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FEDERAL TRADE COMMISSION

16 CFR Part 464

RIN 3084-AB77

Trade Regulation Rule on Unfair or Deceptive Fees

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission ("FTC" or "Commission") is issuing a final trade regulation rule entitled ''Rule on Unfair or Deceptive Fees'' ("rule" or "final rule") and Statement of Basis and Purpose addressing certain unfair or deceptive practices involving fees or charges for live-event tickets and short-term lodging: bait-and-switch pricing that hides the total price by omitting mandatory fees and charges from advertised prices; and misrepresenting the nature, purpose, amount, and refundability of fees or charges. The final rule specifies that it is an unfair and deceptive practice for businesses to offer, display, or advertise any price of live-event tickets or short-term lodging without clearly, conspicuously and prominently disclosing the total price. The rule also requires businesses to clearly and conspicuously make certain disclosures before a consumer consents to pay. The rule further specifies that it is an unfair and deceptive practice for businesses to misrepresent any fee or charge in any offer, display, or advertisement for live-event tickets or short-term lodging.

DATES: This rule is effective [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Copies of this document are available on the Commission's website, *www.ftc.gov*.

FOR FURTHER INFORMATION CONTACT: Janice Kopec or Annette Soberats, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 202–326–2550 (Kopec), 202–326–2921 (Soberats), *jkopec@ftc.gov*, *asoberats@ftc.gov*.

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I. Background

When shopping for a good or service, consumers want to know: how much? It is a bedrock principle of FTC law that price is material to a consumer's decision about whether to purchase a good or service. Consumers look for prices to comparison shop and to weigh what a good or service might be worth. Most consumers also rely on price to answer critical budgeting questions such as: Can I afford this hotel or short-term rental for my upcoming vacation? Can I afford these concert tickets? Unfortunately, consumers face widespread and growing unfair and deceptive fee practices that make it much harder to find out: how much will this cost?

There is nothing new about businesses using bait-and-switch tactics to reel in and deceive consumers. The Commission has a long history of bringing enforcement actions

against these unfair and deceptive practices. Quoting a misleading, artificially low price and then adding in mandatory fees and other charges throughout the buying process—a practice known today as drip pricing—is a quintessential example of bait-and-switch pricing and is a practice that falls squarely within the scope of the Commission's long history of work to protect consumers. While today this practice goes by a different name, the playbook has not changed: lure in consumers with a low price, then hit them with a higher price after they have invested in the transaction and sunk time and effort into trying to buy a good or service for an illusory price. Behavioral and economic research explains that piecemeal numbers and explanations cannot cure the deception or mitigate the harms to consumers when businesses employ these pricing tactics. Often consumers finish the transaction without an accurate understanding of the total price of goods or services.

In recent years, bait-and-switch pricing has garnered widespread public attention. Consumers have cried foul when they discovered the cost of their hotel stays were significantly higher than expected due to a mandatory, hidden "resort fee," typically charged for services that consumers expected to be a part of staying in a hotel. Consumers have also complained when they tried to purchase tickets to a live event, only to find out that the quoted ticket price almost doubled by the time they reached the final checkout page. Consumers have confronted a host of mysterious, mandatory, "convenience," "processing," or "service" charges that are either non-descript or otherwise misleading. These practices are frustrating for consumers when they shop for travel and entertainment especially because these purchases can be significant

expenditures. This rulemaking record is replete with individual stories of consumers inundated by bait-and-switch pricing and misleading fees and charges.

For example, an individual commenter lamented the pervasiveness of bait-and-switch pricing tactics across everyday purchases:

> Like almost every American consumer, I have had to pay these “junk fees” in various circumstances. I consider myself reasonably well informed, yet have been surprised by them, because they keep [c]ropping up in unexpected places. Like many, I’ve experienced them in hotels, with car rentals and telecom providers. In these instances, the consumer has no real recourse, as the bargaining power is wholly unequal. However, these fees are now impacting every aspect of commerce. “Convenience” fees have impacted me with food service. “Facility” fees charges at fitness facilities. Credit card fees in excess of the actual interchange fees being charged at restaurants. It’s endless, ubiquitous and makes it extremely difficult for consumers to make informed decisions.[1]

As another individual commenter aptly put it, “It’s one thing to be on guard when walking down a dark alley, but being on guard every time you want to take a vacation, go to a concert, fly home to see a sick loved one—that’s just not fair.”[2]

It is no surprise that, once bait-and-switch pricing tactics are used by some businesses to obscure the cost of a good or service, they tend to spread. Businesses that want to compete on the true price of their offering are undercut by businesses that use hidden or misleading fees to display an artificially low price. As studies confirm, in such instances, consumers cannot shop for price effectively. This forces businesses into a race to the bottom and results in more and more businesses using hidden and misleading fees to remain competitive. When these types of fees are eventually revealed, consumers are left frustrated with a new and unexpected higher price and misleading fees and charges

[1] FTC-2023-0064-0886 (Individual Commenter).
[2] FTC-2023-0064-1576 (Individual Commenter).

that prevent them from having a real understanding of what they are getting in return for these additional fees.

The Rule on Unfair or Deceptive Fees addresses these problems directly in the live-event ticketing industry and the short-term lodging industry, which includes temporary sleeping accommodations at a hotel, motel, inn, short-term rental, vacation rental, or other place of lodging. These two industries have engaged in bait-and-switch pricing tactics for years. The rule ensures that when businesses advertise a price for live-event tickets or short-term lodging, it is the total price, and when they explain a fee or charge, the description is truthful. In simple terms: tell consumers the real price and do not lie about the fees or charges. The final rule does this by addressing two specific and prevalent unfair and deceptive practices: 1) bait-and-switch pricing that hides the total price of live-event tickets and short-term lodging by omitting mandatory fees and charges from advertised prices, including through drip pricing, and 2) misrepresenting the nature, purpose, amount, and refundability of fees or charges. The rule has two main components. First, the final rule requires businesses that offer a price for live-event tickets or short-term lodging to disclose the total price, inclusive of most mandatory charges, and to make sure that the total price is disclosed more prominently than other pricing information, except the final amount of payment. Second, the final rule prohibits misrepresentations about fees or charges in any offer, display, or advertisement for live-event tickets and short-term lodging.

The final rule is tailored to target these specific unfair and deceptive pricing practices, while preserving flexibility for live-event ticket and short-term lodging businesses. The rule does not prohibit any one type of fee, nor does it prohibit specific

pricing practices such as itemization of fees or dynamic pricing. The rule does not require that all fees be included when offering a price—just mandatory ones. The rule gives businesses discretion to list optional fees selected by the consumer and government and shipping charges separately. The discretion to set prices remains squarely with businesses; the rule simply requires that they tell consumers the truth about prices for live-event tickets and short-term lodging.

A. Advance Notice of Proposed Rulemaking

The Commission published, on November 8, 2022, an advance notice of proposed rulemaking ("ANPR")[3] under the authority of section 18 of the Federal Trade Commission Act ("FTC Act")[4] to address certain unfair or deceptive acts or practices involving fees. The ANPR described the Commission's history of taking law enforcement action against, and educating consumers about, unfair or deceptive practices relating to fees, and it asked a series of questions to help inform the Commission about whether such practices are prevalent and, if so, whether and how to proceed with a notice of proposed rulemaking ("NPRM"). The Commission was particularly interested in the following practices that it identified as the subjects of investigations, enforcement actions, workshops, research, and consumer education: a) misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the total price 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,

[3] Advance notice of proposed rulemaking; request for public comment: Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87 FR 67413 (Nov. 8, 2022). The ANPR and other documents pertaining to this rulemaking are available on the FTC webpage, Rulemaking: Unfair or Deceptive Fees, *https://www.ftc.gov/legal-library/browse/rules/rulemaking-unfair-or-deceptive-fees*.
[4] 15 U.S.C. 57a(b)(2). Section 18 authorizes the Commission to promulgate, modify, or repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

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 any advertisement or in any marketing, the nature or purpose of any fees, interest, charges, or other costs.

The Commission specifically sought public comment on the prevalence of such practices and the costs and benefits of a rule that would require upfront inclusion of mandatory fees whenever consumers are quoted a price, including by asking a series of questions to solicit data and commentary. The Commission took comments for sixty days, extended the comment period by an additional thirty days,[5] and carefully considered the more than 12,000 comments received.[6]

[5] Notice; extension of public comment period: Unfair or Deceptive Fees Trade Regulation Rule, 88 FR 4796 (Jan. 25, 2023).
[6] Publicly posted comments are available to view through Regulations.gov under Docket ID FTC-2022-0069 at *https://www.regulations.gov/docket/FTC-2022-0069/comments*.

B. Notice of Proposed Rulemaking

Based on the substance of the comments received in response to the ANPR, as well as the Commission's history of enforcement and other information, on November 9, 2023, the Commission published an NPRM, which proposed an industry-neutral rule that would prohibit misrepresenting the total price of goods or services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees.[7] The NPRM described the comments received in response to the ANPR and examined the Commission's prior enforcement actions and other responses concerning unfair and deceptive fees. In the NPRM, the Commission stated that it has reason to believe that certain unfair or deceptive acts or practices involving fees are prevalent, specifically: 1) misrepresenting the total price of goods and services by omitting mandatory fees from advertised prices and 2) misrepresenting the nature and purpose of fees. After discussing the comments and explaining its considerations in developing a proposed rule, the Commission also posed specific questions for comment and provided explanation of the proposed rule text. Finally, the NPRM set out the Commission's proposed regulatory text.[8] The Commission took public comments for sixty days, and extended the comment period for an additional thirty days.[9]

[7] Notice of proposed rulemaking; request for public comment: Trade Regulation Rule on Unfair or Deceptive Fees, 88 FR 77420 (Nov. 9, 2023). In accordance with section 18(b)(2)(C) of the FTC Act, 15 U.S.C. 57a(b)(2)(C), on October 10, 2023, the Commission sent notices to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science and Transportation seeking comment concerning the utility and scope of the trade regulation rule proposed in the NPRM and including the full text of the NPRM.
[8] NPRM, 88 FR 77483.
[9] Notice of proposed rulemaking; extension of public comment period: Trade Regulation Rule on Unfair or Deceptive Fees, 89 FR 38 (Jan. 2, 2024).

In response to the NPRM, the Commission received over 60,800 comments from stakeholders representing a wide range of viewpoints and industries.[10] These stakeholders included numerous individual consumers and consumer groups who described examples and experiences with the unfair and deceptive fee practices identified by the Commission. Commenters also included a range of business owners, trade associations, and other industry groups; academics; and government officials and agencies from all levels of government. While some commenters raised concerns and recommended specific modifications to, or exemptions from, the Commission's proposal, the overwhelming majority of commenters strongly supported the Commission's proposed rule.

[10] Publicly available comments are available to view through Regulations.gov under Docket ID FTC-2023-0064 at *https://www.regulations.gov/document/FTC-2023-0064-0001/comment*. As noted on Regulations.gov, not every comment is made publicly available. For example, "[a]gencies may redact or withhold certain Comment Submissions . . ., such as those containing . . . duplicate/near duplicate examples of a mass-mail campaign. Therefore, the total in the Number of Comments Posted Box may be lower than the total in the Comments Received Box." *See https://www.regulations.gov/faq*, Frequently Asked Questions, General FAQs, Find Dockets, Documents, and Comments FAQs, answer to *How are Comments counted and posted to Regulations.gov?*. In this rulemaking, Regulations.gov identified ten mass-mail campaigns as part of the total number of comments received of over 60,800. One mass-mail campaign alone accounted for close to 48,200 comments, and all mass-mail campaigns combined accounted for more than 57,400 comments. Because comments within each mass-mail campaign are highly similar, only representative comments of each mass-mail campaign are publicly posted on Regulations.gov. In addition to representative mass-mail comments, the more than 3,300 comments that Regulations.gov did not identify as belonging to a mass-mail campaign are publicly posted. The Commission received and considered all filed comments, including all mass-mail comments.

The proposed rule received widespread support in comments from Federal,[11] State, and local[12] elected officials; State Attorneys General;[13] Federal,[14] State, and local[15] government agencies; public policy and consumer advocates,[16] including housing

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[11] *See, e.g.*, FTC-2023-0064-3135 (U.S. Senate, Sen. Robert P. Casey, Jr.); FTC-2023-0064-3271 (U.S. Senate, Sen. Amy Klobuchar); FTC-2023-0064-2858 (U.S. House of Representatives, Rep. Maxwell Alejandro Frost, Rep. Jimmy Gomez, Rep. Barbara Lee, Rep. Rashida Tlaib, Rep. Kevin Mullin, Rep. Dwight Evans, Rep. Judy Chu, Rep. Greg Casar, Rep. Dan Goldman, Rep. Salud Carbajal).

[12] *See, e.g.*, FTC-2023-0064-1411 (Arizona House of Representatives, Rep. Analise Ortiz); FTC-2023-0064-2938 (Colorado House of Representatives, Rep. Naquetta Ricks); FTC-2023-0064-2926 (Florida House of Representatives, Rep. Rita Harris); FTC-2023-0064-3081 (Florida House of Representatives, Rep. Anna V. Eskamani); FTC-2023-0064-3103 (Florida House of Representatives, Rep. Angela Nixon); FTC-2023-0064-3117 (Maryland House of Delegates, Del. Julie Palakovich Carr); FTC-2023-0064-2341 (Massachusetts House of Representatives, Rep. Lindsay Sabadosa); FTC-2023-0064-3072 (Michigan Senate and House of Representatives, Sen. Darrin Camilleri, Sen. Mary Cavanagh, and Rep. Betsy Coffia); FTC-2023-0064-3079 (Montana State Senate, Senate Democratic Caucus, Sen. Pat Flowers, Sen. Susan Webber, Sen. Andrea Olsen, Sen. Edie McClafferty, Sen. Jen Gross, Sen. Janet Ellis, Sen. Shane Morigeau, Sen. Ellie Boldman, Sen. Ryan Lynch, Sen. Christopher Pope, Sen. Mike Fox, Sen. Denise Hayman, Sen. Willis Curdy, and Sen. Mary Ann Dunwell); FTC-2023-0064-3184 (New York Senate, Sen. Michael Gianaris); FTC-2023-0064-3123 (Syracuse, New York, City Auditor Alexander Marion); FTC-2023-0064-3149 (North Carolina House of Representatives, Rep. Julie von Haefen); FTC-2023-0064-3237 (North Carolina House of Representatives, Rep. Pricey Harrison).

[13] *See, e.g.*, FTC-2023-0064-3150 (Attorney General of the State of California); FTC-2023-0064-3215 (Attorneys General of the States of North Carolina and Pennsylvania, along with Attorneys General of the States or Territories of Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Michigan, Minnesota, New Jersey, New York, Oklahoma, Oregon, Vermont, Washington, and Wisconsin).

[14] *See, e.g.*, FTC-2023-0064-3134 (U.S. Department of Transportation, Federal Motor Carrier Safety Administration); FTC-2023-0064-3187 (U.S. Department of Justice, Antitrust Division).

[15] *See, e.g.*, FTC-2023-0064-1519 (New York City Department of Consumer and Worker Protection); FTC-2023-0064-2883 (District of Columbia, Office of the People's Counsel); FTC-2023-0064-3196 (South Carolina Department of Consumer Affairs).

[16] *See*, *e.g.*, FTC-2023-0064-1028 (Complex Trauma Project); FTC-2023-0064-2885 (AARP); FTC-2023-0064-3104 (Truth in Advertising, Inc.); FTC-2023-0064-3160 (Consumer Federation of America on behalf of itself and 51 other national and State consumer advocacy groups, authored by American Economic Liberties Project, Consumer Action, Consumer Federation of America, National Association of Consumer Advocates, National Consumer Law Center, National Consumers League, U.S. Public Interest Research Group); FTC-2023-0064-3162 (BBB National Programs, Inc.); FTC-2023-0064-3191 (Community Catalyst and 32 other organizations focused on health care and consumer protection issues); FTC-2023-0064-3205 (Consumer Reports); FTC-2023-0064-3216 (Demand Progress Education Fund); FTC-2023-0064-3218 (National Consumer Law Center); FTC-2023-0064-3242 (William E. Morris Institute for Justice); FTC-2023-0064-3246 (Coalition for App Fairness); FTC-2023-0064-3248 (DC Jobs With Justice on behalf of Fair Price, Fair Wage Coalition); FTC-2023-0064-3259 (National Women's Law Center); FTC-2023-0064-3270 (Consumer Federation of America, National Consumer Law Center, and National Association of Consumer Advocates); FTC-2023-0064-3290 (U.S. Public Interest Research Group Education Fund); FTC-2023-0064-3302 (Public Citizen).

advocates[17] and advocates for the incarcerated or formerly incarcerated;[18] university public policy advocates and clinics;[19] academics;[20] legal services providers;[21] and industry members from a broad range of market sectors, including online merchants,[22] live-event ticketing,[23] and hotels and other short-term lodging.[24] These commenters supporting the rule confirmed the prevalence of hidden and misrepresented fees throughout the economy, across large and small industries subject to the Commission's

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[17] *See, e.g.*, FTC-2023-0064-1431 (McPherson Housing Coalition); FTC-2023-0064-2851 (Housing Action Illinois); FTC-2023-0064-3102 (Corporation for Supportive Housing); FTC-2023-0064-3235 (National Housing Law Project).

[18] *See, e.g.*, FTC-2023-0064-2915 (Voice of the Experienced); FTC-2023-0064-2696 (Safe Return Project); FTC-2023-0064-3253 (Fortune Society); FTC-2023-0064-3260 (Formerly Incarcerated, Convicted People & Families Movement, in collaboration with the Partnership for Just Housing); FTC-2023-0064-3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher).

[19] *See, e.g.*, FTC-2023-0064-1939 (Tzedek DC, David A. Clarke School of Law, University of the District of Columbia); FTC-2023-0064-2888 (Housing Policy Clinic, University of Texas School of Law); FTC-2023-0064-3146 (Institute for Policy Integrity, New York University School of Law); FTC-2023-0064-3255 (Carrie Floyd, Clinical Teaching Fellow, Veterans Legal Clinic, and Mira Edmonds, Clinical Assistant Professor of Law, Civil-Criminal Litigation Clinic, University of Michigan Law School); FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice, University of California, Berkeley School of Law, and Consumer Law Advocates, Scholars & Students Network); FTC-2023-0064-3268 (Housing & Eviction Defense Clinic, University of Connecticut School of Law).

[20] *See, e.g.*, FTC-2023-0064-1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business); FTC-2023-0064-1467 (Richard J. Peltz-Steele, Chancellor Professor, University of Massachusetts Law School).

[21] *See, e.g.*, FTC-2023-0064-2862 (Legal Aid Foundation of Los Angeles); FTC-2023-0064-2892 (Community Legal Services of Philadelphia); FTC-2023-0064-2920 (Colorado Poverty Law Project); FTC-2023-0064-3090 (Atlanta Legal Aid Society, Inc.); FTC-2023-0064-3225 (CED Law); FTC-2023-0064-3278 (Southeast Louisiana Legal Services).

[22] *See, e.g.*, FTC-2023-0064-2840 (Indie Sellers Guild); FTC-2023-0064-2901 (E-Merchants Trade Council, Inc.).

[23] *See, e.g.*, FTC-2023-0064-2856 (National Football League); FTC-2023-0064-3108 (Christian L. Castle, Esq.; Mala Sharma, President, Georgia Music Partners; and Dr. David C. Lowery, founder of musical groups Cracker and Camper Van Beethoven, and a lecturer at the University of Georgia Terry College of Business); FTC-2023-0064-3122 (Vivid Seats); FTC-2023-0064-3195 (League of American Orchestras on behalf of itself and Association of Performing Arts Professionals, Carnegie Hall, Dance/USA, Folk Alliance International, Future of Music Coalition, National Performance Network, OPERA America, PAVA—Performing Arts Venues Alliance, Performing Arts Alliance, and Theatre Communications Group); FTC-2023-0064-3212 (TickPick, LLC); FTC-2023-0064-3230 (Future of Music Coalition); FTC-2023-0064-3250 (National Independent Talent Organization); FTC-2023-0064-3266 (StubHub, Inc.); FTC-2023-0064-3292 (National Association of Theatre Owners); FTC-2023-0064-3304 (Recording Academy); FTC-2023-0064-3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America); FTC-2023-0064-3105 (Charleston Symphony); FTC-2023-0064-3241 (National Association of Ticket Brokers).

[24] *See, e.g.*, FTC-2023-0064-3077 (Far Horizons Travel); FTC-2023-0064-3094 (American Hotel & Lodging Association); FTC-2023-0064-3106 (American Society of Travel Advisors, Inc.); FTC-2023-0064-3204 (Expedia Group); FTC-2023-0064-3244 (Vacation Rental Management Association).

jurisdiction, ranging, for example, from travel, live events, restaurants, delivery, rental housing, and correctional services to carpet cleaning, dietary supplements, moving companies, and gyms. These commenters supported the rule for its benefits to both consumers and honest businesses.

Individual consumers overwhelmingly supported the rule. Out of 60,853 total comments received, a mass mailing of close to 48,186 consumer commenters stated that they supported "the FTC's efforts to protect American consumers and crack down on unscrupulous businesses that tack on junk fees at the end of the purchasing process," and urged the Commission "to pass this rule to not only save consumers tens of billions of dollars each year, but to level the playing field for honest businesses who are transparent about their costs and fees."[25] Other mass mailings contained similar comments in support. In a mass mailing of about 344 comments, consumer commenters made near-identical statements to the aforementioned mass mailing and added: "Junk fees are monies a business tacks on at the end of the purchasing process instead of being transparent about the full price upfront. These fees are common when people are purchasing airline and concert tickets, booking hotel rooms, paying utility bills, and renting apartments."[26] A mass mailing submitted by about 315 consumer commenters stated, "I support cracking down on hidden junk fees that cost Americans billions of dollars each year."[27] A mass mailing by about nineteen consumer commenters stated, "For too long, individuals have been subjected to misleading practices, such as the omission of mandatory fees from advertised prices and misrepresentation of the nature and purpose of fees. These practices

[25] *See, e.g.*, FTC-2023-0064-0962, FTC-2023-0064-1186, FTC-2023-0064-1219, FTC-2023-0064-1230, FTC-2023-0064-1826, FTC-2023-0064-1827, FTC-2023-0064-1933, FTC-2023-0064-1946.
[26] *See*, *e.g.*, FTC-2023-0064-2290.
[27] *See*, *e.g.*, FTC-2023-0064-3156.

not only erode trust but also hinder informed decision-making by consumers."[28] A mass mailing by about thirteen consumer commenters simply urged: "Stop junk fees!"[29] Additional comments from individual consumers also supported the rule.

Other commenters opposed the rule, sought exemptions from the rule, or expressed concern about the rule's definitions or application to specific pricing scenarios. They included a Federal government agency;[30] national business groups and public policy advocates,[31] including tax groups and advisors;[32] academics;[33] representatives from auto dealers and service providers;[34] app-based delivery platforms;[35] financial and

[28] *See*, *e.g.*, FTC-2023-0064-2962.
[29] *See*, *e.g.*, FTC-2023-0064-2964.
[30] U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC-2023-0064-0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf*.
[31] *See, e.g.*, FTC-2023-0064-2367 (Small Business Majority); FTC-2023-0064-2887 (Progressive Policy Institute); FTC-2023-0064-2919 (National Automatic Merchandising Association); FTC-2023-0064-3028 (Competitive Enterprise Institute); FTC-2023-0064-3016 (National Federation of Independent Business, Inc.); FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3128 (Merchants Payments Coalition); FTC-2023-0064-3137 (Chamber of Progress); FTC-2023-0064-3140 (Merchant Advisory Group); FTC-2023-0064-3145 (Association of National Advertisers, Inc.); FTC-2023-0064-3147 (American Land Title Association); FTC-2023-0064-3173 (Center for Individual Freedom); FTC-2023-0064-3186 (National LGBT Chamber of Commerce and National Asian/Pacific Islander American Chamber of Commerce & Entrepreneurship); FTC-2023-0064-3208 (FreedomWorks); FTC-2023-0064-3267 (National Retail Federation).
[32] *See, e.g.*, FTC-2023-0064-3100 (Civitas Advisors, Inc.); FTC-2023-0064-3126 (Tax Foundation); FTC-2023-0064-3258 (National Taxpayers Union Foundation).
[33] *See, e.g.*, FTC-2023-0064-2891 (Mary Sullivan, George Washington University, Regulatory Studies Center); FTC-2023-0064-3264 (Mark J. Perry, Ph.D., Professor Emeritus of Economics at University of Michigan-Flint and Senior Fellow Emeritus at the American Enterprise Institute).
[34] *See, e.g.*, FTC-2023-0064-3121 (National Independent Automobile Dealers Association); FTC-2023-0064-3189 (National Automobile Dealers Association); FTC-2023-0064-3206 (Motor Vehicle Protection Products Association, Guaranteed Asset Protection Alliance, and Service Contract Industry Council); FTC-2023-0064-3276 (Automotive Service Association).
[35] *See, e.g.*, FTC-2023-0064-3263 (Flex Association); FTC-2023-0064-3202 (TechNet).

real estate settlement services;[36] franchised businesses;[37] representatives of housing providers,[38] including apartment associations[39] and a housing advertising platform;[40] hospitality groups, including hotel[41] and restaurant associations;[42] funeral and cemetery providers;[43] gaming associations;[44] telecommunications providers;[45] live-event venues;[46]

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[36] *See, e.g.*, FTC-2023-0064-1425 (Iowa Bankers Association); FTC-2023-0064-1941 (Independent Bankers Association of Texas); FTC-2023-0064-2574 (BattleLine LLC via Investor Protection Initiative); FTC-2023-0064-2893 (America's Credit Unions); FTC-2023-0064-3119 (Money Services Business Association, Inc.); FTC-2023-0064-3138 (Independent Community Bankers of America); FTC-2023-0064-3139 (American Bankers Association and Consumer Bankers Association); FTC-2023-0064-3142 (American Escrow Association); FTC-2023-0064-3144 (Mortgage Bankers Association); FTC-2023-0064-3168 (American Financial Services Association); FTC-2023-0064-3182 (Massachusetts Bankers Association).

[37] *See, e.g.*, FTC-2023-0064-3141 (Coalition of Franchisee Associations); FTC-2023-0064-3211 (American Association of Franchisees & Dealers); FTC-2023-0064-3294 (International Franchise Association).

[38] *See, e.g.*, FTC-2023-0064-3066 (Norhart, Inc.); FTC-2023-0064-3115 (National Association of Residential Property Managers); FTC-2023-0064-3116 (Manufactured Housing Institute); FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3152 (Building Owners & Managers Association, Council for Affordable & Rural Housing, Housing Advisory Group, Institute of Real Estate Management, Manufactured Housing Institute, National Apartment Association, National Association of Home Builders, National Association of Residential Property Managers, National Leased Housing Association, National Multifamily Housing Council, and Real Estate Roundtable).

[39] *See, e.g.*, FTC-2023-0064-2981 (Apartment & Office Building Association of Metropolitan Washington); FTC-2023-0064-3042 (Nevada State Apartment Association); FTC-2023-0064-3044 (San Angelo Apartment Association); FTC-2023-0064-3045 (Chicagoland Apartment Association); FTC-2023-0064-3089 (Apartment Association of Northeast Wisconsin and Fox Valley Apartment Association); FTC-2023-0064-3111 (Houston Apartment Association); FTC-2023-0064-3172 (New Jersey Apartment Association); FTC-2023-0064-3296 (Bay Area Apartment Association); FTC-2023-0064-3311 (Greater Cincinnati Northern Kentucky Apartment Association); FTC-2023-0064-3312 (Tulsa Apartment Association); FTC-2023-0064-3313 (Property Management Association of Michigan).

[40] FTC-2023-0064-3289 (Zillow Group).

[41] *See, e.g.*, FTC-2023-0064-3262 (Skyscanner); FTC-2023-0064-3293 (Travel Technology Association).

[42] *See, e.g.*, FTC-2023-0064-2918 (Elite Catering + Event Professionals); FTC-2023-0064-3078 (Washington Hospitality Association); FTC-2023-0064-3080 (UNITE HERE); FTC-2023-0064-3101 (High Road Restaurants); FTC-2023-0064-3180 (Independent Restaurant Coalition); FTC-2023-0064-3197 (American Beverage Licensees); FTC-2023-0064-3203 (American Pizza Community); FTC-2023-0064-3219 (Georgia Restaurant Association); FTC-2023-0064-3300 (National Restaurant Association).

[43] *See, e.g.*, FTC-2023-0064-3065 (Carriage Services, Inc.); FTC-2023-0064-3130 (International Cemetery, Cremation & Funeral Association); FTC-2023-0064-3210 (Service Corporation International).

[44] *See, e.g.*, FTC-2023-0064-2886 (American Gaming Association); FTC-2023-0064-3120 (Arizona Indian Gaming Association).

[45] *See, e.g.*, FTC-2023-0064-3261 (National Association of Broadcasters); FTC-2023-0064-2884 (NTCA—The Rural Broadband Association); FTC-2023-0064-3143 (ACA Connects—America's Communications Association); FTC-2023-0064-3233 (NCTA—The Internet & Television Association); FTC-2023-0064-3234 (CTIA—The Wireless Association); FTC-2023-0064-3295 (USTelecom—The Broadband Association).

[46] *See, e.g.*, FTC-2023-0064-3033 (The Rebel Lounge, Lucky Man Concerts LLC, PHX Fest, RelentlessBeats LLC).

a law firm;[47] providers of communications services to incarcerated people;[48] and other sectors.[49] The commenters argued that the FTC failed to establish the prevalence of the defined unfair and deceptive practices and failed to conduct an adequate cost-benefit analysis, and that the proposed rule would interfere with established pricing models, could not be applied to all pricing scenarios, would overlap with other laws and regulations, or would exceed the FTC's rulemaking authority or jurisdiction.

Members of the restaurant industry voiced opposition to the proposal. A mass mailing from about 4,650 restaurant owners criticized the rule as a one-size-fits-all approach that would be unworkable for the restaurant industry. In addition, members of the rental housing industry also submitted comments in opposition to the proposed rule. A mass mailing from about 3,781 members of the rental housing industry stated that it is virtually impossible to predict and disclose in advertisements total prices that include all mandatory fees that residents could incur during lease terms. The Commission does not address the specific issues raised by these industries and others that fall outside the scope of this final rule.[50]

C. Informal Public Hearing

On March 27, 2024, the Commission published an initial notice of informal hearing, which also served as the final notice of informal hearing ("Informal Hearing

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[47] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).

[48] *See, e.g.*, FTC-2023-0064-3236 (NCIC Inmate Communications); FTC-2023-0064-3284 (Global Tel*link Corporation d/b/a ViaPath Technologies).

[49] *See, e.g.*, FTC-2023-0064-2906 (National Association of College & University Business Officers, American Council on Education); FTC-2023-0064-3217 (Bowling Proprietors' Association of America); FTC-2023-0064-3249 (Marine Retailers Association of the Americas); FTC-2023-0064-3251 (National RV Dealers Association); FTC-2023-0064-3269 (IHRSA—The Health & Fitness Association). Towing & Recovery Association of America, Inc. submitted a late comment, which the Commission considered in its discretion and makes available at *https://www.ftc.gov/system/files/ftc_gov/pdf/R207011TRAAComment.pdf*.

[50] *See*, *e.g.*, FTC-2023-0064-2953, FTC-2023-0064-2961, FTC-2023-0064-2972; FTC-2023-0064-2971.

Notice").[51] The Informal Hearing Notice was published in accordance with section 18(b)(1) of the FTC Act, 15 U.S.C. 57a(b)(1), which requires the Commission to provide an opportunity for an informal hearing in section 18 rulemaking proceedings. The Informal Hearing Notice identified eight commenters to the NPRM that requested an informal hearing in accordance with the requirements of 16 CFR 1.11(e), as well as nine additional commenters that requested the opportunity to make an oral presentation if the Commission was to hold an informal hearing at others' requests. A number of commenters, including several who requested an informal hearing, proposed potential disputed issues of material fact for the Commission's consideration.[52] The Commission reviewed these potential issues and concluded in its Informal Hearing Notice that there were no disputed issues of material fact to resolve at the hearing.

On April 24, 2024, the Commission conducted an informal public hearing. In the Informal Hearing Notice, which was formally approved by vote of the Commission, the Commission's Chief Presiding Officer, the Chair, designated the Honorable Jay L. Himes, an Administrative Law Judge for the Federal Trade Commission, to serve as the presiding officer of the informal hearing. Seventeen interested parties were identified in the Informal Hearing Notice,[53] and six of them made documentary submissions in support of

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[51] Initial notice of informal hearing; final notice of informal hearing; list of Hearing Participants; requests for submissions from Hearing Participants: Trade Regulation Rule on Unfair or Deceptive Fees, 89 FR 21216 (Mar. 27, 2024).

[52] *See, e.g.*, FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3143 (ACA Connects); FTC-2023-0064-3139 (American Bankers Association and Consumer Bankers Association); FTC-2023-0064-3294 (International Franchise Association); FTC-2023-0064-3233 (NCTA—The Internet & Television Association).

