



February 7, 2024

**To:** Federal Trade Commission

**Re:** Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77,420  
(proposed Nov. 9, 2023) (FTC-2023-0064)

The Institute for Policy Integrity at New York University School of Law (Policy Integrity)<sup>1</sup> respectfully submits the following comments to the Federal Trade Commission (FTC) regarding the proposed Trade Regulation Rule on Unfair or Deceptive Fees (Proposed Rule).<sup>2</sup> Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

The Proposed Rule lays out a sensible approach to regulating the prevalent business practices of “presenting incomplete pricing information that obscures the total price and misrepresenting the nature and purpose of fees.”<sup>3</sup> We recommend some additions to the regulatory text to ensure that the Proposed Rule fully codifies FTC’s stated objectives. FTC should also consider several actions to strengthen its robust breakeven (“Economy-Wide Breakeven Analysis”) and cost-benefit (“Industry-Specific Cost-Benefit Analysis”) analyses.

Specifically, this comment offers the following insights and recommendations:

- FTC should amend § 464.1(g) to **clarify the types of goods or services that must be included in the Total Price.**
- FTC should amend § 464.3(b) to **specify that consumers must affirmatively opt into any fees and charges excluded from the Total Price**, except for Government Charges and Shipping Charges.
- FTC should amend § 464.1(f) to **clarify that Shipping Charges do not include internal handling costs.**
- FTC **should further justify its conclusion that benefits exceed costs**, based on its properly conducted Economy-Wide Breakeven Analysis.
- FTC should **further explain its claim that the Proposed Rule will result in enforcement savings**—and should quantify such savings to the extent feasible.

We expand upon these points below.

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<sup>1</sup> This document does not purport to present the views, if any, of New York University School of Law.

<sup>2</sup> Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77,420 (Nov. 9, 2023) [Proposed Rule].

<sup>3</sup> *Id.* at 77,440.

## Background

In November 2023, FTC published the Proposed Rule, which seeks to “deter deceptive and unfair acts or practices involving fees, to promote a level playing field that enables comparison shopping and allows honest businesses to compete, and to expand the available remedies where such practices are uncovered.”<sup>4</sup> The Proposed Rule follows the Commission’s granting of Policy Integrity’s petition for rulemaking and issuance an advance notice of proposed rulemaking on this subject in 2022.<sup>5</sup>

The Proposed Rule has four key components: (1) it prohibits the offering, displaying, or advertising of any price that does not constitute the maximum amount a consumer must pay for a good or service (which the Proposed Rule defines as the Total Price);<sup>6</sup> (2) it requires that, in any such offer, display, or advertisement, any other pricing information must be displayed less prominently than the Total Price;<sup>7</sup> (3) it declares it an unfair and deceptive practice for a Business to misrepresent the nature and purpose of any amount a customer may pay;<sup>8</sup> and (4) it requires that Businesses disclose any amount excluded from the Total Price, including for optional additional services, before the consumer consents to pay.<sup>9</sup>

The Proposed Rule is accompanied by an Industry-Specific Cost-Benefit Analysis.<sup>10</sup> For this analysis, FTC estimates compliance cost and time-saving benefits in two industries—live-event ticketing and short-term lodging—and finds that benefits exceed costs in each industry.<sup>11</sup> FTC also conducts an Economy-Wide Breakeven Analysis in which it quantifies the compliance costs in other industries, estimates the time savings required for those benefits to exceed costs, and concludes that regulatory benefits likely exceed this breakeven threshold.<sup>12</sup>

### **I. Recommendations for the Regulatory Text**

FTC should consider several revisions and additions to strengthen and clarify its proposed regulatory text. First, FTC should add language to Section 464.1(g) to ensure the Total Price does not mislead customers. Second, FTC should add language to Section 464.3(b) requiring customers to affirmatively opt-in to any fees excluded from the Total Price, except for Government Charges and Shipping Charges. Third, FTC should revise Section 464.1(f) to clarify that Shipping Charges exclude internal handling costs.

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<sup>4</sup> *Id.* at 77,438.

<sup>5</sup> *Id.* at 77,420.

