February 7, 2024

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

Via Electronic Submission:
Https://www.regulations.gov

Re: Unfair or Deceptive Fees NPRM, R207011

Dear Chair Khan:

Thank you for the opportunity to submit comments regarding the proposed rule on unfair or deceptive practices relating to fees for goods or services (also known as "junk fees"). We appreciate the focus by the Federal Trade Commission (FTC) on these issues. The undersigned organizations focus on a range of health and consumer protection issues, including medical debt, disability rights, health equity, and economic justice.

We commend the FTC for promulgating a proposed rule that includes the health industry. In particular, we focus on the application of the proposed rule to "facility fees," which are charges that ostensibly cover operational expenses of hospitals.[1] Facility fees are billed separately from fees for the services of physicians, nurse practitioners, and other health care professionals.[2] As hospitals acquire physician practices and other previously independent providers, patients are seeing facility fee charges more frequently – including for services in freestanding physician offices and telehealth services, for example. The Biden Administration has expressed concern about the increase in such facility fees.[3]

Notably, facility fees are increasing faster than other categories of health care spending.[4] Patients are often surprised by facility fees, which can significantly increase out-of-pocket costs and lead to medical debt. As the FTC seeks to limit unfair or deceptive fees – particularly those that provide little or no value to the consumer – it is appropriate and timely to include facility fees, which contribute to rising health care costs and the medical debt crisis facing our country.

[1] *See* Georgetown University, "Protecting Patients from Unexpected Outpatient Facility Fees: States on the Precipice of Broader Reform," July 2023, https://georgetown.app.box.com/v/statefacilityfeereport.
[2] *Id.*
[3] White House, "FACT SHEET: President Biden Announces New Actions to Lower Health Care Costs and Protect Consumers from Scam Insurance Plans and Junk Fees as Part of 'Bidenomics' Push," July 7, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/07/fact-sheetpresident-biden-announces-new-actions-to-lower-health-care-costs-and-protect-consumers-from-scam-insurance-plans-and-junk-fees-as-part-of-bidenomics-push/ ("The Administration is also concerned about an increase in patients being charged "facility fees" for health care provided outside of hospitals, like at a doctor's office.").
[4] Georgetown University, "Protecting Patients from Unexpected Outpatient Facility Fees: States on the Precipice of Broader Reform," at 8, July 2023.

In sum, we urge the FTC to protect patients from hidden, misleading, and excessive facility fees. In Section I, we provide background on how facility fees are charged, the recent increase in facility fees for outpatient and emergency services, and the impact of facility fees on patients. In Section II, we address the FTC's specific questions on the proposed rule, focusing on application of the proposed rule across industries and our remaining concerns about facility fees that patients cannot reasonably avoid. In Section III, we outline how the FTC's proposed rule applies to facility fees for various services. In Section IV, we recommend that the FTC investigate the rising costs of facility fees, including the cost of facility fees in emergency departments and how facility fees are billed. Finally, in Section V, we recommend that the FTC initiate a separate rulemaking on facility fees.

Finally, we do not think there are any disputed issues of fact for this proposed rule. However, if there are hearings conducted regarding these rules, we wish to participate in those hearings and engage in cross-examination.

I. Background on Facility Fees

a. Facility fees are imposed in addition to fees for professional services, and patients are often surprised by these charges.

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

Independent physician offices do not charge facility fees. When physician offices are acquired by hospitals or health systems, however, those offices may begin adding a facility fee on top of the regular physician charges. This additional fee often results in confusion for patients when they visit a longstanding provider that has been acquired by a health system, many times unbeknownst to the patient.[5] Indeed, the Biden Administration has emphasized: "These fees are often a surprise for consumers."[6]

Patients are also frequently surprised by facility fees for telehealth services or visits that do not involve specialized equipment.[7] News stories have documented many egregious examples. For instance:

[5] *Id.* at 9.
[6] White House, "FACT SHEET: President Biden Announces New Actions to Lower Health Care Costs and Protect Consumers from Scam Insurance Plans and Junk Fees as Part of 'Bidenomics' Push," July 7, 2023, https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/07/fact-sheetpresident-biden-announces-new-actions-to-lower-health-care-costs-and-protect-consumers-from-scam-insurance-plans-and-junk-fees-as-part-of-bidenomics-push/.
[7] Georgetown University, "Protecting Patients from Unexpected Outpatient Facility Fees: States on the Precipice of Broader Reform," at 8, July 2023.

- A *telehealth evaluation* of a three-year-old at his home – during which the specialists appeared to be calling from their homes as well – resulted in a facility fee of $847.35, on top of the professional charges.[8]
- In another case, a *45-minute consultation* with a child psychologist resulted in a $503 facility fee.[9] "There were no vital signs, there were no titanium screws, there was no surgery. This was literally just a lamp and a couch," the child's father noted.[10]

We also emphasize that facility fees may impose the greatest burden on historically disadvantaged communities. For instance, Hispanic, American Indian and Alaska Native, and Black individuals are most likely to be uninsured[11] and therefore bear the full cost of facility fees. Further, Black and Hispanic individuals are *less* likely to report having a primary care provider and *more* likely to report receiving routine healthcare in an emergency department,[12] where facility fees are significant and unpredictable.[13] Addressing facility fees is an important step in the direction of health equity.

b. Facility fees are increasing as hospitals acquire previously independent practices, and facility fees encourage health care consolidation.

