

## Supporting Statement for Proposed Rule on Unfair or Deceptive Fees

### 16 C.F.R. Part 464

The Federal Trade Commission (“FTC” or “Commission”) proposes to promulgate a trade regulation rule titled Rule on Unfair or Deceptive Fees under the authority of Section 18 of the Federal Trade Commission Act, (“FTC Act”), 15 U.S.C. 57a(b)(2), which grants the FTC the authority 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).

The Notice of Proposed Rulemaking (“NPRM”) proposes one requirement that constitutes a collection of information for purposes of the PRA. Specifically, the NPRM proposes to require businesses that exclude an amount from the Total Price that they display, advertise, or offer to consumers to disclose the refundability of such fees (hereinafter, referred to as “refundability disclosure requirement”). If the Commission finalizes the proposed requirement, such disclosures will be required only when an amount is excluded from the Total Price, which will only be permitted for Government Charges, Shipping Charges, and optional charges. The disclosures will have to be made clearly and conspicuously, meaning that they have to be provided in a manner that is difficult to miss (*i.e.*, easily noticeable) and easily understandable. The NPRM proposes other requirements (hereinafter, referred to as “the proposed rule’s other requirements” or “the proposed rule’s other provisions”), but those requirements do not constitute collections of information for purposes of the PRA.<sup>1</sup>

#### **(1) & (2) Necessity for and Use of the Information Collection**

Clear and conspicuous disclosures of the refundability of fees not included in Total Price displays will ensure that consumers have the information that they need to understand the material terms of the sales transactions that they enter into. This information is necessary for a consumer to decide whether to consent to the charge. As explained in Part III.B of the NPRM, comments received in response to the previously issued Advance Notice of Proposed Rulemaking<sup>2</sup> indicated that consumers made purchases that included charges for goods or services that the consumers believed were refundable. These consumers discovered only after making the purchases that the charges were either not refundable at all or that a portion of the fees was not refundable. Whether a charge is refundable is an important component of the nature or purpose of the charge and is material to consumers – that is, it is likely to affect their choice of product or their conduct regarding the product.<sup>3</sup> Disclosures of the refundability of charges excluded from the Total Price are necessary for consumers to decide whether to accept the optional charges.

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<sup>1</sup> See Part VIII of the NPRM for a discussion of these additional requirements and the Commission’s rationale as to why the proposed rule’s other requirements do not constitute collections of information. See also Part V of the NPRM for an overview of the proposed rule’s prohibitions and requirements.

<sup>2</sup> See 87 FR 67413 (Nov. 8, 2022).

<sup>3</sup> See NPRM notes 191, 193.

The FTC does not intend to use fee refundability disclosures for any purpose other than monitoring compliance.

**(3) Consideration of the Use of Improved Information Technology to Reduce Burden**

Businesses subject to the proposed rule are free to offer, display, or advertise their goods or services using whatever technology they wish to use. Nothing in the proposed rule prescribes that the refundability disclosure be made on paper or in any format that would preclude the use of improved technology.

**(4) Efforts to Identify Duplication**

As noted in the NPRM, the Commission has reviewed the proposed rule as a whole, including the proposed rule's other requirements, for any potential duplications of or conflicts with other federal statutes, rules, or policies currently in effect. The FTC has not identified any other federal statutes, rules, or policies currently in effect that may directly duplicate or conflict with the proposed refundability disclosure requirement.

There is some overlap between the proposed rule and some of the FTC's existing regulations. Specifically, the Telemarketing Sales Rule and the Business Opportunity Rule both contain provisions requiring the disclosure of all material terms related to refund policies.<sup>4</sup> Similarly, the Franchise Rule requires the disclosure of certain fees and the disclosure of whether any of the fees are refundable and under what conditions they are refundable,<sup>5</sup> and the Negative Option Rule prohibits misrepresentations pertaining to refunds.<sup>6</sup> However, the proposed refundability disclosure requirement does not conflict with these rules, but would work in tandem with them to protect consumers. Unlike the FTC's existing regulations, the proposed refundability disclosure requirement is not limited to specific marketing or sales techniques (*e.g.*, telemarketing, negative option marketing) or to specific market sectors (*e.g.*, business opportunities, franchises). As such, if finalized, the proposed rule would protect U.S. consumers by filling this regulatory gap.

**(5) Impact on Small Businesses**

The refundability disclosure requirement would impact only a subset of small businesses: those that currently charge a fee that is properly excluded from their Total Price display without disclosing the refundability of that fee. Thus, it would require only small businesses that currently do not disclose the refundability of fees excluded from their Total Price displays to adjust their business practices. Most small businesses will already be aware of whether they are currently excluding any fees from their Total Price displays, and if so, whether they provide a disclosure as to the refundability of such fees in a manner that is difficult to miss (*i.e.*, easily noticeable) and easily understandable. Additionally, instead of disclosing the refundability of such fees, small businesses will also have the option to simply include such amounts in the Total

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<sup>4</sup> See 16 CFR 310.3(a); 16 CFR Part 437.3(a)(4).

<sup>5</sup> 16 CFR Part 436.5(e).