<sup>6</sup> *Id.* at 77,484 (proposed § 464.2(a)).

<sup>7</sup> *Id.* at 77,484 (proposed § 464.2(b)).

<sup>8</sup> *Id.* at 77,484 (proposed § 464.3(a)).

<sup>9</sup> *Id.* at 77,484 (proposed § 464.3(b)).

<sup>10</sup> *Id.* at 77,440–77.

<sup>11</sup> *Id.* at 77,444 tbl.1.A (summarizing results).

<sup>12</sup> *Id.* at 77,453 &tbl.4 (presenting results of Economy-Wide Breakeven Analysis and concluding that it is “likely that consumers would experience search time savings” necessary for benefits to exceed costs).

## A. FTC Should Expand Upon Section 464.1(g) to Ensure that the Total Price Does Not Mislead Consumers

**Add at the end of § 464.1(g): Fees and charges for any good or service that a reasonable consumer would expect to be included under the circumstances must be included in the Total Price.**

(Note: throughout this letter, proposed insertions are in red):

The proposed text of Section 464.1(g) states that the Total Price includes all fees or charges that a consumer “must pay for a good or service” or for any “mandatory Ancillary Good or Service.”<sup>13</sup> FTC requests comment on whether this definition clearly conveys that it includes “all fees or charges for goods or services that a reasonable consumer would expect to be included with the purchase.”<sup>14</sup> Additional clarification on this point would be useful.

Without clarification, a reader could interpret the proposed text to provide Businesses with complete discretion in determining whether to classify a charge or fee as optional versus mandatory, with the distinction resting solely on whether the Business requires the consumer to pay that charge or fee. This ambiguity potentially allows Businesses to re-characterize widely expected or even necessary services as optional to artificially reduce the Total Price. For instance, a hotel could potentially remove ancillary items like towels or even necessary items like a room key from the Total Price without conveying that information to the consumer at the outset of the transaction. This reading would not align with FTC’s stated objectives<sup>15</sup> and could leave consumers vulnerable to being misled by an artificially low advertised price that does not include reasonably and widely expected goods or services.

FTC should revise the definition of Total Price accordingly. The new text could: 1) require inclusion of all fees or charges that a reasonable consumer would expect to be included under the circumstances, 2) require inclusion of all fees or charges that are necessary to render the good or service fit for its intended use,<sup>16</sup> 3) require inclusion when both conditions are met, or 4) require inclusion when either condition is met. Of these options, the first may be the most administrable because it would align the regulation with consumer expectations and tap into an existing body of case law on the reasonable consumer standard.<sup>17</sup> The second option, by contrast, may be somewhat overinclusive in that it would presumably require the joint sale of different products that are frequently sold separately (such as requiring each battery-operated device to be sold with batteries included, or each can be sold with a can opener). It could also be underinclusive in that

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<sup>13</sup> *Id.* at 77,484 (proposed § 464.1(g)).

<sup>14</sup> *Id.* at 77,482.

<sup>15</sup> *See id.* at 77,439 (stating in the regulatory preamble that a Business “cannot treat a feature as optional if it is necessary to render the good or service fit for its intended use”); *id.* at 77,440 (stating FTC’s objective to “foreclose businesses from . . . mischaracterizing essential components of a product as optional add-on components”).

<sup>16</sup> In the regulatory preamble, FTC states that a Business “cannot treat a feature as optional if it is necessary to render the good or service fit for its intended use.” *Id.* at 77,439.

<sup>17</sup> *See Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225, 1228-29 (9th Cir. 2019) (“[T]he reasonable consumer 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.” (internal quotation marks omitted)).

it would allow Businesses to exclude commonly expected goods or services (such as the hotel towel in the above example) without notification upfront. The third and fourth options may also be somewhat overinclusive and/or underinclusive for the same reasons provided above for the second option.

