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Via regulations.gov

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave. NW, Suite CC-5610 (Annex B)
Washington, DC 20580

Re: Unfair or Deceptive Fees ANPR, R207011

The undersigned civil rights, consumer rights, faith-based, criminal justice, and reentry organizations respectfully submit the following comments in response to the Federal Trade Commission’s (“Commission” or “FTC”) Advance Notice of Proposed Rulemaking (“ANPR”) regarding unfair or deceptive fees, R207011.¹ These comments discuss junk fees affecting justice-involved people.² We urge the Commission to identify and confront the unfair and deceptive fees that are all too common in the correctional services sector of the economy, and to keep the needs of this often-overlooked population in mind when analyzing the information collected as part of this proceeding.

We devote our comments to junk fees imposed in the following private correctional services contexts because they represent some of the most egregious and widespread examples of these fees: (1) money-transfer services; (2) release cards; and (3) various technology services increasingly prevalent in correctional institutions—including technologies incarcerated people use to communicate with their loved ones. We also briefly discuss fees associated with several other services in this sector—namely, commercial bail, post-arrest/pretrial diversion programs, private probation, and electronic monitoring—which we recommend the FTC further investigate. Finally, we explain how oligopolistic dynamics characterize the corrections market more broadly, which further fosters junk fees.

I. Background on Unfair and Deceptive Fees in the Private Corrections Industry

In the ANPR, the Commission expresses concern about “unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer.”³ The Commission has noted that “[c]onsumers may be forced to pay [such] junk fees because they have no way to avoid or opt out of them;” for example, if they are “dealing with a company with a monopoly or

¹ Fed. Trade Comm’n, ANPR, 87 Fed. Reg. 67412 (Nov. 8, 2022).

² Our comments draw heavily on comments submitted by Stephen Raheer on behalf of the Prison Policy Initiative in response to the Consumer Financial Protection Bureau’s Request for Information on junk fees. *See* Prison Policy Initiative, Comment Letter in Docket No. CFPB-2022-0003 (Apr. 11, 2022), available at <https://www.regulations.gov/comment/CFPB-2022-0003-2517>.

³ 87 Fed. Reg. at 67413; *see also* 87 Fed. Reg. at 67416 (requesting input on practices involving “billing or charging consumers for fees, interest, goods, services, or programs that have little or no added value to the consumer”).

exclusive rights that can extract fees because there is no competing option.”⁴ This dynamic precisely describes the services forced upon incarcerated people and their families. Indeed, as the Consumer Financial Protection Bureau (“CFPB”) recently acknowledged in a January 2022 report, fairness and transparency “seldom appear in the markets for products and services that capitalize off the criminal justice system, where firms may enter into exclusive relationships with government actors, rather than competing on the basis of consumer choices.”⁵

Private companies are often able to secure the exclusive relationships the CFPB describes by making large kickback payments, often called “site commissions,” to correctional facilities. More specifically, private companies compete with one another for a contract to provide services in a given correctional facility by offering to make kickback payments. The higher the kickback payment, the more attractive the company’s offer is to the correctional facility. In exchange, the company requires the correctional facility to make it the exclusive provider of the contracted service. This secures for the company what is, in many cases, a literally “captive market.” Companies pass on the costs of these kickback payments directly to consumers—here, incarcerated people and their loved ones. They do so by aggressively inflating prices and charging excessive fees, which the exclusive terms of their contracts allow them to do without fear of competition. Excessive fees both pad the company’s profits and help finance the large kickback payments to the corrections agency. But they cause substantial, unavoidable harm to consumers least able to afford these high costs—harm that is not “outweighed by countervailing benefits to [these] consumers or to competition.”⁶

Industry actors may assert that site commissions are used to fund programs for incarcerated people and that, therefore, the fees they charge ultimately benefit incarcerated consumers. Industry actors have made such arguments in the correctional telecommunications context. As the Federal Communications Commission (“FCC”) has found in that context, site commissions are frequently used for purposes completely unrelated to the welfare of incarcerated people. The FCC explained: “[w]hile the record indicates that site commission payments *sometimes* fund inmate health and welfare programs, . . . such payments are also used for non-inmate needs, including employee salaries and benefits, equipment, building renewal funds, states’ general revenue funds, and personnel training.”⁷ In the instances when some site commission money is supposed to be allocated toward “Inmate Welfare Funds,” the amount that directly benefits

⁴ Fed. Trade Comm’n, “Federal Trade Commission Explores Rule Cracking Down on Junk Fees” (Oct. 20, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-explores-rule-cracking-down-junk-fees>.

⁵ Consumer Fin. Prot. Bureau, Justice-Involved Individuals and the Consumer Financial Marketplace 3 (2022), available at <https://www.consumerfinance.gov/data-research/research-reports/justice-involved-individuals-consumer-financial-marketplace/>.

⁶ 15 U.S.C. § 45(n) (defining an unfair act or practice, for purposes of the Federal Trade Commission Act, as one that is “likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition”).

⁷ In the Matter of Rates for Interstate Inmate Calling Servs., 28 F.C.C. Rcd. 14107, 14125 (2013) (emphasis added).

incarcerated people may be minimal.⁸ Based on its findings, and despite the arguments of the private telecommunications companies, the FCC mandated that “site commission payments . . . may not be passed on to inmates and their friends and families”⁹ and “encourage[d] more states to eliminate” them.¹⁰ We encourage the FTC to consider the careful factfinding and reasoning of the FCC when weighing any alleged benefits that site commissions and the excessive fees that fund them may have against the substantial harms they impose.

Unfair and deceptive fees in the corrections industry raise especially grave consumer-protection concerns for at least three reasons. First, incarcerated people have especially limited financial resources: the median income among people entering prison is 41 percent less than the national average,¹¹ and people have virtually no ability to earn meaningful wages while they are incarcerated.¹² Second, the financial cost of supporting incarcerated family members tends to fall disproportionately on people of color, and Black women in particular, raising important equity considerations.¹³ Third, as noted, governments have the ability to award private companies monopoly contracts for essential goods and services in correctional institutions. This power creates a heightened obligation on the part of the government to ensure fair treatment of consumers.

