

February 7, 2024

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Junk Fees Trade Regulation, R207011

The National Housing Law Project (NHLP), members of the Housing Justice Network, and the undersigned organizations engaged in housing justice advocacy submit this comment letter in strong support of the FTC's proposed trade regulation on hidden and misleading fees. This proposed rule is much needed to curb unfair and deceptive practices and to protect tenants in the rental housing industry. NHLP does not believe that there are any disputed issues of fact for this proposed rule. If, however, the FTC decides to conduct hearings regarding this rule, NHLP wishes to participate in those hearings and engage in cross-examination.

NHLP's mission is to advance housing justice for people living in poverty and their communities. NHLP achieves this by strengthening and enforcing the rights of tenants and increasing housing opportunities for underserved communities. Our organization also provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide. NHLP hosts the national Housing Justice Network (HJN), a vast field network of over 2,000 community-level housing advocates and resident leaders. HJN member organizations are committed to protecting affordable housing and residents' rights for low-income families across the country.

I. The Rental Housing Industry and How Junk Fees Impact Tenants

A. *Junk Fees Make Housing Unaffordable, Especially for Low-Income Renters.*

Today's rental housing market is deeply unaffordable for many families. In 2021, 21.6 million renter households spent more than 30% of their income on rent and were considered cost-burdened. For 11.6 million of these households, rent eats up more than half of their income, making them severely cost-burdened.¹ The cost burdens are particularly pronounced for renters of color, in part because both historical and present-day discrimination limits their access to housing. Whereas 45% of white households were cost-burdened in 2021, that share rises to 57% and 53% of Black and Hispanic households respectively.²

¹ Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing 2023* (2023), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2023.pdf

² *Id.*

While many renters are impacted by high costs, renters with the lowest incomes are most acutely harmed. This harm is intensified by a widening gulf between the housing costs that renters must pay for and the wages they earn. Between 2001 and 2021, median rents increased by nearly 18% whereas household income increased only 3%.³ In the United States, a renter working full-time at the prevailing minimum wage cannot afford to pay the fair market rent of a modest two-bedroom apartment.⁴ Only a small percentage would be able to afford the fair market rent of a one-bedroom apartment.⁵

For families living in poverty, the problem is dire. Although federally subsidized housing programs exist to help low-income renters, only one out of four households that qualify receive this benefit.⁶ The rest must navigate the private rental market. For households with incomes of less than \$15,000, three out of four spend more than half of their income on rent, leaving little to no room for essentials such as food, medicine, and transportation.⁷

For low-income families whose budgets are buckling under the weight of these housing costs, every dollar counts. Junk fees divert the limited income that families would otherwise use to pay their rent and add significant stress to households struggling to make ends meet.

B. Junk Fees Increase the Risk to Renters of Evictions for Non-Payment of Rent And, By Extension, the Risk of Abusive, Retaliatory, and Discriminatory Evictions.

By making housing more unaffordable, junk fees increase a tenant's risk of eviction for nonpayment of rent, in part because of how landlords apply rental payments to fees versus rent:

Most nonpayment situations start with a tenant's failure to pay a nominal fee, such as a parking fee or a laundry room fee. When this happens, a portion of the rent paid for the following month is applied to the unpaid fee, which means that the tenant is actually short on the rent for that month. The month after that, a portion of the rent that's paid is applied to the past due rent plus a late fee is assessed and now the tenant is short on the rent again and this time by an even

³ Andy Castillo, Gallery: Rental prices are outpacing minimum wages, especially in these 10 metro areas, American City and County (June 15, 2023), <https://www.americancityandcounty.com/2023/06/16/gallery-rental-prices-are-outpacing-minimum-wages-especially-in-these-10-metro-areas/>

⁴ National Low Income Housing Coalition, Out of Reach 2023, <https://nlihc.org/oor>.

⁵ *Id.*

⁶ Center for Budget & Policy Priorities, More Housing Vouchers: Most Important Step to Help More People Afford Stable Homes (2021), <https://www.cbpp.org/research/housing/more-housing-vouchers-most-important-step-to-help-more-people-afford-stable-homes>.

⁷ See Out of Reach, *supra* note 4.

greater amount. And this happens month after month until the tenant owes hundreds, sometimes thousands of dollars in back rent that the person cannot realistically pay.⁸

Tenant advocates within NHLP's Housing Justice Network regularly see lease provisions that allow the landlord to apply rent payments to fees and charges before rent. They have also encountered provisions making non-rent charges, fees, and penalties collectable and due as "additional rent," thus making nonpayment of such fees potential grounds for eviction.⁹

Nonpayment of rent is the most common grounds for evictions, which landlords often leverage against low-income tenants. In 2017, the vast majority—77.3%—of evictions were for nonpayment of rent.¹⁰ This number may be even higher because many eviction notices that are given for no cause or lease expiration are motivated by a current rental arrearage or past late payments.

The ease with which landlords can evict for nonpayment exposes tenants to abuse and mistreatment. It is not simply the power to evict for nonpayment that landlords can weaponize, but also the power to evict within a legal system that permits summary proceedings, fails to guarantee adequate representation for tenants, and sets a low threshold for displacing tenants from their home.¹¹ It is also the power to evict in a legal system that will often condition a tenant's ability to exercise their rights on their ability to pay rent.

Evictions for nonpayment of rent are about more than reconciling a housing provider's balance sheet. The threat of eviction due to rental arrearages leaves low-income tenants vulnerable and subverts many policies intended to protect them. In a study of landlords in three cities, a number of landlords noted that "when a tenant is late on their rent, even if only a small amount, they are able to use that as a pretext for an eviction motivated on grounds that would be otherwise unallowable."¹² One of those landlords

⁸ Justice in Aging, Tenants' Rights in the California Low-Income Housing Tax Credit Program (Apr. 2023) (Marcos Segura, National Housing Law Project), <https://justiceinaging.org/wp-content/uploads/2023/04/Transcript-LIHTC-Webinar-4.19.23.pdf>.