**B. FTC Should Amend Section 464.3(b) to Require Customers to Affirmatively Opt Into Any Fees and Charges Excluded from the Total Price, Not Including Government Charges and Shipping Charges**

**Add to the end of § 464.3(b): A consumer consents to any amount excluded from the Total Price only by affirmatively “opting in” (i.e., agreeing) to any such amount, except for Government Charges and Shipping Charges.**

Businesses sometimes opt consumers into fees and charges relating to non-mandatory goods and services and require consumers to affirmatively “opt out” to avoid such costs. The Proposed Rule appears to permit this practice so long as the Business discloses these fees omitted from the Total Price before the consumer consents to pay.<sup>18</sup> To prevent this, FTC should clarify that a Business cannot opt consumers into any optional amount excluded from the Total Price, not including Government Charges and Shipping Charges.

Similar to drip pricing, automatic “opt-in” can increase the amount a consumer is charged beyond the Total Price displayed in an initial offer, display, or advertisement. This practice would violate the intent of the Proposed Rule, which intends to prohibit drip pricing. Without an express restriction on the practice, Businesses may therefore comply with the Proposed Rule by advertising a low price and then opting a consumer into additional fees before payment. The consumers could unwittingly pay for additional fees to which they did not affirmatively consent or that they did not sufficiently consider due to inertia.<sup>19</sup> As a result, consumers could end up paying higher prices than they would have otherwise.

Should FTC adopt a restriction on automatic opt-in practices, it can look to several precedents for guidance. For instance, 14 C.F.R. 399.84(c), promulgated by the Department of Transportation (DOT), requires that airline consumers “affirmatively ‘opt-in’ (i.e., agree)” to optional services “before that fee is added to the total price for the air transportation-related purchase.”<sup>20</sup> Various other jurisdictions, including the European Union and Malaysia, require such opt-in for optional airline fees.<sup>21</sup>

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<sup>18</sup> See Proposed Rule, 88 Fed. Reg. at 77,484 (proposed § 464.3 prohibits misleading fees and requires their disclosure “before the consumer consents to pay”).

<sup>19</sup> See, e.g., Cass Sunstein, *Sludge and Ordeals*, 68 DUKE L.J. 1843, 1854-1858, 1854 n.49 (2019) (noting that “[f]or many people, inertia is a powerful force” and that “participation rates are often much lower with opt-in designs than with opt-out designs”); OFF. OF MGMT. & BUDGET, 2009 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES, at 36, 39 (2009) (“inertia has a large effect on behavior”).

<sup>20</sup> 14 C.F.R. § 399.84(c).

<sup>21</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-756, COMMERCIAL AVIATION: INFORMATION ON AIRLINE FEES FOR OPTIONAL SERVICES 38, 39 (2017); 2008 O.J. (L 293) 3.

If FTC does not adopt this change, then it should at least adopt provisions that assist consumers in deciding whether to select optional fees. For instance, FTC seeks comment on whether it should change the requirement for Businesses to disclose any amount excluded from the Total Price from “before the consumer consents to pay” to “before the consumer consents to pay and before obtaining a consumer’s billing information.”<sup>22</sup> This change would be advisable if FTC does not require all optional fees to be opt-in. If FTC adopts this requirement, it should consider providing additional clarity on how this requirement would apply when a consumer has previously provided billing information (such as when a consumer has previously signed up for a subscription service).

### C. FTC Should Amend Section 464.1(f) to Clarify that Shipping Charges Exclude Internal Handling Costs

**Add to § 464.1(f):** *Shipping Charges* means the fees or charges, **not including internal handling costs**, that reasonably reflect the amount a Business incurs to send physical goods to a consumer through the mail, including private mail services.

In its regulatory impact analysis, FTC provides the important clarification that the Proposed Rule requires Businesses to separate internal handling costs from Shipping Charges and include them in the Total Price.<sup>23</sup> FTC’s definition of Shipping Charges in Section 464.1(f) should more clearly reflect this clarification.

