

January 8, 2024

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comments of the Progressive Policy Institute on Unfair or Deceptive Fees - Reference No. R207011

The Progressive Policy Institute (PPI) is pleased to provide comments to the Federal Trade Commission (“FTC” or “Commission”) on the Notice of Proposed Rulemaking on Unfair or Deceptive Fees (“proposed rule”), issued on November 9, 2023 (R207011) in docket FTC-2023-24234.¹ PPI is a catalyst for policy innovation and political reform based in Washington, D.C., with offices in Brussels, Berlin, and the United Kingdom. Its mission is to create radically pragmatic ideas for moving America beyond ideological and partisan deadlock. PPI is home to a center on competition advocacy that features expert analysis and commentary that is rooted in promoting competitive markets and the democratic values that support them.²

I. THE PROPOSED RULE ON UNFAIR OR DECEPTIVE FEES RAISES KEY QUESTIONS AROUND ITS IMPACT ON COMPETITION AND CONSUMERS

The FTC’s proposed rule on unfair or deceptive fees responds to the Biden Administration’s broader policy priority to promote competition. The July 2021 Executive Order (“EO”) on Promoting Competition in the American Economy calls out hidden fees and a lack of price transparency in a number of sectors.³ The EO tasks the Commission with exercising its statutory rulemaking authority to limit unfair or deceptive fees that harm consumers and competition. The proposed rule responds to the EO’s mandate and tackles so-called “junk fees” under the Commission’s consumer protection mandate.

Unfair or deceptive fees harm consumers and competition by obscuring the transparency of prices, capitalizing on the sunk costs consumers incur in searching for a product or service, and impairing comparison shopping. This works to limit competition and reduces consumer welfare. The proposed rule seeks to control unfair or deceptive practices such as “bait and switch” schemes (*i.e.*, hidden fees) and misrepresenting the nature and purpose of fees by requiring

¹ Fed. Trade Commn., 16 CFR Part 464, Trade Regulation Rule on Unfair or Deceptive Fees, Fed. Reg., Vol. 88, No. 216 (Nov. 9, 2023), <https://www.federalregister.gov/documents/2023/11/09/2023-24234/trade-regulation-rule-on-unfair-or-deceptive-fees>.

² For more information on PPI, please visit [progressivepolicy.org](https://www.progressivepolicy.org).

³ Executive Order on Promoting Competition in the American Economy, The White House (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

businesses to disclose: (1) a total price for a product or service that is offered, displayed or advertised and (2) the nature and purpose of any fee that is excluded from the total price.⁴

PPI notes, importantly, that the Commission’s proposed rules do not *prohibit* junk fees. Rather, the proposed disclosure requirements are intended to *discourage* businesses from engaging in such practices. This works by giving consumers more information about the total price of a product or service that, in turn, allows them to compare prices across sellers. The proposed rule also highlights a number of sectors where junk fees are particularly common or egregious, including, among others: live events, transportation, financial services, hotels, and telecommunications.

The Commission solicits comment on whether specific rules should be applied to certain “covered” businesses and whether others, such as small businesses, should be excluded from the proposed rules.⁵ PPI supports, in concept, policies that take on the practice of saddling consumers with unfair or deceptive fees. PPI notes that the proposed rule has significant implications for consumers, businesses, competition, and enforcement resources and offers comments for the FTC to consider in the process of promulgating a final rule. These comments go to three major issues.

First, because the proposed rule seeks to regulate unfair or deceptive fees through consumer protection policy, or mandatory information disclosure requirements, it targets a firm’s *ability* to levy unfair or deceptive fees. However, it does nothing to reduce a firm’s *incentive* to engage in such practices. It is well known that incentives to exercise market power are best addressed through competition enforcement. While there are good reasons for using consumer protection to combat junk fees, PPI stresses that a consumer protection approach should not displace or weaken the role of competition enforcement in getting to the root cause of junk fees.

Second, the proposed rule includes requirements to disclose total prices and detailed information on fees. However, in some markets, different pricing models (*e.g.*, unbundled versus all-in pricing) are important for some segments of consumers, and an important differentiator of competition.⁶ PPI suggests, therefore, that the proposed rule be clarified to explain how the disclosure requirements affect consumers who avail themselves of, and benefit from, different pricing models, as well as firms’ ability to compete in the provision of those services.

Third, the objective of the proposed rules is similar to other sector-specific regulatory and legislative initiatives that focus on consumers and price transparency. The FTC’s rule on unfair or deceptive fees could potentially overlap with other rules that cover similar practices. PPI suggests, therefore, that the final rule be clarified to explain how such overlaps will not cause duplication or conflict, with unintended consequences for consumers, businesses, and competition.

