

The FTC and CFPB are Coming for “Junk Fees,” but What Does that Really Mean?

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The FTC’s [Advanced Notice of Proposed Rulemaking \(ANPR\)](#) seeking comment on a potential rule prohibiting “junk fees” and related practices hit the Federal Register yesterday. The rule has the potential to fundamentally alter how fees are disclosed in advertising and across the customer experience in nearly every industry that charges some type of fee. Interested parties now have until January 9 to provide comments and feedback on the proposal. The ANPR’s publication follows a series of meetings and announcements by the FTC, CFPB, and President Biden that the [administration was taking actions](#) to prohibit so-called “junk fees” that “can weaken market competition, raise costs for consumers and businesses, and hit the most vulnerable Americans the hardest.”

Prohibiting junk fees may sound uncontroversial in the abstract, but what does it mean in practice? We concentrate here on the FTC’s ANPR given its potential breadth and impact on a host of industries including travel, delivery services and others in the gig economy, restaurants, and e-commerce sites.

What is a “Junk Fee”?

The ANPR uses the term “junk fees” to refer to “unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer, including goods or services that consumers would reasonably assume to be included within the overall advertised price.” According to the FTC, the term includes, but is not limited to “hidden fees,” which are fees disclosed only at a later stage of the customer experience or potentially not at all.

The ANPR references a host of industries that allegedly charge junk fees, such as hotels that charge “resort fees” and online ticket sellers that charge transaction fees. The Commission also cites specific enforcement actions as support for its initial conclusion that junk fees are “prevalent,” [which as we’ve previously discussed](#) is a requisite determination to proceed past the ANPR stage to a proposed rule under the FTC’s Magnuson-Moss Rule authority. Those enforcement actions date back 18+ years and include actions related to mobile cramming, connection and maintenance fees on prepaid phone cards, account fees, resort fees, membership programs, and merchandise fees.

What is the FTC Seeking Comment on?

The ANPR seeks comments on a host of issues related to the prevalence and justification for certain fee and disclosure practices, including:

- ▾ The prevalence of failing to disclose in advertisements or at the initial stages of the customer

experience the total cost for a good or service;

• The prevalence of failing to disclose whether certain fees, interest, charges, or costs are reasonably avoidable and/or mandatory to the consumer;

• The capacity to require “all-in-pricing” in advertisements and at every stage of the customer experience, and whether such “all-in-pricing” should include taxes in addition to fees; and

• The need for a new rule addressing fees and disclosure practices and whether a one-size fits all approach works across industries.

Inherent in many of the FTC’s questions is the premise that fees harm consumers and competition, and that such fees do not serve legitimate business purposes. The ANPR also seems to assume without elaboration that consumers do not reasonably expect fees in certain industries, such that they are necessarily deceived when such fees are not clearly and conspicuously disclosed in advertisements. In addition to the issues specifically identified in the ANPR, these topics would be well-suited for comment prior to the January 9 comment deadline.

Potential Obstacles to a Far-Reaching “Junk Fees” Rule

As we’ve discussed in prior posts (see [here](#) and [here](#)), the FTC’s authority to promulgate rules is limited because it must meet a number of substantive and procedural requirements along the way, including making a finding that the prohibited unfair or deceptive practices are prevalent, explaining how the rule prohibits such prevalent unfair and deceptive practices, and analyzing the economic effect of the rule.

In a dissenting statement, Commissioner Wilson raised both procedural and substantive questions related to the ANPR. While noting her agreement in principle in ensuring that consumers (1) have access to sufficient information to make informed decisions and (2) are not charged for products or services they did not agree to purchase, Commissioner Wilson questioned the need for a rule, particularly one of the potential breadth suggested in the ANPR. Along those lines, the rule is likely to implicate “vast economic and political significance,” which could in turn raise constitutional questions under the Supreme Court’s recent decision in *West Virginia v. EPA*.

Commissioner Wilson also questioned whether a rule was necessary in the first place, given that the FTC has initiated enforcement actions to prevent unfair and deceptive fee practices and is specifically empowered under certain statutes like the Truth in Lending Act and the Restore Online Shoppers’ Confidence Act to obtain civil penalties for violations.

How Does this Relate to the CFPB’s Junk Fees Initiative?

The CFPB – with former FTC Commissioner Rohit Chopra at the helm – has previously led the charge against “junk fees.” Indeed, back in January 2022, the CFPB issued [a request for information](#) on back-end junk fees charged in connection with consumer financial products and services. And last month, the CFPB issued [guidance](#) warning companies that it planned to bring enforcement actions under its unfairness authority where companies charge overdraft and depositor fees that a consumer would not reasonably expect.

But, as recognized in the FTC’s ANPR, the CFPB’s authority is limited to consumer financial products or services. Enter Chair Khan and the FTC’s ANPR, which by its own account is intended to be far-reaching and address fees across a wide array of industries. Time will tell, but it’s possible that the CFPB charted the path for an FTC rule that will ultimately have a much more profound and

widespread effect.