

4 Sectors Will Likely Bear Initial Brunt Of FTC 'Junk Fees' Rule

By **Margaret Krawiec, Paul Kerlin and Todd Kelly** (May 13, 2024)

A sweeping proposed Federal Trade Commission rule targeting "junk fees," which was debated in a hearing last month, could make businesses reexamine how they market and price products and services. The lodging sector, event ticket sales, restaurants and transportation will likely be enforcement targets.

Undisclosed fees are the subject of frequent consumer complaints, often associated with shopping, traveling and subscriptions. Given their unpopularity, the junk fees nickname has stuck, and recent polling indicates that a majority of Americans support government action to curb their use.

With public momentum building, combating junk fees has become a priority for President Joe Biden. The White House has used agency enforcement and rulemaking across several agencies to do so. Most significantly, the FTC has signaled its intent to aggressively regulate these charges.

The FTC has proposed a comprehensive rule that would ban junk fees across all sectors of the U.S. economy and impose stiff penalties for violations.

Based on the report accompanying the proposal, if the rule is adopted in its current form, the FTC is likely to focus initial enforcement efforts on certain industries, including hotels and short-term lodging, live-event ticket sales, restaurants and food delivery services, and transportation.

Other potential targets include sectors where the impact of fees may be greatest among vulnerable populations, including telecommunications services, rental housing, education, financial services and correctional services.

The commission is now evaluating the public comments on its proposal with a final decision on the proposed rule pending.

If the FTC adopts its comprehensive proposed rule to ban unfair or deceptive fees across the entire U.S. economy, many businesses will need to reexamine the way they market and price their products and services.

Rule on Unfair or Deceptive Practices

The FTC issued a notice of proposed rulemaking in November 2023 for a "Trade Regulation Rule on Unfair or Deceptive Fees," which would expand the commission's prior junk fees efforts in specific industries, such as telemarketing, funeral services and auto sales, to apply to all sectors.[1]

The FTC's November 2022 advance notice of proposed rulemaking says the rule would



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prohibit various fee-related practices by "classifying certain junk fees as unfair or deceptive."

According to the 2023 notice, the commission argues that a significant benefit of the proposed rule will be to give it the ability to "obtain monetary relief, especially consumer redress, as well as civil penalties" for violations of the rule, avoiding the more cumbersome processes generally required by the FTC Act.

Under the proposed rule, penalties of \$51,744 per violation will be imposed, which "would help create a powerful deterrent against imposing junk fees," the advance notice says.

The proposed rule elicited so much public interest that the FTC extended the comment period by a month, through Feb. 7. The FTC will now review the comments and determine whether to finalize or modify the proposed rule, or terminate the process.

Most recently, the FTC heard from advocates for and against the implementation of the proposed rule at an informal hearing on April 24.

Those in favor argued that the rule is needed because industries will not voluntarily disclose junk fees that harm vulnerable consumers. Opponents of the rule argued that compliance would be burdensome and disproportionately hurt small businesses.

Based on the administration's stated desire to clamp down on junk fees, it seems unlikely that the rulemaking will be terminated. There is no deadline for the commission to offer modifications or publish a final rule.

Potential Enforcement Priorities Under the Rule

The proposed rule contains two general requirements that would apply broadly across all businesses.

1. It would keep businesses from misrepresenting the nature of any fees.
2. Businesses generally would be prohibited from misrepresenting the total costs of goods or services by omitting any mandatory fees.

Although the FTC and Biden administration have said the rule will be "industry-neutral," the text of the proposed rule as well as the discussion surrounding the rule suggest what types of businesses the FTC could initially target.

Hotel and Short-Term Lodging Fees

Resort fees and cleaning fees that are not advertised as part of a nightly rate at hotels and short-term lodging are some of the most common junk fees cited by proponents of the rule.

According to analysis in the proposed rule, resort fees totaled more than \$2.9 billion in 2018. The Biden administration also specifically called out resort fees in its press release about the FTC's proposed actions.

Live-Event Ticket Fees

The commission and Biden administration also have criticized live entertainment ticket sellers' fee disclosure practices. The FTC noted comments about the difficulty of obtaining

tickets at advertised prices because of hidden fees that often raise those prices by 30% to 40%.

The FTC also observed that these hidden fees are often vaguely described or misleadingly labeled, such as delivery fees for tickets sent via email or an app.

Restaurants and Food Delivery Services

The FTC could also target restaurants, claiming consumers are misled by fees that do not accurately describe their nature or purpose, e.g., service fees, kitchen fees or hospitality fees.

The FTC also suggested that restaurants might be using fees to skirt rules that prohibit them from keeping tips that should go to waitstaff. The proposed rule also called out food delivery services, noting that consumers have complained about delivery apps charging fees not reflected in the advertised price.

Transportation

Both the Biden administration and the FTC have cited car rental fees as an area rife with fee disclosure issues. The FTC suggested, for example, that car rental companies often delay disclosure of mandated fees until consumers are far along in the rental process.

The FTC also suggested that airlines similarly fail to include mandatory prices in advertisements or otherwise misrepresent fees, an issue also recently taken up by the U.S. Department of Transportation.

Other likely targets for enforcement include those where the fees may have a particular impact on vulnerable populations: telecom, rental housing, education, financial services and correctional services.

For example, the FTC cites comments by consumer groups that hidden fees for financial services are particularly burdensome for low-income Black and Latino consumers. Similarly, the FTC noted comments suggesting a lack of transparency in tuition costs especially affects communities of color.

Consequences of the Rule

If the FTC adopts its comprehensive proposed rule to ban unfair or deceptive fees across the entire U.S. economy, many businesses will need to reexamine the way they market and price their products and services.

For example, under the new rule, businesses will have to display the total price of a product in any offer or advertisement. This total price must include any fees or charges a consumer has to pay for a good or service other than shipping or taxes. Businesses could no longer engage in drip pricing, in which mandatory fees are added on at checkout or throughout the buying process.

Businesses will also be required to be clear about the nature of any fees. For example, businesses could not suggest that a fee is mandatory when it is not, or suggest that a fee is a state-imposed tax if the charge is actually a charge that the business chose to impose on the consumer to offset increased costs to the business.

The FTC also warns that businesses should not misrepresent the purpose of fees, for example by imposing a cleaning fee but requiring the consumer to engage in extensive cleaning, or imposing a convenience fee when there is no less convenient option.

The FTC will be looking for companies to revise their practices so that consumers receive the benefits intended from the new rule: that is, reduced overall costs for consumers and "reduced frustration and consumer stress that [are] often associated with surprise fees."

The FTC expects the proposed rule to reduce consumer costs overall under the theory that "shrouded prices" keep total prices for goods and services artificially high.

And since "consumers may find it too costly to search for total price information," consumers cannot effectively comparison shop. As a result, the FTC argues consumers pay higher prices than they would have with more pricing information.

In Sum

Given the expansive approach the FTC has taken, and the priority the Biden administration has placed on policing junk fees, businesses may want to prepare for the possibility of a rule that applies very broadly across sectors and types of fees, and mandates many new disclosures.

Businesses can begin this process by reviewing their pricing disclosure practices and exploring possible business alternatives to implement if the proposed rule, or a modified version of it, is ultimately adopted.

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[1] <https://www.federalregister.gov/documents/2023/11/09/2023-24234/trade-regulation-rule-on-unfair-or-deceptive-fees>.

[2] <https://www.federalregister.gov/documents/2022/11/08/2022-24326/unfair-or-deceptive-fees-trade-regulation-rule-commission-matter-no-r207011>.