[53] The interested parties were: ACA Connects—America's Communication Association; American Bankers Association and Consumer Bankers Association; U.S. Chamber of Commerce; NCTA—The Internet & Television Association; International Franchise Association; BattleLine LLC; IHRSA—The Global Health & Fitness Association; National Taxpayers Union Foundation; Consumer Federation of America, representing a coalition of 52 national and state consumer advocacy groups; Consumer Federation of America with National Consumer Law Center and National Association of Consumer Advocates;

their hearing testimony.[54] Fifteen interested parties made presentations,[55] and two did not appear at the hearing.[56] The majority of interested parties that appeared spoke in support of the proposed rule. However, several voiced opposition to the rule, explained perceived problems with the proposed rule text, or argued that the Commission incorrectly concluded that there were no disputed issues of material fact raised in response to the NPRM.

II. The Legal Standard for Promulgating the Rule

The Commission is promulgating 16 CFR part 464 ("final rule" or "rule") pursuant to section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).[57] Whenever the Commission promulgates a rule under section 18(a)(1)(B), the rule must include a Statement of Basis and Purpose ("SBP") that addresses: (1) the prevalence of the acts or practices addressed by the rule; (2) the manner and context in which the acts or practices are unfair or deceptive; and (3) the economic effect of the rule, taking into account the effect on small

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Community Catalyst, representing a coalition of 33 health and consumer protection advocacy groups; National Housing Law Project, representing a coalition of 39 housing justice advocacy organizations; National Consumer Law Center, Prison Policy Initiative, and Stephen Raher; Formerly Incarcerated, Convicted People & Families Movement; Truth in Advertising, Inc.; National Consumer Law Center; and Fair Price, Fair Wage Coalition.

[54] The interested parties that made documentary submissions in connection with the informal hearing were: National Taxpayers Union Foundation; Community Catalyst; National Housing Law Project; Consumer Federation of America; U.S. Chamber of Commerce; and NCTA—The Internet & Television Association. Each of the documentary submissions is posted in the Informal Hearing Documents folder available at *https://www.ftc.gov/legal-library/browse/rules/rulemaking-unfair-or-deceptive-fees*.

[55] Transcript, Informal Hearing on Proposed Trade Regulation Rule on Unfair or Deceptive Fees (Apr. 24, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/transcript-deceptive-fees.pdf*.

[56] American Bankers Association and Consumer Bankers Association and the U.S. Chamber of Commerce did not appear at the Informal Hearing despite being given the opportunity to do so.

[57] *See* 15 U.S.C. 57a(a)(1)(B).

businesses and consumers.[58] The Commission summarizes in this section its findings regarding each of these requirements.

Substantial evidence exists supporting the prevalence of bait-and-switch pricing and misleading fees and charges economy-wide as well as in the live-event ticketing and short-term lodging industries. As documented by the rulemaking record, the Commission's work on these pricing issues for over a decade, and the complementary actions of the Commission's local, State, and international counterparts, these specific practices are widespread across the economy and are harmful to consumers and honest businesses. Nevertheless, the Commission has decided, in its discretion, to focus this final rule on the industries in which the Commission first evaluated drip pricing—live-event ticketing and short-term lodging—and have a long history of harming consumers and honest competitors.

The Commission notes that the harms of bait-and-switch pricing and the misrepresentation of fees and charges are particularly pronounced in industries such as these, in which most transactions occur online. Consumers trying to comparison shop across multiple websites, or even on the same website, when deciding what tickets to purchase or where to travel are unable to do so effectively because some businesses hide the true total price and instead force consumers to go to different sites and click through multiple webpages for each offer to learn the true total price.

Consumer harm is also pronounced in these industries because the offered goods and services are often identical (as is the case with live-event tickets), or nearly identical (as is the case with competing short-term lodging offers in a particular destination and for

[58] 15 U.S.C. 57a(b)(3). In addition, section 22(b)(2) of the FTC Act, 15 U.S.C. 57b-3(b)(2), requires the Commission to prepare a final regulatory analysis, which it discusses in section V.

a particular star rating), and the most salient feature is the total price, which is shrouded from consumers. Indeed, for some consumers, hotel rooms are interchangeable so long as the location, star rating, and reviews are similar across offers, and what matters most is the total price.

In the future, the Commission may address these unfair and deceptive practices across industries as discussed in the NPRM. For now, however, the Commission will address unfair and deceptive pricing practices in other industries using its existing section 5 authority.

A. Prevalence of Acts or Practices Addressed by the Rule

As discussed herein, and in the NPRM, the Commission finds that unfair or deceptive pricing practices involving bait-and-switch pricing and misleading fees or charges are prevalent throughout the economy and affect, or have the potential to affect, virtually every purchasing transaction a consumer undertakes, including decisions about basic goods or services; where to live, dine, stay, or travel; and what events to attend. Specifically, the Commission finds that the following unfair or deceptive practices relating to fees are prevalent generally throughout the economy and specifically in the live-event ticketing and short-term lodging industries: (1) bait-and-switch pricing practices that hide the total price of goods or services by omitting mandatory fees and charges from advertised prices, including through drip pricing, and (2) misrepresenting the nature, purpose, amount, and refundability of fees or charges.

Section 18 of the FTC Act instructs that the Commission may determine that unfair or deceptive acts or practices are prevalent if: “it has issued cease and desist orders regarding such acts or practices” or “any other information available to the Commission

indicates a widespread pattern of unfair or deceptive acts or practices."[59] In support of its preliminary finding that these practices are prevalent, the NPRM cited enforcement evidence, including prior work by the Commission, complementary actions by State Attorneys General, private lawsuits, and international actions to address unfair or deceptive pricing practices, as well as comments received in response to the ANPR.[60] The NPRM also described legislative and regulatory action taken by multiple States to address unfair or deceptive fees.

To support its prevalence determination herein as to the economy generally, and as to the live-event ticketing and short-term lodging industries specifically, the Commission reiterates that it has a long history of enforcement actions, as well as a plethora of other information, indicating a widespread pattern of bait-and-switch pricing practices, including drip pricing and misleading fees or charges. In addition, the Commission's prevalence determination is further supported by the Commission's workshops and warning letters relating to bait-and-switch pricing and misleading fees or charges; the behavioral and economic research documenting consumer harm from these practices; and consumer surveys and reports. The Commission also relies on the great majority of the more than 60,800 comments filed in response to the NPRM—one of the largest number of comments filed in any Commission rulemaking to date—including comments by consumers, consumer groups, academics, businesses, and government

[59] 15 U.S.C. 57a(b)(3).
[60] NPRM, 88 FR 77435; *see also, e.g.*, FTC-2022-0069-6099 (ANPR) (Consumer Reports discussed its *WTFee?! Survey, 2018 Nationally-Representative Multi-Mode Survey* of hidden fees in multiple sectors of the economy and the prevalence of unfair or deceptive fees practices.); FTC-2022-0069-6095 (ANPR) (Consumer Federation of America noted that the Washington Attorney General's Hidden Fee Survey showed that consumers experienced unexpected fees in a wide range of industries.); FTC-2022-0069-6113 (ANPR) (UnidosUS cited surveys or studies by itself, the Financial Health Network, and the Center for Responsible Lending that documented the impact of fees related to financial services products.).

officials highlighting the prevalence of these unfair and deceptive practices and urging the Commission to promulgate a final rule to combat them.

As explained in the NPRM, the Commission has a long history of enforcement actions targeting unfair and deceptive bait-and-switch pricing tactics concerning hidden fees[61] and misrepresentations regarding the nature and purpose of fees.[62] The takeaway

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[61] *See, e.g.*, Complaint ¶¶ 4–5, 106–14, *FTC v. Invitation Homes, Inc.*, No. 24-cv-04280 (N.D. Ga. Sept. 24, 2024) (alleging that defendant, among other deceptive and unfair practices, deceptively advertised monthly home rental prices that omitted and used confusing and buried language about mandatory fees); Complaint ¶¶ 39–46, *FTC v. Vonage Holdings Corp.*, No. 3:22-cv-6435 (D.N.J. Nov. 3, 2022) (alleging in part that defendant charged undisclosed large cancellation fees); Complaint ¶¶ 42–44, 50, *United States v. Funeral Cremation Grp. of N. Am., LLC* ("*Legacy Cremation Servs.*"), No. 0:22-cv-60779 (S.D. Fla. Apr. 22, 2022) (alleging defendants advertised artificially low prices for cremation services which ultimately included undisclosed additional charges and, in some cases where consumers contested these charges, defendants refused to return remains); Complaint ¶ 9, *FTC v. Liberty Chevrolet, Inc.* ("*Bronx Honda*"), No. 1:20-cv-03945 (S.D.N.Y. May 21, 2020) (alleging defendants advertised low sales prices but later told consumers they were required to pay additional charges including certification charges); Complaint ¶ 13, *FTC v. NetSpend Corp.*, No. 1:16-cv-04203 (N.D. Ga. Apr. 11, 2017) (alleging in part that defendant charged maintenance and usage fees to consumers who were unable to use all, or even a portion of, the funds of their prepaid debit cards); *see also* Complaint ¶¶ 24–25, 29, 40–42, *FTC v. AT&T Mobility LLC*, No. 3:14-cv-04785 (N.D. Cal. Oct. 28, 2014) (alleging defendant did not adequately disclose the limitations of defendant's data plan offerings and subsequently charged high cancellation fees for consumers who chose to end their contracts); Complaint ¶¶ 1, 26, 39–40, *FTC v. Millennium Telecard, Inc.*, No. 2:11-cv-02479 (D.N.J. May 2, 2011) (alleging defendants deceptively marketed prepaid credit calling cards by failing to adequately disclose fees that substantially limited the number of minutes consumers had purchased); Complaint ¶ 15, *FTC v. CompuCredit Corp.*, No. 1:08-cv-01976 (N.D. Ga. June 10, 2008) (alleging in part that defendants misrepresented the credit limits on various credit cards and failed to disclose fees charged upfront).

[62] *See, e.g.*, Complaint ¶¶ 4–5, 106–14, 118–23, *Invitation Homes, Inc.*, No. 24-cv-04280 (alleging that defendant, among other deceptive and unfair practices, misled consumers about fees by using confusing and buried language); Complaint ¶¶ 39–46, *Vonage Holdings Corp.*, No. 3:22-cv-6435; Complaint ¶¶ 61–63, *FTC v. Benefytt Techs., Inc.,* No. 8:22-cv-1794 (M.D. Fla. Aug. 8, 2022) (alleging in part that defendants bundled and charged fees for unwanted products with sham health insurance plans); Complaint ¶¶ 17–20, *FTC v. Passport Auto Grp., Inc.*, No. 8:22-cv-02670 (D. Md. Oct. 18, 2022) (alleging in part that defendants advertised vehicle prices that did not include redundant fees ranging from hundreds to thousands of dollars for inspection, reconditioning, preparation, and certification); Complaint ¶¶ 3, 33, 41, *FTC v. N. Am. Auto. Serv., Inc.* (*"Napleton Auto"*), No. 1:22-cv-01690 (E.D. Ill. Mar. 31, 2022) (alleging defendants charged consumers for additional products and services without their consent and misrepresented the fees as mandatory, resulting in artificially low advertised prices); Complaint ¶¶ 50–51, *Amazon.com, Inc.* ("*Amazon Flex*"), No. C-4746 (FTC June 9, 2021) (alleging respondents falsely represented that 100% of tips would go to the driver in addition to the pay respondents offered drivers); Complaint ¶¶ 37–39, *FTC v. Lead Express, Inc.*, No. 2:20-cv-00840 (D. Nev. May 11, 2020) (alleging in part that defendants did not clearly and conspicuously disclose material information related to the total amount of payments related to loans and also withdrew significantly more than the stated total cost of the loan from consumers' accounts); Complaint ¶¶ 9–10, *FTC v. FleetCor Techs, Inc.*, No. 1:19-cv-05727, 2019 WL 13081514 (N.D. Ga. Dec. 20, 2019) (alleging defendants charged consumers arbitrary and unexpected fees related to pre-paid fuel cards without consumers' consent); Complaint ¶¶ 4, 30–32, 36–37, *FTC v. BCO*

from this enforcement history is clear—businesses cannot hide or misrepresent the true cost of a good or service or mislead consumers about the nature, purpose, amount, or refundability of fees or charges. Some commenters suggested consent orders are not cease-and-desist orders that the Commission can rely upon to support a finding of prevalence, but that is incorrect. The FTC Act makes clear when it intends to exclude consent orders from the ambit of "cease and desist orders," and does not do so in section 18.[63]

Consulting Servs., *Inc.*, No. 8:23-cv-00699 (C.D. Cal. Apr. 24, 2023) (alleging defendants enticed consumers with false promises to alleviate student loan debt despite not applying any payments to the student loan balances and collecting illegal advance fees without providing any services); Complaint ¶¶ 31–36, *FTC v. OMICS Grp. Inc.*, No. 2:16-cv-02022 (D. Nev. Aug. 25, 2016) (alleging in part defendants misrepresented the publishing process of academic papers and only disclosed large publishing fees after notifying consumers that their papers had been approved for publication); Complaint ¶¶ 12, 23–25, *FTC v. Lending Club Corp.*, No. 3:18-cv-02454 (N.D. Cal. Apr. 25, 2018) (alleging defendant charged consumers an upfront fee based on a percentage of the loan requested that was not clearly and conspicuously disclosed; this hidden fee caused loans received to be substantially smaller than advertised); Complaint ¶ 37, *FTC v. T-Mobile USA*, *Inc.,* No. 2:14-cv-00967 (W.D. Wash. July 1, 2014) (alleging defendant added unauthorized third-party charges to the telephone bills of consumers); Amended Complaint ¶¶ 21–22, *FTC v. Websource Media, LLC,* No. 4:06-cv-01980 (S.D. Tex. June 21, 2006) (alleging defendants placed charges on consumer telephone bills despite representations that there would be no charges or obligations); *FTC v. Mercury Mktg. of Del., Inc.*, No. 00-cv-3281, 2004 WL 2677177, *1 (E.D. Pa. Nov. 22, 2004) (finding defendants billed consumers without their consent after misleading consumers about introductory internet packages); Complaint ¶¶ 25–27, *FTC v. Stewart Fin. Co.*, No. 1:03-cv-02648 (N.D. Ga. Sept. 4, 2003) (alleging in part that defendants package undisclosed add-on products with consumer loans and in some cases describe those add-on products as mandatory); Complaint ¶¶ 19–21, 24, *FTC v. Hold Billing Serv., Ltd.*, No. SA-98-CA-0629-FB (W.D. Tex. July 16, 1998) (alleging defendants had previously added third-party charges to consumers' phone bills without permission by using sweepstakes entry forms as contracts to authorize charges); Complaint ¶¶ 18, 33, 56–58, *FTC v. Lake,* No. 8:15-cv-00585-CJC-JPR (C.D. Cal. Apr. 14, 2015) (alleging defendants misrepresented that trial loan payments or reinstatement fee payments would be held in escrow and refunded to the consumer if the loan modification was not approved); *FTC v. Hope for Car Owners, LLC*, No. 2:12-CV-778-GEB-EFB, 2013 WL 322895, at *3–4 (E.D. Cal. Jan. 24, 2013) (finding that the FTC sufficiently stated a claim for misrepresentation of the refundability of vehicle loan modification fees and entering default judgment); Amended Complaint ¶¶ 38–39, 58–60, *FTC v. U.S. Mortg. Funding, Inc.,* No. 9:11-cv-80155-JIC (S.D. Fla. July 26, 2011) (alleging defendants misrepresented that an upfront loan modification fee was refundable); *FTC v. Nat'l Bus. Consultants, Inc.*, 781 F. Supp. 1136, 1143 (E.D. La. 1991) (finding that "defendants' misrepresentations regarding the ease with which the 'performance deposit' could be refunded composed a large part of the various and sundry misrepresentations").

[63] *Compare* 15 U.S.C. 45(m) (excluding consent orders from the type of cease and desist orders that could support an action for civil penalties under 15 U.S.C. 45(m)(1)(B)) *and* 108 Stat. 1691 (1994) (amending 15 U.S.C. 45(m) to add "other than a consent order" after the term "cease and desist order") *with* 15 U.S.C. 57a(b)(3) (stating that the Commission may make a determination of prevalence if "it has issued cease and desist orders regarding such acts or practices or any other information available to the Commission indicat[ing] a widespread pattern of unfair or deceptive acts or practices"). Even if consent orders and the

In addition to the Commission's enforcement actions, for more than a decade, the Commission has engaged with the public and issued guidance to industry on issues related to bait-and-switch tactics, including drip pricing, and the misrepresentation of fees or charges. The Commission first engaged with the public on the concept of drip pricing in 2012 by convening a conference, titled "The Economics of Drip Pricing," to bring together economists and marketing academics to "examine the theoretical motivation for drip pricing and its impact on consumers, empirical studies, and policy issues pertaining to drip pricing."[64] Several psychological theories were discussed at this conference, and these theories explain why consumers cannot reasonably avoid making errors when the total price is not revealed upfront.[65] Following the workshop, Commission staff sent warning letters to hotels and online travel agents that were not adequately disclosing resort fees or including those fees in the total price.[66] These hotels and online travel agents were employing drip pricing tactics as well as another bait-and-switch pricing tactic, partitioned pricing, to inadequately disclose resort fees and hide the total price of a hotel stay. Partitioned pricing consists of dividing a price into multiple components without ever disclosing the total and leaving consumers to figure out the true total price on their own. Hotels, for example, might separately list the room rate and "resort fee" but never add them up and quote an all-inclusive total price. In 2017, the Commission's

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investigations that lead up to them are not "cease and desist orders," in making a determination of prevalence, the Commission can still rely upon them as "other information."

[64] Fed. Trade Comm'n, *The Economics of Drip Pricing* (May 21, 2012), *https://www.ftc.gov/news-events/events/2012/05/economics-drip-pricing*.

[65] *See, e.g.*, Fed. Trade Comm'n, *The Economics of Drip Pricing: Conference Transcript* 76–111 (May 21, 2012), *https://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/transcript.pdf*.

[66] 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://www.ftc.gov/news-events/news/press-releases/2012/11/ftc-warns-hotel-operators-price-quotes-exclude-resort-fees-other-mandatory-surcharges-may-be*.

Bureau of Economics published a report that reviewed the existing literature on drip pricing and partitioned pricing and examined the costs and benefits of disclosing hotel resort fees.[67] The report found that "[u]nless 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."[68] Specifically,

> 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. Forcing consumers to click through additional webpages to see a hotel's resort fee increases the cost of learning the hotel's price. Separating the room rate from the resort fee increases the cognitive costs of remembering the hotel's price. When it becomes more costly to search and evaluate an additional hotel, a consumer's choice is either to incur higher total search and cognitive costs or to make an incomplete, less informed decision that may result in a more costly room, or both.[69]

The report observed that hotels could eliminate these costs to consumers by including the resort fee in the advertised price; bundling the same resort services with the room and charging the same total price; listing the components of the total price separately, as long as the total price is the most prominently disclosed price; or changing to unbundled, optional resort services which would not be included in the advertised price.[70] Finally, the report did not find "any benefits to consumers from separately-disclosed mandatory resort fees that could not be achieved by first listing the total price and then disclosing the resort fee."[71]

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[67] Mary Sullivan, Fed. Trade Comm'n, *Economic Analysis of Hotel Resort Fees* 4 (2017), *https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf*.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id*.

In 2019, the Commission hosted a workshop and issued a staff perspective report that examined pricing and fees in the live-event tickets market.[72] The report observed,

> On most primary and resale platforms, the ticket price a consumer first sees is not what the consumer will pay. Mandatory fees, such as 'venue' and 'ticket processing' fees, bulk up the price–often by as much as thirty percent…. The late disclosure of fees increases search costs for consumers and makes it harder to comparison shop.[73]

The report remarked that "[a]ll of the workshop panelists who discussed the fees issue, including each participating ticket seller that does not currently provide upfront all-in pricing, favored requiring all-in pricing through federal legislation or rulemaking."[74]

The Commission's finding of prevalence is further supported by the complementary enforcement actions brought by its law enforcement partners, most of which have resulted in orders prohibiting bait-and-switch pricing and misrepresenting fees and charges in the short-term lodging, live-event ticketing, delivery services, rental cars, travel, and tax filing preparation services industries.[75] Indeed, a group of State

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[72] Fed. Trade Comm'n, "*That's the Ticket" Workshop: Staff Perspective* 4 (May 2020), *https://www.ftc.gov/system/files/documents/reports/thats-ticket-workshop-staff-perspective/staffperspective_tickets_final-508.pdf.*

[73] *Id*.

[74] *Id*.

[75] *See, e.g.,* Complaint ¶ 3, *Rhode Island v. UPP Global, LLC*, No. PC-2024-04453 (R.I. Super. Ct. Aug. 13, 2024) (alleging in part that defendant charges a fee as a tax, fails to disclose prices until after consumers have elected to use defendant's service, and advertises hourly prices and then requires consumers to pay for multiple hours at a minimum); Complaint ¶¶ 3–4, *District of Columbia v. StubHub, Inc.*, No. 2024-CAB-004794 (D.C. Super. Ct. July 31, 2024) (alleging defendant uses drip pricing and entices consumers to shop for tickets by displaying artificially low prices and revealing mandatory fees later in the checkout process which defendant also misrepresents the purpose of); Consent Decree ¶¶ 10–24, *Arizona v. Cox Enterprises, Inc.*, No. CV-2023-019752 (Ariz. Sup. Ct. Jan. 2, 2024) (alleging defendants failed to disclose additional fees to consumers who purchased services through long-term contracts based on "price-lock" guarantee); Assurance of Voluntary Compliance ¶ 2, *Texas v. Marriott Int'l, Inc.,* No. 2023-CI09717 (Tex. Dist. Ct. May 16, 2023) (alleging defendant misrepresented various fees, including resort fees, and did not include all mandatory fees in the advertised room rate in violation of the Texas Deceptive Trade Practices Act); Plaintiff's Original Pet. ¶ 1, *Texas v. Hyatt Hotels Corp.,* No. C2023-0884D (Tex. Dist. Ct. May 15, 2023) (alleging defendant did not include mandatory fees in advertised room rates in violation of the Texas Deceptive Trade Practices Act); Consent Order ¶ 20, *District of Columbia v. Grubhub Holdings, Inc.,* No. 2022 CA 001199 B (D.C. Super. Ct. Jan. 4, 2023) (alleging in part that defendants misrepresented menu

Attorneys General wrote in support of a finding of prevalence of these practices across industries, including event ticket sellers, and hotels and other short-term lodging providers.[76] They have attempted to address some, but not all, of these fees in their own

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prices to consumers and deceptively advertised that consumers could "order online for free"); Assurance of Voluntary Compliance ¶ 4, *Commonwealth v. Omni Hotels Mgmt.*, GD-23-013056 (Pa. Commw. Ct. Nov. 9, 2023) (alleging defendants failed to advertise room prices including mandatory fees, misleading consumers); Assurance of Voluntary Compliance ¶ 2, *Commonwealth v. Choice Hotels Intl., Inc.*, GD-23-011023 (Pa. Commw. Ct. Sept. 21, 2023) (alleging defendants failed to advertise room prices including mandatory fees misleading consumers); Assurance of Voluntary Compliance ¶¶ 1–5, *Commonwealth v. RYADD, Inc.*, No. 2022-07262 (Pa. Commw. Ct. Sept. 8, 2022) (alleging defendants failed to advertise ticket prices including service fees and failed to clearly disclose an itemization of the total cost); Complaint ¶ 1, *Commonwealth v. Mariner Finance, LLC*, No. 2:22-cv-03235-MAK (E.D. Pa. Sept. 6, 2022) (alleging defendant charged consumers for hidden add-on products without consumer knowledge and in some cases after explicit rejection); Consent Order ¶ 6, *District of Columbia v. Maplebear, Inc.,* No. 2020 CA 003777B (D.C. Super. Ct. Aug. 19, 2022) (prohibiting defendant from misrepresenting the nature and purpose of fees applied to consumers' orders); Assurance of Voluntary Compliance ¶ 2, *Commonwealth v. Marriott Int'l, Inc.,* No. GD-21-014016 (Pa. Ct. C.P. Nov. 16, 2021) (alleging defendant misrepresented its room rates by failing to include items such as mandatory fees in its pricing); Consent Order ¶ 3.1–3.18, *Drivo LLC,* N.J. Div. Consumer Aff. (Sept. 16, 2020) (prohibiting unfair and deceptive practices relating to damage fees and third party reservation fees for rental vehicles); Press Release, Off. Minn. Att'y Gen., *Attorney General Ellison Obtains Relief for More than 30,000 Comcast/Xfinity Customers* (Jan. 15, 2020) (alleging in part that defendants misrepresented prices for their services and added services without consumer consent), *https://www.ag.state.mn.us/Office/Communications/2020/01/15_ComcastXfinity.asp*; Press Release, Off. Minn. Att'y Gen., *Attorney General Ellison Obtains Nearly $9 Million Settlement with CenturyLink for Overcharging Minnesota Customers* (Jan. 8, 2020) (alleging defendant misrepresented the price of its services and used a complex pricing scheme to mislead consumers), *https://www.ag.state.mn.us/Office/Communications/2020/01/08_CenturyLinkSettlement.asp*; Assurance of Voluntary Compliance ¶¶ 1–12, *Commonwealth v. Event Ticket Sales, LLC*, No. 201101873 (Pa. Commw. Ct. Nov. 19, 2020) (alleging defendants failed to advertise ticket prices including service fees and failed to clearly disclose an itemization of the total cost); Assurance of Voluntary Compliance ¶ 7, *CenturyLink, Inc.*, No. 19-CV-56401 (Or. Cir. Ct. 2019) (alleging defendants charged undisclosed fees and failing to disclose all mandatory fees and charges); Agreed Final J. ¶ 8, *Texas v. Guided Tourist, LLC,* No. D-1-GN-19-001618 (Tex. Dist. Ct. Mar. 26, 2019) (enjoining defendant from advertising ticket prices other than the total ticket price, including all mandatory fees); Settlement Agreement ¶ 8(b)–(c), *Florida v. Dollar Thrifty Auto. Grp., Inc.,* No. 16-2018-cv-005938 (Fla. Cir. Ct. Jan. 14, 2019) (alleging in part that defendant misrepresented optional charges as mandatory and did not sufficiently disclose toll-related fees). Additionally, Intuit recently entered a multistate settlement of allegations that it misrepresented its tax filing products would come at no cost. Assurance of Voluntary Compliance, *Commonwealth v. Intuit Inc.,* No. 220500324 (Pa. Ct. C.P. May 4, 2022).

[76] FTC-2023-0064-3215 (Attorneys General of the States of North Carolina and Pennsylvania, along with Attorneys General of the States or Territories of Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Michigan, Minnesota, New Jersey, New York, Oklahoma, Oregon, Vermont, Washington, and Wisconsin). The Attorneys General also pointed to prevalence of these practices in residential leasing, payday lending, internet applications, online shopping, automobile rentals, carpet cleaners, dietary supplement sellers, moving companies, gyms, travel companies, outlet stores, and online auctions.

States.[77] The State Attorneys General cited a number of cases across industries demonstrating that bait-and-switch pricing and misleading fees are "a chronic, prolific problem confronting many consumers across numerous sectors of the economy."[78] Further, they agreed with the Commission's assertion that "charges that misrepresent their nature and purpose are unfair and deceptive because they mislead consumers and make it more difficult for truthful businesses to compete on price."[79] The Commission takes note of legislative and regulatory efforts in Minnesota, California, Pennsylvania, New York, Massachusetts, and North Carolina to combat hidden and misleading fees[80] which further support its finding of prevalence.

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[77] *Id*. (The Attorneys General highlighted actions each has taken in their own states to address financial services fees, hotel fees, live-event ticket fees, rental housing fees, auto rental fees, and telecommunication fees.).
[78] *Id*.
[79] *Id*.
[80] N.Y. Arts & Cult. Aff. Law sec. 25.01–25.33 (McKinney 2023) (Effective Jun. 30, 2022) (requiring that the sellers and resellers of live-event tickets disclose the total cost of a ticket, upfront, and clearly and conspicuously disclose the amount of the price that is made up of fees and other charges); An Act Ensuring Transparent Ticket Pricing, H. 259, 193rd Gen. Court (Mass. 2023) (proposed legislation requiring in part that the sellers and resellers of live-event tickets disclose the total cost inclusive of all ancillary fees that must be paid and the portion of the ticket price that represents a service charge or any other fee or surcharge); H.B. 714 (2023–2024 Session) (N.C. 2023) (proposed legislation that requires, among other things, that providers of short-term lodging and live-event ticketing clearly display the total price of goods and services inclusive of mandatory fees a consumer would incur during a transaction); *see also* 2023 Minn. H.B. 3438 (Enacted May 20, 2024) (stating that it is a deceptive trade practice for a business to not include all mandatory fees or surcharges when advertising, displaying or offering a price for goods or services); Cal. S.B. 478 (2023-2024 Regular Session) (Enacted Oct. 7, 2023) (amending the California Consumer Legal Remedies Act to state that it is unlawful to advertise, display, or offer a price for a good or service that does not include all mandatory fees or charges other than taxes or fees imposed by a government on the transaction); Cal. S.B. 1524 (2023-2024 Regular Session) (clarifying and amending S.B. 478 to include that additional fees such as service charges for food services businesses including bars and restaurants could appear separately so long as they were displayed on the menu); H.B. 636 (2023-2024) (Pa. 2023) (Engrossed Oct. 19, 2023) (proposed legislation amending the Pennsylvania Unfair Trade Practices and Consumer Protection Law to require the disclosure of all mandatory fees and charges included in the advertised and displayed price of any good or service); Conn. Gen. Stat. § 53-289a (2023) (requiring conspicuous disclosure in the advertisement of total price of live-event tickets including service charges); Conn. Gen. Stat. § 53-289a (2023) (requiring conspicuous disclosure in the advertisement of total price of live-event tickets including service charges); SB 329 (2024 Reg. Sess.) (Md.) (requiring all-in pricing throughout the purchase process of a live-event ticket); SB 329 (2024 Reg. Sess.) (Md.) (requiring all-in pricing throughout the purchase process of a live-event ticket); 1510 Mass. Reg. 5 (Dec. 8, 2023) (Proposed Regulations 940 C.M.R. 38.00: Unfair and Deceptive Fees) (proposed regulation stating that it is an unfair and deceptive practice to misrepresent or fail to disclose at the time of initial presentation of the

Comments submitted by Federal and State elected officials echoing the widespread practice of misleading consumers about total prices and fees or charges further strengthen the Commission's prevalence finding. For example, U.S. Senator Amy Klobuchar stated that she held a hearing focusing on the lack of transparency in the live-event ticketing industry as well as a hearing on fees in the rental housing market that prevent renters from having meaningful opportunities to compare prices.[81] U.S. Senator Robert Casey discussed a report released on January 24, 2024, "Additional Charges May Apply: How Big Corporations Use Hidden Fees to Nickel, Dime, and Deceive American Families," tracking the variety of junk fees facing Pennsylvania families, including in the short-term lodging industry.[82] A group of Congressional representatives raised concerns regarding misleading fees and a lack of price transparency in the rental housing market.[83] Concerns over unfair and deceptive pricing were also raised by a variety of State

price of any product the total price of that product inclusive of all fees, interest, charges, or other expenses necessary or required in order to complete the transaction).

[81] FTC-2023-0064-3271 (U.S. Senate, Sen. Amy Klobuchar).

[82] FTC-2023-0064-3135 (U.S. Senate, Sen. Robert P. Casey, Jr. noted that his report "details how corporations use hidden fees to deceive consumers and increase corporate profits, which leaves families paying more than they should and puts honest businesses at a disadvantage.") The report is available at *https://www.casey.senate.gov/imo/media/doc/greedflation_junk_fees3.pdf*.

[83] FTC-2023-0064-2858 (U.S. House of Representatives, Rep. Maxwell Alejandro Frost, Rep. Jimmy Gomez, Rep. Barbara Lee, Rep. Rashida Tlaib, Rep. Kevin Mullin, Rep. Dwight Evans, Rep. Judy Chu, Rep. Greg Casar, Rep. Dan Goldman, and Rep. Salud Carbajal stated that the rule would help eliminate some of the barriers to those seeking rental housing as renters "often face ambiguous or misleading fees" and "bring much needed transparency to the rental housing market.").

legislators and officials.[84] There has also been significant bipartisan interest in passing legislation targeting fees in the live-event ticketing and short-term lodging industries.[85]

The Commission also takes notice of the work of its international counterparts, as well as private lawsuits in the United States concerning unfair and deceptive fee practices. Regulatory actions in Canada, Australia, the European Union, and the United Kingdom with respect to such conduct include Paragraph 74.01(1.1) of the Canadian Competition Act,[86] the Australian Competition and Consumer Protection Act of 2010,[87]

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[84] FTC-2023-0064-2341 (Massachusetts House of Representatives, Rep. Lindsay Sabadosa); FTC-2023-0064-1411 (Arizona House of Representatives, Rep. Analise Ortiz); FTC-2023-0064-3072 (Michigan Senate and House of Representatives, Sen. Darrin Camilleri, Sen. Mary Cavanagh, and Rep. Betsy Coffia); FTC-2023-0064-3079 (Montana State Senate, Senate Democratic Caucus, Sen. Pat Flowers, Sen. Susan Webber, Sen. Andrea Olsen, Sen. Edie McClafferty, Sen. Jen Gross, Sen. Janet Ellis, Sen. Shane Morigeau, Sen. Ellie Boldman, Sen. Ryan Lynch, Sen. Christopher Pope, Sen. Mike Fox, Sen. Denise Hayman, Sen. Willis Curdy, and Sen. Mary Ann Dunwell); FTC-2023-0064-3103 (Florida House of Representatives, Rep. Angela Nixon); FTC-2023-0064-3123 (Syracuse, New York, City Auditor Alexander Marion); FTC-2023-0064-3117 (Maryland House of Delegates, Del. Julie Palakovich Carr); FTC-2023-0064-3149 (North Carolina House of Representatives, Rep. Julie von Haefen); FTC-2023-0064-3237 (North Carolina House of Representatives, Rep. Pricey Harrison).

