Consumer Protection/FTC ADVISORY ▪

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FTC Proposes New Rule Targeting "Junk Fees"

By **Kathleen Benway**, **Rachel Lowe**, *and* **Brooke Bolender**

As it announced in its October 20, 2022 open meeting and further explained in a press release that same day, the Federal Trade Commission (FTC) is initiating a new rulemaking targeting so-called "junk fees"—described by the FTC as "unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value." The FTC noted its concern about the prevalence of junk fees across many sectors of the U.S. economy, in which businesses issue charges to "captive consumers" or employ deceptive tactics to hide the fees from consumers. The FTC's vote to initiate the rulemaking was 3–1, with Commissioner Christine Wilson dissenting. The FTC seeks public comment on the harms arising from junk fees and on whether a new promulgated rule would better protect consumers.

The Advance Notice of Proposed Rulemaking

The FTC's advance notice of proposed rulemaking (ANPR) defines "junk fees" 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." Junk fees also encompass "hidden fees, which are fees for goods or services that are deceptive or unfair, including because they are disclosed only at a later stage in the consumer's purchasing process or not at all, whether or not the fees are described as corresponding to goods or services that have independent value to the consumer." The FTC cites as examples of such junk fees hotel resort fees, orientation and other fees paid to colleges, or convenience fees.

The proposed junk fee rulemaking is not cabined to a specific industry, however. The ANPR references deceptive junk fee practices in a wide swath of sectors and industries, including auto financing, phone cards, fuel cards, payday lending, telecommunications, live entertainment, travel (including airlines, hotels, room-sharing, car rentals, and cruises), higher education, financial products and services, telemarketing, funeral services, publishing, insurance, and membership programs.

The proposed rulemaking seeks to address the following practices:

(a) misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the total cost of any good or service for sale;

(b) misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the existence of any fees, interest, charges, or other costs that are not reasonably avoidable for any good or service;

(c) misrepresenting or failing to disclose clearly and conspicuously whether fees, interest, charges, products, or services are optional or required;

(d) misrepresenting or failing to disclose clearly and conspicuously any material restriction, limitation, or condition concerning any good or service that may result in a mandatory charge in addition to the cost of the good or service or that may diminish the consumer's use of the good or service, including the amount the consumer receives;

(e) misrepresenting that a consumer owes payments for any product or service the consumer did not agree to purchase;

(f) billing or charging consumers for fees, interest, goods, services, or programs without express and informed consent;

(g) billing or charging consumers for fees, interest, goods, services, or programs that have little or no added value to the consumer or that consumers would reasonably assume to be included within the overall advertised price; and

(h) misrepresenting or failing to disclose clearly and conspicuously on an advertisement or in marketing the nature or purpose of any fees, interest, charges, or other costs.

While there have been laws and enforcement actions targeting similar practices in specific industries at both the state and federal levels (including by the FTC itself), the ANPR referenced concerns about the limitations of "such piecemeal policies limited to particular sectors or regions," highlighting what the majority believes is the need for "comprehensive nationwide regulation." In its press release announcing the ANPR, the FTC stated that while it "has a history of taking action on junk fee practices" in the form of investigations, enforcement actions, workshops, research, and consumer and business education outreach, "it generally lacks the authority to seek penalties against first-time violators or the ability to obtain redress readily for consumers in instances in which fees violate the FTC's prohibition on unfair or deceptive practices." Thus, a new promulgated rule addressing junk fees would enable the FTC to "seek such remedies when a company violates" the rule.

This proposed rulemaking is not without controversy. In her dissent from the FTC's ANPR, Wilson expressed concern over the rulemaking's "sweeping" breadth and the absence of evidence establishing the need for such a potentially broad rule. In particular, Wilson questioned whether such a rule could be uniformly applied across all sectors of the economy. Indeed, she noted that, given the numerous existing and "overlap[ping]"statutory schemes and regulations governing pricing and disclosures, the junk fee rule's shotgun approach, as set forth in the ANPR, is likely to lead to more confusion among retailers.

