March 13, 2024

The Honorable Matt D. Klein, Chairman
The Honorable Judy Seeberger, Vice Chairwoman
Minnesota Senate Committee on Commerce and Consumer Protection
100 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, Minnesota 55155

Dear Chairman Klein, Vice Chairwoman Seeberger, and members of the Minnesota Senate Committee on Commerce and Consumer Protection:

On behalf of the National Taxpayers Union (NTU), America's oldest taxpayer advocacy organization, and its many supporters in Minnesota, I write to offer our comments regarding SF 3537. This bill would imprecisely define mandatory fees and force businesses to include these fees in the advertised price of their products, lest they be considered a deceptive trade practice.

As a taxpayer advocacy group, we are deeply concerned about this government overreach. We at NTU and National Taxpayers Union Foundation (NTUF) have recently written and stood up for taxpayers against these broad, contradictory policies when promoted on a federal level at the Consumer Financial Protection Bureau, the Federal Communications Commission, and the Federal Trade Commission. Please consider NTUF Executive Vice President Joe Bishop–Henchman's recent public comments to the FTC and recommended policies that would protect consumers and taxpayers as you consider the ramifications of enacting this policy.

While the bill's authors certainly intend to protect consumers in nearly every industry in the economy from unexpected costs, the fact of the matter is that consumers and taxpayers will undoubtedly end up paying more for goods and services as retailers of all sizes throughout the state must spend time, effort, and financial resources on compliance. This will considerably offset, if not negate, any potential benefits the legislation desires to create.

The regulatory compliance of regulations and myriad definitions of "mandatory fees" cause company practices to be set up for each state in different ways. As NTU and NTUF President Pete Sepp recently noted, the Biden administration itself still needs to come up with a consistent definition, and subsequent iterations of contradictory agency decisions on pricing. Furthermore, there would be even broader ramifications if each state were to make a unique definition of these fees.

Given its broad scope, this bill will have some serious unintended consequences. These definitions regulate all advertisements, displays, or offers of prices that do not reflect these "mandatory fees." The variable nature of consumer choice means these prices may vary depending on the products or services a customer ultimately desires. Requirements to report an "all-in" price can actually conspire to prevent a consumer from comparison shopping. It may also vary depending on the compliance complications a

business may face and not anticipate while providing those services. As Mr. Bishop–Henchman put it in his FTC comments, which have direct relevance to the language in SF 3537:

> But under the Proposed Regulation, 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. Customers' desires vary depending on the individual needs of the customer at that moment. However, under the Proposed Regulation, companies would engage in "an unfair and deceptive practice" if one customer needs a mandatory ancillary good or service under her circumstances which another customer does not need.

Ultimately, further study is necessary to understand the actual cost of compliance with this bill. At a time when Minnesota workers and families are facing the effects of inflation, we encourage you to consider any policies that might make groceries, meals, and necessities more expensive for consumers.

We also note that SF 3537 exempts "taxes imposed by a government entity" from its dictates, thereby completely contradicting the legislation's purpose. Depending on the good or service offered, locally imposed government taxes, fees, and charges can add considerably to the total price. These include local sales taxes, business licenses, special area property taxes, and mandatory fees for items such as waste disposal. The same is also true for the embedded tax overhead that a given business may have to factor into the base price of the good or service, such as state income taxes or general property taxes. We would contend that it is "unfair and deceptive" for governments to conceal the burdens they impose on consumers and taxpayers.

Instead of imposing arbitrarily broad regulations without the time to fully understand the impact those restrictions may have on taxpayers, the government should focus on creating a regulatory environment that fosters competition and innovation. By embracing these goals, Minnesota will continue to drive down prices using market forces without creating new hurdles of fees and taxes, ultimately benefiting families, small businesses, workers, and the economy as a whole.

Thank you for your time and consideration of these concerns.

Sincerely,

Mattias Gugel
Director of State External Affairs
National Taxpayers Union

NATIONAL TAXPAYERS UNION FOUNDATION

122 C Street N.W., Suite 700, Washington, DC 20001

February 7, 2024

Submitted via electronic mail at: www.regulations.gov

Attn: NPRM No. R207011
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Mail Stop H-144 (Annex J)
Washington, DC 20580

Re: Comments and Request for a Public Hearing on the Unfair or Deceptive Fees NPRM, R207011

Dear Sir or Madam,

On behalf of National Taxpayers Union Foundation ("NTUF") we write with comments on the Federal Trade Commission's (the "Commission") request for public comment on the Commission's proposed rule on Unfair or Deceptive Fees, NPRM R207011 (proposed on November 9, 2023) (the "Proposed Regulation"). We also formally request the opportunity to speak orally at a public hearing.