[85] *See, e.g.*, Transparency In Charges for Key Events Ticketing Act ("TICKET Act"), H.R. 3950, § 2, 118th Cong. (as engrossed in the House, May 15, 2024) (among other provisions, requiring ticket sellers, including secondary markets and exchanges, to clearly and conspicuously disclose the total ticket price for an event in any advertisement and each time the ticket is displayed in the purchasing process, and to provide an itemized list of the base ticket price and each fee or charge prior to completion of the purchase; violations of the TICKET Act would be treated as violation of a rule defining an unfair or deceptive act or practice under section 18(a)(1)(B) of the FTC Act); No Hidden Fees on Extra Expenses for Stays Act of 2023 ("No Hidden FEES Act of 2023"), H.R. 6543, § 2(a), 118th Cong. (as engrossed in the House, June 11, 2024) (among other provisions, prohibiting providers of short-term lodging, including providers of a website or other centralized platform that advertises or otherwise offers the price of a reservation for short-term lodging, from advertising, displaying, marketing, or otherwise offering for sale, including through a direct offering, third-party distribution, or metasearch referral, a price of a reservation that does not include each mandatory fee; violations of § 2(a) would be treated as violation of a rule defining an unfair or deceptive act or practice under section 18(a)(1)(B) of the FTC Act).

[86] Competition Act, R.S.C., 1985, c. C-34, ¶ 74.01(1.1) (Can.) (providing with respect to "drip pricing" that "the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation"), *https://laws.justice.gc.ca/eng/acts/C-34/FullText.html*.

[87] Competition and Consumer Act 2010, Vol. 4, Sched. 2, Ch. 3, P. 3-1, Sec. 48, Ch. 4, P. 4-1, Sec. 166 (Austl.) (prohibiting "mak[ing] a representation with respect to an amount that, if paid, would constitute a part of the consideration for the supply of the goods or services unless the person also specifies, in a prominent way and as a single figure, the single price for the goods or services"), *https://www.legislation.gov.au/C2004A00109/latest/text*.

EU Directive 2005/29/EC of the European Parliament and of the Council,[88] and the UK Digital Markets, Competition and Consumers Act 2024.[89] In addition, private lawsuits filed against businesses in the live-event ticketing, short-term lodging, banking, and delivery service industries challenging these practices lend further support to the Commission's prevalence determination.[90]

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[88] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, art. 7, 2005 O.J. (L 149) (providing that it is a misleading commercial practice to engage in "bait advertising" or offering products at a specified price if not able to provide the products at that price for a period and in quantities reasonable with regard to the product, the scale of advertising of the product and the price offered), *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029*; *see also* Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, art. 5 and art. 6, 2011 O.J. (L 304), *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0083&qid=1726109600968*. Additionally, a 1998 Directive required that the selling price should be indicated for all products referred to in the Article, which means a price that is the final price for a unit of the product including VAT and all other taxes. *See* Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, 1998 O.J. (L 80), *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998L0006&qid=1726109951386*.

[89] Digital Markets, Competition and Consumers Act 2024, c. 13, § 230 (providing that an invitation to purchase omits material information if it omits the total price of the product or, if the nature of the product prevents all or a part of the total price from reasonably being calculated in advance, how the price (or that part of it) will be calculated), *https://www.legislation.gov.uk/ukpga/2024/13/section/230*. Reports preceding this legislation included: UK Department for Business & Trade, *Estimating the Prevalence and Impact of Online Drip Pricing* (2023), *https://assets.publishing.service.gov.uk/media/64f1ebd7a78c5f000dc6f448/estimating-the-prevalence-and-impact-of-online-drip-pricing.pdf*; and UK Department for Business & Trade, *Government response to consultation on "Smarter Regulation: Consultation on Improving Price Transparency and Product Information for Consumers"* (2023), *https://www.gov.uk/government/consultations/smarter-regulation-improving-price-transparency-and-product-information-for-consumers/outcome/government-response-to-consultation-on-smarter-regulation-improving-consumer-price-transparency-and-product-information-for-consumers#introduction*.

[90] *See, e.g.*, Class Action Complaint ¶¶ 2–3, *Abdelsayed v. Marriot Int'l, Inc.,* No. 3:21-cv-00402-JLS-AHG (S.D. Cal. Mar. 5, 2021) (alleging defendant misled consumers into believing that hotel rooms were cheaper that they actually were by engaging in drip pricing that baited consumers with lower prices and adding charges, such as resort fees, amenity fees, and destination fees, throughout the vending process); Complaint ¶¶ 1, 3–5, *Travelers United v. MGM Resorts Int'l, Inc.,* No. 2021-CA-00477-B (D.C. Super. Ct. Feb. 18, 2021) (alleging defendant misled consumers into believing hotel rooms were cheaper that they actually were by using drip pricing that hid resort fees from advertised daily room rates); Class Action Complaint ¶¶ 18, 31, 43, 69–71, *Lee v. Ticketmaster LLC,* No. 3:18-cv-05987-VC (N.D. Cal. Sept. 28, 2018) (alleging, in part, that defendants were unjustly enriched through service charges added to resale tickets); Second Amended Class Action Complaint ¶¶ 1–2, *Wang v. StubHub, Inc.,* No. CGC-18564120 (Cal. Super. Ct. Feb. 25, 2019) (alleging defendant intentionally hid additional fees in order to advertise artificially low-ticket prices); Class Action Complaint ¶¶ 1–3, 33–34, *Holl v. United Parcel Service, Inc.,* No. 4:16-cv-05856-HSG (N.D. Cal. Oct. 11, 2016) (alleging defendant created a bait and switch by falsely advertising low published rates that were later inflated); (Truth in Advertising, Inc., submitted information about its tracking of class action cases related to unfair and deceptive fees, including cases involving event

The Commission takes notice of additional indications of prevalence identified in response to the NPRM. Commenters to the NPRM noted that unfair or deceptive pricing practices exist economy-wide.[91] For instance, Consumer Reports conducted a nationally representative survey and found that many consumers experienced unexpected fees in a variety of industries and that more than two-thirds of Americans report paying more in hidden fees now than they did five years ago.[92] Similarly, Consumer Federation of American submitted an extensive compilation of stories from consumers about their experiences with junk fees that recounted hidden and misleading fees being applied across a wide range of industries.[93] Truth in Advertising, Inc. provided a sampling of consumer complaints it had received over the years and noted the pervasiveness of hidden and misleading fees in multiple industries, including event ticket sales, hotel and travel companies, short-term lodging, internet apps, automobile rentals, communication services, carpet cleaning, auto/truck sales, dietary supplement orders, food services,

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ticket sellers charging and misrepresenting the purpose of "junk fees" and hotels advertising a low base rate for rooms and then charging consumers more than the advertised rate by imposing additional fees.); *see also* Second Amended Class Action Complaint ¶¶ 5–7, *Hecox v. DoorDash, Inc.,* No. 1:23-cv-01006-JRR (D. Md. Sept. 5, 2023) (alleging in part that defendant employed deceptively named fees misleading consumers to believe the fees were for delivery personnel or for government imposed fees); Class Action Complaint ¶¶ 7–16, *Ramirez v. Bank of Am., N.A.,* No. 4:22-cv-00859-YGR (N.D. Cal. Feb. 10, 2022) (alleging misrepresentations about the refundability of fees); Class Action Complaint ¶¶ 27, 36, 46–51, *Cross v. Point and Pay LLC,* No. 6:16-cv-01182 (M.D. Fla. June 29, 2016) (alleging defendant made representations about its services and fees that contained false, misleading, and deceptive and unfair statements and omissions about fees for online payment processing services); Class Action Complaint ¶¶ 1–2, 9–12, *DeSimone v. LOOK Brands, LLC*, No. 23-cv-11144 (S.D.N.Y. Dec. 22, 2023) (alleging defendant failed to disclose the total cost of movie ticket prices, inclusive of all fees, in violation of New York state law); Class Action Complaint ¶¶ 1–2, 9–15, *Jones v. Regal Cinemas, Inc.*, No. 23-CV-11145 (S.D.N.Y. Dec. 22, 2023) (alleging defendant failed to disclose total cost of movie ticket prices, inclusive of all fees, in violation of New York state law); *see also* FTC-2022-0069-6042 (ANPR).

[91] *See, e.g.*, FTC-2023-0064-3216 (Demand Progress Education Fund noted that consumers face surprise or "bogus" fees across industries, including rental housing, cell phone service, utilities, and ticketing, and cited a Consumer Reports study finding that 85% of Americans have dealt with fees of this nature.).

[92] FTC-2023-0064-3205 (Consumer Reports noted the prevalence of unexpected fees in live entertainment or sporting events, hotels, telecommunication services, gas or electric utilities, air travel, credit cards, auto loans and purchases, and personal banking services.).

[93] FTC-2023-0064-3160 (Consumer Federation of America submitted the compilation as Appendix B to its comment.).

airlines, moving services, credit unions and banks, payday lending services, gym memberships, outlet stores, sports betting, and online auctions.[94] Public Citizen commented about "the widespread use of the deceptive practice of charging undisclosed fees by major industries . . . including communication carriers, air carriers, ticket sales, auto dealers, credit card companies, cable giants, and property owners," as well as "event ticketing, hotels, funeral homes," and other industries.[95] Additionally, AARP pointed to a myriad of confusing fees charged by assisted living facilities.[96] Commenters also noted that instances of unfair and deceptive fees or charges have increased over time.[97]

Commenters also raised concerns about the prevalence of hidden fees in specific industries such as live-event ticketing and short-term lodging. The American Society of Travel Advisors, Travel Technology Association, and a travel agent observed that, despite increased scrutiny over hotel resort fees, there remains little uniformity in pricing practices, and bait-and-switch pricing remains an issue.[98] Multiple commenters raised continued concerns over hidden fee pricing practices in the live-event ticketing market. TickPick, LLC observed the "widespread" deceptive practice of bait-and-switch pricing

[94] FTC-2023-0064-3104 (Truth in Advertising, Inc.).
[95] FTC-2023-0064-3302 (Public Citizen).
[96] FTC-2023-0064-2885 (AARP argued these fees are not well understood by potential residents and that renters are charged "many superfluous fees, including application fees, credit check fees, pet fees, excessive late fees, utility-related fees, mail sorting fees, inspection fees, convenience fees, common area fees, guest fees, trash fees, notice fees, security deposit fees, check cashing fees, cleaning or repair fees, and other mandatory fees for services that a renter does not need or want.").
[97] *See, e.g.*, FTC-2023-0064-3290 (U.S. Public Interest Research Group Education Fund commented that consumers have faced more unfair and deceptive fees as consumers "have become accustomed to online transactions."); FTC-2023-0064-3090 (Atlanta Legal Aid Society, Inc. noted the ubiquity of unfair and deceptive fees and that these types of fees in the rental housing context have been steadily rising for years.).
[98] FTC-2023-0064-3106 (American Society of Travel Advisors stated that resort fees are disclosed in a highly inconsistent manner, even between hotels doing business under the same brand name.); FTC-2023-0064-3293 (Travel Technology Association commented that hotels have been known to surprise guests at check-in with these fees and "guests have no reasonable recourse but to pay them."); FTC-2023-0064-3077 (Far Horizons Travel, by its owner, a travel agent of almost 40 years, called hotel fees "out of control" and stated: "I am appalled by these fees and how much they have risen over the years. . . . They say it's for extra amenities but that is not always the case and more often not the case at all.").

rampant in this industry. Chamber of Progress noted that deceptive and unfair fees are "rampant in some industries and pose clear threats to consumers," including "hotel stays, live sports or concert tickets, and airline tickets." Future of Music Coalition commented that they have worked to "deal[] with the scourge of junk fees in various parts of the economy," including live touring. The Charleston Symphony affirmed that "requiring sellers to disclose the total price clearly and conspicuously[] addresses a pressing issue in the nonprofit performing arts sector."[99]

Despite the overwhelming evidence supporting the prevalence of bait-and-switch pricing and misleading fee practices economy-wide, a minority of commenters argued that the Commission has failed to meet its burden of establishing prevalence. Some commenters contended that the Commission's evidence focuses on a small number of problematic industries and does not demonstrate prevalence in every single industry across the economy.[100] Some commenters similarly contended that the proposed rule was an attempt to impose a "one-size-fits-all" solution on distinct industries, not all of which

[99] FTC-2023-0064-3212 (TickPick, LLC); FTC-2023-0064-3137 (Chamber of Progress); FTC-2023-0064-3230 (Future of Music Coalition); FTC-2023-0064-3105 (Charleston Symphony).

[100] FTC-2023-0064-3143 (ACA Connects—America's Communication Association argued that the NPRM contained no meaningful discussion of prevalence of unfair or deceptive pricing disclosures with respect to communication services.); FTC-2023-0064-3186 (National LGBT Chamber of Commerce and the National Asian/Pacific Islander American Chamber of Commerce & Entrepreneurship argued that "prepared food and grocery delivery applications . . . have demonstrated transparency and accessibility, providing clear explanations about fees."); FTC-2023-0064-3292 (National Association of Theatre Owners argued that the NPRM failed to demonstrate prevalence with respect to the theatre industry, identifying only fifty comments received in response to the ANPR that reference movie theatre convenience fees.); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP argued that the Commission has failed to reliably demonstrate the prevalence of unfair or deceptive fees across any industry or sector.); FTC-2023-0064-3233 (NCTA—The Internet & Television Association argued that the only mention of telecommunication fees is anecdotal, and the Commission has failed to show prevalence with respect to any NCTA member.); FTC-2023-0064-3263 (Flex Association stated that "[t]he Commission has not pointed to evidence of any prevalent consumer harm that justifies imposing new pricing and disclosure rules on app-based delivery platforms."); FTC-2023-0064-3130 (International Cemetery, Cremation & Funeral Association argued that over the last several reviews of the Funeral Rule the Commission has not found evidence of widespread consumer abuse among cemeteries or third-party suppliers.).

are engaging in unfair or deceptive practices, and thus the proposed rule is overbroad and not supported by the requisite evidence of prevalence.[101]

First, the Commission disagrees that it must find that the unfair or deceptive act or practice is widespread within every individual context or industry to issue a rule targeting a specific practice across industries. To begin with, the Commission's prevalence findings need only have "some basis or evidence" to show "the practice the FTC rule seeks to regulate does indeed occur."[102] While many trade regulation rules promulgated under section 18 focus on a particular industry, as discussed in section IV.A.1, others apply to specific practices across industries regardless of product or service, such as the Cooling-Off Period for Door-to-Door Sales Rule (the "Cooling-Off Rule"), the Rule on the Preservation of Consumers' Claims and Defenses (the "Holder Rule"), the Rule on Retail Food Store Advertising and Marketing Practices (the "Unavailability Rule"), the Mail, Internet, or Telephone Order Merchandise Rule (the "Mail Order Rule"), the Rule on the Use of Prenotification Negative Option Plans (the "Negative Option Rule"), the Rule on Impersonation of Government and Businesses (the "Impersonator Rule"), and the Rule on the Use of Consumer Reviews and Testimonials.[103] While the Commission agrees that minimal evidence of a practice would be insufficient to meet the prevalence standard, section 18 did not require the Commission to find for its economy-wide rulemakings that every industry engaged in sales made at a consumer's home or at certain

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[101] FTC-2023-0064-3258 (National Taxpayers Union Foundation); FTC-2023-0064-3173 (Center for Individual Freedom argued that the Commission was overly reliant on lodging, ticketing, and restaurants in justifying an economy-wide rule.); FTC-2023-0064-3251 (National RV Dealers Association argued the proposed rule "is an overextension from this drip pricing concern, and not only strays from the FTC's traditional areas of concern but also risks impeding the normal business operations and innovation across a multitude of sectors.").

[102] *Pa. Funeral Dirs. Ass'n v. FTC,* 41 F.3d 81, 87 (3d Cir. 1994).

[103] 16 CFR part 429; 16 CFR part 433; 16 CFR part 424; 16 CFR part 435; 16 CFR part 425; 16 CFR part 461; 16 CFR part 465.

other locations (Cooling-Off Rule), used credit contracts (Holder Rule), offered products at an advertised price when they did not have the advertised products in stock (Unavailability Rule), or had a robust mail, internet or telephone order business (Mail Order Rule); or that every industry used negative options (Negative Option Rule), had an issue with impersonating government agencies or businesses (Impersonator Rule), or used and abused reviews (Rule on the Use of Consumer Reviews and Testimonials). Imposing such a standard would artificially limit the Commission's rulemaking authority under section 18 in a way that does not align with the Commission's mandate or the text of the statute, which focuses on acts or practices generally and never mentions the need to define markets or industries. As explained herein and in the NPRM, the information evidencing prevalence of bait-and-switch pricing and misleading fees more than meets section 18's standard for prevalence for the economy generally, and for the live-event ticketing and short-term lodging industries, specifically, by demonstrating that the practices are widespread and, further, that such practices are occurring across a wide range of industries.

Second, the Commission notes that, even when commenters challenged the application of the rule to specific pricing scenarios or to their own industries, they also appeared to concede that advertising a base price to which mandatory fees are added later is a frequent practice even in their own industries. While some commenters raised genuine challenges or questions about the application of the rule, others attempted to conflate such genuine challenges with their desire to continue to use drip or partition pricing.

As discussed in section III.B.1, commenters from some ticket sellers did not contest that their advertised prices failed to include all mandatory fees and to provide the total price of goods or services. Instead, they attempted to explain why they engaged in those practices.

Finally, some commenters from industries other than live-event ticketing and short-term lodging argued that the Commission's NPRM failed to establish prevalence because of the following reasons: the cited cases focused on inapplicable fact patterns or resulted in settlement; the cited conferences called for additional research rather than regulatory strategy, or were narrow in scope as to the industries covered; and the resort fee warning letters failed to result in enforcement action.[104] Commenters such as the U.S. Chamber of Commerce argued that the enforcement record should rely only on cease-and-desist orders or "extensive empirical research."[105] Other commenters also raised concerns about a lack of empirical research.[106] These commenters overlook section 18's clear instruction that the Commission's prevalence determination can be based on "any other information available to the Commission" that indicates a widespread pattern, which the Commission thoroughly laid out in the NPRM and expands upon herein.

In sum, the Commission's enforcement history, workshops, and reports, together with the record of this rulemaking and the enforcement cases brought by the

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[104] FTC-2023-0064-3127 (U.S. Chamber of Commerce argued the NPRM failed to cite any cases holding that late in time fee disclosures are unfair or deceptive and the settlements described by the Commission only raised the failure of companies to disclose certain applicable fees prior to purchase or at all.).
[105] *Id*.
[106] FTC-2023-0064-3152 (Building Owners & Managers Association et al. commented that the proposed rule "lacks any reasonable factual underpinning as applied to the rental housing industry because it is not based on any statistical data relevant to the industry," but is "based solely upon anecdotal, conclusory, and non-representative justification."); FTC-2023-0064-3172 (New Jersey Apartment Association stated that the NPRM lacked "statistical basis" for claims that unfair and deceptive fees were an issue in the rental housing context and that the Commission relied on anecdotal evidence.).

Commission's local, State, and international enforcement counterparts fully support a finding that bait-and-switch pricing that hides the total price of goods or services and misrepresenting the nature, purpose, amount, and refundability of fees or charges are prevalent across the economy, including in the live-event ticketing and short-term lodging industries.[107] Despite the evidence that these specific practices are prevalent economy wide, the Commission will first focus its rulemaking authority on combatting these practices in the live-event ticketing and short-term lodging industries, the two industries in which the Commission first began evaluating drip pricing more than a decade ago and for which there is a long history of consumer harm.

[107] *See, e.g., supra* notes 66, 67, 72, 75, 80, 85, 90 (detailing the Commission's enforcement history, workshops, and reports, class action lawsuits, state and local enforcement and regulations, and other efforts to curb unfair or deceptive pricing practices in the live-event ticket and short-term lodging industries). The Commission also received thousands of comments from individual consumers detailing bait-and-switch pricing and deceptive fees in the live-event ticket and short-term lodging industries in response to the ANPR and the NPRM. *See, e.g.*, FTC-2023-0064-0820 (Individual Commenter stated "I was just considering buying some event tickets on Vivid Seats and was shocked to see that they add a full 33% in bogus fees."); FTC-2023-0064-0058 (Individual Commenter stated: "The worst offenders are ticket sellers/resellers, who advertise baseline ticket prices in their search engines and then include some unknown amount of fees when it's time to pay."); FTC-2023-0064-0102 (Individual Commenter stated: "I recently went to a MLB game and the fees were $21 for a $75 ticket or greater than 20%. I went to a concert and the tickets were $55 but the fees brought the price to over $100. On both cases, the fees were not disclosed until the payment screen."); FTC-2023-0064-0145 (Individual Commenter described purchasing tickets to a musical: "Nearly 20% of the total cost was for fees that were not disclosed until I was at the payment step ($119 ticket + $4.55 order processing fee + $4.00 facility charge + $20.50 service fee). I don't understand what any of those fees are actually for."); FTC-2023-0064-0040 (Individual Commenter described hotel resort fees as "egregious and opaque" and stated they learned of an additional $50 per night resort fee upon check-in: "I asked what the purpose of the fee was and was told by the staff person, 'I'm not really sure.'"); FTC-2023-0064-1462 (Individual Commenter stated: "Recently I found an "affordable" hotel in a city and booked a 4 night stay, but was not informed until after I checked in that parking cost extra each day . . . . which made the hotel no longer affordable for me"); FTC-2023-0064-0977 (Individual Commenter described spending hours trying to book a hotel to face "mandatory hotel fees for a pool, a gym and 24 hour security totalled $50/night"); FTC-2023-0064-0152 (Individual Commenter stated that fees through services including Airbnb and VRBO are "often vague and undefined" and described fees including a "host fee," "booking fee," "safety fee," and "resort fee").

B. Manner and Context in Which the Acts or Practices Are Deceptive or Unfair

The final rule curbs certain unfair or deceptive pricing practices by requiring truthfulness and transparency in pricing for live-event ticketing and short-term lodging. Truthful, timely, and transparent pricing, including the nature, purpose, and amount of any fees or charges imposed, is critical for consumers—and also for honest businesses. The legal underpinning of the rule, or the manner and context in which the acts or practices defined by the rule are unfair or deceptive, is not complex. By identifying and targeting pricing tactics that hide the true price of live-event tickets and short-term lodging from consumers, the rule's central provisions prohibit conduct that is inherently deceptive or unfair, including: (1) offering prices that do not include all mandatory fees or charges and (2) misrepresenting the nature, purpose, amount, and refundability of fees or charges, and the identity of the good or service for which the fees or charges are imposed. Thus, the final rule will allow American consumers to make better-informed purchasing decisions when purchasing live-event tickets or deciding where to stay on a short-term basis and level the playing field for honest businesses in these industries that truthfully, timely, and transparently disclose their pricing information.

A representation, omission, or practice is deceptive under section 5 of the FTC Act if it is likely to mislead consumers acting reasonably under the circumstances and is material to consumers—that is, it would likely affect the consumer's conduct or decisions

with regard to a good or service.[108] Price is a material term.[109] It is a deceptive practice to misrepresent the price of a good or service,[110] including through a deceptive first contact.[111] Through its false savings cases, the Commission repeatedly found that it was deceptive under section 5 to present an inflated list price or comparison price, from which consumers were misled to believe that the business offered a lower-than-normal price.[112] The inverse—luring consumers to a good or service with a false low price—is also

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[108] *See* Fed. Trade Comm'n, *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) (appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984) (hereinafter "*Deception Policy Statement*"), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-103/ftc_volume_decision_103_january_-_june_1984pages_103-203.pdf*.

[109] *Deception Policy Statement*, 103 F.T.C. at 182–83 (listing claims or omissions involving cost among those that are presumptively material); *see also, e.g.*, *FTC v. FleetCor Techs., Inc.*, 620 F. Supp. 3d 1268, 1303–04, 1311 (N.D. Ga. 2022) (finding that representations about discounts and transaction fees were material).

[110] *Deception Policy Statement,* 103 F.T.C. at 175 (listing "misleading price claims" among those claims that the FTC has found to be deceptive); *see also, e.g.*, *In re Resort Car Rental Sys., Inc.*, 83 F.T.C. 234, 281–82, 300 (1973), *https://www.ftc.gov/system/files/ftc_gov/pdf/Resort%20Car%20Rental%20System%2C%20Inc.%2083%20FTC%20234%20%281973%29.pdf* (finding that using the name "Dollar-A-Day" misrepresented the price of car rentals in violation of section 5 of the FTC Act where a rental could not be attained for one dollar per day due to mileage, insurance, and other mandatory charges), *aff'd sub. nom. Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).

[111] *See, e.g.*, Opinion of the Commission at 37–40, 47–50, *In re Intuit Inc*., No. 9408 (FTC Jan. 22, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/d09408_commission_opinion_redacted_public.pdf* (finding that under the legal doctrine known as the first-contact or deceptive door-opener rule, respondent's first contact with consumers was deceptive because its advertising falsely claimed that consumers can file their taxes for free with TurboTax and that later disclosures did not cure the deception); Complaint ¶¶ 12, 46–49, *In re LCA-Vision*, No. C-4789 (FTC Mar. 13, 2023) (alleging respondent's advertisements misrepresented the price of surgery and failed to disclose eligibility limitations for a promotional price); Complaint ¶¶ 8-10, *In re Progressive Chevrolet Company*, No. C-4578 (FTC Jun. 16, 2016) (alleging that respondents represented that consumers could lease vehicles at advertised down payment and monthly payment amounts, and deceptively failed to disclose a material condition that meant few consumers would qualify for the advertised terms); *Resort Car Rental Sys.,* 518 F.2d at 964 (upholding the Commission's order finding that the name "Dollar-A-Day" was deceptive when charges adding up to more than one dollar per day were disclosed later).

[112] *E.g.*, *In re Giant Food, Inc.*, 61 F.T.C. 326, 341–42, 361 (1962), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-61/ftcd-vol61july-december1962pages306-404.pdf* (finding that comparative-price advertising of household goods and appliances created false, misleading, and deceptive impressions that induced consumers to make purchases based on mistaken beliefs); *In re George's Radio & Television Co.*, 60 F.T.C. 179, 193–94, 196 (1962), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-60/ftcd-vol60january-june1962pages107-211.pdf* (collecting cases and finding that advertisements including manufacturer's suggested list prices that were higher than the customary retail prices were deceptive).

deceptive.[113] For example, in *In re Filderman Corp.*, 64 F.T.C. 427 (1964), the Commission found that the defendant violated section 5 both when it displayed misleading list prices and when it later imposed mandatory service charges on top of the advertised price.[114] Once a consumer has been lured in by deception, including about the cost of the good or service, it is well established that a later disclosure cannot cure that deception.[115] Thus, bait-and-switch pricing, where the initial contact with a consumer shows a lower or partial price without including mandatory fees, violates the FTC Act even if the total price is later disclosed.

A practice is considered unfair under section 5 if: (1) it causes, or is likely to cause, substantial injury; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by benefits to consumers or competition.[116] Pricing that is

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[113] *See, e.g., In re Filderman Corp.*, 64 F.T.C. 427, 442–43, 461 (1964), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-64/ftcd-vol64january-march1964pages409-511.pdf* (finding, among other things, that respondents unlawfully advertised prices that were later inflated with mandatory service charges); *In re Resort Car Rental Sys.,* 83 F.T.C. at 281–82, 300; Opinion of the Commission at 37–40, 47–50, *In re Intuit Inc*., No. 9408 (finding that respondent's advertising that falsely claimed that consumers can file their taxes for free with TurboTax was deceptive); Complaint ¶¶ 12, 46–49, *In re LCA-Vision*, No. C-4789(alleging respondent's advertisements misrepresented the price of surgery and failed to disclose eligibility limitations for a promotional price). *See also* cases cited *supra* note 61 (collecting FTC enforcement actions alleging that bait-and-switch pricing tactics concerning hidden fees violated section 5).

[114] *In re Filderman Corp.*, 64 F.T.C. at 461 (ordering respondents to stop "[r]epresenting, directly or by implication: That any amount is the price of merchandise when an additional amount is required to be paid before the merchandise will be sold.")

[115] Fed. Trade Comm'n, *Enforcement Policy Statement on Deceptively Formatted Advertisements* 7 n.25 (2015), *https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf*; *see also* Opinion of the Commission at 28–30, *In re Intuit Inc*., No. 9408, *https://www.ftc.gov/system/files/ftc_gov/pdf/d09408_commission_opinion_redacted_public.pdf* (finding that disclosures on Intuit's websites were "inadequate to cure a misimpression for Intuit's ads," which used "false claims to engage consumers and induce them to further interact with the company"); *Resort Car Rental Sys*, 518 F.2d at 964 ("The Federal Trade [Commission] Act is violated if it induces first contact through deception, even if the buyer later becomes fully informed before entering the contract.") (bracketed text added); *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961) ("The law is violated if the first contact is secured by deception, even though the true facts are made known to the buyer before he enters into the contract of purchase." (citations omitted)); *FTC v. City W. Advantage, Inc.*, No. 2:08-cv-00609-BES-GWF, 2008 WL 2844696, at *3 (D. Nev. July 22, 2008) (finding defendant likely employed "deceptive door openers . . . to induce consumers to stay on the line").

[116] 15 U.S.C. 45(n).

not truthful or transparent causes or is likely to cause substantial injury; such injury is not reasonably avoidable by consumers or outweighed by benefits to consumers or competition.

Drip pricing and other bait-and-switch tactics that hide the true price cause substantial injury, as the Commission discusses in detail in section V.E, by leading consumers to buy more goods or services, pay more for those goods or services, and incur higher search costs than they otherwise would have if they had been presented with the true price upfront. Studies have shown that consumers spend more money on the same goods when faced with drip pricing, i.e., when they are not shown the total price upfront, but instead are shown a base price, with mandatory fees or charges added later throughout the buying process.[117] Where mandatory fees or charges are disclosed at the same time as, but separately from, the base price, consumers are still harmed. The practice of dividing the price into multiple components without disclosing the total, generally referred to as partitioned pricing, distorts consumer choice.[118] Consumers confronted with partitioned pricing, on average, underestimate the total price of the good

[117] Alexander Rasch et al., *Drip Pricing and its Regulation: Experimental Evidence*, 176 J. Econ. Behav. & Org. 353 (2020) ("[E]xperimental evidence suggests that consumers indeed strongly and systematically underestimate the total price under drip pricing, and that they make mistakes when searching"); Shelle Santana et al., *Consumer Reactions to Drip Pricing*, 39 Mktg. Sci. 188 (2020) ("Across six studies, we find that drip pricing (versus nondrip pricing) increases the likelihood that consumers will both initially and ultimately select a lower base price option, even though the surcharges for optional add-ons cause this base price to balloon—making the lower base fare option more expensive than the alternative"); Tom Blake et al., *Price Salience and Product Choice*, 40 Mktg. Sci. 619 (2021); Steffen Huck et al., *The Impact of Price Frames on Consumer Decision Making: Experimental Evidence* (2015); Meghan R. Busse & Jorge M. Silva-Risso, *"One Discriminatory Rent" or "Double Jeopardy": Multi-component Negotiation for New Car Purchases*, 100 Am. Econ. Rev. 470 (2010); Raj Chetty et al., *Salience and Taxation: Theory and Evidence*, 99 Am. Econ. Rev. 1145 (2009) ("[C]ommodity taxes that are included in posted prices reduce demand significantly more than taxes that are not included in posted prices."); *see also* FTC-2023-0064-3247 (Private Law Clinic at Yale Law School).

[118] Sullivan, *supra* note 67, at 4; FTC-2023-0064-3271 (U.S. Senate, Sen. Amy Klobuchar).

or service, likely because they use mental shortcuts to estimate price that do not fully account for each component.[119]

In addition, consumers who wish to compare prices incur additional search costs to make direct comparisons of goods or services when the full price is not disclosed upfront.[120] For example, in an online transaction to book a hotel room, consumers cannot simply view the first price displayed on each website, but instead need to navigate to subsequent pages or even enter all their payment information and reach the checkout page for each website to determine the true total price of their hotel stay.[121] The same is true on live-event ticketing websites. As TickPick, LLC noted, "[m]ajor ticketing marketplaces often require consumers to enter their credit card or other payment information prior to disclosing mandatory fees. On these marketplaces, the full purchase price is only disclosed after payment information is collected."[122] Under such circumstances, consumers waste time and effort pursuing an offer that is not actually available at the promised price. Such search costs that result from unfair or deceptive practices are legally cognizable injuries under the FTC Act.[123]

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[119] Sullivan, *supra* note 67, at 22–24; Vicki G. Morowitz et al., *Divide and Prosper: Consumers' Reactions to Partitioned Prices*, 35 J. Mktg. Rsch. 453 (1998) (subjects exposed to partitioned prices recalled significantly lower total product costs than subjects exposed to combined prices).

