

**Before the Federal Trade Commission
Response to Request for Information on Digital Advertising
Docket ID FTC-2022-0035-0001**

**Written Comments from the American Economic Liberties Project
Digital Advertising, P114506**

August 2, 2022

We are submitting this comment in response to your request for information on how to rewrite digital advertising guidelines. By way of background, the American Economic Liberties Project is a nonprofit research and advocacy organization dedicated to understanding and addressing the problem of concentrated economic power in the United States.

I. INTRODUCTION

The digital marketplace has become a breeding ground for deceptive, fraudulent, and anti-competitive tactics. Online sellers have developed tried and true methods—drip pricing and partitioned pricing—that are designed to conceal the true cost of the goods and services they sell to consumers and business customers alike. With *drip pricing*, a digital ad discloses only the baseline cost for a product to lure in buyers. Then, as the buyer proceeds through the online checkout process, the merchant tacks on what we call junk fees, additional costs with vague names like “resort fee”, “service fee”, “fulfillment fee”, “transaction fee”, “processing fee”, and

“ancillary fee” that are ill defined and not clearly tied to any particular commodity or service. With *partitioned pricing*, a digital ad discloses the existence of additional fees but not the final price. For example, an advertisement will promise “\$25 plus fees” or “\$25 (+\$17 service fee).” As shown below, drip pricing and partitioned pricing create a confusing marketplace for buyers, and their existence structurally harms competition. They have enabled the proliferation of junk fees in online transactions, so consumers and business customers cannot take advertised prices at face value or comparison shop with any efficiency.

The ubiquity of deceptive junk fees and deceptive pricing practices is not only a matter of protecting the individual buyer from deception. Markets work to the benefit of buyers, sellers, consumers, and workers only if all participants are playing by a set of fair rules. If deceptive junk fees are permitted, we will have markets that reward companies and sellers who put their entrepreneurial energies into finding clever ways to add unlisted fees, “optional” services, and other add-on costs to the final price of what they are selling. Honest businesspeople—who make investments and innovations to grow their companies, provide consumers with better and cheaper services, and expand their workforce—should be the ones to get ahead in a fair marketplace.

Federal and state agencies have been investigating these deceptive practices for a decade, but through an apparent whack-a-mole strategy of workshops, piecemeal regulations, and sporadic lawsuits. This has been ineffective. Junk fees have only become more ubiquitous in consumers’ lives. A better approach, supported

by empirical studies, is a strict and simple rule against concealing junk fees in digital advertising.

The Federal Trade Commission has, for two decades, stated plainly that (1) “[t]he same consumer protection laws that apply to commercial activities in other media apply online,” and (2) “[d]isclosures that are required to prevent an ad from being misleading, to ensure that consumers receive material information about the terms of a transaction or to further public policy goals, must be clear and conspicuous.”¹ But the 2000 and 2013 .com Rules focus only on express or implied “claims” and their “proximity and placement”—the text of the ad, the product name, and how it is depicted.² They do not mention the extent to which pricing should be disclosed except to say that “[d]isclosures must be effectively communicated to consumers before they make a purchase or incur a financial obligation.”³

As a result, junk fees that are not disclosed in advertising and are only revealed later at checkout, but before incurring the cost, are allowed to persist. To avoid this loophole, we propose that, when a price is displayed in a digital advertisement, it

¹ Federal Trade Commission, *Dot Com Disclosures: Information about Online Advertising* (“2000 .Com Rules”), at 1 (May 2000), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-issues-guidelines-internet-advertising/0005dotcomstaffreport.pdf> (last visited June 21, 2022); Federal Trade Commission, *.com Disclosures – How to Make Effective Disclosures in Digital Advertising* (“2013 .Com Rules”), at i (March 2013), available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> (last visited June 21, 2022).

² *2000 .Com Rules*, *supra* note 1, at 4; *2013 .Com Rules*, *supra* note 1, at 5.

³ *2013 .com Rules*, *supra* note 1, at 14.

must include the full cost of the product or service, including any mandatory fees that might be incurred by the purchaser. This would have the benefit of (1) clarifying that such junk fees are unfair and deceptive, even when disclosed just before a buyer incurs the financial obligation; (2) protecting buyers from predatory advertising that lures them into a purchase based on false advertising; and (3) creating a more competitive and transparent digital marketplace.

