April 24, 2024

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

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

Thank you for the opportunity to testify regarding the Federal Trade Commission's proposed rule on unfair or deceptive fees. My name is Miriam Straus, and I am a Senior Policy Analyst at Community Catalyst. We represent a coalition of advocacy groups focused on medical debt, disability rights, health equity, and racial and economic justice.[1]

We fully support the FTC's proposed rule, and we urge the agency to move forward quickly with this rulemaking. In particular, we focus on the application of this proposed rule to a type of junk fees in the health care industry known as "facility fees." This rule will protect patients from misleading and unnecessary facility fees for telehealth services and require that facility fees be disclosed before they are charged for other services. Finally, the proposed rule on misleading fees would also prohibit excessive facility fees that are unrelated to costs.

First, let me explain what facility fees are. Hospitals typically bill separately for: (1) professional claims; and (2) facility fees. Professional claims cover care provided by health care professionals, such as physicians and nurses. The facility fee 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. However, these facility fees often function as junk fees.

Independent physician offices do not charge facility fees. When physician offices are acquired by hospitals or health systems, however, patients may begin to see a facility fee on top of the regular physician charges. This is not because the physician office now has specialized equipment or operates an emergency room. The patient who visits the physician office does not receive additional services because the hospital now owns the practice. Instead, the patient just *pays more for the same services* because the physician office is now owned by a hospital.

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."[2] The only change from previous years was that the infusion clinic had changed an office-based practice to a so-called "hospital-based setting" – even though the services were provided in the *same medical office building*, which was not a hospital.[3]

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

[2] 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/.

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

Today, patients are seeing facility fees more frequently for care provided *outside of a hospital*. As Consumer Reports explained, this is 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."[4]

Hospital ownership of physician practices has been increasing for years. Between July 2012 and January 2018, hospital ownership of physician practices grew by 124 percent.[5] In fact, a report released after we filed our comments stated that by January 2024, over 55 percent of physicians were employed by hospitals or health systems.[6] Another news report published after we filed our comments noted that in Charlotte, North Carolina, about 80 percent of the oncologists work for a hospital, up from about half of oncologists 10 years ago.[7] For instance, Lake Norman Oncology in suburban Charlotte was acquired by Novant Health in 2020.[8] After the acquisition, one breast cancer survivor visited the practice for the routine monitoring that previously cost her $76.[9] Now that the oncology practice was owned by a hospital system, however, the patient was billed about $400 for the same monitoring.[10]

Addressing facility fees is in line with the FTC's renewed focus on consolidation and rising health care costs.[11] 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 practices, which then leads to higher prices for patients, employers, and insurers," the Health Care Cost Institute explained.[12] For instance, an ultrasound costs $164 on

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

[4] 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/.

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

[6] Physicians Advocacy Institute, "Updated Report: Hospital and Corporate Acquisition of Physician Practices and Physician Employment, 2019 – 2023," April 2024, https://www.physiciansadvocacyinstitute.org/Portals/0/assets/docs/PAI-Research/PAI-Avalere%20Physician%20Employment%20Trends%20Study%202019-2023%20Final.pdf?ver=uGHF46u1GSeZgYXMKFyYvw%3d%3d.

[7] Wall Street Journal, "Hospitals Are Adding Billions in 'Facility' Fees for Routine Care," March 245, 2024, https://www.wsj.com/health/healthcare/hidden-hospital-fees-cost-patients-hundreds-of-dollars-0024cd95.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] 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.

[12] Health Care Cost Institute, "Facility Fees and How They Affect Health Care Prices," June 2023, https://healthcostinstitute.org/images/pdfs/HCCI_FacilityFeeExplainer.pdf.

average in a setting where facility fees are not charged.[13] An ultrasound costs over twice as much - $339 on average - when a facility fee is added.[14]

Notably, facility fees are increasing faster than other categories of health care spending[15] and contributing to our country's medical debt crisis, where 4 in 10 individuals have outstanding health care bills.[16] One study found that facility fees for outpatient surgery increased by 53 percent between 2011 and 2017, with no change in professional fees.[17] Facility fees are also rising sharply for emergency services. Regardless of the services provided to the patient, most emergency departments also charge a facility fee – which is often described as "the cost for walking in the door."[18] 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.[19] These facility fees are particularly concerning because patients cannot comparison shop when they are facing medical emergencies.

In our written comments, we provided numerous examples of facility fees that were unrelated to the goods or services provided by the hospital. For instance:

- 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.[20]
- In another case, a *45-minute consultation* with a child psychologist resulted in a $503 facility fee. "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.[21]
- 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.[22] The surgeon did not appear for over an hour, so the mother and the toddler left the hospital. They were billed $820 in facility fees.[23]

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[13] *Id.*
[14] *Id.*
[15] Georgetown University, "Protecting Patients from Unexpected Outpatient Facility Fees: States on the Precipice of Broader Reform," at 8, July 2023.
[16] 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/.
[17] 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/.
[18] *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.
[19] 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/.
[20] 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.
[21] 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.
[22] 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.
[23] *Id.*

- Another patient visited the emergency room for sharp lower back pain. During the 20-minute visit, the physician checked the patient's blood pressure, asked about the pain, and gave him a muscle relaxant.[24] The patient was billed $2,426 in facility fees.

