February 7, 2024

Federal Trade Commission
Attn: April J. Tabor
Office of the Secretary
600 Pennsylvania Avenue NW,
Suite CC-5610 (Annex C)
Washington, D.C. 20580

Re: Unfair or Deceptive Fees Notice of Proposed Rulemaking ("NPRM") (Project No. R207011)

Dear Secretary Tabor:

The International Franchise Association ("IFA") appreciates this opportunity to submit its views in response to the Federal Trade Commission's ("FTC" or the "Commission") request for public comment on its proposed Rule on Unfair or Deceptive Fees ("Proposed Rule") issued on November 9, 2023.

INTRODUCTION

The IFA is the world's oldest and largest organization representing franchising. IFA members include franchise companies in over 300 different industries, individual franchisees, and companies that support those franchise companies in marketing, law, technology, and business development. The IFA works through its government relations, public policy, and media relations departments and its educational programs to protect, enhance, and promote franchising, serving the approximately 790,492 franchise establishments that support nearly 8.4 million direct jobs.

Franchise establishments produce $825.4 billion of economic output for the U.S. economy, amounting to almost 3 percent of the U.S. Gross Domestic Product (GDP).[1]

However, contrary to common mischaracterization of franchising, it is not big business. Franchising is small business. More than 80% of franchise owners operate just one location. Further, *most franchisors are small too* – the majority of franchise brands in operation today have less than twenty franchised units in their system; nearly a third of all franchisors make less than $5 million per year. As is often the case, small businesses are disproportionately affected by regulations, compared to larger firms that have the legal and executive firepower to navigate difficult administrative and operational changes.

IFA's franchisee and franchisor members take great care in customer relationships and rely on repeat business that centers around customer satisfaction and consumer trust. Transparent pricing lays at the heart of both. The IFA and its members believe companies should not misrepresent total prices of products or services and should not charge consumers for products or services they did not purchase. Rather than banning "junk fees," however, the FTC proposes to overhaul legal pricing practices and mandate a one-size-fits-all, nationalized pricing display regime that spans all industries, which will significantly confuse consumers, curtail discounting and other **legal and pro-consumer practices,** and increase the prices consumers pay for products and services, without saving consumers time or helping consumers make better, informed purchasing decisions. The IFA believes that the economy-wide application of the FTC's Proposed Rule—including without limitation franchised businesses operating across the restaurant, hotel, fitness, preventative medicine, personal wellness, cosmetic, and location-based entertainment

[1] Alka Sinha & Jin Oi, 2023 Franchising Economic Outlook 1-2, (Int'l Franchising Ass'n 2023), http://tinyurl.com/m7knhvsy.

industries—would violate Section 5 of the FTC Act, the Magnuson-Moss Act and the Administrative Procedures Act, and would be unconstitutional under the major question and the non-delegation doctrines. These concerns are also voiced in the U.S. Chamber of Commerce Public Comment (the "Chamber Comment") and American Hotel & Lodging Association Public Comment (the "AHLA Comment"), each of which IFA expressly supports.

To the extent the FTC proceeds with a final proposed rule, the IFA first asks the agency to exempt franchised businesses because it has failed (1) to show the specific acts and practices at issue in the regulation are deceptive or unfair; (2) to make a prevalence showing of unfair acts or practices across the diverse set of industries franchising represents; and (3) to consider the significant costs the regulation will have on small businesses. Second, the FTC should expressly exempt business-to-business transactions. Third, the FTC should exempt pricing disclosures subject to the Franchise Rule. We discuss each of our requests below.

1. The FTC Should Exempt Franchising From Scope of Any Rule.

Although the FTC announced that its proposed rule would "prohibit junk fees, which are hidden and bogus fees that can harm consumers and undercut honest businesses" that the "FTC has estimated … can cost consumers tens of billions of dollars per year in unexpected costs,"[2] the Proposed Rule would not actually prohibit junk fees but rather change how companies display pricing to all consumers economy-wide. The FTC points to a handful of deceptive fee cases, workshops, and anecdotes in a handful of industries but has failed to show how partitioned pricing across all industries is an unfair or deceptive practice under Section 5. Under the FTC Act, the FTC can issue a trade-regulation rule "only where it has reason to believe that the unfair or

[2] Federal Trade Commission, "FTC Proposed Rule to Ban Junk Fees," (Oct. 11, 2023), *available at*: https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-proposes-rule-ban-junk-fees.

deceptive acts or practices ***which are the subject of the proposed rulemaking*** are prevalent." 15 U.S.C. 57a (emphasis added). An act or practice is deceptive (1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material. An act is "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. 5(n). As discussed in more detail in the Chamber Comment, the FTC has not identified a single cease and desist order—including in franchised businesses operating across hundreds of industries—where disclosing fees later in the purchasing process was found to be unfair or deceptive. The FTC cannot promulgate a rule banning conduct that is not otherwise an unfair or deceptive practice under Section 5 of the FTC Act.