I. Introduction

NTUF has been a leader in developing responsible tax administration for nearly five decades. We strive to offer practical, actionable recommendations about how our tax system should function. Our experts and advocates engage in in-depth research projects and informative, scholarly work pertaining to taxation in all aspects, including that of virtual currency.

In 2017, NTUF produced crucial research that guided policymakers as they overhauled the federal tax code for the first time in decades. Our annual Tax Complexity Report highlights the increasing time burden and out-of-pocket filing expenses imposed on taxpayers as they

comply with the tax code each year. NTUF's Interstate Commerce Initiative and Taxpayer Defense Center have both delved into the minutiae of state tax and user charge policies, including those pertaining to situs, nexus, and incidence. NTUF has engaged in commentary analysis as well, recently testifying at the Internal Revenue Service's proposed rule on Gross Proceeds Reporting by Brokers and Determination of Amount Realized and Basis for Digital Transactions.

Given our policy expertise, outreach know-how, and true non-partisanship, we seek to build lasting consensus for impactful reforms. As such, NTUF has a vested interest in producing well-researched tax analyses and addressing administrative compliance issues. The Proposed Regulation promulgated by the Commission is precisely the type of issues NTUF frequently lends its expert analyses to.

NTUF requests a hearing on these Proposed Regulation, which is warranted given the nature of these Proposed Regulations, the serious economical and legal issues they create, and their broad applicability.[1] NTUF's anticipated testimony relies on our comments made herein, and is summarized as follows:

- "Government Charges," as defined in the Proposed Regulation, departs from case law and state and federal tax laws.
    - The definition of "Government Charges" ignores the varying types of taxes created by state and federal law.
- As written, the Proposed Regulation is overbroad and lacks an adequate explanation for its widespread departure from established norms and legal precedent.
- The definition of "Total Price" fails to recognize variable marketplace fees which are based on consumers' choices and compliance complications arising from third-party marketplaces.
- In response to the issues within the Proposed Regulation, we recommend the Commission should eliminate or redefine "Government Charges," redefine "Total Price" to reflect the reality of conducting business, and conduct an extensive analysis of what compliance costs would be.

Accordingly, we write with comments on the Commission's Proposed Regulation and request to speak orally at a public hearing.

II. Comments

[1] There are no issues of material fact that NTUF proposes need to be resolved. *See e.g.*, 16 CFR 1.11(e)(3).

A. The Definition of "Government Charges" Enshrines Form Over Substance, Disregards Commonly Accepted Definitions, and is at Odds with Numerous State Laws

The Proposed Regulation's attempt to exclude taxes and "Government Charges" from the scope of its prohibition, but the inartful and unusual definition used (based on whether the imposition is on consumers or not) disregards common definitions of taxes and fees used elsewhere by the federal and state governments, and fails to take into account that many taxes and fees are imposed on business but expected (or in some cases, required) to be passed forward to suppliers or consumers.[2] A tax may be paid by consumers but collected by a business - most in fact are, such as payroll taxes, sales taxes, and excise taxes - and the Proposed Regulation is unclear whether "imposed" means collected *from* or collected *by*.

A charge imposed by the government can be a tax, fee, or penalty.[3] A tax is imposed for the primary purpose of raising revenue, a fee is imposed for the primary purpose of providing a service, and a penalty is imposed for the primary purpose of discouraging certain behavior with resultant revenue a secondary consideration. No court defines taxes and fees based on whether the law formalistically imposes the obligation on consumers or not; most states have instead held that the *substance* of how the charge operates is more important than the label used.[4]

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[2] NTUF would like to thank Nikki E. Dobay at Greenberg Traurig LLP, for her well thought out research, analysis and advice on this topic.

[3] *See generally* Joseph Bishop-Henchman, How is the Money Used? (2013), https://shorturl.at/aDU45 (collecting federal and state cases defining taxes, fees, and penalties).