Patients are increasingly exposed to facility fees because of vertical integration in the health care sector. For instance, between July 2012 and January 2018, hospital ownership of physician practices grew by 124 percent.[14] By 2022, over half of all physicians in the country were employed by hospitals or health systems.[15] Indeed, the FTC recently noted: "Decades of corporate consolidation has contributed to soaring costs across health care markets, with Americans now paying more for everything from life-saving medicines to a hospital visit."[16]

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[8] Modern Healthcare, "States Crack Down on Facility Fees Charges to Telehealth, Clinic Patients," April 3, 2023, https://www.modernhealthcare.com/digital-health/hospital-facility-fees-telehealth-clinic-patients-colorado-connecticut.

[9] KDVR, "Dad Charged $503 'Facility Fee' for Kid's Doctor Visit," updated Jan. 21, 2022, https://kdvr.com/news/problem-solvers/facility-fee-surprise-medical-billing/?ipid=promo-link-block1.

[10] *Id.*

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

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

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

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

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

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

When a hospital acquires a previously independent physician practice, the hospital may then impose facility fee charges for services at the physician offices – on top of the regular professional charges. For instance, when one patient received her annual steroid injection in 2021, which previously cost her about $30, she was shocked to find that her bill now included a $1,262 "facility fee."[17] The only change from previous years was that the hospital had "moved" the infusion clinic from an office-based practice to a "hospital-based setting" – even though the services were provided in the same medical office building, which was not a hospital.[18]

Addressing facility fees is in line with the FTC's renewed focus on consolidation and rising health care costs.[19] Significantly, facility fees *encourage* hospitals to acquire previously independent practices. "In fact, the opportunity to charge a facility fee is one incentive for hospitals to acquire these [physician] practices, which then leads to higher prices for patients, employers, and insurers," the Health Care Cost Institute explained.[20] Similarly, Consumer Reports has noted that patients are increasingly charged facility fees for care provided *outside* a hospital "because hospitals are rapidly building or buying up not only doctor practices but also urgent-care centers, walk-in clinics, and standalone surgery complexes - pretty much all the places one might go to get healthcare."[21]

c. Outpatient facility fees are rising faster than other health care costs, and they impose significant out-of-pocket burdens on patients.

Facility fees appear to be driving increases in outpatient health care costs. Across a range of services, commercial payments are higher for ambulatory services delivered in hospital outpatient departments than for services delivered in physician offices.[22] Facility fees appear to be an important factor in these price differences.[23]

Significantly, outpatient facility fees are increasing faster than other categories of health care spending.[24] One study found that facility fees for outpatient surgery increased by 53%

[17] KFF Health News, "Her Doctor's Office Moved One Floor Up. Her Bill Was 10 Times Higher." March 6, 2021, https://kffhealthnews.org/news/article/bill-of-the-month-hospital-facility-fee-outpatient-arthritis-injections/.
[18] *Id.; see also* Consumer Reports, "The Suprise Hospital Fee You May Get Just for Seeing a Doctor," June 13, 2019, https://www.consumerreports.org/fees-billing/surprise-hospital-fee-just-for-seeing-a-doctor-facility-fee/ (describing a patient who received an X-ray and a cortisone shot at his doctor's office in less than 30 minutes - but was charged a $1,375 facility fee because - unbeknownst to the patient - the doctor was working for a hospital).
[19] FTC, "FTC, DOJ and HHS Work to Lower Health Care and Drug Costs, Promote Competition to Benefit Patients, Health Care Workers," Dec. 7, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-doj-hhs-work-lower-health-care-drug-costs-promote-competition-benefit-patients-health-care.
[20] Health Care Cost Institute, "Facility Fees and How They Affect Health Care Prices," June 2023, https://healthcostinstitute.org/images/pdfs/HCCI_FacilityFeeExplainer.pdf.
[21] Consumer Reports, "The Suprise Hospital Fee You May Get Just for Seeing a Doctor," June 13, 2019, https://www.consumerreports.org/fees-billing/surprise-hospital-fee-just-for-seeing-a-doctor-facility-fee/
[22] Georgetown University, "Protecting Patients from Unexpected Outpatient Facility Fees: States on the Precipice of Broader Reform," at 9, July 2023.
[23] *Id.*
[24] *Id.* at 8.

between 2011 and 2017, as compared with *no change* in professional fees.[25] This raises questions about whether facility fees are truly related to operational costs.

When facility fees are added or increased, patients often bear a significant financial burden. For instance, the same study found a 200% increase in predicted out-of-pocket expenses for procedures performed in hospital outpatient departments as compared with those performed in physician offices.[26] For uninsured patients, facility fees have a direct impact on costs. Even for insured patients, however, facility fees can impose significant costs because many insurers impose separate cost-sharing responsibilities for professional and facility fees.[27] As *Health Affairs* explained: "However a plan's cost sharing is structured, the addition of a hospital facility fee on top of a physician's fee for care that can be safely provided in a physician's office leads to higher out-of-pocket costs for patients and frequently higher costs for insurers than is necessary."[28]

d. Facility fees are also rising sharply in emergency departments, where patients often have no ability to "shop around" to avoid these charges.

