trade secrets and NDAs provide less restrictive means than non-competes for protecting confidential information. With respect to risk-taking, the Commission notes that the Conti study finds that firms engage in riskier R&D strategies when non-compete enforceability is greater, but it is not clear whether these riskier R&D strategies translate into increased innovation.

Commenters also argued that non-competes may have different effects on different types of workers—for example, across different industries, occupations, or levels of pay—and that these differences may affect the impacts of non-competes on innovation. In response, the Commission notes that the most methodologically robust studies show negative effects across a range of industries and are directionally consistent, even if they do not provide results for all subgroups.

A research organization argued that non-competes decrease the likelihood that innovative technologies are developed outside the U.S. and that non-competes promote economic growth, competitiveness, and national security. The Commission is not aware of any reliable evidence of the effects of non-competes on whether innovative technologies are developed outside the U.S. However, the weight of the empirical evidence indicates that non-competes reduce the amount of innovation occurring within the U.S.

Some commenters noted that innovation hubs have emerged in States that enforce non-competes. In response, the Commission notes that it does not find that it is impossible for innovation hubs to emerge where non-competes are enforceable. Instead, the Commission finds that, overall, non-competes inhibit innovation.

One commenter performed an empirical exercise in which he correlated Global Innovation Index rankings of innovation clusters with the enforceability of non-competes in each location. The commenter found that only one of the top five clusters bans non-competes, and only three others in the top 100 ban non-competes. The

[579] Individual commenter, FTC–2023–0007–2340.

commenter cited the success of Chinese innovation clusters, noting that non-competes are permitted in each of them.[580] The Commission does not find this evidence persuasive. Other differences across countries may explain these results better than policy towards non-competes, which is one factor among many that affect the level of innovation in an economy.

Some commenters argued that the empirical research cited in the NPRM has mixed results. These commenters point to the study by Xiao (2022) showing that non-competes increase exploitative innovation (innovation that incrementally extends firms' existing capabilities), but not explorative innovation (innovation that extends the scope of firms' capabilities). In response, the Commission notes that, within this particular study, the net impact of non-competes on innovation was unclear. But the Commission does not believe the evidence overall is mixed, given that the three empirical studies of the effects of non-competes on innovation that use the most reliable empirical methods all find that non-competes reduce innovation.

Some commenters claimed that two studies cited in the NPRM—the Xiao and Conti studies—had findings that were omitted or misinterpreted: first, the Xiao finding that non-compete enforceability increases the rate of new discoveries of medical devices due to increases in the rate of exploitative innovation but not explorative innovation); and second, the Conti finding that greater non-compete enforceability leads to riskier innovation, which these commenters assert is a positive outcome.[581] In response, the Commission notes that the NPRM described both of these findings and did not omit or misinterpret them.[582] The Commission explains why it gives these studies little weight under ''Evidence of inhibited innovation.''

A commenter asserted that the He study is insufficient evidence to support a finding, and that the study examines the effects of non-compete enforceability on the value of patents, which the commenter asserts misses other aspects of innovation. In response, the Commission believes that the He study is methodologically robust and that, while no single metric can capture all aspects of innovation, the value of patents is a meaningful proxy. The Commission also notes that the effects observed in the He study are considerable, as the study finds that the value of patents, relative to the assets of the firm, increases by about 31% when non-compete enforceability decreases. In addition, the Commission notes that the comment record provides substantial qualitative support in line with the empirical findings. Furthermore, additional research, published since the release of the NPRM, helps confirm the Commission's finding regarding the effect of non-competes on innovation. As described under ''Evidence of inhibited innovation,'' this evidence moves beyond assessing the impact of non-competes on the value of patents or the number of patents to identify the quality of new innovation, as well as the mechanisms underlying these effects.

Many commenters referred to a law review article, which was also submitted as a comment itself, that critiques the literature on non-competes and innovation.[583] First, the authors argue that a measure of enforceability used in part of the economic literature is incorrect and that a more recently developed measure is imperfect but better.[584] The Commission agrees with the authors that the more recently developed measure of enforceability, the scale based on Bishara (2011), is stronger than other measures of enforceability due to its granularity. This metric is used in many studies cited in this final rule, including the Johnson, Lipsitz, and Pei study, which largely reinforces the conclusions in the He study, lending weight to the conclusions in these studies that non-competes suppress the overall level of innovation in the economy.

Second, the authors argue that a given non-compete may be governed by the laws of a State other than the State where the worker lives, which undermines the reliability of studies analyzing the effects of non-compete enforceability. The authors argue that cross-border enforcement of non-competes may be a difficult issue to properly address in empirical work and has not been accounted for in the work to date. In response, the Commission notes that if the State law that applied to a given non-compete were totally random—for example, if a non-compete in Oregon was no more likely to be governed by Oregon's law than any other State's law—we would expect to observe no effects on economic outcomes (such as earnings, innovation, and new business formation) from changes in State law. Instead, the empirical research shows that changes in State law have clear impacts on economic outcomes in particular States. This indicates that enough non-competes within a particular State are subject to that State's law for changes in that State's law to affect economic outcomes in that State.

Third, the authors argue that there is a lack of data on the use of non-competes and that such data are needed to completely assess the effects of non-competes. Although there is not comprehensive data on individual workers' employment agreements, the Commission believes the studies that examine changes in enforceability do so based on sufficient data to be reliable and are otherwise methodologically sound. These studies are also highly probative with respect to the effects of the final rule because what they are examining—how changes in the enforceability of non-competes affect various outcomes—matches closely with what the final rule does. The Commission also notes that there is considerable data regarding the prevalence of non-competes, which it discussed in Part I.B.2.

Fourth, the article argues that some studies of non-competes have small sample sizes, which may lead to measurement error. In response to concerns about small sample sizes, the Commission notes that the most recent studies use a greater breadth of variation in the legal environment surrounding non-competes, overcoming this obstacle. Fifth, the article expresses concern about certain studies that are based on legal changes in Michigan. The Commission takes this critique into account throughout this final rule and notes it when discussing the applicable studies that examine legal changes in Michigan, including under ''Evidence of inhibited innovation.''

In an ex parte communication included in the public record, the author of one of the studies of innovation stated that studies which examine multiple legal changes may be biased, since affected parties may anticipate the legal change and adjust their behavior prior to the date that the legal change is made. The author stated that examination of the legal change in Michigan was therefore preferable, since it was ''inadvertent'' and therefore not

[580] Comment of Mark Cohen, FTC–2023–0007–12064, at 12–13.

[581] Referring to Xiao, *supra* note 572 and Conti, *supra* note 571.

[582] NPRM at 3492–93.

[583] Barnett & Sichelman, *supra* note 389.

[584] The allegedly flawed measures use binary indicators for enforcement versus non-enforcement, or binary indicators for several facets of enforceability (Stuart and Sorenson, *supra* note 529; Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment,* 27 J. L., Econ., & Org. (2011)), and the more recent measure is more nuanced (Bishara, *supra* note 501).

subject to anticipation effects.[585] The Commission agrees that, in general, anticipation effects can bias the findings of empirical studies. However, empirical work shows that the legal changes used in much of the literature on non-competes are not subject to anticipation effects.[586] This may be because the vast majority are changes based on judicial decisions, rather than statutory changes, as hypothesized by researchers.[587] Moreover, even if anticipation effects occur in studies of non-compete enforceability, that would likely not change the measurable observed benefits of reducing non-compete enforceability, and may indeed lead to underestimation of observed benefits. Underestimation would occur if parties were adjusting their behavior in advance of the change in enforceability in the same direction as the effects observed after the change. This would occur if, for example, firms began to decrease use of non-competes in advance of a decrease in non-compete enforceability, knowing that those non-competes would soon be less enforceable. This ultimately would mean that the actual effects on labor mobility, earnings, new business formation, innovation, and other outcomes could be even greater. Additionally, the legal change in Michigan is subject to other criticism, as discussed under ''Evidence of inhibited innovation'' and by commenters.

iii. Non-Competes May Increase Concentration and Consumer Prices

Evidence of Increased Concentration and Consumer Prices

As described in Parts IV.B.3.b.i and ii, the Commission finds that non-competes tend to negatively affect competitive conditions in product and service markets by inhibiting new business formation and innovation, and have in fact done so. The Commission finds that these effects, standing alone, are sufficient to support its finding that non-competes tend to negatively affect competitive conditions in product and service markets.

However, the Commission notes that there is also evidence that non-competes increase industrial concentration more broadly, which in turn tends to raise consumer prices. The empirical literature on these effects is less developed than the empirical work documenting declines in new business formation and innovation; specifically, the empirical evidence on consumer prices relates only to healthcare markets (though the evidence on concentration spans all industries in the economy). For this reason, the Commission does not rest its finding that non-competes tend to negatively affect competitive conditions in product and service markets on a finding that non-competes increase concentration and consumer prices. However, there are several reliable studies finding that non-competes increase concentration and/or consumer prices, bolstering the Commission's finding that non-competes tend to negatively affect competitive conditions in product and service markets.

The Commission finds that non-competes reduce new business formation.[588] By doing so, non-competes may increase concentration. Non-competes may also stunt the growth of existing firms that would otherwise better challenge dominant firms, for example, by limiting potential competitors' access to talented workers.[589]

Non-competes may also affect prices in a variety of ways. By suppressing workers' earnings, non-competes decrease firms' costs, which firms may theoretically pass through to consumers in the form of lower prices. However, non-competes may also have several countervailing effects that would tend to increase prices. First, non-competes may increase concentration, which could lead to less competition between firms on price, and therefore higher prices for consumers. Second, by inhibiting efficient matching between workers and firms, non-competes may reduce the productivity of a firm's workforce, which may lead to higher prices. Third, by inhibiting innovation, non-competes may hinder the development of lower-cost products or more efficient manufacturing processes.

One study, by Hausman and Lavetti, focuses on physician markets. The study finds that as the enforceability of non-competes increases, these markets become more concentrated, and prices for consumers for physician services increase. The study finds that while non-competes allow physician practices to allocate clients more efficiently across physicians, this comes at the cost of greater concentration and higher consumer prices. This study examines several changes in non-compete enforceability measured continuously. The authors note that, in theory, if decreased non-compete enforceability decreases earnings, then the fall in prices may simply be due to pass-through of labor costs. However, empirical research shows that decreased non-compete enforceability increases earnings (as discussed in Part IV.B.3.a.ii). Even if that were not the case, Hausman and Lavetti show that labor cost pass-through cannot explain their findings.[590] This study satisfies all of the principles described in Part IV.A.2, and is accordingly weighted highly by the Commission.

Another study, by Lipsitz and Tremblay, examines all industries in the economy and shows empirically that increased enforceability of non-competes at the State level increases concentration.[591] Lipsitz and Tremblay theorize that non-competes inhibit entrepreneurial ventures that could otherwise enhance competition in goods and service markets. The authors show that the potential for harm is greatest in the industries in which non-competes are likely to be used at the highest rate.[592]

If the general causal link governing the relationship between enforceability of non-competes, concentration, and consumer prices acts similarly to that identified in the study by Hausman and Lavetti, then it is plausible that increases in concentration identified by Lipsitz and Tremblay would lead to higher prices in a broader set of industries than healthcare. Lipsitz and Tremblay use several changes in non-compete enforceability measured in a continuous fashion, but do not measure the impact on consumer prices or welfare. The Commission therefore finds the study's conclusion that non-competes increase concentration highly robust, but the study is not itself direct empirical evidence of a relationship between non-competes and prices.

Two additional studies assess the effects of non-competes on concentration and prices. However, the Commission gives these studies little weight.

A study of physician non-competes by Lavetti, Simon, and White finds that prices charged by physicians with non-competes are similar to those charged by physicians without non-competes.[593]

[585] Ex Parte Communication: Email from G. Carlino, *supra* note 558.

[586] Johnson, Lavetti & Lipsitz, *supra* note 388 at 12–14.

[587] *Id.* at 12.

[588] *See* Part IV.B.3.b.i.

[589] *See* Part IV.C.2.c.i (describing a study addressing how non-competes force firms to make inefficiently high buyout payments).

[590] Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes,* 13 Am Econ. J. Applied Econ. 278 (2021).

[591] Michael Lipsitz & Mark Tremblay, *Noncompete Agreements and the Welfare of Consumers* 6 (2021), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975864.* Concentration is measured by an employment-based Herfindahl-Hirschman Index (HHI).

[592] *Id.* at 3.

[593] *See* Lavetti, Simon, & White, *supra* note 82.

The Commission gives this study less weight because it merely analyzes differences between workers based on the use of non-competes.[594]

A study by Younge, Tong, and Fleming finds that non-competes contribute to economic concentration because non-compete enforceability increases the rate of mergers and acquisitions.[595] This study uses one change in non-compete enforceability—in Michigan—to generate its results. However, in addition to its use of a single legal change in a single State, the change to non-compete enforceability was accompanied by several other changes to Michigan's antitrust laws, so it is not possible to identify the effect of the change in non-compete enforceability standing alone.

Comments Pertaining to Increased Concentration and Consumer Prices and the Commission's Responses

Several commenters addressed the question of whether non-competes affect concentration and consumer prices. Some commenters asserted that the rule would lower consumer prices by improving matches between employers and workers, increasing productivity. Commenters also argued that locking up talent, particularly in specialized markets, prevents entrepreneurship and new business formation and can thus contribute to increased concentration.

Some commenters opposing the NPRM claimed that banning non-competes could increase concentration. These commenters argued that larger firms could discourage companies from expanding into new and underserved markets by poaching, or threatening to poach, their key employees, leading to increased costs that could force some firms out of business. These commenters also argued that non-competes protect small businesses from dominant consolidators, as high recruitment, retention, and other costs may induce small businesses to sell or larger businesses may hire away their workers. A medical trade organization stated that without non-competes, independent practices might not be able to afford to hire and thus may be unable to grow or compete.[596]

While these commenters theorize that prohibiting non-competes would increase concentration, the Commission notes that the available evidence indicates that non-competes increase concentration, rather than reducing it. The Commission further notes that these theories are inconsistent with the robust empirical literature finding that non-competes reduce new business formation, as well as with the hundreds of comments from small businesses, including physician practices, recounting how non-competes stymied their ability to enter markets or grow because they make it harder to hire talent.

Several commenters claimed that prohibiting non-competes would increase worker earnings and increase transaction costs related to hiring, which firms would pass through to consumers in the form of higher prices. However, the only study of how non-competes affect prices—the Hausman and Lavetti study—finds that decreased non-compete enforceability *decreases* prices in the healthcare market, rather than increasing them. Moreover, while it is theoretically possible that higher labor costs could be passed on to consumers in the form of higher prices, there are several countervailing effects from prohibiting non-competes that would tend to lower prices. Additionally, empirical research shows that labor cost pass-through cannot explain decreases in prices in healthcare markets associated with non-competes becoming less enforceable.[597]

An insurance company stated that insurance premiums would increase if the rule allows non-profit hospitals to dominate the hospital market and have more leverage in network negotiations. These commenters do not provide any empirical evidence to support this assertion. Moreover, for the reasons described in Part V.D.5, the Commission disagrees that the ability to use non-competes will provide a material competitive advantage to non-profit hospitals. Another commenter stated that if non-competes are prohibited, physicians will leave States with lower market reimbursement rates for those with higher rates, increasing healthcare costs and shortages. Commenters did not cite any empirical evidence that supports this hypothetical assertion that the final rule would increase healthcare costs or shortages due to physicians leaving States with lower reimbursement rates, and the Commission is aware of none. However, the Commission notes that it received many comments from doctors, nurses, and other healthcare professionals asserting that non-competes worsen healthcare shortages.[598]

Some commenters stated that non-competes may improve access to physicians due to non-compete-led consolidation or more efficient patient-sharing within practices, and that Hausman and Lavetti's study is unable to quantify these benefits. In response, the Commission notes that there is no empirical literature bearing out this theory, and that the commenters overwhelmingly stated that non-competes decrease patients' access to the physicians of their choice, increase healthcare shortages, and negatively affect the quality of health care.[599]

iv. Non-Competes May Reduce Product and Service Quality and Consumer Choice

The negative effects of non-competes on competition may also degrade product and service quality and consumer choice. Competition encourages firms to expand their product offerings and innovate in ways that lead to new and better products and services.[600] However, by inhibiting new business formation, increasing concentration, and reducing innovation, non-competes reduce competitive pressure in product and service markets, which may reduce product quality and consumer choice. In addition, poor working conditions and less optimal matching of workers and firms may lead to reductions in the quality of products and services. For these reasons, non-competes may tend to negatively affect competitive conditions in product and service markets by reducing product quality and consumers' options.

Such effects are less readily quantifiable than the other negative effects of non-competes on product and service markets—*i.e.,* the negative effects on new business formation, innovation, concentration, and consumer prices. It is thus unsurprising that there are not reliable empirical studies of these effects. However, the Commission received an outpouring of public comments on this issue. Hundreds of commenters, primarily from the healthcare field, described how

[594] *See* Part IV.A.2 (describing the shortcomings of such studies).

[595] Kenneth A. Younge, Tony W. Tong, & Lee Fleming, *How Anticipated Employee Mobility Affects Acquisition Likelihood: Evidence From a Natural Experiment,* 36 Strategic Mgmt. J. 686 (2015).

[596] *See also* Part XI.C.2, which addresses these types of comments in greater detail.

[597] Hausman & Lavetti, *supra* note 590.

[598] These comments are summarized in greater detail in Part IV.B.3.b.iv.

[599] *See* Part IV.B.3.b.iv.

[600] In the NPRM, the Commission noted that innovation and entrepreneurship can, in turn, have positive effects on product quality. *See* NPRM at 3492. The Commission did not make specific findings on the effect of non-competes on consumer choice. However, the Commission discussed the closely related questions of how non-competes affect new business formation, innovation, concentration, and consumer prices. *See id.* at 3490–93.

non-competes reduce product and service quality and consumer choice.

The large number of comments the Commission received on this issue, the wide variety of impacts commenters describe, and the fact that the impacts commenters describe are overwhelmingly negative, indicate that non-competes reduce product quality and consumer choice, further bolstering the Commission's finding that non-competes tend to negatively affect competitive conditions in product and service markets.[601]

The commenters who addressed the effects of non-competes on product quality and consumer choice primarily discussed the healthcare industry. The majority of these comments focused on how non-competes harm patient care. Hundreds of physicians and other commenters in the healthcare industry stated that non-competes negatively affect physicians' ability to provide quality care and limit patient access to care, including emergency care. Many of these commenters stated that non-competes restrict physicians from leaving practices and increase the risk of retaliation if physicians object to the practices' operations, poor care or services, workload demands, or corporate interference with their clinical judgment. Other commenters from the healthcare industry said that, like other industries, non-competes bar competitors from the market and prevent providers from moving to or starting competing firms, thus limiting access to care and patient choice. Physicians and physician organizations said non-competes contribute to burnout and job dissatisfaction, and said burnout negatively impacts patient care.

In addition, physicians and physician organizations stated that, to escape non-competes, physicians often leave the area, and that this severs many physician/patient relationships. These commenters stated that non-competes therefore cause patients to lose the knowledge, trust, and compatibility that comes with long-established relationships. These commenters also said that strong physician/patient relationships and continuity of care improve health outcomes, particularly for complex, chronic conditions or patients who need multiple surgeries. These commenters described how patients who lose their physicians to non-competes either travel long distances to see that physician, switch physicians, or lose access entirely if no other physicians are available. One physician argued that taking away a patient's ability to choose their provider violates the Patients' Bill of Rights.[602]

One medical society cited a 2022 survey of Louisiana surgeons in which 64.4% of the surgeons believed non-competes force patients to drive long distances to maintain continuity of care, and 76.7% believed they force surgeons to abandon their patients if they seek new employment.[603] This study had a small sample size and thus the Commission gives it limited weight, but the Commission notes that it accords with the many comments the Commission received describing how patients must drive long distances to maintain continuity of care—or are unable to do so, resulting in harms to their health. Illustrative comments on how non-competes affect the quality of patient care include the following:

- As a primary care physician I truly hope to see [the rule] move forward. I recently left my position at one company and for a year commuted an hour to be outside of my non-compete radius. I recently returned to my community and discovered I have more patients than I can count who simply didn't get care for over a year because they didn't want to find a new [primary care physician] but also couldn't make the hour drive to see me at my new location. The commute was annoying for me, but ultimately the only ones truly hurt were patients. Let's stop hurting our patients by restricting their ability to see their physicians.[604]
- My practice has operated since the 1990s in Danville, Kentucky. We are the only cardiology practice that has been present and has worked tirelessly to serve this rural community. The practice was a private practice originally. Unfortunately, just as most cardiac practices throughout the country have had to, our practice had to come under the control of these hospital systems to maintain its viability. . . . The CEO and the administration . . . have squeezed us out and forced us to leave the area with the employment contract non-compete in place. . . . I have spent the last 6 months hugging patients, medical staff, nursing who are stricken by the fact that we are being pushed out. Patients desperately ask me how they can maintain care if they have to travel up to an hour to see their doctors with this change. They worry how they can pay for the steep gas prices to see their doctors. . . . They are truly concerned for the health of their families. All the while all I can do is tell them that my non-compete does not allow me, their cardiologist for the past decade, to give them any advice on how to maintain their care.[605]
- As a Physician, I had a non compete clause in my contract that extended two counties wide (100 square miles). . . . [W]hen I would not sign a contract amendment regarding pay that was very unfavorable and nebulous I was called in and summarily dismissed 'no cause.' Because of that I had to work out of state and my patients were instantly without a physician. The community did not have enough physicians to be able to care for the patients who now had no medical provider. During COVID this lack of access to healthcare for patients most certainly led to increased unnecessary illness and death. . . . Patients are suffering with access to healthcare, and physician shortages are being exacerbated because every time a physician has to leave because of a non compete clause they start hiring and credentialing all over again and it can take months for them to be able to work again.[606]
- Being a therapist, non-competes are extremely scary when it comes to patient care. Some include date ranges in which we cannot communicate with our patients, some of whom have severe trauma histories or suicidal ideations. If a clinician changes companies but is unable to continue meeting a patient, who is at fault if there is an injury or death? . . . Some non-competes include mileage in which a clinician cannot create their own company or rent out an office within a certain radius—how is this a safe practice? How can clients continue to work on their mental health and desire to stay alive if they have to change clinicians due to a noncompete clause?[607]
- Due to mistreatment and to escape workplace toxicity, one of my colleagues left our practice in compliance to our non-compete conditions, even though they caused great hardship. I, too, wanted to leave, but could not because doing so would have harmed my family's well being. What I witnessed in the aftermath was unconscionable. There was a void in patient care and months later, there still is a void. Not only was this physician required to move quite a distance from the practice, he was forbidden to even inform his patients that he was leaving. The practice in turn, did not inform the patients, and when asked, just informed them that he was no longer with the practice. Consequently, wait times to treat cancers doubled and now have tripled.[608]
- I would like to open a new clinic in my town, but my noncompete would disallow that from happening immediately. Furthermore, I worry that my patients that need medical care wouldn't be able to access it at my current clinic because the providers

[601] As described in Parts IV.B.3.b.i and ii, the Commission finds that the effects of non-competes on new business formation and innovation, standing alone, are sufficient to sustain its finding that non-competes tend to negatively affect competitive conditions in product and service markets.

[602] *See* President's Advisory Commission on Consumer Protection and Quality in the Health Care Industry, *Consumer Bill of Rights and Responsibilities, Executive Summary* (1997), *https://govinfo.library.unt.edu/hcquality/cborr/index.htm.*

[603] *See* William F. Sherman et al., *The Impact of a Non-Compete Clause on Patient Care and Orthopaedic Surgeons in the State of Louisiana: Afraid of a Little Competition?,* 14 Orthopedic Revs. (Oct. 2022), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9569414/.*

[604] Individual commenter, FTC–2023–0007–19853.

[605] Individual commenter, FTC–2023–0007–4072.

[606] Individual commenter, FTC–2023–0007–4440.

[607] Individual commenter, FTC–2023–0007–4270.

[608] Individual commenter, FTC–2023–0007–2384.

are booked out 6+ months, and if one left that would make those immediately increase to nearly a year, which could potentially cause my patient lasting damage. If I could open my own clinic locally without the constraints of the noncompete, those patients would be able to continue care as necessary with me, and I wouldn't feel stuck with poor management worsening patient care for my patients.[609]

- As a veterinarian, I can personally assure the FTC that such restrictions have caused both death and permanent disability of pets. . . . In nearly every scenario I have heard of, the veterinary business that requires and enforces non-compete clauses is underserving the pet-owning public. This is the current situation for veterinary medicine on a national level. Hospitals are so overwhelmed that they are not accepting new patients, turning away emergency cases, and imposing extremely long (several months or more) waiting lists for appointments and/or scheduled procedures. If a hospital cannot accommodate the patients who require veterinary care, that hospital is not able to compete with the existing demand for services. . . . Is it fair for pet owners who cannot get their pets in to see a veterinarian (even on emergency situations) to have the veterinary hospitals who refuse to see their pets remove other options for care via non-compete clauses? These clauses are being blatantly abused by certain large veterinary businesses so that these organizations can maintain a pool of potential patients (on waiting lists) to draw from. Unfortunately, many of these dogs and cats die while waiting to be seen. At least in my profession, the non-compete concept has reached an epitome of unethical conduct. In addition, economic growth has been stunted due to self-serving greedy people in power. Please get rid of this horrible clause and lets make sure pets and their owners get what they need, when they need it.[610]

Some hospital associations argued that a study of physician markets[611] shows that non-competes improve patient care. According to these commenters, this research finds that non-competes make in-practice referrals more likely, increasing revenue and wages and providing patients with more integrated and better care. In response, the Commission notes that while the study finds that non-competes make physicians more likely to refer patients to other physicians within their practice—increasing revenue for the practice—it makes no findings on the impact on the quality of patient care. The Commission further notes that pecuniary benefits to a firm cannot justify an unfair method of competition.[612]

Some medical practices argued that within-group referrals allow physicians to coordinate care plans and simplify logistics, and that non-competes protect the stability of those care teams to patients' benefit. Some industry associations and hospitals argued that non-competes improve patient choice and continuity of care because they stop physicians from leaving a health provider, benefiting patients who cannot follow the provider due to geographic or insurance limitations. One physician association said physicians leaving jobs can be costly to patients, who must transfer records and reevaluate insurance coverage.

The Commission notes that the vast majority of comments from physicians and other stakeholders in the healthcare industry assert that non-competes result in worse patient care. The Commission further notes that the American Medical Association discourages the use of non-competes because they ''can disrupt continuity of care, and may limit access to care.''[613] In addition, there are alternatives for improving patient choice and quality of care, and for retaining physicians, that burden competition to a much less significant degree than non-competes.

A related issue frequently raised in the comments is the impact non-competes have on healthcare shortages. According to many commenters, non-competes contribute to shortages by preventing physicians from moving to areas where their skills and specialties are needed; forcing physicians out of such areas; or forcing them out of practice entirely due to contractual restrictions or burnout. Such shortages, according to these commenters, decrease access to care, increase wait times, lead to canceled procedures, and decrease the quality of care. Many commenters stated that these effects of non-competes are particularly acute in rural, underserved, and less affluent areas that already have difficulty attracting healthcare professionals. Some commenters argued that provider shortages can, in combination with non-competes, create monopolies.

A smaller number of commenters from the healthcare industry argued that non-competes alleviate healthcare shortages and prevent hospital or facility closures by keeping physicians from leaving underserved areas and reducing fluctuations in labor costs. Some of these commenters asserted that a ban on non-competes would upend healthcare labor markets, thereby exacerbating healthcare workforce shortages, especially in rural and underserved areas. A medical society argued that non-competes can allow groups to meet contractual obligations to hospitals, as physicians leaving can prevent the group from ensuring safe care. As the Commission notes, there are not reliable empirical studies of these effects, and these commenters do not provide any. However, the Commission notes that the rule will increase labor mobility generally, which makes it easier for firms to hire qualified workers.

Commenters in a variety of industries beyond healthcare markets also provided a wide range of examples of how non-competes diminish the quality of goods and services, including preventing businesses from hiring experienced staff and creating worker shortages. Commenters stated that, where firms in a market use non-competes, it can be difficult for other firms to remain in the market, and consumers thus lose the freedom to choose providers. Several comments pointed favorably to the American Bar Association's longstanding ban on non-competes for most lawyers to protect clients' freedom to choose their lawyer, in contrast with other highly paid and highly skilled professions such as physicians and their patients or clients.[614]

Commenters from outside the healthcare industry mainly focused on how non-competes increase concentration within industries, which reduces firms' incentive to innovate and results in consumers having fewer choices. Other commenters described how non-competes lock highly talented workers out of their fields or force them into jobs where they are less productive, depriving the marketplace of the products and services they would have developed. Illustrative examples of these comments include the following:

- As a software developer who often works under contracts containing sections stipulating non-compete agreements, I have observed first hand how they can harm the economy by bolstering monopolies, such as in sectors where clientele only have a single choice for meeting their engineering needs. Often, these clients have no other options and are forced to meet whatever arbitrary price point is set by the leading (sole)

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[609] Individual commenter, FTC–2023–0007–1206.

[610] Individual commenter, FTC–2023–0007–0677.

[611] Lavetti, Simon, & White, *supra* note 82.

[612] *See supra* note 305 and accompanying text.

[613] *See, e.g.,* Comment of Am. Med. Ass'n, FTC–2023–0007–21017, at 4–5 (citing AMA *Code of Medical Ethics* Opinion 11.2.3.1). After the comment period closed, the AMA adopted a policy supporting banning non-competes for physicians in clinical practice who are employed by hospitals, hospital systems, or staffing companies, though not those employed by private practices. This policy change does not have legal effect. Andis Robeznieks, *AMA Backs Effort to Ban Many Physician Noncompete Provisions,* Am. Med. Ass'n (Jun. 13, 2023), *https://www.ama-assn.org/medical-residents/transition-resident-attending/ama-backs-effort-ban-many-physician-noncompete.*

[614] *See* Model Rule 5.6, *supra* note 532.

company, and that company may in turn operate howsoever they choose without feeling the need to adopt reasonable business practices that might exist were there competition.[615]

- As an aspiring tree care professional, non-compete agreements prevent me from switching employers/companies to access better work conditions or opportunities. No tree service company has ever invested in me. I learned to climb and saw while working for Federal agencies (USDA and NPS), and also through self-education and practice on my own. I believe that non-compete agreements have adversely limited competition in the tree service industry. This hurts employees who could do better if they were free to change their place of employment, and it hurts consumers who have fewer tree service providers to choose from.[616]
- I worked in a business supplying technology and materiel considered critical for national defense. I was labeled an expert in the field by my DoD customers and commended multiple times for solving logistical and technical problems with protective equipment during the previous two wars. I lead development contracts from the DoD to advance the state-of-the-art in warfighter protection, which set multiple records for figures of merit within my business, and which our program manager volunteered was the most exciting technology she had ever managed. When my business decided to discontinue that technology and transfer me, my noncompete agreement prevented me from continuing to support the DoD. I was removed from consideration at another firm in the third round of interviews because of my noncompete agreement—again, for a technology my business had decided to not pursue and had transferred me out of. So, instead of having the opportunity to advance my career into management in the service of protecting warfighters, I had to exit that industry and move laterally, into a different industry that cannot value 20 years of my expertise, and which will not further the defense of my country. If the FTC had nationalized a prohibition on noncompete clauses two years ago, this would not have happened, and I would have had the opportunity to advance my career, improve my family's economic fortune, and continue to contribute to our nation's defense.[617]

Overall, the Commission believes that the large number of comments it received on the issue of product quality and consumer choice and the wide variety of overwhelmingly negative impacts commenters describe further bolsters the Commission's finding that non-competes tend to negatively affect competitive conditions in product and service markets.

4. Prohibitions in Section 910.2(a)(1)

Based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition, the Commission adopts § 910.2(a)(1), which defines unfair methods of competition related to non-competes with respect to workers other than senior executives. Section 910.2(a)(1) provides that, with respect to a worker other than a senior executive, it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete clause; enforce or attempt to enforce a non-compete clause; or represent that the worker is subject to a non-compete clause.

Part IV.A sets forth the Commission's determination that the foregoing practices are unfair methods of competition under section 5, and Parts IV.B.1 through IV.B.3 explain the findings that provide the basis for this determination. In this Part IV.B.4, the Commission explains the three prongs of § 910.2(a)(1) and addresses comments on proposed § 910.2(a).[618]

a. Entering Into or Attempting To Enter Into (§ 910.2(a)(1)(i))

Proposed § 910.2(a) would have provided that it is an unfair method of competition for an employer to, among other things, "enter into or attempt to enter into a non-compete clause with a worker." The Commission adopts this same language in the final rule in § 910.2(a)(1)(i). As a result, the final rule prohibits persons from entering into or attempting to enter into non-competes with workers other than senior executives as of the effective date. (Section 910.2(a)(2)(i) separately prohibits persons from entering into or attempting to enter into non-competes with senior executives as of the effective date.)

A business commenter requested that the Commission remove "attempt to enter into" from § 910.2(a) on the basis that it may encourage workers to sue employers for contractual provisions that have no practical effect on the worker or which are not finalized in any employment agreement. The Commission disagrees that conduct that would be covered by the attempt provision—such as presenting the worker with a non-compete, even if the employer and worker do not ultimately execute the non-compete—has no practical effect on the worker. The Commission is concerned that such attempts to enter into non-competes still have *in terrorem* effects that deter competition. For example, workers presented with non-competes may not realize they are not bound by them. Such workers may therefore refrain from seeking or accepting other work or starting a business, yielding the same tendency of non-competes to negatively affect competitive conditions that motivate this final rule.

The Commission accordingly finalizes the language as proposed.

b. Enforcing or Attempting To Enforce (§ 910.2(a)(1)(ii))

Proposed § 910.2(a) would have provided that it is an unfair method of competition for an employer to, among other things, "maintain with a worker a non-compete clause." In addition, proposed § 910.2(b)(1) would have provided that, to comply with this prohibition on maintaining a non-compete, an employer that entered into a non-compete with a worker prior to the compliance date must "rescind the non-compete no later than the compliance date."

As elaborated in Part IV.E, the Commission has decided not to finalize a rescission requirement. As a result, the Commission also removes "maintain" from the text of § 910.2(a), to avoid any ambiguity about whether the final rule contains a rescission requirement. Instead of a rescission requirement, the final rule focuses more narrowly on the future enforcement of existing non-competes with workers other than senior executives. It provides that, with respect to a worker other than a senior executive, it is an unfair method of competition for a person to enforce or attempt to enforce a non-compete clause. An employer attempts to enforce a non-compete where, for example, it takes steps toward initiating legal action to enforce the non-compete, even if the court does not enter a final order enforcing the non-compete.

For workers other than senior executives, this prohibition on enforcing a non-compete applies to all non-competes, but affects only enforcement or attempted enforcement conduct taken after the effective date of the rule. In so doing, the Commission reduces the burden on employers by eliminating the need to take steps to formally rescind provisions of existing contracts, instead simply requiring that employers refrain from enforcing or attempting to enforce in the future (after the effective date) non-competes that are rendered unenforceable by this provision of the rule.

As explained in Part IV.C, the Commission in the final rule does not prohibit the future enforcement or attempted enforcement of existing non-

[615] Individual commenter, FTC–2023–0007–5818.

[616] Individual commenter, FTC–2023–0007–1980.

[617] Individual commenter, FTC–2023–0007–4446.

[618] Several commenters requested changes to proposed § 910.2(a) to provide various exceptions to coverage under the final rule. The Commission addresses these comments in Part V.C.

competes with senior executives. The Commission considered whether to take this approach for workers other than senior executives, but based on the totality of the evidentiary record concludes that such non-competes should not remain in force after the effective date for three main reasons. First, existing non-competes with workers other than senior executives negatively affect competitive conditions to a significant degree, for the same reasons as new non-competes. The Commission believes that non-competes with such workers that were entered into before the effective date implicate the concerns described in Part IV.B.3—relating to the negative effects of non-competes on competitive conditions in labor, product, or service markets—to the same degree as non-competes entered into as of the effective date. Of course, the Commission notes that the empirical evidence quantifying the harms to competition from non-competes by definition relates to existing non-competes.

Second, for workers other than senior executives, existing non-competes not only impose acute, ongoing harms to competition, they also impose such harms on individual workers by restricting them from engaging in competitive activity by seeking or accepting work or starting their own business after their employment ends. As described in Part IV.B.2.b, the Commission received thousands of comments from workers that described non-competes as pernicious forces in their lives that forced them to make choices that were detrimental to their finances, their careers, and their families. These concerns are less present for senior executives, who are far more likely than other workers to have negotiated their non-compete and received compensation in return, thereby mitigating this kind of acute, ongoing harm.

Third, because the Commission finds that non-competes with workers other than senior executives generally are not bargained for and such workers generally do not receive meaningful, if any, compensation for non-competes, the practical considerations that are present with respect to existing non-competes for senior executives (discussed in Part IV.C.3) are far less likely to be present for other workers. For these reasons, the Commission concludes that, consistent with the proposed rule, existing non-competes with workers other than senior executives should not remain in force after the effective date.

Several commenters argued that the Commission should allow all existing non-competes to remain in effect. Some of these commenters argued that the rule would upset bargained-for agreements. Commenters asserted that workers who received benefits in exchange for agreeing to non-competes would receive a windfall if such clauses cannot be maintained and are no longer enforceable. A few of these commenters also argued that invalidating existing non-compete agreements will upset workers' economic interests because they will lose out on enhanced compensation that they have received or expect to receive in exchange for their non-competes. Some commenters contended that invalidating existing non-competes would be especially harmful to workers' interests in non-competes tied to particularly large amounts of compensation, complex compensation arrangements, or unique forms of compensation such as equity grants. Relatedly, some commenters expressed concern that the NPRM did not explain whether employers could recoup benefits already paid in exchange for non-competes. A few commenters suggested that they have given workers confidential and trade secret information in exchange for the worker agreeing to a non-compete that may no longer be enforceable.

The Commission is not persuaded by comments arguing that the rule would upset existing bargained-for agreements. As noted in Part IV.B and Part IV.C, the Commission finds that workers who are not senior executives are unlikely to negotiate non-competes or to receive compensation for them. Moreover, the Commission has also determined that non-competes with senior executives that predate the effective date may be enforced,[619] which will substantially reduce the number of workers with complex compensation arrangements whose non-competes are rendered unenforceable after the effective date.

Other commenters argued that employers relied on the expectation of a non-compete when deciding how much to invest in training their workers or the extent to which they share trade secrets with their workers. In response, the Commission notes that firms that are concerned about retention have tools other than non-competes for retaining workers, including fixed-duration employment contracts (*i.e.,* forgoing at-will employment and instead making a mutual contractual commitment to a period of employment) and providing improved pay and benefits (*i.e.,* competing on the merits to retain the worker's labor services). In addition, while some workers that have received training may leave a firm for a competitor, firms will also be able to attract highly trained workers *from* competitors, and this increased job-switching will likely lead to more efficient matching between workers and employers overall.[620]

The Commission is not persuaded by commenters who contended that invalidating existing non-competes would disturb employer expectations with respect to sharing trade secrets or other commercially sensitive information. As explained in Part IV.D.2, the Commission finds that employers have adequate alternatives to non-competes to protect these interests, including trade secret law and NDAs, and that these alternatives do not impose the same burden on competition as non-competes. Some commenters contended that employers may not have adequate alternatives in place for existing non-competes and that former workers may not agree to new NDAs. But the Commission finds that it is rare for an employer who entered into a non-compete agreement as a means of protecting trade secrets or commercially sensitive information to have not also entered into an NDA with the worker.[621] This is especially true given that non-competes are generally less enforceable than NDAs.[622] In any event, nothing in the final rule prevents employers from entering new NDAs with workers.

Some commenters contended that invalidating existing non-competes would enable new employers to ''free ride'' off former employers' investments in training. The Commission addresses comments about ''free riding'' and training investments in Part IV.D.2.

Several comments argued that a final rule should not invalidate existing non-competes because the economic impact is too unpredictable. These commenters maintained that the number of individual employment contracts that would be invalidated means that the economic impact would be exceptionally widespread, and likely impossible to accurately predict. In response, the Commission notes that it

[619] *See* Part IV.C.3.

[620] *See* Part IV.B.3.a.

[621] *See, e.g.,* Balasubramanian, Starr, & Yamaguchi, *supra* note 74 at 35 (finding that 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or a non-recruitment agreement, and 74.7% of workers with non-competes are subject to all three provisions).

[622] Camilla A. Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements that Act Like Noncompetes,* 133 Yale L. J. 669, 676 (2024) (''Courts across jurisdictions routinely give confidentiality agreements 'more favorable treatment' than noncompetes. And confidentiality agreements are not typically subject to the same limitations that are applied to noncompetes. . . . Overall, courts tend to apply a default rule of enforceability.'') (internal citations omitted).

has assessed the benefits and costs of the final rule and finds that the final rule has substantial benefits that clearly justify the costs (even in the absence of full monetization).[623]

c. Representing (§ 910.2(a)(1)(iii))

Proposed § 910.2(a) would have provided that it is an unfair method of competition for an employer to, among other things, ''represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.'' The Commission adopts the same language in the final rule. Pursuant to § 910.2(a)(1)(iii), it is an unfair method of competition for an employer to represent that a worker other than a senior executive is subject to a non-compete clause. The ''good faith'' language remains in the final rule but, for clarity, it has been moved to § 910.3, which contains exceptions to the final rule.[624]

Under this ''representation'' prong, the final rule prohibits an employer from, among other things, threatening to enforce a non-compete against the worker; advising the worker that, due to a non-compete, they should not pursue a particular job opportunity; or telling the worker that the worker is subject to a non-compete. The Commission believes that this prohibition on representation is important because workers often lack knowledge of whether employers may enforce non-competes.[625] In addition, the evidence indicates that employers frequently use non-competes even when they are unenforceable under State law, suggesting that employers may believe workers are unaware of or unable to vindicate their legal rights.[626] Employers can exploit the fact that many workers lack knowledge of whether non-competes are unenforceable under State law by representing to workers that they are subject to a non-compete when they are not or when the non-compete is unenforceable. Such misrepresentations can have *in terrorem* effects on workers, causing them to refrain from looking for work or taking another job, thereby furthering the adverse effects on competition that the Commission is concerned about.

In addition, threats to litigate against a worker—even where the worker is aware of the Commission's rule and believes the non-compete is unenforceable—may deter the worker from seeking or accepting work or starting their own business. As explained in Part IV.B.2.b.ii, many commenters—including highly paid workers—explained in their comments that they believed their non-compete was unenforceable, but they nevertheless refrained from seeking or accepting work or starting their own business because they could not afford to litigate against their employer for any length of time. For this reason, the Commission believes it is important for the final rule to prohibit employers not only from enforcing or attempting to enforce non-competes against workers other than senior executives, but also threatening to do so.

A commenter suggested limiting the ''representation'' prong to instances where the employer has no good-faith basis to believe the non-compete is valid ''under local or State law,'' even if the non-compete is invalid under the final rule. The Commission does not adopt this approach because representing to workers that they are subject to a non-compete, where the rule provides that the non-compete is unenforceable, would mislead the worker and would tend to deter them from competing against the employer by seeking or accepting work or starting a business.

C. Section 910.2(a)(2): Unfair Methods of Competition—Non-Competes With Senior Executives

In the NPRM, the Commission proposed to prohibit non-competes—including non-competes entered into before the effective date—with all workers.[627] The Commission preliminarily found that all non-competes, whether with senior executives or other workers, were restrictive conduct that negatively affected competitive conditions.[628] However, while the Commission preliminarily found that non-competes with workers other than senior executives were exploitative and coercive, the Commission stated that this finding did not apply to senior executives.[629] The Commission requested comment on that preliminary finding, as well as on whether non-competes with senior executives should be excluded from the rule or otherwise subject to a different standard. The NPRM did not define the term ''senior executive,'' but sought comment on potential approaches to defining the term.[630]

In the final rule, the Commission does not find that senior executives—specifically, highly paid workers with the highest levels of authority in an organization—are exploited or coerced in connection with non-competes, and it describes the record on this issue in Part IV.C.1. The Commission does, however, find that non-competes with senior executives are an unfair method of competition, based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that impair competitive conditions in the economy. Specifically, the Commission finds that such non-competes are restrictive and exclusionary conduct that tends to negatively affect competitive conditions in product and service markets and labor markets. Indeed, non-competes with senior executives may tend to negatively affect competitive conditions in product and service markets to an even greater degree than non-competes with other workers, given the outsized role senior executives play in forming new businesses and setting the strategic direction of firms with respect to innovation. The Commission explains the basis for these findings in Part IV.C.2.

Because non-competes with senior executives are not exploitative or coercive, however, this subset of workers is less likely to be subject to the kind of acute, ongoing harms currently being suffered by other workers subject to existing non-competes. In addition, commenters raised credible concerns about the practical impacts of extinguishing existing non-competes for senior executives. For these reasons, as described in Part IV.C.3, the Commission allows existing non-competes with senior executives to remain in force—unlike existing non-competes with all other workers, which employers may not enforce after the effective date.

In Part IV.C.4, the Commission explains the final rule's definition of ''senior executive'' and the related definitions it is adopting.[631] The Commission finds that the final rule's definition of ''senior executive'' appropriately captures the workers that are more likely to have complex compensation packages that present practical challenges to untangle, and who are less likely to be exploited or coerced in connection with their non-competes. To capture this subset of

[623] *See* Part X.E.

[624] *See* Part V.C.

[625] *See* Prescott & Starr, *supra* note 413 at 10–11.

[626] *See* Starr, Prescott, & Bishara, *supra* note 68 at 81.

[627] NPRM, proposed § 910.2(a).

[628] *Id.* at 3500.

[629] *Id.* at 3502–04.

[630] *Id.* at 3520.

[631] *See* § 910.1.

workers for whom the Commission decides to leave existing non-competes unaffected, the final rule adopts a definition of senior executive that uses both an earnings test and a job duties test. Specifically, the final rule defines the term ''senior executive'' to refer to workers earning more than $151,164 who are in a ''policy-making position'' as defined in the final rule.[632]

Finally, in Part IV.C.5, the Commission explains the regulatory text it is adopting in § 910.2(a)(2), which defines unfair methods of competition related to non-competes with senior executives.

1. The Commission Does Not Find That Non-Competes With Senior Executives Are Exploitative or Coercive

The Commission stated in the NPRM that its preliminary finding that non-competes are exploitative and coercive did not apply to senior executives. The Commission stated that non-competes with senior executives are unlikely to be exploitative or coercive at the time of contracting, because senior executives are likely to negotiate the terms of their employment and may often do so with the assistance of counsel.[633] The Commission also stated that such non-competes are unlikely to be exploitative or coercive at the time of the executive's potential departure, because senior executives are likely to have bargained for a higher wage or more generous severance package in exchange for agreeing to the non-compete.[634] The Commission sought comment on whether there are other categories of highly paid or highly skilled workers (*i.e.,* other than senior executives) who are not exploited or coerced in connection with non-competes.[635]

Based on the totality of the record, including the many comments submitted on these questions, the Commission finds that senior executives—specifically, highly paid workers with the highest levels of authority in an organization—are substantially less likely than other workers to be exploited or coerced in connection with non-competes. For these reasons, the Commission does not find that non-competes with senior executives are exploitative or coercive.

There is little empirical evidence on the question of whether non-competes with senior executives are exploitative or coercive. A 2006 study of non-competes with CEOs finds that many of these workers negotiated a severance period as long or longer than their non-compete period, making it easier to sit out of the market.[636] However, this study was limited to very-high-earning CEOs at large public companies—the average total compensation of the CEOs studied was $1.65 million[637]—so its findings do not necessarily capture the experiences of other senior executives. Many Americans work in positions with ''senior executive'' classifications. According to BLS, there were almost 3.4 million ''top executives'' in the U.S. in 2022 at firms under private ownership, and the median income for these workers was $99,240.[638]

The comment record on whether senior executives experience exploitation and coercion in relation to their non-competes is mixed. Many commenters asserted that, because some senior executives negotiate their non-competes with the assistance of expert counsel, they are likely to have bargained for a higher wage or more generous severance package in exchange for agreeing to the non-compete, and thus their non-competes are not exploitative or coercive. Several commenters stated that senior executives frequently negotiate non-competes for valuable consideration and/or typically agree to non-competes only in exchange for compensation. Some senior executives said they were not exploited or coerced in connection with non-competes.[639] Several commenters agreed with the Commission's preliminary finding that senior executives often obtain the assistance of counsel with respect to non-competes. Some commenters stated that to the extent a non-compete is not exploitative or coercive at the time of contracting, it is also not exploitative or coercive at the time of departure. One CEO stated that non-competes should be permissible for senior executives when they are entered into in exchange for severance and when the senior executive leaves voluntarily.

The Commission notes that a relatively small number of self-identified senior executives submitted comments in their personal capacity. While the Commission did receive some comments from self-identified senior executives suggesting that their non-competes were exploitative and coercive, such comments were far less common than for other workers. However, some senior executives did report experiencing similar issues of exploitation and coercion. Several senior executives said that their non-competes were required and non-negotiable. Multiple senior executives described their own non-competes as ''one-sided'' in favor of the employer. Some senior executives said they were not given consideration for the non-compete, and even some who said they received consideration still said their non-competes were exploitative and coercive. For example, some senior executives said they: (1) were required to sign a non-compete under threat of losing their job or their earned compensation; (2) were forced into a stock share buyout that included a non-compete; or (3) could obtain long-term compensation only if they signed a non-compete. Two advocacy groups stated that many senior executives may lack power to avoid non-competes and that employers still hold most of the leverage in employment negotiations, even with respect to senior executives. An employment law firm stated that in its experience, it had not seen higher compensation for senior executives and other highly paid workers in jurisdictions where non-competes were allowed, and that employers rarely provide compensation for non-competes. The firm said that senior executives and other highly paid workers are more likely to receive severance payments, but such payments are paid only in some cases. It said that even when paid, the severance payments often do not fully compensate for what a senior executive could have otherwise earned during the non-compete period.

Furthermore, several self-identified senior executives said they felt unable to leave their company because of their non-competes. Many of these commenters said they feared being unemployed. Some senior executives said they feared or could not afford litigation, while two senior executives said that they could not afford to fight non-competes they believed were unenforceable. Several self-identified senior executives, having spent their careers in one industry, said they were forced to sit out of the market for long periods, forgoing earnings and the ability to work. Others reported struggling to find a job and suffering

[632] *Id.*

[633] NPRM at 3503.

[634] *Id.* at 3504.

[635] *Id.* at 3503–04.

[636] Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?,* 63 Wash. & Lee L. Rev. 231, 256–57 (2006).

[637] *Id.* at 244.

[638] BLS, Occupational Employment and Wage Statistics, *Tables Created by BLS, https://www.bls.gov/oes.tables.htm.* These data are from the May 2022 National XLS table for Top Executives under private ownership.

[639] For the sake of readability, the Commission refers to the commenters based on how they described themselves. For example, if a commenter said they were a senior executive, the Commission refers to them as a senior executive (rather than as a ''self-described senior executive'').

financially, including living on Social Security or nearing bankruptcy.

One law firm specializing in executive compensation said many senior executives may have achieved top roles at companies because they have spent decades in the same industry and would struggle to find work with firms other than competitors. Another law firm said senior executives blocked from an industry could lose their long-cultivated reputation in the industry and, as a result, time out of an industry could harm their careers. Worker advocacy organizations and a law firm said senior executives tend to be relatively older and, as older workers are forced out of the job market, they are likely to be losing out on increasingly scarce employment opportunities relative to their younger counterparts. Another advocacy group argued that the Commission did not provide sufficient evidence to support its preliminary finding that non-competes are not exploitative and coercive for senior executives. A few commenters suggested that senior executives from historically marginalized groups may be paid less and have less bargaining power than other senior executives.[640]

Critically, the Commission received an outpouring of comments indicating that highly paid workers who are *not* senior executives (*i.e.,* who are not workers with the highest levels of authority in an organization) are often coerced or exploited via non-competes. The Commission received many comments from workers in relatively higher-wage fields—such as medicine, engineering, finance and insurance, and technology—who stated that employers exploited and coerced them through the use of non-competes.[641] The vast majority of higher-wage workers who are not senior executives reported that they lacked bargaining power in relation to their employer; did not negotiate their non-compete or receive compensation for it; and/or were not informed of the non-compete until after they received the job offer. Many of these workers stated that their non-compete was hidden or obscured; that their employers misled them about the terms of a non-compete; and/or that the non-compete was confusingly worded or vague. In addition, many high-wage workers recounted how non-competes coerced them into refraining from competing against their employer by forcing them to stay in jobs they wanted to leave or forcing them to leave their profession, move their families far away, and/or commute long distances. And a large share of high-wage workers argued that even where their non-competes were overbroad and likely unenforceable, they were deterred from seeking or accepting other work or starting a business by the threat of a lawsuit from their employer, which they said would be ruinous to their finances and professional reputations.[642] The Commission accordingly finds that higher-wage workers who are not senior executives are often exploited and coerced through employers' use of non-competes.

In addition, the Commission believes it is appropriate to conclude that lower-earning workers, regardless of their job title or function in an organization, are more likely to be exploited or coerced in connection with non-competes. As noted, many workers classified as ''top executives'' make under $100,000. Commenters did not self-report their income, so the Commission cannot definitively determine that the self-identified senior executives who reported exploitation and coercion are lower-wage senior executives. Because of their incomes, however, lower-wage senior executives are likely subject to many of the same exploitative and coercive factors that affect other workers, such as the inability to afford a non-compete lawsuit, forgo work for a lengthy period, leave the field, or relocate.[643] Comments from some senior executives confirmed that they did not have sufficient bargaining power to negotiate the non-compete or consideration for it, suffered serious financial harm from non-competes, and could not afford to litigate their non-competes. Accordingly, the Commission finds that a mere job title alone is insufficient to confer bargaining power on a worker, and lower-wage senior executives can be subject to the same exploitation and coercion that other workers face.

However, having considered the comments and the available empirical evidence on this question, the Commission does not find that non-competes with highly paid workers who are also senior executives are likely to be exploitative or coercive. The Commission stresses that it is not affirmatively finding that such non-competes can never be exploitative or coercive. The Commission has simply determined the record before it is insufficient to support such a finding at this time.

2. The Use of Non-Competes With Senior Executives is an Unfair Method of Competition Under Section 5

While the Commission does not find that non-competes with senior executives are exploitative and coercive, the Commission determines that these non-competes are nonetheless unfair methods of competition, for the reasons described herein.

To determine whether conduct is an unfair method of competition under section 5, the Commission assesses two elements: (1) whether the conduct is a method of competition, as opposed to a condition of the marketplace and (2) whether it is unfair, meaning that it goes beyond competition on the merits. The latter inquiry has two components: (a) whether the conduct has indicia of unfairness and (b) whether the conduct tends to negatively affect competitive conditions. These two components are weighed according to a sliding scale.[644]

Non-competes with senior executives satisfy all the elements of the section 5 inquiry. As described in Part IV.C.2.a, these non-competes are methods of competition. As described in Part IV.C.2.b, these non-competes are facially unfair conduct because they are restrictive and exclusionary. And as described in Part IV.C.2.c, these non-competes tend to negatively affect competitive conditions in product and service markets and in labor markets. Because the Commission finds that non-competes with senior executives are unfair methods of competition, the Commission declines to exclude them from the final rule. However, as described in Part IV.C.3, the final rule allows existing non-competes with senior executives to remain in effect, due to the considerations described therein.

[640] One of those commenters cited two *USA Today* articles that examined Federal workforce records for 88 companies in the S&P 100 to assess the number of Asian and Latina women in executive positions. The articles did not include the underlying data used for the evaluation. *See* Jessica Guynn & Jayme Fraser, *Asian Women Are Shut Out of Leadership at America's Top Companies. Our Data Shows Why,* USA Today (Apr. 25, 2022), *https://www.usatoday.//money/2022/04/25/asian-women-executives-discrimination-us-companies/7308310001/?gnt-cfr=1;* Jessica Guynn & Jayme Fraser, *Only Two Latinas Have Been CEOs at a Fortune 500 Company: Why So Few Hispanics Make It to the Top,* USA Today (Aug. 2, 2022), *https://www.usatoday.com/story/money/2022/08/02/hispanic-latina-business-demographics-executive//?gnt-cfr=1.* These news reports find a disparity in the number of Asian and Latina women in senior executive roles at these companies but make no specific findings on bargaining power. While lack of representation and other factors may impact bargaining power, the Commission believes that these two articles (with no underlying data provided) are insufficient evidence at this time to find exploitation and coercion with respect to this subset of senior executives.

[641] *See* Part IV.B.2.b.i–ii.

[642] *See* Part IV.B.2.b.ii.

[643] *See id.*

[644] *See* Part II.F.

a. The Commission Finds That Non-Competes With Senior Executives are a Method of Competition, Not a Condition of the Marketplace

With respect to the first element—whether conduct is a method of competition—the Commission finds that non-competes with senior executives are a method of competition for the same reasons as non-competes with other workers.[645]

b. Non-Competes With Senior Executives are Facially Unfair Conduct Because They are Restrictive and Exclusionary

In Part IV.B.2.a, the Commission finds that non-competes with workers other than senior executives are facially unfair conduct because they are restrictive and exclusionary. The Commission finds that non-competes with senior executives are facially unfair conduct for the same reasons.

Like non-competes for all other workers, the restrictive nature of non-competes with senior executives is evident from their name and function: non-competes restrict competitive activity. They prevent senior executives from seeking or accepting other work or starting a business after leaving their job. And like non-competes for all other workers, non-competes with senior executives are exclusionary because they impair the opportunities of rivals. Where a worker is subject to a non-compete, the ability of a rival firm to hire that worker is impaired. In addition, where many workers in a market are subject to non-competes, the ability of firms to expand into that market, or entrepreneurs to start new businesses in that market, is impaired. While non-competes may impair the opportunities of rivals in all labor markets, non-competes for senior executives are especially pernicious in this regard. Senior executives are relatively few in number, are bound by non-competes at high rates,[646] and have highly specialized knowledge and skills. Therefore, it can be extremely difficult for existing firms and potential new entrants to hire executive talent and to form the most productive matches.

Because senior executives are often compensated in return for their promise not to compete, some commenters argue that non-competes with senior executives are not unfair methods of competition. However, agreements can present concerns under the antitrust laws even when both parties benefit. Here, non-competes with senior executives are not unfair methods of competition under section 5 because they are unfair to the individual executive, but because they tend to negatively impact competitive conditions—*i.e.,* harm competition in product and service markets, as well as in labor markets—by imposing serious negative externalities on other workers, rivals, and consumers.[647]

c. Non-Competes With Senior Executives Tend To Negatively Affect Competitive Conditions

The Commission finds non-competes with senior executives tend to negatively affect competitive conditions in product and service markets and in labor markets. As explained in Part II.F, the legal standard for an unfair method of competition under section 5 requires only a tendency to negatively affect competitive conditions. The inquiry does not turn on whether the conduct directly caused actual harm in a specific instance. Here, the tendency of non-competes to impair competition is obvious from their nature and function, as it is for non-competes with workers who are not senior executives. And even if this tendency were not facially obvious, the evidence confirms that non-competes with senior executives do in fact negatively affect competitive conditions.

i. Non-Competes With Senior Executives Tend To Negatively Affect Competitive Conditions in Product and Service Markets

In the NPRM, the Commission stated that non-competes with senior executives may harm competition in product and service markets in unique ways.[648] The Commission stated that non-competes with senior executives may contribute more to negative effects on new business formation and innovation than non-competes with other workers, to the extent that senior executives may be likely to start competing businesses, be hired by potential entrants or competitors, or develop innovative products and services.[649] The Commission also stated that non-competes with senior executives may also block potential entrants, or raise their costs, to a high degree, because such workers are likely to be in high demand by potential entrants.[650] The Commission preliminarily concluded that, as a result, prohibiting non-competes for senior executives may have relatively greater benefits for consumers than prohibiting non-competes for other workers.[651]

Based on the Commission's expertise and after careful review of the rulemaking record, including the empirical research and the public comments, the Commission finds that non-competes with senior executives tend to negatively affect competitive conditions in markets for products and services, inhibiting new business formation and innovation.

Non-Competes With Senior Executives Inhibit New Business Formation and Innovation

In Part IV.B.3.b, the Commission described the extensive empirical evidence indicating that non-competes inhibit new business formation and innovation. The Commission's finding in Part IV.B.3.b that non-competes inhibit new business formation and innovation does not examine non-competes with senior executives specifically. However, the Commission finds that non-competes with senior executives inhibit new business formation and innovation at least as much as non-competes with other workers and likely to a greater extent, given the outsized role of senior executives in forming new businesses, serving on new businesses' executive teams, and setting the strategic direction of businesses with respect to innovation.

Specifically, non-competes with senior executives tend to negatively affect competitive conditions in product and service markets in three ways. First, non-competes with senior executives inhibit new business formation. In Part IV.B.3.b.i, the Commission finds that non-competes with workers other than senior executives inhibit new business formation. The Commission finds that non-competes with senior executives inhibit new business formation as much as non-competes with other workers and likely to a greater extent, due to the important role senior executives play in new business formation.

Senior executives are particularly well-positioned to form new businesses because of their strategic expertise and business acumen; knowledge of multiple facets of their industries; experience making policy decisions for businesses; and ability to secure financing. Senior executives are also often crucial to the formation of startups, because startups often begin by

[645] *See* Part IV.B.1.

[646] *See* Part I.B.2 (noting studies estimating that about two-thirds of senior executives work under non-competes).

[647] *See* Part IV.C.2.i–ii (describing the negative effects of non-competes with senior executives on markets for products and services and labor markets).

[648] NPRM at 3502.

[649] *Id.* at 3513.

[650] *Id.*

[651] *Id.*

forming a leadership team, which is often comprised of experienced and knowledgeable executives from elsewhere in the industry.[652] Empirical research shows that when startups hire top management teams from other firms, they are more likely to grow beyond their initial stages[653] and that top managers' experience in an industry allows startups to grow more quickly.[654] Additionally, empirical research finds that startups that hire top management teams with experience are more likely to become successful businesses.[655] Empirical research also finds that, in addition to experience, top management teams that have worked together in the past are more successful than those that have not.[656] For these reasons, non-competes with senior executives not only inhibit new business formation by blocking the executives from forming new businesses; they also prevent other potential founders from forming new businesses, because potential founders are less likely to start new businesses when they are unable to assemble the executive team they need because so many executives in the industry are tied up by non-competes. By inhibiting new business formation, these non-competes deprive product and service markets of beneficial competition from new entrants—competition that in turn tends to benefit consumers through lower prices or better product quality.

Second, non-competes with senior executives inhibit innovation. In Part IV.B.3.b.ii, the Commission finds that non-competes with workers other than senior executives inhibit innovation. The Commission finds that non-competes with senior executives inhibit innovation at least as much as non-competes with other workers and likely to a greater extent, because senior executives play a crucial role in setting the strategic direction of firms with respect to innovation.

Non-competes with senior executives inhibit innovation by impeding efficient matching between workers and firms. As described in Part IV.B.3.a, labor markets function by matching workers and employers. The same is true for senior executives. Executives compete for roles at firms, and firms compete to attract (often highly sought-after) executives; executives choose the role that best meets their objectives, and firms choose the executive who best meets theirs. Non-competes impede this competitive process by blocking executives from pursuing new opportunities (*i.e.,* positions that are within the scope of their non-compete) and by preventing firms from competing to attract their talent. Thus, because non-competes are prevalent, the quality of the matches between executives and firms suffers.

By inhibiting efficient matching between firms and executives, non-competes frustrate the ability of firms to hire executives who can best maximize the firm's capacity for innovation. Senior executives play an important role in advancing innovation at firms.[657] Senior executives are often a fundamental part of the innovative process, guiding the strategic direction of the firm in terms of topics of new research and the depth of new research; determining the allocation of R&D funding; and making the decision to develop (and supervising the development of) new products and services.[658]

Research shows that labor mobility among senior executives may tend to foster innovation. Empirical research finds that executives with shorter job tenures tend to engage in more innovation than those who are longer tenured at firms.[659] In addition, empirical research shows that the strength of executives' external networks—which are likely stronger among executives hired externally—increase the rate of innovation.[660] Finally, when senior executives are hired by new companies, they bring their experience and understanding of the industry, which may cross-pollinate with the capabilities of the new company, cultivating new research which would not otherwise be achieved.[661] By inhibiting efficient matching between executives and firms, non-competes impede the ability of firms to develop innovative products and services that benefit consumers.

Furthermore, empirical research shows that better matching among executives and firms drives productivity as well as innovation. When firms and executives have a higher quality match, the firm as a whole is more productive.[662] By inhibiting efficient matching between firms and executives, non-competes tend to reduce the productivity of firms.

In theory, firms that seek to hire an executive could just pay the executive's employer (or former employer) to escape the non-compete. However, research by Liyan Shi describes how non-competes with senior executives force firms to make inefficiently high buyout payments. Shi ultimately concludes that ''imposing a complete ban on noncompete clauses would be close to implementing the social optimum.''[663]

Shi explains that firms and executives jointly create market power by entering into non-competes and excluding rivals from hiring experienced labor in a competitive labor market. The existence of a non-compete forces rivals to make an inefficiently high buyout payment, where the inefficiency arises due to the market power of the incumbent firm created by the non-compete. Rival firms must either make these payments, which therefore lead to deadweight economic loss, or forgo the payment—and, consequently, the ability to hire a talented executive (and perhaps the ability to enter the market at all, for potential new firms).[664] New and small businesses in particular might be unable to afford these buyouts. By calibrating

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[652] *See, e.g.,* Leslie Crowe, *How to Hire Your First Leadership Team* (Oct. 24, 2023), *https://baincapitalventures.com/insight/how-to-hire-your-first-leadership-team-as-a-startup-founder/.*

[653] Bradley Hendricks, Travis Howell, & Christopher Bingham, *How Much Do Top Management Teams Matter in Founder-Led Firms?,* 40 Strategic Mgmt. J. 959 (2019).

[654] Yasemin Y. Kor, *Experience-Based Top Management Team Competence and Sustained Growth,* 14 Org. Sci. 707 (2003).

[655] Agnieszka Kurczewska & Michał Mackiewicz, *Are Jacks-of-All-Trades Successful Entrepreneurs? Revisiting Lazear's Theory of Entrepreneurship,* 15 Baltic J. of Mgmt. 411 (2020).

[656] Kathleen M. Eisenhardt, *Top Management Teams and the Performance of Entrepreneurial Firms,* 40 Small Bus. Econ. 805 (2013).

[657] *See, e.g.,* Jean-Philippe Deschamps, *Innovation Leaders: How Senior Executives Stimulate, Steer and Sustain Innovation* (John Wiley & Sons, 2009); Jean-Philippe Deschamps & Beebe Nelson, *Innovation Governance: How Top Management Organizes and Mobilizes For Innovation* (John Wiley & Sons, 2014).

[658] Christopher Kurzhals, Lorenz Graf-Vlachy, & Andreas König, *Strategic Leadership and Technological Innovation: A Comprehensive Review and Research Agenda,* 28 Corp. Governance: An Int'l Review 437 (2020); Pascal Back & Andreas Bausch, *Not If, But How CEOs Affect Product Innovation: A Systematic Review and Research Agenda,* 16 Int'l J. of Innovation and Tech. Mgmt. 1930001 (2019); Vassilis Papadakis & Dimitris Bourantas, *The Chief Executive Officer as Corporate Champion of Technological Innovation: An Empirical Investigation,* 10 Tech. Analysis & Strategic Mgmt. 89 (1998) (finding that CEO characteristics significantly influence technological innovation, and that the influence is particularly powerful for new product introductions).

[659] Vincent L. Barker III & George C. Mueller, *CEO Characteristics and Firm R&D Spending,* 48 Mgmt. Sci. 782 (2002).

[660] Qing Cao, Zeki Simsek, & Hongping Zhang, *Modelling the Joint Impact of the CEO and the TMT on Organizational Ambidexterity,* 47 J. of Mgmt. Stud. 1272 (2010); Olubunmi Faleye, Tunde Kovacs, & Anand Venkateswaran, *Do Better-Connected CEOs Innovate More?,* 49 J. of Fin. And Quant. Analysis 1201 (2014).

[661] *See, e.g.,* Orly Lobel, *Talent Wants to Be Free* (Yale Univ. Press, 2013).

[662] Yihui Pan, *The Determinants and Impact of Executive-Firm Matches,* 63 Mgmt. Sci. 185 (2017); Matthew Ma, Jing Pan, & Xue Wang, *An Examination of Firm-Manager Match Quality in the Executive Labor Market* (2021), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3067808.*

[663] Shi, *supra* note 84 at 427.

[664] *Id.*

this theoretical model to data on executive non-competes and executive compensation, the study shows that banning non-competes would result in nearly optimal social welfare gains.

Shi notes that such a mechanism could be tempered by the ability of a labor market to provide viable alternative workers for new or competing businesses. However, when a particular type of labor is somewhat scarce, when on-the-job experience matters significantly, or when frictions prevent workers from moving to new jobs—all of which tend to be the case for senior executives—there is no way for the market to fill the gap created by non-competes.

Some of the evidence in this study arises from analysis of non-compete use coupled with non-compete enforceability. Other evidence in the study, including the finding that a ban on non-competes is close to optimal, relies not on use at the individual level, but on prevalence of non-competes across a labor market. The latter approach does not rely, therefore, on comparing individuals with and without non-competes, and is therefore not subject to the estimation bias that leads the Commission to give less weight to evidence based on the use of non-competes.

Relevant Comments and Commission Responses

Many commenters stated that non-competes with senior executives reduce new business formation and innovation, confirming the Commission's findings. Several senior executives recounted personal experiences in which a non-compete prevented them from starting a business. A tech executive stated that they knew many tech executives who would have left their roles to start within-industry spinoffs if not for their non-competes. A senior executive stated that they had planned to start a small business that would not have harmed the former employer but had signed a non-compete that prevented them from doing so. A former executive stated that they were sued after starting a new business despite confirming with the CEO of their former employer that doing so would not violate the non-compete. Another senior executive said their non-compete prevented them from taking a job at a smaller, more innovative company in their industry. Some commenters warned that permitting non-competes for senior executives would reinforce dominant positions for industry incumbents who can foreclose new entrants from access to critical talent and expertise. An advocate for startups stated that small businesses significantly benefit from mentorship from experienced founders, which can be inhibited by non-competes.

Other commenters argued that the Commission should exclude senior executives from coverage under the final rule because doing so would benefit competition in product and service markets. These commenters generally stated that non-competes may promote innovation by encouraging firms to make productivity-enhancing investments, such as investments in developing trade secrets. The Commission does not believe that non-competes are needed to protect valuable firm investments. As discussed in Part IV.D, the Commission finds that employers have less restrictive alternatives for protecting valuable investments and that these alternatives are available for senior executives as well as for other workers.

In addition, when assessing how non-competes with senior executives affect competition in product and service markets, the Commission believes it is important to consider the net impact. It is possible that the effects described by these commenters and the effects described by the Commission earlier in this Part IV.C.2.c.i can be occurring at the same time. That is, a non-compete with a senior executive might in some instances be protecting a firm's investments in a manner that is productivity-enhancing, holding all else equal. At the same time, however, that same non-compete may restrict the executive's ability to start a new business after leaving the firm. And even that same non-compete can—and certainly non-competes in the aggregate do—prevent the most efficient match between senior executives and the firms that can make the highest and best use of their talents, and decrease knowledge flow between firms, which limits the cross-pollination of innovative ideas. What the empirical evidence shows is that overall, *i.e.,* in net effect, non-competes reduce new business formation and innovation,[665] indicating that the tendency of non-competes to inhibit new business formation and innovation more than counteracts any effect of non-competes on promoting new business formation and innovation by protecting a firm's investments.

A commenter—referencing the Shi study—argued that banning buyout clauses in non-competes would enhance economic efficiency relative to banning non-competes altogether. Other commenters, including Shi, the author of the study, disagreed with this claim.[666] In response to these comments, the Commission finds that prohibiting buyout clauses would not enhance efficiency relative to prohibiting non-competes altogether. The Commission does not believe prohibiting buyout clauses would address the tendency of non-competes for senior executives to negatively affect competitive conditions, because it would mean that fewer executives could escape their non-competes, reducing labor mobility and efficient matching between executives and firms even further.

Some commenters disputed the Commission's legal rationale for prohibiting non-competes with senior executives. One comment stated that the NPRM did not cite any case law where a non-compete for a senior executive violated antitrust law and argued that there is no widespread case law to support a *per se* ban. In response, the Commission notes that it is determining that non-competes are an unfair method of competition under section 5, not a *per se* violation of the Sherman Act. For the reasons described in this Part IV.C.2, the Commission finds that non-competes are restrictive and exclusionary and that, based on the totality of the evidence, they tend to negatively affect competitive conditions at least as much as non-competes with other workers, and likely even more so, given the outsize role of senior executives in new business formation and innovation. For these reasons, the Commission finds that these non-competes are an unfair method of competition under section 5.

Another commenter stated that the NPRM did not satisfy the standard for finding a tendency to negatively affect competitive conditions for senior executives as set forth in the Commission's section 5 Policy Statement.[667] The commenter stated that a *per se* ban on non-competes considers neither the size, power, or purpose of the firm nor how non-competes interact with individual markets. The commenter argued that the evidence cannot justify an economy-wide ban.

The Commission finds that non-competes for senior executives are an unfair method of competition under section 5 for all the reasons described in this Part IV.C.2. The Commission states the applicable legal standard under section 5 in Part II.F, which is consistent with the standard set forth in the Policy Statement. As noted in Part

[665] *See* Part IV.B.3.b.i–ii.

[666] Comment of Liyan Shi, FTC–2023–0007–19810.

[667] *See* FTC Policy Statement, *supra* note 286.

II.F, the Commission need not make a separate showing of market power or market definition. Nor must the Commission show that the conduct directly caused actual harm in the specific instance at issue. Instead, the inquiry under section 5 focuses on the nature and tendency of the conduct. Moreover, as noted in Part II.F, the Commission may consider the aggregate effect of conduct as well. The language in the Policy Statement stating that the size, power, and purpose of the respondent may be relevant is not limiting, but instead provides guidance regarding factors the Commission may consider in evaluating potentially unfair methods of competition. This guidance may be especially relevant in individual cases and less so in section 5 rulemakings. Finally, as described in Part II.F, a finding that conduct is an unfair method of competition does not require definition of a market or consideration of individual markets. Moreover, as described in Part V.D, the Commission considered and finds no basis for excluding particular industries or workers.

ii. Non-Competes With Senior Executives Tend to Negatively Affect Competitive Conditions in Labor Markets

The effects of non-competes with senior executives on product and service markets are the primary reason why the Commission finds that non-competes with senior executives are an unfair method of competition. However, non-competes also tend to negatively affect competitive conditions in labor markets.

Non-Competes With Senior Executives Suppress Labor Mobility and Earnings

In Part IV.B.3.a, the Commission describes extensive empirical evidence that non-competes reduce labor mobility and worker earnings. The Commission's finding in Part IV.B.3.a that non-competes suppress labor mobility and earnings does not examine non-competes with senior executives specifically. However, the evidence cited by the Commission is also probative with respect to non-competes with senior executives.

Non-competes reduce labor mobility for senior executives for the same reasons they reduce labor mobility for other workers—they directly restrict workers from seeking or accepting other work or starting a business after they leave their job. In Part IV.B.3.a.i, the Commission cites empirical evidence that non-competes reduce labor mobility. This evidence shows that non-competes reduce labor mobility for all subgroups of workers that have been studied, including inventors, high-tech workers, low-wage workers, and workers across the labor force. The impact of non-competes on labor mobility is direct, since non-competes directly prohibit certain types of mobility. Therefore, the Commission finds the non-competes restrict the labor mobility of senior executives as well.

This finding is supported by Mark Garmaise's study of the relationship between non-compete enforceability and the labor mobility and earnings of executives.[668] Garmaise finds that stricter non-compete enforceability reduces within-industry executive mobility by 47% and across-industry executive mobility by 25%. The study, which is limited to senior executives, uses multiple legal changes in non-compete enforceability, measured along multiple dimensions in a binary fashion. The Shi study qualitatively confirms these results—that executives experience greater labor mobility in the absence of non-competes.[669] However, that study examines use, and not just enforceability, of non-competes, so the Commission gives it less weight.

Furthermore, by inhibiting efficient matching between executives and firms—through a similar mechanism as for all other workers[670]—non-competes reduce executives' earnings. Like non-competes for other workers, non-competes block senior executives from switching to a job in which they would be better paid. And by doing so, non-competes decrease opportunities (and earnings) for senior executives who are not subject to non-competes—as well as for workers who are not senior executives, but who would otherwise move into one of those roles.

As described in Part IV.B.3.a.ii, the empirical research indicates that non-competes suppress wages for a wide range of subgroups of workers across the spectrum of income and job function, including workers who are not subject to non-competes. Importantly, an empirical study that does focus on senior executives finds that non-competes suppress earnings of senior executives. The Garmaise study finds that decreased enforceability of non-competes increases executives' earnings by 12.7%.[671] Garmaise also finds that decreased enforceability of non-competes increases earnings growth for CEOs by 8.2%. Since much of the increase in earnings is attributable to an increase in earnings growth (as opposed to earnings at the start of the employment relationship), Garmaise hypothesizes that earnings increase because CEOs are more likely to invest in their own human capital when they have no non-compete.[672] However, Garmaise also notes that while non-competes may offer benefits to firms which use them, there may be negative impacts across the labor markets in which they are used.[673] This is the only study of executive earnings that does not examine the use of non-competes: it examines multiple legal changes in non-compete enforceability, measured along multiple dimensions (though in a binary fashion).

As noted in Part IV.C.1, many senior executives negotiate valuable consideration for non-competes. However, the evidence suggests that non-competes still have a net negative effect on senior executives' earnings, because the suppression of earnings through reduced labor market competition more than cancels out the compensation that some of these executives individually receive for their non-competes.

A second study, by Kini, Williams, and Yin,[674] simultaneously estimates the impact of non-compete enforceability and non-compete use on earnings and finds a positive correlation. The Commission gives this study less weight because it analyzes the use of non-competes. As described in Part IV.A.2, such studies cannot easily differentiate between correlation and causation. Kini, Williams, and Yin use an enforceability measure to generate their estimates, but do not estimate models that omit use of non-competes, meaning that the Commission does not interpret the findings as representing a causal relationship.

Relevant Comments and Commission Responses

Many commenters addressed negative effects of non-competes with senior executives on competition in labor markets. Non-competes, these commenters stated, can negatively affect a senior executive's career when they leave their field or sit out of the workforce for a period, causing their skills and knowledge (particularly in fast-paced fields) to stagnate and affecting their reputations. Like other workers, some senior executives said their non-compete limited their options and earnings in their specialized field.

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[668] Garmaise, *supra* note 584.

[669] Shi, *supra* note 84.

[670] *See* Part IV.B.3.a.

[671] Garmaise, *supra* note 584 at 403. The reduction in earnings is calculated as $e^{-1.3575*0.1} - 1$, where −1.3575 is taken from Table 4.

[672] *Id.* at 402.

[673] *Id.* at 379.

[674] Kini, Williams, & Yin, *supra* note 83.

Other commenters argued the Commission should exclude senior executives from the rule because they earn more compensation, including higher wages, for non-competes than they would gain under the final rule. Many of these commenters argued that because senior executives have bargaining power, any findings on decreased wages would not apply to them. Some employers stated they compensated their senior executives for non-competes. Some industry organizations stated that some additional compensation and bonuses might not be offered if non-competes are banned. One business stated the compensation it pays executives takes their non-competes into account. Another business stated it provides severance benefits in exchange for non-competes that fully compensate the executive for the duration of the non-compete.

In response to these comments, the Commission notes the Garmaise study indicates that non-competes have a net negative effect on earnings for senior executives in the aggregate because they suppress competition, even if individual senior executives receive some amount of compensation for their personal non-compete. Garmaise's analysis accounts for any compensation the executive receives for the non-compete.

An industry trade organization stated that non-competes create job opportunities for executives and other highly skilled workers, rather than restricting them, because, without non-competes to protect confidential information, employers will often be reluctant to expand their executive teams. The Commission notes this assertion is unsupported by empirical evidence, and the Commission finds that firms have less restrictive alternatives for protecting confidential information.[675]

An investment industry organization stated that the Commission cannot assume senior executives will be equally or more effective at new firms compared to their old firms. In response, the Commission notes that voluntary labor mobility—for senior executives and all workers—typically reflects a mutually beneficial outcome. To the extent a firm is willing to pay more to attract a particular worker to come work for them, it is typically because the firm places a higher value on the worker's productivity than the worker's current employer. In addition, the Commission notes that many commenters stated that non-competes often force senior executives to sit out of the workforce, causing them to lose valuable knowledge and skills. In general, senior executives are more likely to be effective when they can remain in the industry in which they have experience and expertise, rather than starting over in a new industry because of a non-compete.

An industry trade organization stated that the Commission's assertion that wages are reduced across the labor market is inconsistent with the NPRM's preliminary finding that non-competes are not coercive or exploitative for senior executives, because when more issues are left for negotiation, the job market is increasingly competitive, as workers can differentiate themselves through their terms and tailor their terms to each employer. The Commission does not believe these findings are in tension. Agreements do not need to be exploitative or coercive to inhibit efficient matching between workers and firms or to negatively affect competitive conditions. Furthermore, the Commission believes that executives have many other ways to differentiate themselves other than based on non-compete terms.

One commenter argued that the findings in the Kini, Williams, and Yin study should not be interpreted as representing a causal relationship. Upon further consideration, the Commission agrees with this comment and does not interpret this study causally, as described in this Part IV.C.2.c.ii.

For these reasons, the Commission finds that non-competes with senior executives are an unfair method of competition. As a result, the Commission declines to exclude senior executives from the final rule altogether.

3. The Final Rule Allows Existing Non-Competes With Senior Executives To Remain in Effect

The final rule prohibits employers from, among other things, entering into or enforcing new non-competes with senior executives—*i.e.,* non-competes entered into on or after the effective date.[676] However, the Commission decides to allow existing non-competes with senior executives—*i.e.,* non-competes entered into before the effective date—to remain in effect. The Commission describes the basis for this determination in this Part IV.C.3.

The Commission believes the evidence could provide a basis for prohibiting employers from enforcing existing non-competes with senior executives, as the final rule does for all other workers, given the tendency of such agreements to negatively affect competitive conditions.[677] However, the Commission has decided to allow existing non-competes for senior executives to remain in effect, based on two practical considerations that are far more likely to be present for senior executives than other workers. First, as described in Part IV.C.1, senior executives are substantially less likely than other workers to be exploited or coerced in connection with non-competes. As a result, this subset of workers is substantially less likely to be subject to the kind of acute, ongoing harms currently being suffered by other workers with existing non-competes (even if senior executive's existing non-competes are still harming competitive conditions in the economy overall). Second, commenters raised credible concerns about the practical impacts of extinguishing existing non-competes for senior executives, as described in this Part IV.C.3.[678]

Numerous businesses and trade associations argued that, if the final rule were to invalidate existing non-competes for senior executives, that would present practical challenges for employers, because many such non-competes were exchanged for substantial consideration. According to commenters, consideration exchanged for non-competes includes long-term incentive plans, bonuses, stock awards, options, or severance payments, among other arrangements.

Some commenters were concerned about a potential windfall for workers. They argued that if the non-compete portion of the contract were rescinded or otherwise invalidated, the worker may be left with any benefits already received in exchange for the non-compete, such as equity or bonuses, and could also compete. An industry association stated that some of its members' workers have already received thousands or hundreds of thousands of dollars in additional compensation alongside non-competes, though it was unclear what each worker received. Some business associations said businesses do not have a clear way to recover those payments or benefits. A commenter asked whether a worker who forfeited equity for competing could get the equity back or if executives who were compensated by their new

[675] *See* Part IV.D.2.

[676] § 910.2(a)(2).

[677] *See* Part IV.C.2

[678] Because the Commission proposed to require employers to rescind existing non-competes—*see* NPRM, proposed § 910.2(b)(1)—many of these comments addressed the proposed rescission requirement specifically. Comments that pertain only to the issue of rescission, and that do not apply to whether existing non-competes for senior executives may remain in effect generally, are addressed in Part IV.E.

employers for the non-compete would be paid twice.

The Commission views the problem as more complex than these commenters suggest. First, the empirical evidence and comments illustrate that in many cases, non-competes are currently trapping workers, including senior executives, in their jobs, meaning the employer is getting not only the benefit of trapping that individual worker, but also the benefit of non-competition.[679] In such circumstances, employers may have already received part or all of the benefit they sought from entering a non-compete, though the value would be difficult if not impossible to quantitatively assess. Moreover, it is impracticable for the Commission to untangle whether, to the extent some workers received compensation that was denominated consideration for a non-compete, that non-compete simultaneously suppressed other compensation to the worker such as wages. For example, some commenters who described negotiating their non-competes stated the employer used it as a tactic to drive down wages.

In addition, most workers subject to a non-compete are subject to other restrictive covenants,[680] both mitigating any purported harm and complicating any quantitative valuation of a non-compete.

The Commission also notes that, to the extent equity was provided as consideration, owning a share in the prior employer may induce workers not to risk lowering the value of that equity by competing. However, the concern about workers seeking already-forfeited compensation is misplaced, as the final rule will not impact workers who forfeited compensation for competing under a then-valid non-compete.

Overall, however, where an employer has provided meaningful consideration in exchange for a non-compete, the comments indicate that being unable to enforce that non-compete may complicate that exchange in a way that would be difficult to value and untangle. These difficult practical assessments indicate that the final rule should contain a limited, easily administrable exception for existing non-competes with senior executives, who are considerably more likely than other workers to have negotiated non-competes and received substantial consideration in return.

[679] *See* Part IV.B.2.b.

[680] *See* Balasubramanian, Starr, & Yamaguchi, *supra* note 74 (finding that 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or non-recruitment agreement, and 74.7% of workers with non-competes are also subject to all three other types of provisions).

In addition, an employment attorney suggested that employers may suspend any mid-stream benefits and terminate unvested options and stock and cancel bonuses. One commenter suggested employers may seek refunds from workers, which could create uncertainty. Similarly, an industry association said senior workers who signed a non-compete as part of a severance agreement might see their severance payments taken away, as employers would need to decide whether to continue paying despite the elimination of non-competes or, to the extent they legally can, attempt to renegotiate any outstanding severance agreements. Finally, a business said executives in the middle of their contracts might need to renegotiate those contracts. The Commission shares these concerns about the practicalities of untangling non-competes that are more likely to have been bargained for. Senior executives who engaged in a fair bargaining process may have obtained significant consideration and planned accordingly, as have their employers. While employers' ability to stop payments or claw back consideration is uncertain, any efforts to do so could be disruptive.

Other commenters stated that they believed rescission could result in litigation against workers. An employment lawyer said litigation was difficult to predict but that there could be litigation seeking declarations from courts on how the rule impacts existing contracts. A group of commenters stated that rescinding or invalidating agreements would lead to increased litigation against workers who received the benefit of the bargain but were no longer bound by a non-compete in exchange, and that such litigation would seek to nullify severance agreements, employment agreements, clawback agreements, and others.

One business said the NPRM was silent on how to address specially taxed arrangements, but the business did not provide additional details on any such arrangements. A law firm said workers who received consideration in a prior year would have paid taxes on it and would now need to amend their prior tax return to get a refund if they have to pay back that consideration, while employers might have to amend their return to reflect the loss of a deduction. That law firm also said some executives and other workers use and plan for non-competes to reduce their ''golden parachute'' tax burden.

Finally, an accountant explained that valuations of senior executive non-competes are conducted during many merger and acquisition transactions. Similarly, an industry association said acquisition prices may include the value of non-competes that ensure the buyer retains certain talent, so if non-competes were rescinded or invalidated the buyer would lose the value of what they paid for with no way to recoup the costs. The commenter stated that the bargained-for value of such sales may decrease if existing senior executive non-competes cannot be enforced. The exemption for existing non-competes addresses this concern. Moreover, this concern does not exist for future transactions in any event, since they would not account for non-competes that have been banned.

In response to the foregoing comments, the Commission finds it plausible that rendering existing non-competes with senior executives enforceable could create some of these practical implementation challenges. The Commission accordingly elects to exclude existing non-competes with senior executives from the rule, reducing the burden of implementation of the final rule.

The Commission also understands that some of these practical concerns could arise for workers other than senior executives if they received substantial consideration in exchange for a non-compete. However, the evidence indicates that any such agreements with workers other than senior executives are very rare, and that such workers are more likely to experience exploitation and coercion in connection with non-competes. Therefore, allowing only existing non-competes with senior executives to remain in force will significantly reduce these practical concerns for employers. In contrast, a wider exemption for all existing agreements would leave in place a large number of non-competes that tend to harm competitive conditions, including a large number of exploitative and coercive non-competes for which no meaningful consideration was received.

Some commenters suggested the Commission exempt from the final rule non-competes in exchange for which the worker received consideration. One business asked for an exception to the final rule for paid non-competes, asserting that such an exception would allow workers to receive guaranteed payments while accessing information and training and would allow workers to start their own businesses after the non-compete period. Another business recommended allowing non-competes that provide severance equal to a worker's salary for the non-compete period. An employment attorney suggested an exception from the rule for non-competes that are part of a severance agreement or where the

worker receives a paid non-compete period or garden leave, which the attorney says do not align with the Commission's concerns about non-competes and represent a balanced trade-off.

The Commission declines to adopt an exception for non-competes in exchange for which the worker received consideration (whether under an existing or future non-compete). The fact that a worker received compensation for a non-compete does not mean the worker received fair compensation, *i.e.,* compensation commensurate with earnings that would be received in a competitive labor market. In addition, such an exception would raise significant administrability concerns. For example, a rule that exempts non-competes exchanged for ''substantial consideration'' or ''meaningful consideration'' would not provide sufficient clarity to employers and workers to avoid significant compliance costs and litigation risks. Requiring a brighter-line specific amount (or standard) of compensation would be unlikely to appropriately capture highly fact-specific, varying financial circumstances of workers and firms. Moreover, it would be difficult to prevent employers from suppressing compensation or benefits along other dimensions (*e.g.,* a requirement for severance equal to the worker's salary during the non-compete period as one commenter suggested could lead to the salary being suppressed). The Commission also notes, however, that while it is not adopting a blanket exemption from the final rule for non-competes in exchange for which the worker received consideration, it is satisfying this request to some extent by adopting an exemption for existing non-competes for senior executives, which are the non-competes most likely to have been exchanged for consideration.

Finally, the Commission concludes that allowing existing non-competes for senior executives to remain in effect is appropriate despite the significant negative effects of such non-competes on competition described in Part IV.C.2. The Commission took into consideration that non-competes with senior executives are less likely to be causing ongoing harm to individuals by preventing them from seeking or accepting other work or starting their own business, because such non-competes were likely to have been negotiated or exchanged for consideration. In addition, the negative effects of these non-competes on competitive conditions will subside over time as these non-competes expire.

4. Defining Senior Executives

As noted earlier, the Commission did not define the term ''senior executive'' in the NPRM. Instead, the Commission requested comment on how the term should be defined.[681] In this final rule, the Commission adopts a definition of ''senior executive'' to isolate the workers who are least likely to have experienced exploitation and coercion and most likely to have bargained for meaningful compensation for their non-compete. Workers for whom exploitation and coercion concerns are likely most relevant and who are unlikely to have bargained for or received meaningful consideration for a non-compete—namely, lower-earning workers, and relatively higher paid or highly skilled workers who lack policy-making authority in an organization—do not fall within this final definition.

This definition is relevant because, as explained in Part IV.C.2, the basis for the Commission's findings that non-competes with senior executives are unfair methods of competition differs in some ways from the evidence and rationales underpinning its findings that non-competes with other workers are unfair methods of competition. Furthermore, as explained in Part IV.C.3, the final rule allows existing non-competes with senior executives to remain in force, while prohibiting employers from enforcing existing non-competes with other workers after the effective date.

The Commission defines ''senior executives'' based on an earnings test and a job duties test. In general, the term ''senior executives'' refers to workers earning more than $151,164[682] who are in a ''policy-making position'' as defined in the final rule. The Commission adopted this definition after considering the many comments on who senior executives are and how to define them. Notably, the Commission concluded that, unlike highly paid senior executives, highly paid workers other than senior executives and lower-wage workers with senior executive titles as a formal matter likely experience exploitation and coercion and are unlikely to have engaged in bargaining in connection with non-competes, much like lower-wage workers.[683] In other words, the Commission finds that the only group of workers that is likely to have bargained for meaningful compensation in exchange for their non-compete is senior executives who are both highly paid and, as a functional matter, exercise the highest levels of authority in an organization.[684] The Commission estimates that approximately 0.75% of workers are such senior executives.[685]

a. Definition of ''Senior Executive''

The NPRM requested comment on how to define senior executives while providing sufficient clarity to employers and workers.[686] The NPRM stated that there is no generally accepted legal definition of ''senior executive'' and that the term is challenging to define given the variety of organizational structures used by employers.[687] The NPRM raised the possibility of looking to existing Securities and Exchange Commission (''SEC'') definitions; adopting a definition closely based on a definition in an existing Federal regulation; adopting a new definition; defining the category according to a worker's earnings; using some combination of these approaches; or using a different approach.[688] Commenters proposed a wide variety of definitions, largely focused on two types: an exception based on a worker's job duties or title, and an exception based on a compensation threshold. Upon review of the full record, the Commission determines that a test that combines both of these criteria best captures the subset of workers who are likely to have bargained for meaningful compensation in exchange for their non-compete in a readily administrable manner.

i. The Need for a Two-Part Test

Many commenters suggested combining a compensation threshold with a job duties test. For example, one business supported excepting workers who met a combination of tests based on a compensation threshold, FLSA exemption status, and access to trade secrets. A law firm suggested the final rule should account for both pay, exempting only low-wage hourly workers, and job duties in determining an exception. One commenter suggested defining ''senior executive'' based on total compensation, job title, and job duties. Though the Commission does not adopt these specific duties and wage combinations, the Commission agrees that a combined approach is necessary.

The Commission has determined that the definition of ''senior executive'' should include both a compensation threshold and job duties test, similar to

[681] NPRM at 3520.

[682] This threshold is based on the 85th percentile of earnings of full-time salaried workers nationally. *See* Part IV.C.4.b.

[683] *See* Part IV.C.1.

[684] *See id.*

[685] *See* Part X.F.11.

[686] NPRM at 3520.

[687] *Id.*

[688] *Id.*

the DOL regulations that define and delimit the FLSA's exemption for executive employees.[689] The key advantage of a compensation threshold, as one industry organization commenter stated, is that compensation thresholds are objective and easily understood by all stakeholders—yielding significant administrability benefits. However, since not all workers above any given compensation threshold are senior executives, a job duties test is also needed to identify senior executives.

The two-part test isolates the workers most likely to have bargaining power to negotiate meaningful consideration for a non-compete and least likely to experience exploitation and coercion in connection with non-competes. A compensation threshold ensures that stakeholders do not need to spend time assessing the job duties of workers below the threshold—minimizing the amount of detailed analysis stakeholders must undertake. A compensation threshold also helps ensure that workers who work in positions with ''senior executive'' classifications but likely lack meaningful bargaining power due to their relatively low incomes and who likely did not receive meaningful consideration for a non-compete are excluded from the definition. The job duties test ensures that the definition identifies the individuals most likely to have bespoke, negotiated agreements—those with the highest level of authority over the organization—while also ensuring that high-earning workers who are not senior executives, who likely experience exploitation and coercion from non-competes and do not generally bargain over them, are not captured by the definition.[690]

Clarity from a compensation threshold is essential, as without clarity workers and employers would often be uncertain about a non-compete's enforceability (absent adjudication), and such uncertainty often fosters *in terrorem* effects.[691] For example, an attorney commenter stated that an exception for executive, management, and professional employees and those with access to trade secrets would inherently lack clarity. A lack of clarity could also facilitate evasion by employers, as one law firm commented.

While there may be some workers other than senior executives as defined here who may have bargained for consideration for a non-compete, the benefits to workers and employers of a clear and administrable definition outweigh the risk that some bargained-for non-competes are invalidated. In Part IV, the Commission finds even bargained-for non-competes tend to negatively affect competitive conditions. The Commission finds that the need to avoid an overinclusive exception that increases those harms to competitive conditions outweighs the risk that in rare instances private parties with non-competes other than with senior executives may need to restructure their employment agreements to utilize less restrictive alternatives that burden competition to a lesser degree.

Many commenters sought an exception for senior executives and/or highly paid and highly skilled workers based on justifications such as access to trade secrets or confidential information, rather than compensation thresholds. Some argued that compensation thresholds do not align with or allow individualized assessments of which workers meet a given justification such as access to confidential information. One law firm commented that a bright-line compensation threshold would eliminate non-competes for lower wage workers while allowing non-competes for what the commenter viewed as legitimate business purposes. Some commenters opposed an exception for senior executives because they believed ''senior executive'' would be too difficult to define. In Part V.D.2, the Commission explains why it is not adopting an exception for workers based on their access to trade secrets and other intellectual property. Further, in the Commission's view, eliminating the need for individualized assessments for most workers is the primary advantage of a compensation threshold, not a drawback (although the Commission declines to adopt a compensation threshold alone for reasons stated previously and in Part V.D.1). However, the evidence indicates that an exception for existing senior executive non-competes is appropriate, which the Commission defines here.

Commenters, both those supporting and opposing the rule, pointed out several issues with compensation thresholds standing alone. Some commenters were concerned a compensation threshold would exclude some workers, such as many physicians, from the final rule's benefits based on their income level. Two commenters said an exception would penalize the advancement of workers near a threshold and those workers may have to choose between higher wages or being free from a non-compete. Including the job duties tests alongside the compensation threshold mitigates the risk of such cliff effects, assuming they exist (which is far from clear).

Some commenters asserted a threshold would need to be updated for inflation, while one law firm commented that frequent updates would make the final rule more difficult to understand and implement. Commenters also pointed out the need to explain when the threshold would be measured. While adjusting for inflation could be important to ensure the final rule continues serving its intended function if the compensation threshold governed a total exemption from the rule (as these commenters assume), it is unnecessary to the final rule because the exception adopted applies only to existing non-competes (*i.e.,* it has only one-time application). The Commission explains in Part IV.C.4.b its reasons for declining to adopt a locality adjustment.

ii. The Final Rule's Definition of ''Senior Executive''

Based on the considerations described in Part IV.C.4.a.i, the Commission adopts a two-pronged definition of ''senior executive'' in § 910.1. Under § 910.1, a senior executive is a worker who was in a policy-making position and who received from a person for the employment:

- Total annual compensation of at least $151,164 in the preceding year (under paragraph (2)(i)); or
- Total compensation of at least $151,164 when annualized if the worker was employed during only part of the preceding year (under paragraph (2)(ii)); or
- Total compensation of at least $151,164 when annualized in the preceding year prior to the worker's departure if the worker departed from employment prior to the preceding year and the worker is subject to a non-compete (under paragraph (2)(iii)).

Paragraph (2)(ii) applies to workers who were in a policy-making position during only part of the preceding year, which includes workers who were hired or who left a business entity within the preceding year as well as workers who were promoted to or demoted from a policy-making position in the preceding year. Paragraph (2)(iii) ensures that the exception applies to senior executives who departed from the employer more than one year before the effective date but are still subject to a non-compete (*e.g.,* a worker who left more than a year ago and has a non-compete term of 18 months). To account for those senior executives, paragraph (2)(iii) considers total annual compensation in the year preceding their departure.

[689] The FLSA is the Federal statute establishing minimum wage, overtime, recordkeeping, and youth employment standards. *See* 29 U.S.C. 201 *et seq.*

[690] *See* Part IV.C.1.

[691] *See* Part IX.C.

To clarify the definition's compensation threshold, the final rule includes definitions of ''total annual compensation'' and ''preceding year.'' To clarify the job duties test, the final rule includes definitions of ''policy-making position'' as well as two additional terms that are in the definition of ''policy-making position'': ''officer'' and ''policy-making authority.'' These definitions are described in Parts IV.C.4.b and IV.C.4.c.

b. Defining the Compensation Threshold

Pursuant to § 910.1, the senior executive exception applies only to workers who received total annual compensation of at least $151,164 from a person for employment in a policy-making position in the most relevant preceding year. Section 910.1 further defines ''total annual compensation'' and ''preceding year,'' respectively. This threshold is based on the 85th percentile of earnings of full-time salaried workers nationally.[692]

The Commission draws this line between more highly paid and less highly paid workers based on its assessment of which workers are more likely to experience exploitation and coercion and less likely to have engaged in bargaining in connection with non-competes and the need to implement a two-part test. As commenters noted, there is no single compensation threshold above which zero workers will have been coerced and exploited and below which zero workers will have been uncompensated for the non-compete that binds them. Based on the Commission's expertise and after careful review of the rulemaking record, including relevant data, the empirical research, and the public comments, the Commission concludes $151,164 in total annual compensation reflects a compensation threshold under which workers are likely to experience such exploitation and coercion and are less likely to have bargained for their non-competes, while providing employers a readily administrable line. With this line, market participants can easily know that workers below the line cannot be subject to non-competes, minimizing both *in terrorem* effects and eliminating the administrative burden of conducting a job duties test for those workers.

The Commission looked to several sources and suggestions from the comments in selecting a threshold. Numerous commenters suggested the Commission should look to the FLSA, and some specifically recommended the FLSA regulations' threshold for highly compensated employees.[693] DOL sets the compensation threshold for highly compensated employees in its overtime regulations under the FLSA based on earnings of full-time salaried workers. Since January 2020, based on a regulation adopted in 2019, that threshold is $107,432 and reflects the 80th percentile of full-time salaried workers nationally using combined 2018 and 2019 data.[694] In September 2023, DOL proposed raising that threshold to the 85th percentile of full-time salaried workers nationally and, *inter alia,* updating the amount to reflect more current earnings data. For 2023, the 85th percentile of full-time salaried workers nationally is $151,164.[695] The Commission recognizes DOL's expertise in determining who qualifies as a highly compensated worker and employers' likely familiarity with DOL regulations. Given this familiarity, the Commission borrows from DOL's definition of compensation to minimize compliance burdens on employers.

Another Federal regulatory threshold for high wage workers noted by commenters also aligns with the 85th percentile of full-time salaried workers nationally in 2023 or approximately $150,000. In the retirement context, the IRS sets a threshold for highly compensated employees at $150,000 for 2023 and $155,000 for 2024.[696] Additionally, the District of Columbia bans non-competes for workers making less than $150,000.[697]

The Commission analyzed occupational wage data to identify a threshold that would capture more highly paid senior executives, who are likely to have bespoke, negotiated non-competes. BLS's most recent wage data indicates that workers in the ''chief executive'' category have a median wage of $209,810.[698] Thus, most ''chief executives,'' most if not all of whom would meet the duties component of the two-part test in this final rule, earn well above the $151,164 compensation threshold, ensuring that the threshold is likely not underinclusive. The Commission notes that some very high-wage occupations have a median wage above $151,164, including: physicians; surgeons; computer and information systems managers; and dentists.[699] To qualify for the exemptions, these workers would have to also meet the job duties portion of the senior executive test, which is appropriate because the Commission finds that workers in these professions are often subject to coercion and exploitation and rarely have bespoke, negotiated non-competes.

The Commission also considered a lower wage threshold of approximately $100,000, which would be closer in range to the DOL highly compensated employee threshold of $107,432 that DOL adopted in 2019. According to 2022 BLS data, the median wage for ''top executives'' in the U.S. is $99,240.[700] Workers in the ''top executive'' category include ''chief executives,'' but also include officials with less authority like ''general and operations managers.'' The latter have an annual median wage of $97,030 with their earnings at the 75th percentile being $154,440.[701] The Commission believes that a significant number of general and operations managers (some of whom may be in a policy-making position) likely do not have bespoke, negotiated non-competes. For example, a vice president of operations of a local retail chain with only a few locations would likely be in this category. The same vice president—unlike the vice president of a multinational

[692] BLS, Labor Force Statistics from the Current Population Survey, *https://www.bls.gov/cps///nonhourly-workers.htm* (based on the data from the table ''Annual average 2023'').

[693] However, at the time of commenting the highly compensated employee threshold was $107,432 and the Department had not proposed a new threshold.

[694] 29 CFR 541.601; *see also* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, NPRM, 88 FR 62152, 62157 (Sept. 8, 2023) (hereinafter ''2023 FLSA NPRM'').

[695] *See* Bur. Of Labor Stats., Research Series on Percentiles of Usual Weekly Earnings of Nonhourly Full-Time Workers, at *https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm* (based on the table ''Annual average 2023''); 2023 FLSA NPRM at 62153. The DOL proposed a threshold at $143,998, the 85th percentile of full-time salaried workers at the time the 2023 FLSA NPRM was proposed. When the highly compensated employee test was originally created in 2004, its $100,000 threshold exceeded the annual earnings of 93.7% of salaried workers. *Id.* at 62159.

[696] IRS, *Definitions,* (Aug. 29, 2023) (Highly Compensated Employees), *https://www.irs.gov/retirement-plans/plan-participant-employee/definitions;* IRS, *COLA Increases for Dollar Limitations on Benefits and Contributions,* (updated Nov. 7, 2023), *https://www.irs.gov/retirement-plans/cola-increases-for-dollar-limitations-on-benefits-and-contributions.*

[697] DC Code sec. 32–581.02(a)(1) (effective Oct. 1, 2022) (where the employee's compensation is less than $150,000, or less than $250,000 if the employee is a medical specialist, employers may not require or request that the employee sign an agreement or comply with a workplace policy that includes a non-compete).

[698] BLS Occupational Employment and Wage Statistics, *supra* note 49. These data are from the May 2022 National XLS table for Chief Executives under private ownership.

[699] *See id.* These data are from the May 2022 National XLS table for private ownership.

[700] *Id.* These data are from the May 2022 National XLS table for Top Executives under private ownership.

[701] *Id.* These data are from the May 2022 National XLS table for General and Operations Managers under private ownership.

corporation—is unlikely to possess the same bargaining power or to have a bespoke, negotiated employment agreement. Moreover, to the extent an individual's total compensation is under $151,164, in the unlikely event the individual received consideration for their non-compete, such consideration is unlikely to represent a significant part of their compensation.

Similarly, the Commission believes a $107,432 (or thereabouts) threshold would be overinclusive and individuals who likely do not have bespoke, negotiated non-competes—and who were likely to be exploited and coerced—could meet the threshold test. The $107,432 threshold was adopted based on earnings in 2018 and 2019. Adjusting for inflation, $107,432 in June 2019 is the equivalent of $130,158 in February 2024. Moreover, as noted previously, BLS data reflect that chief executives generally earn significantly more than $130,158. In contrast, occupations with a median wage below $151,164 but above $107,432 include: advertising, marketing, promotions, public relations, purchasing, and sales managers; financial managers; software developers; physician assistants; optometrists; nurse practitioners; and pharmacists.[702] These are occupations that the comment record reflects often experience coercion and exploitation with respect to non-competes and rarely have negotiated or compensated non-competes. A civic organization commenter also argued that the DOL regulations' ''highly compensated employee'' definition's $107,432 threshold was close to the median wage in some industries and areas and cited several cases that it said demonstrate that adopting this threshold would exclude workers who are vulnerable to exploitation and coercion.

Accordingly, the Commission adopts a threshold of $151,164. This threshold, combined with the duties test, reflects highly compensated individuals who are most likely to have the bespoke, complex non-competes that the Commission elects to leave undisturbed, and who the Commission finds are less likely to experience coercion and exploitation. This threshold also has significant administrability benefits, as it is calculated in accord with definitions used in FLSA compliance, with which employers are generally familiar. This alignment will yield efficiency benefits that reduce compliance burdens on employers.

After careful review, the Commission decided not to choose a threshold higher or lower in part because as the compensation threshold in the rule increased, fewer small businesses and firms in areas with lower wages and costs of living would have senior executives with non-competes who would qualify for the exception as compared to larger businesses. Similarly, the lower a threshold is, the more workers who live in areas with higher wages and costs of living would fall above the threshold.[703]

The Commission also declines to adopt a locality adjustment. Some commenters said that a uniform national threshold could lead to geographic disparities because of the different cost of living and average incomes in different areas. Geographic disparities are difficult to resolve, as disparities often exist not just between States, but, for example, between urban and rural areas within a State. The Commission considered this factor in selecting the $151,164 threshold compared to other options. Tailoring a compensation threshold to every locality or even State or region would be burdensome and generate significant confusion for workers and employers. The Commission finds that the importance of a uniform threshold to avoid confusion and for administrability outweighs the drawbacks of any geographic disparities, particularly in light of comments from employers stating that the existing patchwork of State laws is burdensome to navigate. The Commission notes that neither DOL nor IRS have adopted thresholds for highly compensated individuals that vary geographically. Given the rise in remote work, applying geographic variation to employers and workers would also prove burdensome. Moreover, total annual compensation under § 910.1 includes traditional bonuses or compensation a senior executive might receive, such as a bonus tied to performance that is paid pursuant to any prior contract, agreement, or promise. The rule also allows for the entire amount of such bonuses to be credited to total annual compensation, thus, increasing the likelihood of capturing highly compensated policy-making individuals across the nation.

The Commission estimates that approximately 92% of workers will fall below this compensation threshold, ensuring that existing non-competes will be unenforceable for the vast majority of workers most likely to experience exploitation and coercion in connection with non-competes.[704] The Commission also estimates that approximately 0.75% of workers are likely to be considered senior executives.[705] The compensation threshold reflects the Commission's finding that non-competes are very rarely bargained for, and to the extent they are, below $151,164 such bargaining is almost non-existent and consideration for a non-compete, if any, is likely to be relatively small. Pairing the compensation threshold with the duties test will also minimize compliance costs, as employers and the Commission will not need to conduct job duties tests for those workers whose compensation fall below the threshold.

i. Definition of ''Total Annual Compensation''

Section 910.1 provides that ''total annual compensation'' is based on the worker's earnings over the preceding year. It is based on DOL's regulation defining ''total annual compensation'' for highly compensated employees in 29 CFR 541.601(b)(1) and matches DOL's determination of what types of compensation can count towards total annual compensation for highly compensated employees.

Section 910.1, like DOL's definition, states that total annual compensation may include salary, commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during that 52-week period. Nondiscretionary bonuses and compensation includes compensation paid pursuant to any prior contract, agreement, or promise, including performance bonuses the terms of which the worker knows and can expect.[706] The definition further states that total annual compensation does not include board, lodging and other facilities as defined in 29 CFR 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other similar fringe benefits. Section 541.606 is part of DOL's regulations concerning salary requirements for employees employed in a bona fide executive, administrative, or professional capacity, and applies to

[702] *Id.*

[703] *See also* 2023 FLSA NPRM at 62176.

[704] *See* Steven Ruggles, Sarah Flood, Matthew Sobek, Daniel Backman, Annie Chen, Grace Cooper, Stephanie Richards, Renae Rodgers, & Megan Schouweiler. IPUMS USA: Version 15.0 [dataset]. Minneapolis, MN: IPUMS, 2024. *https://doi.org/10.18128/D010.V15.0* (American Community Survey 2022 data, adjusted to 2023 dollars and excluding government and non-profit workers).

[705] *See* Part X.F.11.

[706] 29 CFR 778.211(c); *see also* U.S. DOL, Fact Sheet #56C: Bonuses under the Fair Labor Standards Act (FLSA) (Dec. 2019), *https://www.dol.gov/agencies/whd/fact-sheets/56c-bonuses.*

highly compensated employees.[707] That regulation cross-references DOL's regulations on wage payments under the FLSA in 29 CFR part 531, including the term ''other facilities'' defined in 29 CFR 531.32.

This regulatory text makes one modification to the DOL approach to correspond to the final rule's purposes and the non-compete context. Based on comments received, the Commission decided not to adopt DOL's base salary requirement for highly compensated employees in its definition of compensation, which serves a different purpose than the definition adopted here. The 2019 DOL regulation requires that a portion of the worker's total annual compensation must be paid on a salary or fee basis in order to qualify as a highly compensated employee, to ensure that the worker receives at least a base salary and to guard against potential abuses.[708] In contrast, the exception in § 910.2(a)(2) applies only to senior executives. The Commission understands that compensation for senior executives can be structured in many different ways. A law firm commented that senior executive compensation can be particularly complex, as base salary may be 20% or less of a senior executive's annual pay, and much of their pay is variable and does not vest until the end of the year. One comment said some CEOs receive only a $1 salary and receive the rest of their compensation in other forms. The definition of total annual compensation in the final rule is designed to allow for different forms of nondiscretionary compensation without requiring employers to pay a particular amount as salary.

ii. Definition of ''Preceding Year''

The definitions of ''senior executive'' and ''total annual compensation'' in § 910.1 use the term ''preceding year.'' To provide clarity and facilitate compliance, the Commission defines the term ''preceding year'' in § 910.1 as a person's choice among the following time periods: the most recent 52-week year, the most recent calendar year, the most recent fiscal year, or the most recent anniversary of hire year. The term ''preceding year'' is drawn from DOL's FLSA regulations in 29 CFR 541.601(b)(4), which states that ''[t]he employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply.'' Here, the Commission similarly gives employers flexibility to minimize compliance costs, as many employers may have compensation more readily available based on the last calendar year, their fiscal year, or the anniversary of a worker's hire as part of tax and other reporting requirements.

iii. Other Proposed Compensation Thresholds

In seeking to exempt senior executives and highly paid workers from the rule altogether, commenters suggested several possible wage-related thresholds, including specific dollar thresholds (*e.g.,* $100,000) not tied to any existing metric or standard; whether the worker is an hourly worker; annual compensation at or above some multiple of the Federal poverty level or minimum wage, as in New Hampshire, Maine, and Rhode Island statutes; State average wages or ten times the local median wage; and $330,000, the IRS annual compensation limit for 401(k) retirement contributions.[709]

As explained in Part V.D, the Commission declines to exempt workers from the rule altogether based on their earnings. With respect to defining the workers whose *existing* non-competes the Commission exempts, the Commission also declines to use these thresholds or standards. For the reasons described in this Part IV.C.4.b, the Commission believes the compensation threshold it is adopting—in combination with the job duties test it is adopting—most effectively isolates the workers (namely, senior executives) who are likely to bargain with employers and receive compensation for their non-competes and who are unlikely to be exploited or coerced in connection with non-competes. While thresholds based on State lines or metrics would reflect differences in wages and costs of living among States, they would not reflect differences between, for example, urban and rural areas within a State and could generate confusion where the threshold varies between States, in addition to increasing compliance burdens by requiring employers to assess which State adjustment applies—a particularly challenging task in increasingly cross-border and remote work environments. Using the local median wage would generate too much unpredictability for employers and workers and would face the same administrability and confusion challenges to an even higher degree. In contrast, a uniform national compensation threshold as part of the test provides clarity that reduces the risks of *in terrorem* effects and increases ease of compliance. Finally, the $330,000 threshold is an annual compensation limit, while the IRS has a different test to identify highly compensated employees. A $330,000 threshold would be too high for employers in areas with lower average incomes and costs of living and would likely exclude from the definition many senior executives who bargained for their non-compete in exchange for consideration.

One business recommended an exception for individuals in the top 10% income tier at their respective employers to exempt workers at start-ups that might not be able to compensate their workers at a high level but whose workers may still be exposed to trade secrets. Another proposed using Internal Revenue Code section 414(q), defining highly compensated employee as the highest paid 1% or 250 employees in the corporation. A percentage threshold, however, has significant practical issues including workers entering and exiting, earnings changes, and factoring in independent contractors, workers at subsidiaries, or workers at parent companies. It would also lead to disparities between large and small firms, as large firms could use non-competes for far more workers than could small firms.

Other commenters pointed to State laws setting a compensation threshold to support excluding highly paid workers from the final rule or suggested the Commission look to those States as an example. A public policy organization that supported a categorical ban said any threshold should be at least higher than $100,000, citing research on Washington's non-compete reforms that indicated employers did not value non-competes up to that threshold.[710] The compensation threshold the

[707] 29 CFR 541.601(a)(1) (''[A]n employee with total annual compensation of at least $107,432 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee as identified in subparts B, C or D of this part.'').

[708] 29 CFR 541.601(b)(1); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 FR 22122, 22175 (Apr. 23, 2004) (''This change will ensure that highly compensated employees will receive at least the same base salary throughout the year as required for exempt employees under the standard tests, while still allowing highly compensated employees to receive additional income in the form of commissions and nondiscretionary bonuses.'').

[709] IRS, *COLA Increases for Dollar Limitations on Benefits and Contributions,* (updated Nov. 7, 2023), *https://www.irs.gov/retirement-plans/cola-increases-for-dollar-limitations-on-benefits-and-contributions;* Treas. Reg. sec. 1.401(a)(17)–1.

[710] Hiraiwa, Lipsitz & Starr, *supra* note 502.

Commission is adopting is higher than this amount.

c. Defining the Job Duties Component

i. Definitions of ''Officer,'' ''Policy-Making Authority,'' and ''Policy-Making Position''

In NPRM, the Commission suggested that the final rule's definition of senior executive could be based on SEC Rule 3b–7.[711] The Commission did not receive comments specifically addressing this option, but the Commission carefully considered arguments for and against job duties or job title distinctions as well as numerous comments on potential job duties tests, alone or in combination with compensation thresholds, before determining that a modified version of SEC Rule 3b–7's job duties requirements would best meet the exception's goals. The duties test adopted by the Commission is precise and more tailored than the other definitions proposed by commenters[712] and minimizes the risk that workers who likely experienced exploitation and coercion are included in the definition of senior executive. The test focuses primarily on job duties, rather than solely on job titles, because businesses do not all use the same job titles, and a job title might not reflect the worker's actual level of authority in an organization, which is a key indicator of whether a worker is likely to face exploitation and coercion or to have bargained in connection with non-competes.

Section 910.1 defines ''policy-making position'' as a business entity's president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority. The definition of ''policy-making position'' further states that an officer of a subsidiary or affiliate of a business entity that is part of a common enterprise who has policy-making authority for the common enterprise may be deemed to have a policy-making position for the business entity for purposes of this paragraph. Finally, the definition of ''policy-making position'' states that a natural person who does not have policy-making authority over a common enterprise may not be deemed to have a policy-making position even if the person has policy-making authority over a subsidiary or affiliate of a business entity that is part of the common enterprise.

Section 910.1 also defines terms used in the definition of ''policy-making position.'' Section 910.1 defines ''officer'' as a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any natural person routinely performing corresponding functions with respect to any business entity whether incorporated or unincorporated. To account for differences in the way business entities may use and define job titles, the definition includes workers in equivalent roles. By incorporating this definition of ''officer,'' ''senior executive'' applies to workers at the highest levels of a business entity.

This definition is nearly verbatim of the SEC definition of ''officer'' in 17 CFR 240.3b–2. That term ''officer'' is used in SEC Rule 3b–7.[713] To maintain consistency with the SEC regulations by ensuring that ''officer'' has the same meaning, and to utilize the SEC's expertise in this area, the Commission adopts the SEC's definition of ''officer.''

Section 910.1 defines ''policy-making authority'' as final authority to make policy decisions that control significant aspects of a business entity or a common enterprise. The definition further states that policy-making authority does not include authority limited to advising or exerting influence over such policy decisions or having final authority to make policy decisions for only a subsidiary of or affiliate of a common enterprise.

Accordingly, for a worker to be a senior executive, in addition to meeting the compensation threshold, the worker must be at the level of a president, chief executive officer or the equivalent, officer (defined in § 910.1), or in a position that has similar authority to a president or officer. Further, an officer or other qualifying person must have policy-making authority. Presidents, chief executive officers, and their equivalents are presumed to be senior executives (*i.e.,* employers do not need to consider the further element of ''policy-making authority''). The term ''chief executive officer or the equivalent'' was added to the definition of ''policy-making position'' to increase clarity on who was included and to reflect the wider range of businesses with various structures that are subject to the final rule (as compared to SEC Rule 3b–7). The definition of ''policy-making position'' includes workers with equivalent authority because job titles and specific duties may vary between companies. This ensures that the term ''senior executive'' is broad enough to cover more than just a president or chief executive officer, especially for larger companies, as others may have final policy-making authority over significant aspects of a business entity.

For example, many executives in what is often called the ''C-suite'' will likely be senior executives if they are making decisions that have a significant impact on the business, such as important policies that affect most or all of the business. Partners in a business, such as physician partners of an independent physician practice, would also generally qualify as senior executives under the duties prong, assuming the partners have authority to make policy decisions about the business. The Commission notes that such partners would also likely fall under the sale of business exception in § 910.3 if the partner leaves the practice and sells their shares of the practice. In contrast, a physician who works within a hospital system but does not have policymaking authority over the organization as a whole would not qualify.

The Commission changed some aspects of SEC Rule 3b–7 to fit the context of this rulemaking. First, because § 910.2(a)(2) will extend to non-public companies, unlike SEC regulations, the final rule's definition of ''policy-making position'' does not include the phrase ''any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance)'' in the definition of ''executive officer.''[714] The Commission believes that in the context of this final rule, in which the definition is relevant to a broader array of entities than public companies, that phrase would encompass workers who, despite their titles, are among those who are likely to be coerced or exploited by non-competes. For example, this aspect of the definition can be too easily applied to managers of small departments, who the Commission finds

[711] 17 CFR 240.3b–7; NPRM at 3520.

[712] *See* Part IV.C.4.c.ii.

[713] 17 CFR 240.3b–7 (''The term executive officer, when used with reference to a registrant, means its president, any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant. Executive officers of subsidiaries may be deemed executive officers of the registrant if they perform such policy making functions for the registrant.''); 17 CFR 240.3b–2 (''The term officer means a president, vice president, secretary, treasury or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated.'').

[714] 17 CFR 240.3b–7.

are unlikely to have bargained for their non-competes. At the same time, a manager who does in fact have policy-making authority would meet the definition of ''officer'' in § 910.1 and thus be included in the definition of senior executives (if the manager also meets the compensation threshold). Similarly, depending on the organization, a vice president may have final policy-making authority over significant aspects of a business entity. The adapted definition is based on functional job duties rather than formal job titles.

Second, SEC Rule 3b–7 uses the term ''policy making function'' as part of its definition of the types of job duties that could classify a person as an ''executive officer.'' [715] While the term ''policy making function'' is undefined in SEC Rule 3b–7 and other SEC regulations, the Commission believes that defining the term ''policy-making authority'' in § 910.1 would provide greater clarity and facilitate compliance with the final rule. The final rule applies to a wider range of business entities than SEC rules, and the Commission seeks to minimize the need to consult with counsel about the meaning of this term. The Commission is also concerned that if the term is left undefined, employers could, inadvertently or otherwise, label too many workers who have any involvement in the employer's policy making as senior executives, especially workers without bargaining power.

In defining this term, the Commission seeks to broadly align with the SEC's definition of ''executive officer'' while focusing on senior executives in a wider variety of entities, who are less likely to experience exploitation and coercion. As explained in Part IV.C.4.b with respect to the compensation threshold, there is no job duties test that will exclude every worker who experiences exploitation and coercion with respect to non-competes while including every worker who does not. Building on the SEC definition provides firms and workers with a more administrable definition that isolates workers at the most senior level of an organization.

To ensure that the final rule's job duties test for senior executives broadly aligns with the SEC definition, the Commission looked to case law interpreting that SEC definition. Few courts have interpreted SEC Rule 3b–7's ''policy making function'' language, though some courts view it as an officer test.[716] In the most in-depth discussion, the U.S. District Court for DC considered a defendant who was a member of a corporate body that discussed important policy decisions and made recommendations to the CEO, and supervised and had ''substantial influence'' over a major aspect of the company's business. However, the court held that only the CEO, and not the defendant, had authority to make company policy and ultimate decisions on significant issues.[717] The court conducted a fact-intensive analysis of the defendant's duties and held that the defendant did not have the authority to make policy. The court also held that the term did not include individuals solely ''involved in discussing company strategy and policy.'' [718]

The Commission finds this case law instructive and thus defines ''policy-making authority'' in the final rule as ''final authority to make policy decisions that control significant aspects of a business entity and does not include authority limited to advising or exerting influence over such policy decisions.'' Adding this definition provides stakeholders with additional clarity as to what type of authority meets the definition of ''senior executive'' and prevents overbroad application of the definition. It expressly does not include workers who merely advise on or influence policy, as a wide range of workers in an organization can advise on or influence policy without being a senior executive.

In order to ensure that lower-level workers, whom the Commission finds likely experience exploitation and coercion, are not included in the definition of senior executive, policy-making authority is assessed based on the business as a whole, not a particular office, department, or other sublevel. It considers the authority a worker has to make policy decisions that control a significant aspect of a business entity without needing a higher-level worker's approval. For example, if the head of a marketing division in a manufacturing firm only makes policy decisions for the marketing division, and those decisions do not control significant aspects of the business (which would likely be decisions that impact the business outside the marketing division), that worker would not be considered a senior executive. Similarly, in the medical context, neither the head of a hospital's surgery practice nor a physician who runs an internal medical practice that is part of a hospital system would be senior executives, assuming they are decision-makers only for their particular division. The definition is limited to the workers with sufficient pay and authority such that they are more likely to have meaningful bargaining power and actually negotiated their non-competes.

For the same reason, the Commission added language to the definitions of ''policy-making authority'' and ''policy-making position'' to exclude from the definition of ''senior executives'' workers with policy-making authority over only a subsidiary or affiliate of a common enterprise who do not have policy-making authority over the common enterprise. One commenter argued that the proposed definition of ''business entity'' would allow firms to divide themselves into separate entities to evade the final rule. In addition to sharing this concern, the Commission is concerned that executives of subsidiaries or affiliates of a common enterprise [719] could rely on their final authority to make policy decisions for only that subsidiary or affiliate to classify the head of each office as a senior executive even though that individual only has authority over one component of a coordinated common enterprise. Rather, the worker must have policy-making authority with respect to the common enterprise as a whole, not just a segment of it, to be a senior executive. Workers who head a subsidiary or affiliate of a common enterprise are similar to department heads; the senior executives controlling the entire common enterprise control those individual subsidiaries and affiliates. As the Commission has explained, the Commission finds that department heads and other highly paid non-senior executives do not have sufficient bargaining power to avoid exploitation and coercion and are unlikely to have bargained in connection with non-competes. The job duties test identifies the workers with the highest levels of authority in an organization, *i.e.,* the workers most likely to have bargaining power and a bespoke, negotiated agreement, and a

[715] *Id.*

[716] *See, e.g., SEC* v. *Enters. Solutions,* 142 F. Supp. 2d 561, 570, 574 (S.D.N.Y. 2001) (finding that a so-called consultant's role was ''sufficiently similar to the duties of an officer or director of the company that his involvement, along with his history of criminal and regulatory violations, ought to have been disclosed'' where the consultant controlled the company, including hiring the CEO, arranging loans from companies controlled by the consultant, negotiating acquisitions, and putting his daughter on the board in his place); *In re Weeks,* SEC Release No. 8313 at *9 (Oct. 23, 2003) (finding a consultant was *de facto* in charge of the company while the officers and directors were figureheads who lacked authority and influence over the company).

[717] *SEC* v. *Prince,* 942 F. Supp. 2d 108, 133–36 (D.D.C. 2013).

[718] *Id.* at 136.

[719] *FTC* v. *WV Universal Mgmt., LLC,* 877 F.3d 1234, 1240 (11th Cir. 2017) (''[C]ourts have justly imposed joint and several liability where a common enterprise exists'').

common enterprise is effectively a single organization. Such workers may have a senior executive job title, but they are unlikely to meet the job duties test.

To be considered a ''common enterprise'' for the purposes of defining policy-making authority and policy-making position, the Commission looks beyond legal corporate entities to whether there is a common enterprise of ''integrated business entities.'' [720] This means that the various components of the common enterprise have, for example, one or more of the following characteristics: maintain officers, directors, and workers in common; operate under common control; share offices; commingle funds; and share advertising and marketing.[721] Therefore, the definitions of policy-making authority and policy-making position include provisions whose purpose is to exclude those executives of a subsidiary or affiliate of a common enterprise from being considered senior executives. For example, if a business operates in several States and its operations in each State are organized as their own corporation, assuming these businesses and the parent company meet the criteria for a common enterprise, the head of each State corporation would not be a senior executive. Rather, only the senior executives of the parent company (or whichever company is making policy decisions for the common enterprise) could qualify as senior executives for purposes of this final rule, because they are the workers with the highest level of authority in the organization and most likely to have bargaining power and a bespoke, negotiated agreement. However, a worker could qualify as a senior executive even if they were an executive of one or more subsidiaries or affiliates of the common enterprise, so long as that senior executive exercised policy-making authority over the common enterprise in its entirety. These provisions are consistent with the approach taken elsewhere in this final rule to focus on real-world implications and authority rather than formal titles, labels, or designations. This exclusion from the definitions of ''policy-making authority'' and ''policy-making position'' applies only to common enterprises; for subsidiaries or affiliates that are not part of a common enterprise, a worker could qualify as a senior executive if they have policy-making authority over that subsidiary or affiliate and meet all of the requirements.

The Commission has also substituted ''business entity'' in the definitions of ''officer'' and ''policy-making position'' where SEC Rule 3b–7 uses the word ''registrant'' and 17 CFR 240.3b–2 uses ''organization,'' because ''registrant'' has a specific meaning in the SEC context that is inapplicable to the wider array of business entities covered by this final rule and because ''business entity'' is defined in § 910.1 and is used throughout this final rule. The Commission substituted ''natural person'' where SEC Rule 3b–7 and 17 CFR 240.3b–2 use ''person'' because ''person'' is separately defined for purposes of this final rule in § 910.1.

ii. Other Proposed Job Duties Tests

The FLSA

Numerous commenters suggested basing a job duties test on the categories of occupations that are exempt from requirements under the FLSA. Some commenters suggested using only some of the exemptions such as executive employees,[722] administrative employees, learned or creative professionals, or workers in the practice of medicine.[723] DOL's regulations also set a salary threshold at not less than $684 per week ($35,568 annually),[724] though other commenters suggested using a higher compensation threshold.

One civic organization opposed applying any FLSA exemptions, stating that the FLSA provides numerous exemptions that do not relate to any non-compete policy considerations, and an exception or more lenient standards for FLSA-exempt workers would not solve the problems caused by non-competes. It opposed using the FLSA's executive, administrative, or professional exemptions, arguing that updates to the FLSA's salary threshold are often delayed and outdated, often falling below the poverty threshold, and the duties test serves as a loophole for wage and hour protections.

Commenters offered several reasons for adopting the FLSA exemptions: these categories are already well-established in Federal law; nonexempt workers under the FLSA tend not to have access to trade secrets or be able to take an employer's goodwill and are thus less likely to harm the employer; the exemptions would capture both wage and job duties tests; some States use a similar standard to the FLSA in their non-compete statutes; and the exemptions would ban non-competes for low-skilled workers for whom there are insufficient justifications for non-competes. An employment attorney also pushed back on the NPRM's concerns that the FLSA exemptions could enable misclassification,[725] asserting that misclassification under the FLSA is unlawful and penalized, and thus usually inadvertent.

The Commission does not adopt the FLSA exemptions for purposes of this final rule because it would exempt millions of non-competes that harm competition and workers. For example, the FLSA exempts most highly paid and highly skilled workers,[726] who the Commission finds experience exploitation and coercion (except where those workers are also senior executives).[727] The Commission also adopts brighter-line rules than the FLSA to ease compliance burdens and address *in terrorem* effects that result from uncertainty about whether a non-compete is unenforceable.[728] Although the Commission does not believe that the FLSA job duties tests are appropriate for this final rule, it does view the FLSA wage threshold methodology for ''highly compensated employees'' as a useful benchmark.[729]

Trade Secret and Confidential Information Exceptions

Numerous commenters urged the Commission not to ban non-competes for workers who have access to trade secrets and confidential information, often noting this justification is commonly used for highly paid and highly skilled workers, including senior executives. One comment expressly stated that this exception should apply regardless of earnings, though many

[720] *See FTC* v. *E.M.A. Nationwide, Inc.,* 767 F.3d 611, 636–37 (6th Cir. 2014).

[721] *See id.* ('''If the structure, organization, and pattern of a business venture reveal a 'common enterprise' or a 'maze' of integrated business entities, the FTC Act disregards corporateness. Courts generally find that a common enterprise exists 'if, for example, businesses (1) maintain officers and employees in common, (2) operate under common control, (3) share offices, (4) commingle funds, and (5) share advertising and marketing.''') (quoting *FTC* v. *Wash. Data. Res.,* 856 F. Supp. 2d 1247, 1271 (M.D. Fla. 2012)). In assessing a common enterprise, ''no one factor is controlling,'' and ''federal courts routinely consider a variety of factors.'' *FTC* v. *Wyndham Worldwide Corp.,* No. CIV.A. 13–1887 ES, 2014 WL 2812049, at *7 (D.N.J. Jun. 23, 2014); *see also Del. Watch Co.* v. *FTC,* 332 F.2d 745, 746 (2d Cir. 1964) (''[T]he pattern and frame-work of the whole enterprise must be taken into consideration.'')

[722] *See* 29 CFR 541.100(a).

[723] *See* DOL, Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA) (revised Sept. 2019), *https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime.*

[724] *Id.*

[725] *See* NPRM at 3511.

[726] *See* 2023 FLSA NPRM at 62190 (estimating that 36.4 million salaried, white-collar employees currently qualify as FLSA-exempt executive, administrative, or professional employees).

[727] *See* Part IV.C.1.

[728] *See* Part IX.C.

[729] *See* Part IV.C.4.b.

others did not mention compensation thresholds. One business suggested a bright-line rule for the types of confidential business information that can be protected by a non-compete based on existing State statutes, to increase certainty about what is allowed. Commenters suggested exceptions based on a variety of job types they viewed as more likely to be exposed to trade secrets and confidential information, including all highly skilled workers; key scientific, technical, R&D, or sales workers; or workers with highly detailed knowledge of business and marketing plans. The Commission explains why it is not adopting exceptions based on access to trade secrets or other intellectual property in Parts V.D.1 and V.D.2.

Additional Proposed Job Duties and Job Title Tests

The Commission carefully considered several other proposed tests. The NPRM stated that the Commission could base the definition of senior executive on SEC Regulation S–K's definition of senior executives.[730] Commenters did not discuss this potential option. The Commission is not adopting this approach because it bears little relation to the likelihood that a senior executive bargained for a non-compete, and because it would designate roughly seven individuals per company as ''senior executives'' regardless of their compensation level or the size of the company, meaning it would not apply equally among employers or workers.[731] For example, a ten-person company could potentially use non-competes for most of its workforce irrespective of whether they are senior executives, whereas a company with ten thousand employees would be limited to the same number.[732]

One commenter proposed adopting a definition similar to the tax code provision on ''golden parachute payments.'' [733] Several commenters drafted their own definition of senior executive based on job duties, titles, or ownership status, such as C-suite executives and their immediate subordinates, partners and equity holders, managers, workers involved in strategic decision-making, and more.

The Commission carefully considered each proposed definition and how it would operate in practice before selecting the two-part test. Elements of some of these proposals, such as strategy development or decision-making, are also similar to the job duties test the Commission is finalizing. The Commission believes that definitions based on job titles alone would be inadequate because, as one industry association commented, employers define job titles differently, and a title might not accurately reflect a worker's job duties. The other definitions proposed by commenters, such as the provision on golden parachute payments, would generally require a more fact-intensive analysis than the job duties test the Commission is adopting. Market participants would need to conduct the analysis for more workers, including workers who are exploited and coerced by non-competes. A more fact-intensive analysis would require more resources for litigation and is thus likely to have *in terrorem* effects for lower-wage workers.[734] Moreover, many of these proposals would exempt more workers than the Commission's definition, such as managers, even though workers in such roles and occupations are often coerced and exploited by non-competes.

As explained in this Part, the Commission pairs a relatively easy-to-apply job duties test with a compensation threshold to maximize administrability and clarity while identifying those senior executives most likely to have bargained for non-competes. In addition, proposals to except partners, shareholders, and similar groups are likely covered by the sale of business exception if they sell their share of the business upon leaving.

5. Prohibitions in Section 910.2(a)(2)

Based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition, the Commission adopts § 910.2(a)(2), which defines unfair methods of competition related to non-competes with respect to senior executives. Section 910.2(a)(2) provides that, with respect to a senior executive, it is an unfair method of competition for a person: (i) to enter into or attempt to enter into a non-compete clause; (ii) to enforce or attempt to enforce a non-compete clause entered into after the effective date; or (iii) to represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date. Part IV.A.1 sets forth the Commission's determination that the foregoing practices are unfair methods of competition under section 5, and Part IV.C.2 explains the findings that provide the basis for this determination.

Section 910.2(a)(2) uses similar language as § 910.2(a)(1); however, there are two key differences. First, the prohibition in § 910.2(a)(2)(ii) on enforcing or attempting to enforce a non-compete applies only to non-competes entered into after the effective date. Second, the prohibition in § 910.2(a)(2)(iii) on representing that a senior executive is subject to a non-compete applies only where the non-compete was entered into after the effective date. Sections 910.2(a)(2)(ii) and (iii) include this language because, for the reasons described in Part IV.C.3, the Commission has determined not to prohibit existing non-competes with senior executives—*i.e.,* non-competes entered into before the effective date—from remaining in effect.

Otherwise, the explanation of the three prongs of § 910.2(a)(1) in Part IV.B.4—relating to issues such as, for example, what ''attempt to enter into'' and ''attempt to enforce'' mean, and what conduct the ''representation'' prong applies to—is applicable to the corresponding language in § 910.2(a)(2). The good-faith exception in § 910.3 is also applicable to the relevant prohibitions with respect to senior executives and is explained in Part V.C.

D. Claimed Justifications for Non-Competes Do Not Alter the Commission's Finding That Non-Competes Are an Unfair Method of Competition

For the reasons described in Parts IV.B and IV.C, the Commission determines that certain practices related to non-competes are unfair methods of competition under section 5. In this Part IV.D, the Commission finds the claimed justifications for non-competes do not alter the Commission's determination that non-competes are an unfair method of competition.

As noted in Part II.F, some courts have declined to consider justifications altogether and the Commission and courts have consistently held that pecuniary benefit to the party responsible for the conduct in question

[730] *See* NPRM at 3520 (citing 17 CFR 229.402(a)(3)).

[731] *See* 17 CFR 229.402(a)(3).

[732] Additionally, while the reporting obligations of public companies may provide them with an incentive to avoid generating a profusion of ''senior executives,'' privately held companies would not face a similar constraint and could potentially avoid any ''per-company'' limitations through corporate restructuring.

[733] This provision determines who is an ''officer'' ''on the basis of all the facts and circumstances in the particular case (such as the source of the individual's authority, the term for which the individual is elected or appointed, and the nature and extent of the individual's duties) . . . .'' Treas. Reg. sec. 1.280G–1, Q/A–18.

[734] *See* Part IX.C.

is not cognizable as a justification.[735] However, where defendants raise justifications as an affirmative defense, they must be legally cognizable,[736] and non-pretextual,[737] and any restriction used to bring about the benefit must be narrowly tailored to limit any adverse impact on competitive conditions.[738]

In the NPRM, the Commission considered the commonly cited business justifications for non-competes and preliminarily found they did not alter the Commission's determination that non-competes are an unfair method of competition.[739] The Commission has reviewed and considered the comments on its analysis of the justifications for non-competes. For two reasons, the claimed justifications for non-competes do not alter the Commission's determination that non-competes are an unfair method of competition. First, employers have more narrowly tailored alternatives to non-competes for protecting valuable investments that tend to negatively affect competitive conditions to a lesser degree. Second, the asserted benefits from the claimed business justifications from non-competes do not justify the considerable harm from non-competes.

1. Claimed Business Justifications for Non-Competes and Empirical Evidence

Claimed business justifications for non-competes relate to increasing employers' incentives to make productive investments, such as investments in worker human capital (worker training), client and customer attraction and retention, or in creating or sharing trade secrets or other confidential information with workers. According to these asserted justifications, without non-competes, employment relationships are subject to an investment hold-up problem. Investment hold-up would occur where an employer—faced with the possibility that a worker may depart after receiving some sort of valuable investment or obtaining valuable information—opts not to make that investment in the first place, thereby decreasing the firm's productivity and overall social welfare. For example, according to this claimed justification, an employer may be more reticent to make capital investments or invest in workers' human capital by training its workers if it knows the worker may depart for or may establish a competing firm. Similarly, commenters argued that employers may decrease investments or experience harm if a worker takes a trade secret or other confidential information to a competitor.

Courts have cited these justifications when upholding non-competes under State common law and in cases challenging non-competes under the Sherman Act.[740] However, courts have not considered non-competes' aggregate harms, and neither legislatures nor courts have had occasion to consider these justifications in the context of section 5. The Commission has considered them and found them unavailing in cases in which it has successfully obtained consent decrees against non-competes alleged to be an unfair method of competition in violation of section 5.[741]

There is some empirical evidence that non-competes increase investment in human capital of workers, capital investment, and R&D investment. However, the Commission also finds that there are alternatives that burden competition to a lesser degree,[742] and, in any event, these claimed benefits do not justify the harms from non-competes.[743]

As explained in the NPRM, a study by Evan Starr finds that moving from mean non-compete enforceability to no non-compete enforceability would decrease the number of workers receiving training by 14.7% in occupations that use non-competes at a high rate (relative to a control group of occupations that use non-competes at a low rate).[744] The study further finds that changes in training are primarily due to changes in firm-sponsored, rather than employee-sponsored, training.[745]

Firm-sponsored training is the type of investment in human capital that non-competes are often theorized to protect, as the firm may be unwilling to make an unprotected investment. However, the study does not distinguish between core training, *i.e.,* training required to perform job duties, and advanced training, *i.e.,* training with potential to increase productivity beyond the baseline requirements for job performance. When non-competes are more enforceable, workers may receive additional core training rather than advanced training, but this may actually reflect a reduction in efficiency. When non-competes are more enforceable, labor mobility decreases and workers may also move to new industries to avoid potentially triggering non-compete clause violations (as discussed in Part IV.B.2.b.ii), both of which make experienced workers less often available for hire. Firms therefore may need to train workers at a greater rate because they will hire inexperienced workers who require more core training. On the other hand, advanced training can be associated with productivity gains, and firms using non-competes may increase rates of advanced training for experienced workers because non-competes increase the likelihood that firms receive a return on the training investment. The study does not distinguish between these types of training, and thus leaves unclear whether the observed increases in training reflect productivity gains or losses (or neither in net).

Additionally, the Starr study uses data on the use of non-competes, comparing high- and low-use occupations, rather than changes in enforceability; however, the study does not examine differences between individuals who are bound by non-

[735] *Atl. Refin. Co.,* 381 U.S. at 371 (considering that defendant's distribution contracts at issue ''may well provide Atlantic with an economical method of assuring efficient product distribution among its dealers'' and holding that the ''Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves''); *FTC* v. *Texaco,* 393 U.S. 223, 230 (1968) (following the same reasoning as *Atlantic Refining* and finding that the ''anticompetitive tendencies of such system [were] clear''); *L.G. Balfour Co.* v. *FTC,* 442 F.2d 1, 15 (7th Cir. 1971) (''While it is relevant to consider the advantages of a trade practice on individual companies in the market, this cannot excuse an otherwise illegal business practice.''). For provisions of the antitrust laws where courts have not accepted justifications as part of the legal analysis, the Commission will similarly not accept justifications when these claims are pursued through section 5.

[736] *See, e.g., FTC* v. *Ind. Fed'n of Dentists,* 476 U.S. 447, 463 (1986); *Fashion Originators' Guild of Am.* v. *FTC,* 312 U.S. 457, 467–68 (1941); *FTC* v. *Superior Ct. Trial Lawyers Ass'n,* 493 U.S. 411, 423–24 (1990).

[737] *See, e.g., Ind. Fed'n of Dentists,* 476 U.S. at 464. *See also United States* v. *Microsoft Corp.,* 253 F.3d 35, 62–64, 74 (D.C. Cir. 2001); *Eastman Kodak Co.* v. *Image Tech. Svcs.,* 504 U.S. 451, 484–85 (1992); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.,* 472 U.S. 585, 608–10 (1985).

[738] *NCAA* v. *Alston,* 594 U.S. 69, 99–104 (2021); *Polygram Holding, Inc.* v. *FTC,* 416 F.3d 29, 38 (D.C. Cir. 2005); 2000 Collaboration Guidelines, sec. 3.36b. *See also Union Circulation Co.* v. *FTC,* 241 F.2d 652, 658 (2d Cir. 1957) (''The agreements here went beyond what was necessary to curtail and eliminate fraudulent practices.'').

[739] NPRM at 3504–08.

[740] *See, e.g., United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, 281 (6th Cir. 1898); *Polk Bros., Inc.* v. *Forest City Enters.,* 776 F.2d 185, 189 (7th Cir. 1985).

[741] *See* FTC, *In the Matter of O–I Glass, Inc and In the Matter of Ardagh Group S.A., Ardagh Glass Inc., and Ardagh Glass Packaging Inc.,* Analysis of Agreements Containing Consent Order to Aid Public Comment, FTC File No. 2110182 (Jan. 4, 2023) at 6–7; FTC, *In the Matter of Prudential Security, Inc., et al.,* Analysis of Agreement Containing Consent Order to Aid Public Comment, FTC File No. 2210026 (Jan. 4, 2023) at 7; FTC, *In the Matter of Anchor Glass Container Corp. et al.,* FTC File No. 2210182 Analysis of Agreement Containing Consent Order to Aid Public Comment (Mar. 15, 2023) at 6.

[742] *See* Part IV.D.2.

[743] *See* Part IV.D.3.

[744] Starr, *supra* note 445 at 796–97.

[745] *Id.* at 797.

competes and individuals who are not. This study is the only study that attempts to identify the causal link between non-competes and worker human capital investment, and the Commission gives it some weight, though not as much weight as it would receive if it examined changes in non-compete enforceability. The Commission also weights it less highly because it does not distinguish between core and advanced training.

The second study, by Jessica Jeffers, finds knowledge-intensive firms invest substantially less in capital equipment following decreases in the enforceability of non-competes, though the effect is much more muted (and statistically insignificant) when considering all industries.[746] While firms may invest in capital equipment for many different reasons, Jeffers examines this outcome (as opposed to labor-focused outcomes) to avoid looking at R&D expenditure as a whole, which is in large part composed of labor expenses. This allows the study to isolate the effects of non-compete enforceability on investment from other effects of non-competes, such as reduced worker earnings.

Jeffers finds that there are likely two mechanisms driving these effects: first, that firms may be more likely to invest in capital when they train their workers because worker training and capital expenditure are complementary (*i.e.,* the return on investment in capital equipment is greater when workers are more highly trained); and second, that non-competes reduce competition, and firms' returns to capital expenditure are greater when competition is lower, incentivizing firms to invest more in capital.[747] Jeffers does not find any impact of non-compete enforceability on R&D expenditure (intangible investment). The sample in this study's examination of capital investment is limited to incumbent firms, and the study also finds decreases in new firm entry due to increases in non-compete enforceability. The study therefore does not offer clear insights into the overall net effect on capital investment (which includes investment by incumbent firms as well as investment by entering firms). Additionally, the Commission notes that if Jeffers' hypothesis—that firms increase investment in capital because of decreased competition—is correct, then this increased capital investment may not necessarily reflect increased economic efficiency. Jeffers uses multiple changes in non-compete enforceability, measured in a binary fashion, and the Commission therefore gives this study substantial weight, but less weight than studies which additionally measure enforceability in a non-binary fashion.

Two studies published after the release of the NPRM also assess the effects of non-competes on firm investments. A study by Johnson, Lipsitz, and Pei revisits the form of the regressions used by Jeffers. The authors find that greater non-compete enforceability increases R&D expenditure.[748] This is consistent with the NPRM's preliminary finding, and the finding of the Jeffers study, that there is evidence that non-competes increase employee human capital investment and other forms of investment. The Commission gives this study substantial weight because it examines multiple changes in non-compete enforceability measured in a non-binary fashion.

Similarly, a study by Liyan Shi examines the relationship between non-compete enforceability, the use of non-competes among executives, and firm investment.[749] Shi finds that intangible capital (expenditure on R&D) is positively associated with use of non-competes, especially in States that enforce non-competes more strictly. However, Shi finds that—unlike in the Jeffers study—physical capital expenditure has no relationship with the use of non-competes, even in high enforceability States. The Commission notes that this evidence pertains specifically to non-competes with highly paid senior executives: the executives in Shi's study earned $770,000 in cash compensation, on average. The Commission also notes that this evidence arises from analysis of non-compete use coupled with non-compete enforceability. The Commission therefore gives less weight to these empirical findings.

As the NPRM described, there are also two studies examining the impact of non-compete use (as opposed to non-compete enforceability) on investment. However, these studies simply compare differences between samples of workers that do and do not use non-competes, a methodology the Commission gives less weight to.[750] The first is a study by Starr, Prescott, and Bishara using their 2014 survey of non-compete use. They find no statistically significant association with either training or the sharing of trade secrets (after inclusion of control variables) but do not examine other investment outcomes.[751] The second study, by Johnson and Lipsitz, examines investment in the hair salon industry. That study finds that firms that use non-competes train their employees at a higher rate and invest in customer attraction through the use of digital coupons (on so-called ''deal sites'') to attract customers at a higher rate, both by 11 percentage points.[752]

As the Commission stated in the NPRM, it gives these two studies (the 2021 Starr, Prescott, and Bishara studies and the 2021 Johnson and Lipsitz studies) minimal weight, because they do not necessarily represent causal relationships, a point recognized by the authors of both of these studies.[753] Similar to other studies of non-compete use—as opposed to changes in non-compete enforceability—these studies are less reliable because the use of non-competes and the decision to invest may be jointly determined by other characteristics of the firms, labor markets, or product markets.[754]

One additional study, by Younge and Marx, finds that the value of publicly traded firms increased by 9% due to an increase in non-compete enforceability.[755] As the Commission noted in the NPRM, the authors attribute this increase to the value of retaining employees, which comes with the negative effects to parties other than the firm (employees, competitors, and consumers) described in Parts IV.B and IV.C. As the NPRM stated, if the benefits to the firm arise primarily from reductions in labor costs, then the increase in the value of firms is in part a transfer from workers to firms and is therefore not necessarily a benefit of non-competes. However, the authors do not explore the extent to which increases in firm value arise from decreases in labor costs. The authors additionally note that since the time frame used in the study is short, ''there may be deleterious effects of non-competes in the long run'' which are absent in their findings.[756] This study

[746] Jeffers, *supra* note 450 at 28. Jeffers reports 34%–39% increases in capital investment due to increases in non-compete enforceability at knowledge-intensive firms in the 2024 version of the study, and the Commission calculates increases of 7.9% across all sectors (see Part X.F.9.a.i).

[747] *Id.* at 29.

[748] Johnson, Lipsitz, and Pei, *supra* note 526.

[749] Shi, *supra* note 84.

[750] *See* Part IV.A.2.

[751] Starr, Prescott, & Bishara, *supra* note 68 at 76.

[752] Johnson & Lipsitz, *supra* note 80 at 711.

[753] Starr, Prescott, & Bishara, *supra* note 68 at 73; Johnson & Lipsitz, *supra* note 80 at 711.

[754] *See* Part IV.A.2 (describing the analytical framework the Commission is applying to weigh the empirical studies, including why it assigns greater weight to studies assessing changes in non-compete enforceability than to studies of non-compete use).

[755] Kenneth A. Younge & Matt Marx, *The Value of Employee Retention: Evidence from a Natural Experiment,* 25 J. Econ. & Mgmt. Strategy 652 (2016).

[756] *Id.* at 674.

does not address the effects of non-competes on firm investments specifically.

As the Commission stated in the NPRM, it is unaware of any evidence of a relationship between the enforceability of non-competes and the rate at which companies invest in creating or sharing trade secrets.[757] Similarly, the Commission is unaware of any evidence non-competes reduce trade secret misappropriation or the loss of other types of confidential information, difficult areas for researchers to study given the lack of reliable data on firms' trade secrets and confidential information.[758] As explained in Part IV.D.2, even assuming non-competes do reduce misappropriation or information loss, the Commission finds that there are alternatives to protect these investments that burden competition to a lesser degree.

2. Employers Have Alternatives to Non-Competes for Protecting Valuable Investments

a. The Proposed Rule

In the NPRM, the Commission preliminarily found that employers have alternatives to non-competes for protecting valuable investments.[759] The Commission stated that these alternatives may not be as protective as employers would like, but they reasonably accomplish the same purposes as non-competes while burdening competition to a less significant degree.[760]

The Commission stated that trade secret law—a form of intellectual property law that protects confidential business information—already provides significant legal protections for an employer's trade secrets.[761] The Commission also stated that employers that seek to protect valuable investments are able to enter into NDAs with their workers. NDAs, which are also commonly known as confidentiality agreements, are contracts in which a party agrees not to disclose or use information designated as confidential.[762] The Commission further stated that, if an employer wants to prevent a worker from leaving right after receiving valuable investment in their human capital, the employer can sign the worker to an employment contract with a fixed duration.[763] In addition, the Commission stated that employers that wish to retain their workers can also pay their workers more, offer them better hours or better working conditions, or otherwise improve the conditions of their employment—*i.e.,* compete to retain their labor services.[764]

The Commission also noted that in three States—California, North Dakota, and Oklahoma—employers generally cannot enforce non-competes, so they must protect their investments using one or more of these less restrictive alternatives.[765] The Commission stated that the economic success in these three States of industries that are highly dependent on trade secrets and other confidential information illustrates that companies have viable alternatives to non-competes for protecting valuable investments.[766]

b. The Commission's Final Findings

Based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition, the Commission in this final rule finds that the asserted business justifications for non-competes do not alter the Commission's determination that non-competes are an unfair method of competition. Employers have alternatives to non-competes for protecting valuable investments that burden competition to a less significant degree. Rather than restraining a broad scope of beneficial competitive activity—by barring workers altogether from leaving work with the employer or starting a business and by barring competing employers and businesses from hiring those workers—these alternatives are much more narrowly tailored to limit impacts on competitive conditions.

For the protection of trade secrets and other confidential information, these alternatives include enforcement of intellectual property rights under trade secret and patent law, NDAs, and invention assignment agreements. Employers also have alternative mechanisms to protect their investments in worker human capital, including fixed duration contracts, and competing on the merits to retain workers by providing better pay and working conditions.

The experiences of certain States in banning non-competes bolster this conclusion. Non-competes have been void in California, North Dakota, and Oklahoma since the 1800s.[767] In these three States, employers generally cannot enforce non-competes, so they must protect their investments using one or more less restrictive alternatives. There is no evidence that employers in these States have been unable to protect their investments (whether in human capital, physical capital, intangible assets, or otherwise) or have been disincentivized from making them to any discernible degree. Rather, in each of these States, industries that depend on highly trained workers and trade secrets and other confidential information have flourished. California, for example, is home to four of the world's ten largest companies by market capitalization, and it also maintains a vibrant startup culture.[768] Technology firms are highly dependent on highly-trained and skilled workers as well as protecting trade secrets and other confidential information—and, since the 1980s, California has become the epicenter of the global technology sector, even though employers cannot enforce non-competes.[769] Indeed, researchers have posited that high-tech clusters in California may have been aided by increased labor mobility due to the unenforceability of non-competes.[770] In

[757] Recent evidence suggests that trade secret litigation does not increase following bans on non-competes. Brad N. Greenwood, Bruce Kobayashi, Evan Starr, *Can You Keep a Secret? Banning Noncompetes Does Not Increase Trade Secret Litigation* (2024), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4771171.* The Commission does not rely on this study to support the findings described in this Part IV.D.

[758] *See, e.g.,* David S. Levine & Christopher B. Seaman, *The DTSA at One: An Empirical Study of the First Year of Litigation Under the Defend Trade Secrets Act,* 53 Wake Forest L. Rev. 106, 120–22 (2018).

[759] NPRM at 3505–07.

[760] *Id.*

[761] *Id.* at 3505–06.

[762] *Id.* at 3506–07.

[763] *Id.* at 3507.

[764] *Id.*

[765] Since the NPRM was issued, Minnesota has become the fourth State to make non-competes unenforceable. *See* Minn. Stat. Ann. sec. 181.988 (effective July 1, 2023).

[766] NPRM at 3507.

[767] Non-competes have been void in California since 1872, in North Dakota since 1865, and in Oklahoma since 1890. *See* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Non-Compete Clauses,* 74 N.Y.U. L. Rev. 575, 616 (1999) (California); *Werlinger* v. *Mut. Serv. Casualty Ins. Co.,* 496 NW2d 26, 30 (N.D. 1993) (North Dakota); Brandon Kemp, *Noncompetes in Oklahoma Mergers and Acquisitions,* 88 Okla. Bar J. 128 (2017) (Oklahoma). Minnesota also recently prohibited non-competes, through a law that took effect in July 2023. *See* Minn. Stat. sec. 181.988. However, Minnesota's experience is too new to draw conclusions about the ability of industries that depend on trade secrets to thrive where non-competes are unenforceable.

[768] Josh Dylan, *What Is Market Cap In Stocks?,* Nasdaq.com (Aug, 12, 2022), *https://www.nasdaq.com/articles/what*marketcap-in-stocks; Ewing Marion Kauffman Found., *State Entrepreneurship Rankings, https://www..com/public_affairs//02/25/_foundation_state_entrepreneurship_rankings.html.*

[769] *See, e.g.,* Gilson, *supra* note 767 at 594–95.

[770] *See, e.g., id.* at 585–86, 590–97; Bruce Fallick, Charles A. Fleischman, & James B. Rebitzer, *Job-Hopping in Silicon Valley: Some Evidence Concerning the Microfoundations of a High-Technology Cluster,* 88 Rev. Econ. & Statistics 472, 477 (2006).

North Dakota and Oklahoma, the energy industry has thrived, and firms in the energy industry depend on highly-trained workers as well as the ability to protect trade secrets and other confidential information.

The Commission finds that the economic success in these three States of industries that are highly dependent on highly trained workers, trade secrets, and other confidential information illustrates that non-competes are not necessary to protect employers' legitimate interests in trained workers or securing their intellectual property and confidential information. These alternatives are available to employers and viable both with respect to senior executives and to workers other than senior executives. The Commission addresses these alternatives in this Part IV.D.2.b and summarizes and responds to the comments on these alternatives in Part IV.D.2.c.

i. Trade Secret Law

The Commission finds that trade secret law provides employers with a viable, well-established means of protecting investments in trade secrets, without the need to resort to the use of non-competes with their attendant harms to competition. Trade secret law is a form of intellectual property law that is specifically focused on providing employers with the ability to protect their investments in trade secrets.[771]

Forty-seven States and DC have adopted the Uniform Trade Secrets Act (''UTSA'').[772] The UTSA provides a civil cause of action for trade secret misappropriation, which refers to disclosure or use of a trade secret by a former employee without express or implied consent.[773] The UTSA also provides for injunctive and monetary relief, including compensatory damages, punitive damages, and attorney's fees.[774]

In addition, in 2016, Congress enacted the Defend Trade Secrets Act of 2016 (''DTSA''), which established a civil cause of action under Federal law for trade secret misappropriation.[775] The DTSA brought the rights of trade secret owners ''into alignment with those long enjoyed by owners of other forms of intellectual property, including copyrights, patents, and trademarks.'' [776] Similar to State laws modeled on the UTSA, the DTSA authorizes civil remedies for trade secret misappropriation, including injunctive relief, damages (including punitive damages), and attorney's fees.[777] The DTSA also authorizes a court, in ''extraordinary circumstances,'' to issue civil ex parte orders for the ''seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.'' [778] There is thus a clear Federal statutory protection that specifically governs protection of trade secrets.

Trade secret theft is also a Federal crime. The Economic Espionage Act of 1996 (''EEA'') makes it a Federal crime to steal a trade secret for either (1) the benefit of a foreign entity (''economic espionage'') or (2) the economic benefit of anyone other than the owner (''theft of trade secrets'').[779] The EEA authorizes substantial criminal fines and penalties for these crimes.[780] The EEA further authorizes criminal or civil forfeiture, including of ''any property constituting or derived from any proceeds obtained directly or indirectly as a result of'' an EEA offense.[781] The EEA also requires offenders to pay restitution to victims of trade secret theft.[782]

Under the UTSA, DTSA, and EEA, the term ''trade secret'' is defined expansively and includes a wide range of confidential information.[783] The viability of trade secret law as a means for redressing trade secret theft is illustrated by the fact that firms regularly bring claims under trade secret law. A recent analysis by the legal analytics firm Lex Machina finds that 1,156 trade secret lawsuits were filed in Federal court in 2022.[784] In addition, an analysis by the law firm Morrison Foerster finds that 1,103 trade secret cases were filed in State courts in 2019.[785] The number of cases filed in State court has held steady since 2015, when 1,161 cases were filed.[786] The fact that a considerable number of trade secret lawsuits are filed in Federal and State courts—over 2,200 cases per year—and the fact that this number has held relatively steady for several years suggests that many employers themselves view trade secret law as a viable means of obtaining redress for trade secret theft.

The use of trade secret law burdens competition to a lesser degree than the use of non-competes. Trade secret law provides firms with a viable means of redressing trade secret misappropriation—and deterring trade secret misappropriation by workers—without blocking beneficial competitive activity, such as workers switching to jobs in which they can be more productive or starting their own businesses.

ii. NDAs

NDAs provide employers with another well-established, viable means for protecting valuable investments.[787]

[771] Brian T. Yeh, *Protection of Trade Secrets: Overview of Current Law and Legislation,* Cong. Rsch. Serv. 4 (Apr. 22, 2016) (Report R43714), *https://sgp.fas.org/crs/secrecy/R43714.pdf.*

[772] *See* Levine & Seaman, *supra* note 758 at 113. The three States that have not adopted the UTSA offer protection to trade secrets under a different statute or under common law. Yeh, *supra* note 771 at 6 n.37.

[773] Uniform Trade Secrets Act with 1985 Amendments (Feb. 11, 1986) at sec. 1(2).

[774] *Id.* at secs. 2–4.

[775] Defend Trade Secrets Act of 2016, Public Law 114–153, 130 Stat. 376, 379 (2016).

[776] U.S. Senate, Report to Accompany S. 1890, the Defend Trade Secrets Act of 2016, S. Rep. No. 114–220 at 3 (2016).

[777] 18 U.S.C. 1836(b)(3).

[778] 18 U.S.C. 1836(b)(2).

[779] 18 U.S.C. 1831 (economic espionage); 18 U.S.C. 1832 (theft of trade secrets).

[780] 18 U.S.C. 1831 through 1832.

[781] 18 U.S.C. 1834, 2323.

[782] 18 U.S.C. 1834, 2323.

[783] The UTSA generally defines a ''trade secret'' as information that (1) derives independent economic value from not being generally known to other persons who can obtain economic value from its disclosure or use and (2) is the subject of reasonable efforts to maintain its secrecy. UTSA, *supra* note 773 at sec. 1(4). The DTSA and EEA use a similar definition. 18 U.S.C. 1839(3). The Supreme Court has held that ''some novelty'' is required for information to be a trade secret, because ''that which does not possess novelty is usually known.'' *Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470, 476 (1974). As the high court of one State noted in applying a State statute based on the UTSA, ''business information may . . . fall within the definition of a trade secret, including such matters as maintenance of data on customer lists and needs, source of supplies, confidential costs, price data and figures.'' *U.S. West Commc'ns, Inc.* v. *Off. of Consumer Advoc.,* 498 NW2d 711, 714 (Iowa 1993). *See also Confold Pac., Inc.* v. *Polaris Indus., Inc.,* 433 F.3d 952, 959 (7th Cir. 2006) (''A trade secret is really just a piece of information (such as a customer list, or a method of production, or a secret formula for a soft drink) that the holder tries to keep secret by executing confidentiality agreements with employees and others and by hiding the information from outsiders by means of fences, safes, encryption, and other means of concealment, so that the only way the secret can be unmasked is by a breach of contract or a tort.'').

[784] Gloria Huang, *Lex Machina Releases its 2023 Trade Secret Litigation Report,* Lex Machina (Jul. 13, 2023), https://.com/blog/lex-machina-releases-its-2023-trade-secret-litigation-report/.

[785] Kenneth A. Kuwayti & John R. Lanham, Morrison Foerster, Client Alert, *Happy Anniversary, DTSA: The Defend Trade Secrets Act at Five* (May 25, 2021), *https://www.mofo.com///210525-defend-trade-secrets-act-dtsa.*

[786] *Id.* at n.5.

[787] The Commission uses the term ''NDA'' to refer to contractual provisions that are designed to protect trade secrets or other business information that has economic value. Employers may also seek to use NDAs to protect other kinds of information, such as information about discrimination, harassment, sexual assault, corporate wrongdoing, or information that may disparage the company or its executives or employees. These types of NDAs have been widely criticized for, among other things, their pernicious effects on workers. *See, e.g.,* Rachel S. Arnow-Richman et al., *Supporting Market Accountability, Workplace Equity, and Fair Competition by Reining In Non-Disclosure Agreements,* UC-Hastings Research Paper 2–6 (Jan. 2022), *https://papers.ssrn.com/sol3/.?abstract_=.*

NDAs are contracts in which a party agrees not to disclose and/or use information designated as confidential. If a worker violates an NDA, the worker may be liable for breach of contract.[788] Employers regularly use NDAs to protect trade secrets and other confidential business information. Researchers estimate that between 33% and 57% of U.S. workers are subject to at least one NDA.[789] One study finds that 95.6% of workers with non-competes are also subject to an NDA; 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or a non-recruitment agreement; and 74.7% of workers with non-competes are subject to all three provisions.[790] In most States, NDAs are more enforceable than non-competes.[791] While some commenters argued that NDAs would not be an adequate alternative to non-competes because of the NPRM's proposed functional definition of ''non-compete clause,'' the final rule will not prevent employers from adopting garden-variety NDAs; rather, it prohibits only NDAs that are so overbroad as to function to prevent a worker from seeking or accepting employment or operating a business.[792]

Appropriately tailored NDAs burden competition to a lesser degree than non-competes. Such NDAs may prevent workers from disclosing or using certain information, but they generally do not prevent workers from seeking or accepting other work, or starting their own business, after their employment ends. As the Tenth Circuit has stated, workers subject to NDAs, unlike workers subject to non-competes, ''remain free to work for whomever they wish, wherever they wish, and at whatever they wish,'' subject only to the terms that prohibit them from disclosing or using certain information.[793]

iii. Other Means of Protecting Valuable Investments

The Commission finds that employers have additional well-established means of protecting valuable investments in addition to trade secret law and NDAs. For the protection of trade secrets and other confidential information, the Commission finds that these additional means include patent law and invention assignment agreements. Patent law provides inventors with the right, for a certain period of time, to exclude others from making, using, offering for sale, or selling an invention or importing it into the U.S.[794] During the period when patent protection is effective, patents grant the patent holder these exclusive rights, while other firms may use trade secrets if they are independently developed, reverse-engineered, or inadvertently disclosed.[795] In some cases, however, firms may choose to keep their invention a trade secret rather than seeking a patent because patent protection only lasts a certain number of years, after which the invention becomes part of the public domain.[796] Where a technology, process, design, or formula is able to meet the rigorous standards for patentability, patent law provides companies with a less restrictive alternative than non-competes for protecting it.[797]

Employers can further protect their property interests in these forms of intellectual property through appropriately tailored invention assignment agreements. These are agreements that give the employer certain rights to inventions created by the employee during their employment with a firm.[798] Like patent law, this tool, when appropriately tailored, provides employers with additional protection for some of their most valuable intellectual property interests.

With respect to investments in worker human capital, the Commission finds that these less restrictive alternatives include fixed duration contracts and competing on the merits to retain workers. If an employer wants to prevent a worker from leaving right after receiving valuable training, the employer can sign the worker to an employment contract with a fixed duration. An employer can establish a term that is long enough for the employer to recoup its human capital investment, without restricting who the worker can work for, or their ability to start a business, after their employment ends. In doing so, the employer makes a commitment to the worker and vice versa.

Finally, instead of using non-competes to lock in workers, the Commission finds that employers that wish to retain their workers can also compete on the merits for the worker's labor services—*i.e.,* they can provide a better job than competing employers by paying their workers more, offering them better hours or better working conditions, or otherwise improving the conditions or desirability of their employment. These are all viable tools for protecting human capital investments and other investments an employer may make that do not rely on suppressing competition.

c. Comments and Responses to Comments

Many commenters agreed with the Commission's preliminary finding that employers have less restrictive alternatives to non-competes. These commenters asserted that trade secret law, combined with NDAs, creates a powerful deterrent to post-employment disclosures of trade secrets and confidential information, and that these tools adequately protect valuable investments in the absence of non-competes. The Commission agrees with these commenters. Other commenters asserted that the alternatives to non-competes identified in the NPRM are inadequate for protecting employer investments. The Commission summarizes and responds to the comments it received on less restrictive alternatives in this Part IV.D.2.c.

i. Comments and Responses to Comments on Trade Secrets and Other Confidential Information

Several commenters who generally supported the proposed rule stated that trade secret law and NDAs offer meaningful enforcement advantages to employers compared with non-competes. A few commenters stated that, unlike non-competes, trade secret law and NDAs are broadly enforceable in all fifty States. A few commenters stated that, while monetary penalties for breaching non-competes are ordinarily difficult to obtain, employers can obtain substantial monetary recovery for trade secret law and NDA violations. The Commission agrees with these comments.

Several commenters stated that the scope of trade secret law is limited in various respects. Several commenters stated, for example, that customer lists, pricing, and bid development information are typically excluded from the definition of ''trade secret'' under the DTSA and the law of many States.

[788] *See* Chris Montville, *Reforming the Law of Proprietary Information,* 56 Duke L.J. 1159, 1168 (2007).

[789] Arnow-Richman, *supra* note 787 at 2–3.

[790] Balasubramanian, Starr, & Yamaguchi, *supra* note 74 at 44. The value 97.5% is calculated as (1 − 0.6%/24.2%), where 0.6% represents the proportion of workers with only a non-compete (see Table 1 on page 36), and no other post-employment restriction, and 24.2% represents the proportion of workers with a non-compete, regardless of what other post-employment restrictions they have.

[791] Montville, *supra* note 788 at 1179–83.

[792] *See* Part III.D.2.b.

[793] *MAI Basic Four, Inc.* v. *Basis, Inc.,* 880 F.2d 286, 288 (10th Cir. 1989).

[794] 35 U.S.C. 271.

[795] Yeh, *supra* note 771 at 3–4.

[796] *Id.* at 4–5. *See also United States* v. *Dubilier Condenser Corp.,* 289 U.S. 178, 186 (1933) (rather than seeking a patent, an inventor ''may keep his invention secret and reap its fruits indefinitely.'').

[797] Yeh, *supra* note 771 at 4–5.

[798] *See, e.g., Milliken & Co.* v. *Morin,* 731 SE2d 288, 294–95 (S.C. 2012); *Revere Transducers, Inc.* v. *Deere & Co.,* 595 NW2d 751, 759–60 (Iowa 1999); *Ingersoll-Rand Co.* v. *Ciavatta,* 542 A.2d 879, 886–87 (N.J. 1988).

In response to these comments, the Commission notes that customer information may be classified as trade secrets under certain circumstances, such as when the information is not generally known or not otherwise easy to obtain and when a firm has taken measures to protect the confidentiality of the information.[799] Employers may also use NDAs to protect such information. NDAs broadly protect all information defined as confidential, regardless of whether such information constitutes a ''trade secret'' under State or Federal law.[800]

Some commenters argued that other tools under intellectual property law, such as patent and trademark law, are inadequate to protect employers' investments. These commenters misinterpret the Commission's findings. The Commission did not find in the NPRM, nor does it find in this final rule, that patent law standing alone or trademark law standing alone provide employers benefits equal to the benefits they may reap from an unfair method of competition, namely the use of non-competes. Rather, the Commission finds that patent law can be used, together with the other tools the Commission cites, including NDAs and fixed-term employment contracts, to protect legitimate investments in intellectual property and worker human capital investment and therefore that these tools, taken together, are viable alternatives to non-competes.

A number of commenters stated that there are enforceability disadvantages to trade secret law and NDAs compared to non-competes. Several commenters stated that trade secret law and NDAs are inadequate to protect employer investments prophylactically because employers can enforce them only after the trade secrets or other confidential information have already been disclosed. These commenters stated that trade secrets and confidential information can be highly valuable, and its value could be destroyed as soon as a worker discloses such information to a competing employer. Additionally, some commenters argued that trade secret law and NDAs are inadequate to protect employers' investments because enforcement outcomes for trade secrets and NDAs are less predictable and certain than with non-competes. Some comments suggested that this purported clarity of non-competes benefits workers, arguing that non-competes offer bright lines workers can follow to ensure against unintended violations. Other commenters assert that non-competes themselves are not necessarily effective as a prophylactic remedy, because it is often unclear whether a particular non-compete is enforceable, and non-competes are difficult to enforce in many jurisdictions. A few commenters stated that prophylactic remedies are already available under trade secret law in almost half of U.S. States where the doctrine of inevitable disclosure is recognized, while other commenters were concerned that not all States recognize the doctrine. Other commenters argued the inevitable disclosure doctrine may be worse for workers, and one commenter argued that the final rule would increase the use of the inevitable disclosure doctrine and thus reduce worker mobility.

Some commenters stated that prophylactic remedies are necessary to adequately protect trade secrets and confidential information because workers can exploit their former employers' trade secrets and confidential information without ever disclosing the information themselves, thus leaving aggrieved employers with no recourse under trade secret law or an NDA. Specifically, these commenters argued that when workers take new roles, they will inevitably use their knowledge of former employers' confidential information. For example, where a worker has experience with attempts and failures to develop new ideas or products with a former employer, they will likely use this knowledge to prevent a new employer from making similar mistakes, thus free riding off the former employer's development efforts, costs, and time. A commenter argued that preventing non-competes from restricting this type of misappropriation would discourage investment and harm innovation in the long run.

The Commission believes that what some commenters describe as the ''prophylactic'' benefits of non-competes—that an employer can block a worker from taking another job, without respect to any alleged misconduct—is also the source of their overbreadth because it enables employers to restrict competition in both labor markets and product and service markets, as detailed in Parts IV.B and IV.C. That employers prefer to wield non-competes as a blunt instrument on top of or in lieu of the specific legal tools designed to protect legitimate investments in intellectual property and other investments cannot justify an unfair method of competition. The Commission also disagrees that banning non-competes would discourage investment and would harm innovation in the long run. As discussed in Part IV.B.3.b.ii, the Commission finds that the weight of the evidence indicates that non-competes reduce innovation by preventing workers from starting businesses in which they can pursue innovative new ideas; inhibiting efficient matching between workers and firms (making it less likely that workers match with firms that can maximize their talent and productivity); and decreasing the cross-pollination of ideas.

Additionally, the Commission notes that non-compete agreements themselves cannot be said to provide ironclad ''prophylactic'' protections against disclosure of trade secrets and other confidential information. As other commenters point out, in the absence of this rule, it is often unclear whether and to what extent a specific non-compete is enforceable, and they are difficult to enforce in many jurisdictions. Moreover, non-competes do not prevent the worker from disclosing trade secrets or confidential information after the end of the non-compete period or outside of the clause's geographic restriction. The Commission also notes that, as a few commenters stated, prophylactic remedies are already available under trade secret law in almost half of U.S. States where the doctrine of inevitable disclosure is recognized.[801]

Several commenters argued that detecting and proving violations of NDAs and trade secret law is more

[799] *See U.S. West Commc'ns, Inc.* v. *Off. of Consumer Advoc.,* 498 NW2d 711, 714 (Iowa 1993) (''business information may . . . fall within the definition of a trade secret, including such matters as maintenance of data on customer lists and needs . . .''); *Guy Carpenter & Co.* v. *Provenzale,* 334 F.3d 459, 467 (5th Cir. 2003) (''A customer list may be a trade secret, but not all customer lists are trade secrets under Texas law. The broader rule of trade secrets, that they must be *secret,* applies to customer lists''); *Home Paramount Pest Control Cos.* v. *FMC Corporation/Agricultural Prods. Group,* 107 F. Supp. 2d 684, 692 (D. Md. 2000) (''There is no question that a customer list can constitute a trade secret.''); *Liebert Corp.* v. *Mazur,* 827 NE2d 909, 922 (2005) (''[W]hether customer lists are trade secrets depends on the facts of each case.'').

[800] *See, e.g., Tendeka, Inc.* v. *Glover,* No. CIV.A. H–13–1764, 2015 WL 2212601 at *14 (S.D. Tex. May 11, 2015).

[801] In some States, under the ''inevitable disclosure doctrine,'' courts may enjoin a worker from working for a competitor of the worker's employer where it is ''inevitable'' the worker will disclose trade secrets in the performance of the worker's job duties. *See, e.g., PepsiCo, Inc.* v. *Redmond,* 54 F.3d 1262, 1269, 1272 (7th Cir. 1995). The inevitable disclosure doctrine is controversial. Several States have declined to adopt it altogether, citing the doctrine's harsh effects on worker mobility. *See Bayer Corp.* v. *Roche Molecular Sys., Inc.,* 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999); *LeJeune* v. *Coin Acceptors, Inc.,* 849 A.2d 451, 470–71 (Md. 2004). Other States have required employers to meet high evidentiary burdens related to inevitability, irreparable harm, and bad faith before issuing an injunction pursuant to the doctrine. *See generally* Eleanore R. Godfrey, *Inevitable Disclosure of Trade Secrets: Employee Mobility* v. *Employer Rights,* 3. J. High Tech. L. 161 (2004).

difficult than for non-competes, and that enforcement is accordingly more expensive, because it is more difficult to detect and obtain evidence of the disclosure or use of confidential information than it is to determine that a former worker has moved to a competitor. Some commenters asserted that trade secret litigation is expensive because the cases are fact-intensive and involve litigating multiple challenging issues. Some commenters argued that as a result, the proposed rule conflicted with Congressional intent underlying the DTSA. A few commenters similarly argued that breaches of non-solicitation agreements are difficult to detect and can be enforced only after the solicitation has occurred. While the Commission recognizes that trade secrets litigation and NDA and non-solicitation enforcement may be more costly than non-compete enforcement in some instances, the Commission is not persuaded that higher costs associated with alternative tools make those tools inadequate. The comments do not establish that pursuing remedies through trade secrets litigation or NDA enforcement are prohibitively expensive. In any event, the Commission and courts have consistently held that pecuniary benefit to the party responsible for the conduct in question is not cognizable as a justification.[802] While employers may find that protecting trade secrets and confidential information or customer relationships by using non-competes to restrict worker mobility, regardless of whether that worker would misappropriate confidential information or solicit customers, is easier for them, the Commission finds that same overbreadth of non-competes imposes significant negative externalities on workers, consumers, businesses, and competition as a whole.[803] This overbreadth that employers benefit from wielding is what causes the harms from non-competes relative to more narrowly-tailored alternatives.

Some commenters contended that higher burdens for establishing violations of trade secret and IP laws will harm employer incentives to share trade secrets with workers and to invest in valuable skills training. The Commission is not persuaded that higher evidentiary burdens render trade secret law and NDAs inadequate for protecting employers' valuable investments. Heightened standards are a valuable mechanism to filter out overbroad restrictions on beneficial competitive activity. The comment record is replete with examples of workers bound by non-competes who lacked knowledge of trade secrets or whose employment with a competitor never threatened their previous employer's investments. To the extent trade secret law and NDAs require higher evidentiary showings, that makes these alternatives more tailored tools for protecting employers' valuable investments without unduly restricting a worker from engaging in competitive activity.

Some commenters argued that, without non-competes, employers would limit access to valuable trade secrets within the workplace because trade secret law requires employers to show reasonable efforts to maintain the secrecy of an alleged trade secret to prove a violation, and that reduced rates of intrafirm trade secrets sharing will ultimately harm innovation as well as workers. In response, the Commission notes that the empirical evidence indicates otherwise: when non-competes are more enforceable, the overall level of innovation decreases.[804] Furthermore, these comments seem to overstate the burden of reasonable efforts to keep information secret. Under the DTSA, courts have found that employers meet this requirement by sharing information at issue only among workers bound by NDAs or maintaining such information in password-protected digital spaces.[805] Accordingly, assertions that employers will need to take extraordinary precautions to maintain secrecy over trade secrets and confidential information are inconsistent with standards courts typically recognize for determining whether reasonable efforts were taken to keep such information confidential. The Commission is not persuaded that requirements in trade secret law to show reasonable efforts to maintain secrecy will deter intrafirm information sharing, or otherwise make alternative tools inadequate.

Several commenters argued that the Commission should not find that employers have adequate alternatives to protecting their valuable investments because there is a lack of empirical evidence specifically showing that trade secret law and NDAs are effective for the purpose of protecting trade secrets and confidential information. In response, the Commission notes that trade secret law is a body of law that is specifically designed to protect the interests being asserted; employers consistently bring cases under this body of law; and a preference among firms for a blunter instrument for protecting trade secrets and confidential information cannot justify an unfair method of competition that imposes significant negative externalities on workers, other firms, consumers, and the economy.[806] An industry trade organization commenter stated that neither fixed-duration employment contracts nor improved pay, benefits, or working conditions specifically protect against the disclosure of confidential information. In response, the Commission notes that firms can protect against the disclosure of confidential information using trade secret law and NDAs, and, where applicable, patent law and invention assignment agreements. And in response to these commenters, the Commission notes that companies in California, North Dakota, and Oklahoma have been able to protect their trade secrets and other confidential information adequately using tools other than non-competes since the late nineteenth century. Industries that are highly dependent on trade secrets and other confidential information have flourished in those States even though non-competes have been unenforceable.

A few commenters disputed the NPRM's contention that the rate at which employers pursue trade secrets litigation is evidence of the viability of trade secret law as a means for redressing trade secret theft or protecting confidential information, in part because those employers were not necessarily relying exclusively on trade secret law. The Commission does not assert that these data, alone, conclusively establish trade secret law is a perfect vehicle for redressing trade secret theft. Rather, the data show trade secret litigation is more than a mere theoretical possibility—it is an avenue many companies choose to redress trade secret theft and indeed it is the body of law designed and developed for this very purpose. Accordingly, the Commission believes that the fact that many companies bring claims under the well-established body of State and Federal law on trade secrets is relevant evidence that trade secret law provides a viable means for redressing trade secret theft.

Some commenters suggested a higher volume of trade secrets litigation in California may reflect a higher rate of trade secret disclosure due to the State's policy against enforcing non-competes. However, these commenters did not

[802] *See supra* note 305 and accompanying text.

[803] *See* Parts IV.B and IV.C.

[804] *See* Part IV.B.3.b.ii.

[805] *See e.g., In re Adegoke,* 632 B.R. 154, 167 (Bankr. N.D. Ill. 2021); *Houser* v. *Feldman,* 569 F. Supp. 3d 216, 230 n.7 (E.D. Pa. 2021); *AvidAir Helicopter Supply, Inc.* v. *Rolls-Royce Corp.,* 663 F.3d 966, 974 (8th Cir. 2011).

[806] *See* Parts IV.B. and IV.C (describing the negative externalities from non-competes).

provide evidence to support this hypothesis. The Commission also notes industries in California that depend on protecting trade secrets have thrived despite the inability to enforce non-competes; indeed, the State is the capital of the global technology industry. Therefore, regardless of whether there is a higher rate of trade secret litigation in California, the less restrictive alternatives identified in this Part IV.D have provided sufficient protection to enable these companies to grow, thrive, and innovate. Furthermore, the rate of trade secret litigation in California may result from factors unique to California's economy, such as California's high concentration of technology companies relative to other States. As such, the Commission does not believe there is credible evidence to suggest trade secrets are disclosed at a higher rate in California than in other jurisdictions.[807]

Many commenters agreed with the Commission's preliminary conclusion that the economic success in California, North Dakota, and Oklahoma of industries highly dependent on trade secrets and other confidential information illustrates that companies have viable alternatives to non-competes for protecting valuable investments. In contrast, a few commenters argued that the Commission mischaracterized California's non-compete ban because they claim that California permits non-competes to protect trade secrets, citing dicta from the 1965 California Supreme Court case *Muggill* v. *Reuben H. Donnelley Corp.*[808] However, the Commission is unaware of any cases in which a California court has actually upheld a non-compete agreement under California law based on the dicta in this opinion, and commenters do not point to any.[809] To the contrary, California courts have consistently refused to enforce non-competes even where employers alleged they were needed to protect trade secrets.[810]

Another commenter argued that California's experience does not necessarily demonstrate anything about the effect of banning non-competes because California employers impose non-competes at rates comparable to other States. In response, the Commission notes that while Starr, Prescott, and Bishara state that workers are covered by non-competes at ''roughly the same rate'' in States where non-competes are unenforceable and enforceable,[811] when the authors control for employee characteristics to compare ''observationally equivalent employees,'' they find that non-competes are less common (by 4–5 percentage points) in nonenforcing States compared to States that permit vigorous enforcement of non-competes.[812] Additionally, California, North Dakota, and Oklahoma are still distinct from other States because employers may not actually enforce non-competes, even if employers in those States continue to enter into them.

A commenter argued that the Commission misattributes California's success in the technology industry and North Dakota's and Oklahoma's success in the energy industry to their non-compete laws, rather than the presence of top universities and venture capital firms in the State (in the case of California) or of abundant natural resources in the State (in the case of North Dakota and Oklahoma). The Commission believes that this commenter mischaracterizes its analysis. The Commission does not attribute California's success in the technology industry and North Dakota's and Oklahoma's success in the energy industry to their non-compete laws. The Commission merely notes that these industries are highly dependent on protecting trade secrets and having highly trained workers, and that these industries have thrived in these States despite the inability of employers to enforce non-competes.

One commenter argued that there are no alternatives that adequately protect employers' legitimate interests because other restrictive employment agreements do not sweep as broadly as non-competes. In this Part IV.D, the Commission concludes that less restrictive alternatives such as trade secret law, IP law, and NDAs are adequate to protect trade secrets and other confidential information even where they do not sweep as broadly as non-competes. Indeed, the Commission believes that non-competes are overbroad with respect to protecting trade secrets and other confidential information, because they enable employers to restrict a wide swath of beneficial competitive activity without respect to any alleged misconduct. That employers prefer to wield non-competes as a blunt instrument on top of or in lieu of the specific legal tools designed to protect legitimate investments in intellectual property and other investments cannot justify an unfair method of competition.

ii. Comments and Responses to Comments on Human and Physical Capital Investment

Several commenters addressed the evidence concerning the effects of non-competes on human capital investment and other investment. Several commenters asserted that, even if non-competes increased human capital investment, they still left workers worse off because they suppressed workers' mobility and wages overall. Workers and worker advocates also argued that workers lose the value of their skills and human capital investment when non-competes force them to sit out of the workforce, and non-competes can decrease their incentive to engage in human capital investment since they cannot capitalize on their skills and knowledge. These commenters stated that many workers, particularly highly skilled workers, have had some form of education prior to working for their employer, diminishing any potential need for non-competes to protect the employers' human capital investment. For example, many physicians pointed out that they had to go through medical school, residency, internships, and/or fellowships—significant investments that they made, not their employers.

Some commenters questioned the link between increased human capital investment and non-compete enforcement, arguing that employer human capital investment will still be provided without non-competes. Other commenters also stated that prohibiting non-competes would make it easier for firms to hire trained workers, because it would be easier for them to switch jobs. More generally, one advocacy organization said that employers frequently make investments that do not work out and should not place the risk of that investment onto their workers. A commenter who discussed physician non-competes argued that investment-based justifications for non-competes overestimate the value added by employers while failing to recognize the value physicians bring to employers.

Some businesses and trade organizations argued that employers invest significant time and money into training workers who lack the specific skills needed for the job. These commenters stated that, without non-competes, employers risk the worker taking that investment to a competitor. Some commenters state that this risk is

[807] *See* NPRM at 3507.

[808] 62 Cal. 2d 239, 242 (Cal. 1965).

[809] *See generally* David R. Trossen, Edwards *and Covenants Not to Compete in California: Leave Well Enough Alone,* 24 Berkeley Tech. L.J. 539, 546 (2009).

[810] *See, e.g., D'sa* v. *Playhut, Inc.,* 102 Cal. Rptr. 2nd 495, 497–501 (Cal. Ct. App. 2nd 2000); *Dowell* v. *Biosense Webster, Inc.,* 102 Cal. Rptr. 3d 1, 11 (Cal. Ct. App. 2nd 2009); *Arthur J. Gallagher & Co.* v. *Lang,* 2014 WL 2195062 (N.D. Cal. May 23, 2014) at *4 n.3.

[811] Starr, Prescott & Bishara, *supra* note 68 at 81.

[812] *Id.* at 68.

greatest in underserved areas and when there are worker shortages. Several commenters said that employment restrictions such as non-competes incentivize businesses to pay for credentials, training, and advanced education that low-wage and other workers would be unable to afford on their own, facilitating upward mobility. For highly educated workers, such as physicians, some employers said they need non-competes to protect payments for continuing education as well as mentorships and on the job training. Businesses and their advocates asserted that in some industries, many new employees are unprofitable for a significant period, requiring up-front investment and training from employers who want to recoup that investment.

In response, the Commission notes that, as described in Part IV.D.2.b.iii, firms have less restrictive alternatives for protecting human capital investments, including fixed-duration contracts and competing on the merits for the worker's labor services through better pay, benefits, or working conditions. Through these means, employers can retain workers without restricting who they can work for, or their ability to start a business, after their employment ends. The Commission also notes that these commenters often inaccurately describe the increased labor mobility afforded by the final rule as a one-way street. While it will be easier under the final rule for workers to switch jobs and work for a competitor, it will also be easier for firms to hire talented workers, since those workers are not subject to non-competes. In general, firms will benefit from access to a wider pool of labor, because the rule eliminates the friction non-competes impose on the free functioning of competition in labor markets. Whether this will be a net benefit to a particular firm, or not, will depend on the firm's ability to compete for workers on the merits to attract and retain talent.

A group of healthcare policy researchers stated that the investment justifications offered by corporate owners of physician practices are misleading since the true value of the investment in the practice is the book of business and referrals. These researchers suggested that non-competes are used to circumvent laws that prohibit payment for physician referrals. The Commission notes that this comment aligns with a statement by researcher Kurt Lavetti at the Commission's 2020 forum on non-competes. Lavetti stated that patient referrals are a valuable asset, but buying or selling those referrals is illegal, so non-competes are a secondary method of protecting that asset.[813]

Commenters also stated that non-competes protect investments other than in human capital, capital expenditures, and R&D, including recruiting and hiring, providing client and customer service, facilities, marketing, and technology, among others. The Commission is unaware of any empirical evidence showing that non-competes increase these types of investments, and commenters did not provide any. In general, however, firms can protect investments in trade secrets and confidential information, and investments in workers, through the less restrictive alternatives described in Part IV.D.2.b.

Two trade organizations stated that prohibiting non-competes could cause businesses to lose staff, and that losing staff could cause them to reduce investments that may be based on staffing assumptions. These commenters did not provide empirical evidence to support these arguments. The Commission also notes that firms would not necessarily lose workers because of the final rule. As described previously, some firms may lose workers because it will be easier for workers to leave for better opportunities, while some firms may gain workers by attracting workers from other firms. Additionally, firms can retain workers by competing on the merits for their labor services—*i.e.,* by offering better jobs than their competitors.

Commenters asserted that Starr, Prescott, and Bishara[814] found that notice of non-competes alongside a job offer is positively correlated with training compared to later notice. In response, the Commission notes that the evidence is a correlation between early notice and training, not a causal finding, so the Commission gives it minimal weight. In addition, regardless of whether there is an increase in training where notice of non-competes is provided along with the job offer instead of later on, this data is not salient on the question of whether employers have less restrictive alternatives to protecting training investments.

A few commenters stated non-competes protect against the ''disclosure'' of general trade knowledge and skills, while the less restrictive alternatives cited in the NPRM do not. Relatedly, some commenters argued prohibiting non-competes and broadly enabling workers to take general trade knowledge and skills to competitors will mean that their new employers will free ride off investments the former employers made in their human capital, which will discourage future investment in human capital. The Commission does not believe preventing workers from using their general trade knowledge and skills, including their gains in trade knowledge and skills through experience with a particular employer, is a legally cognizable or legitimate justification for non-competes. Under State common law, preventing a worker from using their general knowledge and skills with another employer is not a legitimate interest that can justify a non-compete.[815] Indeed, there is a general principle in the law of restrictive employment agreements—and trade secret law as well—that these tools cannot be used to prevent workers from using their general trade knowledge and skills.[816] The Commission does not view the inability to prevent disclosure or use of general skills and knowledge as a shortcoming of trade secret law and NDAs; instead, it considers the use of general skills and knowledge as beneficial competitive activity. Moreover, the Commission notes that sectoral job training strategies can be a tool for employers and workers to access worker training that is transferrable across employers.[817]

One commenter asserted trade secret law and NDAs are inadequate to protect employers' goodwill, while another commenter asserted these tools are inadequate to protect investments in relationships with clients. Regarding whether trade secret law and NDAs are adequate to protect employers' client relationships, the Commission interprets this to refer to employers' concern that a client will follow a worker to a competitor. The Commission believes that employers have alternatives for protecting these investments, including fixed-duration contracts (in the case of goodwill), NDAs (in the case of client lists), and competing on the merits to retain workers and/or clients. Firms can seek to protect client relationships by offering superior service and value—through the free and fair functioning of competition. These more narrowly

[813] Kurt Lavetti, *Economic Welfare Aspects of Non-Compete Agreements,* Remarks at the FTC Workshop on Non-Competes in the Workplace, at 145–46 (Jan. 9, 2020), at *https://www.ftc.gov//files//_events/1556256/non-compete-workshop-transcript-full.pdf.*

[814] Starr, Prescott & Bishara, *supra* note 68 at 53.

[815] *See* NPRM at 3495 n.162.

[816] *See* Montville, *supra* note 788 at 1161.

[817] *See, e.g.,* Mayu Takeuchi & Joseph Parilla, *Federal Investments in Sector-Based Training Can Boost Workers' Upward Mobility,* Brookings Inst. (Dec. 7, 2023), *https://www.brookings.edu/articles/federal-investments-in-sector-based-training-can-boost-workers-upward-mobility/.*

tailored alternatives reasonably protect the applicable interest while burdening competition to a lesser degree because they do not restrict the worker's ability to seek or accept work or start a business after their employment ends. Therefore, while trade secret law and NDAs may not protect goodwill or client relationships, the Commission finds that employers have adequate alternative tools to protect these interests. Furthermore, the Commission notes the final rule does not restrict employers from using trade secret law and NDAs in tandem—along with other alternatives—to protect their investments, and comments maintaining that employers lack adequate alternatives to non-competes because the commenter views just one of these mechanisms as inadequate are unpersuasive.

A commenter argued the final rule may implicate the ability of Federal contractors to provide letters of commitment, which are often required by government agencies and require contractors to identify key personnel who will work on an awarded contract, sometimes for years in the future. In response, the Commission notes that contractors have alternatives to non-competes to retain key personnel, including by using fixed-term employment contracts or providing the key personnel a better job than competitors.

A commenter stated that fixed-duration employment contracts are not necessarily effective at protecting human capital investments because employers may not know at the time of hiring when they will be providing training to a worker. This commenter also stated that improving the pay, benefits, and working conditions of workers is not necessarily an effective means for protecting human capital investments. In response, the Commission notes employers may enter into fixed-duration employment contracts with their workers at any time, not just at the outset of the employment relationship. It further notes competing to retain a trained worker will not work in every instance, but it is an important option available to employers and the provision of training can itself be a competitive differentiator for an employer.

A commenter also asserted California has the highest cost of living and, if this is attributable to the absence of non-competes, the proposed rule could risk increasing the cost of living nationwide. The commenter did not provide evidence to support the existence of an inverse relationship between non-compete enforceability and cost of living, and the Commission is aware of no such evidence. The Commission thus does not believe that there is a basis to conclude the final rule would increase the cost of living nationwide.

iii. Comments Regarding Alternatives to Non-Competes for Senior Executives

Commenters offered the same justifications for non-competes with senior executives: that they increase employers' incentive to make productive investments. However, many commenters argued senior executives are more likely than other workers to have knowledge of trade secrets and other competitively sensitive information or to have customer relationships and thus non-competes for senior executives are necessary, and other tools such as trade secret law and NDAs are not viable alternatives.

In response, the Commission finds that these tools—trade secret law, NDAs, patents, and invention assignment agreements—provide viable means of protecting valuable investments against disclosure by senior executives, just as they do for all other workers. Commenters do not identify any reasons why senior executives are uniquely situated with respect to these less restrictive alternatives—*i.e.,* why trade secret law or NDAs may not adequately protect firm investments from disclosure by senior executives specifically—and the Commission is not aware of any such reasons.

Some commenters argued non-competes with executives and high-wage workers promote competition because they encourage innovation in businesses by providing investors with more confidence that executives will not share trade secrets with competitors, decreasing competition. An industry organization asserted that non-competes allow executives to share ideas and business decisions with other workers within the business and collaborate to make strategic decisions. A commenter stated that an executive leaving to start a competing product could also delay the timeline for both the former employer's product and the competing product. As noted previously, the Commission does not believe there is reliable empirical data on the relationship between non-competes and disclosure of confidential information, but employers have alternatives to protect such information. Further, the empirical evidence shows non-competes overall inhibit innovation on the output side; therefore, to the extent any of these effects are occurring, they are more than outweighed by the negative effects of non-competes on innovation.[818]

According to some commenters, an executive moving to a competitor could unfairly advantage the competitor and irreparably harm the former employer. In response, the Commission notes that there is nothing inherently unfair about an executive moving to a competitor, particularly if this results from competition on the merits (such as the competitor paying more or otherwise making a more attractive offer). If companies seek to retain their executives, they have other means for doing so—such as increasing the executives' compensation or entering fixed-duration contracts—that do not impose significant negative externalities on other workers and on consumers, as non-competes do.[819]

Some commenters also said senior executives may have more client, business partner, and customer relationships than other employees and may contribute substantially to a firm's goodwill. The Commission believes that employers have alternatives for protecting goodwill and client/customer relationships. For example, if a firm wants to keep a worker from departing and taking goodwill or clients or customers with them, it can enter a fixed-duration contract with the worker, otherwise seek to retain the worker through competition on the merits, or seek to retain the client/customer through competition on the merits.

An accountant with experience analyzing executive non-competes for business valuations said such valuations are calculated based on the potential harm if the executive violated the non-compete. In addition, some commenters argued non-competes for senior executives and other important workers increase the value of firms in mergers and acquisitions because they ensure such valuable workers stay after the sale. An investment industry organization said investors seek to ensure the right workers who know the business stay and run the newly acquired business. In addition, that organization said some institutional investors may require contracts retaining key workers.

In response, the Commission notes that valuation of senior executive non-competes in such contexts is part of the reason the Commission is allowing such existing senior executive non-competes to remain in force.[820] In future

[818] *See* Part IV.B.3.b.ii.

[819] *See* Part IV.C.2 (describing the negative externalities of non-competes for senior executives).

[820] *See* Part IV.C.3.

transactions, businesses and investors have other methods of incentivizing senior executives and other workers to remain, including fixed duration contracts and competing to retain workers on the merits, and thereby enhancing the value of firms and transactions—methods that do not impose such significant externalities on other workers and consumers.

Some industry organizations said non-competes increase employer investment in management and leadership training for executives. An investment industry organization said non-competes allow senior executives to access training and experience for their own benefit and the benefit of investors in the firm. In response, the Commission notes that employers have alternative mechanisms to protect their investments in worker training, including fixed-duration contracts and improved compensation.

Some commenters argued that non-competes may improve executive performance, as some executives have non-competes tied to deferred compensation and other future benefits, which encourages long-term value creation by incentivizing executives to focus on long-term rather than short-term gains. A law firm said that forfeiture-for-competition clauses are an important component of deferred compensation agreements, and deferred compensation incentivizes long-term value-building and penalizes, via reduction or forfeiture, harm to the business, which the commenter said includes working for a competitor. The commenter claimed that if forfeiture-for-competition clauses are banned, firms would shift some of the deferred compensation to more short-term awards, which would in turn increase risk-taking and decrease overall wealth accumulation. The commenter cited a review by the Federal Reserve after the 2008 financial crisis which found that deferred compensation can mitigate executive risk-taking activities.[821] It also cited other Federal agencies and court decisions recognizing the value of deferred compensation to mitigate risk. Separately, the firm argued that without forfeiture-for-competition clauses, an executive who moves to a competitor will compete less against their former employer so as not to devalue their equity award, thus degrading competition. Commenters also contended that State courts have recognized forfeiture-for-competition clauses to be reasonable and that some State statutes governing non-competes carve them out.

In response, the Commission recognizes that many existing deferred compensation contracts may have been negotiated to include non-competes or forfeiture-for-competition clauses that may not be easily separated, and the final rule allows existing senior executive non-competes to remain in force.[822] However, the Commission is not persuaded that non-competes are necessary for future deferred compensation agreements. The Federal Reserve study on the value of deferred compensation does not mention non-competes or forfeiture-for-competition clauses. While the study states that clawback provisions may discourage specific types of behavior, it notes that they do not affect most risk-related decisions.[823] The commenter did not explain why non-competes are necessary for deferred compensation to reduce risk-taking or how post-employment competition could impact performance while at the firm. The commenter also did not explain why firms would forgo the benefits of deferred compensation even without a forfeiture-for-competition clause. The commenter separately argued that an executive who moves to a competitor will be conflicted and compete less against their former employer so as not to devalue their equity award. The comment framed this as an anticompetitive problem akin to interlocking directorates under the Clayton Act, as it could increase collusion (though the commenter provided no support for this argument). The commenter did not, however, explain why an executive would move to a competitor if doing so would devalue their own equity. The Commission also does not believe that the solution to this type of anticompetitive behavior, even if it were to occur, is to further restrict competition by blocking the executive from moving to the competitor in the first place.

Some commenters argued that forfeiture-for-competition clauses, which are sometimes attached to deferred compensation arrangements, were also justified. Some commenters contended that workers subject to forfeiture-for-competition clauses who choose to work for a competitor are likely to be compensated by the competitor for whom they will be working. Separately, a law firm and an investment industry organization stated that it would be unfair for companies to continue making deferred compensation or other payments to former workers who now work for a competitor if forfeiture-for-competition clauses were banned. A law firm also stated that forfeiture-for-competition clauses allow senior executives to retire without losing their deferred compensation, which in turn clears a path for younger workers to move up, while protecting senior executives' retirement benefits. In response, the Commission notes that pre-existing agreements for senior executives are not banned under the final rule.[824] The Commission also sees no reason why deferred compensation, including for retiring workers, cannot be used without forfeiture-for-competition clauses.

Some commenters stated that the study by Kini, Williams, and Yin, discussed in the NPRM with respect to senior executive earnings,[825] finds that CEOs with non-competes are more frequently forced to resign their position. Commenters note that Kini, Williams, and Yin also find that CEO contracts more closely align the incentives of executives (with respect to stock prices and risk taking) with shareholders when the executives have non-competes or when those non-competes are more enforceable. In response, the Commission notes that, as indicated by commenters, this study examines the use of non-competes in conjunction with their enforceability. The Commission therefore finds that the results may not reflect a causal relationship. For example, the use of non-competes and the propensity of the board to force an executive to resign may be jointly determined by the strength of the relationship or the trust between management and the board, rather than the use of non-competes causing forced turnover. The Commission also notes that—as shown in the study—there are other methods by which boards may encourage executives to perform, such as by structuring financial incentives to encourage or discourage risk taking, according to the preferences of the board. Boards can also fire poorly performing executives even without non-competes.

One commenter said that a ban on non-competes may encourage U.S. companies to relocate their executive teams outside the U.S. in order to continue using non-competes. The

[821] *See* Bd. of Govs. of the Fed. Reserve Sys., *Incentive Compensation Practices: A Report on the Horizontal Review of Practices at Large Banking Organizations* (Oct. 2011), *https://www.federalreserve.gov/publications/other-reports//incentive-compensation-practices-report-201110.pdf.*

[822] *See* Part IV.C.3.

[823] Federal Reserve Report on Incentive Compensation Practices, *supra* note 821 at 16–17.

[824] *See* § 910.2(a)(2).

[825] *See* Kini, Williams, & Yin, *supra* note 83.

commenter did not provide specific evidence to support this assertion. The Commission believes that firms' decisions on where to locate their executive teams are likely influenced by a multitude of factors other than whether the firm may or may not use non-competes.

3. The Asserted Benefits From These Justifications Do Not Justify the Harms From Non-Competes

a. The Commission's Final Findings

Based on the totality of the evidence, including its review of the empirical literature, its review of the full comment record, and its expertise in identifying practices that harm competition, the Commission in this final rule finds that the claimed business justifications for non-competes do not justify the harms from non-competes—for either senior executives or for workers other than senior executives, whether considered together or separately—because the evidence indicates that increasing enforceability of non-competes has a net negative impact along a variety of measures. Whether the benefits from a practice outweigh the harms is not necessarily an element of section 5,[826] but, in any event, the benefits from the justifications cited in Part IV.D.1 clearly do not justify the harms from non-competes.

Not all the harms from non-competes are readily susceptible to monetization.[827] However, even the quantifiable harms from non-competes are substantial and clearly not justified by the purported benefits. Non-competes cause considerable harm to competition in labor markets and product and service markets. Non-competes obstruct competition in labor markets because they inhibit optimal matches from being made between employers and workers across the labor force through the process of competition on the merits for labor services. The available evidence indicates that increased enforceability of non-competes substantially suppresses workers' earnings, on average, across the labor force generally and for specific types of workers.[828]

In addition to the evidence showing that non-competes reduce earnings for workers across the labor force, there is also evidence that non-competes reduce earnings specifically for workers who are not subject to non-competes.[829] These workers are harmed by non-competes, because their wages are depressed, but they do not necessarily benefit from any purported incentives for increased human capital investment that non-competes may provide. Overall, these harms to labor markets are significant. The Commission estimates the final rule will increase workers' total earnings by an estimated $400 billion to $488 billion over ten years, at the ten-year present discounted value.[830]

The available evidence also indicates non-competes negatively affect competition in product and service markets. The weight of the evidence indicates non-competes have a negative impact on new business formation and innovation.[831] There is evidence that non-competes increase consumer prices and concentration in the health care sector.[832] There is also evidence non-competes foreclose the ability of competitors to access talent.[833] While available data do not allow for precise quantification of some of these effects, they are nonetheless substantial: the Commission estimates that the rule will reduce spending on physician services over ten years by $74–194 billion in present discounted value, will result in thousands to tens of thousands of additional patents per year, and will increase in the rate of new firm formation by 2.7%.[834]

In the Commission's view, the asserted benefits from non-competes do not justify their harms. Even if the businesses using non-competes benefit, pecuniary benefits to the party undertaking the unfair method of competition are not a sufficient justification under section 5.[835] As described in Part IV.D.1, the most commonly cited justifications for non-competes are that they increase employers' incentive to make productive investments in, for example, trade secrets, customer lists, and human and physical capital investment. There is some evidence that non-competes increase human and physical capital investment, as noted previously.[836] However, the empirical literature does not show the extent to which human capital investment and other investment benefits from non-competes accrue to any party besides the employer, and to the extent it addresses this issue it suggests otherwise. For example, in theory, if increased human capital investment from non-competes benefited workers, they would likely have higher earnings when non-competes are more readily available to firms (*i.e.,* when legal enforceability of non-competes increases). However, as explained in Parts IV.B.3.a.ii and IV.C.2.c.ii, the empirical evidence indicates that, on net, greater enforceability of non-competes reduces workers' earnings. Likewise, in theory, if increased human capital investment increased innovation that redounds to the benefit of the economy and society as a whole, one would expect to see legal enforceability of non-competes yield such benefits, but as elaborated in Part IV, the empirical evidence on innovation effects indicates the opposite.

Moreover, the Commission is also not aware of any evidence that these potential benefits of non-competes lead to reduced prices. Indeed, the only empirical study of the effects of non-competes on consumer prices—in the health care sector—finds increased prices as the enforceability of non-competes increases.[837] That study, which finds that non-compete enforceability increased physician pay, also finds that labor cost pass-through is not driving price decreases.[838]

Furthermore, there is no evidence that, in the three States in which non-competes are generally void, the inability to enforce non-competes has materially harmed employers, consumers, innovation (or economic conditions more generally), or workers. As a result, the Commission finds that the asserted benefits from non-competes do not justify the harms they cause.

The Commission finds that the harms from non-competes are clearly not justified by the purported benefits, regardless of whether one considers senior executives or workers other than senior executives together or separately. In this Part IV.D.3, the Commission explains why, for workers overall, the asserted benefits from non-competes do not justify the harms they cause. This is at least as true for senior executives as for other workers. As described in Part IV.C.2.c.i, non-competes with senior executives tend to negatively affect competitive conditions in product and service markets at least as much as non-competes with other workers—and likely to a greater extent—given the outsized role of senior executives in forming new businesses, serving on new

[826] *See* Part II.F (stating that the inquiry as to whether conduct tends to negatively affect competitive conditions focuses on the nature and tendency of the conduct and does not require a detailed economic analysis).

[827] *See, e.g.,* Parts IV.B.3.a.iii and IV.B.3.b.iv.

[828] *See* Part IV.B.3.a.ii; Part IV.C.2.c.ii.

[829] *See* Part IV.B.3.a.ii.

[830] *See* Part X.F.6.

[831] *See* Part IV.B.3.b.i-ii; Part IV.C.2.c.i.

[832] *See* Part IV.B.3.b.iii.

[833] *See* Part IV.C.2.c.i.

[834] *See* Part X.F.6.

[835] *See* Part II.F.

[836] *See* Part IV.D.1.

[837] *See* Part IV.B.3.b.iii.

[838] *See* Hausman & Lavetti, *supra* note 590 at 278.

businesses' executive teams, and setting the strategic direction of businesses with respect to innovation. At the same time, firms have the same less restrictive alternatives available for senior executives as they do for other workers, as described in Part IV.D.2.c.iii. For these reasons, whether one considers non-competes with senior executives or non-competes with other workers, the claimed business justifications for non-competes do not justify the harms from non-competes.

b. Responses to Comments

Commenters focused on the question of whether employers have adequate alternatives to non-competes and the analysis of costs and benefits of the proposed rule in the preliminary regulatory impact analysis, rather than the balancing analysis discussed in this Part IV.D.3 specifically. These comments are addressed in Part IV.D.2 and in Part X, respectively.

E. Section 910.2(b): Notice Requirement for Existing Non-Competes

The Commission proposed to require employers to rescind (*i.e.,* legally modify) existing non-competes and provide notice to inform workers that they are no longer bound by existing non-competes.[839] Based on comments, the Commission is not adopting a rescission requirement in the final rule. Rather than require employers to legally modify existing non-competes, the final rule prohibits employers from enforcing existing non-competes with workers other than senior executives after the compliance date.

The final rule adopts the notice requirement—for workers who are not senior executives—with minor revisions to facilitate compliance and to improve the likelihood of workers being meaningfully informed. The revisions include an option for employers to make the notice more accessible to workers who speak a language other than English. The final rule also simplifies compliance and ensures that workers have prompt notice that their non-competes are no longer in force by requiring employers to provide notice by the effective date, rather than 45 days thereafter.

1. The Proposed Rule

Proposed § 910.2(b)(1) would have required employers to rescind existing non-competes with all workers. Proposed § 910.2(b)(2) would have required employers that rescinded non-competes to provide notice to the affected workers that their non-compete is no longer in effect and may not be enforced.

As proposed, § 910.2(b)(2) had three subparagraphs that imposed various requirements related to the notice. Proposed § 910.2(b)(2)(i) stated that an employer that rescinds a non-compete pursuant to § 910.2(b)(1) must provide notice in an individualized communication to the worker that the worker's non-compete is no longer in effect and may not be enforced. The Commission stated in the NPRM that an employer could not satisfy the notice requirement by, for example, posting a notice at the employer's workplace.[840] Proposed § 910.2(b)(2)(i) also stated that the employer must provide the notice in writing on paper or in a digital format such as an email or text message within 45 days of rescinding the non-compete.

Proposed § 910.2(b)(2)(ii) stated that the employer must provide the notice to both current workers and former workers when the employer has the former worker's contact information readily available. To ease the burden of compliance, proposed § 910.2(b)(2)(iii) provided model language that would satisfy the notice requirement. Proposed § 910.2(b)(2)(iii) and § 910.2(b)(3) provided a safe harbor for employers using the model language, while also permitting an employer to use different language, provided that the language communicates to the worker that the worker's non-compete is no longer in effect and may not be enforced.[841]

In the NPRM, the Commission stated that the purpose of the proposed notice requirement was to ensure that workers are informed that their existing non-competes are no longer in effect. The Commission cited evidence indicating that many workers are not aware of the applicable law governing non-competes or their rights under those laws, and stated that it was therefore concerned that, absent a notice requirement, workers may not know that their non-competes are no longer enforceable as of the effective date.[842]

2. The Final Rule

a. The Final Rule Does Not Require Rescission (Legal Modification) of Existing Non-Competes

The Commission has eliminated the proposed rule's requirement that employers rescind (*i.e.,* legally modify) existing non-competes. The Commission believes the proposed rescission requirement would have imposed unnecessary burdens on employers, as other aspects of the final rule provide less burdensome means of ensuring that workers other than senior executives will not be bound or chilled from competitive activity by non-competes after the effective date. Under § 910.2(a)(1)(ii), it is an unfair method of competition for a person to enforce or attempt to enforce a non-compete (except where, under § 910.3 the person has a good-faith basis to believe that the final rule is inapplicable). Further, under § 910.2(b)(1), the person who entered into the non-compete must provide clear and conspicuous notice to the worker by the effective date that the worker's non-compete clause is no longer in effect and will not be, and cannot legally be, enforced against the worker. These provisions are sufficient to achieve the purposes of the proposed rescission requirement without requiring any affirmative conduct beyond the notice requirement.

The Commission has also eliminated the proposed rescission requirement in response to comments expressing confusion about the requirement and concern about its practical implications. Some comments interpreted the proposed rescission requirement to mean that the worker and employer must be returned to their original positions (*i.e.,* on the day they entered into the non-compete) and presumed to not have entered into it or that it mandated wholly new contracts to replace any existing agreements that contained non-competes. Some commenters objected to what they considered the high compliance costs of rescinding and revising every employment contract with a non-compete. Some businesses said their contracts with senior executives and potentially other workers would be unwound by a rescission requirement. Other commenters said that if the Commission promulgated the proposed rescission requirement, it would be disregarding the role non-competes played in the overall value of the exchange for an employment contract. An industry association said rescission would require assessment of each contract's severability under relevant State law, and the answers would vary widely.

The Commission does not intend for the final rule to have such effect and has omitted the rescission requirement proposed in the NPRM. The Commission also adopts § 910.3(b), which provides an exception for causes of action that accrued before the effective date, to be clear that the final rule does not render any existing non-competes unenforceable or invalid from the date of their origin. Instead, it is an unfair method of competition to enforce

[839] *See* NPRM, proposed § 910.2(b).

[840] *Id.* at 3513.

[841] *Id.* at 3514.

[842] *Id.* at 3513.

certain non-competes beginning on the effective date. Actions taken before the effective date—for example, enforcing an existing non-compete or making representations related to an existing non-compete—are not unfair methods of competition under the final rule. As noted elsewhere, the Commission also exempts from the rule future enforcement of existing non-competes with senior executives.

Commenters also argued that a rescission requirement would be impermissibly retroactive, present due process concerns, and/or constitute an impermissible taking under the Fifth Amendment. The Commission responds to these comments in Part V.B.

Numerous commenters opposed the proposed rescission requirement based on perceived challenges presented by proposed § 910.1(b)(2), which addressed *de facto* non-competes, and its purported ambiguity with respect to which contractual terms employers would be required to rescind. The Commission has removed the rescission requirement for the reasons described in this Part IV.E.2.a and has also revised the proposed rule's language concerning *de facto* non-competes to clarify the scope of the definition.

b. The Final Rule's Notice Requirement

While the final rule does not require rescission (*i.e.,* legal modification) of existing non-competes, the final rule does prohibit enforcement of existing non-competes after the effective date and requires the person who entered into the non-compete with the worker to provide clear and conspicuous notice to the worker, by the effective date, that the worker's non-compete will not be, and cannot legally be, enforced against the worker.[843] The notice must identify the person who entered into the non-compete with the worker and must be on paper delivered by hand to the worker, or by mail at the worker's last known personal street address, or by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker.[844]

Several commenters emphasized the importance of notice, especially for former workers who may be actively refraining from competitive activity (in compliance with a non-compete), and who may continue to do so if they are not informed that their non-compete is no longer in effect. One commenter highlighted the importance of notice, because a non-compete may be coercive regardless of its enforceability. Many commenters emphasized the need for clear and concise language in the notices, including in languages other than English. One commenter asked the Commission to use concrete, lay-friendly terms to help reduce workers' fears of being sued. A commenter that recommended notice in languages other than English suggested that such a requirement apply to medium and large businesses with a threshold percentage of workers (such as 10%) who primarily speak a language other than English.

Commenters also suggested changes in notice procedures to improve the chances of workers receiving and understanding the notice. One commenter stated that text messages should not qualify as a primary means of individual notice because they are too casual, may be automatically deleted, and the sender may not be identifiable. However, in this commenter's view, text messages could be a secondary form of notice. Some commenters suggested that in addition to individual notice, the final rule should require an employer to post a copy of the notice in the workplace and/or online.

A number of commenters asserted that the requirement for employers to provide notice to former workers when ''the employer has the worker's contact information readily available'' was confusing or burdensome. A commenter stated that employers do not update former employees' contact information, so such information is likely incomplete and might be inaccurate. One commenter asserted that a requirement to provide notice within 45 days of the effective date is too difficult for small businesses. Another commenter suggested that the final rule should require contacting only former workers who left the firm two years or less before the effective date, unless the non-compete has elapsed.[845] Some commenters expressed concern that former workers might not be notified under the ''readily available'' standard. A commenter stated that, to avoid confusion and evasion, employers should be required to send notice to former workers at the worker's last known home address, email address, or cell phone number. Commenters also contended that the meaning of ''individualized communication'' was not clear or that compliance with it would be too difficult or burdensome.

The Commission finalizes the proposed rule's notice requirement largely as proposed, with minor revisions to facilitate compliance, reduce burdens on employers, and improve accessibility for non-English speakers.[846] The final rule also requires covered businesses to provide notice by the effective date, rather than 45 days thereafter, to simplify the final rule and to secure its benefits for competition in labor markets and product and service markets as soon as practicable.

The Commission finalizes a notice requirement because the available evidence indicates that many workers are not aware of the applicable law governing non-competes or their rights under those laws, or are unable to enforce their rights—and are chilled from engaging in competitive activity as a result. The evidence shows that even when employers impose non-competes that are unenforceable under State law, many workers believe they are bound by them (or are otherwise unable to enforce their rights to be free of non-competes).[847] As a result, the Commission finds that even after the final rule is in effect, absent a clear notice requirement, many workers may be unaware that, because of the final rule, their employer cannot enforce a non-compete and that the Commission has the authority to take action against employers who violate the final rule. Accordingly, absent notice, these workers may continue to be chilled from switching jobs or starting their own business. This would tend to negatively affect competitive conditions in the

[843] § 910.2(b)(1).

[844] This language mirrors language in other Federal regulations. *See, e.g.,* 17 CFR 9.11 (notice of disciplinary action must be made personally by mail at the person's last known address or last known email address); 29 CFR 38.79 (written notice must be sent to a ''complainant's last known address, email address (or another known method of contacting the complainant in writing)''); 16 CFR 318.5 (providing for written notification at an individual's last known address, or email if the individual chooses that option).

[845] Under the final rule, notice is only required for existing non-competes, *i.e.,* those that have not elapsed.

[846] The Commission notes that this required notice is a routine disclosure of valuable, factual information to workers that does not implicate the First Amendment. *See Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 559 U.S. 229, 249–53 (2010) (citing *Zauderer* v. *Off. of Disciplinary Counsel,* 471 U.S. 626, 651 (1985)). As described in this Part IV.E, the Commission adopts this notice requirement to ensure workers do not wrongly believe they remain bound by unenforceable non-competes after the rule goes into effect. The Commission's conclusion that such notice is necessary to achieve the full benefits of the final rule is based on its expertise and on empirical evidence supporting the Commission's finding of an *in terrorem* effect related to non-competes.

[847] *See* Prescott & Starr, *supra* note 413; *see also* Part IV.B.2.b.ii (describing the Commission's finding that non-competes are exploitative and coercive where they trap workers in jobs or force them to bear significant harms or costs, even where workers believe the non-compete is unenforceable).

same manner as if non-competes were in full force and effect.

A notice requirement helps address this concern by informing individual workers, to the extent possible, that after the effective date the employer will not enforce any non-compete against the worker. The Commission believes that prompt and clear notice to workers other than senior executives that non-competes are no longer enforceable is essential to furthering the purposes of the final rule—to allow workers to seek or accept another job or to leave to start and run a business, and to allow other employers to compete freely for workers. Indeed, the Commission has refined the model language to make it shorter and clearer than the proposed model language.

While the proposed rule would have required employers to provide the notice no later than 45 days after the compliance date, the final rule requires notice no later than the effective date (*i.e.,* no later than 120 days after the final rule is published in the **Federal Register**). The Commission believes that it is practicable and reasonable for employers to provide the notice by the effective date. The Commission has designed the notice requirement to make compliance as easy as possible for employers. The final rule provides safe harbor model language that satisfies the notice requirement; [848] gives employers several options for providing the notice—on paper, by mail, by email, or by text; [849] and exempts employers from the notice requirement where the employer has no record of a street address, email address, or mobile telephone number for the worker.[850]

In addition, while the model language in the proposed rule used the phrase ''the non-compete clause in your contract is no longer in effect,'' [851] the model language in the final rule uses the phrase ''[EMPLOYER NAME] will not enforce any non-compete clause against you.'' [852] Because this language does not identify the recipient as having a non-compete, the employer does not need to determine which of its workers have non-competes; instead, it can simply send a mass communication such as a mass email to current and former workers.

Furthermore, requiring notice by the effective date simplifies the final rule and allows its benefits to begin sooner. In response to commenters that contended that they need more time to provide workers notice, the Commission believes that providing notice should not be time-consuming, even for small businesses, particularly given that the final rule provides model language, allows use of the worker's last known contact information for notice, allows digital notice, and (unlike in the proposed rule) categorically exempts an employer who has no such information from the notice requirement. Moreover, as described in Part IV.B.2.b.ii, non-competes trap workers in jobs or force them to bear other significant harms or costs—even where workers believe the non-compete is unenforceable. Given the limited burdens associated with providing notice only to workers whose last known contact information is on file and employers' option to simply copy and paste the safe harbor model notice, as well as the known and currently ongoing acute harms of non-competes (including their *in terrorem* effects) and the importance of workers knowing as soon as possible that their non-compete is unenforceable, the Commission declines to extend the time to provide notice.[853] The Commission finds that 120 days is more than adequate for employers to complete this task.

In response to comments expressing concern that the NPRM's ''individualized communication'' requirement was unclear or burdensome, the Commission has removed that language. Instead, the final rule ensures each worker will receive notice while specifying several permissible methods for providing the notice, which furthers compliance certainty while giving employers a range of options and an efficient means of complying. By allowing a number of formats for such communications, including digital formats, employers are more likely to be able to contact workers rapidly, individually, and have flexibility to do so at low cost. Accordingly, § 910.2(b)(2) of the final rule allows for notice by text message, by email, as well as paper notice by hand or by mail to the worker's last known street address. The final rule gives employers flexibility to choose among these methods. In responses to the concerns expressed by the commenter about text messages, the Commission believes that text messages should be a permissible method for providing the notice because they are widely used, delivered quickly, low-cost for employers, and an effective means of communication for workers who do not have email accounts.

In response to comments contending that notice to former workers is too burdensome or difficult, the Commission believes that providing notice to former workers is critical because former workers may be refraining from competitive activity because they believe they are subject to a non-compete. The Commission disagrees that providing notice to former workers will be burdensome. The Commission believes that most employers have contact information for former workers who may be subject to non-competes.[854] And under the final rule, in those rare cases in which an employer has no record of a street address, email address, mobile telephone number, or other method of contacting the worker or former worker, § 910.2(b)(3) exempts the employer from the final rule's notice requirement with respect to the worker. Furthermore, by specifying the circumstances under which notice may not be provided, this exemption also addresses concerns expressed by some commenters that ambiguity in the proposed rule's ''readily available'' standard for notifying former workers would lead to fewer former workers being notified.

In response to comments contending that notice to former workers is too burdensome or difficult, the Commission believes that providing notice to former workers is critical because former workers may be refraining from competitive activity because they believe they are subject to a non-compete. In light of the comments about the proposed ''readily available'' contact information standard, the Commission in this final rule does not adopt that language and instead requires that the notice must be on paper delivered by hand to the worker, or by mail at the worker's last known personal street address, or by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker. The Commission agrees with commenters that stated that most employers have such contact information for both present and former workers. For those rare cases in which

[848] § 910.2(b)(4)–(5).

[849] § 910.2(b)(2)(ii).

[850] § 910.2(b)(3).

[851] NPRM, proposed § 910.2(b)(2)(iii).

[852] § 910.2(b)(4).

[853] The Commission addresses the effective date in Part VIII.

[854] Employers have many record-keeping requirements under State and Federal laws under which they may retain the contact information described in § 910.2(b)(2)(ii). *See, e.g.,* IRS, Circular E, Employer's Tax Guide, Pub. 15, 8 (2024) (''Keep all records of employment taxes for at least 4 years,'' including addresses of employees and recipients and forms with addresses.); USCIS, Handbook for Employers M–274, Sec. 10.0, Retaining Form I–9 (requiring retention of I–9 form, which includes employees' addresses, email addresses, and telephone numbers).

an employer has no record of a street address, email address, mobile telephone number, or other method of contacting the worker or former worker, § 910.2(b)(3) exempts the employer from the final rule's notice requirement.

The Commission agrees with comments that notices in other languages spoken by workers would help achieve the goal of informing workers that their non-competes are no longer enforceable and help employers to comply with the final rule. However, to avoid imposing a burden of translation on employers, § 910.2(b)(6) makes it optional to provide notices in languages other than English. The Commission encourages employers to provide this notice to workers who speak languages other than English. To facilitate the provision of notices in other languages, the final rule provides a model notice in English and links to translations of other languages that are commonly spoken in U.S. homes, including Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean.[855]

V. Section 910.3: Exceptions

A. Section 910.3(a): Exception for Persons Selling a Business Entity

In the NPRM, the Commission proposed an exception for certain non-competes between the seller and the buyer of a business that applied only to a substantial owner, member, or partner, defined as an owner, member, or partner with at least 25% ownership interest in the business entity being sold. Based on comments, the Commission adopts an exception for the bona fide sale of a business without requiring that the seller have at least a 25% ownership interest.

1. The Proposed Rule

Proposed § 910.3 allowed non-competes where the restricted party is ''a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity, or . . . selling all or substantially all of a business entity's operating assets,'' and is also ''a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete.'' [856] The Commission proposed to define ''substantial owner, substantial member, and substantial partner'' as ''an owner, member, or partner holding at least a 25 percent ownership interest in a business entity.'' [857] The text of proposed § 910.3 stated that non-competes allowed under the proposed exception would remain subject to Federal antitrust law and all other applicable law.

The Commission stated in the NPRM that its proposal to exempt from the rule non-competes between the seller and the buyer of a business did not reflect a finding that such non-competes are beneficial to competition.[858] Rather, the Commission explained that such non-competes may implicate unique interests and have unique effects, and the evidentiary record did not permit the Commission to thoroughly assess the full implications of restricting their enforceability.[859] The Commission noted that because all States permit non-competes between the seller and the buyer of a business to some degree, and because the laws that apply to these types of non-competes have seen fewer changes recently than the laws applicable to non-competes that arise solely out of employment, there have not been natural experiments allowing researchers to assess this type of non-compete's effect on competition.[860]

2. Comments Received

A few commenters suggested eliminating the proposed exception. These commenters contended that non-competes between the seller and the buyer of a business may still be exploitative and coercive, particularly in the case of small business owners in transactions with larger, better-resourced corporations. However, most commenters who addressed the issue supported an exception that would allow certain non-competes between the seller and the buyer of a business. These commenters agreed with the NPRM that State common law generally applies less-intensive scrutiny to non-competes ancillary to the sale of a business and that every State statute banning non-competes has an exception which allows some or all non-competes between the seller and the buyer of a business. Most of the commenters who supported some form of exception for non-competes between the seller and the buyer of a business contended that they are necessary to protect the value of the sale by ensuring the effective transfer of the business's goodwill. According to these commenters, a buyer will be less willing to pay for a business if they cannot obtain assurance that they will be protected from future competition by the seller, and so a failure to exempt related non-competes may chill acquisitions. Commenters stated that sellers of a business have more bargaining power than workers do and generally receive a portion of the sales price, making exploitation and coercion less likely. They also noted that non-competes between the seller and the buyer of a business remain subject to State limitations on scope, duration, and reasonableness.

Some commenters supported the proposed 25% ownership threshold. However, most commenters who otherwise supported the exception stated that the proposed 25% ownership threshold is too high. They argued that the 25% threshold does not account for the reality of most transactions, in which owners with less than 25% interest in a business may have significant goodwill and receive significant proceeds from a sale. Some commenters focused on the tax costs of the threshold, pointing to IRS provisions that currently allow taxpayers to deduct from their taxable income the portion of the sales price made in exchange for non-competes. Others argued that the 25% threshold would disincentivize equity-based consideration. To avoid these harms, these commenters suggested a variety of other thresholds, including the 5% ownership threshold used in SEC regulations.[861] Some commenters contended that the Commission failed to provide evidence justifying the proposed 25% ownership threshold. Others questioned the effectiveness of ownership as a proxy for goodwill or the likelihood of exploitation and coercion. As examples, these commenters pointed to passive investors who may have significant ownership stakes in a business but none of its goodwill, and owners whose interests may be purchased for less than fair market value or who are excluded from sales negotiations.

A few commenters argued that the proposed 25% threshold would preempt the laws of California and other States which ban non-competes except in the sale of a business, none of which require that the seller have a substantial ownership stake. They pointed to cases in which California courts applied the exception and allowed enforcement of non-competes against shareholders holding as little as a 3% ownership interest. In light of these statutes, some of these commenters urged the Commission to adopt an exception for

[855] *See* Sandy Dietrich & Erik Hernandez, Census Bureau, *Nearly 68 Million People Spoke a Language Other Than English at Home in 2019* (Dec. 6, 2022) at Table 1, *https://www.census.gov/library/stories/2022/12/languages-we-speak-in-united-states.html.*

[856] NPRM, proposed § 910.3.

[857] *Id.,* proposed § 910.1(e).

[858] *Id.* at 3515.

[859] *Id.* at 3514–15.

[860] *Id.*

[861] *See, e.g.,* 17 CFR 240.13d–1 (requiring reporting by beneficial owners holding more than 5% interest in an equity security).

agreements that involve the sale of a business or equity in a company without a threshold ownership requirement.

Some commenters urged the Commission to adopt a case-by-case assessment of business sales based on State law, such as a ''totality of the circumstances'' or ''reasonableness'' test. Others proposed replacing the ownership-based exception with an exception for founders, key workers with IP access, and/or those with goodwill. At least one commenter asked the Commission to use a bright-line rule rather than a functional or definitional test that would require adjudication and interpretation by courts.

Some commenters presented empirical evidence to justify a lower ownership threshold. A few commenters pointed to data suggesting that more than 96% of CEOs of the 3,000 largest publicly traded companies own less than 25% of their company. One commenter pointed to data suggesting that the average duration of a startup's life from fundraising to acquisition is 6.1 years, arguing that it is unlikely for venture-capital backed businesses to operate and grow for that period of time without accepting funding that dilutes founders' and key employees' equity stake in the business. Other commenters supporting a lower threshold provided anecdotal evidence that businesses cede large shares to financial backers, resulting in many owner-operators holding significantly less than a 25% share in their business.

Finally, some commenters focused on eliminating potential loopholes to the proposed exception. Some commenters expressed concern that employers may set up sham transactions with wholly owned subsidiaries in order to impose non-competes that would otherwise be prohibited under the rule, urging the Commission to clarify that the exception applies only to bona fide transfers to an independent third party. Some commenters contended that firms may use ''springing'' non-competes (in which a worker must agree at the time of hiring to a non-compete in the event of some future sale) and repurchase rights, mandatory stock redemption programs, or similar stock-transfer schemes (pursuant to which a worker may be required to sell their shares if a certain event occurs) to impose non-competes on their workers which would otherwise be prohibited. They urged the Commission to address those instances specifically, including by defining the exception by the percentage of total equity value received in liquid proceeds at the time of the relevant transaction.

3. The Final Rule

The Commission adopts a sale of business exception for substantially the same reasons articulated in the NPRM. However, in response to comments concerning the ownership percentage threshold, the Commission modifies § 910.3(a) so that it no longer includes the proposed requirement that the restricted party be ''a substantial owner of, or substantial member or substantial partner in, the business entity'' to fall under the exception. The Commission otherwise adopts this provision largely as proposed. To address commenters' concerns that employers will use sham transactions, stock-transfer schemes or other mechanisms designed to evade the rule, § 910.3(a) requires that, to fall under the exemption, a non-compete must be entered into pursuant to a bona fide sale.

The Commission reiterates that § 910.3(a) does not reflect a finding that non-competes between the seller and the buyer of a business are beneficial to competition or that they are not restrictive and exclusionary or exploitative and coercive. Indeed, the Commission acknowledges that some non-competes between the seller and buyer of a business may be exploitative and coercive due to an imbalance in bargaining power and/or may tend to harm competitive conditions. However, commenters did not present empirical research on the prevalence of non-competes between the seller and the buyer of a business or on the aggregate economic effects of applying additional legal restrictions to non-competes between the seller and buyer of a business. The Commission's decision to adopt § 910.3(a) reflects the view of the Commission and most commenters that, compared to non-competes arising solely out of an employment relationship, non-competes between the sellers and buyers of businesses may implicate unique interests and have unique effects that this rulemaking record does not address.[862]

The proposed requirement that an excepted non-compete bind only a ''substantial'' owner, member or partner of the business entity being sold was designed to allow those non-competes between the seller and the buyer of a business which are critical to effectively transfer goodwill while prohibiting those which are more likely to be exploitative and coercive due to an imbalance of bargaining power between the seller and the buyer. However, commenters persuasively argued that the proposed 25% ownership threshold was too high because it failed to reflect the relatively low ownership interest held by many owners, members, and partners with significant goodwill in their business. The Commission declines to maintain the ''substantial'' interest requirement with a lower percentage threshold for the same reason.

The Commission also declines to adopt a threshold of $1 million, $250,000, or some other dollar limit on the proceeds received by the seller. On the current record, these thresholds were not sufficiently correlated to sellers' goodwill or bargaining power for a broadly generalizable approach. The Commission declines to adopt a ''totality of the circumstances'' or ''reasonableness'' test in the text of § 910.3(a) because they would provide little meaningful guidance to buyers and sellers and would be difficult to administer. For the same reasons, the Commission declines to replace the ownership-based exception with an exception for founders, key workers, workers with access to intellectual property, and/or workers with goodwill. Furthermore, non-competes allowed under the exception will continue to be governed by State law, which generally requires a showing that a non-compete is necessary to protect the value of the business being sold, as well as Federal antitrust law.[863]

Finally, the Commission agrees with commenters' concerns about the risks that firms may abuse the exception through sham transactions with wholly owned subsidiaries, ''springing'' non-competes, repurchase rights, mandatory stock redemption programs, or similar evasion schemes. The Commission adds the term ''bona fide'' and makes changes clarifying that any excepted non-compete must be made ''pursuant to a bona fide sale'' to ensure that such schemes are prohibited under the rule. A bona fide sale is one made in good faith as opposed to, for example, a transaction whose sole purpose is to evade the final rule.[864] In general, the Commission considers a bona fide sale to be one that is made between two

[862] *See* NPRM at 3514–15.

[863] *See, e.g., U.S.* v. *Addyston Pipe & Steel Co.,* 85 F. 271, 281 (6th Cir. 1898) (''For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements [*inter alia*] by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold . . . . Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary . . . to the enjoyment by the buyer of the property, good will, or interest in the partnership bought. . . .'').

[864] Black's Law Dictionary defines bona fide as ''[m]ade in good faith; without fraud or deceit,'' and ''[s]incere; genuine.'' (11th ed. 2019).

independent parties at arm's length, and in which the seller has a reasonable opportunity to negotiate the terms of the sale. So-called ''springing'' non-competes and non-competes arising out of repurchase rights or mandatory stock redemption programs are not entered into pursuant to a bona fide sale because, in each case, the worker has no good will that they are exchanging for the non-compete or knowledge of or ability to negotiate the terms or conditions of the sale at the time of contracting. Similarly, sham transactions between wholly owned subsidiaries are not bona fide sales because they are not made between two independent parties.

The Commission declines to specifically delineate each kind of sales transaction which is not a bona fide sale under the exception to avoid the appearance that any arrangement not listed is allowed under the exception. Courts have effectively identified and prohibited such schemes pursuant to State statutes prohibiting non-competes.[865] In addition, non-competes allowed under the sale-of-business exception remain subject to Federal and State antitrust laws, including section 5 of the FTC Act.

B. Section 910.3(b): Exception for Existing Causes of Action

Proposed § 910.2(a) would have prohibited employers from maintaining an existing non-compete with a worker. The proposed rule also would have required employers to rescind existing non-competes.[866] Commenters argued that any invalidation or rescission required of existing non-competes would be impermissibly retroactive, present due process concerns, and/or constitute an impermissible taking under the Fifth Amendment.

As described in Part IV.C.5, the Commission adopts a modified § 910.2(a) under which existing non-competes for workers who are not senior executives are no longer enforceable. The Commission adds an exception in § 910.3(b) in response to comments raising concerns related to retroactivity. Section 910.3(b) specifies that the final rule does not apply if a cause of action related to a non-compete provision accrued prior to the effective date. This includes, for example, where an employer alleges that a worker accepted employment in breach of a non-compete if the alleged breach occurred prior to the effective date. This provision responds to concerns that the final rule would apply retroactively by extinguishing or impairing vested rights acquired under existing law prior to the effective date.[867] In this Part V.B, the Commission addresses commenters' arguments regarding retroactivity, due process, and impermissible taking under the Fifth Amendment.

1. Retroactivity

A number of commenters asserted that applying the final rule to prohibit the enforcement of existing non-competes would render the final rule impermissibly retroactive. The Commission disagrees. A rule ''does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the [rule's] enactment, or upsets expectations based in prior law.'' [868] Rather, courts have explained that an ''administrative . . . rule is retroactive [only] if it takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed.'' [869] ''A rule that 'alter[s]' the past legal consequences of 'past action' is retroactive,'' while a rule that '''alter[s] only the 'future effect' of past actions, in contrast, is not.'' [870] Agency action ''that only upsets expectations based on prior law is not retroactive.'' [871]

The final rule is not impermissibly retroactive because it does not impose any legal consequences on conduct predating the effective date. The Commission is not creating any new obligations, imposing any new duties, or attaching any new disabilities for past conduct.[872] And to minimize concerns about retroactivity, the Commission adopts § 910.3(b), which states that the final rule does not apply where a cause of action related to a non-compete accrues before the effective date. The notice requirement in § 910.2(b) likewise does not render the final rule impermissibly retroactive because that requirement merely requires notice that non-competes that exist after the effective date will not be enforced in the future with respect to workers other than senior executives. No penalties attach to persons who entered non-competes before the effective date.

This final rule is analogous to the FCC rulemaking upheld in *National Cable & Telecommunications Ass'n* v. *FCC.* There, the agency promulgated a rule that ''forbade cable operators not only from entering into new exclusivity contracts, but also from enforcing old ones.'' [873] The court upheld the rule against a retroactivity challenge because the FCC had ''impaired the future value of past bargains but ha[d] not rendered past actions illegal or otherwise sanctionable.'' [874] This final rule does the same with existing non-competes. The final rule does not render it illegal or otherwise sanctionable for parties to have entered into non-competes before the effective date; it merely provides that persons cannot enforce or attempt to enforce such agreements with workers other than senior executives or represent to such workers that they are bound by an enforceable non-compete after the effective date. It is thus not impermissibly retroactive.

In *National Cable,* the court also considered whether the agency had ''balance[d] the harmful 'secondary retroactivity' of upsetting prior expectations or existing investments against the benefits of applying [its] rules to those preexisting interests.'' [875] While commenters did not frame their objection as one of ''secondary retroactivity,'' some did object that the final rule would upset the benefits of pre-existing bargains. As in *National Cable,* however, the Commission has ''expressly consider[ed] the relative benefits and burdens of applying its rule

[865] *See, e.g., Bosley Med. Grp.* v. *Abramson,* 161 Cal. App. 3d 284, 291 (Cal. Ct. App. 1984) (refusing to enforce non-compete imposed on physician under agreement requiring physician to purchase 9% of stock at hiring and resell to corporation upon termination because agreement ''was devised to permit plaintiffs to accomplish that which the law otherwise prohibited: an agreement to prevent defendant from leaving plaintiff medical group and opening a competitive practice'').

[866] *See* proposed § 910.2(b)(1).

[867] As discussed in Part V.B.1, courts have explained that an ''administrative . . . rule is retroactive [only] if it takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed.'' *Regents of the Univ. of Cal.* v. *Burwell,* 155 F. Supp. 3d 31, 44 (D.D.C. 2016) (alteration in original) (quoting *Nat'l Min. Ass'n* v. *DOL,* 292 F.3d 849, 859 (D.C. Cir. 2002)). But a regulation is *not* retroactive simply because it ''impair[s] the future value of past bargains'' if it does not also ''render[ ] past actions illegal or otherwise sanctionable.'' *Nat'l Cable & Telecomms. Ass'n* v. *FCC,* 567 F.3d 659, 670 (D.C. Cir. 2009).

[868] *Landgraf* v. *USI Film Prods.,* 511 U.S. 244, 269 (1994).

[869] *Burwell,* 155 F. Supp. 3d at 44 (alteration in original) (quoting *Nat'l Min. Ass'n,* 292 F.3d at 859).

[870] *Id.* (alterations in original) (quoting *Ne. Hosp. Corp.* v. *Sebelius,* 657 F.3d 1, 14 (D.C. Cir. 2011)).

[871] *Nat'l Cable,* 567 F.3d at 670 (internal quotation omitted) (quoting *Mobile Relay Assocs.* v. *FCC,* 457 F.3d 1, 11 (D.C. Cir. 2006)).

[872] For instance, the D.C. Circuit found that agency action impermissibly attached a ''new disability'' when a Department of Interior rule made mine operators ineligible for a surface mining permit based on ''pre-rule violations.'' *Nat'l Min. Ass'n* v. *U.S. DOI,* 177 F.3d 1, 8 (D.C. Cir. 1999). Here, the final rule imposes no penalties or other disabilities on persons who entered into non-competes before the effective date.

[873] *Nat'l Cable,* 567 F.3d at 661.

[874] *Id.* at 670.

[875] *Id.* at 670.

to existing contracts.'' [876] This consideration led the Commission to adopt the various exceptions described in the final rule, including the decision not to apply the final rule to non-competes entered into with senior executives before the effective date. As explained in Part IV.B, however, the Commission has determined that, for workers other than senior executives, there are substantial benefits to applying the rule to prohibit the future enforcement of non-competes entered into before the effective date. These benefits include the anticipated increase in worker earnings, new business formation, and innovation.[877] Additionally, the Commission finds such agreements are generally coercive and exploitative, so prohibiting their future enforcement is also a benefit.[878]

In the Commission's view, these significant benefits justify any burdens of applying the final rule to the future enforcement of pre-existing agreements with workers other than senior executives. Having balanced the burdens and benefits of so applying the final rule, the Commission has satisfied its obligation to consider the secondary retroactivity effects of the final rule. Moreover, the Commission notes that non-competes were already subject to case-by-case adjudication under section 5.[879] Employers were thus already responsible, even before the final rule, for ensuring their non-competes are not unfair methods of competition.

2. Takings

The Commission also disagrees with commenters who contended that applying the final rule to non-competes entered into before the effective date would violate the Fifth Amendment by effecting a taking without due compensation. Some comments interpreted the proposed rescission requirement to mean that the worker and employer must be returned to their original positions (*i.e.,* on the day they entered into the non-compete) and presumed to not have entered the agreement, or that the rule would mandate wholly new contracts to replace any existing agreements that contained non-competes. The Commission does not intend the final rule to have such effect and has omitted the rescission requirement proposed in the NPRM. The Commission also adopts § 910.3(b), which provides an exception for causes of action that accrued before the effective date, to clarify that the final rule is purely prospective. The final rule does not render any existing non-competes unenforceable or invalid from the date of their origin. Instead, under the final rule, it is an unfair method of competition to enforce certain non-competes beginning on the effective date. Action taken before the effective date to enforce an existing non-compete or representations made before the effective date related to an existing non-compete are not an unfair method of competition under the final rule. The final rule does not effectuate a taking.

The Takings Clause provides that ''private property'' shall not ''be taken for public use, without just compensation.'' [880] When, as here, ''the government, rather than appropriating private property for itself or a third party, imposes regulations that restrict an owner's ability to use his own property,'' courts consider whether the regulation ''goes too far'' and constitutes a ''regulatory taking.'' [881] Consistent with the Supreme Court's decision in *Penn Central Transportation Co.* v. *City of New York* (''*Penn Central*''), this is necessarily an ''ad hoc, factual inquir[y]'' and focuses on three factors: ''the economic impact of the regulation on the claimant''; ''the extent to which the regulation has interfered with distinct investment-backed expectations''; and ''the character of the governmental action.'' [882] ''[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.'' [883] As a general matter, ''the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking.'' [884]

Under the *Penn Central* test, the final rule does not effect a taking as a matter of law. First, the economic impact of the regulation on employers with existing non-competes with workers who are not senior executives is insufficient to constitute a taking.[885] The Commission has found that such agreements are rarely the product of bargaining, and that little to nothing is offered in exchange for them. And research has confirmed that for many such agreements, employers do not value the ability to enforce the agreements.[886] The final rule also includes provisions that allow employers and workers to ''moderate and mitigate the economic impact'' of the final rule.[887] The Commission has made clear that employers may continue to use reasonable NDAs and trade secrets law to protect their interests, including customer goodwill.[888] In fact, one study finds that 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or a non-recruitment agreement, and 74.7% of workers with non-competes are subject to all three provisions.[889] And in cases where non-competes with workers other than senior executives were tied to benefits like cash or equity, the Commission has provided time for those agreements to be renegotiated if necessary.[890] For senior executives, the Commission allows existing agreements to continue to be enforced.

The character of the governmental action here also counsels against viewing the final rule as a taking. ''A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.'' [891] There is no physical invasion here, and the final rule is promulgated under the Commission's authority to identify and prohibit unfair methods of competition.[892] Among other economic benefits described in Part IV.B, the Commission finds economy-wide benefits, including increases in new business formation and innovation. The Commission also finds that the final rule will increase earnings for workers by preventing enforcement of agreements that suppress their earnings. Moreover, non-competes have long been subject to government regulation, including not only section 5 of the FTC Act, but also State common

[876] *Id.* at 671.

[877] *See* Part IV.B.

[878] *See* Part IV.B.2.b.

[879] Part I.B.1.

[880] U.S. Const. amend. V.

[881] *Cedar Point Nursery* v. *Hassid,* 594 U.S. 139, 148 (2021).

[882] *Penn Cent. Transp. Co.* v. *City of N.Y.,* 438 U.S. 104 (1978).

[883] *Lingle* v. *Chevron U.S.A. Inc.,* 544 U.S. 528, 540 (2005).

[884] *Connolly* v. *Pension Ben. Guar. Corp.,* 475 U.S. 211, 224 (1986); *see also Nat'l Min. Ass'n* v. *Babbitt,* 172 F.3d 906, 917 (D.C. Cir. 1999) (applying *Connolly* to a Takings challenge to an administrative rule).

[885] *Murr* v. *Wis.,* 582 U.S. 383, 405 (2017); *see also Connolly,* 475 U.S. at 225.

[886] *See* Hiraiwa, Lipsitz, & Starr (2023) (showing that firms do not value the ability to enforce non-competes for workers earning up to $100,000 per year and potentially more).

[887] *Connolly,* 475 U.S. at 225–26.

[888] *See* Part IV.D.2.

[889] Balasubramanian, Starr, & Yamaguchi, supra note 74 at 35.

[890] *See* § 910.6.

[891] *Penn Cent. Transp. Co.* v. *City of N.Y.,* 438 U.S. 104, 124 (1978) (internal citation omitted).

[892] *See* 15 U.S.C. 45(a); *see also* Parts IV.B and C (the Commission's findings outlining the public benefits of the final rule and the public harm from the use of non-competes).

law, State enactments, and other Federal antitrust laws.

Finally, the final rule does not upset investment-backed expectations to the extent necessary to constitute a taking. Even in States that prohibit some or all non-competes, employers make many investments in workers that they would continue to make regardless of their ability to use non-competes, such as training, or that would be protected by other mechanisms, such as reasonable NDAs, trade secret law, and/or fixed term contracts. In other words, non-competes are not a prerequisite to employers' productivity and output, in large part because (as described in Part IV.D) employers have reasonable alternatives to protecting the investments they make. The Commission has also lessened the economic burden of the final rule by creating an exception for situations where a cause of action accrued before the effective date.[893] Furthermore, States and the Federal government have regulated and considered further regulating non-competes for years, and the Commission issued the NPRM more than 18 months before the effective date—and began exploring whether to regulate non-compete agreements more than five years ago.[894] There has thus been ample notice that non-competes may become unenforceable by rule,[895] and prior to this rule non-competes were already subject to case-by-case adjudication under section 5. For all these reasons, the Commission does not believe the final rule constitutes a taking.

3. Due Process

Similarly, the Commission disagrees with commenters who argued that applying the final rule to existing non-competes would present due process concerns. Assuming that these due process concerns are independent of other constitutional concerns like the alleged retroactive application of the final rule,[896] which are addressed in Parts V.B.1 and V.B.2, the Commission disagrees that there is any due process infirmity. Due process requires the government, at a minimum, to provide notice and an opportunity to be heard before depriving any person of property.[897] By issuing the NPRM and engaging in notice-and-comment rulemaking, the Commission has provided sufficient due process. And on top of the notice-and-comment process, there will be further process in an administrative adjudication or in court before any person is found to have violated the rule.

C. Section 910.3(c): Good Faith Exception

The Commission adds an exception in § 910.3(c) in an abundance of caution to ensure the final rule does not infringe on activity that is protected by the First Amendment[898] and to improve clarity in § 910.2(a). The exception states: ''It is not an unfair method of competition to enforce or attempt to enforce a non-compete clause or to make representations about a non-compete clause where a person has a good-faith basis to believe that this part 910 is inapplicable.'' A similar ''good-faith basis'' clause was in proposed § 910.2(a).

As described in Parts IV.B.4 and IV.C.5, the final rule includes a prohibition on enforcing or attempting to enforce non-competes in both § 910.2(a)(1) and (2). Under the *Noerr-Pennington* doctrine, filing a lawsuit—even if the suit may tend to restrict competition and is ultimately unsuccessful—is typically protected under the First Amendment right to petition and immune from antitrust scrutiny.[899] However, courts have recognized that where a lawsuit is a ''sham,'' *i.e.,* objectively baseless and subjectively designed solely to prevent competition, it is not protected.[900] For a non-compete covered by the final rule, enforcing or attempting to enforce the non-compete would likely be considered a ''sham'' lawsuit. Accordingly, such a lawsuit would not enjoy protection under the First Amendment. Section 910.3(b) ensures, however, that if a circumstance arises under which an employer's enforcement of or attempt to enforce a non-compete is protected by the First Amendment, the final rule does not run afoul of it.

As explained in Parts IV.B.4 and IV.C.5, the Commission adopts a prohibition on ''representing'' that a worker is subject to a non-compete in §§ 910.2(a)(1)(iii) and 910.2(a)(2)(iii). In § 910.3(c), the Commission incorporates a ''good-faith'' exception that applies to the prohibition on ''representing'' the worker is subject to a non-compete. Taken together, these provisions of the final rule prohibit an employer from representing to a worker that the worker is subject to a non-compete unless the employer has a good-faith basis to believe the worker is subject to an enforceable non-compete.

The Supreme Court has held ''there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.''[901] Accordingly, ''[t]he government may ban forms of communication more likely to deceive the public than to inform it, . . . or commercial speech related to illegal activity.''[902] The final rule does not cover protected speech because it prohibits only misrepresentations about whether a non-compete covered by the rule is enforceable. The good-faith exception in § 910.3(b) ensures, however, that the final rule does not run afoul of the First Amendment if a circumstance arises under which an employer's representation that a worker is subject to a non-compete is protected by that Amendment.

In the NPRM, the Commission stated that an employer would have no good faith basis to believe that a worker is subject to an enforceable non-compete ''where the validity of the rule . . . has been adjudicated and upheld.'' Some commenters stated that legal challenges to the final rule will create uncertainty and unpredictability related to compliance. The Commission believes the foregoing statement in the NPRM would contribute to this confusion and does not adopt it in this final rule. The Commission clarifies that the absence of a judicial ruling on the validity of the final rule does not create a good-faith basis for non-compliance. If the rule is in effect, employers must comply.

D. Requests To Expand Final Rule Coverage or To Provide an Exception From Coverage Under the Final Rule

In the NPRM, the Commission preliminarily concluded that applying the rule uniformly to all employers and workers would advance the proposed

[893] *See* § 910.3(b).

[894] *See* Part I.B.

[895] *Connolly* v. *Pension Ben. Guar. Corp.,* 475 U.S. 211, 226 (1986).

[896] Commenters invoking a due process concern outside the retroactivity context provided little contextual detail on the precise substance of the concern, nor did they explain what further process would be due before the Commission could promulgate the rule.

[897] *See, e.g., N. Am. Butterfly Ass'n* v. *Wolf,* 977 F.3d 1244, 1265 (D.C. Cir. 2020) (citing *Mathews* v. *Eldridge,* 424 U.S. 319, 333–34 (1976)).

[898] The Commission adopts § 910.3(b)(3) out of an abundance of caution and does not believe that any of the requirements in the final rule run afoul of the First Amendment because the Commission finds that the use of certain existing non-competes is an unlawful unfair method of competition.

[899] *See E.R.R. Presidents' Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers of Am.* v. *Pennington,* 381 U.S. 657 (1965).

[900] *Pro. Real Est. Invs., Inc.* v. *Columbia Pictures Indus., Inc.,* 508 U.S. 49, 60 (1993).

[901] *Cent. Hudson Gas & Elec.* v. *Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 563 (1980).

[902] *Id.* at 563–64.

rule's objectives to a greater degree than differentiating among workers on the basis of industry or occupation, earnings, another factor, or some combination of factors, and that it would better ensure workers are aware of their rights under the rule.[903] The Commission sought comment on this topic, including what specific parameters or thresholds, if any, should apply in a rule differentiating among workers.[904]

The vast majority of commenters supported the Commission's proposal to ban non-competes categorically for all workers.[905] Commenters from a broad spectrum of job types and industries stated that non-competes harm competition in a way that hurts workers and employers.

Commenters also supported the rule with perspectives specific to particular industries. In response to the Commission's request for comment on the issue, some commenters argued that the Commission should further expand the rule to cover non-competes between franchisors and franchisees.

Other commenters argued the Commission should differentiate among workers and employers along different parameters. They stated that workers with higher earnings, higher skills, specific job titles, or access to specific types of information should be excluded. Some stated that particular industries should be excluded wholesale, including all workers in an industry regardless of their job duties, while some stated that only certain workers in particular industries should be excluded.

In adopting the final rule, the Commission considered each request for exclusion from or expansion of coverage under the final rule and concludes that the use of covered non-competes is an unfair method of competition. The Commission also concludes that applying the final rule as adopted in part 910 to the full extent of the Commission's jurisdiction with respect to covered workers advances the final rule's objectives to a greater degree than differentiating among workers. In response to, *inter alia,* comments regarding the potential costs and difficulties that may result from invalidating existing non-competes for certain senior executives, however, the final rule differentiates between senior executives and other workers by allowing existing non-competes for senior executives to remain in force. The final rule adopts a uniform rule categorically banning new non-competes for all workers. The Commission substantiates its finding that the use of non-competes with workers is an unfair method of competition in Parts IV.B and IV.C.

In this Part V.D, the Commission addresses comments related to differentiation or exclusion of certain workers, employers, or industries. Comments related to expanding or limiting the definition of worker or employer are addressed in Parts III.C and III.G. Comments related to the Commission's jurisdiction and exclusions from the Commission's jurisdiction in the FTC Act are addressed in Part II.E. Comments related to the prevalence of non-competes within and across industries are addressed in Part I.B.2.

Overall, the Commission is committed to stopping unlawful conduct related to the use of certain non-competes to the full extent of its authority and jurisdiction. The Commission finds every use of a non-compete covered by the final rule to be an unfair method of competition under section 5 of the FTC Act for the reasons in Parts IV.B and IV.C. The use of an unfair method of competition cannot be justified on the basis that it provides a firm with pecuniary benefits.[906] To the extent commenters argue for an exception based on this justification, the Commission declines to create any exception on that basis. Moreover, a uniform rule carries significant benefits, which many commenters who otherwise opposed the NPRM acknowledged.[907] Among those benefits is the certainty for both workers and employers from a uniform rule, which also lessens the likelihood of litigation over uncertain applications. Exceptions for certain industries or types of workers would likely increase uncertainty and litigation costs, as parties would dispute whether a specific business falls within an industry-wide exception. Most importantly, exceptions would fail to remedy the tendency of non-competes to negatively affect competitive conditions in the excepted industries or for excepted types of workers and would likely have *in terrorem* effects.

1. Differentiation by Worker Compensation or Skills

Many commenters sought an exception for highly paid or highly skilled workers, often alongside requests for an exception for senior executives, while many others asked the Commission to keep these workers within the scope of the final rule. Commenters seeking an exception argued that highly paid and highly skilled workers in particular did not experience exploitation and coercion and were more likely to have access to confidential information or client or customer relationships, along with the other justifications for non-competes discussed in Part IV.D. Commenters' specific arguments on the evidence concerning highly paid or highly skilled workers are considered in the relevant subsections of Part IV.B. Many commenters proposed using a compensation threshold to differentiate highly paid workers and senior executives, discussed in IV.C.4.b. Other commenters suggested an exception based on the FLSA exemptions or the worker's level of access to confidential information, discussed in Parts IV.C.4. and V.D.2.

The Commission finds that non-competes have a tendency to negatively affect competitive conditions in labor markets and product and service markets, including non-competes binding highly paid and highly skilled workers. The evidence shows that, among the other effects described in Part IV.B, non-competes for highly paid and highly skilled workers suppress wages for these workers,[908] restrict competitors' access to highly skilled workers,[909] and restrict entrepreneurship.[910] Notably, as described in Parts IV.B.2 and IV.C.1, the Commission concludes that non-competes for highly paid or highly skilled workers who are not senior executives are generally exploitative and coercive. The Commission finds that highly paid and highly skilled workers who are not senior executives only rarely negotiate meaningful consideration in exchange for a non-compete. As the Commission finds, the overwhelming response from commenters, particularly workers, was that non-competes are exploitative and

[903] NPRM at 3518. The NPRM's proposed definition of ''worker'' excluded franchisees in the context of franchisee-franchisor relationships. *Id.* at 3520. The NPRM also proposed an exception for certain non-competes between the seller and the buyer of a business.

[904] NPRM at 3519.

[905] The Commission received over 26,000 public comments from a wide range of stakeholders. Among these comments, over 25,000 expressed support for the Commission's proposal to categorically ban non-competes.

[906] *See, e.g., Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 371 (1965) (''Upon considering the destructive effect on commerce that would result from the widespread use of these contracts by major oil companies and suppliers, we conclude that the Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves.''); *see also* Part II.F.

[907] *See* Part IX.C.

[908] *See* Part IV.B.3.a.ii.

[909] *See* Part IV.C.2.c.i.

[910] *See* Part IV.B.3.b.i.

coercive for many workers in highly paid professions other than senior executives.[911] While there may be highly paid or highly skilled workers who do not meet the definition of ''senior executive'' and who are not exploited or coerced, including workers above the definition's total compensation threshold, the Commission explains in Part IV.C.4 why a compensation threshold is necessary—but not sufficient—for purposes of defining senior executives whose existing non-competes may remain in force under the final rule. Further, the Commission finds that employers have sufficient alternatives to non-competes for highly paid and highly skilled workers.[912] The Commission also explains why it is not exempting all non-competes that were exchanged for consideration in Part IV.C.3. Accordingly, the final rule does not include any workers other than highly paid senior executives in the exception from the ban on enforcing existing non-competes. To ensure that only workers for whom there is insufficient evidence of exploitation and coercion are included in the exception, the final rule narrowly defines senior executive in § 910.1.[913]

2. Differentiation by Worker Access to Information

Some commenters suggested excluding workers with access to trade secrets, confidential business information, or other intellectual capital. Commenters contended these workers are uniquely situated because of their access to valuable employer information. Many commenters responded to these arguments and disagreed with them. Some commenters stated that employers overstate the proportion of workers who have access to such information. Commenters also stated that employers exaggerate the amount or quality of information that should be appropriately considered a trade secret, confidential business information, or other intellectual capital, and therefore exaggerate the purported cost to the firm of not being able to use non-competes. Commenters also stated that employers have alternatives to non-competes that generate less harm to competition, to workers, to the economy, and to rival firms, including NDAs and fixed-term employment contracts.

The Commission declines to adopt an exclusion based on workers' access to trade secrets, confidential business information, or other intellectual capital because it finds such an exclusion would be unnecessary, unjustified, unworkable, and prone to evasion. The Commission finds the use of non-competes to be an unfair method of competition and addresses claimed justifications related to trade secrets, confidential business information, or other intellectual capital in Part IV.D. The Commission finds that protecting trade secrets, confidential information, and other intellectual capital is an insufficient justification for non-competes because employers have less restrictive alternatives for protecting such information. Moreover, if the Commission were to exempt workers with access to confidential information, employers could argue that most or all workers fall under the exception, requiring workers to engage in complex and fact-specific litigation over the protected status of the underlying information. As explained in Part IX.C, such case-by-case adjudication of the enforceability of non-competes has an *in terrorem* effect that would significantly undermine the Commission's objective to address non-competes' tendency to negatively affect competitive conditions in a final rule.

3. Differentiation by Industry Other Than Healthcare

Some businesses and organizations argued that specific industries should be exempt from the final rule. The Commission carefully considered these comments and declines to adopt any industry-based exceptions. The Commission notes that while some commenters characterized purported justifications for an exclusion from the final rule as unique to a particular industry, the purported justifications were in fact the same as the those addressed in Part IV.D, namely, the need to protect investments in labor, trade secrets, confidential business information, or other intellectual capital. The Commission addresses those arguments in full in Part IV.D, but in this Part V.C.3 further discusses examples of comments seeking industry-based exceptions.

a. Client- and Sales-Based Industries

Some commenters in client- or sales-based industries, including real estate and insurance, argued they are unique and should be excluded from any rule. A real estate commenter argued that job switching by real estate employees is similar to the sale of a business where the goodwill and book of business generated by the departing employee must remain with the business. A timeshare industry commenter claimed the industry had unique features justifying the use of non-competes with highly paid workers, such as the cost of marketing and cultivation of relationships to bring in and maintain customers as well as the need to protect proprietary targets and strategies for resort development, due in part to the limited number of available resort contracts. A commenter representing insurance marketing organizations (IMOs), which serve as facilitators between insurance carriers, agents, and consumers similarly argued for an exclusion, citing client goodwill, purported trade secrets in sales methods, sales leads, unique compensation structures, and company analyses, and consumer harm from potential agent misconduct if the agent moves to a new IMO and changes the consumer's policy. Some businesses stated that non-competes rarely impact a worker's ability to find other work in their industry, sometimes because the new employer ''buys out'' the non-compete.

The majority of commenters from the real estate and insurance industry workers and small, independent insurance agencies, supported a comprehensive ban. These comments painted a picture consistent with the Commission's findings in Part IV.B regarding indicia of unfairness, including facial unfairness, and the tendency of non-competes to negatively affect competitive conditions in the labor and product and service markets. A worker from the real estate industry stated that non-competes are standard in the industry for all workers, regardless of their position in a company. Commenters stated that they were asked to sign after starting their job, with one worker stating that they faced the option of either signing the non-compete or leaving and losing future commissions for work they had done. Workers noted that they were terminated without cause and still required to comply with a non-compete, and that they had no bargaining power for promotion or wage increases. The following examples are illustrative of the comments the Commission received:

- As an aspiring entrepreneur in the real estate space, I am in a relatively small market where one company dominates. I recently ended my employment with them. They use non-competes to restrict competition and trap employees. The abolition of non-competes is paramount as small towns/cities grow. . . .[914]
- I signed a non-compete after working at a Real Estate Brokerage for several months. I

[911] *See* Part IV.B.2.b.

[912] *See* Part IV.D.2.

[913] For a more detailed discussion of proposed § 910.1(i), *see* Part IV.C.4.a.

[914] Individual commenter, FTC–2023–0007–10710.

was told I had to sign it or I would not be paid on the transactions I had pending. The non-compete was so overreaching—there was no geographical scope, the penalty was more than prohibitive. I was told that no one really enforces them or attempts to. I signed it, collected my outstanding pay and left the company within 90 days. Fast forward 4 years, I have been defending myself in litigation over this non-compete for over 3 years. Unable to afford qualified representation.[915]

- I am a business owner and have had 40 independent contractors under my business at my peak. They were all under non-compete, and if I could go back, I would eliminate the non-compete. It doesn't help the employee or contractor, and it doesn't help the business either. It spurs an unhealthy work environment. Clogs up the judicial system with frivolous cases where they try and scare people from earning a living. . . . I 100% support this ban, and it should go into effect immediately.[916]

Commenters stated that non-competes are standard in the insurance industry and that the industry is facing significant consolidation, fueled in part by private equity firms. These commenters argued that workers in the insurance industry are prohibited from seeking jobs with higher pay and better benefits in their specialty. Commenters stated that they were not able to negotiate better conditions at their current job and that employers can change the employment terms at will, so workers face reduced commissions and pay while still being held to a non-compete. Commenters stated that insurance agents are highly trained and specialized, and non-competes force them to leave their specialty and start over in a new specialty for less pay. Commenters also argued that non-competes thwart consumer choice because insurance agents create relationships with their customers, and customers lose the ability to choose the same agent if the agent is bound by a non-compete. Commenters also noted that standard employment agreements in the insurance industry require workers to pay their own costs to defend against noncompete litigation even if the worker is successful in the challenge such that even if a worker does not violate the terms of a noncompete, or the noncompete is not enforceable, workers who change jobs or start a new agency are often faced with significant legal bills. Commenters noted that although independent licensing agents are meant to be able to contract with multiple insurance companies, they are heavily restricted by non-competes, creating regional monopolies. The following examples are illustrative of the comments the Commission received:

- As a captive "Independent Contractor" for a large insurance company, this rule would be a lifeline should I decide to pursue an independent agent opportunity. The insurance company I represent, has gradually cut commissions over the past few years . . . that makes it extremely uncompetitive compared to peers. There is absolutely no reason why I should be held prisoner and not be able to pursue far more favorable, and beneficial opportunities, for both myself and my family.[917]
- Ideally I would like to start my own insurance agency but am currently prevented from doing so due to a non-compete clause. We are already somewhat limited in employment opportunities here in rural West Texas . . . . I'm finding it difficult to find a path to provide for my family during the two year period [of the non-compete], and therefore am considering scrapping the new business idea and remaining at my current job. . . . In a sense, I feel trapped at my current job, and ultimately I feel hobbled from achieving my full potential as a future small business owner.[918]

The Commission declines to adopt an exclusion for client- or sales-based industries such as real estate and insurance. The use of non-competes is an unfair method of competition and the purported justifications raised by commenters do not change the Commission's finding. The Commission also notes that, to the extent commenters seeking an exception are referencing different restrictive covenants, including some garden variety non-solicitation agreements, which do not prohibit or function to prevent a worker from switching jobs or starting a new business as described in Part III.D, the final rule does not apply to them. Thus, the Commission focuses on commenters' purported need for an exclusion based on non-competes alone.

In response to commenters arguing that information and techniques related to sales, including strategy on developing business, is confidential or proprietary and that workers' ability to move to another job or start a business would thus harm them, the Commission notes that any specific information or truly proprietary techniques can be protected by much less restrictive alternatives, such as trade secret law and NDAs. For example, proprietary targets and strategies for timeshares or unique compensation structures or company analyses cited by IMOs can be otherwise protected. Moreover, companies can compete on the merits to retain their customers by offering better products and services. Requiring workers to leave the industry or the workforce is an overbroad restriction that tends to negatively affect—and actually harms—competition with attendant harm to workers and rivals, as outlined in Part IV.B.

With respect to commenter arguments that non-competes are needed to protect specialization related to particular products and skills related to sales, as the Commission finds in Part IV.D, preventing workers from using their general trade knowledge and skills, including their gains in the same through experience with a particular employer, is not a legally cognizable justification for non-competes. That a real estate, insurance, or any other sales agent inherently learns skills and gains knowledge in the performance of their job, becoming a more effective salesperson over time, is not itself a cognizable justification for preventing the worker from re-entering the labor market as a worker or business owner. Employers' efforts to use non-competes to prevent workers from using general trade knowledge and skills is an unfair method of competition under section 5 because it is an attempt to avoid competition on the merits.[919] To the extent employers seek to protect legitimate investments in training, the Commission finds employers have less restrictive alternatives, including fixed duration contracts and better pay or other terms and conditions of employment to retain the worker. Finally, the Commission notes that because all covered employers can no longer maintain or enforce non-competes with workers who are not senior executives, employers may also have a larger pool of trained and experienced workers to hire from.

The Commission disagrees with commenters arguing that a worker leaving a sales position is akin to the sale of a business. Unlike the seller of a business, a worker is in an unequal bargaining position and does not receive compensation when leaving the firm. The fact that a worker generates goodwill for an employer is not a cognizable justification for non-competes. First, it not clear that the employer would lose goodwill associated with their business if a particular worker leaves. Moreover, commenters do not specify the extent to which their legitimate investment in the worker—separate from employing the

[915] Individual commenter, FTC–2023–0007–5502.

[916] Individual commenter, FTC–2023–0007–6782.

[917] Individual commenter, FTC–2023–0007–10919.

[918] Individual commenter, FTC–2023–0007–19441.

[919] *See Nat'l Soc'y of Prof. Engrs.* v. *United States,* 435 U.S. 679 (1978) (confirming that limiting competition, even if based on the specific advantages of doing so because of the particular nature of an industry, is not a cognizable justification).

worker to use their general skills and knowledge to successfully perform the job—generates such goodwill. To the extent employers do seek to protect investments in goodwill, the employer has less restrictive alternatives to attract and retain workers and customers or clients.

b. Industries With Apprenticeships or Other Required Training

Some commenters representing industries with apprenticeships or that require training as a part of employment, such as real estate appraisers, plumbers, and veterinarians, argued their industry should be excluded from the final rule. These commenters contended that a significant investment is needed to make workers productive in their industries and that they need to use non-competes to protect that investment. Each commenter cited an apprenticeship or training period during which they are not able to bill or must bill a lower amount for a worker's labor.

Worker commenters from these industries stated that non-competes leave them unable to launch or progress in their career because non-competes tie them to their first employer. Some appraiser commenters noted that, while their share of the appraisal fee rises to some extent after completing their apprenticeship, they cannot negotiate higher shares of the fee or other better working conditions because of non-competes. A union commenter representing plumbers noted that plumbers with non-competes are not able to accept better offers of employment, with better pay and benefits, including union positions. Other worker commenters mentioned geographic overbreadth and excessively long non-competes of two years. Many veterinarian commenters supported the proposed rule, stating that non-competes artificially held down their compensation and did not allow them to start new practices in areas where the need for more veterinary services is great, with some commenters stating that this contributed to consolidation.

The Commission declines to exclude industries, such as real estate appraisal, plumbing, and veterinary medicine, in which an industry must purportedly invest in significant training or apprenticeship of workers before the employer considers them to be productive. The Commission finds that these employers have less restrictive alternatives—namely fixed duration contracts—to protect their investment in worker training. A return on investment in the training does not require that the worker be unable to work for a period after leaving employment. Moreover, employers stand to benefit from the final rule through having access to a broader labor supply—including incoming experienced workers—with fewer frictions in matching with the best worker for the job.

c. Financial Services

Some commenters representing financial services companies opposed the rule, arguing non-competes are necessary for the industry and their industry is unique because non-competes have been used for decades, while numerous firms have entered the market, workers are mobile, and there is no evidence of blocked or curbed entry, lack of access to talent, lower innovation, or other negative impacts in that market. These commenters mention that mobility and access to talent is possible because new employers often "buy out" a worker's non-compete to hire a worker who may be otherwise bound by a non-compete. Several commenters also contend that non-competes are especially vital to firms that focus on securities or commodities trading because disclosure of commercially sensitive information to competitors can be extremely damaging to their former employers' profitability.

Commenters identified three studies which they contend suggest that non-competes improve worker productivity. First, commenters identified two studies on the Broker Protocol, an agreement among financial advisory firms which ostensibly limited the use of NDAs, non-solicitation agreements, and non-competes simultaneously. One study by Gurun, Stoffman, and Yonker finds that firms that joined the Protocol experienced higher rates of employee misconduct and earned increased fees.[920] The other study, by Clifford and Gerken, finds that firms which joined the Protocol invested more heavily in licensure and experienced fewer customer complaints.[921] Commenters noted that these two studies have conflicting findings on advisor misconduct. The authors themselves discuss these findings, with each criticizing the approach of the other. One commenter stated that, from a technical standpoint, the Clifford and Gerken study has a superior approach due to its substantially larger sample size and its analysis of the assumptions underlying the methodologies used in both studies. A third study—a study of the mutual fund industry by Cici, Hendriock, and Kempf—finds that mutual fund managers increase their firms' revenue when non-competes are more enforceable by investing in higher performing funds, attracting new clients, and increasing revenue from fees.[922] This study uses three changes in non-compete enforceability, measured in a binary fashion.

A commenter representing a large group of public equity investors supported the rule, stating that a comprehensive ban would create an inclusive labor market, which is integral to long-term corporate value and a dynamic, innovative, and equitable economy. Financial services worker commenters also supported the rule, citing to their failure to be paid for their skills over time, the threat of litigation in seeking new employment, and the overbroad nature of non-competes in the industry. The following example is illustrative of the comments the Commission received:

- I am a female finance professional with strong qualifications and experience. I am subject to an extremely long and comprehensive non compete contract which I was induced to sign at a young age. I have been offered many positions at other firms who would be more willing to provide me with leadership opportunities and a path to further advancement, but I am unable to consider them and I am essentially trapped at my firm. . . .[923]

The Commission declines to exclude financial services companies over which it has jurisdiction from the final rule. The Commission finds in Part IV.C that non-competes are restrictive, exclusionary, and also exploitative and coercive for higher wage and highly skilled workers, including workers in finance. The Commission also finds in Part IV.B and IV.C that non-competes tend to negatively affect competitive conditions in labor market through reduced labor mobility and in the product and services market through reduced innovation and new business formation. Evidence that new employers sometimes buy out non-competes also suggests that such clauses harm competition by raising the cost to compete and creating deadweight economic loss for the new employer.[924]

The empirical evidence provided by commenters arguing for differentiation

[920] Umit G. Gurun, Noah Stoffman, & Scott E. Yonker, *Unlocking Clients: The Importance of Relationships in the Financial Advisory Industry,* 141 J. of Fin. Econ. 1218–43 (2021).

[921] Christopher P. Clifford & William C. Gerken, *Property Rights to Client Relationships and Financial Advisor Incentives,* 76 J. of Fin. 2409–45 (2021).

[922] Gjergji Cici, Mario Hendriock, & Alexander Kempf, *The Impact of Labor Mobility Restrictions on Managerial Actions: Evidence from the Mutual Fund Industry,* 122 J. of Banking & Fin. 105994 (2021).

[923] Individual commenter, FTC–2023–0007–0953.

[924] *See* Part IV.C.2.c.i.

for the finance industry does not support their claims. The Commission finds that it is difficult to weigh the evidence in the two studies of the Broker Protocol because they reach conflicting results, though the Commission agrees that the technical approach in the Clifford and Gerken study is superior due to its larger sample size. More importantly, both studies primarily concerned non-solicitation agreements, and do not isolate any effects of non-competes. So even if the studies did not reach conflicting results, the Commission believes they still would yield little reliable information about the effects of non-competes specifically. With respect to the study of the mutual fund industry, the Commission notes that under section 5, firms may not justify unfair methods of competition based on pecuniary benefit to themselves.[925] The study does not establish that there were societal benefits from the attraction of new clients or the increased fee revenue—just that the firms benefited. Therefore, this study does not establish a business justification that the Commission considers cognizable under section 5.

d. On-Air Talent

Some commenters opposing the rule stated that investment in on-air talent would be considerably reduced without non-competes. Commenters argued that on-air talent becomes well-known because of employers' investment and reputation and that employers must be able to use non-competes to protect this investment. The Commission also received a number of comments from and on behalf of on-air talent. Those commenters stated that non-competes are ubiquitous for on-air talent, that they are often localized geographically, that they suppress compensation, and that they force workers seeking a better match to move out of their localities. The following example is illustrative of the comments the Commission received:

- I am a professional broadcast journalist subject to a non-compete agreement with every employment contract I have ever signed, which is the industry standard. I understand the need for contractual agreements with on-air talent and some off-air talent, but non-compete agreements have historically offered nothing to employees besides restricting where they work, and how much money they are able to earn . . . [while] knowing that employees would have to completely relocate if they wanted to seek or accept another opportunity.[926]

The Commission declines to exclude on-air talent from the final rule. The Commission finds the use of non-compete agreements is an unfair method of competition as outlined in Part IV.B, and commenters do not provide evidence that a purported reduction in investment in on-air talent would be so great as to overcome that finding. Specifically, the success of on-air talent is a combination of the employer's investment and the talent of the worker, both of which benefit the employer. As noted in Part IV.D, other less restrictive alternatives, including fixed duration contracts and competing on the merits to retain the talent, allow employers to make a return on their own investments. Moreover, as stated in Part II.F, firms may not justify unfair methods of competition based on pecuniary benefit to themselves. Employers in this context do not establish that there are societal benefits from their investment in on-air talent, but only that the firms benefited.

e. Construction

A commenter representing companies who provide skilled workers in construction stated that the Commission should exclude the industry from the rule because non-competes are necessary to the industry's success. The commenter states that non-competes are necessary for investment in innovation and productivity in the industry. The comment cites to three studies. Two of the studies find a general reduction in productivity in construction and conclude, *inter alia,* further study is warranted to better understand the trend—Goolsbee and Syverson [927] and Huang, Chapman, and Burty (''NIST study'' [928]). The third study is a McKinsey & Company report published in 2020 predicting innovation in the construction industry in the coming years.[929]

The evidence cited by this commenter is exclusively about broad trends in productivity in the industry, and what may impact those trends. None of the studies explicitly examines non-competes, and they do not support inferences on the effects of non-competes in this particular industry. Indeed, the Commission finds that the final rule addresses issues raised by the commenter. For example, the commenter notes that productivity in the industry has been broadly declining for years. Notably, this downward trend exists with non-competes in use in the industry. The Commission notes that, under its analysis of the effect of the final rule, productivity will benefit because the final rule frees up labor and allows for greater innovation. The NIST study raises ''skilled labor availability'' as the very first factor that affects productivity. The Commission finds in Part IV that non-competes suppress labor mobility and the Commission believes the final rule will result in firms having access to workers who are a better, more productive fit. The McKinsey & Company report notes that changes in the industry will require adaptation by firms. The Commission believes the final rule will facilitate this adaptation by sharing non-confidential know-how across firms through increased mobility of workers. The rule may also help mitigate, and certainly will not exacerbate, concerns over increased concentration in the industry raised in the McKinsey & Company report, as the Commission finds that non-competes inhibit new business formation in Part IV.B.3.b.i. Moreover, the Commission believes non-competes may increase concentration, as discussed in Part IV.B.3.b.iii.

Additionally, the Commission finds that less restrictive alternatives, including appropriately tailored NDAs and non-solicitation agreements, are sufficient to address disclosure of confidential information and concerns related to client business. With respect to concerns that the construction industry as a whole is suffering from under-investment in capital and that the final rule may further disincentivize capital investment, as the Commission finds in Part IV.B.3.b.i, non-competes inhibit new business formation. The increase in new business formation from the final rule will bring new capital to bear in the industry. The Commission addresses the empirical literature and comments related to capital investment in detail Part IV.D.1. The Commission notes here that it is not clear any purported capital investment associated with non-competes is entirely beneficial because it may be the result of firms over-investing in capital because they do not face competition on the merits. Even if there is some net decrease in capital investment due to the final rule, commenters provide no reason to believe it would be a material amount.

[925] *Id.*

[926] Individual commenter, FTC–2023–0007–12779.

[927] Austan Goolsbee & Chad Syverson, *The Strange and Awful Path of Productivity in the U.S. Construction Sector* (NBER Working Paper 30845, Jan. 2023).

[928] Allison L. Huang, Robert E. Chapman, & David Burty, *Metrics and Tools for Measuring Construction Productivity: Technical and Empirical Considerations,* Nat'l Inst. of Standards and Tech., Bldg. and Fire Rsch. Lab., NIST Special Publication 110 (September 2009).

[929] McKinsey & Co., *The Next Normal in Construction: How Disruption is Reshaping the World's Largest Ecosystem* (June 2020).

4. Exclusion for Covered Market Participants That Have Competitors Outside the FTC's Jurisdiction

The Commission explained in the NPRM that some entities that would otherwise be employers may not be subject to the final rule to the extent they are exempted from coverage under the FTC Act.[930] As described in Part II.E.1, the Act exempts, *inter alia,* ''banks,'' ''persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act of 1921'' [931] as well as an entity that is not ''organized to carry on business for its own profit or that of its members.'' [932] A few business and trade organization commenters argued the Commission should rescind the proposal or should not promulgate the rule because limits on the Commission's jurisdiction mean that the rule will distort competitive conditions where coverage by the final rule may not be universal. These commenters identified industries where employers excluded from the Commission's jurisdiction compete with covered persons, including livestock and meatpacking industries, and areas where government or private employers subject to the State action doctrine compete with covered employers. They contended that excluded employers will be able to use non-competes while their covered competitors are legally prohibited from doing so, advantaging excluded employers.

The Commission declines to rescind the proposal or otherwise refrain from promulgating a rule simply because the rule would not cover firms outside the Commission's jurisdiction. As an initial matter, jurisdictional limits are not unique to the Commission. All agencies have limits on their jurisdiction—many of which do not neatly map to all competitors in a particular market. Moreover, as explained in Parts IV and X, the final rule will have substantial benefits notwithstanding the FTC Act's jurisdictional limits, including increases in worker earnings, new firm formation, competition, innovation, and a decrease in health care prices (and potentially other prices). Furthermore, the Commission finds the risk of material disparate impact in markets where some but not all employers are covered by the final rule is minimal and, in any event, the final rule's overall benefits justify any such potential impact. As commenters acknowledged, excluded employers already compete with covered employers in the same markets. That is, coverage under the FTC Act—whether an employer is subject to the FTC Act and enforcement by the FTC—differs across a range of topics and long predates this final rule, which does not materially alter the status quo in that respect. Moreover, even in the absence of the rule, firms within the jurisdiction of the FTC Act are already subject to potential FTC enforcement against unfair methods of competition, including against non-competes, while firms outside the FTC's jurisdiction are not. The final rule does not alter that basic landscape.

At least one financial services industry commenter stated that national banks are outside of the Commission's jurisdiction and argued the final rule should exclude bank holding companies, subsidiaries, and other affiliates of Federally regulated banks to avoid disparate treatment of workers employed by different affiliates within the same organization, and because those entities are already heavily regulated. The Commission declines to exclude bank holding companies, subsidiaries, and other affiliates of Federally regulated banks that fall within the Commission's jurisdiction. While these institutions may be highly regulated, and depending on the corporate structure non-competes may be allowed for some workers but not others, the Commission finds that neither factor justifies excluding them from the final rule. If Federally regulated banks are concerned about disparate treatment of workers employed by their own different affiliates, they have the option to stop using non-competes across all their affiliates.

A corporation wholly owned by an Indian tribe asserted that the Commission should exclude Indian tribes and their wholly owned business entities from the definition of ''employer.'' The commenter asserted that the FTC Act does not explicitly grant jurisdiction over Indian tribes and their corporate arms. The commenter further argued that critical tribal revenue will be lost if tribal businesses' ability to retain skilled workers is impacted. The Commission declines to categorically exclude tribes or tribal businesses from coverage under the final rule. The FTC Act is a law of general applicability that applies to Indians, Indian Tribes, and tribal businesses.[933] The Commission recognizes, however, that in some instances these entities may be organized in such a way that they are outside the Commission's jurisdiction.[934] Whether a given Tribe or tribal business is a corporation within the FTC Act will be a fact-dependent inquiry. The Commission is aware of no evidence suggesting the final rule would disproportionately impact tribes or tribal businesses.[935]

5. Coverage of Healthcare Industry

Many commenters representing healthcare organizations and industry trade associations stated the Commission should exclude some or all of the healthcare industry from the rule because they believe it is uniquely situated in various ways. The Commission declines to adopt an exception specifically for the healthcare industry. The Commission is not persuaded that the healthcare industry is uniquely situated in a way that justifies an exemption from the final rule. The Commission finds use of non-competes to be an unfair method of competition that tends to negatively affect labor and product and services markets, including in this vital industry; the Commission also specifically finds that non-competes increase healthcare costs. Moreover, the Commission is unconvinced that prohibiting the use of non-competes in the healthcare industry will have the claimed negative effects.

a. Comments Received

Many business and trade industry commenters from the healthcare industry seeking an exception,

[930] NPRM at 3510.

[931] *Id.* (citing 15 U.S.C. 45(a)(2)).

[932] *Id.* (citing 15 U.S.C. 44).

[933] *See Fed. Power Comm'n* v. *Tuscarora Indian Nation,* 362 U.S. 99, 116–17 (1960) (examining case law supporting the conclusion that ''a general statute in terms applying to all persons includes Indians and their property interests''); *FTC* v. *AMG Servs., Inc.,* No. 2:12–CV–00536–GMN, 2013 WL 7870795, at *16–*21 (D. Nev. July 16, 2013), *report and recommendation adopted,* No. 2:12–CV–00536–GMN, 2014 WL 910302 (D. Nev. Mar. 7, 2014) (discussing the FTC Act's applicability to Indian Tribes and tribal businesses).

[934] *See, e.g., AMG Servs.,* 2013 WL 7870795, at *22 (finding genuine dispute of material fact barring summary judgment on question of whether tribal chartered corporations were corporations under the FTC Act).

[935] The commenter also asked the Commission to engage Indian tribes about the proposed rule, citing Executive Order 13175. However, the Commission notes that Executive Order 13175, which requires consultation with Indian Tribes before promulgating certain rules, does not apply to independent regulatory agencies such as the Commission. E.O. No. 13175, 65 FR 67249 (Nov. 6, 2000) (stating that the term ''agency,'' which governs the applicability of the executive order, excludes agencies ''considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5)''); 44 U.S.C. 3502(5) (listing the Commission as an ''independent regulatory agency''). The Commission did, however, provide extensive opportunities for public input from any and all stakeholders, including a 120-day comment period (extended from 90 days) and a public forum held on February 16, 2023, that provided an opportunity to directly share experiences with non-competes.

including, for example, hospitals, physician practices, and surgery centers, focused on whether the Commission has jurisdiction to regulate nonprofit entities registered under section 501(c) of the Internal Revenue Code. The Commission addresses its jurisdiction in Part II.E and considers comments related to requests for an industry-based exclusion for all or part of the healthcare industry in this section. As stated in Part II.E, entities claiming tax exempt status are not categorically beyond the Commission's jurisdiction, but the Commission recognizes that not all entities in the healthcare industry fall under its jurisdiction.

Based on the assumption that entities claiming tax-exempt status as nonprofits and publicly owned healthcare organizations would be exempt, many industry commenters contended that for-profit healthcare organizations must be also exempted from the rule as a matter of equal treatment. Commenters cited data from the American Hospital Association (AHA) indicating that as many as 58% of all U.S. hospital systems claim tax-exempt status as nonprofits, 24% are for-profit hospitals, and 19% are State and local government hospitals. One commenter cited AHA data indicating that 78.8% of for-profit hospitals are located in the same Hospital Referral Region (HRR) as at least one entity that claims tax-exempt status as a nonprofit. Many commenters argued that for-profit entities and entities that claim nonprofit status compete for patients, physician and non-physician staff, and market share. These commenters contended that a rule covering only for-profit healthcare entities will distort the market in favor of entities claiming tax-exempt status as nonprofits, which would continue using non-competes. One commenter identifying as an entity claiming nonprofit tax-exempt status argued that such entities need to rely on non-competes to compete with for-profit competitors because, unlike for-profit health systems, they invest significantly in specialized training and mentorship, and offer a guaranteed minimum salary to recent graduates.

Some commenters contended that favoring entities claiming tax-exempt status as nonprofits would have negative effects. Some commenters argued that disparate coverage under the rule may exacerbate consolidation in the healthcare industry by advantaging entities that claim tax-exempt status as nonprofits. They stated that increased consolidation would reduce the available supply of skilled labor for for-profit hospitals, increasing labor costs and contributing to higher prices paid by patients. Commenters noted a trend in physicians increasingly leaving private practice to work at large hospital groups claiming tax-exempt status as nonprofits, which, they contended, may continue to lock those physicians up using non-competes. Industry commenters also argued that insurance premiums will rise more than they would absent the rule because of the greater market power and resulting leverage of entities that claim tax-exempt status as nonprofits in provider network negotiations. One manufacturing industry association commenter argued that the burden of rising premiums will be passed on to manufacturers who provide health insurance to their employees.

Commenters also argued that a rule covering for-profit healthcare providers would cause independent, physician-owned practices, and small community practices to suffer a competitive disadvantage compared to larger entities that claim tax-exempt status as nonprofits and public hospital groups, reducing the number of these practices and interrupting continuity of care for their patients. Commenters stated that such practices will suffer these consequences acutely in States or localities that are particularly saturated with entities that claim tax-exempt status as nonprofits or exempt State or local hospitals, and cited New York and Mississippi as examples. A commenter claimed that public hospitals regulated by the Commission will incur losses because of their reduced ability to hire and retain physicians that perform profitable procedures. One commenter cited a 1996 Commission study to contend that, all else equal, hospitals that claim tax-exempt status as nonprofits set higher prices when they have more market power. A business commenter contended that, given what they considered a large-scale exemption of certain physician employers from the Commission's jurisdiction, the States are more appropriate regulators of non-competes between physicians and employers. Other commenters claimed that the Commission must further study the consequences of differential treatment.

Conversely, many commenters vociferously opposed exempting entities that claim tax-exempt status as nonprofits from coverage under the final rule. Several commenters contended that, in practice, many entities that claim tax-exempt status as nonprofits are in fact ''organized to carry on business for [their] own profit or that of [their] members'' such that they are ''corporations'' under the FTC Act. These commenters cited reports by investigative journalists to contend that some hospitals claiming tax-exempt status as nonprofits have excess revenue and operate like for-profit entities. A few commenters stated that consolidation in the healthcare industry is largely driven by entities that claim tax-exempt status as nonprofits as opposed to their for-profit competitors, which are sometimes forced to consolidate to compete with the larger hospital groups that claim tax-exempt status as nonprofits. Commenters also contended that many hospitals claiming tax-exempt status as nonprofits use self-serving interpretations of the IRS's ''community benefit'' standard to fulfill requirements for tax exemption, suggesting that the best way to address unfairness and consolidation in the healthcare industry is to strictly enforce the IRS's standards and to remove the tax-exempt status of organizations that do not comply. An academic commenter argued that the distinction between for-profit hospitals and nonprofit hospitals has become less clear over time, and that the Commission should presumptively treat hospitals claiming nonprofit tax-exempt status as operating for profit unless they can establish that they fall outside of the Commission's jurisdiction.

The Commission also received many comments about coverage of the health care sector generally under the rule. Some commenters urged the Commission to ensure that health care workers, including doctors and physicians, were covered by the final rule. Several commenters stated that eliminating non-competes would allow doctors wishing to change jobs to stay in the same geographic area, fostering patient choice and improving continuity of care. Other commenters urged the Commission to create an exception for health care workers. Some argued that the evidence does not support the Commission's conclusion that non-competes depress earnings in health care. Other reasons commenters cited in support of an exception included concerns about continuity and quality of care for patients, the increased costs for employers of health care workers, physicians' negotiating power with their employers, and the effect on incentives for employers to train their health care workers.[936]

Thousands of healthcare workers submitted comments supporting a ban on non-competes. Worker commenters

[936] Some commenters also contended that the health care industry should be exempt from the rule because many health care providers fall outside of the Commission's jurisdiction. The Commission summarizes and responds to those commenters in Part II.E.2.

did not always identify whether they were working at for-profit organizations, entities that claim tax-exempt status as nonprofits, or State or local healthcare organizations, but each category was represented in the comments. These commenters detailed the negative effects of non-competes on their families, their mental health, their financial health, and their career advancement, as elaborated in Part IV.B.2.b.ii. Specifically, healthcare workers commented that because non-competes prohibited them from switching jobs or starting their own businesses, they had to stay at jobs with unsafe and hostile working conditions, to take jobs with long commutes, to relocate their families, to give up training opportunities, and to abandon patients who wanted to continue seeing them. Illustrative comments are highlighted in Parts I and IV.

Additionally, commenters stated the hardship patients have suffered because of non-competes when, for example, their physician was required to move out of their area to work for a different employer. The Commission highlights some of these comments in Part IV.B.2.b.ii and includes two further illustrative comments here:

- As a patient, non compete clauses are affecting mine and my [family's] ability to receive medical care. Our pediatrician left a practice and we aren't able to be informed where they are going. When we find out, it is an hour away [because] of the non compete. And when we look for other [doctors] closer they aren't accepting new patients. So for an entire year we are driving 2 [hours] round trip to see our pediatrician until they can move back to a local medical group. The non compete clause is not just affecting the life of the [doctor], but is also impacting many of us who rely on their services.[937]
- As a family physician this has caused much grief and obstructs my desire to work and provide care for underserved populations. I am a NHSC scholarship recipient and due to non compete clauses was unable to continue working in the town I served due to its rurality. This created a maternity desert in the region I served. Now in a more metropolitan area, there has been an exodus of physicians in the area due to non compete clauses that has caused worsening access to primary care, specialty services, including behavioral health and substance use disorder treatment.[938]

A number of physician group commenters stated that nonprofit healthcare organizations regularly impose non-competes on physicians, and that the impact of the rule would be limited if nonprofits are not required to comply. Some physician group commenters urged the Commission to work with other agencies to fill in gaps in applying the rule based on the Commission's jurisdiction, citing the importance of banning non-competes as widely as possible because of the harms they impose on physicians and patients irrespective of employer status. Specifically, commenters suggested that the Commission use its antitrust and referral authority to aggressively monitor nonprofit organizations for antitrust violations, to collaborate with other Federal agencies, including the IRS, and to provide incentives and guidance to States, which can enact measures to ensure that a prohibition on non-competes is implemented comprehensively. One commenter also noted that a ban would bring scrutiny to non-competes and would likely intensify pressure to eliminate them. A few commenters also contended that entities claiming tax-exempt status as nonprofits are subject to the Commission's jurisdiction as "persons" under the FTC Act.

b. The Final Rule

After carefully considering commenters' arguments, the Commission declines to exempt for-profit healthcare employers or to exempt the healthcare industry altogether.

First, as described in Part IV, the Commission finds that certain uses of non-competes are an unfair method of competition. The use of unfair methods of competition cannot be justified on the basis that it provides a firm with pecuniary benefits to help them compete with other firms that use similar tactics.[939] In this case, for-profit and other covered entities have urged the Commission to allow them to continue to employ an unfair method of competition (*i.e.,* use non-competes) because some competitors are not prohibited from doing so as they are beyond the Commission's jurisdiction. The Commission is committed to stopping unlawful conduct to the full extent of its jurisdiction. For example, the Commission would not refrain from seeking to enjoin unlawful price fixing by a for-profit within its jurisdiction because entities outside its jurisdiction under the FTC Act would not be subject to the same FTC action.

Second, the Commission disagrees with commenters' contention that all hospitals and healthcare entities claiming tax-exempt status as nonprofits necessarily fall outside the Commission's jurisdiction and, thus, the final rule's purview. As explained in Part II.E.2, a corporation's "tax-exempt status is certainly one factor to be considered," but that status is not coterminous with the FTC's jurisdiction and therefore "does not obviate the relevance of further inquiry into a [corporation's] operations and goals."[940] Accordingly, as noted by commenters, entities that claim tax-exempt nonprofit status may in fact fall under the Commission's jurisdiction. Similarly, whether the final rule would apply to quasi-public entities or certain private entities that partner with States or localities, such as hospitals affiliated with or run in collaboration with States or localities, depends on whether the particular entity or action is an act of the State itself under the State action doctrine, which is a well-established, fact-specific inquiry.[941] Thus, some portion of the 58% of hospitals that claim tax-exempt status as nonprofits and the 19% of hospitals that are identified as State or local government hospitals in the data cited by AHA likely fall under the Commission's jurisdiction and the final rule's purview. Further, many States have banned non-competes for a variety of healthcare professionals in both for-profit and nonprofits entities by statute.[942] Even if

[937] Individual commenter, FTC–2023–0007–10085.

[938] Individual commenter, FTC–2023–0007–0924.

[939] *See Atl. Refin. Co.* v. *FTC,* 381 U.S. 357, 371 (1965) ("Upon considering the destructive effect on commerce that would result from the widespread use of these contracts by major oil companies and suppliers, we conclude that the Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves.").

[940] *In the Matter of the Am. Med. Assoc.,* 94 F.T.C. 701, 1979 WL 199033 (FTC Oct. 12, 1979).

[941] *In the Matter of Ky. Household Goods Carriers Ass'n, Inc.,* 139 F.T.C. 404, 405 (2005) ("The Supreme Court has made clear that the state action doctrine only applies when (1) the challenged restraint is clearly articulated and affirmatively expressed as state policy, and (2) the policy is actively supervised by the State itself.") (citation and alterations omitted); *see also id.* at 410–13 (applying test); *Elec. Inspectors, Inc.* v. *Vill. of East Hills,* 320 F.3d 110, 117–19 (2d Cir. 2003).

[942] Colo. Rev. Stat. sec. 8–2–113(5)(a) (Colorado statute banning non-competes for physicians); D.C. Code sec. 32–581.01 (D.C. statute banning non-competes for medical specialists earning less than $250,000, compared to $150,000 for other workers); Fla. Stat. sec. 542.336 (Florida statute banning non-competes for physician specialists in certain circumstances); Ind. Code Ann. secs. 25–22.5–5.5–2 and 2.5(b) (Indiana statute banning non-competes for primary care physicians and restricting non-competes for other physicians); Iowa Code sec. 135Q.2(3)(a) (banning non-competes for health care employment agency workers who provide nursing services); Ky. Rev. Stat. sec. 216.724(1)(a) (Kentucky statute banning non-competes for temporary direct care staff of health care services agencies); N.M. Stat. Ann. secs. 24–1I–1 and 2 (New Mexico statute banning non-competes for several types of health care practitioners); S.D. Codified Laws secs. 53–9–11.1–11.2 (South Dakota statute banning non-

Continued

the final rule's coverage extends only to hospitals that do not identify as tax-exempt non-profits based on AHA data, as explained in Part IV.A.1, the Commission finds every use of covered non-competes to be an unfair method of competition and concludes that the evidence supports the Commission's decision to promulgate this final rule, which covers the healthcare industry to the full extent of the Commission's authority.

Relatedly, in response to commenters' concern that large numbers of healthcare workers will not benefit from the final rule because they work for entities that the final rule does not cover, the Commission notes many workers at hospitals, including those that claims tax-exempt status as a nonprofit or government-owned hospital, contract with or otherwise work for a for-profit entity, such as a staffing agency or physician group. Although some of these individuals may work at an excluded hospital, the final rule applies to their employer—the staffing agency or for-profit physician group—because it is covered by the final rule.

The Commission disagrees with commenters stating the ability to use non-competes will provide a material competitive advantage to entities claiming tax-exempt status as nonprofit or publicly owned entities that are beyond the Commission's jurisdiction. To the contrary, those entities outside FTC jurisdiction that continue to deploy non-competes may be at a self-inflicted disadvantage in their ability to recruit workers, even if they derive some short-term benefit from trapping current workers in their employment. Furthermore, commenters' concern that for-profit healthcare entities will be at a competitive disadvantage is based on the false premise that entities outside the jurisdiction of the FTC will not be otherwise regulated or scrutinized with respect to the use of non-competes. States currently regulate non-competes by statute, regulation, and common law. According to the AHA data cited by commenters, over 12% (398/3,113) of nonprofit hospitals and 13% of government hospitals (187/1,409) are in States that ban non-competes for all employers. In any event, even if true, arguments that for-profit and other covered entities could suffer competitive harm by not being able to employ an unfair method of competition would not change the Commission's finding that use of certain non-competes is an unfair method of competition, as further discussed in Part IV.

While the Commission shares commenters' concerns about consolidation in healthcare, it disagrees with commenters' contention that the purported competitive disadvantage to for-profit entities stemming from the final rule would exacerbate this problem. As some commenters stated, the Commission notes that hospitals claiming tax-exempt status as nonprofits are under increasing public scrutiny. Public and private studies and reports reveal that some such hospitals are operating to maximize profits, paying multi-million-dollar salaries to executives, deploying aggressive collection tactics with low-income patients, and spending less on community benefits than they receive in tax exemptions.[943] Economic studies by FTC staff demonstrate that these hospitals can and do exercise market power and raise prices similar to for-profit hospitals.[944] Thus, as courts have recognized, the tax-exempt status as nonprofits of merging hospitals does not mitigate the potential for harm to competitive conditions.[945]

Commenters provide no empirical evidence, and the Commission is unaware of any such evidence, to support the theory that prohibiting non-competes would increase consolidation or raise prices. To the contrary, as elaborated in Parts IV.B.3.a and IV.B.3.b, the empirical literature suggests, and the Commission finds, that the final rule will increase competition and efficiency in healthcare markets, as workers at for-profit healthcare entities will be able to spin off new practices or work for different employers where their productivity is greater. This is true even if the Commission does not reach some portion of healthcare entities. While the Commission's prior research may indicate, as one commenter suggested, that nonprofit hospitals set higher prices when they have more market power, the Commission finds that the final rule is not likely to increase healthcare prices

competes for several types of healthcare practitioners); Tex. Bus. & Com. Code secs. 15.50–.52 (Texas statute restricting the use of non-competes for physicians).

