



March 7, 2024

VIA ELECTRONIC SUBMISSION

April J. Tabor  
Secretary  
Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Mail Stop H-144 (Annex J)  
Washington, DC 20580.

**Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC-2023-0064-0001**

Dear Secretary Tabor:

On November 9, 2023, the Federal Trade Commission (FTC) published a notice of proposed rulemaking (NPRM) on the Trade Regulation Rule on Unfair or Deceptive Fees.<sup>1</sup> The proposed rule would prohibit unfair or deceptive practices relating to fees for goods or services, specifically, misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees.

The Office of Advocacy is concerned about the potential impact of the proposed rulemaking on small entities. The Office of Advocacy recommends that the FTC prepare a supplemental initial regulatory flexibility analysis that fully considers the economic impact of the proposed rulemaking on small entities and alternatives that may reduce that burden. Advocacy further recommends that the FTC clarify that this rulemaking will not apply to small non-profit organizations.

**I. Background**

**A. The Office of Advocacy**

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office

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<sup>1</sup> 88 Fed. Reg. 77420 (Nov. 9, 2023).

within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.<sup>4</sup> Additionally, section 609 of the RFA requires the Consumer Financial Protection Bureau, the Occupational Safety and Health Administration, and the Environmental Protection Agency to conduct special outreach efforts through a review panel.<sup>5</sup> The panel must carefully consider the views of the impacted small entities, assess the impact of the proposed rule on small entities, and consider less burdensome alternatives for small entities.<sup>6</sup> If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.<sup>7</sup> The agency must provide a statement of factual basis that adequately supports its certification.<sup>8</sup>

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>9</sup> The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.<sup>10</sup> While Advocacy acknowledges that the comment period for this proposed rule closed on February 7, 2024, the agency should still consider Advocacy's comments as required under the Small Business Jobs Act of 2010.

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."<sup>11</sup>

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<sup>2</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

<sup>3</sup> Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

<sup>4</sup> 5 U.S.C. § 603.

<sup>5</sup> *Id.* § 609.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* § 605(b).

<sup>8</sup> *Id.*

<sup>9</sup> Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

<sup>10</sup> *Id.*

<sup>11</sup> Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

## **B. The Proposed Rule**

On November 9, 2023, the FTC published a proposed rulemaking on the Trade Regulation Rule on Unfair or Deceptive Fees. The FTC asserts that the proposed rule addresses prevalent fee practices that are unlawful under Section 5 of the FTC Act, 15 U.S.C. § 45, because they are unfair or deceptive to consumers. The FTC has identified two practices that, for the reasons described herein, are unfair or deceptive practices under Section 5 of the FTC Act: (1) practices that misrepresent the total costs by omitting mandatory fees from advertised prices, and (2) practices that misrepresent the nature and purpose of fees or charges.<sup>12</sup>

## **II. The IRFA Does Not Comply with the Requirements of the RFA**

The FTC prepared an initial regulatory flexibility analysis (IRFA) for the proposed rule.<sup>13</sup> In developing a proposed rule, an agency must prepare an IRFA if it determines that a proposal may impose a significant economic impact on a substantial number of small entities. The RFA requires agencies to publish the IRFA, or a summary, in the Federal Register at the same time it publishes the proposed rulemaking. The IRFA must include a discussion of each element required by Section 603 of the RFA. The elements of an IRFA are:

1. A description of the reasons why the action by the agency is being considered.
2. A succinct statement of the objectives of, and legal basis for, the proposed rule.
3. A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply.
4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.
5. An identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.
6. A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact of the proposed rule on small entities.

The principal issues an agency should address in an IRFA are the impact of a proposed rule on small entities, the comparative effectiveness of that proposed rule, and the costs of alternative regulatory options. In the IRFA, the FTC fails to provide an accurate description of the small entities to which the proposed rule will apply as well as an accurate description of the costs associated with the compliance requirements. The FTC also failed to consider significant alternatives that would minimize any significant economic impact of the proposed rule on small businesses.

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<sup>12</sup> 88 Fed. Reg. 77420.

<sup>13</sup> *Id.* at 77,479.