[4] *See id.* at 6-8 (collecting cases); *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992) (finding that a tax is thus an exaction imposed by the government, on the public, for the purpose of raising revenue which is then spent on general (not particular) public purposes; a charge not imposed by government, or a charge collected from those receiving particularized benefits, or a charge collected for primary purpose other than raising revenue, is not a tax); *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000) (applying San Juan Cellular to determine if a charge "qualifies" as a tax); Neinast v. Texas, 217 F.3d 275, 278 (5th Cir. 2000) (applying *San Juan Cellular*); *Hedgepeth v. Tennessee*, 215 F.3d 608, 612 (6th Cir. 2000) (describing *San Juan Cellular* as the "leading decision" used for "the definition of the term 'tax'"); *RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.*, 169 F.3d 448, 457 (7th Cir. 1999) ("Penalties stand on a different footing. States do not assess penalties for the purpose of raising revenue. . . ."); *Chicago & Nw. Transp. Co. v. Webster County Bd. of Supervisors*, 71 F.3d 265, 267 (8th Cir. 1995) ("A government levy is a tax if it raises revenue to spend for the general public welfare."); *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996) (applying *San Juan Cellular* test to "determin[e] whether an assessment is a tax"); *Hill v. Kemp*, 478 F.3d 1236, 1244 (10th Cir. 2007) (finding that a tax's "primary purpose . . . is revenue rather than regulation"); *Seven-Sky v. Holder*, 661 F.3d 1, 8 (D.C. Cir. 2011) ("It is well established that Congress used the term 'tax' in the Tax Injunction Act to mean assessments made for the purpose of raising revenues, not regulatory 'penalties' intended to encourage compliance with a law."); *Rural Tel. Coal. v. F.C.C.*, 838 F.2d 1307, 1314 (D.C. Cir. 1988) ("[A] regulation is a tax only when its primary purpose judged in legal context is raising revenue."); *Lightwave Tech., LLC v. Escambia Cty.*, 804 So.2d 176, 178 (Ala. 2001) (finding that a charge "designed to generate revenue" for general spending is a tax); *May v. McNally*, 55 P.3d 768, 773-74 (Ariz. 2002) (adopting *San Juan Cellular*); *City of North Little Rock v. Graham,* 647 S.W.2d 452, 453 (Ark. 1983) (finding that a tax "is a means of raising revenue to pay additional money for services already in effect"); *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1354 (Cal. 1997) ("In general, taxes are imposed for revenue purposes, rather than in return for a special benefit

conferred or privilege granted."); *Zelinger v. City & Cty. of Denver*, 724 P.2d 1356, 1358 (Colo. 1986) ("A hallmark of such taxes is that they are intended to raise revenue to defray the general expenses of the taxing entity."); *Stuart v. Am. Sec. Bank*, 494 A.2d 1333, 1337 (D.C. 1985) (describing taxes as "for the purpose of raising revenue"); *Gunby v. Yates*, 102 S.E.2d 548, 550 (Ga. 1958) ("A tax is an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes . . . ."); *State v. Medeiros*, 973 P.2d 736, 742 (Haw. 1999) (holding that a tax does not apply to direct beneficiaries of a service, does not directly defray the costs of a particular service, or is not necessarily proportionate to the benefit received); *BHA Inv., Inc. v. State*, 63 P.3d 474, 479 (Idaho 2003) ("[T]axes are solely for the purpose of raising revenue."); *Crocker v. Finley*, 459 N.E.2d 1346, 1350 (Ill. 1984) ("[A] charge having no relation to the services rendered, assessed to provide general revenue rather than compensation, is a tax."); *Ennis v. State Highway Comm'n*, 108 N.E.2d 687, 693 (Ind. 1952) ("Taxes are levied for the support of government . . . ."); *City of Hawarden v. US W. Commc'ns, Inc*., 590 N.W.2d 504, 507 (Iowa 1999) (holding that an exaction intended to raise revenue is a tax); *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n,* 956 P.2d 685, 708 (Kan. 1998) ("The primary purpose of a tax is to raise money, not regulation."); *Krumpelman v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 314 S.W.2d 557, 561 (Ky. 1958) ("[T]axes are generally held to be a rate or duty levied each year for purposes of general revenue . . . ."); *Audubon Ins. Co. v. Bernard,* 434 So.2d 1072, 1074 (La. 1983) (holding that "revenue is the primary purpose" of a tax); *Bd. of Overseers of the Bar v. Lee*, 422 A.2d 998, 1004 (Me. 1990) ("[T]axes are primarily intended to raise revenue . . . ."); *Workmen's Comp. Comm'n v. Prop. & Cas. Ins. Guar. Corp.*, 570 A.2d 323, 325 (Md. 1990) (finding that taxes "are intended to raise revenue for public purposes"); *Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1105 (Mass. 1984) (finding that a charge "collected not to raise revenues" but for another purpose is not a tax); *Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (Mich. 1998) (holding that a charge with "a revenue-raising purpose" is a tax); *Cty. Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 686 (Minn. 1997) (holding that a charge "expressly intended to raise revenue" is a tax); *Leggett v. Mo. State Life Ins. Co.*, 342 S.W.2d 833, 875 (Mo. 1961) (finding that a charge is not a tax unless "the object of [it] is to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures"); *Monarch Mining Co. v. State Highway Comm'n*, 270 P.2d 738, 740 (Mont. 1954) ("Taxes are levied for the support of government, and their amount is regulated by its necessities."); *Douglas Cty. Contractors Ass'n v. Douglas Cty.*, 929 P.2d 253, 257 (Nev. 1996) (holding that a charge with the "true purpose . . . to raise revenue" is a tax); *Horner v. Governor*, 951 A.2d 180, 183 (N.H. 2008) (finding that a tax must be "intended to raise additional revenue" not "solely to support a governmental regulatory activity made necessary by the actions of those who are required to pay the charge"); *Resolution Trust Corp. v. Lanzaro*, 658 A.2d 282, 290 (N.J. 1995) (finding that a tax "is intended primarily to raise revenue"); *Scott v. Donnelly*, 133 N.W.2d 418, 423 (N.D. 1965) ("If the primary purpose is revenue, it is a tax; on the other hand, if the primary purpose is regulation, it is not a tax."); *Olustee Co-op Ass'n v. Okla. Wheat Utilization Research and Market Dev. Comm'n*, 391 P.2d 216, 218 (Okl. 1964) (citing definition of tax in part including purpose "to provide public revenue"); *Woodward v. City of Philadelphia,* 3 A.2d 167, 170 (Pa. 1938) ("[T]axes are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes, and to defray the necessary expenses of government."); *State v. Foster*, 46 A. 833, 835-36 (R.I. 1900) ("If the imposition of such a condition has for its primary object the regulation of the business, trade, or calling to which it applies, its exercise is properly referable to the police power; but if the main object is the obtaining of revenue, it is properly referable to the taxing power."); Brown v. County of Horry, 417 S.E.2d 565, 568 (S.C. 1992) (citing with approval the standard that "a tax is an enforced contribution to provide for the support of government . . . ."); *Valandra v. Viedt*, 259 N.W.2d 510, 512 (S.D. 1977) ("[T]axes are imposed for the purpose of general revenue . . . ."); *Memphis Retail Liquor Dealers' Ass'n v. City of Memphis*, 547 S.W.2d 244, 245-46 (Tenn. 1977) ("If the imposition is primarily for the purpose of raising revenue, it is a tax . . . ."); *Hurt v. Cooper*, 110 S.W.2d 896, 899 (Tex. 1937) (finding that a tax is a charge with the "primary purpose" of "raising of revenue"); *V-1 Oil Co. v. Utah State Tax Comm'n*, 942 P.2d 906, 911 (Utah 1996), *vacated on other grounds*, 942 P.2d 915 (Utah 1997) ("Generally speaking, a tax raises revenue for general governmental purposes . . . ."); *Marshall v. N. Va. Transp. Authority*, 657 S.E.2d 71, 77-78 (Va. 2008) ("We consistently have held that when the primary purpose of an enactment is to raise revenue, the enactment will be considered a tax, regardless of the name attached to the act."); *City of Spokane v. Spokane Police Guild*, 553 P.2d 1316, 1319 (Wash. 1976) ("[I]f the primary purpose of legislation is regulation rather than raising revenue, the legislation cannot be classified as a tax even if a burden or charge is imposed."); *City of Huntington v. Bacon*, 473 S.E.2d 743, 752 (W. Va. 1996) ("The primary purpose of a tax is to obtain revenue for the government . . . ."); *State v. Jackman*, 211 N.W.2d 480, 485 (Wis. 1973) ("A tax is one whose primary purpose is to obtain revenue . . . .").