[943] *See, e.g.,* Press Release, Office of U.S. Sen. Chuck Grassley, *Bipartisan Senators Probe Potential Abuse Of Tax-Exempt Status By Nonprofit Hospitals* (Aug. 9, 2023), *https://www.grassley.senate.gov/news/news-releases/bipartisan-senators-probe-potential-abuse-of-tax-exempt-status-by-nonprofit-hospitals;* Request for Information Regarding Medical Payment Products, 88 FR 44281 (July 12, 2023); U.S. Gov't Accountability Off., Testimony Before the Subcommittee on Oversight, Committee on Ways and Means, House of Representatives, *Tax Administration: IRS Oversight of Hospital's Tax-Exempt Status,* GAO–23–106777 (Apr. 26, 2023), *https://www.gao.gov/assets/gao-23-106777.pdf; Pottstown Sch. Dist.* v. *Montgomery Cnty. Bd. of Assessment Appeals,* 289 A.3d 1142 (Pa. Commw. Ct. 2023) (holding that for-profit hospitals purchased by nonprofit claiming tax exempt status under Federal law do not qualify under State law for nonprofit tax exemption); *Phoenixville Hosp., LLC* v. *Cnty. of Chester Bd. of Assessment Appeals,* 293 A.3d 1248 (Pa. Commw. Ct. 2023); *Brandywine Hosp., LLC* v. *Cnty. of Chester Bd. of Assessment Appeals,* 291 A.3d 467 (Pa. Commw. Ct. 2023); *Jennersville Hosp., LLC* v. *Cnty of Chester Bd. of Assessment Appeals,* 293 A.3d 1248 (Pa. Commw. Ct. 2023); The Daily, *How Nonprofit Hospitals Put Profits Over Patients* (Jan. 5, 2023), *https://www.nytimes.com/2023/01/25/podcasts/the-daily/nonprofit-hospitals-investigation.html;* Gov't Accountability Off., *Tax Administration: Opportunities Exist to Improve Oversight of Hospitals' Tax-Exempt Status,* GAO–20–679 (Sept. 17, 2020), *https://www.gao.gov/products/gao-20-679;* Danielle Ofri, *Why Are Nonprofit Hospitals So Highly Profitable?,* N.Y. Times, Feb. 20, 2020, *https://www.nytimes.com/2020/02/20/opinion/nonprofit-hospitals.html;* Maya Miller & Beena Raghavendran, *Thousands of Poor Patients Face Lawsuits From Nonprofit Hospitals That Trap Them in Debt,* ProPublica (Sept. 13, 2019), *https://www.propublica.org/article/thousands-of-poor-patients-face-lawsuits-from-nonprofit-hospitals-that-trap-them-in-debt.*

[944] *See, e.g.,* Michael G. Vita & Seth Sacher, *The Competitive Effects of Not-For-Profit Hospital Mergers: A Case Study,* 49 J. Indus. Econ. 63 (2001), *http://onlinelibrary.wiley.com/doi/10.1111/1467-6451.00138/epdf* (finding substantial price increases resulting from a merger of nonprofit, community-based hospitals, and determining that mergers involving nonprofit hospitals are a legitimate focus of antitrust concern); Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction,* 18 Int'l J. Econ. Bus. 65, 79 (2011), *http://www.tandfonline.com/doi/full/10.1080/13571516.2011.542956* (finding evidence of post-merger price increases ranging from 28%–44%, and concluding that ''[o]ur results demonstrate that nonprofit hospitals may still raise price quite substantially after they merge. This suggests that mergers involving nonprofit hospitals should perhaps attract as much antitrust scrutiny as other hospital mergers.'').

[945] *See, e.g., FTC* v. *OSF Healthcare Sys.,* 852 F. Supp. 2d 1069, 1081 (N.D. Ill. 2012) (''[T]he evidence in this case reflects that nonprofit hospitals do seek to maximize the reimbursement rates they receive.''); *FTC* v. *ProMedica,* No. 3:11 CV 47, 2011 WL 1219281 at *22 (N.D. Ohio Mar. 29, 2011) (finding that a nonprofit hospital entity ''exercises its bargaining leverage to obtain the most favorable reimbursement rates possible from commercial health plans.''); *United States* v. *Rockford Mem'l Corp.,* 898 F.2d 1278, 1284–87 (7th Cir. 1990) (rejecting the contention that nonprofit hospitals would not seek to maximize profits by exercising their market power); *FTC* v. *Univ. Health, Inc.,* 938 F.2d 1206, 1213–14 (11th Cir. 1991) (''[T]he district court's assumption that University Health, as a nonprofit entity, would not act anticompetitively was improper.''); *Hospital Corp. of America* v. *FTC,* 807 F.2d 1381, 1390–91 (7th Cir. 1986) (rejecting the contention that nonprofit hospitals would not engage in anticompetitive behavior). *See also* FTC & Dep't of Jusitce, *Improving Health Care: A Dose of Competition* 29–33 (2004), *https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf* (discussing the significance of nonprofit status in hospital merger cases, and concluding that the best available empirical evidence indicates that nonprofit hospitals exploit market power when given the opportunity and that ''the profit/nonprofit status of the merging hospitals should not be considered a factor in predicting whether a hospital merger is likely to be anticompetitive'').

through this same mechanism because it is unlikely to lead to significant increases in healthcare nonprofits' market share, if at all.

Moreover, the Commission has other tools to address consolidation in healthcare markets and is committed to using them. The Clayton Act grants the Commission authority to enforce compliance with, *inter alia,* section 7 of the Clayton Act. The Clayton Act does not include any carveout for entities that are nonprofit or otherwise do not operate for profit—and the FTC's jurisdictional limit based on the definition of ''corporation'' in the FTC Act does not apply in this context.[946] Accordingly, the Commission has authority under the Clayton Act to review and challenge mergers and acquisitions involving healthcare entities or hospitals regardless of nonprofit status.[947] Thus, even if the jurisdictional limitations of the final rule were to somehow incentivize some hospitals and other healthcare entities claiming non-profit status to consolidate, the Commission will continue to scrutinize those mergers and work with State partners to vigorously defend competition.[948] For the same reason, the Commission disagrees with commenters who contended that the effects of consolidation and staffing shortages will be worse in areas highly saturated with nonprofits claiming tax-exempt status.

Finally, the Commission disagrees with commenters that stated the Commission must further study the final rule's effect on healthcare workers and entities. The Commission has specific, long-time expertise in the healthcare market as anticompetitive mergers and conduct in healthcare markets have long been a focus of FTC law enforcement, research, and advocacy.[949] This work includes economic analyses of the effects of mergers involving nonprofit hospitals and studies of the impacts of hospital mergers.[950] Accordingly, given this expertise and the extensive record in the rulemaking, the Commission finds it has sufficient understanding of healthcare markets and that the evidence supports the final rule's application to the healthcare industry.

6. Coverage of Franchisors Vis-à-Vis Franchisees

a. The Proposed Rule

The Commission proposed to exclude franchisees from the definition of ''worker'' and requested comment on whether and to what extent the rule should cover non-competes between franchisors and franchisees (''franchisor/franchisee non-competes'').[951] The Commission explained that it proposed to exclude franchisees from the definition of ''worker'' because, in some cases, the relationship between a franchisor and franchisee may be more analogous to the relationship between two businesses than the relationship between an employer and a worker.[952] The Commission also noted that the evidentiary record relates primarily to non-competes that arise out of employment. However, the Commission stated that, in some cases, franchisor/franchisee non-competes may present concerns under section 5 similar to the concerns presented by non-competes between employers and workers and sought comment on coverage of franchisor/franchisee non-competes.[953]

b. Comments Received

Many commenters requested that the final rule cover franchisor/franchisee non-competes. Numerous commenters contended the franchisee-franchisor relationship is closer to a relationship between a worker and an employer than a relationship between businesses. These commenters argued that franchisees are often individual business owners who, like workers, lack bargaining power to negotiate over non-competes. One commenter stated that the Commission acknowledged in the Franchise Rule that franchisees generally lack bargaining power.[954] Several commenters, including industry commenters representing franchisees, argued that franchisees tend to suffer even greater power imbalances than workers because many risk significant personal assets to start their franchises. According to these commenters, this risk places acute strain on franchisees' bargaining leverage when negotiating to renew franchise agreements because, if they choose to reject a new agreement, they not only lose the opportunity to continue working in the same field due to their non-compete, but also the value of their investment.

Commenters seeking coverage of franchisor/franchisee non-competes also stated that these non-competes do not protect legitimate interests because franchisors generally do not entrust franchisees with trade secrets or details about their broader commercial strategy. These commenters stated that, even if franchisees do receive such information, franchisors have less restrictive alternatives for protecting it, including NDAs and trade secret law. Some commenters also stated that non-competes have anticompetitive effects because franchisors may degrade the quality of inputs or raise input prices without fearing that their existing franchisees will leave for a competitor.

Many franchisee commenters also stated their desire to compete after exiting their franchise relationships. Franchisees also stated that their non-competes harm their negotiating position in bargaining over franchise renewal terms. These franchisees stated that franchisors can impose higher royalty rates or other less favorable terms over time as the franchisees feel powerless to refuse or make effective counteroffers, due to their non-competes. Many franchisees asserted that their non-competes are overbroad because they restrain individual owners' spouses and other close relatives from competing in the same industry. Some franchisees stated that their non-competes include penalties for choosing

[946] 15 U.S.C. 18; 15 U.S.C. 45; *Univ. Health, Inc.,* 938 F.2d at 1214–16.

[947] *Id.*

[948] *See, e.g., In the Matter of RWJ Barnabas Health and Saint Peters Healthcare Sys.,* Docket No. 9409 (Jun. 2, 2022) (complaint); *FTC* v. *Advoc. Health Care,* No. 15 C 11473, 2017 WL 1022015, at *1 (N.D. Ill. Mar. 16, 2017); *FTC* v. *Penn State Hershey Med. Ctr.,* 838 F.3d 327, 332 (3d Cir. 2016).

[949] *See, e.g.,* FTC, *Competition in the Health Care Marketplace, https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care; FTC, Overview of FTC Actions in Health Care Services and Products* (2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/2022.04.08%20Overview%20Healthcare%20%28final%29.pdf;* Joseph Farrell et al., *Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals,* 35 Rev. Indus. Org. 369 (2009), *http://link.springer.com/content/pdf/10.1007%2Fs11151-009-9231-2.pdf;* FTC, *Examining Health Care Competition* (Mar. 20–21, 2014), *https://www.ftc.gov/news-events/events-calendar/2014/03/examining-health-care-competition;* FTC & Dep't of Justice, *Examining Health Care Competition* (Feb. 24–25, 2015), *https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition; Improving Health Care: A Dose of Competition, supra* note 945.

[950] *See, e.g.,* FTC, *FTC Policy Perspectives on Certificates of Public Advantage* (Aug. 15, 2022), *www.ftc.gov/copa;* FTC, *Physician Group and Healthcare Facility Merger Study* (ongoing, initiated Jan. 2020), *https://www.ftc.gov/enforcement/competition-matters/2021/04/physician-group-healthcare-facility-merger-study;* Christopher Garmon, *The Accuracy of Hospital Merger Screening Methods,* 48 RAND J. of Econ. 1068 (2017), *https://www.ftc.gov/system/files/documents/reports/accuracy-hospital-merger-screening-methods/rwp_326.pdf;* Joseph Farrell, et al., *Economics at the FTC: Hospital Mergers, Authorized Generic Drugs, and Consumer Credit Markets,* 39 Rev. Indus. Org. 271 (2011), *http://link.springer.com/content/pdf/10.1007%2Fs11151-011-9320-x.pdf;* Devesh Raval, Ted Rosenbaum, & Steve Tenn, *A Semiparametric Discrete Choice Model: An Application to Hospital Mergers,* 55 Econ. Inquiry 1919 (2017).

[951] NPRM at 3511, 3520.

[952] *Id.* at 3511.

[953] *Id.* at 3520.

[954] Trade Regulation Rule on Franchising and Business Opportunity Ventures, 43 FR 59614, 59625 (Dec. 21, 1978).

not to renew their contracts even if they do not compete.

Other commenters, primarily franchisors and trade organizations, stated that franchisor/franchisee non-competes should be excluded from the final rule. Many of these commenters argued that franchisor/franchisee non-competes are more similar to restrictive covenants between businesses than non-competes between employers and workers. Some of these commenters argued that franchisor/franchisee non-competes are more justified than non-competes in the employment context because, unlike employment relationships, entering into a franchise agreement is completely voluntary. Some commenters argued that, unlike non-competes in the employment context, franchisor/franchisee non-competes are only entered into by individuals with access to substantial capital and who therefore always have the option of starting their own businesses.

Many of these commenters argued that prohibiting non-competes for franchisees would threaten to severely disrupt or destroy the franchise business model, and that this would harm franchisors and franchisees alike, as franchising offers a unique opportunity for working people to become entrepreneurs with established brands. Commenters asserted non-competes are critical to the franchise business model because they offer both franchisors and franchisees confidence that existing franchisees will likely stay with a brand and refrain from using a franchise's trade secrets to unfairly compete against the franchisor. Commenters also asserted that franchisees are often exposed to proprietary information through training manuals and operational support and that non-competes help protect this information. In addition, commenters contended franchisor/franchisee non-competes protect investments made by other franchisees and maintain a franchise's goodwill.

Commenters supporting the exclusion of franchisor/franchisee non-competes from the final rule also asserted that the Commission lacked an evidentiary basis for covering such non-competes. These commenters also claimed no State has prohibited non-competes for franchisees, and the Commission would therefore lack data from natural experiments to justify extending a final rule to the franchise context.

c. The Final Rule

The Commission continues to believe that, as many commenters attested, franchisor/franchisee non-competes may in some cases present concerns under section 5 similar to the concerns presented by non-competes between employers and workers. The comments from franchisors, franchisees, and others provide the Commission with further information about non-competes in the context of the franchisor/franchisee relationship, but the evidentiary record before the Commission continues to relate primarily to non-competes that arise out of employment. Accordingly, the final rule does not cover franchisor/franchisee non-competes. Non-competes used in the context of franchisor/franchisee relationships remain subject to State common law and Federal and State antitrust laws, including section 5 of the FTC Act.

VI. Section 910.4: Relation to State Laws and Preservation of State Authority and Private Rights of Action

In proposed § 910.4, the Commission addressed State laws and preemption. Based on comments, the Commission adopts a modified provision clarifying and explaining that States may continue to enforce laws that restrict non-competes and do not conflict with the final rule, even if the scope of the State restrictions is narrower than the final rule.[955]

A. The Proposed Rule

The NPRM contained an express preemption provision, proposed § 910.4, that explained the proposed rule preempted State laws inconsistent with the rule and did not preempt State laws that offer greater protection than the rule. The NPRM explained that when a State law offers greater protection than the rule, employers would be able to comply with both the NPRM and the State law. Thus, the proposed rule would have established a regulatory floor, but not a ceiling. The NPRM provided two hypothetical examples, one of a State law that would be inconsistent with, and therefore preempted by, proposed § 910.2(a) and one that would not because it satisfied the savings clause by offering greater protection and was not inconsistent with proposed part 910.[956]

B. Authority for Preemption

Numerous commenters supported the preemption of inconsistent State laws. Some commenters asserted the Commission lacks the legal authority to preempt State laws, including State common law, on non-competes because Congress allegedly did not confer the necessary authority to the Commission or because of federalism principles. They argued there must be clear Congressional intent to preempt State laws relating to non-competes.[957] Numerous commenters asserted the Commission lacks clear authority from Congress to preempt State laws on non-competes, arguing the FTC's statutory authority neither expressly nor impliedly authorizes preemption of non-competes. Commenters made similar points based on cases about the preemptive force of the Commission's UDAP regulations. For example, one commenter asserted the FTC may not have the authority to preempt less restrictive State laws, citing *American Optometric Association* v. *FTC,* in which the court noted the need for congressional authorization for the Commission to preempt an entire field of State laws that arise from the State's police powers.[958]

The Commission finds it has the authority to promulgate regulations that preempt inconsistent State laws under section 6(g), together with section 5, of the FTC Act. Even without an express preemption provision, Federal statutes and regulations preempt conflicting State laws. Under the Supreme Court's conflict preemption doctrine, a Federal statute or regulation impliedly preempts State laws when it is impossible for the regulated parties to comply with both the Federal and the State law, or when a State law is an obstacle to achieving the full purposes and objectives of the Federal law.[959] ''Federal regulations have no less pre-emptive effect than Federal statutes.'' [960] Indeed, even commenters who questioned the FTC's authority to preempt State laws agreed that if a Federal agency promulgates a rule pursuant to its Congressionally conferred authority, the rule preempts conflicting State laws.

As discussed in Parts II.A, II.B, and II.C, the Commission has the authority to promulgate this final rule. Accordingly, the final rule preempts conflicting State laws. To provide a clear explanation of the Commission's intent and the scope of preemption effected by the final rule, the final rule includes an express preemption

[955] State statutes, regulations, orders, or interpretations, including State common law, are referred to as ''State laws'' for ease of reference.

[956] NPRM at 3515.

[957] Comments on the Commission's authority to promulgate this final rule, separate from the issue of preemption of State law, are summarized in Part II.

[958] *Am. Optometric Ass'n* v. *FTC,* 626 F.2d 896, 910 (1980).

[959] *See, e.g., Federal Preemption: A Legal Primer,* Cong. Rsch. Serv., 23 (May 18, 2023) (Report R45825), *https://crsreports.congress.gov/product/pdf/R/R45825/3*.

[960] *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta,* 458 U.S. 141, 153 (1982).

provision at § 910.4.[961] As discussed in Part VI.D, the Commission has modified proposed § 910.4 to make clear that even when the scope of non-compete prohibitions under a State law is less than that of the final rule, State authorities and persons may enforce the State law by, for example, bringing actions against non-competes that are illegal under the State law.

C. The Benefits of Preemption

Numerous commenters stated that variations in State laws chill worker mobility and expressed support for a uniform Federal standard. Some commenters explained that a preemption clause could bring clarity to the law's effect.

The U.S. Department of Justice commented that, due to the patchwork of State laws, a worker may be free to switch jobs in one jurisdiction but subject to a non-compete in another, creating uncertainty as to the non-compete's enforceability for both firms and workers.[962] In another commenter's view, the variation in State non-compete laws creates competitive disadvantages for companies in States that ban such clauses, necessitating a Federal ban.

Another commenter pointed out that most States have not passed statutes that ban or restrict non-competes, and that existing statutes cover different categories of workers and different wage levels, making it difficult for workers to know whether employers can enforce a particular non-compete. The commenter stated that variations in the legal authority of State attorneys general to take action on the public's behalf also limit the effectiveness of State restrictions on non-competes. A number of commenters explained that the difficulties arising from variations in State non-compete laws are exacerbated by the increase in remote and hybrid work, and workers who travel to work across State lines. Accordingly, many commenters favored a uniform Federal standard that would promote certainty for employers and workers. Even some commenters who generally opposed banning non-competes favored preemption to eliminate the patchwork of State laws that makes it difficult for workers to know the applicable law and encourages forum shopping by employers who want to bring suits in sympathetic jurisdictions.

Other commenters opposed preemption, asserting that State legislatures and courts are best situated to address non-competes and that the States have historically regulated this area. They contended States should be allowed to continue adjusting the scope of restrictions on non-competes including applicability to different types of workers, time span, and geographic scope.

The Commission finds that preemption of State laws, including State common law, that conflict with the final rule best mitigates the negative effects of the patchwork of State laws, including chilling worker mobility and undercutting competitive conditions in labor and product and services markets.[963] Preempting this patchwork with a Federal floor is particularly important given the increase in work across State lines, and remote and hybrid work, since the COVID–19 pandemic.

Moreover, as discussed in Part IX.C, preemption furthers a primary goal of the final rule: to provide a uniform, high level of protection for competition that is easy for both employers and workers to understand and makes it less likely that employers will subject workers to illegal non-competes or forum shop. Indeed, some commenters who otherwise opposed the proposed ban on non-competes regarded the patchwork itself burdensome to employers as well as workers and noted the rule would reduce burden by eliminating uncertainty and confusion caused by State law variations.[964] As described in Part IX.C, the Commission has determined that declining to issue this final rule and continuing to rely solely on State laws and case-by-case adjudication would be less effective than issuing a clear national standard. The Commission concludes, however, that supplementing the final rule with additional State authority and resources, so long as the State laws are not inconsistent with the final rule, will assist in protecting both workers and competition.

D. The Extent of Preemption

Some commenters strongly supported the NPRM but expressed concern that the preemption provision as proposed could undermine States' efforts to curb non-competes and would thereby undercut the final rule's effectiveness. These commenters stated that under one interpretation, proposed § 910.4 could preempt State laws that prohibit non-competes for workers earning less than a specified income because the law as a whole may not be deemed to provide greater protection than the final rule. In their view, such an interpretation would not further the final rule's goals, because States with income-based restrictions on non-competes rather than complete bans may offer covered workers protections against non-competes that the FTC's proposed rule would not provide, such as State enforcement, private rights of action, and certain financial penalties.[965]

These commenters also asserted that in many cases, State agencies and residents could be better positioned to respond to unlawful non-compete use specific to a particular State, but they would be unable to do so and dependent on the Commission if their laws were fully preempted. To enable concurrent enforcement of State laws that restrict the use of non-competes, thereby increasing the enforcement resources devoted to the issue, they recommended a ''savings clause'' that would exempt from preemption State laws that provide workers with protections substantially similar to or greater than those afforded by the

[961] Many FTC regulations, including regulations promulgated under section 6(g) of the FTC Act, include provisions addressing State laws and preemption. *See, e.g.,* Funeral Rule, 16 CFR 453.9 (exempting from preemption State laws that ''afford an *overall* level of protection that is *as great as, or greater than,* the protection afforded by'' the FTC's Rule) (emphasis added); Concerning Cooling Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429.2(b) (exempting laws and ordinances that provide ''a right to cancel a door-to-door sale that is *substantially the same or greater* than that provided in this part'') (emphasis added); Business Opportunity Rule, 16 CFR 437.9(b) (''The FTC does not intend to preempt the business opportunity sales practices laws of any [S]tate or local government, except to the extent of any conflict with this part. A law is not in conflict with this Rule if it affords prospective purchasers *equal or greater protection*[.]'') (emphasis added); Mail, internet, or Telephone Order Merchandise Rule, 16 CFR 435.3(b) (''This part does supersede those provisions of any State law, municipal ordinance, or other local regulation which are inconsistent with this part to the extent that those provisions do not provide a buyer with rights which are *equal to or greater* than those rights granted a buyer by this part.'') (emphasis added); Franchise Rule, 16 CFR 436.10(b) (''The FTC does not intend to preempt the franchise practices laws of any [S]tate or local government, except to the extent of any inconsistency with part 436. A law is not inconsistent with part 436 if it affords prospective franchisees *equal or greater protection*[.]'') (emphasis added); Labeling and Advertising of Home Insulation, 16 CFR 460.24(b) (preemption of ''State and local laws and regulations that are inconsistent with, or frustrate the purposes of this regulation''). *See also* Part II.B.

[962] Comment of Dep't of Justice Antitrust Div., FTC–2023–0007–20872 at 7.

[963] *See* Part IX.C.

[964] *See, e.g.,* Comment of Mech. Contractors Ass'n of Am., FTC–2023–0007–18218 (although opposed to the proposed rule, MCCA's position supports a single Federal rule and some level of preemption).

[965] *See* Comment of the Attys. Gen. of 17 States and DC, FTC–2023–0007–21043, at 14–15 (''jurisdictions like Colorado, Illinois, Washington, and the District of Columbia have passed laws that ban non-competes for workers making under a specified income threshold and also include remedies provisions that authorize [S]tate agencies and residents to enforce the law''); *id.* at 9–11 (discussing State enforcement, private action, and damages in several State non-compete laws).

rule.[966] They also recommended that the rule not preempt State antitrust and consumer protection laws that may protect workers against non-competes and other restrictive employment arrangements as those laws can provide another enforcement avenue for State agencies and residents.

Another commenter recommended including a narrow reverse preemption provision so that relevant State laws in States that enact the Uniform Restrictive Employment Agreement Act[967] would not be preempted.[968] The comment asserted that by doing so, a final rule would preserve a role for the States and encourage their cooperation with the Commission, and also provide greater protections for employees than the proposed rule provided in several ways, such as allowing for greater enforcement and including classes of employers that the final rule would not cover.[969] The uniform law would ban non-competes for workers earning at or below the State's annual mean wage and would allow non-competes for those earning more, but apply limits and require disclosures for any non-compete.

Based on comments, the Commission has modified the final rule's preemption provision to clarify and explain that State laws that restrict non-competes and do not conflict with the final rule are not preempted. Section 910.4 also expressly references State common law, antitrust law, and consumer protection law, so that the intended scope of preemption is clear. State common law is expressly referenced because many States do not have a general non-compete statute, and the common law varies considerably.

Section 910.4(b) reflects the Commission's intent that States may continue to enforce in parallel laws that restrict non-competes and do not conflict with the final rule, even if the scope of the State restrictions is narrower than that of the final rule. That is, State laws cannot authorize non-competes that are prohibited under this final rule, but States may, for example, continue to pursue enforcement actions under their laws prohibiting non-competes even if the State laws prohibit a narrower subset of non-competes than this rule prohibits.

Accordingly, § 910.4(a) states that the final rule will not be construed to annul, or exempt any person from complying with, any State statute, regulation, order, or interpretation applicable to a non-compete, including, but not limited to, State antitrust and consumer protection laws and State common law. Rather, the final rule supersedes such laws to the extent, and only to the extent, that such laws would otherwise permit or authorize a person to engage in conduct that is an unfair method of competition under § 910.2(a) or conflict with the notice requirement in § 910.2(b).[970] These revisions provide that when States have restricted non-competes and their laws do not conflict with the final rule, employers must adhere to both provisions, and workers are protected by both provisions (including State restrictions and penalties that exceed those in Federal law).

For example, § 910.4 makes clear that the final rule does not preempt State law enforcement where a State bans non-competes only for workers earning below a certain amount and thus has a ban that is narrower than the final rule. Thus, if a State's law bars non-competes only for workers who earn less than $150,000 per year, the final rule and the law are different in scope of protection but not directly inconsistent. The State may continue to enforce its ban for workers earning less than $150,000, but all non-competes covered by the final rule, regardless of a worker's earnings, remain an unfair method of competition under the final rule and are therefore unlawful.

In response to concerns raised by commenters and to further bolster the consistent use of State laws, the Commission expressly recognizes State authority and the existence of private rights of action arising under State laws that restrict non-competes or bar unfair methods of competition. This is set forth in § 910.4, now titled ''Relation to State laws and preservation of State authority and private rights of action,'' and is detailed in § 910.4(b). That section provides that unless a State law conflicts with the final rule and is superseded as described in § 910.4(a), part 910 does not limit or affect the authority of State attorneys general and other State agencies or the rights of a person to bring a claim or regulatory action arising under State laws, including State antitrust and consumer protection laws and State common law. Section 910.4(b) also explains that persons retain the right to bring a claim or regulatory action under State laws unless the laws conflict with the final rule and have been superseded as described in § 910.4(a).

These modifications are consistent with many commenters' recommendations and recognize State-based enforcement as a potent force that supplements Federal enforcement. In addition, the modifications, particularly those that explain § 910.4 does not exempt any person from complying with State laws, are intended to curb the use of preemption as a defense against State restrictions of non-competes.[971] Under the final rule, States may continue to play a critical role in restricting the use of non-competes. In contrast to the FTC Act, which cannot be enforced by private persons or State authorities,[972] the non-compete laws of numerous States provide for such enforcement.[973] Non-competes that are outside the FTC's jurisdiction or otherwise outside the scope of the final rule may be covered by State non-compete laws.[974] State penalties can be substantial and may be particularly important as a deterrent.

The modifications also reflect the Commission's long history of working in concert with States and encouraging concurrent enforcement of State laws to pursue common goals. While the Commission recognizes this will leave some variation in the enforcement exposure covered persons face among States, that variation will be greatly reduced by the final rule, which sets a

[966] Another comment recommended a similar formulation, which would exempt from preemption State laws that offer workers protection that is equal to or greater than the protection provided by the final rule. This commenter asserted that this formulation would allow existing State law to stand.

[967] *See* Uniform Restrictive Employment Agreement Act, *supra* note 332 at sec. 5, sec. 8.

[968] *See* Comment of ULC, FTC–2023–0007–20940.

[969] *See also* Part II.E (discussing comments on the Commission's jurisdiction under the FTC Act).

[970] The effect of part 910 is limited to non-competes. It would not broadly preempt other uses of State antitrust and consumer protection law.

[971] *See, e.g., Sprietsma* v. *Mercury Marine,* 537 U.S. 51, 62–70 (2002) (finding Federal Boat Safety Act did not relieve defendant from liability for State common law tort claim because it did not expressly nor impliedly preempt State common law).

[972] *See, e.g.,* FTC, A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority App. A (May 2021), *https://www.ftc.gov/about-ftc/mission/enforcement-authority; Holloway* v. *Bristol-Myers Corp.,* 485 F.2d 986, 997 (D.C. Cir. 1973).

[973] Comment of the Attys. Gen. of 17 States and DC, FTC–2023–0007–21043 at 7 (''jurisdictions like Colorado, Illinois, Washington, and the District of Columbia have passed laws that ban non-competes for workers making under a specified income threshold and also include remedies provisions that authorize state agencies and residents to enforce the law''). *See also* 2023 Cal. Legis. Serv. Ch. 157 (S.B. 699) West (adding Cal. Bus. & Prof. Code sec. 16600.5, Sept. 1, 2023) (providing for a private right of action in regard to California's non-compete statute).

[974] *See* Part II.E (discussing the Commission's jurisdiction under the FTC Act). *See, e.g.,* Cal. Bus. & Prof. Code secs. 16600–16602 (broad coverage); Minn. Stat. Ann. sec. 181.988, subdiv. 1 (b) ('''Employer' means any individual, partnership, association, corporation, business, trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.'').

floor that applies nationally.[975] As it has done in the past, the Commission will ''share the field'' with States and partner with them in the battle against abusive non-competes.[976] As set out in Part IX.C, the Commission considered and rejected the alternative of relying on existing State laws alone. Consistent with that determination, the Commission declines to adopt the suggestion from a comment that relevant State laws in States that enact the Uniform Restrictive Employment Agreement Act not be preempted.

VII. Section 910.5: Severability

The Commission stated in the NPRM that it may adopt a severability clause[977] and it received a comment stating the Commission should adopt such a clause to protect the rights and securities of workers if one part of the rule or one category of workers were invalidated. The Commission adds § 910.5, together with this section, to clarify the Commission's intent.[978]

Section 910.5 states that if any provision of the final rule is held to be invalid or unenforceable either facially, or as applied to any person or circumstance, or stayed pending further agency action, such invalidity shall not affect the application of the provision to other persons or circumstances or the validity or application of other provisions. Section 910.5 also states that if any provision or application of the final rule is held to be invalid or unenforceable, the provision or application shall be severable from the final rule and shall not affect the remainder thereof. This provision confirms the Commission's intent that the remainder of the final rule remain in effect in the event that a reviewing court stays or invalidates any provision, any part of any provision, or any application of the rule—including, for example, an aspect of the terms and conditions defined as non-competes, one or more of the particular restrictions on non-competes, or the standards for or application to one or more categories of workers.

The Commission finds that each of the provisions, parts of the provisions, and applications of the final rule operate independently and that the evidence and findings supporting each provision, part of each provision, and application of each provision stand independent of one another. In this final rule, the Commission determines that certain conduct is an unfair method of competition in Part IV.B and Part IV.C and differentiates between senior executives and workers who are not senior executives with respect to existing non-competes. The final rule distinguishes between the two in both the final rule's operation and in the bases for adopting the final rule. The difference in restrictions among different workers, and the distinct bases for adopting the restrictions, is described in detail in Parts IV.B and IV.C. The Commission also estimates the effect of excluding senior executives entirely from the rule in Part X.F.11 and finds that the benefits of covering only those workers who are not senior executives justify the costs.

The Commission promulgates each provision, part of each provision, and application of each provision as a valid exercise of its legal authority. Were any provision, part of any provision, or any application of any provision of the final rule stayed or held inapplicable to a particular category of workers, to particular conduct, or to particular circumstances, the Commission intends the remaining elements or applications of the final rule to prohibit a non-compete between covered persons and covered workers as an unfair method of competition.

In Parts IV.B and IV.C, the Commission finds that the use of non-competes is an unlawful unfair method of competition under section 5 of the FTC Act because it is restrictive and exclusionary conduct that tends to negatively affect competitive conditions in several independent ways. In support of its finding that the use of non-competes is an unlawful unfair method of competition for workers who are not senior executives, the Commission additionally finds that the use of non-competes is exploitative and coercive in Part IV.B.2.b.

The Commission relies principally on empirical evidence regarding the effects of changes in non-compete enforceability, both when finding in Part IV.B.3.a and Part IV.C.2.c.ii that the use of non-competes tends to negatively affect competitive conditions in labor markets, and when finding in Part IV.B.3.b and Part IV.C.2.c.i that the use of non-competes tends to negatively affect competitive conditions in product and service markets. The Commission further analyzes and quantifies these effects in Part X.F.6, including sensitivity analyses that compare the estimated effects of smaller changes in enforceability and larger changes in enforceability.

Based on this empirical evidence and analysis, the Commission believes that more limited application of the rule—which might result were a court to render the final rule inapplicable in some way—may be equivalent to smaller changes in the enforceability of non-competes in the empirical literature. As described in Part IV.B.3.a and IV.B.3.b, smaller changes in enforceability change the magnitude, but not the directional nature, of the labor market and product and service market effects.[979] Accordingly, consistent with the findings related to the use of certain non-competes being an unfair method of competition in Part IV, the empirical evidence on the use of non-competes, the regulatory impact analysis in Part X, and its expertise, the Commission finds that any smaller reduction in enforceability resulting from circumstances in which a court stays or invalidates some application of the final rule would not impair the function of the remaining parts of the final rule nor would it undermine the justification or necessity for the final rule as applied to other persons, conduct, or circumstances. The Commission intends for any remaining application of the final rule to be in force because it is committed to stopping any and all unlawful conduct related to the use of certain non-competes and the Commission finds every use of a non-compete covered by the final rule to be an unlawful unfair method of competition under section 5 of the FTC Act.[980]

In Part X, the Commission conducts a regulatory impact analysis for the final rule as applied to all workers, as applied to all workers other than senior executives, and as applied to senior executives. The Commission finds that the asserted benefits of the use of non-competes do not justify the harms from the use of non-competes for any category of workers. The Commission's findings and differential analysis demonstrate that the asserted benefits from the use of non-competes do not justify the harms from the use of non-competes for higher- or lower-wage earners, including, for example, lower-wage workers defined as workers whose total annual compensation is less than $151,164.

[975] The Commission has taken this position in previous regulations. *See, e.g.,* Part 429—Cooling-Off Period for Door-to-Door Sales, 37 FR 22934 (Oct. 26, 1972).

[976] For a previous example, *see* Trade Regulation Rule; Funeral Industry Practices, 47 FR 42260, 42287 (Sept 24, 1982) (noting the purpose of the rule's provision addressing relation of the rule to State law is ''to encourage [F]ederal-[S]tate cooperation by permitting appropriate [S]tate agencies to enforce their own [S]tate laws that are equal to or more stringent than the trade regulation rule'').

[977] NPRM at 3518–19 & n.429.

[978] In the NPRM, proposed § 910.5 addressed the compliance date.

[979] *See also* Part X.F.6.

[980] *See* NPRM at 3518–19.

For instance, if, for any reason, a reviewing court were to stay or invalidate the final rule as applied to senior executives, the Commission would intend for the remainder of the final rule to apply to all workers other than senior executives. Likewise, if a reviewing court were to stay or invalidate the final rule to apply to workers other than senior executives, the Commission would intend for the remainder of the final rule to apply to senior executives. Additionally, if a reviewing court were to stay or invalidate the final rule as applied to some other subset of workers, the Commission would intend for the remainder of the final rule to apply to all but those workers. So, for example, if a reviewing court were to stay or invalidate the final rule as applied to workers other than lower-wage workers—defined as workers whose total annual compensation is less than $151,164—the Commission would intend for the remainder of the final rule to apply to those workers, and further notes the evidentiary record demonstrates that application of the rule to those remaining workers would be beneficial and achieve lawful objectives. In the same way, if a reviewing court were to stay or invalidate the provision of the final rule regarding enforcing an existing non-compete or the notice requirement, the Commission would intend for the remainder of the final rule to apply. As described in Part IX.C, although the Commission concludes that a national standard is most effective, a number of States currently apply different standards to different workers and States also apply a myriad of legal standards to non-competes generally. Accordingly, were a reviewing court to stay or invalidate a particular application of the final rule, a covered person could simply comply with the provisions, parts of provisions, or applications of the final rule that remain in effect.

The Commission's adoption of the final rule does not hinge on the same restrictions applying to all non-competes, on the final rule applying to all workers, or on joint adoption or operation of each provision. Accordingly, the Commission considers each of the provisions adopted in the final rule to be severable, both within each provision and from other provisions in part 910. In the event of a stay or invalidation of any provision, any part of any provision, or of any provision as it applies to certain conduct or workers, the Commission's intent is to otherwise preserve and enforce the final rule to the fullest possible extent.

VIII. Section 910.6: Effective Date

The Commission adopts a uniform effective date of 120 days after publication of the final rule in the **Federal Register**. The final rule will go into effect, and compliance with the final rule will be required, on that date. Based on comments urging the Commission to reduce the compliance period from the 180-day period proposed in the NPRM so that the benefits of the final rule may be obtained as soon as possible, the Commission's findings that the use of non-competes is exploitative and coercive for the vast majority of workers, and modifications in the final rule that reduce covered entities' compliance burden, the Commission modifies the date that compliance with the final rule is required from 180 days to 120 days after publication in the **Federal Register**.

A. The Proposed Rule

In the NPRM the Commission proposed a compliance date of 180 days after publication of the final rule in the **Federal Register**. The Commission stated that, during the compliance period, employers would need to: (1) assess whether to implement replacements for existing non-competes (such as NDAs), draft those covenants, and then negotiate and enter into those covenants with the relevant workers; (2) remove any non-competes from employment contracts that they provide to new workers; and (3) rescind, no later than the date that compliance is required, any non-competes that it entered into prior to the compliance date.[981] The Commission preliminarily found that 180 days would be enough time for employers to accomplish all of these tasks.[982] The NPRM would have also required employers to provide the notice specified in proposed § 910.2(b)(2) within 45 days of rescinding the non-compete.[983]

The Commission also stated that it proposed to establish an effective date of 60 days after the final rule is published in the **Federal Register** even though compliance would not be required for 180 days.

[981] *Id.* at 3483, 3515–16. In the NPRM and herein, the Commission refers to the period between the publication of the final rule and the date on which compliance with the final rule is required as the ''compliance period.'' *See id.* at 3515.

[982] *Id.* at 3516.

[983] *Id.* (addressing compliance with proposed § 910.2(b)(2)).

B. Comments Received

Many worker commenters urged the Commission to act as quickly as possible to bring the final rule into force, citing the current acute, ongoing harms to their earnings, mobility, quality of life, and other significant impacts and noting the final rule's potential for immediate relief if their non-compete was no longer in force. Representatives of many local governments from different States contended that the negative effects of non-competes and the anticipated benefits of the proposed rule justified allowing the Commission's rule to go into effect as soon as possible. Other commenters supported the compliance date as proposed or favored other measures to obtain the anticipated benefits of the final rule as soon as practicable. Another commenter contended that the 180-day compliance period was sufficient to allow businesses to ensure compliance and suggested that the Commission move the effective date back to the day or the day after the final rule is published.[984]

Several commenters suggested the Commission adopt a longer compliance period of one year, 18 months, or two years. These commenters generally stated that businesses need more time to adjust their compensation packages, contracting practices, and employee policies to comply with the rule and to protect their intellectual property. At least one commenter also argued the Commission should adopt a two-year compliance period to allow courts sufficient time to hear and resolve challenges to the final rule. One commenter asserted that the compliance period would be especially burdensome for smaller business. Another industry commenter argued application of the rule should be phased in over time.

C. The Final Rule

The Commission adopts a 120-day compliance period. As outlined in Parts IV.B and IV.C, based on both voluminous comments from the public as well as a significant body of empirical evidence, the Commission finds that the use of non-competes is coercive and exploitative for the vast majority of workers across different earnings levels and occupations and that for all workers it tends to negatively affect competitive conditions in labor markets and also tends to negatively affect competitive conditions in product and service markets—and that such actual harms are in fact currently ongoing. The Commission adopts a 120-

[984] The comment did not consider the limitations on the effective date imposed by the CRA.

day compliance period to stop these unfair methods of competition as soon as practicable. The Commission finds that a 120-day period appropriately balances the interests at hand.

The Commission has taken several steps in the final rule to make compliance as simple as possible for employers. These steps make it practicable and reasonable to require compliance within 120 days. The final rule allows regulated entities to enforce existing non-competes with senior executives, who commenters contended are most likely to have complex compensation arrangements that include non-competes. Accordingly, there is no need for a lengthy compliance period, as the most complex existing arrangements are left in place. The Commission also eliminated the rescission requirement for all workers. Under the final rule, employers will not need to rescind (*i.e.,* legally modify) existing non-competes for any workers; rather, employers will simply be prohibited from enforcing them after the effective date of the final rule and will be required to provide the notice in § 910.2(b)(1).[985] While employers are required to provide notice to workers with existing non-competes who are not senior executives, under § 910.2(b), the final rule provides model safe harbor language that satisfies the notice requirement.[986] The final rule gives employers several options for providing the notice—on paper, by mail, by email, or by text.[987] And employers are exempt from the notice requirement where the employer has no record of a street address, email address, or mobile telephone number for the worker.[988] Furthermore, as explained in Part IV.E, the Commission has simplified the notice requirement to facilitate employers' ability to comply by simply sending a mass communication such as a mass email to current and former workers.

Starting on the effective date of the final rule, employers will be prohibited from entering into new non-competes barred by this final rule and from enforcing non-competes that the employer entered into prior to that date with workers other than senior executives. Prior to the effective date employers will need to identify each of their workers with existing non-compete agreements and can assess which, if any, are senior executives and determine if they wish to maintain those non-competes. Employers will also need to assess and revise, if necessary, any employment policies or handbooks that purport to bind workers even after the effective date.

To the extent they have confidential business information, trade secrets, or other investments to protect with respect to a particular worker, employers will be able to assess their options to lawfully protect that information. However, new protections will be unnecessary in many cases, because, for example, 95.6% of workers subject to non-competes are already subject to an NDA.[989] In the rare case where compensation might be tied to a non-compete that is not with a senior executive, the employer and worker can determine whether to amend their original employment agreement. The Commission concludes that the 120-day compliance period gives employers more than sufficient time to complete these tasks. For example, firms routinely complete entire onboarding processes for new employees in much shorter timeframes than 120 days.

The Commission also finds that the 120-day compliance period gives small businesses enough time to comply with the final rule. Although small businesses may have limited staff and funds compared to larger firms, they also have fewer workers, and the exclusion for existing non-competes for senior executives will relieve the compliance burden altogether for those small firms that use non-competes only with those workers. Moreover, the steps the Commission has taken to reduce the compliance burden of § 910.2(b) will further simplify and streamline compliance for small businesses.

The Commission has also determined it is not necessary to extend the compliance period to give courts time to adjudicate pending non-compete litigation because, as described in Part V.C.3, the Commission has adopted § 910.3(b), which provides that the final rule does not apply where a cause of action related to a non-compete arose prior to the effective date. The Commission also finds that a longer compliance period is not needed to hear and resolve challenges to the final rule, especially given the ability of a challenger to seek a preliminary injunction.

In sum, the Commission finds that due to modifications reducing covered entities' burden to comply with the final rule, a compliance period of 120 days is sufficient time to comply with the final rule. Given these changes the longer compliance period proposed in the NPRM is no longer warranted and would allow the use of certain non-competes that are an unfair method of competition—and their related harms and costs—to continue for longer than necessary. The substantial benefits to competition and to workers of the final rule taking effect as soon as possible outweigh any concerns about potential difficulties in meeting an earlier compliance date.

The Commission also adopts a 120-day effective date. The Commission concludes that it would ease the burden of implementation and reduce possible confusion by having a uniform date for when the final rule goes into effect and when compliance under the final rule is required. A 120-day effective date complies with the requirements of the Congressional Review Act that a "major rule" may not take effect fewer than 60 days after the rule is published in the **Federal Register**.

IX. Alternative Policy Options Considered

The Commission proposed to ban non-competes categorically, with a limited exception for non-competes entered into by a person who is selling a business entity. In the NPRM, the Commission discussed and sought comment on potential alternatives to the proposed categorical ban, including discrete alternatives that would implement a rebuttable presumption of unlawfulness or apply different standards to different categories of workers.[990] The Commission also sought comment on whether a rule should apply a different standard to senior executives, and whether, in lieu of the proposed rule, the Commission should adopt a disclosure rule or reporting rule.[991] The Commission sought comment on all aspects of potential alternatives, including whether the Commission should adopt one of the identified alternatives or some other alternative instead of the proposed rule.[992] The Commission also sought comment on the extent to which a uniform Federal standard for non-competes would promote certainty for employers and workers.[993]

The Commission received many comments on these questions, as well as on the question of whether the Commission should issue a Federal standard for non-competes or continue relying on existing law and case-by-case litigation to address harms from non-

[985] *See* Part IV.E (describing why the Commission is not finalizing a rescission requirement).

[986] § 910.2(b)(4) and (5).

[987] § 910.2(b)(2)(ii).

[988] § 910.2(b)(3).

[989] Balasubramanian, Starr, & Yamaguchi, *supra* note 74 at 44.

[990] NPRM at 3516.

[991] *Id.* at 3519–21.

[992] *Id.* at 3521.

[993] *Id.* at 3497.

competes. In this section, the Commission discusses the comments received regarding these alternatives and the reasons it has decided not to adopt them. This Part IX addresses these comments but does not address alternatives related to the design of specific regulatory provisions, which are discussed in the Part addressing the relevant provision.

A. Categorical Ban vs. Rebuttable Presumption

1. The Rebuttable Presumption Alternative Generally

While preliminarily finding that a categorical ban would best achieve the proposed rule's objectives, the Commission nevertheless sought comment on the alternative of a rebuttable presumption, under which it would be presumptively unlawful for an employer to use a non-compete, but a non-compete would be permitted if the employer could meet a certain evidentiary burden or standard.[994] The Commission also sought feedback on the form any rebuttable presumption should take.[995]

Most commenters that addressed this issue, including those both supporting and opposing the proposed rule, discouraged the Commission from including a rebuttable presumption in the final rule. These commenters contended that a rebuttable presumption would add complexity and uncertainty to the rule.

Supporters of the proposed rule asserted that a rebuttable presumption would undermine the rule's effectiveness, failing to deter employers from imposing non-competes while making litigation too uncertain and costly for most workers to pursue. Some of these commenters contended that a rebuttable presumption would also do little to reduce the chilling effects of non-competes. They argued that employers would continue to impose non-competes that are unlikely to survive a rebuttable presumption.

Many commenters critical of the proposed rule opposed a rebuttable presumption for essentially the same reasons they opposed the rule in general. They contended that, in States where non-competes are generally enforceable, a rebuttable presumption would inappropriately shift the burden of proof from workers to employers. Many of these commenters specifically opposed a rebuttable presumption that would use a test similar to antitrust law's "quick look" analysis, contending that the Commission's analysis of empirical research on non-competes cannot substitute for the lengthy experience courts usually have with a particular restraint before giving it quick-look treatment. A few commenters contended that a rebuttable presumption would increase litigation and raise employers' compliance costs by complicating the determination of whether a given non-compete is likely valid, requiring more lawyer involvement in drafting clauses and more reliance on courts to determine a non-compete's validity.

A few commenters supported a rebuttable presumption, arguing the Commission's proposed ban on non-competes was too blunt an instrument. Some also contended that a rebuttable presumption would offer a more flexible approach akin to the majority of State law approaches. At least one commenter stated a rebuttable presumption would make the final rule more likely to survive judicial review. A few commenters stated a rebuttable presumption would provide more protections than most State laws by allowing only non-competes that the commenter contended are not unfair to the worker, such as where highly paid workers agree to narrow non-competes in exchange for bargained-for consideration. One commenter argued a rebuttable presumption would enable the Commission to accrue more experience adjudicating non-competes and assessing their impact on competition.

Commenters advocating for a rebuttable presumption generally preferred a test focusing on one or more factors, including: the non-compete's geographic scope and duration; the presence and amount of any liquidated damages or penalty provision; whether the clause is narrowly tailored to prevent competition with actual competitors; the restrained worker's duties and income; and the availability of less restrictive alternatives. A few commenters supported a "preponderance" (as opposed to a "clear and convincing") standard to permit as many non-competes as possible but acknowledged that such a rule may be so similar to the existing common law as to be redundant.

After carefully reviewing and considering the comments, the Commission concludes that a rule implementing a rebuttable presumption is not preferrable to the final rule as adopted. Based on the Commission's expertise, including careful review and consideration of the entire rulemaking record, the Commission finds that a rebuttable presumption would be less effective than the final rule for achieving the Commission's stated goals. A rebuttable presumption also presents administrability concerns that the final rule does not.

Overall, the comments reinforced the Commission's concerns that a rebuttable presumption would foster substantial uncertainty about the validity of a given non-compete and would do little to reduce the *in terrorem* effects of non-competes. Research demonstrates that employers maintain non-competes even where they likely cannot enforce them,[996] that many workers are not aware of the applicable law governing non-competes or their rights under those laws,[997] and that the degree to which non-competes inhibit worker mobility is affected not only by whether a non-compete is actually enforceable but also on whether a worker believes their employer may enforce it.[998] Accordingly, the Commission concludes that a rule implementing a rebuttable presumption would be inadequate to reduce the prevalence of non-competes, their chilling effect on worker mobility, or their tendency to negatively affect competitive conditions. Relatedly, the Commission believes a rebuttable presumption would increase litigation costs for workers and employers relative to the final rule as adopted.

The Commission also believes that, in important respects, a rebuttable presumption for non-competes is inconsistent with the Commission's findings in this final rule. As discussed in greater detail in Part IX.C, a rule that provides for case-by-case, individualized assessment of non-competes is unlikely to address the negative effects of non-competes on competition in the aggregate. In addition, by focusing on considerations specific to the worker and the employer, a rebuttable presumption is unlikely to address the external effects of non-competes (*i.e.,* the effects on persons other than the parties to the non-compete), including their negative effects on the earnings of workers who are not covered by non-competes.

The Commission recognizes there may be some benefits to a rebuttable presumption relative to the status quo. Because it puts the burden of proof on employers, a rebuttable resumption would be stricter than the current law in States where non-competes are allowed, and research suggests even a small decrease in enforceability would increase worker mobility, raise wages,

[994] *Id.* at 3517.

[995] *Id.* at 3517–19.

[996] *See* Part IV.B.2.b.

[997] *See* Prescott & Starr, *supra* note 413.

[998] Starr, Prescott, & Bishara, *supra* note 68 at 633, 652, 664.

and promote innovation.[999] But the categorical ban adopted in the final rule would have greater benefits in these respects without the drawbacks explained in this Part IX.A.1.

2. Discrete Alternatives Related to Rebuttable Presumptions

In the NPRM, the Commission also sought comment on four discrete alternatives to the proposed rule: Alternative #1 (categorical ban below some threshold, rebuttable presumption above); Alternative #2 (categorical ban below some threshold, no requirements above); Alternative #3 (rebuttable presumption for all workers); and Alternative #4 (rebuttable presumption below some threshold, no requirements above).[1000]

As explained in Part IX.A.1, the Commission finds a rebuttable presumption would be ineffective in addressing the harms to competitive conditions caused by non-competes. For the same reasons, the Commission declines to adopt Alternatives #1, #3, and #4, all of which contemplated a rebuttable presumption for some or all workers.

While the vast majority of commenters supported the Commission's proposal to ban non-competes categorically for all workers, a number of commenters suggested that the Commission permit non-competes with senior executives (or other highly skilled or highly paid workers) and other workers. The Commission addresses these comments in Part IV.C and V.D.1, where it finds that such non-competes tend to negatively affect competitive conditions in labor markets and in product and service markets, and that non-competes are also exploitative and coercive for workers other than senior executives. For these reasons, the Commission declines to adopt Alternative #2, which contemplated imposing no requirements on workers above a certain wage or other threshold.

B. Other Discrete Alternatives

1. Disclosure Rule

In the NPRM, the Commission sought comment on the potential alternative of adopting disclosure requirements related to non-competes.[1001] The Commission explained that the rule could, for example, require an employer to disclose to a worker prior to making an employment offer that the worker will be subject to a non-compete and/or to explain the terms of the non-compete and how the worker would be affected by signing it.[1002] The Commission noted that a 2021 study by Starr, Prescott, and Bishara finds that disclosure of non-competes to workers prior to the acceptance of a job offer was associated with increased earnings, rates of training, and job satisfaction.[1003] The authors of the study, however, cautioned that their analysis ''should not be interpreted causally,'' a point the Commission noted in explaining why it gave minimal weight to the study.[1004] The Commission preliminarily concluded in the NPRM that a disclosure requirement would not achieve the objectives of the proposed rule.[1005]

In general, commenters stated they agreed with the Commission's preliminary view that, while there may be some benefits to a disclosure rule, it would not achieve the objectives of the rule. Workers and worker advocacy groups stated that non-competes are often presented to workers on their first day on the job, or after they accept an employment offer. Although these commenters generally supported a comprehensive ban, they noted that if the Commission did not pursue a ban, a disclosure requirement may help improve workers' awareness of non-competes before accepting an offer. On the other hand, these commenters contended that a disclosure rule would do little to reduce the prevalence of non-competes, because workers have little choice but to accept non-competes, which are typically presented as ''take-it-or-leave-it'' terms and are ubiquitous in many fields.

Many trade organizations, advocacy groups, and academics who were generally supportive of the rule stated that a disclosure rule would fail to mitigate the competitive harms caused by non-competes in the aggregate. While acknowledging a disclosure rule may ameliorate some problems related to worker awareness of non-competes, these commenters contended that non-competes are unfair and coercive because employees generally lack adequate bargaining power to refuse to sign or bargain over non-competes even when they are presented at the time of an employment offer, and that a disclosure rule would therefore not have the effect of making non-competes less unfair or coercive. A few commenters opposed a disclosure rule generally but urged the Commission to adopt a disclosure requirement for any non-competes permitted by the final rule, including for any non-competes entered into by a person who is selling a business.

On the other hand, some trade organizations, advocacy groups, and businesses that generally opposed the rule advocated for the Commission to adopt a disclosure rule in lieu of the proposed categorical ban. These commenters contended that a disclosure rule would substantially mitigate the unfairness of non-competes that are entered into without adequate notice to the worker without drastically altering the legal status quo, thereby maintaining the protections for trade secrets, training expenditures, and intellectual property they contend that non-competes provide. They stated that eight States and the District of Columbia have statutory notice requirements for non-competes.

Most of the commenters who supported a disclosure rule also argued that rather than demonstrating that non-competes tend to negatively affect competitive conditions, the available evidence merely demonstrates opportunistic behavior by employers (such as presenting non-competes only after prospective workers have taken hard-to-reverse steps towards accepting employment) and workers (such as seeking to be excused from a non-compete after recognizing its impact on future job prospects). These commenters asserted that a disclosure rule would be better suited to address these types of opportunistic behaviors than a categorical ban.

Some commenters based their support for a disclosure rule on their contention that workers have sufficient bargaining power to negotiate over non-competes when they are provided with notice of them. One such commenter pointed to the cited research by Starr, Prescott, and Bishara finding that disclosure of non-competes to workers prior to acceptance of a job offer may increase earnings, increase rates of training, and increase job satisfaction.[1006] The commenter also referenced the study's finding that of those workers who did not attempt to negotiate a non-compete, 52% reported that they thought the terms were reasonable and 41% reported that they assumed the terms to be non-

[999] Johnson, Lavetti, & Lipsitz, *supra* note 388 (decreasing enforceability increases worker mobility and earnings); Johnson, Lipsitz, & Pei, *supra* note 526 at 2–5 (enforceability negatively impacts patent quantity and quality).

[1000] NPRM at 3519.

[1001] *Id.* at 3521 n.446 (noting certain provisions in the Commission's Franchise Rule (16 CFR part 436), such as § 436.5(i) and (q), require non-competes to be disclosed to a franchisee).

[1002] *Id.* at 3521.

[1003] *Id.,* citing Starr, Prescott, & Bishara, *supra* note 68 at 75.

[1004] *Id.* at 3487, citing Starr, Prescott, & Bishara, *supra* note 68 at 73.

[1005] *Id.* at 3521.

[1006] Starr, Prescott, & Bishara, *supra* note 68 at 75.

negotiable.[1007] The commenter contended that a disclosure rule would decrease the number of workers who assumed non-competes were non-negotiable.

A few commenters contended a disclosure rule may be more likely to withstand judicial review because the Commission could promulgate a disclosure rule in this context under its UDAP authority pursuant to the Magnuson-Moss Act. In addition, a few commenters requested the Commission adopt timing rules for when the disclosure must be provided, such as by requiring that employers disclose a non-compete in the job advertisement, at the time of the job offer, or at least five business days prior to the worker's deadline to sign an employment agreement.

The Commission declines to adopt a disclosure rule.[1008] The Commission finds that merely ensuring workers are informed about non-competes would not address the negative externalities non-competes impose on workers, rivals, and consumers. As described in Part IV.B.3.a.ii, non-competes suppress wages for workers across the labor force, including workers who are not subject to non-competes. Ensuring that a worker who enters into a non-compete is informed about the non-compete does not address the harm to these other workers. In addition, it does not address the ways in which non-competes harm consumers and the economy through reduced new business formation and innovation, described in Part IV.B.3.b. In other words, non-competes have negative spillover effects on workers, consumers, businesses, and the economy that disclosure cannot remediate.

The Commission also finds that a disclosure requirement would not be as effective as a categorical ban in addressing the exploitation and coercion of workers through non-competes. As described in Part IV.B.2.b.i, there is a significant imbalance in bargaining power between employers and most workers, which is particularly acute in the context of negotiating employment terms such as non-competes. And, as many comments from workers and worker advocacy groups attest, non-competes are often included in standard-form contracts and offered on a take-it-or-leave-it basis.[1009] As a result, workers have limited practical ability to negotiate non-competes even if they are notified of such clauses prior to accepting their employment offer. Indeed, as described in Part IV.B.2.b.i, the comment record reflects that very few workers (other than senior executives) bargain over their non-competes—whether the worker knew about the non-compete before the job offer and understood its terms, or not.

The Commission gives the findings of the Starr, Prescott, and Bishara study on the impacts of disclosure little weight because the study reflects only correlation, not causation, with respect to the effects of a disclosure rule (similar to the "use" studies the Commission gives little weight to, as described in Part IV.A.2). The study merely compares a set of workers whose firms disclosed the non-compete and workers whose firms did not, and any correlation may thus be attributable to confounding factors. This comparison—similar to comparisons of workers with and without non-competes—may be polluted by differences between firms that opt to disclose non-competes and those that do not, or differences between workers who are the beneficiaries of disclosure versus those who are not.[1010] For example, it is possible that firms that disclose non-competes are also more responsible employers in general that tend to pay their workers more, train their workers more, and have more satisfied workers. The Commission therefore does not find that this evidence represents a causal relationship between the disclosure of non-competes and earnings and other outcomes. Moreover, the weight of the evidence discussed in Parts IV.B and IV.C finding increased earnings, new business formation, and innovation from the final rule significantly surpass the potential effects of disclosing non-competes.

One commenter stated that the Starr, Prescott, and Bishara study suggests that a disclosure rule would decrease the number of workers who assume a non-compete with which they are presented is non-negotiable. The study suggests that the potential effects of a disclosure rule in this respect would be, at best, limited.[1011] For the reasons described in this Part IX.B.1, the Commission is skeptical that a disclosure requirement would meaningfully increase the share of workers who actually bargain over non-competes.

A disclosure rule may address some deceptive or misleading practices in connection with non-competes. However, considering that a disclosure rule is not likely to significantly reduce the negative competitive impacts of non-competes on labor markets and on product and service markets, this benefit is significantly outweighed by the limitations of a disclosure rule.[1012]

The Commission further concludes that a disclosure rule is not necessary for non-competes in the context of sales of a business entity. As described in Part V.A, persons selling a business entity tend to have bargaining power in the context of the transaction, and the Commission is unaware of evidence that deceptive and misleading practices in connection with non-competes (such as waiting to disclose a non-compete until after the job offer) are common with respect to business sales.

2. Reporting Rule

In the NPRM, the Commission sought comment on a reporting rule as a potential alternative to the proposed rule.[1013] The Commission stated that it could require employers to report certain information to the Commission relating to their use of non-competes; for example, employers that use non-competes could be required to submit a copy of the non-compete to the Commission.[1014] As the Commission explained, a reporting rule might enable the Commission to monitor the use of non-competes and could potentially discourage employers from using non-competes that are not clearly justified under existing law.[1015]

The Commission stated in the NPRM that it did not believe a reporting rule would achieve the objectives of the proposed rule. The Commission stated that merely requiring employers to report their non-competes to the Commission would not meaningfully reduce the prevalence of non-competes and would therefore fail to reduce the negative effects non-competes have on competitive conditions in labor markets and product and service markets.[1016] At the same time, the Commission stated that a reporting rule would impose

[1007] *Id.* at 72.

[1008] The Commission notes that the Franchise Rule requires franchisors to disclose any non-compete that franchisees must impose on managers. 16 CFR 436.5(o)(3). These non-competes are prohibited by the final rule. *See* Parts III.D and V.D.6.

[1009] *See* Part IV.B.2.b.i.

[1010] Indeed, the authors of this study note that "unobservables may more plausibly account for these estimates." *See* Starr, Prescott, & Bishara, *supra* note 68 at 77 n.35.

[1011] *Id.* at 72. The study finds that 38% of workers asked to sign a non-compete before accepting a job offer assumed they could not negotiate, versus 48% of workers asked after accepting a job offer.

[1012] The Commission considered whether a disclosure rule would be appropriate for senior executives, but concludes that it is not because it would fail to address many of the ways in which non-competes are restrictive and exclusionary and tend to negatively affect competitive conditions.

[1013] *Id.* at 3521.

[1014] *Id.*

[1015] *Id.*

[1016] *Id.*

significant and recurring compliance costs on employers.[1017]

Most commenters addressing this topic agreed with the Commission's preliminary view that a reporting rule would not achieve the goals of the proposed rule. At least one business opposed any reporting requirement due to the cost of compliance and to avoid exposing any confidential information contained in employment agreements. At the same time, some commenters stated that a reporting rule may assist enforcement and provide quantitative data sets to measure compliance, while recognizing that such benefits would lose significance if the Commission were to adopt the proposed rule. One commenter suggested that, to improve the effectiveness of any reporting rule, any such rule should include a provision stating that any non-competes which were not properly disclosed to State and Federal authorities are null and void.

The Commission declines to adopt a reporting rule. A reporting rule would impose recurring compliance costs on employers, compared with the proposed rule, which largely imposes one-time costs. At the same time, a reporting rule would be inadequate to address the negative effects of non-competes on competitive conditions in labor markets and product and service markets, or the Commission's concerns about exploitation and coercion through the use of non-competes, since it would allow for the continued use of non-competes.

3. Limitations on Scope and Duration

In addition to those alternatives listed in the NPRM, a few commenters suggested adopting an alternative rule that allows non-competes but sets a limitation on their geographic scope and/or duration. Some commenters suggested a geographic limit of five, ten, or thirty miles and/or a temporal limit of six months or one, two, or three years, while others suggested a fact-specific requirement that the geographic scope or duration of a non-compete be ''reasonable.'' Many of these commenters cited State laws that take a similar approach.

A few commenters opposed this alternative. One worker advocacy group argued that any bright-line limit may end up serving as a default, encouraging employers to impose non-competes of the maximum allowable scope or duration even if that limit is longer or broader than they otherwise would have imposed. At least one academic commenter argued that setting geographic scope or duration limitations on non-competes is unlikely to have a substantial impact, pointing to the continued prevalence of overly broad non-competes despite State laws designed to set upper limits on geographic scope and duration.

The Commission declines to adopt a standard providing that the geographic scope or duration of non-competes must be ''reasonable.'' The Commission is concerned a reasonableness standard would foster significant uncertainty among workers and businesses about the enforceability of non-competes, for the same reasons a rebuttable presumption would. In addition, as described in Part II.C.1 of the NPRM, all States where non-competes are enforceable currently apply a reasonableness standard, so a Federal reasonableness standard would not mitigate the negative effects of non-competes that are presently occurring.

The Commission also declines to adopt the alternative of imposing limits on the scope and duration of non-competes. Such a rule would be insufficient to address the negative effects of non-competes on competitive conditions in labor markets or products and services markets. Although a non-compete that lasts for a shorter duration or within a smaller geographic area curtails job mobility for the individual worker it binds to a lesser degree, it nonetheless curtails the worker's job mobility and the ability of competing employers to recruit and access talent. Non-competes limited in duration and scope still tend to inhibit efficient matching between workers and employers, with spillover effects on new business formation and innovation through the mechanisms described in Parts IV.B and IV.C. Furthermore, limitations on the scope and duration of non-competes would not address the spillover effects from non-competes on other workers and consumers. In short, even if a non-compete applies only to a relatively delimited location or time period, it still—by design—cuts off free and fair competition in labor and product and service markets.

In addition, most of the commenters who stated that they were exploited and coerced by non-competes did not do so on the basis that the non-compete was overbroad in scope or duration. Instead, most of the commenters who described the terms of their non-competes described limits on scope and duration that were within the bounds of what is typically permissible under State law.[1018] Some of these commenters even stated expressly that they were subject to the non-compete that was standard or typical in their field. Even these commenters, however, explained how they were exploited and coerced in connection with non-competes because the non-compete was unilaterally imposed and because the non-compete trapped them in worse jobs or forced them to bear significant harms or costs. For these reasons, the Commission declines to adopt bright-line limits on the scope and duration of non-competes.

4. Compensation Requirement

Some commenters requested that the Commission adopt an alternative that would permit non-competes so long as the worker is compensated. Some commenters pointed to Massachusetts and Oregon law governing non-competes under which, for certain workers, non-competes may be enforced if, *inter alia,* they include a minimum level of compensation or consideration to the worker separate from compensation for employment.[1019]

The Commission declines to adopt a rule requiring compensation for non-competes. First, such a rule would not address the harms to competitive conditions that non-competes cause, which result in harm to other workers, to rivals of employers, and to consumers. The Commission finds in Parts IV.B.3.a.ii and IV.C.2.c.ii. that non-competes harm workers other than the workers who sign them, by reducing the number of job opportunities and thereby inhibiting efficient matching for all workers. The Commission further finds in Parts IV.B.3.b and IV.C.2.c.i that non-competes inhibit new business formation and innovation, which affects consumers. Therefore, even if a worker were fully compensated for a non-compete, the fact of that compensation would not redress these negative externalities. Second, this alternative would be ineffective or significantly less effective because of the *in terrorem* effect of non-competes, which the Commission finds to be grounded in empirical evidence and supported by the comment record described in Part IV.B.2.b. Third, such a rule would be difficult to administer and potentially easy to evade, as employers could suppress other wages or job quality while labeling some compensation as attributable to the non-compete.

5. Combination of Different Alternatives

Some commenters suggested the possibility of combining two or more of the alternatives discussed in this Part IX

[1017] *Id.*

[1018] *See* Part IV.B.2.b.

[1019] Mass. Gen. Laws Ann. ch. 149, sec. 24L; Or. Rev. Stat. Ann. sec. 653.295.

in place of a categorical ban. While a combination of these regulations or limitations might modulate some of the ways in which non-competes are exploitative and coercive, they would not be as effective as a comprehensive ban. In particular, a combination approach would lack the clarity of a comprehensive ban and thus would not be as effective as a categorical ban in addressing the exploitation and coercion of workers through non-competes. Moreover, as noted previously, the alternatives discussed would do little to address the tendency of non-competes to negatively affect competitive conditions and to cause spillover effects on other workers and on consumers. Accordingly, a combination of these alternative regulations or limitations would fail to remedy the aggregate and spillover effects of non-competes and thus would not achieve the Commission's stated goals.

C. The No-Action Alternative: Reliance on Existing Legal Frameworks Instead of a Clear National Standard

The Commission sought comment on whether a Federal standard for non-competes would promote certainty for employers and workers.[1020] The Commission finds that a clear national standard for non-competes will more effectively address non-competes' tendency to negatively affect competitive conditions than case-by-case adjudication or relying on existing law alone. The Commission also finds that declining to adopt the final rule, and instead relying on case-by-case adjudication or existing law alone, would not address the exploitation and coercion of workers through non-competes.

1. Comments Received

Many commenters expressed support for the NPRM because they viewed current laws as insufficient to protect all workers, rivals, or consumers, regardless of where they are located, from the negative effects of non-competes on competitive conditions in labor markets and markets for products and services. Numerous workers, businesses, and other commenters said the patchwork of State laws and confusion about those laws, particularly reasonableness tests, makes it difficult for workers and businesses to understand the law and in turn contributes to the use of unenforceable or overbroad non-competes and chills worker mobility. Several commenters also said that case-by-case adjudication and reasonableness tests make it difficult for parties to predict outcomes, which in turn raises litigation costs. Even some organizations opposed to the proposed rule or who supported a different policy believed that a Federal rule could be beneficial, such as to businesses operating in multiple jurisdictions.

In addition, according to commenters, case-by-case adjudication under State law cannot address the harms caused by non-competes through their use in the aggregate. Some commenters also asserted that the patchwork of State laws is complicated by remote and hybrid workers. Others argued that State laws are skewed in favor of employers or leave workers vulnerable to unreasonable agreements. Some argued that many workers, businesses, non-competes, and labor markets cross State lines, demonstrating the need for one standard. Several State Attorneys General also said that numerous complications arise when localities span more than one State and those States have different laws on non-competes; workers become confused and enforcement of non-competes can have spillover effects in another State.[1021]

In contrast, many commenters stated that case-by-case adjudication is preferable to a Federal rule because it allows individual facts to be considered. In addition, many commenters argued that existing State legislative and judicial decisions are sufficient to impose limitations on non-competes while recognizing legitimate business interests. Commenters also argued that States should be allowed to continue their natural experiments with non-competes; that non-competes historically have been and should remain an issue of State law; and that States are best suited to make policy judgments for their citizens.

Some commenters argued that unenforceable or overly broad non-competes are not a problem because courts can strike down or reform them. Some employers asserted that they specifically, or employers more generally, did not enter into unenforceable non-competes. Other commenters argued that employers did not use choice of law clauses to evade State laws, stating the clauses are the products of arms-length bargaining and provide certainty and predictability.

2. Responses to Comments and the Commission's Findings

a. The Value of Rulemaking

The Commission has the authority to make rules and regulations to carry out the FTC Act's prohibition on unfair methods of competition under sections 5 and 6(g) of the FTC Act as described in Parts II.A through II.C, and the Supreme Court has stated that agencies generally have discretion to choose between rulemaking and adjudication.[1022] Based on the empirical evidence, the comments, and the Commission's expertise, the Commission finds that rulemaking is the appropriate method of addressing non-competes.

The prevalence of non-competes across the economy, described in Part I.B.2, and the scale of the harms they cause, described in Parts IV.B and IV.C, show that it is more efficient to address the harms to competition from non-competes via rulemaking compared to case-by-case adjudication. As the D.C. Circuit stated in ruling that the Commission had the authority to promulgate unfair methods of competition rules, "the availability of substantive rule-making gives any agency an invaluable resource-saving flexibility in carrying out its task of regulating parties subject to its statutory mandate." [1023] The Commission estimates that there are 2.92 million firms using non-competes in the U.S.[1024] Adjudicating individual cases against even just one-tenth of 1% of these employers would be slow, inefficient, and costly for the Commission, employers, and workers. Rulemaking provides notice of the application of section 5 to non-competes in a clearer and more accessible way than piecemeal litigation and avoids compliance delays.[1025] The final rule will provide all market participants greater clarity about their obligations under section 5 of the FTC Act, facilitating compliance. Additionally,

[1020] NPRM at 3497.

[1021] Comment of the Attys. Gen. of 17 States and DC, FTC–2023–0007–21043 at 11.

[1022] *SEC* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947); *NLRB* v. *Bell Aerospace Co. Div. of Textron, Inc.,* 416 U.S. 267, 293 (1974); Wright & Miller, Federal Practice and Procedure sec. 8117 (2d ed. 2023).

[1023] *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672, 681–82 (D.C. Cir. 1973); *see also id.* at 690 (stating that "the historic case-by-case purely adjudicatory method of elaborating the Section 5 standard and applying it to discrete business practices has not only produced considerable uncertainty" but has also spawned lengthy litigation).

[1024] *See* Part X.F.6 (estimating that 49.4% of the 5.91 million firms in the U.S. use non-competes).

[1025] *See* Wright & Miller, Federal Practice and Procedure sec. 8117 (2d ed. 2023); *Nat'l Petroleum Refiners,* 482 F.2d at 690 ("[W]hen delay in agency proceedings is minimized by using rules, those violating the statutory standard lose an opportunity to turn litigation into a profitable and lengthy game of postponing the effect of the rule on their current practice. As a result, substantive rules will protect the companies which willingly comply with the law against what amounts to the unfair competition of those who would profit from delayed enforcement as to them.") (citation omitted).

the final rule will simplify enforcement proceedings by streamlining the proof required.[1026]

In addition, the principal harms from non-competes arise from their tendency to negatively affect competitive conditions in the aggregate. A single non-compete with a single worker may not do much to inhibit efficient matching between workers and employers across a labor market or suppress new business formation or innovation (and what effects it does have would be difficult to measure), but the Commission finds based on empirical evidence that the use of many non-competes across the labor market does have these aggregate net negative effects.[1027] For this reason, rulemaking is preferable to individual litigation for addressing the negative effects of non-competes. Past Commission experience has also illustrated that case-by-case enforcement, education, and other enforcement mechanisms are not always sufficient to stop widespread harms.[1028] A Federal rulemaking is the most efficient method to address the scale of harm to competitive conditions in labor, product, and service markets caused by non-competes.

Finally, ''utilizing rule-making procedures opens up the process of agency policy innovation to a broad range of criticism, advice and data that is ordinarily less likely to be forthcoming in adjudication.'' [1029] Rulemaking is particularly beneficial when, as here, ''a vast amount of data had to be compiled and analyzed, and the Commission, armed with these data, had to weigh the conflicting policies.'' [1030] Rulemaking also allows for more fulsome engagement from the public by providing for public comment on a complete regulatory scheme. The Commission greatly benefited from the submitted comments.

[1026] *See Nat'l Petroleum Refiners,* 482 F.2d at 690 (''With the issues in Section 5 proceedings reduced by the existence of a rule delineating what is a violation of the statute or what presumptions the Commission proposes to rely upon, proceedings will be speeded up.'').

[1027] *See* Part IV.B.3.a–b.

[1028] *See, e.g.,* Combating Auto Retail Scams Trade Regulation Rule, 89 FR 590, 600 (Jan. 4, 2024) (stating that rulemaking was necessary because certain unfair and deceptive acts and practices had persisted despite more than a decade of Federal and State enforcement, education, and other action in the motor vehicle dealer marketplace).

[1029] *Nat'l Petroleum Refiners,* 482 F.2d at 683 (citations omitted); *see also* Wright & Miller, Federal Practice and Procedure sec. 8117 (2d ed. 2023).

[1030] *Nat'l Petroleum Refiners,* 482 F.2d at 683 (citations omitted).

b. Case-by-Case Litigation Alone Cannot Address the Negative Effects of Non-Competes on Competition

The Commission finds that case-by-case litigation alone is insufficient to address the harms to competition from non-competes due to the cost of litigation, which deters many workers from challenging non-competes, and the limited resources of public enforcement agencies. In addition, individual litigation is not well-suited to redress the negative externalities non-competes impose on other workers, other employers, consumers, and the economy from their use in the aggregate.

Many commenters addressed the shortcomings of individual litigation as a means for addressing the harms of non-competes. Numerous commenters noted that litigation is costly and many workers cannot afford to litigate their non-competes.[1031] Many commenters, including workers, entrepreneurs, and employment attorneys, shared examples of five-figure and six-figure litigation costs related to non-compete lawsuits. Numerous commenters reported that the fear of litigation costs induced them to refrain from seeking or accepting other work or starting a business, even though they thought the non-compete was likely unenforceable. Many other commenters stated that they complied with a non-compete after they were threatened with enforcement, even though they were unsure about the non-compete's enforceability. One study finds that 53% of workers subject to non-competes are hourly workers,[1032] who are particularly unlikely to be able to afford a court challenge.

Commenters also noted some non-competes include liquidated damages clauses or fee-shifting provisions requiring the worker to pay the employer's attorney and other costs if the employer wins, further increasing the costs (and risks) of challenging a non-compete. In addition, commenters stated that litigation is time-consuming and could take as long or longer than the non-compete period. For example, one commenter shared a decision in the commenter's own case where the appellate court found the non-compete violated public policy by leaving an area with only one surgeon in a specialty—but reached that decision only after the two-year non-compete had already run its course.[1033] Commenters also said workers who sued their employer could experience reputational harm and difficulty finding work going forward.

[1031] *See also* Part IV.B.2.b.ii (describing exploitative and coercive effects of the risk and cost of being subject to a non-compete suit).

[1032] Lipsitz & Starr, *supra* note 72 at 144 (analyzing data from the Starr, Prescott, & Bishara survey).

[1033] *Graham* v. *Cirocco,* 69 P.3d 194, 200 (Kan. App. 2003).

Litigation can be even riskier if a court might reform a non-compete, which leaves the worker subject to some restrictions even if the initial non-compete was impermissibly broad. Several commenters cited a *Harvard Law Review* article that discusses the consequences of allowing courts to sever or reform overbroad non-competes:

> For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction. If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable.[1034]

If there is no penalty for drafting overbroad non-competes (as is true in most States),[1035] employers have little incentive to draft non-competes narrowly, particularly if a court is likely to revise it rather than strike it down, or if a worker is unlikely to be able to litigate at all. An employment attorney commented it is particularly difficult to advise workers about whether their specific non-compete is enforceable when it is possible a court may modify the underlying non-compete.

Case-by-case litigation under other antitrust laws alone is also insufficient to address the harms from non-competes. Non-competes restrain trade and therefore are subject to the Sherman Act.[1036] While private litigants may bring private causes of action to enforce the Sherman Act,[1037] the Commission views private litigation under the Sherman Act as an ineffectual response in the context of non-competes based on the history of cases by private litigants arising under that Act, as explained in the NPRM.[1038] For an individual litigant, proving harm to competition in the relevant geographic and product markets is a resource-intensive task that

[1034] Blake, *supra* note 22 at 682–83 (noting that this may not be applicable if the worker has bargaining power and it may be inefficient to tailor non-competes to each worker, and recommending that courts only sever when they determine the employer acted fairly).

[1035] *See* NPRM at 3495.

[1036] *See* Part I.B.1.

[1037] *See* 15 U.S.C. 15.

[1038] NPRM at 3496.

typically requires expert testimony.[1039] This makes an already expensive proposition even less palatable for most workers and further tips the risk-versus-reward calculus away from litigation. In addition, to succeed on a Sherman Act claim, a plaintiff must show harm to competition as a whole, not just to themselves. It may be difficult or impossible for a worker to establish that their individual non-compete—or a single firm's use of a non-compete—adversely affected competition in a labor market or product/service market sufficiently to violate the Sherman Act.[1040] Section 5, on the other hand, is more inclusive than the Sherman Act.[1041] As outlined in Part II.F, section 5 requires a showing of indicia of unfairness and a tendency to negatively affect competitive conditions. It does not require a separate showing of market power or market definition—nor does it require proof of harm to competition by each non-compete.[1042]

Case-by-case litigation by public enforcers, such as the Commission or State attorneys general, is a potential alternative or supplement to private litigation under other antitrust laws. But the ability of public enforcers to engage in effective case-by-case litigation related to non-competes, absent a rule, is limited.

As cited in Parts I.B. and II.C.2, the FTC has previously secured consent orders premised on the use of non-competes being an unfair method of competition under section 5, and the Commission has the authority to determine that non-competes are unfair methods of competition through adjudication. However, FTC resource constraints limit the potential effectiveness of enforcement of section 5 on a purely case-by-case basis. The Commission is an independent agency that works to promote fair and open markets and protect the entire American public from unfair and deceptive business practices. The Commission has fewer than 1,500 employees for its entire body of work related to this mission,[1043] which includes investigating, challenging, and litigating anticompetitive mergers and conduct; processing and reviewing merger filings; and investigating and challenging a wide range of consumer protection issues.[1044]

Similarly, several State Attorneys General commented that the multi-factor common law approaches to non-compete law result in piecemeal decisions that do not address the non-compete problem in a uniform manner.[1045] These State Attorneys General also noted that some State enforcement agencies lack straightforward authority to enforce existing common law protections related to non-competes and argued that the challenges associated with common law enforcement underscore the need for a Federal rule.[1046] And the resource limitations to pursue non-competes comprehensively through enforcement limit States equally—if not more.

The Commission estimates that there are approximately 30 million individual non-competes in the U.S.[1047] In contrast to the large volume of non-competes, the resources of public enforcement agencies are limited. Public enforcers must balance competing demands for resources and priorities when they bring public enforcement actions. Public enforcers cannot conceivably investigate the specific details of every non-compete or initiate litigation concerning more than a small fraction of unlawful non-competes. A Federal rule provides clarity to market participants, engages all stakeholders in the development of the rule, and more effectively ceases an unfair method of competition.

The significant limitations on the ability of private and public litigants to challenge unlawful non-competes have practical implications. Courts cannot strike down an unenforceable non-compete that they never had the opportunity to review. Moreover, as detailed in Part IV.B.2.b, non-compete restrictions may still have significant *in terrorem* effects when workers are uncertain about the enforceability of their non-competes or lack the ability to challenge their use.

Furthermore, case-by-case litigation is insufficient to address negative externalities from non-competes (*i.e.,* harms non-competes cause to persons other than the parties to the non-compete). As described in Parts IV.B and IV.C, non-competes impose significant negative externalities on other workers, other firms, consumers, and the economy. Individual non-compete cases are not well-suited for redressing these harms. For example, while the precise reasonability test for non-competes differs from State to State, the test typically considers the business interest asserted by the employer; the harm to the worker; and the injury to the public from the loss of the worker's services.[1048] This test does not generally account for the harms experienced by other workers, other firms, consumers, and the economy resulting from the negative effects of non-competes on competition.

Furthermore, because the significant harms of non-competes result from their aggregate use, they are unlikely to be captured by an assessment of an individual worker's non-compete or an individual firm's use of non-competes. This is true regardless of whether those non-competes are challenged under State non-compete laws or under other antitrust laws. It is likewise true regardless of whether non-competes are challenged by private litigants or public enforcers. Accordingly, the Commission finds that case-by-case litigation alone is insufficient to address the negative externalities of non-competes.

The Commission, by contrast, is well-positioned to evaluate non-competes holistically. The Commission is an expert agency and has used its expertise to assess the weight of the empirical evidence and comment record to evaluate the aggregate effects of non-competes. The Commission here implements a clear national standard through notice-and-comment rulemaking to protect competition, based on the evidence that the use of non-competes in the aggregate negatively affects competition and harms workers and consumers.

For all these reasons, the Commission finds that case-by-case litigation is not a viable alternative to the final rule.[1049]

[1039] *See, e.g., U.S. Healthcare, Inc.* v. *Healthsource, Inc.,* 986 F.2d 589, 599 (1st Cir. 1993) (''In practice, the frustrating but routine question how to define the product market is answered in antitrust cases by asking expert economists to testify.'').

[1040] *See* NPRM at 3496–97 (discussing non-compete cases that have been brought under the antitrust laws).

[1041] *See* Part II.A.

[1042] *See* Part II.F.

[1043] FTC, *Congressional Budget Justification—Fiscal Year 2025,* at 8 (2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/fy25-cbj.pdf.*

[1044] *Id.*

[1045] Comment of the Attys. Gen. of 17 States and DC, FTC–2023–0007–21043 at 7.

[1046] *Id.*

[1047] *See* Part I.B.2.

[1048] *See* NPRM at 3494–95.

[1049] A few commenters suggested that the Commission could create guidelines instead of a rule to explain what factors the agency would look at in an enforcement action. By definition, however, a guidance document would ''not have the force and effect of law.'' *Perez* v. *Mortg. Bankers Ass'n,* 575 U.S. 92, 97 (2015) (quoting *Shalala* v. *Guernsey Mem'l Hosp.,* 514 U.S. 87, 99 (1995)). Guidelines would not bind employers or courts and would not provide workers with the same clarity about the enforceability of their non-competes. Moreover, case-by-case litigation itself is not suited to address the negative externalities of non-competes, a concern the issuance of guidelines would not address. The Commission finds that the issuance of guidelines is not a viable alternative to the final rule for the same reasons that it finds that the no-action alternative generally is not a viable alternative to the final rule.

c. State Law Alone Cannot Address the Negative Effects of Non-Competes on Competition

The Commission appreciates that States have enacted legislation in recent years to ban or restrict non-competes and ameliorate their negative effects.[1050] The Commission has long recognized the value of concurrent enforcement of Federal and State law and believes States have an important role to play in restricting the use of non-competes. Indeed, in this final rule, the Commission has revised § 910.4 to ensure that States may continue to enforce laws that restrict non-competes and do not conflict with the final rule. However, the Commission believes that reliance on State law alone is insufficient to address the negative effects of non-competes on competition. The practical ability of States to address the harms to their residents from non-competes is limited by various factors, including employers' use of choice-of-law, forum-selection, and arbitration clauses; significant confusion among both employers and workers resulting from the patchwork of State law, which chills workers from engaging in competitive activity even where non-competes are likely unenforceable under State law and also increases employers' compliance costs, particularly given the increase in interstate remote work; spillover effects from other States' laws; and incentives for States to adopt permissive non-compete policies.

Many States have adopted statutory restrictions or compete bans on non-competes. Four States—California, Minnesota, North Dakota, and Oklahoma—have adopted statutes rendering non-competes void for nearly all workers.[1051] The majority of the remaining 46 States have statutory provisions or case law that ban or limit the enforceability of non-competes for workers in certain specified occupations.[1052] The general language of the test for whether a non-compete is reasonable is fairly consistent from State to State.[1053] However, the specifics of the application of the standard differ from State to State. For example, States vary in how narrowly or broadly they define legitimate business interests and the extent to which courts are permitted to modify an unenforceable non-compete. States also differ with respect to statutory restrictions on non-competes.[1054] As a result, among the 46 States where non-competes may be enforced, variation exists with respect to the enforceability of non-competes.[1055]

State law also differs with respect to the steps courts take when they conclude that a non-compete is unenforceable as drafted. As noted in the NPRM, the majority of States have adopted the ''reformation'' or ''equitable reform'' doctrines, which allow courts to revise the text of an unenforceable non-compete to make it enforceable.[1056]

Because the enforceability of non-competes and courts' positions with respect to unenforceable non-competes vary from State to State, the question of which State's law applies in a legal dispute can determine the outcome of a non-compete case. Non-competes often contain choice-of-law provisions designating a particular State's law for resolution of any future dispute.[1057] Furthermore, some non-competes include forum-selection provisions specifying the court and location where a dispute may be heard.[1058] The default rule under conflict-of-laws principles is that the court honors the parties' choice of law, meaning that the burden is typically on the worker—the vast majority of whom the Commission finds are exploited and coerced when entering into a non-compete—to negotiate for the law of a different forum to apply.[1059]

There is significant variation, however, in how courts apply choice of law rules in disputes over non-competes.[1060] As a result, it can be difficult for employers and workers to predict how disputes over choice of law (and, in turn, the enforceability of the non-compete) will be resolved.[1061] Several commenters agreed that a Federal rule would alleviate these problems.

Choice of law provisions may also mean that workers lose their own State's protections. For example, workers from States where non-competes are banned commented that they faced enforcement of non-competes that selected the law of another State. This raises the concern that choice of law clauses can be used to evade State bans or restrictions by forum shopping.[1062] As two scholars note, when ''the parties or issues involved have connections to multiple jurisdictions,'' the law ''confounds lawyers and commentators because of its complexity and unpredictability.'' [1063]

Employers may also impose arbitration clauses, which require that legal disputes with the employer—including disputes related to non-competes—be resolved through binding arbitration rather than in court.[1064] Where such clauses are valid, the Federal Arbitration Act requires that courts enforce them.[1065] Choice of law, forum selection, and arbitration clauses create opportunities for employers to forum-shop in ways that undermine any given State's ability to effectively regulate non-competes.

Numerous workers, businesses, and other commenters said the patchwork of State laws and confusion about those laws makes it difficult for workers and businesses to understand whether a particular non-compete would be enforceable. The lack of a clear national standard, and resulting confusion,

[1050] *See* NPRM at 3494 (summarizing recent State non-compete legislation).

[1051] *See* Cal. Bus. & Prof. Code sec. 16600; N.D. Cent. Code sec. 9–08–06; Okla. Stat. Ann. tit. 15, sec. 219A. Minnesota banned non-competes signed on or after July 1, 2023, after the comment period closed. Minn. Stat. Ann. sec. 181.988.

[1052] In most States, those limits apply to just one or two occupations (most commonly, physicians). *See* Beck Reed Riden LLP, *Employee Noncompetes: A State-by-State Survey* (Feb. 19, 2024), *https://beckreedriden.com/wp-content/uploads/2024/02/BRR-Noncompetes-20240219-50-State-Noncompete-Survey-Chart.pdf* (hereinafter ''Beck Reed Riden Chart'').

[1053] *See* NPRM at 3494–95.

[1054] *See, e.g.,* Beck Reed Riden Chart, *supra* note 1052.

[1055] NPRM at 3495.

[1056] *Id.*

[1057] Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective,* 31 Comp. Lab. & Pol'y J. 389, 396–402 (2010).

[1058] *Id.* at 402–04.

[1059] *Id.* at 397 (''In general, courts defer to choice of law clauses because they are presumed to represent the express intention of the parties.''). *Cf.* Cal. Lab. Code sec. 925(a) (stating that employers shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would either (1) require the employee to adjudicate outside of California a claim arising in California or (2) deprive the employee of the substantive protection of California law with respect to a controversy arising in California).

[1060] Lester & Ryan, *supra* note 1057 at 394–95.

[1061] *Id.* at 395 (''The state of the law is perhaps characterized more by inconsistency than anything else, so much so that commentators lament the 'disarray' and 'mish-mash' of the law, and criticize courts for their 'post-hoc rationalizing of intuitions' or their use of a 'hodgepodge of factors, often with insignificant explanation of how they decide what weight to give each.''') (internal citations omitted).

[1062] *See generally* Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Non-Compete Agreements: Regulatory Risk Management and the Race to the Bottom,* 65 Wash. & Lee L. Rev. 1381, 1386 (2008) (noting ''judicial attempts to preempt other courts from disregarding the parties' choice of law''). Some States have attempted to defend against this by enacting statutes banning selection of a different State's law for a non-compete. *See* Minn. Stat. Ann. sec. 181.988(3)(a) (Minnesota); Cal. Lab. Code sec. 925 (California); Colo. Rev. Stat. sec. 8–2–113(6) (Colorado); Mass. Gen. Laws ch. 149, sec. 24L(e) (Massachusetts); La. Rev. Stats. 23:921(2) (Louisiana). Many of these statutes are relatively recent, however, and it remains to be seen how effective they will be.

[1063] Lester & Ryan, *supra* note 1057 at 389.

[1064] *See, e.g.,* Alexander J.S. Colvin, Econ. Pol'y Inst., Report, *The Growing Use of Mandatory Arbitration* (Apr. 6, 2018).

[1065] *See, e.g., Nitro-Lift Techs.* v. *Howard,* 568 U.S. 17, 20–22 (2012).

contributes to non-competes being used in jurisdictions where they are unenforceable. Starr, Prescott, and Bishara find that employers frequently use non-competes even when they are unenforceable under State law.[1066] Similarly, Colvin and Shierholz find that 45.1% of workplaces in California use non-competes even though they are unenforceable there.[1067] Anecdotally, an economist commented that the Commission's *Prudential Security* case, in which the employer continued using non-competes after they were held unenforceable by a court, was an example of employers enforcing unenforceable non-competes.[1068]

While the Commission has no doubt that many employers aim to ensure their contracts comply with applicable law, the empirical evidence indicates that at least some employers are using unenforceable non-competes, and some workers are turning down jobs where their non-competes are likely unenforceable. Some commenters referenced Starr, Prescott, and Bishara's finding that workers frequently cite non-competes as a factor in turning down job offers in both States that enforce non-competes and in those that do not.[1069] The study also finds that workers are more likely to report that they would be willing to leave for a competitor when they did not believe their employer would attempt to enforce a non-compete in court.[1070] The study suggests that whether a worker's non-compete is enforceable may matter less than whether the employer is willing to try to enforce it.[1071] The Commission notes that this study does not necessarily indicate a causal relationship, but it does indicate that for many workers, the *in terrorem* effect of non-competes may outweigh any State protections.

Furthermore, the ability of States to address harms to their residents from non-competes is limited by spillover effects from other States. The economies of States are closely interconnected. Therefore, even where a State adopts a law that strictly regulates non-competes, such a law can be undermined by permissive non-compete laws in a nearby State.[1072]

Finally, several comments argued that State regulation of non-competes should continue by quoting Justice Brandeis's dissent in *New State Ice Co.* v. *Leibmann:* ''[i]t is one of the happy incidents of the [F]ederal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'' [1073] The Commission disagrees that further laboratory testing by States is needed. States have been experimenting with non-compete regulation for more than a century, with laws ranging from full bans to notice requirements, compensation thresholds, bans for specific professions, reasonableness tests, and more.[1074] Past State experimentation and legal changes yielded a considerable body of empirical research, which as described in Parts IV.B and IV.C, demonstrates that non-competes negatively affect competitive conditions in labor markets and in product and service markets. This evidence supports the Commission's finding that non-competes are an unfair method of competition.

Individual States' non-compete policies can cause spillover effects that negatively affect competitive conditions in other States. Individual States' non-compete policies can also affect the operation of legal regimes in other States. Choice of law provisions cause confusion for workers even in States where non-competes are unenforceable. There are incentives for some States to adopt extremely permissive non-compete policies to attract employers that favor non-competes, and potentially even to enable employers to ''export'' those permissive policies to other States through choice-of-law provisions.[1075] In short, States are interconnected with respect to non-competes. Without a uniform standard through the final rule, States are forced to balance the benefit to their residents of laws regulating non-competes against the fear that some employers may shift jobs to States where non-competes are more enforceable. One benefit of the Commission's rulemaking is it resolves this problem. The rulemaking record shows banning non-competes will improve competitive conditions in all States and will benefit workers in all States.

X. Regulatory Analysis

A. Introduction

The Commission has examined the economic impacts of the final rule as required by section 22 of the FTC Act (15 U.S.C. 57b–3). Section 22 directs the Commission to issue a final regulatory analysis that analyzes the projected benefits and any adverse economic effects and any other effects of the final rule. The final regulatory analysis must also summarize and assess any significant issues raised by comments submitted during the public comment period in response to the preliminary regulatory analysis.[1076]

B. Preliminary Analysis

Pursuant to section 22 of the FTC Act, the Commission issued a preliminary regulatory analysis of its proposed rule.[1077] The preliminary regulatory analysis contained (1) a concise description of the need for, and objectives of, the proposed rule; (2) a description of any reasonable alternatives to the proposed rule that may accomplish the stated objective of the final rule in a manner consistent with applicable law; and (3) for the proposed rule and for each of the alternatives described, a preliminary analysis of the projected benefits and any adverse economic effects and any other effects.[1078]

In the preliminary regulatory analysis, the Commission described the anticipated effects of the proposed rule and quantified the benefits and costs to the extent possible. For each benefit or cost quantified, the analysis identified the data sources relied upon and, where relevant, the quantitative assumptions made. The preliminary analysis measured the benefits and costs of the proposed rule against a baseline in which the Commission did not promulgate a rule regarding non-competes and included in the scope of the analysis the broadest set of economic actors possible. Several of the benefits and costs were quantifiable, but not monetizable—especially with respect to differentiating between transfers, benefits, and costs. The Commission preliminarily found that others were not quantifiable. The

[1066] Starr, Prescott, & Bishara, *supra* note 68 at 53, 81.

[1067] Colvin & Shierholz, *supra* note 65 at 5–6.

[1068] *See* FTC, Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re Prudential Sec., Inc. et al.,* Matter No. 211 0026 at 1, 5–7 (Dec. 28, 2022).

[1069] Starr, Prescott, & Bishara, *supra* note 68 at 633, 663.

[1070] *Id.* at 633, 652, 664.

[1071] *Id.*

[1072] *See, e.g.,* Johnson, Lavetti, & Lipsitz, *supra* note 388 (finding that increases in non-compete enforceability in one State have negative impacts on workers' earnings in bordering States, and that the effects are nearly as large as the effects in the State in which enforceability changed, but taper off as the distance to the bordering State increases).

[1073] *New State Ice Co.* v. *Leibmann,* 285 U.S. 262, 311 (1932) (Brandeis, dissenting).

[1074] *See* Beck Reed Riden Chart, *supra* note 1052.

[1075] *See, e.g.,* Glynn, *supra* note 1062 at 1385–86 (stating that ''because employers typically are the first movers in [non-compete] litigation, they often can litigate in a hospitable judicial forum,'' and noting a rise in interjurisdictional disputes related to non-compete enforcement and ''judicial attempts to preempt other courts from disregarding the parties' choice of law'').

[1076] 15 U.S.C. 57b–3(b)(2)(C), (E).

[1077] NPRM at 3521–31.

[1078] *See* 15 U.S.C. 57b–3(b)(1)(A) through (C).

preliminary analysis discussed any bases for uncertainty in the estimates.

The Commission preliminarily found substantial positive effects of the proposed rule: an increase in workers' earnings by $250–$296 billion annually (with some portion representing an economic transfer from firms to workers); an increase in new firm formation and competition; a reduction in health care prices (and prices in other markets may also fall); and an increase in innovation. The Commission noted that several of these benefits overlap (*e.g.,* increases in competition may fully or in part drive decreases in prices and increases in innovation). The Commission also preliminarily found some costs of the proposed rule. Direct compliance and contract updating would result in $1.02 to $1.77 billion in one-time costs, and firm investment in human capital and capital assets would fall.

The Commission preliminarily concluded that the substantial labor market and product and service market benefits of the proposed rule would exceed the costs. Furthermore, the Commission preliminarily found the benefits would persist over a substantially longer time horizon than most costs of compliance and contract updating.

C. Public Comments on the Preliminary Regulatory Impact Analysis

Based on the comments received, the final regulatory analysis reflects greater quantification where possible and includes sensitivity analyses to reflect different assumptions, including assumptions commenters suggested. The final regulatory analysis concludes, consistent with the preliminary analysis, that the benefits of the final rule justify the costs.

Some commenters urged the Commission to quantify the costs and benefits to a greater degree. In the final analysis, the Commission incorporates greater quantification where possible. That some effects cannot be quantified or monetized does not, however, undermine the Commission's conclusion that the benefits justify the costs.

Some commenters focused on the methodology used to estimate earnings effects in the preliminary analysis, stating that extrapolating estimated effects on earnings based on linear predictions may result in incorrect estimates. These commenters stated that linear predictions might be particularly unreliable outside the range observed in the data. While as a general matter, linear extrapolation may not be appropriate in all circumstances, especially in the absence of data supporting such an approach, the Commission notes the linear effect of non-compete enforceability on earnings was statistically tested in the economic literature.[1079]

Nevertheless, to test and confirm the robustness of the conclusions drawn in the preliminary analysis from the linear approach, in this final analysis, the Commission uses several estimation approaches. For its primary analysis, the Commission adopts an approach that does not rely on extrapolation. Specifically, the Commission assumes that the historical average change[1080] in non-compete enforceability observed at the State level represents the total change in enforceability that results from the rule. This approach is hereafter referred to as the ''average enforceability change approach.'' It likely underestimates the effects of the rule because the State-level changes that would occur under the rule (which adopts a near comprehensive ban) would be substantially larger than the changes observed historically. The Commission also conducted sensitivity analyses with two other approaches—described further in Parts X.C and X.F.6.a—that use linear extrapolation to scale up the effects estimated in the literature to estimate the effects of the final rule (*i.e.,* a near comprehensive ban).

Some commenters alleged the proposed rule would increase inflation. Some commenters also stated the proposed rule would harm shareholders by decreasing corporate profits. In response, the Commission notes that the regulatory analysis attempts to quantify and monetize real costs and benefits of the final rule as opposed to nominal costs and benefits. Therefore, net benefits are benefits that represent increased economic efficiency resulting from the final rule rather than increases in the dollar value of output that may be due to inflation. Additionally, earnings increases are due, at least in part, to increased economic efficiency, which would likely lower prices. Accordingly, the Commission does not expect that prices will rise because of the rule. Indeed, empirical evidence shows that in physician clinics, prices fall with decreased non-compete enforceability.[1081] Similarly, while the effect of the final rule on corporate profits is unclear,[1082] the Commission's analysis is focused on overall gains or losses in economic surplus—*i.e.,* the net benefits to society, not to individual corporations.

Some commenters stated that certain costs may be missing from the preliminary analysis, including costs related to worker misconduct and litigation over the validity of the final rule. The Commission finds no evidence or compelling arguments directly linking non-competes to worker misconduct and therefore does not consider such costs.[1083] Costs related to litigation over the validity of the rule are outside the scope of the regulatory analysis under section 22, which is concerned with costs and benefits should the final rule be implemented.

Some commenters stated the rule may have beneficial tax ramifications for businesses and workers with non-competes that are no longer enforceable, including based on changes in amortization schedules. In response, the Commission notes that any tax savings under the final rule represent transfers from the government to firms that previously used non-competes. Significantly, the Commission is allowing existing non-competes with senior executives, who may be most likely to have non-competes with tax implications, to remain in effect. This will mitigate the need for tax-related administrative work. In response to comments on the tax ramifications of clawed back pay, the final rule does not encourage or require firms to ''claw back'' compensation and given the exclusion for senior executives' existing non-competes in the final rule, situations in which a firm would be in a position to consider clawing back pay are likely to be extremely limited, if any.

Some commenters stated workers may be harmed if firms claw back workers' earnings, if workers lose long-term incentive payments, retention bonuses, and severance payments, or if workers must pay for training out of pocket in response to the rule. First, in Parts IV.B.3.a.iiv and X.F.6.a, the Commission finds earnings increases overall associated with decreases in non-compete enforceability. With respect to existing non-competes, non-competes

[1079] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 17.

[1080] In other words, taking all changes in non-compete enforceability between 1991 and 2014 (the range studied in the relevant literature) into account, the Commission considers a change whose magnitude is equal to the average of the magnitudes of all those changes. *See* Johnson, Lavetti, & Lipsitz, *supra* note 388 for more details.

[1081] Hausman & Lavetti, *supra* note 590.

[1082] The evidence in the empirical literature is mixed. Younge & Marx (*supra* note 755) find an increase in firm value when non-competes became enforceable in Michigan. Hiraiwa, Lipsitz, & Starr (*supra* note 502) find no effect on firm value when non-competes were prohibited for the majority of workers in Washington.

[1083] *See* Part V.D.3.

with senior executives, which are most likely to be structured with incentive payments, bonuses, and severance, may remain in effect under the final rule. To the extent any other existing non-competes with such structures are not excluded from the final rule, as noted in Parts III.D and IV.D, deferred compensation and other structured payments generally have many material contingencies other than a non-compete, which means incentive payments and retention bonuses will continue to retain value for the employer. Going forward, under the final rule, agreements for deferred compensation and other structured payments may be permissible as long as they do not fall within the definition of non-compete clause in § 910.1. With respect to payments for training, the Commission notes evidence that worker-sponsored training is unaffected by legal enforceability of non-competes,[1084] and it is therefore unlikely that workers will incur costs related to training as a result of the final rule.

Some commenters disagreed with the Commission's use of patenting activity as a proxy for innovation in the preliminary analysis, stating that the value of innovation may not be captured in patenting, in part because employers may use patents as a substitute for non-competes. First, the Commission agrees that innovation likely has value above and beyond patenting. That patenting does not capture the full value of innovation is not a basis for dismissing its value as a proxy altogether. Second, while it is theoretically possible firms may substitute from the use of non-competes to the use of patents to protect intellectual property, the empirical literature shows increases in innovation do not follow from the simple substitution of protections between non-competes and patents. Specifically, the empirical literature confirms the innovations prompted by decreased non-compete enforceability are qualitatively valuable, and—examining the relationship between non-compete enforceability and patenting for drugs and medical devices, where patenting is ubiquitous[1085]—it shows the patents reflect true net increases in innovation (as opposed to substitutions). One commenter stated there can be difficulty ascertaining the value of patenting. The Commission finds that there are several estimates of the private value of a patent (*e.g.,* the value to the patenting firm) in the literature, but no estimates of the social value of a patent, as further discussed in Part X.F.6.b. The Commission therefore stops short of monetizing this benefit. The final analysis addresses effects on innovation in greater detail in Part X.F.6.b.

Some commenters asserted the research related to investment in human capital does not distinguish between two different types of training: core training, *i.e.,* training required to perform job duties, and advanced training, *i.e.,* training with potential to increase productivity beyond the baseline requirements for job performance.[1086] Commenters stated that when non-competes are more enforceable, workers may receive additional core training rather than advanced training. In other words, when non-competes are more enforceable, labor mobility decreases and workers may also move to new industries to avoid potentially triggering non-compete clause violations (as discussed in Part IV.B.3.b.ii), both of which make experienced workers less often available for hire. Firms therefore may need to train workers at a greater rate because they will hire inexperienced workers who require more core training. Research finding increases in training associated with increases in non-compete enforceability therefore may not imply increases in advanced training—*i.e.,* the kind of training that increases productivity of workers already able to perform job duties, with net benefits for society as a whole. In response, the Commission agrees that decreases in training under the final rule may represent decreases in core, rather than advanced, training. It is not possible to discern whether the observed effects on training in the literature represent core versus advanced training because evidence that would facilitate such an analysis does not exist. Importantly, a decrease in core training would be economically beneficial because it would reflect a more efficient use of the labor force. Therefore, to the extent a decrease in training reflects a change in core training, this would be a net benefit of the final rule—not a cost. On the other hand, to the extent a decrease in training is due to a change in advanced training, this would represent a net cost of the final rule. The Commission further discusses investment in human capital in Part X.F.7.a.

Some commenters stated that costs associated with rescinding existing non-competes and updating contractual practices may be greater than estimated in the NPRM and attributed the greater cost to the need for high-cost outside counsel. In response, the Commission finds it likely that many firms will not need to use costly outside counsel (or indeed, any counsel) to comply with the final rule. This is especially true since the final rule allows non-competes for senior executives to remain in effect, since it does not require rescission of any existing contracts, and since it provides a model safe harbor notice for other workers and makes other adjustments to simplify the notice process. In response to commenters stating that firms will need more time to implement than estimated in the NPRM, the Commission conducts an updated analysis in Part X.F.7.b. The Commission notes that the model language provided in the final rule and allowing employers to use the last known address, mail or electronic, will significantly simplify the notice process for employers. Additionally, the Commission performs two sensitivity analyses in Part X.F.7.b. The first assumes an attorney's time is more costly—it replaces the primary estimate of the average hourly productivity of an attorney ($134.62 per hour, based on BLS earnings data) with an estimated rate of the cost of outside counsel who is a tenth-year attorney ($483 per hour).[1087] The second makes different assumptions about the time spent by employers related to existing non-competes that will be no longer be enforceable and updating contractual practices. Finally, the Commission clarifies the definition of ''non-compete clause'' in Part III.D to reduce confusion and give employers and workers a clearer understanding of what is prohibited. This, in turn, will reduce compliance costs and potential litigation costs over what constitutes a non-compete.

One commenter from the retail industry claimed the cost of implementing the proposed rule could

[1084] Starr, *supra* note 445.

[1085] See Part IV.B.3.b.ii, discussing Johnson, Lipsitz, & Pei, *supra* note 526.

[1086] Commenters used the words ''requisite'' and ''discretionary'' in lieu of ''core'' and ''advanced,'' respectively.

[1087] This estimate is drawn from the Fitzpatrick Matrix, which is a fee schedule used by many U.S. courts for determining the reasonable hourly rates in the District of Columbia for attorneys' fee awards under Federal fee-shifting statutes. It is used here as a proxy for market rates for litigation counsel in the Washington, DC area, which likely represent the high end of rates for litigation counsel in the U.S. The estimate is therefore adjusted to reflect a national rate by multiplying by the ratio of the hourly wage of attorneys nationwide to the hourly wage of attorneys in the Washington, DC metro area, based on BLS Occupational Employment and Wage Statistics data. The Commission conservatively uses the rates of a tenth-year attorney—a much more experienced attorney than is likely to be needed (and indeed no attorney at all may be needed). *See* Fitzpatrick Matrix, *https://www.justice.gov/usao-dc/page/file/1504361/dl?inline. See* BLS Occupational Employment and Wage Statistics, *https://www.bls.gov/oes/data.htm.*

be $100,000 to $200,000 per firm but did not support this assertion with any evidence. The Commission disagrees with this assertion, which does not align with its careful estimates based on empirical evidence and significant expertise presented in Part X.F.7.b.ii. The Commission's estimates also acknowledge and account for potentially heterogeneous costs across firms.

Some commenters stated that employers would need to spend substantial resources to litigate trade secret disputes and violations of post-employment restrictions other than non-competes. One commenter stated that the cost of a trade secret case may range from $550,000 to $7.4 million, depending on the monetary value of the trade secret claim. The Commission analyzes costs of litigation in Part X.F.7.c. The Commission agrees with commenters that trade secret litigation, and litigation over post-employment restrictions other than non-competes, may be costly. However, the Commission notes that no evidence exists to support the hypothesis that litigation on these fronts will increase because of the final rule. Indeed, recent evidence suggests that trade secret litigation does not increase following bans on non-competes.[1088] Moreover, the final rule, with its clear and bright-line standard (as compared to the current patchwork of State laws), would likely decrease litigation attempting to enforce non-competes, including litigation initiated by former employers against workers who start their own business or who find a new employer. While the Commission does not have evidence on the frequency of these different types of litigation, it expects the decrease in non-compete litigation would likely offset potential increases in other litigation.

Positing that firms will be reluctant to share trade secrets with workers under the rule, some commenters also stated that the costs of lessened sharing of trade secrets should be taken into account. Since no data exists on the effect of non-competes on the monetary value of shared trade secrets, the Commission does not quantify or monetize this effect. Moreover, there is no evidence that employers will lessen the extent to which they share trade secrets under the final rule, much less that any change would be material. As detailed in Part IV.D, employers have less restrictive alternatives to non-competes that mitigate these concerns.

Some commenters reference the Starr, Balasubramanian, and Sakakibara study[1089] and the Commission's interpretation of it in the NPRM to assert that firms founded because of the rule may be of lower quality than existing firms in terms of average employment and survival rates, and adjustments should be made to the Commission's analysis to account for these differences. Upon further review, the Commission interprets the authors' findings to show that within-industry spinouts resulting from lessened non-compete enforceability tend to be lower quality than non-within industry spinouts resulting from lessened non-compete enforceability. However, both types of spinouts are better, on average, than spinouts that form under stricter non-compete enforceability. The study's results therefore suggest that, if anything, the Commission underestimates the final rule's benefits from new business formation, because the estimates do not adjust for quality.

Some commenters asserted that, because of the positive effects of the proposed rule on labor mobility, firms may face greater costs associated with turnover (especially firms that currently use non-competes) due to the cost of finding a replacement, the cost of training a replacement, and the cost of lost productivity. Based on Pivateau (2011),[1090] one commenter estimated that turnover costs 25% of the annual salary of a worker. Some commenters also argued that some firms may face decreased costs of turnover, because more plentiful availability of labor can reduce the cost of hiring. The Commission finds that there may be distributional effects of increased turnover—benefits for firms that face a lower cost of hiring and costs for firms losing workers who had been bound by non-competes—and assesses the same in Part X.F.9.c.

Some commenters offered additional empirical evidence not discussed in the NPRM that was not specific to the proposed regulatory analysis. The Commission responds to those comments in Part IV.

D. Summary of Changes to the Regulatory Analysis

In the final regulatory analysis presented in Part X.F, the Commission updates its analyses based on the parameters of the final rule, comments received, supporting empirical evidence raised by commenters, changes in the status quo regarding regulation of non-competes, and reanalysis of evidence presented in the NPRM.[1091] This includes the Commission's attempt to quantify and monetize, to the extent feasible, all costs and benefits of the final rule, as well as transfers and distributional effects. The Commission additionally analyzes hypothetical scenarios to assess what otherwise unmonetized benefits and costs would lead to a final rule that is net beneficial. Finally, the Commission elects to include an analysis of an alternative the Commission considered, namely an analysis of fully excluding senior executives.[1092]

Under the final rule, existing non-competes with senior executives may remain in effect. While this change likely affects some costs and benefits associated with the final rule temporarily, the Commission does not specifically quantify or monetize those effects. The effect on persistent costs and benefits would be temporary, as senior executives will eventually move out of their jobs and retire or move into new jobs, to which the final rule will apply. The Commission notes throughout its analysis, however, how different estimates may be affected by this differential treatment of senior executives even if it cannot quantify the precise effect.

E. Summary of Benefits and Costs

The Commission considered several effects of the final rule on economic outcomes: earnings, innovation, entrepreneurship, distributional effects on workers, investment in human capital, capital investment, legal and administrative costs, prices, labor mobility and turnover, and litigation costs.

The Commission describes the primary estimates of benefits, transfers, costs, and distributional effects associated with each of these outcomes in Table 1. Table 1 also reports whether the outcome for each effect is quantifiable or monetizable and

[1088] Greenwood, Kobayashi & Starr, *supra* note 757. The Commission notes that this study supplements—but is not necessary to support—its finding that no evidence supports the conclusion that litigation costs will increase under the final rule. That finding is based on the Commission's expertise and the rulemaking record, including relevant comments. This study was published after the close of the comment period.

[1089] Starr, Balasubramanian, & Sakakibara, *supra* note 518.

[1090] Griffin Toronjo Pivateau, *Preserving Human Capital: Using the Noncompete Agreement to Achieve Competitive Advantage,* 4 J. Bus. Entrepreneurship & L. 319 (2010).

[1091] As described in detail in this Part X, the Commission's final analysis, including its quantification and monetization of effects, therefore is not precisely the same as its preliminary analysis.

[1092] The Commission is not required to analyze costs and benefits of regulatory alternatives in its final regulatory analysis. *See* 15 U.S.C. 57b–3(b)(2)(B).

discusses important nuance or uncertainty.

TABLE 1

Category	Extent of characterization	Description of estimate	Discussion
Earnings	Quantified	The estimated ten-year present discounted value of increased worker earnings is $400-$488 billion. Effect on earnings partially represents a transfer and partially represents a benefit of the final rule.	The extent to which the estimated increase in worker earnings represents a benefit versus a transfer is unclear, though there is evidence to suggest that a substantial portion is a benefit.
Innovation	Quantified	Annual count of new patents estimated to rise by 3,111–5,337 in the first year, rising to 31,110–53,372 in the tenth year. Annual spending on R&D estimated to fall by $0-$47 billion. Effect on innovation represents a benefit of the final rule.	Estimates of the societal value of innovation are not available. The two effects on innovation together represent a benefit because more output (amount of innovation) is produced with less input (R&D spending).
Prices	Partially Quantified	The estimated ten-year present discounted value of decreases in spending on physician and clinical services is $74-$194 billion. Prices in other sectors may decrease as well but are not quantified. The effect on prices partially represents a transfer and partially represents a benefit of the final rule.	Price changes encompass transfers (from firms to consumers) and benefits (since price changes are likely due to increased competition); however, the exact split is not clear. Increased competition may also increase consumer quantity, choice, and quality. Prices outside of physician and clinical services may fall due to changes in competition because of new entrants; however, the literature has not quantified this effect.
Investment in Human Capital	Monetized	The estimated ten-year present discounted value of the net effect of the final rule on investment in human capital ranges from a benefit of $32 billion to a cost of $41 billion. The effect on investment in human capital may represent a cost or benefit of the final rule.	The range in estimates reflects uncertainty over whether decreased investment in human capital under the final rule reflects reductions in advanced investment (which the firms opt into to increase productivity) or core investment (which is no longer necessary if more experienced workers are hired) and uncertainty over the workers for whom investment in human capital (all workers or workers in occupations which use non-competes at a high rate) is affected.
Legal and Administrative Costs	Monetized	One-time legal and administrative costs are estimated to total $2.1–$3.7 billion. Legal and administrative costs represent a cost of the final rule.	
Litigation Effects	Not quantified or monetized	The final rule may increase or decrease litigation costs. Effects on litigation costs may represent a cost or benefit of the final rule.	Estimates of the effect of the final rule on total litigation costs are not quantifiable. Litigation costs may rise or fall depending on firms' subsequent use of other contractual provisions and trade secret law and how the costs of such litigation compare to the cost of non-compete litigation, as well as the decreased uncertainty associated with a bright-line rule on non-competes.

TABLE 1—Continued

Category	Extent of characterization	Description of estimate	Discussion
Firm Expansion and Formation	Quantified	The final rule is estimated to increase new firm formation by 2.7–3.2% and decrease capital investment at incumbent firms by 0–7.9%. These effects represent a shift in productive capacity from incumbent firms to new firms. The overall effect on firm expansion and formation represents a distributional effect of the final rule.	New firm formation is generally a benefit, but may also crowd out incumbent firms and is therefore not a pure benefit. Decreased capital investment at incumbent firms may be counterbalanced by increased capital investment at new firms or rebalancing across industries, and therefore may or may not be a cost in net.
Distributional Effects on Workers	Not quantified or monetized	The rule may reduce the gender and racial earnings gap, may disproportionately encourage entrepreneurship among women, and may mitigate legal uncertainty for workers, especially relatively low-paid workers. The differential effect on different groups of workers represents a distributional effect of the final rule.	
Labor Mobility	Partially Monetized	Some firms may save on turnover costs (due to easier hiring as more potential workers are available), while some firms may have greater turnover costs (due to lost workers newly free from non-competes). The latter is estimated to be no more than $131 per worker with a non-compete, while estimates are not available to monetize the former. While it is unclear whether labor mobility costs represent a net cost or benefit of the final rule, they likely represent a distributional effect (costing firms which use non-competes and helping firms which do not) of the final rule.	The estimate of the increase in turnover costs for firms using non-competes is an upper bound, since it encompasses effects on investment in workers' human capital, hiring workers, and lost productivity of workers, all of which are expected to diminish under the final rule.

Note: Present values are calculated using discount rates of 2%, 3%, and 7%.

The Commission finds that, even in the absence of a full monetization of all costs and benefits of the final rule, the final rule has substantial benefits that clearly justify the costs. While data limitations make it challenging to monetize all the expected effects of the final rule, the Commission believes it has quantified the effects of the final rule likely to be the most significant in magnitude, and thus, potentially drive whether and the extent to which the final rule is net beneficial. This includes both benefits and costs. Based on those quantifications, the Commission is able to make conservative assumptions, based on its expertise, under which the final rule would be net beneficial. In this context, by conservative assumption, the Commission means that it is presuming the benefits it quantifies to be relatively low in value for purposes of this analysis, *i.e.,* lower than it believes is likely the case. With respect to costs, the Commission assumes costs are on the higher end of the estimated range, which is higher than the Commission believes is likely to be the case. Through this analysis, provided in detail in Part X.F.10, the Commission further bolsters its finding that the benefits of the final rule justify the costs.[1093]

Specifically, the Commission finds that even if only 5.5% of the estimated $400–$488 billion increase in worker earnings represents increased productivity resulting from improved, more productive matches between workers and employers, the benefits will outweigh the costs. In Part X.F.6.a, the Commission explains that the economic literature does not provide a way to separate increased productivity from the total effect on earnings (*i.e.,* transfers versus benefits in the regulatory impact analysis sense). However, the Commission finds that based on the literature, some part of the increase in worker earnings represents increased productivity and believes that 5.5%, and likely more, represents increased productivity. Similarly, even presuming that no part of the effect on earnings is a benefit (as opposed to a transfer), the Commission finds that if the social value of a patent were at least $297,144, then the monetizable benefits will exceed monetized costs. Notably, the literature finds that the average private value of a patent may be as high

[1093] The Commission notes that it does not believe there is a likely scenario in which firm exit and lost capital investment, especially when balanced against firm entry and gained capital investment at new firms, would change this outcome. Firm exit and lost capital investment, which are not quantified and are discussed as distributional effects in Part X.F.9, would not, for example, result in costs large enough to overcome the break-even analyses (even if, for example, the value of earnings representing productivity increases or the social value of patents had to be marginally higher) or the finding that the benefits justify the costs.

as $32,459,680, again making this assumption regarding the social value of a patent quite conservative. Finally, even presuming none of the earnings are benefits (rather than transfers) and that the social value of a patent is zero (an implausibly low estimate), if all the lost investment in human capital is core, the monetized benefits would also exceed monetized costs. Notably, in conducting these analyses, in each instance, the Commission further makes the very conservative assumption that monetizable benefits other than the benefit being analyzed are zero. That is, the Commission assumes that patents have no social value and that no reduced investment in human capital is core when considering how much of earnings must represent increased productivity in order for the monetized benefits to exceed the monetized costs. This break-even analysis shows that while data limitations making it challenging to monetize all of the expected benefits of the rule, the Commission finds that the final rule can be shown to be net beneficial even under very conservative assumptions.

F. Final Regulatory Analysis

1. Background

As discussed in Part IV.B.3.a, non-competes inhibit worker mobility, creating worse matches between workers and firms and decreasing workers' productivity and therefore their earnings. Non-competes also prevent firms from hiring talented and experienced workers; inhibit new business formation; and reduce the flow of innovative workers between firms, harming innovation. The final rule increases competition in labor markets by allowing workers to move more freely between jobs and increases competition in product and service markets by ensuring that firms are able to hire appropriate workers, that workers are able to create new entrepreneurial ventures, and that worker flow between firms enhances innovation.

2. Economic Rationale for the Final Rule

The final rule addresses two primary economic problems. First, non-competes tend to harm competitive conditions in labor markets. Non-competes increase barriers to voluntary labor mobility and prevent firms from competing for workers' services, thus creating frictions and obstructing the functioning of labor markets. These frictions inhibit the formation of optimal and efficient matches in the labor market, resulting in diminished worker and firm productivity and in lower wages.

The second economic problem is that non-competes tend to harm competitive conditions in product and service markets. Non-competes create a barrier to new business formation and entrepreneurial growth, which negatively affects consumers by lessening competition in product and service markets. Non-competes also make it difficult for competitors to hire talented workers, which reduces these competitors' ability to effectively compete in the marketplace. Additionally, non-competes impede innovation by preventing the churn [1094] of innovative workers between firms, limiting the spread and recombination of novel ideas, which may negatively affect technological growth rates.

3. Purpose of the Final Rule

The final rule provides that, with respect to a worker other than a senior executive, it is an unfair method of competition—and thus a violation of section 5 of the FTC Act—for a person to enter into or attempt to enter into a non-compete; enforce or attempt to enforce a non-compete; or represent that the worker is subject to a non-compete.[1095] The final rule also provides that, with respect to senior executives, it is an unfair method of competition—and thus a violation of section 5 of the FTC Act—for a person to enter into or attempt to enter into a non-compete; enforce or attempt to enforce a non-compete entered into after the effective date; or represent that the worker is subject to a non-compete, where the non-compete was entered into after the effective date.[1096]

4. Baseline Conditions

a. Estimate of the Affected Workforce

As described in Part II.E, some workers may not be subject to the final rule to the extent they are employed by an entity or in a capacity that is exempted from coverage under the FTC Act. The Commission estimates the fraction of the workforce who would be covered under the final rule (the ''coverage rate'') by applying conservative assumptions to individual-level data on the characteristics of the workforce from the American Community Survey (ACS) for 2017 to 2021.[1097] Residents of four States (California, Minnesota, North Dakota, and Oklahoma) are excluded from the sample used for the computation, since these States already generally do not enforce non-compete agreements.

To estimate the coverage rate, workers are classified according to three criteria: (1) whether the individual is identified as working for the government; (2) whether the individual is identified as working for a non-profit organization; and (3) whether the individual works in an industry or in a capacity that is likely to be outside the jurisdiction of the FTC Act. Government employment consists of employment with local, State, and Federal governments, in addition to individuals on active duty in the U.S. Armed Forces or Commissioned Corps. Nonprofit status is self-reported by survey respondents. Industries are defined based on the North American Industry Classification System (NAICS).

Such a classification of workers is necessarily imperfect as the FTC's jurisdiction does not exclude all workers that may be identified in the data as government employees or map directly into the data on non-profit status or the NAICS classifications that are available within the ACS. For example, the FTC Act is likely to exempt some firms that are classified as non-profits but not others, as described in Part II.E. Also, in some instances, only a subset of a given NAICS category (and not the entire category) appeared likely to fall outside the jurisdiction of the FTC Act. When ambiguity arose, the Commission was overinclusive in excluding workers. For example, the Commission classified all nonprofits as outside the coverage of the final rule for the purposes of estimating the coverage rate. Moreover, in estimating the coverage rate, the Commission excluded entire industries in calculating the coverage rate when some subset of that industry appeared to be outside the Commission's jurisdiction. This over-inclusiveness has the effect of underestimating the coverage rate of the final rule, and thus the overall net effect of the final rule will be conservative.

Using data from the ACS and the assumptions detailed in Part X.F.4, the Commission estimates that the final rule is likely to cover 80% of the private U.S. workforce.

b. Non-Compete Enforceability

For regulatory analyses, the effects of the final rule are measured against a baseline representing conditions that would exist in the absence of the rule. The extent of the final rule's costs and benefits depends on the degree to which it will change the enforceability of non-competes relative to what it would be in the baseline. Currently, non-competes are broadly prohibited in four States:

[1094] Churn in this context means turnover that is neither job creation nor job destruction—essentially the movement of workers among jobs.

[1095] *See* § 910.2(a)(1).

[1096] *See* § 910.2(a)(2).

[1097] The preliminary analysis in the NPRM did not estimate or apply a coverage rate based on jurisdiction.

California, North Dakota, Oklahoma, and Minnesota. In some other States, non-competes are prohibited for some, but not all, workers. For non-competes that are not prohibited expressly by statute, some version of a reasonableness test is used under State law to determine whether a given non-compete is enforceable or not. These reasonableness tests examine whether the restraint is greater than needed to protect an employer's purported business interest. Non-competes can also be found unreasonable where the employer's need for the non-compete is outweighed by the hardship to the worker or the likely injury to the public. Because these cases arise in the context of individual litigation, courts focus the ''likely injury to the public'' inquiry on the loss of the individual worker's services and not on the aggregate effects of non-competes on competition in the relevant market or overall in the economy.[1098]

Researchers have used various scoring systems to capture the enforceability of non-competes State by State over time. As described in Part IV.A.2, the Commission gives greatest weight to studies that measure enforceability granularly (*i.e.,* not using a binary score but, for example, an integer scale) and along various dimensions (*e.g.,* the employer's burden of proof in non-compete litigation and the extent to which courts are permitted to modify unenforceable non-competes to make them enforceable). The scoring system which fits these criteria best[1099] has been used to study the effect of non-compete enforceability on several economic outcomes. This score, which varies across States and across years, measures non-compete enforceability along a scale which runs from zero to one.[1100] A score of zero indicates enforceability equal to that of the State which enforces non-competes least (North Dakota). A score of one indicates enforceability equal to that of the State which enforces non-competes most readily (Florida). The final analysis relies on this score heavily as a granular and reliable scoring system that allows the Commission to consider the effect of non-compete enforceability on several economic outcomes. The studies that use this score form much of the basis for the final regulatory analysis.

5. Estimating the Effect of the Rule on a State-Level Enforceability Metric

In the absence of the rule, the average State enforceability score—in States that do not broadly prohibit them—when measured on a scale of 0 (lowest enforceability) to 1 (highest enforceability), is 0.78. The final rule will result in State-level enforceability of non-competes falling from its level in the absence of the rule to zero (*i.e.,* an average decrease of 0.78, excluding States that broadly prohibit non-competes).[1101] Using data on scores from 1991 to 2014, researchers report that the average magnitude of a change in the score (*i.e.,* the size of the change, regardless of whether it was a score increase or decrease) from year to year was 0.081.[1102] In other words, when a State's score changed from one year to the next, the average magnitude of that change was 0.081, on a scale of zero to one. Since the decrease that will result from the final rule is significantly larger than the average decrease considered in the literature (0.78 v. 0.081), the Commission considered different methods for the primary estimate in this final analysis. Consistent with the NPRM, this final analysis could attempt to scale up, or extrapolate, estimated effects to account for this larger decrease. As discussed in Part X.C, some commenters criticized this approach, stating that it may result in unreliable estimates absent evidence that the economic effects the Commission is attempting to measure would scale up linearly.

The Commission notes in X.C that empirical studies show a linear extrapolation is appropriate for measuring earnings effects.[1103] However, similar evidence supporting the use of linear extrapolation is not available for all economic outcomes the Commission is measuring in this final analysis. To maintain consistent reporting across economic outcomes and to avoid extrapolation, the final analysis considers the effect of a change equal to 0.081 when possible.[1104] That is, for the purposes of the final analysis, the Commission conservatively assumes the projected effects on economic outcomes due to the final rule are equal to the effects the economic literature associates with an average magnitude change in the non-compete enforceability score from year to year. The economic literature reports enforceability changes as simply increases or decreases in some studies,[1105] and the magnitude of those legal changes in this final analysis is assumed to mirror the average magnitude change of 0.081. The Commission makes these assumptions to avoid the possibility of inadvertently inflating the effects of changes in the enforceability score. The final rule will result in greater changes in enforceability than the changes examined in empirical studies. There is a possibility that the magnitude of change for particular economic outcomes will not be the same in response to every reduction in enforceability. For example, it is possible that for some economic outcomes, as enforceability gets closer to zero, the changes in the outcome being measured will be lower with each change in enforceability.

At the same time, the Commission notes that this may result in underestimating benefits of the final rule—the average magnitude change of 0.081 is much smaller than the average 0.78 change it would take for enforceability to reflect the final rule. To reflect this possibility, the final analysis includes sensitivity analyses which extrapolate beyond an average magnitude change. In these sensitivity

[1098] *See* NPRM at 3493–97 (describing the law governing non-competes at the time the NPRM was published). Minnesota prohibited non-competes after the publication of the NPRM. *See* Minn. Stat. Ann. sec. 181.988.

[1099] Bishara, *supra* note 501 at 751.

[1100] Different researchers have rescaled this score in different ways (*e.g.,* from zero to 470, or scaled such that the mean score is zero and the standard deviation of the score is one). The Commission uses the scaling from zero to one because that is the way it is used in the majority of the studies which are relied on in the final analysis, as well as for easy interpretability and consistency across the final analysis.

[1101] Calculated using data from 2009, the most recent year with publicly available data, and rescaled to a zero to one scale. *See* Starr, *supra* note 445.

[1102] Changes of zero (*i.e.,* years in which the score in a given State was the same as the prior year) were excluded from this calculation. The Commission notes that the study which reports this average (Johnson, Lipsitz, & Pei, *supra* note 526) was released after publication of the NPRM. The Commission also notes that the data underlying this calculation were used in other studies discussed in the NPRM; Johnson, Lipsitz, & Pei report the average score in the most accessible fashion and is therefore used here. The average they report is the average change in the analysis sample they select, which is chosen for analytical reasons to ensure accuracy of their estimates. Use of the underlying data to re-calculate the average score or use of scores provided by other researchers would not change the overall outcomes, conditional on sample selection. Moreover, the Commission reports the estimates resulting from a full extrapolation in this final analysis, which does not use this average score change in its sensitivity analysis, and is the method used in the NPRM. As noted, the Commission believes that the full extrapolation method is a valid, but potentially less precise method. Accordingly, the use of this score supplements—but is not necessary to support—the Commission's ultimate finding that the benefits to the final rule justify the costs.

[1103] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 17.

[1104] When considering studies which do not report the relationship between non-compete enforceability and economic outcomes based on a numeric score, the Commission is unable to scale the effect to reflect the average magnitude change of 0.081.

[1105] *See, e.g.,* Jeffers, *supra* note 450.

analyses, the estimated effects from the empirical literature are scaled up on a State-by-State basis (rather than taking the average) to account for the estimated size of the decrease in each State's score. The Commission notes that linear extrapolation provides a robust estimate of earnings changes based on the empirical literature, but for consistency, the Commission reports effects based on the average magnitude change as its primary analysis.

6. Benefits of the Rule

The Commission finds several benefits attributable to the final rule, as reflected in part by the effects of the rule on earnings and prices, and all the effects on output and innovation, as summarized in Table 1 in Part X.E.

a. Earnings

The Commission finds labor markets will function more efficiently under the final rule, which will lead to an increase in earnings or earnings growth. Specifically, in this regulatory analysis, the Commission finds that the estimated ten-year present discounted value of increased worker earnings is $400–$488 billion. The final rule will result in additional earnings stemming from improvements in allocative efficiency due to more productive matching between businesses, which are economic benefits. In other words, the increase in worker mobility will allow employers to hire workers who are a better, more productive fit with the positions they are seeking to fill, which in turn will increase productivity overall. A portion of the additional earnings are transfers from firms to workers resulting from more plentiful employment options outside the firm,[1106] as workers who are not bound by non-competes will be in a different bargaining position with their employer. To the extent other better opportunities with different employers exist for a given worker, their current employers will now be competing with those other employers and may increase worker compensation to keep those workers. The Commission finds that the economic literature does not provide a way to separate the total effect on workers' earnings into transfers and benefits.

The increase in worker earnings resulting from the final rule is calculated as follows:

*Increase in worker earnings = (% Increase in Earnings caused by the change in enforceability of non-competes) * (Total Affected Earnings)*

The primary approach in this analysis is to estimate the percentage increase in earnings assuming that the effect of the final rule will be the same as the effect of an average magnitude change in non-compete enforceability, as discussed in Part X.F.5. The Commission estimates the percentage increase in workers' earnings to be 0.86%.[1107] The Commission estimates total affected annual earnings to be $6.2 trillion (in 2023 dollars).[1108]

Multiplying the percentage effect (0.86%) by overall affected annual earnings ($6.2 trillion) results in an annual earnings effect of $53 billion. The ten-year effect on earnings, discounted separately by 2%, 3%, and 7%, is reported in the first row of Table 2.[1109]

This primary approach requires no extrapolation (*i.e.,* it does not scale the effect on economic outcomes to account for the fact that the effect of the rule on enforceability scores will be greater than the changes studied in the economic literature). However, it may understate the increase in workers' earnings resulting from the final rule. Thus, the Commission conducts two sensitivity analyses to assess how the estimated effect of the rule would change if effects are extrapolated to represent changes in enforceability scores greater than those examined in the literature.

The first sensitivity analysis, hereafter referred to as the "full extrapolation" approach, calculates the effect on worker earnings in an identical fashion to the primary analysis but relies on an estimate of the percentage increase in worker earnings which extrapolates to the effect of a complete prohibition on the use of non-competes. This results in an effect on worker earnings equal to 3.2% (instead of 0.86% in the primary analysis).[1110] For this estimate, total affected earnings are equal to $7.3 trillion in 2023 dollars.[1111] The estimated effect on earnings across the workforce for this first sensitivity analysis is therefore given by the percentage effect on earnings (3.2%) multiplied by the total annual wages in the U.S. for the affected population ($7.3 trillion). This results in an annual

[1106] By transfers, the Commission refers to "a gain for one group and an equal-dollar-value loss for another group." *See* Off. of Mgmt. & Budget, *Circular A–4* (Nov. 9, 2023), 57, *https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf.*

[1107] Calculated as $-(e^{-0.107*0.081}-1)$, where −0.107 is the estimated coefficient of earnings on non-compete enforceability score in Johnson, Lavetti, & Lipsitz (*supra* note 388), and 0.081 represents the size of an average magnitude change calculated in Johnson, Lipsitz, & Pei (*supra* note 526) which scales the effect to represent the effect of an average sized change in the non-compete enforceability score.

[1108] This figure represents total annual earnings in the U.S. in the most recent year with data available (2022), adjusted to 2023 dollars: see *https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=0&year=2022&qtr=A&own=5&ind=10&supp=0.* Earnings from California, North Dakota, Oklahoma, and Minnesota (States which broadly do not enforce non-competes) are subtracted out, since enforceability in those States will be broadly unaffected by the rule. The estimate is additionally adjusted to account for the proportion of the workforce the Commission estimates are currently covered by the Commission's jurisdiction (80%), as discussed in Part X.F.4.a. Numerically, $6.2 trillion is calculated as ($9.1 trillion − $1.6 trillion) * 80% = $6.0 trillion, adjusted to $6.2 trillion to adjust to 2023 dollars. $9.1 trillion is total private earnings in 2022 in the U.S. (the most recent year with data available), and $1.6 trillion is total private earnings in 2022 in CA, ND, OK, and MN.

[1109] For illustrative purposes, State-specific estimates are displayed in Appendix Table A.1. In this table, the estimated number of covered workers is calculated as 80% * (total employed population in the State); the estimated increase in total earnings is calculated as 0.86% * (estimated total covered earnings), where estimated total covered earnings is calculated as (estimated number of covered workers) * (average annual earnings); and the estimated increase in average earnings is calculated as 0.86% * (average annual earnings). Total employed population and average annual earnings are taken from the Census Bureau Quarterly Census of Employment and Wages for 2022 (see *https://www.bls.gov/cew/data.htm*).

[1110] The percentage effect, 3.2%, is reported by Johnson, Lavetti, & Lipsitz (*supra* note 388) as the lower end of a range of possible effects of a ban on non-competes, relative to non-compete enforceability in 2014. The estimate is constructed by calculating the change in the enforceability score in each State which would bring that State's score to zero (representing no enforceability of non-competes) and scaling the estimated effect on worker earnings by that amount. The Commission uses the low end of the reported range in order to exercise caution against extrapolation, since the estimate uses an out-of-sample approximation: the changes in most States necessary to arrive at a score of zero are greater than the changes examined in the study (though this approximation is consistent with the results of a test in Johnson, Lavetti, and Lipsitz which shows that the effect of enforceability on earnings is roughly linear: namely, a change in enforceability that is twice as large results in a change in earnings that is twice as large). The Commission also notes that the estimated range is based on enforceability in 2014. Since then, some changes in State law have made non-competes more difficult to enforce for subsets of their workforces so that a prohibition on non-competes today is likely to have a slightly lesser effect than a prohibition would have had in 2014.

[1111] This estimate differs from total affected earnings for the primary analysis because the estimate of 3.2% takes into account enforceability in California, North Dakota, and Oklahoma. Earnings in those States is therefore added back into total affected earnings. However, earnings in Minnesota are still omitted, since the prohibition in that State was enacted after the conclusion of the study period in Johnson, Lavetti, and Lipsitz (2023): see Minn. Stat. sec. 181.988. Total annual earnings in the U.S. for the affected population excluding MN are calculated as ($9.1 trillion − $0.2 trillion) * 80%, updated to adjust to 2023 dollars. $9.1 trillion is earnings for all workers in the US in 2022 (the most recent year with available data) and $0.2 trillion is earnings for workers in MN. *See https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=0&year=2022&qtr=A&own=5&ind=10&supp=0.*

estimated earnings gain of $234 billion.[1112] The ten-year effect, discounted at 2%, 3%, and 7%, is displayed in the second row of Table 2.

The second sensitivity analysis, hereafter referred to as the ''partial extrapolation'' approach, uses the same formula as the other two analyses (% effect on earnings * total affected earnings) but is more conservative in its estimate of the percent effect on earnings than the full extrapolation estimate. The full extrapolation approach assumes that enforceability scores fall to zero. The partial extrapolation approach instead assumes that enforceability scores fall to the minimum observed enforceability score ignoring scores in States that broadly prohibit non-competes (a more moderate extrapolation). The minimum observed enforceability score excluding States that broadly prohibit non-competes is 0.53 (on a scale of zero to one), which is the enforceability score in New York.[1113] This analysis calculates the change in each State's score that would bring it to 0.53, and scales the effect on worker earnings estimated in the empirical literature by that amount.[1114] For example, West Virginia's enforceability score is 0.59. To change to New York's enforceability score would imply a decrease in West Virginia's score of 0.06 (calculated as 0.59—0.53). This implies a percent effect on earnings in West Virginia of 0.64%.[1115]

Total affected earnings in each State are calculated by multiplying total earnings in that State (adjusted to 2023 dollars) by the estimated percentage of covered workers (80%). For example, in West Virginia, total earnings are estimated to be $0.24 trillion.[1116]

Next, the percent increase in earnings in each State is multiplied by total affected earnings in that State. In West Virginia, this results in an earnings increase of 0.64% * $0.24 trillion = $152 million. Finally, the earnings increases are added across States. The overall estimated effect is an annual increase in earnings of $161 billion. The ten-year effect, discounted at 2%, 3%, and 7%, is displayed in the third row of Table 2.

TABLE 2

	Estimated ten-year increase in earnings ($ billions), assuming:		
	2% Discount rate	3% Discount rate	7% Discount rate
Primary estimate (average enforceability change)	$488	$468	$400
Estimate (full extrapolation)	2,148	2,060	1,762
Estimate (partial extrapolation)	1,488	1,427	1,221

The estimated effects on earnings in Table 2 are based on estimates of the percentage change in earnings from a study in the empirical literature that aligns with the metrics outlined in Part IV.A.2. Another study in the literature estimates earnings effects using a comparison between workers in occupations that use non-competes at a high rate versus a low rate.[1117] After adjusting the finding from that study to the average magnitude enforceability change, the estimated effect on worker earnings is 0.5%,[1118] or $31 billion annually.[1119]

The Commission notes that, as discussed in Part X.E, earnings of senior executives who continue to work under non-competes are included in the calculations in this Part X.F.6.a. If the Commission were able to identify those senior executives, their omission from the calculations would decrease the earnings effect of the final rule, since the earnings effect for those senior executives (and others, because of spillovers) would be pushed further into the future, causing steeper discounting. However, while senior executives are paid relatively highly, there are relatively few of them: for example, based on BLS data on earnings by occupation, Chief Executives' earnings comprise just 0.5% of all earnings.[1120] Therefore, the impact on the earnings calculations of omitting or pushing forward the earnings of senior executives who would continue to work under a non-compete is limited.

Discussion of Transfers Versus Benefits

It is difficult to determine the extent to which the earnings effects represent transfers versus benefits. Transfers, in this context, refer to ''a gain for one group and an equal-dollar-value loss for another group.'' [1121] Such transfers do not represent a net benefit or cost to the economy as a whole for purposes of regulatory impact analysis.

To the extent a prohibition on non-competes leads to greater competition in the labor market and a more efficient allocation of labor by allowing workers to sort into their most productive

[1112] This estimate is comparable to the estimate of $250 billion per year reported in the NPRM. *See* NPRM at 3523. The estimate in the NPRM was based on earnings in 2020 (as opposed to 2022 in this final regulatory analysis), included earnings in Minnesota (which has since passed a bill prohibition non-competes), and did not adjust for the estimate of the affected workforce discussed in Part X.F.4.a.

[1113] Enforceability score data come from Starr (2019), which reports scores for 2009 (the most recent data available). Scores are adjusted to a scale of zero to one.

[1114] In particular, for each State, the Commission calculates the percentage effect on earnings as $e^{(0.107*\Delta Enf)} - 1$, where ΔEnf is equal to the enforceability score in that State minus the lowest observed enforceability score, excluding CA, ND, OK, and MN (0.53).

[1115] Calculated as $-(e^{-0.107*0.064} - 1)$, where −0.107 is the estimated coefficient of earnings on non-compete enforceability score in Johnson, Lavetti, & Lipsitz (*supra* note 388), and 0.064 represents the scaling factor due to West Virginia's score change.

[1116] Calculated as $0.29 trillion * 80%, where $0.29 trillion is earnings in WV in 2022 (the most recent year with data available) adjusted to 2023 dollars. See *https://data.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=0&year=2022&qtr=A&own=5&ind=10&supp=0.*

[1117] For further discussion of this study, see the discussion in Part IV.B.3.a.ii of Starr, *supra* note 445.

[1118] The change in enforceability which generates the estimate in Starr (*supra* note 445) is a one standard deviation change, as measured using non-compete enforceability scores for all 50 States and the District of Columbia in 1991, which is a change on a scale of zero to one of approximately 0.17, calculated as 1/[1.60 − (−4.23)]. Scaling the estimate, a change equal to 0.081 would result in an earnings effect of 0.5%, calculated as $e^{(0.0099*0.081/0.172)} - 1$.

[1119] Calculated as $6.2 trillion * 0.5%.

[1120] Calculated as (199,240 * 246,440)/(147,886,000 * 61,900), where 199,240 and 147,886,000 are employment for Chief Executives and All Workers, respectively, and 246,440 and 61,900 are dollar earnings for Chief Executives and All Workers, respectively, in 2022. See Occupation Employment and Wage Statistics, BLS, *https://www.bls.gov/oes/tables.htm.* The Commission notes that Chief Executives are used as an illustrative example, and are an imperfect proxy for senior executives: some Chief Executives (as classified by BLS) may not be senior executives under the final rule, and some senior executives under the rule may not be Chief Executives.

[1121] Off. of Mgmt. & Budget, *Circular A–4* (Nov. 9, 2023) at 57.

matches with firms (including new firms that may be formed), then the resulting earnings increases may reflect higher productivity and so represent a net benefit to the economy. However, some increases in earnings when non-competes are prohibited may simply represent a transfer of income from firms to workers (or, if firms pass labor costs on to consumers, from consumers to workers).

Several pieces of evidence support the Commission's finding that at least part of the increase in earnings represents a social benefit or net benefit to the economy, rather than just a transfer. As described in Part IV.B.3.a.ii, two studies have sought to estimate the external effect of non-compete use or enforceability: that is, the effect of use or enforceability on individuals other than those directly affected by non-compete use or enforceability.

One study directly estimates the external effect of a change in non-compete enforceability.[1122] While use of non-competes is not observed in the study, the effects of changes in a State's laws are assessed on outcomes in a neighboring State. Since the enforceability of the contracts of workers in neighboring States are not affected by these law changes, the effect must represent a change related to the labor market which workers in both States share. The estimate suggests that workers in the neighboring State experience effects on their earnings that are 76% as large as workers in the State in which enforceability changed.[1123] In other words, two workers who share a labor market would experience nearly the same increase in their earnings from a prohibition on non-competes, even if the prohibition only affects one worker. While the study does not directly estimate the differential effects by use, the effects on workers unaffected by a change in enforceability may be similar to the effects on workers not bound by non-competes.

A second study demonstrates that when the use of non-competes by employers increases, wages decrease for workers who do not have non-competes but who work in the same State and industry. This study also finds that this effect is stronger where non-competes are more enforceable.[1124] Since the affected workers are not bound by non-competes themselves, the differential in earnings likely does not completely represent a transfer resulting from a change in bargaining power between a worker bound by a non-compete and their employer.

Overall, these studies suggest there are market-level dynamics governing the relationship between earnings and the enforceability of non-competes: specifically, restrictions on the enforceability of non-competes affect competition in labor markets by alleviating frictions and allowing for more productive matching. Changes in enforceability or use of non-competes have spillover effects on the earnings of those workers who should not be directly affected because they do not have non-competes or they work in nearby labor markets that did not experience changes in enforceability. If non-competes simply changed the relative bargaining power of workers and firms, without affecting market frictions or competition, then these patterns are less likely to be observed. Additionally, new business formation when non-competes are less enforceable (see Part IV.B.3.b.i for a discussion of the evidence) may create new productive opportunities for workers.

Due to the uncertainty related to earnings as transfers versus benefits, the Commission analyzes various scenarios that allocate the percent of the earnings effect to a benefit at different levels in Part X.F.10. This does not represent a finding that no part or only a small part of the effect on earnings is a benefit; rather, it is to ensure that the total estimated effect of the final rule is robust for the purposes of the regulatory impact analysis to the possibility that a small percentage of the effect on earnings represents a net benefit.[1125]

b. Innovation

The Commission finds that an additional benefit of the rule would be to increase the annual count of new patents by 3,111–5,337 in the first year, rising to 31,110–53,372 in the tenth year. By alleviating barriers to knowledge-sharing that inhibit innovation, and by allowing workers greater opportunity to form innovative new businesses, the final rule will increase innovation. Studies have sought to directly quantify this effect, primarily focused on patenting activity. The Commission therefore considers the effect on patenting in support of its findings related to innovation. Lacking an estimate of the social value of a patent, the Commission does not monetize this benefit. The Commission also finds that the rule will reduce expenditure on R&D by $0 to $47 billion per year. In light of the increase in overall innovation, this reduction is a cost savings for firms, but may not reflect a market-level effect because it does not measure potential expenditure on R&D by new firms formed as a result of the final rule. The change in patenting due to the rule for each year is calculated as follows:

*Increase in # of Patents = (% Increase in Patenting) * (Total # of Affected Patents)*

The Commission estimates the percentage increase in patenting to average 10.9%–18.7% annually over a ten-year period,[1126] which is the percentage effect on patenting of an average magnitude change in non-compete enforceability, as discussed in Part X.F.5. The Commission assumes that the full effect on patenting phases in over the course of a ten-year period, resulting in an effect of 2.0%–3.4% in the first year, increasing to 19.8%–34.0% by the tenth year.[1127] The total number of affected patents in each year is 156,976.[1128]

The results of the analysis, for the top and bottom end of the reported range of percentage increases in patenting, are displayed in Table 3.

As a sensitivity analysis, mirroring the analysis in Part X.F.6.a, the Commission assumes that enforceability scores in each State will fall to the lowest observed score among States which do not broadly prohibit non-competes. The Commission calculates the percentage change in patenting in each State by extrapolating the

[1122] Johnson, Lavetti, & Lipsitz, *supra* note 388.

[1123] *Id.* (note: a new version of this paper, posted in 2023 after the NPRM was published, revised this estimate slightly).

[1124] Starr, Frake, & Agarwal, *supra* note 469.

[1125] The Commission notes that Part IV.B.3.a.ii does not measure or consider whether earnings are transfers or benefits because to the extent that the earnings that are transfers represent firms' ability to suppress earnings using an unfair method of competition, the transfer of such earnings from firms to workers through the use of non-competes still reflect the tendency of non-competes to negatively affect competitive conditions in the labor market.

[1126] These values represent the range reported in Johnson, Lipsitz, & Pei, *supra* note 526, considering both raw patent counts and patent counts weighted by a measure of their quality: the number of citations received in the five years after the patent is granted. The findings by Johnson, Lipsitz, & Pei are qualitatively confirmed in the literature, with similar estimates generated by He (*supra* note 560)—a study discussed in the NPRM—and Rockall & Reinmuth (*supra* note 564).

[1127] This analysis assumes that the effect on patenting increases by an identical amount each year (2.0–3.4%), ensuring that the overall average annual change is equal to that reported in Johnson, Lipsitz, & Pei (*supra* note 526).

[1128] This is the number of granted utility patents, which are patents for new or improved innovation and are the types of patents studied by Johnson, Lipsitz, & Pei (*Id.*). The figure comes from 2020, which is the most recent data available from the U.S. Patent and Trademark Office. It excludes States in which non-competes are not enforceable (California, Oklahoma, North Dakota, and Minnesota). Data available at *https://www.uspto.gov/web/offices/ac/ido/oeip/taf/st_co_20.htm.*

percentage increase in patenting to reflect the size of the change in that State's enforceability score. For example, as noted in Part X.F.6.a, West Virginia's score would fall from 0.59 to 0.53 as a result of this analysis. The percentage change in patenting in West Virginia would therefore average 9.0%–16.6%,[1129] resulting in an increase of 1.9%–3.6% in the first year, rising to 19.2%–35.6% by the tenth year.

The annual State-specific percentage changes are multiplied by the number of annual patents granted in each State.[1130] Finally, the changes in patenting across States are combined across States for a national estimate. The results are reported in Table 3. As States have broadly decreased legal enforceability of non-competes in recent years, the changes necessary to move to lower enforceability are likely overestimated in this sensitivity analysis. This causes the values estimated by this method to likely overestimate the true extent of the benefit.

TABLE 3

Year relative to publication of the rule	Estimated annual count of additional patents using low estimate of innovation effect	Estimated annual count of additional patents using high estimate of innovation effect	Estimated annual count of additional patents using low estimate of innovation effect and extrapolation approach	Estimated annual count of additional patents using high estimate of innovation effect and extrapolation approach
1	3,111	5,337	8,927	19,306
2	6,222	10,674	17,853	38,611
3	9,333	16,012	26,780	57,917
4	12,444	21,349	35,706	77,222
5	15,555	26,686	44,633	96,528
6	18,666	32,023	53,560	115,833
7	21,777	37,360	62,486	135,139
8	24,888	42,697	71,413	154,444
9	27,999	48,035	80,339	173,750
10	31,110	53,372	89,266	193,055

The Commission is not aware of estimates that assess the overall social value of a patent and therefore the Commission does not monetize the estimated effects on innovative output. Estimates of the effect of a patent on a firm's value in the stock market exist in the empirical literature,[1131] as do estimates of the sale value of a patent at auction.[1132] However, those estimates do not include the effects on follow-on innovation, consumers (who may benefit from more innovative products), competitors, or the rents that are shared with workers, and instead reflect solely the private effect of a patent to the relevant firms.

The Commission notes that patent counts may not perfectly proxy for innovation. However, by using citation-weighted patents, as well as other measures of quality, the study by Johnson, Lipsitz, and Pei shows that patent quality, not just patent quantity, increase when non-competes become less enforceable.[1133] Similarly, the study by He shows that the value of patents also increases when non-competes become less enforceable.[1134]

The second effect of the final rule associated with innovation is a possible change in spending on R&D. The change in R&D spending due to the final rule is calculated as follows:

Reduction in R&D Spending = (% Reduction in Spending) * (Total Affected Spending)

The Commission estimates that the percentage reduction in spending is 0–8.1%, with the broad range reflecting disagreement in the empirical literature.[1135] Total affected spending is $575 billion (in 2023 dollars).[1136] Multiplying the percentage effect by total affected spending, the overall annual effect is a reduction of $0-$47 billion in R&D spending in 2023 dollars.

The Commission notes that, in light of the increases in innovation identified in this Part X.F.6.b, reductions in R&D spending represent a cost savings for firms. Put differently, reductions in R&D spending may cause commensurate reductions in innovative output. Insofar as reductions in R&D spending resulting from the rule could have countervailing effects on innovation, the estimated increase in innovative output represents the net effect, which would otherwise be even larger, if R&D spending were held constant.

Notably, empirical estimates of R&D spending are based on observed changes among incumbent firms and therefore may not reflect market-level effects. Decreased investment at the firm level (the level of estimation in the studies that report effects of enforceability on R&D spending) does not necessarily mean that investment would decrease at the market level, since new firms entering the market may contribute additional R&D spending not captured in the referenced studies. For these reasons, the Commission stops short of classifying the effect on R&D spending as a benefit of the final rule.

The Commission notes that, as discussed in Part X.E, the estimated effects on innovation do not take into account that some senior executives

[1129] Calculated as $e^{(1.43*0.06)} - 1$ and $e^{(2.56*0.06)} - 1$, where 1.43 and 2.56 represent the coefficients reported in Johnson, Lipsitz, & Pei (*Id.*) as the lower and upper bounds of the reported coefficient range, and 0.06 is the decline in the enforceability score in West Virginia.

[1130] Data available at *https://www.uspto.gov/web/offices/ac/ido/oeip/taf/st_co_20.htm.*

[1131] Leonid Kogan, Dimitris Papanikolaou, Amit Seru, & Noah Stoffman, *Technological Innovation, Resource Allocation, and Growth,* 132 The Quarterly J. of Econ. 665 (2017).

[1132] Ariel Pakes, *Patents as Options: Some Estimates of the Value of Holding European Patent Stocks,* 54 Econometrica 755 (1986).

[1133] Johnson, Lipsitz, & Pei, *supra* note 526.

[1134] He, *supra* note 560.

[1135] Johnson, Lipsitz, & Pei (*supra* note 526) find a negative effect on R&D spending of 8.1% due to an average magnitude change in non-compete enforceability, while Jeffers (*supra* note 450) finds no economically or statistically significant effect on R&D spending.

[1136] Total U.S. R&D spending was estimated by the NSF in 2019, the most recent available year with finalized estimates, excluding nonprofits, higher education, and nonfederal and Federal government. Nat'l Ctr. for Sci. and Engrg. Stats., *New Data on U.S. R&D: Summary Statistics from the 2019–20 Edition of National Patterns of R&D Resources* (Dec. 27, 2021), *https://ncses.nsf.gov/pubs/nsf22314;* Nat'l Ctr. for Sci. and Engrg. Stats., *U.S. R&D Increased by $51 Billion in 2020 to $717 Billion; Estimate for 2021 Indicates Further Increase to $792 Billion* (Jan. 4, 2023), *https://ncses.nsf.gov/pubs/nsf23320.* Note that the data are not broken out by State, and therefore the final analysis cannot exclude CA, ND, OK, and MN.

may continue to work under non-competes under the rule. The Commission is unable to separate the effects of senior executives' non-competes from other workers' non-competes on innovation. Some effects estimated in this Part X.F.6.b may occur further in the future than assumed in this analysis, based on the extent of continued use of non-competes for senior executives.

Overall, the Commission finds that the final rule will significantly increase innovation. Furthermore, the increase in innovation may be accompanied by a decrease in spending on R&D that would, thus, be a cost saving to firms.

c. Prices

The Commission finds that consumer prices may fall under the final rule because of increased competition. The only empirical study of this effect concerns physician practice prices. Based on this study, the Commission estimates the ten-year present value reduction in spending for physician and clinical services from the decrease in prices is $74–$194 billion. The Commission finds some of the price effects may represent transfers from firms to consumers and some may represent benefits due to increased economic efficiency. Some of the benefits may overlap with benefits otherwise categorized, such as benefits related to innovation.

The decrease in prices for physician services because of the final rule is calculated as follows:

*Decrease in Prices = (% Decrease in Prices) * (Total Affected Spending)*

The Commission estimates the percentage decrease in prices for physician services to be 3.5%.[1137] Total spending on physician and clinical services was $801 billion in 2023 dollars, excluding States that broadly do not enforce non-competes.[1138] The Commission separately multiplies spending by 35%, 61.9%, and 75% (estimates of the proportion of hospitals covered by the Commission's jurisdiction as a proxy for total physician and clinical services spending covered by the Commission's jurisdiction) to arrive at total affected spending.[1139] The ten-year sum of discounted spending decreases for these analyses are presented in Table 4.

As a sensitivity analysis, mirroring the analysis in Part X.F.6.a, the Commission assumes that enforceability scores in each State will fall to the lowest observed score among States which do not broadly prohibit non-competes. The Commission calculates the percentage change in prices in each State by extrapolating the percentage decrease in prices to reflect the size of the change in that State's enforceability score. As noted in Part X.F.6.a, West Virginia's score would fall from 0.59 to 0.53 as a result of this analysis. The percentage decrease in prices in West Virginia would therefore be 2.5%.[1140] This percentage decrease is multiplied by State-specific physician spending, adjusted by the relevant multiplier to account for the Commission's jurisdiction, and summed over States.

The ten-year present discounted value of the spending decreases estimated by this analysis are presented in Table 4.

TABLE 4

	Assumed percent of physicians covered (%)	Estimated spending reduction over ten years (billions of dollars) assuming:		
		2% Discount rate	3% Discount rate	7% Discount rate
Primary estimate (average magnitude enforceability change)	35	$90	$87	$74
	61.9	160	153	131
	75	194	186	159
Sensitivity analysis (partial extrapolation approach)	35	257	247	211
	61.9	455	437	373
	75	552	529	459

Several effects of the final rule, including changes in capital investment, new firm formation, and innovation, may possibly filter through to consumer prices. Prices, therefore, may act as a summary metric for the effects on consumers. The Commission notes, however, that prices are an imperfect measure for the effect on consumers. For example, increased innovation catalyzed by the final rule could result in quality increases in products, which might increase prices (all else equal), but nevertheless, consumers may be better off. New firm formation may result in a broader set of product offerings, even if prices are unaffected. Finally, some portion of this effect may represent a transfer from physician practices to consumers. For all these reasons, as well as to avoid double-counting (since prices may reflect changes in innovation, investment, market structure, wages, and other outcomes that are measured elsewhere), the Commission considers evidence on prices to be corroborating evidence, rather than a unique cost or benefit, though some portion of the total effect likely represents a standalone benefit of the rule. The Commission also notes increased competition brought about by the final rule will likely increase

[1137] 3.5% is calculated as $-(e^{(0.427 * 0.081)} - 1)$, where 0.427 is the coefficient relating non-compete enforceability and physician prices in Hausman & Lavetti (*supra* note 590), and 0.081 represents the average magnitude non-compete enforceability score, as described in Part X.F.5.

[1138] See *https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/National HealthAccountsStateHealthAccountsProvider.* Spending in 2020, the most recent year with available data, was $679 billion, which is $801 billion adjusted to 2023 dollars. CA, ND, OK, and MN are omitted.

[1139] In the absence of data on the percentage of physician practices that are non-profit, the Commission uses a range of three different assumptions on the share of covered hospitals. In the first two scenarios, the Commission assumes that the set of covered hospitals is all hospitals that are not non-profit. The first scenario uses 2020 data from the American Hospital Association indicating that 65% of hospitals report that they are non-profits (based on data available at *https://www.ahadata.com/aha-dataquery*). The second scenario uses 2017–2021 data from the American Community Survey indicating that 38.1% of hospital employment is at non-profits (see *https://www.washingtonpost.com/business/2023/05/12/force-behind-americas-fast-growing-nonprofit-sector-more).* Finally, consistent with the Commission's findings in Part V.D.4, the percentages of firms that report themselves as nonprofit in the data, which reflects registered tax-exempt status under IRS regulations, does not equate to the Commission's jurisdiction. It is likely the Commission may have jurisdiction over some hospitals and other healthcare organizations identified as nonprofits. Therefore, the third scenario assumes that 75% are covered.

[1140] Calculated as $e^{(0.427 * 0.06)} - 1$, where 0.427 is the coefficient reported in Hausman and Lavetti (*supra* note 590), and 0.06 is the decline in the enforceability score in West Virginia.

consumer quantity, choice, and quality. These effects are not quantified in the literature.

To draw inferences to other industries, the Commission notes that if the relationship between non-compete enforceability and prices observed in healthcare markets holds in other industries, then under the final rule prices would likely decrease, and product and service quality would likely increase. Insofar as such effects may be driven by increases in competition, as discussed in Part IV.B.3.b.iii, *e.g.,* because of new firm formation, it is likely output would also increase. However, the evidence in the literature addresses only healthcare markets and therefore the Commission cannot say with certainty that similar price effects would be present for other products and services.

In many settings, it is possible that increases in worker earnings from restricting non-competes may increase consumer prices because of higher firms' costs.[1141] There is no empirical evidence that enforceability of non-competes increase prices due to increased labor costs. Additionally, greater wages for workers freed from non-competes may result from better worker-firm matching, which could simultaneously increase wages and increase productivity, leading to lower prices.

The Commission notes that, as discussed in Part X.E, the estimates of the effect of the rule on prices do not separately account for the effect of senior executives who may continue to have non-competes under the rule. The Commission is unable to monetize or quantify these effects separately because there is no accounting in the applicable literature of why, nor to which groups of workers, the observed price effects occur. If such non-competes have a large impact, some of the effects estimated in this section may occur further in the future than described in this Part X.F.6.c.

7. Costs of the Final Rule

The Commission finds costs associated with the final rule, including legal and administrative costs, and possibly costs related to investment in human capital and litigation, as summarized in Table 1 in Part X.E. The Commission notes the final analysis includes effects on investment in human capital and litigation costs in this Part X.F.7 discussing costs associated with the final rule, though it is not clear whether effects associated with investment in human capital are costs or benefits, and it is not clear whether litigation costs would rise or fall under the final rule.

a. Investment in Human Capital

The Commission estimates the ten-year present discounted value of the net effect of the final rule on investment in human capital (*i.e.,* worker training) ranges from a benefit of $32 billion to a cost of $41 billion. The Commission notes that this wide range represents substantial uncertainty in the interpretation of the estimates that exist in the economic literature. The estimates contained in this Part X.F.7.a are separated along lines created by that uncertainty.

There are two primary sources of uncertainty. The first pertains to the extent to which lost investment in human capital is ''core'' versus ''advanced.'' As discussed in Part IV.B.3.b.ii, when non-competes are enforceable, fewer workers will be available due to decreased labor mobility, including workers who would be a good skills match for a particular job, as well as workers moving to new industries to avoid triggering a potential non-compete clause violation. This may require retraining of workers forced into a new field that would not otherwise be necessary for an experienced worker within the same industry. The departure of experienced workers from the industry also means firms will be required to invest in the human capital of inexperienced workers who replace them. This type of investment in training to address a skills mismatch—which is referred to as the ''core'' training scenario—contrasts with what is referred to as the ''advanced'' training scenario, which is investment in training that builds upon the productivity of workers who may already be experienced in an industry. Insofar as reductions in investment in human capital due to the final rule represent reductions in core investment, the rule will save firms money and will additionally not require workers to forgo time spent producing goods and services to train. Therefore, such reductions would represent a benefit of the final rule. However, insofar as reductions in investment in human capital from the final rule represent reductions in advanced investment, there may be productivity losses for workers. The estimates in the literature do not allow the Commission to distinguish between the types of forgone human capital investment in the final analysis. This final analysis therefore separately estimates the effects assuming lost investment in human capital is core and assuming it is advanced.

The second source of uncertainty pertains to the specific estimates of the effect of non-compete enforceability on investment of human capital. Starr (2019) estimates the differential effect of non-compete enforceability on training in occupations which use non-competes at a high rate versus those that use non-competes at a low rate but does not estimate the absolute effect on investment across the workforce. Therefore, this final analysis separately estimates the effects on training under two different assumptions—that the increase in training due to greater non-compete enforceability affects all workers, or only workers in high-use occupations—to demonstrate how this uncertainty affects the estimates.[1142]

The Commission notes that some of the estimates described in this Part X.F.7 may overlap with estimates reported in other sections of the regulatory analysis. For example, if decreased enforceability of non-competes decreases investment in workers' human capital, and this decreased investment would be reflected in lower wages for workers, then the estimate of the wage increase resulting from the final rule will already account for the extent to which decreased investment decreases wages. That is, if investment were held constant, the earnings increase associated with the final rule may be even larger.

i. Estimates Assuming Lost Investment in Human Capital Is Core Training

The first set of estimates assumes that all lost training is core. This results in estimated effects of the final rule that represent upper bounds on the benefits associated with the final rule's effect on investment in human capital. In these scenarios, the final rule will allow firms to hire experienced workers instead of needing to provide costly training to workers new to the industry or a position. The change in investment in core training brought about by the rule is calculated as follows:

Effect of Decreased Investment in Core Training = Additional Output of

[1141] Sebastian Heise, Fatih Karahan, & Ayşegül Şahin *The Missing Inflation Puzzle: The Role of the Wage-Price Pass-Through,* 54 J. Money, Credit & Banking 7 (2022).

[1142] Whether this assumption yields an overestimate or underestimate depends on what happens to training of workers in occupations with a low-rate of non-competes use when the enforceability of non-competes changes. If the effect of a change in non-compete enforceability on workers in occupations that use non-competes at a low rate is small, this assumption yields an overestimate of the overall effect on training. If the effect on those workers is large, it results in an underestimate.

Workers Resulting From Less Time Spent Training + Reduced Direct Outlays on Training

Additional Output of Workers Resulting From Less Time Spent Training

The first component is additional output of workers resulting from less time spent on otherwise unnecessary training if they were better matched with firm and industry. The change in the output of workers from less time spent training because of the final rule is calculated as follows:

*Additional Output of Workers Resulting From Less Time Spent Training = (Total # of Affected Workers) * (Percentage Point Decrease in Trained Workers) * (Average Hours Spent Training Per Worker) * (Average Hourly Output of Workers)*

The Commission estimates the total number of affected workers as 101.1 million workers, assuming all workers are affected, and 45.3 million workers, assuming only workers in high-use occupations are affected.[1143] The percentage point decrease in trained workers is estimated to be 0.4.[1144] Average hours spent training per worker is estimated to be 85 hours per year.[1145] Average hourly output of workers is estimated to be $60.77.[1146]

The total additional output due to forgone training time is therefore calculated as $1.9 billion per year when all workers are assumed to be affected, or $0.8 billion per year when only workers in high-use occupations are assumed to be affected.

Reduced Direct Outlays on Human Capital Investment

The second component of the economic effect calculated in the final analysis is reduced direct outlays on human capital investment—or the out-of-pocket cost to firms for training. The change in direct outlays on human capital investment resulting from the rule is calculated as follows:

*Reduced Direct Outlays = [(Total Direct Outlays)/(# of Workers Receiving Training)] * [(Total # of Affected Workers) * (Percentage Point Decrease in Trained Workers)]*

Total direct outlays on human capital investment are estimated to be $105 billion in 2023 dollars.[1147] The estimated number of workers receiving training is 23.5 million workers.[1148] The Commission estimates the total number of affected workers as 101.1 million workers, assuming all workers are affected, and 45.3 million workers, assuming only workers in high-use occupations are affected.[1149] The percentage point decrease in trained workers is estimated to be 0.4.[1150]

This calculation results in annual cost savings of $1.6 billion, assuming the training rates of workers in all occupations are affected and $0.7 billion assuming the training rates of workers only in high-use occupations are affected. The ten-year present value effects of the final rule on investment in human capital, assuming that lost investment is core investment, discounted at 2%, 3%, and 7% and separately assuming effects on workers in all occupations versus just workers in occupations that use non-competes at a high rate, are presented in the first two rows of Table 5.

ii. Estimates Assuming Lost Investment in Human Capital Is Advanced Training

The second set of estimates of the effects on human capital investment in the final analysis assumes all training is advanced. The Commission begins with the same approach (calculated in Part X.F.7.a.i) to estimate the direct gain in output of workers and reduced direct outlays from foregone advanced human capital investment because such investment is costly for firms and results in decreased time spent on productive activities by workers, regardless of whether the investment is core or advanced. The major difference is that the Commission nets out an additional component which represents lost long-term productivity of workers caused by lost investment in their human capital. The Commission nets out this additional component based on the assumption that advanced human capital investment results in some increased long-term productivity in workers (because it assumes that firms would not otherwise make such a costly investment). This results in estimated effects of the final rule that represent upper bounds on the costs associated with changes in investment in human capital. Therefore, the estimated effect of the rule on advanced human capital investment is calculated as follows:

Effect of Decreased Investment in Advanced Training = Additional Output of Workers Resulting from Less Time Spent Training + Reduced Direct Outlays on Training − Lost Output Resulting from Foregone Advanced Training

The first two components—additional output of workers due to less time spent training and reduced direct outlays on training—are calculated in Part X.F.7.a.i. The lost output of workers due to lost investment in their human

[1143] Excluding States which broadly prohibit non-competes (CA, ND, OK, and MN), the BLS reports employment of 126.4 million individuals in May 2022 (the most recent year with occupation-specific data available), 56.6 million of whom work in occupations that use non-competes at a high rate, as defined in Starr, *supra* note 445; see *https://www.bls.gov/oes/tables.htm.* The Commission estimates that 80% of employed individuals are covered by the Commission's jurisdiction (see Part X.F.4.a), resulting in 101.1 million covered workers, 45.3 million of whom work in high-use occupations. The Commission notes that these estimates include public employment, as data on occupation-specific employment at the State level are not available by firm ownership. Occupation-specific employment data are necessary to split workers into low- and high-use occupations. Workers including those estimated to be bound by non-competes and those who are not are included in this estimate, since the empirical estimate of the increase in training reflects a sample representative of the full workforce, not just those bound by non-competes.

[1144] The coefficient reported by Starr (*supra* note 445), 0.77%, corresponds to a one standard deviation increase on Starr's scale, and represents the percentage point effect on the percentage of workers trained (rather than the amount of training they receive). Rescaling to a scale of zero to one, a one standard deviation increase is equal to a change in the enforceability measure of 0.17. Since estimates for earnings and innovation use a mean enforceability change of 0.081 on a scale of zero to one, the coefficient in Starr is rescaled to 0.77 * (0.081/0.17) = 0.364%, which represents the change in the fraction of covered workers receiving training due to an average magnitude change of 0.081.

[1145] 85 hours per year is calculated as 5.7 weeks per year * 20.1 hours per week * 73.9%, where 73.9% is the percentage of training that is firm-sponsored (the type of training likely to be affected by the final rule). These three estimates (5.7 weeks per year, 20.1 hours per week, and 73.9% of training being firm sponsored) are estimated in Harley J. Frazis & James R. Spletzer, *Worker Training: What We've Learned from the NLSY79,* 128 Monthly Lab. Rev. 48 (2005).

[1146] The Commission assumes that the average hourly output of workers is twice their average earnings and estimates average earnings to be $30.38 per hour, which is the average hourly earnings for workers in training ages 22–64 currently holding one job in the Survey of Income and Program Participation for all waves from 1996 to 2008. The dollar value is adjusted to 2023 dollars.

[1147] 2022 Training Industry Report, Training Magazine (Nov. 2022) at 17.

[1148] Calculated as 15.8% * 148.9 million, where 15.8% is the percentage of workers who receive training, according to Frazis & Spletzer *supra* note 1145 at 48. 148.9 million is the estimated number of workers in the U.S. in May 2022 according to *https://www.bls.gov/oes/tables.htm.* Note that all workers are included in this estimate (not just workers in States which enforce non-competes) because the estimate of training expenditures also covers all workers.

[1149] Excluding States which broadly prohibit non-competes (CA, ND, OK, and MN), the BLS reports employment of 126.4 million individuals in May 2022 (the most recent year with occupation-specific data available), 56.6 million of whom work in occupations that use non-competes at a high rate, as defined in Starr (*supra* note 445) (*see https://www.bls.gov/oes/tables.htm*). The Commission estimates that 80% of employed individuals are covered by the Commission's jurisdiction (see Part X.F.4.a), resulting in 101.1 million covered workers, 45.3 million of whom work in high-use occupations. *See supra* note 1143.

[1150] As discussed in Part X.F.7.a.i.

capital due to the rule in each year is calculated as follows:

*Lost Output from Lost Investment in Human Capital = (Total # of Affected Workers) * (Percentage Point Decrease in Trained Workers) * (Average Hourly Output of Workers) * (Average Hours Worked per Year) * (% Productivity Loss)*

The Commission estimates the total number of affected workers as 101.1 million workers, assuming all workers are affected, and 45.3 million workers, assuming only workers in high-use occupations are affected.[1151] The percentage point decrease in trained workers is estimated to be 0.4.[1152] Average hourly output of workers is estimated to be $60.77.[1153] The average number of hours worked per year is 1,784.[1154] The Commission assumes the percent productivity loss to be 6.4%.[1155]

In the first year, this yields a total estimate of lost output from lost investment in human capital of $1.5 billion or $0.7 billion (under the separate assumptions of all workers being affected and only high-use occupation workers being affected). Since the returns to advanced training persist to some extent over time, in the second year, returns to advanced training from the first year are assumed to depreciate by 20%,[1156] and the calculation is redone according to the depreciated return to advanced training. In the third year, training from the first year again depreciates, and so on until the tenth year (the end of the horizon considered).

Additionally, in the second year, a new round of advanced training is forgone. An additional $1.5 billion or $0.7 billion in lost output is therefore incurred in the second year under the final rule, and the depreciation calculations are again repeated for the new round of advanced training until year ten. New rounds of advanced training are forgone in each year through the tenth. Lost output from lost advanced training in the tenth year is therefore the sum of a depreciated return to training from each of the prior nine years plus lost output from lost training in the tenth year itself.

To arrive at estimates of overall lost productivity due to lost advanced training, lost productivity in each year (separately due to lost training in each prior year) is added together. Finally, lost productivity due to lost advanced training is subtracted from the two components calculated in Part X.F.7.a.i (additional output of workers from less time spent training and reduced direct outlays). The ten-year discounted effects of the final rule on investment in human capital, assuming lost investment is advanced training investment, discounted at 2%, 3%, and 7%, and separately assuming workers in all occupations versus just workers in occupations that use non-competes at a high rate, are presented in the last two rows of Table 5.

TABLE 5

	2% Discount rate	3% Discount rate	7% Discount rate
Estimated discounted ten-year effect assuming lost training is core and workers in all occupations are affected	$32	$31	$27
Estimated discounted ten-year effect assuming lost training is core and workers in high-use occupations are affected	14	14	12
Estimated discounted ten-year effect assuming lost training is advanced and workers in all occupations are affected	−41	−39	−31
Estimated discounted ten-year effect assuming lost training is advanced and workers in high-use occupations are affected	−19	−17	−14

Note: All values in billions of 2023 dollars. Negative values represent net cost estimates, while positive values represent net benefit estimates.

As discussed in Part X.E, the Commission notes that the estimates in this Part X.F do not account for senior executives who continue to work under non-competes under the rule. If the effects on training are due to effects on such senior executives, then the effects discussed herein would occur further into the future than discussed.

b. Legal and Administrative Costs Related to Compliance

The Commission finds that firms with existing non-competes will have related legal and administrative compliance costs as a result of the final rule. The Commission quantifies and monetizes these costs and conducts related sensitivity analyses.

i. Legal Costs

The Commission finds one-time legal costs related to firms' compliance with the final rule are estimated to total $2.1-$3.7 billion. The Commission estimates two main components of legal costs: (1) updating existing employment agreements or terms to ensure new hire employment terms comply with the final rule; and (2) advising employers about potential operational or contractual changes for workers who will no longer have enforceable non-competes. The latter includes determination of workers whose non-competes are no longer enforceable

[1151] Excluding States which broadly prohibit non-competes (CA, ND, OK, and MN), the BLS reports employment of 126.4 million individuals in May, 2022 (the most recent year with occupation-specific data available), 56.6 million of whom work in occupations that use non-competes at a high rate, as defined in Starr (*Id.*) (see *https://www.bls.gov/oes/tables.htm*). The Commission estimates that 80% of employed individuals are covered by the Commission's jurisdiction (see Part X.F.4.a), resulting in 101.1 million covered workers, 45.3 million of whom work in high-use occupations. *See supra* note 1143.

[1152] As discussed in Part X.F.7.a.i.

[1153] The Commission assumes that the average hourly output of workers is twice their average earnings and estimates average earnings to be $30.38 per hour, which is the average hourly earnings for workers in training ages 22–64 currently holding one job in the Survey of Income and Program Participation for all waves from 1996 to 2008. The dollar value is adjusted to November 2023 dollars using *https://www.bls.gov/data/inflation_calculator.htm.*

[1154] See *https://fred.stlouisfed.org/release/tables?rid=50&eid=6462#snid=6449,* which reports average weekly hours and overtime of all employees on private nonfarm payrolls by industry sector, seasonally adjusted. The reported value, 34.3, is multiplied by 52 to get annual hours worked.

[1155] This figure is the midpoint of two estimates in the literature: Harley Frazis & Mark A. Loewenstein, *Reexamining the Returns to Training: Functional Form, Magnitude, and Interpretation,* 40 J. Hum. Res. 453 (2005) [3.7%] and Gueorgui Kambourov, Iourii Manovskii, & Miana Plesca, *Occupational Mobility and the Returns to Training,* 53 Can. J. of Econ. 174 (2020) [9.1%].

[1156] There is no perfect estimate of the rate of human capital depreciation in the economic literature. Studies typically make assumptions they deem reasonable to estimate this rate, with 20% representing neither the low end nor the high end of the range of such assumptions. *See, e.g.,* Rita Almeida & Pedro Carneiro, *The Return to Firm Investments in Human Capital,* 16 Lab. Econs. 97 (2009), who assume that the human capital depreciation rate may range from 5% to 100%.

under the rule, as opposed to those that fall under the exemption for senior executives.

For the first component, firms must consider what changes to their contractual practices are needed to ensure that incoming workers are not offered or subject to non-competes and what revisions to human resources materials and manuals are needed to ensure they are not misused on a forward-going basis. Firms may respond by removing specific non-compete language from standard contracts and human resources (H.R.) materials and manuals used for future employees. The second component involves strategic decisions and changes in response to the final rule. For example, firms may adjust other contractual provisions such as NDAs. This legal work is not mandated or required by the rule; it would be undertaken only by the subset of firms and workers for whom firms conclude that such alternatives would be desirable. Additionally, such adjustments are likely unnecessary for senior executives whose non-competes continue to be enforceable under the rule. Therefore, this component additionally involves identifying senior executives whose existing non-competes are unaffected. For any such legal work, firms may use in-house counsel or outside counsel.

Legal costs are therefore calculated as follows:

Legal Costs = Modify Standard Contract Language/H.R. Materials and Manuals Costs + Revise Contractual Practices Costs

One component of the legal cost will be due to the modification of standard contracts to remove prohibited language regarding non-competes which is calculated as follows:

*Modify Standard Contract Language/ H.R. Materials and Manuals = (Average Hours Necessary for Modification) * (Cost per Hour) * (# of Affected Businesses)*

The Commission estimates that, on average, modifying standard contract language and H.R. materials and manuals would take the equivalent of one hour of a lawyer's time.[1157] The estimated cost per hour is $134.62 in 2023 dollars,[1158] and the number of affected businesses is 3.4 million.[1159] This results in a total one-time modification cost of $457 million.

Another component of legal costs relates to any firm-level revision to their contractual practices, including identification of senior executives, which is calculated as follows:

*Revise Contractual Practices Costs = (Average Hours Necessary to Update Contractual Practices) * (Cost per Hour) * (# of Affected Businesses)*

The Commission estimates the average firm employs the equivalent of four to eight hours of a lawyer's time to update its contractual practices and determine which employees may fall under the final rule's exemption.[1160] The Commission estimates the cost of a lawyer's time to be $134.62 as discussed in this Part X.F.7.b.i. The number of affected businesses is estimated to be 2.9 million.[1161]

Under the assumption that the average firm that uses a non-compete employs the equivalent of four to eight hours of a lawyer's time, the total one-time expenditure on revising contractual practices would range from $1.6 billion (assuming four hours are necessary) to $3.1 billion (assuming eight hours are necessary).

Some commenters indicated that some firms may use outside counsel, which is more costly to firms, to remove non-competes from contracts of incoming workers and to update contractual practices. While commenters did not provide data to support this assertion, as a sensitivity analysis, the Commission replaces the estimate of the hourly earnings of a lawyer with an estimate of the cost of outside counsel ($483 per hour), conservatively overestimating costs by using the estimated rate of a tenth-year lawyer.[1162] Under this sensitivity analysis, the Commission estimates the total cost of ensuring that incoming workers' contracts do not contain non-competes would be $1.6 billion and the cost of updating contractual practices would be $5.6-$11.3 billion. Some commenters stated that the hourly cost of lawyers' time may be even greater than the value assumed in the sensitivity analysis ($483 per hour). The Commission finds that the sensitivity analysis assuming a rate of $438 per hour provides a reasonable estimate of the costs under the assumption that outside counsel would be used, and that higher rates (*e.g.,* $749 per hour, as stated by one commenter) are unreasonably high, especially as an average across many firms.

The Commission believes the exclusion of existing non-competes with senior executives could result in lower net legal costs than the Commission's estimate. First, for senior executives who currently work under a non-compete, firms will have a longer time period during which they may update

[1157] This process would likely be straightforward for most firms (*i.e.,* simply not using non-competes or removing one section from a boilerplate contract). There may be firms for which it is more difficult and requires more time. This analysis uses an average time spent of one hour, which conservatively represents the *average* time spent to do so, and accounts for variation across firms.

[1158] According to BLS, the median wage for a lawyer was $65.26 per hour in 2022, or $67.31 in 2023 dollars. See *https://www.bls.gov/ooh/legal/lawyers.htm.* As in Part X.F.7.a, the Commission doubles this number to reflect the lost productivity of the worker.

[1159] Calculated as 6.88 million * 0.494. Here, 6.88 million is the number of establishments in the U.S. (excluding California, North Dakota, Oklahoma, and Minnesota, where non-competes are broadly unenforceable) in 2021 (the most recent year with data available): see *https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html.* This value is multiplied by 49.4%, the percentage of firms using non-competes in the U.S. according to Colvin & Shierholz (*supra* note 65).

[1160] The Commission emphasizes that this is an average to underscore there would likely be large differences in the extent to which firms update their contractual practices. Many firms, including those that use non-competes only with workers who do not have access to sensitive information, or those which are already using other types of restrictive employment provisions to protect sensitive information, may opt to do nothing. There is evidence indicating firms that use non-competes are already using other types of restrictive employment provisions: Balasubramanian et al. (2024) find that 95.6% of workers with non-competes are also subject to an NDA, 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or a non-recruitment agreement, and that 74.7% of workers with non-competes are also subject to all three other types of provisions. See Balasubramanian, Starr, & Yamaguchi (*supra* note 74). Other firms may employ several hours or multiple days of lawyers' time to arrive at a new contract. The estimated range of four to eight hours represents an average taken across these different possibilities. For example, if two-thirds of firms that currently use non-competes opt to make no changes to their contractual practices (for example, because they are one of the 97.5% of firms which already implement other post-employment restrictions, or because they will rely on trade secret law in the future, or because they are using non-competes with workers who do not have access to sensitive information), and one-third of such firms spend (on average) the equivalent of 1.5 to 3 days of an attorney's time, this would result in the estimate of 4–8 hours on average.

[1161] Calculated as 5.91 million * 0.494. Here, 5.91 million is the number of firms in the U.S. (excluding California, North Dakota, Oklahoma, and Minnesota, where non-competes are broadly unenforceable) in 2021 (the most recent year with data available): *see https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html.* This value is multiplied by 49.4%, the percentage of firms using non-competes in the U.S. according to Colvin & Shierholz (*supra* note 65). The Commission notes that this analysis assumes that decisions regarding protection of sensitive information and contract updating are made at the firm (a collection of establishments under shared ownership and operational control), rather than establishment, level, since sensitive information is likely shared across business establishments of a firm. This explains the difference between the number of businesses used here (2.9 million) versus the number used to calculate the cost of contract revision (3.4 million).

[1162] This estimate is drawn from the Fitzpatrick Matrix. *See supra* note 1087 and accompanying text. Note that the Commission does not double this number to reflect productivity, since the cost of outside counsel's time likely already reflects the productivity of that worker.

contractual practices. For example, for a senior executive who does not change jobs for 5 years after the compliance date of the final rule, the firm will have 5 years to determine how it wants to update contractual practices for an incoming senior executive who replaces the current one. Delaying costs in this way reduces their economic effect due to discounting. Additionally, if a senior executive remains in their job for over ten years, then the cost of updating contractual practices would fall outside the scope of the Commission's estimates altogether.

At the same time, when the final rule goes into effect, firms will need to identify senior executives whose existing non-competes are not covered by the final rule in order to determine which contractual practices they may need to update immediately. The Commission does not include a separate legal cost for identifying senior executives and estimates the range of attorney time for revising contractual practices under the final rule, which encompasses identifying senior executives, to be the same as the estimate for the proposed rule—4 to 8 hours. This is in part because the strategic considerations involved in revision of contractual practices will likely include such identification. Moreover, the Commission believes the identification of such workers will not be difficult or time consuming. Firms can use the compensation threshold to rule out the vast majority of workers from the exemption and the definition of senior executive in § 910.1 includes clear duties to determine whether any executives who meet the compensation threshold are senior executives under the final rule. It also provides that the CEO and/or president of a firm is a senior executive without the need to conduct any duties analysis.

Another reason the Commission does not add to its estimate of 4 to 8 hours to account for identification of senior executives is that excluding existing non-competes with senior executives would otherwise decrease this estimate, likely to a greater degree than the cost of identifying senior executives. As noted, a significant amount of time spent by attorneys as estimated in the NPRM was intended to account for revising contractual practices for more complex agreements. Commenters noted that employment terms with senior executives are often individualized so that attorney and firm time would be spent on their agreements regardless of whether a non-compete may be included. Since firms use non-competes for senior executives at a high rate,[1163] revising contractual practices for senior executives may constitute a significant portion of the overall estimate of the cost of revising contractual practices, and given their exclusion, the Commission finds that the cost estimate for revising contractual practices likely represents an overestimate overall. The Commission does not, however, reduce its final cost estimates to account for this change. As noted in Part X.D, this final analysis generally does not account for the temporal difference in coverage of non-competes for senior executives. The same is true here and, to be consistent across the estimates in this final regulatory analysis, the Commission does not estimate a reduction in legal cost but notes potential bases for differences in estimates where relevant.

Overall, the Commission acknowledges that there may be substantial heterogeneity in the costs for individual firms; however, these numbers may be overestimates. For firms whose costs of removing non-competes for incoming workers is greater, the work of ensuring that contracts comply with the law would overlap substantially with the costs of updating contractual practices.

ii. Administrative Costs for Notification Requirement

The Commission finds the total one-time costs for implementing the notification requirement are estimated to be $94 million. These costs relate to the provision of notice to workers other than senior executives as required by § 910.2(b). Notably, firms may use the model notice language provided by the Commission, and the form of this model notice enables firms to choose to send the notice to workers regardless of whether they have non-competes as described in Part IV.E. The notice provision cost is calculated as follows:

Notice Provision Cost = Digital Notice Provision Costs + Mailed Notice Provision Costs

The first component, digital notice provision costs, are calculated as follows:

*Digital Notice Provision Costs = (Average Hours Necessary to Compose and Send Notice) * (Cost per Hour) * (# of Affected Businesses)*

The Commission estimates that 20 minutes (⅓ of one hour) are necessary for a human resources specialist to compose and send this notice in a digital format to all of a firm's workers who are not senior executives[1164] and applicable former workers, on average.[1165] The cost per hour is estimated to be $63.70.[1166] The estimated number of affected businesses is 3.4 million.[1167] The digital notice provision cost is therefore estimated to be $72 million.

Businesses may not have digital contact information for some workers. The cost of mailed notice provision would include the cost of postage and the cost of a human resource professional's time. Mailed notice provision costs are therefore calculated as follows:

*Cost of Mailed Notice Provision = Number of Workers with Non-competes Receiving Physical Notice * (Cost of One Printed Page + Mailing Cost + Cost of Human Resource Professional's Time)*

The number of workers with non-competes receiving physical notice is the total number of covered workers (101.1 million; see Part X.F.7.a.i) times the percentage of workers who have non-competes (18.1%) times the percentage of workers who require mailed notice (assumed to be 66% of workers[1168]), for a total of 12.3 million workers. The Commission notes that the percentage of workers who require mailed notice is likely a substantial overestimate, since it is estimated based on the percentage of individuals who receive health information digitally. The Commission believes employers are more likely to have digital means of providing the notice to their current workers especially, but also to their

[1163] More than 60%; *see* Part I.B.2.

[1164] The Commission notes that identification of such workers is accounted for in revision of contract costs calculated in Part X.F.7.b.i.

[1165] *See, e.g.,* the supporting statement for the Notice of Rescission of Coverage and Disclosure Requirements for Patient Protection under the Affordable Care Act (CMS–10330/OMB Control No. 0938–1094) at 5, which estimates time spent customizing and sending similar notice. Available at *https://www.reginfo.gov/public/do/DownloadDocument?objectID=119319401.*

[1166] According to BLS, the median wage for a human resources specialist was $30.88 per hour in 2022, which is equivalent to $31.85 in November 2023 dollars, updated for inflation using *https://www.bls.gov/data/inflation_calculator.htm.* See *https://www.bls.gov/ooh/business-and-financial/human-resources-specialists.htm.* As in Part X.F.7.a, the Commission doubles this number to reflect the lost productivity of the worker.

[1167] As calculated in Part X.F.7.b.i., the Commission conservatively assumes that each establishment—a physical location of a business—must engage in its own communication, and that each establishment has digital contact information for at least one worker, and will therefore engage in digital notice provision.

[1168] See *infra* note 1165 (CMS Supporting Statement assumes 66% of workers require mailed notice from their health insurance companies).

former workers. The Commission adopts this estimate as an upper bound.

The cost per worker is estimated as 5 cents for one printed page plus mailing cost of 70 cents plus one minute of an HR professional's time, at $63.70 per hour, for a total of $1.81 per notice. The overall cost of mailed notice provision is therefore estimated to be $22 million. The total cost of the notice provision is therefore $94 million.

Commenters stated that it may take two hours of a legal professional's time to provide notice. The Commission finds this estimated time to be a substantial overestimate and reiterates that this analysis incorporates a legal professional's time necessary to identify senior executives and to strategize updates to firm contractual practices into its estimate of legal costs in X.F.7.b.i. The model notice language alleviates the need for a legal professional's time and the Commission finds it unreasonable to assume such a notice would need to actually be sent by a legal professional. While firms may opt to use original language drafted by an attorney to notify workers, the Commission notes that the model language satisfies the notification requirement and therefore does not include the cost of original language as a regulatory cost estimate in the final analysis. However, under these assumptions, the cost of providing the notice is estimated at $5.2 billion.

The Commission notes that communication is conducted at the establishment level and time costs do not vary based on the number of existing senior executives with non-competes that the final rule does not cover. While establishments with only senior executives with non-competes would not incur any notification costs because the final rule does not cover existing non-competes with senior executives, without an estimate of the percentage of firms for which this is true, the Commission conservatively assumes that all establishments estimated to use non-competes engage in this notification.

Legal and administrative costs are summarized in Table 6. The Commission notes that, since all costs are assumed to be borne in the first year, there is no discounting applied and therefore only one estimate for each analysis is presented.

TABLE 6

	$ billions
Cost of modifying standard contract language/H.R. materials and manuals	
Primary	$0.5
Sensitivity analysis (outside counsel cost of $483)	1.6
Cost of reviewing and revising contractual practices	
Primary, four hours	1.6
Primary, eight hours	3.1
Sensitivity analysis (four hours, outside counsel cost of $483)	5.6
Sensitivity analysis (eight hours, outside counsel cost of $483)	11.3
Administrative Costs for Notification Requirement	
Primary	0.09

c. Litigation Effects

Theoretically, under the final rule, certain litigation costs may fall. Litigation related to non-competes may decrease because the final rule creates bright line rules, reducing uncertainty about the enforceability of non-competes. On the other hand, litigation costs may rise if firms turn to litigation to protect trade secrets and if that litigation is more expensive than enforcing (or threatening to enforce) non-competes, and/or if firms elect to litigate over what constitutes a non-compete.

The Commission finds there are plausible but directionally opposite theoretical outcomes for the different types of litigation that may be affected by the final rule. In fact, some recent evidence suggests trade secret litigation falls as a result of bans on non-competes taking effect.[1169] The Commission finds no evidence increased litigation will result in increased costs associated with the final rule. The Commission cannot quantify or monetize the overall effect as a cost or benefit, but estimates the magnitude of any change would be sufficiently small as to be immaterial to the Commission's assessment of whether the benefits of the rule justify its costs.

8. Transfers

As discussed in Part X.F.6.a, some portion of the earnings effect associated with the final rule represents a transfer: while workers may earn more with greater productivity resulting from the rule, some of their earnings increase may result from enhanced bargaining power, which constitutes a transfer from firms to workers.

Similarly, some portion of the price effects associated with the final rule represents a transfer: while consumers may achieve greater surplus with increased competition, the price decrease itself is partially a transfer from firms to consumers.

9. Distributional Effects

The Commission finds several distributional effects associated with the final rule, including those associated with firm expansion and formation, distributional effects on workers, and labor mobility, as summarized in Table 1 in Part X.E.

a. Firm Expansion and Formation

When non-competes are prohibited, new firms may enter the market but incumbent firms may opt to invest less in capital, leaving the overall effect on total capital investment unclear. Similarly, while new firms may enter the market, it is theoretically possible that incumbent firms may exit the market without the ability to use non-competes (though no evidence of this

[1169] Greenwood, Kobayashi, & Starr, *supra* note 757. The Commission notes that this study supplements—but is not necessary to support—its finding that no evidence supports the conclusion that litigation costs will increase under the final rule. That finding is based on the Commission's expertise and the rulemaking record, including relevant comments. This study was published after the close of the comment period.

effect exists) or contract. Research finds that decreased non-compete enforceability increases new firm formation by 2.7% and may have no effect on capital investment or may decrease capital investment at incumbent firms by up to 7.9%. To the extent there may be a decrease in capital investment at incumbent firms as a result of the final rule, it may represent a shift in productive capacity from incumbent firms to new firms. As discussed in Part IV.D, another purported justification for non-competes is that they allow firms to protect trade secrets, which in theory might allow firms to share those trade secrets more freely with workers, and so improve productivity. However, no empirical evidence substantiates this claim or would allow quantification or monetization of this effect.

Empirical evidence has studied parts, but not all, of the contrasting effects on capital investment and new firm formation. Studies have examined effects of non-competes on capital investment by large, publicly traded firms, who are likely incumbents.[1170] However, no study examines the effect of capital investment economy-wide, nor does any study specifically examine capital investment for new firms. Similarly, studies have examined new firm formation, but no studies look at firm exit among incumbents.

It is thus not possible to measure the benefit and costs of the full economy-wide effects on firm expansion and formation. The calculations that may be performed using available data will necessarily omit components of the tradeoff. The final analysis therefore quantifies the effects that the literature has examined but does not monetize those effects.

i. Capital Investment

Research finds that capital investment for incumbent firms at the firm level may decrease under the final rule for the economy as a whole, though effects for high-tech industries may be positive, negative, or close to zero. The Commission notes that the capital investment discussed in this Part X.F.9 relates to tangible capital, does not reflect capital investment by newly-formed firms, and is distinct from R&D spending, which is discussed in Part X.F.6.b.

One estimate of the overall effect of non-compete enforceability on capital investment by incumbent firms, which some commenters pointed to, is estimated with substantial uncertainty and is statistically indistinguishable from zero (*i.e.,* statistically insignificant): a decline in capital investment of 7.9% for the average incumbent publicly-traded firm.[1171] Another study finds no effect on capital investment, but includes the use of non-competes in its estimating procedure, leading to concerns that the finding does not support a causal interpretation, as explained in Part IV.A.2.[1172]

The Commission notes two additional estimates specific to high-tech or knowledge firms: a decline in capital investment among incumbent publicly-traded firms of 34%–39% (an estimate which corresponds to the estimate of a decline of 7.9% when all publicly traded firms are examined),[1173] and an increase in capital investment of 3.1% for the average publicly-traded high-tech firm (an estimate that is statistically insignificant).[1174] The Commission notes the study finding an increase in capital investment of 3.1% uses a more granular measure of non-compete enforceability than the study finding a decrease of 34%–39%, and the Commission therefore gives it more weight.[1175]

The Commission reiterates that any change in investment at the firm level does not necessarily mean investment would change at the market level, since increased firm entry may also increase the employed capital stock and investment in that capital stock, which may offset any possible decreases in investment for incumbent firms. These potential positive offsetting effects are not captured in the estimates herein.

ii. New Firm Formation

Research finds that new firm formation increases by 2.7% across the economy due to decreases in non-compete enforceability.[1176] The Commission also notes an estimate specific to high-tech industries: that decreases in non-compete enforceability led to a 3.2% increase in the establishment entry rate.[1177]

The benefits associated with new firm entry may include added surplus for consumers (*e.g.,* from increased competition) or workers (from expanded labor demand). However, the Commission is unable to quantify those beneficial effects, though some may be captured by the effect on prices discussed in Part X.F.6.c. Nor is it able to quantify whether existing firms might exit or contract in response to this new firm entry (*i.e.,* whether the new firms' output would be wholly additive or crowd out some amount of existing firms' output). New firm entry may also drive some of the innovative effects of the final rule if new firms are engaging in substantial innovation.

Overall, the Commission finds that the rule will likely result in a 2.7% increase in new firm formation and is unable to quantify the net effects of this on the productive capacity of the economy. Benefits from new firm entry and possible costs from decreased capital investment may offset each other but the degree to which this happens is not quantifiable. The effect of the final rule on firm expansion and formation likely results in productive capacity shifting from incumbent firms to new firms. Consistent with findings in Part IV.B.3.b.iii, productive capacity shifting from incumbent to new firms may decrease concentration, possibly contributing to decreases in prices, as discussed in Part X.F.6.c.

[1170] Jeffers, *supra* note 450; Johnson, Lipsitz, & Pei, *supra* note 526.

[1171] The increase, 7.9%, is calculated as 0.00317/0.04, where 0.00317 is the reported coefficient (Table 4, Panel A, Column 1), and 0.04 is the mean investment per million dollars of assets ratio, across all firms (Table 2, Panel C). Due to statistical uncertainty, the estimate cannot rule out (with 95% confidence) values ranging from a *gain* in capital investment equal to 6.7% to a *loss* in capital investment equal to 22.5% for the average firm. See Jeffers, *supra* note 450.

[1172] Shi, *supra* note 84.

[1173] Jeffers, *supra* note 450. The estimate pertains to firms in Technology and Professional, Scientific, and Technical Services.

[1174] Johnson, Lipsitz, & Pei, *supra* note 526. The estimate pertains to firms classified as high-technology by the National Science Foundation: see *https://nsf.gov/statistics/seind14/index.cfm/chapter-8/tt08-a.htm.*

[1175] The two studies are otherwise identical in the extent to which they satisfy the criteria for assessing empirical research laid out in Part IV.A.2.

[1176] Jeffers (*supra* note 450) does not report an effect for the economy as a whole. However, Jeffers reports coefficients of −0.103 for the effect of increased non-compete enforceability on firms founded per million people in knowledge-sector industries and 0.008 for non-knowledge sector industries, with respective sample sizes of 78,273 and 190,665 (Table 9, Panel A, Columns 1 and 2). Using the sample sizes as weights, the Commission estimates a weighted average of these coefficients of −0.024. Applying this estimate to the average number of firms founded per million people (Table 2, Panel B) results in an estimated increase in new firm formation of 2.7%. The Commission did not calculate the effect for the economy as a whole in the NPRM. The NPRM reported that increases in non-compete enforceability decreased new firm entry by "0.06 firms per million people (against a mean of 0.38) for firms in the knowledge sector," NPRM at 3526, which was consistent with the version of the Jeffers study cited in the NPRM. The final rule cites the updated version of the Jeffers study, published in 2024. The Commission notes that estimation of the uncertainty in the combined estimate requires information on the covariance of the estimated coefficients, which is not reported in Jeffers' study. See Jeffers, *supra* note 450.

[1177] Johnson, Lipsitz, & Pei, *supra* note 526. The estimate pertains to firms classified as high-technology by the National Science Foundation: see *https://nsf.gov/statistics/seind14/index.cfm/chapter-8/tt08-a.htm.*

b. Distributional Effects on Workers

The Commission finds that the final rule may reduce gender and racial earnings gaps, may especially encourage entrepreneurship among women, and may mitigate legal uncertainty for workers, especially relatively low-paid workers.

Specifically, the Commission finds gender and racial wage gaps may close significantly under a nationwide prohibition on non-competes, according to economic estimates.[1178] Another estimate indicates that the negative effect of non-compete enforceability on within-industry entrepreneurship is significantly greater for women than for men.[1179]

The Commission finds the rule may be especially helpful for relatively low-paid workers, for whom access to legal services may be prohibitively expensive. Workers generally may not be willing to file lawsuits against deep-pocketed employers to challenge their non-competes, even if they predict a high probability of success. The Commission finds that the bright-line prohibition in the final rule, which the Commission could enforce, may mitigate uncertainty for workers.[1180]

c. Labor Mobility

The Commission finds the overall effect of the final rule on turnover costs due to increased labor mobility is ambiguous and represents a distributional effect of the rule. The Commission finds turnover costs for firms seeking new workers may fall with a greater availability of experienced labor. For firms losing workers newly freed from non-competes, the Commission estimates the effect of the final rule to be $131 per worker with a non-compete. The Commission therefore finds the effect on turnover costs represents a distributional effect of the final rule because it costs firms that use non-competes to constrain workers and benefits firms that do not.

To calculate the potential $131 increase in turnover costs for workers whose non-competes are no longer enforceable after the rule, this final analysis calculates:

*Additional Turnover Cost per Worker with a Non-compete = (Baseline Turnover Rate) * (% Increase in Turnover) * (Rate of Use of Non-competes in Affected Industries) * (Overall Earnings of Affected Workers) * (Cost of Turnover as % of Earnings)/(Number of Workers in Affected Industries with Non-competes)*

The Commission estimates the baseline turnover rate, *i.e.,* the turnover rate in the status quo, to be 47% annually.[1181] The estimated percent increase in turnover from the final rule is 1.0%.[1182] The estimated rate of use of non-competes in affected industries is 23.9%.[1183] Estimated overall earnings of affected workers is $5.25 trillion.[1184] The estimated cost of turnover as a percentage of earnings is 25%.[1185] Finally, the estimated number of workers in affected industries with non-competes is 11.8 million.[1186]

The annual estimated increase in turnover costs per worker with a non-compete is $131.

The Commission notes the actual costs of turnover to businesses may be substantially lower under the final rule than this estimate reflects. This is because the specific components of turnover costs—finding a replacement, training, and productivity—are likely to be affected by the final rule. An increased availability of experienced workers results when non-competes no longer constrain those workers, and finding replacements will be less costly to firms. Additionally, training should not be counted in the costs of turnover presented in this Part X.F.9.c, since it is separately accounted for in Part X.F.7.a, but is nevertheless included in the 25% estimate used to arrive at the estimate of $131 per worker with a non-compete, since there is no reliable way to remove training costs from that estimate; it is thus double-counted. Finally, because the Commission finds increased labor mobility will likely increase worker productivity due to better matching between workers and firms, the cost of lost productivity will be lower. The cost of lost productivity will also be lessened because the pool of workers available to firms may be more talented or experienced, since such workers would no longer be bound by non-competes (relative to new entrants to the workforce, who are not experienced and also are not bound by non-competes). This would allow firms to recruit workers who are more likely to be highly productive upon entry at a new job.

The Commission reiterates its finding that the costs of turnover for many firms may diminish due to a more plentiful supply of available labor. Without estimates of the effect of the final rule on the cost of recruiting a worker, the net effect of the final rule on turnover costs is not quantified.

10. Break-Even Analysis

The Commission believes it has quantified the effects of the final rule that are likely to be the most significant in magnitude, but data limitations make it challenging to monetize all the expected effects of the final rule, *i.e.,* to numerically estimate the impact of particular effects on the economy as a whole. Most of the estimated costs of the final rule are monetized in Part X.F.7. However, the Commission is unable to monetize the estimated benefits of the final rule without additional assumptions. Two of the major benefits—innovation and earnings—are quantified but they are not monetized because a particular parameter or data point that would allow the Commission to estimate their effect in dollars is unavailable. For earnings, this parameter is an estimate of the percentage of the effect on earnings that represents a benefit versus a transfer.[1187] For innovation, this parameter is an estimate of the social value of a patent. Making an assumption about these parameters allows the Commission to monetize the benefits associated with the effect on earnings and innovation. A break-even analysis based on such assumptions confirms the Commission's finding that the benefits of the rule clearly justify the costs.

The analysis in this Part X.F.10 calculates the sum of the monetizable costs of the rule, separately under the assumption that lost investment in human capital is core training (in which case monetizable costs are direct

[1178] Johnson, Lavetti, & Lipsitz, *supra* note 388 at 38.

[1179] Marx (2022), *supra* note 524 at 8.

[1180] NPRM at 3531.

[1181] Based on annual worker mobility rates (separations divided by employment) in 2022 as calculated using the Job Openings and Labor Turnover Survey, conducted by BLS.

[1182] Calculated as $-e((^{-0.241+0.112)*0.081)} - 1)$, where $-0.241+0.112$ represents the estimated effect in Johnson, Lavetti, and Lipsitz (*supra* note 388) on workers in high use industries. The corresponding estimate for other industries is statistically indistinguishable from zero and those industries are therefore omitted from calculations. The multiplier 0.081 is the average magnitude change in non-compete enforceability, as discussed in Part X.F.5.

[1183] Calculated as the average usage rate in high-use industries in Starr, Prescott & Bishara (*supra* note 68).

[1184] Based on data from BLS for industries classified as high-use in Starr, Prescott & Bishara (*supra* note 68), excluding CA, ND, OK, and MN. See *https://data.bls.gov/cew/apps/data_views/data_views.htm#tab=Tables.*

[1185] See Pivateau, *supra* note 1090.

[1186] Calculated as 49.4 million * 23.9%. 49.4 million is equal to 0.8 * 61.8 million, where 0.8 is the coverage rate (see Part X.F.4.a) and 61.8 million is the number of workers in high-use industries (*https://data.bls.gov/cew/apps/data_views/data_views.htm#tab=Tables*). 23.9% is the average usage rate in high-use industries in Starr, Prescott, & Bishara (*supra* note 68).

[1187] Though the estimated effect on earnings is presented in dollars, the Commission considers this value to be quantified, but not monetized, since some part of the estimate may represent a transfer and not a benefit.

compliance costs and the cost of updating contractual practices), and under the assumption that lost investment in human capital is advanced training (in which case monetizable costs are the net cost of lost productivity from decreased human capital investment, direct compliance costs, and the cost of updating contractual practices). The analysis conservatively assumes that training for all workers is affected (versus just those in high-use occupations, as described in Part X.F.7.a).

If the Commission assumes the decrease in human capital investment is a decrease in core training, the final rule results in net benefits without monetizing or counting any positive effects on the economy from earnings or innovation. The savings or benefit to the economy from reduced core training would be greater than the combined monetized costs of the final rule in X.F.7.b. In other words, even if the benefit to the economy from earnings and innovation were assumed to be zero (an implausible and extremely conservative assumption), the final rule would be net beneficial under the assumption that estimates of reduced training reflect better matching of workers and firms and therefore a reduced need to provide workers with core training.

Under the assumption that lost human capital investment is advanced, the Commission calculates values of the social value of a patent and the benefit percentage of the earnings effect that would fully offset the net monetizable costs of the final rule.

a. Estimate of Net Benefit Assuming Lost Human Capital Investment Is Core Training

Under the assumption that lost human capital investment is core, the sum of the present discounted value of direct compliance costs and the cost of contractual updating (the monetizable costs of the rule), using a 3% discount rate, is $3.7 billion. In this case, the final rule is net beneficial even ignoring the benefits associated with innovation and earnings. This is because the net monetized cost ($3.7 billion) is less than the monetized benefit associated with investment in human capital ($31 billion or $13.9 billion, when all occupations are assumed to be affected versus just high-use occupations, respectively). The net monetizable benefit of the final rule—even ignoring benefits associated with innovation and earnings—is therefore $27.3 billion or $10.2 billion, respectively.

b. Estimate of Net Benefit Assuming Lost Human Capital Investment Is Advanced Training

In this Part X.F.10.b, the Commission calculates the net monetizable costs and benefits of the final rule assuming that lost human capital investment is advanced training, and under varying assumptions about the values of the two monetization parameters identified (the social value of a patent and the percentage of the earnings effect that represents a benefit). Then, the Commission calculates break-even points: values for the monetization parameters which would fully offset the net monetizable costs of the final rule.

Break even points are calculated by finding the values of the social value of a patent and the benefit percent of the earnings increase such that:

*(Net Costs Associated with Investment in Human Capital) + (Direct Compliance Costs) + (Costs of Updating Contracts) = (Earnings Increase) * (Benefit % of Earnings Increase) + (Patent Increase) * (Social Value of Patent)*

As calculated in Part X.F.7, assuming a 3% discount rate, the net cost associated with investment in human capital is $39.0 billion.[1188] Direct compliance costs plus the cost of updating contracts are estimated to be $3.7 billion.[1189] Net monetizable costs therefore total $42.7 billion.

The estimated earnings increase of the final rule over ten years, discounted at 3% is $468 billion. The estimated effect of the rule on innovation (using the low end of the primary estimate) ranges from an additional 3,111 patents per year to 31,110 patents per year, increasing as time goes on.[1190]

The Commission presents estimates that demonstrate break-even points by making an assumption for the value of one of the two monetization parameters, and calculating the value of the other which implies equal monetized costs and benefits. Based on estimates of the private value of a patent, the Commission separately assumes that the social value of a patent is $94,886, $234,399, $5,865,833, or $32,459,680.[1191] In addition to spanning a wide range of possible valuations, these values all represent the private value of a patent to certain actors (*e.g.,* the purchaser or seller of a patent, or shareholders of a patenting company). These values do not account for innovative spillovers (*e.g.,* follow-on innovation) or product market spillovers to competitors (who may lose business to innovating firms), and therefore do not necessarily represent the social value of a patent. However, they serve as benchmarks against which to assess the breakeven points of the analysis of the final rule.

No studies have assessed what percentage of the earnings effect of non-compete enforceability is a benefit versus a transfer. The Commission separately assumes that the percentage is equal to 0%, 5%, 10%, and 25%.

The computed breakeven points are reported in Table 7, under the assumption that lost investment in human capital is advanced. Panel A reports necessary benefit percentages, under each of the four assumed social values of a patent, that would cause the rule to result in zero net monetized benefit. A reported value of 0% indicates that the assumed value of a patent itself covers the net monetized costs of the final rule. Panel B reports the necessary social value of a patent, under each of the four assumed benefit percentages, that would cause the rule to result in zero net monetized benefit. A reported value of $0 indicates that the benefits associated with earnings cover the net monetized costs of the final rule on their own.

TABLE 7

Assumed social value of a patent	Necessary benefit percentage on earnings
Panel A	
$94,886	5.5
$234,399	1.7
$5,865,833	0.0

[1188] Note that this calculation considers the net cost of lost investment in human capital (*i.e.,* the cost of lost productivity, minus the savings on direct outlays and gained output due to less time spent training). The Commission reiterates that this calculation assumes that lost human capital investment is advanced, rather than core.

[1189] This calculation assumes that updating contractual practices takes, on average, eight hours per firm.

[1190] The estimates presented here conservatively assume zero effect on R&D spending.

[1191] The Commission points out that the economic literature has not explored the *social* value of a patent, but has explored the *private* value of a patent, with highly varied conclusions (all reported here adjusted to 2023 dollars). Serrano estimates the average value of a patent (in terms of its sale price at auction) to be between $234,399 and $289,022. Pakes estimates the average value of a patent (in terms of stock market reactions to announcements) to be $5,865,833. Kogan et al. estimate the average value of a patent (also in terms of stock market reactions to announcements) to be $32,459,680. Outside of the academic literature, a Richardson Oliver Insights report notes that the average sale price of U.S. issued patents on a brokered market was $94,886. *See* Carlos J. Serrano, *Estimating the Gains from Trade in the Market for Patent Rights,* 59 Int'l Econ. Rev. 1877 (2018); Pakes, *supra* note 1132; Kogan, et al., *supra* note 1131; Richardson Oliver Insights Report (2022): *https://www.roipatents.com/secondary-market-report.*

TABLE 7—Continued

Assumed social value of a patent	Necessary benefit percentage on earnings
$32,459,680	0.0
Assumed benefit percentage on earnings	**Necessary patent value**
Panel B	
0%	$297,144
5%	134,202
10%	0
25%	0

Panel A shows that, even assuming a value of patenting ($94,886) that is substantially lower than the estimates in the economic literature, only 5.5% of the earnings effect must be an economic benefit (as opposed to a transfer) for the benefits associated with innovation and earnings to outweigh the monetized costs of the rule. Panel B shows that, even if no part of the earnings effect of the final rule reflects an economic benefit (which the Commission finds to be unlikely, in light of the evidence discussed in Part IV.B.3.a.ii), the social value of a patent would need to be only $297,144 in order to cover the monetized costs of the rule—well within the range of (private) values of a patent found in the literature.

The Commission additionally notes that Table 7 omits other benefits of the rule. The estimated benefits do not include the benefits arising from decreased consumer prices or increased workforce output. The estimates also omit possible changes in litigation costs associated with the rule. The Commission finds it likely that the omitted benefits substantially exceed the omitted costs, and additionally reiterates that the estimated values in Table 7 assume that lost investment in human capital is fully advanced. Therefore, the Commission views the values reported in Table 7 as conservative estimates of the breakeven points of the rule under those scenarios.

11. Analysis of Alternative Related to Senior Executives

The Commission elects to provide an analysis of the effects of an alternative with more limited coverage. Specifically, the Commission provides an analysis of a rule that would cover—and therefore ban—non-competes with all workers except senior executives. As compared to the final rule, under this alternative, it would not be an unfair method of competition to enter into non-competes with senior executives after the effective date. The Commission finds that excluding all non-competes with senior executives from coverage under the rule (as opposed to the final rule, which excludes only existing non-competes with senior executives) would diminish both costs and benefits, but would still result in substantial benefits on net.

a. Analysis of Lost Benefits and Costs if Senior Executives Are Excluded

Several costs and benefits may be affected if senior executives are excluded from coverage by the final rule. The Commission now discusses each of those costs and benefits relative to the final rule.

The Commission finds that some benefits related to labor market competition and workers' earnings would be lost if senior executives were entirely excluded from the final rule. This is especially true because those workers have high earnings, meaning that a given percentage increase in their earnings yields a greater overall effect compared with relatively lower earning individuals. However, those workers make up a small portion of the workforce—approximately 0.75% of the workforce, based on data from the American Community Survey.[1192] The overall change in the earnings benefit is therefore limited, but would exceed senior executives' share of the workforce. Support for this finding is discussed in Part IV.C. Garmaise (2011) finds that earnings of senior executives are negatively affected by non-competes. Countervailing evidence exists, but it is based on evaluation of the use of non-competes, which the Commission gives less weight.[1193] The Commission notes the definition of senior executive used in Garmaise (2011) does not map perfectly to the definition of senior executives in this final rule, though there is likely substantial overlap.

The Commission is unable to quantify the lost benefits related to innovation if senior executives were excluded from coverage under the final rule but finds their exclusion would diminish the innovation benefits of the final rule. Senior executives are involved in determination of the strategic path of the firm and its execution, which likely has a substantial effect on innovation. The Commission cannot quantify what percentage of the innovation effect is due to senior executives versus other workers, though it is likely shared by both groups.

The Commission finds that benefits related to consumer prices would fall significantly if senior executives were excluded from coverage. By increasing competition, increases in new firm formation and increased ability to hire talented workers may be key drivers of the effect of the final rule on consumer prices. As discussed in Part IV.C, senior executives have the knowledge and skills necessary to found new firms, or to be key members of other firms. Therefore, if senior executives are excluded from the final rule, some benefits associated with new firm foundation and innovation would be lost, though the exact proportion cannot be estimated. The Commission notes that benefits associated with lower prices through increased competition might also be lost but cannot be quantified.

Turning to costs, the Commission finds that costs associated with investment in human capital may fall if senior executives were excluded from the rule. The productivity of senior executives may benefit from investment in their human capital.[1194] The precise monetary contribution of investment in senior executives' human capital to the productivity of firms has not been estimated, nor has the empirical literature separately assessed the effect of non-competes on human capital investment for senior executives. If senior executives benefit from advanced, rather than core, training investment (as described in Part X.F.7.a), their exclusion will reduce costs. Because senior executives are a small part of the workforce and must be highly skilled, locking them up with non-competes could theoretically mean that firms would need to invest in relatively more core training for senior executives if they were excluded from the final rule.

The Commission finds that the direct costs of compliance with the final rule may be partially affected if senior executives were categorically excluded. The final rule allows employers to enforce existing non-competes for senior executives, so there are no notice and re-negotiation costs for senior executives. However, in this scenario, costs associated with ensuring incoming

[1192] In particular, 0.75% represents the percentage of employed individuals from 2017–21 ages 22–64, excluding residents of CA, ND, OK, and MN, and excluding workers reporting working for non-profits or the government, whose earnings are above the inflation-adjusted threshold and who are coded as having occupation ''Top Executive.'' The Commission notes that this estimate may not exactly match the definition in the final rule but the Commission believes that this provides a reasonable estimate.

[1193] *See* Part IV.A.2 (explaining the Commission's concerns with these types of studies).

[1194] Solomon Akrofi, *Evaluating the Effects of Executive Learning and Development on Organisational Performance: Implications for Developing Senior Manager and Executive Capabilities,* 20 Int'l. J. of Training and Dev. 177 (2016).

senior executives' contracts do not have non-competes would be substantially reduced. Because senior executives' contracts are generally more complex than other workers' contracts, this reduction may be relatively large, even though there are relatively few senior executives in the workforce (approximately 0.75%). With respect to the costs of updating contractual practices, commenters noted the costs of updating senior executives' contracts may be greater than for other workers because of the complexity of their contracts. Therefore, excluding senior executives categorically might reduce costs associated with updating contractual practices substantially. At the same time, senior executives' contracts may already be bespoke and individualized to such an extent that removing a non-compete would not considerably raise the costs associated with revising contractual practices. Moreover, these contracts may be even more likely than other workers to already include NDAs and other similar provisions.

Finally, the Commission finds exclusion of senior executives may reduce litigation costs from the final rule, though the overall effect is unclear. Senior executives are highly likely to have access to sensitive business information. To the extent costs associated with trade secret litigation or litigation over other restrictive covenants increase under the final rule, though no evidence supports this possibility, then exclusion of senior executives may substantially reduce these costs. Litigation related to whether a worker meets the definition of a senior executive may also increase if senior executives are categorically excluded.

Overall, excluding senior executives from the final rule would substantially reduce the benefits of the rule—especially those associated with new firm formation, innovation, and prices—but would also likely reduce costs, especially those associated with investment in human capital and updating contractual practices. The Commission finds that the benefits of a rule excluding senior executives would justify the costs of such a rule.

b. Analysis of Benefits and Costs to Workers Other Than Senior Executives

Now, the Commission turns to an analysis of the benefits and costs that remain if senior executives are excluded from the rule.

The Commission finds there would be substantial benefits to labor market competition and workers' earnings even if senior executives were categorically excluded. The evidence on earnings discussed in Part IV.B.3.a.ii does not exclude senior executives, but based on the percentage of the population that represents senior executives, the evidence largely pertains to workers other than senior executives. Therefore, while studies focused on senior executives (largely) do not apply, studies of the entire workforce mostly reflect the effects of non-competes on other workers. In addition to the broader evidence on earnings discussed in Part IV.B.3.a.ii, one study analyzes a population exclusively comprised of hourly workers, nearly all of whom are highly likely not to be senior executives, supporting the finding that even with senior executives excluded from a rule, there would be substantial benefits to labor market competition and workers' earnings.[1195]

The Commission is unable to quantify to what extent the estimated effects on innovation are driven by senior executives versus other workers, but still finds that a final rule excluding these senior executives would result in substantial benefits to innovation. First, there is evidence that productivity of inventors decreases when they take career detours because of non-competes.[1196] Second, insofar as effects on innovation are driven by increased idea recombination, having access to those ideas (which innovators actively engaged in R&D must) implies that moving to new firms would increase innovation. Empirical studies have not quantified the size of these effects relative to the overall effect of banning non-competes for workers including senior executives on innovation, however.

The Commission finds that a rule excluding senior executives would still yield substantial benefits with respect to consumer prices. Many entrepreneurs were not formerly senior executives, meaning that encouraging entrepreneurship among workers who are not senior executives by prohibiting non-competes will yield more business formation. That business formation increases competition, which may lead to lower prices. Additionally, firms will not be foreclosed access to talent (which is likely important across the spectrum of workers, though evidence only specifically exists for senior executives), which may also lead to lower prices. In the absence of empirical evidence demonstrating which workers' non-competes affect consumer prices, the Commission cannot estimate how much of the effect is due to coverage of which workers.

[1195] Lipsitz & Starr, *supra* note 72.

[1196] Mueller, *supra* note 569.

The Commission finds that a rule excluding senior executives would result in decreased levels of investment in workers' human capital. The empirical literature has not separately assessed the effect of non-competes on investment in human capital for senior executives versus other workers, though the study finding that training decreases with greater non-compete enforceability includes both workers who are and are not senior executives. The Commission therefore believes that some or much of any cost or benefit of the rule from changing investment in human capital would pertain to workers who are not senior executives. However, the Commission notes that, as discussed in Part X.F.7.a, if lost training under the rule is lost ''core'' (as opposed to ''advanced'') training, then the final rule will cause a cost *savings* for firms, which will have greater access to experienced workers and will therefore spend less on ''core'' training.

The Commission finds that the direct costs of compliance with the final rule may be partially diminished if senior executives were excluded. First, the Commission reiterates that notice is not required for senior executives under the final rule. Therefore, that component of the direct costs of compliance would not be affected. However, even with those senior executives excluded, costs associated with ensuring incoming workers' contracts do not have non-competes would still be present. Insofar as senior executives' contracts may be more complex than other workers' contracts, this cost may be substantially diminished, however. Similarly, with respect to the costs of updating contractual practices, as noted by commenters, these costs may be substantially greater for the contracts of senior executives due to the complexity of their contracts and the sensitivity of the information they possess. Therefore, while some costs associated with updating contractual practices would survive if senior executives were excluded, their exclusion may reduce costs associated with the rule disproportionately to their (relatively low) share of the workforce.

Finally, some litigation costs may still be present if senior executives are excluded. Litigation costs associated with non-competes would still likely fall for workers other than senior executives due to the bright-line coverage in the rule. Costs associated with litigation other than non-compete litigation may rise if firms turn to those methods, though no evidence suggests they will.

Overall, a rule that excludes senior executives will likely result in

substantial benefits, as well as some costs. While the Commission largely cannot quantify the extent to which benefits and costs would fall if senior executives were excluded from coverage under the rule, the Commission finds that the benefits quantified and monetized elsewhere in this impact analysis would likely be diminished relative to the final rule as adopted, especially those associated with innovation and prices, but costs would also be diminished, especially those associated with investment in human capital and updating contractual practices. The Commission finds that, even in the absence of a full monetization of all costs and benefits of the final rule, the final rule has substantial benefits that clearly justify the costs, which remains true even if senior executives were excluded from coverage.

XI. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') and Final Regulatory Flexibility Analysis (''FRFA'') of any final rule subject to notice-and-comment requirements, unless the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.[1197] In the NPRM, the Commission provided an IRFA, stated its belief that the proposal will not have a significant economic impact on small entities, and solicited comments on the burden on any small entities that would be covered.[1198] In addition to publishing the NPRM in the **Federal Register**, the Commission announced the proposed rule through press and other releases,[1199] as well as through other outreach including hosting a public forum on the proposed rule [1200] and attending the U.S. Small Business Administration Office of Advocacy's (''SBA Advocacy'') roundtable on the proposed rule with small entities,[1201] in keeping with the Commission's history of small business guidance and outreach.[1202]

The Commission thereafter received over 26,000 public comments, many of which identified themselves as being from small businesses, industry associations that represent small businesses, and workers at small businesses.[1203] The Commission greatly appreciates and thoroughly considered the feedback it received from such stakeholders in developing the final rule. The Commission made changes from the proposed rule in response to such feedback and will continue to engage with small business stakeholders to facilitate implementation of the final rule. Further, the Commission is publishing compliance material to assist small entities in complying with the final rule.

Specifically, based on the Commission's expertise and after careful review and consideration of the entire rulemaking record—including empirical research on how non-competes affect competition and over 26,000 public comments—the Commission adopts this final rule, including with changes relative to the proposal to reduce compliance burdens on small business and other entities. For example, the Commission allows existing non-competes with senior executives to remain in force,[1204] amends the safe harbor notice requirement to ease compliance,[1205] removes the requirement to rescind existing non-competes, and removes the ownership threshold from the sale of business exception.[1206] In light of the comments, the Commission has carefully considered whether to certify that the final rule will not have a significant impact on a substantial number of small entities. The Commission continues to believe the final rule's impact will not be substantial in the case of most small entities, and in many cases the final rule will likely have a positive impact on small businesses. However, the Commission cannot fully quantify the impact the final rule will have on such entities. Therefore, in the interest of thoroughness and an abundance of caution, the Commission has prepared the following FRFA with this final rule.

Although small entities across all industrial classes—*i.e.,* all NAICS codes—would likely be affected, the estimated impact on each entity would be relatively small. The Small Business Administration (''SBA'') states that, as a rule of thumb, the impact of a rule could be significant if the cost of the rule (a) eliminates more than 10% of the businesses' profits; (b) exceeds 1% of the gross revenues of the entities in a particular sector; or (c) exceeds 5% of the labor costs of the entities in the sector.[1207] As calculated in Part XI.F, the Commission estimates that legal and administrative costs would result in costs on average of $712.45 to $1,250.93 for single-establishment firms with 10 workers.[1208] These costs would exceed the SBA's recommended thresholds for significant impact only if the average profit of regulated entities with 10 workers is $7,125 to $12,509, average revenue is $71,245 to $125,093, or average labor costs are $14,249 to $25,019, respectively. Furthermore, while there are additional nonmonetizable costs associated with the final rule, there are also nonmonetizable benefits which would at least partially offset those costs, as explained in Part X.F.6.

A. Reasons for the Rule

The Commission describes the reasons for the final rule in Parts IV.B and IV.C.

B. Statement of Objectives and Legal Basis

The Commission describes the objectives and legal basis for the final rule in Part IV.B and IV.C and the legal authority for the final rule in Part II.

[1197] 5 U.S.C. 603–605.

[1198] NPRM at 3531.

[1199] FTC, Press Release, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.*

[1200] FTC, FTC Forum Examining Proposed Rule to Ban Noncompete Clauses (Feb. 16, 2023), *https://www.ftc.gov/news-events/events/2023/02/ftc-forum-examining-proposed-rule-ban-noncompete-clauses.*

[1201] Commission staff attended the February 28, 2023, roundtable. *See also* Comment from SBA Off. of Advocacy, FTC–2023–0007–21110 at 2.

[1202] Each year since FY2002, the Small Business Administration (SBA) Office of the National Ombudsman has rated the Federal Trade Commission an ''A'' on its small business compliance assistance work. *See, e.g.,* SBA Office of the Nat'l Ombudsman, 2021 Annual Report to Congress at 47.

[1203] The Commission received over 26,000 comment submissions in response to its NPRM. *See Regulations.gov, Non-Compete Clause Rule* (Jan. 9, 2023), *https://www.regulations.gov/document/FTC-2023-0007-0001.* To facilitate public access, 20,697 such comments have been posted publicly at *www.regulations.gov. Id.* (noting posted comments). Posted comment counts reflect the number of comments that the agency has posted to *Regulations.gov* to be publicly viewable. Agencies may redact or withhold certain submissions (or portions thereof) such as those containing private or proprietary information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. Gen. Servs. Admin., *Regulations.gov* Frequently Asked Questions, *https://regulations.gov/faq.*

[1204] *See* Part IV.C.3.

[1205] *See* Part IV.E.

[1206] *See* Part V.A.

[1207] SBA, *A Guide for Government Agencies: How to Comply With the Regulatory Flexibility Act,* at 19 (Aug. 2017) *https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/* (hereinafter ''RFA Compliance Guide'').

[1208] Ten workers is chosen as an illustrative example. For this example, the Commission calculates the cost of notification based on 10 workers and applies legal costs consistent with the average per establishment cost calculated in X.F.7.

C. Issues Raised by Comments, the Commission's Assessment and Response, and Any Changes Made as a Result

1. Comments [1209] on Benefits to Small Businesses and the Commission's Findings [1210]

a. Comments

Numerous small businesses and small business owners generally supported the proposed rule and shared two primary reasons, among others, that the rule may uniquely benefit small business owners. First, because non-competes are expressly designed to prevent workers from starting new businesses within the industry and geographic market that worker is experienced in, commenters said non-competes prevent new business formation and threaten new small businesses. Thus, consistent with the empirical evidence,[1211] commenters said a ban on non-competes will drive small business creation as entrepreneurial employees will be free to compete against their former employers. Second, commenters said non-competes harm small businesses by preventing them from hiring experienced workers. The Commission considered all comments related to small businesses and addresses many of them in Parts IV.B and IV.C and throughout this document.

Many comments from small businesses align with the findings in Part IV.B.3.b.i, namely that non-competes inhibit new business formation. A vast majority of such new businesses will be small businesses. For example, Kang and Fleming find that when Florida made non-competes more enforceable, larger businesses entered the State and increased employment while small businesses entered less frequently, and employment for them did not change.[1212] An economist stated the NPRM's findings show that non-competes harm small business formation and that firms struggle to hire and grow in States that are more likely to enforce non-competes. Another commenter identified an additional study showing that Hawaii's ban on non-competes in the technology industry increased the number of technology startups.[1213]

Some commenters cited the Small Business Majority's polling data on non-competes. The survey finds that 67% of small businesses that currently use non-competes support the proposed ban [1214] and 46% of small business owners have been subject to a non-compete that prevented them from starting or expanding their own businesses.[1215] Additionally, 35% of small business respondents reported that they have been prevented from hiring an employee because of a non-compete.[1216] The survey also finds that of the 312 small businesses that responded, 59% expressed agreement that NDAs could likely protect confidential information or trade secrets as effectively as a non-compete.[1217] The online survey had a small sample size of 312 small business owners and decision-makers, and had a margin of error of +/−6%.[1218] An economist commented that these survey findings provide specific evidence underlying the mechanisms identified in the empirical studies finding that non-competes decrease new business formation and prevent new firms from hiring and growing. While the survey has too small of a sample size to be fully representative of small businesses, the survey illustrates that non-competes have prevented or delayed small businesses from starting or expanding.

Small businesses stated non-competes hindered their small business, including through costly lawsuits from former employers. Many commenters said non-competes were preventing them from starting a business.[1219] One technology startup organization cited the thousands of startups formed by alumni of five leading tech companies as well as key within-industry spinoffs in the aerospace industry and suggested the number of spinoffs could be greater with a nationwide ban on non-competes. The commenter stated that even delays in founding a startup slow innovation. The commenter looked at the employment history of these aerospace startup founders and stated that, while it could not determine whether they had non-competes, their work history suggested they were not constrained in the labor market.

Many small businesses commented that non-competes prevented them from hiring the right talent and harmed their businesses, often because small businesses could not afford a lawsuit or even the legal costs of determining whether a non-compete with a perspective employee was unenforceable.[1220] A technology startup organization stated that startups are much more likely to survive with experienced counselors and mentors.[1221] A policy organization stated that non-competes favor established and large companies, because they can use non-compete litigation strategically to chill movement of experienced executives to startups and smaller firms that lack the resources to contest the non-competes in court. The policy organization also stated workers with non-competes often go to an established competitor that has the resources to protect them in case of a suit rather than a small firm, meaning small firms are disadvantaged in hiring. Similarly, a law firm commenter stated that small firms are less able to compensate new hires who have forfeiture-for-competition clauses compared to larger firms.

Commenters made several other arguments in favor of the rule covering small businesses. Several commenters pointed out that small businesses have not struggled to thrive in States where non-competes have long been prohibited, including California, Oklahoma, and North Dakota. A startup organization agreed with data cited in the NPRM indicating non-competes disproportionately reduce entrepreneurship for women, and argued that disproportionate financial challenges for women mean women entrepreneurs have fewer resources to withstand other harms from non-competes, including lack of access to talent.[1222] A law firm stated that a small business exception to the rule would lead to an inefficient ''cliff'' effect, where small businesses who previously fell within the exception would need to

[1209] The U.S. SBA publishes a Table of Small Business Size Standards based on the North American Industry Classification System (NAICS), determining the maximum number of employees or annual receipts allowed for a concern and its affiliates to be considered small. 13 CFR 121.201; *see also* Small Bus. Admin., *Table of Size Standards, https://www.sba.gov/document/support-table-size-standards.* Because commenters did not provide their NAICS number or annual receipts, and many did not provide the number of workers, the Commission is unable to determine whether each individual commenter meets the SBA's definition of a small business. Instead, for purposes of considering comments from small businesses, the Commission relies on the commenter's self-description of being a small business or start-up.

[1210] This section captures comments related to the potential benefits of the final rule for small businesses. These comments do not directly address the IRFA. Comments on the IRFA are captured in Part XI.G. Many comments and issues concerning small businesses are also discussed in Part IV.B.3.b.i.

[1211] *See* Part IV.B.3.b.i.

[1212] Kang & Fleming, *supra* note 536.

[1213] *See* Glasner, *supra* note 528.

[1214] Sm. Bus. Majority, Opinion Poll, *Small Business Owners Support Banning Non-Compete Agreements* 2 (Apr. 13, 2023). The survey also finds that 51% of small businesses that do not use non-competes support the proposed ban.

[1215] *Id.*

[1216] *Id.*

[1217] *Id.* at 3 (finding that 24% strongly agreed and 35% somewhat agreed).

[1218] *Id.* at 2.

[1219] *See* Part IV.B.3.b.i (summarizing these comments).

[1220] *Id.*

[1221] *Id.*

[1222] *See also* Marx (2022), *supra* note 519.

rescind their existing non-competes after surpassing a threshold. Finally, and importantly, numerous workers at small businesses reported substantial harms from non-competes consistent with the harms cited in Part IV.B.2 and IV.B.3.a, just as workers for large employers did.

b. Responses to Comments

As the Commission explained in Parts IV.B.3.b and IV.C.2.c, the weight of the empirical evidence supports the conclusion that non-competes inhibit new business formation and foreclose small and other businesses from accessing the talent they need to grow and succeed. Most new businesses are small, and non-competes are expressly designed to prevent workers from starting new businesses in the fields they know best. The Commission appreciates the small businesses and entrepreneurs who shared their experiences in the comments. These comments and the many comments discussed in Parts IV.B.2 and IV.B.3 from small businesses align with and bolster the empirical evidence. The comments illustrate the real-world impacts of non-competes on entrepreneurs and would-be entrepreneurs, both before and after formation of a business. Moreover, the labor market effects—including reducing labor mobility and artificially suppressing wages and job quality—are not different or mitigated when a worker works for a small business rather than a large one. Studies finding harm from non-competes examined both large and small businesses, and the Commission believes that small businesses' use of non-competes causes the same harms set forth in Parts IV.B and IV.C, including harm to other small businesses.

Based on these and other comments, the Commission believes that many small businesses are blocked from hiring workers that could help their business grow and have fewer resources than larger businesses to evaluate the risk of hiring a worker subject to a non-compete, to pay to "release" a worker they want to hire from a non-compete, such as a forfeiture-for-competition clause, and defend themselves from a non-compete suit.

In response to the comments on small business successes in States where non-competes are banned, the Commission notes that it recognizes that there are many successful small businesses in States that ban non-competes, but is not aware of any empirical evidence considering success rates of small businesses based on enforceability of non-competes.

In response to the comment discussing startups in the aerospace industry, the Commission notes that the conclusions of the commenter align with the empirical evidence that the most successful startups are within-industry spinoffs.[1223] However, the Commission notes that according to the data presented in the comment, some of the founders the comment described as being unrestrained in the labor market have significant gaps in their work history, though the Commission cannot determine the cause of any gaps.

As explained in Part IV.C, the Commission adopts a partial exception in § 910.2(a)(2) for senior executives under which their existing non-competes—non-competes entered into before the effective date—are not covered by the final rule. Employers cannot, however, enter into new non-competes with senior executives as of the effective date. The evidence and comments describing the importance of freeing senior executives from non-competes with respect to founding and supporting new and small businesses contributed to the Commission's decision to ban future non-competes for senior executives instead of excepting senior executives entirely from the final rule. The Commission is aware that existing non-competes with senior executives will reduce some of the benefits for new and small businesses as fewer senior executives will be free to join or found those businesses beginning on September 4, 2024. However, senior executives are a small, narrowly defined group, meaning there will still be numerous experienced workers freed from non-competes that can found or support small businesses, and senior executive non-competes will eventually become phased out. In addition, the Commission expects small businesses to receive the other anticipated benefits of the final rule.

2. Comments Arguing the Rule Will Harm Small Businesses and the Commission's Findings[1224]

a. Comments

Some small businesses and industry groups stated they believe a ban on non-competes would harm small businesses. Several commenters requested an exception for small businesses or certain types of small businesses, such as independent medical practices. The Commission addresses these comments in this Part XI.C.2 and addresses direct potential costs in Part XI.E. The Commission appreciates the small businesses and entrepreneurs who shared their experiences in the comments.

Commenters raised concerns that eliminating non-competes for all businesses would allow larger businesses and incumbents to easily hire away talent from smaller competitors and startups. Other small businesses said they had been harmed in the past by former workers competing against them, including by recruiting clients and other workers, or by large competitors hiring their workers. Similarly, some industry associations and small businesses said non-competes protect independent businesses, including medical practices, from dominant consolidators, as high recruitment, retention, and other costs may induce small businesses to sell their business to consolidators. Relatedly, some healthcare organizations argued a ban that does not cover nonprofit hospitals and health systems would provide those large nonprofits with an unfair advantage over independent medical practices.

Some small businesses offered the same justifications as other businesses for using non-competes but emphasized the heightened potential damage to smaller businesses less able to bear costs, including being forced to close or sell.[1225] Many of these comments asserted that small businesses relying on legitimate trade secrets would be especially harmed if a worker took that information to a competitor or new business, particularly because they would be least equipped to detect theft or retain sophisticated legal counsel to litigate potential trade secrets or NDA claims, thus reducing investment and innovation.[1226] A law firm argued that trade secrets litigation often costs millions, and few attorneys are willing to work on contingency, so startups would struggle to litigate against larger well-financed firms, especially as large firms can drive costs up to force the startup out of the litigation. SBA Advocacy asserted that if competitive information is not protected, some small businesses could face a serious risk of loss or potential closure and could not afford alternative means of protection.

One industry organization stated more generally that protecting information is a high priority for emerging growth companies. Some small businesses

[1223] *See* Part IV.B.3.b.i.

[1224] This section captures comments that do not directly address the IRFA but that are related to the potential costs of the final rule for small businesses. Comments directly addressing the IRFA are captured in Part XI.G. Many comments concerning small businesses are also discussed in Part IV.B.3.b.i.

[1225] *See, e.g.,* SBA Off. of Advocacy, FTC–2023–0007–21110 at 3.

[1226] *Id.*

stated if non-competes are banned, they might silo workers and information to limit the potential harm from a worker leaving for a larger competitor and would harm the business. One business stated that while banning non-competes might allow more market entrants, those new entrants will be more likely to fail without the protection of non-competes for worker retention and confidential information. Some business associations stated small business owners often rely on independent contractors and sole proprietors such as marketers to build their businesses and share proprietary information with them (meaning contractors may have access to information from multiple competitors) and covering such groups under the rule would harm their growth.

Small businesses also stated they use non-competes to protect investments, including in training, to prevent workers from taking clients or customers, and to increase retention and stability. For example, some small businesses shared that they started using non-competes after workers they had trained extensively went to a larger competitor or started their own business. One small business organization stated the proposed requirement to relate ''costs incurred'' to TRAPs would be harder for small businesses who are more likely to train on the job. A physician practice stated a partner leaving for a hospital would destabilize and increase costs for the practice, but a non-compete that is bought out helps practices afford those extra costs or otherwise prevents destabilization.

Commenters provided additional reasons small businesses use non-competes. A business stated that they could not afford to pay workers as much as larger businesses, so will be unable to find workers. A small business association stated that banning non-competes would exacerbate the labor shortage for small businesses by decreasing investment in training, when there are already insufficient qualified applicants. A commenter stated that the NPRM did not provide any examples of small businesses using non-competes in an unfair way. SBA Advocacy also stated that some small business employment contracts compensate workers for non-competes. One business stated small businesses may not be able to afford to fight larger businesses using borderline *de facto* non-competes.

A banking association stated new businesses that cannot protect their business would be less able to attract capital than more established businesses, while a community bank similarly said it may be unable to lend to small businesses that cannot protect their workers, customers, and proprietary information with non-competes. A small business stated that NDAs and non-solicitation clauses were too difficult to enforce, as it was told by judges that in order to win a non-solicitation suit against a former worker who purportedly took clients, the business would need to subpoena its own former clients to testify, which would damage the business's reputation.

A physician said they were able to start an independent practice while complying with a non-compete and hire others in compliance with their non-competes. One small business said they were able to work out solutions when hiring a worker subject to a non-compete to avoid violating it.

SBA Advocacy relayed the concern of one 8(a) [1227] small business that feared if entities in the 8(a) business development program cannot control their talent, the money the Federal government has spent helping these companies would be wasted. Accordingly, SBA Advocacy asserted that the proposed rule conflicted with the Congressional law creating the 8(a) program.[1228]

A small Federal contractor stated that larger companies could poach workers who are skilled and/or who are already cleared by the government to work on projects from small businesses, potentially putting them out of business, and would damage contractors' ability to provide stability to the agencies.

Some commenters expressed concern that the proposed 25% threshold [1229] for the sale of business exception would cause small businesses to lose value when acquired because owners and key workers are critical contributors to the business and non-competes are intangible assets, making buyers less likely to buy. Some commenters requesting a small business exception suggested various definitions of ''small business,'' including based on the number of employees.

Finally, SBA Advocacy encouraged the Commission to adopt an approach addressing the different concerns of small entities and consider, analyze, and tailor alternatives to the size and type of entity to minimize adverse impacts to small entities.[1230] It stated that a categorical ban was inappropriate given the range of industries and nature of economic impacts.[1231] One business requested an exception for highly paid workers at small businesses, to create a predictable bright-line rule while leveling the playing field for small businesses. An industry association asked for an exception for newly formed businesses to encourage capital formation among start-up entities.

b. Responses to Comments

First and foremost, the Commission finds, based on its expertise, the empirical evidence, and the record before it, that non-competes tend to negatively affect competitive conditions in both labor and product and service markets, including by inhibiting new business formation.[1232] The Commission is not aware of any empirical research on existing firm closures—including small business closures—being correlated with decreased non-compete enforceability. The Commission is also not aware of empirical research on specific business closure patterns. Rather, the empirical evidence shows that non-competes overall increase new business formation and decrease concentration, indicating that the final rule will likely increase the overall number of small businesses. The Commission is focused on the aggregate effects of non-competes on competitive conditions and here considers the overall effect on small businesses. While an individual small business may benefit from prohibiting one of its workers from joining a competitor or from keeping a competitor from entering the market, non-competes have a substantial net negative aggregate impact on competitive conditions in both labor markets and product and services markets, including negative spillover effects on other small businesses that do not use non-competes.[1233]

The Commission has assessed the evidence on protection of trade secrets and proprietary information in Part IV.D and finds that businesses have sufficient, less restrictive alternatives to protect such information. These options, such as NDAs, protection under trade secrets law, and importantly, competing

[1227] Sections 7(j)(10) and 8(a) of the Small Business Act (15 U.S.C. 636(j)(10) and 637(a)) authorize the SBA to establish a business development program, which is known as the 8(a) Business Development program. The 8(a) program is a robust nine-year program created to help firms owned and controlled by socially and economically disadvantaged individuals. SBA, *8(a) Business Development Program* (last updated Jan. 25, 2024), *https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program.*

[1228] SBA Off. of Advocacy, FTC–2023–0007–21110 at 3.

[1229] NPRM, proposed § 910.1(e).

[1230] SBA Off. of Advocacy, FTC–2023–0007–21110 at 3.

[1231] *Id.*

[1232] *See* Parts IV.B and IV.C.

[1233] *See id.*

on the merits to retain workers, are also accessible to small businesses. On the latter, small businesses have potentially distinct options from larger firms because of their greater ability to be flexible and responsive to their workers' preferences. Moreover, the Commission notes that no evidence exists to support the hypothesis that trade secret litigation will increase after the final rule takes effect. Recent evidence suggests trade secret litigation does not increase following bans on non-competes.[1234] With a bright-line rule banning non-competes, small businesses, like other business, will not face or have to undertake litigation related to non-competes, which may partially offset other litigation costs if firms do substitute other litigation. In fact, the purported dynamic where small firms are outspent and outmatched by large firms that drive up the cost of trade secrets litigation, is the exact dynamic many small businesses face when sued over a non-compete, which can also force small businesses to close.[1235] While the Commission does not have data on the frequency of each type of litigation or how often it forces small businesses to close, these comments indicate that this alleged legal threat is already present in a different form. Moreover, the overbreadth of non-competes that employers cite as the source of their benefits for reducing litigation costs is also the source of the negative effects of non-competes on competitive conditions, and pecuniary benefits to a firm engaged in an anticompetitive practice are not a cognizable justification for an anticompetitive practice.[1236]

Additionally, the Commission is unaware of any evidence that small businesses in States where non-competes are less enforceable are more likely to experience trade secret misappropriation, or evidence that small businesses are at a distinct disadvantage in these States. Finally, the Commission notes that despite claims that using non-competes to protect trade secrets supports innovation, the empirical evidence shows increased enforceability of non-competes on net in the aggregate harms innovation. Again, the Commission considers the overall effect on all business, including small businesses, and finds that the final rule will not reduce innovation by small business.

In response to the comments that businesses would limit sharing confidential information with their workers or that a small business's inability to protect confidential information would cause new businesses to fail, the Commission notes that use of less restrictive alternatives, including, for example, NDAs, fixed term contracts, and worker retention policies, would allow small businesses to maintain the same or near same level of protection for the confidential information they might share and want to protect. Accordingly, to the extent it is productive for a small business to protect such information or share it with a worker, the firm would adopt these alternatives and be able to continue to operate with the same or similar use of confidential information. Moreover, the Commission is not aware of any empirical evidence supporting the conclusion that firms would share less confidential information or be less able to protect it. In fact, the evidence shows that both within-industry and non-within industry spinouts are better quality, on average, when non-competes are less enforceable, which reinforces the conclusion that small businesses do not rely on non-competes to thrive.[1237] Indeed, no empirical evidence shows new businesses fail at a higher rate when (or because) non-competes are less enforceable. To the extent some businesses may choose to limit information sharing (as some individual comments suggest), the Commission concludes that the benefits of the final rule with respect to earnings, new business formation, and innovation justify any limited resulting negative effect.

In Parts IV.D.1 and X.F.7.a, the Commission examines the evidence on human capital investment and other investment and finds uncertainty regarding whether the effects on training and other investment will be benefits or costs under the final rule. The Commission distinguishes between core training and advanced training, finding that businesses may be able to spend less on core training under the final rule to the extent businesses are able to better match workers with their needs. The Commission similarly finds that new business formation under the final rule could result in an increase in overall capital investment or serve to offset any decreased capital investment in incumbent firms. As noted in comments from small businesses, non-competes limit their ability to hire experienced, productive workers. While it may be true in some cases that large businesses will be able to ''poach'' workers from smaller business, smaller businesses would also be better able to hire talent from large (or other) businesses under the final rule. In fact, theoretically, the final rule would be more beneficial to smaller businesses because they would no longer be hamstrung by the threat of non-compete litigation by large firms when hiring experienced workers from those firms. To the extent large firms can afford to pay out a worker non-compete or to litigate or threaten litigation to secure talent they want from a small firm, a ban on non-competes will better level the playing field between small and large firms competing for talent. While as stated by one commenter, some small businesses may be successful if they are able to use non-competes, the empirical evidence supports the conclusion that new business formation will increase overall under the final rule, and the Commission is not aware of any evidence of small business closure patterns. Businesses also have other alternatives to retain workers.[1238] Finally, the empirical evidence demonstrates ways in which non-competes advantage large businesses against smaller ones.[1239]

In response to comments that argued non-competes were needed to promote stability and worker retention, the Commission notes there is no evidence that stability and worker retention are economically productive in and of themselves. The overall evidence on the harms from non-competes demonstrates that retention of workers through non-competes has considerable costs to both labor markets and product and service markets. Importantly, businesses also have other, less restrictive alternatives—that do not tend to negatively affect competitive conditions—to retain workers as discussed in this Part and in Part IV.D.2. In response to the comment that small businesses will be less likely to afford retaining workers than large businesses that can pay more, the Commission notes that increases in innovation are likely to make small businesses more productive and successful, allowing them to better compete with their larger competitors. Moreover, the Commission notes that, in addition to those retention alternatives, many workers commented that their non-competes prevented them from seeking jobs with better working

[1234] Greenwood, Kobayashi, & Starr, *supra* note 757. The Commission notes that this study supplements—but is not necessary to support—its finding that no evidence supports the conclusion that litigation costs will increase under the final rule. That finding is based on the Commission's expertise and the rulemaking record, including relevant comments. This study was published after the close of the comment period.

[1235] *See* Parts IV.D and X.F.7.c.

[1236] *See* Part II.F.

[1237] *See* Part X.F.9.a.

[1238] *See* Part IV.D.2.

[1239] *See* Part IV.B.3.b.

conditions, shorter commutes, more flexible hours, or more career advancement opportunities, among others.[1240] Small businesses have ways to compete for workers beyond wages alone.

Many of the comments from small businesses, as well as from other commenters, appear to confuse non-competes with other types of agreements, such as non-solicitation agreements or NDAs, and argue that non-competes are needed to prevent former workers from taking the employer's customers or clients or disclosing confidential information. The final rule does not ban non-solicitation clauses unless they meet the definition of non-compete clause.[1241] While one commenter argued that non-solicitation clauses may be more difficult to enforce than non-competes, the Commission weighs the cost of this potential increased difficulty against the harms from non-competes and finds that any marginal benefit compared to a non-solicitation clause does not justify the costs of non-competes. And as explained previously, pecuniary benefits to a firm from an anticompetitive practice are not a cognizable defense.[1242]

In response to comments that small businesses are more reliant on independent contractors and without non-competes independent contractors might have access to confidential information for multiple competitors, the Commission first notes that the final rule does not prohibit agreements preventing a worker from working for two firms simultaneously.[1243] Many alternatives to non-competes allow businesses working with independent contracts to protect their confidential information, including maintaining security of confidential information as well as NDAs and other such agreements, as described in Part IV.D. There is no evidence that independent contractors are more likely to use or share confidential business information and, in fact, they are likely to be working under an agreement detailing their responsibilities and to be more familiar with ways to assure clients that any confidential business information shared with them will remain confidential.

In response to comments that banks might decrease lending without non-competes, the Commission notes that there is no indication that small businesses in States that have banned or limited non-competes have been unable to obtain financing and commenters provide no related evidence. Again, small businesses will have less restrictive alternatives as a means of protecting confidential information. Moreover, with respect to new business formation, workers seeking to start their own businesses will be able to reassure banks that their business will not face the threat of litigation or a court enjoining them from continuing with their business because of a non-compete.

In response to SBA Advocacy's comment on compensation for non-competes, the Commission considered this issue in Part IV.C. and decided to allow existing non-competes with senior executives, which the Commission finds are most likely to have involved consideration, to remain in force.

In response to the comment on the 8(a) business development program, the Commission notes that there are likely program participants in States where non-competes are banned or partially banned and, thus, are not able to use non-competes. Moreover, the program aims to help firms owned and controlled by socially and economically disadvantaged individuals with various supports and assistance to improve their success in securing government contracts. There is no basis to believe such assistance hinges on these small businesses being able to use non-competes with their workers. Like other firms, program participants have viable, less restrictive alternatives that do not tend to negatively affect competitive conditions. The evidence presented in this Part shows that on the whole, small businesses—including 8(a) participants—are expected to benefit from the ban on non-competes by, for example, having a larger pool of talent from which to hire workers.

In response to the comment that large businesses may use borderline *de facto* non-competes, the Commission notes that it provides greater clarity on the definition of non-compete clause in Part III.D, which the Commission believes will reduce both confusion and evasion. To the extent the commenter is raising the possibility that such other restrictive employment terms may tend to negatively affect competitive conditions, the Commission notes that section 5 and the other antitrust laws apply to those terms and govern whether such terms might be unlawful.

In response to comments on the proposed sale of business threshold, as explained in Part V.A, the Commission is eliminating the 25% threshold, meaning more small businesses will be able to utilize non-competes for more owners when they are selling their business. While individual businesses might see decreased value in a sale from being unable to use non-competes for workers, any decrease is justified by the net aggregate benefits of freeing labor markets and product and service markets from non-competes. Again, pecuniary benefits to a firm engaged in an anticompetitive practice is not a cognizable defense.[1244]

In response to the proposed definitions of ''small business,'' first, as explained in Part X.H, the Commission declines to create an exception for small businesses. Second, the SBA already defines ''small business'' based on size standards set forth in 13 CFR 121.201, and agencies are prohibited from deviating from this definition without following the procedures set out in 13 CFR 121.903.[1245]

In response to the comments arguing that the Commission's jurisdiction does not extend to tax-exempt nonprofit hospitals and healthcare organizations and that the final rule would, thus, give large nonprofits an unfair advantage over small practices, the Commission addresses this question in Parts II.E.2 and V.D.4. In response to the comment on difficulties in using TRAPs under the proposed rule, the Commission notes the final rule does not ban TRAPs, but covers terms and conditions of employment that meet the definition of non-compete clause as delineated in § 910.1 and described in Part III.D.

The commenter asserting that the final rule would exacerbate a labor shortage for small businesses did not provide evidence to support this claim. The Commission, however, finds that a ban on non-competes will increase labor mobility and enable skilled workers who are currently trapped by non-competes to work for others in the industry.

Finally, the Commission notes that numerous workers at small businesses have shared how non-competes have harmed them.

The Commission has carefully considered all of SBA Advocacy's and other stakeholders' comments, including those requesting a small business exception. The Commission has made the following changes, which the Commission believes will benefit small entities: adding an exception for existing senior executive non-competes; amending the notice requirement to ease compliance; and eliminating the sale of

[1240] *See* Part IV.B.3.a.iii.

[1241] *See* Part III.D.

[1242] *See* Part II.F.

[1243] *See* Part III.D.

[1244] *See* Part II.F.

[1245] RFA Compliance Guide, *supra* note 1207 at 14. One business suggested that the SBA definition is prone to confusion and litigation but did not provide any additional information to explain why or how.

business ownership threshold. The Commission believes that the final rule will benefit small businesses overall. The Commission notes that no State has exempted small businesses from any State statutes regulating non-competes.[1246] There is no empirical evidence that a small business exception is necessary or appropriate. Further, the evidence indicating that a ban on non-competes will benefit the economy accounts for non-competes used by both large and small businesses. In sum, the evidence indicates the final rule will, in the aggregate, benefit both small businesses and workers who work for small businesses—not to mention the consumers who in turn benefit. More small businesses are expected to enter the market, and the final rule will remove barriers to their growth.

D. Comments by the Chief Counsel for Advocacy of the SBA, the Commission's Assessment and Response, and Any Changes Made as a Result

The Commission received and carefully reviewed the comment from the SBA.[1247] The issues raised by the SBA and the Commission's responses are included in Parts XI.C and XI.F.

E. Description and Estimated Number of Small Entities to Which the Rule Will Apply

The final rule will impact all small businesses, across all industry classes, that use non-competes. It may also impact some small businesses that do not use non-competes but are impacted by other businesses' use of non-competes. The Commission does not expect that there are classes of businesses which will face disproportionate impacts from the final rule.

For the vast majority of industries, there is no nationwide granular data regarding the percentage of firms that use non-competes, which would facilitate calculating the number of small entities in a given industry using non-competes. Because of this data limitation and given the relatively stable percentage of firms using non-competes across the size distribution,[1248] the Commission estimates the total number of small firms across all industries in the U.S. economy. The Commission then calculates the number of firms estimated to use non-competes by applying an estimate of the percentage of firms using non-competes to that total. Using the size standards set by the SBA,[1249] the Commission calculates that there are 5.25 million small firms and 5.48 million small establishments in the U.S.[1250] Assuming that 49.4% of firms or establishments use non-competes,[1251] an estimated 2.59 million small firms, comprising 2.71 million small establishments, would be affected by the final rule. These calculations—the counts of businesses and the percentage of businesses that use non-competes—are based on small businesses with employees, since sole proprietorships are unlikely to use non-competes. Since the estimate cannot account for differential use of non-competes across industries, these firms span all industries and various sizes below the standards set in the SBA's size standards.

The Commission sought comments on all aspects of the IRFA, including the description and estimated number of small entities to which the rule would apply. A business association claimed the IRFA estimated the number of small businesses solely based on one incomplete study, the Colvin and Shierholz study, which it argued counted only firms with no union members who said all employees signed non-competes, risking significantly undercounting the number of impacted businesses. This comment misreads the study. The cited statement explained that when tabulating the share of businesses where all employees sign non-competes, the study counted only firms with no union members as it did not have information on whether union members signed non-competes.[1252] That does not mean that only firms with no union members where all employees signed non-competes were included in the study. In fact, the study divided its results between the share of workplaces where all employees and only some employees were subject to non-competes.[1253] The comment cites to only one component of the study results. Moreover, the study states that anecdotal evidence indicates it is rare for unions to agree to non-competes,[1254] and comments the Commission received align with that anecdotal evidence.

F. Projected Reporting, Recordkeeping, and Other Compliance Requirements

To comply with the final rule, small entities must do three things. First, to comply with §§ 910.2(a)(1)(i) and 910.2(a)(2)(i), which state it is an unfair method of competition to enter into a non-compete with a worker, small entities can no longer enter into new non-competes with incoming workers, including senior executives. This may include revising human resources materials and manuals and template or form contracts to ensure they are not misused on a forward-going basis, and making strategic decisions regarding workers' employment terms. Second, to comply with § 910.2(a)(1)(ii) and (iii), small entities cannot enforce (or make misrepresentations about) existing non-competes for workers other than senior executives after the effective date. That is, businesses must refrain from suing or threatening to sue workers other than senior executives regarding a non-compete after the effective date; but formal contract rescission is not required. Third, businesses must provide notice to workers other than senior executives that the worker's non-compete will not be enforced against the worker. The Commission provides a safe harbor notice that must be provided only to workers with known contact information. These foregoing steps entail some potential legal and administrative costs.

As calculated in Parts X.D.1.a and X.D.2.a, the Commission estimates the legal and administrative costs would

[1246] *See generally* Beck Reed Riden Chart, *supra* note 1052. In 2023, Maryland increased its non-compete compensation threshold to $19.88 per hour and set a slightly lower threshold for small employers at $19.20 per hour. Md. Lab. & Empl. Code sec. 3–716.

[1247] SBA Off. of Advocacy, FTC–2023–0007–21110.

[1248] *See* Colvin & Shierholz, *supra* note 65 at 5. The Commission emphasizes that, since smaller firms generally use non-competes at a lower rate, based on the numbers reported in Table 1, the estimate of the number of affected small entities is likely larger than is true in practice.

[1249] *See* Small Bus. Admin., *Table of Size Standards, https://www.sba.gov/document/support-table-size-standards.*

[1250] The Commission uses the latest data available from the Census Bureau's Statistics of U.S. Businesses database, available based on firm revenue and firm size. Census Bureau, *Statistics of U.S. Businesses (SUSB)* (last revised Nov. 17, 2023), *https://www.census.gov/programs-surveys/susb.html.* Values are deflated to current dollars using *https://www.bls.gov/data/inflation_calculator.htm.* As used in this analysis, per the Census Bureau, ''a firm is a business organization consisting of one or more domestic establishments in the same geographic area and industry that were specified under common ownership or control.'' On the other hand, ''an establishment is a single physical location at which business is conducted or services or industrial operations are performed.'' *See* Census Bureau, *Glossary, https://www.census.gov/programs-surveys/susb/about/glossary.html.* The number of small firms calculated here has decreased compared to the IRFA based on the updated Census Bureau data and SBA size standards.

[1251] *See* Colvin & Shierholz, *supra* note 65. The Commission notes that the estimated percentage of firms which use non-competes is based on a survey of businesses with employees. In addition, the Small Business Majority's recent survey of small businesses finds that 48% of respondents use non-competes. Sm. Bus. Majority Opinion Poll, supra note 1214. The Commission does not find that this survey has a sufficiently representative sample size to be considered definitive but notes that it aligns with the Colvin & Shierholz estimate.

[1252] *See* Colvin & Shierholz, *supra* note 65.

[1253] *See generally id.*

[1254] *Id.*

total $538.48 to $1,076.96 for each small firm, plus an additional $155.85 for each establishment owned by that firm, plus an additional $1.81 per worker. A single-establishment firm with 10 workers, for example, would bear estimated costs of $712.45 to $1,250.93.[1255] Only a small portion of the average cost estimated for each small firm—$155.85 per establishment, plus $1.81 per worker—is required under the rule. The remainder of the estimated cost is attributable to legal costs which firms may (but are not required to) undertake to revise their contractual practices. The FRFA assumes that the value of human resource professionals' times and legal professionals' time is equal to twice their average wages, which results in updated estimates.[1256] In an abundance of caution, the Commission has erred on the side of overestimating costs.

As described in greater detail in Part X.F.7.a, the Commission also finds that firm investment in human capital may increase or decrease under the final rule, depending on the type of training affected. Given the evidence available, the Commission is unable to fully monetize the estimates of firm investment in human capital. It concludes, however, that even in the absence of a full monetization of all costs and benefits of the final rule, the final rule has substantial benefits that clearly justify the costs.

1. Legal Costs

To ensure that incoming workers' contracts do not include non-competes and that they fully comply with the final rule, firms may employ in-house counsel, outside counsel, or human resource specialists (depending on the complexity of the relevant non-compete). For many firms, this process would likely be straightforward (*i.e.,* simply not using non-competes or removing one section from a boilerplate contract). Other firms may have more complex agreements or choose to use more time. The Commission assumes that, on average, ensuring that contracts for incoming workers do not have non-competes would take the equivalent of one hour of a lawyer's time (valued at $134.62),[1257] resulting in a total cost of $134.62*2.71 million = $364.8 million. There may be substantial heterogeneity in the costs for individual firms; however, the Commission believes this number is conservative. For firms whose costs of removing non-competes for incoming workers is greater, the work of ensuring that contracts comply with the law would overlap substantially with the costs of updating contractual practices, described in Part X.F.7.b.

For each establishment of each firm, estimated direct compliance costs total $21.23 + $134.62 = $155.85, plus $1.81 per worker with a non-compete.

Some business commenters have indicated that they may add or expand the scope of NDAs or other contractual provisions. This legal work is not mandated or required by the rule; it would be undertaken only by the subset of firms and workers for whom firms conclude that such alternatives would be desirable. Additionally, such adjustments are likely unnecessary for senior executives whose non-competes continue to be enforceable under the final rule. Therefore, this component additionally involves identifying senior executives whose existing non-competes are unaffected. For any such legal work, firms may use in-house counsel or outside counsel. To do so, firms may use in-house counsel or outside counsel to revise current contracts or enter into new, different contracts with workers.

The Commission is not aware of empirical evidence on how much it costs firms to revise their contractual practices when they can no longer use non-competes, and commenters did not provide evidence on costs. However, there is evidence indicating that firms that use non-competes are already using other types of restrictive employment provisions. Balasubramanian et al. find that 95.6% of workers with non-competes are also subject to an NDA, 97.5% of workers with non-competes are also subject to a non-solicitation agreement, NDA, or a non-recruitment agreement, and that 74.7% of workers with non-competes are also subject to all three other types of provisions.[1258] Firms that are already using multiple restrictive covenants may not need to expand the scope of existing restrictive employment provisions or enter into new ones.

Among the approximately one half of firms that use non-competes,[1259] the Commission assumes that the average firm employs the equivalent of four to eight hours of a lawyer's time to revise its contractual practices.[1260] The Commission emphasizes that this is an average to underline the fact that there would likely be large differences in the extent to which firms update their contractual practices. Many firms, including those that use non-competes only with workers who do not have access to sensitive information, or those that are already using other types of restrictive employment provisions to protect sensitive information, may opt to make no changes. Other firms may employ several hours or multiple days of lawyers' time to arrive at a new contract.[1261] The estimated range of four to eight hours represents an average taken across these different possibilities. For example, if two-thirds of firms that currently use non-competes opt to make no changes to their contractual practices (for example, because their workers are among the 97.5% of workers that already have other post-employment restrictions, or because they will rely on trade secret law in the future, or because they are using non-competes with workers who do not have access to sensitive information), and one-third of such firms spend (on average) the equivalent of 1.5 to 3 working days of an attorney's time, this would result in the estimate of 4–8 hours on average.

The Commission further emphasizes this estimate is an average across all employers that would be covered by the final rule. There is likely substantial heterogeneity in the amount of time firms would use to revise contractual practices; very large firms that use non-competes extensively would likely incur greater costs.

Under the assumption that the average firm that uses a non-compete employs the equivalent of four to eight hours of a lawyer's time, this analysis calculates the total expenditure on updating contractual practices to range from $134.62*4*2.59 million = $1.4 billion to $134.62*8*2.59 million = $2.8 billion. Note that this assumes decisions regarding protection of sensitive information and contract updating are

[1255] ''Ten workers'' is chosen as an illustrative example.

[1256] See Part X.F.7.b for a detailed description of the calculation and assumptions. The Commission notes that a typographical error in the IRFA resulted in the Commission reporting preliminary figures that were substantially larger than the comparable calculations in the preliminary section 22 analysis, which accounts for some of the differential between the preliminarily reported figures in the IRFA and the final estimates here.

[1257] BLS, *Occupational Outlook Handbook, Lawyers* (last modified Sept. 6, 2023), *https://www.bls.gov/ooh/legal/lawyers.htm* (updated for inflation to 2023 dollars and based on updated BLS data). Assumed lost productivity is twice the median wage.

[1258] Balasubramanian, Starr, & Yamaguchi, *supra* note 74. The value 97.5% is calculated as (1–0.6%/24.2%), where 0.6% represents the proportion of workers with only a non-compete, and no other post-employment restriction, and 24.2% represents the proportion of workers with a non-compete, regardless of what other post-employment restrictions they have.

[1259] Colvin & Shierholz, *supra* note 65 at 1.

[1260] Part X.F.7.b.i.

[1261] These estimates are derived from outreach to employment attorneys active in assisting firms in writing their non-competes. Commenters did not provide additional information or data that could be used to update these estimates.

made at the firm, rather than establishment, level, since sensitive information is likely shared across business establishments of a firm.

For each affected small business, the estimated cost of updating contractual practices is $134.62*4 = $538.48 to $134.62*8 = $1,076.96.

2. Administrative Costs for Notification Requirements

To reduce compliance costs and increase compliance certainty, § 910.2(b)(5) provides that an employer complies with the notice requirement in § 910.2(b)(1) where it provides notice to a worker pursuant to § 910.2(b)(4). Furthermore, § 910.2(b)(4) includes model language that constitutes notice to the worker that the worker's non-compete is no longer in effect. The Commission estimates that composing and sending this message in a digital format to all of a firm's workers and applicable former workers for whom digital contact information is available would take 20 minutes of a human resources specialist's time.[1262] According to BLS, the median wage for a human resources specialist was $31.85 per hour in 2023.[1263] The cost of compliance for currently employed workers with digital contact information available is therefore ($31.85*2)/3 = $21.23 per establishment. As estimated in Part XI.E, there are 2.59 million small firms, comprising 2.71 million small establishments, in the U.S. that use non-competes.[1264] Conservatively assuming that each establishment must engage in its own communication (*i.e.,* that a firm's headquarters does not have the ability to send a company-wide email, for example), this means that the total direct compliance cost for workers who are already employed and for whom digital contact information is available is $21.23*2.71 million = $57.5 million.

Each small firm must additionally mail notice to workers with non-competes for whom a physical address is available, but digital contact information is not. The cost per notice is estimated as 5 cents for one printed page plus mailing cost of 70 cents plus one minute of an HR professional's time, at $63.70 per hour, for a total of $1.81 per notice. Given an estimated count of affected workers with non-competes at small businesses of 584,843,[1265] the overall cost of mailed notice provision is therefore estimated to be $1.1 million.

G. Comments and Responses to Comments on the IRFA

The IRFA explained the Commission's preliminary assessment of the direct compliance costs for employers, both for rescinding non-competes for workers who are already employed as well as the costs of an attorney to ensure contracts for incoming workers do not have non-competes.[1266] The IRFA also explained the Commission's assessment of the costs of updating contractual practices, if the employer seeks to do so, by expanding the scope of other contractual provisions to protect trade secrets and other valuable investments.[1267] The Commission sought comment on all aspects of the IRFA.[1268]

In support of the proposed rule, one employment law firm said there are no significant recurring compliance costs to the final rule that would create an undue burden for small employers compared to larger employers. The Commission agrees. The final rule is designed to require only a one-time action and no recurring compliance requirements in order to minimize compliance costs for employers. A technology startup organization said the rule would save small businesses significant legal costs from the complex legal analysis currently necessary when trying to hire a worker subject to a non-compete, particularly when trying to assess the patchwork of State laws, ''reasonableness'' tests, and choice-of-law issues, which startups have few resources to pay.

Some commenters raised concerns about the preliminary assessment of direct compliance costs, primarily concerning unsubstantiated costs of consulting with counsel. Some commenters said small businesses would need to consult with outside counsel to ensure they properly comply with the final rule, though they did not explain why. Another business association said most small businesses do not have the organizational development required to issue the notice and would need to hire outside counsel. A group of industry associations said the estimated costs of $317.68 to $563.84 were not realistic and did not reflect the cost of discussions with outside counsel on its existing agreements and contracts and its contract negotiation practices, but the comment did not provide information to support a different estimate. Some commenters argued that small businesses lacking internal counsel or employment lawyers on retainer would face substantial unplanned expenses when seeking outside counsel on whether other restrictive covenants violated the proposed *de facto* non-compete provision. These commenters did not provide cost estimates.

First, in response to the proposed rule's Preliminary Regulatory Impact Analysis, commenters discussed that the estimated compliance costs and costs of contractual updating may underestimate true costs for the broader business community and provided alternative estimates of the time employers might spend complying with the rule and updating contractual practices, as well as the charged rates of outside counsel. These comments are addressed in the sensitivity analyses presented in Part X.F.7. The Commission has also updated the estimated legal costs in this Part. Commenters also argued that small businesses would face greater costs associated with the use of outside counsel but did not quantify those costs for small businesses. Again, the Commission provides a sensitivity analysis reflecting the cost of experienced outside counsel for all firms in Part X.F.7.b.i. Moreover, as the Commission notes, the estimate reflects significant heterogeneity, so that it is likely that some firms will simply be able to remove the paper or electronic copy of the non-compete from their website or workplace manual—requiring no attorney time—while others, like the commenter, may spend more time consulting with counsel.

Second, in response to these and other comments and as explained in Part III.D, the definition of non-compete clause has been revised to reduce confusion and give employers and workers a clearer understanding of what is prohibited, which will in turn reduce compliance costs. Third, the FRFA includes updated compliance costs to reflect any remaining need to assess contracts under § 910.2(a). Fourth, the Commission has made the notice

[1262] *See* Part X.F.7.

[1263] *See* BLS, *Occupational Outlook Handbook, Human Resources Specialists, https://www.bls.gov/ooh/business-and-financial/human-resources-specialists.htm* (last modified Sept. 6, 2023) (updated for inflation to 2023 dollars).

[1264] The dataset is available at Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry,* Industry (Feb. 2022) (last revised Sept. 15, 2023), *https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html.*

[1265] Estimated as 80% * 18.1% * 66% * (33,271,644–27,151,987), where 80% is the percentage of covered workers (see Part X.F.4.a), 18.1% is the estimated percentage of workers with non-competes (see Starr, Prescott, & Bishara, *supra* note 68), 67% is the assumed percent of workers without digital contact information, and 6,119,657 = 33,271,644–27,151,987 is the count of workers at small businesses (see *https://advocacy.sba.gov/wp-content/uploads/2023/11/2023-Small-Business-Economic-Profile-US.pdf*).

[1266] *See* NPRM at 3532.

[1267] *See id.* at 3532–33.

[1268] *See id.* at 3531.

requirement as simple as possible by providing model language for the notice in § 910.2(b)(4) and a safe harbor allowing employers to use a last known address and an exception for employers who do not have a workers' contact information. Employers can provide the notice by hand or through the mail, email, or a text message,[1269] and employers are not required to provide notice if they have no method of contacting a worker by paper or digital format.[1270] An employer is required only to notify workers that existing non-competes are no longer in effect and refrain from including non-competes in future contracts. This process is designed to be as easy as possible for employers. Employers should rarely need to seek outside legal assistance for complying with the notice requirement, and commenters do not provide an explanation of why legal assistance would be a necessary part of this process, though the cost of any such legal assistance (to identify senior executives for whom notice is not required) is accounted for in Part XI.F.1. Finally, the Commission will provide guidance materials for small entities to explain how to comply with the final rule.

The estimated compliance costs do not directly include any costs or savings from the senior executive exception, because the number of workers the exception might apply to is such a small portion of workers overall that any effect is *de minimis.* At an individual firm level, small businesses might not be impacted by the exception (if no workers earn above the total compensation threshold). Others might face increased compliance costs if they choose to use the exception and need to evaluate whether a worker meets the definition of senior executive (as accounted for in Part XI.F.1). However, the total compensation threshold included in the final rule's definition of ''senior executive'' is designed to ensure that employers and workers do not need to conduct a job duties assessment for every worker, only workers making above the threshold. In addition, in many cases it may be clear that a worker does or does not meet the test for whether a worker is a ''senior executive'' without a detailed assessment. For example, CEOs and Presidents are presumed to be in a policy-making position under § 910.1 and will not be otherwise subject to a job duties test, while highly paid workers in a non-executive role such as many physicians will not. Other small businesses might see decreased or eliminated direct and indirect compliance costs if they can maintain existing senior executive non-competes.

Many commenters also stated there are other indirect costs. SBA Advocacy suggested that the IRFA did not account for additional potential costs, including the costs of services, including higher legal fees to protect information, potential increased training, hiring and retention costs, and process changes.[1271] Similarly, a business association argued small businesses could face additional costs for finding alternatives to protect assets and to alter hiring, training, and retention processes. Some business associations argued that the cost of updating contractual practices would be higher because businesses would need to consult counsel, and many small businesses may be unable to afford to do so. A business organization stated that the Commission should consider the costs from a small business diminishing in value to potential buyers because it cannot record the value of its non-competes.

Another business organization said costs to small businesses are not limited to updating contractual agreements, mentioning the use of non-competes to protect assets and investments. A law firm suggested that trade secrets litigation often costs unspecified millions in attorney and expert fees and investigations costs. A business association commented that the rule would likely trigger additional litigation costs for trade secret protection and satisfying standards for injunctive relief, as well as unspecified additional costs related to lost business relationships and ideas. The business association cited an article from the biotech industry as saying a ban will force biotech companies to find other ways to protect themselves, likely through increased trade secret litigation, and recognizing that non-competes are critical to startups in the industry.

Two comments requested that the Commission publish a supplemental IRFA to account for the rule's potential impact.

The Commission notes that agencies are generally not required to consider indirect costs, though it is considered a best practice.[1272] While commenters raised categories of indirect costs that may be implicated (and it is not clear exactly what potential costs may fit into those categories), commenters did not provide any data or information that could enable the Commission to estimate any indirect costs. Some of these costs are also attenuated and speculative. Many of these concerns are also addressed in Parts IV.D and XI.C. The commenters also misunderstand the calculations in the IRFA and RIA; the estimates are an average across employers using non-competes, and there is likely to be substantial heterogeneity. The calculations account for the assumption that some firms may spend more than this amount. In response to comments on hiring costs, some firms may save on hiring costs from easier hiring, while others might have increased turnover costs.[1273] Businesses also have other options to compete on the merits besides raising wages, as many commenters indicated they sought jobs with better hours, more flexible schedules, shorter commutes, career opportunities, and other benefits.[1274] Businesses will be better able to hire workers experienced in their field who require less training than workers new to an industry.[1275]

Even if commenters' unsupported assertions that trade secret litigation and NDA enforcement may be more costly for businesses, including small businesses, are correct, such costs are justified by the benefits of the rule and in any event pecuniary benefits to a firm from an anticompetitive practice are not a cognizable justification.[1276] The Commission estimates that the final rule may increase or decrease overall litigation costs, and there is no evidence in the literature to allow the Commission to quantify those costs or benefits.[1277]

The comment citing an article on the biotech industry overstates the article's statements. The article said the existing increase in trade secrets litigation was likely to continue if the rule were adopted, did not cite any evidence for this prediction other than that non-competes are often used to protect trade secrets, and noted that companies may also use NDAs or restrict access to sensitive information.[1278] The article

[1269] § 910.2(b)(2).

[1270] § 910.2(b)(3).

[1271] SBA Off. of Advocacy, FTC–2023–0007–21110 at 3.

[1272] *Mid-Tex Elec. Co-op., Inc.* v. *FERC,* 773 F.2d 327, 342 (D.C. Cir. 1985) (''[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities[,]'' and the court inferred that ''Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy.''); *see also* RFA Compliance Guide, *supra* note 1207 at 22–23, 64–68.

[1273] *See* Part X.F.9.

[1274] *See* Part XI.C.2.b.

[1275] *See* Part X.F.7.a.

[1276] *See* Parts IV.D.3, X.F.5–6, II.F.

[1277] *See* Part X.F.7.c.

[1278] Rosemary Scott, *FTC's Non-Compete Law Could Propel Rise in Trade Secrets Lawsuits,* Continued

did not say that non-competes are critical to biotech startups.[1279]

The commenter asking the Commission to consider small business valuation changes did not provide any potential estimates of such a cost, nor did the commenter demonstrate that such costs exist. It is unclear whether this commenter was referring to the value of non-competes for owners or for workers, but some such non-competes may fall within the exceptions for existing senior executive non-competes or for owners in a sale of business.[1280] To the extent there are any remaining non-competes that increase the value of a business in a sale, the Commission finds that any marginal decrease is justified by the substantial overall benefits of the rule.

In response to the requests for a supplemental IRFA, one is not required by law, and this FRFA responds to all comments on the IRFA. A supplemental IRFA would not provide the public with additional relevant information that the IRFA did not.

H. Discussion of Significant Alternatives

The RFA requires that agencies include a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.[1281] Statutory examples of ''significant alternatives'' include different requirements or timetables that take into account the resources available to small entities; the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; the use of performance rather than design standards; and an exemption from coverage of the rule, or any part thereof, for small entities.[1282]

In Part IX, the Commission discusses significant alternatives to the final rule. Part IX also includes an assessment determining that each of the significant alternatives would not accomplish the objectives of the final rule. The Commission did incorporate some of the alternatives proposed in the NPRM and in comments into the final rule, namely the exception for existing senior executive non-competes, simplifying notice requirements, eliminating rescission requirements, and eliminating the 25% threshold for the sale of business exception. In addition, the Commission's analysis of benefits and costs in Part X includes an assessment of the benefits and costs of excluding senior executives. The Commission notes that it has designed the final rule to minimize compliance costs for all businesses and that the final rule does not include any reporting requirements. As stated in Part X.F.7.b, the Commission estimates that direct compliance costs and the costs of updating contractual practices would result in costs of $538.48 to $1,076.96 for each firm. As previously noted, the Commission does not believe the final rule imposes a significant economic impact on a substantial number of small entities. The Commission has also described how the final rule will benefit and increase the number of small businesses.

After careful consideration, the Commission is not creating an exception for small entities or different regulatory requirements for small entities. The final rule provides that for workers other than senior executives, it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete, enforce or attempt to enforce a non-compete, or represent that the worker is subject to a non-compete.[1283] For senior executives, the final rule provides that it is an unfair method of competition for a person to enter into or attempt to enter into a non-compete, enforce or attempt to enforce a non-compete entered into after the effective date, or represent that the worker is subject to a non-compete, where the non-compete was entered into after the effective date.[1284] Based on the available evidence, the Commission does not believe that the analysis in Parts IV.B and IV.C is fundamentally different for non-competes that are imposed by small entities. For this reason, the Commission is not creating an exception for small entities or different regulatory requirements for small entities.

The Commission is not delaying the effective date of the final for small entities. Under § 910.6, the final rule is effective 120 days after publication in the **Federal Register** on September 4, 2024. One small business asked that the final rule's effective date be delayed for two years to give the business time to silo its intellectual property and implement safeguards to protect its information. In the Commission's view, the rule's effective date of September 4, 2024 will afford small entities a sufficient period of time to comply with the final rule, and commenters have not provided evidence that more time is necessary.[1285]

XII. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (''PRA''),[1286] Federal agencies must obtain approval from the Office of Management and Budget (''OMB'') for each collection of information they conduct or sponsor. The term ''collection of information'' includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.[1287] Under the PRA, the Commission may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid control number assigned by OMB.[1288]

A. The Proposed Rule

In the NPRM, the Commission stated that it believed the proposed rule would contain a disclosure requirement that would constitute a collection of information requiring OMB approval under the PRA. The Commission stated that this disclosure requirement was proposed § 910.2(b)(2), which would have required employers to provide notice to a worker with an existing non-compete—*i.e.,* a non-compete that was entered into prior to the effective date—that the non-compete is no longer in effect and may not be enforced against the worker.[1289] Conservatively assuming that each establishment must engage in its own communication—*i.e.,* a firm's headquarters does not have the ability to send a company-wide email, for example—the Commission estimated that covered employers would incur an estimated labor cost burden of 1,310,747 hours to comply with this requirement (3,932,240 establishments × 20 minutes). The Commission estimated the associated labor cost for notifying affected workers who are already employed is $9.98 × 7.96 million × 0.494 = $39,243,755.[1290]

The Commission stated that the proposed rule would impose only *de minimis* capital and non-labor costs.

BioSpace (Feb. 8, 2023), *https://www.biospace.com/article/ftc-s-non-compete-law-could-propel-rise-in-trade-secrets-lawsuits-/.*

[1279] *Id.*

[1280] *See* § 910.3.

[1281] 5 U.S.C. 604(a)(6).

[1282] *See* 5 U.S.C. 603(c)(1)–(4).

[1283] *See* § 910.2(a)(1).

[1284] *See* § 910.2(a)(2).

[1285] *See* Part VIII.

[1286] 44 U.S.C. 3501 *et seq.*

[1287] 44 U.S.C. 3502(3); 5 CFR 1320.3(c).

[1288] 44 U.S.C. 3506(c)(1)(B); 5 CFR 1320.5(a)(3).

[1289] NPRM at 3533.

[1290] *Id.* at 3534.

The Commission anticipated that covered employers would already have in place existing systems to communicate with and provide employment-related disclosures to workers. While the proposed rule would require a one-time disclosure to some workers subject to a rescinded non-compete, the Commission anticipated that this one-time disclosure would not require substantial investments in new systems or other non-labor costs. The Commission noted that, moreover, many establishments are likely to provide the disclosure electronically, further reducing total costs.[1291]

The Commission sought comment on all aspects of its PRA analysis, including (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of these information collections on respondents.

B. Comments Received

No commenters specifically addressed the PRA analysis in the NPRM. However, the Commission received extensive comments on its Preliminary Regulatory Impact Analysis and Initial Regulatory Flexibility Act Analysis, and many of these commenters addressed the Commission's estimates related to the cost of compliance. These comments are summarized in Parts X (the Commission's Final Regulatory Analysis) and XI (the Commission's Final Regulatory Flexibility Act Analysis). The Commission also received comments on the proposed notice requirement itself. These comments are summarized in Part IV.E.

C. Final PRA Analysis

The Commission finalizes the proposed rule's notice requirement largely as proposed, with some adjustments to even further ease compliance. In the final rule, § 910.2(a)(1)(ii) prohibits employers from enforcing existing non-competes—*i.e.,* non-competes entered into prior to the effective date—with respect to workers other than senior executives. Section 910.2(b)(1) as finalized states further that for each existing non-compete that it is an unfair method of competition to enforce or attempt to enforce under § 910.2(a)(1)(ii)—*i.e.,* non-competes entered into with workers other than senior executives—the person who entered into the non-compete with the worker must provide clear and conspicuous notice to the worker by the effective date that the worker's non-compete will not be, and cannot legally be, enforced against the worker.

Pursuant to § 910.2(b)(2), the notice must (i) identify the person who entered into the non-compete with the worker and (ii) be on paper delivered by hand to the worker, or by mail at the worker's last known personal street address, or by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker.

Section 910.2(b)(3) provides an exception to the notice requirement in § 910.2(b)(1) where the person that would otherwise be required to provide the notice has no record of a street address, email address, or mobile telephone number.

Section 910.2(b)(4) provides model language that employers may use to comply with the notice requirement. Section 910.2(b)(5) states that an employer presumptively complies with the notice requirement in § 910.2(b)(1) where the employer provides a notice to the worker pursuant to § 910.2(b)(4). And § 910.2(b)(6) allows but does not require employers, in addition to providing the required notice in English, to provide the notice in another language (or languages). Section 910.2(b)(6) also permits employers to use any Commission-provided translation of the model language in § 910.2(b)(4).

The notice requirement has changed in two important respects from the proposed rule. First, employers are no longer required to provide the notice to senior executives with existing non-competes. Second, as long as employers provide the notice in English, they are permitted to provide the notice in a language other than English. However, neither of these changes significantly affects the burden of complying with the notice. Senior executives are only 0.75% of workers, so the cost savings to employers of not needing to provide the notice to senior executives are minimal. No employer is required to provide the notice in a different language, so the rule does not require employers to incur any compliance costs for doing so.

The Commission estimates that composing and sending the notice in a digital format to workers for whom digital contact information is available would take 20 minutes of a human resources specialist's time. According to BLS, the median wage for a human resources specialist in 2022 was $31.85 per hour in 2023 dollars.[1292] The cost of compliance for currently employed workers is therefore ($31.85*2)/3=$21.23 per establishment.[1293] According to the Census Bureau's Statistics of U.S. Businesses database, in 2021 (the most recent year for which data are available), there were 5.91 million firms and 6.88 million establishments in the U.S.[1294] The Commission estimates the percentage of firms using non-competes in the U.S. at 49.4%.[1295] The Commission conservatively assumes that each establishment must engage in its own communication—*i.e.,* that a firm's headquarters does not have the ability to send a company-wide email, for example. This yields an estimated 3,397,545 covered establishments which would incur an estimated labor cost burden of 1,132,515 hours to comply with this requirement (3,397,545 establishments × 20 minutes). The Commission estimates the associated labor cost for notifying affected workers who are already employed and for whom digital contact information is available is $21.23 × 6.88 million × 0.494 = $72,141,201.

Businesses may not have digital contact information for workers. The number of workers with non-competes who must therefore receive physical notice is the total number of covered workers (101.1 million; see Part X.F.7.a.i) times the percentage of workers who have non-competes (18.1%) times the percentage of workers who require mailed notice (assumed to be 66% of workers[1296]), for a total of 12.1 million workers. The Commission notes that the percentage of workers who require mailed notice is likely a substantial overestimate, since it is estimated based on the percentage of individuals who receive health information digitally. The Commission believes that employers are more likely to have digital means of providing the notice to their current workers

[1291] *Id.*

[1292] BLS, *Occupational Outlook Handbook: Human Resources Specialists, https://www.bls.gov/ooh/business-and-financial/human-resources-specialists.htm.* The value in 2022 was $30.88, which was updated to 2023 dollars.

[1293] The lost productivity of workers is assumed to be twice the median wage. *See* Part X.F.7.b.ii.

[1294] Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry* (December 2023), *https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html.*

[1295] *See* Colvin & Shierholz, *supra* note 65 at 4.

[1296] *See supra* note 1165 (CMS Supporting Statement assumes 66% of workers require mailed notice from their health insurance companies).

especially, but also to their former workers. The Commission conservatively adopts this estimate as an upper bound. The cost of mailed notice provision includes some capital costs (the cost of postage and mailing materials) and the cost of a human resource professional's time. The cost per worker is estimated as 5 cents for one printed page plus mailing cost of 70 cents plus the cost of one minute of an HR professional's time, at $63.70 per hour, for a total of $1.81 per notice. The overall cost of mailed notice provision is therefore estimated to be $22 million.

As the Commission stated in the proposed rule, the Commission anticipates that covered employers already have in place existing systems to communicate with and provide employment-related disclosures to workers. While the final rule requires a one-time disclosure to some workers, the Commission anticipates this one-time disclosure will not require substantial investments in new systems or other non-labor costs. Moreover, many establishments are likely to provide the disclosure electronically, further reducing total costs.

XIII. Other Matters

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this final rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 910

Antitrust.

■ For the reasons set forth above, and under the authority of Sections 5 and 6(g) of the Federal Trade Commission Act, the Federal Trade Commission adds subchapter J, consisting of parts 910 and 912, to chapter I in title 16 of the Code of Federal Regulations to read as follows:

Subchapter J—Rules Concerning Unfair Methods of Competition

PART 910—NON-COMPETE CLAUSES

PART 912—[RESERVED]

PART 910—NON-COMPETE CLAUSES

Sec.
910.1. Definitions.
910.2. Unfair methods of competition.
910.3. Exceptions.
910.4. Relation to State laws and preservation of State authority and private rights of action.
910.5. Severability.
910.6. Effective date.

Authority: 15 U.S.C. 45 and 46(g).

PART 910—NON-COMPETE CLAUSES

§ 910.1 Definitions.

As used in this part:

Business entity means a partnership, corporation, association, limited liability company, or other legal entity, or a division or subsidiary thereof.

Employment means work for a person.

Non-compete clause means:

(1) A term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from:

(i) Seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or

(ii) Operating a business in the United States after the conclusion of the employment that includes the term or condition.

(2) For the purposes of this part, term or condition of employment includes, but is not limited to, a contractual term or workplace policy, whether written or oral.

Officer means a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any natural person routinely performing corresponding functions with respect to any business entity whether incorporated or unincorporated.

Person means any natural person, partnership, corporation, association, or other legal entity within the Commission's jurisdiction, including any person acting under color or authority of State law.

Policy-making authority means final authority to make policy decisions that control significant aspects of a business entity or common enterprise and does not include authority limited to advising or exerting influence over such policy decisions or having final authority to make policy decisions for only a subsidiary of or affiliate of a common enterprise.

Policy-making position means a business entity's president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority. An officer of a subsidiary or affiliate of a business entity that is part of a common enterprise who has policy-making authority for the common enterprise may be deemed to have a policy-making position for purposes of this paragraph. A natural person who does not have policy-making authority over a common enterprise may not be deemed to have a policy-making position even if the person has policy-making authority over a subsidiary or affiliate of a business entity that is part of the common enterprise.

Preceding year means a person's choice among the following time periods: the most recent 52-week year, the most recent calendar year, the most recent fiscal year, or the most recent anniversary of hire year.

Senior executive means a worker who:

(1) Was in a policy-making position; and

(2) Received from a person for the employment:

(i) Total annual compensation of at least $151,164 in the preceding year; or

(ii) Total compensation of at least $151,164 when annualized if the worker was employed during only part of the preceding year; or

(iii) Total compensation of at least $151,164 when annualized in the preceding year prior to the worker's departure if the worker departed from employment prior to the preceding year and the worker is subject to a non-compete clause.

Total annual compensation is based on the worker's earnings over the preceding year. Total annual compensation may include salary, commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during that 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in 29 CFR 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other similar fringe benefits.

Worker means a natural person who works or who previously worked, whether paid or unpaid, without regard to the worker's title or the worker's status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person. The term worker includes a natural person who works for a franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship.

§ 910.2 Unfair methods of competition.

(a) *Unfair methods of competition*—(1) *Workers other than senior executives.* With respect to a worker other than a senior executive, it is an unfair method of competition for a person:

(i) To enter into or attempt to enter into a non-compete clause;

(ii) To enforce or attempt to enforce a non-compete clause; or

(iii) To represent that the worker is subject to a non-compete clause.

(2) *Senior executives.* With respect to a senior executive, it is an unfair method of competition for a person:

(i) To enter into or attempt to enter into a non-compete clause;

(ii) To enforce or attempt to enforce a non-compete clause entered into after the effective date; or

(iii) To represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date.

(b) *Notice requirement for existing non-compete clauses*—(1) *Notice required.* For each existing non-compete clause that it is an unfair method of competition to enforce or attempt to enforce under paragraph (a)(1)(ii) of this section, the person who entered into the non-compete clause with the worker must provide clear and conspicuous notice to the worker by the effective date that the worker's non-compete clause will not be, and cannot legally be, enforced against the worker.

(2) *Form of notice.* The notice to the worker required by paragraph (b)(1) of this section must:

(i) Identify the person who entered into the non-compete clause with the worker;

(ii) Be on paper delivered by hand to the worker, or by mail at the worker's last known personal street address, or by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker.

(3) *Exception.* If a person that is required to provide notice under paragraph (b)(1) of this section has no record of a street address, email address, or mobile telephone number, such person is exempt from the notice requirement in paragraph (b)(1) of this section with respect to such worker.

(4) *Model language.* For purposes of paragraph (b)(1) of this section, the following model language constitutes notice to the worker that the worker's non-compete clause cannot legally be enforced and will not be enforced against the worker.

BILLING CODE 6750–01–P

Figure 1 to Paragraph (b)(4)—Model Language

A new rule enforced by the Federal Trade Commission makes it unlawful for us to enforce a non-compete clause. As of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE], [EMPLOYER NAME] will not enforce any non-compete clause against you. This means that as of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE]:

- You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].
- You may run your own business—even if it competes with [EMPLOYER NAME].
- You may compete with [EMPLOYER NAME] following your employment with [EMPLOYER NAME].

The FTC's new rule does not affect any other terms or conditions of your employment. For more information about the rule, visit [*link to final rule landing page*]. Complete and accurate translations of the notice in certain languages other than English, including Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean, are available at [URL on FTC's website].

BILLING CODE 6750–01–C

(5) *Safe harbor.* A person complies with the requirement in paragraph (b)(1) of this section if the person provides notice to a worker pursuant to paragraph (b)(4) of this section.

(6) *Optional notice in additional languages.* In addition to providing the notice required in paragraph (b)(1) of this section in English, a person is permitted to provide such notice in a language (or in languages) other than English or to include internet links to translations in additional languages. If providing optional notice under this paragraph (b)(6), a person may use any Commission-provided translation of the model language in paragraph (b)(4) of this section.

§ 910.3 Exceptions.

(a) *Bona fide sales of business.* The requirements of this part shall not apply to a non-compete clause that is entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets.

(b) *Existing causes of action.* The requirements of this part do not apply where a cause of action related to a non-compete clause accrued prior to the effective date.

(c) *Good faith.* It is not an unfair method of competition to enforce or attempt to enforce a non-compete clause or to make representations about a non-compete clause where a person has a good-faith basis to believe that this part is inapplicable.

§ 910.4 Relation to State laws and preservation of State authority and private rights of action.

(a) This part will not be construed to annul, or exempt any person from complying with any State statute,

regulation, order, or interpretation applicable to a non-compete clause, including, but not limited to, State antitrust and consumer protection laws and State common law, except that this part supersedes such laws to the extent, and only to the extent, that such laws would otherwise permit or authorize a person to engage in conduct that is an unfair method of competition under § 910.2(a) or conflict with the notice requirement in § 910.2(b).

(b) Except with respect to laws superseded under paragraph (a) of this section, no provision of this part shall be construed as altering, limiting, or affecting the authority of a State attorney general or any other regulatory or enforcement agency or entity or the rights of a person to bring a claim or regulatory action arising under any State statute, regulation, order, or interpretation, including, but not limited to, State antitrust and consumer protection laws and State common law.

§ 910.5 Severability.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law and such invalidity shall not affect the application of the provision to other persons or circumstances or the validity or application of other provisions. If any provision or application of this part is held to be invalid or unenforceable, the provision or application shall be severable from this part and shall not affect the remainder thereof.

§ 910.6 Effective date.

This part is effective September 4, 2024.

PART 912—[RESERVED]

By direction of the Commission, Commissioners Holyoak and Ferguson dissenting.

April J. Tabor,

Secretary.

Note: The following appendix will not appear in the Code of Federal Regulations.

APPENDIX A—TABLE A.1

State	Estimated number of covered workers	Estimated increase in total annual worker earnings	Estimated increase in average annual worker earnings
Alabama	1,620,882	$822,829,396	$508
Alaska	251,167	145,317,588	579
Arizona	2,460,342	1,410,771,964	573
Arkansas	999,178	478,239,544	479
California			
Colorado	2,251,980	1,484,772,427	659
Connecticut	1,314,029	945,571,637	720
Delaware	367,291	220,637,013	601
District of Columbia	598,990	604,415,889	1,009
Florida	7,486,582	4,229,047,004	565
Georgia	3,764,270	2,188,893,667	581
Hawaii	495,988	270,123,206	545
Idaho	656,688	315,487,683	480
Illinois	4,735,066	3,051,620,266	644
Indiana	2,490,735	1,280,797,352	514
Iowa	1,229,598	624,937,405	508
Kansas	1,112,654	553,683,941	498
Kentucky	1,536,365	759,416,081	494
Louisiana	1,492,474	747,953,455	501
Maine	501,216	258,101,666	515
Maryland	2,112,817	1,378,702,305	653
Massachusetts	2,876,506	2,288,111,777	795
Michigan	3,440,754	1,946,978,052	566
Minnesota			
Mississippi	916,362	384,971,511	420
Missouri	2,256,955	1,184,012,673	525
Montana	396,982	191,696,465	483
Nebraska	787,174	399,373,568	507
Nevada	1,177,510	646,371,090	549
New Hampshire	536,516	343,360,391	640
New Jersey	3,307,696	2,301,979,408	696
New Mexico	666,290	326,156,344	490
New York	7,411,689	5,879,334,118	793
North Carolina	3,759,643	2,105,343,963	560
North Dakota			
Ohio	4,314,090	2,330,837,261	540
Oklahoma			
Oregon	1,560,619	916,694,759	587
Pennsylvania	4,690,586	2,795,472,689	596
Rhode Island	385,074	220,004,925	571
South Carolina	1,745,274	858,798,497	492
South Dakota	354,502	169,742,169	479
Tennessee	2,526,310	1,389,744,066	550
Texas	10,599,295	6,535,957,999	617
Utah	1,320,994	715,807,809	542
Vermont	241,017	127,248,043	528
Virginia	3,166,902	1,995,480,948	630

APPENDIX A—TABLE A.1—Continued

State	Estimated number of covered workers	Estimated increase in total annual worker earnings	Estimated increase in average annual worker earnings
Washington	2,809,814	2,090,953,114	744
West Virginia	539,026	253,817,680	471
Wisconsin	2,301,874	1,207,149,373	524
Wyoming	217,787	108,650,236	499
Full US, excluding CA, ND, OK, MN	101,785,552	53,291,058,349	524

Note: The estimated number of covered workers is calculated as 80% * (total employed population in the state); the estimated increase in total earnings is calculated as 0.86% * (estimated total covered earnings), where estimated total covered earnings is calculated as (estimated number of covered workers) * (average annual earnings); and the estimated increase in average earnings is calculated as 0.86% * (average annual earnings). Total employed population and average annual earnings are taken from the U.S. Census Bureau Quarterly Census of Employment and Wages for 2022 (see *https://www.bls.gov/cew/data.htm*). National totals may not equal the sum of state-specific estimates due to rounding.

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AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

FEDERAL TRADE COMMISSION

16 CFR Part 318

RIN 3084–AB56

Health Breach Notification Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is amending the Commission's Health Breach Notification Rule (the ''HBN Rule'' or the ''Rule''). The HBN Rule requires vendors of personal health records (''PHRs'') and related entities that are not covered by the Health Insurance Portability and Accountability Act (''HIPAA'') to notify individuals, the FTC, and, in some cases, the media of a breach of unsecured personally identifiable health data.

DATES: The amendments are effective July 29, 2024.

ADDRESSES: Relevant portions of the record of this proceeding, including this document, are available at *https://www.ftc.gov* and *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ryan Mehm, (202) 326–2918, *rmehm@ftc.gov,* and Ronnie Solomon, (202) 326–2098, *rsolomon@ftc.gov,* Bureau of Consumer Protection, Federal Trade Commission.

SUPPLEMENTARY INFORMATION: The amendments: (1) clarify the Rule's scope, including its coverage of developers of many health applications (''apps''); (2) clarify what it means for a vendor of personal health records to draw PHR identifiable health information from multiple sources; (3) revise the definition of breach of security to clarify that a breach of security includes data security breaches and unauthorized disclosures; (4) revise the definition of PHR related entity; (5) modernize the method of notice; (6) expand the content of the notice; (7) alter the Rule's timing requirement for notifying the FTC of a breach of security; and (8) improve the Rule's readability by clarifying cross-references and adding statutory citations, consolidating notice and timing requirements, articulating the penalties for non-compliance, and incorporating a small number of non-substantive changes.

I. Background

Congress enacted the American Recovery and Reinvestment Act of 2009 (''Recovery Act'' or ''the Act''),[1] in part to advance the use of health information technology and, at the same time, strengthen privacy and security protections for health information. Recognizing that certain entities that hold or interact with consumers' personal health records were not subject to the privacy and security requirements of HIPAA,[2] Congress created requirements for such entities to notify individuals, the Commission, and, in some cases, the media of the breach of unsecured identifiable health information from those records.

