

FTC's Accelerating Agenda for Wide-Ranging Enforcement Against Junk Fees

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Undisclosed fees have become a now common complaint associated with consumers' everyday activities—shopping, traveling and subscriptions. These **fees** can add up to “hundreds of dollars a month,” and can have a significant impact on consumers, particularly in light of current interest rates. Given their unpopularity, the nickname of “junk fees” has stuck, and recent polling indicates that a majority of Americans support government action to curb their use.

The Biden administration has picked up on this cue and is moving forward on various fronts.

Biden Administration's “Junk Fees” Agenda

With public momentum building, combatting “junk fees” has now become a clear priority for President Joe Biden. The administration **defines** these fees as “hidden, surprise fees that companies sneak onto customer bills, increasing costs and stifling competition in industries across the economy.” In pursuing its agenda, the White House has deliberately taken a broad approach through legislation, private company pressure and agency actions.

The Biden administration has been most successful in using agency enforcement and rulemaking to combat junk fees. These efforts span the government, involving the Federal Communications Commission (FCC), Department of Transportation, Consumer Financial Protection Bureau (CFPB), Department of Housing and Urban Development, and Federal Trade Commission (FTC).

Among all of the agencies, the FTC is expected to continue playing the largest role in regulating junk fees.

FTC's Role

Recent FTC rulemaking has highlighted the Commission's aggressive focus on junk fees. These efforts have included addressing unwanted subscriptions with proposed amendments to the Negative Option Rule as well as targeting “add-on” fees in the auto industry through the Combating Auto Retail Scams (CARS) Rule.

Most significantly, the FTC is taking forward a proposed comprehensive rule to generally ban unfair or deceptive fees across the entire US economy, not simply particular, individualized industries. The rule would be sweeping in scope, bringing with it dramatic implications for both businesses and consumers.

Negative Option Rule

The FTC has moved to give more teeth to the Negative Option Rule by targeting unwanted subscriptions with a “Click to Cancel” requirement and with other related amendments **requiring** sellers to make cancelling subscriptions as easy as signing up. FTC, Negative Option Rule, **88 Fed. Reg. 24716** (Apr. 24, 2023).

To that end, the proposed Click to Cancel amendment requires cancellation of subscriptions to be “at least as simple” as enrollment. Sellers of subscription services must ensure that consumers can cancel their subscriptions as easily as they can sign up. The proposed amendments also prohibit sellers from offering alternative products to subscribers trying to cancel without their express permission.

In addition, the proposed amendments would expand the scope of the Negative Option Rule to cover all types of subscriptions, going beyond only the sale of certain physical products to include automatic renewals and free trials. The amendments require sellers of subscriptions to disclose “any material term . . . necessary to prevent deception” to consumers prior to obtaining their billing information and would explicitly make any material misrepresentation about the subscription terms or underlying good or service an unfair or deceptive act or practice in violation of **Section 5 of the FTC Act**.

Through February 2024, the FTC has held informal hearings, including those at which various industry groups have **argued** the Commission “vastly underestimated” the cost of implementing the Click to Cancel amendment in its cost-benefit analysis. The groups also argued that preventing sellers of subscriptions services from offering consumers alternatives when they go to cancel their subscriptions would prevent them from learning of cost-saving incentives, including discounts and complimentary services.

FTC Chair Lina M. Khan has disagreed with the criticism, arguing these changes “would save consumers time and money, and businesses that continued to use subscription tricks and traps would be subject to stiff penalties.” Potential publication of the final rule remains pending.

CARS Rule

The auto dealer industry also has come under pressure for junk fees and “bait-and-switch” promotions from the FTC's CARS Rule. The final rule was published in January 2024 and is scheduled to become effective pending resolution of a petition for review of the rule, which will be fully briefed in June 2024. FTC, Combating Auto Retail Scams Trade Regulation Rule, **89 Fed. Reg. 590** (Jan. 4, 2024).

The CARS Rule implements new disclosure requirements and prohibits the sale of certain add-on features like extended warranties, service plans and guaranteed automobile or asset protection (GAP). First, the CARS Rule requires auto dealers to clearly and conspicuously disclose the full cash price of a car, the fact that add-on features are not required, and the total cost and timing of payments. Second, the CARS Rule flat-out prohibits the sale of an add-on feature to a consumer when that particular consumer could not benefit from the feature, for example, the sale of “a GAP agreement if the consumer’s vehicle or neighborhood is excluded from coverage.”