The Proposed Regulation would exclude taxes and fees only if they are "imposed on consumers by a Federal, State, or local government agency, unit or department," and not any charge "that the government imposes on a business and the business chooses to pass on to consumers." As an initial matter, this division of the world into (1) taxes and fees imposed on consumers (technically, taxes on consumers that are collected by businesses) and (2) taxes and fees imposed on a business that the business chooses to pass on to consumers misses at least two further categories: (3) taxes and fees imposed on a business that the statute allows, or even requires, to be passed on to consumers and (4) taxes and fees imposed on a business where the government prohibits it from being passed on to consumers. A logical definition of "government charges" should acknowledge the existence of (3) and (4), and draw the line between (3) and (4), not between (1) and (2).

Number (3) includes a lot of taxes, and its exclusion from the definition used in the Proposed Regulation would mean even state sales and use taxes, excise taxes on purchases on certain goods by consumers, and business taxes expected by states to be passed forward to consumers would sometimes be encompassed by the Proposed Regulation and sometimes not, entirely because of formalistic structures of those taxes that those expected to comply with this Proposed Regulation may be totally unaware of. For example:

- Arizona, California, Hawaii, and New Mexico structure their sales taxes as taxes on the business, as measured by its gross receipts.[5] The consumer sees no difference between sales taxes in these states versus other states, as it still appears on the receipt and is collected the same way. No economist would argue that there is a material difference in the incidence or economic burden in these states' sales taxes versus other states'. But this Proposed Regulation would exclude these states' sales taxes from the definition of "Government Charges" because they are not formally imposed on consumers. The U.S. Supreme Court has upheld the states' authority to structure their taxes in this way, so a federal regulation attempting to pre-empt this power may violate the Tenth Amendment.

