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U.S. Federal Trade Commission
Office of the Secretary
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Washington, DC 20580

Petition for Rulemaking Concerning Drip Pricing

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity"),[1] pursuant to 16 C.F.R. § 1.9 and 5 U.S.C. § 553(e), hereby petitions the Federal Trade Commission ("FTC" or the "Commission") to promulgate rules governing drip pricing.

Drip pricing is "the practice of advertising only part of a product's price upfront and revealing additional charges later as consumers go through the buying process."[2] It is a category of partitioned pricing, a practice in which "sellers divide an offering's total price into two or more mandatory components such as a base price and a surcharge."[3] Specifically, drip pricing "describes a narrower partitioned pricing scenario that adds the element of delay in posting separate, mandatory prices."[4] By withholding key pricing information from consumers until they have already taken steps towards completing a transaction, sellers engaged in drip pricing cause consumers to expend additional time on their purchasing decision and make it difficult for

[1] 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. This document does not purport to present the views, if any, of New York University School of Law.
[2] MARY W. SULLIVAN, FED. TRADE COMM'N, ECONOMIC ANALYSIS OF HOTEL RESORT FEES v (2017).
[3] David A. Friedman, *Regulating Drip Pricing*, 31 STAN. L. & POL'Y REV. 51, 53 (2020) (internal quotation marks omitted).
[4] *Id.*

consumers to comparison shop.[5] Further, "empirical studies suggest that such pricing strategies may systematically make consumers pay more for goods and services" than they would have paid if fully informed of the genuine price at the outset.[6]

Under our proposal, sellers would be required to prominently provide the entire price to be paid by the customer—inclusive of all unavoidable fees and service charges. Although unavoidable fees and charges included within the total price could also be stated separately, in addition to being included within the total price, such separate statement of fees could not be more prominent than the total price (i.e., the price including all unavoidable fees).[7]

Our proposal would not require sellers to include certain charges within the total price. For one, optional fees and service charges for additional services would not need to be included in the total price, since the customer has the option of purchasing those additional services. Under the rule, any fees imposed for purchasing through a specific medium or forum should be considered unavoidable, meaning that sellers must disclose online shopping surcharges or ticket broker fees upfront, as part of the total purchase price. Additionally, the proposed regulation does not require sellers to disclose taxes as part of the total price, because taxes are imposed by government rather than the seller.

Regulating drip pricing would advance the Commission's mission to "protect[] consumers and competition by preventing anticompetitive, deceptive, and unfair business

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[5] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-347, EVENT TICKET SALES: MARKET CHARACTERISTICS AND CONSUMER PROTECTION ISSUES 45 (2018), https://www.gao.gov/assets/700/691247.pdf (hereinafter "GAO Report").

[6] NAT'L ECON. COUNCIL, THE COMPETITION INITIATIVE AND HIDDEN FEES 7-15 (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf (hereinafter "The Competition Initiative").

[7] *Cf.* Sullivan, *supra* note 2, at 25–26 (explaining that "disclosing the [mandatory] resort fee separately from the room rate, and in a smaller font . . . may lead consumers to believe that the total price is lower than it actually is, or even worse, to ignore the resort fee disclosure").

practices."[8] The FTC can justify drip pricing rules under three distinct sources of authority. First, drip pricing is a deceptive practice because it involves material representations (incomplete opening prices) and omissions (hidden mandatory fees) that are likely to mislead consumers acting reasonably under the circumstances. Second, drip pricing is an unfair practice because it "causes or is likely to cause substantial injury to consumers"—including increased search times and consumer costs—"which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[9] Third, drip pricing is an unfair method of competition because it creates a race to the bottom by diverting consumers away from sellers that disclose their full prices upfront.

This petition begins below with proposed regulatory language. It then provides background on the regulation of drip pricing by the FTC, as well as by other federal and state authorities. Next, the petition explains why drip pricing meets the standards for deceptive, unfair, and anticompetitive trade practices that the Commission has authority to regulate. The petition closes with suggestions on how the Commission can assess the benefits and costs of a regulation on drip pricing.

[8] FED. TRADE COMM'N, ABOUT THE FTC, https://www.ftc.gov/about-ftc (last visited July 2, 2021) (hereinafter "About the FTC").

[9] 15 U.S.C. § 45(n).

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PROPOSED REGULATORY LANGUAGE

"It is an unfair or deceptive act or practice and unfair method of competition to advertise or solicit the sale of a product or service without prominently disclosing the entire price to be paid by the customer inclusive of all unavoidable fees and service charges (excluding government taxes). Although unavoidable fees and charges included within the single total price disclosed may also be stated separately from the total price, such statement of fees and charges may not be false or misleading and may not be presented more prominently or in the same or larger size as the total price. In addition, all other fees or service charges that might foreseeably be assessed in connection with the sale of the product or service, including additional fees for optional services, must be conspicuously disclosed in the advertisement or solicitation."

REGULATORY BACKGROUND

By this petition, Policy Integrity requests action from the FTC to address a practice that has already drawn the Commission's ire.

In 2012, the FTC hosted "The Economics of Drip Pricing," a conference that brought together economists and marketing experts "to examine the theoretical motivation for drip pricing and its impact on consumers, empirical studies, and policy issues pertaining to drip pricing."[10] At this conference, FTC Chairman Jon Leibowitz asked consumers to share their drip-pricing experiences with the Commission.[11] Based on complaints shared with the FTC, the Commission "warned 22 hotel operators that their online reservation sites may violate [Section 5 of the Federal Trade Commission Act] by providing a deceptively low estimate of what

[10] FED. TRADE COMM'N, THE ECONOMICS OF DRIP PRICING (2012), https://www.ftc.gov/news-events/events-calendar/2012/05/economics-drip-pricing.
[11] *See id*.

consumers can expect to pay for their hotel rooms."[12] Upon issuing these warnings, Chairman Leibowitz observed that drip-pricing charges, though "sometimes portrayed as 'convenience' or 'service' fees," are in reality "anything but convenient," and he accused "businesses that hide" such charges of "doing a huge disservice to American consumers."[13]

More recently, some members of Congress called on the Commission to "act against deceptive and unfair practices in [the event ticket sales] industry relating to hidden fees."[14] Following this letter, the FTC continued to explore drip-pricing concerns in its 2019 Online Events Ticket Workshop, dedicating an hour-long panel discussion to "The Adequacy of Ticket Price and Fee Disclosures."[15]

Other law-enforcement actors have also noticed this troubling practice and begun to take steps to combat the proliferation of drip pricing. In 2019, the District of Columbia filed suit against Marriott International, alleging that the company's pricing practices are deceptive, unfair, and unlawful.[16] That same year, Nebraska filed a similar action against Hilton.[17] Importantly, law enforcement has not limited its push to address drip pricing to the hotel industry. For example, the City and County of San Francisco filed suit against the operators of the online travel sites JustFly and FlightHub for unlawful and deceptive fee practices.[18] San Francisco

[12] Press Release, Fed. Trade Comm'n, FTC Warns Hotel Operators that Price Quotes that Exclude 'Resort Fees' and Other Mandatory Surcharges May Be Deceptive (Nov. 28, 2012), https://perma.cc/DBA5-UWVQ.

[13] *Id*.

[14] Letter to Chairman Joseph J. Simons from Congressmen Frank Pallone, Jr. and Bill Pascrell, Jr. (June 20, 2018), https://pascrell.house.gov/sites/pascrell.house.gov/files/ftc%20letter%20on%20ticket%20sales_072018.pdf.