[120] Sullivan, *supra* note 67, at 4; Fed. Trade Comm'n, *"That's the Ticket" Workshop: Staff Perspective* 4 (May 2020), *https://www.ftc.gov/system/files/documents/reports/thats-ticket-workshop-staff-perspective/staffperspective_tickets_final-508.pdf*; *see also* Han Hong et al, *Using Price Distributions to Estimate Search Costs*, 37 RAND J. Econ. 257 (2006) (describing methods of estimating search costs).

[121] NPRM, 88 FR 77433 n.170.

[122] FTC-2023-0064-3212 (TickPick, LLC) ("[On] StubHub's website, for example, a consumer can be required to click 12 times after being shown the first price before being shown the total price they will pay.")

[123] *See, e.g.*, Decision & Order at 3–4, *In re LCA-Vision*, No. C-4789 (FTC Mar. 13, 2023) (settling allegations that deceptive advertising caused consumers to "waste[ ] 90 minutes to two hours of their time" responding to a deceptive promotion, Complaint ¶ 35, and prohibiting misrepresentations of price and requiring disclosure of price or discount qualification requirements), *https://www.ftc.gov/system/files/ftc_gov/pdf/1923157-lca-vision-consent-package.pdf*; Decision & Order at 2–3, *In re Credit Karma, LLC*, No. C-4781 (FTC Jan. 19, 2023) (settling allegations that deceptive

Misrepresented fees also cause or are likely to cause substantial injury—they harm consumers as well as businesses that do not engage in these practices. For example, as discussed in section III.C, a hotel might charge a resort fee when only typical and ordinary accommodations and amenities are offered, an environmental fee that serves no environmental purpose, or a fee misrepresented as a government charge. As TickPick, LLC put it, misrepresented fees trick consumers into paying more and ultimately inhibit competition by providing an unfair advantage to businesses that misrepresent their fees.[124] Likewise, when businesses misrepresent fees, consumers are unable to make informed choices about the value of the fee or charge, or the good or service it represents, because their understanding of the fee or charge is predicated on false, vague, or otherwise misleading information. As such, consumers are unable to understand what they have purchased, or to which charges they have consented.[125]

Consumers cannot reasonably avoid these harms. As explained in the NPRM, studies suggest that cognitive bias may prevent consumers from reasonably avoiding injury caused by unfair and deceptive pricing practices.[126] Several behavioral studies explain why consumers cannot reasonably avoid making errors when the true price is not displayed upfront. Behavioral research shows that consumers who first learn of a lower

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advertising caused consumers to waste significant time in applying for "pre-approved" offers that were denied, Complaint ¶ 13, and requiring Credit Karma to pay $3 million in monetary relief), *https://www.ftc.gov/system/files/ftc_gov/pdf/2023138-credit-karma-combined-final-consent-without-signatures.pdf*; *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 U.S. Dist. LEXIS 55569, at *17 (W.D. Wash. Apr. 26, 2016) (finding consumer injury included "time spent pursuing those refunds"); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D. Cal. 2008) (finding "no genuine issue of material fact that consumers suffered substantial injury" based on "considerable amount of time" spent by consumers); *FTC v. Accusearch, Inc.*, No. 06-cv-105-D, 2007 U.S. Dist. LEXIS 74905, at *22–23 (D. Wyo. Sept. 28, 2007) (granting summary judgment in favor of FTC based in part on finding of consumer injury for "lost time and productivity").

[124] FTC-2023-0064-3212 (TickPick, LLC).

[125] *Id.*

[126] NPRM, 88 FR 77434 (discussing various cognitive biases that contribute to the unavoidability of consumer injury, including the anchoring theory, the endowment theory, and the sunken cost fallacy).

price do not properly adjust their calculations when additional fees are added, thereby underestimating the total price.[127] It also shows that consumers attach value to things they perceive to be theirs and, once consumers begin the purchase process, their perception shifts so that stopping the transaction feels like a loss.[128] The research shows that consumers who already have invested in an endeavor, such as by taking time to make selections on a travel or live-event ticket website, continue that endeavor even if they would pay less if they began again elsewhere.[129] Lastly, consumers necessarily incur search costs when mandatory fees are obscured because it takes them longer to discover the full price within a single transaction and to comparison shop across transactions.[130] Notably, it is unlikely that the market can correct for these injuries because once the practice of displaying incomplete initial prices takes hold, honest businesses will struggle to compete. For example, as noted in the NPRM, one market participant in the live-event ticketing industry, StubHub, unilaterally adopted all-in pricing in 2014 but soon reverted back to its original model after it lost significant market share when customers incorrectly perceived StubHub's prices to be higher.[131]

The consumer injury caused by these bait-and-switch pricing practices is not outweighed by any benefits to consumers or competition. Consumers receive no benefit from businesses that use drip pricing, partitioned pricing, or misleading price presentation

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[127] Inst. for Policy Integrity, *Pet. for Rulemaking Concerning Drip Pricing* 18 (2021), *https://policyintegrity.org/documents/Petition_for_Rulemaking_Concerning_Drip_Pricing.pdf*.
[128] Steffen Huck et al., *The Impact of Price Frames on Consumer Decision Making: Experimental Evidence* (2015).
[129] David A. Friedman, *Regulating Drip Pricing*, 31 Stan. L. & Pol'y Rev. 51, 55 n.13 (2020).
[130] *See* NPRM, 88 FR 77447 (discussing reductions in search costs from the proposed rule).
[131] *See* NPRM, 88 FR 77434 (quoting Fed. Trade Comm'n, "*That's the Ticket" Workshop: Staff Perspective* 4 (May 2020), *https://www.ftc.gov/system/files/documents/reports/thats-ticket-workshop-staff-perspective/staffperspective_tickets_final-508.pdf*.). *See also, e.g.*, *https://www.contactlensking.com/faq.aspx* (describing a contact lens company's decrease in traffic and total orders when it displayed a total price while competitors implemented "processing" fees).

while they obscure the total price. To the extent that consumers could benefit from itemized information about price components, such itemization can be done in conjunction with clear total price information. Consumers receive no benefit from businesses partitioning or breaking up mandatory price components while they obscuring the total price.

Likewise, as discussed in section V.E, there is no benefit to competition, as honest businesses that disclose all-inclusive total prices lose market share to businesses that do not. Bait-and-switch pricing and misleading fees undermine the ability of honest businesses to compete on price and therefore diminish the competitive pressure in a market that pushes prices downward. As a result, these practices lead to higher prices than would be supported in a competitive marketplace. The Antitrust Division of the U.S. Department of Justice noted that "companies that impose mandatory hidden fees" have "an unfair advantage over honest brokers" and interfere with consumers' ability to "choose between competitors based on the important considerations of price and what, exactly, the consumer is purchasing."[132] Some commenters, including those from the live-event ticketing and short-term lodging industries, noted that bait-and-switch pricing not only confuses consumers, but harms honest businesses that offer truthful, timely, and transparent pricing because their prices initially may seem higher than competitors that use bait-and-switch pricing and misleading fees. For example, TickPick, LLC commended the Commission for proposing to curb the widespread practice of bait-and-

[132] FTC-2023-0064-3187 (U.S. Department of Justice, Antitrust Division, observed that "[w]hen consumers lack choice and information, and are saddled with mandatory hidden fees, the benefits of the competitive process break down."); *see also* FTC-2023-0064-3106 (American Society of Travel Advisors); FTC-2023-0064-3184 (New York State Sen. Michael Gianaris); FTC-2023-0064-1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business).

switch pricing and observed that "the proposed rule would significantly benefit consumers and competition in the live-event ticketing industry."[133] The American Society of Travel Advisors argued that, in addition to consumer harm, "the imposition of undisclosed fees also unfairly places honest retailers – those that do disclose the full, all-in price upfront – at a competitive disadvantage relative to those that do not."[134]

A minority of commenters stated that hidden and misleading fees do not harm consumers. For instance, the Competitive Enterprise Institute argued that consumers' search costs do not increase when advertisements lack a single total price, as the consumer is better informed after watching the advertisement despite the omission.[135] While the commenter conceded that consumers may benefit more if a total price is disclosed, the commenter argued that any harm could be easily avoidable by consumers calculating the total themselves.[136] Some commenters also argued that these types of fees often benefit consumers and are openly disclosed.[137] Indeed, the American Gaming Association stated that resort fees enhance a consumer's stay, distinguish resorts from more standard lodging offerings, are openly disclosed to consumers, and often appear several times throughout the search and purchasing process. As the Commission already noted, drip and partitioned pricing and other bait-and-switch pricing harm consumers for numerous reasons, including because consumers underestimate the total price of a good or service, overconsume, overpay, and waste time. The U.S. Chamber of Commerce argued that there are pro-consumer and pro-competitive justifications for this type of

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[133] FTC-2023-0064-3212 (TickPick, LLC).
[134] FTC-2023-0064-3106 (American Society of Travel Advisors).
[135] FTC-2023-0064-3028 (Competitive Enterprise Institute argued that consumers already bear a search cost merely by looking for a product, and that any advertisement that includes some, but not all, pricing information, benefits the searching consumer if the information is accurate and non-deceptive.).
[136] *Id.*
[137] FTC-2023-0064-2886.

pricing, including allowing for dynamic pricing strategies and preventing consumers from paying for services that they do not use.[138] The rule, however, does not prohibit the use of dynamic pricing strategies, itemization, or offering optional goods or services for consumers to select; it simply prohibits offering a price that is not inclusive of all mandatory fees and charges, as well as prohibiting misrepresented fees and charges.

As stated herein, the Commission and courts have previously recognized that price is a material term[139] and that it is a violation of section 5 of the FTC Act to misrepresent the price of a good or service.[140] Commenters emphasized the materiality of price to consumers.[141] The commenters who argue that bait-and-switch pricing does not harm consumers ignore the large body of literature demonstrating that drip pricing and partitioned pricing have a negative impact on consumers and competition. The economic analysis in Section V provides additional discussion regarding the economic harms from bait-and-switch pricing tactics, including drip pricing and partitioned pricing in the live-event and short-term lodging industries.

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[138] FTC-2023-0064-3127 (U.S. Chamber of Commerce noted that, among these pricing practices, dynamic pricing strategies provide these benefits to consumers and this was ignored in the conclusions of the NPRM.).

[139] *Deception Policy Statement*, 103 F.T.C. at 182–183, 183 n.55 (listing claims or omissions involving cost among those that are presumptively material); *see also, e.g., FleetCor Techs., Inc.*, 620 F. Supp. 3d at 1303–04, 1311 (finding that representations about discounts and transaction fees were material); *FTC v. Windward Marketing, Inc.*, No. 1:96-CV-615F, 1997 WL-33642380, at *10 (N.D. Ga. Sept. 30, 1997) ("[A]ny representations concerning the price of a product or service are presumptively material").

[140] *Deception Policy Statement*, 103 F.T.C. at 175 (listing "misleading price claims" among those claims that the FTC has found to be deceptive); *see also, e.g.*, *Resort Car Rental Sys.*, 518 F.2d at 964 (upholding the Commission's order finding that using the name "Dollar-A-Day" misrepresented the price of car rentals in violation of section 5 of the FTC Act).

[141] *See, e.g.*, FTC-2023-0064-3162 (BBB National Programs Inc. stated that BBB National Advertising Division "precedent is clear that the advertised price for a product or service is among one of the most material terms to a consumer's purchasing decision.").

C. The Economic Effect of the Rule

As part of the rulemaking proceeding, the Commission solicited public comment and data (both qualitative and quantitative) on the economic impact of the proposed rule and its costs and benefits. In issuing this final rule, the Commission has carefully considered the comments received and the costs and benefits of each provision, taking into account the effects on small businesses and consumers, as discussed in more detail in sections V and VII.

The record demonstrates that the most significant anticipated benefits of the final rule are promoting transparent pricing, facilitating comparison shopping for consumers, and leveling the playing field for businesses in the live-event ticketing and short-term lodging industries. By prohibiting drip pricing, the final rule also will promote social trust, which is a necessary component of successful market interactions.[142] Most participants in a market transaction do not have prior experience with one another and consumers must rely on some degree of trust that the business will provide the good or service in question, at the stated price and quality level. Without social trust, it would be costlier for both consumers and businesses to acquire all the necessary information to participate in the market. While there has been less research on the relationship between social trust and previous market interactions, there is some evidence that bad market

[142] The relationship between social trust and market outcomes is well established. *See, e.g.*, Paul J. Zak & Stephen Knack, *Trust and growth*. 111 Econ. J., 470 (Mar. 2001), *https://doi.org/10.1111/1468-0297.00609*; Philip Keefer & Stephen Knack, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q.J. Econ. 4 (Nov. 1997), *https://doi.org/10.1162/003355300555475*. Social trust is particularly necessary for participation in financial markets. *See* Jesse Bricker & Geng Li, Fed. Reserve Bd., *Credit Scores, Social Trust, and Stock Market Participation*, Finance and Economics Discussion Series 2017-008r1, *https://doi.org/10.17016/FEDS.2017.008r1*; Luigi Guiso, Paola Sapienza, & Luigi Zingales, *Trust the Stock Market*, 63 J. Fin. (Dec. 2008), *https://www.jstor.org/stable/20487944?seq=1*.

experiences can reduce social trust.[143] Thus, prohibiting these types of deceptive and unfair practices will promote social trust, which can be a measure of a well-functioning market.[144]

Another beneficial consequence would be the expansion of the remedies available for violations of the final rule, including the ability to more effectively obtain monetary relief for consumers who have been deceived about the true total price of live-event tickets or short-term lodging. This is particularly critical given the U.S. Supreme Court's decision in *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67 (2021), which held that equitable monetary relief, including consumer redress, is not available under section 13(b) of the FTC Act.[145] Under the final rule, the Commission will now be able to seek court-ordered consumer redress in one Federal district court action brought under section 19(a)(1), rather than the longer, less efficient, two-step process for obtaining redress under section 19(a)(2).[146] By allowing the Commission to secure redress more efficiently, this rule will also allow the Commission to conserve its limited enforcement resources for other mission priorities.

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[143] Ginny Seung Choi & Virgil Henry Storr, *Market interactions, trust and reciprocity*, 15 PLOS One 5 (May 7, 2020), *https://doi.org/10.1371/journal.pone.0232704*.
[144] Joshua Kleinfeld & Hadar Dancig-Rosenberg, *Social Trust in Criminal Justice: A Metric*, 98 Notre Dame L. Rev. 815 (2022), *https://scholarship.law.nd.edu/ndlr/vol98/iss2/6*.
[145] *AMG Cap. Mgmt.*, 593 U.S. at 82.
[146] *See* 15 U.S.C. 57b(a)(1) and (2); *see also* NPRM, 88 FR 77438 (discussing impact of *AMG Cap. Mgmt*.). When the Commission has reason to believe that the rule has been violated, the Commission can commence a Federal court action to ask a Federal judge to determine liability and, if proven, require violators to provide redress. *See* 15 U.S.C. 57b(a)(1), (b). Without the rule, the path to court-ordered redress is longer. The Commission must first conduct an administrative proceeding to determine whether the respondent engaged in unfair or deceptive acts or practices in violation of section 5(a) of the FTC Act. If the Commission finds that the respondent did so, the Commission issues a cease-and-desist order, which might not become final until after the resolution of any resulting appeal to a Federal court of appeals. Then, to obtain redress, the Commission must initiate a second action in Federal district court, in which it must prove that the violator engaged in objectively fraudulent or dishonest conduct in order to obtain court-ordered redress. *See* 15 U.S.C. 57b(a)(2), (b).

As an additional benefit, the rule will enable the Commission to seek civil penalties against violators. The FTC Act generally does not allow the Commission to obtain civil penalties against those who engage in unfair or deceptive acts or practice in violation of section 5(a) of the FTC Act. Section 5(m)(1)(A) of the FTC Act does, however, authorize the Commission to seek civil penalties in court for violations of trade regulation rules, such as the final rule here.[147] The ability to obtain civil penalties provides two benefits. First, court-ordered civil penalties give the Commission the ability to ensure that violators do not retain the profits they earn by engaging in the unfair or deceptive pricing practices prohibited by the rule. Second, the potential for civil penalties will deter violations and provide a strong incentive for businesses providing live-event tickets and short-term lodging to provide truthful and transparent pricing information in compliance with the rule, which will have consumer welfare benefits and will benefit honest competition.[148]

When promulgating a final rule, the Commission must prepare a final regulatory analysis, which is contained in section V. The final regulatory analysis contains an estimated cost-benefit analysis of the final rule, as well as a more in-depth discussion of the comments the Commission received in response to the NPRM. In addition, the Commission's final regulatory flexibility analysis, which is contained in section VII, discusses the final rule's economic impact on small entities.

[147] *See* section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A) (providing that those who violate a trade regulation rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule" are liable for civil penalties for each violation). In addition, any entity or person who violates such a rule (irrespective of the state of knowledge) is liable for any injury caused to consumers by the rule violation. The Commission may pursue such recovery in a suit under section 19(a)(1) of the FTC Act, 15 U.S.C. 57b(a)(1).

[148] NPRM, 88 FR 77447–48.

III. Section-by-Section Analysis

The Commission has carefully considered the rulemaking's extensive comment record. It has weighed considerations raised by individual consumers, businesses (including small businesses), industry advocates, consumer advocates, labor representatives, academics, and other law enforcement bodies. After considering these comments, the Commission finalizes this rule to address a subset of the specific unfair and deceptive practices identified in the NPRM. The rule will help ensure that consumers shopping for live-event tickets and short-term lodging see advertised prices that include all mandatory fees, can obtain such goods or services at those prices, and know what they are paying for. The rule promotes honest and transparent pricing for consumers and a level playing field for businesses.

Numerous public comments in support of and in opposition to the rule included discussions of the definitions and substantive provisions of the proposed rule, and made various recommendations. The Commission considered comments pointing out confusion about specific phrases in the proposed rule, particularly phrases that commenters found vague or overbroad. The Commission also took notice of comments that suggested some entities or transactions would be subject to overlapping Federal regulations regarding pricing disclosures that could result in confusion to consumers or businesses. In addition, the Commission appreciated comments from industry that identified potential gaps in how the proposed rule would interact with certain types of pricing practices.

The Commission makes a number of changes to the final rule. Notably, the Commission narrows the application of the final rule to offers, displays, or advertisements of a Covered Good or Service—i.e., live-event tickets or short-term

lodging. The Commission recognizes that many comments to the proposed rule focused on the application of the rule to specific industries or pricing scenarios. As a result of the Commission's decision to limit this final rule to live-event ticketing and short-term lodging, the Commission need not respond to each of these comments at this time.

In addition, wherever possible, the Commission works to reduce burden on, and maintain pricing flexibility for, businesses. Finally, the Commission provides guidance and explanation to respond to specific questions and hypotheticals posed by commenters to help give additional clarity to businesses. The following discussion provides a section-by-section analysis of the NPRM's proposed provisions and the provisions adopted in the final rule, as well as a discussion of the comments received and the Commission's responses.

A. § 464.1: Definitions

Proposed § 464.1 contained definitions for the following terms: "Ancillary Good or Service"; "Business"; "Clear(ly) and Conspicuous(ly)"; "Government Charges"; "Pricing Information"; "Shipping Charges"; and "Total Price." The Commission received various comments with respect to these definitions, including particular industries' requests for exemption from the definition of "Business" and other suggestions. Section 464.1 of the final rule adopts these definitions, in some instances with minor modifications for clarification, and adds a definition for "Covered Good or Service." In the definition-by-definition analysis, the Commission discusses each definition proposed in the NPRM, any changes to the definition's text, the added definition, and other comments relevant to the definitions section that are not otherwise addressed in the discussion of the final rule's substantive provisions.

1. Ancillary Good or Service

Proposed § 464.1(a) in the NPRM defined "Ancillary Good or Service" as "any additional good(s) or service(s) offered to a consumer as part of the same transaction." This definition was relevant to the definition of "Total Price," in proposed § 464.1(g), which specified that any mandatory fees or charges for such goods or services would be included in Total Price. Commenters proposed modifications to the definition of "Ancillary Good or Service" but, following review of those comments and as discussed in this section, the Commission declines to adopt the suggested modifications. Final § 464.1 adopts the definition of "Ancillary Good or Service" without modification.

Several commenters recommended that the Commission modify the definition of "Ancillary Good or Service" to state that fees charged by a third party must be included in Total Price if those fees are part of the same transaction.[149] As stated in the NPRM, if a Business advertises a price for a good or service that requires an Ancillary Good or Service provided by another entity, the charge for the mandatory Ancillary Good or Service must be included in Total Price. Additionally, the NPRM made clear that the definition includes goods and services (whether from the seller or third parties) offered as part of the same transaction, because it included examples of mandatory Ancillary Goods or Services that may be offered by third-party providers but are part of the same transaction, such as a payment processing fee for an online transaction. Accordingly, the Commission does not believe that it is necessary to modify the definition of "Ancillary Good or Service" to clarify that fees charged by a third party must be included in Total Price if those fees are part of the same transaction.

[149] FTC-2023-0064-3191 (Community Catalyst et al.); FTC-2023-0064-3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher).

Several commenters also suggested that the Commission add language referring to a reasonable consumer in the definition of "Ancillary Good or Service," to clarify that only goods or services that a "reasonable consumer" would expect to be included must be included in Total Price.[150] The Commission does not believe that adding "reasonable consumer" to the definition of "Ancillary Good or Service" is necessary, as the reasonable consumer standard is implicit in the rule text. Under longstanding precedent, the Commission examines conduct from the perspective of a consumer acting reasonably under the circumstances.[151] If a representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of an ordinary member of that group.[152] Accordingly, the Commission does not believe it is

[150] FTC-2023-0064-3268 (Housing & Eviction Defense Clinic, University of Connecticut School of Law, commented "the definition of an 'Ancillary Good or Service' should be amended to include all fees that are not reasonably avoidable and all fees or charges for goods or services that a reasonable consumer would expect to be included with the purchase."); FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al. recommended the definition of "Ancillary Good or Service" be revised "to mean 'any optional, additional good(s) or service(s), offered to a consumer as part of the same transaction, that a reasonable consumer would not expect to be included with the purchase of the advertised good or service."); FTC-2023-0064-3160 (Consumer Federation of America et al. proposed the definition of "Ancillary Good or Service" be modified to "any optional, additional good(s) or service(s), offered to a consumer as part of the same transaction, that a reasonable consumer would not expect to be included with the purchase of the advertised good or service.").

[151] *Deception Policy Statement*, 103 F.T.C. at 175, 177–82; *see also FTC v. Cantkier*, 767 F. Supp. 2d 147, 151–52 (D.D.C. 2011) (applying deception standard set forth in the *Deception Policy Statement*); *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490, 500 (D.C. Cir. 2015) (applying deception standard set forth in the *Deception Policy Statement* and upholding administrative law judge determination that "'a significant minority' of 'reasonable' consumers 'would interpret [the ad] to be claiming that drinking eight ounces of POM Juice daily prevents or reduces the risk of heart disease.'"); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988) (upholding lower court's determination that "'the $29 airfare promotion constituted the type of misrepresentation upon which a reasonably prudent person would rely'"); Fed. Trade Comm'n, *FTC Policy Statement on Unfairness* (appended to *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984), (hereinafter "*Unfairness Policy Statement*"), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-104/ftc_volume_decision_104__july_-_december_1984pages949_-_1088.pdf* ("To justify a finding of unfairness the [consumer] injury must . . . be an injury that consumers themselves could not reasonably have avoided.").

[152] *Deception Policy Statement*, 103 F.T.C. at 175, 179 ("For instance, if a company markets a cure to the terminally ill, the practice will be evaluated from the perspective of how it affects the ordinary member of that group.").

necessary to modify the definition of "Ancillary Good or Service" to refer to a reasonable consumer.

One commenter argued, in the context of online movie ticket purchases, that online convenience fees are reasonably avoidable because consumers can purchase tickets in-person at a theater without incurring the fees.[153] Although a movie ticket is not a Covered Good or Service, similar convenience fees are common in the live-event ticketing industry. The Commission disagrees with the commenter that online convenience fees are reasonably avoidable: If a consumer must pay a service or other fee in order to purchase tickets online (i.e., as part of the same transaction), then such a fee must be included in Total Price when it appears online. In addition, using vague fee descriptions, such as an unspecified "convenience" fee, may violate §§ 464.2(c) and 464.3 by failing to disclose Clearly and Conspicuously, and by misrepresenting, the nature or purpose of fees or the identity of the good or service for which fees or charges are imposed.

Another commenter argued that the definition of "Ancillary Good or Service" should "not turn on whether the good or service is 'offered' to a consumer but whether it is 'required to be purchased' by the consumer."[154] The commenter proposed that the Commission incorporate the word "mandatory" into the definition of "Ancillary Good or Service." The Commission disagrees with this proposed modification. As discussed in the NPRM, an Ancillary Good or Service may be mandatory or optional. Whether the cost of the Ancillary Good or Service must be incorporated into Total Price turns on whether the

[153] FTC-2023-0064-3292 (National Association of Theatre Owners).
[154] FTC-2023-0064-3206 (Motor Vehicle Protection Products Association et al.).

good or service is mandatory, which depends on the facts of a transaction.[155] For example, if a hotel offers a consumer the option to purchase or decline a trip protection plan with a room reservation, the plan would be an optional Ancillary Good or Service because the consumer has the option to decline the trip insurance. Conversely, a hotel may require all guests to purchase a daily breakfast voucher. In this case, the hotel guest cannot avoid being charged for the voucher, and it is a mandatory Ancillary Good or Service. If a Business charges payment processing fees that the consumer cannot reasonably avoid, such fees would be for a mandatory Ancillary Good or Service.

It is also possible that a good or service may be mandatory in one transaction but optional in another.[156] For example, if a hotel allows a guest to purchase amenities such as bottled water or pool towels for an additional fee but permits each guest to supply their own water or pool towels, such amenities would be optional Ancillary Goods or Services. If, however, the hotel requires all patrons to use the hotel-provided amenities for a fee, then the amenities would be mandatory Ancillary Goods or Services. Because Ancillary Goods or Services may be either mandatory or optional, the Commission declines to add the word "mandatory" into the definition of "Ancillary Good or Service."

Some commenters also asked the Commission for additional guidance as to when a good or service might be considered ancillary, particularly if a good or service includes

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[155] *See infra* section III.A.8.a.

[156] The Commission notes that several commenters misinterpreted the definition of "Ancillary Good or Service" as necessarily being optional. *See, e.g.*, FTC-2023-0064-3145 (Association of National Advertisers, Inc. stated that "Ancillary fees, by definition, are not 'mandatory' and should not be characterized as 'mandatory' fees subject to the proposed disclosure requirements."); FTC-2023-0064-1425 (Iowa Bankers Association stated, "While the definition of Total Price includes 'mandatory' Ancillary Goods or Services, the actual definition [of Ancillary Good or Service] seems to speak to the discretionary aspect of this term."). The Commission reiterates that the rule text is clear: Ancillary Goods or Services may be mandatory or optional, depending on the facts of a particular transaction.

variable costs.[157] The Commission addresses pricing scenarios, including those pertaining to contingent or variable fees, in section III.B.1.a. Another commenter stated that the use of the word ancillary was unclear, because it "implies a relationship between a primary object and the ancillary object" and does not include guidance concerning the primary object.[158] The Commission cannot identify in every possible situation which good or service would be the "primary object" versus an Ancillary Good or Service because such a determination is fact-specific and will depend on the goods or services offered by individual businesses.

For the foregoing reasons, and based on its review of the comments received, the Commission adopts the definition of "Ancillary Good or Service" set forth in the NPRM. As discussed in section III.A.8, to address comments and clarify the rule, the Commission modifies the definition of Total Price to further clarify that under final § 464.2(a), Businesses may exclude from Total Price fees or charges for any optional Ancillary Good or Service.

2. Business

Proposed § 464.1(b) defined "Business" as "an individual, corporation, partnership, association, or any other entity that offers goods or services, including, but not limited to, online, in mobile applications, and in physical locations." As part of the NPRM, the Commission also proposed a carve-out for certain motor vehicle dealers required to comply with the Combating Auto Retail Scams Trade Regulation Rule ("CARS Rule"),[159] and for the carve-out to become effective upon the CARS Rule's

[157] FTC-2023-0064-3172 (New Jersey Apartment Association); FTC-2023-0064-3296 (Bay Area Apartment Association).
[158] FTC-2023-0064-3206 (Motor Vehicle Protection Products Association et al.).
[159] 16 CFR part 463.

effective date. The CARS Rule provides for certain pricing disclosure requirements and prohibits misrepresentations. Final § 464.1 adopts the first sentence of the proposed definition of "Business," but removes the carve-out for motor vehicles required to comply with the CARS Rule because of the final rule's narrowed scope.

In the NPRM, the Commission sought input as to whether it should modify the proposed definition of "Business" to exclude certain businesses, or whether it should add a definition of "Covered Business" to narrow the businesses subject to the rule. The NPRM also included several questions concerning how to define "Covered Business" in the event the Commission opted to adopt such a definition. The Commission received broad support for an industry-neutral rule from individual commenters, consumer groups, and industry organizations. Commenters cited the prevalence of hidden and deceptive fees across a variety of industries and argued that broad exemptions would create an uneven economic playing field and confuse consumers by creating unpredictability across industries.[160] Conversely, the Commission received numerous comments asking that it narrow the rule to specific industries, including, for example, live-event ticketing and short-term lodging. Several commenters also urged the Commission to exempt certain industries, arguing that the rule would pose challenges for those industries or that those industries are already subject to existing regulations.

Following its review of the comments, the Commission narrows application of the final rule to Covered Goods or Services, those involving live-event tickets or short-term lodging. While the comments demonstrated that bait-and-switch pricing and misleading

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[160] *See, e.g.*, FTC-2023-0064-2887 (Progressive Policy Institute); FTC-2023-0064-3160 (Consumer Federation of America et al.); FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al.).

fees and charges inflict harms on consumers across the economy, the rulemaking record reveals longstanding concerns with these unfair and deceptive practices within the live-event ticketing and short-term lodging industries in particular. The final rule addresses these industries first. The Commission addresses the definition of "Covered Good or Service" in section III.A.4.

The Commission received comments requesting modifications to various definitions, including the definition of "Business," or wholesale exemptions from the proposed rule's coverage related to issues in particular industries, including auto dealers and service providers,[161] app-based delivery platforms,[162] financial services providers,[163] franchised businesses,[164] funeral service providers,[165] rental housing,[166] restaurants and

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[161] *E.g.*, FTC-2023-0064-3276 (Automotive Service Association); FTC-2023-0064-3206 (Motor Vehicle Protection Products Association et al.); FTC-2023-0064-3189 (National Automobile Dealers Association); FTC-2023-0064-3121 (National Independent Automobile Dealers Association).

[162] *E.g.*, FTC-2023-0064-3263 (Flex Association); FTC-2023-0064-3202 (TechNet); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).

[163] *E.g.*, FTC-2023-0064-3139 (American Bankers Association and Consumer Bankers Association); FTC-2023-0064-2893 (America's Credit Unions); FTC-2023-0064-3168 (American Financial Services Association); FTC-2023-0064-3147 (American Land Title Association); FTC-2023-0064-1425 (Iowa Bankers Association); FTC-2023-0064-1941 (Independent Bankers Association of Texas); FTC-2023-0064-3182 (Massachusetts Bankers Association); FTC-2023-0064-3119 (Money Services Business Association, Inc.); FTC-2023-0064-3144 (Mortgage Bankers Association); FTC-2023-0064-3127 (U.S. Chamber of Commerce).

[164] *E.g.*, FTC-2023-0064-3294 (International Franchise Association); FTC-2023-0064-3141 (Coalition of Franchisee Associations); FTC-2023-0064-3211 (American Association of Franchisees & Dealers).

[165] *E.g.*, FTC-2023-0064-3210 (Service Corporation International); FTC-2023-0064-3065 (Carriage Services, Inc.); FTC-2023-0064-3130 (International Cemetery, Cremation & Funeral Association).

[166] *E.g.*, FTC-2023-0064-3152 (Building Owners & Managers Association et al.); FTC-2023-0064-3116 (Manufactured Housing Institute); FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3172 (New Jersey Apartment Association); FTC-2023-0064-3289 (Zillow Group). As explained in section III.A.4, the Commission does not intend to cover rental housing providers in its definition of "Covered Good or Service" at this time.

other food and beverage service providers,[167] telecommunications providers,[168] vending machine retailers,[169] movie theaters,[170] health and fitness centers,[171] higher education institutions,[172] recreational vehicles and marine crafts,[173] and towing companies.[174] The Commission's decision to narrow the final rule to Covered Goods or Services renders these requests inapplicable, and as such, the Commission does not address them at this time.

The Commission received comments from various third-party travel service providers, including online travel agencies and travel advisors, arguing that third-party travel intermediaries and advisors are situated differently from underlying travel service providers and may be subject to existing Department of Transportation ("DOT") regulations. Online travel agencies and travel advisors routinely offer, display, or advertise prices of Covered Goods or Services to consumers, including businesses, which is conduct covered by the final rule. One industry group representing travel advisors argued that travel advisors do not set the price of underlying travel products and rely on the sellers of such products to provide accurate pricing information.[175] The commenter

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[167] *E.g.*, FTC-2023-0064-0264 (Individual Commenter); FTC-2023-0064-2953 (Individual Commenter); FTC-2023-0064-2124 (Individual Commenter); FTC-2023-0064-3022 (Individual Commenter); FTC-2023-0064-3021 (Individual Commenter); FTC-2023-0064-3300 (National Restaurant Association); FTC-2023-0064-3219 (Georgia Restaurant Association); FTC-2023-0064-3180 (Independent Restaurant Coalition); FTC-2023-0064-3078 (Washington Hospitality Association); FTC-2023-0064-3080 (UNITE HERE); FTC-2023-0064-2918 (Elite Catering + Event Professionals).