The FTC has expressed confidence that the CARS Rule will help eliminate auto dealer junk fees, with FTC Chair Khan **claiming** the rule will save “time and money” for consumers and also protect “honest dealers” from having to compete with unscrupulous auto dealers.

Proposed “Rule on Unfair or Deceptive Practices”

The FTC’s latest and most wide-ranging effort to combat junk fees is its proposed rule broadly banning, without limitation to particular industries, unfair or deceptive fees. The FTC issued a notice of proposed rulemaking for its Trade Regulation Rule on Unfair or Deceptive Fees in November of 2023 (the “Proposed Rule”). FTC, Trade Regulation Rule on Unfair or Deceptive Fees, **88 Fed. Reg. 77420** (Nov. 9, 2023). The Biden administration has touted the Proposed Rule as a “bold, new action[] to crack down on junk fees and promote competition.”

Most significantly, and in contrast with the Commission’s prior junk fees measures, the Proposed Rule is designed to push back on hidden fees in all sectors of the economy. In lieu of targeting particular industries and businesses, it would broadly and indiscriminately prohibit various fee-related practices. Chair Khan has explained the FTC’s need for an expansive rule of this kind:

The Commission has a long track record of taking action against junk fees. . . . The FTC has regulated junk fees in sector-specific contexts, including telemarketing and funeral homes. . . . Unfortunately, in areas where there is no specific rule or sector-specific law, the Commission lacks authority to seek penalties against violators or readily get financial compensation for victims. A forward-looking rule classifying certain junk fees as unfair or deceptive could give us that authority, allowing us to make wronged consumers whole and to seek penalties from lawbreakers. That, in turn, would help create a powerful deterrent against imposing junk fees.

FTC, Unfair or Deceptive Fees Trade Matter Regulation Rule Commission Matter No. R207011, **87 Fed. Reg. 67413**, 67422 (Nov. 8, 2022)

The FTC’s previous ability to obtain monetary penalties was upended when the Supreme Court held that the Commission could no longer seek equitable monetary relief under **Section 13(b) of the FTC Act** in its 2021 *AMG Capital Management, LLC* decision. In the Proposed Rule, the FTC argues that a significant benefit of its new trade regulation rule will be the Commission’s ability to again “obtain monetary relief, especially consumer redress, as well as civil penalties” and avoid more cumbersome processes under the FTC Act. Instead, junk fees violations would be generally subject to the steep penalties of \$51,744 per violation. See FTC, Adjustments to Civil Penalty Amounts, **89 Fed. Reg. 1445** (Jan. 10, 2024).

The Proposed Rule has been the subject of significant attention, requiring an extension of the comment period to accommodate the public’s interest. The FTC will now review the public’s submitted comments and determine whether to proceed with the final rule or, in the alternative, publish a modified proposed rule or terminate the rulemaking. Based on the interest of the current Administration in clamping down on junk fees, it seems unlikely that the rulemaking will be terminated altogether. There is no required timeline to publish a final rule.

Potential Enforcement Priorities

The Proposed Rule contains two general requirements that will apply broadly across all businesses. First, the Proposed Rule will keep businesses from misrepresenting the nature of any fees. Proposed **16 C.F.R. § 464.3**. Second, businesses generally would be prohibited from misrepresenting the total costs of goods or services by omitting any mandatory fees. Proposed **16 C.F.R. § 464.2**.

While the FTC and Biden administration have suggested this will be an “industry-neutral” rule benefitting consumers in their future purchases and also businesses by removing uncertainty about whether the requirements apply to them, the FTC is still most likely to begin enforcement by focusing on particular industries. The text of the Proposed Rule itself provides some hints as to what types of businesses the FTC might 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 the cost-benefit analysis in the Proposed Rule, resort fees generated more than \$2.9 billion in 2018. The Biden administration has also specifically called out resort fees in its press release about the FTC’s proposed actions.
- *Live-Event Ticket Fees.* Live entertainment ticket sellers have also been criticized by the Commission and Biden administration for their fee disclosure practices. The FTC noted comments about the difficulty of obtaining tickets at advertised prices because of hidden fees that often raise the advertised price by 30 – 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 & 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 complained about delivery apps charging fees not reflected in the advertised price.