Specifically, section 13407 of the Recovery Act created certain protections for ''personal health records'' or ''PHRs,'' [3] electronic records of PHR identifiable health information on an individual that can be drawn from multiple sources and that are managed, shared, and controlled by or primarily for the individual.[4] Congress recognized that vendors of personal health records and PHR related entities (*i.e.,* companies that offer products and services through PHR websites or access information in or send information to personal health records) were collecting consumers' health information but were not subject to the privacy and security requirements of HIPAA. Accordingly, the Recovery Act directed the FTC to issue a rule requiring these non-HIPAA covered entities, and their third party service providers, to provide notification of any breach of unsecured PHR identifiable health information. The Commission issued its Rule implementing these provisions in 2009.[5] FTC enforcement of the Rule began on February 22, 2010.

The Rule the Commission issued in 2009 (''2009 Rule'') requires vendors of personal health records and PHR related entities to provide: (1) notice to consumers whose unsecured PHR identifiable health information has been breached; (2) notice to the Commission; and (3) notice to prominent media outlets [6] serving a State or jurisdiction, in cases where 500 or more residents are confirmed or reasonably believed to have been affected by a breach.[7] The Rule also requires third party service providers (*i.e.,* those companies that provide services such as billing, data storage, attribution, or analytics) to vendors of personal health records and PHR related entities to provide notification to such vendors and entities following the discovery of a breach.[8]

The 2009 Rule requires notice to individuals ''without unreasonable delay and in no case later than 60 calendar days'' after discovery of a data breach.[9] If the breach affects 500 or more individuals, notice to the FTC must be provided ''as soon as possible and in no case later than ten business days'' after discovery of the breach.[10] The FTC makes available a standard form for companies to use to notify the Commission of a breach,[11] and posts a list of breaches involving 500 or more individuals on its website.[12]

The 2009 Rule applies only to breaches of ''unsecured'' health information, which the Rule defines as health information that is not secured through technologies or methodologies specified by the Department of Health and Human Services (''HHS''). The Rule does not apply to businesses or organizations covered by HIPAA.[13] HIPAA-covered entities and their ''business associates'' must instead comply with HHS's breach notification rule.[14]

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[1] Am. Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (2009).

[2] Health Ins. Portability and Accountability Act, Public Law 104–191, 110 Stat. 1936 (1996).

[3] 42 U.S.C. 17937.

[4] 42 U.S.C. 17921(11).

[5] 74 FR 42962 (Aug. 25, 2009) (''2009 Final Rule'').

[6] The Recovery Act does not limit this notice to particular types of media. Thus, an entity can satisfy the requirement to notify ''prominent media outlets'' by, for example, disseminating press releases to a number of media outlets, including internet media in appropriate circumstances, where most of the residents of the relevant State or jurisdiction get their news. This will be a fact-specific inquiry that will depend on what media outlets are ''prominent'' in the relevant jurisdiction. 74 FR 42974.

[7] 16 CFR 318.3, 318.5.

[8] *Id.* § 318.3(b).

[9] *Id.* § 318.4(a).

[10] *Id.* § 318.5(c).

[11] Fed. Trade Comm'n, Notice of Breach of Health Information, *https://www.ftc.gov/system/files/documents/rules/health-breach-notification-rule/health_breach_form.pdf.*

[12] Fed. Trade Comm'n, Notices Received by the FTC Pursuant to the Health Breach Notification Rule, *https://www.ftc.gov/system/files/ftc_gov/pdf/Health%20Breach%20Notices%20Received%20by%20the%20FTC.pdf* (last visited Dec. 2, 2022).

[13] Per HHS guidance, electronic health information is ''secured'' if it has been encrypted according to certain specifications set forth by HHS, or if the media on which electronic health information has been stored or recorded is destroyed according to HHS specifications. *See* 74 FR 19006; *see also* U.S. Dep't of Health & Human Servs., *Guidance to Render Unsecured Protected Health Information Unusable, Unreadable, or Indecipherable to Unauthorized Individuals* (July 26, 2013), *https://www.hhs.gov/hipaa/for-professionals/breach-notification/guidance/index.html.* PHR identifiable health information would be considered ''secured'' if such information is disclosed by, for example, a vendor of personal health records, to a PHR related entity or a third party service provider, in an encrypted format meeting HHS specifications, and the PHR related entity or third party service provider stores the data in an encrypted format that meets HHS specifications and also stores the encryption and/or decryption tools on a device or at a location separate from the data.

[14] 45 CFR 164.400 through 164.414.

Since the Rule's issuance, apps and other direct-to-consumer health technologies, such as fitness trackers and wearable blood pressure monitors, have become commonplace.[15] Further, as an outgrowth of the COVID–19 pandemic, consumer use of such health-related technologies has increased significantly.[16]

In May 2020, the Commission announced its regular, ten-year review of the Rule and requested public comment about potential Rule changes.[17] The Commission requested comment on, among other things, whether changes should be made to the Rule in light of technological changes, such as the proliferation of apps and similar technologies. The Commission received 26 public comments.[18]

Many of the commenters in 2020 encouraged the Commission to clarify that the Rule applies to apps and similar technologies.[19] In fact, no commenter opposed this type of clarification regarding the Rule's coverage of health apps. Several commenters pointed out examples of health apps that have abused users' privacy, such as by disclosing sensitive health information without consent.[20] Several commenters noted the urgency of this issue, as consumers have further embraced digital health technologies during the COVID–19 pandemic.[21] Commenters argued the Commission should take additional steps to protect unsecured PHR identifiable health information that is not covered by HIPAA, both to prevent harm to consumers [22] and to level the competitive playing field among companies dealing with the same health information.[23] To that end, commenters not only urged the Commission to revise the Rule, but also to increase its enforcement efforts.[24]

A. The Commission's 2021 Policy Statement

On September 15, 2021, the Commission issued a Policy Statement providing guidance on the scope of the Rule. The Policy Statement clarified that the Rule covers most health apps and similar technologies that are not covered by HIPAA.[25] The Rule defines a ''personal health record'' as ''an electronic record of PHR identifiable health information on an individual that can be drawn from multiple sources and that is managed, shared, and controlled by or primarily for the individual.'' [26] As the Commission explained in the Policy Statement, many makers and purveyors of health apps and other connected devices are vendors of personal health records covered by the Rule because their products are electronic records of PHR identifiable health information.

The Commission explained that PHR identifiable health information includes individually identifiable health information created or received by a health care provider,[27] and that ''health care providers'' include any entities that ''furnish[ ] health care services or supplies.'' [28] Because these health app purveyors furnish health care services to their users through the mobile applications they provide, the information held in the app is PHR identifiable health information, and therefore many health app purveyors likely qualify as vendors of personal health records.[29]

The Policy Statement further explained that the statute directing the FTC to promulgate the Rule requires that a ''personal health record'' be an electronic record that can be drawn from multiple sources.[30] Accordingly, health apps and similar technologies likely qualify as personal health records covered by the Rule if they are capable of drawing information from multiple sources. The Commission further clarified that health apps and other products experience a ''breach of security'' under the Rule when they disclose users' sensitive health information without authorization; [31] a breach is ''not limited to cybersecurity intrusions or nefarious behavior.'' [32]

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[15] *See, e.g.,* Kokou Adzo, *App Development in Healthcare: 12 Exciting Facts,* TechnoChops (Jan. 3, 2023), *https://www.technochops.com/programming/4329/app-development-in-healthcare/;* Emily Olsen, *Digital health apps balloon to more than 350,000 available on the market, according to IQVIA report,* MobiHealthNews (Aug. 4, 2021), *https://www.mobihealthnews.com/news/digital-health-apps-balloon-more-350000-available-market-according-iqvia-report;* Elad Natanson, *Healthcare Apps: A Boon, Today and Tomorrow,* Forbes (July 21, 2020), *https://www.forbes.com/sites/eladnatanson/2020/07/21/healthcare-apps-a-boon-today-and-tomorrow/?sh=21df01ac1bb9.*

[16] *See id. See also* Lis Evenstad, *Covid–19 has led to a 25% increase in health app downloads, research shows, ComputerWeekly.com* (Jan. 12, 2021), *https://www.computerweekly.com/news/252494669/Covid-19-has-led-to-a-25-increase-in-health-app-downloads-research-shows* (finding that COVID–19 has led to a 25% increase in health app downloads); Jasmine Pennic, *U.S. Telemedicine App Downloads Spikes During COVID–19 Pandemic,* HIT Consultant (Sept. 8, 2020), *https://hitconsultant.net/2020/09/08/u-s-telemedicine-app-downloads-spikes-during-covid-19-pandemic/* (''US telemedicine app downloads see dramatic increases during the COVID–19 pandemic, with some seeing an 8,270% rise YoY.'').

[17] 85 FR 31085 (May 22, 2020).

[18] Comments are available at *https://www.regulations.gov/docket/FTC-2020-0045/comments.*

[19] *E.g.,* Am. Health Info. Mgmt. Ass'n (''AHIMA'') at 2; Kaiser Permanente at 3; Allscripts at 3; Am. Acad. of Ophthalmology at 2; All. for Nursing Informatics (''ANI'') at 2; Am. Med. Ass'n (''AMA'') at 4; Am. Coll. of Surgeons at 6; Physicians' Elec. Health Rec. Coal. (''PEHRC'') at 4 (''Apps that collect health information, regardless of whether or not they connect to an EHR, must be regulated by the FTC Health Breach Notification Rule to ensure the safety and security of personal health information.''); Am.'s Health Ins. Plans (''AHIP'') and Blue Cross Blue Shield Ass'n (''BCBS'') at 2; The App Ass'n's Connected Health Initiative (''CHI'') at 3.

[20] Kaiser Permanente at 7; The Light Collective at 2; Am. Acad. of Ophthalmology at 2; PEHRC at 2–3.

[21] Lisa McKeen at 2–3; Kaiser Permanente at 7–8; AMA at 3; Off. of the Att'y Gen. for the State of Cal. (''OAG–CA'') at 3–4; Healthcare Info. and Mgmt. Sys. Soc'y (''HIMSS'') and Personal Connected Health All. (''PCH Alliance'') at 4–5.

[22] Georgia Morgan; Am. Acad. of Ophthalmology at 2–3 (arguing that consumers do not know all the ways their data is being used by third parties, and the downstream consequences of data being used in this way may ultimately erode a patient's privacy and willingness to disclose information to his or her physician); Coll. of Healthcare Info. Mgmt. Exec.'s (''CHIME'') at 3 (arguing that apps' privacy practices impact the patient-provider relationship because providers do not know what technologies are sufficiently trustworthy for their patients); AMA at 2–3 (expressing concern that patients share less health data with health care providers, perhaps because of ''spillover from privacy and security breaches'').

[23] Kaiser Permanente at 2, 4; Workgroup for Elec. Data Interchange (''WEDI'') at 2; AHIP and BCBS at 3 (''[HIPAA] covered entities, such as health plans, that use or disclose protected health information should not be subject to stricter notification requirements than those imposed on vendors of personal health records or other such entities. Otherwise, the Federal government will be providing market advantages to particular industry segments with the effect of dampening competition and harming consumers.'').

[24] Kaiser Permanente at 4; Fred Trotter at 1; Casey Quinlan at 1; CARIN Alliance at 2. At the time of this document's publication, the Commission has brought two enforcement actions under the Rule; the first against digital health company GoodRx Holdings, Inc., and the second against an ovulation-tracking mobile app marketed under the name ''Premom'' and developed by Easy Healthcare, Inc. *United States* v. *GoodRx Holdings, Inc.,* No. 23–cv–460 (N.D. Cal. Feb. 17, 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2023090-goodrx-holdings-inc; United States* v. *Easy Healthcare Corp.,* No. 1:23–cv–3107 (N.D. Ill. June 22, 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/202-3186-easy-healthcare-corporation-us-v.*

[25] Statement of the Commission on Breaches by Health Apps and Other Connected Devices, Fed. Trade Comm'n (Sept. 15, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1596364/statement_of_the_commission_on_breaches_by_health_apps_and_other_connected_devices.pdf* (''Policy Statement'').

[26] 16 CFR 318.2.

[27] *Id.* § 318.2, incorporating in part the definition from section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)).

[28] *Id.* § 318.2; 42 U.S.C. 1320d(6), d(3).

[29] *See* Policy Statement at 1.

[30] The Policy Statement provided this example: ''[I]f a blood sugar monitoring app draws health information only from one source (*e.g.,* a consumer's inputted blood sugar levels), but also takes non-health information from another source (*e.g.,* dates from your phone's calendar), it is covered under the Rule.'' *Id.* at 2.

[31] 16 CFR 318.2.

[32] Policy Statement at 2. In the Statement of Basis and Purpose to the 2009 Final Rule published in the

Continued

B. Enforcement History

In 2023, the Commission brought its first enforcement actions under the Rule against vendors of personal health records. In February 2023, the Commission brought an enforcement action alleging a violation of the Rule against GoodRx Holdings, Inc. (''GoodRx''), a digital health company that sells health-related products and services directly to consumers, including prescription medication discount products and telehealth services through its website and mobile applications.[33]

In its complaint, the Commission alleged that between 2017 and 2020, GoodRx, as a vendor of personal health records, disclosed more than 500 consumers' unsecured PHR identifiable health information to third party advertising platforms like Facebook and Google, without the authorization of those consumers. As charged in the complaint, these disclosures violated explicit privacy promises the company made to its users about its data sharing practices (including about its sharing of PHR identifiable health information). The Commission alleged GoodRx broke these promises and disclosed its users' prescription medications and personal health conditions, personal contact information, and unique advertising and persistent identifiers. The Commission charged GoodRx with violating the Rule by failing to provide the required notifications, as prescribed by the Rule, to (1) individuals whose unsecured PHR identifiable health information was acquired by an unauthorized person, (2) the Federal Trade Commission, and (3) media outlets. 16 CFR 318.3 through 318.6. The Commission entered into a settlement that imposed injunctive relief and required GoodRx to pay a $1.5 million civil penalty for its alleged violation of the Rule.[34]

Similarly, on May 17, 2023, the Commission brought its second enforcement action under the Rule against Easy Healthcare Corporation (''Easy Healthcare''), a company that publishes an ovulation and period tracking mobile application called Premom, which allows its users to input and track various types of health and other sensitive data. Similar to the conduct alleged against GoodRx, Easy Healthcare disclosed PHR identifiable health information to third party companies such as Google and AppsFlyer, contrary to its privacy promises, and did not comply with the Rule's notification requirements. The Commission entered into a settlement that imposed injunctive relief and required Easy Healthcare to pay a $100,000 civil penalty for its alleged violation of the Rule.[35]

C. Notice of Proposed Rulemaking

Having considered the public comments on the regulatory review notification and its Policy Statement, on June 9, 2023, the Commission issued a notice of proposed rulemaking (''NPRM'')[36] proposing to revise the Rule, 16 CFR part 318, in seven ways:

- First, the Commission proposed to revise several definitions in order to clarify the Rule and better explain its application to health apps and similar technologies not covered by HIPAA. Consistent with this objective, the NPRM modified the definition of ''PHR identifiable health information'' and added two new definitions (''health care provider'' and ''health care services or supplies''). These proposed changes were consistent with a number of public comments supporting the Rule's coverage of these technologies.
- Second, the Commission proposed to revise the definition of ''breach of security'' to clarify that a breach of security includes an unauthorized acquisition of PHR identifiable health information in a personal health record that occurs as a result of a data security breach or an unauthorized disclosure.
- Third, the Commission proposed to revise the definition of ''PHR related entity'' in two ways. Consistent with its proposal to clarify that the Rule applies to health apps, the Commission first proposed clarifying the definition of ''PHR related entity'' to make clear that the Rule covers entities that offer products and services through the online services, including mobile applications, of vendors of personal health records. In addition, the Commission proposed revising the definition of ''PHR related entity'' to provide that entities that access or send unsecured PHR identifiable health information to a personal health record—rather than entities that access or send *any* information to a personal health record—are PHR related entities.
- Fourth, the Commission proposed to clarify what it means for a personal health record to draw PHR identifiable health information from multiple sources.
- Fifth, in response to public comments expressing concern that mailed notice is costly and not consistent with how consumers interact with online technologies like health apps, the Commission proposed to revise the Rule to authorize electronic notice in additional circumstances. Specifically, the proposed Rule adjusted the language in the ''method of notice section'' and added a new definition of the term ''electronic mail.'' The proposed Rule also required that any notice delivered by electronic mail be ''clear and conspicuous,'' a newly defined term, which aligns closely with the definition of ''clear and conspicuous'' codified in the FTC's Financial Privacy Rule.[37]
- Sixth, the Commission proposed to expand the required content of the notice to individuals, to require that consumers whose unsecured PHR identifiable health information has been breached receive additional important information, including information regarding the potential for harm from the breach and protections that the notifying entity is making available to affected consumers. In addition, the proposed Rule included exemplar notices, which entities subject to the Rule could use to notify consumers in terms that are easy to understand.
- Seventh, in response to public comments, the Commission proposed to make a number of changes to improve the Rule's readability. Specifically, the Commission proposed to include explanatory parentheticals for internal cross-references, add statutory citations in relevant places, consolidate notice and timing requirements in single sections, respectively, of the Rule, and add a new section that plainly states the penalties for non-compliance.

The NPRM also included a section discussing several alternatives the

Federal Register (''2009 Rule Commentary''), the Commission, in addressing questions about how the extent of individual authorization should be determined, stated data sharing to enhance consumers' experience with a PHR is authorized only if such use is consistent with the entity's disclosures and individuals' reasonable expectations. For anything beyond such uses, the Commission expects vendors of personal health records and PHR related entities to limit the sharing of consumers' information, unless the consumers exercise ''meaningful choice'' in allowing sharing. The Commission believes burying disclosures in lengthy privacy policies does not satisfy the standard of ''meaningful choice.'' 74 FR 42967.

[33] *United States* v. *GoodRx Holdings, Inc.*, No. 23–cv–460 (N.D. Cal. Feb. 17, 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2023090-goodrx-holdings-inc.*

[34] In addition, the Commission alleged GoodRx's data sharing practices were deceptive and unfair, in violation of section 5 of the FTC Act.

[35] *United States* v. *Easy Healthcare Corporation,* No. 1:23–cv–3107 (N.D. Ill. June 22, 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/202-3186-easy-healthcare-corporation-us-v.*

[36] 88 FR 37819 (''2023 NPRM'').

[37] 16 CFR 313.3(b). The FTC's Financial Privacy Rule requires financial institutions to provide particular notices and to comply with certain limitations on disclosure of nonpublic personal information. Using a comprehensive definition of ''clear and conspicuous'' based on the Financial Privacy Rule definition aims to ensure consistency across the Commission's privacy-related rules.

Commission considered but did not propose. Although the Commission did not put forth any proposed modifications on those issues, the Commission nonetheless sought public comment on them.

The Commission received approximately 120 comments in response to the NPRM from a wide spectrum of stakeholders, including consumers, consumer groups, trade associations, think tanks, policy organizations, private sector entities, and members of Congress.[38] As discussed in detail below, commenters addressed the seven topics on which the Commission proposed changes, responded to particular points on which the Commission requested comment, offered additional comment on alternatives that the Commission considered but did not propose, and provided comment on other topics. The majority of commenters expressed support for the Commission's proposed changes.

The Commission believes the amendments are consistent with the language and intent of the Recovery Act, address the concerns raised by the public comments in response to the NPRM, and will ensure the Rule remains current in the face of changing business practices and technological developments.

II. Analysis of the Final Rule

The following discussion analyzes the amendments to the Rule.

A. Clarification of Entities Covered

1. The Commission's Proposal To Clarify the Entities Covered

The Commission proposed changes to several definitions in § 318.2 to clarify the Rule's application to health apps and similar technologies not covered by HIPAA. First, the proposed Rule revised the definition of ''PHR identifiable health information'' to remove a cross-reference and instead import language from section 1171(6) of the Social Security Act, 42 U.S.C. 1320d(6), which is also referenced directly in section 13407 of the Recovery Act. The proposed Rule defined ''PHR identifiable health information'' as information (1) that is provided by or on behalf of the individual; (2) that identifies the individual or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual; (3) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual; and (4) is created or received by a health care provider, health plan (as defined in 42 U.S.C. 1320d(5)), employer, or health care clearinghouse (as defined in 42 U.S.C. 1320d(2)).

The Commission explained that this proposed definition covers traditional health information (such as diagnoses or medications), health information derived from consumers' interactions with apps and other online services (such as health information generated from tracking technologies employed on websites or mobile applications or from customized records of website or mobile application interactions), as well as emergent health data (such as health information inferred from non-health-related data points, such as location and recent purchases). The Commission sought comment as to whether any further amendment of the definition was needed to clarify the scope of data covered.

Second, the NPRM proposed to define the term ''health care provider'' that appears in the proposed definition of ''PHR identifiable health information'' (''is created or received by a health care provider''). The Commission proposed to define this term in a manner similar to the definition of ''health care provider'' found in 42 U.S.C. 1320d(3) (and referenced in 42 U.S.C. 1320d(6), which is directly referenced in section 13407 of the Recovery Act), to mean a provider of services (as defined in 42 U.S.C. 1395x(u)), a provider of medical or other health services (as defined in 42 U.S.C. 1395x(s)), or any other entity furnishing health care services or supplies. The Commission observed that this proposed definition, which is consistent with the statutory scheme, differs from, but does not contradict, the definitions or interpretations adopted by HHS. The Commission sought comment on defining this term more broadly than the term is used in other contexts.

Third, the NPRM proposed to define ''health care services or supplies'' (the final term in the definition of ''health care provider'') to include any online service, such as a website, mobile application, or internet-connected device that provides mechanisms to track diseases, health conditions, diagnoses or diagnostic testing, treatment, medications, vital signs, symptoms, bodily functions, fitness, fertility, sexual health, sleep, mental health, genetic information, diet, or that provides other health-related services or tools. The Commission explained that this change clarified that the Rule applies generally to online services, including websites, apps, and internet-connected devices that provide health care services or supplies, and clarified that the Rule covers online services related not only to medical issues (by including in the definition terms such as ''diseases, diagnoses, treatment, medications'') but also wellness issues (by including in the definition terms such as ''fitness, sleep, and diet'').

The Commission explained that these proposed changes to the definitions clarified that developers of health apps and similar technologies providing ''health care services or supplies'' qualify as ''health care providers,'' such that any individually identifiable health information these products collect or use would constitute ''PHR identifiable health information'' covered by the Rule. The Commission explained that these proposed changes further clarified that a mobile health application can be a ''personal health record'' covered by the Rule and the developers of such applications can be ''vendors of personal health records.''

2. Public Comments Regarding the Commission's Proposal To Clarify the Entities Covered

The Commission received numerous comments on the application of the Rule to health apps and similar technologies. A substantial number of commenters supported the Rule's application to health apps and similar technologies not covered by HIPAA as necessary in light of the explosion of health apps and the associated dangers to the privacy and security of consumers' health information.[39] Notably, support for the

[38] Comments are available at *https://www.regulations.gov/document/FTC-2023-0037-0001/comment.*

[39] *See generally,* Am. Acad. of Fam. Physicians (''AAFP''); AHIP; AHIMA; Ass'n of Health Info. Outsourcing Serv.'s (''AHIOS''); AMA; Am. Med. Informatics Ass'n (''AMIA''); ANI; Anonymous 1; Anonymous 2; Anonymous 3; Anonymous 4; Anonymous 9; Anonymous 10; Anonymous 11 ; Anonymous 14; Am. Osteopathic Ass'n (''AOA''); Ella Balasa; Beth Barnett; Lauren Batchelor; Bipartisan Pol'y Ctr. (''BPC''); Alan Brewington; Ctr. for Democracy & Tech. (''CDT''); Ctr. for Digit. Democracy (''CDD''); Confidentiality Coal.; Consumer Rep.'s; Elec. Frontier Found. (''EFF''); Elec. Priv. Info. Ctr. (''EPIC''); Dave K.; Members of the House of Representatives; MRO Corp. (''MRO''); Omada Health; Pharmed Out; Planned Parenthood Federation of Amer. (''Planned Parenthood''); CB Sanders; Robb Streicher; SYNGAP1 Foundation and SYNGAP1 Foundation 2; Devin Thompson; Janice Tufte; Michael Turner; U.S. Public Interest Research Group (''U.S. PIRG''); UL Sol.'s; Grace Vinton; WEDI; Anli Zhou. Some commenters elaborated on the nature of the risks to consumers' health data and on the importance to consumers. Two commenters, for example, described research they had performed regarding mental health and/or reproductive health apps' disclosure of consumers' health data to third parties. Mozilla at 3–4; Consumer Reports at 2. Another commenter, a public interest group and advocacy organization, attached a petition containing 9,659 signatures

Continued

Commission's proposals came from a variety of commenters—industry associations,[40] businesses,[41] members of Congress,[42] consumer or patient advocacy groups,[43] individual consumers,[44] and anonymous sources.[45] Many commenters argued that safeguards for non-HIPAA covered health data are essential,[46] particularly because consumers generally are not aware of varying legal protections for health data.[47] Indeed, according to some commenters, requiring notification to consumers of the breach of health information not protected by HIPAA is precisely what Congress intended by authorizing the FTC to issue this Rule; the Commission's proposed changes are, therefore, consistent with the goals of the Recovery Act.[48] Some commenters argued that Federal privacy legislation is needed to protect non-HIPAA covered health data, but, in the interim, the Commission should strengthen its Rule to protect consumer health data to the extent possible.[49] Other commenters urged the Commission to take even broader measures in this Rule, such as imposing breach prevention measures,[50] banning health-based surveillance technologies or targeted advertising,[51] banning selling or sharing of health data not necessary to provide patient care or mandating data retention limits and deletion,[52] or requiring adherence to standardized terms of service with strong privacy protections.[53]

Although many commenters expressed support for the proposed changes, several business coalitions, industry associations and individual firms opposed the changes, which, they argued, are inconsistent with Congress's intent in the Recovery Act to address a narrow subset of "personal health records" and therefore exceed the FTC's statutory authority.[54] According to some comments, Congress should address any privacy issues that exceed the narrow scope of the Recovery Act. These commenters also contend that if the Commission believes there has been a violation of section 5, then the Commission needs to engage in an FTC Act section 18 rulemaking.[55] One commenter argued further that consumers have different privacy expectations for an electronic health record offered by their physician versus a fitness app (for example) that they download themselves, and the Commission's Rule should respect those differing expectations.[56]

Some commenters opposed to the changes also argued that the revised definitions would reduce choice and access in the marketplace,[57] stifle innovation,[58] or create disincentives for advertising[59] because (1) firms would risk initiating breaches by sharing user data with their partners and (2) in accepting data from health apps, partners such as advertising and analytics firms would risk being covered by the Rule.[60] According to some commenters, placing such strictures on the advertising and service provider ecosystem would raise prices (by, for example, undermining ad-supported services) and thereby harm competition.[61] One commenter argued that while robust protections for consumer health data are needed, the Rule should not be a vehicle for such protections, because it will result in over-notification of consumers (who have largely learned to disregard breach notices) and be a barrier to legislative change on privacy and data security issues more generally.[62] Another commenter argued against a breach notification rule altogether, asserting that the Commission should instead focus on requiring robust data security practices to prevent breaches in the first instance.[63]

Some commenters specifically addressed the proposed changes to the definitions of "PHR identifiable health information" and the new definitions of "health care provider" and "health care services or supplies." First, a number of comments addressed the scope of "PHR identifiable health information." Some commenters urged greater breadth, arguing, for example, that the definition of "PHR identifiable health information" should be expanded to include other types of data, such as data *about* an individual—not just data provided by or on behalf of an individual.[64] Other commenters urged the Commission to state expressly that its definition encompasses particular types of information, such as unique persistent identifiers[65] or information about sexual health[66] or substance use or treatment.[67] By contrast, some commenters urged the Commission to narrow the definition or otherwise clarify its limits, by, for example, exempting data relating to clinical research or trials[68] or data that has been de-identified.[69]

Relatedly, some commenters urged the Commission to create a definition of or standard for "identifiable data," "de-identification" or "de-identified

asking for strong rules to protect digital health privacy. US PIRG at 5–230.

[40] *E.g.,* AAFP, AHIMA, AHIOS, AMA, AMIA, AOA; Network Advert. Initiative ("NAI").

[41] *E.g.,* Mozilla; MRO; Omada Health; UL Sol.'s.

[42] *See* Members of the House of Representatives (six members of Congress expressing support for the proposed changes).

[43] *E.g.,* CDD; CDT; EFF; U.S. PIRG.

[44] Ella Balasa; Beth Barnett; Lauren Batchelor; Alan Brewington; Sean Castillo; Dave K.; CB Sanders; Robb Streicher; Devin Thompson; Janice Tufte; Michael Turner; Grace Vinton; Anli Zhou.

[45] Anonymous 1; Anonymous 2; Anonymous 3; Anonymous 4; Anonymous 5; Anonymous 6; Anonymous 9; Anonymous 10; Anonymous 11; Anonymous 14.

[46] *See, e.g.,* AAFP at 1–2; AHIMA at 2; AHIOS at 2; Anonymous 5 at 1; AOA at 1; Am. Speech-Language-Hearing Ass'n ("ASHA") at 1; Am. Psychiatric Ass'n ("APA") at 1; CDT at 3–4; CHIME at 2; EFF at 1; Generation Patient at 1; HIMSS at 2; HIMSS Elec. Health Rec. Ass'n ("HIMSS EHR Ass'n") at 1; MRO at 1–2; Omada Health at 2; PharmedOut at 1; Planned Parenthood at 2–3; Michael Turner at 1; WEDI at 1–4.

[47] AHIMA at 2; Anonymous 5 at 1; ASHA at 1; EFF at 1; WEDI at 2. One commenter, a software company that assists digital health companies with legal compliance, argued that three factors, in particular, support greater protection for digital health data: (1) consumers mistakenly believe HIPAA covers all health data; (2) there is a culture within some digital health companies that favors rapid adoption of products to secure venture capital even when compliance infrastructure is lacking; and (3) digital health products deal with sensitive data and inherently present a greater privacy risk given their heavy reliance on data and data exchange compared to traditional medicine. Tranquil Data at 1.

[48] Confidentiality Coal. at 2; Consumer Rep.'s at 4.

[49] *See, e.g.,* AAFP at 2. One commenter, an industry coalition focused on health IT and health care information exchange, emphasized a significant privacy problem adjacent to the Rule: whether HIPAA covered entities should warn patients about the privacy risks associated with health apps and what the Federal government can do to apply equal privacy protections to health data, notwithstanding HIPAA's limitations. *See* WEDI at 3. One commenter supported the proposed changes but argued the Commission should work with Congress to update antiquated terms like "personal health record." HIMSS at 3.

[50] Ella Balasa at 2; PharmedOut at 1.

[51] Light Collective at 5.

[52] EFF at 2.

[53] Texas Med. Ass'n ("TMA") at 1–2.

[54] *See, e.g.,* Ass'n of Nat'l Advertisers, Inc. ("ANA") at 4–5; Comput. & Commc'n's Indus. Ass'n ("CCIA") at 2–3; Chamber of Com. ("Chamber") at 1–3; CHI at 2; Consumer Tech. Ass'n ("CTA") at 2; Lab'y Access and Benefits Coal. ("LAB") at 1; Priv. for Am. at 1–2; TechNet at 2.

[55] Priv. for Am. at 2–3; Chamber at 6–7; Health Innovation All. ("HIA") at 1. *See also* Advanced Med. Tech. Ass'n ("AdvaMed") at 1 (recommending the Commission adopt a privacy framework pursuant to the advanced notice of proposed rulemaking (R111004) regarding commercial surveillance and data security (87 FR 51273, Aug. 22, 2022)).

[56] CCIA at 4.

[57] Am. Telemedicine Ass'n ("ATA Action") at 1.

[58] TechNet at 1–2; CTA at 5.

[59] ANA at 3.

[60] Priv. for Am. at 3.

[61] *E.g.,* ANA at 3; Priv. for Am. at 1, 3–4.

[62] World Priv F. ("WPF") at 4.

[63] HIA at 2.

[64] Consumer Rep.'s at 3.

[65] *Id.*

[66] BPC at 1–2; Planned Parenthood at 5.

[67] Legal Action Ctr. & Opioid Pol'y Inst. at 1–2.

[68] Soc'y for Clinical Rsch. Sites ("SCRS") at 1.

[69] Future of Priv. F. ("FPF") at 3.

data,'' [70] such as by adopting HHS's de-identification standard,[71] or by stating that information is identifiable if it is ''reasonably linkable to an identified or identifiable individual.'' [72] Commenters argued that clarifying what constitutes ''identifiable'' data is necessary both because of the increasing ability for de-identified data to be re-identified [73] and because the market needs clarity to enable uninhibited flow of de-identified health data for research, public health, and commercial activities.[74] Indeed, according to one commenter, failure to clarify the standard could complicate or chill public health research and other innovation.[75] One commenter argued that an objective standard of ''reasonable linkability'' is better than what the commenter described as the Rule's knowledge-based standard (*i.e.,* whether the company has a reasonable basis to believe it can be used to identify an individual).[76] One commenter urged the Commission to issue a new notice of proposed rulemaking on the issue of de-identification alone.[77]

Second, many commenters specifically addressed the Commission's proposed new definition of ''health care provider.'' One commenter applauded the Commission's revised definition of ''health care provider,'' arguing that taking a crabbed view of that or related terms would lead to further fragmentation of health data, which is already fragmented by HIPAA's limited purview.[78] Another commenter noted the Commission's definition of ''health care provider'' is simply a logical outgrowth of how consumers interact with health apps: consumers look to health apps to provide health-related services—the quintessential function of a health care provider.[79]

Other commenters, however, raised concerns that the proposed definition of ''health care provider'' is confusing in its departure from HIPAA's terminology or is otherwise overbroad.[80] Some commenters argued this departure from the traditional meaning of the term is not what Congress intended.[81] A few commenters suggested reducing the confusion with the traditional term by re-naming the definition. These commenters suggested the Commission instead use one of the following terms: ''non-HIPAA-regulated health care provider,'' [82] ''PHR provider,'' [83] ''Health-related vendor,'' [84] ''HIPAA covered entity,'' [85] or ''health-related service provider.'' [86] Another commenter recommended eliminating the confusion by stating within the definition that it excludes HIPAA-covered entities and their business associates.[87] Another commenter urged the Commission to affirm that its definition would have no impact on the term ''health care provider'' as used in other regulations.[88]

Several comments also expressed concern with the final phrase of the definition of ''health care provider'' (''any other entity furnishing health care services or supplies''), as overly broad and confusing. Commenters argued its breadth (and the breadth of the accompanying definition of ''health care services or supplies'') would have perverse results, turning retailers of tennis shoes, shampoo, or vitamins into entities covered by the Rule, which is not what Congress intended.[89] Moreover, it would result not only in compliance burdens for companies (with the downstream effect of raising prices for consumers) but also in massive over-notification of consumers, who will become desensitized to the onslaught of notices.[90]

Several commenters urged the Commission to address this problem by dropping the phrase ''any other entity furnishing health care services or supplies'' entirely—or at least excising the word ''supplies''—from the definition of ''health care provider.'' [91] One commenter recommended replacing the phrase with a different phrase: ''any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.'' [92] Another commenter recommended expressly excluding retailers.[93] Commenters requested further clarification of certain terms within the definition of ''health care provider,'' including the terms ''furnishing'' [94] and ''health care.'' [95] And another commenter argued a better approach would be to jettison the definitions of ''health care provider'' and ''health care services and supplies'' entirely and instead apply the Rule to any entity that ''promotes its offering as addressing, improving, tracking or informing matters about a consumer's health.'' [96]

Third, some commenters addressed the proposed definition of ''health care services or supplies.'' [97] Several commenters requested more clarity as to what constitutes an ''online service,'' [98] as nearly all commercial activities have some online presence.[99] Several commenters recommended deleting the final phrase of the definition (''or that provides other health-related services or tools'') to limit the definition's breadth.[100] Conversely, some commenters urged the Commission to reinforce its breadth, by expressly stating that ''health care services or supplies'' include services related to ''wellness'' [101] or to specific health conditions, such as substance abuse disorder diagnosis, treatment, medication, recurrence of use (''relapse'') and recovery.[102]

3. The Commission Adopts the Proposed Changes To Clarify the Entities Covered

After considering the comments received, the Commission adopts the proposed changes to the Rule (with only non-substantive, organizational improvements noted below) to clarify that the Rule applies to mobile health applications and similar technologies. The Commission agrees with the substantial number of comments, from many different types of entities and individuals, who argued that such clarification is necessary in light of changing technology (*i.e.,* the mass adoption of health apps) and the privacy and data security risks to consumer health data collected by that technology. The Commission also agrees with

[70] SCRS at 2; Chamber at 7; EPIC at 7–9; FPF at 3–4, LAB at 2; MRO at 4; Network for Pub. Health L. and Texas A&M Univ. (''Network'') at 3.

[71] LAB at 2; Network at 3; SCRS at 2.

[72] FPF at 3.

[73] SCRS at 2.

[74] FPF at 3; Network at 3–4.

[75] Network at 3.

[76] FPF at 3.

[77] Chamber at 7.

[78] CDT at 11.

[79] Confidentiality Coal. at 3–4.

[80] AAFP at 2–3; AdvaMed at 3–4; AHIP at 2; AMA at 2–3; ATA Action at 1; CARIN Alliance at 2–3; CCIA at 3; CTA at 4, 6–9; Datavant at 2; Invitae Corp. (''Invitae'') at 4; NAI at 3–4; Software & Info. Indus. Ass'n (''SIIA'') at 1–2; TechNet at 2; TMA at 2–3; WPF at 7.

[81] ANA at 5; ATA Action at 1; Invitae at 4–5; Priv. for Am. at 4.

[82] Planned Parenthood at 6.

[83] WPF at 7.

[84] AHIP at 2.

[85] AMA at 3.

[86] AHIP at 2.

[87] Datavant at 2.

[88] AAFP at 2–3.

[89] ANA at 7–8; CCIA at 4; CHI at 3–4; CTA at 7–8; SIIA at 2.

[90] ANA at 3; SIIA at 1.

[91] AdvaMed at 4; CHI at 4; CTA at 9; TechNet at 2.

[92] AdvaMed at 4.

[93] CTA at 8–9.

[94] EPIC at 2.

[95] AdvaMed at 3 (urging the Commission to define ''health care'' and ''health care provider'' as in 45 CFR 160.103).

[96] WPF at 10.

[97] AdvaMed at 3; AAFP at 3; AHIP at 3; Priv. for Am. at 6–7.

[98] MRO at 2; WPF at 7–8.

[99] WPF at 8.

[100] NAI at 4.

[101] EPIC at 4.

[102] Legal Action Ctr. & Opioid Pol'y Inst. at 3.

commenters who argued that the proposed changes to the Rule are consistent with the Recovery Act, which was intended to bolster breach notifications for consumer health data that falls outside HIPAA. Although the Commission agrees with commenters who argue that consumer health data should enjoy substantial and unfragmented privacy protections, this Rule addresses breach notification, not omnibus privacy protections. While this rulemaking does not address omnibus privacy protections, the Commission observes that companies collecting or holding consumers' sensitive health data should engage in many of the practices commenters described, such as imposing data retention limits, enabling deletion options, and preventing breaches through robust privacy and data security practices.[103]

The Commission is not persuaded that applying the Rule to health apps and similar technologies will have deleterious consequences for individual firms or competition or result in over-notification of consumers. Importantly, the only obligation the Rule imposes is to notify the Commission, consumers, and, in some cases, the media of a breach of unsecured PHR identifiable health information. As noted in the NPRM, many State laws already impose similar, or significantly broader, data breach obligations.[104] Moreover, firms can avoid notification costs entirely by avoiding breaches—by reducing the amount of unsecured PHR identifiable health information they access and maintain (which can be achieved by securing PHR identifiable health information), by de-identifying health information, and by implementing other privacy and data security measures appropriate to the sensitivity of the data. Congress intended for consumers to learn of breaches of their unsecured PHR identifiable health information that fall outside HIPAA; the changes to the Rule help ensure consumers will receive the notification Congress intended.

The Commission carefully considered the arguments commenters raised that the definitional changes depart from the language or spirit of the Recovery Act. The Commission does not agree. The definitions hew closely to the language of the Recovery Act and to the definitions directly referenced by the Recovery Act in section 1171(6) of the Social Security Act, 42 U.S.C. 1320d(6). As many commenters noted, while health apps did not exist when Congress passed the Recovery Act, they function in a similar manner to the personal health records that existed at the time.

For these reasons, the Commission is adopting the proposed definitions, with minor clarifications. First, the Commission has retained the definition of ''PHR identifiable health information'' as set out in the NPRM, with non-substantive organizational changes noted below. In response to comments that the definition of ''PHR identifiable health information'' should be broader, the Commission notes the definition, which closely follows the statutory language, already encompasses most of the categories of data that commenters identified. For example, unique, persistent identifiers (such as unique device and mobile advertising identifiers), when combined with health information, constitute ''PHR identifiable health information,'' if these identifiers can be used to identify or re-identify an individual. Moreover, ''PHR identifiable health information'' encompasses information about sexual health and substance abuse disorders, because the information ''relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.'' The Recovery Act states PHR identifiable health information is information provided ''by or on behalf of the individual,'' so the Commission declines to change this phrase to ''about,'' as one commenter suggested.[105] The Commission notes, however, that information provided ''by or on behalf of the individual'' will encompass much information ''about'' an individual, as the consumer is the original source of most data; many inferences ''about'' the individual originate from information provided ''by or on behalf of the individual.''

The Commission does not agree with commenters who sought to narrow the definition of PHR identifiable health information out of concern for the Rule's overall breadth. The Commission notes that liability under the Rule does not arise from a single definition. While data used for public health research, for example, may, in some instances, meet the definition of ''PHR identifiable health information,'' the firm using that data is subject to the Rule only if other conditions are met (*i.e.,* the firm is an entity covered by the Rule).

The Commission declines to create a new definition of ''de-identified data'' or another similar term, because the definition of de-identification is already embedded in the second part of the definition of PHR identifiable health information (''that identifies the individual or with respect to which there is a reasonable basis to believe that the information can be used to identify the individual''). Where there is no ''reasonable basis to believe that the information can be used to identify the individual,'' the information is not identifiable; rather, it is de-identified. If data has been de-identified according to standards set forth by HHS, then there is not a ''reasonable basis to believe that the information can be used to identify the individual,'' as the definition of PHR identifiable health information requires. Because the Commission's standard is consistent with HHS's, the Commission's Rule poses no impediment to health-related research or other flows of de-identified data. The Commission does not view the existing language as a subjective standard that turns on a company's knowledge, as one commenter suggested; by requiring a ''reasonable basis to believe'' that the information is not identifiable, the Rule creates an objective standard. Whether such reasonable basis exists will depend on whether the data can reasonably be linked to an individual consumer. There is no need for a supplemental notice of proposed rulemaking on this issue, as the Commission is not changing this aspect of the Rule, which closely follows the statute.[106]

Second, the Commission is modifying the proposed definition of ''health care provider'' to ''covered health care provider'' to distinguish that term from interpretations of the term ''health care provider'' in other contexts, which may be more limited in scope. As commenters requested, the Commission affirms its definition of ''covered health care provider'' is unique to the Rule; it does not bear on the meaning of ''health care provider'' as used in other regulations enforced by other government agencies. The Commission adopts this change merely to dispel confusion in terminology; the Commission is not making any substantive change from the definition as proposed. The Commission does not need to state expressly, either in this definition or elsewhere, that the Rule's notification requirements do not apply to HIPAA-covered entities and their business associates, as § 318.1 of the

[103] In the 2009 Final Rule, the Commission similarly underscored the importance of maintaining protections for health information, stating: ''In addition, as noted in the NPRM, the Commission expects entities that collect and store unsecured PHR identifiable health information to maintain reasonable security measures, including breach detection measures, which should assist them in discovering breaches in a timely manner.'' 74 FR 42971 n.93 (2009).

[104] 88 FR 37832 n.103.

[105] Consumer Rep.'s at 4.

[106] 42 U.S.C. 17937(f)(2).

Rule already includes this proviso. The Commission declines to remove the phrase ''any other entity furnishing health care services or supplies'' from the definition of ''health care provider,'' because this phrase is nearly identical to the language that appears in 42 U.S.C. 1320d(3), which is referenced in the definition of individually identifiable health information in 42 U.S.C. 1320d(6), which is in turn referenced in the definition of PHR identifiable health information in section 13407(f)(2) of the Recovery Act, 42 U.S.C. 17937.[107] The Commission declines to define the terms ''furnish'' and ''health care'' as the Commission believes the plain meaning of the term ''furnish'' (to supply someone with something) is already clear and adding a definition of ''health care'' is unnecessary in light of the definition of ''covered health care provider'' and ''health care services and supplies.'' Differences from HHS's regulations pursuant to HIPAA are appropriate, as the Recovery Act differs from HIPAA, and the Recovery Act's mandate is specifically to cover entities *not* covered by HIPAA.

Third, the Commission is adopting the proposed definition of ''health care services or supplies,'' with one minor modification: the Commission has substituted the word ''means'' for ''includes'' to avoid implying greater breadth than the Commission intends. The Commission adopts this change merely to dispel confusion about undue breadth; the Commission does not intend any substantive change from the definition proposed. The Commission otherwise affirms the proposed definition without change. The Commission believes the term ''online service'' in the definition of ''health care services or supplies'' is sufficiently clear because of the examples of ''online services'' given within the definition itself: website, mobile application, or internet-connected device. Providing an exhaustive list of what constitutes an online service would prevent the definition from being sufficiently flexible to account for future innovation in types of online services. The Commission also retains the catch-all ''or that provides other health-related services or tools'' for the same reason: to ensure the Rule's language can accommodate future changes in technology. There is no undue breadth, because that phrase's meaning is in the context of the preceding phrase (''provides mechanisms to track diseases, health conditions, diagnoses or diagnostic testing, treatment, medications, vital signs, symptoms, bodily functions, fitness, fertility, sexual health, sleep, mental health, genetic information, diet'').

In response to some commenters' concerns that the proposed Rule's definition of ''health care provider'' and ''health care services or supplies'' would impermissibly cause the Rule to cover retailers of general-purpose items like tennis shoes, shampoo, or vitamins, the Commission disagrees this would necessarily be the case. A threshold inquiry under the Rule is whether an entity is a ''vendor of personal health records,'' which the Recovery Act defines as ''an entity . . . that offers or maintains a personal health record.'' [108] The Recovery Act usage of the term ''vendor of'' in connection with ''personal health records'' underscores that entities that are not in the business of offering or maintaining (*e.g.,* selling, marketing, providing, or promoting) a health-related product or service are not covered—in other words, they are not ''vendors'' of personal health records. Thus, to be a vendor of personal health records under the Rule, an app, website, or online service must provide an offering that relates more than tangentially to health.[109]

The Commission notes a general retailer (one that sells food products, children's toys, garden supplies, healthcare products (such as pregnancy tests), or apparel (such as maternity clothes)) offering consumers an app to purchase and access purchases of these products—by itself—would not make the retailer a vendor of personal health records. In this scenario, purchase information relating to certain items—such as a pregnancy test or maternity clothes from a retailer—may reveal information about that person's health. While this purchase information may be PHR identifiable health information, the retailer in this scenario is not a vendor of personal health records because the app is only tangentially related to health. The Commission notes, however, there may be scenarios where a general-purpose retailer described above may become a vendor of personal health records under the Rule, such as where the retailer offers an app with features or functionalities that are sold, marketed, or promoted as more than tangentially relating to health.

In addition, the Commission reiterates a personal health record must be an electronic record of PHR identifiable health information on an individual, must have the technical capacity to draw information from multiple sources, and must be managed, shared, and controlled by or primarily for the individual. The Commission also notes that purchases of items at a brick and mortar retailer where there is no app, website, or online service to access or track that purchase information electronically is not a personal health record, because there is no electronic record at issue. Contrary to the assertions of some commenters, these definitions do not result in undue breadth, because they do not function in isolation. The Commission provides the following examples to illustrate the interplay of these definitions with the definition of ''personal health record'':

- *Example 1:* Health advice app or website A, which is not covered by HIPAA, provides information to consumers about various medical conditions. Its function is purely informational; it does not provide any mechanism through which the consumer may track or record information. Health advice app or website A is not a personal health record, because it is not an electronic record of PHR identifiable health information on an individual.
- *Example 2:* Health advice app or website B, which is not covered by HIPAA, provides information to consumers about various medical conditions and provides a symptom tracker, available to consumers who log into the site with a username and password, in which consumers may input symptoms and receive potential diagnoses. Health advice app or website B is an electronic record of PHR identifiable health information on an individual, because its information is provided by the individual, it identifies the individual (via username and password), it relates to the individual's health conditions (the symptoms), and is received by a health care provider (*i.e.,* the entity providing the site itself, as that entity is furnishing the health care service of an online service that provides mechanisms to track symptoms). However, health advice app or website B is not a personal health

[107] The definition of ''covered health care provider'' in § 318.2 substitutes ''entity'' for ''person''—*i.e.,* ''any other *entity* furnishing health care services or supplies''—because the rest of the Rule speaks in terms of ''entities,'' but the definition in § 318.2 is otherwise identical to the statutory definition in 42 U.S.C. 1320d(3).

[108] 42 U.S.C. 17921(18); *see also* 42 U.S.C. 17937.

[109] At least one commenter urged a somewhat similar interpretation, contending that a relevant inquiry in determining whether a service offers a personal health record is ''the terms under which a product or service is offered to consumers. If an entity promotes its offering as addressing, improving, tracking, or informing matters about a consumer's health, then that entity's offering would be subject to the rule. Thus, any product or services that tracks or addresses physical activity, blood pressure, heart rate, digestion, strength, genetics, sleep, weight, allergies, pain, and similar characteristics would be subject to a PHR rule.'' *See* WPF at 10.

record to the extent the site does not have the technical capacity to draw information from multiple sources (*i.e.,* if the consumer is its only source of information).

• *Example 3:* Health advice website C, which is not covered by HIPAA, functions in the same way as health advice app or website B, except that it collects geolocation data via an application programming interface (''API''). For the reasons stated in Example 2, it is an electronic record of PHR identifiable health information on an individual. It also has the technical capacity to draw information from multiple sources (consumer inputs and collection of geolocation data through the API. It is managed primarily for the individual (*i.e.,* to provide the individual health advice). Therefore, health advice app or website C is a personal health record.

• *Example 4:* Health advice app or website D, which is not covered by HIPAA, functions in the same way as health advice app or website B, except that it also draws information from a data broker and connects that information to some of its individual users to provide them with more accurate diagnostic suggestions. For the reasons stated in Example 2, it is an electronic record of PHR identifiable health information on an individual. It also has the technical capacity to draw information from multiple sources (the consumer and the data broker) and is managed by or primarily for the individual. Therefore, health advice app or website D is a personal health record.

Whether a health app or other electronic record constitutes a personal health record (and is therefore subject to the Rule) is a fact-intensive inquiry whose outcome depends not only on the nature of the information contained in that record, but also on numerous other factors, such as its ''technical capacity,'' its source(s) of information, and its relationship to the individual.

Finally, the Commission notes a non-substantive, organizational change relating to the definition of ''PHR identifiable health information.'' In the 2023 NPRM, the Commission proposed revising ''PHR identifiable health information'' by importing language from section 1171(6) of the Social Security Act, 42 U.S.C. 1320d(6), which is referenced directly in section 13407 of the Recovery Act. To hew more closely to the organization of the Recovery Act, and to preserve the word ''includes'' in the phrase ''includes information that is provided by or on behalf of the individual,'' the Commission revised slightly the order of the elements in the definition of ''PHR identifiable health information.''

B. Clarification of What It Means for a Personal Health Record To Draw Information From Multiple Sources

1. The Commission's Proposal Regarding What It Means for a Personal Health Record To Draw Information From Multiple Sources

The Commission proposed amending the definition of the term ''personal health record'' to clarify what it means for a personal health record to draw information from multiple sources. Under the 2009 Rule, a personal health record is defined as an electronic record of PHR identifiable health information that can be drawn from multiple sources and that is managed, shared, and controlled by or primarily for the individual. Under the Commission's proposed definition, a ''personal health record'' would be defined as an electronic record of PHR identifiable health information on an individual that has the technical capacity to draw information from multiple sources and that is managed, shared, and controlled by or primarily for the individual.

Changing the phrase ''that can be drawn from multiple sources'' to ''has the technical capacity to draw information from multiple sources'' serves several purposes. First, it clarifies a product is a personal health record if it can draw information from multiple sources, even if the consumer elects to limit information to a single source only, in a particular instance. For example, a depression management app that accepts consumer inputs of mental health states and has the technical capacity to sync with a wearable sleep monitor is a personal health record, even if some customers choose not to sync a sleep monitor with the app. Thus, whether an app qualifies as a personal health record would not depend on the prevalence of consumers' use of a particular app feature, like sleep monitor-syncing. Instead, the analysis of the Rule's application would be straightforward: either the app has the technical means (*e.g.,* the application programming interface or API) to draw information from multiple sources, or it does not. Next, adding the phrase ''technical capacity to draw information'' clarifies a product is a personal health record if it can draw any information from multiple sources, even if it only draws health information from one source. This change further clarifies the Commission's interpretation of the Recovery Act, as explained in the Policy Statement.[110]

The Commission sought public comment as to whether this revised language sufficiently clarifies the Rule's application to developers and purveyors of products that have the technical capacity to draw information from more than one source. The Commission invited comment on its interpretation that an app is a personal health record because it has the technical capacity to draw information from multiple sources, even if particular users of the app choose not to enable the syncing features. The Commission also requested comment about whether an app (or other product) should be considered a personal health record even if it only draws health information from one place (in addition to non-health information drawn elsewhere); or only draws identifiable health information from one place (in addition to non-identifiable health information drawn elsewhere). The Commission further requested comment about whether the Commission's bright-line rule (apps with the ''technical capacity to draw information'' are covered) should be adjusted to take into account consumer use, such as where no consumers (or only a de minimis number) use a feature, and about the likelihood of such scenarios. For example, the Commission offered an example of an app that might have the technical capacity to draw information from multiple sources, but its API is entirely or mostly unused, either because it remains a Beta feature, has not been publicized, or is not popular.

2. Public Comments Regarding What It Means for a Personal Health Record To Draw Information From Multiple Sources

Many commenters supported the Commission's proposal amending the definition of a ''personal health record.''[111] Commenters noted, for instance, this change would help to ensure that many services that collect PHR identifiable health information are covered by the Commission's Rule,[112] and would help to promote greater privacy and security for health information,[113] while still ''hewing to

[110] Policy Statement at 2.

[111] Ella Balasa at 1; TMA at 4 (arguing that ''PHRs include applications with the technical capacity to draw information from multiple sources, regardless of the patient's preference to activate the technical capability.''); Consumer Rep.'s at 6; AAFP at 3; AHIMA at 4–5; AMA at 4; CHIME at 4; CDT at 13; AOA at 3.

[112] AHIMA at 4–5.

[113] AAFP at 3.

the limitations of the statute.'' [114] Some commenters noted without this change, developers of personal health records (such as app developers) might have incentives to design their products in ways that would intentionally skirt the Rule's requirements (such as by restricting a consumer's ability to import data from other sources).[115] Others noted the importance of the Rule covering apps with the technical capacity to draw information from multiple sources even where such capacity is not used by the consumer.[116]

Other commenters opposed this proposal.[117] Some argued the proposed clarification regarding what drawing information from multiple sources means runs counter to Congress's statutory intent,[118] because virtually every app has some sort of integration (*e.g.,* for analytics) through which it draws information other than from the consumer.[119] One commenter asserted the change would broaden the scope of the Rule to the point that it would sweep in online services that should not be thought of as a personal health record (such as email apps),[120] or otherwise create confusing standards for app developers or reduce innovation.[121] In addition, commenters expressed concern this change would sweep in apps or online services that have the technical capacity to draw from multiple sources during the development or testing phase of the product, or would sweep in products with unused, unavailable, or unpublicized APIs or integrations that count as a source.[122] One commenter expressed concern about lack of clarity, such as in scenarios where a user is required to pay for an upgrade to access a feature or integration that draws information from another source.[123] Some commenters also expressed concern that apps and online services that are subject to HIPAA (*i.e.,* HIPAA-covered entities or business associates) should be carved out of the definition of a personal health record.[124] Other commenters expressed broader concern with the definition of ''personal health record,'' urging the Commission to, for example, abandon the purportedly outdated term in favor of a more modern one.[125] For instance, some commenters urged that the Commission abandon or tweak the requirement that the personal health record be ''managed, shared, and controlled by or primarily for the individual.'' [126]

Another commenter expressed concern the proposed change could sweep in services that draw any information from multiple sources, regardless of whether that information is identifiable health information.[127]

3. The Commission Adopts the Proposed Changes Clarifying What It Means for a Personal Health Record To Draw Information From Multiple Sources

After considering the comments received, the Commission adopts the proposed amendment without change. This amendment will help clarify the types of entities covered by the Rule. The definition does not create undue breadth or deviate from Congressional intent; rather, the changes are consistent with the language of the Recovery Act, and only serve to give meaning to the phrase ''can be drawn'' in the Recovery Act in a way that is consistent with the current state of technology. They are also necessary to keep pace with technological change, which has enabled firms to offer consumers mobile electronic records of their health information that contain numerous integrations. To illustrate the intended meaning of the proposed revisions to the term ''personal health record,'' the Commission reiterates examples from the 2023 NPRM of two non-HIPAA covered diet and fitness apps available for consumer download in an app store. Under the amended Rule, each is a personal health record.

- *Example 1:* Diet and fitness app Y allows users to sync their app with third-party wearable fitness trackers. Diet and fitness app Y has the technical capacity to draw identifiable health information both from the user (*e.g.,* name, weight, height, age) and the fitness tracker (*e.g.,* user's name, miles run, heart rate), even if some users elect not to connect the fitness tracker.
- *Example 2:* Diet and fitness app Y has the ability to pull information from the user's phone calendar via the calendar API to suggest personalized healthy eating options. Diet and fitness app Y has the technical capacity to draw identifiable health information from the user (*e.g.,* name, weight, height, age) and non-health information (*e.g.,* calendar entry info, location, and time zone) from the user's calendar.

As these examples make clear, and in response to one commenter's concern that the changes would sweep in services that do not draw any health information,[128] the Commission notes the Rule still requires drawing PHR identifiable health information from at least one source to count as a personal health record.

The Commission declines to make other requested changes to the definition of personal health record. First, the Commission declines to include an express exemption for HIPAA-covered entities within the definition of personal health record because § 318.1 of the Rule already specifically exempts businesses or organizations covered by HIPAA.[129] Second, the Commission declines to exempt apps and services where there are available but unused or unpublicized APIs or integrations. Similarly, the Commission declines to exempt apps and services from the definition just because they are drawing information from multiple sources while undergoing product or beta testing and are not yet in their final form.[130] The Commission notes a product feature or integration that exists

[114] Consumer Reports at 5–6.

[115] AHIP at 2–3; CDT at 13 (arguing that changes remove ''incentives for companies to technically design products and services to not trigger the HBNR to avoid any need to provide consumer notice.'').

[116] AHIOS at 4; CARIN Alliance at 4.

[117] NAI at 6 (urging that the Commission make clear that a personal health record is one that ''not only has the technical capacity to draw PHR identifiable health information from multiple sources, but that it also has the functionality and actually does incorporate data from multiple sources.''); ANA at 7; ACLA at 1–2.

[118] NAI at 6.

[119] Chamber at 4–5; Priv. for Am. at 5–6; NAI at 6.

[120] CCIA at 6.

[121] CTA at 11; AdvaMed at 5; CHI at 5.

[122] CHI at 5 (asking the Commission to clarify that an ''app having the ability to draw from multiple sources with some changes to the app's coding/APIs is not within this definition's threshold.''); ACLA at 1 (arguing ''[i]f a feature is unused by individuals 'because it remains a Beta feature,' then in fact it does not have the 'technical capacity' to draw an individual's information from other sources, unless and until its functionality has been enabled by the vendor. The mere possibility that an application vendor *might* sometime in the future enable that functionality should not bring the electronic record within the scope of the definition of 'personal health record.' '') (emphasis in original); CTA at 11 (arguing Rule should instead have bright-line test that assesses whether the app actually draws health information from multiple sources); AdvaMed at 5 (arguing the Commission should decline to adopt multiple sources changes because it could cause confusion and potentially sweep in apps or services with features that have not been made available to consumers, such as APIs connected to the PHR that have not been publicized).

[123] WPF at 9.

[124] Omada at 5; Datavant at 3.

[125] HIMSS at 3 (urging the Commission to work with Congress to craft a definition more consonant with technological realities).

[126] AHIOS at 4; MRO at 4.

[127] NAI at 6.

[128] NAI at 6.

[129] *See, e.g.,* 16 CFR 318.1(a) (Rule ''does not apply to HIPAA-covered entities, or to any other entity to the extent that it engages in activities as a business associate of a HIPAA-covered entity.''); *see also* 16 CFR 318.2 (exempting business associates and HIPAA-covered entities from the Rule's definitions of ''PHR related entity'' and ''vendor of personal health records.'').

[130] ACLA at 1–2; CTA at 11; AdvaMed at 5.

and that is able to draw PHR identifiable health information counts as a source under the Rule. Exempting such instances would be contrary to the purpose of the Rule and would impermissibly limit notification of breaches just because a product feature is not widely disseminated, used, or in its final form. The Commission notes under the Rule, a covered entity that experienced a breach of security of unsecured PHR identifiable health information triggering the Rule would not be exempt because the breach occurred in the context of such scenarios.

Further, and importantly, the Rule is triggered only by breaches of unsecured PHR identifiable health information and does not apply to information that is protected or ''secured'' through the use of a technology or methodology specified by the Secretary of Health and Human Services in the guidance issued under section 13402(h)(2) of the American Reinvestment and Recovery Act of 2009, 42 U.S.C. 17932(h)(2).[131] The Rule, therefore, creates appropriate incentives for product testing with de-identified data or that secures information through certain specifications, such as through specified encryption methods.

Third, the Commission declines, as one commenter requested,[132] to expressly exempt scenarios where a change is required to an app's coding to draw information from another source. The Commission notes, however, it does not intend to cover instances where an app can draw from multiple sources only through changes to the design or underlying software code and where the app developer does not implement those changes.

In addition, the Commission declines to remove from the definition of personal health record the requirement that it be ''managed, shared, and controlled by or primarily for the individual.'' This language mirrors the Recovery Act's statutory definition of personal health record.[133] Further, this language provides a boundary to the definition. Even if a website or app has the technical capacity to draw information from multiple sources (for example, because it has integrations for advertising or analytics), it must still be ''managed, shared, and controlled by or primarily for the individual'' to be covered by the Rule.

Generally, a personal health record is an electronic record of an individual's health information by which the individual maintains access to the information and may have, for example, the ability to manage, track, control, or participate in his or her own health care. If these elements are not present, the website or app may not be ''managed, shared, and controlled by or primarily for the individual,'' and would not, therefore, constitute a personal health record.

C. Clarification Regarding Types of Breaches Subject to the Rule

1. The Commission's Proposals

a. The Commission's Proposal Regarding ''Breach of Security''

The Commission proposed a definitional change to clarify that a breach of security under the Rule encompasses unauthorized acquisitions that occur as a result of a data breach *or* an unauthorized disclosure. The Commission's proposal underscores that a breach of security is not limited to data exfiltration, and includes unauthorized disclosures (such as, but not limited to, a company's unauthorized sharing or selling of consumers' information to third parties that is inconsistent with the company's representations to consumers). The Rule previously defined ''breach of security'' as the acquisition of unsecured PHR identifiable health information of an individual in a personal health record without the authorization of the individual, which language mirrored the definition of ''breach of security'' in section 13407(f)(1) of the Recovery Act.

Accordingly, consistent with the Recovery Act definition, the Policy Statement, FTC enforcement actions under the Rule, and public comments received, the Commission proposed amending the definition of ''breach of security'' in § 318.2 by adding the following sentence to the end of the existing definition: ''[a] breach of security includes an unauthorized acquisition of unsecured PHR identifiable health information in a personal health record that occurs as a result of a data breach or an unauthorized disclosure.'' The change was intended to make clear to the marketplace that a breach includes an unauthorized acquisition of identifiable health information that occurs as a result of a data breach or an unauthorized disclosure, such as a voluntary disclosure made by the PHR vendor or PHR related entity where such disclosure was not authorized by the consumer.

The NPRM, like the 2009 Rule, continued to include a rebuttable presumption for unauthorized access to an individual's data; it stated when there is unauthorized access to data, unauthorized acquisition will be presumed unless the entity that experienced the breach ''has reliable evidence showing that there has not been, or could not reasonably have been, unauthorized acquisition of such information.''

b. The Commission's Related Proposal To Not Define the Term ''Authorization'' in the Rule

In the 2023 NPRM, the Commission stated it had considered defining the term ''authorization,'' which appears in § 318.2's definition of ''breach of security,'' but did not propose any such change in the NPRM.

The Commission considered defining ''authorization'' to mean the affirmative express consent of the individual and then defining ''affirmative express consent'' consistent with State laws that define consent, such as the California Consumer Privacy Rights Act, Cal. Civ. Code 1798.140(h).[134] Such changes would have ensured notification is required anytime there is acquisition of

[131] Per HHS guidance, electronic health information is ''secured'' if it has been encrypted according to certain specifications set forth by HHS, or if the media on which electronic health information has been stored or recorded is destroyed according to HHS specifications. *See* 74 FR 19006; *see also* U.S. Dep't of Health & Human Servs., *Guidance to Render Unsecured Protected Health Information Unusable, Unreadable, or Indecipherable to Unauthorized Individuals* (July 26, 2013), *https://www.hhs.gov/hipaa/for-professionals/breach-notification/guidance/index.html.* PHR identifiable health information would be considered ''secured'' if such information is disclosed by, for example, a vendor of personal health records, to a PHR related entity or a third party service provider, in an encrypted format meeting HHS specifications, and the PHR related entity or third party service provider stores the data in an encrypted format that meets HHS specifications and also stores the encryption and/or decryption tools on a device or at a location separate from the data.

[132] CHI at 5 (asking the Commission to clarify that an ''app having the ability to draw from multiple sources with some changes to the app's coding/APIs is not within this definition's threshold.'').

[133] 42 U.S.C. 17921(11).

[134] As noted in the 2023 NPRM, the Commission considered defining ''affirmative express consent'' as any freely given, specific, informed, and unambiguous indication of an individual's wishes demonstrating agreement by the individual, such as by a clear affirmative action, following a clear and conspicuous disclosure to the individual, apart from any ''privacy policy,'' ''terms of service,'' ''terms of use,'' or other similar document, of all information material to the provision of consent. Acceptance of a general or broad terms of use or similar document that contains descriptions of agreement by the individual along with other, unrelated information, does not constitute affirmative express consent. Hovering over, muting, pausing, or closing a given piece of content does not constitute affirmative consent. Likewise, agreement obtained through use of user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice, does not constitute affirmative express consent. *See* 88 FR 37830 n.78.

unsecured PHR identifiable health information without the individual's affirmative express consent for that acquisition—such as when an app discloses unsecured PHR identifiable health information to another company, having obtained nominal ''consent'' from the individual by using a small, greyed-out, pre-selected checkbox following a page of dense legalese.

The Commission did not, however, propose to define ''authorization'' because (1) the 2009 Rule Commentary already provided guidance on the types of disclosures the Commission considers to be ''unauthorized''; [135] (2) recent Commission orders, such as the Commission's enforcement actions against GoodRx and Easy Healthcare,[136] also make clear that the use of ''dark patterns,'' which have the effect of manipulating or deceiving consumers, including through use of user interfaces designed with the substantial effect of subverting or impairing user autonomy and decision-making, do not satisfy the standard of ''meaningful choice''; and (3) Commission settlements establish important guidelines involving authorization (the Commission's recent settlement with GoodRx, alleging violations of the Rule, highlights that disclosures of PHR identifiable health information inconsistent with a company's privacy promises constitute an unauthorized disclosure).

The Commission sought public comment about:

• Whether the commentary above and FTC enforcement actions under the Rule provide sufficient guidance to put companies on notice about their obligations for obtaining consumer authorization for disclosures, or whether defining the term ''authorization'' would better inform companies of their compliance obligations.

• To the extent that including such definitions would be appropriate, the definitions of ''authorization'' and ''affirmative express consent,'' as described above, and the extent to which such definitions are consistent with the language and purpose of the Recovery Act.

• What constitutes an acceptable method of authorization, particularly when unauthorized sharing is occurring.[137]

• Whether there are certain types of sharing for which authorization by consumers is implied because such sharing is expected and/or necessary to provide a service to consumers.

2. Public Comments

a. Public Comments Regarding ''Breach of Security''

Many commenters supported the Commission's proposed amendment to the definition of ''breach of security.'' [138] One commenter noted the change is consistent with the broad definition of ''breach of security'' in the Recovery Act, which refers explicitly to the acquisition of PHR identifiable health information without the authorization of an individual (rather than the authorization of an entity holding the data, as is the case where a breach involves data theft or exfiltration).[139] Commenters also noted the amendment would ensure notice, accountability, and regulatory oversight, regardless of the underlying cause of the unauthorized acquisition.[140] Commenters noted that breaches encompass more than just cybersecurity intrusions.[141] Commenters also argued that a company's voluntary unauthorized disclosure can be just as damaging as data theft.[142] For instance, a commenter noted that unauthorized disclosures of health information may cause embarrassment, perpetuate stigma about patients' conditions, deter patients from seeking care, interfere in the patient-physician relationship, or impact patients' employment.[143] Moreover, voluntary, unauthorized disclosures increase the risk of additional unauthorized acquisition and sharing of this information among bad actors.[144]

Some commenters supported expanding or changing the definition further. Specifically, some commenters urged the Commission to amend the definition to encompass (1) exceeding authorized access or use of PHR identifiable health information, such as where a company collects data for one purpose, but later uses or discloses that data for a second, undisclosed purpose; [145] or (2) the collection or retention of PHR identifiable health information beyond what is necessary to provide the associated service to an individual consumer.[146] One commenter asked the Commission to clarify that the Rule would be triggered by unauthorized use of or access to information derived from PHR identifiable health information, and to define the phrase acquisition.[147]

Some commenters, however, urged the Commission to not amend the definition at all. These commenters expressed concern the amendment would cause the Rule to exceed what Congress intended in the Recovery Act and transform the Rule into an opt-in notice and consent privacy regime.[148] Commenters argued further the proposed changes would cause consumer notice fatigue,[149] consumer panic,[150] or over-reporting by companies.[151] One commenter urged the Commission to limit the definition of ''acquisition'' to actual acquisition, and exclude instances of access or disclosure where the information was not actually acquired by a third party.[152] Commenters argued the proposed definition would be burdensome and force companies to limit certain beneficial disclosures to certain third parties, such as disclosures to support internal operations, detect security vulnerabilities or fraud, for law enforcement, and other purposes.[153]

Some commenters also urged that the Commission adopt carve-outs so that certain conduct would not be deemed breaches of security under the Rule. Commenters requested exemptions consistent with or found in HIPAA or

[135] *See, e.g.,* 74 FR 42967.

[136] *United States* v. *GoodRx Holdings, Inc.,* No. 23–cv–460 (N.D. Cal. 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2023090-goodrx-holdings-inc; United States* v. *Easy Healthcare Corp.,* No. 1:23–cv–3107 (N.D. Ill. 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/202-3186-easy-healthcare-corporation-us-v.*

[137] For example, the Commission sought comment about when a vendor of personal health records or a PHR-related entity is sharing information covered by the Rule, is it acceptable for that entity to obtain the individual's authorization to share that information when an individual clicks ''agree'' or ''accept'' in connection with a pre-checked box disclosing such sharing? Is it sufficient if an individual agrees to terms and conditions disclosing such sharing but that individual is not required to review the terms and conditions? Or is it sufficient if an individual uses a health app that discloses in its privacy policy that such sharing occurs, but the app knows via technical means that the individual never interacts with the privacy policy? *See* 88 FR 37832.

[138] *See, e.g.,* TMA at 3; U.S. PIRG at 2–3; AAFP at 3; AHIMA at 3; AMA at 3–4; AMIA at 3; AOA at 2–3; AHIOS at 3; CDT at 11–12; CHIME at 4; EPIC at 5–6.

[139] Consumer Rep.'s at 4.

[140] CDT at 11–12; U.S. PIRG at 2–3.

[141] AMA at 4; CDT at 11–12; EPIC at 5.

[142] AAFP at 3; CDT at 11–12.

[143] AOA at 2.

[144] AHIMA at 3.

[145] FPF at 12–15.

[146] EPIC at 5–7; U.S. PIRG at 2–3.

[147] Mozilla at 6–7.

[148] Chamber at 6; Priv. for Am. at 2–5; ANA at 6–7.

[149] SIIA at 3; CTA at 13–14.

[150] CCIA at 4–5, 7 (arguing that requiring notification for unauthorized disclosures could cause consumers to worry in the absence of harm, such as where it is ''typical'' to disclose such information.)

[151] CTA at 13–14.

[152] *Id.* at 14–16.

[153] TechNet at 3; Chamber at 7; CCIA at 5–6.

under State breach notification laws, such as exemptions for disclosures to certain types of entities or for certain purposes, or where there is inadvertent or unintentional access, use, or disclosure.[154] Commenters also proposed safe harbors for companies that implement recognized security or privacy safeguards; [155] and one commenter proposed safe harbors that would apply where data is shared with ''affiliated businesses,'' where there is inadvertent but ''good-faith'' access by a company employee, where a company makes good faith efforts to inform consumers of disclosures to third parties, and where companies take steps to contractually limit downstream uses of the data.[156] Other commenters expressed support for exempting disclosures of PHR identifiable health information to public health authorities for public health purposes, noting the amended definition could discourage such disclosures.[157]

b. Public Comments Regarding Defining ''Authorization''

Commenters were divided as to whether the Commission should define ''authorization.'' Some commenters supported defining ''authorization'' to provide greater guidance to companies, to promote transparency, and to discourage buried or inconspicuous disclosures relating to health information, or approaches to consent that are not meaningful because they are confusing or coercive.[158] To further regulatory consistency, some commenters supported adding a definition of ''authorization'' that is consistent with how that term is defined in other health-related laws, such as under HIPAA [159] or State health privacy laws that define consent or authorization (such as the California Consumer Privacy Rights Act [160] or the Washington My Health, My Data Act).[161]

By contrast, some commenters opposed defining the term—or opposed a requirement under the Rule that entities be required to get authorization before disclosing PHR identifiable health information.[162] Commenters argued that Congress had not granted the Commission the authority to define ''authorization'' in the Recovery Act,[163] or that doing so would import a substantive consent requirement that is outside the scope of the Rule, converting a breach notice Rule into an opt-in privacy regime.[164] Other commenters noted that requiring a specifically defined authorization would create an inflexible standard that would not evolve with changes in technology.[165] Other commenters opposed a requirement that consumers should be required to review terms before agreeing to use a service, contending that this would not increase consumer understanding of terms.[166]

Some commenters endorsed other approaches that would exempt from any requirement of affirmative express consent certain types of disclosures of PHR identifiable health information, such as to service providers, data processors, and entities that assist with combatting fraud and promoting safety.[167] Some commenters urged a disclosure be deemed authorized if the disclosure is consistent with a company's privacy notices or policies or where applicable State privacy laws require affirmative consent or provide for the right to opt-out, without the need to define affirmative express consent under the Rule.[168] One commenter argued that authorization should be met when a consumer agrees to opt-in to certain data sharing, such as by clicking a box proximate to a disclosure of material terms.[169]

3. The Commission Adopts the Proposed Changes to the Definition of ''Breach of Security''

After carefully considering the public comments, the Commission adopts the proposed amendment without change. The final rule definition is consistent with the statutory definition in the Recovery Act, the Policy Statement,[170] and recent Commission enforcement actions under the Rule. The Commission notes the statutory definition in the Recovery Act is sufficiently broad to cover both cybersecurity intrusions as well as a company's intentional but unauthorized disclosures of consumers' PHR identifiable health information to third party companies. In addition, the Commission finds persuasive the comment noting the Recovery Act's definition of ''breach of security'' refers to the acquisition PHR identifiable health information without the authorization of an individual, rather than the authorization of the entity holding the data.[171] The definition is

[154] CHI at 4 (stating the FTC ''should explicitly except the same situations from disclosure that are excepted from HIPAA disclosures, and/or try to align exceptions with those found in State privacy statutes.''); CTA at 16; HIA at 2; TechNet at 3 (arguing the Rule should adopt exemptions that encompass ''actions taken to prevent and detect security incidents, to comply with a civil, criminal, or regulatory inquiry or investigation, to cooperate with law enforcement agencies concerning conduct or activity that the data controller reasonably and in good faith believes may be illegal, to perform internal operations consistent with a consumer's expectations, and to provide a product or service that a consumer requested.''); CCIA at 5–6 (arguing the Rule should exempt disclosures relating to a host of purposes, including: preventing and detecting security incidents and fraud, complying with legal process, cooperating with law enforcement, performing internal operations consistent with consumer expectations, providing a service requested by the consumer, protecting ''the vital interests of the consumer,'' or processing data relating to public health); Chamber at 7 (arguing if the Commission does amend the definition of breach of security, it ''should provide exceptions for legitimate and societally beneficial uses of data that other privacy laws have for failure to honor opt-in including but not limited to network security, prevention and detection of fraud, protection of health, network maintenance, and service/product improvement.''); LAB at 2.

[155] DirectTrust at 1–2.

[156] ATA Action at 2.

[157] Network for Pub. Health L. and Texas A&M Univ. at 1–2.

[158] AHIP at 4; Light Collective at 4; MRO at 2–3; Mozilla at 4; CARIN Alliance at 10; Consumer Rep.'s at 9; *see also* PharmedOut at 3 (arguing that defining ''authorization'' is crucial but urging the Commission go further and place substantive restrictions on what companies can do with consumer health data.).

[159] AdvaMed at 7 (arguing that any definition of ''authorization'' or ''affirmative express consent'' should take into account the necessity for medical technologies and medical technology companies to be able to operate and communicate under standards consistent with those governing HIPAA covered entities and others in the health care ecosystem. These standards permit certain uses and disclosures of individually identifiable health information without express consent where necessary for the provision of timely and effective health care); MRO at 3; AHIMA at 7–8.

[160] AHIOS at 3.

[161] Consumer Rep.'s at 9.

[162] HIA at 2 (arguing that ''[r]outine disclosures of data should be allowed in certain contexts without additional need for authorizations''); CTA at 16–17; AdvaMed at 7–8; ACLA at 6; Confidentiality Coal. at 4–5.

[163] Confidentiality Coal. at 4–5.

[164] CTA at 16–17 (arguing that the Rule does not allow the Commission to impose ''substantive consent requirements'' that would be burdensome and ''likely not administrable for many companies.'').

[165] SIIA at 4.

[166] CHI at 7.

[167] FPF at 10 (arguing that ''an organization may share information with a service provider operating on their behalf to provide storage; may share information to protect the safety or vital interests of an individual or react to a public health emergency; or to protect themselves against security incidents and fraud. In each of these situations, data protection laws typically invoke a variety of non-consent measures, including data minimization, transparency, notice to the end-user or the regulator, and opportunities to object.''); Chamber at 7.

[168] Confidentiality Coal. at 4–5; SIIA at 4; CHI at 7.

[169] CTA at 17.

[170] The Commission's Policy Statement makes clear that ''[i]ncidents of unauthorized access, including sharing of covered information without an individual's authorization, triggers notification obligations under the Rule,'' and that a breach ''is not limited to cybersecurity intrusions or nefarious behavior.'' Policy Statement at 2.

[171] Consumer Rep.'s at 5 (noting ''the Recovery Act frames breaches of security in relation to individuals, rather than to vendors of personal health records or PHR related entities,'' and defines

also consistent with public comments received by the Commission in 2020 (when the Commission announced its regular, ten-year review of the Rule and requested public comments about potential Rule changes [172]), which urged the Commission to clarify what constitutes an unauthorized acquisition under the Rule.[173] Importantly, the amendment to the definition of ''breach of security'' in § 318.2 does not depart from the 2009 Rule Commentary or the Commission's enforcement policy under the Rule. Instead, it further underscores the 2009 Rule Commentary and subsequent Commission enforcement actions that unauthorized disclosures (*i.e.,* sharing inconsistent with consumer expectations) can be a ''breach of security'' that triggers the Rule.[174]

The Commission declines to adopt any specific exemptions or safe harbors to the definition of breach of security. Unlike the section of the Recovery Act that governs breach notifications under HIPAA,[175] Congress did not provide for any specific, enumerated exemptions for breaches under the Commission's Rule. Moreover, the Commission's Rule provides for a rebuttable presumption for certain types of access: when there is unauthorized access to data, unauthorized acquisition will be presumed unless the entity that experienced the breach ''has reliable evidence showing that there has not been, or could not reasonably have been, unauthorized acquisition of such information.'' That is, companies can rebut the presumption of acquisition in instances of unauthorized access by providing reliable evidence disproving acquisition. The Commission has previously offered guidance on what counts as unauthorized access and reiterates that guidance here.[176]

4. The Commission Affirms Its Proposal Not To Define ''Authorization''

After carefully considering the public comments, the Commission declines to define ''authorization,'' as that term appears in § 318.2's definition of ''breach of security.'' The Commission finds persuasive the public comments suggesting that imposing an affirmative express consent requirement would not be appropriate or warranted in all cases.

The Commission believes whether a disclosure is authorized under the Rule is a fact-specific inquiry that will depend on the context of the interactions between the consumer and the company; the nature, recipients, and purposes of those disclosures; the company's representations to consumers; and other applicable laws. The Commission reiterates the 2009 Rule Commentary, which states a use of data is ''authorized'' only where it is consistent with a company's disclosures and consumers' reasonable expectations and where there is meaningful choice in consenting to sharing—buried disclosures do not suffice.[177]

The Commission's recent enforcement actions alleging violations of the Rule against GoodRx and Easy Healthcare further highlight that disclosures of PHR identifiable health information inconsistent with a company's privacy promises constitute an unauthorized disclosure. These recent Commission orders also make clear that the use of ''dark patterns,'' which have the effect of manipulating or deceiving consumers, including through use of user interfaces designed with the substantial effect of subverting or impairing user autonomy and decision-making, undercut an entity's assertion that consumers exercised ''meaningful choice.''

In response to public comments seeking more guidance on what constitutes an unauthorized disclosure under the Rule,[178] the Commission

breach of security as ''acquisition of such information without the authorization of the individual.'')

[172] 85 FR 31085 (May 22, 2020).

[173] *See* Public Comments in response to May 2020 Request for Public Comments in connection with regular, ten-year review of Rule: AMA at 5–6 (''The FTC should define 'unauthorized access' as presumed when entities fail to disclose to individuals how they access, use, process, and disclose their data and for how long data are retained. Specifically, an entity should disclose to individuals exactly what data elements it is collecting and the purpose for their collection''; ''[T]he FTC should define 'unauthorized access' as presumed when an entity fails to disclose to an individual the specific secondary recipients of the individual's data.''); AMIA at 2 (recommending the FTC ''[e]xpand on the concept of 'unauthorized access' under the definition of 'Breach of security,' to be presumed when a PHR or PHR related entity fails to adequately disclose to individuals how user data is accessed, processed, used, reused, and disclosed.''); OAG–CA at 5–6 (urging the FTC to include ''impermissible acquisition, access, use, disclosure'' under the definition of breach.). These comments can be found at *https://www.regulations.gov/docket/FTC-2020-0045.*

[174] The 2009 Rule Commentary noted other examples illustrating that unauthorized sharing or transferring of information constitutes a breach of security, including that the unauthorized downloading or transfer of information by an employee can constitute a breach of security; that inadvertent access by an unauthorized employee reading or sharing information triggers the Rule's notification obligations; and notes that given the highly personal nature of health information, ''the Commission believes that consumers would want to know if such information was read or shared without authorization.'' *See* 74 FR 42966–67.

[175] 42 U.S.C. 17921; *see also* U.S. Dep't of Health & Human Servs., *Breach Notification* (July 26, 2013), *https://www.hhs.gov/hipaa/for-professionals/breach-notification/index.html.* Under the Recovery Act's definition of ''breach of security'' for the Rule governing HIPAA-covered entities and business associates, the statute explicitly provides for three exceptions: (1) unintentional acquisition, access, or use of protected health information by a workforce member or person acting under the authority of a covered entity or business associate, if such acquisition, access, or use was made in good faith and within the scope of authority; (2) the inadvertent disclosure of protected health information by a person authorized to access protected health information at a covered entity or business associate to another person authorized to access protected health information at the covered entity or business associate, or organized health care arrangement in which the covered entity participates; and (3) if the covered entity or business associate has a good faith belief that the unauthorized person to whom the impermissible disclosure was made, would not have been able to retain the information. *See* 45 CFR 164.400 through 164.414. In the first two cases, the information cannot be further used or disclosed in a manner not permitted by the Privacy Rule. These exceptions are not found in the provisions of the Recovery Act authorizing the FTC's Health Breach Notification Rule; this makes sense, given there is no analogous Privacy Rule, Security Rule, or required Business Associate agreements outside the HIPAA sphere governing entities covered by the FTC's Health Breach Notification Rule.

[176] The Rule continues to provide that, when there is unauthorized access to data, unauthorized acquisition will be presumed unless the entity that experienced the breach ''has reliable evidence showing that there has not been, or could not reasonably have been, unauthorized acquisition of such information.'' As noted in the 2009 Rule Commentary, the presumption was intended to address the difficulty of determining whether access to data (*i.e.,* the opportunity to view the data) did or did not lead to acquisition (*i.e.,* the actual viewing or reading of the data). In these situations, the Commission stated that the entity that experienced the breach is in the best position to determine whether unauthorized acquisition has taken place. In describing the rebuttable presumption, the Commission provided several examples. It noted that no breach of security has occurred if an unauthorized employee inadvertently accesses an individual's PHR and logs off without reading, using, or disclosing anything. If the unauthorized employee read the data and/or shared it, however, he or she ''acquired'' the information, thus triggering the notification obligation in the Rule. Similarly, the Commission provided an example of a lost laptop: If an entity's employee loses a laptop in a public place, the information would be accessible to unauthorized persons, giving rise to a presumption that unauthorized acquisition has occurred. The entity can rebut this presumption by showing, for example, that the laptop was recovered, and that forensic analysis revealed that files were never opened, altered, transferred, or otherwise compromised. *See* 74 FR 42966.

[177] The 2009 Rule Commentary states: ''[g]iven the highly personal nature of health information, the Commission believes that consumers would want to know if such information was read or shared without authorization.'' It further states that data sharing to enhance consumers' experience with a PHR is authorized only ''as long as such use is consistent with the entity's disclosures and individuals' reasonable expectations'' and that ''[b]eyond such uses, the Commission expects that vendors of personal health records and PHR related entities would limit the sharing of consumers' information, unless the consumers exercise meaningful choice in consenting to such sharing. Buried disclosures in lengthy privacy policies do not satisfy the standard of 'meaningful choice.' '' 74 FR 42967.

[178] TechNet at 4; Tranquil Data at 4.

offers the following, non-exhaustive examples relating to authorization:

• *Example 1—Unauthorized Disclosure (Affirmative Misrepresentation):* A medication app offers a personal health record (not covered by HIPAA) which allows users to track information about their prescription medication history, such as prescription names, dosages, pharmacy and refill information, and the user's health conditions. The app voluntarily discloses PHR identifiable health information to third party companies for advertising and advertising-related analytics, in violation of the app's privacy representations to its users. The third parties that receive the PHR identifiable health information are able to use the information for their own business purposes, such as to improve the third party's own products and services, to infer information about consumers, or to compile profiles about consumers to use for targeted advertising. These disclosures are not authorized under the Rule because they are inconsistent with consumer expectations—the disclosures violate the app's privacy representations, and consumers would also not expect their PHR identifiable health information (which they input into the app to track their medications and health conditions) would be disclosed to, and used by, third party companies that use the data for their own economic benefit.

• By contrast, disclosures of PHR identifiable health information by the app in Example 1 would be authorized if made to service providers in the following circumstances: (1) the service providers assist with functions that are necessary to the operation and functioning of the medication app, or with services the consumer requested; (2) the service providers are contractually prohibited from using, sharing, or disclosing the PHR identifiable health information for any purpose beyond providing services to the medication app; and (3) the medication app's privacy notice clearly and conspicuously discloses the specific purposes for which it shares users' PHR identifiable health information with these service providers. Such authorized disclosures could include those to cloud storage providers that host user data in the health record in a secure fashion; payment processors who process user payments to the app; vendors that facilitate refill reminders or other communications from the app developer that directly relate to the provision of the personal health record or services the consumer requested; analytics providers that assist with tracking analytics relating to the app's functionality;[179] or companies that help to detect, prevent, or mitigate fraud or security vulnerabilities. Such disclosures are authorized because they are consistent with consumer expectations. Importantly, this sharing is disclosed to consumers in a clear and conspicuous manner, and is essential, and limited to, sharing the PHR identifiable health information with service providers solely to provide users with a safe and reliable personal health record experience.

• *Example 2—Unauthorized Disclosure (Deceptive Omission).* The medication app from Example 1 shares PHR identifiable health information with a third party for purposes of targeting consumers with ads. The app does not disclose the sharing and also fails to obtain affirmative express consent from users whose information it shares. The third party company can use the PHR identifiable health information to market and advertise—on behalf of the medication app, on behalf of other companies, or on behalf of itself. It can also use the information to improve its own products and services. Such disclosures are not authorized because they are not consistent with consumer expectations (*i.e.,* without disclosure and without affirmative express consent, consumers would not expect that their PHR identifiable health information would be shared, sold, or otherwise exploited for a purpose other than providing the user with a personal health record, and are neither essential nor limited to sharing the PHR identifiable health information solely to provide users with a safe and reliable personal health record experience). This conclusion is also consistent with Commission enforcement actions relating to the sharing of health information (*e.g.,* GoodRx and Easy Healthcare), and those relating to the sharing of other types of sensitive information.[180]

• *Example 3—Authorized Disclosure (Public Health Reporting):* A COVID–19 contact tracing app not covered by HIPAA allows users to self-report their COVID–19 diagnosis, and to notify the user's contacts of their diagnosis, or others with whom the individual may have come into physical contact. PHR identifiable health information about the individual's COVID–19 diagnosis is transmitted to public health authorities for public health-related purposes, such as public health reporting and analysis or to track areas where the virus is spreading the most rapidly. The contact tracing app discloses to users clearly and conspicuously the specific purposes for which it shares their PHR identifiable health information with public health authorities. These disclosures are authorized, and consistent with consumer expectations, because they are consistent with the company's relationship with the consumer (a PHR that allows a user to report their COVID–19 diagnosis in order to notify others) and are also appropriately disclosed.

Examples 1 and 3 provide guidance about scenarios in which limited disclosures of PHR identifiable health information are permitted without opt-in consent because it is necessary to provide a personal health record to a consumer, is consistent with consumer expectations, the sharing is disclosed to consumers, and (in the case of Example 1) the sharing is subject to protections like service provider agreements that limit the use of the data only for the purpose of providing that service to the consumer. Examples 1 and 3 are also consistent with HIPAA and State health privacy laws.[181] For instance, HIPAA permits disclosures for treatment, payment, and operations without patient authorization.

The Commission notes ''breach of security'' could cover more than just an unauthorized disclosure to a third party. For example, depending on the facts and scope of the authorizations, such as in the company's promises and disclosures to consumers, a ''breach of security'' could include unauthorized *uses.* There may be a ''breach of security'' where an entity exceeds authorized access to use PHR identifiable health information, such as where it obtains the data for one legitimate purpose, but later uses that data for a secondary purpose that was not originally authorized by the individual.

Finally, the Commission notes unauthorized access or use of derived PHR identifiable health information may also constitute a breach of security. The Commission noted in its 2023 NPRM that PHR identifiable health information includes ''health

[179] This would include an analytics provider whose services are essential to the proper functioning of the app and not tied to marketing or advertising—this includes analytics tools to assist with crash reporting or to assess usage patterns (such as the frequency of use of certain features).

[180] *Fed. Trade Comm'n et al.* v. *Vizio, Inc. et al.,* No. 17–cv–00758 (D.N.J. 2017), *https://www.ftc.gov/legal-library/browse/cases-proceedings/162-3024-vizio-inc-vizio-inscape-services-llc.*

[181] For example, Washington State's My Health, My Data Act permits sharing consumer health data to the ''extent necessary to provide a product or service that the consumer to whom such consumer health data relates has requested from such regulated entity or small business.'' *See* Revised Code of Washington (RCW) 19.373.030 (1)(b)(ii).

information derived from consumers' interactions with apps and other online services (such as health information generated from tracking technologies employed on websites or mobile applications or from customized records of website or mobile application interactions), as well as emergent health data (such as health information inferred from non-health-related data points, such as location and recent purchases).'' [182]

D. Clarification of What Constitutes a ''PHR Related Entity''

1. The Commission's Proposal Regarding ''PHR Related Entity''

The NPRM proposed to revise the definition of ''PHR related entity'' in two ways. Consistent with its clarification that the Rule applies to health apps, the Commission proposed amending the definition of ''PHR related entity'' to make clear the Rule covers entities that offer products and services through the online services, including mobile applications, of vendors of personal health records. In addition, the Commission proposed revising the definition of ''PHR related entity'' to provide that entities that access or send unsecured PHR identifiable health information to a personal health record—rather than entities that access or send any information to a personal health record—are PHR related entities.

The Commission explained the first change (to cover online services) was necessary as websites are no longer the only means through which consumers access health information online. The Commission explained the second change—narrowing the scope of ''PHR related entities'' to entities that access or send unsecured PHR identifiable health information—was intended to eliminate potential confusion about the Rule's breadth and promote compliance by narrowing the scope of entities that qualify as PHR related entities.[183] The Commission identified remote blood pressure cuffs, connected blood glucose monitors, and fitness trackers as examples of internet-connected devices that could qualify as a PHR related entity when individuals sync them with a personal health record (*e.g.,* a health app).[184] The Commission explained, however, that a grocery delivery service that sends information about food purchases to a diet and fitness app would not be a PHR related entity if it does not access unsecured PHR identifiable health information in a personal health record or send unsecured PHR identifiable health information to a personal health record.

The proposed Rule also revised § 318.3(b) by adding language establishing that a third party service provider is not rendered a PHR related entity when it accesses unsecured PHR identifiable health information in the course of providing services. The Commission explained it did not intend for any entity (such as a firm performing attribution and analytics services for a health app) to be considered both a PHR related entity (to the extent it accesses unsecured PHR identifiable health information in a personal health record) and a third party service provider, which could create competing notice obligations and confuse consumers with notice from an unfamiliar company. The Commission explained it considers such firms to be third party service providers that must notify the health app developers for whom they provide services, who in turn would notify affected individuals.

The Commission explained that distinguishing between third party service providers and PHR related entities would create incentives for responsible data stewardship and for de-identification because a firm would only become an entity covered by the Rule in relation to unsecured PHR identifiable health information. To the extent that firms must deal with unsecured PHR identifiable health information, PHR vendors would have incentives to select and retain service providers capable of treating data responsibly (*e.g.,* by not engaging in any onward disclosures of data that could result in a reportable breach) and incentives to oversee their service providers to ensure ongoing responsible data stewardship (which would avoid a breach).

The Commission observed in most cases, third party service providers are likely to be non-consumer facing. The Commission noted examples of PHR related entities would include, as noted above, makers of fitness trackers and health monitors when consumers sync their devices with a mobile health app. The Commission noted further examples of third party service providers would include entities that provide support or administrative functions to vendors of personal health records and PHR related entities.

2. Public Comments Regarding ''PHR Related Entity''

The Commission received numerous public comments about the changes to the definition of PHR related entity. Most commenters supported the Commission's approach.[185] One commenter, an industry association for advertisers, noted that addition of the term ''unsecured'' in the definition of ''PHR related entity'' created a limitation on the definition's scope that counterbalances the breadth of including ''any online service'' in the definition.[186] Moreover, this commenter noted, the addition of ''unsecured'' creates appropriate incentives for firms to secure PHR identifiable health information and to choose partners who will be good data stewards.[187] This commenter noted that limiting the definition to ''unsecured'' PHR identifiable health information was consistent with the original intent of the Rule, to cover only the most sensitive types of data not covered by HIPAA.[188]

A few commenters proposed changes to the definition of ''third party service provider'' to further distinguish the term from ''PHR related entity.'' One commenter recommended defining ''third party service provider'' as an

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[182] 88 FR 37823.

[183] The proposed definition stated that a PHR related entity is an entity, other than a HIPAA-covered entity or an entity to the extent that it engages in activities as a business associate of a HIPAA-covered entity, that (1) offers products or services through the website, including any online service, of a vendor of personal health records; (2) offers products or services through the websites, including any online services, of HIPAA-covered entities that offer individuals personal health records; or (3) accesses unsecured PHR identifiable health information in a personal health record or sends unsecured PHR identifiable health information to a personal health record. Although the Rule is only triggered when there is a breach of security involving unsecured PHR identifiable health information, the Commission explained it believed there is a benefit to revising the third prong of PHR related entity to make clear that only entities that access or send unsecured PHR identifiable health information to a personal health record—rather than entities that access or send any information to a personal health record—are PHR related entities. Otherwise, many entities could be a PHR related entity under the definition's third prong and such entities would then, in the event of a breach, need to analyze whether they experienced a reportable breach under the Rule. If an entity, per the proposed revision, does not qualify as a PHR related entity in the first place, there would be no need to consider whether it experienced a reportable breach. 88 FR 37825 n.54.

[184] The Commission explained, for example, the maker of a wearable fitness tracker may be both a vendor of personal health records (to the extent that its tracker interfaces with its own app, which also accepts consumer inputs) and a PHR related entity (to the extent that it sends information to another company's health app). The Commission noted that regardless of whether the maker of the fitness tracker is a vendor of personal health records or a PHR related entity, its notice obligations are the same: it must notify individuals, the FTC, and in some case, the media, of a breach. 16 CFR 318.3(a), 318.5(b). 88 FR 37825 n.55.

[185] ANI at 1; AAFP at 3; AHIMA at 3; AHIOS at 4; AOA at 3; CARIN Alliance at 3; CDT at 12; CHIME at 3; Confidentiality Coal. at 6; Consumer Rep.'s at 6; CHI at 5; DirectTrust at 4; EFF at 2; EPIC at 7.

[186] NAI at 4–5.

[187] *Id.* at 5.

[188] *Id.* at 4.

entity that only processes data.[189] This commenter argued the Commission could then impose liability on service providers for further use, sale, disclosure for incompatible purposes.[190] Another commenter recommended aligning the definition of ''third party service provider'' with the definition of ''business associate'' under HIPAA.[191]

Some commenters raised concerns that the Commission's approach did not provide sufficient clarity for companies trying to understand their obligations as either a third party service provider or PHR related entity.[192] Some commenters requested more examples of types of firms falling within each definition (*e.g.,* examples clearly establishing the status of health data brokers, health marketing firms, search engines, email providers, cloud storage providers) [193]—to facilitate compliance,[194] avoid overlapping notice requirements [195] and to prevent a loophole through which firms may attempt to avoid obtaining consumers' authorization for data disclosures and to avoid providing breach notifications.[196] One commenter urged the Commission to exempt from the definition of ''PHR related entity'' any firm that complies with the privacy and data security requirements of HIPAA.[197]

In response to the Commission's request for comment on whether an analytics firm would be a third party service provider, many commenters responded that an analytics firm should fall within that definition [198] for the reasons the Commission articulated: It would be confusing to consumers to receive a notice from a back-end service provider rather than the firm with whom the consumer has the relationship, and categorizing analytics firms (and firms that provide other services) as service providers will create incentives for PHR vendors and PHR related entities to choose their service providers with care. A few commenters, however, expressed concern about covering advertising, analytics, and cloud firms—and health information service providers (''HISPs'') more generally—as they are unable to determine whether the data they receive contains unsecured PHR identifiable health information; only the vendor of the PHR knows what their data transmissions contain.[199] One commenter urged the Commission to address the data recipient's unawareness of the content of the data by creating a safe harbor that exempts advertising, analytics and cloud providers that contractually limit their customers, vendors, or partners from sharing health information with them.[200]

3. The Commission Adopts the Proposed Changes to ''PHR Related Entity''

After considering the comments received, the Commission adopts the proposed changes regarding ''PHR related entity'' without further change. The Commission affirms that (1) PHR related entities include entities offering products and services not only through the websites of vendors of personal health records, but also through any online service, including mobile applications; (2) PHR related entities encompass only entities that access or send unsecured PHR identifiable health information to a personal health record; and (3) while some third party service providers may access unsecured PHR identifiable health information in the course of providing services, this does not render the third party service provider a PHR related entity.

In response to commenters who expressed concern that certain data recipients will not be able to understand their obligations under the Rule because they are unaware of the content of the data transmissions they receive, the Commission highlights § 318.3(b), which states: ''For purposes of ensuring implementation of this requirement, vendors of personal health records and PHR related entities shall notify third party service providers of their status as vendors of personal health records or PHR related entities subject to this Part.'' This requirement puts data recipients on notice about the potential content of the data transmissions they receive.

Firms may also facilitate compliance by stipulating by contract whether transmissions of data will contain unsecured PHR identifiable health information. Both the sender and recipient of the data can monitor for compliance with those contractual agreements through the use of automated tools, internal auditing, external auditing, or other mechanisms, as appropriate to the size and sophistication of the firms and the sensitivity of the data. For example, a large advertising platform that has routinely received unsecured PHR identifiable health information, notwithstanding partners' promises not to send this information, may have different obligations to monitor the data it receives than small firms that do not engage in high-risk activities where the contract precludes sending such data and there is no history of such transmissions.

The Commission believes this approach—notice to service providers pursuant to § 318.3(b) coupled with contracts and oversight—is more appropriate than creating a safe harbor in the Rule that exempts firms that enter into contracts, as there is evidence from FTC cases that firms do not always abide by contractual obligations to safeguard data.[201]

The Commission declines to change the definition of ''third party service provider'' to distinguish it further from a ''PHR related entity,'' for two reasons. First, the Commission notes the current definitions of ''third party service provider'' and ''PHR related entity'' align closely with the language prescribed by section 13407 and section 13424(b)(1)(A) of the Recovery Act. Jettisoning the current language entirely, as some commenters suggested, would not be consistent with the Recovery Act's requirements. Second, the Commission believes the current language, in conjunction with the examples provided below, will provide sufficient guidance to the market as to which types of firms fit within each definition.

In response to comments that requested examples of the types of firms that fall into the category of ''third party service provider'' or ''PHR related entity,'' the Commission provides the following examples. The Commission believes these examples, in conjunction with the language in § 318.3(b), will provide sufficient clarity about the obligations of third party service providers and PHR related entities to promote compliance, avoid overlapping notice, and prevent loopholes.

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[189] FPF at 10.

[190] *Id.*

[191] AdvaMed at 8.

[192] SIIA at 3; CARIN Alliance at 4.

[193] AHIMA at 3–4; AMIA at 3–4; CHI at 5; Direct Trust at 1; Light Collective at 4–5.

[194] SCRS at 1.

[195] NAI at 5.

[196] MRO at 3.

[197] AdvaMed at 5.

[198] NAI at 5; TMA at 3; Consumer Rep.'s at 11.

[199] CCIA at 7–8; CTA at 9–10; SIIA at 3; Direct Trust at 5.

[200] CTA at 13.

[201] Compl. at ¶ 21, *In the Matter of Flo Health, Inc.,* FTC File No. 1923133 (Jan. 13, 2021), *https://www.ftc.gov/legal-library/browse/cases-proceedings/192-3133-flo-health-inc;* Compl. at ¶ 14(d), *In the Matter of UPromise, Inc.,* FTC File No. 1023116 (Mar. 27, 2012), *https://www.ftc.gov/legal-library/browse/cases-proceedings/102-3116-c-4351-upromise-inc; Cf.* Compl. at ¶ 40, *U.S.* v. *Easy Healthcare Corporation,* No. 1:23–cv–3107 (N.D. Ill. 2023), *https://www.ftc.gov/legal-library/browse/cases-proceedings/202-3186-easy-healthcare-corporation-us-v* (alleging that the defendant's disclosures of consumers' health information violated the policies of platforms to which it had agreed).

• *Example 1:* Four separate firms provide data security, cloud computing, advertising and analytics services to a health app (a personal health record), as specified by their service provider contracts, for the health app vendor's benefit. To perform the services specified in their respective contracts, the firms access unsecured PHR identifiable health information. The firms are ''third party service providers'' of the vendor of the personal health record (the maker of the health app) because they provide services to a vendor of a personal health record (the maker of the health app) in connection with the offering or maintenance of the app, and they access unsecured PHR identifiable health information as a result of these services. In the event of a breach, they should abide by their obligations as third party service providers.

• *Example 2:* An analytics firm provides analytics services to a health app (a personal health record). The analytics firm and health app vendor do not have a customized service provider contract, although the health app vendor agrees to the analytics firm's standard terms of service. The analytics firm accesses unsecured PHR identifiable health information (device identifier and whether the consumer has paid for therapy). The analytics firm uses that data both to provide analytics services to the health app and for its own benefit, for research and development and product improvement. The analytics firm is a third party service provider to the extent that it provides analytics services to the health app for the health app's benefit because it is then providing services to a vendor of a PHR in connection with the offering of the PHR and accessing unsecured PHR identifiable health information as a result of such services. However, the analytics firm is a PHR related entity, rather than a third party service provider, to the extent that it offers its services through the health app for its own purposes (*i.e.,* for research and development and product improvement) rather than to provide the services. In the event of a breach, the analytics firm must fulfill its notification obligations under the Rule according to which function it was performing in connection with the breach. If the functions are indistinguishable, then, pursuant to § 318.3(b), the Commission will consider the firm a third party service provider for policy reasons: a firm that functions, at least in part, as a service provider may not be consumer-facing, such that the consumer may be surprised by a breach notification from that entity. As a policy matter, it is better for the consumer to receive notice from the health app with whom the consumer directly interacts.

• *Example 3:* A health tracking website (a personal health record) integrates a search bar branded with its maker's logo, which enables its maker (a search engine firm) to offer its services through the website. The search engine firm is a PHR related entity because it offers its services through the website, which is a personal health record. The search bar branded with its maker's logo is consumer-facing, so the consumer would not be surprised to receive a notice from that company if it experiences a reportable breach. By contrast, if the health tracking website had contracted with the search engine firm to provide back-end search services to the website (rather than offering its own branded product or service through the website), and the search engine firm had accessed unsecured PHR identifiable health information as a result of such services, it would be a third party service provider. In the event of a breach, it should abide by its obligations as a third party service provider.

• *Example 4:* Digital readings from a fitness tracker offered by Company A can be integrated into a sleep app offered by Company B (in which the consumer may input other health information). Company A is a PHR related entity to the extent that it offers its fitness tracker product through an online service (Company B's sleep app), and to the extent that it sends unsecured PHR identifiable health information (fitness tracker readings) to a personal health record (the sleep app).

E. Facilitating Greater Opportunity for Electronic Notice

1. The Commission's Proposal Regarding Electronic Notice

The Commission proposed to authorize expanded use of email and other electronic means of providing clear and effective notice of a breach to consumers. In furtherance of this objective, the Commission proposed to update § 318.5 to specify that vendors of personal health records or PHR related entities that discover a breach of security must provide written notice at the last known contact information of the individual. Such written notice may be sent by electronic mail, if an individual has specified electronic mail as the primary contact method, or by first-class mail. The Commission proposed defining ''electronic mail'' in § 318.2 to mean email in combination with one or more of the following: text message, within-application messaging, or electronic banner. The Commission further specified that any notification delivered via electronic mail should be clear and conspicuous, and the proposed Rule defined ''clear and conspicuous.'' To assist entities that are required to provide notice to individuals under the Rule, the Commission developed a model notice for entities to use to notify individuals.[202]

2. Public Comments Regarding Electronic Notice

Nearly every comment submitted on this proposed change supported the Commission's efforts to update the Rule to allow for greater electronic notice.[203] One commenter noted electronic notices increase the likelihood that individuals will receive the notice, may reduce the time it takes for individuals to receive notice, and reduce the burden on entities providing notice.[204] Many commenters also supported the Commission's efforts to provide notice via more than one channel through the new definition of ''electronic mail.'' [205]

However, not all commenters agreed with the Commission's proposal and some commenters offered other suggestions. Some objected to defining ''electronic mail'' to mean anything more than ''email,'' stating that electronic mail is commonly understood to mean email and nothing else.[206] A few commenters noted that defining multiple forms of electronic notice could result in entities collecting more information than necessary (and consumers having to provide more information than needed) in order to comply with the Rule.[207] Others preferred a single notice, arguing that multiple forms of notice is burdensome

[202] This model notice was attached as appendix A to the NPRM. 88 FR 37837.

[203] AHIP at 5; AAFP at 3; AHIMA at 5; AHIOS at 3; Anonymous 3 at 1; Anonymous 10 at 1; Beth Barnett; CARIN Alliance at 7; CHI at 5–6; CHIME at 4; Consumer Reports at 8–9; CTA at 21; EPIC at 10; HIMSS at 4; George Mathew at 1; MRO at 3; NAI at 7; Dharini Padmanabhan at 1; Nancy Piwowar at 1. One commenter also stated while there are clear advantages to allowing increased use of electronic notification of data breaches, this notification method could also increase the likelihood that breaches escape public scrutiny. Identity Theft Res. Ctr. (''ITRC'') at 2.

[204] AdvaMed at 5.

[205] AAFP at 3; AHIMA at 5; Anonymous 3 at 1; CARIN Alliance at 7; CHIME at 4; CCIA at 7; EPIC at 10; NAI at 7.

[206] ACLA at 5; Mass. Health Data Forum (''MHDF'') at 9.

[207] Consumer Rep.'s at 7–8; CTA at 22. Consumer Reports further suggested the Commission clarify that substitute notice may be effectuated under the Rule via text message, in-app messaging, or electronic banners for consumers that do not wish to share a mailing or email address. Consumer Rep.'s at 8.

and could result in over-notification, confusion, and notice fatigue among consumers.[208] One commenter stated the Commission should revise the definition of ''electronic mail'' to mean ''one or more of the following that is reasonable and appropriate based on the relationship between the individual and the relevant vendor of personal health records or PHR related entity: email, text message, within-application messaging, or electronic banner.'' [209] Another commenter encouraged the FTC to clarify the in-app messaging method must include push notifications in the event of a breach so consumers are made aware of a breach as soon as possible.[210] One commenter urged the Commission to specify in § 318.5(i) that a banner notice in the affected app or a website home page notice must be posted for a period of 90 days.[211] Another commenter noted that the different mechanisms listed in the proposed rule are not equivalent—this commenter noted that some are push notifications that a consumer is likely to see without directly interacting with the application, website, or device and some require consumer interaction with the application, website, or device in order to see the notification.[212] This commenter recommended that the requirement be selection of one push notification but that additional options like in-app notifications and website banners be supported as additional, secondary notice options.[213] One commenter stated the FTC may want to consider adding a provision allowing an individual to request a copy of the notice in other accessible formats, such as for hearing- or vision-impaired people, or in a non-English language.[214] Another commenter argued the Commission should take into consideration TCPA and CAN–SPAM compliance regarding the delivery of electronic notification. Another commenter stated the Commission's proposal to require two contact methods imposes a higher requirement than HIPAA and State breach notification laws.[215]

Many commenters endorsed the Commission's proposal that any notification delivered via electronic mail should be ''clear and conspicuous,'' a newly defined term in the Rule.[216] One commenter stated that consistent with FTC's desire for entities to provide a clear and conspicuous notice, the Commission should consider requiring an email subject line that starts with ''Breach of Your Health Information'' so that attention is appropriately drawn to the importance of the message content.[217] One commenter disagreed with the new definition, arguing that the definition is unnecessary and confusing, and urged the Commission to insert the ''clear and conspicuous'' definition directly into § 318.5 of the Rule.[218]

Regarding the model notice, nearly all who commented on this topic urged the Commission to make the model notice voluntary.[219] One commenter suggested that using the model should be a safe harbor that shields entities from enforcement.[220]

3. The Commission Adopts the Proposed Changes Regarding Electronic Notice

The Commission adopts without change the modifications regarding § 318.5 involving electronic notice and adopts without change the definition of ''electronic mail'' in § 318.2. The Commission declines to make the other changes commenters requested. First, the Commission believes it is critical, especially given how consumers are accessing information today, to modernize the methods of notice to facilitate greater opportunities for electronic notice. The Commission believes the changes to § 318.5 and the new definition of ''electronic mail'' [221] in § 318.2 accomplish this objective.

In response to concerns raised about the two-part electronic notice, the Commission agrees with commenters who stated it increases the likelihood that individuals will encounter such notices.[222] The Commission does not agree that it is burdensome for entities to comply with this requirement. For example, an entity who complies with the notice requirement by notifying consumers via email plus posting a website notice likely would not need to expend significant additional time and resources by issuing the second part of the notice (*i.e.,* the website notice), and any ''cost'' of posting such a notice is outweighed by the benefit to consumers of learning of a breach involving their health information. The Commission also is not persuaded that consumers who, for example, receive an email about a breach coupled with an in-app notice about the same breach will be confused. The Commission believes consumers will understand that such notices relate to the same incident, especially given the Rule's requirement that the notices be ''clear and conspicuous.'' The Commission also does not find it problematic that the Rule requires notice effectuated via ''electronic mail'' to occur via two methods while other breach notice laws require one method. The Commission also notes while these amendments are intended to facilitate greater electronic notice, the Rule still permits notice via first-class mail. Accordingly, the contention that this Rule requires two methods of electronic notice is incorrect.

The Commission also declines, in response to public comments,[223] to mandate how notifications are effectuated when sent via ''electronic mail,'' as the Commission believes it is important to not be overly prescriptive given rapidly changing technologies.

[208] AdvaMed at 6; ACLA at 5; AHIP at 5; CTA at 21–22;

[209] AdvaMed at 6.

[210] AHIMA at 5.

[211] TechNet at 5.

[212] MHDF at 10.

[213] *Id.*

[214] AHIP at 5.

[215] CHI at 6.

[216] AMA at 5; CHIME at 5; EPIC at 9.

[217] TMA at 4.

[218] NAI at 7.

[219] AdvaMed at 6; AHIP at 6; AMA at 6; CCIA at 7; CHI at 6; Consumer Rep.'s at 8–9; NAI at 7–8. One commenter stated that making the model notice mandatory can lead to industry consistency and it may be easier for consumers to understand the message and the contents if they are familiar with a uniform, standardized notice. AHIMA at 5. While the Commission generally agrees that uniform, consistent notices assist with consumer comprehension, the Commission declines to make the model notice compulsory because the facts and circumstances of each breach will vary. Plus, § 318.6 sets forth certain required elements of the content of the notice, so the presence of these elements in all breach notices achieves some degree of consistency across notices.

[220] AHIP at 6.

[221] The Commission disagrees with the commenters who urged the Commission to avoid defining ''electronic mail'' to mean anything more than ''email.'' ACLA at 5; MHDF at 9. The definition in § 318.2 is clear and unambiguous. Plus, section 13402(e)(1) of the Recovery Act requires that notification be provided via ''written notification by first-class mail'' or ''electronic mail.'' Accordingly, the Commission must use ''electronic mail.''

[222] AAFP at 3–4 (noting AAFP appreciates ''the proposed structure of providing notice in two different electronic formats to increase the likelihood individuals will see them''); CHIME at 5 (''CHIME is supportive of the FTC's approach to revise the ''method of notice section'' and to structure the breach notification in two parts in order to increase the likelihood that consumers encounter the notice.''); EPIC at 10 (''By requiring email *and* an in-app or website notice option, the expanded definition enables entities to have the best chance at notifying consumers regardless of whether they reliably check their email or continue to use the entity's app or website.''). The Commission also disagrees with the commenter who recommended that the Commission abandon the two-part notice and create a new definition of ''electronic mail'' where, for example, only a website notice alone would satisfy the notice requirement if such a notice was ''reasonable and appropriate.'' AdvaMed at 6. The Commission disagrees with this approach and declines to adopt it.

[223] *See supra* notes 210–213.

The Commission emphasizes though, as described below, that the notice must satisfy the Rule's definition of ''clear and conspicuous.''

Nor does the Commission believe, as some commenters argued, the two-part electronic notification will result in additional collections of information by notifying entities. The Commission agrees with commenters who stated entities are generally already collecting the information needed for notice via ''electronic mail'' and a data minimization issue does not exist.[224]

In response to the commenter who suggested the FTC consider adding a provision allowing an individual to request a copy of the notice in other accessible formats, such as for hearing- or vision-impaired people, or in non-English languages,[225] the Commission previously addressed a similar comment in the 2009 Rule Commentary. There, the Commission noted that section 13402(e)(l) of the Recovery Act requires that notification be provided via ''written notification by first-class mail'' or ''electronic mail.'' The Commission emphasized then, as we do today, that the Rule does not preclude notifications in accessible formats. The Commission supports their use in appropriate circumstances, in addition to the forms of notice prescribed by the Rule.[226]

The Commission also adopts without modification the definition of ''clear and conspicuous.'' The Commission agrees with the commenter who indicated it is imperative that a breach notice be reasonably understandable and call attention to the significance of the information that is included in the notice.[227] The Commission believes its definition of ''clear and conspicuous'' will assist in achieving this objective. The Commission declines, however, to mandate specific language for the email subject line to satisfy the Rule's ''clear and conspicuous'' requirement, as one commenter had suggested.[228] The Commission emphasizes, however, that the clear and conspicuous requirement would require a notifying entity to use an email subject line that draws the reader's attention to the email notice. The Commission also declines to adopt the suggestion that the definition of ''clear and conspicuous'' be incorporated directly into § 318.5. The Commission believes the entities seeking information on what ''clear and conspicuous'' means will find it clearer to consult the definition in § 318.2.

Turning to the model notice,[229] as the Commission noted in the NPRM, the model was intended for entities to use, in their discretion, to notify individuals, and the Commission adopts the same position here.[230] The model is voluntary and while the Commission believes it represents a best practice, using the model is not required to achieve compliance with the Rule.

The Commission declines to adopt the position that use of the model notice provides a safe harbor, although the Commission would take into consideration in an enforcement action an entity who follows the model notice. Further, the Commission notes an entity who follows the model notice can nevertheless violate the Rule in other ways. For example, an entity could follow the model notice but fail to provide timely notice. In such instances, providing a safe harbor because the entity utilized the model notice would be inappropriate.

F. Revisions to the Required Content of Notice

1. The Commission's Proposal Regarding Content of Notice

The Commission proposed five changes to the content of the notice. First, in § 318.6(a), as part of relaying what happened regarding the breach, the Commission proposed the notice to individuals also include a brief description of the potential harm that may result from the breach, such as medical or other identity theft. Second, the Commission proposed to amend the requirements for the notice under § 318.6(a) to include the full name, website, and contact information (such as a public email address or phone number) of any third parties that acquired unsecured PHR identifiable health information as a result of a breach of security, if this information is known to the vendor of personal health records or PHR related entity (such as where the breach resulted from disclosures of users' sensitive health information without authorization). Third, the Commission proposed modifications to § 318.6(b), which requires that the notice include a description of the types of unsecured PHR identifiable health information that were involved in the breach. The Commission proposed this exemplar list be expanded to include additional types of PHR identifiable health information, such as health diagnosis or condition, lab results, medications, other treatment information, the individual's use of a health-related mobile application, and device identifier. Fourth, the Commission proposed revising § 318.6(d) of the Rule to require the notice to individuals include additional information providing a brief description of what the entity that experienced the breach is doing to protect affected individuals, such as offering credit monitoring or other services. Fifth, the Commission proposed modifying § 318.6(e) so the contact procedures specified by the notifying entity must include two or more of the following: toll-free telephone number; email address; website; within-application; or postal address.

2. Public Comments Regarding Content of Notice

a. Proposal That Notice Include Description of Potential Harm That May Result From a Breach

The Commission's proposal to modify § 318.6(a) to include in the notice to individuals a brief description of the potential harm that may result from a breach drew a wide range of comments. On the one hand, many commenters supported the Commission's proposal.[231] For example, one commenter noted this proposal would help individuals better understand the connection between the information breached and the potential harm that could result from the breach of such information.[232] Other commenters stated that providing the potential harms from a breach better equips consumers to address injuries and mitigate harms from it.[233] One commenter stated including some potential harms would be helpful, but notifying entities should also include language in the notice stating that other harms may occur.[234] This same commenter suggested the Commission consider selecting the most common types of breaches and listing some but not all of the potential consequences from each.[235]

On the other hand, many commenters criticized this proposal.[236] Some

[224] CARIN Alliance at 6; EPIC at 10.

[225] *See supra* note 214.

[226] 74 FR 42972.

[227] AMA at 5.

[228] *See supra* note 217.

[229] The model notice is found in appendix A.

[230] 88 FR 37827.

[231] AAFP at 4; AMA at 6; AOA at 5; Anonymous 3; AHIOS at 3; CARIN Alliance at 7–8; CHIME at 3, 6; Consumer Reports at 9–10; EFF at 2; EPIC at 10–11; HIMSS at 3–4; ITRC at 2; Members of the House of Representatives at 1–2; Dharini Padmanabhan at 1.

[232] AMA at 6.

[233] Consumer Rep.'s at 9–10; EPIC at 10–11.

[234] MHDF at 10–11.

[235] *Id.*

[236] AdvaMed at 6–7; AHIP at 6; ACLA at 4–5; Confidentiality Coal. at 7; CTA at 23–24; MHDF at 10; NAI at 9.

commenters argued this proposal will result in notifying entities having to speculate about potential harms that may never occur or providing a list of harms that may be incomplete.[237] Others pointed out that notifying individuals about potential harms could cause consumer anxiety, consumer confusion, and detract from actions the individuals should take.[238] One commenter noted the Commission's proposal might lead consumers to believe the harms listed in the notice are the only possible harms from a breach, when in fact consumers may suffer other harms not disclosed in the notice.[239] This same commenter also noted it is opposed to entities stating there are no known harms that may result from a breach solely because a notifying entity is unaware of any specific bad outcomes.[240]

b. Proposal That Notice Include Full Name, Website and Contact Information of Third Parties That Acquired Unsecured PHR Identifiable Health Information

Next, the Commission proposed to amend the requirements for the notice under § 318.6(a) to include the full name, website, and contact information (such as a public email address or phone number) of any third parties that acquired unsecured PHR identifiable health information as a result of a breach of security. Although several commenters supported this proposal,[241] many others pointed out it is problematic in certain circumstances.[242] A few commenters noted the proposal is ill-suited for security breaches, such as a hacking, where providing consumers with the name and contact information of an actor who committed a security breach (*e.g.,* a hacker) could result in further malicious action against the target entity.[243] One commenter noted for security breaches, the malicious actor or hacker would not be responsive to consumers.[244] Further, one commenter noted this requirement could hamper law enforcement efforts.[245] One commenter also indicated this requirement could frustrate investigative efforts or have a chilling effect on an inadvertent recipient from reporting a wrongful disclosure.[246]

c. Proposal That Notice Include Description of Types of Unsecured PHR Identifiable Health Information Involved in a Breach

Third, the Commission proposed modifications to § 318.6(b), which requires the notice to individuals include a description of the types of unsecured PHR identifiable health information that were involved in the breach. The Commission proposed this exemplar list be expanded to include additional types of PHR identifiable health information, such as health diagnosis or condition, lab results, medications, other treatment information, the individual's use of a health-related mobile application, and device identifier. Several commenters supported this proposal.[247] One commenter noted it is important for consumers to receive notice of the specific types of PHR identifiable health information involved in a breach, given that the exposure of health information can lead to a wide spectrum of harms.[248] Another commenter stated providing individuals with a more expansive list of exposed data points will also give them a more complete picture of the risks they face.[249]

d. Proposal That Notice Include Description of What Entity Is Doing To Protect Affected Individuals

Fourth, the Commission proposed revising § 318.6(d) of the Rule to require that the notice to individuals include additional information providing a brief description of what the entity that experienced the breach is doing to protect affected individuals, such as offering credit monitoring or other services. This proposal attracted support from multiple commenters.[250] One commenter stated that informing individuals about these steps is important so that they know what additional actions they should take to protect themselves from potential harm.[251] Another similarly stated that knowing what the notifying entity is doing to protect affected individuals can help consumers who are considering making purchase decisions for fraud detection or credit monitoring.[252] One commenter stated that requiring notifying entities to share this information will incentivize them to take proactive measures to mitigate harms to consumers.[253]

Some commenters, however, raised concerns about this proposal. For instance, one commenter believed the Rule already encompasses this requirement and therefore the Commission's proposal could result in duplicative information being provided in the notice.[254] Another commenter stated the FTC needs to go further in ensuring that notification requirements help consumers understand what remedies are available when their health information is breached.[255]

e. Proposal That Notice Include Two or More Contact Procedures

Fifth, the Commission proposed amendments to § 318.6(e) so the contact procedures specified by the notifying entity in its breach notification must include two or more of the following: toll-free telephone number; email address; website; within-application; or postal address. Many commenters expressed support for this proposal.[256] One commenter noted multiple contact options ensures that victims of all backgrounds and technical capabilities are able to contact the notifying entity to learn more about how to protect themselves after a breach.[257] Another commenter noted that providing multiple contact options encourages and facilitates communication between the individual and the notifying entity.[258] One commenter, however, expressed concern the proposal is burdensome, the HIPAA breach notice rule requires only one method of contact, and HHS has not identified any concerns with individuals having difficulty obtaining information from covered entities using one contact method under HIPAA's breach notice rule.[259]

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[237] AdvaMed at 6–7; AHIP at 6; MHDF at 10; NAI at 9.

[238] ACLA at 4–5; AMIA at 5; NAI at 9.

[239] MHDF at 10.

[240] *Id.* at 10–11.

[241] AAFP at 4; AHIMA at 5–6; AMA at 6; AMIA at 5; AOA at 5; CARIN Alliance at 7; Consumer Rep.'s at 9–10; EFF at 2; EPIC at 10–11; HIMSS at 3–4; ITRC at 2; Members of the House of Representatives at 1–2.

[242] ACLA at 4–5; AHIP at 6; CHI at 6; Confidentiality Coalition at 7; CTA at 24.

[243] ACLA at 4–5; Confidentiality Coal. at 7.

[244] Confidentiality Coal. at 7.

[245] CTA at 24.

[246] AHIP at 6.

[247] AAFP at 4; AHIMA at 6; AMA at 6; AOA at 5; CARIN Alliance at 7; Consumer Rep.'s at 9–10; Ella Balasa at 2; HIMSS at 3–4; ITRC at 2; NAI at 9.

[248] Light Collective at 2.

[249] ITRC at 2.

[250] AAFP at 4; AMA at 6; AOA at 4; CARIN Alliance at 7–8; HIMSS at 3–4; ITRC at 2.

[251] AMA at 6.

[252] AHIMA at 5–6.

[253] Consumer Rep.'s at 9–10.

[254] Confidentiality Coal. at 7.

[255] Light Collective at 6–7.

[256] AAFP at 4; AHIMA at 6; AHIP at 5; Anonymous 3 at 1; AOA at 5; CARIN Alliance at 8; Consumer Rep.'s at 9–10; EPIC at 9–10; HIMSS at 3–4; ITRC at 2; Dharini Padmanabhan at 1.

[257] AHIMA at 6.

[258] AMA at 6.

[259] AdvaMed at 6–7.

3. The Commission Changes Regarding Content of Notice

a. The Commission Declines To Adopt Proposal That Notice Include Description of Potential Harm That May Result From a Breach

The Commission believes, in light of the public comments, that the downsides of requiring in the notice a description of the potential harms that may result from a breach outweigh the upsides. The Commission is concerned about requiring a consumer notice to include possible harms that may never materialize. In such cases, consumers may experience needless anxiety and take actions that are not necessary, leading to consumer frustration. The Commission also is concerned this proposal may result in entities describing potential harms so generically that the description provides minimal value to consumers, or, alternatively, that entities will provide a laundry list of potential harms, making such a list meaningless to consumers. The Commission also agrees with one commenter who noted this proposal might lead consumers to believe the harms listed in the notice are the only possible harms from a breach, when in fact consumers may suffer other harms not disclosed in the notice.[260]

Accordingly, the Commission declines to adopt this proposal.[261] The Commission believes the remaining elements of the content of the notice will supply individuals with sufficient information about a breach, especially given the other modifications to § 318.6. The Commission also emphasizes in certain cases where harms are concrete and known, notifying entities should as a best practice inform individuals about those harms in the notice.

b. The Commission Modifies Proposal That Notice Include Full Name, Website, and Contact Information of Third Parties That Acquired Unsecured PHR Identifiable Health Information

In light of the public comments, the Commission is modifying § 318.6(a) to require notifying entities to provide the full name or identity (or where providing name or identity would pose a risk to individuals or the entity providing notice, a description) of the third parties that acquired the PHR identifiable health information as a result of a breach of security.[262] The Commission believes it is important for consumers to know who acquired their PHR identifiable health information as a result of a breach. At the same time, the Commission acknowledges in some scenarios it could be problematic to require notifying entities to provide the contact information of those who acquired PHR identifiable health information.

Accordingly, this revised provision is intended to still provide individuals with information about who acquired their health information. Under § 318.6(a), notifying entities are required to provide the full name or identity of the third parties that acquired the PHR identifiable health information as a result of a breach of security, except where providing the full name or identity of the third parties would pose a risk to affected individuals or the entity providing notice. In cases where providing the name or identity of the third parties that acquired the PHR identifiable health information as a result of a breach of security would pose a risk to affected individuals or the entity providing notice (*e.g.,* providing the name of hacker could subject affected individuals or the entity providing notice to further harm), § 318.6(a) permits notifying entities to describe the type of third party (*e.g.,* hacker) who acquired individuals' PHR identifiable health information.

c. The Commission Adopts Proposal That Notice Include Description of Types of Unsecured PHR Identifiable Health Information Involved in a Breach

The Commission agrees with the many public comments supporting this proposal.[263] The Commission concurs with the commenter who noted it is important for consumers to receive notice of the specific types of PHR identifiable health information involved in a breach,[264] and the commenter who stated that providing affected individuals with a more expansive list of health data points implicated in a breach will help them better understand the risks they face.[265] The Commission adopts this proposal without modification.

d. The Commission Adopts Proposal That Notice Include Description of What Entity Is Doing To Protect Affected Individuals

Several commenters supported the Commission proposal that the notice to individuals include a description of what the notifying entity is doing to protect affected individuals.[266] The Commission concurs with the commenter who stated that informing affected individuals about the steps notifying entities are taking to protect them is important so that affected individuals know what additional actions they should take to protect themselves from potential harm.[267] The Commission similarly agrees with the commenter who stated that knowing what the notifying entity is doing to protect affected individuals can help consumers who are considering making purchase decisions like fraud detection or credit monitoring.[268] The Commission also agrees with the commenter who stated that requiring notifying entities to share information about what they are doing to protect affected individuals will incentivize notifying entities to take proactive measures to mitigate harms to consumers.[269]

In response to the one commenter who noted the 2009 Rule already includes this proposed requirement,[270] the Commission notes § 318.6(d) from the 2009 Rule requires notifying entities to include in the notice to individuals what the entity is doing to investigate the breach, to mitigate any losses, and to protect against any further breaches. Accordingly, under the 2009 Rule, there is no explicit requirement for the notifying entity to state in the individual notice what the entity is doing to protect affected individuals. Given this, the Commission does not believe individuals will receive duplicative information.

In response to the commenter who argued the Commission needs to help consumers understand post-breach remedies,[271] the Commission believes this concern is addressed by the combination of § 318.6(c), which requires notifying entities to include in the notice steps individuals should take to protect themselves from potential harm resulting from the breach, and § 318.6(d), which requires notifying entities to include in the notice the steps the notifying entity is taking to protect affected individuals following the breach.

The Commission adopts proposed § 318.6(d) without modification.

e. The Commission Adopts Proposal That Notice Include Two or More Contact Procedures

In response to the comment that providing two or more contact

[260] MHDF at 10.

[261] The Commission has updated the model notice in appendix A to reflect this change.

[262] The Commission has updated the model notice in appendix A to reflect this change.

[263] *See supra* note 247.

[264] *See supra* note 248.

[265] *See supra* note 249.

[266] *See supra* note 250.

[267] *See supra* note 251.

[268] *See supra* note 252.

[269] *See supra* note 253.

[270] *See supra* note 254.

[271] *See supra* note 255.

procedures in the notice is burdensome,[272] the Commission believes if this proposal results in any burden to notifying entities, such burden will be minimal given the ease with which compliance with this provision can be achieved, and outweighed by the benefits to consumers who will have increased options to communicate with notifying entities. Second, in response to the comment that the HIPAA Breach Notification Rule requires only one contact method,[273] the Commission notes while there are many similarities between the FTC's and HHS's respective breach notification rules and the agencies have consulted to harmonize the two rules, there are differences between them, and the Commission believes it is important to update this provision to reflect new modes of communication and facilitate greater opportunities for communication between affected individuals and notifying entities.

The Commission notes multiple commenters supported this proposal.[274] Specifically, the Commission agrees with the commenter who stated multiple contact procedures enables greater opportunities for affected individuals to communicate with notifying entities.[275] The Commission also agrees with the commenter who noted multiple contact options ensures that affected individuals from all backgrounds and technical capabilities are able to contact the notifying entity following a breach.[276] The Commission therefore adopts proposed § 318.6(e) without modification.

G. Timing of Notice to the FTC

1. The Commission's Proposal Regarding Timing of Notice

Although the Commission did not propose any timing changes in the NPRM, the Commission requested comments on several issues related to timing, including the timing of the notification to the FTC. Regarding the notification timeline to the FTC, the Commission sought comment on whether it should extend the timeline to give entities more time to investigate breaches and better ascertain the number of affected individuals or whether an extension would simply facilitate dilatory action and minimize the opportunity for an important dialogue with Commission staff during the fact-gathering stage immediately following a breach.

2. Public Comments Regarding Timing of Notice

Several commenters expressed support for extending the notification timeline to the FTC.[277] Commenters provided several reasons why the existing requirement of notice to the FTC ''as soon as possible and in no case later than ten business days following the date of discovery of the breach'' for breaches involving 500 or more individuals should be amended. For example, commenters noted that ten days does not provide entities with sufficient time to adequately investigate incidents and fully understand the facts, possibly leading to notices that may be incomplete and require amendment or correction.[278] Others commented that the existing requirement diverts key resources from investigating potential breaches, indicating when a breach is suspected or has been discovered, the target entity's focus should be responding to the incident, conducting a thorough investigation of what may have occurred, and addressing and mitigating vulnerabilities to ensure additional information is not compromised.[279]

Several commenters urged the FTC to align the timeframe to notify the FTC with the timing requirement under HIPAA's Health Breach Notification Rule,[280] which requires notification to the Secretary of HHS without unreasonable delay and in no case later than 60 calendar days following a breach.[281] One commenter, irrespective of HIPAA, suggested the Commission give entities up to 60 days to investigate a breach and provide notification to the Commission.[282] One commenter recommended the FTC adopt a ''risk-based'' notification approach whereby the agency could create a shorter notification timeline for high-risk incidents and a longer notification timeline or even no notification for low-risk incidents.[283]

3. The Commission Adopts Changes to the Timing of Notice

Having considered the public comments, the Commission agrees with commenters who recommended that the notification timeline to the FTC for breaches of security involving 500 or more individuals should be adjusted. The Commission agrees that in certain incidents, especially large, complex breaches, it can be challenging for entities to fully understand the scope of a breach in ten business days, leading to the possibility of incomplete breach notices.

Accordingly, the Commission is revising § 318.4(b) to read: ''All notifications required under § 318.5(c) involving the unsecured PHR identifiable health information of 500 or more individuals shall be provided contemporaneously with the notice required by paragraph (a) of this section.'' This change requires entities, for breaches involving 500 or more individuals, to notify the FTC consistent with the notice required by § 318.4(a)—*i.e.,* without unreasonable delay and in no case later than 60 calendar days after the discovery of a breach of security. This change also requires the notice to the FTC be sent at the same time as the notice to the individuals. This requirement thus ensures the notice to the FTC includes all of the information provided in the notice to the individual. It also avoids a scenario where individuals receive notice before the FTC receives notice and affected individuals contact the FTC about a breach for which the Commission has not been notified.

As a result of this change, the Commission anticipates entities will have sufficient time to provide complete and fulsome notifications to the Commission. The Commission emphasizes, however, that notice to the FTC should occur ''without unreasonable delay,'' with 60 days serving as the outer limit.[284] The Commission believes, consistent with public comments, this change effectively harmonizes the notification timeline to the FTC with the notification timeline to the Secretary of HHS under the HIPAA Breach Notification Rule.

[272] *See supra* note 259.

[273] *Id.*

[274] *See supra* note 256.

[275] *See supra* note 258.

[276] *See supra* note 257.

[277] AdvaMed at 9; AHIP at 7; ACLA at 3–4; ATA Action at 2; CCIA at 8; CHI at 6; CTA at 20–21; TechNet at 5.

[278] AdvaMed at 9; ACLA at 3–4; AHIP at 7; TechNet at 5–6.

[279] ACLA at 3–4; CTA at 19–21.

[280] 45 CFR 164.400 through 414.

[281] AdvaMed at 9; AHIP at 7; ACLA at 3; ATA Action at 2; TechNet at 5–6.

[282] ACLA at 3–4.

[283] CTA at 19–21.

[284] As the Commission stated in the 2009 Rule Commentary, in some cases, it may be an ''unreasonable delay'' to wait until the 60th day to provide notification. For example, if a vendor of personal health records or PHR related entity learns of a breach, gathers all necessary information, and has systems in place to provide notification within 30 days, it would be unreasonable to wait until the 60th day to send the notice. Similarly, the Commission noted there may be circumstances where a vendor of personal health records discovers that its third party service provider has suffered a breach before the service provider notifies the vendor that the breach has occurred. In such circumstances, the vendor should begin taking steps to address the breach immediately, and should not wait until receiving notice from the service provider. 74 FR 42971 n.94 (2009).

The Commission also believes this notification timeline satisfies the Recovery Act requirement that notice be provided ''immediately.'' [285] The Commission also notes this change does not affect in any way the timing of the notice to the FTC for breaches involving less than 500 individuals.

Finally, a small number of commenters addressed other issues related to timing, such as the timeline for providing notice to consumers or the media. The Commission believes, for the reasons stated in the commentary accompanying the 2009 NPRM and the 2009 Rule Commentary, the current timelines are appropriate to give consumers and the media timely notice without overburdening notifying firms.[286]

H. Proposed Changes To Improve Rule's Readability

1. The Commission Proposed Changes To Promote Readability

The Commission proposed several changes to improve the Rule's readability. Specifically, the Commission proposed to include explanatory parentheticals for internal cross-references, add statutory citations in relevant places, consolidate notice and timing requirements in single sections, and revise the Enforcement section to state more plainly the penalties for non-compliance.

2. Public Comments Regarding Readability

Commenters supported the Commission's proposed changes to improve the Rule's readability and promote comprehension by including explanatory parentheticals and statutory citations.[287] Commenters also expressed support for the proposed changes to improve the Rule's readability and promote compliance by consolidating into single sections, respectively, the Rule's breach notification and timing requirements.[288] Commenters also favored the proposal to modify § 318.7 to make plain that a violation of the Rule constitutes a violation of a rule promulgated under section 18 of the FTC Act and is subject to civil penalties, stating this clarification will decrease the burden on the FTC in enforcement actions and prevent unintended barriers to enforcement.[289]

3. The Commission Adopts Changes Regarding Readability

In light of support from commenters and the Commission's belief that these proposed changes improve readability, the Commission adopts these changes without modification.[290]

III. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. chapter 35, requires Federal agencies to seek and obtain Office of Management and Budget (''OMB'') approval before undertaking a collection of information directed to ten or more persons.[291] This final rule is modifying an existing collection of information,[292] which OMB has approved through July 31, 2025 (OMB Control No. 3084–0150). As required by the PRA, the Commission sought OMB review of the modified information collection requirement at the time of the publication of the NPRM. OMB directed the Commission to resubmit its request at the time the final rule is published. Accordingly, simultaneously with the publication of this final rule, the Commission is resubmitting its clearance request to OMB. FTC staff has estimated the burdens associated with the amendments as set forth below.

FTC staff estimates the amendments to 16 CFR part 318 will likely result in more reportable breaches by covered entities to the FTC. In the event of a breach of security, the covered firms will be required to investigate and, if certain conditions are met, notify consumers, the Commission, and, in some cases, the media.[293]

Based on industry reports, FTC staff estimates the amendments will cover approximately 193,000 entities, which, in the event they experience a breach, may be required to notify consumers, the Commission, and, in some cases, the media. While there are approximately 1.8 million apps in the Apple App Store [294] and 2.4 million apps in the Google Play Store,[295] as of March 2024, it appears that roughly 193,000 of the apps offered in either store are categorized as ''Health and Fitness.'' [296]

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[285] 42 U.S.C. 17932(e)(3). Like the Department of Health and Human Services previously concluded with respect to notification to the Secretary under the HIPAA Breach Notification Rule (74 FR 42753 (2009)), the Commission concludes this interpretation satisfies the statutory requirement that notifications of larger breaches be provided to the FTC immediately as compared to the notifications of smaller breaches (*i.e.,* those involving less than 500 individuals), which the statute allows to be reported annually to the FTC.

[286] 74 FR 17918 (2009); 74 FR 42971 (2009).

[287] AMA at 6; CARIN Alliance at 9.

[288] AHIMA at 7; AMA at 6–7.

[289] AHIMA at 7; AMA at 6–7; AHIOS at 5; MRO at 4. As part of its comment, AMA recommended the FTC, as Rule violations are filed, use actual examples as case study models for future educational resources. The Commission notes that its existing enforcement actions under the Rule already provide guidance for the marketplace and the FTC also has issued business guidance regarding the Rule. *E.g.,* Fed. Trade Comm'n, *Collecting, Using, or Sharing Consumer Health Information? Look to HIPAA, the FTC Act, and the Health Breach Notification Rule* (Sept. 2023), *https://www.ftc.gov/business-guidance/resources/collecting-using-or-sharing-consumer-health-information-look-hipaa-ftc-act-health-breach* (last visited Jan. 11, 2023); Fed. Trade Comm'n, *Health Breach Notification Rule: The Basics for Business* (Jan. 2022), *https://www.ftc.gov/business-guidance/resources/health-breach-notification-rule-basics-business* (last visited Jan. 11, 2024); Fed. Trade Comm'n, *Complying with FTC's Health Breach Notification Rule* (Jan. 2022), *https://www.ftc.gov/business-guidance/resources/complying-ftcs-health-breach-notification-rule-0* (last visited Jan. 11, 2024) One commenter also asserted the Commission was seeking to apply the NPRM's proposed changes retrospectively to breaches of security that were discovered on or after September 24, 2009. This commenter urged the Commission to modify § 318.8 so that the Rule would only apply to breaches of security discovered at least 30 days after the effective date of this final rule. TechNet at 5–6. The 2023 NPRM set out the entire part for the convenience of commenters but did not propose any changes to § 318.8. The Commission notes this effective date section was codified in 2009 when part 318 was added to the CFR and has been in effect since September 24, 2009. As explained in the 2009 Rule Commentary, ''the Commission does not have discretion to change the effective date of the rule because the Recovery Act establishes the effective date.'' See 74 FR 42976; see also 42 U.S.C. 17937(g)(1) (''The provisions of this section shall apply to breaches of security that are discovered on or after the date that is 30 days after the date of publication of such interim final regulations.''). The Commission emphasizes that this final rule does not apply retroactively.

[290] Relatedly, the Commission also is making a non-substantive grammatical change to § 318.5(a)(2)(ii), which involves substitute notice. This provision currently states: ''Such a notice in media or web posting shall include a toll-free phone number, which shall remain active for at least 90 days, where an individual can learn whether or not the individual's unsecured PHR identifiable health information may be included in the breach.'' The Commission is revising § 318.5(a)(2)(ii) so it reads: ''Such a notice in media or web posting shall include a toll-free phone number, which shall remain active for at least 90 days, where an individual can learn if the individual's unsecured PHR identifiable health information may have been included in the breach.'' The Commission made this grammatical change to improve the rule's readability; the change does not alter the provision's substantive meaning.

[291] 44 U.S.C. 3502(3)(A)(i).

[292] *See* 44 U.S.C. 3502(3)(A)(i).

[293] Third party service providers who experience a breach are required to notify the vendor of personal health records or PHR related entity, which in turn is then required to notify consumers. The Commission expects the cost of notification to third party service providers would be small, relative to the entities that have to notify consumers. As part of the NPRM, the Commission solicited public comment on this issue and data that may be used to quantify the costs to third party service providers. The Commission did not receive any responsive submissions pertaining to this issue.

[294] *See* App Store—Apple, *https://www.apple.com/app-store/*.

[295] *See* AppBrain: Number of Android Apps on Google Play (Mar 2024), *https://www.appbrain.com/stats/number-of-android-apps*.

[296] *See* Business of Apps, ''App Data Report: App Store Stats, Downloads, Revenues and App Rankings,'' *https://www.businessofapps.com/data/report-app-data/* (reporting 90,913 apps in the Apple iOS App Store and 102,402 apps in the Google Play Store were categorized as ''Health and

Continued

The Commission received three comments in response to the NPRM arguing the Rule's scope is broader than apps categorized as ''Health and Fitness'' and the NPRM's PRA analysis therefore underestimated the number of covered entities and the resulting number of reportable breaches.[297] As discussed above,[298] the Commission is adopting these amendments to clarify that the Rule applies to mobile health applications and similar technologies. The Commission also highlighted several key limitations to the Rule's scope.[299] Thus, the 193,000 covered entities is a rough proxy for all covered PHRs, because it encompasses mobile health applications categorized as ''Health and Fitness.'' Similar health technologies are included in the roughly 193,000 covered entities because most websites and connected health devices that will be covered by the amendments act in conjunction with an app.[300]

FTC staff estimates these entities will, cumulatively, experience 82 breaches per year for which notification may be required. With the proviso that there is insufficient data at this time about the number and incidence rate of breaches at entities covered by the amendments (due to underreporting prior to issuance of the Policy Statement), FTC staff determined the number of estimated breaches by calculating the breach incidence rate for HIPAA-covered entities, and then applied this rate to the estimated total number of entities that will be subject to the amendments.[301] Additionally, as the number of breaches per year has grown significantly in the recent years,[302] and FTC staff expects this trend to continue, FTC staff relied on the average number of breaches from 2021 through 2023 to estimate the annual breach incidence rate for HIPAA-covered entities.

Specifically, HHS's OCR reported 715 breaches in 2021, 719 breaches in 2022, and 733 breaches in 2023,[303] which results in an average of 722 breaches between 2021 and 2023. Based on the 1.7 million entities that are covered by the HIPAA Breach Notification Rule [304] and the average number of breaches for 2021–2023, FTC staff determined an annual breach incidence rate of 0.000425 (722/1.7 million). Accordingly, multiplying the breach incidence rate (0.000425) by the estimated number of entities covered by the amendments (193,000) results in an estimated 82 breaches per year.[305]

Costs

To determine the costs for purposes of this analysis, FTC staff has developed estimates for two categories of potential costs: (1) the estimated annual burden hours and labor cost of determining what information has been breached, identifying the affected customers, preparing the breach notice, and making the required report to the Commission; and (2) the estimated capital and other non-labor costs associated with notifying consumers.

Estimated Annual Burden Hours: 12,300.

Estimated Annual Labor Cost: $883,140.

First, to determine what information has been breached, identify the affected customers, prepare the breach notice, and make the required report to the Commission, FTC staff estimates covered firms will require per breach, on average, 150 hours of employee labor at a cost of $10,770.[306] This estimate does not include the cost of equipment or other tangible assets of the breached firms because they likely will use the equipment and other assets they have for ordinary business purposes. Based on the estimate that there will be 82 breaches per year the annual hours of burden for affected entities will be 12,300 hours (150 hours × 82 breaches) with an associated labor cost of $883,140 (82 breaches × $10,770).

Estimated Capital and Other Non-Labor Costs: $91,984,370.

The capital and non-labor costs associated with breach notifications depend upon the number of consumers contacted and whether covered firms are likely to retain the services of a forensic expert. For breaches affecting large numbers of consumers, covered firms are likely to retain the services of a forensic expert. FTC staff estimates, for each breach requiring the services of forensic experts, forensic experts will spend approximately 40 hours to assist in the response to the cybersecurity intrusion, at an estimated cost of $20,000.[307] FTC staff estimates the

Fitness''). Together, this suggests there are approximately 193,000 Health and Fitness apps. This figure is likely both under- and over-inclusive as a proxy for covered entities. For example, this figure does not include apps categorized elsewhere (*i.e.,* outside ''Health and Fitness'') that may be PHRs. However, at the same time, this figure also overestimates the number of covered entities, since many developers make more than one app and may specialize in the Health and Fitness category.

[297] *See* Chamber at 2; CHI at 6–7; CCIA at 8–9.

[298] *See* section II.1.c.

[299] *Id.*

[300] Indeed, one of the commenters who argued the Rule's coverage is broader than projected in the NPRM's PRA analysis acknowledged that there has been growth in the number of websites and apps since the 2009 PRA analysis estimated 700 covered entities to be covered by the Rule. Chamber at 2. Further, the approximately 193,000 covered entities may overestimate the number of covered entities, as some apps or websites may not qualify as a covered entity given the Rule's boundaries. For example, a website or app must have the technical capacity to draw information from multiple sources and that same website or app must still be ''managed, shared, and controlled by or primarily for the individual'' to be covered by the Rule.

[301] FTC staff used information publicly available from HHS on HIPAA related breaches because the HIPAA Breach Notification Rule is similarly constructed. However, while there are similarities between HIPAA-covered entities and HBNR-covered entities, it is not necessarily the case that rates of breaches would follow the same pattern. For instance, HIPAA-covered entities are generally subject to stronger data security requirements under HIPAA, but also may be more likely targets for security incidents (*e.g.,* ransomware attacks on hospitals and other medical treatment centers covered by HIPAA have increased dramatically in recent years); thus, this number could be an under- or overestimate of the number of potential breaches per year.

[302] According to HHS's Office for Civil Rights (''OCR''), the number of breaches per year grew from 276 in 2013 to 739 breaches in 2023. *See Breach Portal,* U.S. Dep't of Health & Human Servs., Office for Civil Rights, *https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf* (last visited March 1, 2024). The data was downloaded on March 1, 2024, resulting in limited data for 2024. Thus, breaches from 2024 were excluded from the calculations. However, breach investigations that remain open (under investigation) from years prior to 2024 are included in the count of yearly breaches.

[303] *See Breach Portal,* U.S. Dep't of Health & Human Servs., Office for Civil Rights, *https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf* (last visited March 1, 2024).

[304] In a **Federal Register** publication titled ''Proposed Modifications to the HIPAA Privacy Rule to Support, and Remove Barriers to, Coordinated Care and Individual Engagement'', OCR proposes increasing the number of covered entities from 700,000 to 774,331. 86 FR 6446, 6497 (Jan. 21, 2021). For purposes of calculating the annual breach incidence rate, FTC staff utilized 700,000 covered entities because the proposed estimate of 774,331 covered entities represents a projected increase that has not been finalized by OCR. The OCR publication also lists the number of covered Business Associates as 1,000,000. 86 FR 6528. FTC staff arrived at 1.7 million entities subject to the HIPAA Breach Notification Rule by adding 700,000 covered entities and 1,000,000 Business Associates.

[305] One commenter argued that basing the NPRM's projection of the annual number of breaches on the breach incidence rate for HIPAA-covered entities is problematic because the NPRM's proposed definition of a breach of security ''goes far and beyond'' the HIPAA definition of a breach. CCIA at 8–9. To the extent the commenter is referring to the fact that the Rule's definition of breach of security covers unauthorized disclosures, the Commission notes the HIPAA Breach Notification Rule similarly covers unauthorized disclosures. *See Breach Notification Rule,* U.S. Dep't of Health & Human Servs., Office for Civil Rights, *https://www.hhs.gov/hipaa/for-professionals/breach-notification/index.html* (''A breach is, generally, an impermissible use or disclosure under the Privacy Rule that compromises the security or privacy of the protected health information.'').

[306] This estimate is the sum of 40 hours of marketing managerial time (at an average wage of $76.10), 40 hours of computer programmer time ($49.42), 20 hours of legal staff ($78.74), and 50 hours of computer and information systems managerial time ($83.49). *See* Occupational Employment and Wage Statistics, U.S. Bureau of Labor Statistics (May 2022), *https://www.bls.gov/oes/current/oes_nat.htm#00-0000.*

[307] This estimate is the sum of 40 hours of forensic expert time at a cost of $500 per hour,

services of forensic experts will be required in 60% of the 82 breaches. Based on the estimate that there will be 49 breaches per year requiring forensic experts (60% × 82 breaches), the annual hours burden for affected entities will be 1,960 hours (49 breaches requiring forensic experts × 40 hours) with an associated cost of $980,000 (49 breaches requiring forensic experts × $20,000).

Using the data on HIPAA-covered breach notices available from HHS for the years 2018–2023, FTC staff estimates the average number of individuals affected per breach is 93,497.[308] Given an estimated 82 breaches per year, FTC staff estimates an average of 7,666,754 consumers per year will receive a breach notification (82 breaches × 93,497 individuals per breach).

Based on a recent study of data breach costs, FTC staff estimates the cost of providing notice to consumers to be $11.87 per breached record.[309] This estimate includes the costs of electronic notice, letters, outbound calls or general notice to data subjects; and engagement of outside experts.[310] Applied to the above-stated estimate of 7,666,754 consumers per year receiving breach notification yields an estimated total annual cost for all forms of notice to consumers of $91,004,370 (7,666,754 consumers × $11.87 per record). Accordingly, the estimated capital and non-labor costs total $91,984,370 ($980,000 + $91,004,370).

FTC staff notes these estimates likely overstate the costs imposed by the amendments because FTC staff made conservative assumptions in developing many of the underlying estimates. Moreover, many entities covered by the amendments already have similar notification obligations under State data breach laws.[311] In addition, the Commission has taken several steps designed to limit the potential burden on covered entities that are required to provide notice, including by providing exemplar notices that entities may choose to use if they are required to provide notifications and expanding the use of electronic notifications.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[312] requires that the Commission provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA'') with a final rule, unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of small entities. As discussed in the IRFA, the Commission believes the final rule will not have a significant economic impact upon small entities.

In this document, the Commission largely adopts the amendments proposed in its NPRM. The Commission believes the amendments will not have a significant economic impact upon small entities, although they may affect a substantial number of small businesses. Among other things, the amendments clarify certain definitions, revise the disclosures that must accompany notice of a breach under the Rule, and modernize the methods of notice to allow additional use of electronic notice such as email by entities affected by a breach. In addition, the amendments improve the Rule's readability by clarifying cross-references and adding statutory citations. The Commission does not anticipate that these changes will add significant additional costs for entities covered by the Rule, and by authorizing electronic notice in additional circumstances, the amendments may reduce costs for many entities covered by the Rule. Therefore, the Commission certifies that the amendments will not have a significant economic impact on a substantial number of small entities. Although the Commission certifies under the RFA that the Rule will not have a significant impact on a substantial number of small entities, and hereby provides notice of that certification to the Small Business Administration (''SBA''), the Commission has determined, nonetheless, that it is appropriate to publish an FRFA to inquire into the impact of the proposed amendments on small entities.

A. Need for and Objectives of the Amendments

The objective of the amendments is to clarify existing notice obligations for entities covered by the Rule. The legal basis for the amendments is section 13407 of the Recovery Act.

B. Significant Issues Raised in Public Comments

Although the Commission received several comments that argued that the amendments would be burdensome for businesses, none argued specifically that smaller businesses in particular would be subject to special burdens. The Commission did not receive any comments filed by the Chief Counsel for Advocacy of the SBA.

C. Small Entities to Which the Amendments Will Apply

The amendments, like the current Rule, will apply to vendors of personal health records, PHR related entities, and third party service providers, including developers and purveyors of health apps, connected health devices, and similar technologies. As discussed in the Commission's PRA estimates above, FTC staff estimates the amendments will apply to approximately 193,000 covered entities. The Commission estimates that a substantial number of these entities likely qualify as small businesses. According to the Statistics on Small Businesses Census data, approximately 94% of ''Software Publishers'' (the category to which health and fitness apps belong) are small businesses.[313]

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which yields a total cost of $20,000 (40 hours × $500/hour).

[308] HHS Breach Data, *supra* note 303. This analysis uses the last six years of HHS breach data to generate the average, in order to account for the variation in number of individuals affected by breaches observed in the HHS data over time.

[309] *See* IBM Security, Costs of a Data Breach Report 2023 (2023), *https://www.ibm.com/reports/data-breach* (''2023 IBM Security Report''). The research for the 2023 IBM Security Report is conducted independently by the Ponemon Institute, and the results are reported and published by IBM Security. Figure 2 of the 2023 IBM Security Report shows that cost per record of a breach was $165 per record in 2023, $164 in 2022, and $161 in 2021, resulting in an average cost of $163.33. Figure 5 of the 2023 IBM Security Report shows that 8.3% ($0.37m/$4.45m) of the average cost of a data breach are due to ''Notification'' costs. The fraction of average breach costs due to ''Notification'' were 7.1% in 2022 and 6.4% in 2021 (IBM Security, Costs of a Data Breach Reports 2022 and 2021). Using the average of these numbers (7.27%), FTC staff estimates that notification costs per record across the three years are 7.27% × $163.33 = $11.87 per record.

[310] *See* 2023 IBM Security Report at 72.

[311] Many State data breach notification statutes require notification when a breach occurs involving certain health or medical information of individuals in that State. *See, e.g.,* Ala. Code 8–38–1 *et seq.;* Alaska Stat. 45.48.010 *et seq.;* Ariz. Rev. Stat. 18–551 *et seq.;* Ark. Code 4–110–101 *et seq.;* Cal. Civ. Code 1798.80 *et seq.;* Cal. Health & Safety Code 1280.15; Colo. Rev. Stat. 6–1–716; Del. Code Ann. tit. 6 12B–101 *et seq.;* D.C. Code 28–3851 *et seq.;* Fla. Stat. 501.171; 815 Ill. Comp. Stat. 530/5 *et seq.;* Md. Code Com. Law 14–3501 et seq; Mo. Rev. Stat. 407.1500; Nev. Rev. Stat. 603A.010 *et seq.;* N.H. Rev. Stat. 359–C:19–C:21; N.H. Rev. Stat. 332–I:5; N.D. Cent. Code 51–30–01–07; Or. Rev. Stat. 646A.600–646A.628; R.I. Gen. Laws 11–49.3–1—11–49.3–6; SDCL 22–40–19—22–40–26; Tex. Bus. & Com. Code 521.002, 521.053, 521.151–152; 9 V.S.A. 2430, 2435; Va. Code 18.2–186.6; Va. Code 32.1–127.1:05; Va. Code 58.1–341.2; Wash. Rev. Code 19.255.010 *et seq.*

[312] 5 U.S.C. 601–612.

[313] *2017 SUSB Annual Data Tables by Establishment Industry,* U.S. Census Bureau (May 2021), *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html,* using ''Data by Enterprise Receipts Size.'' The U.S. Small Business Administration (''SBA'') categorizes Software Publishers as a small business if the annual receipts are less than $41.5 million; the 2017 data is the most recent data available reporting receipts size.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Covered Small Entities and Professional Skills Needed To Comply

The Recovery Act and the amendments contain certain reporting requirements. The amendments will clarify which entities are subject to those reporting requirements. Specifically, the Act and amendments require vendors of personal health records and PHR related entities to provide notice to consumers, the Commission, and in some cases the media in the event of a breach of unsecured PHR identifiable health information. The Act and amendments also require third party service providers to provide notice to vendors of personal health records and PHR related entities in the event of such a breach. If a breach occurs, each entity covered by the Act and amendments will expend costs to determine the extent of the breach and the individuals affected. If the entity is a vendor of personal health records or a PHR related entity, additional costs will include the costs of preparing a breach notice, notifying the Commission, compiling a list of consumers to whom a breach notice must be sent, and sending a breach notice. Such entities may incur additional costs in locating consumers who cannot be reached, and in certain cases, posting a breach notice on a website, notifying consumers through media advertisements, or sending breach notices through press releases to media outlets.

In-house costs may include technical costs to determine the extent of breaches; investigative costs of conducting interviews and gathering information; administrative costs of compiling address lists; professional/legal costs of drafting the notice; and potentially, costs for postage, web posting, and/or advertising. Costs may also include the purchase of services of a forensic expert. As discussed in the context of the PRA, FTC staff estimates that compliance with these requirements will likely result in $883,148 in labor costs and $91,984,370 in capital and other non-labor costs. The estimated cost per covered entity is $481 (the total labor, capital, and non-labor costs of $92,867,518 divided by 193,000 covered entities). The SBA categorizes Software Publishers with annual receipts under $41.5 million as a small business; the per entity cost of $481 represents 0.0001% of this annual receipts threshold.

E. Significant Alternatives to the Amendments

In drafting the Rule, the Commission has made every effort to avoid unduly burdensome requirements for entities. In particular, the Commission believes that the changes to facilitate electronic notice will assist small entities by significantly reducing the costs of sending breach notices. In addition, the Commission is making available exemplar notices that entities covered by the Rule may use, in their discretion, to notify individuals. The Commission anticipates these exemplar notices will further reduce the burden on entities that are required to provide notice under the Rule. The Commission is not aware of alternative methods of compliance that will reduce the impact of the amendments on small entities, while also comporting with the Recovery Act. The statutory requirements are specific as to the timing, method, and content of notice.

V. Other Matters

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 318

Breach, Consumer protection, Health, Privacy, Reporting and recordkeeping requirements, Trade practices.

■ Accordingly, the Federal Trade Commission revises and republishes 16 CFR part 318 to read as follows:

PART 318—HEALTH BREACH NOTIFICATION RULE

Sec.
318.1 Purpose and scope.
318.2 Definitions.
318.3 Breach notification requirement.
318.4 Timeliness of notification.
318.5 Methods of notice.
318.6 Content of notice.
318.7 Enforcement.
318.8 Applicability date.
318.9 Sunset.

Authority: 42 U.S.C. 17937 and 17953.

§ 318.1 Purpose and scope.

(a) This part, which shall be called the ''Health Breach Notification Rule,'' implements section 13407 of the American Recovery and Reinvestment Act of 2009, 42 U.S.C. 17937. This part applies to foreign and domestic vendors of personal health records, PHR related entities, and third party service providers, irrespective of any jurisdictional tests in the Federal Trade Commission (FTC) Act, that maintain information of U.S. citizens or residents. This part does not apply to HIPAA-covered entities, or to any other entity to the extent that it engages in activities as a business associate of a HIPAA-covered entity.

(b) This part preempts State law as set forth in section 13421 of the American Recovery and Reinvestment Act of 2009, 42 U.S.C 17951.

§ 318.2 Definitions.

Breach of security means, with respect to unsecured PHR identifiable health information of an individual in a personal health record, acquisition of such information without the authorization of the individual. Unauthorized acquisition will be presumed to include unauthorized access to unsecured PHR identifiable health information unless the vendor of personal health records, PHR related entity, or third party service provider that experienced the breach has reliable evidence showing that there has not been, or could not reasonably have been, unauthorized acquisition of such information. A breach of security includes an unauthorized acquisition of unsecured PHR identifiable health information in a personal health record that occurs as a result of a data breach or an unauthorized disclosure.

Business associate means a business associate under the Health Insurance Portability and Accountability Act, Public Law 104–191, 110 Stat. 1936, as defined in 45 CFR 160.103.

Clear and conspicuous means that a notice is reasonably understandable and designed to call attention to the nature and significance of the information in the notice.

(1) *Reasonably understandable.* You make your notice reasonably understandable if you:

(i) Present the information in the notice in clear, concise sentences, paragraphs, and sections;

(ii) Use short explanatory sentences or bullet lists whenever possible;

(iii) Use definite, concrete, everyday words and active voice whenever possible;

(iv) Avoid multiple negatives;

(v) Avoid legal and highly technical business terminology whenever possible; and

(vi) Avoid explanations that are imprecise and readily subject to different interpretations.

(2) *Designed to call attention.* You design your notice to call attention to the nature and significance of the information in it if you:

(i) Use a plain-language heading to call attention to the notice;

(ii) Use a typeface and type size that are easy to read;

(iii) Provide wide margins and ample line spacing;

(iv) Use boldface or italics for key words; and

(v) In a form that combines your notice with other information, use distinctive type size, style, and graphic devices, such as shading or sidebars, when you combine your notice with other information. The notice should stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) *Notices on websites or within-application messaging.* If you provide a notice on a web page or using within-application messaging, you design your notice to call attention to the nature and significance of the information in it if you use text or visual cues to encourage scrolling down the page if necessary to view the entire notice and ensure that other elements on the website or software application (such as text, graphics, hyperlinks, or sound) do not distract attention from the notice, and you either:

(i) Place the notice on a screen that consumers frequently access, such as a page on which transactions are conducted; or

(ii) Place a link on a screen that consumers frequently access, such as a page on which transactions are conducted, that connects directly to the notice and is labeled appropriately to convey the importance, nature and relevance of the notice.

Covered health care provider means a provider of services (as defined in 42 U.S.C. 1395x(u)), a provider of medical or other health services (as defined in 42 U.S.C. 1395x(s)), or any other entity furnishing health care services or supplies.

Electronic mail means email in combination with one or more of the following: text message, within-application messaging, or electronic banner.

Health care services or supplies means any online service such as a website, mobile application, or internet-connected device that provides mechanisms to track diseases, health conditions, diagnoses or diagnostic testing, treatment, medications, vital signs, symptoms, bodily functions, fitness, fertility, sexual health, sleep, mental health, genetic information, diet, or that provides other health-related services or tools.

HIPAA-covered entity means a covered entity under the Health Insurance Portability and Accountability Act (HIPAA), Public Law 104–191, 110 Stat. 1936, as defined in 45 CFR 160.103.

Personal health record (PHR) means an electronic record of PHR identifiable health information on an individual that has the technical capacity to draw information from multiple sources and that is managed, shared, and controlled by or primarily for the individual.

PHR identifiable health information means information that:

(1) Relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual; and

(i) Identifies the individual; or

(ii) With respect to which there is a reasonable basis to believe that the information can be used to identify the individual; and

(2) Is created or received by a:

(i) Covered health care provider;

(ii) Health plan (as defined in 42 U.S.C. 1320d(5));

(iii) Employer; or

(iv) Health care clearinghouse (as defined in 42 U.S.C. 1320d(2)); and

(3) With respect to an individual, includes information that is provided by or on behalf of the individual.

PHR related entity means an entity, other than a HIPAA-covered entity or an entity to the extent that it engages in activities as a business associate of a HIPAA-covered entity, that:

(1) Offers products or services through the website, including any online service, of a vendor of personal health records;

(2) Offers products or services through the websites, including any online service, of HIPAA-covered entities that offer individuals personal health records; or

(3) Accesses unsecured PHR identifiable health information in a personal health record or sends unsecured PHR identifiable health information to a personal health record.

State means any of the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

Third party service provider means an entity that:

(1) Provides services to a vendor of personal health records in connection with the offering or maintenance of a personal health record or to a PHR related entity in connection with a product or service offered by that entity; and

(2) Accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses, or discloses unsecured PHR identifiable health information as a result of such services.

Unsecured means PHR identifiable information that is not protected through the use of a technology or methodology specified by the Secretary of Health and Human Services in the guidance issued under section 13402(h)(2) of the American Reinvestment and Recovery Act of 2009, 42 U.S.C. 17932(h)(2).

Vendor of personal health records means an entity, other than a HIPAA-covered entity or an entity to the extent that it engages in activities as a business associate of a HIPAA-covered entity, that offers or maintains a personal health record.

§ 318.3 Breach notification requirement.

(a) *In general.* In accordance with §§ 318.4 (regarding timeliness of notification), 318.5 (regarding methods of notice), and 318.6 (regarding content of notice), each vendor of personal health records, following the discovery of a breach of security of unsecured PHR identifiable health information that is in a personal health record maintained or offered by such vendor, and each PHR related entity, following the discovery of a breach of security of such information that is obtained through a product or service provided by such entity, shall:

(1) Notify each individual who is a citizen or resident of the United States whose unsecured PHR identifiable health information was acquired by an unauthorized person as a result of such breach of security;

(2) Notify the Federal Trade Commission; and

(3) Notify prominent media outlets serving a State or jurisdiction, following the discovery of a breach of security, if the unsecured PHR identifiable health information of 500 or more residents of such State or jurisdiction is, or is reasonably believed to have been, acquired during such breach.

(b) *Third party service providers.* A third party service provider shall, following the discovery of a breach of security, provide notice of the breach to an official designated in a written contract by the vendor of personal health records or the PHR related entity to receive such notices or, if such a designation is not made, to a senior official at the vendor of personal health records or PHR related entity to which it provides services, and obtain acknowledgment from such official that such notice was received. Such notification shall include the identification of each customer of the vendor of personal health records or PHR related entity whose unsecured PHR identifiable health information has been, or is reasonably believed to have been, acquired during such breach. For

purposes of ensuring implementation of this paragraph (b), vendors of personal health records and PHR related entities shall notify third party service providers of their status as vendors of personal health records or PHR related entities subject to this part. While some third party service providers may access unsecured PHR identifiable health information in the course of providing services, this does not render the third party service provider a PHR related entity.

(c) *Breaches treated as discovered.* A breach of security shall be treated as discovered as of the first day on which such breach is known or reasonably should have been known to the vendor of personal health records, PHR related entity, or third party service provider, respectively. Such vendor, entity, or third party service provider shall be deemed to have knowledge of a breach if such breach is known, or reasonably should have been known, to any person, other than the person committing the breach, who is an employee, officer, or other agent of such vendor of personal health records, PHR related entity, or third party service provider.

§ 318.4 Timeliness of notification.

(a) *In general.* Except as provided in paragraph (d) of this section (exception for law enforcement), all notifications required under § 318.3(a)(1) (required notice to individuals), (a)(3) (required notice to media), and (b) (required notice by third party service providers), shall be sent without unreasonable delay and in no case later than 60 calendar days after the discovery of a breach of security.

(b) *Timing of notice to FTC.* All notifications required under § 318.5(c) (regarding notice to FTC) involving the unsecured PHR identifiable health information of 500 or more individuals shall be provided contemporaneously with the notice required by paragraph (a) of this section. All logged notifications required under § 318.5(c) (regarding notice to FTC) involving the unsecured PHR identifiable health information of fewer than 500 individuals may be sent annually to the Federal Trade Commission no later than 60 calendar days following the end of the calendar year.

(c) *Burden of proof.* The vendor of personal health records, PHR related entity, and third party service provider involved shall have the burden of demonstrating that all notifications were made as required under this part, including evidence demonstrating the necessity of any delay.

(d) *Law enforcement exception.* If a law enforcement official determines that a notification, notice, or posting required under this part would impede a criminal investigation or cause damage to national security, such notification, notice, or posting shall be delayed. This paragraph (d) shall be implemented in the same manner as provided under 45 CFR 164.528(a)(2), in the case of a disclosure covered under § 164.528(a)(2).

§ 318.5 Methods of notice.

(a) *Individual notice.* A vendor of personal health records or PHR related entity that discovers a breach of security shall provide notice of such breach to an individual promptly, as described in § 318.4 (regarding timeliness of notification), and in the following form:

(1) Written notice at the last known address of the individual. Written notice may be sent by electronic mail if the individual has specified electronic mail as the primary method of communication. Any written notice sent by electronic mail must be Clear and Conspicuous. Where notice via electronic mail is not available or the individual has not specified electronic mail as the primary method of communication, a vendor of personal health records or PHR related entity may provide notice by first-class mail at the last known address of the individual. If the individual is deceased, the vendor of personal health records or PHR related entity that discovered the breach must provide such notice to the next of kin of the individual if the individual had provided contact information for his or her next of kin, along with authorization to contact them. The notice may be provided in one or more mailings as information is available.

(2) If, after making reasonable efforts to contact all individuals to whom notice is required under § 318.3(a), through the means provided in paragraph (a)(1) of this section, the vendor of personal health records or PHR related entity finds that contact information for ten or more individuals is insufficient or out-of-date, the vendor of personal health records or PHR related entity shall provide substitute notice, which shall be reasonably calculated to reach the individuals affected by the breach, in the following form:

(i) Through a conspicuous posting for a period of 90 days on the home page of its website; or

(ii) In major print or broadcast media, including major media in geographic areas where the individuals affected by the breach likely reside. Such a notice in media or web posting shall include a toll-free phone number, which shall remain active for at least 90 days, where an individual can learn if the individual's unsecured PHR identifiable health information may have been included in the breach.

(3) In any case deemed by the vendor of personal health records or PHR related entity to require urgency because of possible imminent misuse of unsecured PHR identifiable health information, that entity may provide information to individuals by telephone or other means, as appropriate, in addition to notice provided under paragraph (a)(1) of this section.

(b) *Notice to media.* As described in § 318.3(a)(3), a vendor of personal health records or PHR related entity shall provide notice to prominent media outlets serving a State or jurisdiction, following the discovery of a breach of security, if the unsecured PHR identifiable health information of 500 or more residents of such State or jurisdiction is, or is reasonably believed to have been, acquired during such breach.

(c) *Notice to FTC.* Vendors of personal health records and PHR related entities shall provide notice to the Federal Trade Commission following the discovery of a breach of security, as described in § 318.4(b) (regarding timing of notice to FTC). If the breach involves the unsecured PHR identifiable health information of fewer than 500 individuals, the vendor of personal health records or PHR related entity may maintain a log of any such breach and submit such a log annually to the Federal Trade Commission as described in § 318.4(b) (regarding timing of notice to FTC), documenting breaches from the preceding calendar year. All notices pursuant to this paragraph (c) shall be provided according to instructions at the Federal Trade Commission's website.

§ 318.6 Content of notice.

Regardless of the method by which notice is provided to individuals under § 318.5 (regarding methods of notice), notice of a breach of security shall be in plain language and include, to the extent possible, the following:

(a) A brief description of what happened, including: the date of the breach and the date of the discovery of the breach, if known; and the full name or identity (or, where providing the full name or identity would pose a risk to individuals or the entity providing notice, a description) of any third parties that acquired unsecured PHR identifiable health information as a result of a breach of security, if this information is known to the vendor of

personal health records or PHR related entity;

(b) A description of the types of unsecured PHR identifiable health information that were involved in the breach (such as but not limited to full name, Social Security number, date of birth, home address, account number, health diagnosis or condition, lab results, medications, other treatment information, the individual's use of a health-related mobile application, or device identifier (in combination with another data element));

(c) Steps individuals should take to protect themselves from potential harm resulting from the breach;

(d) A brief description of what the entity that experienced the breach is doing to investigate the breach, to mitigate harm, to protect against any further breaches, and to protect affected individuals, such as offering credit monitoring or other services; and

(e) Contact procedures for individuals to ask questions or learn additional information, which must include two or more of the following: toll-free telephone number; email address; website; within-application; or postal address.

§ 318.7 Enforcement.

Any violation of this part shall be treated as a violation of a rule promulgated under section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a, regarding unfair or deceptive acts or practices, and thus subject to civil penalties (as adjusted for inflation pursuant to § 1.98 of this chapter), and the Commission will enforce this part in the same manner, by the same means, and with the same jurisdiction, powers, and duties as are available to it pursuant to the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*

§ 318.8 Applicability date.

This part shall apply to breaches of security that are discovered on or after September 24, 2009.

§ 318.9 Sunset.

If new legislation is enacted establishing requirements for notification in the case of a breach of security that apply to entities covered by this part, the provisions of this part shall not apply to breaches of security discovered on or after the effective date of regulations implementing such legislation.

By direction of the Commission, Commissioners Holyoak and Ferguson dissenting.

April J. Tabor,

Secretary.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A—Health Breach Notification Rule Exemplar Notices

The notices below are intended to be examples of notifications that entities may use, in their discretion, to notify individuals of a breach of security pursuant to the Health Breach Notification Rule. The examples below are for illustrative purposes only. You should tailor any notices to the particular facts and circumstances of your breach. While your notice must comply with the Health Breach Notification Rule, you are not required to use the notices below.

Mobile Text Message and In-App Message Exemplars

Text Message Notification Exemplar 1

Due to a security breach on our system, *the health information you shared with us through [name of product] is now in the hands of unknown attackers.* Visit [add non-clickable URL] to learn what happened, how it affects you, and what you can do to protect your information. We also sent you an email with additional information.

Text Message Notification Exemplar 2

You shared health information with us when you used [product name]. *We discovered that we shared your health information with third parties for [describe why the company shared the info] without your permission.* Visit [add non-clickable URL] to learn what happened, how it affects you, and what you can do to protect your information. We also sent you an email with more information.

In-App Message Notification Exemplar 1

Due to a security breach on our system, *the health information you shared with us through [name of product] is now in the hands of unknown attackers.* This could include your [Add specifics—*for example, your name, email, address, blood pressure data*]. Visit [URL] to learn what happened, how it affects you, and what you can do to protect your information. We also sent you an email with additional information.

In-App Message Notification Exemplar 2

You shared health information with us when you used [product name]. *We discovered that we shared your health information with third parties for [if known, describe why the company shared the info] without your permission.* This could include your [Add specifics—*for example, your name, email, address, blood pressure data*]. Visit [URL] to learn what happened, how it affects you, and what you can do to protect your information. We also sent you an email with additional information.

Web Banner Exemplars

Web Banner Notification Exemplar 1

Due to a security breach on our system, *the health information you shared with us through [name of product] is now in the hands of unknown attackers.* This could include your [Add specifics—*for example, your name, email, address, blood pressure data*]. Visit [URL] to learn what happened, how it affects you, and what you can do to protect your information.

• *Recommend:* Include clear ''Take action'' call to action button, such as the example below:

Due to a security breach on our system, **the health information you shared with us through [name of product] is now in the hands of unknown attackers**. This could include your [Add specifics – **for example, your name, email, address, blood pressure data**]. Visit [URL] to learn what happened, how it affects you, and what you can do to protect your information.

Take action

Web Banner Notification Exemplar 2

You shared health information with us when you used [product name]. *We discovered that we shared your health information with third parties for [if known, describe why the company shared the info] without your permission.* This could include your [Add specifics—*for example, your name, email, address, blood pressure data*]. Visit [URL] to learn what happened, how it affects you, and what you can do to protect your information.

• *Recommend:* Include clear ''Take action'' call to action button, such as the example below:

You shared health information with us when you used [product name]. **We discovered that we shared your health information with third parties for [if known, describe why the company shared the info] without your permission**. This could include your [Add specifics – **for example, your name, email, address, blood pressure data**]. Visit [URL] to learn what happened, how it affects you, and what you can do to protect your information.

Take action

Email Exemplars

Exemplar Email Notice 1

Email Sender: [Company] <company email>
Email Subject Line: [Company] Breach of Your Health Information

Dear [Name],

We are contacting you because an attacker recently gained unauthorized access to our system and stole health information about our customers, including you.

What happened and what it means for you

On [March 1, 2024], we learned that an attacker had accessed a file containing our customers' health information on [February 28, 2024]. The file included your name, the name of your health insurance company, your date of birth, and your group or policy number.

What you can do to protect yourself

You can take steps now to reduce the risk of identity theft.

1. *Review your medical records, statements, and bills for signs that someone is using your information.* Under the health privacy law known as HIPAA, you have the right to access your medical records. Get your records and review them for any treatments or doctor visits you don't recognize. If you find any, report them to your healthcare provider in writing. Then go to *www.IdentityTheft.gov/steps* to see what other steps you can take to limit the damage.

Also review the Explanation of Benefits statement your insurer sends you when it pays for medical care.

Some criminals wait before using stolen information so keep monitoring your benefits and bills.

2. *Review your credit reports for errors.* You can get your free credit reports from the three credit bureaus at *www.annualcreditreport.com* or call 1–877–322–8228. Look for medical billing errors, like medical debt collection notices that you don't recognize. Report any medical billing errors to all three credit bureaus by following the ''What To Do Next'' steps on *www.IdentityTheft.gov.*

3. *Sign up for free credit monitoring to detect suspicious activity.* Credit monitoring detects and alerts you about activity on your credit reports. Activity you don't recognize could be a sign that someone stole your identity. We're offering free credit monitoring for two years through [name of service]. Learn more and sign up at [URL].

4. *Consider freezing your credit report or placing a fraud alert on your credit report.* A credit report freeze means potential creditors can't get your credit report without your permission. That makes it less likely that an identity thief can open new accounts in your name. A freeze remains in place until you ask the credit bureau to temporarily lift it or remove it.

A fraud alert will make it harder for someone to open a new credit account in your name. It tells creditors to contact you before they open any new accounts in your name or change your accounts. A fraud alert lasts for one year. After a year, you can renew it.

To freeze your credit report, contact *each of the three credit bureaus,* Equifax, Experian, and TransUnion.

To place a fraud alert, contact *any one of the three credit bureaus,* Equifax, Experian, and TransUnion. As soon as one credit bureau confirms your fraud alert, the others are notified to place fraud alerts on your credit report.

Credit bureau contact information

Equifax, *www.equifax.com/personal/credit-report-services,* 1–800–685–1111
Experian, *www.experian.com/help,* 1–888–397–3742
TransUnion, *www.transunion.com/credit-help,* 1–888–909–8872

Learn more about how credit report freezes and fraud alerts can protect you from identity theft or prevent further misuse of your personal information at *www.consumer.ftc.gov/articles/what-know-about-credit-freezes-and-fraud-alerts.*

What we are doing in response

We hired security experts to secure our system. We are working with law enforcement to find the attacker. And we are investigating whether we made mistakes that made it possible for the attackers to get in.

Learn more about the breach.

Go to [URL] to learn more about what happened and what you can do to protect yourself. If we have any updates, we will post them there.

If you have questions or concerns, call us at [telephone number], email us at [address], or go to [URL].

Sincerely,
First name Last Name
[Role], [Company]

Exemplar Email Notice 2

Email Sender: [Company] <company email>
Email Subject Line: Unauthorized disclosure of your health informationby [Company]

Dear [Name],

We are contacting you because you use our company's app [name of app]. When you downloaded our app, we promised to keep your personal health information private. Instead, we disclosed health information about you without your approval.

What happened?

We told [insert Company name, identity, or, where providing full name or identity would pose a risk to individuals or the entity providing notice, a description of type of company] that you use our app, and between [January 10, 2024] and [March 1, 2024], we gave them your name and your email address.

We gave [insert Company name, identity, or where providing full name or identity would pose a risk to individuals or the entity providing notice, a description of type of company] this information so they could use it for advertising and marketing purposes. For example, to target you for ads for cancer drugs.

What we are doing in response

We will stop selling or sharing your health information with other companies. We will stop using your health information for advertising or marketing purposes. We have asked Company XYZ to delete your health information, but it's possible they could continue to use it for advertising and marketing.

What you can do

We made important changes to our app to fix this problem. Download the latest updates to our app then review your privacy settings. You can also contact Company XYZ to request that it delete your data.

Learn more

Learn more about our privacy and security practices at [URL]. If we have any updates, we will post them there.

If you have any questions or concerns, call us at [telephone number] or email us at [address].

Sincerely,

First name Last Name
[Role], [Company]

Exemplar Email Notice 3

Email Sender: [Company] <company email>
Email Subject Line: [Company] Breach of Your Health Information

Dear [Name],

We are contacting you about a breach of your health information collected through the [product], a device sold by our company, [Company].

What happened?

On [March 1, 2024], we discovered that our employee had accidentally posted a database online on [February 28, 2024]. That database included your name, your credit or debit card information, and your blood pressure readings. We don't know if anyone else found the database and saw your information. If someone found the database, they could use personal information to steal your identity or make unauthorized charges in your name.

What you can do to protect yourself

You can take steps now to reduce the risk of identity theft.

1. *Get your free credit report and review it for signs of identity theft.* Order your free credit report at *www.annualcreditreport.com.* Review it for accounts and activity you don't recognize. Recheck your credit reports periodically.

2. *Consider freezing your credit report or placing a fraud alert on your credit report.* A credit report freeze means potential creditors can't get your credit report without your permission. That makes it less likely that an identity thief can open new accounts in your name. A freeze remains in place until you ask the credit bureau to temporarily lift it or remove it.

A fraud alert will make it harder for someone to open a new credit account in your name. It tells creditors to contact you before they open any new accounts in your name or change your accounts. A fraud alert lasts for one year. After a year, you can renew it.

To freeze your credit report, contact *each of the three credit bureaus,* Equifax, Experian, and TransUnion.

To place a fraud alert, contact *any one of the three credit bureaus,* Equifax, Experian, and TransUnion. As soon as one credit bureau confirms your fraud alert, the others are notified to place fraud alerts on your credit report.

Credit bureau contact information

Equifax, www.equifax.com/personal/credit-report-services, 1–800–685–1111
Experian, www.experian.com/help, 1–888–397–3742
TransUnion, www.transunion.com/credit-help, 1–888–909–8872

Learn more about how credit report freezes and fraud alerts can protect you from identity theft or prevent further misuse of your personal information at *www.consumer.ftc.gov/articles/what-know-about-credit-freezes-and-fraud-alerts.*

3. *Sign up for free credit monitoring to detect suspicious activity.* Credit monitoring detects and alerts you about activity on your credit reports. Activity you don't recognize could be a sign that someone stole your identity. We're offering free credit monitoring for two years through [name of service]. Learn more and sign up at [URL].

What we are doing in response

We are investigating our mistakes. We know the database shouldn't have been online and it should have been encrypted. We are making changes to prevent this from happening again.

We are working with experts to secure our system. We are reviewing our databases to make sure we store health information securely.

Learn more about the breach.

Go to [URL] to learn more about what happened and what you can do to protect yourself. If we have any updates, we will post them there.

If you have questions or concerns, call us at [telephone number], email us at [address], or go to [URL].

Sincerely,

First name Last Name
[Role], [Company]

Appendix B—Joint Statement by FTC Chair and Commissioners

Joint Statement of Chair Lina M. Khan, Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya

Today, the FTC finalizes an update to the Health Breach Notification Rule (''the Final Rule'') that ensures its protections keep pace with the rapid proliferation of digital health records. We do so to fulfill a clear statutory directive given to us by Congress.

In 2009, as part of the American Recovery and Reinvestment Act (''ARRA''), Congress passed the Health Information Technology for Economic and Clinical Health Act (''HITECH Act'').[314] Among other things, the HITECH Act sought to fill the gaps left by the privacy and security protections created under the Health Insurance Portability and Accountability Act (''HIPAA''), which was passed more than a decade earlier.[315] Specifically, it expanded the kinds of entities subject to the privacy and security provisions of HIPAA,[316] gave state attorneys general enforcement powers,[317] and—most relevant here—directed the Commission to issue a rule requiring entities not covered by HIPAA to provide notification of any breach of unsecured health records.[318] The Commission issued the original rule in 2009.[319] In 2020, the Commission initiated its regular decennial rule review and, in 2021, the Commission issued a policy statement clarifying how the rule applies to health apps and other connected devices.[320] In the years since, the Commission has brought enforcement actions against health apps alleging violations of the Health Breach Notification Rule.[321] Today's issuance of the Final Rule codifies this approach, honoring the statutory directive that people must be notified when their health records are breached.

The dissent argues that the Commission's action ''exceeds the Commission's statutory authority.'' [322] But its analysis contravenes a plain reading of the statute.

In the HITECH Act, Congress directed the FTC to issue rules requiring vendors of personal health records (''PHR'') to notify consumers and the FTC following ''a breach of security of unsecured PHR identifiable health information.'' [323] The statute defines the term ''PHR identifiable health information'' as ''individually identifiable health information, as defined in section 1320d(6) of this title.'' [324] Section 1320d(6), a portion of the Social Security Act created by HIPAA, defines ''individually identifiable health information'' as ''any information . . . that is created or received by a health care provider, health plan, employer, or health care clearinghouse.'' [325] Section 1320d(3), another section of the Social Security Act created by HIPAA, defines ''health care provider'' as, first, ''a provider of services'' as defined in section 1395x(u); [326] second, ''a provider of medical or other health services'' as defined in section 1395x(s); [327] and, third, ''any other person furnishing health care services or supplies.'' [328]

The term ''health care services or supplies,'' undefined in the statute, is defined in the Final Rule as follows:

Health care services or supplies means any online service such as a website, mobile application, or internet-connected device that provides mechanisms to track diseases, health conditions, diagnoses or diagnostic testing, treatment, medications, vital signs, symptoms, bodily functions, fitness, fertility, sexual health, sleep, mental health, genetic information, diet, or that provides other health-related services or tools.[329]

The dissent argues that this definition violates certain canons of statutory construction.[330] But its effort to cabin the third category of HIPAA's ''health care provider'' reads it out of existence, violating the canon that holds interpretations giving effect to every clause of a statute are superior to those that render distinct clauses superfluous.[331] Specifically, the second

[314] Am. Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (2009) at Sec. 13400 *et seq.*

[315] Health Insurance Portability and Accountability Act, Public Law 104–191, 110 Stat. 1936, 2022 (1996) at Sec. 1171, codified at 42 U.S.C. 1320d.

[316] Health Information Technology for Economic and Clinical Health Act, Public Law 111–5, Div. A, Title XIII, Subtitle D, sections 13401 and 13404 (codified at 42 U.S.C. 17937(a))

[317] *Id.* 13410(e).

[318] *Id.* 13407(g)(1).

[319] 74 FR 42962 (Aug. 25, 2009).

[320] Statement of the Commission on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1596364/statement_of_the_commission_on_breaches_by_health_apps_and_other_connected_devices.pdf.*

[321] *See, e.g.,* Fed. Trade Comm'n, FTC Enforcement Action to Bar GoodRx from Sharing Consumers' Sensitive Health Info for Advertising (Feb. 1, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-enforcement-action-bar-goodrx-sharing-consumers-sensitive-health-info-advertising;* Fed. Trade Comm'n, Ovulation Tracking App Premom Will be Barred from Sharing Health Data for Advertising Under Proposed FTC Order (May 17, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/05/ovulation-tracking-app-premom-will-be-barred-sharing-health-data-advertising-under-proposed-ftc.*

[322] Dissenting Statement of Comm'rs Melissa Holyoak and Andrew Ferguson at 1 (Apr. 25, 2024) (hereinafter ''Dissent'').

[323] Health Information Technology for Economic and Clinical Health Act, Public Law 111–5, Div. A, Title XIII, Subtitle D, section 13407 (codified at 42 U.S.C. 17937(a)).

[324] 42 U.S.C. 17937(f)(2).

[325] 42 U.S.C. 1320d(6).

[326] *See* 42 U.S.C. 1395x(u) (''The term ''provider of services'' means a hospital, critical access hospital, rural emergency hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program, or, for purposes of section 1395f(g) and section 1395n(e) of this title, a fund.'').

[327] 42 U.S.C. 1395x(s) (listing a vast array of services, tests, supplies, and measurements, comprising over 2000 words and 15 categories, one of which has over 30 subcategories).

[328] 42 U.S.C. 1320d(3) (emphasis added).

[329] HBNR Final Rule § 318.2(e).

[330] Dissent at 2 (''When a statute contains a list, ''each word in that list presumptively has a 'similar' meaning'' under the canon of *noscitur a sociis.* And when a general term follows a list of specific terms, the *ejusdem generis* canon teaches that the general term ''should usually be read in light of those specific words to mean something 'similar.' '' Together, these canons instruct that the final category of health care provider that includes the general term ''other person'' must be similar to the more specific terms that precede it.'' (citations omitted)).

[331] *Marx* v. *Gen. Revenue Corp.,* 568 U.S. 371, 386 (2013) (Thomas, J.) (''Finally, the canon against

Continued

category of ''health care provider'' already comprises a vast array of ''provider[s] of medical and other services.'' [332] If the Commission were to interpret the third category as comprising, as the dissent recommends, only ''traditional forms of health care providers,'' this distinct provision would be entirely redundant.

The dissent's approach also fails to give meaning to other textual differences between the second and third category. The second category in the definition of ''health care provider'' discusses a ''provider'' and ''medical'' services.[333] The third category, by contrast, drops the terms ''provider'' in favor of ''person furnishing'' and drops ''medical'' in favor of ''health care.'' [334] Honoring the materially different words of the statute requires us to read these two categories as covering distinct, not entirely overlapping, entities.[335] The Final Rule faithfully follows these textual markers and identifies specific services and tools that comprise ''health care services or supplies.'' [336] Contrary to this plain reading of the text, the dissent claims that Congress must have meant for this provision to apply only to ''traditional forms of health care providers.'' [337] But we cannot subordinate the text of the statute to speculative accounts of what Congress intended.

The dissent also notes that the Department of Health and Human Services (''HHS'') ''has never interpreted the term 'health care provider' to reach the expansive, creative conclusion that the Commission does today.'' [338] HHS has, however, interpreted ''health care provider,'' and its interpretation of this term is consistent with the Commission's definition.[339] In the HIPAA Privacy Rule, HHS defines first two categories of ''health care provider'' using the same language as the statute, but the third category is changed from ''any other person furnishing health care services or supplies'' to ''any other person or organization who furnishes, bills, or is paid for health care in the normal course of business.'' [340] HHS also defines ''health care'' broadly, as any ''care, services, or supplies related to the health of an individual.'' [341]

Notably, in its 1999 Notice of Proposed Rulemaking for the HIPAA Privacy Rule, HHS originally had proposed to define the term ''health care'' as constituting ''the provision of care, services, or supplies. . . .'' [342] But, in its final rule, HHS eliminated the concept of ''provision'' in order to distinguish the broader term of ''health care'' from the narrower term ''treatment.'' [343] HHS explained: ''We delete the term 'providing' from the definition [of health care] to delineate more clearly the relationship between 'treatment,' as the term is defined in § 164.501, and 'health care.' '' [344] HHS defined ''treatment,'' in contrast to ''health care,'' as ''the provision, coordination, or management of health care and related services.'' [345] In short, HHS defines ''health care'' broadly, covering all aspects related to the health of an individual, and defines ''treatment'' more narrowly, referring to the provision of medical care to an individual. The dissent's proposal to narrow the third category of ''health care provider'' to ''traditional forms of health care providers'' closely mirrors the approach that HHS rejected when it defined this term.[346]

The dissent also claims that changing the phrase ''can be drawn'' to ''has the technical capacity to draw'' violates the surplusage canon because it renders the limitation meaningless as to health apps, because ''virtually every app has the technical capacity to draw some information from more than one source.'' [347] This argument fails for two reasons. First, as the Statement of Basis and Purpose (''SBP'') explains, there are products and services that do not satisfy this requirement.[348] Second, even if the definition did reach every health app, that would not itself suggest that the Final Rule's definition was wrongly crafted. Rather, it would reflect the rapid growth in digital applications and services related to consumers' health.[349]

The practical ramifications of the dissent's legal shortcomings are significant.

Just last year, the Commission brought an action against Easy Healthcare Corporation, alleging privacy violations by its fertility tracking application Premom.[350] As laid out in the complaint, Premom—which encourages users to provide information about their menstrual cycles, fertility, and pregnancy, as well as to import their data from other services, such as Apple Health—shared information with advertisers and China-based companies through software development kits (''SDKs'') embedded in the application. The Commission's eight-count complaint against Easy Healthcare reflected the seriousness of this misconduct, charging the business with deceptive and unfair practices, as well as a violation of the Health Breach Notification Rule, which triggered civil penalties.

Under the dissent's analysis of health care services or supplies, the developer of the Premom application—Easy Healthcare—would not be covered by the Health Breach Notification Rule. This reading would mean that when companies like Easy Healthcare suffer a breach that may divulge health information to companies located in China, the Health Breach Notification Rule would not require them to disclose the breach to its users. It would also mean that when Easy Healthcare broadcasts women's sensitive health data across the vast commercial surveillance network propped up by SDKs and ad networks, the Health Breach Notification Rule would not require Easy Healthcare to alert women. Today's Final Rule rejects this atextual and cramped reading of the law, ensuring that businesses that hold themselves out as health care services companies—like Easy Healthcare—

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surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.'').

[332] 42 U.S.C. 1320(d)(3) (citing 42 U.S.C. 1395x(u)).

[333] 42 U.S.C. 1320(d)(3).

[334] *Id.*

[335] *See Southwest Airlines Co.* v. *Saxon,* 596 U.S. 450, 458 (2022) (Thomas, J.) (''Where a document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea'' (cleaned up)).

[336] In addition to defining this term by identifying specific services, the Final Rule actually also narrowed the definition originally proposed in the NPRM, by eliminating ''includes'' from the definition. SBP at 27 (''[T]he Commission has substituted the word 'means' for 'includes' to avoid implying greater breadth than the Commission intends.'').

[337] Dissent at 3. This rejection of the text of the statute, in favor of vague speculation about what Congress intended, mirrors the argument advanced by the Chamber of Commerce (''the Chamber''). The Chamber purports to rely on a ''plain text reading'' of the statute but immediately switches—in the very same sentence—to vague notions of Congressional intent: ''It is clear from a plain text reading of both the HITECH Act and HIPPA [*sic*] that Congress intended for the HBNR to cover health records more aligned with the provision of health services provided by traditional health providers at a time when it was attempting to digitize traditional health records.'' Comment submitted by U.S. Chamber of Com., Health Breach Notification Rule, *Regulations.gov* (Aug. 8, 2023) at 3, *https://www.regulations.gov/comment/FTC-2023-0037-010.*

[337] Dissent at 3.

[338] Dissent at 3.

[339] That the HIPAA Privacy rule has a narrower overall scope does not change this fact.

[340] 45 CFR 160.103.

[341] *Id.* (emphasis added). The dissent asserts that we ''mischaracterize[] the HIPAA Privacy Rule, which only applies to HIPAA 'covered entities' and their 'business associates,'—*i.e.,* to traditional health care providers, that do not include the broad swath of app developers the Final Rule will encompass.'' Dissent at 4 n.24 (internal citations omitted). It is not clear how this qualifies as a mischaracterization. Indeed, this is precisely the stated purpose of the Health Breach Notification Rule: To cover entities that HIPAA does not. The dissent also notes that we fail to recognize that HHS provides two examples of ''health care.'' But, HHS expressly states that the definition ''includes, but is not limited to'' these categories. 45 CFR 160.103. In any case, the breadth of these categories further underscores the expansive scope of HHS's definition of health care. *Id.*

[341] Dissent at 2.

[342] Proposed Rule, Standards for Privacy of Individually Identifiable Health Information, 64 FR 59918, 60049 (Nov. 3, 1999) (emphasis added).

[343] 65 FR 82462, 82477.

[344] *Id.*

[345] 45 CFR 164.501.

[346] Dissent at 2.

[347] Dissent at 4.

[348] SBP at 29–30.

[349] The dissent's argument anachronistically assumes that Congress intended for the Rule to cover some health apps, but not other health apps. But, in fact, the Apple and Google app stores were in their infancy when Congress drafted this legislation in 2009, and so there is no indication that Congress was thinking about specific health apps at all. To the extent the dissent's argument is that Congress simply did not anticipate the vast number of products that would end up covered by the broad category of ''supplies and services,'' it is not within the Commission's authority to re-write the statute based on the Commission's belief of what Congress would have wanted. *MCI Telecomms. Corp.* v. *Am. Telephone & Telegraph Co.,* 512 U.S. 218, 229 (1994) (holding that FCC's authority to ''modify'' does not extend to eliminating altogether a statutory requirement).

[350] Press Release, Fed. Trade Comm'n, Ovulation Tracking App Premom Will be Barred from Sharing Health Data for Advertising Under Proposed FTC Order (May 17, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/05/ovulation-tracking-app-premom-will-be-barred-sharing-health-data-advertising-under-proposed-ftc.*

are considered ''health care services'' companies under the law.

Lastly, the dissent claims that the Final Rule introduces ambiguity where previous there was none. But *GoodRx* suggests otherwise. In a unanimous action, the Commission charged GoodRx with making unauthorized disclosures of people's health data to Facebook and Google, among others.[351] GoodRx, meanwhile, disputed the applicability of the HBNR to its practices, calling it a ''novel'' application.[352] By codifying how HBNR applies to online platforms and applications, today's Final Rule provides market participants with more clarity about what entities are covered—thereby providing greater certainty and notice.[353]

GoodRx marked the first time the Commission had ever enforced the Health Breach Notification Rule. A top priority for us at the Commission is ensuring we are faithfully discharging our statutory duties, rather than letting the authorities that Congress has granted us sit dormant, and we are proud of the work the Commission and the staff are doing to take care that the full set of laws assigned to the FTC are being faithfully executed.[354] We agree with the dissent that we must look out for the institutional integrity of the Commission. Failing to use the full scope of our statutory tools to protect Americans—and failing to update our application of these tools even as technologies change—would undermine the agency's integrity and credibility alike.

We are deeply grateful to the Division of Privacy and Identity Protection for leading the Commission's work to activate the Health Breach Notification Rule and for finalizing this Rule update. In an environment rife with new and evolving threats to Americans' health data, ensuring we are faithfully harnessing all of our statutory tools to protect people from data breaches is paramount.

Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew Ferguson

The Health Breach Notification Rule (''Final Rule'') that the Commission adopts today exceeds the Commission's statutory authority, puts companies at risk of perpetual non-compliance, and opens the Commission to legal challenge that could undermine its institutional integrity. I share the majority's goal of protecting the privacy and security of consumers' identifiable health information,[1] and I support vigorous enforcement of laws protecting sensitive personal information with which Congress has entrusted the FTC.[2] I would support finalizing a rule that extends and clarifies the scope of the Commission's enforcement in this important area of consumer protection if that rule were consistent with our grant of authority from Congress. But, no matter how the majority attempts to shoehorn its desired policy goal into a ''plain reading'' of the statute,[3] I cannot support a rule that exceeds the bounds Congress clearly established. Indeed, a core principle guiding my tenure at the Commission will be that our rules must effectuate the law as it is—not as the Commission may wish it to be. For these reasons, I respectfully dissent.

The American Recovery and Reinvestment Act of 2009 (''Recovery Act'') [4] authorized the Commission to issue a rule requiring vendors of ''personal health records'' (''PHRs'') and related entities that are not covered by HIPAA to notify individuals and the FTC of a ''breach of security'' of ''unsecured PHR identifiable health information.'' [5] The Commission issued the Health Breach Notification Rule in 2009,[6] initiated a routine review of the Rule in 2020,[7] issued a policy statement re-interpreting the then-current Rule in 2021 (''2021 Policy Statement''),[8] issued a Notice of Proposed Rulemaking on June 9, 2023 (''NPRM''),[9] and today issues the Final Rule.[10]

I am encouraged that today the Commission is acting by rulemaking, as authorized by statute and following a period of notice and comment that elicited a range of views, rather than acting by fiat in a policy statement, as the Commission did in 2021.[11] I cannot endorse any policy statement that either displaces Congress's authority to make law or subverts the rulemaking process. The 2021 Policy Statement did both. The majority clearly recognizes this overreach. After all, if the 2021 Policy Statement had any force, today's rulemaking would be unnecessary.

Setting aside this troubling history, I turn to the Final Rule itself, which, unfortunately, I find equally troubling in its extension beyond the parameters established by Congress.

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[351] Press Release, Fed. Trade Comm'n, FTC Enforcement Action to Bar GoodRx from Sharing Consumers' Sensitive Health Info for Advertising (Feb. 1, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-enforcement-action-bar-goodrx-sharing-consumers-sensitive-health-info-advertising; See also,* Concurring Statement of Comm'r Christine S. Wilson, GoodRx Holdings, Inc. (Feb. 1, 2023), *https://www.ftc.gov/system/files/ftc_gov/pdf/2023090_goodrx_final_concurring_statement_wilson.pdf* (''Today's settlement marks the first enforcement matter in which the FTC has invoked the HBNR. I congratulate staff on this important step—the agency rightly is focused on protecting the privacy of sensitive health data and empowering consumers to make informed choices about the goods and services they use.''); *see also id.* at 5 (describing the GoodRx case as ''an important milestone in the Commission's privacy work.''). The dissent suggests that Commissioners Holyoak and Ferguson would have supported the application of HBNR to GoodRx.

[352] *See* GoodRx, GoodRx Response to FTC Settlement (Feb. 1, 2023) (''We believe this is a novel application of the Health Breach Notification Rule by the FTC. . . . We do not agree with the assertion that this was a violation of the HBNR.'').

[353] The dissent concedes that it does support an update to the rule that provides more clarity—and specifically an update that provides clarity to show that the rule covers GoodRx. Dissent at 7 (''I would support changes to the Rule that clarify the Rule's application to companies like GoodRx.''). That is precisely what today's Final Rule does. Previously, the rule did not define ''health care services or supplies,'' and today's Final Rule does. Previously, health apps like GoodRx stated that it was unclear whether the rule applies to them, and today's Final Rule makes clear that it does. This concession from the dissent suggests a more modest disagreement with the contours of how the Rule defines ''health care services or supplies,'' though—notably—the dissent does not provide an alternative definition.

[354] *See, e.g.,* Press Release, Fed. Trade Comm'n, FTC Hits R360 and its Owner With $3.8 Million Civil Penalty Judgment for Preying on People Seeking Treatment for Addiction (May 17, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-hits-r360-its-owner-38-million-civil-penalty-judgment-preying-people-seeking-treatment-addiction* (the Commission's first action brought under the Opioid Addiction Recovery Fraud Prevention Act); Harris Jewelry, Press Release, Fed. Trade Comm'n, FTC and 18 States Sue to Stop Harris Jewelry from Cheating Military Families with Illegal Financing and Sales Tactics (Jul. 20, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-18-states-sue-stop-harris-jewelry-cheating-military-families-illegal-financing-sales-tactics* (the Commission's first action brought under the Military Lending Act); Press Release, Fed. Trade Comm'n, Smart Home Monitoring Company Vivint Will Pay $20 Million to Settle FTC Charges That It Misused Consumer Credit Reports (Apr. 29, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/04/smart-home-monitoring-company-vivint-will-pay-20-million-settle-ftc-charges-it-misused-consumer* (the Commission's first action brought under the Red Flags Rule, brought under Acting Chair Slaughter); Press Release, Fed. Trade Comm'n, FTC Sues Burger Franchise Company That Targets Veterans and Others With False Promises and Misleading Documents (Feb. 8, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/02/ftc-sues-burger-franchise-company-targets-veterans-others-false-promises-misleading-documents* (the Commission's first action under the Franchise Rule since 2007); Press Release, Fed. Trade Comm'n, FTC Issues Rule to Deter Rampant Made in USA Fraud (Jul. 1, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-issues-rule-deter-rampant-made-usa-fraud* (issuance of the Made in the USA Rule, more than 25 years after Congress authorized the Commission to promulgate a rule).

[1] Like the majority, and other Commissioners before me, I support federal privacy legislation, particularly where such legislation could address gaps in sector-specific laws and level the playing field for companies navigating a patchwork of laws. And like the majority, and other Commissioners before me, I care deeply about protecting the privacy and security of consumers' health information, particularly where it falls outside the bounds of the Health Insurance Portability and Accountability Act (''HIPAA''). For more than two decades, the FTC has been in a leader in protecting consumers' health information. *See, e.g., Eli Lilly,* FTC File No. 0123214 (May 10, 2002), *https://www.ftc.gov/legal-library/browse/cases-proceedings/012-3214-eli-lilly-company-matter.* I look forward to continuing the Commission's important work in this area.

[2] *See, e.g.,* Children's Online Privacy Protection Rule, 16 CFR part 312, as authorized by the Children's Online Privacy Protection Act of 1998, 15 U.S.C. 6501 *et seq.*

[3] Joint Statement of Chair Lina M. Khan, Comm'r Rebecca Kelly Slaughter, and Comm'r Alvaro M. Bedoya at 2 (Apr. 24, 2024) (''Majority Statement'').

[4] Am. Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (2009).

[5] 42 U.S.C. 17937(a), (g).

[6] 74 FR 42962 (Aug. 25, 2009).

[7] 85 FR 31085 (May 22, 2020).

[8] *See* Statement of the Comm'n on Breaches by Health Apps and Other Connected Devices (Sept. 15, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1596364/statement_of_the_commission_on_breaches_by_health_apps_and_other_connected_devices.pdf (''2021 Policy Statement'').*

[9] 88 FR 37819 (June 9, 2023).

[10] *See* Statement of Basis and Purpose (''SBP'') accompanying the Final Rule, Section I (summarizing procedural history).

[11] *See* 2021 Policy Statement, *supra* note 8.

Some background first. Under the Recovery Act, PHR identifiable health information means ''individually identifiable health information,'' as defined by the Social Security Act, 42 U.S.C. 1320d(6).[12] The Social Security Act defines ''individually identifiable health information'' as information that is ''created or received by a health care provider, health plan, employer, or health care clearinghouse.'' [13] The Social Security Act then defines ''health care provider'' to include three categories: ''[1] a provider of services (as defined in section 1395x(u) of this title), [2] a provider of medical or other health services (as defined in section 1395x(s) of this title), and [3] any other person furnishing health care services or supplies.'' [14]

The Commission takes liberties with the final category in that definition (''any other person furnishing health care services or supplies'') to adopt a new, capacious definition of ''covered health care provider'' and a new, similarly capacious definition of ''health care services and supplies,'' whose joint effect is to sweep a large swath of apps and app developers under the purview of the Final Rule. These expansive definitions are not consistent with the statute. Under longstanding principles of statutory interpretation, the final category of provider (''any other person . . .'') must be understood in relation to the first two categories (''provider of services'' and ''provider of medical or other health services'').[15] When a statute contains a list, ''each word in that list presumptively has a 'similar' meaning'' under the canon of *noscitur a sociis*.[16] And when a general term follows a list of specific terms, the *ejusdem generis* canon teaches that the general term ''should usually be read in light of those specific words to mean something 'similar.' '' [17] Together, these canons instruct that the final category of health care provider that includes the general term ''other person'' must be similar to the more specific terms that precede it.

The first two categories of health care provider incorporate the definitions of sections 1395x(u) and 1395x(s) of the Social Security Act, respectively.[18] The first category of provider includes ''a hospital, critical access hospital, rural emergency hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program, or . . . a fund.'' [19] The second category of provider includes an extensive list (section 1395x(s) includes 17 paragraphs and over 35 subparagraphs) of medical professionals including physicians, physician assistants, nurse practitioners, clinical psychologists, clinical social workers, and others, and the specific services administered by medical professionals.[20] These two categories comprise traditional forms of health care providers.

The final category, addressing ''any other person furnishing health care services or supplies,'' must therefore only include persons that are ''similar in nature'' to these first two categories.[21] The majority argues that my ''effort to cabin the third category . . . reads it out of existence, violating the canon that holds interpretations giving effect to every clause of a statute are superior to those that render distinct clauses superfluous.'' [22] This application of the canon is incorrect. Requiring similarity among categories does not result in superfluity; it merely prevents interpretations that extend beyond what the text permits. A catch-all's limited application due to its context is not a reason to expand that phrase to encompass dissimilar applications.

The Final Rule's definition of ''covered health care provider'' is not remotely similar, because it incorporates a new, astonishingly broad definition of ''health care services or supplies,'' which means ''any online service such as a website, mobile application, or internet-connected device that provides mechanisms to track diseases, health conditions, diagnoses or diagnostic testing, treatment, medications, vital signs, symptoms, bodily functions, fitness, fertility, sexual health, sleep, mental health, genetic information, diet, or that provides other health-related services or tools.'' [23] Thus, the Commission transforms ''health care provider,'' which both under common usage and in context of the statutory provision means entities such as physicians and hospitals, to now include any company ''furnishing'' a health-related app.[24] As a result, the Final Rule creates a tautology: Health app developers may be ''vendors of personal health records'' by offering an app containing health information that has been created or received by a health care provider, where the health app developer is itself the health care provider that creates or receives that health information by virtue of offering the app.

Notably, even though the Department of Health and Human Services (''HHS'') interprets this same provision of the Social Security Act, HHS has—notwithstanding the majority's assertion to the contrary [25]—never interpreted the term ''health care provider'' to reach the expansive, creative conclusion that the Commission does today.[26] The majority's argument misstates the scope and language of the HIPAA Privacy Rule, which only applies to HIPAA ''covered entities'' and their ''business associates,'' [27]—*i.e.,* to traditional health care providers that do not include the broad swath of app developers the Final Rule will encompass. Significantly, the majority omits from its characterization of the term ''health care'' HHS's own illustrations of that term, which highlight the proximity to traditional forms of health care by different kinds of medical professionals:

(1) Preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the physical or mental condition, or functional status, of an individual or that affects the structure or function of the body; and

(2) Sale or dispensing of a drug, device, equipment, or other item in accordance with a prescription.[28]

The Majority Statement repeatedly says that HHS defines ''health care'' broadly,[29] but the language it cites provides no such support.

Aware of this incongruency, the Commission seeks to differentiate its use of ''health care provider'' from that of ''other government agencies.'' [30] Yet the Commission provides no explanation *why* its definition should differ, particularly where it is unclear whether the Commission has interpretative authority over the Social Security Act's definition of health care provider and where other agencies *are* delegated such interpretative authority.[31]

[12] 42 U.S.C. 17937(f)(2).

[13] 42 U.S.C. 1320d(6).

[14] *Id.* 1320d(3).

[15] *See Yates* v. *United States,* 574 U.S. 528, 549–51 (2015) (Alito, J., concurring); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 195–196,199–200 (2012).

[16] *Yates,* 574 U.S. at 549.

[17] *Id.* at 550.

[18] 42 U.S.C. 1320d(3).

[19] 42 U.S.C. 1395x(u).

[20] *Id.* 1395x(s).

[21] *Yates,* 574 U.S. at 545 (internal quotation marks omitted).

[22] Majority Statement at 2.

[23] Final Rule at 98.

[24] The SBP explains that an app developer (or any company ''furnishing'' a health app) would be covered as a health care provider because its health app is a health care service or supply. SBP at 7, 22–28.

[25] Majority Statement at 3.

[26] *See* NPRM at 37823.

[27] 45 CFR 160.102 through 103.

[28] *Id.* § 160.103.

[29] Majority Statement at 3–4.

[30] SBP at 26.

[31] *Id.* at 13 (noting that HHS interprets these provisions of the Social Security Act). *Cf. City of Arlington, Tex.* v. *F.C.C.,* 569 U.S. 290, 323 (2013) (Roberts, C.J., dissenting) (''When presented with an agency's interpretation of such a statute, a court cannot simply ask whether the statute is one that the agency administers; the question is whether authority over the particular ambiguity at issue has been delegated to the particular agency.'').

The Commission also takes troubling liberties with the statute's definition of ''personal health record,'' which are evident from a side-by-side comparison of the statute and the Final Rule:

Recovery act	Final rule
''an electronic record of PHR identifiable health information . . . on an individual that can be drawn from multiple sources and is managed, shared, and controlled by or primarily for the individual.'' [32].	''an electronic record of PHR identifiable health information on an individual that has the technical capacity to draw information from multiple sources and that is managed, shared, and controlled by or primarily for the individual.'' [33]

Under the Final Rule, a PHR need not actually draw health information from multiple sources, as the statute contemplates (because the statutory phrase ''that can be drawn'' modifies its immediate antecedent, ''health information''). Rather, under the Final Rule, a single source of health information will render an app a PHR as long as the ''PHR'' has the ''technical capacity'' to draw some other information elsewhere.[34] The implications of this change, in conjunction with the expansion of ''health care provider,'' are significant. Any retailer that offers an app that tracks health-related purchases (*e.g.,* bandages, vitamins, dandruff shampoo) may be a vendor of a PHR covered by the Rule if the app draws health information (*e.g.,* purchasing information) from the consumer and the app has the ''technical capacity'' to draw any information from any other source. As the Statement of Basis and Purpose notes, commenters warned that virtually every app has the technical capacity to draw some information from more than one source.[35] That expansive scope could be appropriate if Congress's language permitted it. But the Commission's interpretation, which effectively renders the Recovery Act's ''multiple sources'' requirement meaningless, ignores longstanding principles of statutory interpretation that require each provision of a statute to be given effect.[36]

The Commission's expansive definitions of ''covered health care provider,'' ''health care services and supplies,'' and ''personal health record'' have a profound effect on the scope of the Rule: Most companies that offer or disseminate health-related apps or similar products would be treated as ''covered health care providers'' that therefore hold ''PHR identifiable health information'' in their apps (*i.e.,* PHRs), such that they are vendors of PHRs—even if their app is merely health-adjacent.

Remarkably, the Commission imposes no limit on this extraordinary breadth in the Rule itself. Rather, in a post-NPRM attempt to check the scope, the Commission fashions a limiting principle: Apps are covered only if they are ''more than tangentially relating to health.'' [37] This extra-statutory, extra-regulatory limit has several significant problems.

First, if the majority were correct, from where would it draw the authority to impose this ''more than tangentially relating to health'' limitation? If Congress in fact commanded us to cover all the apps the majority claims, this extra-textual limitation would be beyond our power to impose.[38] Why, then, does the majority blink in the face of what it understands Congress to have required? There may be good policy reasons not to follow Congress's language—as the majority understands it—wherever it leads, but we do not have power to shortchange Congress's commands. That even the majority feels compelled to adopt this extra-textual limitation—again, as the majority understands the text—on the statute's reach suggests that the language probably does not mean what the majority says.

The second problem is substantive: What does this language mean? When does an app cross the line between tangentially related to health and more than tangentially related? If a gas station with a loyalty app sells Advil, is the app only tangentially related to health and outside the Final Rule's purview? If the gas station adds Robitussin and pregnancy tests to its inventory, does it cross the line to more than tangentially related to health? If a clothing store with an e-commerce app sells a handful of maternity shirts, is the app only tangentially related to health? If the store adds more maternity clothes, nursing bras, and some anti-nausea ginger tea to its in-app offerings, is the app more than tangentially related to health? If vitamins, over-the-counter medicines, acne creams, bandages, and similar items comprise 0.1% or 1% or 10% of a superstore's inventory, when is the retailer's e-commerce app more than tangentially related to health? I see no clear answers to any of these hypotheticals in today's Final Rule, which suggests that the marketplace will see no clear answers either.[39]

The third problem is procedural. The Commission did not propose this ambiguous but impactful limitation in a Notice of Proposed Rulemaking—likely because there is no statutory basis for this newly-created language. Rather, it introduces this crucial concept for the first time in a Statement of Basis and Purpose (a purely interpretive document) as a *post hoc* fix to the problem the Commission itself created with its expansive definitions. As a result, the Commission did not provide notice or receive public comment on the efficacy or propriety of this limitation, depriving the public of its opportunity to meaningfully participate in the rulemaking process and depriving itself of potentially valuable input from commenters.

The final problem is that this *post hoc,* extra-regulatory limitation renders the Commission's burden analysis inadequate. The Paperwork Reduction Act (''PRA'') requires the Commission to estimate the reportable breaches by entities covered by the Rule and compliance costs.[40] The Regulatory Flexibility Act (''RFA'') requires the Commission to assess the economic impact on small businesses.[41] Apparently relying on the SBP's ''more than tangentially related to health'' limitation, the PRA and RFA analyses only address breaches by apps categorized as ''Health and Fitness.'' [42] Because the Rule itself contains no such limitation, general retailers with e-commerce apps, gas stations with loyalty apps, and other similar generalists that sell any health-related items do not factor into these analyses. As a result, they likely dramatically underestimate the numbers of regulated entities, number of breaches, and costs to businesses.

Perhaps the breath of the Final Rule would be more of a theoretical than practical concern to businesses, if they could adopt practices sufficient to avoid any breach that would trigger notice obligations under the Final Rule, or, in the event of a breach, err on the side of notification. But § 318.3(b) of the Final Rule imposes affirmative obligations on companies to notify their service providers if they are covered by the Final Rule, regardless of whether they experience a breach.[43] To comply with this requirement, companies must know whether they are covered by the Rule—that is, which side of ''more than tangentially relating to health'' they fall on. Without clarity on that line, companies run the risk of being in

[32] 42 U.S.C. 17921(11).

[33] Final Rule at 99.

[34] *See* SBP at 32 (''Next, adding the phrase 'technical capacity to draw information' clarifies that a product is a personal health record if it can draw *any* information from multiple sources, even if it only draws *health* information from one source.'').

[35] *See id.* at 34.

[36] Scalia & Garner, *supra* note 15 at 174 (discussing surplusage canon).

[37] SBP at 28.

[38] *See Nat'l Fed'n of Indep. Business* v. *Dep't of Labor,* 595 U.S. 109, 117 (2022) (per curiam) (''Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.'').

[39] The expansive coverage increases the likelihood of creating unintended consequences. Will the gas station decline to add over-the-counter medicines to its inventory to avoid crossing the line of ''more than tangentially related to health''? Will the clothing retailer shy away from maternity apparel? Will the e-commerce giant avoid selling bandages and dandruff shampoo? These potentially detrimental outcomes undermine a Rule intended to benefit consumers.

[40] *See generally* 44 U.S.C. 3501 *et seq.;* SBP at 86.

[41] 5 U.S.C. 601 through 612.

[42] SBP at 86, 93.

[43] This may have been a sensible requirement in 2009, when the scope of the Rule was much narrower, but it has dramatic consequences in this much-expanded Rule.

perpetual violation of the Final Rule and, therefore, perpetually at the mercy of the Commission's enforcement discretion. The Commission, at this moment, may not intend to pursue such technical violations. But any expression of intended restraint will be cold comfort to companies that have seen the Commission's self-imposed restraint wax and wane in other areas.[44]

I find the majority's liberties with the statute particularly troubling because they are unnecessary to reach health apps. Indeed, the Commission's own recent enforcement action against digital healthcare platform GoodRx makes that clear. Only last year, a bipartisan Commission applied the 2009 Rule to GoodRx's online platform and app because the company received identifiable health information on prescription medications (among other things) from pharmacy benefit managers and pharmacies, among other sources, so that consumers could manage their information.[45] The majority argues that today's changes are necessary to provide clarity to the market about the Rule's scope,[46] but *GoodRx* has already done that—and I would support changes to the Rule that are consistent with the statute. In short, I agree with the majority's goals—safeguarding consumers' sensitive health information and implementing a Congressional mandate to put consumers on notice of the breach of that data—but I believe that we must effectuate those goals within the scope of the law as it is, rather than legislating in the guise of applying the law.

The FTC is a venerable institution that does vital work to protect consumers and promote competition, thanks to its hardworking and devoted career staff. I commend the staff attorneys, economists, and technologists who worked on the rule for their careful and thoughtful consideration of difficult issues. Ultimately, while I am sympathetic to the majority's goal, I fear that adopting a Final Rule that is irreconcilable with the statute and that puts companies in an untenable position puts the Commission at risk. Legal challenges may undermine the Commission's institutional integrity, and Congress may be reluctant to trust the Commission with other authority—even the much-needed authority to protect the privacy of consumers' sensitive personal information. I therefore respectfully dissent.

[44] Significantly, the Majority Statement is silent as to the propriety and consequences of its ''tangentially related'' limiting principle, likely because this approach is indefensible.

[45] *See Concurring Statement of Commissioner Christine S. Wilson, GoodRx,* Matter No. 2023090 1 n.2 (Feb. 1, 2023) (''GoodRx has violated the HBNR based on a plain reading of the text, setting aside any gloss the Commission sought to add in its September 2021 Statement on Breaches by Health Apps and Other Connected Devices.''), *https://www.ftc.gov/system/files/ftc_gov/pdf/2023090_goodrx_final_concurring_statement_wilson.pdf.*

[46] Majority Statement at 5.

[FR Doc. 2024–10855 Filed 5–29–24; 8:45 am]

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FEDERAL TRADE COMMISSION

16 CFR Part 456

RIN 3084–AB37

Ophthalmic Practice Rules (Eyeglass Rule)

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is publishing a final rule to implement amendments to the Ophthalmic Practice Rules (''Eyeglass Rule'' or ''Rule''). These amendments require that prescribing eye care practitioners obtain a signed confirmation after releasing an eyeglass prescription to a patient and maintain each such confirmation for a period of not less than three years. The Commission is permitting prescribers to comply with automatic prescription release via electronic delivery if they first obtain verifiable affirmative consent from the patient and maintain a record of such consent for a period of not less than three years. The amendments further clarify that the presentation of proof of insurance coverage shall be deemed to be a payment for the purpose of determining when a prescription must be provided. Finally, the Commission amends the term ''eye examination'' to ''refractive eye examination'' throughout the Rule.

DATES: This rule is effective September 24, 2024.

FOR FURTHER INFORMATION CONTACT: Alysa S. Bernstein, Attorney, (202) 326–3289; Sarah Botha, Attorney, (202) 326–2036; or Paul Spelman, Attorney, (202) 326–2487, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

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I. Background

A. Overview of the Eyeglass Rule

The Eyeglass Rule (16 CFR part 456) declares it an unfair practice for an optometrist or ophthalmologist to fail to provide a patient with a copy of the patient's eyeglass prescription immediately after an eye examination is completed.[1] The prescriber may not charge the patient any fee in addition to the prescriber's examination fee as a condition of releasing the prescription to the patient.[2] The Rule defines a prescription as the written specifications for lenses for eyeglasses which are derived from an eye examination, including all of the information specified by State law, if any, necessary to obtain lenses for eyeglasses.[3]

The Rule prohibits an optometrist or ophthalmologist from conditioning the availability of an eye examination on a requirement that the patient agree to purchase ophthalmic goods from the ophthalmologist or optometrist.[4] The Rule also prohibits the prescriber from placing on the prescription, or requiring the patient to sign, or deliver to the patient, a waiver or disclaimer of prescriber liability or responsibility for the accuracy of the exam or the ophthalmic goods and services dispensed by another seller.[5]

The Rule was implemented after findings that many consumers were being deterred from comparison shopping for eyeglasses because eye care practitioners would not release prescriptions, even when requested to do so, or charged an additional fee for release of the prescription. The Rule's operative provision, which requires prescription release and prohibits fees and waivers for prescription release, is entitled ''Separation of Examination and Dispensing.'' [6] Keeping the exam process and prescription separate from the retail sale of eyeglasses is the key underpinning of the Rule.

B. Background of Prescribers' Failure To Release Prescriptions and the Commission's Automatic-Release Remedy

The FTC has been regulating the optical goods industry for more than six decades, and this experience continues to inform and guide the Rule. As early as 1962, the Commission took steps to protect consumers and competition by adopting the ''Guides for the Optical Products Industry,'' declaring it an unfair practice to ''tie in or condition'' refraction services to eyeglass sales when there was a ''reasonable probability'' of harming competition.[7] However, the Guides were not binding, the FTC never sought to enforce them, and prescribers did not comply with them.[8] In light of such non-compliance, on June 2, 1978, the Commission issued the Advertising of Ophthalmic Goods and Services Rule (the ''Eyeglass I Rule''), which, among other things, contained the provision ''Separation of Examination and Dispensing'' requiring prescribers to automatically release prescriptions—regardless of whether or not patients requested them—so as to draw a line between exams and eyeglass sales, and ensure consumers had unconditional access to prescriptions.[9] The Commission found that consumers suffered substantial economic loss and lost opportunity costs due to an inability to comparison-shop for glasses,[10] and that such practices offended public policy and inhibited competition by denying consumers the ability to use available information.[11] The Commission explained that while it considered requiring prescriptions be released only upon request, it chose ''automatic release'' due to consumers' lack of awareness of their prescription rights, and to immunize such rights from an ''evidentiary squabble'' over whether a consumer did or did not request their prescription.[12]

Upon issuance of the Eyeglass I Rule, the American Optometric Association (''AOA'') filed suit, and the D.C. Circuit upheld the automatic-release requirement, finding there was ''extensive'' evidence that withholding prescriptions harmed consumers.[13] The court also noted there was considerable evidence that prescribers used certain practices ''to frighten consumers'' into purchasing from the prescriber.[14]

In 1985, the Commission re-reviewed the Rule and held public hearings, after which FTC staff proposed changing to release-upon-request,[15] due to what staff perceived to be altered market conditions and increased public awareness, and the challenges staff faced trying to enforce the automatic-release provision.[16] According to staff at that time, automatic release had not prevented evidentiary squabbles,[17] but rather increased them, since whether a prescriber released a prescription could not, in most cases, be ascertained without documentary evidence.[18] In contrast, the hearing officer recommended the automatic-release requirement remain in effect, since prescribers were still not releasing prescriptions to consumers.[19] The Commission sided with the presiding officer's recommendation and issued the ''Eyeglass II Rule,'' which preserved automatic release.[20] The Rule was again challenged in court and parts of it were vacated, but not the automatic-release component, which remained lawful and in effect.[21]

In 1997, the Commission again sought input on the Rule's prescription-release requirement but withheld taking action while it evaluated whether contact lenses should be covered by the Rule.[22] That question was resolved by Congress, which passed the Fairness to Contact Lens Consumers Act (''FCLCA''),[23] directing the FTC to issue a separate rule with automatic prescription-release requirements for contact lenses that were similar to those required by the Eyeglass Rule.[24]

When the Commission looked again at the Eyeglass Rule in 2004, it determined that prescribers continued to withhold prescriptions, and consumers were still not sufficiently aware of their rights.[25] The Commission felt that were it to eliminate the automatic-release remedy, even more prescribers might fail to release prescriptions. Due to this, and because the Commission found that prescription-release enhanced consumer choice at minimal cost, the Commission opted to again retain the automatic-release remedy.[26] By retaining the requirement, the Commission also ensured that prescription-release requirements for eyeglasses and contact lenses would be largely aligned.[27]

C. Evidentiary Standard for Promulgating or Amending the Rule

The Commission promulgated the Eyeglass Rule under section 18 of the FTC Act, which grants the Commission

the authority to adopt rules defining unfair or deceptive acts or practices in or affecting commerce.[28] When amending or repealing the Rule, the Commission follows the same section 18 procedures governing the adoption of rules [29] and, in doing so, engages in a multi-step inquiry. To make a determination that an act or practice is unfair, the Commission evaluates the following questions: (1) Does the act or practice cause or is it likely to cause substantial injury to consumers? (2) Is the injury to consumers outweighed by countervailing benefits that flow from the act or practice at issue? and (3) Can consumers reasonably avoid the injury? [30]

If an act or practice is deemed unfair, the Commission may issue a notice of proposed rulemaking under section 18 only where it has ''reason to believe'' that the unfair act or practice at issue is ''prevalent.'' [31] The Commission can find prevalence where information available to it indicates a widespread pattern of conduct.[32] The evidence necessary to answer the aforementioned questions will vary depending on the circumstances of each rulemaking and the characteristics of the industry involved.[33] When inviting public comment, the Commission requests that commenters provide useful factual data, and, in particular, empirical data such as surveys or other methodologically sound quantitative analyses.[34] The Commission may also consider other reliable evidence and input from experts.[35] Documentary and testimonial evidence, and the absence of any substantial or persuasive contrary evidence, may also be considered.[36] Once the Commission finds that an unfair act or practice is prevalent, the Commission has wide latitude in fashioning a remedy, and need only show a ''reasonable relationship'' between the unfair act or practice and the remedy.[37]

D. The Current Eyeglass Rule Review

1. Advance Notice of Proposed Rulemaking

In 2015, as part of a periodic review of its rules and regulations, the Commission simultaneously published notices in the **Federal Register** initiating reviews of both the Eyeglass Rule and the Contact Lens Rule. The Commission published a request for comment (''RFC'') seeking public input on the efficiency, costs, benefits, and regulatory impact of the Contact Lens Rule, including its prescription release requirement.[38] The Commission published an advance notice of proposed rulemaking (''ANPR'') for the Eyeglass Rule inviting comments on, among other things: the continuing need for the Rule; the Rule's economic impact and benefits; and the effect on the Rule of any technological, economic, or other industry changes.[39] The Commission also sought comment on whether: the definition of ''prescription'' should be modified to include pupillary distance, to require that a prescriber provide a duplicate copy of a prescription to a patient who does not have access to the original, and to require that a prescriber provide a copy to or verify a prescription with third parties authorized by the patient.[40]

In response to its Eyeglass Rule ANPR, the Commission received and considered 868 comments from a variety of individuals and entities, including ophthalmologists, optometrists, opticians, trade associations, consumers (and consumer-advocacy representatives), and eyeglass sellers.[41] Virtually all comments supported retaining the Rule. Some commenters, including trade associations representing opticians and retailers who employ optometrists and opticians, stated that the Rule is needed because some prescribers are still not automatically releasing prescriptions, and some consumers face resistance when they try to obtain their prescriptions.[42] The AOA, on the other hand, questioned the continued need for the Rule based on its view that optometrists widely comply with the Rule's requirements, but also commented that the Rule—as currently codified—is not necessarily harmful.[43]

2. The Contact Lens Rule Review

The Commission focused on finalizing changes to the Contact Lens Rule (CLR) before considering amendments to the Eyeglass Rule. During its CLR review, the Commission considered over 8,000 comments and issued both a notice of proposed rulemaking [44] and a supplemental notice of proposed rulemaking [45] (''SNPRM'') before issuing a final rule on August 17, 2020.[46] While the CLR differs from the Eyeglass Rule in some respects, many of the issues and concerns regarding prescription release and portability are the same, and therefore, some of the comments and data submitted during the CLR review are pertinent to the Commission's review of the Eyeglass Rule.

In its CLR final rule, the Commission determined that the evidentiary record, as well as the Commission's enforcement and oversight experience, demonstrated that prescriber compliance with the automatic-prescription-release requirement was deficient, and as a result, millions of consumers were not receiving their contact lens prescriptions as required by law.[47] The Commission further found that many consumers remained unaware that they have a right to their prescriptions.[48] To remedy this, the Commission implemented a confirmation-of-prescription-release provision, requiring that prescribers request that patients confirm receipt of their contact lens prescription.[49] According to the Commission, the patient confirmation requirement was intended to, among other things, increase the number of patients in possession of their contact lens prescription, improve flexibility and choice for consumers, foster improved competition in the market, and result in lower prices and more efficient contact lens sales for consumers.[50] The Commission noted that the requirement would also increase the Commission's ability to enforce and assess the CLR.[51]

The final CLR included an additional amendment addressing a concern relevant to the Eyeglass Rule review, in that the Commission recognized the value in allowing prescribers to deliver prescriptions to patients digitally, so long as prescribers provide the prescription in a format that can be accessed, downloaded, and printed by the patient, and the patient agrees to receive their prescription in the format identified by the prescriber.[52] The final CLR expressly made this permissible by adding a definition of the term ''provide to the patient a copy'' to allow the prescriber to provide the patient with a digital copy of the prescription in lieu of a paper copy, so long as the prescriber adheres to certain requirements.[53]

3. The Notice of Proposed Rulemaking and Eyeglass Rule Workshop

After the amended CLR final rule took effect, the Commission resumed its review of the Eyeglass Rule. Based on a review of comments received in response to the ANPR, a regulatory review of the CLR, and the Commission's enforcement experience, the Commission issued a notice of proposed rulemaking (''NPRM'') on January 3, 2023.[54] In the NPRM, the Commission proposed to: (1) require that prescribers obtain a signed confirmation after releasing an eyeglass prescription to a patient, and maintain each such confirmation for a period of not less than three years; (2) permit prescribers to comply with automatic prescription release via electronic delivery if the prescription is provided in a digital format that can be accessed, downloaded, and printed by the patient,

and if the prescriber obtains the patient's verifiable affirmative consent to the electronic delivery method; (3) clarify that the presentation of proof of insurance coverage shall be deemed to be a payment for the purpose of determining when a prescription must be provided; and (4) amend the term ''eye examination'' to ''refractive eye examination'' throughout the Rule.

In response to the NPRM, the Commission received 27 comments from various individuals and entities, including consumers, optometrists, ophthalmologists, opticians, trade associations, consumer advocates, and eyeglass sellers.[55] The Commission also announced it would hold a public workshop to consider: the proposed confirmation-of-prescription-release requirement for eyeglass prescriptions; consumers' and prescribers' experiences with the implementation of the similar requirement for contact lens prescriptions; other proposed changes to the Rule; and other issues raised in response to the NPRM.[56] The workshop notice invited interested parties to request to participate as a panelist or to file a comment.[57] Staff convened the workshop, titled ''A Clear Look at the Eyeglass Rule,'' with three panels and a total of 13 panelists in Washington, DC, on May 18, 2023, and the discussion was transcribed.[58] At the conclusion of the workshop, panelists, audience members, and the general public were invited to share additional views, data, and other information related to the NPRM and the subjects discussed, after which the Commission received an additional 20 comments, providing further perspectives from consumers, prescribers, opticians, trade associations, and retailers, as well as a U.S. Congressman.[59]

4. Overview of the Final Rule

The Commission now issues this final rule that largely adopts the amendments proposed in the NPRM, with some minor modifications based on public comments and other considerations, as discussed below. In issuing this final rule, the Commission has relied on an extensive record that includes comments received in response to the ANPR, the NPRM, and the workshop notice. The Commission also relies on the discussion at the May 2023 workshop, the Commission's experience enforcing the Eyeglass Rule and Contact Lens Rule, and the rulemaking record for the 2020 amendments to the CLR, to the extent that such record is pertinent to the Eyeglass Rule.[60] The Commission has also examined the current state of the marketplace, and the content of consumer complaints about prescriber practices. Further, the Commission remains cognizant of the lengthy regulatory history and evidentiary record pertaining to prescribers' failure to release prescriptions, and eyewear-specific market incentives (such as that many eye doctors sell the same items that they prescribe) that provided the initial impetus for both the Eyeglass Rule and the CLR.

Based on the entirety of the record, the Commission finds that prescribers' failure to provide consumers with prescriptions at the completion of an eye exam—held to be an unfair act or practice when the Eyeglass Rule was enacted[61]—remains prevalent, and tens of millions of Americans every year are not receiving their eyeglass prescriptions as required.[62] The Commission also finds that significant harm to consumers continues to exist and that, without the Rule's requirements, consumers could not reasonably avoid the injury resulting from the unfair acts and practices prohibited by the Rule. The Commission further determines that the Rule's automatic-release requirement remains the best remedy for failure to release prescriptions, and that documentation of prescription release is necessary to better effectuate and enforce this remedy. Consequently, the Commission is amending the Rule to implement a confirmation-of-prescription-release requirement similar to that already in place under the amended CLR, albeit a simpler version.[63] Pursuant to these amendments, prescribers will be required to do one of the following:

(i) If a paper copy of the prescription was provided to the patient, request that the patient acknowledge receipt of the prescription by signing a separate statement on paper or in a digital format confirming receipt of the prescription; or

(ii) If a digital copy of the prescription was provided to the patient (via methods including an online portal, electronic mail, or text message), retain evidence that such prescription was sent, received, or made accessible, downloadable, and printable.

As with the CLR provision, this final rule provides sample language for the confirmation option, but also allows prescribers to craft their own confirmation wording if they so desire. As with the CLR's confirmation requirement, the requirement for eyeglass prescriptions would apply only to prescribers with a financial interest in the sale of eyeglasses.

The Commission believes that revising the automatic-release remedy to require a confirmation of prescription release will provide an educational benefit to consumers and prevent consumer harm. This amendment is necessary due to demonstrated failures of prescribers to comply with the automatic-release remedy, and to ensure the separation of eye examination and eyeglass dispensing, which engenders a competitive marketplace for eyeglasses. The Commission is sensitive to any additional burden that this rule change imposes. However, it finds that this amendment maximizes the benefits of comparison-shopping while imposing a relatively small cost. The potential benefit of increasing the number of patients in possession of their prescriptions is substantial: namely, increased flexibility and choice for consumers; increased competition among eyeglass sellers; a reduced likelihood of errors associated with incorrect, invalid, and expired prescriptions, and consequently, improved patient safety; and an improved ability for the Commission to enforce and monitor prescriber compliance.

The confirmation requirement also brings the prescription-release-related provisions of the Rule into congruence with those of the CLR, thereby reducing the confusion and complexity that arise for both consumers and prescribers from having inconsistent requirements for eyeglass and contact lens prescriptions. In addition, because the CLR already obligates ophthalmologists and optometrists to obtain a confirmation and maintain a record, their marginal cost associated with the confirmation requirement in the Eyeglass Rule should be extremely low. Prescribers in compliance with the CLR should already have in place forms, systems, and staff training for prescription release, and should only need to make minor adjustments for eyeglass prescriptions.

The Commission is also amending the Rule to permit prescribers to comply with automatic prescription release via electronic delivery in certain circumstances. In order to do so, the prescriber must identify the delivery method to be used—such as portal, text, or email—and the prescription must be provided in a format that can be accessed, downloaded, and printed by the patient. Further, a prescriber may only opt for digital delivery after obtaining the patient's verifiable affirmative consent, and must maintain evidence of that consent for a period of not less than three years. The Commission is also revising the Rule to clarify that presentation of proof of insurance coverage shall be deemed a payment for the purpose of determining when a prescription must be provided

under 16 CFR 456.2(a). Again, these revisions harmonize the Eyeglass Rule with the existing Contact Lens Rule, which should reduce confusion and complexity. And lastly, the Commission is further clarifying that the term ''eye examination'' in the Rule refers to a refractive eye exam, and is amending that term accordingly.

This final rule summarizes the public comments the Commission received, and explains why the Commission continues to believe that the Rule and its automatic-prescription-release provision are necessary. It also explains the Commission's rationale for adopting the amendments previously proposed in the NPRM, with some minor modifications.[64] Finally, this final rule sets forth the Commission's regulatory burden analyses under the Regulatory Flexibility and Paperwork Reduction Acts, as well as the regulatory text of the final rule.

5. The Eyeglass Marketplace

The retail vision care industry in the United States consists of several types of participants, namely ophthalmologists, optometrists, opticians, and eyewear retailers. The services provided by these different participants often overlap, and different participants often have business affiliations with each other.

Ophthalmologists are medical doctors who specialize in treating diseases of the eye. They are the only eye care professionals who can treat all eye and vision-system diseases, perform eye surgery, prescribe nearly all manner of drugs, and use any treatment available to licensed physicians. Ophthalmologists can prescribe and sell eyeglasses and contact lenses, and their offices may be attached to an associated optical dispensary. Ophthalmologists have typically completed four years of college, four years of medical school, a year of general internship, and three years of specialized hospital residency training in ophthalmology. It is estimated that there are approximately 18,000 active ophthalmologists in the United States.[65] Many ophthalmologists, especially those who specialize in surgery or particular eye conditions, do not sell eyewear, although some do.

Optometrists are doctors of optometry. They have not completed medical school, but have instead completed four years of medical training in optometry school, typically following a four-year college degree. They are trained and licensed to examine eyes, diagnose refractive problems, prescribe and dispense eyeglasses and contact lenses, and detect eye disease.[66] As with ophthalmologists, optometrists can prescribe and sell eyeglasses and contact lenses, and their offices are often attached to, or part of, an associated optical dispensary. A government estimate reports that in 2020 there were some 43,000 active optometrists in the United States.[67] While professional services—such as eye health and refraction examinations—generate significant revenue for optometrists, the majority of optometrists still derive a larger percentage of their income from product sales, including the sale of eyeglasses and contact lenses.[68] According to some estimates, product sales typically account for roughly 45 to 60% of optometrist revenue.[69]

Opticians, also known as dispensing opticians or ophthalmic dispensers, act primarily as retail providers of eyeglasses and contact lenses. Opticians fabricate, fit, adjust, and repair eyeglasses, primarily on the basis of prescriptions issued by optometrists and ophthalmologists. Opticians typically are not authorized to examine eyes to determine prescriptions, but may conduct pupillary distance examinations in order to fit a pair of eyeglasses to an individual. According to one source, twenty-one States currently require opticians to obtain licenses,[70] usually through a State-approved course of study and completion of an exam. The remaining States have no formal requirements for practice, but many opticians in these States complete some form of apprenticeship or training. A 2020 estimate put the number of active opticians in the United States at approximately 73,000.[71] Opticians sometimes co-locate their optical dispensaries with examination offices of optometrists or ophthalmologists and, sometimes, although not always, share revenue from the sale of eyeglasses and contact lenses.

Eyewear retailers are companies and independent merchants that sell glasses. They often are owned by, employ, or associate themselves with, ophthalmologists, optometrists, and opticians. Some are considered independent optical retailers (defined as a retailer with three or fewer locations that has either an ophthalmologist, optometrist, optician, or optical retailer on site [72]), while others may be optical chain stores, such as LensCrafters and America's Best, mass merchandisers, such as Costco and Sam's Club, department stores, such as Macy's, or online entities, such as Zenni Optical and *GlassesUSA.com.*

The overall retail eyeglass market continues to grow in both the number of eyeglass wearers as well as the number of eyeglasses purchased. It is currently estimated that approximately 165 million American adults regularly wear prescription eyeglasses, representing nearly two-thirds of the country's adult population,[73] and the overall market for eyeglass frames and lenses is estimated at $35.6 billion.[74] That represents an 18% increase in value from 2019.[75]

An industry report found that more than half of Americans surveyed between January 10 and March 19, 2023 had had an eye exam within the previous twelve months, and of those who had an eye exam in the previous three months and use eyeglasses, 50% purchased new eyewear.[76] While online eyeglass sales have increased significantly (in just the four years of 2019–2022, online sales of frames and lenses nearly doubled from $1.82 billion to $3.24 billion),[77] roughly four out of five eyeglass purchases still occur in person.[78] Furthermore, of those who have an eye exam and proceed to purchase eyeglasses, the vast majority purchase from their prescriber on the day of the exam.[79] This is often referred to as a prescriber's ''capture rate,'' [80] and remains relatively high for a variety of reasons, even though the average unit price for frames and lenses in 2022 was $360 from independent optical retailers and prescribers compared to just $183 from online eyewear sellers.[81] For many consumers, the convenience of being able to shop at the same location that they have their exam makes it worthwhile to buy glasses from their prescriber, even if they are more expensive. Many consumers also find it advantageous to try on glasses in person and have an expert tell them, based on their prescription and physical characteristics, the pros and cons of particular eyewear.[82] In-person optical dispensaries can also perform precise facial measurements to provide a more personalized fit.[83] Buying from one's prescriber can also make it simpler to have glasses adjusted post-purchase, if necessary.[84] As discussed *infra,* however, some consumers buy eyeglasses from their prescriber because they feel pressured or obligated to, or are unaware that they can take their prescription and shop elsewhere for glasses.

Final Rule Pertaining to the Automatic-Prescription-Release Provision

A. Separation of Examination and Dispensing

Section 456.2(a) of the Eyeglass Rule provides that it is an unfair act or practice for a prescriber to fail to provide to the patient one copy of the patient's prescription immediately after

the eye examination is completed. This provision allows, however, that a prescriber may refuse to give the patient a copy of the patient's prescription until the patient has paid for the eye examination, but only if that prescriber would have required immediate payment from that patient had the eye examination revealed that no ophthalmic goods were required.[85] Sections 456.2(b) and (c) prohibit prescribers from imposing conditions for patients to receive eye examinations and prescriptions. Section 456.2(b) provides that it is an unfair act or practice for a prescriber to condition the availability of an eye examination on a requirement that the patient agree to purchase any ophthalmic goods from the prescriber. Section 456.2(c) provides that it is an unfair act or practice for a prescriber to charge any fee in addition to the examination fee as a condition for releasing the prescription to the patient. Section 456.2(d) provides that it is an unfair act or practice for a prescriber to waive or disclaim prescriber liability for the accuracy of the eye examination or the accuracy of the ophthalmic goods and services dispensed by another seller.

These provisions, often referred to as the automatic-prescription-release requirement (also referred to as the required ''separation of examination and dispensing''),[86] were intended to make it clear that the purchase of eyeglasses is separate and distinct from the act of obtaining an eye exam, and to ensure consumers have possession of their ophthalmic prescriptions so they are able to ''price shop'' for eyeglasses.[87] Absent physical possession of their prescriptions, consumers do not have the ability—and in some cases, the knowledge—to buy eyeglasses wherever they want. Consequently, there is less comparison-shopping, and less incentive for eyeglass sellers to advertise or compete with each other on price or service.[88]

1. Comments and Evidence Regarding the Automatic-Prescription-Release Provision

In response to the Commission's NPRM, and during and after the Eyeglass Rule workshop, numerous commenters addressed the Rule's automatic-prescription-release provision, weighing in on whether (a) prescribers comply with the requirement and consumers receive their prescriptions, and (b) compliance is still necessary and beneficial for consumers.

a. Prescriber Compliance With Automatic Release, and Consumer Receipt of Their Prescriptions

Several commenters stated that even though the automatic-release provision has been in effect for decades, prescribers still do not adhere to this requirement, and thus consumers often do not receive a copy of their prescription. Longtime eyewear consumer and ER workshop panelist Felecia Neilly, for instance, recounted how she has visited various eye doctors at least 50 times over the course of her life, and yet has rarely been handed her prescription without having to request it.[89] ''It just always felt like there was a reluctance [on the part of the prescriber] in getting the complete information needed to fill the prescription, always,'' commented Neilly, adding that if the Rule has been in effect since the '70s, it should be automatic.[90] Neilly added that even when she did request her prescription, she did not always receive the complete copy, thus making it a challenge for her to purchase eyewear.[91]

Likewise, the National Association of Retail Optical Companies (''NAROC''),[92] a trade association comprised of retail optical companies with co-located eye care services (such as LensCrafters, Costco Optical, and Walmart Vision Center), submitted a comment stating, ''We have no evidence to contradict the [previous Commission] finding that prescribers' failure to automatically provide customers with prescriptions at the completion of an eye exam—held to be an unfair act or practice when the Eyeglass Rule was enacted—remains prevalent, and millions of Americans every year are not receiving their eyeglass prescriptions as required by law.'' [93] One Michigan optometrist, Dr. David Durkee, commented that ''the far majority of my colleagues do not engage in such practices [automatic release of prescriptions] out of fear of losing [retail] business.'' [94]

Other members of the ophthalmic community, on the other hand, typically felt that compliance with the automatic-prescription-release provision is routine and common practice. Workshop panelist Dr. Jeffrey Michaels, a Virginia optometrist, commented, ''I think that the automatic compliance with this [prescription release] is so ingrained in optometrists and ophthalmologists that it's just a normal part of their day.'' [95] He noted that in his optometric office, 100% of prescriptions are automatically uploaded to a patient portal ''the very second the prescription is finalized.'' [96] The American Academy of Ophthalmology (''AAO'') volunteered that ophthalmology practices ''have a tremendous track record of compliance with existing prescription release requirements,'' [97] and the Opticians Association of America (''OAA'') and American Optometric Association both noted that online eyeglass sales have been steadily increasing year over year, which they believe indicates that consumers have copies of their prescriptions.[98]

The American Optometric Association also pointed to the fact that, over the past five years, there had been fewer than fifty prescribers warned by the FTC for potential violations of the Eyeglass Rule (such as failure to release prescriptions).[99] The dearth of complaints was also emphasized by other optometrists, such as Dr. Michaels,[100] who said, ''Well, we heard that there were 30-some-odd letters [relating to complaints of non-compliance] out of 55,000 doctors who prescribe,'' and Dr. Scott Sanders, a Mississippi optometrist, who commented, ''The FTC is trying to fix something that is not broken . . . Prescriber compliance is 99.99999%.'' [101] Additionally, the American Optometric Association cited a consumer survey, performed at its behest by NERA Economic Consulting, which purportedly found that only 3 of 1072 eyeglass consumers polled mentioned a possible Eyeglass Rule automatic-release compliance issue, and this, according to the American Optometric Association, indicates that non-compliance is not prevalent.[102]

However, the NERA survey did not specifically address prescription-release compliance,[103] did not directly ask consumers whether they received their prescription from their prescriber, and did not ask consumers if they were aware of their right to their prescription.[104] Rather, the survey focused on where consumers purchased their eyeglasses and contact lenses, and why they purchased from that particular location. When consumers were asked to select the reasons that they purchased from that location, none of the 17 options offered included the availability or unavailability of their prescription (such as ''Because my prescriber didn't give me my prescription.''). The only way for survey respondents to reference prescription availability or unavailability was when asked open-ended questions such as ''In your own words, why did you purchase glasses from [the location that you did]?'' and ''Why did you ONLY consider purchasing glasses from [the location that you did]?'' In response to these questions, three consumers volunteered that they either thought they were required to buy from their doctor, or

that they bought from their doctor because the prescriber would not provide them with a copy of their prescription.[105] Since only three consumers mentioned the lack of prescription release, the American Optometric Association contends that noncompliance must not be an issue.[106]

Though the NERA survey provides some insights discussed later in this document, the Commission does not find the survey to be probative as to whether prescribers are releasing prescriptions (either automatically or on request). The fact that only three consumers [107] proactively mentioned that prescribers had not provided them with their prescriptions could, perhaps, suggest that prescribers typically comply, but cannot be accorded significant evidentiary weight since consumers were not actually asked whether they received their prescriptions.

The Commission also notes, as it has repeatedly in the past, that the raw number of consumer complaints about prescriber non-compliance is an unreliable barometer of prescriber compliance. As discussed in some detail during the Contact Lens Rule review, the Commission's experience has shown that the vast majority of injured or impacted consumers do not typically register complaints with the government, and even fewer are likely to submit a complaint about an FTC rule violation such as a prescriber's failure to release their prescription.[108] This is especially true when—as will be discussed later in this final rule—evidence shows that many consumers remain unaware that they have an unconditional right to their prescription and should be receiving them automatically after each refractive exam. As workshop panelist Neilly commented, the lack of consumer complaints may correlate to the lack of knowledge about the prescription-release requirement ''because people don't even know there's an Eyeglass Rule.'' [109] And even if consumers are aware that they have a right to their prescription and should have received it, they might not know to whom to complain in instances when it wasn't given to them.

Apart from the NERA survey, none of the commenters to the NPRM or Eyeglass Rule workshop supplied new or updated empirical evidence. The extensive evidentiary record, however, includes two previously submitted surveys that shed light on the percentage of patients that do or do not receive their prescriptions. A survey conducted on behalf of Warby Parker by the polling firm SurveyMonkey reported that, of consumers who had purchased eyeglasses within the last three years, 47% of those who saw optometrists and 31% of those who visited ophthalmologists were not automatically provided with a physical copy of their eyeglass prescription.[110] The survey also found that 14% of consumers had to pay their prescriber for a copy of their prescription when they requested a copy at a later time.[111]

Another survey—conducted on behalf of 1–800 CONTACTS by the polling firm Survey Sampling International (''SSI'')—found that only 34% of eyeglass wearers automatically received their prescriptions on the day of their office visit, with another 19% receiving it during their visit, but only after asking for it.[112] According to the SSI survey, some consumers were able to obtain their prescription at a later point by returning to their prescriber's office, but 39% of consumers never received their prescription at all.[113]

It is important to note that these surveys reveal more than simply that many prescribers fail to always comply with the automatic-release requirement. The surveys reveal that, even if prescribers will provide prescriptions *when asked,* a significant percentage of consumers leave their prescriber's office without their prescriptions. Which means that, for the next year or two (until their next eye exam), those consumers might be unable to shop for eyeglasses at an alternative location without having to contact their prescriber and ask for their prescription (and possibly have to pay for it). Although it is possible for other eyeglass sellers to call prescribers' offices and request patient prescriptions, this can lead to delays, and—in sharp contrast to the Contact Lens Rule—there is no legal requirement under the Eyeglass Rule that prescribers comply with requests to verify patient eyeglass prescriptions to third-party sellers.

The two surveys cited herein have been criticized by optometrists and the American Optometric Association, which contend the Commission should disregard their results because the surveys were submitted by retail competitors with a financial stake in the outcome of the rulemaking,[114] and were submitted as part of the FTC's Contact Lens Rule review, and the markets and patient experiences for eyeglasses and contact lenses are not the same.[115] The American Optometric Association cited to NERA's survey and comment for the premise that ''Commission conclusions and decisions regarding regulation in the contact lenses market cannot be presumed to apply to the eyeglasses market.'' [116] As evidence of this dissimilarity, AOA has pointed to the NERA survey finding that eyeglass users are more likely than contact lens users to buy their corrective eyewear from someone other than their prescriber.[117] AOA also noted that because contact lens fittings are not always complete in office due to patients taking home trial lenses to test, surveys of contact lens users may produce imperfect results in that consumers may report that they didn't receive their prescriptions at the end of their exam when, in fact, their contact lens fittings hadn't been finalized and so they weren't actually entitled to receive their prescriptions at that point.[118]

With respect to AOA's first argument, the Commission acknowledges that both Warby Parker and 1–800 CONTACTS have a financial interest in the outcome of the Rulemaking. The Commission recognizes, however, that nearly all commenters have some form of interest in the outcome. And thus, as a general practice, the Commission does not simply disregard data or opinions submitted by interested parties. Rather, the Commission takes into account the financial interests of submitting parties, but also, when possible, examines the underlying data and methodology submitted to gauge a survey's usefulness, and considers factors such as how many people are queried, how the questions are phrased, and whether the surveys are conducted in-house (by the interested parties themselves) or by independent and established third-party polling firms. Lastly, the Commission recognizes that all surveys are likely to have some methodological limitations, and thus the Commission will often decide not to treat any single survey as controlling or dispositive. The Commission is also aware, however, that multiple surveys conducted by different sources at different times with similar results tend to bolster the credibility of each individual survey.[119] In this case, the surveys submitted by Warby Parker and 1–800 CONTACTS are not flawless or immune to criticism, but were performed by reputable third-party polling firms and appear sufficiently reliable based on an examination of their questions and methodology.

As for AOA's assertion that the two surveys were submitted during the Contact Lens Rule review and thus are not relevant to this Eyeglass Rule review, the Commission cannot concur. The contention that the SurveyMonkey survey was submitted during the Contact Lens Rule review is incorrect. While the Survey Monkey data was referenced during the Contact Lens Rule review, it was submitted in response to

the Commission's Eyeglass Rule Advance Notice of Proposed Rulemaking in 2015 and was a survey of eyeglass wearers.[120] As for the SSI survey, that was indeed included as part of a submission during the Contact Lens Rule review, but that particular survey polled *both* contact lens users and eyeglass users about their experiences with prescription release, and distinguished between the two in its results. The SSI results cited above—showing that approximately only 34% of eyeglass wearers automatically received their prescriptions following their refractive eye exam, and 39% did not receive their prescription at all—are results *solely* of eyeglass users' experiences.[121] Any impact or effect caused by a dissimilarity in eyeglass and contact lens markets or experiences would not apply.[122] Thus, criticism that these surveys do not reflect the appropriate target group or take into account differences between eyeglass and contact lens users is misdirected, and these surveys merit the Commission's full consideration.

Moreover, the Commission cannot agree that other surveys detailing how contact lens users have not received their prescriptions do not have relevance in the context of the Eyeglass Rule. As noted above, there are, admittedly, differences in the examination and prescription processes for eyeglasses and contact lenses,[123] but the mandatory prescription-release requirements are similar, and there is little evidence to indicate that prescribers release eyeglass prescriptions in dramatically different numbers than they release contact lens prescriptions. And while the NERA survey indicates that contact lens users are less likely than eyeglass wearers to purchase from someone other than their prescriber, this has little or no bearing on whether consumers are receiving their prescriptions from their prescriber (although it may have some bearing on whether automatic release is necessary or beneficial, as discussed below).

The Commission therefore views the five additional consumer surveys submitted and considered during the CLR review—which found that between 21 and 34% of contact lens users did not receive their prescriptions when they were supposed to—as additional indications that prescriber compliance with prescription release, and overall consumer receipt of their prescriptions (whether contact lens prescription or eyeglass prescription), is sub-optimal.[124]

Furthermore, the Commission notes, as it did in the CLR final rule, that despite multiple opportunities and requests for comment since 2015, the Commission has yet to locate or receive any reliable consumer-survey data rebutting or contradicting the prescription-release data in the record for either contact lens users or eyeglass wearers, or establishing, other than anecdotally, that consumers consistently receive their prescriptions from prescribers as they are supposed to under the applicable FTC rule.[125] Based on the evidence in the record, it is thus the conclusion of the Commission that tens of millions of American consumers in need of corrective vision wear are not receiving their eyeglass prescriptions after visiting their prescriber each year.[126]

b. Whether the Automatic-Release Provision is Still Necessary and Beneficial for Consumers

Having determined that prescriber compliance with the Rule's automatic-release provision is deficient, and that many eyeglass consumers do not receive their prescriptions, the Commission next considers the impact of this deficiency, and whether such failure remains an unfair act or practice in need of remedial action, as originally determined by the FTC when it formulated the Rule.[127] Again, opinions on the need for, and benefit from, automatic prescription release, varied significantly in the comments received by the Commission. NAROC, for instance, opined that the automatic-release requirement—when complied with—provides a substantial benefit to consumers as it enables comparative shopping, and added there is "no evidence to support a conclusion that the automatic release provision is no longer needed; to the contrary, the substantial expansion of consumer choice in recent years is strong evidence that this requirement has helped consumers and that it is more necessary than ever." [128] In a subsequent comment, the organization added, "There is widespread agreement that the Commission should continue the 'automatic-prescription-release requirement' for eyeglasses," but evidence demonstrates that not all consumers are aware they should receive their prescription automatically, and some prescribers are not providing it.[129] Wallace Lovejoy from NAROC opined during the workshop that, while some people have their mind made up before they go to the eye doctor, and want to get an exam and buy glasses at the same time and place, "there's a significant number of people who get an eye exam and wait to shop and go somewhere else. It's useful to have the prescription released and I would agree that the automatic release seems to make the most sense." [130]

Some other commenters endorsed this view. 1–800 CONTACTS, for example, stated, "automatic prescription release is critical to promoting consumer choice and competition in the market for prescription eyewear," and "prescribers are unlikely to comply with their automatic release obligations absent a credible threat of enforcement and fines. Prescribers have a strong financial incentive to withhold a prescription to discourage comparison shopping and pressure patients to purchase lenses inhouse." [131] One anonymous commenter submitted, "Being able to have a prescription in your hands as soon as your examination is done would be very beneficial to a lot of people for many reasons. This would allow people to shop for different resources for their lenses and find the best price for them. It shouldn't be a hassle for someone to get their prescription . . ." [132] Likewise, Sara Brown, from the advocacy organization Prevent Blindness, stated during the workshop, "I think not having [automatic release] would make a major impact on patient access." [133] She noted that millions of Americans have difficulty affording eyewear, and not having information that makes it easier for them to comparison-shop would be detrimental.[134]

On the other hand, some commenters felt that, irrespective of whether prescribers automatically release prescriptions, prescribers no longer withhold prescriptions if directly asked for them. Dr. Arlan Aceto, a Connecticut Professor of Ophthalmic Design and Dispensing, for example, said during the workshop that he and his optician colleagues have not had a problem obtaining prescriptions from prescribers in instances where the patients failed to bring them,[135] and panelist Dr. Artis Beatty, a North Carolina optometrist, commented that oftentimes patients are issued a prescription but fail to have it on hand when they need it.[136] These comments suggest there may be less need for, and consequently less benefit from, the automatic-release requirement.

The most extensive criticism of the automatic-release requirement came from workshop panelist and NERA consultant Dr. Andrew Stivers,[137] who submitted a survey and lengthy comment that challenged the underlying basis for the requirement, noting, "It's not just how much compliance, it's how impactful that compliance or lack of compliance is on consumers." [138] According to Dr. Stivers, the relevant issue is whether, and how much, consumers have their eyeglass-shopping options curtailed by failure of

prescribers to automatically provide patients with their prescriptions, since some consumers would not have shopped elsewhere even if they had received their prescriptions, and some consumers might have been offered their prescription and declined.[139]

Dr. Stivers argued that the Rule's automatic-release provision was meant to address a lack of competition resulting from market conditions that do not exist in today's ''information rich, dynamic market,'' and thus the Commission should reexamine whether automatic release still benefits consumers in light of two fundamental changes that have occurred in the market.[140] First, said Dr. Stivers, mass merchandisers and wholesale clubs have ''transformed'' the eyeglass shopping experience, and second, internet search and shopping has created a new, competitive channel for eyewear.[141] The original rule's finding of unfairness, according to Dr. Stivers, rested on a context of advertising restrictions [of eyeglass sellers], State restraints on trade, limited shopping options for consumers, and overt prescription-withholding behavior by prescribers, that rarely exists today.[142] Therefore, he contended, the Commission's ''determination of unfairness from 40 years ago cannot be presumed to apply today and thus there is no rationale or basis for new regulation in the prescription eyeglass market.'' [143] Furthermore, Dr. Stivers explained, ''Today, consumers can choose to shop before getting an exam, which increases incentives to provide information and increases competition in ways that the Commission of 1978 could not imagine,'' [144] and this change has made automatic release less likely to generate substantial benefit. And absent such benefits, per Dr. Stivers, lack of compliance with automatic release cannot be the basis for a determination of unfairness, or the proposed changes to the Rule.[145]

As evidence of the altered market and changed consumer behavior, both Dr. Stivers and the American Optometric Association pointed to the NERA survey, which found, among other things: that consumers have numerous options for eyeglass purchases; that one in three eyeglass purchasers consider alternatives to where they ultimately purchase; that consumers purchase glasses from alternative channels such as retail chains and online stores more than 50% of the time; that consumers choose purchasing locations for a variety of reasons (including price, service, familiarity, location), with convenience valued over all others; and that eyeglass purchasers are more likely than contact lens users to know about and consider alternative purchasing channels.[146] According to the American Optometric Association, these results demonstrate that consumers are aware of, and utilize, their eyeglass-purchasing options, and that there is a ''well-functioning and competitive market for eyeglasses,[147] thus calling into question the ''underlying premise that more must be done to encourage competition and choice in the eyeglass market.'' [148] The AOA further quoted Dr. Stivers' NERA report for the premise that the survey results ''do not support or uncover any systemic market failures requiring additional rulemaking that would benefit consumers.'' [149]

2. Analysis of Evidence Regarding Failure To Release Prescriptions

Having considered the evidence in the record—including the written submissions and workshop comments, empirical surveys of prescription-release and consumer knowledge, ongoing and historical patterns of consumer complaints and anecdotal reports, and other relevant evidence submitted during the CLR review (and the Commission's determinations in that regard), along with the industry's long-documented history of failing to release prescriptions in order to capture consumer eyewear purchases in-house—in context of the intent, purpose, and history of the Eyeglass Rule, the Commission finds that, regardless of the increased information and availability of purchasing alternatives in today's eyeglass marketplace, it remains an unfair act or practice for prescribers to fail to release a prescription to consumers. The practice denies consumers the ability to effectively use the information available, and continues to result in substantial economic loss and lost opportunity costs due to an impaired ability to comparison-shop for eyeglasses. The Commission finds that such conduct remains pervasive, is likely to cause consumers substantial injury, is not outweighed by countervailing benefits that flow from such conduct, and cannot reasonably be avoided by a substantial number of consumers.

The Commission does not dispute that mass merchandisers, wholesale clubs, and internet search and shopping have dramatically altered the overall retail landscape for eyeglass shopping. But these changes relate primarily to aspects of eyeglass shopping that occur *once a consumer already has a prescription in hand.* The initial experience of having an eye exam and obtaining a prescription remains much the same as it was when the Rule was created in that a consumer still has to be examined by an optometrist or ophthalmologist in order to obtain a prescription with which to buy eyeglasses. While Dr. Stivers has suggested that consumer emphasis on convenience when deciding where to buy glasses suggests they ''likely consider both where to get an exam and where to shop for glasses ahead of time for an efficient shopping experience,'' [150] the NERA survey does not reveal to what extent this pre-exam shopping occurs, and Dr. Stivers acknowledged that he was unaware of any survey evidence establishing that many consumers comparison-shop *before* choosing their eyecare provider.[151] The Commission is not aware of any empirical evidence showing whether pre-exam shopping is prevalent, nor—even if it is—whether that means consumers no longer want or need a copy of their prescriptions. It also would not aid consumers who are hesitant to ask for their prescription, or feel pressured to buy glasses from their prescriber—whom they may view as a respected medical ''authority figure'' [152]—even if consumers' pre-exam intention was to take their prescription and buy glasses elsewhere. Furthermore, even if consumers decide pre-examination that they want to buy glasses from their prescriber, and thus do not need a copy of their prescription, they could still be harmed by a prescriber's failure to release their prescription if, at a later date, those consumers want to purchase additional or replacement eyeglasses, and lack a copy of their prescription. In addition, as Dr. Michaels noted during the workshop, many consumers go in for an eye exam every year without any intention of buying glasses,[153] only to learn during their exam that they now need vision correction, or that their vision correction has changed.

Dr. Stivers is correct in that not all consumers necessarily benefit from receiving a copy of their prescription. Some consumers prefer buying glasses from their prescriber for convenience, or trust the expertise of their prescriber's staff to help fit them with the most appropriate eyewear. Some consumers simply favor the prescriber's frame options. But in trying to calculate how much consumer eyeglass-shopping options are, or are not, curtailed by the failure to receive their prescriptions, the Commission faces a dilemma in that consumer decisions and preferences with respect to buying eyeglasses are impacted by the fact that so many consumers are not given a copy of their

prescription. Widespread lack of automatic prescription-release renders it difficult, if not impossible, to determine what percentage of consumers opted to buy glasses from their prescriber because they favored the prescriber's convenience, selection, and expertise, and what percentage opted to buy from their prescriber because they did not have a copy of their prescription, did not feel comfortable asking for one, or did not even know that they could. In sum, it is unlikely that consumers' current conduct and preferences regarding where they purchase eyeglasses can fully establish how much is or is not to be gained from improving compliance with the Rule's automatic-prescription-release requirement because current consumer conduct and preferences are colored (and perhaps unfairly influenced) by current prescriber non-compliance with automatic prescription release.[154]

Ultimately, it is the Commission's view that, regardless of the widespread availability of information and alternative opportunities to buy eyeglasses, not possessing a prescription continues to impede consumer options and comparison-shopping for eyeglasses. By many accounts, the Eyeglass Rule, and the removal of State restrictions, have played a major role in significantly altering and improving the information and alternatives available to eyeglass consumers.[155] But possession of the prescription remains the key that unlocks the door to this altered and improved marketplace. As workshop panelist Lovejoy commented, ''[t]he ability to advertise doesn't matter if you don't get a copy of your prescription.'' [156] The Commission noted this when promulgating the Eyeglass I Rule, declaring that the injury arising from failure to release prescriptions is clear in that consumers are denied ''the ability to effectively use available information, and inhibit the functioning of the competitive market model,'' and therefore, the failure to release prescriptions immediately after the eye examination is completed is, in and of itself, an unfair act or practice.[157] This holds true irrespective of other changes and improvements in the eyeglass marketplace.

Furthermore, it remains evident that many consumers are still not fully knowledgeable about their unconditional right to their prescriptions, and thus their ability to avoid or self-remedy harm arising from not possessing their prescriptions. While prescribers have often asserted that consumers are well-aware of their purchasing options,[158] the Commission continues to receive communications evidencing that some consumers do not even realize they are entitled to their prescriptions.[159] As workshop panelist Brown noted, ''there was a question that was [asked] earlier about why don't patients ask for this information? Because they don't know.'' [160]

Indeed, some surveys have found that consumer awareness of prescription rights remains less than ideal. According to a 2015 survey—performed on behalf of 1–800 CONTACTS—49% of prescription eyeglass wearers are not aware that they have a right to receive their eyeglass prescription, and 51% are not aware that their eye exam provider cannot charge for their eyeglass prescription.[161] Multiple consumer surveys reviewed during the Contact Lens Rule review reinforce this by showing that a high percentage of contact lens users (46 to 60%, according to submitted data) still do not realize they are entitled to receive their contact lens prescription,[162] and it is probable that many of these consumers are also unaware they are entitled to their eyeglass prescription. The percentages of consumers unaware of their rights have been found to be even higher for traditionally underserved groups such as African Americans and Hispanics,[163] and due to less English language proficiency, non-native speakers may also be less likely to speak up and request their prescription—even if they know they can—if it is not automatically provided by their prescriber. There are also significant numbers of consumers each year who are new to the need for corrective eyewear, and thus have little experience with eye examinations, including whether they should receive a copy of their prescription. Therefore, the Commission concludes that while the NERA survey may suggest that some percentage of consumers is now aware of their option to obtain eyeglasses from a source other than their prescriber, the number of consumers fully informed of their prescription rights, and of their ability to take their prescription and shop elsewhere, remains sub-optimal.

Furthermore, as noted previously, the Commission is also aware that some consumers know they have the right to their prescription but may feel pressure to purchase from their prescriber, or feel uncomfortable asking for their prescriptions since it signals to the prescriber that they plan to purchase eyewear at a different location.[164] Consumers often like and respect their prescribers, and are hesitant to do something that might be perceived as disloyal.[165] Other consumers may be reluctant to acknowledge to their prescriber that they are cost-conscious and have concerns about their ability to afford eyewear at the price charged by their prescriber.[166]

After considering all of the evidence, the Commission concludes that when prescribers do not release prescriptions, it still harms consumers and puts them at a disadvantage in the marketplace, and thus continues to require remedial regulation.

B. The Remedy for Failure To Release Prescriptions Remains the Automatic-Release Requirement

In fashioning a remedy for an unfair act or practice, the Commission has wide latitude, and need only show a ''reasonable relation'' between the unfair act or practice and the remedy.[167] When, in the past, the Commission has considered how to remedy failure to release, it evaluated a variety of options, including, among other things, release-upon-request, offer-to-release, and increased signage and consumer education, and yet the Commission repeatedly determined that the most effective remedy is to require automatic release of prescriptions regardless of whether a consumer requests one following an examination. The Commission still finds this to be true and concludes that automatic release as a remedial measure continues to have a reasonable relationship to the unfair act or practice of withholding prescriptions. The Commission continues to find that automatic release remains the optimal remedy for prescribers' failure to release prescriptions because absent the requirement: (1) even more doctors would not always provide patients with their prescriptions, as demonstrated by surveys indicating that they often do not presently, even though required to do so; (2) large numbers of patients would not ask for their prescriptions due to a lack of awareness of their unconditional right to their prescription; (3) some patients would be reluctant to ask for their prescriptions (particularly underserved groups); and (4) release-upon-request would inappropriately place the burden on the consumer. Release-upon-request would also be difficult for the Commission to enforce because, absent documentary evidence, it would likely turn into a debate as to whether a patient did or did not ask for their prescription.

While the Commission concludes that automatic prescription release remains the best remedy for the unfair practice of failure to release, it is also evident from the record that the remedy has not fulfilled its potential. The remedy has been in effect for over forty years, and yet a significant number of consumers are still not receiving their

prescriptions. The Commission therefore turns next to examine ways to improve the automatic-release remedy via amendments and clarifications to the Rule.

C. Commission Determination To Update the Rule To Clarify Requirements for Prescription Release

One prescription-release issue that is periodically brought to the attention of the Commission relates to the timing of the Rule's required automatic prescription release—*i.e.,* at what point that release must occur during a patient's office visit to their prescriber. The Rule, as presently written, states that it must occur ''immediately after'' the eye examination is completed, but that a prescriber may withhold the prescription until the patient has paid for the examination if the prescriber also requires immediate payment from patients for whom the examination revealed that no ophthalmic goods were required.[168] The words ''immediately after,'' however, have not previously been discussed or clarified in detail, and some non-prescribing eyewear sellers have raised concerns that prescribers who also sell eyewear have a tendency to lead patients into the prescriber-owned optical dispensaries and offer to sell them eyeglasses immediately following an examination and *before* providing their patients with their prescriptions.[169] Some prescribers and optometric consultants even recommend such an approach as a way of increasing customer ''capture rate.'' [170] When this occurs, the prescription copy is only released to the patient after they have already shopped for eyeglasses, when they are checking out and paying their total bill (a bill that would include the cost of the examination, as well as the cost for new glasses).

As noted during the Eyeglass Rule workshop, the Commission believes that prescribers holding onto a prescription until after they have already made an eyeglass sale runs contrary to both the letter and purpose of the Rule.[171] The letter of the Rule is clear. The prescriber must provide the prescription ''immediately after the eye examination is completed.'' [172] The policy of the Rule, as it relates to the timing of prescription release, is also clear in several ways. First, the regulatory history makes evident that two of the foundational purposes of the Rule have been to (a) separate the eye examination from the purchase of eyeglasses, and (b) ensure that consumers have possession of their ophthalmic prescriptions so they are able to comparison-shop for glasses.[173] The singular fact that eyeglass prescribers sell what they prescribe [174] (a practice that some members of Congress have called an ''inherent conflict of interest'') [175] already blurs the distinction between eye examination and the purchase of eyeglasses, and when a prescriber offers to sell consumers glasses before releasing their prescriptions, it blurs that distinction even further.

Additionally, as noted at the time the Commission first created the Rule, the prescription itself is ''the means by which consumers can comparison shop.'' [176] Absent a prescription in hand, (whether that be physically in hand, or digitally uploaded to a patient portal and readily accessible to the consumer), consumers might not even realize they have an option to comparison-shop for their glasses. They may be confused, or misled, into thinking that the examination and purchase of eyeglasses are part of a unitary, or ''total vision care'' process, a once-common practice in the ophthalmic community in which the sale of eyeglasses was tied to the examination, and by scheduling an eye exam, a patient was essentially committing to purchase eyewear (if they needed it) from the same location at which they were examined.[177]

While there is nothing inherently wrong with consumers buying eyewear from the prescriber who conducted their refractive examination, and there may be benefits to it,[178] the Eyeglass Rule was created because the Commission determined it was an unfair practice when consumers did not at least have the option to buy glasses from someone other than their prescriber. The Commission believes it is problematic if patients are confused about whether they have, or do not have, the option to separate the examination process from the commercial purchase of eyeglasses. And even if patients recognize that by coming for an examination they are not committing to buy glasses from their prescriber, they may feel pressure to do so, a pressure heightened by the fact that until they possess a copy of their prescription, they cannot shop at any other locations.

Lastly, the practice of not providing prescriptions until after the patient has selected eyeglasses can lead consumers to believe that they are receiving their prescription because it comes with the eyeglasses, or to believe that what they are paying for is their prescription copy, when, in fact, they are paying for their examination, and the prescription copy is free per the Rule. The Commission periodically receives complaints from consumers who believe they were charged for their prescription when, in actuality, consumers were charged for their examination, but the confusion arose because the prescriptions were only handed over after the consumers paid.[179]

Ultimately, of course, the consumer is free to buy eyeglasses from their prescriber. Many consumers prefer to do so,[180] and the Commission has no interest in preventing this. But to fully realize the intent and purpose of the Rule, consumers must have the unfettered option to buy from wherever they choose, and must not be confused or misled about their unconditional prescription rights, and whether their examination is connected to the purchase of glasses. To achieve this, consumers must have the prescription in their possession—whether physically or digitally—as soon as the prescription is finalized and before they are offered eyeglasses for sale.

For this reason, the Commission is revising § 456.2 to clarify that the prescription must be provided after the refractive eye examination is completed ''and before offering to sell the patient ophthalmic goods.'' This does not mean that a patient is not permitted to walk through a prescriber's eyeglass dispensary, or browse available eyeglass frames, before receiving a copy of their prescription. Nor does it cancel the Rule provision that a prescriber may make consumers pay for their exam before releasing their prescriptions, so long as that prescriber would have required immediate payment from the patient had the examination revealed that no ophthalmic goods were required.[181] But it does mean that if a prescriber (or the prescriber's staff) is ready and willing to sell that patient eyeglasses, the prescriber must release a copy of the prescription to the patient before moving forward with any aspect of the sale. If the prescription is released electronically (with the patient's consent), it must be uploaded to a patient portal or transmitted to the patient via email or text, and thus fully accessible to the patient before that patient is offered an opportunity to purchase eyewear. It also means that if the prescriber makes a medical determination to not write and release a prescription to a patient,[182] or withholds a prescription pending payment by the patient for the examination, the prescriber may not offer to sell that patient eyeglasses at that time.[183] The prescriber may only offer to sell the patient eyeglasses after the prescription is released.[184]

Furthermore, per the discussion above regarding automatic prescription release, the Commission still concludes—as it concluded multiple

times in the past—that the burden of ensuring prescriptions are released must rest on the prescriber and not the patient.[185] And thus automatic release must occur regardless of whether or not the prescription is requested by the patient. This has always been the intent of the Rule—and is already reflected in the existing requirement that the patient's prescription must be provided ''immediately'' after the examination—but, unlike with the Contact Lens Rule, it has never been specifically stated in the Rule text. To ensure that is clear, and to bring the Eyeglass Rule prescription-release requirement into concordance with that of the Contact Lens Rule, thereby simplifying compliance, the Commission is further revising § 456.2 to clarify that the prescription must be provided ''whether or not the prescription is requested by the patient.'' This does not mean that a prescriber must force the prescription on a patient who does not want a copy. The patient is always free to refuse a copy, in which case the prescriber should merely note that in their files. But prescribers and their staff must at least attempt to give the patient a copy of the prescription, rather than merely offer to provide a copy, or just wait and see if the patient asks for it.

Neither of these clarifications alter the burden on prescribers, they merely make clearer what is already required by the Rule, and what should already be occurring in practice.

III. Final Rule Pertaining to Affirmative Consent to Digital Delivery of Eyeglass Prescriptions

A. Digital Delivery Option in the NPRM and the Basis for Such Amendment

As discussed above, § 456.2(a) of the Eyeglass Rule provides that it is an unfair act or practice for a prescriber to fail to provide to the patient one copy of the patient's prescription immediately after the eye examination is completed. The Rule, as currently codified, does not expressly permit electronic delivery of prescriptions as a means for automatic prescription release. In the NPRM, the Commission considered technological advances, such as the proliferation of patient portals, along with prescriber-to-patient communication via email or text, that could facilitate the transmission of the prescription to the patient once the eye exam is completed, and thereby enhance prescription portability.[186] The Commission opined that permitting electronic delivery in certain circumstances could provide benefits to consumers, and proposed amending the Rule to permit such delivery after the prescriber obtains the patient's verifiable affirmative consent.[187]

To ensure that patients are able to make an informed choice about whether to agree to electronic delivery, the proposal required that the prescriber identify the particular delivery method to be used, such as portal, text, or email, and the prescription would need to be provided in a digital format that can be accessed, downloaded, and printed by the patient.[188] This could enable patients to have easier access to and use of a prescription, reduce requests for additional copies and calls from sellers to verify a prescription, and potentially lower costs while providing flexibility for prescribers and patients. To aid Commission enforcement efforts to monitor compliance with the Rule, the Commission proposed that prescribers be required to keep a record or evidence of a patient's affirmative consent for a period of not less than three years.[189]

This proposed amendment to the Eyeglass Rule mirrored a change made to the CLR in 2020, allowing prescribers to satisfy the CLR's automatic-release requirement by providing the patient with a digital copy of his or her contact lens prescription in lieu of a paper copy, provided the prescriber first identified the specific method of delivery to be used and obtained the patient's verifiable affirmative consent to this method of delivery.[190] In the CLR SNPRM, the Commission noted that providing patients with an electronic copy of their prescriptions could enable patients to share prescriptions more easily with sellers when purchasing eyewear, and this in turn could potentially reduce the number of patient and seller requests for verification or additional copies of the prescription. To enhance portability, the Commission noted that electronic delivery methods should allow patients to download, save, and print the prescription.[191]

B. Comments on the NPRM and Discussion at the Workshop Regarding the Proposal To Permit Digital Delivery of the Eyeglass Prescription With Patient's Affirmative Consent

In addition to seeking general comments on the benefits and burdens of this proposed change, the Commission invited public comment on whether prescribers would choose to satisfy the automatic-prescription-release requirement through electronic delivery if permitted by the Rule, and whether patient portals, emails, or text messages would be feasible methods for the provision of digital prescription copies. The Commission also asked what other technologies are available that could be implemented to improve prescription portability, and thereby increase benefits and decrease burdens related to prescription release.

1. Comments About the Benefits and Burdens of the Proposed Affirmative Consent to Digital Delivery Provision

The Commission received generally positive feedback on the proposed digital delivery provision, with commenters noting that it would allow the Rule to keep pace with technology and it would help patients understand their rights under the Rule.[192] The AOA opined that this would be a ''commonsense update'' that would ''ensure [ ] that the FTC's regulatory language is keeping pace with updates in technology.'' [193] NAROC suggested that the ''impact of allowing a prescriber to release the [prescription] in digital form will be to increase patient understanding of their rights, because every instance of receipt of a digital copy of the prescription will require affirmative consent to such delivery and will help build an expectation on the part of consumers that they are entitled to the prescription.'' [194]

Other commenters who objected generally to the burden of other proposed changes, including the proposed confirmation requirement, pointed to the widespread transition to electronic health records (''EHRs'') or electronic medical records (''EMRs'') and argued in favor of prescription availability via a portal as being wholly sufficient to address the FTC's concerns about prescription release, and ensure patient access to their prescription.[195] Another commenter, an ophthalmic technician, expressed concerns over the added recordkeeping burden from the proposed confirmation requirement, noting that their practice already has a record of the prescription on file for the patient and that most EHRs track when prescriptions are printed out.[196]

Although having a prescription available on file upon request (either in a paper record or accessible through an online portal) would not satisfy the automatic-prescription-release requirement, the Commission considered the proliferation of patient portals and EHR systems in the NPRM, and discussed both the potential benefits available to consumers, prescribers, and sellers through the use of such systems, as well as the possible drawbacks. On the benefit side, a patient using a portal could have direct access to a current, exact copy of the eyeglass prescription, reducing the chance of errors caused by an inaccurate or expired prescription, and the need for follow-up corrections by prescribers.[197] The use of health information

technologies, such as patient portals, could also reduce costs for prescribers, patients, and sellers by making it easier and more efficient for patients to obtain and share eyeglass prescriptions, and by reducing the number of requests placed on prescribers to verify prescription information or provide duplicate copies of prescriptions. In addition, it is likely that patient portals do not raise the same privacy concerns expressed by some prescribers about sharing patient prescription information with third parties because patient portals can enable the secure sharing of such information directly with the patients themselves, who may then provide the prescription to the third-party seller.[198]

The Commission is aware, however, of potential drawbacks in relying on electronic records exclusively for prescription delivery. In the recent CLR rulemaking, commenters expressed concerns that: (1) online portals are not widely used; (2) patients may not always be aware of the portal or may have difficulty accessing or printing documents online; and (3) some prescribers and patients prefer paper copies.[199]

Recent data shows that the number of prescribers offering patients access to their health information through an EHR system or patient portal has increased significantly. A survey from 2022 found that nearly 3 out of 5 U.S. adults reported they were offered and accessed their online medical record or patient portal, which was a 50% increase since 2020.[200] Patients also increased their use of apps to access online medical records, and patients using apps to view their online medical records accessed them more frequently than those who used only a web-based method.[201] Available information suggests, however, that disparities still exist in the availability and use of patient portals among some populations, including older patients.[202] A variety of factors may influence the limited portal use in such populations, including lack of access to technology and personal preference, and some groups (including Black and Hispanic individuals) may be less likely to report being offered access to a portal in the first place, suggesting a need for improvement in provider communication and clinic practices.[203] In addition, of those patients who access their online medical records through an app or web-based patient portal, relatively low numbers are downloading and transmitting their health information, which ''suggests a need for further education of both individuals and providers on these features,'' according to the Office of the National Coordinator for Health Information Technology.[204]

2. Comments in Favor of Allowing Prescribers to Choose Whether To Offer Digital Delivery of Prescriptions

A number of commenters supported making the decision to offer digital prescription delivery—either at all or using particular delivery methods—a voluntary one on the part of prescribers.[205] For example, NAROC approved of not requiring prescribers to provide prescriptions electronically, but noted that some prescribers may already be complying with the CLR prescription-release requirement through digital prescription delivery and, for these prescribers, permitting compliance with the Eyeglass Rule in the same manner would create efficiencies for prescribers' offices.[206] Some commenters also suggested that compliance with the automatic-release requirement is made easier by the digital delivery option due to the ease of emailing either the prescription itself or a link to a portal on which the prescription is available.[207]

One anonymous commenter questioned whether portals would need to be configured to require a patient signature whenever a patient accesses the portal to print a prescription.[208] Workshop panelist Dr. Michael Repka, Medical Director for Governmental Affairs at the AAO, described an intricate process his office undertakes to attempt to obtain a signature of prescription-receipt from a patient who accesses their contact lens prescription via a portal.[209] The Commission, however, notes that this represents a misunderstanding of the CLR's digital-prescription-delivery provision, which specifically removes the signature-requirement when prescriptions are digitally delivered, and likewise, confirmation signatures would not be required when prescriptions are delivered digitally under the amended Eyeglass Rule. Using a digital delivery method to comply with § 456.2 would relieve the prescriber of having to collect a signature from the patient confirming their receipt of the prescription.[210] Under the new § 456.4(a)(1)(ii), prescribers using a digital delivery method would not need to request that the patient sign a separate statement confirming receipt of the prescription.[211] Instead, prescribers would need merely to retain evidence that the prescription was sent, received, or made accessible, downloadable, and printable, which commenters have acknowledged EHRs generally are configured to do.[212] Similarly, an emailed or texted prescription should create its own record of transmission, and therefore involve minimal burden to the prescriber.

Other commenters shared that the existence of electronic health records in a medical practice does not automatically result in a patient having access to their prescription on a portal,[213] and that some prescribers may be using simplified websites to provide prescription delivery without giving a patient full access to all of their exam information, in order to make access simpler for patients.[214] Some prescribers may be hesitant to offer EHR systems because of concerns about cost, functionality, and data security.[215] For these reasons, the Commission believes it is important to allow prescribers the choice of whether to offer a digital delivery method to comply with the automatic-release requirement in the Eyeglass Rule, rather than mandating it.[216] The final rule neither compels prescribers to offer prescription-release by an electronic method nor requires that patients accept their prescription by electronic method when offered by the prescriber.

3. Comments Regarding Giving Patients a True Choice as to How To Have Their Prescription Delivered

Some commenters expressed concerns that not all patients may benefit from electronic access to their prescription, both as a result of limitations in broadband capabilities and due to differences in patient needs and health literacy that might affect patients' ability to access their prescriptions online.[217] Commenters asserted that patients must retain the ability to receive a paper copy of their prescription.[218] The challenges in educating patients on how to access their prescription on a portal were also noted by Workshop panelist Dr. Stephen Montaquila, a Rhode Island optometrist, who acknowledged that some patients prefer a paper copy.[219]

Other commenters described their experience with patients frequently losing or forgetting their prescription when going to order glasses. The commenters pointed to the remedy of having the prescription available on the portal, or noted that the patient could request a duplicate copy of the prescription or the seller could call to verify a prescription with the prescriber, and argued that these solutions should resolve concerns over prescription access and portability.[220] The Eyeglass Rule does not, however, require prescribers to respond to seller verification requests or provide duplicate copies of prescriptions, as is required by the CLR. The Commission also remains concerned about the

ongoing lack of understanding and limitations in patient access to portals or other health technology, and concludes that requiring all patients agree to digital delivery is not appropriate at this time.[221]

C. Additional Discussion and Commission Determination Regarding the Affirmative Consent to Digital Delivery

1. Final Rule Determination To Add Option for Digital Delivery of Eyeglass Prescriptions

The Commission agrees with the comments in favor of permitting, but not requiring, electronic delivery of the eyeglass prescription, provided consumers are informed about, and consent to, the delivery method. Based on its review of the record, the Commission is hereby modifying the Rule to require that prescribers provide patients with a copy of their prescription either (a) on paper or (b) after obtaining verifiable affirmative consent to digital delivery, in a digital format that can be accessed, downloaded, and printed by the patient. Obtaining such consent to digital delivery will require the prescriber to identify the specific method or methods of electronic delivery that will be used, and collect the patient's affirmative consent to the specified delivery method in a way that is verifiable, *i.e.,* can later be confirmed, such as through a signed consent form or electronic approval (as discussed below). Prescribers must then keep evidence of a patient's affirmative consent for a period of not less than three years. Patients who decline to consent, for any reason, must be given a paper copy of their prescription. Likewise prescribers who prefer to provide paper copies to their patients need not offer an electronic option.

Importantly, providing the option for digital delivery does not alter the prescriber's obligation to automatically provide the eyeglass prescription regardless of whether a patient requests it, but merely the method by which the patient will receive the prescription. It also does not impact the timing of prescription delivery. Whether the patient consents to digital delivery or opts for a paper copy of the prescription, prescribers must provide the prescription immediately after the eye examination is completed. As discussed above, it is critical that the patient be in receipt of their prescription before a prescriber offers to sell them eyeglasses, so as to ensure the separation of examination and dispensing under § 456.2, and to ensure that patients are able to freely comparison-shop for eyeglasses.[222] Accordingly, if a patient consents to the prescriber emailing or texting the prescription, or placing it on a portal, this method of delivery must take place at the end of the examination, and before the prescriber or prescriber's staff attempts to sell the patient eyeglasses.

The digital delivery option includes a recordkeeping provision, but, as the Commission concluded in the CLR final rule, the burden of retaining a record of patient consent should be minimal, ''since prescribers who opt for electronic delivery of prescriptions will, in all likelihood, obtain and/or store such consent electronically.'' [223] As detailed below, the Commission is modifying the proposed rule text to expressly recognize that consent to digital delivery can be obtained either on paper or in a digital format. In any case, obtaining and storing a record of patient consent should not take longer than obtaining and storing a patient's confirmation of prescription release,[224] and prescribers who use digital delivery to provide the prescription would not need to request that the patient acknowledge receipt of the prescription by signing a separate confirmation statement. Finally, offering a prescription in a digital format would be an option for prescribers, but is not mandatory, so prescribers can choose not to offer electronic delivery of prescriptions if they find the recordkeeping provision overly burdensome.[225]

One related issue raised by some commenters is whether prescribers could obtain a patient's consent to digital delivery a single time rather than at every visit, and only need to obtain consent again if the prescriber changes their digital-delivery policy, a practice permitted by the Department of Health and Human Services with regard to its Notice of Privacy Practices signed-acknowledgement requirement.[226] Dr. Montaquila, for one, noted that allowing prescribers to obtain consent just once, when the patient first visits a practice, would lessen the Rule's burden for prescribers and yet still allow for the patient to be educated, opt-in knowingly, and have the opportunity to withdraw consent at a later time.[227]

The Commission notes that the Rule, as proposed in the NPRM and hereby adopted, does not specify that the verifiable affirmative consent must be obtained at every appointment. Instead, it requires the prescriber to provide the prescription on paper or ''in a digital format that can be accessed, downloaded, and printed by the patient, after obtaining verifiable affirmative consent, pursuant to § 456.3.'' The Commission clarifies that if the prescriber identifies the digital method that will be used for prescription delivery and allows the patient to choose whether to consent to that delivery method (rather than making it the default), then allowing patients to sign an authorization just once would satisfy the Rule's requirements. But as noted by the commenters, if the prescriber changes their digital delivery policies (for example, by switching from email delivery of prescriptions to access on a portal), they would need to re-obtain the patient's digital delivery consent. Additionally, prescribers should allow a patient to revoke consent at any time.

Further, the Commission believes that prescribers could use a single document to obtain verifiable consent to digital delivery of both contact lens and eyeglass prescriptions so long as it is clear to consumers that they are consenting to digital delivery for both. Ensuring that patients are aware of where to locate their prescriptions, and how to access them, should be a priority for prescribers, so regular re-education on these points is appropriate.[228]

Furthermore, § 456.3(c) requires that prescribers maintain records or evidence of a patient's affirmative consent for a period of *not less than* three years. It is important to note that if a prescriber intends to provide digital delivery to a patient for more than three years following that patient's signed consent, they should not dispose of the consent record after three years. Rather, the prescriber should retain the patient's signed consent for as long as the prescriber relies on it to authorize digital delivery of the prescription, plus another three years.[229]

2. Final Rule Moves Requirement for Obtaining Patient's Verifiable Affirmative Consent for Digital Delivery to a New Section and Out of Definitions

In the NPRM, the Commission proposed adding the digital delivery provision to the Rule as a new definition of the phrase ''provide to the patient one copy'' in § 456.1.[230] This definition would have stated both the option for the prescriber to offer the patient a digital copy of their prescription, and the requirements for obtaining verifiable affirmative consent to the digital delivery and maintaining a record or evidence of the patient's affirmative consent for a period of not less than three years. Adding this definition to the Rule would have mirrored the Commission's amendment of the CLR in 2020 to provide a similar

option for digital prescription delivery.[231]

Upon further consideration, the Commission has decided to move the digital delivery provision out of the definitions section and into § 456.2. By moving this language to § 456.2, the Commission seeks to ensure prescribers do not overlook the requirements for providing prescriptions digitally. Moving the digital delivery provision to this section may also make the requirement more noticeable and understandable to consumers. The FTC is also cognizant that the preferred drafting practice for regulations is to set out requirements in the body of the rule, rather than in the definitions.[232]

Accordingly, the Commission is amending § 456.2(a), ''Separation of examination and dispensing,'' to state that the automatic prescription release shall be provided on paper; or in a digital format that can be accessed, downloaded, and printed by the patient, after obtaining verifiable affirmative consent, pursuant to § 456.3. The Commission is then adding a new § 456.3 to the Rule titled, ''Verifiable affirmative consent to providing the prescription in a digital format.'' [233] New § 456.3 sets out the remainder of the text proposed in the NPRM as § 456.1(h)(2). It requires that when a prescription copy is provided in a digital format, the prescriber shall inform the patient of the specific method(s) of electronic delivery that will be used; obtain, on paper or in a digital format, the patient's verifiable affirmative consent to receive a digital copy through the identified method or methods; and maintain records or evidence of a patient's affirmative consent for a period of not less than three years, as specified in the new § 456.3.

Since the digital delivery provision, as adopted herein as § 456.3, was clearly proposed as § 456.1(h)(2) in the NPRM, moving the requirement to a new section in the Rule complies with the rulemaking requirements of both the Administrative Procedure Act and the FTC Act, while ensuring that regulated entities and the general public do not overlook the requirements because they were included in the definitions.[234] The Commission recognizes that the placement of the digital delivery provision in a new, dedicated section differs from the CLR, where it appears in the definitions. The requirements in each rule, however, are effectively the same. The Commission can amend the CLR during the next periodic rule review to mirror the Eyeglass Rule and, in the meantime, can provide clarity to prescribers through guidance materials.

3. Final Rule Adds Explicit Recognition of the Ability To Obtain Affirmative Consent on Paper or in a Digital Format

In this final rule, the Commission is amending the Rule to explicitly permit prescribers to obtain a patient's verifiable affirmative consent either ''on paper or in a digital format.'' This clarification comes in response to comments relating to permitting digital consent.

Participants at the workshop discussed that some EHR companies haven't updated their systems in light of the new CLR requirements to allow prescribers to collect signatures electronically, which would reduce the record-keeping burden.[235] Nevertheless, commenters suggested that the Rule should expressly permit prescribers to obtain patient signatures digitally or on paper.[236] For example, regarding the confirmation of prescription release, NAROC wrote, ''[t]he Commission may want to specifically allow for the signature to be an electronic signature by means of either a handwritten signature input onto an electronic signature pad or a handwritten signature input on a display screen with a stylus device. . . . While it is not clear to us how many optometry or ophthalmology offices use electronic signatures today, this clarification may pave the way for more offices to adopt this method of collecting a signature, making the confirmation process more efficient and less reliant on paper receipts in the future.'' [237] Dr. Montaquila acknowledged that some practices are already using electronic methods to capture patient signatures required by the CLR.[238]

Throughout the process of updating the CLR to permit digital prescription delivery and require confirmation of prescription release, the Commission acknowledged that prescribers may obtain a patient's signature either on paper or digitally. In the NPRM for the Contact Lens Rule review, the Commission proposed, ''[t]he acknowledgment form shall be in a format that allows either conventional or electronic signatures. Prescribers may maintain copies of the acknowledgment forms in paper or electronically.'' [239] In the SNPRM for the CLR, the Commission stated, ''[t]he precise wording of such confirmations would be left to the prescriber's discretion, but for prescribers opting for (a), (b), or (c), a patient's written or electronic signature would always be required.'' [240] Similarly, when proposing changes to the Eyeglass Rule in its NPRM, the Commission noted the ''recordkeeping burden could be reduced to the extent that prescribers have adopted electronic medical record systems, especially those where patient signatures can be recorded electronically and inputted automatically into the electronic record.'' [241]

The Commission finds the Rule is improved by explicitly permitting prescribers to obtain a patient's verifiable affirmative consent either ''on paper or in a digital format.'' Accordingly, §§ 456.3 and 456.4, setting forth the requirement for obtaining a patient signature confirming prescription receipt, allow prescribers to meet the requirements of these provisions by obtaining the patients signature either ''on paper or in a digital format.'' [242] This will resolve prescriber confusion regarding the need to print out digital forms and collect wet signatures that might then need to be scanned and stored electronically in an EHR system. Alleviating prescriber misunderstanding regarding signature collection should help reduce waste and facilitate faster, more efficient Rule compliance.[243]

4. Final Rule Clarifies That Digital Delivery Methods Identified in Affirmative Consent Request Must in Fact Be Used

The Commission recently sent cease and desist letters to prescribers of contact lens prescriptions and eyeglass prescriptions in response to consumer complaints that the prescribers did not release their prescriptions at the end of the contact lens fitting or eye examination, or otherwise violated the CLR or Eyeglass Rule.[244] As discussed at the workshop, in subsequent communications with letter recipients, Commission staff obtained samples of forms some prescribers were using to comply with the CLR consent-to-digital-delivery and confirmation-of-prescription-release requirements. Staff noted, ''[w]e've seen forms where there's not a separate signature about digital consent. We've also seen forms where the information is included in an intake form among a lot of other information that the patient may not see. And in some cases, the specific method of electronic delivery is not necessarily identified. It may say, 'We will provide you with your prescription digitally either by text, email, or portal.' '' [245]

The Commission is concerned that patients cannot provide informed consent to digital delivery if prescribers do not identify the delivery method that will be used. Patients will not know where to locate their prescription if they are not told which delivery method the prescriber plans to use. This can result

in the patient effectively not receiving the prescription, as required by the Rule. Similarly, providing a disclosure about digital delivery as part of a long form containing unrelated information, such as privacy practices and payment policies, and then requesting one signature at the end of the form might not be an effective way of obtaining the ''verifiable affirmative consent'' required by the Rule. Dr. Beatty noted that decoupling information during intake related to patient consent may be appropriate to ensure patients are understanding and agreeing to digital delivery.[246]

In addition, providing a copy of the prescription electronically by default while notifying patients that they can request a paper copy if they want one undermines the automatic-prescription-release requirement by converting it to a release-upon-request model that the Commission has rejected.[247] As an example, one of the sample forms shown at the workshop stated, ''I acknowledge the [Prescription Access] policy and note I can (i) access my eyeglass and contact lens prescriptions digitally at [website redacted] or (ii) obtain a paper copy at any time as well.'' [248] This language essentially transforms it into a notice of digital delivery rather than a true patient consent to digital delivery. In satisfying the Eyeglass Rule's automatic-prescription-release requirement, the patient must be given an actual choice to select an identified electronic delivery method or to receive the prescription on paper automatically. Prescribers are free to also place prescriptions on a portal, but this action would not satisfy the requirements of § 456.2 if the patient did not opt-in to the digital delivery option.

To provide clarity to prescribers, the final rule, in § 456.3(a), states that the prescriber shall, ''identify to the patient the specific method or methods of electronic delivery *that will* be used,'' rather than ''to be used,'' as was proposed.[249] The digital delivery method or methods the prescriber identifies to the patient when seeking consent should be the method the prescriber actually uses. It would not be appropriate, for example, for a consent form to state, ''I authorize my eye doctor to provide me with a digital copy of my prescription via email, text, and/or the secure online patient portal at the completion of my contact lens fitting and/or refractive eye examination,'' unless the prescriber did in fact deliver the prescription using all of the referenced methods.

IV. Final Rule Pertaining to Confirmation of Prescription Release

A. Proposed Confirmation Requirement in the NPRM and the Basis for Such Proposal

After considering the evidence discussed in sections I and II, *supra,* including comments submitted in response to the ANPR, the Commission proposed in the NPRM to amend the Rule to add a confirmation-of-prescription-release requirement. In so doing, the Commission stated its belief that such confirmation would increase the number of patients who receive their prescriptions, inform patients of the Rule and of their right to their prescriptions, reduce the number of seller requests to prescribers for eyeglass prescriptions, improve the Commission's ability to monitor overall compliance and target enforcement actions, reduce evidentiary issues, complaints and disputes between prescribers and consumers, and bring the Eyeglass Rule into congruence with the confirmation-of-prescription-release requirements of the Contact Lens Rule.[250]

As a result, in the NPRM, the Commission proposed a new § 456.3 [251] to require that upon completion of a refractive eye examination, and after providing a copy of the prescription, the prescriber shall do one of the following:

(i) Request that the patient acknowledge receipt of the prescription by signing a separate statement confirming receipt of the prescription;

(ii) Request that the patient sign a prescriber-retained copy of a prescription that contains a statement confirming receipt of the prescription;

(iii) Request that the patient sign a prescriber-retained copy of the sales receipt for the examination that contains a statement confirming receipt of the prescription; or

(iv) If a digital copy of the prescription was provided to the patient (via methods including an online portal, electronic mail, or text message), retain evidence that such prescription was sent, received, or made accessible, downloadable, and printable.