The FTC has also not shown prevalent deceptive or unfair practices across the many industries in which franchised businesses operate that the FTC seeks to regulate under the proposed Rule, including nail salons, massage studios, gyms and restaurants. Franchise systems in each of these industries have their own business models and marketing strategies, respond differently to economic circumstances, and face unique challenges and consumer demands. Importantly, while promotional, "limited time offer" pricing may be set at the franchise system level, individual franchised businesses independently establish pricing based on economic factors relevant in the markets in which they operate. For example, some might make extensive use of service and other additional fees. Others might not use them at all.

Without considering the nuanced distinction of franchised versus non-franchised small businesses, and further, studying franchised businesses in the industries that would be impacted by the Proposed Rule, the Commission cannot regulate under the Magnuson-Moss Act. The Act "impose[s] upon the Commission rulemaking procedures and judicial review provisions stricter

than those contained in the Administrative Procedure Act." *Am. Fin. Servs. v. FTC*, 767 F.2d 957, 967 n.9 (D.C. Cir. 1985). Among other things, the Commission can promulgate rules targeting unfair or deceptive acts or practices only if it first makes a finding that "the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent." 15 U.S.C. § 57a(b)(3) (emphasis added). But the Commission did not make a prevalence finding with respect to franchised businesses. In fact, the Commission cites to a handful of individual comments and only two consumer group comments that it claims "recommended an industry-neutral rule requiring the disclosure of all-in pricing" in support of its broad-sweeping, one-size-fits-all Proposed Rule, which notably do not mention the myriad of industries that operate using the franchise model but would nonetheless be subject to compliance with the Proposed Rule. 88 Fed. Reg. 77431. With respect the restaurant industry specifically, the Proposed Rule relies on only a few anecdotal individual commenters' complaints to support its claim that "mandatory fees are also common in the restaurant industry." 88 Fed. Reg. 77426, 77442. Nor does the Proposed Rule cite any cease-and-desist orders against franchised businesses that have unfairly or deceptively utilized partitioned pricing upon consumers. Rather, the Proposed Rule provides limited anecdotal accounts of settled enforcement actions—for instance, against a funeral home and a seller of prepaid calling cards. 88 Fed. Reg. 77435. These settlements cannot support a finding that these practices are prevalent in unrelated industries. *Id.* at 77436. Similarly, private lawsuits or state enforcement actions that seek to enforce state law against allegedly bad actors in particular industries do not necessarily support a finding that other firms in unrelated industries are engaging in unfair or deceptive practices at issue in this rulemaking. A private citizen's state-law *allegations* against a ticket company do not support a finding that unfair or deceptive fees are prevalent in franchised restaurants, spas and gyms. *Id.* at 77436 n.222.

This limited prevalence analysis is especially problematic given the breadth of the Proposed Rule. The Proposed Rule would regulate the nuances of how nearly every business in the United States displays its prices. The FTC must make a prevalence showing to meet its statutory obligations and cannot justify the rule simply because it seeks an avenue through which to seek civil penalties. *Id.* at 77440 (rule "most practicable means for achieving consumer redress"). Such a public policy consideration cannot form the basis of a trade regulation rule. 15 U.S.C. 45n.

But the Commission has focused its analysis on a mere three industries, and the "isolated examples" of unfair or deceptive fees that it does discuss do not demonstrate that the supposed problem is prevalent economy wide. *Compassion Over Killing v. U.S. Food & Drug Admin.*, 849 F.3d 849, 855 (9th Cir. 2017). The FTC's failure to justify the Proposed Rule across hundreds of industries, including those that operate under the franchise model, therefore is arbitrary and capricious. *See, e.g.*, *Del. Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 17–18 (D.C. Cir. 2015) (holding that overbroad regulatory action was arbitrary and capricious).