[15] FED. TRADE COMM'N, ONLINE EVENT TICKETS WORKSHOP (2019), https://www.ftc.gov/news-events/events-calendar/2019/03/online-event-tickets-workshop.

[16] *See* Complaint for Violations of the Consumer Protections Procedures Act at 1, *D.C. v. Marriott International, Inc.* (D.C. Super. Ct. July 9, 2019), https://perma.cc/FM2K-Q9FJ.

[17] *See* Amended Complaint for Injunction and Other Relief at 4, *Nebraska v. Hilton Dopco., Inc*., No. CI 19-2366 (Lancaster Cty. Neb., July 24, 2019), https://perma.cc/Q8SX- ZQ5S.

[18] *See* Press Release, City Att'y of S.F., Herrera Sues JustFly and FlightHub Over Hidden Fees and Other Predatory Scams (Sept. 19, 2019), https://www.sfcityattorney.org/2019/09/19/herrera-sues-justfly-and-flighthub-over-hidden -fees-and-other-predatory-scams/.

emphasized that consumers deserve honest pricing, and asserted that JustFly is "in the hidden fee business."[19]

In addition to litigation, some regulatory action has already been taken at the federal and state levels with respect to drip pricing. At the federal level, the FTC can look to the Department of Transportation's 2011 "full fare" regulation as a potential model for rulemaking. The DOT rule provides that "any advertising or solicitation" will be considered "an unfair and deceptive practice [] unless the price stated is the entire price to be paid by the customer."[20] At the state level, the Commission can examine a Connecticut law which requires any advertisement for an in-state event to conspicuously disclose "the total price for each ticket and what portion of each ticket price, stated in a dollar amount, represents a service charge."[21] While laudable, these geographically- and sectorally-limited policies are not a substitute for comprehensive, nationwide regulation of drip pricing.

ARGUMENT

I. Drip Pricing Harms Consumers and Undermines Competition.

In her opening remarks at the FTC's aforementioned 2019 workshop on online ticket sales, Commissioner Rebecca Slaughter recounted her personal frustration from a drip-pricing encounter while purchasing tickets for a comedy show:

> I wanted to go see a comedian's set downtown. I looked up the tickets, coordinated times with my husband and others, identified a babysitter, made sure we could budget for the expense, and went through the online booking process. When I got

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[19] *Id*.

[20] 14 C.F.R. § 399.84(a). In full, the subsection reads: "The Department considers any advertising or solicitation by a direct air carrier, indirect air carrier, an agent of either, or a ticket agent, for passenger air transportation, a tour (i.e., a combination of air transportation and ground or cruise accommodations) or tour component (e.g., a hotel stay) that must be purchased with air transportation that states a price for such air transportation, tour, or tour component to be an unfair and deceptive practice in violation of 49 U.S.C. [§] 41712, unless the price stated is the entire price to be paid by the customer to the carrier, or agent, for such air transportation, tour, or tour component."). The FAA enacted this provision as part of a broader suite of consumer protections in Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110 (Apr. 25, 2011).

[21] CONN. GEN. STAT. § 53-289a.

> to the final purchase screen, I did a double take—the all-in price was almost a third more than the listed price for the tickets I had selected. At that point, I was committed, so I grudgingly clicked purchase. … I honestly did feel deceived.[22]

Commissioner Slaughter rightfully felt deceived, and many other consumers can relate to her frustration. In fact, thousands of concerned consumers sent letters to the FTC in response to the Commission's call for comment ahead of that workshop.[23]

Drip pricing imposes an array of economic harms, including increasing consumer search times and financial cost, and undermining healthy market competition. Starting with search costs, FTC economist Mary Sullivan summarized these costs nicely in an economic analysis of hotel resort fees. She explained: "The literature suggests that separating mandatory resort fees from posted room rates without first disclosing the total price is likely to harm consumers by artificially increasing the search costs and the cognitive costs of finding and booking hotel accommodations."[24] The Government Accountability Office ("GAO") has similarly concluded that disclosing full price information upfront reduces consumer search costs both on the primary market "by informing consumers of the total ticket price early in the process" and "help[ing] consumers decide whether to buy from the ticketer's website or at the box office," and on the secondary market "by helping consumers identify the resale exchange with the best total price."[25]

Drip pricing also imposes increased costs on consumers who complete their transactions, as multiple studies show consumers end up paying more when they face drip pricing.[26] For

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[22] Commissioner Rebecca K. Slaughter, Opening Remarks at an FTC Workshop About Online Ticket Sales 2, FTC (June 11, 2019), transcript available at https://www.ftc.gov/system/files/documents/public_statements/1527238 /slaughter_-_prepared_remarks_ftc_tickets_workshop_6-11-19.pdf. (hereinafter "Commissioner Slaughter's Opening Remarks").

[23] *See id.*

[24] Sullivan, *supra* note 2, at 37.

[25] GAO Report, *supra* note 5, at 42.

[26] *See* Tom Blake et al., *Price Salience and Product Choice* 16, Nat'l Bureau of Econ. Research, Working Paper No. 25186 (2018); Raj Chetty et al., *Salience and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145, 1164 (2009); Steffen Huck & Brian Wallace, *The Impact of Price Frames on Consumer Decision Making: Experimental*

example, a study on StubHub ticket sales showed that consumers who were subject to drip pricing spent 19.5% more than those who were shown the full price upfront.[27] And after documenting the various costs imposed by hotels engaged in drip pricing, moreover, Sullivan concluded that "unless the total price is disclosed up front, separating resort fees from the room rate is unlikely to result in benefits that offset the likely harm to consumers."[28]

Moreover, drip pricing undermines healthy market competition. As the GAO explained, "sellers that do not provide enough or full information on prices through hidden fees could have competitive advantage because they would be perceived as offering lower prices over their competitors that do provide full information showing the price."[29] In particular, a 2016 report by the National Economic Council cautions that "the creation of consumer confusion and wariness around actual prices" resulting from deceptive pricing "may make consumers disbelieve advertised prices, making it harder for the genuine price-cutter to attract consumers."[30] Absent an FTC rule prohibiting drip pricing, competitors remain stuck in a prisoner's dilemma.[31] As the GAO observed: "Three secondary ticket sellers told us they might support a requirement to provide all-in pricing, but only if it was required of all ticket sellers."[32]

Two years ago, Commissioner Slaughter warned ticket sellers that "if industry doesn't step up to address this problem with its own collective solution . . . the government must explore

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Evidence 2 (2015), https://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf; Alexander Rasch et al., *Drip Pricing and its Regulation: Experimental Evidence*, 176 J. ECON. BEHAV. & ORG. 353, 362–63 (2020).

[27] Blake et al., *supra* note 26, at 16. A follow-up study on StubHub, forthcoming in Marketing Science, confirms this finding, and in fact finds an even greater disparity of 21%. Morgan Foy, Berkley Haas, *Buyer Beware: Massive Experiment Shows Why Ticket Sellers Hit You With Last-Second Fees* (Feb. 9, 2021), https://newsroom.haas.berkeley.edu/research/buyer-beware-massive-experiment-shows-why-ticket-sellers-hit-you-with-hidden-fees-drip-pricing/.

[28] Sullivan, *supra* note 2, at 37.

[29] GAO Report, *supra* note 5, at 42.

[30] The Competition Initiative, *supra* note 6, at 9.

[31] Commissioner Slaughter's Opening Remarks, *supra* note 22, at 4.