Businesses frequently treat handling costs as a part of shipping costs, or at least present the fee for both in a lump sum.<sup>24</sup> Given this common practice, a Business could believe that its internal handling costs are “fees or charges that reasonably reflect the amount a business incurs to send physical goods to a consumer through the mail” and thus meet FTC’s proposed definition of Shipping Charges.<sup>25</sup>

To avoid this reading, FTC should clarify its definition of Shipping Charges. For example, a similar California regulation excludes from the price that businesses must display any “postage or carriage charges that will be reasonably and actually incurred to ship the physical goods to the consumer.”<sup>26</sup> By describing these charges as “postage or carriage charges,” the California law specifically limits these excluded costs to those incurred by the process of shipping. Similarly, in its regulatory impact analysis of the Proposed Rule, FTC clarifies that internal handling costs,

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<sup>22</sup> Proposed Rule, 88 Fed. Reg. at 77,482.

<sup>23</sup> *Id.* at 77,448.

<sup>24</sup> *See, e.g., id.* at 77,448 (noting that “shipping and handling charges are currently often combined into one fee”); Brandon Batchelor, *How to Understand Your Actual Shipping Costs*, FORBES (Sept. 11, 2020), <https://perma.cc/U8C3-YWEZ?type=image> (“Shipping and handling refers to the process in which an order is prepared, packed and sent to the customer. Consumers typically see “shipping and handling” as a category of fees added to their e-commerce orders.”); *Shipping and handling*, CAMBRIDGE DICTIONARY (defining “shipping and handling” as “a charge for the cost of having something wrapped and then mailed.”).

<sup>25</sup> Proposed Rule, 88 Fed. Reg. at 77,484 (proposed § 464.1(f)).

<sup>26</sup> S.B. 478, 2023-2024 Leg. (Cal. 2023).

which must be excluded from the Total Price, “include costs not attributable to the amount sellers are charged by third party shipping services.”<sup>27</sup>

These formulations reflect that internal handling costs should be included within (not exempted from) the Total Price. Businesses can predict internal handling costs in advance (which are not customer-dependent), unlike Shipping Charges attributable to third-party shipping services (in which Businesses do not know where customers are located at the time of solicitation).<sup>28</sup> Moreover, unlike Government Charges and third-party Shipping Charges, Businesses are in control of internal handling costs, and could thus potentially inflate or manipulate them.<sup>29</sup>

## II. Recommendations Relating to FTC’s Regulatory Impact Analysis

FTC should also consider several actions to strengthen its robust Economy-Wide Breakeven and Industry-Specific Cost-Benefit analyses. First, FTC can bolster its Economy-Wide Breakeven Analysis by further supporting its conclusion that the Proposed Rule’s benefits will likely exceed its costs. Second, to strengthen its Industry-Specific Cost-Benefit Analysis, FTC can further assess and potentially quantify enforcement costs.

### A. FTC Properly Conducts an Economy-Wide Breakeven Analysis, and Should Further Justify Its Conclusion that Benefits Will Exceed Costs

While FTC appropriately conducts an Economy-Wide Breakeven Analysis to support its conclusion that the Proposed Rule’s benefits likely justify its costs, the agency could offer more support for its conclusion.<sup>30</sup> In particular, FTC quantifies the consumer time savings that would be required for those benefits to exceed compliance costs—59.09 minutes per consumer annually, assuming 50% economy-wide compliance under the baseline—but can provide further analysis to support its conclusion that time savings resulting from the Proposed Rule are likely to exceed that breakeven threshold.

For instance, FTC could conduct a bounding exercise based on its per-transaction time-savings estimates in the event-ticketing and short-term lodging industries from the Industry-Specific Cost-Benefit Analysis. Specifically, FTC would assume that the economy-wide, per-transaction time savings from the Proposed Rule falls between 0.7625 minutes (FTC’s lowest estimate for the event-ticketing and short-term lodging industries)<sup>31</sup> and 3.53 minutes (its highest estimate for those two industries).<sup>32</sup> Dividing 59.09 minutes by these figures yields a range of 16.75 to 77.50 affected transactions per year—that is, the number of transactions that would need to be affected annually per customer for benefits to exceed costs. Thus, if a consumer makes at least 34–156 transactions per year (two multiplied by 16.75–77.5, reflecting FTC’s assumption of 50% baseline compliance), or 3–13 transactions per month, then those time-saving benefits alone

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<sup>27</sup> Proposed Rule, 88 Fed. Reg. at 77,448.