Facility fees are also rising sharply for emergency services. Regardless of the services provided, most emergency departments also charge a facility fee – which is often described as "the cost for walking in the door."[29] These facility fees are particularly concerning because patients cannot comparison shop when they are facing medical emergencies.

From 2004 to 2021, emergency department facility fees for evaluation and management services grew by 531%, as compared to a growth rate of 132% for professional fees during that time.[30] Researchers found: "The rapid overall growth in emergency department evaluation and management costs (relative to other outpatient settings including urgent care and physician offices) appears to be driven primarily by rapidly rising facility fees."[31]

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[25] Billig JI, Lan WC, Chung KC, Kuo CF, Sears ED. The Increasing Financial Burden of Outpatient Elective Surgery for the Privately Insured. Ann Surg. 2020 Sep 1;272(3):530-536. doi: 10.1097/SLA.0000000000004201. PMID: 32740255; PMCID: PMC8015353. https://pubmed.ncbi.nlm.nih.gov/32740255/.

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

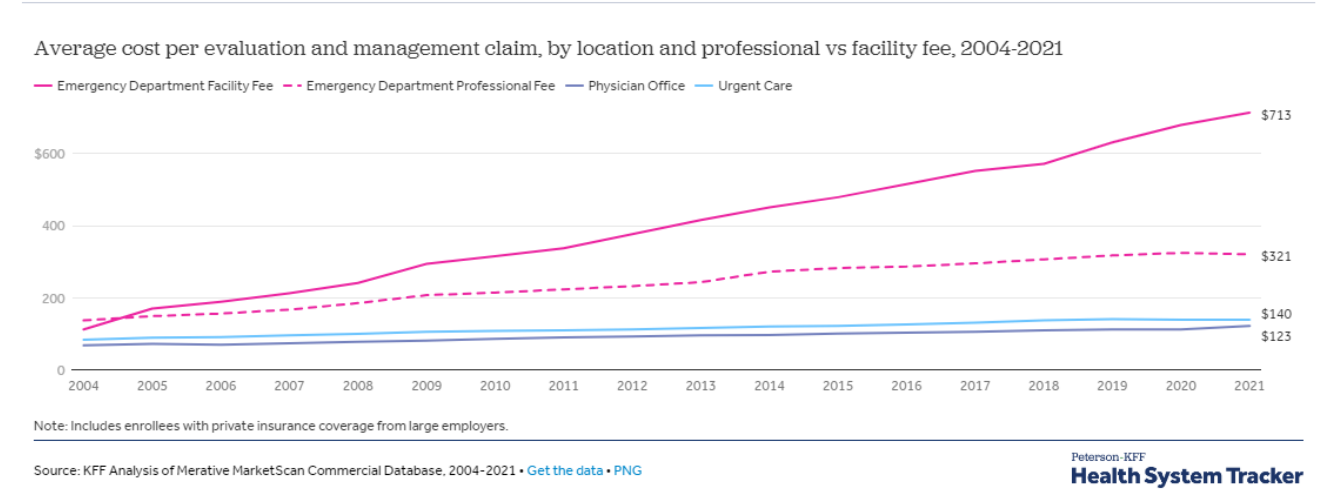
[27] Health Affairs, "Facility Fees 101: What is all the Fuss About?" Aug. 4, 2023, https://www.healthaffairs.org/content/forefront/facility-fees-101-all-fuss.

[28] *Id.*

[29] *E.g.,* Vox, "I read 1,182 emergency room bills this year. Here's what I learned." Dec. 18, 2018, https://www.vox.com/health-care/2018/12/18/18134825/emergency-room-bills-health-care-costs-america.

[30] Peterson-KFF Health Systems Tracker, "How do facility fees contribute to rising emergency department costs?" March 27, 2023, https://www.healthsystemtracker.org/brief/how-do-facility-fees-contribute-to-rising-emergency-department-costs/.

[31] *Id.*



Facility fees vary widely based on how the hospital codes the complexity of the visit.[32] Nationwide, the median facility fee for self-pay patients[33] was $160.78 for emergency department visits coded as Level 1, while the median facility fee for self-pay patients was $1,097.43 for visits coded as Level 5.[34] Across all levels, for-profit hospitals charged significantly higher self-pay prices for facility fees than nonprofit hospitals.[35] For Level 5 visits, for-profit status was associated with an average *additional* facility fee charge of $1,217.88 for self-pay patients.[36]

For patients, emergency department charges are highly unpredictable, largely driven by facility fee differences. Notably, many facility fees appear to be unrelated to the patient's use of hospital facilities.

- One California hospital charged two completely different amounts - $3,561 and $6,056 – for two visits on the same day by the same child for the same injury: a dislocated elbow.[37]
- A mother took her toddler to the emergency room for a burn, where a nurse took the toddler's vital signs and said a surgeon would inspect the burn more closely.[38]

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[32] Morgan A. Henderson and Morgane C. Mousim, "Hospital And Regional Characteristics Associated With Emergency Department Facility Fee Cash Pricing," July 2022, https://www.healthaffairs.org/doi/10.1377/hlthaff.2022.00045.

[33] Self-pay patients are those who uninsured or who choose not to bill insurance for their hospital care. Charges for self-pay patients are sometimes referred to as "cash prices."

[34] Morgan A. Henderson and Morgane C. Mousim, "Hospital And Regional Characteristics Associated With Emergency Department Facility Fee Cash Pricing," July 2022, https://www.healthaffairs.org/doi/10.1377/hlthaff.2022.00045.