Proposed § 456.3 further provided that if the prescriber elects to confirm prescription release via paragraphs (a)(i), (ii), or (iii), the prescriber may, but is not required to, use the statement, ''My eye care professional provided me with a copy of my prescription at the completion of my examination'' to satisfy the requirement. In the event the patient declines to sign a confirmation requested under paragraphs (a)(i), (ii), or (iii), the prescriber shall note the patient's refusal on the document and sign it. A prescriber shall maintain the records or evidence of confirmation for not less than three years. Such records or evidence shall be available for inspection by the Federal Trade Commission, its employees, and its representatives. The prescription confirmation requirements shall not apply to prescribers who do not have a direct or indirect financial interest in the sale of eye wear, including, but not limited to, through an association, affiliation, or co-location with an optical dispenser.'' [252]

The Commission then sought public comment on the benefits and burdens of its confirmation-of-prescription-release proposal.[253] The Commission also invited comment on whether the proposed change would affect Rule compliance, the Commission's ability to enforce the Rule, or patient's understanding of their rights under the Rule.[254]

B. Comments on the NPRM and Discussion at the Workshop Regarding Confirmation of Prescription Release

1. Comments in Favor of Confirmation-of-Prescription-Release Proposal

The record contains numerous comments in support of the confirmation-of-prescription-release amendment, with these comments detailing the need for, and benefits of, the proposed amendment. Reasons given in support of the amendment include: that it will bring greater awareness of a consumer's right to their prescription, greater compliance with automatic prescription release,[255] and a greater ability for the Commission to enforce the Rule; that the acknowledgment will serve as evidence of compliance for prescribers; and that benefits flow from having the Eyeglass Rule's confirmation requirement match that of the Contact Lens Rule. Other commenters generally support the Rule, but did not provide specific reasons for their support.[256]

NAROC, calling the confirmation proposal needed and simple,[257] stated that it would result in greater compliance and wider consumer understanding of their rights.[258] In addition, according to NAROC, the proposal would allow all sellers in the market for corrective eyeglasses to participate. Specifically, NAROC stated support for requiring confirmation since ''evidence demonstrates that despite the many years that the [automatic prescription release] requirement has been in effect, not all consumers are aware that they should receive an eyeglass prescription without requesting it.'' [259] Consumer Action, likewise,

called the confirmation proposal "consumer-friendly" and discussed it as a way to remedy a lack of compliance, a lack of consumers awareness of their automatic right to a copy of a prescription, a lack of competition, and a reduced ability to shop around for lower prices.[260]

Other commenters reiterated that the confirmation proposal would increase compliance with automatic prescription release. The advocacy organization National Taxpayers Union supported requiring confirmation to "strengthen the process of providing consumers with a copy of their eyeglass prescription," which will benefit consumers.[261] 1–800 CONTACTS stated the "confirmation proposal will bolster prescription portability, promoting consumer choice and competition in the evolving market for prescription eyewear." [262]

Commenters specifically spoke to the proposed amendment's ability to assist the Commission in enforcing the Rule's automatic-release requirement. 1–800 CONTACTS stated its desire for greater enforcement of the Rule and expressed disappointment that the Commission has only issued warning letters since enacting a similar requirement for the Contact Lens Rule in 2021.[263] NAROC commented that both the confirmation of prescription release and the three-year recordkeeping requirement will make the Rule easier for the FTC to enforce. The organization stated that prescribers have a responsibility to provide evidence that the patient received a copy of the eyeglass prescription at the end of the exam, and that confirmations of prescription release are helpful to prescribers to show their compliance in instances when patient complaints of non-compliance are brought before them.[264] At the workshop, Joseph Neville of NAROC added that, if the FTC was going to regularly enforce the Rule, the prescriber needs proof they actually complied, and the acknowledgment will serve that purpose.[265] NAROC likened the confirmation proposal to prescribers asking their patients to acknowledge receipt of privacy practices, to give consent to certain treatments or procedures, and to allow providers to share protected health information in certain situations.[266] According to NAROC, such acknowledgments benefit the prescriber by averting disputes as to what the patient agreed.

At the workshop, Wallace Lovejoy opined that it is appropriate to encourage some sort of recordkeeping that the prescription was in fact delivered to the patient due to "the unique nature of the market and a significant amount of financial interest on the part of prescribing and dispensing optometrists" [267] Indeed, NAROC commented that prescribers have a powerful incentive to improve the "capture rate" of in-office eyewear sales to their patients since they still make most of their revenue from selling the eyewear that they prescribe.[268]

NAROC also stated that the significant benefits of the proposed confirmation would exceed the minimal burdens. Its comment stated that the "amendments should not have significant or disproportionate impact on prescribers' costs" and that its member experience and observation indicates that "thousands of optometrists affiliated in co-location with NAROC member companies regularly comply with the current Eyeglass Rule and the Contact Lens Rule [which already contains a confirmation-of-prescription-release requirement] with little added cost or other burden on the eye care practice." [269] NAROC said it has not seen any credible evidence that the requirement is overly burdensome or will result in anything more than a trivial expense. In response to requests from their members for information as to whether the added effort of confirmations for contact lens prescriptions was a problem, they heard that compliance is occurring with little or no disruption or expense.[270]

Pete Sepp, the president of the National Taxpayers Union, said he supports the Rule and the confirmation proposal, but is very cognizant of regulatory burdens imposed on prescribers. He said the key question for him is whether the extra burden the confirmation brings is a problem, or alternatively, whether the problem may derive rather from the overall burden from all regulations imposed on prescribers.[271]

The National Taxpayers Union (NTU) suggested that the Commission may have underestimated the confirmation burden, particularly the 10-second estimate for how long it takes for consumers to read and sign the confirmation statement.[272] It also stated it was likely the burden would have a disproportionate impact on smaller, less sophisticated, prescribers who lack economies of scale and equipment, and thus merely averaging the burden cost among all of the nation's eyecare prescribers was an "oversimplification." [273] According to NTU's estimate, a "modest optometry establishment" performing 3,000 examinations a year would—based on the Commission's NPRM estimates for time and labor—increase the paperwork burden by 167 hours and incur an additional labor compliance cost of $4,123, "not an inconsiderable burden for a small establishment." [274] Sepp of the NTU did suggest, however, that compliance with the confirmation-of-prescription-release proposal "might not be quite as burdensome" when comparing it to the overall regulatory burdens on prescribers, and that perhaps the real focus should be on reducing overall burdens that hamper small businesses.[275]

One factor worth noting for the confirmation proposal, according to NAROC, is that having a similar confirmation requirement for the Eyeglass Rule, as already codified in the Contact Lens Rule, should lessen the additional incremental burden of the proposed amendment to the Eyeglass Rule, since most contact lens wearers also receive eyeglass prescriptions and should get them at the same time.[276] NAROC also stated that the similar requirement for the Eyeglass Rule should ease issues with compliance and staff training.[277]

2. Comments Against the Confirmation-of-Prescription-Release Proposal

Some commenters, largely prescribers and prescriber trade associations, were critical of the confirmation-of-prescription-release proposal, stating that existing strong compliance with the automatic-prescription-release requirement of the Eyeglass Rule makes the proposed confirmation requirement unnecessary, and that the confirmation proposal is burdensome.[278]

The American Optometric Association opposed the proposed confirmation requirement for a number of reasons. As noted above in the discussion regarding automatic-release compliance, the AOA asserts that the requirement is unnecessary because it disputes that there is any issue with prescription-release compliance.[279] In addition, the AOA asserted that a confirmation requirement would not have a significant and meaningful impact on competition and choice and in support cited the (previously discussed) NERA survey for the propositions that: (1) three in five Americans do not believe that additional paperwork requirements in their doctor's offices would make them more aware of their rights; (2) nearly half indicated the amount of paperwork they currently do is overwhelming; (3) 41% indicated that the complexity of the paperwork is overwhelming; and (4) approximately 20% of those surveyed did not even remember the purpose of the paperwork they have to complete at a doctor's appointment.[280] Based on these results, the AOA concluded that

''it is inaccurate to say that a new paperwork requirement for eyeglass prescriptions can lead to increased competition and choice.'' [281]

Further, the AOA expressed concern that the confirmation requirement would have a disproportionate burden on small business, given the fact that many of its members have a small staff, high staff turnover, and face challenging economic pressures, including increased overhead and costs.[282] In fact, according to AOA, the NERA survey data supports its position that the FTC ''significantly underestimated'' how long it takes to confirm prescription release.[283] According to the AOA, a large percentage of its members report that it takes 30 seconds or more to obtain the patient's signed confirmation and ''[e]ssentially, doctors of optometry have reported that the time burden is *at least* 3 times the FTC's estimated burden.'' [284] (emphasis in original). The AOA requested that the Commission reconsider whether there is an urgent need at this time for the confirmation-of-prescription-release amendment.[285]

Individual prescribers share some of the same concerns voiced by the AOA. At least two commenters stated that the proposed confirmation is a burdensome solution to a problem that does not exist.[286] A number of commenters, some of whom commented anonymously, stated that the confirmation is unnecessary, costly, intrusive, and would be time-consuming and take away from patient care.[287] Optometrist Dr. David Durkee suggested that adding the burden of another confirmation requirement would be counterproductive and likely just lead to more prescriber non-compliance.[288] At the workshop, Dr. Michaels stated that there is a lot of time, effort, and discussion required when prescribers ask their patients to sign confirmations.[289] Dr. Montaquila explained at the workshop that for contact lens prescriptions, it takes his ''very best staff about four minutes to complete the [confirmation and prescription release] process, from explaining why we're doing it to the patient, providing them with their prescription, making the copies, providing their prescription back to them, and ultimately storing it.'' [290] He stated that the office devotes about 1.5 full time employees to all of the office's compliance issues and that adding more rules [to the Eyeglass Rule] will only increase costs to the practice.[291] Dr. Montaquila also noted that the burden is recurring (as opposed to a one-time expense) since each time prescribers provide a prescription, a confirmation will be needed.[292] Dr. Masoudi questioned whether multiple confirmations are needed when multiple prescriptions are provided, and claimed that that would also increase the burden of compliance.[293]

The AAO also disagreed that the burden would be minimal, noting that it would particularly hit hard on small practices that may not utilize electronic health record systems.[294] AAO further argued that, without better evidence of non-compliance, the confirmation-of-prescription-release amendment should not be imposed, and asked the Commission to identify alternative mechanisms to address actions of noncompliant prescribers.[295] Dr. Repka also noted at the workshop that he has not seen a benefit for either the prescriber or the consumer in the contact lens space since enactment of the confirmation requirement in the Contact Lens Rule.[296]

Some commenters pointed to differences between the eyeglass and contact lens markets to support their position that the Eyeglass Rule should not contain the same confirmation requirement as exists in the Contact Lens Rule. Dr. Montaquila argued that there is a greater burden associated with the Eyeglass Rule proposal due to the greater volume of eyeglass wearers—165 million eyeglass wearers versus 45 million contact lens wearers.[297] Dr. Repka pointed out that the average eyeglass wearer is much older than the average contact lens wearer and that the older population may be more easily concerned about multiple signature lines.[298]

3. Comments About the Exemption for Prescribers Who Do Not Have a Direct or Indirect Financial Interest in the Sale of Eyeglasses

In the NPRM, the Commission proposed to exempt prescribers who do not have a direct or indirect financial interest in the sale of eyeglasses from the proposed signed confirmation-of-prescription-release requirement.[299] Direct or indirect interest in the sale of eyeglasses would include, but not be limited to, an association, affiliation, or co-location with prescription-eyewear sellers.[300] The Commission requested input on the question, ''Aside from associations, affiliations, and co-locations with prescription-eyewear sellers, what other indirect financial interests exist in the sale of prescription eyewear that should disqualify a prescriber from the proposed exemption?'' [301] There were no written comments in response to the NPRM or workshop on this point.[302]

At the workshop, Joseph Neville floated the idea of applying the exemption more broadly. Specifically, he said that for the Contact Lens Rule, NAOO, the predecessor to NAROC, suggested that prescribers who were affiliated in a co-location situation should be exempt from the signed acknowledgment requirement.[303] He explained that when an optical company leases space to a prescriber, the prescriber does not sell the eyeglasses, and thus, the exemption should apply. Yet, he acknowledged that the Commission previously rejected that position and in concluding his comments, he supported the Commission's proposal to limit the exemption to those who are solely involved in clinical and not connected in any way with sales.[304]

4. Comments About Alternatives to the Confirmation-of-Prescription-Release Proposal

As possible alternatives to the signed acknowledgement proposal, commenters at the ANPR stage recommended conspicuous signage regarding consumers' right to a copy of their prescription, or an eye care patients' bill of rights, notifying consumers of their rights under the Rule.[305] Some commenters seemed to suggest that there is a greater need for the FTC or prescribers to educate consumers or to enforce the Rule as is, as opposed to amending the Rule to include a confirmation of prescription release.[306] For instance, the AOA opposed the Commission's NPRM proposal, and asserted that the Commission should focus its energies on scrutinizing the sales of online retailers, and advising the public about ''risks'' arising from purchasing glasses online.[307] Meanwhile optometrist David Durkee recommended that instead of adding the confirmation requirement, the Commission should increase enforcement through random audits, inspections, fines, and increased publicity about such penalties.[308]

C. Additional Discussion and Commission Determination Regarding the Confirmation-of-Prescription-Release Proposal

1. Final Rule Determination To Amend the Rule To Require Confirmation of Prescription Release

The Commission has carefully reviewed and analyzed all of the evidence in the record, including the 868 comments submitted in response to its ANPR, 27 comments submitted in response to its NPRM, the discussion at the 2023 Eyeglass Rule workshop, 20 comments after the workshop, and when appropriate, the record from the

Commission's recent review of the Contact Lens Rule. This record, in conjunction with the historical impetus for the Rule and the Commission's enforcement and oversight experience, has led to a Commission determination to amend the Rule to add a confirmation-of-prescription-release requirement.

The evidence demonstrates that the automatic-release requirement remains the optimal remedy for prescribers' continued failure to release prescriptions, and yet lack of compliance with the automatic-release provision hampers the effectiveness of this remedy.[309] The evidence also demonstrates that consumers lack an awareness of their rights to a copy of their eyeglass prescription, and thus may be unable to remedy a prescriber's failure to release prescriptions on their own.[310] Having determined that it would be beneficial to increase compliance with, and awareness of, the automatic-release provision, the Commission has determined that the best way to achieve this goal is to amend the Rule to add a new requirement to the existing automatic-release remedy. By modifying and improving the remedy for prescribers' failure to release a prescription, it will not only increase the number of patients who receive their prescriptions and learn of their right to possess their prescriptions, but will also: reduce the number of seller requests to prescribers for eyeglass prescriptions, improve the Commission's ability to monitor overall compliance and target enforcement actions, reduce evidentiary issues, complaints and disputes between prescribers and patients, and substantively bring the Eyeglass Rule into congruence with the Contact Lens Rule in terms of the confirmation-of-prescription-release requirement.

This remedy also solves the ''evidentiary squabbles'' issue as to whether a prescriber complied in a specific instance, or complies routinely with prescription release. As explained in the NPRM, the absence of documentation often makes it difficult in an enforcement investigation to determine whether, in any particular case, a prescriber provided a patient with a prescription. The lack of documentation also makes it difficult to determine how many times, or how frequently, a particular noncompliant prescriber has violated the Rule.[311] In fact, due in part to the difficulty of ascertaining whether a prescriber violated the Rule, the Commission has only brought one enforcement action against an eyeglass prescriber for failure to comply with the automatic prescription release.[312] The confirmation-of-prescription-release requirement will improve and simplify its ability to assess and verify compliance with the Rule's automatic prescription release requirement. It will also make it easier for prescribers to prove that they did, in fact, provide prescriptions to patients who claim otherwise.

a. Alternatives to Confirmation of Prescription Release Not Adopted

The Commission is not adopting the alternative remedies proposed by some commenters. First, as explained above, no new comments or evidence was submitted following the NPRM regarding the proposal to require conspicuous signage in prescribers' offices stating consumers' rights to their prescriptions, and, likewise, no new comments or evidence submitted with respect to a consumer Bill of Rights.[313] Since the Commission had previously decided, for the reasons outlined in the NPRM,[314] not to adopt these measures, the Commission has no reason to revisit and alter its decision.

For a number of reasons, the Commission also declines to adopt the proposal that the Commission focus on additional consumer education in lieu of adopting the signed confirmation of prescription release. First, relying on such an approach would improperly shift the burden of prescription-release compliance and enforcement to the consumer, an approach the Commission has repeatedly rejected in the past.[315] Second, the Commission resolves that educating consumers at their appointment about their right to their prescription is more targeted and impactful than other methods of consumer education alone in which a consumer is not asked to read and provide a signature. Lastly, the AOA's suggestion in its NPRM comment to educate consumers about the potential risks from purchasing eyeglasses online would do nothing to increase prescription release. In fact, the suggestion appears unrelated to the issues under discussion in the NPRM or this final rule.

Although the Commission declines commenters' suggestions that it rely on greater consumer education in lieu of a signed confirmation requirement, as discussed in section IV.B.4, *supra,* the Commission agrees there is a need to bolster its existing guidance on the Eyeglass Rule, as an added measure to inform consumers of their rights, and businesses of their obligations, under the Rule.

As for the suggestion that the Commission increase enforcement of the existing automatic-release provision in lieu of adding a confirmation requirement, the Commission addressed this in the NPRM, noting that the Commission recognizes the need for increased enforcement, but that the absence of documentation often makes it difficult in an enforcement investigation to determine whether, in any particular case, a prescriber provided a patient with a prescription.[316] The lack of documentation also makes it difficult to determine how many times, or how frequently, a particular noncompliant prescriber has violated the Rule. Instead, allegations and denials of non-compliance often become a matter of a patient's word against that of the prescriber, making violations difficult to prove.[317]

b. The Burdens of the Confirmation of Prescription Release Are Not Substantial

The evidentiary record does not establish that the burden of the confirmation-of-prescription-release requirement will have a substantial financial impact on prescribers. Prescribers already comply with a similar requirement for contact lens prescriptions, and it should require a minimum of additional time, effort, and training to include eyeglass prescriptions. Some prescribers may already be getting patient confirmations for eyeglass prescriptions, since it does not make much sense to obtain confirmations for contact lenses but not for eyeglasses, and the patient confirmation provides the prescriber with tangible proof that they complied with the existing prescription-release requirement. In its Paperwork Reduction Act (''PRA'') analysis, the Commission doubled the previously estimated time it takes for prescribers' offices to obtain a signed patient confirmation, and yet even doubled, it is still merely 20 seconds. In reality, it may even take less, and some industry estimates appear to be based on faulty presumptions.[318] Furthermore, the ongoing transition to digital recordkeeping will continue to reduce the burden, both in terms of record preservation and obtaining patient signatures. The final rule's overall estimated financial burden for the confirmation-of-prescription-release requirement of $38,389,993 amounts by one estimate to approximately $629 in additional annual administrative costs per eye care provider.[319]

The Commission also does not find the AOA's paperwork survey, summarized in its comment, as compelling evidence for its position that ''it is inaccurate to say that a new

paperwork requirement for eyeglass prescriptions can lead to increased competition and choice.'' [320] A review of appendix A attached to its comment shows that the following survey question was asked of 1,063 respondents: ''Thinking about your experience, both virtual and in-person, with doctors in general, please select your level of agreement with the following statements.'' The statements included in the survey were: (1) ''I generally remember the purpose of the paperwork I complete at a doctor's appointment''; (2) ''The amount of paperwork I have to complete at a doctor's appointment is overwhelming''; (3) ''The complexity of the paperwork I have to complete at a doctor's appointment is overwhelming''; and (4) ''Having to sign more paperwork at a doctor's appointment would make me more aware of my patient's rights.'' The options provided to the respondents for each statement are: ''Completely agree,'' ''Somewhat agree,'' ''Neutral,'' ''Somewhat disagree,'' and ''Completely disagree.'' [321]

These questions, and the extent to which consumers agree or disagree with them, may reveal the unsurprising fact that most people do not appreciate doing ''paperwork,'' but do not display anything of import related to this rulemaking. By asking generalized questions about ''paperwork''—a term with a negative connotation—and ''patient's rights,'' without explaining to respondents the context or what rights they are referring to, the survey loses its informational value. It does not reveal what consumers think about a confirmation-of-prescription-release requirement, about whether they would appreciate having a copy of their prescription, about whether they understand their right to their prescription, or even about their experiences with any particular documents provided to them by eye care prescribers.[322]

Aside from the fact that these survey questions are too vague and generalized to serve as a gauge as to the usefulness of a confirmation-of-prescription-release requirement, the survey questions may even indicate that some paperwork can serve a purpose. According to the survey, 62% of Americans respond that they generally remember the purpose of the paperwork they complete at a doctor's appointment, with another 19% remaining neutral on this question; and 40% agree with the statement, ''having to sign more paperwork at a doctor's appointment would make me more aware of my patient rights,'' with another 30% responding neutrally.[323] While these percentages do not reveal anything about the confirmation-of-prescription-release requirement, they could, in fact, support the general position that many Americans do remember information from the paperwork they fill out at their doctors' offices, and that the paperwork can serve to make them somewhat more aware of their general rights. Of greater significance for this rulemaking, however, is the fact that the confirmation-of-prescription-release requirement is not solely intended to educate consumers about their rights. While that is one purpose, the requirement is also intended to remind prescribers' offices to provide patients with their prescriptions, and to create a mechanism for prescription-release verification and enforcement. Therefore, the Commission finds that the signed confirmation of prescription release (a form of ''paperwork'') will increase prescriber compliance, and that will lead to increased competition that benefits consumers.

The Commission also carefully considered information and comments on the record that question the Commission's estimate of time for confirming prescription release, including the separately conducted AOA survey of its members submitted in support of its statement that the FTC ''significantly underestimated'' the length of time it would take for prescribers to confirm prescription release. As discussed more fully in the Paperwork Reduction Act section (section VIII of this SBP), the Commission has decided to increase the estimated time to obtain a patient confirmation signature.[324]

Although the Commission does not find the burdens of the confirmation of prescription release to be substantial, the Commission is sensitive to the concerns raised by the AOA and others regarding the burden on prescribers, many of whom are small businesses. In an attempt to minimize these burdens, the Rule provides prescribers with both digital and paper options for methods to comply,[325] and provides one-sentence sample language that prescribers can use when providing paper copies of prescriptions should they wish to use it. As for concerns that the burden is ongoing since each time a prescriber provides a prescription a confirmation is needed, the Commission notes that many prescribers may offer and consumers may accept a digital delivery of the prescription, and as previously discussed, may not need to ask for affirmative consent to digital delivery for every new visit.[326] As for paper copies of prescriptions, over time consumers should become more familiar with the request for their signature to confirm prescription receipt and thus, the staff time to handle possible questions or to otherwise comply with the confirmation of prescription release should decrease.[327] The Rule also has an exemption for those without a direct or indirect financial interest in the sale of eyeglasses. Moreover, this amendment aligns with the prescription release related provisions of the Contact Lens Rule, thereby reducing the confusion and complexity that might arise for consumers and prescribers from having different confirmation-of-prescription-release requirements for contact lens and eyeglass prescriptions. In addition, the marginal cost of the amendment to the Eyeglass Rule should be relatively low because the CLR already requires prescribers to obtain confirmation of prescription release and to maintain records of such. Some prescribers likely have forms and systems in place already, which may need only minor adjustments to accommodate confirmations for eyeglass prescriptions.[328]

c. Exemption for Prescribers Who Do Not Have a Direct or Indirect Financial Interest in the Sale of Eyeglasses

The Commission also adopts without modification proposed § 456.3(c), which provides an exemption to the confirmation-of-prescription-release requirements for prescribers who do not have a direct or indirect financial interest in the sale of eyeglasses.[329] Direct or indirect financial interest in the sale of eyeglasses includes, but is not limited to, an association, affiliation, or co-location with prescription-eyewear sellers.[330] The Contact Lens Rule contains a parallel exemption.[331] The purpose of such an exemption is to reduce the burden on prescribers who do not sell lenses, and therefore, have no incentive to withhold prescriptions.[332] Although Joseph Neville of NAROC questioned whether co-location arrangements should be considered as having an interest in the sale of eyeglasses, the Commission finds that co-location arrangements could create a financial incentive for prescribers to withhold a prescription, and thus, should be required to comply with the confirmation requirement. If a prescriber has uncertainty as to whether the exemption applies, they should err on the side of caution by complying with the confirmation-of-prescription-release requirement.[333] Since there was no opposition to the proposal relating to the exemption, the Commission adopts § 456.3(c) as proposed.[334]

2. Comments About Options for Obtaining the Confirmation and Commission Determination

The Eyeglass Rule NPRM proposed in § 456.3(a) the same options to confirm prescription release of eyeglass prescriptions as the options available to confirm prescription release of contact lens prescriptions in the Contact Lens Rule. They consist of: (i) a signed statement confirming receipt of the prescription; (ii) a prescriber-retained copy of a contact lens prescription that contains a statement confirming receipt of the prescription; (iii) a prescriber-retained copy of the receipt for the examination containing a statement confirming receipt of the prescription; and (iv) if a digital copy of the prescription was provided to the patient, retain evidence that the prescription was sent, received, or made accessible, downloadable and printable.[335] Workshop participants discussed these options in the context of the Contact Lens Rule in order to recommend for or against their inclusion in the Eyeglass Rule's confirmation requirement.

a. Comments at the Eyeglass Rule Workshop

At the workshop, Dr. Montaquila discussed the ''range of approaches'' prescribers use to comply with the CLR's confirmation-of-prescription-release requirements and provided concrete examples of the way some of the options are currently in use. He called option (a)(1)(i), the signed statement option, a flexible option currently in use. But, he stated that, for some offices that have electronic health records, offices must print the prescription from the electronic health records systems, request a signature, scan or retain the prescription with the acknowledgment, and store the acknowledgment.[336] He provided an example of a template form that he said is in use by many offices.[337] This form, entitled ''Contact Lens Prescription Signed Acknowledgment Form'' is recommended by the AOA to its members and is in its ''Contact Lens Rule Compliance Toolkit.'' [338] The form contains six paragraphs, with the first stating, ''Included below is important information to review prior to receiving your contact lens prescription.'' The middle three paragraphs consist of advice, attributed to the Centers for Disease Control and the Food and Drug Administration, on healthy contact lens wearing habits, and include recommendations such as ''Schedule a visit with your eye doctor at least once a year'' and ''Understand that eye infections that go untreated can lead to eye damage or even blindness,'' among others. The fifth paragraph presents five bullet points listing common symptoms of an eye infection, such as ''Irritated, red eyes,'' ''Light sensitivity,'' and ''Sudden blurry vision.'' The last paragraph, directly above a patient signature and date line, states, ''Sign below to acknowledge that you were provided with a copy of your contact lens prescription at the completion of your contact lens fitting.''

As for proposed § 456.3(a)(1)(ii), in which prescribers retain signed copies of contact lens prescriptions that contain a statement confirming receipt of the prescriptions, Dr. Montaquila stated that the AOA assists prescribers who use this option by providing carbon-copy prescription pads.[339] With this method, the prescriber writes the prescription, the patient signs the confirmation statement on the prescription, and the patient and prescriber each retain a copy. Dr. Montaquila then implied that this paper option was less convenient or accurate because 88% of office-based physicians have transitioned to EHRs.[340] According to Dr. Montaquila, some prescribers are handwriting prescriptions after generating a prescription in an electronic health record, and this duplication increases cost, time, and the possibility for errors.[341] In support of his assertion about greater errors from handwritten prescriptions, he cited to a Weill Cornell Medical College study of drug prescriptions finding error rates in 30 per 100 written prescriptions versus seven per hundred in electronic prescriptions.[342] He stated that some EHRs permit prescriptions containing statements of confirmation to be printed, but this creates a different problem because once it is signed by the patient, the office ''needs to take that prescription back, copy and perhaps scan it and then retain that for three years.'' [343]

Section 456.3(a)(1)(iii) of the NPRM Eyeglass Rule confirmation proposal (and existing Contact Lens Rule confirmation requirement) allows prescribers to retain a signed statement confirming prescription receipt on a copy of the examination payment receipt. According to a 2023 AOA survey of optometrists, about 15% of prescribers said they use this method,[344] but Dr. Montaquila stated that he had not found that any of his colleagues had a payment system in place that would allow for the use of this method with respect to the confirmation of contact lens prescription release.[345]

Dr. Montaquila also addressed the digital release option, proposed § 456.3(a)(1)(iv), which allows a prescriber, with the patient's affirmative consent, to release the prescription digitally so long as they retain evidence that the prescription was sent, received, or made accessible, downloadable and printable. In discussing this option, he displayed a model consent form used by many practices for contact lens prescription release entitled ''prescription access notice policy statement.'' The model form states that access to prescriptions is available to patients digitally and that physical copies of prescriptions are available, and provides a place for a patient signature. He noted that the electronic prescription-release approach can take many forms depending on what's available to the practice, and that some forms default to the patient agreeing to receive the prescription digitally, with a paper version available upon request.[346]

b. Commission Determination Regarding Options for Obtaining the Confirmation

The final rule, § 456.4(a)(1), replaces the four options from the NPRM with two broader options in paragraphs (a)(1)(i) and (ii) that encompass the options proposed in the NPRM, but also ensure prescribers have flexibility and choice in how they obtain their confirmations. The first option, § 456.4(a)(1)(i), covering instances where prescribers provide a *paper copy* of the prescription, provides that the prescriber must request that the patient acknowledge receipt of the prescription by signing a separate statement confirming receipt of the prescription. Section 456.4(a)(1)(i) adopts the proposed § 456.3(a)(1)(i) with modifications so that it encompasses the proposed § 456.3(a)(1)(ii) (where a prescriber can retain a copy of a prescription that contains a signed statement confirming receipt of the prescription) and proposed § 456.3(a)(1)(iii) (where a prescriber can retain a signed copy of the sales receipt for the examination that contains a statement confirming receipt of the prescription). The NPRM's proposed § 456.3(a)(1)(ii) and (iii) are essentially examples of documents—prescriptions and sales receipts—that can contain separate statements confirming receipt of the prescription, and these methods of obtaining confirmation continue to be permitted under the final rule's broader option § 456.4(a)(1)(i).

The Commission adopts § 456.4(a), which requires that the statement confirming receipt be separate. Prescribers should provide a signature line that clearly and conspicuously applies to a statement of confirmation that the patient has received their

prescription. If instead it is part of a multi-paragraph form containing unrelated information, such as advice about contact lens wear and care habits or the symptoms of eye infections, which then requests a signature at the end of the form, it may not be a valid method to request confirmation of prescription release. While additional information supplied on the model form may be useful to patients, it can confuse patients as to what it is they are signing for, and add additional time to the confirmation obligation. Indeed, as discussed in this document's PRA analysis section, the use of a model template from AOA containing several additional paragraphs unrelated to the confirmation requirement may well contribute to some prescribers' claims that it takes more than 10 seconds to obtain a contact lens prescription confirmation from a patient.[347]

Section 456.4(a)(1)(ii) applies to instances where the prescriber provides a digital copy of the prescription to the patient and is, with one minor alteration,[348] the same as the NPRM's proposed § 456.3(a)(1)(iv). If a prescriber provides the prescription digitally, after obtaining verifiable affirmative consent, the prescriber need not request the patient sign a separate statement confirming receipt. However, the prescriber does need to retain evidence that the prescription was sent, received, or made accessible, downloadable, and printable. In the final rule's § 456.4(a)(1)(ii), that evidence serves as the ''confirmation of prescription release.''

The Commission recognizes that by altering its NPRM proposal in this manner, the options for obtaining confirmation of prescription release in the Eyeglass Rule will not precisely mirror the language of the options provided in the Contact Lens Rule, but these are differences in textual language, not the Rules' policy or effects. The obligations for prescribers with respect to when and how to offer a prescription, and how prescribers can obtain and store a confirmation of receipt, are essentially the same for contact lens and eyeglass prescriptions. For clarity purposes, the Commission may address the language differences in the CLR's next periodic rule review. For these reasons, the Commission adopts § 456.4(a) as set out in this final rule.

The full text of the Rule amendment is located at the end of this document.

3. Final Rule Modification To Add Explicit Recognition of a Prescriber's Ability To Obtain a Confirmation on Paper or in a Digital Format

If the prescriber provides a paper copy of the prescription to the patient, the prescriber must request that the patient acknowledge receipt by signing a separate statement confirming receipt of the prescription. As discussed above with respect to obtaining signatures of affirmative consent to digital delivery, participants at the workshop discussed that some EHR companies haven't updated their systems in light of the new CLR requirements to allow prescribers to collect signatures electronically, which would reduce the record-keeping burden, and suggested that the Rule should expressly permit prescribers to obtain patient signatures digitally or on paper.[349] Specifically, at the workshop, Dr. Repka stated that the electronic medical records of the future will be able to accept electronic signatures that will be stored in ways other than on paper and says, ''if there's an option to do that, it would be nice. If you still needed it to be on a printable PDF, then not as convenient.'' [350]

When proposing changes to the Eyeglass Rule, the Commission noted the ''recordkeeping burden could be reduced to the extent that prescribers have adopted electronic medical records systems, especially those where patient signatures can be recorded electronically and inputted automatically into the electronic record.'' [351] The Commission resolves therefore to change the Rule to explicitly state that obtaining patient signatures ''on paper or in a digital format'' is permissible and complies with the Rule. Accordingly, § 456.4 of the final rule sets forth this language. The Commission believes this will resolve prescriber confusion regarding the need to print out digital forms and collect wet signatures that might then need to be scanned and stored electronically in an EHR system. As with electronic collection of patient consent to digital delivery, alleviating prescriber misunderstanding regarding signature collection should help reduce waste and facilitate faster, more efficient, Rule compliance.[352]

V. Final Rule Pertaining to Proof of Insurance Coverage as Payment

A. Proposed Requirement in the NPRM To Treat Proof of Insurance Coverage as Payment and the Basis for Such Proposal

The Eyeglass Rule requires that prescribers provide consumers with a copy of their prescription immediately after the eye examination is completed, but also contains a long-standing exception to allow a prescriber to refuse to give the patient a copy of their prescription until the patient has paid for the eye examination, so long as the prescriber would have required immediate payment had the eye examination revealed that no ophthalmic goods were required.[353] The CLR contains a similar provision, permitting the collection of fees for an eye examination, fitting, and evaluation before the release of a contact lens prescription, but also provides clarification that for purposes of this exception, a patient's presentation of proof of insurance coverage for those services shall be deemed to constitute a payment.[354] The Eyeglass Rule does not contain this insurance clarification, and staff has received questions from the public about this issue. The Commission proposed that such a proviso, which was initially formulated by Congress in drafting the FCLCA,[355] be added to the Eyeglass Rule, both because it is appropriate that a patient's proof of insurance coverage equates to payment, and to bring the two rules into conformity and eliminate unnecessary confusion.[356] Accordingly, in the NPRM the Commission proposed to amend § 456.2(a) to add the sentence, ''For purposes of the preceding sentence, the presentation of proof of insurance coverage for that service shall be deemed to be a payment.'' [357] The Commission invited public comment on the potential benefits and burdens of such an amendment.[358]

B. Comments on NPRM and Discussion at Workshop Regarding the Insurance Coverage as Payment Proposal

The Commission received a few public comments addressing this proposed amendment. NAROC supported the Commission's clarification that proof of insurance coverage shall be deemed to constitute a payment under § 456.2(a), and opined that this clarification will generally increase compliance with the Rule's prescription release requirement.[359] 1–800 CONTACTS also supported ''amending the [Rule] to follow the CLR in requiring that prescribers accept proof of insurance coverage as payment for purposes of automatic prescription release.'' [360]

The AAO expressed concern that the provision could create challenges for, and ultimately result in financial impacts to, ophthalmology practices, such as instances where a patient has already utilized their insurance benefit and would thus be ineligible at the time of the visit to be covered by

insurance.[361] Requiring the prescriber to accept proof of insurance as payment in such a situation would be problematic for the prescriber, since the insurance would not be obligated to pay anything. The AAO noted that a ''remedy for this would be to instead allow for insurance to be used as payment if the insurance carrier confirms that the patient is eligible for the benefit at the time of their visit.'' [362] An anonymous commenter stated there can be a problem with vision plans showing authorizations for services but not guaranteeing payment, which takes advantage of the prescriber.[363]

C. Additional Discussion and Commission Determination Regarding the Insurance Coverage as Payment Proposal

The Commission has decided that the proposed clarification in the NPRM's § 456.2(a) will aid prescribers' compliance with the Rule and help ensure that patients and prescribers understand when a prescription should be released. Accordingly, the Commission is adopting the provision as proposed in the NPRM as § 456.2(a)(2). Regarding the AAO's concern that prescribers should be allowed to wait until an insurance carrier confirms a patient's eligibility for a benefit at the time of service, the Commission notes that this is, in fact, what the provision would permit. Section 456.2(a)(2) states that proof of insurance coverage—not merely possession of an optical or health insurance policy—will be deemed to constitute payment. For the anonymous commenter who was concerned about vision plans that show authorizations for services but do not guarantee payment, this prescriber could withhold the prescription pending payment if coverage cannot be conclusively established. But in such a case, the prescriber also could not offer to sell the patient eyeglasses until after releasing the prescription to the patient.[364]

Participants at the workshop discussed that some patients may prefer not to have to make two separate payments—one for the examination fee, prior to receiving the prescription, and a separate one for the purchase of eyeglasses, if they choose to purchase from their prescriber's office.[365] Commission staff noted that the Eyeglass Rule does not mandate when prescribers collect payment for examination fees or eyeglasses, but instead merely requires that the prescription be released immediately after the exam and before offering to sell the patient eyeglasses.[366] Prescribers may decide to wait to collect the examination fee until a purchase is completed, if they believe their patients have a strong preference for a single transaction, so long as they already released the prescription prior to making that sale.[367]

VI. Final Rule Regarding ''Eye Examination'' Terminology

A. Proposed Revision in the NPRM To Change ''Eye Examination'' Term to ''Refractive Eye Examination'' and the Basis for Such Proposal

The Rule defines an ''eye examination'' as ''the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests.'' [368] As discussed above, the Rule currently allows eye care prescribers to refuse to provide the patient with their prescription when the patient has not paid for the ''eye examination''—which refers back to the definition describing the refraction—as long as the prescriber does not have different policies for those whose examination revealed that no ophthalmic goods were required.[369] In response to the ANPR, the AOA and several individual prescribers requested that the Commission modify the Rule to change the term ''eye examination'' to ''refraction.'' [370] These commenters stated that an eye examination determines the health of the eye and includes many components that are not used to determine the refractive condition. According to some commenters, the Rule's definition for, and use of, the phrase ''eye examination'' more accurately describes refractive services rather than the full scope of an eye examination.[371] Commenters stated that the Rule should reflect that a comprehensive eye examination and a refraction are separate services,[372] and that while eye health exams are typically covered by Medicare, the testing required to produce the refractive prescription may not be a covered service under Medicare or other insurance plans, and therefore patients may be required to pay out of pocket for the service.[373] The commenters suggested that changing the Rule to reflect the separate services and payments involved would reduce consumer confusion.

In the NPRM, the Commission responded to the ANPR commenters by proposing to replace the term ''eye examination'' with ''refractive eye examination'' throughout the Rule, noting that the Eyeglass Rule's purpose is to ensure that prescribers provide patients with a copy of their prescription at the completion of an eye examination determining the patient's refraction, and that this prescription must be provided free of any additional charge, without obligation, and without a waiver.[374] The Commission opined that clarifying that the eye examination referred to in the Rule is a refractive examination would likely increase consumer understanding of their rights and prescriber compliance with the Rule. The Commission invited further public comment on the potential benefits and burdens of such an amendment; and asked whether the current definition in the Rule is a clear and accurate way of describing a refractive eye examination, whether using the term ''refractive eye examination'' in place of ''eye examination'' could help avoid confusion over when the prescriber must release the prescription, and whether prescribers should be allowed to withhold release of the prescription subject to any charges other than the one due for the refractive eye examination.[375]

B. Comments on NPRM and Discussion at Workshop Regarding the ''Refractive Eye Examination'' Proposal

1. Comments About the Proposed Terminology Change

The FTC received some comments in support of the proposed terminology change. 1–800 CONTACTS agreed with the Commission's proposal to replace the term ''eye examination'' with the term ''refractive eye examination'' throughout the Rule.[376] The National Taxpayers Union asserted that clarifying that an ''examination'' triggering the prescription release requirement is ''one involving a refractive diagnostic . . . should provide some reduction in overhead for providers, who might otherwise spend time and effort explaining to the consumer those conditions under which a prescription is not automatically furnished.'' [377] NAROC stated that it was not aware of compliance concerns arising from the use of the term ''eye examination'' versus ''refractive eye examination,'' and had never heard the complaint that a prescriber did not understand the context of the prescription-release requirement, but acknowledged that the proposed change would eliminate the issues described in the NPRM.[378] NAROC further recognized that prescribers also conduct examinations that are not related to prescribing corrective eyewear, and noted that the proposed change might improve the FTC's ability to enforce the Rule, in that the prescriber would not have the

excuse that they did not understand scope of the term.[379]

While not expressly taking a position on the NPRM proposal to change the terminology, the American Academy of Ophthalmology did express concern—in relation to insurance payments—that many patients are confused as to the difference between health exams that are covered by insurance and refractive exams which often are not.[380] The association said the Commission could be ''more proactive'' in explaining that eye health exams and exams that lead to eyeglass prescriptions are not the same services.[381]

AOA, while in favor of the proposed change in 2015, noted that its position had ''evolved'' since then,[382] and opined that the terminology change ''may not truly address any confusion that exists,'' noting that the results of a refractive examination do not necessarily provide all the information needed to determine and devise an optical prescription.[383] The AOA asked that if the FTC chooses to update the language as proposed, it should clarify that the update does not impact any State or Federal definitions of a comprehensive eye examination.[384]

At the workshop, Dr. Beatty echoed the AOA's concern that consumers benefit most from a comprehensive eye examination, and worried that labeling the exam that results in a prescription a ''refractive exam'' starts to ''confuse patients as to what the value is for having a full eye exam, and can start to make that feel the same as having some exam that you are getting online without the presence of the doctor.'' [385] At the same time, Dr. Beatty confirmed that the definition in the Eyeglass Rule accurately describes a refraction.[386]

2. Comments About the Need To Allow Prescribers To Make a Medical Decision To Withhold the Prescription, Where Appropriate

Commenters also noted that while a refraction may be provided to a patient for the purpose of determining their most current and appropriate eyeglass prescription, it may also be ''completed as a 'diagnostic tool' to assist in the determination of visual status when there are comorbidities in the visual system.'' [387] In this case, the intent of the refraction may not be to create and provide a prescription for eyeglasses or contact lenses, but rather to understand how the patient's refractive error may be a factor in decreased vision, and to help diagnose medical conditions in the eye, such as macular degeneration or a cataract.[388] In the latter scenario, the eye care professional may even determine that it is not appropriate to provide a prescription for corrective eyewear, if the refractive error is not the cause of the decreased vision and comorbidities are present. Commenters felt that the eye care provider should, in their discretion, be free to make the medical decision of whether to dispense the diagnostic refraction, and not be required by the Rule to release a copy of the prescription solely because they had tested the patients' refractive error.[389] Commenters also stated that regardless of whether the provider releases the prescription in that case, they should be able to charge the patient for the diagnostic examination that was completed.[390]

3. Comments About the Permissibility To Charge for the Refraction, as Opposed To Charging for the Prescription Release

Although the Rule allows eye care prescribers to withhold a patient's prescription until the patient has paid for the ''eye examination''—so long as the prescriber would have required immediate payment even if the exam had revealed that no ophthalmic goods were required—the Rule also prohibits prescribers from ''charg[ing] the patient any fee in addition to the ophthalmologist's or optometrist's examination fee as a condition to releasing the prescription to the patient.'' [391] This provision is intended to prevent a once-common practice whereby prescribers would charge their patients a separate fee for releasing the prescription, which could, in turn, dissuade patients from taking their prescription to shop elsewhere for eyeglasses. Some commenters discussed that consumers can be confused about whether a fee is being charged for the exam or for the prescription, and that the Rule language has resulted in some patients believing that they do not have to pay for the refractive exam.[392] Commission staff noted, based on their experience enforcing the Eyeglass Rule, that some practices may tell patients that there is a charge for the prescription, without indicating that the charge is actually for the refractive exam, rather than for receiving the prescription, and that this can lead to consumer confusion about their rights under the Rule.[393]

C. Additional Discussion and Commission Determination Regarding the ''Refractive Eye Examination'' Proposal

After considering all of the comments in the record on the question of the appropriate terminology for the ''eye examination'' definition, the Commission has decided to amend this term to ''refractive eye examination'' throughout the Rule.[394] Both the comments the Commission received in 2015 and the panel discussion at the 2023 workshop confirmed that the definition in the Rule most accurately describes a refraction. A refractive eye examination can be a portion of a more comprehensive exam, but by changing the terminology, the Rule will provide a clear indication to the consumer and prescriber that if the refraction has been completed, the prescription should be provided, barring a medical decision by the prescriber.

By making this change, the Commission is not suggesting that consumers would not benefit from a comprehensive eye examination, or that it would be preferable for consumers to seek out solely a refraction in order to obtain their prescription. But the Commission is aware that a refraction can be completed in a variety of contexts, and wishes to clarify that regardless of the purpose of the examination, the prescription should always be released whenever the optometrist or ophthalmologist determines the patient's refractive error.[395] The Commission is mindful, however, that in some cases in which the refraction may be used as a diagnostic tool, the provider may make a medical decision that it would not be appropriate for a patient to obtain eyeglasses. The Commission does not intend the Rule to override the provider's medical judgment in such cases. If a prescriber determines it is not medically appropriate for the results of a refractive exam to result in a prescription for a particular patient, the prescriber may choose not to release the prescription. But, in such cases, the prescriber may not then offer to sell the patient eyeglasses.[396] Moreover, the prescription should not be withheld merely due to it being inconvenient for the prescriber to provide it.

The Commission concludes that changing the term to ''refractive eye examination'' may help consumers understand that they may be required to pay for the refraction if it is not covered by a vision plan or other health insurance. Furthermore, this terminology change will help prescribers understand that while they may withhold the prescription pending receipt of payment for the refraction, it is not appropriate to make prescription-release contingent upon the payment for any additional service.

The Commission plans to undertake additional consumer education after the Rule is amended to help patients understand that they may be charged for the exam, but not for the prescription

itself. Revised business education materials can also advise prescribers on the types of fees that may be assessed as a condition of prescription release, as well as advise them to train staff to communicate the purpose of fees to patients.

VII. Miscellaneous Issues Raised in Comments

A. Pupillary Distance

1. Background and Comments

In the NPRM, the Commission explored whether to amend the Rule to require the inclusion of pupillary distance on eyeglass prescriptions. Pupillary distance is the measurement (in millimeters) of the distance between the pupils of a person's eyes and is typically needed to properly fit a pair of eyeglasses.[397] The Rule has historically left it to the States to determine what measurements constitute a complete refractive prescription, and thus, it has been up to the States to determine whether pupillary distance is required to be included on prescriptions.[398] In the NPRM, the Commission analyzed comments received in response to the ANPR in favor of and against adding a pupillary distance requirement and concluded that there was not adequate evidence in the rulemaking record at this time to determine that the failure to provide a pupillary distance on a prescription is an unfair practice.[399] As a result, in the NPRM the Commission did not propose to require prescribers to include the pupillary distance measurement on prescriptions.[400] However, since it had last invited comment on the question of whether to require the inclusion of pupillary distance in a prescription in 2015, and the market for optometry and eyeglasses may have evolved since then, the Commission, in the NPRM, again invited comment on this issue. Specifically, the Commission asked for input and information about changes to State regulation on the content of prescriptions, or to changes in the marketplace, or to changes in technology, that might affect and alter the Commission's prior conclusion that pupillary distance on prescriptions should not be required by rule.[401]

In response, the Commission did not receive any comments addressing changes to State regulations on the content of prescriptions, or changes in the marketplace, or changes to technology pertaining to pupillary distance. Commenters in favor of and against the inclusion of pupillary distance on prescriptions largely reiterated viewpoints previously expressed in response to the ANPR.

The Commission received a number of comments in favor of the Commission's NPRM determination not to require the inclusion of pupillary distance on prescriptions from optometry, ophthalmology, and optician trade groups (the AOA, AAO, and OAA, respectively). The AOA, for instance, agreed with the Commission's concern, as discussed in the NPRM, that requiring pupillary distance measurements on prescriptions could place the patient in the optical dispensary—where pupillary distance measuring devices are typically located and operated—prior to the patient receiving their prescription, thereby undercutting the Rule's long-standing principle (a foundation of the Rule) of separating a patient's eye examination from the retail dispensing of eyeglasses. The AOA and the OAA added further that, historically, taking pupillary distance measurements is not a standard part of an eye examination by an optometrist or ophthalmologist (it is typically performed by an optical goods dispenser, such as an optician, in the dispensary *after* a patient decides to purchase glasses), and stated that there was no reason to require that prescriptions from refractive eye exams, written by optometrists and ophthalmologists, should include pupillary distance.[402] The AOA also pointed to Commission language in the NPRM stating that there are zero-cost and relatively-low-cost alternative methods for consumers to obtain their pupillary distance if they wish to shop for glasses online.[403] The trade association NAROC also agreed with the Commission's NPRM determination, stating that if the pupillary distance requirement was added, prescribers and opticians might end up at odds over whose pupillary distance measurement should control.[404]

The OAA further expressed concern that if pupillary distance is required on prescriptions, opticians filling the prescription would have to abide by the exact measurements written on the prescription by the prescriber, regardless of the accuracy of the information or their own measurement, and stated that opticians—who have a long history of performing pupillary distance measuring tests—may consider several factors such as: whether the current pupillary distance measurement matches the previous measurement, changes that may have occurred since the issuance of the prescription, and the complexity of the prescription.[405]

The AAO also agreed with the Commission's decision not to mandate the inclusion of pupillary distance measurements on eyeglass prescriptions.[406] The group said that because many ophthalmologists do not take this measurement, and not all ophthalmic practices have an optician on staff to perform these measurements, if pupillary distance were required on prescriptions, ophthalmologists would be forced to make difficult practice decisions over the hiring of additional staff or the elimination of refractive services.[407]

On the other hand, some sellers and consumers said they would like the Commission to reconsider its decision and require prescribers to include pupillary distance on prescriptions. Online seller Eyeglasses.com stated that it receives hundreds of prescriptions from consumers each day and about half of them do not include the pupillary distance measurement, making it challenging to provide them with eyeglasses.[408] The seller contended that the failure to provide pupillary distance is an obstacle to consumer choice, and expressed its belief that prescribers do not add this measurement because they either do not want to take the extra time to take the measurement, or because such prescribers sell eyeglasses themselves, and withhold the measurement to make it more difficult for consumers to buy eyeglasses elsewhere. According to Eyeglass.com, consumers are frequently too embarrassed to ask for the pupillary distance measurement, and if they do ask the prescriber, it gives the prescriber an opportunity to discourage the patient from buying online or elsewhere. The seller also noted that some prescribers charge a fee to measure the pupillary distance, which is not prohibited by the Rule.[409]

1–800 CONTACTS, which also sells eyeglasses, reiterated the view that not giving consumers their pupillary distance measurement could discourage online shopping and result in diminished competition and less consumer choice.[410] It opined that the elements of unfairness are met when a prescriber's office takes the pupillary distance measurement during the patient's visit but fails to automatically provide that measurement to the patient, and reiterated that patients may not know to ask for their pupillary distance, may not want to offend the prescriber by asking for that measurement, or may be refused or charged for that measurement.[411] According to 1–800 CONTACTS, obtaining the pupillary distance measurement on their own may be a costly or time-consuming hassle for some consumers, and some consumers may not be aware of the ways in which they can obtain their pupillary distance

measurement. Moreover, in response to the Commission's stated concern that a pupillary distance requirement could have the unintended and undesirable consequence of placing the patient in the dispensary prior to them having their prescription in hand, 1–800 CONTACTS proposed that the pupillary distance measurement should be released in some other format, separate from the refractive prescription itself.[412] For this scenario, the commenter explained, the prescriber would release the prescription prior to the patient entering the dispensary, and the patient would then automatically receive their pupillary distance measurement separately after having it measured in the dispensary.[413] 1–800 CONTACTS asserted that an appropriately tailored amendment to automatically release a pupillary distance measurement is critical to creating prescription portability and promoting competition in the evolving market for prescription eyewear.[414]

Another commenter, a consumer, stated that pupillary distance measurements are needed to order glasses online, where glasses are much cheaper than in the optometrist's shop.[415] The commenter said that, when they ask their prescriber for the measurement, the prescriber does not provide it, and instead tells them that the measurement will be taken when they buy eyeglasses. The commenter felt this was a way to force consumers to buy their eyeglasses at their prescriber's office, or at the least, discourage them from buying glasses online.[416]

2. Pupillary Distance Requirement Determination

After considering the comments and evidence regarding pupillary distance, the Commission does not disturb its conclusion, reached in the NPRM and previous Eyeglass Rule rulemakings, not to mandate the inclusion of pupillary distance on prescriptions in States that do not otherwise include such a requirement. To determine an act or practice is unfair, the Commission must find that the act or practice causes or is likely to cause substantial injury to consumers; the injury is not reasonably avoidable by consumers themselves; and, the injury is not outweighed by countervailing benefits to consumers or to competition.[417] The comments submitted in response to the NPRM did not reveal any relevant changes in the marketplace, technology, or State regulations that sufficiently alter the landscape such that not providing a pupillary distance measurement is generally unfair. The comments largely raise the same points as those submitted in response to the ANPR,[418] indicating that requiring the inclusion of pupillary distance measurements on prescriptions could potentially increase consumer convenience and improve competition, but could also impose burdens on prescribers, hamstring opticians, and undercut other pro-competitive aspects of the Rule. On balance, upon review of the record, the Commission finds again that there is not sufficient evidence that the practice of not providing pupillary distance is an unfair act or practice.

Purchasing eyeglasses online can, indeed, be more convenient and less costly for consumers, and consumers can find it more difficult to shop online if their pupillary distance is not provided by prescribers. But every State determines what is required to be included in an eyeglass prescription, and only four require the inclusion of pupillary distance measurements.

Based on the record developed, the Commission concludes that preempting these State determinations by imposing a requirement to include pupillary distance on the prescription may have a detrimental overall effect for prescribers and consumers. Some prescribers—particularly ophthalmologists—would be required to take a measurement they do not ordinarily take, or might feel obligated, for professional and liability reasons, to hire new staff or acquire new equipment to take this measurement, which could result in higher costs passed on to patients in the form of higher prices.[419] Particularly for smaller practices, the costs to these providers could be considerable.

In addition, imposing such a requirement could undermine the pro-competitive aim of the Rule. If the Commission required the inclusion of pupillary distance, some prescribers might lead patients to the dispensary for the measurement, instead of adding expensive pupillary distance measurement equipment to the exam room.[420] As noted above, such a shift would place the patient in the dispensary prior to the patient receiving their prescription, a result that would blur the important distinction between the clinical eye exam and the retail dispensing process, a distinction that is central to the Rule, and that the Commission has consistently attempted to preserve.

Although commenters point to circumstances under which the act of not providing a pupillary distance measurement can be injurious, consumers have alternative means to obtain eyeglasses from a seller other than their prescriber. Other methods are available for consumers to obtain this measurement, and many of these methods—while possibly not as precise as a measurement taken with expensive equipment by an optician in a dispensary—are low-cost or no-cost. For instance, one seller stated that all you need is a mirror and a printable ruler,[421] and another provided instructions for using their digital ruler.[422] Consumers can also obtain this measurement at an in-person optical dispensary, though it may come at a small cost if the consumer is not purchasing eyeglasses at that shop.[423] Although some consumers reported problems with their vision when using eyeglasses made with pupillary distances they measured themselves using online tools,[424] NAROC stated that many online sellers have developed accurate alternative ways to measure pupillary distance.[425] Moreover, a new pupillary distance measurement does not have to be obtained every year or office visit. Obtaining it once is usually sufficient, since for most people, the measurement does not change significantly from one year to the next. The widespread availability of these alternative methods make it difficult to conclude at this time that the injury to consumers from prescribers failing to take and provide pupillary distance measurements is both substantial and not reasonably avoidable.

Importantly, the Commission's determination does not preclude States from defining prescriptions to include pupillary distance measurements. Indeed, in the handful of States that already do so, the Rule, by its operation, requires dispensing of such measurements. But the Commission is mindful that the vast majority of States have not required prescribers to include pupillary distance measurements, and the Commission is reluctant to override the determinations of local jurisdictions without a clearer record establishing that the status quo is unfair.

For these reasons and others described in the Commission's NPRM,[426] the Commission has decided at this time to retain its prior conclusion not to amend the Rule to add a pupillary distance requirement for prescriptions.[427]

B. Consumer and Business Education

Commenters and workshop participants stated that the Commission should better educate consumers about their rights to their prescription, or the confirmation process. Dr. Masoudi stated that consumers should be made more aware of their rights before they walk in the door.[428] This point was illustrated at the workshop by Felecia Neilly, who stated that before she became involved with this Rule review

process, she ''wasn't even aware of an eyeglass rule'' and did not know she had the option to receive the prescription.[429] As to the confirmation requirement, Dr. Montaquila stated that there is widespread confusion by his patients as to why they are signing a prescription.[430] One anonymous commenter stated that the burden should be on the FTC to provide education to the consumer.[431] The AAO added its concern that patients misunderstand that services resulting in a prescription, in addition to the prescription, are to be provided free of charge.[432]

Some commenters also mentioned that in addition to a need to educate consumers, there is a need to educate prescribers about their responsibilities under the Rule. NAROC requested the Commission work with industry to develop useful guidance or templates relating to patients' rights and prescribers' responsibilities with respect to eyewear prescription release.[433]

The Commission has existing guidance on the Eyeglass Rule on its website and has engaged in outreach to both consumers and prescribers at periodic intervals, including through press releases, consumer alerts, and business blogs announcing warning letters to prescribers.[434] Nevertheless, it agrees it should bolster its existing guidance on the Rule as an added measure to inform consumers of their rights, and businesses of their obligations, especially given the amendments to the Rule.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.,* requires Federal agencies to obtain Office of Management and Budget (''OMB'') approval before undertaking a collection of information directed to ten or more persons. Pursuant to the regulations implementing the Paperwork Reduction Act,[435] an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number.

In this final rule, the Commission is amending a rule that contains recordkeeping and other collection of information requirements as defined by OMB regulations that implement the PRA. First, the Commission is modifying the Rule to require that: (i) if a paper copy of the prescription was provided to the patient, the prescriber must request that the patient acknowledge receipt of the prescription by signing a separate statement on paper or in a digital format confirming receipt of the prescription, and retain the confirmation for not less than three years; or (ii) if a digital copy of the prescription was provided to the patient (via methods including an online portal, electronic mail, or text message), the prescriber must retain evidence that such prescription was sent, received, or made accessible, downloadable, and printable.[436]

Section 456.4(a)(2) provides sample language for option paragraph (a)(2)(i) in that prescribers may use the single-sentence statement, ''My eye care professional provided me with a copy of my prescription at the completion of my examination,'' but also allows prescribers to craft their own wording of the signed confirmation if they so desire. For prescribers who choose to offer an electronic method of prescription delivery, the Rule will require that such prescribers identify the specific method or methods to be used and maintain records or evidence of affirmative consent by patients to such digital delivery for at least three years. For instances where a consumer refuses to sign the confirmation or accept digital delivery of their prescription, the Rule (§ 456.4(a)(3)) directs the prescriber to note the refusal and preserve this record as evidence of compliance. None of these new requirements, however, would apply to prescribers who do not have a direct or indirect financial interest in the sale of eyeglasses.

Below, the Commission describes and discusses the changes between the proposed rule regulatory text and this final rule, the public comments received relating to the collection of information burden, and the Commission's ultimate determination of the burden generated by the final rule.

A. Comments Regarding the NPRM Estimate for the Confirmation-of-Prescription-Release Requirement

In its NPRM, the Commission put forth estimates for the burden on individual prescribers' offices to generate and present to patients the confirmations of prescription release, and to collect and maintain the confirmations of prescription release for a period of not less than three years. Based on an estimate that there are 165 million eyeglass wearers in the United States, the Commission calculated the total disclosure and recordkeeping burden from the new requirement at 2,979,167 hours for prescribers and their staff (1,375,000 disclosure hours + 1,604,167 recordkeeping hours).[437] These totals were based on estimates that it would take prescribers' offices one minute to hand out a prescription, ten seconds for the patients to read and sign a confirmation-of-prescription-release statement or consent-to-electronic-prescription-delivery, and one minute for prescribers' offices to store (or scan and save) the signed confirmation or consent in their files.[438] The Commission's time estimates were based on previously-approved estimates for a nearly identical confirmation-of-prescription-release requirement added to the Contact Lens Rule in 2020.[439]

In its NPRM, the Commission requested comment on, among other things, the accuracy of the FTC's burden estimates, including whether the methodology and assumptions used were valid.[440] In response, the Commission received various comments from prescribers opining, among other things, that a confirmation requirement for eyeglass prescriptions would ''take an immense amount of time and take away from patient care,'' [441] be ''very time consuming,'' [442] and ''add a significant burden to small business optometry practices that already are enduring financial challenges and staffing issues.'' [443] More specifically, some commenters, such as the American Optometric Association and Eyeglass workshop panelist Dr. Jeffrey Michaels stated that the Commission had previously underestimated the time it takes to perform the confirmation requirement,[444] and commenter Coast Eyes Pllc suggested the paperwork cost would be $18,000 per provider per year.[445] Another workshop panelist, Dr. Stephen Montaquila concurred with Dr. Michaels, commenting that it takes his staff four minutes to complete the entire Contact Lens Rule process of printing out a patient's prescription, handing it to the patient, explaining why it needs to be signed, having the patient sign it, making a copy of it, and storing the signed copy as a record.[446] In addition, the National Taxpayers Union submitted a comment stating that while it generally supports the confirmation requirement, ''[G]iven the various reading speeds of customers who may be elderly or have limited proficiency in English, the 10-second estimate [to read and sign the statement] could prove low.'' [447] As noted previously in the discussion of the proposed confirmation requirement, the NTU also suggested that smaller optometry practices might bear a disproportionate share of the burden, which it estimated—based on the NPRM proposal and the estimate that that a ''modest optometry establishment'' might perform 3000 examinations per year—at an additional 167 hours and $4,123 per year for such an establishment.[448]

Some commenters, however, disagreed that it would take a significant amount of time to obtain a patient's signed confirmation. The NAROC commented that thousands of optometrists affiliated in co-location with NAROC member companies "regularly comply with [Contact Lens Rule confirmation-of-prescription-release requirements, as well as other requirements of the CLR and Eyeglass Rule] with little or no added cost or other burden on the eye care practice." [449] According to NAROC representative and Eyeglass Rule workshop panelist Joseph Neville, "I've personally witnessed a couple of situations where the process for contact lenses seemed very easy. . . . the prescription was handed over at the front desk by the staff person, and the staff person maybe a bit simplistically said, 'We'd like to ask you to sign this receipt for your prescription. We're required to get your signature acknowledging that you've received it.' And a couple of people, and again, anecdotes here that I witnessed on this, just said, 'Okay, fine, thank you.' " [450]

All of the above comments, however, are, as Mr. Neville acknowledged, anecdotal in nature.[451] The only new empirical evidence that the Commission is aware of regarding the time it will take prescribers and their staff to comply with a confirmation-of-prescription-release requirement comes from an American Optometric Association submission filed in response to a 2023 request for comment about extending Office of Management and Budget ("OMB") clearance for the information collection requirements of the Contact Lens Rule.[452] In that submission, the AOA said that the Commission "significantly underestimated" how long it would take prescribers to confirm prescription release for the Contact Lens Rule requirement, and cited a 2023 survey it conducted of some of its member optometrists which found that 84.8% report it takes 30 seconds or more to obtain the patient's signed confirmation for contact lens prescriptions, not counting additional time necessary to address patient questions about the form they are signing, and 69.9% of prescribers said patients "typically" have questions regarding the acknowledgment.[453] Since the confirmation-of-prescription-release requirement adopted herein is very similar to that for the Contact Lens Rule, the Commission regards AOA's comment regarding the CLR's burden as on point.

The Commission cannot, however, accord the AOA survey significant weight. As explained in the Commission's notice responding to public comments on extending OMB's approval for CLR collection of information for another three years,[454] it is very likely the AOA survey overestimates the average time necessary to obtain a confirmation because of the manner in which the survey solicited prescribers to respond. AOA emailed a newsletter to members and included an invitation to "Voice your concerns" about complying with the Contact Lens Rule. A small number of prescribers self-selected in response, and took part in the survey. Because the poll only included prescribers who responded to this invitation, it is questionable whether its findings are truly representative of the average prescriber.[455] Furthermore, framing the survey as an invitation for concerned prescribers to air their grievances rather than as a disinterested information-gathering tool affects the objective reliability of survey responses, making it much harder for the Commission to accord it significant weight.

The Commission also reiterates concerns—previously detailed in the Commission's CLR PRA Notice [456]—that the amount of time prescribers ascribe to patients reading and signing that Rule's confirmation statement may, in fact, be due largely to non-mandated choices with respect to the design of the statement. The Contact Lens Rule requires that patients read and sign a simple statement confirming receipt of their prescription, and allows that the one-sentence statement, "My eye care professional provided me with a copy of my contact lens prescription at the completion of my contact lens fitting," fully satisfies the requirement. However, the Contact Lens Rule also permits prescribers to design their own confirmation form and statement, and the survey did not specify or ask prescribers what form or wording of the confirmation statement that patients were reading and signing, making it difficult to determine a true average time it would take to comply with the requirements of the rule. Even more concerning (from the standpoint of assessing the burden) is that the AOA has supplied its members with a model template confirmation form that includes several additional paragraphs consisting of "important information to review prior to receiving your contact lens prescription." [457] This information includes various recommendations from the Centers for Disease Control ("CDC") and the Food and Drug Administration ("FDA") about healthy contact lens use (such as "Take out your contacts and call your eye doctor if you have eye pain, discomfort, redness, or blurry vision") as well as five bullet points listing some of the symptoms for an eye infection ("Irritated, red eyes, worsening pain in or around the eyes," etc.).[458] While the template document is titled "Contact Lens Prescription Acknowledgment Form," only at the very end is there a statement, "Sign below to acknowledge that you were provided a copy of your contact lens prescription at the completion of your contact lens fitting." [459]

According to workshop panelist Dr. Montaquila, the AOA template is a common form that eye doctors are using to obtain patient confirmations.[460] If this is indeed the case, it calls into question the relevance of AOA's survey results finding that it takes patients 30 seconds or longer to comply with the Contact Lens Rule requirements, since the majority of those 30 seconds would likely be taken up by patients reading information that the rule does *not* require, or even suggest, that they read. Widespread use of AOA's model template confirmation form might also account for why prescribers report that patients have questions, or are confused, as to why they need to sign a new form, since patients are being asked not merely to confirm they received their prescription, but that they received other information from the CDC and FDA.[461] While the additional information from these two Federal agencies may very well be useful to provide to patients, it is not required by the FTC, and the time it takes patients to read it is not part of the Rule's burden of compliance.

Despite the aforementioned concerns about the reliability of the AOA's survey in establishing the time it takes for a patient confirmation, the Commission does not wholly discount the survey, but rather views it as suggestive, and an additional indication that many prescribers sincerely believe the Commission's 10-second estimate does not accurately reflect the time required to obtain a patient's signed confirmation. The Commission has therefore decided to increase its estimate for the time required to obtain a patient confirmation signature (and the time to collect an affirmative consent to electronic delivery, in instances where the prescription is provided digitally rather than in paper) for the Eyeglass Rule from 10 seconds—as proposed in the NPRM—to 20 seconds for this final rule. The Commission concludes that 20 seconds may better reflect the time required for a patient to not just read a one-sentence confirmation, but also to physically sign

and return the document to prescriber's staff, and for any necessary staff explanation as to why the patient's signature is required.[462] The 20-second estimate may also better align with the original HIPAA estimate that was a basis for the initial CLR confirmation estimate, since the original HIPAA proposal accorded 10 seconds to hand out the acknowledgment and another 10 seconds to obtain a patient's signature and collect the document.[463]

The Commission hereby provides PRA burden estimates, analysis, and discussion for the existing Eyeglass Rule burden of automatically releasing a prescription at the completion of a refractive eye exam, as well as the new requirement to collect patient signatures as confirmation of prescription release or as consent to electronic prescription delivery. The Commission estimates these PRA burdens based on the comments and submissions discussed above, in conjunction with its long-standing knowledge and experience with the eye care industry. The Commission is submitting these amendments and a Supporting Statement to OMB for review.

B. Commission Estimate of the Total Burden = 3,208,333 Hours

1. Estimated Hour Burden of 1,375,000 Hours for Prescribers To Release Prescriptions

The number of adult eyeglass wearers in the United States is currently estimated to be approximately 165 million.[464] Assuming a biennial refractive eyeglass exam for each eyeglass wearer,[465] approximately 82.5 million people would receive a copy of their eyeglass prescription every year. Historically, the Commission has estimated that it takes one minute to provide the patient with a prescription copy.[466] It is possible that one minute is an overestimate of the amount of time required, particularly as more doctors move to digital delivery. As of now, however, we have not seen sufficient evidence to merit making a change to the approach we have taken in the past. We therefore estimate an annual disclosure burden for prescribers to formulate and release prescriptions of approximately 1,375,000 hours (82.5 million annual exams × 1 min/60 mins).

2. Estimated Hour Burden of Prescribers' Staff To Obtain and Store Patient Confirmation of Prescription Release = 1,375,000 Hours (343,750 Hours for Patients To Read and Sign Confirmations, 1,031,250 Hours for Prescribers' Offices To Scan and Store Such Confirmations)

The requirement to generate and present the confirmation of prescription release will not require significant time or effort. The requirement is flexible in that it allows different modalities and delivery methods at the discretion of the prescriber. The requirement is also flexible in that it does not dictate other details, such as the precise content or language of the patient confirmation. At the same time, prescribers and their staff would not be obligated to spend time formulating their own content for the confirmation, since the amended Rule provides draft language that prescribers are free to use, should they so desire. Furthermore, prescribers likely have forms and systems in place to maintain confirmation records already, since they already must comply with the similar confirmation requirement of the Contact Lens Rule, and may need make only minor adjustments to accommodate confirmations for eyeglasses prescriptions. As a result, the marginal cost of the Confirmation amendment to the Eyeglass Rule should be extremely low, possibly lower than that estimated herein.

As noted above, the requirement of § 456.4(a)(1)(i) to collect a patient's signature on the confirmation of prescription release and preserve it constitutes a new information collection as defined by OMB regulations that implement the PRA. Nonetheless, the Commission determines it will require minimal time for a patient to read the confirmation and provide a signature. As noted above, the Commission estimated in the Contact Lens Rule and the NPRM that it would take patients 10 seconds to read the one-sentence confirmation of prescription release and provide a signature.[467] However, for the reasons discussed above, the Commission now believes that 20 seconds is an appropriate estimate for this task.[468]

The second option, § 456.4(a)(1)(ii), involves digital delivery of the prescription and does not, in and of itself, constitute an information collection under the PRA, since no new information that would not otherwise be provided under the Rule is provided to or requested from the patient.[469]

In its NPRM, the Commission assumed that prescribers would elect digital prescription delivery 25% of the time, and thus would be required to obtain a signed confirmation for the other 75% of patients receiving prescriptions.[470] That assumption was based on the premise that the NPRM offered prescribers four options (confirmation on a stand-alone document, confirmation on a prescription copy, confirmation on a sales receipt, or digital delivery with no confirmation required). With no specific details that clearly show which option prescribers would prefer, the Commission employed the assumption that prescribers would choose each of four options in equal numbers.

The current Rule amendment has only two options, paper delivery or digital delivery, and thus if the Commission used the same equal-share assumption it followed in the NPRM, the percentage attributed to digital delivery (and thereby not implicating the burden of a confirmation) for PRA purposes would be 50%. However, based on conversations with prescribers and the industry, the Commission has reason to believe that regardless of widespread EHR adoption, many prescribers still do not provide patient portals or deliver prescriptions digitally to patients, and thus it would not be correct to designate 50% of all prescription releases as digital delivery. Further supporting this view, the aforementioned AOA survey found that only 35% of prescribers said they provided prescriptions electronically.[471] Even that might overcount the number of prescriptions delivered digitally, since the prescribers surveyed by AOA about their method for either obtaining patient confirmations and delivering prescriptions were permitted to select more than one option, so some of the 35% who chose digital delivery of prescription (and thus no confirmation) may also have responded that they use other options, meaning that the overall percentage of prescriptions released electronically is actually less than 35%.[472] Furthermore, as discussed above, there are questions as to the reliability of AOA's survey findings, and whether they are truly representative of the average prescriber. Therefore, in order to ensure that the PRA burden for the Rule is not underestimated, the Commission will retain the previously used assumption that just 25% of prescribers employ digital-prescription delivery, and the other 75% of approximately 82.5 million annual prescription releases require a consumer reading and signing a confirmation statement. Thus, assuming twenty seconds for each such release, prescribers' offices would devote

343,750 hours, cumulatively (75% × 82.5 million prescriptions yearly × 20 seconds each/60 secs/60 mins) to obtaining patient signatures as confirmations of prescription release.[473]

Maintaining those signed confirmations for a period of not less than three years should not impose substantial new burdens on individual prescribers and office staff. Since the Rule allows flexibility in how prescribers craft the confirmation statement, prescribers may add it to documents that they would already be saving, such as prescription copies (and the majority of States already require that optometrists keep records of eye examinations for at least three years[474]) or customer sales receipts (which are normally preserved for financial accounting and recordkeeping purposes). Even if the prescriber chooses to create and use a separate confirmation statement, storing a one-page document per patient per year should not require more than a few seconds, and an inconsequential, or *de minimis,* amount of record space. Some prescribers might also present the confirmation of prescription release in electronic form, enabling patients to sign a computer screen or tablet directly, and have their confirmation immediately stored as an electronic document.

For other prescribers, however, the recordkeeping requirement would likely require that office staff electronically scan the signed confirmation and save it as a digital document. For prescribers who preserve the confirmation by scanning it, Commission staff estimates that preserving such a document would consume approximately one minute of staff time.

The Commission does not possess information on the percentage of prescribers' offices that currently use and maintain paper records versus electronic records, or that scan paper files and maintain them electronically. Thus, for purposes of this PRA analysis, and to again guard against possibly underestimating the Rule's burden, the Commission will assume that all prescriber offices who opt for § 456.4(a)(1)(i) (who do not dispense prescriptions electronically) require a full minute per confirmation statement for storing such recordkeeping.

Assuming—as the Commission did above—that 25% of prescriptions will be delivered electronically, and thus 75% of prescriptions require a patient confirmation that must be scanned and saved, the recordkeeping burden for all prescribers' offices to scan and save such confirmations amounts to 1,031,250 hours (75% × 82.5 million prescriptions yearly × one minute for scanning and storing/60 mins) per year.

3. Estimated Hour Burden on Prescribers' Offices To Obtain and Store Patient Consents to Electronic Delivery = 458,333 Hours (114,583 Hours To Obtain Signed Consents and 343,750 Hours To Store Same)

As noted previously, § 456.4(a)(1)(ii), the second option for satisfying the confirmation-of-prescription-release requirement, involves digital delivery of prescriptions, and thus does not necessitate that prescribers obtain or maintain a record of the patient's signature confirming receipt of a prescription. However, this option does require that prescribers obtain and maintain records or evidence of the patients' affirmative consent to electronic delivery for three years. Based on the previous estimate that 25% of patients will receive digital delivery of their prescriptions, the Commission will use the assumption that consumers sign such consents for electronic delivery for one quarter of the 82.5 million prescriptions released per year,[475] and that this task would take the same amount of time as to obtain and preserve a signature of the patient's confirmation of prescription release. Thus, the Commission will assign 114,583 hours for the time required for prescribers' offices to obtain patients' affirmative consent to electronic delivery of their prescriptions[476] and 343,750 hours for the time to store and maintain such records.[477]

In total, the estimated incremental PRA recordkeeping burden for prescribers and their staff resulting from adding the confirmation-of-prescription-release requirement to the Rule amounts to 1,833,333 total hours (343,750 and 114,583 hours, respectively, to obtain signatures confirming release and consenting to electronic delivery, plus 1,031,250 and 343,750 hours, respectively, to maintain records of confirmation and consent for three years) for prescribers' offices. Adding this incremental PRA burden to the 1,375,000-hours burden resulting from the existing prescription-release requirement yields a total PRA disclosure and recordkeeping burden from the Rule of 3,208,333 hours for prescribers and their staff.

C. Estimated Labor Cost

The Commission derives labor costs by applying appropriate hourly-cost figures to the burden hours described above. Since prescribers conduct patient examinations and formulate the prescriptions, the time spent releasing prescriptions to patients has traditionally been attributed for PRA purposes to prescribers, rather than their office staff. As for the task of obtaining patient confirmations and consent to electronic delivery, this could be performed by prescribers or their support staff. In the past, the task of collecting patient signatures was attributed to prescribers, but based on more recent conversations with prescribers and others in the industry, it has become evident that this task is more appropriately designated as performed by prescribers' office staff.[478] Therefore, the Commission will continue to assume that prescribers release prescriptions to patients, but that prescribers' office staff perform the task of collecting patient signatures on confirmations and digital-release consents, as well as the labor pertaining to printing, scanning, and storing of both documents.

According to the U.S. Bureau of Labor Statistics (''BLS''), general office clerks earn an average wage of $20.94 per hour, optometrists earn an average wage of $68.75 per hour, and ophthalmologists—which are listed by BLS under ''surgeons''—earn an average wage of $150.06 per hour.[479] Using the average wage for office clerks, and the aforementioned estimate of 1,833,333 total hours for office staff to obtain signed patient confirmations and consents to digital prescription delivery and to store such documents, the Commission calculates an incremental burden of $38,389,993 from adding the confirmation of prescription release to the Eyeglass Rule.[480]

Based on our knowledge of the industry, we assume that of the 1,375,000 prescriber-labor hours relating to the Rule's requirement to release a copy of the prescription to the patient, optometrists are performing 85% (1,168,750) of such hours and ophthalmologists are performing the remaining 15% (206,250) of such hours. Applying this to the BLS wage figures results in a prescriber-labor burden for the existing burden of releasing prescriptions of $111,301,438 ($80,351,563 for optometrists + $30,949,875 for ophthalmologists).

Adding the $38,389,993 staff burden from the confirmation-of-prescription-release requirement to the $111,301,438 prescriber burden from the automatic prescription-release requirement already in place yields a total estimated annual labor cost burden for the Eyeglass Rule of $149,691,431. While not insubstantial, this amount constitutes less than one half of one percent of the estimated $35.6 billion retail market for eyeglass sales in the United States in 2022.[481] Furthermore, the actual burden

is likely to be less, because, as noted *supra,* prescribers who do not have a financial interest in the sale of eyewear will not be required to obtain patient confirmations, many prescribers' offices will require less than a minute to store the confirmation form, prescribers can use the same document to obtain confirmations for eyeglass prescriptions and contact lens prescriptions, and, as digital prescription delivery increases over time, the overall burden should correspondingly decrease.

D. Capital and Other Non-Labor Costs

The recordkeeping requirements detailed above regarding prescribers impose negligible capital or other non-labor costs, as prescribers likely have already the necessary equipment and supplies (*e.g.,* prescription pads, patients' medical charts, scanning devices, recordkeeping storage) to perform those requirements.

IX. Final Regulatory Analysis and Regulatory Flexibility Act Analysis

Under section 22 of the FTC Act, 15 U.S.C. 57b–3, the Commission must issue a final regulatory analysis related to a final rule only when it: (1) estimates that the amendment will have an annual effect on the national economy of $100,000,000 or more; (2) estimates that the amendments will cause a substantial change in the cost or price of certain categories of goods or services; or (3) otherwise determines that the amendments will have a significant effect upon covered entities and upon consumers. The Commission has determined that this final rule will not have such an annual effect on the national economy, on the cost or prices of goods or services, or on covered businesses or consumers.

The amendments adopted in this final rule require that prescribers obtain from patients, and maintain for a period of no less than three years, a signed confirmation of prescription release acknowledging that patients received their eyeglass prescriptions at the completion of their eye examination. The amendments also require some prescribers to obtain and maintain for three years a patient's consent to deliver prescriptions electronically, but only for prescribers who elect to offer this method of delivery as an alternative to providing prescriptions in paper, and only if the patient agrees.

As discussed in the Paperwork Reduction Act section of this document, the Commission approximates that collecting a patient's signature on the confirmation of prescription release (giving time for the patient to read the confirmation) in accordance with § 456.4 will take approximately 20 seconds. Providing the patient with the confirmation of prescription release in accordance with this provision will require prescribers' offices to present a statement of prescription release and request a patient signature. The amendment provides prescribers with language that they can use on a confirmation form, which will relieve prescribers of the burden of coming up with such language. This requirement may also involve some staff training, which should be minimal, particularly since prescribers' staff will already be trained in obtaining patient confirmation of prescription releases under the Contact Lens Rule.[482] As a result, complying with § 456.4(a) will impose only minimal incremental costs on prescribers' offices.[483]

The PRA section of this document also addresses the burden under § 456.4(b) for prescribers to maintain, for at least three years, records confirming their patients' receipt of prescriptions, and estimates it will take one minute for prescribers' staff to meet their recordkeeping obligations. This likely overstates the recordkeeping burden, since, as noted above, storing a one-page document per patient per year should not require more than a few seconds, and an inconsequential, or *de minimis,* amount of record space. Prescribers who decide to collect or maintain signatures electronically may already have electronic health records in place. Some prescribers might also present the confirmation of prescription release in electronic form, enabling patients to sign a computer screen or tablet directly, and have their confirmation immediately stored as an electronic document.

As further noted in the Paperwork Reduction Act section of this final rule, the estimated cost to prescribers of complying with all of the requirements of the Eyeglass Rule is just .0042 of the total retail market for prescription eyeglass sales, with the cost of this final rule representing less than a third of that amount. In sum, the burdens imposed on small entities are likely to be relatively small.

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Act (''FRFA'') with the final rule, if any, unless the agency certifies that the rule will not have a significant impact on a substantial number of small entities.

In the NPRM, the Commission determined the proposed amendments should not have a significant or disproportionate impact on prescribers' costs, and based on available information, the Commission certified that amending the Rule as proposed in the NPRM, would not have a significant impact on a substantial number of small entities. Nonetheless, the Commission determined that it was appropriate to publish an IRFA to inquire into the impact of the proposed rule on small entities. Based on the IRFA set forth in the Commission's NPRM, a review of the public comments submitted in response to that notice and the workshop notice, and the discussions from the Workshop itself, the Commission submits this FRFA. This document serves as notice to the Small Business Administration of the agency's certification of no significant impact.

A. Need for and Objectives of the Final Rule

The Commission has concluded that millions of American consumers in need of corrective vision wear are not receiving their eyeglass prescriptions after visiting their prescriber. It has also concluded that a rulemaking to add a confirmation-of-prescription-release requirement is necessary to increase the number of patients who receive their prescriptions, to inform patients of the Rule and of their right to their prescriptions, and to ensure the separation of eye examination and eyeglass dispensing, which fosters a competitive marketplace for eyeglasses. The Commission notes that prescribers who currently comply with the automatic-release provision of the Rule may presently face a competitive disadvantage because of widespread non-compliance by other prescribers. This creates an unlevel playing field and undermines fair competition. In addition, the Commission expects that this final rule will: reduce the number of seller requests to prescribers for eyeglass prescriptions; improve the Commission's ability to monitor overall compliance and target enforcement actions; reduce evidentiary issues, complaints, and disputes between prescribers and consumers; and bring the Eyeglass Rule into congruence with the confirmation-of-prescription-release requirements of the Contact Lens Rule, reducing confusion for prescribers and consumers, and easing compliance and enforcement for both rules.

B. Significant Issues Raised by Public Comments in Response to the IRFA and the Agency's Response, Including Any Changes Made in the Final Rule

In crafting the final rule, the Commission carefully considered the comments received throughout the Rule

review process. This document contains a detailed discussion of the comments received by the Commission and the Commission's response to those comments. The Commission did not receive any comment from the Chief Counsel for Advocacy of the Small Business Administration.

The Commission received 47 comments in response to the NPRM and Workshop notices. Some of the comments, from prescribers and prescriber groups, strongly opposed the confirmation-of-prescription-release requirement indicating that such a change was not needed or would be burdensome to comply with. Specifically, those commenters stated that there was not a compliance problem with the Eyeglass Rule's automatic-release provision and the confirmation requirement was therefore an attempt to ''fix something that was not broken.'' Some also commented that the Rule changes, if finalized, would add a burden to small business optometry practices that already are enduring financial challenges and staffing issues. A few commenters contended that compliance with the proposed amendments would take longer than the Commission estimated in its NPRM, as demonstrated by the amount of time it currently takes prescribers to comply with the existing Contact Lens Rule requirements that are similar to those proposed for the Eyeglass Rule.

In contrast to the position expressed above, commenters from NAROC said that it is their understanding—based on responses from their prescriber members—that compliance with the current Contact Lens Rule confirmation-of-prescription-release requirement is occurring with little or no disruption or expense.[484] And as explained in the PRA section of this document, the Commission has concerns about the reliability of some of the evidence, cited by those critical of the Rule's confirmation proposal, as to the burden of the existing contact lens confirmation requirement. The Commission did not ignore or dismiss any comments and evidence outright, however, and evaluated the evidentiary record as a whole in making a final determination.

The Commission is sensitive to the additional burden or cost that this final rule imposes on businesses. However, after weighing all of the comments and evidence, it finds that this final rule will provide many benefits with a relatively small burden or cost. In particular, the Commission determines that the potential benefit of increasing the number of patients in possession of their eyeglass prescriptions is substantial: namely, increased flexibility and choice for consumers; increased competition among eyeglass sellers; a reduced likelihood of errors associated with incorrect, invalid, and expired prescriptions, and consequently, improved patient safety; and an improved ability for the Commission to enforce and monitor prescriber compliance with the Rule's prescription-release requirements. The Commission concludes that revising the existing remedy of automatic prescription release by adding the confirmation-of-prescription-release mechanism is necessary and beneficial due to demonstrated failures of prescribers to comply with the automatic-release remedy, and to ensure the separation of eye examination and eyeglass dispensing, which engenders a competitive marketplace for eyeglasses. As a result, this final rule adopts the amendments proposed in the NPRM with the modifications discussed in this document.

In response to comments that the Commission, in its NPRM, underestimated the amount of time it takes to comply with the CLR confirmation-of-prescription-release requirements, and for other reasons noted in the PRA section of this document, the Commission increased its time estimate for complying with the new requirements.[485]

C. Description and Estimate of the Number of Small Entities to Which the Amendments Will Apply or Explanation Why No Estimate Is Available

This final rule applies to eyeglass prescribers, and many prescribers will fall into the category of small entities (*e.g.,* offices of optometrists with $9 million or less in annual receipts).[486] Determining a precise estimate of the number of small entities covered by the Rule's prescription release requirements is not readily feasible because most prescribers' offices do not release the underlying revenue information necessary to make this determination. In the NPRM, the Commission sought comment on the number or nature of small business entities for which the proposed amendments would have a significant impact.[487] In response, the AOA commented that ''doctors of optometry reported collecting $826,612, on average, in gross receipts in 2021.'' The AOA also stated that 91.9% of optometry practices have fewer than 25 employees.[488] Based on the AOA comment, and staff's knowledge of the eye care industry, including meetings with industry members and a review of industry publications, staff expects that a substantial number of these entities likely qualify as small businesses.[489]

D. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Amendments, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills That Will Be Necessary To Comply

The final rule will impose a confirmation-of-prescription-release requirement on all optometrists or ophthalmologists who have a direct or indirect financial interest in the sale of eyewear. If a paper copy of the prescription was provided to the patient, the prescriber must request that the patient acknowledge receipt of the prescription by signing a separate statement on paper or in a digital format confirming receipt of the prescription. If a digital copy of the prescription was provided to the patient, the prescriber must retain evidence that such prescription was sent, received or made accessible, downloadable, and printable. Prescribers are required to maintain the records or evidence associated with the confirmation of prescription release, or digital delivery of the prescription for at least three years. In addition, if a prescriber elects to provide a digital copy of the prescription to comply with the Rule, the prescriber is required to identify to the patient the specific method or methods of electronic delivery that they will use and to obtain the patient's verifiable affirmative consent to receive a digital copy through the identified method or methods. The prescriber must maintain records or evidence of the patient's affirmative consent for at least three years.

As discussed in section C of section IX., Final Regulatory Analysis and Regulatory Flexibility Act Analysis, we assume that many of the estimated 43,000 active optometrists and 18,000 active ophthalmologists fall within the definition of a small entity. As discussed in the PRA section of this document, we estimate that prescribers' office staff perform the task of collecting patient signatures on confirmations and digital-release consents, as well as the labor pertaining to printing, scanning, and storing of both documents. Prescribers' offices will have to train staff on, and set up procedures for complying with, the new requirements of the Eyeglass Rule. However, as discussed in the PRA section of this document, prescribers likely have forms and systems in place to maintain confirmation records already, since they already must comply with the similar confirmation requirement of the Contact

Lens Rule, and may need make only minor adjustments to accommodate confirmations for eyeglasses prescriptions.

E. Steps Taken To Minimize the Significant Impact, if Any, of the Amendments, Including Why Any Significant Alternatives Were Not Adopted

Commenters at the ANPR stage recommended, as alternatives to the signed acknowledgment proposal, conspicuous signage declaring consumers' right to a copy of their prescription, or an eye care patients' bill of rights notifying consumers of their rights under the Rule. As explained in the NPRM, the Commission ultimately decided against a signage provision, after determining that the benefits were limited and that requiring signage would be significantly less effective at ensuring contact lens prescription release than requiring a written patient confirmation.[490] As explained in the NPRM, the Commission also decided against another proposed alternative, an eye care patients' bill of rights, for reasons including that the bill of rights proposal does not require the type of prescriber recordkeeping that would allow for better Rule monitoring and enforcement, and would not help resolve disputes between patients and prescribers over whether a prescription had been released.[491]

In an attempt to minimize the burdens associated with the confirmation-of-prescription-release requirement, the Rule provides prescribers with different compliance options depending on whether they release a paper or digital copy of the prescription, and provides one-sentence sample language that prescribers can elect to use should they release paper copies of prescriptions. Moreover, this amendment aligns with the prescription-release-related provisions of the Contact Lens Rule, thereby reducing the confusion and complexity that might arise for consumers and prescribers from having different confirmation-of-prescription-release requirements for contact lens and eyeglass prescriptions. In addition, the marginal cost of the amendment to the Eyeglass Rule should be relatively low because the Contact Lens Rule already requires prescribers to obtain confirmation of prescription release and to maintain records of such. Some prescribers likely have forms and systems in place already, which may need only minor adjustments to accommodate confirmations for eyeglass prescriptions.

The Commission also adopts the proposed exemption to the confirmation-of-prescription-release requirements for prescribers who do not have a direct or indirect financial interest in the sale of eyeglasses as § 456.4(c).[492] The purpose of such an exemption is to reduce the burden on prescribers who do not sell lenses.

X. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this final rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 456

Advertising, Medical devices, Ophthalmic goods and services, Trade practices.

For the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR part 456 as follows:

PART 456—OPHTHALMIC PRACTICE RULES (EYEGLASS RULE)

■ 1. The authority citation for part 456 is revised to read as follows:

Authority: 15 U.S.C. 57a.

■ 2. Amend § 456.1 by revising paragraphs (a), (b), (d), (e) and (g) to read as follows:

§ 456.1 Definitions.

(a) A *patient* is any person who has had a refractive eye examination.

(b) A *refractive eye examination* is the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests.

* * * * *

(d) *Ophthalmic services* are the measuring, fitting, and adjusting of ophthalmic goods subsequent to a refractive eye examination.

(e) An *ophthalmologist* is any Doctor of Medicine or Osteopathy who performs refractive eye examinations.

* * * * *

(g) A *prescription* is the written specifications for lenses for eyeglasses which are derived from a refractive eye examination, including all of the information specified by State law, if any, necessary to obtain lenses for eyeglasses.

■ 3. Revise § 456.2 to read as follows:

§ 456.2 Separation of examination and dispensing.

It is an unfair act or practice for an ophthalmologist or optometrist to:

(a)(1) Fail to provide to the patient one copy of the patient's prescription immediately after the refractive eye examination is completed and before offering to sell the patient ophthalmic goods, whether or not the prescription is requested by the patient. Such prescription shall be provided:

(i) On paper; or

(ii) In a digital format that can be accessed, downloaded, and printed by the patient, after obtaining verifiable affirmative consent, pursuant to § 456.3.

(2) Provided: An ophthalmologist or optometrist may refuse to give the patient a copy of the patient's prescription until the patient has paid for the refractive eye examination, but only if that ophthalmologist or optometrist would have required immediate payment from that patient had the examination revealed that no ophthalmic goods were required. For purposes of the preceding sentence, the presentation of proof of insurance coverage for that service shall be deemed to be a payment;

(b) Condition the availability of a refractive eye examination to any person on a requirement that the patient agree to purchase any ophthalmic goods from the ophthalmologist or optometrist;

(c) Charge the patient any fee in addition to the ophthalmologist's or optometrist's refractive eye examination fee as a condition to releasing the prescription to the patient. Provided: An ophthalmologist or optometrist may charge an additional fee for verifying ophthalmic goods dispensed by another seller when the additional fee is imposed at the time the verification is performed; or

(d) Place on the prescription, or require the patient to sign, or deliver to the patient a form or notice waiving or disclaiming the liability or responsibility of the ophthalmologist or optometrist for the accuracy of the refractive eye examination or the accuracy of the ophthalmic goods and services dispensed by another seller.

§§ 456.3 through 456.5 [Redesignated as §§ 456.5 through 456.7]

■ 4. Redesignate §§ 456.3 through 456.5 as §§ 456.5 through 456.7, respectively.

■ 5. Add new § 456.3 to read as follows:

§ 456.3 Verifiable affirmative consent to providing the prescription in a digital format.

For a prescription copy provided in a digital format, the prescriber shall:

(a) Identify to the patient the specific method or methods of electronic delivery that will be used, such as text message, electronic mail, or an online patient portal;

(b) Obtain, on paper or in a digital format, the patient's verifiable affirmative consent to receive a digital

copy through the identified method or methods; and

(c) Maintain records or evidence of a patient's affirmative consent for a period of not less than three years. Such records or evidence shall be available for inspection by the Federal Trade Commission, its employees, and its representatives.

■ 6. Add new § 456.4 to read as follows:

§ 456.4 Confirmation of prescription release.

(a)(1) Upon completion of a refractive eye examination, and after providing a copy of the prescription to the patient, the prescriber shall do one of the following:

(i) If a paper copy of the prescription was provided to the patient, request that the patient acknowledge receipt of the prescription by signing a separate statement on paper or in a digital format confirming receipt of the prescription; or

(ii) If a digital copy of the prescription was provided to the patient (via methods including an online portal, electronic mail, or text message, and pursuant to § 456.3), retain evidence that such prescription was sent, received, or made accessible, downloadable, and printable.

(2) If the prescriber elects to confirm prescription release via paragraph (a)(1)(i) of this section, the prescriber may, but is not required to, use the statement, ''My eye care professional provided me with a copy of my prescription at the completion of my examination'' to satisfy the requirement.

(3) In the event the patient declines to sign a confirmation requested under paragraph (a)(1)(i) of this section, the prescriber shall note the patient's refusal on the document and sign it.

(b) A prescriber shall maintain the records or evidence required under paragraph (a) of this section for a period of not less than three years. Such records or evidence shall be available for inspection by the Federal Trade Commission, its employees, and its representatives.

(c) Paragraphs (a) and (b) of this section shall not apply to prescribers who do not have a direct or indirect financial interest in the sale of eye wear, including, but not limited to, through an association, affiliation, or co-location with an optical dispenser.

* * * * *

By direction of the Commission.

April J. Tabor,

Secretary.

Endnotes

[1] 16 CFR 456.2(a). A prescriber may withhold a patient's prescription until the patient has paid for the eye examination, but only if the prescriber would have required immediate payment if the examination had revealed that no ophthalmic goods were needed. *Id.* The Rule defines an ''eye examination'' as ''the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests.'' 16 CFR 456.1. The Commission is changing this term in the final rule text to ''refractive eye examination,'' in order to make it more precise, and differentiate between eye health exams and refractive exams. *See infra* section VI, Final Rule Regarding ''Eye Examination'' Terminology. However, the meaning of the defined term remains the same, and since it has previously been referred to as ''eye exam'' or ''eye examination''—including by commenters—it is frequently referred to as such throughout the SBP.

[2] 16 CFR 456.2(c).

[3] 16 CFR 456.1(g).

[4] 16 CFR 456.2(b). The Rule thereby also prohibits conditioning the release of the prescription on the requirement that the patient purchase ophthalmic goods from the ophthalmologist or optometrist.

[5] 16 CFR 456.2(d).

[6] 16 CFR 456.2.

[7] 16 CFR part 192 (rescinded); *see also* ''Staff Report on Advertising of Ophthalmic Goods and Services and Proposed Trade Regulation Rule,'' at 235–36 (May 1977), *https://www.ftc.gov/reports/staff-report-advertising-ophthalmic-goods-services-proposed-trade-regulation-rule-16-cfr-part-456* [hereinafter Eyeglass I Report].

[8] *See* Eyeglass I Report, *supra* note 7, at 240–48 (detailing myriad accounts of prescribers refusing to release eyeglass prescriptions to their patients); *see also* Final Trade Regulation Rule, Advertising of Ophthalmic Goods and Services, 43 FR 23992, 23998 (June 2, 1978) [hereinafter Eyeglass I Rule] (finding that in nearly every survey of practicing optometrists considered in the rulemaking record, more than 50% imposed a restriction on the availability of eyeglass prescriptions to patients).

[9] Eyeglass I Rule, 43 FR 23998, 24007–08.

[10] *Id.* at 24003.

[11] *Id.*

[12] *Id.* at 23998.

[13] *Am. Optometric Ass'n* v. *FTC,* 626 F.2d 896, 915 (D.C. Cir. 1980). The Court held that the harm arose by making comparison-shopping harder, removing seller incentives to advertise, and reducing opticians' ability to compete. The Court overturned other provisions of the Rule related to bans on State advertising restrictions. *Id.* at 910–11.

[14] *Id.* at 916. Following the court's remand, FTC staff conducted additional investigation and recommended the Commission seek new comment on whether to keep the automatic-prescription-release requirement or change it to release-upon-request. Fed. Trade Comm'n, State Restrictions on Vision Care Providers: The Effects on Consumers (1980), *https://www.ftc.gov/reports/state-restrictions-vision-care-providers-effects-consumers-eyeglasses-ii.* The Commission then sponsored a survey—commonly known as the ''Market Facts Study''—to determine to what extent prescribers were complying with the Rule. The Study found that only a little more than one-third of prescribers were in ''technical compliance'' with the Rule's prescription-release requirement, and only 38% of consumers knew they were entitled to automatically receive their prescription. *See* Fed. Trade Comm'n, Ophthalmic Practice Rules: State Restrictions on Commercial Practice at 256–58 (Oct. 1986), *https://www.ftc.gov/reports/ophthalmic-practice-rules-state-restrictions-commercial-practice-eyeglasses-ii-report-staff* [hereinafter Eyeglass II Report]. Following the Market Facts Study, the Commission did not take any action to revise the Rule.

[15] Eyeglass II Report, *supra* note 14, at 249.

[16] *Id.* at 249, 274–76.

[17] Eyeglass I Rule, 43 FR 23992, 23998.

[18] Eyeglass II Report, *supra* note 14, at 275–76.

[19] Report of the Presiding Officer on Proposed Trade Regulation Rule: Ophthalmic Practice Rules, Public Record No. 215–63 (1986), *https://www.ftc.gov/reports/report-presiding-officer-proposed-trade-regulation-rule-ophthalmic-practice-rules-eyeglass-rule-16* [hereinafter Presiding Officer's Report].

[20] Eyeglass II Rule, 54 FR 10285, 10286–87. In addition to relying on the Market Facts Study, hearing testimony, and the Presiding Officer's Report, the Commission also cited a survey by the American Association of Retired Persons, which found significant non-compliance and continued lack of consumer awareness of their rights, particularly among older consumers. *Id.* at 10303 & nn.180 & 181; *see also* Eyeglass II Report, *supra* note 14, at 263 n.682 (noting that 32% of consumers who did not receive a prescription stated that they did not know to ask for one).

[21] *See Cal. State Bd. of Optometry* v. *FTC,* 910 F.2d 976 (D.C. Cir. 1990). The court overturned provisions related to certain State laws of optometry, which the court found could not be overridden by the FTC without more explicit authority from Congress. Following the court decision, in 1992, the Commission reissued the Eyeglass Rule, but without the portions declared invalid, and with renumbered designations pertaining to prescription release. *See* Final Trade Regulation Rule, Ophthalmic Practice Rules, 57 FR 18822 (May 1, 1992).

[22] Ophthalmic Practice Rules, Request for Comments, 62 FR 15865, 15867 (Apr. 3, 1997).

[23] 15 U.S.C. 7601–7610 (Pub. L. 108–164).

[24] Pursuant to the FCLCA, the Commission promulgated the Contact Lens Rule (''CLR'') on July 2, 2004. Contact Lens Rule, Final Rule, 69 FR 40482 (July 2, 2004) (codified at 16 CFR part 315).

[25] Ophthalmic Practice Rules, Final Rule, 69 FR 5451, 5453 (Feb. 4, 2004) (''2004 ER''). The Commission also made findings that: release of prescriptions enhances consumer choice; no evidence had been submitted that the Rule's restrictions on disclaimers and waivers were no longer needed; the automatic-release provision imposed only a minimal burden on prescribers; and retaining automatic release would keep the Eyeglass Rule consistent with the automatic-release provision of the Contact Lens Rule, 16 CFR part 315.

[26] 2004 ER, 69 FR 5453.

[27] *Id.; see also* Contact Lens Rule, Final Rule, 69 FR 40482.

[28] 15 U.S.C. 57a(a)(1)(B).

[29] 15 U.S.C. 57a(d)(2)(B) (''A substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection.'').

[30] 15 U.S.C. 45(n); *see also* Eyeglass II Rule, 54 FR 10285, 10287; Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, U.S. Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *appended to Int'l Harvester Co.,* 104 F.T.C. 949, 1070, 1073 (1984) (also referred to as ''FTC Policy Statement on Unfairness'': *https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness*).

[31] 15 U.S.C. 57a(b)(3).

[32] 15 U.S.C. 57a(b)(3)(B).

[33] Ophthalmic Practice Rules, Final Trade Regulation Rule, Statement of Basis and Purpose, 54 FR 10285, 10288 (1989) (citing Credit Practices Rule, Statement of Basis and Purpose, 49 FR 7740, 7742 (1980)).

[34] *See* Ophthalmic Practice Rules, Final Trade Regulation Rule, Statement of Basis and Purpose, 54 FR 10288.

[35] *Id.*

[36] *Id.*

[37] *Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 988 (D.C. Cir. 1985) (quoting *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 612–13 (1946)).

[38] Contact Lens Rule, Request for Comment, 80 FR 53272 (Sept. 3, 2015) [hereinafter CLR RFC].

[39] Ophthalmic Practice Rules (Eyeglass Rule), Advance Notice of Proposed Rulemaking; Request for Comment, 80 FR 53274 (Sept. 3, 2015) [hereinafter ANPR].

[40] ANPR, 80 FR 53276.

[41] The public comments responding to the ANPR are posted on *Regulations.gov* at *https://www.regulations.gov/document/FTC-2015-0095-0001* (ANPR Comments). *Regulations.gov* has assigned each comment an identification number appearing after the name of the commenter. This final rule cites comments using the last name of the individual submitter, or the name of the organization and the individual within the organization who submitted the comment, along with the last four digits of the comment identification number assigned by *Regulations.gov*. For instance, the full comment number assigned by *Regulations.gov* to the comment submitted by an individual named Publi is FTC–2015–0095–0040. In this document, that comment is cited as ''Publi (ANPR Comment #0040).'' This SBP will use this same identification method when discussing comments submitted in response to other rulemaking notices.

[42] *See, e.g.,* Opticians Association of Virginia (ANPR Comment #0647 submitted by Nelms) (stating that patients are led into the dispensary before paying for their exam and requesting the Rule be amended to include language that the prescription be given to the patient without additional sales pressure or intimidation); Burchell (ANPR Comment #0866); National Association of Optometrists and Opticians (''NAOO'') (ANPR Comment #0748 submitted by Cutler); Professional Opticians of Florida (ANPR Comment #0803 submitted by Couch). Other commenters more generally stated their support for the Rule. *See* Publi (ANPR Comment #0040); Santini (ANPR Comment #0047); Costa (ANPR Comment #0068); Ellis (ANPR Comment #0189); Hildebrand (ANPR Comment #0220); Prevent Blindness (ANPR Comment #0385 submitted by Parry); DiBlasio (ANPR Comment #0441); Pulido (ANPR Comment #0019); Stuart (ANPR Comment #0841).

[43] AOA (ANPR Comment #0849 submitted by Peele); *see also* Barnes (ANPR Comment #0043) (stating she complies with the Rule although it is unnecessary since any ethical doctor will release a non-expired prescription to a patient); Kanevsky (ANPR Comment #0364) (optometrist states she and the prescribers she knows comply with the Rule).

[44] Contact Lens Rule, Notice of Proposed Rulemaking, 81 FR 88526 (Dec. 7, 2016) [hereinafter CLR NPRM].

[45] Contact Lens Rule, Supplemental Notice of Proposed Rulemaking, 84 FR 24664 (May 28, 2019) [hereinafter CLR SNPRM].

[46] Contact Lens Rule, Final Rule, 85 FR 50668 (Aug. 17, 2020) [hereinafter CLR Final Rule].

[47] *Id.* at 50687.

[48] *Id.*

[49] 16 CFR 315.3(c).

[50] CLR Final Rule, 85 FR 50687.

[51] *Id.* at 50687–88.

[52] CLR SNPRM, 84 FR 24668–69; CLR Final Rule, 85 FR 50681–83.

[53] CLR Final Rule, 85 FR 50717; 16 CFR 315.2.

[54] Ophthalmic Practice Rules (Eyeglass Rule), Notice of Proposed Rulemaking, Request for Public Comment, 88 FR 248 (Jan. 3, 2023) [hereinafter NPRM].

[55] The public comments submitted in response to the NPRM are available on *Regulations.gov* at *https://www.regulations.gov/document/FTC-2023-0001-0001* (''NPRM Comments''). There are 47 comments available at this link. Twenty-seven comments were received in response to the Commission's NPRM, and 20 comments were submitted in response to a subsequent public notice. *See infra* note 59.

[56] Public Workshop Examining Proposed Changes to the Ophthalmic Practice Rules (Eyeglass Rule), Public Workshop and Request for Public Comment, 88 FR 18266 (Mar. 28, 2023) [hereinafter WS Notice].

[57] *Id.* at 18268.

[58] The workshop transcript (along with the agenda and a video recording) is available on the FTC website at *https://www.ftc.gov/news-events/events/2023/05/clear-look-eyeglass-rule* [hereinafter WS Transcript].

[59] The public comments submitted in response to the WS Notice are available on *Regulations.gov* at *https://www.regulations.gov/document/FTC-2023-0001-0029* [hereinafter WS Comments]. There are 47 comments available at this link. Twenty-seven comments were received in response to the Commission's NPRM, and 20 comments were submitted in response to the WS Notice.

[60] The 2020 Contact Lens Rulemaking record includes comments to the CLR RFC; the CLR NPRM; the Public Workshop Examining Contact Lens Marketplace and Analyzing Proposed Changes to the Contact Lens Rule, Public Workshop and Request for Public Comment, 82 FR 57889 (Dec. 8, 2017) [hereinafter CLR WS Notice]; and the CLR SNPRM. Public comments received in response to these notices are available on *Regulations.gov: https://www.regulations.gov/document/FTC-2015-0093-0001* (CLR RFC Comments); *https://www.regulations.gov/document/FTC-2016-0098-0001* (CLR NPRM Comments); *https://www.regulations.gov/document/FTC-2017-0099-0001* (CLR WS Comments); and *https://www.regulations.gov/document/FTC-2019-0041-0001* (CLR SNPRM Comments). *Regulations.gov* has assigned each comment an identification number appearing after the name of the commenter. This document cites comments using the last name of the individual submitter, or the name of the organization and the individual within the organization who submitted the comment, along with the last four digits of the comment identification number assigned by *Regulations.gov.*

[61] The Commission has determined not to disturb that finding, even after analyzing comments suggesting it should do so. *See* section II.A, *infra.*

[62] *See* section II.A.1.a, *infra* note 126 and text, noting that two third-party surveys of eyeglass wearers reveal that the number of consumers not receiving their eyeglass prescription automatically after a refractive exam ranges from 25.6 million to 55.3 million a year (based on the Commission's estimate that 82.5 million consumers visit their eye care prescriber for a refractive exam each year). These figures are generally consistent with multiple prior surveys of contact lens users, which found significant percentages of contact lens users were not receiving their prescriptions from their prescribers following their exams, and provided an impetus for the adoption of a confirmation-of-prescription-release requirement in the CLR amendments of 2020. *See* section II.A.1.a, *infra* note 124; *see also* CLR Final Rule, 85 FR 50687.

[63] *See* 16 CFR 315.3.

[64] This final rule does not revisit some amendments that the Commission previously determined not to propose; namely, amending the Rule to require prescribers provide additional copies of eyeglass prescriptions; to require that prescribers respond to third-party seller requests for copies of, or verification of, prescriptions; or to set an expiration date for eyeglass prescriptions. In the NPRM, the Commission determined it did not need to seek further comment on these issues, and explained its rationale for not proposing these amendments. *See* NPRM, 88 FR 266–67 (additional copy), 271–73 (third-party seller requests), and 277–79 (expiration date).

[65] American Academy of Ophthalmology (''AAO''), ''Eye Health Statistics,'' *https://www.aao.org/newsroom/eye-health-statistics.* Estimates as to the number of

ophthalmologists vary, with some putting the number at closer to 17,000. Richard Edlow, ''By the Numbers: How Many ODs Are Actually Practicing Medical Eyecare,'' Rev. of Optm. Bus. (Nov. 3, 2021), *https://reviewob.com/by-the-numbers-how-many-ods-are-actually-practicing-medical-eyecare/.*

[66] In some States, optometrists can prescribe medicine and perform certain surgeries. AOA, ''What's a doctor of optometry?'' *https://www.aoa.org/healthy-eyes/whats-a-doctor-of-optometry*?

[67] Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook, Optometrists, *https://www.bls.gov/ooh/healthcare/optometrists.htm.* Estimates as to the number of optometrists vary, with some putting the number at closer to 48,000. Edlow, *supra* note 65.

[68] Management & Bus. Acad. for Eye Care Prof'ls, ''Best Practices of Spectacle Lens Mgmt'' 2 (2015) (estimating revenue from prescription eyewear sales at 44% of total practice revenue, with contact lens sales revenue at 16%, eye exam revenue at 21%, and medical eye care revenue at 17%), *https://files.optometrybusiness.com/Best%20Practices%20Spectacle%20Lenses.pdf, see also infra* note 174, Lovejoy (WS Transcript at 19) (noting that data he has seen over the years shows that between 50–60% of gross revenues for practitioners who dispense eyewear is derived from product sales).

[69] *Id., see also* Margery Weinstein, ''Key Practice Metrics: Numbers to Track & Grow to Help Speed Practice Recovery,'' Rev. of Optm. Bus. (Aug. 5, 2020), *https://www.reviewob.com/key-practice-metrics-numbers-to-track-grow-to-speed-practice-recovery/* (noting that product sales in 2019 continued to account for the majority of gross revenue (54%), with eyewear at 37%) (citing Glimpse & Care Credit, ''Independent Optometry Key Performance Metrics: 2019 Trend Report'' at 5, 9)).

[70] OpticianEDU.org, ''Optician Certification,'' *https://www.opticianedu.org/optician-certification/.* The Commission has not independently verified the precise number of States that currently require opticians to obtain licenses.

[71] Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook, Opticians, *https://www.bls.gov/ooh/healthcare/opticians-dispensing.htm.*

[72] Vision Council, ''VisionWatch—The Vision Council Market Analysis Report,'' at 17 (Dec. 2019) [hereinafter VisionWatch Report].

[73] Determining the precise number of adults, and adult eyeglass wearers, in the United States at any given time, is not possible, and estimates will change every year. According to the U.S. Census Bureau, in 2020 there were 258.3 million adults in the United States. ''U.S. Census Bureau, Age and Sex Composition: 2020,'' 2020 Census Briefs (2023), *https://www2.census.gov/library/publications/decennial/2020/census-briefs/c2020br-06.pdf.* Meanwhile, four different surveys of U.S. residents in 2021 and 2022 by The Vision Council found that 61–65% of adults wear glasses, which equates to approximately 158–168 million adults who wear eyeglasses, based on the 2020 census. Vision Council Consumer inSights reports 2022 Q1, Q2, Q3, Q4. In its NPRM, the Commission used a prior Vision Council estimate of 165 million adult eyeglass wearers, NPRM, 88 FR 252, which is within the 158–168 million range.

[74] The Vision Council, Market inSights 2022.

[75] The Vision Council, Market inSights 2019–2022.

[76] Vision Council Consumer inSights Report Q1 2023 at 23, 42.

[77] *See* Opticians Association of America (NPRM Comment #20) (noting that according to Optics Magazine, the online eyewear industry will continue to experience a compound annual growth rate of 6.96% between 2022 and 2027).

[78] Vision Council Consumer inSights Report Q2 2023 at 39, 42.

[79] Vision Council Consumer inSights Report Q2 2023 at 41.

[80] *See, e.g.,* Practice Tips by First Insight Corporation, ''How to Calculate and Increase Your Optical Capture Rate,'' (July 6, 2021), *https://www.first-insight.com/blog/calculate-increase-optical-capture-rate/*; Eric Rettig, ''How We Increased Frame Capture Rate by 20% in 3 Years,'' Rev. of Optm. Bus. (Sept. 7, 2022), *https://reviewob.com/how-we-increased-frame-capture-rate-20-in-3-years/.*

[81] Vision Council Market inSights 2022 at 11.

[82] Catherine Roberts, ''Get Great Glasses For Way Less,'' Consumer Reports, Oct. 2023, at 36.

[83] *Id.*

[84] *Id.*

[85] 16 CFR 456.2(a).

[86] 16 CFR 456.2; *see also* Presiding Officer's Report, *supra* note 19, at 17–24, 206.

[87] Eyeglass I Rule, 43 FR 23992; Eyeglass II, 54 FR 10302; *see also* Eyeglass I Report, 261, 265. (''[W]ith prescription in hand, consumers would be free to seek out the price, quality and other features which best suit their needs and capabilities.'' The ophthalmic prescription is ''the means by which consumers can comparison shop,'' and thus ''[i]f the Commission does not act to guarantee consumers their prescriptions, consumers may be unable to take full advantage of this competition.'').

[88] *See* 2004 ER, 69 FR 5453.

[89] Neilly (WS Transcript at 4–5).

[90] *Id.* at 5.

[91] *Id.*

[92] Formerly known as the National Association of Optometrists and Opticians, or NAOO.

[93] NAROC (NPRM Comment #0024 submitted by Neville).

[94] Durkee (NPRM Comment #0015).

[95] Michaels (WS Transcript at 14).

[96] *Id.* at 7; *see also* Cooper (NPMR Comment #0009) (asserting that patients are receiving their prescriptions, the problem lies with inaccurate filling of these prescriptions by ''unlicensed, untrained people'').

[97] AAO (NPRM Comment #0027 submitted by Repka).

[98] OAA (NPRM Comment #0020 submitted by Allen); AOA (WS Comment #0047 submitted by Benner).

[99] AOA (NPRM Comment #0023 submitted by Benner).

[100] Michaels (WS Transcript at 11).

[101] Sanders (WS Comment #0043) (Dr. Sanders' calculation is based on comparing his assumptions about the number of complaints received by the FTC to his estimate that prescribers perform 236 million refractions every year, an estimate the FTC has not seen evidence supporting); *see also* Coast Eyes Pllc (WS Comment #0046) (''Nothing is broken here. Patients get their prescription without conflict. . . . Prescribers are historically >99.9% compliant in the market's current state.'') Coast Eyes Pllc is operated by Dr. Sanders.

[102] AOA (WS Comment #0047 submitted by Benner).

[103] While the ophthalmic community has repeatedly stated that overall prescriber compliance with prescription release is extremely high, the community has not offered the FTC a consumer survey on this issue, despite repeated comments from the Commission noting the absence of empirical evidence to support their claim of substantial compliance, or to rebut the multiple consumer surveys in the record which show prescriber non-compliance. *See* NPRM, 88 FR 260 (''the Commission notes, as it did in the CLR Final Rule, that despite multiple opportunities and requests for comment since 2015, the Commission has yet to find or receive any reliable consumer-survey data rebutting or contradicting the submitted findings [showing compliance problems] for either contact lens users or eyeglass wearers, or establishing (other than anecdotally) that consumers consistently receive their prescriptions from prescribers.''). Indeed, when suggesting that the Commission consider the NERA survey, the AOA referenced the repeated comments from the Commission about the lack of survey data evidencing compliance. AOA (WS Comment #0047 submitted by Benner).

[104] AOA (WS Comment #0047 submitted by Benner).

[105] *Id.* According to Dr. Andrew Stivers from NERA Consulting, the survey did not specifically ask about compliance with the Rule's automatic-prescription-release requirement because the survey was not designed to examine compliance, but rather to examine consumer conduct and shopping habits for eyewear and, consequently, explore the ongoing *need* for consumers to possess a copy of their prescription. According to Dr. Stivers, whether prescribers are automatically providing patients with their prescriptions is not as relevant if the manner in which consumers purchase eyewear indicates that they don't suffer harm (or as great a harm) from not having their prescriptions released automatically. ''I do not address the Commission's contention of significant non-compliance with automatic release, although the provided evidence suggests a relatively limited problem, and does not provide evidence linking such a problem to harm today.'' Stivers (NPRM Comment #0018).

[106] AOA (WS Comment #0047 submitted by Benner).

[107] It is also not certain that there were not more than three respondents who mentioned a prescriber's failure to release their prescription. According to NERA, due to budgetary constraints, responses to open-

ended questions were not formally coded and reviewed. Rather, NERA searched all open-ended responses for variations of the words ''prescription,'' ''Rx,'' ''had to,'' ''forced,'' ''made to,'' ''choice,'' and ''pressure.'' AOA (WS Comment #0047 submitted by Benner). The three consumers who raised the issue of failure to release the prescription were identified via this search. It is possible, however, that additional respondents may have referenced a prescriber's failure to release prescriptions but used words or phrases that did not show up during NERA's targeted search, and the Commission did not receive the responses to the open-ended questions. This adds to the challenge of ascribing weight to, or drawing conclusions from, responses (or the lack of responses) to open-ended survey questions.

[108] *See* CLR Final Rule, 85 FR 50676; CLR SNPRM, 84 FR 24674–75. By some estimates, less than 5% of actual fraud victims file complaints, and for consumer complaints about FTC rule violations the percentage drops even further, perhaps because filing a complaint requires that consumers know what an FTC rule specifies, that it has been violated, and how to complain to the FTC about it. *Id.* It has generally been the Commission's experience that while a large number of complaints can indicate a rule compliance problem, a dearth of complaints does not necessarily indicate that there isn't a rule compliance problem.

[109] Neilly (WS Transcript at 16).

[110] Warby Parker (ANPR Comment #0817 submitted by Kumar). The October 2015 SurveyMonkey online survey was comprised of 1,329 respondents recruited from a sample that was U.S. Census-balanced and representative of the national distribution of major demographic factors, including age, gender, geography, and income. Respondents were not informed of the identity of the survey sponsor. Survey respondents who had purchased eyeglasses within the last three years (65% of the total respondents) answered questions about prescription information, purchase behavior, and prescriber experience. Within the set of respondents who had purchased within the last three years, 54% had purchased within the last 12 months. There were no significant differences in responses regarding automatic prescription release between those who had purchased within the last year and those who had purchased between one and three years prior to the survey. The significant difference in automatic-release compliance between optometrists and ophthalmologists may be due to the fact that fewer ophthalmologists sell eyeglasses, and might thus have less incentive to withhold a consumer's prescription, but the survey did not directly explore this issue. *See* ER NPRM, 88 FR 260 note 174.

[111] *Id.*

[112] ''FCLCA Study, Focus on Prescription (Rx)'' at 2, 9, attached as Exhibit B to 1–800 CONTACTS's comment in response to the FTC's 2015 Request For Comment (CLR RFC Comment #0555 submitted by Williams), *https://www.regulations.gov/comment/FTC-2015-0093-0555,* showing that of 303 eyeglass wearers surveyed, only 61% reported receiving a ''hard copy'' of their prescription at their last eye exam. Of that 61% who received a copy of the prescription, the poll found that 55% were given the copy automatically (in other words, approximately 34%—55% of 61%—of the total eyeglass wearers surveyed were given a copy in full compliance with the Rule), 31% of the 61% were not given a copy automatically but requested their prescription and were given it immediately in response (19% of the total surveyed), and 14% of the 61% were not given a copy of their prescription, asked for it, and were told to call the office or return for it at a later time (8.5% of the total surveyed). 39% of the total eyeglass users surveyed were not given a copy and did not ask for it, and thus never received a copy of their prescription. The survey was sponsored by 1–800 CONTACTS but conducted by an independent third-party polling firm, SSI, and respondents were not informed of the identity of the survey sponsor. As explained *infra* note 124, the Commission has recognized some concerns about the methodology used for this survey, particularly the use of the word ''hard copy,'' and the lack of an ''I don't know'' response option for some questions, but believes that the information remains strongly suggestive of non-compliance, particularly when viewed in conjunction with information from other sources and the absence of contradictory data.

[113] *Id.*

[114] *See* Coast Eyes Pllc (WS Comment #0046) (''The 'data/surveys' provided to the FTC that they are guiding their decision on come from online retailers who have a HUGE conflict of interest.'').

[115] AOA (WS Comment #0047 submitted by Benner) (''We [ ] question the FTC deriving much of its eyeglass rulemaking from its rulemaking on contact lenses. The eyeglass market and contact lens market have unique characteristics.'').

[116] *Id.* (quoting NERA Report). It was also noted that the median age of eyeglass patients is likely to be higher than that for contact lenses, and older patients are more likely to be confused or bothered by the need to sign a confirmation document. Repka (WS Transcript at 38–39).

[117] AOA (WS Comment #0047 submitted by Benner) at 25 (''[G]lasses purchasers are 10 percentage points more likely to consider other options for where to purchase.'').

[118] *Id.* A primary difference between eyeglass and contact lens examinations and prescriptions is that contact lens exams involve a lens ''fitting,'' in which consumers try on the lenses, and prescriptions are only provided after the fitting is complete. Fittings can sometimes entail sending consumers home with a set of lenses to try out for a few days, and thus sometimes the prescriber will not provide the prescription until after this process. This can lead some consumers to think they should have been provided their prescriptions when, in fact, the fitting was not yet complete. There is no such fitting for eyeglass prescriptions. *See also infra* note 123 (discussing how the different processes can affect survey results about prescription release).

[119] *See* CLR Final Rule, 85 FR 50675; CLR SNPRM, 84 FR 24673.

[120] Warby Parker (ANPR Comment #0817 submitted by Kumar).

[121] ''FCLCA Study, Focus on Prescription (Rx)'' at 2, 9, *supra* note 112.

[122] In particular, these survey results could not have been affected by some consumers erroneously thinking they should have received their prescriptions when, in fact, their contact lens fitting had not been finalized, since eyeglass prescriptions do not entail a fitting, and there is little or no reason for a consumer to think their eyeglass prescription had been finalized when, in fact, it hadn't been.

[123] *See supra,* note 118, explaining the fitting process for contact lenses. In theory, the differences between the contact lens prescription process and the eyeglass prescription process should mean that fewer eyeglass patients are confused as to whether they did or did not receive their prescriptions when they were supposed to. The fact that the percentage of eyeglass users surveyed who said they did not receive their prescriptions is similar, or even higher than that of contact lens wearers surveyed adds considerable credence to both types of surveys, and provides further support for the conclusion that a substantial number of consumers are not automatically receiving their prescriptions from prescribers as the Eyeglass Rule requires.

[124] The results from the individual consumer contact lens surveys are as follows: (1) June 2019 survey by Dynata (formerly known as SSI) on behalf of 1–800 CONTACTS of 1,011 contact lens users found that 21% said they never received their prescriptions (1–800 CONTACTS (CLR SNPRM Comment #0135 submitted by Montclair)); (2) January 2017 survey by Caravan ORC International on behalf of Consumer Action of 2,018 adults found that 31% of contact lens users said that at their last eye exam, their doctor did not provide them with a paper copy of their prescription (Consumer Action (CLR NPRM Comment #2954 submitted by Sherry)); (3) December 2016 survey of 1,000 contact lens users by SSI on behalf of 1–800 CONTACTS found that 24% of consumer respondents said they did not receive their prescription (1–800 CONTACTS (CLR NPRM Comment #2738 submitted by Williams)); (4) May 2015 SSI survey of 2,000 contact lens wearers found that 34% said they did not receive their prescription (1–800 CONTACTS (CLR RFC Comment #0555 submitted by Williams, Ex. C)); and (5) November 2014 SSI survey of 2,000 contact lens wearers found that 34% said they did not receive their prescription (1–800 CONTACTS (CLR RFC Comment #0555 submitted by Williams, Ex. C)). As noted in the CLR SNPRM, the manner in which a few of the questions were phrased in the 2014 and 2015 surveys raised some Commission concerns, since some questions were leading, lacked an ''I don't know'' response option, and used a term—''hard copy''—which not all consumers may understand. The more recent surveys represented an improvement because they included an option for respondents to acknowledge that they do not recall whether they received their prescriptions, and used the term ''paper copy'' rather than ''hard copy.'' CLR SNPRM, 84 FR 24672.

[125] *See* CLR Final Rule, 85 FR 50675.

[126] *See* section I.D.4, *supra* note 62. Since it is estimated that 165 million Americans regularly wear prescription glasses, and that each patient visits their eye care prescriber every two years for a refractive exam, the number of consumers not receiving their prescription automatically could be as high as 55.3 million a year, based on the Survey Sampling International survey, or 25.6 million, based on the SurveyMonkey poll. Multiple surveys in the record of contact lens users find similar non-compliance with prescription release requirements.

[127] Eyeglass I Rule, 43 FR 24003 (''[I]t is the Commission's finding that the failure to release ophthalmic prescriptions and related practices are unfair acts or practices,'' and such practices ''offend public policy in that they deny consumers the ability to effectively use available information and inhibit the functioning of the competitive market model.'').

[128] NAROC (NPRM Comment #0024 submitted by Neville).

[129] NAROC (WS Comment #0049 submitted by Neville).

[130] Lovejoy (WS Transcript at 14).

[131] 1–800 CONTACTS (NPRM Comment #0025 submitted by Montclair); *see also* Durkee (NPRM Comment #15) (calling it a ''borderline unethical practice'' not to automatically release prescriptions, and favoring more robust enforcement of the existing automatic-release requirement rather than adding a confirmation requirement.)

[132] Anonymous (WS Comment #0030).

[133] Brown (WS Transcript at 13).

[134] *Id.*

[135] Aceto (WS Transcript at 45–46).

[136] Beatty (WS Transcript at 46).

[137] Dr. Stivers, a former Deputy Director for Consumer Protection in the FTC's Bureau of Economics, now an economics consultant with NERA, submitted a comment (NPRM Comment #0018) in response to the NPRM. That comment, and his research into consumer experience with eyeglass purchases, was sponsored by the American Optometric Association. His appearance as a workshop panelist, however, was on his own behalf.

[138] Stivers (WS Transcript at 17).

[139] *Id.* at 18–19; *see also* Beatty (WS Transcript at 46) (noting that many patients are given a copy but do not still have it later on when they need it. And therefore he recommends merely ensuring that patients can request a copy of their prescription and access it electronically).

[140] Stivers (WS Transcript at 10, 17); Stivers (NPRM Comment #0018).

[141] Stivers (NPRM Comment #0018).

[142] *Id.*

[143] *Id.*

[144] *Id; see also* Stivers (WS Transcript at 12) (''[T]he big thing that has really changed is the ability of consumers to find prices, to shop to find competitors, before they even leave their house. Before the internet, before good information availability, really the only way to price compare, if there was also these advertising restrictions was to actually go to the establishment.''); Montaquila (WS Transcript at 32) (stating that people often come to his office knowing beforehand where they plan to purchase eyewear); Michaels (WS Transcript at 14) (agreeing that most patients today are evaluating their options before they wind up in a brick-and-mortar establishment). *But see* Michaels (WS Transcript at 13) (noting that many patients come in for an eye health examination even if they do not think they need glasses, and thus would not have decided beforehand where to purchase).

[145] Stivers (NPRM Comment #0018).

[146] *Id.*

[147] AOA (WS Comment #0047 submitted by Benner) (quoting NERA report).

[148] *Id.*

[149] *Id.*

[150] *Id.* (''Consumer emphasis on convenience suggests that consumers likely consider both where to get an exam and where they want to shop for glasses ahead of time for an efficient shopping experience.'') (quoting NERA survey).

[151] Stivers (WS Transcript at 20).

[152] Some prescribers are known to engage in a practice referred to as ''prescribing from the chair,'' in which prescribers recommend certain eyewear purchases to patients while the patients are still in the exam room. This is touted as a means of increasing prescribers' eyewear-sale capture rate. *See, e.g.,* Dr. Gayle Karanges, ''The 4 Most Powerful Ways I Prescribe from the Chair and Contribute to an 82% Eyewear Capture Rate,'' Rev.of Optm. Bus. (Apr. 7, 2021) (''Patients often view doctors, including optometrists, as authority figures. With that status, you have an opportunity to influence patients in their decision to follow your treatment plan and purchase the eyewear you have prescribed.''), *https://reviewob.com/the-4-most-powerful-ways-i-prescribe-from-the-chair-contribute-to-an-82-eyewear-capture-rate/*; Practice Tips by First Insight Corporation, ''How to Calculate and Increase Your Optical Capture Rate,'' Jul. 6, 2021 (describing how one doctor ''recommends and prescribes the eyewear needs while the patient is still in the exam chair . . . [and] then invites and guides the patient to the optical department, introducing the eyewear layout''), *https://www.first-insight.com/blog/calculate-increase-optical-capture-rate/.* The FTC is unaware how widespread this practice is, but it has concerns that such practices can further blur the line between medical practice and retail sales, and increase the risk that patients may feel undue pressure to purchase eyewear from their prescriber.

[153] Michaels (WS Transcript at 13).

[154] As an example, surveys from The Vision Council have found that 83% of consumers who recently had an eye exam and bought glasses said they purchased the glasses from their prescriber. The Vision Council, Consumer inSights Q1 2022. One interpretation of this might be that only 17% of consumers benefit from having a copy of their prescription with which to shop elsewhere. This seems supported by the NERA survey showing convenience is the most important factor in a consumer's decision as to where to buy glasses. On the other hand, another interpretation is that 83% of consumers buy glasses from their prescriber because many were not given their prescription, and they either felt uncomfortable demanding it or did not know that they could. This interpretation could also be supported by the NERA survey, since the survey found that price is the second-most important factor for consumers deciding where to purchase glasses, and buying glasses from a prescriber is often more expensive than other options. Because so many consumers do not currently receive their prescription after each exam, looking to their current conduct and behavior to determine what would happen if they did receive their prescription involves a great degree of speculation.

[155] *See, e.g.,* Lovejoy (WS Transcript at 15); National Taxpayers Union (NPRM Comment #0028 submitted by Sepp) (stating that the Eyeglass Rule has been a huge ''boon'' to competition in the marketplace).

[156] Lovejoy (WS Transcript at 15).

[157] Eyeglass I Rule, 43 FR 24003 (declaring that Rule § 456.7 (now § 456.2), which provides it is an unfair act or practice for a refractionist to fail to release a prescription immediately after the eye examination is completed, is justified ''both as a specific delineation of an unfair act or practice as well as a remedy to implement the right to advertise.'').

[158] *See, e.g.,* Montaquila (WS Transcript at 32) (patients already understand what their choices are before they even come in for an exam); Michaels (WS Transcript at 14) (noting that most patients seem to be evaluating their purchase options before they visit their prescriber).

[159] *See, e.g.,* Neilly (WS Transcript at 16) (''Before I got this notification [about the Eyeglass Rule workshop], I wasn't even aware of an eyeglass rule.''); Anonymous (WS Comment #0030) (''Being able to have a prescription in your hands as soon as the examination is done would be very beneficial.'').

[160] Brown (WS Transcript at 17). Dr. Stivers noted in a comment that a Commission-sponsored survey in 1981 (the Market Facts Survey) found that a significant percentage of consumers, even then, were aware that they did not have to buy eyeglasses from their examining eye doctor and could ask for their prescription. Stivers (NPRM Comment #0018) at 9. This is not incorrect (the Market Facts Survey results indicated that ''a large majority of consumers are knowledgeable enough to request an eyeglass prescriptions if they want one,'' Eyeglass II Report, *supra* note 14, at 262), but it should be noted that another survey conducted around that time (in 1985, by the American Association of Retired People) found that 83% of consumers—particularly the elderly—remained unaware of their right to ask for their prescription. Presiding Officer's Report at 22. It may also be worth noting that the format and phrasing of the Market Facts Survey questions may have been flawed (and came under criticism) because consumers were simply asked whether it was true or false that ''once a person decides where to have his eye examined, he must purchase his eyeglasses from his doctor,'' creating the possibility that some consumers answered ''false'' not because they understood they were free to take their prescription and shop elsewhere, but rather because they knew they

could not be forced to buy eyeglasses if they didn't want to. Eyeglass II Report, *supra* note 14, at 259–61. The Commission, after reviewing both the Market Facts and AARP surveys, and other evidence in the record, ultimately concluded at that time that ''there continues to be a lack of consumer awareness about prescription rights.'' Eyeglass II, 54 FR 10303. The two surveys are now roughly 40 years old, and more recent surveys show that many consumers are not fully aware of their prescription rights. *See infra* notes 161–163 and text.

[161] As with the SSI survey referenced above, the 2015 survey performed on behalf of 1–800 CONTACTS was submitted during the Contact Lens Rule review, but it was a poll of eyeglass wearers and is therefore on point. 1–800 CONTACTS (CLR NPRM Comment #2738 submitted by Williams). As noted during the Contact Lens Review, the manner in which the consumer awareness questions were phrased in the survey submitted by 1–800 CONTACTS did raise some concerns about the weight that should be accorded to the results. In particular, the questions were leading and used a term—''hard copy''—that some consumers might not understand. On the other hand, the question's phrasing may have led to under-reporting by consumers who did not want to acknowledge that they were unaware of their rights under Federal law (this is known as social-desirability bias). *See* Diamond, *Reference Guide on Survey Research,* in Reference Manual on Scientific Evidence, 2nd. ed., 248–64 (Federal Judicial Center 2000), *https://wwws.law.northwestern.edu/faculty/fulltime/diamond/papers/referenceguidesurveyresearch.pdf;* Floyd Jackson Fowler, Jr., *How Unclear Terms Affect Survey Data,* The Public Opinion Quarterly (Summer 1992), *https://www.jstor.org/stable/2749171; see generally,* Carl A. Latkin, et al., *The relationship between social desirability bias and self-reports of health, substance use, and social network factors among urban substance users in Baltimore, Maryland,* 73 Addictive Behaviors 133–36 (2017), *https://www.sciencedirect.com/science/article/abs/pii/S0306460317301752?via%3Dihub* (social desirability bias is the tendency of survey respondents to answer questions in a manner that will be viewed favorably by others, and can skew survey results by over-reporting attitudes and behaviors that may be considered desirable attributes, while underreporting less desirable attributes). Social-desirability bias in this instance likely serves to artificially lower the number of patients unaware of their right to their prescription. In other words, the way the question was phrased could lead to results that make it appear that more patients are aware of their rights than is, in fact, the case. *See* ''FCLCA Study, Focus on Prescription (Rx),'' attached as Exhibit B to 1–800 CONTACTS (CLR RFC Comment #0555 submitted by Williams) (One question was phrased, ''Are you aware that it is your right under federal law, as a patient to receive a hard copy of your contact lens/eye glasses prescription from your eye exam provider?'' and the other asked, ''Are you aware of the following . . .—Your eye exam provider cannot charge you for an actual hard copy of your prescription?'').

[162] CLR SNPRM, 84 FR 24675 (citing a Caravan ORC International survey submitted by Consumer Action (CLR NPRM Comment #2954 submitted by Sherry) and SSI survey submitted by 1–800 CONTACTS (CLR NPRM Comment #2738 submitted by Williams)).

[163] *See* Consumer Action (CLR NPRM Comment #2954 submitted by Sherry) (noting survey results showing that 65% of Hispanics and 63% of African Americans were unaware of their prescription rights, compared to 58% of white Americans surveyed, and that Hispanics were less likely to be given copies of their prescriptions after their contact lens exams); National Hispanic Med. Ass'n & League of United Latin Am. Citizens (CLR SNPRM Comment #0146 submitted by Benavides) (''Our community continually has been victimized and denied their prescriptions by prescribers and doctors at a higher rate than most other Americans''); League of United Latin Am. Citizens (CLR NPRM Comment #2336 submitted by Wilkes) (noting that many ''working families'' take time off from work to visit their eye doctor because they believe their eye doctor is the only place to buy eyewear).

[164] CLR SNPRM, 84 FR 24675; *see also supra* note 152 and text, noting that some prescribers blur the separation between exams and retail dispensing as a means of improving their eyeglass sales ''capture rate.''

[165] CLR SNPRM, 84 FR 24675.

[166] *Id.*

[167] *Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 988 (D.C. Cir. 1985) (quoting *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608, 612–13 (1946)).

[168] 16 CFR 456.2.

[169] *See* Aceto (WS Transcript at 52); Santini (ANPR Comment #0047) (prescribers should be required to provide a copy of the eyeglass prescription before the consumer is led or enters the prescriber's optical dispensary); Opticians Ass'n of VA (ANPR Comment #0647 submitted by Nelms) (''More often than should be occurring, patients are led into the dispensary before paying for the exam, and shown their options for eyewear. We would ask the Rule be amended to include language that the prescription must be given to the patient on completion of the exam without additional sales pressure or intimidation.'').

[170] *See* Practice Tips by First Insight Corporation, ''How to Calculate and Increase Your Optical Capture Rate'' (Jul. 6, 2021) (describing how one doctor ''recommends and prescribes the eyewear needs while the patient is still in the exam chair . . . [and] then invites and guides the patient to the optical department, introducing the eyewear layout''), *https://www.first-insight.com/blog/calculate-increase-optical-capture-rate/*; Nicole Lovato, ''3 Things We Did to Increase Capture Rate by 15%,'' Rev. of Optm. Bus. (Oct. 27, 2021) (describing how after each exam visit, the doctor or a technician will walk the patient to the optical dispensary to try and sell them glasses, and ''pulls out a chair from the table and tells the patient, 'Have a seat, someone will be right over to get you finished up.' It is important to state it this way. If you say anything about purchasing it gives the patient an opportunity to say they are not interested.''), *https://reviewob.com/3-things-we-did-to-increase-capture-rate-by-15/. See also supra* notes 80, 152.

[171] Botha (WS Transcript at 53).

[172] 16 CFR 456.2(a).

[173] Eyeglass I Rule, 43 FR 23992. *See* section I.B, *supra* (discussing the history and purpose of the Rule).

[174] In most medical fields, a prescriber is prohibited from selling the product that they prescribe so as to prevent potential conflicts of interest. *See generally* Limitation on Certain Physician Referrals (commonly known as the ''Stark Law'') 42 U.S.C. 1395nn, (prohibiting physician self-referral, including for outpatient prescription medications); Anti-Kickback Statute, 42 U.S.C. 1320a–7b(b) (prohibiting physicians from receiving compensation for a prescription referral). While there are a few other medical professions apart from eyecare—such as veterinary care—in which the prescriber may sell what they prescribe, the Commission is unaware of another field in which prescribers generate such a substantial share of their income from commercial product sales. *See* Lovejoy (WS Transcript at 19) (''I do think that optometry is unique among the healthcare professions in the amount of revenue, the percentage of the total revenue that comes from product sales, the products that they prescribe. The surveys that I've seen and information over the years shows it consistently staying over 50%, maybe as high as 55 or 60% of gross revenues comes from product sales in the practitioners that are dispensing optometrists.''); NAROC (WS Comment #0049 submitted by Neville) (''Private dispensing optometrists today still make most of their revenue from selling the eyewear that they prescribe. These optometrists have a strong incentive to improve the 'capture rate' of in-office eyewear sales to their patients.'').

[175] H.R. Rep. No. 108–318 at 5 (2003); *see also* Letter from Senators Richard Blumenthal and Orrin G. Hatch of the U.S. Senate Regarding the Contact Lens Rule Rulemaking Proceeding & the Proposed Rule Set Forth in the Notice of Proposed Rulemaking (Aug. 11, 2017), *https://www.ftc.gov/system/files/filings/initiatives/677/public_comment_from_senators_blumenthal_and_hatch_re_contact_lens_rulemaking.pdf* (these comments were made in reference to the contact lens marketplace, but the same potential conflict of interest exists when eyeglass prescribers also sell eyeglasses to their patients).

[176] Eyeglass I Report, *supra* note 7, at 265.

[177] The ophthalmic community and its representative associations were once fervent advocates for the ''total vision care'' approach to eyecare, and argued that patients received the best care when they obtained glasses and contacts from the same eye doctor who examined them and determined their prescription. *See* Eyeglass I Report at 236–39. While the AOA no longer publicly advocates for ''total vision care,'' some prescribers still occasionally comment to the FTC that patients would be best served by a total-vision-care approach.

[178] *See* section I.D.5, *supra,* discussing the benefits of in-person eyeglass fittings.

[179] This is a different situation from patients complaining that they did not

receive their prescription from their prescriber even after paying for their exam, or had to ask for their prescription in order to get a copy. There is much less room for consumer confusion with respect to those types of complaints than for complaints that consumers had to pay for their prescription.

[180] The majority of patients who go in for an eye exam and need new glasses do end up purchasing them from their prescriber. According to data from The Vision Council, 83% of consumers surveyed who recently had an eye exam and bought glasses said they purchased the eyewear from their prescriber. The Vision Council, Consumer inSights Q1 2022. This is true even though, on average, prescribers charge significantly higher prices for eyeglasses than other alternatives such as online eyeglass sellers. The Vision Council, Market inSights 2019–2022.

[181] 16 CFR 456.2(a).

[182] There are situations where a doctor may conduct a refractive exam on a patient but then use his or her professional judgment to refrain from writing a prescription for corrective eyewear. *See* Lovejoy (WS Transcript at 56) (''[C]onsumers may want a prescription when they shouldn't have one [for medical reasons], and the potential prescriber, the physician or optometrist, ought to have the ability to say, 'No, I'm not prescribing eyewear for you for the following reasons.' And make a note of that in the record.''). In such situations, the prescriber would have no reason to offer to sell the patient eyewear and would be prohibited from doing so under the Rule.

[183] Panelists at the workshop discussed whether greater clarity in the Rule could help ensure that patients have their prescription in hand before being invited to purchase eyeglasses. *See* Aceto (WS Transcript at 52) (''That's one concern that some of our optician members have had some concerns with, and that is at the end of the actual doctor's exam, oftentimes they're directed to the dispensary just as a matter of course, and they purchase [eyeglasses] at the end of the actual [exam]. And the copays, the exam fees, the glasses are all taken [together]. Then they said, here's your eyeglass prescription. And some of our members have asked, is there a way that we could clarify that the prescription should come to them at the end of the doctor's experience?'').

[184] The Commission realizes that some eye care practices advertise a bundle where the consumer pays a fixed price for an eye examination and one or more pairs of frames, or complete eyeglasses. Such an offer may also be advertised as an opportunity to obtain a free eye exam with the purchase of eyeglasses. The amendment to the Rule's wording is not intended to change those practices' ability to make, and lawfully deliver upon, such offers. However, the prescriber must still provide the prescription to the patient before offering to sell them eyeglasses. By doing so, the patient should have the choice to take advantage of the advertised bundle, or to pay the practice's routine cost of an examination and walk away with no eyeglasses, but with their prescription. The exam cannot be contingent on the purchase of eyeglasses, as stated in the Rule. *See* 16 CFR 456.2. The Commission has provided guidance with respect to the Contact Lens Rule for similar bundles of eye exams offered with contact lenses, instead of eyeglasses. In that context, the Commission has stated that a prescriber is not prohibited from offering a bundled package of an eye examination and contact lenses, provided that consumers have an option to purchase the eye examination separately and still receive their prescription. Contact Lens Rule, Final Rule, 69 FR 40482, 40494. A similar result is appropriate here.

[185] CLR SNPRM, 84 FR 24675; Eyeglass I Rule, 43 FR 23998.

[186] NPRM, 88 FR 268–69.

[187] NPRM, 88 FR 268.

[188] *Id.*

[189] *Id.*

[190] CLR Final Rule, 85 FR 50717; 16 CFR 315.2.

[191] CLR SNPRM, 84 FR 24668.

[192] OAA (NPRM Comment #0020 submitted by Allen) (''OAA believes that this revision ensures that the FTC's regulatory language is keeping pace with updates in technology.''); 1–800 CONTACTS (NPRM Comment #0025 submitted by Montclair) (''1–800 also supports . . . allowing prescribers to release a prescription in digital format with a patient's verifiable affirmative consent to a specific method for digital delivery.''); Aceto (WS Transcript at 42) (''[F]rom the optician standpoint and those who fill the prescription, it's sort of brilliant. Because again, we're keeping up with our current status of technology. It helps people, it's an all about an access type thing, and I think that that's a really, really good option.'').

[193] AOA (NPRM Comment #0023 submitted by Benner).

[194] NAROC (NPRM Comment #0024 submitted by Neville).

[195] Anonymous (NPRM Comment #0007) (''Most practices have an EMR system that also has a patient portal. Most of these patient portals provide access to the eye glass prescription. This new 'rule' is not necessary. If there is ever a question, the EMR system will always have a copy of the prescription available for anyone that wants it.''); Anonymous (NPRM Comment #0011) (''In 2009 The Hitech Act was passed which assured the use of electronic medical records. The EMR (The Electronic Medical Records Mandate) requires healthcare providers to convert all medical charts to a digital format. Incurring more costs on businesses for storage, paper, ink, private and government payroll, etc., is not an [ ] economically intelligent idea in a recession driven economy.''); Michaels (WS Transcript at 7) (''in my experience, 100% of the prescriptions that are coming out of our offices are automatically uploaded electronically to a portal the very second that the prescription is finalized. . . . That was the most important piece of the MIPS program that Medicare had. It mandated that patients get access to their portals. And so, in our experience, the vast majority of our patients don't want paper copies of the prescription. They want electronic copies so that they can have access in their phone and access at 2:00 in the morning, whenever they want it.'').

[196] Anonymous (NPRM Comment #0006). *See also* Rosemore (WS Comment #0045) (''As an optometrist, the added requirements would be a significant burden on my practice. Requiring more paperwork, consents, data storage, and time makes the cost of doing business go up significantly.'').

[197] One workshop participant suggested that prescribers who use electronic health records should not be required to transcribe an electronic prescription into a handwritten one, as this could introduce errors into the prescription. *See* Montaquila (WS Transcript at 22) (''Handwriting prescriptions after generating one in an electronic format increases time and cost, and is not risk-free. Researchers at Weill Cornell Medical College found error rates of 30 per 100 written prescriptions, and only seven per 100 electronic prescriptions. Now, that of course was from medications, but I would propose that contact lenses are no less complex when written on a sheet of paper.''). The FTC's requirement that patients be given the option to receive a paper copy would not necessitate a prescription to be converted from an electronic record to a handwritten one; instead the prescription could be printed out on paper, as was described by other workshop participants. *See* Hyder (WS Transcript at 53) (''If it's coming from the EHMR, I tend to get that when I'm checking out because it's being printed someplace other than the exam room.'').

[198] *See, e.g.,* U.S. Dep't of Health & Human Servs., The Office of the National Coordinator for Health Information Technology (''ONC''), ''Do I Need to Obtain Consent From My Patients to Implement a Patient Portal?,'' *https://www.healthit.gov/faq/do-i-need-obtain-consent-my-patients-implement-patient-portal* (noting that the Health Insurance Portability and Accountability Act (''HIPAA'') permits the disclosure of health information to the patient without requiring the patient's express consent and that portals are ''an excellent way to afford patients access to their own information and to encourage them to be active partners in their health care.'').

[199] CLR SNPRM, 84 FR 24668.

[200] U.S. Dep't of Health & Human Servs., ONC, ''Individuals' Access and Use of Patient Portals and Smartphone Health Apps, 2022,'' Data Brief: 69 (2023), *https://www.healthit.gov/sites/default/files/2023-10/DB69_IndividualsAccess-UsePatientPortals_508.pdf.*

[201] *Id.*

[202] National Institutes of Health, National Cancer Institute, Health Information National Trends Survey, Hints Brief Number 52, ''Disparities in Patient Portal Communication, Access, and Use'' (2020), *https://hints.cancer.gov/docs/Briefs/HINTS_Brief_52.pdf* (''[S]ignificant disparities exist in patient portal use, with underserved groups (including racial and ethnic minorities, those with lower socioeconomic status, older individuals, and persons with disabilities) using these tools less often.'').

[203] *Id.*

[204] U.S. Dep't of Health & Human Servs., ONC, ''Individuals' Access and Use of Patient Portals and Smartphone Health Apps, 2022,'' *supra* note 200.

[205] *See, e.g.,* Hyder (WS Transcript at 43) (''I would say that we're supportive of giving the option for digital prescriptions. But again, we would agree with not mandating that every type of digital option be available.''); Beatty (WS Transcript at 42) (''I think we do have to be careful with how we consider that delivery though. Requirements for that delivery to include all of the methods, including SMS and MMS, would or could actually produce new burden. Not everyone who delivers these things electronically has access to an SMS system or an MMS system. And so we'd want to be able to provide the possibility of delivering them electronically, but also allow for the provider to have the choice of how the electronic delivery would occur.'').

[206] NAROC (NPRM Comment #0024 submitted by Neville) (''We note with approval that the prescriber will not be required to offer a digital copy of the prescription, which some prescribers may not be able to offer. But we also suspect that those prescribers using digital release for contact lenses will likely use it for eyeglass prescriptions as well, again, adding efficiency to office operations.'').

[207] Lovejoy (WS Transcript at 45) (''Well, I do think it is easier . . . if a patient can get a prescription through email either directly of the prescription itself or to a link to a website or a portal where they can obtain it. And anecdotally I've heard reports of being able to be standing at the office desk checking out and having the prescription emailed to you before you leave the office. It's in your iPad or your iPhone and ready to be used wherever you might want to use it.''); Hyder (WS Transcript at 45) (''I would say that it gives providers more ability to comply, but I can't say that we have data to show that it improves compliance.'').

[208] NPRM Comment #0006 (''What happens when they access their portal and print the prescription off from there? Will our portals have to update to require a signature as well?'').

[209] Repka (WS Transcript at 26) (''And then if a patient gets it in the portal, which in our portal is simple, they just go on if they have it, they can download it. They don't actually need to provide a signature. So we send a note asking for a signature, and we never get those returned because the patient doesn't have to. And the modules aren't set up in the EMR to be compliant with that. So they get a notification. If they happen to send it back, of course they have to print it, sign it, scan it, and then figure out how to upload it into the portal. And then the staff have to actually take it from the portal and put it into the right record so that it can be retained.'').

[210] Prescribers are also not required to obtain signed confirmations for contact lens prescriptions that are delivered digitally, provided the prescriber complied with the CLR's requirement for obtaining and storing a record of a patient's verifiable affirmative consent to digital delivery. 16 CFR 315.3(c)(1)(i)(D). Instead, the prescriber need only retain evidence that the prescription was sent, received, or made accessible, downloadable, and printable—evidence that will typically be electronic and automatic via the email, text, or portal method used by the prescriber. *Id.*

[211] *See* section III, *infra.*

[212] Anonymous (NPRM Comment #0006) (''We already have a record of the prescription on file for the patient and most EHRs track when they are printed out.''); Lovejoy (WS Transcript at 10) (the requirement, as proposed, ''sounds like it would not be difficult to have a record of the patient receiving access to their prescription through [the] portal, so that would not seem like a significant burden.'').

[213] Lovejoy (WS Transcript at 10).

[214] Beatty (WS Transcript at 43) (''So if a portal could possibly be confusing, having a website where the patient can enter rudimentary data and then get back just the prescription information that they were looking for should be acceptable too.'').

[215] Montaquila (WS Transcript at 23) (''[The electronic] approach is not without challenges. The method requires many steps and a secure system for data transmission. Additionally, some electronic health record systems cannot automatically transmit the eyeglass or contact lens prescription to the patient portal. So when a patient requests an electronic copy of their prescription in those scenarios, the doctor must first print the prescription, attach it to an email, and then send it to the patient. For storage, it is possible to attach the information to the patient's medical record, but colleagues report that some electronic health record systems impose costs to store data over time. So using this method for them would increase the doctor's cost in perpetuity.'').

[216] Through the 21st Century Cures Act, Congress authorized HHS to take action to promote the interoperability of health IT, support the use, exchange, and access of electronic health information, and limit information blocking. 21st Century Cures Act, Public Law 114–255, Title IV (2016). The Cures Act Final Rule, promulgated by the U.S. Dep't of Health & Human Servs., ONC, requires healthcare providers to enable patient access to enumerated classes of data in their electronic health record systems. ONC, 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program, Final Rule, 85 FR 25642 (May 1, 2020). These data classes include providers' clinical notes and information on medications, and the ONC noted in the latest update (Version 4 from July 2023) to the United States Core Data for Interoperability (USCDI) that the definition of ''clinical tests'' includes ''visual acuity exam.'' ONC, *HealthIT.gov,* Interoperability Standards Advisory (ISA), Clinical Tests, USCDI V4, *https://www.healthit.gov/isa/uscdi-data-class/clinical-tests#uscdi-v4.* While this decision may result in consumers having greater access to their prescription information in their EHRs, it does not directly impact prescribers' obligations for automatic prescription release under the Eyeglass Rule.

[217] Brown (WS Transcript at 7) (''it is very concerning that patients might not understand how to access their prescriptions. It's wonderful that patients are . . . requesting or desiring these prescriptions to be available to them online. But from the Prevent Blindness perspective and the patient's perspective, not every single patient is the same. Not everybody has the same access. Not everybody has the same broadband capabilities, the same smartphone technologies. And a lot of patients lack health literacy that encourages us as a completely available use to, or available avenue for them to receive access to their prescriptions.''); Aceto (WS Transcript at 42) (''My only concern with [technology] is not everybody, as we talked about with different clientele and different patients and different modalities, not everybody's as well versed.''); Hyder (WS Transcript at 45) (''ophthalmology patients who are older[—for the] digital option, they may not even want or have any idea of how to access [it].'').

[218] Brown (WS Transcript at 7) (''So it is encouraging, but it seems [] that there's a missed opportunity if patients can access their records digitally, but if they're not also given other means to access their prescriptions.''); Beatty (WS Transcript at 42) (''And so we'd want to be able to provide the possibility of delivering [prescriptions] electronically, but also allow for the provider to have the choice of how the electronic delivery would occur. And then the patient to consent to whether they want that electronic delivery or if they would prefer to have a paper version.'').

[219] Montaquila (WS Transcript at 26) (Once the prescription is on the portal, ''we have to then teach them, if they want to use the portal, how to find it. They have to go in, they have to log in, they have to download it. It's not that difficult to do, but they still need the education as you would for any new system you'd use. But then we have plenty of patients who say, 'I'm not electronic, just give me a copy.' '').

[220] Aceto (WS Transcript at 45) (''I will say that a good amount of the time that we spend oftentimes as opticians is sometimes calling for verification. But I do worry that some of these other burdensome regulations like the affirmative consent, for example, isn't going to change that. Because if [patients] forget [the prescription] at home, if they don't have it, we end up calling. And I don't know that it's that much of a burden to [prescribers]. Because as we've called optometrist's office and ophthalmologist's office, I will tell you that without fail because of the great work of the FTC since 1978, there hasn't been as much pushback as before those rules were instigated.''); Beatty (WS Transcript at 46) (''I think that the number of patients who are issued a paper prescription only, to just not have it when they need it is relatively high. And so a simple request from the patient to have a paper copy should they need one I think is a really simple request on their side and not really burdensome. I think that as long as that prescription is issued at the request and there's an electronic version available to that patient, then it should be ample.'').

[221] The Commission notes that for some telemedicine exams, digital delivery might be the only practical way for a prescriber to transmit the prescription immediately after the exam; in such cases, medical practices may need to obtain patient consent during the intake process. If a patient is in a medical office, however, and only the prescriber is remote, the office could print a paper copy

of the prescription for the patient. *See* Lovejoy (WS Transcript at 45) (''And more and more we're seeing some of those prescriptions being written after a telemedicine eye exam where the doctor and the patient are in a real time communication, but the doctor's remote. And the only way for the doctor to prescribe and get the prescription to the patient is electronically. It can be then printed out at the office and the patient can use it either there at the location or take it someplace else, but the patient then has access to it electronically as well.'').

[222] *See* section II.C., *supra.*

[223] CLR Final Rule, 85 FR 50683.

[224] *See* section VIII.A, *infra.*

[225] The digital delivery provision also does not alter or pre-empt existing State and Federal requirements pertaining to the electronic delivery of records and consumer consent, such as the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001.

[226] 45 CFR 164.520; AOA (WS Comment #0047 submitted by Benner) (''Greater analysis of the overall burden [of] regulations on doctors would also be helpful to inform how best to streamline rule changes and explore alternative options, FTC could consider mirroring some of the acknowledgement requirements after the Department of Health and Human Services (HHS) Notice of Privacy Practices which does not require acknowledgment to be obtained at every visit. Seeking authorization to provide a prescription electronically could follow the same approach.'').

[227] Montaquila (WS Transcript at 35) (Allowing the consent form to be signed once ''would make it much easier for all of us to implement because we could educate [the patient] as to what the office policy is, whether that's paper or electronic or a combination thereof. It could happen at the outset when they first establish their relationship with us and only if we change policy or they make a request, because the patients could understand, 'I know your policy and I'm happy with it.' Or, 'I'm not happy with it, I want it done a different way.' And that could all be documented when we first meet them or at any time at [a] time [of] their choosing. So putting it in the patient's hands to have control.'').

[228] *See, e.g.,* 45 CFR 164.520(c)(1)(ii) (''No less frequently than once every three years, the health plan must notify individuals then covered by the plan of the availability of the notice and how to obtain the notice.'').

[229] For example, consider an instance where a prescriber obtains a patient's affirmative consent to digital prescription delivery via email in September 2024, and the prescriber relies on that consent to email prescriptions until and including the patient's September 2028 appointment. In 2029 the prescriber changes the digital delivery policy to delivery via patient portal, and the consumer signs a new affirmative consent during their annual 2029 appointment. The prescriber's office should retain the original affirmative consent to email delivery at least through September 2031 (September 2028 appointment plus three years), and should retain the 2029 consent to delivery via portal for three years, or for as long as the prescriber relies on that consent to provide prescriptions via portal, plus another three years.

[230] NPRM, 88 FR 268.

[231] CLR Final Rule, 85 FR 50682–50684; 16 CFR 315.2.

[232] *See* Office of the Federal Register, Regulatory Drafting Guide, Definitions, *https://www.archives.gov/federal-register/write/legal-docs/definitions.html* (''5. Do not include a substantive rule within a definition. A reader can easily miss a rule placed within a definition.'').

[233] Old Rule §§ 456.3, 456.4, and 456.5 are redesignated as new §§ 456.5, 456.6, and 456.7, respectively.

[234] 5 U.S.C. 553; 15 U.S.C. 57a(b)(1).

[235] *See* WS Transcript at 27–28, 36; Repka (WS Transcript at 28) (''The question [ ] was why the EMR companies haven't followed? Well, the new rule, it takes time to get a consumer base or a user base that goes and asks the big company to prioritize that development over 500 other development requests that they get. I think we clearly need one because a signature pad or a checkoff box, which just rolled out in Epic for procedure consents would make this easier.''); Montaquila (WS Transcript at 36) (''You mentioned Epic. I worked with one of the first Epic implementations in the country, believe it or not, way back. And they have a really good system with a signature pad. The system I use now has an iPad. You can open up, they can sign on the iPad. But I am talking to other colleagues who say that their EHR system has no option similar to this. All of them are probably moving in the same direction, right?'').

[236] *See, e.g.,* Repka (WS Transcript at 36) (''it still seems to me that the EMRs of the future will be able to accept this as an electronic signature, that it will store in some fashion other than necessarily on a paper that says any of the three things that you've had there. So that if there's an option to do that, it would be nice. If you still needed it to be on a printable PDF, then not as convenient.'').

[237] NAROC (NPRM Comment #0024 submitted by Neville). NAROC also requested the Commission be open to petitions from prescribers to allow additional digital methods of verifications as technology evolves and provided examples including the use of a personal identification number by the patient in an EHR, a fingerprint, a retinal scan, voice recognition or other verifiable consent documentation. WS Comment #0049 submitted by Neville. The FTC is open to new digital methods of verifications such as biometric data so long as the processes are optional, secure, there are methods in place to confirm and verify the identity of the signatory, and the signatures are designed such that they cannot be used by anyone other than their genuine owners.

[238] Montaquila (WS Transcript at 23) (''For the approach on screen, the consent is obtained on paper, but then other practices will use an electronic means to collect that signature.'').

[239] CLR NPRM, 81 FR 88535.

[240] CLR SNPRM, 84 FR 24667.

[241] NPRM, 88 FR 265.

[242] *See* sections I.D.4 *supra,* IV.C.3 *infra.*

[243] Although prescribers may similarly comply with the CLR by obtaining digital signatures, the Commission recognizes that, for the time being, the CLR will differ from the Eyeglass Rule by not expressly permitting signature collection in a digital format. The Commission can amend the CLR to include this express permission during its next rule review and, in the meantime, can provide clarity to prescribers through guidance materials.

[244] Press Release, Fed. Trade Comm'n, FTC Sends Cease and Desist Letters to Prescribers Regarding Potential Violations of the Commission's Contact Lens Rule (Feb. 21, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-sends-cease-desist-letters-prescribers-regarding-potential-violations-commissions-contact-lens*; Press Release, Fed. Trade Comm'n, FTC Sends 37 New Cease and Desist Letters Regarding Agency's Eyeglass Rule (Apr. 20, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-sends-37-new-cease-desist-letters-regarding-agencys-eyeglass-rule*.

[245] Botha (WS Transcript at 44).

[246] Beatty (WS Transcript at 44) (''While I think there are things that can be coupled together to decrease the amount of forms that a patient is having to sign, I do think that there are certain aspects of that intake process that should be separate so that we can make sure that the patient is acknowledging things appropriately . . . in this case, whether or not we separate the acknowledgement for the availability of the prescription.'').

[247] *See* section I.B, *supra.*

[248] Montaquila presentation, FTC Eyeglass Rule Workshop at 7, *https://www.ftc.gov/system/files/ftc_gov/pdf/Stephen-Montaquila-OD-Presentation.pdf*.

[249] *See* NPRM, 88 FR 286 (previously proposed as § 456.1(h)(2)).

[250] NPRM, 88 FR 265.

[251] The NPRM proposed to redesignate the provisions currently codified at §§ 456.3 through 456.5 as §§ 456.4 through 456.6, respectively, and add a new Section 456.3.

[252] *Id.* at 266.

[253] *Id.* at 280.

[254] *Id.* at 280–81.

[255] These comments are in addition to the comments detailed above on the need for automatic prescription release due to a lack of compliance and patient awareness of their rights to a prescription. *See* section II.A, *supra.*

[256] Williams (NPRM Comment #0002) (''This is a great idea and will protect patients!''); Wolin (NPRM Comment #0003) (''I support the proposed rule changes as a smart and efficient update''); Riffle (NPRM Comment #0013) (''I agree with the proposed rule''); Anonymous (NPRM Comment #0017) (''I support the proposal to require eye doctors to obtain signed confirmation of prescription release.'').

[257] NAROC also points out that more prescriptions in the hands of consumers might reduce the number of requests for additional copies. NPRM Comment #0024 submitted by Neville; WS Comment #0049 submitted by Neville.

[258] NAROC (NPRM Comment #0024 submitted by Neville; WS Comment #0049 submitted by Neville).

[259] NAROC (WS Comment #0049 submitted by Neville).

[260] Consumer Action (NPRM Comment #0026 submitted by McEldowney).

[261] NPRM Comment #0028 submitted by Sepp.

[262] 1–800 Contacts (NPRM Comment #0025 submitted by Montclair).

[263] *Id.* Another commenter stated that he approves of the Rule and hopes the Rule is enforced. White (NPRM Comment #0022).

[264] NAROC (NPRM Comment #0024 submitted by Neville). It encourages the Commission to report on how its access to prescribers' confirmation of prescription release has been used and whether it can demonstrate that the cost to prescribers associated with the confirmations is justified by improved enforcement. *Id.*

[265] WS Transcript at 32–33. *See also* Consumer Action (NPRM Comment #0026 submitted by McEldowney) (''In fact, providers should welcome this record-keeping as a way to prove that they are following the law if challenged.'').

[266] NAROC (WS Comment #0049 submitted by Neville).

[267] WS Transcript at 19.

[268] WS Comment #0049 submitted by Neville. *See also supra* note 174 (citing Lovejoy (WS Transcript at 19) noting the high percentage of optometrists' gross revenue that comes from the product sales)).

[269] NAROC (WS Comment #0049 submitted by Neville). Consumer Action does not believe it is a burden on prescribers to obtain, document, and retain a consumer's affirmative receipt of their prescription. NPRM Comment #0026 submitted by McEldowney.

[270] NAROC (WS Comment #0049 submitted by Neville). At the workshop, Joseph Neville said that he's been talking over the last two years with their members and they ''said they're not having problems [complying] with the Contact Lens Rule.'' WS Transcript at 28.

[271] WS Transcript at 31.

[272] National Taxpayers Union (WS Comment #0028).

[273] *Id.*

[274] *Id.* The Commission has not been able to replicate NTU's cost calculation. Based on NTU's estimate that a ''modest optometry establishment'' might conduct 3000 examinations per year, and using the NPRM burden estimate of 10 seconds to obtain a patient's confirmation and one minute to store it, the requirement would impose an additional paperwork burden on such a practice of 58.3 hours per year (3,000 × 70 seconds ÷ 60 ÷ 60). Using the NPRM estimated wage rates for optometrists and office staff, such an additional burden would amount to an incremental burden of $1,439.88. However, staff does not know how accurate NTU's estimate for a ''modest optometry establishment'' is, and does not possess information about typical practices. As explained in this document's PRA section, staff based its ultimate burden calculations on the expected overall number of refractive exams that would result in a written prescription every year rather than trying to determine a number for a typical practice. *See* Paperwork Reduction Act, section VIII, *infra,* for an updated estimate for the amended Rule.

[275] WS Transcript at 40.

[276] NPRM Comment #0024 submitted by Neville.

[277] *Id.*

[278] Some of these comments were discussed above with respect to the Commission's determination that the failure to provide a prescription continues to be an unfair act or practice. *See* section II.A *supra.* One other commenter expressed disfavor with the proposal, but did not provide specific reasons for the opposition. Anonymous (NPRM Comment #0004).

[279] AOA (WS Comment #0047 submitted by Benner).

[280] AOA (WS Comment #0047 submitted by Benner). Appendix A to this comment contains a summary it created of the purported study results.

[281] AOA (WS Comment #0047 submitted by Benner). Similarly, at the workshop, Dr. Stivers suggested that most consumers sign papers at the doctor's office without reading them and questioned whether the confirmation of prescription release ''accomplish[es] anything in the broader context of all of the information that the patient is trying to absorb in that kind of environment.'' WS Transcript at 10.

[282] *See also* Stivers, WS Transcript at 11 (noting that regulations like the Eyeglass Rule require businesses to hire expensive attorneys and consultants to advise them, and the Commission should take into account the burden placed on ''the vast majority of practitioners or businesses in general that are absolutely law abiding.''

[283] *See* section VIII, *infra.*

[284] During the pendency of the Eyeglass Rulemaking, the American Optometric Association filed a comment in response to the Commission's Paperwork Reduction Act (''PRA'') notice for the Contact Lens Rule. That comment, CLR PRA Comment #0007 (submitted by Benner), is available at: *https://www.regulations.gov/comment/FTC-2023-0049-0007* (emphasis in original).

[285] AOA (NPRM Comment #0023 submitted by Benner; WS Comment #0047 submitted by Benner).

[286] Rosemore (WS Comment #0045) ''As an optometrist, the added requirements would be a significant burden on my practice . . . I'm not sure what sort of issue the Commission believes it is solving here.'' Dr. Rosemore added, ''I am disturbed that my profession continues to get treated like a punching bag. It appears to me that we are viewed by some at the Commission as predators to consumers instead of the doctors we are to our patients. I did nothing to deserve that treatment.'' Coast Eyes Pllc (WS Comment #0046) (''Nothing is broken here. Patients get their prescriptions without conflict. The financial/time/paper (material) burden on small business is not justified by the number of complaints.)''.

[287] Anonymous (NPRM Comment #0006) (''something that would take an immense amount of time and take away from patient care.''); Anonymous (NPRM Comment #0007) (isn't ''necessary'' and would be ''very time consuming.''); Cooper (NPRM Comment #0009) (''yet another example of an unnecessary, time consuming, and intrusive requirement [that would] add to cost of doing business which ultimately gets passed on to the patient (consumer)''); Anonymous (NPRM Comment #0011) (costly, time consuming, and redundant). WS Transcript at 23–24.

[288] Durkee (NPRM Comment #15).

[289] WS Transcript at 9. Voicing a similar concern, Dr. Montaquila said he's seen widespread confusion from patients as to why they are signing a prescription or confirmation of prescription release and he states that ''they don't understand the process.'' WS Transcript at 24. Dr. Masoudi raised communication issues surrounding the form when language barriers exist between the patient and staff. WS Transcript at 27.

[290] WS Transcript at 23.

[291] WS Transcript at 23–24.

[292] WS Transcript at 29.

[293] WS Transcript at 29.

[294] AAO (NPRM Comment #27).

[295] *Id.* The AAO recommended the Commission exempt from the confirmation-of-prescription-release amendment ophthalmology practices with fewer than ten full-time employees because they often operate with limited administrative support and may not use electronic health records. *Id.*

[296] WS Transcript at 31. Dr. Montaquila stated that he has not seen much difference since the Contact Lens Rule confirmation requirement was put in place andthat he'll give prescriptions whether or not there is a confirmation requirement in place.

[297] WS Transcript at 29.

[298] WS Transcript at 37–38.

[299] NPRM, 88 FR 287.

[300] NPRM, 88 FR 287.

[301] *Id.* at 281.

[302] The Commission has determined not to add an exemption for ophthalmology practices with fewer than ten full-time employees, as requested by the AAO. *See supra* note 295. It is equally important for patients at these practices to be aware of their right to receive their prescriptions and receive their prescriptions as it is for patients at larger practices. If the practices sell eyeglasses or have a direct or indirect financial interest in the sale of eyeglasses, they must comply with the confirmation-of-prescription-release amendments.

[303] WS Transcript at 34.

[304] WS Transcript at 34.

[305] Warby Parker (ANPR Comment #0817 submitted by Kumar) (bill of rights and signage); Tedesco (ANPR Comment #0042) (signage).

[306] AOA (NPRM Comment #0023 submitted by Benner); Masoudi (WS Transcript at 38) (suggesting that the FTC should be more active in making consumers more aware of their rights ''before they even walk in our door.''). Other commenters discussed a need for greater education generally in this area. *See* section VII.B, *infra.*

[307] NPRM Comment #0023 submitted by Benner. According to the AOA, these include: (1) online retailers cannot guarantee the glasses purchased will meet the consumers' visual needs; (2) if the eyeglasses do not fit well, the online retailer is not required to adjust the glasses in person, but will often instruct the consumer how to self-

adjust the glasses; and (3) the online retailer is not obligated to respond to any complaints or issues surrounding the purchase. *Id. See also* American Optometric Association, ''AOA: No letting up on Eyeglass Rule advocacy,'' Nov. 2, 2023, *https://www.aoa.org/news/advocacy/federal-advocacy/aoa-no-letting-up-on-eyeglass-rule-advocacy*.

[308] Durkee (NPRM Comment #15). At the workshop, panelist Pete Sepp of NTU inquired about the FTC not enforcing the Rule against prescribers who take actions aimed at improving automatic prescription release and suggested such actions be treated as ''safe harbors'' from FTC enforcement. One example he provided was for prescribers to show a training video to their employees on prescription release and retain evidence of the training. WS Transcript at 33. As explained in response, although every instance where a prescription is not automatically provided to a patient is a civil penalty violation, the Commission is generally not looking for one-off instances of non-compliance in its enforcement actions. *See* Bernstein (WS Transcript at 34). Nevertheless, the Commission does not believe expressly establishing ''safe harbors'' of the type described by Pete Sepp would sufficiently counter the significant non-compliance detailed elsewhere in this document.

[309] *See* section II, *supra.*

[310] *Id.*

[311] NPRM, 88 FR 263. This inquiry is particularly relevant in that, as the Commission has stated, it is primarily interested in bringing actions against repeat offenders, not prescribers who may make a one-off mistake in forgetting to release a prescription.

[312] *U.S.* v. *Doctors Eyecare Ctr., Inc.,* No. 3:96–cv–01224–D (N.D. Tex. June 24, 1996). The complaint alleged that the eye care center only released prescriptions when patients asked for them, and included waivers of liability on patients when doing so. The prescriber paid a $10,000 civil penalty and was enjoined from future violations of the Eyeglass Rule. *See* Press Release, Fed. Trade Comm'n, Dallas Eyecare Center Agrees to Settle Charges That They Failed to Give Consumers Copies of Their Eyeglass Prescriptions (May 3, 1996), *https://www.ftc.gov/news-events/press-releases/1996/05/dallas-eyecare-center-agrees-settle-charges-they-failed-give*.

[313] NAROC's comment mentions that, while a requirement for signage in the office was rejected as inadequate, industry members might use the option of making information easily available to customers in other formats, such as websites or point of sale handouts about patients' rights or prescriber responsibilities. NPRM Comment #0024 submitted by Neville. NAROC proffered these ideas as additive to, and not instead of, the confirmation proposal, which it supports. An anonymous commenter suggests that the FTC should educate the consumer and ''[m]aybe provide a template to the providers so that the consumer gets the same info, presented the same way at every provider?'' WS Comment #0037. It is unclear whether the commenter is suggesting this action in addition to, or instead of, the signed acknowledgment proposal. The Commission discusses business and consumer education as an additional method to increase business and consumer awareness of responsibilities and rights, respectively, in section VII.B, *infra.*

[314] NPRM, 88 FR 264 (signage), 263–64 (bill of rights).

[315] *See* CLR SNPRM, 84 FR 24675; Eyeglass I Rule, 43 FR 23998.

[316] NPRM, 88 FR 263.

[317] Commission staff first identified this issue in its Eyeglass II Report, where it explained that the automatic release requirement had not helped to prevent ''evidentiary squabbles''—as the Commission had hoped it would—but instead had increased them, because whether or not a prescriber had released a prescription could not, in most cases, be ascertained absent documentary evidence. Eyeglass II Report, *supra* note 14, at 275–76.

[318] *See* sections IV.C.2.a and VIII.A, *infra* (describing how many prescribers are using confirmation forms that contain extraneous information and thus, likely take far longer to read and sign than actually required under the rule).

[319] This calculation is based on estimates that there are 165 million eyeglass wearers who get exams every other year, and that there are 18,000 ophthalmologists and 43,000 optometrists in the United States. As discussed above, section I.D.5, *supra* note 67, this may undercount the number of optometrists, which could mean the per-provider burden is even less. On the other hand, the burden may fall differently on different providers (depending on their size, or volume, or electronic-records adoption, for instance), and at least one commenter, the National Taxpayers Union, felt it might be disproportionally felt by small providers. *See* section IV.B, *supra.*

[320] AOA (WS Comment #0047 submitted by Benner).

[321] *Id.*

[322] AOA's appendix A to its workshop comment (WS Comment #0047 submitted by Benner) does not contain information about the methodology of the survey or the representativeness of the surveyed population. This analysis assumes the methodology is sound and the population surveyed is appropriately representative—assumptions which may or may not be correct.

[323] Moreover, 28% of respondents disagree with the statement that the amount of paperwork they have to complete at a doctor's appointment is overwhelming (with another 25% responding neutrally) and 34% of respondents disagree with the statement that the complexity of the paperwork they have to complete at a doctor's appointment is overwhelming (with another 25% responding neutrally).

[324] However, the Commission notes that some of the burden that commenters suggest has resulted from the CLR confirmation-of-prescription-release requirement appears to be wrongfully attributed to that requirement. *See* sections IV.C.2.a, *infra,* and section VIII.A, *infra* (describing how in one form in use by many prescribers' offices, and recommended in the AOA's online toolkit for complying with the CLR, five out of six paragraphs are extraneous to the confirmation-of-prescription-release proposal).

[325] These options include permitting electronic delivery of eyeglass prescriptions, in which case prescribers would not need to request that the patient acknowledge receipt of the prescription. Yet, flexibility exists for prescribers who prefer to provide paper copies to their patients, as they do not need to offer an electronic option. *See* section III.C, *supra.* For instances in which a patient refuses to confirm prescription release, the prescriber shall note the patient's refusal on the document and sign it.

[326] *See* section III.C, *supra.*

[327] If multiple eyeglass prescriptions are provided on paper at the same time, the prescriber can obtain confirmation of prescription release with one signature, and need not obtain separate signatures for each prescription confirmation.

[328] To reduce the burden associated with prescription release, a prescriber could create a document requesting a single signature to confirm receipt of both an eyeglass and a contact lens prescription (in cases where both prescriptions are finalized at the same time). Such a document could meet the requirements of both rules so long as it is clear and conspicuous what the patient is signing for, and that the signature requested confirms receipt of *both* the contact lens and eyeglass prescriptions. Similarly, as mentioned above, a prescriber could use one document to obtain verifiable affirmative consent to digital prescription release of both contact lens and eyeglass prescriptions.

[329] NPRM, 88 FR 287.

[330] *Id.*

[331] 16 CFR 315.3(c)(3).

[332] *See* NPRM, 88 FR 260–61. The same purpose is stated for the exemption in the Contact Lens Rule. CLR Final Rule, 85 FR 50687.

[333] Current guidance issued by the Commission in connection with the Contact Lens Rule states the same. FTC, FAQs: Complying with the Contact Lens Rule, *https://www.ftc.gov/business-guidance/resources/faqs-complying-contact-lens-rule* (''If you're not sure if your interest qualifies, err on the side of caution and ask your patients to confirm receipt of their prescriptions.'').

[334] One commenter requested an exemption in long-term care settings for the confirmation requirement, as well as for affirmative consent for digital delivery. This commenter said that, in the long-term care setting, the parties responsible for the patients are almost never present during the exam and the patients themselves are not able to give consent and as a result, prescribers coordinate care with, and provide prescriptions to, facility staff. Morer (NPRM Comment #0021). In such situations, the Commission recommends the prescriber note in their records to whom the prescription was provided (*e.g.,* staff or caregiver), and whether it was provided on paper, or made available digitally and by what method. As with the instance where a patient refuses a copy of a prescription, *see supra* note 325,

the prescriber could relay that information to the Commission should questions about compliance arise.

[335] 16 CFR 315.3(c)(1) (CLR); NPRM, 88 FR 266.

[336] Montaquila (WS Transcript at 22). The Commission notes that other offices using EHRs could collect and store signatures electronically, as Dr. Montaquila noted they do for the consent to digital delivery. *Id.* at 23.

[337] Montaquila presentation, FTC Eyeglass Rule Workshop, *https://www.ftc.gov/system/files/ftc_gov/pdf/Stephen-Montaquila-OD-Presentation.pdf*.

[338] AOA, Contact Lens Rule Compliance Toolkit (July 2020), *https://www.aoa.org/AOA/Documents/doctor%20resources/Contact-Lens-Rule-Compliance-Toolkit.pdf*.

[339] WS Transcript at 22. Dr. Montaquila shared an example of a what the prescription pad looks like. *See* Montaquila presentation, FTC Eyeglass Rule Workshop, *https://www.ftc.gov/system/files/ftc_gov/pdf/Stephen-Montaquila-OD-Presentation.pdf*. This pad is also shown in the AOA's toolkit, with a note that doctors should contact the AOA Marketplace if interested in obtaining the product. *See* AOA, Contact Lens Rule Compliance Toolkit at 9 (July 2020), *https://www.aoa.org/AOA/Documents/doctor%20resources/Contact-Lens-Rule-Compliance-Toolkit.pdf*. At the bottom of each prescription sheet, after a statement in bright blue declaring, ''Contact lenses are medical devices which require ongoing medical care for optimal performance and safety. Please contact our office if you experience any signs of complications including pain, redness, loss of vision,'' there is a statement in black for patients to ''Sign below to indicate you were provided a copy of your contact lens prescription at the completion of your contact lens fitting,'' with a space for a signature and the date.

[340] WS Transcript at 22. Dr. Montaquila referenced *HealthIT.gov* data, as of 2021. *See* U.S. Dep't of Health & Human Servs., ONC, ''Office-based Physician Electronic Health Record Adoption,'' *https://www.healthit.gov/data/quickstats/office-based-physician-electronic-health-record-adoption*. The 88% figure, however, pertains to U.S. office-based physicians, but not specifically to optometrists or ophthalmologists. Moreover, this figure relates to adoption of EHR by doctors for their recordkeeping, but does not necessarily cover the use of EHR, and specifically portal-use, by patients themselves. There may be instances where doctors retain their records in electronic format but do not make them available via portal for their patients to access. And even when records are available electronically, many patients may opt not to use prescriber portals. *See* section III.B.1, *supra* (discussing patient portal access and usage) and section VIII.B.2, *infra* (discussing AOA survey of a small sample of optometrists showing that just 35% provided prescriptions electronically).

[341] WS Transcript at 22.

[342] WS Transcript at 22. Dr. Montaquila did not produce this study to staff. A news article on the study is available at: Cornell Chronicle, ''Study: E-prescribing cuts medication errors by seven-fold'' (2010), *https://news.cornell.edu/stories/2010/03/e-prescribing-cuts-medication-errors-seven-fold*.

[343] WS Transcript at 22.

[344] AOA (CLR PRA Comment #0007 submitted by Benner), *https://www.regulations.gov/comment/FTC-2023-0049-0007* (filed in response to FTC Request For Comment, 88 FR 55044 (Aug. 14, 2023), *https://www.regulations.gov/document/FTC-2023-0049-0001*). As discussed more fully in the PRA section of this document (section VIII, *infra* notes 452–55 and accompanying text.), the Commission has doubts about the methodology used for this survey,and does not rely on it for any determinations.

[345] WS Transcript at 22–23. Dr. Montaquila stated that EHR or practice management systems were not flexible enough to accommodate this functionality. *Id.*

[346] The Commission points out that if the prescriber delivers the prescription digitally, but the patient has not opted-in to the digital delivery option, the prescriber has not satisfied the requirements of § 456.2. *See* section III.B.1, *supra.*

[347] *See* Section VIII, *infra.*

[348] Section 456.4(a)(1)(ii) relating to digital prescription release, now cross references § 456.3, requiring verifiable affirmative consent to providing the prescription in digital format.

[349] *See* section III.B, *supra.*

[350] WS Transcript at 36.

[351] NPRM, 88 FR 265. *See* section III.C.3, *supra* notes 239–40 and text (citing Commission language from the CLR NPRM and CLR SNPRM supporting the position that, for the CLR, prescribers may obtain a patient's signature either on paper or digitally.).

[352] Although prescribers may similarly comply with the CLR by obtaining digital signatures, the Commission recognizes that, for the time being, the text of the CLR will differ from that of the Eyeglass Rule by not expressly permitting signature collection in a digital format. The Commission can amend the CLR to include this express permission during its next rule review and, in the meantime, can provide clarity to prescribers through guidance materials.

[353] 16 CFR 456.2(a).

[354] 16 CFR 315.4.

[355] 15 U.S.C. 7602.

[356] NPRM, 88 FR 271.

[357] *Id.* at 286.

[358] *Id.* at 281.

[359] NAROC (NPRM Comment #0024 submitted by Neville); NAROC (WS Comment #0049 submitted by Neville). NAROC noted, however, that it was not aware of significant instances in which prescribers had refused to automatically provide prescriptions until receiving payment from the insurance company. NAROC (NPRM Comment #0024 submitted by Neville); Lovejoy (WS Transcript at 48).

[360] NPRM Comment #0025 submitted by Montclair.

[361] NPRM Comment #0027 submitted by Repka.

[362] *Id.*

[363] WS Comment #0039. *See also* Hyder (WS Transcript at 47) (recommending that the FTC clarify the difference between covered services—such as eye health exams—and non-covered services—such as refractive exams—because ''insurance is complex and I think sometimes it can be a challenge to confirm whether or not the coverage is available for a patient.'').

[364] *See* section II.C, *supra.*

[365] Beatty (WS Transcript at 52); Lovejoy (WS Transcript at 52–53).

[366] Botha (WS Transcript at 53).

[367] However, prescribers who wait to collect payment for the examination until the eyeglass purchase is completed are precluded from using a confirmation method in which the statement confirming receipt of the prescription is included on the sales receipt.

[368] 16 CFR 456.1(b).

[369] 16 CFR 456.2(a).

[370] *See* AOA (ANPR Comment #0849 submitted by Peele); Brauer (ANPR Comment #0045); Yadon (ANPR Comment #0046); Bolenbaker (ANPR Comment #0633). Some of these commenters also stated that the defined term in the Rule is at odds with the definition of eye examination in the American Medical Association's Current Procedural Terminology codes to bill outpatient and office procedures, because that definition does not include a refraction. AOA (ANPR Comment #0849 submitted by Peele); Bolenbaker (ANPR Comment #0633).

[371] AOA (ANPR Comment #0849 submitted by Peele); Lunsford (ANPR Comment #0346); Bolenbaker (ANPR Comment #0633).

[372] Bolenbaker (ANPR Comment #0633).

[373] Lehman (ANPR Comment #0610).

[374] NPRM, 88 FR 279.

[375] NPRM, 88 FR 281.

[376] NPRM Comment #0025 submitted by Montclair.

[377] NPRM Comment #0028 submitted by Sepp.

[378] NPRM Comment #0024 submitted by Neville.

[379] *Id.*

[380] AAO (WS Comment #0027).

[381] *Id.*

[382] AOA (WS Comment #0047).

[383] NPRM Comment #0023 submitted by Benner (''The refractive error measured should be analyzed with other testing data, and an assessment of the patient's visual needs obtained during an in-person examination. This information is used to determine if, and in what amount, an optical correction is needed to provide optimal vision and comfort for all viewing distances.''); *see also* OAA (NPRM Comment #0020 submitted by Allen) (''A refraction may include objective and subjective assessment of the patient's refractive status; however, the results of a refraction do not provide all the information needed to determine an optical prescription.''); AOA (WS Comment #0047 submitted by Benner) (''we believe that the market has significantly evolved . . . thereby negating the need for any language adjustments in the rule. We believe the original language should stand without revision.'').

[384] AOA (WS Comment #0047 submitted by Benner).

[385] Beatty (WS Transcript at 54).

[386] *Id.* at 55–56.

[387] Boatner (WS Comment #0036); *see also* Lovejoy (WS Transcript at 49) (describing a

scenario where an ophthalmologist may ''want to do a measure of whether or not there is a refractive error to help with the medical diagnosis, but may not want to write a prescription at the end of that because that's not what the chief complaint is about and they don't see a need for the patient to have a prescription for corrective eyewear.'').

[388] Boatner (WS Comment #0036); Beatty (WS Transcript at 49).

[389] Boatner (WS Comment #0036); Lovejoy (WS Transcript at 51, 56) (stating that an exemption for use of medical judgment to withhold the prescription should be written into the Rule).

[390] Boatner (WS Comment #0036); *see also* Hyder (WS Transcript at 50).

[391] 16 CFR 456.2(c).

[392] *See* Hyder (WS Transcript at 50) (noting that some ophthalmologists have reported having patients say, ''you're not allowed to charge me for my refraction,'' and opining, ''there needs to be something that states in the rule that refraction services are different than the cost of a prescription.'').

[393] Botha (WS Transcript at 49).

[394] The term has been revised in the following sections of the final rule: (1) Definitions, Section 456.1(a), (b), (d), (e) and (g); (2) Separation of examination and dispensing, § 456.2(a)(1) and (2) and (b) through (d); and (3) Confirmation of prescription release, § 456.4(a)(1).

[395] The Commission also makes clear that requirement to release prescriptions does not depend on how prescribers label their exams, and whether a prescriber charges a fee for that particular practice. The definition for the amended refractive eye exam terminology remains ''the process of determining the refractive condition of a person's eyes or the presence of any visual anomaly by the use of objective or subjective tests.'' § 456.1(b). A prescriber who charged a patient only one fee—designated as for an eye health exam—but also performed an exam that determined the refractive condition of a person's eyes or the presence of any visual anomaly, is still required to automatically release the prescription upon completion of the exam. A prescriber is only permitted to not release a prescription automatically following a refractive exam if the prescriber makes a medical determination that the patient should not be given a prescription for eyeglasses.

[396] Workshop panelists who spoke on this issue were unanimous in agreeing that if a prescriber decides not to provide the prescription in their medical judgment, then it is appropriate that they do not sell eyewear to that patient. WS Transcript at 57.

[397] *See, e.g.,* ACLens, ''Measuring Pupillary Distance (PD),'' *https://www.aclens.com/measuring-pupillary-distance.*

[398] The Rule, as amended, defines a prescription as the ''written specifications for lenses for eyeglasses which are derived from a refractive eye examination, including all of the information specified by state law, if any, necessary to obtain lenses for eyeglasses.'' 16 CFR 456.1(g). As of the date of the NPRM, only four States, Alaska, Kansas, Massachusetts, and New Mexico, required the inclusion of pupillary distance measurements on prescriptions. NPRM, 88 FR 273.

[399] NPRM, 88 FR 276–77.

[400] NPRM, 88 FR 276–77.

[401] NPRM, 88 FR 277.

[402] OAA (NPRM Comment #0020 submitted by Allen); AOA (NPRM Comment #0023 submitted by Benner).

[403] AOA (NPRM Comment #0023 submitted by Benner); *see* NPRM, 88 FR 276.

[404] NAROC (Comment #0024).

[405] OAA (NPRM Comment #0020 submitted by Allen).

[406] AAO (NPRM Comment #0027 submitted by Repka).

[407] AAO (NPRM Comment #0027 submitted by Repka). Others also expressed favor with the Commission's decision not to require pupillary distance on prescriptions. Anonymous (NPRM Comment #0012) (the only way to ensure accurate measurement is by having the patient try on the desired frame and it is impossible to determine segment height and optical center without fitting the frame on the patient's face and marking the lens center); Anonymous (WS Comment #0034) (requiring pupillary distance on prescriptions would be the ''absolute death of the optical industry'' and it would be unfair to ''require people who properly train their staff to freely give the expertise so the consumer can go to another provider that has no such staff and get glasses.'').

[408] *Eyeglasses.com* (WS Comment #0040).

[409] *Id. Eyeglasses.com* also stated that, for purchases of bifocal, trifocal, or progressive lenses, a segment height is required and that consumers should be able to get a segment height measurement from an optical professional so they can include it when ordering eyeglasses online. *Id.*

[410] 1–800 CONTACTS (NPRM Comment #0025 submitted by Montclair).

[411] *Id.*

[412] *Id.*

[413] This commenter urged the Commission to require prescribers to ask patients to confirm receipt of the PD measurement, in addition to receipt of the prescription. 1–800 CONTACTS (NPRM Comment #0025 submitted by Montclair).

[414] *Id.*

[415] Beckman (WS Comment #0041).

[416] *Id.* An unidentified commenter agreed, indicating that when the optometrist fails to measure and include pupillary distance measurements on the prescription, they are preventing the consumer from shopping around and discovering lower prices elsewhere. Anonymous (NPRM Comment #0010). Another consumer comment does not explicitly mention pupillary distance, but stated it is their right to receive all of their personal medical information, and states they have to go to other sellers to be able to afford eyeglasses. Crete (WS Comment #0035).

[417] *See* section I.C, *supra.*

[418] *See* NPRM, 88 FR 274.

[419] As explained in the NPRM, pupillary distance measuring systems vary in cost and precision, and ''if the Commission required prescribers to include pupillary distance measurements on prescriptions, it is unlikely that prescribers would use less expensive rulers and the like, but instead—for professional and liability reasons—would select more technologically sophisticated methods, such as a digital centration device, to take the measurement. Such devices, and the training, staff, and exam time necessary to operate the devices, could be costly.'' 88 FR 276.

[420] The Commission recognizes that there is a tension between the fact that there are zero and low-cost methods to measure pupillary distance and the fact that prescribers claim providing the measurement requires expensive equipment and potential increases in staff. However, both things can be true. Consumers are able to ascertain serviceable pupillary distance measurements without expensive training and equipment, while medical professionals will likely want—and perhaps even feel professionally obligated—to provide a measurement that meets higher standards of technical precision.

[421] EyeBuyDirect, ''How to Measure Pupillary Distance (PD),'' *https://www.eyebuydirect.com/guides/how-to-measure-your-pd.*

[422] Zenni, ''Measure your pupillary distance (PD),'' *https://www.zennioptical.com/measuring-pd-infographic.* The Commission has not analyzed whether the various methods consumers may use to determine their pupillary distance, or whether sellers manufacturing eyeglasses in accordance with self-measured pupillary distances, are permitted in all jurisdictions. The Commission noted this in the NPRM, 88 FR 274, but did not receive any comments on this topic in response to the NPRM.

[423] The FTC has heard from consumers that they have been charged between $15 and $40 to obtain an in-person pupillary distance measurement.

[424] Bailer (ANPR Comment #0191); Emanuel (ANPR Comment #0282); Land (ANPR Comment #0311).

[425] ANPR Comment #0748 submitted by Cutler.

[426] NPRM, 88 FR 276.

[427] Because the Commission did not find adequate evidence of unfairness, it need not consider alternative ways to remedy that unfairness. Thus, it does not address seller 1–800 CONTACTS' alternate methods for providing pupillary distance to patients.

[428] WS Transcript at 38.

[429] WS Transcript at 4–6, 16.

[430] WS Transcript at 23–24.

[431] Anonymous (WS Comment #0037).

[432] NPRM Comment #0027 submitted by Repka.

[433] NPRM Comment #0024 submitted by Neville. In addition, at the workshop, Mr. Lovejoy stated that the FTC should give prescribers some guidance on how to educate their own customers and make sure the message is consistent throughout the industry. WS Transcript at 58.

[434] *See, e.g., https://www.ftc.gov/business-guidance/resources/complying-eyeglass-rule* (for prescribers); *https://consumer.ftc.gov/articles/buying-prescription-glasses-or-contact-lenses-your-rights* (for consumers); *https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sends-28-warning-letters-regarding-agencys-eyeglass-rule* (press release); *https://consumer.ftc.gov/consumer-alerts/2020/12/ftc-warns-eye-care-prescribers-follow-law-or-else* (consumer

alert); *https://www.ftc.gov/business-guidance/blog/2023/04/required-action-after-refraction-ftc-staff-sends-cease-desist-letters-about-eyeglass-rule-compliance* (business guidance).

[435] 5 CFR 1320.8(b)(3)(vi).

[436] 16 CFR 456.4(a)(1).

[437] NPRM, 88 FR 283.

[438] *Id.* at 282–83.

[439] CLR Final Rule, 85 FR 50709. The estimates for the Contact Lens Rule's confirmation requirement were, in turn, based on a (1) survey of how long it took consumers to read a proposed Contact Lens Rule confirmation statement, and (2) previously approved burden estimates for a similar patient-acknowledgment requirement under HIPAA rules, found at 45 CFR 164.520(c)(2)(ii).

[440] 88 FR 284.

[441] Anonymous (NPRM Comment #0006).

[442] Anonymous (NPRM Comment #0007).

[443] AOA (NPRM Comment #0023). *See also* Rep. Williams, House Committee on Small Business (WS Comment #0044) (''The Committee fears that this rule will have a disproportionate impact on small businesses by adding redundant requirements to already understaffed practices.'').

[444] Michaels (WS Transcript at 9) (''I don't think that it's a burden to provide the prescription. Where I see the burden is to ask for paperwork, to say, 'Sign this piece of paper acknowledging that we've already given you a prescription.' There's a lot of time, effort, discussion around that. I think that that is something that is greatly underestimated in terms of how long it takes.''); AOA (WS Comment #0047 submitted by Benner).

[445] Coast Eyes Pllc (WS Comment #46).

[446] Montaquila (WS Transcript at 23–24). Dr. Montaquila did not break down his 4-minute estimate by task, so it is unclear how long he estimates it takes for a consumer to simply read and sign the confirmation statement, as opposed to the time it takes for his staff to print out the prescription and confirmation and store the patient confirmation as a record. In its NPRM, the Commission allowed a total of two minutes and 10 seconds for the entire process (one minute for prescribers to print out the prescription, 10 seconds for the confirmation signature, and an additional minute for staff to store the signed confirmation.).

[447] National Taxpayers Union (NPRM Comment #0028 submitted by Sepp).

[448] *See* section IV.B, *supra* note 274 and text. As noted previously, the Commission has not been able to replicate the NTU estimate. Accepting NTU's assumption that a small practice performs 3000 refractive eyeglass examinations per year, the confirmation requirement would add a paperwork burden of $1,439.88 for such a practice based on the proposal and PRA analysis applied in the NPRM, and an increased paperwork burden of $1,318.73 based on the amendment and PRA analysis of this Final Rule. While the AOA has stated that approximately 92% of optometry practices have fewer than 25 employees and average $826,612 in gross receipts per annum (AOA NPRM Comment #23), the Commission does not have information detailing how many refractive eyeglass examinations a typical practice performs—or even what a ''typical practice'' is and whether it is advisable to weigh the burden based on a typical practice experience—and finds it preferable to calculate the burden based on the overall number of eyeglass wearers in the United States, and the estimate that each wearer obtains a refractive eye exam for eyeglasses every two years.

[449] NAROC (NPRM Comment #0024 submitted by Neville); *see also* Consumer Action (NPRM Comment #0026 submitted by McEldowney) (''we do not believe it is a burden on providers to obtain, document, and retain a consumer's affirmative receipt of their prescription.'').

[450] Neville (WS Transcript at 28–29).

[451] Coast Eyes Pllc did not provide any evidence in support of its $18,000 estimate, and it is not clear where this calculation comes from.

[452] AOA (CLR PRA Comment #0007 submitted by Benner), *https://www.regulations.gov/comment/FTC-2023-0049-0007* (filed in response to FTC Request For Comment, 88 FR 55044 (Aug. 14, 2023), *https://www.regulations.gov/document/FTC-2023-0049-0001*).

[453] *Id.* According to the AOA, the survey was conducted in-house by its Health Policy Institute and Research Departments, and distributed to member optometrists via AOA's weekly email newsletter with a link and invite to the survey titled, ''Voice your concerns by Oct. 9: Complying with the FTC Contact Lens Rule.'' Of members who responded to the AOA's link request, 327 completed the survey.

[454] FTC Notice, Proposed Collection, 88 FR 88076, 88079, Dec. 20, 2023 (''2023 CLR PRA''). Following this notice and response to commenters, on Jan. 26. 2024, OMB approved the extension request for CLR clearance. Notice of Office and Management and Budget Action, OMB Control No. 3084–0127.

[455] The Commission notes that while the AOA claims to represent some 50,000 optometric professionals, only 327 members responded to the AOA's invitation and completed the survey, which could indicate that many of those who self-selected and took part in the survey were those who have concerns about the confirmation requirement, while most other AOA members do not have such concerns. However, there could be other reasons for the relatively small number of prescribers (in proportion to the total membership) who responded, so the Commission will not draw inferences from the low response rate.

[456] 2023 CLR PRA, 88 FR 88079.

[457] *See* section IV.C.2.a, *supra,* discussing the AOA model form exhibited by Dr. Montaquila at the workshop. A copy of the model form is available at *https://www.aoa.org/AOA/Documents/doctor%20resources/Contact-Lens-Rule-Compliance-Toolkit.pdf.*

[458] *Id.*

[459] *Id.*

[460] Montaquila (WS Transcript at 23).

[461] The Commission has never subscribed to the belief that consumers will be greatly confused as to why they are signing a straightforward confirmation statement such as, ''My eye care professional provided me with a copy of my contact lens prescription at the completion of my contact lens fitting.'' The Commission's understanding is based on a common sense reading of the statement, but is also supported by a survey submitted during the Contact Lens Rule rulemaking showing that 90% of consumers responded they understood the proposed confirmation statement, and 94% responded that they had no follow-up questions. Laurence C. Baker, ''Analysis of Costs and Benefits of the FTC Proposed Patient Acknowledgment and Recordkeeping Amendment to the Contact Lens Rule,'' 13 (2017), *https://www.ftc.gov/system/files/summaries/initiatives/677/10192017_meeting_summary_from_mko_for_the_contact_lens_rule_rulemaking_proceeding.pdf.*

[462] The Commission recently made a similar revision to its estimate of the time required to obtain confirmation for the Contact Lens Rule, and the revised burden figures received clearance by the Office of Management and Budget. *See supra* note 454.

[463] Standards for Privacy of Individually Identifiable Health Information, Final Rule, 67 FR 53182, 53261 (Aug. 14, 2002) (implementing 45 CFR 164.520(c)(2)(ii)).

[464] *See* section I.D.5, *supra* note 73.

[465] The Commission relies on industry sources for its estimate that eyeglass wearers typically obtain one refractive eye exam every two years. *See, e.g.,* AOA, Excel and Jobson Medical Information, The State of the Optometric Profession: 2013, at 4, *https://www.reviewob.com/wp-content/uploads/2016/11/8-21-13stateofoptometryreport.pdf* (showing an average interval between exams of 25 months); AOA, Comprehensive Eye Exams, *https://www.aoa.org/healthy-eyes/caring-for-your-eyes/eye-exams?* (showing recommended examination frequency for adult patients 18–64 of ''at least every two years'' for asymptomatic/low risk patients). In contrast to the CLR, which establishes a one-year minimum term for most contact lens prescriptions (16 CFR 315.6(a)) (a term-length mirrored by a majority of States, *see* CLR NPRM, 81 FR 88545, n.245) the Eyeglass Rule does not discuss or define prescription expiration terms, and many States do not set any limit for eyeglass prescriptions. Some eyeglass wearers, therefore, can legally go many years between refractive eye examinations. But the Commission will use two years as a basis for purposes of this assessment, since that is recommended interval for the majority of eyeglass wearers.

[466] *See, e.g.,* CLR SNPRM, 84 FR 24693 n.347.

[467] CLR Final Rule, 85 FR 50709. This estimate was based on responses to a consumer survey regarding how long it would take consumers to read the form, and a prior PRA estimate for consumers to complete a similar signed acknowledgment. *See* CLR SNPRM, 84 FR 24693; NPRM, 88 FR 282.

[468] *See supra* note 462–63 and accompanying text.

[469] In order to utilize § 456.4(a)(1)(ii) however, a prescriber must obtain and maintain records or evidence of affirmative consent by patients to electronic delivery of

their prescriptions. The burden to do so is included in the recordkeeping burden calculation of this PRA section.

[470] NPRM, 88 FR 283.

[471] AOA (CLR PRA Comment #0007 submitted by Benner).

[472] The survey found that approximately 57% said they used a separate signed confirmation form, 35% said they opted for digital delivery, 15% used a confirmation statement on a signed sales receipt, 27% used a confirmation statement on a signed prescription copy, and 9% selected ''other.'' As noted, prescribers were permitted to choose more than one option, so these percentages add up to more than 100%.

[473] Section 456.3(a)(3) also requires that in the event that a patient declines to sign a confirmation requested under paragraph (a)(1)(i) the prescriber must note the patient's refusal on the document and sign it. However, the Commission has no reason to believe that such notation should take any longer than for the patient to read and sign the document, so the Commission will maintain its calculation as if all confirmations requested under paragraph (a)(1)(i) require the same amount of time. It is worth noting that using the 82.5 million figure here is an overestimate by the Commission, since it does not deduct for the number of patients who visit a prescriber who does not have a direct or indirect financial interest in the sale of eye wear and would not be required to confirm receipt of prescriptions under Rule amendment § 456.4(c). However, staff does not currently possess information as to what number of prescribers will qualify for the exception in § 456.4(c), and so has assumed that all patients receiving a prescription will either sign a confirmation of prescription release or a consent to receive their prescription electronically every year.

[474] *See, e.g.,* 246 Mass. Code Regs. § 3.02 (requiring optometrists to maintain patient records for at least seven years); Wash. Admin. Code § 246–851–290 (requiring optometrists to maintain records of eye exams and prescriptions for at least five years); Iowa Admin. Code r. 645–182.2(2) (requiring optometrists to maintain patient records for at least five years).

[475] 20,625,000 prescriptions (82.5 million prescriptions × 25%). As noted in section III.C., *supra,* prescribers may not need to obtain patient consents at every visit. But the Commission does not have reliable information as to the percentage of consumers that are new to their prescribers as opposed to being repeat visitors or how often prescribers' practices with digital prescription delivery will change and require new consents, and thus how many will or will not have to sign a consent-to-electronic-delivery. Thus, the Commission will assume, for PRA calculation purposes, that every time a consumer receives a digital prescription, the prescriber's staff has collected a signed consent. This very likely results in a significant overestimation of the consent burden.

[476] 20,625,000 prescriptions yearly × 20 seconds/60 secs/60 mins.

[477] 20,625,000 affirmative consents × one minute/60 mins) for storing such records.

[478] This is further supported by comments during the Eyeglass Rule Workshop, such as that of panelist Dr. Montaquila, who noted that his staff completes the process ''from explaining why we're doing it to the patient, providing them with their prescription, making copies, providing their prescription back to them, and ultimately storing it. . . . Our staff has to explain, 'You're signing this for this reason' '' Montaquila (WS Transcript at 22, 28). *See also* Neville (WS Transcript at 28) (commenting that he has observed situations where the doctor pushed a button to have the prescription printed out at the front desk, the prescription was handed over at the desk by the staff person, and the staff person obtained the patient's signature on the confirmation); AOA Report for Complying with the FTC Contact Lens Rule, (survey to prescribers, Question 3, ''Have you experienced challenges in training staff on the new requirements for the Contact Lens Rule?''; Question 9 ''How much time per day does your staff spend on addressing patient questions with the acknowledgment form and process?'').

[479] Bureau of Labor Statistics, U.S. Department of Labor, Occupational Employment Statistics, *https://www.bls.gov/news.release/ocwage.t01.htm.*

[480] Based on information that there are approximately 61,000 optometrists and ophthalmologists in the United States, this averages to $629 per prescriber per year.

[481] The Vision Council, Market inSights 2022. Total market value of eyeglass frames and lenses. Does not include exams, reading glasses, or contact lenses. The $149,691,431 cost of the Eyeglass Rule is 0.0042 of the total $35.6 billion market value.

[482] It is possible that bringing the prescription confirmation requirements for eyeglass prescriptions into conformity with those for contact lenses will ease staff training burdens rather than increase them, since prescribers' staff will not have to learn to differentiate between the two types and treat them differently for rule purposes.

[483] As explained in the PRA Section, *supra,* the Commission calculates an incremental burden of $38,389,993 from adding the confirmation of prescription release to the Eyeglass Rule. The Commission need not issue a final regulatory analysis under section 22 of the FTC Act because this amount does not meet the threshold of an annual effect on the national economy from the amendment of $100 million or more or cause the other changes or effects described in section 22(a)(1)(B) and (C). *See* 15 U.S.C. 57b–3.

[484] NAROC (WS Comment #0049 submitted by Neville).

[485] *See* section VIII, *supra.*

[486] See 13 CFR 121.201 (Small Business Size Regulations).

[487] *See* NPRM, 88 FR 285.

[488] AOA (NPRM Comment #0023 submitted by Benner).

[489] According to one publication, 65% of optometrists work in a practice owned by an optometrist or ophthalmologist, practices that are likely small businesses. *See* AOA, ''An Action-Oriented Analysis of the State of the Optometric Profession: 2013,'' at 7 *https://reviewob.com/wp-content/uploads/2016/11/8-21-13stateofoptometryreport.pdf.* This publication also reported that although it could not ascertain the precise number of independent optometric practices, it estimated that as of 2012, there were 14,000 to 16,000 optometric businesses with no corporate or institutional affiliation. *Id.*

[490] NPRM, 88 FR 264.

[491] *Id.* at 263.

[492] NPRM, 88 FR 287.

[FR Doc. 2024–15620 Filed 7–25–24; 8:45 am]

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FEDERAL TRADE COMMISSION

16 CFR Part 465

RIN 3084–AB76

Trade Regulation Rule on the Use of Consumer Reviews and Testimonials

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is issuing this final rule and Statement of Basis and Purpose (''SBP'') relating to certain specified unfair or deceptive acts or practices involving consumer reviews or testimonials. This final rule, among other things, prohibits selling or purchasing fake consumer reviews or testimonials, buying positive or negative consumer reviews, certain insiders creating consumer reviews or testimonials without clearly disclosing their relationships, creating a company-controlled review website that falsely purports to provide independent reviews, certain review suppression practices, and selling or purchasing fake indicators of social media influence.

DATES: This rule is effective October 21, 2024.

FOR FURTHER INFORMATION CONTACT: Michael Ostheimer, (202) 326–2699, Attorney, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, Room CC–6316, 600 Pennsylvania Avenue NW, Washington, DC 20580.

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I. Background

A. Advance Notice of Proposed Rulemaking

On November 8, 2022, the Federal Trade Commission (''Commission'' or ''FTC'') published an advance notice of proposed rulemaking (''ANPR'') to address certain deceptive or unfair acts or practices involving consumer reviews or testimonials.[1] Specifically, the ANPR discussed: (1) reviews or endorsements by people who do not exist, who did not actually use or test the product or service, or who were misrepresenting their experience with it; (2) review hijacking, where a seller steals or repurposes reviews of another product; (3) marketers offering compensation or other incentives in exchange for, or conditioned on, the writing of positive or negative consumer reviews; (4) owners, officers, or managers of a company (a) writing reviews or testimonials of their own products or services, or publishing testimonials by their employees or family members, which fail to provide clear and conspicuous disclosures of those relationships, or (b) soliciting reviews from employees or relatives without instructing them to disclose their relationships; (5) the creation or operation of websites, organizations, or entities that purportedly provide independent reviews or opinions of products or services but are, in fact, created and controlled by the companies offering the products or services; (6) misrepresenting that the consumer reviews displayed represent most or all of the reviews submitted when, in fact, reviews are being suppressed based upon their negativity; (7) the suppression of customer reviews by physical threat or unjustified legal threat; and (8) selling, distributing, or buying followers, subscribers, views, and other indicators of social media influence. As part of the ANPR, the Commission solicited public comment on, among other things, whether such practices are prevalent and, if so, whether and how to proceed with a notice of proposed rulemaking

[1] Fed. Trade Comm'n, Trade Regulation Rule on the Use of Reviews and Endorsements, 87 FR 67424 (Nov. 8, 2022) [hereinafter ''ANPR''], *https://www.federalregister.gov/documents/2022/11/08/2022-24139/trade-regulation-rule-on-the-use-of-reviews-and-endorsements.* The ANPR was entitled ''Trade Regulation Rule Concerning Reviews and Endorsements.'' In order to better reflect its content, the Commission subsequently decided to change the name of the proposed rule to ''Trade Regulation Rule on the Use of Consumer Reviews and Testimonials.''

(''NPRM'').[2] The ANPR provided for a 60-day comment period, and the Commission received 42 responsive comments [3] from review platforms and other businesses, trade associations, consumer advocacy organizations, entities dedicated to fighting fake reviews, a public interest research center, a think tank, academic researchers, and individual consumers.[4] Most commenters expressed support for the Commission proceeding with the rulemaking. Five comments expressed the view that a rulemaking was unnecessary, was premature, or should not apply to the commenter's constituents, or expressed skepticism about the utility of a rulemaking.

B. Notice of Proposed Rulemaking

Based on an extensive review of the comments received in response to the ANPR, the Commission's own history of enforcement, and other sources of information, the Commission published the NPRM on July 31, 2023.[5] In the NPRM, the Commission stated that it has reason to believe that certain unfair or deceptive acts or practices involving consumer reviews or testimonials are prevalent, including: (1) fake consumer reviews and testimonials, as well as reviews and testimonials that otherwise misrepresent the experiences of the reviewers and testimonialists; (2) the unfair or deceptive reuse or repurposing of consumer reviews; (3) the giving of incentives for reviews conditioned on the sentiment of the reviews; (4) the use of consumer reviews and testimonials written by company insiders without disclosure of their relationships to the company; (5) marketers setting up purportedly independent websites, organizations, or entities to review or endorse their own products; (6) seller websites representing that the consumer reviews displayed represent most or all of the reviews submitted when, in fact, reviews are being suppressed based upon their negativity; (7) review suppression by unjustified legal threat or physical threat; and (8) the sale and misuse of fake indicators of social media influence for commercial purposes.[6] The Commission identified no disputed issues of material fact; explained its considerations in developing the proposed rule; solicited additional public comment thereon, including specific questions designed to assist the public in submitting comments; and provided interested parties the opportunity to request to present their position orally at an informal hearing.[7] Finally, the NPRM set out the Commission's proposed regulatory text.[8]

In response to the NPRM, the Commission received 100 responsive and non-duplicative comments [9] from entities and individuals interested in the proposed rule,[10] which are discussed in sections III and IV. Although some commenters raised concerns and recommended specific modifications or additions to the Commission's proposal, the majority of commenters generally supported the Commission's proposal. Three commenters submitted timely requests to make oral statements at an informal hearing (''the hearing requesters'').[11]

C. Notice of Informal Public Hearing

On January 16, 2024, the Commission published an Initial Notice of Informal Hearing, which also served as the Final Notice of Informal Hearing.[12] The Notice designated the Honorable Carol Fox Foelak, an Administrative Law Judge for the Securities and Exchange Commission, to serve as the presiding officer for the informal hearing and stated that the hearing requesters could speak at the informal hearing, make documentary submissions to be placed on the public rulemaking record, or both. Written submissions were due on or before January 30, 2024. In response to the Notice of Informal Hearing, the Commission received seven comments.[13] The Notice also stated that the Commission had decided not to proceed with proposed § 465.3,[14] which pertained to the unfair or deceptive reuse or repurposing of a consumer review written or created for one product so that it appears to have been written or created for a substantially different product.

As announced in the Notice of Informal Hearing, the informal hearing began as scheduled on February 13, 2024.[15] Because the Commission had not designated disputed issues of material fact, the February 13 hearing session included no cross-examination or rebuttal submissions but did include oral statements from the three hearing requesters.[16] One of the hearing requesters, the Interactive Advertising Bureau (''IAB''), a trade association, argued that there were two disputed issues of material fact.[17] The other two hearing requesters discussed their comments submitted pursuant to the NPRM. At the conclusion of this hearing session, the presiding officer issued an order inviting further submissions, including specific evidence, concerning whether there were disputed issues of material fact.[18] IAB submitted a letter that described the results from a survey directed to its members—to which eighteen unidentified members responded [19]—regarding the impact of the proposed rule, including their estimated compliance costs.[20]

On February 23, 2024, the presiding officer issued an order finding one disputed issue of material fact, namely, ''[w]hether the compliance costs for businesses will be minimal.'' [21] However, the February 23 order stated that ''[i]t can be argued that . . . even

[2] *See* ANPR, 87 FR 67427.

[3] The Commission also received six unresponsive comments.

[4] The comments are publicly available on this rulemaking's docket at *https://www.regulations.gov/docket/FTC-2022-0070/comments.*

[5] *See* Fed. Trade Comm'n, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 88 FR 49364 (July 31, 2023) [hereinafter ''NPRM''], *https://www.federalregister.gov/documents/2023/07/31/2023-15581/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials.*

[6] *See id.* at 49370–77.

[7] *Id.* at 49377–81, 49389–90.

[8] *Id.* at 49390–92.

[9] The Commission also received sixteen comments that were non-responsive and two that were duplicates.

[10] The comments are publicly available on this rulemaking's docket at *https://www.regulations.gov/document/FTC-2023-0047-0001/comment.*

[11] Fake Review Watch, Cmt. on NPRM at 4–5 (Aug. 8, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0015* (''Fake Review Watch Cmt.''); Interactive Advertising Bureau, Cmt. on NPRM at 14–15 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0101* (''IAB Cmt.''); Researchers at Brigham Young University, Pennsylvania State University, and Emory University, Cmt. on NPRM at 4 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0060* (''The Researcher Cmt.'').

[12] Fed. Trade Comm'n, Trade Regulation Rule on the Use of Consumer Reviews and Testimonials, 89 FR 2526 (Jan. 16, 2024) [hereinafter ''Hearing Notice''], *https://www.federalregister.gov/documents/2024/01/16/2024-00678/rule-on-the-use-of-consumer-reviews-and-testimonials.*

[13] The comments are publicly available on this rulemaking's docket at *https://www.regulations.gov/docket/FTC-2024-0004/comments.*

[14] Hearing Notice, 89 FR 2528.

[15] Members of the public were able to watch the informal hearing live on the Commission's website, *https://www.ftc.gov.*

[16] A transcript of the February 13 hearing session is available at *https://www.ftc.gov/system/files/ftc_gov/pdf/transcript-consumer-reviews-and-testimonials-rule-informal-hearing-feb-13-2024.pdf* [hereinafter ''February 13 Hearing Transcript''].

[17] IAB's proposed disputed issues of material fact were ''whether the compliance costs for businesses will be minimal, particularly if the 'knew or should have known' standard is finalized'' and ''whether the Commission finding that unattended consequences from the NPRM are unlikely is accurate.'' February 13 Hearing Transcript at 9.

[18] Order by Presiding Officer Foelak at 2 (Feb. 13, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003aljorder20240213.pdf.*

[19] IAB ''represents over 700 leading media companies, brand marketers, agencies and technology companies.'' February 13 Hearing Transcript at 6.

[20] Letter Brief from Interactive Advertising Bureau to Presiding Officer Foelak (Feb. 20, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabsubmission20240220.pdf.*

[21] Order by Presiding Officer Foelak (Feb. 23, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/p311003aljorder20240226.pdf.*

if the actual costs are more than double what the FTC assumed, it would not change the outcome of the rule, and therefore, it is not a 'disputed issue[ ] of *material* fact necessary to be resolved.' " [22] The order provided that the presiding officer was nevertheless scheduling an additional hearing session for March 5, 2024, because "an expert witness or proposed testimony from affected firms' compliance officers or legal counsel" might "shed light on what would be involved with compliance review and implementation" and "could give the FTC a way of better quantifying cost." [23] The March 5 hearing session was subsequently moved to March 6, 2024 at the trade association's request.[24]

At the March 6 hearing session, the trade association put on one witness: its Executive Vice President for Public Policy, an attorney, who testified about the results of two limited surveys of its members.[25] FTC staff conducted cross examination. The attorney's testimony about the surveys [26] did not call the Commission's cost estimates into legitimate question. Only a small number of unidentified trade association members completed the surveys, and no evidence was submitted to indicate that they were representative of any group, much less all affected businesses.[27] Further, only a few of the survey respondents gave compliance cost estimates, none of which were accompanied by explanation or evidence of their factual bases, and all of which could have been influenced by the trade association's misconceptions about the law and the proposed rule.[28]

The presiding officer issued a recommended decision on May 8, 2024, stating that based on the evidence, "it cannot be found whether or not the proposed rule will have compliance costs that will be minimal." [29] Later in the decision, the presiding officer explained that the evidence "falls short as the basis for a finding that compliance costs would not be minimal" because "a minute sample of businesses that would be affected by the proposed rule responded to the surveys, and there is insufficient information about the nature of those businesses, how they calculated potential compliance costs, and the methodology of the surveys." [30]

In crafting the final rule, the Commission has carefully considered the comments received and the rulemaking record as a whole, which includes the oral statements made at and documents submitted for the informal hearing. As a result, the final rule contains some changes from the proposed rule. These modifications, mostly clarifications and limitations, discussed in detail in section IV of this document, are based upon input from commenters and careful consideration of relevant law. Section IV also discusses commenters' recommendations that the Commission declined to adopt, along with the Commission's reasons for rejecting them. Accordingly, the Commission adopts the proposed rule with limited modifications as discussed below. The rule will take effect October 21, 2024.

II. The Legal Standard for Promulgating the Rule

The Commission is promulgating 16 CFR part 465 pursuant to section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).[31]

Whenever the Commission promulgates a rule under section 18(a)(1)(B), the rule must also include a Statement of Basis and Purpose ("SBP") that addresses: (1) the prevalence of the acts or practices addressed by the rule; (2) the manner and context in which the acts or practices are unfair or deceptive; and (3) the economic effect of the rule, taking into account the effect on small businesses and consumers.[32] In this section of the preamble, the Commission summarizes its findings regarding each of these requirements.

A. Prevalence of Acts or Practices Addressed by the Rule

In its ANPR, the Commission described its enforcement record, demonstrating the pervasiveness of the deceptive or unfair commercial acts or practices involving reviews or other endorsements it was examining.[33] In the NPRM, the Commission cited additional enforcement evidence, including actions brought by State Attorneys General ("AGs") and private lawsuits, as well as international evidence, and also took notice of additional indications of prevalence that came from commenters.[34]

In support of the finding that fake reviews are prevalent, the NPRM cited to (1) FTC, State, and private cases; (2) statistics from review platforms, a platform insider, academic and other researchers, consumer surveys, investigative journalists, and others about the incidence of fake reviews; (3) information about the pervasiveness of consumer review rings that facilitate the buying, selling, or exchange of fake reviews; (4) the experiences of regulators in other countries and of international bodies; and (5) reporting regarding the use of generative artificial intelligence ("AI") tools that make it easier for bad actors to write fake reviews.[35] In support of the finding that fake testimonials are prevalent, the NPRM discussed relevant FTC cases, an in-depth Better Business Bureau investigative study that examined fake celebrity endorsements, a celebrity lawsuit involving the fraudulent use of the celebrities' names, and an FTC consumer alert about fake Shark Tank celebrity testimonials.[36] In support of the finding that misrepresentations of endorsers' experiences are prevalent, the NPRM cited to FTC cases and a

[22] *Id.*

[23] *Id.*

[24] Order by Presiding Officer Foelak (Feb. 28, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003_alj_order_3_2024.02.28.pdf.*

[25] A transcript of the March 6 hearing session is available at *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003informalhearing03062024.pdf. See also,* Interactive Advertising Bureau's Submission of Exhibits (Mar. 5, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabsubmissionexhibits20240305.pdf.*

[26] The presiding officer stated that testimony by the trade association's "attorney about survey responses is hearsay and will be weighed accordingly." Order by Presiding Officer Foelak (Mar. 4. 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003aljorder20240304-1.pdf.*

[27] IAB received eighteen responses to the first survey and nineteen to the second. *See* Post-Hearing Letter Brief from Interactive Advertising Bureau to Presiding Officer Foelak (Mar. 13, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabposthearingbrief20240313.pdf.*

[28] *See* Transcript of Informal Hearing on Proposed Trade Regulation Rule on the Use of Consumer Reviews and Testimonials (Mar. 6, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003informalhearing03062024.pdf.*

[29] Order by Presiding Officer Foelak at 5 (May 8, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003aljdecision20240508.pdf.* The presiding officer added that, "[u]nquestionably, there is insufficient evidence in the record to make a specific finding as to the size of the compliance costs associated with the proposed rule." *Id.* at 5 n.9.

[30] *Id.* at 6.

[31] *See* 15 U.S.C. 57a(a)(1)(B).

[32] 15 U.S.C. 57a(d)(1). In addition, section 22(b)(2) of the FTC Act requires the Commission to prepare a final regulatory analysis. 15 U.S.C. 57b–3(b)(2). The final regulatory analysis is in section VI of this document.

[33] ANPR, 87 FR 67425–26.

[34] NPRM, 88 FR 49370–77.

[35] *Id.* at 49370–72. AI tools make it easier for bad actors to pollute the review ecosystem by generating, quickly and cheaply, large numbers of realistic but fake reviews that can then be distributed widely across multiple platforms. AI-generated reviews are covered by the final rule, which the Commission hopes will deter the use of AI for that illicit purpose.

[36] NPRM, 88 FR 493720–73.

comment by the North American Insulation Manufacturers Association (''NAIMA'') asserting that testimonials by those misrepresenting their experiences with insulation products are plentiful.[37] The Commission concluded that the unfair or deceptive reuse or repurposing of consumer reviews is prevalent, relying upon a prior Commission case and numerous news articles.[38] To show how commonly incentives are given in exchange for reviews with the incentives conditioned on the sentiment of the reviews, the NPRM pointed to FTC and private cases, analyses by researchers of markets for procuring reviews, and the experience of a small business employee commenter who said a competitor was providing incentives for 5-star reviews.[39] The Commission found prevalence of unfair or deceptive insider reviews and testimonials based on its prior cases; a State AG action; statistics from a review platform commenter about how many reviews of businesses were written by their owners, officers, or employees, or their family members; and an individual commenter who relied upon insider reviews in selecting an auto repair shop.[40] The NPRM cited prior cases regarding the prevalent practice of marketers setting up purportedly independent websites, organizations, or entities to review or endorse their own products.[41] The Commission found prevalence of suppression of negative reviews on retailer or business websites based on a platform's comment, a recent FTC case, and what it learned in another investigation about more than 4,500 merchants that were automatically publishing only 4- or 5-star consumer reviews.[42] The NPRM relied upon reports by platform and other commenters, as well as FTC and State AG cases, regarding review suppression by unjustified legal threat or physical threat.[43] Finally, with respect to the prevalence of sales and misuse of fake indicators of social media influence for commercial purposes, the NPRM discussed cases brought by the FTC, a State AG, and private parties, and published reports on social media bots and fake social media accounts.[44]

B. Manner and Context in Which the Acts or Practices Are Deceptive or Unfair

The rule is intended to curb certain unfair or deceptive uses of consumer reviews and testimonials. It contains several provisions to promote accuracy and truthfulness in reviews and testimonials and, thus, will allow American consumers to make better-informed purchase decisions. The key provisions of the rule prohibit conduct that is inherently deceptive or unfair, including creating, selling, and buying fake or false reviews or testimonials; buying reviews in exchange for, or conditioned on, their sentiment; and using reviews and testimonials from company insiders that hide their relationships to the company. The rule also includes prohibitions against misleading, company-controlled review websites or entities; unfair or deceptive review suppression practices; and the misuse of fake indicators of social media influence.

C. The Economic Effect of the Rule

As part of the rulemaking proceeding, the Commission solicited public comment and data (both qualitative and quantitative) on the economic impact of the proposed rule and its costs and benefits.[45] In issuing the final rule, the Commission has carefully considered the comments received and the costs and benefits of each provision, taking into account the effect on small businesses and consumers, as discussed in more detail in sections VI and VIII of this document. The record demonstrates that the most significant anticipated benefit of the final rule is increased deterrence of clearly unfair or deceptive acts or practices involving consumer reviews or testimonials. Another significant benefit is the expansion of the remedies available to the Commission, including the ability to more effectively obtain monetary relief. This is particularly critical given the U.S. Supreme Court's decision in *AMG Capital Management, LLC* v. *FTC,* which held that equitable monetary relief, including consumer redress, is not available under section 13(b) of the FTC Act.[46] Post-*AMG,* the Commission's primary means for obtaining redress is section 19 of the FTC Act. By issuing the final rule, the Commission can obtain such redress based on violations of the rule in one proceeding under section 19(a)(1), which will be significantly faster than the two-step process for obtaining redress under section 19(a)(2).[47] By allowing the Commission to secure redress more quickly and efficiently, this rule will also allow the Commission to preserve enforcement resources for other mission priorities.[48] As an additional benefit, the rule will enable the Commission to seek civil penalties against violators.[49] Without an efficient way to seek civil penalties, bad actors have little fear of being penalized for using fraud and deception in connection with reviews and endorsements. Increased deterrence will have consumer welfare benefits and will benefit honest competition.[50] Moreover, the final rule is likely to impose relatively small compliance costs on honest businesses.[51]

III. Overview of the Comments [52]

The Commission received 100 responsive and non-duplicative comments in response to the NPRM from a diverse group of individuals (including consumers and law students), industry groups and trade associations, review platforms, retailers, and other businesses, consumer advocacy organizations, and government entities.

In the NPRM, the Commission invited the public to comment on any issues or concerns the public believed were relevant or appropriate to the Commission's consideration of the

[37] *Id.* at 49373.

[38] *Id.* at 49373–74.

[39] *Id.* at 49374.

[40] *Id.* at 49374–75.

[41] *Id.* at 49375

[42] *Id.* at 49376.

[43] *Id.*

[44] *Id.* at 49376–77.

[45] ANPR, 87 FR 67426–27; NPRM, 88 FR 49387–88.

[46] *See AMG Cap. Mgmt., LLC* v. *FTC,* 593 U.S. 67, 82 (2021).

[47] *See* 15 U.S.C. 57b(a)(1), (2); *see also* NPRM, 88 FR 49377–78 (discussing impact of *AMG Cap. Mgmt.*).

[48] When the rule has been violated, the Commission can commence a Federal court action and seek to recover money for consumers or obtain an order imposing civil penalties. *See* 15 U.S.C. 57b(a)(1), 15 U.S.C. 45(m)(1)(A). Without the rule, the path to monetary relief is longer and requires the Commission to first conduct an administrative proceeding to determine whether the respondent violated the FTC Act; if the Commission finds that the respondent did so, the Commission issues a cease-and-desist order, which might not become final until after the resolution of any resulting appeal. Then, to recover money for consumers, the Commission must prove in a separate Federal court action that the violator engaged in fraudulent or dishonest conduct. *See* 15 U.S.C. 57b(a)(2).

[49] *See* section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A) (providing that violators of a trade regulation rule ''with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule'' are liable for civil penalties for each violation). In addition, any entity or person who violates such a rule (irrespective of the state of knowledge) is liable for any injury caused to consumers by the rule violation. The Commission may pursue such recovery in a suit under section 19(a)(1) of the FTC Act, 15 U.S.C. 57b(a)(1).

[50] NPRM, 88 FR 49382–85.

[51] *Id.* at 49385–87; *see infra* sections VI and VIII of this document.

[52] Minor changes to formatting, grammar, and punctuation have been made to some of the comments quoted in this document. These changes do not entail any substantive changes.

proposed rule.[53] The NPRM also posed twenty-three specific questions for the public.[54] The first two are broad questions addressed in this section III, which also discusses several issues or concerns that commenters raised generally without reference to particular sections of the rule. Responses to the more specific questions in the NPRM are discussed in section IV of this document, a section-by-section analysis of the final rule. Questions relating to the Paperwork Reduction Act (''PRA'') and Regulatory Flexibility Act (''RFA'') and are addressed in sections VII and VIII of this document, respectively.[55]

A. Furthering the Commission's Goal

In Question 1 of the NPRM, the Commission asked whether its proposal would further the Commission's goal of protecting consumers from clearly unfair or deceptive acts or practices involving consumer reviews and testimonials.[56]

Several commenters expressly addressed this question. A review platform and a business that specializes in identifying fake online reviews submitted comments stating that the proposed rule would further the Commission's goal of protecting consumers from clearly unfair or deceptive acts or practices involving consumer reviews.[57] Another review platform commenter answered that there are ''numerous advantages of the FTC's proposed new Rule,'' that it is ''generally supportive of this intervention overall,'' and that the proposed rule ''will be helpful to set out clear rules that expressly prohibit practices like writing or purchasing fake reviews, providing compensation or incentives in exchange for reviews, and certain acts of unfair review suppression.'' [58] A business commenter similarly answered that the ''Proposed Rule addresses many concerns about unfair or deceptive acts or practices involving consumer reviews and testimonials, such as false and biased reviews.'' [59] Both of these commenters also noted areas in which they thought certain provisions of the proposed rule should be adjusted or clarified; those issues are addressed below.[60] A consumer organization said that ''[i]n general, . . . the proposed Rule will reduce the incentives for businesses to purchase, disseminate, or sell fake consumer reviews or testimonials,'' but thought that the proposed rule should have placed explicit restrictions on third-party review platforms.[61] The Commission notes that this topic is beyond the scope of the rulemaking, which focuses instead on those responsible for inarguably unfair or deceptive acts or practices regarding reviews and testimonials.

B. Adoption of the Proposed Rule as a Final Rule

In Question 2 of the NPRM, the Commission inquired whether it should finalize the proposed rule, the reasons for why commenters were in favor of or against the finalization of the proposed rule, and whether the Commission should make any changes to its original proposal.[62]

Only two commenters directly addressed this question. A business commenter agreed that the Commission should finalize the proposed rule.[63] A review platform commenter said it ''supports this Rule and would support the Commission finalizing the Rule.[64] It also suggested adjustments to the Commission's proposal, which are addressed below in this document.

Numerous individual commenters,[65] trade associations,[66] and consumer organizations [67] expressed general support for the proposed rule. For example, an individual commenter wrote, ''I completely agree with the proposal. . . . Because review sections have become so untrustworthy (being impossible to tell whether a company has paid for positive reviews of its own product, or for negative reviews on a rival's product), review sections have become functionally useless for me. This makes it difficult to purchase any products online, since real consumer feedback is one of the few ways to determine whether I should buy the product or service without first examining it in person.'' [68] Another individual stated, ''I support the rules as specified, and applaud the FTC's action in this regard. It is extremely difficult for the consumer to determine the validity of online reviews—even within specific retailers such as amazon. There is little benefit for large online retailers to ensure that reviews are accurate, and this fact is evident in the large number of bogus reviews found on amazon, newegg, youtube and other sites.'' [69] A third individual wrote, ''I strongly support the rules against fake review

[53] NPRM, 88 FR 49388.

[54] *Id.* at 49388–89.

[55] *Id.* at 49388. In addition to soliciting public comment on the NPRM's PRA and RFA analyses in the PRA and RFA sections, the NPRM also posed two specific questions related to the PRA and RFA analyses. Question 4 inquired whether ''the proposed rule contains a collection of information,'' and Question 5 asked, ''Would the proposed rule, if promulgated, have a significant economic impact on a substantial number of small entities? If so, how could it be modified to avoid a significant economic impact on a substantial number of small entities?'' *Id.* at 49381–86, 49388.

[56] NPRM, 88 FR 49388.

[57] Yelp Inc., Cmt. on NPRM at 3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0088* (''Yelp Cmt.''); The Transparency Company, Cmt. on NPRM at 1, 5 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0107* (''Transparency Company Cmt.'').

[58] Trustpilot, Cmt. on NPRM at 2 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0084* (''Trustpilot Cmt.'').

[59] Family First Life, LLC, Cmt. on NPRM at 2 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0104* (''Family First Life Cmt.'').

[60] Trustpilot Cmt. at 2–3; Family First Life Cmt. at 2–3.

[61] Consumer Reports, Cmt. on NPRM at 2–3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0099* (''Consumer Reports Cmt.'').

[62] NPRM, 88 FR 49388.

[63] Transparency Company Cmt. at 6.

[64] Trustpilot Cmt. at 3.

[65] Amelia Markey, Cmt. on NPRM (July 31, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0003* (''Markey Cmt.''); Chris Hippensteel, Cmt. on NPRM (Aug. 1, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0006* (''Hippensteel Cmt.''); Jeremy Anderson, Cmt. on NPRM (Aug. 1, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0007* (''Anderson Cmt.''); Caroline Fribance, Cmt. on NPRM (Aug. 11, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0017* (''Fribance Cmt.''); Pia Edborg, Cmt. on NPRM (Aug. 17, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0027* (''Edborg Cmt.''); Anonymous 1, Cmt. on NPRM (Aug. 20, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0031* (''Anonymous 1 Cmt.''); Jessica Ludlam, Cmt. on NPRM (Aug. 24, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0036* (''Ludlam Cmt.''); SUPERGUEST, Cmt. on NPRM (Sept. 8, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0046* (''Superguest Cmt.''); Sean Poole, Cmt. on NPRM at 1–2 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0063* (''Poole Cmt.''); Artemio Magana, Cmt. on NPRM (Sept. 28, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0079* (''Magana Cmt.'').

[66] American Dental Association, Cmt. on NPRM at 1 (Sept. 28, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0078* (''ADA Cmt.''); Travel Technology Association, Cmt. on NPRM at 1, 4–5 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0097* (''Travel Tech. Cmt.'').

[67] Coalition of Civil Society Organizations, Cmt. on NPRM at 1–3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0108;* U.S. Public Interest Research Group Education Fund, Cmt. on NPRM at 2 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0109* (''US PIRG Cmt.'').

[68] Markey Cmt.

[69] Anderson Cmt.

and testimonials and fines for businesses and people who write them. As a consumer, I often use reviews to help determine whether a product or service is reliable; the prevalence of fake reviews makes this impossible.'' [70] A trade association commented, ''The NPRM proposes rules that are appropriately scoped to target the bad actors [who are] intent on committing fraud through fake or deceptive reviews. . . . The NPRM strikes the appropriate balance between enhancing the Commission's tools to target bad actors and preserving industry flexibility to develop innovative and effective solutions to maintain consumer confidence in reviews.'' [71] A consumer organization stated, ''The Commission absolutely should finalize the proposed rule to better protect shoppers and hold businesses accountable.'' [72]

A number of individual consumers,[73] a review platform,[74] other industry members,[75] and consumer organizations [76] supported the Commission's proposal, but urged the Commission to go further and impose additional requirements, such as by adding provisions that would apply to third-party review platforms. As noted above, such provisions would be beyond the scope of the rulemaking. Similarly beyond the scope of the rulemaking is an individual's suggestion that the Commission should restrict the highlighting of testimonials on websites and prohibit payments for reviews.'' [77] A review platform's comment ''applaud[ed] . . . the Commission . . . for its extensive efforts to address the problem of deceptive review practices, as reflected in the Commission's notice of proposed rulemaking, and . . . fully support[ed] and endorse[d] the Commission's proposed Rule.'' [78] Its suggestions for several provisions are discussed below. A consumer group stated that the proposed rule ''is needed'' and ''addresses an urgent problem: fabricated and otherwise deceptive reviews and ratings of products and services,'' but asked for numerous modifications to strengthen it.[79] These proposals are discussed below.

A few individual commenters [80] and industry commenters [81] were supportive of a rule but expressed the need for clarifications or modifications. An individual commenter wrote that ''[a]ll of the rules proposed . . . make (common) sense'' but identified ''a few scenarios that highlight that the language in the proposed rules is a bit ambiguous'' and that with ''steep penalties like this, guidelines need to be clear, concrete, AND simple so businesses can understand.'' [82] Another individual commenter said that the proposed rule ''takes great strides,'' but that two proposed sections, 465.4 and 465.6, are too restrictive.[83] A retailer wrote, ''On the whole, . . . the Proposed Rule contains provisions that are reasonable and would provide additional protection to consumers'' but ''there are a few provisions . . . that are not well drafted or that need additional language.'' [84] Another retailer said that it ''supports a tailored rule that focuses on the bad actors that harm consumers,'' but that the proposed rule ''sweeps more broadly, extending to the activities of legitimate businesses that do not uncover abuses that they 'should have' identified, regardless of their good faith efforts'' and that ''[s]uch an overbroad rule would have significant unintended negative consequences on legitimate conduct.'' [85] An industry organization commented that the proposed rule ''is an important step, and we share the Commission's goal of improving consumer confidence in reviews and testimonials'' but ''strongly urge[d] the Commission to reexamine . . . [four] provisions'' to address what it viewed as First Amendment concerns and for other reasons.[86] The specific suggestions or concerns raised by these and other commenters are addressed below. In particular, whether in the text of the final rule or in the discussion below, the Commission is clarifying the scope or meaning of various rule provisions to cover the specific activities or conduct that harm consumers and avoid ambiguity or overbreadth.

Only four commenters, two individual commenters [87] and two trade associations,[88] said that the proposed rule was unnecessary or unwarranted. One of the individuals, wrote that ''the rule seems to be unnecessary as it is unlikely to actually provide the benefit to consumers of removing falsified reviews'' because it is difficult to identify and trace fake reviews and ''punish[ ] an offender'' and that the proposed rule ''also has potential to penalize non-offenders'' when competitors purchase ''review bombs.'' [89] The commenter asserted that the FTC's estimated benefits are based on faulty assumptions such as that ''the entirety of the loss'' from false reviews ''would be eliminated simply because the rule is enacted.[90] The commenter said that the FTC should either maintain the status quo or require websites with consumer reviews to include a disclosure that ''some reviews may have not been made by genuine customers, may potentially have been paid

[70] Anonymous 1 Cmt.

[71] Travel Tech. Cmt. at 1, 4.

[72] US PIRG Cmt. at 2.

[73] Michael Ravnitzky, Cmt. on NPRM at 1–2 (Aug. 6, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0013* (''Ravnitzky Cmt.''); Adam Foster, Cmt. on NPRM at 1–2 (Sept. 21, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0052* (''Foster Cmt.''); Anonymous 2, Cmt. on NPRM at 1, 4 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0065* (''Anonymous 2 Cmt.''); Anonymous 3, Cmt. on NPRM (Sept. 27, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0069* (''Anonymous 3 Cmt.'').

[74] Yelp Cmt. at 1, 5–8.

[75] Strategic Marketing, Cmt. on NPRM (Aug. 7, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0014;* PerfectRec Inc., Cmt. on NPRM at 1–3 (Aug. 23, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0035;* Mozilla, Cmt. on NPRM at 5–7 (Sept. 28, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0076* (''Mozilla Cmt.''); The Responsible Online Commerce Coalition, Cmt. on NPRM at 2, 4–6 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0086.*

[76] Fake Review Watch Cmt. at 1–4; Truth in Advertising, Inc., Cmt. on NPRM at 2, 4–11 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0083* (''TINA Cmt.''); National Consumers League, Cmt. on NPRM at 2–9 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0096* (''NCL Cmt.''); Consumer Reports Cmt. at 2–11.

[77] Anonymous 3 Cmt.

[78] Yelp Cmt. at 1, 4–8.

[79] TINA Cmt. at 4, 6.

[80] Anonymous 4, Cmt. on NPRM (Sept. 1, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0040* (''Anonymous 4 Cmt.''); Riley Albert, Cmt. on NPRM at 3 (Sept. 21, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0053* (''Albert Cmt.''); Alyssa Frieling, Cmt. on NPRM at 1–4 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0059* (''Frieling Cmt.'').

[81] Hammacher, Schlemmer and Co., Inc., Cmt. on NPRM at 1–7 (Aug. 21, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0032* (''Hammacher Schlemmer Cmt.''); *Amazon.com,* Inc., Cmt. on NPRM at 5–13 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0085* (''Amazon Cmt.''); TechNet Cmt. on NPRM at 2–4 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0089* (TechNet Cmt.''); Family First Life Cmt. at 2–16.

[82] Anonymous 4 Cmt.

[83] Frieling Cmt. at 1–4.

[84] Hammacher Schlemmer Cmt. at 1.

[85] Amazon Cmt. at 5.

[86] TechNet Cmt. at 2–4.

[87] Marc Slezak, Cmt. on NPRM at 1–5 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0054* (''Slezak Cmt.''); Sumner Camp-Martin, Cmt. on NPRM at 1–5 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0056* (''Camp-Martin Cmt.'').

[88] National Automobile Dealers Association, Cmt. on NPRM at 1–2 (Sept. 28, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0077* (NADA Cmt.''); Association of National Advertisers, Cmt. on NPRM at 3–7 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0105* (''ANA Cmt.'').

[89] Slezak Cmt. at 1–4.

[90] *Id.* 3.

testimonials, etc.'' [91] The other individual commenter said that the ''proposed rule is unnecessary because all of the practices considered by the rule 'are already unlawful under Section 5 of the FTC Act,' it has potentially massive compliance costs for American businesses'' (citing the FTC's estimated cost), ''and the better salutation [sic] is to work with States and review platforms to resolve the issue.'' [92] One of the trade associations stated that the ''Proposed Rule is [u]nnecessary,'' that ''current FTC enforcement authority has been effective in addressing such clearly deceptive practices, and there is no indication how or why a trade regulation rule is needed, or how such a rule would more effectively address concerns about such deceptive practices,'' and that ''a need to alleviate the 'difficulty' of obtaining monetary relief under the FTC Act where such authority has never existed, does not provide an adequate basis for the issuance of a Magnuson-Moss rulemaking.'' [93] The other trade association asserted that (1) it ''does not believe that rulemaking is warranted, wise, or a balanced approach, in part because it raises serious First Amendment concerns;'' (2) ''a well-designed rule would focus on a defined trade'' but the ''record to date does not establish that customer reviews, the use of those reviews, or the dissemination of those reviews by commercial platforms is itself a defined trade;'' (3) the ''FTC should not promulgate a rule solely because the augmented penalties attendant to a rule violation could ostensibly advance a Commission goal generally;'' and (4) ''the FTC fail[ed] to show how enforcement actions, many of which were settled by consent order, translate into 'prevalence.' '' [94]

The Commission disagrees with the four commenters who said that the proposed rule was unnecessary or unwarranted. The Commission believes that the status quo is inadequate to address consumer harm and that the rule will add deterrence and aid enforcement even though the practices covered by the rule are already unlawful under section 5 of the FTC Act. Greater deterrence and more effective enforcement are legitimate reasons to engage in a rulemaking, whereas difficulties in enforcing a rule against some violators are no reason to eschew it.[95] Further, the compliance costs estimated by the Commission are greatly outweighed by the estimated benefits to consumers and honest competition. The Commission notes that the harm caused by the acts and practices addressed cut across multiple trades. The Commission addresses potential First Amendment concerns and arguments regarding prevalence below.

[91] *Id.* 4.

[92] Camp-Martin Cmt. at 1–2. The commenter said, ''In the alternative to the complete abandonment of the proposed rule, Section 465.4 should be amended'' and broadened. *Id.* at 1.

[93] NADA Cmt. at 1–2.

[94] ANA Cmt. at 3–7.

IV. Section-by-Section Analysis

The following discussion provides a section-by-section analysis of the provisions proposed in the NPRM, and discusses the comments received, the Commission's responses to the comments, and the provisions adopted in the final rule.[96]

A. § 465.1—Definitions

1. Overview

The proposed rule included definitions for the following terms: ''business''; ''celebrity testimonial''; ''clear and conspicuous''; ''consumer review''; ''consumer testimonial''; ''indicators of social media influence''; ''officers''; ''purchase a consumer review''; ''reviewer''; ''substantially different product''; ''testimonialist''; and ''unjustified legal threat.'' In Question 6 of the NPRM, the Commission asked whether the proposed definitions are clear and what changes should be made to any definitions. In Questions 11 and 21 of the NPRM, the Commission asked specifically about the definitions of ''substantially different product'' and ''unjustified legal threat,'' respectively. In the following definition-by-definition analysis, the Commission discusses each definition proposed in the NPRM, relevant comments not otherwise addressed in the discussion of the corresponding substantive provisions of the final rule, and the definitions that the Commission is finalizing.[97]

[95] The Commission is aware that a business could attempt to damage a competitor's reputation by purchasing fake positive reviews for that competitor and then reporting those reviews to the platform on which they appear. In investigating a fake review matter, FTC staff would take such a possibility into account.

[96] The Commission notes that many commenters raised similar concerns or addressed overlapping issues. To avoid repetition, the Commission has endeavored to respond to issues raised in similar comments together. Responses provided in any given section apply equally to comments addressing the same subject in the context of other sections. Moreover, throughout the SBP, the Commission discusses justifications for the final rule that are informed by its careful consideration of all comments received, even where that discussion is not linked to a particular comment.

[97] Because the Commission is adding additional definitions and not including one proposed definition, the definitions are renumbered in the final rule.

2. Definition-by-Definition Analysis

a. Business

The proposed rule defined ''business'' as ''an individual, partnership, corporation, or any other commercial entity that sells products or services.'' This term appeared in the proposed definitions of ''celebrity testimonial,'' ''consumer review,'' ''consumer testimonial,'' and ''officers,'' and in every substantive section of the proposed rule. For the following reasons, the Commission adopts the definition of ''business'' largely as proposed, with a minor, non-substantive clarification as described below.

A trade association commenter noted correctly that the Commission's rulemaking authority is limited to acts or practices ''in or affecting commerce.'' [98] It recommended that the Commission insert ''in or affecting commerce as defined in section 4 of the Federal Trade Commission Act (15 U.S.C. 44)'' in the definition of a ''business.'' [99] The Commission declines to make this modification. An entity that is selling products or services is engaging in commerce and, even without the commenter's proposed addition, the acts and practices covered by the final rule are limited to commercial practices.

A consumer advocacy organization commenter argued that the definition of a business potentially liable under the proposed rule was unduly narrow and should be expanded to include ''advertisers,'' ''endorsers,'' and ''[a]dvertising agencies, public relations firms, review brokers, reputation management companies, and other similar intermediaries.'' [100] However, advertisers, advertising agencies, public relations firms, review brokers, reputation management companies, and other similar intermediaries all sell products or services and are covered by the Commission's definition of ''business.'' To the extent that an endorser is in the business of selling reviews or testimonials, the endorser is covered by the definition. The Commission is therefore not making the proposed change.

A review platform commenter suggested that, to avoid ambiguity, the Commission clarify that ''sells products or services'' in the definition of ''business'' applies to each of the types of entities listed in the definition, not just to ''any other commercial

[98] National Federation of Independent Businesses, Cmt. on NPRM at 2 (Sept. 12, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0047* (''NFIB Cmt.'').

[99] *Id.*

[100] TINA Cmt. at 6–7.

entity.'' [101] The Commission is adopting this recommendation to clarify the intended scope of the definition.

For the reasons explained in this section, the Commission is finalizing the definition of ''business'' to mean an individual who sells products or services, a partnership that sells products or services, a corporation that sells products or services, or any other commercial entity that sells products or services.

b. Celebrity Testimonial

The proposed rule defined ''celebrity testimonial'' as ''an advertising or promotional message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a well-known person who purchased, used, or otherwise had experience with a product, service, or business.'' The Commission is finalizing the definition of this term—which is used in § 465.2, Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials—with one modification.

A trade association commenter said that the definition of a celebrity endorsement should be clarified to exclude ''a situation where a celebrity or celebrity likeness appears or is used by a business as a promotion, without any specific advertising or opinions presented.'' [102] The commenter gave the example of an athlete who appears at a business to sign autographs or simply appears, without making any statements or representations about the business.[103] Such situations should not be excluded from the scope of the definition because a business's use in advertising or promotion of a celebrity or a celebrity's image can, even without any additional statements, imply that the celebrity has a positive opinion of the business or its products or services and therefore constitute a celebrity testimonial. However, if consumers would not interpret the celebrity's appearance to reflect the celebrity's opinions of, beliefs about, or experiences with, a business or its products or services, then the appearance is not a testimonial. That issue is thus highly dependent on specific facts. Further, to take the commenter's example, it is highly unlikely that a celebrity who does nothing more than sign autographs or appear at a business could violate § 465.2, because such signings or appearances alone would likely not communicate anything to consumers about the celebrity's use or experience with a product, service, or business.

A second trade association asserted that the definition of a ''celebrity testimonial'' does not give advertisers adequate notice as to when a testimonial is a ''celebrity'' testimonial or a ''consumer'' testimonial.[104] The commenter requested that the Commission provide further guidance on what constitutes a ''well-known'' individual.[105] Based upon common usage, well-known individuals include those famous in the areas of entertainment, such as film, music, writing, or sport, and those known to the public for their positions or successes in business, government, politics, or religion. Individuals who earn money through their work as ''influencers'' are also well known, as are those who have been featured in the news or media. More important, whether someone is well known does not matter for purposes of rule interpretation and enforcement because any provisions that apply to celebrity testimonials also apply to consumer testimonials.

A business commenter suggested replacing ''a well-known person'' in the definition with a ''widely known all-purpose public figure'' or ''widely known public figure'' for the purpose of ''clarity.'' [106] It said that Black's Law Dictionary defines the term ''all-purpose public figure'' to mean ''[s]omeone who achieves such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts.'' [107] To be ''well known,'' one need not have such pervasive fame as to be a public figure for all purposes and in all contexts. For example, an influencer may be well known to a subset of individuals interested in a particular subject. The commenter gave no justification for narrowing the definition of a ''celebrity testimonial,'' and the Commission declines to do so.

A public interest research center commenter said that the definitions of ''celebrity testimonials'' and ''consumer testimonials'' should ''be broadened to explicitly include non-natural persons, such as businesses and public sector entities.'' [108] Although endorsements by such organizations are addressed in the Commission's Endorsement Guides,[109] the Commission did not intend for any provision using the term ''testimonials'' to apply to endorsements by entities. To clarify that the Commission does not intend for any provision using the term ''testimonials'' to apply to endorsements by entities, the Commission is substituting the word ''individual'' for the word ''person'' wherever the word appeared in the Commission's original proposal.[110] The only section of the rule that applies to endorsements by entities or purported entities is § 465.6, which addresses company-controlled review websites or entities. However, § 465.6 does not apply to consumer or celebrity testimonials.

c. Clear and Conspicuous

The proposed rule defined ''clear and conspicuous'' to mean ''that a required disclosure is easily noticeable (*i.e.,* difficult to miss) and easily understandable,'' including in eight enumerated ways, listing proposed requirements for ''any communication that is solely visual or solely audible,'' ''[a] visual disclosure,'' ''[a]n audible disclosure,'' and ''any communication using an interactive electronic medium,'' and providing, inter alia, that such disclosures ''must use diction and syntax understandable to ordinary consumers,'' ''must appear in each language in which the representation that requires the disclosure appears,'' and ''must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.'' Based on the following, the Commission is finalizing the definition of this term—which is used in § 465.5, Insider Consumer Reviews and Consumer Testimonials—with one modification.

A trade association commenter suggested not using the terms ''diction'' and ''syntax'' in the definition because many of those subject to the rule ''may not know the meaning of th[os]e words.'' [111] The commenter suggested replacing them with ''words'' and

[101] Yelp Cmt. at 3.

[102] NADA Cmt. at 5.

[103] *Id.*

[104] IAB Cmt. at 14.

[105] *Id.*

[106] Family First Life Cmt. at 4–5.

[107] *Id.* at 5. *See* Black's Law Dictionary (11th ed. 2019).

[108] Electronic Privacy Information Center, Cmt. on NPRM at 3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0111* (''EPIC Cmt.'').

[109] *See* Fed. Trade Comm'n, Guides Concerning Use of Endorsements and Testimonials in Advertising (''Endorsement Guides''), 16 CFR 255.4.

[110] The Commission is using the term ''individual'' in the context of this rule to mean a single human being. *See Individual* (def. 1), *Dictionary.com,* LLC, *https://www.dictionary.com/browse/individual* (last visited July 5, 2024) (defining ''individual'' as ''a single human being, as distinguished from a group''). The Commission notes that, in the context of a different rulemaking, it has proposed defining ''individual'' to mean ''a person, entity, or party, whether real or fictitious, other than those that constitute a business or government'' under 16 CFR 461. *See* Fed. Trade Comm'n, Trade Regulation Rule on Impersonation of Government and Businesses, 89 FR 15072, 15083 (Mar. 1, 2024).

[111] NFIB Cmt. at 2.

''grammar.'' [112] ''Diction'' means the choice and use of words.[113] ''Syntax'' involves the arrangement of words and phrases and is a subset of grammar.[114] The Commission believes that the meaning of ''diction'' and ''syntax'' are sufficiently clear.

One trade association commenter asserted that it is unnecessary to have a definition of ''clear and conspicuous'' because the ''phrase . . . has a meaning under FTC jurisprudence.'' [115] The definition is based on that jurisprudence and decades of Commission experience policing deceptive and unfair conduct. The Commission believes it is both helpful and necessary that the rule provides more explicit guidance on what does and does not constitute a clear and conspicuous disclosure.

Several commenters asserted that the proposed definition was overly prescriptive and not sufficiently flexible.[116] The Commission disagrees and reiterates that the definition contains basic, common-sense principles, such as requiring visual disclosures in a size consumers can see and audible disclosures at a volume they can hear. The definition merely provides a baseline and provides a great deal of flexibility in what a disclosure should say and how it appears. The basic, enumerated requirements are necessary for a disclosure to be effective.

Two commenters objected to the requirement that internet disclosures be ''unavoidable,'' an objective standard that depends on whether consumers could have avoided the disclosure, which, per the definition is the case when ''a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see'' the disclosure.[117] The commenters do not believe that a disclosure has to be unavoidable for it to be effective; they noted that a staff business guidance document, issued in 2000 and updated in 2013, allowed for the possibility that avoidable disclosures, *e.g.,* those available through a hyperlink, could be clear and conspicuous.[118] The Commission believes that a disclosure is not effective when it is not seen or heard, including when the reason for it not being seen or heard is its avoidability. The staff guidance said that ''[d]isclosures that are an integral part of a claim or inseparable from it should not be communicated through a hyperlink,'' and the purported independence and objectivity of a reviewer or testimonialist is often integral.[119] Further, some readers misunderstood the staff guidance about the necessity of properly labeling hyperlinks to convey the ''importance, nature, and relevance of the information'' to which the hyperlinks lead. The staff guidance said that, to be effective, the label of the hyperlink might need to give the essence of the disclosure, with the hyperlink leading to the details.[120] Even had these qualifications been absent, the Commission is not bound by the 2013 staff business guidance, which is currently under review in light of an evolution of views over time regarding online disclosures and avoidability.[121]

One commenter asked whether a disclosure in the first line of a product review would be considered unavoidable.[122] For the purposes of this rule, the Commission would consider such a disclosure to be unavoidable. A different commenter expressed concern that the requirement that a disclosure ''stand out'' would require new formatting techniques for companies hosting reviews and preclude a disclosure from being in the review itself.[123] For the purposes of this rule, the Commission would consider a disclosure at the beginning of a text-only consumer review to ''stand out.''

A trade association said that ''the average social media user is familiar with where text is found in any given social media post, and social media platforms already make text visible against a variety of backgrounds'' so ''[r]equiring the endorsement-disclosure text to differ from other text is not only impractical, but it could actually create confusion for social media users who have grown accustomed to viewing all text related to a post in a certain manner.'' [124] The Commission recognizes that, on a social media platform that allows only uniform text, it is not possible to have the text of a disclosure appear in different text. As with a text-only consumer review, the Commission would consider a disclosure at the beginning of such a text-only testimonial to ''stand out.'' On visual platforms with superimposed text, it is quite possible and reasonable to require that the text of a disclosure ''stand out.''

One commenter asserted that being ''unavoidable'' and being ''easily noticed'' are ambiguous concepts.[125] The Commission disagrees. ''Unavoidable'' means that a consumer cannot avoid a disclosure such as by failing to click on a link or by failing to scroll. ''Easily noticeable'' is a simple and objective standard evaluated from the perspective of a reasonable consumer.

Two commenters asserted that it would be difficult to make clear and conspicuous disclosures required by the proposed rule on a small screen.[126] They did not explain why that would be the case, and the Commission does not believe that compliance with the rule's disclosure requirement should be difficult on handheld devices.

One commenter asserted that, because of the proposed definition of clear and conspicuous, ''[t]here is no need for the FTC to determine whether the resulting speech is rendered deceptive, untrue, or inaccurate.'' [127] The Commission disagrees. The only substantive provision for which the definition is relevant is § 465.5. A business would not violate that provision merely by having a disclosure that is not clear and conspicuous. Rather, the business would have to engage in conduct that would be unfair or deceptive in the absence of a clear and conspicuous disclosure (*e.g.,* a corporate officer

[112] *Id.*

[113] *See Diction* (def. 2), *Merriam-Webster.com* Dictionary, *https://www.merriam-webster.com/dictionary/diction* (last visited July 5, 2024) (defining ''diction'' as the ''choice of words especially with regard to correctness, clearness, or effectiveness'').

[114] *See Syntax* (defs. 1a, 1b), *Merriam-Webster.com* Dictionary, *https://www.merriam-webster.com/dictionary/syntax* (last visited July 5, 2024) (defining ''syntax'' as the ''the way in which linguistic elements (such as words) are put together to form constituents (such as phrases or clauses)'' and as ''the part of grammar dealing with this'').

[115] ANA Cmt. at 11.

[116] IAB Cmt. at 14; U.S. Chamber of Commerce, Cmt. on NPRM at 7–8 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0087* (''Chamber of Commerce Cmt.''); National Retail Federation, Cmt. on NPRM at 10 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0090* (''NRF Cmt.'').

[117] IAB Cmt. at 14; Chamber of Commerce Cmt. at 8.

[118] *Id.*

[119] Fed. Trade Comm'n, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* at 10 (Mar. 2013), *https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf.*

[120] *Id.* at 11. (''Although the label itself does not need to contain the complete disclosure, it may be necessary to incorporate part of the disclosure to indicate the type and importance of the information to which the link leads.'')

[121] *See* Press Release, Fed. Trade Comm'n, *FTC Looks to Modernize Its Guidance on Preventing Digital Deception* (June 3, 2022), *https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-looks-modernize-its-guidance-preventing-digital-deception.*

[122] Trustpilot Cmt. at 14. The same commenter also raised concerns about the applicability of the definition to ratings and aggregate ratings. *Id.* That is issue is discussed below in the discussion of the corresponding substantive rule provision. *See infra* section IV.E.6 of this document.

[123] NRF Cmt. at 10.

[124] *Id.* at 11.

[125] ANA Cmt. at 11.

[126] IAB Cmt. at 14; NRF Cmt. at 11.

[127] ANA Cmt. at 11.

giving a consumer endorsement without disclosing that they are an insider). As discussed below, the Commission is finalizing proposed § 465.5 with a modification to clarify to clarify that the provision is limited to conduct that would violate section 5 of the FTC Act.[128] The same commenter also surmised, based on the similarity of the definition of ''clear and conspicuous'' to the definition of the same phrase in the Endorsement Guides, that the Commission intends that the examples used in the Endorsement Guides would also be examples of violative behavior under the rule.[129] That is not the case. The Endorsement Guides address a broader range of conduct than the rule. Of the three examples in the Endorsement Guides that illustrate whether disclosures are clear and conspicuous, two of them address issues—the payment of influencers and implied typicality—not covered by the rule.[130] The third example involves a disclosure that individuals appearing in a television ad and giving testimonials are paid actors.[131] Such conduct would not be covered by the rule unless the underlying testimonials were fake or false.

One commenter, a trade association, stated that it was ''unclear if the Commission has considered any social media platform constraints with respect to the length of posts (*e.g.,* character and time limits),'' and asked (1) whether and how hashtags can meet the ''clear and conspicuous'' requirement, (2) whether '''#Ad' is a sufficient visual disclosure of a material relationship,'' and (3) that the Commission ''provide more examples, including appropriate use of hashtags in disclosures, in its final rule.'' [132] Another trade association requested in its comment that the Commission provide ''visual examples of 'insider' endorsement disclosures that the Commission finds acceptable.'' [133] The Commission believes it is not difficult to comply with the rule's disclosure requirements in the social media context. Depending upon their wording and appearance, hashtags can be clear and conspicuous for purposes of the rule. In a social media post promoting a brand, it might be sufficient to prominently disclose an employee relationship via a hashtag beginning with the brand name and followed by the word ''employee.'' Whether ''#ad'' would be an adequate disclosure would depend on the specific context. It could be adequate at the beginning of a social media post by the testimonialist, but it would likely be inadequate in a television ad or magazine ad featuring the testimonialist. Because the only provision for which the definition is relevant is § 465.5, which addresses the failure to disclose insider relationships, the disclosure could be as simple as the testimonialist describing a product as ''my company's'' or ''my wife's company's.''

A commenter asserted that disclosures ''utilizing a social media platform's built-in disclosure tool should be . . . at least sufficient enough to avoid the risk of penalties under the FTC's rulemaking authority.'' [134] As it has previously said, the Commission supports development of effective, built-in disclosure tools but is concerned that some of the existing tools lead to inadequate disclosures that are too poorly contrasting, fleeting, or small, or may be placed in locations where they do not catch the user's attention.[135] Whether a business could be subject to civil penalties for social media posts by insiders who utilized a social media platform's built-in disclosure tool would depend on whether a court would find that the business met the knowledge standard of section 5(m)(1)(A) of the FTC Act.

A trade association's comment expressed concerns about the proposed requirement that ''[i]n any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.'' [136] The commenter said that ''it is unnecessary and duplicative to require video endorsements that include visual and audio components to include both visual and audio disclaimers,'' and ''requiring an additional visual disclaimer, on top of a disclaimer that an endorser may easily include via audio, is cumbersome, and restricts companies' marketing capabilities.'' [137] On reflection, in the context of this rulemaking and as to the relationships of company insiders, if a communication makes an endorsement in only its visual or audio portion, then it should be sufficient for a disclosure to appear in the same format as the claim that requires the disclosure. On the other hand, if an endorsement is conveyed in both the audio and visual portions of a communication, then the disclosure should be made in both the audio and visual portions. Consumers can watch a video with the sound off or listen to it without looking at the screen. The Commission is changing the relevant language to, ''[i]n any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented in at least the same means as the representation(s) requiring the disclosure.'' This change makes the rule less restrictive while still accomplishing the Commission's goal of ensuring that consumers are fully informed. A different trade association noted that the ''simultaneous disclosure requirement is confusing and would benefit from examples of sufficient simultaneous disclosure.'' [138] Because the Commission is not finalizing the simultaneous disclosure requirement contained in the proposed rule, it is not providing further guidance on the meaning of simultaneous.

The second trade association also asked ''if a social media influencer posts a video and discloses verbally in the video that they have a brand ambassador relationship with the retailer/brand, is it sufficient to display in the text accompanying the posted video some written disclosure'' or would the disclosure ''need to be embedded or flash across the video itself.'' [139] The rule does not address or apply to an influencer's disclosure of a brand ambassador relationship. The rule's only disclosure requirements are in § 465.5 and apply to company insiders. Whether a testimonial in a social media post by a company insider requires a superimposed textual disclosure depends on whether there is an endorsement communicated by the visual portion of the post. If there is an endorsement in the visual portion, there would need to be a disclosure in the visual portion. If the endorsement is communicated only in the audio portion of the post, there would not need to be a disclosure in the visual portion.

d. Consumer Review

The proposed rule defined ''consumer review'' as ''a consumer's evaluation, or a purported consumer's evaluation, of a product, service, or business that is

[128] *See infra* section IV.E.1 of this document.

[129] *Id.*

[130] 16 CFR 255.0(g)(9) and (11).

[131] 16 CFR 255.0(g)(10).

[132] Retail Industry Leaders Association, Cmt. on NPRM at 5 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0094* (''RILA Cmt.'').

[133] NRF Cmt. at 10.

[134] *Id.*

[135] Fed. Trade Comm'n, Guides Concerning the Use of Endorsements and Testimonials in Advertising, 87 FR 44288, 44290 (July 26, 2022) (proposing changes to guides and soliciting public comment).

[136] NRF Cmt. at 11.

[137] *Id.*

[138] RILA Cmt. at 5.

[139] *Id.*

submitted by the consumer or purported consumer and that is published to a website or platform dedicated in whole or in part to receiving and displaying such evaluations.'' The proposed definition also noted that, for the purposes of the rule, consumer reviews include consumer ratings regardless of whether they include any text or narrative. The Commission has determined to finalize the definition of this term—which is used in §§ 465.2 through 465.6—with a minor, technical change.

A comment from a review platform supported the proposed definition, calling it ''particularly clear and holistic.'' [140]

A comment from an individual asserted that the ''definition of 'consumer' implies an individual who purchased the product for their own use'' and that when a ''product is provided by the company seeking a review, for the purposes of it being reviewed, the reviewer is arguably not a consumer.'' [141] The Commission disagrees that a ''consumer'' is necessarily a purchaser. For purposes of the rule, a consumer is a person who purchased, used, or otherwise had experience with a product, service, or business.

A trade association commenter suggested deleting the definition's element that a consumer review be ''published.'' [142] It said that a ''consumer review should still be considered a 'review' before it is publicly displayed by a website or platform.'' [143] Although that may be true for some purposes, the Commission declines to make that change. A consumer review that is submitted to a website or platform but never published does not in and of itself deceive consumers, although the failure to publish a review may be deceptive pursuant to paragraphs (a)(1) and (b) of § 465.7. Paragraphs (a)(1) and (b) of § 465.7 are worded in a way that does not limit their application to published reviews, because they relate to suppressed reviews.

A comment from a consumer advocacy organization suggested deleting the portion of the definition that refers to publication to a website or platform ''dedicated in whole or in part to receiving and displaying such evaluations.'' [144] It asked whether the definition would ''only apply to reviews on a website 'dedicated' to posting reviews, such as Yelp'' and whether ''it include[s] any website where reviews are possibly posted, like Reddit?'' [145] The commenter continued, ''Would a website be excluded if only a very small portion of the website contained consumer evaluations?'' [146] The commenter asserted that ''[a]ll fake reviews and ratings that are used to market a product or service should be captured in the . . . Rule—no matter where they are posted.'' [147] The definition is not limited to consumer reviews on websites that are dedicated entirely to posting such reviews. It would also cover reviews on a portion of a website, no matter how small a portion, that is dedicated to receiving and displaying such reviews, such as a reviews page or the review sections of product pages on a retailer's website. The definition would not, however, cover consumer statements about products or services on a website or portion of a website, such as Reddit, that is not dedicated to receiving and displaying reviews. Such free-floating consumer statements are outside of the generally understood context in which content is submitted and published as reviews. Under some circumstances, such statements might be considered ''consumer testimonials,'' such as when an advertiser has paid for them.

A comment from a review platform raised two issues with the ''consumer review'' definition.[148] It said that ''[b]are ratings provide no context, making them virtually useless for other consumers or to businesses that might use consumer feedback to improve their services'' and suggested that ''the Commission differentiate between reviews and ratings.'' [149] The fact that bare ratings do not provide context does not mean that consumers do not rely on them or on aggregate ratings that include bare ratings. The Commission does not see a reason to distinguish between reviews and ratings for the purposes of the rule, and the commenter did not provide such a reason. The same commenter also expressed ''concern[ ] with the definition's use of the word 'purported[,]' . . . which has a negative connotation that feeds into the false narrative that consumer reviews are inherently unreliable'' and suggested replacing ''purported'' with different language.[150] The definition simply recognizes and accounts for the undisputed fact that some reviews are fake. Just because some reviews are unreliable does not suggest that reviews are generally unreliable. The Commission declines to adopt this recommendation.

To conform with the Office of the Federal Register's drafting requirements, the Commission is changing a reference to ''this Rule'' to ''this part.'' [151]

e. Consumer Testimonial

The proposed rule defined ''consumer testimonial'' as ''an advertising or promotional message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a consumer who has purchased, used, or otherwise had experience with a product, service, or business.'' The Commission is finalizing the definition of the term—which is used in §§ 465.2 and 465.5—as originally proposed.

A trade association commenter expressed concern that consumers seeing a clearly dramatized television commercial might unreasonably believe that the actors' scripted lines actually reflected their opinions, beliefs, or experiences and could therefore be considered consumer testimonials.[152] It suggested clarifying the definition by inserting ''reasonably in the circumstances'' after ''that consumers are likely to believe.'' [153] The Commission agrees that it would not be reasonable for viewers to consider ''an obviously fictional dramatization'' to be an endorsement.[154] The Commission does not, however, believe it is necessary to modify the definition. The concept of ''reasonable consumers'' from FTC jurisprudence [155] is incorporated into the concept of consumers being likely to believe something.

The same public interest research center that commented, as discussed above, that the Commission should broaden the definition of ''celebrity testimonials'' to explicitly include non-natural persons (such as businesses and

[140] Trustpilot Cmt. at 8.

[141] Anonymous 2 Cmt. at 1.

[142] IAB Cmt. at 13–14.

[143] *Id.*

[144] TINA Cmt. at 7.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] Yelp Cmt. at 3–4.

[149] *Id.*

[150] *Id.* at 4.

[151] The Commission is making this change throughout the rule, including in §§ 465.2(a), (b), and (c), 465.4, 465.5(a), 465.6, 465.7, 465.8, and 465.9.

[152] NFIB Cmt. at 2–3.

[153] *Id.* at 4.

[154] *See* Endorsement Guides, 16 CFR 255.0(g)(2).

[155] *See, e.g.,* Fed. Trade Comm'n, *FTC Policy Statement on Deception,* 103 F.T.C. 174, 176–77 (1984) [hereinafter FTC Policy Statement on Deception] (appended to *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110 (1984)), *available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.*

public sector entities)[156] made the same comment with respect to the definition of ''consumer testimonials.''[157] The Commission declines to make that change in the latter definition for the same reason it declined to make it in the former definition.

f. Indicators of Social Media Influence

The proposed rule defined ''indicators of social media influence'' as ''any metrics used by the public to make assessments of an individual's or entity's social media influence, such as followers, friends, connections, subscribers, views, plays, likes, reposts, and comments.'' For the following reasons, the Commission adopts the definition of ''indicators of social media influence''—a term which is used in § 465.8, Misuse of Fake Indicators of Social Media Influence—largely as proposed, with one modification described below.

A comment from a consumer advocacy organization suggested explicitly including ''Saves'' and ''Shares'' within the definition of indicators of social media influence.''[158] The commenter explained that the number of times that social media posts are saved or shared serves as indicators of social media influence and that both ''Saves'' and ''Shares'' are offered for sale on the internet.[159] Because the NPRM proposed to define the term as ''any metrics used by the public to make assessments of an individual's or entity's social media influence,'' ''Saves'' and ''Shares'' were already covered by the definition as originally proposed. However, merely for the purpose of clarification, the Commission is adding them to the listed examples of indicators. The same commenter also suggested that the Commission expand the definition to include engagement metrics that are not publicly visible but that are used to gain an algorithmic advantage.[160] Such non-visible indicators are outside the scope of this rulemaking, and the Commission chooses not to address them at this time.

One review platform commenter suggested that the Commission ''simplify the definition to exhaustively list the current metrics that are such indicators.''[161] The commenter continued that ''whether a given metric is 'used by the public to make assessments of an individual's or entity's social media influence' may become the subject of substantial dispute in future cases . . . in the absence of an exhaustive, disjunctive list of indicators.''[162] The Commission intends the listed indicators to be examples and non-exhaustive, a flexible and efficient approach that avoids having to modify the rule when such metrics change. The Commission has no reason to believe that its approach will result in substantial disputes in its cases.

For the reasons explained in this section, the Commission is finalizing the definition of ''indicators of social media influence'' to mean any metrics used by the public to make assessments of an individual's or entity's social media influence, such as followers, friends, connections, subscribers, views, plays, likes, saves, shares, reposts, and comments.

g. Officers

The proposed rule defined ''officers'' as ''including owners, executives, and managing members of a business.'' The Commission is finalizing the definition of this term—which is used in §§ 465.2 and 465.5.

A review platform commenter said that including ''managing members'' in the definition of ''officers'' ''could suggest that managers are officers.''[163] The commenter also suggested that the definition of ''officers'' ''should be refined to only include 'senior management members' of a business,'' thereby creating ''a clearer distinction between those in a position of leadership versus lower-level employees, or staff that may have the title 'manager' without any practical level of control and power to exert influence over others.''[164]

Because a ''managing member'' is a commonly understood term referring to an owner and senior manager of a limited liability company, and because the term does not refer to all ''managers'' of a business, the Commission declines to remove ''managing members'' from the definition of ''officer.'' As discussed below, the Commission continues to believe it appropriate that §§ 465.2 and 465.5 apply to both officers and managers and is therefore not limiting the definition of ''officers'' to ''senior management members.'' A new definition of ''managers'' is discussed below.[165]

h. Purchase a Consumer Review

The proposed rule defined ''purchase a consumer review'' as ''provid[ing] something of value, such as money, goods, or another review, in exchange for a consumer review.'' For the following reasons, the Commission adopts the definition of ''purchase a consumer review''—a term which is used in § 465.2, Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials—largely as proposed, with two modifications described below.

An individual commenter wrote, ''[r]egarding payment for reviews, the use of . . . discounts on future purchases from the business should be specifically prohibited as well.''[166] A review platform commenter suggested ''that the Commission list additional examples of . . . what the Commission considers 'value.' ''[167] Specifically, it suggested adding ''gift certificates,'' ''services,'' ''discounts,'' ''coupons,'' and ''contest entries.''[168] Such examples of value were covered by the proposed definition, which applies to ''something of value'' provided in exchange for a consumer review'' but, for purposes of clarification, the Commission is adding these examples of value in the final definition. The review platform commenter also suggested adding ''other incentives,''[169] which the Commission thinks is unnecessary, given that the list is only exemplary and preceded by the words ''such as.''

Another review platform commenter suggested using language explicitly stating that the listed examples of ''value'' are not exhaustive.[170] The Commission believes that, because the phrase ''such as'' precedes the list of examples, this is already sufficiently clear from the language of the definition.

The proposed definition used the term ''goods.'' To ensure that terminology is used consistently throughout the rule, the Commission is replacing the term ''goods'' with the synonymous word ''products'' in the final definition.[171]

For the reasons explained in this section, the Commission is finalizing the definition of ''purchase a consumer review'' to mean to provide something

[156] *See supra* Section IV.A.2.b of this document.

[157] EPIC Cmt. at 3.

[158] NCL Cmt. at 3.

[159] *Id.* at 3–6.

[160] *Id.* at 6–8.

[161] Yelp Cmt. at 4–5.

[162] *Id.* at 5.

[163] Trustpilot Cmt. at 12.

[164] *Id.*

[165] *See infra* Section IV.A.3.b of this document.

[166] John Christofferson, Cmt. on NPRM (Aug. 16, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0025*.

[167] Yelp Cmt. at 5.

[168] *Id.*

[169] *Id.*

[170] Trustpilot Cmt. at 8.

[171] The Commission is also replacing the term ''goods'' with the word ''products'' in the final definition of the phrase ''purchase a consumer review'' (final § 465.1(m)).

of value, such as money, gift certificates, products, services, discounts, coupons, contest entries, or another review, in exchange for a consumer review.

i. Reviewer

The proposed rule defined ''reviewer'' as ''the author or purported author of a consumer review.'' The Commission is finalizing the definition of the term—which is used in §§ 465.2 and 465.5—as originally proposed.

One review platform commenter objected to the use of the word ''purported'' in the definition of ''reviewer,'' just as it objected to that word's inclusion in the definition of ''consumer review.'' [172] The commenter asserted that ''purported'' feeds into the false narrative that consumer reviews are inherently unreliable. As discussed above, the use of the word ''purported'' simply recognizes and accounts for the undisputed fact that some reviews are fake.[173] The Commission declines to modify the definition of ''reviewer.''

j. Substantially Different Product

The proposed rule defined ''substantially different product'' as a product that differs from another product in one or more material attributes other than color, size, count, or flavor. The defined term appeared in proposed § 465.3, Consumer Review or Testimonial Reuse or Repurposing, which the Commission is no longer planning on finalizing.[174] Given that the Commission has decided not to proceed with proposed § 465.3 at this time, it is not including a definition of ''substantially different product'' in the final rule.

k. Testimonialist

The proposed rule defined ''testimonialist'' as ''the person giving or purportedly giving a consumer testimonial or celebrity testimonial.'' None of the comments received addressed the definition of testimonialist. As already discussed in section IV.A.2.b of this document, the Commission is substituting the word ''individual'' for the word ''person'' wherever the word appeared in the Commission's original proposal. Aside from this minor, clarifying modification, the Commission has determined that it will finalize the definition of the term—which is used in §§ 465.2 and 465.5—as originally proposed.

l. Unjustified Legal Threat

The proposed rule defined ''unjustified legal threat'' as ''a threat to initiate or file a baseless legal action, such as an action for defamation that challenges truthful speech or matters of opinion.'' For the following reasons, the Commission adopts the definition—a term which is used in § 465.7, Review Suppression—largely as proposed, with two modifications described below.

The NPRM asked whether ''the definition of 'unjustified legal threat' is sufficiently clear.'' One company's comment said that the proposed definition was clear.[175] A trade association said ''the term 'unjustified' is a vague standard that leaves unclear what legal support a business must have for its legal position before it warns the creator of a review of possible legal proceedings.'' [176] A comment from State Attorneys General suggested changing ''unjustified'' to ''unfounded, groundless, or unreasonable'' in order to provide a more objective legal standard for evaluating the types of legal threats that are not permitted.[177] The Commission agrees in part with this recommendation. As a clarification of what it intended, the Commission is changing ''unjustified'' to ''unfounded or groundless.'' Specifically, this change avoids the unintended, potentially broader scope of the term ''unjustified,'' which is also freighted with subjective considerations, in favor of terms that reflect objective legal standards. For similar reasons, the Commission is not adding ''unreasonable,'' a term which is unnecessary and not as precise in this particular situation as ''unfounded or groundless.''

The State Attorneys General comment also recommended that the definition include ''a threat to enforce an agreement that is void, voidable, or unenforceable.'' [178] It said that the word ''unjustified'' may be insufficient to address merchants arguing that their legal threats were justified by their non-disclosure agreements that limit consumer reviews.[179] The change from ''unjustified'' to ''unfounded or groundless'' addresses this concern. A comment from a review platform suggested that the Commission expand the definition to include threats based on form contracts that violate the Consumer Review Fairness Act (''CRFA'').[180] Given that such form contracts are already prohibited by the CRFA,[181] the Commission declines to address them in this rulemaking.

A consumer group's comment disagreed with the definition's use of the phrase ''baseless legal action'' on the basis that it ''open[s] just as many questions as the underlying term it attempts to define.'' [182] A company's comment noted that the phrase ''a baseless legal action'' is vague, and recommend that the Commission instead adopt language that is based upon Rule 11(b)(2) of the Federal Rules of Civil Procedure.[183] Specifically, the commenter recommended changing ''a baseless legal action'' to ''a legal action that is not warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law.'' [184]

The Commission is partially adopting the commenter's suggestion by adopting language that is loosely based upon Federal Rule of Civil Procedure 11(b)(2) and (3).[185] However, the Commission is not adopting the phrase ''extending, modifying, or reversing existing law or establishing new law'' because it is highly doubtful that companies would threaten consumers by asserting that, while no lawsuit is warranted under existing law, they will bring a lawsuit anyway and try to change existing law. Instead, the Commission chooses to clarify the definition by changing ''threat to file a baseless legal action'' to ''legal threat based on claims, defenses, or other legal contentions unwarranted by existing law or based on factual contentions that have no evidentiary support or will likely have no evidentiary support after a reasonable opportunity for further investigation or discovery.''

A review platform commenter was concerned that the proposed definition's ''wording opens the door to bad actors being able to claim defamation on weakly justified grounds and to seek to game the system by deliberately constructing legal terms which can then be deployed to suppress reviews.'' [186] The Commission believes that the revised definition addresses this

[172] Yelp Cmt. at 4.

[173] *See supra* Section IV.A.2.d of this document.

[174] Some commenters suggested edits to the definition, such as removing ''flavor'' from the list of attributes that might not be material, adding other product attributes to that list, or adding flexibility by removing the listed attributes altogether. TINA Cmt. at 6; Amazon Cmt. at 9–10; Chamber of Commerce Cmt. at 6–7; RILA Cmt. at 3; NRF Cmt. at 7–8; IAB Cmt. at 8.; ANA Cmt. at 15–16; NRF Cmt. at 8. Other commenters asked questions about how the definition would apply to an updated version of a product or to different scenarios. Magana Cmt.; NADA Cmt. at 5.

[175] Transparency Company Cmt. at 14.

[176] NFIB Cmt. at 4.

[177] State Attorneys General, Cmt. on NPRM at 2–3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0100* (''State AGs Cmt.'').

[178] *Id.* at 2.

[179] *Id.* at 3.

[180] Yelp Cmt. at 5.

[181] Consumer Review Fairness Act of 2016 § 2(b)(1), 15 U.S.C. 45b(b)(1).

[182] Consumer Reports Cmt. at 10.

[183] Family First Life Cmt. at 16.

[184] *Id.*

[185] *See* Fed. R. Civ. P. 11(b)(2) and (3).

[186] Trustpilot Cmt. at 17–18.

concern, especially given its inclusion of language from Federal Rule of Civil Procedure 11(b)(2) and (3), which is intended to avoid such misuse of the court system. In any event, the Commission is deleting ''such as an action for defamation that challenges truthful speech or matters of opinion'' because this example is unnecessary and possibly confusing in this context.

For the reasons explained in this section, the Commission is adopting the proposed definition of an ''unfounded or groundless legal threat'' with clarifying changes. The final definition provides that an ''unfounded or groundless legal threat'' is a legal threat based on claims, defenses, or other legal contentions unwarranted by existing law or based on factual contentions that have no evidentiary support or will likely have no evidentiary support after a reasonable opportunity for further investigation or discovery.

3. Proposed Additional Definitions

In Question 7 of the NPRM, the Commission asked what additional definitions, if any, are needed. In Questions 14 and 18 of the NPRM, the Commission asked whether it should define the terms ''managers'' and ''relatives,'' respectively. As discussed below, various commenters suggested that the Commission define the following terms and phrases that appear in the proposed rule: ''dissemination,'' ''manager,'' ''relative,'' and ''purchase or procure fake indicators.'' One commenter suggested that the Commission define ''review hosting'' and exclude it from the scope of § 465.2.[187]

a. Dissemination

The term ''disseminate'' appears in both proposed and final §§ 465.2 and 465.5. A comment from a trade association stated that the Commission should define ''disseminate'' ''within Proposed § 465.2(b) to include only the affirmative posting or intentional distribution of reviews, where a company has actual knowledge that the reviews are false or fraudulent in nature.'' [188] The commenter continued by saying that ''disseminate'' should ''not include passive actions such as allowing a review to be posted or published on a company's web page, unless the company has actual knowledge that the review is false or fraudulent in nature'' or ''retailers sharing reviews with third-party platforms such as Google.'' [189] Within both §§ 465.2 and 465.5, however, ''disseminate'' applies only to testimonials, not to consumer reviews. One of the basic canons of statutory and regulatory construction is that words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.[190] In §§ 465.2 and 465.5, the Commission intended for the term to have its ordinary, everyday meaning—that is, to spread or to convey something, rather than the proposed definition.[191] Accordingly, the Commission declines to add the proposed definition.

b. Manager

The term ''manager'' appeared in proposed § 465.5, Insider Consumer Reviews and Consumer Testimonials, and was undefined. Due to the clarifying changes to § 465.2 that are discussed in further detail below, the term is now included in both final § 465.5 and final § 465.2, Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials.

One business commenter noted that it is unnecessary to define ''manager.'' [192] An industry organization wrote in its comment that the failure to define the term ''manager'' ''raises concerns about the number of a firm's employees impacted.'' [193] A review platform commenter said that using the term ''manager'' without any definition is particularly problematic,[194] noting that someone ''may have the title 'manager' without any practical level of control and power to exert influence over others. For example, it is possible in a business for a person to have the title 'manager' while holding a relatively junior position and without having any employees that directly report to them.'' [195] Proposed and final § 465.5(c) address ''managers'' soliciting or demanding consumer reviews from employees or agents. In this context, the Commission's intent was for the term ''manager'' to be limited to those who supervise others. Thus, the Commission is adopting a definition for the term ''manager'' to make this clarification, which will ensure that § 465.5(c) is not interpreted as more restrictive than the Commission intended.[196]

A business commenter that operates in the insurance-marketing space explained that independent-contractor insurance agents who build their own agencies are referred to as ''managers'' and asked that the definition of ''managers'' expressly carve out ''managers in the insurance marketing space'' or at least clarify that managers are those ''who are employed by the company.'' [197] As similar situations may arise in other contexts, the Commission is adopting the commenter's latter recommendation, and clarifying that managers are employees of the businesses.

For the reasons explained in this section, the final rule adopts a definition for the term ''manager.'' The final rule defines the term ''manager'' as an employee of a business who supervises other employees or agents and who either holds the title of a ''manager'' or otherwise serves in a managerial role.

c. Relative

The term ''relative'' appeared in proposed § 465.5, Insider Consumer Reviews and Consumer Testimonials. It was undefined in the proposed rule.

Two commenters suggested that the Commission define the term ''relative.'' A comment from a review platform said that a plain reading of ''relative'' could cover ''an extremely broad range of people'' and ''is likely to extend to persons who may not be biased since they are in reality not close to the

[187] As discussed below in Section IV.H. of this document, the Commission is adding definitions of two phrases in response to concerns raised by commenters: ''fake indicators of social media influence'' and ''distribute fake indicators of social media influence.''

[188] NRF Cmt. at 3.

[189] *Id.* at 3–4. The Commission elsewhere addresses whether § 465.2 applies to a business allowing reviews to be posted or published on its web page or to retailers sharing reviews with third-party platforms. *See infra* Section IV.B.5 of this document.

[190] *See, e.g., Kouichi Taniguchi* v. *Kan Pac. Saipan, Ltd.,* 566 U.S. 560, 566 (2012); *Tanzin* v. *Tanvir,* 592 U.S. 43, 48 (2020) (''Without a statutory definition, we turn to the phrase's plain meaning at the time of enactment.''); *Lamar, Archer & Cofrin, LLP* v. *Appling,* 584 U.S. 709, 715 (2018) (''Because the Bankruptcy Code does not define the words 'statement,' 'financial condition,' or 'respecting,' we look to their ordinary meanings.'').

[191] *Disseminate, Dictionary.com*, LLC, *https://www.dictionary.com/browse/disseminate* (last visited July 5, 2024) (defining ''disseminate'' as ''to scatter or spread widely, as though sowing seed; promulgate extensively; broadcast; disperse''); *Disseminate, Merriam-Webster.com* Dictionary, *https://www.merriam-webster.com/dictionary/disseminate* (last visited July 5, 2024) (defining ''disseminate'' as ''to spread abroad as though sowing seed'' or ''to disperse throughout''); *Disseminate,* Cambridge Dictionary, *https://dictionary.cambridge.org/us/dictionary/english/disseminate* (last visited July 5, 2024) (defining ''disseminate'' as ''to spread or give out something, especially news, information, ideas, etc., to a lot of people'').

[192] Transparency Company Cmt. at 13.

[193] TechNet Cmt. at 3.

[194] Trustpilot Cmt. at 9.

[195] *Id.* at 12.

[196] If the term were only to appear in § 465.2(c), such a clarification would not be needed. This is because § 465.2(c) also covers employees and agents.

[197] Family First Life Cmt. at 13.

business.'' [198] The commenter suggested that the prohibition in § 465.5(c) be limited to close relatives such as immediate family members.[199] A comment from a business organization said that the term ''relative'' is too vague and that ''[i]t is unclear whether the rule applies to third cousins, the spouses of a stepbrother's child from a previous marriage, or friends that are considered family.'' [200] The commenter continued that ''[l]arge companies creating monitoring programs for testimonials need some clarity about what relatives will be captured under the Rule.'' [201]

As discussed below, the Commission believes that some rule provisions should be limited to ''immediate relatives.'' [202] The Commission is adding a definition of an ''immediate relative,'' which clarifies that the term refers to a spouse, parent, child, or sibling. In the final rule, the term ''immediate relative'' is used in §§ 465.2(c) and 465.5(c).

d. Purchase or Procure Fake Indicators

The phrase ''purchase or procure fake indicators of social media influence'' is used in proposed and final § 465.8, Misuse of Fake Indicators of Social Media Influence. The phrase was undefined in the proposed rule.

A consumer advocacy commenter stated that leaving the terms ''purchase'' and ''procure'' undefined ''leaves ambiguity regarding which types of incentives are restricted,'' and suggested defining the phrase ''purchase or procure fake indicators of social media influence'' to mean ''to provide something of value, such as money, goods, or another indicator of social media influence (*i.e.*[,] a 'like'), in exchange for a fake indicator of social media influence.'' [203] The Commission declines to adopt the commenter's suggestion.[204] The definition proposed by the commenter would unnecessarily narrow the types of actions that would be covered by the rule to an exchange. In the final rule, the Commission intends for the term ''procure'' to bear its ordinary, everyday meaning—that is, to obtain something.[205] Even if there is any ambiguity in the term ''purchase,'' any exchange of value in order to obtain fake indicators of social media influence would be ''procuring'' the fake indicators.

e. Review Hosting

A retailer submitted a comment suggesting that ''review hosting'' be defined and excluded from the scope of § 465.2.[206] The commenter suggested the following definition:

Review hosting includes but is not limited to activity associated with maintaining a repository of consumer reviews and testimonials for display such as: offering review submission functionality, collecting and moderating reviews, organizing and displaying reviews, aggregating reviews into star ratings, and providing guidance to consumers about how to leave reviews where no incentive is offered.[207]

As discussed below, the Commission did not intend for its proposal to apply to simply hosting consumer reviews.[208] The Commission is therefore, for the purpose of clarification, adopting a definition of the term ''consumer review hosting'' in order to exclude mere review hosting from certain provisions of the rule. The Commission is not adopting the commenter's proposed definition because it included activities that go beyond the core of mere review hosting and because it begins with the phrase ''include but is not limited to,'' which would allow it to include an unknown, larger category of activities. The final rule defines ''consumer review hosting'' as providing the technological means by which a website or platform allows consumers to see or hear the consumer reviews that consumers have submitted to the website or platform. The exclusion of ''consumer review hosting'' from certain sections of the rule is discussed below.

B. § 465.2—Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials

Proposed § 465.2 addressed fake or false consumer reviews, consumer testimonials, and celebrity testimonials. Based on the following, the Commission has determined to finalize these prohibitions, with a number of revisions. The following paragraphs discuss comments relating to (1) proposed § 465.2 generally, (2) common language in all three paragraphs, (3) the individual paragraphs, 4) the knowledge standard, and (5) other potential requirements.

Numerous individual commenters wrote about the importance of authentic reviews or testimonials and that fake or false ones should be prohibited.[209] A technology company commenter wrote that it ''would welcome rules to prohibit fake reviews and place stronger obligations on businesses who host them to better protect consumers.'' [210]

A celebrity commenter wrote that he had ''received more than 100 emails from consumers who have been induced to purchase fake products through the mis-use of . . . [his] image and the images of other Shark Tank 'sharks.' '' [211]

A business commenter suggested explaining the ''financial consequence of fake reviews,'' such as whether it is ''~$50,000 per fake review.'' [212] The maximum civil penalty is currently $51,744 per violation, but courts must take into account the statutory factors set forth in section 5(m)(1)(C) of the FTC Act and may impose much lower per-violation penalties.[213] Ultimately, courts will also decide how to calculate the number of violations in a given case.

1. Common Language in § 465.2(a), (b), and (c)

Proposed § 465.2 consisted of three paragraphs, each of which sought to address unfair or deceptive conduct by

[198] Trustpilot Cmt. at 12.

[199] *Id.*

[200] Chamber of Commerce Cmt. at 7.

[201] *Id.*

[202] *See infra* Section IV.E.2 of this document.

[203] Consumer Reports Cmt. at 4.

[204] Commenters also expressed concern about or sought guidance on the meaning of the term ''procure'' as used in proposed § 465.2(c), but they did not expressly suggest that the Commission define the term. The use of the term ''procure'' in § 465.2 is discussed below in the context of that substantive provision. *See infra* Section IV.B.4 of this document.

[205] *See Procure* (def. 1), *Merriam-Webster.com* Dictionary, *https://www.merriam-webster.com/dictionary/procure* (last visited July 5, 2024) (establishing that the word ''procure'' means, among other things, ''to get possession of (something)'' or ''to obtain (something) by particular care and effort'').

[206] Amazon Cmt. at 7. As discussed below, other commenters also argued that § 465.2 should not apply to merely hosting reviews. *See infra* section IV.B.5 of this document.

[207] *Id.* at 7.

[208] *See infra* section IV.B.5 of this document.

[209] *See, e.g.,* William Hardy, Cmt. on NPRM (July 31, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0002;* Eric Beback, Cmt. on NPRM (Aug. 1, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0005* (''Beback Cmt.''); Hippensteel Cmt.; Anderson Cmt.; Nathan Wilson, Cmt. on NPRM (Aug. 2, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0008;* fred foreman, Cmt. on NPRM (Aug. 6, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0012;* Ravnitzky Cmt. at 1; Fribance Cmt.; Ian wolk, Cmt. on NPRM (Aug. 15, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0020;* Edborg Cmt.; Anonymous 5, Cmt. on NPRM (Aug. 18, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0030;* Anonymous 1 Cmt.; Steven Osburn, Cmt. on NPRM (Aug. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0033* (''Osburn Cmt.''); Ludlam Cmt.; Janette Ponticello, Cmt. on NPRM (Sept. 5, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0042;* Hannah Abbott, Cmt. on NPRM at 1 (Sept. 20, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0051* (Abbott Cmt.).

[210] Pasabi, Cmt. on NPRM at 2 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0103.*

[211] Mark Cuban, Cmt. on NPRM (Sept. 25, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0066.*

[212] Transparency Company Cmt. at 9.

[213] *See* 15 U.S.C. 45(m)(1)(C).

prohibiting specified types of reviews or testimonials: (1) by someone who ''does not exist,'' (2) by someone ''who did not use or otherwise have experience with the product, service, or business that is the subject'' of it, or (3) ''that materially misrepresents, expressly or by implication, the [person's] . . . experience with the product, service, or business.'' For the purpose of the following discussion, references to ''fake or false'' reviews or testimonials cover these three types of reviews or testimonials.

A trade association asserted that the Commission lacked sufficient evidence of prevalence of reviews and testimonials that ''materially misrepresent[ ] . . . the reviewer's or testimonialist's experience.'' [214] The trade association asserted that some of the cases cited by the Commission also involved ''actual fake reviews'' and therefore should not count as evidence of prevalence.[215] The Commission disagrees: a fake or fabricated review misrepresents the purported reviewer's experience (*e.g.,* that the reviewer used the product and what their experience was). The commenter also asserted that five of the cases cited by the Commission to establish prevalence ''provide no additional details about the unfair or deceptive act or practice at issue aside from bare allegations that the consumer testimonials in the case involved misrepresentations of the consumer's experience,'' and therefore are insufficient to establish prevalence.[216] However, the quoted representations in each of the Commission's complaints makes clear the nature of the misrepresentations.[217] Furthermore, even if a Commission complaint does not provide all details about a specific misrepresentation, that does not mean that it cannot serve as evidence of prevalence. The Commission thus has a strong basis for its conclusion that reviews and testimonials misrepresenting the experiences of the reviewers and testimonialists are prevalent.

The same trade association and another one expressed concern that the ''prohibition on *all* reviews that are authored by individuals that [sic] 'do not exist' or have not used the product would prohibit a wide swath of non-deceptive speech, including for example, any satirical reviews that a business authors, creates, sells, purchases, disseminates, or procures.'' [218] As discussed in the NPRM, the Commission's intent was to prohibit misrepresentations resulting from reviews or testimonials by someone who does not exist or who did not use or otherwise have experience with the product, service, or business.[219] The Commission is unsure of the extent to which there are satirical reviews that could run afoul of the provision as proposed. Nonetheless, upon a review of the comments, the Commission now recognizes that absent an express reference to material misrepresentations, the provision could be interpreted to prohibit other potentially non-deceptive speech, such as the use of virtual influencers.[220] To avoid this unintended consequence, the Commission is clarifying that § 465.2 is limited to prohibiting material misrepresentations. As finalized, the prohibitions in § 465.2 are expressly limited to reviews and testimonials ''materially misrepresent[ing], expressly or by implication . . . that the reviewer or testimonialist exists; . . . that the reviewer or testimonialist used or had experience with the product, service, or business that is the subject of the review or testimonial; or . . . the reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial.''

A different trade association raised several concerns about the common language of proposed § 465.2. It asserted that the provision ''would prohibit the use of a dead person's endorsement because arguably that person does not exist.'' [221] The Commission does not interpret a person who ''does not exist'' to include a person who died after making an endorsement, but that concern should be resolved by the new language regarding material misrepresentations. The commenter went on to question ''what constitutes an 'actual experience,' '' asking whether a person who saw a label had actual experience with it and whether a person who tasted an item purchased at a restaurant but did not visit the restaurant had actual experience.[222] The proposed provision did not use the term ''actual experience,'' and the persons in the commenter's posited hypotheticals did have legitimate experience with the product or service but should not misrepresent that experience as more than it was. The commenter also said that ''it is unclear if the . . . element—materially misrepresenting the experience with the product or service—relates to the experience or an opinion about the product or service.'' [223] It relates to the person's ''experience'' with the product or service, that is, what actually happened when they used or otherwise experienced it and not simply their ''opinion'' of it. The same commenter asked whether ''an actor portraying an actual reviewer'' is misrepresenting their experience as long as it is ''clear that it is an actor portrayal.'' [224] The provision does not prohibit using an actor to portray a real testimonialist.

An individual commenter who raised the same concern about whether actors could portray real testimonialists [225] went on to express concerns that the actor ''shouldn't misrepresent who the original person was,'' such as by misrepresenting ''the effectiveness/health benefits of [a] product by hiring a very fit in shape person.'' [226] The Commission has issued guidance stating that ''use of an endorsement with the image or likeness of a person other than the actual endorser is deceptive if it misrepresents a material attribute of the endorser.'' [227] Nevertheless, the Commission does not intend for § 465.2 to address such misrepresentations.

A consumer organization's comment requested that the Commission ''explicitly indicate that fake . . . ratings are an independent and separate violation from deceptive narrative reviews.'' [228] The Commission believes that making this distinction is unnecessary and declines to make this change.

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[214] IAB Cmt. at 3.

[215] *Id.*

[216] *Id.* at 4 & n.12.

[217] Complaint at 8–11, 17–18, *FTC* v. *NextGen Nutritionals, LLC,* No. 8:17–cv–2807 (M.D. Fla. filed Nov. 20, 2017) (testimonials in ads made specific quantified claims of weight loss and blood pressure reduction); *In re Esrim Ve Sheva Holding Corp.,* 132 F.T.C. 736, 737 (2001) (testimonial made specific quantified claims about increased mileage and decreased harmful pollutants); *In re Computer Bus. Servs., Inc.,* 123 F.T.C. 75, 78 (1997) (endorsers made specific quantified earnings claims); *In re Twin Star Prods., Inc.,* 113 F.T.C. 847, 849–51, 853–54 (1990) (endorsements made regarding a weight-loss product, a baldness treatment, and an impotency treatment); *In re National Sys. Corp.,* 93 F.T.C. 58, 61–62 (1979) (testimonials about jobs obtained by graduates of respondents' schools).

[218] IAB Cmt. at 6; NRF Cmt. at 6.

[219] NPRM, 88 FR 49373.