- No one would dispute that gasoline excise taxes are "government charges" and that consumers purchasing gasoline bear the economic incidence of those taxes. However, these taxes are formally imposed on the *sellers* of motor fuels, not consumers. *See* 26 U.S.C. § 4041(a)(1)(A)(i). They would therefore strangely not

[5] The Arizona sales tax is called the Transaction Privilege Tax, the Hawaii sales tax is called the General Excise Tax, and the New Mexico sales tax is called the Gross Receipts Tax. The California use tax, unlike the sales tax, is imposed on consumers and so, confusingly, whether this Proposed Regulation would consider it a tax would depend on whether the buyer is in California or not.

be within the scope of "Government Charges" under this Proposed Regulation.

- The vast majority of states define their hotel occupancy taxes as imposed on amounts received by the hotel operator; it is only a minority of states (six states and D.C.) that impose it on amounts paid by the consumer. This is even after extended and generally unsuccessful litigation by states seeking to expand the scope of hotel taxes to other charges without modifying their statutes to change the incidence of tax. Although addressing hidden hotel charges is one stated objective of the Proposed Regulation, and even though most everyone understands that consumers bear the burden of hotel taxes, this Proposed Regulation would bizarrely not consider most hotel taxes to be government charges because it bases its definition on whether or not the tax is formalistically imposed on consumers. The Commission should acknowledge that states impose their hotel taxes on consumers, and not operators, and acknowledge that the Proposed Regulation would in fact not apply to hotel-related transactions in most states.

- Nearly all U.S. states with sales tax *prohibit* retailers from including sales taxes, including taxes collected from both suppliers and consumers, in the sales price.[6] This restriction on absorption is common enough to be remarked on by visitors familiar with Value Added Taxes (VATs) where transaction taxes are included in the price (but separately stated on the receipt). There may be a constructive policy purpose in debating the merits and drawbacks of tax-exclusive pricing or tax-inclusive pricing, but to the extent the Proposed Regulation excludes only government charges imposed on consumers, it would directly conflict with these state laws directing retailers to not include in prices these government charges

[6] *See, e.g.*, Ala. Code § 40-23-26(b); D.C. Code Ann. § 47-2014; Fla. Stat. § 212.0305; Ga. Code § 48-8-36; Ill. General Information Letter ST 01-0173-GIL (Sep. 25, 2001) (retailer advertising "TAX FREE DAY!!," guilty of a misdemeanor); Ind. Admin. Code tit. 6, 2.5-9-4; La. Rev. Stat. § 47:304(F); Md. Code Tax-Gen. § 13-1017; Mass. Gen. L. ch. 64H, § 23; N.C. Gen. Stat. § 105-164.9; N.D. Cent. Code § 57-40.2–08; N.Y. Tax Law § 1133(d); Okla. Stat. tit. 68, § 402; 72 Pa. Stat. § 7268; Tex. Tax Code § 151.704; Va. Code § 58.1-626; Wash. Rev. Code §82.08.050(9); Wash. Admin. Code §458-20-107(3) (Washington permits advertising prices as tax-included only under specified conditions); Washington Tax Decision Det. No. 14-0409 (Dec. 23, 2014); W. Va. Code § 11-9-7; Wis. Stat. § 77.52(4). The Louisiana statute allows a dealer to specify in the advertising that it is remitting the tax and furnishes the purchaser with written evidence. *But see* N.J. Rev. Stat. § 54:32B-14(f), (permitting vendors to advertise that they will pay sales tax for their customers). *See also* Jared Walczak, "Proposed Junk Fee Rule Would Create Inadvertent Tax Headaches," Tax Foundation, Feb. 2024, https://taxfoundation.org/blog/junk-fees-taxes-biden-administration-ftc/ ("California, meanwhile, allows including the sales tax in the listed price, but only if they post signage reading 'All Prices Include Sales Tax.' Meanwhile, for certain transactions the state requires price displays that excludes all taxes and government-imposed fees, creating a quandary. The federal government might require California sales tax to be included in the initial pre-tax price, while California might ordinarily allow that if advertised as such, but also requires a price display that excludes California sales tax. All of this is a lot to ask of retailers, and particularly of small remote sellers, even when the requirements aren't directly in conflict.").

collected by businesses or even (in Arizona, California, Hawaii, and New Mexico) owed by business.

An artificial distinction between charges formally imposed on consumers versus not imposed on consumers, rather than treating all charges the same, would require every retailer in America to engage in a confusing and massive alteration of business sales and payment processing systems. Retailers would have to understand that they must differentially treat certain states' sales taxes, excise taxes, and other charges based entirely and counterintuitively on whether the authorizing statute imposes the charge on consumers or on business. This may result in certain charges being required to be included before checkout and others being required to be included at checkout.