[35] *Id.*

[36] *Id.*

[37] LA Times, Opinion: "Same hospital, same injury, same child, same day: Why did one ER visit cost thousands more?" https://www.latimes.com/opinion/story/2023-12-11/hospital-healthcare-insurance-medical-billing-bay-area-san-francisco-california.

[38] NPR, "The Doctor Didn't Show Up, But the Hospital ER Still Billed $1,012," January 24, 2022, https://www.npr.org/sections/health-shots/2022/01/24/1074531328/the-doctor-didnt-show-up-but-the-hospital-er-still-billed-1-012.

The surgeon did not appear for over an hour, so the mother and toddler left the hospital.[39] They were billed $820 in facility fees.[40]

- During a 20-minute visit for sharp lower back pain, the physician checked the patient's blood pressure, asked about the pain, and gave him a muscle relaxant.[41] The patient was billed $2,426.34 in facility fees.[42]
- After sustaining a small gash above his eye during a basketball game, a patient visited the emergency room. The doctors glued the wound shut and covered it with Steri Strips – a visit that took around 15 minutes. The patient received a bill for $899 in facility fees.[43]

One reporter, who reviewed 1,182 emergency room bills over a 15-month investigation, concluded: "Patients are usually at the mercy of the hospital when it comes to ER billing."[44]

II. Responses to Specific Questions Posed by the FTC

Question 10: Are the proposed definitions clear? Should any changes be made to any definitions? Are additional definitions needed?

Response:

The FTC should clarify that "Ancillary Good or Service" includes fees that are charged by another entity and not by the Business directly if those fees are part of the same transaction or service. For instance, physician groups and hospitals often bill separately for the same health care visit. The FTC should clarify that the "Total Price" includes Ancillary Goods or Services that are charged by a third-party entity.

See Section III for further discussion on the application of the proposed rule in health care settings.

Question 12: Should the proposed definition for "Business" exclude certain businesses, and if so, why?

Response:

No, we support the current definition of "Business," which would allow the FTC's rule on unfair or deceptive fees to reach a much wider array of practices and industries. In particular, we support prohibiting hidden and misleading fees in the health care industry. This is consistent

[39] *Id.*
[40] *Id.*
[41] Vox, "Emergency rooms are monopolies. Patients pay the price." Dec. 4, 2017, https://www.vox.com/health-care/2017/12/4/16679686/emergency-room-facility-fee-monopolies.
[42] *Id.*
[43] *Id.* The hospital ultimately lowered his portion of the bill, but only after the patient made 25 calls to dispute it.
[44] Vox, "I read 1,182 emergency room bills this year. Here's what I learned." Dec. 18, 2018, https://www.vox.com/health-care/2018/12/18/18134825/emergency-room-bills-health-care-costs-america

with the FTC's broad mission to protect the public from unfair or deceptive business practices and from unfair methods of competition.[45]

Question 23: By requiring mandatory fees to be included in the Total Price, does the requirement in 464.2(a) effectively eliminate fees that provide little or no value to the consumer in exchange for the charge? Why or why not? Are there any such fees that would not be eliminated by the proposed rule?

Response:

No, the disclosure requirement in proposed § 464.2(a) would not eliminate all fees that provide little or no value to consumers. Health care providers do not generally seek to attract patients by advertising a particular price. Instead, patients seek health care because of essential medical needs, which can be life threatening. Patients usually do not know the amount they will be billed until after the visit.

Disclosures such as those mandated by the proposed rule do not protect the most vulnerable patients from fees that provide them little or no value. For instance, patients in need of emergency services cannot "shop around" for health care, so price comparisons will not allow them to avoid excessive facility fee charges. Patients who have serious illnesses also may not have the time or energy to compare facility fees when they are already missing work and/or childcare responsibilities, navigating multiple appointments and diagnostic testing, and undergoing treatment. Additionally, patients with low health literacy may not be able to effectively compare prices.[46] Health literacy is lowest among those over age 65, those identifying as Hispanic, non-native English speakers, individuals of lower socioeconomic status, and people with Medicare, Medicaid, or no insurance.[47]

Finally, as health care markets become more concentrated, patients may not have many options to avoid facility fees. For instance, 52 percent of all physicians in the country were employed by hospitals or health systems in 2022.[48] In the Midwest, over 63 percent of all physicians were employed by hospitals or health systems.[49] In particular, rural patients may have less access to independent physician practices that do not charge facility fees.[50]

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[45] FTC, Mission, https://www.ftc.gov/about-ftc/mission (last accessed Dec. 5, 2023).
[46] Milosavljevic, S., Milligan, M.G. & Lam, M.B. Barriers Patients Face in Predicting Cost of Care Despite Increasing Healthcare Price Transparency. J GEN INTERN MED 38, 2198–2199 (2023). https://doi.org/10.1007/s11606-023-08108-4.
[47] *Id.*
[48] Physicians Advocacy Institute, "COVID-19's Impact on Acquisitions of Physician Practices and Physician Employment in 2019-2021," at 12, April 2022, https://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/PAI-Research/PAI%20Avalere%20Physician%20Employment%20Trends%20Study%202019-21%20Final.pdf?ver=ksWkgjKXB_yZfImFdXlvGg%3d%3d.
[49] *Id.* at 25.
[50] AJMC, "Physician Practices in Rural Areas Being Acquired By Hospitals at Dramatic Rate," Nov. 5, 2016, https://www.ajmc.com/view/physician-practices-in-rural-areas-being-acquired-by-hospitals-at-dramatic-rate.