II. Incarcerated People and Their Loved Ones Are Forced to Pay Junk Fees for a Variety of Correctional Services

A. Money-Transfer Services Are Frequently Accompanied by Unfair and Deceptive Fees

Correctional facilities are supposed to provide a basic level of subsistence to people who are incarcerated. But fiscal austerity and mass incarceration have combined to put intense downward pressure on public spending for any goods or services that directly benefit incarcerated people. This requires incarcerated people’s loved ones to pick up the slack by sending in money for basic

⁸ *Id.* at 14110 n.13 (“Petitioners point out that in Orange County, California, the Inmate Welfare Fund had a budget of \$5,016,429 in 2010, and of that amount 74% were used for staff salaries, 0.8% was used for the actual services, supplies, and training for inmate education programs, and 0.06% as used for services, supplies, and training for inmate reentry programs.”).

⁹ *Id.* at 14111–12.

¹⁰ *Id.* at 14173.

¹¹ Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned* (2015), available at <https://www.prisonpolicy.org/reports/income.html> (“We found that, in 2014 dollars, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than nonincarcerated people of similar ages.”).

¹² Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, Prison Policy Initiative (Apr. 10, 2017), available at <https://www.prisonpolicy.org/blog/2017/04/10/wages/>. (showing average hourly wages of 14¢ to 63¢ for typical prison jobs).

¹³ Saneta deVuono-powell, et al., Ella Baker Center for Human Rights, *Who Pays? The True Cost of Incarceration on Families 9* (2015), available at <https://ellabakercenter.org/who-pays-the-true-cost-of-incarceration-on-families/>.

necessities, such as hygiene products, food, and paper from the commissary.¹⁴ Sending money to someone in prison or jail typically requires dealing with a private company that handles money transfers,¹⁵ and the fees charged for such services are often unfair, deceptive, or both.

1. *Unfair Fees*

Fees for money transfers to incarcerated people are a prime example of fees that are unfair because they are charged for services that provide “little or no added value to the consumer.”¹⁶ The Prison Policy Initiative (“PPI”), a non-profit, non-partisan organization, recently reviewed the money-transfer setups in all state prisons and found that these fees are alarmingly high. The average is around 20 percent of the principal amount in 26 states that issue monopoly contracts; the highest fees observed were 37 percent.¹⁷ By comparison, services like Venmo, CashApp, Paypal, and Zelle often provide *free* automated clearing house (“ACH”) transfers from bank accounts (correctional money-transfer companies do not offer an ACH option), and they offer transfers from a credit or debit card either for free or for a typical fee of 3 percent or less.¹⁸

These stark pricing differences between free-world and correctional money-transfer services are the somewhat predictable result of a market failure. The monopoly contracts awarded to correctional money-transfer services like JPay allow these companies to impose non-cost-based fees on a captive customer base without fear of competition. There are some limited instances of consumer choice in prison money transfers (discussed in Part II.A.2, below). But average fees in jurisdictions that allow competition are still only slightly lower than in other jurisdictions.

The massive disparity between fees for money-transfer services inside versus outside of the correctional sector become even more difficult to justify when one considers that correctional money-transfer companies seem to have an *easier* job than their free-world counterparts. Whereas a service like Venmo must facilitate transfers between two large groups of customers (senders and recipients) and manage the resulting complexities that can arise in either group

¹⁴ Incarcerated people obtain many necessities of life at the commissary, a retail outlet that is often operated by a for-profit contractor. Commissary is where people can buy necessary hygiene products and over-the-counter medications; purchase basic supplies like paper, batteries, and small appliances; and supplement the low-quality, too-small, and possibly spoiled or rotten food served in the cafeteria. Ariel Nelson & Stephen Raheer, *Captive Consumers: How government agencies and private companies trap and profit off incarcerated people and their loved ones*, *Inquest* (Mar. 19, 2022), available at <https://inquest.org/captive-consumers/>.

¹⁵ See Worth Rises, *The Prison Industry: How It Started. How It Works. How It Harms* 61–62, available at <https://static1.squarespace.com/static/58e127cb1b10e31ed45b20f4/t/621682209bb0457a2d6d5cf/a/1645642294912/The+Prison+Industry+How+It+Started+How+It+Works+and+How+It+Harms+December+2020.pdf>.

¹⁶ 87 Fed. Reg. at 67413.

¹⁷ Stephen Raheer & Tiana Herring, *Show Me the Money: Tracking the Companies that Have a Lock on Sending Funds to Incarcerated People*, Prison Policy Initiative (Nov. 9, 2021), available at <https://www.prisonpolicy.org/blog/2021/11/09/moneytransfers/>.

¹⁸ *Id.*

(from errors or disputes), a correctional money-transfer service has only one recipient to deal with under any given contract (the correctional agency that awarded the contract).

The conclusion of this evidence is clear: users of money-transfer services in correctional institutions pay fees far in excess of the cost of the service they receive.

2. *Deceptive Fees*

The majority of states grant monopoly franchises to money-transfer companies operating in state prisons.¹⁹ About eleven states, however, allow consumers to choose between multiple companies. But even if competition can theoretically benefit users by encouraging lower prices,²⁰ the information that companies provide about their fees is often so confusing that consumers cannot easily determine which company offers the lowest-cost option. Of the states with multiple options, only one (Arizona) provides comparative fee information in one location so that consumers can consult a single source to calculate the lowest-cost service.²¹

Confusing pricing not only makes choosing between competing companies difficult, but also makes choosing between money-transfer services offered by a single company more challenging. This is because fees for money transfers are often expressed in complicated tiered structures. For example, the average fee for a \$50 online transfer is \$5.99, or 12 percent of the principal amount; but, as the principal amount declines, the fee *increases* on a percentage basis: the average fee for a \$20 online transfer is \$3.75 (20 percent of the principal).²²

B. The Release Card Industry Is Also Replete with Junk Fees

When people leave prison or jail, so does their money. Upon leaving custody, people often have money left in their inmate trust account²³—whether from accumulated earnings; support from family; or, in the case of a short-term jail stay, a return of whatever cash they had in their possession when arrested. In the past, people received their money in the form of cash or a check. But, working in concert with private-equity backed financial services firms, correctional facilities have increasingly given released people their money in the form of a prepaid debit card,

¹⁹ *Id.*

²⁰ As noted above, average fees in facilities that allow competition are still only slightly lower than in other jurisdictions.