II. A BRIEF HISTORY OF JUNK FEE STUDIES

Government enforcers have been investigating junk fees for at least a decade. In 2012, the FTC hosted a conference on the “Economics of Drip Pricing.”⁴ The stated goal was to “to examine the theoretical motivation for drip pricing and its impact on consumers, empirical studies, and policy issues pertaining to drip pricing.”⁵ The transcript from that day reveals a long discussion among economists over how to study what they all agreed was a problem, without reaching any practical conclusions about what rules to enforce or what behavior should be prohibited. The stasis they achieved is perhaps best illustrated by this statement from Professor David Laibson:

I don't think we're going to come up with rules, in general, for shrouding and for drip pricing in the next nine years, certainly not the next nine months. What I'm hoping for is a set of studies that begins to provide the empirical ground work for the learning that might produce, in a decade, the kind of general understanding that you're describing.⁶

⁴ <https://www.ftc.gov/news-events/events/2012/05/economics-drip-pricing>

⁵ *Id.*

⁶ A Conference on the Economics of Drip Pricing, Transcript, at 55 (May 21, 2022), available at https://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/transcript.pdf (last visited July 15, 2022).

The economists were more concerned with whether “there might be a trade off between the efficiencies of [drip] pricing” and “the clarity of pricing”⁷ and less about whether consumers and business customers were in fact being deceived. Yet with the prevalence of junk fees, this is not a question of trade-offs, efficiencies, or consumer surpluses. As then-FTC Chairman Leibowitz stated at the beginning of the workshop, “[D]rip pricing, by advertising only part of a price, has the potential to mislead and harm consumers, causing them to pay too much and to waste time searching for cell phone plans, airline or concert tickets, hotel rooms, or rental cars with deceptively low prices.”⁸ Drip pricing and other similar practices are deceptive, they undermine the competitive process, and they reward sellers seeking to get ahead through unfair means. They should be plainly prohibited.

Four years later, the Obama Administration’s National Economic Council published a paper examining the economic impact of “hidden fees.”⁹ The 2016 report more appropriately focused on the harms associated with junk fees, not any supposed efficiencies. Grounded in empirical evidence, the report identified several threats to competition and to consumers:

⁷ *Id.* at 71-72.

⁸ *Id.* at 4.

⁹ National Economic Council, *The Competition Initiative and Hidden Fees* (“NEC Hidden Fees Report”) (Dec. 2016), available at https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf (last visited July 15, 2022).

(1) systematic transfers of wealth from low information consumers to more educated ones;¹⁰

(2) a consumer's increased willingness to pay junk fees that flows from a perception that abandoning a purchase after spending one's time in the purchasing process would result in some sort of loss;¹¹

(3) consumer confusion around advertised prices that makes it harder for competitors with genuinely lower prices to compete with those who shroud their prices with hidden junk fees;¹² and

(4) tacit collusion in the form of parallel decisions to make certain junk fees a standard part of the purchasing process.¹³

The NEC also proposed a solution: “Federal and state agencies can enact rules that require any mandatory, or de facto mandatory fee be included *in any advertised price.*”¹⁴ The NEC emphasized first that, because imposing junk fees through drip

¹⁰ *Id.* at 9; Federal Trade Commission, *Economics at the FTC: Drug and PBM Mergers and Drip Pricing* (“FTC Drip Pricing Report”), at 15 (Dec. 2012), available at http://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-drug-and-pbm-mergers-and-drip-pricing/shelanskietal_rio2012.pdf (last visited July 20, 2022) (noting evidence that “there are regressive welfare consequences of shrouding because the welfare losses are likely to be borne by consumers with low levels of economic literacy”).

¹¹ Steffen Huck & Brian Wallace, *The impact of price frames on consumer decision making: Experimental evidence*, at 3 (Oct. 15, 2015), available at <https://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf> (last visited July 20, 2022); NEC Hidden Fees Report, *supra* note 9, at 9. There are multiple behavioral explanations for this phenomenon. One is called the “endowment effect”, which “can cause consumers to feel as if they own the good as soon as they initiate the buying transaction.” FTC Drip Pricing Report, *supra* note 10, at 20. Another is “anchoring”, whereby consumers “focus[] on the base price and adjust incompletely when the additional charges are revealed.” *Id.* These “loss aversions” wipe out 22% of consumer surplus. *Id.*; Huck & Wallace at 1, 2.

¹² NEC Hidden Fees Report, *supra* note 9, at 9.

