

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

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LILA HARPER HELMS, MAJORITY STAFF DIRECTOR
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July 12, 2024

The Honorable Lina Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Madam Chairwoman:

We are concerned by the Federal Trade Commission’s (FTC) newfound use of flawed and self-serving cost-benefit analyses in recent notices of proposed rulemaking (NPRMs) and finalized rules. While the FTC had previously described its mission as protecting consumers “without unduly burdening legitimate business activity,”¹ its latest strategic plan omits this crucial caveat.² It seems the FTC is no longer concerned with whether newly issued regulations are so cost-prohibitive they cripple free enterprise. The consequences of this change are evident in recent rulemakings for the Unfair or Deceptive Fees (Junk Fees) Rule, the Combating Auto Retail Scams (CARS) Rule, and the Non-Compete Clause Rule.³ In advancing these initiatives, the FTC inflated benefits, underestimated costs, and relied more on its own biased assumptions than empirical evidence.

Cost-benefit analysis is built into the FTC’s rulemaking process. To deem an act or practice as unfair or deceptive, and therefore unlawful, the Commission must put forth what it calls a “preliminary regulatory analysis,” which includes a “preliminary analysis of the projected benefits and adverse economic effects,” as well as “any other effects,” of a proposed rule, such as “the effectiveness of the proposed rule and each alternative in meeting [its] stated

¹ FED. TRADE COMM’N, STRATEGIC PLAN FOR FISCAL YEARS 2018 TO 2022, at 2 (2018), https://www.ftc.gov/system/files/documents/reports/2018-2022-strategic-plan/ftc_fy18-22_strategic_plan.pdf.

² FED. TRADE COMM’N, STRATEGIC PLAN FOR FISCAL YEARS 2022–2026, at 6 of PDF (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/fy-2022-2026-ftc-strategic-plan.pdf. Notably, this shift in mission occurred during a period when the FTC lacked a Director for its Bureau of Economics. See Leah Nylen, *FTC’s Top Economist Resigned Amid Dispute Over Pharma Study*, POLITICO (Feb. 25, 2022), <https://www.politico.com/news/2022/02/25/ftcs-top-economist-resigned-amid-dispute-over-pharma-study-00011878>.

³ Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77420 (proposed Nov. 9, 2023) (to be codified at 16 C.F.R. pt. 464), <https://www.federalregister.gov/documents/2023/11/09/2023-24234/trade-regulation-rule-on-unfair-or-deceptive-fees>; Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3490 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-competes-clause-rule>; Motor Vehicle Dealers Trade Regulation Rule, 87 Fed. Reg. 42012, 42037 (proposed July 13, 2022) (to be codified at 16 C.F.R. pt. 463), <https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule>.

objectives.”⁴ Simply put, the FTC must conduct a thorough cost-benefit analysis that considers *all* relevant factors when it issues an NPRM. For rulemakings relating to “unfair” acts or practices, the FTC must further determine that the act or practice “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.”⁵ Yet in three recent NPRMs, two of which have led to final rules, the Commission’s preliminary regulatory analyses overlooked key factors and failed to justify the respective rulemakings.

First, the FTC ignored key factors in its Junk Fees NPRM. The FTC overly relied on sector-specific studies for hotel fees and live event ticketing to draw conclusions about fee practices across industries.⁶ It also downplayed how an economy-wide rule requiring companies to show “mandatory fees . . . [in] advertised prices” could actually *reduce* the amount of information available to consumers.⁷ For credit card usage fees, for example, the FTC claimed “restaurants would eliminate these fees and adjust menu prices in response to the proposed rule.”⁸ But the Junk Fees rule would merely require restaurants to wrap credit card fees into the cost of each menu item rather than as a line-item charge on the final check. This is a gift to credit card companies—forcing cash-paying customers to subsidize credit card users while obscuring credit card processing fees and how they are passed on to consumers.⁹ Line-item charges, in contrast, “provide consumers with useful information” and “help consumers understand economic realities.”¹⁰ The cost-benefit analysis additionally failed to consider how the rule might reduce price advertising, thereby decreasing consumer information, as companies seek to avoid regulatory risk.¹¹

Second, the FTC initially overstated the anticipated benefits of the now-finalized CARS Rule.¹² The agency’s NPRM claimed that “each consumer who ends up purchasing a vehicle will spend 3 fewer hours” on the entire vehicle purchasing process—supposedly a 20 percent reduction in the average amount of time spent on a vehicle purchase.¹³ The report on which this analysis depends, however, states that the primary activity the CARS Rule addresses—negotiating a price

⁴ Federal Trade Commission Act of 1914 §§ 18, 22(b)(1)(C) (editorially codified as amended at 15 U.S.C. §§ 57a, 57b-3(b)(1)(C)).