Nonetheless, the Commission proposes a regulation which broadly applies to all sectors of the economy. Despite promulgating a massive change to the modern-day American market, the Commission has not conducted an analysis of this Proposed Regulation's benefits and costs across different economic sectors, aside from just three industries. Given the widespread economic and legal effects this Proposed Regulation would have, the FTC should revise its estimate of the compliance costs to include costs to implement new checkout software and practices for every retailer in America, before proceeding with a final regulation.

Recommendation I:

The Proposed Regulations should give no special protection to government charges. So, if that aspect is inseparable from the underlying proposal, the Proposed Regulation should be dropped. Alternatively, the Proposed Regulation should apply equally to all charges, without excluding taxes and fees and certainly without excluding only certain taxes and fees. Alternatively, the Proposed Regulation should instead define "Government Charges" as "any fees or charges imposed by the government on consumers and on businesses where the imposition requires or allows or does not expressly forbid the business to pass the fee or charge onto consumers."

B. The Proposed Regulation is Overbroad

The purported application of the Proposed Regulation is overbroad. Instead of applying the Proposed Regulation to specific industries, it adopts an one-size-fits-all mentality. Such an approach is not only unnecessary, but will lead to widespread economic consequences.

The Proposed Regulation's definition of "Total Price," when applied, is not practical for modern-day businesses. Under the Proposed Regulations, "Total Price" is the "maximum total of

all fees or charges a consumer may pay for a good or service and any mandatory Ancillary Good or Service" but does not include "Shipping Charges and Government Charges." The Proposed Regulation defines "mandatory Ancillary Good or Service" as an "additional good[] or service[] offered to a customer as part of the same transaction" which is necessary for the customer's acquisition thereof. Although this definition may work in some instances, the Commission's broad application of the term is problematic when applied to different industries.

1. Consumers' Differing Choices Affect the Total Price

As consumers interact with business and purchase goods, they make decisions which can change what fees are to be applied and what the Total Price will be. This is especially true for online business. Depending upon a consumer's choices, the fees *chosen* by a customer might be considered a "mandatory" Ancillary Good or Service under the Proposed Regulations. Oftentimes, the elective fee is still necessary for a customer's acquisition of the goods or services, and thus would be considered a mandatory Ancillary Good or Service per the Proposed Regulations. "Mandatory-ness" is often in the eye of the beholder and different for different consumers depending on individual circumstances.

Stated simply, variable pricing is not always an unfair or deceptive fee. Rather, variable fees reflect some consumers' choices which may be necessary to that consumer's purchase, while not necessary for others.

But under the Proposed Regulation, 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. Customers' desires vary depending on the individual needs of the customer at that moment. However, under the Proposed Regulation, companies would engage in "an unfair and deceptive practice" if one customer needs a mandatory ancillary good or service under her circumstances which another customer does not need.

<u>Recommendation II:</u>

Given that businesses are unable to predict consumers' choices, a broad application of the term "Total Price" will not achieve the Commission's desired results of ending unfair and deceptive fees. The definition and usage of the term "Total Price" should be modified so that ancillary goods or services are not included in the definition. The Commission should also either justify a conclusion that discouraging variable pricing is broadly beneficial to consumers, or remove all elements of the Proposed Regulation that discourage variable pricing.

2. The Proposed Regulation Creates Compliance Conflicts with Existing Laws on Third-Party Marketplaces

Nearly every state has recently enacted new laws regulating tax collection by marketplace facilitators, a recognition of a fast-growing area of the economy where independent sellers interact with buyers on a platform provided by a separate operator. These third-party marketplaces, such as eBay, Etsy, or Amazon Marketplace, may charge a fee on the transaction or the seller separate from the price agreed to by the buyer and seller. The fees may be flat per time period, flat per transaction, or variable by price.

A requirement that "total price" only be displayed would harm consumers who value transparency and who may expect to see the purchase price and platform fee stated separately. In some cases, the prices are set by negotiation or auction, and preventing the prospective buyer from knowing which party (seller or marketplace provider) is charging which amount would place the buying consumer at a disadvantage. Transparency, which in this case means not requiring total price be displayed in third-party marketplace situations, empowers consumers.

"Total price" may also be difficult or impossible to implement with a third-party marketplace because while the platform may control the display of prices, it is sellers and not the platform that sets the prices. Although the Proposed Regulation seems to recognize this burden, it places the onus of compliance on the corporations, ignoring the complications which will likely arise. This advanced level of communication between differing corporations will require a mass re-integration of companies' pricing systems and is not only costly, but will also take a lengthy amount of time to implement.