[32] GAO Report, *supra* note 5, at 44.

a law-enforcement or regulatory solution."[33] Two years later, ticket sellers have not ceased drip pricing of their own accord. Drip pricing continues to impose costs upon consumers and undermine market competition. Thus, an FTC rule banning drip pricing is warranted.

II. Drip Pricing Falls Squarely Within the FTC's Authority to Regulate Deceptive, Unfair, and Anticompetitive Trade Practices.

Under the Federal Trade Commission Act ("FTCA"), the FTC is the primary government agency entrusted with preventing deceptive and unfair trade practices and, along with the Justice Department, unfair methods of competition.[34] The FTC envisions a "vibrant economy characterized by vigorous competition and consumer access to accurate information."[35] To achieve that vision, the Commission should take action to regulate drip pricing. It has three distinct sources of authority for doing so: Drip pricing is deceptive, unfair to consumers, and an unfair method of competition under Section 5 of the FTCA.[36]

A. Drip Pricing Constitutes a Deceptive Practice Within the Meaning of Section 5 of the FTCA.

To justify a Section 5(a) deceptive practices rule, the FTC must make three findings: "(1) there is a representation, omission, or practice that," (2) "is likely to mislead consumers acting reasonably under the circumstances," and (3) "the representation, omission, or practice is material."[37] As detailed below, drip pricing easily satisfies each of these elements.

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[33] Commissioner Slaughter's Opening Remarks, *supra* note 22, at 4.

[34] *See* 15 U.S.C. § 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.").

[35] About The FTC, *supra* note 8.

[36] *See* 15 U.S.C. § 45(a).

[37] *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (internal quotation marks and citation omitted). The FTC summarizes this standard in a similar way: "[C]ertain elements undergird all deception cases. First, there must be a representation, omission, or practice that is likely to mislead the consumer .... Second, we examine the practice from the perspective of a [reasonable] consumer ... Third, the representation, omission, or practice must be a material one ... likely to affect the consumer's conduct or decision with regard to a product or service[.]" FED. TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION (1983) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984)), http://ftc.gov/bcp/policystmt/ad-decept.htm (hereinafter "Deception Policy Statement").

i. Drip Pricing Involves Incomplete Representations and Meaningful Omissions.

Drip pricing meets the first element required to invoke the FTC's authority to regulate deceptive practices, as it involves incomplete representations and meaningful omissions.

Imagine an online ticket seller advertises theater tickets for $200, but when a consumer clicks through a few pages and proceeds to enter payment information, the consumer sees the price total is now $250 due to a $50 processing fee. The initial $200 listing is an incomplete representation because it does not reflect a genuine offer to complete the transaction. The $50 processing fee is a meaningful omission of information that would have allowed consumers to more effectively vet ticket prices and avoid psychological biases that might push them towards transactions on unfavorable terms. Along these lines, the FTC's 2012 warning letter to 22 hotel operators identified how drip pricing involves notable omissions that make the initial price presented incomplete and misleading.[38]

ii. Drip Pricing Is Likely To Mislead Consumers Acting Reasonably Under the Circumstances.

By advertising an incomplete price for the relevant service or product, drip pricing schemes are likely to mislead consumers who are acting reasonably under the circumstances. In interpreting this prong of the deceptive-practices test, courts have instructed the FTC to consider the "net impression"[39] that an advertisement or solicitation is likely to give to "the average member of the public."[40] Furthermore, the FTC can construe ambiguous statements against the

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[38] Warning Letter, Fed. Trade Comm'n (Nov. 2012), https://www.ftc.gov/sites/default /files/attachments/press-releases/ftc-warns-hotel-operators-price-quotes-exclude-resort-fees-other-mandatory-surcharges-may-be/121128hoteloperatorsletter.pdf (hereinafter "Warning Letter"). *See also supra* note 12 and accompanying text.

[39] *FTC v. Cyberspace.com LLC,* 452 F.3d 1196, 1200 (9th Cir. 2006) ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures.").

[40] *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952, 954 (2d Cir. 1960) ("[A]dvertisements are not to be judged by their effect upon the scientific or legal mind which will dissect and analyze each phrase but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a quick

sophisticated seller.[41] Notably, in evaluating this effect, seller intent is not relevant: "The deception need not be made with intent to deceive; it is enough that the representations or practices were likely to mislead consumers acting reasonably."[42]

In its Enforcement Policy Statement on Deceptively Formatted Advertisements published in 2003, the FTC identified "Misleading Door Openers" as one of three key deceptive advertising formats that it would seek to address.[43] Drip pricing fits squarely into this category of practices that is likely to mislead reasonable consumers. In particular, the Commission's general proposition—"when the first contact between the seller and a buyer occurs through a deceptive practice, the law may be violated, even if the truth is subsequently made known to the purchaser"[44]—perfectly describes drip pricing. Sellers that apply drip pricing use an initial "deal" price as a "door opener" to lure in consumers who subsequently invest time and energy into a purchasing decision that ends up costing more than initially advertised.

The FTC's enforcement history against misleading door openers includes: (1) prohibiting the practice of door-to-door salespersons posing as surveyors engaged in advertising research while they actually sought to sell encyclopedias;[45] (2) enforcing the Telemarketing Sales Rule

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glance at the most legible words."); *Feil v. FTC*, 285 F.2d 879, 897 (9th Cir. 1960) ("In applying these principles the courts have, ever since the enactment of the Federal Trade Commission Act, sustained orders which sought to limit the use of language which, although seemingly innocuous to the expert was likely to deceive the unlearned and gullible.")

[41] *See Country Tweeds, Inc. v. FTC*, 326 F.2d 144, 148 (2d Cir. 1964) ("Statements susceptible of both a misleading and a truthful interpretation will be construed against the advertiser.") (referencing the Supreme Court's decision in *United States v. Ninety-Five Barrels of Vinegar*, 265 U.S. 438, 443 (1924) in which the Court noted the Food and Drugs Act's aim of preventing deception should guide courts to find the prohibition applies to phrases which are "ambiguous and liable" to mislead).

[42] *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006).

[43] FED. TRADE COMM'N, FTC ENFORCEMENT POLICY STATEMENT ON DECEPTIVELY FORMATTED ADVERTISEMENTS 7 (2015), https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf (hereinafter "Deception Enforcement Statement").

[44] Deception Policy Statement, *supra* note 37, at 4.

[45] *See Encyc. Britannica, Inc.*, 87 F.T.C. 421, 495-97, 531 (1976), *aff'd*, 605 F.2d 964 (7th Cir. 1979), *as modified*, 100 F.T.C. 500 (1982).

against telemarketers "who misrepresented that calls were from, or made on behalf of, companies with which consumers had done business, such as banks and credit card companies";[46] (3) prohibiting a rental car company from using the trade name "Dollar-a-Day" to lure customers in for business at higher prices;[47] and (4) disciplining a debt-negotiation company for soliciting customer agreements with a misleading introductory promise that it settles all client debt for 40–60% of the amount owed.[48]

FTC action against drip pricing would be consistent with the Commission's prior enforcement actions and enforcement principle that deceptive introductions permanently taint sales solicitations even if a seller subsequently reveals the truth to the purchaser. For instance, an incomplete introductory hotel room price is largely comparable to a rental car company calling itself "Dollar-a-Day," as both attract consumer attention based on the suggestion of a lower price than is actually being offered.

iii. The Misleading Representations and Omissions Are Material.

