

US and States Target Deceptive “Junk Fees” and “Drip Pricing”

Businesses should cautiously craft their pricing and fee disclosures as US and state lawmakers and regulators launch campaigns against “unfair and deceptive” pricing and fee practices.

Key Points:

- During his State of the Union address on February 7, 2023, President Joe Biden urged Congress to pass legislation eliminating junk fees that allegedly cost consumers billions of dollars every year.
- President Biden’s administration has since taken broad, coordinated executive action through several federal agencies across multiple industry sectors to improve transparency and eliminate hidden fees, and has engaged in coordinated advocacy before legislative leaders regarding state efforts to address junk fees.
- The Federal Trade Commission (FTC), in particular, released an advanced notice of proposed rulemaking on junk fees across the economy (summarized below).
- On October 7, 2023, California Governor Gavin Newsom signed S.B. 478 into law, which prohibits “drip pricing.” Drip pricing is a practice in which a business initially advertises only a portion of a good or service’s price, and later reveals additional charges or fees as the customer goes through the buying process.

The FTC’s Proposed Rule Banning Junk Fees

On October 11, 2023, the FTC issued a Notice of Proposed Rulemaking and Request for Public Comment titled “Trade Regulation Rule on Unfair or Deceptive Fees” (the Proposed Rule).¹ The FTC said the Proposed Rule “would prohibit unfair or deceptive practices relating to fees for goods or services, specifically, misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees.”²

The FTC has long criticized as an unlawful “dark pattern” the practice of hiding or obscuring material information from consumers, such as burying key limitations of a product or service in dense terms of service documents that consumers do not see before purchase. This tactic also includes burying junk fees in the buying process. For example, a company might advertise only part of a product’s total price to lure consumers in, but not mention other mandatory charges until late in the buying process. In its Section 5 enforcement case against LendingClub, the FTC alleged that the online lender used prominent visuals

to falsely promise loan applicants that they would receive a specific loan amount and pay “no hidden fees,” but hid mention of fees behind tooltip buttons and between more prominent text.³

In this way, the FTC asserts that the use of hidden or misleading fees is already covered by the general prohibition against unfair or deceptive acts or practices in Section 5 of the FTC Act. However, the Proposed Rule aims to improve the FTC’s ability to “combat the most prevalent unfair or deceptive practices relating to fees,” including through civil penalties.⁴ The rule also would provide more precise requirements regarding disclosures businesses must make with respect to their prices and fees.

Hidden Fees

One of the primary purposes of the Proposed Rule is to address what the FTC calls “bait-and-switch pricing practices,” in which — similar to drip pricing — a business advertises a lower price that is ultimately augmented by additional mandatory charges or fees later in the transaction.⁵ The FTC’s Proposed Rule would explicitly prohibit any business from “offer[ing], display[ing], or advertis[ing] an amount a consumer may pay without Clearly and Conspicuously disclosing the Total Price.”⁶

Under the Proposed Rule, the Total Price:

- must include all mandatory fees and charges;
- must include the price for any mandatory “Ancillary Good or Service,” meaning any additional good or service that must be purchased in connection with the transaction (e.g., a trash service offered in connection with a housing rental agreement that cannot be reasonably avoided);
- must be disclosed even if the business will then apply discounts and rebates to the price;
- may exclude shipping charges (i.e., the reasonable cost to send goods to a consumer); and
- may exclude government charges (i.e., fees and charges imposed on consumers by a federal, state, or local government).⁷

In addition, “Clearly and Conspicuously” means that the disclosure of the Total Price must be “difficult to miss” and “easily understandable.” The Proposed Rule provides various examples of the qualities of “Clear and Conspicuous” disclosures (consistent with existing FTC interpretations of the phrase), including that visual disclosures stand out from accompanying text and that audible disclosures be given at a volume, speed, and cadence that can be easily heard and understood.⁸

The Proposed Rule also would require that, in any “offer, display, or advertisement that contains an amount a consumer may pay,” the business must display the “Total Price” *more prominently* than any other information on pricing.⁹

The Proposed Rule provides hypothetical examples of how its prohibition on hidden fees applies:

- An online travel agency that advertises a hotel room provided by a hotel chain must display the Total Price, including any mandatory fees that the hotel chain charges.¹⁰
- A business that requires its customers to pay for “payment processing” must include the cost of payment processing in the Total Price.¹¹