The FTC admits that the economy-wide proposal will have unintended impacts on many industries, Fed. Reg. at 77441 n.247, yet has failed to analyze those costs, compare the costs to purported consumer benefits, and identify any less restrictive alternatives. In particular, the FTC did not consider that franchised businesses are uniquely impacted by the Proposed Rule. First, franchisees are independent business owners and establish their own pricing. Second, franchisees contribute the systemwide marketing funds for the benefit of national and regional marketing. The ability of an individual gym or restaurant to receive the benefit of nationwide marketing campaigns like celebrity endorsements and television commercials is a core reason that many franchisees invest in a franchise rather than establish a non-franchised business. And, while national and

regional marketing campaigns may feature discounted pricing on limited time offer products available at all locations, each individual franchised business has the right to establish its own pricing regime for regular product and service offerings, including electing to pass through transaction fees charged by credit card payment processors or crewmember support fees allocated to workers to offset rising inflation rather than increase the price of the product or service. Compliance with the Proposed Rule destroys the independence of these small business owners to make those choices about their pricing regime if they want to have the benefit of national and regional marketing campaigns featuring limited time offers. Under the Proposed Rule, national marketing campaigns are only workable if all franchised businesses in a franchise system adhere to the same pricing regime (including pass-through fees), regardless of the economic demands of the markets in which they operate. *See also* Chamber Comment, sect. III.B.

2. The FTC Has Failed To Conduct A Cost-Benefit Analysis on Impacts to Consumers and Small Businesses that Operate Under the Franchise Model.

The FTC must carefully evaluate the costs and benefits of the Proposed Rule. An agency's inconsistent and opportunistic framing of benefits, errors in quantifying costs, and failure to respond to commenters concerning cost and benefit calculations can lead to a finding of arbitrary and capricious agency action. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (2011). As an initial matter, the FTC concedes that "most firms in the U.S. economy would be subject to this proposed rule," yet incorrectly assumes that "only firms that do not currently disclose total price will need to adjust their pricing strategy." 88 Fed. Reg. 77479 In fact, most firms in the U.S. economy will need to adjust their pricing strategy because the proposed rule arguably requires each advertised price to be the "all-in" price. Further, firms will also need to re-examine pricing disclosures due to proposed rule's mandated disclosure requirements.

Second, the FTC has failed to perform the requisite cost-benefit analysis as to how the rule would impact consumers and franchised businesses across industries generally (i.e., "[T]here likely are other industries that may need to change their current practices to comply with the proposed rule, if finalized. To determine compliance cost for the remainder of the economy, **we assume** [*emphasis added*] that 90% of these firms already comply with the proposed rule…" 88 Fed. Reg. 77448). The FTC, however, fails to provide any support for its assumption and further acknowledges that its assumption "may overestimate the number of non-compliant firms in the remainder of the economy." *Id* at 77453. Even within the industries for which the FTC espouses to have more information regarding mandatory fees, including live-event ticketing, short-term lodging and restaurants, the FTC's analysis fails to consider the unique impacts to consumers and franchised businesses operating within those industries.

The following examples are illustrative of adverse impact of the Proposed Rule to consumers of the restaurant industry:

- Certain franchised restaurants within a franchise system may offer discounts and limited time offers locally. Other franchised restaurants within the franchise system may offer delivery through one or more channels, including multiple third-party delivery providers (each of whom independently sets delivery fees and driver tips based on their respective policies over which the franchised restaurants have no control, including pricing based on geographic delivery areas surrounding the franchised restaurants) and online ordering via a system-wide mobile application and/or website for pick-up or delivery. So, under the Proposed Rule, a consumer who visits the mobile application for a national pizza franchise system will see displayed two prices for the same medium pepperoni pizza: one price for carry-out and a greater price for delivery. If the consumer instead visits DoorDash to

purchase a medium pepperoni pizza from the national pizza franchise system, he or she may see displayed a price greater than the delivery price offered on the brand's mobile application because it includes Door Dash's delivery fee, service charge and tip. Uber Eats, Grubhub, Postmates all may similarly display different pricing to the consumer for the medium pepperoni pizza purchased from the national pizza franchise system. Neither the franchisor nor each individual franchised restaurant controls the various prices charged by third party delivery service providers. Nonetheless, the consumer is faced with six different prices for a medium pepperoni pizza purchased from the national pizza franchise system. The Proposed Rule fails to address the impact of disclosure overload from fee disclosures. Moreover, in the past, the FTC has penalized companies for burying important information among other disclosures, yet the Proposed Rule requires unnecessary information overload resulting in muddying a price of menu item where it is delivered to the consumer by one of several delivery methods. This is an example of the many logistical impossibilities created by the Proposed Rule as it relates specifically to restaurant delivery charges, as more fully described in the National Restaurant Association's Public Comment ("NRA Comment"). IFA shares the concerns raised in the NRA Comment about the Proposed Rule, both with respect to delivery costs and the challenges for restaurant businesses of compliance with the Proposed Rule generally.