²¹ See Ariz. Dep't of Corr., “Inmate Deposits” (last visited Nov. 28, 2022), available at <https://corrections.az.gov/constituent-services/inmate-deposits>.

²² This description of “average fees” focuses on fees for online money transfers. Fees for in-person payments or phone payments are usually higher.

²³ As PPI has explained, “trust account” is a term of art in the correctional sector, referring to a pooled bank account that holds funds for incarcerated people whose individual balances are sometimes treated as subaccounts. The term “trust” is used because the correctional facility typically holds the account as trustee, for the benefit of the individual beneficiaries (or subaccount holders). See, e.g., Wanda Bertram, *The CFPB’s Enforcement Order Against Prison Profiteer JPay, Explained*, Prison Policy Initiative, n.1 (Oct. 28, 2021), available at <https://www.prisonpolicy.org/blog/2021/10/28/cfpb-jpay/#lf-fnref:1>.

known in correctional circles as a “release card.”²⁴ Fees associated with release cards are often outrageous, with the card provider charging people for things like having an account, using the account, not using the account, and seeking customer service.

Private correctional companies engaged in similar abusive practices in the telecommunications context. In that context, the FCC found that prison telecommunications providers were “assess[ing] a wide range of separate charges for services ancillary to the provision of [inmate calling services], such as fees to open, fund, maintain, close, or refund an [calling] account,” as well dozens of other ancillary fees.²⁵ The FCC identified the few ancillary service charges it found appropriate and banned all others.²⁶ The unjust fees that private companies once charged in the telecommunications context are very similar to the fees they are now attempting to charge for services not regulated by the FCC—such as release cards. Just as the FCC took action to ban unjust and unreasonable fees in that sphere, so too should the FTC use its authority to act here.

Recent action by the CFPB provides additional support for the FTC to take strong action in this area. The CFPB recently found that a leading release-card company, JPay, violated federal consumer protection laws by, among other things, abusing its monopoly contracts to impose fees on captive consumers who had no way to avoid them.²⁷ The CFPB required JPay to pay \$4 million for consumer redress and a \$2 million civil money penalty,²⁸ and negotiated a settlement

²⁴ Stephen Raheer, *Insufficient Funds: How Prison and Jail “Release Cards” Perpetuate the Cycle of Poverty*, Prison Policy Initiative (May 3, 2022), available at <https://www.prisonpolicy.org/blog/2022/05/03/releasecards/>; see also Worth Rises, *supra* note 15 at 59, 62–63.

²⁵ In the Matter of Rates for Interstate Inmate Calling Servs., 30 F.C.C. Rcd. 12763, 12838 n.519 (2015); see also *id.* at 12839 (“Our Mandatory Data Collection confirmed that various ICS providers charge a plethora of ancillary service charges[.]”).

²⁶ *Id.* at 12839, 12770 (listing “permitted ancillary service charges and taxes” in Table 2 and stating that all other ancillary service charges are prohibited); see also *id.* at 12763–64 (FCC’s cost-benefit analysis regarding ancillary service charges).

²⁷ The CFPB found that JPay “abused its market dominance” by

charg[ing] consumers unavoidable fees for prepaid cards used to return money owed to consumers at the time of their release from incarceration. Consumers could not protect their interests in the selection and use of JPay’s cards because they were denied a choice on how their own money would be given to them upon release. JPay did not provide a reasonable way for consumers to close their card accounts to obtain their card balances without paying fees. By assessing fees on these captive consumers, JPay took advantage of them and caused harm.

Consumer Fin. Prot. Bureau, “CFPB Penalizes JPay for Siphoning Taxpayer-Funded Benefits Intended to Help People Re-enter Society After Incarceration: JPay Will Pay \$6 Million in Consumer Redress and Penalties” (Oct. 19, 2021), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-jpay-for-siphoning-taxpayer-funded-benefits-intended-to-help-people-re-enter-society-after-incarceration/>.

²⁸ *Id.*

whereby the company agreed to not charge most types of fees for five years.²⁹ Private litigants have also had success challenging release-card fees,³⁰ and have even managed to defeat some arbitration provisions given the practical inability of cardholders to avoid using the debit cards that are foisted upon them.³¹ Despite these recent successes, the release-card industry remains replete with junk fees.

1. *Unfair Fees*

All release-card fees are a matter of concern because people leaving incarceration often do not have a realistic ability to get their own money back through an alternative mechanism. Nonetheless, some types of fees stand out as particularly unreasonable because they do not appear to compensate card issuers for real costs, making them the type of unfair junk fee the Commission is concerned with in this ANPR. We discuss the most objectionable of these fees below. The analysis below is based on a survey that PPI conducted of release-card fees and contractual provisions.³²

- *Purchase fees.* Although card issuers do incur some costs to process payment transactions, they are already compensated for these costs through “interchange fees,” which are fees the merchant’s bank pays to the card issuer’s bank. Collecting fee revenue from cardholders for processing purchase transactions thus appears to be a form of double recovery.
- *Declined-purchase fees.* Twenty-four release cards (half of PPI’s data set) charge fees for declined transactions, with an average fee amount of 62¢. These fees are especially difficult to justify because no available evidence indicates that card issuers incur any costs when a transaction is declined. Accordingly, these fees appear to be nothing more than enrichment at the expense of consumers who are least able to absorb these costs.
- *Periodic maintenance fees.* Because interchange fees compensate card issuers for the cost of processing transactions, periodic account maintenance fees also seem unnecessary. Card issuers already enjoy interest-free use of unspent cardholder funds, so it is not clear why cardholders should pay a fee for the mere existence of their account.