## **A. The IRFA Fails to Provide an Accurate Description of the Small Entities to Which the Proposed Rule Will Apply**

In the IRFA, the FTC states:

“Most firms in the U.S. economy would be subject to this proposed rule, but only firms that do not currently disclose total price will need to adjust their pricing strategy. According to the Statistics of U.S. Businesses, there were 6,119,657 firms in the United States with fewer than 500 employees, representing 99.7% of all U.S. firms.”<sup>14</sup>

Advocacy asserts that the FTC used an inappropriate definition of “small entity” in its IRFA. The RFA requires agencies to use the Small Business Administration's definition of small entity. Section 601 of the RFA sets forth, in relevant part, “[f]or the purposes of this chapter ... the term ‘small entity’ shall have the same meaning as the term ‘small business’ ....”<sup>15</sup> The term “small business” has the same meaning as the term “small business concern” under Section 3 of the Small Business Act.<sup>16</sup> SBA size standards are for the most part expressed in either millions of dollars (those preceded by “\$”) or number of employees (those without the “\$”). For the most part, size standards are the average annual receipts or the average employment of a firm set by industry.<sup>17</sup>

It is inappropriate to define a small business as one with fewer than 500 employees in an RFA analysis. Small businesses are defined by industry and the definition can vary within the same sector. For example, Sector 72 covers accommodation and food services. The size standard for hotels and motels is \$40.0 million in annual receipts. However, the size standard for bed and breakfast inns is \$9.0 million in annual receipts. Similarly, the size standard for drinking places that serve alcoholic beverages is \$9.0 million annual receipts. However, the size standard for full-service restaurants is \$11.5 million in annual receipts, while limited-service restaurants is \$13.5 million in annual receipts. Cafeterias, grill buffets, and buffets have a size standard of \$34.0 million in annual receipts.<sup>18</sup>

Those are just a few examples that illustrate why the FTC cannot simply make a blanket statement about the number of employees to describe the small businesses that may be impacted. The FTC must identify each size standard to describe the affected businesses for its IRFA to comply with the RFA.

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<sup>14</sup> *Id.*

<sup>15</sup> 5 U.S.C. § 601(6).

<sup>16</sup> 15 U.S.C. § 632 (1994); 5 U.S.C. § 601(3). *See also*, Northwest Mining v. Babbitt, 5 F. Supp. 2d 9, 14-15 (D.D.C. 1998).

<sup>17</sup> U.S. SMALL BUS. ADMIN., U. S. SMALL BUSINESS ADMINISTRATION TABLE OF SMALL BUSINESS SIZE STANDARDS MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES 1, [https://www.sba.gov/sites/default/files/2023-06/Table%20of%20Size%20Standards\\_Effective%20March%2017%2C%202023%20%282%29.pdf](https://www.sba.gov/sites/default/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf) (effective Mar. 17, 2023).

<sup>18</sup> *Id.* at 34-35.

## **B. The IRFA Underestimates the Compliance Costs**

The IRFA also underestimates the compliance costs. The main compliance cost that the FTC lists is firms conducting compliance review—which the FTC proxies as \$78.74 per hour for an attorney<sup>19</sup>. This number is based on the information about hourly wages from the U.S. Bureau of Labor Statistics.<sup>20</sup> An hourly wage is not the same as an attorney fee, so this estimate deeply understates compliance costs. Attorney fees vary by location, area of expertise, experience, and many other factors. Fees range from the low end of \$168 per hour in West Virginia to the high end of \$424 per hour in the District of Columbia.<sup>21</sup> The average attorney fee clearly exceeds the average hourly wage provided by the FTC. Advocacy recommends that the FTC reassess the compliance costs of this rulemaking based on realistic attorney fees. As it stands, both the one-time and ongoing compliance costs listed in the proposed rule are understated.

The other compliance costs that the FTC includes are for the firms' updated pricing strategies and changing their prices on websites and/or menus. These are proxied by hourly wages for data scientists and web developers—which are \$55.40 and \$42.11 per hour, respectively. The FTC assumes that these are one-time costs. This assumption seems dubious. If attorneys find any need of changes, entities will need to revise their pricing strategies and websites. As such, these ongoing costs are understated. The FTC should assume a percentage of firms that in the previous year were in compliance will not be the following year.

There are also other compliance costs that the FTC neglected that make their cost estimates understated. Two such examples are rule review and employee training expenses. These costs are important as front-line employees must also be made aware and trained on how to relay prices in a way that is compliant with this proposed rule.