[168] *E.g.*, FTC-2023-0064-3234 (CTIA—The Wireless Association); FTC-2023-0064-3295 (USTelecom—The Broadband Association); FTC-2023-0064-2884 (NTCA—The Rural Broadband Association); FTC-2023-0064-3143 (ACA Connects).

[169] *E.g.*, FTC-2023-0064-2919 (National Automatic Merchandising Association).

[170] *E.g.*, FTC-2023-0064-3292 (National Association of Theatre Owners).

[171] *E.g.*, FTC-2023-0064-3269 (IHRSA—The Health & Fitness Association).

[172] *E.g.*, FTC-2023-0064-2906 (National Association of College & University Business Officers et al.).

[173] *E.g.*, FTC-2023-0064-3249 (Marine Retailers Association of the Americas); FTC-2023-0064-3251 (National RV Dealers Association).

[174] Towing & Recovery Association of America, Inc. submitted a late comment, which the Commission considered in its discretion and makes available at *https://www.ftc.gov/system/files/ftc_gov/pdf/R207011TRAAComment.pdf.*

[175] FTC-2023-0064-3106 (American Society of Travel Advisors).

requested that the Commission include a "safe harbor mechanism" to protect travel advisors who may rely on inaccurate pricing information provided by sellers. The Commission declines to exclude travel advisors from the rule or to provide them with a safe harbor. The Commission addresses in section III.B.1.f requests for immunity for third-party intermediaries.

The Commission also received comments from online travel agencies seeking an exemption from the rule for airfare or bundled products that include airfare, arguing that the FTC Act does not confer jurisdiction over airlines and, further, that DOT's Full Fare Advertising Rule requires certain pricing disclosures for airfare.[176] As noted in the NPRM, the Commission's enforcement of its rule is subject to all existing limitations of the law and the Commission cannot bring a complaint to enforce its rule if doing so would exceed the Commission's jurisdiction or constitutional limitations. The Commission declines to exempt online travel agencies from the rule. However, the Commission notes that, where there is overlap between this rule and the DOT's Full Fare Advertising Rule on the treatment of Government Charges (i.e., in the context of bundled travel packages, such as for airfare and hotels, the Full Fare Advertising Rule requires the inclusion of government taxes and fees in the total price), complying with both rules is feasible. While this rule permits Businesses to exclude Government Charges from Total Price, it does not require them to do so.

The Commission received a comment from a gaming association seeking an exemption for Federally recognized Indian Tribes and Tribal entities as governments that act for the benefit of their tribal citizens.[177] The commenter asserted that the Commission

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[176] *See, e.g.*, FTC-2023-0064-3293 (Travel Technology Association); FTC-2023-0064-3262 (Skyscanner).
[177] FTC-2023-0064-3120 (Arizona Indian Gaming Association).

does not generally exercise regulatory authority over such entities. The comment focused on Tribal government casinos and explained that Tribal casino revenues are used for essential Tribal government services and community development, including education, healthcare services, housing, and infrastructure development.[178]

The Commission recognizes that some Tribal government casinos and other Businesses may operate as hotels or live-event venues, or may otherwise offer goods or services that fit within the definition of Covered Good or Service. Nevertheless, the Commission declines to exempt Federally recognized Indian Tribes and Tribal entities from coverage under the final rule. The FTC Act is a law of general applicability that applies to such entities, as well as individual members thereof.[179] The Commission recognizes that, in some instances, these entities may be organized in such a way that they are outside FTC jurisdiction, but whether a given Tribe or Tribal business is a corporation within the scope of the FTC Act is a fact-dependent inquiry.[180] The Commission is not aware of any evidence to suggest that the final rule would disproportionately impact such entities or that it would have any impact on their ability to continue to use revenues for government services or community development.

The Commission received a comment seeking an exemption for all franchised businesses. The commenter raised concerns that franchised businesses may lose out on the benefit of national advertising campaigns, asserting that "[u]nder the Proposed Rule,

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[178] *Id*.

[179] *See Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116–17 (1960) (examining case law supporting the conclusion that "a general statute in terms applying to all persons includes Indians and their property interests"); *FTC v. AMG Servs., Inc.*, No. 2:12-CV-00536-GMN, 2013 WL 7870795, at *16–21 (D. Nev. July 16, 2013), *R. & R. adopted*, 2014 WL 910302 (D. Nev. Mar. 7, 2014) (discussing the FTC Act's applicability to Federally recognized Tribes and Tribal businesses).

[180] *See, e.g.*, *AMG Servs.*, 2013 WL 7870795, at *22–23 (holding there was a genuine dispute of material fact barring summary judgment on question of whether Tribal chartered corporations were for-profit corporations under the FTC Act).

national marketing campaigns are only workable if all franchised businesses in a franchise system adhere to the same pricing regime (including pass-through fees), regardless of the economic demands of the market in which they operate."[181] The commenter also raised concerns particular to restaurant franchises.[182]

The Commission declines to exclude franchised businesses from the final rule. As the commenter notes, franchised businesses include hotels, restaurants, and fitness centers, among other businesses. The Commission's addition of the "Covered Good or Service" definition narrows the rule's application to Businesses that make available live-event tickets or short-term lodging and moots the commenter's concerns regarding restaurants or other franchises. Further, the final rule applies equally to franchised and non-franchised Businesses, including hotels. The commenter has not provided any evidence to suggest that the rule will disproportionately impact franchised businesses. As to the commenter's contention that application of the rule will negatively impact franchised businesses' ability to benefit from national advertising campaigns, the Commission addresses commenters' questions and concerns about national advertising campaigns in section III.B.1.d.

The commenter also urged the Commission to exclude from the rule sellers of franchises ("franchisors") subject to the FTC's Disclosure Requirements and Prohibitions Concerning Franchising Rule ("Franchise Rule"), arguing that the rule's Total Price requirement would undermine the Franchise Rule's requirement to itemize specific fees.[183] Two commenters representing franchised businesses ("franchisees"), however,

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[181] FTC-2023-0064-3294 (International Franchise Association).
[182] *Id.*
[183] *Id*.

urged the Commission to address "the types of fees that are charged to franchisees by franchisors," which are not subject to the Franchise Rule.[184]

The Franchise Rule, 16 CFR part 436, requires franchisors, in connection with the offer or sale of a franchise, to provide prospective franchisees with specific information about the fees and charges necessary to begin operation of the franchised business, including the estimated initial investment, expected fees, and other expenses.[185] Because the final rule is limited to prices for Covered Goods or Services and Ancillary Goods or Services offered as part of the same transaction, it would not apply to an offer or sale of a franchise, including a hotel franchise. However, the Commission reiterates that franchised Businesses must comply with the final rule in its entirety when selling Covered Goods or Services.

One industry group recommended that the definition of "Business" be limited to "an individual, corporation, partnership, association, or any other entity that offers goods or services to consumers," with the purpose of exempting business-to-business transactions from the scope of the final rule.[186] Another industry group similarly requested that the Commission exempt business-to-business transactions from the scope of the final rule.[187] As set forth in section III.B.1.f, the Commission believes that application of the rule to business-to-business transactions is appropriate and necessary to provide the Commission with the tools necessary to seek redress from Businesses that violate the law. The final rule covers both business-to-consumer transactions and

[184] FTC-2023-0064-3141 (Coalition of Franchisee Associations); FTC-2023-0064-3211 (American Association of Franchisees & Dealers).

[185] 16 CFR 436.5; *see also* Fed. Trade Comm'n, *Staff Guidance on the Unlawfulness of Undisclosed Fees Imposed on Franchisees* (July 2024), *https://www.ftc.gov/system/files?file=ftc_gov/pdf/Franchise-Staff-Guidance.pdf*.

[186] FTC-2023-0064-3189 (National Automobile Dealers Association).

[187] FTC-2023-0064-3294 (International Franchise Association).

business-to-business transactions, so no modification to the definition of "Business" is required.

3. Clear(ly) and Conspicuous(ly)

Proposed § 464.1(c) in the NPRM defined "Clear(ly) and Conspicuous(ly)," consistent with longstanding FTC practice, as "a required disclosure that is difficult to miss (i.e., easily noticeable) and easily understandable," and listed proposed specifications for "visual disclosure[s]," "audible disclosure[s]," and "any communication using an interactive electronic medium." Among other specifications, the definition explained that the disclosure "must be made through the same means through which the communication is presented." The proposed definition also provided that disclosures "must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires disclosure appears" and "must not be contradicted or mitigated by, or inconsistent with, anything else in the communication." The proposed definition further made clear that for "representations or sales practice[s]" targeting specific audiences, "such as children, older adults, or the terminally ill, 'ordinary consumers' includes reasonable members of that group." The Commission finalizes the definition of "Clear(ly) and Conspicuous(ly)" proposed in § 464.1(c) with minor clarifications to harmonize the language and terminology used in this provision with the terminology used in recent rulemakings and agency guidance.

Specifically, proposed § 464.1(c) provided that a required disclosure must be "difficult to miss (i.e., easily noticeable)." Final § 464.1 reverses the order of the phrases "easily noticeable" and "difficult to miss," and, thus, provides that a required disclosure must be "easily noticeable (*i.e.*, difficult to miss)." Additionally, in final § 464.1, the Commission adds language to clarify that required disclosures must be "easily

understandable by ordinary consumers." In final § 464.1, the Commission deletes reference to "reasonable" members of a specifically targeted group. Each of these modifications is to comport with the Commission's recently finalized Trade Regulation Rule on the Use of Consumer Reviews and Testimonials and the Negative Option Rule, as well as the Commission's Endorsement Guides.[188] Moreover, as noted in section II.B., the Commission examines conduct from the perspective of a consumer acting reasonably under the circumstances, and if a representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of an ordinary member of that group.[189] In final § 464.1, the Commission also includes "mobile applications" within the definition of "Clear(ly) and Conspicuous(ly)." This addition clarifies that "mobile applications" constitute interactive media devices under item (4) of the definition. The Commission does not believe that these modifications substantively alter the definition of "Clear(ly) and Conspicuous(ly)."

The Commission declines to adopt several modifications to the definition of "Clear(ly) and Conspicuous(ly)" proposed by a consumer group. First, the commenter suggested that the Commission add "limited English proficient consumers" to the list of specific audience-types that a representation or sales practices may target in proposed

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[188] *See* Promulgation of Trade Regulation Rule and Statement of Basis and Purpose: Rule Concerning Recurring Subscriptions and Other Negative Option Programs, 89 FR 90476 (Nov. 15, 2024), *https://www.federalregister.gov/documents/2024/11/15/2024-25534/negative-option-rule* (amending 16 CFR 425.4); 16 CFR part 465; Promulgation of Trade Regulation Rule and Statement of Basis and Purpose: Rule on the Use of Consumer Reviews and Testimonials, 89 FR 68034 (Oct. 22, 2024), *https://www.federalregister.gov/documents/2024/08/22/2024-18519/trade-regulation-rule-on-the-use-of-consumer-reviews-and-testimonials*; *Guides Concerning Use of Endorsements and Testimonials in Advertising*, 16 CFR 255.0(f). The Commission notes that it declines to adopt every modification adopted in the finalized Rule on the Use of Consumer Reviews and Testimonials, based on the goals of each rule and the comment record.

[189] *See Deception Policy Statement*, 103 F.T.C. at 175, 177–82; *Unfairness Policy Statement*, 104 F.T.C. at 1073; and other sources cited *supra* notes 151–52.

§ 464.1(c)(8) to make clear that disclosures are understandable for both English and limited-English speakers.[190] The Commission does not believe such a modification is necessary. While the definition includes examples of specific audiences who may be targeted by particular sales practices or representations, the use of "such as" is intended to make clear these are examples, rather than an exhaustive list of categories of consumers who may be targeted. The Commission further notes that final § 464.1 requires that the disclosures "must appear in each language in which the representation that requires the disclosure appears."

The commenter also suggested that the Commission add language to require that disclosures on interactive electronic media "be capable of being printed and saved in an easily readable format."[191] The Commission does not believe such a modification is necessary. The definition considers the various types of media through which consumers and businesses transact and, for all types of media, the definition requires the disclosures to be "easily noticeable (i.e., difficult to miss)." Thus, the Commission believes that the definition provides Businesses with flexibility to continue transacting effectively and efficiently through different media, while ensuring sufficient consumer understanding of required disclosures. The commenter further proposed that the rule clarify that disclosures must be concise to discourage businesses from "listing hundreds of optional fees, identifying fees that would not be applicable to the consumer, providing a description that uses complex jargon, [or is] unnecessarily lengthy."[192] The definition already addresses these concerns by setting forth what "Clear(ly) and Conspicuous(ly)"

[190] FTC-2023-0064-3160 (Consumer Federation of America et al.).
[191] *Id.*
[192] *Id.*

means: using simple terms that provide sufficient information about how Businesses can formulate disclosures that are easily understandable and noticeable to consumers. The definition provides that disclosures "must stand out from any accompanying text or other visual elements" to be "easily noticed, read, and understood."

An automobile industry group urged the Commission to remove "required disclosure" from the definition of "Clear(ly) and Conspicuous(ly)," arguing that "the NPRM is silent on what those required disclosures actually are."[193] The Commission disagrees and notes that the final rule modifies § 464.2(a)–(c) to provide greater clarity concerning what needs to be disclosed, including Total Price and other information related to fees or charges that were excluded from Total Price, and the nature, timing, and prominence of those disclosures. Those modifications are discussed in detail in section III.B.

One commenter on behalf of members in the financial services industry asserted that the definition of "Clear(ly) and Conspicuous(ly)" may conflict with requirements of certain financial services regulations, which do not generally require a certain text size or placement, but do require that certain disclosures be made with "equal prominence and in close proximity to certain trigger terms."[194] The Commission does not believe that financial services regulations are implicated by the final rule's more narrow application to Covered Goods or Services. Nonetheless, the Commission notes that the definition does not require a particular text size or placement; the definition states that "Clear(ly) and Conspicuous(ly)" requires a visual disclosure to "stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood."

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[193] FTC-2023-0064-3206 (Motor Vehicle Protection Products Association et al.).
[194] FTC-2023-0064-1425 (Iowa Bankers Association).

A commenter on behalf of marketing and advertising businesses criticized the proposed definition of "Clear(ly) and Conspicuous(ly)" as imposing "prescriptive visual and audio disclosure[s] . . . that may not cleanly map onto all advertising mediums" and argued that a business's compliance obligations may not be clear if the business relies on advertising mediums not mentioned in the definition.[195] The commenter urged the Commission to allow for sufficient flexibility "to better accommodate current and future advertising mediums that may not allow for the contemplated disclosures," in particular to make it easier for small businesses to comply with the rule.[196] The commenter did not provide any examples of advertising media that would make it difficult to comply with the rule and did not suggest alternative language. Similarly, a commenter representing app-based delivery platforms noted the limited space for disclosures on delivery platforms and asserted that the rule lacked clarity as to how such platforms should comply.[197]

The Commission believes that the definition of "Clear(ly) and Conspicuous(ly)" provides basic, common-sense, and flexible principles to address current and future advertising media. For example, the definition requires that visual disclosures be in a size and font that consumers will easily notice and not be obscured by other text and that audible disclosures be at a volume, speed, and cadence that consumers will easily understand. In keeping with longstanding Commission interpretation and guidance, the definition does not mandate specific fonts, text-size, or volume, or otherwise impose a one-size-fits-all approach. Instead, it provides substantial flexibility to Businesses in

[195] FTC-2023-0064-3145 (Association of National Advertisers, Inc.).
[196] *Id*.
[197] FTC-2023-0064-3263 (Flex Association).

meeting the rule's disclosure requirements so long as consumers take away an accurate understanding of the disclosure. The Commission has published multiple resources to assist Businesses in ensuring that disclosures are Clear and Conspicuous, including a guide specifically geared toward digital and mobile advertising.[198]

4. Covered Good or Service

In the NPRM, the Commission solicited comment on whether it should narrow the Businesses covered by the rule to particular industries or to Covered Businesses, and if so, how to define Covered Businesses.[199] The final rule includes a definition for "Covered Good or Service" to include: (1) Live-event tickets; or (2) Short-term lodging, including temporary sleeping accommodations at a hotel, motel, inn, short-term rental, vacation rental or other place of lodging. Under § 464.2(a), the final rule requires Businesses that offer, display, or advertise any price of a Covered Good or Service to Clearly and Conspicuously disclose the Total Price. In addition, § 464.3 of the final rule prohibits Businesses that offer, display, or advertise a Covered Good or Service from misrepresenting any fees or charges.

The Commission received comments encouraging it to adopt an industry-neutral rule and urging it not to limit the rule's application to particular industries, as well as comments conversely urging it to limit the rule to live-event ticketing and short-term lodging industries. One advocacy group argued that narrowing application of the final rule to a subset of industries would "create an unlevel playing field" and alter competitive

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[198] *See* Fed. Trade Comm'n, Bureau of Consumer Protection Business Guidance, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* 7, 18 (Mar. 2013), *https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf*.

[199] NPRM, 88 FR 77481, Question 14.

incentives.[200] Other commenters argued that hidden or deceptive fees are present across industries and often impact vulnerable populations.[201] Several commenters did not specifically address the Commission's question regarding whether to add a definition of "Covered Business" or how to define "Covered Business," but instead submitted comments highlighting unfair and deceptive pricing practices in certain industries, and encouraging the Commission to adopt a final rule applicable to those industries. Those included comments concerning the motor vehicle industry;[202] delivery applications;[203] the

[200] FTC-2023-0064-2887 (Progressive Policy Institute).
[201] FTC-2023-0064-1519 (NYC Consumer and Worker Protection argued that "[c]onsumers deserve every business to be transparent and fair about prices."); FTC-2023-0064 (Berkeley Law stated that "[r]estricting the Rule to particular industries would exclude some of the most critical sectors that low-income people especially rely on," including "the rental housing market, tax preparation services, payday lenders, and gift card merchants"); FTC-2023-0064-3282 (NCLC highlighted hidden or deceptive fees in "businesses that offer credit, lease, or savings products")
[202] *See, e.g.*, FTC-2023-0064-3160 (Consumer Federation of America et al.); FTC-2023-0064-3270 (Consumer Federation of America, National Consumer Law Center, National Association of Consumer Advocates); *see also* FTC-2023-0064-2853 (Performance Auto Inc., an individual car dealership, supported application of the rule to car dealers.).
[203] *See, e.g.*, FTC-2023-0064-1939 (Tzedek DC).

financial services industry;[204] the restaurant industry;[205] the movie theater industry;[206] tax preparation services;[207] and the health care industry.[208]

[204] *See, e.g.*, FTC-2023-0064-3160 (Consumer Federation of America et al.); FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al.); *see also* FTC-2023-0064-0199 ("I don't understand why I have to pay to have my credit card bill mailed to me . . . ."); FTC-2023-0064-0258 ("I checked our account and discovered that they had charged $10.00 for maintenance fees."); FTC-2023-0064-0418 ("Even credit unions are charging insane fees it is bleeding us dry if we are broke already why are we getting hit with fees for being poor"); FTC-2023-0064-0396 ("My son is on SSI, and his bank charges him fees when his account goes below $100! . . . How does this make sense? Banks should not have fees like this. It [is] penalizing the poorest people!"); FTC-2023-0064-0425 ("What bothers me is that my bank charges me $35 for every overdraft!! I find that excessive! It's a lot of money, especially when you don't have enough in the first place. It's like being punished for being poor."); FTC-2023-0064-0762 ("We have and continue to pay unnecessary costs for services especially personal loans and credit card debt. This makes payments for these loans much more of a hardship than the initial being in need of the card or loans was in the first place.").

[205] *See, e.g.*, FTC-2023-0064-3248 (DC Jobs With Justice on behalf of Fair Price, Fair Wage Coalition encouraged the Commission to maintain an industry-neutral rule applicable to the restaurant industry); FTC-2023-0064-2885 (AARP commented that many consumers "feel deceived when faced with an unexpected mandatory charge," such as "service fees," "living wage fees," or "kitchen fees," and "would prefer these costs be incorporated into the price of food so that they better understand restaurants' costs upfront."); FTC-2023-0064-0103 (Individual Commenter stated: "[R]estaurants are adding surcharges [for] providing health insurance, or to make sure that kitchen crew receives a tip. But these are existing operating costs that can and should be factored into the price. . . . On at least a couple occasions, the add-on fee wasn't even disclosed until the check."); FTC-2023-0064-0119 (Individual Commenter stated: "Fees of approximately 5-20% are often added to restaurant bills. . . . They are often written in small font in inconspicuous places on the menu or past blank space on websites. It's often unclear where these additional fees are going and should be simply incorporated into the menu prices."); FTC-2023-0064-0120 (Individual Commenter stated: "Now restaurants are adding service fees instead of increasing food price. I want to buy goods and services, I want to know the full price, with all the extra fees and taxes before, not after selecting a goods or service."); FTC-2023-0064-0152) (Individual Commenter stated: "Tipping since covid is crazy now too - and now these add on fees appear to be creeping into restaurants. A local pizza restaurant added a 20% 'gratuity fee' on the bill - this was not a tip but an additional charge for 'business costs' and does not go to employees."); FTC-2023-0064-0065 (Individual Commenter stated: "A number of restaurants here in Chicago are now adding surcharges that are only disclosed after you get the check, or they are disclosed in small print on the menu, which effectively makes the prices displayed on the menu deceptive."); FTC-2023-0064-0052 (Individual Commenter stated: "Small businesses, particularly restaurants, have grown their use of the type of non-transparent pricing practices that this rule aims to address . . ., such as the inclusion in bills of various fees that cannot be avoided (and that therefore should be part of the total price)").

[206] *See, e.g.*, FTC-2026-0064-1303 (Individual Commenter stated: "Just last night I tried to buy movie tickets (from the movie theater's own app no less!) but the fees added 25% more to the cost of the ticket! Ten dollars in fees on an app that the big movie chain runs on its own!"); FTC-2023-0064-1469 (Individual Commenter stated: "I'm sick of paying for 'convenience fees' when purchasing tickets online (to live events and even the local movie theater), even though there is no other way to purchase them."); *see also* FTC-2023-0064-3104 (Truth in Advertising, Inc.) (highlighting class action lawsuits alleging failure to disclose the total cost of movie ticket prices, inclusive of fees, in violation of New York State law).

[207] *See, e.g.*, FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al.).

[208] *See, e.g.*, FTC-2023-0064-3191 (Community Catalyst et al.).

Several commenters specifically urged the Commission to ensure that the rental housing industry would be subject to the final rule, including in any definition of "Covered Business," to mitigate unfair or deceptive fees imposed on renters.[209] The Commission also received numerous comments from individual consumers, consumer and policy organizations, elected officials, legal service providers, and housing advocates highlighting unfair and deceptive fees in the rental housing industry.[210] Conversely,

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[209] FTC-2023-0064-2888 (Housing Policy Clinic, University of Texas School of Law stated, "it is essential for the rule to cover the rental housing industry in order to mitigate the harmful impacts of unfair and deceptive fees on renters."); FTC-2023-0064-2858 (U.S. House of Representatives, Rep. Maxwell Alejandro Frost, Rep. Jimmy Gomez, Rep. Barbara Lee, Rep. Rashida Tlaib, Rep. Kevin Mullin, Rep. Dwight Evans, Rep. Judy Chu, Rep. Greg Casar, Rep. Dan Goldman, and Rep. Salud Carbajal encouraged an industry-neutral rule but urged the Commission at minimum to include live-event ticketing, short-term lodging, and the rental housing industries in the final rule.); FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al. commented that: "Exempting landlords from the Rule as other commenters have proposed would deprive the Commission of a critical tool to challenge purveyors of junk fees charged in connection with a basic necessity of life, one that is disproportionately relevant to low-income consumers.").

[210] *See, e.g.*, FTC-2023-0064-3218 (National Consumer Law Center collected consumer comments highlighting: "a 'technology fee' addendum that adds 1% fee of total rent on top of rental cost"; "an extra $255 in mandatory fees, for services I don't even want"; and "water, sewer, and garbage fees would be charged over and above the base rent we agreed to . . . [that] could add as much as $250 extra per month to our rent."); FTC-2023-0064-3271 (U.S. Senator Amy Klobuchar commented discussing a hearing conducted concerning rental housing competition and noting that: "[R]enters are often hit with numerous junk fees that are only disclosed to them when signing a lease—frequently after the renter has already given notice to end a prior lease. . . . As a result, renters struggle to meaningfully compare the cost of various housing options."); FTC-2023-0064-2888 (Housing Policy Clinic, University of Texas School of Law commented: "This lack of transparency robs tenants of their opportunity to fairly participate in comparison shopping in the rental housing market and can seriously disrupt their financial well-being and housing stability."); FTC-2023-0064-3218 (National Consumer Law Center commented: "With respect to the rental housing market, the proposed rule would benefit consumers and competition. By requiring disclosure of the actual cost of an apartment, the rule would help renters to comparison shop and enable them to find housing that fits their budget."); FTC-2023-0064-3225 (CED Law described undisclosed fees experienced by its clients and stated: "Up front disclosure of all mandatory fees and accurate representation of all fees charged would go a long way towards ensuring low income renters like those we represent in Colorado understand what their monthly housing expenses will be before being locked into a lease agreement."); FTC-2023-0064-0146 (Individual Commenter stated they pay fees including for trash, electricity, and "some other junk fees" and argued that rental providers "should be forced to disclose all fees before lease signing and never be able to add fees after the lease has been signed."); FTC-2023-0064-0157 (Individual Commenter highlighted mandatory added fees and charges not disclosed in listed rental prices and stated: "Landlords should not be allowed to force tenants into paying these fees with no opt out or if the fees are allowed, then the landlord must add that to the total monthly rent in advertisements so prospective tenants have an accurate scope of what the real monthly costs are."); FTC-2023-0064-0229 (Individual Commenter described an apartment company with fees: "[I]ncluding a $20 mos. fee for package delivery. It's a mandatory add-on. Many people do not get packages. Including myself."); FTC-2023-0064-0923 (Individual Commenter stated their rental "requires a number of fixed, non-negotiable mandatory fees. . . .

advocates from the rental housing industry urged the Commission to exempt rental housing providers from any definition of "Covered Business."[211] A rental housing advertising platform urged the Commission to adopt a definition of "Covered Business" that excludes third-party advertising platforms, arguing that third-party platforms do not direct pricing and "are not best positioned to meet the requirements of the proposed rule."[212]

On the other hand, the Commission also received comments in support of a narrow definition of "Covered Business" limited to the live-event ticketing and short-term lodging industries, including from members of those industries.[213] The U.S. Chamber of Commerce recommended limiting the definition of Covered Businesses to "the live-event ticketing and/or short-term lodging industries," arguing that unique aspects of these markets, including a robust secondary market for live-event tickets and pressures on third-party lodging intermediaries "to advertise the lowest price to consumers to optimize search outcomes," have shaped FTC research on all-in pricing and appropriate remedies.[214] One academic commenter likewise recommended a definition of "Covered Business" limited to live-event ticketing and short-term lodging, stating that

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In my opinion, these fees allow the company to advertise a lower monthly rental rate, intentionally making it difficult for a prospective tenant to comparison shop and compare rents from different organizations.").

[211] *See, e.g.*, FTC-2023-0064-3172 (New Jersey Apartment Association supported the rule's inclusion of a definition of Covered Business and asked that rental housing providers be excluded from the scope of Covered Business); *see also* FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association).

[212] FTC-2023-0064-3289 (Zillow Group).

[213] *See, e.g.*, FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-2891 (Mary Sullivan, George Washington University, Regulatory Studies Center); FTC-2023-0064-3233 (NCTA—The Internet & Television Association); *see also* FTC-2023-0064-3300 (National Restaurant Association urged the Commission to exclude small restaurants from a definition of "Covered Business").

[214] FTC-2023-0064-3127 (U.S. Chamber of Commerce).

these industries have been subject to extensive research showing "their use of across-the-board drip pricing to be harmful."[215]

Commenters from the live-event ticketing industry supported a rule applicable to their industry, emphasizing that a Total Price requirement will aid consumers and businesses alike if applied across the entire industry.[216] For example, TickPick, a secondary ticket marketplace, commented that it already provides consumers with all-in pricing and supports "eliminating drip pricing from the live-event ticketing industry," arguing that "widespread use of hidden and/or misleading fees harms consumers and market competition."[217] StubHub similarly commented that it "strongly supports efforts to increase price transparency for consumers nationwide with the federal adoption of all-in pricing" in the live-event ticketing industry. According to StubHub, in 2014, it decided to display the all-in price to consumers in the hopes of encouraging the remainder of the

[215] FTC-2023-0064-2891 (Mary Sullivan, George Washington University, Regulatory Studies Center also stated that a rule focused on the short-term lodging and live-event ticketing industries would "increase the chance of [the rule's] success" and provide well-defined limits for those Covered Businesses.)
[216] *See, e.g.*, FTC-2023-0064-3212 (TickPick, LLC stated that it "supports the Commission using its authority under Section 18 of the FTC Act to address unfair and deceptive acts or practices involving hidden and misleading fees."); FTC-2023-0064-3266 (StubHub, Inc. commented that it "strongly supports efforts to increase price transparency for consumers nationwide with the federal adoption of all-in pricing."); FTC-2023-0064-3105 (Charleston Symphony commented: "[R]equiring sellers to disclose the total price clearly and conspicuously[] addresses a pressing issue. . . . Predatory practices in the secondary ticket sales market pose a significant threat to artists, venues, audiences, and the future of nonprofit arts organizations, impacting the integrity of the ticket-buying process and eroding audience confidence."); FTC-2023-0064-3122 (Vivid Seats stated that it "supports additional consumer disclosures, including all-in pricing," but the rule should "apply equally across all parts of the live-events ticketing industry," so consumers can compare prices and businesses that display total prices will not be at a competitive disadvantage.); FTC-2023-0064-3241 (National Association of Ticket Brokers submitted a comment supporting all-in pricing, but noting that it would only work if "(i) it was required of every ticket seller and (ii) there was rigorous and expeditious enforcement."); FTC-2023-0064-3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America commented that they "support[] a definition of all-in pricing that requires the first price for a live-event ticket shown to consumers to be the price ultimately charged at checkout (exclusive of state and local taxes and optional add-ons)."); *see also* FTC-2023-0064-3264 (Mark J. Perry, Ph.D., Professor Emeritus of Economics at University of Michigan-Flint and Senior Fellow Emeritus at the American Enterprise Institute, "urge[d] the FTC to ensure that any rule requiring all-in pricing in live events apply equally to all market participants."). The Commission addresses other comments and factual scenarios raised by commenters concerning live-event ticketing, including those concerning ticket service fees, in section III.B.1.b.
[217] FTC-2023-0064-3212 (TickPick, LLC).

industry to follow suit; however, it "had no choice but to revert to its former pricing display," which used dripped fees, because other platforms continued to rely on drip pricing, making StubHub's all-in prices appear higher than other platforms.[218] Live Nation and its subsidiary, Ticketmaster North America, likewise expressed concern that, absent a nationwide rulemaking to implement all-in pricing, "the current market realities present barriers to implementing all-in pricing," because adopting all-in pricing "absent a mandate creates a first-mover disadvantage."[219] Live Nation stated that the rule would "increase pricing transparency for fans and support competition in the ticketing industry."[220]

The Commission also received support from the representatives of the short-term lodging industry for the rule's application to that industry. The American Society of Travel Advisors commented that "the rule as proposed would greatly benefit consumers of hotel and other short-term lodging services" and applauded the proposed rule's prohibition on misleading fees.[221] The American Hotel & Lodging Association also expressed support for implementation of clear Total Price requirements and encouraged the Commission to "ensure that any final rule it promulgates . . . apply broadly to all industry participants," including intermediaries such as online travel agencies, short-term rental platforms, and metasearch sites.[222] The American Gaming Association, a trade group representing the casino industry, contended that fees are adequately disclosed and provide value to consumers, but stated that, if applied to the lodging industry, the rule

[218] FTC-2023-0064-3212 (StubHub).
[219] FTC-2023-0064-3306 (Live Nation Entertainment).
[220] *Id*.
[221] FTC-2023-0064-3106 (American Society of Travel Advisors).
[222] FTC-2023-0064-3094 (American Hotel & Lodging Association).

should be applied "equitably across the industry . . . . including search engines, online travel agencies, and other third-party vendors."[223]

As described in section II, the Commission has determined, in its discretion, to focus this final rule on the live-event ticketing and short-term lodging industries. The Commission recognizes that substantial evidence exists to support a finding of the prevalence of bait-and-switch pricing and misleading fees throughout the economy; nevertheless, the Commission elects to use its rulemaking authority incrementally by first combatting these unfair and deceptive practices in the two industries in which the Commission first began evaluating drip pricing and that have a history of bait-and-switch pricing tactics and misleading fees. Indeed, commenters representing the live-event ticket and short-term lodging industries recognized the need for the Commission's rulemaking and generally supported the rule's application to those industries.