Misleading Fees

The second purpose of the Proposed Rule is to prohibit misleading fees. Specifically, the Proposed Rule would prohibit businesses from “misrepresent[ing] the nature and purpose of any amount a consumer may pay, including the refundability of such fees and the identity of any good or service for which fees are charged.”¹² The Proposed Rule, however, does not offer a specific definition of “nature and purpose.” In addition, the Proposed Rule requires businesses to Clearly and Conspicuously disclose, before a consumer consents to pay, the “nature and purpose” of any amount the consumer may pay that is *excluded* from the Total Price. In other words, a business must disclose the nature and purpose of any shipping charges, government charges, optional fees, voluntary gratuities, and invitations to tip.¹³

The Proposed Rule also provides hypothetical examples of the application of its ban on misleading fees:

- A meal delivery app that itemizes a mandatory service charge must disclose the service(s) for which the fee is charged. If a portion of a service charge is used to compensate a delivery driver, while another portion of the charge is used to compensate the meal delivery app for providing online ordering and delivery, the meal delivery app must specify which portion of the service charge is paid to the driver and which portion is paid to the meal delivery app.¹⁴
- If a delivery app includes an invitation to tip a delivery driver, but a portion of that tip is used to offset the delivery driver’s base wages or benefits, the delivery app must disclose that fact.¹⁵

Enforcement

One of the major goals of the Proposed Rule is to unlock additional remedies to provide the FTC with more tools to address hidden and misleading fees. If the Proposed Rule is enacted, it would provide a more direct route to impose the remedies of Section 19 of the FTC Act, which include ordering consumer refunds, requiring public notifications regarding violations of the FTC Act, and imposing civil penalties. Indeed, the FTC noted that the ability to pursue monetary remedies, such as consumer refunds and civil penalties, is particularly important in its efforts to police unfair or deceptive fee practices.¹⁶

Comment Period

Once the Proposed Rule has been published in the Federal Register, interested parties will have 60 days to submit comments. Comments may be filed online or mailed to: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex B), Washington, DC 20580.

Other Federal Regulatory Actions

Reflecting the Biden administration’s high priority on this consumer protection issue, other agencies and departments have also stepped up their attention to hidden or junk fees:

- In 2022, the Consumer Financial Protection Bureau (CFPB) increased supervision of banks’ fees and issued guidance on illegal bounced check penalties and overdraft fees.¹⁷
- The Department of Transportation (DOT) has proposed a rule that would require airlines to disclose up front all of their fees — from baggage fees to wireless internet to seat changing fees — when a consumer first compares prices.¹⁸ In May 2023, the DOT also announced it will propose a rule later this year mandating that airlines cover expenses and compensate stranded passengers when the airline is at fault for a flight cancellation or delay.¹⁹ The DOT also published a dashboard of airline policies for when flights are delayed or cancelled due to issues under the

airlines' control, leading nine airlines to change policies to guarantee coverage of hotels and 10 airlines to guarantee coverage of meals.²⁰

- The Federal Communications Commission (FCC) released new rules that will go into effect in 2024 to require broadband providers to use “nutrition labels” — similar to those used for food products — to convey key information to consumers about internet service options in an accessible format. The information featured will include prices, speeds, data allowances, and any additional fees charged.²¹ Earlier this year, the FCC proposed a new rule that would require cable providers to disclose all-in pricing for cable and satellite services.²²

State Approaches

Many state legislatures and attorneys general have also focused on junk fees. States have taken actions against hotel resort fees, debt settlement fees, food delivery service fees, event ticketing fees, rental car fees, car purchase fees, and cable and internet fees. Because many junk fees are likely to be unfair, deceptive, or unconscionable under various state laws, states already have ample authority to target such practices through enforcement actions, which (as noted above) many states have already pursued. State legislators have also enacted new legislation to prohibit or limit specific junk fees by enumerating certain practices as explicitly constituting an unfair and deceptive trade practice.

California All-In Pricing Law

On October 7, 2023, California Governor Gavin Newsom signed S.B. 478 into law, which prohibits “drip pricing.” Drip pricing is a practice in which a business initially advertises only a portion of a good or service’s price, and then later reveals additional charges or fees as the customer goes through the buying process. The new law will go into effect in California on July 1, 2024.²³ Drip pricing often occurs when a seller uses an artificially low headline price to attract a customer and usually either discloses additional required fees in smaller print, or reveals additional unavoidable charges later in the buying process.