<u>Recommendation III:</u>

There is high likelihood the Proposed Regulation would pre-empt or conflict with numerous recent state laws regulating marketplace facilitator practices. The Commission should rewrite the Proposed Regulation to exclude variable pricing structures and third-party marketplaces from its prohibitions. At the very least, the Commission should determine which states have marketplace facilitator laws whose regulations (especially on responsibility for tax remittance) would potentially be pre-empted or create a conflict. The Commission should also calculate the consumer benefits and costs associated specifically with the Proposed Regulation's discouragement of variable fees in favor of flat fees, as there has been no showing that a combination of flat and variable fees is harmful to consumers.

<u>Recommendation IV:</u>

Given the economic stakes at serious risk, the Commission should conduct an extensive review of what the compliance cost would be. As the Proposed Regulation stands, the Commission glosses over the costs associated with implementing the Proposed Regulation, absent a few specific industries. The Commission should also conduct and release an industry-by-industry analysis of the benefits and costs of the Proposed Regulation. If this essential understanding of the impacts of the Proposed Regulation is not possible, the Commission should not move forward with the Proposed Regulation.

III. Conclusion

The Proposed Regulation, as written, is overbroad and poses significant compliance, legal, and economical risks. Regulations should acknowledge existing case precedent and state and federal laws. Likewise, regulations should contemplate the drastic effects they would have on companies before coming into effect. We believe the recommendations we have offered will serve the goal of alleviating any ambiguity in the statute while protecting taxpayers.

NTUF is grateful for your consideration. If you have any questions or concerns, please do not hesitate to contact us.

Sincerely,
Joe Bishop-Henchman
Executive Vice President, National Taxpayers Union Foundation

NATIONAL TAXPAYERS UNION

Blog

Biden Touts Junk Policy Towards "Junk" Fees

by Pete Sepp March 05, 2024

In the modern political world, presidential State of the Union addresses often resemble recitations of wish lists, interspersed with appropriate pauses for applause from the audience assembled in the House of Representatives chamber. According to media accounts, so it will be with President Biden's speech this coming Thursday.

Taxpayers should beware of the hidden price tag behind the President's words, especially a "Strike Force" (!) he will mention that was recently formed against what the White House has termed "price gouging" and "junk fees." His unfortunate choice of intimidating words aside, the policies Biden proposes amount to an Administration-wide assault on commonly accepted (and often already regulated) fees and charges associated with everything from car and home purchases to bank overdrafts, from past due payments on credit cards to hotel accommodations.

The Consumer Financial Protection Bureau (CFPB), the Federal Communications Commission (FCC), and the Federal Trade Commission (FTC) are just a few of the agencies issuing rulemakings in this regard. If successful, this massive regulatory overreach would reduce the services customers have come to count on, while leaving taxpayers to clean up the mess.

The problem with this effort starts with the Biden Administration's varying definitions of what a "junk fee" is. One of the more articulate, but still vague attempts appeared in a White House document last year, which referred to "unnecessary, unavoidable, or surprise charges that inflate prices while adding little to no value."

Yet, this very interpretation would contradict the actions of CFPB's rulemaking that proposes price controls on overdraft fees for "very large financial institutions" ($10 billion or more in assets). The agency would force affected banks to calculate the break-even cost of an overdraft and set the fee accordingly, or adopt government-mandated fixed rates (contemplated at a range of $3 to $14).

This type of micromanagement is silly on its face, for several reasons. Overdraft charges are currently well-disclosed under federal and state laws. Perhaps that is one reason why both the average charge, at $35, as well as total overdraft revenue, are heading downward dramatically without further government intervention. Bank of America has slashed its fee to just $10, which will soon put pressure on others to either do the same or offer some other kind of benefit to lure customers to their services.

Not content to leave well-functioning markets alone, CFPB insists that Americans are still insufficiently informed about overdraft fees. Yet there is no "surprise" to the consumer who reads the terms of their bank

account. Furthermore, overdraft charges often have to cover more than just the cost to the bank of the individual's mistake. An overdraft may occur due to identity theft or fraud, necessitating investments from the bank in network-wide security.

An additional consideration is the incentive behind overdraft charges – to protect customers who exercise care in maintaining proper balances in their accounts from paying for others' mistakes. Most account holders would find plenty of "value" in such charges, precisely because they do not raise the "price" of the account itself by forcing banks to charge everyone higher monthly service fees. In this light, overdraft fees hardly seem "unnecessary."

Ironically, government attempts to manipulate overdraft charges could penalize moderate-income consumers who are trying to build good financial histories that could improve their access to credit and other tools. As *Washington Post* financial columnist Megan McCardle noted, previous experience shows that overdraft fees help to balance the costs of offering free checking and low minimum balance accounts:

> This seems to have happened in the past, judging from what we saw when federal regulators preempted some state fee caps in 2001. According to researchers from the New York Fed, the exempted banks both raised overdraft fees and expanded available overdraft credit, while lowering minimum balance requirements. The rate at which checks were returned for insufficient funds declined by 15 percent. And the share of low-income households with a bank account rose by 10 percent, suggesting that minimum balance requirements had kept those households from opening accounts.