Wilson further noted how the proposed rule's emphasis on "up-front, all-in pricing," where all prices are compiled and represented to the consumer at the outset, could actually thwart the objective of increasing price transparency: the up-front, all-in pricing approach might disincentivize or even prohibit businesses from "unbundling" goods or offering them on an itemized basis to the consumer. The consumer may not be able to understand the breakdown of the various costs or make an informed choice about what they are agreeing to pay for. Wilson also questioned the "vague definitions" supplied by the proposed rule and whether costs seen as unnecessary by a consumer are nevertheless reasonable attempts by businesses to recover incremental costs. The latter concern might be especially applicable to businesses facing COVID-19-related supply chain issues and inflationary cost increases; a rule purporting to prohibit or limit junk fees could, in turn, limit the manner a business can pass on these incremental costs to the consumer.

FTC's Request for Comment on Its Proposed Rule

The FTC is seeking public comment on a range of issues relating to junk fees and related practices, including:

- How widespread the described junk fee practices are.
- Whether such practices cause consumer injury.
- Whether there are circumstances where such practices are ever *not* deceptive or unfair.
- How the rule can be crafted to maximize consumer benefit and minimize costs to legitimate businesses.
- Whether the rule should apply to all industries or whether certain industries should be exempted.
- Whether any existing laws or regulations might interfere with the implementation of the rule.

The period for public comment runs for 60 days after the date of publication of the notice of rulemaking in the *Federal Register*.

Junk Fees as a Biden Administration Priority

Though the FTC is an independent agency, the ANPR comes swiftly on the heels of several remarks by President Biden condemning junk fees. On September 26, 2022, President Biden remarked that junk fees are "weighing down family budgets" and "hitting families at a time when they can't afford it." Then, exactly one month later on October 26, 2022, President Biden appeared with Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra and FTC Chair Lina Khan to announce the Administration's recent efforts to "take on" junk fees. President Biden referenced the FTC's proposed rulemaking on junk fees, as well as new action by the CFPB on bank overdraft and deposit fees—fees that President Biden later tweeted as examples of "hidden 'junk' fees." In particular, the CFPB issued a new circular stating that the imposition of overdraft fees can be considered an unfair practice in violation of the Consumer Financial Protection Act, and a new compliance bulletin describing how fees assessed to the depositor of a bounced check are potentially unfair.

President Biden noted the Administration was "just getting started" on its junk fee crackdown. Indeed, the President revealed that the Department of Transportation would be "going after unfair airline fees" by "working on rules that would require airlines and travel sites to disclose fees up front" and that the Federal Communications Commission is working on a rule requiring internet service providers to show the costs charged up front. These disparate actions may further highlight Wilson's concern that, if a global pricing rule is enacted, it will expose already-regulated and to-be-regulated industries to yet another set of rules to harmonize.

Is a Junk Fee Rule Likely?

Though the Biden Administration has made clear that junk fee regulation is a priority, the FTC has had a busy year, causing some to question whether all its actions will come to fruition. The FTC has initiated an unprecedented six rulemakings this year, likely in an attempt to try to fill the monetary relief void created by the Supreme Court's decision in *AMG Capital*, which robbed the agency of its favored route for obtaining monetary remedies. However, the process the FTC must proceed under to promulgate a new rule, Magnuson–Moss rulemaking, is complex and time-consuming and requires the FTC to demonstrate that the practices at issue are deceptive or unfair and are prevalent in the marketplace. Indeed, Wilson's dissent also took aim at the rulemaking process itself, questioning whether "the credibility of the FTC [would] be tarnished if [it] pursue[s] broad rulemaking efforts without qualitative and quantitative evidence of consumer injury." Interestingly, the FTC cites newspaper articles, rather than its own prior enforcement on junk fees, as the predicate basis for the proposed rulemaking.

In addition, in the past, the average time from ANPR to final rule has been upwards of seven years, making it far from clear whether all (or any) of the FTC's rulemakings will come to fruition. And any eventual junk fee rule may bear little resemblance to the retail game-changer currently posited.