[220] A virtual influencer is a computer-generated fictional character that can be used for a variety of marketing-related purposes, but most frequently for social media marketing, in lieu of human influencers. *See, e.g.,* Koba Molenaar, *Discover the Top 12 Virtual Influencers for 2024—Listed and Ranked!,* Influencer MarketingHub (Mar. 29, 2024), *https://influencermarketinghub.com/virtual-influencers/.*

[221] ANA Cmt. at 12.

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] Beback Cmt.

[226] *Id.*

[227] *See* Endorsement Guides, 16 CFR 255.1(g).

[228] TINA Cmt. at 8.

2. § 465.2(a)

Proposed § 465.2(a) would have made it a violation for a ''business to write, create, or sell a consumer review, consumer testimonial, or celebrity testimonial'' that is fake or false.

An individual commenter noted that the prohibition ''is too specific and it would be easy for a business to find an alternative method not prohibited by the rule.'' [229] The commenter posited an example: ''a business could have someone next to them tell them their review and someone could transcribe it, technically the business did not create, make, or sell anything and thus would not be in violation.'' [230] If a business is paying an individual to transcribe a fake or false review, it is creating or making the review, and would therefore have violated § 465.2(a). Accordingly, the Commission declines to modify the prohibition in response to the commenter's concern.

A trade association submitted a comment asking the Commission to ''confirm that when a real consumer authors the review, the business cannot be said to have written or created it, and thus . . . section [465.2(a)] could not apply.'' [231] The Commission is unsure what the commenter means by a ''real consumer authors the review.'' The provision would apply if, for example, a business employs a ''real consumer'' to write fifty reviews of a product under different names.

A comment from a retailer that publishes reviews said that ''review brokers and other bad actors . . . coordinate the high-volume writing, buying, and selling of fake reviews'' and that the rule should apply to those ''approaching customers, instructing them on how to create fake reviews and avoid detection, and connecting them with bad actors operating [fake] accounts.'' [232] Brokers of fake reviews would generally fall under the provision's prohibition against selling a consumer review, given that such brokers are generally being paid to provide fake reviews.

A trade association commenter suggested clarifying that ''business'' in § 465.2(a) ''refers to a business that helps to create or sell reviews or testimonials.'' [233] Although the paragraph does apply to such businesses, it also applies to a business that writes or creates fake reviews or testimonials for its own products or services. For this reason, the Commission declines to adopt the commenter's suggestion.

An individual commenter asked whether the prohibition covers ''people who leave reviews in good faith'' if ''they were getting paid for it.'' [234] Neither § 465.2(a) nor any section of the rule imposes liability on individual consumers who write honest reviews, even if they are paid for doing so.

Another individual commenter requested that civil penalties be imposed ''on the company for soliciting the reviews, rather than on the reviewer, unless the reviewer knowingly is leaving fake reviews.'' [235] Under § 465.2(a), an individual who is in the business of writing, creating, selling, or brokering reviews could be liable for creating consumer reviews that are fake or false. That individual could only be subject to civil penalties if they did so with actual knowledge or knowledge fairly implied on the basis of objective circumstances that they were engaging in an act or practice that is unfair or deceptive and is prohibited by the rule.[236]

An individual commenter expressed concern that ''competing parties could potentially create fake reviews on another party in order to give the impression that the party is in violation of the'' rule.[237] Although such misconduct is possible, the target of such misconduct would not be liable under § 465.2(a), based on how it is worded. For example, the target would not have been the one who created, wrote, or sold the review, nor would the target have purchased the review. The competitor who engaged in such misconduct might be liable for deceptive or unfair conduct under the FTC Act.

3. § 465.2(b)

Proposed § 465.2(b) would have made it a violation for a business to ''purchase a consumer review'' or ''disseminate or cause the dissemination of a consumer testimonial or celebrity testimonial'' about ''the business or one of its products or services'' which ''the business knew or should have known'' was fake or false.

A consumer organization commented that, by limiting § 465.2(b) to a business posting reviews or disseminating or causing the dissemination of testimonials about ''the business or one of its products or services,'' the Commission's proposal limits liability to the business itself ''instead of including other . . . creators or disseminators of deceptive reviews and testimonials.'' [238] In response to the commenter's concern, the Commission notes that those creating or disseminating deceptive reviews and testimonials could be liable under § 465.2(a).

A trade association asked whether a business '' 'disseminates' reviews for its products merely by . . . placing them in advertising/marketing materials.'' [239] Section 465.2(b) applies only to the dissemination of testimonials, but if a business includes consumer reviews in its advertising or marketing materials, those reviews become ''testimonials'' and are covered.

Another commenter requested that the Commission ''clarify the limited applicability of 'to disseminate or cause the dissemination' in proposed § 465.2(b) so the definition does not wrongly apply to third parties that host or license reviews.'' [240] The phrase ''to disseminate or cause the dissemination'' applies only to testimonials and not to consumer reviews, so it could not apply to third parties that host or license reviews. The only situation in which § 465.2(b) applies to consumer reviews is when a business purchases a consumer review.

4. § 465.2(c)

Proposed § 465.2(c) would have made it a violation for a business to ''procure a consumer review for posting on a third-party platform or website, about the business or one of its products or services,'' which ''the business knew or should have known'' was fake or false.

Several commenters questioned the scope and ''vagueness'' of the undefined term ''procure'' in proposed § 465.2(c).[241] A trade association wrote that ''the Commission should explain that a retailer does not 'procure a consumer review for posting on a third-party platform or website' simply by requesting that previous customers submit reviews, and then allowing submitted reviews to be posted on the retailer's own website or sharing customer reviews with Google.'' [242] The

[229] Albert Cmt. at 3.

[230] *Id.*

[231] IAB Cmt. at 6.

[232] Amazon Cmt. at 6.

[233] Computer & Communications Industry Association, Cmt. on NPRM at 3 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0110* (''CCIA Cmt.'').

[234] Wilson Cmt.

[235] Osburn Cmt.

[236] *See* 15 U.S.C. 45(m)(1)(A) (establishing that the recovery of civil penalties requires a showing of ''actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule'').

[237] Slezak Cmt. at 1.

[238] TINA Cmt. at 6 n.23.

[239] NRF Cmt. at 5.

[240] CCIA Cmt. at 3.

[241] NRF Cmt. at 4; ANA Cmt. at 12; IAB Cmt. at 4; Amazon Cmt. at 7.

[242] NRF Cmt. at 4.

Commission did not intend to cover such activities. Instead, the Commission intended to cover a much more limited set of activities: the procurement of fake and false reviews from company insiders. The Commission is therefore revising § 465.2(c) by limiting it to a business procuring consumer reviews ''from its officers, managers, employees, or agents, or any of their immediate relatives.''

A trade association's comment questioned the phrase ''its products or services'' in the context of what was proposed § 465.2(c).[243] It asked whether the term would apply to all of the products sold by a department store, an online marketplace, or a consignment business.[244] The Commission recognizes that the phrase ''its products or services'' was ambiguous. In order to address this inadvertent ambiguity, the Commission is making clarifying changes by replacing the phrase ''its products or services'' with the phrase ''the products or services it sells'' in § 465.2(b) and (c), as well as in other places where it appears in the rule.[245] The revised language captures what the Commission originally intended and would apply to products sold by a department store, an online marketplace, or a consignment business.

5. § 465.2(d)

Upon consideration of the comments received, the Commission is adding paragraph (d) in § 465.2 to clarify the scope of § 465.2(b) and (c). The Commission recognizes that, when a business sends a broad solicitation to customers to post customer reviews, one or more recipients might also be employees of the business. If any such employee then posts reviews, one might consider those reviews to have been ''procured'' from the employee. Similarly, the Commission recognizes that broad, incentivized solicitations to the general public or past customers to post about a product on social media could be considered ''causing the dissemination'' of testimonials. It would not be reasonable to expect a business to know whether such resulting reviews or testimonials were fake or false, and the Commission did not intend to cover those reviews in this section of the proposed rule. Therefore, the Commission is adding § 465.2(d)(1), which clarifies that § 465.2(b) and (c) do not apply to ''generalized solicitations to purchasers to post reviews or post testimonials about their experiences with the product, service, or business that is the subject of the review or testimonial.'' By ''generalized solicitations,'' the Commission means to exempt from § 465.2(b) and (c) solicitations sent to large groups of customers, such as those who purchased a particular item or who became customers during a given time period, where specific customers are not chosen based on the likelihood that they will express a particular sentiment. In contrast, solicitations made only to customers whom the business believes to be happy customers would not be ''generalized solicitations'' and would therefore be subject to § 465.2(b) and (c).

As the Commission said in the NPRM, § 465.2 does not ''apply to any reviews that a platform simply publishes and that it did not purchase.'' In other words, the Commission did not intend for § 465.2 to apply to platforms that simply host third-party content and does not believe that the section can be interpreted otherwise. Nonetheless, numerous commenters expressed concern over whether the section covered the mere hosting of third-party content.[246] A number of industry commenters and an individual commenter asked the Commission to expressly exempt those who host consumer reviews created by a third party.[247] Three industry comments asked the Commission to create a safe harbor for review hosting when the company has reasonable processes in place to identify and remove fake reviews.[248] Consistent with its statement in the NPRM, the Commission is adding § 465.2(d)(2) to provide an explicit exemption for ''merely engaging in consumer review hosting'' from the scope of § 465.2(b) and (c).

A trade association noted that, in the ''case of reviews being shared between retailers and third-party platforms,'' ''it would be unfair to immunize the search platform from liability for the review shared by the retailer, but not to immunize the retailer for the review created by the potential bad actor.''[249] However, a retailer or other entity will not be liable for sharing consumer reviews unless it would have been liable for displaying those same reviews on its own website.

Two comments raised the issue of hosting both reviews and testimonials. A trade association commenter expressed concern that the Commission should ''avoid sweeping in companies such as online retailers that host consumer reviews and testimonials and engage in activities such as organizing, moderating, aggregating, and prompting the submission of reviews and testimonials.''[250] Another trade association made a very similar comment and ''urge[d] the FTC to confirm that liability under this section would require the company to do more than host reviews/testimonials.''[251] As for reviews, § 465.2 will not prohibit an online business that hosts reviews from prompting the submission of reviews from the general public or from organizing, moderating, or aggregating them. Nonetheless, certain unfair or deceptive conduct that involves prompting the submission of reviews or moderation could violate § 465.4 or § 465.7(b), respectively.[252] As for testimonials, it is unclear what hosting scenarios the commenters are contemplating. The Commission is not adding an exemption for ''merely hosting testimonials'' because there is no provision in the rule that applies to testimonial hosting because testimonials are, by definition, advertising or promotional messages. A business that puts testimonials on its own website is ''disseminating'' them and is not merely ''hosting'' them. When such testimonials are fake or false, the business should face potential liability under this paragraph. On the other hand, a business that has on its website a community forum in which consumers can comment about the business and the products or services it sells could be merely hosting the community forum. A comment in the community forum touting one of the business's products, which was posted by a consumer who was not incentivized to do so and who has no other connection to the company, is not a testimonial in the first place, so it would not fall under § 465.2(b). The same analysis would apply to a business that hosted a section on its website

[243] *Id.* at 5.

[244] *Id.* at 5–6.

[245] See §§ 465.5(a), (b), and (c), 465.6, and 465.7(b) of the rule.

[246] One industry commenter expressed a general concern that was not tied to a specific provision ''that the Proposed Rule imposes liability on companies for the dissemination and/or display of fake reviews that clashes with Section 230 of the *Communications Decency Act.*'' TechNet Cmt. at 3. As discussed below, the Commission is including exemptions for mere consumer review hosting in §§ 465.2 and 465.5. *See infra* section IV.B.5 of this document.

[247] *See, e.g.,* NRF Cmt. at 5–6; IAB Cmt. at 6; Amazon Cmt. at 7–9; CCIA Cmt. at 3; Abbott Cmt.

[248] TechNet Cmt. at 2; IAB Cmt. at 5; NRF Cmt. at 7. A trade association also requested a ''safe harbor'' but did not tie it to any specific provision of the proposed rule. NADA Cmt. at 4.

[249] NRF Cmt. at 6.

[250] IAB Cmt. at 4.

[251] ANA Cmt. at 12–13.

[252] Prompting the submission of consumer reviews that must be positive in order to obtain an incentive could violate § 465.4. Moderation of consumer reviews that results in the suppression of some of them based upon their ratings or their negative sentiment could violate § 465.7(b).

where consumers could answer questions posed by other consumers.

A business organization commenter said the Commission should ''make clear [that] Section 465.2 does not apply to platforms or retailers that display ratings even if they prompt review submissions or aggregate star ratings of submitted reviews.'' [253] Paragraphs (b) and (c) of § 465.2 do not apply to mere consumer review hosting, even if the business prompts review submissions or aggregates star ratings.

The commenter continued by saying that ''the Commission must clearly indicate that the Rule provision would not apply to any website displaying a consumer review or testimonial that they did not purchase or procure,'' arguing that ''Section 230 [of the Communications Decency Act] . . . broadly immunizes providers of an interactive computer service from liability for presenting third party content.'' [254] If a business creates fake or false reviews or testimonials and displays them on its website, it is not presenting third-party content. It could be liable for such reviews or testimonials under § 465.2(a). The commenter made a similar argument with respect to the applicability of § 465.2(b) to a website that displays a fake or false testimonial and thus causes its dissemination.[255] Section 465.2(b) does apply if such testimonials are about the business or one of the products or services it sells. Such testimonials are advertising, not third-party content covered by section 230 of the Communications Decency Act (47 U.S.C. 230).

6. Knowledge Standard

Like proposed § 465.2(b) and (c), final § 465.2(b) and (c) are limited to situations in which businesses ''knew or should have known'' that they were engaging in the conduct that was prohibited. Commenters had varied reactions to this standard, with some finding it appropriate, others finding it too high, and others finding it too low.

A corporate commenter noted that, for the purpose of § 465.2(b) and (c), '''[s]hould have known' needs to be the standard.'' [256] Similarly, an individual commenter recommended that the FTC adopt the ''knew or should have known'' standard for purposes of § 465.2(b) and (c):

> because it: (1) sufficiently effectuates consumers' shared interest in reducing the prevalence of unfair or deceptive online consumer reviews and testimonials, (2) avoids unfairly imposing liability on unwitting, blameless business transgressors, and (3) conveniently aligns with the FTC's existing ''has good reason to believe'' standard for similar purpose of application of FTC Act Section 5 to the use of endorsements and testimonials in advertising.[257]

However, several commenters objected to the imposition of civil penalties based upon a ''should have known'' standard, believing that standard would be too onerous.[258] For example, an industry organization said that proposed § 465.2(b) and (c) are ''problematic because [they] place[ ] the onus on the business to have knowledge of the author's state of mind as to whether their actual experience was expressed. . . , an impossible task for anyone but the'' author.[259] The industry organization also claimed that the risk of a civil penalty will ''likely . . . compel businesses to drastically limit the consumer reviews or testimonials they seek out or even allow on their websites.'' [260] Under section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A), however, the Commission can seek civil penalties for a rule violation only by showing that a defendant had ''actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule'' (hereinafter shortened to ''actual knowledge or knowledge fairly implied''). A lower knowledge standard in a Commission rule—such as the ''knew or should have known'' standard found within certain sections of the proposed rule—does not override the higher standard found in section 5(m)(1)(A) of the FTC Act. The Commission has not suggested otherwise in the course of this rulemaking.

Other commenters objected similarly, saying that ''knew or should have known'' is too low as a knowledge threshold and that the standard should be actual knowledge, but did not tie their concerns to the imposition of civil penalties.[261] For example, some of the comments expressing concern about a ''knew or should have known'' standard appeared to focus primarily on the standard's supposed applicability to, and harsh impact on, websites hosting reviews.[262] As another example, a trade association commenter recommended ''that the Commission define 'knew,' as used in . . . § 465.2, as 'having actual knowledge,' and remove the 'should have known' language.'' [263]

Additionally, two commenters advocated for a standard higher than ''should have known'' but lower than actual knowledge. With respect to activities such as ''purchasing'' a review, they said that businesses should be held responsible for ensuring the reviews are authentic but recommended a ''knew or consciously avoided'' standard.[264] One of the commenters asserted that the proposed ''should have known'' standard ''is vague and does not provide adequate specificity about the sorts of actions businesses should take to ensure that they will not be held liable for not detecting that a review they purchased was fake.'' [265] The commenter said a ''consciously avoided'' knowing standard would allow for liability when a business takes no steps to respond to receiving repeated complaints raising red flags about the authenticity of a particular purchased review.[266]

As part of the NPRM, the Commission also inquired whether, instead of the ''should have known'' standard, the Commission should adopt a ''knew or could have known'' standard. Only two commenters addressed that proposed standard. An individual commenter said that such a standard would ''ambiguously expand the proposed Rule's prosecutorial scope and possibly open unsuspecting businesses to financial penalties for violations they had no inkling of having committed in the moment.'' [267] Another individual commenter, who incorrectly thought the proposed rule provided a private right of action, said that such a standard ''provides scienter never used in consumer law'' and the ''courts could potentially become overwhelmed with an influx of claims.'' [268]

Other commenters advocated for a lower standard than ''knew or should have known.'' An individual commenter did not think that ''knew or should have known'' was appropriate because it would make it ''very difficult to prove'' violations and recommended that the Commission require ''businesses to be able to show they used reasonable

[253] Chamber of Commerce Cmt. at 4.

[254] *Id.*

[255] *Id.*

[256] Transparency Company Cmt. at 11.

[257] Poole Cmt. at 2.

[258] IAB Cmt. at 5–6; NRF Cmt. at 2–5; NADA Cmt. at 3–4; Chamber of Commerce Cmt. at 2–3; TechNet Cmt. at 2.

[259] TechNet Cmt. at 2.

[260] *Id.*

[261] Amazon Cmt. at 8; ANA Cmt. at 13; Trustpilot Cmt. at 5, 8; NRF Cmt at 3; Family First Life Cmt. at 5–8.

[262] Amazon Cmt. at 7–8; ANA Cmt. at 12–13; NRF Cmt. at 2–5. One trade association commenter disagreed, asserting that the ''knew or should have known'' standard the Commission proposed for § 465.2 will ''not unduly burden review platforms.'' Travel Tech Cmt. at 4.

[263] NRF Cmt. at 3.

[264] Amazon Cmt. at 9; IAB Cmt. at 5.

[265] Amazon Cmt. at 9.

[266] *Id.*

[267] Poole Cmt. on at 1.

[268] Albert Cmt. at 3.

diligence through policies and procedures to prove that the[ ] reviews are legitimate.'' [269] A consumer organization said in its comment that ''there is no need for a knowledge or intent requirement under this Rule'' as ''Section 5 of the FTC Act does not otherwise require the Commission to prove knowledge or intent when enforcing against entities engaging in deceptive practices.'' [270] It continued that ''the Commission can and should consider knowledge and intent in deciding the equities of bringing any enforcement action.'' [271]

After reviewing and considering the comments received, the Commission believes that the most appropriate standard for imposing liability under § 465.2(b) and (c) is the ''knew or should have known standard.'' As discussed above,[272] those paragraphs were not intended to apply to consumer review hosting and § 465.2(d)(2) now contains an explicit exemption for consumer review hosting.[273] Thus, the ''knew or should have known'' language in § 465.2(b) and (c) will not have a harsh impact on review platforms, as some of the commenters suggested. Eliminating the knowledge standard altogether, however, may indeed have an overly harsh impact on businesses in some circumstances, and the idea garnered almost no public support. For example, it would be unreasonable to hold a company liable for publishing a testimonial when it had no reason to know that the testimonial misrepresented the testimonialist's experience. The Commission sees no reason why the standard should be higher than ''knew or should have known.'' The ''knew or should have known'' standard—which the Commission has used in other rules [274]—thus best achieves the appropriate, equitable balance between protecting consumers and holding marketers accountable for deceptive conduct while not overly burdening marketers that engage in the responsible use of reviews and testimonials.

Two trade associations' comments said that if ''the Commission . . . imposes a 'should have known' standard, the Commission must provide greater clarity about what sorts of indicators of inauthenticity would provide companies with sufficient notice to trigger liability.[275] They both said, ''Without that guidance and faced with the risk of significant civil penalty exposure for failing to stop the actions of undiscovered third parties, many businesses would likely be deterred from using consumer reviews or testimonials at all.'' [276] The Commission has already addressed the knowledge standard found in section 5(m)(1)(A), which applies to the imposition of civil penalties. In the discussion of § 465.2(b) and (c) below, the Commission provides further guidance as to what is intended by ''knew or should have known.''

Several other commenters discussed general views about the application of the ''knew or should have known'' standard. For example, an individual commenter said that ''[a] business cannot always reasonably know that a testimonial contains testimony that is fake or false, if the influencer expresses to them that it is true.'' [277] The Commission agrees with this assertion.

A comment from a public interest research center said that the ''lack of an adequate endorser oversight program should be a per se violation of the 'know or should have known' standard as that is tantamount to the company deliberately avoiding knowing.'' [278] A consumer organization commenter said that the following actions should be considered knowledge that a review is fake or false: ''failure to meaningfully police'' for suspicious review activity, ''inducements to provide reviews without clearly instructing the reviewer to clearly disclose material conflicts,'' ''materially incentivizing reviews where it's impossible to convey material conflicts (*e.g.,* providing a five-star review with no accompanying narrative on TripAdvisor),'' and ''failure to take meaningful steps to confirm the existence of the purported celebrity or meaningfully document the celebrity's purported experience with the product or service.'' [279] The Commission encourages businesses to have endorser oversight programs, and whether a company has and follows such a program could impact the exercise of prosecutorial discretion. The Commission does not intend, however, for companies to be liable under this section of the rule based merely on the absence of an oversight program or on these other suggested bases.

A corporate commenter said that ''how a business 'should have known' that a reviewer does not exist is not apparent,'' and posited that, under a ''should have known'' standard, ''perhaps [a] business may be under a duty to reach out to the reviewer, but it is unclear how many resources the business must expend to attempt to contact the reviewer.'' [280] First, as noted, § 465.2(d)(2) exempts businesses merely engaging in consumer review hosting from § 465.2(b) and (c). Another key limitation here is the exemption for generalized solicitations under § 465.2(d)(1). That exemption means that businesses can send such solicitations to their customers without creating any investigative obligation for resulting reviews under § 465.2(b) or (c), even if such reviews have been ''purchased.'' [281]

With respect to ''purchased'' reviews under § 465.2(b)the rule's ''knew or should have known'' standard does not impose a general duty to reach out to the reviewers or investigate whether each resulting review is fake or false. While each case will depend on its specific facts, it is possible that a business may possess clear indications that purchased reviews are likely to be fake or false, in which case a failure to investigate further may trigger liability under the ''should have known''

[269] Annie Horgan, Cmt. on NPRM at 1–2 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0058.*

[270] Consumer Reports Cmt. at 4.

[271] *Id.* at 4–5. An individual commenter disagreed, stating that ''the complete removal of a knowledge requirement in favor of a strict liability approach would almost guarantee situations of unwarranted punishment under the proposed rule.'' Poole Cmt. at 3.

[272] *See supra* section IV.B.5. of this document.

[273] The final rule would therefore not require a business that is merely hosting consumer reviews on its platform to prove that the reviews it is hosting are legitimate.

[274] Other Commission rule provisions with a ''knew or had reason to know'' requirement include § 460.8 of Labeling and Advertising of Home Insulation (commonly known as the R-Value Rule), which prohibits non-manufacturers of home insulation from relying on R-value data provided by the manufacturer if they ''know or should know'' the data is false or not based on proper tests. 16 CFR 460.8; *see also* 16 CFR 460.19(e) (non-manufacturers are liable only if they ''know or should know that the manufacturer does not have a reasonable basis for the claim''); 16 CFR 436.7(d) (franchise sellers must notify prospective franchisees of any material changes ''that the seller knows or should have known occurred'').

[275] IAB Cmt. at 5–6; ANA Cmt. at 13. An individual commenter said that the Commission should ''provide some clear and objective criteria or indicators for identifying fake reviews, such as the use of bots, scripts, templates, or multiple accounts, or the lack of verifiable purchase or experience, or the inconsistency with other reviews or information'' and this ''would help businesses and consumers to distinguish between genuine and fake reviews.'' Ravnitzky Cmt. at 1.

[276] IAB Cmt. at 5–6; ANA Cmt. at 13. As explained above, these concerns are unwarranted given that the ''should have known'' standard has no bearing here on the imposition of civil penalties, for which the Commission must prove that a defendant met the higher knowledge standard of section 5(m)(1)(A) of the FTC Act.

[277] Taylor V, Cmt. on NPRM at 2 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0062* (''Taylor V. Cmt.'').

[278] EPIC Cmt. at 3.

[279] Consumer Reports Cmt. at 5.

[280] Family First Life Cmt. at 6.

[281] Paying for or giving other incentives in exchange for consumer reviews expressing a particular sentiment regarding the product, service, or business that is the subject of the review would violate § 465.4 of the rule.

standard. For example, a business that hires a third party to provide free samples of its products to consumers in order to generate reviews, without more, may have no reason to investigate the resulting reviews. However, a business may be on notice that the resulting reviews are likely fake or false if they are submitted too quickly after purchase or many of them are submitted in a very short period of time or refer to the wrong product. As for § 465.2(c), which applies only to reviews by insiders, a possible reason for knowing that such reviews are likely fake or false could be that an insider sent emails to a manager over time that together showed that the insider was using multiple accounts to submit reviews to the same website.

A company that is in the business of identifying fake consumer reviews described ways that a business purchasing or procuring a consumer review should know that the review is fake or false. These indications include the named reviewer not being a customer, the content of the review being vague or odd, many reviews arriving at once, and the use of unnatural language or ''keyword stuffing.'' [282] A review platform commenter gave similar ways that a business could identify fake reviews, such as ''the review text describes a product or service that is not offered by the business, the review clearly references the wrong business name, or perhaps if a review . . . acknowledges that the reviewer has never shopped there.'' [283] Although, as previously stated, each case depends on its specific facts, these various indications may indeed suggest that one or more purchased or insider reviews are likely fake or false, in which case a failure to reasonably investigate them may trigger liability under the ''should have known'' standard.

With respect to testimonials, there may be red flags that should indicate to a business that a testimonial is likely fake or false, and, thereby, would serve as indicia of the fact that the business should have known that the testimonials that it disseminated were fake or false. For example, the Commission alleged that Google asked iHeartMedia, Inc. radio personalities to record product testimonials for a smartphone using a standard script written for Google and refused to provide the radio personalities with the product when requested.[284] If a business provides the text for a testimonial, it should have a reasonable basis to conclude, based on inquiry or otherwise, that the text is truthful for the testimonialist. A testimonialist asking for the product should cause a business to question whether the testimonialist used the product. If a business knows that a testimonialist is using a competing product, it should inquire into whether a testimonial for its own product is truthful. For example, a business should investigate whether a celebrity testimonial for its new smartphone is false if the testimonial claims the celebrity exclusively uses the smartphone, but the social media post containing the testimonial indicates that the celebrity posted it using a competing smartphone brand.

A review platform said in its comment that, ''if procuring fake reviews is the action of a single, rogue employee trying to help the business they work for, on a practical level it may be difficult for a business to have knowledge of'' it.[285] The commenter suggested that the Commission consider ''whether it is in fact disproportionate for knowledge and liability to be attributed to a business because of the actions of a well-intentioned rogue employee.'' [286] Whether a business will be held responsible under the rule for a rogue employee under a ''knew or should have known'' standard will be a fact-intensive inquiry. While a business may not be aware of every employee's activities, it should be pay attention to red flags. Assuming that the facts are such that the business should have known of the rogue employee's actions, whether the business would also be subject to civil penalties would depend on whether a court finds that the business met the actual knowledge or knowledge fairly implied standard of section 5(m)(1)(A) of the FTC Act.

7. Other Proposals

Some commenters suggested that the Commission impose additional requirements. Many commenters suggested that third-party platforms featuring reviews should be held responsible for certain conduct, such as for: failing to report businesses that they suspect are posting fake reviews,[287] the ''lack of identification verifications,'' [288] not posting notices reminding consumers that there is no guarantee of the veracity or accuracy of customer reviews,[289] engaging in review ''manipulation'' for advertising purposes,[290] failing to disclose publicly certain information about posted reviews,[291] or failing to employ reasonable measures to root out fraud and deceptive reviews.[292] A review platform suggested imposing requirements on social media companies and internet service providers to address the sale of fake reviews,[293] and a trade association proposed that the Commission require reviewers to identify themselves and that social media sites hosting reviews verify reviewers' identities.[294] As explained above, the Commission's intent from the outset of this rulemaking was to focus on clearly unfair or deceptive conduct involving reviews and testimonials. This intent is reflected in, as explained above, the addition of a definition of the term ''consumer review hosting'' and the explicit exclusion of such mere hosting from the coverage of certain rule provisions. This focus should not be taken to signal that third-party platforms do not bear significant responsibility for combatting fake reviews.

An individual commenter recommended ''requir[ing] proof of purchase of [a] product for a consumer to leave a review.'' [295] Another individual commenter would have the Commission hold businesses that recruit, direct, and compensate influencers responsible for the influencers' false or fake testimonials.[296] A third commenter asked that the Commission ''ensure there is a way for anyone who is believed to have violated reviewing policies [to have] a chance to reinstate their ability to leave

[282] Transparency Company Cmt. at 11.

[283] Trustpilot Cmt. at 10.

[284] Complaint at 2–5, *In re Google, LLC,* Nos. C–4783 and C–4784 (F.T.C. Feb. 8, 2023).

[285] Trustpilot Cmt. at 9–10.

[286] *Id.*

[287] Anonymous 3 Cmt.

[288] Foster Cmt. at 2.

[289] Frieling Cmt. at 2; *see also* Anonymous 6, Cmt. on NPRM (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0082.*

[290] Wilhelmina Randtke, Cmt. on NPRM at 1 (Sept. 26, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0068.*

[291] Fake Review Watch Cmt. at 2–3.

[292] Consumer Reports Cmt. at 3.

[293] Trustpilot Cmt. at 3, 7.

[294] ADA Cmt. at 2.

[295] Albert Cmt. at 4; *see also* Yanni Kakouris, Cmt. on NPRM at 1, 3 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0055.* The commenter also expressed concerns that ''violators are too difficult to track,'' asserted that civil penalties would somehow deter consumers from posting honest, negative comments about a business, and misunderstood the purpose and use of civil penalties, thinking that a large portion of civil penalties would go to businesses maligned by false comments. *Id.* at 1–2. A review platform commenter said that the proposed rule ''upholds legitimate consumer speech by ensuring that, 'proposed § 465.2 does not limit legitimate reviews to reviews by purchasers or verified purchasers' '' and ''by preserving anonymous reviews.'' Tripadvisor LLC, Cmt. on NPRM at 4–5 (Sept. 29, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0092* (''Tripadvisor Cmt.'').

[296] Taylor V. Cmt. at 2.

reviews.'' [297] A consumer organization recommended making clear that ''it is a deceptive practice to aggregate fake reviews in a product's consumer rating'' and that ''reviews requiring a disclosure should not be included in a product's rating.'' [298] The Commission appreciates these additional suggestions but declines to add any of them to the rule. The suggestions are beyond the scope of the rulemaking, which focuses instead on those responsible for clearly unfair or deceptive acts or practices regarding reviews and testimonials, and which is limited to those acts or practices for which the Commission has evidence of prevalence.

In response to other commenters suggesting that the Commission impose liability on review sites and online retailers, a trade association asked the Commission to make clear that sections 5 and 18 of the FTC Act contain no express authorization for assisting-and-facilitating liability.[299] As this legal issue goes beyond, the context of this rulemaking, the Commission declines to address it here.

C. § 465.3—Consumer Review or Testimonial Reuse or Repurposing

Proposed § 465.3 sought to address a business using or repurposing a consumer review written or created for one product so that it appears to have been written or created for a substantially different product. It also sought to cover businesses that caused such use or repurposing.

The Commission received varied comments, both supportive and critical, about this provision.[300] As described above, some commenters also raised concerns about the definition of ''substantially different product,'' a term that appeared only in this provision and is key to determining the circumstances in which the provision would apply; one of those commenters proposed a disputed issue of material fact related to that definition.[301] The Commission would need to address those concerns before finalizing the provision. As it is not able to resolve those concerns on the current rulemaking record, the Commission has decided not to finalize the provision. If the Commission chooses later to engage in further rulemaking regarding the provision, it will address the comments at that time.

D. § 465.4—Buying Positive or Negative Consumer Reviews

Proposed § 465.4 sought to address businesses providing ''compensation or other incentives in exchange for, or conditioned on, the writing or creation of consumer reviews expressing a particular sentiment, whether positive or negative, regarding the product, service, or business that is the subject of the review.'' Based on the following, the Commission has decided to finalize this provision with two modifications.[302]

Comments from a retailer and a trade association expressed that they found the section important and useful. The retailer said, ''This section is important to ensure that the rule covers bad actors that seek inauthentic reviews reflecting a particular predetermined sentiment.'' [303] The trade association wrote, ''Providing compensation in exchange for reviews that must reflect a particular sentiment is a deceptive practice,'' and expressed support for ''the Commission's goal of targeting and eliminating this practice.'' [304]

Three individual commenters mistakenly thought that proposed § 465.4 banned paid or incentivized customer reviews and were opposed to such a ban. One of them said the proposed provision would ''ban reviews which are made by those who have been provided an item,'' that ''[g]enerally the writer includes a list of sponsors on, or within, their blog/website,'' and that ''[i]f such sponsorship relationships are eliminated . . ., the ability of writers to review a variety of items will disappear.'' [305] The second one wrote, ''Section 465.4 of the proposed rule prohibits the incentivization of or compensation on for the creation of consumer reviews or testimonials. . . . [I]t is unnecessarily restrictive.'' [306] The third commenter did not support the provision ''forbidding paying for reviews'' because the practice ''does not . . . deceive the public unless the paid review service dictates that the review must be positive.'' [307] These commenters misunderstand the nature of § 465.4. First, § 465.4 does not apply to testimonials, only to consumer reviews, and then only to reviews that appear on a website or portion of a website dedicated to receiving and displaying such reviews. A blogger's ''review'' is not considered a consumer review for purposes of the rule; if such a review was incentivized, it would be considered a testimonial. Second, § 465.4 does not prohibit paid or incentivized consumer reviews. It only prohibits paid or incentivized consumer reviews when the business soliciting the review provides compensation or an incentive in exchange for a review expressing a particular sentiment.

In Question 12 of the NPRM, the Commission asked whether the prohibition in § 465.4 should ''distinguish in any way between an explicit and implied condition that a consumer review express a particular sentiment.'' [308]

A business commenter responded, ''Real consumers' reviews often contain multiple sentiments on what businesses did right and what they did wrong. This is helpful.'' [309] The meaning of this comment is unclear.

Another business commenter responded to Question 12 of the NPRM by stating that § 465.4 ''should unequivocally prohibit explicit conditions only,'' because this would ''provide[ ] a clear standard for businesses and reviewers to follow,'' and ''the lack of clarity in how the Proposed Rule would prohibit 'implied conditions' [would] stifle[ ] businesses' ability to encourage and to entice reviews in a legitimate manner.'' [310] The Commission disagrees and believes that businesses are capable of soliciting and encouraging reviews without suggesting that the reviews must be positive to obtain an incentive. The commenter also asserted that the Commission ''has no experience bringing enforcement actions against a business for allegedly creating an implied condition that a review or endorsement be positive,'' referencing the cases the Commission cited in the NPRM.[311] That assertion is incorrect. The respondent in *AmeriFreight, Inc.* did not expressly state that the reviews needed to be positive but only implied it, encouraging past customers to submit reviews in order to be eligible for a $100 ''Best Monthly Review Award'' given to ''the review with the most captivating subject line and best content.'' [312] The respondent also told past customers that

[297] Osburn Cmt.

[298] TINA Cmt. at 6.

[299] Chamber of Commerce Cmt. at 2.

[300] *See, e.g.,* IAB Cmt. at 7–8; ANA Cmt. at 14; Chamber of Commerce Cmt. at 5–6; Trustpilot Cmt. at 10; Consumer Reports Cmt. at 5–6; Amazon Cmt. at 10; CCIA Cmt. at 3; NRF Cmt. at 7–8; Ravnitzky Cmt. at 2.

[301] *See supra* sections I.C. and IV.A.2.j of this document.

[302] One minor modification is changing ''Rule'' to ''part.''

[303] Amazon Cmt. at 6.

[304] IAB Cmt. at 8.

[305] Alex Rooker, Cmt. on NPRM (Aug. 15, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0019.*

[306] Frieling Cmt. at 2.

[307] Anonymous 7, Cmt. on NPRM (Aug. 15, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0021.*

[308] NPRM, 87 FR 49389.

[309] Transparency Company Cmt. at 12.

[310] Family First Life Cmt. at 8–9.

[311] *Id.* at 10–11.

[312] *In re AmeriFreight, Inc.,* 159 F.T.C. 1626, 1627–30 (2015).

they should ''be creative and try to make your review stand out for viewers to read.'' [313]

Two trade associations gave examples of what they asserted were innocuous requests for reviews that could be considered as implying that reviews need to be positive in order to receive an incentive. One said that its members will sometimes automatically contact customers saying, ''Tell us how much you loved [product] for 10% off your next purchase!'' and that such a request could ''be read to violate this Section of the Proposed Rule—even if a negative review would still entitle the consumer to the incentive or bonus.'' [314] The other commenter wrote that, if the Commission says that ''a business may not implicitly seek positive reviews in exchange for incentives, then the rule could apply to such offers as, 'Tell us how much you loved your visit to John's Steakhouse and get a $5 coupon' or 'Tell your friends about all the fun you had at Jane's Arcade for a chance to win prizes,' '' and asserted that such requests are justified because businesses ''prefer to use these enthusiastic and positive messages when seeking reviews, as opposed to less inspiring messages like, 'Write a review and save 10% next time.' '' [315] The problem with the enthusiastic and positive messages suggested by these commenters is that consumers receiving them could reasonably take the message that their reviews must be positive and enthusiastic in order to obtain the reward. As the second commenter noted, there are perfectly acceptable, albeit less ''inspiring,'' alternatives. The second commenter also said that ''a reasonable consumer would infer that a business prefers positive reviews, and so even a neutral request such as, 'Write a review and receive a discount off your next purchase,' might be construed as impliedly requesting a positive review.'' [316] The Commission disagrees. The fact that businesses prefer positive reviews is not a basis on which to conclude that consumers would interpret any such ''neutral request'' as containing an implied condition that reviews must be positive to receive the offered discount.

A consumer organization said in its comment that, ''[w]hen a reviewer feels pressured to express a certain sentiment, regardless of how that pressure was generated, the net result is a deceptive review,'' and that there should be ''no distinction made between explicitly and implicit conditioning of compensation or other incentives.'' [317] A second consumer organization commenter said that ''[i]mplied conditions may be just as salient as express conditions'' and quoting *Aronberg* v. *FTC,* 132 F.2d 165, 167 (7th Cir. 1942), said that, ''[i]n interacting with businesses, '[t]he ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.' '' [318] The Commission agrees with both of these commenters.

Advocating for limiting the provision to express conditions, a trade association acknowledged that the NPRM clarified that the provision does not cover review gating,[319] the mere solicitation of positive reviews, or incentivized reviews (except for those required to express a particular sentiment), but argued that, ''[r]egardless, the Proposed Rule still could be read to prohibit such behavior—*i.e.,* when a Company solicits a review that it has reason to believe will be positive.'' [320] The Commission does not consider this statement to be a fair reading of the provision. Just because a business engages in review gating or otherwise expects reviews to be positive does not mean there is either an express or implied requirement that reviews need be positive to obtain an incentive. The Commission notes that, although § 465.4 does not cover ''review gating,'' review gating can nonetheless violate section 5 of the FTC Act.[321]

A review platform commenter said that prohibiting an ''implied condition to express a particular sentiment could create a number of gray areas'' and ''encouraged the FTC to provide guidance and examples to businesses.'' [322] The examples, discussed above, by the trade association asking consumers to say how much they ''love'' something or how much fun they had are excellent examples of implied conditions.

The Commission has decided to clarify that the rule prohibits businesses from providing incentives conditioned on the writing or creation of consumer reviews expressing a particular sentiment, regardless of whether the conditional nature of the incentive is express or implicit. For this purpose, the Commission is adding the phrase ''expressly or by implication'' in § 465.4 to clarify that, although the incentive needs to be conditioned on the writing or creation of consumer reviews expressing a particular sentiment in order for conduct to violate § 465.4, the condition may be implicit.

Three commenters argued that the Commission should allow the compensation or incentives addressed in § 465.4 as long as they are disclosed in the resulting reviews. For example, the first commenter wrote, ''A reasonable consumer can easily understand that when a reviewer is incentivized or compensated, the content they produce may be skewed in a more positive light. A mere disclaimer is sufficient to stave off misrepresentation.'' [323] This statement may be correct for some incentivized reviews when there is no express or implied condition for those reviews to express a particular sentiment. For such reviews, an adequate disclosure that incentives were provided in exchange for the review may be able to cure a misleading impression that the reviews were independent and unbiased. However, such a disclosure does not reveal to consumers the requirement that reviews be positive. In addition, even if an individual review disclosed that it resulted from incentives requiring the review to be positive, such a disclosure would not be effective in instances where a consumer relies on the overall average star rating and does not read all individual reviews. Furthermore, the Commission believes that, if incentives are conditioned on reviews expressing a particular sentiment, many resulting reviews will not be merely misleading but false. For example, the offer of an incentive in exchange for a positive review may lead some reviewers to create positive reviews even when they had a negative experience with the product, service, or business. No disclosure can adequately cure a false review.[324]

[313] *Id.* at 1628.

[314] NRF Cmt. at 8.

[315] ANA Cmt. at 8.

[316] *Id.*

[317] Consumer Reports Cmt. at 6.

[318] TINA Cmt. at 10. An individual commenter described the pressure they felt to leave a positive review of a car dealership in order to receive a gift card and said that proposed ''§ 465.4 should . . . address both explicit and implied conditions of incentivization.'' Anonymous 8, Cmt. on NPRM at 3–5 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0061.*

[319] As the Commission explained in the NPRM, ''Review gating occurs when a business asks past purchasers to provide feedback on a product and then invites only those who provide positive feedback to post online reviews on one or more websites.'' *See* NPRM, 88 FR 49379.

[320] NRF Cmt. at 9. The commenter went on to ask that ''the Rule be revised to only prohibit companies from '. . . provid[ing] compensation or other incentives in exchange for . . . consumer reviews *explicitly required to express* a particular sentiment, whether positive or negative. . . .' '' (emphasis in original). *Id.*

[321] *See* Endorsement Guides, 16 CFR 255.2(d) and (e)(11).

[322] Trustpilot Cmt. at 11.

[323] Frieling Cmt. at 3.

[324] *See* FTC Policy Statement on Deception, 103 F.T.C. at 180 (''[*P*]*ro forma* statements or

The second commenter taking this position pointed to examples in the Endorsement Guides,[325] claiming inaccurately that they stand for the proposition that businesses are allowed to offer incentives in exchange for positive reviews.[326] The Endorsement Guides do contain an example involving incentives for reviews conditioned on the reviews being positive: ''[a] manufacturer offer[ing] to pay genuine purchasers $20 each to write positive reviews of its products on third-party review websites.'' [327] However, consistent with the Commission's approach in this section, the Guides provide that ''[s]uch reviews are deceptive *even if the payment is disclosed* because their positive nature is required by, rather than being merely influenced by, the payment.'' [328]

The third commenter taking this position suggested that it should be acceptable to use a disclosure like, ''We asked customers to tell us how much they loved their visit to John's Steakhouse, and here's what some of them said! (customers who submitted reviews received a $5 coupon).'' [329] The scenario the commenter describes does not involve consumer reviews. It involves consumer testimonials, which are not covered by § 465.4. Further, it is unlikely that one could make such a disclosure in the context of consumer reviews, given how reviews are usually presented on a business's own website and the lack of control over the way they are presented on a third-party website. In addition, the disclosure does not communicate that the customers had to ''tell how much they loved their visit *in order to* receive a $5 coupon.'' Furthermore, as discussed above, many incentivized reviews conditioned on consumers saying how much they ''loved their visit'' are likely false regardless of such a disclosure.

Two commenters, an individual and a review platform, requested that § 465.4 go further and prohibit all incentives given in exchange for reviews regardless of any requirement to express a particular sentiment.[330] An individual commenter would have the Commission ''require businesses to disclose any form of incentive that they provide or arrange for reviewers.'' [331] These requests are beyond the scope of this rulemaking but are addressed in the Endorsement Guides, which provide that unexpected material connections such as incentives given in exchange for customer reviews without any requirement as to the sentiment of the reviews must be disclosed clearly and conspicuously.[332] The Commission continues to believe that this principle from the Endorsement Guides is an appropriate expression of what incentivized review practices would or would not violate section 5 of the FTC Act. In any event, there is no basis on the current rulemaking record for the Commission to conclude that *all* incentivized reviews should be prohibited or that *all* incentivized reviews should require a disclosure.

Two commenters, an individual and a review platform, recommended that § 465.4 also prohibit offering compensation to remove or change consumer reviews.[333] Another individual commenter inquired about paid review removal without stating a position on the topic.[334] The Commission previously noted that, ''[i]n procuring [or] suppressing . . . consumer reviews of their products, advertisers should not take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products.'' [335] A product marketer paying consumers to change or remove truthful negative reviews may be engaging in an unfair or deceptive act or practice that has the effect of distorting or otherwise misrepresenting what consumers think of a marketer's products. Nevertheless, that act or practice is beyond the scope of this rulemaking.

E. § 465.5—Insider Consumer Reviews and Consumer Testimonials

Proposed § 465.5 sought to prohibit certain undisclosed insider reviews and testimonials. It had three subparts. Proposed § 465.5(a) would have prohibited an officer or manager of a business from writing or creating a consumer review or consumer testimonial about the business or one of its products or services that failed to have a clear and conspicuous disclosure of the officer's or manager's relationship to the business.[336] Proposed § 465.5(b) would have applied to testimonials, but not consumer reviews. It would have prohibited a business from disseminating or causing the dissemination of a consumer testimonial about the business or one of the products or services by one of its officers, managers, employees, or agents, or any of their relatives, if that testimonial failed to have a clear and conspicuous disclosure of the testimonialist's relationship to the business or to the officer, manager, employee, or agent, and if the business knew or should have known of that relationship. Proposed § 465.5(c) would have applied to consumer reviews, but not testimonials, and would have been limited to when an officer or manager of a business solicits or demands a consumer review about the business or one of its products or services from an employee, an agent, or a relative of any such officer, manager, employee, or agent. Proposed § 465.5(c) would have prohibited that conduct when (1) the person requesting the review knew or should have known the prospective reviewer's relationship to the business (or to one of its officers, managers, employees, or agents), (2) the request resulted in a consumer review without a disclosure, and (3) the person requesting the review (a) did not instruct the prospective reviewer to disclose clearly and conspicuously that relationship, (b) knew or should have known that such a review appeared without such a disclosure and failed to take remedial steps, or (c) encouraged

disclaimers may not cure otherwise deceptive messages''); *Removatron Int'l Corp.* v. *FTC,* 884 F.2d 1489, 1497 (1st Cir. 1989) (''Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.''); Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long-Distance Services to Consumers (Mar. 1, 2000), *https://www.ftc.gov/system/files/documents/public_statements/297751/000301jpsdeceptoveads.pdf* (''If a claim is false, a disclosure that provides contradictory information is unlikely to cure the deception.''); *FTC* v. *Direct Marketing Concepts, Inc.,* 624 F.3d 1, 12 n.9 (1st Cir. 2010) (''A statement that studies prove a product cures a certain disease, followed by a disclaimer that the statement is opinion and the product actually does not cure the disease, leaves an overall impression of nonsense, not clarity.'').

[325] Endorsement Guides, 16 CFR 255.5(b)(2), (3), (7), (8), (9), and (11).

[326] Hammacher Schlemmer Cmt. at 3–4.

[327] Endorsement Guides, 16 CFR 255.2(e)(9).

[328] *Id.* (emphasis added).

[329] ANA Cmt. at 8.

[330] Anonymous 3 Cmt; Yelp Cmt. at 5–6.

[331] Ravnitzky Cmt. at 1.

[332] Endorsement Guides, 16 CFR 255.5(a) & (b)(6)(ii).

[333] Camp-Martin Cmt. at 4–5; Yelp Cmt. at 7.

[334] Anonymous 4 Cmt.

[335] Endorsement Guides, 16 CFR 255.2(d).

[336] Due to an inadvertent drafting error, the regulatory text of proposed § 465.5(a), which addressed an officer or manager of a business writing or creating a consumer review or consumer testimonial about the business or its products or services, only referenced disclosure of the officer's but not the manager's relationship to the business. The Commission clearly intended that proposed § 465.5(a) require disclosure of the manager's relationship as well. *See* NPRM, 88 FR 49379 (''Proposed § 465.5(a) would prohibit an officer or manager of a business from writing or creating a consumer review or consumer testimonial about the business or its products or services if the consumer review or consumer testimonial does not have a clear and conspicuous disclosure of the officer's or manager's relationship to the business.'').

the prospective reviewer not to make such a disclosure. The Commission has determined to finalize proposed § 465.5 with a number of modifications.[337]

Two individual commenters shared their experiences with insider reviews. One individual commenter ''made a purchase based on a glowing review'' but ''later discovered that the person who wrote the review was, in fact, a salesperson for the same company, receiving a commission based on my purchase,'' and the purchase turned out to be ''a fraudulent service.'' [338] Another individual commenter shared their experience as an employee: ''I was asked to leave positive reviews in Amazon . . . and in other sites to boost the number of positive reviews for our products. The CEO asked employees to do this and include family members. In fact, I found the immediate family and friends of the CEO leaving glowing reviews of the product.'' [339]

A business commenter said, ''If you allow insider reviews, disclosure [of the reviewers' relationship to the business] should be mandatory.'' [340] Another business commenter wrote that ''limiting . . . § 465.5(a)–(c) to circumstances in which the requisite disclosure is absent is a fair restriction on businesses that would simultaneously protect consumers all while allowing businesses to effectively advertise.'' [341] The commenter noted that the ''requirement for clear-and-conspicuous disclosure is used widely throughout federal and state consumer protection laws.'' [342] The commenter was also concerned that a rule might ''infringe on the ability of employees and independent contractor agents . . . to inform others of their experiences with an employer or principal.'' [343] To the extent that the commenter is referring to review websites that specialize in reviewing employers from the perspective of employees, it is obvious that the reviewers are employees or former employees, and no further disclosure appears necessary.

A trade association commented that it ''understands the Commission's concern that in some cases, employees may have an incentive to post positive reviews on behalf of their company's products,'' but the concern ''is already addressed through Section 5 and the Endorsement Guides.'' [344] The Commission continues to believe that certain conduct should be addressed by a trade regulation rule even if it can also be addressed through section 5 enforcement actions. Having specific conduct addressed by a rule provides the general public with further clarity as to what steps are necessary to conform its conduct to the requirements of the law, deters prevalent unlawful conduct, and allows the Commission to bring enforcement actions more efficiently and effectively.

A retailer recommended that the provision ''be revised to further incorporate a requirement that the 'insider' review/testimonial be 'fake' or 'false,' in order to better target the deceptive acts of bad actors that use their employees to generate fake reviews and testimonials that purport to be from actual customers.'' [345] The Commission rejects that suggestion, as the intention of § 465.5 is to address certain inherently biased reviews and testimonials. Fake and false reviews are already addressed by § 465.2.

1. Material Connections

Commenters pointed out what they saw as inconsistencies between proposed § 465.5 and section 5 of the FTC Act. A retailer commenter wrote that proposed § 465.5 was ''inconsistent with the longstanding principles in the Endorsement Guides . . . that disclosures must be made when the connection between a reviewer and the sponsoring advertiser is material, meaning it would affect the weight or credibility that consumers give to the endorsement.'' [346] A trade association noted in its comment that the section ''seeks to impose liability for reviews and testimonials authored by certain employees or their relatives that lack disclosures regardless of context, and whether that connection is material under the circumstances'' and ''would impose civil penalties for reviews or testimonials that are not even deceptive.'' [347] Another trade association opined ''that a reviewer's out-of-state second cousin [who] works a minimum-wage job at a retailer would (hopefully) not be a 'material connection' requiring disclosure under the Endorsement Guides, because such connection would not bias the reviewer's review, and therefore would not make the review misleading.'' [348] The same trade association and a business organization also commented that the provision poses concerns under the First Amendment by ''broadly prohibiting certain reviews or testimonials by 'insiders' regardless of whether that speech is deceptive in context.'' [349] The Commission intended for § 465.5 to be limited to unfair or deceptive failures to disclose material connections, and is now clarifying this intent. Specifically, in paragraphs (a) through (c) of § 465.5, the Commission is limiting the covered relationships to ''material'' relationships. In § 465.5(a) and (b), the Commission is also clarifying that, under certain circumstances, the relationship of a consumer testimonialist may be clear to the audience without disclosure. For example, the audience may already be aware that an executive is associated with a particular company, or the context of an ad may otherwise communicate a relationship with a particular company. Specifically, in § 465.5(b), which applies only to consumer testimonials, the Commission is adding the requirement that ''the relationship is not otherwise clear to the audience,'' and in § 465.5(a), which involves both consumer reviews and testimonials, it is adding, ''unless, in the case of a consumer testimonial, the relationship is otherwise clear to the audience.'' The Commission does not believe that, absent a disclosure, a relationship will ever be clear to consumers in the context of an ordinary consumer review.

2. Relatives

Proposed § 465.5(b) and (c) would have required disclosures in some circumstances involving consumer testimonials or reviews from ''relatives'' of a company's officers, managers, employees, or agents. Some commenters voiced concerns pertaining to these requirements.

For example, a review platform, explaining that it prohibits reviews about a business or its products by someone whose immediate family owns or works for the business, asked how businesses would ''know whether reviews have been submitted by the extended family (such as the second cousins) of their officers, managers, employees, or agents,'' questioned whether it would be proportional to seek penalties when extended family are involved, and suggested ''narrowing the scope of the family requirement'' to ''immediate family.'' [350] A trade association said that ''relatives can include cousins, nieces/nephews, and other more distant familial

[337] Proposed § 465.5(b) and (c) are being renumbered as final § 465.5(b)(1) and (c)(1).

[338] Anonymous 9, Cmt. on NPRM (Aug. 16, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0023.*

[339] Anonymous 5 Cmt.

[340] Transparency Company Cmt. at 13.

[341] Family First Life Cmt. at 13.

[342] *Id.*

[343] *Id.* at 3.

[344] NRF Cmt. at 9.

[345] Amazon Cmt. at 11.

[346] *Id.*

[347] IAB Cmt. at 9.

[348] NRF Cmt. at 9.

[349] *Id.* at 11; TechNet Cmt. at 3.

[350] Trustpilot Cmt. at 5–6.

relationships,'' that ''even immediate family relationships (parents, children, siblings) are not always closely held'' because ''adult siblings are not necessarily in each other's day-today lives,'' and that ''it would be more appropriate to substitute the term . . . 'members of the same household' as that would suggest individuals that have regular contact with an employee.'' [351] A business organization wrote in its comment that the term ''relative'' is too vague and that ''[i]t is unclear whether the rule applies to third cousins, the spouses of a stepbrother's child from a previous marriage, or friends that are considered family,'' concluding that ''[l]arge companies creating monitoring programs for testimonials need some clarity about what relatives will be captured under the Rule.'' [352] A second trade association said in its comment that ''relatives'' of ''any company employee should not be considered 'insiders''' because ''[i]n most cases, such family members would have no incentive to post a fake review.'' [353] However, the Commission intended for § 465.5 to address biased reviews and testimonials by insiders or their relatives, not the writing of ''fake [or false] reviews,'' which is addressed in § 465.2.

To reduce the compliance burden, the Commission is removing relatives from § 465.5(b) and limiting what was originally proposed as § 465.5(c)(1), which is now split into three separate prohibitions. One prohibition addresses officers or managers soliciting or demanding a consumer review from ''any of their [own] immediate relatives.'' A second prohibition addresses officers or managers soliciting or demanding reviews from employees or agents. A third prohibition addresses solicitations or demands by officers or managers that ''employees or agents seek such [consumer] reviews from their relatives.'' In such instances the request will likely be a general one (such as ''Ask your relatives to review us'' or ''Get three family members to review us''), although it could also be more specific (such as ''Get your spouse to write us a review''). As set forth in § 465.5(c)(1)(i), any reviews resulting from demands that employees or agents solicit their relatives would only be violations if the resulting reviews were written by immediate relatives of the employees or agents.

3. Agents

A trade association objected to the inclusion of the undefined term ''agents'' in proposed § 465.5(b) and (c) and suggested its removal. The commenter said that ''it is not clear what individuals would be considered 'agents' of the business'' and the meaning of the term ''agent'' could ''dramatically expand the scope of the compliance programs that businesses will likely need to create in order to mitigate their risks under this section'' which ''would be particularly important for small businesses.'' [354] The Commission intends for the term ''agents'' in this rule to apply only to those agents that promote the company or its products, such as representatives of advertising agencies, public relations firms, and review management firms. As discussed below, given the clarifications of and limitations to § 465.5(b)(1) and (c)(1), the Commission has no reason to believe that the inclusion of ''agents'' will ''dramatically expand the scope of the compliance programs.'' [355]

4. Scope

Several comments addressed the scope of proposed § 465.5, including the scope of liability of businesses in the context of insider reviews and testimonials. For example, a trade association asserted that § 465.5 should ''be limited to the extent it references employees (or agents) who are not officers or managers, and who were not instructed by their superiors to post reviews.'' [356] A retailer asked for a safe harbor that would apply to employee reviews and testimonials ''if businesses are not encouraging insider reviews and testimonials.'' [357] The Commission intended for the provision to apply to reviews or testimonials by employees or agents who are not officers or managers only when (1) the reviews are requested or solicited by an officer or manager of the business or (2) the testimonials appear in advertising or promotional messages actively disseminated by the business. As discussed in this section, the Commission's clarifications and limitations should resolve any concerns arising from any broader interpretation.

Two trade associations and another industry organization asserted in their comments that § 465.5 ''appears to impose liability on businesses for distributing the content of third parties, even when they had no knowledge that the content violated the proposed rule.'' [358] As the commenters used the word ''distributing,'' the Commission assumes that these comments pertain to the liability of businesses under § 465.5(b), which prohibits businesses from ''disseminating or causing the dissemination of consumer testimonials'' by insiders without disclosures. The testimonials covered by § 465.5 are, by definition, a business's advertising or promotional messages, so the Commission does not consider them to be third-party content. The section covers such testimonials when disseminated by the business itself, by its officers or managers, or in response to solicitations or demands from its officers or managers. With respect to the commenters' concern that businesses will be liable even when they had no knowledge that the content violated the rule, the Commission discusses below the appropriate application of the ''knew or should have known'' standard.

A retailer's comment expressed ''significant concerns with this section if the FTC intends to apply it to marketplace service providers with hundreds of thousands of employees.'' [359] A trade association said in its comment that, ''to the extent the Commission intends for this language to apply to reviews or testimonials written by employees of online retailers with hundreds of thousands of employees, the Commission has failed to demonstrate that this is an unfair or deceptive act or practice that is prevalent'' as ''[n]one of the cases cited in the NPRM involved this type of company.'' [360] With respect to employees, the section applies only to (1) testimonials by employees that the company chooses to disseminate and (2) reviews that are solicited or demanded by company officers or managers. Further, the Commission has sufficient evidence of prevalence as to the use of insider reviews and testimonials,[361] and that evidence need not specifically include examples of companies of every size, such as those ''with hundreds of thousands of employees.''

A trade association's comment ''urge[d] the Commission to add a safe harbor . . . that will assure businesses acting in good faith that they will not face civil penalty liability for the actions of rogue individuals.'' [362] Again, whether a business will be subject to civil penalties will depend on whether

[351] RILA Cmt. at 6.

[352] Chamber of Commerce Cmt. at 7.

[353] NRF Cmt. at 9.

[354] IAB Cmt. at 10.

[355] *See infra* section IV.E.4 and 5 of this document.

[356] NRF Cmt. at 10.

[357] Amazon Cmt. at 11.

[358] NRF Cmt. at 11; IAB Cmt. at 10; TechNet Cmt. at 3.

[359] Amazon Cmt. at 11.

[360] IAB Cmt. at 9.

[361] *See* NPRM, 88 FR 49374–75.

[362] IAB Cmt. at 10.

the facts show that the business had actual knowledge or knowledge fairly implied of the violation. A business will not violate the rule—much less be subject to civil penalties—merely because employees write consumer reviews without disclosing their relationship to the business, but it may violate the rule when an officer or manager of the company solicited or demanded such reviews. A business will also not be liable under § 465.5 simply because one of its employees (other than an officer or manager) or agents makes an unsolicited social media post. However, as discussed above, a business might be liable under § 465.2(a) for an employee posting fake testimonials to social media on behalf of the company.[363]

Two commenters addressed general review solicitations from businesses to their customers. A trade association said that ''[b]usinesses which seek reviews from their customers generally seek reviews from all customers, and again, do not currently monitor or screen for potential relatives or agency relationships.'' [364] A review platform operator wrote in its comment, ''An automated review invitation system can operate via integration with, for example, a C[ustomer] R[elationship] M[anagement] platform where customer details are automatically fed through to generate review invitations following on from purchases or experiences. The information within the system could be as minimal as a name and email address. . . . It could therefore be possible for businesses to inadvertently invite persons that are related to an officer, manager, employee, or agent . . . . In practice, it will be difficult to check whether any invitation recipients could fall within the very wide group of persons outlined at [§] 465.5(c), and it will also be difficult to draw a firm line between what types of indicators are sufficient to warrant imputing constructive knowledge.'' [365] The Commission did not intend for § 465.5(c) to cover such generalized invitations to past purchasers to write reviews. The Commission is therefore adding language in § 465.5(c)(2) to clarify that § 465.5(c)(1) ''does not apply to generalized review solicitations to purchasers for them to post reviews about their experiences with the product, service, or business.'' The Commission is making a similar clarification in § 465.5(b)(2)(i); specifically, that § 465.5(b)(1) ''does not apply to generalized review solicitations to purchasers for them to post testimonials about their experiences with the product, service, or business.''

The Commission has also added § 465.5(b)(2)(ii), which exempts ''merely engaging in consumer review hosting'' from § 465.5(b)(1). Thus, an unsolicited employee review merely appearing on the business's website cannot violate the provision against disseminating insider testimonials.

A trade association noted that ''[l]arge national retail chains collectively employ millions of workers who are also their customers'' and ''[w]hile a retailer may provide guidance on disclosing their relationship, it should not be liable for policing their customer reviews for posts that may have been submitted by any one of their thousands or millions of employees—who in many cases may be using ambiguous screennames or not be readily identifiable.'' [366] The Commission points out that only § 465.5(c) applies to customer reviews by employees, and that provision only applies to employee reviews that an officer or manager has solicited or demanded. If there are no such solicitations or demands, then § 465.5 does not apply to employee reviews. When an officer or manager does solicit or demand a review, the business would only be liable if the officer or manager (1) ''encouraged the prospective reviewer not to make . . . a disclosure,'' (2) ''did not instruct that prospective reviewers disclose clearly and conspicuously their relationship to the business,'' [367] or (3) ''knew or should have known that such a review appeared without such a disclosure and failed to take remedial steps.'' It is only under the last of the three clauses that a business might be liable for any ''policing'' of reviews, and, as discussed below, any such obligations should not be unduly burdensome.[368]

An industry organization commenter expressed concern that § 465.5 ''would require the disclosure of personally identifying information'' and impact employees' privacy.[369] The Commission does not see how the provision requires the disclosure of personally identifying information. Section 465.5 requires the disclosure of unexpected material connections but does not require that employees identify themselves by name. Testimonialists and reviewers could be anonymous, or use pseudonyms, and include general phrases indicating their relationship to the business, such as ''my employer's product,'' ''my company's,'' or ''my spouse's company.''

5. Knowledge Standard

A number of commenters discussed the ''knew or should have known'' standard contained in § 465.5(b) and (c). A trade association said that a '' 'knew or should have known' standard . . . [in] § 465.5 aptly reflects that the rule is targeting bad actors that intend to commit fraud through fake reviews.'' [370] A consumer organization ''advise[d] the Commission against relying on knowledge standards that will introduce unnecessary evidentiary burdens in the enforcement process'' and against making it ''a condition of liability,'' noting that instead ''the Commission can and should consider knowledge and intent in deciding the equities of bringing any enforcement action.'' [371] A review platform said ''that 'should have known' is too low as a knowledge threshold and this should therefore be limited to 'knew', *i.e.,* actual knowledge.'' [372] A trade association called the ''should have known'' standard ''vague.'' [373] A business commenter also described ''should have known'' as vague and suggested limiting the knowledge standard to actual knowledge.[374] A trade association and a retailer said that civil penalties should not be based upon a ''should have known'' standard.[375] The retailer continued, ''In the alternative, if the Commission refuses to elevate the knowledge standard for this section, the final rule must provide greater guidance on the sorts of scenarios that would give rise to liability.'' [376] Specifically, the retailer asserted that the Commission would have to provide ''additional information about when a company or officer/manager 'should' know that an 'insider' review or testimonial violates the rule.'' [377] A trade association wrote in its comment that ''the Commission should raise the knowledge standard for this section to actual knowledge,'' which ''would ensure that companies that are actually complicit in the proliferation of deceptive insider reviews and testimonials are the targets of this section, rather than well-meaning

[363] *See supra* section IV.B.2 of this document.

[364] NADA Cmt. at 6.

[365] Trustpilot Cmt. at 13.

[366] RILA Cmt. at 6.

[367] The Commission has slightly modified this clause, changing ''did not instruct the prospective reviewer to disclose clearly and conspicuously that relationship'' to ''did not instruct that prospective reviewers disclose clearly and conspicuously their relationship to the business'' for purposes of clarity.

[368] *See infra* section IV.E.5 of this document.

[369] TechNet Cmt. at 3.

[370] Travel Tech Cmt. at 4.

[371] Consumer Reports Cmt. at 8.

[372] Trustpilot Cmt. at 5, 8.

[373] NRF Cmt. at 9.

[374] Family First Life Cmt. at 15.

[375] NADA Cmt. at 3; Amazon Cmt. at 11.

[376] Amazon Cmt. at 11.

[377] *Id.*

businesses that fail to discover and remedy reviews or testimonials by employees, managers, officers, agents, or any of those individuals' relatives that lack disclosures.'' [378] The commenter continued, ''[r]egardless of the knowledge standard the Commission imposes, the final rule must provide greater guidance on what sorts of scenarios would give rise to liability under this section.'' [379]

The Commission chooses to retain the proposed ''knew or should have known'' standard in § 465.5(b)(1) and (c)(1)(ii)(c). First, the Commission notes again that it cannot obtain civil penalties under section 5(m)(1)(A) of the FTC Act for a rule violation unless it proves that a defendant had actual knowledge or knowledge fairly implied that the act or practice is unfair or deceptive and is prohibited by the rule. With respect to § 465.5(b)(1), the provision applies only to testimonials that the business disseminates or causes to be disseminated, *i.e.,* it applies to the business's own advertising and promotional activities. As noted above, § 465.5(b)(1) does not apply to unsolicited social media posts by employees or to social media posts that result from generalized solicitations. The Commission does not expect that a business will ask every potential testimonialist whether they are an agent of the business. There may be red flags, however, that should cause a business to realize that a prospective testimonialist is likely an insider, such as the testimonial featuring an image of that person standing in front of the company's headquarters. If a business routinely asks prospective testimonialists how they became interested in the business or its products, it should not avoid looking at answers that might indicate a covered connection.

With respect to § 465.5(c)(1)(ii)(c), the Commission believes that, if officers and managers of a business request or demand that the business's employees or agents write consumer reviews or solicit or demand that such employees or agents seek such reviews from their relatives, it is more than reasonable to have those officers and managers take on certain responsibilities with respect to those reviews. The employees, agents, and relatives on the receiving end of such requests or demands are likely to assume that their reviews should be positive, which gives such reviews an inherent bias. Therefore, officers and managers should instruct that prospective reviewers make disclosures. When they demand that employees or agents seek reviews from their relatives, the officers or managers should instruct the employees or agents to ask their immediate relatives to make disclosures. The officers and managers should also take remedial steps when they know or should know that resulting insider reviews appeared without a disclosure. The Commission does not expect an officer or manager to scour every review of the business for possible insider reviews appearing without a disclosure. There may be red flags, however, that should cause officers or managers to inquire further. An example that is at least applicable to smaller companies is a review without a disclosure by someone the soliciting officer or manager recognizes as having the same last name as an employee whom the officer or manager told to obtain reviews from relatives. Another example is an employee sending a soliciting officer or manager a link to the resulting review, in which case the officer or manager should take the time to see if that review has a disclosure. By taking ''remedial steps,'' the Commission means that the officer or manager should request that the reviewer delete the review or add a clear and conspicuous disclosure to it.

6. Other Suggestions

Commenters recommended that the Commission adopt a number of additional requirements or prohibitions. An individual commenter said that insider reviews should be banned and that disclosures are insufficient to cure them.[380] One consumer group proposed that (1) ''non-disclosed insider ratings'' should be ''independent and separate violation[s] from deceptive narrative reviews;'' (2) ''symbolic ratings—both independently and when aggregated—should feature a clear and conspicuous disclosure of necessary material connections;'' and (3) ''reviews requiring a disclosure should not be included in a product's aggregate rating without a disclosure.'' [381] Another consumer group suggested the following: (1) § ''465.5(a) and (c) should apply to all employees and board members of a business;'' (2) § 465.5(b) and (c) be extended ''to employees or board members of other companies with a material business relationship with the first business;'' (3) § 465.5(c) should be extended ''to include solicitations or demands of employees of companies with which the business conducts material business;'' (4) § 465.5(c) should prohibit ''any employee or board member of a business to solicit or demand from another employee or board member (or relative of an employee or board member) a consumer review about the business or one of its products or services;'' and (5) ''employees of a business should not be permitted to provide star or numerical reviews that count toward an aggregate or average rating, even if their conflict of interest is otherwise disclosed in an accompanying narrative review.'' [382] Some of these proposals go beyond the scope of this rulemaking. Based on its policy expertise, the Commission declines to make any of these changes at this time. The Commission notes, however, that some may, in certain situations, involve unfair or deceptive acts or practices that violate section 5 of the FTC Act.

F. § 465.6—Company-Controlled Review Websites or Entities

Proposed § 465.6 sought to prohibit a business from representing, expressly or by implication, that a website, organization, or entity that it controls, owns, or operates provides independent reviews or opinions about a category of businesses, products, or services including the business or one or more of its products or services. Based on the following, the Commission has determined to finalize this provision with two limiting modifications.[383]

A business organization, a retailer, and a review platform submitted comments supporting the intent of proposed § 465.6.[384] For example, the business organization noted that it ''was supportive of a . . . rule aimed at addressing the practice of marketers setting up purportedly independent websites, organizations, or entities to review or endorse their own product.'' [385]

Some commenters argued that, as drafted, the provision was overly broad and would prohibit conduct that was not deceptive or unfair. A business organization said that, as drafted, proposed § 465.6 ''. . . could capture retailers that sell their own house brands'' and ''prevent media companies from operating general review websites that publish reviews by independent critics and consumers about films or television produced by affiliated studios or divisions.'' [386] A consumer

[378] IAB Cmt. at 9.

[379] *Id.* at 10.

[380] Anonymous 3 Cmt.

[381] TINA Cmt. at 6 and 8.

[382] Consumer Reports Cmt. at 7–8.

[383] Two modifications are changing ''Rule'' to ''part'' and, as discussed above, changing ''its products or services'' to ''the products and services it sells.'' *See supra* section IV.B.4. of this document.

[384] Chamber of Commerce Cmt. at 6; Amazon Cmt. at 12; Trustpilot Cmt. at 4–5.

[385] Chamber of Commerce Cmt. at 6.

[386] *Id.*

organization similarly said that, ''as written, . . . [proposed § 465.6] would make it illegal for companies to host any reviews whatsoever so long as some of the reviews touch on a category of business, products, or services the company provides'' and would prohibit ''customer review forums on sites such as Home Depot and Amazon.'' [387] A retailer said that ''the plain text of . . . [proposed § 465.6 would] sweep[ ] in more conduct that is neither deceptive nor unfair—for example, where Company A provides customer reviews authored by others to Company B, without disclosing an ownership relationship.'' [388] A trade association wrote that proposed § 465.6 ''could be applied to prohibit retailers from representing that any consumer reviews or opinions featured on their own websites are independent, even if they are.'' [389] A retailer commented that proposed § 465.6 is ''overly broad and would prohibit a business from using a related entity from [sic] testing or comparing products in good faith and publishing those results, even if the company clearly disclosed that the test or comparison was done by an affiliate.'' [390] A review platform asked in its comment that the Commission clarify that the section would not ''unintentionally lead[ ] to review sites being unable to host reviews of their own company or sector.'' [391] The Commission recognizes and agrees with the above concerns and is making two responsive modifications to narrow final § 465.6 in a way that better reflects the Commission's intent. The Commission is excluding ''consumer reviews'' from the scope of final § 465.6 and changing the prohibition against ''represent[ing]'' to a prohibition against ''materially misrepresent[ing].''

A trade association commented that ''many retailers host product reviews on their online shopping websites and make no direct claims that the reviews are independent'' and asked the Commission to ''make clear that it is permissible for retailers to host product reviews on a site they control and operate.'' [392] Assuming that the commenter is referring to retailers hosting independent consumer reviews on a site they operate or control, then this is permissible under § 465.6. If the retailer's website misrepresents that it provides independent reviews or opinions by experts or organizations, then the retailer could be liable under § 465.6.

Two commenters asked the Commission to adopt a safe harbor provision for disclosures of the relationship between the business and the provider of the purportedly independent reviews or opinions.[393] The Commission's modifications address this request effectively by providing that businesses do not violate § 465.6 if they are not materially misrepresenting independence. The Commission believes that contradictory disclosures cannot cure a false express claim, such as a false express claim of independence. If a false claim of independence is merely implied, whether a disclosure is adequate to cure it will depend on the net impression of the website or advertisement, *i.e.,* whether it materially misrepresents independence even with the disclosure.

A trade association commented that ''[i]t would be helpful to make it clear that . . . § 465.6 only applies to websites or entities whose core service is providing reviews or opinions.'' [394] The term ''core service'' is ambiguous, and it is not clear how one would determine whether it applies to reviews or opinions provided by a given website or other entity. False material claims that a website or entity provides independent reviews or opinions would still be deceptive even if such reviews or opinions are not the website's or entity's core service. The NPRM cited a number of cases in which businesses created purportedly independent seals or badges that they then awarded to their own products; the awarding of such seals or badges was clearly not their core business.[395] The NPRM also cited cases involving purportedly independent review websites, and, although such review websites might have appeared to be a ''core service,'' the true core business was selling the respondent's or defendant's own products.[396] Focusing on the ambiguous term ''core services'' would likely open the door to manipulation and evasion of the prohibition. The commenter further noted that it would also be ''useful to clarify what 'independent reviews or opinions' means.'' [397] In this context, the term ''independent'' merely refers to explicit or implicit claims that reviews or opinions are not coming from a business that offers any of the products or services being reviewed or evaluated.

A business organization commenter suggested that the Commission not finalize § 465.6 because ''the fraudulent nature of reviews on purportedly independent websites would likely be covered by . . . [§§] 465.2 and 465.5 of the . . . Rule.'' [398] Those sections are limited to consumer reviews and consumer or celebrity testimonials and do not apply to reviews, seals, or other opinions by purportedly independent experts, organizations [399] or other entities. Therefore, § 465.6 is not duplicative of either § 465.2 or § 465.5.

G. § 465.7—Review Suppression

Proposed § 465.7 sought to prohibit two different types of consumer review suppression.

1. § 465.7(a)

Proposed § 465.7(a) sought to prohibit anyone from using an unjustified legal threat or a physical threat, intimidation, or false accusation in an attempt to prevent a consumer review or any portion thereof from being written or created or to cause a consumer review or any portion thereof to be removed. Based on the following, the Commission is finalizing § 465.7(a) with several revisions for the purpose of clarity.[400]

A number of commenters supported the provision.[401] The NPRM asked whether it is ''appropriate that . . . § 465.7(a) focuses on the specific types of listed threats or activities,'' and two

[387] Consumer Reports Cmt. at 9.

[388] Amazon Cmt. at 12. The commenter suggested that the Commission ''clarify the regulatory language to make clear that it covers only reviews authored by the owner company or its agents.'' *Id.* The Commission is not adopting this approach because § 465.6 is not limited to websites with reviews. It also applies to organizations or entities that misrepresent that they provide independent reviews or opinions (*e.g.,* seals) about a category of businesses, products, or services including the business or one or more of the products or services it sells.

[389] NRF Cmt. at 11–12.

[390] Hammacher Schlemmer Cmt. at 5.

[391] Trustpilot Cmt. at 5.

[392] RILA Cmt. at 7.

[393] Hammacher Schlemmer Cmt. at 6–7 (proposing that the Commission adopt § 465.6 with the addition of the following clause: ''unless the business discloses that there is a relationship or affiliation between the business and the website, organization, or entity that it controls, owns, or operates and why the reviews or opinions are 'independent', including the steps that the business takes to ensure objectivity or independence in obtaining such reviews or opinions.'' (emphasis omitted)); Frieling Cmt. at 4.

[394] CCIA Cmt. at 3.

[395] NPRM, 88 FR 49375.

[396] *Id.*

[397] CCIA Cmt. at 3.

[398] Chamber of Commerce Cmt. at 6.

[399] ''Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member.'' Endorsement Guides, 16 CFR 255.4(a).

[400] One modification is changing ''Rule'' to ''part.''

[401] Anonymous 10, Cmt. on NPRM (Aug. 3, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0009;* TT in PA, Cmt. on NPRM (Aug. 9, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0016* (''TT in PA Cmt.''); Kurt Braun, Cmt. on NPRM (Aug. 17, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0026;* Superguest Cmt.; Tripadvisor Cmt. at 5–6; Consumer Reports Cmt. at 9–10; State AGs Cmt. at 2.

business commenters responded that it is.[402] One of the commenters said that ''[t]his narrow approach protects consumers, all while ensuring clarity for businesses and avoiding the pitfall of ambiguity in the . . . Rule.'' [403] However, as already noted above, based on the comments and on the proposed definition for the phrase ''unjustified legal threat,'' the Commission is adopting a definition for the phrase ''unfounded or groundless legal threat,'' instead of a definition of the phrase ''unjustified legal threat,'' as originally proposed.[404]

A trade association commenter noted that '' 'intimidation' means threat of the use of force'' so it ''duplicates 'physical threat' '' and should be deleted.[405] A review platform commenter questioned why the ''proposed text is limited to 'physical threats' '' and said that non-physical threats, such as verbal threats in the form of abusive or coercive language, should not be tolerated and should be acted against.'' [406] A consumer group's comment said that ''[t]he term 'intimidation' seems sufficiently broad to cover most types of threats not otherwise covered by 'legal' or 'physical' threats.'' [407] The Commission disagrees with the first commenter because, in this context, ''intimidation'' means things other than legal or physical threats. Intimidation can include abusive communications, stalking, character assassination, and sexual harassment when those things are used to intimidate, that is to force someone into or deter someone from taking some action by inducing fear.[408]

Three commenters voiced concerns about the fact that proposed § 465.7(a) included ''false accusation[s]'' as a type of conduct that could amount to review suppression. A review platform noted that the determination of whether an accusation is false ''introduces an element of subjectivity,'' and that it would ''be preferable to ground this in a legal basis, such as defamation.'' [409] A trade association wrote that ''a statement by a business about a consumer review or the consumer making a review may sometimes be in order,'' and a prohibition on false accusations should ''allow breathing room for First Amendment free speech concerns, such as requiring a guilty mental state from the maker of an accusation before culpability attaches.'' [410] It recommended adding ''knowing that it is false or with reckless disregard as to its truth or falsity.'' [411] A second trade association asserted that proposed § 465.7(a) was ''not narrowly tailored to serve a compelling state interest because it applies regardless of the magnitude of the alleged error or intent or state of mind of the business that makes the false statement.'' [412] In order to illustrate its point, the second trade association also posited a scenario involving false accusations by a restaurant owner in a private conversation with a disgruntled patron.[413] The owner in the hypothetical did not know the accusations were false and did not act recklessly. In response to these comments, final § 465.7(a) adopts the phrase ''a public false accusation in response to a consumer review that is made with the knowledge that the accusation was false or made with reckless disregard as to its truth or falsity,'' rather than the phrase ''false accusation,'' as originally proposed. This change resolves the commenters' concerns regarding the accuser's state of mind, clarifies the Commission's intent that the provision applies only to public accusations, and provides greater clarity, thereby making compliance less burdensome. In response to the concern about subjectivity, the Commission notes that courts can make objective determinations of whether a given accusation is false. One of these commenters also asserted broadly that § 465.7(a) ''regulates 'pure speech,' not conduct, because it applies to the use of words to convey a message'' and that speech is not commercial speech if it does not propose a commercial transaction.[414] This assertion has no basis in First Amendment law and is an overly limited articulation of what counts as commercial speech. When a business makes a public false accusation in response to a consumer review in an attempt to cause the review to be removed, the speech at issue is clearly commercial speech because it is intended to promote the product, service, or business that was the subject of the negative consumer review.

Two commenters, a review platform and a trade association, said that the provision should be strengthened by also covering attempts to force a consumer review or a portion thereof to be changed or edited.[415] Proposed § 465.7(a) would have prohibited certain acts made in an attempt to, among other things, ''cause a consumer review or any portion thereof to be removed.'' The Commission believes that, in most cases, changing or editing a review would necessarily require removing a portion of it. Accordingly, the Commission is clarifying that final § 465.7 applies to such modifications of reviews by adding ''whether or not that review or a portion thereof is replaced with other content,'' immediately after ''cause a consumer review or any portion thereof to be removed.''

A trade association's comment asked that the ''Rule be clarified to emphasize that it does not prohibit companies from contacting customers who post negative reviews to resolve the reported issues.'' [416] The commenter was concerned that ''sensitive customers could argue that such communication from the Company (no matter how innocuous) amounts to intimidation.'' [417] The Commission does not believe that a company engages in intimidation by merely contacting customers to resolve reported issues or simply asking satisfied customers to update their reviews. Specifying that a consumer's concerns will be addressed only if the consumer changes or removes a truthful negative review may be an unfair or deceptive act or practice that has the effect of distorting or otherwise misrepresenting what consumers think of a marketer's products,[418] but that issue is beyond the scope of this rulemaking.

A consumer organization's comment said that, ''[j]ust as businesses may use threats or intimidation to prevent a consumer from leaving a negative review, they may use similar tactics to ensure receipt of a positive review,'' thus concluding that § 465.7(a)'s ''prohibitions . . . should also apply to compelled creation of positive reviews.'' [419] Although compelling the creation of positive reviews through threats or intimidation may be an unfair or deceptive act or practice, the

[402] Transparency Company Cmt. at 14; Family First Life Cmt. at 15.

[403] Family First Life Cmt. at 15.

[404] *See supra* section IV.A.2.l of this document.

[405] NFIB Cmt. at 4.

[406] Trustpilot Cmt. at 17.

[407] Consumer Reports Cmt. at 10.

[408] *See Intimidate* (def. 3), *Dictionary.com,* LLC, *https://www.dictionary.com/browse/intimidate* (last visited July 5, 2024) (establishing that the word ''intimidate'' means, among other things, ''to force into or deter from some action by inducing fear'').

[409] Trustpilot Cmt. at 17.

[410] NFIB Cmt. at 4.

[411] *Id.* at 5.

[412] ANA Cmt. at 10.

[413] *Id.* at 9–10.

[414] *Id.*

[415] Yelp Cmt. at 7; CCIA Cmt. at 4.

[416] NRF Cmt. at 12.

[417] *Id.*

[418] *See* Endorsement Guides, 16 CFR 255.2(d).

[419] Consumer Reports Cmt. at 9. Although it does not involve § 465.7(a), a business urged the Commission to ''deter meritless legal threats by platforms against providers and users of pro-consumer tools.'' Mozilla Cmt. at 6. Such threats are beyond the scope of this rulemaking.

Commission declines to address that practice in this rulemaking at this time.

A dental trade association expressed that, because Federal and State privacy laws prohibit dentists and other health care providers from disclosing patient information, their ability to correct the record when they are themselves a target of deceptive or unfair reviews is limited.[420] The commenter asked the Commission to permit dentists and other health care providers to disclose patient information in response to a review (limited to the scope of the topics addressed in the review) without violating any FTC privacy-based prohibitions.[421] This request is beyond the scope of this rulemaking.

2. § 465.7(b)

Proposed § 465.7(b) sought to prohibit a business from misrepresenting, ''expressly or by implication, that the consumer reviews of one or more of its products or services displayed on its website or platform represent most or all the reviews submitted to the website or platform when reviews are being suppressed (*i.e.,* not displayed) based upon their ratings or their negativity.'' Proposed § 465.7(b) enumerated reasons for suppressing reviews that would not be considered suppression based upon their ratings or their negativity, so long as the criteria for withholding reviews are applied to all reviews submitted without regard to the favorability of the review. Proposed § 465.7(b) listed the following valid reasons for review suppression: (1) ''the review contain[ed] . . . [(a)] trade secrets or privileged or confidential commercial or financial information, . . . [(b)] libelous, harassing, abusive, obscene, vulgar, or sexually explicit content, . . . [(c)] the personal information or likeness of another person, . . . [(d)] content that is discriminatory with respect to race, gender, sexuality, ethnicity, or another protected class, or . . . [(e)] content that is clearly false or misleading;'' (2) ''the seller reasonably believe[d] the review is fake;'' or (3) ''the review is wholly unrelated to the products or services offered by or available at the website or platform.'' Based on the following, the Commission has determined to finalize this prohibition with some modifications.[422]

Multiple commenters said that the practice of product sellers suppressing less favorable reviews was problematic. One individual commenter said they were ''[d]isgusted by businesses who[ ] filter/have control over their . . . reviews.'' [423] Another individual commenter stated that ''[t]he removal of reviews that are critical, but accurate of the service or good creates an illusion and ultimately, defrauds the consumer of their choice,'' but also worried about how ''the FTC [will] catch companies that delete negative reviews.'' [424] A third individual commenter said that the ''Rule should prohibit businesses from suppressing . . . honest negative reviews.'' [425] A fourth individual commenter wrote that ''[b]usiness should be barred from misrepresenting reviews on their websites and from suppressing negative reviews.'' [426] The State Attorneys General said that, when ''a merchant . . . only posts positive consumer reviews on its website, instead of both favorable and negative reviews, [it] can potentially mislead consumers into believing that such reviews represent most or all of the reviews submitted to the merchant's website.'' [427] A retailer wrote that it ''support[s] the goals of section 465.7[(b)], which prohibits sellers from suppressing customer reviews based on their negativity'' and ''believe[s] that it is critically important that customers not be deprived of useful, negative feedback when deciding whether to purchase a product.'' [428]

The NPRM asked whether ''it [is] appropriate that proposed § 465.7(b) is limited to circumstances in which reviews are being suppressed based on rating or negativity,'' and a business commenter agreed that it was.[429]

A trade association commenter said ''that the Commission has . . . failed to satisfy the requirement that the specific unfair or deceptive acts or practices identified in the rule be prevalent.'' [430] According to the commenter, ''The rulemaking record cites only one case, one closing letter, and one comment in support of the Commission's conclusion that review suppression is prevalent.'' [431] The commenter understates the significance of the evidence that the Commission considered in finding that the suppression of reviews based upon their rating or sentiment is prevalent. The closing letter to Yotpo, a company that provided review management services, is significant because the investigation revealed that more than 4,500 Yotpo merchant clients were automatically publishing only 4- or 5-star reviews and that most 1-star reviews and 2-star reviews submitted to those merchants were suppressed.[432] The investigation of Yotpo shows that there was widespread suppression of negative reviews. The Commission thus has a strong basis for its conclusion that the suppression of negative reviews on retailer or business websites is prevalent.

A review platform's comment suggested changing ''based upon their ratings or their negativity'' to ''based upon their ratings or their sentiment'' because ''reviews can be difficult to categorize as wholly 'negative' or 'positive.' '' [433] The Commission intended for the phrase ''based upon their ratings or their negativity'' to refer to the suppression of reviews based on their ratings or their sentiment. However, in light of the comment, the Commission now realizes that the use of the word ''negativity'' in this context could be subject to misinterpretation and be construed to imply that a review must be wholly negative for its suppression to be problematic. Accordingly, the Commission is clarifying its original intent by changing ''their negativity'' to ''their negative sentiment.'' The commenter also said that ''consumer harm may result if someone suppresses a review, regardless of the sentiment expressed in the review.'' [434] The Commission is not expanding the rule to address other types of review suppression not based on ratings or negative sentiment. There are numerous legitimate reasons for suppressing consumer reviews, including those listed in § 465.7(b)(1), (2), and (3). Furthermore, such an expansion would be beyond the scope of the rulemaking.

A trade association's comment requested that the Commission ''carve out the use of reviews in marketing materials'' because the provision ''could effectively prohibit retailers from highlighting any customer reviews in advertising—even though customers understand that advertising normally highlights particularly positive

[420] ADA Cmt. at 1.

[421] *Id.* at 1–2.

[422] One modification, discussed above, is changing ''its products or services'' to ''the products and services it sells.'' *See supra* section IV.B.4. of this document. Another modification discussed above is changing ''person'' to ''individual.'' *See supra* section IV.A.2.b of this document. As it has done elsewhere in the rule, the Commission is limiting the misrepresentations prohibited to ''material'' misrepresentations. Nonetheless, in the context of § 465.7(b), the Commission believes that all such misrepresentations would likely always be material.

[423] Hippensteel Cmt.

[424] Superguest Cmt.

[425] Ravnitzky Cmt. at 2.

[426] TT in PA Cmt.

[427] State AGs Cmt. at 3.

[428] Amazon Cmt. at 12.

[429] Transparency Company Cmt. at 14.

[430] IAB Cmt. at 11.

[431] *Id.*

[432] NPRM, 88 FR 49376.

[433] Yelp Cmt. at 7–8.

[434] *Id.*

reviews.'' [435] The Commission did not intend for proposed § 465.7(b) to cover the use of consumer reviews in marketing materials. Specifically, proposed § 465.7(b) was only intended to cover misrepresentations about the body of reviews in a ''reviews'' section of a website or platform—that is, a portion of a website or platform dedicated in whole or in part to receiving and displaying consumer reviews—and not misrepresentations about whether a highlighted review is ''representative.'' The Commission is clarifying this by changing ''displayed on its website or platform'' to ''displayed in a portion of its website or platform dedicated in whole or in part to receiving and displaying consumer reviews.'' The Commission notes however, that the use of non-representative consumer reviews in marketing could be deceptive in violation of section 5 of the FTC Act.[436]

A trade association asked that the Commission ''clarify what it means for a review to be ''suppressed (*i.e.,* not displayed).'' [437] The trade association said that ''[m]any businesses that operate websites that display consumer reviews will organize those reviews in reasonable ways to help consumers navigate what might be a large corpus of varying consumer commentary'' and that, ''[i]f a business takes reasonable steps to organize their reviews, those reviews should not be considered 'suppressed.' '' [438] The Commission agrees that organizing reviews does not qualify as suppressing reviews. The Commission notes, however, that organizing reviews in a way that makes it difficult for consumers to know about or find negative reviews could be an unfair or deceptive act or practice in violation of section 5 of the FTC Act. The commenter also asked that the Commission change ''not displayed'' to ''not displayed or accessible.'' [439] The Commission is instead clarifying its original intent by changing ''not displayed'' to ''not displayable,'' so that the provision only covers reviews that consumers will be unable to view even if they were to sort or filter the reviews differently. Another trade association's comment said that ''the Rule should explicitly allow retailers to sort reviews by objective measures unrelated to the positivity of the review, where the sorting method is disclosed.'' [440] As modified, § 465.7(b) does not prohibit the sorting or organization of reviews, so the proposed modification is unnecessary.

Four industry commenters argued that there are legitimate reasons for suppressing consumer reviews beyond those listed in proposed § 465.7(b).[441] One of these commenters, a retailer, gave examples of other legitimate reasons for suppressing a review: ''describing violence, encouraging illegal activities or misuse of the product, incorporating hyperlinks that could jeopardize customer online safety, or using a language not supported by the website.'' [442] Three of the industry commenters said that, by limiting review suppression to the listed reasons, the provision violated the First Amendment and section 230 of the Communications Decency Act,[443] and all four asked the Commission to clarify that the listed reasons are not exhaustive.[444] The Commission agrees that there are legitimate reasons for suppressing reviews beyond those listed and is clarifying that the listed criteria for review suppression are non-exhaustive examples.

Proposed § 465.7(b) provided that suppression was not violative ''so long as the criteria for withholding reviews are applied to all reviews submitted without regard to the favorability of the review.'' The Commission is clarifying that the criteria must be applied to all reviews equally. Additionally, to be consistent with the above clarification regarding sentiment, the Commission is changing ''without regard to the favorability of the review'' to ''without regard to sentiment.''

An individual commenter asked whether a company could ''have a policy of not posting reviews that mention other products'' or suppress a review that is ''patently false (wrong company, wrong product, wrong location, *etc.*).'' [445] As long as the policy is applied to all reviews equally, those could be legitimate reasons for suppressing reviews.

A trade association commented that one of the listed, acceptable reasons for suppressing reviews is too limited. Specifically, it said that ''libelous'' reviews would not cover reviews with an oral component that were ''slanderous,'' and it thus recommended using the word ''defamatory.'' [446] The Commission intended to cover all defamatory consumer reviews, not just written ones, and the Commission is making that clarification.

Another one of the listed, acceptable reasons for suppressing reviews was that ''the seller reasonably believes the review is fake.'' A review platform commented that it is important that this criteria ''cannot be used by a business to seek to censor consumer reviews based on a valid experience'' and said that, without information about the reviewer, the reviewer's location, and the reviewer's other reviews, ''it can be difficult to accurately identify fake reviews.'' [447] One individual commenter wrote that this ''is overbroad and gives sellers leeway to suppress reviews at their discretion so long as they claim a belief that said reviews were fake.'' [448] The commenter recommended ''revising this provision to add specificity and identify the parameters of what a fake review looks like.'' [449] A seller does not risk liability if the suppression occurs for a reason other than the review's rating or negative sentiment. The provision's phrase ''such as'' recognizes that it is proper to suppress reviews for legitimate reasons. For this specific enumerated exception, ''the seller [only needs to] reasonabl[y] believe[ ] the review . . . [to be] fake.'' Thus, if there are indicia that would lead a reasonable person to believe that the review is fake, the seller would meet this exception.

A different, listed acceptable reason for suppressing reviews was ''content that is discriminatory with respect to race, gender, sexuality, ethnicity, or another protected class.'' The Commission is changing ''protected class'' to ''intrinsic characteristic'' in order to more closely echo the language in the CRFA on which the reason is based.[450]

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[435] NRF Cmt. at 12.

[436] An individual commenter said it would be helpful to have rule language ''around a business being allowed to highlight specific testimonial reviews on their website as long as there is a disclaimer or prominent indication that the page does not represent all reviews for the business.'' Anonymous 3 Cmt. The rule does not prohibit such ''highlighting'' of specific reviews or testimonials, but the creation of a safe harbor for such highlighting is beyond the scope of the rule. In addition, the Commission believes that the wording of the proposed disclosure is likely inadequate.

[437] IAB Cmt. at 11.

[438] *Id.* at 11–12.

[439] *Id.* at 12.

[440] NRF Cmt. at 13.

[441] IAB Cmt. at 11; Technet Cmt. at 3; Amazon Cmt. at 12; NRF Cmt. at 13.

[442] Amazon Cmt. at 12. A different commenter gave the example of a snowstorm ''obstruct[ing] the delivery of a package to a buyer who could claim failure to deliver on time.'' TechNet Cmt. at 3. The Commission does not agree that this is a legitimate reason for suppressing consumer reviews.

[443] IAB Cmt. at 12; Amazon Cmt. at 12; NRF Cmt. at 13.

[444] IAB Cmt. at 11; TechNet Cmt. at 3; Amazon Cmt. at 12; NRF Cmt. at 12–13.

[445] Anonymous 4 Cmt.

[446] NFIB Cmt. at 5.

[447] Trustpilot Cmt. at 18.

[448] Madeline D'Entrmont, Cmt. on NPRM at 1 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0064.*

[449] *Id.*

[450] *See* Consumer Review Fairness Act of 2016 § 2(b)(2)(C)(i), 15 U.S.C. 45b(b)(2)(C)(i).

A trade association noted that the ''FTC should not prohibit sellers from excluding reviews that solely discuss service experience and do not include comments on the product.'' [451] The rule as clarified does not prohibit suppressing reviews that solely discuss customer service as long as the criteria is applied equally to all reviews. The Commission notes, however, that it has expressed the view that suppressing customer reviews about a ''particular seller's customer service, delivery, returns, and exchanges'' can be deceptive in violation of section 5 of the FTC Act.[452]

A consumer organization expressed concern that proposed § 465.7(b) ''allows businesses to suppress reviews when they contain 'harassing,' 'abusive,' or 'obscene' content, which are highly subjective terms likely to be interpreted broadly by businesses that have a clear interest in suppressing reviews that may harm their public perception.'' [453] The commenter suggested that, ''to preserve the public benefit of reviews that contain instances of objectionable content,'' the Commission could ''allow businesses to redact such content but require them to leave the remainder of the review along with any corresponding score or numerical rating available for public consumption.'' [454] Appropriate redaction of portions of consumer reviews may be difficult or infeasible in some instances. The Commission declines to impose such a requirement at this time.

The State Attorneys General asked in their comment that the Commission ''delete[ ] the phrase 'based upon their ratings or their negativity' at the end of the first sentence.'' [455] The State Attorneys General's reasoning for this request was that the language is unnecessarily limiting and superfluous'' because ''a company seeking to suppress negative reviews could potentially succeed by offering reasons that are proxies for negativity'' and ''any legitimate suppression should already be sufficiently covered by the robust carve-outs set forth in § 465.7(b)(1).'' [456] The Commission declines to make that change, as the enumerated ''carve-outs'' do not exhaustively identify every legitimate reason for suppressing reviews.

A business organization asserted that proposed § 465.7(b) ''implies a 'gross feedback score' must be disclosed along with the 'net feedback score,' which is the actual number of reviews viewable to a user.'' [457] The commenter is incorrect, as § 465.7(b) contains no such disclosure requirements.

An individual commenter expressed concern as to how the FTC will ''catch companies that delete negative reviews'' and suggested offering rewards ''for individuals or organizations to help address'' the problem.[458] The Commission will use the investigative and law enforcement tools at its disposal to identify bad actors who suppress reviews.

In connection with proposed § 465.7(b), several commenters recommended that the Commission impose additional consumer review-related requirements. An individual commenter asked the Commission to ''require businesses to display consumer reviews in a fair and transparent manner, such as by allowing consumers to choose how they want to sort or filter reviews, and by disclosing any criteria or algorithm that they use to rank or highlight reviews.'' [459] Another individual commenter said that ''companies . . . should be required to maintain and periodically disclose records of review suppression,'' which would, at a minimum, ''contain the number of reviews suppressed at each rating level and an associated justification.'' [460] A review platform recommended the Commission expand the scope of the rule to (1) prevent reviews from ''being misquoted and manipulated via quoting select parts of reviews,'' and (2) require that the criteria on which consumer reviews are selected for showcasing (*e.g.,* on a website carousel) be made clear.[461] A consumer organization commented that consumers should be able to assume that the reviews that they see on a business's website are representative of the reviews the business receives, and if ''a business wishes to curate reviews, the business should have the burden to transparently communicate the fact and nature of the curation to consumers.'' [462] One individual commenter asked that the proposed rule be ''extended to include penalties for Pay-to-Play platforms that engage in practices such as manipulating ratings and suppressing negative reviews for businesses that advertise on their websites,'' [463] and another commenter thought the rule should cover ''companies that profit from shaming businesses by posting negative reviews while unilaterally determining positive reviews are 'unverified'—effectively holding any positive sentiment back until the business subscribes to the platform.'' [464] Some of these proposed requirements are beyond the scope of this rulemaking, although some of the acts and practices described may be deceptive or unfair in violation of section 5 of the FTC Act. For example, misquoting reviews can be deceptive [465] and showcasing or curating reviews might deceptively represent that the reviews presented are representative or typical of the reviews received. Based on its policy expertise, the Commission declines to address any of these practices in this rulemaking at this time.

H. § 465.8—Misuse of Fake Indicators of Social Media Influence

Proposed § 465.8(a) sought to prohibit anyone from selling or distributing fake indicators of social media influence that can be used by persons or businesses to misrepresent their influence or importance for a commercial purpose. Proposed § 465.8(b) sought to prohibit anyone from purchasing or procuring fake indicators of social media influence to misrepresent their influence or importance for a commercial purpose. Based on the following, the Commission has determined to finalize these prohibitions with certain modifications.[466]

Several commenters raised concerns about the meaning of the term ''fake'' in the context of indicators of social media influence. A trade association asked, ''Does 'fake' only mean that the likes and followers were created by bots or through fake accounts? If a social media influencer were to recommend that their followers also follow another business' social media account, would that also be 'procuring' of 'fake' indicators of social media influence? . . . If the FTC means to capture a specific category of 'likes,' 'follows,' or other metrics that do not reflect any real opinions, findings, or experiences with the marketer or its products or services, it should make that

[451] RILA Cmt. at 4.

[452] Endorsement Guides, 16 CFR 255.2(e)(8)(ii).

[453] Consumer Reports Cmt. at 10.

[454] *Id.*

[455] State AGs Cmt. at 4.

[456] *Id.*

[457] TechNet Cmt. at 3.

[458] Superguest Cmt.

[459] Ravnitzky Cmt. at 2.

[460] Rob Levy, Cmt. on NPRM at 2 (Sept. 22, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0057.*

[461] Trustpilot Cmt. at 18.

[462] Consumer Reports Cmt. at 11.

[463] Anonymous 11, Cmt. on NPRM (Aug. 16, 2023), *https://www.regulations.gov/comment/FTC-2023-0047-0022.*

[464] Anonymous 4 Cmt.

[465] Endorsement Guides, 16 CFR 255.0(g)(1) and 255.1(b).

[466] One modification is changing ''Rule'' to ''part.'' Another modification, discussed above, is changing ''persons'' to ''individuals.'' *See supra* section IV.A.2.b of this document.

intention more clear.'' [467] A retailer asked for ''confirmation . . . that this provision would not apply where companies award legitimate indicators of influence to certain users upon satisfaction of objective criteria, even if those individuals are later discovered to have circumvented or abused those criteria.'' [468] A second trade association said that, ''[w]hen . . . indicators are awarded based on legitimate criteria, they serve this informative and non-deceptive purpose'' and the ''innovative companies that develop these indicators of influence should not be punished if bad actors try to abuse the processes,'' so the Commission ''should . . . clarify that this section applies to true 'fake' indicators of social media influence.'' [469] In response to these comments, the Commission is clarifying what it intended as ''fake indicators of social media influence.'' For this purpose, the final rule includes a definition of the phrase ''fake indicators of social media influence'' in § 465.1(h), which defines the phrase as indicators of social media influence derived from bots, purported individual accounts not associated with a real individual, accounts created with a real individual's personal information without their consent, hijacked accounts, or that otherwise do not reflect a real individual's or entity's activities, opinions, findings, or experiences. If a social media influencer were to recommend that their followers also follow another social media account, any resulting followers of the second account would not be ''fake.'' If a company awards legitimate indicators of influence to certain users upon satisfaction of objective criteria reflecting the influence of the users, the company would not be selling ''fake'' indicators, even if bad actors were able to deceive the company.

Three commenters addressed the section's lack of a knowledge requirement. A retailer commenter wrote that ''a business could be in violation of this provision even if it innocently sold or procured a fake indicator, without knowledge or any indication that the indicator was fake,'' which it said ''is patently unreasonable.'' [470] A second retailer similarly ''recommend[ed] that the rule be revised so that it only applies when the seller/buyer knows the indicators are fake.'' [471] A trade association suggested ''revising this section to additionally require that the seller or purchaser act 'with knowledge that the indicators of influence are fake.' '' [472] The Commission recognizes that someone could think that they were paying for a promotional campaign to increase their followers but, unbeknownst to the purchaser, the entity offering the campaign was lying and just providing fake followers. It is also possible that a company might bestow a legitimate indicator of social media influence, like a seal, that the company does not know is based upon or derived from fake indicators of social media influence. The Commission is therefore narrowing the provision by adding ''that they knew or should have known to be fake'' to both § 465.8(a) and (b).

A trade association's comment asserted that ''the Commission failed to meet the prevalence requirement'' because ''the evidence the Commission . . . cited in the NPRM . . . all relate[s] to the use of actual 'fake' indicators of influence that the seller or purchaser knew were fake.'' [473] The Commission believes that, with the addition of the definition of ''fake indicators'' and the knowledge requirement, it has sufficiently addressed the commenter's concerns.

A trade association expressed concern that the provision would ''hold[ ] retailers vicariously liable for the actions of independent endorsers,'' that is, the influencers and other endorsers that they hire.[474] That was not the Commission's intention. The distribution of fake indicators of social media influence was intended to mean the distribution *to* individuals or businesses who could use the indicators to misrepresent their influence, not causing the dissemination of social media by users of such fake indicators, *e.g.,* by hiring influencers who happen to have fake followers. The Commission is clarifying this intent by adding a definition of ''distribute fake indicators of social media influence'' in § 465.1(g).

Although no commenter specifically raised the issue in the context of § 465.8, the Commission is adding the concept of materiality to both § 465.8(a) and (b) in terms of the scope of misrepresentations covered therein, so as to be consistent with other parts of the rule.

A consumer organization said in its comment that the Commission ''should clarify that 'procure' '' in § 465.8(b) ''includes the creation of automated bot or other fake accounts that 'follow' or 'subscribe' to an account, artificially inflating the popularity of that account.'' [475] The Commission declines to make this change. It is not the creation of the bot or fake account, itself, that the rule makes illegal, but the use of the bot or fake account to follow another user, watch another user's videos, or create other fake indicia of social media influence. The same commenter said the Commission should ''remove the word 'fake' from the Rule to clarify that it covers the purchase or procurement of any social media engagement . . . from both real and fake accounts unless those incentives can be disclosed to people who can view the engagement.'' [476] The use of incentivized indicia of social media influence is not necessarily deceptive in all cases, and it is beyond the scope of this rulemaking.

Finally, a trade association and a retailer suggested changing the prohibition in § 465.8(a) from selling or distributing fake indicators that ''can be used'' by persons to misrepresent their influence to those that ''are used'' by persons to misrepresent their influence.[477] The trade association said that ''[a]pplying this section to indicators of social media influence that 'can be' used for this purpose, but are not, would mean that the rule prohibits conduct that is not deceptive.'' [478] Such fake indicators are not physical products that people collect and then use later as desired. Instead, their existence is premised on and limited to situations in which they appear deceptively on a social media site. Therefore, any person or business that obtains fake indicators of social media influence is misrepresenting their social media influence. While some individuals may not be doing so for a commercial purpose, those individuals are excluded from the rule's scope. Further, a person or entity that is in the business of selling or distributing fake indicia of social media influence is engaging in commerce, and it is unreasonable to posit that no buyers would use such indicia to misrepresent their social media influence for a commercial purpose. The Commission therefore declines to make the suggested modification.

I. § 465.9—Severability

Proposed § 465.9 provided that the provisions of the rule are separate and severable from one another and that, if any provision is stayed or determined to

[467] ANA Cmt. at 17–18.

[468] Amazon Cmt. at 13.

[469] IAB Cmt. at 13.

[470] Hammacher and Schlemmer Cmt. at 7.

[471] Amazon Cmt. at 13.

[472] IAB Cmt. at 13.

[473] *Id.* at 12.

[474] NRF Cmt. at 13.

[475] Consumer Reports Cmt. at 11.

[476] *Id.*

[477] IAB Cmt. at 13; Amazon Cmt. at 13.

[478] IAB Cmt. at 13.

be invalid, the remaining provisions shall continue in effect. The Commission did not receive any comments regarding proposed § 465.9. The Commission is changing ''shall continue in effect'' to ''will continue in effect'' which is more precise. With that clarification, the Commission is finalizing § 465.9.

V. Final Rule

For the reasons described above, the Commission has determined to adopt the provisions of §§ 465.1, 465.2, and 465.4 through 465.9 with clarifying or limiting modifications. The Commission declines to finalize proposed § 465.3 regarding consumer review or testimonial reuse or repurposing.

VI. Final Regulatory Analysis Under Section 22 of the FTC Act

Under section 22 of the FTC Act, the Commission, when it promulgates any final rule for a ''rule'' as defined in section 22(a)(1), must include a ''final regulatory analysis.'' 15 U.S.C. 57b–3(b)(2). The final regulatory analysis must contain (1) a concise statement of the need for, and objectives of, the final rule; (2) a description of any alternatives to the final rule which were considered by the Commission; (3) an analysis of the projected benefits, any adverse economic effects, and any other effects of the final rule; (4) an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and (5) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues. 15 U.S.C. 57b–3(b)(2)(A)–(E).

The Commission received several comments that included elements that the Commission identified as specifically in response to the preliminary regulatory analysis. Two trade associations asserted that compliance costs would be higher than estimated by the Commission. These associations stated that the risk of statutory penalties would lead many of their members to engage in compliance activities beyond those assumed for the high-cost compliance scenario in the NPRM.[479] In the preliminary regulatory analysis, the high-cost compliance scenario assumed an average compliance burden of 8 hours of attorney time for firms with greater than 500 employees. This average is consistent with some firms, especially the largest ones in industries more reliant on reviews and testimonials, choosing to make more extensive improvements to their compliance programs. In addition, the Commission has narrowed the rule and clarified the rule requirements as described in section IV of this document. For these reasons, the Commission continues to believe the high-cost scenario likely overestimates compliance costs, and chooses to not modify its estimate of possible compliance costs for that scenario, but it does present a sensitivity analysis below that assesses what effect systematic underestimation of compliance costs would have on the rule's net benefits to the public.

One individual commenter asserted that the benefits the Commission estimated in the NPRM did not justify the estimated compliance costs because the same results could be obtained using the FTC's existing section 5 authority.[480] As explained in detail in this final regulatory analysis, the Commission believes that the final rule will increase deterrence of unfair or deceptive acts or practices involving consumer reviews and testimonials relative to relying on its existing authority and that the net benefits of the rule justify its promulgation.

A second individual commenter claimed that it was unreasonable to assume that the rule would eliminate the entire loss to consumers, in terms of choosing products optimally, from the impact of bad information in false reviews. The commenter asserted that deterrence would be only partial because some circumstances would make it difficult to identify such reviews.[481] The Commission believes that its estimate of the benefits of *reducing* manipulated reviews is appropriate, as discussed further below. However, the Commission presents additional sensitivity analysis below that assesses the effect of systematic overestimation of the degree to which the rule would fix review manipulation, and determines that, even conceding that point, the quantified net benefits are highly positive.

Finally, a business offering third-party review fraud detection tools offered research that it claimed showed that the rule would generate benefits of $180.83 billion and that the benefits would outweigh the costs 100:1.[482] These estimates are similar to those of the Commission.

A. Need for, and Objectives of the Final Rule

The Commission believes that the final rule will substantially improve its ability to combat certain specified, clearly unfair or deceptive acts or practices involving consumer reviews or testimonials. Although such unfair or deceptive acts or practices are already unlawful under section 5 of the FTC Act, the rule will increase deterrence of such conduct by allowing courts to impose civil penalties against the violators. In addition, the final rule will allow the Commission to seek court orders requiring violators to compensate consumers for the harms caused by their unlawful conduct. The Commission believes that the rule will accomplish these goals without significantly burdening honest businesses and that the rule will provide significant benefits to consumers and honest competitors.

The final rule will allow courts to impose civil penalties under section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A), against those who engage in the deceptive or unfair conduct that the final rule prohibits. The ability to obtain civil penalties is important because it can be difficult to quantify consumer losses that stem from the use of unfair or deceptive consumer reviews and testimonials. Without civil penalties, persons who engage in such conduct might avoid monetary consequences for their unlawful conduct simply because there is insufficient evidence to link their unlawful conduct to quantifiable losses suffered by consumers. And if there are no monetary consequences, potential wrongdoers have little incentive to refrain from engaging in unlawful practices. Because the final rule will allow courts to impose civil penalties for violations, it provides the deterrence necessary to incentivize compliance with the law, even in cases where it is difficult to quantify consumer harm.

In addition, the final rule is necessary to allow the Commission to recover redress more efficiently to redress consumer harm resulting from the unfair or deceptive use of reviews or testimonials. In 2021, the U.S. Supreme Court in *AMG Capital Management, LLC*

[479] NRF Cmt. at 2–3, 13–14; IAB Cmt. at 5, 15. IAB also raised this issue in the context of the informal hearing discussed above in section I of this document. *See, e.g., Petition by Interactive Advertising Bureau to Designate Disputed Issues of Material Fact* (Feb. 12, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/r311003iabpetition20240212.pdf.* As noted above, the presiding officer at that hearing found that IAB had not shown that compliance costs would be more than minimal.

[480] Camp-Martin Cmt. at 2–3.

[481] Slezak Cmt. at 3.

[482] Transparency Company Cmt. at 6–9.

v. *FTC*[483] ruled that section 13(b) of the FTC Act[484] did not authorize the Commission to seek court orders requiring wrongdoers to return money unlawfully taken from consumers through unfair or deceptive acts or practices or give up the unjust gains they earned from engaging in such unlawful conduct. The *AMG* ruling has made it significantly more difficult for the Commission to return money to injured consumers, particularly in cases that do not involve rule violations.[485]

Since *AMG,* the primary means for the Commission to return money unlawfully taken from consumers is section 19 of the FTC Act, 15 U.S.C. 57b, which provides two paths for consumer redress. The longer path, under section 19(a)(2), typically requires the Commission to first conduct an administrative proceeding to determine whether the respondent violated the FTC Act; if the Commission finds that the respondent did so, the Commission issues a cease-and-desist order, which might not become final until after the resolution of any resulting appeal to a Federal court of appeals. After the conclusion of the administrative proceeding (and any appeal), the Commission must initiate an action in Federal court to obtain monetary relief under section 19 and, in that action, the Commission must prove that the violator engaged in objectively fraudulent or dishonest conduct.[486] In effect, the section 19(a)(2) pathway requires the Commission to file two separate actions to obtain monetary relief.

The more efficient path to monetary relief is under section 19(a)(1), which allows the Commission to recover redress in one Federal court action for violations of a Commission rule relating to unfair or deceptive acts or practices.[487] Only a small portion of the Commission's past cases challenging unfair or deceptive consumer reviews or testimonials involved rule violations that would allow the Commission to seek monetary relief under section 19(a)(1). With the final rule, however, the Commission will be able to use section 19(a)(1) to obtain redress for consumer losses attributable to violations of the rule.

Overall, outlawing egregious review and testimonial practices in the final rule expands the Commission's enforcement toolkit and allows it to deliver on its mission by stopping and deterring harmful conduct and, in some cases, making American consumers whole when they have been harmed. The unfair or deceptive acts or practices involving reviews and testimonials encompassed by this final rule are prevalent and harmful to consumers and honest businesses. Thus, the unlocking of additional remedies through this rulemaking—particularly, the ability to obtain civil penalties against violators and redress for consumers or others injured by the conduct—will allow the Commission to more effectively police and deter harmful review and testimonial practices that plague consumers and honest businesses.

B. Anticipated Costs and Benefits of the Final Rule

As discussed below, the Commission has determined that the rule's benefits greatly outweigh its costs. The rule promotes accuracy in reviews and testimonials by prohibiting certain unfair or deceptive acts or practices involving reviews and testimonials. Thus, this rule will help the vast majority of American consumers who rely on such reviews and testimonials to make better-informed purchase decisions. The rule prohibits (1) the creation, sale, purchasing, or procurement from insiders of fake or false reviews, and (2) buying of reviews conditioned on the reviews expressing particular sentiments. It also includes prohibitions on fake or false consumer or celebrity testimonials, certain insider reviews without adequate disclosures, misleading company-controlled review websites or entities, certain review suppression practices, and the misuse of fake indicators of social media influence.

In the analysis below, the Commission describes the anticipated impact of the rule. Where possible, the Commission quantifies the benefits and costs. If a benefit or cost is quantified, the Commission indicates the sources of the data relied upon. If an assumption is needed, the analysis makes clear which quantities are being assumed. The Commission measures the benefits and costs of the rule against a baseline in which no rule has been promulgated by the Commission. For the remainder of section VI, and in the interest of brevity, the term ''reviews'' collectively refers to both reviews and testimonials.

Quantifiable benefits stem from consumer welfare improvements and consumer time savings. With the rule, reviews will be more accurate overall, leading consumers to purchase higher-quality products or products that are better-matched to their preferences. The rule will also lead to more trustworthy aggregate review ratings (*e.g.,* star ratings), leading some consumers to spend less time scrutinizing reviews to determine their validity. Quantifiable costs primarily reflect the resources spent by businesses to review the rule and to take any preemptive or remedial steps to comply with its provisions. Because the rule is an application of preexisting law under section 5 of the FTC Act, the Commission expects these compliance costs to be minimal.

A period of ten years is used in the baseline scenario because FTC rules are subject to review every ten years.[488] Quantifiable aggregate benefits and costs are summarized as the net present value over this ten-year period in Table 1.1. The discount rate reflects society's preference for receiving benefits earlier rather than later; a higher discount rate is associated with a greater preference for benefits in the present. The present value is obtained by multiplying each year's net benefit by a discount factor raised to the power of the number of years in the future the net benefit accrues.

[483] 141 S. Ct. at 1352.

[484] 15 U.S.C. 53(b).

[485] *See* ANPR, 87 FR at 67425, 67425 n.1 (discussing *AMG Cap. Mgmt.*).

[486] *See* 15 U.S.C. 57b(a)(2) (''If the Commission satisfies the court that the act or practice to which the cease-and-desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief.'').

[487] Certain statutes, such as the Restore Online Shoppers' Confidence Act, 15 U.S.C. 8401–05, include provisions that treat violations of the statute as a violation of a rule for purposes of section 19(a)(1). *See* 15 U.S.C. 8404(a).

[488] Fed. Trade Comm'n, Notice Announcing Ten-Year Regulatory Review Schedule and Request for Public Comment on the Federal Trade Commission's Regulatory Review Program, 76 FR 41150, 41150 (July 13, 2011), *https://www.govinfo.gov/content/pkg/FR-2011-07-13/pdf/2011-17513.pdf* (''all rules and guides are scheduled to be reviewed ten years after implementation and ten years after completion of a regulatory review.'')

TABLE 1.1—PRESENT VALUE OF NET BENEFITS

[2024–2033 (in billions)]

	Present value: low-end estimate	Present value: high-end estimate
Total Benefits:		
3% Discount Rate	$67.40	$269.55
7% Discount Rate	57.03	230.44
Total One-Time Costs	0.87	0.00
Net Benefits:		
3% Discount Rate	66.53	269.55
7% Discount Rate	56.16	230.44

1. Estimated Benefits of the Final Rule

This section describes the beneficial impact of the rule, provides quantitative estimates where possible, and describes benefits that are only assessed qualitatively. The quantifiable estimates reflect benefits stemming from the decrease in online review manipulation on third-party platforms or company websites, which covers most of the prohibitions contained in the rule. This analysis does not calculate benefits from the other aspects of the rule—that is, the prohibitions on fake or false celebrity testimonials, company-controlled entities that deceptively purported to provide independent opinions, review suppression, and the misuse of fake indicators of social media influence—because of the limited quantitative research in these areas. Some of these benefits are likely to be substantial. The quantified benefits are presented by benefit category, rather than stemming from a specific provision of the rule, because the relevant provisions have the same end goal—that is, to improve the information available to consumers by reducing the level of review manipulation. Therefore, it is difficult to disentangle the benefits stemming from each provision.

Existing academic literature in economics, marketing, computer science, and other fields documents the importance of online reviews; specifically that the number of online reviews and aggregate ratings are extremely important for consumer purchase decisions. It is widely documented that the presence of online reviews improves consumer welfare via reductions in both search costs and the level of information asymmetry that exists prior to purchase.[489]

When making purchase decisions, consumers typically have incomplete information on product quality and attributes. Searching for additional information is costly. Consumers incur costs—including time and effort costs—to seek, evaluate, and integrate incoming information. Online platforms where past users share information about their experiences can significantly lower search costs.

Researchers have also demonstrated that consumer reviews create value for consumers beyond a reduction in search costs. Consumers are better able to learn of a product's quality and attributes when there is free-flowing, non-manipulated commentary from past consumers. Consumer reviews lead to ''better'' decisions by increasing the level of information available prior to purchase and reducing uncertainty. By the same token, the academic literature also documents that manipulated or fake reviews lead to reductions in consumer welfare by leading consumers to buy low-quality products or otherwise make suboptimal purchase decisions.[490]

A secondary benefit is deterrence of the specified review practices. The rule is essentially the only means for imposing civil penalties in most cases involving such practices. Civil penalties are not available for conduct that violates section 5(a)'s prohibition on unfair or deceptive acts or practices—rather, a violation of an FTC rule is necessary to impose civil penalties under section 5(m)(1)(a). Civil penalties act as a deterrent to fraud and deception in connection with reviews.[491]

To obtain redress without alleging a rule violation, the Commission must typically first determine in an administrative proceeding that the respondent violated the FTC Act, successfully defend that determination in any appeal to a Federal court of appeals, and then initiate a second action in Federal district court under section 19(a)(2) in which the Commission must prove that the conduct at issue is ''one which a reasonable man would have known under the circumstances was dishonest or fraudulent.'' [492] Although these requirements are likely to be satisfied in cases involving the conduct covered by

[489] *See, e.g.,* Dina Mayzlin, *Promotional Chat on the Internet,* 25(2) Mktg. Sci., 155–63 (2006).

[490] *See, e.g.,* Chrysanthos Dellarocas, *Strategic Manipulation of Internet Opinion Forums: Implications for Consumers and Firms,* 52(10) Mgmt. Sci., 1577–93 (2006), *https://www.jstor.org/stable/pdf/20110630.pdf;* Michael Anderson & Jeremy Magruder, *Learning from the Crowd: Regression Discontinuity Estimates of the Effects of an Online Review Database,* 122(563) Econ. J., 957–89 (2012); Michael Luca & Georgios Zervas, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud,* 62(12) Mgmt. Sci., 3412–27 (2016), *https://dash.harvard.edu/handle/1/22836596;* Jonathan Zinman & Eric Zitzewitz, *Wintertime for Deceptive Advertising?,* 8(1) Am. Econ. J. Applied, 177–92 (2016), *https://www.aeaweb.org/articles?id=10.1257/app.20130346;* Imke Reiners & Joel Waldfogel, *Digitization and Pre-purchase Information: The Causal and Welfare Impacts of Reviews and Crowd Ratings,* 111(6) Am. Econ. Rev., 1944–71 (2021), *https://www.aeaweb.org/articles?id=10.1257/aer.20200153.*

[491] In October 2021, the Commission authorized a Notice of Penalty Offenses concerning endorsement practices that the FTC determined to be unfair or deceptive in prior administrative cases, including falsely claiming an endorsement by a third party; misrepresenting whether an endorser is an actual, current, or recent user; and failing to disclose an unexpected material connection with an endorser. *See, e.g.,* Press Release, Fed. Trade Comm'n, *FTC Puts Hundreds of Businesses on Notice about Fake Reviews and Other Misleading Endorsements* (Oct. 13, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other-misleading-endorsements.* The notice allows the agency to seek civil penalties pursuant to section 5(m)(1)(B) of the FTC Act against a company that received the notice and then engages in conduct that the Commission previously determined to be unfair or deceptive. 15 U.S.C. 45(m)(1)(B).

[492] 15 U.S.C. 57b(a)(2). Depending on the egregiousness of the misconduct and the harm it is causing, the Commission also may seek preliminary injunctive relief in Federal court. 15 U.S.C. 53(b).

the rule, it would take substantially more time and resources, and would significantly delay any redress to consumers, compared to a single Federal court action alleging a rule violation, in which the court adjudicates both whether the defendant violated the rule and, if so, the appropriate amount of monetary relief to award.[493]

Given the prevalence of unfair or deceptive conduct involving reviews and testimonials, the Commission will have no shortage of bad actors to investigate; it can invest the extra resources freed up by the final rule into more investigations and actions with respect to consumer reviews or testimonials. In sum, the potential consumer-redress benefits of the rule are significant: the Commission can put a stop to more inarguably unfair or deceptive consumer reviews, return more money to consumers, and obtain that redress more quickly.

a. Consumer Welfare Benefits From Better-Informed Purchase Decisions

The study containing the most direct estimate of welfare losses from review manipulation finds that the presence of fake reviews leads consumers to lose $0.12 for every dollar spent in an experimental setting.[494] The study considers a limited number of kinds of review manipulation, which notably does not include suppression of negative reviews or misrepresenting the independence of reviews, which might mean that $0.12 is an underestimate of the effect of the rule. However, the study also measures the effect of complete elimination of inflated star ratings and false written narratives, which might mean that $0.12 is an overestimate of the effect of the rule. Thus, the Commission believes that a reasonable proxy for the effect of the rule's elimination of much review manipulation is that consumers will gain an estimated $0.12 for every dollar spent on goods whose online reviews included fake or false ones.

To estimate consumer welfare benefits from better-informed purchase decisions, the Commission first estimates the total amount of sales for which consumers consult online reviews. U.S. e-commerce sales by retail firms totaled $1.119 trillion in 2023.[495] The Commission assumes that all online retail sales had some form of user-generated commentary (*e.g.,* on third-party review platforms or on company websites), and that this commentary factored into consumers' purchase decisions for these goods.

Online reviews are also important for commerce that is not conducted online, including for revenues earned by the hospitality industry and by other services. Sales for businesses classified as ''Food Services and Drinking Places'' by the U.S. Census totaled $980.15 billion in 2022, which includes revenue from restaurants and bars.[496] The Commission assumes that consumers rely on reviews for only a portion of these sales. Some consumers—particularly those living in rural parts of the country and in smaller cities—may have a small set of familiar food and drink establishments available to them, making online reviews less influential to their decision to patronize a particular one. Moreover, prior research has found that online reviews do not impact revenues of chain restaurants.[497] Accordingly, the Commission assumes that consumers rely on reviews for twenty-five percent of the total revenue generated in the food services and drinking places sector (twenty-five percent of $980.15 billion, or $245.04 billion).[498]

Online reviews are also important for sales in other service sectors. In 2022, total revenue was $316.35 billion for the accommodations sector (which includes hotels and vacation rentals), and total revenue was $67.70 billion for personal services (including beauty salons, barber shops, health clubs, and non-veterinary pet care), totaling $384.05 billion for both sectors.[499] About half of hotel revenue is generated by business travelers, who might rely less on online reviews than leisure travelers do.[500] In addition, pre-paid hotel bookings and vacation rentals booked online are already accounted for in the e-commerce sales figure described above. Furthermore, some consumers may be loyal customers of local salons and other personal services, regardless of these businesses' online reputations. For these reasons, the Commission assumes that a subset of accommodation and personal services revenues is affected by consumer reviews. Similar to the calculation for the food and drinking places industry, the Commission assumes that twenty-five percent of total accommodation and personal care services revenue is impacted by consumer reviews (twenty-five percent of $384.05 billion, or $96.01 billion). The total estimated revenue for services impacted by consumer reviews is $341.05 billion (the sum of $245.04 billion and $96.01 billion). Combining the revenue estimates described above yields $1.461 trillion in estimated sales of goods or services for which consumers incorporate reviews into their decision-making.

Quantitative estimates of the incidence of fake or false reviews vary by source.[501] Nevertheless, at least three prior studies examining the degree of review manipulation as a proportion of businesses or products (rather than as a proportion of *reviews*) contain similar findings. According to these studies, approximately ten percent of products or businesses have some manipulated

[493] *See, e.g.,* Press Release, Fed. Trade Comm'n, *Marketers of Ab Force Weight Loss Device Agree to Pay $7 Million for Consumer Redress* (Jan. 14, 2009), *https://www.ftc.gov/news-events/news/press-releases/2009/01/marketers-ab-force-weight-loss-device-agree-pay-7-million-consumer-redress* (describing a 2009 settlement of a follow-on section 19(a)(2) action against Telebrands Corp. that was brought after the conclusion of litigation over a 2003 administrative complaint alleging violations of section 5).

[494] *See* Jesper Akesson et al., *The Impact of Fake Reviews on Demand and Welfare,* National Bureau of Economic Research Working Paper 31836, Nov. 2023, *https://www.nber.org/papers/w31836.*

[495] *See* U.S. Census Bureau, *Quarterly Retail E-Commerce Sales 4th Quarter 2023,* Feb. 20, 2024, *https://www2.census.gov/retail/releases/historical/ecomm/23q4.pdf.*

[496] U.S. Census Bureau, *Service Annual Survey (SAS),* Jan. 30, 2024, *https://www.census.gov/programs-surveys/sas.html* (listing total revenue of $980,153,000,000 for NAICS Code 722 in 2022, the most recent year with data).

[497] *See* Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com,* Harvard Bus. Sch. Working Paper 12–016 (2016).

[498] Twenty-five percent is likely a reasonable estimate based on the difference in revenues for new restaurants and established restaurants. A study conducted by Toast, Inc., found that new restaurants earn approximately $112,000 in average revenue per year. Justin Guinn, *What is the Average Restaurant Revenue for a New Restaurant?, https://pos.toasttab.com/blog/on-the-line/average-restaurant-revenue* (last visited July 5, 2024). This is approximately twenty-five percent of average revenue for restaurants overall ($486,000, according to the website Eat Pallet, *see* Shari Mason, *How Much Do Restaurants Make in a Day? Solved,* May 24, 2024, *https://eatpallet.com/how-much-do-restaurants-make-in-a-day*).

[499] *See* U.S. Census Bureau, *Service Annual Survey (SAS), supra* note 496 (listing total 2022 revenue of $316,350,000,000 for NAICS Code 721 and listing total 2022 revenue of $67,698,000,000 for NAICS Codes 812111 through 812199 and NAICS Code 81291.

[500] *See* Linchi Kwok, *Will Business Travel Spending Return to the Pre-Pandemic Level Soon?,* Hospitality Net, Sept. 22, 2022, *https://www.hospitalitynet.org/opinion/4112075.html.*

[501] These estimates range from the single digits to over twenty percent. *See* Tripadvisor, *2023 Review Transparency Report, https://www.tripadvisor.com/TransparencyReport2023* (last visited July 5, 2024) (finding that 4.4 percent of review submissions were fraudulent); Trustpilot, *Transparency Report 2024, https://assets.ctfassets.net/b7g9mrbfayuu/7p63VLqZ9vmU2TB65dVdnF/6e47d9ee81c145b5e3d1e16f81bba89a/Trustpilot_Transparency_Report_2024.pdf* (last visited July 5, 2024) (stating that its software removed 6 percent of reviews due to being fake); Yelp, *2023 Yelp Trust & Safety Report* (Feb 28, 2024), *https://trust.yelp.com/trust-and-safety-report/2023-report* (stating that 16 percent of submitted reviews were marked as ''not recommended'' by Yelp's software); Devesh Raval, *Do Gatekeepers Develop Worse Products? Evidence from Online Review Platforms,* (Feb. 27, 2023), *https://deveshraval.github.io/reviews.pdf* (Working Paper) (finding that the share of hidden (likely fake) Yelp reviews is as high as 47 percent).

consumer reviews.[502] Thus, a basic approximation of total e-commerce sales involving some review manipulation is ten percent of $1.119 trillion, or $111.9 billion. Similarly, a basic approximation of review-dependent service industry sales involving some review manipulation is ten percent of $341.05 billion, or $34.1 billion.

Importantly, online businesses that engage in review manipulation are likely to earn less revenue than other e-commerce companies. For example, prior research has found that independent firms and sellers offering lower-quality products are more likely to engage in review manipulation.[503] Therefore, e-commerce sales affected by review manipulation are likely to be lower than the $111.9 billion in sales described above. A more conservative estimate of e-commerce sales involving review manipulation can be obtained by using price differentials of review-manipulated products versus others. Because products with online review manipulation have price points that are approximately 19 percent of the average price of goods sold online (according to research using data from Amazon),[504] a more conservative estimate of review-manipulated products' revenue is 1.9 percent (19 percent × 10 percent) of all $1.119 trillion in e-commerce sales, or $21.26 billion. Because the Commission does not have data on the revenue or quantities sold of review-manipulated products, it assumes that revenue is constant across price points and relies solely on the price differential to approximate revenue. The Commission does not similarly adjust revenues for non-e-commerce firms (*e.g.,* restaurant and hotels) because there is less variation in prices in those industries.

The Commission estimates annual welfare gains by applying the $0.12 estimate, described above, to the estimated amount of U.S. sales that are likely to have some manipulated consumer reviews, yielding an annual estimate of welfare gains in the range of $6.64 billion (12 percent of $55.36 billion, the sum of $21.26 billion and $34.1 billion) and $17.52 billion (12 percent of $146.0 billion, the sum of $111.9 billion and $34.1 billion). Assuming that e-commerce sales increase linearly over the next ten years at the same rate as they did in the past year,[505] the present value of consumer welfare improvements from better-informed purchasing decisions is estimated to be between $57.03 and $230.36 billion as described in Table 2.1.

TABLE 2.1—ESTIMATED BENEFITS FROM CONSUMER WELFARE IMPROVEMENTS FROM PURCHASE DECISIONS

[2024–2033]

Percent of e-commerce revenue impacted by review manipulation	Total annual welfare improvements from better-informed purchase decisions (in billions)	Total 10-year (2024–2033) welfare improvement, 3% discount rate (in billions)	Total 10-year (2024–2033) welfare improvement, 7% discount rate (in billions)
10	$17.52	$230.36	$196.91
1.9	6.64	67.40	57.03

b. Consumer Time Savings From Increased Reliability of Summary Ratings

The rule's prohibitions against deceptive and unfair consumer review acts and practices would increase the reliability of consumer reviews. The Commission assumes that this improvement in the dependability of reviews will lead consumers to place more trust in aggregate measures (*e.g.,* aggregate star ratings), which many review settings use to summarize consumer reviews. This in turn will lead some consumers to spend less time scrutinizing individual reviews to detect red flags commonly found in manipulated reviews (*e.g.,* spelling and grammar mistakes, generic highly positive or negative statements, and lack of detail). Therefore, the rule is likely to result in some amount of time savings for consumers who consult online reviews before making purchases.

Approximately eighty percent of Americans are online shoppers.[506] Of those who shop online, fourteen percent shop online more than once a week, twenty percent shop online once a week, twenty-three percent shop online once every two weeks, twenty-five percent shop online once a month, and the remainder do so every few months.[507] Different age groups of online shoppers spend various amounts of time reading reviews before making a purchase decision. On average, younger consumers spend more time reading reviews than older consumers.[508] This analysis does not incorporate time spent by consumers researching reviews of

[502] *See* Nan Hu et al., *Manipulation of Online Reviews: An Analysis of Ratings, Readability, and Sentiments,* 52(3) Decision Support Systems 674–84 (Feb. 2012) (finding that 10.3 percent of books sold on Amazon had manipulated reviews); Luca, *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud, supra* note 490 (finding that ten percent of Boston restaurants had filtered 5-star reviews on Yelp) (Table 3, row 4); Raval, *Do Gatekeepers Develop Worse Products? Evidence from Online Review Platforms, supra* note 501 (finding that 9.7 percent of businesses with reviews or complaints with the Better Business Bureau are of low quality, where fake reviews inflate ratings) (Table III, column 3, row 1).

[503] *See, e.g.,* Sherry He et al., *The Market for Fake Reviews,* 41(5) Mktg. Sci. 896 (2022), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664992;* Dina Mayzlin et al., *Promotional Reviews: An Empirical Investigation of Online Review Manipulation,* 104(8) Am. Econ. Rev. 2421–55 (2014).

[504] *See* Davide Proserpio et al., *How Fake Customer Reviews Do—and Don't—Work,* Harvard Bus. Rev., Nov. 24, 2020, *https://hbr.org/2020/11/how-fake-customer-reviews-do-and-dont-work.* The authors find that products sold on Amazon with manipulated reviews are typically in the $15 to $40 price range. The midpoint of this range ($27.50) represents 19 percent of the average product's price ($142.74, according to one study *see* Semrush Inc., *Amazon Pricing Study: The Most Expensive Products, Category Volatility, and Seasonal Price Shifts,* Mar. 22, 2022, *https://www.semrush.com/blog/amazon-pricing-study*).

[505] E-commerce sales increased by 7.6 percent from 2022 to 2023. *See* U.S. Census Bureau, *Quarterly Retail E-Commerce Sales 4th Quarter 2023, supra* note 495. Using growth in the past year to predict future e-commerce sales results in a more conservative estimate than using a longer time frame. E-commerce sales experienced higher annual growth rates prior to 2021 (14 percent from 2018 to 2019, 43 percent from 2019 to 2020, and 14 percent from 2020 to 2021) and grew 7.7 percent from 2021 to 2022. This analysis does not project revenues for non-e-commerce industries because linear trends during recent years are unique to the pandemic and are unlikely to be accurate for future years.

[506] *See* Pew Research Center, *Online Shopping and E-Commerce,* Dec. 19, 2016, *https://www.pewresearch.org/internet/2016/12/19/online-shopping-and-e-commerce.*

[507] *See* Int'l Post Corp., *Cross-Border E-Commerce Shopper Survey 2022,* Jan. 2023, *https://www.ipc.be/-/media/documents/public/publications/ipc-shoppers-survey/onlineshoppersurvey2022.pdf.*

[508] *See* BrightLocal, *Local Consumer Review Survey 2019,* Dec. 11, 2019, *https://www.brightlocal.com/research/local-consumer-review-survey-2019.*

restaurants, hotels, and other goods and services that are not purchased online because of the limited amount of information available regarding consumers' total time spent on such activities.

According to the Bureau of Labor Statistics, the average hourly wage in 2023 was $31.48.[509] Recent research suggests that individuals living in the United States value their non-work time at eighty-two percent of average hourly earnings.[510] Thus, Americans overall value their non-work time at $25.81 per hour on average.

The survey data does not specify whether consumers were surveyed regarding the time spent reading reviews before the purchase of a single product or whether the question concerned the purchase of multiple products. This analysis assumes that the time listed in the survey results pertains to the purchase of a single product. It also assumes that the implementation of the rule will reduce the time spent reading reviews by ten percent. Combining the above figures results in $2.49 billion in consumer time savings per year, or a present value of $33.53 billion to $39.19 billion over a 10-year period, as described in Table 2.2.

In addition, there are likely to be other utility-related benefits consumers receive when reading nonmanipulated online reviews or consulting more accurate aggregate summary measures, such as increased satisfaction (apart from purchasing decisions) and decreased frustration. The Commission is not able to quantify these benefits.

Finally, some consumers may spend *more* time reading reviews if reviews are less likely to be fake or otherwise manipulated. This increase in time spent reading reviews may offset any time savings from the increased reliability of summary ratings. Therefore, the Commission presents another scenario in Table 2.2 where consumers do not gain any benefits from time savings. However, as before, there are likely to be additional benefits that are difficult to quantify (*e.g.,* decreased frustration) that result from reading more accurate reviews, likely yielding positive net benefits related to reading reviews even when consumers spend more time doing so.

TABLE 2.2—ESTIMATED BENEFITS FROM TIME SAVINGS

[2024–2033]

Scenario 1—Improved Reliability of Aggregate Measures Reduces Overall Time Spent Reading Reviews	
Number of online shoppers, age 18–34 [a]	60,467,204
Average amount of time spent reading online reviews before making a purchase decision (in hours), age 18–34	0.336
Number of online shoppers, age 35–54 [a]	67,273,832
Average amount of time spent reading online reviews before making a purchase decision (in hours), age 35–54	0.231
Number of online shoppers, age 55+ [a]	78,920,814
Average amount of time spent reading online reviews before making a purchase decision (in hours), age 55+	0.167
Total amount of time all online shoppers spend reading online reviews before making a purchase decision (in hours)	48,991,116
Total amount of time U.S. online shoppers spend reading online reviews per year (in hours) [b]	1,728,406,578
Value of time for online shoppers (per hour)	$25.81
Percentage of time saved	10%
Total annual time savings	$4,461,017,378
Total 10-year (2024–2033) time savings, 3% discount rate (in billions)	$39.19
Total 10-year (2024–2033) time savings, 7% discount rate (in billions)	$33.53
Scenario 2—Increase in Time Spent Reading Reviews Offsets Time Savings from Improved Reliability of Summary Measures	
No quantifiable benefit	$0

[a] 80% of age-specific total U.S. population (Source: Pew Research Center, U.S. Census).
[b] Adjusting for online shopping frequency (Source: International Post Corporation).

c. Benefits Related to Competition

Accurate online reviews have been shown to improve competition. Several studies have found that online reviews are particularly important for independent and newer firms.[511] Ratings are more influential for these firms because consumers do not have strong prior beliefs as to their quality. New entrants whose sales benefit from online reviews typically offer higher quality goods and services. On the other hand, lower-quality firms often experience revenue losses with more online review activity.[512]

Relatedly, fake, false, and manipulated online reviews allow companies to surpass competitors. One study found that it only takes 50 fake reviews for a seller to pass any of its competitors in terms of visibility (*e.g.,* via rankings or search results).[513] It follows that by curbing the number of fake, false, or manipulated reviews, the rule would benefit consumers by improving the competitive environment for legitimate firms selling higher-quality products (*i.e.,* those who do not rely on review manipulation to sell their goods). While the benefits resulting

[509] Bureau of Labor Statistics, *May 2023 National Occupational and Wage Estimates, Unites States, https://www.bls.gov/oes/current/oes_nat.htm* (listing mean hourly wage of $31.48 for all occupations).

[510] *See* Daniel S. Hamermesh, *What's to Know About Time Use?,* 30 J. of Econ. Survs. 198–203 (2016), *https://doi.org/10.1111/joes.12107.*

[511] *See* Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com, supra* note 497 (finding that chain restaurants have declined in market share as Yelp penetration has increased); Gregory Lewis and Georgios Zervas, *The Welfare Impact of Consumer Reviews: A Case Study of the Hotel Industry, https://economics.sas.upenn.edu/sites/default/files/filevault/u475/tawelfare.pdf* (Working Paper) (finding that demand for independent hotels is more sensitive to reviews on Tripadvisor); Brett Hollenbeck, *Online Reputation Mechanisms and the Decreasing Value of Chain Affiliation,* 55(5) J. of Mktg. Resch. 636–54 (2018), *https://www.jstor.org/stable/26966532* (finding that branded, chain-affiliated hotels' premiums over independent hotels have declined substantially largely due to online reputation mechanisms).

[512] *See* Limin Fang, ''*The Effects of Online Review Platforms on Restaurant Revenue, Consumer Learning, and Welfare*'' 68(11) Mgmt. Sci. 7793–8514 (2022).

[513] *See* Theodoros Lappas et al., *The Impact of Fake Reviews on Online Visibility: A Vulnerability Assessment of the Hotel Industry,* 27(4) Inf. Sys. Research 940–961 (2016), *https://pubsonline.informs.org/doi/abs/10.1287/isre.2016.0674.*

from improvements in the competitive environment are difficult to quantify, the Commission believes they are likely to be substantial.

2. Estimated Costs of the Final Rule

This section describes the costs associated with the rule, provides quantitative estimates where possible, and describes costs that are only assessed qualitatively. While the Commission only quantifies benefits from reduced review manipulation and not the other rule provisions above, the Commission quantifies compliance costs for all aspects of the rule.

a. Compliance Costs

The acts and practices prohibited by the rule are unfair or deceptive under section 5 of the FTC Act. The rule targets acts or practices that are clear violations of section 5, and businesses that are already compliant will not experience any additional compliance costs as a result of the rule. Moreover, the FTC routinely provides guidance to businesses on complying with FTC law, which will make the implications of the rule easy to understand for a wide range of businesses. Finally, in response to the comments, the Commission has both narrowed and clarified the rule requirements relative to the proposed rule (*see* section IV of this document). Accordingly, one of the scenarios reflected in Table 3.1 assumes that businesses will spend a *de minimis* amount of time interpreting the rule and make no changes to their current policies.

However, because businesses now face the potential for civil penalties if they engage in conduct that violates the final rule, businesses may choose to incur additional administrative burdens to ensure compliance. The Commission presents another scenario in Table 3.1 where businesses notify their employees of the rule, conduct a review of their processes, and take any steps they deem important to ensure compliance. For firms that already comply with section 5 of the FTC Act, these steps might be out of caution so as not to risk the possibility of violating the rule. For example, some sellers may currently flag and remove reviews on their websites that they reasonably believe are fake. While this practice would not amount to a violation of the relevant rule provision (§ 465.7(b)), the rule may lead some businesses to choose to take extra steps to verify the inauthenticity of such reviews before suppressing them. A business may also decide to notify its employees of the rule. For example, if certain employees are responsible for posting new product pages or managing the company's social media presence, business owners may wish to notify these employees to ensure compliance. Although cautious firms may elect to conduct additional compliance review, the rule would not require any additional recordkeeping or notices beyond what is required by section 5 of the FTC Act.

For the heightened compliance review scenario in Table 3.1, the Commission makes assumptions about the number of businesses impacted and the number of person-hours involved in compliance activities. In 2021, there were approximately 34.77 million total firms in the United States. Of these firms, 19,688 had 500 or more employees (''large companies''), and the remaining 34.75 million had fewer than 500 employees (''small companies'').[514] The Commission assumes that all 19,688 large companies had some form of online consumer review presence (*e.g.*, on third-party business platforms such as Yelp or Google Reviews, or on their own websites). It assumes that 74 percent of the 34.75 million small companies (25.71 million companies) had an online consumer review presence.[515]

With heightened compliance review, the Commission assumes that lawyers at large companies, whose time is valued at $70.08 per hour,[516] will spend eight hours conducting a one-time review of the rule and notifying employees whose role involves creating new product pages, managing the company's social media presence, and any other relevant practices covered by the rule. It assumes that small company owners, whose time is valued at $33.48,[517] and are less likely have formal compliance programs, spend one hour doing the same.

In addition, some companies may spend time reviewing their automated processes to ensure that they comply with the rule. These costs, which companies might incur just once or on a recurring basis, are likely to be minimal. The Commission does not quantify these process-related costs because, among other things, the Commission does not know the number of firms that might undertake such a review.

The total estimated costs are tabulated in Table 3.1.

TABLE 3.1—ESTIMATED COMPLIANCE COSTS

	2024 Only
Scenario 1—No Review	
No cost	$0
Total cost	$0
Scenario 2—Heightened Compliance Review	
Number of large companies (in thousands)	19.69
Cost per hour of rule review and related activities	$70.08
Number of hours of rule review and related activities	8
Subtotal (in millions)	$11.04
Number of small companies with online reviews (in thousands)	25,715.23
Cost per hour of rule review and related activities	$33.48

[514] *See* U.S. Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry, https://www.census.gov/data/tables/2021/econ/susb/2021-susb-annual.html* (last visited July 5, 2024) (listing 6.29 million total firms with at least one paid employee) and U.S. Census Bureau, *Nonemployer Statistics, https://www.census.gov/programs-surveys/nonemployer-statistics.html* (listing 28.48 million firms with no paid employees) (last visited July 5, 2024).

[515] Seventy-four percent of small businesses have at least one Google review. *See* BrightLocal, *Google Reviews Study: How Many Reviews Do Local Businesses Need?,* Oct. 31, 2018, *https://www.brightlocal.com/research/google-reviews-study/.*

[516] *See* Bureau of Labor Statistics, *Occupational Outlook Handbook: Lawyers, https://www.bls.gov/ooh/legal/lawyers.htm* (last visited July 5, 2024).

[517] *See* Payscale, *Average Small Business Owner Salary, https://www.payscale.com/research/US/Job=Small_Business_Owner/Salary* (last visited July 5, 2024) (reporting median base salary of $69,648 for small business owners). We assume small business owners work 2,080 hours per year.

TABLE 3.1—ESTIMATED COMPLIANCE COSTS—Continued

	2024 Only
Number of hours of rule review and related activities	1
Subtotal (in millions)	$860.95
Total cost (in millions)	$871.98

b. Other Impacts of the Rule

There are several other potential effects from the rule. While the proposed requirements are far from onerous, there is the possibility that some sellers may ''overcorrect'' in response to the penalties available for rule violations. For example, a firm may encounter an excess of fake, negative reviews from a competitor. While § 465.7(b) permits the suppression of reviews that the seller reasonably believes are fake, an overcautious seller seeking to suppress fake reviews from competitors may choose to display no reviews whatsoever so as not to risk violating the rule. Alternatively, such a firm may take no action towards suspected fake reviews to avoid a possible rule violation. Both of these hypothetical scenarios would likely hurt the information environment for consumers. The Commission believes that such unintended consequences of the rule are very unlikely, especially in light of how the rule has been clarified and narrowed in response to the comments.

C. Reasonable Alternatives and Explanation of Why Particular Alternative Chosen

The Commission has attempted to catalog and quantify the incremental benefits and costs of the provisions included in the final rule. Extrapolating these benefits over the 10-year assessment period and discounting to the present provides an estimate of the present value for total benefits and costs of the rule, with the difference—net benefits—providing one measure of the value of regulation.

Using our low-end estimate above, the present value of quantified benefits for consumers from the rule's requirements over a 10-year period using a 7% discount rate is estimated at $57.03 billion. The present value of quantified costs for covered firms of complying with the rule's requirements over a 10-year period using a 7% discount rate is estimated at $0.83 billion. This generates an estimate of the present value of quantified net benefits equal to $56.16 billion using a discount rate of 7%. Using the upper-end assumptions discussed in the preceding analysis results in net benefits of $230.44 billion using a discount rate of 7%.

To examine the sensitivity of the net benefits conclusions to the possibility of systematic underestimating of compliance costs, the Commission calculates costs and benefits in a scenario where all labor costs turn out to be ten times larger than the parameter values in the heightened compliance review scenario. For both small and large companies, the number of hours of rule review and related activities are increased by a factor of ten. All benefits and other cost parameters are unchanged in this analysis. With these new parameters, compliance review will cost $8.72 billion in 2024, and the present value of quantified net benefits will be equal to $48.31 billion using a discount rate of 7%. Thus, while the Commission believes compliance costs in the heightened compliance scenario are likely overestimates, even if they are instead severe underestimates, the quantified net benefits are highly positive.

To examine the sensitivity of the net benefits conclusions to the possibility of systematic overestimating of the effectiveness of deterrence, the Commission calculates costs and benefits in a scenario in which the rule only partially eliminates the welfare losses to consumers caused by the various types of review manipulation covered by the rule. For this scenario, the Commission instead assumes that consumers will gain an estimated $0.04, rather than $0.12, for every dollar spent on goods whose online reviews included fake or false ones, the minimum welfare improvement reported for partial elimination of review manipulation in the study on which these estimates are based.[518] Under this scenario, the present value of quantified net benefits under a 7% discount rate is $18.14 billion instead of $56.16 billion. Combining the two scenarios, if the Commission both systematically underestimates compliance costs and systematically overestimates the effectiveness of the rule in preventing review manipulation, the present value of quantified net benefits under a 7% discount rate is $10.29 billion. Thus, even if the main compliance cost estimates above are underestimates and the main welfare benefits above are overestimates, the quantified net benefits are highly positive.

One alternative to the final rule would be to terminate the rulemaking and rely instead on the existing tools that the Commission currently possesses to combat the specified review and testimonial practices, such as consumer education and enforcement actions brought under sections 5 and 19 of the FTC Act. Failing to strengthen the set of tools available in support of the Commission's enforcement program against unfair or deceptive consumer reviews or testimonials would deprive it of the net benefits outlined above.

The Commission expects unquantified benefits to outweigh unquantified costs for this rule. As noted above, the benefits from several rule provisions are unquantified, while the compliance costs of all rule provisions are quantified. Thus, the quantified net benefits of $56.16 billion above likely underestimate the benefits to the public. Furthermore, these estimates are robust to uncertainty. Even assuming systematic underestimation of compliance costs and systematic overestimation of the rule effectiveness, the quantified net benefits are large and positive. Therefore, this regulatory analysis indicates that adoption of the rule will result in benefits to the public that outweigh the costs.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.,* requires Federal agencies to seek and obtain Office of Management and Budget (''OMB'') approval before undertaking a collection of information directed to ten or more persons. As part of the NPRM, the Commission noted that the proposed rule did not contain an information collection requirement. However, for the purpose of confirmation, in Question 4 of the NPRM, the Commission nonetheless asked commenters whether the proposed rule contained a collection

[518] *See* Akesson, *The Impact of Fake Reviews on Demand and Welfare, supra* note 494 (reviews for inferior products that had inflated star ratings but accurate written narratives caused consumers to lose $0.04 in welfare for every dollar spent).

of information.[519] One commenter responded, ''Yes, it does. It contains our research and others' research, as well as valuable estimates to harm/costs for all 3 parties: consumers, businesses, and government.'' [520] The Commission believes that this commenter was addressing whether the NPRM was collecting information, as opposed to whether the proposed rule would contain a collection of information within the meaning of the PRA. No other comments responding to the NPRM or Notice of Hearing addressed this question. While the Commission finalizes the proposed rule with some limiting modifications and clarifications based on the comments it received, it has not added any new requirements that would collect information from the public. Accordingly, the Commission has determined that the final rule neither includes a new collection of information, nor modifies an existing collection of information.

VIII. Regulatory Flexibility Act—Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA'') with a final rule, if any, unless the Commission certifies that the rule will not have a significant economic impact on a substantial number of small entities.[521] The purpose of a regulatory flexibility analysis is to ensure that an agency considers potential impacts on small entities and examines regulatory alternatives that could achieve the regulatory purpose while minimizing burdens on small entities.

In the NPRM, the Commission provided an IRFA, stating its belief that the proposal will not have a significant economic impact on small entities, and soliciting comments on its burden estimate. In addition to publishing the NPRM in the **Federal Register***,* the Commission announced the proposed rule through press and other releases. The Commission received comments from small businesses and associations that represent small businesses. In order to reduce compliance burdens on small businesses and other small entities, the Commission finalizes the proposed rule with some limiting modifications and clarifications as described in section IV of this document.

The Commission believes that the rule will not have a significant economic impact upon small entities, although it may affect a substantial number of small businesses. The rule primarily prohibits certain unfair or deceptive acts or practices involving consumer reviews or testimonials and does not impose a reporting or recordkeeping requirement upon businesses. In addition, the Commission does not anticipate these changes will impose any additional significant additional costs upon small businesses. Specifically, as discussed in further detail below, the Commission anticipates than an average small business will spend, at most, one hour on compliance review, incurring a cost of $33.48.[522] Therefore, the rule imposes no new significant burdens on law-abiding small businesses. The Commission has determined, nonetheless, that it is appropriate to publish an FRFA to identify the impact of the rule on small entities. Therefore, the Commission has prepared the following analysis:

A. Reasons for the Rule

The Commission describes the reasons for the rule in section VI.A. of this document. The FTC's law enforcement, outreach, and other engagement in this area indicate that certain unfair or deceptive acts or practices involving consumer reviews or testimonials are prevalent. The rule will benefit consumers and legitimate businesses without imposing significant burdens.

B. Statement of the Objectives of, and Legal Basis for, the Rule

The Commission describes the objectives for the rule in section VI.A of this document. The legal basis for the rule is section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

C. Issues Raised by Comments, the Commission's Assessment and Response, and Any Changes Made as a Result

One individual commenter accepted the Commission's estimated compliance costs on small businesses but said it was unfair that ''small companies with online reviews would bear almost all of the [rule's] estimated compliance costs.'' [523] As the Commission stated in the NPRM, it is likely that only a minority of small businesses would elect to conduct optional compliance review and the total compliance costs for small businesses is likely to be significantly lower than the Commission's estimate.[524]

One trade association simply asserted that certain provisions of the proposed rule could be detrimental to small businesses but did not specifically address the IRFA.[525] This commenter expressed concern about: (1) civil penalty exposure for failing to stop the actions of undiscovered third parties providing reviews and testimonials appearing on a business's website; (2) a subsequent broadening of the proposed rule to prohibit incentivized reviews other than those required to express a particular sentiment; and (3) potential liability when an agent's review or testimonial appears without a disclosure.[526] The Commission addresses these specific concerns in section IV of this document and has narrowed the rule or provided clarification as appropriate.

The Commission does not believe that it needs to make any changes to its IRFA in response to these comments.

Section IV provides a section-by-section analysis that discusses the provisions proposed in the NPRM, the comments received, the Commission's responses to the comments, and any changes made by the Commission as a result.

D. Comments by the Chief Counsel for Advocacy of the SBA, the Commission's Assessment and Response, and Any Changes Made as a Result

The Commission did not receive any comments from the Chief Counsel for Advocacy of the SBA.

E. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply

The final rule could impact small entities that currently have, or might potentially, solicit consumer reviews or disseminate consumer testimonials. It could also impact small entities that use celebrity testimonials or have a social media presence. It is likely that the rule will primarily affect businesses that sell products or services directly to consumers. For example, the rule is less likely to impact small entities that manufacture niche raw materials for other businesses or small agricultural

[519] NPRM, 88 FR 49388.

[520] Transparency Company Cmt. at 10.

[521] *See* 5 U.S.C. 605(b).

[522] *See infra* section VIII.F of this document.

[523] Camp-Martin Cmt. at 2–3.

[524] NPRM, 88 FR 49388.

[525] IAB Cmt. at 1–15.

[526] *Id.* at 2, 5–6, 8–9, 10.

firms that do not sell directly to consumers. Nevertheless, for a conservative estimate of total costs, the Commission assumes that the rule will impact all industry classes of small entities.

As described in section VI.B.2 of this document, there are approximately 34.75 million small businesses in the United States. Prior research has found that 74 percent of small businesses have at least one Google review.[527] On the one hand, it is possible that, across all platforms (beyond Google reviews), a higher percentage of small businesses have consumer reviews or testimonials, celebrity testimonials, or a social media presence. On the other hand, it is likely that many of these firms do not interact with reviews and such passive firms would not be affected by the rule. The Commission does not have the appropriate data to refine this estimate. Therefore, its best estimate is that no more than 25.71 million (74 percent × 34.75 million) small businesses will be impacted by the rule.

F. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

The rule contains no reporting or recordkeeping requirements. Therefore, many law-abiding businesses are likely to incur no additional compliance costs with the rule.

As described in section VI.B.2 of this document, a cautious firm may elect to undertake additional compliance review due to the potential for civil penalties for rule violations. If every small business impacted by the rule conducts one hour of compliance review, each firm would incur $33.48 of compliance costs, which reflects the estimated hourly earnings of a small business owner.[528] Therefore, under the conservative estimate of heightened compliance review for all small businesses, costs to small businesses would total $860.95 million (25.71 million × $33.48). Because it is likely that only a minority of small businesses will elect to conduct optional compliance review, total compliance costs for these entities are likely to be significantly lower than this estimate.

G. Description of Steps Taken To Minimize Impact of the Rule on Small Entities

In response to comments, the Commission has narrowed the rule and clarified the rule requirements as described in section IV of this document, which should minimize further any economic impact on small entities. In its IRFA, the Commission described an alternative to the proposed rule, namely, to rely on the Commission's previously existing tools, such as consumer education and enforcement actions brought under sections 5 and 19 of the FTC Act, to combat the specified review and testimonial practices. The Commission believes that promulgation of the rule will result in greater net benefits to the marketplace while imposing no additional burdens beyond what is required by the FTC Act. As described in further detail in section VI.B.1.c of this document, the rule will not only result in significant benefits to consumers but also improve the competitive environment, particularly for small, independent, or new firms. Therefore, the rule appears to be superior to this alternative for small entities.

IX. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 465

Advertising.

■ For the reasons set forth above, the Federal Trade Commission amends 16 CFR Chapter I by adding part 465 to read as follows:

PART 465—RULE ON THE USE OF CONSUMER REVIEWS AND TESTIMONIALS

Sec.
465.1 Definitions.
465.2 Fake or false consumer reviews, consumer testimonials, or celebrity testimonials.
465.3 [Reserved]
465.4 Buying positive or negative consumer reviews.
465.5 Insider consumer reviews and consumer testimonials.
465.6 Company-controlled review websites or entities.
465.7 Review suppression.
465.8 Misuse of fake indicators of social media influence.
465.9 Severability

Authority: 15 U.S.C. 57a.

§ 465.1 Definitions.

(a) *Business* means an individual who sells products or services, a partnership that sells products or services, a corporation that sells products or services, or any other commercial entity that sells products or services.

(b) *Celebrity testimonial* means an advertising or promotional message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a well-known individual who purchased, used, or otherwise had experience with a product, service, or business.

(c) *Clear and conspicuous* means that a required disclosure is easily noticeable (*i.e.,* difficult to miss) and easily understandable by ordinary consumers, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented in at least the same means as the representation(s) requiring the disclosure.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

(4) In any communication using an interactive electronic medium, such as social media or the internet, the disclosure must be unavoidable. A disclosure is not clear and conspicuous if a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it.

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

(7) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(8) When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, ''ordinary consumers'' includes members of that group.

(d) *Consumer review* means a consumer's evaluation, or a purported consumer's evaluation, of a product, service, or business that is submitted by

[527] *See supra* note 515.

[528] *See* Payscale, *Average Small Business Owner Salary, supra* note 517.

the consumer or purported consumer and that is published to a website or platform dedicated in whole or in part to receiving and displaying such evaluations. For the purposes of this part, consumer reviews include consumer ratings regardless of whether they include any text or narrative.

(e) *Consumer review hosting* means providing the technological means by which a website or platform enables consumers to see or hear the consumer reviews that consumers have submitted to the website or platform.

(f) *Consumer testimonial* means an advertising or promotional message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual) that consumers are likely to believe reflects the opinions, beliefs, or experiences of a consumer who has purchased, used, or otherwise had experience with a product, service, or business.

(g) *Distribute fake indicators of social media influence* means the distribution of fake indicators of social media influence to individuals or businesses who could use the indicators to misrepresent their influence.

(h) *Fake indicators of social media influence* means indicators of social media influence generated by bots, purported individual accounts not associated with a real individual, accounts created with a real individual's personal information without their consent, or hijacked accounts, or that otherwise do not reflect a real individual's or entity's activities, opinions, findings, or experiences.

(i) *Immediate Relative* means a spouse, parent, child, or sibling.

(j) *Indicators of social media influence* means any metrics used by the public to make assessments of an individual's or entity's social media influence, such as followers, friends, connections, subscribers, views, plays, likes, saves, shares, reposts, and comments.

(k) *Manager* means an employee of a business who supervises other employees or agents and who either holds the title of a ''manager'' or otherwise serves in a managerial role.

(l) *Officers* include owners, executives, and managing members of a business.

(m) *Purchase a consumer review* means to provide something of value, such as money, gift certificates, products, services, discounts, coupons, contest entries, or another review, in exchange for a consumer review.

(n) *Reviewer* means the author or purported author of a consumer review.

(o) *Testimonialist* means the individual giving or purportedly giving a consumer testimonial or celebrity testimonial.

(p) An *unfounded or groundless legal threat* is a legal threat based on claims, defenses, or other legal contentions unwarranted by existing law or based on factual contentions that have no evidentiary support or will likely have no evidentiary support after a reasonable opportunity for further investigation or discovery.

§ 465.2 Fake or false consumer reviews, consumer testimonials, or celebrity testimonials.

(a) It is an unfair or deceptive act or practice and a violation of this part for a business to write, create, or sell a consumer review, consumer testimonial, or celebrity testimonial that materially misrepresents, expressly or by implication:

(1) That the reviewer or testimonialist exists;

(2) That the reviewer or testimonialist used or otherwise had experience with the product, service, or business that is the subject of the review or testimonial; or

(3) The reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial.

(b) It is an unfair or deceptive act or practice and a violation of this part for a business to purchase a consumer review, or to disseminate or cause the dissemination of a consumer testimonial or celebrity testimonial, about the business or one of the products or services it sells, which the business knew or should have known materially misrepresented, expressly or by implication:

(1) That the reviewer or testimonialist exists;

(2) That the reviewer or testimonialist used or otherwise had experience with the product, service, or business that is the subject of the review or testimonial; or

(3) The reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial.

(c) It is an unfair or deceptive act or practice and a violation of this part for a business to procure a consumer review from its officers, managers, employees, or agents, or any of their immediate relatives, for posting on a third-party platform or website, when the review is about the business or one of the products or services it sells, and when the business knew or should have known that the review materially misrepresented, expressly or by implication:

(1) That the reviewer exists;

(2) That the reviewer used or otherwise had experience with the product, service, or business that is the subject of the review; or

(3) The reviewer's experience with the product, service, or business that is the subject of the review.

(d) However, paragraphs (b) and (c) of this section do not apply to:

(1) Reviews or testimonials that resulted from a business making generalized solicitations to purchasers to post reviews or testimonials about their experiences with the product, service, or business; or

(2) Reviews that appear on a website or platform as a result of the business merely engaging in consumer review hosting.

§ 465.3 [Reserved]

§ 465.4 Buying positive or negative consumer reviews.

It is an unfair or deceptive act or practice and a violation of this part for a business to provide compensation or other incentives in exchange for, or conditioned expressly or by implication on, the writing or creation of consumer reviews expressing a particular sentiment, whether positive or negative, regarding the product, service, or business that is the subject of the review.

§ 465.5 Insider consumer reviews and consumer testimonials.

(a) It is an unfair or deceptive act or practice and a violation of this part for an officer or manager of a business to write or create a consumer review or consumer testimonial about the business or one of the products or services it sells that fails to have a clear and conspicuous disclosure of the officer's or manager's material relationship to the business, unless, in the case of a consumer testimonial, the relationship is otherwise clear to the audience.

(b)(1) It is an unfair or deceptive act or practice and a violation of this part for a business to disseminate or cause the dissemination of a consumer testimonial about the business or one of the products or services it sells by one of its officers, managers, employees, or agents, which fails to have a clear and conspicuous disclosure of the testimonialist's material relationship to the business, when the relationship is not otherwise clear to the audience and the business knew or should have known the testimonialist's relationship to the business.

(2) However, paragraph (b)(1) of this section does not apply to:

(i) Generalized solicitations to purchasers for them to post testimonials about their experiences with the product, service, or business, or

(ii) Merely engaging in consumer review hosting.

(c)(1) It is an unfair or deceptive act or practice and a violation of this part for an officer or manager of a business to solicit or demand a consumer review about the business or one of the products or services it sells from any of their immediate relatives or from any employee or agent of the business, or to solicit or demand that such employees or agents seek such reviews from their relatives, when:

(i) The solicitation or demand results in an officer's or manager's immediate relatives, an employee or agent, or the immediate relatives of an employee or agent writing or creating such a review without a disclosure of the reviewer's material relationship to the business, and

(ii) The officer or manager:

(A) Encouraged the prospective reviewer not to make such a disclosure,

(B) Did not instruct that prospective reviewers disclose clearly and conspicuously their relationship to the business, or

(C) knew or should have known that such a review appeared without such a disclosure and failed to take remedial steps.

(2) However, paragraph (c)(1) of this section does not apply to generalized solicitations to purchasers for them to post reviews about their experiences with the product, service, or business.

§ 465.6 Company-controlled review websites or entities.

It is an unfair or deceptive act or practice and a violation of this part for a business to materially misrepresent, expressly or by implication, that a website, organization, or entity that it controls, owns, or operates provides independent reviews or opinions, other than consumer reviews, about a category of businesses, products, or services including the business or one or more of the products or services it sells.

§ 465.7 Review suppression.

It is an unfair or deceptive act or practice and a violation of this part:

(a) For anyone to use an unfounded or groundless legal threat, a physical threat, intimidation, or a public false accusation in response to a consumer review that is made with the knowledge that the accusation was false or made with reckless disregard as to its truth or falsity, in an attempt to:

(1) Prevent a review or any portion thereof from being written or created, or

(2) Cause a review or any portion thereof to be removed, whether or not that review or a portion thereof is replaced with other content, or

(b) For a business to materially misrepresent, expressly or by implication, that the consumer reviews of one or more of the products or services it sells displayed in a portion of its website or platform dedicated in whole or in part to receiving and displaying consumer reviews represent most or all the reviews submitted to the website or platform when reviews are being suppressed (*i.e.,* not displayable) based upon their ratings or their negative sentiment. For purposes of this paragraph, a review is not considered suppressed based upon rating or negative sentiment if the suppression occurs based on criteria for withholding reviews that are applied equally to all reviews submitted without regard to sentiment, such as when:

(1) The review contains:

(i) Trade secrets or privileged or confidential commercial or financial information,

(ii) Defamatory, harassing, abusive, obscene, vulgar, or sexually explicit content,

(iii) The personal information or likeness of another individual,

(iv) Content that is discriminatory with respect to race, gender, sexuality, ethnicity, or another intrinsic characteristic, or

(v) Content that is clearly false or misleading;

(2) The seller reasonably believes the review is fake; or

(3) The review is wholly unrelated to the products or services offered by or available at the website or platform.

§ 465.8 Misuse of fake indicators of social media influence.

It is an unfair or deceptive act or practice and a violation of this part for anyone to:

(a) Sell or distribute fake indicators of social media influence that they knew or should have known to be fake and that can be used by individuals or businesses to materially misrepresent their influence or importance for a commercial purpose; or

(b) Purchase or procure fake indicators of social media influence that they knew or should have known to be fake and that materially misrepresent their influence or importance for a commercial purpose.

§ 465.9 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions will continue in effect.

By direction of the Commission.

April J. Tabor,

Secretary.

[FR Doc. 2024–18519 Filed 8–21–24; 8:45 am]

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AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

FEDERAL TRADE COMMISSION

16 CFR Part 425

RIN 3084–AB60

Negative Option Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') issues final amendments to the Commission's trade regulation ''Rule Concerning Use of Prenotification Negative Option Plans,'' retitled the ''Rule Concerning Recurring Subscriptions and Other Negative Option Programs'' (''Rule,'' ''final Rule'' or ''Negative Option Rule''). The final Rule now applies to all negative option programs in any media. This document also contains the text of the final Rule, the Rule's Statement of Basis and Purpose (''SBP''), and a final regulatory analysis.

DATES:

Effective date: This rule is effective January 14, 2025.

Compliance date: Regulated entities have until May 14, 2025 to comply with §§ 425.4 through 425.6.

ADDRESSES: Relevant portions of the record of this proceeding, including this document, are available *at https://www.ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Katherine Johnson, Attorney, (202) 326–2185, *kjohnson3@ftc.gov,* Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave. NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Overview

The Commission commenced this proceeding because it had reason to believe unfair and deceptive negative option practices are widespread in the marketplace. Negative option programs can provide substantial benefits for sellers and consumers. However, consumers cannot realize these benefits when sellers make material misrepresentations to induce consumers to enroll in such programs, fail to provide important information, bill consumers without their consent, or make cancellation difficult or impossible. Unfair and deceptive negative option practices have been a persistent source of consumer harm for decades, saddling shoppers with recurring payments for products and services they never intended to purchase nor wanted to continue buying. In the past, the Commission sought to address these practices through individual law enforcement actions and a patchwork of laws and regulations. Nevertheless, problems persist, as demonstrated by both a steady stream of State and Federal law enforcement actions and thousands of consumer complaints each year. To address these practices, the Commission proposed amending the current Negative Option Rule to establish clear, enforceable performance-based requirements for all negative option features in all media. The Commission solicited comments first in an advance notice of proposed rulemaking (''ANPR'') and then on proposed amendments in a notice of proposed rulemaking (''NPRM''). The Commission designed these amendments to ensure consumers understand what they are purchasing and allow them to cancel their participation without undue burden.

Among other things, this final Rule (1) prohibits misrepresentations of any material fact made while marketing using negative option features; (2) requires sellers to provide important information prior to obtaining consumers' billing information and charging consumers; (3) requires sellers to obtain consumers' unambiguously affirmative consent to the negative option feature prior to charging them; and (4) requires sellers to provide consumers with simple cancellation mechanisms to immediately halt all recurring charges.

The Commission now promulgates a final Rule. Pursuant to 15 U.S.C. 57a(a)(1)(B), the Rule, *inter alia,* defines the following acts and practices as unfair or deceptive within the meaning of section 5 of the FTC Act:

- to misrepresent any material fact made while marketing using a negative option feature (§ 425.3);
- to fail to clearly and conspicuously disclose material terms prior to obtaining a consumer's billing information in connection with a negative option feature (§ 425.4);
- to fail to obtain a consumer's express informed consent to the negative option feature before charging the consumer (§ 425.5); and
- to fail to provide a simple mechanism to cancel the negative option feature and immediately halt charges (§ 425.6).

Further, the Rule, consistent with the final sentence of 15 U.S.C. 57a(a)(1)(B) includes requirements prescribed for the purpose of preventing such acts or practices.

The final Rule differs from the proposed Rule in two significant ways. First, the proposed Rule would have required sellers to provide annual reminders to consumers of the negative option feature. Second, the proposed Rule would have prohibited sellers from forcing consumers to receive saves [1] without first obtaining consumers' unambiguously affirmative consent. The Commission has considered comments both supporting and opposing these proposed provisions. As explained in the section-by-section analysis, the Commission declines to adopt these provisions of the proposed Rule at this time. Instead, the Commission plans to seek further comment through a supplemental NPRM (''SNPRM''), and therefore, keeps the record open on these issues.[2]

Finally, in response to the comments, the Commission adds two definitions and two provisions to the final Rule for clarity. The final Rule explicitly defines the terms ''material'' and ''interactive electronic medium'' consistent with how they were defined and discussed in the NPRM. Additionally, the final Rule includes a severability provision and a provision allowing requests for exemptions from the final Rule consistent with the Commission's Rules of Practice.[3]

II. Background

A. Statutory Authority

The Commission promulgates the final Negative Option Rule, 16 CFR part 425 pursuant to section 18 of the FTC Act, 15 U.S.C. 57a, the Administrative Procedure Act (''APA''), 5 U.S.C. 533; and part 1, subpart B of the Commission's Rules of Practice, 16 CFR 1.7–1.20. Section 18 permits the Commission to promulgate, amend, and repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1); and allows the Commission to prescribe requirements for the purpose of preventing these unfair or deceptive acts and practices.

B. Negative Option Marketing

1. Negative Option Programs

Negative option programs come in a variety of forms, but all share a central feature: each contain a term or condition that allows a seller to interpret a customer's silence, or failure to take an

[1] Save was defined in the proposed Rule to mean an attempt by a seller to present any additional offers, modifications to the existing agreement, reasons to retain the existing offer, or similar information when a consumer attempts to cancel a negative option feature. Proposed Rule § 425.2(f).

[2] *See* 16 CFR 1.11 (''Commission's Rules of Practice'' or ''Commission Rules''); *cf.* Impersonation Rule, 89 FR 15072 (Feb. 29, 2024).

[3] *See* 16 CFR 1.16.

affirmative action, as acceptance of an offer.[4] Negative option programs generally fall into four categories: prenotification plans, continuity plans, automatic renewals, and free trial (*i.e.,* free-to-pay or nominal-fee-to-pay) conversion offers.

Prenotification plans are the only negative option practice currently covered by the Commission's current Negative Option Rule, originally promulgated in 1973. Under such plans (*e.g.,* book-of-the-month clubs), sellers provide periodic notices offering goods to participating consumers and then send—and charge for—those goods only if the consumers take no action to decline the offer. The periodic announcements and shipments can continue indefinitely. In continuity plans, consumers agree in advance to receive periodic shipments of goods or provision of services (*e.g.,* bottled water delivery), which they continue to receive until they cancel the agreement. In automatic renewals, sellers (*e.g.,* a magazine publisher, credit monitoring service provider, etc.) automatically renew consumers' subscriptions when they expire, unless consumers affirmatively cancel the subscriptions. Finally, in free-to-pay plans, consumers receive goods or services for free (or at a nominal fee) for a trial period. After the trial period, sellers automatically begin charging a fee (or higher fee) unless consumers affirmatively cancel or return the goods or services.

Some negative option offers include upsell or bundled offers, where sellers use consumers' billing data to sell additional products from the same seller or pass consumers' billing data to a third party for their sales. An upsell occurs, *e.g.,* when a consumer completes a first transaction and then receives a second solicitation for an additional product or service. A bundled offer occurs, *e.g.,* when a seller packages two or more products or services together.

Importantly, negative option programs are distinct from other continuing agreements such as installment contracts. In an installment contract, consumers are obligated for the entire contractual period for the entire contract. A prime example of this type of transaction is a contract for purchasing a vehicle, which outlines terms, such as price, interest rate, and payment schedule. The contract thus allows the consumer to pay the purchase price of the vehicle over time. Consumers' failure to pay amounts due under an installment agreement may bring the total balance due, and may trigger halting performance, or provide the seller with other contractual rights.

A negative option, in contrast, merely determines whether a seller may continue to send, and charge for, goods or provide services without the consumer's further action. Notably, a contract could have both installment and negative option features. Take, for instance, a software license agreement. A consumer may purchase a software license for a year, in which the consumer is obligated for the entire year, payable monthly, to renew automatically at the conclusion of the year unless the consumer cancels the agreement.[5] Canceling the agreement during the first year does not void a consumer's obligation to pay for the whole first year, but it does terminate the consumer's responsibility for the next year.

2. Prevalence of Deceptive or Unfair Negative Option Acts and Practices

Negative option programs are widespread in the marketplace and can provide substantial benefits for sellers and consumers. For businesses, the benefits of negative option marketing include ''greater revenue predictability, customer base continuity, and the ability to better plan in advance.'' [6] For consumers, such benefits may include opportunities to explore new products prior to purchase (*e.g.,* free trials),[7] broader selections at lower prices and transaction costs,[8] and the convenience of uninterrupted products or services.[9] However, consumers cannot reap these benefits when marketers misrepresent material facts, fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible. Over the years, such problematic practices have remained a persistent source of consumer harm, saddling consumers with recurring payments for products and services they never intended to purchase nor wanted to continue buying.

The Commission tried to address these practices through individual law enforcement cases and a patchwork of regulations (*see* discussion at sections III–IV). Nevertheless, problems persist, as demonstrated in part by the tens of thousands of complaints consumers submit about these practices to the FTC each year. Moreover, the Commission and States continue to regularly bring cases challenging harmful negative option practices, including more than 35 recent FTC cases.[10] These matters involved a range of deceptive or unfair practices, including inadequate disclosures for ''free'' offers and other products or services, enrollment without consumer consent, and inadequate or overly burdensome cancellation and refund procedures.[11] As discussed further below, the continuing stream of cases; the high volume of ongoing complaints; and comments on the record all demonstrate prevalent unfair and deceptive practices and unabated consumer harm.

III. The FTC'S Existing Regulatory Scheme

A. The FTC's Current Negative Option Rule

The Commission first promulgated the Rule in 1973 pursuant to the FTC Act, 15 U.S.C. 41 *et seq.,* finding some negative option marketers committed

[4] The Commission's Telemarking Sales Rule defines a negative option feature as a provision in an offer or agreement to sell or provide any goods or services ''under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.'' 16 CFR 310.2(w).

[5] *See, e.g., United States* v. *Adobe, Inc.,* No. 5:24–cv–03630 (N.D. Cal. 2024).

[6] News/Media Alliance (''N/MA''), FTC–2023–0033–0873; *see also* Association of National Advertisers (''ANA''), FTC–2023–0033–1001; National Retail Federation (''NRF''), FTC–2023–0033–1005. Citations herein to comments are cited as the name of commenter and unique identifier (*e.g.,* FTC–2023–0033–____). Comments are available online at *regulations.gov,* Negative Option Rule (NPRM), FTC–2023–0033–0001, *https://www.regulations.gov/document/FTC-2023-0033-0001.*

[7] N/MA, FTC–2023–0033–0873; Sirius XM Radio Inc. (''Sirius XM''), FTC–2023–0033–0857; NCTA—The Internet & Television Association (''NCTA''), FTC–2023–0033–0858; Interactive Advertising Bureau (''IAB''), FTC–2023–0033–1000.

[8] *See* IAB, FTC–2023–0033–1000; Sirius XM, FTC–2023–0033–0857; Joint Comment from Entertainment Software Association, Digital Media Association, and Motion Picture Association (''ESA''), FTC–2023–0033–0867.

[9] N/MA, FTC 2023–0033–0873; NRF, FTC–2023–0033–1005; ANA, FTC–2023–0033–1001.

[10] *See, e.g., FTC* v. *FloatMe Corp.,* No. 5:24–cv–00001 (W.D. Tex. 2024); *United States* v. *Adobe, Inc.,* No. 5:24–cv–03630 (N.D. Cal. 2024); *FTC* v. *WealthPress, Inc.,* No. 3:23–cv–00046 (M.D. Fla. 2023); *FTC* v. *Bridge It, Inc.,* No. 1:23–cv–09651 (S.D.N.Y. 2023); *FTC* v. *Amazon.com, Inc.,* No. 2:23–cv–0932 (W.D. Wash. 2023); *see also* n.60.

[11] *E.g., FTC* v. *Triangle Media Corp.,* No. 3:18–cv–01388 (S.D. Cal. 2018); *FTC* v. *Credit Bureau Ctr., LLC,* No. 1:17–cv–00194 (N.D. Ill. 2017); *FTC* v. *JDI Dating, Ltd.,* No. 1:14–cv–08400 (N.D. Ill. 2014); *FTC* v. *One Techs., LP,* No. 3:14–cv–05066 (N.D. Cal. 2014); *FTC* v. *Health Formulas, LLC,* No. 2:14–cv–01649 (D. Nev. 2014); *FTC* v. *NutraClick, LLC,* No. 2:16–cv–06819 (C.D. Cal. 2016); *FTC* v. *XXL Impressions, LLC,* No. 1:17–cv–00067 (D. Me. 2017); *FTC* v. *AAFE Prods. Corp.,* No. 3:17–cv–00575 (S.D. Cal. 2017); *FTC* v. *Pact, Inc.,* No. 2:17–cv–1429 (W.D. Wash. 2017); *FTC* v. *Tarr,* No. 3:17–cv–02024 (S.D. Cal. 2017); *FTC* v. *AdoreMe, Inc.,* No. 1:17–cv–09083 (S.D.N.Y. 2017); *FTC* v. *DOTAuthority.com, Inc.,* No. 0:16–cv–62186 (S.D. Fla. 2016); *FTC* v. *BunZai Media Grp., Inc.,* No. 2:15–cv–04527 (C.D. Cal. 2015); *FTC* v. *RevMountain, LLC,* No. 2:17–cv–02000 (D. Nev. 2017).

unfair and deceptive practices that violated section 5 of the Act, 15 U.S.C. 45. Based on practices at the time, however, the Rule only applied to prenotification plans for the sale of goods, and therefore, does not reach the vast majority of modern negative option programs.[12]

Specifically, the Rule required prenotification plan sellers to disclose their plans' material terms clearly and conspicuously before consumers subscribe. To do so, it required sellers to disclose seven material terms: (1) how subscribers must notify the seller if they do not wish to purchase the selection; (2) any minimum purchase obligations; (3) the subscribers' right to cancel; (4) whether billing charges include postage and handling; (5) that subscribers have at least ten days to reject a selection; (6) that if any subscriber is not given ten days to reject a selection, the seller will credit the return of the selection and postage to return the selection, along with shipping and handling; and (7) the frequency with which announcements and forms will be sent.[13] In addition, sellers had to disclose the specific periods during which they would send introductory merchandise, give consumers a specified period to respond to announcements, provide instructions for rejecting merchandise in announcements, and promptly honor written cancellation requests.[14]

B. Other Current Regulatory Requirements

Several other statutes and regulations also address harmful negative option practices. First, section 5 of the FTC Act has served as the Commission's primary mechanism for addressing deceptive negative option claims. Additionally, the Restore Online Shoppers' Confidence Act (''ROSCA''), 15 U.S.C. 8401–8405, the Telemarketing Sales Rule (''TSR''), 16 CFR part 310, the Postal Reorganization Act (*i.e.,* the Unordered Merchandise Statute), 39 U.S.C. 3009, and the Electronic Fund Transfer Act (''EFTA''), 15 U.S.C. 1693–1693r, all address various aspects of negative option marketing. ROSCA, however, is the only law primarily designed to do so, but only for online transactions.

1. Section 5 of the FTC Act

Section 5(a) of the FTC Act, 15 U.S.C. 45(a), is the core consumer protection statute enforced by the Commission. That statute broadly prohibits ''unfair or deceptive acts or practices'' but does not specifically address negative option marketing.[15] Therefore, in guidance and cases, the FTC has highlighted six basic requirements negative option marketing must follow to avoid deceptive and unfair practices.[16] First, marketers must disclose the material terms of a negative option offer including, at a minimum: the existence of the negative option offer; the offer's total cost; the transfer of a consumer's billing information to a third party, if applicable; and how to cancel the offer. Second, section 5 requires these disclosures to be clear and conspicuous. Third, sellers must disclose the material terms of the negative option offer before consumers agree to the purchase. Fourth, marketers must obtain consumers' consent to such offers. Fifth, marketers must not impede the effective operation of promised cancellation procedures and must honor cancellation requests that comply with those procedures. Finally, marketers cannot make any material misrepresentation regarding any portion of the transaction.

In addition to these deception-based requirements, the Commission has repeatedly stated billing consumers without consumers' express informed consent is an unfair act under the FTC Act.[17]

2. ROSCA

Enacted by Congress in 2010 to address, in part, ongoing problems with online negative option marketing, ROSCA contains general provisions related to disclosures, consent, and cancellation.[18] Specifically, ROSCA prohibits charging or attempting to charge consumers for goods or services sold on the internet through any negative option feature unless the marketer: (1) clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information, regardless of whether a material term directly relates to the terms of the negative option offer; [19] (2) obtains a consumer's express informed consent before charging the consumer's account; and (3) provides simple mechanisms for the consumer to stop recurring charges.[20] ROSCA, however, does not prescribe specific steps marketers must follow to comply with these provisions and is limited to online transactions.

Furthermore, pursuant to the statute, a violation of ROSCA is treated as a violation of a Commission trade regulation rule under section 18 of the FTC Act.[21] Thus, the Commission may seek a variety of remedies for violations of ROSCA, including civil penalties under section 5(m)(1)(A) of the FTC Act; [22] injunctive relief under section 13(b) of the FTC Act; [23] and consumer redress, damages, and other relief under section 19 of the FTC Act.[24]

3. Telemarketing Sales Rule

The TSR prohibits deceptive telemarketing acts or practices,

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[12] The Rule defines ''negative option plan'' narrowly to apply only to prenotification plans. 16 CFR 425.1(c)(1). In 1998, the Commission clarified the Rule's application to such plans in all media, stating that it ''covers all promotional materials that contain a means for consumers to subscribe to prenotification negative option plans, including those that are disseminated through newer technologies.'' 63 FR 44555, 44561 (Aug. 20, 1998).

[13] 16 CFR 425.1(a)(1)(i)–(vii).

[14] 16 CFR 425.1(a)(2) and (3); *id.* 425.1(b).

[15] Under the FTC Act, ''unfair or deceptive acts or practices'' include acts or practices involving foreign commerce that cause or are likely to cause reasonably foreseeable injury within the United States or involve material conduct occurring within the United States. 15 U.S.C. 45(a)(4)(A). Section 5(n) of the FTC Act provides that ''unfair'' practices are those that cause or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. 45(n).

[16] *See Negative Options: A Report by the Staff of the FTC's Division of Enforcement,* 26–29 (Jan. 2009) (''Staff Report''), *https://www.ftc.gov/reports/negative-options-federal-trade-commission-workshop-analyzing-negative-option-marketing-report-staff.* In discussing the principal Section 5 requirements related to negative options, the report cites the following pre-ROSCA cases, *FTC* v. *JAB Ventures, LLC,* No. 2:08–cv–04648 (C.D. Cal. 2008); *FTC* v. *Complete Weightloss Ctr.,* No. 1:08–cv–00053 (D.N.D. 2008); *FTC* v. *Berkeley Premium Nutraceuticals,* No. 1:06–cv–00051 (S.D. Ohio 2006); *FTC* v. *Think All Publ'g, LLC,* No. 4:07–cv–00011 (E.D. Tex. 2006); *FTC* v. *HispaNexo, Inc.,* No. 1:06–cv–424 (E.D. Va. 2006); *FTC* v. *Consumerinfo.com,* No. 8:05–cv–00801 (C.D. Cal. 2005); *FTC* v. *Conversion Mktg.,* No. 8:04–cv–01264 (C.D. Cal. 2004); *United States* v. *Mantra Films, Inc.,* No. 2:03–cv–9184 (C.D. Cal. 2003); *FTC* v. *Preferred Alliance, Inc.,* No. 1:03–cv–0405 (N.D. Ga. 2003); *United States* v. *Prochnow,* No. 1:02–cv–917 (N.D. Ga. 2002); *FTC* v. *Ultralife Fitness, Inc.,* No. 2:08–cv–07655 (C.D. Cal. 2008); *In re America Isuzu Motors,* FTC Docket No. C–3712 (1996); *FTC* v. *Universal Premium Servs.,* No. 2:06–cv–00849 (C.D. Cal. 2006); *FTC* v. *Remote Response Corp.,* No. 1:06–cv–20168 (S.D. Fla. 2006). The report also cited the FTC's previously issued guidance, *Dot Com Disclosures* (2002), archived at *https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-issues-guidelines-internet-advertising/0005dotcomstaffreport.pdf. See also* nn.245–252.

[17] Courts have found unauthorized billing to be unfair under the FTC Act. *See, e.g., FTC.* v. *Neovi, Inc.,* 604 F.3d 1150, 1157–59 (9th Cir. 2010), *amended by* 2010 WL 2365956 (9th Cir. June 15, 2010); *FTC* v. *Amazon.com, Inc.,* No. 2:14–cv–1038, 2016 WL 10654030, at *8 (W.D. Wash. Apr. 26, 2016); *FTC* v. *Ideal Fin. Sols., Inc.,* No. 2:13–cv–00143, 2015 WL 4032103, at *8 (D. Nev. June 30, 2015).

[18] 15 U.S.C. 8401–8405.

[19] ROSCA, 15 U.S.C. 8403(1); *see also In re MoviePass, Inc.,* FTC Docket No. C–4751 (2021).

[20] 15 U.S.C. 8403. ROSCA incorporates the definition of ''negative option feature'' from the TSR, 16 CFR 310.2(w).

[21] 15 U.S.C. 8404 (citing section 18 of the FTC Act, 15 U.S.C. 57a).

[22] 15 U.S.C. 45(m)(1)(A).

[23] 15 U.S.C. 53(b).

[24] 15 U.S.C. 57b(a)(1), (b).

including those involving negative option offers, and certain types of payment methods common in deceptive negative option marketing. Specifically, the TSR requires telemarketers to disclose all material terms and conditions of the negative option feature, including the need for affirmative consumer action to avoid the charges, the date (or dates) the charges will be submitted for payment, and the specific steps the customer must take to avoid the charges. It also prohibits telemarketers from misrepresenting such information and contains specific requirements related to payment authorization.[25] The TSR, however, only applies to negative option offers made over the telephone.

4. Other Relevant Requirements

EFTA [26] and the Unordered Merchandise Statute [27] also contain provisions relevant to unfair and deceptive negative option marketing. EFTA prohibits sellers from imposing recurring charges on a consumer's debit cards or bank accounts without written authorization.[28] The Unordered Merchandise Statute provides that mailing unordered merchandise, or a bill for such merchandise, constitutes an unfair method of competition and an unfair trade practice in violation of section 5 of the FTC Act.[29]

IV. Limitations of Existing Regulatory Requirements

The existing patchwork of laws and regulations does not provide industry and consumers with a consistent legal framework across media and offers. For instance, as discussed above, the current Rule does not cover common practices such as continuity plans, automatic renewals, and free-to-pay conversions.[30] In addition, ROSCA and the TSR do not address negative option programs in all media. Yet, harmful negative option practices that fall outside of ROSCA and the TSR's coverage still occur.[31]

Additionally, ROSCA lacks specificity about cancellation procedures and the placement, content, and timing of cancellation-related disclosures. Instead, the statute requires marketers to provide ''simple mechanisms'' for the consumer to stop recurring charges without guidance about what is simple. While the statute provides more than adequate specificity to avoid blatant violations, it makes law enforcement actions much more difficult for closer calls, even when these practices cause significant harm.

V. Negative Option Rulemaking and Enforcement Efforts

The Commission initiated its last regulatory review of the Negative Option Rule in 2009,[32] following a 2007 FTC workshop and subsequent Staff Report.[33] The Commission completed the review in 2014.[34] At the time, the Commission found the comments supporting the Rule's expansion ''argue convincingly that unfair, deceptive, and otherwise problematic negative option marketing practices continue to cause substantial consumer injury, despite determined enforcement efforts by the Commission and other law enforcement agencies.'' [35] It also noted practices not covered by the Rule (*e.g.,* trial conversions and continuity plans) accounted for most of the Commission's enforcement activity in this area. Nevertheless, the Commission declined to expand or modify the Rule because the enforcement tools provided by the TSR and, especially, ROSCA, which had only recently become effective, might prove adequate to address the extant problems. The Commission emphasized, however, if ROSCA and its other enforcement tools failed to protect consumers, the Commission would consider whether and how to amend the Rule.[36] Since that review, the problems with negative options have persisted.[37]

VI. Rule Review and Request for Comment

A. 2019 Advance Notice of Proposed Rulemaking

Given the persistence of unfair and deceptive practices despite significant law enforcement attention at both the Federal and State level, the Commission published its 2019 advance notice of proposed rulemaking (''ANPR'') seeking comments on the current Rule, as well as possible new measures to reduce consumer harm created by deceptive or unfair negative option marketing.[38] Specifically, the Commission sought comment on various alternatives, including amendments to existing rules to further address disclosures, consumer consent, and cancellation. The Commission also requested input on whether and how it should use its authority under section 18 of the FTC Act to expand the Negative Option Rule to address prevalent unfair or deceptive practices involving negative option marketing.[39] In response, the Commission received 17 comments.[40]

B. 2021 Enforcement Policy Statement

On November 4, 2021, the Commission published an ''Enforcement Policy Statement Regarding Negative Option Marketing'' (''2021 Enforcement Policy Statement'' or ''EPS'') to provide guidance regarding its enforcement of

[25] 16 CFR 310.3(a).

[26] 15 U.S.C. 1693–1693r.

[27] 39 U.S.C. 3009.

[28] EFTA provides that the Commission shall enforce its requirements, except to the extent that enforcement is specifically committed to some other Federal government agency, and that a violation of any of its requirements shall be deemed a violation of the FTC Act. Accordingly, the Commission has authority to seek injunctive relief for EFTA violations, just as it can seek injunctive relief for other section 5 violations.

[29] The Commission has authority to seek the same remedies for violations of the Unordered Merchandise Statute that it can seek for other section 5 violations. The Commission can seek civil penalties pursuant to section 5(m)(1)(B) of the FTC Act from violators who have actual knowledge that the Commission has found mailing unordered merchandise unfair. 15 U.S.C. 45(m)(1)(B).

[30] Indeed, the prenotification plans covered by the Rule represent only a small fraction of negative option marketing. In 2017, for instance, the Commission estimated that fewer than 100 sellers (''clubs'') were subject to the current Rule's requirements. 82 FR 38907, 38908 (Aug. 16, 2017).

[31] *See, e.g., In re Dun & Bradstreet, Inc.,* FTC Docket No. C–4761 (2022); *FTC* v. *Nobetes Corp.,* No. 2:18–cv–10068 (C.D. Cal. 2018); *FTC* v. *Dill,* No. 2:16–cv–00023 (D. Me. 2016); *FTC* v. *Shopper Sys., LLC,* No. 1:12–cv–23919 (S.D. Fla. 2012); *FTC* v. *XXL Impressions, LLC,* No. 1:17–cv–00067 (D. Me. 2017); *FTC* v. *Health Rsch. Labs., LLC,* No. 2:17–cv–00467 (D. Me. 2017); *FTC* v. *Mktg. Architects,* No. 2:18–cv–00050 (D. Me. 2018); *see also* Individual commenter, FTC–2023–0033–0007 (discussing deceptive and unfair negative option practices for in-person enrollment); Individual commenter, FTC–2023–0033–0129 (gym membership in-person enrollment); Individual commenter, FTC–2023–0033–0299 (same).

[32] 74 FR 22720 (May 14, 2009).

[33] *See* Staff Report, n.16.

[34] 79 FR 44271 (July 31, 2014).

[35] 79 FR 44275. The Commission cited a number of its law enforcement actions challenging negative option marketing practices, including, for example, *FTC* v. *Process Am., Inc.,* No. 2:14–cv–00386 (C.D. Cal. 2014) (processing of unauthorized charges relating to negative option marketing); *FTC* v. *Willms,* No. 2:11–cv–00828 (W.D. Wash. 2011) (internet free trials and continuity plans); *FTC* v. *Moneymaker,* No. 2:11–cv–00461 (D. Nev. 2011) (internet trial offers and continuity programs); *FTC* v. *Johnson,* No. 2:10–cv–02203 (D. Nev. 2010) (internet trial offers); and *FTC* v. *John Beck Amazing Profits, LLC,* No. 2:09–cv–04719 (C.D. Cal. 2009) (infomercial and telemarketing trial offers and continuity programs).

[36] 79 FR 44275–76.

[37] *See* sections VI–VII of this SBP.

[38] ANPR, 84 FR 52393 (Oct. 2, 2019).

[39] Section 18 of the FTC Act authorizes the Commission to promulgate rules that define with specificity acts or practices in or affecting commerce which are unfair or deceptive. 15 U.S.C. 57a(a)(1)(B). The Commission may issue regulations ''where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.'' 15 U.S.C. 57a(b)(3). The Commission may make such a prevalence finding if it has issued cease and desist orders regarding such acts or practices, or any other available information indicates a widespread pattern of unfair or deceptive acts or practices. Rules under section 18 ''may include requirements prescribed for the purpose of preventing such acts or practices.''

[40] The comments are available online. *See Regulations.gov*, Negative Option Rule (ANPR), FTC–2019–0082, *https://www.regulations.gov/docket/FTC-2019-0082.*

various statutes and FTC regulations.[41] The 2021 Enforcement Policy Statement enunciated various principles rooted in FTC case law and restated previous guidance related to the provision of information to consumers, consent, and cancellations. Among these principles, the Statement emphasized ROSCA's requirement that sellers disclose all material terms related to the underlying product or service that are necessary to prevent deception, regardless of whether that term relates directly to the terms of the negative option offer.[42] In addition, consistent with ROSCA, judicial decisions applying section 5, and cases brought by the Commission, the 2021 Enforcement Policy Statement reiterated sellers should obtain consumers' acceptance of the negative option feature separately from any other portion of the transaction. Finally, the Statement explained sellers should provide cancellation mechanisms at least as easy to use as the method the consumer employed to initiate the negative option feature.

C. 2023 Notice of Proposed Rulemaking

After reviewing the comments received in response to the ANPR and issuing the 2021 Enforcement Policy Statement, the Commission issued a notice of proposed rulemaking (''NPRM'') on April 23, 2023 (88 FR 24716). In the NPRM, the Commission proposed amending the existing Rule to prohibit material misrepresentations and to require sellers to provide important information to consumers, obtain consumers' express informed consent, and ensure consumers can easily cancel negative option programs if they choose. All these proposed changes would be applicable to all forms of negative option marketing across all media (*e.g.,* telephone, internet, traditional print media, and in-person transactions).[43]

The Commission designed the proposed amendments to curb deceptive or unfair practices occurring in negative option marketing. The Commission sought public comment on ''all aspects'' of the proposal, ''including the likely effectiveness of the proposed Rule in helping the Commission combat unfair or deceptive practices in negative option marketing.'' [44] The Commission further identified specific questions and areas where it solicited available data and evidence, including data and evidence supporting alternatives to the proposed regulations.[45] The Commission did not identify any disputed issues of material fact that needed to be resolved at an informal hearing.[46] The comment period closed on June 23, 2023.

In response, the Commission received more than 16,000 comments, and published the 1,162 unique comments from stakeholders representing a wide range of viewpoints.[47] Although some commenters raised concerns and recommended specific modifications or additions to the proposed Rule (some of which the Commission adopts as discussed herein), the majority generally supported the Rule. The Commission discusses these comments in section VII below.

D. Informal Hearing and Recommended Decision

Section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a, and the Commission's Rules of Practice, 16 CFR 1.11(e),[48] provide interested persons the opportunity to make an oral statement at an informal hearing upon request.[49] The Commission received six [50] such requests. Additionally, although the Commission did not designate any disputed issues of material fact in the NPRM, two interested commenters, IAB and NCTA, proposed the Commission consider several potential disputed issues of material fact.[51]

On December 8, 2023, the Commission published an Initial Notice of Informal Hearing (88 FR 85525, ''Hearing Notice''). The Hearing Notice designated the Honorable Carol Fox Foelak, Administrative Law Judge for the Securities Exchange Commission, to serve as the presiding officer of the informal hearing and scheduled the informal hearing for January 16, 2024. In the Hearing Notice, the Commission again did not designate any disputed issues of material fact, finding the issues raised by IAB and NCTA did not need to be resolved at the informal hearing through cross-examination.[52]

On January 16, 2024, Judge Foelak commenced the informal hearing, at which IAB, NCTA, Performance Driven Marketing Institute (''PDMI''), TechFreedom, and the International Franchise Association (''IFA'') appeared and made oral submissions subject to cross-examination.[53] Included in their oral and written submissions, IAB and

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[41] EPS, 86 FR 60822 (Nov. 4, 2021).

[42] The Commission recently alleged a negative option seller's failure to disclose it was impeding access to its movie subscription service violates ROSCA. *In re MoviePass, Inc.,* FTC Docket No. C–4751 (2021).

[43] The Commission proposed to issue such amendments pursuant to section 18 of the FTC Act, which authorizes it to promulgate rules specifying acts or practices in or affecting commerce which are unfair or deceptive. 15 U.S.C. 57a(a)(1)(B). Several commenters raised concerns the Commission failed to follow section 18's procedures for two reasons. First, commenters argued the Commission's proposed Rule went beyond the scope of the ANPR. *See, e.g.,* ESA, FTC–2023–0033–0867; USTelecom-The Broadband Association (''USTelecom''), FTC–2023–0033–0876; Retail Industry Leaders Association (''RILA''), FTC–2023–0033–0883; U.S. Chamber of Commerce (''Chamber''), FTC–2023–0033–0885; The Computer & Communications Industry Association (''CCIA''), FTC–2023–0033–0984; IAB, FTC–2023–0033–1000; National Retail Federation (''NRF''), FTC–2023–0033–1005). Second, they argued the Commission's proposed Rule did not satisfy the specificity and prevalence requirements of section 18. The Commission addresses these comments in section VII.A.

[44] NPRM, 88 FR 24730.

[45] *See* NPRM, 88 FR 24728 (inviting comments on free trials); *id.* at 24729 (requesting comments on proposed annual reminder provision); *id.* at 24730 (inviting comments on conflicts with existing state requirements; *id.* (seeking comments on proposed material changes provision and exempted activities or entities); *id.* (inviting submissions of ''data, views, and arguments on the proposed amendments''); *id.* at 24732–33 (inviting comments on the impacts on small businesses, including any modifications to reduce costs or burdens for small entities); *id.* at 24734 (inviting comments on the Paperwork Reduction Act analysis). *See also id.* at 24730 (NPRM section XIII, Request for Comments).

[46] *See* 16 CFR 1.11(e).

[47] Unique public comments to the NPRM are available online. *See regulations.gov,* Negative Option Rule (NPRM), FTC–2023–0033–0001, *https://www.regulations.gov/document/FTC-2023-0033-0001.* The Commission published 1,162 unique comments. As explained at *regulations.gov,* agencies may withhold duplicate/near duplicate examples of a mass-mail campaign. *See* Gen. Servs. Admin., *Regulations.gov* Frequently Asked Questions, Find Dockets, Documents, and Comments FAQs, ''How are comments counted and posted to *Regulations.gov*?,'' *https://www.regulations.gov/faq.* The Commission cannot quantify the number of individuals or entities represented by the comments. The number of comments undercounts the number of individuals or entities represented by the comments because many comments, including those from different types of organizations, jointly represent the opinions or interests of many. Overall, the Commission received 16,612 comments. Of those, 15,449 were not posted online for various reasons (*i.e.,* 14 unrelated, 23 duplicates, and 15,412 that appear to be non-unique responses to mass media campaigns) and one comment was withdrawn. The Commission has considered all timely and responsive public comments it received in response to its NPRM.

[48] 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).

[49] 16 CFR 1.11(e).

[50] The six requesters were (1) International Franchise Association; (2) TechFreedom; (3) Performance Driven Marketing Institute; (4) NCTA—The Internet & Television Association; (5) Frontdoor; and (6) Interactive Advertising Bureau. All but one—TechFreedom—identified their interest in the proceeding either as industry groups or private companies.

[51] *See* Notice of Informal Hearing (''Hearing Notice''), 88 FR 85525, 85526 (Dec. 8, 2023).

[52] 88 FR 85526–27.

[53] The Hearing Notice also allowed interested persons to make additional written submissions. The following interested parties timely filed additional written submissions on December 22, 2023: (1) BSA—The Software Alliance; (2) PDMI; (3) U.S. Chamber of Commerce; (4) IAB; (5) NCTA; and two individuals. All filings related to the Hearing Notice are available online at *regulations.gov* at *https://www.regulations.gov/document/FTC-2023-0073-0001.*

NCTA renewed their requests to have the presiding officer designate disputed issues of material fact.[54] Following the hearing, Judge Foelak designated two disputed issues: (1) will the proposed rule have an annual effect on the national economy of $100 million or more?; and (2) what will the recordkeeping and disclosure costs associated with the proposed rule be? Judge Foelak held subsequent hearings on January 31, 2024, and February 14, 2024. She allowed post-hearing briefs filed by February 22, and February 28, 2024, respectively, and issued her recommended decision on April 12, 2024. Based on the evidence, the presiding officer found: (1) the proposed Rule will have an annual effect on the national economy of $100 million or more; and (2) there is insufficient evidence to make a finding regarding the size of the recordkeeping and disclosure costs associated with the proposed Rule.[55]

VII. Discussion of Final Rule

A. Legal Standard for Promulgating the Final Rule

As explained above in section II, the Commission promulgates the final Rule, 16 CFR part 425, pursuant to section 18 of the FTC Act, also known as Magnuson-Moss rulemaking (''Magnuson-Moss''). Under section 18 and the Commission Rules,[56] to promulgate a rule the Commission must: (1) issue a SBP with statements detailing: (a) the prevalence of the acts or practices treated by the rule; (b) the manner and context in which such acts or practices are unfair or deceptive; and (c) the economic effect of the rule, taking into account the effect on small business and consumers; and (2) ''define with specificity acts or practices which are unfair or deceptive.'' The Commission addresses these requirements in part A.1–2. In part A.3, the Commission addresses additional legal issues, including the ANPR's scope and the ''major questions'' doctrine.

1. Statements Required Under Section 18(d) of the FTC Act

(a) Statement Regarding Prevalence of the Acts and Practices Treated by the Rule

Under the Magnuson-Moss statute, the Commission may promulgate rules if it ''has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.'' [57] An act or practice is ''prevalent'' if the FTC has previously issued cease and desist orders regarding the act or practice, or if ''any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices.'' [58] Based on the rulemaking record, the Commission has more than sufficient reason to believe unfair or deceptive acts and practices in the negative option marketplace are prevalent. These practices include: (1) material misrepresentations made while marketing using negative option features to induce consumers to enter into negative option programs; (2) failure to provide important information about material terms prior to billing consumers; (3) lack of informed consumer consent; and (4) failure to provide consumers with a simple cancellation method, including failure to honor cancellation requests, refusal to provide refunds to consumers who unknowingly enrolled in programs, denying consumers refunds, forcing them to pay to return the unordered goods, requiring consumers to cancel using a more difficult method than the one used to sign up for the program, and forcing consumers to contend with multiple upsells before allowing cancellation.[59] These practices cause consumer harm by luring consumers into purchasing goods and services they do not want, or ensnaring consumers into unwanted recurring payments that are difficult or impossible to cancel.

The Commission relies on substantial evidence in the record showing a widespread pattern of unfair or deceptive conduct in the negative option marketplace. This evidence generally falls into three categories: State, private, and Federal actions (including administrative and Federal court FTC law enforcement actions); consumer complaints and comments; and studies. The Commission discusses each in turn below.

Federal, State, and Private Actions. As discussed in the ANPR and NPRM, the volume of enforcement efforts in recent years seeking to stem illegal negative option marketing is significant. These matters involve a range of deceptive and unfair practices, including: failure to adequately disclose the existence of negative options, including after the expiration of free trials; enrollment without consumer consent; and inadequate or unnecessarily burdensome cancellation and refund procedures. The FTC itself has brought at least 35 such cases in the years since ROSCA was enacted.[60] The Consumer Financial Protection Bureau (''CFPB'') also has brought many of its own negative option cases.[61] Truth in Advertising, Inc. (''TINA''),[62] a consumer advocacy organization, stated in 2019 that more than 100 Federal class actions involving various negative option terms and conditions have been filed since 2014. Notwithstanding these actions, according to TINA, ''the incidence of deceptive negative option

[54] Subsequently, IFA also asserted there were disputed issues of material fact regarding the impact to both small businesses and their consumers. IFA, FTC–2024–0001–0009.

[55] Recommended Decision by Presiding Officer, *https://www.regulations.gov/comment/FTC-2024-0001-0042.*

[56] 15 U.S.C. 57a and 16 CFR 1.14(a)(1).

[57] 15 U.S.C. 57a(b)(3).

[58] 15 U.S.C. 57a(b)(3)(A)–(B); *see also Compassion Over Killing* v. *FDA,* 849 F.3d 849, 855 (9th Cir. 2017).

[59] NPRM, 88 FR 24725.

[60] In the NPRM, the Commission cited a number of its law enforcement actions challenging negative option marketing practices, including, for example, *FTC* v. *Process Am., Inc.,* No. 1:14–cv–00386 (C.D. Cal. 2014) (processing of unauthorized charges relating to negative option marketing); *FTC* v. *Willms,* No. 2:11–cv–00828 (W.D. Wash. 2011) (internet free trials and continuity plans); *FTC* v. *Moneymaker,* No. 2:11–cv–00461 (D. Nev. 2011) (internet trial offers and continuity programs); *FTC* v. *Johnson,* No. 2:10–cv–02203 (D. Nev. 2010) (internet trial offers); and *FTC* v. *John Beck Amazing Profits, LLC,* No. 2:09–cv–04719 (C.D. Cal. 2009) (infomercial and telemarketing trial offers and continuity programs). Further examples of these matters include: *FTC* v. *Triangle Media Corp.,* No. 3:18–cv–01388 (S.D. Cal. 2018); *FTC* v. *Credit Bureau Ctr., LLC,* No. 1:17–cv–00194 (N.D. Ill. 2017); *FTC* v. *JDI Dating, Ltd.,* No. 1:14–cv–08400 (N.D. Ill. 2014); *FTC* v. *One Techs., LP,* No. 3:14–cv–05066 (N.D. Cal. 2014); *FTC* v. *Health Formulas, LLC,* No. 2:14–cv–01649 (D. Nev. 2014); *FTC* v. *NutraClick, LLC,* No. 2:16–cv–06819 (C.D. Cal. 2016); *FTC* v. *XXL Impressions, LLC,* No. 1:17–cv–00067 (D. Me. 2017); *FTC* v. *AAFE Prods. Corp.,* No. 3:17–cv–00575 (S.D. Cal. 2017); *FTC* v. *Pact, Inc.,* No. 2:17–cv–1429 (W.D. Wash. 2017); *FTC* v. *Tarr,* No. 3:17–cv–02024 (S.D. Cal. 2017); *FTC* v. *AdoreMe, Inc.,* No. 1:17–cv–09083 (S.D.N.Y. 2017); *FTC* v. *DOTAuthority.com, Inc.,* No. 0:16–cv–62186 (S.D. Fla. 2016); *FTC* v. *BunZai Media Grp., Inc.,* No. 2:15–cv–04527 (C.D. Cal. 2015); and *FTC* v. *RevMountain, LLC,* No. 2:17–cv–02000 (D. Nev. 2017); *see also FTC* v. *WealthPress, Inc.,* No. 3:23–cv–00046 (M.D. Fla. 2023); *FTC* v. *Bridge It, Inc.,* No. 1:23–cv–09651 (S.D.N.Y. 2023); *FTC* v. *Amazon.com, Inc.,* No. 2:23–cv–0932 (W.D. Wash. 2023); *FTC* v. *FloatMe Corp.,* No. 5:24–cv–00001 (W.D. Tex. 2024); *United States* v. *Adobe, Inc.,* No. 5:24–cv–03630 (N.D. Cal. 2024).

[61] *See, e.g., CFPB* v. *Transunion,* No. 1:22–cv–01880 (N.D. Ill. 2022); *CFPB* v. *ACTIVE Network, LLC,* No. 4:22–cv–00898 (E.D. Tex. 2022); *CFPB* v. *Sterling Jewelers, Inc.,* No. 1:19–cv–00448 (S.D.N.Y. 2019); *In re Equifax Inc., et al.,* CFPB No. 2017–CFPB–0001, 2017 WL 1036710 (Jan. 3, 2017) (consent order); *CFPB* v. *Prime Mktg. Holdings, LLC,* No. 2:16–cv–07111 (C.D. Cal. 2016); *In re Transunion Interactive, Inc., et al.,* CFPB No. 2017–CFPB–0002, 2017 WL 1036711 (Jan. 3, 2017) (consent order); *CFPB* v. *Student Financial Aid Servs., Inc.,* No. 2:15–cv–00821 (E.D. Cal. 2015); *CFPB* v. *Affinion Group Holdings, Inc.,* No. 5:15–cv–01005 (D. Conn. 2015); *CFPB* v. *Intersections Inc.,* No. 1:15–cv–835 (E.D. Va. 2015). Notably, the CFPB has independent authority to enforce FTC rules, and both agencies share some overlapping jurisdiction. *See* 12 U.S.C. 5581(b)(5)(B)(ii).

[62] TINA, FTC–2019–0082–0014 (cmt. to ANPR, *https://www.regulations.gov/comment/FTC-2019-0082-0014*) and FTC–2023–0033–1139 (cmt. to NPRM).

offers continues to rise.'' [63] TINA also reports that deceptive negative options ''have only continued to grow'' since its 2019 comment.[64]

Several state Attorneys General [65] also referenced dozens of enforcement actions taken in recent years to address the proliferation of deceptive negative option practices they regularly encounter, including the ''lack of informed consumer consent, lack of clear and conspicuous disclosures, failure to honor cancellation requests and/or refusal to provide refunds to consumers who unknowingly enrolled in plans.'' [66] These agencies explained their actions ''demonstrate that problems persist in this area and that additional regulatory action is needed.'' [67] For example, over the last decade, New York alone has reached 23 negative option settlements involving a variety of products and services such as membership programs, credit monitoring, dietary supplements, and apparel.[68] They also described several multi- and individual state law enforcement actions involving negative option offers for products and services such as satellite radio, social networking services, language learning programs, security monitoring, and dietary supplements. They further recounted numerous, illustrative complaints from consumers who ordered what they thought were free, no-obligation samples but then found themselves enrolled in costly continuity programs.[69]

Additionally, the State AGs outlined several ongoing investigations into deceptive or unfair negative option programs since 2019. These investigations include allegations of misrepresenting offers as free when they were not; and failure to clearly and conspicuously disclose negative option features.[70]

Additionally, consumer advocacy organizations and others explained that the widespread prevalence of deceptive acts and practices underscores the ''ongoing need for [S]tate engagement to limit negative option abuses.'' [71] Several commenters observed that more than half of States specifically regulate some aspect of negative option marketing.[72] A group of law professors explain this ''ongoing engagement just shows that unscrupulous negative-option business models remain such a problem that [S]tates *increasingly* find themselves needing to step in.'' [73]

Consumer Complaints and Comments. The FTC receives tens of thousands of complaints about negative options each year through its Sentinel complaint database, and marketers receive many more as demonstrated by evidence in FTC cases.[74] Additionally, TINA explained that negative options are one of its top complaint categories. These complaints usually involve consumers who unwittingly enroll in programs and then find it difficult or impossible to cancel.[75]

Moreover, hundreds of consumer comments detailed specific practices (discussed more thoroughly in connection with the section-by-section analysis below) demonstrating the prevalence of unfair or deceptive negative option practices. Likewise, comments from public interest and consumer advocacy groups further describe existing deceptive or unfair practices prevalent in the negative option marketplace. For example, Berkeley Consumer Law Center explained businesses regularly use dark patterns [76] to facilitate enrollment in subscription-based products and inhibit cancellation, and provided numerous examples of these activities.[77] A group of law professors referenced the burgeoning industry offering to help consumers identify and cancel their unwanted subscriptions. As they explained: ''One might expect that, if consumers experienced the marketplace as one in which they are adequately informed of recurring payments and readily able to cancel them, there would not be an emerging industry to help them do just that.'' [78]

Members of Congress also detailed ongoing problems in this area. Citing the increase in consumer complaints and consumer harm in recent years, Representative Takano stated, ''deceptive online marketing and unclear recurring payment plans are leaving too many consumers on the hook for products they may not want or even know they purchased.'' [79] Representatives Schiff and Norton noted their constituents' desire for greater protections in the negative option marketplace, stating the ''proposed updates will help put the consumers

[63] NPRM, 88 FR 24720.

[64] TINA, FTC–2023–0033–1139.

[65] Several State Attorneys General offered comments to the ANPR (FTC–2019–0082–0012 (State Attorneys General cmt. to ANPR, *https://www.regulations.gov/comment/FTC-2019-0082-0012*)), and additionally 26 Attorneys General for the States of Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Vermont, Washington, and Wisconsin (''State AGs'') filed comments in response to the NPRM. *See* State AGs, FTC–2023–0033–0886 (cmt. to NPRM).

[66] NPRM, 88 FR 24720; State Attorneys General (ANPR), FTC–2019–0082–0012. They further explained the nature of the underlying products often fails to alert consumers of their enrollment in a negative option program. For instance, many offers involve credit monitoring or anti-virus computer programs costing less than $20 a month and have no tangible presence for consumers. The State AGs explained consumers are often unaware of having ordered these products, never use them, and never notice them on their bills. The State AGs further explained these transactions often pull consumers into a stream of recurring payments by obtaining credit card information to ostensibly pay for a small shipping charge. Consequently, they commented many consumers have been billed for such services for years before discovering the unauthorized charges. *Id.*

[67] NPRM, 88 FR 24721.

[68] State Attorneys General (ANPR), FTC–2019–0082–0012.

[69] *Id.*

[70] State AGs, FTC–2023–0033–0886.

[71] *See, e.g.,* Joint comment from Professor Kaitlin Caruso (U. of Maine School of Law), Professor Jeff Sovern (St. John's U. School of Law), Professor Dee Pridgen (U. of Wyoming College of Law), Professor Chrystin Ondersma (Rutgers Law School), Professor Vijay Raghavan (Brooklyn Law School), Professor David Vladeck (Georgetown U. Law Center), Professor Edward Janger (Brooklyn Law School), and Professor Susan Block-Lieb (Fordham U. School of Law) (collectively, ''Law Professors''), FTC–2023–0033–0861.

[72] *See, e.g.,* PDMI, FTC–2023–0033–0864 (stating over 27 states regulate negative option marketing); N/MA, FTC–2023–0033–0873 (stating 35 states and the District of Columbia now have automatic renewal laws, and at least 20 address all forms of automatic renewals); Service Contract Industry Council (''SCIC''), FTC–2023–0033–0879 (noting about half of U.S. states enacted auto-renewal laws); NRF, FTC–2023–0033–1005 (stating at least half of all states have statutes governing free-trial, negative-option, and/or automatic-renewal programs); *see also* Law Professors, FTC–2323–0033–0861 (stating the ''number of states that have recently adopted specific laws targeting negative option marketing, on top of their general prohibitions on unfair and deceptive practices and ability to enforce ROSCA, is particularly noteworthy.''); IHRSA, The Global Health & Fitness Association (''IHRSA''), FTC–2023–0033–0863 (noting many states have laws on negative options). *But see* The Center for Consumer Law and Economic Justice at UC Berkeley School of Law (''Berkeley Consumer Law Center''), FTC–2023–0033–0855 (stating that ''fewer than half the states have a law specifically addressing negative option marketing'').

[73] Law Professors, FTC–2023–0033–0861. This group also points out that private industry, too, has felt the need for more action in this area, noting that VISA and Mastercard have their own requirements for businesses that bill using a negative option model.

[74] *See, e.g., United States* v. *Adobe, Inc.,* No. 5:24–cv–03630 (N.D. Cal. 2024) (ECF No. 40, Amd. Compl.); *FTC* v. *Amazon.com, Inc.,* No. 2:23–cv–0932 (W.D. Wash. 2023) (ECF No. 67, Amd. Compl.).

[75] TINA, FTC–2023–0033–1139.

[76] The term ''dark patterns'' has been used to describe design practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm *See Bringing Dark Patterns to Light,* FTC Staff Report (Sept. 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf.*

[77] Berkeley Consumer Law Center, FTC–2023–0033–0855.

[78] Law Professors, FTC–2023–0033–0861.

[79] NPRM, 88 FR 24720–21.

back in control of their purchases and subscriptions.'' [80]

Studies. Finally, ''studies cited by commenters confirm a pattern of consumer ensnarement in unwanted recurring payments.'' [81] A Better Business Bureau study of FTC data, titled ''Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements,'' demonstrated complaints about free trials doubled between 2015 and 2017, with complaints during the period reaching nearly 37,000.[82] The BBB study shows consumer losses in FTC ''free trial offer'' cases exceeded $1.3 billion (over the ten years covered by the study).[83] A group of consumer and public interest advocacy organizations, including the National Consumers League [84] stated that, according to the BBB, the average consumer loss for a free trial is $186.[85]

Referring to another survey conducted in 2016, TINA noted unwanted fees associated with trial offers and automatically renewing subscriptions ranked as ''the biggest financial complaint of consumers.'' [86] Similarly, TINA noted the FBI's internet Crime Complaint Center recorded a rise in complaints about free trial offers, growing from 1,738 in 2015 to 2,486 in 2017.[87] A 2019 *Bankrate.com* survey cited by NCL found that 59% of consumers have been signed up ''against their will'' for ''free trials'' that automatically converted into a recurring payment.[88]

NCL and others also cited a 2017 national telephone survey commissioned by *CreditCards.com* finding 35% of U.S. consumers have enrolled in at least one automatically renewing contract without realizing it.[89] In response to the NPRM, the Public Interest Groups cited more recent studies confirming the continued prevalence of harms from deceptive and unfair negative option practices. For instance, consumer groups referenced a 2022 study, which concluded ''on average, consumers pay two-and-a-half times what they originally estimated on monthly subscriptions, likely due to the lack of adequate notice from sellers.'' [90] They also noted burdensome cancellation procedures remain rampant. ''One survey found that more than half of respondents reported it took an average of three months to cancel unwanted recurring payments.'' [91] That same study reported 71% of individuals lost more than $50 a month in unwanted subscriptions. Another study concluded consumers underestimate how much they pay to maintain their subscriptions by an average of $133/month (or $1,596 per year), and 42% of the consumers had forgotten about a subscription for which they continued to pay.[92]

Finally, TINA also noted a consumer survey by the Washington Attorney General's office finding ''59% of Washingtonians (3.5 million residents) may have been unintentionally enrolled in a subscription plan or service when they thought they were making a one-time purchase.'' [93] TINA contended this is ''consistent with'' the 2022 Bankrate survey finding more than half of U.S. adults experience unwanted charges from a subscription or membership.[94] These findings are further supported by a Chase Bank study in 2021 finding nearly three-quarters of Americans waste more than $50 a month on unwanted subscription fees.[95]

Despite the robust evidence that unfair or deceptive practices are exceedingly prevalent, several trade organizations challenged the Commission's proposed prevalence determination. However, their arguments, as discussed below, are not persuasive.

First, they argued the Commission must show prevalence in a specific industry in order to regulate negative option practices in that industry, but the Commission failed to do so. For instance, NCTA asserted there is no evidence of widespread deceptive negative option practices in the broadband, cable, or voice industries warranting regulation.[96] Other commenters argued the Commission must identify the prevalence of a specific deceptive or unfair act to warrant regulating that specific act or practice under Section 18. For instance, IAB, NCTA, TechNet, and TechFreedom argued the Commission failed to show prevalence of misrepresentations about the underlying product or service in connection with negative option contracts. Similarly, three commenters argued the Commission should limit the scope of the Rule to business-to-consumer transactions and exclude business-to-business (''B2B'') transactions, in part, because the Commission failed to show ''the prevalence of harms created by automatically-renewing subscriptions entered into in the business-to-business context.'' [97]

As demonstrated above, however, there is ample evidence in the record demonstrating the prevalence of the specific unfair and deceptive practices across numerous sectors of the economy, which the Commission now addresses in an industry-neutral fashion.[98] Moreover, nothing in Section 18 requires the Commission to find prevalence regarding a specific industry or group.[99] The Commission need only

[80] Schiff and Norton, FTC–2023–0033–0868.

[81] NPRM, 88 FR 24725.

[82] Steve Baker, *Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements,* Better Business Bureau (Dec. 2018), *https://www.bbb.org/article/investigations/18929-subscription-traps-and-deceptive-free-trials-scammillions-with-misleading-ads-and-fake-celebrity-endorsements.*

[83] *Id.; see also* Better Business Bureau, BBB Investigation Update: Free Trial Offer Scams (Apr. 2020), *https://www.bbb.org/article/news-releases/22040-bbb-update-free-trial-offerscams* (reporting the total has risen to nearly $1.4 billion since the 2018 BBB study); *id.* (observing that while celebrities, credit card companies and government agencies have increased their efforts to fight deceptive free trial offer scams, victims continue to lose millions of dollars to fraudsters after the release of a December 2018 BBB study about the shady practices).

[84] The six public interest and consumer advocacy groups are: Consumer Action, Consumer Federation of America, Demand Progress Education Fund, National Association of Consumer Advocates, Nation Consumer Law Center (on behalf of its low income clients,) and National Consumers League (''NCL'') (collectively, the ''Public Interest Groups'').

[85] Steve Baker, *Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements,* Better Business Bureau (Dec. 2018).

[86] NPRM, 88 FR 24720 (citing Rebecca Lake, ''Report: Hidden Fees Are #1 Consumer Complaint,'' *mybanktracker.com* (updated Oct. 16, 2018), *https://www.mybanktracker.com/money-tips/money/hidden-fees-consumercomplaint-253387.*)

[87] NPRM, 88 FR 24721.

[88] Bankrate, ''Despite safety concerns, 64% of U.S. debit or credit cardholders save their information online'' (Oct. 24, 2019), at *https://www.bankrate.com/pdfs/pr/20191024-online-shopping-survey.pdf* (as cited by Civil Society Organizations, FTC–2023–0033–0870).

[89] NPRM, 88 FR 24720.

[90] Public Interest Groups, FTC–2023–0033–0880 (citing ''Subscription Service Statistics and Costs,'' C+R Research Blog (May 18, 2022)).

[91] Public Interest Groups, FTC–2023–0033–0880 (citing Chase, ''Survey from Chase Reveals That Two-Thirds of Consumers Have Forgotten About At Least One Recurring Payment In The Last Year'' (Apr. 1, 2021), *https://media.chase.com/news/survey-from-chase-reveals*).

[92] State AGs, FTC–2023–0033–00866 (citing Sarah Brady and Korrena Bailie, ''5 Tools To Help You Cancel Unwanted Subscriptions,'' Forbes (July 13, 2022), *https://www.forbes.com/advisor/personal-finance/manage-subscriptions*). *See also* Einav, Liran, et al., ''Selling Subscriptions'' (Dec. 1, 2023), *https://nmahoney.people.stanford.edu/sites/g/files/sbiybj23976/files/media/file/mahoney_subscriptions.pdf.*

[93] TINA, FTC–2023–0033–1139.

[94] *Id.*

[95] *See* n.91.

[96] NCTA, FTC–2023–0033–0858; *see also* SCIC, FTC–2023–0033–0879.

[97] BSA, FTC–2023–0033–1015; *see also* Anonymous commenter, FTC–2023–0033–1007; NCTA, FTC–2023–0033–0858.

[98] *See* sections VII.A.1.a–b and section II.A.1.b of this SBP.

[99] *See generally* 15 U.S.C. 57a.

find ''some basis or evidence'' demonstrating the practice the Commission seeks to regulate ''does indeed occur.'' [100] Such evidence exists here in abundance. As NCTA itself pointed out, individual consumers complained of deceptive and unfair practices in its members' industries.[101] Further, ''consumer subscription models are rapidly growing in popularity,'' [102] and there is evidence of the proliferation of negative option features in virtually every industry.[103] The harms outlined here resulted from the negative option transaction itself, and many businesses, regardless of industry, are incentivized to continue to leverage negative options to the possible detriment of consumers.[104] The Commission also declines to limit the scope of the final Rule by excluding business-to-business transactions. As explained in Section VII.B.1, the Commission has a long history of protecting businesses, particularly small business, in their role as consumers; the practices and harms described here impact these consumers, as well.

(b) The Manner and Context in Which the Acts or Practices Are Unfair or Deceptive

Pursuant to Section 18 and the Commission's Rules, the Commission must also state the manner and context in which the prevalent acts or practices are unfair or deceptive. The record demonstrates consumers are often lured into enrolling in negative option programs through seller misrepresentations about material facts—for instance, when a seller offers a product for ''free'' when it is not.[105] Additionally, sellers misrepresent other aspects of the deal, such as product features, processing or shipping fees, billing information use, deadlines, consumer authorization, refunds, cancellations, among other facts.[106]

Sellers also often fail to disclose important information about the offer prior to billing the consumer. As detailed in the comments from, *inter alia,* State AGs and TINA, sellers fail to disclose in a clear and conspicuous manner the existence of the negative option feature, refund and cancellation deadlines, or other material terms of the agreement, resulting in consumers purchasing goods or services they do not want.[107] All of these unfair or deceptive acts are further supported in dozens of FTC, State AG, and class action cases.[108]

The record also demonstrates sellers fail to obtain consumers' express informed consent to the negative option feature before charging them. For instance, as detailed in representative consumer complaints from State AGs and several FTC cases, consumers are often unwittingly enrolled into recurring subscriptions with promises of no- or low-cost or discounted rates (not knowing that agreeing will result in subscription to a costly membership), with consumers not realizing the deceptive and unfair enrollment until they see unexpected charges, often after several billing cycles.[109]

Finally, substantial record evidence shows sellers often fail to provide a simple cancellation method. If consumers cannot easily leave a negative option program when they wish, the negative option feature is merely a means of charging consumers for goods or services they no longer want. Commission cases, the Sentinel complaint database, and State Attorneys General's complaints all show sellers often use difficult and cumbersome cancellation mechanisms to prevent or curtail cancellations.[110] This fact is further corroborated by studies discussed above.[111]

[100] *Pennsylvania Funeral Dirs. Ass'n, Inc.* v. *FTC,* 41 F.3d 81, 87–88 (3d Cir. 1994) (holding the FTC did not need ''substantial, rigorous, quantitative studies'' or to show the practice occurs in a certain percentage of transactions through the country to find prevalence). ''Further, 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.* at 87.

[101] NCTA, FTC–2023–0073–0008.

[102] CTA, FTC–2023–0033–0997. CTA reports that a 2022 study found the global subscription e-commerce market is expected to reach $904.2 billion by 2026, and between 2021 and 2022, existing subscription brands grew their customer bases by 31 percent.

[103] According to a 2018 McKinsey & Company study, the subscription e-commerce market increased more than 100% over a five-year period prior to the study's publication. Tony Chen, Ken Fenyo, Sylvia Yang, and Jessica Zhang, ''Thinking Inside the Subscription Box: New Research on E-Commerce Consumers,'' McKinsey & Company (February 2018) (as cited by, *e.g.,* TechNet, FTC–2023–0033–0869 and Individual commenter, FTC–2023–0033–0800). PDMI also observed that negative options are offered in a wide array of product and services from major brands including media services, meal preparation kits, shaving and beauty products, beer and wine, contacts and ordinary household consumables. FTC–2023–0033–0864. Digital Content Next (''DCN''), FTC–2023–0033–0983, reports the United States had more than one billion paid subscriptions in Q1 2023 across the digital media landscape, indicating almost all online U.S. households subscribe to one or more digital media subscription services. *See also, e.g.,* Individual commenter, FTC–2023–0033–0137 (detailing difficulty cancelling recurring subscriptions for newspaper, mobile, and other businesses); Individual commenter, FTC–2023–0033–0217 (reported spending hours on the phone and online to cancel mobile account); Individual commenter, FTC–2023–0033–0465 (reported difficulty cancelling rewards program subscription); Individual commenter, FTC–2023–0033–0674 (complaint reporting difficulty canceling mobile device protection subscription); Individual commenter, FTC–2023–0033–0965 (trying to cancel mobile phone service because they bill for different amount every month); Individual commenter, FTC–2023–0033–0003 (difficulty cancelling ''home warranty'' subscription); Individual commenter, FTC–2023–0033–0004 (full cost and refund policy for gym contract not clearly disclosed); Individual commenter, FTC–2023–0033–0006 (''2 attempts and far too much time'' to cancel radio subscription); Individual commenter, FTC–2023–0033–0008 (discussing how ''subscription services in particular pervade the market. Even long-standing 'buy-it-once' products such as certain software suits have moved to subscription models''); Anonymous commenter, FTC–2023–0033–0013 (difficulty canceling home security monitoring contract, including hearing unwanted upsells); Anonymous commenter, FTC–2023–0033–0023 (webhosting service); Anonymous commenter, FTC–2023–0033–0024 (cable service); Individual commenter, FTC–2023–0033–0039 (language learning app); Anonymous commenter, FTC–2023–0033–0046 (software); Individual commenter, FTC–2023–0033–0049 (cannot cancel streaming service); Individual commenter, FTC–2023–0033–0050 (virus protection software and charity); Individual commenter, FTC–2023–0033–0052 (e-news service subscription); Individual commenter, FTC–2023–0033–0057 (magazine subscription service); Individual commenter, FTC–2023–00330061 (newspaper); Individual commenter, FTC–2023–0033–0063 (big box retailer membership); Individual commenter, FTC–2023–0033–0064 (cosmetics); Anonymous commenter, FTC–2023–0033–0066 (home warranty service); Individual commenter, FTC–2023–0033–0071 (lawncare service).

[104] *See* Prof. Chris Jay Hoofnagle, UC Berkeley (''Hoofnagle''), FTC–2023–0033–1137 (discussing the subscription economy). See also nn.245–252, collecting cases showing deceptive and unfair negative option practices occur across a wide range of industries and involve a variety of claims.

[105] State AGs, FTC–2023–0033–0886 (consumer paid for shipping on ''free'' gift only to have it converted to a paid item because she retained the item); *id.* (Money Map Press), *FTC* v. *Triangle Media Corp.,* No. 3:18–cv–01388 (S.D. Cal. 2018) (consumers who clicked on ads for risk free trials, paid for shipping and handling fees unwittingly enrolled in negative option programs).

[106] *See* nn.245–252 (collecting cases).

[107] *See* State Attorneys General (ANPR), FTC–2019–0082–0012 and State AGs, FTC–2023–0033–0886; TINA, FTC–2019–0082–0014 and FTC–2023–0033–1139.

[108] *See, e.g., id.; see also FTC* v. *Pact, Inc.,* No. 2:17–cv–1429 (W.D. Wash. 2017); *United States* v. *MyLife.com, Inc.,* No. 2:20–cv–6692 (C.D. Cal. 2020); *FTC* v. *NutraClick, LLC,* No. 2:20–cv–08612 (C.D. Cal. 2020); *In re Dun & Bradstreet, Inc.,* FTC Docket No. C–4761 (2022). *See generally* Staff Report, n.16.

[109] *See, e.g.,* State Attorneys General (ANPR), FTC–2019–0082–0012 and State AGs, FTC–2023–0033–0886; *FTC* v. *FloatMe Corp.,* No. 5:24–cv–00001 (W.D. Tex. 2024); *United States* v. *Cerebral, Inc.,* No. 1:24–cv–21376 (S.D. Fla. 2024); *FTC* v. *Bridge It, Inc.,* No. 1:23–cv–09651 (S.D.N.Y. 2023); *FTC* v. *Benefytt Techs., Inc.,* No. 8:22–cv–01794 (M.D. Fla. 2022); *FTC* v. *First Am. Payment Sys.,* No. 4:22–cv–00654 (E.D. Tex. 2022); *FTC* v. *NutraClick, LLC,* No. 2:20–cv–08612 (C.D. Cal. 2020); *FTC* v. *F9 Advert., LLC,* No. 3:19–cv–01174 (D.P.R. 2019); *FTC* v. *Age of Learning, Inc.,* No. 2:20–cv–07996 (C.D. Cal. 2020); *FTC* v. *NutraClick, LLC,* No. 2:16–cv–06819 (C.D. Cal. 2016); *FTC* v. *AH Media Grp., LLC,* No. 3:19–cv–04022 (N.D. Cal. 2019); *In re Urthbox, Inc.,* FTC Docket No. C–4676 (2019); *FTC* v. *Health Rsch. Labs., LLC,* No. 2:17–cv–00467 (D. Me. 2017); *FTC v HispaNexo, Inc.,* No. 1:06–cv–424 (E.D. Va. 2006).

[110] *See* section VII.B.6.

[111] Section VII.A.1.a.

(c) Statement as to the Economic Effect of the Rule

Finally, pursuant to section 18 and the Commission's Rules, the SBP must include a statement regarding the economic effect of the Rule. As part of these rulemaking proceedings, the Commission solicited and received comments on the economic impact of the proposed Rule. In issuing the final Rule, the Commission has carefully considered the comments and other information received as well as the costs and benefits of each provision, as discussed in more detail in section X, Final Regulatory Analysis. That analysis demonstrates the benefits of the Rule far exceed the costs. Benefits were evaluated on a per-cancellation basis; that is, the analysis assumes the primary consumer benefit of the Rule will come in the form of faster cancellations. Costs were evaluated primarily to reflect resources spent by businesses to review and come into compliance with the Rule. The overall net benefit of the Rule is estimated to exceed $5.3B (and could be as much as $49.2B) over the first 10 years (in 2023 dollars).

2. Magnuson-Moss Specificity Requirement

Pursuant to Magnuson-Moss, the Commission must also define with specificity acts or practices which are unfair or deceptive and either prohibit those activities or establish rules to prevent them. The Commission has done just that, despite some commenters' arguments to the contrary. Specifically, IAB and others[112] argue the provision prohibiting material misrepresentations fails to define claims that fall within its scope, and therefore, ''fails to identify covered acts with the requisite level of specificity.''[113]

First, section 18 does not require the Commission to define claims with specificity, only acts or practices. The practice of misrepresenting the material facts of a transaction, for instance, is a deceptive practice, but could vary depending on the transaction's terms. Requiring the Commission to identify particular claims would make its rules no better than a leaky sieve, unable to effectively address consumer harm.

Second, the NPRM and the final Rule do define with the requisite specificity the unfair or deceptive negative option acts and practices covered by the Rule.[114] While those critical of the proposed Rule cite to *Katharine Gibbs School* v. *FTC,* 612 F.2d 658 (2d Cir. 1979), this case is inapposite. In *Katharine Gibbs School,* the Second Circuit held the Commission failed to connect elements of its trade regulation rule to specifically defined unfair or deceptive acts or practices. The opinion held the Commission may not merely set requirements and then define failure to meet those requirements as unfair or deceptive acts or practices. The Commission must instead identify some underlying deceptive or unfair conduct and connect the rule requirements to that conduct.

In contrast here, the Commission specifically identified misrepresentation of material facts as a deceptive practice, and defined the term ''material'' with the same meaning it has under Section 5 of the FTC Act.[115] Moreover, the misrepresentations provision goes further, providing categories of potentially material facts to assist the marketplace in understanding the provision and supporting those examples with cases.[116] Thus, the final Rule's prohibition against material misrepresentations is not only connected to underlying deceptive or unfair conduct, but in fact prohibits that very conduct.

3. Other Legal Issues

Several commenters raised additional challenges to the Commission's ability to promulgate the Rule. These challenges fall into two categories. First, some commenters argued the Commission failed to give adequate notice of the scope of the proposed amendments to the Rule in the ANPR in accordance with Section 57a(b)(2)(A) of the FTC Act. Second, four commenters argued the Commission exceeded its grant of Congressional authority under the ''major questions'' doctrine. The Commission addresses each argument below.

(a) ANPR

Several commenters asserted the ANPR, issued in 2019, failed to provide adequate notice of the acts and practices to be covered by the proposed Rule. Specifically, ESA, USTelecom, RILA, a coalition of trade associations, Chamber, CCIA, IAB, and NRF argued the ANPR failed to provide notice the proposed Rule would cover misrepresentations of all material facts; would require express informed consent to opt-in to receive a save;[117] and would require an annual reminder.[118] Thus, according to these commenters, including these provisions in the final Rule would violate Section 18(b)(2)(A). They further argued the lack of these topics' inclusion in the ANPR meant that affected entities had inadequate opportunity to provide input, leading to an inadequate rulemaking record.[119]

These arguments, however, are unpersuasive. Section 18 imposes no requirement the ANPR have the level of specificity the commenters demand. In fact, the statute only says the ANPR must include ''a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission.''[120] The Commission included a discussion of each of these topics in the ANPR.[121] Moreover, the affected entities have had the chance to raise concerns with the Rule in their comments to the NPRM, which the Commission has considered and responded to in this Statement of Basis and Purpose.

(b) Major Questions Doctrine

Four commenters asserted the Rule implicates the ''major questions'' doctrine.[122] According to the Supreme Court, the major questions doctrine is implicated in ''extraordinary cases . . . in which the history and the breadth of the authority that the agency has

[112] IAB, FTC–2023–0033–1000; Coalition Comments from CCIA, Direct Selling Association, Information Technology Industry Council, IAB, Software & Information Industry Association, and Chamber (''Coalition''), FTC–2023–0033–0884; PDMI, FTC–2023–033–0864; TechNet, FTC–2023–0033–0869; TechFreedom, FTC–2023–0033–0872; ACT-The App Association (''ACT App Association''), FTC–2023–0033–0874; USTelecom, FTC–2023–0033–0876.

[113] IAB, FTC–2023–0033–1000.

[114] *See* Section I; Section VII.A, defining the acts and practices covered in §§ 425.3 through 425.6 as unfair or deceptive and a violation of the Rule. As acknowledged by USTelecom, the ''contours of the 'specificity' requirement have not been precisely defined.'' FTC–2023–0033–0876.

[115] *See* SBP Section VII.B.3 discussing § 425.3.

[116] *Id.* As explained in the *Katharine Gibbs School* dissent, ''Congress required specific definitions of such practices so that a rule would 'reasonably and fairly inform those within its ambit of the obligation to be met and the activity to be avoided.' '' 612 F.2d 658, 672 (*quoting* H.R. Rep. No.93–1107, 93d Cong., 2d Sess. 46 (1974), *reprinted in* (1974) U.S.C.C.A.N., pp. 7702, 7727).

[117] As discussed in Section VII.B.6, the Commission removes the proposed save provision from the final Rule.

[118] As discussed in Section VII.B.7, the Commission removes the proposed annual reminder provision from the final Rule.

[119] *E.g.,* IAB, FTC–2023–0033–1000.

[120] 15 U.S.C. 57a(b)(2)(A). ''The Advance Notice [of Proposed Rulemaking] is a formal invitation to participate in shaping the proposed rule and starts the notice-and-comment process in motion.'' Office of the Federal Register, ''A Guide to the Rulemaking Process,'' *https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.*

[121] ANPR, 84 FR 52393; *see also id.* 52396–8 (Request for Comments); Section VII.B.3.b.1 (discussing ANPR in context of § 425.3).

[122] PDMI, FTC–2023–0033–0864; ACT App Association, FTC–2023–0033–0874; Coalition, FTC–2023–0033–0884; Chamber, FTC–2023–0033–0885.

asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.'' [123] Citing this authority, the commenters argue Congress only granted the FTC ''limited and tailored authorities to regulate certain mediums and types of negative option marketing, but not all mediums and types as the NPRM encompasses.'' [124] Further, they assert Congress never intended for the Commission to create a comprehensive regulatory scheme for negative option marketing that encompasses the variety of requirements proposed in the NPRM. Because negative option programs play an ever-increasing role in the economy, these commenters claim the proposed Rule would ''dramatically alter'' how companies structure their subscription services.[125] More specifically, they assert the prohibition against misrepresentations, together with the ability to seek civil penalties in Federal court, would expand the FTC's authority beyond that envisioned by Congress.

However, far from exceeding Congressional intent, the Rule merely effectuates that intent in a way wholly consistent with the specific requirements set forth in Section 18 of the FTC Act. Specifically, Congress explicitly authorized the Commission to prescribe ''rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)),'' which ''may include requirements prescribed for the purpose of preventing such acts or practices.'' [126] As demonstrated below, each of the Rule's provisions identifies specific deceptive or unfair acts or practices that are prevalent throughout the marketplace and ties each Rule provision tightly to those findings.

As the Supreme Court explained, courts use the ''major questions doctrine'' when examining ''extraordinary cases'' where agency action would ''make a radical or fundamental change'' to a statutory scheme and assert ''extravagant'' authority over the national economy through ''ambiguous statutory text,'' citing ''modest words,'' ''vague terms,'' ''subtle device[s],'' or ''oblique or elliptical language.'' [127] Here, no such extraordinary circumstance exists. The prohibitions and disclosures in the Rule do not effect a major change in the economy. In fact, all the substantive requirements in the Rule are already extant under section 5 of the FTC Act, ROSCA, or the TSR. Moreover, the Rules' terms, as explained below, are neither vague, oblique, or elliptical—in fact, if anything, they are clearer than the legal authority just cited.

B. Discussion of Specific Rule Provisions, Section-by-Section Analysis

Below, for each provision of the proposed Rule, the Commission reviews the provision, summarizes comments received in response, and sets forth the final Rule with an analysis of the comments and other record evidence.

1. Proposed § 425.1 Scope

The Commission proposed eliminating the old Rule's prescriptive requirements applicable to prenotification plans and replacing them with flexible, but enforceable, standards. The proposed requirements would apply to all forms of negative option marketing, including prenotification and continuity plans, automatic renewals, and free trial offers.[128] The expanded coverage would establish a common set of requirements applicable to all types of negative option marketing. The proposed Rule would cover offers made in all media, including internet, telephone, in-person, and printed material, and would apply to all ''negative option sellers.'' With certain exceptions, not applicable here, the FTC Act provides the agency with jurisdiction over nearly every economic sector.[129]

(a) Negative Option Seller

(1) Comments

The scope of the proposed Rule covered ''negative option seller,'' defined to mean ''the person selling, offering, promoting, charging for, or otherwise marketing goods or services with a negative option feature.'' Several commenters raised concerns regarding the scope of this definition.

The Chamber, for example, suggested the Commission delete the term ''promoting'' from the definition.[130] It cited a wide variety of actors who could be swept in by the term, including ''advertising companies, web designers, [and] entities in the supply chain,'' who ''may not actually play an active role in determining'' what consumers see and hear about negative option programs.[131] An individual business commenter also criticized the term, saying to include ''promoting'' ''would potentially burden our technicians and our business when we provide service for equipment manufacturers that have their own service contract programs.'' [132]

ETA, representing the payments industry, addressed the words ''charging for'' in the definition.[133] ETA interpreted those words not to cover ''intermediaries, such as payment processors, that merely effect the transfer of funds from the consumer buyer to the merchant seller resulting from a negative option feature.'' [134] ETA noted that payment intermediaries typically ''do not control the terms of the negative option feature and do not control the interface with the consumer buyer.'' [135] ETA therefore suggested the final Rule ''include an express exemption for payment processors and other intermediaries.'' [136]

Other commenters, while not specifically criticizing the definition of negative option seller, raised concerns about the scope of the proposed Rule where third parties are involved in marketing and cancellation. For example, several suggested the Rule exempt a seller who contracts with a third party for subscription enrollment, management, or cancellation services.[137] PDMI argued, ''it is

[123] *West Virginia* v. *EPA,* 597 U.S. 697, 721 (2022) (internal quotations cleaned up). *Accord Biden* v. *Nebraska,* 143 S. Ct. 2355, 2372 (2023).

[124] Coalition, FTC–2023–0033–0884.

[125] *See, e.g.,* PDMI, FTC–2023–0033–0864.

[126] 15 U.S.C. 57a(a)(1)(B).

[127] *West Virginia* v. *EPA,* 597 U.S. at 723 (cleaned up).

[128] The proposed Rule stated it applied to any form of negative option plan. Because ''negative option plan'' was a defined term in the old Rule specifically referring to prenotification plans, the Commission modifies the scope to apply to any form of ''negative option program.''

[129] Certain entities or activities are wholly or partially exempt from FTC jurisdiction under the FTC Act, including most depository institutions, charities, transportation and communications common carriers, and the business of insurance. Under Sections 4 and 5 of the FTC Act, however, the Commission's jurisdiction extends to companies organized to carry on business for their own profit or that of their members, even if those companies are organized under state law as a not-for-profit entity. *See California Dental Ass'n* v. *FTC,* 526 U.S. 756 (1999). *But see* n.151.

[130] Chamber, FTC–2023–0033–0885.

[131] *Id.*

[132] Individual commenter, FTC–2023–0033–1136.

[133] Electronic Transactions Association (''ETA''), FTC–2023–0033–1004.

[134] *Id.*

[135] *Id.*

[136] *Id.* IHRSA noted health and fitness membership charges are typically processed on a monthly basis from the time of agreement, and in many cases by a third-party service provider. IHRSA, FTC–2023–0033–0863.

[137] NCTA asserted, ''The proposed rule also fails to account for third-party sign-up arrangements. For example, programmers have arrangements with Roku, Amazon, Apple, and others that allow consumers to sign up through these third parties for their streaming services.'' NCTA, FTC–2023–0033–0858. N/MA suggested the Commission ''should make clear that when a sale with a negative option feature is made through a third party that controls the process of purchasing and/or cancelling a subscription with a negative option feature, any new requirements would apply to the third party only, and not to the company that fulfills the

imperative that the Proposed Rule exempt sellers from compliance with those provisions that are not under their direct control . . . [and] should also exempt the seller from any misrepresentations made by a third-party platform.'' [138] NRF expressed concern a careful retailer could still ''face steep financial penalties for negligent misrepresentations (concerning, *e.g.,* product efficacy) based on information provided by third-party vendors.'' [139]

(2) Analysis

Based on the record, the Commission revises the definition of ''negative option seller'' to remove the word ''promoting,'' but declines to create status-based exemptions.[140] Moreover, the Commission clarifies it will enforce the final Rule in accordance with established section 5 principles regarding parties' responsibilities for, and involvement in, relevant activity. This approach should fully address commenters' concerns while maintaining the Rule's consumer protections.

As several commenters observed, a wide variety of actors may have secondary or tertiary roles in promoting products or services with a negative option feature. Further, as the Chamber noted, ''many of those participants . . . may not actually play an active role in determining how the negative option is presented to the consumer.'' [141] Similarly, participants in the promotion process may have no role in cancellation. Deleting the word ''promoting'' from the definition of negative option seller addresses this issue by ensuring those who have no active participation in the negative option feature are outside the Rule's coverage. However, this amendment does not mean all actors involved in promotion are exempt from the Rule. A participant who promotes and takes on a further role ''selling, offering, charging for, or otherwise marketing goods or services with a negative option feature'' remains subject to the final Rule, including the provisions covering ''promoting'' such goods or services for those who meet the negative option seller definition.[142]

The Commission declines to adopt a status-based exemption for payment intermediaries. Such exemptions are overbroad, excluding actors engaged in the practices condemned by the Rule. For example, a payment processor selling its own services on a negative option basis, as opposed to just providing payment services for another negative option seller, is no different than any other business covered by the Rule. Additionally, as ETA correctly noted, the words ''charging for'' as used in the Rule do not cover intermediaries merely effecting the transfer of funds from the consumer buyer to the merchant seller. This is consistent with the Commission's interpretation of ROSCA's coverage of persons who ''charge or attempt to charge any consumer.'' [143] Based on longstanding section 5 principles, the Commission has not enforced ROSCA against payment intermediaries solely for their conduct in effecting funds transfers.[144] The Commission will apply the same principles to the Rule.[145]

Similarly, the Commission will not grant blanket exemptions to sellers who contract with third parties while offering subscription services. The Commission expects negative option sellers to evaluate their commercial relationships with the Rule's provisions in mind. Even where a seller does not directly manage its negative option feature disclosures, consent, or cancellation, it can satisfy its obligations under the Rule by choosing to contract with third parties who act in accordance with the Rule and monitoring those parties' performance. An exemption for all sellers who contract with third parties to manage aspects of their negative option programs would effectively nullify the Rule by incentivizing less than legitimate sellers to contract with actors engaged in deceptive practices to maximize negative option enrollments and frustrate cancellation with impunity. A seller cannot evade its responsibility to deal honestly with consumers by contracting with a third party who does not.[146]

(b) Insurance

(1) Comments

Several commenters asked the Commission to expressly exclude insurance and State-regulated service contracts from the Rule.[147] They argued Congress prohibited the FTC from regulating the ''business of insurance'' in section 2 of the McCarran-Ferguson Act and the FTC exempted insurance sales in its Cooling-Off Rule.[148] They also asserted, ''State regulations in every jurisdiction require an insurer to give notice of a policy renewal,'' and State rules prohibit negative options.[149] Other commenters argued the Commission should exempt all service contract providers from the Rule due to existing State laws and regulations,[150] regardless

subscription.'' N/MA, FTC–2023–0033–0873. Marketplace Industry Association (''MIA'') requested ''the Commission clarify that where there are third-party payment platforms managing Subscriptions on behalf of businesses . . . (collectively, ''Third Party Subscription Managers''), that such Third Party Subscription Managers be legally responsible and legally liable for compliance with the proposed Rule. As is the case with Third Party Subscription Managers, businesses that offer Subscriptions have zero control over such Subscriptions, including the initiation of Subscriptions or the cancellation of Subscriptions. Said another way, it is impossible for businesses to comply with the proposed Rule where there are Third Party Subscription Managers. As such, the Association requests that the Commission make clear that Third Party Subscription Managers be responsible for compliance with the proposed Rule, including any penalties for noncompliance.'' MIA, FTC–2023–0033–1008.

[138] PDMI, FTC–2023–003–0864.

[139] NRF, FTC–2023–0033–1005.

[140] *See also* Section VII.B.1; Section VIII.A.1.

[141] Chamber, FTC–2023–0033–0885.

[142] *See, e.g., FTC* v. *LeadClick Media, LLC,* 838 F.3d 158, 172 (2d Cir. 2016) (operator of affiliate marketing network liable where it did not create ads but ''directly participat[ed] in the deceptive scheme by recruiting, managing, and paying a network of affiliates to generate consumer traffic through the use of deceptive advertising and allowing the use of deceptive advertising where it had the authority to control the affiliates participating in its network.'').

[143] 15 U.S.C. 8403.

[144] *See FTC* v. *Apex Capital Grp., LLC,* No. 2:18–cv–09573 (C.D. Cal. 2018). In this ROSCA matter, the Commission amended its complaint to add payment intermediary defendants for their unlawful conduct in connection with the scheme. However, the Commission did not assert ROSCA claims against the payment intermediary defendants, instead asserting counts for credit card laundering and manipulation of chargeback levels as Section 5 violations.

[145] *Id.; see FTC* v. *First Am. Payment Sys.,* No. 4:22–cv–00654 (E.D. Tex. 2022) (ROSCA case against payment processor for its unlawful acts and practices against its merchant customers).

[146] *E.g., FTC* v. *LeadClick Media, LLC,* 838 F.3d 158, 170 (2d Cir. 2016) (''A defendant may be held liable for its own acts of deception under the FTC Act, whether by directly participating in deception or by allowing deceptive acts or practices to occur that are within its control.''); *see also FTC* v. *Inc21.com Corp.,* 688 F. Supp. 2d 927, 939 (N.D. Cal. 2010) (''Even if Inc21 did not approve of the fraud (and it seems likely that it *did* approve), the fact remains that Inc21 is responsible for organizing this engine of fraud and reaping its profits. As such, Inc21 may *certainly* be held accountable[.]'') (emphasis in original).

[147] Asurion, FTC–2023–0033–0878; Florida Service Agreement Association, FTC–2023–0033–0882; American Property Casualty Insurance Association (''APCIA''), FTC–2023–0033–0996; National Association of Mutual Insurance Companies (''NAMIC''), FTC–2023–0033–1143.

[148] *See* 15 U.S.C. 1012; 16 CFR 429(a)(6).

[149] NAMIC, FTC–2023–0033–1143.

[150] SCIC, FTC–2023–0033–0879 (noting SCIC's comment to the ANPR stated most states have substantial regulatory frameworks for service contracts and that industry operates nationwide consistent with the intent of the proposed Rule); CTIA, FTC–2023–0033–0866 (noting service contracts are typically regulated by state departments of insurance and most states with autorenewal laws, including California, New York, and Oregon, provide an exemption for entities regulated by the state department of insurance); Frontdoor, Inc. (''Frontdoor''), FTC–2023–0033–0862 (noting majority of states have rigorous laws

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of whether they are engaged in the ''business of insurance'' within the meaning of the McCarran-Ferguson Act.

(2) Analysis

The Commission declines to exempt insurance or service contracts from the Rule. The final Rule can be enforced by the Commission only against covered persons and activities within the Commission's jurisdiction.[151] Restating or further specifying each jurisdictional limit in the final Rule's text, therefore, is not necessary.

Additionally, the requested industry-wide exemption is considerably broader than the FTC's jurisdictional limitations. The McCarran-Ferguson Act does not exempt entities engaged in the business of insurance from the Commission's jurisdiction unless such entities are subject to State regulation.[152] Moreover, activities of entities within the insurance industry that are beyond the scope of the ''business of insurance'' are subject to the Commission's jurisdiction.[153] No commenter provided any compelling reason to exempt these otherwise covered activities from the Rule.

Finally, commenters' citations to existing State laws and regulations governing service contract sellers indicate these sellers already provide disclosures and protections consistent with the Rule. As a practical matter, sellers who already provide consumers the Rule's protections should not be burdened by its application.[154]

(c) Business-to-Business

(1) Comments

Nine commenters noted the NPRM did not expressly address whether the proposed Rule would apply to business-to-business (''B2B'') transactions. Seven, including five industry associations,[155] said it should not apply.[156] Two individuals disagreed.[157]

Commenters advocating against including B2B sales in the Rule asserted the Commission should presume businesses are more sophisticated than individual consumers,[158] and contended B2B contracts typically are individually negotiated.[159] For example, ZoomInfo maintained business consumers are generally ''more sophisticated than individual consumers,'' explaining B2B contracts ''are assumed to result from arm's-length negotiation and often benefit from professional legal counsel.'' [160] Similarly, NCTA, an organization representing the internet and television industry, characterized business consumers as ''typically sophisticated,'' and said the Commission should not intervene in transactions based on ''[n]on-form contracts that are the subject of extensive bargaining between sophisticated companies.'' [161]

Seller and consumer commenters differed on whether the harmful negative option practices discussed in the NPRM are extant for B2B consumers. In support of excluding B2B transactions, two commenters asserted there is insufficient evidence of harm in the B2B context to support a prevalence finding.[162] A B2B consumer, however, noted individuals and small businesses both suffer from the harms of deceptive and unfair negative option practices. ''As a small business owner,'' the individual wrote, ''as well as a consumer, I am especially aware of how purposely difficult many companies make it to cancel their services. From telephone companies to travel channel companies . . . to email targeting campaigns . . . the cancelling process is ridiculously complex and at times hidden, if it exists at all on their websites.'' [163]

Seller and consumer commenters also differed on the significance of existing State law B2B exclusions. Three B2B sellers recommended the Commission follow those States that exclude B2B transactions.[164] A consumer, however, asserted such exclusions are why this Rule is necessary.[165] Specifically, the commenter explained: ''negative option marketing also greatly affect[s] many individual sellers and small businesses,'' but due to B2B exclusions, ''some larger corporations or companies are able to take advantage of that loophole and use predatory negative option practices against individual sellers and small businesses.'' [166]

Some sellers also referred to other Federal regulations to support excluding businesses from the scope of the Rule. For instance, ETA and NCTA each noted the Commission excluded most B2B transactions in the TSR. ETA made the same observation about the Cooling Off Rule.[167] Both CTIA and USTelecom approvingly cited the FCC's approach. USTelecom explained, ''the FCC has limited certain consumer protection rules to 'mass-market retail services' '' that are '' 'marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries.' '' [168] USTelecom further explained, ''Mass-market retail services stand in contrast to 'customized or individually negotiated arrangements' that are typically offered to larger organizations.'' [169]

ETA questioned whether the Commission has authority to address B2B transactions. ETA argued the proposed Rule would let the Commission ''interpose regulatory influence and law enforcement authority in contractual arrangements between businesses in a way that has not been authorized by Congress or

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for the offering, sale, and renewal of home service contracts, including the use of automatic renewals and applicable cancellation rights).

[151] Nothing in this Rule, however, shall limit another agency's ability to enforce this Rule within its own statutory authority, even if that authority is different than the FTC's authority. *See, e.g.,* 12 U.S.C. 5581(b)(5)(B)(ii).

[152] *FTC* v. *IAB Mktg. Assocs. LP,* 746 F.3d 1228, 1235 (11th Cir. 2014) (''[T]he FTC Act applies to the business of insurance only to the extent that such business is not regulated by state law.'').

[153] The Supreme Court has explained that, under the McCarran-Ferguson Act, a three-part factual inquiry is necessary to evaluate whether any particular activity constitutes the business of insurance. *See Union Labor Life Ins. Co.* v. *Pireno,* 458 U.S. 119, 129 (1982). First, does the activity have the effect of transferring or spreading a policyholder's risk; second, is the activity an integral part of the policy relationship between the insurer and the insured; and third, is the practice limited to entities within the insurance industry. *Id.* This inquiry requires a factual analysis of the activities in question.

[154] Moreover, service contract sellers, like other interested persons, may seek full or partial exemption from the final Rule. *See* Section VIII.A.1 (discussing new § 425.8, Exemptions provision).

[155] BSA, FTC–2023–0033–1015 (B2B software sellers); CTIA, FTC–2023–0033–0866 (wireless communication industry); ETA, FTC–2023–0033–1004 (payments industry); NCTA, FTC–2023–0033–0858 (internet and television); USTelecom, FTC–2023–0033–0876 (broadband). A sixth association, the U.S. Chamber of Commerce, asked the Commission to ensure that the scope of its cost-benefit analysis includes business-to-business transactions. FTC–2023–0033–0885.

[156] Anonymous commenter, FTC–2023–0033–1007; BSA, FTC–2023–0033–1015; CTIA, FTC–2023–0033–0866; ETA, FTC–2023–0033–1004; NCTA, FTC–2023–0033–0858; USTelecom, FTC–2023–0033–0876; ZoomInfo, FTC–2023–0033–0865.

[157] Individual commenter, FTC–2023–0033–0755; Individual commenter, FTC–2023–0033–0042.

[158] Anonymous commenter, FTC–2023–0033–1007; CTIA, FTC–2023–0033–0866; NCTA, FTC–2023–0033–0858; ZoomInfo, FTC–2023–0033–0865.

[159] CTIA, FTC–2023–0033–0866; NCTA, FTC–2023–0033–0858; USTelecom, FTC–2023–0033–0876; ZoomInfo, FTC–2023–0033–0865.

[160] ZoomInfo, FTC–2023–0033–0865.

[161] NCTA, FTC–2023–0033–0858. NCTA requested any final rule exclude individually negotiated business-to-business contracts. FTC–2023–0033–0858.

[162] BSA, FTC–2023–0033–1015; NCTA, FTC–2023–0033–0858. The Commission discusses the subject of prevalence more broadly at Section VII.A.

[163] Individual commenter, FTC–2023–0033–0755.

[164] Anonymous commenter, FTC–2023–0033–1007 (California); BSA, FTC–2023–0033–1015 (California, Colorado, Delaware); ZoomInfo, FTC–2023–0033–0865 (California, Colorado, Connecticut, Delaware, Hawaii, New York, Oregon, Tennessee, Virginia).

[165] Individual commenter, FTC–2023–0033–0042.

[166] *Id.*

[167] 16 CFR 429.0–429.3.

[168] USTelecom, FTC–2023–0033–0876.

[169] *Id.*

justified by the Commission's own rationale for the Proposed Rule.'' [170] ETA cited the Commission's use of ROSCA in the *First American Payment Systems* case to illustrate its view the Rule's application in the B2B context would be impermissible regulation of ''an automatic renewal clause in an arm's length commercial agreement.'' [171]

Finally, ETA and ZoomInfo argued various provisions of the Rule, such as the disclosure and notice requirements, could present unusual implementation problems in B2B transactions. For instance, ETA asserted disclosure requirements could result in operational uncertainty because the Commission did not consider all the typical terms included in B2B agreements. Similarly, ZoomInfo explained ''B2B agreements are often complex, involving multiple decision-makers and points of contact, who might rotate or leave their roles over the course of a contract.'' [172]

(2) Analysis

The final Rule, like the proposed Rule, covers B2B transactions. It has been the Commission's longstanding view that section 5 of the FTC Act [173] protects business consumers as well as individual consumers. Moreover, commenters' arguments that, under section 5, all business consumers must be held to a heightened standard of sophistication are inconsistent with settled law.

The Commission has long enforced the FTC Act against those who deceive and act unfairly to businesses and other organizations.[174] As the Supreme Court explained in *FTC* v. *Standard Educ. Soc.,* 302 U.S. 112, 116 (1937), ''Laws are made to protect the trusting as well as the suspicious.'' This principle applies no less to the business consumer than to the individual.[175] The Commission maintains a decades-long list of business protection cases on its website and dedicates significant effort to educate and protect small businesses.[176] Indeed, the Commission has made protecting small businesses a priority.[177]

Moreover, the TSR never exempted B2B transactions entirely. Importantly, the Commission recently amended the TSR to cover a broader scope of B2B activity. Specifically, in 2024, the Commission expanded the TSR to prohibit material misrepresentations and false or misleading statements in B2B calls due to the ongoing harm to small businesses from such practices.[178]

Additionally, recent Commission actions to protect small businesses underscore the fact deceptive practices pertaining to negative option features occur in B2B transactions just as they do with individual consumers. None of these cases present the arms-length negotiation of contracts by sophisticated parties that commenters claim to be universal. For example, in its 2022 action against *First American Payment Systems,*[179] the Commission alleged the defendants violated section 5 and ROSCA by making false claims about fees and cost savings to persuade merchants in small- and medium-sized businesses, many of whom had limited English proficiency, to enter into payment processing agreements.[180] Once enrolled, the defendants allegedly withdrew funds from merchants' accounts without consent, and made it difficult and expensive to cancel the service. Under a stipulated court order, the defendants must (among other things) make it easier for merchants to cancel their services.

In the Commission's 2022 *Dun & Bradstreet* [181] matter, the complaint alleged multiple deceptive practices pertaining to products the defendant marketed to small- and medium-sized businesses, in violation of section 5. The resulting consent order includes substantial provisions pertaining to negative option features.

The Commission's 2022 action against *Vonage* [182] also illustrates this point. The complaint detailed the defendants' deceptive and unfair practices targeting both business and residential customers and alleged those practices violated section 5 and ROSCA.[183] The stipulated court order includes multiple provisions relating to consent, cancellation, and disclosures pertaining to both individual and business consumers.

Nonetheless, two arguments for excluding B2B transactions warrant additional discussion. *First,* several commenters elide the distinction between B2B agreements generally and individually negotiated B2B agreements. It is neither the purpose nor the effect of the final Rule to prevent businesses from entering into agreements with individually negotiated negative option terms. By requiring the cancellation mechanism to be ''at least as easy to use'' as the consent mechanism, the final Rule incorporates a symmetrical standard that accounts for individually negotiated B2B agreements. A B2B consumer who consents to a negative option feature through an individually negotiated term of an agreement can also individually negotiate the cancellation mechanism. Moreover, as the Commission noted above, it will enforce this Rule in the same manner in which it enforces section 5 of the FTC Act.[184] The Commission has not used its consumer protection authority in the type of large individually negotiated B2B transactions commenters are worried about.[185] Unsurprisingly, no commenter cited any historical instance to the contrary. Thus, the Rule preserves the ability of sophisticated business consumers to individually negotiate B2B agreement terms.[186]

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[170] ETA, FTC–2023–0033–1004.

[171] *Id.* (citing *FTC* v. *First Am. Payment Sys.,* No. 4:22–cv–00654 (E.D. Tex. 2022)).

[172] ZoomInfo, FTC–2023–0033–0865. ETA also raised a concern about the definition of negative option seller, addressed in Section VII.B.1.a.

[173] 15 U.S.C. 45(a).

[174] *See, e.g., Indep. Directory Corp.* v. *FTC,* 188 F.2d 468 (2d Cir. 1951) (deceptive practices in selling directory ads to businesses).

[175] *Indep. Directory Corp.,* 188 F.2d at 470 (applying *Standard Educ. Soc.*); *see also, e.g., FTC* v. *LoanPointe, LLC,* 525 F. App'x 696, 701 (10th Cir. 2017) (FTC need only prove ''the likelihood that a consumer (here, employers)'' would be deceived); *FTC* v. *Crittenden,* 19 F.3d 26 (9th Cir. 1994) (Table) (noting stipulated judgment with B2B office supplier); *FTC* v. *Inc21.com Corp.,* 688 F. Supp. 2d 927 (N.D. Cal. 2010) (preliminary injunction against deceptive and unfair B2B billing scheme); *FTC* v. *IFC Credit Corp.,* 543 F. Supp. 2d 925, 934 (N.D. Ill. 2008) (FTC Act applies to B2B sales).

[176] *See* Fed. Trade Comm'n, ''Protecting Small Businesses: Cases,'' *https://www.ftc.gov/business-guidance/small-businesses/protecting-small-businesses-cases* (last visited October 23, 2024); Fed. Trade Comm'n, ''Protecting Small Businesses,'' *https://www.ftc.gov/business-guidance/small-businesses* (last visited October 23, 2024); Fed. Trade Comm'n, ''Scams and Your Small Business: A Guide For Business,'' *https://www.ftc.gov/business-guidance/resources/scams-your-small-business-guide-business* (last visited October 23, 2024).

[177] *See* Press Release, Fed. Trade Comm'n, ''FTC, BBB, and Law Enforcement Partners Announce Results of Operation Main Street: Stopping Small Business Scams Law Enforcement and Education Initiative'' (June 18, 2018), *https://www.ftc.gov/news-events/press-releases/2018/06/ftc-bbb-law-enforcement-partners-announce-results-operation-main* (last visited October 23, 2024).

[178] TSR, 89 FR 26760 (April 16, 2024).

[179] *FTC* v. *First Am. Payment Sys.,* No. 4:22–cv–00654 (E.D. Tex. 2022).

[180] In describing the basis for the misrepresentations provision of the proposed Rule, the NPRM cited (among other cases) *First Am. Payment Sys.* NPRM, 88 FR 24726 n.65. *See also* ETA, FTC–2023–0033–1004.

[181] *In re Dun & Bradstreet, Inc.,* FTC Docket No. C–4761 (2022).

[182] *FTC* v. *Vonage Holdings Corp.,* No. 3:22–cv–06435 (D.N.J. 2022).

[183] The *Adobe* matter provides another recent example of a matter alleging unlawful negative option practices targeting both individual and business consumers. *United States* v. *Adobe, Inc.,* No. 5:24–cv–03630 (N.D. Cal. 2024).

[184] *See* section VII.B.1.a.

[185] *See* 16 CFR 2.3.

[186] The *Vonage* order expressly exempts negative option feature provisions in B2B contracts where the defendants ''possess evidence that consumers negotiated significant terms of the negative option feature that are only negotiable with business consumers.'' *FTC* v. *Vonage Holdings Corp.,* No. 3:22–cv–06435 (D.N.J. 2022). The final Rule is less prescriptive and more flexible than that order,

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Second, it appears several commenters mistakenly thought the required simple cancellation mechanism would necessarily terminate all aspects of any broader contract or agreement. In fact, this provision only pertains to cancellation of the negative option feature. Complex commercial agreements, such as those described by ETA, will have numerous provisions unrelated to negative option features. Nothing in this Rule prohibits these provisions from being subject to separate cancellation and termination terms.

2. Proposed § 425.2 Definitions

In the NPRM, the proposed Rule set forth several definitions. For example, the proposed Rule defined ''negative option feature'' as a contract provision under which the consumer's silence or failure to take affirmative action to reject a good or service or to cancel an agreement is interpreted by the negative option seller as acceptance or continuing acceptance of an offer. This definition is consistent with the TSR and ROSCA (which references the TSR's definition). The proposed term includes, but is not limited to, automatic renewals, continuity plans, free-to-pay conversion or fee-to-pay conversions, and pre-notification negative option plans.[187]

Additionally, the proposed Rule defined ''clear and conspicuous,'' ''negative option seller,'' and ''save.'' To define ''clear and conspicuous,'' the FTC imported its definition developed through years of enforcement experience. As explained in the NPRM, the proposed definition substantially overlaps with the concepts provided in California and District of Columbia negative option laws,[188] with one exception. Specifically, the District of Columbia definition requires disclosures to be visually proximate to any request for consumer consent. The final Rule incorporates this requirement in a separate consent section.

(a) Summary of Comments

The Commission did not receive any comments specifically supporting any proposed definition, though several commenters generally supported the concepts incorporated in the definitions, such as ''clear and conspicuous disclosures.'' Several commenters critiqued the Commission's omission of certain definitions, such as ''material'' in connection with § 425.3 and § 425.4,[189] ''simple cancellation mechanism,'' [190] ''practical,'' and ''normal business hours,'' [191] because these terms are used throughout the Rule. Other commenters asked the Commission to add a definition for ''consumer'' that excludes businesses,[192] while another asked the Commission to include small businesses in that definition.[193] Similarly, other commenters asked the Commission to ''exempt'' certain industries from, or otherwise alter the scope of, the definition of ''negative option seller.'' [194]

Several commenters critiqued the proposed definitions. For example, ESA stated ''the definition of 'save' [195] is overly broad and would prohibit the presentation of useful, consumer-friendly details about a consumer's subscription before they cancel it.'' [196] Other commenters questioned why the ''clear and conspicuous'' definitions says a disclosure is not clear and conspicuous, if a consumer must click on a hyperlink to see it.[197]

Additionally, several commenters requested the Commission revise certain of its proposed definitions for clarity. For instance, the National Federation of Independent Businesses (''NFIB'') asked the Commission to revise the definitions for ''clear and conspicuous'' and ''negative option feature'' to ''make their meanings clearer'' [198] by, for example, using simpler words in the clear and conspicuous definition (''words and grammar'' versus ''diction and syntax'') or by providing detailed examples of each type of program covered in the definition of negative option feature. NFIB further explained ''Those regulated by and served by subsection 425.2(d) most likely would understand the meaning of an automatic renewal, but perhaps not the meaning of the other examples.'' [199]

(b) Analysis

Based on the record, the Commission makes several changes to the proposed definitions. First, as explained in sections VII.B.1.3 (material) and VII.B.6.c.2.b.ii (interactive electronic medium), it adds definitions of material and interactive electronic medium for clarity. Further, as discussed in section VII.B.4, the Commission modifies the definition of clear and conspicuous.

Second, the Commission removes the definition of save. As discussed in section VII.B.6.c the proposed saves provision did not achieve the right balance between protecting consumers from unfair tactics and allowing sellers to provide necessary and valuable information about cancellation. Therefore, the Commission declines to include the NPRM's proposed limitation on saves, and instead will consider issuing an SNPRM in the future for

thereby promoting more flexibility in the marketplace.

[187] Section II of this Notice contains descriptions of these various plans.

[188] Cal. Bus. & Prof. Code section 17601 and DC Code section 28A–202.

[189] *See, e.g.,* BSA, FTC–2023–0033–1015 (material is not defined); Chamber, FTC–2023–0033–0885 (same).

[190] Center for Data Innovation (''CDI''), FTC–2023–0033–0887; *see also* Act App Association, FTC–2023–0033–0874; NRF, FTC–2023–0033–1005 (failed to defined ''as simple as'').

[191] International Carwash Association, FTC–2023–0033–1142.

[192] *See, e.g.,* Anonymous commenter, FTC–2023–0033–1007; Zoominfo, FTC–2023–0033–0865; CTIA, FTC–2023–0033–0866; BSA, FTC–2023–0033–1015.

[193] Individual commenter, FTC–2023–0033–0042.

[194] *See, e.g.,* Asurion, FTC–2023–0033–0878 (exempt service contracts); Chamber, FTC–2023–0033–0885 (exclude promoting); ETA, FTC–2023–0033–1004 (exclude ''charging for''). These requests are more appropriately addressed in the scope and requested exemptions, and the Commission does not consider them here.

[195] Save was defined in the proposed Rule as an attempt by a seller to present any additional offers, modifications to the existing agreement, reasons to retain the existing offer, or similar information when a consumer attempts to cancel a negative option feature.

[196] ESA, FTC–2023–0033–0867. PDMI argued similarly as to the definition of save. FTC–2023–0033–0864 (arguing sellers should be able to be able to immediately discuss pause, skip or modification options without having to ask for permission, particularly because it is impossible to know which customers prefer to cancel as opposed to merely modify their current plan). *Accord* USTelecom, FTC–2023–0033–0876 (definition of Save overly broad); RILA, FTC–2023–0033–0883 (modify definition of save to allow short clarification and confirmation of intent follow-up communications); Chamber, FTC–2023–0033–0885; CDI, FTC–2023–0033–0887 (''Commission should exclude information about permanent, irreparable harms that may result from cancellation, and is relevant to the current subscription or product plan.''); CCIA, FTC–2023–0033–0984; IAB, FTC–2023–0033–1000 (definition of save overly broad and ''would prohibit the presentation of useful, consumer-friendly details about a consumer's subscription before they cancel it.'').

[197] *See, e.g.,* NCTA, FTC–2023–0033–0858 (definition does not take into account small screens); Chamber, FTC–2023–0033–0885 (''The requirements that disclosure on the internet or mobile applications be 'unavoidable' and 'immediately adjacent' rase practical concerns.''); CCIA, FTC–2023–0033–0984 (definition should ''hew closely to the Commission's guidance in its *.com Disclosures* policy to ensure regulatory consistency.'').

[198] NFIB, FTC–2023–0033–0789. *Accord* Kuehn, FTC–2023–0033–0871 (proposed revised definition of negative option feature); Chamber, FTC–2023–0033–0885 (requests the definition of negative option feature to be revised to exclude monthly subscription services). *See* section VII.B.4 for further discussion of proposed modifications. *See also* ETA, FTC–2023–0033–1004 (clarify and narrow ''automatic renewal in the definition).

[199] NFIB, FTC–2023–0033–0789 (requesting specific examples of each type of program be included in the definition of negative option feature); *see also* IHRSA, FTC–2023–0033–0863 (observes the Commission does not define what ''automatic renewal, continuity plan'' and other examples of negative option features mean).

further comment. Accordingly, without the saves provision, the Commission determines there is no need for a defined term at this time.

Although several commenters critiqued the lack of definitions for such terms as ''simple cancellation mechanism,'' ''practical,'' or ''normal business hours,'' the Commission addresses these concerns with further clarification, rather than with formal definitions, in the section-by-section analysis below. As to commenter requests for a definition of ''consumer'' expressly excluding (or including) business-to-business transactions, the Commission similarly addresses these requests in the sections regarding scope and requested exemptions, above.

Finally, NFIB asked the Commission to add specific examples of each type of negative option program to the text of the Rule, stating those served by the Rule would likely not understand these ''terms of art.'' [200] The Commission discusses examples of each type of negative option program in more detail as part of the SBP at section II. Further, the Commission typically engages in robust consumer and business education campaigns when promulgating and issuing final rules and will do so here. The Commission therefore disagrees the Rule must incorporate these examples into the text.[201]

3. Proposed § 425.3 Misrepresentations

Section 425.3 of the proposed Rule prohibited sellers from misrepresenting ''any material fact related to the transaction, such as the negative option feature, or any material fact related to the underlying good or service.'' [202] As explained in the NPRM, ''misrepresentations in negative option marketing cases often involve deceptive representations not only related to the negative option feature but to the underlying product (or service) or other aspects of the transaction as well.'' [203] These include ''misrepresentations related to costs, product efficacy, free trial claims, processing or shipping fees, billing information use, deadlines, consumer authorization, refunds, [and] cancellation.'' [204]

The FTC Act provides the legal basis for the Commission to prevent and remedy misrepresentations in the negative option context. Specifically, section 5(a)(1) of the FTC Act declares unfair or deceptive acts or practices in or affecting commerce to be unlawful. Negative option sellers making material misrepresentations are engaged in deceptive practices. Addressing these practices through the Rule prevents deception by giving the Commission the ability to seek civil penalties (where appropriate under 5(m)(1)(a)), where they are not already provided, thus deterring misrepresentations, protecting consumers, and leveling the playing field for ''honest sellers who must compete with those who engage in deception.'' [205]

(a) Summary of Comments

The State AGs strongly supported this provision, stating, for example, it would ''combat[ ] seller misrepresentations, by providing the FTC with authority to seek civil penalties and consumer redress for material misrepresentations in all types of media.'' [206] Echoing the NPRM, they explained, ''[l]ike the FTC, we have found that negative option marketing cases 'often involve deceptive representations not only related to the negative option feature but to the underlying product (or service) or other aspects of the transaction as well.' '' [207]

Law Professors further supported prohibiting ''material misrepresentations . . . whether or not the false claim is exclusively about the negative option feature.'' [208] They, too, offered evidence of the prevalence of misconduct, stating ''entities like the Better Business Bureau have long reported, based on FTC and other data, the prevalence of misrepresentation in certain negative option arrangements, and non-FTC enforcement efforts confirm the problem.'' [209] Citing multiple sources, they argued the ''Commission thus has more than ample 'reason to believe that' co-occurring negative option violations and other misrepresentations 'are prevalent.' '' [210]

These commenters further argued the Commission should not adopt a narrower provision limited strictly to the elements of a negative option feature because, in their view, it would be difficult ''to fully separate misrepresentations regarding the negative option feature from all other material misrepresentations.'' [211]

Several commenters, largely trade groups and sellers, criticized the proposed provision. As discussed in section V.A, several questioned the prevalence of misrepresentations [212] and asserted the provision was not within the scope of the ANPR.[213] Additionally, several commenters argued the provision is overbroad, and suggested it is unnecessary in light of existing law. Finally, they proposed ways to narrow the proposed provision.

Several commenters objected to the scope of the proposed provision. Citing Commissioner Wilson's dissent to the NPRM, TechNet noted the proposed Rule ''would capture alleged misrepresentations regarding the underlying product or service 'wholly unrelated' to the negative option feature.'' [214] Three commenters asserted no current trade regulation rule

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[200] NFIB, FTC–2023–0033–0789.

[201] Further, as explained in n.307, the Commission also declines to revise the definition of ''clear and conspicuous'' to replace the words ''diction and syntax'' with ''words and grammar.''

[202] NPRM, 88 FR 24734.

[203] NPRM, 88 FR 24726.

[204] *Id.* (citing *e.g., FTC* v. *Tarr,* No. 3:17–cv–02024 (S.D. Cal. 2017); *FTC* v. *First Am. Payment Sys.,* No. 4:22–cv–00654 (E.D. Tex. 2022); *FTC* v. *XXL Impressions, LLC,* No. 1:17–cv–00067 (D. Me. 2017); *United States* v. *MyLife.com, Inc.,* No. 2:20–cv–6692 (C.D. Cal. 2020); *FTC* v. *Health Rsch. Labs., LLC,* No. 2:17–cv–00467 (D. Me. 2017); *FTC* v. *Leanspa, LLC,* No. 3:11–cv–01715 (D. Conn. 2011); *FTC* v. *WealthPress, Inc.,* No. 3:23–cv–00046 (M.D. Fla. 2023); *FTC* v. *BunZai Media Grp., Inc.,* No. 2:15–cv–04527 (C.D. Cal. 2015); *FTC* v. *Willms,* No. 2:11–cv–00828 (W.D. Wash. 2011); *FTC* v. *Universal Premium Servs.,* No. 2:06–cv–00849 (C.D. Cal. 2006); *FTC* v. *Remote Response Corp.,* No. 1:06–cv–20168 (S.D. Fla. 2006); and *FTC* v. *Johnson,* No. 2:10–cv–02203 (D. Nev. 2016).

[205] NPRM, 88 FR 24726.

[206] State AGs, FTC–2023–0033–0886.

[207] *Id.*

[208] Law Professors, FTC–2023–0033–0861.

[209] *Id.,* citing Better Business Bureau, ''BBB Investigation Update: Free Trial Offer Scams'' (Apr. 2020), *https://www.bbb.org/article/news-releases/22040-bbb-update-free-trial-offerscams;* C. Steven Baker & Better Business Bureau, ''Subscription Traps and Deceptive Free Trials Scam Millions with Misleading Ads and Fake Celebrity Endorsements'' (Dec. 2018), *https://www.bbb.org/article/investigations/18929-subscription-traps-and-deceptive-free-trialsscam-millions-with-misleading-ads-and-fake-celebrity-endorsements.* The Law professors further pointed to evidence found by searching BBB's ScamTracker for terms like ''subscription.'' *See, e.g.,* Better Business Bureau, ScamTracker, ID #720953, *https://www.bbb.org/scamtracker/lookupscam/720953.* They additionally cited Consumer Financial Protection Bureau, ''CFPB Charges TransUnion and Senior Executive John Danaher with Violating Law Enforcement Order'' (Apr. 2022), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-charges-transunion-and-seniorexecutive-john-danaher-with-violating-law-enforcement-order/;* David Pierson, 'Santa Monica fitness brand Beachbody is fined $3.6 million over automatic renewals,'' L.A. Times (Aug. 29, 2017), *https://www.latimes.com/business/la-fi-beachbody-20170829-story.html;* Bruce A. Craig, Negative-Option Billing—Understanding the Stealth Scams of the '90s, 7 Loy. Consumer L. Rev. 5 (1994).

[210] Law Professors, FTC–2023–0033–0861.

[211] Law Professors, FTC–2023–0033–0861.

[212] CTA, FTC–2023–0033–0997; ESA, FTC–2023–0033–0867; IAB, FTC–2023–0033–1000; N/MA, FTC–2023–0033–0873; RILA, FTC–2023–0033–0883; TechFreedom, FTC–2023–0033–0872. *See* section VII.A for a discussion of prevalence addressing these comments.

[213] ANA, FTC–2023–0033–1001; CCIA, FTC–2023–0033–0984; Coalition, FTC–2023–0033–0884; ESA, FTC–2023–0033–0867; Frontdoor, FTC–2023–0033–0862; IAB, FTC–2023–0033–1000; NRF, FTC–2023–0033–1005; RILA, FTC–2023–0033–0883. *See* section VII.A for a discussion addressing these comments.

[214] TechNet, FTC–2023–0033–0869.

prohibits misrepresentations so broadly.[215]

Similarly on scope, some commenters also argued the proposed language lacked the specificity necessary to give sellers notice of what conduct would violate the Rule.[216] For example, ACT App Association asserted, ''Notwithstanding best efforts, tech startups' ability to flawlessly adhere to the vague and broad language used in this rule is unrealistic.'' [217]

A few commenters provided hypotheticals or asked rhetorical questions to illustrate concerns about the proposal's breadth. MIA, for example, stated, ''if a streaming service advertises, 'movies that you will love,' but you do not 'love' them, is that a violation of this rule subject to penalties? If a housekeeping service claims, 'great cleaning every time,' but the resulting cleanliness is not up to the consumer's 'standards,' will that trigger this provision and any resulting penalties?'' [218] The Chamber asked, ''[c]ould a privacy policy, for example, be considered a material representation covered under this requirement?'' [219]

Many of these commenters argued the reach of the proposed Rule would negatively impact consumers by discouraging negative option offerings. TechNet said, ''[f]or a variety of subscription services, the main drivers of consumer engagement are the subscription services' ability to provide financial savings, convenience, and access to premium services. . . . Unfortunately, the NPRM ignores these benefits and would discourage the offering of subscription services altogether.'' [220] ESA feared ''this section will discourage industry members from developing and offering innovative negative option plans that consumers will enjoy.'' [221]

Several commenters asserted existing laws and regulations make the proposed provision unnecessary. Some argued section 5's prohibition against deceptive practices already provides the Commission sufficient authority on this issue.[222] Others asserted State laws and regulations prohibiting misrepresentations are sufficient to protect the public.[223]

Commenters were divided on ROSCA's coverage. NRF, for example, said ''[i]n light of the Commission's decision that ROSCA already prohibits deceptive statements made in connection with a subscription, even if not directly related to subscription terms, many of the proposed amendments are unnecessary.'' [224] In contrast, PDMI said while *MoviePass* ''perhaps reflects a colorable approach,'' the application of ROSCA there ''exceeded Congress' intent.'' [225] Similarly, IAB asserted the proposed Rule would break new ground by ''grant[ing] the Commission authority to seek monetary remedies against a first-time offender for misrepresentations that would not give rise to monetary relief if made outside the context of an autorenewal agreement.'' [226]

Several commenters recommended changes if the proposed provision remains in the Rule. BSA, for example, suggested the Commission should define the term ''material,'' citing the TSR and the FTC Policy Statement on Deception as examples.[227] Separately, RILA urged the Commission ''to include clear language stating a 'reasonable person standard' will apply to determinations of 'material facts' related to products.'' [228]

Several commenters suggested the Commission limit the misrepresentation provision to the terms of the negative option feature. For instance, BSA advocated for limiting the provision ''to facts relating to the transaction and not every material fact relating to the underlying good or service.'' [229] CCIA and CDI agreed, stating the final phrase should instead cover only those material facts related to the underlying negative option feature and exclude ''any material fact related to the underlying good or service.'' [230]

(b) Analysis

Based on the record, the Commission adopts a clarified version of the material misrepresentation section and adds a definition for further clarification. Specifically, the final Rule omits the proposed language referring to ''any material fact related to the transaction, such as the negative option feature, or any material fact related to the underlying good or service'' and instead prohibits misrepresentation of ''any material fact,'' and defines ''material'' consistent with the TSR and section 5 of the FTC Act. Further, to enhance clarity and specificity, the text lists several examples of potentially material fact categories, taken from Commission precedent.

As further explained below: (1) despite commenters' concerns to the contrary, this provision is consistent with the ANPR and prevalence requirements of section 18 of the FTC Act; (2) consistent with ROSCA, the final provision is not limited to material misrepresentations about the negative option feature itself; (3) the Commission declines to exclude any subset of material misrepresentations from the scope of the Rule; and (4) for clarity, the Commission adds a definition of ''material'' consistent with established law of section 5 and other Commission Rules.

(1) *Adoption of a prohibition against misrepresentations is consistent with the ANPR and is appropriate to address prevalent unfair or deceptive acts or practices.*

Prior to the publication of any notice of proposed rulemaking promulgated under the Magnuson Moss Act, the Commission must publish an advance notice of proposed rulemaking (ANPR).[231] That notice must contain a ''brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives

[215] NCTA, FTC–2023–0033–0858; PDMI, FTC–2023–0033–0864; TechFreedom, FTC–2023–0033–0872.

[216] For example, the Coalition and IAB both said, ''The NPRM fails, however, to identify which claims would constitute a material fact, and thus fails to identify covered acts with the requisite level of specificity.'' Coalition, FTC–2023–0033–0884; IAB, FTC–2023–0033–1000. PDMI similarly claimed the proposed provision's lack of specificity ''renders [the proposed Rule] overly vague and unlawful.'' FTC–2023–0033–0864. *See also* ESA, FTC–2023–0033–0867; TechFreedom, FTC–2023–0033–0872; USTelecom, FTC–2023–0033–0876 (citing *Katharine Gibbs School* v. *FTC,* 612 F.2d 658 (2d Cir. 1979)).

[217] ACT App Association, FTC–2023–0033–0874.

[218] MIA, FTC–2023–0033–1008.

[219] Chamber, FTC–2023–0033–0885. *See also* CDI, FTC–2023–0033–0887 (''consumers could argue that the dish detergent they received through a subscription service did not clean dishes as advertised.'').

[220] TechNet, FTC–2023–0033–0869.

[221] ESA, FTC–2023–0033–0867; *see also* IAB, FTC–2023–0033–1000 (predicting ''autorenewing (sic) subscriptions will become less common and significantly more costly because of the regulatory risks'' and ''businesses and consumers will be harmed by the loss of convenience and savings offered by autorenewal arrangements.''); Chamber, FTC–2023–0033–0885 (contending ''many entities may forgo negative options altogether. This decreases consumer choice in the marketplace given the clear popularity and use of negative option features across the economy.'').

[222] ANA, FTC–2023–0033–1001; Consumer Technology Association (''CTA''), FTC–2023–0033–0997; N/MA, FTC–2023–0033–0873.

[223] NRF, FTC–2023–0033–1005; RILA, FTC–2023–0033–0883; SFE Energy, Inc. (''SFE''), FTC–2023–0033–1151.

[224] NRF, FTC–2023–0033–1005.

[225] PDMI, FTC–2023–003–0864.

[226] IAB, FTC–2023–0033–1000.

[227] BSA, FTC–2023–0033–1015; *see also* Chamber, FTC–2023–0033–0885 (noting ''materiality'' not defined in NPRM).

[228] RILA, FTC–2023–0033–0883.

[229] BSA, FTC–2023–0033–1015.

[230] CCIA, FTC–2023–0033–0984; CDI, FTC–2023–0033–0887; *see also* TechFreedom, FTC–2023–0033–0872.

[231] 15 U.S.C. 57a(b)(2).

under consideration by the Commission.'' [232] The ANPR in this case meets this standard. Specifically, in the ANPR, the Commission stated the objective of the Rule was to prevent deceptive or unfair practices in the marketing of products and services with negative option features. Several industry associations submitted comments in response to the ANPR, illustrating the effectiveness of the ANPR in soliciting views of the interested public and affected industry before issuing the NPRM.[233] Moreover, as detailed herein, the Commission has reviewed and carefully considered the views of the public and industry as expressed in response to both the ANPR and NPRM.

The record demonstrates misrepresentations made to induce consumers to enter into negative option programs are prevalent. Specifically, the Commission's enforcement experience (including consumer complaints, matters cited in the NPRM, and matters cited in this Statement of Basis and Purpose) as well as the experiences of the State AGs, the information cited by the Law Professors, and comments by consumer commenters all support this conclusion.[234]

As several commenters critical of the proposed provision correctly note, misrepresentations to induce consumers to join negative option programs are already unlawful under section 5, as well as under other State and Federal laws and regulations, depending on (among other things) media used and jurisdiction. This fact, however, does not undermine the need for the Rule provision. By definition, a section 18 trade regulation rule addresses conduct that is already prohibited under section 5. With such prohibited conduct defined, the trade regulation rule may also more broadly ''include requirements prescribed for the purpose of preventing such acts or practices,'' but the core of a trade regulation rule is the description of acts or practices already violative of section 5.[235] The misrepresentations section of the Rule is narrower than the full scope of tools available under section 18. It simply prohibits conduct that is already deceptive. Such a provision promotes clarity and confidence in the marketplace and provides for more effective remedies (*i.e.,* civil penalties, where appropriate) against wrongdoers.

Moreover, the fact that ROSCA's disclosure requirement [236] already essentially prohibits material misrepresentations about online negative option transactions, means much of the rhetoric predicting the downfall of negative option marketing simply is ill-founded. Indeed, the Chamber pointed to the ''clear popularity and use of negative option features across the economy'' even as ROSCA has been law for over a decade.[237] Far from undermining legitimate business, the Rule's express prohibition on misrepresenting material facts in connection with promoting or offering for sale a negative option feature should increase consumer confidence in negative option marketing, thus making it easier for legitimate businesses to market their products.

(2) Prohibiting misrepresentation of any material facts, not just those pertaining to the negative option feature, promotes clarity consistent with ROSCA and Commission precedent.

The final Rule prohibits misrepresentation of ''any material fact.'' In doing so, it provides a non-exhaustive list of categories of potentially material facts (including transaction terms) and adds a definition of ''material,'' consistent with section 5 and the TSR. Specifically, consistent with section 5, ''material'' means ''likely to affect a person's choice of, or conduct regarding, goods or services.'' [238] This approach both clarifies the terms most at issue and ensures the Rule accords with longstanding section 5 precedent.

The Commission declines to limit the misrepresentations prohibition solely to elements of the negative option feature.[239] First, the Commission finds imposing such a narrow restriction would be inconsistent with existing protections. Pursuant to ROSCA section 8403, sellers must ''clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer's billing information.'' As Congress has explained, a healthy marketplace ''must provide consumers with clear, accurate information and give sellers an opportunity to fairly compete with one another for consumers' business.'' [240] Limiting a misrepresentations prohibition solely to misrepresentations about the negative option feature itself would fall well short of the scope of ROSCA and the Commission's responsibility to protect the public.

Moreover, seller commenters themselves highlighted transaction elements other than negative option terms as critical to inducing consumers to choose negative option features. IAB, for example, pointed to the promise of ''broader selection and lower prices'' or ''convenience and savings.'' [241] Similarly, TechNet identified the ''ability to provide financial savings, convenience, and access to premium services'' as ''the main drivers'' of varied subscriptions.[242]

Furthermore, such a distinction may invite dishonest actors to misrepresent material facts about a transaction so long as they felt they could evade monetary liability for such misrepresentations. Moreover, simply refraining from making material misrepresentations is hardly a significant burden given the fact that such misrepresentations are already illegal under section 5 of the FTC Act, and subject to civil penalties when made on the internet and over the telephone pursuant to ROSCA and the TSR, respectively.

(3) The Commission declines to exclude any material facts from the scope of the provision.

To further promote clarity, the Commission includes a list of non-exclusive examples in the text of § 425.3. In addition to the negative option feature itself, the examples include certain characteristics the Commission has identified as presumptively material for more than 40 years [243] and which have in fact appeared as the subject of material misrepresentations in Commission negative option cases—cost,[244] purpose

[232] 15 U.S.C. (b)(2)(A)(i).

[233] Section 425.3 is the only remaining section as to which commenters made this ANPR argument.

[234] *See* section VII.1.a. In the cited Commission law enforcement matters, the Commission has applied its established materiality standard, limiting its actions to misrepresentations that are likely to affect consumers' choice of, or conduct regarding, goods or services. *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110 (1984). That is to say, in the cited matters the Commission alleged defendants made misrepresentations to induce consumers to enter into negative option programs.

[235] 15 U.S.C. 57a(a)(1)(B).

[236] 15 U.S.C. 8403(1).

[237] Chamber, FTC–2023–0033–0885.

[238] 16 CFR 310.2(t) (TSR); 16 CFR 461.1 (Impersonation Rule); Policy Statement on Deception (Oct. 14, 1983) (appended to *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110 (1984)). *See also* BSA, FTC–2023–0033–1015 (requesting definition of material consistent with TSR and Policy Statement); Chamber, FTC–2023–0033–0885 (criticizing the proposed Rule for not defining materiality).

[239] *E.g.,* ESA, FTC–2023–0033–0867; NFIB, FTC–2023–0033–0789; TechFreedom, FTC–2023–0033–0872.

[240] 15 U.S.C. 8401(2).

[241] IAB, FTC–2023–0033–1000.

[242] TechNet, FTC–2023–0033–0869.

[243] Policy Statement on Deception (Oct. 14, 1983) (appended to *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110 (1984)) (describing and citing materiality of purpose, safety, efficacy, and cost); *In re Thompson Medical Co., Inc.,* 104 F.T.C. 648, 816–17 (1984) (listing cost, purpose, efficacy, and safety as presumptively material characteristics).

[244] In the negative option context, material cost misrepresentations may include any cost (and total

Continued

or efficacy,[245] and health or safety.[246] The record demonstrates the list must be non-exclusive because the Commission has observed the use of material misrepresentations other than those enumerated to induce consumers to enter into transactions with negative option features, including, for example, characteristics of the seller,[247] the format of the ad or other sales communication,[248] consumer authorization,[249] consumer privacy or data security,[250] and endorsements or testimonials.[251] The Commission cannot predict what other material misrepresentations dishonest actors may employ in the future.

Some commenters asserted section 18 does not authorize the Commission to prohibit material misrepresentations in a given area of commerce. Section 18, however, permits the FTC to promulgate ''rules which 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)]) . . . [and] may include requirements prescribed for the purpose of preventing such acts or practices.'' [252] It places no additional restrictions on the scope of this rulemaking.

Several commenters appear to think section 18 requires the Commission to define specific claims as deceptive; for example, two commenters cited the Business Opportunity Rule's treatment of misrepresentations.[253] While the cited Rules show one way to meet the statute's specificity requirements, the statute does not require the Commission to define *claims* with specificity, but instead *acts or practices.*[254] For example, in the Business Opportunity Rule, the practice of misrepresenting ''any material aspect of any assistance offered to a prospective purchaser'' in a business opportunity transaction is a specific type of deceptive practice in or affecting commerce.[255] By the same token, the practice of misrepresenting material facts to induce consumers to consent to negative option features constitutes a specific type of deceptive practice.

The record, including the submissions of many industry commenters, shows negative option features are found across industries, but are consistently distinguishable as a subset of general commercial practices. As commenters point out, negative option features offer many distinct benefits to consumers and sellers. These benefits do not lose their distinct character merely because they occur across different kinds of goods and services sold across different channels. While the record shows this practice offers distinct benefits, it also shows the practice is plagued by distinct abuse. This is not a hypothetical statement; the Commission is not promulgating the final Rule because negative option features may engender deception, whether relating to the feature itself or to other material facts, but rather because the record shows they have.[256] Just as with the benefits of

costs) from inception through the course of the commercial relationship, including misrepresentations as to recurring costs and refunds or guarantees. *See, e.g., FTC* v. *FloatMe Corp.,* No. 5:24–cv–00001 (W.D. Tex. 2024); *United States* v. *Cerebral, Inc.,* No. 1:24–cv–21376 (S.D. Fla. 2024); *FTC* v. *Bridge It, Inc.,* No. 1:23–cv–09651 (S.D.N.Y. 2023); *FTC* v. *Benefytt Techs., Inc.,* No. 8:22–cv–01794 (M.D. Fla. 2022); *FTC* v. *First Am. Payment Sys.,* No. 4:22–cv–00654 (E.D. Tex. 2022); *FTC* v. *XXL Impressions, LLC,* No. 1:17–cv–00067 (D. Me. 2017); *FTC* v. *Cardiff,* No. 5:18–cv–02104 (C.D. Cal. 2018); *FTC* v. *Health Rsch. Labs., LLC,* No. 2:17–cv–00467 (D. Me. 2017); *FTC* v. *Tarr,* No. 3:17–cv–02024 (S.D. Cal. 2017); *FTC* v. *AdoreMe, Inc.,* No. 1:17–cv–09083 (S.D.N.Y. 2017); *FTC* v. *Pact, Inc.,* No. 2:17–cv–1429 (W.D. Wash. 2017); *FTC* v. *Leanspa, LLC,* No. 3:11–cv–01715 (D. Conn. 2011); *FTC* v. *Willms,* No. 2:11–cv–00828 (W.D. Wash. 2011); *FTC* v. *Universal Premium Servs.,* No. 2:06–cv–00849 (C.D. Cal. 2006).