⁹ National Housing Law Project, Response to Federal Housing Finance Agency's Request for Input on Multifamily Tenant Protections 25 (July 31, 2023), <https://www.nhlp.org/wp-content/uploads/NHLP-Response-to-FHFA-RFI-on-Multifamily-Tenant-Protections.pdf>

¹⁰ Michele Lerner, *Does Your City Rank High or Low When it Comes to Evictions?* (Dec. 28, 2017) (<https://www.washingtonpost.com/news/where-we-live/wp/2017/12/28/does-your-city-rank-high-or-low-when-it-comes-to-evictions/>)

¹¹ See Kate Sablosky Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, Yale L. J., & Feminism 227, 269 (2016) ("A landlord's access to his female tenants and their families is structural, not a result of deviancy.").

¹² Phillip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, City & Community 0:0, 18.

described “several tenants with whom he moved from negotiation to an immediate eviction filing when he felt they otherwise stepped out of line.”¹³ For these landlords, tenants who “stepped out of line” included tenants who complained about the lack of shoveling after a rare snowstorm in Dallas and tenants related to, but not living with, a former tenant who had been evicted previously.¹⁴ In considering the impact of junk fees in the rental housing market, FTC should balance both the needs of landlords to collect their rent in a timely manner and the needs of tenants made vulnerable by the threat of eviction for nonpayment of rent.

C. *Junk Fees Can Result in Additional Housing Barriers for Tenants Who Want to Move.*

Junk fees can hinder a tenant’s ability to obtain rental housing in the future in two ways. First, junk fees increase the likelihood that tenants will accumulate rental debt. Past due junk fees will show up as rental debt on a tenant’s credit report, even if the fees and charges are technically not rent, and landlords often deny applicants on the basis of these past debts.

Second, junk fees can lead to an eviction court record, and eviction records often pose a housing barrier for renters. Some landlords file eviction actions as a scare tactic and a debt collection tool. But even an eviction filing in the absence of a judgment can create serious housing barriers for tenants because of the pervasive practice of eviction records screening by landlords. Landlords tend not to look beyond the eviction filing and will deny housing, even mitigating circumstances can explain the nonpayment of rent.

In summary, if unchecked, junk fees harm tenants by significantly risking a tenant’s ability to afford their rent, maintain their current housing without threat of eviction, and obtain future housing without eviction records screening.

II. *Businesses in the Rental Housing Industry Should be Included in the Definition of “Business” to Protect Tenants From the Harms of Junk Fees.*

The definition for “business” should include businesses in the rental housing industry to help protect tenants from the proliferation of rental housing junk fees made possible by the stark imbalance of power between landlords and tenants.

Landlords hold immense power throughout the tenancy from start to finish. During the application process, they can tack on junk fees knowing that the applicant is very likely trapped into the transaction if they have invested time, money, and other resources into pursuing that unit. Faced with limited affordable housing options, many will accept a unit

¹³ *Id.*

¹⁴ *Id.*

that may not meet all of their standards or agree to surprise fees tacked onto already skyrocketing rents rather than risk homelessness. During a tenancy, if a renter falls behind on paying their rent due to inflated junk fees, landlords can easily weaponize the threat of eviction for non-payment of rent, leading renters to put up with problematic practices to avoid the eviction. Even once a landlord has followed through with initiating the eviction process, they can still continue to charge fees, racking up a tenant's rental debt and harming their future housing prospects. Given this power imbalance, renters are simply not in a position to walk away from the many rental housing fees that landlords impose.

On a systemic level, landlords also hold significant power to undermine legislation that regulates rental housing fees on a piecemeal basis. Tenant advocates who have successfully fought for local regulation of rental housing junk fees often discover that in the aftermath, landlords will often find another way to assess the intended charge against the tenant, most often by re-branding the fee with a new name. In Chicago, for example, landlords have generally stopped requiring security deposits and instead charge tenants on a non-refundable move-in fee, thus bypassing the tenant protections that a security deposit triggers under the Chicago Residential Landlord Tenant Ordinance.¹⁵ The FTC's efforts to take an industry-wide approach is a necessary federal complement to the whack-a-mole game that localities and tenant advocates often engage in when attempting to regulate rental housing junk fees.

The FTC's trade regulation can also be an important contribution to the federal government's work to provide a minimum floor of tenant protections. Relying on state and local landlord-tenant law to protect tenants is insufficient given the seismic shifts in the rental housing market—especially in the aftermath of the Great Recession, through the pandemic, and into the present day. The rise of multi-state corporate landlords and institutional investors in the private rental market demands a federal response to regulate their business models incorporating the aggressive use of evictions, predatory fees, abusive lease terms, and other exploitative business practices.¹⁶

NHLP strongly supports the FTC's proposed trade regulation and its application to the rental housing industry and recommends that the FTC issue interpretive guidance specific to the rental housing industry upon publication of the final trade regulation.

¹⁵ Chicago Agent, What You Should Know About the Chicago Landlord Tenant Ordinance (June 13, 2022), <https://chicagoagentmagazine.com/2022/06/13/what-you-should-know-about-the-chicago-landlord-tenant-ordinance/>

¹⁶ Kristin Capps, Corporate Landlords 'Aggressively' Evicted Tenants During the Pandemic, House Report Says (July 28, 2022), <https://www.bloomberg.com/news/articles/2022-07-28/house-report-corporate-landlords-defied-cdc-eviction-ban>.

III. Hidden Fees

Required disclosure of hidden fees in advertisements and leases can help renters avoid fees that may otherwise be buried. In the rental housing industry, the FTC should clarify when the disclosures must take place. Ideally, landlords should disclose all relevant fees in advertisements as well as provide applicants with an itemized list of required and optional fees with the total rental amount. Such disclosures help tenants avoid sinking a significant amount of funds and time into applying for rental housing only to discover that they cannot actually afford the apartment.

