

Tossing Out Junk Fees: The FTC’s Proposed Rule to Promote Clarity and Competition in Price Advertising

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How does an \$87 concert ticket turn into a \$124 total price at checkout?¹ Consumers know that their total price will increase due to taxes, but businesses are sneaking in more mandatory fees than just taxes. The use of generic line items such as “service fee” or “convenience fee” on pricing breakdowns are often the reason for these inflated total prices.² Consumers are led down a path of bait and switch as to the cost of the product. Once they are far enough into the purchase process, they are held captive to pay the mandatory fees.³ Even more, businesses often provide no clarity as to what a “service fee” goes toward. The Federal Trade Commission (“FTC”) proposed a “Rule on Unfair or Deceptive Fees” seeking to regulate these hidden and misleading fee practices to prevent businesses from deceiving consumers and inhibiting fair competition of price.⁴ The proposed rule follows President Biden’s executive order calling on various departments and agencies to crack down on junk fees and harms to competition.⁵

¹ Council of Economic Advisors, How Junk Fees Distort Competition (Mar. 21, 2023), <https://www.whitehouse.gov/cea/written-materials/2023/03/21/how-junk-fees-distort-competition/>.

² *Id.*

³ *Id.*

⁴ FTC Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77420 (proposed Nov. 9, 2023) (to be codified at 16 C.F.R. 464).

⁵ White House Press Release, Biden-Harris Administration Announces Broad New Actions to Protect Consumers from Billions in Junk Fees (Oct. 11, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/11/biden-harris-administration-announces-broad-new-actions-to-protect-consumers-from-billions-in-junk-fees/>.

I. What are Junk Fees?

The practice of junk fees spans many industries, most often utilized in online purchasing.⁶ These industries commonly include live event tickets, food delivery apps, car rentals, transportation tickets, rental housing, telecommunication providers, tuition, and financial services.⁷ One of the most common industries where consumers face the bait and switch tactics of junk fees are in renting short-term lodging. On hotel booking websites or online travel agency sites, consumers see prominent cost per night prices advertised for the listed hotels or short-term home rentals.⁸ Only after clicking through to the purchase page does the price breakdown include mandatory add-on fees, such as hotel resort fees, vacation rental fees, or cleaning fees, that bring the total price much higher than originally advertised.⁹ In the U.S., resort fees average 11% of the room cost per night, and can be as high as 35%.¹⁰ This junk fee scheme represents two harms to consumers that the proposed FTC rule seeks to address: (1) these fees are hidden from consumers, and (2) these fees are misleading to consumers.¹¹

The tactic of hidden fees is also called “drip pricing,” where the consumer encounters additional costs “dripped in” as they go through the purchasing process.¹² The initial advertised price is not consistent with the true price they must pay at the time of purchase that includes other fees and charges. In the live-event ticketing market for live music and sporting events, fees averaged 27% of the ticket price total in the primary ticket market and 31% in the secondary market.¹³

⁶ FTC Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. at 77420.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Council of Economic Advisors, *supra* note 1.

¹³ U.S. Gov't Accountability Off., Event Ticket Sales: Market Characteristics and Consumer Protection Issues (April 12, 2018), <https://www.gao.gov/products/gao-18-347>.

The other tactic of misleading fees demonstrates why they are called “junk” fees. Consumers may see a fee listed but have no idea what their money is actually going to. Further, they have no choice but to pay it, in order to purchase the product they want. For example, the “hotel resort fee” provides no clarity to the consumer as to what the business is actually using that money for, and it is typically non-negotiable.

II. The FTC Rule on Unfair or Deceptive Fees

The FTC requested initial public comment on the issue of junk fees on November 8, 2022, in an Advance Notice of Proposed Rulemaking.¹⁴ After reviewing 12,000 comments received, the FTC concluded that unfair or deceptive practices relating to junk fees were prevalent and that promulgating this rulemaking is in the public interest.¹⁵ The FTC then issued its Notice of Proposed Rulemaking on October 9, 2023.¹⁶