⁴ Proposed Rule, *supra* note 1, at p. 77,432.

⁵ *Id.*, at p. 77,481.

⁶ *See, e.g.*, Carl Shapiro and Hal Varian, “Versioning: The Smart Way to Sell Information,” *Harvard Bus. Rev.* (Nov.-Dec. 1998), <https://hbr.org/1998/11/versioning-the-smart-way-to-sell-information>.

II. THE PROPOSED RULE SHOULD EXPLAIN HOW CONSUMER PROTECTION POLICY WILL INTERACT WITH COMPETITION ENFORCEMENT TO COMBAT THE PROBLEM OF JUNK FEES

Analysis from the Council of Economic Advisors explains how junk fees limit competition in important markets by obscuring the transparency of prices, capitalizing on the sunk costs consumers incur in searching for a product or service, and limiting comparison shopping.⁷ In implementing the mandate in the EO, the Commission proposes new consumer protection measures to discourage firms from engaging in unfair or deceptive fee practices. PPI notes that the consumer protection measures proposed in the rule control firms' *ability* to engage in unfair or deceptive practices. They do nothing to reduce *incentives* to target consumers with such fees.

Incentives to adopt coercive junk fee policies are stronger when firms possess market power.⁸ When markets lack competition, firms have more incentive to raise prices through any number of methods, including junk fee schemes. Firms can do this by acting alone, or tacitly colluding with rivals to adopt and follow coercive industry junk fee policies. For example, consider Live Nation-Ticketmaster, a well-known monopoly, which notoriously exploits consumers by adding myriad fees to the face value of ticket prices. The ticket fee problem has grown as Ticketmaster has solidified its hold on the primary and secondary ticketing market.⁹

The source of the junk fee problem in ticketing, and many other sectors, is a lack of competition. As such, the most effective tool for reducing incentives to levy unfair or deceptive fees is strong enforcement of mergers, monopolies, and anticompetitive agreements. PPI is concerned that the proposed rule's consumer protection approach to combatting junk fees does not adequately account for the important role of competition enforcement in preventing them in the first place.

For example, under the proposed disclosure requirements, powerful firms will still have strong incentives to game the rules by finding more creative ways to obscure junk fees or to hide the nature and purpose of the fees. This is likely to be exacerbated by subjective definitions of hidden fees that the Commission contemplates in the rule. These include, for example, fees that are "not reasonably avoidable;" that "a reasonable consumer would expect to be included with a purchase; and that provide consumers "little or no value."¹⁰ Subjective definitions can invite disputes and controversy that risk consuming valuable Commission resources.

PPI notes that it is imperative that the Commission's consumer protection approach to junk fees not in any way discourage, weaken, or substitute for vigorous competition enforcement that gets to the root of the junk fee problem. PPI suggests, therefore, that the final rule emphasizes that competition enforcement is also an integral part of an overarching policy to control unfair or deceptive fees. Specifically, PPI urges the Commission to include in the proposed rule: (1) analysis of the relationship between competition and incentives to impose junk fees; (2) how

⁷ How Junk Fees Distort Competition, Council of Economic Advisors (Mar. 21, 2023), <https://www.whitehouse.gov/cea/written-materials/2023/03/21/how-junk-fees-distort-competition/>.

⁸ Executive Order on Competition, *supra* note 3, at Section 1.

⁹ Mark Dent, *The sneaky economics of Ticketmaster*, The Hustle (Dec. 10, 2022), <https://thehustle.co/the-sneaky-economics-of-ticketmaster/>.

¹⁰ Proposed Rule, *supra* note 1, at p. 77,482.

consumer protection and competition policy are expected to interact in combatting junk fees; and (3) how the agency expects to coordinate its competition and consumer protection missions in implementing the proposed rules.

III. THE PROPOSED RULE SHOULD CLARIFY THAT SOME UNBUNDLED PRICING MODELS ARE IMPORTANT FOR CONSUMERS AND COMPETITION AND ARE NOT JUNK FEE SCHEMES

A major challenge for the Commission in developing the proposed rules on unfair or deceptive fees is to ensure they are not confused with certain pricing methods that provide value to some segments of consumers. For example, it is well-known that unbundled or a la carte pricing, multi-part tariffs, and versioning are more sophisticated forms of price discrimination. When not deployed in anticompetitive ways, these pricing formats can deliver value to consumers.