¹³ *Id.*

¹⁴ *Id.* at 15.

pricing obfuscates the true cost of a company’s goods and services, market forces alone will not discourage them.¹⁵ Junk fees, like drip pricing, undermine the market itself. Furthermore, the NEC acknowledged that a case-by-case approach, using existing deceptive practices laws, was unlikely to be effective.¹⁶

In 2019, the FTC held a workshop regarding junk fees in online ticket sales and published a paper regarding the same the following year.¹⁷ In the ticket sales market, “[m]andatory fees, such as ‘venue ’and ‘ticket processing ’fees, bulk up the price – often by as much as thirty percent.”¹⁸ And because these junk fees are concealed until the end of the purchasing process, competitors offering true lower prices are disadvantaged, it is harder to comparison shop, and consumers face higher search costs.¹⁹ Everyone at the workshop—in a remarkable consensus among enforcers, economists, and ticket sellers—agreed that legislation or regulations

¹⁵ *Id.*

¹⁶ *Id.* at 16.

¹⁷ Opening Remarks of Commissioner Rebecca Kelly Slaughter, “*That’s the Ticket*”: *An FTC Workshop about Online Ticket Sales* (June 11, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1527238/slaughter_-_prepared_remarks_ftc_tickets_workshop_6-11-19.pdf (last visited July 15, 2022); Federal Trade Commission, “*That’s the Ticket*” *Workshop: Staff Perspective* (“FTC Staff Perspective”), (May 2020), available at https://www.ftc.gov/system/files/documents/reports/thats-ticket-workshop-staff-perspective/staffperspective_tickets_final-508.pdf (last visited July 21, 2022).

¹⁸ *Id.* at 4.

¹⁹ *Id.*

requiring “all-in” pricing for ticket sales, coupled with robust enforcement, was the best approach.²⁰ However, no action has been taken to date.

III. THE CURRENT STATE OF THE JUNK FEE ECONOMY AND ENFORCEMENT

Professor Laibson’s prediction—that it would take a decade to study and develop rules regarding drip fees—proved to be true, but unnecessarily so. A decade has passed since the FTC’s junk fee workshop was held. Six years have passed since the NEC issued its own report. In that time, junk fees have exploded across our economy. Mobile apps like Grubhub use them to extract more profits from restaurants and their patrons. Online ticket merchants and hoteliers conceal them to lure in shoppers and undercut competitors. Junk fees are a particularly insidious part of transactions with financial institutions and auto dealers. Airlines increasingly use partitioned pricing to nickel-and-dime passengers. But the FTC and other agencies have, to date, taken only small and piecemeal actions against the problem.

In 2011, the Department of Transportation implemented a regulation requiring airlines and ticket agents to advertise the full fare, inclusive of all government-imposed taxes and fees.²¹ However, this regulation only applies to mandatory fees, not so-called optional fees for checked bags, reserved seats, early boarding, and other services. As many flyers consider such “optional” services as effectively mandatory (e.g. checked bags), airline pricing is still effectively opaque as

²⁰ *Id.*

²¹ 14 CFR § 399.84.

to the total cost, and buyers are unable to easily compare prices, even on third-party sites that offer multiple airlines.

The FTC is attempting to address junk fees in the auto industry. It recently proposed a regulation that “would require dealers to make key disclosures to consumers, including providing a true ‘offering price’ for a vehicle that would be the full price a consumer would pay, excluding only taxes and government fees” and would ban surprise and fraudulent junk fees.²²

The Attorney General for the District of Columbia has been a leader in litigation to stop these anticompetitive practices. In 2019, it sued Marriott International, alleging the hotelier excluded a host of junk fees from its advertised prices, in violation of D.C.’s Consumer Protection Procedures Act.²³ Its 2022 lawsuit against Grubhub alleges, among other things, that the online food delivery app uses a number of tactics to obscure its delivery fees, service fees, and menu markups from consumers.²⁴

The Consumer Financial Protection Bureau has also shown a renewed interest in junk fees. It launched an initiative aimed at junk fees charged by banks and other

²² *FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers* (June 23, 2022), available at <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers> (last accessed July 21, 2022).

²³ *District of Columbia v. Marriott International, Inc.*, No. 2019 CA 004497, Complaint (July 9, 2019).