- Certain franchised restaurants may include a reminder to consumers to consider tipping a restaurant worker or delivery driver. The Proposed Rule's preamble implies that a restaurant would be in violation of the Proposed Rule's requirements "[i]f a delivery application includes an invitation to tip a driver without disclosing the portion of the tip allocated to offset the delivery driver's base wage or benefits." 88 Fed. Reg. 77440. The

Commission fails to consider that while brand mobile applications offering delivery services nationwide to restaurant consumers, some franchised restaurants may use a tip credit while others elect not to do so or are legally prohibited from using a tip credit. Compliance with the Proposed Rule would restrict franchised restaurant systems from recommending an *optional* tip to consumers across all franchised restaurants nationwide, to the detriment of workers and for an estimated benefit to consumers of only $6.65 per year. 88 Fed. Reg. 77452. Additionally, franchised restaurants may independently establish discounts (including delivery fee discounts) for meeting a minimum purchase order or purchasing bundled menu items, which the Proposed Rule renders impossible if such discounts include any nationally advertised menu item. Compliance with Proposed Rule renders national and regional advertising—a benefit to both consumers and franchisees—impossible and eliminates a key reason many franchisees elected to invest in their franchise.

Additionally, the following examples are illustrative of the adverse impact of the Proposed Rule on small business owners that operate franchised restaurants:

- Franchisees no longer have the full benefits provided by national marketing fund to which they contribute, including centralized marketing support for the franchise system, which for many was material inducement to entering into a long-term contractual relationship with their franchisor. National marketing funds often are used for research and development of limited time offers, a proven tool to drive consumer traffic and increase ticket sales. Critical to the success of limited-time offers is pricing and advertising, which the Proposed Rule makes impossible on a national scale unless all franchisees operating within the system are stripped of the autonomy to choose whether to include ancillary fees

in the total purchase price for each order containing the limited-time offer menu item. If franchisees are to retain the authority to choose whether to impose ancillary fees, then marketing collateral must be produced at a per-restaurant level rather than systemwide level, resulting in greater costs per restaurant location, both for the franchisee in producing such marketing collateral and the franchisor in ensuring compliance with its brand standards at each restaurant location.

- Restaurant brands and their franchisees will lose consumer confidence and trust, as consumers navigate multiple prices for a single menu item across third party delivery platforms, brand websites and mobile applications, and in-store menus.

Notwithstanding the aforementioned challenges with the Proposed Rule for franchised restaurants, the Commission claims "pricing in the restaurant industry is less complex than in previously discussed industries." 88 Fed. Reg. 77473. There are similar challenges with the Proposed Rule in the fitness industry, as further described in the Public Comment submitted by IHRSA, The Global Health & Fitness Association ("IHRSA Comment"). IFA shares the concerns raised in the IHRSA Comment as they specifically impact IFA's members that operate franchise businesses in the health and fitness industry, including adverse implications for advertising by described in the IHRSA Comment.

The Commission further estimates that small businesses not currently in compliance with the Proposed Rule will incur an estimated annual cost of $2,010 to re-optimize prices, adjust marketing campaigns and adapt the purchase process to include full total costs. *Id.* at 77479. Within the restaurant industry, the Commission estimates that restaurants not currently in compliance with the Proposed Rule will incur 5-10 hours of legal advice to understand the impact of the Proposed Rule and 5-10 hours of legal advice to come into compliance with the Proposed

Rule, at an estimated billable hourly rate of $88.88/hr. *Id.* at 77473-74. The Commission further relies on a 10-year-old FDA Regulatory Impact Analysis to estimate the cost of updates to menu labeling and estimates 5-10 hours of manager time spent optimizing menu pricing at $31.47/hour. *Id.* at 774734. The Commission's estimates of cost are materially understated. Our members estimate incurring hundreds of hours in legal advice at an average billable rate of $500/hour to understand the impact of the Proposed Rule for systemwide advertising across all media channels and digital platforms and on-site at franchised restaurant locations as well as ongoing costs of compliance as new national, regional and local advertising campaigns are implemented.

