

Lawyer Insights

What Cos. Should Know About FTC's Proposed Junk Fee Rule

By Phyllis Marcus and Nicole Johnson
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On Oct. 11, the [Federal Trade Commission](#) announced a notice of proposed rulemaking targeting misleading and hidden fees, commonly known as junk fees, and how businesses may advertise and market prices to consumers.

The notice of proposed rulemaking should come as no surprise to businesses and consumers as it follows the FTC's Nov. 8, 2022, advance notice of proposed rulemaking.

The advanced notice received over 12,000 public comments. Support for FTC regulation of junk fees was split between business and advertising groups, generally in opposition, and consumer groups, generally in support.

The FTC considers hidden and misleading fees to be unfair and deceptive practices that are unlawful under Section 5 of the FTC Act. The proposed rule would prohibit businesses from offering, displaying or advertising a price that omits hidden fees, or from misleading consumers by misrepresenting the nature and purpose of any fees.

The proposed rule would amend Title 16 of the Code of Federal Regulations, Chapter 1, by adding Part 464 – Rule on Unfair or Deceptive Fees. If enacted, the rule would apply broadly to all businesses, including individuals, corporations, partnerships, associations, or any other entity that offers goods or services.

Only motor vehicle dealers that must comply with Title 16 of the Code of Federal Regulations, Part 463, are exempt from the business definition under the proposed rule. One point of contention for business and advertising groups is the breadth of application of the FTC's proposal.

One key result is that the rule would give the FTC enforcement powers to seek monetary penalties against businesses that do not comply with the regulations.

The FTC believes these regulations are necessary in light of the [U.S. Supreme Court's](#) 2021 AMG Capital Management v. FTC decision, in which the court unanimously held that the FTC does not have the authority to seek monetary relief under Section 13(b) of the FTC Act.

The FTC historically relied on Section 13(b) for court-ordered monetary relief, such as restitution and disgorgement. The loss of Section 13(b) authority made it significantly more difficult for the commission to return money to injured consumers; for the FTC, the proposed rule prohibiting hidden and misleading fees is a necessary regulation to protect consumers.¹

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Prohibition of Hidden Fees

Hidden fees are charges imposed later on in a transaction, but before the purchase is made. The FTC considers mandatory fees the consumer is unaware of until checkout to be hidden fees.

Some examples include: subscription models to use features that already are a part of a product, or subscriptions with undisclosed limitations on the services that require additional purchases.

The proposed rule would address hidden fees by requiring businesses to clearly and conspicuously disclose the total price upfront to the customer in a manner that is difficult to miss — i.e., easily noticeable — and easily understandable.

Prohibition of Misleading Fees

According to the FTC, misleading fees are fees that do not disclose the nature and purpose of the fee, or the refundability and identity of the good or service for which the fee is charged.

Examples of misleading fees are so-called cleaning fees levied for short-term rentals when the renter is still required to clean extensively, or convenience fees or processing fees for purchasing a ticket to live entertainment that appear to be arbitrary.

The proposed rule would require businesses to clearly and conspicuously disclose the nature and purpose of these fees before the customer consents to payment.

Industries in the Crosshairs

The FTC's proposal takes particular aim at the live entertainment ticketing, short-term lodging and restaurant industries in their economic analysis of how hidden fees affect consumers and the projected effects of regulating junk fees in these specific industries. As a result, these industries could be under a more watchful eye from the FTC for hidden and misleading fees.

The focus on live entertainment ticketing businesses was likely intensified due to the fan experience purchasing Taylor Swift's Eras Tour tickets this past year. Some ticket purchasers were prevented from buying secured tickets once they navigated to the checkout page because hidden fees made the tickets too expensive.

However, as detailed above, the proposed rule would apply to all businesses. Businesses should be aware of how they advertise prices for goods and services to the public based on the FTC's general focus on consumer protection.

Some companies in the live entertainment industry now provide consumers with the option to show the all-in price — the advertised price plus all fees — when searching for event tickets.²

However, the FTC is aware of this practice and may determine that an opt-in requirement would not satisfy proposed regulations if the opt-in does not comply with the proposed rule's clear and conspicuous requirement.

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Enforcement

The FTC currently takes enforcement action against unfair and deceptive fees and price advertising under Section 5 of the FTC Act.³

While the FTC can directly pursue monetary remedies in federal district court, the commission can only do so in cases where someone has engaged in unfair or deceptive conduct with respect to which the commission has issued a final cease-and-desist order applicable to that person, and thus, the procedure for doing so is cumbersome.⁴

The proposed rule, if finalized, will allow the FTC to seek civil penalties against violators and more readily obtain monetary redress for the consumers who were harmed.