The misleading price representations and omitted fees in drip-pricing schemes are material and thus actionable under the FTCA. The 2003 Enforcement Policy Statement defined a misleading representation as material if it "is likely to affect consumers' choices or conduct regarding the advertised product or the advertisement, such as by leading consumers to give greater credence to advertising claims or to interact with advertising with which they otherwise would not have interacted."[49] Furthermore, "the omission of material information, even if an advertisement does not contain falsehoods, may cause the advertisement to violate section 5."[50]

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[46] Deception Enforcement Statement, *supra* note 43, at 8 & n.29 (collecting examples of enforcement actions).

[47] *See Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).

[48] *See FTC v. Connelly*, 2006 U.S. Dist. LEXIS 98263, at *49 (C.D. Cal. Dec. 20, 2006).

[49] Deception Enforcement Statement, *supra* note 43, at 10.

[50] *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988) (citing *Sterling Drug, Inc. v. FTC,* 741 F.2d 1146, 1154 (9th Cir. 1984); *Katherine Gibbs School v. FTC,* 612 F.2d 658, 665 (2d Cir. 1979)).

A product's true price undoubtedly meets this standard, as a reasonable consumer would be concerned with a product or service's true price. Indeed, one recent study found that cost is "the most influential decision driver, with nearly half of the respondents [in the survey] considering it as one of the top three factors for selecting a product or service."[51] The FTC has recognized product price as an example of a material term,[52] and as noted above, the agency has successfully pursued enforcement action in cases in which price was misrepresented at the outset, such as against Dollar-a-Day.[53]

Because drip pricing involves material representations and omissions that mislead reasonable consumers, the FTC should issue a rule banning drip pricing under its authority to regulate deceptive practices.

B. Drip Pricing Constitutes an Unfair Practice Within the Meaning of Section 5 of the FTCA.

The FTC also has the authority to regulate drip pricing as an unfair act or practice under Section 5(a) of the FTCA.[54] Congress specified when an act or practice should be considered unfair in Section 5(n),[55] which was enacted in 1994 to codify the FTC's 1980 Policy Statement on Unfairness.[56] Under Section 5(n), an act or practice is unfair if it (1) "causes or is likely to cause substantial injury to consumers," (2) "which is not reasonably avoidable by consumers themselves," and is (3) "not outweighed by countervailing benefits to consumers or to

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[51] Indika Jayasinghe, *Consumer Decision Making Criteria and the Importance of Price*, MEDIUM (Oct. 24, 2016), https://medium.com/stax-insights/consumer-decision-making-criteria-and-the-importance-of-price-1783d5589a8e.
[52] Deception Policy Statement, *supra* note 37, at 5.
[53] *See supra* note 47 and accompanying text.
[54] 15 U.S.C. § 45(a)(2).
[55] *Id*. § 45(n).
[56] FED. TRADE COMM'N, POLICY STATEMENT ON UNFAIRNESS (Dec. 17, 1980), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness (hereinafter "Policy Statement on Unfairness"); S. Rep. No. 103-130, at 12 (1993).

competition."[57] Courts have declined to apply additional factors, finding that these three elements are sufficient for a finding of unfairness.[58] Drip pricing meets all three prongs of the unfairness test and accordingly constitutes an unfair practice under Section 5(a) of the FTCA.

i. Drip Pricing Causes Substantial Injuries to Consumers.

Drip pricing meets the first requirement of unfairness, as the added monetary costs and search costs significantly injure consumers. The FTC's 1980 Policy Statement on Unfairness states that often, but not always, substantial injury comes in the form of monetary harm.[59] Courts have found that non-financial harms, like investment of time, can also constitute a substantial injury.[60] Consumers who face drip pricing are harmed by both monetary costs and search costs, as drip pricing causes consumers to spend more money and time buying goods and services than they would under a more transparent pricing system.

With regard to monetary costs, a study conducted by StubHub found that consumers who were subject to drip pricing on its website spent 19.52% more than consumers who were shown the full price upfront.[61] This increased spending came from both a higher transaction rate (14.1%) as well as an increase in the per-seat price of the tickets purchased (5.42%). Similarly, a study by Chetty et al. (2009) found that alcohol purchasing decisions were far more sensitive to a price increase when that increase was reflected in the product's displayed price than when the additional cost was revealed at the register.[62] These studies show that drip pricing causes

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[57] 15 U.S.C. § 45(n).
[58] *See, e.g.*, *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 U.S. Dist. LEXIS 55569, at *12-13 (W.D. Wash. Apr. 26, 2016).
[59] Policy Statement on Unfairness, *supra* note 56.
[60] *Amazon*, 2016 U.S. Dist. LEXIS 55569, at *17; *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010).
[61] Blake et al., *supra* note 26, at 16.
[62] Chetty et al., *supra* note 26, at 1164. This study found that consumers had a price elasticity of .84 when facing a salient tax increase in the form of an excise tax, but a much smaller price elasticity (.05) for a sales tax that was revealed at the register. The excise tax functions similarly to a transparent price, whereas the sales tax functions similar to an undisclosed fee and is thus relevant to the question of whether drip pricing harms consumers by leading

consumers to engage in transactions that they would forgo if made aware of the full price upfront. Consumers thus bear a monetary cost when faced with drip pricing. And these monetary injuries are substantial, in both relative and absolute terms. As mentioned, StubHub consumers increased their spending by nearly 20% when faced with drip pricing.[63] In addition, an experiment by Huck and Wallace (2015) found that drip pricing reduced consumer surplus by 22%.[64] And in 2017, the hotel industry made $2.7 billion on resort fees.[65] Not only can drip pricing lead to large harms to individual consumers, but also in the aggregate it leads to very large monetary injuries.

Drip pricing also imposes search costs on consumers, who, in order to make accurate price comparisons across vendors, must spend time looking past the advertised price in order to find the true price. In *FTC v. Amazon*, a federal district court found that time spent seeking a refund on an in-app purchase constituted injury to Amazon's customers.[66] Similarly in the case of drip pricing, consumers who spend time searching for full prices suffer an injury. Given the prevalence of drip pricing, consumers' aggregated search times add up to a substantial injury.

ii. The Consumer Harm from Drip Pricing Is Not Reasonably Avoidable.

Drip pricing also meets the second prong of the unfairness test, as consumers cannot reasonably avoid the injury imposed.[67] When faced with drip pricing, consumers must choose to either incur search costs or make a decision with incomplete information. Additionally,

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them to spend more on products than they otherwise would. We do not, however, request that the FTC's drip pricing ban extend to sales taxes.

[63] Blake et al., *supra* note 26, at 16.

[64] Huck & Wallace, *supra* note 26, at 2.

[65] Shelle Santana et al., *Consumer Reactions to Drip Pricing*, 39 MARKETING SCI. 188, 189 (2020).

[66] *Amazon*, 2016 U.S. Dist. LEXIS 55569, at *17.

[67] *See Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) (outlining standard).

consumers confronted with drip pricing fall victim to heuristics and biases that lead them to engage in transactions that they would forgo if fully informed at the outset.

A consumer cannot reasonably avoid incurring search costs when making a purchase if the consumer intends to make an informed decision. For example, by separating the rate of the room from the resort fee, hotels necessarily force the consumer into suffering an injury: either the consumer must spend additional time searching for full pricing information to engage in comparison shopping, or must make an uninformed decision.[68] Therefore, consumers confronted with drip pricing cannot reasonably avoid injury altogether.