As described in this section, the Commission received comments supporting a definition of "Covered Business" that is limited to the live-event ticketing and short-term lodging industries.[224] The Commission also received comments emphasizing the need for a level playing field among businesses and allowing consumers to comparison shop.[225] For reasons described herein, the final rule applies to a defined set of Covered Goods or Services, rather than to Covered Businesses. Because some Businesses in the live-event ticketing and short-term lodging industries provide goods or services outside of those

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[223] FTC-2023-0064-2886 (American Gaming Association). As discussed in section II, bait-and-switch pricing, including drip pricing, harms consumers even when charges are subsequently disclosed.
[224] *See, e.g.*, FTC-2023-0064-3212 (TickPick, LLC); FTC-2023-0064-3106 (American Society of Travel Advisors).
[225] *See, e.g.,* FTC-2023-0064-2886 (American Gaming Association); FTC-2023-0064-3106 (American Society of Travel Advisors); FTC-2023-0064-3266 (StubHub, Inc.); FTC-2023-0064-3264 (Mark J. Perry, Ph.D., Professor Emeritus of Economics at University of Michigan-Flint and Senior Fellow Emeritus at the American Enterprise Institute); FTC-2023-0064-3162 (BBB National Programs, Inc.); FTC-2023-0064-1000 (Individual Commenter).

industries, a narrowing of the Businesses covered by the rule rather than a narrowing of the goods or services covered by the rule, might unintentionally create an uneven playing field. As a result, the Commission instead narrows the rule to the defined Covered Goods and Services of live-event tickets and short-term lodging. The Commission notes that the rule also applies to Ancillary Goods or Services, defined as additional goods or services offered to consumers as part of the same transaction.

The NPRM also solicited comment as to how to define Businesses that offer either live-event ticketing or short-term lodging, if the final rule were narrowed to Covered Businesses.[226] A third-party ticketing marketplace commented that it "supports inclusion of the live-event ticketing industry as a 'Covered Business' and is comfortable with the proposed definition of 'businesses in the live-event ticketing industry . . . .'"[227] The final rule's inclusion of live-event tickets in the definition of "Covered Good or Service" is consistent with the proposed definition of Covered Business in the NPRM.

With respect to the proposed definition of the short-term lodging industry, the American Hotel & Lodging Association commented that the Commission should define short-term lodging as: "a hotel, motel, inn, short-term rental, or other place of lodging that advertises at a price that is a nightly, hourly, or weekly rate."[228] One commenter representing the rental housing industry expressed concern that the proposed definition of short-term lodging "could mean different things to different people, and that could be (mis)applied to rental housing industry," including, for example, where an apartment

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[226] NPRM, 88 FR 77481, Question 14(a)(i) (proposing to define Businesses in the live-event ticketing as "any Business that makes live-event ticketing available, directly or indirectly, to the general public"); Question 14(a)(ii) (proposing to define Business in the short-term lodging industry as "any Business that makes temporary sleeping accommodations available, directly or indirectly, to the general public").
[227] FTC-2023-0064-3212 (TickPick, LLC).
[228] FTC-2023-0064-3094 (American Hotel & Lodging Association).

community provides temporary corporate housing subject to the same leasing agreements as longer-term tenants or where a resident extends a lease agreement for a few weeks or months.[229] Conversely, another commenter representing the rental housing industry explained that for rental housing, "the landlord-tenant relationship involves an ongoing contractual relationship, typically at least a year-long commitment."[230]

The final rule incorporates portions of the American Hotel & Lodging Association's suggested definition of short-term lodging and the Commission modifies the rule text proposed in the NPRM to refer to hotels, motels, inns, short-term rentals, vacation rentals, or other places of lodging. The Commission declines to limit the definition of short-term lodging based on the advertised payment period or length of stay. In some instances, short-term lodging may include home shares and vacation rentals, such as through platforms like Airbnb or VRBO, that offer short-term rental accommodations for durations as long as several months. The Commission clarifies that, with the addition of a definition for "Covered Good or Service," it does not intend to cover rental housing providers at this time. When a rental housing provider offers a short-term extension on a lease, the extension typically would not be considered short-term lodging under the rule. Similarly, an apartment community that offers temporary corporate housing subject to the same conditions as its long-term leases typically would not be considered short-term lodging under the rule. On the other hand, a hotel that offers discounted extended stays typically would be considered short-term lodging under the rule. Whether any particular good or service is short-term lodging within the rule's definition of "Covered Good or Service" will depend on the specific factual

[229] FTC-2023-0064-3296 (Bay Area Apartment Association).
[230] FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association).

circumstances. In addition, the Commission may provide additional business guidance to address nuanced pricing scenarios that may arise.

5. Government Charges

Proposed § 464.1(d) in the NPRM defined “Government Charges” as “all fees or charges imposed on consumers by a Federal, State, or local government agency, unit, or department,” and specified that Government Charges did not encompass fees or charges that the government imposes on a Business and that a Business chooses to pass on to consumers. The proposed rule permitted Businesses to exclude Government Charges from Total Price. The Commission received comments supporting and critiquing the proposed rule’s treatment of Government Charges. Final § 464.1 adopts this provision with minor modifications to add “Tribal” fees and charges and to clarify that the definition of “Government Charges” includes “the fees or charges imposed on the transaction by a Federal, State, Tribal, or local government agency, unit, or department.”

One consumer group supported the NPRM’s exclusion of fees or charges that Businesses choose to pass onto consumers from the definition of “Government Charges” (thus requiring their inclusion in Total Price), and expressed concern that Businesses may inflate such fees to pad profits, rather than accurately reflect amounts paid in fees or charges to the government.[231] Two academic commenters similarly supported the distinction between fees or charges imposed on consumers and those that a Business chooses to pass onto consumers, stating that the latter should be incorporated into Total Price to avoid creating a loophole that would undermine the rule.[232]

[231] FTC-2023-0064-3290 (U.S. Public Interest Research Group Education Fund).
[232] FTC-2023-0064-1467 (Richard J. Peltz-Steele, Chancellor Professor, University of Massachusetts Law School); FTC-2023-0064-1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business).

On the other hand, the Commission received several comments expressing concern over the NPRM's definition of "Government Charges" as including only those charges "imposed on consumers." Two commenters argued that the proposed definition failed to consider nuances in tax law across States and localities. They pointed out, for example, that several State laws formally impose sales tax on Businesses, rather than on consumers.[233] Under the proposed definition, sales tax in those States would need to be included in Total Price, while sales tax in other States could be excluded from Total Price. These and other commenters also noted that many States prohibit the inclusion of sales tax in Total Price, which would result in direct conflict between the proposed rule and State laws that formally impose sales tax on Businesses.[234] Relatedly, one tax policy organization noted variation in how State laws treat hotel occupancy taxes, with most State laws defining hotel occupancy taxes as imposed on the hotel operator and just six States defining hotel occupancy taxes as imposed on the consumer. Under the proposed definition of "Government Charges," the commenter stated, hotel operators in all but six States would be required to include occupancy taxes in Total Price.[235] As such, these commenters argued that the proposed definition is unworkable and noted that Businesses

[233] FTC-2023-0064-3126 (Tax Foundation stated: "In several states, at least including Alabama, Arizona, Hawaii, and New Mexico, and possibly California, the state sales tax would not meet the Rule's definition of a government charge, since its legal incidence (per statute, regulation, or court determination) is on the seller."); FTC-2023-0064-3258 (National Taxpayers Union Foundation commented: "Arizona, California, Hawaii, and New Mexico structure their sales taxes as taxes on the business, as measured by its gross receipts.").

[234] *See, e.g.*, FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3258 (National Taxpayers Union Foundation stated, "[n]early all states with sales tax prohibit retailers from including sales taxes, including taxes collected from both suppliers and consumers, in the sales price," and cited to states including Alabama, Florida, Georgia, Indiana, Maryland, Massachusetts, Oklahoma, Pennsylvania, and others.); FTC-2023-0064-3126 (Tax Foundation stated, "many states prohibit sales tax-inclusive pricing," highlighting Alabama as a State in which the legal incidence of sales tax on the seller may "obligate a vendor, per the proposed Rule, to list the sales tax-inclusive price if selling to an Alabama resident—which not only presupposes advance knowledge of the consumer's location, but forces the vendor to disregard Alabama's requirement that the list price not include sales tax.").

[235] FTC-2023-0064-3258 (National Taxpayers Union Foundation).

will spend considerable time and resources in understanding the legal incidence of Federal, State, and local taxes.[236]

Industry groups also urged the Commission to modify the definition of "Government Charges" to include charges and fees that the government expressly permits, and sometimes requires, Businesses to pass through to consumers.[237] One commenter noted that Businesses may be required to "unfairly absorb" the cost of these government charges.[238] Commenters also expressed concern that incorporating pass-through taxes that consumers understand and have come to expect into Total Price would obscure government fees, resulting in less pricing transparency, because consumers will not understand that the additional costs stem from the imposition of government fees.[239] Relatedly, two industry groups argued that consumers should be made aware through transparent pricing that additional costs stem from government taxes and fees, rather than requiring Businesses to include them in Total Price.[240]

After considering the comments, the Commission modifies the definition of "Government Charges" from those fees or charges "imposed on consumers" to those "imposed on the transaction." As such, it eliminates the potential distinction between fees and charges for the transaction a government imposes directly on consumers and those imposed on Businesses. Businesses may not exclude from Total Price fees and charges that are wholly distinct from the relevant transaction, such as a proportional share of a

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[236] *Id*.
[237] *See, e.g.*, FTC-2023-0064-3100 (Civitas Advisors, Inc.); FTC-2023-0064-3217 (Bowling Proprietors' Association of America); FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3233 (NCTA—The Internet & Television Association).
[238] FTC-2023-0064-3234 (CTIA—The Wireless Association).
[239] *See, e.g.*, *id*.; FTC-2023-0064-3217 (Bowling Proprietors' Association of America); FTC-2023-0064-3295 (USTelecom—The Broadband Association).
[240] FTC-2023-0064-3233 (NCTA—The Internet & Television Association); FTC-2023-0064-3127 (U.S. Chamber of Commerce).

Business's income or property taxes, because they would not be government charges that were "imposed on the transaction by a Federal, State, Tribal, or local government agency, unit, or department."

An online travel agency submitted a comment identifying concerns about a potential conflict between the definition of "Government Charges" and DOT's Full Fare Advertising Rule, 14 CFR 399.84, which requires tax-inclusive pricing for certain travel products, including airline tickets and bundled vacation packages (e.g., airline tickets and hotel stays purchased together).[241] Specifically, the commenter asserted that the final rule should require that hotels and short-term lodging providers incorporate Government Charges into Total Price because, otherwise, consumers shopping for bundled vacation packages—which are subject to the Full Fare Advertising Rule—could see different prices from consumers who shop separately for flights and lodging. The commenter also argued that the rule should require that taxes and government-imposed fees be included in advertised lodging prices, consistent with DOT's Full Fare Advertising Rule. The Commission declines to require only short-term lodging providers, as opposed to live-event ticket sellers and other Businesses covered by the rule, to incorporate Government Charges into Total Price. However, the Commission notes that while the final rule provides that Businesses "may" exclude Government Charges from Total Price, nothing in the rule prevents Businesses from advertising prices inclusive of those charges, as required by DOT's Full Fare Advertising Rule.

Finally, an industry group representing certain Federally recognized Arizona Indian Tribes that operate gaming entities urged the Commission to include fees or

[241] FTC-2023-0064-3204 (Expedia Group).

charges imposed on consumers by “tribal” agencies, units, or departments in the definition of “Government Charges,” to recognize taxes or fees that Tribes might impose.[242] The Commission agrees and adds the word “Tribal” to the definition of “Government Charges” to clarify that Businesses may exclude from Total Price fees or charges imposed on a transaction by a Tribal government.

The Commission notes that the modifications in the final rule to the definition of “Government Charges” represent a narrowing of the final rule. Businesses must still make the disclosures required by § 464.2(c) in connection with Government Charges and are prohibited by § 464.3 from misrepresenting the nature, purpose, amount, or refundability of Government Charges.

6. Pricing Information

Proposed § 464.1(e) in the NPRM defined “Pricing Information” as “any information relating to any amount a consumer may pay.” The final rule references Pricing Information in one provision: § 464.2(b). As discussed in section III.B.2, final § 464.2(b) is limited to Covered Goods or Services and requires that, in any offer, display, or advertisement that represents any price of a Covered Good or Service, a Business disclose the Total Price more prominently than any other Pricing Information. However, where the final amount of payment for the transaction is displayed, the final amount of payment must be disclosed more prominently than, or as prominently as, the Total Price.

A commenter from the financial services industry asserted that the proposed definition of “Pricing Information” would be inappropriate for “standard bank products,

[242] FTC-2023-0064-3120 (Arizona Indian Gaming Association).

such as checking, savings, CDs, consumer loans, etc." and failed to address the treatment of interest rates for products and services governed by existing financial regulations.[243] The commenter's concerns about the definition of "Pricing Information" are inapplicable because the final rule, including § 464.2(b), is limited to Covered Goods or Services. Accordingly, the final rule adopts the proposed definition of "Pricing Information" at § 464.1 without modification.

7. Shipping Charges

Proposed § 464.1(f) in the NPRM defined "Shipping Charges" as "the fees or charges that reasonably reflect the amount a Business incurs to send physical goods to a consumer through the mail, including private mail services." The NPRM made clear that Businesses are not permitted to artificially inflate the cost of shipping, and, instead, Shipping Charges must reasonably reflect the cost incurred to send goods to consumers. Final § 464.1 adopts the proposed definition of "Shipping Charges," with a minor modification to clarify that shipping charges incurred through private mail and shipping services such as FedEx and UPS, or by freight, fall within the definition.

One trade association raised numerous concerns about the proposed definition of "Shipping Charges." First, the commenter argued that the proposed definition fails to consider the unpredictability of shipping fees, noting that precise costs are difficult for retailers to determine because shipping costs are frequently based on quotes or estimates subject to change based on the carrier.[244] The commenter noted that businesses may face challenges using certain shipping methods, including consolidating shipment of multiple

[243] FTC-2023-0064-1425 (Iowa Bankers Association argued that the definition of "Pricing Information" is inappropriate for "standard bank products" and products earning interest).
[244] FTC-2023-0064-3267 (National Retail Federation).

orders or using rail service for partial shipment, which it argued can be particularly difficult to predict. Second, the commenter asked that the Commission modify the definition of "Shipping Charges" to explicitly permit the use of flat rate shipping, explaining that many businesses have existing agreements with major freight carriers to provide flat rate shipping. For example, the commenter asked whether the use of flat rate shipping charges would be considered unlawful if the business shipped a small, lightweight item for which the actual shipping costs are less than the flat rate to ship. Finally, the commenter argued that the use of the phrase "reasonably reflect" in the definition is ambiguous and asked that the Commission clarify whether the definition includes a scienter requirement. Two commenters also asserted that the rule would "force" businesses to disclose proprietary shipping calculations in a threat to free market competition.[245]

The Commission's use of the phrase "reasonably reflect" is intended to allow for flexibility in determining shipping costs. The Commission recognizes that precise shipping costs may not be knowable until the end of a transaction, and, for that reason, the final rule permits Businesses to exclude Shipping Charges from Total Price. The rule does not require that the cost of shipping reflect an exact certainty. Moreover, the rule does not require Businesses to disclose proprietary information pertaining to relationships with freight or shipping providers because the rule does not require that Shipping Charges be excluded from Total Price; instead, the rule permits Businesses to exclude Shipping Charges from Total Price if they choose. The final rule does not prohibit Businesses from incorporating the cost of shipping into Total Price and thereby providing

[245] *Id.*; FTC-2023-0064-2901 (E-Merchants Trade Council).

shipping to consumers at no additional charge. Nor does the final rule prohibit the use of flat rate shipping or shipping costs based on national averages. Instead, the language is intended to prevent Businesses from inappropriately excluding from Total Price costs unrelated to shipping.

One live-event ticket platform supported the proposed rule's exclusion of certain shipping costs from Total Price, noting that the cost to ship physical tickets may vary based on factors determined later in the transaction, such as the location of the buyer.[246] The commenter also noted that a variety of delivery and shipping methods may be available to consumers purchasing live-event tickets, some of which may be mandatory and therefore included in Total Price.[247] The Commission emphasizes that certain fees do not fall within the definition of "Shipping Charges," including online "convenience" or other fees charged, for example, by online ticket agencies to electronically "deliver" tickets or other processing fees associated with certain online purchases. The Commission further notes that an online convenience or other fee for electronic delivery of a ticket should be included in Total Price if a consumer cannot obtain the ticket as part of the same transaction (i.e. online) without incurring a fee. While the Commission received comments raising concerns about incorporating the cost of delivery, as opposed to shipping, into Total Price,[248] the Commission is not aware of any evidence that such concerns would apply to sales of live-event tickets or short-term lodging.

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[246] FTC-2023-0064-3266 (StubHub, Inc.).
[247] *Id*.
[248] *See, e.g.*, FTC-2023-0064-3263 (Flex Association); FTC-2023-0064-3137 (Chamber of Progress); FTC-2023-0064-3186 (National LGBT Chamber of Commerce and National Asian/Pacific Islander American Chamber of Commerce & Entrepreneurship); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3267 (National Retail Federation).

Finally, the Commission also received a range of comments regarding handling costs. Some commenters urged the Commission to amend the definition of "Shipping Charges" to clarify that internal handling costs do not constitute shipping costs and therefore must be included in Total Price.[249] The comments related to handling costs involving goods or services covered by the broader proposed rule in the NPRM.[250] While the Commission has not received any evidence that the concerns raised in these comments would impact Covered Goods or Services, the Commission clarifies that internal handling costs must be included in Total Price. The Commission does not believe that a modification to the "Shipping Charges" definition is necessary, however, because the definition specifically states that Shipping Charges include only those costs that reasonably reflect the cost to "send physical goods" to consumers. The Commission does not believe that handling charges, like the cost to store goods or labor costs associated with preparing items for shipment, reflect the costs to "send physical goods" to consumers. Accordingly, handling charges are not Shipping Charges and must be included in Total Price.

8. Total Price

Proposed § 464.1(g) in the NPRM defined "Total Price" as "the maximum total of all fees or charges a consumer must pay for a good or service and any mandatory Ancillary Good or Service, except that Shipping Charges and Government Charges may be excluded." Although some commenters stated that the proposed definition was not

[249] *See, e.g.*, FTC-2023-0064-3146 (Institute for Policy Integrity, New York University School of Law); FTC-2023-0064-1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business).

[250] FTC-2023-0064-3146 (Institute for Policy Integrity, New York University School of Law); FTC-2023-0064-1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business); FTC-2023-0064-3267 (National Retail Federation).

flexible enough to account for all pricing models, the Commission believes the modified definition of "Total Price" is narrowly tailored to protect consumers by addressing the identified unfair and deceptive practice of hiding costs by omitting mandatory fees from advertised prices for Covered Goods or Services. Consumers must be able to purchase and use goods or services at the advertised Total Price.

Final § 464.1 differs from the proposed definition of "Total Price"[251] to the extent the definitions of "Government Charges" and "Shipping Charges," as discussed in section III at A.5 and A.7, are modified. In addition, the Commission clarifies in final § 464.1 that Businesses also may exclude from Total Price any fees or charges for optional Ancillary Goods or Services. Further, the Commission notes herein that the rule does not directly address concerns that fees imposed in connection with Covered Goods or Services are "excessive"; the rule does not cap, ban, or prohibit the charging of any fees, but requires certain disclosures and prohibits misrepresentations to prevent unfair or deceptive pricing practices.

As detailed herein, the Commission declines to accept commenters' recommendations to define "mandatory," to exclude Ancillary Goods or Services from the "Total Price" definition, to modify the "maximum total" requirement, or to require the inclusion of Shipping Charges and Government Charges in Total Price. However, the Commission clarifies in final § 464.2(c) that Businesses must disclose the final amount of payment for the transaction before a consumer consents to pay.

[251] Although one commenter expressed concern that businesses would use different terms for Total Price, and thereby create confusion, the rule does not mandate that Businesses use the term Total Price. *See* FTC-2023-0064-3290 (U.S. Public Interest Research Group Education Fund).

a) Mandatory Fees

Commenters noted that the rule does not define "mandatory," and expressed concern about identifying mandatory fees to be included in Total Price.[252] Some commenters recommended that the Commission clarify the distinction between "core" goods and services and Ancillary Goods or Services,[253] provide guidance as to which Ancillary Goods or Services are mandatory,[254] and modify the "Total Price" definition to exclude the reference to mandatory Ancillary Goods or Services.[255]

The Commission has considered these comments and declines to accept these proposed modifications to the definition of "Total Price." The definition of "Total Price" specifies that it includes the cost of the goods and services being offered and any mandatory Ancillary Goods or Services, subject to certain exceptions. The Commission retains in the definition of "Total Price" fees and charges for "any mandatory Ancillary Good or Service" as necessary to protect consumers from the identified unfair and deceptive practice of hidden fees.

The Commission also declines to modify the rule to add a definition of "mandatory fees." The Commission cannot identify in advance a definitive list of mandatory fees because whether a particular fee will be mandatory or optional will depend on the specific facts of an individual business transaction, as described in section III.A.1.

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[252] *See, e.g.*, FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3134 (U.S. Department of Transportation, Federal Motor Carrier Safety Administration); FTC-2023-0064-3145 (Association of National Advertisers, Inc.).
[253] *See*, *e.g.*, FTC-2023-0064-2888 (Housing Policy Clinic, University of Texas School of Law).
[254] *See*, *e.g.*, FTC-2023-0064-3267 (National Retail Federation).
[255] *See, e.g.*, FTC-2023-0064-3160 (Consumer Federation of America et al.); FTC-2023-0064-3258 (National Taxpayers Union Foundation); FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al.).

Ancillary Goods or Services can be either optional or mandatory depending on whether Businesses require consumers to purchase them or if they are necessary to make the principal goods or services fit for their intended purpose. If Businesses offer Ancillary Goods or Services and require consumers to purchase them to complete transactions for or to use the Covered Goods or Services being offered, the Ancillary Goods or Services are mandatory and their cost must be included in Total Price.

In the NPRM, the Commission sought comment on whether it was clear that the reference in the definition of "Total Price" to "all fees or charges a consumer must pay for a good or service and any mandatory Ancillary Good or Service" includes (1) all fees or charges that are not reasonably avoidable and (2) all fees or charges for goods or services that a reasonable consumer would expect to be included with the purchase.[256] Commenters disagreed on whether the rule text is clear that "Total Price" includes unavoidable fees and fees based on consumer expectations, and recommended clarifying the definition of "Total Price" in this regard or adding a definition of mandatory fees.[257] Other commenters argued that the two types of fees described are themselves vague and unclear.[258]

Businesses should consider, in the context of their specific business practices, the Commission's guidance that mandatory fees include charges that consumers cannot reasonably avoid and charges for goods or services that a reasonable consumer would

[256] NPRM, 88 FR 77482, Question 19.
[257] *See*, *e.g.*, FTC-2023-0064-3134 (U.S. Department of Transportation, Federal Motor Carrier Safety Administration); FTC-2023-0064-3160 (Consumer Federation of America et al.); FTC-2023-0064-3196 (South Carolina Department of Consumer Affairs); FTC-2023-0064-3248 (DC Jobs With Justice on behalf of Fair Price, Fair Wage Coalition); FTC-2023-0064-3146 (Institute for Policy Integrity, New York University School of Law).
[258] *See, e.g.*, FTC-2023-0064-3233 (NCTA—The Internet & Television Association); FTC-2023-0064-3172 (New Jersey Apartment Association).

expect to be included with the purchase because they are necessary to make primary goods or services fit for their intended purpose. The Commission reiterates the guidance about Total Price that it provided in the NPRM: It is well established that it is deceptive to offer goods or services that are not fit for the purpose for which they are sold. By offering goods or services, Businesses impliedly represent that the goods or services are fit for their intended purpose; reasonable consumers would expect that, when they purchase a good or service, they will be able to use it for that purpose.[259] It is therefore deceptive to advertise a Total Price for a primary good or service that does not include fees for additional purchases that are necessary to render the primary good or service fit for its intended purpose.

Further, Businesses cannot treat additional purchases that are necessary to render Covered Goods or Services fit for their intended purpose as optional and exclude the costs of these additional purchases from Total Price. For example, Businesses cannot treat credit card surcharges or processing fees as optional and exclude them from Total Price if they do not provide consumers with other payment options. The rule does not require, as some commenters suggested, the inclusion of fees for truly optional Ancillary Goods or Services in Total Price.[260] Nonetheless, such fees and their nature, purpose, and amount still must be Clearly and Conspicuously disclosed before the consumer consents to pay and cannot be misrepresented.

[259] NPRM, 88 FR 77432.
[260] *See, e.g.*, FTC-2023-0064-2891 (Mary Sullivan, George Washington University, Regulatory Studies Center, noted that "purely optional" subscription services, such "optional features that are installed in automobiles, like satellite radio" are "not deceptive and unfair" but are instead efficient. She further contended that the proposed rule lacks specificity as to these types of "purely optional" services.)

Commenters expressed the concern that Businesses could misrepresent mandatory fees as optional, for example, by including them by default in bills, requiring consumers to opt out from them, or using other deceptive practices, and recommended that the Commission include safeguards in the rule to prevent these practices.[261] The Commission determines that the rule adequately protects consumers from the posited scenarios without modification. Businesses cannot characterize fees as optional and exclude them from Total Price when Businesses require consumers to purchase the good or service for which the fees are charged and employ practices, such as default billing or opt-out provisions, that effectively take away consumers' ability to consent to the fees. For example, a previously undisclosed resort fee that a hotel discloses at check-in is not an optional fee if the hotel will charge the fee unless the guest challenges the fee. Final § 464.3 prohibits misrepresenting the nature, purpose, amount, and refundability of fees, including misrepresenting mandatory fees as optional fees from which consumers must opt out.[262]

Whether fees for Ancillary Goods or Services must be included in Total Price will depend on the specific factual circumstances. The inclusion of the defined term "Ancillary Good or Service" in the definition of "Total Price" clarifies that Total Price includes "additional good(s) or service(s) offered to a consumer as part of the same transaction." Businesses cannot exclude mandatory fees from Total Price simply by characterizing them as not part of the same transaction if, in fact, they are.

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[261] *See, e.g.*, FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al.); FTC-2023-0064-3160 (Consumer Federation of America et al.); FTC-2023-0064-3248 (DC Jobs With Justice on behalf of Fair Price, Fair Wage Coalition); FTC-2023-0064-0915 (Individual Commenter noted that businesses may misrepresent optional fees as mandatory and "[t]he consumer may not realize they are optional when receiving a bill and may not realize they can be removed.").

[262] *See* discussion *infra* section III.C and note 349.

b) Maximum Total

The rule provides that "Total Price" is the "maximum total" of all mandatory fees except identified permissible exclusions. Some commenters objected to defining "Total Price" as the maximum total, arguing that it could discourage advertising discounted rates or misrepresent actual costs and interfere with comparison shopping.[263] Other commenters suggested that the reference to maximum total would require businesses that enter into continuous service contracts with consumers (e.g., subscriptions) to include in Total Price all mandatory fees that might arise over the duration of a contract, which they argued would be difficult to determine at the time the rule requires a Total Price disclosure.[264] Some commenters argued that continuous service contracts that reflect negotiated transactions do not raise "bait and switch" concerns and that Total Price is adequately disclosed in such contracts.[265]

The Commission has considered comments relating to the "maximum total" requirement and retains that language in the definition of "Total Price." The Commission determines that such language is necessary to protect consumers from advertised Total Prices that are deceptively lower than what Businesses actually charge. As the Commission noted in the NPRM, "[t]he use of the phrase 'maximum total' would allow businesses to apply discounts and rebates after disclosing Total Price."[266] Since all

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[263] *See, e.g.*, FTC-2023-0064-3293 (Travel Technology Association); FTC-2023-0064-3233 (NCTA—The Internet & Television Association).

[264] *See, e.g.*, FTC-2023-0064-3116 (Manufactured Housing Institute); FTC-2023-0064-3172 (New Jersey Apartment Association); FTC-2023-0064-3121 (National Independent Automobile Dealers Association); FTC-2023-0064-1425 (Iowa Bankers Association).

[265] *See, e.g.*, FTC-2023-0064-3289 (Zillow Group stated that "rental housing market fees are distinct from fees in other economic sectors" because they are not charged in "click-to-purchase" transactions, but involve an "interactive process" over a "much longer period of time" and involved "written agreements that include all relevant binding terms and conditions, including the total price."); FTC-2023-0064-3269 (IHRSA—The Health & Fitness Association).

[266] NPRM, 88 FR 77439.

Businesses are subject to the maximum total requirement for Covered Goods or Services, the resulting level playing field would allow for comparison shopping. The Commission does not agree that disclosures in contracts or agreements adequately protect consumers from deceptive advertising that omits mandatory fees.

Commenters questioned how businesses should handle conditions or limitations on advertised prices.[267] Businesses must comply with the rule and other disclosure requirements, including those related to material conditions or limitations.[268] Businesses that advertise prices that are not attainable by consumers because the prices are conditioned on undisclosed material conditions, restrictions, or limitations may fail to disclose and misrepresent Total Price.

c) Itemization

The rule neither requires, nor prohibits, the itemization of mandatory fees that must be included in Total Price. The Commission notes that final § 464.2(c) requires disclosure of the nature, purpose, and amount of fees or charges imposed on the transaction that have been excluded from Total Price but declines to modify the regulatory text proposed in the NPRM to otherwise require or prohibit the itemization of fees.

Some commenters recommended that the rule not require itemization.[269] Other commenters stated that including mandatory fees in Total Price would obscure the nature

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[267] *See, e.g.*, FTC-2023-0064-3162 (BBB National Programs, Inc. commented that the definition of "Total Price" does not specifically address "how advertisers should disclose material limitations to obtaining an advertised price."); FTC-2023-0064-1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business, commented that "[i]f there are any restrictions, they must be as clear and conspicuous as the price.").
[268] *See, e.g.*, *supra* note 111.
[269] *See, e.g.*, FTC-2023-0064-3293 (Travel Technology Association "recommends that any final rule refrain from imposing an obligation to itemize mandatory fees.").

and purpose of the fees and provide less information to consumers,[270] while others recommended that the rule require itemization to provide more information to consumers and to protect other transaction participants by disclosing where mandatory fees go.[271] Other commenters recommended that the rule prohibit itemization because fees could be arbitrary or invented by Businesses and itemizing them could misrepresent their nature and purpose.[272]

The Commission has considered the comments and declines to require or prohibit the itemization of mandatory fees, except as provided by § 464.2(c). Section 464.2 of the rule permits, but does not require, itemization of the components of Total Price, and therefore allows Businesses to break out transaction inputs, consistent with laws that require itemization. When Businesses choose to itemize mandatory fees that are a part of Total Price or itemize fees pursuant to § 464.2(c), Total Price must be displayed more prominently than itemized fees. Further, § 464.3 prohibits misrepresenting itemized fees.

d) Exclusions from Total Price

The definition of "Total Price" in final § 464.1 is modified from the proposed definition to the extent that the definitions of "Government Charges" and "Shipping Charges" are modified, as discussed in section III at A.5 and A.7. Finally, the definition

[270] *See*, *e.g.*, FTC-2023-0064-3173 (Center for Individual Freedom); FTC-2023-0064-3137 (Chamber of Progress); FTC-2023-0064-3208 (FreedomWorks); FTC-2023-0064-3263 (Flex Association); FTC-2023-0064-3258 (National Taxpayers Union Foundation).
[271] *See, e.g.*, FTC-2023-0064-3304 (Recording Academy stated: "Price itemization is the only way to ensure pricing is transparent and that all parties involved in setting the ticket's total price are held accountable for what they charge."); FTC-2023-0064-3230 (Future of Music Coalition); FTC-2023-0064-3250 (National Independent Talent Organization); FTC-2023-0064-3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher stated that itemization is necessary to clarify opaque charges in the context of consumer correctional services.); FTC-2023-0064-3290 (U.S. Public Interest Research Group Education Fund).
[272] *See, e.g.*, FTC-2023-0064-3212 (TickPick, LLC).

of "Total Price" clarifies that Businesses may exclude fees or charges for optional Ancillary Goods or Services.

e) Intersection with IRS requirements

One commenter sought clarification as to the intersection of the Total Price requirements with Internal Revenue Service ("IRS") requirements regarding charitable gifts.[273] The commenter specifically highlighted a scenario in which charitable contributions are made concurrent with ticket sales. The Commission is not aware of—and indeed, the commenter did not cite to—any specific conflict with the final rule. Instead, the commenter asked about the rule's intersection with the IRS's Substantiation and Disclosure Requirements. Based on the Commission's review, the IRS Substantiation and Disclosure Requirements pertain to substantiation requirements for donors who contribute to charitable organizations or causes, and disclosure requirements for charitable organizations that provide goods or services to donors for certain contributions. The Commission's rule has no bearing on, and does not change or impact, any of these IRS requirements. The commenter also stated that "the concept of 'refundability'" is "not common in charitable giving." As set forth in section III.B.3, the Commission eliminates the requirement that Businesses affirmatively disclose the refundability of each fee or charge imposed; however, § 464.3 still prohibits Businesses from misrepresenting a fee's refundability.