⁵ § 5(n) (editorially codified as amended at 15 U.S.C. § 45(n)).

⁶ Mary Sullivan, George Washington University Regulatory Studies Center, Public Interest Comment on FTC Trade Regulation Rule on Unfair or Deceptive Fees, at 2, 7 (Jan. 8, 2024), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/2024-01/comment_ftc-2023-0064_deceptive_fees_msullivan.pdf.

⁷ Trade Regulation Rule on Unfair or Deceptive Fees, *supra* note 3.

⁸ Ryan Bourne & Sophia Bagley, *Junk Fees or Junk Economics?*, CATO INST. (May 23, 2023), https://www.cato.org/sites/cato.org/files/2023-05/BP-157_update.pdf.*Id.*

⁹ Mary Sullivan, *supra* note 6, at 3.

¹⁰ *Id.*

¹¹ See U.S. Chamber of Commerce, Comment Letter on Unfair or Deceptive Fees NPRM, at 18–19 (Feb. 7, 2024), <https://www.uschamber.com/assets/documents/USCC-Unfair-Deceptive-Fee-NPRM-Comments.pdf>.

¹² Formerly the “Motor Vehicle Dealers Trade Regulation Rule.”

¹³ Motor Vehicle Dealers Trade Regulation Rule, *supra* note 3, at 42037, n.180.

and trade-in offer for a vehicle—takes all of 32 minutes.¹⁴ Simply put, it is not possible to shave three hours off of a 32 minute endeavor. And yet, the FTC relied upon this three-hour estimate—multiplied by the value of non-work time for the average U.S. worker and the annual number of vehicle transactions—to conclude that the rule would provide an estimated \$31 billion in consumer benefits.¹⁵ The agency relied on more conservative time-saving assumptions in its finalized rule, perhaps realizing that its NPRM analysis was unsupported.¹⁶

Third, the FTC underestimated businesses' compliance costs and overestimated workers' benefits in its Non-Compete Clause NPRM.¹⁷ In discussing the consequences of banning non-compete clauses, the FTC wrote that it was “not aware of empirical evidence on how much it costs firms to update their contractual practices when they can no longer use non-compete clauses.”¹⁸ But the FTC nevertheless assumed businesses would pay for only four to eight hours of legal work per contract to rescind non-compete clauses and update contractual language by the rule's compliance date.¹⁹ This estimate appeared not to include time needed to renegotiate contracts in light of the material change or to apply the proposed rule's prohibition on “de facto” non-compete clauses, which encompassed certain non-disclosure agreements.²⁰ The Commission's estimate that providing notice of the non-compete ban would require only 20 minutes of “human resources specialists' time” was likewise uncorroborated.²¹ At the same time, the FTC argued that the rule would increase workers' earning by more than a quarter trillion dollars annually based on the results of only two, possibly inapt studies.²²

¹⁴ Dan Goldbeck, *FTC Needs to Run Those Numbers Again*, AMERICAN ACTION FORUM (Sept. 1, 2022), <https://www.americanactionforum.org/insight/ftc-needs-to-run-those-numbers-again/>.

¹⁵ Motor Vehicle Dealers Trade Regulation Rule, *supra* note 3, at 42037.

¹⁶ See Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. 590, 676 (Jan. 4, 2024) (to be codified at 16 C.F.R. pt. 463), <https://www.federalregister.gov/documents/2024/01/04/2023-27997/combating-auto-retail-scams-trade-regulation-rule> (“While the Commission believes its 3-hour time-saving assumption in the NPRM remains reasonable, the Commission has conducted additional analyses, the results of which demonstrate the positive net benefits of the Rule even when applying more conservative assumptions around time savings and adjusting for the removal of certain proposed provisions from the NPRM.”).

¹⁷ In issuing this proposed “competition” rule, the Commission cited not to Section 18 of the FTC Act, with its cost-benefit analysis requirement, but to Section 6(g), 15 U.S.C. § 46, which was long thought to only grant the Commission authority to make *procedural* rules. The Commission likely lacks authority to engage in such substantive competition rulemaking. See *Dissenting Statement of Comm’r Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule*, Comm’n File No. P201200-1, Office of Comm’r Christine S. Wilson, Fed. Trade Comm’n (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompewilsondissent.pdf.

¹⁸ Non-Compete Clause Rule, *supra* note 3, at 3528.

¹⁹ *Id.* at 3528–29 (describing a fanciful scenario where “two-thirds of firms that currently use non-competes opt to make no changes to their contractual practices...and one-third of such firms spend (on average) the equivalent of 1.5 to 3 days of an attorney’s time.”)

²⁰ See *id.* at 3507 (“NDAs that are unusually broad in scope may function as de facto non-compete clauses, hence falling within the scope of the proposed rule.”); *id.* at 3509 (noting that “functional equivalents” of non-compete clauses, such as restrictive employment covenants, “would be non-compete clauses for purposes of the Rule.”)