We note, however, that the prohibition on misleading fees in § 464.3 *would* eliminate some facility fees and require disclosure of other facility fees. Please see Section III for further discussion.

Question 25: Should the proposed rule explicitly prohibit fees that are excessive? Why or why not? How would such a rule define excessive fees?

Response:

Yes, the FTC should explicitly prohibit excessive fees, including fees that significantly exceed the cost of providing a good or service. In the context of facility fees, patients often pay significant and unexpected fees that are not related to the goods or services they receive. For instance, patients who visit a doctor's office that has been acquired by a hospital system often must pay new facility fees on top of the professional services fees for the same physician services they have been receiving for years. Additionally, patients who visit the emergency room are sometimes charged thousands of dollars in facility fees simply for walking in the door.

We note that the prohibition on misleading fees should already prohibit excessive facility fees that misrepresent the nature and purpose of the fees. However, we urge the FTC to explicitly clarify that excessive fees are misleading. The FTC could make this clarification in the text of the final rule or in Advisory Opinions or Staff Interpretations.

Question 27(a): Section 264.3(b) of the proposed rule requires certain disclosures "before the consumer consents to pay." Should the proposed rule instead require Businesses to disclose Clearly and Conspicuously the nature and purpose of any amount a consumer may pay that is excluded from the Total Price "before the consumer consents to pay and before obtaining a consumer's billing information"?

Response:

We urge the FTC to clarify that required disclosures apply before the consumer consents to the transaction and that the disclosures apply to variable costs. Specifically, the FTC should clarify that "before the consumer consents to pay" means "before the consumer *agrees to the transaction* or before the consumer *agrees to make any payment*." The FTC should also clarify that, when additional costs are variable, the Business must disclose the existence of such costs.

In the health care context, it is difficult to provide the exact price in advance because the charges may depend on the patient's medical needs and the complexity of the services provided. For instance, facility fees vary based on the level of complexity that is coded for the services.[51] Regardless, health care offices should be required to disclose the existence of facility fees *before* the patient agrees to receive services at a location that charges facility fees. For example, a patient seeking services at a physician's office that is owned by a hospital should be notified

[51] Morgan A. Henderson and Morgane C. Mousim, "Hospital And Regional Characteristics Associated With Emergency Department Facility Fee Cash Pricing," July 2022, https://www.healthaffairs.org/doi/10.1377/hlthaff.2022.00045.

about the existence of facility fees because that patient might otherwise seek the same services at an independent physician's office that does not charge facility fees.

As discussed in Section III, we believe that the current language requires health care offices to disclose the existence of facility fees when scheduling patient appointments. However, we urge the FTC to increase clarity for the health care industry by explicitly including variable fees in the final rule or in Advisory Opinions or Staff Interpretations.

III. Application of the Proposed Rule to Specific Facility Fees

We support the FTC's proposal to prohibit hidden and misleading fees across industries. We specify below how the proposed rule would protect patients from hidden and misleading facility fees.

A. Application of the Proposed Rule to Facility Fees for Telehealth Services

The proposed rule would prohibit facility fees for telehealth services. The proposed rule provides: "It is an unfair and deceptive practice and a violation of this part for any Business to misrepresent the nature and purpose of any amount that a consumer must play, including...*the identity of any good or services for which fees are charged*."[52] Patients who receive health care advice by phone or video call in their homes are not using any hospital facility. For telehealth services, charges for "facility fees" do not accurately identify the goods or services received by the patient.

Prohibiting facility fees for telehealth services is also consistent with the FTC's commentary on the proposed rule. For instance, the FTC noted highlighted similar examples of "pricing structures that misrepresented information about the nature and purpose of fees and charges."[53] These examples of misleading charges included:

- A "cleaning fee" for a vacation rental where the consumer was also required to conduct extensive cleaning;[54]
- A "convenience fee" to purchase a ticket when the purchasing method was *not* more convenient to the consumer than any alternative;[55]
- "Maintenance fees" that did not correspond to the actual maintenance of a product;[56]
- "Service fees" for water and other services, when water was not provided;[57] and
- "Amenity fees" for amenities that were not available.[58]

Similarly, charging a "facility fee" when a patient speaks to a doctor from home without using any hospital facilities is a misrepresentation of the nature and purpose of the fee. While we

[52] Proposed 16 C.F.R. 164.3(a) (emphasis added).
[53] 88 Fed. Reg. 216 at 7734.
[54] *Id.*
[55] *Id.*
[56] *Id.* at n.186.
[57] *Id.*
[58] *Id.*

applaud the broad application of the proposed rule, we also encourage the FTC to emphasize that charging facility fees for telehealth services is misleading through Advisory Opinions or Staff Interpretations

B. Application of the Proposed Rule to Facility Fees for Freestanding Hospital-Owned Physician Offices, Clinics, and Surgery Centers

The proposed rule would mandate disclosure of facility fees for services provided at health care offices or facilities that are not located on the hospital's campus and which may not be recognized by patients as part of the hospital. The proposed rule provides: "A Business must disclose Clearly and Conspicuously *before the consumer consents to pay* the nature and purpose of any amount a consumer must pay that is excluded from the Total Price, including…the identity of any good or service for which fees are charged."[59] Thus, patients who schedule appointments at freestanding hospital-owned physician offices, clinics, and surgery centers must be informed about facility fees *before* they consent to pay for services at these locations.