[245] *See, e.g., FTC* v. *FloatMe Corp.,* No. 5:24–cv–00001 (W.D. Tex. 2024); *United States* v. *Cerebral, Inc.,* No. 1:24–cv–21376 (S.D. Fla. 2024); *FTC* v. *NGL Labs, LLC,* No. 2:24–cv–05753 (C.D. Cal. 2024); *FTC* v. *Bridge It, Inc.,* No. 1:23–cv–09651 (S.D.N.Y. 2023); *FTC* v. *WealthPress, Inc.,* No. 3:23–cv–00046 (M.D. Fla. 2023); *In re Dun & Bradstreet, Inc.,* FTC Docket No. C–4761 (2022); *FTC* v. *First Am. Payment Sys.,* No. 4:22–cv–00654 (E.D. Tex. 2022); *In re MoviePass, Inc.,* FTC Docket No. C–4751 (2021); *United States* v. *MyLife.com, Inc.,* No. 2:20–cv–6692 (C.D. Cal. 2020); *FTC* v. *RagingBull.com, LLC,* No. 1:20–cv–03538 (D. Md. 2020); *FTC* v. *Match Grp., Inc.,* No. 3:19–cv–02281 (N.D. Tex. 2019); *FTC* v. *XXL Impressions, LLC,* No. 1:17–cv–00067 (D. Me. 2017); *FTC* v. *Cardiff,* No. 5:18–cv–02104 (C.D. Cal. 2018); *FTC* v. *JDI Dating, Ltd.,* No. 1:14–cv–08400 (N.D. Ill. 2014); *FTC* v. *Credit Bureau Ctr., LLC,* No. 1:17–cv–00194 (N.D. Ill. 2017); *FTC* v. *Health Rsch. Labs., LLC,* No. 2:17–cv–00467 (D. Me. 2017); *FTC* v. *Health Formulas, LLC,* No. 2:14–cv–01649 (D. Nev. 2014); *FTC* v. *Leanspa, LLC,* No. 3:11–cv–01715 (D. Conn. 2011); *FTC* v. *Willms,* No. 2:11–cv–00828 (W.D. Wash. 2011); *FTC* v. *Johnson,* No. 2:10–cv–02203 (D. Nev. 2010); *FTC* v. *Remote Response Corp.,* No. 1:06–cv–20168 (S.D. Fla. 2006).

[246] *See, e.g., FTC* v. *XXL Impressions, LLC,* No. 1:17–cv–00067 (D. Me. 2017); *FTC* v. *Cardiff,* No. 5:18–cv–02104 (C.D. Cal. 2018); *FTC* v. *Health Rsch. Labs., LLC,* No. 2:17–cv–00467 (D. Me. 2017); *FTC* v. *Health Formulas, LLC,* No. 2:14–cv–01649 (D. Nev. 2014); *FTC* v. *Leanspa, LLC,* No. 3:11–cv–01715 (D. Conn. 2011); *FTC* v. *Willms,* No. 2:11–cv–00828 (W.D. Wash. 2011).

[247] *E.g., FTC* v. *Elite IT Partners, Inc.,* No. 2:19–cv–00125 (D. Utah 2019) (affiliation with well-known companies); *In re Urthbox, Inc.,* FTC Docket No. C–4676 (2019) (independence of reviews); *FTC* v. *BunZai Media Grp., Inc.,* No. 2:15–cv–04527 (C.D. Cal. 2015) (BBB accreditation and ratings); *FTC* v. *DOTAuthority.com, Inc.,* No. 0:16–cv–62186 (S.D. Fla. 2016) (ratings); *FTC* v. *FTN Promotions, Inc.,* No. 8:07–cv–1279 (M.D. Fla. 2007) (affiliation with consumer's bank).

[248] *E.g., FTC* v. *XXL Impressions, LLC,* No. 1:17–cv–00067 (D. Me. 2017) (radio news show); *FTC* v. *Leanspa, LLC,* No. 3:11–cv–01715 (D. Conn. 2011) (news reports).

[249] *E.g., In re Dun & Bradstreet, Inc.,* FTC Docket No. C–4761 (2022) (charging for same product consumer previously purchased); *FTC* v. *Benefytt Techs., Inc.,* No. 8:22–cv–01794 (M.D. Fla. 2022) (charging for authorized products); *FTC* v. *Triangle Media Corp.,* No. 3:18–cv–01388 (S.D. Cal. 2018) (completeness of order); *FTC* v. *Apex Capital Grp., LLC,* No. 2:18–cv–09573 (C.D. Cal. 2018) (completeness of order); *FTC* v. *Moneymaker,* No. 2:11–cv–00461 (D. Nev. 2011) (purpose of authorization).

[250] *E.g., United States* v. *Cerebral, Inc.,* No. 1:24–cv–21376 (S.D. Fla. 2024) (data security and privacy); *In re MoviePass, Inc.,* FTC Docket No. C–4751 (2021) (data security).

[251] *E.g., FTC* v. *XXL Impressions, LLC,* No. 1:17–cv–00067 (D. Me. 2017); *FTC* v. *Cardiff,* No. 5:18–cv–02104 (C.D. Cal. 2018); *FTC* v. *Willms,* No. 2:11–cv–00828 (W.D. Wash. 2011).

[252] 15 U.S.C. 57a(a)(1)(B).

[253] PDMI, FTC–2023–003–0864 (contrasting the proposed Rule language with Business Opportunity Rule language, saying ''The Business Opportunity Rule does not prohibit any misrepresentation in connection with business opportunities. It prohibits specific misrepresentations about earnings claims.''); TechFreedom, FTC–2023–0033–0872 (''For example, the Business Opportunity Rule prohibits no fewer than 21 different kinds of misrepresentation regarding business opportunities. This specificity is typical of trade regulation rules.'') (footnotes omitted).

[254] 15 U.S.C. 57a(a)(1)(B).

[255] 16 CFR 437.6(i).

[256] *See, e.g., FTC* v. *FloatMe Corp.,* No. 5:24–cv–00001 (W.D. Tex. 2024); *United States* v. *Cerebral, Inc.,* No. 1:24–cv–21376 (S.D. Fla. 2024); *FTC* v. *NGL Labs, LLC,* No. 2:24–cv–05753 (C.D. Cal. 2024); *FTC* v. *Bridge It, Inc.,* No. 1:23–cv–09651 (S.D.N.Y. 2023); *FTC* v. *WealthPress, Inc.,* No. 3:23–cv–00046 (M.D. Fla. 2023); *FTC* v. *Benefytt Techs., Inc.,* No. 8:22–cv–01794 (M.D. Fla. 2022); *In re Dun & Bradstreet, Inc.,* FTC Docket No. C–4761 (2022); *FTC* v. *First Am. Payment Sys.,* No. 4:22–cv–00654 (E.D. Tex. 2022); *In re MoviePass, Inc.,* FTC Docket No. C–4751 (2021); *United States* v. *MyLife.com, Inc.,* No. 2:20–cv–6692 (C.D. Cal. 2020); *FTC* v. *RagingBull.com, LLC,* No. 1:20–cv–03538 (D. Md. 2020); *FTC* v. *Match Grp., Inc.,* No. 3:19–cv–02281 (N.D. Tex. 2019); *FTC* v. *Elite IT Partners, Inc.,* No. 2:19–cv–00125 (D. Utah 2019); *In re Urthbox, Inc.,* FTC Docket No. C–4676 (2019); *FTC* v. *Triangle Media Corp.,* No. 3:18–cv–01388 (S.D. Cal. 2018); *FTC* v. *Apex Capital Grp., LLC,* No. 2:18–cv–09573 (C.D. Cal. 2018); *FTC* v. *XXL Impressions, LLC,* No. 1:17–cv–00067 (D. Me. 2017); *FTC* v. *Cardiff,* No. 5:18–cv–02104 (C.D. Cal. 2018); *FTC* v. *JDI Dating, Ltd.,* No. 1:14–cv–08400 (N.D. Ill. 2014); *FTC* v. *Credit Bureau Ctr., LLC,* No. 1:17–cv–00194 (N.D. Ill. 2017); *FTC* v. *BunZai Media Grp., Inc.,* No. 2:15–cv–04527 (C.D. Cal. 2015); *FTC* v. *DOTAuthority.com, Inc.,* No. 0:16–cv–62186 (S.D. Fla. 2016); *FTC* v. *Health Rsch. Labs., LLC,* No. 2:17–cv–00467 (D. Me. 2017); *FTC* v. *Tarr,* No. 3:17–cv–02024 (S.D. Cal. 2017); *FTC* v. *AdoreMe, Inc.,* No. 1:17–cv–09083 (S.D.N.Y. 2017); *FTC* v. *Pact, Inc.,* No. 2:17–cv–1429 (W.D. Wash. 2017); *FTC* v. *RevMountain, LLC,* No. 2:17–cv–02000 (D. Nev. 2017); *FTC* v. *AAFE Prods. Corp.,* No. 3:17–cv–00575 (S.D. Cal. 2017); *FTC* v. *Health Formulas, LLC,* No. 2:14–cv–01649 (D. Nev. 2014); *FTC* v. *Dill,* No. 2:16–cv–00023 (D. Me. 2016); *FTC* v. *Leanspa, LLC,* No. 3:11–cv–01715 (D. Conn. 2011); *FTC* v. *Willms,* No. 2:11–cv–00828 (W.D. Wash. 2011); *FTC* v. *Moneymaker,* No. 2:11–cv–00461 (D. Nev. 2011); *FTC* v. *Johnson,* No. 2:10–cv–02203 (D. Nev. 2010); *FTC* v. *Inc21.com Corp.,* 745 F. Supp. 2d 975 (N.D. Cal. 2010); *FTC* v. *JAB Ventures, LLC,* No. 2:08–cv–04648 (C.D. Cal. 2008); *FTC* v. *Ultralife Fitness, Inc.,* No. 2:08–cv–07655 (C.D. Cal. 2008); *FTC* v. *FTN Promotions, Inc.,* No. 8:07–cv–1279 (M.D. Fla. 2007); *FTC* v. *Think All Publ'g, LLC,* No. 4:07–cv–00011 (E.D. Tex. 2007); *FTC v HispaNexo, Inc.,* No. 1:06–cv–424 (E.D. Va. 2006); *FTC* v. *Universal Premium Servs.,* No. 2:06–cv–00849 (C.D. Cal.

negative option marketing, these problems do not lose their distinct character, in other words they are distinct practices, even though they appear in a variety of contexts.

In addressing this deceptive practice, the Commission remains guided by core principles articulated in its 1983 Deception Policy Statement. As the Commission explained, in considering whether to act against a deceptive practice, the Commission will observe the extent to which consumers themselves have been able to police and generate consequences for seller deception.

> Finally, as a matter of policy, when consumers can easily evaluate the product or service, it is inexpensive, and it is frequently purchased, the Commission will examine the practice closely before issuing a complaint based on deception. There is little incentive for sellers to misrepresent (either by an explicit false statement or a deliberate false implied statement) in these circumstances since they normally would seek to encourage repeat purchases. Where, as here, market incentives place strong constraints on the likelihood of deception, the Commission will examine a practice closely before proceeding.[257]

The record shows the practice of misrepresenting material facts to induce consent to negative option features has created distinct issues consumers have not been able to address themselves, enabling sellers to collect numerous recurring payments before consumers detect the misrepresentation and act to stop the charges. This problem is not confined to a particular subset of industries or misrepresentations but instead is a too-frequent practice throughout negative option marketing.[258] Specifically, when a consumer makes a series of purchases from the same seller in ordinary circumstances (rather than through a negative option), each purchase requires the consumer to actively, even if only briefly, re-evaluate the transaction and affirmatively consent. Dishonest negative option sellers too easily bypass these typical guardrails of ''repeat purchases.'' Thus, up-front misrepresentations can induce consumers into recurring transactions lacking ordinary sales' built-in interruptions for re-evaluation and renewed consent. As with other areas where consumers have limited opportunities for critical up-front evaluation (for example, consumers cannot easily evaluate medical claims about dietary supplements), so too, here, the Commission finds additional protection warranted.

The Commission has considered commenters' section 18 specificity concerns pertaining to material misrepresentations and finds them unsupported by the record. These commenters suggest a hypothetical world where negative option features provide distinguishable commercial benefits without presenting distinguishable material misrepresentation challenges. The reality is otherwise. Thus, the final Rule prohibits the specific practice of sellers misrepresenting material terms or facts in connection with negative option sales.

(4) For clarity, the final Rule adds a definition of ''material'' consistent with precedent.

As noted above, and as suggested by commenters, the Commission defines ''material'' in the final Rule. This definition adds clarity and addresses the rhetorical questions raised by commenters regarding scope. Specifically, consistent with section 5, the TSR, and longstanding Commission policy and case law, the final Rule defines the term to mean likely to affect a person's choice of, or conduct regarding, goods or services.[259] Thus, mere puffery is not material.[260]

The hypotheticals posed by MIA—''movies that you will love'' or ''great cleaning every time''—are classic examples of puffery, and thus, are not within the scope of materiality.[261] The response to the question posed by the Chamber—whether misrepresentation of a privacy policy would be covered—depends, as it always has, on whether the seller misrepresents its privacy policy in a way likely to affect consumer choice or conduct.

4. Proposed § 425.4 Important Information

Section 425.4 of the proposed Rule prohibited sellers from failing to disclose ''any material conditions related to the underlying product or service that is necessary to prevent deception, regardless of whether that term directly relates to the terms of the negative option offer.'' [262] As explained in the NPRM, the Commission drafted this provision because ''many sellers fail to provide adequate disclosures, thereby luring consumers into purchasing goods or services they do not want.'' [263] To address this issue, the proposed Rule required sellers to provide the following important information prior to obtaining a consumer's billing information: ''(1) that consumers' payments will be recurring, if applicable; (2) the deadline by which consumers must act to stop charges; (3) the amount or ranges of costs consumers may incur; (4) the date the charge will be submitted for payment; and (5) information about the mechanism consumers may use to cancel the recurring payments.'' [264]

The Commission also proposed requirements regarding the form and location of this important information, as its ''law enforcement experience and consumer complaints are replete with examples of hidden disclosures, including those in fine print, buried in paragraphs of legalese and sales pitches, and accessible only through hyperlinks.'' [265] Thus, under the proposed Rule, information ''directly related to the negative option feature . . . must appear immediately adjacent to the means of recording the consumer's consent for the negative option feature.'' Information ''not directly related to the negative option feature . . . must appear before consumers make a decision to buy (*e.g.,* before they 'add to shopping cart').''

Further, the proposal stated all disclosures must be clear and conspicuous as defined in § 425.2(c). Among other elements of the clear and conspicuous definition, the proposed Rule specified that in any communication using an interactive electronic medium, such as the internet, mobile application, or software, the disclosure must be unavoidable. The proposed Rule also specified that a disclosure is not clear and conspicuous if a consumer ''must take any action, such as clicking on a hyperlink or hovering over an icon, to see it.''

Finally, the proposed Rule prohibited sellers from including any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to read, hear, see, or otherwise understand the required disclosures. The final clause of this prohibition ''includ[ed] any

2006); *FTC* v. *Remote Response Corp.,* No. 1:06–cv–20168 (S.D. Fla. 2006).

[257] Policy Statement on Deception (Oct. 14, 1983) (appended to *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110 (1984)).

[258] *See* n.257.

[259] 16 CFR 310.2(t); *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110 (1984).

[260] *See FTC* v. *Direct Mktg. Concepts, Inc.,* 624 F.3d 1, 11 (1st Cir. 2010) (''Where a claim is merely 'exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely,' it may be un-actionable puffery.'').

[261] The Commission declines to add language defining a ''reasonable person standard'' as suggested by RILA, and refers instead to the discussion of reasonableness set forth in the Commission's Policy Statement on Deception (Oct. 14, 1983) (appended to *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110 (1984)).

[262] NPRM, 88 FR 24727.

[263] NPRM, 88 FR 24726–27.

[264] NPRM, 88 FR 24726.

[265] NPRM, 88 FR 24727.

information not directly related to the material terms and conditions of any negative option feature.''

Through these provisions, the Commission sought to prevent deception by businesses taking advantage of the gray areas in current law, to deter fraudulent actors through the possibility of monetary relief, and to ''level the playing field for legitimate businesses, freeing them from having to compete against those employing deception.'' [266]

(a) Summary of Comments

Thousands of commenters supported the important information requirement, stating it is ''critically important that companies make it explicitly clear what consumers are signing up for.'' [267] Consumers identified problematic practices the provision would address, including insufficient and unclear disclosures in small print or those appearing too late in the transaction. For example, an individual commenter said, ''[t]oo many [sellers] hide these details in extra fine print, and increasingly text is in a very light gray color, making it even harder to read.'' [268] Another individual commenter noted, ''I ordered skin care from a tv infomercial only to find out it was a subscription thing though none of this was disclosed by famous actresses on the promotion. . . . I went back to my receipt of what I originally ordered and in fine print saw that I had been duped!'' [269]

Several individual commenters indicated clear upfront disclosures would help them make informed choices and improve their willingness to try negative option offerings, particularly if the disclosure provided an easy cancellation mechanism. As one put it, ''I am much more like[ly] to try—and buy—a new service if I know there is an easy way to cancel online.'' [270] Another said, ''I actually subscribe to far fewer services than I would if I knew that I could easily cancel once I had tried a sample.'' [271]

Public advocacy commenters also supported the provision. The Berkeley Consumer Law Center said, ''the requirement of 'clear and conspicuous' disclosures of 'any material term related to the underlying goods or services that is necessary to prevent deception' will help prevent cancellation terms from being shrouded in mystery through complicated terms and conditions, while also blocking the practice of hiding subscription services that are needed to fully use a product.'' [272] Similarly, a coalition of consumer and public interest advocacy organizations asserted the proposed disclosure requirement ''will clearly inform consumers of the terms of the contract and how they may terminate the agreement.'' [273]

Law enforcement commenters likewise supported the important information requirements. The State AGs said they would ''repel the abusive practices of hidden disclosures, 'including those in fine print, buried in paragraphs of legalese and sales pitches, and accessible only through hyperlinks.' '' [274] They particularly emphasized their support for ''the required disclosure of 'the information necessary for the consumer to cancel the negative option feature.' '' [275] The California Auto-Renew Task Force (''CART''), a group of Southern California prosecutors, supported disclosures appearing ''immediately adjacent to the means of recording the consumer's consent for the negative option feature.'' [276] CART asserted this provision, together with others, ''will greatly minimize consumer deception and ensure that consumers fully understand—and agree to—the nature of the transaction under consideration.'' [277]

Other commenters, mostly industry groups,[278] expressed several concerns with the proposed requirements, specifically with the definition of ''clear and conspicuous,'' the scope and timing of the material terms to be disclosed, specific disclosure requirements, placement, and treatment of other information.[279]

Multiple commenters claimed the requirement that disclosures using an interactive electronic medium must be ''unavoidable'' would be unworkable given the additional provision that a ''disclosure is not clear and conspicuous if a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it.'' [280] Commenters noted it would be difficult or impossible to implement this requirement on small screens (such as mobile phones), and it may reduce rather than improve clarity.

Several commenters also objected to the requirement sellers disclose material terms other than those pertaining exclusively to the negative option feature, asserting this would be overbroad.[281] Additionally, commenters questioned how the Commission would enforce a requirement to disclose material terms before obtaining a

[266] NPRM, 88 FR 24727.

[267] Thousands of consumers submitted the following identical comment in their own names: ''It's critically important that companies make it explicitly clear what consumers are signing up for and to make canceling fast and easy. If you signed up online, you should be able to cancel online. If it took one click to join, it should take one click to cancel. Implementing this consumer protection rule has the potential to save American consumers millions of dollars and I hope it is implemented as soon as possible.'' While apparently a response to a mass solicitation, many consumers further personalized their submission by adding their unique experiences and desire for the Rule. *See, e.g.,* Individual commenter, FTC–2023–0033–0161; –0163; –0164; 0198; –0204; –0545; 0658.

[268] Individual commenter, FTC–2023–0033–0268. Similarly, another individual commenter said, ''Businesses should not present agreements in tiny print on an agent's tablet for the customer to sign. I can't read the print.'' Individual commenter, FTC–2023–0033–0349.

[269] Individual commenter, FTC–2023–0033–0345.

[270] Individual commenter, FTC–2023–0033–0781.

[271] Individual commenter, FTC–2023–0033–0031. *Accord* Individual commenter, 0196 (''I have had to get to the point of not subscribing to any online offers, as far too many times I have found it nearly impossible to unsubscribe''); Individual commenter, FTC–2023–0033–0306 (''you could win over more subscribers to your services if you took away the fear and doubts of the public that they will probably be hooked into something that would be more troublesome to get out of . . . I can tell you that I have passed over many opportunities that I was interested in for this very reason.''); Individual commenter, FTC–2023–0033–0333 (''I've had some difficulty in the past cancelling enrollments or subscriptions, so that now I've become very wary of products or services I would otherwise appreciate having. Implementing this consumer protection rule would help me feel more confident again.'').

[272] Berkeley Consumer Law Center, FTC–2023–0033–0855. Similarly, for the same reasons they provided in connection with the misrepresentations provision, the Law Professors encouraged the Commission to maintain the proposed disclosure provision's coverage of material terms necessary to prevent deception, regardless of whether such terms are exclusively about the negative option feature. Law Professors, FTC–2023–0033–0861.

[273] Public Interest Groups, FTC–2023–0033–0880.

[274] State AGs, FTC–2023–0033–0886.

[275] *Id.*

[276] CART, FTC–2023–0033–0698.

[277] *Id.*

[278] Not all industry groups criticized the provision. Specifically, MIA wrote, ''The Association agrees with the important information requirement under the proposed Rule.'' MIA, FTC–2023–0033–1008.

[279] In addition, some commenters cited industry-specific laws and regulations pertaining to disclosures as rendering the proposed provision unnecessary or counterproductive. ACA Connects-America's Communications Association (''ACA''), FTC–2023–0033–0881; NCTA, FTC–2023–0033–0858; SFE, FTC–2023–0033–1151; USTelecom, FTC–2023–0033–0876.

[280] ANA, FTC–2023–0033–1001; CCIA, FTC–2023–0033–0984; Coalition, FTC–2023–0033–0884; ESA, FTC–2023–0033–0867; IAB, FTC–2023–0033–1000; NCTA, FTC–2023–0033–0858; Chamber, FTC–2023–0033–0885. NFIB suggested the Commission strike the provision ''The disclosure must use diction and syntax understandable to ordinary consumers'' and replace it with '' 'The disclosure must use words and grammar that ordinary consumers would likely understand.' '' FTC–2023–0033–0789.

[281] ACT App Association, FTC–2023–0033–0874; ANA, FTC–2023–0033–1001; BSA, FTC–2023–0033–1015; CCIA, FTC–2023–0033–0984; NCTA, FTC–2023–0033–0858; NFIB, FTC–2023–0033–0789; NRF, FTC–2023–0033–1005; PDMI, FTC–2023–003–0864; Sirius XM, FTC–2023–0033–0857; Chamber, FTC–2023–0033–0885.

consumer's billing information, especially where a consumer previously elected to save billing information with the seller.[282] Commenters also found the requirement that material terms ''not directly related to the negative option feature . . . must appear before consumers make a decision to buy'' to be vague.[283]

Several commenters took issue with the five specific disclosures in the proposed Rule. For example, the requirement to disclose ''the date (or dates) each charge will be submitted for payment'' drew substantial criticism, with several commenters asserting appropriate disclosures regarding frequency should suffice.[284] Commenters also criticized the requirements to disclose deadlines to act and the amount or range of costs.[285] A group of direct marketers asserted, for example, ''the Proposed Rule goes too far in appearing to require a specific date by which consumers must act to stop charges when certain negative option plans are inherently more flexible and allow consumers to cancel anytime.'' [286] Commenters also found the requirement to disclose ''the information necessary for the consumer to cancel the negative option feature'' was vague and impractical. They contended the requirement would result in unnecessary details crowding out other disclosures.[287] IAB contended ''[a] more effective strategy [regarding cancellation disclosures] would be to make clear but concise disclosures of where that information can be found.'' [288]

Additionally, multiple commenters criticized the provision requiring the placement of material terms ''directly related to the negative option feature'' . . . ''immediately adjacent'' to recording the consumer's consent.[289] Commenters asserted having numerous disclosures in a constrained space would impair consumers' ability to make informed choices. As an individual commenter explained, ''this important information may still become overwhelming to a user, or challenge the integrity of other disclosures if it must compete for space (especially because this disclosure must be placed immediately adjacent to where a user will consent to the negative option feature).'' [290] NRF found unclear the distinction between which terms are or are not ''directly related to the negative option feature.'' [291] Other commenters noted the ''immediately adjacent'' requirement may not be appropriate for voice transactions.[292]

Finally, one commenter expressed uncertainty about the meaning of the ''other information'' provision. NRF said it ''asks companies to walk a tight rope between ensuring they contain all material terms, while risking liability if they include '*any* information not directly related to the material terms.' '' [293]

The State AGs also recommended three amendments to this proposal. First, they recommended requiring sellers to ''disclose all material policies concerning cancellation.'' Second, they recommended ''sellers be required to disclose 'all the information necessary for the consumer to effectively cancel the negative option feature.' '' (Emphasis in comment.) They explained, ''[d]isclosures in the form of 'click-here-to-cancel' icons, which lead to terms and conditions pages, confusing cancellation flows, or do not otherwise explain how to cancel online, should not be permitted.'' Third, they recommended ''the FTC amend this provision to require that the important information identified by this proposed Rule be provided to the consumer in a manner that is capable of being retained by the consumer.'' [294]

(b) Analysis

Based on the record, the Commission retains proposed § 425.4 with several clarifications. First, as explained in section VII.B.3 of this SBP, the Commission adds a definition of ''material'' at § 425.2(e). Second, in § 425.4(a), the Commission clarifies three of the listed types of important information sellers must provide and omits one to address commenters' concerns. Third, as explained in section VII.B.4.b.2 of this SBP, the Commission revises the definition of ''clear and conspicuous'' in § 425.2(c). Fourth, in § 425.4(b)(2) the Commission clarifies language regarding ''placement'' of disclosures. Finally, the Commission clarifies the language prohibiting sellers from including ''any other information'' that ''interferes with, detracts from, contradicts, or otherwise undermines'' consumers' abilities to read, hear, see, or understand the required disclosures.

(1) The Commission declines to limit the required important information under § 425.4(a).

The Commission declines to limit the scope of the required information under this provision to only information related to the negative option feature. Section 425.4(a)'s requirement that sellers disclose ''all material terms'' prior to obtaining the consumer's billing information is consistent with ROSCA and section 5 of the FTC Act. Moreover, in the Commission's law enforcement experience such a provision is necessary to prevent deception.[295] Therefore, extending this requirement is well within the Commission's rulemaking authority.[296]

To address commenters' concerns about clarity, however, § 425.2(e) adds a definition of ''material;'' specifically, material means ''likely to affect a person's choice of, or conduct regarding, goods or services.'' [297] This definition is consistent with longstanding section 5 case law and other Commission rules defining ''material.'' [298]

[282] CTA, FTC–2023–0033–0997; ESA, FTC–2023–0033–0867; IAB, FTC–2023–0033–1000; NRF, FTC–2023–0033–1005; RILA, FTC–2023–0033–0883. Sirius XM asserted this requirement could be interpreted to mean every advertisement must contain disclosure of all material terms. FTC–2023–0033–0857.

[283] Rebecca Kuehn (''Kuehn''), FTC–2023–0033–0871; NRF, FTC–2023–0033–1005.

[284] CCIA, FTC–2023–0033–0984; CTA, FTC–2023–0033–0997; ESA, FTC–2023–0033–0867; IAB, FTC–2023–0033–1000; NRF, FTC–2023–0033–1005; RILA, FTC–2023–0033–0883; Sirius XM, FTC–2023–0033–0857.

[285] IAB, FTC–2023–0033–1000 (deadlines); Comment from Kelley Drye & Warren LLP on behalf of certain direct marketing companies (''Direct Marketing Companies''), FTC–2023–0033–1016 (deadlines); NRF, FTC–2023–0033–1005 (amount or range of costs); Sirius XM, FTC–2023–0033–0857 (amount or range of costs).

[286] Direct Marketing Companies, FTC–2023–0033–1016.

[287] CCIA, FTC–2023–0033–0984; ESA, FTC–2023–0033–0867; IAB, FTC–2023–0033–1000; NRF, FTC–2023–0033–1005.

[288] IAB, FTC–2023–0033–1000.

[289] ANA, FTC–2023–0033–1001; CCIA, FTC–2023–0033–0984; Coalition, FTC–2023–0033–0884; CTA, FTC–2023–0033–0997; ESA, FTC–2023–0033–0867; IAB, FTC–2023–0033–1000; Direct Marketing Companies, FTC–2023–0033–1016; NRF, FTC–2023–0033–1005; SFE, FTC–2023–0033–1151; Sirius XM, FTC–2023–0033–0857; Chamber, FTC–2023–0033–0885.

[290] Individual commenter, FTC–2023–0033–0552.

[291] NRF, FTC–2023–0033–1005.

[292] Coalition, FTC–2023–0033–0884; Chamber, FTC–2023–0033–0885.

[293] NRF, FTC–2023–0033–1005 (emphasis in comment); *see also* Chamber, FTC–2023–0033–0885 (''[T]he [disclosure] requirement is also ambiguous considering it does not clearly outline the specific material terms that need to be disclosed, which is particularly important considering the requirement applies not just to the negative option feature, but all terms in the transaction.'').

[294] State AGs, FTC–2023–0033–0886.

[295] *See., e.g., In re MoviePass, Inc.,* FTC Docket No. C–4751 (2021).

[296] 15 U.S.C. 57a(a)(1)(B).

[297] Additionally, the Commission changes ''any'' to ''all'' material terms, and deletes the phrase ''related to the underlying good or service that is necessary to prevent deception'' for clarity. Specifically, the Commission makes clear that sellers are required to disclose all material terms, consistent with the requirements of ROSCA.

[298] *See In re Cliffdale Associates, Inc.,* 103 F.T.C. 110, 165 (1984) (misleading impression created by a solicitation is material if it ''involves information that is important to consumers and, hence, likely

Continued

Additionally, the Commission modifies the proposed list of important information.[299] The Commission retains the first proposed requirement that sellers must disclose ''[t]hat consumers will be Charged for the good or service, or that those Charges will increase after any applicable trial period ends, and, if applicable, that the Charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such Charges.'' [300] The Commission continues to find this requirement appropriate to combat deception.

The Commission revises the second proposed disclosure, that sellers provide ''*the deadline* (by date or frequency) by which the consumer must act in order to stop *all* charges.'' As revised, this provision requires sellers to disclose ''*each deadline* (by date or frequency) by which the consumer must act to prevent or stop *the* Charges.'' This change clarifies there may not be a single ''deadline'' by which a consumer must act to ''stop all charges.'' A single seller, for example, may offer a single consumer multiple goods or services, and the consumer may wish to stop some charges without terminating the entire relationship. The Commission also clarifies that ''frequency'' as used in the final Rule includes a description of an irregular frequency (*e.g.,* within a certain period after the seller notifies the consumer a new item in a series has become available) as well as a regular one (*e.g.,* the 15th of each month).

The Commission also clarifies the third proposed disclosure. The proposed Rule required sellers to disclose ''[t]he amount (or range of costs) the consumer will be charged, and, if applicable, the frequency of such charges a consumer will incur unless the consumer takes timely steps to prevent or stop those charges'').[301] The record suggests, however, that in some circumstances, the amounts to be charged may be inexact before the seller obtains the consumer's billing information. For example, taxes or delivery fees may depend in part on the billing information the consumer provides. Thus, the Commission clarifies under the final Rule as adopted, the ''amount (or range of costs)'' need not be exact if an exact figure is impossible, but the seller must give a reasonable approximation. For example, it is within the meaning of ''amount (or range of costs)'' for a seller to disclose an amount ''plus tax'' where the seller requires billing information to determine the actual amount of tax. However, a ''plus shipping'' disclosure may not be sufficient if the amount of shipping is beyond what a consumer would reasonably expect or is greater than the amount a seller would reasonably incur for shipping. In such a circumstance, the seller would need to provide an estimate of shipping costs. These clarifications should address commenters' concerns about having to disclose an exact cost when doing so is not possible.

The final Rule omits the proposed fourth disclosure: the date (or dates) each charge will be submitted for payment. The Commission is persuaded by commenters' concern that a specific date or dates may be cumbersome or impossible to calculate. For example, if the seller will submit a charge when it ships a new item in a series, the seller may not be able to predict the specific dates it will submit the charge in the future. In addition, in light of the change to the placement requirements of § 425.4(b)(2)(i), discussed below, including these dates could reduce the clarity and conspicuousness of higher priority adjacent disclosures (especially cancellation deadlines, which will often occur before dates of charges). If, however, disclosure of the date (or dates) each charge will be submitted for payment is necessary to prevent deception in individual cases, such disclosure is required under § 425.4(a). However, its placement is governed by revised § 425.4(b)(2)(ii) rather than § 425.4(b)(2)(i).

Finally, the Commission clarifies the fifth proposed mandatory disclosure (the fourth in the final Rule). The proposed Rule required sellers to disclose ''[t]he information necessary for the consumer to cancel the negative option feature''. In contrast, the final Rule requires sellers to disclose ''The information necessary for the consumer to find the simple cancellation mechanism required pursuant to § 425.6''. This change addresses commenters' concern the language of the proposed Rule, combined with the placement requirements of § 425.4(b)(2)(i), would result in detailed cancellation disclosures crowding out other important required disclosures.[302] This new language should provide consumers with concise critical upfront information about how to cancel, while offering sellers flexibility to avoid obscuring other important information.[303]

Some sellers expressed concern regarding the timing of disclosures where a consumer previously elected to save billing information with the seller. To address this concern the Commission now clarifies that, where a consumer has previously provided account information to the seller and expressly allowed the seller to store that information,[304] the seller must make the required disclosures prior to obtaining the consumer's consent to use saved account information.[305]

(2) The Commission modifies the requirements of § 425.4(b) to promote clarity.

Section 425.4(b)(1) provides, ''[e]ach disclosure required by paragraph (a) of this section must be clear and conspicuous.'' The Commission retains this requirement but revises the definition of clear and conspicuous at § 425.2(c) to address commenters' concerns regarding space-constrained

to affect their choice of, or conduct regarding, a product.''); *see also FTC* v. *Cyberspace.com, LLC,* 453 F.3d 1196, 1201 (9th Cir. 2006); 16 CFR 310.2(t) (TSR); 16 CFR 461.1 (Impersonation Rule); Policy Statement on Deception (Oct. 14, 1983) (appended to *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174 (1984)).

[299] In the misrepresentations provision (§ 425.3), the final Rule uses the term ''including'' to provide examples of categories of potentially material facts. In the disclosures provision, the final Rule retains the proposed Rule's use of ''and including'' (rather than just ''including'') to establish all of the specifically listed disclosures as being always material.

[300] NPRM, 88 FR 24735 (proposed 425.4).

[301] The final Rule requires sellers to disclose ''The amount (or range of costs) the consumer will be Charged and, if applicable, the frequency of the Charges a consumer will incur unless the consumer takes timely steps to prevent or stop those Charges.''

[302] For example, IAB suggested the Commission should require sellers ''to make clear but concise disclosures of where [cancellation] information can be found, so consumers can find that information if and when it is relevant to them.'' IAB, FTC–2023–0033–1000.

[303] The Commission declines to adopt the State AGs three suggestions to supplement this section. The Commission expects the final Rule will address two of those suggestions (disclosure of ''all material policies concerning cancellation'' and of ''all the information necessary for the consumer to effectively cancel the negative option feature'') through the requirement that sellers disclose all material terms (§ 425.4), the prohibition of misrepresentations of material facts or terms including those pertaining to cancellation (§ 425.3), and the requirement of a simple cancellation mechanism (§ 425.6). The Commission expects to address the concerns underlying their third suggestion (''to require that the important information identified by this proposed Rule be provided to the consumer in a manner that is capable of being retained by the consumer''), through its further development of the reminders requirement. In the interim, the Commission expects the Rule provisions as adopted will encourage sellers to make important information easy to find and easy to retain.

[304] It is a violation of section 5 for a seller to retain and use a consumer's payment information without the consumer's consent. *E.g., FTC* v. *Classic Closeouts LLC,* No. 2:09–cv–2692 (E.D.N.Y. 2009).

[305] *See FTC* v. *Amazon.com, Inc.,* No. 2:23–cv–00932, 2024 WL 2723812, at *11 (W.D. Wash. May 28, 2024) (''Nothing in ROSCA says that companies . . . may not give consumers the option to autofill the billing information already on file or simply to provide billing information after the disclosures, but ROSCA requires that consumers be given that choice *after* the disclosures.'') (emphasis in original).

disclosures.[306] Specifically, the Commission deletes the sentence, ''A disclosure is not Clear and Conspicuous if a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it.'' This prohibition would have made effective space-constrained disclosures of the terms required by the final Rule difficult if not impossible. However, a clear and conspicuous disclosure still must be ''unavoidable.'' By this requirement, consumers are protected from buried or inconspicuous disclosures. Sellers, on the other hand, can make disclosures ''unavoidable'' even if the consumer must take some action to see it. Specifically, the seller could make it impossible for the consumer to consent to a transaction or feature unless and until the consumer has seen the disclosure. For example, a seller dealing with space constraints on a mobile device might not display a consent button until after the consumer has scrolled down to a clear disclosure and then clicked a button indicating they have seen the disclosure.

Section 425.4(b)(2) (''Placement'') retains the proposed Rule's structure requiring a subset of disclosures to ''appear immediately adjacent to the means of recording the consumer's consent for the negative option feature,'' while setting a more general timing requirement regarding other disclosures. However, the Commission has revised some terms to promote clarity.

Specifically, final § 425.4(b)(2)(i) requires only the four specific mandatory disclosures listed in § 425.4(a) to appear ''immediately adjacent to the means of recording the consumer's consent.'' The Commission is persuaded by commenters' concerns that requiring market participants to determine which required disclosures are ''directly related to the negative option feature,'' and which are not, is too great a burden and could lead to consumer confusion.[307] Thus, rather than define ''directly related to the negative option feature,'' the Commission removes this phrasing and confines the ''immediately adjacent'' requirement to a specific, narrow list of disclosures. This change provides clarity and improves predictability for consumers, and should prevent disclosure overload.

Several commenters requested clarification of the ''immediately adjacent'' requirement in the context of voice transactions.[308] In response, the Commission clarifies to comply with this requirement, a voice transaction seller must make the required disclosures immediately before requesting and recording the consumer's consent to the negative option feature.

Two commenters expressed concern that requiring sellers to make disclosures ''before consumers make a decision to buy'' creates uncertainty because it is unclear when that triggering event occurs.[309] The Commission agrees. Therefore, it revises § 425.4(b)(2)(ii) to provide generally for all required disclosures to appear before the seller obtains consumer consent to the transaction pursuant to § 425.5. This amended language provides a triggering event based on a clear point in the process. Additionally, the Commission revises § 425.4(b)(2)(ii) to remove the phrase ''not directly related to the negative option feature,'' doing so for the same clarity reasons described above for removing the phrase ''directly related to the negative option feature'' from § 425.4(b)(2)(i).

Finally, the Commission adopts a clarified version of § 425.4(b)(3) (''Other information''). The Commission retains the proposed Rule's requirement that sellers not employ ''other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to read, hear, see, or otherwise understand the disclosures.'' However, the Commission finds the final clause in the proposed Rule (''including any information not directly related to the material terms and conditions of any negative option feature'') could be read to contradict other requirements of the Rule. Specifically, there may be necessary material disclosures not directly related to the terms and conditions of a negative option feature, and it is illogical to simultaneously require these disclosures (through §§ 425.4(a) and (b)(2)) and prohibit them (through § 425.4(b)(3)). The Commission therefore omits the clause from the final Rule. This revision does not alter the requirement of § 425.4(b)(2)(i) that certain specific disclosures be made clearly and conspicuously immediately adjacent to the means of recording the consumer's consent. A seller who makes additional disclosures immediately adjacent to the means of recording the consumer's consent in a manner undermining the clarity and conspicuousness of the required § 425.4(b)(2)(i) disclosures violates § 425.4(b)(2)(i) and § 425.4(b)(3).

5. Proposed § 425.5 Consent

Section 425.5(a) of the proposed Rule prohibited sellers from charging consumers before obtaining their express informed consent to the negative option feature. This provision mirrors 15 U.S.C. 8403(2) (ROSCA), but provided specificity for sellers covered by the Rule and to prevent unfair and deceptive practices. Specifically, the provision addressed one of the most pervasive problems of negative option marketing: sellers employing inadequate consent procedures to increase enrollment. Even for marketers trying to comply with the law, negative option programs present unique challenges. Specifically, consumers often focus on the aspects of an offer that mirror the offers they regularly encounter (*e.g.,* the quality, functionality, and one-time price of the item) and think they are consenting to these core attributes while missing the negative option feature.

To address this problem, § 425.5(a)(1) of the proposed Rule required sellers to obtain a consumer's unambiguously affirmative consent to the feature separately from any other portion of the transaction. Section 425.5(a)(2) of the proposed Rule further required the seller to exclude any information that ''interferes with, detracts from, contradicts, or otherwise undermines'' the consumer's ability to provide express informed consent to the negative option feature. This prohibition is consistent with longstanding Commission precedent that consent can be subverted, including by so-called ''dark patterns,'' sophisticated design practices used to manipulate users into making choices they would not otherwise have made.[310]

Additionally, under § 425.5(a)(3) of the proposed Rule, sellers had to obtain consumers' unambiguously affirmative consent to the rest of the transaction to ensure consumers agreed to all elements of the agreement, even those not specifically related to the negative option feature. Further, § 425.5(a)(4) of the proposed Rule required sellers to obtain and maintain (for three years or a year after cancellation, whichever is

[306] The Commission declines to adopt NFIB's suggested change to strike the provision ''The disclosure must use diction and syntax understandable to ordinary consumers'' and replace it with '' 'The disclosure must use words and grammar that ordinary consumers would likely understand.' '' Particularly in the context of audio disclosures, the terms ''diction and syntax'' provide clearer requirements than the terms ''words and grammar.'' NFIB, FTC–2023–0033–0789.

[307] NRF, FTC–2023–0033–1005; Law Professors, FTC–2023–0033–0861.

[308] Coalition, FTC–2023–0033–0884; Chamber, FTC–2023–0033–0885.

[309] Kuehn, FTC–2023–0033–0871; NRF, FTC–2023–0033–1005.

[310] *See, e.g., FTC* v. *RevMountain, LLC,* No. 2:17–cv–02000 (D. Nev. 2017); *FTC* v. *Cyberspace.com, LLC,* 453 F.3d 1196 (9th Cir. 2006); *United States* v. *Mantra Films, Inc.,* No. 2:03–cv–9184 (C.D. Cal. 2003); *FTC* v. *Crescent Publ'g Grp., Inc.,* 129 F. Supp. 2d 311 (S.D.N.Y. 2001).

longer) verification of the consumer's consent. The Commission specifically sought comment on the appropriate recordkeeping period.[311]

To maintain consistency with the TSR, § 425.5(b) contained a cross-reference to 16 CFR part 310 so sellers subject to the TSR know they must comply with all applicable provisions of that Rule, including those related to pre-acquired account information and free-to-pay conversions.

Proposed § 425.5(c) provided an exemplar consent mechanism for those making written offers (including those on the internet) to illustrate how sellers could obtain consumers' unambiguously affirmative consent to the negative option feature. Specifically, this provision stated for all written offers, sellers may obtain such consent through a check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign to accept the negative option feature. This consent had to be independent from any other portion of the offer.[312]

Finally, the Commission invited comments on whether sellers offering free trials should be required to obtain an additional round of consent before charging a consumer at the end of a free trial.[313]

(a) Summary of Comments

Consistent with the Commission's and States' enforcement experience,[314] individual consumers' comments confirm the need for clear, unambiguous, affirmative consent to a negative option feature. These comments identify numerous examples of consumers' unwitting enrollment in negative option programs.[315]

Sellers and trade groups also supported the requirement,[316] as did consumer groups.[317] However, sellers and trade groups expressed concern about the requirement that sellers obtain separate, unambiguously affirmative consent to the ''rest of the transaction,'' as opposed to the ''negative option feature'' itself. Specifically, these commenters asserted consumers may be confused where the product or service itself is only offered as a negative option, such as with streaming services or periodicals.[318] As explained by one commenter, in these situations a second consent is likely unanticipated, and thus, could be confusing.[319]

Other groups asserted if consumers are confused, they may not affirmatively consent to the rest of the transaction, which could cause uncertainty about the existence of the contract.[320] Commenters also noted too many required actions during the purchasing process may lead to ''fatigue'' and ''cognitive overload,'' causing consumers to abandon transactions they may have otherwise wanted.[321] Finally, several commenters complained the separate consent requirements would be difficult (and costly) to implement, but without any benefit to consumers.[322]

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[311] NPRM, FR 88 24727 n.70; *see also id.* at 24734.

[312] To avoid potential conflict with EFTA, this proposed provision does not apply to transactions covered by the preauthorized transfer provision of that Act, 15 U.S.C. 1693e, and Regulation E, 12 CFR 1005.10. Those EFTA provisions, which apply to a range of preauthorized transfers include some used for negative options, contain various prescriptive requirements (*e.g.,* written consumer signatures that comply with E-Sign, 15 U.S.C. 7001–7006, evidence of consumer identity and assent, the inclusion of terms in the consumer authorization, and the provision of a copy of the authorization to the consumer) beyond the measures identified in the proposed Rule. Consequently, compliance with the proposed Rule would not necessarily ensure compliance with Regulation E. For example, use of a check box for consent without additional measures may not comply with Regulation E's more specific authorization requirements.

[313] NPRM, 88 FR 24728.

[314] *See, e.g.,* State Attorneys General (ANPR), FTC–2019–0082–0012; State AGs, FTC–2023–0033–0886 (citing cases); *FTC* v. *Amazon.com, Inc.,* No. 2:23–cv–0932 (W.D. Wash. 2023); *see also* n.109.

[315] *See, e.g.,* Anonymous commenter, FTC–2023–0033–0799 (automatically enrolled in program without consent); Individual commenter, FTC–2023–0033–0039 (free-trial conversion to one year plan without consent); Individual commenter-FTC–2023–0033–0052 (discount to full-price conversion without consent); Individual commenter, FTC–2023–0033–1119 (cancelled, then automatically re-enrolled without consent); Individual commenter, FTC–2023–0033–0079 (automatically re-enrolled without consent); Individual commenter, FTC–2023–0033–0083 (no disclosure account would be automatically renewed); FTC–2023–0033–0138 (charged after cancellation); Individual commenter, FTC–2023–0033–0275 (no affirmative consent to monthly charge).

[316] Sirius XM, FTC–2023–0033–0857 (businesses should be required to obtain express informed consent to the negative option feature at the point of sale); PDMI, FTC–2023–0033–0864 (no objection to the general requirement that sellers obtain a consumer's consent to a transaction containing a negative option feature); MIA, FTC–2023–0033–1008 (agreeing with the consent requirement under the proposed Rule).

[317] Berkely Consumer Law Center, FTC–2023–0033–0855; State AGs, FTC–2023–0033–0886 (noting State Attorneys General support the FTC's proposed consent requirements and agree this provision is necessary given how easily marketers can enroll consumers in negative option programs without actual consent.). One individual consumer generally supported the separate consent requirements of the proposed Rule, but asked that the regulation prevent businesses from only offering goods and services through auto-renewal and subscription programs, *i.e.,* consumers should have the option to purchase a good or service a la carte and not only on a recurring basis. Individual commenter, FTC–2023–0033–0026.

[318] Sirius XM, FTC–2023–0033–0857 (requiring an additional consent will only result in consumer confusion); NCTA, FTC–2023–0033–0858 (''requiring two consents could lead to consumer confusion (to say nothing of their exasperation at being forced to read and provide consent to a plethora of successive and largely duplicative documents). They may wonder why they are being asked to consent twice to a single transaction. And might worry that they have somehow misunderstood one or both of the consent notices''); PDMI, FTC–2023–003–0864 (anecdotal evidence received from several PDMI members demonstrates that any time an additional choice or check box is offered to a consumer during a single transaction, such extra steps are likely to cause consumer confusion); N/MA, FTC–2023–0033–0873 (''Requiring sellers to separate a single unified offer into separate components is not only unnecessary, it risks creating consumer confusion and fatigue'' and consumers may ''simply abandon the transaction''); RILA, FTC–2023–0033–0883 (''requirement for two distinct consents . . . may be confusing and not helpful to consumers.''); DCN, FTC–2023–0033–0983 (''We are concerned that requiring a separate consent would be confusing for the consumer who may not have the details of the entire contract readily available in the mandated separate context. For example, most consumers would likely want to review all of the benefits they would receive as part of a subscription including any discounts when deciding on whether to choose the option of automatic renewal.''); APCIA, FTC–2023–0033–0996 (''Requiring a separate consent for a feature that is inherent in service contracts—continuous coverage—seems unnecessary and detrimental to consumers.'').

[319] IAB, FTC–2023–0033–1000 (''Furthermore, consumers are familiar with subscription sign-up experiences and do not expect to have to consent a second time once they choose to purchase an autorenewal plan.''). One individual consumer confirmed the comment. Individual commenter, FTC–2023–0033–0552 (''The rule specifically prescribes that users must affirmatively assent specifically to the negative option feature, but in cases where a user is only purchasing a negative option product, how should other disclosures be presented?'')

[320] NCTA, FTC–2023–0033–0858; Sonsini Alarm Clients, FTC–2023–0033–0860 (''could lead to consumers inadvertently failing to consent to auto-renewal (because they did not notice the second check box) and having an unintended lapse in home security system coverage.''); Asurion, FTC–2023–0033–0878 (''many consumers who want and could benefit from auto-renewal protection provisions will neglect to make the requisite two separate affirmative consents and suffer real consequences when they find themselves with a broken device during a gap in coverage''); APCIA, FTC–2023–0033–0996 (''A consumer who wants a service contract but then inadvertently fails to check a box indicating separate consent for the negative option feature could find that they no longer have coverage at the time they most need it.'').

[321] *See, e.g.,* DCN, FTC–2023–0033–0983 (could lead to over-notification); CCIA, FTC–2023–0033–0984 (''Adding too much additional information or too many required actions in a purchase cart has diminishing returns for consumer comprehension and attention, and can increase the cognitive load for consumers to the point that they simply stop reading or give up on the purchase.''); ANA, FTC–2023–0033–1001.

[322] NCTA, FTC–2023–0033–0858 (''would require companies to change their current customer sign-up flows, at significant cost, without providing consumers with any additional benefits''); PDMI, FTC–2023–003–0864 (''requiring merchants to implement a double opt-in would impose an extraordinary financial and resource burden on sellers.''); *id.* (double opt-in requirements ''makes absolutely no sense, where, as is often the case, there is no transaction separate from the negative option transaction''); SCIC, FTC–2023–0033–0879; Chamber, FTC–2023–0033–0885 (little to no evidence that double opt-in will create any

Thus, these commenters asked the Commission to exclude transactions where the negative option feature is not independent of the good or service being sold, *i.e.,* where the good or service is itself only offered as a negative option,[323] or to delete the requirement that sellers obtain separate, unambiguous, affirmative consent "to the rest of the transaction." [324]

Two commenters asked the Commission to modify the proposed provision by merging consent to the transaction and the negative option feature. These commenters suggested a separate consent should only be necessary where there are two independent portions of the transaction: one related to the negative option feature and a second for the sale of a separate good or service (including a free trial).[325] Without this change, commenter Kuehn suggested "the proposed Rule could have the unintended result of diminishing the efficacy of other important terms of the contract." Accordingly, Kuehn suggested the Commission revise the definition of negative option feature to encompass the entire contract (rather than a provision of the contract).[326] This alteration, along with changing "rest of the transaction" to "the sale of another good or service," would make it clear separate consent is only required where the seller has both an auto renewal agreement and the sale of another good or service.

IAB, DCN, CTA, and several direct marketing companies asserted the Commission could achieve the same outcome—informed consent—through less restrictive means, *e.g.,* by requiring a clearer disclosure of the negative option feature.[327] For example, CTA posited: "[a]lternatively, to advance the same goal, and because the Proposed Rule already requires clear and conspicuous disclosure of material terms, the FTC could instead require subscription service providers to prominently disclose subscription terms in a manner that differentiates them from other disclosures, such as in bolded or underlined font, in the course of obtaining consumer consent to the transaction." [328] Additionally, several commenters questioned "why a seller should be precluded from including other material terms of the transaction in obtaining a single consent." [329]

Some commenters raised additional concerns. For instance, several commenters challenged the Commission's statement that a separate check box or similar method could be used to record a consumer's unambiguously affirmative consent. Specifically, PDMI contended the check box, signature, or "substantially similar" method of consent could quickly become obsolete and "replaced by far more effective and consumer friendly mechanisms." [330] Another, NRF, argued courts routinely hold a separate check box is not required for consumers to manifest asset to terms and conditions of the agreement, so long as the terms are reasonably conspicuous.[331] Finally, a group of direct marketing companies, argued standalone consent is not necessary or reasonable, and other methods could suffice. They suggested the Commission include language that it "shall be a question of fact" whether the seller obtained consent through another means.[332]

Additionally, several trade groups and sellers expressed concern about the NPRM's proposed recordkeeping requirements. For instance, one trade group explained the proposed requirements "would require sellers to maintain records of consumer consent for at least three years, even for consumers who signed up for a free trial and cancelled it before being charged. As drafted, the proposed amendments would also require sellers to maintain records of consumer consent for eleven years for individuals who continuously subscribe to negative option features for at least ten years." [333]

Numerous commenters asserted these recordkeeping requirements would increase costs, which could ultimately be passed onto consumers,[334] or small businesses, especially with respect to in-person and telephone transactions.[335] Others raised concern the proposed recordkeeping requirement could conflict with best privacy practices. For example, commenters noted the retention period is at odds with the need to minimize the amount of consumer data that businesses hold and to enable customers to request deletion of their data.[336] Commenters also suggested the Commission reduce the length of the recordkeeping requirement, *e.g.,* to six months,[337] or revise the proposal to eliminate the requirement for those who do not allow customers to purchase without

consumer benefit, instead will increase consumer fatigue); *see also* IAB, FTC–2023–0033–1000 (double opt-in could be especially burdensome for bundled services, requiring consumers to check an additional box for each service, without added benefit to clarity or disclosure); ICA, 2023–0033–1142 ("requiring recording keeping of "express informed consent" potentially expressed through verbal, digital, or written records for multiple years will be an onerous and expensive requirement for small business owners to fulfill.").

[323] Chamber, FTC–2023–0033–0885 ("unless there is a negative promotional option, service providers should not be required to have a separate consent for monthly billing and the underlying transaction when the underlying transaction is for a monthly service."); *see also* MIA, FTC–2023–0033–1008 ("an additional consent to initiate a Subscription is unnecessary and superfluous").

[324] *See, e.g.,* Direct Marketing Companies, FTC–2023–0033–1016.

[325] Kuehn, FTC–2023–0033–0871; RILA, FTC–2023–0033–0883.

[326] Kuehn, FTC–2023–0033–0871.

[327] Direct Marketing Companies, FTC–2023–0033–1016 ("the Commission provides no evidence or rationale that a robust, clear and conspicuous disclosure proximate to the consumer's consent would be insufficient to prevent deception and remedy allegedly prevalent unfair or deceptive acts and practices").

[328] CTA, FTC–2023–0033–0997.

[329] PDMI, FTC–2023–003–0864; Sirius XM, FTC–2023–0033–0857 ("Businesses should be able to obtain such consent in conjunction with the other terms of an offer,[ ] as long as they clearly and conspicuously disclose the negative option features and the other material terms of the offer and refrain from "includ[ing] any information that 'interferes with, detracts from, contradicts, or otherwise undermines" the negative option terms.").

[330] PDMI, FTC–2023–003–0864.

[331] NRF, FTC–2023–0033–1005 (citing *Meyer* v. *Uber Techs., Inc.,* 868 F.3d 66, 79 (2d Cir. 2017)). It is unclear from NRF's comment whether it questioned separate consent generally, or the guidance on a check box.

[332] Direct Marketing Companies, FTC–2023–0033–1016.

[333] ANA, FTC–2023–0033–1001; *see also* BSA, FTC–2023–0033–1015 ("the current language could be read to require a company to retain for three years the records of a customer who signed up for a free trial but cancelled before the trial ended—and was therefore never a paying customer.").

[334] APCIA, FTC–2023–0033–0996; IAB, FTC–2023–0033–1000 ("this requirement will be significantly costly, as subscription businesses will need to overhaul their sign-up processes to comply with this requirement. Businesses seeking to offset this increased cost will be forced to pass this cost to consumers or avoid offering subscriptions at all").

[335] NCTA, FTC–2023–0033–0858 ("The proposal fails to account for the immense burden the proposal would impose on companies using alternative means to sell their products and services by requiring them to create and implement ways to capture and store duplicative layers of consumer consent.").

[336] CCIA, FTC–2023–0033–0984 ("This record retention rule also seems to be at odds with key principles of consumer privacy, namely the need to minimize the amount of consumer data that businesses hold and to enable customers to request deletion of any data in possession of a third party. A shorter mandatory retention period is more appropriate for both businesses and consumers."); NCTA, FTC–2023–0033–0858 ("Not only is it expensive to maintain these records, it does not comport with privacy best practices.").

[337] ICA, 2023–0033–1142 ("Decrease the duration of the record-keeping requirement to six months after the business and the consumer enters into the agreement."); *see also* Direct Marketing Companies, FTC–2023–0033–1016 (change recordkeeping requirement to keep or maintain records "for at least one year if the consumer is charged at least twice within six months after the initial charge; or for at least three years if the consumer is not charged at least twice within six months after the initial charge.").

accepting the terms of the negative option feature.[338]

Two consumer groups supported the consent provision but asked the Commission to add clarifying language. Specifically, Berkeley Consumer Law Center asked the Commission to state the Rule strictly prohibits the use of dark patterns to obtain consent and that consent cannot be given through silence. A group of professors asked the Commission to clarify that disclosures ''appear in each language in which the representation that requires the disclosure appears.'' [339]

Finally, commenters split on whether the Rule should require separate affirmative consent for free-trial offers. Several consumers supported requiring separate consent at the conclusion of a free-trial period,[340] with one consumer suggesting the Commission ban free-trial offers that require the prepurchase of the good or service.[341] Other consumer interest and public advocacy groups reiterated consumers often forget, or are unaware they have signed up for, a negative option feature in connection with a free trial offer.[342] Sellers and trade groups disagreed, specifically noting the Commission's own analysis indicating a separate consent may not be necessary given the other requirements of the Rule [343] and existing State laws.[344]

(b) Analysis

Based on the record, the Commission removes the proposed requirement that sellers obtain separate consent to ''the rest of the transaction'' under § 425.5(a)(3). Further, the Commission modifies the recordkeeping requirement to require sellers to maintain records only for three years from the date of consent. Alternatively, if sellers can show by a preponderance of the evidence they use processes that make it technologically impossible for a consumer to purchase the good or service without consent, sellers need not retain such records.[345] Finally, the Commission declines to modify the consent provisions to require separate consent for free-trial offers. However, should the Commission seek additional comments about a provision to require annual reminders,[346] it will consider addressing such offers at that time.

Prior to addressing each of the issues listed above, it is important to clarify one point. A negative option feature is not itself a product or service—it is simply a mechanism for repeatedly consenting to the extension of a contract through silence. Thus, there are not situations in which the negative option feature is the product, as some commenters suggested. In the example provided above, a subscription to a streaming entertainment service can be offered with (*e.g.,* the offer renews each month until cancellation) or without (*e.g.,* the subscription lasts one year and then must be affirmatively renewed, or it cancels) a negative option feature. There are situations in which sellers only offer products or services on a negative option basis; however, doing so does not lessen the need to ensure consumers consent to the negative option mechanism within the agreement. Therefore, the analysis below does not separately address this issue.

(1) The Commission does not adopt a requirement for separate consent to ''*the rest of the transaction*'' *because it is unnecessary, confusing, and hard to implement.*

Based on the comments, the Commission finds requiring consumer consent to ''the rest of the transaction'' apart from the negative option feature is unnecessary, potentially confusing, and may be hard to implement. First, even without the separate consent requirement, the proposed Rule contained several elements that work together to ensure consumers know they are agreeing to a negative option feature. Specifically, the proposed Rule required sellers to obtain the consumer's unambiguously affirmative consent to the negative option feature separately from any other portion of the transaction [347] through, for example, a separately presented check box.[348] It also required sellers to clearly and conspicuously provide important information immediately adjacent to the request for consumer consent, including that the charge will be recurring, the deadline to act to stop charges, the amount of the charges, and information necessary to cancel.[349] Further, the proposed Rule stated the seller cannot include any information or employ any techniques that interfere with the consumer's ability to understand these important disclosures and provide unambiguously affirmative consent to the negative option feature.

Given these protections, a separate consent requirement is not necessary.[350] Second, the Commission agrees the separate consent requirement could cause consumer confusion. Moreover, compliance with the Rule's required disclosure and consent provisions should address the concerns commenters raised regarding deception. Finally, several sellers suggested, and there is no evidence to the contrary, that seeking consent to both the negative

[338] PDMI, FTC–2023–003–0864; Chamber, FTC–2023–0033–0885.

[339] Law Professors, FTC–2023–0033–0861.

[340] Individual commenter, FTC–2023–0033–0843 (''In addition to making it easy to cancel an online subscription, it should be illegal for companies offering a 'free trial' to bill for any term of subscription without an opt-in step. If they really believe trying their product will prompt me to keep using it, then it needs to be a 2-step process in which at the end of the trial period they must ask for and receive an opt in before they place a charge on my card.''); Individual commenter, FTC–2023–0033–0615 (''Rather than automatic renewals, I think subscriptions should only be renewed following consumer approval. For example, after a 14-day trial of an app, consumers should be asked if they approve a purchase to continue. If approval isn't given, the default should be that the subscription expired and the consumer isn't charged.''); Individual commenter, FTC–2023–0033–0993 (''If it's a trial subscription the company should notify you that your trial is over and affirm your desire to continue.'').

[341] Individual commenter, FTC–2023–0033–0026; *see also* Individual commenter, FTC–2023–0033–0583 (''Require that any entity not require a credit card on file for a trial, or any free period.''); Individual commenter, FTC–2023–0033–0641 (''Consumers shouldn't have to be required to submit credit/debit card information for a trial usage. And, consumers shouldn't be automatically charged the day after the trial expires.''); Individual commenter, FTC–2023–0033–1069 (''A free trial should not create an automatic subscription!''); Individual commenter, FTC–2023–0033–0607 (''A 'trial offer' should be just that—a ONE-TIME purchase.'').

[342] State AGs, FTC–2023–0033–0886 (''the State Attorneys General again respectfully encourage the FTC to require sellers offering free trials to obtain an additional round of consent before charging a consumer at the completion of the free trial.''); Law Professors, FTC–2023–0033–0861 (''we ask that the Commission require additional consent from the consumer before a business may convert a free (or nominal-fee) trial into an expensive subscription. Indeed, it seems that Congress, in adopting ROSCA, validated consumer expectations that they would ''have an opportunity to accept or reject [a] membership club offer at the end of [a] trial period.''); TINA, FTC–2023–0033–1139 (''Such consumer complaints are consistent with survey data showing that 42 percent of consumers forget they are still paying for a subscription they no longer use.[ ] 'Many of those happen after you get enticed by a free trial for an online streaming service or a monthly subscription service for clothes or personal items, and then you forget to cancel it after that trial is over.' '').

[343] Sirius XM, FTC–2023–0033–0857 (''As long as consumers are clearly informed about the terms of a free trial offer and evince affirmative consent, no further consumer consent should be required when the free trial period expires.'').

[344] CCIA, FTC–2023–0033–0984; Chamber, FTC–2023–0033–0885.

[345] This change will not affect a seller's obligation to maintain appropriate records under other regulations, *e.g.,* the TSR.

[346] *See* section VII.B.7.

[347] Section 425.5(a)(1).

[348] Section 425.5(c) allows sellers to comply with the requirement to obtain unambiguously affirmative consent to the negative option feature through a check box, signature, or other substantially similar method.

[349] *See* Rule § 425.4(a)(1)–(4).

[350] The Commission further notes because the seller is obtaining express informed consent to the negative option feature separately from the rest of the transaction, consumers are, in effect, agreeing to both the negative option feature and the sale of the good or service separately.

option feature and the rest of the transaction could be hard to implement for many sellers. Thus, the final Rule does not contain the separate consent requirement.[351]

(2) The Commission modifies the recordkeeping requirements to address legitimate privacy concerns and reduce undue burden on small businesses.

Section 425.5(a)(4) of the proposed Rule required sellers to obtain and maintain (for three years or a year after cancellation, whichever was longer) verification of the consumer's consent to the negative option feature. Implementation of this requirement would undoubtably enhance the FTC's ability to enforce the Rule. However, the Commission agrees the proposal creates privacy concerns. The Commission has long recommended companies employ data retention policies that ''dispose of data once it has outlived the legitimate purpose for which it was collected.'' [352] Therefore, the Rule's data retention requirement, could, in some instances, be at odds with this guidance. Further, several commenters asserted a longer recordkeeping requirement will be burdensome, particularly for small businesses.

Balancing the Commission's interest in robust Rule enforcement against privacy and burden concerns, the Commission modifies the proposed Rule. Specifically, § 425.5(a)(3) of the final Rule requires sellers to keep or maintain verification of the consumer's consent for a period of three years from the date of consent (rather than three years or a year after cancellation, whichever is longer). Removing the requirement that sellers keep records until one year after cancellation prevents the retention of records for very long periods of time while the contract is still in force. Moreover, as some commenters stated,[353] sellers can employ technological processes for online consent that could alter the balance of concerns. Specifically, it is technologically feasible to make it impossible for customers to enroll without providing unambiguously affirmative consent. The Commission therefore further modifies the recordkeeping requirement to eliminate the requirement entirely if a seller can demonstrate it meets this threshold. The final provision will allow sellers to destroy consumer records more quickly, while accomplishing the same goal.[354] Finally, the Commission clarifies maintaining copies of advertisements or telephone scripts documenting the disclosures provided in general does not meet this requirement. Such information is easily manipulated by deceptive sellers and cannot show any particular consumer received the disclosures prior to giving consent. Therefore, sellers must either maintain records of each consumer's unambiguously affirmative consent or demonstrate they satisfy the technological exemption provision.

(3) Other concerns raised by commenters do not warrant modifications to the rule.

As noted above, a few commenters questioned the Commission's proposed exemplar consent mechanism under § 425.5(c). This proposed provision states for written offers, a check box, signature, or ''substantially similar'' method can be used to obtain a consumer's unambiguously affirmative consent. The Commission notes the mechanism applies to the negative option feature only, and thus corrects the cross-reference contained in this provision from (a)(3) to (a)(1).

The Commission further notes this provision does not require a check box or signature. The Commission offered these methods only as examples a seller can use to obtain unambiguously affirmative consent, not the only ways to do so. Thus, the exemplar does not conflict with caselaw holding that a check box is not required to manifest consent. The Commission also declines to include language in the final Rule, as one commenter suggested,[355] stating whether a seller has complied with this provision is a question of fact. This is unnecessary because the Commission always evaluates sellers' practices on a case-by-case basis to determine whether they comply with the law.

The Commission further declines to remove this provision's reference to ''substantially similar'' methods as some commenters requested. The language is intended to cover any method that affords consumers all the same protections as a check box or signature. The phrase ''substantially similar'' performs this function while allowing for technological advancement, innovation, and adaption without tying sellers to specific mechanism that may become obsolete.

Further, the Commission declines to modify the final Rule to allow sellers to obtain express informed consent by merely ''disclosing'' the negative option more clearly through, *e.g.,* bolded or underlined font, rather than obtaining expressed informed consent separately for the negative option feature. Although this change would be ''less restrictive,'' it would not adequately protect consumers from unknowingly enrolling in negative option programs. In the NPRM, the Commission balanced the need for clear, unavoidable disclosure of, *inter alia,* the negative option feature with the need for flexibility to allow sellers to best communicate their entire message to consumers. The proposed Rule strikes the right balance. As discussed above, proposed § 425.4 (Important Information), required sellers to clearly and conspicuously disclose important information about the negative option feature, immediately adjacent to the means of recording consent to the feature, and, under § 425.5 (Consent), separately from any other portion of the transaction. The Commission did not specify exact placement, language, or font size because doing so would have diminished flexibility without a sufficient corresponding benefit.

While this balance is appropriate, the required disclosure of important information under § 425.4 does not replace the requirement that sellers obtain consumers' express informed consent. To avoid harm from unfair and deceptive practices, it is imperative consumers unequivocally understand they are agreeing to enrollment in a negative option program and demonstrate their agreement.

The Commission also declines to add language stating (1) the Rule strictly prohibits the use of dark patterns to obtain consent and (2) consent cannot be given through silence. The Rule already addresses both concerns. First, the Rule bars any information that ''interferes with, detracts from, contradicts, or otherwise undermines'' the consumer's ability to provide express informed consent. To the extent dark patterns run afoul of any of these requirements, they are prohibited. To the extent they do not, consumers' express informed consent as required by the Rule is not implicated. Second, under § 425.5, consumers already must give affirmative consent.

Finally, the Commission does not need to clarify, as some commenters suggested, that required consents ''appear in each language in which the

[351] *See* § 425.5(a)(3).

[352] NCTA, FTC–2023–0033–0858 (citing FTC, ''Protecting Consumer Privacy in an Era of Rapid Change'' (2012) at 28, *www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommnedations-businessespolicymakers*).

[353] ANA, FTC–2023–0033–1001; ESA, FTC–2023–0033–0867 (for purchases that cannot be completed without a consumer's consent, a business will be deemed compliant with any recordkeeping requirement and is not required to maintain an individual record of consent).

[354] Importantly, if the seller does not maintain records and cannot satisfy the technological exemption, the seller has violated the Rule.

[355] Direct Marketing Companies, FTC–2023–0033–1016.

representation . . . appears.'' [356] To obtain a consumer's express informed consent, each disclosure must be clear and conspicuous and immediately adject to the means of recording the consumer's consent. To meet the clear and conspicuous standard as defined in the Rule, the disclosure must, among other things, ''appear in each language in which the representation that requires the disclosure appears.'' [357]

(4) The Commission does not modify the Rule to require separate consent for free trial offers.

In the NPRM, the Commission invited comments on whether the Rule should require an additional (or alternative) round of consent after the end of a free trial offer. As explained in the NPRM, if the seller follows the proposed Rule's disclosure and consent requirements, consumers should understand they are enrolled in, and will be charged for, the negative option feature once the free trial ends. As discussed above, however, several commenters explained with enough time between initial enrollment and charge after conversion, consumers are primed to forget the negative option feature.[358] The Commission agrees this an important issue; however, clear upfront disclosures lessen the chance a negative option feature may be unfair or deceptive. Specifically, clear, accurate upfront disclosures reduce the risk of deception, and the potential harms caused are more likely to be reasonably avoidable (*i.e.,* the consumer can simply refuse to enter into the contract). That said, taking advantage of consumers' ''forgetfulness'' is extremely troubling and thus ripe to be addressed by other means.

6. Proposed § 425.6 Simple Cancellation (''Click to Cancel'')

Section 425.6 of the proposed Rule contains several requirements to ensure consumers can easily cancel negative option features. As explained in the NPRM, ''easy cancellation is an essential feature of a fair and non-deceptive negative option program,'' but one that has become ''far too often illusory.'' [359] ''If consumers cannot easily leave a negative option program, the negative option feature is little more than a means of charging consumers for goods and services they no longer want.'' [360]

To prevent unfairly trapping consumers in a transaction they do not want, the proposed Rule directed sellers to provide a cancellation mechanism that (1) immediately halts recurring charges; (2) is as simple to use as the mechanism the consumer used to consent to the negative option feature; and (3) is readily accessible through the same medium the consumer used to provide that consent. The Commission intended these requirements to erect clear guardrails, while providing sellers with the flexibility to innovate. Therefore, rather than propose specific prohibitions, which may lose utility over time, or inadvertently provide a roadmap for deception, the proposed Rule outlined a performance-based standard mapping the contours of what constitutes a simple mechanism, without overly prescriptive requirements.

(a) § 425.6(a) and (b) Simple Mechanism Required for Cancellation; and Simple Mechanism at Least as Simple as Initiation

(1) Summary of Comments

Proposed § 425.5(a) and (b) required a fast and easy cancellation mechanism that, at minimum, allows the consumer to cancel as easily as they enrolled in the program. The Commission received thousands of comments in support of this provision, with individual consumers uniformly expressing their desire for a simple easy to use cancellation mechanism.[361] Such comments included: ''If you signed up online, you should be able to cancel online. If it took one click to join, it should take one click to cancel;'' [362] ''I would like the option to cancel my subscriptions, [and] offers online just as easily as it was to sign up;'' [363] ''As more and more services enter online use, it is ridiculous that consumers have to jump through so many hoops to cancel services when it is so easy to sign up for them;'' [364] and ''Consumers need the one-click option.'' [365]

Some commenters suggested unsubscribing should be easier than enrolling,[366] and others, ''very easy.'' [367] Indeed, several advocated for an ''Unsubscribe link,'' [368] similar to those available under the CAN–SPAM Act.[369] Numerous commenters complained they

[356] Law Professors, FTC–2023–0033–0861.

[357] Rule § 425.2(c)(6).

[358] Deceptive sellers also commonly delay shipment of goods or services until close to the end of the trial period, giving consumers little time to stop the charge or cancel the negative option. *See, e.g.,* Individual commenter, FTC–2023–0033–0085.

[359] NPRM, 88 FR 24729; *see* ANPR, 84 FR 52395 (discussing general requirements for nondeceptive negative options); *id.* at 52396 (discussing the ongoing problems in the marketplace including inadequate or overly burdensome cancellation procedures).

[360] NPRM, 88 FR 24729.

[361] Individual commenter FTC–2023–0033–0029 (''Please implement this necessary rule to protect consumers and save us hours on the phone cancelling services we signed up for with one click online.''); Individual commenter, FTC–2023–0033–0072 (''I have had issues with some online subscriptions which were entered into purely online, but to cancel I had to call a phone number open only during certain business hours. I would like a rule that requires all subscriptions to be available to cancel through the same means as they were initiated, whether that is online, in person, phone, mail, or chat. I believe that would be fair to people of all technological levels while allowing businesses to conduct business how they feel comfortable without allowing them to create unnecessary hurdles for customers looking to end their service.'').

[362] Individual commenter, FTC–2023–0033–0111. Thousands of individual consumers repeated this phrase through a mass media campaign. *See, e.g.,* Anonymous commenter, FTC–2023–0033–0013; Individual commenter, FTC–2023–0033–0016 (''If I can subscribe in one click, I should be able to unsubscribe in one click.''); Individual commenter, FTC–2023–0033–0017 (''It should be as easy as one click to cancel an online account.''); Individual commenter, FTC–2023–0033–0068 (''Being able to go online and with a simple click be able to cancel a subscription would be a dream.''); *see also* Individual commenter, FTC–2023–0033–0015 (''Ending a subscription should be as easy as it was to sign up. it makes no sense how hard it is to close out an account with some places.''); Individual commenter, FTC–2023–0033–0020 (''The time has come to make it as easy for consumers to cancel subscriptions as it has been to start them.''); Individual commenter, FTC–2023–0033–0087 (''I think any offer you can buy with a click should also be an offer to unsubscribe with a click.'').

[363] Individual commenter, FTC–2023–0033–0003; *see also* Individual commenter, FTC–2023–0033–0010 (''I for one would be for the Easing of subscription cancellation. Having it be much harder to cancel a subscription than start it simply shouldn't be.''); Anonymous commenter, FTC–2023–0033–0024 (''It should be no harder for consumers to stop giving a company their money than it is for them to start giving it to them.''); Individual commenter, FTC–2023–0033–0025 (''In fact, it should be as easy to cancel as it is to sign up.'').

[364] Individual commenter, FTC–2023–0033–0231; Individual commenter, FTC–2023–0033–0109.

[365] Individual commenter, FTC–2023–0033–0403.

[366] ''Unsubscribing should be easier than subscribing.'' Individual commenter, FTC–2023–0033–0005. *Accord* Individual commenter, FTC–2023–0033–0021 (same); Anonymous commenter, FTC–2023–0033–0040 (''I am in favor of making it easier to discontinue services.''); Individual commenter, FTC–2023–0033–0107 (''Canceling a subscription should be easier that setting up the subscription.'').

[367] Individual commenter, FTC–2023–0011 (''It should be very easy to cancel a subscription, artificially creating difficulty or hurdles only serves to hurt the consumer of a service as well as a company's image and deplete trust in a brand or service.''); Individual commenter, FTC–2023–0033–0036 (''It should be very easy to cancel a subscription!!!!!'').

[368] Individual commenter, FTC–2023–0033–0030; Individual commenter, FTC–2023–0033–0035; *see also* Individual commenter, FTC–2023–0033–0188 (''If you sign up online, you should be able to cancel online. If it took one click to join, it should take one click to cancel. Kind of like 'unsubscribing' from an email newsletter you don't want to get anymore.''); Individual commenter, FTC–2023–0033–0236 (''When I get an email from a politician I'm not interested in there is always an unsubscribe button. Why can't paid subscriptions be the same?'').

[369] Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (''CAN–SPAM Act''), 15 U.S.C. 7701–7713; 16 CFR part 316.

often have to resort to disputing the charge with credit card companies (or cancelling the card altogether) because cancellation is so difficult or impossible.[370] Additionally, commenters described the simple cancellation mechanism requirements as a ''no brainer,'' ''common sense,'' and ''only fair'' to consumers.[371] These and others commenters complained of the hundreds of dollars [372] and hours [373] wasted on unused and unwanted products and services they were not effectively able to cancel due to byzantine cancellation procedures.[374]

As summarized by the Berkeley Consumer Law Center, ''requiring the mechanism of cancellation be as simple as enrollment'' will minimize ''overly complex cancellation processes with multiple steps,'' and prevent sellers ''from trapping consumers in automatically renewing subscriptions through obstacles created by tedious processes or confusion.'' [375]

Sellers and trade organizations argued the proposed requirements were ''too vague.'' [376] For instance, PDMI asserted the requirement that the simple cancellation mechanism be as easy to use as the one used to initiate the transaction provides no clear guidance on when a transaction is ''initiated.'' Several industry and trade groups echoed this comment, contending ''as easy as'' is a difficult, and often subjective, standard.[377] Other businesses complained the proposed Rule fails to define ''simple mechanism'' [378] and making cancellation as easy as enrollment was not possible because they serve different purposes.[379] IAB asserted the proposed requirements were overbroad in relation to the prevalent acts or practices the Commission identified.[380]

(2) Analysis

Considering the overwhelming support for a simple cancellation [381] mechanism that immediately halts charges,[382] and given substantial evidence supporting the need for such mechanism to prevent unfair and deceptive acts and practices, the Commission retains proposed § 425.6(a) and (b).[383] The Commission disagrees with commenters' argument that the ''as easy as'' standard is vague. The Commission has provided considerable guidance on what constitutes a simple or ''easy'' cancellation mechanism through numerous cases and its 2021 Enforcement Policy Statement.[384]

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[370] *See, e.g.,* Individual commenter, FTC–2023–0033–0068; Individual commenter, FTC–2023–0033–0086; Individual commenter, FTC–2023–0033–0203 (''Recently, I had to start a dispute case with my credit card company because I had subscribed to a service and there was no way to cancel that service.''); Individual commenter, FTC 2023–0033–0211; Individual commenter, FTC–2023–0033–0225 (had new card issued); Individual commenter, FTC–2023–0033–0275 (disputed the charge and cancelled card); Individual commenter, FTC–2023–0033–0311 (cancelled credit card); Individual commenter, FTC–2023–0033–0320 (disputed charge); Individual commenter, FTC–2023–0033–0501 (terminated credit card); Individual commenter, FTC–2023–0033–1134 (cancelled credit card).

[371] *See, e.g.,* Individual commenter, FTC–2023–0033–0256; Individual commenter, FTC–2023–0033–0408 (''common sense''); Individual commenter, FTC–2023–0033–0431 (''no brainer''); Individual commenter, FTC–2023–0033–0586 (''no brainer'').

[372] Individual commenter, FTC–2023–0033–0232; Individual commenter, FTC–2023–0033–0459 (''I once lost hundreds of dollars because I could not find how to cancel.''); Individual commenter, FTC–2023–0033–0509; Individual commenter, FTC–2023–0033–0232 (''I'm currently trapped in at least three subscriptions that are nearly impossible to cancel, costing me hundreds of dollars per year.''); Individual commenter, FTC–2023–0033–0509; Individual commenter, FTC–2023–0033–0825 (''I have wasted hundreds of dollars for things that automatically renewed as a result of not being able to figure out easily how to cancel.''); Individual commenter, FTC–2023–0033–0572; Individual commenter, FTC–2023–0033–0697 (''I have been caught up in just this very unfair practice where I've been lured in and can't get out—to the tune of hundreds of dollars that I don't have.''); *see also* Public Interest Groups, FTC–2023–0033–0880.

[373] *See, e.g.,* Individual commenter, FTC–2023–0033–029 (''Please implement this necessary rule to protect consumers and save us hours on the phone cancelling services we signed up for with one click online.''); Anonymous commenter, FTC–2023–0033–0040 (''My negative experience was that it was a simple 'click' on-line to sign up for a service but to cancel same service it took three phone calls and hours of my time.); Individual commenter, FTC–2023–0033–0084 (''I spent over two hours of my time trying to cancel the subscription.''); Individual commenter, FTC–2023–0033–0106 (''I've definitely lost at least 30 hours of my life dealing with insufferable 'retention specialists,' all of whom should be ashamed of what they do.''); Individual commenter, FTC–2023–0033–0431; Individual commenter, FTC–2023–0033–0385 (''This is not a bot generating a letter; it's an actual person, and I want to register strong support for the one Click rule you are considering. I have wasted hours trying to deal with customer service, whose only goal is to keep me on board.''); Individual commenter, FTC–2023–0033–0672 (''It's about time! Trying to unsubscribe can waste many hours, induce stress, result in unwanted subscription or cancellation fees, and leave personal data subject to abuse.''); Individual commenter, FTC–2023–0033–0642 (''There needs to be a substantial penalty when a service is requested to be cancelled, but the charges continue. I dropped my TV service from Comcast 3 months ago and they continue to charge me. Every time I need to re-contact them I waste an hour.'').

[374] Individual commenter, FTC–2023–0033–0422 (''Implementing this consumer-protection rule has the potential to save American consumers millions of dollars, and prevent unscrupulous companies from using byzantine cancellation procedures to squeeze unwarranted funds out of their customers.''); Individual commenter, FTC–2023–0033–0233 (''I had to navigate an endless labyrinth of dark-patterned links in order to cancel an Amazon Prime subscription that took me one click to sign up for.''); Individual commenter, FTC–2023–0033–0482 (''They make it a labyrinth of obscure phrases and if you don't know to click on just the right one, you'll never be able to cancel.'').

[375] Law Professors, FTC–2023–0033–0861; *see also* State AGs, FTC–2023–0033–0886 (''state attorneys general strongly endorse the FTC's efforts to ensure that consumers enrolled in subscription services or other negative option plans are continuing to pay for those plans because they want to maintain their subscriptions, and not because it is too much trouble to cancel.'').

[376] PDMI, FTC–2023–003–0864; ACT App Association, FTC–2023–0033–0874 (elusive language); IAB, FTC–2023–0033–1000 (unclear how to measure simplicity).

[377] Chamber, FTC–2023–0033–0885 (''ambiguous and hard to implement requirement); NRF, FTC–2023–0033–1005 (as simple as not defined and no examples).

[378] ACT App Association, FTC–2023–0033–0874. The Commission does indeed define ''simple mechanism'' through the requirements of § 425.6, as well as through existing caselaw and the 2021 Enforcement Policy Statement. *See* n.385.

[379] ESA, FTC–2023–0033–0867; IHRSA, FTC–2023–0033–0863; Chamber, FTC–2023–0033–0885; BSA, FTC–2023–0033–1015.

[380] IAB, FTC–2023–0033–1000. The Commission addresses IAB's prevalence assertions elsewhere. *See* section VII.A.

[381] Beyond the near universal support by consumers and consumer advocacy groups, some trade groups also supported the goal of ensuring consumers have a quick and easy mechanism to cancel. RILA, FTC–2023–0033–0883; *see also* Sirius XM, FTC–2023–0033–0857 (''All parties want an easy-to-use and an accessible method of cancellation''); ZoomInfo, FTC–2023–0033–0865 (''We concur with the FTC's recognition that negative option terms, often concealed in 'fine print', can be difficult for consumers to negotiate or even to comprehend fully, and that canceling these contracts can be unfairly burdensome.'').

[382] Some commenters asked for clarification regarding whether the requirement under § 425.6(a) would also immediately cancel the entire contract. *See, e.g.,* N/MA (''The FTC should also clarify that the ''Click to Cancel'' proposal applies only to the negative option portion of a subscription and not to the entire subscription.''). The language of the Rule is clear—cancellation under the Rule applies only to the negative option portion of the contract, and not the entire contract. Section 425.6 (''it is violation of this Rule . . . for the negative option seller to fail to provide a simple mechanism for a consumer to cancel the negative option feature''). Thus, when a consumer cancels, all terms and conditions continue until the expiration of the contract or agreement.

[383] BSA specifically requested the Commission revise subsection (a) to the following: ''We suggest revising this language to clarify the intended result by stating the obligation is 'to cancel the negative option feature and immediately stop any recurring charges for the good or service.' '' BSA, FTC–2023–0033–1015. However, this change could create ambiguity regarding application of the subsection to the initiation of charges under free- and fee-to-paid conversions. Accordingly, the Commission will not incorporate the suggested change.

[384] *See, e.g.,* EPS, 86 FR 60822; *FTC* v. *FloatMe Corp.,* No. 5:24–cv–00001 (W.D. Tex. 2024); *United States* v. *Cerebral, Inc.,* No. 1:24–cv–21376 (S.D. Fla. 2024); *FTC* v. *Bridge It, Inc.,* No. 1:23–cv–09651 (S.D.N.Y. 2023); *FTC* v. *Vonage Holdings Corp.,* No. 3:22–cv–06435 (D.N.J. 2022); *FTC* v. *Benefytt Techs., Inc.,* No. 8:22–cv–01794 (M.D. Fla. 2022); *FTC* v. *First Am. Payment Sys.,* No. 4:22–cv–00654 (E.D. Tex. 2022); *United States* v. *MyLife.com, Inc.,* No. 2:20–cv–6692 (C.D. Cal. 2020); *FTC* v. *RagingBull.com, LLC,* No. 1:20–cv–03538 (D. Md. 2020); *FTC* v. *Age of Learning, Inc.,* No. 2:20–cv–07996 (C.D. Cal 2020); *FTC* v. *Match Grp., Inc.,* No. 3:19–cv–02281 (N.D. Tex. 2019); *FTC* v. *Cardiff,* No. 5:18–cv–02104 (C.D. Cal. 2018); *FTC* v. *AdoreMe,*

Continued

Moreover, the ''as easy as'' standard is even clearer in context, *i.e.,* a flexible measure that ensures consumers have similar cancellation and consent experiences in terms of time, burden, expense, and ease of use, among other things.[385] The Commission is aware these experiences may not always be perfectly symmetrical. Consumers may have to verify or authenticate their identity, for instance,[386] or they may be asked to confirm their intent to cancel.[387] However, reasonable verification, authentication, or confirmation procedures should not create distinctly asymmetrical experiences, particularly if the cancellation mechanism is located within account or user settings secured by authentication requirements for access. Any authentication, verification, or confirmation procedure that creates unreasonable asymmetry runs afoul of section 5 of the FTC Act and the Rule. Moreover, given the extensive record and the Commission's experience with sellers using verification and authentication tools to thwart or delay cancellation,[388] the Commission declines to create a safe harbor for these activities as some States have [389] and as some commenters requested.[390]

Nevertheless, as some commenters point out, the proposed initiation or purchase date trigger may provide insufficient clarity.[391] Not all negative option features begin with a purchase (*e.g.,* free trials), and when a transaction is initiated is subject to interpretation or possible manipulation. Given this ambiguity, businesses attempting to comply with the proposed Rule may have difficulty, and those attempting to evade the proposed Rule may find loopholes with the proposed initiation or purchase date trigger. Thus, the Commission revises § 425.6(b) [392] to require the simple cancellation mechanism be ''as easy as'' the mechanism the consumer used ''to consent'' to the negative option feature, rather than ''initiate'' or ''purchase'' the feature. The moment of consent avoids the lack of clarity the terms ''purchase'' and ''initiate'' introduce and clarifies the action to which the cancellation must be compared.

(b) Proposed § 425.6(c) Minimum Requirements for Simple Mechanisms

(1) Summary of Comments

The proposed Rule required sellers to provide a simple cancellation mechanism through the same medium (internet, phone, in-person) the consumer used to consent to the negative option feature. Almost uniformly, consumers supported this requirement.[393] However, a number of a trade groups disagreed, arguing, as explained below, the requirement is too prescriptive, or could lead to accidental or inadvertent cancellation.[394] Instead, these commenters suggested the Commission allow consumers to choose their cancellation medium (*e.g.,* based on ''consumer expectations,'' convenience, or common use by the seller).[395]

Consumer groups and law enforcement asked the Commission to add minimum requirements to the simple cancellation mechanism. For instance, the State AGs asked the Commission to include the various requirements stated in the 2021 Enforcement Policy Statement, *e.g.,* require negative option sellers ''not [to] erect unreasonable barriers to cancellation or impede the effective operation of promised cancellation procedures, and must honor cancellation requests that comply with such procedures.'' [396] They also urged the Commission to adopt language from New York's statute, which provides simple cancellation mechanisms must be ''cost effective, timely, and easy to use.'' [397] Additionally, the Center for Data Innovation asked the Commission to create a working group to define simple mechanism further, including best practices for businesses.[398]

Finally, some commenters suggested the record lacks evidence that it would be unfair or harmful to consumers to have a cancellation process different from the sign-up process.[399] Accordingly, they argued promulgating a trade regulation rule requiring such symmetry is beyond the Commission's authority. Further, IAB argued the Commission cannot create new requirements defining simple cancellation methods beyond ROSCA's simplicity standard, *i.e.,* that sellers provide simple mechanisms to stop recurring charges, because Congress already decided the appropriate standard.[400]

(a) Proposed § 425.6(c)(1): Online Cancellation

Section 425.6(c)(1) of the proposed Rule specifically addressed online cancellation, requiring sellers to provide a cancellation mechanism over the same website or web-based application the consumer used to consent. Thousands of commenters repeated the mantra: ''If you signed up online, you should be able to cancel online,'' noting they often face hurdles finding a cancellation mechanism, and then must call and

Inc., No. 1:17–cv–09083 (S.D.N.Y. 2017); *FTC* v. *AAFE Prods. Corp.,* No. 3:17–cv–00575 (S.D. Cal. 2017); *FTC* v. *JDI Dating, Ltd.,* No. 1:14–cv–08400 (N.D. Ill. 2014).

[385] Some commenters raised the concern that sellers might create complicated signup procedures to justify complex cancellation mechanisms. ESA, FTC–2023–0033–0867; State AGs, FTC–2023–0033–0886; IAB, FTC–2023–0033–1000. As pointed out by the State AGs sellers must comply with all requirements of a simple cancellation mechanism, including that consumers can promptly effectuate cancellation through an accessible means.

[386] Commenters insisted that reasonable authentication and verification procedures be allowed prior to cancellation to ensure that only authorized persons are making changes to an account. NFIB, FTC–2023–0033–0789; IHRSA, FTC–2023–0033–0863; ESA, FTC–2023–0033–0867; N/MA, FTC–20230033–0873; RILA, FTC–2023–0033–0883; ANA, FTC–2023–0033–1001.

[387] *See, e.g.,* MIA, FTC–2023–0033–1008.

[388] Berkeley Consumer Law Center, FTC–2023–0033–0855; RocketMoney, FTC–2023–0033–0998; Anonymous commenter, FTC–2023–0033–0024; Individual commenter, FTC–2023–0033–0411; Individual commenter, FTC–2023–0033–0850; Individual commenter, FTC–2023–0033–0861; Individual commenter, FTC–2023–0033–0888; Anonymous commenter; FTC–2023–0033–0134; Individual commenter, FTC–2023–0033–0326; Individual commenter, FTC–2023–0033–0778.

[389] *See, e.g.,* Cal. Bus. & Prof. Code § 17602(d)(3); Colo. Rev. Stat. § 6–1–732(2)(d)(I)(B).

[390] USTelecom, FTC–2023–0033–0876 (''expressly allow'' business to engage in privacy and data security measures prior to cancellation); ANA, FTC–2023–0033–1001.

[391] For online cancellation, § 425.6(c)(1) of the proposed Rule required sellers to provide a simple cancellation mechanism through the same medium consumers used ''to purchase the negative option feature.''

[392] The Commission also will make a conforming change to add ''consent'' in section 425.6(c)(1).

[393] *See, e.g.,* Individual commenter, FTC–2023–0033–0072 (''I would like a rule that requires all subscriptions to be available to cancel through the same means as they were initiated, whether that is online, in person, phone, mail, or chat.''); Individual commenter, FTC–2023–0033–0252 (''the method provided for signing up for a service must also be provided for cancelling the same service, be just as easy to find, and require no more steps than it took to sign up.'').

[394] *See, e.g.,* NCTA, FTC–2023–0033–0858; PDMI, FTC–2023–0033–0864; CTA, FTC–2023–0033–0997; ANA, FTC–2023–0033–1001. *See also* Wilson Sonsini Goodrich & Rosati on behalf of certain of its alarm company clients (''Sonsini Alarm Clients''), FTC–2023–0033–0860 (alarm companies should be able to speak to the customers to verify identity and confirm cancellation intent); N/MA–FTC–2023–0033–0873 (A ''one click'' cancellation requirement for an entire subscription, especially absent some form of authentication, could also lead to accidental and/or malicious cancellations.); NRF, FTC–2023–0033–1005 (data suggests that one-click-cancellation functions frequently cause accidental cancellations).

[395] *See, e.g.,* Sirius XM, FTC–2023–0033–0857; N/MA, FTC–2023–0033–0873; State AGs, FTC–2023–0033–0886.

[396] State AGs, FTC–2023–0033–0886.

[397] *Id.*

[398] CDI, FTC–2023–0033–0887.

[399] CTA, FTC–2023–0033–0997; IAB, FTC–2023–0033–1000.

[400] IAB, FTC–2023–0033–1000.

spend significant time on the telephone to cancel their subscriptions.[401]

In contrast, RILA suggested consumers would not always expect to find a cancellation function through the same online medium the consumer used to enroll. ''For example, contracts are . . . increasingly concluded online through third parties or via social media apps. Regardless of how a customer initially signs up, once she/he establishes a purchasing arrangement with a seller, the customer will logically look to the seller to cancel.'' [402] Several commenters agreed, stating where a consumer enrolls through a third party, or through an IoT device, the consumer may naturally look to the seller with whom the consumer has the agreement.[403]

Similarly, trade groups, such as NCTA and PDMI, argued mandating consumer cancellation through the same website or web-based application the consumer used to initiate the transaction is too prescriptive.[404] Several of these commenters asserted the proposed requirement is unnecessary and contrary to consumer expectations.[405] They further contended when consumers enroll online, any online cancellation mechanism should be adequate.[406] Further, these commenters suggested it may not be possible to offer the same website or web-based application due to contractual obligations and limitations imposed by third parties.[407]

Additionally, broadband, wireless, and streaming groups, such as NCTA and USTelecom, suggested the same-medium requirement is particularly troublesome for their industries because consumers often subscribe to multiple, or bundled, services, rendering cancellation online through a single click difficult or impossible. These industries posited consumers often do not, in fact, want to cancel, but rather seek to downgrade or modify services. Therefore, requiring a consumer to speak to a live agent best accomplishes this goal, regardless of how the consumer enrolled.[408]

Alarm companies raised a similar concern, *i.e.,* there are no safeguards to ensure the consumer intended to cancel (rather than, *e.g.,* unsubscribe from marketing emails) when cancelling online. They also emphasized the importance of verifying a consumer's identity prior to cancellation. As explained by a commenter representing various alarm company clients, alarm companies' ''cancellation procedures are designed to prevent inadvertent or malicious disabling of alarm monitoring services, often by directing consumers to call trained customer support representatives who can verify the consumer's identity via their secure passcode and ensure any changes made to the account are intentional and fully informed.'' [409]

(b) Proposed § 425.6(c)(2): Telephone Cancellation

Proposed § 425.6(c)(2) addressed situations in which sellers obtain consumer consent by telephone. In these situations, the proposed Rule required sellers to provide a telephone number to consumers and ''assure'' all calls are answered promptly during ''normal business hours'' and are no more costly than the call to enroll.

Several commenters asked the Commission to modify this section. Specifically, N/MA asked that sellers be allowed to confirm telephone cancellations through email verification.[410] A group of law professors asked the Commission to require sellers to answer cancellation calls in ''comparable timeframe to sign-up calls.'' [411] They also suggested telephone answering systems should not be limited to normal business hours if they are entirely automated. The State AGs further asked the Commission to incorporate the guidance for telephone cancellation from the 2021 Enforcement Policy statement, for example, ensuring ''the calls are not lengthier or otherwise more burdensome than the telephone call the consumer used to consent to the negative option feature,'' and prohibiting sellers from ''hang[ing] up on consumers who call to cancel; plac[ing] them on hold for an unreasonably long time; provid[ing] false information about how to cancel; or misrepresent[ing] the reasons for delays in processing consumers' cancellation requests.'' [412]

(c) Proposed § 425.6(c)(3): In-person Cancellation

For in-person sales, proposed § 425.6(c)(3) required sellers to offer online or telephone call cancellation mechanisms in addition to the same in-person mechanism, where practical. The proposed Rule further required sellers not make telephone cancellation more costly than the method used to consent to the negative option feature.

Individual consumers identified the many ways in which demanding in-person cancellation is unfair. For instance, they observed it may not always be possible to cancel in person, as was true during the COVID pandemic,[413] after a consumer moves from the area,[414] or for people with young children or who have difficulty leaving their home.[415] Others

[401] Individual commenter, FTC–2023–0033–0215 (''If you signed up online, you should be able to cancel online. If it took one click to join, it should take one click to cancel.''); Individual commenter, FTC–2023–0033–0847; Anonymous commenter, FTC–2023–0033–0040 (''My negative experience was that it was a simple 'click' on-line to sign up for a service but to cancel same service it took three phone calls and hours of my time. If I can sign up with a 'click' then I SHOULD be able to cancel with a 'click.' '').

[402] RILA, FTC–2023–0033–0883.

[403] ESA, FTC–2023–0033–0867; ANA, FTC–2023–0033–1001.

[404] NCTA, FTC–2023–0033–0858; PDMI, FTC–2023–0033–0864; CTA, FTC–2023–0033–0997; ANA, FTC–2023–0033–1001.

[405] *See, e.g.,* ESA, FTC–2023–0033–0867; IAB, FTC–2023–0033–1000.

[406] *See, e.g.,* IAB, FTC–2023–0033–1000; MIA, FTC–2023–0033–1008; *see also* RILA, FTC–2023–0033–0883 (enrollment online, *e.g.,* internet-based mobile applications, should be allowed through seller's website).

[407] *See, e.g.,* ESA, FTC–2023–0033–0867.

[408] USTelecom, FTC–2023–0033–0876; CTIA, FTC–2023–0033–0866 (''imperative that businesses are able to have a live representative speak with a customer seeking to cancel, regardless of the medium used to sign up''); NCTA, FTC–2023–0033–0858; (''Whatever these consumers' reasons for seeking to cancel or modify services, in most instances they are best served by speaking with a live agent, even if they enrolled online.''); *see also* Chamber, FTC–2023–0033–0885 (subscriptions to multiple products or services ''require[ ] more time and personal assistance to address when a customer seeks to cancel only one of such related products or services'').

[409] Sonsini Alarm Clients, FTC–2023–0033–0860; *see also* Joint Alarm Industry Comments—ESA, TMA, SIA and AICC, FTC–2023–0033–1014 (asking for clarification that alarm companies can require written or verbal confirmation of online cancellation requests). The concerns raised by these industries are likely an artifact of the Saves provision, which, as proposed, could be interpreted to prevent verification procedures and cancellation intent. The Commission addresses these concerns in section VII.B.6.c.

[410] N/MA, FTC–2023–0033–0873.

[411] Law Professors, FTC–2023–0033–0861.

[412] State AGs, FTC–2023–0033–0886.

[413] Individual commenter, FTC–2023–0033–0399 (''Even if I didn't sign up online, terminating, a membership in person isn't always possible. Lock down during Covid being a prime example.'').

[414] Individual commenter, FTC–2023–0033–0677 (''Companies are absolutely being deceptive about their practices when it comes to canceling a service, including their initial pitch to 'Cancel anytime!' only for you to find out that canceling requires you to go in person to a business in a place you might not even live anymore'').

[415] Individual commenter, FTC–2023–0033–0741 (''[m]any places . . . require you to go in person to cancel—they won't even let you do it over the phone! This harms anyone that may have trouble leaving the house regularly, including disabled folks and parents of small children and those caring for older or ailing family members.''). *See also* TechFreedom, FTC–2023–0033–0872 (''Returning to the in-person venue where the initial sale occurred may be inconvenient, or even impossible, for the consumer.''); Individual commenter, FTC–202–0033–1141 (''Sometimes an unexpected move or unforeseen circumstances make it impossible to cancel in person. I would like to see an option to be able to cancel remotely, even if the subscription was purchased on site.'').

complained they showed up numerous times in person, only to be told they could not cancel because the manager was not available.[416] One commenter complained sellers demanded consumers cancel by certified mail if they originally consented in person.[417]

In contrast, two trade associations requested the Commission allow sellers to require consumers to cancel in person if they signed up in person. These commenters argued such a limitation is appropriate due to the unique challenges of their industries. For example, IHRSA, which represents the health and fitness industry, stated, ''it is appropriate for a brick-and-mortar business'' to require customers to cancel in person ''to verify their identity.'' The International Carwash Association (''ICA'') stated some of its members sell products and services exclusively in person; therefore, it asked the Commission to not ''force'' these small business owners ''to set up an online marketplace'' to process cancellations if the seller does not already have an online presence.[418]

(2) Analysis

(a) The Commission retains the general ''same medium'' requirements of § 425.6(c).

Based on the record, the final Rule retains the general requirements proposed in § 425.6(c); specifically, the negative option seller must provide a simple cancellation mechanism through the same medium (such as internet, telephone, mail, or in-person) the consumer used to consent to the negative option feature. Further, the final Rule retains § 425.6(a) that requires sellers to provide consumers with a simple mechanism to immediately stop charges that is cost-effective, timely, and easy to use. Such a mechanism cannot include ''unreasonable barriers to cancellation or impede the effective operation of promised cancellation procedures.''[419] This provision makes adding language from the 2021 Enforcement Policy Statement or the New York statute unnecessary because the simple mechanism provision already includes it. Further, several commenters asked the Commission to allow consumers to choose additional, alternate means of cancellation.[420] This modification, however, is also unnecessary. The ''same medium'' requirement presents a floor, not a ceiling. That is, it only requires businesses to offer consumers the ability to cancel in the manner they were able to sign up. Sellers are free to provide additional cancellation mechanisms, giving consumers choices.

Moreover, despite some commenters' assertions to the contrary, the Commission has clear authority to issue a rule requiring sellers to offer cancellation through the same medium as enrollment. As detailed in section VII.A, there is a substantial record demonstrating the negative option practices covered by this Rule are unfair or deceptive, prevalent, and have caused significant consumer harm.[421] Moreover, Magnuson-Moss empowers the Commission to promulgate requirements designed to prevent any unfair or deceptive practice it identifies with specificity.[422] By promulgating a rule that prevents sellers from making cancellation unreasonably difficult, the Commission has done so here. Further, while ROSCA does not provide for APA rulemaking, it does not limit the Commission's authority to issue a trade regulation rule.[423] In fact, the Commission's Negative Option Rule predates ROSCA, and the statute does not rescind that Rule.

(b) The Commission modifies the requirements of § 425.6(c)(1): Online Cancellation.

In response to comments, the Commission makes several changes to clarify the online cancellation mechanism requirements. First, it removes the requirement that, for website or web-based applications, cancellation must be afforded through the same precise means as consent. Instead, the final Rule provides the simple cancellation must be easy to find. Second, the revised provision incorporates a definition of ''interactive electronic medium'' in place of ''internet.'' Third, the Commission excludes cancellation mechanisms requiring interaction with a live or virtual agent, unless the consumer consented to the negative option feature through such mechanism. Each modification is discussed below.

(i) The simple cancellation mechanism must be easy to find.

Consumers uniformly opposed having to engage with a representative to cancel when they could simply click a button to enroll.[424] They also expressed deep

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[416] *See, e.g.,* Individual commenter, FTC–2023–0033–0510 (''I had to go in person 3 different times because the manager wasn't there so to cancel it'').

[417] Individual commenter, FTC–2023–0033–0007 (''I work dispute resolutions for a bank. I see so many cases where someone is trying to cancel something like a gym membership and, while they can sign up in person, they for some reason have to mail a certified letter to the [company's] home office. That has always seemed unreasonable and deliberately contrived.'').

[418] ICA, FTC–2023–0033–1142. ICA's comment seems to suggest a misunderstanding that the Rule would require both telephone and online cancellation for in-person consent. It does not. A business may elect either online or telephone (or both), but there must be at least one mechanism in addition to in-person cancellation.

[419] EPS, 86 FR 60823; *see also* NPRM, 88 FR 24728 (explaining the simple cancellation mechanism proposed in the Rule should remove barriers, such as unreasonable hold times or verification requirements).

[420] *See, e.g.,* N/MA, FTC–2023–0033–0873 (subscribers should be allowed to choose method most convenient; subscribers who sign up by mail may prefer to cancel online or by telephone, and consumers who subscribed by telephone may prefer to cancel online); Sirius XM, FTC–2023–0033–0857 (''For example, requiring a customer to use direct mail to cancel if the customer used direct mail to accept a subscription offer would be inconvenient for the customer and not the customer's expected or desired means for cancellation. Instead, the cancellation method should be an easy-to-use mechanism for a consumer to stop recurring charge which would closely track consumer expectations and allow for changes in technology.''); State AGs, FTC–2023–0033–0886 (''We respectfully suggest requiring sellers to allow *all* consumers to cancel through *any* medium that the seller uses to sell subscriptions or memberships, regardless of the medium through which that particular consumer signed up.'').

[421] *See generally* section VII.A.

[422] 15 U.S.C. 57a(a)(1)(B).

[423] NPRM, 88 FR 24716 n.9. Although, as stated in the NPRM, Congress did not direct the FTC to promulgate implementing regulations, it certainly did not preclude them, and the language contained in ROSCA confirms the FTC's authority to do so. 15 U.S.C. 8404(a) (''Violation of this chapter or any regulation prescribed under this chapter shall be treated as a violation of a rule. . . .''); *see also id.* 8404(b) (''Any person who violates this chapter or any regulation prescribed under this chapter'' shall be subject to penalties); *id.* 8404(c) (''Nothing in this section shall be construed to limit the authority of the Commission under any other provision of law.'').

[424] Individual commenter, FTC–2023–0033–0003 (''When signing up, I didnt talk to a single individual. So its fair that when cancelling, I should not have to talk to a single individual.''); Individual commenter, FTC–2023–0033–0006 (was forced to call ''and speak with several agents'' because unable to cancel online); Anonymous commenter, FTC–2023–0033–0044 (shouldn't be forced to make a phone call and sit on hold for hours if signed up online); Individual commenter, FTC–2023–0033–0072 (fair to consumers to allow consumers to cancel through same means as they were initiated); Individual commenter, FTC–2023–0033–0087 (''I think any offer you can buy with a click should also be an offer to unsubscribe with a click''; having to call instead is a scam); Anonymous commenter, FTC–2023–0033–0095 (''I would like to specify that [company] did not allow to terminate the account online. They specifically requested a phone call, which they then ignored for as long as possible. This practice is unfair and deceptive and needs to be outlawed.''); Anonymous commenter; FTC–2023–0033–0097 (FTC should ban practice of companies only offering cancellation via phone call, despite not requiring a phone call for signup); Individual commenter, FTC–2023–0033–0274 (''having to call the company to cancel when the party clicked on the website is forced verbal speech''); Individual commenter, FTC–2023–0033–0356 (''If you signed up online, you should be able to cancel online. If it took one click to join, it should take one click to cancel. I am tried [sic] of calling some call center, waiting on hold, and then having someone go through a long script about why I should not cancel. Generally make it as easy to cancel as to sign up.''); Individual commenter, FTC–2023–0033–0379 (''I have now been charged for a full month because I have to call and speak

frustration over having to hunt to find cancellation mechanisms, usually buried deep within a website or in fine print on a bill or other correspondence.[425] The Commission has brought numerous cases alleging these practices are unfair or deceptive.[426] The proposed Rule sought to prevent these unfair and deceptive practices by requiring sellers to provide an easily accessible online cancellation mechanism to consumers who enrolled online.[427] As several commenters rightly noted, however, consumers may not always expect (and it may not always be possible) to use the same precise means for both enrollment and cancellation.[428]

Accordingly, to clarify the intent of the original language and to better match consumer expectation with actual cancellation procedures, the Commission now clarifies that where a consumer enrolls online, whether through a website, a mobile application, chat, email, or messaging, consumers must be afforded an equally simple online cancellation experience, *i.e.,* one that allows them easily to find and use the cancellation mechanism.[429]

Many commenters agreed consumers would consider a link or button located on a website or within a user's account or device settings to be ''easy to find.'' [430] Providing a clearly-labeled cancellation button in a consumer's account or user settings is, thus, one example of a simple online cancellation mechanism.[431] The Commission cautions, however, while such a mechanism need not be exactly the same as the consent mechanism, the seller cannot make it more difficult to use or find than the consent mechanism. For example, the seller cannot prominently label the mechanism within the account settings but make it difficult for consumers to find the account settings in the first instance.

Further, the Commission emphasizes that the cancellation mechanism must be easy to find at the time the consumer decides to cancel. Providing an easy-to-find mechanism at consent does not mean the mechanism will be easy to find later when the consumer wants to cancel, and therefore will not prevent unreasonable barriers to cancellation. Thus, providing the information necessary to find the cancellation mechanism at enrollment (as required under § 425.4) does not discharge the seller's obligation to ensure cancellation is easy to find when most relevant to the consumer.[432]

(ii) ''Interactive electronic medium'' is broadly defined to include all methods of electronic communication.

The State AGs asked the Commission specifically to address the requirements for cancellation by chat, text messaging, and email. The State AGs explained that although chat and text are increasingly common cancellation mechanisms, they share some of the same qualities and potential problems as telephone cancellation because they require interaction with a live or virtual customer representative.[433] Further, the State AGs suggested email should not be an acceptable cancellation medium for online consent.[434]

To address these concerns, the Commission revises the proposed provision to refer to ''interactive electronic medium'' rather than ''internet.'' This change clearly includes text, chat, and email within the scope of online cancellation mechanisms.

to a representative instead of clicking to cancel.''); Individual commenter, FTC–2023–0033–0443 (''If the public is allowed to set up an account online we should be allowed to cancel online without ever making a phone call. The consumer should have more rights than corporations.''); Individual commenter, FTC–2023–0033–0617 (''It is truly obnoxious to be able to click to join but have to research to find the way to cancel, often involving making a phone call and being left on hold.''); Individual commenter, FTC–2023–0033–0716 (''We shouldn't have to call the company to cancel!''); Individual commenter, FTC–2023–0033–0788 (requiring a call when enrolled online is ''coercive and unfair''); Individual commenter, FTC–2023–0033–0822 (''I am sick of having to call a phone number to cancel something I signed up for on line, and often speaking to someone who is snide, sarcastic, or downright rude!'').

[425] Individual commenter, FTC–2023–0033–0065 (''Often a company makes it significantly more difficult to even find out where or how to cancel a subscription.''); Individual commenter, FTC–2023–0033–0024 (''It took a Google search to find the right Customer Service number because it was hidden or unavailable on the website.''); Individual commenter, FTC–2023–0033–0084 (finally found corporate number to cancel trampoline park after scouring website for a membership enrolled online); *see also* Individual commenter, FTC–2023–0033–0067 (''why are they allowed to sign you up for automatic renewal with no way to cancel nothing on their web page in order to cancel a subscription''); Individual commenter, FTC–2023–0033–0071 (biggest annoyance is that subscriptions can be signed up for so easily with a few buttons on the remote but nearly impossible to cancel); Anonymous commenter, FTC–2023–0033–0108 (''I certainly hope this goes through. These companies make it incredibly difficult to even find the cancel or opt out option.''); Anonymous commenter, FTC–2023–0033–0123 (''Straight forward plain language cancelation instructions that are easy to locate should be required.''); Individual commenter, FTC–2023–0033–0124 (''Clearly there should be an easy way to unsubscribe that is easy to find.''); Individual commenter, FTC–2023–0033–0560 (cancellation page should be easy to find); Individual commenter, FTC–2023–0033–0642 (''If you signed up online, you should be able to cancel online. If it took one click to join, it should take one click to cancel. I have had trouble finding where to cancel on multiple subscription services. Often, they are confusing on purpose to keep customers like me trapped in the payment cycle. Some require an email or phone call to a separate customer service representative. Cancelling should not be harder than signing up for their service.''); Individual commenter, FTC–2023–0033–0685 (''I am tired of having to screen grab the fine print to figure out my options for cancelling subscriptions-it just shouldn't be this hard!?!''); Ashley Sheil on behalf of Maynooth University and in collaboration with Radboud University, FTC–2023–0033–1006 (observing that companies may take advantage of the ''as easy as'' requirement, and recommending any termination button should be highlighted and in an obvious location).

[426] *See* n.385 (citing simple cancellation cases).

[427] NPRM, 88 FR 24728 (''On the internet, this 'Click to Cancel' provision requires sellers, at a minimum, to provide an accessible cancellation mechanism on the same website or web-based application used for sign-up.'').

[428] *See, e.g.,* ESA, FTC–2023–0033–0867 (''Such a requirement would not be helpful for players seeking to cancel a subscription, as in-game is not the place that most players would expect to find a cancellation ingress.''); RILA, FTC–2023–0033–0883 (''The method that a consumer uses for initial sign-up may not be the place where that consumer would expect to find a simple cancellation function. For example, contracts are also increasingly concluded online through third parties or via social media apps. Regardless of how a customer initially signs up, once she/he establishes a purchasing arrangement with a seller, the customer will logically look to the seller to cancel the arrangement.'').

[429] The Chamber asked the Commission to clarify that web-based chat is an appropriate cancellation where a consumer signs up online. As is clear from the record, unless the seller required the consumer to engage with an agent through a web-based chat to enroll, the Rule will preclude requiring the consumer to do so to cancel. There is substantial evidence this asymmetrical practice of requiring consumers to engage with agents (live or virtual) for cancellation but not enrollment is one of the principal methods sellers use to create unfair and deceptive cancellation procedures. Accordingly, it is appropriate to include limitations within the Rule to prevent unscrupulous sellers from using such practices.

[430] Individual commenter, FTC–2023–0033–0124 (''Clearly there should be an easy way to unsubscribe that is easy to find.''); Individual commenter, FTC–2023–0033–0252 (''I had been thinking of contacting my Governor to suggest just such a rule that the method provided for signing up for a service must also be provided for cancelling the same service, be just as easy to find, and require no more steps than it took to sign up.''); Individual commenter, FTC–2023–0033–0560 (''And ensure the bill is explicit with requirement to make it EASY TO FIND HOW TO REACH the company or cancellation page.''); Individual commenter, FTC–2023–0033–0640 (''The Federal Trade Commission needs to make it mandatory for companies to have an easy to find button to cancel a subscriptions -online-.''); Individual commenter, FTC–2023–0033–0784 (''And the cancel button should be easy to find and as attractively marketed as an opportunity to extend a subscription (font size, colors, etc.).''); Individual commenter, FTC–2023–0033–1006 (cancellation should be highlighted and in an obvious location).

[431] *See, e.g.,* Cal. Bus. & Prof. Code § 1702(d)(1)(A); Conn. Gen. Stat. Ann. § 42–158ff (d)(1)(A); N.J. Stat. Ann. § 56:8–42.1.a.

[432] *See, e.g.,* Individual commenter, FTC–2023–0033–0022 (''Note that subscriptions are by their very nature long lasting in time, therefor requirements should not just emphasize some fine print disclosure at the time of sign up but also it should be easy to check back with the company or their many layers of subcontractors to cancel at anytime in the future.'').

[433] State AGs, FTC–2023–0033–0886.

[434] *Id.*

Specifically, the phrase ''interactive electronic medium'' used in the ''clear and conspicuous'' definition includes all media that involve electronic communications (except telephone calls), whether or not they strictly use the internet (and thus would otherwise be ''online''). Consumers may not know whether a text or chat is MMS (online) or SMS (offline), for example. This broader definition should provide flexibility to sellers while continuing to require parallel cancellation and sign-up procedures to meet consumers expectations.

Although the State AGs suggested prohibiting the use of email as a cancellation mechanism, the record provides no basis for doing so. Further, consistent with the Commission's definition of interactive electronic medium, several States specifically allow sellers to use email as an online cancellation method.[435] Thus, the final Rule does not bar the use of email to effectuate online cancellation.

(iii) No interaction with representatives for online cancellation.

The State AGs noted, and consumer comments further support, the fact that sellers have often used chat, text, and messaging to perpetrate the same abuses documented for telephone cancellation. The Commission, therefore, reiterates all cancellation mechanisms, including chat, text, messaging, and email, are subject to the same ''simple'' requirements, *i.e.,* sellers may not erect unreasonable barriers or prevent consumers from immediately halting charges. Cancellation mechanisms must be as easy to use as the mechanism the consumer used to sign up, in terms of time, expense, burden, and ease of use; and the mechanism must be as readily accessible as the means the consumer used to consent in the first place.

Consumer comments, as well as the Commission's and State AGs' enforcement experience demonstrate asymmetrical enrollment and cancellation experiences, such as requiring telephone cancellation when consumers can easily sign up online without speaking with an agent, are unfair. Specifically, this asymmetry creates unreasonable barriers to cancellation, such as unreasonable hold times, unreasonable verification requirements, and aggressive save tactics. Moreover, comments and the Commission's enforcement experience indicate consumers likely understand a simple online enrollment experience as an implied claim that the cancellation experience also will be simple.[436] As consumers themselves explain, they do not anticipate engaging with a customer service representative (whether by phone, or through a web-based chat or messaging) if they did not do so to sign up for the negative option feature.[437] Thus, the Commission further clarifies, for online consent, the seller cannot require the consumer to engage with an agent or customer service representative to cancel unless the consumer did so at enrollment.[438]

Finally, the Commission declines to exclude industries providing bundled services from the same medium requirement. NCTA and other industries with such services insisted their customers are better served by speaking with a live representative, even when they enroll online.[439] They expressed concern these sellers cannot confirm a consumer's cancellation intent (consumers may want to modify or renegotiate services) or apprise consumers of any negative consequences of cancellation (loss of access to emergency services, for example) without a live discussion.[440] They further assert providing this information online could be complicated and expensive for the seller and not what the consumer would prefer.[441] NCTA noted only 30% of its members' customers sign up online, with the remaining 70% enrolling in person or over the phone.[442]

NCTA's comment seems to suggest the simple cancellation mechanism requirement demands a certain asymmetry—specifically, no matter how complex online enrollment is, the proposed Rule would require a simple ''one click'' cancellation mechanism, which could preclude the seller from confirming cancellation intent or apprising consumers of negative consequences of cancellation. The Commission reiterates the simple cancellation requirement requires symmetry in terms of, *inter alia,* time, burden, expense, and ease of use. It does not require use of the exact same mechanism.

Further, existing verification procedures, such as two-factor authentication, are routinely used to ensure a consumer's identity in highly sensitive situations. Thus, they are more than sufficient to ensure the correct person is cancelling and do not require the use of a cancellation mechanism different than enrollment. Moreover, at this juncture, the Commission has removed the proposed ''saves'' provision from the final Rule, making communication regarding material consequences of cancelling easier to convey (so long as communicating through the same medium).

(c) The Commission adopts § 425.6(c)(2): Telephone Cancellation as proposed, with one exception.

The Commission adopts the telephone cancellation provision as proposed, except the final Rule removes the requirement sellers must assure all calls are answered during normal business hours. Instead, the final Rule requires sellers to promptly effectuate cancellation requests by consumers via a telephone number that is answered or records messages during normal business hours.

Several commenters suggested specific changes were necessary to enhance the proposed telephone medium requirements. For instance, the State AGs asked the Commission to include the various requirements detailed in the 2021 Enforcement Policy Statement, *e.g.,* require negative option

[435] *See, e.g.,* Cal. Bus. & Prof. Code § 17602 (''The business shall provide a method of termination that is online in the form of either of the following: By an immediately accessible termination email formatted and provided by the business that a consumer can send to the business without additional information.''); Conn. Gen. Stat. Ann. § 42–158ff (an electronic mail message from the business to the consumer, which is immediately accessible by the consumer and to which the consumer may reply without obtaining any additional information); N.J. Stat. Ann. § 56:8–42.1 (a termination email formatted and provided by the subscription service provider that a consumer can email to the subscription service provider without being required to provide any additional information).

[436] *See* nn.362–369; *see also* vlogbrothers, Why isn't this Illegal?, *https://www.youtube.com/watch?v=FjAw1LMShIA&pp=ygUMdmxvZ2Jyb3RoZXJz* (last visited Aug. 25, 2024).

[437] *See, e.g.,* Anonymous commenter, FTC–2023–0033–0024 (could not cancel online even though consumer could upgrade online and via TV); Individual commenter, FTC–2023–0033–0137 (''3 months to cancel, 3 minutes to sign-up. Seriously?''); Individual commenter, FTC–2023–0033–0252 (detailing three instances where consumer signed up online with a few clicks but was required to call to cancel, concluding ''the method provided for signing up for a service must also be provided for cancelling the same service, be just as easy to find, and require no more steps than it took to sign up.''); Individual commenter, FTC–2023–0033–0457 (''If I enrolled in a subscription online, there are no good reasons why I can't disenroll that way as well. Forcing me to call a number to unsubscribe, which is only staffed during 'normal business hours,' unnecessarily complicates the process''); Anonymous commenter, FTC–2023–0033–0802 (this practice of making someone call or chat to someone to cancel a membership is predatory).

[438] The Chamber asked the Commission to ''make clear that a web-based chat qualifies as an appropriate cancellation mechanism where a customer signed up for a service online.'' FTC–2023–0033–0885. The Commission reiterates that a web-based chat cancellation mechanism may be appropriate, but only if the consumer enrolled through a virtual or live agent.

[439] NCTA, FTC–2023–0033–0858; CTIA, FTC–2023–0033–0866.

[440] *Id.*

[441] *Id.*

[442] NCTA, FTC–2023–0073–0008.

sellers ''not [to] erect unreasonable barriers to cancellation or impede the effective operation of promised cancellation procedures, and . . . honor cancellation requests that comply with such procedures.'' However, the proposed provisions already include these requirements.[443]

Nonetheless, several commenters correctly pointed out requiring sellers to answer cancellation calls during normal business hours could create considerable costs for small businesses while not directly addressing the core problem identified by the Commission—the unreasonable delay of cancellation requests. To address these concerns, the Commission first clarifies normal business hours are those hours in which the business would normally engage with its customers. A seller, however, cannot make telephone cancellation available only at times that are so inconvenient they erect a barrier to cancellation. For instance, it would be improper to limit cancellation calls to only between midnight and 3 a.m., regardless of whether these are the seller's normal business hours. Importantly, however, the final Rule does not require a seller to physically answer the telephone call (a task that could be difficult for, *e.g.,* a sole proprietorship). An answering machine that clearly provides for cancellation (*e.g.,* a message stating: if you want to cancel your subscription please identify that subscription, and leave identifying information) would comply with this provision of the Rule. To effectuate the provision's intent, the final Rule states sellers, whether answering the cancellation call in person or not, must effectuate that cancellation promptly. Thus, a seller could not, for example, have an answering machine it does not regularly monitor or for which it does not promptly effectuate cancellation requests.

Notably, the final Rule retains the requirement that, for the mechanism to be at least as simple as the one used to initiate the recurring charge, any cancellation call cannot be more expensive than the call used to enroll (*e.g.,* if the sign-up call is toll free, the cancellation call must also be toll free). Consumers would not expect such fees, rendering them unfair or deceptive.[444]

(d) The Commission adopts § 425.6(c)(3): In-Person Cancellation as proposed.

Based on the Commission's experience and that of other States, as well as many comments in the record, requiring in-person cancellation presents significant opportunities for unfair and deceptive practices. To prevent such practices, the final Rule adopts provision 425.6(c)(3) essentially as proposed. Thus, the provision continues to require in-person sellers to provide alternatives to in-person cancellation, either online or by phone, at the seller's choice. The Commission, however, corrects the requirement that if the alternative is a telephone call, the call cannot be more costly than the in-person consent. That proposal connected two unrelated costs and thus did not make logical sense. To effectuate the purpose of this provision, however, the Commission adds language stating the call cannot impose any cost that creates an unreasonable barrier to cancellation, including by making the call unreasonably expensive.[445]

To address ICA's concerns, the Commission clarifies the Rule does not require sellers who sell in-person to maintain an alternative online presence to process cancellations. Sellers who have no such presence can allow cancellations by phone if they comply with the simple telephone cancellation requirements detailed above.

(c) § 425.6(d) Saves

(1) Summary of Comments

Proposed § 425.6(d) would have required sellers to immediately effectuate cancellation unless they obtained the consumer's unambiguously affirmative consent to receive a save prior to cancellation. The Commission explained the record shows many businesses have created unnecessary and burdensome obstacles to cancellation, including forcing uninterested consumers to sit through multiple upsells before allowing them to cancel.[446] Individual consumer commenters corroborated the pervasive use of such unfair tactics to thwart cancellation.[447]

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[443] *E.g.,* the requirements that all cancellation mechanisms be simple and easy to use (§ 425.6), and the seller disclose where to find the cancellation mechanism prior to the sale (§ 425.4).

[444] *Cf. United States* v. *Adobe, Inc.,* No. 5:24–cv–03630 (N.D. Cal. 2024) (cancellation fees plead as a failure to disclose and failure to obtain consent to charge in violation of ROSCA); *FTC* v. *FloatMe Corp.,* No. 5:24–cv–00001 (W.D. Tex. 2024) (extra cost in relation to timing of receipt of product deceptive in violation of section 5); *United States* v. *Cerebral, Inc.,* No. 1:24–cv–21376 (S.D. Fla. 2024) (delays in cancellation deceptive and injured consumers in violation of section 5); *FTC* v. *Bridge It, Inc.,* No. 1:23–cv–09651 (S.D.N.Y. 2023) (claims to cancel at any time without paying any fees, interest, or other charges deceptive); *FTC* v. *Vonage Holdings Corp.,* No. 3:22–cv–06435 (D.N.J. 2022) (requiring phone cancellation with roadblocks including long hold times, frequent disconnects, endless loops, and early termination fee unfair under section 5); *FTC* v. *Benefytt Techs., Inc.,* No. 8:22–cv–01794 (M.D. Fla. 2022) (unexpected cost for additional product is deceptive and unfair); *In re Dun & Bradstreet, Inc.,* FTC Docket No. C–4761 (2022) (renewal practices, including at end of designated time periods, deceptive); *FTC* v. *First Am. Payment Sys.,* No. 4:22–cv–00654 (E.D. Tex. 2022) (misrepresentations in cancellation and unfair debiting); *United States* v. *MyLife.com, Inc.,* No. 2:20–cv–6692 (C.D. Cal. 2020) (cancellation by phone discouraged or prevented by unavailable or uncooperative agents specified as a violation of ROSCA); *FTC* v. *Match Grp., Inc.,* No. 3:19–cv–02281 (N.D. Tex. 2019) (pleading cancellation difficulties in violation of ROSCA); *In re Urthbox, Inc.,* FTC Docket No. C–4676 (2019) (unexpected charges, including for a full 6 months following the first month of free trial, are a failures to disclose in violation of section 5); *FTC* v. *Cardiff,* No. 5:18–cv–02104 (C.D. Cal. 2018) (unexpected charges a section 5 misrepresentation and unfair charging); *FTC* v. *BunZai Media Grp., Inc.,* No. 2:15–cv–04527 (C.D. Cal. 2015) (failure to disclose charge as deceptive and unfair); *FTC* v. *Tarr,* No. 3:17–cv–02024 (S.D. Cal. 2017) (failure to disclose material terms deceptive and unfair); *FTC* v. *AdoreMe, Inc.,* No. 1:17–cv–09083 (S.D.N.Y. 2017) (cancelling made difficult by phone, contributing to misrepresentations regarding store credit); *FTC* v. *RevMountain, LLC,* No. 2:17–cv–02000 (D. Nev. 2017) (unexpected product deceptive); *FTC* v. *AAFE Prods. Corp.,* No. 3:17–cv–00575 (S.D. Cal. 2017); *FTC* v. *Health Formulas, LLC,* No. 2:14–cv–01649 (D. Nev. 2014) (deceptive costs).

[445] N/MA suggested there may be instances where the original method of consent is no longer available. FTC–2023–0033–0873. For example, if the person signed up a trade show in person, returning to the in-person venue may be impossible. The Commission notes the in-person method only must be made available, ''where practical.''

[446] NPRM, 88 FR 24729.

[447] *See, e.g.,* Individual commenter, FTC–2023–0033–0006 (''Last year I had the pleasure of trying to cancel a radio subscription which took 2 attempts and far too much time to accomplish. Unable to cancel online, I was forced to call and speak with several agents trying to convince me to keep their service. After nearly a half hour of insisting I wanted to cancel, they simply hung up on me which forced me to start the cancellation process all over again from the beginning.''); Anonymous commenter, FTC–2023–0033–0024 (able to cancel only after listening to a ''long sale pitch about why he shouldn't''); Anonymous commenter, FTC–2023–0033–0066 (when you request a cancellation, will pass your call on to a more ''experienced representative'' in an attempt to convince you to keep your service. They do not listen to your concerns, instead make you jump through hoops for a cancellation which makes me not want to be one of their customers even more); Individual commenter, FTC–2023–0033–0071 (call to cancel and they repeatedly said ''well let's just see how we can save you money'' instead of canceling); Individual commenter, FTC–2023–0033–0082 (''You have to call them and endure a high pressure pitch to renew . . . . It wastes time and minutes on your phone bill''); Anonymous commenter, FTC–2023–0033–0097 (the only way to cancel a service is to call them on the phone, intended to allow for sales reps to make a pitch); Individual commenter, FTC–2023–0033–0120 (''However, when you attempt to cancel a continuous subscription you are told you cannot do that and you must call the provided phone number. You are connected to a sales person who then will negotiate with you to continue at a lower rate.''); Individual commenter, FTC–2023–0033–0125 (''The only way for me to cancel this service was to CALL THEM DIRECTLY, whereupon they spent nearly half an hour trying to upsell me into a two year subscription.''); Individual commenter, FTC–2023–0033–0130 (''It should not be required to call (and sit on hold forever), only to have to sit through a diatribe of hard-sell techniques to try to convince

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one not to cancel.''); Individual commenter, FTC–2023–0033–0233 (''I had to wait on hold and then get sales pitch after sales pitch after sales pitch to cancel a digital-only [newspaper] subscription that I signed up for online.''); Individual commenter, FTC–2023–0033–0228 (had difficulty canceling a newspaper subscription of all things as it required consumer to call an 800 number during the day and then had to listen to multiple sales pitches and saying ''No! What part of 'no' don't you understand'' to cancel); Individual commenter, FTC–2023–0033–0312 (''I and members of my family have had to use valuable time to call corporations to cancel subscriptions, each time getting a long pitch to keep the subscription. If I wanted to keep it, I would not be calling to cancel it.''); Individual commenter, FTC–2023–0033–0356 (''If it took one click to join, it should take one click to cancel. I am tired of calling some call center, waiting on hold, and then having someone go through a long script about why I should not cancel.''); Individual commenter, FTC–2023–0033–0457 (Forcing me to call a number to unsubscribe, which is only staffed during ''normal business hours,'' unnecessarily complicates the process for the provider's benefit: I don't need to give opportunity to upsell or persuade me to continue at a reduced price.); Individual commenter, FTC–2023–0033–0491 (''Some have even required me to make a phone call and listen to a hard sell before they will cancel the service.''); Individual commenter, FTC–2023–0033–0597 (have to sit and turn down multiple offers to cancel); FTC–2023–0033–0677 (sit and ''suffer through a long sales pitch'' to cancel); Individual commenter, FTC–2023–0033–0784 (''I suggest limiting the seller's efforts to pitch additional offers & modifications when trying to cancel . . . . no one wants to wade through too many of screens until the cancel 'finally' appears.''); Anonymous commenter, FTC–2023–0033–0785 (person being ''penalized by losing time waiting to speak to a customer service rep, having to decline further sales, or being stuck with recurring charges they don't want''); Individual commenter, FTC–2023–0033–0798 (difficult to cancel subscriptions, including by repeatedly forcing the customer to turn down ''special offers'' to entice the customer not to cancel); Individual commenter, FTC–2023–0033–0815 (No reason to have to call customer service reps who will keep trying to prevent me from canceling); Individual commenter, FTC–2023–0033–0835; Individual commenter, FTC–2023–0033–0850 (Have to make a long awkward phone call and wait on hold or long repetitive live chat); Individual commenter, FTC–2023–0033–0913 (''I've experienced having to call to cancel a subscription only to be forced to listen to a sales spiel in order to do so.''); Individual commenter, FTC–2023–0033–0967 (''Some have even required me to make a phone call and listen to a hard sell before they will cancel the service.''); Individual commenter, FTC–2023–0033–0999 (Consumers should have an on-line option to cancel. A national media company ONLY provides a cancel option with a call to customer service. When doing so, you are met with a CS rep that will not accept your request to cancel, talks over you, continued harassment, making offer after offer. We must stop this deceptive practice.); Individual commenter, FTC–2023–0033–1063 (''Now I'm about to cancel my [company name] account. If it's anything like the last time when I moved, I expect to spend several hours dealing with multiple levels of salespeople, trying to convince me to stay.''); Individual commenter, FTC–2023–0033–1099 (Once customer service is contacted, it should not take more than about 90 seconds to cancel a subscription instead of the endless questions of why you want to cancel. Then try to keep you by offering a discounted rate on yet another year of useless service. Please make this end.); Individual commenter, FTC–2023–0033–1138 (The agent, made multiple attempts to sell me the service, disregarding my many direct statements that I just wanted to cancel.); Individual commenter, FTC–2023–0033–1150 (They make you call their company so that sales retention can try to talk you into staying with freebies etc.); Individual commenter, FTC–2023–0033–1153 (There is no reason a person should be subjected to 20 minutes or repeated drilling if they say upfront that they want to cancel service.).

However, other commenters explained some of the ''barriers'' consumers complained about are necessary to prevent harm, at least in certain situations. Specifically, commenters noted consumers might not understand the negative consequences of cancellation,[448] and the provision might prevent consumers from taking advantage of money-saving offers prior to cancellation.[449] Some commenters also expressed confusion regarding whether verification or authentication procedures, or discussion of consumers' attempts to pause or modify their existing offers, would violate the Rule.[450] Finally, commenters noted the proposed provision requiring consumers to opt-in to saves could interfere with the simplicity of a cancellation mechanism.[451]

(2) Analysis

Based on the record, the Commission determines revisions to this proposed provision are necessary, for which the Commission would need to seek additional comment. Therefore, the Commission does not adopt this provision in the final Rule at this time. On one hand, the record demonstrates saves are often used simply as a barrier to prevent cancellations.[452] On the other, the proposed opt-in save provision could have unintended consequences.[453] Specifically, the provision may thwart attempts to confirm consumers' intent or apprise consumers of any negative consequences of cancellation (*e.g.,* losing data). Moreover, the opt-in save provision may prevent consumers from obtaining valuable concessions (*e.g.,* lower prices), which they would otherwise want.

Consequently, the proposed saves provision did not achieve the right balance between protecting consumers from unfair tactics and allowing sellers to provide necessary and valuable information about cancellation. Therefore, the Commission will consider issuing an SNPRM in the future seeking a better solution to this difficult problem.

However, the Commission notes the removal of the saves proposal is not a license to erect unreasonable and unnecessary barriers to cancellation. The final Rule requires sellers to provide a simple, easy to use cancellation mechanism. Save attempts that interfere with this mandate by requiring consumers to navigate through upsells, jump through unreasonable hoops, or wait unreasonable amounts of time to cancel are neither simple nor easy.[454]

7. Proposed § 425.7 Annual Reminders

In the NPRM, the Commission proposed requiring sellers to provide an annual reminder to consumers for non-physical goods sold with a negative option feature. Under this proposal, reminders would have needed to identify the product or service, the frequency and amount of charges, and the means to cancel. Additionally, the proposal required Negative Option Sellers to provide the reminders through the same medium the consumer used to consent to the negative option feature. The Commission opined the delivery of physical goods may remind consumers they enrolled in a negative option feature. Therefore, these consumers effectively already receive reminders and can reasonably avoid further payments by canceling their subscription. For services lacking a regular, tangible presence (*e.g.,* data security monitoring or subscriptions for online services), however, many consumers may reasonably forget they enrolled and, consequently, incur charges for services they do not want or use. Thus, the Commission concluded, the failure to provide reminders for such contracts would meet all elements of unfairness.[455] The Commission sought

[448] NCTA, FTC–2023–0033–0858; PDMI, FTC–2023–0033–0864; Chamber, FTC–2023–0033–0885.

[449] *Id.*

[450] *See, e.g.,* PDMI, FTC–2023–0033–0864; ANA, FTC–2023–0033–1001; CTIA, FTC–2023–0033–0866.

[451] *See, e.g.,* CCIA, FTC–2023–0033–0984. Some commenters also argued the saves provision violates the First Amendment. *E.g.,* PDMI, FTC–2023–0033–0864; Chamber, FTC–2023–0033–0885; ACT App Association, FTC–2023–0033–0874. The Commission rejects this proposition. *See Mainstream Mktg. Servs., Inc.* v. *FTC,* 358 F.3d 1228 (10th Cir. 2004).

[452] *See* nn.447–448.

[453] *See* nn.449–452.

[454] *See, e.g., United States* v. *Adobe, Inc.,* No. 5:24–cv–03630 (N.D. Cal. 2024); *FTC* v. *Amazon.com, Inc.,* No. 2:23–cv–0932 (W.D. Wash. 2023).

[455] NPRM, 88 FR 24729, citing FTC Policy Statement on Unfairness, appended to *In re International Harvester Co.,* 104 F.T.C. 949 (1984). ''To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.'' *Id.; see also* 15 U.S.C. 45(n) (Commission has no authority to declare a practice unfair ''unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not

comment on this proposal, including whether it should narrow the coverage of the proposed language, for example, by types of covered services or the duration between reminders.[456]

(a) Summary of Comments

The Commission received 32 comments in response.[457] Consumers, public interest and consumer advocacy groups, and academics, among others, generally supported the reminder requirement, observing, for example, that ''subscription-based products and services have become so widespread that consumers are having difficulty keeping track of them all.'' [458] The commenters asserted the proposed ''annual notice will clearly inform consumers of the terms of the contract and how they may terminate the agreement.'' [459] Despite this support, virtually every group of commenters—individuals, consumer advocates, trade organizations, and industry groups—suggested the Commission modify or clarify its proposal.

Only three commenters specifically requested the Commission jettison a reminder provision altogether. Specifically, ESA argued the requirement (1) would impose a significant burden on businesses because several State laws already require reminders or notices; (2) would be improper because the Commission did not raise reminders in the ANPR; and (3) would increase the overall number of notices consumers receive, which could result in consumers ignoring reminders, thus benefiting bad actors. NCTA suggested the Commission should instead ''allow businesses flexibility to determine whether to provide reminders.'' [460] IAB also ''recommend[ed] that the Commission remove this requirement for several reasons.'' [461] Both ESA and NCTA conceded, however, the Commission could adopt the provision with additional modifications, such as making the reminders optional (NCTA) or offering consumers the ability to opt-out of subscription reminders (ESA).[462] Other commenters agreed, asking for ''less prescriptive'' requirements that would allow businesses more flexibility.[463]

Several commenters, while not urging the Commission to reject the reminder requirement, suggested the NPRM proposal did not satisfy the unfairness test. For instance, CTA, a technology trade association, questioned whether there was sufficient basis to find a lack of annual reminder is an unfair practice or causes consumer harm.[464] Similarly, two other commenters from the communications industry questioned whether a lack of annual reminder would be unfair in the specific context of services that are ''always on,'' such as cable or wireless services.[465]

A few commenters asked to be exempted from the reminder requirement based on the nature of their industries or the frequency of existing notices.[466] For instance, cable/broadband/wireless/streaming industry groups suggested they should be exempt for the same reasons they argued the unfairness test did not render the lack of reminders illegal in their industries. Similarly, these and other sellers, such as service contract providers, suggested consumers who receive monthly bills are already effectively receiving reminders, and therefore, these transactions should be exempt.[467]

Several commenters questioned the proposed requirement that sellers provide the annual reminder through the same medium the consumer used to consent to the negative option feature.[468] For example, several commenters observed that requiring reminders through a telephone call could violate the TCPA, the TSR, or at minimum, be a nuisance, and thus ignored by consumers.[469] Many of these commenters advocated for letting consumers choose how they want to receive annual reminders,[470] or allowing sellers to provide reminders through any medium they typically use to communicate with consumers.[471]

Additionally, several commenters disagreed with the Commission's observation that agreements involving delivery of physical goods inherently create a ''regular, tangible presence'' that serves as a reminder of the contract.[472] For example, they noted some companies charge a monthly fee, but only deliver physical goods at the consumer's request.

Some commenters stated that, without Federal preemption, the annual reminder requirement would create another layer of regulatory complexity because several State laws already require reminders or notices.[473] In contrast, Professor Hoofnagle stated many ''credit card processing service'' providers likely afford a simple and inexpensive means for sellers to comply with State and Federal mandates ''because policy changes can be made programmatically in dashboards.'' [474]

Several commenters suggested the Commission amend the proposal. For instance, TINA and several individual consumers recommended the Commission require reminders at the end of a free trial period.[475] Others suggested the Commission require more frequent reminders, such as every six

outweighed by countervailing benefits to consumers or to competition'').

[456] NPRM, 88 FR 24729; *see also id.* at section XIII, Request for Comments (''The Commission seeks any suggestions or alternative methods for improving current requirements.'').

[457] The Commission received comments from, *inter alia,* individual consumers; cable/broadband/communications industry groups; public interest and consumer advocacy groups; various trade associations representing traditional and digital marketing, technology, news and magazine media, gaming and entertainment, and retail industries; academic and public policy groups; and service contract and alarm company industries.

[458] State AGs, FTC–2023–00330–0886.

[459] Public Interest Groups, FTC–2023–0033–0880.

[460] NCTA, FTC–2023–0033–0858.

[461] IAB, FTC–2023–0033–1000.

[462] ESA, FTC–2023–0033–0867; NCTA, FTC–2023–0033–0858.

[463] *See, e.g.,* Sirius XM, FTC–2023–0033–0857 (asking Commission not to mandate exactly how renewal notices must be sent); N/MA, FTC–2023–0033–0873 (allow sellers to obtain consent to provide notice through alternate means); Chamber, FTC–2023–0033–0885 (proposed revisions); DCN, FTC–2023–0033–0983 (make annual notice an option company could comply with to provide adequate notice of obligations); ACT App Association, FTC–2023–0033–0874 (adopt a less prescriptive approach so same medium can be used to comply with State and Federal requirements).

[464] CTA, FTC–2023–0033–0997 (no basis to conclude different medium is unfair, or that lack of reminders is unfair).

[465] NCTA, FTC–2023–0033–0858 (lack of notice for ''always on'' services not unfair, injury reasonably avoidable); USTelecom, FTC–2023–0033–0876 (same).

[466] *See, e.g.,* CTIA, FTC–2023–0033–0866 (exempt mobile services offered on a month-to-month basis); USTelecom, FTC–2023–0033–0876 (exempt broadband and communication services). The Commission addresses exemptions elsewhere in the SBP at sections VII.B.1 and VIII.

[467] *See, e.g.,* Chamber, FTC–2023–0033–0885.

[468] Sirius XM, FTC–2023–0033–0857; Kuehn, FTC–2023–0033–0871; N/MA, FTC–2023–0033–0873; Act App Association, FTC–2023–0033–0874; CTA, FTC–2023–0033–0997; Chamber, FTC–2023–0033–0885; ANA, FTC–2023–0033–1001.

[469] Sirius XM, FTC–2023–0033–0857; Kuehn, FTC–2023–0033–0871; N/MA, FTC–2023–0033–0873; Chamber, FTC–2023–0033–0885; SCIC, FTC–2023–0033–0879.

[470] Sirius XM, FTC–2023–0033–0857; Kuehn, FTC–2023–0033–0871; Chamber, FTC–2023–0033–0885; Public Interest Groups, FTC–2023–0033–0880.

[471] State AGs, FTC–2023–0033–0886.

[472] Individual commenter, FTC–2023–0033–0026; TINA, FTC–2023–0033–1139.

[473] NCTA, FTC–2023–0033–0858; ESA, FTC–2023–0033–0867; IAB, FTC–2023–0033–1000; ACT App Association, FTC–2023–0033–0874.

[474] Hoofnagle, FTC–2023–0033–1137.

[475] Individual commenter, FTC–2023–0033–0039 (not reminded ''that the free trial was up''); Individual commenter, FTC–2023–0033–0045 (''consumer should get an email reminder their free period is about to end''); Individual commenter, FTC–2023–0033–0050 (businesses should ''be required to provide advance notice that the free trial is about to expire.''); TINA, FTC–2023–0033–1139; ACT App Association, FTC–2023–0033–0874 (provide less prescriptive process).

months, or before each charge.[476] They noted that under an annual notice requirement, a consumer could be charged up to 12 times before discovering a negative option feature.[477] One commenter asked the Commission to require a reminder for so-called ''zombie'' agreements, ones that have long periods, *e.g.,* 24 months, of inactivity.[478]

In contrast, other commenters noted consumers may suffer from ''notice fatigue'' given the increasing popularity of subscription services.[479] Some argued there is no evidence of tangible consumer benefit from additional notices, and consumers should be given a choice whether to opt-in to receive annual reminders (or more frequent reminders), or to opt-out.[480] Three commenters suggested sending annual reminder notices could increase opportunities for phishing and other deceptive practices.[481]

Finally, several commenters asked the Commission to clarify certain aspects of the reminder requirement. For instance, ANA asked the Commission to explain what constitutes the ''same medium,'' and a group of law professors asked for more detail about what constitutes an adequate telephone reminder.[482] Additionally, some commenters asked the Commission to clarify that sellers can rely on contact information provided by the consumer at the time of consent,[483] or to provide that abiding by State reminder requirements satisfies a seller's obligations under this provision.[484]

(b) Analysis

After reviewing these comments, the Commission determines it needs additional information on the scope and particularities of the proposed annual reminder requirement. The record suggests, given the proliferation of subscription and auto-renewal services, consumers have difficulty tracking all the negative option services and products in which they may be enrolled—so much so that there are now companies claiming to help consumers keep track of these services for a fee. As one commenter noted, consumers should not have to sign up for yet another service to manage all their subscriptions.[485] Thus, limiting the reminder provision to just non-physical goods, and only annually, may not adequately mitigate the harm caused by negative option practices in the marketplace.

Additionally, the Commission shares some commenters' concerns that consumers may ignore these reminder calls. Further, as some commenters noted, the proposed provision does not specify the timing for these reminders (*e.g.,* should sellers issue reminders annually from the date of initial purchase and a specific number of days before the charge?). Accordingly, the Commission will consider issuing a SNPRM seeking additional comment on these issues at a later date.

8. Proposed § 425.8 Relation to State Laws

In its NPRM, the Commission proposed that amendments to the Rule would not affect State laws, regulations, orders, or interpretations relating to negative options, except to the extent they are inconsistent with the final Rule, and then only to the extent of the inconsistency. A State provision would not be ''inconsistent'' with the proposed Rule if it affords any consumer greater protection than the Rule.[486]

The Commission received a range of comments in response. On one end, a commenter opined the ''FTC cannot preempt existing [State] laws,'' so it should instead strive for ''harmonization and consistency with existing laws.'' [487] At the other end, multiple industry groups said the Commission should completely preempt State laws in this area.[488] These commenters argued having both State and Federal standards may confuse consumers and create financial and operational burdens for sellers, thus raising consumer prices. For example, NCTA asserted that, without preemption, the proposed Rule ''would encourage the enactment of new [S]tate laws with differing standards.'' [489] Another industry commenter suggested the Commission should work with lawmakers on one national standard.[490]

Other industry groups and individual businesses supported preemption in various ways. For example, CTA argued the Rule should ''preempt [S]tate laws with differing requirements.'' [491] Two additional commenters, including a mixed group of industry associations, asserted the Rule should set the ceiling and preempt any State provision that is more stringent.[492]

NRF said the Rule should ''preempt any [S]tate law requirements that contradict or are inconsistent with the Rule . . . to the extent of the inconsistency.'' [493] To effectuate this change, NRF suggested the Commission adopt language from California's Automatic Renewal Law, which it said other States have copied. NRF proposed State laws be deemed inconsistent if they require disclosures or actions ''that contradict . . . the [final rule],'' and requirements be deemed contradictory if they use the same terms differently from the final rule or require ''using a term different from the one required in the [final rule] to describe the same item.'' [494]

Several industry groups expressed concern regarding potential confusion about preemption. For example, ACA Connects asserted it ''may be unclear whether and to what extent [a particular State law offers] 'greater' or 'lesser' protection than [the proposed Rule]'' and asked for more guidance generally or for a process that lets interested parties ask the Commission if a

[476] Public Interest Groups, FTC–2023–0033–0880 (''consumers deserve to know when they are about to be charged automatically, with a chance to opt out''); State AGs, FTC–2023–0033–0886; MIA, FTC–2023–0033–1008; Individual commenter, FTC–2023–0033–0026 (notification within one month of renewal, stating specific renewal date); Individual commenter, FTC–2023–0033–0708 (commenting that companies do not provide reminders before being charged, possibly overdrawing an account).

[477] *See, e.g.,* Public Interest Groups, FTC–2023–0033–0880.

[478] Law Professors, FTC–2023–0033–0861.

[479] NCTA, FTC–2023–0033–0858; USTelecom, FTC–2023–0033–0876; CCIA, FTC–2023–0033–0985 (recommending a biannual reminder for longer subscriptions); and Coalition, FTC–2023–0033–0884; *see also* DCN, FTC–2023–0033–0983 (incorrectly states the current proposed rule would require monthly notice for month-to-month renewals).

[480] NCTA, FTC–2023–0033–0858 (opt in); ESA, FTC–2023–0033–0867 (opt out); Chamber, FTC–2023–0033–0885 (opt in); DCN, FTC–2023–0033–0983 (opt out); Public Interest Groups, FTC–2023–0033–0880 (opt out).

[481] NCTA, FTC–2023–0033–0858; ESA, FTC–2023–0033–0867; DCN, FTC–2023–0033–0983.

[482] ANA, FTC–2023–0033–1001 (same medium); Law Professors, FTC–2023–0033–0861 (adequate phone reminder).

[483] Sirius XM, FTC–2023–0033–0857; NFIB, FTC–2023–0033–0789.

[484] ACT App Association, FTC–2023–0033–0874.

[485] State AGs, FTC–2023–0033–0886 (''Subscription management has become an entire industry; consumers can choose from a variety of companies that offer to monitor their recurring subscriptions. We believe that consumers should not have to sign up for yet another service—one that comes with privacy and security risks, as subscription monitoring services require sharing financial account and other sensitive information—in order to effectively manage their subscriptions.'').

[486] *See* proposed § 425.8.

[487] ANA, FTC–2023–0033–1001.

[488] NCTA, FTC–2023–0033–0858; PDMI, FTC–2023–0033–0864; CCIA, FTC–2023–0033–0984; ESA, FTC–2023–0033–0867; IAB, FTC–2023–0033–1000.

[489] NCTA, FTC–2023–0033–0858; *see also* Chamber, FTC–2023–0033–0885 (''A floor just creates an increased [F]ederal burden without actually ensuring consistency of overall regulation on entities in the different [S]tates.'').

[490] IHRSA, FTC–2023–0033–0863 (national standard).

[491] CTA, FTC–2023–0033–0997; *see also* Sirius XM, FTC–2023–0033–0857; DCN, FTC–2023–0033–0983.

[492] Coalition, FTC–2023–0033–0884; CCIA, FTC–2023–0033–0984.

[493] NRF, FTC–2023–0033–1005.

[494] *Id.*

particular State law is inconsistent.[495] NRF noted such a system has worked well with gift card laws, explaining the CARD Act (Pub. L. 111–24, 124 Stat. 2385) preempts less restrictive State laws.[496]

Finally, a group of law professors supported the Commission's proposed Rule. They noted ''more than half of [S]tates . . . regulate some negative option marketing practices,'' and said the Commission ''does not occupy the field or displace non-conflicting [S]tate [laws].'' [497] The professors added States ''can often move more nimbly to address problematic elements and evolving business models'' and should retain the ability to do so.[498]

Having considered the foregoing comments, the Commission will streamline the text of the final Rule for clarity and efficiency, while maintaining the substance of the proposed Rule's proposed preemption language (renumbered in the final Rule as § 425.7). The FTC Act does not expressly preempt State law, and the legislative history of the FTC Act indicates Congress did not intend the FTC to occupy the consumer protection regulation field.[499] Therefore, any preemptive effect of the Rule must be limited to instances where it is not possible to comply with both State law and the Rule, or where application of State law would frustrate the purposes of the Rule.[500] This approach preserves States' ability to continue to act as laboratories to handle new and changing business models. This approach is consistent with other Commission Rules.[501]

Therefore, § 425.7 of the final Rule specifies the Rule does not supersede, alter, or affect State statutes, regulations, orders, or interpretations relating to negative option marketing, except to the extent a State statute, regulation, order, or interpretation is inconsistent with the Rule. The final language also continues to make clear State requirements are not inconsistent with the Rule to the extent they afford greater protection to any consumer. The manners in which a State law may provide greater protection are many. For example, a State law that requires sellers to remind consumers at the end of a free trial that they are about to be billed would provide greater protection to consumers and not be inconsistent with the Rule.

VIII. Modifications, Alternatives Considered

A. New Provisions in Final Rule for Clarification

1. New § 425.8 Exemptions

The NPRM sought comment on whether the Rule should exempt any entities or activities that are otherwise subject to the Commission's authority under the FTC Act.[502] Several commenters requested Rule exemption for their business or industry.[503] These commenters made various arguments based on the law and facts in their particular circumstances. For example, some argued existing State licensing and other requirements that already apply to their activities adequately address the problems identified in the NPRM and additional rules would only interfere with the existing regulatory structure. Because such decisions are highly fact dependent, the Commission must consider exemptions, even of larger groups, on an individualized basis pursuant to the FTC's Rules of Practice.[504] Pursuant to these rules, interested persons may file petitions for exemption with relevant evidence and data. If the Commission deems the petition sufficient to warrant further consideration, it will follow the procedures outlined in § 1.31 of its rules.

The Commission adopts a new section, § 425.8. Pursuant to this provision, and consistent with the Commission's Rules of Practice, sellers and other covered persons may seek full or partial exemptions if they can demonstrate application of the Rule's requirements to a particular product or service, or class of product or service, is not necessary to prevent the acts or practices to which the Rule relates.

2. New § 425.9 Severability

One commenter, NFIB, asked the Commission to address severability in the Rule.[505] Specifically, NFIB proposed a provision stating if a court finds any part of the Rule to be invalid, then the remainder of the Rule remains in force. The Commission agrees with this proposal. It is the Commission's intent that the provisions of the final Rule are separate and severable from one another; therefore, if any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect. Thus, the final Rule includes this language in a new section, § 425.9.[506]

B. Notice of Material Changes

In the NPRM, the Commission sought comment on whether and how sellers should notify consumers when they make material changes to contracts with a negative option.[507] As discussed in the NPRM, several commenters responding to the ANPR recommended the Commission require sellers to send consumers notices of such changes. TINA, for example, asserted the Commission should require such notice and provide consumers an opportunity to cancel before the terms become effective.[508] Several States require similar notices.[509] The Commission, however, did not require notice of material changes in the proposed Rule. As it explained at the time, whether a seller's failure to provide such notice is unfair or deceptive is a highly fact-specific inquiry that must be determined on a case-by-case basis. Given the importance of the issue, however, the Commission requested further comment.

1. Summary of Comments

Five commenters responded.[510] TINA reiterated sellers should provide

[495] ACA, FTC–2023–0033–0881 (greater or lesser); NRF, FTC–2023–0033–1005 (more guidance); DCN, FTC–2023–0033–0983 (more guidance).

[496] NRF, FTC–2023–0033–1005.

[497] Law Professors, FTC–2023–0033–0861.

[498] *Id.*

[499] *See, e.g., Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 989 (D.C. Cir. 1985).

[500] Preemption would occur where there is an actual conflict between the two schemes of regulation such that both cannot stand in the same area. *Fla. Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 141 (1963); *see also Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957 (D.C. Cir. 1985) (Credit Practices Rule); *Harry & Bryant Co.* v. *FTC,* 726 F.2d 993 (4th Cir. 1984) (Funeral Rule); *Am. Optometric Ass'n* v. *FTC,* 626 F.2d 896 (D.C. Cir. 1980) (Ophthalmic Practices Rule).

[501] *See, e.g.,* 16 CFR 437.9(b) (Business Opportunity Rule); *id.* 435.3(b) (Merchandise Rule); *id.* 436.10 (Franchise Rule); *id.* 429.2 (Cooling-Off Rule).

[502] *See, e.g.,* NPRM, 88 FR 24730.

[503] Categories of products and services for which commenters sought exemptions include: alarm companies (FTC–2023–0033–0860; FTC–2023–0033–1001); wireless carriers (FTC–2023–0033–0866); telecommunication providers (FTC–2023–0033–0876; FTC–2023–0033–0881); service contracts (FTC–2023–0033–0877; FTC–2023–0033–0879; FTC–2023–0033–0882; FTC–2023–0033–0996; FTC–2023–0033–1136; FTC–2023–0033–1143); insurance agreements, service contracts on consumer goods, and cancellable month-to-month agreements (FTC–2023–0033–0878); and retail energy service (FTC–2023–0033–1151). Some of these and others sought to exclude B2B agreements. *See* section VII.B.1.c.

[504] *See* 16 CFR 1.25, 1.31; *see also* 86 FR 59851 (Oct. 29, 2021) (amending Commission procedures and rules on the petition exemption process).

[505] NFIB, FTC–2023–0033–0789.

[506] This provision is comparable to the severability provision in other Commission Rules. *See* 16 CFR 437.10 (Business Opportunity Rule); 16 CFR 455.7 (Used Motor Vehicle Rule); 16 CFR 436.11 (Franchising Rule); 16 CFR 453.8 (Funeral Industry Rule); 16 CFR 310.9 (TSR).

[507] NPRM, 88 FR 24730.

[508] NPRM, 88 FR 24724.

[509] Those States include Virginia, California, and Oregon. NPRM, 88 FR 24724.

[510] ESA, FTC–2023–0033–0867; USTelecom, FTC–2023–0033–0876; ACA, FTC–2023–0033–0881; IAB, FTC–2023–0033–1000; and TINA, FTC–2023–0033–1139.

consumers with notice of material changes to subscription terms.[511] Further, it asserted the Commission's reasoning is at odds with State laws and the Commission's longstanding position on material terms, *i.e.,* that they be ''clearly and conspicuously disclosed when relevant to the marketing being presented.'' [512] TINA further argued allowing businesses to ''hide'' material changes to these contracts is likely to cause injury because consumers ''do not read these contracts (let alone monitor them for changes) and a significant minority of consumers are not even aware they are bound by these subscription contracts.'' [513]

In contrast, ESA, USTelecom, ACA, and IAB supported the Commission's proposal. IAB and ESA said it is ''industry practice for subscription-based services and products to have regular price increases over time,'' and consumers expect it.[514] USTelecom agreed with the Commission's rationale that ''whether such a practice is unfair or deceptive depends heavily on the facts presented in each case.'' [515] ACA, a telecommunications trade association, noted the FCC and States already have notice requirements for contract term changes.[516]

2. Analysis

Based on the record, the Commission does not require notice of material changes to contract conditions in the final Rule. The final Rule requires the seller disclose important information prior to charging the consumer. Such information includes all material terms, including, *e.g.,* the range of costs the consumer will be charged and the frequency of charges that will incur unless the consumer takes timely steps to prevent or stop them. The seller's failure to disclose such information upfront, clearly and conspicuously, violates the Rule.

Moreover, State laws have different predicate requirements (*e.g.,* less robust initial disclosures) and, importantly, are often based on different legal authority. Additionally, the Commission's final Rule does not conflict with its longstanding advice on clear upfront disclosure. The final Rule requires just such disclosure, § 425.4; and the Commission has never required after sale disclosure based on its section 5 authority.

Finally, as the Commission explained in the NPRM, whether a seller's failure to notify a consumer of material changes is unfair or deceptive could be heavily dependent on the particular facts and circumstances, such as the seller's upfront marketing claims. For example, based on a clear upfront agreement to allow periodic price increases, consumers may understand that firms can make small price increases over long periods of time. On the other hand, significant unilateral changes to the terms of the agreement, such as huge prices increases over short periods of time would probably be inconsistent with reasonable consumer expectation, and therefore, deceptive or unfair. Because the determination of whether a practice runs afoul of section 5 in this context is highly fact dependent, the Commission declines to address it at this time. Nevertheless, the Commission will continue to monitor the need for such a requirement and will continue to bring enforcement actions when appropriate.

C. Consumer Education

The Commission solicited comments on alternative approaches such as additional consumer and business education, and received two comments in response.[517] The Commission plans to continue its efforts to provide information to help consumers with their purchasing decisions and avoid ensnarement in unwanted recurring payment programs. However, consumer education is not a substitute for improving existing regulatory provisions. Consumer education is likely to have a limited benefit where sellers lure consumers into an agreement without consumers' knowledge, particularly with the use of dark patterns.

D. Implementation Date

Several industry groups and one individual commenter asked the Commission to delay the final Rule's effective date. Three commenters sought a delay of at least 12 months or up to 18 months, citing generalized concerns that changes can take time ''given the complexities'' of the proposed Rule.[518] The Chamber asked for a two-year period ''depending on the scope and specific requirements of the final rule.'' [519] By contrast, consumers generally encouraged the Commission to enact the Rule without delay.[520]

None of the commenters identified a precise period it would take to comply with a specific provision or otherwise detailed what would necessitate a particular length of time.[521] They did, however, detail the general actions they would need to take. For example, NCTA explained, ''this proposal would require companies to change and update their customer processes and user interfaces to provide the mandated notices, obtain additional consent, and implement cancellation mechanisms,'' as well as troubleshoot those changes in a careful way to avoid ''glitches and issues that would affect service and frustrate and harm consumers.'' [522]

The Commission recognizes changes to processes and disclosures typically require some time to address and has regularly provided a grace period for implementation of its rules.[523] Small businesses in particular may require time to ensure their modified processes conform to the Rule. To address these concerns, the final Rule provides 180 days from the date the final Rule is published to come into full compliance. However, sellers must comply with § 425.3 60 days after publication of the Rule, consistent with 5 U.S.C. 801(a)(3). This section prohibits misrepresentations in connection with a negative option feature. Existing law already requires sellers not to make misrepresentations. Therefore, this provision should not impose an added time or cost burden on businesses operating lawfully.[524]

The Commission recognizes the remainder of the final Rule may require some businesses to implement or modify systems, software, or procedures. As detailed in the NPRM, however, the existing legal landscape already includes a patchwork of relevant Federal laws and regulations in

[511] TINA, FTC–2023–0033–1139.

[512] *Id.*

[513] *Id.*

[514] IAB, FTC–2023–0033–1000; ESA, FTC–2023–0033–0867.

[515] USTelecom, FTC–2023–0033–0876.

[516] ACA, FTC–2023–0033–0881.

[517] *See* NPRM. 88 FR 24730; NFIB, FTC–2023–0033–0789 (requesting a business education enforcement provision); Hoofnagle, FTC–2023–0033–1137 (consumer and business education probably uneconomical intervention).

[518] IAB, FTC–2023–0033–1000 (at least 12 months); ESA, FTC–2023–0033–0867 (12–18 months); Kuehn, FTC–2023–0033–0871 (12–18 months).

[519] Chamber, FTC–2023–0033–0885.

[520] Individual commenter, FTC–2023–0033–0257; Individual commenter, FTC–2023–0033–0685.

[521] ACA, FTC–2023–0033–0881; SCIC, FTC–2023–0033–0879 (noting many States require service contract forms be filed with State regulators for approval); ANA, FTC–2023–0033–1001; NCTA, FTC–2023–0033–0858.

[522] NCTA, FTC–2023–0033–0858.

[523] *E.g.,* 38 FR 33766 (Dec. 7, 1973) (original Negative Option Rule, 6-month grace period); 60 FR 43842 (Aug. 23, 1995) (TSR. 4-month grace period); 89 FR 26767 (Apr. 16, 2024) (TSR amendment, 180-day grace period); 79 FR 55615 (Sept. 17, 2014) (Merchandise Rule amendments, 3-month grace period).

[524] Similarly, the various procedural sections of the Rule, *e.g.,* § 425.1 (Scope), § 425.2 (Definitions); § 425.7 (Relation to State Laws), § 425.8 (Exemptions), and § 425.9 (Severability) are also operative 60 days after publication.

addition to State laws to address sellers' negative option practices.[525] The Commission has also issued guidance to businesses on the basic requirements that negative option marketers must follow to avoid deception.[526] Compliance with these statutes and regulations should mean sellers have a significant head start on their compliance efforts.

Moreover, the Commission has streamlined the final Rule, significantly reducing the compliance burdens. Specifically, for reasons detailed in section VII, above, the final Rule omits or modifies proposed requirements that gave some commenters particular concern. Most notably, the Commission omitted the entire annual reminder and saves requirements. As commenters pointed out, these two sections imposed the greatest compliance burdens on sellers.[527] Their removal, therefore, should substantially reduce the time and expense needed to ensure processes comply.

Similarly, other modifications should clarify and streamline requirements, making compliance easier. For example, the final Rule eliminates certain recordkeeping requirements.[528] Additionally, the final Rule narrows the required disclosures.[529] These changes combined with existing law obviate the need for a lengthy grace period.

E. Anti-Abuse Provision

The Law Professors suggested the Commission include an ''anti-abuse'' provision to provide a mechanism for enforcement against sellers' attempts to evade the Rule.[530] Such a provision would make it an ''unfair or deceptive act or practice'' for a seller to, for example, set up a facially complicated sign-up process to allow for a similarly complicated cancellation process, but in practice to simplify the sign-up process to maximize enrollment.[531] As the Law Professors acknowledge, such attempts to evade the Rule already violate the Rule, and the record does not suggest a need for such an additional anti-abuse provision.

[525] NPRM, 88 FR 24716–18.

[526] *See* EPS, 86 FR 60822; Staff Report, *https://www.ftc.gov/sites/default/files/documents/reports/negative-options-federal-tradecommission-workshop-analyzing-negative-optionmarketing-report-staff/p064202negativeoptionreport.pdf* {last visited on Aug. 26, 2024}.

[527] *See* sections VII.B.6 (saves) and VII.B.7 (reminders).

[528] *See* § 425.5(a)(4).

[529] *See* § 425.4.

[530] Law Professors, FTC–2023–0033–0861.

[531] *Id.*

IX. Congressional Review Act

Pursuant to the Congressional Review Act, 5 U.S.C. 801 *et seq.,* we anticipate the Office of Information and Regulatory Affairs will designate the final Rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

X. Final Regulatory Analysis

Under section 22(a) of the FTC Act, 15 U.S.C. 57b–3(a), the Commission must issue a preliminary regulatory analysis for a proceeding to amend a rule if the Commission: (1) estimates that the amendment will have an annual effect on the national economy of $100 million or more; (2) estimates that the amendment will cause a substantial change in the cost or price of certain categories of goods or services; or (3) otherwise determines that the amendment will have a significant effect upon covered entities or upon consumers. Although the Commission preliminarily determined the proposed amendments to the Rule would not have such effects on the national economy; on the cost of goods and services offered for sale by mail, telephone, or over the internet; or on covered parties or consumers, several commenters raised concerns with the Commission's preliminary determination. Ultimately, the presiding officer determined, after receiving additional comments from interested stakeholders, the proposed amendments would have such effect.[532] In accordance with section 22, the Commission therefore issues its final regulatory analysis below.

A. Introduction

Under section 22 of the FTC Act, 15 U.S.C. 57b–3, the final regulatory analysis must contain (1) a concise statement of the need for, and objectives of, the final rule; (2) a description of any alternatives to the final rule which were considered by the Commission; (3) an analysis of the projected benefits, any adverse economic effects, and any other effects of the final rule; (4) an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and (5) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.

[532] Recommended Decision by Presiding Officer, *https://www.regulations.gov/comment/FTC-2024-0001-0042.*

The Commission received comments from trade associations regarding the preliminary regulatory analysis in the NPRM, and three presented testimony and expert reports at the informal hearing. Comments and testimony, including reports submitted by experts, were largely conclusory in nature.[533] The general theme of the comments and testimony, however, was that the compliance costs would be higher than those estimated in the NPRM's preliminary analysis, and the Commission herewith presents revised estimates of those compliance costs.

B. Regulatory Analysis

1. Concise statement of the need for, and the objectives of, the final Rule.

As discussed previously, the objective of the proposed amendments is to curb deceptive or unfair negative option practices . The legal basis for the proposed amendments is section 18(a)(1)(B) of the FTC Act, which provides the Commission with authority to issue ''rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.'' [534]

As described in this SBP, the amendments address unfair or deceptive negative option practices. The FTC, other Federal agencies, and State attorneys general have brought multiple administrative and judicial actions to stop and remedy harmful negative option practices. The record demonstrates, however, that existing legal authorities fall short because they leave consumers unprotected from certain practices and constrain the relief the Commission may obtain for law violations to redress consumers and deter future unlawful activity. In the ANPR and NPRM, the Commission explained it receives thousands of consumer complaints a year related to negative option marketing.

As discussed above in sections III–VII, the final Rule clarifies existing requirements regarding negative option marketing currently dispersed in other rules and statutes administered by the FTC and provides a consistent legal framework across media and offers. It also consolidates all requirements, such as those in the TSR and ROSCA, specifically applicable to negative

[533] Where specific components of the Rule, as anticipated when the NPRM was published, were discussed, commenters combined them, such that the concerns expressed cannot readily be separated to reflect what remains in the final Rule. For example, NCTA claims that ''(t)he rigid 'Click-to-Cancel' requirements and limits on 'saves' will harm consumers,'' but addresses these harms only in combined and qualitative ways. FTC–2023–0073–0008.

[534] 15 U.S.C. 57a(a)(1)(B).

option marketing. The final Rule also provides clarity about how to avoid deceptive negative option disclosures and procedures. For example, ROSCA lacks specificity about cancellation procedures and the placement, content, and timing of cancellation-related disclosures. The final Rule now provides clear standards for sellers about, *inter alia,* the content and timing of important information disclosures and what constitute ''simple mechanisms'' for the consumer to stop recurring charges. Further, the Rule allows the Commission to seek civil penalties and consumer redress under section 19(a)(1) of the FTC Act in contexts where such remedies are currently unavailable, such as deceptive or unfair practices involving negative options in print materials and face-to-face transactions (*i.e.,* in media not covered by ROSCA or the TSR).

2. A description of any alternatives to the final Rule which the Commission considered.

In formulating the final Rule, the Commission makes every effort to avoid imposing unduly burdensome requirements on sellers. To that end, the Commission avoids, where possible, proposing specific, prescriptive requirements that could stifle marketing innovation or otherwise limit seller options in using new technologies. In the NPRM, the Commission sought comments on several alternatives, including provisions related to consent requirements (additional consent for free trials) and reminder requirements (narrowing the scope of product types requiring reminders). The Commission also sought comments on how it could modify the proposed amendments to reduce costs or burdens for small entities. In response to the comments, and as discussed in the section-by-section analysis, the Commission determines not to finalize the proposed Rule in its entirety. Instead, the Commission finalizes a Rule that limits the material terms to be disclosed immediately adjacent to consent for the negative option feature; removes the limitation on saves and the accompanying recordkeeping requirement; removes the annual reminder provision; and modifies the length of the recordkeeping requirement for verification of consent to three years and provides an alternative method of compliance.

One alternative to the final Rule would be to terminate the rulemaking and rely instead on the existing legal framework to combat unfair or deceptive negative option practices. Another alternative would be to limit the scope of the final Rule to just those negative option plans that are marketed in person or through the mail and therefore, currently, are covered only by section 5 of the FTC Act and not by ROSCA or the TSR. However, failing to proceed in accordance with the final Rule would substantially reduce or eliminate the benefits of the Rule, including clarifying the requirements currently spread throughout statutes and regulations and covering negative options in media not subject to the TSR or ROSCA.

Given that the Commission expects the unquantified benefits and unquantified costs of the final Rule to be small, and that there is considerable scope for the net benefits to remain positive and large even if compliance costs have been substantially underestimated, this regulatory analysis indicates that adoption of the Rule will result in benefits to the public that outweigh the costs.

3. An analysis of the projected benefits and any adverse economic effects and any other effects of the final Rule.

(a) Summary of Benefits and Costs

The primary consumer benefits of the final Rule, relative to the existing regulatory baseline,[535] come in the form of faster cancellations when consumers wish to cancel subscriptions.[536]

The final Rule requires negative option sellers to provide cancellation mechanisms that are at least as easy to use as the mechanisms by which consumers consent to negative option plans. For negative option sales made online or over the telephone, ''at least as easy to use'' requires that the cancellation mechanism operate in the same medium and take no more time or effort than the consumer used when enrolling in the negative option plan. For negative option sales that are made in-person or through the mail, the final Rule requires that, in addition to offering cancellation through the specific method used for enrollment, the seller must also offer at least one alternate cancellation mechanism that can be used remotely, *e.g.,* cancellation via a website, email, or a toll-free telephone number and, again, that the consumer can cancel the negative option contract at least as quickly as he or she completed enrollment in the negative option plan.

In the following analysis, the Commission describes the anticipated effects of the final Rule. Where possible, it quantifies the benefits and costs. If a benefit or cost is quantified, it indicates the sources of the data relied upon. If an assumption is needed, the text makes clear which quantities are being assumed. The Commission measures the benefits and costs of the Rule against the existing regulatory baseline that consists primarily of ROSCA, the TSR, and section 5 enforcement.[537]

[535] As explained in section III of the SBP, several other statutes and regulations address harmful negative option practices. Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, has traditionally served as the Commission's primary mechanism for addressing deceptive negative option claims. ROSCA, the TSR, 1the Unordered Merchandise Statute, and EFTA all address various aspects of negative option marketing.

[536] The final Rule also requires that specific disclosures relating to negative option features be provided separately to consumers before consent is obtained, whereas the existing regulatory framework requires that all material terms of a negative option contract be disclosed in a clear and conspicuous manner. The new disclosure requirements will aid consumers in understanding both that they are entering a negative option contract and the terms and conditions of that contract, especially how they can cancel the contract and when such cancellation must occur to avoid future charges. No consumer testing of the final Rule's disclosure requirements, relative to a ''control'' of ''clear and conspicuous'' disclosure requirements under the existing regulatory baseline, has been done. Accordingly, it is not possible to quantify any incremental consumer comprehension of a negative option plan at the time a consumer provides consent to that plan that may result from the final Rule's disclosure requirements. Moreover, some academic studies claim that ''[n]ot only do consumers have a tendency to forget, but also a tendency to forget that they forget,'' suggesting that any gain in comprehension of the negative option features of an agreement that might be measured under consumer testing might not be durable. *See* Sophia Wang, ''One Size Does Not Fit All: The Shortcomings of Current Negative Option Legislation,'' 26 Cornell J. of L. & Pub. Policy, 197, 212 n.135 (2016) citing Keith M. Marzilli Ericson, ''Forgetting We Forget: Overconfidence and Memory,'' 9 J. Eur. Econ. Assoc. 43 (2011). Additionally, if the disclosures required by the final Rule come to be viewed as ''boilerplate'' language that consumers rush through, or consumers consider those disclosures to be less salient than other aspects of the transaction, such as acquiring a free trial of a product or service, the final Rule's disclosures may not offer any incremental benefit over existing ''clear and conspicuous'' because ''people have limited attentional resources and will overlook non-salient features of any transaction.'' *See* Tess Wilkinson-Ryan, ''A Psychological Account of Consent to Fine Print,'' 99 Iowa L. Rev. 1745 (2014). Concerns such as these are consistent with some consumer advocacy groups seeking amendments that would require a second round of consent to be obtained at the end of a free trial and before any recurring charges could be initiated in addition to routine reminders of recurring charges. *See, e.g.,* TINA, FTC–2019–0082–0014 (seeking amendments to require notice and re-affirmance of consumer consent, prior to being charged because consumers may forget about the trial and incur unwanted charges or enrollments at the end of the offer, particularly with long trial periods).

[537] The Unordered Merchandise Statute and EFTA also address various aspects of negative option marketing, but violations of those laws in relation to negative option marketing are typically pleaded in conjunction with violations of other laws; without loss of generality, the regulatory analysis expressly considers only ROSCA, the TSR, and section 5 as the regulatory baseline against which incremental benefits and costs from the final Rule are measured.

First, the likely per-cancellation benefits of the final Rule in relation to four scenarios under the existing regulatory baseline are considered. Next, the number of transactions relevant to each scenario are estimated. The product of average benefits-per-cancellation in each scenario multiplied by the likely number of consumer cancellation transactions for each scenario, summed across all scenarios, provides an estimate of the aggregate, quantifiable, consumer benefits produced by marketers' compliance with the final Rule's cancellation requirements. Quantifiable costs primarily reflect the resources spent by businesses to review the Rule and to take any preemptive or remedial steps to comply with its provisions, including, when and as needed, making changes to the manner they receive and process cancellation requests from consumers.

The Commission estimates the present discounted value of quantified benefits over ten years, using a 2 percent discount rate, will range between $6.1 and $49.3 billion. Annualized over 10 years, the Commission estimates the quantified benefits will range between $682.8 million and $5.5 billion per year. The Commission estimates the present discounted value of quantified costs over ten years, using a 2 percent discount rate, will range between $100.9 and $826.2 million. Annualized over ten years, the Commission estimates the quantified costs will range between $11.2 and $92.0 million per year. These estimates are presented in Table 1 below.

TABLE 1—SUMMARY OF TOTAL QUANTIFIED BENEFITS AND COSTS

[In millions, 2023 dollars]

	Low	High
Present Discounted Value over 10 years, 2% discount rate		
Benefits	$6,133.57	$49,315.39
Costs	100.89	826.15
Net Benefits	*5,307.43*	*49,214.50*
Annualized over 10 years, 2% discount rate		
Benefits	682.83	5,490.11
Costs	11.23	91.97
Net Benefits	*590.86*	*5,478.88*

(b) Benefits of the Final Rule

This section describes the beneficial impacts of the Rule, provides quantitative estimates where possible, and describes benefits that are only assessed qualitatively.

The quantifiable estimates reflect benefits stemming from the decreased amount of time and effort consumers will need to expend cancelling subscriptions, and in contexts where data are available, welfare gains from avoided expenditure for unwanted subscriptions, under the final Rule relative to marketers' compliance with the existing regulatory baseline. This section first estimates per-consumer savings from cancellation mechanisms that would become at least as easy to use as the mechanisms through which consent to the negative option transactions was given and then estimates the number of cancellation transactions to which those benefits apply.

In addition to these quantified benefits, there are several benefits we do not quantify. First, marketers' compliance with the final Rule is likely to improve consumer confidence in using subscriptions [538] and increase the number of consumers who are willing to subscribe and obtain the convenience, and often cost savings, that subscriptions can provide. Second, research in economics and psychology finds the perceived monetary and psychological costs from switching products or services can lead consumers to make sub-optimal decisions. The final Rule, by reducing these costs through simpler cancellation methods, may improve consumer decision-making by reducing enrollments in subscriptions that consumers do not value and increasing enrollments in subscriptions that they do value.[539]

Marketers' compliance with the final Rule, and the consumer confidence that compliance inspires, may also ''exert additional competitive pressures on businesses who offer subscription contracts (and) could increase productivity in the sector.'' [540]

Compliance with the final Rule may also result in some allocative effects when consumers can cancel online instead of by telephone. In such cases, consumers will be able to cancel subscriptions at times of the day that may be more convenient to them than the hours that subscription sellers staff their telephone lines and from devices that they find more convenient to use than telephones.[541]

[538] One survey found that consumers without subscriptions were much more pessimistic about the ability to cancel subscriptions than were consumers who had subscriptions. *See* Jabil, ''Connected Packaging Perceptions and Attitudes: A Consumer Insights Survey'' (July 2021), *https://www.jabil.com/dam/jcr:ecdb74e6-c34f-4c30-aa34-c10269617db6/2021-connected-packaging-survey.pdf#page=3.* Another recent study finds that consumers are aware that they may be inattentive in future and not cancel subscriptions that they no longer desire, and so are less likely to sign up for negative-option subscriptions. *See* Klaus Miller, *et al.,* ''Sophisticated Consumers with Inertia: Long-Term Implications from a Large-Scale Field Experiment'' (2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4065098.*

[539] A large literature in economics has documented that consumers face switching costs and/or psychological biases towards inertia. *See, e.g.,* Brigitte Madrian & Dennis Shea, ''The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior,'' 116 Quarterly J. of Econ. 1149 (2001); William Samuelson and Richard Zeckhauser, ''Status Quo Bias in Decision Making,'' 1 J. of Risk & Uncertainty 7 (1988). Research has found that many consumers do not cancel subscriptions due to such inertia effects. *See, e.g.,* Miller, *et al.* (2023); Liran Einav, *et al.,* ''Selling Subscriptions'' (2023), *https://harris.uchicago.edu/sites/default/files/mahoney_ppe_seminar_paper_9-26-23_0.pdf.*

[540] *See* U.K. Department for Business and Trade, ''Impact Assessment—Digital Markets, Competition and Consumers Bill: Subscription Measures,'' at 3 (Apr. 20, 2023), *https://publications.parliament.uk/pa/bills/cbill/58-03/0294/ImpactAssessment Annex2.pdf.*

[541] In some instances, an online cancellation completed at, say, 11:59 p.m., compared to a counterfactual in which a call center closed at, say, 8 p.m., could result in sparing a consumer from a recurring charge that would take effect the next day, and such instances would result in actual monetary

Continued

Finally, the Commission's estimates of quantified benefits are based on reductions in time and effort from cancelling subscriptions to non-business consumers. The Commission expects small businesses may also benefit in similar ways from less costly cancellations, but it does not quantify such benefits due to lack of data on business cancellation transactions.

The following subsections then estimate the quantified benefits from reductions in time and effort from cancelling subscriptions. First, in subsection (1), the Commission estimates the per-cancellation benefit relative to the regulatory baseline for (i) online cancellation when only ROSCA-compliant telephonic cancellation was available, (ii) simpler online cancellation when only ROSCA-compliant online cancellation was available, (iii) simpler telephone cancellation when only TSR-compliant cancellation was available, and (iv) online or telephone cancellation when only in-person or mail cancellation was available. The Commission then estimates the number of cancellation transactions in subsection (2), and finally calculates benefits as the per-cancellation benefit in each scenario multiplied by the number of affected transactions in subsection (3).

(1) Estimating Per-Cancellation Benefits

For each of the four scenarios below, the Commission estimates a range of benefits that a consumer will gain each time they cancel a negative option subscription. In these scenarios, the Commission assumes a final Rule-compliant online cancellation should take no more than 30 seconds to one minute, based on the Commission's experience that the average time for consumers to read required disclosures and provide consent to a negative option plan online is 30 seconds to one minute. For telephone cancellations under the final Rule, the Commission assumes that a rule-compliant cancellation should take no more than one to two minutes, based on the assumption it takes a telemarketer twice as long to read required disclosures to a consumer as it would take a consumer to read such disclosures to his or herself online.

(a) Estimated Per-Cancellation Benefit Relative to ROSCA-Compliant Telephonic Cancellation

For consumers enrolling in negative option plans online, the existing regulatory baseline, ROSCA, requires marketers to provide ''simple'' cancellation mechanisms. A facially ROSCA-compliant, ''simple'' telephonic cancellation may, nonetheless, require more time and effort from consumers than was expended when enrolling in the negative option plan. Online subscription sellers' compliance with the final Rule will save consumers that extra measure of time and effort.

To estimate the average time savings to consumers of a final Rule-compliant ''click-to-cancel'' mechanism compared to a ROSCA-compliant simple telephonic cancellation, this analysis first assumes that ROSCA-compliant simple telephonic cancellations take no more time than the ''average handle time'' for all customer service requests made to call centers, which an industry source indicates is six minutes and three seconds.[542] As discussed at the beginning of this subsection, the Commission assumes a final Rule-compliant cancellation should take no more than 30 seconds to one minute, saving consumers between five minutes and three seconds and five minutes and 33 seconds per cancellation relative to a simple telephonic cancellation.

The Commission then assumes consumers, on average, value their non-work time at 82% of the mean hourly wage of $31.48, or $25.81 (*i.e.,* .82 × $31.48) per hour.[543] Accordingly, the Commission estimates the faster online cancellations the final Rule will provide, relative to ROSCA-compliant telephonic cancellations, will be valued at between $2.17 (*i.e.,* 5:03 minutes × $25.81/hour) and $2.39 (*i.e.,* 5:33 minutes × $25.81/hour).

(b) Estimated Per-Cancellation Benefit Relative to ROSCA-Compliant Online Cancellation

For online cancellations of online-entered subscriptions, the Commission lacks a source of average cancellation times presumed to be ROSCA-compliant that is as comprehensive as that used for the average handle times of call centers. The Commission relies, instead, on an experiment that involved signing up for 16 online subscriptions between August 2 to October 4, 2022, then canceling each one, and recording the time it took to cancel, as well as the variety of other obstacles faced in canceling.[544] To estimate the average time for online cancellations, the Commission subtracts the time incurred in canceling the three subscriptions that required telephonic cancellation from the aggregate time reported to cancel all 16 subscriptions. This yields an average of two minutes and 4 seconds per online cancellation.[545]

Based on the Commission staff's experience, the average time needed to read the required disclosures and provide consent to a negative option feature is 30 seconds to one minute. An online cancellation that took no longer than the provision of online consent would therefore save the consumer between one minute and four seconds and one minute and 34 seconds. Valuing consumers' time at $25.81 per

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savings to consumers, but we are unable to estimate the frequency of such occurrences or the monetary savings they would engender.

[542] *See* Michelle Hawley and Shane O'Neill, ''21 Important Call Center Statistics to Know About,'' (Apr. 3, 2024), *https://www.cmswire.com/contact-center/16-important-call-center-statistics-to-know-about.* We use this proxy for the time a ROSCA-compliant telephonic cancellation takes only for the express purpose of estimating the incremental benefits to consumers of a final Rule-compliant cancellation replacing a ROSCA-compliant telephonic cancellation. ''Average handle time'' has not been used as a standard for ROSCA enforcement and is not intended to set a standard here.

[543] The Commission uses a mean hourly wage rate of $31.48; *see* Bureau of Labor Statistics, ''May 2023 National Occupational and Wage Estimates, Unites States,'' *https://www.bls.gov/oes/current/oes_nat.htm.* A meta-analysis of studies on how consumers value time used in traveling (an area in which ''a huge literature has arisen'') has determined that consumers value time used in that matter at 82% of their wage rate. *See* Daniel S. Hamermesh, ''What's to Know About Time Use?,'' 30 J. Econ. Surv. 1, 198–203 (2015). The Commission assumes for the purpose of the final Rule consumers value transaction costs savings in the same way that they value travel time.

[544] *See* Caroline Sinders, ''How Companies Make It Difficult to Unsubscribe,'' *https://pudding.cool/2023/05/dark-patterns.* Among the obstacles noted for otherwise seemingly simple online cancellations were that some websites did not use straight forward terms, such as ''unsubscribe'' or ''cancel,'' and instead put the cancellation path under titles such as ''auto-renew'' or ''edit plan.''

[545] The researcher reported the aggregate time expended to cancel all 16 subscriptions was 57 minutes and 31 seconds. Of the three subscriptions that required telephonic cancellations, one call took 17 minutes and 36 seconds, one took seven minutes, and the time to cancel the third one was not reported (apart from explaining that it was necessary to call three times due to the seller's ''technical difficulties''). The Commission replaces this missing value with the average handle time found by Hawley/O'Neill (2024) of six minutes and three seconds. The Commission therefore subtracted 30 minutes and 39 seconds from the aggregate cancellation time of 57 minutes and 31 seconds; measured in seconds, this becomes 3,451 − 1,839 = 1,612. Dividing this result by 13 equals 124 seconds, or two minutes and 4 seconds. The Commission notes this average cancellation time, though relevant for this regulatory analysis, has not been used as a standard for ROSCA enforcement and is not intended to set a standard here. Moreover, while we have calculated this average, the study notes cancellation took under one minute for three large sellers of digital entertainment subscriptions. Last, the Commission notes one commenter opined, ''(f)or the most part,'' companies offer convenient, no-hassle, cancellation options that probably take about five clicks on average, though the commenter did not indicate a time duration. *See* Individual commenter, FTC–2023–0033–0780.

hour, as assumed above, the final Rule would therefore save consumers who enroll online and cancel online time that they value at between $0.46 (*i.e.,* 1:04 seconds × $25.81/hour) and $0.67 (*i.e.,* 1:34 minutes × $25.81/hour).

(c) Average Per-Cancellation Benefit Relative to TSR-Compliant Cancellation

For consumers enrolling in negative option plans via telemarketing, the existing regulatory baseline is the TSR. The TSR does not specify a performance standard specific to negative option cancellations. Although egregious cancellation delays can be pleaded against telemarketers under § 310.3(a)(1)(vii) (requiring disclosure of all material terms and conditions of the negative option feature) or § 310.3(a)(2)(ix) (prohibiting misrepresentation directly or by implication of any material aspect of a negative option feature), the final Rule's requirement that the cancellation mechanism be at least as easy to use as the consent mechanism provides cancellation-specificity to negative options sold through telemarketing that is lacking under the existing regulatory baseline. Because telemarketers have substantial discretion in designing and implementing consent processes specific to their programs, telemarketers will have a clear benchmark for the speed with which they must complete a final Rule-compliant cancellation.

As described at the beginning of this subsection, the Commission assumes it takes telemarketers between one and two minutes to read the required disclosures to consumers and receive their consent for enrollment in a negative option plan. Using the same average handle time measure of six minutes and three seconds used a previous scenario to proxy for baseline time spent for a telephonic cancellation, the Commission assumes the final Rule will save consumers who consent to a negative option sale via telemarketing, and cancel in the same manner, between four minutes and three seconds and five minutes and three seconds. Evaluating that time saving in the same manner as above, compliance with the final Rule results in a per-cancellation time saving that is worth between $1.74 (*i.e.,* 4:03 minutes × $25.81/hour) and $2.17 (*i.e.,* 5:03 minutes × $25.81/hour).

(d) Estimated Per-Cancellation Benefit Related to In-Person Enrollments

Some sellers market negative option plans in ways that are not covered by ROSCA or the TSR. Those that involve in-person enrollment and only offer in-person or mail cancellation, in particular, may be highly burdensome to consumers. The final Rule requires sellers who offer in-person enrollment to offer at least one alternate cancellation method that consumers may use remotely, *e.g.,* online [546] or via telephone.

Providing consumers with an alternative to in-person cancellations will give consumers a faster route to cancel a subscription and may also spare some consumers from incurring additional recurring charges which might accrue during the pendency of a slow cancellation mechanism, enabling consumers to reallocate their spending power in directions of greater utility, resulting in allocative efficiencies.

Unlike negative option transactions entered into online (ROSCA) or by telephone (TSR), the Commission lacks comprehensive experience with negative option plans that require cancellation in person or through the mail. However, because many gym/fitness center/health studio memberships (hereafter, ''gym memberships'') are sold via negative options [547] and may require cancellation via certified mail or in person (sometimes even when consumers can enroll online [548]), the Commission proxies the per-cancellation benefits of an additional, remote, method of cancellation by looking at those benefits in the context of gym memberships.[549]

As noted in the comment submitted by comment filed by IHRSA,[550] The Global Health & Fitness Association, ''many (fitness club) operations allow several options for agreement termination through simple online solutions including online account management, email cancellation requests, and specific online cancellation buttons or forms'' and ''[m]any of these options are currently available for members who have purchased their membership either online or in person.'' IHRSA did not quantify the share of their member organizations that provide such cancellation opportunities or the number or share of consumer cancellation transactions in which online cancellation is available. Accordingly, the Commission assumes the low-end of the range of quantifiable benefits to consumers who purchased negative option plans in person, but could currently cancel online is the same as the same the low-end of the range for consumers who purchased negative option plans online and had access to online cancellations: $0.46 per cancellation.

Notwithstanding IHRSA's assertion that many fitness clubs offer online cancellation, at least 25 individual consumers submitted comments attesting to the difficulties of canceling gym memberships. Some wrote in general terms of the difficulties consumers experience in canceling such memberships as something that contributed to their support for the Rule.

[546] At the seller's choice, an online cancellation method may be through a website or via email.

[547] IHRSA, The Global Health & Fitness Association, commenting on behalf of itself and the industry (*see* FTC–2023–0033–0863) claimed there were clear distinctions between in-person, brick and-mortar health and fitness businesses and online subscription services, explaining a month-to-month contract is a very different risk to consumers than a long-term contract that begins after a free trial or auto-renews without notice. IHRSA further claims short-term (*e.g.,* month-to-month) continuous service agreements should be distinguished from purely online subscription services targeted by the rule. IHRSA further (mis-) characterizes the Rule as appearing to be concerned with paid contracts that initiate automatically after a free trial period or auto-renew without notice after a long, pre-paid initial term. IHRSA notes consumers with membership agreements with firms in its industry are on notice of the recurring cost because of the monthly charge and have the option to cancel each month under the terms of their contract. The Commission disagrees with IHRSA's characterization of the Rule; the Rule is not intended to exclusively, or even primarily, address online subscription services or long-term contracts that begin after a free trial or auto-renew without notice, but to address all recurring charge plans where the consumer's silence or failure to cancel is interpreted as consent to recurring charges. Accordingly, consumer memberships with firms in IHRSA's industry where consumers have the option to cancel each month squarely fit within the Rule's coverage of negative option plans.

[548] Individual commenter, FTC–2023–0033–0233.

[549] The International Carwash Association (''ICA''), however, commented many of its 60,000 U.S. members offer carwash subscriptions that offer a reduced price for carwashes to subscribers and strengthen the relationship with customers and reduce dependence on cash transactions for these businesses. *See* FTC–2023–0033–1142. These subscriptions may be purchased in person, on the world wide web, via a mobile app, or at an automated teller, which indicates at least some of those subscriptions are covered by ROSCA. ICA asserts cancellation through a means other than in person may be burdensome to the generally small businesses that operate carwashes. *Id.* Although commenter Rocket Money, FTC–2023–0033–0998, mentioned ''car wash chains that require consumers to visit a specific location to cancel their membership as an example of draconian cancellation requirements they experienced working with consumers, no individual consumer commenter mentioned difficulties with carwash subscriptions. Because no consumer commenter provided any other indication of the number of carwash subscriptions purchased or the costs of cancelling such subscriptions, even anecdotally, they are excluded from the analysis. The estimate of the consumer benefits that would flow from the final Rule's provision that an extra, remote, cancellation mechanism be required of marketers who currently offer only in person or mail cancellation mechanisms may therefore be an under-estimate of such benefits.

[550] FTC–2023–0033–0863.

- ''What seems more troublesome tend to be stuff like gym memberships.'' [551]
- ''I work dispute resolutions for a bank. I see so many cases where someone is trying to cancel something like a gym membership and, while they can sign up in person, they for some reason have to mail a certified letter to the companies (sic) home office.'' [552]
- ''I have experienced so much frustration ending memberships with gyms, online subscriptions, etc. over many years and welcome help in this matter. So many friends I speak to share similar stories of how they were roped into paying for longer memberships and subscriptions that they no longer wanted.'' [553]
- ''Many places, like [specific fitness center chain], require you to go in person to cancel—they won't even let you do it over the phone! This harms anyone that may have trouble leaving the house regularly, including disabled folks and parents of small children and those caring for older or ailing family members, not to mention being horribly inconvenient for everyone else.'' [554]

Many others conveyed personal experiences with burdensome gym membership cancellation. The Commission relies upon these comments to estimate the high-end of the range of quantifiable benefits that the final Rule will provide to consumers who purchase negative option plans in-person. Examples of these include:

- ''I had to write a letter and physically mail it to cancel a gym membership I singed [sic] up for on an iPad.'' [555]
- ''Recently it took me three days and several hours to cancel a gym membership (that) had taken less than 20 minutes to join, on line [sic].'' [556]
- ''I had to go in person 3 different times because the manager wasn't there so [sic] to cancel it.'' This consumer attached a screen shot of the gym's cancellation policy, which read, in part, ''There is no contract and you are free to cancel your Direct Debit at any time. If you do decide to cancel your membership, you must allow at least 7 days before the fifth of the month to ensure your payment is cancelled and advise Reception of the cancellation.'' Both ''(a)t *least* 7 days before the fifth of the month,'' and the failure to specify whether ''7 days'' is seven business days or seven calendar days introduce considerable uncertainty as to when, precisely, the consumer must tender a cancellation to avoid the next recurring payment.[557]
- ''Years ago, I had signed up for a gym membership, and after a change in job situation, was no longer able to make use of it. Repeated attempts to reach the gym membership department and cancel my membership went unheeded—a [sic] got a classic runaround, and as often forwarded to unattended phone numbers—and I kept racking up monthly bills for a membership I didn't want . . . . It was only through a personal relationship with someone who worked in the corporate office that I was finally able to get past their automatic renewals and effect a cancellation.'' [558]
- ''We wanted to cancel the [gym] membership, but when we called and emailed, we were told we couldn't cancel that way. We had to send a certified letter or go in person. We have gone in person twice to try to cancel or [sic] membership and it has been a nightmare.'' [559]
- ''Personally, I have been impacted by my local gym's undisclosed policies and shady cancelation policies that have costed me hundreds of dollars.'' [560]
- ''They bill you monthly for your gym membership but when you want to cancel your membership that's when the problems arise. You cannot do it over phone or on their website. You have to go into the gym personally to cancel said membership. Not only that I was told that I'd have to go to the gym [home gym] where I signed up in order to cancel membership. I could only imagine what this would be like had I moved out of the state. Please help us stop these practices.'' [561]
- ''I am currently trying to cancel a gym membership and have been overwhelmed by how difficult it has been . . . . I just called my gym . . . and the pre-recorded automated answering message literally says there is no direct line to the gym! That's outrageous!!!'' [562]
- ''My personal experience is with my gym membership . . . . Getting out of it was terrible, and I'd hate to see it happen to anyone else.'' [563]

Based on these comments, the Commission makes the simplifying assumption that the worst gym membership cancellation experiences involve three failed attempts at cancellation, each costing one hour of time, and that, because of those cancellation failures, three unwanted monthly charges were processed. The Commission assumes a fourth cancellation attempt, also costing one hour of time, succeeds in halting the recurring payments.

As above, the Commission values consumers' time at $25.81/hour. The typical gym membership costs between $40 and $70 a month.[564] The Commission therefore assumes, at the high-end, consumers incur gym membership cancellation costs of $313.25 (*i.e.,* (4 × $25.81) + (3 × $70)) in the absence of this Rule.[565] As stated previously, the Commission assumes a final Rule-compliant cancellation should take no more one minute at the high end, which has a value of consumers' non-market time of $0.43. Then, to estimate the high-end avoided burden that such consumers would experience under the final Rule, the Commission takes the difference between the high-end cancellation costs in the absence of this Rule ($313.25) and the high-end final Rule-compliant cancellation costs ($0.43), which equates to $312.82. Accordingly, the low-to-high range of benefits provided by the final Rule to consumers who purchase negative option plans in person or through the mail ranges from $0.46 to $312.78.[566]

(e) Summary of Per-Cancellation Benefits

Table 2 presents a summary of the per-cancellation benefit the Commission estimates would result from this final Rule. For subscriptions that are currently cancelled over the phone but would be cancelled online under this final Rule, the Commission estimates

[551] Individual commenter, FTC–2023–0033–0780.

[552] Individual commenter, FTC–2023–0033–0007.

[553] Individual commenter, FTC–2023–0033–1046.

[554] Individual commenter, FTC–2023–0033–0741.

[555] Individual commenter, FTC–2023–0033–0233.

[556] Individual commenter, FTC–2023–0033–1076.

[557] Individual commenter, FTC–2023–0033–0510.

[558] Individual commenter, FTC–2023–0033–0968.

[559] Individual commenter, FTC–2023–0033–0387.

[560] Individual commenter, FTC–2023–0033–0572.

[561] Individual commenter, FTC–2023–0033–0299.

[562] Individual commenter, FTC–2023–0033–1163.

[563] Individual commenter, FTC–2023–0033–0545.

[564] *See* Dana George, ''This Is How Much the Average American Really Spends on Gym Memberships,'' Jan. 7, 2024, *https://www.fool.com/the-ascent/personal-finance/articles/this-is-how-much-the-average-american-really-spends-on-gym-memberships.* Because this report is from January 2024, the Commission assumes it measured gym membership costs in 2023 dollars.

[565] Note the avoided recurring payments associated with delayed cancellations may overstate the amount of consumer surplus gained attributable to the final Rule if consumers continue to use their gym membership during that period of delayed cancellation. However, it is difficult to estimate the extent to which that occurs due to lack of data. A part of those gains may also be transfers of producer surplus from firms to consumers.

[566] Other cancellation methods gyms may currently offer, such as in-person visits that succeed in cancellation and cancellation via certified mail, would fall in between these low/high endpoints, as would the benefits to consumers if those methods were augmented under the final Rule not with online cancellations but with telephonic cancellations.

consumers would experience a benefit of between $2.17 and $2.39 per cancellation. For subscriptions that are currently cancelled online and would move to a simpler online cancellation under this Rule, the Commission estimates consumers would experience a benefit of between $0.46 and $0.67 per cancellation. For subscriptions that are currently cancelled over the phone and would move to a simpler telephone cancellation under this Rule, the Commission estimates consumers would experience a benefit of between $1.74 and $2.17 per cancellation. For subscriptions enrolled in person that would be required to provide online or telephone cancellation under this Rule, the Commission estimates consumers would experience a benefit of between $0.46 and $312.82 per cancellation.

TABLE 2—ESTIMATES OF BENEFIT PER CANCELLATION

[In 2023 dollars]

	Low	High
Phone to Online Cancellation	$2.17	$2.39
Online to Simpler Online Cancellation	0.46	0.67
Phone to Simpler Phone Cancellation	1.74	2.17
In-Person to Online or Phone Cancellation	0.46	312.82

(2) Estimating the Number of Consumer Cancellation Transactions

(a) Baseline Number of Subscriptions

The Commission regards ''consumers'' for the purposes of this analysis as the U.S. population over the age of 18;[567] this is estimated to be 269 million in 2025,[568] the first year in the ten-year period over which the Commission estimates the benefits and costs of the final Rule (''Year 1'').

Because negative option sales are a form of marketing of goods and services, and not an industry or type of output, and because no occupational category is uniquely associated with negative option marketing, no publicly produced data source, such as the Economic Census, tracks the use of negative option marketing in the United States. Accordingly, the Commission must look to other data sources, to estimate the number of subscription cancellations and the channels through which consumer consent was obtained and cancellation mechanisms provided.

To estimate the aggregate number of consumer cancellation transactions, the Commission relies upon a credible source that found that, as of mid-2023, 83% of American consumers had at least one subscription.[569] The Commission assumes, for the purposes of this analysis, that the percentage of American consumers with at least one subscription remains constant over ten years. Accordingly, in Year 1 the Commission assumes 223.27 million consumers (*i.e.,* .83 × 269 million) have at least one subscription.

To estimate the total number of subscriptions held by U.S. consumers the Commission looks to data on the average number of subscriptions per subscriber. One source, relying upon a large sample of U.S. consumers conducted in late 2023 and early 2024, reported, ''[t]he average subscriber now has 4.5 subscriptions.''[570] The Commission therefore applies a multiplier of 4.5 to the number of consumers estimated to have at least one subscription to estimate the aggregate number of subscriptions held by consumers in each year. Continuing with the Year 1 example from above, the Commission assumes the 223.27 million U.S. consumers who have subscriptions collectively hold 1,004,715 subscriptions (*i.e.,* 223.27 million × 4.5). The Commission acknowledges some uncertainty in these estimates which could lead to overestimation since subscriptions may be held by households of multiple individual consumers or underestimation due to potential growth in subscription-based goods and services.

(b) Baseline Number of Cancellations

The Commission next considers how many subscriptions consumers may want to cancel. To do so, we look to subscription ''churn,'' or cancellation, rate data. Churn rates can reflect intentional cancellations as when a consumer completes a merchant's cancellation process, but can also reflect involuntary or passive cancellations, which occur when the payment mechanism the consumer has on file with the merchant is unable to be processed by the merchant.[571] Churn rates may be calculated on a monthly, quarterly, or annual basis,[572] and some rates do not disclose a time dimension; mischaracterizing a monthly churn rate as an annual churn rate could vastly underestimate the volume of annual cancellations.

One source reports an aggregate measure of voluntary[573] churn of 3% per month.[574] The Commission assumes

[567] Although this final Rule also benefits small businesses that purchase negative option plans, the Commission does not have sufficient data to quantify those effects in this analysis.

[568] *See* U.S. Census, ''Demographic Turning Points for the United States: Population Projections for 2020 to 2060: Population Estimates and Projections,'' Feb. 2020, *https://www.census.gov/library/publications/2020/demo/p25-1144.html.* The Commission linearly extrapolated between the report's figures for the population over the age of 18 in 2020 and its estimates of the same population in 2030 to estimate the number of consumers in years 2025 through 2029. Similarly, the Commission linearly extrapolated between the report's estimates of the over age 18 population in 2030 and 2040 to estimate the over age 18 population in the years 2031 through 2034.

[569] *See* Julia Stoll, ''SVOD service user shares in the U.S. 2015–2023'' (Sept. 7, 2023) (noting 83 percent of U.S. consumers used a subscription video-on-demand service in 2023), *https://www.statista.com/statistics/318778/subscription-based-video-streaming-services-usage-usa.*

[570] Bango, ''Subscription Wars: Super Bundling Awakens,'' at 4 (2024) (based on data from 5,000 U.S. subscribers), *https://bango.com/resources/subscription-wars-super-bundling-awakens.*

[571] *See* Stripe, ''Subscription churn 101: A complete guide for businesses'' (Jan. 23, 2024), *https://stripe.com/resources/more/subscription-churn-101.*

[572] *Id.* (noting the choice often depends on your business cycle and how often you want to assess your performance).

[573] Some consumers may welcome an ''involuntary'' cancellation of a subscription, and other cancellations that payment processors perceive as ''involuntary'' may reflect consumers' deliberate cancellation of a credit card as a means of escaping a subscription that was difficult to cancel. The Commission's analysis nonetheless uses only the reported ''voluntary'' churn rate to avoid the possibility of over-estimating the consumer benefits of the final Rule.

[574] Recurly, a subscription management platform used across multiple industries, reports an overall churn rate of 4.1% per month and parses this rate into that arising from voluntary cancellations, 3%, and involuntary cancellations, 1%, with, presumably, 0.1% lost to rounding. Recurly explains its methodology in producing these estimates is based on a sample of over 1,200 subscription sites on the Recurly platform over 12 months (January to December 2023); its churn rates are monthly, calculated by dividing the number of subscribers who churn during the month by the total number of subscribers and uses median, 25th, and 75th percentile values to eliminate outliers and provide a more accurate representation of the data in its view. *See* Recurly, ''What is a good churn rate?,'' *https://recurly.com/research/churn-rate-benchmarks.* Other payment processors report similar churn rates but provide fewer details on the

Continued

this rate is constant from month to month and from year to year and therefore assume that the average annual churn rate across all subscriptions is 36%.[575] This churn rate, multiplied by the number of subscriptions held by consumers each year, provides the yearly estimate of how many subscriptions are cancelled by consumers.[576] Continuing with the Year 1 example from above, the Commission therefore estimates 361.70 million cancellations (*i.e.,*.36 × 1,004.72 million) will occur in Year 1 of the analysis and that this number will increase to 384.82 million by Year 10. Table 3 presents the number of subscriptions and total number of cancellations expected in each year.

TABLE 3—NUMBER OF SUBSCRIPTIONS AND TOTAL CANCELLATIONS PER YEAR

[In millions]

Year	Subscriptions	Cancellations
1	1,004.72	361.70
2	1,012.48	364.49
3	1,020.25	367.29
4	1,028.02	370.09
5	1,035.79	372.88
6	1,043.56	375.68
7	1,049.91	377.97
8	1,056.26	380.25
9	1,062.61	382.54
10	1,068.96	384.82

(c) Number of Cancellations by Enrollment and Baseline Cancellation Method

As discussed in the estimates of per-cancellation benefits, the estimated per-cancellation benefits stemming from the final Rule depend on the regulatory baseline cancellation methods relative to those that would be made available under the final Rule. To determine the number of cancellations for which the four categories of per-cancellation benefits estimates would apply, the Commission uses data on its enforcement experience to determine the share of cancellations likely to occur through online and telephone methods. For cancellations of subscriptions that are enrolled in person, the Commission uses data on gym membership cancellations as a proxy.

(i) In-Person Subscriptions

As a proxy for the number of subscriptions entered into in person, the Commission uses a report from Renew Bariatrics that claims 19 percent of the U.S. population are members of gyms or health clubs.[577] The Commission assumes gym members are uniformly distributed by age and multiplies the U.S. adult population by 19 percent to estimate that 51.11 million adults will have active gym membership subscriptions when this final Rule goes into effect. An IHRSA article from 2019 stated the average health club has an annual attrition rate of 28.6 percent.[578] Interpreting this to mean 28.6 percent of all adult gym members cancel their memberships each year, the Commission estimates 14.62 million gym membership subscriptions will be cancelled in the first year of this Rule. In Year 10, the Commission estimates 15.55 million gym membership subscriptions will be cancelled. The Commission uses these estimates as a proxy for the total number of subscriptions that are entered into in person and cancelled each year.

The Commission acknowledges several limitations with this proxy. To begin, there are likely many other types of businesses, such as car washes, lawn care, pest control, and personal care and grooming establishments, that may offer in-person subscription enrollment. To the extent these subscriptions are not included in the count, the estimates may be understated. Further, the source that states 19 percent of the population are members of gyms does not specify the age distribution of the gym members. The Commission has assumed children and adults are distributed uniformly across that 19 percent; however, if adults are more likely to have gym memberships than children, the estimates of gym memberships and cancellations among adults will be understated. On the other hand, gym memberships are not always individual memberships; multiple family members may share a single-family membership. In estimating the number of gym memberships and cancellations, the Commission has assumed each adult gym member has their own subscription, which may overestimate the number of subscriptions and cancellations.

(ii) Online and Telephone Subscriptions

The Commission assumes all subscriptions that are not entered into in person are instead entered into either online or over the phone. Subtracting the in-person subscription, as proxied by gym membership cancellations, from the total number of cancellations, the Commission estimates 347.08 million subscriptions entered into either online or over the phone will be canceled in the first year of this Rule. This number would increase to 369.27 million cancellations in Year 10.

To estimate the distribution of cancellation methods for these subscriptions that are entered into online and over the phone, the Commission reviewed matters it has brought and resolved[579] in which complaints specifically alleged negative option cancellation mechanisms that violated ROSCA, the TSR, or section 5.[580] The Commission found 54 matters met these criteria.

Online[581] enrollment was possible in 42 of 54 matters that met the review

data underlying their churn rate estimates or do not distinguish voluntary from involuntary churn rates.

[575] Because consumers may cancel a subscription and then enroll in a different subscription (or even re-enroll in a recently canceled subscription), the Commission assumes average, aggregate, monthly voluntary churn rates are additive across months and that the number of consumers with subscriptions do not ''decay'' at a rate of 3% per month. Indeed, another report found one-quarter of U.S. consumers cancelled a streaming video service in the past 12 months and resubscribed to the same service, with younger generations significantly more likely to return. *See* Deloitte, Digital Media Trends Survey: 16th Edition (2022), *https://www2.deloitte.com/us/en/insights/industry/technology/digital-media-trends-consumption-habits-survey/summary.html.* The Deloitte report also notes the average churn cancellation rate has remained consistent since 2020 at about 37% across all paid streaming video on demand services. Similarly, a comment from NCTA, FTC–2023–0073–0008, quotes Congressional testimony from Consumer Reports that 36% of consumers who subscribed to streaming services, switched and resubscribed multiple times over a period of 12 months.

[576] The Commission is aware a recent survey of U.S. subscribers found 75% identified one subscription as one they will never cancel or even pause. *See* Bango (2024) at 8. The Commission assumes no adjustment is needed to the reported ''churn'' rate in light of this finding as subscriptions with such loyalty are already reflected in the denominator of the reported churn rate.

[577] *See* ''28 Gym Membership Statistics: Average Cost of Memberships,'' Renew Bariatrics (Jan. 4, 2024), *https://renewbariatrics.com/gym-membership-statistics/.*

[578] *See* ''Why Health Club Retention Requires a Technology Solution,'' IHRSA (May 20, 2019), *https://www.healthandfitness.org/improve-your-club/why-health-club-retention-requires-a-technology-solution/#:~:text=Acquiring%20a%20new%20customer%20is%20five%20times,rates%20by%205%%20increases%20profits%20from%2025%%2D95%.*

[579] This tally does not include ongoing matters or matters that obtained ''fencing-in'' relief encompassing the sale of negative options without expressly pleading complaint counts related to cancellation mechanisms.

[580] In many instances, ROSCA and TSR counts were cross-pled as section 5 counts; in parsing cancellation transactions by their enrollment methods, we use ''section 5'' to refer to instances in which neither ROSCA nor TSR violations were pled.

[581] For ease, the Commission includes in this tally two negative option plans that enrolled consumers via phone apps. Similarly, the Commission regards matters involving online marketing of negative options that were resolved before the passage of ROSCA (and some others that were resolved after the passage of ROSCA, but addressed online

criteria. In the remaining 12 matters, enrollment occurred over the phone. Among the 42 matters in which online enrollment was possible, only six firms offered online[582] cancellation,[583] and the remaining 36 firms offered only telephonic cancellation.[584] Among the 12 matters in which enrollment occurred over the telephone; none of the firms offered online cancellation, therefore, the Commission treats these 12 matters as if only telephone cancellation was available.[585] To summarize, the Commission finds that, among subscriptions that are entered into online and over the phone, 66.7 percent (*i.e.,* 36/54) offered online enrollment and only telephone cancellation, 11.1 percent (*i.e.,* 6/54) offered online enrollment and online cancellation, and 22.2 percent (*i.e.,* 12/54) offered telephone enrollment and telephone cancellation. Extrapolating the baseline cancellation methods from enforcement matters may weight the online enrollment/telephone cancellation subscriptions and the telephone enrollment/telephone cancellation subscriptions more heavily than is currently experienced in the market. It also assumes that there are no subscriptions offered in the baseline with cancellation methods that are already compliant with the provisions of this Rule. The Commission explores the impacts of these limitations in a sensitivity analysis in section (d).

Multiplying the distribution of cancellation methods for subscriptions entered into online and over the phone by the total number of cancellations of online and telephone subscriptions, the Commission estimates the annual number of cancellations that fall into each of these categories. In Year 1, the Commission estimates that, in the absence of this final Rule, there would be 231.39 million cancellations by telephone of subscriptions entered into online, 38.56 million online cancellations of subscriptions entered into online, and 77.13 million telephone cancellations of subscriptions entered into over the phone.

(iii) Summary of Subscription Cancellations by Enrollment and Baseline Cancellation Method

Table 4 provides the number of subscription cancellations each year distributed across the four enrollment and regulatory baseline cancellation method categories: online enrollment and telephone cancellation; online enrollment and online cancellation; telephone enrollment and telephone cancellation; and in-person enrollment.

TABLE 4—CANCELLATIONS BY ENROLLMENT AND BASELINE CANCELLATION METHOD

[In millions]

Year	Online enrollment, telephone cancellation	Online enrollment, online cancellation	Telephone enrollment, telephone cancellation	In-person enrollment
1	231.39	38.56	77.13	14.62
2	233.18	38.86	77.73	14.73
3	234.96	39.16	78.32	14.84
4	236.75	39.46	78.92	14.96
5	238.54	39.76	79.51	15.07
6	240.33	40.06	80.11	15.18
7	241.79	40.30	80.60	15.27
8	243.26	40.54	81.09	15.37
9	244.72	40.79	81.57	15.46
10	246.18	41.03	82.06	15.55

(3) Total Quantified Benefits

To estimate total benefits from this final Rule, the Commission first matches the enrollment and baseline cancellation method categories from the previous section to the four scenarios used to estimate the per-cancellation benefit. The Commission assumes that, under this final Rule, subscriptions enrolled online and cancelled over the phone in the baseline would move to online cancellations; subscriptions enrolled online and cancelled online would move to simpler online cancellation; subscriptions enrolled over the phone and cancelled over the phone would move to simpler telephone cancellation; and subscriptions enrolled in person would allow online or phone cancellation.

Next, the Commission multiplies the number of cancellations in each baseline category by the matched per-cancellation benefit on the low- and the high-end and then sums across all four categories to obtain total benefits each year. Those totals are presented in Table 5. In the first year following implementation of the final Rule, the Commission estimates the benefits will

marketers' conduct that occurred prior to the passage of ROSCA), as ROSCA matters for the purposes of assessing the incremental benefits of the final Rule relative a regulatory baseline of ROSCA's simple cancellation mechanism.

[582] In a few of these matters, online cancellation was offered in addition to telephonic cancellation, and to simplify the analysis, the Commission attributed half to the measure of telephonic cancellations and half to the measure of online cancellations. In a few other instances the Commission's designation of ''online'' cancellation includes cancellation by email or within the marketer's app.

[583] In contrast, other evidence indicated that 81.25% of U.S. online marketers offered online cancellation. *See, e.g.,* Sinders (2023). Different research looked at nine U.S. news media publishers that sold subscriptions online. When two ''personas'' created by the researchers subscribed to each of the nine publications, and then attempted to cancel, 17 of the 18 subscriptions could be canceled online; one publication permitted only the California resident persona to cancel online and offered only telephonic cancellation to the persona posing as a Texas resident. *See* Ashley Sheil, *et al.,* ''Staying at the Roach Motel: Cross-Country Analysis of Manipulative Subscription and Cancellation Flows,'' in Mueller, F.F. (ed.), CHI '24: Proceedings of the CHI Conference on Human Factors in Computing Systems (May 11–16, 2024), *https://repository.ubn.ru.nl/handle/2066/30690.*

[584] In some of the 36 matters, no cancellation method was disclosed by the seller, and in a few other matters consumers were required to return merchandise through the mail to prevent a free trial from rolling over into a subscription or to obtain a refund for merchandise that was shipped to a consumer, and for which the consumer was charged. Such instances generally occurred before the passage of ROSCA, and it is highly unlikely that an online marketer who offered only a mailed-in cancellation could be in compliance with ROSCA's requirement that cancellation mechanisms be ''simple.'' Without loss of generality, the Commission therefore treats instances in which online cancellation was not offered as instances in which only telephonic cancellation was offered to consumers.

[585] Some required the return of merchandise through the mail if consumers wanted refunds. In two matters, no cancellation mechanism was revealed. Without loss of generality, we assume that cancellation could take place telephonically.

range between $661.52 million and $5.32 billion. In Year 10, the Commission estimates the benefits will range between $703.82 million and $5.66 billion. Using a 2 percent discount rate, the Commission estimates the present discounted value of benefits over 10 years to range between $6.13 and $49.32 billion. Annualized over 10 years using a 2 percent discount rate, the Commission estimates the benefits to range between $682.83 million and $5.49 billion per year.

TABLE 5—TOTAL QUANTIFIED BENEFITS

[In millions, 2023 dollars]

Year	Low	High
1	$661.52	$5,318.76
2	666.63	5,359.88
3	671.75	5,401.01
4	676.86	5,442.14
5	681.98	5,483.26
6	687.09	5,524.39
7	691.27	5,558.00
8	695.45	5,591.62
9	699.63	5,625.23
10	703.82	5,658.84
Present Discounted Value of Benefits over 10 years, 2% discount rate	6,133.57	49,315.39
Annualized Benefits over 10 years, 2% discount rate	682.83	5,490.11

(c) Estimated Costs of the Final Rule

This section describes the costs associated with firms coming into compliance with the final Rule, provides quantitative estimates where possible, and describes costs that are only assessed qualitatively. Whereas benefits were estimated based on cancellation transactions, compliance costs are estimated on the basis of firms covered by the final Rule. The Commission first examines the comment record on compliance costs and then estimates the compliance costs for the initial year and subsequent nine years following implementation of the final Rule.

(1) The Comment Record

The comment record has not provided specific data useful to the estimation of the costs of compliance with the disclosure, cancellation, and recordkeeping requirements of the final Rule.

Some industry commenters addressed compliance costs by providing broad, aggregate, conclusory cost estimates; because those costs were not itemized by specific features of the Rule as proposed in the NPRM, the Commission is unable to use those comments to estimate compliance costs relevant to the substantially narrowed scope of the final Rule in comparison to the Rule proposed in the NPRM.[586] The same is generally true of testimony and expert reports submitted in conjunction with the informal hearing. Those materials did not focus on providing specific, relevant, data that would permit estimating compliance costs of the final Rule.[587]

[586] For example, NCTA, FTC–2023–0073–0008, indicated some major cable operators estimate it could cost $12–$25 million per company and take 2–3 years to rebuild their systems and *one* of its members thought annual costs could be 15–20% of the implementation costs (an industry rule of thumb). This comment does not itemize costs across different elements of the specific rules adopted. Additionally, estimates of the annual costs of maintaining systems may be blanket costs that include a host of programming maintenance features that are unrelated to the specific disclosures and ''click to cancel'' features of the final Rule. Moreover, NCTA's comment indicated customers of top cable operators enrolled over the phone (43%), online (30%), and in person (24%) and calls to customer service are answered within 30 seconds and lines are available 24 hours a day, 7 days a week. Accordingly, no extra compliance steps may be necessary with respect to offering final Rule-compliant cancellations for enrollments made by telephone, and compliance with the final Rule's requirement that firms offer an extra cancellation mechanism for in-person enrollments likely could be met through reliance on these firms' existing telephonic cancellation capabilities. Accordingly, the provision of an online cancellation mechanism will be required only for the 43% of their consumers who presently enroll online, and NCTA has not provided estimates of compliance costs that are specifically tailored to that segment of their consumer base. Because NCTA members who enroll consumers online already, clearly, have websites, the Commission rejects the notion that adding ''click to cancel'' functionality to websites that already include an order path for enrolling, and likely also include functionality for registering a payment mechanism for automated billing, would cost $12–$25 million, particularly in light of NCTA's discussion of compliance with the 2019 Television Viewer Protection Act (''TVPA'') which, NCTA claims, already regulates *the very same practices* the FTC is attempting to regulate here. NCTA further claims major cable operators estimate that it cost approximately $2.5 to 4 million per company and took about one year for TVPA compliance. However, having *already* incurred the costs to comply with ''the very same practices'' the final Rule addresses in the course of complying with the TVPA, there would appear to be no incremental costs to comply with the final Rule. Therefore, because the final Rule is narrower in scope than as proposed in the NPRM and because it offers firms the opportunity to apply to be excluded, the Commission rejects NCTA's claim compliance with the Rule would be multiples of TVPA compliance costs and require building online cancellation systems virtually from the ground up and expensive ongoing recordkeeping requirements across all services. Accordingly, the Commission does not include in the estimates of compliance costs the aggregate, non-specific, and possibly idiosyncratic compliance costs NCTA cites. Similarly, an expert's survey submitted by IAB (attachment B to FTC–2024–0001–0010) found only six respondents (out of more than 100,000 companies subject to the proposed Rule) indicated the annual cost of compliance would be a total of $50 million, but provided no itemization of these costs, such that they cannot be disaggregated to comport with the narrower scope of the final Rule.

[587] For example, an expert report (Christopher Carrigan and Scott Walster, FTC–2024–0001–0026) filed by IAB concluded the effects of the proposed Rule, if finalized, on the U.S. economy would surpass $100 million annually. The Commission agrees with this conclusion. The Commission disagrees, however, with both the initial and on-going compliance costs used by Carrigan-Walster; both were liberally based on replicating assumptions made in the preliminary regulatory analysis in the NPRM. Further, their assumptions are inappropriate to this cost analysis because they fail to account for the fact firms subject to the final Rule, unlike firms subject to the proposed Unfair or Deceptive Fees Rule, are already required to provide clear and conspicuous disclosures of all material facts relating to the sale of negative option contracts under the totality of ROSCA, the TSR, and section 5 of the FTC Act, and to provide simple cancellation mechanisms under ROSCA for those firms covered by ROSCA. In addition, firms subject to the final Rule are also required to comply with a variety of other laws relating to negative option sales, including the current Prenotification Rule, EFTA, the Unordered Merchandise Statute, numerous State laws, various laws and regulations that effect specific industries, such as the Television Viewer Protection Act of 2019 (TVPA), other FCC regulations, and, for multi-national entities, various foreign laws. Accordingly, the units of specialized labor, *e.g.,* lawyer, web developer, and business analyst time, that Carrigan-Walster adopt from the Unfair or Deceptive Fees NPRM are not valid representations of the usage of such inputs that are *incremental* to compliance

Another commenter addressed the Paperwork Reduction Act cost estimate in the NPRM in a way that conflated it with the totality of compliance costs. IFA, which represents firms, including small firms, in the fitness, preventative healthcare, personal wellness or children's extracurricular activities industries, commented, ''the FTC's estimate (in the NPRM) that it will cost companies merely three hours annually at $22.15/hr to comply is grossly understated for IFA's members.'' [588] The Commission agrees the final Rule's compliance costs will exceed the Paperwork Reduction Act costs discussed in the NPRM because the Paperwork Reduction Act costs only include burden associated with information collection requirements, such as recordkeeping and disclosure costs, while the total compliance costs include those costs as well as costs of familiarization with the Rule and costs to bring cancellation mechanisms into compliance. IFA did not, however, provide a sufficiently detailed alternative estimate of annual or ongoing general compliance or recordkeeping costs for its members.[589] Similarly, IFA provided no information on the enrollment mechanisms used by its members nor an estimate of what share of its members offer negative option plans.[590]

IFA did, however, comment that many of its members already offer consumers the ability to pause or ''freeze'' memberships, noting, ''consumers take advantage of alternatives to membership cancellation at rates of 10% to 40%, with many consumers electing to reactivate their memberships, saving thousands of dollars annually in increased membership rates and additional initiation fees.'' While pause/freeze capabilities are indeed beneficial to consumers, they do not relieve a firm from an obligation to offer a cancellation mechanism. IFA did not provide similar data on what percentage of its member firms' consumers are dissatisfied with pause/freeze opportunities and seek authentic cancellations or what cancellation mechanisms its member firms make available to consumers.

The technological capability to pause or freeze subscriptions suggests the presence of software architecture ''scaffolding'' upon which a cancellation mechanism could be built at a modest incremental cost. Alternatively, the offering of subscription pauses or freezes by some IFA members may suggest those members use the services of third-party e-commerce hosting platforms or payment processors who routinely provide consumer subscription account management tools relied on by businesses, including small businesses. As discussed, below, existing software scaffolding and the utilization of third-party consumer subscription management tools can facilitate low- (and even no-) cost compliance with some of the final Rule's requirements.

(2) Initial Compliance Costs

The Commission has previously estimated that 106,000 firms offer negative option plans.[591] The Commission assumes that to come into compliance with the final Rule, all 106,000 firms selling negative option plans will need to expend some resources to familiarize themselves with the final Rule and some firms will incur costs related to improvements in their pre-consent disclosures and cancellation mechanisms.

Familiarization costs: No commenters presented estimates expressly related to the costs of legal and managerial review of the final Rule and front-line staff training needed to come into compliance. The U.K. ''Impact Assessment,'' using surveys and interviews with managers of firms that sold goods and services via negative options, found that firms would need between four and 16 hours of ''senior staff'' time, depending upon the size of the firm, to gain familiarization with their proposed rule, and between zero and 80 hours of ''service staff'' time, again depending upon the size of the firm.[592] The Commission assumes that similarities between American and British firms are such that the same units of time are relevant for American firms to gain familiarity with the final Rule. In the American context, the Commission assumes ''senior staff time'' is proxied by ''attorney time,'' and uses the mean hourly wage for attorneys, $84.84 per hour, to estimate those costs.[593] Similarly, the Commission assumes ''service staff time'' is proxied by the average of mean wages for salespersons and clerical workers, which is $23.27.[594] Accordingly, the

with the final Rule relative to its existing regulatory baseline.

[588] *See* IFA, FTC–2024–0001–0001.

[589] IFA provided an extreme example relevant to what it identified as a preventative healthcare franchise system without disclosing how many individual firms belonged to that system. In the context of that system, IFA stated it would take thousands of hours to access if modifications are necessary to existing contracts, marketing, and operational processes and implement any requirements, costing hundreds of thousands of dollars. IFA did not, however, provide detailed, itemized, estimates of compliance costs that relate to the specific features of the final Rule, which has been substantially streamlined relative to what was proposed in the NPRM, making IFA's highly aggregated notion of compliance costs for one particular group system' inapplicable to the current cost analysis. The same lack of specificity is present in IFA's discussion of ''Fitness franchise systems.'' With somewhat greater specificity, IFA estimates costs to comply with disclosure and recordkeeping requirements are 24 hours annually, but IFA did not disclose what type of labor inputs are involved in those tasks nor the number of fitness facilities that will incur these costs. Moreover, IFA reveals its members estimate the impact to member lifetime value will exceed $100,000 per fitness center and lost revenue is expected to be nearly $40,000 annually per fitness center, but these figures cannot properly be considered compliance costs as they may, in fact, represent benefits consumers receive from speedier exits from fitness club memberships that are no longer wanted by consumers.

[590] Some of its members may offer yearly contracts that do not auto-renew, but that apportion payments over 12 months for the convenience of consumers. Such contracts are installment plans, and not negative option plans. Others may conduct business on a pay-as-you-go basis.

[591] As explained in the NPRM, this estimate is based primarily on data from the U.S. Census North American Industry Classification System (NAICS) for firms and establishments in industry categories wherein some sellers offer free trials, automatic renewal, prenotification plans, and continuity plans. Based on NAICS information as well as Commission staff's own research and industry knowledge, the Commission identified an estimated total of 530,000 firms involved in such industries. However, the Commission estimates only a fraction of the total firms in these industry categories offer negative option features to consumers. For example, few grocery stores and clothing retailers, which account for approximately a third of the of the total estimate from all industry categories, are likely to regularly offer negative option features. In addition, some entities included in the total may be exempt from the Commission's authority. Accordingly, the Commission estimates approximately 106,000 business entities (20%) offer negative option features to consumers. *See* 88 FR 24733. Although no commenter proposed a different number, ETA, FTC–2023–0033–1004, challenged the Commission's estimated number of firms selling negative option plans on the basis that it did not account for ''the many providers of goods and services to business where automatic renewal clauses are used.''

[592] *See* U.K. ''Impact Assessment'' (2023) at 26. While the U.K.'s rule may not be directly analogous to the final Rule, it addresses similar problems associated with consent and cancellation associated with negative option practices. Therefore, the burden the U.K.'s rule places upon subscription sellers, in terms of executive and staff resources to read and understand the rule and assess whether existing procedures are in compliance or need to be revised, may be highly similar to the familiarization steps that U.S. businesses will need to undertake.

[593] The mean hourly wage for lawyers in 2023 was $84.84; *see* Bureau of Labor Statistics, ''Occupational Employment and Wages, May 2023, 23–1011 Lawyers,'' *https://www.bls.gov/oes/current/oes231011.htm.*

[594] The Commission uses a mean hourly wage for sales personnel of $25.62; *see* Bureau of Labor Statistics, ''Occupational Employment and Wages, May 2023, 41–0000 Sales and Related Occupations (Major Group),'' *https://www.bls.gov/oes/currenT/oes410000.htm.* The Commission uses a mean hourly wage for clerical workers of $20.94, *see* Bureau of Labor Statistics, ''Occupational Employment and Wages, May 2023, 43–9061 Office Clerks, General,'' *https://www.bls.gov/oes/currenT/oes439061.htm.* The average of these two mean wage rates is $23.27.

Commission estimates the aggregate initial year familiarization costs as ranging between $35.97 million and $341.22 million.

Disclosures: Clear and conspicuous disclosures are already required by the existing regulatory baseline; § 425.4(a)(1)–(4) of the final Rule adds specificity to those disclosures, albeit in a flexible way.[595] As estimated below, the Commission assumes some marketers are already in compliance with the disclosure requirements of the final Rule; for these marketers, there are no incremental costs of compliance with the disclosure requirements of the final Rule.

For online marketers, the current regulatory baseline is ROSCA, which requires marketers to clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer's billing information. To the extent ROSCA-covered marketers' current disclosures lack the specificity required by the final Rule, the Commission estimates changes will be needed only to textual elements of such marketers' websites and that no changes to the underlying website architecture will be needed. The Commission further assumes any such changes, if needed, will be made by website developers, whose mean hourly wage is $45.95.[596] Similarly, some telemarketers and in-person negative option marketers may need to modify their sales agents' scripts to incorporate the disclosures required by the final Rule. Without loss of generality, the Commission assumes the mean wage rates of marketers' staff who will make such script changes is proxied by the mean wage rates of web developers.[597] Although in the Commission's experience these changes should take very little time, perhaps as little as one hour, the Commission adopts a range of one to 10 hours to complete this task.[598]

Accordingly, the Commission estimates that for those marketers whose disclosures are not already in compliance with the requirements of the final Rule, disclosure compliance costs will range between $45.95 and $459.50.

Cancellation mechanisms: Section 425.6 of the final Rule requires negative option marketers to provide a simple cancellation mechanism that is in the same medium, and at least as simple for the consumer to use, as the mechanism by which the consumer provided consent to the negative option plan. Additional requirements are medium-specific. For example, when consent is provided through an interactive electronic medium, the cancellation mechanism (also provided through an interactive electronic medium) must be easy for the consumer to find when the consumer seeks cancellation information (for example, on a website, the cancellation mechanism cannot be hidden in ''terms and conditions'' or otherwise difficult to find) and cannot require interactions with live or virtual representatives (such as chatbots) if no such interactions were required when the consumer consented.

When consent is provided over the telephone, the final Rule requires that telephonic cancellation must be available during normal business hours and not be more costly for the consumer to use than the telephone call the consumer used to consent to the negative option feature.

When consumer consent to a negative option plan is provided via an in-person method, the marketer must offer cancellation opportunities, where practical, in a like manner. In addition, the marketer must offer an alternative simple cancellation mechanism through an interactive electronic medium or by providing a telephone number that satisfies all final Rule requirements related to use of those cancellation media.

The costs negative option sellers will incur in the initial year following implementation of the final Rule to bring their cancellation mechanisms into compliance with the final Rule will depend upon their pre-existing cancellation mechanisms. No commenter provided research or data on the frequency of use of different cancellation mechanisms across negative option marketers or on the incremental costs to make the existing cancellation mechanism compliant with the requirements of the final Rule.[599]

Because the comment record has not provided sufficient data to estimate the costs of compliance with the final Rule's cancellation requirements, the Commission turns to data from the U.K.'s ''Impact Assessment'' on regulating subscriptions there. Based on these sources, the Commission finds some sellers of negative option plans are already in compliance with the cancellation requirements of the final Rule, and many others will incur only minimal costs to make their cancellation flows compliant with the final Rule.

The relevant experimental research looked at the cancellation practices of 16 online subscription sellers, many of them large and well-known firms, and noted the cancellation mechanisms made available to consumers and how easy those mechanisms were for consumers to locate and use.[600] Although the number of firms sampled in this research was small, publicly available data on total enrollments, located for just seven of the 16 firms, collectively numbered over 350 million,[601] which may lend significance

[595] The final Rule requires disclosure of: the fact consumers will be charged; the amount(s) they will be charged; when the consumer must act (by deadline or frequency) to prevent or stop charges; and the information needed for the consumer to find the simple cancellation mechanism.

[596] *See* Bureau of Labor Statistics, ''Occupational Employment and Wages, May 2023, 15–1254 Web Developers,'' *https://www.bls.gov/oes/2023/may/oes151254.htm.*

[597] This is consistent with the approach taken in the expert report submitted by IAB. *See* Carrigan-Walster, FTC–2024–0001–0026 (noting many firms using negative option marketing present offers through the internet and, for firms presenting offers through other means, web developer time is used as a proxy for worker time to create the presentation of the offers).

[598] The assumed range of one to 10 hours is consistent with the time estimate used for compliance checks and minor modifications of websites in the Unfair or Deceptive Fees NPRM. *See* 88 FR 77420 (Nov. 9, 2023).

[599] Trade association commenters who addressed cancellation mechanisms used by their members, and whether those mechanisms were or were not symmetric with enrollment mechanism or as easy to use as enrollment mechanisms did so only in a very general manner. For example, NCTA (FTC–2024–0001–0011) commented that, in 2021 and 2022, customers of top cable operators enrolled over the phone (43%), online (30%), and in person (24%)'' but provided no information on available cancellation mechanisms. Additionally, NCTA stated its analysis shows complaints received about cancellation are very limited (approximately 0.017% of cancellations) out of the approximately 14 million customers who cancelled some or all of their services from NCTA's largest cable operator members in 2022. Anecdotes such as these, about ''top'' or ''largest'' companies do not provide sufficiently reliable data for the instant analysis. Similarly, IHRSA's comment about ''many'' fitness club operations allowing options to cancel by simple online solutions is not specific enough to be helpful (*see* FTC–2023–0033–0863).

[600] *See* Sinders (2023).

[601] The Commission located subscriber estimates for seven (Amazon, Ancestry, Hulu, Netflix, Paramount+, The Boston Globe, and The New York Times) of the 16 firms included in the research. The number of U.S. subscribers to Amazon Prime is estimated to reach 171.8 million in 2024. *See https://www.yaguara.co/amazon-prime-statistics.* At year-end 2023, Ancestry.com had over 3 million subscribers. *See https://www.ancestry.com/corporate/newsroom/press-releases/ancestry-releases-2023-annual-impact-report--underscoring-corpor.* As of the second quarter of 2024, Hulu had 50.2 million paid U.S. subscribers. *See https://www.statista.com/statistics/258014/number-of-hulus-paying-subscribers*). Also as of the second quarter of 2024, Netflix had 84.11 million subscribers in the U.S. and Canada. *See https://www.statista.com/statistics/483112/netflix-subscribers.* Even if the Commission makes the extreme assumption that every Canadian held a Netflix subscription, that would still leave approximately 50 million U.S. subscribers. Paramount+ had over 71 million subscribers as of the first quarter of 2024. *See https://www.theverge.com/2024/4/29/24144766/paramount-plus-now-has-over-71-million-subscribers*). The Boston Globe had 260,000 (mostly digital) subscribers in 2023. *See https://pressgazette.co.uk/north-america/us-local-news-*

to this research beyond what might otherwise be associated with a sample size of 16 firms. Moreover, the methodology of the study suggests that the researcher's experiences with enrollment and cancellation likely would be typical of any consumer undertaking the same enrollment and cancellation tasks with those firms.

The experimental research found that 18.75% (*i.e.,* 100 × 3/16) of the online marketers studied offered online cancellations in a straightforward, easy to use manner such that it took the researcher less than one minute to complete a subscription cancellation. The Commission therefore assumes that 18.75% of online sellers of negative option plans will not need to change their websites to come into compliance with the cancellation requirements of the final Rule. Although this research did not specifically measure the adequacy of pre-consent disclosures, the Commission assumes that companies who make cancellation so easy for consumers perform equally well in making disclosures. Accordingly, the Commission assumes that the 18.75% of online firms selling negative options that will not incur incremental costs to comply with the final Rule's cancellation requirements also will not incur any incremental costs to comply with the final Rule's disclosure requirements. The Commission assumes that the remaining 81.25% of online negative option sellers that lacked such easy-to-use cancellation mechanisms also performed less well in making the disclosures required by the final Rule, such that they would incur initial year compliance costs of improving their disclosures as indicated by the range estimated above.

The same research found that 62.5% (*i.e.,* 100 × 10/16) of sampled online negative option sellers had cancellation paths that took longer for consumers to complete as a result of nomenclature, not website architecture. These sites, rather than using straightforward terms such as ''unsubscribe'' or ''cancel,'' put the cancellation path under titles such as ''auto-renew'' or ''edit plan,'' [602] and locating the cancellation mechanism delayed the researcher in completing the cancellation task because of the non-intuitive labeling of the entry point into the cancellation mechanism. In such instances, more intuitive, consumer-friendly labeling of the existing cancellation architecture is assumed to be what is needed for these sites to come into compliance with the cancellation requirements of the final Rule. The Commission assumes such relabeling will not require any additional programming or changes to the underlying website architecture. In the Commission's experience, such ''cosmetic'' changes can be made quickly and inexpensively, possibly in as little as one hour of a website developer's time. The Commission notes, however, that the U.K. ''Impact Assessment,'' in considering ''general updates to websites such as reflecting the clearer communication on contract conditions and updating cancellation options,'' estimated that such changes would ''require eight hours' work from an IT professional and that these costs are uncorrelated with the size of the business.'' [603] The website changes contemplated in that assessment likely exceed those required to merely relabel consumer-facing elements of an existing cancellation architecture. Out of an abundance of caution, however, the Commission uses the U.K.'s estimate of eight hours as an upper bound on the time required to make the needed changes and further assumes that the relevant ''IT professionals'' are website developers, which, as noted previously, have a mean wage rate of $45.95. Accordingly, the Commission assumes each firm that needs to relabel existing cancellation mechanisms to make those mechanisms easy for consumers to locate and use will spend between $45.95 (*i.e.,* 1 × $45.95) and $367.60 (*i.e.,* 8 × $45.95) to come into compliance with the final Rule's cancellation requirements.

Lastly, the aforementioned research found that 18.75% (*i.e.,* 100 × 3/16) of online negative option sellers offered only telephonic cancellation. Such firms, because they were online sellers, clearly had online ordering and payment website architecture in place, and so had ''scaffolding'' upon which online cancellation architecture could be built. No commenter provided relevant data on the costs of building-out a ''click-to-cancel'' mechanism in such instances, and the U.K ''Impact Assessment'' indicated it ''lacked high quality evidence on the costs businesses would incur'' to integrate ''easy exiting mechanisms into websites.'' As a result, the ''Impact Assessment'' turned to ''external estimates'' from ''[t]he U.S. eCommerce agency OuterBox [which] indicates a possible range of costs. It suggests that integrating simple tools into an existing eCommerce platform would cost most businesses approximately $500'' in 2022.[604] In 2023 dollars, that amount is $532.05.[605] The Commission notes, however, that many payment processors and website hosting platforms used by many businesses, particularly small and medium-sized businesses, provide marketers with consumer subscription account management tools that provide consumers with ''click-to-cancel'' functionality at no direct [606] incremental cost to marketers.[607] As no commenter

subscribers-ranking. As of mid-year 2024, the New York Times had 10.8 million subscribers. *See https://www.nytimes.com/2024/08/07/business/media/new-york-times-earnings.html.* The Commission was unable to locate subscriber data for some of the other firms sampled (*e.g.,* Savage Fenty, Daily Harvest, Deliveroo) and in some other instances found subscriber data reported only on a global basis (*e.g.,* Google One, Adobe).

[602] In the researcher's view, this kind of naming is confusing and adds unnecessary friction to the cancellation process. *See* Sinders (2023).

[603] U.K. ''Impact Assessment'' (2023) at 26.

[604] U.K. ''Impact Assessment'' (2023) at 27 (citing a report from 2022).

[605] *See* Bureau of Labor Statistics, ''CPI Inflation Calculator,'' *https://www.bls.gov/data/inflation_calculator.htm.* We note that this amount is equal to 10.25 hours of computer programmer time valued at a mean hourly wage rate of $51.90; *see* Bureau of Labor Statistics, ''Occupational Employment and Wages, May 2023, 15–1251 Computer Programmers,'' *https://www.bls.gov/oes/current/oes151251.htm.* As such, this is consistent with the outcome of the approach used by Carrigan-Walster, FTC–2024–0001–0026, in proxying the first-year costs of compliance costs with each of the six provisions of the Rule proposed in the NPRM (which differed, substantially, from the narrowed final Rule, although not with respect to ''click to cancel'' provisions). That approach made the ad hoc assumption that technological changes required by the Rule would require the same labor inputs as similar requirements in the NPRM for the FTC's Rule on Unfair or Deceptive Fees, notwithstanding the two rules differ substantially in their regulatory baselines. *See* 88 FR 77420.

[606] To the extent that a marketer uses the easy subscription account management and cancellation tools offered by hosting platforms or payment processors and the presence of such tools reduces consumers' perception of the risks of entering into a subscription agreement with the marketer, the marketer's sales may increase along with any payments to the platform or processor that are based on the number of transactions or aggregate sales.

[607] See, for example, Shopify's help page at *https://help.shopify.com/en/manual/products/purchase-options/shopify-subscriptions/customer-experience#subscription-management-for-customers,* ''Shopify Subscriptions displays subscription information to customers in the checkout. For example, when buying a subscription product, the order frequency and discount amount for the subscription is displayed in the order summary . . . . During checkout, your customer needs to agree to the cancellation policy terms to confirm that they understand they're purchasing a subscription. They can't complete their purchase without agreeing to this policy . . . . Customers can log in to their customer account to view and manage their subscription orders. Customers can resume, skip, and cancel their subscriptions, and manage their payment methods and shipping address.'' Moreover, Shopify offers a variety of consumer subscription management tools to merchants that use Shopify for payment processing (''checkout'') or website hosting at no incremental cost to merchants *See https://apps.shopify.com/categories/selling-products-purchase-options-subscriptions.* The fees Shopify charges merchants varies with a number of merchant-specific features, including website design elements, whether merchants want ''Shopify checkout'' to work on

Continued

provided information on (1) how many negative option sellers comply with ROSCA by offering only telephonic cancellation, (2) what specific costs they would face to provide an online cancellation mechanism, or (3) whether they would build such functionality themselves or use a third-party payment processor or hosting platform to provide it for them, we estimate such costs to range between $0 and $532.05 per firm.

Accordingly, the Commission assumes that most online marketers of negative option plans will face minimal IT costs of coming into compliance with the cancellation requirements of the final Rule.[608]

As noted previously, telemarketers have substantial control over both how long the consent process takes and how long it takes a consumer to complete a cancellation over the telephone. If compliance with the final Rule expedites the cancellation process over the phone, telemarketers may experience cost-savings associated with such resources. Furthermore, no telemarketers or call centers that provide services to telemarketers submitted comments relating to what costs telemarketers would incur to bring cancellation mechanisms into compliance with the final Rule. Because of this, and because the Commission has previously found that only 2,000[609] of 106,000 firms selling negative options were telemarketers (and no commenter has disputed this finding), the Commission proceeds as if telemarketers face no incremental costs in complying with the final Rule's cancellation requirements. However, to reduce any potential downward bias[610] this might introduce into the compliance cost estimate, the Commission does not subtract the estimated number of telemarketers (2,000) from the total estimated number of online negative option marketers in its calculations of costs. Similarly, the Commission lacks data on how many of the 106,000 firms selling negative option plans currently offer only in-person or by-mail cancellations.[611] The final Rule requires such firms to add a cancellation mechanism that consumers can easily use in a remote manner, *e.g.,* through interactive electronic media or by telephone.

Lastly, the Commission considers the initial year recordkeeping costs required by the Rule, which are estimated in section XIII to be $6.54 million when aggregated across all 106,000 firms.

Because of the aforementioned data limitations emerging from the comment record, the Commission applies the findings of the experimental research above, which looked only at online sellers, to the full number of firms, 106,000, that it has previously estimated to be marketers of negative option plans. This approach comports with a general proposition made by the report submitted by IAB.[612]

Accordingly, the Commission makes the following estimates of initial year compliance costs.

Familiarization costs: All 106,000 firms selling negative options will collectively incur final Rule familiarization costs of between $35.97 million and $341.22 million.

Disclosure costs: 19,875 firms (*i.e.,* .1875 × 106,000) will incur no costs in bringing their disclosures into compliance with the requirements of the final Rule because their disclosures are already compliant. The remaining 86,125 firms will collectively incur costs of between $3.96 million (*i.e.,* $45.95 × 86,125) and $39.58 million (*i.e.,* $459.50 × 86,125) to make their disclosures compliant with the final Rule.

Cancellation costs: 19,875 firms (*i.e.,* .1875 × 106,000) will incur no costs in bringing their cancellation mechanisms into compliance with the final Rule. 66,250 firms (*i.e.,* .625 × 106,000) collectively will incur costs of between $3.04 million (*i.e.,* 1 × $45.95 × 66,250) and $24.35 million (*i.e.,* 8 × $45.95 × 66,250) to bring their online cancellation mechanisms into compliance with the final Rule by relabeling consumer-facing elements of their existing cancellation architecture. 19,875 firms (*i.e.,* .1875 × 106,000) collectively will incur costs of between $0 and $10.57 million (*i.e.,* 19,875 × $532.05) to bring their telephonic cancellation mechanisms into compliance with the final Rule.

The Commission notes that this analysis does not quantify costs for the firms selling negative option plans that offer only in-person or by-mail cancellation. The Commission assumes that, in complying with this final Rule, these firms will choose to provide the alternative cancellation method (by phone, online, or both) that makes the most economic sense. The Commission also assumes that the cost of processing a cancellation over the phone should be similar to or less than the cost of processing a cancellation in person or by-mail for these firms. Therefore, the Commission assumes that these firms will not incur significant compliance

social media platforms in addition to the merchant's own website, how many of the merchant's employees will have the ability to log-in to the merchant's Shopify account, etc. (*see https://aureatelabs.com/blog/shopify-website-development-cost*). So, although what merchants pay to use Shopify may vary across firms, the incremental cost of using Shopify for consumer subscription account management is assumed to be zero. *See also* Hoofnagle, FTC–2023–0033–1137 (''There are scores of companies like Chargebee that help companies manage subscriptions . . . . Compliance with new rules is inexpensive because policy changes can be made programmatically in dashboards'' provided by entities such as Chargebee.'').

[608] No commenter to the ANPR or NPRM, and no comment, expert report, or testimony in relation to the informal hearing provided estimates of compliance costs firms would incur that were specific to the features of the Rule as then-proposed that remain in the final Rule.

[609] *See* NPRM, 88 FR 24733.

[610] Because telemarketing firms are such a small share of all firms that will be covered by the final Rule, the Commission does not expect this treatment of telemarketers (or, indeed, even a total exclusion of telemarketers from the analysis) to impart a significant bias.

[611] Three trade associations, who have some members who either sell or offer cancellation mechanisms in-person, submitted comments that were not sufficiently detailed to permit Commission staff to estimate the number of firms that both sell and cancel in-person or through the mail. For example, IHRSA (FTC–2023–0033–0863) commented many of its members allow several options for agreement termination through simple online solutions including online account management, email cancellation requests, and specific online cancellation buttons or forms, adding many of these options are currently available for members who have purchased their membership either online or in person. The International Carwash Association (''ICA''), FTC–2023–0033–1142, commented on subscription-related revenues of member firms (noting more than half, and sometimes more than 80%, of store revenues can be attributable to subscription sales), but not on the number of firms that sell subscriptions or how many subscriptions they sell. Similarly, although it commented subscriptions could be purchased in person, on the world wide web, via a mobile app, or at an automated teller, it provided no data on the relative shares of subscription purchases through these channels or the cancellation mechanisms made available to consumers. The objections ICA raised to a Rule requiring its members to offer cancellation by any method other than in-person strongly suggests that most member firms currently only offer cancellation that way, suggesting that those who sell on the internet, via a mobile app and (possibly) at an automated teller may already be in violation of ROSCA if in-person cancellations are a violation of ROSCA's ''simple cancellation mechanism'' requirement. IFA (FTC–2023–0033–0856) provided data from its database on the number of franchisees operating fitness establishments, spa/massage studios, entertainment facilities, and preventative healthcare facilities in the U.S., but provided no information on what share of firms sold subscriptions or the media through which consent was obtained or cancellation mechanisms were offered. In a later comment (FTC–2024–0001–0009), IFA noted consumers of member firms used the alternative of ''freezing'' their memberships at rates of 10%–40% but did not provide information on what the ''freezing'' mechanism was or what cancellation mechanisms were available to consumers.

[612] *See* Carrigan-Walster, FTC–2024–0001–0026 (employing a similar assumption: ''Many firms using negative option marketing present their offers through the web. For those firms that present offers through other means, web developer time is used as a proxy for worker time to create the presentation of the offers.'').

costs to provide an alternative cancellation method.

Recordkeeping costs: Collectively, firms will incur recordkeeping costs of $6.54 million annually.

Total Initial Year Costs: Summing costs enumerated above, the Commission estimates the costs of the Rule in the first year will range between $49.52 and $422.26 million. These costs are presented in Table 6. The Commission assumes that these costs will be incurred by the end of the initial year following the Rule's implementation.

TABLE 6—TOTAL INITIAL YEAR COMPLIANCE COSTS

[In millions, 2023 dollars]

	Low	High
Familiarization Costs	$35.97	$341.22
Disclosure Costs	3.96	39.57
Cancellation Mechanisms Costs	3.04	34.93
Recordkeeping Costs	6.54	6.54
Total Initial Year Costs	49.52	422.26

(3) Ongoing Compliance Costs, Years 2 Through 10

Compliant disclosures, cancellation paths, and consumer-facing information about cancellation mechanisms will form a ''template'' that can be used without any incremental compliance costs as new subscription products are added to a marketer's retinue of products offered for sale via a negative option plan. The information relevant to the sale of a new product may be ''dropped'' into the template in a fill-in-the-blank way. The Commission assumes marketers, in the ordinary course of business, know what is required for the disclosures (*e.g.,* the amounts consumers will be charged, when, by date or frequency, such charges will occur, when consumers must act to stop recurring charges, etc.) and consider the costs of entering this information into established disclosure templates to be a routine cost of doing business, not an incremental cost required by compliance with the final Rule. The same will also be true for negative option plans that are telemarketed or sold in person; once a telemarketing script or an in-person sales disclosure form is developed in the initial year of compliance, it becomes a template that readily can be used as new subscription products are offered over time. Accordingly, once a marketer comes into compliance with the final Rule there should be no incremental costs of ongoing compliance with respect to disclosures and cancellation mechanisms, and the costs of adding, changing, or deleting products the marketer offers for sale via negative option will be no different from what they would have been absent the final Rule.

The Commission can seek redress or civil penalties for violations of the final Rule. Absent the final Rule, enforcement actions against unfair or deceptive negative option practices would be brought under section 5 where civil penalties are not available and where, post-*AMG,* it is difficult to obtain redress. Accordingly, some negative option marketers may pay closer attention to underlying claims made for products marketed using negative option sales because of the monetary relief available for violations of the final Rule relative to a section 5 enforcement action. This, however, is no different than what any firm should do to assure that it is not in violation of section 5, and the Commission considers the costs of attentiveness to section 5 compliance as part of the existing regulatory baseline, not as costs that are incremental to complying with the final Rule.

The U.K.'s ''Impact Assessment'' of its regulatory treatment of subscription plans did not estimate ongoing compliance costs because ''the size of these costs . . . are likely small in comparison to the one-off cost and benefits.'' [613] In further support of this, the ''Impact Assessment'' cited a report that found that on-going costs were meaningful only in relation to sending reminders to consumers about their subscriptions, and only for firms that used postal mail delivery and not electronically delivered reminders.[614] The final Rule does not contain a ''reminder'' requirement, and so the ongoing costs of sending reminders to consumers, small though they may be, are not ongoing costs of compliance with the final Rule.

The experts' report submitted by IAB estimated 10 hours of attorney time for annual compliance checks for the Rule proposed in the NPRM. Because the final Rule has removed the most complex (and, therefore, costly) features of the proposed Rule (*e.g.,* double consent, the treatment of ''saves'' in cancellation flows, and the issuance of annual ''reminders'' for some subscriptions), the Commission assumes half of the annual compliance check hours assumed in IAB's experts' report, five hours, is an upper bound on attorney hours needed for annual compliance checks. Moreover, the Commission assumes that some firms will incur no incremental annual compliance check costs, either because their pre-existing business practices followed what the final Rule requires or because the platforms or payment processors they use provide compliant disclosures and cancellation flows.[615]

Accordingly, the Commission estimates the aggregate annual costs of compliance checks to range between $0 and $44.97 million (*i.e.,* 106,000 × 5 hours × $84.84/hour). Inclusive of recordkeeping costs, total ongoing costs range between $6.54 million (*i.e.,* $0 + $6.54 million) and $51.51 million (*i.e.,* $44.97 million + $6.54 million).

(4) Summary of Total Costs

Table 7 presents the initial and recurring costs of this Rule in each year, as well as the present discounted value and annualized costs over 10 years using a 2 percent discount rate. The Commission estimates that in Year 1, the initial costs will range between $49.52 and $422.26 million. In each of the following years, the Commission estimates that the recurring costs will range between $6.54 and $51.51 million. The Commission estimates that the

[613] U.K. ''Impact Assessment'' (2023) at 30.

[614] ''We note for example, that Ofcom assessed . . . the business costs of providing customers with notifications at the end of their contracts. These involved possible ongoing costs related to identifying customers that needed notifications on an ongoing basis and providing them with the notification. After consultation with stakeholders, Ofcom only estimated the costs of providing consumers with letters, on the basis that only this medium had significant ongoing costs.'' *Id.*

[615] See discussion in section VII.B.1.a.2 of this SBP and n.146.

present discounted value of costs over ten years, using a 2 percent discount rate, will range between $100.89 and $826.15 million. The Commission estimates that these costs, annualized over ten years using a 2 percent discount rate, would range between $11.23 and $91.97 million per year.

TABLE 7—TOTAL QUANTIFIED COSTS

[In millions, 2023 dollars]

Year	Low	High
1	$49.52	$422.26
2	6.54	51.51
3	6.54	51.51
4	6.54	51.51
5	6.54	51.51
6	6.54	51.51
7	6.54	51.51
8	6.54	51.51
9	6.54	51.51
10	6.54	51.51
Present Discounted Value of Costs over 10 years, 2% discount rate	100.89	826.15
Annualized Costs over 10 years, 2% discount rate	11.23	91.97

(d) Sensitivity Analysis

As a sensitivity analysis, the Commission considers an alternative method that does not rely on data from historical enforcement matters for distributing subscription cancellations across the baseline cancellation methods used to estimate quantified benefits. This alternative method assumes the majority of subscriptions are enrolled online and can be cancelled online in the baseline; whereas, in the main analysis, the majority of subscriptions are enrolled online and can only be cancelled by phone in the baseline. Compared with the main analysis, this alternative method produces lower total quantified benefits by $419.77 to $449.53 million annualized per year, yet the estimated range of quantified benefits still exceeds the estimated range of quantified costs.

(1) Number of Cancellations by Enrollment and Baseline Cancellation Method

Under this sensitivity analysis, the Commission assumes that the baseline number of subscriptions and cancellations is the same as in the main analysis. The Commission also assumes the number of in-person subscriptions, as proxied for by gym memberships, is the same as in the main analysis. What differs here is the approach for determining the share of cancellations likely to occur through online and telephone methods.

The main analysis uses enforcement data to determine the share of cancellations likely to occur through online and telephone methods. This data may suffer from selection bias if, among other factors, only the more egregious violations are pursued through enforcement methods. This approach also assumes no marketers of negative option plans comply with this Rule in the baseline. Further, because the data only include resolved cases and resolved cases tend to be older, they are less likely to reflect the current state of the market.

In this alternative analysis, the Commission uses statistics discussed in the NPRM—that 106,000 firms offer negative option plans and 2,000 of those firms are telemarketers.[616] Based on that, the Commission assumes 1.9 percent (*i.e.,* 2,000/106,000) of subscriptions and cancellations are enrolled and cancelled over the phone in the baseline. The Commission then assumes the remaining cancellations of subscriptions that were not enrolled over the phone or in person were instead enrolled online.[617]

To estimate the distribution of baseline cancellation methods of subscriptions enrolled online, the Commission uses the results from an experiment in which a researcher consented to 16 online subscriptions between August 2 to October 4, 2022 and then canceled each one, recording the time it took to cancel along with a variety of other obstacles faced in cancelling.[618] Of the 16 online subscriptions, three were found to be easy to cancel online, indicating they are likely in compliance with this Rule; three required phone calls to cancel; and the remaining 10 had a non-straightforward online cancellation method. Based on these results, the Commission assumes 18.75 percent (*i.e.,* 3/16) of online subscriptions have Rule-compliant cancellation methods in the baseline; 18.75 percent (*i.e.,* 3/16) of online subscriptions require telephone cancellation in the baseline; and 62.5 percent (*i.e.,* 10/16) of online subscription offer non-Rule-compliant online cancellations in the baseline.

Table 8 provides the number of subscription cancellations each year distributed across the enrollment and regulatory baseline cancellation methods: online enrollment and telephone cancellation; online enrollment and non-Rule-compliant online cancellation; online enrollment and Rule-compliant online cancellation; telephone enrollment and telephone cancellation; and in-person enrollment.

[616] *See* NPRM, 88 FR 24733.

[617] The Commission acknowledges this excludes subscriptions that are enrolled by mail, likely resulting in an overestimate of the number of subscriptions enrolled online.

[618] *See* Sinders (2023). Among the obstacles noted for otherwise seemingly simple online cancellations were that some websites did not use straight forward terms, such as ''unsubscribe'' or ''cancel,'' and instead put the cancellation path under titles such as ''auto-renew'' or ''edit plan.''

TABLE 8—SENSITIVITY ANALYSIS: CANCELLATIONS BY ENROLLMENT AND BASELINE CANCELLATION METHOD

[In millions]

Year	Online enrollment, telephone cancellation	Online enrollment, non-compliant online cancellation	Online enrollment, compliant online cancellation	Telephone enrollment, telephone cancellation	In-person enrollment
1	63.79	212.63	63.79	6.87	14.62
2	64.28	214.27	64.28	6.93	14.73
3	64.78	215.92	64.78	6.98	14.84
4	65.27	217.56	65.27	7.03	14.96
5	65.76	219.21	65.76	7.08	15.07
6	66.26	220.85	66.26	7.14	15.18
7	66.66	222.19	66.66	7.18	15.27
8	67.06	223.54	67.06	7.22	15.37
9	67.46	224.88	67.46	7.27	15.46
10	67.87	226.23	67.87	7.31	15.55

(2) Estimating Total Benefits

To estimate total quantified benefits under this sensitivity analysis, the Commission uses the same matching of enrollment and baseline cancellation methods to per-cancellation benefit estimates as in the main analysis. The only difference here is that the Commission assumes consumers who experience Rule-compliant online cancellations in the baseline will not see any additional benefit as a result of this final Rule.

As in the main analysis, the Commission multiplies the number of cancellations in each category by the matched per-cancellation benefit on the low- and the high-end and then sums across all five categories to obtain total quantified benefits each year. Those totals are presented in Table 9 below. In the first year following implementation of the final Rule, the Commission estimates the benefits under this sensitivity analysis will range between $254.85 million and $4.88 billion. In Year 10, the Commission estimates the benefits will range between $271.15 million and $5.20 billion. Using a 2 percent discount rate, the Commission estimates the present discounted value of benefits over 10 years to range between $2.36 and $45.28 billion. Annualized over 10 years using a 2 percent discount rate, the Commission estimates the benefits to range between $263.06 million and $5.04 billion per year. These annualized benefits estimates are between $419.77 and $449.53 million less per year than the estimates from the main analysis.

TABLE 9—SENSITIVITY ANALYSIS: ESTIMATES OF BENEFITS

[In millions, 2023 dollars]

Year	Low	High
1	$254.85	$4,883.26
2	256.82	4,921.01
3	258.79	4,958.77
4	260.76	4,996.53
5	262.73	5,034.29
6	264.70	5,072.05
7	266.31	5,102.91
8	267.92	5,133.77
9	269.54	5,164.63
10	271.15	5,195.49
Present Discounted Value of Benefits over 10 years, 2% discount rate	2,362.97	45,277.43
Annualized Benefits over 10 years, 2% discount rate	263.06	5,040.58
Difference in Annualized Benefits from Main Analysis	−419.77	−449.53

4. *An explanation of the reasons for the determination of the Commission that the final Rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen.*

As discussed above in sections I, II, and VII.A, the Commission determines the following deceptive or unfair practices are widespread in the negative option marketplace and cause consumer harm: (1) material misrepresentations made while marketing goods or services with negative option features; (2) failure to provide important information about material terms prior to obtaining consumers' billing information and charging consumers; (3) lack of informed consumer consent; and (4) failure to provide consumers with a simple cancellation method, including failure to honor cancellation requests, refusal to provide refunds to consumers who unknowingly enrolled in programs, denying consumers refunds and forcing them to pay to return the unordered goods, and requiring consumers to cancel using a different method than the one used to sign up for the program.

The final Rule amendments prohibit sellers from misrepresenting material facts in connection with promoting or offering for sale a good or service with a negative option feature, require negative option sellers to disclose certain important information about negative option features, obtain a consumer's express informed consent and maintain records of consumer consent for three years after the initial transaction (unless the seller satisfies

the technological exemption), and provide consumers a simple mechanism for cancellation. In promulgating the final Rule, the Commission sought to enhance consumer protections while avoiding detailed, prescriptive requirements that would impede innovation.

5. *A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis and a summary of the assessment by the Commission of such issues.*

Several commenters (*e.g.,* NCTA, IAB) raised concerns over the Commission's conclusions regarding the economic effect of the proposed Rule. NCTA asserted the NPRM lacked any meaningful cost-benefit analysis, suggesting compliance with the proposed Rule would result in significant costs to its members.[619] Among other things, NCTA said its members would be required to implement changes to their existing customer processes, review and revise existing disclosures, and revamp recordkeeping systems. During the informal hearing process, NCTA further argued it could cost major cable operator members between $12–25 million to comply with the proposed Rule.[620] Additional commenters also suggested compliance with the proposed Rule would cost more than what the Commission estimated. None of them, however, offered any empirical analysis of the issue. In response to these comments, and following the presiding officer's recommended decision, the Commission provides the detailed cost-benefit analysis above in Section X.B.3.

XI. Final Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, requires the Commission to conduct an Initial Regulatory Flexibility Analysis (''IRFA'') with a proposed rule and a Final Regulatory Flexibility Analysis (''FRFA''), if any, with a final rule, unless the Commission certifies the rule will not have a significant economic impact on a substantial number of small entities.[621] The Regulatory Flexibility Act further states the required elements of the FRFA may be performed in conjunction with or as part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of the FRFA.[622]

In the NPRM, the Commission provided an IRFA, stating its belief that the proposal will not have a significant economic impact on small entities, and solicited comments on the burden on any small entities that would be covered. Specifically, the Commission acknowledged it did not have sufficient empirical data to determine whether the proposed amendments may affect a substantial number of small entities; therefore, the Commission sought comment on the percentage of affected companies that qualify as small businesses.

The Commission reviewed and considered the comments in response to the NPRM and determined, as an alternative to finalizing the proposed Rule in its entirety, to modify the Rule. In particular, the Commission decided to limit the material terms to be disclosed immediately adjacent to consent for the negative option feature; remove the limitation on saves and the accompanying recordkeeping requirement; remove the annual reminder provision; and modify the length of the recordkeeping requirement for verification of consent by fixing it to three years and provide an alternative method of compliance. After careful consideration of the comments and following the Commission's determination not to finalize the proposed Rule in its entirety, the Commission certifies that the final Rule will not have a significant economic impact on a substantial number of small entities. Nevertheless, because the Commission included an IFRA in the NPRM, the Commission has also performed an FRFA below, and comments to the IFRA are discussed below.

A. A statement of the need for, and objectives of, the Rule.

The Commission describes the need for and the objectives of the final Rule in section X.B.1 to the Final Regulatory Analysis.

B. A statement of the significant issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed Rule as a result of such comments.

Several commenters raised issues about the proposed Rule's economic impact on small businesses. For instance, NFIB asked the Commission to adopt a special provision that would limit enforcement of the Rule against small businesses (fewer than 50 employees) to instances of willful or repeated violations, and set up a program for education on compliance.[623] IFA and IHRSA encouraged the Commission to conduct a ''Small Business Regulatory Impact Analysis'' to determine how the proposal will impact small businesses.[624] IHRSA stated that small businesses in the health and fitness industry operate at ''much different capacity'' than larger industries, noting 44% of U.S. small businesses have less than three months of cash reserves, making them more vulnerable to disruptions.[625] Similarly, ACT App Association noted that roughly 20% of small business startups fail in the first year due to scarcity in financial resources.[626]

Other commenters, including PDMI, ESA, Joint Small Business Digital Economy Innovators, and ICA, generally stated the proposed Rule would impose unnecessary and undue burdens on small businesses, but did not offer any detailed empirical data for the Commission to consider.[627]

In response, the Commission first notes its sensitivity to small businesses' concerns. It provides numerous free resources through the Bureau of Consumer Protection Business Center web page[628] to assist businesses of all sizes in complying with the law and will engage in consumer and business education campaigns about this Rule. Second, in consideration of comments regarding regulatory burden, the Commission clarifies or modifies the Rule in several significant ways: (1) it defines ''material'' and provides several concrete categories of material facts to ensure businesses have a clear understanding of how it will interpret materiality under the Rule; (2) it limits the number of terms that must mandatorily appear ''immediately adjacent'' to the request for consent to

[619] NCTA, FTC–2023–0033–0858; IAB, FTC–2023–0033–1000. *See also* IFA, FTC–2023–0033–0856; USTelecom, FTC–2023–0033–0876; RILA, FTC–2023–0033–0883; Coalition, FTC–2023–0033–0884; Chamber, FTC–2023–0033–0885 (urging the Commission to refine its cost benefit analysis).

[620] FTC–2024–0001–0011; *see also* Asurion, FTC–2023–0033–0878 (stating the Commission's estimated annual labor costs are understated, and projecting the costs to Asurion and its clients would be millions of dollars); SCIC, FTC–2023–0033–0879 (cost of compliance for the service contract industry would be substantially higher than cost of compliance for unregulated entities, and disproportionately borne by small businesses; APCIA, FTC–2023–0033–0996 (same).

[621] *See* 5 U.S.C. 603–605.

[622] 5 U.S.C. 605.

[623] NFIB, FTC–2023–0033–0789.

[624] IFA, FTC–2023–0033–0856; IHRSA, FTC–2023–0033–0863.

[625] IHRSA, FTC–2023–0033–0863.

[626] ACT App Association, FTC–2023–0033–0874.

[627] PDMI, FTC–2023–0033–0864; ESA, FTC–2023–0033–0867; Joint Small Business Digital Economy Innovators, FTC–2023–0033–0875; ICA, FTC–2023–0033–1142.

[628] *https://www.ftc.gov/business-guidance.*

the negative option feature; (3) it removes the requirement to obtain separate affirmative consent to ''the rest of the transaction'' and modifies the recordkeeping requirement; (4) it removes the saves and annual reminder requirements, which also should reduce recordkeeping and compliance burdens. Additionally, the Commission delays the effective date of the final Rule for 180 days to allow time for implementation (except for the provisions related to misrepresentations and other procedural requirements, which should not be an added burden for businesses already complying with the law and which take effect 60 days after publication of the final Rule).

C. The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed Rule, and a detailed statement of any change made to the proposed rule in the final Rule as a result of the comments.

The Small Business Administration did not file comments in response to the proposed Rule.

D. A description of and an estimate of the number of small entities to which the Rule will apply or an explanation of why no such estimate is available.

The final Rule affects sellers, regardless of industry, engaged in making negative option offers, defined by the final Rule to mean any person ''selling, offering, charging for, or otherwise marketing goods or services with a Negative Option Feature.''[629] Small entities in potentially any industry could incorporate a negative option feature into a sales transaction.[630] The Commission is unaware, however, of any source of data identifying across every industry the number of small entities that routinely utilize negative option features. Although the NPRM requested comments on the percentage of affected companies that qualify as small businesses, and some trade association commenters indicated that some of their members were small businesses, these comments did not identify either the number or share of their small business members that sold negative option contracts.

E. A description of the projected reporting, recordkeeping, and other compliance requirements of the Rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The estimates of the recordkeeping requirements under the final Rule are set out within the Paperwork Reduction Act analysis in section XII below. As mentioned above, the Commission preliminarily determined the impact of the proposed requirements on small entities is most likely not significant. The small entities potentially covered by these amendments will include all such entities subject to the Rule (*e.g.,* all entities selling goods or services through negative option programs). The professional skills necessary for compliance with the proposed amendments would include sales and clerical personnel. The Commission requested comment on these issues.

In the NPRM, The FTC estimated the majority of firms subject to the recordkeeping requirements already retained these types of records in the normal course of business. The FTC anticipated many transactions subject to the final Rule would be conducted via the internet, minimizing burdens associated with compliance. Additionally, most entities subject to the final Rule were likely to store data though automated means, which reduces compliance burdens associated with record retention. Furthermore, regarding the disclosure requirements, the Commission stated it was likely the substantial majority of sellers routinely provide these disclosures in the ordinary course as a matter of good business practice. Moreover, many State laws already require the same or similar disclosures as the Rule would mandate. Finally, some negative option sellers are already covered by ROSCA and the TSR and thus subject to similar disclosure requirements.

Commenters provided additional comments, suggesting small businesses will be significantly impacted, and the Commission underestimated the burdens. Recordkeeping and disclosure costs associated with the Rule became one of the issues designated for the informal hearing, after which the presiding officer determined ''the issue is not genuinely disputed,'' noting the failure of interested parties to ''provide any evidence to establish what the costs *would be,*'' as opposed to generalized complaints ''costs will be *higher* than the NPRM's estimates.''[631] As explained in the Paperwork Reduction Act estimates below and elsewhere in this SBP, the Commission made changes to the Rule based on the record. Specifically, the Commission determined to specify and thereby limit the types of disclosures required, narrow the scope of entities covered (by excluding those solely involved in ''promoting'' negative option plans), curtail the length of time for retaining records (to only three years), and establish an option for sellers to eliminate having to keep records of consent if they have the requisite processes in place. Because neither the Commission nor the presiding officer at the informal hearing received evidence to dispute the recordkeeping and disclosure costs figures in the NPRM, the Commission adopts the NPRM's analysis. Given the narrower scope of the final Rule, that analysis should be more conservative and tend to overstate the burden.

F. A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final Rule and why each one of the other significant alternatives to the Rule considered by the agency which affect the impact on small entities was rejected.

In formulating the proposed amendments, the Commission made every effort to avoid imposing unduly burdensome requirements on sellers. To that end, the Commission avoided, where possible, proposing specific, prescriptive requirements that could stifle marketing innovation or otherwise limit seller options in using new technologies.

As explained above, in response to comments regarding regulatory burden, the Commission clarifies or modifies the Rule in several significant ways: (1) it defines ''material'' and provides several concrete categories of material facts to ensure businesses have a clear understanding of how it will interpret materiality under the Rule; (2) it limits the number of terms that must mandatorily appear ''immediately adjacent'' to the request for consent to the negative option feature; (3) it removes the requirement to obtain separate affirmative consent to ''the rest of the transaction'' and modifies the recordkeeping requirement; (4) it removes the saves and annual reminder requirements, which also should reduce recordkeeping and compliance burdens. Additionally, the Commission delays the effective date of the final Rule for 180 days to allow time for implementation (except for the provisions related to misrepresentations and other procedural requirements, which should not be an added burden

[629] Rule § 425.2(g).

[631] Recommended Decision by Presiding Officer, *https://www.regulations.gov/comment/FTC-2024-0001-0042* (emphasis in original).

for businesses already complying with the law and which take effect 60 days after publication of the final Rule).

XII. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.,* requires Federal agencies to obtain Office of Management and Budget (''OMB'') approval before collecting information directed to ten or more persons. The current Rule contains various provisions that constitute information collection as defined by 5 CFR 1320.3(c), the OMB regulations implementing the PRA. In January 2024, OMB approved continuation of the Rule's existing information collection (OMB Control No. 3084–0104). The final Rule makes changes in the Rule's recordkeeping and disclosure requirements that will increase the PRA burden as detailed below. Accordingly, the Commission is submitting the final Rule and a Supplemental Supporting Statement to OMB for review under the PRA.[632] The associated burden analysis follows.

A. The Proposed Rule

In the NPRM, the Commission provided time and cost estimates for the proposed Rule's recordkeeping and disclosure requirements, and solicited comments about their associated costs, including on: (1) whether the disclosure, recordkeeping, and reporting requirements are necessary, including whether the resulting information will be practically useful; (2) the accuracy of our burden estimates, including whether the methodology and assumptions used are valid; (3) how to improve the quality, utility, and clarity of the disclosure requirements; and (4) how to minimize the burden of providing the required information to consumers.[633]

The NPRM also included staff's estimate that the burden for recordkeeping compliance would be 53,000 hours and the estimated burden for disclosures would be 212,000 hours, for a total of 265,000 hours. These estimates are explained below.

Number of Respondents. FTC staff estimated there are 106,000 entities offering negative option features to consumers. This estimate is based primarily on data from the U.S. Census North American Industry Classification System (NAICS) for firms and establishments in industry categories wherein some sellers offer free trials, automatic renewal, prenotification plans, and continuity plans. Based on NAICS information as well as its own research and industry knowledge, FTC staff identified an estimated total of 530,000 firms involved in such industries.[634] However, FTC staff estimated that only a fraction of the total firms in these industry categories offer negative option features to consumers. For example, few grocery stores and clothing retailers, which account for approximately a third of the of the total estimate from all industry categories, are likely to regularly offer negative option features. In addition, some entities included in the total may qualify as common carriers, exempt from the Commission's authority under the FTC Act. Accordingly, the Commission estimated approximately 106,000 business entities (20%) offer negative option features to consumers.

Recordkeeping Hours. FTC staff estimated the majority of firms subject to the Rule already retain the types of records in the normal course of business that would be required by the proposed Rule. Under such conditions, the time and financial resources needed to comply with disclosure requirements do not constitute ''burden'' under the PRA.[635] Moreover, staff anticipated that many transactions subject to the Rule are conducted via the internet and most entities subject to the Rule are likely to store data though automated means, which reduces compliance burdens associated with record retention. Accordingly, staff estimated that 53,000 entities subject to the Rule will require approximately one hour per year to comply with the Rule's recordkeeping requirements, for an annual total of 53,000 burden hours.

Disclosure Hours. Staff anticipated that the substantial majority of sellers already routinely provide the disclosures that would be required by the proposed Rule. For these sellers, the time and financial resources associated with making these disclosures do not constitute a ''burden'' under the PRA because they are a usual and customary part of regular business practice. 5 CFR 1320.3(b)(2). Moreover, many State laws require the same or similar disclosures as the Rule mandates. In addition, approximately 2,000 negative option sellers are already covered by the TSR and subject to its disclosure requirements. Accordingly, FTC estimated the disclosure burden required by the Rule will be, on average, two hours each year for each seller subject estimated to be subject the Rule, for a total estimated annual burden of 212,000 hours.

Estimated Annual Labor Cost. To estimate labor costs for recordkeeping requirements, staff multiplied the 53,000 hours to comply with the proposed Rule's recordkeeping provisions by a clerical wage rate of $18.75/hour.[636] The result is an annual cost of approximately $993,750.

To estimate annual labor costs for disclosures for all entities, staff multiplied the 212,000 hours to comply with the proposed Rule's disclosure provisions by a sales personnel wage rate of $22.15/hour.[637] The result is an annual cost of approximately $4,695,800.

Thus, the estimated annual labor costs were $5,689,550 [($993,750 recordkeeping) + ($4,695,800 disclosure)].

Estimated Annual Non-Labor Cost. The NPRM stated capital and start-up costs associated with the Rule's recordkeeping provisions are *de minimis.* Any disclosure or recordkeeping capital costs involved with the Rule, such as equipment and office supplies, would be costs borne by sellers in the normal course of business.

B. Comments Received and Informal Hearing

The NPRM sought comments on the PRA analysis and stated, ''comments should provide any available evidence and data that supports their position, such as empirical data.'' [638] The Commission did not receive such evidence. A few commenters from businesses and industry groups, however, raised generalized concerns

[632] The PRA analysis for this rulemaking focuses strictly on the information collection requirements created by and/or otherwise affected by the amendments.

[633] 88 FR 24734.

[634] Examples of these industries include sellers of software, streaming media, social media services, financial monitoring, computer security, fitness services, groceries and meal kits, dietary supplements, sporting goods, home service contracts, home security systems, office supplies, pet food, computer supplies, cleaning supplies, home/lawn maintenance services, personal care products, clothing sales, energy providers, newspapers, magazines, and books. The NAICS does not provide estimates for all of these categories. Where such data is unavailable, the staff has used its own estimates based on its knowledge of these industry categories.

[635] Under the PRA, the time, effort, and financial resources necessary to comply with the collection of information that would be incurred by persons in the normal course of their activities (*e.g.,* in compiling and maintaining business records) does not constitute a burden under the Rule where the associated recordkeeping is a usual and customary part of business activities. 5 CFR 1320.3(b)(2).

[636] This figure is derived from the mean hourly wage shown for Information and Record Clerks. *See* Bureau of Labor Statistics, ''Occupational Employment and Wages—May 2021,'' at Table 1 (Mar. 31, 2022) (National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2021), *https://www.bls.gov/news.release/pdf/ocwage.pdf.*

[637] This figure is derived from the mean hourly wage shown for Sales and related occupations. *See id.*

[638] 88 FR 24730.

that the NPRM underestimated PRA-related costs.[639]

As noted earlier, the Commission set an informal hearing, at the request of interested parties, and appointed Administrative Law Judge Carol Fox Foelak as the presiding officer.[640] Based on submissions by interested parties, and other information in the record, the presiding officer designated two disputed issues of material fact, including, ''What will the recordkeeping and disclosure costs associated with the proposed rule be?'' [641]

Based on the record, the presiding officer concluded, ''There is insufficient evidence to make a finding concerning the . . . recordkeeping and disclosure costs associated with the proposed rule,'' and ''in the absence of evidence, the issue is not genuinely disputed.'' [642] The presiding officer further explained: ''IAB made a well-reasoned argument that the costs will be *higher* than the NPRM's estimates, generalizing from limited estimates that it, IFA, and NCTA provided. However, it did not provide any evidence to establish what the costs *would be.*'' [643]

C. Final PRA Analysis

As previously discussed, the Commission made changes to the Rule based on the record. Some of these changes, in turn, affect the PRA analysis. Specifically, the Commission determined to specify and thereby limit the types of disclosures required, narrow the scope of entities covered (by excluding those solely involved in ''promoting'' negative option plans), curtail the length of time for retaining records (to only three years), and establish an option for sellers to eliminate having to keep records of consent if they have the requisite processes in place. Neither the Commission nor the presiding officer at the informal hearing received evidence to dispute the specific PRA-related figures in the NPRM. For the final Rule, the Commission adopts the following PRA analysis.

Number of Respondents. The Commission received no evidence to dispute the NPRM's statements on the number of entities offering negative option features to consumers, so the Commission adopts the NPRM estimate that there are 106,000 such entities. Although the final Rule is narrower in that it excludes the term ''promote'' from its scope, the Commission retains the estimate of 106,000 entities for the purposes of this analysis, which would be more conservative and tend to overstate the burden.

Recordkeeping Hours. The Commission received no evidence to dispute the NPRM's statements on recordkeeping under the PRA. As the final Rule is narrower, the time and financial resources needed to comply with disclosure requirements still do not constitute ''burden'' under the PRA.[644] Accordingly, the Commission adopts the NPRM estimate that 53,000 entities subject to the Rule will require approximately one hour per year to comply with the Rule's recordkeeping requirements, for an annual total of 53,000 burden hours.

Disclosure Hours. Similarly, the Commission received no evidence to dispute the NPRM's statements on disclosure hours under the PRA. As the final Rule narrowed and delineated the types of disclosures required, the time and financial resources associated with making these disclosures is even less than under the proposed Rule, which also did not constitute a ''burden'' under the PRA because they are a usual and customary part of regular business practice. 5 CFR 1320.3(b)(2). Accordingly, the Commission adopts the NPRM estimate that the disclosure burden required by the Rule will be, on average, two hours each year for each seller subject estimated to be subject the Rule, for a total estimated annual burden of 212,000 hours.

Estimated Annual Labor Cost. The Commission received no evidence to dispute the NPRM's statements on labor costs under the PRA. For the final Rule, the Commission updates its labor cost estimates by using more recent wage data. For recordkeeping, staff multiplied the 53,000 estimated hours to comply with the Rule's recordkeeping provisions by a clerical wage rate of $20.94/hour,[645] to yield an annual cost of approximately $1,109,820. For disclosure compliance, staff multiplied the 212,000 estimated hours by an hourly wage rate for sales personnel of $25.62,[646] to yield an annual cost of $5,431,440. Thus, the estimated total annual labor costs are $6,541,260 [($1,109,820 recordkeeping) + ($5,431,440 disclosure)].

Estimated Annual Non-Labor Cost. The Commission received no evidence to dispute the NPRM's statements that capital and start-up costs associated with the Rule's recordkeeping provisions are *de minimis* under the PRA. The Commission adopts those findings.

List of Subjects in 16 CFR Part 425

Advertising, Consumer protection, Trade practices.

■ For the reasons stated in the preamble, the Federal Trade Commission revises 16 CFR part 425 to read as follows:

PART 425—RULE CONCERNING RECURRING SUBSCRIPTIONS AND OTHER NEGATIVE OPTION PROGRAMS

Sec.
425.1 Scope.
425.2 Definitions.
425.3 Misrepresentations.
425.4 Important information.
425.5 Consent.
425.6 Simple cancellation (''Click to Cancel'').
425.7 Relation to State laws.
425.8 Exemptions.
425.9 Severability.

Authority: 15 U.S.C. 41 through 58.

§ 425.1 Scope.

This Rule contains requirements related to any form of negative option program in any media, including, but not limited to, Interactive Electronic Media, telephone, print, and in-person transactions.

§ 425.2 Definitions.

Billing Information means any data that enables any person to access a consumer's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

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[639] Sirius XM, FTC–2023–0033–0857; SCIC, FTC–2023–0033–0879; Coalition, FTC–2023–0033–0884; ETA, FTC–2023–0033–1004; Direct Marketing Companies, FTC–2023–0033–1016. In addition, one commenter seemingly confused PRA-related costs with full implementation of the Rule, but still offered only generalized points. *See* Asurion, FTC–2023–0033–0878. Another commenter queried whether the Commission's estimate of the number of firms offering negative option features include B2B sales with automatic renewal clauses. ETA, FTC–2023–0033–1004. The staff estimate did not seek to exclude such sellers.

[640] Hr'g Notice, 88 FR 85525.

[641] Recommended Decision by Presiding Officer, *https://www.regulations.gov/comment/FTC-2024-0001-0042.*

[642] Recommended Decision by Presiding Officer, *https://www.regulations.gov/comment/FTC-2024-0001-0042.*

[643] Recommended Decision by Presiding Officer, *https://www.regulations.gov/comment/FTC-2024-0001-0042.*

[644] Under the PRA, the time, effort, and financial resources necessary to comply with the collection of information that would be incurred by persons in the normal course of their activities (*e.g.,* in compiling and maintaining business records) does not constitute a burden under the Rule where the associated recordkeeping is a usual and customary part of business activities. 5 CFR 1320.3(b)(2).

[645] This figure is derived from the mean hourly wage shown for Information and Record Clerks. *See* Bureau of Labor Statistics, ''Occupational Employment and Wages, May 2023, 43–9061 Office Clerks, General,'' *https://www.bls.gov/oes/currenT/oes439061.htm.*

[646] This figure is derived from the mean hourly wage shown for Sales and related occupations. *See id.*

Charge, Charged, or *Charging* means any attempt to collect money or other consideration from a consumer, including but not limited to causing Billing Information to be submitted for payment, including against the consumer's credit card, debit card, bank account, telephone bill, or other account.

Clear and Conspicuous means that a required disclosure is easily noticeable (*i.e.,* difficult to miss) and easily understandable by ordinary consumers, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

(4) In any communication using an Interactive Electronic Medium, such as the internet, mobile application, or software, the disclosure must be unavoidable.

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

(7) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(8) When the representation or sales practice targets a specific audience, such as children, older adults, or the terminally ill, "ordinary consumers" includes members of that group.

Interactive Electronic Medium is any electronic means of communicating (except via telephone calls), including internet, mobile application, text, chat, instant message, email, software, or any online service.

Material means likely to affect a person's choice of, or conduct regarding, goods or services.

Negative Option Feature is a provision of a contract under which the consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement is interpreted by the negative option seller as acceptance or continuing acceptance of the offer, including, but not limited to:

(1) An automatic renewal;

(2) A continuity plan;

(3) A free-to-pay conversion or fee-to-pay conversion; or

(4) A pre-notification negative option plan.

Negative Option Seller means the person selling, offering, charging for, or otherwise marketing a good or service with a Negative Option Feature.

§ 425.3 Misrepresentations.

In connection with promoting or offering for sale any good or service with a Negative Option Feature, it is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the Federal Trade Commission Act ("FTC Act") for any Negative Option Seller to misrepresent, expressly or by implication, any Material fact, including any of the following:

(a) The Negative Option Feature or any term of the Negative Option Feature, including consumer consent, any deadline to prevent or stop a Charge, or the cancellation of the Negative Option Feature;

(b) Cost;

(c) Purpose or efficacy of the underlying good or service;

(d) Health or safety; or

(e) Any other Material fact.

§ 425.4 Important information.

(a) *Disclosures.* In connection with promoting or offering for sale any good or service with a Negative Option Feature, it is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the FTC Act for a Negative Option Seller to fail to disclose to a consumer, prior to obtaining the consumer's Billing Information, all Material terms, regardless of whether those terms directly relate to the Negative Option Feature, and including but not limited to:

(1) That consumers will be Charged for the good or service, or that those Charges will increase after any applicable trial period ends, and, if applicable, that the Charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such Charges;

(2) Each deadline (by date or frequency) by which the consumer must act to prevent or stop the Charges;

(3) The amount (or range of costs) the consumer will be Charged and, if applicable, the frequency of the Charges a consumer will incur unless the consumer takes timely steps to prevent or stop those Charges; and

(4) The information necessary for the consumer to find the simple cancellation mechanism required pursuant to § 425.6.

(b) *Form and content of required information.* (1) Clear and Conspicuous: Each disclosure required by paragraph (a) of this section must be Clear and Conspicuous.

(2) Placement:

(i) The disclosures required by paragraphs (a)(1) through (4) of this section must appear immediately adjacent to the means of recording the consumer's consent for the Negative Option Feature; and

(ii) The disclosures required by paragraph (a) of this section (including, but not limited to, the disclosures required by paragraphs (a)(1) through (4) of this section) must appear before obtaining the consent required pursuant to § 425.5.

(3) Other Information: All communications, regardless of media, must not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to read, hear, see, or otherwise understand the disclosures required by paragraph (a) of this section.

§ 425.5 Consent.

(a) *Express informed consent.* In connection with promoting or offering for sale any good or service with a Negative Option Feature, it is a violation of this part and an unfair or deceptive act or practice in violation of section 5 of the FTC Act for a Negative Option Seller to fail to obtain the consumer's express informed consent before Charging the consumer. In obtaining such expressed informed consent, the Negative Option Seller must:

(1) Obtain the consumer's unambiguously affirmative consent to the Negative Option Feature offer separately from any other portion of the transaction;

(2) Not include any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent to the Negative Option Feature; and

(3) Keep or maintain verification of the consumer's consent for at least three years. However, if the seller can

demonstrate by a preponderance of the evidence that it uses processes ensuring no consumer can technologically complete the transaction without consent, such seller does not have to maintain these records for such transactions.

(b) *Requirements for Negative Option Features covered in the Telemarketing Sales Rule.* Negative Option Sellers covered by the Telemarketing Sales Rule must comply with all applicable requirements provided in 16 CFR part 310, including, for transactions involving preacquired account information and a free-to-pay–conversion feature, obtaining from the customer, at a minimum, the last four (4) digits of the account number to be charged and making and maintaining an audio recording of the entire telemarketing transaction as required by 16 CFR part 310.

(c) *Documentation of unambiguously affirmative consent for written offers.* Except for transactions covered by the preauthorized transfer provisions of the Electronic Fund Transfer Act (15 U.S.C. 1693e) and Regulation E (12 CFR 1005.10), a Negative Option Seller will be deemed in compliance with the requirements of paragraph (a)(1) of this section for all written offers (including over the internet or phone applications), if that seller obtains the required consent through a check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign to accept the Negative Option Feature and no other portion of the transaction. The consent request must be presented in a manner and format that is clear, unambiguous, non-deceptive, and free of any information not directly related to the consumer's acceptance of the Negative Option Feature.

§ 425.6 Simple cancellation (''Click to Cancel'').

(a) *Simple mechanism required for cancellation.* In connection with promoting or offering for sale any good or service with a Negative Option Feature, it is a violation of this Rule and an unfair or deceptive act or practice in violation of section 5 of the FTC Act for the Negative Option Seller to fail to provide a simple mechanism for a consumer to cancel the Negative Option Feature; avoid being Charged, or Charged an increased amount, for the good or service; and immediately stop any recurring Charges.

(b) *Simple mechanism at least as simple as consent.* The simple mechanism required by paragraph (a) of this section must be at least as easy to use as the mechanism the consumer used to consent to the Negative Option Feature.

(c) *Minimum requirements for simple mechanism.* At a minimum, the Negative Option Seller must provide the simple mechanism required by paragraphs (a) and (b) of this section through the same medium the consumer used to consent to the Negative Option Feature, and:

(1) For cancellation by Interactive Electronic Medium, the simple cancellation mechanism must be easy to find when the consumer seeks to cancel. Compliance with the disclosure required under § 425.4(a)(4) does not discharge this obligation. In no event shall a consumer be required to interact with a live or virtual representative (such as a chatbot) to cancel if the consumer did not do so to consent to the Negative Option Feature.

(2) For cancellation by telephone call, the Negative Option Seller must promptly effectuate cancellations requested by the consumer via a telephone number that is answered or records messages, made available during normal business hours, and not more costly to use than the telephone call the consumer used to consent to the Negative Option Feature.

(3) For cancellation of consent obtained in person, in addition to offering cancellation, where practical, via an in-person method similar to that the consumer used to consent to the Negative Option Feature, the Negative Option Seller must offer the simple mechanism through an Interactive Electronic Medium or by providing a telephone number. The alternate simple mechanism required by this paragraph must satisfy all requirements of paragraphs (c)(1) and (2) of this section, as applicable. If the Negative Option Seller offers the alternate mechanism by providing a telephone number, the seller shall not erect a cost-barrier to cancellation by imposing any unnecessary or unreasonable cost for the cancellation call.

§ 425.7 Relation to State laws.

(a) *In general.* This part shall not be construed as superseding, altering, or affecting any State statute, regulation, order, or interpretation relating to negative option requirements, except to the extent it is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

(b) *Greater protection under State law.* For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if it affords any consumer greater protection than provided under this part.

§ 425.8 Exemptions.

Any person to whom this part applies may petition the Commission for a partial or full exemption. The Commission may, in response to petitions or on its own authority, issue partial or full exemptions from this part if the Commission finds application of this part's requirements is not necessary to prevent the acts or practices to which this part relates. The Commission shall resolve petitions using the procedures provided in 16 CFR 1.31. If appropriate, the Commission may condition such exemptions on compliance with alternative standards or requirements to be prescribed by the Commission.

§ 425.9 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

By direction of the Commission, Commissioners Holyoak and Ferguson dissenting.

April J. Tabor,

Secretary.

Note: The following statements will not appear in the Code of Federal Regulations.

Statement of Commissioner Rebecca Kelly Slaughter

As is common in rulemaking proceedings, this Final Rule that the Commission promulgates is somewhat different from what it originally proposed—clarified, narrowed, and ultimately improved by the process of grappling with the substantial record of comments submitted by the public. I extend my heartfelt thanks to everyone who submitted comments; to the talented staff in our Division of Enforcement and the East Central Regional Office who diligently shepherded this proceeding, thoroughly considered all those comments, and recommended thoughtful revisions; and to my colleagues for their deep engagement with this issue of great importance, including former Chairman Joe Simons, under whose leadership the Commission initiated this rulemaking proceeding.

I write separately to draw attention to the comment record about a provision that the Commission proposed but ultimately does not finalize, proposed § 425.7, which would have required annual reminders of subscriptions that do not involve the delivery of physical goods.[1] Americans understand the importance and value of such a requirement; many have discovered that they or their parents had been paying for years or even decades for a service wholly unused, such as a dial-up internet service from the

[1] *See* Negative Option Rule, 88 FR 24716, 24736 (proposed Apr. 24, 2023) (''Annual reminders for negative option features not involving physical goods.'') (to be codified at 16 CFR 425.7), *https://www.federalbregister.gov/documents/2023/04/24/2023-07035/negative-option-rule.*

1990s.[2] The reason that the Commission declines to finalize this proposal is not that it lacks policy merit but that the record in total does not support its inclusion in the Final Rule as proposed.[3] Of course, we are always mindful that our authority under the FTC Act to issue rules under section 18 has limits; sometimes, as here, those limits prevent us from codifying in a rule practices that we might, as a matter of policy, prefer to require explicitly.

Congress and State legislatures, by contrast, have plenary authority to require such a reminder. This spring, for example, in a show of bipartisanship, Virginia Governor Glenn Youngkin signed into law legislation sponsored by Delegate Michelle Lopes Maldonado, H.B. 744, which requires that subscriptions that renew annually provide to the consumer a notice of the upcoming renewal and the opportunity to cancel via between 30 and 60 days before the consumer is charged for the renewal.[4] The comment record compiled in this rulemaking proceeding strongly supports the wisdom of Federal and State legislators' carefully considering adopting such a law, and the Final Rule's omission of such a provision should be understood only as a reflection of the Commission's cautious approach to its jurisdictional limits and not as related to the merits of a policy that requires annual reminders for subscription services.

[2] *See, e.g.,* Cmt. of the Attorneys General of New York, Pennsylvania, Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, Vermont, Washington, and Wisconsin (June 23, 2023), at 15 (''Subscription management has become an entire industry; consumers can choose from a variety of companies that offer to monitor their recurring subscriptions. We believe that consumers should not have to sign up for yet another service—one that comes with privacy and security risks, as subscription monitoring services require sharing financial account and other sensitive information—in order to effectively manage their subscriptions.''), *https://www.regulations.gov/comment/FTC-2023-0033-0886;* Cmt. of Consumer Action, Consumer Federation of America, Demand Progress Education Fund, National Association of Consumer Advocates, National Consumer Law Center (on behalf of its low-income clients), and National Consumer League (June 23, 2023), at 7 (''Consumers deserve to know when they are about to be charged automatically, with a chance to opt out.''), *https://www.regulations.gov/comment/FTC-2023-0033-0880;* Cmt. of Profs. Caruso, Raghavan, Sovern, Vladeck, Pridgen, Janger, Ondersma, and Block-Lieb (June 23, 2023), at 7–8 (encouraging the Commission to adopt the reminder requirement without narrowing it), *https://www.regulations.gov/comment/FTC-2023-0033-0861.*

[3] *See* Fed. Trade Comm'n, Negative Option Rule, Final Rule Statement of Basis and Purpose (Oct. 16, 2024) (draft as submitted to the Office of the Federal Register), at 138–44.

[4] *See* 2024 Va. Acts, H. 744, Apr. 4, 2024 (to be codified at section 59.1–207.46(E)), *https://legacylis.virginia.gov/cgi-bin/legp604.exe?241+ful+CHAP0452+pdf.*

Dissenting Statement of Commissioner Melissa Holyoak

''Article I of the Constitution vests 'all legislative Powers herein granted' in Congress. 'By vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure not only that all power would be derived from the people, but also that those entrusted with it should be kept in dependence on the people.' ''[1] Whenever we engage in rulemaking, the Commission should recall that Article I of the Constitution vests legislative powers in Congress, not with agencies. Because of that, it is elected officials that delineate the boundaries, and set the requirements, that we as Commissioners must adhere to. I believe the Commission exceeds those boundaries and requirements in amendments to the Negative Option Rule, 16 CFR part 425, (''Rule'') it finalizes today. Instead of pursuing targeted enforcement efforts or finalizing a rule consistent with the Commission's authority under section 18 of the FTC Act,[2] the Commission has used its limited resources to promulgate a broader regulation that may not survive legal challenge.[3]

The likely unlawful character of the rule is compounded by the Majority's race to cross the finish line. Why the rush? There is a simple explanation. Less than a month from election day, the Chair is hurrying to finish a rule that follows through on a campaign pledge made by the Chair's favored presidential candidate.[4]

The Majority votes today to approve a final trade regulation rule amendment to the existing negative option rule. This amendment greatly expands the prior rule, which had covered now-rare prenotification plans (*e.g.,* book-of-the-month clubs)—and goes well beyond what existing laws, such as the Restore Online Shoppers' Confidence Act (''ROSCA''),[5] Telemarketing Sales Rule (''TSR''),[6] or Regulation E,[7] require. The now-capacious Rule creates potential civil penalty liability for: any misrepresentation of material fact made in connection with the marketing of a product or service that has a negative option feature (§ 425.3); failure to disclose all material terms before obtaining billing information in connection with a negative option (§ 425.4); failure to obtain express informed consent before charging in connection with a negative option (§ 425.5); and failure to provide a simple mechanism for cancelling a negative option (§ 425.6). The Rule also preempts inconsistent State laws (§ 425.7).

I respectfully dissent for three reasons. First, this rulemaking did not follow the FTC Act's section 18 requirements for rulemaking because: (1) the Rule is much broader than the ''area of inquiry'' proposed by the advance notice of proposed rulemaking (''ANPR''); (2) the Rule fails to define with specificity acts or practices that are unfair or deceptive, improperly generalizing from narrow industry-specific complaints and evidence to the entire American economy; and (3) the Rule fails to demonstrate that the unfair or deceptive acts or practices related to negative option billing are ''prevalent.''[8] Second, the Rule's breadth incentivizes companies to avoid negative option features that honest businesses and consumers find valuable. Third, the Rule represents a missed opportunity to make useful amendments to the preexisting negative option rule within the scope of the Commission's authority.

Such amendments could have provided greater clarity to businesses about the patchwork of Federal laws pertaining to negative options and lawfully used our section 18 rulemaking authority to fill potential gaps including, for example, cancellation requirements. Indeed, I am very concerned that consumers are sometimes misled by companies using deceptive negative option features. The Rule represents a missed opportunity to devote scarce staff resources to bringing enforcement actions related to negative option features using the clear tools that Congress gave us, rather than conducting an overbroad rulemaking that cost years of staff time to propose and finalize, but will likely not survive legal challenge.

Today's rulemaking did not need to end this way. Had political leadership at the Commission taken more time to engage with other Commissioners to refine and improve the Rule, my vote and statement would look very different. Instead, less than a month from November 5, the Chair has put political expediency over getting things right. Unfortunately, pushing politically motivated rulemakings has not been the exception with the Majority.[9] Today, I believe we are seeing another low in our abuse and misuse of the tools Congress has given us. Rather than engage in blatant electioneering to advance political ends, the Commission should have

[1] Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *In the Matter of the Non-Compete Clause Rule,* FTC Matter No. P201200, at 1 (June 28, 2024) (quoting U.S. Const. Art. I and *W. Virginia* v. *EPA,* 597 U.S. 697, 737–38 (2022) (Gorsuch, J., concurring)) (cleaned up), *https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf.*

[2] 15 U.S.C. 57a.