B. § 464.2 Hidden fees prohibited.

Proposed § 464.2(a) and (b) in the NPRM provided, respectively, that it would be a violation of the rule for a Business to "offer, display, or advertise an amount a consumer

[273] FTC-2023-0064-3195 (League of American Orchestras et al.).

may pay without Clearly and Conspicuously disclosing Total Price" and that "[i]n any such offer, display, or advertisement that contains an amount a consumer may pay, a Business must display Total Price more prominently than any other Pricing Information." As discussed herein, final § 464.2 makes certain modifications to proposed § 464.2(a) and (b) and consolidates all provisions related to disclosures by relocating proposed § 464.3(b), with certain modifications, to final § 464.2(c).

As discussed in section III.B.1 and III.B.2, to address commenter concerns that "an amount a consumer may pay" is vague and overbroad, the Commission modifies final § 464.2(a) and (b) as compared to the NPRM proposals to focus their required disclosures on offers, displays, or advertisements that include "any price of a Covered Good or Service." Final § 464.2(b) also clarifies that, in any offer, display, or advertisement that represents any price of a Covered Good or Service, Total Price must be more prominent than other Pricing Information, except if the final amount of payment for a transaction is displayed, the final amount of payment must be more prominent than, or as prominent as, Total Price.

As discussed in section III.B.3, the Commission also consolidates all provisions related to required disclosures under § 464.2 of the rule and, therefore, codifies proposed § 464.3(b) with certain modifications at final § 464.2(c). Proposed § 464.3(b) specified that Businesses must disclose Clearly and Conspicuously, and before the consumer consents to pay, the nature and purpose of any amount a consumer may pay that is excluded from Total Price. The Commission clarifies that, in line with the narrower scope of the rule, the trigger requiring disclosures in final § 464.2(c) is "before the consumer consents to pay for any Covered Good or Service." As with final § 464.2(a) and (b), final

§ 464.2(c) also eliminates the reference to "any amount a consumer may pay" to narrow the focus of the disclosures required by § 464.2(c)(1) to "any fee or charge imposed on the transaction that has been excluded from Total Price."

Final § 464.2(c) also differs from the NPRM proposal in that it explicitly requires disclosure of the amount, nature, and purpose of any fees or charges imposed on the transaction that have been excluded from Total Price and the identity of the good or service for which the fees or charge is imposed, as well as the final amount of payment for the transaction. Importantly, to preserve choice and control for Businesses, § 464.2(c)'s disclosures with respect to Government Charges and Shipping Charges are only required if a Business elects to permissibly exclude such charges from Total Price. Similarly, § 464.2(c)'s disclosures with respect to fees for optional Ancillary Goods or Services are only required if the consumer has elected to purchase such goods or services as part of the same transaction and the Business has excluded their fees from Total Price. Nothing in the final rule requires a Business to disclose commercially sensitive information regarding the components of its Total Price.

The Commission discusses herein changes to the text of the proposed provisions and addresses substantive comments about these provisions, including how § 464.2 would apply to specific pricing scenarios discussed in the comment record.

1. § 464.2(a)

Proposed § 464.2(a) in the NPRM provided that it would be a violation of the rule for a Business to "offer, display, or advertise an amount a consumer may pay without Clearly and Conspicuously disclosing Total Price," which was defined in proposed § 464.1(g) as "the maximum total of all fees or charges a consumer must pay for a good or service and any mandatory Ancillary Good or Service, except that Shipping Charges and

Government Charges may be excluded." In final § 464.2(a), the Commission changes the reference to "an amount a consumer may pay" to the more limited "any price of a Covered Good or Service." Final § 464.2(a) also further clarifies that Businesses may exclude from Total Price fees or charges for any optional Ancillary Good or Service. The Commission makes these modifications to address NPRM comments and to clarify the rule. The comments relating to the exclusion from Total Price of charges for any optional Ancillary Good or Service, and the Commission's reasons for allowing these exclusions, are discussed in section III at A.1 and A.8.

Commenters argued that the reference to "an amount a consumer may pay" in proposed § 464.2(a) and in other sections (*i.e.*, proposed §§ 464.2(b) and 464.3(b)) was overbroad and that the Commission failed to consider its application to various pricing scenarios.[274] In response to these comments, the Commission finalizes § 464.2(a) with modification to limit the Total Price disclosure requirement from each time Businesses "offer, display, or advertise an amount a consumer may pay" to only when they "offer, display, or advertise any price of a Covered Good or Service." The Commission also provides guidance regarding the application of § 464.2(a) to various types of fees and pricing scenarios, including: contingent fees; ticket service fees; credit card surcharges; dynamic pricing and national advertising; rebates, bundled pricing, and discounts; and online marketplaces in section III.B.1.a–f.

[274] *See, e.g.*, FTC-2023-0064-3206 (Motor Vehicle Protection Products Association et al. commented that proposed § 464.3, in referring to any amount a consumer may pay, goes "far broader than 'fees'" and "the use of the verb 'may' suggests that even offers of goods or services—or, frankly, even goods or services that 'may be' available but not actually offered—impermissibly and imprudently stretches this section.").

a) Contingent Fees

Under certain circumstances discussed herein, Total Price can exclude certain fees that Businesses cannot calculate in advance because they necessarily are contingent on consumer behavior or choice; unknown, external factors; or pricing models that include variable fees. The Commission notes that whether certain contingent fees cannot be calculated and are truly unknown at the time the rule requires disclosures may depend on the specific factual circumstances. The Commission is not persuaded by the comments to change the rule as it applies to contingent fees.

Certain commenters remarked that, in some instances, businesses cannot quote an all-inclusive price due to unknown fees arising from consumer behavior and choices during and after the purchasing process; unknown, external factors; or pricing models that have variable rates such as hourly rates or rates based on guest count and consumption. Indeed, some commenters argued that the Commission's failure to recognize the existence of variable marketplace fees is a significant oversight of the proposed rule.[275] Other commenters observed that concerns about variable marketplace

[275] *See, e.g.*, FTC-2023-0064-3127 (U.S. Chamber of Commerce stated that variable fees should be excluded from Total Price because (1) fees that "vary based on volume, transaction type, and region" cannot be assessed until consumers take some action, (2) requiring their inclusion in Total Price "could less efficiently spread costs, undermine consumer choice, and eliminate price competition on certain cost inputs," and (3) "[t]he NPRM also provides no reason to think that variable or dynamic pricing is necessarily deceptive or unfair across all industries and sectors of the economy."); FTC-2023-0064-3137 (Chamber of Progress expressed concern about the rule's impact on variable pricing models, including delivery platforms, where "the prices for delivery or other services increase as the size of the order increases," which it asserts is "a more efficient way of distributing costs than flat rates" and asserted it is not clear how such platforms would comply with the rule "without creating confusion for customers or misrepresenting prices."); FTC-2023-0064-3173 (Center for Individual Freedom argued that: "Acknowledging the distinct roles and objectives of both flat and variable fees in different industries is crucial, and the proposed rule's failure to recognize the benefits of variable pricing structures, which allow fees to scale based on the nature of the items or services purchased, is a significant oversight."); FTC-2023-0064-3258 (National Taxpayers Union Foundation stated that under the rule, "it will be nearly impossible for businesses using variable prices to display the Total Price at all times, because businesses are unable to predict consumer's choices."); FTC-2023-0064-3202 (TechNet urged the Commission to exclude from Total Price "fees that are variable or unknowable," such as in e-commerce marketplaces, or the rule "would

fees are overblown and stated that the Commission should prohibit charging such fees if the full amount of such fees cannot be calculated in the upfront price.[276]

The Commission finds that, to the extent that certain fees are contingent on later conduct or choices by a consumer after purchase (e.g., pet fees, fees for late payments, fees for property damage at a rental accommodation, or smoking in a non-smoking hotel room), these fees are not mandatory for purposes of the transaction, and as such, do not need to be included in Total Price.[277] The Commission notes that fees that are unavoidable by the consumer, regardless of conduct or choices, are not contingent. Ultimately, if a Business cannot ascertain whether certain fees or charges apply until after concluding a purchase or transaction, the Business need not include such fees or charges in Total Price. Whether mandatory fees are truly unknown due to reasons beyond a Business's control will depend on specific factual circumstances.

Businesses should include in Total Price other fees that may vary depending on a consumer's choices during the purchase process or transaction as soon as consumers provide the Business with the information needed to determine the applicability or

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complicate the communication of pricing in situations where the 'total price cannot practically be determined' in advance."); FTC-2023-0064-3263 (Flex Association commented that app-based delivery platforms could be "forced to change the way they price entirely—moving from variable . . . to static fees . . . that would not benefit consumers"); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP commented that the proposed rule failed to consider reliance on dynamic pricing that depends on consumer choices throughout the buying process).

[276] *See, e.g.*, FTC-2023-0064-3134 (U.S. Department of Transportation, Federal Motor Carrier Safety Administration recommended that the rule prohibit "charging variable mandatory ancillary fees if the full amount of such variable fees cannot be calculated in the upfront price."); FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al. asserted that concerns "that it is impossible to accurately estimate all fees in advance of providing a complex service" or fees dependent on consumer choice, are "easily resolvable with minimal effort and creativity on the part of vendors.").

[277] *See*, *e.g.*, FTC-2023-0064-3233 (NCTA—The Internet & Television Association commented that the definition of "Total Price" is ambiguous as "it does not clearly address fees that are contingent on later actions by particular consumers . . . such as for unreturned equipment or late payment of the consumer's bill" and encouraged the Commission to "resolve the ambiguity by, among other things, making clear in the rule itself that contingent or avoidable fees are to be excluded from the Total Price.").

amount of those fees. Indeed, some commenters discussed different scenarios in which Total Price depends on a consumer's choices while buying a good or service, such as season and flexible ticket packages for the arts.[278] According to some commenters, consumers expect fees arising from their personal choices and customizations to be disclosed only after providing additional information to, or negotiating with, sellers. Businesses can include in their advertisements "starting at" or base prices to deal with situations in which ultimate price may depend on a consumer's selection of various ticketing and lodging options, but only if consumers can in fact obtain the advertised ticket or lodging for the "starting at" or base price.[279]

Businesses still must Clearly and Conspicuously disclose the nature, purpose, and amount of such fees or charges and the identity of the good or service for which they are imposed, and the final amount of payment, before a consumer consents to pay or, if the applicability of a fee or charge is contingent on later conduct or choices by a consumer after purchase, as soon as such circumstances arise. Businesses also must not mispresent those or other fees or charges, including Total Price.

b) Ticket Service Fees

Businesses operating in the live-event ticketing industry, including venues, ticket sellers, and ticket resellers, historically have imposed on consumers a host of charges in addition to the ticket's face value that are dripped in throughout the purchasing process.

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[278] *See, e.g.*, FTC-2023-0064-3195 (League of American Orchestras et al. requested the Commission's "consideration for season-based and flexible ticket packages in which multiple and variable options are available to ticket-buyers, and the total price will vary based on selection.").

[279] In some instances, advertising prices as a base or starting price can be deceptive, depending on the relevant limiting or qualifying criteria. In such instances, the material terms, conditions and obligations upon which receipt and retention of the base or starting price are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.

One of the rule's principal purposes is to give consumers upfront knowledge of the true cost of a good or service, including mandatory charges, without being forced to navigate through a time-intensive search and transaction. A broad swath of industry members supported a nationwide Total Price requirement for ticket pricing,[280] although some industry commenters expressed concerns with certain aspects of the rule. The Commission addresses commenters' concerns herein.

Some industry members emphasized that the added fees are their primary source of revenue, since they typically do not share in the revenue from the ticket's face value.[281] Industry members and an academic commenter also stated that certain added fees pay for valuable services such as delivery and the convenience of selecting a seat from home.[282]

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[280] *See, e.g.*, FTC-2023-0064-3266 (StubHub, Inc. submitted a comment supporting nationwide all-in pricing and including Total Price in every advertisement to consumers and throughout the transaction.); FTC-2023-0064-3105 (Charleston Symphony commented: "[R]equiring sellers to disclose the total price clearly and conspicuously[] addresses a pressing issue. . . . Predatory practices in the secondary ticket sales market pose a significant threat to artists, venues, audiences, and the future of nonprofit arts organizations, impacting the integrity of the ticket-buying process and eroding audience confidence."); FTC-2023-0064-3122 (Vivid Seats stated that it "supports additional consumer disclosures, including all-in pricing," but the rule should "apply equally across all parts of the live-events ticketing industry," so consumers can compare prices and businesses that display total prices will not be at a competitive disadvantage.); FTC-2023-0064-3241 (National Association of Ticket Brokers submitted a comment supporting all-in pricing, but noting that it would only work if "(i) it was required of every ticket seller and (ii) there was rigorous and expeditious enforcement."); FTC-2023-0064-3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America commented that they "support[] a definition of all-in pricing that requires the first price for a live-event ticket shown to consumers to be the price ultimately charged at checkout (exclusive of state and local taxes and optional add-ons)."); *see also* FTC-2023-0064-3264 (Mark J. Perry, Ph.D., Professor Emeritus of Economics at University of Michigan-Flint and Senior Fellow Emeritus at the American Enterprise Institute, "urge[d] the FTC to ensure that any rule requiring all-in pricing in live events apply equally to all market participants."); FTC-2023-0064-2856 (National Football League stated that if the live-event ticket industry is included in the rule's coverage, the Commission must "include all sellers of live-event tickets to prevent inconsistencies in its application.").

[281] *See, e.g.*, FTC-2023-0064-3122 (Vivid Seats commented that service fees "are the TRM's [ticket resale marketplace's] sole source of revenue and provide the capital necessary to operate the TRM."); FTC-2023-0064-3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America commented that a ticket service charge "compensates the venue for hosting the event and the ticketing company for distributing tickets and related services—important since venues and ticketing companies typically do not share in revenues attributable to a ticket's face value.").

[282] *See, e.g.*, FTC-2023-0064-3122 (Vivid Seats commented that delivery fees cover costs associated with delivering a ticket.); FTC-2023-0064-3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America); FTC-2023-0064-3292 (National Association of Theatre Owners commented: "These fees

An industry member emphasized, however, that although consumers do expect additional fees, businesses nonetheless should clearly disclose a ticket's true, all-in price (i.e., Total Price).[283] Another industry member commented that unless an added fee is truly optional, it should be included in Total Price.[284] The Commission reiterates that Businesses are not prohibited from charging fees; instead § 464.2(a) requires the disclosure of Total Price, including fees for mandatory Ancillary Goods or Services, when a price for a good or service is displayed, while § 464.2(c) requires disclosures about fees being imposed on the transaction that have been permissibly excluded from Total Price, including for optional Ancillary Goods or Services, before a consumer consents to pay for a Covered Good or Service. The Commission further reiterates that, in an online transaction, fees such as for payment processing, electronic ticket "delivery," "convenience," or similar add-on ticketing fees are mandatory and must be included in Total Price if a consumer cannot obtain the Covered Good or Service as part of the same transaction (e.g., online)

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allow moviegoers to purchase tickets and select their seats from home, and this service requires ongoing support and management, entailing operational costs that are offset by convenience fees. At the same time customers can avoid the convenience fee altogether by purchasing directly at the box office.") FTC-2023-0064-3264 (Mark J. Perry, Ph.D., Professor Emeritus of Economics at University of Michigan-Flint and Senior Fellow Emeritus at the American Enterprise Institute, commented that ticket resale marketplaces offer numerous valuable services to ticket sellers and buyers that a single seller or buyer could not access otherwise, including access to buyers or tickets, inventory management, seller and customer support, secure financial transactions, and guarantees.").

[283] FTC-2023-0064-3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America commented: "Because the practice of adding these charges to the ticket's face value has been so longstanding, consumers have come to expect service fees when purchasing a ticket to a live entertainment event—but it is impossible for consumers to anticipate the amount of applicable fees because those rates are set by hundreds of different venues and can vary accordingly." The commenter continued, "Consumers therefore need clear disclosures about the true price of a ticket, including the elements that constitute the all-in price.").

[284] FTC-2023-0064-3266 (StubHub, Inc. supported the exclusion of "fees for optional add-on features selected at the discretion of the consumer." As an example, the commenter stated, "[I]n some instances, consumers may not have a choice on delivery method. In those cases, delivery fees are mandatory and should be included in the [Total Price] because the consumer has no discretion to choose. In other instances, consumers have multiple delivery options at different price points.").

without incurring the fee. Final § 464.3 also prohibits Businesses from misrepresenting the nature or purpose, or the identity of the good or service for which fees are imposed.

Some industry members expressed concern that the rule would prohibit itemization of fees in addition to Total Price, while others argued that it should prohibit such itemization.[285] The Commission clarifies that, so long as Total Price is displayed Clearly and Conspicuously, and more prominently than any itemized fees, the rule does not prohibit Businesses from itemizing the charges imposed on a transaction. However, any such itemization must not misrepresent the nature, purpose, amount, or refundability of the itemized fees, including the identity of the goods or services for which they are being charged.

c) Credit Card and Other Payment Processing Surcharges

The rule requires Businesses to include credit card surcharges or processing fees in Total Price only if they choose to make payment by credit card mandatory. If, on the other hand, credit card use is optional because consumers can use multiple payment options, those fees do not need to be included in Total Price. If the consumer chooses to use a credit card, Businesses must Clearly and Conspicuously disclose the nature, purpose, and amount of any credit card surcharge before the consumer consents to pay.

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[285] *See, e.g.*, FTC-2023-0064-3230 (Future of Music Coalition commented that "adopting all in pricing without itemization [of the base ticket price or face value and of fee amounts] would be a gift to . . . predatory resellers."); FTC-2023-0064-3250 (National Independent Talent Organization stressed "the need for an itemized breakdown of ticket fees" and called for "fees to be clearly itemized throughout the purchasing process."); FTC-2023-0064-3304 (Recording Academy commented: "Price itemization is the only way to effectively regulate transparent pricing in a manner that truly informs the consumer about how their dollar is being spent. . . . Additionally, price itemization is the only way to effectively hold third party fees and charges in check."). *But see* FTC-2023-0064-3212 (TickPick, LLC commented that the rule "must prohibit the itemization of fees and charges that make up the Total Price (other than breaking out government taxes and shipping fees) in order to prevent harm from hidden and/or misleading fees." The commenter stated concerns that such fees were "arbitrary" and "any secondary ticketing marketplace that itemizes mandatory fees and charges is arguably misrepresenting the 'nature and purpose of any amount a consumer may pay.'").

Some commenters expressed concern about the rule's application to credit card fees but, as discussed herein, the Commission was not persuaded by the comments to change the proposed rule as it applies to such fees.

Many commenters expressed concern that the rule would require Total Price to include credit card processing fees or prohibit businesses from passing through such fees to consumers. This was of particular concern to small businesses.[286] Numerous industry members also commented that requiring such fees to be part of Total Price would reduce price transparency and penalize customers who want or need to pay with cash.[287]

Various commenters suggested that if businesses properly disclose credit card processing charges and provide alternate payment methods, both consumers and businesses would benefit.[288] Commenters noted that, when appropriately disclosed, consumers can avoid such fees by choosing another form of payment.[289] An academic commenter suggested that prominent disclosure of a credit card surcharge in advance, so consumers can avoid it, would benefit consumers and reduce business costs more than requiring such charges to be included in Total Price.[290] A tenant advocacy legal clinic that

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[286] *See, e.g.*, FTC-2023-0064-3217 (Bowling Proprietors' Association of America); FTC-2023-0064-2755 (Caffe! Caffe!); FTC-2023-0064-3114 (Shine Beer Sanctuary); FTC-2023-0064-1456 (MED Murphy St. Enterprise); *see also, e.g.*, FTC-2023-0064-2953; FTC-2023-0064-2972 (Over 4,600 comments submitted through a National Restaurant Association mass mailing campaign misinterpreted the rule as "eliminating the use of fees and surcharges.").

[287] *See, e.g.*, FTC-2023-0064-3300 (National Restaurant Association); FTC-2023-0064-3128 (Merchants Payments Coalition); FTC-2023-0064-3219 (Georgia Restaurant Association); FTC-2023-0064-3180 (Independent Restaurant Coalition).

[288] *See, e.g.*, FTC-2023-0064-3180 (Independent Restaurant Coalition commented: "Clearly and prominently displaying any fees promotes transparency and fairness as well as allowing restaurants to meet the needs of their workers and customers."); FTC-2023-0064-2891 (Mary Sullivan, George Washington University, Regulatory Studies Center).

[289] *See, e.g.*, FTC-2023-0064-3128 (Merchants Payments Coalition); FTC-2023-0064-3140 (Merchant Advisory Group stated: "When appropriately disclosed, consumers can typically avoid these fees by simply choosing lower-cost forms of payment, and this could help keep prices down for consumers overall."); FTC-2023-0064-3300 (National Restaurant Association commented: "When a credit card surcharge is properly disclosed via in-store signage, on the menu, and on the receipt, customers have a clear understanding that the fee is a product of the card companies, not the restaurant.").

[290] FTC-2023-0064-2891 (Mary Sullivan, George Washington University, Regulatory Studies Center).

generally supported requiring credit card processing charges to be included in Total Price, suggested that such charges might be reasonably avoidable if disclosed in advance to let consumers use a different payment method.[291] Another academic commenter recommended that the Commission clarify that, while credit card surcharges need not be included in Total Price, a Business can only pass through the actual amount of the charge and must Clearly and Conspicuously disclose any markup it imposes.[292]

The Commission notes that the rule does not prohibit a Business from charging or passing through credit card fees if otherwise allowed by law. The rule does not affect State laws that prohibit credit card surcharges. Whether credit card charges must be included in Total Price, however, depends on whether a Business makes such fees mandatory, for example, by not providing any other payment option for the transaction. For example, if a consumer is purchasing a ticket online, there must be another online payment option that does not require a fee, not merely an option to go in person to the box office to purchase the ticket with cash for no additional fee.

In other words, if there is no other payment option for an offered transaction, or if every payment option requires a fee or charge, such fees are mandatory and must be included in Total Price.[293] But, if a Business offers consumers multiple viable payment options for the offered transaction, so that paying with a credit card is optional, then credit card fees need not be included in Total Price. The same is true for debit card surcharges and other payment processing fees.

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[291] FTC-2023-0064-3268 (Housing & Eviction Defense Clinic, University of Connecticut School of Law).
[292] FTC-2023-0064-1294 (James J. Angel, Ph.D., CFP, CFA, Professor, Georgetown University, McDonough School of Business).
[293] This approach is consistent with the Telemarketing Sales Rule, which requires sellers and telemarketers to disclose, in a clear and conspicuous manner, the total cost of a good or service, which would include any applicable credit card or other payment processing charges, before a consumer consents to pay for that good or service. 16 CFR 310.3(a)(1)(i), (a)(2)(i).

A Business that provides at least one viable method to pay for the offered transaction without a fee, chooses to pass through payment processing fees to consumers, and excludes such fees from Total Price would have to Clearly and Conspicuously disclose the nature, purpose, and amount of the processing fees before a consumer consents to pay. In addition, nothing in the rule prohibits Businesses that accept multiple viable forms of payment from advertising two prices, one that includes credit card or other payment processing fees and one that does not. It is the Commission's understanding that some businesses already do this, and such a strategy is consistent with the rule.

In addition, under final § 464.3, a Business that offers, displays, or advertises a Covered Good or Service cannot misrepresent the nature, purpose, amount, or refundability of credit card or other fees. Since the rule does not prohibit itemization, a Business may choose to also itemize mandatory credit card fees so long as they are included in Total Price and Total Price is displayed more prominently. The voluntary itemization of mandatory credit card fees addresses commenters' concerns that consumers will not understand the different costs affecting businesses.

d) Dynamic Pricing and National Advertising

Some commenters expressed concern that the Total Price requirements will interfere with dynamic pricing strategies where Total Price is not fixed but changes based on supply, demand, or other factors.[294] The rule does not bar Businesses from engaging in

[294] *See, e.g.*, FTC-2023-0064-3195 (League of American Orchestras et al. observed: "It would be harmful to paint all dynamic pricing strategies as 'unfair.' Nonprofit performing arts organizations often use variable pricing strategies to both maximize the earned revenue that supports the nonprofit performing arts workforce, as well as to offer reduced or free-of-charge ticketing options for community-based partners."); FTC-2023-0064-3230 (Future of Music Coalition stated that dynamic pricing "can certainly be used in ways that frustrate consumers" but "can also solve practical problems." It is "often used by nonprofit arts

dynamic pricing, but adjusted prices must include all known mandatory fees and the advertised good or service must be actually available to consumers at the quoted price. The Commission's review of the comments did not identify any persuasive reason to change the rule as it applies to dynamic pricing.

A few commenters noted that the rule could interfere with businesses' ability to engage in national advertising or to advertise to a broad audience because mandatory fees may vary by location, as is often the case with franchisee costs and delivery costs.[295] One commenter argued that the rule would require either impractical and challenging geo-targeted advertising or advertising a "maximum total price" to any potential consumer in the businesses' footprint, which would overstate the price that most consumers need to pay and defeat comparison shopping.[296] The commenter also noted that "[a]lternatively, companies might respond to the proposed rule by omitting pricing from advertising

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presenters in non-problematic ways." The commenter noted, however, that "disclosure of specific dynamic pricing strategies and tools, whether manual or algorithmic[,] will only help predatory resellers make purchasing decisions and maximize their extraction of value.").

[295] *See, e.g.*, FTC-2023-0064-3127 (U.S. Chamber of Commerce commented that the Total Price requirements "may eliminate the opportunity for national advertising campaigns" because "[m]andatory fees [such as regional sports fees] may vary by location or tie to specific franchisee costs." The commenter recommended that the FTC "consider revising the definition of 'Total Price' to exclude all charges that vary based on geographic region."); FTC-2023-0064-3294 (International Franchise Association commented: "Under the Proposed Rule, national marketing campaigns are only workable if all franchised businesses in a franchise system adhere to the same pricing regime (including pass-through fees), regardless of the economic demands of the markets in which they operate."); FTC-2023-0064-3300 (National Restaurant Association commented: "Like 'Shipping Charges,' delivery fees should be excluded from the 'Total Price' requirement since local or national advertising may feature the cost of the food item but cannot reasonably predict how regional market conditions will alter the price of delivery.").

[296] *See, e.g.*, FTC-2023-0064-3233 (NCTA—The Internet & Television Association stated that the rule would interfere with "efforts to advertise pricing nationwide or to a broad audience" and would require impractical and technically challenging geo-targeted advertising. The commenter further stated that businesses may be incentivized to ""advertis[e] a Total Price for a particular service option that overstates the price that most consumers would actually end up paying at their service location (i.e., the Total Price would be the maximum price that any potential customer in the provider's footprint would have to pay for the service)," which would "confuse consumers and undermine the type of comparison-shopping the FTC is aiming to facilitate. Bundled pricing would be even more challenging to calculate and represent in advertising, given that each bundled service could have multiple different applicable taxes or surcharges.").

altogether, an option that would defeat the [Commission's] goal of ensuring consumers have access to accurate and reliable cost information as they shop for services."[297]

The Commission determines that Shipping Charges may be excluded from Total Price. As to other charges that may vary by time or location, Businesses can comply with the rule by advertising a maximum Total Price either by region or nationwide. The Commission understands that many businesses already engage in regional or geo-targeted advertising that enables flexibility for pricing by time and locality. Since the rule applies to all Businesses offering Covered Goods or Services, it levels the playing field and preserves comparison-shopping even when advertised prices are maximum totals.

e) Rebates, Bundled Pricing, and Other Discounts: Compliance When Promotional Pricing Models Have Different Fees

Promotional pricing models, such as two-for-one deals, bulk or bundled pricing, unbundled or a la carte pricing, rebates, or other discounts, can change the price a consumer ultimately may pay. Section 464.2(a)'s Total Price disclosure requirement applies whether a consumer is purchasing a single Covered Good or Service, multiple Covered Goods or Services, or Covered Goods or Services combined with Ancillary Goods or Services, as well as when a discount or other promotion affects the final amount of payment. If a consumer applies a discount or otherwise qualifies for a promotional price, the Business can update the Total Price displayed. The Commission provides clarification herein to address commenter concerns about the rule as it applies to promotional pricing models.

[297] *Id*.

Some commenters expressed concern that the rule's Total Price requirement would prohibit or discourage businesses from offering promotional prices to consumers.[298] Two industry groups commented that the potential difficulty of incorporating promotions into Total Price might discourage businesses from offering them.[299] A competition policy group agreed and suggested modifications might be "necessary to ensure that the proposed rules do not interfere with such pricing models."[300]

The Antitrust Division of the U.S. Department of Justice commented that "[c]ompetition between companies that offer bundled and unbundled pricing for core products and value-added features can play an important role in preserving consumer choice . . . and unbundled pricing can empower consumers who prefer to pay only for what they value."[301] The Antitrust Division further commented that the proposed rule "does not affect companies' ability to offer consumers a choice whether to buy unbundled features that do not impose mandatory fees."[302] However, it asserted that "[w]hen companies use unbundled offerings to disguise mandatory fees, they undermine the value to competition of that unbundled option."[303]

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[298] *See, e.g.*, FTC-2023-0064-2919 (National Automatic Merchandising Association) (expressing concern that the rule would ban offering cash discounts); *see also*, FTC-2023-0064-3217 (Bowling Proprietors' Association of America) (stating that requiring businesses to consolidate "diverse pricing models into a single displayed price could lead to significant consumer confusion and dissatisfaction.").

[299] FTC-2023-0064-3263 (Flex Association commented that some fees cannot be calculated at the start of a transaction, including for discounts and special offers: "For example, a 'two-for-one' offer cannot be activated until two eligible items are added to a shopping cart."); FTC-2023-0064-3137 (Chamber of Progress commented that sellers may abandon discounts on bundles of goods or bulk orders, because "the total price of each good could vary depending on the other items in the customer's cart.").

[300] FTC-2023-0064-2887 (Progressive Policy Institute commented, "the proposed disclosure requirements may interfere with the use of different pricing models that provide value to consumers and are the basis upon which some firms compete," such as unbundled pricing models when "the total price may not be known until the consumer completes the purchase process," and therefore, a "requirement to display prices before the purchase . . . may mislead consumers and distort competition.").

[301] FTC-2023-0064-3187 (U.S. Department of Justice, Antitrust Division).

[302] *Id*.

[303] *Id*.

The rule does not prohibit Businesses from using bundled, discount, or similar pricing models if, when the Business advertises any price of a Covered Good or Service, it discloses the Total Price the consumer must pay for the good or service. The rule also does not require Businesses to incorporate different pricing models into a single price; rather, under the rule, Businesses advertising any price of a Covered Good or Service must only display the maximum Total Price. For example, a hotel can display a regular Total Price and a loyalty program member Total Price. Businesses also can display Total Price under a promotional pricing model, such as a bundled price or a promotion advertising, "stay three nights, get one night free," when and to the extent that model applies. The Commission notes that offering, displaying, or advertising a general [x]% or $[y] discount, without displaying the price of a Covered Good or Service, does not require the disclosure of Total Price under the rule.

f) Online Marketplaces

The rule covers sellers and online marketplace platforms or other intermediaries in the same manner as other Businesses that offer Covered Goods or Services. Various commenters, however, highlighted the challenges some Businesses may face in implementing the rule if it is applied equally to all online marketplace stakeholders. The Commission's review of the comments, as discussed herein, did not identify any persuasive reason to change the rule as it applies to online marketplaces for Covered Goods or Services.