²⁹ Bertram, *supra* note 23.

³⁰ *Danica Brown v. Stored Value Cards, Inc.*, 953 F.3d 567 (9th Cir. 2020).

³¹ Grace Bennett, Comment, *Mandatory Arbitration and Prison Services Contracts: How Private Companies Exploit the Incarcerated and Consumers to Reject Meaningful Accountability*, 5 UCLA Crim. L.J. 201–05 (2021), available at <http://dx.doi.org/10.5070/CJ85154812>.

³² Using records in the CFPB’s prepaid product agreements database (the “Database”), PPI collected fee disclosures for all active prepaid cards that: (1) were marked with the product-type code “prison release,” or (2) were associated with known release-card issuers, marketers, or program managers. Using these parameters, PPI examined documents for forty-eight active release cards issued by five different financial institutions. For fee information compiled by this survey, see Prison Policy Initiative Comments, *supra* note 2 at Ex. 2.

Of particular concern is the prevalence of weekly maintenance fees in the release-card market. Of the forty-eight cards in PPI’s data set, eighteen (38%) charge monthly maintenance fees, while sixteen (33%) charge weekly maintenance fees. While the average monthly fee is \$4.01, the average weekly fee is \$2.25. Thus, the average cardholder with a weekly-fee card would pay \$9 in maintenance fees per month—more than twice the average monthly cost for cards with monthly fees. While we believe that all release-card maintenance fees are unfair as a normative matter, weekly fees are particularly odious because they appear to be used for purposes of making the total cost of having an account seem smaller.

- *Account closure fees.* Cards issued by Central Bank of Kansas City (and managed by Numi Financial) feature a \$9.95 fee for closing an account and receiving a check. The nature and amount of this fee is particularly puzzling, given that the same issuer’s standard cardholder agreement claims that cardholders can transfer their remaining balance via ACH for no fee at all. With average ACH fees topping off at around \$2 for a typical consumer transaction, it is difficult to understand why this issuer would charge nothing for ACH transfers but nearly \$10 for a check payment that costs 58¢ (the current cost of a first-class postage) plus the de minimis cost of printing a check. Perhaps the no-fee ACH option is the card issuer’s attempt to appear reasonable while resting comfortably in the knowledge that a majority of cardholders are unbanked and therefore will not be able to use this feature.
- *Customer service.* Thankfully, fees for accessing live customer service agents have apparently fallen out of favor. Nonetheless, we would support any effort to categorically prohibit such fees on any type of prepaid card.

Finally, research has shown that consumers use prepaid cards most effectively when they schedule regular value loads.³³ This allows unbanked consumers to actually derive convenience and value from some prepaid cards.³⁴ But no release cards in PPI’s survey allow consumers to make additional value loads after the card is first issued. Furthermore, PPI’s research reveals that many features of these release cards render them decidedly *inconvenient* for users.³⁵ For example, one issuer’s cardholder agreement states that cardholders can perform in-person withdrawals only at a “MasterCard principal financial institution,” but provides no information about how to determine which institutions fall into this category.³⁶ These observations raise the

³³ Stephanie M. Wilshusen, et al., Fed. Reserve Bank of Phila., Payment Cards Center, “Consumers’ Use of Prepaid Cards: A Transaction-Based Analysis” 25–26 (2012), available at <https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/discussion-papers/D-2012-August-Prepaid.pdf> (finding significantly greater consumer utilization of prepaid debit cards when consumer schedules a regular value load; based on a review of more than 3 million prepaid cards).

³⁴ Jennifer Romich, Sarah Gordon & Eric Waithaka, Indiana State Univ., A Tool for Getting By or Getting Ahead? Consumers’ View on Prepaid Cards 12–13 (2009), available at <https://ideas.repec.org/p/nfi/nfiwps/2009-wp-09.html>.

³⁵ See Prison Policy Initiative Comments, *supra* note 2.

³⁶ *Id.* at 10.

question of whether most of these release cards—at least in their current state—provide any value at all to consumers leaving incarceration, or instead are simply vehicles for extracting fees from a population that has no viable alternative for accessing their own money.

2. *Deceptive Fees*

People released from jail frequently complain that jail staff do not provide them with copies of cardholder agreements and fee disclosures for their release cards. Accordingly, fees associated with release cards fall into the FTC’s definition of fees that are deceptive “because they are disclosed only at a later stage in the consumer’s purchasing process *or not at all*.”³⁷

Even if release-card companies cannot entirely be faulted for jail employees’ delinquency, they are certainly responsible for hiding their fees from consumers by failing to comply with federal disclosure requirements. More specifically, the CFPB requires card issuers to submit prepaid account agreements and legally-mandated fee disclosures to an online database.³⁸ Database entries include “names of other relevant parties . . . such as the employer for a payroll card or the agency for a government benefit program.”³⁹ In the case of a release card, the correctional agency clearly qualifies as a “relevant party” for purposes of this rule. Yet numerous release-card entries in the database fail to identify any relevant parties, which can result in obscured fees. If, for example, a person released from jail receives a release card issued by Central Bank of Kansas City and managed by Numi Financial but is not provided with a copy of the cardholder agreement and fee disclosures, they might visit the CFPB’s website to find this information in the database. If this hypothetical cardholder looks up release cards issued by Central Bank of Kansas City, they will find nineteen different release cards with vastly different fee schedules. None of the entries list a relevant party, and the cards are only identified by alphanumeric designations that have no inherent meaning (version 1B, 1C, 3B, etc.). By failing to link specific cards to specific correctional agencies, release-card companies prevent cardholders from determining which fees govern their release cards.

C. Captive Consumers Are Increasingly Forced to Pay Junk Fees for Technology Services, Including Services Used to Communicate with Their Loved Ones

The FCC has been making progress in regulating abusive add-on—or so-called ancillary—fees for “services” related to prison and jail phone calls (e.g., fees to open an account, have an account, add money to an account, and close an account).⁴⁰ The FCC has banned or capped many

³⁷ 87 Fed. Reg. at 67412 (emphasis added).

