

FTC Initiates Process to Adopt Proposed Rule on Rental Housing Fee Practices

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The day after the [release of a new Advance Notice of Proposed Rulemaking \(ANPR\) on Negative Option Offers](#), the FTC [released](#) another ANPR soliciting information and comments on a prospective Rule on Unfair or Deceptive Rental Housing Fee Practices. The ANPR is not a surprise – with Chair Ferguson having previewed a forthcoming rule in a [Concurring Statement](#) in connection with the FTC’s settlement with Greystar Real Estate Partners last year.

The announcement yesterday hits on key themes we’ve heard from this FTC since Chair Ferguson took over last year – affordability for everyday consumers and pricing transparency to enable informed choices. As the first step in the rule process, there is not an actual rule proposed yet, but the objectives and questions provide insight into the likely potential focus of a future rule. (For a refresher on the FTC’s rulemaking processes, [see our previous blog post here.](#))

Background and Past Rental Fee Enforcement

The ANPR explains that recent rental increases and the fact that nearly 35% of households live in rentals reinforce the need for price transparency in the rental housing market as “consumers... struggle to learn the true total rent of a property” through many channels. The ANPR cites responsible parties such as owners, property managers, and software providers, and listing and rental platforms, that may fail to include all mandatory fees and charges in rent advertising. The FTC also hits on potential anti-competitive effects by noting that “[t]he failure to advertise the true total rent and to clearly and conspicuously disclose fees or charges and their nature and purpose” impedes comparison shopping and “may undermine competition” where other rentals advertise total rent.

The ANPR explains that unfair and deceptive rental housing fee practices already violate existing law and points to its recent cases against rental housing providers [Invitation Homes](#) and [Greystar](#). In those cases, the FTC ordered both companies to change fee practices to advertise the total rent including all mandatory fees, clearly and conspicuously disclose certain information about fees, and pay millions in consumer redress. In support of the ANPR, the FTC also points to [state laws and enforcement actions](#) relating to rental fees or general price transparency.

The ANPR acknowledges that some industry participants previously commented (in response to the previous, broader Unfair or Deceptive Fees rulemaking, which ultimately only covered live-event tickets and short-term lodging as discussed [here](#)) that they advertise base rent because many rental fees are conditional or usage based, fees are disclosed in the lease, and further regulation is unnecessary given state laws. Nonetheless, the ANPR expresses “the Commission’s current view []

that unfair and deceptive rental fee practices . . . appear to be prevalent and may require additional Commission action.” The FTC solicits comments on a host of topics, including the disclosure of total price and mandatory fees, application fees, security deposits, billing issues, and practices that impede consumer choice.

Potential Deceptive Practices

The FTC seeks comment to assist in both 1) determining whether it should engage in rulemaking and 2) the scope of a proposed rule. The potentially unfair and deceptive rental fee practices that may be addressed in a forthcoming rule include:

- **Disclosure of Total Price and Fees.** Failing to clearly and conspicuously disclose or misrepresenting the total rent, existence of mandatory fees, nature and purpose of fees, and whether they are mandatory or optional or conditional;
- Failing to obtain express informed consent for fees that “consumers would reasonably believe to be included in the total rent;” and
- **Consumer Choice.** Inhibiting consumer choice by requiring the use of a certain service provider.

Questions for Comment

The FTC lists 74 questions (many with subparts) about the rental housing industry and fees and asks for reasoning, data, evidence, and analyses, including information on costs and benefits and how they may vary. The following topics, among others are addressed:

Current State of Market

- What is the current state of rental housing market price advertising, including what percentage of the market advertises a total rent or fails to conspicuously disclose any excluded fees, and what types of mandatory and optional fees are common?
- What type of fees are common before lease signing or at termination, such as application fees, deposits or other one-time charges, and are these charges refundable if an application is rejected?
- How common is requiring specific service providers or services, or requiring fees for certain payment methods or utilities?

Feasibility

- What are the potential impediments from advertising total rent, including whether third-party service providers, technology, or consumer choices impact these disclosures?
- Is it feasible to include actual or estimated utility charges in advertising, and how are they typically calculated and billed?
- How have past FTC fee rule proposals and the final Rule on Unfair or Deceptive Fees impacted relevant markets?
- How can a new rule minimize costs to businesses?

What Should be in the Rule?

Along with the expected questions on a rule to advertise the total price inclusive of mandatory fees and disclose the nature, purpose, and amount of fees, the FTC digs into further potential requirements and prohibitions in a forthcoming rule.

- Should the rule require the total rent to be displayed more prominently than other pricing information?
- What fees should be required to be included in advertising “total rent,” such as whether one-time fees should be included or government charges?
- Should advertising estimate variable fees?
- Should all fees be itemized?
- When in the leasing process should different fees be displayed?
- Should certain security deposit charges should be prohibited, such as withholding amounts for normal wear and tear or tying the amount to actual costs?
- Should certain rental housing be excluded from the scope of a rule – such as small businesses, single family homes, or third-party providers?

Next Steps

Comments are due by April 13. In the meantime, and throughout the rulemaking process, we anticipate this will continue to be an area of focus for federal or state regulators, notwithstanding some gray areas in federal standards relative to more prescriptive state level requirements. Moreover, regardless of the outcome of the federal rulemaking process, states are rapidly enacting targeted laws governing fee disclosures that may require similar changes.

The comment window is a meaningful opportunity for businesses to help shape whatever rule may follow. Companies and trade associations that want a workable framework should consider weighing in. For questions about the ANPRM or assistance preparing comments, please reach out to the authors.