S.B. 478 amends Section 1770 of California’s Civil Code to make it a violation of the Consumer Legal Remedies Act (the CLRA) to “advertis[e], display[], or offer[] a price for a good or service that does not include all mandatory fees or charges” other than (i) “[t]axes or fees imposed by a government on the transaction”; and (ii) “[p]ostage or carriage charges that will be reasonably and actually incurred to ship the physical good to the consumer.”²⁴ The law applies broadly to businesses operating in California, but exempts “financial transactions” conducted by “financial entities” (e.g., banks, credit unions, escrow agents, and other businesses required to make certain disclosures under state or federal laws), as well as transactions by broadband internet access providers that comply with federal law.²⁵ S.B. 478 also explicitly states existing statutes, including the California Unfair Competition Law (the UCL) and the California False Advertising Law (the FAL), prohibit drip pricing.²⁶

S.B. 478’s prohibition against drip pricing under the CLRA, the UCL, and the FAL creates a number of potential penalties for businesses that engage in such pricing, including:

- actual damages;
- punitive damages;
- restitution;
- civil penalties (up to \$2,500 *per violation*);

- injunctive relief; and
- attorney's fees and court costs.²⁷

The breadth of the applicable statutes also gives various governmental entities and injured private plaintiffs the ability to bring claims.

Conclusion

California's new law and the FTC's Proposed Rule, as well as other federal and state legislative and enforcement actions, highlight a growing focus and scrutiny on fees and related pricing practices. The increase in legislative and rulemaking activity in this area suggests that additional enforcement against how businesses advertise their prices and disclose fees could be on the horizon. Coupled with consumer protection enforcement and rulemaking initiatives around "dark patterns," these new legal authorities and regulatory announcements counsel caution in the manner in which businesses craft their pricing and disclosures surrounding fees.

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Endnotes

- ¹ Trade Regulation Rule on Unfair or Deceptive Fees (proposed Oct. 11, 2023) (to be codified at 16 C.F.R. pt. 464) *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/r207011unfairjunkfeesnprmfinal.pdf (the Proposed Rule).
- ² *Id.* at 1.
- ³ See FTC, *LendingClub Agrees to Pay \$18 Million to Settle FTC Charges* (July 14, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/lendingclub-agrees-pay-18-million-settle-ftc-charges>.
- ⁴ Proposed Rule at 50.
- ⁵ *Id.* at 33, 52.
- ⁶ *Id.* at 157.
- ⁷ *Id.* at 52-56, 156-57.
- ⁸ *Id.* at 157.
- ⁹ *Id.*
- ¹⁰ *Id.* at 55.
- ¹¹ *Id.* at 55-56.
- ¹² *Id.* at 157-58.
- ¹³ *Id.* at 56, 158.
- ¹⁴ *Id.* at 57.
- ¹⁵ *Id.*
- ¹⁶ *Id.* at 51-52.
- ¹⁷ CFPB, *CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts* (Oct. 26, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-help-banks-avoid-charging-illegal-junk-fees-on-deposit-accounts/>.
- ¹⁸ Enhancing Transparency of Airline Ancillary Service Fees (proposed Oct. 20, 2022) (to be codified at 14 C.F.R. pt. 399) *available at* <https://www.govinfo.gov/content/pkg/FR-2022-10-20/pdf/2022-22214.pdf>.
- ¹⁹ DOT, *DOT to Propose Requirements for Airlines to Cover Expenses and Compensate Stranded Passengers* (May 8, 2023), <https://www.transportation.gov/briefing-room/dot-propose-requirements-airlines-cover-expenses-and-compensate-stranded-passengers#:~:text=WASHINGTON%20%E2%80%93%20The%20U.S.%20Department%20of,are%20responsible%20for%20stranding%20passengers>.
- ²⁰ *Id.*
- ²¹ FCC, *Broadband Consumer Labels* (Oct. 12, 2023), <https://www.fcc.gov/broadbandlabels>.
- ²² All-In Pricing for Cable and Satellite Television Service (proposed June 20, 2023) *available at* <https://docs.fcc.gov/public/attachments/FCC-23-52A1.pdf>.
- ²³ S.B. 478, 2023-2024 Leg. (Cal. 2023), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB478 (S.B. 478).
- ²⁴ S.B. 478 § 2.
- ²⁵ *Id.*
- ²⁶ *Id.* § 1.
- ²⁷ See Cal. Bus. & Prof. Code §§ 17203, 17204, 17206, 17535, 17536; Cal. Civ. Code §§ 1780, 1781.