• *Transportation.* Both the Biden administration and the FTC have called out 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.

Based on discussion in the Proposed Rule, other likely targets for enforcement include those with particular effects 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.

Criticism & Potential Challenges

Despite the polling on these issues, not all of the attention on the Proposed Rule has been positive. Industry groups, in particular, have criticized both the rule's legality and the practical limitations for "industry-neutral" enforcement over an entire economy. Critics of the Proposed Rule have laid out what a potential challenge could look like.

Some opponents of the Proposed Rule argue that the FTC lacks actual authority to promulgate a rule regarding pricing practices for the entire economy, suggesting Congress has not passed any law that gives the FTC authority to regulate pricing across all industries. This is reflected in the FTC's past practice of promulgating pricing regulations limited to specific sectors, not the entire economy. See, e.g., Funeral Rule, **16 C.F.R.453.2(a)**; Telemarketing Sales Rule, **16 C.F.R.3010.3(a)(1)-(2)**.

The Proposed Rule also seems a likely candidate for the Supreme Court's newly minted "Major Questions Doctrine." As explained in Justice Gorsuch's concurrence in *West Virginia v. EPA*, **597 U.S. 697** (2022), when an agency attempts to claim authority over "decisions of vast economic and political significance," the agency must be able to point to a "clear congressional authorization" for the rule. Former FTC Commissioner Christine Wilson has endorsed this concern, noting that the US GDP in 2021 was nearly \$23 trillion and questioning whether any "precedent would support the perspective that Congress has clearly empowered the FTC to promulgate a rule that would regulate pricing disclosures for the breadth of good[s] and services" in an economy-wide rule.

Under the current administrative law regime, the rule also could be attacked through more traditional challenges, such as that the FTC was arbitrary and capricious in promulgating the rule. Indeed, the FTC's earlier junk fees efforts already are fighting off challenges on this front. As noted above, the FTC has postponed the effective date of the CARS Rule because of a legal challenge by the National Automobile Dealers Association (NADA). NADA argues that the CARS Rule is arbitrary and capricious because the FTC failed to conduct a proper cost-benefit analysis of the rule's effect on the automobile industry and failed to show that there was a "significant industry-wide problem" that would justify disruptive regulation. Because the Proposed Rule applies across all industries, and the FTC may not be positioned to provide the requisite cost-benefit analyses for every industry, industry groups may consider the Proposed Rule vulnerable to similar attacks.

The Proposed Rule also will overlap with existing regulations related to advertising and fee disclosures, including those specifically authorized by Congress for enforcement by other agencies. For example, organizations that extend credit already have complex credit disclosure requirements regulated by the CFPB, pursuant to the Truth in Lending Act. **15 U.S.C. §§ 1601 et seq.** The FCC also has proposed a pricing transparency requirement for cable and satellite providers that could potentially conflict with the Proposed Rule. As a result, the FTC could see challenges from specific industries that the Proposed Rule does not apply because that industry already is regulated under a different pre-existing statute.

On the practical side, some have described the FTC's desire for economy-wide coverage as naïve and failing to understand the practical challenge of enforcing the rule across the entire economy. They express concern that the sheer scope of the Proposed Rule will result in inconsistent enforcement and confusion about how businesses should comply with it, particularly as the FTC has never before enforced this type of one-size-fits-all rule for an entire market or economy.

Conclusion

The FTC's actions show that it intends to take bold action to address what it believes are widespread deceptive practices in pricing disclosures. Not content with the tools at its disposal, the Commission is seeking to pass an ambitious rule that will allow it to regulate fee disclosures across the entire economy. Legal challenges from groups seeking to delay or chip away at the final rule are sure to come along with this sort of unprecedented administrative action.

If the FTC is ultimately successful in finalizing a rule and navigating legal challenges, it will have a powerful new tool in its consumer protection toolbox. Businesses can prepare now by reviewing their pricing disclosure practices and starting to explore possible business alternatives to implement if the rule comes to pass.