A. *Mandatory Fees for Unnecessary or Absent “Services”*

The final rule should also explicitly prohibit fees that provide little or no value to the consumer in exchange for the charge since the proposed rule does not effectively eliminate such fees. This is particularly true in the rental housing industry, where affordable housing shortages, the growing numbers of cost-burdened tenants, and the stark imbalance of power between tenants and landlords deprives tenants of any meaningful ability to walk with their feet.

Some landlords will charge fees for “services” that provide little or no benefit to tenants. These services and fees are often mandatory for tenants to live in the apartment. While they may fall under the Commission’s definition of a hidden or misleading fee in some situations, these types of mandatory fees for “services” are problematic even when they are disclosed upfront and described explicitly.

One of the most common mandatory fee-for-“service” schemes that tenants encounter is valet, or “concierge,” trash. The idea behind these services is that tenants are saved a trip to the central garbage receptacle by having their unit’s trash collected from just outside their door. Advocates report that tenants pay as much as \$55 per month in valet trash fees, depending on what state they live in.¹⁷ One online forum for multifamily landlords included a post saying they would charge “as much as possible” for the service.¹⁸ To add insult to injury, tenants may not even receive the promised trash pickup services or the building may not follow through and remove the trash properly from the premises.¹⁹

¹⁷ National Consumer Law Center, Too Damn High: How Junk Fees Add to Skyrocketing Rents, 25 (March 2023), <https://www.nclc.org/wp-content/uploads/2023/03/JunkFees-Rpt.pdf>.

¹⁸ Multifamily Insiders, The Front Lines, Topic: What does everyone charge for valet trash pickup? <https://www.multifamilyinsiders.com/apartment-ideas/the-front-lines/18408-what-does-everyone-charge-for-valet-trash-pickup>.

¹⁹ See *supra* note 17 at 26; Joe Ducey, ABC 15 Arizona, Trash mess angers renter who pays mandatory removal fee (Aug. 22, 2022), <https://www.abc15.com/news/let-joe-know/trash-mess-angers-renter-who-pays-mandatory-removal-fee>

Other advocates say tenants are forced to pay for technology packages, including internet or cable-related fees. Landlords will install wifi or cable TV from one provider in every unit of an apartment building, then require tenants to sign up with that provider at a set rate. In many cases, this rate will be much higher than a tenant can afford to pay.²⁰

Landlords also include these kinds of fees in catch-all “amenities” packages. One tenant who commented on the Federal Housing Finance Agency’s tenant protections RFI reported their rent was raised by 10% when their landlord added on “mandatory amenities fees, made mandatory even if the renter did not avail him/herself of any of the amenities.”²¹ One tenant advocate found that a landlord in their community had begun offering “resident benefit packages” to tenants, who were forced to either pay for the package or pay the same amount to decline the package. The package cost \$45 per month and included the ability to pay rent online, access to the property’s resident portal, and a “utility and maintenance reduction program.”

B. Excessive & Compounding Late Fees

The proposed rule should also prohibit fees that are excessive, such as excessive late fees.

It is common practice for landlords to charge a late fee when a tenant does not pay rent on time, which puts additional pressure on low and very-low income tenants who are already overly rent-burdened. On top of this, landlords have begun charging excessively high amounts in late fees, further exacerbating this pressure and making it no more likely a tenant will be able to pay on time. As one HJN member noted, as rents increase, the “late fees” are getting excessive -- a 10% late fee that can be an additional \$150 and \$200 if the rent is paid on the 6th instead of the 5th of the month. Additionally, many landlords apply any future payments toward fees and charges first instead of rent, leading to further late fees and causing the total amount overdue to balloon in a matter of months. Some HJN members have also reported landlords charging late fees after an eviction has been filed, even though the landlord isn’t accepting rent anymore to begin with, raising concerns of misleading fees.

Eighty-seven percent of advocates that the National Consumer Law Center surveyed for their report on junk fees reported seeing excessive late fees.²² According to advocates that NHLP surveyed, late fees can look like “per day” fines every day the rent is late – for example, charging a tenant \$20 per day every day after the 5th of the month. This

²⁰ CBS Texas, Some North Texas Renters Unable to Cut Cable TV: “We Should Not Be Forced To Pay For Something We Cannot Afford” (Nov. 7, 2019) <https://www.cbsnews.com/texas/news/texas-renters-cut-cable-tv/>.

²¹ Ann Dalrymple, Comment on FHFA Request for Information on Multifamily Tenant Protections (Jul. 25, 2023), <https://www.fhfa.gov/AboutUs/Contact/Pages/input-submission-detail.aspx?RFID=5120>.

²² See *supra* note 17 at 8.

“compounds pretty rapidly and seeps into the next month, which creates a perpetual cycle of late payments and astronomical fees.” Some landlords include a provision in their leases preserving their rights to refuse to accept late rent and then inflate the overdue amount with “unconscionable fees.”

Nearly three quarters of advocates that NHLP surveyed stated that they had encountered lease provisions allowing rent payments to be applied to other fees and charges first and before rent. Some states allow landlords to assign any payments they receive to the earliest amount owed, then to later amounts, rather than requiring that they assign a rent payment to this month’s rent.

Late fees can also get in the way of tenants vindicating their right to obtain more time to move by paying their landlord and filing a stay of execution (sometimes referred to as “pay and stay”), because the total amount owed becomes unaffordable. Therefore, late fees force tenants out of their housing prematurely.

Because late fees are often explicitly disclosed to tenants and there is no question as to their purpose, nature, or amount, the Commission’s definitions of hidden and misleading fees would not protect tenants from these harmful fees. Since the challenges that tenants face with late fees often boils down to the amount, prohibiting fees that are excessive would be the best way to address this type of fee. Further, because compounding late fees are such a common and pernicious challenge for tenants, FTC should also address the application of rental payments to previous fees or other charges.