³⁸ 12 C.F.R. § 1005.19.

³⁹ 12 C.F.R. § 1005.19(b)(1)(i).

⁴⁰ *See, e.g.*, Peter Wagner & Alexi Jones, Prison Policy Initiative, State of Phone Justice: Local Jails, State Prisons, and Private Phone Providers, n.2 (2019), available at https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

of these fees.⁴¹ And it continues to engage in rulemaking to further protect consumers from unjust add-on fees.⁴²

But phone calls are not the only technology plagued by junk fees. And while the recently passed Martha Wright-Reed Just & Reasonable Communications Act of 2022 expands the FCC’s authority to address the price of various communications services for incarcerated people, the law appears to exclude electronic messaging and focuses on services that permit incarcerated people to “communicat[e] with individuals outside the correctional institution,” therefore leaving ample room for the FTC to act.⁴³ As consumer protections around phone calls have become stronger, prison telecommunications companies have evolved to evade regulation.⁴⁴ Telecom companies have bought up competitors that provide services like electronic messaging (i.e., email) and various programs delivered on personal tablets.⁴⁵ These technologies are significantly

⁴¹ Fed. Comm’ns Comm’n, “Telephone Service for Incarcerated Individuals” (Dec. 20, 2022), available at <https://www.fcc.gov/consumers/guides/telephone-service-incarcerated-individuals>; see also Wagner & Jones, *supra* note 40 at n.12; *supra* Part II.B.

⁴² See, e.g., Martha Wright-Reed Just and Reasonable Communications Act of 2022, S. 1541, Public Law No: 117-338 (ordering the FCC to promulgate regulations to ensure, *inter alia*, that all rates and charges for telephone services in correctional and detention facilities are “just and reasonable”); Fed. Comm’ns Comm’n, Fourth Report and Order and Sixth Further Notice of Proposed Rulemaking, FCC 22-76, at 37–38 (Sept. 30, 2022) (e.g., capping fees charged by third-party money transmitters—such as Western Union and MoneyGram—to \$5.95); Fed. Comm’ns Comm’n, PR, 87 Fed. Reg. 219 (Nov. 15, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-11-15/pdf/2022-24597.pdf>.

⁴³ Martha Wright-Reed Just and Reasonable Communications Act of 2022, S. 1541, Public Law No: 117-338, § 2(a)(2), (b)(3).

⁴⁴ In 2015, the year after the FCC’s first rate caps went into effect, the Huffington Post—citing internal Securus documents—reported that Securus was purchasing JPay because its non-phone products offered “faster-growing revenue streams” than phone calls. Peter Wagner & Wanda Bertram, Prison Policy Initiative, State of Phone Justice 2022: The Problem, the Progress, and What’s Next, n.20 (2022), available at https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html (citing Ben Walsh, Prisoners Pay Millions To Call Loved Ones Every Year. Now This Company Wants Even More, *Huffington Post* (Jun. 10, 2015), available at https://www.huffpost.com/entry/prison-phone-profits_n_7552464).

⁴⁵ Aventiv Technologies, the corporate parent of Securus, explains on its website that Securus is “continuing [its] transformation from a traditional corrections telecommunications service provider to a diversified technology company” that provides products and services “across multiple sectors.” Aventiv is now the corporate parent of Securus, JPay, and AllPaid, whose combined correctional products and services span communications, security, entertainment, education, money transfers, release cards, parole and probation payments, tablets, and more. Aventiv, “Securus Technologies Realigns Business Units, Diversifies Product Offerings Under New Corporate Parent: Aventiv Technologies” (Oct. 10, 2019), available at <https://www.aventiv.com/securus-technologies-realigns-business-units-diversifies-product-offerings-under-new-corporate-parent-aventiv-technologies/>.

less regulated—and, unsurprisingly, attended by numerous junk fees. We describe the fees associated with these technologies in the sections below.

1. *Email Services*

a. Unfair Fees

As with other correctional services, companies that provide electronic messaging services in prisons and jails are able to abuse their monopoly contracts with correctional facilities by charging high fees to captive consumers who have no way to avoid them. Fees for emails are particularly unreasonable because they do not appear to compensate electronic-messaging companies for real costs or provide consumers with added value. Accordingly, they are the type of unfair junk fee the Commission is concerned with in this ANPR.

Unlike in the free world, where there is no incremental cost for each email you send or receive, with prison-based electronic messaging services, there is almost always a fee. According to a comprehensive 2016 report published by PPI, users most often must pay a flat fee per message.⁴⁶ At the majority of facilities, fees tend to be in the neighborhood of 50¢ per message.⁴⁷ PPI, however, discovered fees for text-only messages ranging from a low of 5¢ per message to a high of \$1.25.⁴⁸ Some systems offer the ability to send pictures or other attachments for a separate, usually higher, fee.⁴⁹ The most notable exception to flat-fee pricing is the Federal Bureau of Prison’s TRULINCS system, which charges a per-*minute* fee for use of the system.⁵⁰

PPI concluded that the wide range of fees suggests that prices are not based on provider costs.⁵¹ This is not surprising, it reasoned, given the fact that electronic messaging services typically take advantage of hardware that is already installed for other purposes (e.g., commissary ordering or video calls) and the costs to operate a closed electronic messaging network are likely quite low.⁵²

Further, PPI surmised, the fact that many facilities offer electronic messaging at 50¢ per message suggests that prices are likely set with an eye toward the cost of the most similar competing product: a single-piece first-class letter.⁵³ Indeed, JPay expressly admits to setting rates in relation to postage prices, and refers to prepaid message credits as “stamps.”⁵⁴ Postage rates are

⁴⁶ Stephen Raher, Prison Policy Initiative, *You’ve Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation* (2016), available at <https://www.prisonpolicy.org/messaging/report.html> [hereinafter “You’ve Got Mail”].