<sup>6</sup> See *generally* 88 FR 24716 (June 23, 2023).

Price that they display, advertise, or offer to consumers. As such, any covered small businesses would incur only *de minimis* costs in assessing whether they are in fact noncompliant with the proposed refundability disclosure requirement.<sup>7</sup>

**(6) Consequences of Conducting Collection Less Frequently**

Less frequent disclosure of the refundability of fees would undermine the purpose of the proposed rule. Every consumer benefits from receiving transparent information about the fees they pay, including whether the fees are refundable. Requiring a less frequent disclosure of this information would mean that some consumers would not have the same ability as others to make informed purchasing decisions. Businesses would be required to affirmatively disclose the refundability of fees only if those fees are excluded from the Total Price. Fees are only permitted to be excluded from the Total Price if they are Shipping Charges, Government Charges, or optional fees—*i.e.*, they are not fees that a consumer *must* pay for a good or service and any mandatory Ancillary Good or Service. Thus, the proposed refundability disclosure requirement was drafted in a manner that limits the circumstances in which businesses would be required to make these disclosures.

**(7) Circumstances Requiring Collection Inconsistent with Guidelines**

None. The collection of information in the Rule is consistent with all applicable guidelines contained in 5 CFR 1320.5(d)(2).

**(8) Public Comments/Consultation Outside the Agency**

Because this request pertains to a new proposed rule, the FTC did not previously seek public comment related to the disclosure requirement for which the FTC is seeking clearance. The FTC sought public comment generally about unfair or deceptive practices related to fees in an Advance Notice of Proposed Rulemaking,<sup>8</sup> pursuant to which the FTC received over 12,000 comments, some of which addressed the issue of refundability, as discussed above. Through the NPRM, the Commission is providing an opportunity for public comment while seeking OMB approval.

**(9) Payment or Gift to Respondents**

Not applicable.

**(10) Assurances of Confidentiality**

No assurance of confidentiality is necessary as the businesses that would be subject to the proposed rule do not have to register or file any documents with the Commission, and disclosing to consumers in advertising whether fees are refundable does not involve confidentiality concerns.

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<sup>7</sup> However, the Commission acknowledges that small businesses will incur additional costs as a result of the proposed rule's other provisions. See *infra* note 10 for a discussion of these costs.

<sup>8</sup> 87 FR 67413 (Nov. 8, 2022).

**(11) Sensitive or Private Information**

Disclosing to consumers in advertising whether fees are refundable does not require the disclosure of any information of a private or sensitive nature.

**(12) Estimated Annual Hours Burden and Associated Labor Costs**

Although the NPRM proposes several requirements, only one of the proposed requirements constitutes a collection of information for purposes of the PRA.<sup>9</sup> Specifically, the FTC’s proposal to require businesses to disclose the refundability of fees not included in the Total Price constitutes the proposal’s only collection of information (hereinafter, also referred to as “refundability disclosure requirement”). Therefore, this burden analysis focuses on the burden resulting from the proposed refundability disclosure requirement, although the Commission understands that businesses will likely incur additional costs as a result of the proposed rule’s other requirements.<sup>10</sup>

*Estimated One-Time Hours Burden: 245,454 Hours.*

FTC staff estimates that 818,178 entities are currently not in compliance with one or more of the proposed requirements (including those that do not constitute a collection of information).<sup>11</sup> However, FTC staff assumes that only 20 percent of these 818,178 entities, or 163,636 entities, will incur costs as a result of the refundability disclosure requirement. FTC staff believes that the remaining entities (approximately 654,542) already make disclosures consistent with the proposed refundability disclosure requirement in the normal course of their activities.<sup>12</sup> Thus, although the majority of firms within the FTC’s jurisdiction will be subject to the

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<sup>9</sup> See Part VIII of the NPRM for the Commission’s rationale as to why the other proposed requirements do not constitute collections of information.

<sup>10</sup> As noted in the NPRM for purposes of transparency and comprehensiveness, FTC staff estimates that, in connection with the proposed rule’s other provisions, all firms in the U.S. economy will spend, on average, approximately one hour conducting a compliance review. *See* NPRM, Part VIII. Additionally, entities that are currently not in compliance with one or more of the proposed rule’s other provisions will incur costs as a result of having to bring their business processes into compliance. *See id.*

<sup>11</sup> *See* the United States Census Bureau’s Statistics of U.S. Businesses. U.S. Census Bureau, *2020 SUSB Annual Datasets by Establishment Industry* (Mar. 2023). The number of entities (818,178) is derived as follows: FTC staff subtracted the number of firms in the live-event ticketing, short-term lodging, and restaurant industries (518,119) from the total number of firms in the U.S. (6,140,612) and assumes that 10% of those remaining firms will incur costs because they are currently not in compliance with one or more provisions of the proposed rule, including those provisions of the rule that do not constitute collections of information for purposes of the PRA. This results in 562,249 firms that incur compliance costs (beyond an initial review of whether they are compliant) that are not in the live-event ticketing, short-term lodging, and restaurant industries. Next, FTC staff added the number of firms in the live-event ticketing, short-term lodging, and restaurant industries that FTC staff currently expects to be noncompliant with the proposed rule (255,929), which results in 818,178 entities.