<sup>28</sup> *Id.*

<sup>29</sup> This point relates to FTC’s question on whether the current definition of “Shipping Charges” may allow for “artificial inflation” of shipping costs. *Id.* at 77,482.

<sup>30</sup> *Id.* at 77,440.

<sup>31</sup> *Id.* at 77,456 tbl.5 (low-end estimate for live-event ticketing).

<sup>32</sup> *Id.* at 77,464 tbl.9 (high-end estimate for short-term lodging).

exceed compliance costs. That is indeed the case: The average consumer reported 28.8–30.8 purchases per month in 2022, including 10.4–12.6 remote purchases,<sup>33</sup> which indicates that benefits likely exceed costs under the Economy-Wide Breakeven Analysis.

This exercise may potentially understate or overstate the savings generated by the rule because of differences between the event-ticketing and short-term lodging industries and other industries. Nonetheless, it is plausible that search-time savings may be greater in other industries, indicating that the breakeven range of 3–13 affected transitions per customer per month could be an overestimate. This is because some industries not covered by FTC’s analysis—such as automotive and real estate sales or rentals—would likely yield greater search-time savings per transaction, in which case fewer transactions would be required for benefits to exceed costs.

### **B. FTC Should Further Explain Its Claim that the Proposed Rule Reduces Enforcement Costs and Should Quantify Such Cost Savings If Feasible**

In 2021, Policy Integrity submitted a petition for rulemaking to FTC calling for a ban on the use of drip pricing. In our petition, Policy Integrity recommended that FTC consider enforcement costs associated with that regulation, such as increased agency staffing, by drawing on its experience with other regulations.<sup>34</sup> Yet in its preamble, FTC asserts the Proposed Rule will result in *savings* of enforcement resources, which could then be invested into investigating and potentially bringing additional enforcement actions.<sup>35</sup>

FTC should provide further explanation for its claim that the Proposed Rule will result in enforcement resource savings—a seemingly counterintuitive conclusion given that the rule would define additional conduct as unlawful. Specifically, FTC should explain how the Proposed Rule will lead to cost savings relative to its current baseline level of enforcement activity against hidden fees. To bolster this analysis, FTC may wish to quantify and compare projected enforcement expenditures under a baseline scenario with projected enforcement expenditures under the Proposed Rule. When assessing the latter, FTC should consider how many staff it anticipates would work on the Proposed Rule and their wages. FTC may also wish to consider any potential indirect costs resulting from shifting enforcement resources.

Sincerely,

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<sup>33</sup> The low end of this range reflects transactions initially reported by respondents; the high end reports transactions reported following a day-after nudge. Moreover, the share of remote purchases has approximately doubled since 2019 given changes consumers made early in the pandemic. See KEVIN FOSTER, CLAIRE GREENE & JOANNA STAVINS, FED. RSRV. BANK OF ATLANTA, RESEARCH DATA REPORT, 2022 SURVEY AND DIARY OF CONSUMER PAYMENT CHOICE 20-21, tbl.D (2023), [https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2022/sdpc\\_2022\\_report.pdf](https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2022/sdpc_2022_report.pdf).

<sup>34</sup> Inst. for Pol’y Integrity, Petition for Rulemaking Concerning Drip Pricing 28 (July 7, 2021).

<sup>35</sup> Proposed Rule, 88 Fed. Reg. at 77,441.

### **Recommended Edits and Additions to Regulatory Text**

- Add at the end of § 464.1(g): Fees and charges for any good or service that a reasonable consumer would expect to be included under the circumstances must be included in the Total Price.
- Add to the end of § 464.3(b): A consumer consents to any amount excluded from the Total Price only by affirmatively “opting in” (*i.e.*, agreeing) to any such amount, except for Government Charges and Shipping Charges.
- Add to §464.1(f): *Shipping Charges* means the fees or charges, **not including internal handling costs**, that reasonably reflect the amount a Business incurs to send physical goods to a consumer through the mail, including private mail services.