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ JPay, “Inmate Services: Email” (last accessed Jan. 26, 2023), available at <https://www.jpays.com/pemessages.aspx> (explaining that “each email requires a ‘Stamp,’ often

legally required to cover the U.S. Postal Service’s direct and indirect costs of delivering first-class mail,⁵⁵ however, which is something that has absolutely no relevance to the cost of providing electronic messaging services in correctional facilities. Put simply, “stamps” in this context are a sham.

Various ancillary fees can also significantly increase out-of-pocket costs for consumers.⁵⁶ For example, one email provider—InmateCanteen.com, operated by Turnkey Corrections—requires users to make advance deposits, which at the time of PPI’s study were subject to a flat \$8.95 “convenience fee.”⁵⁷ InmateCanteen.com’s “conditions of use” from 2020 explain that it “charges a flat processing fee for each payment instruction processed by InmateCanteen.com,” and it “reserves the right to change the amount of the processing fee at any time, without notice to users.”⁵⁸ (The “conditions of use” webpage on InmateCanteen.com’s current website is entirely blank.⁵⁹) PPI also found examples of email providers charging “maintenance fees” once a user made a deposit and charging fees for each deposit made.⁶⁰

Finally, some providers incentivize—and sometimes even require—users to pre-purchase messages in certain message-quantities or dollar-amounts.⁶¹ As PPI explains,

[t]he primary problem with incentivizing or requiring customers to prepay for electronic messaging service is that fees are nearly always non-refundable. In the case of a jail, where a person’s period of incarceration can be brief, it is likely that many family members sign up for the service to communicate with a particular relative in jail. When that relative is released, there will probably be unused funds in the account. Given the churn of people through county jails . . . , it seems that messaging providers count on customers forfeiting unused funds as part of their business model[.]⁶²

available at more affordable rates than traditional postage”); *see also* JPay, “Buying Stamps” (last accessed Jan. 26, 2023), available at <https://www.jpayers.com/jpayhelp/Content/products%20and%20services/Email/Buying%20stamps.htm>.

⁵⁵ You’ve Got Mail, *supra* note 46 (citing 39 U.S.C. § 3622(c)(2)).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Inmate Canteen, “Conditions of Use” (last updated Sept. 25, 2020), available at <https://inmatecanteen.com/Contact/ConditionsOfUse.aspx>.

⁵⁹ Inmate Canteen, “Terms of Service” (last updated Mar. 30, 2022; last visited Jan. 25, 2023), available at <https://team3.inmatecanteen.com/#/policies>.

⁶⁰ You’ve Got Mail, *supra* note 46.

⁶¹ PPI found that at least two companies—ICSolutions and JPay—charge differently depending on how many messages a customer pre-purchases. ICSolutions offers a single-message price, and it offers discounts for pre-purchases of multiple messages, up to forty. JPay, in some of its contracts, requires customers to prepay for at least five messages. Tech Friends (JailATM) and Smart Communications (SmartJailMail.com) both require users to prepay (at least \$5 at a time), but do not use volume discounts. *Id.*

⁶² *Id.*

In sum, electronic messaging appears to suffer from many of the same perverse pricing dynamics that spurred the FCC to regulate phone rates and fees in corrections facilities, including prices that bear little relation to cost and consumer choice vested in corrections officials who are not obliged to protect the rights of end-users (a particularly vulnerable population).⁶³ The FTC should similarly take action to regulate junk fees in the correctional email context.

b. Deceptive Fees

Fees for electronic messaging services in prisons and jails are often hidden. Ancillary fees are often disclosed only at the time of purchase—which, as explained in the ANPR, can prevent consumers from knowing the true cost of their purchase until they have already invested substantial time and energy, can cause them to spend more than they expected or wanted to, and can force honest businesses to compete on an unfair playing field.⁶⁴ More specifically, these fees are not mentioned in the facility contracts or in the providers’ publicly available terms and conditions. Moreover, it is difficult to directly compare prices between providers because message bundles, volume discounts, ancillary fees, and character limits⁶⁵ make dollar-to-dollar comparisons unreliable.

2. Tablets

Tablet computers have become increasingly popular in correctional facilities nationwide, and they have become a means for people who are incarcerated to send emails, make phone or video calls, listen to music, read e-books, and more. Unfortunately, they have also become a means of delivering a captive market to profit-seeking companies who charge unfair and deceptive fees.

a. Unfair Fees

Tablets come with hefty price tags due to large fees charged to users at every opportunity. Many tablet programs, for example, charge users a *per-minute* fee to read e-books, send messages, or listen to music.⁶⁶ One tablet provider charges \$14.99 for a 14-day digital music subscription, including a \$9 “infrastructure charge.”⁶⁷ In some cases, these costly options are being used to replace free ones. Pennsylvania, for example, ended book donations to incarcerated people in favor of pricy e-books, many of which were lifted directly from a free online library.⁶⁸ And one

⁶³ *Id.*

⁶⁴ 87 Fed. Reg. at 67422.

⁶⁵ Electronic message providers often limit message length, with every letter, period, and space counting against the limit. Limits can be as high as 6,000 characters or as low as 1,500 characters. PPI provides a helpful illustration of how these limits operate in practice: If a user wants to send Martin Luther King Jr.’s “Letter from a Birmingham Jail,” it would take twenty-seven separate messages under a 1,500-character limit. As noted, users are typically charged on a per-message basis, so this user would be charged for twenty-seven messages.

⁶⁶ Nelson & Raheer, *supra* note 14; Mack Finkel & Wanda Bertram, *More States Are Signing Harmful “Free Prison Tablet” Contracts*, Prison Policy Initiative (Mar. 7, 2019; updated Mar. 28, 2021), available at <https://www.prisonpolicy.org/blog/2019/03/07/free-tablets/>.