State attorneys general and private citizens have brought enforcement cases against hidden and misleading fees, as well.

To minimize the risk of potential enforcement action, businesses should take precaution with how prices are advertised from the beginning of the customer's transaction, and ensure that any fees that are included in the total price of the good or service accurately reflect the fee's nature and purpose.

Additional Federal and State Action Addressing Junk Fees

Additional federal agencies and organizations, including the [Consumer Financial Protection Bureau](#), the [Federal Communications Commission](#), the [U.S. Department of Housing and Urban Development](#) and the [U.S. Department of Transportation](#), are also implementing rules and regulations requiring businesses to advertise and market full prices upfront.

At the beginning of 2023, the Biden administration called on Congress to pass legislation addressing junk fees, but so far there has not been any traction in the Senate or House on companion Junk Fee Prevention Act legislation.⁵

On the state level, governors are signing legislation similar to the FTC's proposed rule into law.

Effective July 1, 2024, California will prohibit advertising, displaying, or offering a price for a good or service that does not include all mandatory fees or charges other than taxes or fees imposed by a government on the transaction, or postage or carriage charges that will be reasonably and actually incurred to ship the physical good to the consumer.⁶

The legislation takes aim at hidden fees where a seller uses an artificially low headline price to attract a customer but then imposes additional unavoidable charges later in the buying process or disclosed only in smaller print.

The law contains a few exceptions and safe harbors. For example, food delivery platforms need not include in the menu prices the fees the platform charges for providing its services, and certain separately regulated industries — e.g., broadband internet access services, car rental companies, financial entities — that are in compliance with industry laws specifying how fees must be disclosed will not be in violation of this new law.

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New York signed similar legislation into law targeting ticket pricing in June 2022.⁷ The New York law requires live entertainment ticketing companies to clearly and conspicuously disclose the total price of tickets, and prohibits delivery fees for tickets printed at home.

State legislatures in Pennsylvania and Massachusetts have also introduced legislation targeting hidden and misleading fees in various industries.⁸

States are also highly focused on similar industries that the FTC has singled out in press releases and the proposed rule.

In a press statement hailing California's new law, California Attorney General Rob Bonta highlighted certain industries — lodging, tickets for live events, restaurants and food delivery — particularly susceptible to such tactics and declared, "With the signing of S.B. 478, California now has the most effective piece of legislation in the nation to tackle this problem."

Further Considerations for Businesses

A final FTC junk fees rule and its implementation may be years down the road due to potential litigation from industry groups targeting the proposed rule.

Industry groups have raised objections to the FTC's regulation on the grounds that the regulation implicates the major questions doctrine and does not comply with FTC Act requirements for proposed rulemaking.

However, with the FTC's focus on hidden and misleading fees and various states enacting laws targeting the same practices, businesses may benefit from getting ahead of any potential enforcement action from the FTC or state attorneys general.

The FTC seeks comments, data, and arguments from the public on the utility and scope of the notice of proposed rulemaking, due within 60 days of the publication of the notice in the Federal Register.

Industry parties may submit comments through the Federal eRulemaking portal once the notice is officially posted to the Federal Register by noting the comment is for Unfair or Deceptive Fees, R207011.

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Notes

1. Trade Regulation Rule on Unfair or Deceptive Fees, R207011 (proposed Oct. 11, 2023) (to be codified at 16 C.F.R. pt. 464), <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-464-trade-regulation-rule-unfair-or-deceptive-fees-notice-proposed-rulemaking-request> (last accessed Oct. 26, 2023).
2. Noah Pransky, Live Nation Spars with Senator Over Its Vow to Ditch Hidden Ticket Fees, CNBC (Oct. 25, 2023), <https://www.cnbc.com/2023/10/25/ticketmasters-hidden-fees-remain-common-long-after-it-vowed-to-scrap-them.html>.
3. 15 U.S.C. § 45.
4. 15 U.S.C. § 57b.
5. S. 916, 118th Cong. (2023); H.R. 2463, 118th Cong. (2023).
6. S.B. 478 (Cal. 2023).
7. S.9461/A.10500 (N.Y. 2023).
8. H.B. 636 (2023–2024) (Pa. 2023) (targeting advertising prices on event ticketing, lodging platform, or food delivery platform that do not include all mandatory fees), <https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2023&sInd=0&body=H&type=B&bn=636>; An Act Ensuring Transparent Ticket Pricing, H.259, 193rd Gen. Court (Mass. 2023) (prohibiting hidden fees and delivery fees for electronic ticketing), <https://malegislature.gov/Bills/193/H259>.

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