The Commission similarly underestimates the costs of compliance in the short-term lodging industry. The Commission estimates that hotels not currently in compliance with the Proposed Rule will incur 10 hours of legal advice to under the impact of the Proposed Rule at an estimated billable rate of $91.57/hour, an estimated 40 hours of data scientist services to determine optimal pricing at an estimated rate of $39.07 per hour, and an estimated 40 hours of website development services at an estimated rate of $33.11 per hour. As further described in the AHLA Comment, the Commission's estimates do not accurately reflect the actual implementation costs and fails to incorporate a number of likely costs associated with the Proposed Rule that will require significantly more development, testing, troubleshooting and training than is included in the NPRM. *See also* Chamber Comment, IHRSA Comment and AHLA Comment.

In addition to failing to examine the costs the franchised businesses across industries would expend in complying with the rule, the FTC concedes that "total costs of the proposed rule are uncertain" and that it is "unable to quantify economy-wide benefits." 88 Fed. Reg. 77448. It further states that there is a "lack of reliable information on how . . . fees affect search and decision-making at the economy level." *Id.* As it relates to the restaurant industry specifically, the FTC

concedes that it "lack[s] data to quantify the benefits of the proposed rule within the restaurant industry." 88 Fed. Reg. 77476. IFA believes there are several foundational issues about the Proposed Rule that require further consideration and due diligence by the Commission. As also noted in the Chamber Comment and IHRSA, there are disputed issues of material fact needing to be resolved and requiring an informal hearing.

IFA further encourages the FTC to conduct a SBRIA to determine how the Proposed Rule will impact small businesses, including hundreds of thousands of franchised businesses operating in the short-term lodging, restaurant, fitness, preventative medicine and personal wellness industries, and examine the impact fully at an informal hearing. Without this analysis, the Commission cannot conclude with confidence that the impact of the Proposed Rule on all firms across all industries is not substantial.

In addition, although the FTC admits the proposed rule may cause consumer confusion and increase consumer search costs, the FTC does not include any such costs in its analysis. For example, the FTC admits that consumers "may mistakenly make inefficient purchases while adjusting to the new regime of all-in total pricing," and may "under-consume" products or services. *Id.* at 77447. Public commenters also stated that the proposed rule could increase the prices consumers pay for goods and services. Indeed, if one reads the proposed rule to require all-in pricing at each offer, this practice could lead to standardized pricing which will increase the prices consumers may, even if consumers are differently situated. Further, consumers may experience "information overload" in conjunction with the proposed rule's disclosure requirements, and not necessarily benefit as the FTC assumes. These consumer costs need to be fully evaluated and considered.

Overall, an agency's rule will be found arbitrary and capricious if the agency "inconsistently and opportunistically frame[s] the costs and benefits of the rule; fail[s] adequately to quantify the certain costs or to explain why those costs could not be quantified; neglect[s] to support its predictive judgments; contradict[s] itself; and fail[s] to respond to substantial problems raised by commenters." *See, e.g.*, *Bus. Roundtable*, 647 F.3d at 1148. The FTC has failed to undertake a thorough analysis of how the proposed rule will impact all sectors of the economy, and in particular, franchised businesses. While the FTC requests "that factual data on which the comments are based be submitted with the comments," the FTC has provided no data to support its own assumptions and conclusions as to the number of firms impacted and the extent of those impacts. Indeed, the FTC concedes that "total costs of the proposed rule are uncertain because it is unclear how, across a variety of industries, firms would adjust prices, change their price displays and disclosures, and upgrade their systems in response to the proposed rule," and the agency does "not have data on the exact costs firms not presently compliant will incur to comply with the proposed rule," instead proceeding on assumptions and limited information. The FTC's incomplete analysis is insufficient to justify the promulgation of a rule impacting industries economy-wide and the hundreds of thousands of franchised businesses operating within them without (1) showing how the underlying conduct is unfair, deceptive, and prevalence; (2) any meaningful analysis of the economic effect of the rule, taking into account the effect on small business and consumers. 15 U.S.C. 57a.