⁶⁷ *Id.*

⁶⁸ *Id.*

large Florida jail even took away Bibles, replacing them with low-quality e-Bibles on tablets.⁶⁹ Once again, incarcerated people and their families are defenseless against these unfair fees due to the monopolistic dynamics at work: “they have no way to avoid or opt out of them” because they are “dealing with a company with . . . exclusive rights that can extract fees because there is no competing option.”⁷⁰

b. Deceptive Fees

Tablet companies and correctional facilities often market tablets as being “free,” and describe them as a “gift” to incarcerated people. In reality, tablet companies are very effective at hiding their products’ costs. As a recent experience in New York State showed, some companies are so successful in hiding their fees that legislators are unable to find them.⁷¹ In 2018, JPay signed a contract with the New York Department of Corrections to give “free” tablets to 52,000 incarcerated people.⁷² Confused, one Republican legislator asked: “If it’s this easy to encourage vendors to provide free tablets to inmates, why aren’t they being provided to our students?”⁷³ PPI was able to discover the true cost of these tablets only by filing a public records request.⁷⁴ It found that JPay provides “free” tablets as part of a package deal—or a “bundled contract”—of several JPay products and services that gouge incarcerated people and their families. These include many of the same products and services already discussed, such as selling “stamps” for emails, charging fees for depositing money, and charging above-market prices for things like e-books. We discuss these bundling practices, and how they help companies hide their fees, in greater detail in Part III, below.

D. The Commission Should Investigate High Fees Charged in Markets for Other Correctional Services

Although the specifics of the services and abuses vary, common features across the correctional services industry create an environment ripe for consumer abuses and financial exploitation. We encourage the Commission to closely scrutinize the high fees charged in connection with the following correctional services:

- *Commercial bail.* Commercial bail companies commonly levy fees for various (often ambiguous) expenses, beyond the bond premium itself. When entering into these contracts,

⁶⁹ *Id.*

⁷⁰ Fed. Trade Comm’n, “Federal Trade Commission Explores Rule Cracking Down on Junk Fees: Agency seeks comment on harms from unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value” (Oct. 20, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-explores-rule-cracking-down-junk-fees>.

⁷¹ Wanda Bertram & Peter Wagner, *How to Spot the Hidden Costs in a “No-Cost” Tablet Contract: There’s No Such Thing as a Free Lunch—or a Free Tablet*, Prison Policy Initiative (July 24, 2018), available at <https://www.prisonpolicy.org/blog/2018/07/24/no-cost-contract/>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

the consumer has almost zero bargaining power. Contracts are negotiated at the bail agent's office—and an accused person who does not sign the agreement under the proffered terms can be taken back to jail. Bail agents have little incentive to ensure that consumers understand the terms to which they are agreeing. Furthermore, many bail agents allow the consumer to pay for the bond premium in installments, often in return for charging financing fees and costs. The terms and cost of this extension of credit may be murky and devoid of the types of disclosures typically required in consumer contracts. In addition, financing costs may cause the premiums to exceed the jurisdiction's rate cap.⁷⁵ All of this occurs against a backdrop in which these companies have increasingly escaped any financial risk by carving out loopholes to place that burden on the backs of their customers and the taxpayers.⁷⁶

- *Post-arrest/pretrial diversion programs.* Post-arrest diversion programs come in different forms, but typically allow—at the state's discretion—selected individuals to avoid criminal charges if they follow a prescribed program of treatment, restitution, or community service. These programs can often have much to recommend them. But recent investigations have revealed a troubling new pattern: jurisdictions often outsource pretrial diversion programs to private companies that charge excessive participation fees and operate beyond public scrutiny. These fees can be substantial, particularly for low-income families. A ProPublica investigation found that course fees in Illinois ranged from \$125 to \$175; administrative fees added another \$25 to \$35. Companies also charge additional fees for conveniences like rescheduling a missed class—or even enrolling in a payment plan.⁷⁷
- *Private probation.* Several states allow counties and municipalities to contract with private companies to administer their probation systems for misdemeanor and lower offenses. Under these arrangements, the government extends exclusive contracts to supervision companies, which are then allowed to enforce probation requirements against people ordered to probation. Electronic monitoring fees (discussed in the next bullet point) are a major source of revenue for private probation companies. Other common fees are payments for drug testing, rehabilitative courses, and other treatment programs. These conditions are sometimes required not by courts but by the private probation company.

These supervisory systems lack transparency, both to consumers and to the public at large. The prices for their supervision “services” often vary widely, even within the same state, and are billed to consumers with little clarity or explanation. Consumers are also frequently

⁷⁵ Brian Highsmith, Nat'l Consumer L. Ctr., *Commercialized (In)justice: Consumer Abuses in the Bail and Corrections Industry* 26 (2019), available at <https://www.nclc.org/wp-content/uploads/2022/09/report-commercialized-injustice.pdf> (internal citations omitted).

⁷⁶ Wendy Sawyer, *All Profit, No Risk: How the Bail Industry Exploits the Legal System*, Prison Policy Initiative (October 4, 2022), available at <https://www.prisonpolicy.org/reports/bail.html>.

⁷⁷ *Id.* at 27–28 (citing Rebecca Burns, *Diversion Programs Say They Offer a Path Away from Court, but Critics Say the Tolls Are Hefty*, ProPublica Illinois (Nov. 13, 2018), available at <https://www.propublica.org/article/diversion-programs-illinois-criminal-justice-system-bounceback-correctivesolutions#:~:text=Illinois%20Reporting%20Project-Diversion%20Programs%20Say%20They%20Offer%20a%20Path%20Away%20From%20Court,ways%20they%20might%20not%20otherwise>).

deceived about the costs involved. For example, Human Rights Watch found that where probation is offered in exchange for a plea deal, neither the lawyers (prosecutor or defense) nor the judge would explain the financial burden of private probation, and the companies may not make their fee schedules available to the public. Indeed, companies have argued that these figures are trade secrets and have refused to publish them on that basis. Furthermore, private probation companies frequently fail to inform low-income probationers about their ability to waive supervision fees (where available), or other legal rights.⁷⁸

- *Electronic monitoring.* Electronic device monitoring (e-monitoring) is becoming increasingly common for people during the pretrial period or while they are on parole or probation. It is often administered by private companies, and the vast majority of states allow fees to be charged for costs associated with it.⁷⁹ Providers frequently charge a one-time installation fee, which can be up to \$250.⁸⁰ Afterwards, the person must pay for monitoring; a recent report found that monitoring fees can be as high as \$30 or \$40 *per day* in some counties.⁸¹ The national average for all probation sentences is just under two years,⁸² meaning that fees can add up to substantial sums, particularly for low-income communities that are disproportionately subjected to it.⁸³

III. The Oligopolistic Nature of the Corrections Macroeconomy Further Fosters Junk Fees

The previous sections explain how a single company often controls a particular service within a correctional facility, creating a monopoly that enables the company to charge unfair and/or deceptive fees. In addition to these monopolies within facilities, oligopolistic dynamics characterize the corrections market more broadly. These dynamics further foster junk fees.