<sup>12</sup> However, as these entities are currently not in compliance with one or more of the proposed rule’s other provisions, they will likely incur costs related to bringing their business processes into compliance with those proposed requirements. *See also supra* note10.

refundability disclosure requirement, only the time, effort, and financial resources expended by these 163,636 entities<sup>13</sup> constitute a burden for purposes of the PRA.<sup>14</sup>

FTC staff believes that businesses will incur only minimal costs in assessing whether they currently comply with the refundability disclosure requirement because that determination is simple. Businesses will merely have to assess whether they are currently excluding any fees from the Total Price, and if so, whether they provide a disclosure as to the refundability of such fees in a manner that is difficult to miss (*i.e.*, easily noticeable) and easily understandable. Therefore, FTC staff believes that any costs related to this rudimentary compliance review is *de minimis*.

However, FTC staff believes that businesses will incur costs as a result of providing the required disclosure. FTC staff estimates the burden resulting from the refundability disclosure requirement will be, on average, 90 minutes (or 1.5 hours) for each entity estimated to not be currently compliant with the refundability disclosure requirement (163,636). Of this 90-minute total, FTC staff estimates that 30 minutes will be time spent by attorneys reviewing the disclosure, and 60 minutes will be time spent to update the website or physical price display to include the appropriate disclosure.<sup>15</sup> Accordingly, the total estimated one-time hours burden is 245,454 hours (163,636 firms x 1.5 hours).

*Estimated One-Time Labor Cost:* \$13,305,243.

Applying the hourly wage for attorney time of \$78.40<sup>16</sup> to the estimate of 30 minutes of attorney time and applying the hourly wage for web developer time of \$42.11<sup>17</sup> to the estimate of 60 minutes of web developer time, this yields a one-time labor cost of \$81.31 per entity (\$39.20+\$42.11). Accordingly, the estimated total one-time labor cost for disclosures is \$13,305,243 (\$81.31 per entity \* 163,636 entities).

### **(13) Estimated Capital/Other Non-Labor Costs Burden**

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<sup>13</sup> This number may be overinclusive as it includes entities that would be exempted from the definition of the term “Business,” as described in proposed Section 464.1(b), if another proposed rule that is currently in development, the Motor Vehicle Dealers Trade Regulation Rule, is finalized, published, and in effect at 16 CFR Part 463. However, FTC staff is including such entities in its calculations because the Motor Vehicle Dealers Trade Regulation Rule is not yet finalized, published, and in effect.

<sup>14</sup> See 5 CFR 1320.3(b)(2) (“The time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the normal course of their activities (*e.g.*, in compiling and maintaining business records) will be excluded from the “burden” if the agency demonstrates that the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary.”).

<sup>15</sup> Web developer time is a proxy for any costs associated with changing the firm’s disclosures to comply with the proposed rule, such as the time spent adjusting websites or adjusting any physical price displays to include the disclosure.

<sup>16</sup> See U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, *Occupational Employment and Wages, May 2022: 23-1011 Lawyers* (May 2022), <https://www.bls.gov/oes/current/oes231011.htm> (providing the hourly wages for lawyers).

<sup>17</sup> See U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, *Occupational Employment and Wages, May 2022: 15-1254 Web Developers* (May 2022), <https://www.bls.gov/oes/current/oes151254.htm> (providing the hourly wages for web developers).

Any capital and start-up costs associated with the proposed rule's disclosure requirements will be at most *de minimis*. Businesses already convey pricing information to consumers in their normal course of business, and any capital costs involved in making the necessary disclosures would be costs borne by sellers in the normal course of business.

**(14) Estimated Cost to the Federal Government**

FTC staff estimates that the Federal Government will not incur any costs from the proposed refundability disclosure requirement except for monitoring for compliance and taking enforcement action. FTC staff estimates that the cost to the FTC's Bureau of Consumer Protection of enforcing the refundability disclosure requirement will be approximately \$70,619.60 per year. FTC staff estimates that approximately 1/10 of the time spent enforcing the proposed rule as a whole would involve the refundability disclosure requirement. The estimate of the cost of the proposed rule includes the cost of 3.5 full-time employees ("FTEs") (salary and benefits for two full-time attorneys, one half-time attorney, one half-time investigator, and one half-time economist) annually to monitor, investigate, and enforce violations of the rule. Approximately 1/10 of these FTEs would be applied to the refundability disclosure requirement. FTC staff does not expect the agency to incur additional costs.

**(15) Adjustments/Changes in Burden**

This request is for a new proposed rule. There are therefore no adjustments or changes in burden to report.

**(16) Plans for Tabulation and Publication**

The proposed rule does not require businesses to provide information to the FTC. There are therefore no plans to publish any information obtained pursuant to this information collection.

**(17) Failure to Display Expiration Date for OMB Approval**

Not applicable.

**(18) Exceptions to Certification**

The FTC certifies that this collection of information is consistent with the requirements of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), and is not seeking an exemption to these certification requirements.