Since we submitted our comments, there have been additional reports of egregious facility fees. For instance:

- An Ohio patient was billed $348 for his visit to an ear, nose and throat specialist at a clinic. Then, he received a second bill for a $645 facility fee – *just for the use of the office where he met his physician.*[25]
- In Maine, a patient visited an emergency room for what she thought could be appendicitis. She spent only a few minutes in the exam room, where she received an IV with antibiotics and some Tylenol. She received a facility fee bill of over $4,600 – in addition to other charges.[26]

Significantly, facility fees may impose the greatest burden on historically disadvantaged communities. For instance, Hispanic, American Indian and Alaska Native, Native Hawaiians and other Pacific Islanders, and Black individuals are most likely to be uninsured[27] 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,[28] where facility fees are significant and unpredictable.[29] Addressing facility fees is an important step in the direction of health equity and economic justice.

Next, I will discuss how the proposed rule on deceptive or unfair fees would apply to facility fees. First, facility fees for telehealth services would be prohibited. 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*."[30] 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.

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[24] 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

[25] Wall Street Journal, "Hospitals Are Adding Billions in 'Facility' Fees for Routine Care," March 25, 2024, https://www.wsj.com/health/healthcare/hidden-hospital-fees-cost-patients-hundreds-of-dollars-0024cd95.

[26] Third Way, "Same Service, Same Price: Tackling Hospitals' Add-On Facility Fees," March 27, 2024, https://www.thirdway.org/report/same-service-same-price-tackling-hospitals-add-on-facility-fees; see also Portland Press Herald, "Patients, advocates clash with hospitals over bill to restrict facility fees in medical bills," May 11, 2023, https://www.pressherald.com/2023/05/11/patients-advocates-clash-with-hospitals-over-bill-to-restrict-facility-fees-in-medical-bills/.

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

[28] 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.

[29] 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.

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

Prohibiting facility fees for telehealth services is consistent with the FTC's commentary on the proposed rule. For instance, the FTC highlighted similar examples of "pricing structures that misrepresented information about the nature and purpose of fees and charges,"[31] including "amenity fees" for amenities that were not available and "maintenance fees" that did not correspond to the actual maintenance of a product.[32] Similarly, charging "facility fees" when a patient speaks to a doctor from home without using any hospital facilities is a misrepresentation of the nature and purpose of the fee.

Second, the proposed rule would mandate disclosure of facility fees for services provided at health care offices or facilities that are not located on the hospital's campus. The proposed rule 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."[33] Thus, patients 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 or health clinic may impose a facility fee if they are owned by a hospital. These health care offices or facilities are often located far from a hospital campus and do not appear to be a part of the hospital. Further, most patients do not track health care acquisitions, and they may not realize that a hospital has acquired a previously independent practice.

Under the proposed rule, the hospital-owned physician office, health clinic, or other off-campus facilities must disclose the facility fee before the patient agrees to pay for services at that location. When scheduling a patient for treatment, the staff member scheduling the appointment would be required to explain that the patient may be charged an additional facility fee on top of the professional charge.[34] As the FTC has explained, "This information is necessary for a consumer to understand what they are purchasing and to decide whether to consent to the charge."[35]

Third, the proposed rule would mandate disclosure of facility fees for services provided at hospitals. Again, 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."[36] Thus, patients must be informed about facility fees *before* they schedule an appointment at a hospital or register for services at a hospital.

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[31] 88 Fed. Reg. 216 at 7734.
[32] *Id.* at n.186. Other examples include: (1) a "convenience fee" to purchase a ticket when the purchasing method was *not* more convenient to the consumer than any alternative; (2) "service fees" for water and other services, when water was not provided; and (3) "amenity fees" for amenities that were not available. *Id.*
[33] Proposed 16 C.F.R. 464.3(b) (emphasis added).
[34] *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).
[35] 88 Fed. Reg. 216 at 77439.
[36] Proposed 16 C.F.R. 464.3(b) (emphasis added).

When hospital staff schedule appointments by phone or register patients at the front desk, they would be required to disclose that the hospital will charge a facility fee.[37] [38] Of course, some patients facing medical emergencies, patients in rural communities, or patients in areas with so much consolidation that there are few other options, 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[39] – might decide not to register at the front desk if they understand these potential charges.[40] 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."[41]

Finally, 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 other guidance.

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

Thank you for your time today.

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[37] *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).

[38] 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...").

[39] 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 ER. 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 left after waiting an hour – but was then charged a $300 facility fee.) https://www.vox.com/2018/5/1/17261488/er-expensive-medical-bill.

[40] 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).

[41] 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.