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

Since 2021, *hospitals* have been required to disclose standard charges for common health services and procedures.[60] However, these transparency requirements are not sufficient to protect patients from significant and unexpected facility fees. First, facility fees are not currently posted in a manner that allows patients to easily understand and compare charges for facility fees from different hospitals.[61] Second, patients do not always understand that they may be charged hospital facility fees for health care visits or procedures that occur *outside of a hospital building*, such as in a freestanding physician office.[62] Third, as health care markets become increasingly concentrated,[63] patients have fewer independent provider options.

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[59] Proposed 16 C.F.R. 464.3(b) (emphasis added).
[60] Peterson-KFF Health System Tracker, "Ongoing Challenges with Hospital Price Transparency," Feb. 10, 2023, https://www.healthsystemtracker.org/brief/ongoing-challenges-with-hospital-price-transparency/#Percent%20of%20acute-care%20hospitals%20with%20at%20least%20one%20negotiated%20rate%20for%20MS-DRGs.
[61] *Id.* (noting that the current data does not always clarify whether the charge is a facility fee or professional charge, and it is difficult to compare charges without knowing this information).
[62] Georgetown University, "Protecting Patients from Unexpected Outpatient Facility Fees: States on the Precipice of Broader Reform," at 9, July 2023; *see also* White House, "FACT SHEET: President Biden Announces New Actions to Lower Health Care Costs and Protect Consumers from Scam Insurance Plans and Junk Fees as Part of 'Bidenomics' Push," July 7, 2023 (noting that facility fees in such circumstances "are often a surprise for consumers").
[63] Georgetown University, "Protecting Patients from Unexpected Outpatient Facility Fees: States on the Precipice of Broader Reform," at 8, July 2023; *see also* The Commonwealth Fund, "Health Care Market Concentration Trends in the United States: Evidence and Policy Responses," Sept. 6, 2017, https://www.commonwealthfund.org/publications/journal-article/2017/sep/health-care-market-concentration-trends-united-states.

Under the FTC's proposed rule on junk fees, the hospital-owned physician office, health clinic, or surgery center would have to disclose the facility fee to the patient prior to the patient agreeing to pay for services at that location. When scheduling a patient for treatment at a physician's office that is owned by a hospital, the staff member scheduling the appointment would be required to explain that the patient may be charged an additional facility fee on top of the professional charge.[64] As the FTC explained, "This information is necessary for a consumer to understand what they are purchasing and to decide whether to consent to the charge."[65]

For instance, one patient visited a doctor's office, where he got an X-ray and received a cortisone shot to treat his shoulder pain.[66] The patient received a bill from a hospital with a $1,375 facility fee for hospital operating room services because his doctor is employed by the hospital, *even though the patient was not seen at the hospital*.[67] "If I was told that ridiculous facility fee would be charged, I would have declined having the injection and gotten it somewhere else," the patient said.[68]

While we applaud the broad application of the proposed rule, we also encourage the FTC to emphasize that charging facility fees for services at freestanding physician offices or other facilities without specific notice to patients is misleading. The FTC should emphasize this issue through Advisory Opinions or Staff Interpretations.

C. Application of the Proposed Rule to Hospitals

The proposed rule would mandate disclosure of facility fees for services provided at hospitals. The proposed rule provides: "A Business must disclose Clearly and Conspicuously *before the consumer consents to pay* the nature and purpose of any amount a consumer must pay that is excluded from the Total Price, including…the identity of any good or service for which fees are charged."[69] Thus, patients must be informed about facility fees *before* they schedule an appointment at a hospital or register for services at a hospital.

Since 2021, hospitals have been required to post online charges for common health services and procedures.[70] However, facility fees are not currently posted in a manner that allows patients to easily understand and compare charges for facility fees from different hospitals.[71] We

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[64] *See* proposed 16 C.F.R. § 164.3(b); see also § 464.1(c)(1) (disclosures of additional fees must be made in the same manner as other communications).
[65] 88 Fed. Reg. 216 at 77439.
[66] Consumer Reports, "The Surprise Hospital Fee You May Get Just for Seeing a Doctor," June 13, 2019, https://www.consumerreports.org/fees-billing/surprise-hospital-fee-just-for-seeing-a-doctor-facility-fee/.
[67] *Id.*
[68] *Id.*
[69] Proposed 16 C.F.R. 464.3(b) (emphasis added).
[70] Peterson-KFF Health System Tracker, "Ongoing Challenges with Hospital Price Transparency," Feb. 10, 2023, https://www.healthsystemtracker.org/brief/ongoing-challenges-with-hospital-price-transparency/#Percent%20of%20acute-care%20hospitals%20with%20at%20least%20one%20negotiated%20rate%20for%20MS-DRGs.
[71] *Id.* (noting that the current data does not always clarify whether the charge is a facility fee or professional charge, and it is difficult to compare charges without knowing this information).

applaud the FTC's proposed rule because it would require that patients are clearly informed about facility fees before they agree to receive services at a hospital.