The FTC’s proposed rule, titled “Rule on Unfair or Deceptive Fees,” prohibits two categories of junk fee practices. First, the rule addresses hidden fees, requiring businesses to offer, display, or advertise the Total Price more prominently than any other pricing information.¹⁷ Displaying an amount without clearly and conspicuously disclosing the Total Price is deemed a violation of Section 5 of the FTC Act as an unfair and deceptive practice.¹⁸ The rule defines “Total Price” as “the maximum total of all fees or charges a consumer must pay for a good or service and any mandatory Ancillary Good or Service, except that Shipping Charges and Government Charges may be excluded.”¹⁹ Businesses must make the total price (before tax and shipping) easily

¹⁴ FTC Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. at 77420.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

understandable and difficult to miss. For example, if a food delivery app charges a service fee, the price advertised most prominently must include the fee amount.

The second prohibition addresses misleading fees, declaring it an unfair and deceptive practice in violation of the Act for a business to misrepresent the nature and purpose of any amount a consumer may pay.²⁰ This preventative disclosure requirement requires businesses to display clearly and conspicuously the nature and purpose of any fees excluded from the total price. For example, instead of a food delivery app listing a generic “service fee” in their itemization of the total price, they must identify if the fee goes to compensating the delivery driver or compensating the business for providing the app.²¹

The prohibitions apply to “businesses” which include individuals, corporations, partnerships, associations, or entities offering goods or services.²² There is a carve out for certain motor vehicle dealers whose price disclosures are regulated instead by the proposed “Motor Vehicle Dealers Rule.”²³

III. Parallel Efforts to Rein in Junk Fees

The FTC’s proposed rule does not come by surprise, as many forces have paved the way for regulating junk fees. President Biden’s executive order, issued on July 9, 2021, directed the executive branch and recommended independent agencies to take certain actions to promote a “fair, open, and competitive marketplace.”²⁴ President Biden also called on Congress to pass legislation to address unfair competition practices.²⁵ The Junk Fee Prevention Act was introduced

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Executive Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

²⁵ *Id.*

in the Senate and House and aims to protect consumers from hidden fees.²⁶ The Act goes further than the proposed FTC rule by also prohibiting businesses from imposing “excessive” mandatory fees and authorizes the FTC to determine whether a fee is excessive.²⁷

While Congressional action remains uncertain, the agencies have stepped in. The FTC’s broad scope of authority over consumer transactions allows the agency to regulate junk fees across many industries, providing comprehensive action. Within the areas of commerce that the FTC does not have authority over, the Federal Communications Commission (“FCC”) finalized a rule requiring broadband providers to clearly display cost and fee information so consumers can compare pricing more easily.²⁸ Additionally, the Department of Transportation (“DOT”) proposed a rule requiring airlines and online booking services to display the full price of plane tickets up front, including baggage and other fees.²⁹ The Consumer Financial Protection Bureau (“CFPB”) has taken a number of actions to restrict junk fees in financial services, including issuing an advisory opinion with guidance on illegal junk fees from large banks, proposing a rule to rein in excessive bank overdraft fees, and proposing a rule to cut credit card late fees.³⁰

Several states and other countries have taken action. New York passed a law in June 2022 that banned hidden fees in purchasing tickets to live events and prohibited delivery fees on tickets that are delivered electronically or printed at home.³¹ California adopted a law similar to the FTC

²⁶ Junk Fee Prevention Act, H.R.2463, 118th Cong. (2023-2024); S.916, 118th Cong. (2023-2024).

²⁷ *Id.*

²⁸ FCC Rule Empowering Broadband Consumers Through Transparency, 47 C.F.R. § 8 (2023).

²⁹ DOT Enhancing Transparency of Airline Ancillary Service Fees, 87 Fed. Reg. 63718 (proposed Oct. 20, 2022) (to be codified at 14 C.F.R. 399).

³⁰ CFPB Advisory Opinion, Consumer Information Requests to Large Banks and Credit Unions, 88 Fed. Reg. 71279 (Oct. 16, 2023); CFPB Proposed Rule, Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 13852 (proposed Feb. 23, 2024) (to be codified at 12 C.F.R. 1005, 1026); CFPB Proposed Rule, Credit Card Penalty Fees, 88 Fed. Reg. 18906 (proposed Mar. 29, 2023) (to be codified at 12 C.F.R. 1026).