The FTC could look to recent actions by the CFPB for a potential model for limiting excessive late fees. After an analysis finding that credit card late fees were exceeding the actual costs to credit card companies by a factor of 5, the Consumer Financial Protection Bureau (CFPB) issued a notice of proposed rulemaking to lower the immunity limit from \$41 to \$8.²³

In the rental context, 13 states and Washington D.C. have taken some type of action to limit the amounts of late fees.²⁴ A federal rule would protect tenants living in the remaining 38 states that have no such limits. It could also create a more uniform floor

²³ CFPB, CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees (Feb. 1, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/>.

²⁴ See Del. Code tit. 25 § 5501; D.C. Code § 42–3505.31; Haw. Rev. Stat. § 521-21; 14 ME Rev Stat § 6028 (2018); MD Real Prop Code § 8-208(d)(3) (2013); Minn. Stat. Ann. § 504B.177 (West); NRS § 118A.210; NMSA § 47-815(D); N.Y. Real Prop. Law § 238-a (McKinney); N.C. Gen. Stat. Ann. § 42-46; ORS § 90.260; Tenn. Code § 66-28-201; Tex. Prop. Code § 92.019; *Highgate Associates, Ltd. v. Merryfield*, 157 Vt. 313 (1991).

for what counts as an excessive amount – in the rental housing context, states often limit late fees to five percent of total rent. Additionally, Oregon, North Carolina, Nevada, and Washington D.C. include this prohibition in their late fee statutes.²⁵

III. Misleading Fees in the Eviction Context

Landlords often misrepresent the nature and purpose of fees, and required disclosure may help protect tenants who might be otherwise deceived. According to eviction defense attorneys in NHLP's Housing Justice Network, a number of landlords charge tenants misleading fees even when they are in the process of evicting them.

For example, landlords will charge tenants **attorney fees** for an eviction case, even if the landlord's case is ultimately unsuccessful. In a typical court case, the client (here, the landlord) owns the attorney's fees, which is commonly calculated by multiplying the attorney's billing rate to the number of hours worked. By contrast, attorney fees in eviction court are often a set amount, such as \$750, and they rarely correspond to the amount of time that an attorney works on the case. In fact, attorneys who specialize in evicting tenants often churn through cases so rapidly that these firms are known as eviction mills. In this context, it is misleading to call this charge an attorney fee because it does not compensate the landlord for the time that their attorney spends on an eviction case. Rather, landlords and their attorneys use such fees to profit off tenants in eviction proceedings, even where the tenant has met their obligations under the lease. Advocates in New Jersey have reported this practice.

Similarly, in Atlanta, legal services attorneys report the issue of **dispossessory/eviction fees** whose purpose is unknown. Landlords charge these fees of \$300-\$500 once tenants are behind a certain amount of rent, even in the absence of an eviction filing. Ostensibly to compensate the landlord for their attorney's time, these fees are significantly disproportionate to the actual amount that an attorney would charge in attorney fees. These fees are also redundant to the attorney fees that the lease authorizes.

In Louisiana, legal services attorneys report landlords collecting fees for eviction filings and "attorney's fees" after they have moved to evict tenants, even while the landlord continues to accept monthly rental payments and late fees and even after the eviction case is ultimately dismissed.

In Cook County, Illinois, local law prohibits landlords from obtaining attorney fees from tenants, but legal services attorneys reported seeing landlords charge tenants upwards of \$500 for **service of process fees**. This high amount does not correspond with the \$60 fee that the county sheriff charges landlords for service of process.

²⁵ See D.C. Code § 42-3505.31; NRS § 118A.210; N.C. Gen. Stat. Ann. § 42-46; ORS § 90.260.

In California, legal services attorneys see **notice fees** added for issuing a 3-day notice to pay rent or quit or for issuing another notice -- like \$75 or \$100 for issuing a notice. This is in addition to attorney and court costs if the matter would go to court and it's a fee that the LL charges to reinstate the tenancy even if there is no eviction and the matter is resolved.

In Michigan, legal services attorneys report that eviction fees are automatically charged to the tenant. If the eviction case ends up in court, legal services attorneys will often challenge these fees. Not all cases, however, go to court, and not all tenants are represented by legal services attorneys, meaning that these fees become part of the rental arrearages that tenants owe, even if the fee itself should not have been charged. Furthermore, when a tenant is able to access emergency rental assistance for their arrearages, the funds that should otherwise help pay down their actual rental arrearage ends up paying for eviction fees and other non-rent charges as well.

The practices of landlords on the private rental market have a ripple effect on federally subsidized housing, which is targeted toward people with low and extremely low incomes. For example, Omaha Housing Authority charges public housing tenants a \$150 legal fee just for being in eviction proceedings. Once the case goes to court, as the vast majority do, tenants face a minimum of \$350 in legal fees. The housing authority levies these fees even if the tenant owes a mere fraction of the fee amount. One tenant featured in a recent newspaper article was being evicted for owing a mere \$60 in back rent. And in one case, a tenant received an eviction notice with a \$400 legal fee, even before the case went to court. Two years ago, the housing authority hiked the legal fee by 400%, a decision based on the amount that private landlords charge in legal fees.²⁶

IV. Prevalent Unfair Rental Housing Fees

In addition to hidden and misleading fees, there are problematic prevalent practices in the rental housing industry that are inherently unfair and the FTC should therefore regulate under its authority under Section 5(a) of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. Sec. 45(a)(1).

A. Application Fees

An especially problematic kind of junk fee that is widespread in the rental housing industry are rental application fees, which are fees prospective tenants pay just to be considered for admission to a rental housing opportunity. These fees, which typically range from about \$35 to \$50 per adult applicant, are less significant in connection with a single rental application. But renters with marginal creditworthiness or other significant

²⁶ Jeremy Turley & Yanqi Xu, Omaha's Public Housing Residents Are Facing Eviction More Often - and Sometimes Over Small Debts, Flatwater Free Press (Dec. 7, 2023).

admission barriers, such as eviction records or criminal history, must often pay these fees repeatedly to apply for housing with different landlords.