The proposed rule would require that, when hospital staff schedule appointments by phone or register patients at the front desk, they must disclose that hospital will charge a facility fee.[72] [73] Of course, some patients facing medical emergencies may be unable to choose a different medical facility. However, other patients – such as those who visited the emergency room and ultimately left because the wait was too long[74] – might decide not to register at the front desk if they understand these potential charges.[75] For instance, patients should be aware that many emergency rooms are "charging patients hundreds or even thousands of dollars [just] for walking through the door."[76] This proposed rule is an important step toward greater transparency.

While we applaud the broad application of the proposed rule, we also encourage the FTC to emphasize that charging facility fees for services at a hospital without specific notice to patients is misleading. The FTC should emphasize this issue through Advisory Opinions or Staff Interpretations.

D. Application of the Proposed Rule to Excessive Facility Fees

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

IV. FTC Investigation of Facility Fees

While it is beyond the scope of this rule, we recommend that the FTC investigate facility fees. The FTC has broad authority to investigate conduct or practices that affect commerce,[77] and

[72] *See* proposed 16 C.F.R. § 464.3(b); *see also* § 464.1(c)(1) (disclosures of additional fees must be made in the same manner as other communications).
[73] Note that facility fees that are excessive or otherwise unrelated to the use of facilities by patients may also be misleading under proposed § 464.3(a) ("It is an unfair and deceptive practice and a violation of this part for any Business to misrepresent the nature and purpose of any amount a consumer must pay...").
[74] NPR, "The doctor didn't show up, but the hospital ER still billed $1,012," Jan. 24, 2022 (a mother took her toddler home from the ER after waiting over 1.5 hours for the doctor, but she still received a bill for $820 in facility fees); Vox, "She didn't get treated at the R. But she got a $5,751 bill anyway." (A mother took her four-year-old to the emergency room for a cut on her forehead, but they left after waiting an hour.) https://www.vox.com/2018/5/1/17261488/er-expensive-medical-bill.
[75] NPR, "The doctor didn't show up, but the hospital ER still billed $1,012," Jan. 24, 2022 (noting that the act of registering at the front desk of the hospital initiates the billing process even if treatment is not ultimately rendered).
[76] Vox, "She didn't get treated at the ER. But she got a $5,751 bill anyway." https://www.vox.com/2018/5/1/17261488/er-expensive-medical-bill.
[77] *E.g.,* 15 U.S.C. 46(b).

such studies do not need to be related to a specific law enforcement purpose.[78] Specifically, we ask that the FTC investigate:

- The rise in facility fees in various health care settings, including: (1) recently acquired physician practices, clinics, and surgery centers; and (2) emergency departments, particularly for evaluation and management (E&M) services;
- The impact of emergency department facility fees on out-of-pocket costs for patients and on individuals' willingness to seek medical care; and
- The trend of billing facility fees at higher levels of complexity, including the practice of billing facility fees at higher levels of complexity than the professional charges for the same services.[79]

Given the national interest in health care cost transparency and medical debt crisis affecting 100 million individuals,[80] the FTC should also consider presenting a report to Congress regarding the results of its investigation and the Commission's recommendations on facility fees.[81]

V. Separate FTC Rulemaking on Facility Fees

Finally, we recommend that the FTC initiate a separate rulemaking focused on facility fees. The FTC has broad authority to promulgate rules under Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices in commerce.[82] Indeed, the FTC recently voted to "reinvigorate" its rulemaking procedures, emphasizing: "Clear rules help honest businesses comply with the law and better protect consumers and workers against bad actors."[83]

While the proposed rule on junk fees primarily focuses on the "deceptive" prong, practices may be "unfair" even if they are not deceptive.[84] Practices are "unfair" if they: (1) cause or are likely to cause substantial injury to consumers; (2) that injury is not reasonably avoidable by consumers themselves; and (3) the injury is not outweighed by countervailing

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[78] FTC, "A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority," revised May 2021, https://www.ftc.gov/about-ftc/mission/enforcement-authority ("The Commission's [FTC Act §] 6(b) authority also enables it to conduct wide-ranging studies that do not have a specific law enforcement purpose.").

[79] *See, e.g.*, Peterson-KFF Health Systems Tracker, "How do facility fees contribute to rising emergency department costs?" March 27, 2023, https://www.healthsystemtracker.org/brief/how-do-facility-fees-contribute-to-rising-emergency-department-costs/.

[80] KFF Health News, 100 Million People in America Are Saddled with Health Care Debt, June 16, 2022, https://kffhealthnews.org/news/article/diagnosis-debt-investigation-100-million-americans-hidden-medical-debt/.

[81] 15 U.S.C. 46(f).

[82] 15 U.S.C. § 45(a)(1) (prohibition of unfair or deceptive acts in or affecting commerce); 15 U.S.C. 57a(a)(1)(B) (the FTC may enact rules to "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce").

[83] FTC, 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.

[84] *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1367 (11th Cir. 1988).

benefits to consumers or to competition.[85] The FTC may initiate a rulemaking on unfair acts or practices when it has information indicating a widespread pattern of unfair acts or practices.[86]

The FTC should initiate a rulemaking on facility fees because: (1) facility fees cause substantial injury to patients, including significant costs; (2) the injury is not reasonably avoidable because many patients cannot avoid or delay hospital services (*e.g.*, emergency services) or do not have access to services at a facility not affiliated with a hospital (*e.g.*, many rural patients[87]); and (3) the injury is not outweighed by countervailing benefits because patients do not receive increased services in exchange for the facility fees.[88] Additionally, as described in Section I, facility fees are both prevalent and increasing.