³¹ Governor Hochul Signs Legislation Targeting Unfair Ticketing Practices in Live Event Industry (June 30, 2022), <https://www.governor.ny.gov/news/governor-hochul-signs-legislation-targeting-unfair-ticketing-practices-live-event-industry>.

rule, prohibiting advertising, displaying, or offering a price that does not include all additional fees, apart from tax and shipping.³² Australia and the EU both have laws requiring businesses to prominently display a single total price for goods and services.³³ Canada also regulated drip pricing and has brought enforcement actions against online ticket sellers, car rental services, and flight-booking services.³⁴

The FTC's rule is also proposed on the heels of recent FTC enforcement actions challenging undisclosed and misrepresented fees as unfair or deceptive practices under the FTC Act's Section 5 authority.³⁵ Many of these cases resulted in successful settlements requiring defendants to provide immediate and accurate pricing disclosures.³⁶ The settlements also required defendants to refund consumers harmed by the actions in amounts of up to \$100 million.³⁷ This rule would codify the arguments the FTC has used in these enforcement actions, to emphasize the deceptive and unfair nature of junk fee practices. This rule would help the FTC provide consumers with quicker redress, instead of filing individual cases for each unfair or deceptive fee practice.³⁸ Thus, this rule also provides efficiency of resources for the FTC.

Private litigants also filed actions attacking unfair and deceptive junk fees. Putative class actions were filed against banks in Virginia and North Carolina for their repeat overdraft fees of \$35-38.³⁹ In addition to arguing these are unfair and deceptive practices, the plaintiffs have also

³² Cal. S.B. 478, (2023–2024) Regular Session. The FTC's proposed rule also expressly prevents the FTC rule from superseding State laws unless there is an inconsistency. FTC Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. at 77420.

³³ *Id.*

³⁴ *Id.*

³⁵ 15 U.S.C. §45.

³⁶ FTC Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. at 77420.

³⁷ FTC Press Release, FTC Action Against Vonage Results in \$100 Million to Customers Trapped by Illegal Dark Patterns and Junk Fees When Trying to Cancel Service (Nov. 3, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-action-against-vonage-results-100-million-customers-trapped-illegal-dark-patterns-junk-fees-when-trying-cancel-service>.

³⁸ FTC Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. at 77420.

³⁹ *Overton v. Atlantic Union Bank*, No. 3:23cv24 (E.D.V.A. Jan. 10, 2023); *Preston v. HomeTrust Bancshares, Inc.*, Superior Court, Case No. 23CV000617 (N.C. Feb. 13, 2023).

argued that the overdraft junk fee practices breach the account agreements and unjustly enrich the banks.⁴⁰

IV. Promoting Clarity and Competition

The purpose of the FTC proposed rule is to promote a level playing field to enable consumers to accurately compare prices, and to enable businesses to compete honestly.⁴¹ Deceptive pricing practices often result in reduced incentives for businesses to compete by traditional means of lowering prices or improving quality.⁴² Rather than improving the quality of a product in order to charge more, businesses use junk fees to charge more, with no change in product.

Deceptive pricing practices can harm competition by limiting consumers' ability to genuinely compare prices. One case study illustrated the difficulty consumers face in comparison shopping, finding that drip pricing caused consumers to pay nearly 21% more on live event tickets than consumers who were shown all-inclusive prices.⁴³ In situations where consumers are well into the purchasing process when additional fees are disclosed, the consumer may put less effort into searching for alternative lower prices. Consumers in these scenarios are called "captive consumers," who are already locked into the purchase process.⁴⁴ An honest business is competitively harmed by being priced out of the consumer's initial search, though they may offer a more attractive price overall.

⁴⁰ James Sandy, *The Fuss About Junk Fees, Pt. 2: Recent Regulatory, Enforcement, and Private Actions Challenging Fees*, JD SUPRA (July 28, 2023), <https://www.jdsupra.com/legalnews/the-fuss-about-junk-fees-pt-2-recent-3785856/>.

⁴¹ FTC Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. at 77420.

⁴² White House, Guide for States: Cracking Down on Junk Fees to Lower Costs for Consumers, <https://www.whitehouse.gov/wp-content/uploads/2023/03/WH-Junk-Fees-Guide-for-States.pdf>

⁴³ Council of Economic Advisors, *supra* note 1.