Rental application fees arose alongside the growth in third-party tenant-screening reports, which landlords would purchase from consumer reporting agencies. When a prospective tenant would apply for admission, the landlord would purchase a tenant-screening report about that applicant. Over time, landlords began charging applicants fees to cover the costs for those reports. Those fees have since expanded and are now substantially ubiquitous in most rental housing markets.

Already these origins reveal the exploitative nature of rental application fees. Admission screening has no benefit for applicants, only landlords—hence there is no moral justification for passing the cost along to applicants. Landlords are able to do so only as a function of their superior bargaining position and the widespread predominance of application fees.

Application fees would thus fit squarely under a more general prohibition on fees for which a consumer receives little or no value in return. However, if FTC intends to cover application fees in this manner, it should make that clear in comments accompanying the rule because landlords who charge application fees commonly contend that an applicant does receive value in exchange for the fee: the chance to be offered rental housing. Of course, this amounts to no more than gambling, and an applicant who is rejected by the landlord has nothing to show for the expenditure.

Despite paying the costs for the reports, tenants rarely have any choice or influence over the screening product used. Landlords generally choose the screening products they prefer; landlords often have standing contracts with specific screening companies they use for every application. Landlords have little or no incentive to minimize the cost of the specific screening report used, as they are not the ones paying for the reports.

Some landlords take profits from rental application fees. One way is by charging applicants more to apply than the landlords pay for the screening reports. Applicants are rarely aware of these markups as applicants hardly ever have any insight into the landlord's screening costs. Some landlords collect multiple applications for a single vacancy, screen applicants one-at-a-time until the unit is filled, and then retain the unused screening fees. Some landlords collect application fees, but deny admission without ever ordering a screening report—such as based on the contents of a written application form. Though profiting from rental application fees in these ways is frowned-upon in the industry and specifically prohibited under the laws of some states, detecting such abuses is difficult and often impossible and enforcement is seldom worthwhile for applicants.

The proposed rule text prohibiting hidden fees and misleading fees would cover the more egregious practices of this kind, such as collecting fees from applicants who are never actually screened. Additional rule language prohibiting excessive fees would likely apply to landlords who charge more than their actual costs of screening. While these substantive prohibitions would remain difficult to enforce due to the lack of transparency and consumer insight regarding screening costs, optimistically the prospect of FTC enforcement could at least deter larger multifamily landlords from marking up application fees.

Still, the main harm that rental application fees cause arises not from the egregious and fraudulent practices of those landlords who inflate their screening costs or collect fees without ever running reports, but rather the routine shifting of screening costs to applicants and the effective transformation of rental housing applications into high-stakes gambles. If rejected, the applicant must pay fees over again to apply elsewhere—and if rejected a second time, must pay the fees again and again until housing is secured (or funds are exhausted). The repeated payments go to purchase essentially duplicative copies of tenant-screening reports.

Applicants denied housing may forfeit hundreds of dollars with nothing to show for it. Fear of losing these funds deters tenants from applying for the best housing available, and may steer some renter households toward substandard housing in areas of diminished opportunity. In this way, rental application fees likely contribute to residential segregation, as Black and Latino households pay about 50% more rental application fees overall and are nearly twice as likely as White or Asian households to pay five or more screening fees in a single housing search.²⁷

One partial solution to rental application fees is the development of portable tenant-screening reports. With these products, a housing-seeker theoretically pays a single application fee for the preparation of a screening report that a person can use to apply for an unlimited number of housing vacancies within a 30-day period. Yet few landlords accept such portable reports (or waive application fees for applicants who have them), hence making the products largely ineffective—even though portable screening reports contain substantially all the information most any landlord would use to screen a rental applicant.

The current rule text would not deter or prevent different landlords from each charging separate application fees, so long as each individual landlord's fee was disclosed and did not exceed that landlord's actual screening costs. A prohibition on excessive fees might apply to a landlord who refused a portable screening report that contained substantially all the information needed to screen the application, though this would be

²⁷ Manny Garcia, "Renters: Results from the Zillow Consumer Housing Trends Report 2022" (July 27, 2022), <https://www.zillow.com/research/renters-consumer-housing-trends-report-2022-31265/>

far from readily apparent. Again, however, were FTC to prohibit fees for which consumers receive little or nothing in return, and specifically identify rental application fees as a type of charge belonging to that category, then the rule would restore to landlords an incentive to minimize screening costs and avoid duplicative charges.

In summary, rental application fees are anti-competitive, produce adverse public policy consequences, prone to fraud, and in their least harmful form still shift to rental applicants the cost of a product from which only landlords benefit. These are ample grounds on which to declare the charging of rental application fees to be an inherently unfair and abusive practice. Multiple U.S. states and the United Kingdom have already prohibited rental application fees altogether in recognition of these problems.

At the very least, the agency should recognize that charging rental application fees to applicants who offer portable tenant screening reports, forcing them instead to occur new fees for substantially duplicative reports containing essentially the same information, is an unfair and anti-competitive practice that stifles innovation and thwarts market forces that would otherwise reward efficiency. New York currently prohibits landlords from charging rental application fees to applicants with portable reports available.