Key Takeaways

The FTC's announcement that it will explore rules targeting junk fees represents a new enforcement scheme with potentially wide-ranging impact across a variety of industries. The announcement aligns with the Biden Administration's commitment to targeting these junk fees through multiagency coordination. If adopted, the FTC's proposed rulemaking could have a substantial impact on the manner businesses advertise or represent their services and products, whether businesses can bundle products or services, and how businesses can pass on incremental costs to their consumers, if at all.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Kathleen Benway
+1 202 239 3034
kathleen.benway@alston.com

Kelly Connolly Barnaby
+1 202 239 3687
kelly.barnaby@alston.com

Brooke Bolender
+1 213 576 1116
brooke.bolender@alston.com

Alexander G. Brown
+1 404 881 7943
alex.brown@alston.com

Kristine McAlister Brown
+1 404 881 7584
kristy.brown@alston.com

Patrick Eagan-Van Meter
+1 704 444 1447
patrick.eagan-vanmeter@alston.com

Joseph H. Hunt
+1 202 239 3278
+1 404 881 7811
jody.hunt@alston.com

Ryan Martin-Patterson
+1 202 239 3038
ryan.martin-patterson@alston.com

Robert H. Poole II
+1 404 881 4547
robert.poole@alston.com

Alan F. Pryor
+1 404 881 7852
alan.pryor@alston.com

T.C. Spencer Pryor
+1 404 881 7978
spence.pryor@alston.com

John C. Redding
+1 704 444 1070
john.redding@alston.com

ALSTON & BIRD

WWW.ALSTON.COM

ATLANTA: One Atlantic Center ▪ 1201 West Peachtree Street ▪ Atlanta, Georgia, USA, 30309-3424 ▪ +1 404 881 7000 ▪ Fax: +1 404 881 7777
BEIJING: Hanwei Plaza West Wing ▪ Suite 21B2 ▪ No. 7 Guanghua Road ▪ Chaoyang District ▪ Beijing, 100004 CN ▪ +86 10 85927500
BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ▪ 3rd Floor ▪ 1000 Brussels ▪ Brussels, 1000, BE ▪ +32 2 550 3700 ▪ Fax: +32 2 550 3719
CHARLOTTE: One South at The Plaza ▪ 101 South Tryon Street ▪ Suite 4000 ▪ Charlotte, North Carolina, USA, 28280-4000 ▪ +1 704 444 1000 ▪ Fax: +1 704 444 1111
DALLAS: Chase Tower ▪ 2200 Ross Avenue ▪ Suite 2300 ▪ Dallas, Texas, USA, 75201 ▪ +1 214.922.3400 ▪ Fax: +1 214.922.3899
FORT WORTH: Bank of America Tower ▪ 301 Commerce ▪ Suite 3635 ▪ Fort Worth, Texas, USA, 76102 ▪ +1 214 922 3400 ▪ Fax: +1 214 922 3899
LONDON: 4th Floor ▪ Octagon Point, St. Paul's ▪ 5 Cheapside ▪ London, EC2V 6AA, UK ▪ +44 0 20 3823 2225
LOS ANGELES: 333 South Hope Street ▪ 16th Floor ▪ Los Angeles, California, USA, 90071-3004 ▪ +1 213 576 1000 ▪ Fax: +1 213 576 1100
NEW YORK: 90 Park Avenue ▪ 15th Floor ▪ New York, New York, USA, 10016-1387 ▪ +1 212 210 9400 ▪ Fax: +1 212 210 9444
RALEIGH: 555 Fayetteville Street ▪ Suite 600 ▪ Raleigh, North Carolina, USA, 27601-3034 ▪ +1 919 862 2200 ▪ Fax: +1 919 862 2260
SAN FRANCISCO: 560 Mission Street ▪ Suite 2100 ▪ San Francisco, California, USA, 94105-0912 ▪ +1 415 243 1000 ▪ Fax: +1 415 243 1001
SILICON VALLEY: 1950 University Avenue ▪ Suite 430 ▪ East Palo Alto, California, USA 94303 ▪ +1 650 838 2000 ▪ Fax: +1 650 838 2001
WASHINGTON, DC: The Atlantic Building ▪ 950 F Street, NW ▪ Washington, DC, USA, 20004-1404 ▪ +1 202 239 3300 ▪ Fax: +1 202 239 3333