This line of reasoning is supported by case law. For example, in *FTC v. Amazon,* Amazon claimed that consumers could reasonably avoid an injury from in-app purchases by seeking a refund. The U.S. Court for the Western District of Washington rejected this claim, finding that the time that consumers spent seeking the refund constituted an injury in and of itself.[69] Just as Amazon's claim that consumers could reasonably avoid an injury by taking on another injury failed, so too does the argument that consumers can avoid uninformed decisions by incurring search costs.[70]

In addition to being unable to reasonably avoid the search costs caused by drip pricing, consumers also cannot reasonably avoid the harm of spending more on drip-priced products and services than they would on transparently-priced equivalents, due to biases and heuristics. Studies show that buyers alter their decisionmaking when prices are revealed late in the buying

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[68] Sullivan, *supra* note 2, at 4.

[69] *Amazon*, 2016 U.S. Dist. LEXIS 55569, at *21.

[70] A few cases involving drip pricing have ruled in favor of the seller on the grounds that the injuries can be reasonably avoided. *See Washington v. Hyatt Hotels Corp.*, No. 1:19-cv-04724, 2020 U.S. Dist. LEXIS 101118 (N.D. Ill. June 9, 2020); *Batson v. Live Nation Entm't, Inc.*, 746 F.3d 827 (7th Cir. 2014). However, these cases are applying Illinois state law rather than federal law and are thus not controlling. *Cooks v. Hertz Corp.,* 2016 U.S. Dist. LEXIS 73307, at *22-23 (S.D. Ill. Apr. 29, 2016) additionally distinguishes *Batson,* and interprets Illinois law to potentially disallow drip pricing in the context of rental cars.

process compared to when the full price is advertised upfront. Even consumers with experience navigating drip-pricing schemes end up spending more under them. For example, the Chetty et al. (2009) study found that advertising the full price upfront, as opposed to revealing an additional fee at the register, decreased demand by 7.6%.[71] The study observed this effect even though most consumers were aware of the fee when surveyed—indeed, in that survey the additional fee was the government sales tax, which had long been imposed in the jurisdiction.[72]

Consumers act this way in large part because drip pricing exploits common cognitive biases and heuristics, leading consumers to make decisions that they otherwise would not make if provided full pricing information upfront. Several theories exist as to why consumers act differently when the full price is not revealed until late in the purchasing process. The leading theory involves the anchoring and adjustment heuristic, which posits that buyers anchor or attach themselves to the base price and insufficiently adjust to the new price.[73] This causes consumers to underestimate the total price.

A second theory involves the endowment effect, the human tendency to overvalue what one already has. (The endowment effect is, in turn, a function of loss aversion—the preference to forgo a gain rather than experience a loss.)[74] When consumers start to purchase a product or service, they experience a shift in their reference point, and discarding the product or service by

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[71] Chetty et al., *supra* note 26, at 1159.

[72] *Id.* at 1165 (finding that 75% of those surveyed answered within 0.5% of the true tax rate of 7.375%, and 97% answered within 6.75% and 8.75%); *see also* Rasch et al., *supra* note 26, at 367 (finding that consumers not aware of the magnitude of the hidden fee made non-optimal decisions 21% of the time as opposed to 13% for those that were aware of the magnitude of the hidden fee). As previously stated, we do not ask that the FTC apply the proposed drip-pricing regulation to sales taxes.

[73] Gorkan Ahmetoglu et al., *Pricing Practices: A Critical Review of Their Effects on Consumer Perceptions and Behaviour*, 21 J. RETAILING & CONS. SERVS. 696, 697 (2014); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974).

[74] Huck & Wallace, *supra* note 26*,* at 32 ("[T]he data suggest that consumers who see a low base price and do not yet know that the effective price will go up through 'shipping and handling' charges experience an increase in their willingness to pay for the good which is in line with loss aversion and the so-called endowment effect.").

not completing the transaction is perceived as a loss.[75] In order to avoid that loss, consumers may be willing to pay a higher price than they would have just moments earlier, if they had been informed of the full price before mentally investing in the purchase.[76]

Consumers also may be susceptible to the sunk-cost fallacy, which counsels that individuals may irrationally continue on an endeavor because they have already invested time, effort, or money and do not want that investment to be wasted.[77] With regard to drip pricing, consumers invest time and effort into finding the full price and engaging in the transaction.

Whether the cause of consumers' purchasing decisions is a result of the anchoring heuristic, the endowment effect, the sunk cost fallacy, or a combination of these biases and heuristics, the result is the same: Consumers do not possess the ability to reasonably avoid the harm brought about by drip pricing. These biases and heuristics affect many people, not just a few unsophisticated consumers. Tversky and Kahneman state that "reliance on heuristics and the prevalence of biases are not restricted to laymen" but in fact "[e]xperienced researchers are also prone to the same biases."[78] If experienced researchers can fall victim to these biases, the average consumer cannot be expected to avoid the harms caused by drip pricing.

The FTC has acknowledged that certain sales techniques can prevent consumers "from effectively making their own decisions," and at that point "corrective action may then become necessary."[79] This corrective action is brought in order to prevent seller behavior that "takes advantage of an obstacle to the free exercise of consumer decisionmaking."[80] For example, the

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[75] *Id*.
[76] *See id.* ("This loss can be avoided by purchasing the product despite an increased price.").
[77] Friedman, *supra* note 3, at 55 n.13.
[78] Tversky & Kahneman*, supra* note 73, 1130.
[79] Policy Statement on Unfairness, *supra* note 56.
[80] *Id*.

FTC Policy Statement on Unfairness imagines a situation in which a seller withholds price data from the consumer, making it more difficult for the consumer to make an informed decision.[81]

Drip pricing is exactly the sort of practice contemplated by the Commission in that Policy Statement, as the seller withholds price information until the end of the purchasing process and consumers are thus required to choose between incurring search costs or making uninformed decisions. Additionally, drip pricing takes advantage of consumers' biases and heuristics that prevent them from making optimal decisions. Accordingly, consumers cannot reasonably avoid injuries caused by drip pricing.

iii. Those Substantial Injuries Are Not Offset by Countervailing Benefits.

The last prong of the unfairness test requires the FTC to conclude that the injuries caused by a practice "are not outweighed by countervailing benefits to consumers or to competition."[82] Where the practice in question generates *no* such benefits, this test is easily satisfied.[83] Such is the case with drip pricing.

As detailed above, consumers face substantial monetary and search costs as a result of drip pricing. In exchange for these increased costs, consumers receive nothing of value. To the contrary, Huck and Wallace's study found that consumer surplus decreased by 22% when consumers were faced with drip pricing.[84] Furthermore, a study by Rasch et al. found that drip pricing leads to higher prices in the market as a whole, inflicting monetary harm upon consumers without any corresponding product or service benefit.[85]

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[81] *Id.* ("Sellers may adopt a number of practices that unjustifiably hinder . . . free market decisions. Some may withhold or fail to generate critical price or performance data, for example, leaving buyers with insufficient information for informed comparisons.").

[82] 15 U.S.C. § 45(n).

[83] *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000).

[84] Huck & Wallace, *supra* note 26*,* at 2.

[85] Rasch et al., *supra* note 26, at 363.

In the specific area of hotel resort fees, hotels have argued that drip pricing allows them to bundle their services, leading to cheaper prices for consumers.[86] But this argument is unresponsive to criticisms of drip pricing: While bundling may reduce the price of certain services, withholding those prices from consumers using drip pricing does not.[87] This is analogous to the FTC's decision in *Orkin Exterminating Company, Inc.*, in which a company breached its contract that stated that it would not increase its annual fee. The FTC found that since the increase in the annual fee was not accompanied by an increase in the level or quality of the service, there was no benefit to the consumer.[88] Similarly with hotels, withholding the bundled price until late in the buying process instead of including it in the advertised price is not accompanied by any increase in service, and thus does not benefit the consumer.