B. High Risk Fees & Other Discriminatory Fees

Landlords charge a number of fees that can have a discriminatory impact on classes protected by the Fair Housing Act, which the FTC should treat as an unfair and deceptive practice under its UDAP authority. According to Section 5 of the FTC Act, an act or practice is unfair if it (1) causes or is likely to cause substantial injury to consumers, (2) cannot be reasonably avoided by consumers, (3) and is not outweighed by countervailing benefits to consumers or to competition. See 15 U.S.C. Sec. 45(n). Discriminatory rental housing fees likely fall under this definition of unfairness because they cause monetary harm to renters, renters are not in a position to avoid the discriminatory harm, and the discriminatory harm of the fee is unlikely to be outweighed by countervailing benefits to consumers or competition.²⁸

An example of a discriminatory fee is the high risk fee, which landlords assess against applicants and tenants who have seemingly negative information, such as a criminal history. Criminal records screening raises concerns of discriminatory impact under the Fair Housing Act because the practice has a disproportionate and unjustified impact on Black communities and other communities of color.²⁹ Similarly, a landlord imposing fees

²⁸ Stephen Hayes & Kelley Schellenberg, Discrimination is “Unfair”: Interpreting UDA(A)P to Prohibit Discrimination 14-16 (Apr. 2021), https://protectborrowers.org/wp-content/uploads/2021/04/Discrimination_is_Unfair.pdf

²⁹ HUD, *Implementation of the Office of General Counsel’s Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (June. 10, 2022) (“Blacks represent roughly 13 percent of the total U.S. population but account for roughly

based solely on a person's criminal history likely amounts to discrimination under the Fair Housing Act, as well as an unfair practice in violation of Section 5 of the FTC Act.

Similar violations of both the Fair Housing Act and the FTC Act arise when landlords impose high risk fees because a person has negative credit history, negative eviction history, or a Section 8 voucher. These fees cause monetary harm to these rental applicants by causing them to pay more in fees than others who are otherwise similarly situated. Rental applicants also are not in a position to avoid such fees. For example, in Louisiana, a legal services attorney reported seeing a "risk fee" for applicants with low or no credit history that is separate from the security deposit and is not refundable. They observed that these applicants are faced with the "choice" of paying hundreds of dollars or walking away and starting all over to find a place to live, which can come as a gut punch at the end of a lease-up procedure for a Section 8 or Permanent Supportive Housing tenant.

Another example of a discriminatory fee are the fees that landlords charge survivors of gender-based violence for processing orders of protection or agreeing to call the police in response to it, should the person barred from the home seek to re-enter. It is unclear what goods or services these fees are meant to cover, but they quite clearly harm tenants because they discriminate against survivors, who are disproportionately likely to be women, and they chill a survivor's willingness to seek an order of protection and the effectiveness of that order.

C. *Early Termination Fees*

If a tenant ends their lease early, they can face a number of fees that have nothing to do with the costs to the landlord of an early termination. In California, tenants who terminate a lease early will pay a fee even though the tight rental market means that the landlord will likely re-rent the unit quickly. In New Orleans, landlords may even assess an "early termination fee" of thousands of dollars to tenants who have been evicted for nonpayment of rent. Also in New Orleans, there is a practice of charging an "administrative fee." Separate from an application fee, this fee is explicitly described as covering the costs of advertising the unit and finding new tenants. This fee is charged in addition to liquidated damages that the owner charges to tenants for breaking their lease early.

27 percent of all arrests. In 2019, the incarceration rate of Black males was 5.7 times that of White non-Hispanic males, while the incarceration rate of Black females was 1.7 times the rate of White non-Hispanic females. A recent study also reflects that Hispanics are incarcerated in state prisons at a rate that is 1.3 times the incarceration rate of White non-Hispanics. In addition, updated data shows that individuals with disabilities are also disproportionately impacted by the criminal justice system. Research shows that these disparities cannot be simply attributed to certain groups committing more crimes and are better explained by biases in the criminal justice system.”).

Early termination fees can also cause a significant impact to the safety and financial well-being of survivors of gender-based violence. As documented in the National Housing Law Project's State Law Compendium: Housing Rights of Domestic Violence Survivors,³⁰ a number of states recognize that survivors may need to leave their homes because of ongoing trauma or threatened violence by an intimate partner and permit early lease termination by survivors. In these states, survivors have a lawful means to end their lease early without penalty. Landlords, however, undermine this important public policy by charging early lease termination fees against survivors. Sometimes the fee is the entirety of the rent due under the remaining months of the lease even when there are other co-tenants (which is often the perpetrator) in the property or even when the landlord mitigates their damages by releasing the unit. Because survivors cannot reasonably avoid these substantial harms and because such fees undermine state policies giving survivors the right to early termination, the FTC should consider treating such fees as an unfair practice under 15 U.S.C. Sec. 45(n).

D. Lease Renewal Fees & Month-to-Month Fees

When tenants do not renew their leases, landlords may charge fees in several ways. In Cook County, one owner of single family home rentals charges a \$250 fee for lease nonrenewals, even when a tenant wants to renew but the landlord fails to take the steps necessary to complete the lease renewal or flat out refuses. Another legal services attorney reported instances of landlords sabotaging a tenant's ability to renew (e.g., requiring in-person meetings in the middle of the tenant's workday, failing to actually deliver the lease) and then later blaming the tenant for not renewing the lease and then charging them a lease termination fee.

In some jurisdictions, such as Michigan, if there is no lease renewal, the tenant is then subject to a month-to-month lease which often means a premium on the monthly rental payment. Some landlords allow or push toward this to happen because of the increased monthly payments.

D. Maintenance Fees Despite Landlord's Duty to Maintain Unit

Legal services attorneys report landlords imposing additional maintenance fees onto tenants, even though landlords have a duty to maintain the unit. These fees can sometimes cover basic wear-and-tear habitability repairs that should be calculated as part of the landlord's costs of doing business, rather than a separate fee. Some fees are charged whenever the tenant makes a request for repairs, while others take the form of monthly maintenance fees. Some landlords will also charge these fees to Section 8

³⁰ National Housing Law Project, Housing Rights of Domestic Violence and Sexual Assault Survivors (2024), <https://www.nhlp.org/wp-content/uploads/2024-NHLP-Compendium-of-Housing-Rights-for-DVS.pdf>.

voucher tenants, even if the fee was not included in either the lease or the housing authority calculations.