But setting all these arguments aside, why not simply conduct a trial run of this regulatory scheme? After all, it only affects the biggest banks. Wrong again. In January, three banking associations – representing larger banks, credit unions of all asset classes, and independent community banks – warned CFPB that its rulemaking would impact every depositor in America. If the agency wields its power to crack down on "unfair, deceptive, or abusive" practices, by definition that authority cannot be selectively applied by the size of the financial institution. If, on the other hand, CFPB tries to use this power to simply subject overdraft fees to new disclosure rules, the three associations observed that "all banks would face market pressure to conform their practices to the Bureau's rule. … CFPB therefore erred in not conducting a small-business impact analysis before even issuing its proposed changes."

Many of these same arguments apply to CFPB's attempt to force down credit-card late payment fees, with a rule that just became final this week. Writing for NTU in DC Journal last year, Alex Milliken explained:

> Late fees act as an incentive to make payments on time and, therefore, help encourage borrowers to improve their credit scores. Currently, the law allows for these fees to be up to $30 for the first fee and up to $41 for subsequent late payments, but the proposed rule would limit a late-payment fee to just $8 with no additional fee for future delinquencies.
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> Estimates say this will remove $9 billion yearly from the industry. While some might herald this a victory in the 'Junk Fees War,' it will certainly have a devastating effect on the availability of credit. Those with low credit scores stand to lose the most by this new rule. By implementing a price control on late fees, the CFPB will be directly responsible for reducing access to credit because credit issuers must examine their product offerings and eliminate as much risk as possible from their books.

Here again, late fees, which have been well-disclosed and capped for some 15 years, are part of a system of checks and balances that encourage sound financial management from the household level all the way up to the c-suite. If the government tinkers with this system, the services Americans expect, such as solid card security or rewards, may suffer as companies invest fewer resources in those areas in anticipation of tighter rules (and more costs) from delinquent payments. In an industry already facing unwise price caps on "interchange" and routing

fees, CFPB's meddling is more unwelcome news.

But CFPB is not the only regulatory entity out of its depth. Recently the Federal Trade Commission (FTC) issued a rulemaking to stamp out "unfair and deceptive fees" in a variety of consumer-facing situations including prepaid calling cards, funerals, hotels, membership programs, and product discounts. One flaw NTU's research arm, NTU Foundation, immediately identified was FTC's clumsy attempt to exclude taxes and government charges from the dictates of the rulemaking. According to NTU Foundation's filing with FTC:

> The Proposed Regulation would exclude taxes and fees only if they are "imposed on consumers by a Federal, State, or local government agency, unit or department," and not any charge "that the government imposes on a business and the business chooses to pass on to consumers."

This strange distinction would overturn most of the longstanding U.S. system that defines how a tax, penalty, or charge operates, versus who is obligated to remit or collect it. As a practical matter, NTU Foundation notes, the FTC's untenable framework would "require every retailer in America to engage in a confusing and massive alteration of business sales and payment processing systems. Retailers would have to understand that they must differentially treat certain states' sales taxes, excise taxes, and other charges based entirely and counterintuitively on whether the authorizing statute imposes the charge on consumers or on business."

Assuming there is any forethought to the consequences of the rulemaking on the part of the government, perhaps it is that "making businesses pay" government charges somehow enhances "fairness" in the tax system. Nothing could be further from reality. Whether the business passes along the costs of a tax, penalty or charge to consumers, workers, and shareholders, or whether those same consumers, workers, or shareholders shoulder those costs directly, is economically immaterial. The FTC's legal experts and economists should have known this and conducted an honest cost-benefit analysis before ever unleashing this rulemaking on the American people. Here, the *FTC itself is engaging in "unfair and deceptive" practices surrounding fees*.

Thomas Kingsley, Director of the Financial Services Policy with American Action Forum, recently encapsulated the current rulemaking malaise when he wrote, "Populism is not an effective way to regulate markets, and going after socially disfavored targets for providing goods and services within the bounds set by federal regulators does everyone involved a disservice, not least consumers themselves."

Taxpayers also face this disservice. The more that banks, card issuers, and other service providers are squeezed by overzealous government and reduce the attractiveness of their offerings, the louder the cries will be for the government to step in with progressively worse "solutions." This includes mission expansion for taxpayer-backed lending giants like Fannie Mae and Freddie Mac, banking through the U.S. Postal Service, direct federal assistance and looser credit for borrowers, and more debt forgiveness programs such as the costly student loan write-offs the Administration has repeatedly heaped onto the backs of taxpayers.

The Biden Administration's crusade against "junk fees" is more aptly described as "junk policy," one for which taxpayers should not foot the bill.