⁷⁸ *Id.* at 30–31 (citing Sarah Stillman, *Get Out of Jail, Inc.*, *The New Yorker* (June 23, 2014), available at <https://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc.>; Interview with Komala Ramachandra, Senior Researcher, Human Rights Watch (Feb. 15, 2019); and Human Rights Watch, *Profiting from Probation: America’s “Offender-funded” Probation Industry* (2014), available at https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf).

⁷⁹ Fines & Fees Justice Center, *Electronic Monitoring Fees: A 50-State Survey of the Costs Assessed to People on E-Supervision* 1, 4 (2022), available at <https://finesandfeesjusticecenter.org/content/uploads/2022/09/FFJC-Electronic-Monitoring-Fees-Survey-2022.pdf>.

⁸⁰ *Id.* at 18.

⁸¹ *Id.* at 18–19.

⁸² Pew Charitable Trusts, *States Can Shorten Probation and Protect Public Safety: Wide Variations in Policies and Term Lengths Across States Point to Opportunities for Reform* (2020), available at <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/12/states-can-shorten-probation-and-protect-public-safety> (“Nationwide, the average probation term is just under two years, with substantial variation across states. Average terms range from nine months in Kansas to nearly five years (59 months) in Hawaii.”).

⁸³ Fines & Fees Justice Center, *supra* note 72, at 1.

In particular, two companies dominate the correctional phone market—Securus and ViaPath (formerly called Global Tel*Link, or GTL)—and these two companies have in turn acquired numerous competitors that sell products and services like video calling, tablets, electronic messaging, release cards, and money transfer platforms.⁸⁴ Securus and ViaPath then offer correctional facilities packages of unrelated services in one huge “bundled contract.” Bundled contracts give a company exclusive rights to offer incarcerated people multiple services, all covered by a single contract. PPI’s research has shown that bundling is now the norm, present in the overwhelming majority of phone contracts.⁸⁵

Bundling allows private companies to obscure the actual cost of providing their various services—hiding cost information from both end users and the contracting correctional facility. The oligopolistic nature of the corrections macroeconomy also means that correctional facilities have little choice in deciding which company to award contracts to. Once again, this lack of competition prevents companies from having to compete with one another by offering lower costs.

IV. Conclusion

Justice-involved consumers are all too frequently forced to pay junk fees imposed by private companies operating in the market for correctional services. These excessive fees bear all of the hallmarks of an unfair act or practice under the Commission’s enforcement authority.⁸⁶ They cause substantial harm because they constitute high sums for people least able to afford them. They cannot reasonably be avoided because consumers are captive to private companies awarded exclusive contracts. Further, as discussed above, they provide little or no added value to consumers. And they do not benefit competition: to the contrary, the companies that impose them can do so only because they enjoy monopoly contracts in an oligopolistic market.

In addition, these fees are frequently deceptive. The practices of omitting fee information, bundling services, and presenting price information in confusing ways are all likely to mislead reasonable consumers and result in financial and other harms.⁸⁷

⁸⁴ ViaPath Technologies has a 30.4% market share (i.e. provides phone service to facilities holding approximately 30.4% of all incarcerated people). Securus has a 29.5% market share. These two companies’ market dominance is the result of their years of buying up competitors. Wagner & Bertram, *supra* note 36 at n.20; *see also supra* note 37 (describing the wide range of correctional products and services offered by Aventiv, the parent company of Securus, JPay, and AllPaid).

⁸⁵ Wagner & Bertram, *supra* note 36 at n.20. To incentivize a bundled contract, the companies typically offer a higher commission payment, and dangle the prospect of getting more services for less negotiation and paperwork. But in exchange, the facilities give up the leverage to retain *only* the quality services they want at a price they consider fair.

⁸⁶ 15 U.S.C. § 45(n) (defining an unfair act or practice, for purposes of the Federal Trade Commission Act, as one that is “likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition”).

⁸⁷ *See* Fed. Trade Comm’n, “A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority” (rev’d May 2021), available at

The undersigned thank the Commission for considering the challenges confronting justice-involved consumers, and we encourage the Commission to keep this population in mind when crafting any policy proposals that result from this proceeding. We remain committed to assisting the Commission in making sure that any such policy proposals address the unjust fees currently being imposed on consumers who are compelled to use correctional services.

If you have any questions about these comments, please contact Caroline Cohn at ccohn@nclc.org.

Sincerely,

National Consumer Law Center (on behalf of its low-income clients)
Prison Policy Initiative

Alabama Appleseed
Benton Institute for Broadband & Society
Center for Responsible Lending
Color Of Change
Drug Policy Alliance
Ella Baker Center for Human Rights
Family Assistance Program
FREE! Families Rally for Emancipation and Empowerment
Freedom 4 Youth
Institute for Constitutional Advocacy & Protection, Georgetown University Law Center
Juvenile Law Center
Legal Aid Justice Center
Prisoners' Legal Services of Massachusetts
Public Justice
Returning Home Foundation
Rights Behind Bars
Riverside All of Us or None
Root & Rebound
Southern Poverty Law Center
Southern Poverty Law Center Action Fund
Texas Fair Defense Project
TimeDone
United Church of Christ Media Justice Ministry
United CORE Alliance
Washington Defender Association
Western Center on Law & Poverty
Worth Rises

<https://www.ftc.gov/about-ftc/mission/enforcement-authority> (“Deceptive’ practices are defined . . . as involving a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances.” (internal citation omitted)).