Similarly, drip pricing does not have beneficial competitive effects and in fact decreases competition, as discussed further below. As drip pricing meets all three prongs of the unfairness test, the FTC should exercise its authority to regulate drip pricing as an unfair trade practice.

C. Drip Pricing Is an Unfair Method of Competition Within the Meaning of Section 5 of the FTCA.

Finally, the FTC can support drip-pricing regulations under its authority to address unfair methods of competition.[89]

When analyzing the FTC's power to proscribe unfair methods of competition, the Supreme Court has held that the Commission can consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust law."[90] Likewise, the FTC has recognized that Section 5 "does not limit unfair methods of competition to practices that violate

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[86] Sullivan, *supra* note 2, at 31.
[87] *Id.* at 32.
[88] *Orkin Exterminating Company*, *Inc*., 108 F.T.C. 263, 364 (Dec. 15, 1986), *aff'd*, 849 F.2d 1354 (11th Cir. 1998).
[89] *See* 15 U.S.C. § 45(a).
[90] *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

other antitrust laws," but instead encompasses a broad range of anticompetitive conduct.[91] This power is known as the Commission's "standalone" Section 5 authority.

Moreover, the FTCA amendments that made unfair or deceptive acts or practices in commerce unlawful were "not intended to modify [the] previous provision [declaring] 'unfair methods of competition in commerce' unlawful, but rather enlarged the scope of [the] Commissions' jurisdiction."[92] This power was recently reaffirmed in a 2019 joint statement by FTC Commissioners Rebecca Slaughter and Rohit Chopra.[93]

Although the Supreme Court has not set clear bounds on the standalone power, it has provided some guidance on the scope of this authority. In particular, the Court explained that under Section 5's prohibition on unfair methods of competition, a seller "may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their

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[91] Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf. *See also* Transcript of Fed. Trade Comm'n Workshop, Section 5 of the FTC Act as a Competition Statute 137 (Oct. 17, 2008), *available at* http://www.ftc.gov/bc/workshops/section5/transcript.pdf (Commissioner J. Thomas Rosch) ("[*Sperry & Hutchinson]*, in my judgment, is alive and well, notwithstanding the trilogy of appellate cases decided in the early '80s, that rejected the Commission's decisions challenging conduct as unfair methods of competition under Section 5."); *id.* at 208 (Commissioner Jon Leibowitz) (discussing Supreme Court precedents and concluding "that the FTC Act goes well beyond the metes and bounds of the Sherman Act").

[92] *Fresh Grown Preserve Corp. v. FTC*, 125 F.2d 917, 919 (2d Cir. 1942).

[93] *See* Commissioner Rohit Chopra & Commissioner Rebecca K. Slaughter, Statement on the Federal Trade Commission Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes 4, (June 24, 2019), transcript available at https://perma.cc/YEM5-Y277. While admittedly the FTC rarely has invoked its competition rulemaking power, the power remains available to it. *See id.* at 4 (recognizing FTC's authority to define unfair methods of competition through rulemaking). An example of a prior use of this power involves the Discriminatory Practices in Men's and Boys' Tailored Clothing Industry Rule which was issued under the Clayton Act in 1967. 32 Fed. Reg. 15,584, 15,585 (Nov. 9, 1967). Although the notice of proposed rulemaking and final rule notice did not specifically reference the Commission's distinct authorities, the Commission explicitly based its 1994 rescission of the rule in its unfair methods of competition rulemaking power: "This authority permits the Commission to promulgate, modify and repeal rules that define methods of competition that are unfair within the meaning of section 5(a)(1) of the FTC Act, including methods of competition." 58 Fed. Reg. 35,907, 35,907 (July 2, 1993); *see also* 59 Fed. Reg. 8527, 8527–28 (Feb. 23, 1994); 32 Fed. Reg. 15,584, 15,584–85 (Nov. 9, 1967); 31 Fed. Reg. 14,416, 14,416 (Nov. 9, 1966). This power was similarly pertinent to the FTC's solicitation of public comments on a potential rule regulating oil pipelines and petroleum industry vertical integration; the request for public comment exclusively cited the agency's Section 6(g) rulemaking authority governing unfair methods of competition. *See* 44 Fed. Reg. 35,237–38 (June 19, 1979).

trade."[94] This aptly describes drip pricing, which involves the dishonest practice of omitting critical pricing information and causes sellers that do not engage in the practice to risk losing market share to competitors that do. The GAO described this problem in its report on event ticket sales:

> In 2014, the largest secondary market ticketing company began using all-in pricing, with its listings displaying a single total price that incorporated fees. However, the company soon discontinued all-in pricing as the default because, it told us, it put the company at a competitive disadvantage with other secondary market providers whose fees were not included in the initial ticket price displayed to consumers.[95]

Law professor David Friedman, a consumer trade practices expert, contends that this competitive disadvantage materializes because parties that attempt to abandon drip pricing "would still compete with [others that] successfully manipulate the consumers' anchoring bias around the lower base rate."[96]

Notably, the Supreme Court has emphasized that the Commission does not need to show that an act or practice would impose losses upon a specific company to fall within the FTC's authority over unfair methods of competition, as the Commission "is also authorized to infer that trade will be diverted from competitors that do not engage in such unfair methods."[97] As Amelia Fletcher, the Non-Executive Director of the United Kingdom's Competition and Markets Authority,[98] explained at the FTC's 2012 conference, drip pricing diverts market share from sellers that decline to engage in it. Fletcher noted that when the United Kingdom instituted a rule

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[94] *FTC v. R.F. Keppel & Bro*, 291 U.S. 304, 313 (1934).

[95] GAO Report, *supra* note 5, at 44–45.

[96] Friedman, *supra* note 3, at 65–66. *See also* Commissioner Slaughter's Opening Remarks, *supra* note 22, at 4.

[97] *FTC v. Raladam Co.*, 316 U.S. 149, 152 (1942) (internal quotation marks and citation omitted); *see also Dr. W.B. Caldwell, Inc. v. FTC*, 111 F.2d 889, 891 (7th Cir. 1940) ("[T]rade is diverted from the producer of truthfully marked goods."); *E. Griffiths Hughes, Inc. v. FTC*, 77 F.2d 886, 888 (2d Cir. 1935) ("Selling by the use of false and misleading statements necessarily injures or tends to injure petitioner's competitors.").

[98] A non-ministerial government department in the United Kingdom, responsible for strengthening business competition and preventing and reducing anti-competitive activities.

banning drip pricing among airlines without providing a specific implementation deadline, "[t]he first airline to implement actually said afterwards that it lost five percent of consumer traffic to its website while it waited for the other companies to comply."[99] This anecdote aligns with a key finding from a study conducted by the UK Office of Fair Trading: "Because consumers focus on the headline price and choose a trader based on the cheapest advertised price, traders which include all the compulsory components in the headline price will be at a competitive disadvantage compared with traders that leave out compulsory charges."[100]

Furthermore, the FTC need not show the "practice it condemns has totally eliminated competition in the relevant market," as it is sufficient for the Commission to find the "practice in question unfairly burdened competition for a not insignificant volume of commerce."[101] The Commission can point to the numerous consumer complaints made to the Commission,[102] the lawsuits filed by state attorneys general to halt drip-pricing practices,[103] and a first-hand survey of internet price listings,[104] among other authorities, to support the claim that drip pricing impacts more than an insignificant volume of commerce.