3. The Proposed Rule Should Expressly Exempt Business-To-Business Transactions.

The Commission should exempt business-to-business transactions from the Proposed Rule's coverage. The Proposed Rule does not demonstrate that unfair or deceptive fees are prevalent in business-to-business contexts. The ambiguity as to whether the Proposed Rule sweeps

in business-to-business transactions will burden businesses with uncertainty, a cost that will exceed any purported benefits.

The Proposed Rule applies to advertisements of "an amount a consumer may pay," 88 Fed. Reg. 77484 (quoting proposed 16 C.F.R. § 464.2). However, the Proposed Rule is unclear as to whether advertisements of "the amount a consumer may pay" include advertisements that solicit purchases from both businesses and consumers. Countless sellers, including many franchised businesses, offer goods and services to both consumers and businesses. Franchised hotels advertise large event spaces for consumers' weddings and business conventions. Wholesale warehouses advertise bulk food items to franchised restaurants and individual consumers. Mechanics advertise repair services for consumers' vehicles and business vehicles. And construction showrooms advertise building materials to homeowners and to franchised construction firms. The Proposed Rule could be applied against these businesses if they fail to display total price even though no *consumer* is ever misled or deceived.

The Commission has not laid any sufficient factual record to support the prevalence finding as to business-to-business transactions. The Proposed Rule cites no evidence that partitioned pricing or drip pricing harms businesses and accordingly lacks justification for burdening companies with overly prescriptive requirements governing their agreements with business customers. And the Commission's justifications for the Proposed Rule lack force when applied to business-to-business transactions. Sales transactions among businesses are more likely to involve sophisticated parties. Businesses often prefer unbundled, itemized breakdowns of fees and costs rather than all-in pricing precisely so as to be able to negotiate discrete dimensions of a transaction. Failing to consider this "important aspect of the problem" could be grounds for finding that a broad

rule is arbitrary and capricious. *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 43 (1983).

The lack of clarity in the Proposed Rule—as further described in the Chamber Comment and IHRSA Comment—includes ambiguity as to whether the Proposed Rule applies to business-to-business transactions will create costly uncertainty which the FTC did not consider in the rulemaking. Businesses that sell to both consumers and other businesses may be unable to determine whether they will have to revise all of their advertisements and pricing displays, potentially at considerable expense. Some of these businesses may spend millions of dollars to modify their websites, reoptimize their prices, and reprint their physical advertisements, even though the Proposed Rule does not require them to do so. The Commission must consider these important costs in its rulemaking, and failure to do so could support a finding of arbitrary and capricious action. See, e.g., *Bus. Roundtable,* 647 F.3d at 1148. The Commission should therefore amend the Proposed Rule to clarify that it does not apply to business-to-business transactions.

4. The Proposed Rule Should Exempt Franchise Disclosures, Which Are Already Regulated By The Franchise Rule.

When issuing the Proposed Rule, the Commission requested comments addressing how the Proposed Rule would "intersect with existing industry practices, norms, rules, laws, or regulations." *Id.* at 77481. As the Commission correctly observed, there is an "overlap" between the Proposed Rule and the Franchise Rule. 88 Fed. Reg. 77479 (discussing 16 C.F.R. 436). The Franchise Rule already "requires sellers of franchises to make specific disclosures in a prescribed form regarding the total investment necessary to begin operation of a franchise, as well as other costs," 88 Fed. Reg. 77479 n. 364. But the Proposed Rule would require that almost every single business in the United States "display Total Price more prominently than any other Pricing information" whenever it "offer[s], display[s], or advertise[s] an amount," 88 Fed. Reg. 77484 (quoting proposed 16 C.F.R.

§ 464.2), circumventing the aims of the Franchise Rule. The Proposed Rule should therefore exempt pricing and fee disclosures subject to the Franchise Rule.