To determine which facility fees should be regulated or prohibited as "unfair," the FTC should consider state laws and model facility fee legislation from the National Academy for State Health Policy (NASHP). For instance, the FTC should consider limiting or prohibiting facility fees for:

- Telehealth services;[89] [90]
- Outpatient services for evaluation and management or assessment and management provided at an office or facility that is *not a part of the campus of the hospital*, except for services provided at a freestanding emergency facility;[91]
- Outpatient services for evaluation and management or assessment and management provided *on the campus of a hospital, but outside of the emergency department*;[92]
- Preventive services, as defined by the United States Preventive Services Task Force;[93] and
- Health care services, including testing or vaccination, provided to individuals in their vehicle.[94]

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[85] 15 U.S.C. § 45(n).
[86] 15 U.S.C. § 57a(b)(3)(B).
[87] NPR, "Doctor Shortage in Rural Arizona Sparks Another Crisis in Forgotten America,'" July 14, 2017 ("Because of the lack of doctors, they actually end up using the emergency room for their normal needs," explained the mayor or Bisbee, AZ, a town of 5,400).
[88] *Fed. Trade Comm'n v. RCG Advances, LLC*, No. 20-CV-4432 (JSR), 2023 WL 6281138, at *7 (S.D.N.Y. Sept. 27, 2023) ("[A]n injury is not outweighed by other benefits when there are clear adverse consequences for consumers that are not accompanied by an increase in services or benefits to consumers or by benefits to competition") (internal punctuation and citation omitted).
[89] *See, e.g.*, Conn. Gen. Stat. § 19-906(h) (telehealth providers and hospitals are prohibited from charging facility fees for telehealth services).
[90] While the current language of the proposed rule on junk fees should be interpreted to prohibit facility fees for telehealth services because such fees are misleading, a separate rule focused on facility fees should also explicitly prohibit facility fees for telehealth services as "unfair" under Section 5 of the FTC Act.
[91] *See, e.g.*, Conn. Gen. Stat. § 19a-508c(l)(1); NASHP Model State Legislation to Prohibit Unwarranted Facility Fees § 2(A), https://nashp.org/nashp-model-state-legislation-to-prohibit-unwarranted-facility-fees/.
[92] *See, e.g.*, Conn. Gen. Stat. § 19a-508c(l)(2) (effective July 1, 2024); NASHP Model State Legislation to Prohibit Unwarranted Facility Fees § 2(B), https://nashp.org/nashp-model-state-legislation-to-prohibit-unwarranted-facility-fees/
[93] *See, e.g.*, New York Pub. Health Law § 2830(2) ("In no event shall a facility fee be charged for services related to the provision of preventative care as defined by the United States Preventative Services Task Force.").
[94] *See, e.g.*, Texas Health and Safety Code § 241.222(a) (prohibiting certain freestanding emergency medical care facilities from charging facility fees for health care services provided to individuals in their vehicle).

While some states have enacted limits on facility fees, FTC action is necessary and appropriate because many patients live in states that have not enacted such protections. The FTC should initiate a rulemaking on facility fees to ensure that *all* patients are protected from unfair and deceptive facility fees, regardless of where they live.

VI. Conclusion

In conclusion, we applaud the FTC's proposed rule to broadly protect the public from unfair or deceptive fees. We believe the proposed rule will prohibit the imposition of facility fees for patients that do not enter any health care facilities, such as telehealth patients. We also believe the proposed rule will require additional disclosure of the existence of facility fees for patients that schedule appointments at hospitals or at hospital-owned physician offices, outpatient clinics, or freestanding surgery centers.

Given the trend of increasing facility fees and the corresponding increases in out-of-pocket patient costs, we also recommend that the FTC initiate an investigation of facility fees, including the cost of facility fees in emergency departments and how facility fees are billed. Finally, we recommend that the FTC open a separate rulemaking to address the widespread practice of billing facility fees that are unfair under Section 5 of the FTC Act.

Thank you for the opportunity to submit comments. If you have any questions, please feel free to contact Mona Shah at mshah@communitycatalyst.org.

Sincerely,

ACA Consumer Advocacy
American Muslim Health Professionals
Citizen Action of Wisconsin
Colorado Center on Law and Policy
Colorado Consumer Health Initiative
Community Catalyst
Community Service Society of New York
Consumers for Affordable Health Care
Disability Policy Consortium
Disability Rights Education and Defense Fund (DREDF)
Family Voices NJ
Family Voices of Tennessee
Florida Health Justice Project
Florida Voices for Health
Georgia Watch
Goodbill
GO2 for Lung Cancer
Health Care Voices
Health Equity Solutions, Inc.

Hoosier Action
Kentucky Voices for Health
Mano a Mano Family Resource Center
Montana Women Vote
National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)
National Consumer Law Center (on behalf of its low-income clients)
National Partnership for Women & Families
Protect Our Healthcare Coalition RI
South Carolina Appleseed Legal Justice Center
SOWEGA Rising
SPAN Parent Advocacy Network
Tennessee Disability Coalition
Tennessee Justice Center
US Public Interest Research Group