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[99] Amelia Fletcher, Chief Economist for the U.K. Office of Fair Trading, *Drip Pricing: U.K. Experience*, Address at the Federal Trade Commission Workshop 64 (May 21, 2012), https://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/transcript.pdf.

[100] U.K. Office of Fair Trading, *Advertising of Prices* 25 (2010), https://webarchive.nationalarchives.gov.uk/20140402173016/http://oft.gov.uk/shared_oft/market-studies/AoP/OFT1291.pdf.

[101] *FTC v. Texaco, Inc.*, 393 U.S. 223, 230 (1968).

[102] Warning Letter, *supra* note 38, at 1 ("Consumers complained that they did not know that they would be required to pay resort fees in addition to the quoted hotel room rate. Several stated that they only learned of the fees after they arrived at the hotel, long after making a reservation at what they believed to be the total room price. Others paid for the reservation in advance, and only found out after they arrived at the hotel that they would have to pay additional mandatory fees.").

[103] *See supra* notes 16–18 and accompanying text.

[104] Warning Letter, *supra* note 38, at 1 ("FTC staff has reviewed a number of online hotel reservation sites, and has confirmed that some hotels exclude resort fees from the quoted reservation price.").

COST-BENEFIT ANALYSIS

This final section offers advice to the Commission on how to conduct a cost-benefit analysis for this rule, including what categories of benefits and costs to include. A strong cost-benefit analysis can both help inform the Commission's rulemaking and provide support to the Commission in defending the regulation against legal challenge. While a reasonable analysis will very likely show that the benefits of this proposal far outweigh the costs,[105] the Commission should nonetheless be careful to conduct its analysis appropriately and avoid common pitfalls.

The FTC must assess the "economic effect of [any] rule" regulating unfair or deceptive acts or practices,[106] and, for unfair practices specifically, must determine that the benefits of the regulation are "not outweighed by countervailing benefits to consumers or to competition."[107] These requirements largely mirror the mandates of rational decisionmaking imposed upon all administrative agencies by executive order and the Administrative Procedure Act.[108] Under Executive Order 12,866, executive agencies are instructed to conduct an assessment of the costs and benefits of all major regulations and to "adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[109] And under the Administrative Procedure Act, agencies typically treat regulatory costs as a "centrally relevant factor when deciding whether to regulate," and weigh regulatory costs and benefits.[110]

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[105] *Cf.* Sullivan, *supra* note 2, at v ("[S]eparating resort fees from the room rate without first disclosing the total price is unlikely to result in benefits that offset the likely harm to consumers.").

[106] 15 U.S.C. § 57a(d)(1)(C).

[107] *Id.* § 45(n).

[108] The FTCA's evidentiary standards require "the same degree of evidentiary support needed to satisfy the arbitrary and capricious standard" under the Administrative Procedure Act. *Consumers Union of U.S., Inc. v. FTC*, 801 F.2d 417, 422 (D.C. Cir. 1986).

[109] Exec. Order No. 12,866 §1(b)(6), 58 Fed. Reg. 51,735 (Oct. 4, 1993). Although Executive Order 12,866 does not directly apply to independent agencies like the FTC, *id.* § 3(b), courts have recognized that independent agencies must rationally assess regulatory costs and benefits. *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1149 (D.C. Cir. 2011) (rejecting rule promulgated by the SEC, another independent agency, due to faulty cost-benefit analysis).

[110] *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015).

While a "formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value" is not required under either the APA[111] or the FTCA,[112] the APA's arbitrary-and-capricious standard imposes certain obligations on the FTC to reasonably assess and weigh beneficial and adverse regulatory impacts. For one, the agency cannot disregard reasonably foreseeable adverse impacts, particularly adverse economic effects that are of central relevance under the FTCA.[113] The Commission should seek to "quantify the certain costs" of the rule to the extent practicable, or else "explain why those costs could not be quantified."[114]

Moreover, agencies must reasonably balance regulatory costs and benefits.[115] In balancing costs and benefits, the FTC should "look beyond the direct benefits and direct costs of [its] rulemaking and consider any important ancillary benefits and countervailing risks" that may result from the rule.[116] And the agency should remember that even if not all impacts can be

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[111] *Id.* at 759 ("We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value.").

[112] *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 986 (D.C. Cir. 1985) (explaining that, under the FTCA, "a highly quantitative benefit/cost analysis may not be appropriate in each and every individual case," as the statute rather requires the FTC to "summarize its best estimate of" the regulation's economic impact) (internal quotation marks omitted).

[113] *Cf. Nat'l Family Farm Coal. v. United States EPA*, 960 F.3d 1120, 1142 (9th Cir. 2020) ("FIFRA requires the EPA to consider, as part of a cost-benefit analysis, any unreasonable risk to man or the environment, *taking into account the economic, social, and environmental costs* and benefits of the use of any pesticide. . . . The EPA entirely failed to acknowledge risks of economic and social costs.") (internal quotation marks and citation omitted).

[114] *Bus. Roundtable*, 647 F.3d at 1149.

[115] *Id.* at 1148–49 (faulting agency for lopsided analysis that "inconsistently and opportunistically frame[s]" regulatory impacts); *see also Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008) (agency cannot "put a thumb on the scale").

[116] Office of Mgmt. & Budget, Circular A-4 on Regulatory Analysis 26 (2003) (hereinafter "Circular A-4"); *see also Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 956 F.2d 321, 326-27 (D.C. Cir. 1992) (remanding fuel-efficiency rule due to the agency's failure to acknowledge indirect safety costs); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1225 (5th Cir. 1991) (striking down a rule banning asbestos for failure to consider the indirect safety effects of substitute, asbestos-free car brakes being less effective); *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1051–52 (D.C. Cir. 1999) (holding that "all identifiable effects" included indirect costs and benefits, and cautioning that "it seems bizarre that a statute [the Clean Air Act] intended to improve human health would . . . lock the agency into looking at only one half of a substance's health effects in determining the maximum level for that substance"), *rev'd on other grounds sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

quantified or monetized, "qualitative and non-monetized" impacts are nonetheless significant and merit close consideration.[117]

Executive guidance from the Office of Management and Budget ("OMB") provides further insights on what regulatory impacts should be considered as benefits and costs. OMB's *Circular A-4* explains that "[b]enefit and cost estimates should reflect real resource use," meaning that regulatory benefits increase "total resources available to society" whereas regulatory costs decrease total societal resources.[118] As OMB explains in additional guidance, "revealed preference studies . . . based on actual market decisions by consumers" provide the best methodology for monetizing regulatory costs and benefits, particularly when "the market participant is well-informed and confronted with a real choice," and properly processes information.[119] Accordingly, studies on how consumers behave when they are well-informed—as opposed to when they are faced with a drip-pricing scheme that delays the provision of critical pricing information—enable the FTC to assess the impacts of a drip-pricing regulation.

On the cost side, likely the most substantial cost of a drip-pricing regulation[120] is the "[p]rivate-sector compliance cost[]" that sellers will incur to modify their solicitations and online ticket portals.[121] Although precise estimates of compliance costs are likely unavailable, the FTC may wish to commission its own study or consult with economists or industry experts on the

[117] Circular A-4, *supra* note 116, at 3; *see also Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) ("The mere fact that the magnitude of [an effect] is *uncertain* is no justification for *disregarding* the effect entirely.").

[118] Circular A-4, *supra* note 116, at 38.

[119] OMB, *Regulatory Impact Analysis: A Primer* 9 (2011), *available at* https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf (hereinafter "Impact Analysis Primer").