E. Insurance Fees

Legal services attorneys report landlords imposing insurance-related fees that do not benefit the tenant. Some landlords require their tenants to obtain liability insurance that protects the landlord but does not cover the tenant, which is not always apparent to the tenant. Moreover, some landlords will assess a monthly fee against tenants who fail to acquire rental insurance required by the lease. These fees are generally \$20/month, but it is not apparent whether such landlords apply the funds to obtain rental insurance at all.

F. Fees from Third Parties to the Landlord-Tenant Relationship

Legal services attorneys have reported an increasing use of Conservice LLC, a third-party utility services management company that charges “ratio utility billing system fees” to multifamily tenants for utility usage in both their individual units and common areas. When a landlord contracts with Conservice, Conservice stands in as the intermediary, which means that the tenant no longer receives bills directly from the utility company. As a result, if faced with questionable utility charges, the tenant has been deprived of the simple option of asking the utility company or the landlord. Instead, they must go through Conservice, adding an extra layer of bureaucracy that is often opaque in its consistent failure to explain how it calculates a tenant’s utility bills, including their share of the utility charges for the common areas. Tenants living in properties that use Conservice have also seen a hike in their utility bills compared to what the utility company had been charging them previously, sometimes several multiples of the previous amount. The utility charges also inexplicably vary greatly from month to month – in one case jumping from \$61 to \$562 -- making it extremely difficult for tenants to plan their budgets and exposing them to the possibility of eviction. Tenants from multiple states are grappling with these unfair business practices in their rental housing and would benefit from FTC intervention.³¹

³¹ See, e.g., Keristen Holmes, Local Tenants Across San Diego Fired Up Over Conservice, CBS8 (Aug. 23, 2023) (California), <https://www.cbs8.com/article/news/local/tenants-across-san-diego-fired-up-over-conservice/509-b08b9630-5682-488b-8cad-9e3dcec89bc7>; Lester Duhe, Public Services Commissioner Raises Concerns About Third Party Utility Management Companies at Complexes Near LSU (June 23, 2023) (Louisiana), , <https://www.wafb.com/2023/06/23/public-service-commissioner-raises-concerns-about-third-party-utility-bill-management-companies-complexes-near-lsu/>; Nedra Rhone, Tenant Left Scrambling After Utility Bill Jumps 800% in One Month (May 3, 2023) (Georgia) <https://www.ajc.com/life/georgia-residents-struggle-with-high-utility-bills/HDREGDSPFRBIDMJC4RP3TUXMAI/>

G. *Miscellaneous Fees*

Additional fees that legal services attorneys in NHLP's Housing Justice Network report include:

- Surcharges for 3rd party provided services (e.g., cable, internet)
- Fees for services not rendered, such as trash and pest control
- An ambiguous monthly fee of \$30/month for "bundled services"
- Fees associated with requirements that tenants pay through a portal only and those portals charge fees to use and process the payment that are not disclosed in the lease
- A \$20-50 "notice fee" or "admin fee" for sending the tenant a letter
- The appendix provides some additional in-depth examples from legal aid attorneys and other tenant advocates in select states.

NHLP strongly supports the FTC's proposed trade regulation and recommends that the FTC issue interpretive guidance specific to the rental housing industry upon publication of the final trade regulation. For questions or further information, please contact Marie Claire Tran-Leung, Evictions Initiative Project Director, [REDACTED]

Sincerely,

National Housing Law Project

Action St. Louis

African Communities Together

Americans for Financial Reform Education Fund

Atlanta Legal Aid Society, Inc.

Ayuda Legal Puerto Rico

Bay Area Legal Aid

Be:Seattle

Bellingham Tenants Union

Community Justice Project, Inc.

Community to Community Development

Connecticut Legal Services, Inc.

Consumer Action

Debt Collective

Greater Napa Valley Fair Housing Center

Homes Guarantee Campaign

Housing Action Illinois

Justice in Aging

Law Center for Better Housing

Legal Aid Foundation of Los Angeles
Legal Aid Service of Broward County
Legal Services of Greater Miami, Inc.
Legal Services of Northern Virginia
National Association for Latino Community Asset Builders (NALCAB)
National Homelessness Law Center
National Low Income Housing Coalition
North Urban Human Services Alliance (NUHSA)
Pisgah Legal Services
PolicyLink
Private Equity Stakeholder Project
Prosperity Now
RESULTS Educational Fund
Revolving Door Project
Shriver Center on Poverty Law
The Kelsey
Three Rivers Legal Services, Inc.
Washington Low Income Housing Alliance
Western Center on Law & Poverty
William E. Morris Institute for Justice

APPENDIX

This appendix includes select observations from legal aid attorneys and tenant advocates in the Housing Justice Network. They provide real world examples of how junk fees burden renters in a variety of states.

A. New York State

In the state of New York, an attorney reported that a local landlord charged the following fees on top of “rent”: parking, parking security deposit, bounced check, smoking (escalating fine each time), trash, water, sewer, gas, amenity, late fees, and service. The advocate further noted that although these charges came from a single tenant's ledger, they charge the same fees across the board. I also see air conditioning fees, lease signing fees, and fees for not paying electronically.

The attorney also shared the following charges, in addition to the amounts, from a tenant's ledger:

parking	\$68.50/ month
trash	\$19
smoking	\$250-\$750 (escalating for each occurrence)
service	\$4.25/ month
sewer	\$9.60/ month
amenity	\$65/ month
parking tax	\$5.91/ month
gas	\$26.99/ month
water	\$6.84/ month

The consequences of not paying these fees can have a cascading effect. “Once a tenant falls behind on their payments, one large local landlord locks the tenant out of their electronic account. The electronic account is the only way to access statements. Since the fees this landlord charges vary each month, the tenant has no way to see their balance or know what new charges are and has to guess to try to make up

payments.” This uncertainty can cause the tenant to fall further behind on their financial obligations and increase their risk of eviction.

