

December 20th, 2023

Andrea Joy Campbell, Attorney General
1 Ashburton Place
20th Floor
Boston, MA 02108

Dear Attorney General Campbell,

On behalf of the Greater Boston Chamber of Commerce and our 1,300 members, I write to offer comments on proposed regulations 940 C.M.R. 38.00 related to unfair and deceptive fees, or “junk” fees. The unexpected release of the proposed regulations and the broad language contained within the proposal raise several procedural and substantive concerns among the business community. Given the significant impact on almost all consumer-oriented businesses and the potential for major unintended consequences, the Chamber urgently requests the Attorney General’s Office to extend the public comment period to allow for sufficient public engagement with affected stakeholders.

The Attorney General should also delay action until current efforts at the Federal Trade Commission (FTC) to regulate in this area have concluded. This will avoid significant confusion among businesses in the Commonwealth and avoid the potential for differing standards of regulation.

Finally, the preliminary feedback from our members points to several policy concerns with the regulations as drafted that do not account for either industry specific approaches to consumer pricing nor common national pricing and advertising practices. Taking some additional time would allow the Attorney General to reconsider elements of this proposal and work with businesses to understand these nuances prior to issuing sweeping regulations.

Insufficient Stakeholder Engagement

The proposed regulations attempt to prohibit hidden or “junk” fees in the advertising or displaying of consumer products and regulate subscription and trial offers. Released on November 30th, the Attorney General’s Office opened a public comment period with a deadline of December 20th, giving impacted stakeholders only 21 days during the holiday season to respond with constructive feedback on a major public policy change in Massachusetts. This is clearly insufficient for such broad-based rules.

In the ongoing FTC rulemaking process related to junk fees, 41,531 comments have been submitted to date, with a comment period ending on January 8, 2024.ⁱ Impacting every employer that offers a consumer product, good public policy development requires sufficient public input – particularly when the state legislature has not specifically articulated and debated its intent to regulate in this area. We encourage your office to take the time necessary to understand the impacts of this proposal and engage with the businesses on any type of regulatory efforts.

Conflicting with Ongoing Federal Rulemaking

Aside from the sudden nature and limited outreach around this proposal, the proposed regulations also emerge during the above referenced FTC rulemaking process. Putting aside the specifics of the draft regulations, a national approach to regulating fees is more appropriate than patchwork state by state efforts especially given the number of businesses with multi-state operations and sales.

Still collecting comments, the FTC is contemplating national rules around junk fees that may contradict and likely preempt any state standards on the subject. Only California has adopted rules related to junk fees – by passing a law through the legislative process – and those rules are not effective until July 1, 2024. The proposed state-specific regulations will place Massachusetts out of step with the rest of the nation, hurting the state's competitiveness. As we engage in fierce competition to attract and retain talent and businesses, adopting Massachusetts-specific regulations ahead of the FTC's decisions in these matters risks our state's competitiveness and discourages economic growth, innovation, and job creation.

The proposed regulations also include requirements for trial offers and auto-renewal subscriptions. Like junk fees, the federal government, through the Consumer Financial Protection Bureau, offered guidance to address specific conduct and "negative option" subscription services and the FTC collected comments on the topic in 2023, scheduling a hearing to further consider regulatory action on January 16, 2024. To the extent Massachusetts considers rules on this topic, we should be consistent with federal efforts and other states that are more proactive in regulating in this area to avoid overburdensome state-by-state compliance.

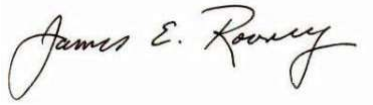
Substantive Policy Concerns

In the limited public engagement period allowed to stakeholders, the Chamber has several concerns with the proposed regulations:

- 1) The regulations do not account for products where pricing is impacted by consumer choices. Products with optional features or discounts based on certain eligibility requirements may change the "total price" after advertising a base product. This may occur after the disclosure of personal information - a term that is undefined in the regulation that creates its own confusion. Any regulation governing consumer pricing should allow for consumer choices to change pricing and allow for pricing changes depending on specific contexts so long as pricing is transparent and clear to the purchaser.
- 2) The draft regulations are overly broad and do not target alleged bad actors. Regulations should start with and be limited to industries with a demonstrated history of deceptive behavior and targeted to protect consumers from unexpected charges. To the extent rules move forward, they should be narrowed to focus on the specific conduct identified by policymakers and not broad based. The proposed rules go far beyond reasonable regulation and will impact everyday, regular business transactions in the Commonwealth.
- 3) Signing up for services will become more difficult under the proposed rules. Consumers will be negatively affected and inconvenienced, and the regulation making process should consider the consumer experience impacts.

We appreciate the challenges of regulating business activity with the dual goals of consumer protection and allowing for robust free trade and economic activity. Unfortunately, as drafted, the proposed regulations represent a rushed attempt to address any perceived deceptive practices in consumer pricing. We encourage you to slow down this process, engage in substantive collaboration with the business community, and revisit the issue when the federal rulemaking process provides more clarity.

Sincerely,

A handwritten signature in black ink that reads "James E. Rooney". The signature is written in a cursive style with a large, stylized initial "J".

James E. Rooney
President & CEO
Greater Boston Chamber
of Commerce

¹ <https://www.federalregister.gov/documents/2023/11/09/2023-24234/trade-regulation-rule-on-unfair-or-deceptive-fees>

Date: 12/19/23