²¹ See *id.* at 3528.

²² *Id.* at 3522–23 (“[T]he proposed rule would increase workers’ earnings workforce-wide by \$250-\$296 billion annually.”). *But see* Fed’n of Am. Hosps., Comment Letter on Proposed Non-Compete Clause Rule at 8–14 (Apr. 9,

In its final rule, the FTC conceded it still lacked evidence of the cost of updating contractual practices but clung to the four-to-eight-hour estimate anyway.²³ The Commission also defended its assumption that HR could handle a notice in just twenty minutes, saying it was “unreasonable to assume the notice would need to be sent by a legal professional”—or might take longer—because the final rule included model language.²⁴ Moreover, the FTC discounted the need to hire outside counsel, despite this potentially increasing estimated legal and administrative costs from \$2.1–\$3.7 billion to \$7.2–\$13 billion.²⁵ The Commission separately acknowledged that “it is not clear whether litigation costs would rise or fall under the final rule.”²⁶ On the other hand, in perhaps a begrudging nod to critics, it scaled back the projected annual rise in workers’ earnings to \$53 billion—a fraction of the initial estimate and an admission that, even accounting for changes in the final rule, benefits were likely inflated in the NPRM.²⁷ This new figure could overstate (or understate) the case, as the Commission could not find “a way to separate the total effect on workers’ earnings into transfers and benefits.”²⁸ The uncertainty is precisely the problem.

None of this criticism is intended to denigrate the hard work of the staff economists at the FTC. Our concern, rather, is that FTC’s leadership has put the cart before the horse, rushing ahead with economy-transforming rules without understanding their real-world effects. Rigorous cost-benefit analysis takes time, but the FTC is impatient. In the case of the CARS rule, to cite just one instance, the FTC *denied* industry requests to grant a routine extension to the notice and comment period, which would have allowed more time for stakeholders to submit supplemental analyses.²⁹

The Standing Rules of the Senate provide the Committee on Commerce, Science, and Transportation the authority to “review and study, on a continuing basis” matters of interstate commerce and consumer affairs.³⁰ So that we may better understand the FTC’s approach to cost-benefit analysis, please provide the documents requested below and written responses to the questions below no later than July 26, 2024, and in accordance with the attached instructions.

2023), <https://www.fah.org/wp-content/uploads/2023/04/FTC-Noncompete-Proposed-Rule-41123-FINAL.pdf> (noting that the proposed rule “reflects a fundamental misunderstanding about the empirical literature on the competitive effects of noncompete agreements.”)

²³ Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38497 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912), <https://www.federalregister.gov/public-inspection/2024-09171/non-compete-clause-rule>.

²⁴ *Id.* at 38484.

²⁵ *Id.* at 38468, 38484.

²⁶ *Id.* at 38479.

²⁷ *Id.* at 38474.

²⁸ *Id.*

²⁹ *Re: Duration of the Public Comment Period in Matter No. P204800, Motor Vehicle Dealers Trade Regulation Rule*, FED. TRADE COMM’N (Aug. 23, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20204800%20Letter%20re%20Extension%20for%20publication.pdf.

³⁰ S. Rules XXV(1)(f), XXVI(8).

1. What has been the attrition rate of economists at the Bureau of Economics since January 2021?
2. Identify and provide all economic reports published by the FTC since January 2021.
3. Why were the words “without unduly burdening legitimate business activity” removed from the FTC’s mission statement in the 2022–2026 strategic plan? Identify or provide documents sufficient to show all individuals involved in this decision and provide all documents and communications referring or relating to this change.
4. Why did the Commission decide to forego a robust regulatory flexibility analysis in the Motor Vehicles NPRM and instead certify that the regulatory action would not have a significant economic impact on a substantial number of small entities?³¹ (It provided regulatory flexibility analysis in the final rule “in the interest of thoroughness.”)³²
5. List and provide all studies relied on by the FTC in concluding that its proposed non-compete rule could “increase wages by nearly \$300 billion per year.”³³ What explains the much lower estimate of increased earnings in the final rule?

Thank you for your attention to this matter.

Sincerely,



Ted Cruz
Ranking Member
Committee on Commerce, Science,
and Transportation



Marsha Blackburn
Ranking Member
Subcommittee on Consumer Protection,
Product Safety, and Data Security



Ted Budd
United States Senator



Deb Fischer
United States Senator

³¹ See Motor Vehicle Dealers Trade Regulation Rule, *supra* note 3, at 42035.

³² Combating Auto Retail Scams Trade Regulation Rule, *supra* note 16, at 666.

³³ *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM’N (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>.



John Thune
United States Senator



Roger Wicker
United States Senator