B. North Carolina

In **North Carolina**, an attorney reports seeing tenants pay application fees. Although the application fees are one time per application, a family may pay multiple application fees due to housing providers rarely renting to low-income tenants. They report that most other junk fees are recurring and are collected without the tenant receiving any kind of premium service or any service at all. Examples include:

- Valet waste fees
- Security deposit waiver fees
- Damage waiver fees – These are particularly misleading because they sound like renter's insurance but only protect the landlord.
- Late fees in excess of the amount authorized by laws

Finally, the attorney observes: “In recent years, the number of junk fees has been increasing with online billing portals making it harder for tenants with limited access to technology to understand how much they are being charged and for what services.”

C. Montana

In Montana, an attorney works for an office that administers the federal Emergency Rental Assistance program and routinely asks landlords for their ledger, tax form W-9, and other documents in order to comply with the federal ERA requirements. This attorney reports that at least one Montana landlord charges \$30 per hour for time spent responding to such a request for documentation. According to this attorney, “the landlord ultimately benefits from the ERA payments and should not be allowed to charge the tenant for its time in responding to these requests for documentation. The ERA funds cannot be used to pay a landlord's hourly rate in responding. Thus, if the landlord charges the tenant the \$30/hour fee, such fees could result in the tenant ultimately being evicted for nonpayment even after ERA has paid thousands to keep the tenant housed.”

Additional fees that landlords charge tenants in Montana:

- Rental application fees are one-time fees; usually it's \$30-70 per adult. The rental application fees are unfair because often the landlord gets so many applications that they don't even process any given tenant's application, but still the landlord gets to pocket the application fee, whether they process the application or not.

- Month-to-month fees vary and are recurring. Some landlords charge a month-to-month fee if the tenant chooses a month-to-month lease, instead of a lease for a set term. One landlord's fee is \$250/month for a tenant who opts for a month-to-month lease. The month-to-month fee is unfair and misleading because a landlord suffers no additional expense each month just because a renter is month-to-month.
- Early termination fees vary (\$250 or more) and are one-time fees when a tenant moves out before their term lease expires. The early termination fee is unfair and misleading, because Montana law already allows a landlord to recover sufficient compensation when a tenant moves out before the end of the lease -- the landlord may charge the departing tenant with the rent remaining under the lease contract until such date as a new renter moves into the vacant unit.
- Utility-related fees are misleading and unfair because often the landlord won't disclose those mandatory fees (e.g. \$60/month for water) when they advertise the rental price of the unit. So, a person or family may apply for a rental they think is \$1,500 per month, paying the \$50 per adult application fee, only to find out afterwards that the mandatory monthly \$60 water fee is added to the rent, which puts the rental over-budget for the tenant-applicant. Thus, the applicant loses the money they paid in application fee(s) and the time invested in the application, whereas if the landlord had been upfront about the actual cost of the monthly rental, the applicant never would have applied.
- Late fees may be as high as \$100 on the 6th of the month plus \$10 per day thereafter until paid. Those fees are unfair because they are untethered to any actual damages suffered by the landlord when a tenant pays the rent late.
- Processing and admin fees (e.g. \$30 for sending tenant a notice or letter) are unfair because they are untethered to any actual damages suffered by the landlord.
- A landlord's unfair fees are especially harmful to low-income renters, including those who have federal Housing Choice Vouchers. Landlords charge the same fees to all renters, regardless of income. Low-income renters cannot absorb an unexpected \$30 notice fee, or a \$100 late fee (e.g., an HCV participant may only have to pay \$50 as their total monthly rent contribution, but could be assessed a \$110 late fee if they don't pay the \$50 rent by the 6th of the month).

D. Virginia

In Virginia, tenants can encounter an unspecified, one-time “administration fee” or “move-in fee,” usually in the amount of \$100-200. According to an advocate, “it is entirely unclear what the administration or move-in fees are for,” especially since “[t]hey

are in addition to an application fee and a security deposit” and “they are also not authorized under the leases.”

In addition, advocates report tenants face monthly fees, such as washer-dryer fees, alarm fees, pest control fees, and liability insurance fees. These monthly fees range from \$3 (pest control) to \$50 (washer-dryer, alarm). These fees are usually authorized under the lease but not included in the “rent” amount on the first page. (They are legally still treated as rent if the tenant fails to pay.) An advocate reports that “[i]t’s unclear what those fees cover. Many of them, such as pest control, are for things the landlord is generally obligated to pay.” They add, “The insurance fee is sometimes not for an actual renter’s insurance policy that would cover the tenant but an extra liability policy for the landlord.”

E. California

In **California**, advocates report seeing landlords charge tenants the following:

- Late fees that are caused by the landlord improperly limiting the methods that tenants can use to pay rent
 - Some landlords, for example, only allow payment through an online portal, which is illegal under state law. This is also problematic because these landlords often also charge tenants a fee to pay electronically.
- A fee for improper trash disposal, even though the landlord incurs no such fee.
- Fees for the issuance of legal notices that resulted from the landlord’s improper behavior (such as not permitting payment in person, as described above)
- Pre-move-in fees that are not more traditional security deposits, rent, or holding fees
- Utility fees raise multiple issues in California.
 - First, landlords will attribute these fees to alleged usage and yet aggressively fight against transparency. As a result, tenants cannot effectively monitor the usage and amount due, leading many tenants to believe that the fees are often inflated.
 - Some tenants are also often subject to an additional monthly fee for receiving “utility” bills.
 - And some tenants have received fees for utility expenses from a prior tenant
- These fees can cost a tenant more than \$100 a month every month.
- California has a rent stabilization statute, which regulates the rent that landlords may charge tenants. Since this statute went into effect several years ago, advocates have noticed a trend of landlords trying to unbundle more and more services from “rent” in hopes of circumventing these regulations.