²⁴ *District of Columbia v. Grubhub Holdings, Inc.*, No. 2022 CA 001199, Complaint at ¶¶5-8 (D.C. Sup. Ct. Mar. 21, 2022).

financial institutions in January 2022.²⁵ The CFPB’s requestion for information notes junk fees account for “about 20% of the total cost of credit card” and reached \$23.6 billion in 2019.²⁶ For bank accounts, “[o]verdraft and NSF fees exceeded \$15.4 billion in 2019.”²⁷ Account maintenance fees cost consumers approximately \$1 billion annually.²⁸ So the CFPB states that it seeks “to strengthen competition in consumer finance by using its authorities to reduce these kinds of junk fees.”²⁹

IV. A BROAD DIGITAL ADVERTISING RULE

Despite these efforts, market-by-market regulations and lengthy offender-by-offender litigation does not address the root cause of the “junk fee” problem—rampant deceptive digital advertising. Any attempts to narrowly address one specific type of deceptive pricing practice is likely to result in its replacement by another, similarly deceptive practice. For example, ad studies show that consumers underestimate the total price, so partitioned pricing has the same effect of drip pricing.³⁰ Thus, allowing

²⁵ *Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees* (“CFPB Junk Fee Initiative”) (Jan. 26, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/> (last visited July 19, 2022).

²⁶ Bureau of Consumer Financial Protection, *Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services*, at 4 (date), available at https://files.consumerfinance.gov/f/documents/cfpb_fees-imposed-by-providers-of-consumer-financial-products-services_rfi_2022-01.pdf (last accessed July 21, 2022).

²⁷ *Id.*

²⁸ *Id.*

²⁹ CFPB Junk Fee Initiative, *supra* note 25.

³⁰ FTC Staff Perspective, *supra* note 17, at 13.

advertisers to use generic phrases like “plus fees” to partition the displayed price into the base cost and fees is insufficient. Instead, a rule requiring that digital advertising include the “all in” price for a good or service is the best way to protect buyers and maintain a competitive digital marketplace.³¹ The “all in” price is the full amount that will be due at the end of the purchasing process, including all mandatory fees.

Two additional steps are required for this rule to be effective. The first is a clear definition of the term “mandatory fee” to prevent advertisers from charging junk fees for “add ons” that consumers would reasonably expect to be part of the product.³² For example, many additional fees that airlines consider to be optional—like carry-on fees, checked bag fees, and seat selection fees—are effectively mandatory expenses for many travelers, even though it may be technically possible to purchase and take a flight without them. To avoid confusion in enforcement and to assure effective deterrence, this could be akin to the reasonable consumer standard that already governs most false advertising claims.³³ The second is robust enforcement and use of

³¹ The Institute for Policy Integrity at New York University School of Law submitted a Petition for Rulemaking Concerning Drip Pricing to the FTC last year proposing a similar regulation that would apply to all advertising. See https://policyintegrity.org/documents/Petition_for_Rulemaking_Concerning_Drip_Pricing.pdf (last visited July 25, 2021).

³² This is increasingly seen in the airline industry, where budget airlines charge fees to passengers for water, carry on bags, and checking in at the airport.

³³ See, e.g., *Fanning v. FTC*, 821 F.3d 164, 170-71 (1st Cir. 2016) (Under the reasonable consumer standard, “if ‘a[] [claim] conveys more than one meaning, only one of which is misleading, a seller is liable for the misleading interpretation even if nonmisleading interpretations are possible.”); *Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228-29 (9th Cir. 2019) (in California, “the reasonable consumer

the FTC’s penalty offence authority against violators.³⁴ Otherwise, advertisers that conform to the “all in” rule will lose market share to advertisers that have perceived lower prices due to concealed junk fees, and the rule will have no deterrent effect.

V. CONCLUSION

The FTC made clear in 2000, in its first iteration of digital advertising rules, that “[a]dvertisements cannot be unfair.”³⁵ However, the digital marketplace has become just that. Consumers cannot rely on advertised prices, and comparison shopping has become a time-consuming and confusing process. The true cost of most goods and services are concealed, and junk fees have become a standard part of the buying experience. This is not a complicated problem, in need of deeper study or a sophisticated set of rules to determine which junk fees are more or less harmful. Junk fees, whether implemented through drip or partitioned pricing, are deceptive advertising practices that significantly distort the online marketplace for competitors, business customers, and the final consumer. An “all in” rule for prices displayed in digital advertising is a simple approach to combat them, ensure fair competition, and protect consumers.

standard requires a probability ‘that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.’”); *Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 475 (7th Cir. 2020) (same).

³⁴ 45 U.S.C. § 45(m)(1)(B). Section 5 allows the FTC to impose penalties up to \$43,792 per violation on companies that knowingly violate engage in conduct prohibited by FTC administrative rules. *Id.*

³⁵ *2000 .com Rules*, *supra* note 1, at 4 n.13.