[3] *Cf.* Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *supra* note 1, at 2 (''My dissent should not, however, be interpreted to mean that I endorse all non-compete agreements. To the contrary, I would support the Commission's prosecution of anti-competitive non-compete agreements, where the facts and law support such enforcement. That is why I am particularly disappointed that the Commission dedicated the Commission's limited resources to a broad rulemaking that exceeds congressional authorization and will likely not survive legal challenge.'') (citation omitted).

[4] *See, e.g., A New Way Forward for the Middle Class: A Plan to Lower Costs and Create an Opportunity Economy, KamalaHarris.com,* at 33 (Sept. 2024) (''Under her leadership as Vice President, the Administration has launched a historic effort to crack down on junk fees and save consumers time and money. This includes [a rule] to . . . make it as easy to cancel a subscription as it is to subscribe. . . . A Harris-Walz Administration will . . . continue to take on the everyday hassles that waste Americans' time and money, [including] subscriptions. . . .'') (citing FTC press release), *https://kamalaharris.com/wp-content/uploads/2024/09/Policy-Book-Economic-Opportunity.pdf.*

[5] 15 U.S.C. 8401–8405.

[6] 16 CFR part 310.

[7] 12 CFR 1005.10.

[8] 15 U.S.C. 57a.

[9] *See generally* Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *supra* note 1.

instead focused on stewarding its resources effectively and in ways that restore our institutional legitimacy, not further undermine it.

I. The historical context surrounding Congress's enactment of rulemaking requirements in section 18 of the FTC Act is important. Congress passed the Magnuson-Moss Warranty Act in 1975, which imposed exacting requirements and limitations on rulemaking regarding unfair or deceptive acts or practices.[10] In the 1970s, the Commission tried to use its rulemaking and unfairness authority aggressively—for example, ''to ban all advertising directed to children on the grounds that it was 'immoral, unscrupulous, and unethical' and based on generalized public policies to protect children.'' [11] In response, Congress refused to fund the Commission, shutting it down for several days.[12] Even this harsh rebuff did not completely cool Congressional ire with the ''National Nanny'' (as the Washington Post—no bastion of conservative thought—facetiously dubbed the Commission).[13] A 1979 Senate Report found that the agency's rulemaking efforts were filled with ''excessive ambiguity, confusion, and uncertainty.'' [14] In 1980, Congress legislated to limit the Commission's authority, by imposing additional procedural obligations on section 18 rulemaking.[15] Among other things, Congress created additional procedural rights, well beyond the Administrative Procedure Act's baseline procedural requirements, such as requiring the FTC to issue an ANPR with numerous specific requirements, which the Commission must submit to Congress, for each rulemaking.[16]

Congress' harsh reaction to the FTC's overreach only makes sense if we understand that section 18 was created and then expanded not to give the Commission free-ranging rulemaking authority, but to curb it. We should be exacting in following the requirements of section 18, lest we risk repeating history—drawing Congressional ire that that could further limit our authority and budget. Indeed, section 18's rulemaking requirements, while demanding, are the means of assuring that we act within the parameters established by Congress.

[10] Magnuson-Moss Warranty Act of 1975, Public Law 93–637, 88 Stat. 2183.

[11] *See* J. Howard Beales III, *The Fed. Trade Comm'n's Use of Unfairness Authority: Its Rise, Fall, and Resurrection,* 22 J. of Pub. Pol'y & Mktg. 192, 193 (2003) (citing FTC Staff Report on Television Advertising to Children (Feb. 1978); Notice of Proposed Rulemaking on Television Advertising to Children, 43 FR 17967 (Apr. 27, 1978)). In the 1970s, the Commission aggressively used its rulemaking authority—so aggressively that it has been called the ''second most powerful legislature in America.'' Timothy J. Muris, *The Consumer Protection Mission: Guiding Principles and Future Direction,* 51 Antitrust L.J. 625, 625 (1982). The approach of today's Majority threatens to turn back the clock to this earlier, ill-advised approach.

[12] *Id.* at 193.

[13] *Id.*

[14] S. Rep. No. 96–500, at 3 (1979).

[15] Federal Trade Commission Improvements Act of 1980, Public Law 96–252, 94 Stat. 374.

[16] *Id.*

As an initial matter, this Rule's procedural irregularities begin with how the Rule was finalized in a compressed time frame. Given the rigorous demands of section 18 rulemaking, historically, it has taken the Commission, on average, 5.57 years to issue a rule after the Magnuson-Moss procedures were enacted.[17] That, apparently, was too much time and procedure for the Majority. In 2021, during the pendency of this rulemaking, the Commission made changes to its rules of practice,[18] over objections from the Commissioners in the Minority, to limit the efficacy of section 18's procedural safeguards and compress rulemaking timeframes.[19] Among other things, the Commission revised the Rules of Practice so as to remove selection of the Presiding Officer from an independent judge and assign that role to the Chair; strip the Presiding Officer of significant control over the hearing process; and narrow opportunities for the public to help determine which factual issues are in dispute.[20] Then-Commissioners Phillips and Wilson dissented, noting: ''What the[se] changes—adopted without public input—in fact do is fast-track regulation at the expense of public input, objectivity, and a full evidentiary record.'' [21]

Apparently not content with even these procedural shortcuts and compressed timeframe, political leadership now speeds to the finish line with minimal opportunity for Commissioner engagement on the final Rule. There should be ample opportunity for robust consideration and dialogue leading up to a Commission vote on any regulation, and especially for a highly consequential rule. Such opportunity for dialogue may assuage concerns, produce constructive changes, and ultimately lead to a better result. Indeed, in the past where political leadership has been willing to engage and make needed modifications preceding votes, that consideration and engagement have been very valuable and led to bipartisan support for Commission actions.

Here, however, the time period for me to review this economy-wide Rule was a matter of weeks. Those weeks were also packed with dozens of cases, one other rulemaking, and other policy matters. (Remarkably, the Chair had this draft final Rule for some time before it was circulated to the other Commissioners.) Reviewing the NPRM was no substitute for robust discussion and

[17] Jeffrey S. Lubbers, *It's Time To Remove the ''Mossified'' Procedures for Removing FTC Rulemaking,* 83 Geo. Wash. L. Rev. 1979, 1997 (2015).

[18] Press Release, Fed. Trade Comm'n, *FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct* (July 1, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger-deterrence-corporate-misconduct.*

[19] *See* Dissenting Statement of Comm'rs Christine S. Wilson and Noah Joshua Phillips, *Regarding the Comm'n Statement On the Adoption of Revised Section 18 Rulemaking Procedures* (July 9, 2021), *https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf.*

[20] *Id.* at 3–5.

[21] *Id.* at 3.

negotiation related to the final Rule's language and statement of basis and purpose, as the final Rule differs in important ways from the rule as proposed. The push to finalize is inexcusable, particularly because it is a discretionary rulemaking with no due date (imposed by Congress or otherwise). For those tracking the Rule and national politics closely, this rush to the finish line (and less than a month from a Presidential election) is no surprise. This Rule is connected to the current administration's efforts relating to so-called junk fees (which are beginning to make a regular appearance before elections [22]), and it has been in the spotlight for some time, including at the White House [23] and now on the campaign trail.[24]

But elevating political goals comes at a high price, harms policy efforts that might otherwise benefit consumers, and undermines the Commission's legitimacy. Publicly appearing to refuse to keep an open mind on a final rule or to prejudge complex policy questions, along with an apparent unwillingness to reconsider various aspects of a rulemaking may create PR buzz for the campaign trail and score political points. But that posture creates real legal risk for the Rule. Statements from the White House [25]

[22] *See generally* Betsy Klein et al., *Biden Cracks Down on ''Junk Fees'' in New Economic Focus Ahead of Midterms,* CNN (Oct. 26, 2022), *https://www.cnn.com/2022/10/26/politics/biden-bank-fees-speech/index.html.*

[23] *See, e.g., Biden-Harris Administration Announces Broad New Actions to Protect Consumers from Billions in Junk Fees,* The White House (Oct. 11, 2023) (''The FTC proposed a 'click to cancel' rule in March of 2023, that, if finalized as proposed, would require sellers to make it as easy for consumers to cancel their enrollment as it was to sign up. This rule would rescue consumers from seemingly never-ending struggles to cancel unwanted subscription payment plans for everything from cosmetics to gym memberships.''), *https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/11/biden-harris-administration-announces-broad-new-actions-to-protect-consumers-from-billions-in-junk-fees/.*

[24] *See, e.g., A New Way Forward, KamalaHarris.com, supra* note 4.

[25] *See, e.g.,* President Biden (@POTUS), *X.com* (Aug. 12, 2024) (''We're making it easier to cancel subscriptions and memberships. You shouldn't have to navigate a maze just to cancel unwanted subscriptions and recurring payments. The FTC is hard at work finalizing its 'Click to Cancel' rule that it proposed to make this process a requirement.''), *https://x.com/POTUS/status/1823037212885414107; see also FACT SHEET: Biden-Harris Administration Launches New Effort to Crack Down on Everyday Headaches and Hassles That Waste Americans' Time and Money,* The White House (Aug. 12, 2024) (''Today, President Biden and Vice President Harris are launching 'Time Is Money,' a new governmentwide effort to crack down on all the ways that corporations . . . add unnecessary headaches and hassles to people's days and degrade their quality of life. . . . The Federal Trade Commission (FTC) has proposed a rule that, if finalized as proposed, would require companies to make it as easy to cancel a subscription or service as it was to sign up for one. The agency is currently reviewing public comments about its proposal.''), *https://www.whitehouse.gov/briefing-room/statements-releases/2024/08/12/fact-sheet-biden-harris-administration-launches-new-effort-to-crack-down-on-everyday-headaches-and-hassles-that-waste-americans-time-and-money/.*

and related statements from the Chair[26] concerning this rule—and other matters related to her tenure or connected to her party's campaign efforts[27]—raise the possibility that foreordained outcomes and political goals curtailed considering the rulemaking record with an open mind and without prejudgment, as law requires.[28] Today's sprint to the finish line has shortchanged the kind of deliberation and thoughtful engagement Congress deemed appropriate when it established rulemaking requirements under the Magnuson-Moss Act.

In addition to my concern about these irregularities, I am convinced that this rulemaking has failed to satisfy section 18's requirements for rulemaking in three ways. First, the Commission is issuing a broad final rule even though the ANPR was far narrower. This mismatch means that the Commission failed to provide in its ANPR the ''brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission'' that section 18 requires.[29] The mismatch is the result of leadership changes and priorities. The ANPR was voted out in 2019 by a bipartisan Commission under then-Chair Joseph J. Simons.[30] It sought public comments about centralizing existing legal requirements regarding negative options and filling gaps via section 18 rulemaking related to disclosures, consent, and cancellation.[31] The current Majority took the bipartisan ANPR and politically supercharged it.

Importantly, the ANPR did not contemplate broader regulation prohibiting all misrepresentations of material fact related to products that have negative option features. The ANPR tailored its inquiry by ''. . . highlighting five basic section 5 requirements that negative option marketing must follow to avoid deception'': (1) disclosure of material terms of a negative option offer; (2) clear and conspicuous disclosures; (3) pre-purchase disclosures; (4) consent; (5) cancellation.[32] Absent from this list is anything about prohibiting all misrepresentations of material fact related to any product that happens to have a negative option feature. Similarly, when the ANPR stated that the Commission was seeking comment ''to reduce consumer harm created by deceptive or unfair negative option marketing,'' it specified the Commission's interest pertained to ''disclosures, consumer consent, and cancellation.''[33] Again, absent from that list was anything about prohibiting all misrepresentations of material fact related to marketing of any product that has a negative option feature.

When Commission leadership changed in 2021, the ''area of inquiry'' changed as well. Almost immediately, the Commission under Chair Khan disrupted this particular rulemaking process to issue an Enforcement Policy Statement Regarding Negative Option Marketing[34]—sub-regulatory guidance on the very same topic as the rulemaking itself. The Commission then issued a Notice of Proposed Rulemaking (''NPRM'') in 2023 that introduced into the rulemaking—for the first time—the notion of prohibiting misrepresentations related to marketing of products with negative option features.[35] Former Commissioner Christine S. Wilson dissented from the issuance of the NPRM for this (among other) reasons. In her dissenting statement, Commissioner Wilson explained: ''Importantly, we did not seek comment in the ANPR about whether an expanded negative option rule should address general misrepresentations; no comments are cited in the NPRM to support the inclusion of these provisions.''[36]

[26] *See, e.g.,* Lina Khan (@linakhanFTC), *X.com* (Aug. 12, 2024) (''As @POTUS notes, @FTC's proposal would require that firms make it as easy to cancel a subscription as it is to sign up. Too often people have to jump through endless hoops—or end up stuck paying for services they don't want. Our rule would end this tax on your time & money.''), *https://x.com/linakhanFTC/status/1823094653962289640.* That Tweet came in response to the President unequivocally saying, ''[w]e're making it easier to cancel subscriptions and memberships,'' and signaling the proposal would be finalized consistent with the NPRM. *See* President Biden (@POTUS), *supra* note 25. Other statements are similarly probative of apparent conclusions being reached about the contours of the final rule. *See, e.g.,* Chair Lina M. Khan, Remarks at Center for American Progress, at 3–4 (Sept. 25, 2024) (''We've also unfortunately seen a rise in subscription traps. We've all been there. Every month, you're paying for that gym membership you don't really use, or streaming services you never signed up for in the first place. But it's absurdly difficult to actually cancel these services. You have to call customer service and spend an hour on the phone with a bot before you finally get through to a human being. Customer Service then transfers you to Memberships. They transfer you to Cancellations. And then suddenly the call drops and you have to do it all over again. It can feel like you're stuck in some type of endless doom loop. And many people understandably just give up—and pay dozens if not hundreds of dollars for subscriptions they don't want or need. And of course, that's kind of the point: to wear you down and keep taking your money, month after month. I'm excited that the Commission will be considering finalization of a 'click to cancel' rule that would require companies to make it just as easy to cancel a subscription as it is to sign up for one.''), *https://www.ftc.gov/system/files/ftc_gov/pdf/20240925-remarks-chair-khan-center-for-american-progress.pdf; see also* Chair Lina M. Khan, Remarks at Strike Force on Unfair and Illegal Pricing Public Convening, at 2 (Aug. 1, 2024) (''We're currently working toward finalizing our 'click to cancel' rule. Too often, businesses require people to jump through endless hoops just to cancel a subscription. Customers end up paying dozens if not hundreds of dollars a month in subscriptions they want to escape. Our proposed rule would require that companies make it as easy to cancel a subscription as it is to sign up for one—ending this tax on people's time and money.''), *https://www.ftc.gov/system/files/ftc_gov/pdf/2024.08.01-remarks-chair-khan-strike-force-public-convening.pdf.* In light of such statements unambiguously reflecting a firm belief in the need for regulatory action—and all but committing to the proposed solution—it is risible to suggest this rule was not effectively baked well before the Commission's vote.

[27] *See, e.g.,* Talmon Joseph Smith, *Lina Khan Ends FTC Term. What's Next for Her?,* Seattle Times (Oct. 1, 2024) (''Q: You've not gotten any whispers, any word that you will not be wanted in a Harris administration? A. No, I think to the contrary.''), *https://www.seattletimes.com/business/lina-khan-ends-ftc-term-whats-next-for-her/; see generally* Ben Brody, *Lina Khan Hits the Road with Democrats Ahead of Election,* Punchbowl News (Oct. 2, 2024), *https://punchbowl.news/article/campaigns/ftc-lina-khan-campaigns-with-democrats/; cf.* Letter from James Comer, Chair, Committee on Oversight and Accountability to Lina Khan, Chair, Fed. Trade Comm'n, at 1 (Oct. 8, 2024) (''During this election season, you have engaged in partisan political activities with numerous Democrat congressional candidates, undermining the FTC's independence and its mission to protect American consumers regardless of partisan affiliation''), *https://oversight.house.gov/wp-content/uploads/2024/10/FTC-re-Chair-Khan-Campaign-Season-Events_10.8.202423.pdf.*

[28] *See generally* 15 U.S.C. 57a(b)(1); 5 U.S.C. 553(c); *cf. Air Transport Ass'n of Am. Inc.* v. *Nat' Mediation Bd.,* 663 F.3d 476 (D.C. Cir. 2011); *Int'l Snowmobile Mfrs. Ass'n* v. *Norton,* 340 F. Supp. 2d 1249 (D. Wyo. 2004); *Nehemiah Corp. of Am.* v. *Jackson,* 546 F. Supp. 2d 830 (E.D. Cal. 2008). The Chair's approach is highly unusual, given this legal risk and the Commission's responsibility to keep an open mind—which is why, typically, Commissioners do not comment on *pending* rulemakings.

[29] 15 U.S.C. 57a(b)(2)(A).

[30] Fed. Trade Comm'n, Press Release, *FTC Seeks Public Comment on Ways to Improve Current Requirements for Negative Option Marketing* (Sept. 25, 2019), *https://www.ftc.gov/news-events/news/press-releases/2019/09/ftc-seeks-public-comment-ways-improve-current-requirements-negative-option-marketing.*

[31] 84 FR 52393, 52394 (Oct. 2, 2019) (''The Commission seeks comments on ways to improve its existing regulations for negative option marketing, a common form of marketing where the absence of affirmative consumer action constitutes assent to be charged for goods or services. Negative option offers are widespread in the marketplace and can provide substantial benefits for sellers and consumers. However, consumers cannot reap such benefits when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible. Over the years, such problematic negative option practices have remained a persistent source of consumer harm, often saddling consumers with recurring payments for products and programs they did not intend to purchase or did not want. In the past, the Commission has sought to address such practices through individual law enforcement cases and a patchwork of regulations. Nevertheless, problems persist, and consumers continue to submit thousands of complaints to the FTC each year about negative option marketing. To address these concerns, the Commission seeks comments on ways to improve existing regulatory requirements, including whether it should use its rulemaking authority under the FTC Act to expand the scope and coverage of the existing Negative Option Rule.'').

[32] *Id.* at 52395.

[33] *Id.* at 52396.

[34] Fed. Trade Comm'n, Press Release, *FTC To Ramp Up Enforcement Against Illegal Dark Patterns that Trick or Trap Consumers Into Subscriptions* (Oct. 28, 2021), *https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap-consumers-subscriptions.*

[35] Fed. Trade Comm'n, Press Release, *Federal Trade Comm'n Proposes Rule Provision Making It Easier for Consumers to ''Click to Cancel'' Recurring Subscriptions and Memberships* (Mar. 23, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/03/federal-trade-commission-proposes-rule-provision-making-it-easier-consumers-click-cancel-recurring.*

[36] Dissenting Statement of Comm'r Christine S. Wilson, *Notice of Proposed Rulemaking, Negative Option Rule,* at 3 (Mar. 23, 2023), *https://www.ftc.gov/system/files/ftc_gov/pdf/p064202_commissioner_wilson_dissent_negative_option_rule_finalrevd_0.pdf.*

The Statement of Basis and Purpose (''SBP'') accompanying the final Rule cursorily dismisses concerns about the ANPR's adequacy, dubiously arguing that section 18 requires no such ''specificity'' in describing the area of inquiry.[37] But the whole purpose of section 18's requirement of a description of what the Commission aims to do is to elicit public comment to inform the Commission about its choices. Indeed, section 18 requires an ANPR to invite interested parties to provide ''suggestions or alternative methods for achieving such objectives.'' [38] Parties cannot possibly include alternative methods if the ANPR wholly fails to identify the objective, *i.e.,* regulating misrepresentations in marketing of products with negative option features.

It is telling that the ANPR here only elicited 17 comments,[39] while the NPRM (which made clear that the Commission was significantly expanding its focus) elicited 16,000 comments.[40] The narrowness of the ANPR meant the Commission could not, consistent with section 18, proceed to a much broader NPRM.[41] In choosing to interpret the ANPR (and the 17 comments it elicited) as sufficient predicate for the much-expanded NPRM, the Commission cut itself off from valuable public comments at important early stages (especially as to regulatory alternatives) and ignored the rulemaking guardrails that Congress carefully established to forestall nondelegation concerns that might otherwise exist.[42]

The second procedural failing lies in the Commission's failure to ''prescribe . . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices'' as Section 18 requires.[43] ''Because the prohibitions of section 5 of the Act are quite broad, trade regulation rules are needed to define with specificity conduct that violates the statute and to establish requirements to prevent unlawful conduct.'' [44] Section 425.3 of the Rule fails Section 18's specificity requirements. Section 425.3 prohibits any misrepresentation of material fact made in connection with the sale or promotion of a product that has a negative option feature.

Unfairness explicitly requires a cost-benefit analysis relating to the practices at issue.[45] Meanwhile, deception is a subset of the broader unfairness authority. With its focus on reasonableness and materiality, no cost-benefit analysis is required because the Commission has historically argued that deceptive practices are always harmful. So far, so good. But both unfairness, and particularly deception, require the Commission to provide sufficient evidence for a reviewing court to evaluate whether the Commission has met the legal predicate for either theory (particularly as it relates to reasonableness and materiality). While the Rule provides examples of material misrepresentations, those are merely examples. Indeed, the Commission ignores the specificity requirement by generalizing from poorly sampled past agency cases. Whatever the merits of the past cases, the Majority does not remotely come close to explaining how the evidence in those limited cases is similar to the myriad contexts an economy-wide rule would inevitably apply to.

Indeed, the Rule is not limited to misrepresentations relating to deceptive terms of negative option features (or some other specific, deceptive conduct), but instead, applies broadly to any material fact. Nor does the Rule require that the consumer actually use the negative option feature; the mere presence of a negative option feature would render any misrepresentation of material fact subject to the Rule. Taken together, the Rule is nothing more than a back-door effort at obtaining civil penalties in any industry where negative option is a method to secure payment. The Rule's application to any misrepresentation therefore fails to meet Section 18's ''specificity'' requirement,[46] and will no doubt invite serious legal challenge on this basis.[47]

The Supreme Court's decision in *AMG,* which held the language of Section 13(b) does not authorize the Commission to obtain equitable monetary relief,[48] limited the Commission's ability to seek money for first-time violations of the FTC Act. The Commission is still able, however, to seek monetary remedies for violation of rules issued under Section 18.[49] Here, the Final Rule effectively transforms Section 5's broad prohibition on unfair or deceptive practices into a Section 18 rule, allowing the Commission to expand its ability to seek money. Indeed, because negative option features are widely used in a variety of industries, the Rule greatly expands that ability. While I generally support *legislation* that would grant the FTC authority under Section 13(b) to obtain court orders for redress or disgorgement (with whatever guardrails Congress deems fit), the Commission should not circumvent legislative prerogative via improper Section 18 rulemaking.

The third significant procedural flaw in this rulemaking is that the Commission failed to appropriately establish the ''prevalence'' of unfair and deceptive practices related to all negative option features for all products in all markets and all media (*i.e.,* with respect to the scope of this rule). According to Section 18, the Commission may issue an NPRM ''only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.'' [50] Section 18 further provides:

The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if—

(A) it has issued cease and desist orders regarding such acts or practices, or

(B) any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices.[51]

In the SBP, the Commission argues that it has satisfied this standard for its economy-wide rulemaking because it has issued more than 35 cases ''challenging harmful negative option practices'' and has received ''tens of thousands of consumers complaints.'' [52] This evidence may well suggest that *some* unfair and deceptive acts related to negative option offers are indeed prevalent. But these statistics do not establish prevalence of misrepresentations of material fact related to products with negative option features, any more than the number of FTC cases and consumer complaints involving the internet means that the entire internet should be the subject of a Section 18 rulemaking prohibiting misrepresentations.

If similarity among complaints and cases only at the highest level of generality constitutes the ''prevalence'' sufficient to ground an economy-wide rulemaking, then a ''prevalence'' determination is in fact no meaningful guardrail on the Commission's conduct at all, creating precisely the type of non-delegation concerns that Section 18's guardrails were meant to prevent. Canons of ''avoidance'' warn us to avoid adopting interpretations that would render statutes unconstitutional.[53] To avoid precisely that fate, ''prevalence'' must require more than what the Commission has shown here.

A final concern here. The Rule's failure to define with specificity the acts or practices which are unfair or deceptive, combined with the rule's preemption of inconsistent

[37] SBP at 37–38.

[38] 15 U.S.C. 57a(b)(2)(A)(ii).

[39] *See Regulations.gov*, Negative Option Rule (ANPR), FTC–2019–0082, *https://www.regulations.gov/docket/FTC-2019-0082.*

[40] The Commission published 1,162 unique comments. SBP at 18. *See Regulations.gov*, Negative Option Rule (NPRM), FTC–2023–0033–0001, *https://www.regulations.gov/document/FTC-2023-0033-0001.*

[41] 15 U.S.C. 57a(b)(2)(A) (''Prior to the publication of any notice of proposed rulemaking pursuant to paragraph (1)(A), the Commission shall publish an advance notice of proposed rulemaking in the **Federal Register**.'').

[42] *Cf.* Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, *In re Non-Compete Clause Rule,* FTC Matter No. P201200, at 20–22 (June 28, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf* (describing nondelegation doctrine).

[43] 15 U.S.C. 57a(a)(1)(B).

[44] S. Rep. No. 93–1408 at 7702, 7755, 7763 (1974) (Conf. Rep.).

[45] 15 U.S.C. 45(n).

[46] *Cf. Katharine Gibbs School (Inc.)* v. *FTC,* 612 F.2d 658, 661–62 (2d Cir. 1979) (setting aside FTC rule under section 18 that did not, among other things, define unfair practices with sufficient specificity).

[47] *See, e.g., id.* at 663 (''When Congress provided that the Commission's rules must define unfair and deceptive acts with specificity, it clearly intended that the Commission's definition would be subject to judicial review.'').

[48] *AMG Capital Mgmt., LLC* v. *FTC,* 593 U.S. 67, 70 (2021).

[49] 15 U.S.C. 57b(a)(1).

[50] *Id.* 57a(b)(3).

[51] *Id.*

[52] SBP at 8.

[53] *See Clark* v. *Martinez,* 543 U.S. 371, 381 (2005) (describing the canon of constitutional avoidance as ''resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts''); *see also* Adrian Vermeule, *Saving Constructions,* 85 Geo. L. J. 1945, 1949 (1997) (providing examples of cases in which the Supreme Court construed a statute so as to avoid a constitutional question).

State laws,[54] seems likely to create confusion and, ultimately, may harm consumers. The Second Circuit rebuked the Commission for a similar approach in a prior rulemaking after the Commission had ''fail[ed] . . . to define with specificity the acts or practices which are unfair or deceptive.'' [55] Absent ''a specification of the acts or practices which the Commission deems deceptive,'' the Court explained that ''the breadth of the preemption provision is such that it places in issue an indefinite variety of [S]tate laws and regulations'' that were relevant to the underlying contractual relationships. Similarly, here, State laws govern the types of conduct today's Rule attempts to regulate.[56] One risk of misguided Federal regulation is that it can confuse or jeopardize State laws and enforcement. Given the Rule's lack of specificity, it raises that concern.

II. The Rule is troubling not only procedurally but also substantively. By singling out representations made in connection with negative option billing models and subjecting these representations to civil penalties or other monetary relief, it tilts the playing field in ways that are likely to pervert business incentives. For example, businesses may avoid using negative option billing models, even when businesses and consumers could derive significant value from them.

One might argue that no shift in incentives will happen for honest businesses because the Rule only addresses misrepresentations of material fact. In other words, all an honest business needs to do to avoid civil penalties is to tell the truth about products and services that involve negative option billing. But what constitutes a misrepresentation can sometimes be in the eye of the beholder (that is, a Commissioner).[57] Even honest businesses will have reason to reconsider the use of negative option billing now that it means subjecting themselves to potential civil penalties for misreading Commission tea leaves.[58] And businesses will also need to factor in the compliance costs associated with implementing this Rule's disclosure, consent, and cancellation requirements—prescriptive requirements that are absent for other billing models or less prescriptive under existing law, such as ROSCA.

These shifting incentives matter to consumers because the reason that honest businesses adopt negative option billing is to lower transaction costs between consumers and firms. For example, say I want to watch a particular streaming service at my convenience. I don't want to be bothered with signing up and paying a fee each month that I log on; I want negative option billing—a subscription—to reduce the friction in my streaming experience. Raising the transaction costs will reduce a business's sales and the utility consumers derive from these services. In other words, in our good intentions, we may harm the consumers and competition we are supposed to protect.[59]

The Rule purports to address any overbreadth by including, consistent with the Commission's Rules of Practice,[60] an ''Exemptions'' provision, which provides: ''Any person to whom this Rule applies may petition the Commission for a partial or full exemption.'' [61] In response to such petition, ''[t]he Commission may . . . issue partial or full exemptions from this part if the Commission finds application of the Rule's requirements is not necessary to prevent the acts or practices to which the Rule relates.'' [62]

But the ''Exemptions'' provision does nothing to reduce the burden on firms from the overbreadth of the Rule's coverage of all misrepresentations of material fact. Rather, taken together, they effectively shift the burden of crafting a tailored rule to regulated entities. And, once again, it appears that the Commission is tilting the playing field in a manner that is likely to harm both consumers and competition. Small businesses and new market entrants are less likely to be able to afford the potentially costly legal fees needed to petition the Commission to obtain an exemption. Even for businesses that can afford to use the exemption process, this process will impose costs on businesses, who will pass on those costs to consumers. Raising potential costs for consumers through an improperly promulgated rule is not a desirable outcome at any time, but especially not in an inflationary economy. Businesses and consumers will not be alone in bearing increased costs. Conducting the exemption process will continue to drain FTC staff resources—reducing the time that our talented staff could devote to enforcing the clear authorities Congress has given us, such as ROSCA.[63]

A final point here. I also have concerns about the Commission's economic analysis of the quantifiable benefits that may result from the Rule's substantive requirements. For example, the Commission's estimate related to the upper bound of the Rule's benefits for consumers who cancel subscriptions with in-person enrollment is based in part on the complaints of 25 individual consumers in a single industry,[64] and a number of other simplifying assumptions.[65] But this self-selected group of 25 consumers does not comprise a random sample, even among people who were not able to cancel subscriptions with in-person enrollment on their first attempt.[66] It is at least possible that other individuals who cancelled subscriptions in person had different experiences or expectations than these particular consumers—and therefore did not voice any complaint. Indeed, given that consumer experiences and expectations may vary significantly across industries and products, there is no reason to believe that balancing of harms and benefits of these consumers can be appropriately extrapolated to the entire economy. Thus, the Commission's estimated benefits are not based on what could be characterized as a representative sample. Without knowing the frequency of consumers having significant difficulty cancelling in-person subscriptions, it is not possible to assess how much weight to place on the estimate of the high end of the range of benefits from the proposed rule. Most of the difference between the low-end and high-end estimates of benefits is driven by the estimate of the high end of the benefits for in-person subscriptions.

III. This Rule is particularly disappointing because it represents two missed opportunities. In 2019, a bipartisan Commission unanimously voted in favor of

[54] 16 CFR 425.7(a) (''Relation to State Laws'') (''*In General.* This part shall not be construed as superseding, altering, or affecting any State statute, regulation, order, or interpretation relating to negative option requirements, except to the extent it is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.'').

[55] *See Katharine Gibbs School,* 612 F.2d at 667.

[56] *See, e.g.,* SBP at 145–46, 214.

[57] *Cf.* Statement of Comm'r Christine S. Wilson Concurring In Part and Dissenting In Part, *FTC* v. *Neurometrix, Inc.,* FTC Matter No. 1723130 (Feb. 28, 2020), (disagreeing with the majority of the Commission on claim interpretation and substantiation for certain claims), *https://www.ftc.gov/system/files/ftc_gov/pdf/2024.08.01-remarks-chair-khan-strike-force-public-convening.pdf.*

[58] Some businesses were already subject to disclosure requirements under existing laws such as ROSCA and the TSR. But those laws are more limited. For example, ROSCA section 8403 states that for goods or services sold through a negative option feature, the seller must ''clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer's billing information.'' 15 U.S.C. 8403.

[59] Concurring and Dissenting Statement of Comm'r Melissa Holyoak, *Social Media and Video Streaming Services Staff Report,* FTC Matter No. P205402, at 18–19 (Sept. 19, 2024) (''The core of this agency's mission is to protect consumers. Unfortunately, recent years have seen some Commissioners take a narrow view of that mission and where harms emanate from . . . . [W]e should also protect the American people from harms that follow when we fail to robustly and comprehensively scrutinize our own policy efforts and advocacy, including for economic effects, and to anticipate potential unintended consequence.''), *https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-social-media-6b.pdf; cf.* Dissenting Statement of Comm'r Melissa Holyoak, Joined by Comm'r Andrew N. Ferguson, *In re Rytr, LLC,* FTC Matter No. 2323052, at 5 (Sept. 25, 2024) (''We must protect consumers through robust enforcement. Indeed, the Commission is at its best when it does so. But we must also think carefully about the potential harms to consumers and innovation that attend misguided enforcement. Today's misguided complaint and its erroneous application of section 5 will likely undermine innovation in the AI space. I therefore respectfully dissent.''), *https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-rytr-statement.pdf.*

[60] 16 CFR 1.25, 1.31.

[61] 16 CFR 425.8.

[62] *Id.*

[63] To be clear, my concern is not with the exemption process itself (or its inclusion in the Rule), but with the enormous work it must do to compensate for the overbreadth of the provision regarding misrepresentations.

[64] *See, e.g.,* SBP at 171 (''Notwithstanding IHRSA's assertion that many fitness clubs offer online cancellation, at least 25 individual consumers submitted comments attesting to the difficulties of canceling gym memberships.'').

[65] *Id.* at 173 (''Based on these comments, the Commission makes the simplifying assumption that the worst gym membership cancellation experiences involve three failed attempts at cancellation, each costing one hour of time, and that, because of those cancellation failures, three unwanted monthly charges were processed.''); *see id.* at 169–70 (explaining how, in its economic analysis for the Rule, ''the Commission proxies the per-cancellation benefits of an additional, remote, method of cancellation by looking at those benefits in the context of gym memberships'').

[66] *See id.* at 171.

issuing the ANPR, which was intended to (1) consolidate the requirements from various laws the FTC enforces, providing businesses who have to navigate this patchwork with greater clarity, thereby benefiting both consumers and businesses; and (2) explore whether a Section 18 rule should fill any gaps ''when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible.'' [67] Today's final Rule could have stayed that prudent course rather than expanding in scope and complexity as it has under this Commission.

The second missed opportunity has taken place every day since the Commission expanded the scope of the rulemaking. This Commission chose to devote scarce staff resources to this overbroad rulemaking—one that seems likely to be challenged in court, which will lead to even more taxpayer-funded expenses—rather than direct our talented staff to draft a rule within the scope of our authority or bring enforcement actions using clear legal authorities like ROSCA and TSR. In my time at the Commission, I have voted in support of numerous ROSCA cases, including *NGL,*[68] *Care.com,*[69] and *Legion Media,*[70] and numerous TSR cases, including *Career Step,*[71] *Carshield,*[72] and *Panda Benefit Services.*[73] As I have said elsewhere, I believe the Commission is at its best when it focuses on enforcing the law, not writing it.[74] But I am not reflexively opposed to rulemaking where Congress has delegated the Commission relevant authority and we act consistent with that authority.[75] Unfortunately, that is not what today's Rule is. Instead, we have an ill-disguised political maneuver from the Majority in the form of a rule, one rushed to publication to advance the prospects of the Chair's preferred presidential candidate.

I dissent.

[FR Doc. 2024–25534 Filed 11–14–24; 8:45 am]

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[67] 84 FR 52393, 52394.

[68] *FTC* v. *NGL Labs, LLC,* No. 2:24–cv–5753 (C.D. Cal.), *https://www.ftc.gov/legal-library/browse/cases-proceedings/ngl.*

[69] *FTC* v. *Care.com, Inc.,* No. 1:24–cv–987 (W.D. Tex.), *https://www.ftc.gov/legal-library/browse/cases-proceedings/carecom-inc-ftc-v.*

[70] *FTC* v. *Legion Media LLC,* FTC Matter No. 2423034, *https://www.ftc.gov/legal-library/browse/cases-proceedings/242-3034-legion-media-llc-et-al-ftc-v.*

[71] *FTC* v. *Career Step, LLC,* FTC Matter No. 2323019, *https://www.ftc.gov/legal-library/browse/cases-proceedings/232-3019-career-step-llc-ftc-v.*

[72] *FTC* v. *NRRM, LLC,* FTC Matter No. 2223031, *https://www.ftc.gov/legal-library/browse/cases-proceedings/2223031-carshield.*

[73] *FTC* v. *Panda Benefit Servs., LLC,* FTC Matter No. 2423041, *https://www.ftc.gov/legal-library/browse/cases-proceedings/2423041-panda-benefit-services-llc-ftc-v.*

[74] Prepared Statement of Comm'r Melissa Holyoak, Fed. Trade Comm'n, Before the Subcomm. on Innovation, Data, and Commerce of the Energy and Commerce Comm., U.S. House of Representatives, Concerning ''The Fiscal Year 2025 Federal Trade Commission Budget,'' at 2–4 (July 9, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-testimony-7-5-24.pdf.*

[75] *Id.*

FEDERAL TRADE COMMISSION

16 CFR Part 464

RIN 3084–AB77

Trade Regulation Rule on Unfair or Deceptive Fees

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is issuing a final trade regulation rule entitled ''Rule on Unfair or Deceptive Fees'' (''rule'' or ''final rule'') and Statement of Basis and Purpose addressing certain unfair or deceptive practices involving fees or charges for live-event tickets and short-term lodging: bait-and-switch pricing that hides the total price by omitting mandatory fees and charges from advertised prices; and misrepresenting the nature, purpose, amount, and refundability of fees or charges. The final rule specifies that it is an unfair and deceptive practice for businesses to offer, display, or advertise any price of live-event tickets or short-term lodging without clearly, conspicuously and prominently disclosing the total price. The rule also requires businesses to clearly and conspicuously make certain disclosures before a consumer consents to pay. The rule further specifies that it is an unfair and deceptive practice for businesses to misrepresent any fee or charge in any offer, display, or advertisement for live-event tickets or short-term lodging.

DATES: This rule is effective May 12, 2025.

ADDRESSES: Copies of this document are available on the Commission's website, *www.ftc.gov*.

FOR FURTHER INFORMATION CONTACT: Janice Kopec or Annette Soberats, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 202–326–2550 (Kopec), 202–326–2921 (Soberats), *jkopec@ftc.gov, asoberats@ftc.gov*.

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VIII. Congressional Review Act

I. Background

When shopping for a good or service, consumers want to know: how much? It is a bedrock principle of FTC law that price is material to a consumer's decision about whether to purchase a good or service. Consumers look for prices to comparison shop and to weigh what a good or service might be worth. Most consumers also rely on price to answer critical budgeting questions such as: Can I afford this hotel or short-term rental for my upcoming vacation? Can I afford these concert tickets? Unfortunately, consumers face widespread and growing unfair and deceptive fee practices that make it much harder to find out: how much will this cost?

There is nothing new about businesses using bait-and-switch tactics to reel in and deceive consumers. The Commission has a long history of bringing enforcement actions against these unfair and deceptive practices. Quoting a misleading, artificially low price and then adding in mandatory fees and other charges throughout the buying process—a practice known today as drip pricing—is a quintessential example of bait-and-switch pricing and is a practice that falls squarely within the scope of the Commission's long history of work to protect consumers. While today this practice goes by a different name, the playbook has not changed: lure in consumers with a low price, then hit them with a higher price after they have invested in the transaction and sunk time and effort into trying to buy a good or service for an illusory price. Behavioral and economic research explains that piecemeal numbers and explanations cannot cure the deception or mitigate the harms to consumers when businesses employ these pricing tactics. Often consumers finish the transaction without an accurate understanding of the total price of goods or services.

In recent years, bait-and-switch pricing has garnered widespread public attention. Consumers have cried foul when they discovered the cost of their hotel stays were significantly higher than expected due to a mandatory, hidden "resort fee," typically charged for services that consumers expected to be a part of staying in a hotel. Consumers have also complained when they tried to purchase tickets to a live event, only to find out that the quoted ticket price almost doubled by the time they reached the final checkout page. Consumers have confronted a host of mysterious, mandatory, "convenience," "processing," or "service" charges that are either non-descript or otherwise misleading. These practices are frustrating for consumers when they shop for travel and entertainment especially because these purchases can be significant expenditures. This rulemaking record is replete with individual stories of consumers inundated by bait-and-switch pricing and misleading fees and charges.

For example, an individual commenter lamented the pervasiveness of bait-and-switch pricing tactics across everyday purchases:

> Like almost every American consumer, I have had to pay these "junk fees" in various circumstances. I consider myself reasonably well informed, yet have been surprised by them, because they keep [c]ropping up in unexpected places. Like many, I've experienced them in hotels, with car rentals and telecom providers. In these instances, the consumer has no real recourse, as the bargaining power is wholly unequal. However, these fees are now impacting every aspect of commerce. "Convenience" fees have impacted me with food service. "Facility" fees charges at fitness facilities. Credit card fees in excess of the actual interchange fees being charged at restaurants. It's endless, ubiquitous and makes it extremely difficult for consumers to make informed decisions.[1]

As another individual commenter aptly put it, "It's one thing to be on guard when walking down a dark alley, but being on guard every time you want to take a vacation, go to a concert, fly home to see a sick loved one—that's just not fair."[2]

It is no surprise that, once bait-and-switch pricing tactics are used by some businesses to obscure the cost of a good or service, they tend to spread. Businesses that want to compete on the true price of their offering are undercut by businesses that use hidden or misleading fees to display an artificially low price. As studies confirm, in such instances, consumers cannot shop for price effectively. This forces businesses into a race to the bottom and results in more and more businesses using hidden and misleading fees to remain competitive. When these types of fees are eventually revealed, consumers are left frustrated with a new and unexpected higher price and misleading fees and charges that prevent them from having a real understanding of what they are getting in return for these additional fees.

The Rule on Unfair or Deceptive Fees addresses these problems directly in the live-event ticketing industry and the short-term lodging industry, which includes temporary sleeping accommodations at a hotel, motel, inn, short-term rental, vacation rental, or other place of lodging. These two industries have engaged in bait-and-switch pricing tactics for years. The rule ensures that when businesses advertise a price for live-event tickets or short-term lodging, it is the total price, and when they explain a fee or charge, the description is truthful. In simple terms: tell consumers the real price and do not lie about the fees or charges. The final rule does this by addressing two specific and prevalent unfair and deceptive practices: (1) bait-and-switch pricing that hides the total price of live-event tickets and short-term lodging by omitting mandatory fees and charges from advertised prices, including through drip pricing, and (2) misrepresenting the nature, purpose, amount, and refundability of fees or charges. The rule has two main

[1] FTC–2023–0064–0886 (Individual Commenter).

[2] FTC–2023–0064–1576 (Individual Commenter).

components. First, the final rule requires businesses that offer a price for live-event tickets or short-term lodging to disclose the total price, inclusive of most mandatory charges, and to make sure that the total price is disclosed more prominently than other pricing information, except the final amount of payment. Second, the final rule prohibits misrepresentations about fees or charges in any offer, display, or advertisement for live-event tickets and short-term lodging.

The final rule is tailored to target these specific unfair and deceptive pricing practices, while preserving flexibility for live-event ticket and short-term lodging businesses. The rule does not prohibit any one type of fee, nor does it prohibit specific pricing practices such as itemization of fees or dynamic pricing. The rule does not require that all fees be included when offering a price—just mandatory ones. The rule gives businesses discretion to list optional fees selected by the consumer and government and shipping charges separately. The discretion to set prices remains squarely with businesses; the rule simply requires that they tell consumers the truth about prices for live-event tickets and short-term lodging.

A. Advance Notice of Proposed Rulemaking

The Commission published, on November 8, 2022, an advance notice of proposed rulemaking (''ANPR'') [3] under the authority of section 18 of the Federal Trade Commission Act (''FTC Act'') [4] to address certain unfair or deceptive acts or practices involving fees. The ANPR described the Commission's history of taking law enforcement action against, and educating consumers about, unfair or deceptive practices relating to fees, and it asked a series of questions to help inform the Commission about whether such practices are prevalent and, if so, whether and how to proceed with a notice of proposed rulemaking (''NPRM''). The Commission was particularly interested in the following practices that it identified as the subjects of investigations, enforcement actions, workshops, research, and consumer education: (a) misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the total price of any good or service for sale; (b) misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the existence of any fees, interest, charges, or other costs that are not reasonably avoidable for any good or service; (c) misrepresenting or failing to disclose clearly and conspicuously whether fees, interest, charges, products, or services are optional or required; (d) misrepresenting or failing to disclose clearly and conspicuously any material restriction, limitation, or condition concerning any good or service that may result in a mandatory charge in addition to the cost of the good or service or that may diminish the consumer's use of the good or service, including the amount the consumer receives; (e) misrepresenting that a consumer owes payments for any product or service the consumer did not agree to purchase; (f) billing or charging consumers for fees, interest, goods, services, or programs without express and informed consent; (g) billing or charging consumers for fees, interest, goods, services, or programs that have little or no added value to the consumer or that consumers would reasonably assume to be included within the overall advertised price; and (h) misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the nature or purpose of any fees, interest, charges, or other costs.

The Commission specifically sought public comment on the prevalence of such practices and the costs and benefits of a rule that would require upfront inclusion of mandatory fees whenever consumers are quoted a price, including by asking a series of questions to solicit data and commentary. The Commission took comments for sixty days, extended the comment period by an additional thirty days,[5] and carefully considered the more than 12,000 comments received.[6]

B. Notice of Proposed Rulemaking

Based on the substance of the comments received in response to the ANPR, as well as the Commission's history of enforcement and other information, on November 9, 2023, the Commission published an NPRM, which proposed an industry-neutral rule that would prohibit misrepresenting the total price of goods or services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees.[7] The NPRM described the comments received in response to the ANPR and examined the Commission's prior enforcement actions and other responses concerning unfair and deceptive fees. In the NPRM, the Commission stated that it has reason to believe that certain unfair or deceptive acts or practices involving fees are prevalent, specifically: (1) misrepresenting the total price of goods and services by omitting mandatory fees from advertised prices and (2) misrepresenting the nature and purpose of fees. After discussing the comments and explaining its considerations in developing a proposed rule, the Commission also posed specific questions for comment and provided explanation of the proposed rule text. Finally, the NPRM set out the Commission's proposed regulatory text.[8] The Commission took public comments for sixty days, and extended the comment period for an additional thirty days.[9]

In response to the NPRM, the Commission received over 60,800 comments from stakeholders representing a wide range of viewpoints and industries.[10] These stakeholders

[3] Advance notice of proposed rulemaking; request for public comment: Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87 FR 67413 (Nov. 8, 2022). The ANPR and other documents pertaining to this rulemaking are available on the FTC web page, Rulemaking: Unfair or Deceptive Fees, *https://www.ftc.gov/legal-library/browse/rules/rulemaking-unfair-or-deceptive-fees.*

[4] 15 U.S.C. 57a(b)(2). Section 18 authorizes the Commission to promulgate, modify, or repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

[5] Notice; extension of public comment period: Unfair or Deceptive Fees Trade Regulation Rule, 88 FR 4796 (Jan. 25, 2023).

[6] Publicly posted comments are available to view through *Regulations.gov* under Docket ID FTC–2022–0069 at *https://www.regulations.gov/docket/FTC-2022-0069/comments.*

[7] Notice of proposed rulemaking; request for public comment: Trade Regulation Rule on Unfair or Deceptive Fees, 88 FR 77420 (Nov. 9, 2023). In accordance with section 18(b)(2)(C) of the FTC Act, 15 U.S.C. 57a(b)(2)(C), on October 10, 2023, the Commission sent notices to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science and Transportation seeking comment concerning the utility and scope of the trade regulation rule proposed in the NPRM and including the full text of the NPRM.

[8] NPRM, 88 FR 77483.

[9] Notice of proposed rulemaking; extension of public comment period: Trade Regulation Rule on Unfair or Deceptive Fees, 89 FR 38 (Jan. 2, 2024).

[10] Publicly available comments are available to view through *Regulations.gov* under Docket ID FTC–2023–0064 at *https://www.regulations.gov/document/FTC-2023-0064-0001/comment.* As noted on *Regulations.gov*, not every comment is made publicly available. For example, ''[a]gencies may redact or withhold certain Comment Submissions . . . , such as those containing . . . duplicate/near duplicate examples of a mass-mail campaign. Therefore, the total in the Number of Comments Posted Box may be lower than the total in the Comments Received Box.'' *See https://www.regulations.gov/faq*, Frequently Asked Questions, General FAQs, Find Dockets, Documents, and Comments FAQs, answer to *How are Comments counted and posted to Regulations.gov?.* In this rulemaking, *Regulations.gov* identified ten mass-mail campaigns as part of the total number of comments received

included numerous individual consumers and consumer groups who described examples and experiences with the unfair and deceptive fee practices identified by the Commission. Commenters also included a range of business owners, trade associations, and other industry groups; academics; and government officials and agencies from all levels of government. While some commenters raised concerns and recommended specific modifications to, or exemptions from, the Commission's proposal, the overwhelming majority of commenters strongly supported the Commission's proposed rule.

The proposed rule received widespread support in comments from Federal,[11] State, and local [12] elected officials; State Attorneys General; [13] Federal,[14] State, and local [15] government agencies; public policy and consumer advocates,[16] including housing advocates [17] and advocates for the incarcerated or formerly incarcerated; [18] university public policy advocates and clinics; [19] academics; [20] legal services providers; [21] and industry members from a broad range of market sectors, including online merchants,[22] live-event ticketing,[23] and hotels and other short-term lodging.[24] These commenters supporting the rule confirmed the prevalence of hidden and misrepresented fees throughout the economy, across large and small industries subject to the Commission's jurisdiction, ranging, for example, from travel, live events, restaurants, delivery, rental housing, and correctional services to carpet cleaning, dietary supplements, moving companies, and gyms. These commenters supported the rule for its benefits to both consumers and honest businesses.

Individual consumers overwhelmingly supported the rule. Out of 60,853 total comments received, a mass mailing of close to 48,186 consumer commenters stated that they supported ''the FTC's efforts to protect American consumers and crack down on unscrupulous businesses that tack on junk fees at the end of the purchasing process,'' and urged the Commission ''to pass this rule to not only save consumers tens of billions of dollars each year, but to level the playing field for honest businesses who are transparent about their costs and

of over 60,800. One mass-mail campaign alone accounted for close to 48,200 comments, and all mass-mail campaigns combined accounted for more than 57,400 comments. Because comments within each mass-mail campaign are highly similar, only representative comments of each mass-mail campaign are publicly posted on *Regulations.gov*. In addition to representative mass-mail comments, the more than 3,300 comments that *Regulations.gov* did not identify as belonging to a mass-mail campaign are publicly posted. The Commission received and considered all filed comments, including all mass-mail comments.

[11] *See, e.g.,* FTC–2023–0064–3135 (U.S. Senate, Sen. Robert P. Casey, Jr.); FTC–2023–0064–3271 (U.S. Senate, Sen. Amy Klobuchar); FTC–2023–0064–2858 (U.S. House of Representatives, Rep. Maxwell Alejandro Frost, Rep. Jimmy Gomez, Rep. Barbara Lee, Rep. Rashida Tlaib, Rep. Kevin Mullin, Rep. Dwight Evans, Rep. Judy Chu, Rep. Greg Casar, Rep. Dan Goldman, Rep. Salud Carbajal).

[12] *See, e.g.,* FTC–2023–0064–1411 (Arizona House of Representatives, Rep. Analise Ortiz); FTC–2023–0064–2938 (Colorado House of Representatives, Rep. Naquetta Ricks); FTC–2023–0064–2926 (Florida House of Representatives, Rep. Rita Harris); FTC–2023–0064–3081 (Florida House of Representatives, Rep. Anna V. Eskamani); FTC–2023–0064–3103 (Florida House of Representatives, Rep. Angela Nixon); FTC–2023–0064–3117 (Maryland House of Delegates, Del. Julie Palakovich Carr); FTC–2023–0064–2341 (Massachusetts House of Representatives, Rep. Lindsay Sabadosa); FTC–2023–0064–3072 (Michigan Senate and House of Representatives, Sen. Darrin Camilleri, Sen. Mary Cavanagh, and Rep. Betsy Coffia); FTC–2023–0064–3079 (Montana State Senate, Senate Democratic Caucus, Sen. Pat Flowers, Sen. Susan Webber, Sen. Andrea Olsen, Sen. Edie McClafferty, Sen. Jen Gross, Sen. Janet Ellis, Sen. Shane Morigeau, Sen. Ellie Boldman, Sen. Ryan Lynch, Sen. Christopher Pope, Sen. Mike Fox, Sen. Denise Hayman, Sen. Willis Curdy, and Sen. Mary Ann Dunwell); FTC–2023–0064–3184 (New York Senate, Sen. Michael Gianaris); FTC–2023–0064–3123 (Syracuse, New York, City Auditor Alexander Marion); FTC–2023–0064–3149 (North Carolina House of Representatives, Rep. Julie von Haefen); FTC–2023–0064–3237 (North Carolina House of Representatives, Rep. Pricey Harrison).

[13] *See, e.g.,* FTC–2023–0064–3150 (Attorney General of the State of California); FTC–2023–0064–3215 (Attorneys General of the States of North Carolina and Pennsylvania, along with Attorneys General of the States or Territories of Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Michigan, Minnesota, New Jersey, New York, Oklahoma, Oregon, Vermont, Washington, and Wisconsin).

[14] *See, e.g.,* FTC–2023–0064–3134 (U.S. Department of Transportation, Federal Motor Carrier Safety Administration); FTC–2023–0064–3187 (U.S. Department of Justice, Antitrust Division).

[15] *See, e.g.,* FTC–2023–0064–1519 (New York City Department of Consumer and Worker Protection); FTC–2023–0064–2883 (District of Columbia, Office of the People's Counsel); FTC–2023–0064–3196 (South Carolina Department of Consumer Affairs).

[16] *See, e.g.,* FTC–2023–0064–1028 (Complex Trauma Project); FTC–2023–0064–2885 (AARP); FTC–2023–0064–3104 (Truth in Advertising, Inc.); FTC–2023–0064–3160 (Consumer Federation of America on behalf of itself and 51 other national and State consumer advocacy groups, authored by American Economic Liberties Project, Consumer Action, Consumer Federation of America, National Association of Consumer Advocates, National Consumer Law Center, National Consumers League, U.S. Public Interest Research Group); FTC–2023–0064–3162 (BBB National Programs, Inc.); FTC–2023–0064–3191 (Community Catalyst and 32 other organizations focused on health care and consumer protection issues); FTC–2023–0064–3205 (Consumer Reports); FTC–2023–0064–3216 (Demand Progress Education Fund); FTC–2023–0064–3218 (National Consumer Law Center); FTC–2023–0064–3242 (William E. Morris Institute for Justice); FTC–2023–0064–3246 (Coalition for App Fairness); FTC–2023–0064–3248 (DC Jobs With Justice on behalf of Fair Price, Fair Wage Coalition); FTC–2023–0064–3259 (National Women's Law Center); FTC–2023–0064–3270 (Consumer Federation of America, National Consumer Law Center, and National Association of Consumer Advocates); FTC–2023–0064–3290 (U.S. Public Interest Research Group Education Fund); FTC–2023–0064–3302 (Public Citizen).

[17] *See, e.g.,* FTC–2023–0064–1431 (McPherson Housing Coalition); FTC–2023–0064–2851 (Housing Action Illinois); FTC–2023–0064–3102 (Corporation for Supportive Housing); FTC–2023–0064–3235 (National Housing Law Project).

[18] *See, e.g.,* FTC–2023–0064–2915 (Voice of the Experienced); FTC–2023–0064–2696 (Safe Return Project); FTC–2023–0064–3253 (Fortune Society); FTC–2023–0064–3260 (Formerly Incarcerated, Convicted People & Families Movement, in collaboration with the Partnership for Just Housing); FTC–2023–0064–3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher).

[19] *See, e.g.,* FTC–2023–0064–1939 (Tzedek DC, David A. Clarke School of Law, University of the District of Columbia); FTC–2023–0064–2888 (Housing Policy Clinic, University of Texas School of Law); FTC–2023–0064–3146 (Institute for Policy Integrity, New York University School of Law); FTC–2023–0064–3255 (Carrie Floyd, Clinical Teaching Fellow, Veterans Legal Clinic, and Mira Edmonds, Clinical Assistant Professor of Law, Civil-Criminal Litigation Clinic, University of Michigan Law School); FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice, University of California, Berkeley School of Law, and Consumer Law Advocates, Scholars & Students Network); FTC–2023–0064–3268 (Housing & Eviction Defense Clinic, University of Connecticut School of Law).

[20] *See, e.g.,* FTC–2023–0064–1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business); FTC–2023–0064–1467 (Richard J. Peltz-Steele, Chancellor Professor, University of Massachusetts Law School).

[21] *See, e.g.,* FTC–2023–0064–2862 (Legal Aid Foundation of Los Angeles); FTC–2023–0064–2892 (Community Legal Services of Philadelphia); FTC–2023–0064–2920 (Colorado Poverty Law Project); FTC–2023–0064–3090 (Atlanta Legal Aid Society, Inc.); FTC–2023–0064–3225 (CED Law); FTC–2023–0064–3278 (Southeast Louisiana Legal Services).

[22] *See, e.g.,* FTC–2023–0064–2840 (Indie Sellers Guild); FTC–2023–0064–2901 (E-Merchants Trade Council, Inc.).

[23] *See, e.g.,* FTC–2023–0064–2856 (National Football League); FTC–2023–0064–3108 (Christian L. Castle, Esq.; Mala Sharma, President, Georgia Music Partners; and Dr. David C. Lowery, founder of musical groups Cracker and Camper Van Beethoven, and a lecturer at the University of Georgia Terry College of Business); FTC–2023–0064–3122 (Vivid Seats); FTC–2023–0064–3195 (League of American Orchestras on behalf of itself and Association of Performing Arts Professionals, Carnegie Hall, Dance/USA, Folk Alliance International, Future of Music Coalition, National Performance Network, OPERA America, PAVA—Performing Arts Venues Alliance, Performing Arts Alliance, and Theatre Communications Group); FTC–2023–0064–3212 (TickPick, LLC); FTC–2023–0064–3230 (Future of Music Coalition); FTC–2023–0064–3250 (National Independent Talent Organization); FTC–2023–0064–3266 (StubHub, Inc.); FTC–2023–0064–3292 (National Association of Theatre Owners); FTC–2023–0064–3304 (Recording Academy); FTC–2023–0064–3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America); FTC–2023–0064–3105 (Charleston Symphony); FTC–2023–0064–3241 (National Association of Ticket Brokers).

[24] *See, e.g.,* FTC–2023–0064–3077 (Far Horizons Travel); FTC–2023–0064–3094 (American Hotel & Lodging Association); FTC–2023–0064–3106 (American Society of Travel Advisors, Inc.); FTC–2023–0064–3204 (Expedia Group); FTC–2023–0064–3244 (Vacation Rental Management Association).

fees.'' [25] Other mass mailings contained similar comments in support. In a mass mailing of about 344 comments, consumer commenters made near-identical statements to the aforementioned mass mailing and added: ''Junk fees are monies a business tacks on at the end of the purchasing process instead of being transparent about the full price upfront. These fees are common when people are purchasing airline and concert tickets, booking hotel rooms, paying utility bills, and renting apartments.'' [26] A mass mailing submitted by about 315 consumer commenters stated, ''I support cracking down on hidden junk fees that cost Americans billions of dollars each year.'' [27] A mass mailing by about nineteen consumer commenters stated, ''For too long, individuals have been subjected to misleading practices, such as the omission of mandatory fees from advertised prices and misrepresentation of the nature and purpose of fees. These practices not only erode trust but also hinder informed decision-making by consumers.'' [28] A mass mailing by about thirteen consumer commenters simply urged: ''Stop junk fees!'' [29] Additional comments from individual consumers also supported the rule.

Other commenters opposed the rule, sought exemptions from the rule, or expressed concern about the rule's definitions or application to specific pricing scenarios. They included a Federal government agency; [30] national business groups and public policy advocates,[31] including tax groups and advisors; [32] academics; [33] representatives from auto dealers and service providers; [34] app-based delivery platforms; [35] financial and real estate settlement services; [36] franchised businesses; [37] representatives of housing providers,[38] including apartment associations [39] and a housing advertising platform; [40] hospitality groups, including hotel [41] and restaurant associations; [42] funeral and cemetery providers; [43] gaming associations; [44] telecommunications providers; [45] live-event venues; [46] a law firm; [47] providers of communications services to incarcerated people; [48] and other sectors.[49] The commenters argued that the FTC failed to establish the prevalence of the defined unfair and deceptive practices and failed to conduct an adequate cost-benefit analysis, and that the proposed rule would interfere with established pricing models, could not be applied to all pricing scenarios, would overlap with other laws and regulations, or would exceed the FTC's rulemaking authority or jurisdiction.

Members of the restaurant industry voiced opposition to the proposal. A mass mailing from about 4,650

[25] *See, e.g.,* FTC–2023–0064–0962, FTC–2023–0064–1186, FTC–2023–0064–1219, FTC–2023–0064–1230, FTC–2023–0064–1826, FTC–2023–0064–1827, FTC–2023–0064–1933, FTC–2023–0064–1946.

[26] *See, e.g.,* FTC–2023–0064–2290.

[27] *See, e.g.,* FTC–2023–0064–3156.

[28] *See, e.g.,* FTC–2023–0064–2962.

[29] *See, e.g.,* FTC–2023–0064–2964.

[30] U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC–2023–0064–0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf.*

[31] *See, e.g.,* FTC–2023–0064–2367 (Small Business Majority); FTC–2023–0064–2887 (Progressive Policy Institute); FTC–2023–0064–2919 (National Automatic Merchandising Association); FTC–2023–0064–3028 (Competitive Enterprise Institute); FTC–2023–0064–3016 (National Federation of Independent Business, Inc.); FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3128 (Merchants Payments Coalition); FTC–2023–0064–3137 (Chamber of Progress); FTC–2023–0064–3140 (Merchant Advisory Group); FTC–2023–0064–3145 (Association of National Advertisers, Inc.); FTC–2023–0064–3147 (American Land Title Association); FTC–2023–0064–3173 (Center for Individual Freedom); FTC–2023–0064–3186 (National LGBT Chamber of Commerce and National Asian/Pacific Islander American Chamber of Commerce & Entrepreneurship); FTC–2023–0064–3208 (FreedomWorks); FTC–2023–0064–3267 (National Retail Federation).

[32] *See, e.g.,* FTC–2023–0064–3100 (Civitas Advisors, Inc.); FTC–2023–0064–3126 (Tax Foundation); FTC–2023–0064–3258 (National Taxpayers Union Foundation).

[33] *See, e.g.,* FTC–2023–0064–2891 (Mary Sullivan, George Washington University, Regulatory Studies Center); FTC–2023–0064–3264 (Mark J. Perry, Ph.D., Professor Emeritus of Economics at University of Michigan-Flint and Senior Fellow Emeritus at the American Enterprise Institute).

[34] *See, e.g.,* FTC–2023–0064–3121 (National Independent Automobile Dealers Association); FTC–2023–0064–3189 (National Automobile Dealers Association); FTC–2023–0064–3206 (Motor Vehicle Protection Products Association, Guaranteed Asset Protection Alliance, and Service Contract Industry Council); FTC–2023–0064–3276 (Automotive Service Association).

[35] *See, e.g.,* FTC–2023–0064–3263 (Flex Association); FTC–2023–0064–3202 (TechNet).

[36] *See, e.g.,* FTC–2023–0064–1425 (Iowa Bankers Association); FTC–2023–0064–1941 (Independent Bankers Association of Texas); FTC–2023–0064–2574 (BattleLine LLC via Investor Protection Initiative); FTC–2023–0064–2893 (America's Credit Unions); FTC–2023–0064–3119 (Money Services Business Association, Inc.); FTC–2023–0064–3138 (Independent Community Bankers of America); FTC–2023–0064–3139 (American Bankers Association and Consumer Bankers Association); FTC–2023–0064–3142 (American Escrow Association); FTC–2023–0064–3144 (Mortgage Bankers Association); FTC–2023–0064–3168 (American Financial Services Association); FTC–2023–0064–3182 (Massachusetts Bankers Association).

[37] *See, e.g.,* FTC–2023–0064–3141 (Coalition of Franchisee Associations); FTC–2023–0064–3211 (American Association of Franchisees & Dealers); FTC–2023–0064–3294 (International Franchise Association).

[38] *See, e.g.,* FTC–2023–0064–3066 (Norhart, Inc.); FTC–2023–0064–3115 (National Association of Residential Property Managers); FTC–2023–0064–3116 (Manufactured Housing Institute); FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3152 (Building Owners & Managers Association, Council for Affordable & Rural Housing, Housing Advisory Group, Institute of Real Estate Management, Manufactured Housing Institute, National Apartment Association, National Association of Home Builders, National Association of Residential Property Managers, National Leased Housing Association, National Multifamily Housing Council, and Real Estate Roundtable).

[39] *See, e.g.,* FTC–2023–0064–2981 (Apartment & Office Building Association of Metropolitan Washington); FTC–2023–0064–3042 (Nevada State Apartment Association); FTC–2023–0064–3044 (San Angelo Apartment Association); FTC–2023–0064–3045 (Chicagoland Apartment Association); FTC–2023–0064–3089 (Apartment Association of Northeast Wisconsin and Fox Valley Apartment Association); FTC–2023–0064–3111 (Houston Apartment Association); FTC–2023–0064–3172 (New Jersey Apartment Association); FTC–2023–0064–3296 (Bay Area Apartment Association); FTC–2023–0064–3311 (Greater Cincinnati Northern Kentucky Apartment Association); FTC–2023–0064–3312 (Tulsa Apartment Association); FTC–2023–0064–3313 (Property Management Association of Michigan).

[40] FTC–2023–0064–3289 (Zillow Group).

[41] *See, e.g.,* FTC–2023–0064–3262 (Skyscanner); FTC–2023–0064–3293 (Travel Technology Association).

[42] *See, e.g.,* FTC–2023–0064–2918 (Elite Catering + Event Professionals); FTC–2023–0064–3078 (Washington Hospitality Association); FTC–2023–0064–3080 (UNITE HERE); FTC–2023–0064–3101 (High Road Restaurants); FTC–2023–0064–3180 (Independent Restaurant Coalition); FTC–2023–0064–3197 (American Beverage Licensees); FTC–2023–0064–3203 (American Pizza Community); FTC–2023–0064–3219 (Georgia Restaurant Association); FTC–2023–0064–3300 (National Restaurant Association).

[43] *See, e.g.,* FTC–2023–0064–3065 (Carriage Services, Inc.); FTC–2023–0064–3130 (International Cemetery, Cremation & Funeral Association); FTC–2023–0064–3210 (Service Corporation International).

[44] *See, e.g.,* FTC–2023–0064–2886 (American Gaming Association); FTC–2023–0064–3120 (Arizona Indian Gaming Association).

[45] *See, e.g.,* FTC–2023–0064–3261 (National Association of Broadcasters); FTC–2023–0064–2884 (NTCA—The Rural Broadband Association); FTC–2023–0064–3143 (ACA Connects—America's Communications Association); FTC–2023–0064–3233 (NCTA—The internet & Television Association); FTC–2023–0064–3234 (CTIA—The Wireless Association); FTC–2023–0064–3295 (USTelecom—The Broadband Association).

[46] *See, e.g.,* FTC–2023–0064–3033 (The Rebel Lounge, Lucky Man Concerts LLC, PHX Fest, RelentlessBeats LLC).

[47] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[48] *See, e.g.,* FTC–2023–0064–3236 (NCIC Inmate Communications); FTC–2023–0064–3284 (Global Tel*link Corporation d/b/a ViaPath Technologies).

[49] *See, e.g.,* FTC–2023–0064–2906 (National Association of College & University Business Officers, American Council on Education); FTC–2023–0064–3217 (Bowling Proprietors' Association of America); FTC–2023–0064–3249 (Marine Retailers Association of the Americas); FTC–2023–0064–3251 (National RV Dealers Association); FTC–2023–0064–3269 (IHRSA—The Health & Fitness Association). Towing & Recovery Association of America, Inc. submitted a late comment, which the Commission considered in its discretion and makes available at *https://www.ftc.gov/system/files/ftc_gov/pdf/R207011TRAAComment.pdf.*

restaurant owners criticized the rule as a one-size-fits-all approach that would be unworkable for the restaurant industry. In addition, members of the rental housing industry also submitted comments in opposition to the proposed rule. A mass mailing from about 3,781 members of the rental housing industry stated that it is virtually impossible to predict and disclose in advertisements total prices that include all mandatory fees that residents could incur during lease terms. The Commission does not address the specific issues raised by these industries and others that fall outside the scope of this final rule.[50]

C. Informal Public Hearing

On March 27, 2024, the Commission published an initial notice of informal hearing, which also served as the final notice of informal hearing (''Informal Hearing Notice'').[51] The Informal Hearing Notice was published in accordance with section 18(b)(1) of the FTC Act, 15 U.S.C. 57a(b)(1), which requires the Commission to provide an opportunity for an informal hearing in section 18 rulemaking proceedings. The Informal Hearing Notice identified eight commenters to the NPRM that requested an informal hearing in accordance with the requirements of 16 CFR 1.11(e), as well as nine additional commenters that requested the opportunity to make an oral presentation if the Commission was to hold an informal hearing at others' requests. A number of commenters, including several who requested an informal hearing, proposed potential disputed issues of material fact for the Commission's consideration.[52] The Commission reviewed these potential issues and concluded in its Informal Hearing Notice that there were no disputed issues of material fact to resolve at the hearing.

On April 24, 2024, the Commission conducted an informal public hearing. In the Informal Hearing Notice, which was formally approved by vote of the Commission, the Commission's Chief Presiding Officer, the Chair, designated the Honorable Jay L. Himes, an Administrative Law Judge for the Federal Trade Commission, to serve as the presiding officer of the informal hearing. Seventeen interested parties were identified in the Informal Hearing Notice,[53] and six of them made documentary submissions in support of their hearing testimony.[54] Fifteen interested parties made presentations,[55] and two did not appear at the hearing.[56] The majority of interested parties that appeared spoke in support of the proposed rule. However, several voiced opposition to the rule, explained perceived problems with the proposed rule text, or argued that the Commission incorrectly concluded that there were no disputed issues of material fact raised in response to the NPRM.

II. The Legal Standard for Promulgating the Rule

The Commission is promulgating 16 CFR part 464 (''final rule'' or ''rule'') pursuant to section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).[57] Whenever the Commission promulgates a rule under section 18(a)(1)(B), the rule must include a Statement of Basis and Purpose (''SBP'') that addresses: (1) the prevalence of the acts or practices addressed by the rule; (2) the manner and context in which the acts or practices are unfair or deceptive; and (3) the economic effect of the rule, taking into account the effect on small businesses and consumers.[58] The Commission summarizes in this section its findings regarding each of these requirements.

Substantial evidence exists supporting the prevalence of bait-and-switch pricing and misleading fees and charges economy-wide as well as in the live-event ticketing and short-term lodging industries. As documented by the rulemaking record, the Commission's work on these pricing issues for over a decade, and the complementary actions of the Commission's local, State, and international counterparts, these specific practices are widespread across the economy and are harmful to consumers and honest businesses. Nevertheless, the Commission has decided, in its discretion, to focus this final rule on the industries in which the Commission first evaluated drip pricing—live-event ticketing and short-term lodging—and have a long history of harming consumers and honest competitors.

The Commission notes that the harms of bait-and-switch pricing and the misrepresentation of fees and charges are particularly pronounced in industries such as these, in which most transactions occur online. Consumers trying to comparison shop across multiple websites, or even on the same website, when deciding what tickets to purchase or where to travel are unable to do so effectively because some businesses hide the true total price and instead force consumers to go to different sites and click through multiple web pages for each offer to learn the true total price.

Consumer harm is also pronounced in these industries because the offered goods and services are often identical (as is the case with live-event tickets), or nearly identical (as is the case with competing short-term lodging offers in a particular destination and for a particular star rating), and the most salient feature is the total price, which is shrouded from consumers. Indeed, for some consumers, hotel rooms are interchangeable so long as the location, star rating, and reviews are similar

[50] *See, e.g.,* FTC–2023–0064–2953, FTC–2023–0064–2961, FTC–2023–0064–2972; FTC–2023–0064–2971.

[51] Initial notice of informal hearing; final notice of informal hearing; list of Hearing Participants; requests for submissions from Hearing Participants: Trade Regulation Rule on Unfair or Deceptive Fees, 89 FR 21216 (Mar. 27, 2024).

[52] *See, e.g.,* FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3143 (ACA Connects); FTC–2023–0064–3139 (American Bankers Association and Consumer Bankers Association); FTC–2023–0064–3294 (International Franchise Association); FTC–2023–0064–3233 (NCTA—The internet & Television Association).

[53] The interested parties were: ACA Connects—America's Communication Association; American Bankers Association and Consumer Bankers Association; U.S. Chamber of Commerce; NCTA—The internet & Television Association; International Franchise Association; BattleLine LLC; IHRSA—The Global Health & Fitness Association; National Taxpayers Union Foundation; Consumer Federation of America, representing a coalition of 52 national and state consumer advocacy groups; Consumer Federation of America with National Consumer Law Center and National Association of Consumer Advocates; Community Catalyst, representing a coalition of 33 health and consumer protection advocacy groups; National Housing Law Project, representing a coalition of 39 housing justice advocacy organizations; National Consumer Law Center, Prison Policy Initiative, and Stephen Raher; Formerly Incarcerated, Convicted People & Families Movement; Truth in Advertising, Inc.; National Consumer Law Center; and Fair Price, Fair Wage Coalition.

[54] The interested parties that made documentary submissions in connection with the informal hearing were: National Taxpayers Union Foundation; Community Catalyst; National Housing Law Project; Consumer Federation of America; U.S. Chamber of Commerce; and NCTA—The internet & Television Association. Each of the documentary submissions is posted in the Informal Hearing Documents folder available at *https://www.ftc.gov/legal-library/browse/rules/rulemaking-unfair-or-deceptive-fees.*

[55] Transcript, Informal Hearing on Proposed Trade Regulation Rule on Unfair or Deceptive Fees (Apr. 24, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/transcript-deceptive-fees.pdf.*

[56] American Bankers Association and Consumer Bankers Association and the U.S. Chamber of Commerce did not appear at the Informal Hearing despite being given the opportunity to do so.

[57] *See* 15 U.S.C. 57a(a)(1)(B).

[58] 15 U.S.C. 57a(b)(3). In addition, section 22(b)(2) of the FTC Act, 15 U.S.C. 57b–3(b)(2), requires the Commission to prepare a final regulatory analysis, which it discusses in section V.

across offers, and what matters most is the total price.

In the future, the Commission may address these unfair and deceptive practices across industries as discussed in the NPRM. For now, however, the Commission will address unfair and deceptive pricing practices in other industries using its existing section 5 authority.

A. Prevalence of Acts or Practices Addressed by the Rule

As discussed herein, and in the NPRM, the Commission finds that unfair or deceptive pricing practices involving bait-and-switch pricing and misleading fees or charges are prevalent throughout the economy and affect, or have the potential to affect, virtually every purchasing transaction a consumer undertakes, including decisions about basic goods or services; where to live, dine, stay, or travel; and what events to attend. Specifically, the Commission finds that the following unfair or deceptive practices relating to fees are prevalent generally throughout the economy and specifically in the live-event ticketing and short-term lodging industries: (1) bait-and-switch pricing practices that hide the total price of goods or services by omitting mandatory fees and charges from advertised prices, including through drip pricing, and (2) misrepresenting the nature, purpose, amount, and refundability of fees or charges.

Section 18 of the FTC Act instructs that the Commission may determine that unfair or deceptive acts or practices are prevalent if: ''it has issued cease and desist orders regarding such acts or practices'' or ''any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices.'' [59] In support of its preliminary finding that these practices are prevalent, the NPRM cited enforcement evidence, including prior work by the Commission, complementary actions by State Attorneys General, private lawsuits, and international actions to address unfair or deceptive pricing practices, as well as comments received in response to the ANPR.[60] The NPRM also described legislative and regulatory action taken by multiple States to address unfair or deceptive fees.

To support its prevalence determination herein as to the economy generally, and as to the live-event ticketing and short-term lodging industries specifically, the Commission reiterates that it has a long history of enforcement actions, as well as a plethora of other information, indicating a widespread pattern of bait-and-switch pricing practices, including drip pricing and misleading fees or charges. In addition, the Commission's prevalence determination is further supported by the Commission's workshops and warning letters relating to bait-and-switch pricing and misleading fees or charges; the behavioral and economic research documenting consumer harm from these practices; and consumer surveys and reports. The Commission also relies on the great majority of the more than 60,800 comments filed in response to the NPRM—one of the largest number of comments filed in any Commission rulemaking to date—including comments by consumers, consumer groups, academics, businesses, and government officials highlighting the prevalence of these unfair and deceptive practices and urging the Commission to promulgate a final rule to combat them.

As explained in the NPRM, the Commission has a long history of enforcement actions targeting unfair and deceptive bait-and-switch pricing tactics concerning hidden fees [61] and misrepresentations regarding the nature and purpose of fees.[62] The takeaway

[59] 15 U.S.C. 57a(b)(3).

[60] NPRM, 88 FR 77435; *see also, e.g.,* FTC–2022–0069–6099 (ANPR) (Consumer Reports discussed its *WTFee?! Survey, 2018 Nationally-Representative Multi-Mode Survey* of hidden fees in multiple sectors of the economy and the prevalence of unfair or deceptive fees practices.); FTC–2022–0069–6095 (ANPR) (Consumer Federation of America noted that the Washington Attorney General's Hidden Fee Survey showed that consumers experienced unexpected fees in a wide range of industries.); FTC–2022–0069–6113 (ANPR) (UnidosUS cited surveys or studies by itself, the Financial Health Network, and the Center for Responsible Lending that documented the impact of fees related to financial services products.).

[61] *See, e.g.,* Complaint ¶¶ 4–5, 106–14, *FTC* v. *Invitation Homes, Inc.,* No. 24–cv–04280 (N.D. Ga. Sept. 24, 2024) (alleging that defendant, among other deceptive and unfair practices, deceptively advertised monthly home rental prices that omitted and used confusing and buried language about mandatory fees); Complaint ¶¶ 39–46, *FTC* v. *Vonage Holdings Corp.,* No. 3:22–cv–6435 (D.N.J. Nov. 3, 2022) (alleging in part that defendant charged undisclosed large cancellation fees); Complaint ¶¶ 42–44, 50, *United States* v. *Funeral Cremation Grp. of N. Am., LLC* (''*Legacy Cremation Servs.*''), No. 0:22–cv–60779 (S.D. Fla. Apr. 22, 2022) (alleging defendants advertised artificially low prices for cremation services which ultimately included undisclosed additional charges and, in some cases where consumers contested these charges, defendants refused to return remains); Complaint ¶ 9, *FTC* v. *Liberty Chevrolet, Inc.* (''*Bronx Honda*''), No. 1:20–cv–03945 (S.D.N.Y. May 21, 2020) (alleging defendants advertised low sales prices but later told consumers they were required to pay additional charges including certification charges); Complaint ¶ 13, *FTC* v. *NetSpend Corp.,* No. 1:16–cv–04203 (N.D. Ga. Apr. 11, 2017) (alleging in part that defendant charged maintenance and usage fees to consumers who were unable to use all, or even a portion of, the funds of their prepaid debit cards); *see also* Complaint ¶¶ 24–25, 29, 40–42, *FTC* v. *AT&T Mobility LLC,* No. 3:14–cv–04785 (N.D. Cal. Oct. 28, 2014) (alleging defendant did not adequately disclose the limitations of defendant's data plan offerings and subsequently charged high cancellation fees for consumers who chose to end their contracts); Complaint ¶¶ 1, 26, 39–40, *FTC* v. *Millennium Telecard, Inc.,* No. 2:11–cv–02479 (D.N.J. May 2, 2011) (alleging defendants deceptively marketed prepaid credit calling cards by failing to adequately disclose fees that substantially limited the number of minutes consumers had purchased); Complaint ¶ 15, *FTC* v. *CompuCredit Corp.,* No. 1:08–cv–01976 (N.D. Ga. June 10, 2008) (alleging in part that defendants misrepresented the credit limits on various credit cards and failed to disclose fees charged upfront).

[62] *See, e.g.,* Complaint ¶¶ 4–5, 106–14, 118–23, *Invitation Homes, Inc.,* No. 24–cv–04280 (alleging that defendant, among other deceptive and unfair practices, misled consumers about fees by using confusing and buried language); Complaint ¶¶ 39–46, *Vonage Holdings Corp.,* No. 3:22–cv–6435; Complaint ¶¶ 61–63, *FTC* v. *Benefytt Techs., Inc.,* No. 8:22–cv–1794 (M.D. Fla. Aug. 8, 2022) (alleging in part that defendants bundled and charged fees for unwanted products with sham health insurance plans); Complaint ¶¶ 17–20, *FTC* v. *Passport Auto Grp., Inc.,* No. 8:22–cv–02670 (D. Md. Oct. 18, 2022) (alleging in part that defendants advertised vehicle prices that did not include redundant fees ranging from hundreds to thousands of dollars for inspection, reconditioning, preparation, and certification); Complaint ¶¶ 3, 33, 41, *FTC* v. *N. Am. Auto. Serv., Inc.* (''*Napleton Auto*''), No. 1:22–cv–01690 (E.D. Ill. Mar. 31, 2022) (alleging defendants charged consumers for additional products and services without their consent and misrepresented the fees as mandatory, resulting in artificially low advertised prices); Complaint ¶¶ 50–51, *Amazon.com, Inc.* (''*Amazon Flex*''), No. C–4746 (FTC June 9, 2021) (alleging respondents falsely represented that 100% of tips would go to the driver in addition to the pay respondents offered drivers); Complaint ¶¶ 37–39, *FTC* v. *Lead Express, Inc.,* No. 2:20–cv–00840 (D. Nev. May 11, 2020) (alleging in part that defendants did not clearly and conspicuously disclose material information related to the total amount of payments related to loans and also withdrew significantly more than the stated total cost of the loan from consumers' accounts); Complaint ¶¶ 9–10, *FTC* v. *FleetCor Techs, Inc.,* No. 1:19–cv–05727, 2019 WL 13081514 (N.D. Ga. Dec. 20, 2019) (alleging defendants charged consumers arbitrary and unexpected fees related to pre-paid fuel cards without consumers' consent); Complaint ¶¶ 4, 30–32, 36–37, *FTC* v. *BCO Consulting Servs., Inc.,* No. 8:23–cv–00699 (C.D. Cal. Apr. 24, 2023) (alleging defendants enticed consumers with false promises to alleviate student loan debt despite not applying any payments to the student loan balances and collecting illegal advance fees without providing any services); Complaint ¶¶ 31–36, *FTC* v. *OMICS Grp. Inc.,* No. 2:16–cv–02022 (D. Nev. Aug. 25, 2016) (alleging in part defendants misrepresented the publishing process of academic papers and only disclosed large publishing fees after notifying consumers that their papers had been approved for publication); Complaint ¶¶ 12, 23–25, *FTC* v. *Lending Club Corp.,* No. 3:18–cv–02454 (N.D. Cal. Apr. 25, 2018) (alleging defendant charged consumers an upfront fee based on a percentage of the loan requested that was not clearly and conspicuously disclosed; this hidden fee caused loans received to be substantially smaller than advertised); Complaint ¶ 37, *FTC* v. *T-Mobile USA, Inc.,* No. 2:14–cv–00967 (W.D. Wash. July 1, 2014) (alleging defendant added unauthorized third-party charges to the telephone bills of consumers); Amended Complaint ¶¶ 21–22, *FTC* v. *Websource Media, LLC,* No. 4:06–cv–01980 (S.D. Tex. June 21, 2006) (alleging defendants placed charges on consumer telephone bills despite representations that there would be no charges or

from this enforcement history is clear—businesses cannot hide or misrepresent the true cost of a good or service or mislead consumers about the nature, purpose, amount, or refundability of fees or charges. Some commenters suggested consent orders are not cease-and-desist orders that the Commission can rely upon to support a finding of prevalence, but that is incorrect. The FTC Act makes clear when it intends to exclude consent orders from the ambit of ''cease and desist orders,'' and does not do so in section 18.[63]

In addition to the Commission's enforcement actions, for more than a decade, the Commission has engaged with the public and issued guidance to industry on issues related to bait-and-switch tactics, including drip pricing, and the misrepresentation of fees or charges. The Commission first engaged with the public on the concept of drip pricing in 2012 by convening a conference, titled ''The Economics of Drip Pricing,'' to bring together economists and marketing academics to ''examine the theoretical motivation for drip pricing and its impact on consumers, empirical studies, and policy issues pertaining to drip pricing.'' [64] Several psychological theories were discussed at this conference, and these theories explain why consumers cannot reasonably avoid making errors when the total price is not revealed upfront.[65] Following the workshop, Commission staff sent warning letters to hotels and online travel agents that were not adequately disclosing resort fees or including those fees in the total price.[66] These hotels and online travel agents were employing drip pricing tactics as well as another bait-and-switch pricing tactic, partitioned pricing, to inadequately disclose resort fees and hide the total price of a hotel stay. Partitioned pricing consists of dividing a price into multiple components without ever disclosing the total and leaving consumers to figure out the true total price on their own. Hotels, for example, might separately list the room rate and ''resort fee'' but never add them up and quote an all-inclusive total price. In 2017, the Commission's Bureau of Economics published a report that reviewed the existing literature on drip pricing and partitioned pricing and examined the costs and benefits of disclosing hotel resort fees.[67] The report found that ''[u]nless the total price is disclosed up front, separating resort fees from the room rate is unlikely to result in benefits that offset the likely harm to consumers.'' [68] Specifically,

> separating mandatory resort fees from posted room rates without first disclosing the total price is likely to harm consumers by increasing the search costs and cognitive costs of finding and choosing hotel accommodations. Forcing consumers to click through additional web pages to see a hotel's resort fee increases the cost of learning the hotel's price. Separating the room rate from the resort fee increases the cognitive costs of remembering the hotel's price. When it becomes more costly to search and evaluate an additional hotel, a consumer's choice is either to incur higher total search and cognitive costs or to make an incomplete, less informed decision that may result in a more costly room, or both.[69]

The report observed that hotels could eliminate these costs to consumers by including the resort fee in the advertised price; bundling the same resort services with the room and charging the same total price; listing the components of the total price separately, as long as the total price is the most prominently disclosed price; or changing to unbundled, optional resort services which would not be included in the advertised price.[70] Finally, the report did not find ''any benefits to consumers from separately-disclosed mandatory resort fees that could not be achieved by first listing the total price and then disclosing the resort fee.'' [71]

In 2019, the Commission hosted a workshop and issued a staff perspective report that examined pricing and fees in the live-event tickets market.[72] The report observed,

> On most primary and resale platforms, the ticket price a consumer first sees is not what the consumer will pay. Mandatory fees, such as 'venue' and 'ticket processing' fees, bulk up the price–often by as much as thirty percent . . . . The late disclosure of fees increases search costs for consumers and makes it harder to comparison shop.[73]

The report remarked that ''[a]ll of the workshop panelists who discussed the fees issue, including each participating ticket seller that does not currently provide upfront all-in pricing, favored requiring all-in pricing through federal legislation or rulemaking.'' [74]

The Commission's finding of prevalence is further supported by the complementary enforcement actions brought by its law enforcement partners, most of which have resulted in orders prohibiting bait-and-switch pricing and misrepresenting fees and charges in the short-term lodging, live-event ticketing, delivery services, rental cars, travel, and tax filing preparation services

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obligations); *FTC* v. *Mercury Mktg. of Del., Inc.,* No. 00–cv–3281, 2004 WL 2677177, *1 (E.D. Pa. Nov. 22, 2004) (finding defendants billed consumers without their consent after misleading consumers about introductory internet packages); Complaint ¶¶ 25–27, *FTC* v. *Stewart Fin. Co.,* No. 1:03–cv–02648 (N.D. Ga. Sept. 4, 2003) (alleging in part that defendants package undisclosed add-on products with consumer loans and in some cases describe those add-on products as mandatory); Complaint ¶¶ 19–21, 24, *FTC* v. *Hold Billing Serv., Ltd.,* No. SA–98–CA–0629–FB (W.D. Tex. July 16, 1998) (alleging defendants had previously added third-party charges to consumers' phone bills without permission by using sweepstakes entry forms as contracts to authorize charges); Complaint ¶¶ 18, 33, 56–58, *FTC* v. *Lake,* No. 8:15–cv–00585–CJC–JPR (C.D. Cal. Apr. 14, 2015) (alleging defendants misrepresented that trial loan payments or reinstatement fee payments would be held in escrow and refunded to the consumer if the loan modification was not approved); *FTC* v. *Hope for Car Owners, LLC,* No. 2:12–CV–778–GEB–EFB, 2013 WL 322895, at *3–4 (E.D. Cal. Jan. 24, 2013) (finding that the FTC sufficiently stated a claim for misrepresentation of the refundability of vehicle loan modification fees and entering default judgment); Amended Complaint ¶¶ 38–39, 58–60, *FTC* v. *U.S. Mortg. Funding, Inc.,* No. 9:11–cv–80155–JIC (S.D. Fla. July 26, 2011) (alleging defendants misrepresented that an upfront loan modification fee was refundable); *FTC* v. *Nat'l Bus. Consultants, Inc.,* 781 F. Supp. 1136, 1143 (E.D. La. 1991) (finding that ''defendants' misrepresentations regarding the ease with which the 'performance deposit' could be refunded composed a large part of the various and sundry misrepresentations'').

[63] *Compare* 15 U.S.C. 45(m) (excluding consent orders from the type of cease and desist orders that could support an action for civil penalties under 15 U.S.C. 45(m)(1)(B)) *and* 108 Stat. 1691 (1994) (amending 15 U.S.C. 45(m) to add ''other than a consent order'' after the term ''cease and desist order'') *with* 15 U.S.C. 57a(b)(3) (stating that the Commission may make a determination of prevalence if ''it has issued cease and desist orders regarding such acts or practices or any other information available to the Commission indicat[ing] a widespread pattern of unfair or deceptive acts or practices''). Even if consent orders and the investigations that lead up to them are not ''cease and desist orders,'' in making a determination of prevalence, the Commission can still rely upon them as ''other information.''

[64] Fed. Trade Comm'n, *The Economics of Drip Pricing* (May 21, 2012), *https://www.ftc.gov/news-events/events/2012/05/economics-drip-pricing.*

[65] *See, e.g.,* Fed. Trade Comm'n, *The Economics of Drip Pricing: Conference Transcript* 76–111 (May 21, 2012), *https://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/transcript.pdf.*

[66] Press Release, Fed. Trade Comm'n, *FTC Warns Hotel Operators that Price Quotes that Exclude ''Resort Fees'' and Other Mandatory Surcharges May Be Deceptive* (Nov. 28, 2012), *https://www.ftc.gov/news-events/news/press-releases/2012/11/ftc-warns-hotel-operators-price-quotes-exclude-resort-fees-other-mandatory-surcharges-may-be.*

[67] Mary Sullivan, Fed. Trade Comm'n, *Economic Analysis of Hotel Resort Fees* 4 (2017), *https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Fed. Trade Comm'n, ''*That's the Ticket*'' *Workshop: Staff Perspective* 4 (May 2020), *https://www.ftc.gov/system/files/documents/reports/thats-ticket-workshop-staff-perspective/staffperspective_tickets_final-508.pdf.*

[73] *Id.*

[74] *Id.*

industries.[75] Indeed, a group of State Attorneys General wrote in support of a finding of prevalence of these practices across industries, including event ticket sellers, and hotels and other short-term lodging providers.[76] They have attempted to address some, but not all, of these fees in their own States.[77] The State Attorneys General cited a number of cases across industries demonstrating that bait-and-switch pricing and misleading fees are ''a chronic, prolific problem confronting many consumers across numerous sectors of the economy.'' [78] Further, they agreed with the Commission's assertion that ''charges that misrepresent their nature and purpose are unfair and deceptive because they mislead consumers and make it more difficult for truthful businesses to compete on price.'' [79] The Commission takes note of legislative and regulatory efforts in Minnesota, California, Pennsylvania, New York, Massachusetts, and North Carolina to combat hidden and misleading fees [80] which further support its finding of prevalence.

Comments submitted by Federal and State elected officials echoing the widespread practice of misleading consumers about total prices and fees or charges further strengthen the Commission's prevalence finding. For example, U.S. Senator Amy Klobuchar stated that she held a hearing focusing on the lack of transparency in the live-event ticketing industry as well as a hearing on fees in the rental housing market that prevent renters from having meaningful opportunities to compare prices.[81] U.S. Senator Robert Casey discussed a report released on January 24, 2024, ''Additional Charges May Apply: How Big Corporations Use

[75] *See, e.g.,* Complaint ¶ 3, *Rhode Island* v. *UPP Global, LLC,* No. PC–2024–04453 (R.I. Super. Ct. Aug. 13, 2024) (alleging in part that defendant charges a fee as a tax, fails to disclose prices until after consumers have elected to use defendant's service, and advertises hourly prices and then requires consumers to pay for multiple hours at a minimum); Complaint ¶¶ 3–4, *District of Columbia* v. *StubHub, Inc.,* No. 2024–CAB–004794 (D.C. Super. Ct. July 31, 2024) (alleging defendant uses drip pricing and entices consumers to shop for tickets by displaying artificially low prices and revealing mandatory fees later in the checkout process which defendant also misrepresents the purpose of); Consent Decree ¶¶ 10–24, *Arizona* v. *Cox Enterprises, Inc.,* No. CV–2023–019752 (Ariz. Sup. Ct. Jan. 2, 2024) (alleging defendants failed to disclose additional fees to consumers who purchased services through long-term contracts based on ''price-lock'' guarantee); Assurance of Voluntary Compliance ¶ 2, *Texas* v. *Marriott Int'l, Inc.,* No. 2023–CI09717 (Tex. Dist. Ct. May 16, 2023) (alleging defendant misrepresented various fees, including resort fees, and did not include all mandatory fees in the advertised room rate in violation of the Texas Deceptive Trade Practices Act); Plaintiff's Original Pet. ¶ 1, *Texas* v. *Hyatt Hotels Corp.,* No. C2023–0884D (TX. Dist. Ct. May 15, 2023) (alleging defendant did not include mandatory fees in advertised room rates in violation of the Texas Deceptive Trade Practices Act); Consent Order ¶ 20, *District of Columbia* v. *Grubhub Holdings, Inc.,* No. 2022 CA 001199 B (D.C. Super. Ct. Jan. 4, 2023) (alleging in part that defendants misrepresented menu prices to consumers and deceptively advertised that consumers could ''order online for free''); Assurance of Voluntary Compliance ¶ 4, *Commonwealth* v. *Omni Hotels Mgmt.,* GD–23–013056 (Pa. Commw. Ct. Nov. 9, 2023) (alleging defendants failed to advertise room prices including mandatory fees, misleading consumers); Assurance of Voluntary Compliance ¶ 2, *Commonwealth* v. *Choice Hotels Intl., Inc.,* GD–23–011023 (Pa. Commw. Ct. Sept. 21, 2023) (alleging defendants failed to advertise room prices including mandatory fees misleading consumers); Assurance of Voluntary Compliance ¶¶ 1–5, *Commonwealth* v. *RYADD, Inc.,* No. 2022–07262 (Pa. Commw. Ct. Sept. 8, 2022) (alleging defendants failed to advertise ticket prices including service fees and failed to clearly disclose an itemization of the total cost); Complaint ¶ 1, *Commonwealth* v. *Mariner Finance, LLC,* No. 2:22–cv–03235–MAK (E.D. Pa. Sept. 6, 2022) (alleging defendant charged consumers for hidden add-on products without consumer knowledge and in some cases after explicit rejection); Consent Order ¶ 6, *District of Columbia* v. *Maplebear, Inc.,* No. 2020 CA 003777B (D.C. Super. Ct. Aug. 19, 2022) (prohibiting defendant from misrepresenting the nature and purpose of fees applied to consumers' orders); Assurance of Voluntary Compliance ¶ 2, *Commonwealth* v. *Marriott Int'l, Inc.,* No. GD–21–014016 (Pa. Ct. C.P. Nov. 16, 2021) (alleging defendant misrepresented its room rates by failing to include items such as mandatory fees in its pricing); Consent Order ¶ 3.1–3.18, *Drivo LLC,* N.J. Div. Consumer Aff. (Sept. 16, 2020) (prohibiting unfair and deceptive practices relating to damage fees and third party reservation fees for rental vehicles); Press Release, Off. Minn. Att'y Gen., *Attorney General Ellison Obtains Relief for More than 30,000 Comcast/Xfinity Customers* (Jan. 15, 2020) (alleging in part that defendants misrepresented prices for their services and added services without consumer consent), *https://www.ag.state.mn.us/Office/Communications/2020/01/15_ComcastXfinity.asp*; Press Release, Off. Minn. Att'y Gen., *Attorney General Ellison Obtains Nearly $9 Million Settlement with CenturyLink for Overcharging Minnesota Customers* (Jan. 8, 2020) (alleging defendant misrepresented the price of its services and used a complex pricing scheme to mislead consumers), *https://www.ag.state.mn.us/Office/Communications/2020/01/08_CenturyLinkSettlement.asp.*; Assurance of Voluntary Compliance ¶¶ 1–12, *Commonwealth* v. *Event Ticket Sales, LLC,* No. 201101873 (Pa. Commw. Ct. Nov. 19, 2020) (alleging defendants failed to advertise ticket prices including service fees and failed to clearly disclose an itemization of the total cost); Assurance of Voluntary Compliance ¶ 7, *CenturyLink, Inc.,* No. 19–CV–56401 (Or. Cir. Ct., 2019) (alleging defendants charged undisclosed fees and failing to disclose all mandatory fees and charges); Agreed Final J. ¶ 8, *Texas* v. *Guided Tourist, LLC,* No. D–1–GN–19–001618 (Tex. Dist. Ct. Mar. 26, 2019) (enjoining defendant from advertising ticket prices other than the total ticket price, including all mandatory fees); Settlement Agreement ¶ 8(b)–(c), *Florida* v. *Dollar Thrifty Auto. Grp., Inc.,* No. 16–2018–cv–005938 (Fla. Cir. Ct., Jan. 14, 2019) (alleging in part that defendant misrepresented optional charges as mandatory and did not sufficiently disclose toll-related fees). Additionally, Intuit recently entered a multistate settlement of allegations that it misrepresented its tax filing products would come at no cost. Assurance of Voluntary Compliance, *Commonwealth* v. *Intuit Inc.,* No. 220500324 (Pa. Ct. C.P. May 4, 2022).

[76] FTC–2023–0064–3215 (Attorneys General of the States of North Carolina and Pennsylvania, along with Attorneys General of the States or Territories of Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Michigan, Minnesota, New Jersey, New York, Oklahoma, Oregon, Vermont, Washington, and Wisconsin). The Attorneys General also pointed to prevalence of these practices in residential leasing, payday lending, internet applications, online shopping, automobile rentals, carpet cleaners, dietary supplement sellers, moving companies, gyms, travel companies, outlet stores, and online auctions.

[77] *Id.* (The Attorneys General highlighted actions each has taken in their own states to address financial services fees, hotel fees, live-event ticket fees, rental housing fees, auto rental fees, and telecommunication fees.)

[78] *Id.*

[79] *Id.*

[80] N.Y. Arts & Cult. Aff. Law sec. 25.01–25.33 (McKinney 2023) (Effective Jun. 30, 2022) (requiring that the sellers and resellers of live-event tickets disclose the total cost of a ticket, upfront, and clearly and conspicuously disclose the amount of the price that is made up of fees and other charges); An Act Ensuring Transparent Ticket Pricing, H. 259, 193rd Gen. Court (Mass. 2023) (proposed legislation requiring in part that the sellers and resellers of live-event tickets disclose the total cost inclusive of all ancillary fees that must be paid and the portion of the ticket price that represents a service charge or any other fee or surcharge); H.B. 714 (2023–2024 Session) (N.C. 2023) (proposed legislation that requires, among other things, that providers of short-term lodging and live-event ticketing clearly display the total price of goods and services inclusive of mandatory fees a consumer would incur during a transaction); *see also* 2023 Minn. H.B. 3438 (Enacted May 20, 2024) (stating that it is a deceptive trade practice for a business to not include all mandatory fees or surcharges when advertising, displaying or offering a price for goods or services); Cal. S.B. 478 (2023–2024 Regular Session) (Enacted Oct. 7, 2023) (amending the California Consumer Legal Remedies Act to state that it is unlawful to advertise, display, or offer a price for a good or service that does not include all mandatory fees or charges other than taxes or fees imposed by a government on the transaction); Cal. S.B. 1524 (2023–2024 Regular Session) (clarifying and amending S.B. 478 to include that additional fees such as service charges for food services businesses including bars and restaurants could appear separately so long as they were displayed on the menu); H.B. 636 (2023–2024) (Pa. 2023) (Engrossed Oct. 19, 2023) (proposed legislation amending the Pennsylvania Unfair Trade Practices and Consumer Protection Law to require the disclosure of all mandatory fees and charges included in the advertised and displayed price of any good or service); Conn. Gen. Stat. sec. 53–289a (2023) (requiring conspicuous disclosure in the advertisement of total price of live-event tickets including service charges); Conn. Gen. Stat. sec. 53–289a (2023) (requiring conspicuous disclosure in the advertisement of total price of live-event tickets including service charges); SB 329 (2024 Reg. Sess.) (Md.) (requiring all-in pricing throughout the purchase process of a live-event ticket); SB 329 (2024 Reg. Sess.) (Md.) (requiring all-in pricing throughout the purchase process of a live-event ticket); 1510 Mass. Reg. 5 (Dec. 8, 2023) (Proposed Regulations 940 C.M.R. 38.00: Unfair and Deceptive Fees) (proposed regulation stating that it is an unfair and deceptive practice to misrepresent or fail to disclose at the time of initial presentation of the price of any product the total price of that product inclusive of all fees, interest, charges, or other expenses necessary or required in order to complete the transaction).

[81] FTC–2023–0064–3271 (U.S. Senate, Sen. Amy Klobuchar).

Hidden Fees to Nickel, Dime, and Deceive American Families,'' tracking the variety of junk fees facing Pennsylvania families, including in the short-term lodging industry.[82] A group of Congressional representatives raised concerns regarding misleading fees and a lack of price transparency in the rental housing market.[83] Concerns over unfair and deceptive pricing were also raised by a variety of State legislators and officials.[84] There has also been significant bipartisan interest in passing legislation targeting fees in the live-event ticketing and short-term lodging industries.[85]

The Commission also takes notice of the work of its international counterparts, as well as private lawsuits in the United States concerning unfair and deceptive fee practices. Regulatory actions in Canada, Australia, the European Union, and the United Kingdom with respect to such conduct include paragraph 74.01(1.1) of the Canadian Competition Act,[86] the Australian Competition and Consumer Protection Act of 2010,[87] EU Directive 2005/29/EC of the European Parliament and of the Council,[88] and the UK Digital Markets, Competition and Consumers Act 2024.[89] In addition, private lawsuits filed against businesses in the live-event ticketing, short-term lodging, banking, and delivery service industries challenging these practices lend further support to the Commission's prevalence determination.[90]

[82] FTC–2023–0064–3135 (U.S. Senate, Sen. Robert P. Casey, Jr. noted that his report ''details how corporations use hidden fees to deceive consumers and increase corporate profits, which leaves families paying more than they should and puts honest businesses at a disadvantage.'') The report is available at *https://www.casey.senate.gov/imo/media/doc/greedflation_junk_fees3.pdf*.

[83] FTC–2023–0064–2858 (U.S. House of Representatives, Rep. Maxwell Alejandro Frost, Rep. Jimmy Gomez, Rep. Barbara Lee, Rep. Rashida Tlaib, Rep. Kevin Mullin, Rep. Dwight Evans, Rep. Judy Chu, Rep. Greg Casar, Rep. Dan Goldman, and Rep. Salud Carbajal stated that the rule would help eliminate some of the barriers to those seeking rental housing as renters ''often face ambiguous or misleading fees'' and ''bring much needed transparency to the rental housing market.'').

[84] FTC–2023–0064–2341 (Massachusetts House of Representatives, Rep. Lindsay Sabadosa); FTC–2023–0064–1411 (Arizona House of Representatives, Rep. Analise Ortiz); FTC–2023–0064–3072 (Michigan Senate and House of Representatives, Sen. Darrin Camilleri, Sen. Mary Cavanagh, and Rep. Betsy Coffia); FTC–2023–0064–3079 (Montana State Senate, Senate Democratic Caucus, Sen. Pat Flowers, Sen. Susan Webber, Sen. Andrea Olsen, Sen. Edie McClafferty, Sen. Jen Gross, Sen. Janet Ellis, Sen. Shane Morigeau, Sen. Ellie Boldman, Sen. Ryan Lynch, Sen. Christopher Pope, Sen. Mike Fox, Sen. Denise Hayman, Sen. Willis Curdy, and Sen. Mary Ann Dunwell); FTC–2023–0064–3103 (Florida House of Representatives, Rep. Angela Nixon); FTC–2023–0064–3123 (Syracuse, New York, City Auditor Alexander Marion); FTC–2023–0064–3117 (Maryland House of Delegates, Del. Julie Palakovich Carr); FTC–2023–0064–3149 (North Carolina House of Representatives, Rep. Julie von Haefen); FTC–2023–0064–3237 (North Carolina House of Representatives, Rep. Pricey Harrison).

[85] *See, e.g.,* Transparency In Charges for Key Events Ticketing Act (''TICKET Act''), H.R. 3950, sec. 2, 118th Cong. (as engrossed in the House, May 15, 2024) (among other provisions, requiring ticket sellers, including secondary markets and exchanges, to clearly and conspicuously disclose the total ticket price for an event in any advertisement and each time the ticket is displayed in the purchasing process, and to provide an itemized list of the base ticket price and each fee or charge prior to completion of the purchase; violations of the TICKET Act would be treated as violation of a rule defining an unfair or deceptive act or practice under section 18(a)(1)(B) of the FTC Act); No Hidden Fees on Extra Expenses for Stays Act of 2023 (''No Hidden FEES Act of 2023''), H.R. 6543, sec. 2(a), 118th Cong. (as engrossed in the House, June 11, 2024) (among other provisions, prohibiting providers of short-term lodging, including providers of a website or other centralized platform that advertises or otherwise offers the price of a reservation for short-term lodging, from advertising, displaying, marketing, or otherwise offering for sale, including through a direct offering, third-party distribution, or metasearch referral, a price of a reservation that does not include each mandatory fee; violations of sec. 2(a) would be treated as violation of a rule defining an unfair or deceptive act or practice under section 18(a)(1)(B) of the FTC Act).

[86] Competition Act, R.S.C., 1985, c. C–34, ¶ 74.01(1.1) (Can.) (providing with respect to ''drip pricing'' that ''the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation''), *https://laws.justice.gc.ca/eng/acts/C-34/FullText.html*.

[87] Competition and Consumer Act 2010, Vol. 4, Sched. 2, Ch. 3, P. 3–1, Sec. 48, Ch. 4, P. 4–1, Sec. 166 (Austl.) (prohibiting ''mak[ing] a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the person also specifies, in a prominent way and as a single figure, the single price for the goods or services''), *https://www.legislation.gov.au/C2004A00109/latest/text*.

[88] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, art. 7, 2005 O.J. (L 149) (providing that it is a misleading commercial practice to engage in ''bait advertising'' or offering products at a specified price if not able to provide the products at that price for a period and in quantities reasonable with regard to the product, the scale of advertising of the product and the price offered), *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029; see also* Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, art. 5 and art. 6, 2011 O.J. (L 304), *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0083&qid=1726109600968*. Additionally, a 1998 Directive required that the selling price should be indicated for all products referred to in the Article, which means a price that is the final price for a unit of the product including VAT and all other taxes. *See* Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, 1998 O.J. (L 80), *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998L0006&qid=1726109951386*.

[89] Digital Markets, Competition and Consumers Act 2024, c. 13, sec. 230 (providing that an invitation to purchase omits material information if it omits the total price of the product or, if the nature of the product prevents all or a part of the total price from reasonably being calculated in advance, how the price (or that part of it) will be calculated), *https://www.legislation.gov.uk/ukpga/2024/13/section/230*. Reports preceding this legislation included: UK Department for Business & Trade, *Estimating the Prevalence and Impact of Online Drip Pricing* (2023), *https://assets.publishing.service.gov.uk/media/64f1ebd7a78c5f000dc6f448/estimating-the-prevalence-and-impact-of-online-drip-pricing.pdf*; and UK Department for Business & Trade, *Government response to consultation on ''Smarter Regulation: Consultation on Improving Price Transparency and Product Information for Consumers''* (2023), *https://www.gov.uk/government/consultations/smarter-regulation-improving-price-transparency-and-product-information-for-consumers/outcome/government-response-to-consultation-on-smarter-regulation-improving-consumer-price-transparency-and-product-information-for-consumers#introduction*.

[90] *See, e.g.,* Class Action Complaint ¶¶ 2–3, *Abdelsayed* v. *Marriot Int'l, Inc.,* No. 3:21–cv–00402–JLS–AHG (S.D. Cal. Mar. 5, 2021) (alleging defendant misled consumers into believing that hotel rooms were cheaper that they actually were by engaging in drip pricing that baited consumers with lower prices and adding charges, such as resort fees, amenity fees, and destination fees, throughout the vending process); Complaint ¶¶ 1, 3–5, *Travelers United* v. *MGM Resorts Int'l, Inc.,* No. 2021–CA–00477–B (D.C. Super. Ct. Feb. 18, 2021) (alleging defendant misled consumers into believing hotel rooms were cheaper that they actually were by using drip pricing that hid resort fees from advertised daily room rates); Class Action Complaint ¶¶ 18, 31, 43, 69–71, *Lee* v. *Ticketmaster LLC,* No. 3:18–cv–05987–VC (N.D. Cal. Sept. 28, 2018) (alleging, in part, that defendants were unjustly enriched through service charges added to resale tickets); Second Amended Class Action Complaint ¶¶ 1–2, *Wang* v. *StubHub, Inc.,* No. CGC–18564120 (Cal. Super. Ct. Feb. 25, 2019) (alleging defendant intentionally hid additional fees in order to advertise artificially low-ticket prices); Class Action Complaint ¶¶ 1–3, 33–34, *Holl* v. *United Parcel Service, Inc.,* No. 4:16–cv–05856–HSG (N.D. Cal., Oct. 11, 2016) (alleging defendant created a bait and switch by falsely advertising low published rates that were later inflated); (Truth in Advertising, Inc., submitted information about its tracking of class action cases related to unfair and deceptive fees, including cases involving event ticket sellers charging and misrepresenting the purpose of ''junk fees'' and hotels advertising a low base rate for rooms and then charging consumers more than the advertised rate by imposing additional fees.); *see also* Second Amended Class Action Complaint ¶¶ 5–7, *Hecox* v. *DoorDash, Inc.,* No. 1:23–cv–01006–JRR (D. Md. Sept. 5, 2023) (alleging in part that defendant employed deceptively named fees misleading consumers to believe the fees were for delivery personnel or for government imposed fees); Class Action Complaint ¶¶ 7–16, *Ramirez* v. *Bank of Am., N.A.,* No. 4:22–cv–00859–YGR (N.D. Cal., Feb. 10, 2022) (alleging misrepresentations about the refundability of fees); Class Action Complaint ¶¶ 27, 36, 46–51, *Cross* v. *Point and Pay LLC,* No. 6:16–cv–01182 (M.D. Fla., June 29, 2016) (alleging defendant made representations about its services and fees that contained false, misleading, and deceptive and unfair statements and omissions about fees for online payment processing services); Class Action Complaint ¶¶ 1–2, 9–12, *DeSimone* v. *LOOK Brands, LLC,* No. 23–cv–11144 (S.D.N.Y. Dec. 22, 2023) (alleging defendant failed to disclose the total cost of movie ticket prices, inclusive of all fees, in violation of New York state law); Class Action Complaint ¶¶ 1–2, 9–15, *Jones* v. *Regal Cinemas, Inc.,* No. 23–CV–11145 (S.D.N.Y. Dec. 22, 2023) (alleging defendant failed to disclose total cost of movie ticket prices, inclusive of all fees, in violation of New York state law); *see also* FTC–2022–0069–6042 (ANPR).

The Commission takes notice of additional indications of prevalence identified in response to the NPRM. Commenters to the NPRM noted that unfair or deceptive pricing practices exist economy-wide.[91] For instance, Consumer Reports conducted a nationally representative survey and found that many consumers experienced unexpected fees in a variety of industries and that more than two-thirds of Americans report paying more in hidden fees now than they did five years ago.[92] Similarly, Consumer Federation of American submitted an extensive compilation of stories from consumers about their experiences with junk fees that recounted hidden and misleading fees being applied across a wide range of industries.[93] Truth in Advertising, Inc. provided a sampling of consumer complaints it had received over the years and noted the pervasiveness of hidden and misleading fees in multiple industries, including event ticket sales, hotel and travel companies, short-term lodging, internet apps, automobile rentals, communication services, carpet cleaning, auto/truck sales, dietary supplement orders, food services, airlines, moving services, credit unions and banks, payday lending services, gym memberships, outlet stores, sports betting, and online auctions.[94] Public Citizen commented about ''the widespread use of the deceptive practice of charging undisclosed fees by major industries . . . including communication carriers, air carriers, ticket sales, auto dealers, credit card companies, cable giants, and property owners,'' as well as ''event ticketing, hotels, funeral homes,'' and other industries.[95] Additionally, AARP pointed to a myriad of confusing fees charged by assisted living facilities.[96] Commenters also noted that instances of unfair and deceptive fees or charges have increased over time.[97]

Commenters also raised concerns about the prevalence of hidden fees in specific industries such as live-event ticketing and short-term lodging. The American Society of Travel Advisors, Travel Technology Association, and a travel agent observed that, despite increased scrutiny over hotel resort fees, there remains little uniformity in pricing practices, and bait-and-switch pricing remains an issue.[98] Multiple commenters raised continued concerns over hidden fee pricing practices in the live-event ticketing market. TickPick, LLC observed the ''widespread'' deceptive practice of bait-and-switch pricing rampant in this industry. Chamber of Progress noted that deceptive and unfair fees are ''rampant in some industries and pose clear threats to consumers,'' including ''hotel stays, live sports or concert tickets, and airline tickets.'' Future of Music Coalition commented that they have worked to ''deal[ ] with the scourge of junk fees in various parts of the economy,'' including live touring. The Charleston Symphony affirmed that ''requiring sellers to disclose the total price clearly and conspicuously[ ] addresses a pressing issue in the nonprofit performing arts sector.'' [99]

Despite the overwhelming evidence supporting the prevalence of bait-and-switch pricing and misleading fee practices economy-wide, a minority of commenters argued that the Commission has failed to meet its burden of establishing prevalence. Some commenters contended that the Commission's evidence focuses on a small number of problematic industries and does not demonstrate prevalence in every single industry across the economy.[100] Some commenters similarly contended that the proposed rule was an attempt to impose a ''one-size-fits-all'' solution on distinct industries, not all of which are engaging in unfair or deceptive practices, and thus the proposed rule is overbroad and not supported by the requisite evidence of prevalence.[101]

First, the Commission disagrees that it must find that the unfair or deceptive act or practice is widespread within every individual context or industry to issue a rule targeting a specific practice across industries. To begin with, 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.'' [102] While many trade regulation rules promulgated under section 18 focus on a particular industry, as discussed in

[91] *See, e.g.,* FTC–2023–0064–3216 (Demand Progress Education Fund noted that consumers face surprise or ''bogus'' fees across industries, including rental housing, cell phone service, utilities, and ticketing, and cited a Consumer Reports study finding that 85% of Americans have dealt with fees of this nature.).

[92] FTC–2023–0064–3205 (Consumer Reports noted the prevalence of unexpected fees in live entertainment or sporting events, hotels, telecommunication services, gas or electric utilities, air travel, credit cards, auto loans and purchases, and personal banking services.).

[93] FTC–2023–0064–3160 (Consumer Federation of America submitted the compilation as Appendix B to its comment.).

[94] FTC–2023–0064–3104 (Truth in Advertising, Inc.).

[95] FTC–2023–0064–3302 (Public Citizen).

[96] FTC–2023–0064–2885 (AARP argued these fees are not well understood by potential residents and that renters are charged ''many superfluous fees, including application fees, credit check fees, pet fees, excessive late fees, utility-related fees, mail sorting fees, inspection fees, convenience fees, common area fees, guest fees, trash fees, notice fees, security deposit fees, check cashing fees, cleaning or repair fees, and other mandatory fees for services that a renter does not need or want.'').

[97] *See, e.g.,* FTC–2023–0064–3290 (U.S. Public Interest Research Group Education Fund commented that consumers have faced more unfair and deceptive fees as consumers ''have become accustomed to online transactions.''); FTC–2023–0064–3090 (Atlanta Legal Aid Society, Inc. noted the ubiquity of unfair and deceptive fees and that these types of fees in the rental housing context have been steadily rising for years.).

[98] FTC–2023–0064–3106 (American Society of Travel Advisors stated that resort fees are disclosed in a highly inconsistent manner, even between hotels doing business under the same brand name.); FTC–2023–0064–3293 (Travel Technology Association commented that hotels have been known to surprise guests at check-in with these fees and ''guests have no reasonable recourse but to pay them.''); FTC–2023–0064–3077 (Far Horizons Travel, by its owner, a travel agent of almost 40 years, called hotel fees ''out of control'' and stated: ''I am appalled by these fees and how much they have risen over the years. . . . They say it's for extra amenities but that is not always the case and more often not the case at all.'').

[99] FTC–2023–0064–3212 (TickPick, LLC); FTC–2023–0064–3137 (Chamber of Progress); FTC–2023–0064–3230 (Future of Music Coalition); FTC–2023–0064–3105 (Charleston Symphony).

[100] FTC–2023–0064–3143 (ACA Connects—America's Communication Association argued that the NPRM contained no meaningful discussion of prevalence of unfair or deceptive pricing disclosures with respect to communication services.); FTC–2023–0064–3186 (National LGBT Chamber of Commerce and the National Asian/Pacific Islander American Chamber of Commerce & Entrepreneurship argued that ''prepared food and grocery delivery applications . . . have demonstrated transparency and accessibility, providing clear explanations about fees.''); FTC–2023–0064–3292 (National Association of Theatre Owners argued that the NPRM failed to demonstrate prevalence with respect to the theatre industry, identifying only fifty comments received in response to the ANPR that reference movie theatre convenience fees.); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP argued that the Commission has failed to reliably demonstrate the prevalence of unfair or deceptive fees across any industry or sector.); FTC–2023–0064–3233 (NCTA—The Internet & Television Association argued that the only mention of telecommunication fees is anecdotal, and the Commission has failed to show prevalence with respect to any NCTA member.); FTC–2023–0064–3263 (Flex Association stated that ''[t]he Commission has not pointed to evidence of any prevalent consumer harm that justifies imposing new pricing and disclosure rules on app-based delivery platforms.''); FTC–2023–0064–3130 (International Cemetery, Cremation & Funeral Association argued that over the last several reviews of the Funeral Rule the Commission has not found evidence of widespread consumer abuse among cemeteries or third-party suppliers.).

[101] FTC–2023–0064–3258 (National Taxpayers Union Foundation); FTC–2023–0064–3173 (Center for Individual Freedom argued that the Commission was overly reliant on lodging, ticketing, and restaurants in justifying an economy-wide rule.); FTC–2023–0064–3251 (National RV Dealers Association argued the proposed rule ''is an overextension from this drip pricing concern, and not only strays from the FTC's traditional areas of concern but also risks impeding the normal business operations and innovation across a multitude of sectors.'').

[102] *Pa. Funeral Dirs. Ass'n.* v. *FTC,* 41 F.3d 81, 87 (3d Cir. 1994).

section IV.A.1, others apply to specific practices across industries regardless of product or service, such as the Cooling-Off Period for Door-to-Door Sales Rule (the ''Cooling-Off Rule''), the Rule on the Preservation of Consumers' Claims and Defenses (the ''Holder Rule''), the Rule on Retail Food Store Advertising and Marketing Practices (the ''Unavailability Rule''), the mail, Internet, or Telephone Order Merchandise Rule (the ''Mail Order Rule''), the Rule on the Use of Prenotification Negative Option Plans (the ''Negative Option Rule''), the Rule on Impersonation of Government and Businesses (the ''Impersonator Rule''), and the Rule on the Use of Consumer Reviews and Testimonials.[103] While the Commission agrees that minimal evidence of a practice would be insufficient to meet the prevalence standard, section 18 did not require the Commission to find for its economy-wide rulemakings that every industry engaged in sales made at a consumer's home or at certain other locations (Cooling-Off Rule), used credit contracts (Holder Rule), offered products at an advertised price when they did not have the advertised products in stock (Unavailability Rule), or had a robust mail, internet or telephone order business (Mail Order Rule); or that every industry used negative options (Negative Option Rule), had an issue with impersonating government agencies or businesses (Impersonator Rule), or used and abused reviews (Rule on the Use of Consumer Reviews and Testimonials). Imposing such a standard would artificially limit the Commission's rulemaking authority under section 18 in a way that does not align with the Commission's mandate or the text of the statute, which focuses on acts or practices generally and never mentions the need to define markets or industries. As explained herein and in the NPRM, the information evidencing prevalence of bait-and-switch pricing and misleading fees more than meets section 18's standard for prevalence for the economy generally, and for the live-event ticketing and short-term lodging industries, specifically, by demonstrating that the practices are widespread and, further, that such practices are occurring across a wide range of industries.

Second, the Commission notes that, even when commenters challenged the application of the rule to specific pricing scenarios or to their own industries, they also appeared to concede that advertising a base price to which mandatory fees are added later is a frequent practice even in their own industries. While some commenters raised genuine challenges or questions about the application of the rule, others attempted to conflate such genuine challenges with their desire to continue to use drip or partition pricing.

As discussed in section III.B.1, commenters from some ticket sellers did not contest that their advertised prices failed to include all mandatory fees and to provide the total price of goods or services. Instead, they attempted to explain why they engaged in those practices.

Finally, some commenters from industries other than live-event ticketing and short-term lodging argued that the Commission's NPRM failed to establish prevalence because of the following reasons: the cited cases focused on inapplicable fact patterns or resulted in settlement; the cited conferences called for additional research rather than regulatory strategy, or were narrow in scope as to the industries covered; and the resort fee warning letters failed to result in enforcement action.[104] Commenters such as the U.S. Chamber of Commerce argued that the enforcement record should rely only on cease-and-desist orders or ''extensive empirical research.'' [105] Other commenters also raised concerns about a lack of empirical research.[106] These commenters overlook section 18's clear instruction that the Commission's prevalence determination can be based on ''any other information available to the Commission'' that indicates a widespread pattern, which the Commission thoroughly laid out in the NPRM and expands upon herein.

In sum, the Commission's enforcement history, workshops, and reports, together with the record of this rulemaking and the enforcement cases brought by the Commission's local, State, and international enforcement counterparts fully support a finding that bait-and-switch pricing that hides the total price of goods or services and misrepresenting the nature, purpose, amount, and refundability of fees or charges are prevalent across the economy, including in the live-event ticketing and short-term lodging industries.[107] Despite the evidence that these specific practices are prevalent economy wide, the Commission will first focus its rulemaking authority on combatting these practices in the live-event ticketing and short-term lodging industries, the two industries in which the Commission first began evaluating drip pricing more than a decade ago and for which there is a long history of consumer harm.

B. Manner and Context in Which the Acts or Practices Are Deceptive or Unfair

The final rule curbs certain unfair or deceptive pricing practices by requiring

[103] 16 CFR part 429; 16 CFR part 433; 16 CFR part 424; 16 CFR part 435; 16 CFR part 425; 16 CFR part 461; 16 CFR part 465.

[104] FTC–2023–0064–3127 (U.S. Chamber of Commerce argued the NPRM failed to cite any cases holding that late in time fee disclosures are unfair or deceptive and the settlements described by the Commission only raised the failure of companies to disclose certain applicable fees prior to purchase or at all.).

[105] *Id.*

[106] FTC–2023–0064–3152 (Building Owners & Managers Association et al. commented that the proposed rule ''lacks any reasonable factual underpinning as applied to the rental housing industry because it is not based on any statistical data relevant to the industry,'' but is ''based solely upon anecdotal, conclusory, and non-representative justification.''); FTC–2023–0064–3172 (New Jersey Apartment Association stated that the NPRM lacked ''statistical basis'' for claims that unfair and deceptive fees were an issue in the rental housing context and that the Commission relied on anecdotal evidence.).

[107] *See, e.g., supra* notes 66, 67, 72, 75, 80, 85, 90 (detailing the Commission's enforcement history, workshops, and reports, class action lawsuits, state and local enforcement and regulations, and other efforts to curb unfair or deceptive pricing practices in the live-event ticket and short-term lodging industries). The Commission also received thousands of comments from individual consumers detailing bait-and-switch pricing and deceptive fees in the live-event ticket and short-term lodging industries in response to the ANPR and the NPRM. *See, e.g.,* FTC–2023–0064–0820 (Individual Commenter stated ''I was just considering buying some event tickets on Vivid Seats and was shocked to see that they add a full 33% in bogus fees.''); FTC–2023–0064–0058 (Individual Commenter stated: ''The worst offenders are ticket sellers/resellers, who advertise baseline ticket prices in their search engines and then include some unknown amount of fees when it's time to pay.''); FTC–2023–0064–0102 (Individual Commenter stated: ''I recently went to a MLB game and the fees were $21 for a $75 ticket or greater than 20%. I went to a concert and the tickets were $55 but the fees brought the price to over $100. On both cases, the fees were not disclosed until the payment screen.''); FTC–2023–0064–0145 (Individual Commenter described purchasing tickets to a musical: ''Nearly 20% of the total cost was for fees that were not disclosed until I was at the payment step ($119 ticket + $4.55 order processing fee + $4.00 facility charge + $20.50 service fee). I don't understand what any of those fees are actually for.''); FTC–2023–0064–0040 (Individual Commenter described hotel resort fees as ''egregious and opaque'' and stated they learned of an additional $50 per night resort fee upon check-in: ''I asked what the purpose of the fee was and was told by the staff person, 'I'm not really sure.' ''); FTC–2023–0064–1462 (Individual Commenter stated: ''Recently I found an ''affordable'' hotel in a city and booked a 4 night stay, but was not informed until after I checked in that parking cost extra each day . . . . which made the hotel no longer affordable for me''); FTC–2023–0064–0977 (Individual Commenter described spending hours trying to book a hotel to face ''mandatory hotel fees for a pool, a gym and 24 hour security totalled $50/night''); FTC–2023–0064–0152 (Individual Commenter stated that fees through services including Airbnb and VRBO are ''often vague and undefined'' and described fees including a ''host fee,'' ''booking fee,'' ''safety fee,'' and ''resort fee'').

truthfulness and transparency in pricing for live-event ticketing and short-term lodging. Truthful, timely, and transparent pricing, including the nature, purpose, and amount of any fees or charges imposed, is critical for consumers—and also for honest businesses. The legal underpinning of the rule, or the manner and context in which the acts or practices defined by the rule are unfair or deceptive, is not complex. By identifying and targeting pricing tactics that hide the true price of live-event tickets and short-term lodging from consumers, the rule's central provisions prohibit conduct that is inherently deceptive or unfair, including: (1) offering prices that do not include all mandatory fees or charges and (2) misrepresenting the nature, purpose, amount, and refundability of fees or charges, and the identity of the good or service for which the fees or charges are imposed. Thus, the final rule will allow American consumers to make better-informed purchasing decisions when purchasing live-event tickets or deciding where to stay on a short-term basis and level the playing field for honest businesses in these industries that truthfully, timely, and transparently disclose their pricing information.

A representation, omission, or practice is deceptive under section 5 of the FTC Act if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers—that is, it would likely affect the consumer's conduct or decisions with regard to a good or service.[108] Price is a material term.[109] It is a deceptive practice to misrepresent the price of a good or service,[110] including through a deceptive first contact.[111] Through its false savings cases, the Commission repeatedly found that it was deceptive under section 5 to present an inflated list price or comparison price, from which consumers were misled to believe that the business offered a lower-than-normal price.[112] The inverse—luring consumers to a good or service with a false low price—is also deceptive.[113] For example, in *In re Filderman Corp.,* 64 F.T.C. 427 (1964), the Commission found that the defendant violated section 5 both when it displayed misleading list prices and when it later imposed mandatory service charges on top of the advertised price.[114] Once a consumer has been lured in by deception, including about the cost of the good or service, it is well established that a later disclosure cannot cure that deception.[115] Thus, bait-and-switch pricing, where the initial contact with a consumer shows a lower or partial price without including mandatory fees, violates the FTC Act even if the total price is later disclosed.

A practice is considered unfair under section 5 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.[116] Pricing that is not truthful or transparent causes or is likely to cause substantial injury; such injury is not reasonably avoidable by consumers or outweighed by benefits to consumers or competition.

Drip pricing and other bait-and-switch tactics that hide the true price cause substantial injury, as the Commission discusses in detail in section V.E, by leading consumers to buy more goods or services, pay more for those goods or services, and incur higher search costs than they otherwise would have if they had been presented with the true price upfront. Studies have shown that consumers spend more money on the same goods when faced with drip pricing, *i.e.,* when they are not shown the total price upfront, but instead are shown a base price, with mandatory fees or charges added later

[108] *See* Fed. Trade Comm'n, *FTC Policy Statement on Deception,* 103 F.T.C. 174, 175 (1984) (appended to *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174 (1984) (hereinafter ''*Deception Policy Statement*''), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-103/ftc_volume_decision_103_january_-_june_1984pages_103-203.pdf.*

[109] *Deception Policy Statement,* 103 F.T.C. at 182–83 (listing claims or omissions involving cost among those that are presumptively material); *see also, e.g., FTC* v. *FleetCor Techs., Inc.,* 620 F. Supp. 3d 1268, 1303–04, 1311 (N.D. Ga. 2022) (finding that representations about discounts and transaction fees were material).

[110] *Deception Policy Statement,* 103 F.T.C. at 175 (listing ''misleading price claims'' among those claims that the FTC has found to be deceptive); *see also, e.g., In re Resort Car Rental Sys., Inc.,* 83 F.T.C. 234, 281–82, 300 (1973), *https://www.ftc.gov/system/files/ftc_gov/pdf/Resort%20Car%20Rental%20System%2C%20Inc.%2083%20FTC%20234%20%281973%29.pdf* (finding that using the name ''Dollar-A-Day'' misrepresented the price of car rentals in violation of section 5 of the FTC Act where a rental could not be attained for one dollar per day due to mileage, insurance, and other mandatory charges), *aff'd sub. nom. Resort Car Rental Sys., Inc.* v. *FTC,* 518 F.2d 962, 964 (9th Cir. 1975).

[111] *See, e.g.,* Opinion of the Commission at 37–40, 47–50, *In re Intuit Inc.,* No. 9408 (FTC Jan. 22, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/d09408_commission_opinion_redacted_public.pdf* (finding that under the legal doctrine known as the first-contact or deceptive door-opener rule, respondent's first contact with consumers was deceptive because its advertising falsely claimed that consumers can file their taxes for free with TurboTax and that later disclosures did not cure the deception); Complaint ¶¶ 12, 46–49, *In re LCA-Vision,* No. C–4789 (FTC Mar. 13, 2023) (alleging respondent's advertisements misrepresented the price of surgery and failed to disclose eligibility limitations for a promotional price); Complaint ¶¶ 8–10, *In re Progressive Chevrolet Company,* No. C–4578 (FTC Jun. 16, 2016) (alleging that respondents represented that consumers could lease vehicles at advertised down payment and monthly payment amounts, and deceptively failed to disclose a material condition that meant few consumers would qualify for the advertised terms); *Resort Car Rental Sys.,* 518 F.2d at 964 (upholding the Commission's order finding that the name ''Dollar-A-Day'' was deceptive when charges adding up to more than one dollar per day were disclosed later).

[112] *E.g., In re Giant Food, Inc.,* 61 F.T.C. 326, 341–42, 361 (1962), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-61/ftcd-vol61july-december1962pages306-404.pdf* (finding that comparative-price advertising of household goods and appliances created false, misleading, and deceptive impressions that induced consumers to make purchases based on mistaken beliefs); *In re George's Radio & Television Co.,* 60 F.T.C. 179, 193–94, 196 (1962), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-60/ftcd-vol60january-june1962pages107-211.pdf* (collecting cases and finding that advertisements including manufacturer's suggested list prices that were higher than the customary retail prices were deceptive).

[113] *See, e.g., In re Filderman Corp.,* 64 F.T.C. 427, 442–43, 461 (1964), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-64/ftcd-vol64january-march1964pages409-511.pdf* (finding, among other things, that respondents unlawfully advertised prices that were later inflated with mandatory service charges); *In re Resort Car Rental Sys.,* 83 F.T.C. at 281–82, 300; Opinion of the Commission at 37–40, 47–50, *In re Intuit Inc.,* No. 9408 (finding that respondent's advertising that falsely claimed that consumers can file their taxes for free with TurboTax was deceptive); Complaint ¶¶ 12, 46–49, *In re LCA-Vision,* No. C–4789 (alleging respondent's advertisements misrepresented the price of surgery and failed to disclose eligibility limitations for a promotional price). *See also* cases cited *supra* note 61 (collecting FTC enforcement actions alleging that bait-and-switch pricing tactics concerning hidden fees violated section 5).

[114] *In re Filderman Corp.,* 64 F.T.C. at 461 (ordering respondents to stop ''[r]epresenting, directly or by implication: That any amount is the price of merchandise when an additional amount is required to be paid before the merchandise will be sold.'')

[115] Fed. Trade Comm'n, *Enforcement Policy Statement on Deceptively Formatted Advertisements* 7 n.25 (2015), *https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf; see also* Opinion of the Commission at 28–30, *In re Intuit Inc.,* No. 9408, *https://www.ftc.gov/system/files/ftc_gov/pdf/d09408_commission_opinion_redacted_public.pdf* (finding that disclosures on Intuit's websites were ''inadequate to cure a misimpression for Intuit's ads,'' which used ''false claims to engage consumers and induce them to further interact with the company''); *Resort Car Rental Sys,* 518 F.2d at 964 (''The Federal Trade [Commission] Act is violated if it induces first contact through deception, even if the buyer later becomes fully informed before entering the contract.'') (bracketed text added); *Exposition Press, Inc.* v. *FTC,* 295 F.2d 869 (2d Cir. 1961) (''The law is violated if the first contact is secured by deception, even though the true facts are made known to the buyer before he enters into the contract of purchase.'' (citations omitted)); *FTC* v. *City W. Advantage, Inc.,* No. 2:08–cv–00609–BES–GWF, 2008 WL 2844696, at *3 (D. Nev., 123 July 22, 2008) (finding defendant likely employed ''deceptive door openers . . . to induce consumers to stay on the line'').

[116] 15 U.S.C. 45(n).

throughout the buying process.[117] Where mandatory fees or charges are disclosed at the same time as, but separately from, the base price, consumers are still harmed. The practice of dividing the price into multiple components without disclosing the total, generally referred to as partitioned pricing, distorts consumer choice.[118] Consumers confronted with partitioned pricing, on average, underestimate the total price of the good or service, likely because they use mental shortcuts to estimate price that do not fully account for each component.[119]

In addition, consumers who wish to compare prices incur additional search costs to make direct comparisons of goods or services when the full price is not disclosed upfront.[120] For example, in an online transaction to book a hotel room, consumers cannot simply view the first price displayed on each website, but instead need to navigate to subsequent pages or even enter all their payment information and reach the checkout page for each website to determine the true total price of their hotel stay.[121] The same is true on live-event ticketing websites. As TickPick, LLC noted, ''[m]ajor ticketing marketplaces often require consumers to enter their credit card or other payment information prior to disclosing mandatory fees. On these marketplaces, the full purchase price is only disclosed after payment information is collected.'' [122] Under such circumstances, consumers waste time and effort pursuing an offer that is not actually available at the promised price. Such search costs that result from unfair or deceptive practices are legally cognizable injuries under the FTC Act.[123]

Misrepresented fees also cause or are likely to cause substantial injury—they harm consumers as well as businesses that do not engage in these practices. For example, as discussed in section III.C, a hotel might charge a resort fee when only typical and ordinary accommodations and amenities are offered, an environmental fee that serves no environmental purpose, or a fee misrepresented as a government charge. As TickPick, LLC put it, misrepresented fees trick consumers into paying more and ultimately inhibit competition by providing an unfair advantage to businesses that misrepresent their fees.[124] Likewise, when businesses misrepresent fees, consumers are unable to make informed choices about the value of the fee or charge, or the good or service it represents, because their understanding of the fee or charge is predicated on false, vague, or otherwise misleading information. As such, consumers are unable to understand what they have purchased, or to which charges they have consented.[125]

Consumers cannot reasonably avoid these harms. As explained in the NPRM, studies suggest that cognitive bias may prevent consumers from reasonably avoiding injury caused by unfair and deceptive pricing practices.[126] Several behavioral studies explain why consumers cannot reasonably avoid making errors when the true price is not displayed upfront. Behavioral research shows that consumers who first learn of a lower price do not properly adjust their calculations when additional fees are added, thereby underestimating the total price.[127] It also shows that consumers attach value to things they perceive to be theirs and, once consumers begin the purchase process, their perception shifts so that stopping the transaction feels like a loss.[128] The research shows that consumers who already have invested in an endeavor, such as by taking time to make selections on a travel or live-event ticket website, continue that endeavor even if they would pay less if they began again elsewhere.[129] Lastly, consumers necessarily incur search costs when mandatory fees are obscured because it takes them longer to discover the full price within a single transaction and to comparison shop across transactions.[130] Notably, it is unlikely that the market can correct for these injuries because once the practice of displaying incomplete initial prices takes hold, honest businesses will struggle to compete. For example, as noted in the NPRM, one market participant in the live-event ticketing industry, StubHub, unilaterally adopted all-in pricing in 2014 but soon reverted back to its original model after it lost significant market share when customers

[117] Alexander Rasch et al., *Drip Pricing and its Regulation: Experimental Evidence,* 176 J. Econ. Behav. & Org. 353 (2020) (''[E]xperimental evidence suggests that consumers indeed strongly and systematically underestimate the total price under drip pricing, and that they make mistakes when searching''); Shelle Santana et al., *Consumer Reactions to Drip Pricing,* 39 Mktg. Sci. 188 (2020) (''Across six studies, we find that drip pricing (versus nondrip pricing) increases the likelihood that consumers will both initially and ultimately select a lower base price option, even though the surcharges for optional add-ons cause this base price to balloon—making the lower base fare option more expensive than the alternative''); Tom Blake et al., *Price Salience and Product Choice,* 40 Mktg. Sci. 619 (2021); Steffen Huck et al., *The Impact of Price Frames on Consumer Decision Making: Experimental Evidence* (2015); Meghan R. Busse & Jorge M. Silva-Risso, ''*One Discriminatory Rent*'' *or* ''*Double Jeopardy*'': *Multi-component Negotiation for New Car Purchases,* 100 a.m. Econ. Rev. 470 (2010); Raj Chetty et al., *Salience and Taxation: Theory and Evidence,* 99 a.m. Econ. Rev. 1145 (2009) (''[C]ommodity taxes that are included in posted prices reduce demand significantly more than taxes that are not included in posted prices.''); *see also* FTC–2023–0064–3247 (Private Law Clinic at Yale Law School).

[118] Sullivan, *supra* note 67, at 4; FTC–2023–0064–3271 (U.S. Senate, Sen. Amy Klobuchar).

[119] Sullivan, *supra* note 67, at 22–24; Vicki G. Morowitz et al., *Divide and Prosper: Consumers' Reactions to Partitioned Prices,* 35 J. Mktg. Rsch. 453 (1998) (subjects exposed to partitioned prices recalled significantly lower total product costs than subjects exposed to combined prices).

[120] Sullivan, *supra* note 67, at 4; Fed. Trade Comm'n, ''*That's the Ticket*'' *Workshop: Staff Perspective* 4 (May 2020), *https://www.ftc.gov/system/files/documents/reports/thats-ticket-workshop-staff-perspective/staffperspective_tickets_final-508.pdf; see also* Han Hong et al., *Using Price Distributions to Estimate Search Costs,* 37 RAND J. Econ. 257 (2006) (describing methods of estimating search costs).

[121] NPRM, 88 FR 77433 n.170.

[122] FTC–2023–0064–3212 (TickPick, LLC) (''[On] StubHub's website, for example, a consumer can be required to click 12 times after being shown the first price before being shown the total price they will pay.'')

[123] *See, e.g.,* Decision & Order at 3–4, *In re LCA-Vision,* No. C–4789 (FTC Mar. 13, 2023) (settling allegations that deceptive advertising caused consumers to ''waste[ ] 90 minutes to two hours of their time'' responding to a deceptive promotion, Complaint ¶ 35, and prohibiting misrepresentations of price and requiring disclosure of price or discount qualification requirements), *https://www.ftc.gov/system/files/ftc_gov/pdf/1923157-lca-vision-consent-package.pdf;* Decision & Order at 2–3, *In re Credit Karma, LLC,* No. C–4781 (FTC, Jan. 19, 2023) (settling allegations that deceptive advertising caused consumers to waste significant time in applying for ''pre-approved'' offers that were denied, Complaint ¶ 13, and requiring Credit Karma to pay $3 million in monetary relief), *https://www.ftc.gov/system/files/ftc_gov/pdf/2023138-credit-karma-combined-final-consent-without-signatures.pdf; FTC* v. *Amazon.com, Inc.,* No. C14–1038–JCC, 2016 U.S. Dist. LEXIS 55569, at *17 (W.D. Wash., Apr. 26, 2016) (finding consumer injury included ''time spent pursuing those refunds''); *FTC* v. *Neovi, Inc.,* 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008) (finding ''no genuine issue of material fact that consumers suffered substantial injury'' based on ''considerable amount of time'' spent by consumers); *FTC* v. *Accusearch, Inc.,* No. 06–cv–105–D, 2007 U.S. Dist. LEXIS 74905, at *22–23 (D. Wyo., Sept. 28, 2007) (granting summary judgment in favor of FTC based in part on finding of consumer injury for ''lost time and productivity'').

[124] FTC–2023–0064–3212 (TickPick, LLC).

[125] *Id.*

[126] NPRM, 88 FR 77434 (discussing various cognitive biases that contribute to the unavoidability of consumer injury, including the anchoring theory, the endowment theory, and the sunken cost fallacy).

[127] Inst. for Policy Integrity, *Pet. for Rulemaking Concerning Drip Pricing* 18 (2021), *https://policyintegrity.org/documents/Petition_for_Rulemaking_Concerning_Drip_Pricing.pdf.*

[128] Steffen Huck et al., *The Impact of Price Frames on Consumer Decision Making: Experimental Evidence* (2015).

[129] David A. Friedman, *Regulating Drip Pricing,* 31 Stan. L. & Pol'y Rev. 51, 55 n.13 (2020).

[130] *See* NPRM, 88 FR 77447 (discussing reductions in search costs from the proposed rule).

incorrectly perceived StubHub's prices to be higher.[131]

The consumer injury caused by these bait-and-switch pricing practices is not outweighed by any benefits to consumers or competition. Consumers receive no benefit from businesses that use drip pricing, partitioned pricing, or misleading price presentation while they obscure the total price. To the extent that consumers could benefit from itemized information about price components, such itemization can be done in conjunction with clear total price information. Consumers receive no benefit from businesses partitioning or breaking up mandatory price components while they obscuring the total price.

Likewise, as discussed in section V.E, there is no benefit to competition, as honest businesses that disclose all-inclusive total prices lose market share to businesses that do not. Bait-and-switch pricing and misleading fees undermine the ability of honest businesses to compete on price and therefore diminish the competitive pressure in a market that pushes prices downward. As a result, these practices lead to higher prices than would be supported in a competitive marketplace. The Antitrust Division of the U.S. Department of Justice noted that ''companies that impose mandatory hidden fees'' have ''an unfair advantage over honest brokers'' and interfere with consumers' ability to ''choose between competitors based on the important considerations of price and what, exactly, the consumer is purchasing.'' [132] Some commenters, including those from the live-event ticketing and short-term lodging industries, noted that bait-and-switch pricing not only confuses consumers, but harms honest businesses that offer truthful, timely, and transparent pricing because their prices initially may seem higher than competitors that use bait-and-switch pricing and misleading fees. For example, TickPick, LLC commended the Commission for proposing to curb the widespread practice of bait-and-switch pricing and observed that ''the proposed rule would significantly benefit consumers and competition in the live-event ticketing industry.'' [133] The American Society of Travel Advisors argued that, in addition to consumer harm, ''the imposition of undisclosed fees also unfairly places honest retailers—those that do disclose the full, all-in price upfront—at a competitive disadvantage relative to those that do not.'' [134]

A minority of commenters stated that hidden and misleading fees do not harm consumers. For instance, the Competitive Enterprise Institute argued that consumers' search costs do not increase when advertisements lack a single total price, as the consumer is better informed after watching the advertisement despite the omission.[135]

While the commenter conceded that consumers may benefit more if a total price is disclosed, the commenter argued that any harm could be easily avoidable by consumers calculating the total themselves.[136] Some commenters also argued that these types of fees often benefit consumers and are openly disclosed.[137] Indeed, the American Gaming Association stated that resort fees enhance a consumer's stay, distinguish resorts from more standard lodging offerings, are openly disclosed to consumers, and often appear several times throughout the search and purchasing process. As the Commission already noted, drip and partitioned pricing and other bait-and-switch pricing harm consumers for numerous reasons, including because consumers underestimate the total price of a good or service, overconsume, overpay, and waste time. The U.S. Chamber of Commerce argued that there are pro-consumer and pro-competitive justifications for this type of pricing, including allowing for dynamic pricing strategies and preventing consumers from paying for services that they do not use.[138] The rule, however, does not prohibit the use of dynamic pricing strategies, itemization, or offering optional goods or services for consumers to select; it simply prohibits offering a price that is not inclusive of all mandatory fees and charges, as well as prohibiting misrepresented fees and charges.

As stated herein, the Commission and courts have previously recognized that price is a material term [139] and that it is a violation of section 5 of the FTC Act to misrepresent the price of a good or service.[140] Commenters emphasized the materiality of price to consumers.[141] The commenters who argue that bait-and-switch pricing does not harm consumers ignore the large body of literature demonstrating that drip pricing and partitioned pricing have a negative impact on consumers and competition. The economic analysis in Section V provides additional discussion regarding the economic harms from bait-and-switch pricing tactics, including drip pricing and partitioned pricing in the live-event and short-term lodging industries.

C. The Economic Effect of the Rule

As part of the rulemaking proceeding, the Commission solicited public comment and data (both qualitative and quantitative) on the economic impact of the proposed rule and its costs and benefits. In issuing this final rule, the Commission has carefully considered the comments received and the costs and benefits of each provision, taking into account the effects on small businesses and consumers, as discussed in more detail in sections V and VII.

The record demonstrates that the most significant anticipated benefits of the final rule are promoting transparent pricing, facilitating comparison shopping for consumers, and leveling

[131] *See* NPRM, 88 FR 77434 (quoting Fed. Trade Comm'n, ''*That's the Ticket*'' *Workshop: Staff Perspective* 4 (May 2020), *https://www.ftc.gov/system/files/documents/reports/thats-ticket-workshop-staff-perspective/staffperspective_tickets_final-508.pdf.*). *See also, e.g., https://www.contactlensking.com/faq.aspx* (describing a contact lens company's decrease in traffic and total orders when it displayed a total price while competitors implemented ''processing'' fees).

[132] FTC–2023–0064–3187 (U.S. Department of Justice, Antitrust Division, observed that ''[w]hen consumers lack choice and information, and are saddled with mandatory hidden fees, the benefits of the competitive process break down.''); *see also* FTC–2023–0064–3106 (American Society of Travel Advisors); FTC–2023–0064–3184 (New York State Sen. Michael Gianaris); FTC–2023–0064–1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business).

[133] FTC–2023–0064–3212 (TickPick, LLC).

[134] FTC–2023–0064–3106 (American Society of Travel Advisors).

[135] FTC–2023–0064–3028 (Competitive Enterprise Institute argued that consumers already bear a search cost merely by looking for a product, and that any advertisement that includes some, but not all, pricing information, benefits the searching consumer if the information is accurate and non-deceptive.).

[136] *Id.*

[137] FTC–2023–0064–2886.

[138] FTC–2023–0064–3127 (U.S. Chamber of Commerce noted that, among these pricing practices, dynamic pricing strategies provide these benefits to consumers and this was ignored in the conclusions of the NPRM.).

[139] *Deception Policy Statement,* 103 F.T.C. at 182–183, 183 n.55 (listing claims or omissions involving cost among those that are presumptively material); *see also, e.g., FleetCor Techs., Inc.,* 620 F. Supp. 3d at 1303–04, 1311 (finding that representations about discounts and transaction fees were material); *FTC* v. *Windward Marketing, Inc.,* No. 1:96–CV–615F, 1997 WL–33642380, at *10 (N.D. Ga., Sept. 30, 1997) (''[A]ny representations concerning the price of a product or service are presumptively material'').

[140] *Deception Policy Statement,* 103 F.T.C. at 175 (listing ''misleading price claims'' among those claims that the FTC has found to be deceptive); *see also, e.g., Resort Car Rental Sys.,* 518 F.2d at 964 (upholding the Commission's order finding that using the name ''Dollar-A-Day'' misrepresented the price of car rentals in violation of section 5 of the FTC Act).

[141] *See, e.g.,* FTC–2023–0064–3162 (BBB National Programs Inc. stated that BBB National Advertising Division ''precedent is clear that the advertised price for a product or service is among one of the most material terms to a consumer's purchasing decision.'').

the playing field for businesses in the live-event ticketing and short-term lodging industries. By prohibiting drip pricing, the final rule also will promote social trust, which is a necessary component of successful market interactions.[142] Most participants in a market transaction do not have prior experience with one another and consumers must rely on some degree of trust that the business will provide the good or service in question, at the stated price and quality level. Without social trust, it would be costlier for both consumers and businesses to acquire all the necessary information to participate in the market. While there has been less research on the relationship between social trust and previous market interactions, there is some evidence that bad market experiences can reduce social trust.[143] Thus, prohibiting these types of deceptive and unfair practices will promote social trust, which can be a measure of a well-functioning market.[144]

Another beneficial consequence would be the expansion of the remedies available for violations of the final rule, including the ability to more effectively obtain monetary relief for consumers who have been deceived about the true total price of live-event tickets or short-term lodging. This is particularly critical given the U.S. Supreme Court's decision in *AMG Capital Mgmt., LLC* v. *FTC,* 593 U.S. 67 (2021), which held that equitable monetary relief, including consumer redress, is not available under section 13(b) of the FTC Act.[145] Under the final rule, the Commission will now be able to seek court-ordered consumer redress in one Federal district court action brought under section 19(a)(1), rather than the longer, less efficient, two-step process for obtaining redress under section 19(a)(2).[146] By allowing the Commission to secure redress more efficiently, this rule will also allow the Commission to conserve its limited enforcement resources for other mission priorities.

As an additional benefit, the rule will enable the Commission to seek civil penalties against violators. The FTC Act generally does not allow the Commission to obtain civil penalties against those who engage in unfair or deceptive acts or practice in violation of section 5(a) of the FTC Act. Section 5(m)(1)(A) of the FTC Act does, however, authorize the Commission to seek civil penalties in court for violations of trade regulation rules, such as the final rule here.[147] The ability to obtain civil penalties provides two benefits. First, court-ordered civil penalties give the Commission the ability to ensure that violators do not retain the profits they earn by engaging in the unfair or deceptive pricing practices prohibited by the rule. Second, the potential for civil penalties will deter violations and provide a strong incentive for businesses providing live-event tickets and short-term lodging to provide truthful and transparent pricing information in compliance with the rule, which will have consumer welfare benefits and will benefit honest competition.[148]

When promulgating a final rule, the Commission must prepare a final regulatory analysis, which is contained in section V. The final regulatory analysis contains an estimated cost-benefit analysis of the final rule, as well as a more in-depth discussion of the comments the Commission received in response to the NPRM. In addition, the Commission's final regulatory flexibility analysis, which is contained in section VII, discusses the final rule's economic impact on small entities.

III. Section-by-Section Analysis

The Commission has carefully considered the rulemaking's extensive comment record. It has weighed considerations raised by individual consumers, businesses (including small businesses), industry advocates, consumer advocates, labor representatives, academics, and other law enforcement bodies. After considering these comments, the Commission finalizes this rule to address a subset of the specific unfair and deceptive practices identified in the NPRM. The rule will help ensure that consumers shopping for live-event tickets and short-term lodging see advertised prices that include all mandatory fees, can obtain such goods or services at those prices, and know what they are paying for. The rule promotes honest and transparent pricing for consumers and a level playing field for businesses.

Numerous public comments in support of and in opposition to the rule included discussions of the definitions and substantive provisions of the proposed rule, and made various recommendations. The Commission considered comments pointing out confusion about specific phrases in the proposed rule, particularly phrases that commenters found vague or overbroad. The Commission also took notice of comments that suggested some entities or transactions would be subject to overlapping Federal regulations regarding pricing disclosures that could result in confusion to consumers or businesses. In addition, the Commission appreciated comments from industry that identified potential gaps in how the proposed rule would interact with certain types of pricing practices.

The Commission makes a number of changes to the final rule. Notably, the Commission narrows the application of the final rule to offers, displays, or advertisements of a covered good or service—*i.e.,* live-event tickets or short-term lodging. The Commission recognizes that many comments to the proposed rule focused on the application of the rule to specific industries or pricing scenarios. As a result of the Commission's decision to limit this final rule to live-event ticketing and short-term lodging, the

[142] The relationship between social trust and market outcomes is well established. *See, e.g.,* Paul J. Zak & Stephen Knack, *Trust and growth.* 111 Econ. J., 470 (Mar. 2001), *https://doi.org/10.1111/1468-0297.00609;* Philip Keefer & Stephen Knack, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation,* 112 Q.J. Econ. 4 (Nov. 1997), *https://doi.org/10.1162/003355300555475.* Social trust is particularly necessary for participation in financial markets. *See* Jesse Bricker & Geng Li, Fed. Reserve Bd., *Credit Scores, Social Trust, and Stock Market Participation,* Finance and Economics Discussion Series 2017–008r1, *https://doi.org/10.17016/FEDS.2017.008r1;* Luigi Guiso, Paola Sapienza, & Luigi Zingales, *Trust the Stock Market,* 63 J. Fin. (Dec. 2008), *https://www.jstor.org/stable/20487944?seq=1.*

[143] Ginny Seung Choi & Virgil Henry Storr, *Market interactions, trust and reciprocity,* 15 PLOS One 5 (May 7, 2020), *https://doi.org/10.1371/journal.pone.0232704.*

[144] Joshua Kleinfeld & Hadar Dancig-Rosenberg, *Social Trust in Criminal Justice: A Metric,* 98 Notre Dame L. Rev. 815 (2022), *https://scholarship.law.nd.edu/ndlr/vol98/iss2/6.*

[145] *AMG Cap. Mgmt.,* 593 U.S. at 82.

[146] *See* 15 U.S.C. 57b(a)(1) and (2); *see also* NPRM, 88 FR 77438 (discussing impact of *AMG Cap. Mgmt.*). When the Commission has reason to believe that the rule has been violated, the Commission can commence a Federal court action to ask a Federal judge to determine liability and, if proven, require violators to provide redress. *See* 15 U.S.C. 57b(a)(1), (b). Without the rule, the path to court-ordered redress is longer. The Commission must first conduct an administrative proceeding to determine whether the respondent engaged in unfair or deceptive acts or practices in violation of section 5(a) of the FTC Act. If the Commission finds that the respondent did so, the Commission issues a cease-and-desist order, which might not become final until after the resolution of any resulting appeal to a Federal court of appeals. Then, to obtain redress, the Commission must initiate a second action in Federal district court, in which it must prove that the violator engaged in objectively fraudulent or dishonest conduct in order to obtain court-ordered redress. *See* 15 U.S.C. 57b(a)(2), (b).

[147] *See* section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A) (providing that those who violate a trade regulation rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule" are liable for civil penalties for each violation). In addition, any entity or person who violates such a rule (irrespective of the state of knowledge) is liable for any injury caused to consumers by the rule violation. The Commission may pursue such recovery in a suit under section 19(a)(1) of the FTC Act, 15 U.S.C. 57b(a)(1).

[148] NPRM, 88 FR 77447–48.

Commission need not respond to each of these comments at this time.

In addition, wherever possible, the Commission works to reduce burden on, and maintain pricing flexibility for, businesses. Finally, the Commission provides guidance and explanation to respond to specific questions and hypotheticals posed by commenters to help give additional clarity to businesses. The following discussion provides a section-by-section analysis of the NPRM's proposed provisions and the provisions adopted in the final rule, as well as a discussion of the comments received and the Commission's responses.

A. § 464.1 Definitions

Proposed § 464.1 contained definitions for the following terms: ''ancillary good or service''; ''business''; ''clear(ly) and conspicuous(ly)''; ''government charges''; ''pricing information''; ''shipping charges''; and ''total price.'' The Commission received various comments with respect to these definitions, including particular industries' requests for exemption from the definition of ''business'' and other suggestions. Section 464.1 of the final rule adopts these definitions, in some instances with minor modifications for clarification, and adds a definition for ''covered good or service.'' In the definition-by-definition analysis, the Commission discusses each definition proposed in the NPRM, any changes to the definition's text, the added definition, and other comments relevant to the definitions section that are not otherwise addressed in the discussion of the final rule's substantive provisions.

1. Ancillary Good or Service

Proposed § 464.1(a) in the NPRM defined ''ancillary good or service'' as ''any additional good(s) or service(s) offered to a consumer as part of the same transaction.'' This definition was relevant to the definition of ''total price,'' in proposed § 464.1(g), which specified that any mandatory fees or charges for such goods or services would be included in total price. Commenters proposed modifications to the definition of ''ancillary good or service'' but, following review of those comments and as discussed in this section, the Commission declines to adopt the suggested modifications. Final § 464.1 adopts the definition of ''ancillary good or service'' without modification.

Several commenters recommended that the Commission modify the definition of ''ancillary good or service'' to state that fees charged by a third party must be included in total price if those fees are part of the same transaction.[149] As stated in the NPRM, if a business advertises a price for a good or service that requires an ancillary good or service provided by another entity, the charge for the mandatory ancillary good or service must be included in total price. Additionally, the NPRM made clear that the definition includes goods and services (whether from the seller or third parties) offered as part of the same transaction, because it included examples of mandatory ancillary goods or services that may be offered by third-party providers but are part of the same transaction, such as a payment processing fee for an online transaction. Accordingly, the Commission does not believe that it is necessary to modify the definition of ''ancillary good or service'' to clarify that fees charged by a third party must be included in total price if those fees are part of the same transaction.

Several commenters also suggested that the Commission add language referring to a reasonable consumer in the definition of ''ancillary good or service,'' to clarify that only goods or services that a ''reasonable consumer'' would expect to be included must be included in total price.[150] The Commission does not believe that adding ''reasonable consumer'' to the definition of ''ancillary good or service'' is necessary, as the reasonable consumer standard is implicit in the rule text. Under longstanding precedent, the Commission examines conduct from the perspective of a consumer acting reasonably under the circumstances.[151] If a representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of an ordinary member of that group.[152] Accordingly, the Commission does not believe it is necessary to modify the definition of ''ancillary good or service'' to refer to a reasonable consumer.

One commenter argued, in the context of online movie ticket purchases, that online convenience fees are reasonably avoidable because consumers can purchase tickets in-person at a theater without incurring the fees.[153] Although a movie ticket is not a covered good or service, similar convenience fees are common in the live-event ticketing industry. The Commission disagrees with the commenter that online convenience fees are reasonably avoidable: If a consumer must pay a service or other fee in order to purchase tickets online (*i.e.,* as part of the same transaction), then such a fee must be included in total price when it appears online. In addition, using vague fee descriptions, such as an unspecified ''convenience'' fee, may violate §§ 464.2(c) and 464.3 by failing to disclose clearly and conspicuously, and by misrepresenting, the nature or purpose of fees or the identity of the good or service for which fees or charges are imposed.

Another commenter argued that the definition of ''ancillary good or service'' should ''not turn on whether the good or service is 'offered' to a consumer but whether it is 'required to be purchased' by the consumer.'' [154] The commenter proposed that the Commission

[149] FTC–2023–0064–3191 (Community Catalyst et al.); FTC–2023–0064–3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher).

[150] FTC–2023–0064–3268 (Housing & Eviction Defense Clinic, University of Connecticut School of Law, commented ''the definition of an 'Ancillary Good or Service' should be amended to include all fees that are not reasonably avoidable and all fees or charges for goods or services that a reasonable consumer would expect to be included with the purchase.''); FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al. recommended the definition of ''Ancillary Good or Service'' be revised ''to mean 'any optional, additional good(s) or service(s), offered to a consumer as part of the same transaction, that a reasonable consumer would not expect to be included with the purchase of the advertised good or service.''); FTC–2023–0064–3160 (Consumer Federation of America et al. proposed the definition of ''Ancillary Good or Service'' be modified to ''any optional, additional good(s) or service(s), offered to a consumer as part of the same transaction, that a reasonable consumer would not expect to be included with the purchase of the advertised good or service.'').

[151] *Deception Policy Statement,* 103 F.T.C. at 175, 177–82; *see also FTC* v. *Cantkier,* 767 F. Supp. 2d 147, 151–52 (D.D.C. 2011) (applying deception standard set forth in the *Deception Policy Statement*); *POM Wonderful, LLC* v. *FTC,* 777 F.3d 478, 490, 500 (D.C. Cir. 2015) (applying deception standard set forth in the *Deception Policy Statement* and upholding administrative law judge determination that '' 'a significant minority' of 'reasonable' consumers 'would interpret [the ad] to be claiming that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease.' ''); *FTC* v. *World Travel Vacation Brokers, Inc.,* 861 F.2d 1020, 1029 (7th Cir. 1988) (upholding lower court's determination that '' 'the $29 airfare promotion constituted the type of misrepresentation upon which a reasonably prudent person would rely' ''); Fed. Trade Comm'n, *FTC Policy Statement on Unfairness* (appended to *In re Int'l Harvester Co.,* 104 F.T.C. 949, 1070, 1073 (1984), *(hereinafter* ''*Unfairness Policy Statement*''*), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-104/ftc_volume_decision_104__july_-_december_1984pages949_-_1088.pdf* (''To justify a finding of unfairness the [consumer] injury must . . . be an injury that consumers themselves could not reasonably have avoided.'').

[152] *Deception Policy Statement,* 103 F.T.C. at 175, 179 (''For instance, if a company markets a cure to the terminally ill, the practice will be evaluated from the perspective of how it affects the ordinary member of that group.'').

[153] FTC–2023–0064–3292 (National Association of Theatre Owners).

[154] FTC–2023–0064–3206 (Motor Vehicle Protection Products Association et al.).

incorporate the word ''mandatory'' into the definition of ''ancillary good or service.'' The Commission disagrees with this proposed modification. As discussed in the NPRM, an ancillary good or service may be mandatory or optional. Whether the cost of the ancillary good or service must be incorporated into total price turns on whether the good or service is mandatory, which depends on the facts of a transaction.[155] For example, if a hotel offers a consumer the option to purchase or decline a trip protection plan with a room reservation, the plan would be an optional ancillary good or service because the consumer has the option to decline the trip insurance. Conversely, a hotel may require all guests to purchase a daily breakfast voucher. In this case, the hotel guest cannot avoid being charged for the voucher, and it is a mandatory ancillary good or service. If a business charges payment processing fees that the consumer cannot reasonably avoid, such fees would be for a mandatory ancillary good or service.

It is also possible that a good or service may be mandatory in one transaction but optional in another.[156] For example, if a hotel allows a guest to purchase amenities such as bottled water or pool towels for an additional fee but permits each guest to supply their own water or pool towels, such amenities would be optional ancillary goods or services. If, however, the hotel requires all patrons to use the hotel-provided amenities for a fee, then the amenities would be mandatory ancillary goods or services. Because ancillary goods or services may be either mandatory or optional, the Commission declines to add the word ''mandatory'' into the definition of ''ancillary good or service.''

Some commenters also asked the Commission for additional guidance as to when a good or service might be considered ancillary, particularly if a good or service includes variable costs.[157] The Commission addresses pricing scenarios, including those pertaining to contingent or variable fees, in section III.B.1.a. Another commenter stated that the use of the word ancillary was unclear, because it ''implies a relationship between a primary object and the ancillary object'' and does not include guidance concerning the primary object.[158] The Commission cannot identify in every possible situation which good or service would be the ''primary object'' versus an ancillary good or service because such a determination is fact-specific and will depend on the goods or services offered by individual businesses.

For the foregoing reasons, and based on its review of the comments received, the Commission adopts the definition of ''ancillary good or service'' set forth in the NPRM. As discussed in section III.A.8, to address comments and clarify the rule, the Commission modifies the definition of total price to further clarify that under final § 464.2(a), Businesses may exclude from total price fees or charges for any optional ancillary good or service.

2. Business

Proposed § 464.1(b) defined ''business'' as ''an individual, corporation, partnership, association, or any other entity that offers goods or services, including, but not limited to, online, in mobile applications, and in physical locations.'' As part of the NPRM, the Commission also proposed a carve-out for certain motor vehicle dealers required to comply with the Combating Auto Retail Scams Trade Regulation Rule (''CARS Rule''),[159] and for the carve-out to become effective upon the CARS Rule's effective date. The CARS Rule provides for certain pricing disclosure requirements and prohibits misrepresentations. Final § 464.1 adopts the first sentence of the proposed definition of ''business,'' but removes the carve-out for motor vehicles required to comply with the CARS Rule because of the final rule's narrowed scope.

In the NPRM, the Commission sought input as to whether it should modify the proposed definition of ''business'' to exclude certain businesses, or whether it should add a definition of ''covered business'' to narrow the businesses subject to the rule. The NPRM also included several questions concerning how to define ''covered business'' in the event the Commission opted to adopt such a definition. The Commission received broad support for an industry-neutral rule from individual commenters, consumer groups, and industry organizations. Commenters cited the prevalence of hidden and deceptive fees across a variety of industries and argued that broad exemptions would create an uneven economic playing field and confuse consumers by creating unpredictability across industries.[160] Conversely, the Commission received numerous comments asking that it narrow the rule to specific industries, including, for example, live-event ticketing and short-term lodging. Several commenters also urged the Commission to exempt certain industries, arguing that the rule would pose challenges for those industries or that those industries are already subject to existing regulations.

Following its review of the comments, the Commission narrows application of the final rule to covered goods or services, those involving live-event tickets or short-term lodging. While the comments demonstrated that bait-and-switch pricing and misleading fees and charges inflict harms on consumers across the economy, the rulemaking record reveals longstanding concerns with these unfair and deceptive practices within the live-event ticketing and short-term lodging industries in particular. The final rule addresses these industries first. The Commission addresses the definition of ''covered good or service'' in section III.A.4.

The Commission received comments requesting modifications to various definitions, including the definition of ''business,'' or wholesale exemptions from the proposed rule's coverage related to issues in particular industries, including auto dealers and service providers,[161] app-based delivery platforms,[162] financial services

[155] *See infra* section III.A.8.a.

[156] The Commission notes that several commenters misinterpreted the definition of ''Ancillary Good or Service'' as necessarily being optional. *See, e.g.,* FTC–2023–0064–3145 (Association of National Advertisers, Inc. stated that ''Ancillary fees, by definition, are not 'mandatory' and should not be characterized as 'mandatory' fees subject to the proposed disclosure requirements.''); FTC–2023–0064–1425 (Iowa Bankers Association stated, ''While the definition of Total Price includes 'mandatory' Ancillary Goods or Services, the actual definition [of Ancillary Good or Service] seems to speak to the discretionary aspect of this term.''). The Commission reiterates that the rule text is clear: Ancillary Goods or Services may be mandatory or optional, depending on the facts of a particular transaction.

[157] FTC–2023–0064–3172 (New Jersey Apartment Association); FTC–2023–0064–3296 (Bay Area Apartment Association).

[158] FTC–2023–0064–3206 (Motor Vehicle Protection Products Association et al.).

[159] 16 CFR part 463.

[160] *See, e.g.,* FTC–2023–0064–2887 (Progressive Policy Institute); FTC–2023–0064–3160 (Consumer Federation of America et al.); FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al.).

[161] *E.g.,* FTC–2023–0064–3276 (Automotive Service Association); FTC–2023–0064–3206 (Motor Vehicle Protection Products Association et al.); FTC–2023–0064–3189 (National Automobile Dealers Association); FTC–2023–0064–3121 (National Independent Automobile Dealers Association).

[162] *E.g.,* FTC–2023–0064–3263 (Flex Association); FTC–2023–0064–3202 (TechNet); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

providers,[163] franchised businesses,[164] funeral service providers,[165] rental housing,[166] restaurants and other food and beverage service providers,[167] telecommunications providers,[168] vending machine retailers,[169] movie theaters,[170] health and fitness centers,[171] higher education institutions,[172] recreational vehicles and marine crafts,[173] and towing companies.[174] The Commission's decision to narrow the final rule to covered goods or services renders these requests inapplicable, and as such, the Commission does not address them at this time.

The Commission received comments from various third-party travel service providers, including online travel agencies and travel advisors, arguing that third-party travel intermediaries and advisors are situated differently from underlying travel service providers and may be subject to existing Department of Transportation (''DOT'') regulations. Online travel agencies and travel advisors routinely offer, display, or advertise prices of covered goods or services to consumers, including businesses, which is conduct covered by the final rule. One industry group representing travel advisors argued that travel advisors do not set the price of underlying travel products and rely on the sellers of such products to provide accurate pricing information.[175] The commenter requested that the Commission include a ''safe harbor mechanism'' to protect travel advisors who may rely on inaccurate pricing information provided by sellers. The Commission declines to exclude travel advisors from the rule or to provide them with a safe harbor. The Commission addresses in section III.B.1.f requests for immunity for third-party intermediaries.

The Commission also received comments from online travel agencies seeking an exemption from the rule for airfare or bundled products that include airfare, arguing that the FTC Act does not confer jurisdiction over airlines and, further, that DOT's Full Fare Advertising Rule requires certain pricing disclosures for airfare.[176] As noted in the NPRM, the Commission's enforcement of its rule is subject to all existing limitations of the law and the Commission cannot bring a complaint to enforce its rule if doing so would exceed the Commission's jurisdiction or constitutional limitations. The Commission declines to exempt online travel agencies from the rule. However, the Commission notes that, where there is overlap between this rule and the DOT's Full Fare Advertising Rule on the treatment of government charges (*i.e.,* in the context of bundled travel packages, such as for airfare and hotels, the Full Fare Advertising Rule requires the inclusion of government taxes and fees in the total price), complying with both rules is feasible. While this rule permits businesses to exclude government charges from total price, it does not require them to do so.

The Commission received a comment from a gaming association seeking an exemption for Federally recognized Indian Tribes and Tribal entities as governments that act for the benefit of their tribal citizens.[177] The commenter asserted that the Commission does not generally exercise regulatory authority over such entities. The comment focused on Tribal government casinos and explained that Tribal casino revenues are used for essential Tribal government services and community development, including education, healthcare services, housing, and infrastructure development.[178]

The Commission recognizes that some Tribal Government casinos and other businesses may operate as hotels or live-event venues, or may otherwise offer goods or services that fit within the definition of covered good or service. Nevertheless, the Commission declines to exempt Federally recognized Indian Tribes and Tribal entities from coverage under the final rule. The FTC Act is a law of general applicability that applies to such entities, as well as individual members thereof.[179] The Commission recognizes that, in some instances, these entities may be organized in such a way that they are outside FTC jurisdiction, but whether a given Tribe or Tribal business is a corporation within the scope of the FTC Act is a fact-dependent inquiry.[180] The Commission is not aware of any evidence to suggest that the final rule would disproportionately impact such entities or that it would have any impact on their ability to continue to use revenues for government services or community development.

The Commission received a comment seeking an exemption for all franchised businesses. The commenter raised concerns that franchised businesses may lose out on the benefit of national

[163] *E.g.,* FTC–2023–0064–3139 (American Bankers Association and Consumer Bankers Association); FTC–2023–0064–2893 (America's Credit Unions); FTC–2023–0064–3168 (American Financial Services Association); FTC–2023–0064–3147 (American Land Title Association); FTC–2023–0064–1425 (Iowa Bankers Association); FTC–2023–0064–1941 (Independent Bankers Association of Texas); FTC–2023–0064–3182 (Massachusetts Bankers Association); FTC–2023–0064–3119 (Money Services Business Association, Inc.); FTC–2023–0064–3144 (Mortgage Bankers Association); FTC–2023–0064–3127 (U.S. Chamber of Commerce).

[164] *E.g.,* FTC–2023–0064–3294 (International Franchise Association); FTC–2023–0064–3141 (Coalition of Franchisee Associations); FTC–2023–0064–3211 (American Association of Franchisees & Dealers).

[165] *E.g.,* FTC–2023–0064–3210 (Service Corporation International); FTC–2023–0064–3065 (Carriage Services, Inc.); FTC–2023–0064–3130 (International Cemetery, Cremation & Funeral Association).

[166] *E.g.,* FTC–2023–0064–3152 (Building Owners & Managers Association et al.); FTC–2023–0064–3116 (Manufactured Housing Institute); FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3172 (New Jersey Apartment Association); FTC–2023–0064–3289 (Zillow Group). As explained in section III.A.4, the Commission does not intend to cover rental housing providers in its definition of ''Covered Good or Service'' at this time.

[167] *E.g.,* FTC–2023–0064–0264 (Individual Commenter); FTC–2023–0064–2953 (Individual Commenter); FTC–2023–0064–2124 (Individual Commenter); FTC–2023–0064–3022 (Individual Commenter); FTC–2023–0064–3021 (Individual Commenter); FTC–2023–0064–3300 (National Restaurant Association); FTC–2023–0064–3219 (Georgia Restaurant Association); FTC–2023–0064–3180 (Independent Restaurant Coalition); FTC–2023–0064–3078 (Washington Hospitality Association); FTC–2023–0064–3080 (UNITE HERE); FTC–2023–0064–2918 (Elite Catering + Event Professionals).

[168] *E.g.,* FTC–2023–0064–3234 (CTIA—The Wireless Association); FTC–2023–0064–3295 (USTelecom—The Broadband Association); FTC–2023–0064–2884 (NTCA—The Rural Broadband Association); FTC–2023–0064–3143 (ACA Connects).

[169] *E.g.,* FTC–2023–0064–2919 (National Automatic Merchandising Association).

[170] *E.g.,* FTC–2023–0064–3292 (National Association of Theatre Owners).

[171] *E.g.,* FTC–2023–0064–3269 (IHRSA—The Health & Fitness Association).

[172] *E.g.,* FTC–2023–0064–2906 (National Association of College & University Business Officers et al.).

[173] *E.g.,* FTC–2023–0064–3249 (Marine Retailers Association of the Americas); FTC–2023–0064–3251 (National RV Dealers Association).

[174] Towing & Recovery Association of America, Inc. submitted a late comment, which the Commission considered in its discretion and makes available at *https://www.ftc.gov/system/files/ftc_gov/pdf/R207011TRAAComment.pdf.*

[175] FTC–2023–0064–3106 (American Society of Travel Advisors).

[176] *See, e.g.,* FTC–2023–0064–3293 (Travel Technology Association); FTC–2023–0064–3262 (Skyscanner).

[177] FTC–2023–0064–3120 (Arizona Indian Gaming Association).

[178] *Id.*

[179] *See Fed. Power Comm'n* v. *Tuscarora Indian Nation,* 362 U.S. 99, 116–17 (1960) (examining case law supporting the conclusion that ''a general statute in terms applying to all persons includes Indians and their property interests''); *FTC* v. *AMG Servs., Inc.,* No. 2:12–CV–00536–GMN, 2013 WL 7870795, at * 16–21 (D. Nev. July 16, 2013), *R. & R. adopted,* 2014 WL 910302 (D. Nev. Mar. 7, 2014) (discussing the FTC Act's applicability to Federally recognized Tribes and Tribal businesses).

[180] *See, e.g., AMG Servs.,* 2013 WL 7870795, at * 22–23 (holding there was a genuine dispute of material fact barring summary judgment on question of whether Tribal chartered corporations were for-profit corporations under the FTC Act).

advertising campaigns, asserting that ''[u]nder the Proposed Rule, national marketing campaigns are only workable if all franchised businesses in a franchise system adhere to the same pricing regime (including pass-through fees), regardless of the economic demands of the market in which they operate.'' [181] The commenter also raised concerns particular to restaurant franchises.[182]

The Commission declines to exclude franchised businesses from the final rule. As the commenter notes, franchised businesses include hotels, restaurants, and fitness centers, among other businesses. The Commission's addition of the ''covered good or service'' definition narrows the rule's application to businesses that make available live-event tickets or short-term lodging and moots the commenter's concerns regarding restaurants or other franchises. Further, the final rule applies equally to franchised and non-franchised businesses, including hotels. The commenter has not provided any evidence to suggest that the rule will disproportionately impact franchised businesses. As to the commenter's contention that application of the rule will negatively impact franchised businesses' ability to benefit from national advertising campaigns, the Commission addresses commenters' questions and concerns about national advertising campaigns in section III.B.1.d.

The commenter also urged the Commission to exclude from the rule sellers of franchises (''franchisors'') subject to the FTC's Disclosure Requirements and Prohibitions Concerning Franchising Rule (''Franchise Rule''), arguing that the rule's total price requirement would undermine the Franchise Rule's requirement to itemize specific fees.[183] Two commenters representing franchised businesses (''franchisees''), however, urged the Commission to address ''the types of fees that are charged to franchisees by franchisors,'' which are not subject to the Franchise Rule.[184]

The Franchise Rule, 16 CFR part 436, requires franchisors, in connection with the offer or sale of a franchise, to provide prospective franchisees with specific information about the fees and charges necessary to begin operation of the franchised business, including the estimated initial investment, expected fees, and other expenses.[185] Because the final rule is limited to prices for covered goods or services and ancillary goods or services offered as part of the same transaction, it would not apply to an offer or sale of a franchise, including a hotel franchise. However, the Commission reiterates that franchised businesses must comply with the final rule in its entirety when selling covered goods or services.

One industry group recommended that the definition of ''business'' be limited to ''an individual, corporation, partnership, association, or any other entity that offers goods or services to consumers,'' with the purpose of exempting business-to-business transactions from the scope of the final rule.[186] Another industry group similarly requested that the Commission exempt business-to-business transactions from the scope of the final rule.[187] As set forth in section III.B.1.f, the Commission believes that application of the rule to business-to-business transactions is appropriate and necessary to provide the Commission with the tools necessary to seek redress from businesses that violate the law. The final rule covers both business-to-consumer transactions and business-to-business transactions, so no modification to the definition of ''business'' is required.

3. Clear(ly) and Conspicuous(ly)

Proposed § 464.1(c) in the NPRM defined ''clear(ly) and conspicuous(ly),'' consistent with longstanding FTC practice, as ''a required disclosure that is difficult to miss (*i.e.,* easily noticeable) and easily understandable,'' and listed proposed specifications for ''visual disclosure[s],'' ''audible disclosure[s],'' and ''any communication using an interactive electronic medium.'' Among other specifications, the definition explained that the disclosure ''must be made through the same means through which the communication is presented.'' The proposed definition also provided that disclosures ''must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires disclosure appears'' and ''must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.'' The proposed definition further made clear that for ''representations or sales practice[s]'' targeting specific audiences, ''such as children, older adults, or the terminally ill, 'ordinary consumers' includes reasonable members of that group.'' The Commission finalizes the definition of ''clear(ly) and conspicuous(ly)'' proposed in § 464.1(c) with minor clarifications to harmonize the language and terminology used in this provision with the terminology used in recent rulemakings and agency guidance.

Specifically, proposed § 464.1(c) provided that a required disclosure must be ''difficult to miss (*i.e.,* easily noticeable).'' Final § 464.1 reverses the order of the phrases ''easily noticeable'' and ''difficult to miss,'' and, thus, provides that a required disclosure must be ''easily noticeable (*i.e.,* difficult to miss).'' Additionally, in final § 464.1, the Commission adds language to clarify that required disclosures must be ''easily understandable by ordinary consumers.'' In final § 464.1, the Commission deletes reference to ''reasonable'' members of a specifically targeted group. Each of these modifications is to comport with the Commission's recently finalized Trade Regulation Rule on the Use of Consumer Reviews and Testimonials and the Negative Option Rule, as well as the Commission's Endorsement Guides.[188] Moreover, as noted in section II.B., the Commission examines conduct from the perspective of a consumer acting reasonably under the circumstances, and if a representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of an ordinary member of that group.[189] In final § 464.1, the Commission also includes ''mobile

[181] FTC–2023–0064–3294 (International Franchise Association).

[182] *Id.*

[183] *Id.*

[184] FTC–2023–0064–3141 (Coalition of Franchisee Associations); FTC–2023–0064–3211 (American Association of Franchisees & Dealers).

[185] 16 CFR 436.5; *see also* Fed. Trade Comm'n, *Staff Guidance on the Unlawfulness of Undisclosed Fees Imposed on Franchisees* (July 2024), *https://www.ftc.gov/system/files?file=ftc_gov/pdf/Franchise-Staff-Guidance.pdf.*

[186] FTC–2023–0064–3189 (National Automobile Dealers Association).

[187] FTC–2023–0064–3294 (International Franchise Association).

[188] *See* Promulgation of Trade Regulation Rule and Statement of Basis and Purpose: Rule Concerning Recurring Subscriptions and Other Negative Option Programs, 89 FR 90476 (Nov. 15, 2024), *https://www.federalregister.gov/documents/2024/11/15/2024-25534/negative-option-rule* (amending 16 CFR 425.4); 16 CFR part 465; Promulgation of Trade Regulation Rule and Statement of Basis and Purpose: Rule on the Use of Consumer Reviews and Testimonials, 89 FR 68034 (Oct. 22, 2024), *https://www.federalregister.gov/documents/2024/08/22/2024-18519/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials*; *Guides Concerning Use of Endorsements and Testimonials in Advertising,* 16 CFR 255.0(f). The Commission notes that it declines to adopt every modification adopted in the finalized Rule on the Use of Consumer Reviews and Testimonials, based on the goals of each rule and the comment record.

[189] *See Deception Policy Statement,* 103 F.T.C. at 175, 177–82; *Unfairness Policy Statement, 104 F.T.C. at 1073;* and other sources cited *supra* notes 151–52.

applications'' within the definition of ''clear(ly) and conspicuous(ly).'' This addition clarifies that ''mobile applications'' constitute interactive media devices under item (4) of the definition. The Commission does not believe that these modifications substantively alter the definition of ''clear(ly) and conspicuous(ly).''

The Commission declines to adopt several modifications to the definition of ''clear(ly) and conspicuous(ly)'' proposed by a consumer group. First, the commenter suggested that the Commission add ''limited English proficient consumers'' to the list of specific audience-types that a representation or sales practices may target in proposed § 464.1(c)(8) to make clear that disclosures are understandable for both English and limited-English speakers.[190] The Commission does not believe such a modification is necessary. While the definition includes examples of specific audiences who may be targeted by particular sales practices or representations, the use of ''such as'' is intended to make clear these are examples, rather than an exhaustive list of categories of consumers who may be targeted. The Commission further notes that final § 464.1 requires that the disclosures ''must appear in each language in which the representation that requires the disclosure appears.''

The commenter also suggested that the Commission add language to require that disclosures on interactive electronic media ''be capable of being printed and saved in an easily readable format.'' [191] The Commission does not believe such a modification is necessary. The definition considers the various types of media through which consumers and businesses transact and, for all types of media, the definition requires the disclosures to be ''easily noticeable (*i.e.,* difficult to miss).'' Thus, the Commission believes that the definition provides businesses with flexibility to continue transacting effectively and efficiently through different media, while ensuring sufficient consumer understanding of required disclosures. The commenter further proposed that the rule clarify that disclosures must be concise to discourage businesses from ''listing hundreds of optional fees, identifying fees that would not be applicable to the consumer, providing a description that uses complex jargon, [or is] unnecessarily lengthy.'' [192] The definition already addresses these concerns by setting forth what ''clear(ly) and conspicuous(ly)'' means: using simple terms that provide sufficient information about how businesses can formulate disclosures that are easily understandable and noticeable to consumers. The definition provides that disclosures ''must stand out from any accompanying text or other visual elements'' to be ''easily noticed, read, and understood.''

An automobile industry group urged the Commission to remove ''required disclosure'' from the definition of ''clear(ly) and conspicuous(ly),'' arguing that ''the NPRM is silent on what those required disclosures actually are.'' [193] The Commission disagrees and notes that the final rule modifies § 464.2(a) through (c) to provide greater clarity concerning what needs to be disclosed, including total price and other information related to fees or charges that were excluded from total price, and the nature, timing, and prominence of those disclosures. Those modifications are discussed in detail in section III.B.

One commenter on behalf of members in the financial services industry asserted that the definition of ''clear(ly) and conspicuous(ly)'' may conflict with requirements of certain financial services regulations, which do not generally require a certain text size or placement, but do require that certain disclosures be made with ''equal prominence and in close proximity to certain trigger terms.'' [194] The Commission does not believe that financial services regulations are implicated by the final rule's more narrow application to covered goods or services. Nonetheless, the Commission notes that the definition does not require a particular text size or placement; the definition states that ''clear(ly) and conspicuous(ly)'' requires a visual disclosure to ''stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.''

A commenter on behalf of marketing and advertising businesses criticized the proposed definition of ''clear(ly) and conspicuous(ly)'' as imposing ''prescriptive visual and audio disclosure[s] . . . that may not cleanly map onto all advertising mediums'' and argued that a business's compliance obligations may not be clear if the business relies on advertising mediums not mentioned in the definition.[195] The commenter urged the Commission to allow for sufficient flexibility ''to better accommodate current and future advertising mediums that may not allow for the contemplated disclosures,'' in particular to make it easier for small businesses to comply with the rule.[196] The commenter did not provide any examples of advertising media that would make it difficult to comply with the rule and did not suggest alternative language. Similarly, a commenter representing app-based delivery platforms noted the limited space for disclosures on delivery platforms and asserted that the rule lacked clarity as to how such platforms should comply.[197]

The Commission believes that the definition of ''clear(ly) and conspicuous(ly)'' provides basic, common-sense, and flexible principles to address current and future advertising media. For example, the definition requires that visual disclosures be in a size and font that consumers will easily notice and not be obscured by other text and that audible disclosures be at a volume, speed, and cadence that consumers will easily understand. In keeping with longstanding Commission interpretation and guidance, the definition does not mandate specific fonts, text-size, or volume, or otherwise impose a one-size-fits-all approach. Instead, it provides substantial flexibility to businesses in meeting the rule's disclosure requirements so long as consumers take away an accurate understanding of the disclosure. The Commission has published multiple resources to assist businesses in ensuring that disclosures are clear and conspicuous, including a guide specifically geared toward digital and mobile advertising.[198]

4. Covered Good or Service

In the NPRM, the Commission solicited comment on whether it should narrow the businesses covered by the rule to particular industries or to covered businesses, and if so, how to define covered businesses.[199] The final rule includes a definition for ''covered good or service'' to include: (1) Live-event tickets; or (2) Short-term lodging, including temporary sleeping accommodations at a hotel, motel, inn, short-term rental, vacation rental or other place of lodging. Under § 464.2(a),

[190] FTC–2023–0064–3160 (Consumer Federation of America et al.).

[191] *Id.*

[192] *Id.*

[193] FTC–2023–0064–3206 (Motor Vehicle Protection Products Association et al.).

[194] FTC–2023–0064–1425 (Iowa Bankers Association).

[195] FTC–2023–0064–3145 (Association of National Advertisers, Inc.).

[196] *Id.*

[197] FTC–2023–0064–3263 (Flex Association).

[198] *See* Fed. Trade Comm'n, Bureau of Consumer Protection Business Guidance, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* 7, 18 (Mar. 2013), *https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf.*

[199] NPRM, 88 FR 77481, Question 14.

the final rule requires businesses that offer, display, or advertise any price of a covered good or service to clearly and conspicuously disclose the total price. In addition, § 464.3 of the final rule prohibits businesses that offer, display, or advertise a covered good or service from misrepresenting any fees or charges.

The Commission received comments encouraging it to adopt an industry-neutral rule and urging it not to limit the rule's application to particular industries, as well as comments conversely urging it to limit the rule to live-event ticketing and short-term lodging industries. One advocacy group argued that narrowing application of the final rule to a subset of industries would ''create an unlevel playing field'' and alter competitive incentives.[200] Other commenters argued that hidden or deceptive fees are present across industries and often impact vulnerable populations.[201] Several commenters did not specifically address the Commission's question regarding whether to add a definition of ''covered business'' or how to define ''covered business,'' but instead submitted comments highlighting unfair and deceptive pricing practices in certain industries, and encouraging the Commission to adopt a final rule applicable to those industries. Those included comments concerning the motor vehicle industry;[202] delivery applications;[203] the financial services industry;[204] the restaurant industry;[205] the movie theater industry;[206] tax preparation services;[207] and the health care industry.[208]

Several commenters specifically urged the Commission to ensure that the rental housing industry would be subject to the final rule, including in any definition of ''covered business,'' to mitigate unfair or deceptive fees imposed on renters.[209] The Commission also received numerous comments from individual consumers, consumer and policy organizations, elected officials, legal service providers, and housing advocates highlighting unfair and deceptive fees in the rental housing industry.[210] Conversely, advocates from

[200] FTC–2023–0064–2887 (Progressive Policy Institute).

[201] FTC–2023–0064–1519 (NYC Consumer and Worker Protection argued that ''[c]onsumers deserve every business to be transparent and fair about prices.''); FTC–2023–0064 (Berkeley Law stated that ''[r]estricting the Rule to particular industries would exclude some of the most critical sectors that low-income people especially rely on,'' including ''the rental housing market, tax preparation services, payday lenders, and gift card merchants''); FTC–2023–0064–3282 (NCLC highlighted hidden or deceptive fees in ''businesses that offer credit, lease, or savings products'')

[202] *See, e.g.,* FTC–2023–0064–3160 (Consumer Federation of America et al.); FTC–2023–0064–3270 (Consumer Federation of America, National Consumer Law Center, National Association of Consumer Advocates); *see also* FTC–2023–0064–2853 (Performance Auto Inc., an individual car dealership, supported application of the rule to car dealers.).

[203] *See, e.g.,* FTC–2023–0064–1939 (Tzedek DC).

[204] *See, e.g.,* FTC–2023–0064–3160 (Consumer Federation of America et al.); FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al.); *see also* FTC–2023–0064–0199 (''I don't understand why I have to pay to have my credit card bill mailed to me . . . .''); FTC–2023–0064–0258 (''I checked our account and discovered that they had charged $10.00 for maintenance fees.''); FTC–2023–0064–0418 (''Even credit unions are charging insane fees it is bleeding us dry if we are broke already why are we getting hit with fees for being poor''); FTC–2023–0064–0396 (''My son is on SSI, and his bank charges him fees when his account goes below $100! . . . How does this make sense? Banks should not have fees like this. It [is] penalizing the poorest people!''); FTC–2023–0064–0425 (''What bothers me is that my bank charges me $35 for every overdraft!! I find that excessive! It's a lot of money, especially when you don't have enough in the first place. It's like being punished for being poor.''); FTC–2023–0064–0762 (''We have and continue to pay unnecessary costs for services especially personal loans and credit card debt. This makes payments for these loans much more of a hardship than the initial being in need of the card or loans was in the first place.'').

[205] *See, e.g.,* FTC–2023–0064–3248 (DC Jobs With Justice on behalf of Fair Price, Fair Wage Coalition encouraged the Commission to maintain an industry-neutral rule applicable to the restaurant industry); FTC–2023–0064–2885 (AARP commented that many consumers ''feel deceived when faced with an unexpected mandatory charge,'' such as ''service fees,'' ''living wage fees,'' or ''kitchen fees,'' and ''would prefer these costs be incorporated into the price of food so that they better understand restaurants' costs upfront.''); FTC–2023–0064–0103 (Individual Commenter stated: ''[R]estaurants are adding surcharges [for] providing health insurance, or to make sure that kitchen crew receives a tip. But these are existing operating costs that can and should be factored into the price. . . . On at least a couple occasions, the add-on fee wasn't even disclosed until the check.''); FTC–2023–0064–0119 (Individual Commenter stated: ''Fees of approximately 5–20% are often added to restaurant bills. . . . They are often written in small font in inconspicuous places on the menu or past blank space on websites. It's often unclear where these additional fees are going and should be simply incorporated into the menu prices.''); FTC–2023–0064–0120 (Individual Commenter stated: ''Now restaurants are adding service fees instead of increasing food price. I want to buy goods and services, I want to know the full price, with all the extra fees and taxes before, not after selecting a goods or service.''); FTC–2023–0064–0152) (Individual Commenter stated: ''Tipping since covid is crazy now too—and now these add on fees appear to be creeping into restaurants. A local pizza restaurant added a 20% 'gratuity fee' on the bill—this was not a tip but an additional charge for 'business costs' and does not go to employees.''); FTC–2023–0064–0065 (Individual Commenter stated: ''A number of restaurants here in Chicago are now adding surcharges that are only disclosed after you get the check, or they are disclosed in small print on the menu, which effectively makes the prices displayed on the menu deceptive.''); FTC–2023–0064–0052 (Individual Commenter stated: ''Small businesses, particularly restaurants, have grown their use of the type of non-transparent pricing practices that this rule aims to address . . ., such as the inclusion in bills of various fees that cannot be avoided (and that therefore should be part of the total price)'').

[206] *See, e.g.,* FTC–2026–0064–1303 (Individual Commenter stated: ''Just last night I tried to buy movie tickets (from the movie theater's own app no less!) but the fees added 25% more to the cost of the ticket! Ten dollars in fees on an app that the big movie chain runs on its own!''); FTC–2023–0064–1469 (Individual Commenter stated: ''I'm sick of paying for 'convenience fees' when purchasing tickets online (to live events and even the local movie theater), even though there is no other way to purchase them.''); *see also* FTC–2023–0064–3104 (Truth in Advertising, Inc.) (highlighting class action lawsuits alleging failure to disclose the total cost of movie ticket prices, inclusive of fees, in violation of New York State law).

[207] *See, e.g.,* FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al.).

[208] *See, e.g.,* FTC–2023–0064–3191 (Community Catalyst et al.).

[209] FTC–2023–0064–2888 (Housing Policy Clinic, University of Texas School of Law stated, ''it is essential for the rule to cover the rental housing industry in order to mitigate the harmful impacts of unfair and deceptive fees on renters.''); FTC–2023–0064–2858 (U.S. House of Representatives, Rep. Maxwell Alejandro Frost, Rep. Jimmy Gomez, Rep. Barbara Lee, Rep. Rashida Tlaib, Rep. Kevin Mullin, Rep. Dwight Evans, Rep. Judy Chu, Rep. Greg Casar, Rep. Dan Goldman, and Rep. Salud Carbajal encouraged an industry-neutral rule but urged the Commission at minimum to include live-event ticketing, short-term lodging, and the rental housing industries in the final rule.); FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al. commented that: ''Exempting landlords from the Rule as other commenters have proposed would deprive the Commission of a critical tool to challenge purveyors of junk fees charged in connection with a basic necessity of life, one that is disproportionately relevant to low-income consumers.'').

[210] *See, e.g.,* FTC–2023–0064–3218 (National Consumer Law Center collected consumer comments highlighting: ''a 'technology fee' addendum that adds 1% fee of total rent on top of rental cost''; ''an extra $255 in mandatory fees, for services I don't even want''; and ''water, sewer, and garbage fees would be charged over and above the base rent we agreed to . . . [that] could add as much as $250 extra per month to our rent.''); FTC–2023–0064–3271 (U.S. Senator Amy Klobuchar commented discussing a hearing conducted concerning rental housing competition and noting that: ''[R]enters are often hit with numerous junk fees that are only disclosed to them when signing a lease—frequently after the renter has already given notice to end a prior lease. . . . As a result, renters struggle to meaningfully compare the cost of various housing options.''); FTC–2023–0064–2888 (Housing Policy Clinic, University of Texas School of Law commented: ''This lack of transparency robs tenants of their opportunity to fairly participate in comparison shopping in the rental housing market and can seriously disrupt their financial well-being and housing stability.''); FTC–2023–0064–3218 (National Consumer Law Center commented: ''With respect to the rental housing market, the proposed rule would benefit consumers and competition. By requiring disclosure of the actual cost of an apartment, the rule would help renters to comparison shop and enable them to find housing that fits their budget.''); FTC–2023–0064–3225 (CED Law described undisclosed fees experienced by its clients and stated: ''Up front disclosure of all mandatory fees and accurate representation of all fees charged would go a long way towards ensuring low income renters like those we represent in Colorado understand what their monthly housing

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the rental housing industry urged the Commission to exempt rental housing providers from any definition of ''covered business.'' [211] A rental housing advertising platform urged the Commission to adopt a definition of ''covered business'' that excludes third-party advertising platforms, arguing that third-party platforms do not direct pricing and ''are not best positioned to meet the requirements of the proposed rule.'' [212]

On the other hand, the Commission also received comments in support of a narrow definition of ''covered business'' limited to the live-event ticketing and short-term lodging industries, including from members of those industries.[213] The U.S. Chamber of Commerce recommended limiting the definition of covered businesses to ''the live-event ticketing and/or short-term lodging industries,'' arguing that unique aspects of these markets, including a robust secondary market for live-event tickets and pressures on third-party lodging intermediaries ''to advertise the lowest price to consumers to optimize search outcomes,'' have shaped FTC research on all-in pricing and appropriate remedies.[214] One academic commenter likewise recommended a definition of ''covered business'' limited to live-event ticketing and short-term lodging, stating that these industries have been subject to extensive research showing ''their use of across-the-board drip pricing to be harmful.'' [215]

Commenters from the live-event ticketing industry supported a rule applicable to their industry, emphasizing that a total price requirement will aid consumers and businesses alike if applied across the entire industry.[216] For example, TickPick, a secondary ticket marketplace, commented that it already provides consumers with all-in pricing and supports ''eliminating drip pricing from the live-event ticketing industry,'' arguing that ''widespread use of hidden and/or misleading fees harms consumers and market competition.'' [217] StubHub similarly commented that it ''strongly supports efforts to increase price transparency for consumers nationwide with the federal adoption of all-in pricing'' in the live-event ticketing industry. According to StubHub, in 2014, it decided to display the all-in price to consumers in the hopes of encouraging the remainder of the industry to follow suit; however, it ''had no choice but to revert to its former pricing display,'' which used dripped fees, because other platforms continued to rely on drip pricing, making StubHub's all-in prices appear higher than other platforms.[218] Live Nation and its subsidiary, Ticketmaster North America, likewise expressed concern that, absent a nationwide rulemaking to implement all-in pricing, ''the current market realities present barriers to implementing all-in pricing,'' because adopting all-in pricing ''absent a mandate creates a first-mover disadvantage.'' [219] Live Nation stated that the rule would ''increase pricing transparency for fans and support competition in the ticketing industry.'' [220]

The Commission also received support from the representatives of the short-term lodging industry for the rule's application to that industry. The American Society of Travel Advisors commented that ''the rule as proposed would greatly benefit consumers of hotel and other short-term lodging services'' and applauded the proposed rule's prohibition on misleading fees.[221] The American Hotel & Lodging Association also expressed support for implementation of clear total price requirements and encouraged the Commission to ''ensure that any final rule it promulgates . . . apply broadly to all industry participants,'' including intermediaries such as online travel agencies, short-term rental platforms, and metasearch sites.[222] The American Gaming Association, a trade group representing the casino industry, contended that fees are adequately disclosed and provide value to consumers, but stated that, if applied to the lodging industry, the rule should be applied ''equitably across the industry. . . . including search engines, online travel agencies, and other third-party vendors.'' [223]

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expenses will be before being locked into a lease agreement.''); FTC–2023–0064–0146 (Individual Commenter stated they pay fees including for trash, electricity, and ''some other junk fees'' and argued that rental providers ''should be forced to disclose all fees before lease signing and never be able to add fees after the lease has been signed.''); FTC–2023–0064–0157 (Individual Commenter highlighted mandatory added fees and charges not disclosed in listed rental prices and stated: ''Landlords should not be allowed to force tenants into paying these fees with no opt out or if the fees are allowed, then the landlord must add that to the total monthly rent in advertisements so prospective tenants have an accurate scope of what the real monthly costs are.''); FTC–2023–0064–0229 (Individual Commenter described an apartment company with fees: ''[I]ncluding a $20 mos. fee for package delivery. It's a mandatory add-on. Many people do not get packages. Including myself.''); FTC–2023–0064–0923 (Individual Commenter stated their rental ''requires a number of fixed, non-negotiable mandatory fees. . . . In my opinion, these fees allow the company to advertise a lower monthly rental rate, intentionally making it difficult for a prospective tenant to comparison shop and compare rents from different organizations.'').

[211] *See, e.g.,* FTC–2023–0064–3172 (New Jersey Apartment Association supported the rule's inclusion of a definition of Covered Business and asked that rental housing providers be excluded from the scope of Covered Business); *see also* FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association).

[212] FTC–2023–0064–3289 (Zillow Group).

[213] *See, e.g.,* FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–2891 (Mary Sullivan, George Washington University, Regulatory Studies Center); FTC–2023–0064–3233 (NCTA—The internet & Television Association); *see also* FTC–2023–0064–3300 (National Restaurant Association urged the Commission to exclude small restaurants from a definition of ''Covered Business'').

[214] FTC–2023–0064–3127 (U.S. Chamber of Commerce).

[215] FTC–2023–0064–2891 (Mary Sullivan, George Washington University, Regulatory Studies Center also stated that a rule focused on the short-term lodging and live-event ticketing industries would ''increase the chance of [the rule's] success'' and provide well-defined limits for those Covered Businesses.)

[216] *See, e.g.,* FTC–2023–0064–3212 (TickPick, LLC stated that it ''supports the Commission using its authority under Section 18 of the FTC Act to address unfair and deceptive acts or practices involving hidden and misleading fees.''); FTC–2023–0064–3266 (StubHub, Inc. commented that it ''strongly supports efforts to increase price transparency for consumers nationwide with the federal adoption of all-in pricing.''); FTC–2023–0064–3105 (Charleston Symphony commented: ''[R]equiring sellers to disclose the total price clearly and conspicuously[ ] addresses a pressing issue. . . . Predatory practices in the secondary ticket sales market pose a significant threat to artists, venues, audiences, and the future of nonprofit arts organizations, impacting the integrity of the ticket-buying process and eroding audience confidence.''); FTC–2023–0064–3122 (Vivid Seats stated that it ''supports additional consumer disclosures, including all-in pricing,'' but the rule should ''apply equally across all parts of the live-events ticketing industry,'' so consumers can compare prices and businesses that display total prices will not be at a competitive disadvantage.); FTC–2023–0064–3241 (National Association of Ticket Brokers submitted a comment supporting all-in pricing, but noting that it would only work if ''(i) it was required of every ticket seller and (ii) there was rigorous and expeditious enforcement.''); FTC–2023–0064–3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America commented that they ''support[ ] a definition of all-in pricing that requires the first price for a live-event ticket shown to consumers to be the price ultimately charged at checkout (exclusive of state and local taxes and optional add-ons).''); *see also* FTC–2023–0064–3264 (Mark J. Perry, Ph.D., Professor Emeritus of Economics at University of Michigan-Flint and Senior Fellow Emeritus at the American Enterprise Institute, ''urge[d] the FTC to ensure that any rule requiring all-in pricing in live events apply equally to all market participants.''). The Commission addresses other comments and factual scenarios raised by commenters concerning live-event ticketing, including those concerning ticket service fees, in section III.B.1.b.

[217] FTC–2023–0064–3212 (TickPick, LLC).

[218] FTC–2023–0064–3212 (StubHub).

[219] FTC–2023–0064–3306 (Live Nation Entertainment).

[220] *Id.*

[221] FTC–2023–0064–3106 (American Society of Travel Advisors).

[222] FTC–2023–0064–3094 (American Hotel & Lodging Association).

[223] FTC–2023–0064–2886 (American Gaming Association). As discussed in section II, bait-and-switch pricing, including drip pricing, harms consumers even when charges are subsequently disclosed.

As described in section II, the Commission has determined, in its discretion, to focus this final rule on the live-event ticketing and short-term lodging industries. The Commission recognizes that substantial evidence exists to support a finding of the prevalence of bait-and-switch pricing and misleading fees throughout the economy; nevertheless, the Commission elects to use its rulemaking authority incrementally by first combatting these unfair and deceptive practices in the two industries in which the Commission first began evaluating drip pricing and that have a history of bait-and-switch pricing tactics and misleading fees. Indeed, commenters representing the live-event ticket and short-term lodging industries recognized the need for the Commission's rulemaking and generally supported the rule's application to those industries.

As described in this section, the Commission received comments supporting a definition of ''covered business'' that is limited to the live-event ticketing and short-term lodging industries.[224] The Commission also received comments emphasizing the need for a level playing field among businesses and allowing consumers to comparison shop.[225] For reasons described herein, the final rule applies to a defined set of covered goods or services, rather than to covered businesses. Because some businesses in the live-event ticketing and short-term lodging industries provide goods or services outside of those industries, a narrowing of the businesses covered by the rule rather than a narrowing of the goods or services covered by the rule, might unintentionally create an uneven playing field. As a result, the Commission instead narrows the rule to the defined covered goods and services of live-event tickets and short-term lodging. The Commission notes that the rule also applies to ancillary goods or services, defined as additional goods or services offered to consumers as part of the same transaction.

The NPRM also solicited comment as to how to define businesses that offer either live-event ticketing or short-term lodging, if the final rule were narrowed to covered businesses.[226] A third-party ticketing marketplace commented that it ''supports inclusion of the live-event ticketing industry as a 'covered business' and is comfortable with the proposed definition of 'businesses in the live-event ticketing industry . . . .' '' [227] The final rule's inclusion of live-event tickets in the definition of ''covered good or service'' is consistent with the proposed definition of covered business in the NPRM.

With respect to the proposed definition of the short-term lodging industry, the American Hotel & Lodging Association commented that the Commission should define short-term lodging as: ''a hotel, motel, inn, short-term rental, or other place of lodging that advertises at a price that is a nightly, hourly, or weekly rate.'' [228] One commenter representing the rental housing industry expressed concern that the proposed definition of short-term lodging ''could mean different things to different people, and that could be (mis)applied to rental housing industry,'' including, for example, where an apartment community provides temporary corporate housing subject to the same leasing agreements as longer-term tenants or where a resident extends a lease agreement for a few weeks or months.[229] Conversely, another commenter representing the rental housing industry explained that for rental housing, ''the landlord-tenant relationship involves an ongoing contractual relationship, typically at least a year-long commitment.'' [230]

The final rule incorporates portions of the American Hotel & Lodging Association's suggested definition of short-term lodging and the Commission modifies the rule text proposed in the NPRM to refer to hotels, motels, inns, short-term rentals, vacation rentals, or other places of lodging. The Commission declines to limit the definition of short-term lodging based on the advertised payment period or length of stay. In some instances, short-term lodging may include home shares and vacation rentals, such as through platforms like Airbnb or VRBO, that offer short-term rental accommodations for durations as long as several months. The Commission clarifies that, with the addition of a definition for ''covered good or service,'' it does not intend to cover rental housing providers at this time. When a rental housing provider offers a short-term extension on a lease, the extension typically would not be considered short-term lodging under the rule. Similarly, an apartment community that offers temporary corporate housing subject to the same conditions as its long-term leases typically would not be considered short-term lodging under the rule. On the other hand, a hotel that offers discounted extended stays typically would be considered short-term lodging under the rule. Whether any particular good or service is short-term lodging within the rule's definition of ''covered good or service'' will depend on the specific factual circumstances. In addition, the Commission may provide additional business guidance to address nuanced pricing scenarios that may arise.

5. Government Charges

Proposed § 464.1(d) in the NPRM defined ''government charges'' as ''all fees or charges imposed on consumers by a Federal, State, or local government agency, unit, or department,'' and specified that government charges did not encompass fees or charges that the government imposes on a business and that a business chooses to pass on to consumers. The proposed rule permitted businesses to exclude government charges from total price. The Commission received comments supporting and critiquing the proposed rule's treatment of government charges. Final § 464.1 adopts this provision with minor modifications to add ''Tribal'' fees and charges and to clarify that the definition of ''government charges'' includes ''the fees or charges imposed on the transaction by a Federal, State, Tribal, or local government agency, unit, or department.''

One consumer group supported the NPRM's exclusion of fees or charges that businesses choose to pass onto consumers from the definition of ''government charges'' (thus requiring their inclusion in total price), and expressed concern that businesses may inflate such fees to pad profits, rather than accurately reflect amounts paid in fees or charges to the government.[231] Two academic commenters similarly supported the distinction between fees

[224] *See, e.g.,* FTC–2023–0064–3212 (TickPick, LLC); FTC–2023–0064–3106 (American Society of Travel Advisors).

[225] *See, e.g.,* FTC–2023–0064–2886 (American Gaming Association); FTC–2023–0064–3106 (American Society of Travel Advisors); FTC–2023–0064–3266 (StubHub, Inc.); FTC–2023–0064–3264 (Mark J. Perry, Ph.D., Professor Emeritus of Economics at University of Michigan-Flint and Senior Fellow Emeritus at the American Enterprise Institute); FTC–2023–0064–3162 (BBB National Programs, Inc.); FTC–2023–0064–1000 (Individual Commenter).

[226] NPRM, 88 FR 77481, Question 14(a)(i) (proposing to define Businesses in the live-event ticketing as ''any Business that makes live-event ticketing available, directly or indirectly, to the general public''); Question 14(a)(ii) (proposing to define Business in the short-term lodging industry as ''any Business that makes temporary sleeping accommodations available, directly or indirectly, to the general public'').

[227] FTC–2023–0064–3212 (TickPick, LLC).

[228] FTC–2023–0064–3094 (American Hotel & Lodging Association).

[229] FTC–2023–0064–3296 (Bay Area Apartment Association).

[230] FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association).

[231] FTC–2023–0064–3290 (U.S. Public Interest Research Group Education Fund).

or charges imposed on consumers and those that a business chooses to pass onto consumers, stating that the latter should be incorporated into total price to avoid creating a loophole that would undermine the rule.[232]

On the other hand, the Commission received several comments expressing concern over the NPRM's definition of ''government charges'' as including only those charges ''imposed on consumers.'' Two commenters argued that the proposed definition failed to consider nuances in tax law across States and localities. They pointed out, for example, that several State laws formally impose sales tax on businesses, rather than on consumers.[233] Under the proposed definition, sales tax in those States would need to be included in total price, while sales tax in other States could be excluded from total price. These and other commenters also noted that many States prohibit the inclusion of sales tax in total price, which would result in direct conflict between the proposed rule and State laws that formally impose sales tax on businesses.[234] Relatedly, one tax policy organization noted variation in how State laws treat hotel occupancy taxes, with most State laws defining hotel occupancy taxes as imposed on the hotel operator and just six States defining hotel occupancy taxes as imposed on the consumer. Under the proposed definition of ''government charges,'' the commenter stated, hotel operators in all but six States would be required to include occupancy taxes in total price.[235] As such, these commenters argued that the proposed definition is unworkable and noted that businesses will spend considerable time and resources in understanding the legal incidence of Federal, State, and local taxes.[236]

Industry groups also urged the Commission to modify the definition of ''government charges'' to include charges and fees that the government expressly permits, and sometimes requires, businesses to pass through to consumers.[237] One commenter noted that businesses may be required to ''unfairly absorb'' the cost of these government charges.[238] Commenters also expressed concern that incorporating pass-through taxes that consumers understand and have come to expect into total price would obscure government fees, resulting in less pricing transparency, because consumers will not understand that the additional costs stem from the imposition of government fees.[239] Relatedly, two industry groups argued that consumers should be made aware through transparent pricing that additional costs stem from government taxes and fees, rather than requiring businesses to include them in total price.[240]

After considering the comments, the Commission modifies the definition of ''government charges'' from those fees or charges ''imposed on consumers'' to those ''imposed on the transaction.'' As such, it eliminates the potential distinction between fees and charges for the transaction a government imposes directly on consumers and those imposed on businesses. Businesses may not exclude from total price fees and charges that are wholly distinct from the relevant transaction, such as a proportional share of a business's income or property taxes, because they would not be government charges that were ''imposed on the transaction by a Federal, State, Tribal, or local government agency, unit, or department.''

An online travel agency submitted a comment identifying concerns about a potential conflict between the definition of ''government charges'' and DOT's Full Fare Advertising Rule, 14 CFR 399.84, which requires tax-inclusive pricing for certain travel products, including airline tickets and bundled vacation packages (*e.g.,* airline tickets and hotel stays purchased together).[241] Specifically, the commenter asserted that the final rule should require that hotels and short-term lodging providers incorporate government charges into total price because, otherwise, consumers shopping for bundled vacation packages—which are subject to the Full Fare Advertising Rule—could see different prices from consumers who shop separately for flights and lodging. The commenter also argued that the rule should require that taxes and government-imposed fees be included in advertised lodging prices, consistent with DOT's Full Fare Advertising Rule. The Commission declines to require only short-term lodging providers, as opposed to live-event ticket sellers and other businesses covered by the rule, to incorporate government charges into total price. However, the Commission notes that while the final rule provides that businesses ''may'' exclude government charges from total price, nothing in the rule prevents businesses from advertising prices inclusive of those charges, as required by DOT's Full Fare Advertising Rule.

Finally, an industry group representing certain Federally recognized Arizona Indian Tribes that operate gaming entities urged the Commission to include fees or charges imposed on consumers by ''tribal'' agencies, units, or departments in the definition of ''government charges,'' to recognize taxes or fees that Tribes might impose.[242] The Commission agrees and adds the word ''Tribal'' to the definition of ''government charges'' to clarify that businesses may exclude from total price fees or charges imposed on a transaction by a Tribal government.

The Commission notes that the modifications in the final rule to the definition of ''government charges'' represent a narrowing of the final rule. businesses must still make the disclosures required by § 464.2(c) in connection with government charges and are prohibited by § 464.3 from misrepresenting the nature, purpose,

[232] FTC–2023–0064–1467 (Richard J. Peltz-Steele, Chancellor Professor, University of Massachusetts Law School); FTC–2023–0064–1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business).

[233] FTC–2023–0064–3126 (Tax Foundation stated: ''In several states, at least including Alabama, Arizona, Hawaii, and New Mexico, and possibly California, the state sales tax would not meet the Rule's definition of a government charge, since its legal incidence (per statute, regulation, or court determination) is on the seller.''); FTC–2023–0064–3258 (National Taxpayers Union Foundation commented: ''Arizona, California, Hawaii, and New Mexico structure their sales taxes as taxes on the business, as measured by its gross receipts.'').

[234] *See, e.g.,* FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3258 (National Taxpayers Union Foundation stated, ''[n]early all states with sales tax prohibit retailers from including sales taxes, including taxes collected from both suppliers and consumers, in the sales price,'' and cited to states including Alabama, Florida, Georgia, Indiana, Maryland, Massachusetts, Oklahoma, Pennsylvania, and others.); FTC–2023–0064–3126 (Tax Foundation stated, ''many states prohibit sales tax-inclusive pricing,'' highlighting Alabama as a State in which the legal incidence of sales tax on the seller may ''obligate a vendor, per the proposed Rule, to list the sales tax-inclusive price if selling to an Alabama resident—which not only presupposes advance knowledge of the consumer's location, but forces the vendor to disregard Alabama's requirement that the list price not include sales tax.'').

[235] FTC–2023–0064–3258 (National Taxpayers Union Foundation).

[236] *Id.*

[237] *See, e.g.,* FTC–2023–0064–3100 (Civitas Advisors, Inc.); FTC–2023–0064–3217 (Bowling Proprietors' Association of America); FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3233 (NCTA—The internet & Television Association).

[238] FTC–2023–0064–3234 (CTIA—The Wireless Association).

[239] *See, e.g., id.;* FTC–2023–0064–3217 (Bowling Proprietors' Association of America); FTC–2023–0064–3295 (USTelecom—The Broadband Association).

[240] FTC–2023–0064–3233 (NCTA—The internet & Television Association); FTC–2023–0064–3127 (U.S. Chamber of Commerce).

[241] FTC–2023–0064–3204 (Expedia Group).

[242] FTC–2023–0064–3120 (Arizona Indian Gaming Association).

amount, or refundability of government charges.

6. Pricing Information

Proposed § 464.1(e) in the NPRM defined ''pricing information'' as ''any information relating to any amount a consumer may pay.'' The final rule references pricing information in one provision: § 464.2(b). As discussed in section III.B.2, final § 464.2(b) is limited to covered goods or services and requires that, in any offer, display, or advertisement that represents any price of a covered good or service, a business disclose the total price more prominently than any other pricing information. However, where the final amount of payment for the transaction is displayed, the final amount of payment must be disclosed more prominently than, or as prominently as, the total price.

A commenter from the financial services industry asserted that the proposed definition of ''pricing information'' would be inappropriate for ''standard bank products, such as checking, savings, CDs, consumer loans, etc.'' and failed to address the treatment of interest rates for products and services governed by existing financial regulations.[243] The commenter's concerns about the definition of ''pricing information'' are inapplicable because the final rule, including § 464.2(b), is limited to covered goods or services. Accordingly, the final rule adopts the proposed definition of ''pricing information'' at § 464.1 without modification.

7. Shipping Charges

Proposed § 464.1(f) in the NPRM defined ''shipping charges'' as ''the fees or charges that reasonably reflect the amount a business incurs to send physical goods to a consumer through the mail, including private mail services.'' The NPRM made clear that businesses are not permitted to artificially inflate the cost of shipping, and, instead, shipping charges must reasonably reflect the cost incurred to send goods to consumers. Final § 464.1 adopts the proposed definition of ''shipping charges,'' with a minor modification to clarify that shipping charges incurred through private mail and shipping services such as FedEx and UPS, or by freight, fall within the definition.

One trade association raised numerous concerns about the proposed definition of ''shipping charges.'' First, the commenter argued that the proposed definition fails to consider the unpredictability of shipping fees, noting that precise costs are difficult for retailers to determine because shipping costs are frequently based on quotes or estimates subject to change based on the carrier.[244] The commenter noted that businesses may face challenges using certain shipping methods, including consolidating shipment of multiple orders or using rail service for partial shipment, which it argued can be particularly difficult to predict. Second, the commenter asked that the Commission modify the definition of ''shipping charges'' to explicitly permit the use of flat rate shipping, explaining that many businesses have existing agreements with major freight carriers to provide flat rate shipping. For example, the commenter asked whether the use of flat rate shipping charges would be considered unlawful if the business shipped a small, lightweight item for which the actual shipping costs are less than the flat rate to ship. Finally, the commenter argued that the use of the phrase ''reasonably reflect'' in the definition is ambiguous and asked that the Commission clarify whether the definition includes a scienter requirement. Two commenters also asserted that the rule would ''force'' businesses to disclose proprietary shipping calculations in a threat to free market competition.[245]

The Commission's use of the phrase ''reasonably reflect'' is intended to allow for flexibility in determining shipping costs. The Commission recognizes that precise shipping costs may not be knowable until the end of a transaction, and, for that reason, the final rule permits businesses to exclude shipping charges from total price. The rule does not require that the cost of shipping reflect an exact certainty. Moreover, the rule does not require businesses to disclose proprietary information pertaining to relationships with freight or shipping providers because the rule does not require that shipping charges be excluded from total price; instead, the rule permits businesses to exclude shipping charges from total price if they choose. The final rule does not prohibit businesses from incorporating the cost of shipping into total price and thereby providing shipping to consumers at no additional charge. Nor does the final rule prohibit the use of flat rate shipping or shipping costs based on national averages. Instead, the language is intended to prevent businesses from inappropriately excluding from total price costs unrelated to shipping.

One live-event ticket platform supported the proposed rule's exclusion of certain shipping costs from total price, noting that the cost to ship physical tickets may vary based on factors determined later in the transaction, such as the location of the buyer.[246] The commenter also noted that a variety of delivery and shipping methods may be available to consumers purchasing live-event tickets, some of which may be mandatory and therefore included in total price.[247] The Commission emphasizes that certain fees do not fall within the definition of ''shipping charges,'' including online ''convenience'' or other fees charged, for example, by online ticket agencies to electronically ''deliver'' tickets or other processing fees associated with certain online purchases. The Commission further notes that an online convenience or other fee for electronic delivery of a ticket should be included in total price if a consumer cannot obtain the ticket as part of the same transaction (*i.e.,* online) without incurring a fee. While the Commission received comments raising concerns about incorporating the cost of delivery, as opposed to shipping, into total price,[248] the Commission is not aware of any evidence that such concerns would apply to sales of live-event tickets or short-term lodging.

Finally, the Commission also received a range of comments regarding handling costs. Some commenters urged the Commission to amend the definition of ''shipping charges'' to clarify that internal handling costs do not constitute shipping costs and therefore must be included in total price.[249] The comments related to handling costs involving goods or services covered by the broader proposed rule in the NPRM.[250] While the Commission has not received any evidence that the

[243] FTC–2023–0064–1425 (Iowa Bankers Association argued that the definition of ''Pricing Information'' is inappropriate for ''standard bank products'' and products earning interest).

[244] FTC–2023–0064–3267 (National Retail Federation).

[245] *Id.;* FTC–2023–0064–2901 (E-Merchants Trade Council).

[246] FTC–2023–0064–3266 (StubHub, Inc.).

[247] *Id.*

[248] *See, e.g.,* FTC–2023–0064–3263 (Flex Association); FTC–2023–0064–3137 (Chamber of Progress); FTC–2023–0064–3186 (National LGBT Chamber of Commerce and National Asian/Pacific Islander American Chamber of Commerce & Entrepreneurship); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3267 (National Retail Federation).

[249] *See, e.g.,* FTC–2023–0064–3146 (Institute for Policy Integrity, New York University School of Law); FTC–2023–0064–1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business).

[250] FTC–2023–0064–3146 (Institute for Policy Integrity, New York University School of Law); FTC–2023–0064–1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business); FTC–2023–0064–3267 (National Retail Federation).

concerns raised in these comments would impact covered goods or services, the Commission clarifies that internal handling costs must be included in total price. The Commission does not believe that a modification to the ''shipping charges'' definition is necessary, however, because the definition specifically states that shipping charges include only those costs that reasonably reflect the cost to ''send physical goods'' to consumers. The Commission does not believe that handling charges, like the cost to store goods or labor costs associated with preparing items for shipment, reflect the costs to ''send physical goods'' to consumers. Accordingly, handling charges are not shipping charges and must be included in total price.

8. Total Price

Proposed § 464.1(g) in the NPRM defined ''total price'' as ''the maximum total of all fees or charges a consumer must pay for a good or service and any mandatory ancillary good or service, except that shipping charges and government charges may be excluded.'' Although some commenters stated that the proposed definition was not flexible enough to account for all pricing models, the Commission believes the modified definition of ''total price'' is narrowly tailored to protect consumers by addressing the identified unfair and deceptive practice of hiding costs by omitting mandatory fees from advertised prices for covered goods or services. Consumers must be able to purchase and use goods or services at the advertised total price.

Final § 464.1 differs from the proposed definition of ''total price''[251] to the extent the definitions of ''government charges'' and ''shipping charges,'' as discussed in section III at A.5 and A.7, are modified. In addition, the Commission clarifies in final § 464.1 that businesses also may exclude from total price any fees or charges for optional ancillary goods or services. Further, the Commission notes herein that the rule does not directly address concerns that fees imposed in connection with covered goods or services are ''excessive''; the rule does not cap, ban, or prohibit the charging of any fees, but requires certain disclosures and prohibits misrepresentations to prevent unfair or deceptive pricing practices.

As detailed herein, the Commission declines to accept commenters' recommendations to define ''mandatory,'' to exclude ancillary goods or services from the ''total price'' definition, to modify the ''maximum total'' requirement, or to require the inclusion of shipping charges and government charges in total price. However, the Commission clarifies in final § 464.2(c) that businesses must disclose the final amount of payment for the transaction before a consumer consents to pay.

(a) Mandatory Fees

Commenters noted that the rule does not define ''mandatory,'' and expressed concern about identifying mandatory fees to be included in total price.[252] Some commenters recommended that the Commission clarify the distinction between ''core'' goods and services and ancillary goods or services,[253] provide guidance as to which ancillary goods or services are mandatory,[254] and modify the ''total price'' definition to exclude the reference to mandatory ancillary goods or services.[255]

The Commission has considered these comments and declines to accept these proposed modifications to the definition of ''total price.'' The definition of ''total price'' specifies that it includes the cost of the goods and services being offered and any mandatory ancillary goods or services, subject to certain exceptions. The Commission retains in the definition of ''total price'' fees and charges for ''any mandatory ancillary good or service'' as necessary to protect consumers from the identified unfair and deceptive practice of hidden fees.

The Commission also declines to modify the rule to add a definition of ''mandatory fees.'' The Commission cannot identify in advance a definitive list of mandatory fees because whether a particular fee will be mandatory or optional will depend on the specific facts of an individual business transaction, as described in section III.A.1.

Ancillary goods or services can be either optional or mandatory depending on whether businesses require consumers to purchase them or if they are necessary to make the principal goods or services fit for their intended purpose. If businesses offer ancillary goods or services and require consumers to purchase them to complete transactions for or to use the covered goods or services being offered, the ancillary goods or services are mandatory and their cost must be included in total price.

In the NPRM, the Commission sought comment on whether it was clear that the reference in the definition of ''total price'' to ''all fees or charges a consumer must pay for a good or service and any mandatory ancillary good or service'' includes (1) all fees or charges that are not reasonably avoidable and (2) all fees or charges for goods or services that a reasonable consumer would expect to be included with the purchase.[256] Commenters disagreed on whether the rule text is clear that ''total price'' includes unavoidable fees and fees based on consumer expectations, and recommended clarifying the definition of ''total price'' in this regard or adding a definition of mandatory fees.[257] Other commenters argued that the two types of fees described are themselves vague and unclear.[258]

Businesses should consider, in the context of their specific business practices, the Commission's guidance that mandatory fees include charges that consumers cannot reasonably avoid and charges for goods or services that a reasonable consumer would expect to be included with the purchase because they are necessary to make primary goods or services fit for their intended purpose. The Commission reiterates the guidance about total price that it provided in the NPRM: It is well established that it is deceptive to offer goods or services that are not fit for the purpose for which they are sold. By offering goods or services, businesses impliedly represent that the goods or services are fit for their intended purpose; reasonable consumers would expect that, when they purchase a good or service, they will be able to use it for

[251] Although one commenter expressed concern that businesses would use different terms for Total Price, and thereby create confusion, the rule does not mandate that Businesses use the term Total Price. *See* FTC–2023–0064–3290 (U.S. Public Interest Research Group Education Fund).

[252] *See, e.g.,* FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3134 (U.S. Department of Transportation, Federal Motor Carrier Safety Administration); FTC–2023–0064–3145 (Association of National Advertisers, Inc.).

[253] *See, e.g.,* FTC–2023–0064–2888 (Housing Policy Clinic, University of Texas School of Law).

[254] *See, e.g.,* FTC–2023–0064–3267 (National Retail Federation).

[255] *See, e.g.,* FTC–2023–0064–3160 (Consumer Federation of America et al.); FTC–2023–0064–3258 (National Taxpayers Union Foundation); FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al.).

[256] NPRM, 88 FR 77482, Question 19.

[257] *See, e.g.,* FTC–2023–0064–3134 (U.S. Department of Transportation, Federal Motor Carrier Safety Administration); FTC–2023–0064–3160 (Consumer Federation of America et al.); FTC–2023–0064–3196 (South Carolina Department of Consumer Affairs); FTC–2023–0064–3248 (DC Jobs With Justice on behalf of Fair Price, Fair Wage Coalition); FTC–2023–0064–3146 (Institute for Policy Integrity, New York University School of Law).

[258] *See, e.g.,* FTC–2023–0064–3233 (NCTA—The internet & Television Association); FTC–2023–0064–3172 (New Jersey Apartment Association).

that purpose.[259] It is therefore deceptive to advertise a total price for a primary good or service that does not include fees for additional purchases that are necessary to render the primary good or service fit for its intended purpose.

Further, businesses cannot treat additional purchases that are necessary to render covered goods or services fit for their intended purpose as optional and exclude the costs of these additional purchases from total price. For example, businesses cannot treat credit card surcharges or processing fees as optional and exclude them from total price if they do not provide consumers with other payment options. The rule does not require, as some commenters suggested, the inclusion of fees for truly optional ancillary goods or services in total price.[260] Nonetheless, such fees and their nature, purpose, and amount still must be clearly and conspicuously disclosed before the consumer consents to pay and cannot be misrepresented.

Commenters expressed the concern that businesses could misrepresent mandatory fees as optional, for example, by including them by default in bills, requiring consumers to opt out from them, or using other deceptive practices, and recommended that the Commission include safeguards in the rule to prevent these practices.[261] The Commission determines that the rule adequately protects consumers from the posited scenarios without modification. businesses cannot characterize fees as optional and exclude them from total price when businesses require consumers to purchase the good or service for which the fees are charged and employ practices, such as default billing or opt-out provisions, that effectively take away consumers' ability to consent to the fees. For example, a previously undisclosed resort fee that a hotel discloses at check-in is not an optional fee if the hotel will charge the fee unless the guest challenges the fee. Final § 464.3 prohibits misrepresenting the nature, purpose, amount, and refundability of fees, including misrepresenting mandatory fees as optional fees from which consumers must opt out.[262]

Whether fees for ancillary goods or services must be included in total price will depend on the specific factual circumstances. The inclusion of the defined term ''ancillary good or service'' in the definition of ''total price'' clarifies that total price includes ''additional good(s) or service(s) offered to a consumer as part of the same transaction.'' Businesses cannot exclude mandatory fees from total price simply by characterizing them as not part of the same transaction if, in fact, they are.

(b) Maximum Total

The rule provides that ''total price'' is the ''maximum total'' of all mandatory fees except identified permissible exclusions. Some commenters objected to defining ''total price'' as the maximum total, arguing that it could discourage advertising discounted rates or misrepresent actual costs and interfere with comparison shopping.[263] Other commenters suggested that the reference to maximum total would require businesses that enter into continuous service contracts with consumers (*e.g.,* subscriptions) to include in total price all mandatory fees that might arise over the duration of a contract, which they argued would be difficult to determine at the time the rule requires a total price disclosure.[264] Some commenters argued that continuous service contracts that reflect negotiated transactions do not raise ''bait and switch'' concerns and that total price is adequately disclosed in such contracts.[265]

The Commission has considered comments relating to the ''maximum total'' requirement and retains that language in the definition of ''total price.'' The Commission determines that such language is necessary to protect consumers from advertised total prices that are deceptively lower than what businesses actually charge. As the Commission noted in the NPRM, ''[t]he use of the phrase 'maximum total' would allow businesses to apply discounts and rebates after disclosing total price.'' [266] Since all businesses are subject to the maximum total requirement for covered goods or services, the resulting level playing field would allow for comparison shopping. The Commission does not agree that disclosures in contracts or agreements adequately protect consumers from deceptive advertising that omits mandatory fees.

Commenters questioned how businesses should handle conditions or limitations on advertised prices.[267] Businesses must comply with the rule and other disclosure requirements, including those related to material conditions or limitations.[268] Businesses that advertise prices that are not attainable by consumers because the prices are conditioned on undisclosed material conditions, restrictions, or limitations may fail to disclose and misrepresent total price.

(c) Itemization

The rule neither requires, nor prohibits, the itemization of mandatory fees that must be included in total price. The Commission notes that final § 464.2(c) requires disclosure of the nature, purpose, and amount of fees or charges imposed on the transaction that have been excluded from total price but declines to modify the regulatory text proposed in the NPRM to otherwise require or prohibit the itemization of fees.

Some commenters recommended that the rule not require itemization.[269] Other commenters stated that including mandatory fees in total price would obscure the nature and purpose of the fees and provide less information to consumers,[270] while others

[259] NPRM, 88 FR 77432.

[260] *See, e.g.,* FTC–2023–0064–2891 (Mary Sullivan, George Washington University, Regulatory Studies Center, noted that ''purely optional'' subscription services, such ''optional features that are installed in automobiles, like satellite radio'' are ''not deceptive and unfair'' but are instead efficient. She further contended that the proposed rule lacks specificity as to these types of ''purely optional'' services.)

[261] *See, e.g.,* FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al.); FTC–2023–0064–3160 (Consumer Federation of America et al.); FTC–2023–0064–3248 (DC Jobs With Justice on behalf of Fair Price, Fair Wage Coalition); FTC–2023–0064–0915 (Individual Commenter noted that businesses may misrepresent optional fees as mandatory and ''[t]he consumer may not realize they are optional when receiving a bill and may not realize they can be removed.'').

[262] *See* discussion *infra* section III.C and note 349.

[263] *See, e.g.,* FTC–2023–0064–3293 (Travel Technology Association); FTC–2023–0064–3233 (NCTA—The internet & Television Association).

[264] *See, e.g.,* FTC–2023–0064–3116 (Manufactured Housing Institute); FTC–2023–0064–3172 (New Jersey Apartment Association); FTC–2023–0064–3121 (National Independent Automobile Dealers Association); FTC–2023–0064–1425 (Iowa Bankers Association).

[265] *See, e.g.,* FTC–2023–0064–3289 (Zillow Group stated that ''rental housing market fees are distinct from fees in other economic sectors'' because they are not charged in ''click-to-purchase'' transactions, but involve an ''interactive process'' over a ''much longer period of time'' and involved ''written agreements that include all relevant binding terms and conditions, including the total price.''); FTC–2023–0064–3269 (IHRSA—The Health & Fitness Association).

[266] NPRM, 88 FR 77439.

[267] *See, e.g.,* FTC–2023–0064–3162 (BBB National Programs, Inc. commented that the definition of ''Total Price'' does not specifically address ''how advertisers should disclose material limitations to obtaining an advertised price.''); FTC–2023–0064–1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business, commented that ''[i]f there are any restrictions, they must be as clear and conspicuous as the price.'').

[268] *See, e.g., supra* note 111.

[269] *See, e.g.,* FTC–2023–0064–3293 (Travel Technology Association ''recommends that any final rule refrain from imposing an obligation to itemize mandatory fees.'').

[270] *See, e.g.,* FTC–2023–0064–3173 (Center for Individual Freedom); FTC–2023–0064–3137 (Chamber of Progress); FTC–2023–0064–3208

Continued

recommended that the rule require itemization to provide more information to consumers and to protect other transaction participants by disclosing where mandatory fees go.[271] Other commenters recommended that the rule prohibit itemization because fees could be arbitrary or invented by businesses and itemizing them could misrepresent their nature and purpose.[272]

The Commission has considered the comments and declines to require or prohibit the itemization of mandatory fees, except as provided by § 464.2(c). Section 464.2 of the rule permits, but does not require, itemization of the components of total price, and therefore allows businesses to break out transaction inputs, consistent with laws that require itemization. When businesses choose to itemize mandatory fees that are a part of total price or itemize fees pursuant to § 464.2(c), total price must be displayed more prominently than itemized fees. Further, § 464.3 prohibits misrepresenting itemized fees.

(d) Exclusions From Total Price

The definition of ''total price'' in final § 464.1 is modified from the proposed definition to the extent that the definitions of ''government charges'' and ''shipping charges'' are modified, as discussed in section III at A.5 and A.7. Finally, the definition of ''total price'' clarifies that businesses may exclude fees or charges for optional ancillary goods or services.

(e) Intersection With IRS Requirements

One commenter sought clarification as to the intersection of the total price requirements with Internal Revenue Service (''IRS'') requirements regarding charitable gifts.[273] The commenter specifically highlighted a scenario in which charitable contributions are made concurrent with ticket sales. The Commission is not aware of—and indeed, the commenter did not cite to—any specific conflict with the final rule. Instead, the commenter asked about the rule's intersection with the IRS's Substantiation and Disclosure Requirements. Based on the Commission's review, the IRS Substantiation and Disclosure Requirements pertain to substantiation requirements for donors who contribute to charitable organizations or causes, and disclosure requirements for charitable organizations that provide goods or services to donors for certain contributions. The Commission's rule has no bearing on, and does not change or impact, any of these IRS requirements. The commenter also stated that ''the concept of 'refundability''' is ''not common in charitable giving.'' As set forth in section III.B.3, the Commission eliminates the requirement that businesses affirmatively disclose the refundability of each fee or charge imposed; however, § 464.3 still prohibits businesses from misrepresenting a fee's refundability.

B. § 464.2 Hidden Fees Prohibited

Proposed § 464.2(a) and (b) in the NPRM provided, respectively, that it would be a violation of the rule for a business to ''offer, display, or advertise an amount a consumer may pay without clearly and conspicuously disclosing total price'' and that ''[i]n any such offer, display, or advertisement that contains an amount a consumer may pay, a business must display total price more prominently than any other pricing information.'' As discussed herein, final § 464.2 makes certain modifications to proposed § 464.2(a) and (b) and consolidates all provisions related to disclosures by relocating proposed § 464.3(b), with certain modifications, to final § 464.2(c).

As discussed in section III.B.1 and III.B.2, to address commenter concerns that ''an amount a consumer may pay'' is vague and overbroad, the Commission modifies final § 464.2(a) and (b) as compared to the NPRM proposals to focus their required disclosures on offers, displays, or advertisements that include ''any price of a covered good or service.'' Final § 464.2(b) also clarifies that, in any offer, display, or advertisement that represents any price of a covered good or service, total price must be more prominent than other pricing information, except if the final amount of payment for a transaction is displayed, the final amount of payment must be more prominent than, or as prominent as, total price.

As discussed in section III.B.3, the Commission also consolidates all provisions related to required disclosures under § 464.2 of the rule and, therefore, codifies proposed § 464.3(b) with certain modifications at final § 464.2(c). Proposed § 464.3(b) specified that businesses must disclose clearly and conspicuously, and before the consumer consents to pay, the nature and purpose of any amount a consumer may pay that is excluded from total price. The Commission clarifies that, in line with the narrower scope of the rule, the trigger requiring disclosures in final § 464.2(c) is ''before the consumer consents to pay for any covered good or service.'' As with final § 464.2(a) and (b), final § 464.2(c) also eliminates the reference to ''any amount a consumer may pay'' to narrow the focus of the disclosures required by § 464.2(c)(1) to ''any fee or charge imposed on the transaction that has been excluded from total price.''

Final § 464.2(c) also differs from the NPRM proposal in that it explicitly requires disclosure of the amount, nature, and purpose of any fees or charges imposed on the transaction that have been excluded from total price and the identity of the good or service for which the fees or charge is imposed, as well as the final amount of payment for the transaction. Importantly, to preserve choice and control for businesses, § 464.2(c)'s disclosures with respect to government charges and shipping charges are only required if a business elects to permissibly exclude such charges from total price. Similarly, § 464.2(c)'s disclosures with respect to fees for optional ancillary goods or services are only required if the consumer has elected to purchase such goods or services as part of the same transaction and the business has excluded their fees from total price. Nothing in the final rule requires a business to disclose commercially sensitive information regarding the components of its total price.

The Commission discusses herein changes to the text of the proposed provisions and addresses substantive comments about these provisions, including how § 464.2 would apply to specific pricing scenarios discussed in the comment record.

1. § 464.2(a)

Proposed § 464.2(a) in the NPRM provided that it would be a violation of the rule for a business to ''offer, display, or advertise an amount a consumer may pay without clearly and conspicuously disclosing total price,'' which was defined in proposed § 464.1(g) as ''the maximum total of all fees or charges a consumer must pay for a good or service and any mandatory ancillary good or service, except that shipping charges

(FreedomWorks); FTC–2023–0064–3263 (Flex Association); FTC–2023–0064–3258 (National Taxpayers Union Foundation).

[271] *See, e.g.,* FTC–2023–0064–3304 (Recording Academy stated: ''Price itemization is the only way to ensure pricing is transparent and that all parties involved in setting the ticket's total price are held accountable for what they charge.''); FTC–2023–0064–3230 (Future of Music Coalition); FTC–2023–0064–3250 (National Independent Talent Organization); FTC–2023–0064–3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher stated that itemization is necessary to clarify opaque charges in the context of consumer correctional services.); FTC–2023–0064–3290 (U.S. Public Interest Research Group Education Fund).

[272] *See, e.g.,* FTC–2023–0064–3212 (TickPick, LLC).

[273] FTC–2023–0064–3195 (League of American Orchestras et al.).

and government charges may be excluded.'' In final § 464.2(a), the Commission changes the reference to ''an amount a consumer may pay'' to the more limited ''any price of a covered good or service.'' Final § 464.2(a) also further clarifies that businesses may exclude from total price fees or charges for any optional ancillary good or service. The Commission makes these modifications to address NPRM comments and to clarify the rule. The comments relating to the exclusion from total price of charges for any optional ancillary good or service, and the Commission's reasons for allowing these exclusions, are discussed in section III at A.1 and A.8.

Commenters argued that the reference to ''an amount a consumer may pay'' in proposed § 464.2(a) and in other sections (*i.e.,* proposed §§ 464.2(b) and 464.3(b)) was overbroad and that the Commission failed to consider its application to various pricing scenarios.[274] In response to these comments, the Commission finalizes § 464.2(a) with modification to limit the total price disclosure requirement from each time businesses ''offer, display, or advertise an amount a consumer may pay'' to only when they ''offer, display, or advertise any price of a covered good or service.'' The Commission also provides guidance regarding the application of § 464.2(a) to various types of fees and pricing scenarios, including: contingent fees; ticket service fees; credit card surcharges; dynamic pricing and national advertising; rebates, bundled pricing, and discounts; and online marketplaces in section III.B.1.a through f.

(a) Contingent Fees

Under certain circumstances discussed herein, total price can exclude certain fees that businesses cannot calculate in advance because they necessarily are contingent on consumer behavior or choice; unknown, external factors; or pricing models that include variable fees. The Commission notes that whether certain contingent fees cannot be calculated and are truly unknown at the time the rule requires disclosures may depend on the specific factual circumstances. The Commission is not persuaded by the comments to change the rule as it applies to contingent fees.

Certain commenters remarked that, in some instances, businesses cannot quote an all-inclusive price due to unknown fees arising from consumer behavior and choices during and after the purchasing process; unknown, external factors; or pricing models that have variable rates such as hourly rates or rates based on guest count and consumption. Indeed, some commenters argued that the Commission's failure to recognize the existence of variable marketplace fees is a significant oversight of the proposed rule.[275] Other commenters observed that concerns about variable marketplace fees are overblown and stated that the Commission should prohibit charging such fees if the full amount of such fees cannot be calculated in the upfront price.[276]

The Commission finds that, to the extent that certain fees are contingent on later conduct or choices by a consumer after purchase (*e.g.,* pet fees, fees for late payments, fees for property damage at a rental accommodation, or smoking in a non-smoking hotel room), these fees are not mandatory for purposes of the transaction, and as such, do not need to be included in total price.[277] The Commission notes that fees that are unavoidable by the consumer, regardless of conduct or choices, are not contingent. Ultimately, if a business cannot ascertain whether certain fees or charges apply until after concluding a purchase or transaction, the business need not include such fees or charges in total price. Whether mandatory fees are truly unknown due to reasons beyond a business's control will depend on specific factual circumstances.

Businesses should include in total price other fees that may vary depending on a consumer's choices during the purchase process or transaction as soon as consumers provide the business with the information needed to determine the applicability or amount of those fees. Indeed, some commenters discussed different scenarios in which total price depends on a consumer's choices while buying a good or service, such as season and flexible ticket packages for the arts.[278] According to some commenters, consumers expect fees arising from their personal choices and customizations to be disclosed only after providing additional information to, or negotiating with, sellers. Businesses can include in their advertisements ''starting at'' or base prices to deal with situations in which ultimate price may depend on a consumer's selection of various ticketing and lodging options, but only if consumers can in fact obtain the

[274] *See, e.g.,* FTC–2023–0064–3206 (Motor Vehicle Protection Products Association et al. commented that proposed § 464.3, in referring to any amount a consumer may pay, goes ''far broader than 'fees''' and ''the use of the verb 'may' suggests that even offers of goods or services—or, frankly, even goods or services that 'may be' available but not actually offered—impermissibly and imprudently stretches this section.'').

[275] *See, e.g.,* FTC–2023–0064–3127 (U.S. Chamber of Commerce stated that variable fees should be excluded from Total Price because: fees that ''vary based on volume, transaction type, and region'' cannot be assessed until consumers take some action; requiring their inclusion in Total Price ''could less efficiently spread costs, undermine consumer choice, and eliminate price competition on certain cost inputs''; and ''[t]he NPRM also provides no reason to think that variable or dynamic pricing is necessarily deceptive or unfair across all industries and sectors of the economy.''); FTC–2023–0064–3137 (Chamber of Progress expressed concern about the rule's impact on variable pricing models, including delivery platforms, where ''the prices for delivery or other services increase as the size of the order increases,'' which it asserts is ''a more efficient way of distributing costs than flat rates'' and asserted it is not clear how such platforms would comply with the rule ''without creating confusion for customers or misrepresenting prices.''); FTC–2023–0064–3173 (Center for Individual Freedom argued that: ''Acknowledging the distinct roles and objectives of both flat and variable fees in different industries is crucial, and the proposed rule's failure to recognize the benefits of variable pricing structures, which allow fees to scale based on the nature of the items or services purchased, is a significant oversight.''); FTC–2023–0064–3258 (National Taxpayers Union Foundation stated that under the rule, ''it will be nearly impossible for businesses using variable prices to display the Total Price at all times, because businesses are unable to predict consumer's choices.''); FTC–2023–0064–3202 (TechNet urged the Commission to exclude from Total Price ''fees that are variable or unknowable,'' such as in e-commerce marketplaces, or the rule ''would complicate the communication of pricing in situations where the 'total price cannot practically be determined' in advance.''); FTC–2023–0064–3263 (Flex Association commented that app-based delivery platforms could be ''forced to change the way they price entirely—moving from variable . . . to static fees . . . that would not benefit consumers''); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP commented that the proposed rule failed to consider reliance on dynamic pricing that depends on consumer choices throughout the buying process).

[276] *See, e.g.,* FTC–2023–0064–3134 (U.S. Department of Transportation, Federal Motor Carrier Safety Administration recommended that the rule prohibit ''charging variable mandatory ancillary fees if the full amount of such variable fees cannot be calculated in the upfront price.''); FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al. asserted that concerns ''that it is impossible to accurately estimate all fees in advance of providing a complex service'' or fees dependent on consumer choice, are ''easily resolvable with minimal effort and creativity on the part of vendors.'').

[277] *See, e.g.,* FTC–2023–0064–3233 (NCTA—The internet & Television Association commented that the definition of ''Total Price'' is ambiguous as ''it does not clearly address fees that are contingent on later actions by particular consumers . . . such as for unreturned equipment or late payment of the consumer's bill'' and encouraged the Commission to ''resolve the ambiguity by, among other things, making clear in the rule itself that contingent or avoidable fees are to be excluded from the Total Price.'').

[278] *See, e.g.,* FTC–2023–0064–3195 (League of American Orchestras et al. requested the Commission's ''consideration for season-based and flexible ticket packages in which multiple and variable options are available to ticket-buyers, and the total price will vary based on selection.'').

advertised ticket or lodging for the ''starting at'' or base price.[279]

Businesses still must clearly and conspicuously disclose the nature, purpose, and amount of such fees or charges and the identity of the good or service for which they are imposed, and the final amount of payment, before a consumer consents to pay or, if the applicability of a fee or charge is contingent on later conduct or choices by a consumer after purchase, as soon as such circumstances arise. Businesses also must not mispresent those or other fees or charges, including total price.

(b) Ticket Service Fees

Businesses operating in the live-event ticketing industry, including venues, ticket sellers, and ticket resellers, historically have imposed on consumers a host of charges in addition to the ticket's face value that are dripped in throughout the purchasing process. One of the rule's principal purposes is to give consumers upfront knowledge of the true cost of a good or service, including mandatory charges, without being forced to navigate through a time-intensive search and transaction. A broad swath of industry members supported a nationwide total price requirement for ticket pricing,[280] although some industry commenters expressed concerns with certain aspects of the rule. The Commission addresses commenters' concerns herein.

Some industry members emphasized that the added fees are their primary source of revenue, since they typically do not share in the revenue from the ticket's face value.[281] Industry members and an academic commenter also stated that certain added fees pay for valuable services such as delivery and the convenience of selecting a seat from home.[282] An industry member emphasized, however, that although consumers do expect additional fees, businesses nonetheless should clearly disclose a ticket's true, all-in price (*i.e.,* total price).[283] Another industry member commented that unless an added fee is truly optional, it should be included in total price.[284] The Commission reiterates that businesses are not prohibited from charging fees; instead § 464.2(a) requires the disclosure of total price, including fees for mandatory ancillary goods or services, when a price for a good or service is displayed, while § 464.2(c) requires disclosures about fees being imposed on the transaction that have been permissibly excluded from total price, including for optional ancillary goods or services, before a consumer consents to pay for a covered good or service. The Commission further reiterates that, in an online transaction, fees such as for payment processing, electronic ticket ''delivery,'' ''convenience,'' or similar add-on ticketing fees are mandatory and must be included in total price if a consumer cannot obtain the covered good or service as part of the same transaction (*e.g.,* online) without incurring the fee. Final § 464.3 also prohibits businesses from misrepresenting the nature or purpose, or the identity of the good or service for which fees are imposed.

Some industry members expressed concern that the rule would prohibit itemization of fees in addition to total price, while others argued that it should prohibit such itemization.[285] The Commission clarifies that, so long as total price is displayed clearly and conspicuously, and more prominently than any itemized fees, the rule does not prohibit businesses from itemizing the

[279] In some instances, advertising prices as a base or starting price can be deceptive, depending on the relevant limiting or qualifying criteria. In such instances, the material terms, conditions and obligations upon which receipt and retention of the base or starting price are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.

[280] *See, e.g.,* FTC–2023–0064–3266 (StubHub, Inc. submitted a comment supporting nationwide all-in pricing and including Total Price in every advertisement to consumers and throughout the transaction.); FTC–2023–0064–3105 (Charleston Symphony commented: ''[R]equiring sellers to disclose the total price clearly and conspicuously[ ] addresses a pressing issue. . . . Predatory practices in the secondary ticket sales market pose a significant threat to artists, venues, audiences, and the future of nonprofit arts organizations, impacting the integrity of the ticket-buying process and eroding audience confidence.''); FTC–2023–0064–3122 (Vivid Seats stated that it ''supports additional consumer disclosures, including all-in pricing,'' but the rule should ''apply equally across all parts of the live-events ticketing industry,'' so consumers can compare prices and businesses that display total prices will not be at a competitive disadvantage.); FTC–2023–0064–3241 (National Association of Ticket Brokers submitted a comment supporting all-in pricing, but noting that it would only work if ''(i) it was required of every ticket seller and (ii) there was rigorous and expeditious enforcement.''); FTC–2023–0064–3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America commented that they ''support[ ] a definition of all-in pricing that requires the first price for a live-event ticket shown to consumers to be the price ultimately charged at checkout (exclusive of state and local taxes and optional add-ons).''); *see also* FTC–2023–0064–3264 (Mark J. Perry, Ph.D., Professor Emeritus of Economics at University of Michigan-Flint and Senior Fellow Emeritus at the American Enterprise Institute, ''urge[d] the FTC to ensure that any rule requiring all-in pricing in live events apply equally to all market participants.''); FTC–2023–0064–2856 (National Football League stated that if the live-event ticket industry is included in the rule's coverage, the Commission must ''include all sellers of live-event tickets to prevent inconsistencies in its application.'').

[281] *See, e.g.,* FTC–2023–0064–3122 (Vivid Seats commented that service fees ''are the TRM's [ticket resale marketplace's] sole source of revenue and provide the capital necessary to operate the TRM.''); FTC–2023–0064–3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America commented that a ticket service charge ''compensates the venue for hosting the event and the ticketing company for distributing tickets and related services—important since venues and ticketing companies typically do not share in revenues attributable to a ticket's face value.'').

[282] *See, e.g.,* FTC–2023–0064–3122 (Vivid Seats commented that delivery fees cover costs associated with delivering a ticket.); FTC–2023–0064–3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America); FTC–2023–0064–3292 (National Association of Theatre Owners commented: ''These fees allow moviegoers to purchase tickets and select their seats from home, and this service requires ongoing support and management, entailing operational costs that are offset by convenience fees. At the same time customers can avoid the convenience fee altogether by purchasing directly at the box office.'') FTC–2023–0064–3264 (Mark J. Perry, Ph.D., Professor Emeritus of Economics at University of Michigan-Flint and Senior Fellow Emeritus at the American Enterprise Institute, commented that ticket resale marketplaces offer numerous valuable services to ticket sellers and buyers that a single seller or buyer could not access otherwise, including access to buyers or tickets, inventory management, seller and customer support, secure financial transactions, and guarantees.'').

[283] FTC–2023–0064–3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America commented: ''Because the practice of adding these charges to the ticket's face value has been so longstanding, consumers have come to expect service fees when purchasing a ticket to a live entertainment event—but it is impossible for consumers to anticipate the amount of applicable fees because those rates are set by hundreds of different venues and can vary accordingly.'' The commenter continued, ''Consumers therefore need clear disclosures about the true price of a ticket, including the elements that constitute the all-in price.'').

[284] FTC–2023–0064–3266 (StubHub, Inc. supported the exclusion of ''fees for optional add-on features selected at the discretion of the consumer.'' As an example, the commenter stated, ''[I]n some instances, consumers may not have a choice on delivery method. In those cases, delivery fees are mandatory and should be included in the [Total Price] because the consumer has no discretion to choose. In other instances, consumers have multiple delivery options at different price points.'').

[285] *See, e.g.,* FTC–2023–0064–3230 (Future of Music Coalition commented that ''adopting all in pricing without itemization [of the base ticket price or face value and of fee amounts] would be a gift to . . . predatory resellers.''); FTC–2023–0064–3250 (National Independent Talent Organization stressed ''the need for an itemized breakdown of ticket fees'' and called for ''fees to be clearly itemized throughout the purchasing process.''); FTC–2023–0064–3304 (Recording Academy commented: ''Price itemization is the only way to effectively regulate transparent pricing in a manner that truly informs the consumer about how their dollar is being spent . . . . Additionally, price itemization is the only way to effectively hold third party fees and charges in check.''). *But see* FTC–2023–0064–3212 (TickPick, LLC commented that the rule ''must prohibit the itemization of fees and charges that make up the Total Price (other than breaking out government taxes and shipping fees) in order to prevent harm from hidden and/or misleading fees.'' The commenter stated concerns that such fees were ''arbitrary'' and ''any secondary ticketing marketplace that itemizes mandatory fees and charges is arguably misrepresenting the 'nature and purpose of any amount a consumer may pay.' '').

charges imposed on a transaction. However, any such itemization must not misrepresent the nature, purpose, amount, or refundability of the itemized fees, including the identity of the goods or services for which they are being charged.

(c) Credit Card and Other Payment Processing Surcharges

The rule requires businesses to include credit card surcharges or processing fees in total price only if they choose to make payment by credit card mandatory. If, on the other hand, credit card use is optional because consumers can use multiple payment options, those fees do not need to be included in total price. If the consumer chooses to use a credit card, businesses must clearly and conspicuously disclose the nature, purpose, and amount of any credit card surcharge before the consumer consents to pay. Some commenters expressed concern about the rule's application to credit card fees but, as discussed herein, the Commission was not persuaded by the comments to change the proposed rule as it applies to such fees.

Many commenters expressed concern that the rule would require total price to include credit card processing fees or prohibit businesses from passing through such fees to consumers. This was of particular concern to small businesses.[286] Numerous industry members also commented that requiring such fees to be part of total price would reduce price transparency and penalize customers who want or need to pay with cash.[287]

Various commenters suggested that if businesses properly disclose credit card processing charges and provide alternate payment methods, both consumers and businesses would benefit.[288] Commenters noted that, when appropriately disclosed, consumers can avoid such fees by choosing another form of payment.[289] An academic commenter suggested that prominent disclosure of a credit card surcharge in advance, so consumers can avoid it, would benefit consumers and reduce business costs more than requiring such charges to be included in total price.[290] A tenant advocacy legal clinic that generally supported requiring credit card processing charges to be included in total price, suggested that such charges might be reasonably avoidable if disclosed in advance to let consumers use a different payment method.[291] Another academic commenter recommended that the Commission clarify that, while credit card surcharges need not be included in total price, a business can only pass through the actual amount of the charge and must clearly and conspicuously disclose any markup it imposes.[292]

The Commission notes that the rule does not prohibit a business from charging or passing through credit card fees if otherwise allowed by law. The rule does not affect State laws that prohibit credit card surcharges. Whether credit card charges must be included in total price, however, depends on whether a business makes such fees mandatory, for example, by not providing any other payment option for the transaction. For example, if a consumer is purchasing a ticket online, there must be another online payment option that does not require a fee, not merely an option to go in person to the box office to purchase the ticket with cash for no additional fee.

In other words, if there is no other payment option for an offered transaction, or if every payment option requires a fee or charge, such fees are mandatory and must be included in total price.[293] But, if a business offers consumers multiple viable payment options for the offered transaction, so that paying with a credit card is optional, then credit card fees need not be included in total price. The same is true for debit card surcharges and other payment processing fees.

A business that provides at least one viable method to pay for the offered transaction without a fee, chooses to pass through payment processing fees to consumers, and excludes such fees from total price would have to clearly and conspicuously disclose the nature, purpose, and amount of the processing fees before a consumer consents to pay. In addition, nothing in the rule prohibits businesses that accept multiple viable forms of payment from advertising two prices, one that includes credit card or other payment processing fees and one that does not. It is the Commission's understanding that some businesses already do this, and such a strategy is consistent with the rule.

In addition, under final § 464.3, a business that offers, displays, or advertises a covered good or service cannot misrepresent the nature, purpose, amount, or refundability of credit card or other fees. Since the rule does not prohibit itemization, a business may choose to also itemize mandatory credit card fees so long as they are included in total price and total price is displayed more prominently. The voluntary itemization of mandatory credit card fees addresses commenters' concerns that consumers will not understand the different costs affecting businesses.

(d) Dynamic Pricing and National Advertising

Some commenters expressed concern that the total price requirements will interfere with dynamic pricing strategies where total price is not fixed but changes based on supply, demand, or other factors.[294] The rule does not bar

[286] *See, e.g.,* FTC–2023–0064–3217 (Bowling Proprietors' Association of America); FTC–2023–0064–2755 (Caffe! Caffe!); FTC–2023–0064–3114 (Shine Beer Sanctuary); FTC–2023–0064–1456 (MED Murphy St. Enterprise); *see also, e.g.,* FTC–2023–0064–2953; FTC–2023–0064–2972 (Over 4,600 comments submitted through a National Restaurant Association mass mailing campaign misinterpreted the rule as ''eliminating the use of fees and surcharges.'').

[287] *See, e.g.,* FTC–2023–0064–3300 (National Restaurant Association); FTC–2023–0064–3128 (Merchants Payments Coalition); FTC–2023–0064–3219 (Georgia Restaurant Association); FTC–2023–0064–3180 (Independent Restaurant Coalition).

[288] *See, e.g.,* FTC–2023–0064–3180 (Independent Restaurant Coalition commented: ''Clearly and prominently displaying any fees promotes transparency and fairness as well as allowing restaurants to meet the needs of their workers and customers.''); FTC–2023–0064–2891 (Mary Sullivan, George Washington University, Regulatory Studies Center).

[289] *See, e.g.,* FTC–2023–0064–3128 (Merchants Payments Coalition); FTC–2023–0064–3140 (Merchant Advisory Group stated: ''When appropriately disclosed, consumers can typically avoid these fees by simply choosing lower-cost forms of payment, and this could help keep prices down for consumers overall.''); FTC–2023–0064–3300 (National Restaurant Association commented: ''When a credit card surcharge is properly disclosed via in-store signage, on the menu, and on the receipt, customers have a clear understanding that the fee is a product of the card companies, not the restaurant.'').

[290] FTC–2023–0064–2891 (Mary Sullivan, George Washington University, Regulatory Studies Center).

[291] FTC–2023–0064–3268 (Housing & Eviction Defense Clinic, University of Connecticut School of Law).

[292] FTC–2023–0064–1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business).

[293] This approach is consistent with the Telemarketing Sales Rule, which requires sellers and telemarketers to disclose, in a clear and conspicuous manner, the total cost of a good or service, which would include any applicable credit card or other payment processing charges, before a consumer consents to pay for that good or service. 16 CFR 310.3(a)(1)(i) and (a)(2)(i).

[294] *See, e.g.,* FTC–2023–0064–3195 (League of American Orchestras et al. observed: ''It would be harmful to paint all dynamic pricing strategies as 'unfair.' Nonprofit performing arts organizations often use variable pricing strategies to both maximize the earned revenue that supports the nonprofit performing arts workforce, as well as to offer reduced or free-of-charge ticketing options for community-based partners.''); FTC–2023–0064–3230 (Future of Music Coalition stated that dynamic pricing ''can certainly be used in ways that frustrate consumers'' but ''can also solve practical problems.'' It is ''often used by nonprofit arts presenters in non-problematic ways.'' The commenter noted, however, that ''disclosure of specific dynamic pricing strategies and tools, whether manual or algorithmic[,] will only help

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businesses from engaging in dynamic pricing, but adjusted prices must include all known mandatory fees and the advertised good or service must be actually available to consumers at the quoted price. The Commission's review of the comments did not identify any persuasive reason to change the rule as it applies to dynamic pricing.

A few commenters noted that the rule could interfere with businesses' ability to engage in national advertising or to advertise to a broad audience because mandatory fees may vary by location, as is often the case with franchisee costs and delivery costs.[295] One commenter argued that the rule would require either impractical and challenging geo-targeted advertising or advertising a ''maximum total price'' to any potential consumer in the businesses' footprint, which would overstate the price that most consumers need to pay and defeat comparison shopping.[296] The commenter also noted that ''[a]lternatively, companies might respond to the proposed rule by omitting pricing from advertising altogether, an option that would defeat the [Commission's] goal of ensuring consumers have access to accurate and reliable cost information as they shop for services.''[297]

The Commission determines that shipping charges may be excluded from total price. As to other charges that may vary by time or location, businesses can comply with the rule by advertising a maximum total price either by region or nationwide. The Commission understands that many businesses already engage in regional or geo-targeted advertising that enables flexibility for pricing by time and locality. Since the rule applies to all businesses offering covered goods or services, it levels the playing field and preserves comparison-shopping even when advertised prices are maximum totals.

(e) Rebates, Bundled Pricing, and Other Discounts: Compliance When Promotional Pricing Models Have Different Fees

Promotional pricing models, such as two-for-one deals, bulk or bundled pricing, unbundled or a la carte pricing, rebates, or other discounts, can change the price a consumer ultimately may pay. Section 464.2(a)'s total price disclosure requirement applies whether a consumer is purchasing a single covered good or service, multiple covered goods or services, or covered goods or services combined with ancillary goods or services, as well as when a discount or other promotion affects the final amount of payment. If a consumer applies a discount or otherwise qualifies for a promotional price, the business can update the total price displayed. The Commission provides clarification herein to address commenter concerns about the rule as it applies to promotional pricing models.

Some commenters expressed concern that the rule's total price requirement would prohibit or discourage businesses from offering promotional prices to consumers.[298] Two industry groups commented that the potential difficulty of incorporating promotions into total price might discourage businesses from offering them.[299] A competition policy group agreed and suggested modifications might be ''necessary to ensure that the proposed rules do not interfere with such pricing models.''[300]

The Antitrust Division of the U.S. Department of Justice commented that ''[c]ompetition between companies that offer bundled and unbundled pricing for core products and value-added features can play an important role in preserving consumer choice . . . and unbundled pricing can empower consumers who prefer to pay only for what they value.''[301] The Antitrust Division further commented that the proposed rule ''does not affect companies' ability to offer consumers a choice whether to buy unbundled features that do not impose mandatory fees.''[302] However, it asserted that ''[w]hen companies use unbundled offerings to disguise mandatory fees, they undermine the value to competition of that unbundled option.''[303]

The rule does not prohibit businesses from using bundled, discount, or similar pricing models if, when the business advertises any price of a covered good or service, it discloses the total price the consumer must pay for the good or service. The rule also does not require businesses to incorporate different pricing models into a single price; rather, under the rule, businesses advertising any price of a covered good or service must only display the maximum total price. For example, a hotel can display a regular total price and a loyalty program member total price. Businesses also can display total price under a promotional pricing model, such as a bundled price or a promotion advertising, ''stay three nights, get one night free,'' when and to the extent that model applies. The Commission notes that offering, displaying, or advertising a general [x]% or $[y] discount, without displaying the price of a covered good or service, does not require the disclosure of total price under the rule.

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predatory resellers make purchasing decisions and maximize their extraction of value.'').

[295] *See, e.g.,* FTC–2023–0064–3127 (U.S. Chamber of Commerce commented that the Total Price requirements ''may eliminate the opportunity for national advertising campaigns'' because ''[m]andatory fees [such as regional sports fees] may vary by location or tie to specific franchisee costs.'' The commenter recommended that the FTC ''consider revising the definition of 'Total Price' to exclude all charges that vary based on geographic region.''); FTC–2023–0064–3294 (International Franchise Association commented: ''Under the Proposed Rule, national marketing campaigns are only workable if all franchised businesses in a franchise system adhere to the same pricing regime (including pass-through fees), regardless of the economic demands of the markets in which they operate.''); FTC–2023–0064–3300 (National Restaurant Association commented: ''Like 'Shipping Charges,' delivery fees should be excluded from the 'Total Price' requirement since local or national advertising may feature the cost of the food item but cannot reasonably predict how regional market conditions will alter the price of delivery.'').

[296] *See, e.g.,* FTC–2023–0064–3233 (NCTA—The Internet & Television Association stated that the rule would interfere with ''efforts to advertise pricing nationwide or to a broad audience'' and would require impractical and technically challenging geo-targeted advertising. The commenter further stated that businesses may be incentivized to ''''advertis[e] a Total Price for a particular service option that overstates the price that most consumers would actually end up paying at their service location (*i.e.,* the Total Price would be the maximum price that any potential customer in the provider's footprint would have to pay for the service),'' which would ''confuse consumers and undermine the type of comparison-shopping the FTC is aiming to facilitate. Bundled pricing would be even more challenging to calculate and represent in advertising, given that each bundled service could have multiple different applicable taxes or surcharges.'').

[297] *Id.*

[298] *See, e.g.,* FTC–2023–0064–2919 (National Automatic Merchandising Association) (expressing concern that the rule would ban offering cash discounts); *see also,* FTC–2023–0064–3217 (Bowling Proprietors' Association of America) (stating that requiring businesses to consolidate ''diverse pricing models into a single displayed price could lead to significant consumer confusion and dissatisfaction.'').

[299] FTC–2023–0064–3263 (Flex Association commented that some fees cannot be calculated at the start of a transaction, including for discounts and special offers: ''For example, a 'two-for-one' offer cannot be activated until two eligible items are added to a shopping cart.''); FTC–2023–0064–3137 (Chamber of Progress commented that sellers may abandon discounts on bundles of goods or bulk orders, because ''the total price of each good could vary depending on the other items in the customer's cart.'').

[300] FTC–2023–0064–2887 (Progressive Policy Institute commented, ''the proposed disclosure requirements may interfere with the use of different pricing models that provide value to consumers and are the basis upon which some firms compete,'' such as unbundled pricing models when ''the total price may not be known until the consumer completes the purchase process,'' and therefore, a ''requirement to display prices before the purchase . . . may mislead consumers and distort competition.'').

[301] FTC–2023–0064–3187 (U.S. Department of Justice, Antitrust Division).

[302] *Id.*

[303] *Id.*

(f) Online Marketplaces

The rule covers sellers and online marketplace platforms or other intermediaries in the same manner as other businesses that offer covered goods or services. Various commenters, however, highlighted the challenges some businesses may face in implementing the rule if it is applied equally to all online marketplace stakeholders. The Commission's review of the comments, as discussed herein, did not identify any persuasive reason to change the rule as it applies to online marketplaces for covered goods or services.

Some commenters stated that certain businesses offering, displaying, or advertising goods and services in an online marketplace often must rely on other entities for accurate information about pricing and expressed concern about liability under the rule if they receive inaccurate pricing information. This concern arose both from intermediaries that display prices provided by sellers and from sellers who offer their goods or services through an intermediary. Intermediaries are concerned about facing liability if they post prices that are inaccurate because the seller of the good or service did not provide complete and accurate pricing information. Commenters also expressed concern about liability when sellers list their good or service for sale on a platform but are not in control of how the platform displays information about pricing.[304]

Travel Technology Association (''Travel Tech''), for instance, observed the complex and multi-layered information flow from travel service providers, such as hotels, motels, inns, vacation rentals, and other short-term lodging providers, to different types of intermediaries which operate either as business-to-business, consumer-facing, or both, and include online travel agents, metasearch engines, global distribution systems, travel management companies, short-term rental platforms, ''brick-and-mortar'' or offline travel agents, tour operators, and wholesalers.[305] Travel Tech explained that travel service providers determine the rates, terms, and mandatory fees, including resort fees, applicable to their travel services, and that only travel service providers know whether the nature and purpose of any fee they impose is accurate.[306] Travel Tech members, which consist of the aforementioned intermediaries, use the information provided to them directly from travel service providers, or indirectly through other intermediaries, to aggregate, sort, and display offers on their sites and applications, and consumers in turn use this information to compare offers and make informed choices.[307] Travel Tech and one of its members, Skyscanner, a metasearch engine, suggested that the rule should immunize intermediaries from liability if travel service providers or other upstream distributors ''fail to provide accurate, complete, and timely pricing information and such downstream [i]ntermediaries have made reasonable efforts to receive such information.''[308] Both commenters further requested that the Commission make clear that travel service providers would be engaging in an unfair or deceptive practice if they provide inaccurate, incomplete, or untimely pricing information to intermediaries or seek remuneration from intermediaries for information necessary for them to comply with any final rule.[309] Finally, Travel Tech further requested that the Commission clarify that the rule applies to any business that supplies or advertises pricing to consumers so all are held to the same standard.[310]

The American Hotel & Lodging Association, a national association representing all segments of the U.S. lodging industry, including hotel owners, beds & breakfasts, State hotel associations, and industry suppliers, also stressed that a final rule must apply broadly to all industry participants, including online travel agencies, short-term rental platforms, and metasearch sites.[311] The commenter noted that the industry broadly is moving to implement the clear publishing of total price (including all mandatory, non-government fees) for lodging, so that consumers can more easily navigate the myriad of choices they have when it comes to places to stay.[312]

The Commission declines to adopt blanket immunity from the rule for intermediaries that depend on providers of live-event tickets and short-term lodging for accurate pricing information. The Commission, clarifies, however, that the final rule applies to business-to-business (''B2B'') transactions as well as business-to-consumer transactions. Businesses such as travel service providers that sell or advertise through intermediaries must provide such entities with accurate pricing information (including about total price, as well as mandatory and optional fees). Platforms and other intermediaries that offer, display, or advertise covered goods or services and ancillary goods or services or allow third party sellers to do so must disclose the total price of the goods and services, including all mandatory and optional fees and, if applicable, provide third-party sellers with all necessary information to calculate the total price. The rule's coverage of B2B transactions in this manner protects not only individual consumers from hidden and misleading fees, but also businesses.

The Commission also notes that at least one commenter, the International Franchise Association, argued that the rule should exempt B2B transactions, without providing any compelling justification for why bait-and-switch pricing, including drip pricing, and the misrepresentation of fees and charges should be allowed in transactions involving businesses.[313] This commenter noted that, for example, ''[f]ranchised hotels advertise large event spaces for consumers' weddings and business conventions'' and the rule ''could be applied against these businesses if they fail to display total price even though no *consumer* is ever misled or deceived.''[314] The prohibition in section 5 of the FTC Act against unfair or deceptive acts or practices does not include any limitation on the ''consumers'' who can be injured. Relying on this authority, the Commission has long interpreted the FTC Act to apply to cases where the harmed consumers are businesses, particularly small- and medium-sized businesses.[315]

[304] *See, e.g.,* FTC–2023–0064–3258 (National Taxpayers Union Foundation stated that Total Price may be difficult or impossible to implement with third-party marketplaces because ''while the platform may control the display of prices, it is sellers and not the platform that sets [sic] the prices.''); FTC–2023–0064–3293 (Travel Technology Association stated that intermediaries may be ''similarly situated to consumers in that they are also dependent on Travel Service Providers such as hotels to provide accurate, complete, and timely information before booking.''); FTC–2023–0064–3262 (Skyscanner Ltd. highlighted ''the numerous and complex ways in which metasearch sites receive pricing information directly from hotels and other short-term lodging providers'').

[305] FTC–2023–0064–3293 (Travel Technology Association).

[306] *Id.*

[307] *Id.*

[308] FTC–2023–0064–3293 (Travel Technology Association); FTC–2023–0064–3262 (Skyscanner Limited).

[309] *Id.*

[310] FTC–2023–0064–3293 (Travel Technology Association).

[311] FTC–2023–0064–3094 (American Hotel & Lodging Association).

[312] *Id.*

[313] FTC–2023–0064–3294 (International Franchise Association).

[314] *Id.*

[315] *See, e.g.,* Complaint ¶¶ 1–7, 13–87, *FTC* v. *Arise Virtual Solutions, Inc.,* No. 24–cv–61152 (S.D. Fla. July 2, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/arise_complaint.pdf* (alleging

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The Commission clarifies that it does not intend to treat intermediaries as the publisher or speaker of information about pricing or as controlling the manner of its display where the intermediary is not responsible, in whole or in part, for such content or display.[316] However, if intermediaries are responsible, in whole or in part, for offering, displaying, or advertising any price, including any portion thereof, of a covered good or service, then within the scope of that responsibility, they must give sellers the information necessary to calculate total price and, when uniquely situated to do so, such intermediaries must ensure that they display total price. For example, if an intermediary charges a fee for access to its platform and the seller passes the fee through to consumers, the intermediary must provide the seller with accurate information about the fee's amount so the seller can accurately calculate total price, or otherwise ensure that the total price is displayed. Travel service providers and other sellers, by the same token, must provide intermediaries with accurate price information.

Whether an intermediary, seller, or other business is responsible for offering, displaying, or advertising a price of a covered good or service, may be a fact- and law-specific determination in which the Commission can consider issues of participation in, and control of, unfair or deceptive practices, as well as contractual obligations between sellers and platforms and other intermediaries, and the applicability of other Federal laws. The Commission will consider issuing and updating business guidance to address particular or nuanced scenarios, as it has done as a complement to other rulemakings.[317]

2. § 464.2(b)

Proposed § 464.2(b) in the NPRM required businesses to display total price more prominently than any other pricing information in any offer, display, or advertisement that contains an amount a consumer may pay. Following review of the comments, the Commission finalizes § 464.2(b) with three modifications. First, as already discussed in this section, the Commission limits the requirements of § 464.2, including § 464.2(b), to covered goods or services. Second, as discussed in section III.B.1, the Commission narrows the disclosure trigger in § 464.2(a) and (b) to ''an offer, display, or advertisement that represents any price of a covered good or service.'' Third, as discussed herein, final § 464.2(b) clarifies the prominence requirement with respect to the final amount of payment for a transaction. Final § 464.2(b) thus provides that, in any offer, display, or advertisement that represents any price of a covered good or service, a business must disclose the total price more prominently than any other pricing information. However, where the final amount of payment for the transaction is displayed, the final amount of payment must be disclosed more prominently than, or as prominently as, the total price.

Various commenters voiced support for proposed § 464.2(b)'s requirement that total price must be displayed more prominently than other pricing information.[318] Certain commenters stated that the prominence requirement will prevent consumer confusion as to the true price of a good or service.[319] Some commenters suggested strengthening the prominence requirement or adding guidance about it.[320] Other commenters also suggested clarifying that the phrase ''an amount a consumer may pay'' refers only to truly mandatory ancillary goods or services.[321] On the other hand, some

defendants made misleading and unsubstantiated earnings claims in selling its Arise business opportunity to gig worker consumers seeking to work from home in customer service and failed to provide the disclosures required by the Business Opportunity Rule); Complaint ¶¶ 7–51, *In re Amazon.com, Inc.,* 171 F.T.C. 860, 861–71 (2021), *https://www.ftc.gov/system/files/ftc_gov/pdf/DV171.pdf* (alleging defendants deceptively claimed they would give their Amazon Flex drivers 100% of consumer tips when in fact they withheld nearly a third of the tips from their drivers); Complaint ¶¶ 13–65, *FTC* v. *First American Payment Systems, LLC,* No. 4:22–cv–00654 (E.D. TX July 29, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/Complaint%20%28file%20stamped%29_0.pdf* (alleging defendants made false claims about their payment processing services, including about total monthly fees, savings opportunities, and the ease of cancelling automatically-renewing accounts, to small business consumers such as restaurants, nail salons, or small retail businesses); Complaint ¶¶ 12–50, *FTC* v. *Yellowstone Capital LLC,* No. 1:20–cv–06023 (S.D.N.Y. Aug. 3, 2020), *https://www.ftc.gov/system/files/documents/cases/1823202yellowstonecomplaint.pdf* (alleging defendants engaged in a pattern of deceptive and unfair conduct involving their ''merchant cash advances'' to small business consumers and made excess, unauthorized withdrawals from consumers' accounts after consumers already repaid the full amount they owed); Complaint ¶¶ 9–104, *FTC* v. *Fleetcor Technologies, Inc.,* No. 1:19–cv–05727–ELR (N.D. Ga. December 20, 2019), *https://www.ftc.gov/system/files/documents/cases/fleetcor_complaint_with_exhibits_002.pdf* (alleging defendants marketed fuel cards to business consumers that operate vehicle fleets, including many small businesses and made false claims about the fuel card's savings, fraud controls, and lack of set-up, transaction, and membership fees, instead charging these businesses hundreds of millions of dollars in unexpected fees); *see also* Fed. Trade Comm'n, *Policy Statement on Enforcement Related to Gig Work* (2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf* (noting that protecting gig workers ''from unfair, deceptive, and anticompetitive practices is a priority,'' and the FTC ''will use its full authority to do so'').

[316] *See, e.g.,* FTC–2023–0064–3202 (TechNet stated: ''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.'').

[317] *See, e.g.,* Fed. Trade Comm'n, Bureau of Consumer Protection Business Guidance, *FTC Safeguards Rule: What Your Business Needs to Know* (May 2022), *https://www.ftc.gov/business-guidance/resources/ftc-safeguards-rule-what-your-business-needs-know*; Fed. Trade Comm'n, Bureau of Consumer Protection Business Guidance, *FAQs: Complying with the Contact Lens Rule* (June 2020), *https://www.ftc.gov/business-guidance/resources/faqs-complying-contact-lens-rule*; Fed. Trade Comm'n, Bureau of Consumer Protection Business Guidance, *Complying with the Funeral Rule* (Aug. 2012), *https://www.ftc.gov/business-guidance/resources/complying-funeral-rule.*

[318] *See, e.g.,* FTC–2023–0064–3266 (StubHub, Inc. agreed with the FTC's proposal to require Total Price in every offer, display, or advertisement presented to consumers and that Total Price must be consistently displayed throughout the transaction); FTC–2023–0064–3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America supported ''requir[ing] the first price for a live-event ticket shown to consumers to be the price ultimately charged at checkout (exclusive of state and local taxes and optional add-ons). This price should be clearly displayed on the initial landing page and easily discernible.'' The commenter proposed adding the phrase, ''from the first instance a consumer sees a price for a good or service'' to the end of proposed § 464.2(a) and moving the phrase, ''as soon as pricing information is provided to the consumer'' before ''more prominently than any other Pricing Information'' in proposed § 464.2(b).); FTC–2023–0064–3290 (U.S. Public Interest Research Group Education Fund commented: ''[T]he Total Price should be provided first and with the most prominence. Businesses must not be allowed to confuse consumers with a barrage of numbers.''); FTC–2023–0064–1939 (Tzedek DC).

[319] *See, e.g.,* FTC–2023–0064–3290 (U.S. Public Interest Research Group Education Fund); FTC–2023–0064–1939 (Tzedek DC commented that proposed § 464.2(b) ''will prevent companies from hiding the real cost of goods and services in fine print or making the total cost difficult to find.'').

[320] *See, e.g.,* FTC–2023–0064–3196 (South Carolina Department of Consumer Affairs commented: ''Guidance on how the business can simultaneously comply with the 'Clearly and Conspicuously' requirement and the prominence requirement may help with business comprehension and compliance.'' The commenter suggested adding ''a definition addressing the different mediums by which the offer, display or advertisement may be relayed to a consumer (visual, audio, print, online)'' and providing ''examples of compliance with the requirement of prominent display'' such as ''in a visual disclosure presentation of the Total Price in bolded typeface at least two points larger than any other Pricing Information or 14-point font, whichever is larger, satisfies the prominence requirement.'').

[321] *See, e.g.,* FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al. suggested modifying proposed § 464.2(b) to include: ''[A] Business must not automatically include Ancillary Goods or Services in the Total Price or automatically select Ancillary Goods or Services for purchase on behalf of the consumer.''); FTC–2023–0064–3160 (Consumer Federation of America et al. made a similar suggestion and stated it would ''ensure that 'must pay' is interpreted to include

industry commenters stated that the prominence requirement may have unintended consequences that could harm consumers, such as consumers not noticing an offered discount or a business deciding not to provide any pricing information.[322] As noted in section III.B.1.e, nothing in the rule prohibits a business from adjusting total price to account for any applied discounts or other promotional pricing and, given strong market incentives, the Commission disagrees with comments that the rule's prohibitions against hidden and misleading fees will deter businesses from advertising prices.[323]

Final § 464.2(b) also clarifies how the prominence requirement applies to the final amount of payment for a transaction. The Commission recognizes that the final amount of payment, now an explicitly required disclosure under final § 464.2(c), may differ from total price due to various factors, such as the exclusion from total price of certain fees or charges, including for any optional ancillary good or service, or the application of promotional pricing models. The Commission determines that both total price and the final amount of payment are material to consumers. The Commission therefore clarifies that, when the final amount of payment is displayed, it must be displayed as prominently as, or more prominently than, total price. The modification avoids a potential unintended consequence of the rule, which may have been read to require total price to obscure the final amount of payment.

The Commission determines that, with these modifications, § 464.2(b)'s prominence requirement is clear, understandable, and unambiguous.

3. § 464.2(c)

In final § 464.2, the Commission consolidates all proposed disclosure requirements; therefore, proposed § 464.3(b) is codified at final § 464.2(c). Proposed § 464.3(b) would have required businesses to disclose clearly and conspicuously, before the consumer consents to pay, the nature and purpose of any amount a consumer may pay that is excluded from total price, including the fee's refundability and the identity of the good or service for which the fee is charged. Final § 464.2(c) largely adopts the disclosure requirements of proposed § 464.3(b), with certain modifications. Specifically, final § 464.2(c) requires businesses to disclose clearly and conspicuously, before the consumer consents to pay for any covered good or service: The nature, purpose, and amount of any fee or charge imposed on the transaction that has been excluded from total price and the identity of the good or service for which the fee or charge is imposed, but not the fee's refundability; and the final amount of payment for the transaction.

The Commission makes these modifications, as discussed herein, in response to the comments and to address related concerns. One commenter recommended that the Commission provide greater specificity about which fees excluded from total price must be disclosed under this provision, and require the itemized disclosure of such fees.[324] Some commenters argued that the provision was vague and overbroad, and that its application to ''any amount a consumer may pay'' would make complying with the provision impracticable and result in excessive disclosures that would confuse consumers into believing that all disclosed fees apply to them when they might not.[325] One commenter recommended that the rule allow the required disclosures to be made at the time goods or services are selected.[326] Commenters argued that requiring businesses to explain how fees will be used is not reasonable and may require the disclosure of confidential, proprietary, or commercially sensitive information, such as the business rationale for imposing fees and the specific uses to which businesses put fees.[327] Other commenters recommended that the rule require the disclosure of the optional nature of optional fees[328] and regulate opt-in and opt-out procedures for fees.[329]

The Commission modifies the NPRM proposal so that final § 464.2(c) requires businesses to disclose separately the amount, as well as the nature and purpose, of each fee or charge imposed on the transaction for the covered good or service that is excluded from total price, and the final amount of payment, before the consumer consents to pay. The Commission determines that these modifications are necessary for price transparency and to protect consumers who would reasonably expect to know the nature, purpose, and amount of fees they will have to pay, as well as the

any fee or charge that is included by default and that the consumer must pay unless they take affirmative action to opt-out or avoid it.'' The commenter proposed adding guidance that: ''A consumer must pay a fee or charge if the fee or charge is not reasonably avoidable or if the consumer must pay the fee or charge unless they take affirmative action to avoid it. An ancillary good or service is mandatory if a reasonable consumer would expect the good or service to be included with the purchase.'').

[322] *See, e.g.,* FTC–2023–0064–3293 (Travel Technology Association commented that if Total Price is ''clearly and conspicuously'' displayed, a prominence requirement is unnecessary and ''discounts would have to be less prominent than the Total Price, potentially leading to a consumer missing out on a deal that may have saved them money or led to a more enjoyable vacation.'' The commenter suggested that the rule be more flexible ''so that Intermediaries can use their expertise to relay the most appropriate information to consumers.''); FTC–2023–0064–3296 (Bay Area Apartment Association commented that the prominence requirement could have a ''chilling effect on the content of commercial speech,'' with some rental housing providers choosing ''not to include pricing information in their advertisements, and instead invite prospective residents to learn about pricing on their website or to call their leasing office,'' thereby ''undermining a key objective (better consumer awareness of the price of goods and service[s]) the rule is intended to accomplish.'').

[323] *See also Bates* v. *State Bar of Ariz.,* 433 U.S. 350, 383–84 (1977) (''Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech.'') (citing *Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 771–772, 771 n. 24 (1976)).

[324] FTC–2023–0064–3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher).

[325] *See, e.g.,* FTC–2023–0064–3094 (American Hotel & Lodging Association asserted: ''The language of the proposed rule is vague, overbroad, and not sufficiently specific to provide notice of what types of fees businesses are required to display . . . . Businesses could reasonably differ in their approaches to disclosing the 'nature and purpose' or 'identity' of such fees.''); FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association commented that disclosing the nature and purpose of fees is ''impracticable'' and requiring rental housing providers to furnish prospective tenants ''with any fee or charge excluded from the total price that the customer may (or may not) have to pay at some point during the lease practically means housing providers will need to disclose all possible fees.''); FTC–2023–0064–3263 (Flex Association asserted that the ''requirement to disclose the 'nature and purpose' of a fee is vague'' and ''provide[s] no material benefit to consumers.''); *see also,* FTC–2023–0064–2981 (Apartment & Office Building Association of Metropolitan Washington); FTC–2023–0064–3042 (Nevada State Apartment Association); FTC–2023–0064–3044 (San Angelo Apartment Association); FTC–2023–0064–3045 (Chicagoland Apartment Association); FTC–2023–0064–3111 (Houston Apartment Association); FTC–2023–0064–3116 (Manufactured Housing Institute); FTC–2023–0064–3233 (NCTA—The internet & Television Association); FTC–2023–0064–3296 (Bay Area Apartment Association); FTC–2023–0064–3311 (Greater Cincinnati Northern Kentucky Apartment Association).

[326] FTC–2023–0064–3094 (American Hotel & Lodging Association).

[327] *See, e.g.,* FTC–2023–0064–1425 (Iowa Bankers Association); FTC–2023–0064–3263 (Flex Association asserted that ''[i]t appears that the Commission seeks to require disclosure of the business rationale for imposing a fee and the specific uses to which proceeds of a given fee will go,'' which would require businesses to ''divulge commercially sensitive information that could seriously alter competition in a given marketplace.'').

[328] *See, e.g.,* FTC–2023–0064–2888 (Housing Policy Clinic, University of Texas School of Law).

[329] *See, e.g., Id.;* FTC–2023–0064–2883 (District of Columbia, Office of the People's Counsel); FTC–2023–0064–3146 (Institute for Policy Integrity, New York University School of Law).

final amount of payment, before they consent to pay.

To provide clarification and address commenter concerns about potential overbreadth and vagueness, the Commission narrows the NPRM proposal so that final § 464.2(c) requires the disclosures in connection with ''any fee or charge imposed on the transaction that has been excluded from total price'' instead of ''any amount a consumer may pay.'' The provision therefore requires the disclosure, before the consumer consents to pay, of the nature, purpose, and amount of government charges, shipping charges, and any other fee or charge, such as for optional ancillary goods or services, that permissibly were excluded from total price but are being imposed on the transaction.

Final § 464.2(c) also explicitly requires disclosure of ''the final amount of payment for the transaction,'' as that amount may differ from total price due to, for example, the application of promotional pricing or the addition of any fees or charges permissibly excluded from total price, including for any optional ancillary goods or services. Where the final amount of payment is displayed, as discussed in section III.B.2, final § 464.2(b) requires it to be at least as prominent as, or more prominent than, total price.

In most instances, the disclosure about the nature, purpose, and amount of the excluded charge or fee will be minimal. For example, using the defined term ''shipping charges'' is likely to convey the nature and purpose of such charges. For government charges, a phrase like ''sales tax'' or ''hotel occupancy tax'' would convey the nature and purpose of an imposed sales tax or hotel occupancy tax. Similarly, in most instances, simply identifying the ancillary good or service for which a charge applies, such as ''valet parking,'' will sufficiently convey the nature and purpose of the charge.

Some commenters observed that the timing of ''before the consumer consents to pay'' is unclear. One commenter cautioned that the language of the rule may open the door to the types of bait-and-switch pricing that the total price disclosure requirement is meant to prevent.[330] Other commenters recommended that the Commission clarify the meaning of the phrase ''before the consumer consents to pay'' and the timing of the required disclosures, for example, by specifying that it means before businesses obtain consumers' billing information.[331]

The Commission clarifies that, although when a consumer consents to pay may depend on the facts and circumstances surrounding the transaction, § 464.2(c) requires businesses to clearly and conspicuously disclose the nature, purpose, and amount of any fees or charges imposed on the transaction that have been excluded from total price and the identity of the good or service for which the fee or charge is imposed, as well as the final amount of payment for the transaction, before consumers are required to pay cash or provide their payment information. The Commission notes that a default setting that automatically opts-in consumers to pay for goods or services does not constitute consent to pay nor does it satisfy § 464.2(c)'s disclosure requirements.

As part of final § 464.2(c), the Commission does not adopt the NPRM's proposed requirement to affirmatively disclose each fee's refundability. The Commission determines that requiring clear and conspicuous disclosure of each fee's refundability may be impractical for businesses and confusing to consumers due to extensive qualifications or other requirements for refunds. Such extensive, itemized disclosures may impede the Commission's goal of ensuring consumers receive clear and accurate pricing information. However, the Commission finalizes § 464.3's prohibition on misrepresenting a fee's refundability.

C. § 464.3 Misleading Fees Prohibited

Both practices that the Commission identified in the NPRM as unfair or deceptive involve misleading practices: (1) bait-and-switch pricing that hides the total price of goods or services by omitting mandatory fees from advertised prices, including through drip pricing, and (2) misrepresenting the nature, purpose, amount, and refundability of fees or charges. Proposed § 464.3(a) would have prohibited any business from misrepresenting the nature and purpose of any amount a consumer may pay, including the refundability of such fees and the identity of any good or service for which fees are charged.[332]

The Commission finalizes proposed § 464.3(a) in § 464.3 with some modifications. Specifically, final § 464.3 prohibits any business, in any offer, display, or advertisement for a covered good or service, from misrepresenting any fee or charge, including its nature, purpose, amount or refundability, and the identity of the good or service for which it is imposed. The Commission adds the phrase ''covered goods or services'' to reflect the narrower scope of the final rule. The Commission also adds ''amount'' to ''nature'' and ''purpose,'' and clarifies that the prohibited misrepresentations concern ''any fee or charge'' instead of ''any amount a consumer may pay.'' This modified provision makes plain that, in connection with covered goods or services, businesses cannot misrepresent the nature, purpose, amount, or refundability of any fee or charge, including government charges, shipping charges, any fees or charges for optional ancillary goods or services, or any mandatory fees or charges. In making these modifications, the Commission has considered recommendations and alternatives suggested in NPRM comments, discussed herein.

The Commission noted in the NPRM that it had received comments in response to the ANPR stating that sellers often misrepresent the nature or purpose of fees, leaving consumers wondering what they are paying for, believing fees are arbitrary, or concerned that they are getting nothing for the fees charged. The Commission received similar comments in response to the NPRM.

The Attorneys General of nineteen States and the District of Columbia commented that fee misrepresentations ''mislead consumers and make it more difficult for truthful businesses to compete on price.'' [333] Commenters supported prohibiting fee misrepresentations because truthful information benefits both consumers and businesses.[334] A commenter

[330] FTC–2023–0064–3160 (Consumer Federation of America et al.).

[331] *See, e.g.,* FTC–2023–0064–3160 (Consumer Federation of America et al.); FTC–2023–0064–3146 (Institute for Policy Integrity, New York University School of Law); FTC–2023–0064–3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher); FTC–2023–0064–3191 (Community Catalyst et al.).

[332] As noted *supra* section III.B, the Commission redesignates proposed § 464.3(b) as final § 464.2(c) to consolidate all provisions related to disclosures in final § 464.2.

[333] FTC–2023–0064–3215 (Attorneys General of the States of North Carolina and Pennsylvania, along with Attorneys General of the States or Territories of Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Michigan, Minnesota, New Jersey, New York, Oklahoma, Oregon, Vermont, Washington, and Wisconsin stated: ''[C]harges that misrepresent their nature and purpose are unfair and deceptive because they mislead consumers and make it more difficult for truthful businesses to compete on price.'' The Attorneys General asserted that ''this provision is another straightforward, commonsense approach that should not significantly burden businesses.'').

[334] *See, e.g.,* FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al. asserted: ''Prohibiting misrepresentation of the

recommended that the Commission clarify that the provision includes misrepresentations about fees included in total price and fees excluded from total price.[335]

Commenters stated that businesses misrepresent fees by using language that is vague and not understandable to consumers,[336] and provided examples of various types of misrepresentations about the nature and purpose of fees, such as ''service'' fees that may not go to service employees, ''environmental'' fees that may not have an environmental purpose, ''resort'' fees for ordinary accommodations or amenities,[337] and fees misrepresented as government charges.[338] Commenters also stated that businesses may misrepresent the mandatory or optional nature of fees, or their amount, and recommended that the Commission clarify that prohibiting misrepresentations about the nature and purpose of fees includes misrepresentations about their mandatory or optional nature.[339] Another commenter argued that businesses can misrepresent fees when they itemize mandatory fees that are arbitrary and are not for identified goods or services, and recommended that the Commission clarify that businesses must have adequate substantiation for itemized fees.[340] Commenters also argued that businesses misrepresent fees when they do not provide the goods or services for which fees are charged or provide nothing of value,[341] and when fees fail to reflect the cost of the goods or services provided.[342]

The American Hotel & Lodging Association and other commenters described the misleading fees provision as unnecessary given the Commission's existing authority under section 5 of the FTC Act to police misleading fees.[343] It is true that section 5, which prohibits unfair or deceptive practices, has long been used to protect against misrepresentations regarding material terms of a transaction, including price. False claims about fees or charges, as well as those claims that lack a reasonable basis, are inherently likely to mislead. However, the Commission disagrees with commenters' contentions that the rule's prohibitions on misrepresentations are unnecessary given the existing section 5 authority. As explained in section V, the final rule is necessary to: (1) ensure all businesses offering covered goods or services are held to the same standard so that consumers can effectively comparison shop; (2) level the playing field for these businesses so that they can compete based on truthful pricing information; and (3) increase deterrence by allowing courts to impose civil penalties and enabling the Commission to more readily obtain redress and damages for consumers through section 19(b) of the FTC Act. As it has become increasingly common for businesses offering covered goods or services to charge or itemize discrete fees over the course of a transaction, a specific prohibition on pricing misrepresentations is necessary to ensure consumers receive truthful information about the charges and fees they incur, and businesses are able to compete based on truthful information.[344]

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identity and nature of fees further serves the Commission's mandate to promote fair business practices and competition.''); FTC–2023–0064–2892 (Community Legal Services of Philadelphia stated that the rule's ''prohibition on misrepresentation regarding the nature and cost of fees would also be extremely beneficial for low-income renters, who often face inflated fees that can contribute to housing insecurity.''); FTC–2023–0064–3268 (Housing and Eviction Defense Clinic, University of Connecticut School of Law stated: ''Prohibiting misleading fees will not only properly inform the tenants of the charges but also hold the landlords accountable for their fees.'').

[335] FTC–2023–0064–3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher stated that § 464.3(a) should make clear that it prohibits misrepresentations regarding any amount included in Total Price as well as any other fee or charge the consumer may pay, including ''Shipping Charges, Government Charges, fines, penalties, optional charges, voluntary gratuities, and invitations to tip,'' and proposed adding specific text to that effect.).

[336] *See, e.g.,* FTC–2023–0064–3268 (Housing & Eviction Defense Clinic, University of Connecticut School of Law stated that rental fees may be ''for something the landlord/property manager cannot explain.''); FTC–2023–0064–3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher stated the rule should clarify that descriptions of fees which are not understandable to reasonable consumers misrepresent their nature and purpose.); FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al. cited research showing that ''many businesses characterize their hidden and unexpected fees using vague or anodyne language that fails to succinctly explain to the consumer exactly what the fee is for.'').

[337] *See, e.g.,* FTC–2023–0064–1939 (Tzedek DC expressed support for the misleading fees provision because it ''will prevent companies from making misleading claims about a fee, in example, a company charging a 'staff service fee' that does not go to employees.''); FTC–2023–0064–3106 (American Society of Travel Advisors noted: ''While admittedly there is no universally accepted industry definition of what constitutes a 'resort,' hotels offering only typical or ordinary accommodations and/or amenities but nevertheless characteriz[ing] their fees as such misrepresent the nature of the property being booked.''); FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al. identified ''environmental fees'' as one example of fees that may ''serve[ ] no apparent environmental sustainability or conservation purpose.'').

[338] *See, e.g.,* FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al. stated that ''environmental'' fees ''are likely designed to trick consumers into thinking that the added cost is either a government-imposed tax to protect the environment, or a salutary contribution to somehow 'offset' any negative environmental impact caused by the good or service'' when they may be ''charged simply to boost a business's profits.''); FTC–2023–0064–3106 (American Society of Travel Advisors noted that ''use of terms such as 'destination fee' . . . will inevitably mislead many consumers into mistakenly believing that it represents a tax or government surcharge that must be collected from the consumer and passed on to a local jurisdiction.'').

[339] *See, e.g.,* FTC–2023–0064–3275 (Berkeley Center for Consumer Law & Economic Justice et al. argued that the rule could be strengthened by clarifying that the misleading fees provision applies to mandatory and optional fees.); FTC–2023–0064–3160 (Consumer Federation of America et al. stated that the FTC should make clear that the misleading fees provision applies to mandatory and optional fees.).

[340] FTC–2023–0064–3212 (TickPick, LLC argued: ''Due to the arbitrary nature of the components that make up the Total Price of a ticket, any secondary ticketing marketplace that itemizes mandatory fees and charges is arguably misrepresenting the 'nature and purpose of any amount a consumer may pay.' '' The commenter proposed that the Commission ''define any breakdown of the amounts that a consumer may pay as a representation that requires adequate substantiation.'').

[341] *See, e.g.,* FTC–2023–0064–3102 (Corporation for Supportive Housing noted that landlords and property managers may collect ''fees for services that were not performed (*e.g.,* running a background check, credit check), [and] charg[e] fees in excess of the actual amount to perform the service/run the check to generate profit.''); FTC–2023–0064–3278 (Southeast Louisiana Legal Services noted that low-income renters face unfair and deceptive fees during residential leases that are ''frequently for services not rendered.'' The commenter further noted: ''Without any restrictions on hidden or misleading fees, landlords are free to use rental applications as an independent source of profit for which there may be no real service provided.''); FTC–2023–0064–1431 (McPherson Housing Coalition stated that rental housing applicants who pay application fees and do not get approved lose their money.); FTC–2023–0064–2862 (Legal Aid Foundation of Los Angeles gave as examples of misleading fees a repairs fee when the landlord is legally obligated to provide the repairs and a parking fee when the tenant does not have or park a car.); FTC–2023–0064–2920 (Colorado Poverty Law Clinic stated, ''we often see fees added for services that the tenant does not receive, or that are basic services that should only reasonably be included in the tenant's monthly rent,'' such as for common area maintenance or utilities.); FTC–2023–0064–3242 (William E. Morris Institute for Justice expressed concern that ''housing providers and landlords are charging junk fees untethered to any real cost or business expense . . . or to any value or benefit delivered to rental housing applicants.'').

[342] *See, e.g.,* FTC–2023–0064–3106 (American Society of Travel Advisors noted that ''even where use of the term 'resort' to describe the property may be warranted, often the amount of the fee collected appears arbitrary and bears no relationship to the value of the services purportedly being provided.''); FTC–2023–0064–3278 (Southeast Louisiana Legal Services commented that rental housing providers charge misleading fees when ''they do not appear to correspond to the cost of service provided'' or are vaguely identified, such as an ''administrative fee'' that causes ''confusion for tenants who believe it to be a security deposit.''); FTC–2023–0064–3253 (Fortune Society commented that ''application fees often do not reflect the actual costs of submitting a rental application.'').

[343] *See, e.g.,* FTC–2023–0064–3094 (American Hotel & Lodging Association).

[344] Given the prevalence of the defined unfair or deceptive practices regarding the misrepresentation

Continued

Other commenters described the misrepresentations provision as vague and overbroad.[345] The Commission carefully considered comments that suggested the language proposed in the NPRM prohibiting misrepresentations lacked specificity and was vague or overbroad, particularly the phrase ''any amount a consumer may pay.'' In final § 464.3, the Commission modifies the NPRM proposal to replace ''any amount a consumer may pay'' with a reference to ''any fee or charge.'' In the NPRM, the Commission stated that ''[o]ther characteristics included in the nature and purpose of a charge, such as the amount of the charge and whether it is refundable, are also material.'' [346] To elaborate on this point in the final rule text, the Commission specifies that the ''amount'' of any fee or charge cannot be misrepresented. Taken together, these modifications provide clarity to businesses that they cannot misrepresent the nature, purpose, amount, or refundability of any fee or charge excluded from total price, including government charges, shipping charges, any fees or charges for optional ancillary goods or services, or any other itemized or totaled fee or charge, including total price and the final amount of payment.

Final § 464.3 prohibits misrepresentations about material pricing terms of a transaction. The nature, purpose, amount, and refundability of fees or charges and the identity of the good or service for which they are imposed are material characteristics that affect the value to consumers of the covered goods or services being offered and businesses' ability to compete on price. As the Commission noted in the NPRM, whether a consumer is required to pay a charge, the amount of the charge, and what goods or services they will receive in exchange for the charge, is necessarily material information that affects a consumer's choice about whether to consent to a charge.[347] Other characteristics included in the nature, purpose, and amount of a charge, such as whether it is refundable, are also material.

Under final § 464.3, businesses cannot misrepresent the nature, purpose, amount, or refundability of fees or charges and the identity of the goods or services for which they are imposed.[348] For example, it would be a misrepresentation to characterize fees as mandatory when they are optional, or to characterize fees as optional when they are mandatory or consumers are automatically opted-in to pay them.[349] Representations that fees are for identified goods or services when those goods or services are not provided would also be a misrepresentation. Further, although the rule does not govern how businesses set their prices, if a business represents that it is charging a fee for a specific good or service, but the amount of the fee does not reflect the cost of that good or service, that may be evidence that the business has misrepresented the nature or purpose of the fee.

