

ALERT

FTC Launches Rulemaking on Fee Disclosures and Practices Across Industries

October 21, 2022

On October 20, 2022, the Federal Trade Commission (FTC) announced the launch of a new rulemaking process to address how fees are charged for goods or services, focusing on potentially “deceptive or unfair” fees that the FTC refers to as “junk fees.” As the first step in the process, the FTC released an Advance Notice of Proposed Rulemaking (ANPR), which asks questions about a number of practices regarding fee disclosures, and suggests that the FTC is considering approaches like “all-in pricing” that would more directly regulate how fees are disclosed in many contexts. The ANPR is broad and focuses on the issue of “junk fees” across the economy as a whole. As such, this proceeding will potentially impact how fees are charged across many industries and sectors, including telecommunications, hospitality, online commerce, and financial services.

Below, we provide additional background and context on the ANPR, and note key next steps and questions on which the FTC is seeking feedback.

The “Junk Fees” ANPR. At the FTC’s October 20, 2022 Open Meeting (which we previewed here), the FTC voted to release the ANPR. The ANPR notes that the FTC has brought many cases alleging that certain fees are deceptive, including cases involving “hidden” fees. However, it more broadly addresses fees characterized as “junk fees,” which it defines as “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.”

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Practice Areas

FTC Regulation

The ANPR discusses fee practices across a number of sectors representing a wide swath of the economy, including telecommunications, hospitality, financial services, online commerce, travel, higher education, live events ticketing, and automobile dealerships, among others. As one example, the ANPR describes what it calls “drip pricing,” which refers to the practice of advertising the base part of a product or service’s price upfront, and then disclosing additional charges later in the purchasing process. The ANPR gives the example of resort fees charged for many hospitality bookings as a form of “drip pricing” it might address if the rulemaking moves forward.

Additionally, the ANPR asks about a number of issues, including:

- The prevalence of practices of not disclosing on advertisements or marketing: total costs of goods or services; the existence of fees, interest charges, or costs; or material restrictions, limitations, or conditions resulting in mandatory charges.
- The prevalence of representing to a consumer that they owe payment for a product or service that they did not agree to purchase or charging consumers for goods and services without their express informed consent.
- The prevalence of termination fees, fees or costs that “consumers would reasonably assume to be included within the overall advertised price” for a product or service, and fees or costs charged without a disclosure regarding the purpose of the charge.
- Whether a rule addressing fee practices should require businesses to disclose in all advertising one price that encompasses all charges, known as “all-in pricing.”
- Whether an “all-in pricing” rule should apply to certain industries, or across all industries.

As noted in the ANPR, the FTC is currently limited in seeking monetary relief for legal violations involving unfair or deceptive fees, under the Supreme Court’s *AMG* decision. However, if the FTC adopts a rule regarding such fees, it can seek monetary relief for violations.

The ANPR was released by a 3-1 vote, with Commissioner Wilson dissenting. In her dissent, Commissioner Wilson suggested a number of additional questions that commenters should address, including:

- What markets or industries could conceivably be covered by an omnibus pricing rule?
- What authority does the FTC have to promulgate a rule that would regulate pricing disclosures across the economy?
- Do pricing practices and fee disclosures vary across industries? How would a clear and conspicuous disclosure requirement work with regards to such fees and charges?
- Does the ANPR overlap with existing FTC rules and guidance?
- Can the FTC meet the statutorily required showing of “prevalence” under Section 18 of the FTC Act without underlying enforcement actions? How?
- Could a potential rule requiring all-in pricing incentivize bundling of goods and services that a consumer may not want or need?

Next Steps. The ANPR is the first step in the rulemaking process. Comments will be due 60 days after Federal Register publication. The FTC will use the information gathered to determine whether to propose a rule, which could apply relatively narrowly to prohibit established deceptive practices regarding deceptive fees, or potentially attempt to mandate certain kinds of fee disclosures. It could also focus on certain industries or apply more broadly.

This “Junk Fees” ANPR is the latest in a series of rulemaking proposals by the FTC, including its ongoing “Commercial Surveillance” rulemaking involving data privacy and security, and its impersonation fraud rulemaking.

For more information about the FTC’s new ANPR or its other rulemaking efforts, please contact one of the authors listed on this alert.