## **C. The RFA Requires the FTC to Consider Less Costly Alternatives for Small Entities**

Having an accurate assessment of compliance costs is important for considering less costly alternatives. The FTC's consideration of less costly alternatives for small businesses is extremely limited. There is no true discussion of significant alternatives in the IRFA. Instead, the FTC states, "Where the Commission has already addressed these components, it incorporates that analysis into its IRFA."<sup>22</sup>

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<sup>19</sup> 88 Fed. Reg. at 77, 479.

<sup>20</sup> 88 Fed. Reg. at 77,452.

<sup>21</sup> Catherine Brock, *Lawyer Hourly Rate & Fees by State*, LAWPAY (Apr. 24, 2024), <https://www.lawpay.com/about/blog/lawyer-hourly-rate-by-state/>.

<sup>22</sup> 88 Fed. Reg. at 77,479.

In reviewing the NPRM, Advocacy could only find one reference to an alternative that was specifically meant to reduce the economic impact on small entities. On page 77441, the FTC states that it considered exempting small businesses or focusing solely on online-only transactions. It is unclear whether the online-only alternative was for small businesses or all businesses.

Although the RFA states that an agency does not need to do a duplicative analysis, the agency must still perform an analysis of alternatives plural, which accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact of the proposed rule on small entities. Simply stating that the FTC considered exempting small businesses is a singular alternative and insufficient.

The RFA requires an agency to consider any significant alternatives which accomplish the agency's objectives, and which minimize any significant economic impact on small entities. There are other alternatives that the FTC should have considered in its IRFA. For example, the agency could have considered allowing small businesses more time to comply with the rule. Additionally, the agency could have also considered exempting certain sectors of small businesses or imposing a limit on certain fees.

Furthermore, in terms of transparency, the agency should include the small business alternatives in the IRFA section of the preamble. Small businesses should not have to spend time combing through the preamble to try to ascertain what alternatives, if any, the agency considered to decrease the burden on small businesses.

Reducing the burden on small entities benefits both small entities and consumers. Small entities in the marketplace provide consumers with more options and creates a more competitive marketplace overall. Advocacy recommends that the FTC consider more alternatives for small businesses and include that information in the RFA section of the preamble.

### **III. The FTC Should Clarify that the Rulemaking Will Not Apply to Non-Profits**

This proposal is being promulgated pursuant to 15 USC § 45, which applies to persons, partnerships, or corporations. In 15 USC § 44, a corporation is defined as any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members. Indeed, the FTC did not include non-profits in its IRFA.

Non-profits should not be subject to this rulemaking. However, non-profit performing arts stakeholders submitted a comment letter on the proposal<sup>23</sup>. Non-profits may incur thousands of dollars in legal fees trying to ascertain whether this rulemaking applies to them. Advocacy encourages the FTC to clarify that this rulemaking will not apply to non-profits.

#### **IV. The Agencies Should Provide Clear Guidance to Assist Small Entities with Compliance**

Given the requirements of the proposed rulemaking, providing clear guidance for complying with the agency's rulemaking will be helpful to small entities and eliminate confusion. Small entities may lack resources to assist them in understanding regulatory requirements and performing the necessary actions to achieve compliance. Advocacy encourages the agency to provide guidance to assist small entities in complying with the requirements of the rulemaking.

#### **V. Conclusion**

The IRFA that the FTC prepared for this rulemaking does not comply with the requirements of the RFA. Advocacy recommends that the FTC prepare a supplemental initial regulatory flexibility analysis that fully considers the economic impact of the proposed rulemaking on small entities and alternatives that may reduce that burden. Advocacy further recommends that the FTC clarify that this rulemaking will not apply to small non-profit organizations.

The Office of Advocacy is available to assist the FTC with its RFA compliance. If you have any questions or require additional information, please contact me or Assistant Chief Counsel Jennifer A. Smith at (202) 205-6943 or by email at [Jennifer.Smith@sba.gov](mailto:Jennifer.Smith@sba.gov). Thank you for the opportunity to comment on this important proposal.

Sincerely,

/s/

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Deputy Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

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<sup>23</sup> Ass'n of Performing Arts Pro. et al., Comment Letter on Proposed Trade Regulation Rule on Unfair or Deceptive Fees (Feb. 7, 2024), <https://www.regulations.gov/comment/FTC-2023-0064-3195>.

/s/

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