For example, the ultra-low-cost passenger air carriers (ULCCs) use a “fare+fee” model that differs from the “all-in” pricing model of the full-service carriers.¹¹ The ULCC model caters to the budget-conscious traveler, allowing consumers to choose their add-ons and control their total cost of travel based on their preferences. The same distinction is true of different wireless phone plans, where basic service plans may incorporate unbundled pricing and premium service uses all-in pricing.

PPI is concerned that the proposed disclosure requirements may interfere with the use of different pricing models that provide value to consumers and are the basis upon which some firms compete. For example, it is not clear how the proposed rule’s definition of “ancillary good or service” that is “not necessary to render the primary good or service fit for its intended use” would be applied in the case of unbundled pricing models.¹² In the ULCC example, it is entirely possible that *no* add-on fee could be considered “ancillary.” The same is true of the proposed requirement to post “offered, advertised, or displayed prices.”¹³ In an unbundled pricing model, the total price may not be known until the consumer completes the purchase process. A requirement to display prices before the purchase, therefore, may mislead consumers and distort competition.

PPI encourages the Commission to ensure, in the final rule, that the proposed disclosure requirements do not interfere with the role of unbundled pricing models in serving certain segments of consumers and spurring firms to compete. Specifically, PPI urges the Commission to: (1) identify the types of unbundled pricing models that provide important choices and benefits to consumers and (2) propose modifications necessary to ensure that the proposed rules do not interfere with such pricing models.

¹¹ Diana Moss, *Consumer Choice And Antitrust Pragmatism: Unpacking The JetBlue-Spirit Merger*, Progressive Policy Institute (Nov. 21, 2023), <https://www.progressivepolicy.org/publication/consumer-choice-and-antitrust-pragmatism-unpacking-the-jetblue-spirit-merger/>.

¹² Proposed Rule, *supra* note 1, at 77,438.

¹³ Proposed Rule, *supra* note 1, at 77,439.

IV. TARGETING CERTAIN SECTORS FOR SPECIAL JUNK FEE RULES COULD HAVE UNINTENDED CONSEQUENCES FOR COMPETITION

The proposed rule highlights a number of sectors where unfair or deceptive fee practices are particularly prominent or problematic. The proposed rule asks whether the Commission should create a special category of “covered” businesses that would “narrow the businesses covered by specific requirements of the rules.”¹⁴ The proposed rule suggests that live-event ticketing, short-term lodging, or businesses that offer products and services online may be candidates for a “covered business” designation. Likewise, the Commission asks if the proposed rules should exclude certain small businesses or those that provide savings products from compliance with the disclosure requirements.

PPI is concerned that policies that target particular firms or sectors for regulatory oversight create can create an unlevel playing field, alter incentives to compete, innovate, and expand; or create barriers to entry. PPI is also concerned that if a final rule targets certain sectors or businesses for junk fee rules, it is more likely to conflict with other policy tools. These include competition enforcement or legislative initiatives around pricing transparency.

For example, in the event the U.S. Department of Justice brings a monopolization case against Live Nation-Ticketmaster, it would address anticompetitive practices that directly impact pricing. A remedy that restores competition in ticketing markets would put downward pressure on ticket fees. Likewise, pending federal and state legislation on promoting ticketing transparency could also have an impact on ticketing fees, and could potentially overlap with the Commission’s proposed disclosure requirements.¹⁵

Dedicated sector regulators have devoted significant resources to promoting pricing transparency. In acknowledging this, the proposed rule asks how the proposed rule would intersect with “existing industry practices, norms, rules, laws, or regulations.” While PPI has not performed this exhaustive survey, it remains that—if rules for pricing transparency are deemed necessary—a technically expert sector regulator is in a far better position to structure a system designed to combat unfair or deceptive fee practices. Any overlap with the Commission’s junk fee rule could create duplicative requirements for businesses and unintended effects from the interaction of the proposed rules and other regulations.

In light of these considerations, PPI encourages the Commission to: (1) enumerate existing regulatory rules, by sector, that could intersect or overlap with the proposed rule on unfair or deceptive fees; and (2) ensure that the effect of the proposed disclosure requirements do not duplicate, or conflict with those rules. In the event that overlaps are apparent, PPI encourages the Commission to pursue further analysis, before issuing a final rule, of the costs and benefits of duplicative regulations.

¹⁴ *Supra* note 5.

¹⁵ *See, e.g.*, SB23-060, Consumer Protection in Event Ticketing Sales, Colorado General Assembly, <https://leg.colorado.gov/bills/sb23-060>.

V. CONCLUSION

Based on the concerns and questions raised herein, PPI respectfully suggests that the proposed rule should not be proposed as a final rule. There are a number of fundamental issues that require further explanation so as to establish the impact of the rules and the clear benefits for consumers and competition.

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