[120] While some businesses have argued that drip pricing benefits consumers by reducing the price of bundled services and reducing commission fees to third-party bookers, economic literature does not support these theories, and it is generally believe that drip pricing provides no benefits to consumers. Sullivan, *supra* note 2, at 30–36.

[121] *See id.* at 10 (listing "[p]rivate-sector compliance costs and savings" as a key cost or benefit in many regulatory impact analyses).

issue. The FTC should also be receptive to estimates provided by the regulated community, and amend its projections based on the information received through the notice-and-comment process. And the FTC should transparently disclose the basis for any estimates.[122] Another cost of the rule is the "government administrative cost[]"—that is, the FTC's enforcement cost.[123] For this estimate, the Commission should consider staffing or other enforcement needs, perhaps looking for guidance to its experience with enforcing other regulations.

While disclosure regulations often produce a cost through "the loss of net benefits of any information displaced by the mandated information,"[124] it appears doubtful that such a cost would result here. In this case, the "information" being "displaced" is the incomplete pricing information that sellers provide at the outset of the transaction to lure in the consumer. As discussed above, there is no apparent benefit to either the consumer or the marketplace to providing this incomplete information. Nonetheless, the FTC should consider whether there are any costs due to the information being displaced and, if it concludes that there are not, should explain its conclusion.

On the benefits side, a major expected benefit of this regulation is a decrease in consumer search time.[125] While also difficult to measure with precision, the FTC can make basic assumptions about consumer search times, incorporating any information about the prevalence of drip pricing that it used to estimate compliance costs. As OMB explains, the FTC should

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[122] *See Mayor of Baltimore v. Azar*, 973 F.3d 258, 282 (4th Cir. 2020) (en banc) (vacating regulation as arbitrary and capricious when agency provided "no justification" for compliance-cost estimates and failed to provide any studies supporting those estimates).

[123] Impact Analysis Primer, *supra* note 119, at 10.

[124] Circular A-4, *supra* note 116, at 9.

[125] *See id.* (listing "[g]ains or losses of time" as key benefits or costs); *see also* Sullivan, *supra* note 2, at 4 ("Studies of drip pricing and partitioned pricing suggest that separating mandatory resort fees from posted room rates without first disclosing the total price is likely to harm consumers by increasing the search costs and cognitive costs of finding and choosing hotel accommodations."); *id.* at 26 (summarizing literature finding that "drip pricing increases search costs").

measure time saved "both in terms of hours saved and to the extent feasible, in terms of monetary equivalents" through "a measure of the value of that time."[126] For instance, the FTC can use the average U.S. hourly wage as a proxy for the monetary value of each hour of time saved. Once again, the FTC should be open to refining its projections based on the information received through the notice-and-comment process.

Additionally, a regulation on drip pricing is likely to produce a decrease in inefficient transactions, which the FTC should view as an economic benefit. As OMB explains, both "inadequate or asymmetric information" and "mistakes in information processing" sometimes cause "markets [to] overreact" and cause consumers to purchase goods or services that they in fact (when given adequate information that they can properly process) value less than the sale or production price.[127] As detailed above, for instance, one study found that a drip-pricing scheme caused consumers to increase their transaction rate by 14.1%[128]; thus, it is likely that a prohibition on drip pricing will result in a reduction in consumer purchasing. This should be considered an economic benefit of the rule, as the transactions being forgone are presumptively inefficient transactions, meaning that the consumer values the product less than the seller's marginal cost. The FTC should attempt to quantify this surplus increase to the extent feasible.

Because some of the benefits of a drip-pricing regulation are likely difficult to precisely quantify, the FTC may wish to make use of "break-even analysis" to justify its regulation. In break-even analysis, an agency estimates the costs of the rule (here, as detailed above, the compliance and administrative costs) and then assesses whether the rule's benefits are likely to

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[126] OMB, Regulatory Impact Analysis: Frequently Asked Questions 11 (Feb. 7, 2011), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf.
[127] Circular A-4, *supra* note 116, at 5.
[128] Blake et al., *supra* note 26, at 16.

exceed those costs.[129] A break-even analysis allows the FTC to precisely estimate costs only—which, in this case, appear easier to estimate than benefits—and then consider whether the rule is net-beneficial without fully monetizing the benefits.[130] For instance, the FTC could determine how many consumer-hours would need to be saved for the rule to be net-beneficial. Then, using information or reasonable assumptions about the prevalence of drip pricing and the time lost to engage in comparison shopping, the Commission could determine whether the regulation is likely to produce at least that level of benefit.

Finally, while the FTC should assess and consider the transfer payments likely to result from the regulation, it should keep in mind that those transfers are neither costs nor benefits in the strict economic sense. Transfer payments are "monetary payments from one group to another that do not affect total resources available to society."[131] A key class of transfers likely to result from a regulation on drip pricing is a reduction in certain consumer prices, thereby transferring money from the seller to the buyer.[132] These transfers can be substantial. As discussed above, for instance, the StubHub study found that consumers spent 5.42% more on tickets purchased per seat when faced with drip pricing[133]—although the economic literature is "mixed on whether"

[129] Circular A-4, *supra* note 116, at 2 ("Threshold or 'break-even' analysis answers the question, 'How small could the value of the non-quantified benefits be (or how large would the value of the non-quantified costs need to be) before the rule would yield zero net benefits?' In addition to threshold analysis you should indicate, where possible, which non-quantified effects are most important and why.").

[130] *See Nicopure Labs, LLC v. Food & Drug Admin.*, 266 F. Supp. 3d 360, 406–07 (D.D.C. 2017), *aff'd*, 944 F.3d 267 (D.C. Cir. 2019) (upholding FDA disclosure regulation after agency quantified the rule's costs, determined that the benefits are too "difficult to quantify," assessed unquantified benefits qualitatively, and made a reasoned determination that "the benefits of the final rule justify the costs") (internal quotation marks omitted); *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 235 (2009) (Breyer, J., concurring in part and dissenting in part) (writing approvingly of EPA's ability to "describe environmental benefits in non-monetized terms and to evaluate both costs and benefits in accordance with its expert judgment and scientific knowledge").

[131] Impact Analysis Primer, *supra* note 119, at 8.

[132] *See* Circular A-4, *supra* note 116, at 38 ("A regulation that restricts the supply of a good, causing its price to rise, produces a transfer from buyers to sellers. The net reduction in the total surplus (consumer plus producer) is a real cost to society, but the transfer from buyers to sellers resulting from a higher price is not a real cost since the net reduction automatically accounts for the transfer from buyers to sellers.").

[133] Blake et al., *supra* note 26, at 16.

and to what extent firms "retain . . . the profits from drip-pricing fees."[134] Once again, the FTC should quantify these distributional effects to the extent feasible, and if that is not feasible, should qualitatively assess these impacts.[135] Though neither a cost nor a benefit, this distributional impact can nonetheless help justify a regulation.[136]

In short, a rigorous assessment of regulatory costs and benefits—whether a full cost-benefit analysis or a break-even approach—can provide strong analytical support for any regulation of drip pricing.

CONCLUSION

For the foregoing reasons, Policy Integrity respectfully requests that the Commission initiate rulemaking to ban drip pricing as a deceptive practice, unfair practice, and unfair method of competition.

Respectfully Submitted,

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[134] Sullivan, *supra* note 2, at 28.

[135] Circular A-4, *supra* note 116, at 14 ("Where distributive effects are thought to be important, the effects of various regulatory alternatives should be described quantitatively to the extent possible, including the magnitude, likelihood, and severity of impacts on particular groups.").

[136] *See id.*