Misrepresentations can result from failing to disclose material conditions or limitations relating to fees and charges, for example, material conditions or limitations that would affect consumers' ability to purchase covered goods or services at advertised prices.[350] Describing a good or service as fully refundable without disclosing material limitations on refundability (*e.g.,* refunds are only accepted for a specified amount of time) would also be misleading.

The American Hotel & Lodging Association expressed the concern that businesses may use inconsistent descriptions of similar fees and confuse consumers in disclosing the nature and purpose of fees or the identity of the goods or services for which fees are imposed.[351] Using vague language or fee descriptions (*e.g.,* unspecified service or convenience fees) that do not accurately inform consumers of the nature or purpose of fees or charges or the identity of the good or service for which the fee or charge is imposed misrepresents those fees. In addition, it would be misleading if a business conflates fees so that consumers are unable to determine their nature, purpose, or the identity of the goods or services for which the fees are charged. Whether fee descriptions are adequate to avoid misrepresenting their nature, purpose, or the identity of goods or services for which they are charged will be case specific and may depend on the context.

Another commenter argued that the rule would unfairly hold online travel agencies and other intermediaries liable for fee misrepresentations when only travel service providers can know whether representations about the nature and purpose of fees are accurate.[352] As discussed in section III.B.1.f, complying with the rule would require businesses that sell or advertise covered goods or services through platforms to provide the platforms with accurate pricing information. Contractual relationships and the rule's application to B2B transactions should ensure that businesses that rely on other parties for pricing information receive accurate pricing information.

One commenter argued that charging consumers for ''speculative tickets'' in the live-event sector is deceptive because it is tantamount to ''charging consumers for something that doesn't exist,'' and suggested the rule should ''prohibit sellers or resellers from charging the consumer for buying something the seller doesn't own, or that does not even exist.'' [353] The

of total costs and the nature and purpose of fees, the Commission finds that it is necessary to require both affirmative disclosures and a prohibition of misrepresentations, instead of limiting the rule to prohibiting misrepresentations. *See supra* Parts II.A and II.B.

[345] *See, e.g.,* FTC–2023–0064–3094 (American Hotel & Lodging Association); FTC–2023–0064–3206 (Motor Vehicle Protection Products Association et al.).

[346] NPRM, 88 FR 77434.

[347] NPRM, 88 FR 77432; *Deception Policy Statement,* 103 F.T.C. 110, 175, 182–183, 183 n.55 (listing, respectively, ''misleading price claims'' among those that the FTC has found to be deceptive, and claims or omissions involving cost among those that are presumptively material); *see also FTC* v. *FleetCor Techs, Inc.,* 620 F. Supp. 3d 1268, 1303–04 (N.D. Ga. 2022) (finding that representations about transaction fees and discounts were material).

[348] As the Commission noted in the NPRM, if a delivery application includes an invitation to tip a delivery driver without disclosing that a portion of the tip is allocated to offset the delivery driver's base wages or benefits, it would violate § 464.3 in addition to other laws or regulations relating to the distribution of tips. *See* Complaint ¶¶ 50–51, *In re Amazon.com, Inc.* (''*Amazon Flex*''), No. C–4746 (FTC June 9, 2021) (alleging respondents falsely represented that 100% of tips would go to the driver in addition to the pay respondents offered drivers).

[349] *See* discussion of optional and mandatory fees *supra* Parts III.A.1 and III.A.8.a; *see also, e.g.,* Fed. Trade Comm'n, *Bringing Dark Patterns to Light: Staff Report* 9, 15, 15 n.122, 22 (stating ''companies must not mislead consumers to believe that fees are mandatory when they are not'' and describing the use of pre-selected checkboxes as a dark pattern that tricks consumers into buying unwanted goods and services) (Sept. 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf*; Stipulated Order for Permanent Injunction, Monetary Judgment, and Other Relief as to Defendants Rhinelander Auto Grp. LLC, et al., *FTC* v. *Rhinelander Auto Ctr., Inc.,* No. 3:23–cv–00737–wmc (W.D. Wis. Nov. 6, 2023) (settling allegations that defendants misrepresented that consumers were required to purchase add-on products to purchase, lease, or finance a vehicle and, among other provisions, enjoining defendants from misrepresenting whether charges, products, or services are optional or required), *https://www.ftc.gov/system/files/ftc_gov/pdf/18-ConsentJudgmentEnteredastoRAGRMGandTowne.pdf.*

[350] *See, e.g.,* cases cited *supra* note 111.

[351] FTC–2023–0064–3094 (American Hotel & Lodging Association).

[352] FTC–2023–0064–3293 (Travel Technology Association).

[353] FTC–2023–0064–3108 (Christian L. Castle, Esq.; Mala Sharma, President, Georgia Music Partners; and Dr. David C. Lowery, founder of musical groups Cracker and Camper Van

Commission notes that the final rule does not directly address the sale of speculative tickets. However, a business that represents that tickets are in fact available when they are not may violate §§ 464.2(c) and 464.3 by failing to disclose clearly and conspicuously, and by misrepresenting, the identity of the good or service for which fees or charges are imposed.

Commenters opposed the misrepresentation provision in the context of negotiated contracts because negotiations arguably allow consumers to seek clarification about fees.[354] The Commission, however, has not identified any justification for excluding contracts from the misleading fees provision. Truthful fee disclosures in contract negotiations are material to consumers. One commenter recommended providing a safe harbor from the misleading fees provision if businesses clearly and conspicuously disclose fees and make either no statement or an accurate statement about the nature and purpose of fees.[355] The Commission declines to grant a safe harbor from the misleading fees provision when businesses make affirmative disclosures. Whether disclosures are adequate, clear and conspicuous, and not misleading are issues that may depend on the specific facts and circumstances of the transaction.

The NPRM identified and sought comment on the proposed rule's intersection with existing Federal rules and regulations containing prohibitions on misrepresentations: the Business Opportunity Rule,[356] the Mortgage Acts and Practices Advertising Rule (Regulation N),[357] the Mortgage Assistance Relief Services Rule (Regulation O),[358] the amendments to the Negative Option Rule,[359] and the Telemarketing Sales Rule.[360] The Commission did not receive substantive comments about overlap or conflict with these rules.[361] The Commission is not aware of any evidence that there is a conflict between these rules and the final rule. The Commission believes it is possible for businesses to comply with each of them, as applicable.

D. § 464.4 Relation to State laws

Proposed § 464.4 addressed preemption and the proposed rule's relation to State statutes, regulations, orders, or interpretations, including State common law (hereinafter ''State law''). Proposed § 464.4(a) provided that the rule would not supersede or otherwise affect any State law unless the State law is inconsistent with the rule, and then only to the extent of the inconsistency. Proposed § 464.4(b) specified that a State law providing consumers with greater protections than the rule does not, solely for that reason, make the State law inconsistent with the rule. When a State law offers greater (or, in some circumstances, even lesser) protection than the rule, if businesses can comply with both, they are not inconsistent. Thus, as commenters noted, the rule would establish a regulatory floor rather than a ceiling.[362] After reviewing the comments, the Commission adopts the provision as proposed in the NPRM.

The Commission finds it has the authority to promulgate regulations that preempt inconsistent State laws under section 5 of the FTC Act. Even without an express preemption provision, Federal statutes and regulations preempt conflicting State laws. Under the Supreme Court's conflict preemption doctrine, a Federal statute or regulation impliedly preempts State law when it is impossible for the regulated parties to comply with both the Federal and the State law, or when a State law is an obstacle to achieving the full purposes and objectives of the Federal law.[363] ''Federal regulations have no less pre-emptive effect than [F]ederal statutes.'' [364] Accordingly, the rule preempts a State law only to the extent it is inconsistent with the rule and compliance with both is impossible, or it is an obstacle to achieving the full purposes and objectives of the rule. To provide a clear explanation of the Commission's intent and the rule's scope of preemption, the rule includes an express preemption provision at § 464.4.[365]

Numerous commenters supported proposed § 464.4(b)'s targeted approach of preempting only inconsistent parts of State laws.[366] Some commenters,

Beethoven, and a lecturer at the University of Georgia Terry College of Business).

[354] *See, e.g.,* FTC–2023–0064–2918 (Elite Catering + Event Professionals opposed the misrepresentations provision for private food services contracts because ''[t]hroughout the contracting process, there are ample opportunities for the customer to seek clarification or negotiate the applicability of the price and fees.'').

[355] FTC–2023–0064–3016 (National Federation of Independent Business proposed modifying the rule as follows: ''(a) . . . [I]t is an unfair and deceptive practice . . . for a Business to: (i) misrepresent the total cost of a good or service by omitting a mandatory fee from the advertised price of the good or service; or (ii) misrepresent the nature and purpose of such a mandatory fee.'' The commenter also proposed exempting any business from that requirement if it discloses the fee clearly and conspicuously ''before a consumer becomes obligated to pay the fee'' and ''either makes no statement about the nature and purpose of the fee or makes an accurate statement of the nature and purpose of the fee.'').

[356] 16 CFR part 437.

[357] 12 CFR part 1014.

[358] 12 CFR part 1015.

[359] Promulgation of Trade Regulation Rule and Statement of Basis and Purpose: Rule Concerning Recurring Subscriptions and Other Negative Option Programs, 89 FR 90476 (Nov. 15, 2024), *https://www.federalregister.gov/documents/2024/11/15/2024-25534/negative-option-rule*.

[360] 16 CFR part 310.

[361] In addition, the added definition of ''Covered Goods or Services'' removes any potential overlap between the final rule and Regulations N and O.

[362] *See, e.g.,* FTC–2023–0064–3150 (Attorney General of the State of California ''appreciate[d] that the FTC's rule respects the states' role in protecting consumers from deceptive price advertising, and the rule's clear intent to create a federal floor, rather than a ceiling, for consumer protection.''); FTC–2023–0064–3212 (TickPick, LLC).

[363] *See, e.g.,* Cong. Rsch. Serv., R45825, *Federal Preemption: A Legal Primer* 23 (2023), *https://crsreports.congress.gov/product/pdf/R/R45825/3*.

[364] *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta,* 458 U.S. 141, 153 (1982).

[365] Many FTC regulations, including regulations promulgated under section 18 of the FTC Act, include provisions addressing State laws and preemption. *See, e.g.,* Funeral Rule, 16 CFR 453.9 (exempting from preemption State laws that ''afford[ ] an overall level of protection [that] is as great as, or greater than, the protection afforded by'' the FTC's Rule); Rule Concerning Cooling Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429.2(b) (exempting laws and ordinances that provide ''a right to cancel a door-to-door sale that is substantially the same or greater than that provided in this part''); Business Opportunity Rule, 16 CFR 437.9(b) (''The FTC does not intend to preempt the business opportunity sales practices laws of any state or local government, except to the extent of any conflict with this part. A law is not in conflict with this Rule if it affords prospective purchasers equal or greater protection . . . .''); Mail, Internet, or Telephone Order Merchandise Rule, 16 CFR 435.3(b) (''This part does supersede those provisions of any State law, municipal ordinance, or other local regulation which are inconsistent with this part to the extent that those provisions do not provide a buyer with rights which are equal to or greater than those rights granted a buyer by this part.''); Franchise Rule, 16 CFR 436.10(b) (''The FTC does not intend to preempt the franchise practices laws of any state or local government, except to the extent of any inconsistency with part 436. A law is not inconsistent with part 436 if it affords prospective franchisees equal or greater protection . . . .''); Labeling and Advertising of Home Insulation, 16 CFR 460.24(b) (preemption of ''State and local laws and regulations that are inconsistent with, or frustrate the purposes of, this regulation'').

[366] *See, e.g.,* FTC–2023–0064–3150 (Attorney General of the State of California commented that consumer protection is also a state concern, so, ''it is appropriate, then, that the rule does not preempt a state law unless the rule and the state law conflict and then only to the extent of the inconsistency.''); FTC–2023–0064–3215 (Attorneys General of the States of North Carolina and Pennsylvania, along with Attorneys General of the States or Territories of Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Michigan, Minnesota, New Jersey, New York, Oklahoma, Oregon, Vermont, Washington, and Wisconsin, supported the rule's preemption provision because it ''recognizes and preserves the interest that individual states have in combatting unfair or deceptive acts or practices committed in our respective jurisdictions.''); FTC–2023–0064–3275 (Berkeley Center for Consumer Law and

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however, stated that the rule should completely preempt all State laws to provide greater consistency and clarity and to lower compliance costs,[367] particularly when State laws provide greater protections.[368] However, if a business subject to both the rule and a State law that imposes greater protections does not want to use different practices for that State versus the rest of the country, it can choose to comply with both by using a single set of practices consistent with the greater protections afforded under the applicable State law. Nothing in the rule prohibits businesses from giving consumers greater protections than the rule requires. Another commenter expressed concern that some State laws create loopholes that allow businesses to mischaracterize fees as government charges that they then can exclude from total price.[369] The Commission discusses issues related to the rule's treatment of government charges in section III.A.5 and notes here that final § 464.3 would prohibit misrepresenting that a fee is a Government Charge, or otherwise misrepresenting the nature, purpose, amount, or refundability of any fee or charge.

Other commenters suggested that the Commission provide compliance guidance that addresses when State law differs from the rule and identify which State laws are not preempted.[370] Some commenters suggested that existing State and local industry regulations can make the rule unnecessary, duplicative, and confusing due to conflicting requirements.[371] The Commission reiterates that a State law is preempted only to the extent it conflicts with the rule's requirements and complying with both is impossible, or it is an obstacle to achieving the full purposes and objectives of the rule. A State law can provide greater protections and, solely for that reason, will not be inconsistent with the rule; a business can comply with both. A business also can comply with both when the State law provides lesser protections, although businesses still would have to comply with the greater protections of the rule. Only if a State law provides conflicting requirements, and a business cannot comply with both, or it is an obstacle to achieving the full purposes and objectives of the rule, will the State law be preempted, and then only to the extent of that conflict or obstacle.

Moreover, preemption furthers a primary goal of the final rule, discussed in section V.A: to provide a uniform, minimum standard for pricing disclosures for covered goods or services that is easy for businesses and consumers to understand. The Commission also determines, as discussed in section V.B, that declining to issue this final rule and continuing to rely solely on State laws and piecemeal adjudication would be less effective. The Commission believes the final rule's establishment of nationwide minimum standard will functionally reduce many variations among State laws,[372] because businesses will have to conform their practices to meet the rule's standards for covered goods or services to the extent those standards exceed or directly conflict with State law requirements. Moreover, to the extent State law is not inconsistent with the final rule, additional State authority and resources will only serve to further protect consumers and competition. To that end, the Commission will continue to work with its State law enforcement partners in battling unfair and deceptive pricing disclosure practices.[373] For the reasons stated herein, the Commission adopts § 464.4 as proposed.

E. § 464.5 Severability

The Commission includes a severability clause at final § 464.5, which provides that, if any provision of the final rule is held to be invalid or unenforceable either by its terms, or as applied to any person, industry, or circumstance, or stayed pending further agency action, the provision shall be construed to continue to give the maximum effect to the provision permitted by law. It further provides that any such invalidity shall not affect the application of the provision to other persons, industries, or circumstances, or the validity or application of other provisions. Final § 464.5 also states that, if any provision or application of the final rule is held to be invalid or unenforceable, the provision or application shall be severable from the final rule and shall not affect the remainder thereof. This provision confirms the Commission's intent, as discussed herein, that the final rule be given the maximum effect permitted by law even if a reviewing court stays or invalidates any provision, any component of any provision, or any application of the rule, in whole or in part, to any person, industry, or circumstance.

In issuing this final rule, as discussed in section II.A and II.B, the Commission finds bait-and-switch pricing tactics and misleading fee practices to be unfair and deceptive because they deceive consumers about the true cost of goods and services, prevent price comparison, and harm competitors that do accurately disclose true cost. The Commission also finds such practices to be widespread and to affect many types of consumer purchasing transactions, particularly with respect to covered goods or services. The Commission adopts this rule to comprehensively address the practices and to provide a consistent, administrable standard with respect to covered goods or services. The Commission finds in section V.E that, for covered goods or services, the benefits of the rule exceed its costs.

At the same time, the Commission finds that each of the provisions,

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Economic Justice et al. commented that the rule is ''an invaluable complement to state and private actions to challenge hidden and deceptive pricing practices.''); FTC–2023–0064–3293 (Travel Technology Association); FTC–2023–0064–3262 (Skyscanner); FTC–2023–0064–3266 (StubHub, Inc.); FTC–2023–0064–3212 (TickPick, LLC); FTC–2023–0064–3267 (National Retail Federation).

[367] *See, e.g.,* FTC–2023–0064–2886 (American Gaming Association); FTC–2023–0064–3094 (American Hotel & Lodging Association); FTC–2023–0064–3122 (Vivid Seats); FTC–2023–0064–3204 (Expedia Group); FTC–2023–0064–3137 (Chamber of Progress); FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3233 (NCTA—The Internet & Television Association); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–2856 (National Football League).

[368] *See, e.g.,* FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[369] FTC–2023–0064–3137 (Chamber of Progress).

[370] *See, e.g.,* FTC–2023–0064–3244 (Vacation Rental Management Association); FTC–2023–0064–3206 (Motor Vehicle Protection Products Association et al.); FTC–2023–0064–3143 (ACA Connects—America's Communications Association).

[371] *See, e.g.,* FTC–2023–0064–3152 (Building Owners & Managers Association et al.); FTC–2023–0064–3133 (National Multifamily Housing Council and the National Apartment Association); FTC–2023–0064–3115 (National Association of Residential Property Managers); FTC–2023–0064–3116 (Manufactured Housing Institute); FTC–2023–0064–3172 (New Jersey Apartment Association); FTC–2023–0064–3289 (Zillow Group).

[372] The Commission has made similar findings in previous regulations. *See, e.g.,* Final rule: Non-Compete Clause Rule, 89 FR 38342, 38453–54 (May 7, 2024) (finding that the Non-Complete Clause Rule sets a Federal floor that will reduce the variations in a patchwork of State regulations); Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose: Cooling-Off Period for Door-to-Door Sales, 37 FR 22934, 22958 (Oct. 26, 1972) (finding that, when State laws ''give the consumer greater benefit and protection . . ., there seems to be no reason to deprive the affected consumers of these additional benefits,'' but when State laws do not, ''the rule would supply the needed protection or be construed to supersede the weak statute to the extent necessary to give the consumer the desired protection.'').

[373] *See, e.g.,* Final Trade Regulation Rule: Trade Regulation Rule; Funeral Industry Practices, 47 FR 42260, 42287 (Sept. 24, 1982) (codified at 16 CFR part 453) (noting the purpose of the rule's provision addressing relation of the rule to State law is ''to encourage federal-state cooperation by permitting appropriate state agencies to enforce their own state laws that are equal to or more stringent than the trade regulation rule'').

components of the provisions, and applications of the final rule operate independently, and that the evidence and findings supporting each stand independent of one another. The Commission finds that realizing the benefits of the rule does not require the joint adoption or operation of each provision. In addition, while the Commission believes applying the same restrictions to all pricing representations would provide even greater overall benefits, as explained in Parts II.B and V.B, the Commission finds the benefits of the final rule exceed the costs as to covered goods or services, both overall and with respect to each substantive provision of the rule. For covered goods or services, as discussed in section V.E, ample data show the rule would have positive quantified net benefits, including by reducing search costs, as well as unquantified reductions in deadweight loss and consumer frustration. Similarly, consumers would benefit from the misleading fees prohibition even if the requirement to disclose total price were stayed or invalidated. The benefits would also justify the costs if the total price provision were further limited to either just the live-event ticketing or just the short-term lodging industry.

Based on the available data, the Commission concludes that, even if the rule were more limited in scope or if it applied to a more limited set of transactions, such as to a single industry or to particular circumstances, it would still achieve some of the Commission's objectives and the benefits of the rule would still exceed the costs. Although a more limited scope or application would change the magnitude of the overall benefit of the final rule, it would not undermine the valid and measurable benefit of, and justification for, the remaining provisions or applications of the final rule. Thus, were a court to stay or invalidate any provision, any component of any provision, or any application of the rule, the Commission intends the remainder of the rule to remain in force.

As described in section V.B, the Commission considered alternatives to the final rule that would have applied the rule to other transactions or industries or expanded it to all goods and services within the Commission's jurisdiction. The Commission finds that each such alternative would be an appropriate exercise of the Commission's authority under sections 5 and 18 of the FTC Act as stand-alone regulations because disclosure of total price in any type of transaction or industry—whether or not the same is required in other transactions or industries—mitigates the harms caused by the unfair or deceptive pricing tactics in those transactions or industries to which the rule does apply. At the same time, as discussed in parts I and II.A, the Commission finds bait-and-switch pricing tactics and misleading fee practices are widespread and potentially growing. As a result, the Commission may later find that a rule of expanded or even general applicability, to the extent of its jurisdiction, would be appropriate and would result in benefits to consumers and competition that are greater in magnitude than a rule with more limited applicability. However, such findings do not invalidate this final rule's quantifiable positive benefits, in whole or in part.

Accordingly, the Commission considers and intends each of the provisions adopted in the final rule to be severable, within each provision, from other provisions in Part 464, and as applied to different persons, industries, or circumstances. In the event of a stay or invalidation of any provision, any component of any provision, or of any provision as it applies to certain persons, conduct, or industry, the Commission's intent is to otherwise preserve and enforce the final rule to the fullest possible extent. Therefore, if a reviewing court were to stay or invalidate a particular application of the final rule, or a provision thereof, as to certain persons, industries, or circumstances, other businesses that remain covered by the rule should be required to comply with the applicable provisions of the final rule that remain in effect.

IV. Challenges to the FTC's Legal Authority To Promulgate the Rule

As explained in the NPRM and section II, this rule is consistent with decades of FTC adjudications and enforcement actions addressing the standards governing unfair or deceptive pricing practices.[374] The Commission issues this rule to prevent prevalent unfair or deceptive acts or practices and to promote compliance in a manner that accounts for and balances the needs of consumers and regulated entities. The rule falls squarely within the Commission's legal authority, is based on substantial evidence in the rulemaking record, and clearly defines specific unfair and deceptive practices regarding fees or charges.

The Commission received comments supporting, discussing, or questioning its authority to promulgate the final rule. Commenters supporting the Commission's authority noted the rule falls squarely within the Commission's mandate to prevent unfair and deceptive acts and practices through rulemaking under sections 5 and 18 of the FTC Act.[375] Commenters questioning the Commission's rulemaking authority typically advanced one of three arguments. First, some commenters argued that requiring disclosures related to pricing is a major question that Congress has not given the Commission authority to address.[376] Second, some commenters argued that if the rule was in fact consistent with the Commission's authority under sections 5 and 18 of the FTC Act, Congress had impermissibly delegated this authority to the Commission.[377] Third, some commenters argued that the disclosures required by the rule violate the First Amendment.[378] In addition to these arguments, one commenter asserted that the rule is invalid because the

[374] *See, e.g., In re Filderman Corp.,* 64 F.T.C. 427, 442–43, 461 (1964), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-64/ftcd-vol64january-march1964pages409-511.pdf; In re Resort Car Rental Sys., Inc.,* 83 F.T.C. 234, 281–82, 300 (1973), *https://www.ftc.gov/system/files/ftc_gov/pdf/Resort%20Car%20Rental%20System%2C%20Inc.%2083%20FTC%20234%20%281973%29.pdf, aff'd sub. nom. Resort Car Rental Sys., Inc.* v. *FTC,* 518 F.2d 962, 964 (9th Cir. 1975); Opinion of the Commission at 28–30, 47–50, *In re Intuit Inc.,* No. 9408 (FTC Jan. 22, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/d09408_commission_opinion_redacted_public.pdf; In re George's Radio & Television Co.,* 60 F.T.C. 179, 193–94 (1962), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-60/ftcd-vol60january-june1962pages107-211.pdf* (collecting cases involving false savings claims); cases cited *supra* notes 61–62 (collecting FTC enforcement actions alleging, respectively, that bait-and-switch pricing tactics concerning hidden fees and misrepresentations regarding the nature and purpose of fees violated section 5); NPRM, 88 FR 77435–37 (section III.C (''*Law Enforcement Actions and Other Responses*'')). *See also supra* note 115 (collecting cases holding that later disclosures cannot cure deceptive door openers).

[375] *See, e.g.,* FTC–2023–0064–2883 (District of Columbia, Office of the People's Counsel); FTC–2023–0064–3104 (Truth in Advertising, Inc.); *see also* FTC–2022–0069–6077 (ANPR) (Institute for Policy Integrity, New York University School of Law).

[376] FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3152 (Building Owners & Managers Association et al.); FTC–2023–0064–3202 (TechNet); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3251 (National RV Dealers Association); FTC–2023–0064–3263 (Flex Association); FTC–2023–0064–3294 (International Franchise Association).

[377] FTC–2023–0064–3233 (NCTA—The internet & Television Association); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3294 (International Franchise Association).

[378] FTC–2023–0064–3016 (National Federation of Independent Business, Inc.); FTC–2023–0064–3028 (Competitive Enterprise Institute); FTC–2023–0064–3233 (NCTA—The internet & Television Association); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3267 (National Retail Federation).

Commission is unconstitutionally structured.[379] Finally, some commenters asserted the Commission has not complied with the Administrative Procedure Act (''APA'').[380]

Most of the commenters challenging the Commission's authority represent businesses that offer goods or services other than covered goods or services. Thus, the concerns raised by these commenters may not be relevant to the narrowed scope of the final rule. Further, the NPRM's industry-neutral approach was central to nearly all of the critiques of the rule that raised questions regarding the Commission's authority to promulgate the rule; while the Commission disagrees with such critiques, they are not applicable to this final rule, which focuses on two industries, live-event tickets and short-term lodging. Notably, the vast majority of comments from businesses offering live-event tickets and short-term lodging and their direct representatives did not raise challenges to the Commission's authority to promulgate the rule.[381] Nevertheless, the Commission has considered the comments challenging its authority and explains in this section why it disagrees with those.

A. Major Questions Doctrine

Some commenters invoked the major questions doctrine to argue that the Commission lacks authority to adopt the rule. Commenters argued the rule raises a major question because addressing consumer fees and pricing across industries is of vast political and economic significance.[382] Some commenters also argued that the rule is broader than the agency's prior rules, based on the assertion that the rule regulates pricing.[383] Commenters concluded that Congress has not authorized the Commission to promulgate the rule.[384]

The major questions doctrine, as the Supreme Court recently explained in *West Virginia* v. *EPA,* 597 U.S. 697 (2022), applies to '' 'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority.'' [385] When an agency claims a '' 'transformative expansion in [its] regulatory authority,' '' it ''must point to 'clear congressional authorization' for the power it claims.'' [386]

Having considered the factors that the Supreme Court has used to identify major questions, the Commission, as discussed herein, concludes that the final rule does not implicate the major questions doctrine. The FTC does not claim a transformative change in its rulemaking authority. The final rule comports with the history and breadth of prior rules that the FTC has promulgated pursuant to its existing rulemaking authority, which Congress conferred to allow the Commission to address prevalent unfair or deceptive practices. Even if the major questions doctrine did apply, the Commission concludes that Congress provided clear authorization for the Commission to promulgate this rule.

1. The Rule Does Not Address a Major Question

(a) The Commission Has a Long History of Addressing Unfair or Deceptive Acts or Practices Related to Pricing Information

Identifying unfair or deceptive acts or practices related to the disclosure of the price and purpose of goods and services is at the core of the Commission's mandate under section 5.[387] The Commission has the authority to address these unfair or deceptive acts or practices both through case-by-case enforcement, either administratively or in Federal court, or through rulemaking if the unfair or deceptive practices are prevalent as established by the rulemaking record. The Commission may choose case-by-case adjudication or rulemaking at its discretion.[388]

The Commission's authority to promulgate rules to define with specificity unfair or deceptive acts or practices under section 18 of the FTC Act, 15 U.S.C. 57a, is not extraordinary and is undisputed, resting on firm historical footing.[389] Indeed, when consumers have faced bait-and-switch tactics in the past, including being unable to get accurate material information about what they must pay and what they will receive in return, the Commission has repeatedly issued rules that define unfair or deceptive acts or practices related to the disclosure of that material information.[390] For example,

[379] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[380] *See, e.g., id.;* FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3152 (Building Owners & Managers Association et al.); FTC–2023–0064–3263 (Flex Association); FTC–2023–0064–3294 (International Franchise Association).

[381] The International Franchise Association, which represents franchised businesses offering short-term lodging, raised challenges to the Commission's authority to promulgate the rule. IFA's comment, however, primarily focused on the NPRM's industry-neutral scope and its implications for franchised businesses that do not offer Covered Goods or Services. Regarding the short-term lodging industry specifically, IFA's comment challenged certain aspects of the Commission's estimate of compliance costs, which are addressed in section V. *See* FTC–2023–0064–3294 (International Franchise Association).

[382] *See, e.g.,* FTC–2023–0064–3263 (Flex Association); FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3152 (Building Owners & Managers Association et al.); FTC–2023–0064–3202 (TechNet); FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP). While commenters suggested that the rule would have ''political and economic significance,'' no commenters pointed to any specific political significance.

[383] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3127 (U.S. Chamber of Commerce).

[384] FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3152 (Building Owners & Managers Association et al.); FTC–2023–0064–3202 (TechNet); FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association).

[385] *West Virginia* v. *EPA,* 597 U.S. at 721 (quoting *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159–60 (2000)).

[386] *Id.* at 723–24 (quoting *Util. Air Regulatory Group* v. *EPA,* 573 U.S. 302, 324 (2014).

[387] *See generally supra* section II.B; NPRM, 88 FR 77432, 77434.

[388] *Cf. NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 294 (1974) (holding that ''the Board is not precluded from announcing new principles in an adjudicative proceeding,'' that ''the choice between rulemaking and adjudication lies in the first instance within the Board's discretion,'' and that the agency's choice between adjudication and rulemaking was ''entitled to great weight''); *SEC* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947) (''[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.'').

[389] Congress added section 18, 15 U.S.C. 57a, to the FTC Act in 1975, and that section provides the process the Commission must follow to promulgate rules defining unfair or deceptive acts or practices. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Public Law 93–637, sec. 202, § 18, 88 Stat. 2183, 2193 (1975) (hereinafter ''Magnuson-Moss Warranty Act''); *see also Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 967 (D.C. Cir. 1985) (summarizing the historical backdrop to the Commission's authority to prevent unfair or deceptive acts or practices including the adoption of the Magnuson-Moss Warranty Act, which codified section 18 of the FTC Act and confirmed the Commission's authority to promulgate rules defining acts or practices that are unfair or deceptive).

[390] *See, e.g.,* Franchise Rule, 16 CFR 436.2(a), 436.5(e) and (f) (defining as an unfair or deceptive act or practice to fail to provide prospective franchisees with the franchisor's disclosure document, which includes, among other things, disclosure of ''initial fees''—*i.e.,* ''all fees and payments, or commitments to pay . . . whether payable in lump sum or installments'' and of ''all other fees that the franchisee must pay to the franchisor or its affiliates''); Business Opportunity Rule, 16 CFR 437.4(d) (defining as an unfair or deceptive act or practice to ''[f]ail to notify any prospective purchaser in writing of any material changes affecting the relevance or reliability of the information contained in an earnings claim statement before the prospective purchaser . . . makes a payment''); Business Opportunity Rule, 16 CFR 437.6(h) (defining as an unfair or deceptive act

the Commission initiated the rulemaking resulting in the Rule on Retail Food Store Advertising and Marketing Practices (the ''Unavailability Rule''), 16 CFR part 424, based in part on findings in a Commission report that items priced at or below the advertised price were frequently unavailable and that in ''a very substantial majority of the instances of the deviations, the prices marked on the items were higher than the advertised price.'' [391]

As discussed in parts I and II, there is nothing new about businesses using bait-and-switch tactics to reel in and deceive consumers, just as there is nothing new about the Commission exercising its authority to limit such tactics and the harms they cause.[392] This rule is tailored to address practices squarely within the scope of the Commission's core work to protect consumers: bait-and-switch pricing tactics, including drip pricing, and misrepresentations regarding a material term. As described in section II.A and II.B, the Commission adopts this rule now because bait-and-switch tactics, including drip pricing, and misrepresentations as to the nature and purpose of fees and charges are prevalent and continue to harm consumers. This is precisely what section 18 of the FTC Act envisions and is consistent with the Commission's exercise of the same authority in the past.

(b) Commenters' Claims About the Scope of the Acts or Practices Covered by the Rule Are Inapplicable or Overstated

Commenters suggested that the major questions doctrine is implicated simply because the rule proposed by the NPRM was industry-neutral.[393] The Commission disagrees. Congress authorized the Commission to prevent unfair or deceptive practices in or affecting commerce across the economy while specifying a limited number of industries, activities, or entities that are exempt.[394] These comments are inapposite, however, because the final rule is limited to covered goods or services: live-event ticketing and short-term lodging.

Commenters also contended that the rule implicates a major question because it regulates pricing practices broadly or supposedly will have effects on a wide array of pricing strategies.[395] The Commission disagrees. The rule focuses on hidden mandatory fees or charges that obscure the total price of a covered good or service and misrepresentations about the nature, purpose, amount, and refundability of fees or charges. The rule has no effect on many pricing practices and strategies, including a business's fundamental decision about what price to charge consumers for its goods or services.[396] Nor does the rule affect a business's ability to use dynamic pricing, to offer or use sales, discounts, rebates, or special offers, or to truthfully itemize fees and costs so long as the business accurately describes the total price upfront.[397] With respect to mandatory fees, the rule does not prevent businesses from continuing to charge such fees as a pricing strategy, itemizing them in addition to stating the total price, or from providing non-misleading information about those fees. Indeed, a number of commenters have misunderstood the rule to act as a prohibition or limitation on itemization; as explained in section III, truthful itemization is not prohibited.

In sum, the rule does not address a major question because it focuses on traditional types of unfair or deceptive acts or practices that have long been the subject of Commission rulemaking and enforcement activity and targets only those acts or practices.

2. Congress Provided the Commission With a Clear Grant of Authority To Promulgate This Rule

Even if the final rule did present a major question, the FTC Act provides clear authorization for the rule. In cases involving major questions, courts expect Congress to ''speak clearly'' if it wishes to assign the disputed power.[398] In the FTC Act, Congress vested the Commission with enforcement powers and the authority to promulgate rules to carry out the Commission's mandate to prevent unfair or deceptive acts or practices.[399] Rather than trying to define all unfair or deceptive acts and practices, Congress empowered the Commission to respond to changing market conditions and to identify conduct that is unfair or deceptive.[400]

When the Commission was created by the FTC Act in 1914, the Act prohibited ''unfair methods of competition'' in

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or practice to ''[m]ispresent the cost . . . of the business opportunity or the goods or services offered to a prospective purchaser''); Funeral Rule, 16 CFR 453.2(a) and (b) (defining as an unfair or deceptive act or practice to ''fail to furnish accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies'' and requiring funeral providers to provide specific price lists in writing).

[391] Statement of Basis and Purpose: Retail Food Store Advertising and Marketing Practices, 36 FR 8777, 8777–78 (May 13, 1971) (citing a Bureau of Economics staff report titled ''Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco''). Similarly, when the Commission later amended the Unavailability Rule, it again stressed that food retailers must not engage in bait and switch advertising—where the seller advertises an unavailable good at a low price to get the consumer in the door—or deception regarding availability of advertised goods. Final amendments to trade regulation rule: Amendment to Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices, 54 FR 35456, 35462–63 (Aug. 28, 1989).

[392] *E.g., In re Filderman Corp.,* 64 F.T.C. 427, 442–43, 461 (1964); *Resort Car Rental Sys.,* 83 F.T.C. at 281–82, 300 (1973); Complaint ¶¶ 12, 46–49, *In re LCA-Vision,* No. C–4789 (FTC Mar. 13, 2023); Opinion of the Commission at 37–40, 47–50, *In re Intuit Inc.,* No. 9408 (FTC Jan. 22, 2024). *See generally supra* section I.A.–I.C (discussing the comment and hearing record in response to the ANPR and NPRM); section II.A (discussing the prevalence of the practices that the rule addresses).

[393] *See, e.g.,* FTC–2023–0064–3263 (Flex Association); FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3152 (Building Owners & Managers Association et al.); FTC–2023–0064–3202 (TechNet); FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association).

[394] 15 U.S.C. 45.

[395] Commenters did not argue or provide substantive support for any argument that a major question was raised by proposed § 464.3(a), which would have prohibited any Business from misrepresenting the nature and purpose of any amount a consumer may pay, including its refundability and the identity of any good or service for which it is charged. The Commission is finalizing § 464.3 more narrowly to prohibit any Business, in any offer, display, or advertisement for a Covered Good or Service, from misrepresenting any fee or charge, including its nature, purpose, amount, or refundability, and the identity of the good or service for which it is imposed.

[396] *See supra* section I (''The discretion to set prices remains squarely with businesses; the rule simply requires that they tell consumers the truth about those prices.'').

[397] *See supra* section III.A.8.c (''The rule neither requires, nor prohibits, the itemization of mandatory fees that must be included in Total Price.''); section III.B.1.d–e (responding to comments about dynamic pricing, rebates, bundled pricing, and other discounts).

[398] *West Virginia* v. *EPA,* 597 U.S. at 716, 723 (quoting *Util. Air,* 573 U.S. at 324).

[399] 15 U.S.C. 45, 57a.

[400] *See* S. Rep. No. 75–221, at 2 (1937) (report on Amendments to the Federal Trade Commission Act (S.1077), explaining Congress's reasoning in granting the Commission authority in 1914 to define specific unfair methods of competition, and then applying the same reasoning to the proposed grant of authority to prohibit unfair or deceptive acts or practices: ''The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices . . . or whether it would by a general declaration . . . condemn[ ] unfair practices, leav[ing] it to the Commission to determine what practices were unfair.'' The Committee ''concluded that the latter course would be the better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.''); *see also* H.R. Rep. No. 93–1606, at H 12060 (1974) (Conf. Rep.) (report on Consumer Product Warranty and Federal Trade Commission Improvement Act, stating: ''[section 18] is an important power by which the Commission can fairly and efficiently pursue its important statutory mission.'' Further, ''[b]ecause the prohibitions of section 5 of the Act are quite broad, trade regulation rules are needed to define with specificity conduct that violates the statute and to establish requirements to prevent unlawful conduct.'').

section 5 and granted the Commission authority to promulgate rules to effectuate the Act's provisions in section 6(g), including the prohibition on unfair methods of competition.[401] The Act did not expressly prohibit deception. While deception could qualify as an unfair method of competition, courts required the Commission to show harm to competition or rivals in each instance; harm to consumers alone was insufficient to meet the standard.[402] In response, Congress amended the FTC Act in 1938 to include a prohibition, not just against unfair methods of competition, but against unfair or deceptive acts or practices as well.[403]

Congress affirmed the Commission's authority to issue rules like the one here through amendments to the FTC Act in 1975 and 1980. First, in the Magnuson-Moss Warranty Act of 1975, Congress added section 18 of the FTC Act, 15 U.S.C. 57a, confirming the Commission's authority to issue rules that ''define with specificity acts or practices which are unfair or deceptive acts or practices,'' and requiring the Commission to follow specific procedures for promulgating rules.[404] Among the substantially completed rules at the time were the Rule on the Preservation of Consumers' Claims and Defenses[405] and the Mail Order Rule,[406] which proposed to define as an unfair or deceptive act—and upon promulgation did so define—certain conduct that the rulemaking record showed was causing harm across various industries. As Congress added procedural requirements to the Commission's rulemaking authority through section 18, Congress did not limit these existing cross-industry rules targeting unfair or deceptive acts or practices, but instead created an exception under which the Commission could finalize them without following section 18's procedural requirements.[407]

Congress again confirmed the Commission's authority to promulgate rules defining unfair and deceptive acts or practices in 1980 when it enacted section 22 of the FTC Act, 15 U.S.C. 57b–3(b), as part of the Federal Trade Commission Improvements Act of 1980.[408] Section 22 imposes certain additional procedural requirements the Commission must follow when it promulgates any ''rule,'' including rules promulgated under section 18. Section 22(b) contemplates the FTC's authority to promulgate rules that are substantive and economically significant by requiring, for example, that the Commission conduct a cost-benefit analysis.[409] In addition, section 22(a) imposes the same requirements on amendments to existing rules if they may ''have an annual effect on the national economy of $100,000,000 or more,'' ''cause a substantial change in the cost or price of goods or services,'' or ''have a significant impact upon'' persons and consumers.[410] Thus, Congress explicitly authorized the Commission to issue rules and amendments that address major economic questions, so long as the rulemaking complies with section 22.

The Commission has exercised its authority to promulgate numerous rules and rule amendments defining unfair or deceptive acts or practices pursuant to sections 18 and 22.[411] Central to many of these rules is a rulemaking record establishing that businesses misrepresent or fail to disclose certain material terms in a transaction, including information related to price, and that these practices are unfair or deceptive.[412] Unlike in *West Virginia* v. *EPA,* courts have upheld Commission rules similar to the one here—that prohibit misrepresentations, define unfair or deceptive conduct, and require specific disclosures to avoid deception—against a myriad of legal challenges.[413]

In sum, this is a far cry from a situation where Congress ''conspicuously and repeatedly'' declined to grant the agency the claimed power.[414] Quite the opposite—Congress has conspicuously and repeatedly confirmed that promulgating a rule like this final rule is precisely how Congress expects the Commission to use its rulemaking authority. For these reasons, even if the final rule involves a major question, Congress has clearly delegated to the Commission the authority to address that question.

B. Non-Delegation Doctrine

One commenter contended that the Commission's issuance of the rule violates the non-delegation doctrine.[415] The commenter argued that, given the rule's breadth, section 5 lacks an intelligible principle if it authorizes the Commission to promulgate the rule. The commenter asserted that the rule regulates pricing economy-wide and that Congress has not made ''the necessary fundamental policy-decision'' underlying the rule. The commenter

[401] Federal Trade Commission Act, Public Law 63–203, secs. 5, 6(g), 38 Stat. 717, 719, 722 (1914).

[402] *FTC* v. *Raladam Co.,* 283 U.S. 643, 647–49 (1931) (''The paramount aim of the [FTC] act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree. . . . Unfair trade methods are not per se unfair methods of competition.'').

[403] Federal Trade Commission Act Amendments of 1938 (Wheeler-Lea Act), Public Law 75–447, sec. 3, sec. 5, 52 Stat. 111, 111 (1938).

[404] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Public Law 93–637, sec. 202, sec. 18, 88 Stat. 2183, 2193 (1975) (codified at 15 U.S.C. 57a).

[405] Promulgation of Trade Regulation Rule and Statement of Basis and Purpose: Preservation of Consumers' Claims and Defenses (Holder Rule), 40 FR 53506 (Nov. 18, 1975).

[406] Promulgation of Trade Regulation Rule and Statement of Basis and Purpose: Mail Order Merchandise, 40 FR 51582 (Nov. 5, 1975).

[407] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Public Law 93–637, sec. 202, sec. 18(c)(1), 88 Stat. 2183, 2198 (1975) (Specifically, section 18(c)(1) provided that ''[a]ny proposed rule under section 6(g)'' with certain components that were ''substantially completed before'' section 18's enactment ''may be promulgated in the same manner and with the same validity as such rule could have been promulgated had this section not been enacted.'').

[408] Federal Trade Commission Improvements Act of 1980, Public Law 96–252, sec. 15, sec. 22, 94 Stat. 374, 388 (1980) (codified at 15 U.S.C. 57b–3).

[409] 15 U.S.C. 57b–3(b).

[581] 15 U.S.C. 57b–3(a).

[411] *See, e.g.,* Franchise Rule, 16 CFR part 436; Business Opportunity Rule, 16 CFR part 437; Funeral Rule, 16 CFR part 453; Negative Option Rule, 16 CFR part 425; Cooling Off Rule, 16 CFR part 429; *see also* discussion *supra* section IV.1.a.

[412] *See, e.g.,* 16 CFR 437.6(d), (h), (i) (The Business Opportunity Rule provides that it is an ''unfair or deceptive act or practice'' to misrepresent, among other information, ''the amount of sales, or gross or net income or profits a prospective purchaser may earn''; ''the cost, or the performance, efficacy, nature, or central characteristics of the business opportunity or the goods or services offered''; or ''any material aspect of any assistance offered to a prospective purchaser''); 16 CFR 436.9(a) and (c) (The Franchise Rule provides that it is an ''unfair or deceptive act or practice'' to ''[m]ake any claim or representation . . . that contradicts'' the required disclosures, which include certain pricing information and fees, or to ''[d]isseminate any financial performance representations to prospective franchisees unless the franchisor has a reasonable basis and written substantiation for the representation[.]'').

[413] *See, e.g., Harry & Bryant Co.* v. *FTC,* 726 F.2d 993, 999–1001 (4th Cir. 1984) (holding that petitioners challenging Funeral Rule were not denied procedural due process, and that the rule was within the Commission's statutory authority and supported by substantial evidence); *Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 983–88, 991 (D.C. Cir. 1985) (holding that the FTC did not exceed its authority when promulgating the Trade Regulation Rule on Credit Practices under sections 5 and 18 of the FTC Act, and that the rule was supported by substantial evidence and not arbitrary, capricious, or an abuse of discretion); *Consumers Union of U.S., Inc.* v. *FTC,* 801 F.2d 417, 422, 426 (D.C. Cir. 1986) (denying petition for review of FTC Used Car Rule and holding that Commission's decision to omit a proposed disclosure requirement from the rule had evidentiary support under both the FTC's substantial evidence test and the APA's arbitrary and capricious test, which are one and the same as to the requisite degree of evidence); *Pa. Funeral Dirs. Ass'n* v. *FTC,* 41 F.3d 81, 92 (3d Cir. 1994) (denying petition for review of Funeral Rule and finding that Commission decision to regulate casket handling fees was not arbitrary or capricious and was supported by substantial evidence).

[414] *West Virginia* v. *EPA,* 597 U.S. at 724.

[415] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

also asserted that the Commission's authority to promulgate the rule is an unconstitutional delegation under a "history and tradition test," citing to a dissenting opinion in *Gundy* v. *United States,* 588 U.S. 128 (2019).[416] The Commission disagrees. The Commission notes that this commenter's argument that the proposed rule violated the non-delegation doctrine was predicated on its assertion that the proposed rule regulated "the disclosing and collecting [of] consumer fees for all businesses."[417] Since the focus of the final rule is narrowed to covered goods or services, the comment may not be relevant to the final rule. Nevertheless, the Commission addresses the arguments herein.

"Only twice in this country's history has the Court found a delegation excessive, in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion."[418] Article I of the Constitution vests the Federal government's legislative powers in Congress, and Congress may not delegate those powers to an executive agency absent an intelligible principle to guide the exercise of discretion.[419] The "intelligible principle" standard is "not demanding."[420] This is because of the practical understanding that " 'in our increasingly complex society, replete with ever changing and more technical problems,' . . . 'Congress simply cannot do its job absent an ability to delegate power under broad general directives.' "[421] For that reason, the Supreme Court has repeatedly held that "a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.' "[422]

As described throughout section IV.A, Congress, the Commission, and the courts have long understood the Commission's mandate to prevent both unfair and deceptive acts or practices as providing intelligible principles to guide the exercise of the Commission's discretion. In *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935), the Court observed that conduct that fell within the ambit of section 5 of the FTC Act was "to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest."[423] The Court ultimately concluded that Congress properly delegated authority to the FTC under the FTC Act based, among other things, on the subject matter and procedural requirements Congress placed on the Commission—which involves "notice and hearing," "appropriate findings of fact supported by adequate evidence," and "judicial review."[424]

FTC rulemaking under section 18 features similar procedural safeguards to FTC adjudication and thus comports with the nondelegation doctrine for the same reasons. For example, section 18's rulemaking process requires the Commission to: (1) notify Congress; (2) publish multiple public notices of the proposed rulemaking; (3) provide all interested persons the opportunity to "submi[t] . . . written data, views, or arguments"; (4) consider all submissions; (5) provide the opportunity for an informal hearing; (6) determine, based on all available information, that the unfair or deceptive acts or practices are prevalent; and (7) determine, based on the rulemaking record, that the final rule is appropriate. In addition, once the rule is finalized, it is subject to judicial review in a court of appeals.[425] The rulemaking process thus "may actually be fairer to regulated parties than total reliance on case-by-case adjudication" because the process allows all interested parties the opportunity to weigh in by submitting data, views, and arguments and by participating in a hearing.[426] In this rulemaking, interested parties had numerous opportunities to be heard by the Commission, including through ninety-day public comment periods on both an advance notice of proposed rulemaking and a notice of proposed rulemaking, as well as an informal hearing. These procedures helped to ensure that the Commission properly applied its statutory mandate when adopting the rule to prevent prevalent unfair and deceptive practices concerning hidden and misleading fees.

Like the FTC's Act's procedural requirements, the subject matter requirements that apply to the FTC's statutory authority are well established. With respect to unfairness, Congress articulated in section 5(n) of the FTC Act the factors the Commission must apply.[427] For deception, virtually all courts have adopted the three-part test put forward by the Commission in its Deception Policy Statement: (1) there is a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material.[428] For decades, courts have reviewed and upheld the Commission's application of unfairness and deception authority in enforcement actions and rules. Moreover, the Supreme Court has recognized the ability of regulators, courts, and regulated entities to distinguish deceptive from nondeceptive claims or advertisements under section 5 of the FTC Act.[429] In sum, the subject matter requirements of the FTC Act's statutory authority as to unfair and deceptive practices are well settled.

Finally, the Supreme Court has not adopted the commenter's suggested "history and tradition test" as the applicable standard for determining whether congressional delegation of authority is constitutional. The intelligible principle test is binding precedent on that question, and the final rule complies with the intelligible principle test.

C. First Amendment

Some commenters argued that § 464.2 impermissibly prohibits and compels speech in violation of the First

[416] *Id.* (citing *Gundy,* 588 U.S. at 159 (Gorsuch, J., dissenting, joined by Roberts, C.J. and Thomas, J.)).

[417] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[418] *Gundy,* 588 U.S. at 130 (plurality op.) (quoting *Mistretta* v. *United States,* 488 U.S. 361, 373 n.3 (1989)).

[419] U.S. Const. art. I, sec. 1; *see also, e.g., Mistretta,* 488 U.S. at 372.

[420] *Gundy,* 588 U.S. at 146.

[421] *Id.* at 135 (quoting *Mistretta,* 488 U.S. at 372).

[422] *Id.* (quoting *J.W. Hampton, Jr., & Co.* v. *United States,* 276 U.S. 394, 409 (1928)) (brackets in original).

[423] *A.L.A. Schechter,* 295 U.S. at 532–33. In so holding, the Supreme Court in *A.L.A. Schechter* referred to cases in which both unfair and deceptive practices were determined to be unfair methods of competition. 295 U.S. at 532–33 (citing *FTC* v. *R.F. Keppel,* 291 U.S. 304 (1934) and *FTC* v. *Algoma Lumber Co.,* 291 U.S. 67 (1934)). Congress later clarified in the Wheeler-Lea Act of 1938 that unfair and deceptive practices are unlawful under the FTC Act independent of any effect they may have on competition. 52 Stat. 111. Accordingly, the *A.L.A. Schechter Court's* conclusion that Congress's grant of authority to the Commission is guided by intelligible principles applies equally to the Commission's authority to identify unfair or deceptive acts or practices and to the Commission's authority to identify unfair methods of competition.

[424] *A.L.A. Schechter,* 295 U.S. at 533–36.

[425] 15 U.S.C. 57a(b)(1)–(2). Section 18 requires both an advance notice of proposed rulemaking and a notice of proposed rulemaking to engage with and solicit comment from interested parties.

[426] *Nat'l Petroleum Refiners Ass'n* v. *FTC,* 482 F.2d 672, 681–83 (D.C. Cir. 1973).

[427] 15 U.S.C. 45(n).

[428] Fed. Trade Comm'n, *FTC Policy Statement on Deception,* 103 F.T.C. 174, 175 (1984) (sent by letter to Congress on October 14, 1983 and appended to *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174 (1984) (hereinafter "*Deception Policy Statement*"), *https://www.ftc.gov/system/files/ftc_gov/pdf/Cliffdale-Assocs-103-FTC-110.pdf.*

[429] *FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 387 (1965); *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626, 645–46 (1985).

Amendment.[430] The Commission disagrees. The rule addresses unfair and deceptive conduct and does not otherwise affect businesses' ability to express truthful and accurate price information.

1. Comments

Some commenters argued the rule's disclosure requirements compel speech in violation of the First Amendment. Some commenters also contended that § 464.2 would prohibit businesses from advertising aspects or parts of truthful and accurate price information. They argued that conditioning the ability to provide some truthful information—such as a partial price without including certain fees—on total price being disclosed violates the First Amendment.[431] Commenters asserted that consumers are not injured where a business presents a price that omits fees or fails to add up the fees for the consumer. They argued that this type of price information is useful and truthful even if it is only partial. A commenter argued that how the price of goods and services is displayed is a message under the First Amendment and the rule's requirement that total price be displayed clearly and conspicuously is unconstitutional compelled speech.[432] One academic commenter supported the rule and argued it does not unconstitutionally compel speech because it only requires disclosure of factual, non-controversial information, without which the prices disclosed or advertised would be misleading.[433]

Some commenters argued the requirement to disclose total price clearly and conspicuously should be subject to strict scrutiny,[434] while others argued it should be reviewed under a heightened scrutiny standard[435] or intermediate scrutiny.[436] One commenter argued that the rule is a content-based regulation subject to strict scrutiny because, where a business presents any type of price information, it is required to display total price and in a particular way—*i.e.,* clearly, conspicuously, and prominently.[437] The commenter argued that the Commission failed to demonstrate the rule directly advances any compelling government interest. Another commenter argued that price information is commercial speech subject to intermediate scrutiny and that the rule fails to meet the standard because, even if some price displays without total price are deceptive, not all such displays are deceptive.[438]

Some commenters asserted that the rule's application to credit card surcharges and government charges violated the First Amendment. An industry commenter interpreted the rule to require all credit card surcharges to be included in total price. The commenter argued that this amounts to a ban on presenting credit card surcharges to consumers, which is regulation of commercial speech that violates merchants' First Amendment rights. The commenter cited to several State laws banning credit card surcharges or fees, but allowing cash discounts, that were struck down by Federal courts of appeals.[439] Two commenters argued that the rule's allowance for government charges to be excluded from total price—while other fees or charges cannot be excluded—amounts to content-based regulation of speech that provides preferential treatment to the government.[440] One commenter argued that the rule would allow businesses to conceal government charges and shows favoritism for government speech to assist it in raising tax revenues; the commenter proposed the alternative of marginally raising the tax rate.[441] The commenter also argued that the rule is underinclusive because total price does not include government charges, arguing that consumers suffer the same harm of being surprised by government fees as with non-government charges required to be included in total price. Finally, other commenters recommended that the Commission adopt a rule that only prohibits deceptive conduct without requiring specific affirmative disclosures.[442]

2. Legal Standard

The Commission finds that businesses' First Amendment rights are adequately protected because § 464.2's compelled disclosures are in a commercial context and meet the longstanding legal standards governing commercial speech. Courts apply one of two standards in the context of commercial speech. In *Cent. Hudson Gas & Electric Corp.* v. *Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557, 563–64 (1980), the Supreme Court established the analytical framework for determining the constitutionality of a regulation of commercial speech that is not misleading and does not involve illegal activity. Under that framework, described as intermediate scrutiny, the regulation must: (1) serve a substantial governmental interest; (2) directly advance this interest; and (3) not be more extensive than necessary to serve the government's interests.[443] The third prong does not require the government to adopt the least restrictive means. Instead, it simply calls for a '' 'fit' between the legislature's ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable.'' [444]

The Supreme Court's ''precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts,'' such as in commercial speech, as set forth in *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626 (1985).[445] Contrary to commenters'

[430] *See, e.g.,* FTC–2023–0064–3028 (Competitive Enterprise Institute); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3233 (NCTA—The internet and Television Association); FTC–2023–0064–3016 (National Federation of Independent Business). In opposing § 464.2, the commenters did not argue that § 464.3, which simply prohibits misrepresentations related to prices and fees, implicates the First Amendment.

[431] *E.g.,* FTC–2023–0064–3028 (Competitive Enterprise Institute provided examples of pricing information it argued was not unfair or deceptive that involve drip pricing with disclaimers, contingent pricing, and partition pricing.) The Commission addresses in section III.B.1 when and to what extent the rule covers these types of information and also explains why the omission of Total Price is unfair and deceptive in those circumstances.

[432] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[433] FTC–2023–0064–3275 (Berkeley Law Center for Consumer Law & Economic Justice et al.).

[434] FTC–2023–0064–3028 (Competitive Enterprise Institute); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[435] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[436] FTC–2023–0064–3016 (National Federation of Independent Business).

[437] FTC–2023–0064–3028 (Competitive Enterprise Institute).

[438] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[439] FTC–2023–0064–3128 (Merchants Payments Coalition).

[440] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3233 (NCTA—The Internet & Television Association).

[441] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP ''assume[d]'' that in allowing government charges to be excluded from Total Price, the Commission aims to ''rais[e] tax revenues'' because the Commission believes ''disclosing a tax upfront will lead to fewer people making purchases, resulting in a decline in revenue''). The commenter did not address the fact that the Commission does not have authority over taxation, or whether the commenter's proposed alternative of raising marginal tax rates would fulfill the Commission's goal in this rulemaking of preventing unfair or deceptive conduct related to mandatory fees and charges. The Commission finds that marginally raising the tax rate is not a viable alternative because the Commission does not have taxing authority and raising the tax rate would not achieve the Commission's stated goal of preventing unfair or deceptive conduct.

[442] FTC–2023–0064–3016 (National Federation of Independent Business); FTC–2023–0064–3028 (Competitive Enterprise Institute).

[443] *Cent. Hudson Gas & Elec. Corp.,* 447 U.S. at 564.

[444] *Bd. of Trs. of State Univ. of N.Y.* v. *Fox,* 492 U.S. 469, 480 (1989) (internal citations omitted).

[445] *Zauderer,* 471 U.S. at 650–53; *Nat'l Inst. of Family & Life Advocates* v. *Becerra* (''*NIFLA*''), 585

assertions, compelled speech in the commercial context is neither unequivocally prohibited nor subject to strict scrutiny under the First Amendment. Rather, the First Amendment permits required disclosures that are: (1) factual and uncontroversial; (2) reasonably related to the government's interest—here, preventing unfair and deceptive commercial practices that harm consumers; and (3) not ''unjustified or unduly burdensome.'' [446] The final rule's disclosure requirements satisfy these parameters.

3. The Rule's Disclosure Requirements Are Constitutional Under Zauderer

Section 464.2 applies to speech that is, at its core, commercial—the disclosure and advertising of the price for goods and services.[447] It requires precisely the type of disclosure the Supreme Court has confirmed is constitutional under *Zauderer.*[448] In *Zauderer,* the Supreme Court considered a challenge to government-compelled commercial speech in an advertisement by an attorney. The advertisement stated that certain types of cases were handled on a contingent fee basis for which the client owed no legal fees if the lawsuit was unsuccessful. The State required such advertisements to disclose that clients may be liable for litigation costs even if their lawsuit is unsuccessful. The attorney argued such a requirement was compelled speech in violation of the First Amendment. The Supreme Court disagreed. Noting that the disclosure applied to commercial advertising, the Court held that an advertiser's ''constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.'' [449] The Court concluded, ''The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed.'' [450] The Court also noted that attorneys were not prevented from conveying information to the public—they were merely required ''to provide somewhat more information than they might otherwise be inclined to present . . . in order to dissipate the possibility of consumer confusion or deception.'' [451]

Section 464.2 satisfies all prongs of *Zauderer.* First, § 464.2 only requires businesses to disclose factual and noncontroversial pricing information, by incorporating known mandatory fees or charges into total price, with exceptions, and by disclosing certain other customary pricing information before a consumer consents to pay. As described in section II.B, the purpose of the rule is to ensure that consumers know the total amount they will have to pay because this information is material to consumer decision making.

Second, parts II.B and III lay out in detail how the rule is reasonably related to—and, in fact, directly advances—the government's interest in preventing unfairness and deception in the marketplace. Preventing unfair and deceptive conduct is the Commission's mandate under sections 5 and 18 of the FTC Act.[452] And based on voluminous comments from the public as well as significant empirical evidence, the Commission finds that consumers seeking to purchase covered goods or services are likely to be deceived and harmed if the required disclosures are not made.

Finally, § 464.2 is neither unduly burdensome nor unjustified. The Commission set forth the justification for the required disclosures in parts II and III, including the harms to consumers and to competition from drip or partitioned pricing. Further, the rule does not impose an undue burden; businesses offering covered goods or services are simply required ''to provide somewhat more information than they might otherwise be inclined to present.'' [453] The rule merely requires clear and conspicuous display of total price if other pricing information is displayed, and requires certain pricing and informational disclosures before the consumer consents to pay. As described in detail in section III, the final rule permits businesses to exclude from total price certain mandatory fees or charges that industry commenters stated would be impractical or burdensome for inclusion in total price.

The Commission disagrees with a commenter who seemed to argue that because the rule imposes disclosure requirements as to ''how'' total price is displayed, the rule ''offends the First Amendment'' by compelling speech.[454] In so arguing, the commenter cited to *303 Creative, LLC* v. *Elenis,* 600 U.S. 570 (2023). The Supreme Court in *303 Creative* considered an as-applied challenge to the Colorado Anti-Discrimination Act (''CAD'') by a sole proprietor who designed individualized websites the Court concluded ''qualify as pure speech,'' with each website being an ''original, customized creation.'' [455] While the Court in that case held that the CAD violated the First Amendment as applied to the plaintiff, the rule here is distinguishable from the facts of *303 Creative.* First, both price

U.S. 755, 768 (2018); *see also Milavetz, Gallop & Milavetz P.A.* v. *United States,* 559 U.S. 229, 249–50 (2010) (applying ''the less exacting scrutiny described in *Zauderer*'' and upholding a requirement that advertisements include a disclosure ''intended to combat the problem of inherently misleading commercial advertisements'').

[446] *Zauderer,* 471 U.S. at 653; *see also Am. Meat Inst.* v. *USDA,* 760 F.3d 18, 22–23 (D.C. Cir. 2014) (*en banc*) (holding *Zauderer* applies to compelled commercial speech in service of government interests in addition to preventing and correcting deception); *CTIA—The Wireless Ass'n* v. *City of Berkeley,* 928 F.3d 832, 844 (9th Cir. 2019) (holding *Zauderer* applies to compelled commercial health and safety disclosures if they further a substantial government interest) (citing *Central Hudson Gas & Elec. Corp.,* 447 U.S. at 564; *NIFLA,* 585 U.S. at 768, 775)); *Pharm. Care Mgmt. Ass'n* v. *Rowe,* 429 F.3d 294, 310, 310 n.8 (1st Cir. 2005) (clarifying that the application of *Zauderer* is not limited to cases in which the compelled disclosure prevents deception and upholding compelled commercial disclosures based on government interests in preventing deception and ''increasing public access to prescription drugs''); *Nat'l Elec. Mfrs. Ass'n* v. *Sorrell,* 272 F.3d 104, 116 (2d Cir. 2001) (applying *Zauderer* to compelled commercial disclosure even though it ''was not intended to prevent 'consumer confusion or deception' per se, . . . but rather to better inform consumers about the products they purchase'') (internal citation and quotation marks omitted) (citing *Zauderer,* 471 U.S. at 651).

[447] *See Expressions Hair Design* v. *Schneiderman,* 581 U.S. 37, 48 (2017) (reviewing State law regulating disclosure of differentiation of prices for credit card versus other types of payment and remanding for determination of whether the statute ''is a valid commercial speech'' regulation); *City of Cincinnati* v. *Discovery Network, Inc.,* 507 U.S. 410, 422 (1993) (''Most of the appellee's mailings consisted primarily of price and quantity information, and thus fell within the core notion of commercial speech—speech which does 'no more than propose a commercial transaction.''') (cleaned up) (citing *Bolger* v. *Young's Prods. Corp.,* 463 U.S. 60, 66 (1983)); *see generally Cent. Hudson Gas & Elec. Corp.,* 447 U.S. at 561 (referring to commercial speech as ''expression related solely to the economic interests of the speaker and its audience''); *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976) (commercial speech includes speech that does ''no more than propose a commercial transaction'' (internal citations omitted)); *see also Bates* v. *State Bar of Ariz.,* 433 U.S. 350, 383 (1977) (''the advertiser knows his product and has a commercial interest in its dissemination''; ''any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability.'').

[448] *Zauderer,* 471 U.S. at 651–53; *see also NIFLA,* 585 U.S. at 768–69 (restating the *Zauderer* standard, noting that ''purely factual and uncontroversial information about the terms under which . . . services will be available . . . should be upheld unless they are unjustified or unduly burdensome'' (internal citations omitted)).

[449] *Zauderer,* 471 U.S. at 651.

[450] *Id.* at 653.

[451] *Id.* at 650–51 (internal quotation omitted).

[452] 15 U.S.C. 45, 57a.

[453] *Zauderer,* 471 U.S. at 650.

[454] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[455] *303 Creative,* 600 U.S. at 587–88.

and how price is displayed (here, how total price is displayed) relate solely to proposing a commercial transaction and to the economic interests of the speaker and its audience.[456] Second, the Court based its decision in *303 Creative* on the unique nature of the plaintiff's work, noting the plaintiff ''does not seek to sell an ordinary commercial good.'' [457] In comparison, the rule merely requires the display of the total price of a covered good or service—live-event tickets and short-term lodging—which is core commercial speech.

Therefore, the Commission finds that the disclosure requirements are consistent with the compelled speech analysis under *Zauderer.* Clear, conspicuous, and prominent disclosure of total price in advertisements, displays, or offers, and the disclosure of complete pricing information of covered goods or services before the consumer consents to pay, directly advance the Commission's interest in preventing deception and harm. The rule's requirements enable consumers to receive the information they need to make informed purchasing decisions about live-event tickets and short-term lodging based on complete and truthful information.

4. The Rule Does Not Prohibit Truthful Speech

Commenters asserted that the rule amounts to a prohibition on the display of truthful price information in violation of the First Amendment because the rule prohibits certain information (like partial prices without mandatory fees) from being displayed without displaying total price. Commenters also asserted that, because the rule prohibits certain displays of price, like parts of prices without fees, it should be evaluated under *Central Hudson.* The Commission disagrees. First, the commenters ''overlook[ ] material differences between disclosure requirements and outright prohibitions on speech.'' [458] The rule does not prevent businesses from conveying information to the public and, in particular, it does not prohibit the disclosure of the components of total price. Businesses remain free to describe, disclose, or convey price, fee, and charge information.[459] Put differently, the rule permits any truthful pricing claims an advertiser wants to make; what it forbids is half-truths that omit total price.

Section 464.2 does require a business that displays certain pricing information about covered goods or services to also provide factual and non-controversial information in the form of total price. Although total price may be ''somewhat more information than they might be otherwise inclined to present,'' such a requirement is allowed by *Zauderer.*[460] With the rule's requirement that total price be clear, conspicuous, and prominent, the Commission balances industry commenters' stated desire to display other price information with its finding that total price is a necessary piece of price information for consumers if any other price information is displayed.[461]

Because the rule does not restrict truthful speech, and because the conduct the rule addresses (advertising prices without mandatory fees) is deceptive, the Commission need not apply the *Central Hudson* factors. Nevertheless, the rule would meet them. Under *Central Hudson,* the regulation must serve a substantial governmental interest, must directly advance that interest, and must not be more extensive than necessary to serve the government's interest.[462] As outlined in parts II and III, the rule serves the substantial governmental interest of providing material price information to consumers purchasing live-event tickets and short-term lodging to allow them to make accurate price comparisons and informed purchasing decisions, and to allow businesses to compete on price in a level playing field. And consistent with the third prong of *Central Hudson,* the rule is no more extensive than necessary to serve the government's interests in preventing unfairness, deception, and harm, as the rule simply requires clear, conspicuous, and prominent display of total price. *Central Hudson* acknowledges that the government can regulate the format of advertising, including by requiring a disclosure.[463]

The Commission also disagrees with commenters arguing the rule violates is overinclusive and would prohibit some displays of partial price that are not deceptive or unfair without the display of total price. Again, because truthful itemization of price components is not prohibited by the rule, commenters' contention that the rule is a prohibition on speech misses the mark. The Commission finds, however, that the display of the price of a good or service without disclosing total price clearly, conspicuously, and prominently is unfair and deceptive and harms consumers and honest competitors. Because the third prong of *Central Hudson* does not require the government to use the least restrictive means necessary to advance its interest, the rule would be constitutional even if it prohibited displaying partial price in instances that, in isolation, may not be unfair or deceptive. The same is true under *Zauderer,* where the Court held that the State's ''assumption that substantial numbers of potential clients would be . . . misled'' about the possibility that they would be responsible for litigation costs—in contrast to proving that all potential clients would be misled—was sufficient to meet the standard.[464]

The Commission addresses in section III commenters who argued that it should adopt alternative policies, such as prohibiting misrepresentations and allowing businesses to disclose amounts or fees as they wish. As relevant here, commenters argued that the Commission should adopt those alternatives because they would not violate the First Amendment. The Commission finds that the rule, including § 464.2, does not violate the First Amendment. Given the Commission's finding that failure to disclose total price is unfair and deceptive, the rule's affirmative disclosure requirements are needed to achieve the Commission's goal of preventing this unfair and deceptive conduct.

[456] *See* cases cited *supra* note 447 (defining commercial speech).

[457] *303 Creative,* 600 U.S. at 593–94.

[458] *Zauderer,* 471 U.S. at 650.

[459] Of course, Businesses offering, displaying, or advertising a Covered Good or Service cannot misrepresent the nature, purpose, amount, or refundability of any fee or charge under § 464.3; this requirement is consistent with the First Amendment. *See Ibanez* v. *Fla. Dep't of Bus. & Prof'l. Regul.,* 512 U.S. 136, 142 (1994) (''false, deceptive, or misleading commercial speech may be banned'' (citations omitted)). Commenters did not argue § 464.3 violates the First Amendment.

[460] *Zauderer,* 471 U.S. at 650.

[461] Indeed, the *Zauderer* Court noted that ''because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.' '' *Id.* at 651 (citation omitted).

[462] *Cent. Hudson Gas & Elec. Corp.,* 447 U.S. at 566.

[463] *See id.* at 570–71 (''To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future.'').

[464] *Zauderer,* 471 U.S. at 652–53.

5. The Rule's Treatment of Credit Card Fees and Government Charges Does Not Violate the First Amendment

The rule does not violate the First Amendment in its treatment of credit card fees and government charges. First, as noted in section III.B.1.c, the rule does not prohibit a business from charging or passing through credit card fees if otherwise allowed by law. The rule also does not affect State laws that prohibit credit card surcharges. Whether credit card charges must be included in total price depends on whether a business makes such fees mandatory. If a business offers consumers multiple viable payment methods for the offered transaction, so that paying with a credit card is optional, then credit card fees are not for a ''mandatory ancillary good or service'' under the rule and need not be included in total price. In addition, where credit card fees are mandatory, the rule does not prohibit businesses from itemizing them as long as they are also included in total price. Accordingly, there is no merit to commenters' concerns that consumers will not understand the impact of costs affecting businesses, since businesses can itemize those costs under the rule.

The Commission also disagrees with commenters' argument that § 464.2 violates the First Amendment as a content-based regulation because it does not require businesses to include government charges in total price. One commenter, who argued the point in detail, relied on *Barr* v. *American Ass'n of Political Consultants, Inc.,* 591 U.S. 610 (2020), in which the Supreme Court held that an exclusion for collectors of government debt from the Telephone Consumer Protection Act (''TCPA''), which generally prohibits robocalls, violated the First Amendment. A majority agreed that the exclusion for collectors of government debt was severable—the prohibition on robocalls was upheld.

The exclusion provision in the TCPA addressed in *Barr* is distinguishable from the final rule in several ways. At the outset, the rule does not favor government charges unequivocally. While the rule allows businesses to exclude government charges from total price, it does not require businesses to do so. Businesses have a choice—they may include government charges in total price. Second, the commenter makes specific and erroneous assumptions about the Commission's reasoning for excluding government charges from total price, such as that the Commission's interest in adopting the rule includes favoring taxes and increasing tax revenue. Tax revenues have no bearing on the Commission's decision to adopt this rule. As noted in section III.A.5, consumers have come to understand and expect sales tax to be added at the end of a purchase, and there are other Federal, State, and local laws that have specific requirements about disclosing taxes and other government charges. In addition, in many online transactions, businesses are unable to fully calculate certain components of government charges until a consumer provides their location information. Thus, the Commission has good reason to allow businesses to exclude government charges from total price if they choose.[465]

D. Commission Structure

One commenter argued the Commission is unconstitutionally structured because the Commissioners are shielded from removal and asserts that *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935), either no longer applies or was wrongly decided by the Supreme Court.[466] The same commenter asserted that the Commission's administrative law judges are unconstitutionally appointed by the Commission Chair and are unconstitutionally shielded from removal.[467] The Commission disagrees.

In *Humphrey's Executor,* the Supreme Court addressed the crux of the commenter's first argument and concluded that the Commission's structure is constitutional. In that case, President Roosevelt sought to remove a Commissioner without cause. The Court held that the FTC Act authorized removal of Commissioners only on the grounds specified in the statute (''inefficiency, neglect of duty, or malfeasance in office'') and that this limitation on the President's removal power was constitutional given the ''character of the [C]ommission and the legislative history which accompanied and preceded the passage of the act.'' [468] The commenter's arguments that *Humphrey's Executor* is no longer applicable are unavailing. The Supreme Court's decision is not rendered any less binding because Congress has refined the Commission's authorities during the course of its more than 100-year tenure.[469] The key policy rationale underlying *Humphrey's Executor* remains valid today. The Commissioners collectively act as an adjudicatory body, and the for-cause removal standard ensures that they are free from ''suspicion of partisan direction'' or ''political domination or control.'' [470] Congress has similarly provided for-cause removal standards for the members of many other non-Article III tribunals composed of multiple members who perform adjudicatory functions as an expert body within a specific area of the law.[471]

Next, the commenter incorrectly asserted that administrative law judges are appointed by the Chair and are unconstitutionally shielded from removal. The commenter argued that under *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477 (2010), administrative law judges must be appointed by the full Commission and that the appointment process for administrative law judges at the FTC is unconstitutional because administrative law judges are appointed by the Commission Chair alone.[472] The commenter is mistaken. The Commission voted in December 2023 to approve the appointment of Administrative Law Judge Jay L. Himes.[473] The Chief Presiding Officer—here, the Chair pursuant to 16 CFR 0.8—then selected Judge Himes to be the presiding officer for this rulemaking, and Judge Himes was properly designated as the presiding officer in the Commission's notice of informal hearing.[474]

In response to the commenter's contention that the removal protections for the Commission's administrative law judges are unconstitutional, the Commission notes that the Supreme Court has recognized in recent decisions that Congress may constitutionally

[465] The Commission modifies the definition of ''Government Charges'' from those fees or charges ''imposed on consumers'' to those ''imposed on the transaction'' to limit the potential distinction between fees and charges imposed directly on consumers and those imposed on Businesses. *See supra* section III.A.5.

[466] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[467] *Id.*

[468] *Humphrey's Executor,* 295 U.S. at 624–32.

[469] *See FTC* v. *Am. Nat'l Cellular, Inc.,* 810 F.2d 1511, 1513–14 (9th Cir. 1987) (enactment of section 13(b) of the FTC Act did not render *Humphrey's Executor* inapposite).

[470] *Humphrey's Executor,* 295 U.S. at 625.

[471] *See Collins* v. *Yellen,* 594 U.S. 220, 250 n.18 (2021); *Wiener* v. *United States,* 357 U.S. 349, 353 (1958).

[472] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[473] Press Release, Fed. Trade Comm'n, *FTC Announces Appointment of Jay L. Himes as New Administrative Law Judge* (Mar. 12, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-announces-appointment-jay-l-himes-new-administrative-law-judge.*

[474] Initial notice of informal hearing; final notice of informal hearing; list of Hearing Participants; requests for submissions from Hearing Participants: Trade Regulation Rule on Unfair or Deceptive Fees, 89 FR 21216 (Mar. 27, 2024); *see also* 16 CFR 0.8, 1.13.

restrict the President's at-will removal power with regard to inferior officers.[475] In *Collins* v. *Yellen,* 594 U.S. 220 (2021), for example, the Court declined to ''revisit . . . prior decisions allowing certain limitations on the President's removal power,'' [476] which include the ''good cause'' protections for inferior officers ''with limited duties and no policymaking or administrative authority'' described by the Court in *Seila Law LLC* v. *CFPB,* 591 U.S. 197 (2020).[477] In *Free Enter. Fund,* the Court held removal protections for Public Company Accounting Oversight Board members unconstitutional and contrasted the duties of those members with the lesser duties of administrative law judges: ''[U]nlike members of the [Public Company Accounting Oversight] Board,'' administrative law judges (1) ''perform adjudicative rather than enforcement or policy making functions,'' or (2) ''possess purely recommendatory powers.'' [478] The FTC's administrative law judges fit squarely within both of those descriptions.

Even if the appointment procedures and removal protections of administrative law judges were unconstitutional because of their role as inferior officers under Article II, the constitutionality of the rule would not be in question because presiding officers under section 18 are not ''officers'' under Article II. Notably, while the presiding officer in the Informal Hearing for this rulemaking happened to be an administrative law judge, neither section 18(c)(1)(B) nor the Commission's rules implementing that provision require an administrative law judge to preside over section 18 informal hearings.[479]

Instead, the presiding officer is a specific, temporary designation made under section 18(c) and its implementing rules, 16 CFR 1.11 through 1.13. The Supreme Court's framework for distinguishing between officers and employees asks whether an individual ''exercise[s] significant authority pursuant to the laws of the United States'' and occupies a position that is ''continu[ous] and permanent.'' [480] For presiding officers, neither is true. As relevant here, the role of the presiding officer in section 18 rulemakings—assisting in the collection of necessary information for the rulemaking to proceed, ensuring hearings proceed methodically, and maintaining the rulemaking record [481]—is not policymaking; that role is reserved for the Commission.[482] Moreover, an administrative law judge, whether or not he or she is serving as a presiding officer, cannot initiate a rulemaking, decide its subject, decide whether a rule should issue, or establish its content. The Commission performs all of these functions.[483]

As an initial matter, the Commission determines whether an informal hearing will be conducted; presiding officers do not have discretion over whether the hearing will occur. The presiding officer simply ''presides over the rulemaking proceedings'' and, when appropriate, makes a ''recommended decision based upon the findings and conclusions of such officer.'' [484] The presiding officer's powers in the conduct of the hearing are also limited. For example, the officer may not extend the time allotted for the informal hearing beyond a certain period ''unless the Commission, upon a showing of good cause, extends the number of days for the hearing.'' [485] The commenter is correct that the presiding officer is initially chosen by the ''chief presiding officer,'' who is the Chair of the FTC under 16 CFR 0.8. However, the formal assignment of that presiding officer to a particular hearing is in the initial notice of informal hearing, which is issued by vote of the Commission. Although the presiding officer reports to the chief presiding officer, again, the powers of the two together amount to no more than conducting the informal hearing and making a recommended decision based on the presiding officer's findings to the Commission.[486] All substantive decisions are made by the Commission. These are temporary assignments that begin and end with the informal hearing process.

Accordingly, neither the Commission's structure nor the role of the presiding officer in section 18 violates the Constitution.

E. Administrative Procedure Act

Several commenters asserted the Commission has not complied with the APA.[487] The Commission disagrees. The Commission complies with the APA's requirements, including by explaining the rule's relationship to the unfair and deceptive conduct the Commission seeks to prevent and by responding to all significant comments.[488] As explained herein, the Commission also complies with the additional requirements of sections 18 and 22 of the FTC Act.

Commenters claimed that the rule is arbitrary and capricious because it is not based on sufficient facts or data, and lacks a rational connection between the facts and the regulatory choices.[489] These commenters argued that the factual record does not support the Commission's decision to promulgate an industry-neutral rule or to apply the rule to particular industries.[490] One commenter criticized various substantive aspects of the rule including its breadth, consideration of alternatives, and costs.[491] The commenter also argued that the rule is duplicative and could lead to regulatory confusion.[492]

The Commission has carefully reviewed and considered the comments and information it received in this rulemaking. As a preliminary matter, the NPRM engaged in extensive discussion concerning the comments received in response to the ANPR and followed up with additional questions and requests for empirical data and proposed rule text. Likewise, the analysis contained throughout this SBP, particularly Parts III–VII, similarly

[475] *See, e.g., Decker Coal Co.* v. *Pehringer,* 8 F.4th 1123, 1133–36 (9th Cir. 2021) (holding that administrative law judge removal protections are constitutional).

[476] *Collins,* 594 U.S. at 250–51 (discussing *Seila Law LLC* v. *CFPB,* 591 U.S. 197 (2020)).

[477] *Seila Law,* 591 U.S. at 217–18.

[478] *Free Enter. Fund,* 561 U.S. at 507 n.10.

[479] 15 U.S.C. 57a(c)(1)(B); 16 CFR 1.13.

[480] *Lucia* v. *SEC,* 585 U.S. 237, 245 (2018) (in the ''Court's basic framework for distinguishing between officers and employees[,] . . . an individual must occupy a 'continuing' position established by law to qualify as an officer . . . [and] 'exercise[ ] significant authority pursuant to the laws of the United States' '' (citations omitted)).

[481] 15 U.S.C. 57a; 16 CFR 0.14.

[482] 16 CFR 1.13.

[483] 16 CFR 1.9, 16 CFR 1.13(i), 16 CFR 1.14, 16 CFR 1.25, 16 CFR 1.26(d).

[484] 15 U.S.C. 57a(c).

[485] 16 CFR 1.13(a)(2)(ii).

[486] 16 CFR 1.13.

[487] FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3152 (Building Owners & Managers Association et al.); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3263 (Flex Association); FTC–2023–0064–3294 (International Franchise Association).

[488] *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto Ins.,* 463 U.S. 29, 43 (1983) (holding that an agency must articulate a satisfactory explanation for its action including a ''rational connection between the facts found and the choices made.'' (citing *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962))).

[489] *See, e.g.,* FTC–2023–0064–3294 (International Franchise Association); FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3152 (Building Owners & Managers Association et al.); FTC–2023–0064–3263 (Flex Association).

[490] *See, e.g.,* FTC–2023–0064–3294 (International Franchise Association); FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3152 (Building Owners & Managers Association et al.); FTC–2023–0064–3263 (Flex Association).

[491] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[492] *Id.*

engages with and considers the additional significant comments and information received in response to the NPRM. Commenters raising questions regarding APA compliance primarily critiqued the industry-neutral nature of the proposal advanced in the NPRM. The Commission disagrees with these critiques. The Commission, however, has determined to limit this final rule to covered goods or services and need not address arguments regarding the application of the rule to a wide range of industries at this time. Further, both the NPRM and this SBP explain in detail the factual record and its relationship to the provisions finalized in the rule. While empirical data is not required, the Commission in section V presents an analysis for the final rule, identifying benefits, such as reductions in consumer search cost time and deadweight loss, and quantifying compliance costs. Finally, in section V.E.2.d, the Commission finds that the rule's benefits to the public will exceed its costs.

V. Final Regulatory Analysis Under Section 22 of the FTC Act

Under section 22 of the FTC Act, when the Commission promulgates any final rule as a ''rule'' as defined in section 22(a)(1), it must include a ''final regulatory analysis.'' 15 U.S.C. 57b–3(b)(2). The final regulatory analysis must contain: (1) a concise statement of the need for, and objectives of, the final rule; (2) a description of any alternatives to the final rule that were considered by the Commission; (3) an explanation of the reasons for the Commission's determination that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; (4) an analysis of the projected benefits, any adverse economic effects, and any other effects of the final rule; and (5) a summary of any significant issues raised by the comments submitted during the public comment period in response to the Preliminary Regulatory Analysis, and the Commission's assessment of such issues. 15 U.S.C. 57b–3(b)(2)(A) through (E). The Commission analyzes each of these components in the following final regulatory analysis.

The Commission has the authority to promulgate this rule under section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1). In explaining the need for, and objectives of, the rule, the Commission observes that a clear rule is the best way to accomplish its goals of: (1) ensuring that consumers receive truthful, timely, and transparent information about price to permit them to comparison shop effectively and (2) leveling the playing field for honest competitors. In addition, a clear rule would deter the defined unfair or deceptive pricing practices by enabling the Commission to more readily obtain monetary relief and civil penalties. The Commission carefully considered several alternatives to the rule, including terminating the rulemaking and pursuing a broader, industry-neutral alternative. The Commission determined that the alternative of terminating the rulemaking would not accomplish these objectives. As explained in section II, the Commission finds that bait-and-switch pricing and misleading fees and charges are prevalent economy-wide, but chooses to begin by tackling these practices in the live-event ticketing and short-term lodging industries, where the Commission first began evaluating drip pricing more than a decade ago and which have a long history of harming consumers and businesses. The final rule will attain its objectives of promoting truthful, timely, and transparent pricing, comparison shopping, and fair competition in the live-event ticketing and short-term lodging industries in a manner consistent with applicable law. The Commission will rely on its existing section 5 authority in pursuing case-by-case enforcement actions against businesses in other industries that engage in the specific unfair and deceptive pricing practices that are the subject of the industry-specific coverage in this rule.

The Commission's final regulatory analysis indicates that adoption of the rule will result in benefits to the public that exceed the costs. As described further herein, the rule will not only result in significant benefits to consumers but also improve the competitive environment in the live-event ticketing and short-term lodging industries, particularly for small, independent, or new firms. One such benefit is that the final rule will reduce deadweight loss. ''Deadweight loss'' is a term used to describe the loss of efficiency or economic welfare, a cost to society, that occurs when resources are not used as efficiently as possible. At a competitive equilibrium, in which the marginal benefit for consumers equals the marginal cost for firms, there is no deadweight loss. When firms, including those in the live-event ticketing and short-term lodging industries, engage in bait-and-switch tactics, consumers purchase more goods and services than they would otherwise because they do not understand the full price. In other words, in such cases, consumers overconsume beyond the quantity necessary for competitive equilibrium. This overconsumption is a deadweight loss because, if they had full information, consumers would shift their spending toward more beneficial and efficient spending patterns that reflect their true preferences. Deadweight loss is discussed more fully in section V.E.2.a.ii.

The rule provides a net benefit to society if its benefits exceed its costs. The Commission quantifies the incremental benefits for the live-event ticketing and short-term lodging industries and shows that the rule's benefits exceed the costs in these industries.

The Commission reviewed the comments relating to its Preliminary Regulatory Analysis, some of which challenged the Commission's estimation of the rule's potential costs and benefits. In response to these comments, the Commission herein clarifies its analysis and adds a sensitivity analysis to the baseline estimation. The Commission concludes that these comments do not affect the Commission's finding that the potential benefits of the rule exceed the potential costs.

A. Concise Statement of the Need for, and Objectives of, the Final Rule

The Commission believes the final rule is needed to ensure that consumers receive truthful, timely, and transparent information about the total price of goods or services, including the nature, purpose, and amount of any fees or charges imposed on the transaction, so that they can effectively comparison shop and budget their spending dollars when deciding what live-event tickets to purchase or where to stay when traveling. Although bait-and-switch pricing and misleading fees are already unlawful unfair or deceptive acts or practices under section 5 of the FTC Act, the Commission concludes that a clear rule is the best way to accomplish its goal of preventing the rule's defined, specific unfair and deceptive pricing practices in the live-event ticketing and short-term lodging industries while fostering a level playing field for honest competitors to be able to compete truthfully and fairly based on price. In addition, the final rule aims to increase deterrence of the defined unfair or deceptive pricing practices in these industries by enabling the Commission

to more readily obtain redress for injury to consumers through section 19(a)(1) of the FTC Act, 15 U.S.C. 57b(a)(1), and by allowing courts to impose civil penalties where appropriate. The Commission believes that the rule will accomplish these goals without significantly burdening businesses and will provide significant benefits to consumers and honest competitors.

The record of this rulemaking is replete with comments from consumers, consumer groups, industry members, academics, and policy organizations, as well as officials and agencies across all levels of government, emphasizing the importance of consumers' ability to effectively comparison shop and businesses' ability to honestly compete against each other based on price. Regardless of industry, consumers want to comparison shop when deciding where to purchase their goods or services from among various competing offers. In many instances, consumers have found it increasingly difficult, if not impossible, to effectively comparison shop because businesses fail to provide the total price when they display a purported amount a consumer will pay for a good or service. Consumers are also misled as to the nature, purpose, amount, and refundability of fees and charges, and are unable to make informed choices about the value of the fee or charge, or the good or service it represents, because their understanding of the fee or charge is predicated on deceptive omissions or false or misleading information. As a result, consumers are harmed because they consume more goods or services, pay more for a good or service, and incur higher search costs than they otherwise would have if they had been presented with the total price upfront and truthful, timely, and transparent information regarding fees and charges. Businesses that honestly present the total price of a good or service and accurately disclose the nature, purpose, and amount of fees and charges are at a competitive disadvantage to those that mislead consumers by presenting purportedly lower prices and inaccurate information about fees and charges. As explained in section II, the record, as well as the Commission's law enforcement actions, outreach, and other engagement with businesses and consumers, support a finding that these practices pervade the economy across industries. Fundamentally, the rule will help consumers make informed decisions when comparison shopping and level the playing field for honest businesses in the live-event ticketing and short-term lodging industries, two industries that have a long history of bait-and-switch pricing and misrepresentations regarding fees and charges.

In addition, the final rule is necessary to allow the Commission to recover redress more efficiently in cases where there is quantifiable consumer harm resulting from bait-and-switch pricing and misleading fees and charges. The final rule will also deter live-event ticketing and short-term lodging businesses from engaging in these practices by allowing for the imposition of monetary relief in the form of consumer redress and civil penalties.

In 2021, the Supreme Court in *AMG Capital Mgmt., LLC* v. *FTC,* 593 U.S. 67, 82 (2021), held that section 13(b) of the FTC Act [493] did not authorize the Commission to seek, or a court to order, equitable monetary relief for consumers such as restitution or disgorgement. The *AMG* ruling has made it significantly more difficult for the Commission to return money to injured consumers, particularly in cases that do not involve rule violations.[494]

Since *AMG,* the primary means for the Commission to return money unlawfully taken from consumers has been through section 19 of the FTC Act, 15 U.S.C. 57b, which provides two paths for consumer redress. One path, under section 19(a)(2), typically requires the Commission to first conduct an administrative proceeding to determine whether the respondent violated the FTC Act; if the Commission finds that the respondent did so, the Commission can issue a cease-and-desist order, which might not become final until after the resolution of any appeals. To obtain monetary relief, the Commission then must initiate a separate action in Federal court under section 19 and, in that action, the Commission must prove that the violator in the administrative action engaged in objectively fraudulent or dishonest conduct.[495]

The more efficient path to monetary relief is under section 19(a)(1), which allows the Commission to recover redress in a single Federal court action for violations of a Commission rule relating to unfair or deceptive acts or practices.[496] Under the rule, the Commission will now be able to use the section 19(a)(1) pathway to obtain redress for losses attributable to the specific unfair or deceptive practices the rule defines and prohibits.

In addition, the final rule will allow courts to impose civil penalties under section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A). Civil penalties will provide the deterrence necessary to incentivize compliance with the law, even in cases when it is difficult to quantify consumer harm.

Overall, the rule's prohibition of bait-and-switch pricing tactics, including drip pricing, and misleading fees in the live-event ticketing and short-term lodging industries expands the Commission's enforcement toolkit and allows it to deliver on its consumer protection mission by stopping and deterring harmful conduct in these industries and making consumers whole when they have been harmed. The unfair or deceptive acts or practices involving bait-and-switch pricing and misleading fees encompassed by this final rule are prevalent and harmful to consumers and honest competitors. Thus, the unlocking of additional remedies through this rulemaking—particularly, the ability to obtain redress for consumers injured by misconduct and civil penalties against violators, where appropriate—will allow the Commission to more effectively police and deter unfair or deceptive pricing practices in these industries.

B. Alternatives to the Final Rule the Commission Considered, Reasons for the Commission's Determination That the Final Rule Will Attain Its Objectives in a Manner Consistent With Applicable Law, and the Reasons the Particular Alternative Was Chosen

In analyzing the potential costs and benefits of the proposed rule, the Commission considered several alternatives, including terminating the rulemaking and a broader rule alternative. As the Commission observed in the NPRM, one potential alternative is to terminate the rulemaking and rely instead on the Commission's existing tools to combat unfair or deceptive practices relating to pricing, such as consumer education and enforcement actions brought under sections 5 and 19(a)(2) of the FTC Act. However, terminating the rulemaking would deprive consumers of live-event tickets and short-term lodging of quantifiable time savings, and unquantifiable benefits including reduced frustration, less consumer

[493] 15 U.S.C. 53(b).

[494] *See* NPRM, 88 FR 77436–38, nn.122, 211, 232 (discussing *AMG*).

[495] *See* 15 U.S.C. 57b(a)(2) (''If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.'').

[496] Certain statutes, such as the Restore Online Shoppers' Confidence Act, 15 U.S.C. 8401 through 8405, include provisions that treat violations of the statute as a violation of a rule for purposes of section 19(a)(1). *See, e.g.,* 15 U.S.C. 8404(a).

stress, and improved economic efficiency through a reduction of deadweight loss, as outlined in section V. Implementation of the rule also strengthens the Commission's enforcement program against unfair or deceptive pricing practices in the live-event ticketing and short-term lodging industries.

As noted in the NPRM, given the strong indicators that bait-and-switch pricing, including drip pricing, and misleading fees and charges are prevalent and worsening across industries, the Commission considered adopting a final rule that would have applied to all industries nationwide. The Commission declines to adopt such an industry-neutral rule at this time and instead chooses, in its discretion, to use its rulemaking authority incrementally. The Commission's rule first targets the two industries where the Commission first began evaluating drip pricing more than a decade ago and where consumer harm has been longstanding and continues to be pronounced. As noted in section II, most transactions in the live-event ticketing and short-term lodging industries occur online, where bait-and-switch pricing and misleading fees and charges have the highest potential to thwart the rule's stated objectives, namely price transparency and timeliness, as well as comparison shopping. In addition, consumers are often presented with identical offers (as is the case with live-event ticketing) or near-identical offers (as is the case with short-term lodging), and as such, price is the most salient feature for consumers in these transactions.

The NPRM also discussed, and the Commission also considered, a small business exemption. Small businesses, which may have smaller profit margins, may be disproportionately affected by initial compliance costs associated with § 464.2's disclosure requirements. On the other hand, a rule exempting small businesses would fail to accomplish the rule's core objectives of transparency in pricing and facilitating comparison shopping because consumers would continue to be subject to a mix of pricing disclosures in the live-event ticketing and short-term lodging industries that could include bait-and-switch pricing and misleading fees. As one commenter noted, ''Small businesses will benefit from the rule because it eliminates the deceptive practices that keep consumers from being able to comparison shop.'' [497] The commenter also stated that a small business ''exception will undermine the ability of consumers to make purchasing decisions based on transparent and honest information.'' [498] A small business exemption could also reduce consumer benefits arising from increased price transparency across markets and lower consumer confidence regarding whether the rule applies to specific purchases.

Excluding small businesses could also harm honest competition because such an exemption might impose more uncertainty and compliance costs for businesses to determine whether the rule applies to them. In addition, as noted in section III, some industry commenters favored a rule that applied equally to all industry members, to facilitate comparison shopping and avoid the creation of competitive advantages.

Some commenters, as noted in section III, expressed frustration with fees or charges they described as ''excessive'' or ''worthless.'' As discussed in the NPRM, an alternative to the final rule could be to explicitly prohibit excessive or worthless fees or charges in the live-event ticketing and short-term lodging industries. This alternative may benefit consumers who pay excessive amounts for goods or services in these industries or for fees or charges that provide them little to no value, allowing them instead to save their money or spend it elsewhere.

The Commission declines to adopt an alternative rule prohibiting worthless or excessive fees or charges, because doing so may raise additional questions for these industries and for the Commission regarding how to assess the value of fees or charges. In addition, the final rule may already accomplish some of the benefits of such an alternative. For example, the final rule requires total price to include all mandatory fees or charges (with limited exceptions for government charges and shipping charges). Transparency and competition on price could then disincentivize live-event ticketing and short-term lodging businesses from incorporating such fees into their pricing schemes altogether. In addition, consumer confusion related to the purpose or value of fees or charges would be addressed by the final rule's requirement to disclose the nature, purpose, and amount of any fees or charges lawfully excluded from total price, as well as the prohibition against misrepresenting any fees or charges.

In sum, the rule accomplishes the Commission's objectives in the areas of live-event ticketing and short-term lodging consistent with applicable law, while providing the Commission additional time to consider further action. As explained in section V.E, the Commission believes the rule's benefits exceed the costs of the rule. Notably, the Commission believes, as detailed in Parts II, III, and V, that the rule also will result in additional tangible benefits from consumers' ability to accurately comparison shop for live-event tickets and short-term lodging. Therefore, the Commission finds in this final regulatory analysis that adoption of the rule will result in benefits to the public that exceed the costs.

C. The NPRM's Preliminary Regulatory Analysis

In the Economic Analysis of Costs and Benefits of the Proposed Rule in section VII.C of the NPRM (hereafter, ''Preliminary Regulatory Analysis''), the Commission described the anticipated effects of the proposed rule and quantified the expected benefits and costs to the extent possible. For each benefit or cost quantified, the analysis identified the data sources relied upon and, where relevant, the quantitative assumptions made. The Preliminary Regulatory Analysis measured the benefits and costs of the proposed rule against a baseline in which the Commission did not promulgate a rule addressing the unfair or deceptive practices of presenting incomplete or inaccurate pricing information that obscures total price and misrepresenting the nature and purpose of fees. Several of the benefits and costs were quantifiable for specific industries, but the Commission found that benefits at the economy-wide level were not quantifiable. The Preliminary Regulatory Analysis discussed the bases for uncertainty in the estimates.

In the Preliminary Regulatory Analysis, the Commission performed a break-even analysis under various assumptions to determine the required benefits necessary to justify the estimated costs. Under the assumptions of high-end compliance costs and a 7% discount rate, the Commission found that if the average benefit to consumers from the proposed rule exceeded $6.65 per year over ten years, then the proposed rule's benefits would exceed its quantified economy-wide compliance costs. The expected benefit could be a result of reduced consumer search time, of increased consumer surplus from more efficient purchasing decisions, or a combination of the two. The Commission found in the Preliminary Regulatory Analysis that if the proposed rule resulted in savings from reduced search time that exceeded 15.82 minutes per consumer per year over ten years, then the benefits from reduced search time alone would

[497] FTC–2023–0064–3302 (Public Citizen).

[498] *Id.*

exceed quantified compliance costs under the assumption of high-end costs and a 7% discount rate.

D. Significant Issues Raised by Comments, the Commission's Assessment and Response, and Any Changes Made as a Result

In this section, the Commission summarizes its assessment of, and response to, the major concerns, comments, and suggestions raised by commenters about the Preliminary Regulatory Analysis. The Commission received comments about the Preliminary Regulatory Analysis from industry groups, law firms, consumer advocacy groups, think tanks, consumers, and business owners. Section V.D.1 addresses comments about the Commission's cost estimates, section V.D.2 addresses comments about the Commission's the benefits estimates, and section V.D.3 addresses comments specific to the economy-wide break-even analysis.

1. Comments on Costs

In section V.D.1.a through d, the Commission addresses four major comments regarding the NPRM's cost estimates: (a) the estimated costs are too low; (b) there are unquantified costs to firms; (c) there are unquantified costs to consumers; and (d) there are unquantified costs to third parties. Section V.D.1.e addresses commenter concerns about costs that may stem from applying the rule to variable, dynamic, or contingent fees.

(a) Public Comments: Estimated Costs Are Too Low

Commenters from members and representatives of the live-event ticketing and short-term lodging industries, among others, argued that estimated costs in the NPRM were too low because the analysis underestimated the number of attorney, data scientist, and web developer hours needed to comply with the proposed rule.[499] These commenters contended that some businesses will require more time than the assumed average estimates of labor hours used in the Preliminary Regulatory Analysis. The Commission acknowledges the possibility that some businesses will incur a greater number of hours to comply with the final rule, but notes that this is consistent with the Preliminary Regulatory Analysis because the employee hour estimates used represent averages. These estimates capture the fact that some businesses will require more time than the average and some will require less. The Commission received additional comments with similar concerns about the Commission's compliance hours estimates as they apply to other specific industries such as movie theater ticketing, delivery apps, restaurants, bowling, and cable and broadband, which are no longer subject to the final rule.[500] However, the Commission's argument that the compliance hours represent averages holds more broadly.

Two commenters in the live-event ticketing industry provided alternative estimates of average employee hours necessary to comply with the rule. Vivid Seats stated that, from its experience implementing upfront pricing as a ticket seller in three states, the Commission underestimated the employee hours needed for live-event ticket sellers by at least a factor of five.[501] Conversely, another live-event ticket seller, TickPick, commented that, for the most part, live-event ticketing companies would incur an immaterial cost to implement all-in pricing because ''the technology already exists within ticketing platforms to eliminate drip pricing and would simply need to be applied to events in the U.S.'' [502] Again, the Commission notes that the estimated employee hours reflect an average and, as these commenters stated, it is possible that firms like Vivid Seats may require more hours, while others, like TickPick, may require fewer.

The National Restaurant Association stated that it would take restaurants at least twenty hours a year to reoptimize menu prices because the Commission's estimates did not account for supply chain issues that may change prices or consider that some restaurants may offer seasonal menus.[503] The Preliminary Regulatory Analysis omitted these costs because they are not a result of the rule; restaurants will face supply chain fluctuations and seasonal changes to their menus regardless of the rule.[504] However, this is no longer a concern in the final rule, which does not apply to restaurants.

The Office of Advocacy of the United States Small Business Administration (''SBA Office of Advocacy'') argued that costs estimated in the Preliminary Regulatory Analysis are too low because data scientist and web developer hours should be ongoing costs, rather than one-time costs.[505] It argued that ''the FTC should assume a percentage of firms that in the previous year were in compliance will not be the following year.'' The Commission does not believe that these ongoing costs are attributable to the rule. Once firms have adjusted to the rule, making sure new pricing strategies comply with the rule is considered a part of the normal course of business, as is ensuring compliance with other existing laws and regulations.

Some commenters identified purported costs that were either already captured in the economic analysis or would not be affected by the rule. The U.S. Chamber of Commerce and SBA Office of Advocacy argued that the Preliminary Regulatory Analysis did not account for the time needed to train staff to provide new upfront prices to customers for in-person, online, and phone sales.[506] The Commission believes training time, to the extent that it exists, is already captured in the assumed range of data scientist and web developer hours, which the Commission has noted serves as a proxy for any rule-associated costs from adjusting pricing strategies and displaying prices to consumers. Another commenter argued that businesses would need to ''hire graphic designers to make advertisements look appealing and web designers or software engineers to rebuild entire websites.'' [507] In addition, it argued that the Preliminary Regulatory Analysis did not account for

[499] FTC–2023–0064–2856 (National Football League); FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3238 (Gibson, Dunn, & Crutcher LLP); FTC–2023–0064–3122 (Vivid Seats); FTC–2023–0064–3094 (American Hotel & Lodging Association); FTC–2023–0064–3292 (National Association of Theatre Owners); FTC–2023–0064–3293 (Travel Technology Association); FTC–2023–0064–3294 (International Franchise Association).

[500] FTC–2023–0064–3263 (Flex Association); FTC–2023–0064–3300 (National Restaurant Association); FTC–2023–0064–3217 (Bowling Proprietors' Association of America); FTC–2023–0064–3233 (NCTA—The internet & Television Association).

[501] FTC–2023–0064–3122 (Vivid Seats).

[502] FTC–2023–0064–3212 (TickPick, LLC).

[503] FTC–2023–0064–3300 (National Restaurant Association).

[504] *See, e.g., id.* (National Restaurant Association commented that there are ''common supply chain issues that may cause certain food items to increase or decrease in price'' and ''thousands of restaurants . . . offer varying seasonal menus with completely different offerings''); FTC–2023–0064–2992 (Individual Commenter who owns a restaurant commented that complying with the rule would not be complex for restaurants because ''[t]hey reprice and change dishes frequently''); FTC–2023–0064–3219 (Georgia Restaurant Association also referred to ''rising food costs [and] supply chain disruptions''); FTC–2023–0064–3180 (Independent Restaurant Coalition commented about ''increasing food costs''); FTC–2023–0064–3078 (Washington Hospitality Association referred to supply chain issues, inflation, and other rising costs).

[505] U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC–2023–0064–0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf.*

[506] *See, e.g., id.;* FTC–2023–0064–3127 (U.S. Chamber of Commerce).

[507] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

costs needed to replace physical ads, subway ads, and billboards and speculated that would take ''thousands of hours.'' The final rule has no bearing on a firm's decision to engage graphic designers to ensure its advertisements are ''appealing,'' and the Commission does not believe—and commenters have failed to cite evidence demonstrating—that the need to update prices will require rebuilding entire websites. Moreover, as discussed in more detail in section V.E.3.a, the estimated range of web developer time is a proxy for any costs associated with changing price displays to comply with the rule.

Two commenters argued that the Preliminary Regulatory Analysis underestimated costs because the wage rates for attorneys and data scientists were too low and were not the same as, for example, attorneys fees.[508] One commenter stated that the estimated wages did not account for overhead costs or reflect the higher costs of hiring outside counsel and data scientists and suggested using $306 in attorney wages and $59 in data scientist wages to reflect these higher costs.[509] In response to these suggestions, the Commission conducted a sensitivity analysis that multiplied wage rates by two to reflect overhead and hiring costs for the short-term lodging and live-event ticket industries. The results of the sensitivity analysis are provided in section V.E.3.b.i and do not impact the Commission's assessment that the benefits exceed the costs. The Commission received two additional comments with similar concerns about the Commission's wage estimates as they apply to the restaurant industry and the innovation economy, which are no longer subject to the final rule.[510]

(b) Public Comments: Unquantified Costs to Firms

The NPRM noted that there are unquantified costs of the rule, primarily in the form of unintended consequences to consumers as they adjust to upfront pricing. In addition, commenters identified additional types of unquantified costs to firms.

An academic commenter argued that there may be unintended consequences to firms from partial compliance.[511] The commenter stated that no firm would want to be the first in its market to comply, and the resulting ''partial or uneven compliance would cause compliant firms to lose business to firms that ignored the rule. Implementing coordinated compliance for the entire economy would be difficult with the [Commission's] limited resources.'' The Commission believes that the partial compliance described by this commenter is the current status quo in the absence of a rule. Currently, some firms impose drip pricing, and these firms may have a competitive advantage over those that do not impose drip pricing. Under the rule, the Commission expects all firms in the short-term lodging and live-event ticket industries to provide total price, which is an improvement relative to the status quo. If, as the commenter argues, some degree of partial compliance remains, the potential competitive advantage from non-compliance would be similar to the status quo, with the additional risk to non-compliant firms of law enforcement actions with potential exposure to consumer redress and penalties. In other words, even with some degree of partial compliance after the final rule, such an equilibrium would still result in more benefits for consumers than a world without the final rule. The commenter's concern that implementing coordinated compliance for the whole economy may be difficult is mitigated in the final rule, which only applies to two industries. In addition, while the Commission may have limited enforcement resources, it expects consumer behavior regarding fees to adjust over time due to the final rule. Once upfront pricing becomes the new norm, consumers will expect to see total prices displayed upfront and will be more likely to punish firms that ignore the rule by taking their business elsewhere. Therefore, any partial compliance is likely to be temporary.

Nine commenters stated the NPRM's assertion that the rule will provide a harmonized legal framework for all States is incorrect because, as discussed in section III, the rule only preempts State laws if they are inconsistent with the rule.[512] Commenters noted that an added layer of regulation is an additional cost for businesses as they determine whether they are compliant with the various rules to which they are subject. The Commission updates the final regulatory analysis to reflect this concern as it applies to covered goods or services, but notes that the cost was already captured by the assumption that all firms within the live-event ticketing and short-term lodging industries will spend on average one hour to determine whether the rule applies to them.

One commenter asserted that ''[t]he Commission erroneously disclaims the possibility of losses to producer surplus.'' [513] The commenter argued that the Commission's statement that consumer surplus is reduced due to consumer search costs under drip pricing ignores the countervailing increase of producer surplus. The commenter further contended that the Preliminary Regulatory Analysis omits that, under drip pricing, consumers purchase more expensive products, which amounts, in part, to a transfer of surplus from consumers to sellers. The Commission acknowledges the transfer of surplus due to higher prices. However, the commenter incorrectly assumes that the movement of surplus from consumers to producers will be a one-to-one transfer and presupposes that there will be no increase in consumer search time or deadweight loss. As is discussed in section V.E.2.a.i, the increased, unnecessary consumer search time due to drip pricing results in a net cost to society—no one benefits from the additional hours consumers collectively spend searching for price information and then being surprised with a higher final amount at the time of purchase. In addition, as is discussed in section V.E.2.a.ii, inefficient overconsumption under drip pricing generates a deadweight loss. Inefficiently high spending under drip pricing thus results in a cost to society in the form of higher search costs and a deadweight loss in addition to a transfer of surplus from consumers to sellers in the form of higher seller revenue. Overall, this results in a net loss to society.

Lastly, some commenters representing the communications services industry noted that there are unquantified costs to cable, broadband, and wireless providers due to similar upfront pricing requirements from the FCC.[514] The

[508] *Id.;* U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC–2023–0064–0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf.*

[509] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[510] FTC–2023–0064–3300 (National Restaurant Association); FTC–2023–0064–3202 (TechNet).

[511] FTC–2023–0064–2891 (Mary Sullivan, George Washington University, Regulatory Studies Center).

[512] FTC–2023–0064–2856 (National Football League); FTC–2023–0064–2887 (Progressive Policy Institute); FTC–2023–0064–3122 (Vivid Seats); FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3143 (ACA Connects—America's Communications Association); FTC–2023–0064–3233 (NCTA—The internet & Television Association); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3258 (National Taxpayers Union Foundation).

[513] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[514] FTC–2023–0064–2884 (NTCA—The Rural Broadband Association); FTC–2023–0064–3143 (ACA Connects—America's Communications Association); FTC–2023–0064–3233 (NCTA—The

Continued

Commission's decision to narrow the final rule to covered goods or services renders these comments inapplicable.

(c) Public Comments: Unquantified Costs to Consumers

The NPRM noted that there may be unquantified costs of the rule in the form of consumer confusion as consumers adjust to upfront pricing. Commenters argued there were several additional unquantified costs to consumers. One commenter suggested that consumers would experience higher search time if companies limit or eliminate price advertising to avoid the regulatory risk of providing an inaccurate total price.[515] The Commission reiterates that the rule does not require firms to eliminate price advertising; rather the rule requires covered firms to present total price to consumers whenever businesses offer, display, or advertise any price of a covered good or service. The Commission believes that unnecessarily high consumer search time and anticompetitive effects resulting from different pricing strategies are already a problem absent the rule, where firms advertise a mix of dripped prices, upfront prices, and no prices. The commenter did not provide evidence for why, under the rule, some firms are, or would be, unable to advertise total price or why it would result in higher search time and a less competitive equilibrium than the status quo. The Commission received two additional comments with similar concerns as they apply to the telecommunications and rental housing industries, which are no longer subject to the final rule.[516]

Two commenters also suggested there might be potentially higher consumer search time if businesses unbundle previously bundled options in an effort to reduce the advertised price in response to the rule, stating that hotels, for example, may make amenities such as wi-fi, gym access, and parking pay-per-use.[517] The Commission acknowledges that some businesses may unbundle previously bundled options but reiterates that the rule prohibits businesses from treating features as optional if they are necessary to render the good or service fit for its intended use. The Commission also notes that consumers are likely to punish firms that unbundle features that they expect to be included in total price by taking their business elsewhere. A commenter also speculated that there may be an increase in deadweight loss if businesses set inefficiently high prices as they reoptimize prices or seek to cut costs by reducing the quality of goods and services.[518] The Commission believes this is unlikely. Under the rule, there will be competitive pressure to adjust both price and product quality to more efficient levels when firms must present total price. As discussed in section V.E.1.b, drip pricing sometimes leads consumers to underestimate the total price of a good or service. The result is that consumers start transactions not understanding that the final amount of payment will be higher than what they are willing or able to pay. For example, consumers may book premium seats to a concert believing they could afford the purchase, only to realize afterward that the total price was understated. Had they understood the final amount of payment, they would have selected seats at a lower price point or skipped the concert altogether. The final rule will help ensure that consumers' preferences, both in terms of cost and quality, can be realized.

One industry group argued that because intermediary travel websites rely on short-term lodging firms for accurate price information, the proposed rule may incentivize these firms to charge intermediaries a premium for accurate pricing information, "knowing that the intermediaries face significant regulatory risk without access to such information." [519] The commenter suggested that these additional costs could be passed onto consumers without adding any value. As explained in section III, the Commission reiterates that the rule requires businesses that sell or advertise through intermediaries to provide the intermediaries with accurate pricing information (including about mandatory and optional fees). The rule's coverage of business-to-business transactions protects consumers when they purchase goods or services, the sellers that do business with intermediaries, and the intermediaries themselves. The Commission further notes that hotels are already free to charge travel websites and intermediaries money in exchange for pricing information, yet they do not because these travel websites and intermediaries allow the hotels to reach more consumers. In addition, under the status quo, intermediaries already contend with different fee practices across short-term lodging firms and are required to ensure they consistently disclose pricing information to consumers; the final rule should obviate the need for intermediaries to deal with inconsistent fee practices moving forward. Therefore, the final rule should not change any incentives relative to the status quo, and it is unlikely that hotels will change their behavior in this respect as a result of the rule.

A commenter disagreed with the Commission's statement that consumer confusion will be a temporary cost as prices adjust.[520] The commenter also argued that consumers may inefficiently under-consume when confronted with higher upfront prices. The Commission believes that consumers who may inefficiently under-consume due to the rule because they are anticipating hidden fees are the same consumers who are accurately accounting for hidden fees and efficiently consuming under the status quo. The percentage of consumers who expect and anticipate hidden fees is likely to be very small because, as discussed in the NPRM, empirical and theoretical models consistently show that consumers strongly and systematically underestimate the full price they will pay when faced with drip pricing, and they pay more than they otherwise would in a transparent marketplace.[521] Therefore, if these consumers are savvy enough to adjust their expectations and accurately account for hidden fees under the status quo, then it is likely that they will quickly adjust their expectations after the final rule becomes effective and any under-consumption will be temporary.

The commenter also misinterpreted the results of a study conducted in the live-event ticketing market, Blake et al. (2021) (the "Blake Study"), in an effort to support the claim that seeing total price will deter consumers from making efficient and economically desirable purchases.[522] The Blake Study found

internet & Television Association); FTC–2023–0064–3234 (CTIA—The Wireless Association).

[515] FTC–2023–0064–3127 (U.S. Chamber of Commerce).

[516] FTC–2023–0064–3143 (ACA Connects—America's Communication Association; FTC–2023–0064–3296 (Bay Area Apartment Association).

[517] FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[518] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[519] FTC–2023–0064–3293 (Travel Technology Association).

[520] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[521] Tom Blake et al., *Price Salience and Product Choice,* 40 Mktg. Sci. 619 (2021), *https://doi.org/10.1287/mksc.2020.1261*; Michael R. Baye et al., *Search Costs, Hassle Costs, and Drip Pricing: Equilibria with Rational Consumers and Firms* (Nash-Equilibrium.com Working Paper, 2019), *http://nash-equilibrium.com/PDFs/Drip.pdf*; Alexander Rasch et al., *Drip Pricing and its Regulation: Experimental Evidence,* 176 J. Econ. Behav. & Org. 353 (2020), *https://doi.org/10.1016/j.jebo.2020.04.007.*

[522] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP, discussing Blake, *supra* note 521).

that providing an upfront total price reduces both the quantity and quality of purchases relative to the inefficiently high levels of quantity and quality purchased under dripped prices. In other words, when consumers do not have truthful, timely, and transparent information about the final price, they purchase goods of higher quality and make more purchases than they would if they had full information. The commenter incorrectly implied that this reduction amounts to inefficient underconsumption when, in fact, it represents a return to an efficient level and quality of consumption compared to drip pricing. The authors explicitly concluded: ''Our empirical results support our hypotheses: price obfuscation distorts both quality and quantity decisions.'' [523]

Five industry groups identified what they incorrectly labeled as three additional types of unquantified costs for consumers. The ''costs'' identified actually are either transfers from consumers to producers (resulting in no net loss for society) or reflect misunderstandings of the rule. These commenters claimed that prices would increase as businesses pass compliance costs onto consumers,[524] that prohibiting businesses from displaying partitioned pricing would decrease transparency for consumers,[525] and that forcing businesses to display all optional fees upfront would overload and confuse consumers with often irrelevant information.[526] None of these are true costs resulting from the final rule. First, increased prices that result from the sellers' increased compliance costs are a transfer of consumer surplus to producer surplus and do not result in a cost to society. Second, the rule does not prohibit itemization. As long as total price is clear and conspicuous and most prominent, businesses are free to display the components of total price if they so choose. Finally, the rule does not require businesses to display all optional fees upfront. Rather, businesses must disclose clearly and conspicuously, before the consumer consents to pay, the nature, purpose, and amount of any fee or charge imposed on the transaction that been excluded from total price.

One policy organization commented on the study [527] cited in the NPRM that shows partitioned pricing decreases consumers' ability to accurately recall total costs and increases their demand.[528] The commenter argued that the conclusion cited in the NPRM does not follow from the study because participants who recalled a lower price could have known the total cost but misunderstood the question to be asking for the base price excluding the fees. This interpretation is incorrect because there was no ambiguity in the study question at issue; it explicitly asked for the total cost inclusive of all fees.

(d) Public Comments: Unquantified Costs to Third Parties

One commenter argued that, as consumer expectations adjust to upfront prices, inefficiently low spending may affect other businesses in the supply chain such as manufacturers, packagers, shippers, and warehouses.[529] The commenter also argued that lower spending may affect live-event venues and ticket resellers due to decreased sales in food, drinks, and merchandise. In addition, the commenter claimed that lower spending will lead to lower sales tax revenue for State and local governments, causing them to borrow more money at high interest rates, raise taxes, or eliminate services. As discussed in detail in section V.E.2.c, the Commission believes that any inefficient underconsumption due to consumer confusion is likely to be temporary, as are any resulting costs to third parties.

(e) Public Comments: Costs From Incorporating Contingent Fees Into Total Price

Several commenters, including industry groups, policy organizations, and an academic, expressed concern that it would be difficult for firms to display total price in cases where total price is unknown because it depends on consumer conduct or choices.[530] In cases where price is determined through customization, total price may not be known until after consumers have finalized their selection of options. The Commission addresses contingent fees in section III.

2. Comments on Benefits

Section V.D.2.a addresses the concern of some commenters that the NPRM's benefit calculations are too high, and section V.D.2.b outlines several unquantified benefits identified by commenters.

(a) Public Comments: Benefits Are Too High

One commenter argued that benefits are too high because the Preliminary Regulatory Analysis overestimated consumer search costs that result from drip pricing.[531] It argued that consumers benefit from seeing an advertisement with dripped fees compared to their position before seeing any advertisement. The Commission believes this is not the correct comparison to make when determining whether consumer search time will change as a result of the rule; a more apt comparison considers consumer benefit when faced with total price versus drip pricing. The Commission expects that the rule will decrease consumer search time, because consumers will spend less time searching for total price under the rule's framework versus a dripped pricing framework.

A commenter argued that the rule's estimated benefits are too high because the value-of-time estimate of $24.40 is too high.[532] The $24.40 figure is calculated by taking 82% of the 2022 mean hourly Housing wage from the Bureau of Labor Statistics. A meta-analysis of eleven studies conducted between 2004–2015 finds that the value of time as a percentage of mean wage is about 82% in the United States.[533] In addition, previous studies indicate that, over time, people's time has become more valuable as a fraction of what they earn.[534] So, it is possible that the current percentage in 2024 may actually be higher than 82%. The final regulatory analysis in section V.E updates the value of time using the same method but

[523] Blake, *supra* note 521.

[524] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3033 (The Rebel Lounge et al.).

[525] FTC–2023–0064–3028 (Competitive Enterprise Institute); FTC–2023–0064–3208 (FreedomWorks).

[526] FTC–2023–0064–3127 (U.S. Chamber of Commerce).

[527] Vicki G. Morwitz et al., *Divide and Prosper: Consumers' Reactions to Partitioned Prices,* 35 J. Mktg. Rsch. 453 (1998), *https://doi.org/10.1177/002224379803500404*.

[528] FTC–2023–0064–3028 (Competitive Enterprise Institute).

[529] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[530] *See, e.g., id.;* FTC–2023–0064–3140 (Merchant Advisory Group); FTC–2023–0064–3180 (Independent Restaurant Coalition); FTC–2023–0064–3300 (National Restaurant Association); FTC–2023–0064–3202 (TechNet); FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–3173 (Center for Individual Freedom); FTC–2023–0064–3258 (National Taxpayers Union Foundation); FTC–2023–0064–2891 (Mary Sullivan, George Washington University, Regulatory Studies Center); FTC–2023–0064–3293 (Travel Technology Association); FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3296 (Bay Area Apartment Association).

[531] FTC–2023–0064–3028 (Competitive Enterprise Institute).

[532] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[533] Daniel S. Hamermesh, *What's to Know About Time Use?,* 30 J. Econ. Surv. 198 (2016), *https://doi.org/10.1111/joes.12107*.

[534] *Id.*

with the more recent 2023 mean hourly wage.

The commenter further asserted that it would be more accurate to calculate the value of time as a percentage of the median hourly wage instead of the mean hourly wage, stating that ''the mean wage is driven by a few outliers.'' [535] Relying on the median hourly wage, however, would be incorrect and reflects a misunderstanding of how the value of time is calculated. The value of time initially was calculated as an absolute dollar amount per hour in the studies reviewed by the Hamermesh (2016) paper, and then expressed as a percentage of the mean hourly wage at that time. That percentage can be applied to the current mean hourly wage to calculate an updated value of time. If the Commission expressed the value of time as a percentage of the median wage, this would not be a ''more accurate'' calculation of the value of time as the commenter suggests, but simply a different way of expressing the same value of time estimated by Hamermesh (2016).

The commenter also argued that the Commission's valuation of time estimate is inaccurate because some consumers may have lower valuations of time, such as consumers who earn no wages or lower wages, and consumers who ''enjoy shopping'' and may not believe they incur costs from searching.[536] These concerns are consistent with the Commission's estimated value of time, which captures an average of a representative group of American consumers across eleven studies; some individuals will have lower valuations of time, and some will have higher.

Furthermore, the Commission distinguishes between efficient and inefficient searching by consumers. Consumers, based on their preferences, may find some amount of search, or comparison shopping, to be beneficial to their consumption choices. A consumer will naturally choose an efficient level of search such that the marginal benefit of discovering an additional different price or comparable good equals the marginal cost of the time and effort to perform the additional search. The Commission recognizes the purpose of this efficient level of search and does not count it as a harm. When consumers face drip pricing, they must spend additional time and effort to acquire full pricing information allowing them to properly comparison shop. This additional time and effort results in an inefficient level of search that harms consumers with no countervailing benefit. In the Commission's final regulatory analysis, the estimate of cost savings through reduced search time is based on the estimated difference between consumer search time under drip pricing and consumer search time under upfront pricing; that is, the estimate is based solely on the estimate of the inefficient level of search.

Finally, another commenter argued that benefits are too high in the short-term lodging calculation because the Preliminary Regulatory Analysis estimated the reduction in listings viewed as a result of the proposed rule using data from a study done in the live-event ticketing market.[537] However, the Commission's base number of listings viewed under the status quo was taken from studies conducted in the short-term lodging industry. The live-event ticketing study provided a scaling factor that the Commission used to estimate a percentage reduction in listings viewed in response to the rule. The commenter neither demonstrated why the Commission's method overestimated the reduction in listings viewed nor provided the Commission with additional data.

(b) Public Comments: Unquantified Benefits

The NPRM identified the rule's unquantified benefits, primarily a reduction in deadweight loss as consumers make more efficient purchasing decisions. Several comments from consumer and worker protection groups identified additional unquantified benefits of the rule to low-income households,[538] incarcerated people and their families,[539] and to restaurant workers.[540] Although these comments no longer apply to the final rule, the Commission acknowledges that the broader rule was likely to positively impact some vulnerable populations like those discussed in the comments and may have had second-order effects on housing security and the labor market.

One commenter also recommended that the Commission further explain or quantify why the rule would result in enforcement resource savings as stated in the NPRM.[541] The Commission does not quantify the net effect of the rule on enforcement resources due to a lack of data, but discusses in detail the rule's enforcement benefits in section V.A. Based on its experience, the Commission finds that the resources it needs to expend under the two-step pathway pursuant to section 19(a)(2) are typically greater because the Commission needs to initiate two separate proceedings.

3. Comments on the Economy-Wide Break-Even Analysis

In this section, the Commission addresses comments specific to the economy-wide break-even analysis of the Preliminary Regulatory Analysis. Section V.D.3.a addresses comments that argued the Commission's break-even analysis contained incorrect assumptions or errors; section V.D.3.b addresses comments that claimed a break-even analysis is not enough to justify an economy-wide rule; and section V.D.3.c addresses a comment that argued the break-even analysis is satisfactory and recommended further analysis to strengthen it.

(a) Public Comments: Break-Even Analysis Has Incorrect Assumptions or Contains Errors

Three commenters argued that the Commission's assumption that 90% of firms are already in compliance with the proposed rule was inaccurate.[542] This comment does not apply to the final rule, which no longer contains an economy-wide analysis. However, the Commission reaffirms its break-even calculation in the Preliminary Regulatory Analysis, and acknowledges uncertainty regarding the number of firms in the economy that currently employ unfair or deceptive fees or charges and that would need to incur additional costs to comply with the rule. To address the uncertainty, the Preliminary Regulatory Analysis provided both the break-even benefits required if 90% of firms in the economy are already compliant with the rule, as well as the break-even benefits required if 50% of the firms were already compliant with the rule.

[535] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[536] *Id.*

[537] FTC–2023–0064–3127 (U.S. Chamber of Commerce).

[538] FTC–2023–0064–2883 (District of Columbia, Office of the People's Counsel).

[539] FTC–2023–0064–3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher).

[540] FTC–2023–0064–3248 (DC Jobs With Justice on behalf of Fair Price, Fair Wage Coalition).

[541] FTC–2023–0064–3146 (Institute for Policy Integrity, New York University School of Law).

[542] FTC–2023–0064–3233 (NCTA—The Internet & Television Association); FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP); FTC–2023–0064–3294 (International Franchise Association).

One commenter also argued that the $6.65 average annual per-consumer benefit number in the Preliminary Regulatory Analysis is too low because the Commission calculated the necessary break-even benefit level by dividing estimated costs by all U.S. adults, rather than only consumers who make live-event ticket and short-term lodging purchases.[543] The Commission emphasizes that the $6.65 figure from the Preliminary Regulatory Analysis is an average per-person benefit. In the same way that the estimated attorney hours assumes that some small businesses will not hire an attorney to ensure compliance, the benefit per consumer figure reflects the fact that some adults will not encounter dripped fees. The Commission does not dispute that some consumers will see much higher benefits than others. The same argument applies to the final rule, where the Commission recalculates the average annual per-consumer break-even benefit level using only the costs from covered goods or services.

Finally, the same commenter contended that both the one-time and annual costs for the high-end estimates in table 2 of the Preliminary Regulatory Analysis were calculated incorrectly.[544] This comment no longer applies to the final rule, which does not contain an economy-wide break-even analysis.

(b) Public Comments: Break-Even Analysis Is Not Enough To Justify an Economy-Wide Rule

Some commenters disagreed that the rule should apply to the whole economy when the Preliminary Regulatory Analysis quantifies a net benefit for two industries and relies on a break-even analysis for the remainder of the economy.[545] Other commenters similarly stated that the Preliminary Regulatory Analysis should include an industry-by-industry cost-benefit analysis.[546] The final rule is limited to only covered goods or services, which are offered by the live-event ticketing and short-term lodging industries.

The Commission emphasizes that a break-even analysis is encouraged by OMB Circular A–4 when there are unquantifiable costs or benefits, and affirms that its break-even analysis in the Preliminary Regulatory Analysis is consistent with OMB guidance.[547] In the final regulatory analysis, the Commission identifies some of the unquantified benefits to the rule and provides a similar break-even analysis for the live-event ticketing and short-term lodging industries. The Commission also provides benefit-cost analyses demonstrating that the quantified benefits exceed the quantified costs.

(c) Public Comments: Break-Even Analysis Is Satisfactory

Conversely, another commenter noted that the Commission's break-even analysis is satisfactory and suggested the Commission provide further analysis to support the conclusion that time savings resulting from the rule are likely to exceed the break-even threshold.[548] Although this comment no longer applies to the final rule, which focuses on addressing hidden and misleading fees in the live-event ticketing and short-term lodging industries, the Commission acknowledges that there is economic support for a broader rule.

E. Economic Regulatory Analysis of the Final Rule's Costs and Benefits

The Commission has narrowed the application of the final rule to a limited set of covered goods or services, which comprise live-event ticketing and short-term lodging. This in turn necessitates revisions to the Preliminary Regulatory Analysis. The final regulatory analysis no longer includes the economy-wide break-even analysis. The Commission provides the per-consumer break-even benefit levels for the live-event ticketing and short-term lodging industries, as well as quantified benefits and costs for these industries. After incorporating these revisions and updating numbers based on recent data releases, the Commission confirms in the final regulatory analysis that the benefits of the rule exceed the costs. Specifically, the Commission estimates that the quantified benefits of the rule will exceed its quantified costs, and the Commission believes that the total benefits of the rule (quantified and unquantified) will outweigh its total costs (quantified and unquantified).

The Commission discusses in the final regulatory analysis the projected impact of the rule's prohibition on offering, displaying, or advertising any price of a covered good or service without clearly and conspicuously disclosing total price, as well as the rule's prohibition on misrepresentations regarding any fee or charge, including the nature, purpose, amount, or refundability of any fee or charge, and the identity of the good or service for which the fee or charge is imposed. The Commission's analysis also assesses the impact of the rule's required disclosures of the nature, purpose, and amount of any fee or charge imposed on the transaction that has been lawfully excluded from total price, the identity of the good or service for which the fee or charge is imposed, and the final amount of payment. When possible, the Commission quantifies the benefits and costs and notes where some potential benefits and costs are unquantified. If a benefit or cost is quantified, the sources of the data relied upon are indicated. If an assumption is needed, the Commission makes clear which quantities are being assumed.

The Commission uses ten years for the time period of analysis because the Commission's trade regulation rules are subject to review every ten years. Tables 1 and 2 summarize the main findings of the final regulatory analysis. Table 1 presents the potential costs, benefits, and resulting net benefits for the live-event ticketing and short-term lodging industries. Quantified benefits in these industries derive from time savings consumers would experience due to greater price transparency, leading to more efficient shopping processes. Quantified costs derive from the costs firms would incur to comply with the rule.

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[543] FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP).

[544] *Id.*

[545] *See, e.g., id.;* FTC–2023–0064–3127 (U.S. Chamber of Commerce); FTC–2023–0064–2891 (Mary Sullivan, George Washington University, Regulatory Studies Center); FTC–2023–0064–3173 (Center for Individual Freedom); FTC–2023–0064–3208 (FreedomWorks); FTC–2023–0064–3143 (ACA Connects—America's Communications Association); FTC–2023–0064–3258 (National Taxpayers Union Foundation).

[546] *See, e.g.,* FTC–2023–0064–3133 (National Multifamily Housing Council and National Apartment Association); FTC–2023–0064–3143 (ACA Connects—America's Communications Association); FTC–2023–0064–3258 (National Taxpayers Union Foundation); FTC–2023–0064–3197 (American Beverage Licensees).

[547] Office of Mgmt. & Budget, Circular A–4 (Sep. 17, 2003) (hereinafter, OMB Circular A–4), *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.*

[548] FTC–2023–0064–3146 (Institute for Policy Integrity, New York University School of Law).

The quantified net benefits for the live-event ticketing and short-term lodging industries are positive. There are also unquantified benefits, which may arise from a reduction in deadweight loss as consumers experience greater price transparency and make fewer mistake purchases. Unquantified costs may stem from potential adjustment costs or consumer confusion as expectations adjust under the rule.

For both quantified benefits and costs, the final regulatory analysis provides a range representing the set of assumptions that result in a ''low-end'' or ''high-end'' estimate. These estimates are calculated as present values over a ten-year period. Benefits and costs are more valuable to society the sooner they occur. A discount rate (3% or 7%) is used to adjust estimated benefits and costs for differences in timing; a higher discount rate is associated with a greater value for benefits and costs in the present.[549]

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[549] We use 3% and 7% for the discount rate, consistent with Office of Management and Budget's guidance. OMB Circular A–4, *supra* note 547.

Table 1 – Summary of Potential Benefits and Costs of Rule by Industry

		Present Value Over a 10-Year Period	
		Low-end Estimate	**High-end Estimate**
Live-Event Ticketing			
Quantified Benefits (Time Savings)	7% discount rate	$184,665,001	$2,462,200,015
	3% discount rate	$224,277,302	$2,990,364,023
Quantified Costs (Compliance)	7% discount rate	$15,137,956	$142,181,566
	3% discount rate	$15,137,956	$154,247,939
Unquantified Benefits	Reduced Deadweight Loss (e.g. efficient quality/quantity purchased, fewer mistake purchases)		
Unquantified Costs	Unintended Consequences (e.g. adjustment costs, consumer confusion as expectations adjust)		
		(Low Benefits – High Cost)	(High Benefits – Low Cost)
Net Benefits (10 Years)	7% discount rate	$42,483,435	$2,447,062,058
Net Benefits (10 Years)	3% discount rate	$70,029,362	$2,975,226,066
Short-Term Lodging			
Quantified Benefits (Time Savings)	7% discount rate	$4,931,159,488	$7,171,936,592
	3% discount rate	$5,988,937,469	$8,710,381,378
Quantified Costs (Compliance)	7% discount rate	$153,306,202	$460,582,520
	3% discount rate	$153,306,202	$489,905,783
Unquantified Benefits	Reduced Deadweight Loss (e.g. efficient quality/quantity purchased, fewer mistake purchases)		
Unquantified Costs	Unintended Consequences (e.g. adjustment costs, consumer confusion as expectations adjust)		
		(Low Benefits – High Cost)	(High Benefits – Low Cost)
Net Benefits (10 Years)	7% discount rate	$4,470,576,968	$7,018,630,389
Net Benefits (10 Years)	3% discount rate	$5,499,031,686	$8,557,075,175
Aggregated Benefits and Costs for Live-Event Ticketing and Short-Term Lodging			
Quantified Benefits (Time Savings)	7% discount rate	$5,115,824,490	$9,634,136,606
	3% discount rate	$6,213,214,771	$11,700,745,400
Quantified Costs (Compliance)	7% discount rate	$168,444,159	$602,764,086
	3% discount rate	$168,444,159	$644,153,722
		(Low Benefits – High Cost)	(High Benefits – Low Cost)

Net Benefits (10 Years)	7% discount rate	$4,513,060,403	$9,465,692,448
Net Benefits (10 Years)	3% discount rate	$5,569,061,048	$11,532,301,242

Note: "Low-End Estimate" reflects all scenarios that jointly result in lower estimates of benefits or costs and "High-End Estimate" reflects all scenarios that jointly result in higher estimates of benefits or costs.

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As discussed in more detail in section V.E.3, the Commission only quantifies benefits from reductions in consumer search costs. However, the Commission notes there are likely additional consumer benefits in the form of reduced deadweight loss. Since the Commission is unable to quantify all of the final rule's potential benefits, the final regulatory analysis instead calculates the minimum value for the average consumer that the final rule would need to generate in order for its benefits to outweigh its quantified costs. Table 2 presents low-end and high-end estimates of the total quantified costs and the necessary ''break-even benefit'' per consumer. Under the high-end cost assumptions with a 7% discount rate, the Commission's analysis finds that each consumer would need to experience a benefit of $0.33 per year over ten years for the rule's benefits to exceed its quantified compliance costs. Under the low-end cost assumptions with a 3% discount rate, that per-consumer amount is $0.08 per year over ten years. As noted, the Commission believes that the necessary break-even benefit per consumer is likely between $0.08 and $0.33 per year over ten years, depending on which set of assumptions is used.

Table 2 – Summary of Quantified Costs and Break-Even Benefits of Rule

		Present Value Over a 10-Year Period	
		Low-end Estimate	**High-end Estimate**
Total Quantified Costs	7% discount rate	$168,444,159	$602,764,086
Total Quantified Costs	3% discount rate	$168,444,159	$644,153,722
Break-even Benefit Per Consumer Per Year	7% discount rate	$0.09	$0.33
Break-even Benefit Per Consumer Per Year	3% discount rate	$0.08	$0.29

Note: "Low-End Estimate" reflects all scenarios that jointly result in lower estimates of benefits or costs and "High-End Estimate" reflects all scenarios that jointly result in higher estimates of benefits or costs.

1. Economic Rationale for the Final Rule

The final rule addresses the economic problem of incomplete and insufficient price information by businesses that shroud the full price from the consumer during parts of the purchasing process, which harms both consumers and honest competitors. Not including mandatory fees in the full price when consumers start the purchasing process for a good or service may result in a market failure. Firms may shroud the full price to the consumer through the practice of ''drip pricing,'' which is ''a pricing technique in which firms advertise only part of a product's price and reveal other charges later as the customer goes through the buying process.'' [550] Discovering the lowest full price prior to a final purchase by going through the checkout process with multiple firms is inefficient and involves additional consumer search costs. In some cases, taking the time to search for the full price from one firm may result in the consumer losing the opportunity to purchase the product from another firm. Drip pricing and the resulting imposition of additional search costs make it more difficult for consumers to compare prices across platforms, which may soften price competition in the market.[551]

[550] Howard A. Shelanski et al., *Economics at the FTC: Drug and PBM Mergers and Drip Pricing,* 41 Rev. Indus. Org. 303 (2012), *https://doi.org/10.1007/s11151-012-9360-x.*

[551] White House, *How Junk Fees Distort Competition* (Mar. 21, 2023), *https://www.whitehouse.gov/cea/written-materials/2023/03/21/how-junk-fees-distort-competition/*; Brian Deese et al., White House, *The President's Initiative on Junk Fees and Related Pricing Practice* (Oct. 26, 2022), *https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/*; Glenn Ellison, *A*

A market failure may also occur when firms shroud full price through non-aggregated partitioned pricing, in which all of the components of the full price (base price, fees, etc.) are presented to consumers without the full price itself.[552] Non-aggregated partitioned pricing, like drip pricing, imposes costs on consumers by requiring them to spend additional time to calculate the full price for themselves. Consumers tend to underestimate the full price when faced with partitioned pricing, and this underestimation leads to an increase in demand. The increased demand from erroneous price calculations, in turn, leads to inefficient overconsumption by consumers.

(a) Shrouded Pricing as a Cause of Market Failure

A well-functioning market depends, in part, on consumers having accurate information regarding the price, and other attributes, of the goods or services being offered. Firms that engage in drip pricing or employ partitioned pricing create a friction in the operation of the market by imposing costs on consumers to acquire price information. Several economic harms may arise from this friction. First, holding consumer choices and prices fixed, the added search cost to acquire price information harms consumers with no countervailing benefit to firms. Second, because shrouded prices make comparison shopping more difficult, consumers might make suboptimal consumption decisions. In fact, consumers may find it too costly to search for full and accurate price information for some or all goods or services under consideration. The lack of full price information may lead consumer demand to become less sensitive, *i.e.,* less elastic, to changes in price, and consumers will accept higher (quality-adjusted) prices than they would if they were fully informed with clear and upfront pricing. This, in turn, leads to a third effect: since shrouded prices make it harder for consumers to compare prices, some firms may gain market power that allows them to raise prices or decrease quality.[553] Firms may further distort the market outcome by changing the products they offer to consumers relative to a market where prices are transparent.

The Commission discusses further the first of these effects, the added search costs incurred by consumers to acquire complete price information, in section V.E.2.a.i and quantifies these costs in the live-event ticketing and short-term lodging industries in section V.E.3.c and V.E.3.d. The Commission discusses the welfare impact of the second of these effects, the distortion of consumers' decisions due to lack of full information, in this section. The third effect, firms increasing their market power in response to increases in search costs, would exacerbate any welfare losses caused by the distortion of consumers' decisions due to the lack of full price information. However, the Commission lacks the data to quantify or distinguish their effects on deadweight loss.

The distortion of consumers' decisions due to the lack of full price information, the second effect discussed in the previous paragraph, can be illustrated through a simple model of supply and demand. For simplicity of exposition, the analysis assumes that there are many firms, each selling a homogeneous product (*i.e.,* good or service). The analysis further assumes that firms can adjust their prices and pricing strategies, but that the quality of the product is fixed.[554]

A useful starting point is to consider the baseline market outcome where consumers are fully informed; that is, consumers know the full price upfront (either because firms state the full price upfront or because consumers can fully and correctly predict any add-on prices). Since all firms sell the same product, competition will lead all firms to set equal prices at marginal cost. Figure 1 illustrates the baseline market outcome. The curve $D_{upfront}$ represents consumers' demand when they are fully informed. The supply curve S represents the marginal cost to firms of producing a given quantity of the product. The intersection of $D_{upfront}$ with S, denoted by point A, at quantity $Q_{upfront}$ and price $P_{upfront}$, represents the outcome. The analysis will refer to this as the ''fully informed outcome.'' At point A, the marginal benefit to consumers from consuming one additional unit is equal to the marginal cost to firms from the production of one more unit of the product.

As long as there are no externalities (*i.e.,* impacts on third parties beyond the consumers and firms under consideration) from the consumption of the product, this outcome is efficient; that is, point A represents the consumption level of the product that provides the greatest benefit to society. The benefit to society is measured by the sum of the benefit to consumers, called consumer surplus, and the benefit to firms, called producer surplus or profit. Consumer surplus is the net benefit consumers experience from consuming the product after accounting for their expenditure on the product. Consumer surplus is given by the difference between the area of trapezoid *ACFG,* the value to consumers from consuming $Q_{upfront}$ units of the product, and the area of rectangle *ABFG,* the total expenditure on the product ($P_{upfront} * Q_{upfront}$); thus, consumer surplus is given by the area of triangle *ABC.* Producer surplus is the net benefit to firms from selling the product after accounting for their costs to provide the product. Producer surplus is given by the difference between rectangle *ABFG,* the total revenue from the product, and the area of trapezoid *AEFG,* the cost to firms from producing $Q_{upfront}$ units of the product; thus, producer surplus is given by the area of triangle *ABE.* The net benefit to society is then given by the area of triangle *ACE.*

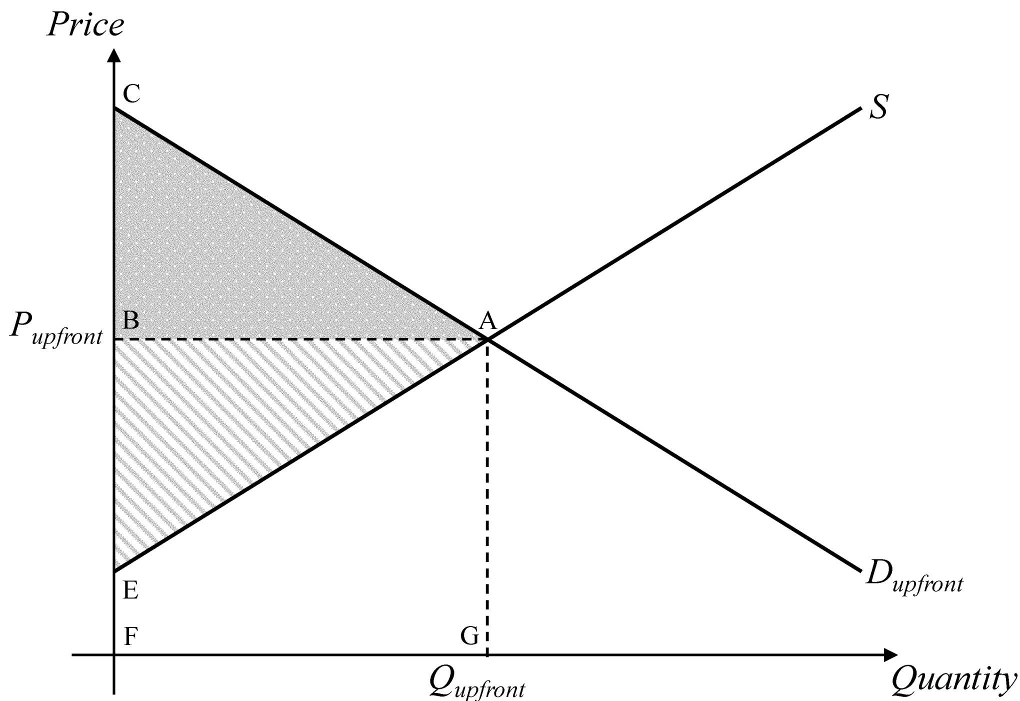
Model of Add-On Pricing, 120 Q.J. Econ. 585 (2005), *https://www.jstor.org/stable/25098747.*

[552] Morwitz, *supra* note 527.

[553] Baye, *supra* note 521.

[554] These assumptions are made for exposition purposes to abstract from the issues of market power in pricing and strategic interactions between firms. The general ideas from this simple framework extend to differentiated products and strategic interactions between a smaller number of firms.

Figure 1– Fully Informed Outcome



As previously discussed, shrouded pricing makes it more difficult for consumers to ascertain the full price of the product. In the case of drip pricing, consumers will see the base price before seeing additional mandatory price components such as convenience fees. Consumers may or may not be unaware of the additional fees at the time they make a purchase decision. If consumers are fully aware of the additional fees, or anticipate them correctly, the outcome remains point *A,* which is efficient. However, there is evidence that consumers respond differently to a change in the base price offered upfront than to changes in the fees disclosed separately from the base price. Specifically, economic studies provide evidence that consumers react less to price changes through fees than they do to price changes through the base price.[555] That is, consumer demand is less elastic to the fee component of the full price than it is to the base price. One possible rationale for this phenomenon is that consumers are fully aware of base prices but are not, or only partially, aware of fees.

The Commission analyzes the impact drip pricing has on market outcomes in the previous framework in two stages. The analysis starts by examining the case where consumers are completely unaware of the additional fees, namely, they assume that the base price offered upfront is the full price. The analysis then examines the case where consumers are aware that a fee might be added later but do not correctly estimate the size of this fee. Note that this case may arise under a variety of circumstances. For example, all consumers could be partially aware of the fees, some consumers could be fully aware of the fees while others are totally unaware, or there could be a mixture of consumers exhibiting different degrees of awareness.

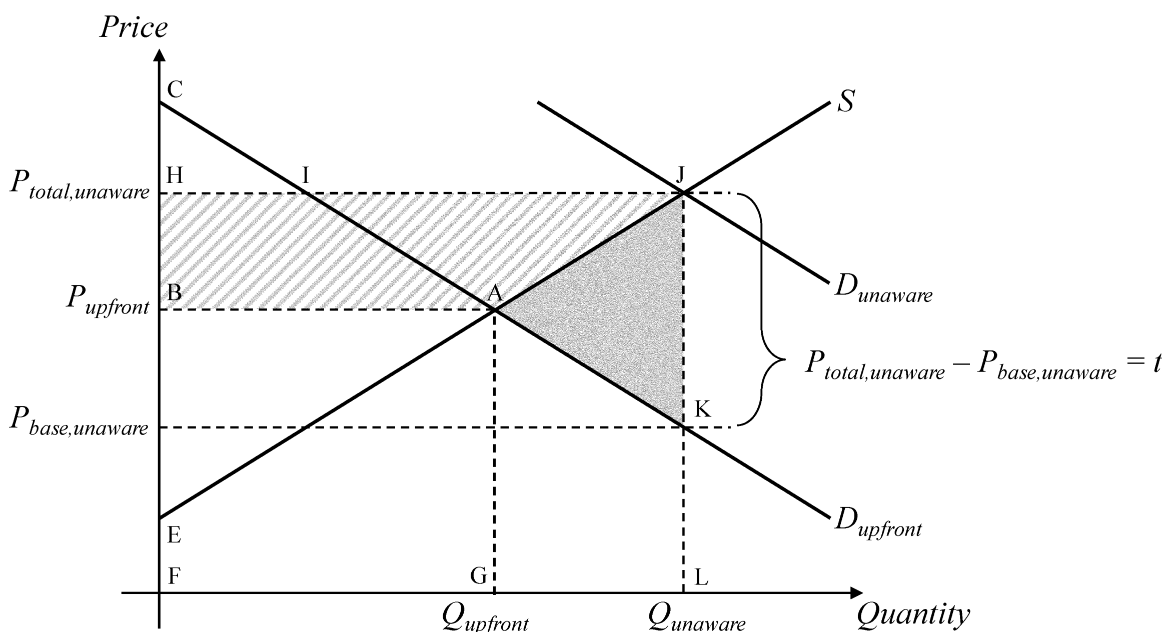
In the first stage of the analysis, $P_{base,unaware}$ denotes the base prices firms offer upfront, and $P_{total,unaware}$ denotes the full price firms charge, which is equal to the base price plus t, the sum of mandatory per unit fees not included in the base price: $P_{total,unaware} = P_{base,unaware} + t$.[556] Consumers determine their consumption according to $P_{base,unaware}$, unaware that they are actually going to pay $P_{total,unaware}$. This difference between the price consumers believe they are paying and the price firms are actually charging leads to an expansion in consumer demand relative to demand when consumers are fully informed. Specifically, as illustrated by Figure 2, the firms' deception causes an upward shift in demand equal to the price difference, t, from $D_{upfront}$ to $D_{unaware}$. The intersection of $D_{unaware}$ with S, illustrated by point J, at quantity $Q_{unaware}$ and price $P_{total,unaware}$,represents the outcome when consumers are unaware of the fee and only observe the base price.[557]

[555] Blake, *supra* note 521; Raj Chetty et al., *Salience and Taxation: Theory and Evidence,* 99 Am. Econ. Rev. 1145 (2009), *https://doi.org/10.1257/aer.99.4.1145.*

[556] For simplicity of exposition, the analysis assumes that all firms follow the same shrouding strategy and set the same *t.*

[557] This shift is entirely analogous to the shift that would occur from a government subsidy. When a subsidy is provided, the price consumers pay is lower than the price charged by firms.

Figure 2 – Market Distortion Caused by Shrouded Pricing when Consumers are Fully Unaware



Consumer surplus is now equal to the area of triangle *CHI* minus the area of triangle *IJK.* Relative to the fully informed outcome, consumer surplus decreases by the area of trapezoid *ABHI,* the decrease in consumer surplus due to the price increase, and the area of triangle *IJK,* the decrease in consumer surplus due to the deceptive pricing strategy. Producer surplus is now equal to the area of triangle *EHJ.* It increases, relative to the fully informed outcome, by the area of trapezoid *ABHJ.* This trapezoid illustrates the transfer of surplus from consumers to firms due to the deceptive practice of shrouded pricing. The net effect on society is now the area of triangle *ACE* minus the area of triangle *AJK.* Relative to the fully informed outcome, the benefit to society decreases by the area of triangle *AJK* (the combined change in consumer and producer surplus). This decrease in social surplus is the harm, also referred to as deadweight loss, caused by the full shrouding of the fee.

The analysis now turns to the case where consumers are aware of the possibility of additional fees but do not fully anticipate their magnitude. As previously discussed, academic research suggests that this might be the case.[558] This reduced salience would increase quantity demanded and incur a deadweight loss compared to the fully informed outcome (illustrated in Figure 1), although both the increase in quantity demanded and the deadweight loss would be smaller than in the case where consumers were fully unaware of the fees (illustrated in Figure 2). Essentially, the aggregate demand curve will lie somewhere between the upfront demand curve in Figure 1 and the fully shrouded demand in Figure 2. This aggregate demand can come from (the same) partial awareness by all consumers or a mixture of different degrees of awareness by different consumers. A technical appendix in section V.E.6 provides a more detailed model of the impact of consumers' partial awareness.

In summary, the shrouding of prices distorts the market outcome by leading consumers to consume more than they would if they were fully aware of the full price. The overconsumption by consumers leads to a social cost in the form of deadweight loss because the resources used to produce the product would have been put to better use if consumer demand had not been distorted in this manner. The deadweight loss from the inefficient consumption level is one component of the welfare loss generated by drip pricing, in addition to the increase in consumer search costs and the possible shift in pricing and product offerings due to increased market power. Collectively, these effects represent a market failure.

Shrouded pricing likely cannot be mitigated by competitive forces alone once it has become pervasive in a market. Although consumers would prefer upfront full prices, it is unlikely that an individual firm in a market with shrouded prices could increase its market share by providing its full price upfront. Under the expectation of shrouded prices, consumers may inadvertently interpret such a firm's upfront full price as a higher base price, with fees added separately, leading the firm to lose, rather than gain, business. The distortion of consumer expectations caused by shrouded pricing thus prevents a shift to upfront pricing through competition.

In many markets, goods and services are differentiated, with higher quality items selling at higher prices. In such markets, drip pricing may lead to outcomes characterized by inefficiently high qualities in addition to the inefficiently high quantities previously discussed.[559] Consumers may respond to fully disclosed prices in these markets by purchasing goods or services of lower, more efficient quality in addition to purchasing lower, more efficient quantities of goods or services.

(b) Shrouded Pricing as a Source of Biased Expectations

As explained in section V.E.1.a, firms have incentives to distort consumer demand toward an inefficient equilibrium. This inefficiency may also

[558] Blake, *supra* note 521; Chetty, *supra* note 555.

[559] This phenomenon has been observed, for example, in the live-event ticketing industry. *See* Blake, *supra* note 521.

arise in a behavioral context.[560] By shrouding full prices through drip or partitioned pricing, a firm may bias its consumers' price expectations. For example, consumers may respond to dripped prices by anchoring their beliefs on the base price and, thus, systematically underestimate the price of the good or service.[561] This underestimation, whether by all consumers, or a subset of consumers, leads to a similarly inefficient equilibrium in which the good or service is overconsumed and society suffers a deadweight loss.

Several studies show how consumer behavior changes because of drip pricing. One study found that when optional surcharges are dripped, individuals are more likely to select a more expensive option (after including surcharges) than what they would have chosen under upfront pricing.[562] Even when the participants became aware of the additional fees, they were reluctant to restart the purchase process because they perceived high search costs from doing so and inaccurately assumed that all firms charge the same fees. A different economics experiment found that consumers encountering drip pricing are more likely to make purchasing mistakes if they are uncertain about the extent of the drip pricing.[563]

Another prominent study looked at how consumers respond to the salience of sales tax on goods, which affects the full price of a product.[564] In this study, when the grocery store displayed the full price of each item on shelves as part of a field experiment, people purchased fewer goods relative to the control scenario in which sales tax was added at checkout, despite knowing that the final price being charged had not changed. In 2014, StubHub conducted an experiment in which some consumers were presented with upfront prices inclusive of fees while other consumers were presented a base price upfront with fees hidden until checkout. This experiment revealed that presenting consumers with full prices upfront reduced both the quantity and quality of tickets purchased relative to presenting consumers with dripped prices.[565]

2. Economic Effects of the Final Rule

The model of incomplete price information, described in section V.E.1.a, provides a framework for assessing the potential costs, benefits, and transfers associated with the final rule in the live-event ticketing and short-term lodging industries. The rule will result in positive net benefits if it allows consumers to learn total price more easily, improves consumer comprehension of fees and charges as they relate to total price, facilitates comparison shopping, reduces search costs, or otherwise allows consumers to make choices that increase net welfare. The Commission believes the rule will accomplish these goals in the live-event ticketing and short-term lodging industries.

The Commission finds in section V.E.1 that consumer demand in the live-event ticketing and short-term lodging industries is distorted by incomplete price information—in simple terms, consumers respond to lower base prices even if fees are revealed or added up later in a transaction. Thus, if a seller in these industries uses hidden fees, that seller may acquire a larger market share by advertising lower initial prices than other sellers not using hidden fees. Absent the rule, competitive forces will drive other firms in these industries to also use hidden fees, as has become evident as noted in section II.B. If firms do not use hidden fees, they may have to accept a lower market share, even though their full prices to consumers are similar to (or lower than) their competitors. Thus, the Commission finds that with the final rule, firms that currently do not use drip pricing will no longer face the competitive pressure to employ hidden fees and may experience higher revenue if consumers can more easily compare prices across firms. The Commission also finds that the rule will generate costs as firms that currently employ hidden or misleading fees adjust how they convey prices to consumers.

Overall, the Commission expects the rule will increase economic efficiency through improved consumer price calculations, resulting in reduced deadweight loss and reduced consumer search time that exceeds the costs to firms of providing more transparent pricing. It may also facilitate price comparison by consumers, increase competition among sellers, and put downward pressure on prices. Due to a lack of data, it is difficult to fully quantify all the potential effects of the final rule. Where there may be impacts that the Commission is unable to quantify, it provides a qualitative description.

(a) General Benefits of the Final Rule

Consumers will benefit from the rule in several ways. In addition to reductions in search costs and deadweight loss, which are described in greater detail herein, the Commission expects there to be unquantified benefits for consumers from the rule, including reduced frustration and consumer stress associated with surprise fees that distort the purchasing process.

i. Reductions in Search Costs

Consumers will save time searching for the total price of live-event tickets and short-term lodging as a result of the rule. In a well-functioning market, consumers find it beneficial to comparison shop for low prices. When mandatory fees are obscured or misrepresented, however, consumers learn the full price at the end of the process and may need to re-assess whether they wish to purchase at a higher price than originally expected or to look for other options. Consumers incur longer search times to discover full prices and make informed purchasing decisions. The final rule will eliminate the need for additional, inefficient amounts of time to determine total price from sellers that do not already provide total price upfront. The Commission quantifies the reduction in search costs in the live-event ticketing and short-term lodging industries.

ii. Reductions in Deadweight Loss

As discussed in section V.E.1.a, incomplete pricing information may distort consumer demand. This distortion will lead to an inefficient market equilibrium and generate deadweight loss, which results from consumers purchasing higher quantities of the good or service than they would if fully informed. Under the final rule, consumers will learn total price upfront. Thus, the rule will likely mitigate distorted consumer demand and prevent welfare-reducing transactions. Resources supporting overconsumption will become available for better societal use, and the deadweight loss will be reduced or eliminated.

The disclosure of total price may also reduce mistake purchases with respect to product quality. Drip pricing can lead consumers to purchase goods of inefficient quality; the final rule will allow consumers to choose more efficient levels of quality. The Commission does not quantify the reduction in deadweight loss but finds

[560] David Laibson, Harvard U., Drip Pricing: A Behavioral Economics Perspective, Address at the FTC (May 21, 2012), *https://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/dlaibson.pdf*.

[561] Morwitz, *supra* note 527.

[562] Shelle Santana et al., *Consumer Reactions to Drip Pricing,* 39 Mktg. Sci. 188 (2020), *https://doi.org/10.1287/mksc.2019.1207*.

[563] Rasch, *supra* note 521.

[564] Chetty, *supra* note 555.

[565] *See* Blake, *supra* note 521.

that it is a positive benefit to the final rule.

(b) Welfare Transfers

The Commission expects that prices in the live-event ticketing and short-term lodging industries will adjust in response to the transparency facilitated by the rule. These price adjustments transfer welfare from one side of the market to the other; consumer welfare will increase, and producer profits will decrease by the same amount. Typically, transfers of welfare from one set of people in the economy to another are documented in a regulatory analysis, but do not change net social welfare.[566] Consequently, while it is likely that the rule will result in transfers of welfare, the Commission does not attempt to estimate these transfers.

(c) General Costs of the Final Rule

Firms in the live-event ticketing and short-term lodging industries will likely do a basic regulatory review to determine how the rule applies to them.[567] Firms that are not already in compliance with the rule may incur additional costs to re-optimize the price of goods and services. These firms may also incur costs to adjust how they display pricing information to disclose total price whenever the price of a good or service is displayed. For example, firms may need to update websites or reprint advertisements to comply with the rule.

In addition, the Commission notes that there may be other indirect short-term costs that the Commission cannot quantify. For instance, consumers who are used to an existing pricing structure that separately discloses mandatory fees at the end of the purchase process may mistakenly make inefficient purchases while adjusting to the new regime of upfront total price. Specifically, consumers accustomed to dripped live-event ticketing fees may initially under-consume when shopping for tickets with upfront total price. The societal cost of such inefficiencies would be temporary and decrease as consumers adjust to the truthful, timely, and transparent pricing required by the rule.

While the rule allows businesses to exclude shipping charges from total price until the point at which a consumer may consent to pay, the rule requires any internal handling costs that were previously disclosed at the end of the purchase process to be incorporated in total price. Since shipping and handling charges are sometimes combined, businesses may have to change how they account for handling costs and how they advertise shipping and handling costs to comply with this provision.

3. Quantified Welfare Effects

This section quantifies the potential benefits and costs of the final rule for the live-event ticketing industry and the short-term lodging industry. The Commission provides quantitative estimates where possible for these industries, and it describes benefits and costs that can only be assessed qualitatively. The Commission estimates that the quantified benefits will exceed the quantified costs, and the Commission believes that the total benefits (quantified and unquantified) will outweigh the total costs (quantified and unquantified) of the rule.

(a) Quantified Compliance Costs

The Commission quantifies the compliance costs for both industries utilizing assumptions about the number of hours required to determine and, if necessary, come into compliance with the final rule. The Commission expects that, in response to the final rule, firms will initially determine whether and how the rule applies to their current pricing and fee disclosure practices. The Commission assumes firms with current practices that align with the final rule will incur, at most, one hour of lawyer time to confirm compliance. This hour of lawyer time is a proxy for the average amount of time firms will need to determine whether the final rule applies to them. For example, some firms may not employ an attorney at all but may instead have a staff member review the rule.

The Commission does not have data on the exact costs noncompliant firms will incur to comply with the final rule. Some firms already may have developed tools to comply with the rule because they operate in jurisdictions, such as California, with existing similar all-in pricing requirements. Coming into compliance with the rule should be relatively easy for these firms. For other firms, complying with the final rule may require additional time and costs. To capture both the variation and uncertainty of costs across the two industries, the analysis includes a series of low- and high-end assumptions about the number of hours required to comply with the rule.[568] For example, the Commission's analysis assumes that firms not presently compliant will employ a low end of five hours and a high end of ten hours of lawyer time to determine necessary steps to comply with the rule. While some firms may forgo legal advice, this range of lawyer time serves as a proxy for any costs associated with understanding and preparing to comply with the rule.

The final rule's requirement to display total price may lead to shifts in consumer demand and, consequently, market equilibria. In response, firms transitioning away from drip pricing may need to determine new optimal prices. The Commission's analysis assumes that these price re-optimizations will require firms to incur a one-time, upfront cost of data scientist time to perform this work. The analysis assumes firms not presently compliant will employ a low-end of forty hours and a high-end of eighty hours of data scientist time. Similar to the use of lawyer hours in estimating compliance costs, this range of data scientist time serves as a proxy for any costs associated with adjusting pricing strategies in response to the rule.[569]

The Commission expects that the drip pricing employed by firms not presently compliant with the rule is, in many cases, manifested in online sales. In such cases, firms also will need to adjust advertised prices as well as purchase processes for online sales, and the analysis assumes these adjustments require firms to incur a one-time, upfront cost of web developer time. The analysis assumes firms not presently compliant will employ a low end of forty hours and a high end of eighty hours of web developer time to become

[566] *See* OMB Circular A–4, *supra* note 547 (''Transfer payments are monetary payments from one group to another that do not affect total resources available to society. A regulation that restricts the supply of a good, causing its price to rise, produces a transfer from buyers to sellers.'' Even though a ''net reduction in the total surplus (consumer plus producer) is a real cost to society, [ ] the transfer from buyers to sellers resulting from a higher price is not a real cost since the net reduction automatically accounts for the transfer from buyers to sellers.'').

[567] This basic regulatory review also captures the time it takes for firms to determine how a nationwide rule interacts with any state-level regulations to which they are already subject.

[568] The Commission requested additional information on potential compliance hours in the NPRM, but it did not receive consistent data. Therefore, the Commission uses the same set of assumptions on hours as used in the NPRM but notes that the live-event ticketing and short-term lodging industries are likely to have already established systems necessary to comply with the final rule due to operating in jurisdictions with similar regulations.

[569] It is possible that presently compliant firms would also need to reoptimize prices in response to shifts in market equilibria. That is, the shift in an industry's equilibrium resulting from the rule could be significant enough that all firms in the industry, compliant or not, would need to adjust prices. Firms regularly reoptimize prices in response to market shifts, but it is possible that this price adjustment would require already compliant firms to incur additional costs. The Commission solicited, but did not receive, the data necessary to quantify this potential cost to firms.

compliant with the final rule.[570] Once firms are compliant with the rule, any future changes to pricing displays or purchasing systems are not a direct consequence of the rule. Since the rule will not take effect for four months, some of these pricing display and advertising updates may come at no additional cost to certain firms. Many firms regularly update their pricing displays and advertisements. Any firms that would, in their normal course of business, update their displays and advertising during the four month window prior to the rule taking effect would not incur the additional one-time cost of updating their displays and advertisements in response to the rule. Because the Commission lacks data on these business practices, the Commission conservatively assumes that all firms not presently compliant with the rule will incur these costs. As such, the Commission's analysis likely represents an overestimate of compliance costs.

It may be the case that once the firm incurs the one-time transition costs, there are no additional costs. For a low-end estimate of costs, the Commission's analysis assumes annual costs are $0 because there are zero additional hours of labor. However, it may be the case that, as firms transition into compliance with the final rule, firms need to reevaluate their pricing policies to ensure continued compliance by employing additional lawyer time on an annual basis. Available data do not allow the Commission to estimate the exact annual compliance costs firms may incur as various industries adapt to the final rule. For the high-end cost estimate, the Commission's analysis assumes firms require an average of ten hours of lawyer time for annual compliance checks. The Commission recognizes some firms may not utilize lawyer time but may delegate compliance to non-attorney employees and still incur annual compliance costs. Data on non-lawyer compliance costs are not available, and these potential annual compliance costs are proxied with lawyer time with the implicit assumption that non-attorney employee hourly wages are lower than lawyer wages.

Table 3 presents the total compliance costs as the sum of the industry-specific compliance costs described in more detail in section V.E.3.c and V.E.3.d. The cost of employee time is monetized using wages obtained from the Bureau of Labor Statistics' May 2023 National Occupational Employment and Wage Estimates for the live-event ticketing industry.[571] For the short-term lodging industry, the analysis uses industry-specific wages associated with the North American Industry Classification System (''NAICS'') codes.

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[570] The U.S. Department of Transportation also uses an assumption of 80 hours of time to reprogram flight quotation websites for the Enhancing Airline Passenger Protections II rule. U.S. Dep't Transp., *Preliminary Regulatory Analysis: Enhancing Airline Passenger Protections II* (May 24, 2010), *https://www.regulations.gov/document/DOT-OST-2010-0140-0003* (''Consumer Rule II'').

[571] U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, *May 2023 National Occupational Employment and Wage Estimates United States* (May 2023), *https://www.bls.gov/oes/current/oes_nat.htm* (''OEWS National''); U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, *Occupational Employment and Wages, May 2023: 15–2051 Data Scientists* (May 2023), *https://www.bls.gov/oes/current/oes152051.htm* (''OEWS Data Scientists'') (providing the hourly wages for data scientists); U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, *Occupational Employment and Wages, May 20231: 15–1254 Web Developers* (May 2023), *https://www.bls.gov/oes/current/oes151254.htm* (''OEWS Web Developers'') (providing the hourly wages for web developers); U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, *Occupational Employment and Wages, May 2023: 23–1011 Lawyers* (May 2023), *https://www.bls.gov/oes/current/oes231011.htm* (''OEWS Lawyers'') (providing the hourly wages for lawyers). This assumption is valid if hours spent in compliance activities would otherwise be spent in other productive work-related activities, the social value of which is summarized by the employee's wage. To the extent that these activities can be accomplished using time during which employees would otherwise be idle in the absence of a rule, our estimates will overstate the welfare costs of the final rule.

Table 3 – Total Compliance Costs

	Firms that Already Comply with Final Rule	Firms that Do Not Already Comply with Final Rule	
One-time Hours for Regulatory Familiarization or Compliance		**Low-end Estimate**	**High-end Estimate**
Lawyer Hours	1	5	10
Data Scientist Hours	0	40	80
Price Display Adjustment Hours	0	40	80
Recurring (Annual) Hours for Compliance			
Lawyer Hours	0	0	10
Total Present Value Costs (Annual + One Time) for Live-Event Ticketing and Short-Term Lodging			
Total @ 7% Discount Rate	$30,495,217	$137,948,942	$572,268,869
Total @ 3% Discount Rate	$30,495,217	$137,948,942	$613,658,505
Grand Total			
Total @ 7% Discount Rate		$168,444,159	$602,764,086
Total @ 3% Discount Rate		$168,444,159	$644,153,722

Table 4 presents the ten-year per-firm annualized compliance costs for the live-event ticketing and short-term lodging industries, separated by firms already in compliance, which incur a one-time compliance check, and firms not presently in compliance, which incur both one-time and recurring costs. Compliance costs for the short-term lodging industry are further disaggregated into costs for U.S. hotels and U.S. home share hosts. Costs to foreign hotels and home share hosts are discussed in section V.E.3.d.ii.

Table 4 – Per Firm Annualized Compliance Costs

	Firms that Already Comply with Final Rule	Firms that Do Not Already Comply with Final Rule	
Live-Event Ticketing		**Low-End**	**High-End**
Annualized Compliance Cost Per Firm @ 7% Discount Rate	$84.84	$648	$2,144
Annualized Compliance Cost Per Firm @ 3% Discount Rate		$534	$1,916
Short-Term Lodging (Hotels - U.S. Only)		**Low-End**	**High-End**
Annualized Compliance Cost Per Firm @ 7% Discount Rate		$527	$2,011
Annualized Compliance Cost Per Firm @ 3% Discount Rate		$434	$1,825
One-Time Cost (Firms Already in Compliance)	$95.60		
Short-Term Lodging (Home Share Hosts)		**Low-End**	**High-End**
One-Time Cost of Price Re-Optimization		$30.42	$91.27

(b) Break-Even Analysis

To have a positive net benefit, the final rule's benefits must outweigh its costs. The Commission calculates the break-even benefit per consumer based on the quantified costs presented in section V.E.3.b.[572] That is, the Commission determines the minimum value the final rule would need to generate for the average consumer for its total benefits to outweigh its quantified costs. The rule's benefits may include reduced search costs, reduced deadweight loss, and reduced psychological distress or frustration from surprise fees. For this analysis, the Commission considers costs in annualized terms—the average discounted cost of compliance per year over 10 years.[573] As such, the analysis expresses the break-even benefit as an average benefit per consumer per year over ten years.[574]

From Table 3, under the assumption that firms and consumers discount future years at 3%, the Commission's analysis estimates that the final rule may result in costs as high as $644 million over 10 years. Assuming instead a discount rate of 7% for future years, the analysis estimates that the final rule may result in costs as high as $603 million over ten years. To determine the break-even benefit, the Commission's analysis begins with the total present value of total costs and calculates the annualized total costs across both industries.[575] Next, the Commission calculates what the break-even benefit would be per consumer, according to the following formula:

Per Consumer Annualized Benefits ≥ (Annualized Quantified Compliance Costs/Population)

Table 5 presents the results of this break-even analysis. According to the 2020 Census, there are 258,343,281 adults living in the United States. Thus, the analysis divides the estimates of annualized costs by the number of U.S. adults to find the average consumer benefit per year for 10 years required to exceed quantified compliance costs. For example, if the final rule results in an average benefit to consumers that exceeds $0.33 per year over ten years, then the final rule's benefits exceed its quantified compliance costs under the high-end assumption and an assumed 7% discount rate.

Table 5 also provides the break-even benefit per consumer in terms of minutes saved as a result of the final rule. According to the Bureau of Labor Statistics' Occupational Employment Statistics, the average hourly wage of U.S. workers in 2023 was $31.48, and recent research suggests that individuals living in the U.S. value their non-work time at 82% of average hourly earnings. Thus, the value of non-work time for the average U.S. worker would be $25.81 per hour.[576] If the analysis divides the

[572] In section V.E.3.c and V.E.3.d, the Commission quantifies the final rule's net social benefits for the live-event ticketing and short-term lodging industries.

[573] For purposes of discounting and annualizing costs, the analysis assumes that firms incur one-time costs immediately, at the beginning of year 1, and potential costs of annual compliance checks at the end of each year.

[574] Benefits to consumers, such as reductions in search costs, will accrue continually over time. For simplicity, the break-even analysis assumes that annualized benefits accrue all at once at the end of each year. As such, the break-even analysis may overestimate the benefits required to outweigh costs.

[575] While total costs are higher with a smaller discount rate, annualized costs are higher with a larger discount rate due to higher upfront costs and lower recurring costs.

[576] *See* OEWS National, *supra* note 571 (providing the mean hourly wage); Hamermesh,

break-even dollar benefit per consumer, using the high-end assumptions and a discount rate of 7% ($0.33), by the value of saved search time ($25.81/hour) and converts to minutes, the break-even saved search time per consumer is 0.77 minutes. That is, if the final rule results in savings from reduced search time that exceed 0.77 minutes per consumer per year over ten years, then the benefits solely from reduced search time will exceed quantified compliance costs.[577] Although the Commission acknowledges that benefits of the final rule may vary across consumers, as some consumers may be more likely than others to consume live-event tickets and/or short-term lodging, the Commission finds it highly likely that consumers would experience average search time savings of this amount.

Table 5 – Break-Even Analysis

Break-Even Benefit Per Consumer ($)	**Low-End Estimate**	**High-End Estimate**
Live-Event Ticketing and Short-Term Lodging		
Total @ 7% Discount Rate	$0.09	$0.33
Total @ 3% Discount Rate	$0.08	$0.29
Break-Even Time Savings Per Consumer (Minutes)		
Live-Event Ticketing and Short-Term Lodging		
Total @ 7% Discount Rate	0.22	0.77
Total @ 3% Discount Rate	0.18	0.68

There are a few important caveats to this break-even analysis. This analysis may overestimate the number of noncompliant firms in the live-event ticketing and short-term lodging industries. In that case, this assumption leads to an overestimate of both costs and necessary break-even benefits. On the other hand, there may be more firms not already in compliance with the final rule, in which case this assumption results in an underestimate of both costs and break-even benefits.

The Commission cannot forecast all potential consequences and costs. This break-even analysis does not account for any unquantified benefits or costs due to unintended consequences. However, if the benefits from reduced deadweight loss caused by consumers' incomplete price information, reduced search time, and beneficial unintended consequences outweigh the costs from compliance and harmful unintended consequences, then the rule results in positive net social benefits. The Commission believes benefits will exceed the costs.

i. Sensitivity Analysis: Assume Higher Wage Rates

The Commission received comments regarding the wage rates used in the cost estimation. To address these comments, this section provides the break-even analysis described in section V.E.3.b using rates that are double the average wage rate obtained from the Bureau of Labor Statistics May 2023 National Occupational Employment and Wage Estimates.[578] Specifically, the wage rates used for this analysis are $169.68 for lawyer time to review compliance, $114.46 for data scientist time to re-optimize pricing, and $91.90 for web developer time. Using these higher wage rates, the break-even benefit required to exceed quantified compliance costs is provided in Table 6.[579]

supra note 533 (providing the value of consumer time).

[577] Assuming a 3% discount rate and the high-end assumptions, the break-even time saved per consumer per year would be 0.68 minutes.

[578] *See* sources cited *supra* note 571, including OEWS National (providing the mean hourly wage); OEWS Data Scientists (providing the hourly wages for data scientists); OEWS Web Developers (providing the hourly wages for web developers); and OEWS Lawyers (providing the hourly wages for lawyers).

[579] Wages are doubled in this sensitivity analysis, but the break-even benefit per consumer does not exactly double because not all costs depend on wages. One component of the cost calculation in the short-term lodging industry is the cost to home share hosts of re-optimizing prices. This cost is evaluated using an estimate of hosts' hourly value of time rather than wages, which is not doubled. Therefore, the break-even benefits per consumer presented in Table 6 are slightly less than double those in Table 5.

Table 6 – Break-Even Sensitivity Analysis (Doubled Wages)

Break-Even Benefit Per Consumer ($)	Low-End Estimate	High-End Estimate
Live-Event Ticketing and Short-Term Lodging		
Total @ 7% Discount Rate	$0.16	$0.59
Total @ 3% Discount Rate	$0.13	$0.52
Break-Even Time Savings Per Consumer (Minutes)		
Live-Event Ticketing and Short-Term Lodging		
Total @ 7% Discount Rate	0.37	1.36
Total @ 3% Discount Rate	0.31	1.21

The break-even analysis under the assumption of doubled wages implies that if the final rule results in an average benefit to consumers that exceeds $0.59 per year over ten years, then the final rule's benefits exceed its quantified compliance costs under the high-end assumption and an assumed 7% discount rate. In terms of minutes saved per consumer, the high-end cost assumptions with doubled wages and a 7% discount rate imply that if the final rule results in savings from reduced search time that exceed 1.36 minutes per consumer per year over ten years, then the benefits solely from reduced search time will exceed quantified compliance costs.

(c) Quantified Benefits and Costs: Live-Event Ticketing Industry

This section analyzes the final rule's quantified benefits and costs in the live-event ticketing industry. Quantified benefits are limited to the expected reductions in search costs to consumers. Since there is an additional, unquantified benefit of reduced deadweight loss, which is discussed conceptually in section V.E.2.a.ii, the net benefit estimated in the following analysis is conservative. The Commission finds that the quantified benefits and costs indicate that the rule will have a positive net benefit, even without accounting for the unquantified benefit of reducing deadweight loss.

Consumers in the live-event ticketing industry are often surprised by mandatory fees at the end of the purchase process.[580] In 2022, online event ticket sales were reported to be $8.1 billion.[581] Live events include concerts (30.3%), sporting events (33%), and dance, opera, and theater productions (12.4%).[582] For many consumers, there are no close substitutes for the specific product that they wish to purchase: a ticket to attend a live event. Thus, when consumers are presented with surprise mandatory fees, the consumer either pays the full price including the fees, spends time searching for a new option such as a different seat or a different seller, or forgoes the purchase entirely.

The live-event ticketing industry is unique relative to other industries because there is a large and robust secondary market. A given ticket to an event may be sold in the primary market, and then resold multiple times in the secondary market. It is difficult to fully quantify how many live-event ticket purchases are made in the U.S., how many involve mandatory fees, and the typical amount of the fee. Many live-event ticket sellers appear to include some kind of fee, although the size and type of the fees vary across sellers.[583] In a non-generalizable sample, the GAO found live-event ticketing fees in primary and secondary ticket markets averaged 27% and 31% of the ticket's price, respectively.[584]

Following White House and Congressional calls for disclosure of hidden fees, and after the ANPR was announced, some ticket sellers pledged to show all-in prices when the consumer begins the purchase process.[585] However, absent the final rule, market forces would likely return to the equilibrium of hidden mandatory fees. In fact, the National Association of Ticket Brokers and StubHub, Inc. submitted comments to the ANPR in support of a rule requiring all-in pricing, but commented that such a rule would only be effective if applied to all ticket sellers and rigorously enforced.[586] As discussed in section III.B.1.b, the

[580] *E.g.,* White House, *How Junk Fees Distort Competition, supra* note 551.

[581] Michal Dalal, *Online Event Ticket Sales in the US, IBIS* World (May 2023) (''Ticket Sales Industry Report'').

[582] *Id.*

[583] Numerous commenters from the live-event ticketing industry recognized the pervasiveness of various ticketing fees. *See, e.g.,* FTC–2023–0064–3212 (TickPick, LLC observed the ''widespread'' deceptive practice of bait-and-switch pricing); FTC–2023–0064–3230 (Future of Music Coalition commented that they have worked to ''deal[ ] with the scourge of junk fees in various parts of the economy,'' including live touring); FTC–2023–0064–3105 (Charleston Symphony affirmed that ''requiring sellers to disclose the total price clearly and conspicuously[ ] addresses a pressing issue in the nonprofit performing arts sector'').

[584] U.S. Gov't Accountability Office, Event Ticket Sales: Market Characteristics and Consumer Protection Issues, (Apr. 12, 2018), (''GAO Report''), *https://www.gao.gov/products/gao-18-347.*

[585] *See, e.g.,* White House, *President Biden Recognizes Actions by Private Sector Ticketing and Travel Companies to Eliminate Hidden Junk Fees and Provide Millions of Customers with Transparent Pricing* (Jun. 15, 2023) *https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/15/president-biden-recognizes-actions-by-private-sector-ticketing-and-travel-companies-to-eliminate-hidden-junk-fees-and-provide-millions-of-customers-with-transparent-pricing/.* Some ticket sellers, such as TickPick, LLC, have never used hidden fees; S. Comm. on Commerce, Sci., & Transp., TICKET Act, *https://www.commerce.senate.gov/services/files/071401A3-D280-414C-AEDB-A9B57F276067.*

[586] FTC–2022–0069–6089 (ANPR) (National Association of Ticket Brokers); FTC–2022–0069–6079 (ANPR) (StubHub, Inc.).

Commission received similar comments in response to the NPRM emphasizing that the benefit of the rule requires industry-wide coverage so that no single seller is allowed to charge surprise fees at the end of the transaction. If any seller utilizes hidden fees, they may capture a larger market share by advertising lower initial prices. Absent a Federal rule applying to all sellers, competitive forces might drive ticket sellers to return to the use of hidden fees. Thus, the Commission's analysis quantifies benefits and costs relative to the baseline equilibrium where sellers do not disclose total price upfront.

In this final live-event ticketing net benefit analysis, the Commission updates firm counts, wage rates, any inflation-adjusted values, value of time, and 10–K live-event ticket revenue information to reflect the most recent available data. The Commission was unable to update any numbers from IBISWorld Reports.

i. Live-Event Ticketing: Estimated Benefits of the Final Rule

(a) Consumer Time Savings When Shopping for Live-Event Tickets

The final rule requires disclosure of total price inclusive of all fees or charges that a consumer must pay in order to use the good or service for its intended purpose. Required disclosure of total price and prohibitions on misrepresentations save consumers time when shopping for a live-event ticket by requiring the provision of salient, material information upfront and eliminating time spent pursuing ticket offers priced above the amount the consumer is willing to spend, also known as the consumer's reservation price.

The Commission's analysis assumes that, as a result of the rule, the total time spent by a consumer conducting the transaction will decrease, because some consumers will reduce the number of ticket listings they view prior to making a ticket purchase. For example, the Blake Study examined an experiment on StubHub where fees were presented upfront to some consumers and at the end of the purchase to others.[587] The experiment found that the percentage of consumers who only view one listing is 74% when fees are presented at the end of the transaction versus 83% when fees are presented upfront. Using the distribution of listings viewed by consumers as reported in the Blake Study, the analysis calculates that the reduction in the average number of listings a consumer views when fees are displayed upfront is 0.1525 listings.

To calculate the reduction in consumer search time resulting from upfront pricing, the Commission requires information on the length of time a consumer spends viewing a single listing. The Commission is not aware of any data available on this. However, many ticket sellers utilize a ''countdown clock'' where the selected tickets in the consumer's shopping cart expire and are returned to the marketplace. During this countdown clock, a consumer who was unhappy with the revealed total price could search for another ticket without losing the original ticket. The Commission uses this range of countdown clock time as a proxy for a low-end and high-end estimate of the time spent viewing a listing. These countdown clocks range from five to ten minutes per ticket transaction.[588] Multiplying the assumed length of a ticket transaction of five or ten minutes by the estimated reduction in viewed listings from the Blake Study results in a search time savings of 0.7625 to 1.525 minutes per consumer transaction.[589]

Next, the Commission's analysis estimates the number of consumer purchases of live-event tickets. Live Nation (which owns Ticketmaster) reported selling over 329 million fee-bearing tickets in the primary and secondary markets using the Ticketmaster system in its 2023 10–K SEC filing.[590] However, this figure combines North American and international ticket sales. Live Nation also reported that slightly more than two-thirds of concert events were in North America, so the analysis applies that proportion to the total combined ticket sales and assumes that Ticketmaster sold more than 221 million tickets in North America. To estimate the number of tickets sold solely in the U.S., the analysis then also adjusts the number of tickets by the share of North American GDP attributable to the U.S. (0.87 in 2023), which results in an estimated 192 million tickets sold in the primary and secondary markets by Ticketmaster in the U.S.[591]

To find the total number of tickets sold in the U.S. by all live-event ticket sellers, the Commission's analysis extrapolates from Ticketmaster's ticket sales using its market share. However, Ticketmaster's market share is uncertain. In 2010, the Department of Justice found that Ticketmaster had maintained a market share of more than 80% for the previous fifteen years.[592] If the Commission's analysis assumes that Ticketmaster still has an 80% share of the live-event ticket market (which includes both primary and secondary ticket markets), it can estimate the total number of tickets sold in the U.S. by dividing Ticketmaster's ticket sales in the U.S. by 80%. This provides a low-end estimate of the number of tickets sold in the U.S. of 240 million tickets.

However, Ticketmaster did not begin selling in the secondary market until after it merged with Live Nation. Based on publicly available information, the Commission is uncertain of Ticketmaster's market share in the secondary market for tickets.[593] If Ticketmaster does not have 80% of the ticket market (both primary and secondary), the number of tickets sold in the U.S. would exceed the low-end estimate of 240 million tickets. To generate a high-end estimate of the total number of tickets sold in the U.S., the Commission's analysis uses the reported revenue for the full online ticket sales industry provided by the private research firm IBISWorld and calculates Ticketmaster's revenue share of the industry. IBISWorld reports the online ticket sales industry, including both primary ticket sellers and ticket

[587] Blake, *supra* note 521.

[588] Ticketmaster states that the amount of time it imposes varies by event but references a five-minute purchasing period. *FAQ's: Why does Ticketmaster enforce a time limit when making purchases online?,* Ticketmaster.com.au, *https://www.ticketmaster.com.au/h/faq.html.* Based on a small, non-representative sample of ticket purchase attempts, StubHub appears to generally offer ten minutes to complete a ticket purchase.

[589] *See also* Consumer Rule II, *supra* note 570, at 39. The Preliminary Regulatory Impact Analysis for Consumer Rule II assumed airfare consumers would save five minutes of search and estimation time if all websites provided full-fare information upfront.

[590] Live Nation Entm't Inc., Annual Report (Form 10–K) (Feb. 22, 2024) (''Live Nation 10–K''), *https://investors.livenationentertainment.com/sec-filings/annual-reports/content/0001335258-24-000017/0001335258-24-000017.pdf.*

[591] U.S. GDP in 2023 was estimated to be $27.36 trillion and GDP for North America was estimated to be $31.4 trillion. *IMF DataMapper United States Datasets,* IMF.org, *https://www.imf.org/external/datamapper/profile/USA; IMF DataMapper North America Datasets,* IMF.org, *https://www.imf.org/external/datamapper/profile/NMQ.* The Commission's analysis adjusts North American tickets (221 million) by 87% to estimate the number of tickets sold in the United States, resulting in 192 million.

[592] *See* Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, *Remarks at the South by Southwest Conference: The TicketMaster/Live Nation Merger Review and Consent Decree in Perspective* (Mar. 18, 2010), *https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective.*

[593] The Live Nation 10–K, *supra note* 590, does not separate out tickets sold by Ticketmaster in the primary versus secondary markets. Ticketmaster now sells tickets on the secondary market, which includes several other sellers such as StubHub, Inc., Vivid Seats, TickPick, LLC, Ace Ticket, Alliance Tickets, Coast to Coast Tickets, and others.

resellers, earned $12.5 billion in revenue in 2023.[594] The Live Nation 10–K reported ticketing revenue of $3 billion in 2023, which suggests that Ticketmaster has a 24% revenue share of the online ticketing industry.[595] The Commission's analysis extrapolates a high-end estimate of the total number of tickets sold in the U.S. by dividing Ticketmaster ticket sales in the U.S. by 24%, which results in an estimate of 801 million live-event tickets sold in the U.S.

Lastly, the reduction in search time of 0.7625 to 1.525 minutes is per consumer purchase, not per ticket purchase. The Commission's analysis assumes that the average consumer purchase is between 1.5 and 3 tickets.[596] Thus, the total number of tickets sold is divided by 1.5 or 3 to arrive at an estimated range for the number of consumer purchases. The analysis estimates the range of live event consumer purchases in the U.S. to be 80 million on the low end and 534 million on the high end.

When multiplied by the number of transactions per year, the reduction in minutes spent viewing ticket listings will generate a total time savings of 1.02 million to 13.6 million hours per year. Using the value of non-work time for the average U.S. worker of $25.81 per hour, the Commission's analysis estimates that the total benefit from time savings for completed transactions is roughly $26.3 million to $350.6 million per year, depending on how conservative its assumptions are. Table 7 presents the expected benefits of time savings over the next ten years in present value.

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[594] *See https://www.ibisworld.com/industry-statistics/market-size/online-event-ticket-sales-united-states/.*

[595] Assuming Ticketmaster's market share is equivalent to its revenue share (of the primary and secondary markets) also assumes that the average price of a ticket sold by Ticketmaster is the same as (or lower than) the average price of a ticket sold by the rest of the industry. If, however, the average price of a ticket sold by Ticketmaster is higher than average prices in the rest of the industry, then Ticketmaster's revenue share is higher than its ticket share, and the extrapolation understates the total number of tickets sold in the U.S.

[596] The Commission does not currently have information on the average number of tickets purchased in a transaction. However, there is reason to believe the average would be greater than one because most venues limit the number of tickets that can be purchased in a given transaction, suggesting that there is consumer demand for purchases of more than a single ticket. The limit is dependent on the event. Ticketmaster, *Why is there a ticket limit?, https://help.ticketmaster.com/hc/en-us/articles/9781245025937-Why-is-there-a-ticket-limit.*

Table 7 – Live-Event Ticketing: Estimated Benefits of Time Savings for Completed Transactions

		Low-End Benefit Estimate	High-End Benefit Estimate
Completed Transactions			
Minutes Viewing Live-Event Ticket Listing		5	10
Reduction in Average Number of Listings Viewed		0.1525	0.1525
Minutes Saved per Transaction		0.7625	1.525
Number of Tickets Sold in the United States		240,441,841	801,472,804
Average Number of Tickets in a Purchase		3	1.5
Number of Consumer Purchases		80,147,280	534,315,203
Hours Saved Per Year		1,018,538	13,580,511
Value of 1 hour of non-work time		$25.81	
Total $ Saved per year		$26,292,142	$350,561,889
Abandoned Transactions		***Unquantified***	***Unquantified***
Reductions in Deadweight Loss		***Unquantified***	***Unquantified***
Total Quantified Benefits (10 Years)	**7% Discount Rate**	$184,665,001	$2,462,200,015
Total Quantified Benefits (10 Years)	**3% Discount Rate**	$224,277,302	$2,990,364,023

Note: Benefits have been discounted to the present value at both 3% and 7% rates. The total number of tickets sold in the U.S. market is estimated using the reported number of tickets sold in the primary and secondary market in the 2023 Live Nation 10-K.[597] This number of tickets is adjusted first by the proportion of North American events, and then by the share of North American GDP attributable to the U.S. Lastly, the total number of tickets is estimated by dividing the tickets sold by TicketMaster by the market share of TicketMaster. Wage rates are taken from the U.S. Bureau of Labor Statistics and adjusted by the consumer value of time reported in Hamermesh (2016).[598] The Commission relied upon publicly available sources of data in its calculations.

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(b) Additional Unquantified Benefits: Reductions in Deadweight Loss and Abandoned Transactions

Due to the incomplete price information problem described in section V.E.1, the final rule requiring ticket sellers to show total price of tickets upfront will likely result in a reduction of deadweight loss. Recent research suggests that when consumers know total prices for tickets upfront, consumers are better able to find the tickets that match their desired quantity and quality (seat type or location).[599] The analysis does not quantify the reduction in deadweight loss, but such a reduction is a positive benefit of the rule.

Another unquantified benefit to the final rule is a potential decrease in abandoned transactions. For example, in some cases, once the additional information impacting full price is revealed, consumers may fully abandon the transaction (*i.e.,* not purchase any ticket). Although the Commission solicited comment in the NPRM on the

[597] Live Nation 10–K, *supra* note 590.

[598] OEWS National, *supra* note 571; Hamermesh, *supra* note 533.

[599] Blake, *supra* note 521. Live-event tickets are an example of a differentiated product; there are higher quality tickets (*e.g.,* better views, more comfortable seats, cover from the elements) that are associated with higher price tiers. Blake et al. find that consumers who face drip pricing purchase more expensive, higher quality tickets than they would if provided with upfront pricing.

frequency of, and the reasons for, abandoned transactions in the live-event ticket market to help quantify this benefit, it did not receive this data and cannot determine the quantity of such abandoned transactions and the amount of time spent pursuing them. As a result, this benefit is unquantified.

ii. Live-Event Ticketing: Estimated Costs of the Final Rule

This section describes the potential costs of the final rule's provisions and provides quantitative estimates where possible. For live-event ticketing, the cost of employee time is again monetized using wages obtained from the Bureau of Labor Statistics' May 2023 National Occupational Employment and Wage Estimates.[600] Because live-event ticketing is not associated with a specific NAICS code, the Commission uses wages at the national level rather than the industry-specific wages that are used to calculate costs for the short-term lodging industry.

The costs to sellers from the rule include a review of whether the rule applies, and, if the firm is not currently compliant with the rule, one-time costs to comply with the rule, as well as recurring annual costs to review and ensure ongoing compliance. The Commission's analysis presents two cost scenarios corresponding to different assumptions of how many hours are required to comply with the rule and how many firms would be affected by the rule. The analysis presents these as low-end and high-end cost scenarios.

To estimate costs for the entire live-event ticket-selling industry, the Commission's analysis calculates the cost per seller and multiplies that by the number of sellers in the industry. There is some uncertainty about the number of live-event ticket sellers that would be affected by the rule because, while the NAICS classification system does not define a classification solely for ticket sellers, two different NAICS codes might include ticket sellers. The GAO Report used the NAICS code 561599, which is ''All Other Travel Arrangement and Reservation Services.''[601] This NAICS category includes 1,442 firms; some live-event ticket sellers, such as Tickets.com and Vivid Seats, use this classification.[602] Other live-event ticket sellers, such as Ticketmaster and StubHub, however, are classified as NAICS code 7113, which is ''Promoters of Performing Arts, Sports, and Similar Events,'' and includes 7,998 firms.[603] As a high-end estimate of the number of live-event ticket sellers, the Commission's analysis uses the sum of the firms within these two NAICS code and assumes there are 9,440 firms potentially impacted by the final rule.[604]

The 9,440 figure is potentially over-inclusive, as many firms within NAICS code 561599 and 7113 do not directly sell tickets or charge mandatory fees, and thus would not be impacted by the final rule. The private research firm IBISWorld estimated that the number of firms in the online live-event ticket selling industry was 3,326.[605] The Commission's analysis uses the 3,326 figure as a low-end estimate of the number of firms.

Next, the Commission's analysis estimates the number of hours a firm would spend complying with the rule. As with assumptions regarding the number of firms, the following estimation utilizes low-end and high-end values for the number of hours necessary for compliance. Because many ticket sellers operate in other countries that currently have requirements similar to the final rule (Canada, Australia, the United Kingdom, and the European Union member states), ticket sellers already may have incorporated any changes required by the final rule to their operating practices. The websites already may be programmed; the lawyers already may be prepared to advise on compliance with the rule; and the data scientists already may have determined the optimal pricing strategy. Thus, sellers would have relatively low costs to transition to all-in pricing in the U.S.[606]

In this low-end cost scenario, because live-event ticket sellers already are prepared to advertise total prices to consumers, the one-time, upfront cost of determining optimal prices and updating the purchase systems in terms of the number of required hours is negligible. The Commission's analysis assumes five hours of lawyer time to determine if the rule applies, forty hours of data scientist time to re-optimize pricing strategy, and forty hours of web developer time to edit and reprogram the website to display upfront prices. For the low-end cost scenario, the analysis also assumes there are no annual costs after the firm has incurred the one-time transition costs.

In the high-end cost scenario, the Commission's analysis assumes that ticket sellers have not laid the groundwork to comply with the rule. The high-end cost scenario assumes sellers require twice the number of hours to determine optimal prices, re-program the website to include total price, and review and confirm compliance. Thus, the one-time costs include 10 hours of lawyer time, 80 hours of data scientist time, and eighty hours of web developer time. For the high-end cost estimate, the analysis assumes there are recurring annual costs of ten hours of lawyer time per year to review and confirm compliance.[607]

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[600] OEWS National, *supra* note 571.

[601] NAICS code 561599 ''comprises establishments (except travel agencies, tour operators, and convention and visitors bureaus) primarily engaged in providing travel arrangement and reservation services.'' U.S. Census Bureau, North American Industry Classification System, *561599 All Other Travel Arrangement and Reservation Services* (2022), *https://www.census.gov/naics/?input=561599&year=2022&details=561599*.

[602] U.S. Census Bureau, 2021 SUSB Annual Datasets by Establishment Industry (Dec. 2023), *https://www.census.gov/data/datasets/2021/econ/susb/2021-susb.html*.

[603] *Id.*

[604] Note that some live-event ticket sellers may be organized as non-profit entities and thus could fall outside of the Commission's jurisdiction. The Commission did not find data on the proportion of ticket sellers that are non-profits and thus uses the full number of firms. If a non-trivial number of ticket sellers are outside the jurisdiction of the Commission and not subject to the provisions of the rule, then the total costs to ticket sellers is overestimated.

[605] Ticket Sales Industry Report, *supra* note 581.

[606] FTC–2023–0064–3212 (TickPick, LLC commented: ''For the most part, ticketing marketplaces would incur an immaterial cost to implement all-in pricing. Internationally, major ticket marketplaces are already required to comply with true all-in pricing in Canada and the United Kingdom. The technology to display tickets inclusive of fees in the form of a toggle is a widely available functionality. Put differently, the technology already exists within ticketing platforms to eliminate drip pricing and would simply need to be applied to events in the U.S.'').

[607] FTC–2023–0064–3122 (Vivid Seats commented: ''We believe that the FTC is underestimating the amount of employee time required by at least a factor of five.''). The Commission notes that other commenters stated the transition to upfront pricing for ticket sellers would be as simple as a toggle switch and that most ticket sellers already have the capability to provide Total Price due to existing regulations in other countries. *See, e.g.,* FTC–2023–0064–3212 (TickPick, LLC); FTC–2023–0064–0132 (Individual Commenter who purchased tickets from GameStop and StubHub noted that ''on all of these sites the fees are not explained until the final page unless you go find the toggle to include fees as you are looking for tickets''); FTC–2023–0064–3207 (Consumer Reports noted a consumer who commented: ''While I appreciate that TM [Ticketmaster] now has the option to view all your fees up front as part of the price if you toggle that option, its totally insane that fees can be 25% of the cost at LEAST.''); FTC–2022–0069–6162 (ANPR) (Recording Academy noted that ''StubHub allows the consumer to toggle 'Show prices with estimated fees' filter during the ticket search''). The Commission did not receive any definitive data on the number of hours this change would take and thus retains the low-end and high-end hours estimates presented in the NPRM.

Table 8 – Live-Event Ticketing: Estimated Costs of Compliance

		Low-End Cost Estimate	High-End Cost Estimate
Number of Live-Event Ticket Sellers		3,326	9,440
Hours to Determine Optimal Pricing (Data Scientist Hours)		40	80
Hours to Update Purchasing Systems to Reflect Total Price (Website Developer Hours)		40	80
Hours to Determine how Rule Applies (Lawyer Hours)		5	10
Hourly Wage Rate Data Scientist		$57.23	$57.23
Hourly Wage Rate Website Developer		$45.95	$45.95
Hourly Wage Lawyer to Review Compliance		$84.84	$84.84
One-Time Fixed Cost to Include Fees Upfront		**$15,137,956**	**$85,930,432**
Hours for Reviewing Rule and Compliance (Annual)		0	10
Hourly Wage Lawyer to Review Compliance		$84.84	$84.84
Total Costs per year		**$0**	**$8,008,896**
Total Quantified Costs (10 Years) (One-Time + Annual)	**7% Discount Rate**	**$15,137,956**	**$142,181,566**
Total Quantified Costs (10 Years) (One-Time + Annual)	**3% Discount Rate**	**$15,137,956**	**$154,247,939**
Annualized Compliance Cost Per Firm	7% Discount Rate	$648.02	$2,144.43
Annualized Compliance Cost Per Firm	3% Discount Rate	$533.56	$1,915.53

Note: Costs have been discounted to the present at both 3% and 7% rates. The high-end estimate of firms is the sum of the number of firms in NAICS code 561599 and NAICS code 7113 reported by the U.S. Census Bureau.[608] The Commission relied upon publicly available sources of data in its calculations.

iii. Live-Event Ticketing: Net Benefits

In Table 9, the Commission's analysis presents net benefits using the quantified benefits and costs discussed in section V.E.3.c.i and V.E.3.c.ii. To calculate the low-end of the range for net benefits, the analysis subtracts the total quantified costs using the high-end cost assumptions from the total quantified benefits using the low-end benefit assumptions. For the high-end of the range for net benefits, the analysis subtracts the low-end estimate of total quantified costs from the high-end estimate of total quantified benefits.

[608] U.S. Census Bureau, *2021 SUSB Annual Datasets by Establishment Industry, supra* note 602. Hourly wages are from the Bureau of Labor Statistics. *See* sources cited *supra* note 571, including OEWS Data Scientists (providing the hourly wages for data scientists); OEWS Web Developers (providing the hourly wages for web developers); and OEWS Lawyers (providing the hourly wages for lawyers).

Table 9 – Live-Event Ticketing: Estimated Net Benefits

		10-Year Period	
		Low-End Estimate	**High-End Estimate**
Total Quantified Benefits	7% Discount Rate	$184,665,001	$2,462,200,015
Total Quantified Benefits	3% Discount Rate	$224,277,302	$2,990,364,023
Total Quantified Costs (One-Time + Annual)	7% Discount Rate	$15,137,956	$142,181,566
Total Quantified Costs (One-Time + Annual)	3% Discount Rate	$15,137,956	$154,247,939
		(Low Benefits – High Cost)	**(High Benefits – Low Cost)**
Net Benefits (10 Years)	7% Discount Rate	$42,483,435	$2,447,062,058
Net Benefits (10 Years)	3% Discount Rate	$70,029,362	$2,975,226,066

Note: Benefits have been discounted to the present at both 3% and 7% rates.

Using various assumptions, the quantified benefits and costs imply that the rule will have a positive net benefit, even without accounting for the additional benefit of reducing deadweight loss.

iv. Live-Event Ticketing: Uncertainties

The Commission's ability to precisely estimate benefits and costs is limited due to uncertainties in key parameters. The quantified benefits and costs for the live-event ticketing industry rely on a set of assumptions, based on the best available public information. When the data are unclear, the analysis relies on assumptions that generate a range of low-end and high-end estimates. In Table 10, the analysis summarizes those key assumptions and their effect on the resulting estimate of quantified benefits and costs.

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Table 10 – Live-Event Ticketing: Summary of Key Uncertainties

Assumption or Uncertainty in Benefits Calculation	**Impact on Benefits**
The analysis assumes that Ticketmaster sales of tickets in North America are proportional to events in North America.	Adjusting total Ticketmaster tickets sold (North America + International) by the proportion of events in North America may overestimate or underestimate tickets sold in North America.
The analysis assumes that the total tickets sold in the U.S. are proportional to Ticketmaster share of ticket market revenue.	Market share extrapolation based on revenue share may underestimate or overestimate the total number of tickets sold in the U.S.
The analysis assumes the number of tickets purchased in the average consumer transaction (1.5 or 3 tickets per consumer).	Adjusting the total tickets sold by the number of tickets in the average transaction may overestimate or underestimate the total number of consumer transactions.
The analysis assumes that reduction in consumer search due to upfront pricing is estimated by the Blake Study that shows a reduction of 0.16 listings viewed on StubHub with upfront pricing.	Assuming that upfront pricing will lead to exactly 0.16 fewer listings viewed may underestimate total search time reduced, because it does not account for consumers using other purchasing systems (ticket selling competitors).
The analysis assumes that consumers spend between five to ten minutes viewing a listing. This assumption is based on shopping cart clocks from Ticketmaster and StubHub sale pages.	Assuming consumers use the full timer clock to view a listing may overestimate transaction time, which would overestimate the benefits of reduced search time.
Assumption or Uncertainty in Costs Calculation	**Impact on Costs**
The analysis assumes that the number of firms selling tickets is the sum of firms in potential NAICS codes.	The analysis may overestimate total number of firms affected if a large proportion of firms in these NAICS codes are not subject to the final rule.
The analysis assumes that the number of firms selling tickets is the number provided in the IBISWorld Ticket Sales Industry Report.	The analysis may underestimate total costs if there is a meaningful number of firms selling tickets offline.
The analysis assumes that the number of hours to comply with the rule is comprised of specified hours of lawyer time, data analyst time, and web developer time.	The analysis may overestimate costs per firm if many firms either already comply or have the systems in place to easily comply with the rule. Also, the analysis may underestimate costs if compliance requires a greater number of hours.

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(d) Quantified Benefits and Costs: Short-Term Lodging Industry

Businesses in the short-term lodging industry, which include both traditional hotels[609] as well as home share options like Airbnb and VRBO, often charge a variety of mandatory add-on fees. These fees are typically either disclosed upfront but separately from the base price (a practice known as partitioned pricing), or revealed just before payment, after the consumer has clicked through multiple pages of a listing (a practice known as drip pricing). Sometimes, these fees are not disclosed at all or are disclosed only when a consumer checks out at the conclusion of their stay. These fees may include mandatory surcharges referred to by hotels as ''resort fees,'' ''amenity fees,'' or ''destination fees.'' Hotels often justify charging these fees as necessary to cover the costs of amenities that are not reflected in the base rate, such as Wi-Fi, pool and gym access, towels, parking, or shuttle services. Home share websites like Airbnb and VRBO may include mandatory fees such as ''cleaning fees,'' ''service fees,'' or ''host fees.'' These fees are mandatory and do not depend on the consumer's use of the amenities or services.

Consumer behavior studies have shown that both partitioned pricing and drip pricing cause consumers to underestimate the full price of the product, even when all components of the price are disclosed upfront.[610] As a result, disclosing mandatory surcharges separately from the room rate without more prominently disclosing total price is likely to harm consumers by increasing search costs and reducing consumer surplus.[611] These fees may reduce consumer surplus if consumers respond by booking a room that is more expensive than the room they would have chosen under upfront total pricing. Partitioned pricing and drip pricing may also increase search costs if consumers spend more time looking at additional listings in search of a cheaper hotel.

One industry group states that 6% of U.S. hotels charge mandatory fees, which amounts to over $2.5 billion paid in resort fees annually by U.S. consumers.[612] This number underestimates how much U.S. consumers pay in mandatory fees because it does not include fees from finding accommodations on the home share market through websites like Airbnb and VRBO, or fees incurred from booking at foreign hotels with U.S.-facing websites. Resort fees in the U.S. average 3.9% of the per-night cost of a room, and can exceed 20% of the per-night cost, especially at lower cost hotels.[613]

This section analyzes the final rule's quantified benefits and costs in the short-term lodging industry. Quantified benefits are limited to the expected reductions in search costs to consumers. Since there is an additional, unquantified benefit of reduced deadweight loss, which is discussed conceptually in section V.E.2.a.ii, the net benefit estimated in the following analysis is conservative. The Commission finds that the quantified benefits and costs indicate that the rule will have a positive net benefit, even without accounting for the unquantified benefit of reducing deadweight loss.[614]

i. Short-Term Lodging: Estimated Benefits of the Final Rule

As a result of the final rule, the Commission expects that the time consumers spend searching for short-term lodging will decrease because prices will be easier to compare within and across websites. Some consumers will reduce the number of short-term lodging listings they view prior to booking or spend less time understanding and assessing the full price.[615] In its analysis, the Commission makes the conservative and simpler assumption that the time spent viewing a listing remains the same, and that consumers reduce the number of listings they view. Table 11 quantifies the benefits of such time savings and provides low- and high-end estimates to account for uncertainty in the available statistics.

The Commission's analysis focuses on the benefits that accrue to consumers who book rooms from within the United States on any U.S.-facing website, which can include bookings at both domestic and foreign short-term lodgings. Short-term lodgings include both traditional hotels as well as rooms booked through home share websites like Airbnb and VRBO. In this section, the Commission outlines how it calculates the benefits listed in Table 11 as well as the assumptions made. The table reports a set of basic search statistics used in the calculation, the savings per year for consumers who book at U.S. short-term lodgings, the savings per year for consumers who book at foreign short-term lodgings with U.S.-facing websites, and the combined total savings for all U.S. consumers per year.

Although not all short-term lodgings charge resort fees, the lack of a unified standard of upfront pricing across listings makes comparing prices difficult and time consuming for consumers. Even a single short-term lodging website can vary in whether listings have hidden fees. Different hotel brands belonging to the same larger hotel company may impose hidden fees for listings in some cities but not in others. Some listings may note whether resort fees are included in the base price, but in very fine print under the listed price. Some listings may not say anything, requiring consumers to click through the listing to learn whether there are hidden fees at the end of the booking process. Given that a minimum of 6% of hotels[616] impose drip or partitioned pricing, and the average hotel shopper visits seventeen travel websites before booking,[617] consumers

[609] Throughout this section, we use ''hotel'' as an umbrella term for hotels, motels, inns, short-term rentals, vacation rentals, traditional bed and breakfasts, hostels, and other places of lodging.

[610] Shelanski, *supra* note 550.

[611] Mary Sullivan, Fed. Trade Comm'n, *Economic Analysis of Hotel Resort Fees* 4 (2017), *https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf*.

[612] FTC–2023–0064–3094 (American Hotel & Lodging Association); Bjorn Hanson, U.S. Lodging Industry Fees and Surcharges Forecast to Increase to a New Record Level in 2018—$2.93 Billion, and Another Record Anticipated for 2019—the Newest Emerging Category is ''Resort Fees'' for Urban Luxury and Full Service Hotels (Aug. 27, 2018), *https://bjornhansonhospitality.com/fees-%26-surcharges*.

[613] Sally French & Sam Kemmis, *How to Avoid Hotel Resort Fees (and Which Brands Are the Worst),* NerdWallet (updated Aug. 1, 2024, 11:53 a.m. PDT), *https://www.nerdwallet.com/article/travel/hotel-resort-fees*.

[614] In this final short-term lodging net benefit analysis, the Commission updates firm counts, wage rates, any inflation-adjusted values, value of time, and 10–K hotel revenue information to reflect the most recent available data. The Commission was unable to update any numbers from IBISWorld Reports.

[615] The drip pricing literature suggests that, because time to view one listing is lower under upfront pricing, a subset of consumers may view more listings rather than fewer because the cost of viewing an additional listing has decreased. Sullivan, *supra* note 611. It is unclear how this affects total search time. If the higher number of listings viewed is offset by the lower time it takes to view each listing, the total search time will be lower under upfront pricing for this subset of consumers. If total time increases, it can be classified as ''good'' search time for this subset of consumers because it results in consumers purchasing their preferred hotel room. Alternatively, another group of consumers could view fewer listings because upfront prices allow consumers to compare rooms more easily and select their preferred hotel room more quickly. Blake, *supra* note 521. The total search time for these consumers will decrease. The Commission's analysis focuses on the latter group of consumers because the change in their search time represents a decrease in ''bad'' or unnecessary searches caused by drip pricing.

[616] FTC–2023–0064–3094 (American Hotel & Lodging Association).

[617] Chris Anderson & Saram Han, *The Billboard Effect: Still Alive and Well,* 17 Cornell Hosp. Rpt. 1 (2017), *https://hdl.handle.net/1813/70982*. The Commission calculates the average number of websites visited by summing the average number of

are likely to encounter at least one website that imposes dripped or partitioned pricing in their search for a hotel. Even if consumers complete their whole search and booking process without visiting any websites that impose hidden resort fees, the fact that there could be hidden fees creates uncertainty and may cause consumers to click through more listings than they otherwise would have to learn if the initial price is truly the final price. Therefore, the Commission quantifies the benefits for all U.S. consumers who book a room in a given year, regardless of whether they interacted with a website that imposed dripped or partitioned pricing.

(a) Search Statistics

The Commission uses two different studies to calculate low- and high-end estimates for the average number of minutes it takes to view one listing. On the low end, the analysis uses statistics on Airbnb user search behavior collected by Fradkin (2017) to calculate that consumers spend 9.48 minutes to view one listing.[618] On the high end, the analysis uses a hotel search cost model developed by Chen and Yao (2016) to calculate the average search cost per listing.[619] Using this average search cost, the Commission estimates that consumers spend 14.18 minutes viewing one listing. Appendix B in section V.E.7 contains calculation details for both estimates. Using the estimates from each study as low- and high-end estimates ensures that the analysis captures user search behavior when shopping on home share websites like Airbnb and when shopping for a traditional hotel.

To estimate the reduction in average listings viewed due to dripped or partitioned pricing, the Commission's analysis uses results on the average reduction in listings viewed under upfront pricing from an experiment in the live-event ticket industry.[620] That study found that the average reduction in listings viewed under upfront pricing was 10.6% of the mean listings viewed under drip pricing. For the low-end estimate, the analysis applies the same proportion to the mean listings viewed by Airbnb users in Fradkin (2017) (2.367 listings, proxied by number of contacts) and finds a reduction of 0.25 listings. On the high end, the Commission applies this to the mean listings viewed by hotel searchers in Chen and Yao (2016), 2.3 listings, and finds a reduction of 0.24 listings.[621]

Multiplying these numbers by the minutes to view one listing results in 2.39 to 3.47 minutes saved per transaction. These are likely conservative estimates, given that they assume consumers only view one website before booking a room. As previously stated, one study suggested that consumers visit an average of seventeen websites before booking.[622] The average reduction in listings viewed may also underestimate benefits from eliminating dripped and partitioned pricing because it is more difficult to adapt to the wide variability of fees in the short-term lodging industry than it is in the live-event ticketing industry, where listings have the same percentage fee. Short-term lodgings have different fees, and the number of lodgings with such fees will vary across markets.

Finally, as is described in detail in section V.E.3.b, the Commission's analysis uses $25.81 as the value of one hour work time.

(b) U.S. Hotels and Home Shares

Next, the Commission calculates the total savings per year for U.S. consumers who book at U.S. short-term lodgings, which includes both U.S. hotels and home shares. The Commission's analysis finds the total number of nights booked in the U.S. in 2022 by dividing the total revenue the U.S. short-term lodgings industry earned from rooms by the average daily rate (''ADR'').[623] The ADR is the average revenue per room-night booked in the U.S. The total number of nights booked in the U.S. in 2022 that would potentially be affected by this rule is about 1.29 billion.

Dividing the total number of nights booked by the average number of nights per booking gives 715 million total bookings.[624] About 91.8%, or 657 million, of these bookings are made by U.S. consumers.[625] Finally, the Commission calculates the total savings for U.S. consumers per year by multiplying the number of bookings made by U.S. consumers by the minutes saved per transaction and the value of time for consumers. This results in total savings ranging from about $674 million to $980.3 million.

(c) Foreign Hotels and Home Shares with U.S.-Facing websites

To estimate the number of foreign short-term lodging bookings made by U.S. consumers, the Commission uses the fact that 96% of all trips taken by U.S. consumers are domestic.[626] Multiplying the number of bookings made by U.S. consumers by $((1-0.96)/0.96)$ gives 27.4 million foreign bookings. The total savings for this category ranges from about $28.1 to $40.8 million.

(d) All Hotels and Home Shares

Together, U.S. and foreign bookings amount to about 683.9 million bookings per year. This corresponds to between 27.2 and 39.6 million hours saved by U.S. consumers per year, and between

OTAs, Hotel Sites, TripAdvisor, and Other Meta websites visited sixty days prior to reserving a room.

[618] Andrey Fradkin, *Search, Matching, and the Role of Digital Marketplace Design in Enabling Trade: Evidence from Airbnb* (MIT Initiative on the Digit. Econ., Working Paper, 2017), *https://ide.mit.edu/wp-content/uploads/2017/07/SearchMatchingEfficiency.pdf*.

[619] Yuxin Chen & Song Yao, *Sequential Search with Refinement: Model and Application with Click-Stream Data,* 63 Mgmt. Sci. 4345 (2016), *https://doi.org/10.1287/mnsc.2016.2557*.

[620] Blake, *supra* note 521.

[621] Although the Commission is basing its estimate about reduction in listings on data that comes from the ticketing industry, this method results in the most conservative reduction of viewed listings compared to other methods. The most relevant study from the hotel search cost literature estimates that improvements in hotel rankings (which may be loosely comparable to removing drip pricing) reduces search costs by $11.50. *See* Raluca M. Ursu, *The Power of Rankings: Quantifying the Effect of Rankings on Online Consumer Search and Purchase Decisions,* 37 Mktg. Sci. 530 (2018), *https://doi.org/10.1287/mksc.2017.1072.* Given the Commission's estimates of the time to view one listing (between 9.48 and 14.18 minutes), this suggests an average reduction of between 2.95 and 1.95 listings viewed, which is implausible given that various papers find the average number of listings viewed at baseline to be between 2 and 3. Thus, while some papers find substantially higher search costs than the Commission's method, these findings reinforce that, if anything, the benefits estimates presented here are likely conservative.

[622] *See* Anderson & Han, *supra* note 800. It is unclear whether the relationship between websites viewed and time saved is linear, as consumers may save less time on the fifteenth website they view than they do on the first. As such, it is difficult to extrapolate from the Commission's estimates to the total time saved for consumers who view multiple websites. Therefore, to remain conservative in its estimate of benefits, the Commission's analysis assumes that consumers visit only one website.

[623] Revenue equals about $192.23 billion. Alexia Moreno Zambrano, *Hotels & Motels in the US,* IBISWorld (Jan. 2023) (''Hotels & Motels Industry Report''); Thi Le, Bed & Breakfast & Hostel Accommodations in the US, IBISWorld (Jan. 2023) (''Bed & Breakfast Industry Report''). The ADR is about $149. *STR: U.S. hotel ADR and RevPAR reached record highs in 2022,* STR (Jan. 20, 2023), *https://str.com/press-release/str-us-hotel-adr-and-revpar-reached-record-highs-2022*.

[624] Consumers book on average 1.8 nights per booking. Jordan Hollander, *75+ Hospitality Statistics You Should Know (2024),* Hotel Tech Report (updated July 9, 2024), *https://hoteltechreport.com/news/hospitality-statistics*.

[625] How much do U.S. hotels depend on international guest stays?, CBRE Econometric Advisors' Blog (Oct. 10, 2017), *https://www.cbre-ea.com/public-home/deconstructing-cre/2017/10/10/how-much-do-u.s.-hotels-depend-on-international-guest-stays*.

[626] Adrian, U.S. Travel & Tourism Statistics 2020–2021, Tourism Academy Blog (Sep. 15, 2021 12:39:18 p.m.), *https://blog.tourismacademy.org/us-tourism-travel-statistics-2020–2021*.

$702.1 million and $1.02 billion total savings per year. Table 11 presents the expected benefits of time savings over the next ten years in present value.

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Table 11 – Short-Term Lodging: Estimated Benefits of Time Savings for Completed Transactions

		Low-end Benefit Estimate	High-end Benefit Estimate
Search Statistics			
Minutes to View Listing		9.48	14.18
Reduction in Average Number of Listings Viewed		0.25	0.24
Minutes Saved Per Transaction		2.39	3.47
Value of 1 hour of Non-work Time		$25.81	$25.81
U.S. Hotels and Home Shares			
Total Number of Nights Booked		1,287,361,938	1,287,361,938
Average Nights Per Booking		1.8	1.8
Number of Bookings		715,201,077	715,201,077
Number of Bookings Made by U.S. Consumers		656,554,589	656,554,589
Total Savings Per Year		**$674,002,727**	**$980,277,525**
Foreign Hotels and Home Shares			
Number of Bookings Made by U.S. Consumers		27,356,441	27,356,441
Total Savings Per Year		**$28,083,447**	**$40,844,897**
All Hotels and Home Shares			
Total Bookings		683,911,030	683,911,030
Hours Saved by U.S. Consumers Per Year		27,198,305	39,557,536
Total $ Saved Per Year		**$702,086,174**	**$1,021,122,422**
Abandoned Transactions		***Unquantified***	***Unquantified***
Reductions in Deadweight Loss		***Unquantified***	***Unquantified***
Total Quantified Benefits Over 10-Year Period	**7% Discount Rate**	**$4,931,159,488**	**$7,171,936,592**
Total Quantified Benefits Over 10-Year Period	**3% Discount Rate**	**$5,988,937,469**	**$8,710,381,378**

Note: Benefits over ten years have been discounted to the present at both 3% and 7% rates. The value of time for hotel consumers is the mean hourly wage and adjusted by the consumer value of time reported in Hamermesh (2016).[627] Average nights per booking is from Hotel Tech Report.[628]

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[627] OEWS National, *supra* note 571; Hamermesh, *supra* note 533.

[628] Hollander, *supra* note 624.

(e) Additional Unquantified Benefits: Reductions in Deadweight Loss and Abandoned Transactions

As is discussed in section V.E.2.a.ii, the final rule requiring short-term lodgings to display total price of rooms will likely result in a reduction of deadweight loss. When consumers are not provided total price at the beginning of the booking process, sellers likely are able to charge higher prices than under the final rule. The rule's total price requirement may provide consumers with more complete pricing information so that they can make informed decisions about short-term lodging reservations, thus reducing deadweight loss. The Commission does not quantify the reduction in deadweight loss but acknowledges that it is a positive benefit to the final rule.

In some cases, once total price is provided, consumers may fully abandon the transaction (*i.e.,* not book any room). Since lodging cost is only a part of overall trip cost, abandoning a transaction may be less likely for short-term lodging than other industries. In that case, the unquantified benefit is likely to be small. The Commission solicited comment in the NPRM on the frequency of, and reasons for, abandoned transactions in the short-term lodging industry to help quantify this benefit, but did not receive adequate information in response, so this benefit remains unquantified.

ii. Short-Term Lodging: Estimated Costs of the Final Rule

The Commission herein describes the final rule's potential costs to the short-term lodging industry and, where possible, provides quantitative estimates of those costs. The costs to hotels from the final rule include a review of whether the rule applies and, in cases of noncompliance with the final rule, one-time costs to come into compliance and recurring annual costs to ensure ongoing compliance. The cost of employee time is monetized using wages obtained from the Bureau of Labor Statistics' National Industry-Specific Occupational Employment and Wage Estimates.[629] The Commission uses wages specific to the Traveler Accommodation industry (associated with NAICS code 721100). This industry includes traditional hotels and motels, casino hotels, bed and breakfast inns, hostels, and home share platforms.[630] The Commission also quantifies the cost to individual home share hosts in the form of a one-time cost to adjust prices on home share listings.

Table 12 outlines the estimated costs of the final rule. Panel A shows the costs for U.S. hotels and home share hosts; Panel B shows the costs for foreign hotels and home share hosts who post listings on U.S.-facing websites;[631] and Panel C shows the total combined costs for both groups.

(a) Panel A: U.S. Hotels and Home Share Hosts

There are 49,216 U.S. hotels associated with the ''Traveler Accommodation'' NAICS code. Of these firms, 6% impose resort fees, bringing the high-end number of U.S. firms affected to 2,953. The low-end number of firms affected is 2,948 after removing Marriott International, Inc., Omni Hotels Management Corporation, Choice Hotels International, Inc., Hilton Worldwide Inc., and Hyatt Hotels Corporation to account for the possibility that these hotels will eliminate dripped and partitioned pricing from their websites regardless of this rule to comply with any existing or forthcoming settlements with various State Attorneys General.[632]

Next, the Commission's analysis estimates the number of hours a U.S. hotel would spend complying with the final rule. The analysis assumes all hotels that do not impose dripped or partitioned pricing will spend one hour of lawyer time determining if the final rule requires any changes to their advertising. Hotels that are not presently compliant with the rule will incur additional costs to come into compliance. In the low-end estimate, the analysis assumes that, because many hotels have websites facing other countries that already have similar requirements to the final rule (*e.g.,* Canada, Australia, and the European Union member states), hotels already may have the experience and infrastructure required to incorporate the necessary changes to their operating practices. In this scenario, hotels have relatively low costs to transition to all-in pricing for their U.S.-facing websites. The analysis assumes five hours of lawyer time to determine how the final rule applies to the firm, forty hours of data scientist time to re-optimize the pricing strategy, and forty hours of web developer time to edit the website to display total prices and make other requisite disclosures.

In addition to hotels, the final rule also would affect individuals who participate in the home share market by listing their properties for short-term rentals on websites like Airbnb and VRBO. The Commission's analysis estimates the total number of home share hosts in the U.S. by starting with the number of Airbnb hosts in the U.S. who post home share listings (not including larger bed and breakfast or hostel establishments) and extrapolating to the full U.S. market using Airbnb's

[629] U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, May 2023 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 721100—Traveler Accommodation (May 2023), *https://www.bls.gov/oes/current/naics4_721100.htm* (''OEWS Traveler Accommodation'').

[630] NAICS code 721100 does not capture intermediary travel websites, which display pricing information and offer booking options for various short-term lodging firms. Because these intermediaries constantly update pricing information obtained directly from short-term lodging firms (*see, e.g.,* FTC–2023–0064–3293, Travel Technology Association), and do not need to reoptimize prices or drastically change displays themselves, the Commission believes that intermediary firms will not face additional compliance costs from the rule.

[631] The Commission's analysis includes costs to foreign hotels with U.S.-facing websites because complying with the rule may cause them to pass through some costs to U.S. hotel shoppers. The Commission is unable to quantify what percentage of costs will be passed through; to be conservative, the analysis includes all costs to foreign hotels and home share hosts.

[632] In 2021, Marriott agreed to a settlement with the Commonwealth of Pennsylvania, Office of the Attorney General, in which Marriott agreed to include mandatory resort fees in the base rate of its hotel rooms on the first page of the booking process. Assurance of Voluntary Compliance, *Commonwealth* v. *Marriott Int'l, Inc.,* No. GD–21–014016 (Pa. Ct. C.P. Nov. 16, 2021). In 2023 and 2024, Marriott entered into similar settlements with the Offices of the Attorney General in both the State of Nebraska and the State of Texas. Assurance of Voluntary Compliance, *Texas* v. *Marriott Int'l, Inc.,* No. 2023–CI09717 (Tex. Dist. Ct. May 16, 2023); Order Approving Assurance of Voluntary Compliance, *Nebraska* v. *Marriott Int'l, Inc.,* No. CI 23–3860 (Neb. Dist. Ct. Jan. 18, 2024). In 2023, Omni and Choice Hotels both agreed to similar multi-state settlements with the Offices of the Attorney General in the State of Colorado, the Commonwealth of Pennsylvania, and the State of Nebraska. *See, e.g.,* Assurance of Discontinuance, *In re Choice Hotels Int'l Inc. Resort Fees* (Colo. Sept. 21, 2023); Assurance of Discontinuance, *In re Omni Hotels Mgmt. Corp. Resort Fees* (Colo. Nov 9, 2023); Assurance of Voluntary Compliance, *Commonwealth* v. *Omni Hotels Mgmt.,* GD–23–013056 (Pa. Commw. Ct. Nov. 9, 2023); Assurance of Voluntary Compliance, *Commonwealth* v. *Choice Hotels Intl., Inc.,* GD–23–011023 (Pa. Commw. Ct. Sept. 21, 2023); Order Approving Assurance of Voluntary Compliance, *Nebraska* v. *Choice Hotels Int'l, Inc.,* No. CI 23–3269 (Neb. Dist. Ct. Sept. 27, 2023); Order Approving Assurance of Voluntary Compliance, *Nebraska* v. *Omni Hotels Mgmt. Corp.,* No. CI 23–3641 (Neb. Dist. Ct. Oct. 27, 2023). Choice Hotels agreed to an additional settlement with the Oregon Department of Justice. Assurance of Voluntary Compliance, *In re Choice Hotels, Int'l, Inc.,* No. 23–CV–39128 (Or. Cir. Ct. Sept. 21, 2023). In 2024, Hilton Hotels agreed to a settlement with the State of Nebraska, Office of the Attorney General. Final Consent Judgment, *Nebraska* v. *Hilton Dopco, Inc.,* No. CI 19–2366 (Neb. Dist. Ct. Jan. 29, 2024). Finally, Hyatt Hotels faces an ongoing lawsuit filed in 2023 by the State of Texas, Office of the Attorney General, which seeks to require Hyatt to display full prices in the initial advertised price of any hotel room. Plaintiff's Original Pet., *Texas* v. *Hyatt Hotels Corp.,* No. C2023–0884D (Tex. Dist. Ct. May 15, 2023).

U.S. market share.[633] On the low-end, the analysis assumes that each host will take one hour to reprice each listing. Hosts have, on average, 1.18 listings, resulting in 1.18 hours of time per host.[634] The value of time comes from the same source as in Table 11.

In the high-end cost scenario, the Commission's analysis assumes that hotels have not laid the groundwork for upfront pricing. The analysis assumes under this scenario that hotels require twice the number of hours to determine optimal prices, re-program the website to include total price, and review and confirm compliance. Thus, the one-time costs for hotels include ten hours of lawyer time, eighty hours of data scientist time, and eighty hours of web developer time. The analysis further assumes home share hosts spend three hours repricing each listing, resulting in 3.5 hours per host.

In addition to the one-time costs, the Commission's analysis also assumes hotels incur annual costs of between zero to ten hours of lawyer time per year to review and confirm compliance with the final rule.[635] The total costs, which include both the one-time fixed cost and the annual costs for the next ten years in present value, range from $35.9 million to $107.8 million using a 7% discount rate, and from $35.9 million to $112 million using a 3% discount rate. The Commission also finds that the per firm annualized cost to U.S. hotels that are not presently compliant with the rule ranges from $527 to $2,011 using a 7% discount rate, and from $434 to $1,825 using a 3% discount rate. Home share hosts in the U.S. incur an average one-time cost between $30.42 to $91.27.

All ranges of lawyer, data scientist, web developer, and home share host time used in the analysis serve as proxies for any costs associated with reviewing and ensuring compliance, adjusting pricing strategies, ensuring consumers are presented with total price, and re-evaluating home share listings, respectively, in response to the final rule.

(b) Panel B: Foreign Hotels and Home Share Hosts

The Commission acknowledges that non-U.S. firms and home share hosts with U.S.-facing websites may bear compliance costs from the final rule that may be passed on to consumers. Therefore, the Commission estimates these costs using the best available data. Estimating costs for foreign hotels and home share hosts using the same method in Panel A would be difficult because there are no reliable estimates for the number of foreign hotels and home share hosts or for the relevant international wage rate for lawyers, data scientists, and web developers. The Commission's analysis instead estimates foreign costs by extrapolating from the estimated U.S. costs in Panel A. Since the U.S. hotel industry's global market share is about 14.5%,[636] the one-time and annual costs for foreign hotels each can be calculated by multiplying the one-time and annual costs for U.S. hotels by $(1-0.145)/0.145$. This method captures the cost of all foreign hotels, including ones that will not be subject to the final rule because they do not have U.S.-facing advertising. Therefore, the costs to foreign hotels may be overestimated.

The Commission's analysis uses the percentage of Airbnb's U.S. revenue (43%)[637] as a proxy for the U.S. home share market's global market share. Using this proxy, the analysis estimates the one-time cost for foreign home share hosts to be equal to the total one-time cost for U.S. home share hosts multiplied by $(1-0.43)/0.43$. The total one-time and annual foreign hotel and home-share costs for the next ten years in present value range from $117.4 million to $352.8 million using a 7% discount rate, and from $117.4 million to $377.9 million using a 3% discount rate. The Commission is unable to provide the per firm annualized cost for foreign hotels and non-U.S. home share hosts because the number of foreign hotels and home share hosts is not known.

(c) Panel C: All Hotels and Home Share Hosts (US + Foreign)

The total cost for all affected hotels and home share hosts over ten years in present value is estimated to be from $153.3 million to $460.6 million using a 7% discount rate and from $153.3 million to $489.9 million using a 3% discount rate.

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[633] *See* Clark Shultz, *Airbnb increases market share in latest read from M Science,* Seeking Alpha (June 6, 2022 1:32 p.m. ET), *https://seekingalpha.com/news/3846023-airbnb-increases-market-share-in-latest-read-from-m-science* (providing Airbnb's market share); Thibault Masson, *Airbnb Host Data: Who are Airbnb hosts? Why are individual hosts more important than professional ones?,* Rental Scale-Up (updated Dec. 19, 2020), *https://www.rentalscaleup.com/airbnb-host-data-who-are-airbnb-hosts-why-are-individual-hosts-more-important-than-professional-ones/* (providing the statistics used to estimate the number of Airbnb home share hosts in the U.S.). The estimated total number of home share hosts in the U.S. is 675,603, which is calculated as 504,000/.746, where 504,000 is the number of Airbnb home share hosts in the U.S. and .746 is Airbnb's U.S. market share. The number of Airbnb home share hosts is calculated as 560,000 * .9 = 504,000, where 560,000 is the number of Airbnb hosts in the U.S., and 90% of these hosts are individual hosts (people who rent individual rooms or entire primary homes rather than traditional bed and breakfasts or hostels; traditional bed and breakfasts or hostels are already captured in the hotel firms defined by Traveler Accommodation NAICS code 721100).

[634] The average number of listings per host is calculated from the total number of U.S. listings and the total number of U.S. hosts. Steve Deane, *2022 Airbnb Statistics: Usage, Demographics, and Revenue Growth,* Stratos Jet Charters, Inc. Blog (Jan. 4, 2022), *https://www.stratosjets.com/blog/airbnb-statistics/* [*https://web.archive.org/web/20220219093345/https://www.stratosjets.com/blog/airbnb-statistics/*] (providing the total number of U.S. listings); Masson, *supra* note 633 (providing the total number of U.S. hosts).

[635] Since home share hosts are not operating large, sophisticated firms and will likely not spend additional time ensuring compliance beyond year one, the analysis assumes home share hosts do not incur annual costs due to the rule.

[636] The U.S. hotel industry's global market share in 2022 is calculated by adding the revenues reported in the IBISWorld Reports for ''Hotels and Motels in the US,'' ''Casino Hotels in the US,'' and ''Bed and Breakfast and Hostel Accommodations in the US,'' and dividing it by the global revenue found in IBISWorld Global Hotels & Resorts Industry Report. Hotels & Motels Industry Report, *supra* note 623; Bed & Breakfast Industry Report, *supra* note 623; Demetrios Berdousis, *Casino Hotels in the US,* IBISWorld (Jan. 2023).

[637] Airbnb, Inc., Annual Report (Form 10–K) (Feb. 16, 2024) (''Airbnb 10–K''), *https://investors.airbnb.com/financials/sec-filings/sec-filings-details/default.aspx?FilingId=17283799.*

Table 12 – Short-Term Lodging: Estimated Costs of Compliance

		Low-End Cost Estimate	High-End Cost Estimate
Panel A: U.S. Hotels and Home Share Hosts			
A.1. U.S. Hotels and Home Share Hosts: One-Time Costs			
Number of U.S. Hotels		49,216	49,216
Hotels That Impose Drip Pricing (6% of Total)		2,948	2,953
Hours to Determine Whether Rule Applies (Non-Drip Price Firms) (Lawyer Hours)		1	1
Hours to Determine Whether Rule Applies (Drip Price Firms) (Lawyer Hours)		5	10
Hours to Determine Optimal Pricing (Data Scientist Hours)		40	80
Hours to Update Purchasing Systems to Reflect Total Price (Website Developer Hours)		40	80
Hourly Wage Rate - Lawyer		$95.60	$95.60
Hourly Wage Rate - Data Scientist		$41.36	$41.36
Hourly Wage Rate - Website Developer		$39.31	$39.31
Total One-Time Fixed Cost for Hotels		**$15,344,827**	**$26,302,999**
Home Share Hosts in the U.S.		675,603	675,603
Hours to Determine Optimal Pricing for Home Share Listing		1.18	3.54
Per Hour Value of Time		$25.81	$25.81
Total One-Time Fixed Cost for Home Share Hosts		**$20,553,992**	**$61,661,977**
Total One-Time Fixed Cost for Hotels + Home Share Hosts		**$35,898,819**	**$87,964,977**
A.2. U.S. Hotels and Home Share Hosts: Annual Costs			
Hours for Reviewing Rule and Compliance (Annual)		0	10
Hourly Wage - Lawyer		$95.60	$95.60
Total Annual Costs		**$0**	**$2,823,030**
A.3. U.S. Hotels and Home Share Hosts: Total Costs			
Total Costs Over 10-Year Period (One-Time + Annual)	**7% Discount Rate**	**$35,898,819**	**$107,792,756**
Total Costs Over 10-Year Period (One-Time + Annual)	**3% Discount Rate**	**$35,898,819**	**$112,045,993**
A.4 U.S. Hotels and Home Share Hosts: Per Firm and Per Host Costs			

Annualized Cost Per Firm	7% Discount Rate	$527	$2,011
Annualized Cost Per Firm	3% Discount Rate	$434	$1,825
One-Time Cost Per Home Share Host		$30.42	$91.27
Panel B: Foreign Hotels and Home Share Hosts			
B.1. Foreign Hotels and Home Share Hosts: One-Time Costs			
Total Cost for Foreign Hotels		$90,447,636	$155,038,835
Total Cost for Foreign Home Share Hosts		$26,959,747	$80,879,242
Total One-Time Fixed Costs		**$117,407,383**	**$235,918,077**
B.2. Foreign Hotels and Home Share Hosts: Annual Costs			
Total Annual Costs		**$0**	**$16,639,899**
B.3. Foreign Hotels and Home Share Hosts: Total Costs			
Total Costs Over 10-Year Period (One-Time + Annual)	**7% Discount Rate**	**$117,407,383**	**$352,789,764**
Total Costs Over 10-Year Period (One-Time + Annual)	**3% Discount Rate**	**$117,407,383**	**$377,859,790**
Panel C: All Hotels and Home Share Hosts (U.S. + Foreign)			
Total One-Time Fixed Costs		$153,306,202	$323,883,053
Total Annual Costs		$0	$19,462,929
Grand Total Costs Over 10-Year Period (One-Time + Annual)	**7% Discount Rate**	**$153,306,202**	**$460,582,520**
Grand Total Costs Over 10-Year Period (One-Time + Annual)	**3% Discount Rate**	**$153,306,202**	**$489,905,783**

Note: Costs over ten years have been discounted to the present at both 3% and 7% rates. The number of U.S. hotels is from the U.S. Census Bureau NAICS code 721100.[638] The statistic that 6% of U.S. hotels impose drip pricing comes from a hotel industry commenter to the NPRM.[639] All hourly wages come from the U.S. Bureau of Labor Statistics.[640] The value of time for home share hosts is the hourly wage rate adjusted by the consumer value of time.[641] The total cost for foreign hotels is calculated by extrapolating from the total cost for U.S. hotels using the U.S. global market share of the short-term lodging industry from IBISWorld Industry Reports.[642] The total cost for foreign home share hosts is calculated by extrapolating from the total cost for U.S. home share costs using Airbnb's U.S. revenue as a percentage of its total revenue, as reported in Airbnb's 2023 10-K Filing.[643]

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iii. Short-Term Lodging: Net Benefits

Table 13 presents the net benefits of the final rule in the short-term lodging industry using the quantified benefits and costs discussed in section V.E.3.d.i and V.E.3.d.ii. To calculate the low-end of the range for net benefits, the Commission's analysis subtracts the total costs using the high-end cost assumptions from the total benefits using the low-end benefit assumptions. For the high-end of the range for net benefits, the analysis subtracts the total costs using the low-end cost assumptions from the total benefits using the high-end benefit assumptions.

[638] U.S. Census Bureau, *2021 SUSB Annual Datasets by Establishment Industry, supra* note 602.

[639] FTC–2023–0064–3094 (American Hotel & Lodging Association).

[640] OEWS Traveler Accommodation, *supra* note 629.

[641] *See* OEWS National, *supra* note 571 (providing the mean hourly wage); Hamermesh, *supra* note 533 (providing the value of time).

[642] *See infra* section V.E.3.d.ii.b (describing the calculations).

[643] Airbnb 10–K, *supra* note 637.

The quantified benefits and costs imply that the final rule will have a positive net benefit, even without accounting for the unquantified benefit of reducing deadweight loss.

Table 13 – Short-Term Lodging: Estimated Net Benefits Over 10-Year Period

		Low-End	High-End
Total Benefits	**7% Discount Rate**	$4,931,159,488	$7,171,936,592
Total Benefits	**3% Discount Rate**	$5,988,937,469	$8,710,381,378
Total Costs (One-Time + Annual)	**7% Discount Rate**	$153,306,202	$460,582,520
Total Costs (One-Time + Annual)	**3% Discount Rate**	$153,306,202	$489,905,783
		(Low Benefits – High Cost)	**(High Benefits – Low Cost)**
Net Benefits	**7% Discount Rate**	$4,470,576,968	$7,018,630,389
Net Benefits	**3% Discount Rate**	$5,499,031,686	$8,557,075,175

Note: Benefits have been discounted to the present at both 3% and 7%.

iv. Short-Term Lodging: Uncertainties

The Commission's ability to precisely estimate benefits and costs is limited due to uncertainties in key parameters. The quantified benefits and costs for the short-term lodging industry rely on a set of assumptions based on the best available public information. When the data are unclear, the analysis uses sets of assumptions that would generate a range of low- and high-end estimates. Table 14 summarizes the key assumptions and how they may affect the resulting estimate of quantified benefits and costs. When possible, the analysis underestimates benefits and overestimates costs in order to conservatively estimate net benefits.

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Table 14 – Short-Term Lodging: Summary of Key Uncertainties

Assumption or Uncertainty in Benefits Calculation	Impact on Benefits
The analysis assumes that reduction in average listings viewed is proportional (as a percentage of the baseline mean) to the reduction in average tickets viewed in the Blake Study.	This likely underestimates benefits because, unlike tickets on a ticketing platform, short-term lodgings vary substantially both within and across locations in the magnitude of the resort fees they charge. In addition, the hotel search cost literature finds search cost savings from improved hotel ranking (which may be comparable to removing drip pricing) that are very large and imply bigger reductions in average listings viewed.
The analysis assumes that because 96% of all trips taken by U.S. consumers are domestic, 96% of all rooms booked by U.S. consumers are located in the U.S.	Trips taken does not necessarily equal rooms booked, and it is likely that only some subset of trips taken by U.S. consumers also correspond to a room booking. If the true percentage of domestic bookings is greater than 96%, the estimate of the number of foreign hotel bookings will be too small, resulting in underestimated benefits. If it is less than 96%, the estimate of foreign hotel bookings will be too large, resulting in overestimated benefits.
The analysis assumes consumers only visit one travel website before booking a room.	If consumers visit more than one website before booking, the average reduction in listings viewed in response to the rule may be larger than estimated, resulting in underestimated benefits.
Assumption or Uncertainty in Costs Calculation	**Impact on Costs**
The analysis assumes 6% of all firms in the short-term lodging industry impose drip pricing.	The American Hotel & Lodging Association commented that "only 6% of hotels nationwide charge a mandatory resort/destination/amenity fee." The analysis assumes that this means that 6% of firms, not 6% of all establishments (physical hotel buildings), impose drip pricing. If actually 6% of all establishments impose drip pricing, then the estimate likely overestimates the number of firms that impose drip pricing, leading to inflated costs. For example, if all chain hotels impose drip pricing for at least one of their establishments and none or very few independent hotels do, the number of firms would be much smaller than 6% of all firms.
The analysis assumes that the number of hours to comply with the final rule is comprised of specified hours of lawyer time, data analyst time, and web developer time.	The analysis may overestimate costs per firm if many firms either already comply or have the systems in place to easily comply with the rule. Also, the analysis may underestimate costs if compliance requires a greater number of hours.

The analysis assumes Airbnb's market share in the U.S. home share industry is the same as its share of total hosts in the U.S.	If Airbnb's share of hosts is smaller than its market share, then the extrapolation to give the number of home share hosts in the U.S. (and therefore their total costs) will be underestimated. It will be overestimated if Airbnb's share of hosts is larger than its market share.
The analysis assumes the number of hours each Airbnb host spends repricing listings due to the final rule.	Costs may be overestimated if hosts spend less or no time repricing. Costs may be underestimated if hosts spend more time repricing.
The analysis assumes that the U.S. hotel industry's global market share by revenue is the same as its global market share by cost.	Costs for foreign hotels may be underestimated if the U.S. hotel industry's true global cost share is smaller and overestimated if the U.S. hotel industry's true global cost share is bigger.
The analysis assumes that the percentage of revenue Airbnb made in the U.S. is the same as the U.S. home share market's global market share.	Costs for hosts outside of the U.S. may be underestimated if the U.S. home share market's true global market share is smaller and overestimated if the U.S. home share market's true global market share is bigger.
The analysis assumes that 100% of all costs to foreign hotels with U.S.-facing advertising will be passed onto U.S. consumers.	The analysis includes costs to foreign hotels with U.S.-facing advertising because complying with the rule may cause them to pass through some costs to U.S. hotel shoppers. The Commission is unable to quantify what percentage of costs will be passed through. Although it may be trivial, to be conservative, the analysis includes all costs to foreign hotels and home share hosts. This inflates the cost estimates, resulting in a smaller, more conservative net benefit.

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4. Economic Evaluation of Alternatives

As an alternative to the rule, the Commission considered not pursuing rulemaking and instead relying on its existing tools of enforcement actions and consumer education. This approach is equivalent to a no-action baseline and would result in no incremental benefits or costs. The prevalence of drip pricing and hidden mandatory fees would persist.

The Commission also alternatively considered, as discussed in the Preliminary Regulatory Analysis, promulgating an industry-neutral version of the rule. The Commission was unable to quantify economy-wide benefits and provided a break-even analysis using quantified compliance costs for the entire economy.[644] The economy-wide break-even analysis implied there would be positive net benefits to the rule if the benefit per consumer was at least $6.65 per consumer per year over a ten-year period assuming a 7% discount rate or at least $5.95 assuming a 3% discount rate. The Commission estimated that per firm annualized costs for an economy-wide rule would be between $691 and $2,010 assuming a 7% discount rate and between $569 and $1,803 assuming a 3% discount rate.

[644] The break-even analysis provided in the Preliminary Regulatory Analysis utilized the same set of assumptions regarding the high-end and low-end numbers of hours required for firms to comply with the proposed economy-wide rule. The preliminary break-even analysis also made a set of assumptions about what proportion of the economy currently complied with the provisions of the proposed rule.

The Commission sets forth additional alternatives to the final rule that it considered in section V.B but does not have sufficient data to prepare a quantitative analysis of those alternatives.

5. Summary of Results

The Commission's final regulatory analysis catalogs and, where possible, quantifies the incremental benefits and costs of the final rule for the live-event ticketing and short-term lodging industries. The Commission estimates that the quantified benefits of the rule will exceed its quantified costs, and the Commission believes that the total benefits of the rule (quantified and unquantified) will outweigh the total costs (quantified and unquantified). The Commission estimates that the benefits of the final rule over the next ten years accruing solely from reduced consumer

search costs in the live-event ticketing industry range from $184 million to $2.46 billion under an assumed 7% discount rate, and $224 million to $2.99 billion using an assumed 3% discount rate. The Commission estimates compliance costs for live-event ticketing firms over the ten-year period to be between $15 million and $142 million using a 7% discount rate, and between $15 million and $154 million using a 3% discount rate.

For the short-term lodging industry, the Commission estimates ten-year benefits to consumers from reduced search costs to range from $4.93 billion to $7.17 billion using a 7% discount rate, and between $5.99 billion and $8.71 billion using a 3% discount rate. The Commission estimates compliance costs for short-term lodging firms for the ten-year period to be between $153 million and $461 million using a 7% discount rate and between $153 million and $490 million using a 3% discount rate.

The Commission also provides a break-even analysis using quantified compliance costs that are aggregated for the live-event ticketing and short-term lodging industries. The break-even analysis demonstrates that there are positive net benefits to the rule if the benefit per consumer is at least $0.33 per consumer per year over a ten-year period using a 7% discount rate. The break-even analysis does not account for costs from unintended consequences of the rule or the potential benefits from reducing deadweight loss by providing consumers with full information.

6. Appendix A: Model of Market Distortion Caused by Drip Pricing

Measuring the deadweight loss, the surplus transfer from consumers to firms, and the shift in quantity demanded requires a quantification of consumers' aggregate level of awareness. Academic research provides a model that relates consumers' partial awareness to the resulting shift in aggregate demand.[645] Specifically, the model assumes, based on empirical evidence, the elasticity of demand with respect to the fee equals the elasticity of demand with respect to the base price scaled by a factor of θ, where $0 < \theta < 1$. This factor, θ, serves as a measure of consumers' awareness of the fee. When consumers are fully aware of the fee, $\theta = 1$; when consumers are completely unaware, $\theta = 0$. As a working example, if demand is given by the equation $Q(P_{base},t) = a + bP_{base} + ct$, where $a, b,$ and c are constants, the previous assumption implies that $c = \theta b$. At $\theta = 1$, shrouding the fee has no effect, and the demand function simplifies to $Q(P_{total}, t) = a + bP_{total}$. At $\theta = 0$, shrouding the fee leaves consumers completely unaware of it, and demand is solely a function of the base price: $Q(P_{base}, t) = a + bP_{base}$. Assuming $0 < \theta < 1$, instead, one may note that, for any given change in the base price and the corresponding change to the quantity demanded, a larger change in the fee would be needed to effect the same change in quantity, reflecting consumers' partial awareness of, and decreased sensitivity to, the fee.

[645] Chetty, *supra* note 555.

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As seen in Figures 1 & 2, D_{upfront} represents the inverse demand function, P_{total} as a function of Q, when $t = 0$, that is, when $P_{\text{total}} = P_{\text{base}}$. For this inverse demand function, changes to the full price, P_{total}, occur only through changes in the base price, P_{base}. For the working example, the inverse demand function is given by $P_{\text{total}}(Q) =- \frac{a}{b} + \frac{1}{b}Q$. For example, when there is no fee and the full price of the product is P_0, demand is $Q(P_0, 0)$, as illustrated by point A in Figure 3. To consider how demand responds to changes in the fee, one may fix P_{base} and let t vary. With the base price fixed at P_0, D_{fee,P_0} represents the inverse demand function relating quantity demanded and the full price when changes in the full price occur only through changes in the fee. That is, as t increases, demand moves up and to the left along D_{fee,P_0}. For the working example, D_{fee,P_0} is given by $P_{\text{total}}(Q) =- \frac{a}{\theta b} - \frac{1-\theta}{\theta} P_0 + \frac{1}{\theta b} Q$. One may note that D_{fee,P_0} is steeper than D_{upfront}, i.e., the slope of D_{fee,P_0}, $\frac{1}{\theta b}$, is greater in magnitude than the slope of D_{upfront}, $\frac{1}{b}$, since $0 < \theta < 1$. This difference in slopes graphically captures the difference in consumers' elasticities relative to the fee and to the base price. If the fee is set to t_0, then demand decreases from $Q(P_0, 0)$, point A, to $Q(P_0, t_0)$, point B.

If the fee is then fixed at t_0, one may consider changes in demand as the base price varies once again. In Figure 3, D_{partial,t_0} represents the inverse demand function when $t = t_0$. For the working example, D_{partial,t_0} is given by $P_{\text{total}}(Q) =- \frac{a}{b} + (1-\theta)t_0 + \frac{1}{b}Q$. For this example, one may note that D_{partial,t_0} equals D_{upfront} shifted up by $(1-\theta)t_0$, and it runs through point B. When $\theta = 1$, e.g., consumers are fully aware of the fee, D_{partial,t_0} coincides with D_{upfront}. That is, the partitioning of the full price into a base price

and a fee has no impact on demand. When θ = 0, e.g., consumers are completely unaware of the fee, D_{partial,t_0} coincides with D_{unaware}. Outside of these extreme cases, D_{partial,t_0} lies between the upfront demand curve and the fully shrouded demand curve, and θ quantifies the shift in aggregate demand caused by shrouded fees.

Figure 3 – Demand Shift Caused by Shrouded Pricing when Consumers are Partially Unaware

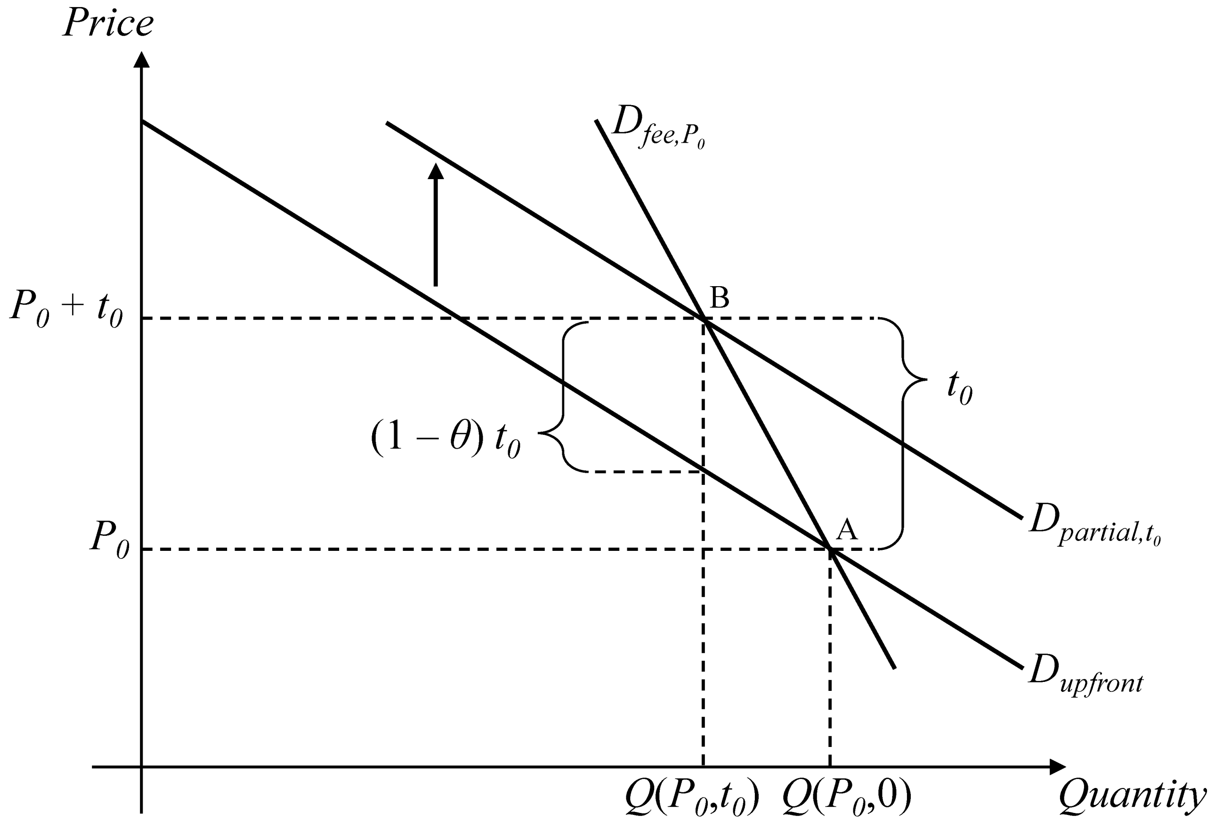

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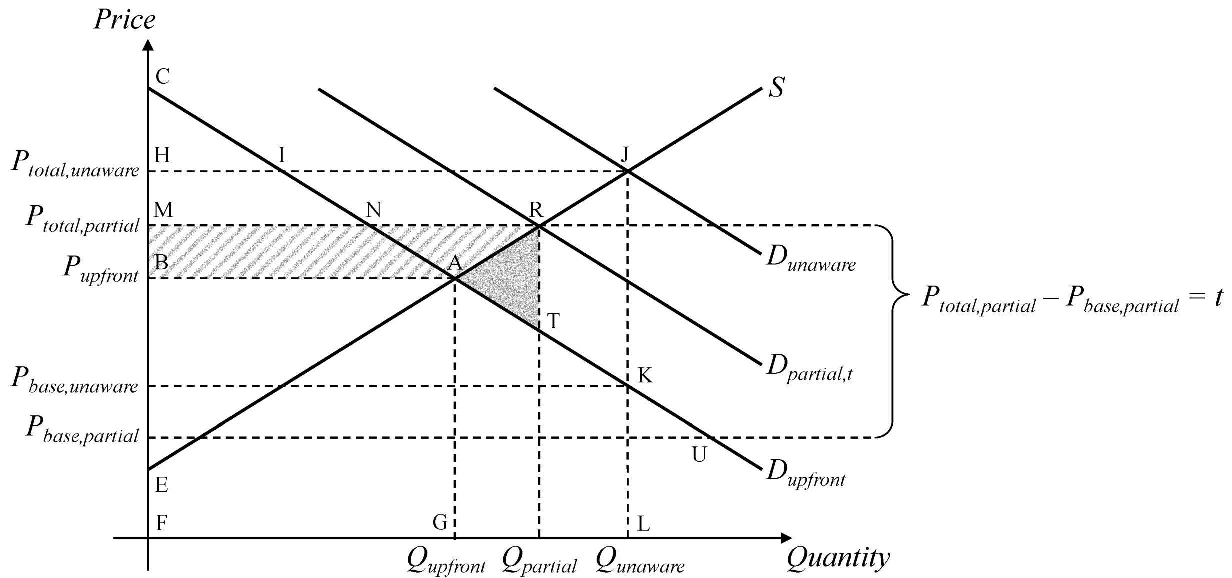
Figure 4 illustrates how consumers' partial awareness of fees impacts the effect of shrouded pricing on consumer and producer surplus. The intersection of D_{partial} with *S*, illustrated by point *R*, at quantity Q_{partial} and price $P_{\text{total,partial}}$, represents the outcome when consumers are partially aware of the fee. In this figure, $D_{\text{fee},P_{\text{base,partial}}}$ (not shown) would go through point *U* (equivalent to point *A* in Figure 3) and point *R* (equivalent to point *B* in Figure 3). For comparison, in the case of complete unawareness (θ = 0), $D_{\text{fee},P_{\text{base,unaware}}}$ (not shown) would go vertically through point *K* (equivalent to point *A* in Figure 3) and point *J* (equivalent to point *B* in Figure 3). As illustrated in Figure 4, the more consumers are aware of the fee, *i.e.,* the larger the θ, the smaller the market clearing full price and, hence, the base price, must be. As an additional example, when consumers are fully aware of the fee (θ = 1), the market clearing full price under shrouded pricing equals the market clearing price under upfront pricing, P_{upfront}, and the base price, $P_{\text{base,aware}}$ (not shown), is lower than $P_{\text{base,partial}}$.

Consumer surplus is now equal to the area of triangle *CMN* minus the area of triangle *NRT*. Producer surplus is now equal to the area of triangle *EMR*. The deceptive shrouding of the price leads to a transfer of surplus from consumers to firms equal to the area of trapezoid *ABMR* as well as an additional decrease in consumer surplus not captured by firms, the deadweight loss, equal to the area of triangle *ART*. The surplus transfer from consumers to firms and the deadweight loss are both smaller in this case of partial awareness relative to the case where consumers are completely unaware of the fee. That is, the harm caused by the firms' deception is mitigated by the extent to which consumers are aware of and account for the fee.

Figure 4 – Market Distortion Caused by Shrouded Pricing when Consumers are Partially Unaware



7. Appendix B: Short-Term Lodging Industry Minutes per Listing Calculations

(a) Low-End Estimate of Minutes per Listing Calculation

The Commission's analysis uses the Airbnb user search statistics reported in Fradkin (2017) [646] to obtain a low-end time estimate to view one listing after clicking on it. The paper provides data on a random sample of users who searched for short-term rentals on Airbnb in a large U.S. city. It reports search behavior separately for all searchers and for searchers who contacted the host, either to inquire about a listing or to book it. The analysis uses those numbers to calculate search behavior for the group of searchers who did not send a contact. The relevant statistics for these three groups are summarized in Table B.1.

''Average unique listings seen'' includes all listings users see on a search result page, including listings users do not click on. ''Average time spent browsing'' includes entering search parameters, scrolling through results, and viewing listings after clicking on them. ''Average number of contacts'' is the average number of times searchers contacted a host for a listing. Since contacting the host requires users to click on the listing, the analysis uses this as a proxy for number of clicked-on listings.

Table B.1

	(1) All Searchers	(2) Searchers who sent at least one contact	(3) Searchers who did not send a contact
Observations	12,241	4,426	7,815
Average unique listings seen	68.53	87.81	57.61
Average time spent browsing (min)	35.77	57.87	23.25
Average number of contacts (proxy for clicks)		2.37	

From the third column, we calculate:

Time to view each listing without clicks = Average time spent browsing/ Average unique listings seen = 23.253/57.61 = .40 minutes per listing.

Because the average time spent browsing for the group in column (2) is inclusive of the amount of time spent sending contacts, not just viewing listings that were not contacted, we use the preceding value calculated from the group in column (3) to estimate the

[646] Andrey Fradkin, *Search, Matching, and the Role of Digital Marketplace Design in Enabling Trade: Evidence from Airbnb,* (MIT Initiative on the Digit. Econ., Working Paper, 2017), *https://ide.mit.edu/wp-content/uploads/2017/07/SearchMatchingEfficiency.pdf.*

following that applies to searchers in column 2:

Time spent viewing listings without clicks = Time to view each listing without clicks * Average unique listings seen = .40 * 87.812 = 35.44 minutes

and

Average total time viewing listings after clicking = Average time spent browsing − Time spent viewing listings without clicks = 57.874 − 35.44 = 22.43 minutes.

Finally, we calculate time to view one listing:

Time per listing = Average total time viewing listings after clicking/ Average number of contacts = 22.43/2.367 = 9.48 minutes per listing.[647]

(b) High-End Estimate of Minutes per Listing Calculation

The Commission's analysis uses the hotel search cost model developed by Chen and Yao (2016)[648] to calculate a high-end estimate of minutes to view one listing. The paper uses data from consumer search behavior when booking hotels in four major international cities on an anonymous major U.S. online travel website.

A search is defined as a listing click-through, and the search cost for a listing is specified as:

$C_{ij} = C_i\,(TimeConstraint_i,\ Slot_j) = \exp(\gamma_{i0} + \gamma_{i1} TimeConstraint_i + \gamma_{i2} Slot_j) = \exp(3.07\ -\ .05 * TimeConstraint_i + .01 * Slot_j)$

where $TimeConstraint_i$ is the number of days between consumer i's search and her check-in. $Slot_j$ is the slot position of the j-th search. The exponential operator ensures that the costs are positive. The gammas are mean levels of cost coefficients.

Using this formula, the analysis can find that the mean search cost per listing when 30 days in advance (the sample average) is exp(3.07 − (.05*30)) = $4.81 per listing. The inflation adjusted value is $6.10.

The resulting total search cost is then $6.10 per listing * 2.3 searches on average = $14.04. This total cost can be conceptualized as the number of minutes of viewing listings multiplied by the consumer's value of time. Using $25.81 per hour as the value of time, the time spent viewing listings is ($14.04/ $25.81 per hour) * 60 minutes per hour = 32.62 minutes.

The minutes to view one listing is then calculated as 32.62 minutes/2.3 searches = 14.18 minutes per listing.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501–3520, requires Federal agencies to seek and obtain OMB approval before collecting information directed to ten or more persons. The term ''collection of information,'' as used in the PRA, includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.[649] The PRA analysis requires an estimate of the burden associated with a collection of information.[650]

Upon publication of the NPRM, the Commission submitted an associated clearance request with a Supporting Statement to OMB for review under the PRA. In response, OMB filed a comment on December 11, 2023 (OMB Control No. 3084–0176), requesting that the Commission resubmit the clearance request upon the finalization of the proposed rule.[651] Accordingly, simultaneously with the publication of this final rule, the Commission is resubmitting its clearance request and a Supplemental Supporting Statement to OMB for review under the PRA. For the reasons discussed below, the Commission has made adjustments to its initial burden analysis. The Commission's updated burden analysis follows.

A. Disclosures Related to Final § 464.2(a) Through (c)

Final § 464.2(a) through (c) provide clarity as to how businesses should disclose total price, optional exclusions from total price, and the final amount of payment. This information is readily available to businesses, and many businesses already disclose this information in the course of their regular business activities. However, the Commission is aware that in some instances the requirements in final § 464.2(a) through (c) may require some businesses to display readily available information more clearly. OMB guidance is unclear regarding whether, and to what extent, requiring displays of information to be clearer amounts to a collection of information. The Commission is of the view that the rule's requirements regarding disclosure of total price, exclusions from total price and the final amount of payment are unlikely to qualify as collections of information. Nevertheless, the Commission includes this analysis out of an abundance of caution and not because it concedes that such standard pricing disclosures constitute collections of information.

Final § 464.2(a) provides it is an unfair and deceptive practice for a business to offer, display, or advertise any price of a covered good or service without clearly and conspicuously disclosing total price, which is defined in final § 464.1 to permit the exclusion of government charges, shipping charges, and fees or charges for any optional ancillary good or service. While businesses may exclude these charges from total price in offers, displays, and advertisements, final § 464.2(c) provides that, before a consumer consents to pay for any covered good or service, a business must disclose clearly and conspicuously: The nature, purpose, and amount of any fee or charge imposed on the transaction that has been excluded from total price and the identity of the good or service for which the fee or charge is imposed; and the final amount of payment for the transaction. Final § 464.2(b) relatedly provides that in any offer, display, or advertisement that represents any price of a covered good or service, total price must be disclosed more prominently than any other pricing information; however, where the final amount of payment for the transaction is displayed, it must be more prominent than, or as prominent as, total price. As discussed in section III, the Commission is not finalizing the proposed affirmative refundability disclosure requirement.

As part of the NPRM, the Commission assumed that, except for the proposed affirmative refundability disclosure requirement, the Commission's proposal was limited to disclosure activities that businesses already perform in the course of their regular business activities. However, following its review

[647] The numerator of ''Time per listing'' is an underestimate because ''Time spent browsing without clicks'' may capture some time spent viewing clicked-on listings that did not result in a contact. The denominator of ''Time per listing'' is also an underestimate because the number of listings clicked on is proxied using the number of listings users inquire about or book. Users may click on more listings than just the ones they want to inquire about or book. The two values are related. If the true denominator is higher than estimated, then the true numerator also will be higher. Higher listing clicks beyond those that resulted in a contact means more time spent viewing clicked-on listings that did not result in a contact. The ratio should remain about the same.

[648] Yuxin Chen & Song Yao, *Sequential Search with Refinement: Model and Application with Click-Stream Data,* 63 Mgmt. Sci. 4345 (2016), *https://doi.org/10.1287/mnsc.2016.2557.*

[649] 44 U.S.C. 3502(3); 5 CFR 1320.3(c).

[650] 5 CFR 1320.8(a)(4).

[651] *See* Office of Info. and Regul. Aff., Office of Mgmt. and Budget, OMB Control Number History for OMB Control Number 3084–0176, *https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3084-0176#.*

of the comments,[652] the Commission determines that, although many businesses already make the disclosures required by final § 464.2(a) through (c) in the usual course of their regular business activities, it is possible that some businesses in the live-event ticketing and short-term lodging industries may nonetheless incur incremental labor costs in ensuring that their disclosure activities are fully aligned with the requirements that are set forth in final § 464.2(a) through (c). As a result, out of an abundance of caution, the Commission updates its burden analysis in recognition of these comments. As described in section VI.A.5, however, the estimated costs may be overestimated.

1. Number of Respondents

The Commission estimates that there are 12,393 entities that may incur additional incremental labor costs to refine their disclosure activities so that they are fully compliant with final § 464.2. This estimate of 12,393 entities takes the high-end estimate of the number of firms in the United States in the live-event ticketing industry (9,440 firms) and the number of firms in the United States in the short-term lodging industry (2,953) that will incur additional compliance costs related to disclosure activities.

2. Estimated One-Time Hour Burden

In section V.E.3, the Commission estimates the cost of adjusting the presentation of advertised prices and the purchase process for online sales. The final regulatory analysis in section V assumes live-event ticketing and short-term lodging firms not presently compliant with the final rule will employ a low end of forty hours and a high end of eighty hours of web developer time to become compliant with the final rule. For purposes of this PRA analysis, the Commission uses the midpoint of the range of web developer hours presented in section V.E.3; that is, the Commission assumes sixty hours of web developer time will be necessary to adjust advertised prices and purchase processes to comply with final § 464.2's disclosure requirements.[653] Once firms adjust advertised prices and purchase process displays to be compliant with the final rule, any future changes to pricing displays or purchasing systems are part of the regular course of business and are not a direct consequence of the rule. The Commission finds that any ongoing additional costs associated with these activities are de minimis. Thus, the Commission estimates the total web developer hours to adjust price displays and purchase processes is 743,580 hours (12,393 firms × 60 web developer hours per firm).

3. Estimated One-Time Labor Costs

The estimated one-time labor cost that live-event ticketing and short-term lodging firms may incur to comply with final § 464.2's disclosure requirements is $32,990,931. This total is calculated by summing the labor costs for the live-event ticketing and short-term lodging industries. The labor cost for the live-event ticketing industry is calculated by applying the hourly wage for web developer time in the live-event ticketing industry of $45.95 to the estimate of 60 hours of web developer time multiplied by the number of U.S. firms in the live-event ticketing industry that incur additional compliance costs ($45.95/hour × 60 hours per firm × 9,440 firms) resulting in $26,026,080.[654] The labor cost for the short-term lodging industry is calculated by applying the hourly wage for web developer time in the short-term lodging industry of $39.31 to the estimate of sixty hours of web developer time multiplied by the number of U.S. firms in the short-term lodging industry that incur additional compliance costs ($39.31/hour × 60 hours per firm × 2,953 firms) resulting in $6,964,851.[655] The total for the two industries is $32,990,931 ($26,026,080 + $6,964,851).

4. Estimated One-Time Non-Labor Costs

The capital and start-up costs associated with the final rule's disclosure are de minimis. Any disclosure capital costs involved with the final rule, such as equipment and office supplies, would be costs borne by businesses in the normal course of business.

5. Projected Labor Costs Likely Overestimated

In preparing its burden estimate for compliance with final § 464.2(a) through (c), the Commission considered comments noting that some businesses may incur incremental labor costs to come into compliance with the rule, though commenters did not submit specific data for the Commission to evaluate this contention. As a result, the Commission's updated burden calculation relies in part on cost assumptions from its final regulatory analysis in section V. Applying these cost assumptions as one-time fixed costs in this burden analysis likely generates an overestimate of incremental labor costs for a number of reasons. First, the number of respondents that will have to make changes to their price displays and offers is likely to be significantly inflated. Since the Commission announced its NPRM, California's Honest Pricing Law, SB 478, which was amended by SB 1524, went into effect, making it illegal for businesses to advertise or list prices that do not include all mandatory fees or charges other than certain government taxes and shipping costs. As such, many national firms doing business in California, including live-event ticketing and short-term lodging firms, will already have incurred costs to develop the capabilities to comply with the Commission's rule even if they are currently only fully deploying such capabilities in California. Similar legislative and regulatory efforts have been enacted in New York, Massachusetts, North Carolina, Minnesota, Tennessee, Connecticut, Maryland, and Colorado.[656] Second, to the extent that live-event ticketing and short-term lodging firms opt to present all-inclusive total prices that obviate the need for the disclosures set forth in final § 464.2(b) through (c), such firms will require less web developer time to

[652] *See, e.g.,* FTC–2023–0064–3238 (Gibson, Dunn & Crutcher LLP argued that businesses would need to hire, among other professionals, web designers or software engineers ''to rebuild entire websites.'' In addition, it argued that the Preliminary Regulatory Analysis did not account for costs needed to replace physical ads, subway ads, and billboards and speculated that would take ''thousands of hours.''); FTC–2023–0064–2856 (National Football League called on the Commission to reexamine the estimated compliance costs because it did not adequately take into account ''the additional legal, developer, and data personnel time that would be required from live-event industry participants—and especially industry participants dealing in large volumes of live-event ticket sales in complying with a final rule.''); FTC–2023–0064–3122 (Vivid Seats commented: ''We believe that the FTC is underestimating the amount of employee time required by at least a factor of five.'').

[653] Brick-and-mortar firms that do not currently comply with the rule would update the price presentation and purchase process by printing new price displays, revising advertising campaigns, adding required disclosures, and potentially updating websites. The Commission uses web developer hours as a proxy for any costs associated with updating the price presentation and purchase process to become compliant with the final rule.

[654] The estimated mean hourly wages for a web developer are $45.95. OEWS Web Developers, *supra* note 571.

[655] The estimated mean hourly wages for a web developer are $39.31 in the short-term lodging industry. OEWS Web Developers, *supra* note 571.

[656] *See, e.g.,* N.Y. Arts & Cult. Aff. Law sec. 25.01–25.33 (McKinney 2023) (Effective Jun. 30, 2022); An Act Ensuring Transparent Ticket Pricing, H. 259, 193rd Gen. Court (Mass. 2023); S. 607 (2023–2024 Session) (N.C. 2023) (Enacted July 9, 2024); 2023 Minn. H.B. 3438 (Enacted May 20, 2024) (Minn.); H.B. 1231 (113th G.A.) (Tenn.) (Enacted May 24, 2023); Conn. Gen. Stat. § 53–289a (2023); S.B. 329 (2024 Reg. Sess.) (Md.); S.B. 329 (2024 Reg. Sess.) (Md.) (Enacted May, 9, 2024); H.B. 23–1378 (2024 Reg. Sess.) (Colo.) (Enacted June 5, 2024).

comply, and the Commission is likely overestimating total labor hours.

B. Prohibited Misrepresentations Under Final § 464.3

Final § 464.3, which the Commission proposed in similar form as § 464.3(a), sets forth that in any offer, display, or advertisement for a covered good or service, it is an unfair and deceptive practice for a business to misrepresent any fee or charge, including its nature, purpose, amount, or refundability, and the identity of the good or service for which the fee or charge is imposed. Consistent with the NPRM's discussion of proposed § 464.3(a), the Commission notes that final § 464.3 does not impose any information collection requirement for the purpose of the PRA. Rather than imposing any affirmative disclosure, reporting, or recordkeeping obligations,[657] final § 464.3 merely prohibits businesses from making certain misrepresentations that are already prohibited under section 5 of the FTC Act. As noted in the NPRM, any additional costs that might be associated with these prohibitions are de minimis.[658]

VII. Regulatory Flexibility Act—Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA''), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to provide an Initial Regulatory Flexibility Analysis (''IRFA'') and Final Regulatory Flexibility Analysis (''FRFA'') of any final rule subject to notice-and-comment requirements, unless the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.[659] In developing the final rule, the Commission carefully considered whether the rule would have a significant impact on a substantial number of small entities. The Commission continues to believe that the final rule's impact will not be substantial for most small entities and, in many cases, will likely positively impact small businesses by enabling them to compete fairly in the marketplace with larger players. However, the Commission cannot fully quantify the impact the final rule will have on such entities. Therefore, in the interest of thoroughness and an abundance of caution, the Commission has prepared the following FRFA for this final rule.

In the NPRM, the Commission provided an IRFA and solicited comments on the burden on any small entities that would be covered.[660] The Commission received comments in response to the IRFA.[661] The Commission received comments from two industry groups requesting that the Commission conduct a Small Business Regulatory Impact Analysis to analyze the impact of small businesses in particular industries.[662] The Commission also received comments from small business owners and industry groups in support of the rule and its impact on small businesses, as well as from commenters concerned about potential costs to small businesses. Consistent with the requirements of the FRFA, the Commission has considered the comments received, and the final rule's impact on small entities, including alternatives to the final rule.

The Commission thoroughly considered the feedback it received from the SBA Office of Advocacy, the Small Business Majority, and other commenters in developing the final rule. The Commission modifies the proposed rule in response, in part, to such feedback. The Commission will continue to engage with small business stakeholders to facilitate implementation of, and compliance with, the final rule and other guidance as necessary to assist small entities in complying with the rule.

Based on the Commission's expertise, and after careful review and consideration of the entire rulemaking record—including the more than 60,800 comments the Commission received in response to the NPRM, empirical research on how bait-and-switch pricing tactics, including drip pricing and partitioned pricing, harm consumers and honest competitors, and the Commission's Final Regulatory Analysis in section V—the Commission adopts this final rule focused on covered goods or services with certain additional revisions to reduce compliance burdens on small businesses and other entities. To begin with, because this final rule is limited to covered goods or services, many industries that have significant small business participants are no longer covered. Second, the Commission adopts an extended compliance date—120 days—to ensure that small businesses have adequate time to come into compliance with the rule's requirements.[663] Third, as discussed in section III, in response to feedback from commenters representing the interests of small businesses, the Commission clarifies in this SBP that businesses may exclude from total price pass-through credit card or other payment processing fees if they give consumers a viable payment alternative without a fee (*e.g.,* cash is accepted). In addition, as discussed in section III, the final rule adopts definitions of government charges to increase flexibility for businesses, including small businesses.

A. Statement of the Need for, and Objectives of, the Rule

The Commission describes the need for, and objectives of, the rule in section V.A. The legal basis for the rule is section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

B. Significant Issues Raised by Comments, the Commission's Assessment and Response, and Any Changes Made as a Result

Commenters, including the Small Business Majority, argued that the IRFA failed to appropriately assess the impact of the proposed rule on small businesses.[664] The NPRM assumed that of the total estimated firms in the United States (6,140,612),[665] only a

[657] *See* 5 CFR 1320.3(c) (definition of the term ''collection of information'').

[658] *See* NPRM, 88 FR 77478.

[659] 5 U.S.C. 603–605.

[660] NPRM, 88 FR 77479–80.

[661] *See, e.g.,* FTC–2023–0064–3251 (National RV Dealers Association); FTC–2023–0064–2367 (Small Business Majority). The Small Business Administration, Office of Advocacy raised similar criticisms of the proposed rule. *See* U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC–2023–0064–0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf.* The Commission addresses that comment *infra* section VII.C.

[662] FTC–2023–0064–3269 (IHRSA—The Health & Fitness Association); FTC–2023–0064–3294 (International Franchise Association). The Commission notes that the final rule is limited to Covered Good or Services, which does not include the health and fitness industry.

[663] A 120-day compliance date after publication in the **Federal Register** complies with the requirements of the Congressional Review Act that a ''major rule'' may not take effect fewer than sixty days after the rule is published in the **Federal Register.** 5 U.S.C. 801(a)(1)(3).

[664] FTC–2023–0064–3251 (National RV Dealers Association); FTC–2023–0064–2367 (Small Business Majority).

[665] The number of firms used in the NPRM was provided by the United States Census Bureau's Statistics of United States Businesses. U.S. Census Bureau, *2020 SUSB Annual Datasets by Establishment Industry* (Mar. 2023), *https://www.census.gov/data/datasets/2020/econ/susb/2020-susb.html.*

small fraction (818,178 or about 13%) would incur additional costs beyond the initial one-hour compliance review to comply fully with the proposed rule. Commenters, including the Small Business Majority, argued that the IRFA failed to appropriately assess the impact of the proposed rule on small businesses.[666] For the purpose of the IRFA, the Commission concluded that the proposed rule would not have a significant economic impact on a substantial number of small entities and solicited comment on its analysis, including the submission of supporting or contradictory empirical data. The Commission did not receive any data or other evidence to suggest that the number of firms incurring additional costs should be higher. The Commission anticipates that modifications made in the final rule will reduce the number of businesses that are likely to incur additional costs.

These commenters further asserted the rule's proposed economic analysis underestimated the cost of attorneys' fees and ongoing costs to comply with the rule.[667] The Commission addresses comments and concerns related to its economic analysis in section V, including estimates for attorneys' fees and ongoing compliance costs.

The same commenters also noted that the Commission's IRFA failed to appropriately consider alternatives to the proposed rule for small businesses.[668] The Commission disagrees. The NPRM stated that the Commission had considered alternatives, including: (1) a rule that would exempt small businesses from the proposed rule; (2) a rule that would apply to online-only businesses; (3) alternatives that would otherwise narrow the scope of the proposed rule, including limiting application of the rule to Covered Businesses as defined in the NPRM; or (4) terminating the rulemaking entirely. Consistent with the NPRM, the Commission declines to exempt small businesses, including those that offer live-event ticketing and short-term lodging, from the rule to avoid creating uncertainty across businesses as to whether the rule applies to them, to avoid creating unfair competitive advantages for those businesses that engage in bait-and-switch pricing and misrepresent fees, and to ensure maximum consumer benefits from increased price transparency. The NPRM also invited comment on questions and concerns related to small businesses, including the estimated number of small businesses and the impact on those businesses, as well as alternatives to the rule for small businesses. The Commission's FRFA includes further discussion of the alternatives considered in section V.B.

The Small Business Majority noted that many small businesses lack access to legal staff and ''run the risk of occupying a substantial amount of time to understand how exactly they need to adjust their pricing models to comply with the new rule.'' [669] As a result, the Small Business Majority encouraged the Commission to provide guidance to small businesses, including through outreach, education, and compliance guidance, as well as working directly with small businesses, to help small businesses comply with the final rule.[670] The Commission highlights and discusses herein that, in response to the comments, the final rule both narrows the NPRM proposal as well as clarifies it in certain respects, thereby decreasing the burden on small businesses. The SBP also discusses various pricing scenarios raised by commenters, and the Commission believes that such discussion will aid businesses, including small businesses, in complying with the final rule. Finally, the Commission routinely provides guidance and conducts outreach to businesses on complying with the FTC Act and regulations that it enforces and, as required by law, the Commission will publish a small entity compliance guide to assist small businesses in complying with the rule.

The Commission received numerous comments from industry groups and individual small business owners, including comments highlighting the benefits of the proposed rule on small businesses, as well as comments identifying certain concerns about application of the proposed rule to small businesses. The Commission addresses many of these comments in other parts of the SBP, including section III, and accordingly incorporates that analysis into its FRFA, and addresses the remainder of these comments herein.

Some commenters argued that fees help small businesses offset rising costs and staff salaries and benefits, especially for small businesses operating on thin margins.[671] One industry group argued that the rule might place small businesses at a competitive disadvantage compared to larger businesses.[672] As discussed in Parts III and V, the Commission narrows the scope of the rule to address concerns affecting small businesses by, for example, modifying the definition of government charges and addressing factual scenarios and questions concerning application of the rule to small businesses, including related to credit card surcharges and contingent fees. In making these clarifications and modifications, the Commission narrows the total price requirement for, and thereby reduces the compliance burden on businesses, including small businesses, offering covered goods or services. As discussed in section VII.C, the Commission is also adopting an extended 120-day compliance date to allow more time for businesses, including small businesses, to assess and come into compliance with the final rule.

Conversely, other commenters noted that bait-and-switch practices and misleading fees harm small businesses, and that the rule will help small businesses.[673] One State representative asserted that the final rule would help small businesses because small businesses that advertise the entire price of their goods and services are at a competitive disadvantage compared to larger businesses that advertise lower prices and only disclose fees at the end of a transaction.[674] Consumer advocacy groups urged the Commission not to exempt small businesses, arguing that consumers and small businesses alike will benefit from greater pricing transparency and a prohibition on deceptive pricing.[675] The Commission also received numerous individual comments, including from small business owners, expressing support for

[666] FTC–2023–0064–3251 (National RV Dealers Association); FTC–2023–0064–2367 (Small Business Majority).

[667] FTC–2023–0064–3251 (National RV Dealers Association); FTC–2023–0064–2367 (Small Business Majority).

[668] FTC–2023–0064–3251 (National RV Dealers Association); FTC–2023–0064–2367 (Small Business Majority).

[669] FTC–2023–0064–2367 (Small Business Majority).

[670] *Id.; see also* U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC–2023–0064–0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf.*

[671] *See, e.g.,* FTC–2023–0064–3033 (The Rebel Lounge et al.); FTC–2023–0064–3078 (Washington Hospitality Association); FTC–2023–0064–2367 (Small Business Majority).

[672] FTC–2023–0064–3292 (National Association of Theater Owners).

[673] FTC–2023–0064–2840 (Indie Sellers Guild); FTC–2023–0064–2341 (New Hampshire State Representative Lindsay Sabadosa); FTC–2023–0064–3302 (Public Citizen); FTC–2023–0064–3160 (Consumer Federation of America); FTC–2023–0064–3141 (Coalition of Franchisee Associations).

[674] FTC–2023–0064–2341 (New Hampshire State Representative Lindsay Sabadosa).

[675] FTC–2023–0064–3302 (Public Citizen); FTC–2023–0064–3160 (Consumer Federation of America).

the rule, because it would benefit small businesses.[676]

The Commission notes that the final rule does not prohibit any business offering live-event ticketing or short-term lodging from charging consumers fees or raising prices to support necessary operating costs, such as labor costs or rising expenses. The final rule instead requires that such charges and fees be incorporated in total price and that they not be misleading.

C. Comment by the Small Business Administration, Office of Advocacy, the Commission's Assessment and Response, and Any Changes Made as a Result

The SBA Office of Advocacy filed a comment requesting that the Commission ''prepare a supplemental initial regulatory flexibility analysis that fully considers the economic impact of the proposed rulemaking on small entities and alternatives that may reduce that burden,'' as well as ''clarify that this rulemaking will not apply to small non-profit organizations.'' [677] The SBA Office of Advocacy argues that the Commission's IRFA did not comply with the requirements of the Regulatory Flexibility Act because it ''fail[ed] to provide an accurate description of the small entities to which the proposed rule will apply,'' and failed to provide ''an accurate description of the costs associated with the compliance requirements.'' [678] According to the SBA Office of Advocacy, the Commission also ''failed to consider significant alternatives that would minimize any significant economic impact of the proposed rule on small businesses.'' [679] The Commission has considered this comment, which it further summarizes herein, and responds as follows.

The SBA Office of Advocacy recommended that the Commission count small businesses using NAICS-code specific thresholds defined by the SBA, rather than using a threshold of 500 employees.[680] In response to this comment, the Commission now uses the NAICS-code specific thresholds set by the SBA to determine the number of small businesses in the Final Regulatory Flexibility Analysis contained in section VII.D.

The comment further contended that ''there are other alternatives that the FTC should have considered in its IRFA,'' such as ''exempting certain sectors of small businesses or imposing a limit on certain fees'' and ''allowing businesses more time to comply with the rule.[681] The Commission did consider such alternatives and narrows the scope of the final rule to covered goods or services, thereby limiting the rule's application to only those businesses, including small businesses, that offer, display, or advertise such goods or services. The Commission declines, however, to impose a limit on the amount of fees, so long as they are disclosed and not misleading in accordance with the rule's requirements, including as discussed in section III.

As to the suggestion to give businesses more time to comply with the rule, the Commission adopts a compliance date of 120 days after publication of the final rule in the **Federal Register**. The final rule will go into effect, and compliance with the final rule will be required, on that date. This extended timeline considers comments received from the SBA Office of Advocacy and small businesses, underscoring the time it might take to come into compliance with the final rule. For example, some small businesses may decide to seek outside guidance about whether they need to make adjustments to come into compliance, while others will conduct their own compliance review.[682] The Commission finds 120 days should be enough time even for small businesses conducting their own compliance review, and that a 120-day period between publication in the **Federal Register** and the rule's compliance date appropriately balances the interests of small businesses with the interests of protecting consumers. Further, in addition to guidance in this SBP, the Commission also will publish a small entity compliance guide to assist small businesses in complying with the rule.

Finally, the SBA Office of Advocacy ''encourages the FTC to clarify that this rulemaking will not apply to non-profits.'' [683] The final rule can be enforced to the full scope of the Commission's jurisdiction. Congress empowered the Commission to ''prevent persons, partnerships, or corporations'' from engaging in ''unfair or deceptive acts or practices in or affecting commerce.'' [684] To fall within the definition of ''corporation'' under the FTC Act, an entity must be ''organized to carry on business for its own profit or that of its members.'' [685] These FTC Act provisions, taken together, have been interpreted in Commission precedent [686] and judicial decisions [687] to mean that the Commission lacks jurisdiction to prevent section 5 violations by a corporation not organized to carry on business for its own profit or that of its members. The Commission stresses, however, that both judicial decisions and Commission precedent recognize that not all entities claiming tax-exempt status as non-profits fall outside the Commission's jurisdiction.[688] ''Congress took pains in drafting § 4 [15 U.S.C. 44] to authorize the Commission to regulate so-called nonprofit corporations, associations and all other entities if they are in fact profit-making enterprises.'' [689]

D. Description and Estimate of the Number of Small Entities To Which the Rule Will Apply

The final rule covers businesses that offer short-term lodging and live-event tickets. Small businesses that currently comply with the final rule will have a relatively trivial cost of assessing whether they are currently in

[676] *See, e.g.,* FTC–2023–0064–0105 (Individual Commenter); FTC–2023–0064–2422 (Individual Commenter); FTC–2023–0064–2697 (Individual Commenter).

[677] U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC–2023–0064–0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf.*

[678] *Id.*

[679] *Id.*

[680] *Id.*

[681] *Id.*

[682] *See, e.g., id.* (SBA urged the Commission to consider ''allowing small businesses more time to comply with the rule'' and to provide clear compliance guidance); FTC–2023–0064–2367 (Small Business Majority urged the Commission to issue comprehensive guidance and commented: ''[M]any small businesses do not have access to legal staff or consultants, and without clear and specific disclosure requirements provided by industry, small businesses run the risk of occupying a substantial amount of time to understand how exactly they need to adjust their pricing models to comply with the new rule.'').

[683] U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC–2023–0064–0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf.*

[684] 15 U.S.C. 45(a)(2). The Commission herein focuses on coverage of ''corporations.''

[685] 15 U.S.C. 44.

[686] *In re Coll. Football Ass'n,* 117 F.T.C. 971, 994 (1994).

[687] *Cal. Dental Ass'n* v. *FTC,* 526 U.S. 756, 766–67 (1999); *Cmty. Blood Bank of Kansas City Area, Inc.* v. *FTC,* 405 F.2d 1011, 1019 (8th Cir. 1969); *FTC* v. *Univ. Health, Inc.,* 938 F.2d 1206, 1214 (11th Cir. 1991).

[688] The Commission has determined that ''[r]ulings of the Internal Revenue Service are not binding upon the Commission, . . . but a determination by another Federal agency that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded.'' *In re Am. Med. Ass'n,* 94 F.T.C. 701, 990 (1979) (citing *In re Ohio Christian Coll.,* 80 F.T.C. 815, 848 (1972)).

[689] *Cmty. Blood Bank,* 405 F.2d at 1018; *see also, e.g., FTC* v. *Nat'l Comm'n on Egg Nutrition,* 517 F.2d 485, 488 (7th Cir. 1975); *In re Coll. Football Ass'n,* 117 F.T.C. at 998.

compliance, and the Commission assumes these firms will require at most one hour of lawyer time to confirm compliance. Small businesses that offer covered goods or services and currently do not disclose total price will incur additional costs to adjust advertised prices, their marketing campaigns, and the consumer purchase process to comply with the rule.

Using the size standards set by the SBA,[690] the Commission calculates that there are potentially as many as 9,034 small firms in the U.S that may sell tickets for live events.[691] For the economic regulatory analysis in section V, the Commission assumes all live-event ticketing firms will incur additional costs to adjust advertised prices, their marketing campaigns, and the consumer purchase process to comply with the rule. The Commission notes that there may be some live-event ticket sellers that are currently in compliance and will therefore have a trivial cost of compliance with the final rule.

For the short-term lodging industry, the Commission separately estimates there are as many as 675,603 home share hosts in the U.S. The Commission assumes that these home share hosts are all considered small entities. Using the NAICS-code specific thresholds set by the SBA, the Commission calculates that there are potentially as many as 2,798 small firms within NAICS code 7211 (''Accommodation'').[692]

E. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

The final rule contains no reporting or recordkeeping requirements; however, the final rule imposes disclosure obligations. Only small entities that offer, display, or advertise covered goods or services must comply with the rule and, therefore, will incur compliance costs. To comply with the final rule, small entities that offer, display, or advertise any price of a covered good or service are required to disclose the total price clearly and conspicuously and, generally, more prominently than any other pricing information. Small entities must also disclose other imposed fees and charges before a consumer consents to pay and must not misrepresent any fee or charge. For firms that already comply with the final rule, the one-time indirect cost per firm is assumed to be, at most, one hour of lawyer time for regulatory familiarization. This cost is excluded from the Regulatory Flexibility Analysis since such familiarization is not a compliance requirement.

For small businesses subject to the rule that are not currently in compliance with the rule's requirements, the Commission has determined that firms will need to adjust advertised prices, marketing campaigns, and the purchase process to comply with the rule. These firms may also incur recurring annual costs of additional lawyer time to assess and confirm annual compliance. As discussed in more detail in section V, the Commission estimates that direct compliance costs in the live-event ticketing industry, over a ten-year period, would result in annualized costs of $648–$2,144 per firm assuming a 7% discount rate or $534–$1,916 per firm assuming a 3% discount rate. U.S. home share hosts would incur one-time costs re-optimizing prices of $30.42–$91.27. The Commission also estimates direct compliance costs for U.S. hotels, over a ten-year period, would result in annualized costs of $527–$2,011 per firm assuming a 7% discount rate or $434–$1,825 per firm assuming a 3% discount rate. These estimates, however, are for firms of all sizes; the Commission has not separately estimated the costs for small businesses specifically.

F. Discussion of Significant Alternatives the Commission Considered That Would Accomplish the Stated Objectives of the Final Rule and That Would Minimize Any Significant Economic Impact of the Final Rule on Small Entities

The Regulatory Flexibility Act requires that agencies include a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.[693] Statutory examples of ''significant alternatives'' include different requirements or timetables that take into account the resources available to small entities; the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; the use of performance rather than design standards; and an exemption from coverage of the rule, or any part thereof, for small entities.[694]

In the NPRM, the Commission sought comment on various potential alternatives to the proposed rule, including alternatives that were tailored to the needs of small businesses and that addressed the impact (including costs) that would be incurred by businesses to comply with the proposed rule.[695] Specifically, the Commission sought comment on the estimated number and the nature of small business entities for which the proposed rule would have a significant economic impact, whether the proposed rule would have a significant economic impact on a substantial number of small entities, and if so, how it could be modified to avoid such an impact, as well as whether the proposed definition for ''business'' should exclude certain businesses, including small businesses meeting the SBA's definition of a ''small business concern'' and the SBA's Table of Size Standards, or simply certain limited-service and full-service restaurants meeting such requirements.[696] The Commission also inquired as to whether the ''total price'' definition should exclude mandatory charges by restaurants for service performed for the customer in lieu of tips, as defined by the Department of

[690] *See* U.S. Small Bus. Admin., Table of Small Bus. Size Standards, *https://www.sba.gov/document/support-table-size-standards.*

[691] The Commission uses the latest data available from the Census Bureau's Statistics of U.S. Businesses database, available based on firm revenue and firm size. U.S. Census Bureau, Stat. of U.S. Bus. (last revised July 9, 2024), *https://www.census.gov/programs-surveys/susb.html.* The calculation of 9,034 live-event ticketing firms is likely an overestimate of the number of small businesses due to data incompatibility and the use of the high-end assumption regarding how live-event ticketing firms are categorized using NAICS codes. The U.S. SBA sets different revenue thresholds for different NAICS codes. However, the Statistics of U.S. Businesses does not necessarily report the number of firms with earnings under those particular thresholds. Therefore, the Commission calculates there may be as many as 3,094 firms in NAICS code 711310 with receipts under the SBA threshold of $40 million, 4,358 firms in NAICS code 711320 with receipts under $25 million (an overestimate given the SBA threshold of $22 million for NAICS code 711320), and 1,582 firms in NAICS code 561599 with receipts under $35 million (an overestimate given the SBA threshold of $32.5 million for NAICS code 561599).

[692] *Id.* The calculation of 2,798 small hotels firms is likely an overestimate of the number of small businesses due to data incompatibility. The U.S. SBA sets a revenue threshold of $9 million for NAICS code 721191 and NAICS code 721199. However, the Statistics of U.S. Businesses does not report number of firms for those particular thresholds. Therefore, the Commission calculates there are as many as 42,186 firms in NAICS code 721110 with receipts under the SBA threshold of $40 million, 101 firms in NAICS code 721120 with receipts under the SBA threshold of $40 million, 2,960 firms in NAICS code 7211191 with receipts under $10 million (an overestimate given the SBA threshold), and 1,384 firms with receipts under $10 million (an overestimate given the SBA threshold).

[693] 5 U.S.C. 604(a)(6).

[694] *See* 5 U.S.C. 603(c).

[695] NPRM, 88 FR 77479–83.

[696] *Id.*

Labor.[697] The Commission also considered alternatives that would otherwise narrow the scope of the proposed rule, including limiting application of the rule to ''Covered Businesses'' as defined in the NPRM, ultimately adopting a variation of this approach in the final rule.

The Commission requested this information to minimize the final rule's burden on all businesses, including small entities. As explained through this SBP, the Commission has considered the comments and alternatives proposed by the commenters, including the SBA Office of Advocacy, and finds that the final rule will not create a significant impact on small entities. Indeed, the type of deception that will be unlawful under the final rule is already unlawful under the FTC Act, but the final rule would allow the Commission to obtain monetary relief more efficiently than it could solely under section 19(a)(2) of the FTC Act (*i.e.,* without a rule violation), thereby deterring current and would be violators of the FTC Act.

In its Preliminary Regulatory Analysis, the Commission described an alternative to the proposed rule, namely, to terminate the rulemaking and rely instead on the Commission's previously existing tools, such as consumer education and enforcement actions brought under sections 5 and 19 of the FTC Act, to combat the specified unfair or deceptive pricing practices. The Commission believes that promulgation of the rule will result in greater net benefits to the marketplace while imposing no additional burdens beyond what is required by the FTC Act. As the Commission describes further in section V, the rule will not only result in significant benefits to consumers but also improve the competitive environment, particularly for small, independent, or new firms. Therefore, the rule appears to be superior to this alternative for small entities.

As discussed herein, the Commission narrows the rule by adding a definition for ''covered good or service'' that is limited to Live-event tickets or Short-term lodging. The Commission also modifies the definition of government charges to replace the language that included only those government charges levied ''on consumers,'' with language clarifying that any government charge ''imposed on the transaction'' may be excluded from total price. Finally, the Commission addresses in section III how the rule would apply to credit card processing fees and contingent fees charged by small businesses.

[697] *Id.,* 88 FR 77481.

The Commission notes that it has designed the final rule to minimize compliance costs for all businesses. As stated in section V, the Commission estimates that direct compliance costs in the live-event ticketing industry, over a ten-year period, would result in annualized costs of $648–$2,144 per firm assuming a 7% discount rate or $534–$1,916 per firm assuming a 3% discount rate. U.S. home share hosts would incur one-time costs re-optimizing prices of $30.42–$91.27. The Commission also estimates direct compliance costs for U.S. hotels, over a ten-year period, would result in annualized costs of $527–$2,011 per firm assuming a 7% discount rate or $434–$1,825 per firm assuming a 3% discount rate. Based on the available evidence, the Commission does not believe that the analysis in section V is fundamentally different for small entities. For this reason, the Commission is not creating an exception for small entities or creating different regulatory requirements for small entities.

The Commission also is not delaying the effective date of the final rule solely for small entities. The final rule's effective date is 120 days after publication in the **Federal Register** on May 9, 2025. In the Commission's view, the rule's effective date of May 9, 2025 will afford small entities sufficient time to comply with the final rule, and commenters have not provided evidence that more time is necessary. The Commission declines to set different effective dates for small businesses and larger businesses because the final rule's core objectives include promoting comparison shopping for consumers and leveling the playing field for honest competitors. For all of the reasons stated, these objectives would be thwarted in a marketplace where certain businesses must comply with the rule's requirements for a period of time while others have more time to continue engaging in unfair or deceptive pricing practices.

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 464

Advertising, Consumer protection, Trade practices.

■ For the reasons set forth above, the Federal Trade Commission adds part 464 to chapter I of title 16 of the Code of Federal Regulations to read as follows:

PART 464—RULE ON UNFAIR OR DECEPTIVE FEES

Sec.

464.1 Definitions.
464.2 Hidden fees prohibited.
464.3 Misleading fees prohibited.
464.4 Relation to State laws.
464.5 Severability.

Authority: 15 U.S.C. 41 through 58.

§ 464.1 Definitions.

Ancillary good or service means any additional good(s) or service(s) offered to a consumer as part of the same transaction.

Business means an individual, corporation, partnership, association, or any other entity that offers goods or services, including, but not limited to, online, in mobile applications, and in physical locations.

Clear(ly) and conspicuous(ly) means a required disclosure that is easily noticeable (*i.e.,* difficult to miss) and easily understandable by ordinary consumers, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

(4) In any communication using an interactive electronic medium, such as the internet, a mobile application, or software, the disclosure must be unavoidable.

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

(7) The disclosure must not be contradicted or mitigated by, or

inconsistent with, anything else in the communication.

(8) When the representation or sales practice targets a specific audience, such as children, older adults, or the terminally ill, ''ordinary consumers'' includes members of that group.

Covered good or service means:

(1) Live-event tickets; or

(2) Short-term lodging, including temporary sleeping accommodations at a hotel, motel, inn, short-term rental, vacation rental, or other place of lodging.

Government charges means the fees or charges imposed on the transaction by a Federal, State, Tribal, or local government agency, unit, or department.

Pricing information means any information relating to an amount a consumer may pay.

Shipping charges means the fees or charges that reasonably reflect the amount a business incurs to send physical goods to a consumer, including through the mail, private mail and shipping services, or by freight.

Total price means the maximum total of all fees or charges a consumer must pay for any good(s) or service(s) and any mandatory ancillary good or service, except that government charges, shipping charges, and fees or charges for any optional ancillary good or service may be excluded.

§ 464.2 Hidden fees prohibited.

(a) It is an unfair and deceptive practice and a violation of this part for any business to offer, display, or advertise any price of a covered good or service without clearly and conspicuously disclosing the total price.

(b) In any offer, display, or advertisement that represents any price of a covered good or service, a business must disclose the total price more prominently than any other pricing information. However, where the final amount of payment for the transaction is displayed, the final amount of payment must be disclosed more prominently than, or as prominently as, the total price.

(c) A business must disclose clearly and conspicuously, before the consumer consents to pay for any covered good or service:

(1) The nature, purpose, and amount of any fee or charge imposed on the transaction that has been excluded from total price and the identity of the good or service for which the fee or charge is imposed; and

(2) The final amount of payment for the transaction.

§ 464.3 Misleading fees prohibited.

In any offer, display, or advertisement for a covered good or service it is an unfair and deceptive practice and a violation of this part for any business to misrepresent any fee or charge, including: the nature, purpose, amount, or refundability of any fee or charge; and the identity of the good or service for which the fee or charge is imposed.

§ 464.4 Relation to State laws.

(a) *In general.* This part will not be construed as superseding, altering, or affecting any State statute, regulation, order, or interpretation relating to unfair or deceptive fees or charges, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

(b) *Greater protection under State law.* For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part.

§ 464.5 Severability.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person, industry, or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law and such invalidity shall not affect the application of the provision to other persons, industries, or circumstances or the validity or application of other provisions. If any provision or application of this part is held to be invalid or unenforceable, the provision or application shall be severable from this part and shall not affect the remainder thereof.

By direction of the Commission, Commissioner Ferguson dissenting.

Joel Christie,

Acting Secretary.

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