The Franchise Rule regulates the contents of franchise disclosure documents, including how franchisors disclose the costs of franchise ownership to prospective franchisees. Franchisors must disclose all the "initial fees" of franchise ownership and "any conditions under which these fees are refundable." 16 C.F.R. § 436.5(e). They must also disclose "all other fees that the franchisee must pay to the franchisor or its affiliates, or that the franchisor or its affiliates impose or collect in whole or in part for a third party." *Id.* § 436.5(f). For each of these "other fees," franchisors must list the "type of fee," "amount of the fee," and "remarks, definitions, or caveats that elaborate" on these fees. *Id.* Similarly, franchisors must disclose a franchisee's "estimated initial investment," which includes the "initial franchise fee," "training expenses," "real property," "equipment," "inventory to begin operating," and "security deposits." *Id.* § 436.5(g) (capitalization altered). For each of these expenses, franchisors must list the "type of expense," "amount," "method of payment," "the due date," and "to whom payment will be made." *Id.*

The Franchise Rule thus mandates that franchisors itemize the specific fees that franchisees must pay and explain the purpose of each fee. This helps prospective franchisees "to understand fully the nature of the franchise relationship and the financial and legal commitments they will be undertaking." 64 Fed. Reg. 57295. Prospective franchisees need to see an itemized fee breakdown and complete explanations of each fee in order to evaluate whether investment in a franchise is a financially sound decision.

The Proposed Rule circumvents and undermines the Franchise Rule. It requires businesses to combine all fees into one "total price" and to display this total price "more prominently than any other Pricing Information." 88 Fed. Reg. 77484 (quoting proposed 16 C.F.R. § 464.2). The

prominent display of total price could confuse prospective franchisees and make the cost of purchasing a franchise seem more expensive than it really is, thereby deterring prospective franchisees from making efficient investments that they would otherwise make.

Additionally, by the Commission's own reasoning, there is no reason to apply the Proposed Rule to franchise disclosure documents. The Proposed Rule claims to offer two major benefits to consumers but neither applies, certainly not with comparable force, to franchisees. First, the Proposed Rule purportedly would "improve pricing transparency," 88 Fed. Reg. 77420, because consumers do not expect "surprise fees that distort the purchasing process," *id.* 77447. But unlike consumers who might not expect additional fees when purchasing goods and services, prospective franchisees expect the itemized disclosure of various fees associated with the economically complex, long-term contractual franchise relationship. Again, the Franchise Rule *requires* this disclosure.

Second, the Proposed Rule is supposed to reduce "costs on consumers of acquiring [pricing] information," 88 Fed. Reg. 77445, on the theory that displaying the total price upfront will help consumers avoid wasting time on transactions that they will ultimately abandon after being surprised by additional fees. However, the Proposed Rule would do little to reduce the search costs of prospective franchisees. Consumers comparison-shop for relatively fungible goods and services, and often spend only minutes or seconds deciding whether to make a purchase. Franchises, in contrast, are hardly fungible, and the decision whether to purchase one is significant (evidenced by the 14-day "cooling off" period mandated by the Franchise Rule before a prospective franchisee may complete the purchase of a franchise). Prospective franchisees can spend weeks or months studying franchising opportunities, scrutinizing legal documents, interviewing with franchisors, and engaging with financial advisors and other experts before

deciding whether to invest in a franchise. Therefore FTC's search-cost justification does not fit the franchise purchasing paradigm. Not only would the Proposed Rule frustrate the purpose of the Franchise Rule, but the Franchise Rule should also govern because it is more specific. *See, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (noting that a more specific statute controls over a more general); *Arzio v. Shinseki,* 602 F.3d 1343, 1347 (Fed. Cir. 2010) (noting that the specific-over-general "canon of construction applies to the interpretation of regulations as well as statutes.").

For all of these reasons, the Proposed Rule should exempt pricing disclosures subject to the Franchise Rule.

CONCLUSION

As a result of the Proposed Rule's overbreadth, franchised businesses will face costly regulatory burdens and confront considerable uncertainty with no countervailing benefits to consumers. We urge the Commission to consider the concerns raised by IFA in this comment as well as the concerns raised in the Chamber Comment, AHLA Comment, IHRSA Comment and NRA Comment, conduct a SBRIA to determine the impact of the Proposed Rule on the small businesses operating under the franchise model, and conduct an informal hearing to fully examine disputed issues of material fact raised in IFA's comment and the public comments described above. Finally, IFA urges the FTC to revise the Proposed Rule and exempt franchised businesses, business-to-business transactions, and pricing disclosures subject to the Franchise Rule.

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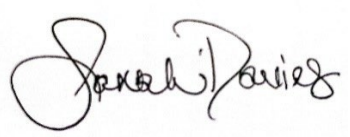
Thank you for the opportunity to submit our views and for considering our perspective.

Respectfully submitted,



Sarah Davies
General Counsel
International Franchise Association