⁴⁴ *Id.*

Junk fees also present a threat of anti-competitive tying practices, as businesses require consumers to pay the mandatory fee in addition to the product, without a choice to the consumer. Tying is the antitrust principle that when a consumer wants to buy one product and is forced to buy a second product with it, this limits consumer choice, especially when the seller has sufficient market power.⁴⁵ For example, a mandatory “hotel resort fee” may provide extra amenities such as breakfast, gym, or spa services, without allowing the consumer to choose if they would rather pay the additional cost for these services.

Junk fee practices are ripe for regulation, as there are no natural market forces to effectively push out these tactics.⁴⁶ There is a collective action problem, as businesses are only willing to display total pricing with transparent labeling if everyone else in their industry does the same. Once one firm returns to using hidden fees, they will automatically have a competitive advantage that would unravel any pledges by competitors to maintain transparent pricing. Some live event ticket sellers have voluntarily pledged to display total prices at the beginning of the purchase process.⁴⁷ However, they did this only after the FTC’s advance notice of proposed rulemaking was announced. Further, the trade association of ticket brokers commented that the proposed FTC rule would only work if vigorously enforced to establish an equal playing field.⁴⁸

V. **Call to Substantively Regulate Excessive Junk Fees**

While the FTC’s rule is a step in the right direction to make junk fees less hidden and less misleading, the rule doesn’t stop the underlying problem that consumers will still be charged junk fees. By requiring clear and conspicuous disclosures of the fees, this targets the deceptive nature

⁴⁵ FTC Guide to Antitrust Laws, Tying the Sale of Two Products, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products>.

⁴⁶ FTC Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. at 77420.

⁴⁷ *Id.*

⁴⁸ *Id.*

of the presentation of the fees. However, the junk fee itself also can be an unfair practice when the fee is not proportional to the underlying product or service. Thus, the FTC should go further to prohibit excessive fees as an unfair trade practice.

Congress' proposed bill, the Junk Fee Prevention Act, includes an important provision prohibiting excessive fees.⁴⁹ The bill charges the FTC with determining whether a fee is excessive by considering: “(1) whether the fee is reasonable and proportional to the cost of the good or service provided by the covered entity; (2) the reason for which the covered entity charges such fee; and (3) any other factors determined appropriate by the Federal Trade Commission or the court.”⁵⁰ Whether by Congressional action or FTC rulemaking, the regulation of junk fees needs to rein in excessive fees in addition to disclosure regulations in order to truly protect consumers against the unfair and deceptive practices.

When disclosed up front and with a clear description, some fees are reasonable, while some fees do not provide any benefit to the consumer and are merely an upcharge for no good reason. For example, vacation home rentals often include a “cleaning fee.” The reason for this fee is clearly related to a service that benefits the consumer – staying at a place that is regularly cleaned. There are expenses to the merchant for this cleaning service that are likely accurately reflected in the fee charged. However, online purchases of live event tickets often include a “delivery fee.” There are no longer expenses involved to mail tickets to customers, as tickets are “delivered” by email or text. An added fee for delivering the ticket invokes questionable proportionality of the service performed to the amount charged. A prohibition on excessive fees would prevent this practice of adding fees in a way that merely equates to charging a higher price for the ticket.

⁴⁹ Junk Fee Prevention Act, H.R. 2463, 118th Cong. (2023-2024).

⁵⁰ *Id.* at §2(g).

Even after full disclosures, junk fees will remain harmful to consumers without more substantive regulation to prohibit businesses from charging excessive or disproportionate fees. If the FTC were to substantively regulate junk fees, they could also develop metrics and tests to establish what constitutes excessive, unreasonable, or disproportionate fees to add predictability to their case-by-case determinations.

VI. Conclusion

The FTC's proposed rule is an appropriate and timely measure to regulate deceptive and unfair fee practices that have been harming consumers and competitors across a wide array of industries. Based on the significant amount of data and public comments received, the rule has strong support to be a successful prohibition on junk fees. Future regulation should go further to substantively prohibit excessive junk fees in addition to disclosure regulations.