Some commenters stated that certain businesses offering, displaying, or advertising goods and services in an online marketplace often must rely on other entities for accurate information about pricing and expressed concern about liability under the rule if they receive inaccurate pricing information. This concern arose both from

intermediaries that display prices provided by sellers and from sellers who offer their goods or services through an intermediary. Intermediaries are concerned about facing liability if they post prices that are inaccurate because the seller of the good or service did not provide complete and accurate pricing information. Commenters also expressed concern about liability when sellers list their good or service for sale on a platform but are not in control of how the platform displays information about pricing.[304]

Travel Technology Association ("Travel Tech"), for instance, observed the complex and multi-layered information flow from travel service providers, such as hotels, motels, inns, vacation rentals, and other short-term lodging providers, to different types of intermediaries which operate either as business-to-business, consumer-facing, or both, and include online travel agents, metasearch engines, global distribution systems, travel management companies, short-term rental platforms, "brick-and-mortar" or offline travel agents, tour operators, and wholesalers.[305] Travel Tech explained that travel service providers determine the rates, terms, and mandatory fees, including resort fees, applicable to their travel services, and that only travel service providers know whether the nature and purpose of any fee they impose is accurate.[306] Travel Tech members, which consist of the aforementioned intermediaries, use the information provided to them directly from travel service providers, or indirectly through other intermediaries, to aggregate, sort, and

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[304] *See, e.g.*, FTC-2023-0064-3258 (National Taxpayers Union Foundation stated that Total Price may be difficult or impossible to implement with third-party marketplaces because "while the platform may control the display of prices, it is sellers and not the platform that sets [sic] the prices."); FTC-2023-0064-3293 (Travel Technology Association stated that intermediaries may be "similarly situated to consumers in that they are also dependent on Travel Service Providers such as hotels to provide accurate, complete, and timely information before booking."); FTC-2023-0064-3262 (Skyscanner Ltd. highlighted "the numerous and complex ways in which metasearch sites receive pricing information directly from hotels and other short-term lodging providers").
[305] FTC-2023-0064-3293 (Travel Technology Association).
[306] *Id*.

display offers on their sites and applications, and consumers in turn use this information to compare offers and make informed choices.[307] Travel Tech and one of its members, Skyscanner, a metasearch engine, suggested that the rule should immunize intermediaries from liability if travel service providers or other upstream distributors "fail to provide accurate, complete, and timely pricing information and such downstream [i]ntermediaries have made reasonable efforts to receive such information."[308] Both commenters further requested that the Commission make clear that travel service providers would be engaging in an unfair or deceptive practice if they provide inaccurate, incomplete, or untimely pricing information to intermediaries or seek remuneration from intermediaries for information necessary for them to comply with any final rule.[309] Finally, Travel Tech further requested that the Commission clarify that the rule applies to any business that supplies or advertises pricing to consumers so all are held to the same standard.[310]

The American Hotel & Lodging Association, a national association representing all segments of the U.S. lodging industry, including hotel owners, beds & breakfasts, State hotel associations, and industry suppliers, also stressed that a final rule must apply broadly to all industry participants, including online travel agencies, short-term rental platforms, and metasearch sites.[311] The commenter noted that the industry broadly is moving to implement the clear publishing of total price (including all mandatory, non-government fees) for lodging, so that consumers can more easily navigate the myriad of choices they have when it comes to places to stay.[312]

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[307] *Id.*
[308] FTC-2023-0064-3293 (Travel Technology Association); FTC-2023-0064-3262 (Skyscanner Limited).
[309] *Id.*
[310] FTC-2023-0064-3293 (Travel Technology Association).
[311] FTC-2023-0064-3094 (American Hotel & Lodging Association).
[312] *Id.*

The Commission declines to adopt blanket immunity from the rule for intermediaries that depend on providers of live-event tickets and short-term lodging for accurate pricing information. The Commission, clarifies, however, that the final rule applies to business-to-business ("B2B") transactions as well as business-to-consumer transactions. Businesses such as travel service providers that sell or advertise through intermediaries must provide such entities with accurate pricing information (including about Total Price, as well as mandatory and optional fees). Platforms and other intermediaries that offer, display, or advertise Covered Goods or Services and Ancillary Goods or Services or allow third party sellers to do so must disclose the Total Price of the goods and services, including all mandatory and optional fees and, if applicable, provide third-party sellers with all necessary information to calculate the Total Price. The rule's coverage of B2B transactions in this manner protects not only individual consumers from hidden and misleading fees, but also businesses.

The Commission also notes that at least one commenter, the International Franchise Association, argued that the rule should exempt B2B transactions, without providing any compelling justification for why bait-and-switch pricing, including drip pricing, and the misrepresentation of fees and charges should be allowed in transactions involving businesses.[313] This commenter noted that, for example, "[f]ranchised hotels advertise large event spaces for consumers' weddings and business conventions" and the rule "could be applied against these businesses if they fail to display total price even though no *consumer* is ever misled or deceived."[314] The prohibition in section 5 of the FTC Act against unfair or deceptive acts or practices does not include any limitation on

[313] FTC-2023-0064-3294 (International Franchise Association).
[314] *Id*.

the "consumers" who can be injured. Relying on this authority, the Commission has long interpreted the FTC Act to apply to cases where the harmed consumers are businesses, particularly small- and medium-sized businesses.[315]

The Commission clarifies that it does not intend to treat intermediaries as the publisher or speaker of information about pricing or as controlling the manner of its display where the intermediary is not responsible, in whole or in part, for such content or display.[316] However, if intermediaries are responsible, in whole or in part, for offering, displaying, or advertising any price, including any portion thereof, of a Covered Good or Service, then within the scope of that responsibility, they must give sellers the

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[315] *See, e.g.*, Complaint ¶¶ 1–7, 13–87, *FTC v. Arise Virtual Solutions, Inc.*, No. 24-cv-61152 (S.D. Fla. July 2, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/arise_complaint.pdf* (alleging defendants made misleading and unsubstantiated earnings claims in selling its Arise business opportunity to gig worker consumers seeking to work from home in customer service and failed to provide the disclosures required by the Business Opportunity Rule); Complaint ¶¶ 7–51, *In re Amazon.com, Inc.*, 171 F.T.C. 860, 861–71 (2021), *https://www.ftc.gov/system/files/ftc_gov/pdf/DV171.pdf* (alleging defendants deceptively claimed they would give their Amazon Flex drivers 100% of consumer tips when in fact they withheld nearly a third of the tips from their drivers); Complaint ¶¶ 13–65, *FTC v. First American Payment Systems, LLC*, No. 4:22-cv-00654 (E.D. TX July 29, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/Complaint%20%28file%20stamped%29_0.pdf* (alleging defendants made false claims about their payment processing services, including about total monthly fees, savings opportunities, and the ease of cancelling automatically-renewing accounts, to small business consumers such as restaurants, nail salons, or small retail businesses); Complaint ¶¶ 12–50, *FTC v. Yellowstone Capital LLC*, No. 1:20-cv-06023 (S.D.N.Y. Aug. 3, 2020), *https://www.ftc.gov/system/files/documents/cases/1823202yellowstonecomplaint.pdf* (alleging defendants engaged in a pattern of deceptive and unfair conduct involving their "merchant cash advances" to small business consumers and made excess, unauthorized withdrawals from consumers' accounts after consumers already repaid the full amount they owed); Complaint ¶¶ 9–104, *FTC v. Fleetcor Technologies, Inc.*, No. 1:19-cv-05727-ELR (N.D. Ga. December 20, 2019), *https://www.ftc.gov/system/files/documents/cases/fleetcor_complaint_with_exhibits_002.pdf* (alleging defendants marketed fuel cards to business consumers that operate vehicle fleets, including many small businesses and made false claims about the fuel card's savings, fraud controls, and lack of set-up, transaction, and membership fees, instead charging these businesses hundreds of millions of dollars in unexpected fees); *see also* Fed. Trade Comm'n, *Policy Statement on Enforcement Related to Gig Work* (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf (noting that protecting gig workers "from unfair, deceptive, and anticompetitive practices is a priority," and the FTC "will use its full authority to do so").

[316] *See, e.g.*, FTC-2023-0064-3202 (TechNet stated: "The FTC's proposed rule also poses significant harm to online marketplaces by potentially creating liability for platforms that merely display pricing advertised by others. As publishers, such platforms are likely protected from such responsibility by Section 230 of the Communications Decency Act of 1996.").

information necessary to calculate Total Price and, when uniquely situated to do so, such intermediaries must ensure that they display Total Price. For example, if an intermediary charges a fee for access to its platform and the seller passes the fee through to consumers, the intermediary must provide the seller with accurate information about the fee's amount so the seller can accurately calculate Total Price, or otherwise ensure that the Total Price is displayed. Travel service providers and other sellers, by the same token, must provide intermediaries with accurate price information.

Whether an intermediary, seller, or other Business is responsible for offering, displaying, or advertising a price of a Covered Good or Service, may be a fact- and law-specific determination in which the Commission can consider issues of participation in, and control of, unfair or deceptive practices, as well as contractual obligations between sellers and platforms and other intermediaries, and the applicability of other Federal laws. The Commission will consider issuing and updating business guidance to address particular or nuanced scenarios, as it has done as a complement to other rulemakings.[317]

2. § 464.2(b)

Proposed § 464.2(b) in the NPRM required Businesses to display Total Price more prominently than any other Pricing Information in any offer, display, or advertisement that contains an amount a consumer may pay. Following review of the comments, the Commission finalizes § 464.2(b) with three modifications. First, as already discussed in this section, the Commission limits the requirements of § 464.2, including § 464.2(b), to

[317] *See, e.g.*, Fed. Trade Comm'n, Bureau of Consumer Protection Business Guidance, *FTC Safeguards Rule: What Your Business Needs to Know* (May 2022), *https://www.ftc.gov/business-guidance/resources/ftc-safeguards-rule-what-your-business-needs-know*; Fed. Trade Comm'n, Bureau of Consumer Protection Business Guidance, *FAQs: Complying with the Contact Lens Rule* (June 2020), *https://www.ftc.gov/business-guidance/resources/faqs-complying-contact-lens-rule*; Fed. Trade Comm'n, Bureau of Consumer Protection Business Guidance, *Complying with the Funeral Rule* (Aug. 2012), *https://www.ftc.gov/business-guidance/resources/complying-funeral-rule*.

Covered Goods or Services. Second, as discussed in section III.B.1, the Commission narrows the disclosure trigger in § 464.2(a) and (b) to "an offer, display, or advertisement that represents any price of a Covered Good or Service." Third, as discussed herein, final § 464.2(b) clarifies the prominence requirement with respect to the final amount of payment for a transaction. Final § 464.2(b) thus provides that, in any offer, display, or advertisement that represents any price of a Covered Good or Service, a Business must disclose the Total Price more prominently than any other Pricing Information. However, where the final amount of payment for the transaction is displayed, the final amount of payment must be disclosed more prominently than, or as prominently as, the Total Price.

Various commenters voiced support for proposed § 464.2(b)'s requirement that Total Price must be displayed more prominently than other Pricing Information.[318] Certain commenters stated that the prominence requirement will prevent consumer confusion as to the true price of a good or service.[319] Some commenters suggested strengthening the prominence requirement or adding guidance about it.[320] Other

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[318] *See, e.g.*, FTC-2023-0064-3266 (StubHub, Inc. agreed with the FTC's proposal to require Total Price in every offer, display, or advertisement presented to consumers and that Total Price must be consistently displayed throughout the transaction); FTC-2023-0064-3306 (Live Nation Entertainment and its subsidiary Ticketmaster North America supported "requir[ing] the first price for a live-event ticket shown to consumers to be the price ultimately charged at checkout (exclusive of state and local taxes and optional add-ons). This price should be clearly displayed on the initial landing page and easily discernible." The commenter proposed adding the phrase, "from the first instance a consumer sees a price for a good or service" to the end of proposed § 464.2(a) and moving the phrase, "as soon as pricing information is provided to the consumer" before "more prominently than any other Pricing Information" in proposed § 464.2(b).); FTC-2023-0064-3290 (U.S. Public Interest Research Group Education Fund commented: "[T]he Total Price should be provided first and with the most prominence. Businesses must not be allowed to confuse consumers with a barrage of numbers."); FTC-2023-0064-1939 (Tzedek DC).

[319] *See, e.g.*, FTC-2023-0064-3290 (U.S. Public Interest Research Group Education Fund); FTC-2023-0064-1939 (Tzedek DC commented that proposed § 464.2(b) "will prevent companies from hiding the real cost of goods and services in fine print or making the total cost difficult to find.").

[320] *See, e.g.*, FTC-2023-0064-3196 (South Carolina Department of Consumer Affairs commented: "Guidance on how the business can simultaneously comply with the 'Clearly and Conspicuously' requirement and the prominence requirement may help with business comprehension and compliance." The commenter suggested adding "a definition addressing the different mediums by which the offer, display or advertisement may be relayed to a consumer (visual, audio, print, online)" and providing "examples of

commenters also suggested clarifying that the phrase "an amount a consumer may pay" refers only to truly mandatory Ancillary Goods or Services.[321] On the other hand, some industry commenters stated that the prominence requirement may have unintended consequences that could harm consumers, such as consumers not noticing an offered discount or a business deciding not to provide any pricing information.[322] As noted in section III.B.1.e, nothing in the rule prohibits a Business from adjusting Total Price to account for any applied discounts or other promotional pricing and, given strong market incentives, the Commission disagrees with comments that the rule's prohibitions against hidden and misleading fees will deter Businesses from advertising prices.[323]

Final § 464.2(b) also clarifies how the prominence requirement applies to the final amount of payment for a transaction. The Commission recognizes that the final amount

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compliance with the requirement of prominent display" such as "in a visual disclosure presentation of the Total Price in bolded typeface at least two points larger than any other Pricing Information or 14-point font, whichever is larger, satisfies the prominence requirement.").

[321] *See, e.g.*, FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al. suggested modifying proposed § 464.2(b) to include: "[A] Business must not automatically include Ancillary Goods or Services in the Total Price or automatically select Ancillary Goods or Services for purchase on behalf of the consumer."); FTC-2023-0064-3160 (Consumer Federation of America et al. made a similar suggestion and stated it would "ensure that 'must pay' is interpreted to include any fee or charge that is included by default and that the consumer must pay unless they take affirmative action to opt-out or avoid it." The commenter proposed adding guidance that: "A consumer must pay a fee or charge if the fee or charge is not reasonably avoidable or if the consumer must pay the fee or charge unless they take affirmative action to avoid it. An ancillary good or service is mandatory if a reasonable consumer would expect the good or service to be included with the purchase.").

[322] *See, e.g.*, FTC-2023-0064-3293 (Travel Technology Association commented that if Total Price is "clearly and conspicuously" displayed, a prominence requirement is unnecessary and "discounts would have to be less prominent than the Total Price, potentially leading to a consumer missing out on a deal that may have saved them money or led to a more enjoyable vacation." The commenter suggested that the rule be more flexible "so that Intermediaries can use their expertise to relay the most appropriate information to consumers."); FTC-2023-0064-3296 (Bay Area Apartment Association commented that the prominence requirement could have a "chilling effect on the content of commercial speech," with some rental housing providers choosing "not to include pricing information in their advertisements, and instead invite prospective residents to learn about pricing on their website or to call their leasing office," thereby "undermining a key objective (better consumer awareness of the price of goods and service[s]) the rule is intended to accomplish.").

[323] *See also Bates v. State Bar of Ariz.*, 433 U.S. 350, 383–84 (1977) ("Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech.") (citing *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–772, 771 n. 24 (1976)).

of payment, now an explicitly required disclosure under final § 464.2(c), may differ from Total Price due to various factors, such as the exclusion from Total Price of certain fees or charges, including for any optional Ancillary Good or Service, or the application of promotional pricing models. The Commission determines that both Total Price and the final amount of payment are material to consumers. The Commission therefore clarifies that, when the final amount of payment is displayed, it must be displayed as prominently as, or more prominently than, Total Price. The modification avoids a potential unintended consequence of the rule, which may have been read to require Total Price to obscure the final amount of payment.

The Commission determines that, with these modifications, § 464.2(b)'s prominence requirement is clear, understandable, and unambiguous.

3. § 464.2(c)

In final § 464.2, the Commission consolidates all proposed disclosure requirements; therefore, proposed § 464.3(b) is codified at final § 464.2(c). Proposed § 464.3(b) would have required Businesses to disclose Clearly and Conspicuously, before the consumer consents to pay, the nature and purpose of any amount a consumer may pay that is excluded from Total Price, including the fee's refundability and the identity of the good or service for which the fee is charged. Final § 464.2(c) largely adopts the disclosure requirements of proposed § 464.3(b), with certain modifications. Specifically, final § 464.2(c) requires Businesses to disclose Clearly and Conspicuously, before the consumer consents to pay for any Covered Good or Service: (i) the nature, purpose, and amount of any fee or charge imposed on the transaction that has been excluded from Total Price and the identity of the good or service for which the fee or charge is imposed, but not the fee's refundability; and (ii) the final amount of payment for the transaction.

The Commission makes these modifications, as discussed herein, in response to the comments and to address related concerns. One commenter recommended that the Commission provide greater specificity about which fees excluded from Total Price must be disclosed under this provision, and require the itemized disclosure of such fees.[324] Some commenters argued that the provision was vague and overbroad, and that its application to "any amount a consumer may pay" would make complying with the provision impracticable and result in excessive disclosures that would confuse consumers into believing that all disclosed fees apply to them when they might not.[325] One commenter recommended that the rule allow the required disclosures to be made at the time goods or services are selected.[326] Commenters argued that requiring businesses to explain how fees will be used is not reasonable and may require the disclosure of confidential, proprietary, or commercially sensitive information, such as the business rationale for imposing fees and the specific uses to which businesses put fees.[327] Other

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[324] FTC-2023-0064-3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher).

[325] *See, e.g.*, FTC-2023-0064-3094 (American Hotel & Lodging Association asserted: "The language of the proposed rule is vague, overbroad, and not sufficiently specific to provide notice of what types of fees businesses are required to display. . . . Businesses could reasonably differ in their approaches to disclosing the 'nature and purpose' or 'identity' of such fees."); FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association commented that disclosing the nature and purpose of fees is "impracticable" and requiring rental housing providers to furnish prospective tenants "with any fee or charge excluded from the total price that the customer may (or may not) have to pay at some point during the lease practically means housing providers will need to disclose all possible fees."); FTC-2023-0064-3263 (Flex Association asserted that the "requirement to disclose the 'nature and purpose' of a fee is vague" and "provide[s] no material benefit to consumers."); *see also*, FTC-2023-0064-2981 (Apartment & Office Building Association of Metropolitan Washington); FTC-2023-0064-3042 (Nevada State Apartment Association); FTC-2023-0064-3044 (San Angelo Apartment Association); FTC-2023-0064-3045 (Chicagoland Apartment Association); FTC-2023-0064-3111 (Houston Apartment Association); FTC-2023-0064-3116 (Manufactured Housing Institute); FTC-2023-0064-3233 (NCTA—The Internet & Television Association); FTC-2023-0064-3296 (Bay Area Apartment Association); FTC-2023-0064-3311 (Greater Cincinnati Northern Kentucky Apartment Association).

[326] FTC-2023-0064-3094 (American Hotel & Lodging Association).

[327] *See, e.g.*, FTC-2023-0064-1425 (Iowa Bankers Association); FTC-2023-0064-3263 (Flex Association asserted that "[i]t appears that the Commission seeks to require disclosure of the business rationale for imposing a fee and the specific uses to which proceeds of a given fee will go," which would require

commenters recommended that the rule require the disclosure of the optional nature of optional fees[328] and regulate opt-in and opt-out procedures for fees.[329]

The Commission modifies the NPRM proposal so that final § 464.2(c) requires Businesses to disclose separately the amount, as well as the nature and purpose, of each fee or charge imposed on the transaction for the Covered Good or Service that is excluded from Total Price, and the final amount of payment, before the consumer consents to pay. The Commission determines that these modifications are necessary for price transparency and to protect consumers who would reasonably expect to know the nature, purpose, and amount of fees they will have to pay, as well as the final amount of payment, before they consent to pay.

To provide clarification and address commenter concerns about potential overbreadth and vagueness, the Commission narrows the NPRM proposal so that final § 464.2(c) requires the disclosures in connection with "any fee or charge imposed on the transaction that has been excluded from Total Price" instead of "any amount a consumer may pay." The provision therefore requires the disclosure, before the consumer consents to pay, of the nature, purpose, and amount of Government Charges, Shipping Charges, and any other fee or charge, such as for optional Ancillary Goods or Services, that permissibly were excluded from Total Price but are being imposed on the transaction.

Final § 464.2(c) also explicitly requires disclosure of "the final amount of payment for the transaction," as that amount may differ from Total Price due to, for

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businesses to "divulge commercially sensitive information that could seriously alter competition in a given marketplace.").

[328] *See, e.g.*, FTC-2023-0064-2888 (Housing Policy Clinic, University of Texas School of Law).

[329] *See, e.g.*, *Id.*; FTC-2023-0064-2883 (District of Columbia, Office of the People's Counsel); FTC-2023-0064-3146 (Institute for Policy Integrity, New York University School of Law).

example, the application of promotional pricing or the addition of any fees or charges permissibly excluded from Total Price, including for any optional Ancillary Goods or Services. Where the final amount of payment is displayed, as discussed in section III.B.2, final § 464.2(b) requires it to be at least as prominent as, or more prominent than, Total Price.

In most instances, the disclosure about the nature, purpose, and amount of the excluded charge or fee will be minimal. For example, using the defined term “Shipping Charges” is likely to convey the nature and purpose of such charges. For Government Charges, a phrase like “sales tax” or “hotel occupancy tax” would convey the nature and purpose of an imposed sales tax or hotel occupancy tax. Similarly, in most instances, simply identifying the Ancillary Good or Service for which a charge applies, such as “valet parking,” will sufficiently convey the nature and purpose of the charge.

Some commenters observed that the timing of “before the consumer consents to pay” is unclear. One commenter cautioned that the language of the rule may open the door to the types of bait-and-switch pricing that the Total Price disclosure requirement is meant to prevent.[330] Other commenters recommended that the Commission clarify the meaning of the phrase “before the consumer consents to pay” and the timing of the required disclosures, for example, by specifying that it means before businesses obtain consumers’ billing information.[331]

The Commission clarifies that, although when a consumer consents to pay may

[330] FTC-2023-0064-3160 (Consumer Federation of America et al.).
[331] *See, e.g.*, FTC-2023-0064-3160 (Consumer Federation of America et al.); FTC-2023-0064-3146 (Institute for Policy Integrity, New York University School of Law); FTC-2023-0064-3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher); FTC-2023-0064-3191 (Community Catalyst et al.).

depend on the facts and circumstances surrounding the transaction, § 464.2(c) requires Businesses to Clearly and Conspicuously disclose the nature, purpose, and amount of any fees or charges imposed on the transaction that have been excluded from Total Price and the identity of the good or service for which the fee or charge is imposed, as well as the final amount of payment for the transaction, before consumers are required to pay cash or provide their payment information. The Commission notes that a default setting that automatically opts-in consumers to pay for goods or services does not constitute consent to pay nor does it satisfy § 464.2(c)'s disclosure requirements.

As part of final § 464.2(c), the Commission does not adopt the NPRM's proposed requirement to affirmatively disclose each fee's refundability. The Commission determines that requiring Clear and Conspicuous disclosure of each fee's refundability may be impractical for Businesses and confusing to consumers due to extensive qualifications or other requirements for refunds. Such extensive, itemized disclosures may impede the Commission's goal of ensuring consumers receive clear and accurate pricing information. However, the Commission finalizes § 464.3's prohibition on misrepresenting a fee's refundability.

C. § 464.3 Misleading fees prohibited

Both practices that the Commission identified in the NPRM as unfair or deceptive involve misleading practices: (1) bait-and-switch pricing that hides the total price of goods or services by omitting mandatory fees from advertised prices, including through drip pricing, and (2) misrepresenting the nature, purpose, amount, and refundability of fees or charges. Proposed § 464.3(a) would have prohibited any Business from misrepresenting the nature and purpose of any amount a consumer may pay, including the

refundability of such fees and the identity of any good or service for which fees are charged.[332]

The Commission finalizes proposed § 464.3(a) in § 464.3 with some modifications. Specifically, final § 464.3 prohibits any Business, in any offer, display, or advertisement for a Covered Good or Service, from misrepresenting any fee or charge, including its nature, purpose, amount or refundability, and the identity of the good or service for which it is imposed. The Commission adds the phrase "Covered Goods or Services" to reflect the narrower scope of the final rule. The Commission also adds "amount" to "nature" and "purpose," and clarifies that the prohibited misrepresentations concern "any fee or charge" instead of "any amount a consumer may pay." This modified provision makes plain that, in connection with Covered Goods or Services, Businesses cannot misrepresent the nature, purpose, amount, or refundability of any fee or charge, including Government Charges, Shipping Charges, any fees or charges for optional Ancillary Goods or Services, or any mandatory fees or charges. In making these modifications, the Commission has considered recommendations and alternatives suggested in NPRM comments, discussed herein.

The Commission noted in the NPRM that it had received comments in response to the ANPR stating that sellers often misrepresent the nature or purpose of fees, leaving consumers wondering what they are paying for, believing fees are arbitrary, or concerned that they are getting nothing for the fees charged. The Commission received similar comments in response to the NPRM.

[332] As noted *supra* section III.B, the Commission redesignates proposed § 464.3(b) as final § 464.2(c) to consolidate all provisions related to disclosures in final § 464.2.

The Attorneys General of nineteen States and the District of Columbia commented that fee misrepresentations "mislead consumers and make it more difficult for truthful businesses to compete on price."[333] Commenters supported prohibiting fee misrepresentations because truthful information benefits both consumers and businesses.[334] A commenter recommended that the Commission clarify that the provision includes misrepresentations about fees included in Total Price and fees excluded from Total Price.[335]

Commenters stated that businesses misrepresent fees by using language that is vague and not understandable to consumers,[336] and provided examples of various types of misrepresentations about the nature and purpose of fees, such as "service" fees that may not go to service employees, "environmental" fees that may not have an environmental

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[333] FTC-2023-0064-3215 (Attorneys General of the States of North Carolina and Pennsylvania, along with Attorneys General of the States or Territories of Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Michigan, Minnesota, New Jersey, New York, Oklahoma, Oregon, Vermont, Washington, and Wisconsin stated: "[C]harges that misrepresent their nature and purpose are unfair and deceptive because they mislead consumers and make it more difficult for truthful businesses to compete on price." The Attorneys General asserted that "this provision is another straightforward, commonsense approach that should not significantly burden businesses.").

[334] *See, e.g.*, FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al. asserted: "Prohibiting misrepresentation of the identity and nature of fees further serves the Commission's mandate to promote fair business practices and competition."); FTC-2023-0064-2892 (Community Legal Services of Philadelphia stated that the rule's "prohibition on misrepresentation regarding the nature and cost of fees would also be extremely beneficial for low-income renters, who often face inflated fees that can contribute to housing insecurity."); FTC-2023-0064-3268 (Housing and Eviction Defense Clinic, University of Connecticut School of Law stated: "Prohibiting misleading fees will not only properly inform the tenants of the charges but also hold the landlords accountable for their fees.").

[335] FTC-2023-0064-3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher stated that § 464.3(a) should make clear that it prohibits misrepresentations regarding any amount included in Total Price as well as any other fee or charge the consumer may pay, including "Shipping Charges, Government Charges, fines, penalties, optional charges, voluntary gratuities, and invitations to tip," and proposed adding specific text to that effect.).

[336] *See, e.g.*, FTC-2023-0064-3268 (Housing & Eviction Defense Clinic, University of Connecticut School of Law stated that rental fees may be "for something the landlord/property manager cannot explain."); FTC-2023-0064-3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher stated the rule should clarify that descriptions of fees which are not understandable to reasonable consumers misrepresent their nature and purpose.); FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al. cited research showing that "many businesses characterize their hidden and unexpected fees using vague or anodyne language that fails to succinctly explain to the consumer exactly what the fee is for.").

purpose, "resort" fees for ordinary accommodations or amenities,[337] and fees misrepresented as government charges.[338] Commenters also stated that businesses may misrepresent the mandatory or optional nature of fees, or their amount, and recommended that the Commission clarify that prohibiting misrepresentations about the nature and purpose of fees includes misrepresentations about their mandatory or optional nature.[339] Another commenter argued that businesses can misrepresent fees when they itemize mandatory fees that are arbitrary and are not for identified goods or services, and recommended that the Commission clarify that businesses must have adequate substantiation for itemized fees.[340] Commenters also argued that businesses misrepresent fees when they do not provide the goods or services for which fees are charged or provide

[337] *See, e.g.*, FTC-2023-0064-1939 (Tzedek DC expressed support for the misleading fees provision because it "will prevent companies from making misleading claims about a fee, in example, a company charging a 'staff service fee' that does not go to employees."); FTC-2023-0064-3106 (American Society of Travel Advisors noted: "While admittedly there is no universally accepted industry definition of what constitutes a 'resort,' hotels offering only typical or ordinary accommodations and/or amenities but nevertheless characteriz[ing] their fees as such misrepresent the nature of the property being booked."); FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al. identified "environmental fees" as one example of fees that may "serve[] no apparent environmental sustainability or conservation purpose.").

[338] *See, e.g.*, FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al. stated that "environmental" fees "are likely designed to trick consumers into thinking that the added cost is either a government-imposed tax to protect the environment, or a salutary contribution to somehow 'offset' any negative environmental impact caused by the good or service" when they may be "charged simply to boost a business's profits."); FTC-2023-0064-3106 (American Society of Travel Advisors noted that "use of terms such as 'destination fee' . . . will inevitably mislead many consumers into mistakenly believing that it represents a tax or government surcharge that must be collected from the consumer and passed on to a local jurisdiction.").

[339] *See, e.g.*, FTC-2023-0064-3275 (Berkeley Center for Consumer Law & Economic Justice et al. argued that the rule could be strengthened by clarifying that the misleading fees provision applies to mandatory and optional fees.); FTC-2023-0064-3160 (Consumer Federation of America et al. stated that the FTC should make clear that the misleading fees provision applies to mandatory and optional fees.).

[340] FTC-2023-0064-3212 (TickPick, LLC argued: "Due to the arbitrary nature of the components that make up the Total Price of a ticket, any secondary ticketing marketplace that itemizes mandatory fees and charges is arguably misrepresenting the 'nature and purpose of any amount a consumer may pay.'" The commenter proposed that the Commission "define any breakdown of the amounts that a consumer may pay as a representation that requires adequate substantiation.").

nothing of value,[341] and when fees fail to reflect the cost of the goods or services provided.[342]

The American Hotel & Lodging Association and other commenters described the misleading fees provision as unnecessary given the Commission's existing authority under section 5 of the FTC Act to police misleading fees.[343] It is true that section 5, which prohibits unfair or deceptive practices, has long been used to protect against misrepresentations regarding material terms of a transaction, including price. False claims about fees or charges, as well as those claims that lack a reasonable basis, are inherently likely to mislead. However, the Commission disagrees with commenters' contentions that the rule's prohibitions on misrepresentations are unnecessary given the existing section 5 authority. As explained in section V, the final rule is necessary to: (1) ensure all Businesses offering Covered Goods or Services are held to the same standard so that

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[341] *See, e.g.*, FTC-2023-0064-3102 (Corporation for Supportive Housing noted that landlords and property managers may collect "fees for services that were not performed (e.g., running a background check, credit check), [and] charg[e] fees in excess of the actual amount to perform the service/run the check to generate profit."); FTC-2023-0064-3278 (Southeast Louisiana Legal Services noted that low-income renters face unfair and deceptive fees during residential leases that are "frequently for services not rendered." The commenter further noted: "Without any restrictions on hidden or misleading fees, landlords are free to use rental applications as an independent source of profit for which there may be no real service provided."); FTC-2023-0064-1431 (McPherson Housing Coalition stated that rental housing applicants who pay application fees and do not get approved lose their money.); FTC-2023-0064-2862 (Legal Aid Foundation of Los Angeles gave as examples of misleading fees a repairs fee when the landlord is legally obligated to provide the repairs and a parking fee when the tenant does not have or park a car.); FTC-2023-0064-2920 (Colorado Poverty Law Clinic stated, "we often see fees added for services that the tenant does not receive, or that are basic services that should only reasonably be included in the tenant's monthly rent," such as for common area maintenance or utilities.); FTC-2023-0064-3242 (William E. Morris Institute for Justice expressed concern that "housing providers and landlords are charging junk fees untethered to any real cost or business expense . . . or to any value or benefit delivered to rental housing applicants.").

[342] *See, e.g.*, FTC-2023-0064-3106 (American Society of Travel Advisors noted that "even where use of the term 'resort' to describe the property may be warranted, often the amount of the fee collected appears arbitrary and bears no relationship to the value of the services purportedly being provided."); FTC-2023-0064-3278 (Southeast Louisiana Legal Services commented that rental housing providers charge misleading fees when "they do not appear to correspond to the cost of service provided" or are vaguely identified, such as an "administrative fee" that causes "confusion for tenants who believe it to be a security deposit."); FTC-2023-0064-3253 (Fortune Society commented that "application fees often do not reflect the actual costs of submitting a rental application.").

[343] *See, e.g.*, FTC-2023-0064-3094 (American Hotel & Lodging Association).

consumers can effectively comparison shop; (2) level the playing field for these Businesses so that they can compete based on truthful pricing information; and (3) increase deterrence by allowing courts to impose civil penalties and enabling the Commission to more readily obtain redress and damages for consumers through section 19(b) of the FTC Act. As it has become increasingly common for Businesses offering Covered Goods or Services to charge or itemize discrete fees over the course of a transaction, a specific prohibition on pricing misrepresentations is necessary to ensure consumers receive truthful information about the charges and fees they incur, and Businesses are able to compete based on truthful information.[344]

Other commenters described the misrepresentations provision as vague and overbroad.[345] The Commission carefully considered comments that suggested the language proposed in the NPRM prohibiting misrepresentations lacked specificity and was vague or overbroad, particularly the phrase "any amount a consumer may pay." In final § 464.3, the Commission modifies the NPRM proposal to replace "any amount a consumer may pay" with a reference to "any fee or charge." In the NPRM, the Commission stated that "[o]ther characteristics included in the nature and purpose of a charge, such as the amount of the charge and whether it is refundable, are also material."[346] To elaborate on this point in the final rule text, the Commission specifies that the "amount" of any fee or charge cannot be misrepresented. Taken together, these modifications provide clarity to Businesses that they cannot misrepresent the nature,

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[344] Given the prevalence of the defined unfair or deceptive practices regarding the misrepresentation of total costs and the nature and purpose of fees, the Commission finds that it is necessary to require both affirmative disclosures and a prohibition of misrepresentations, instead of limiting the rule to prohibiting misrepresentations. *See supra* Parts II.A and II.B.

[345] *See, e.g.*, FTC-2023-0064-3094 (American Hotel & Lodging Association); FTC-2023-0064-3206 (Motor Vehicle Protection Products Association et al.).

[346] NPRM, 88 FR 77434.

purpose, amount, or refundability of any fee or charge excluded from Total Price, including Government Charges, Shipping Charges, any fees or charges for optional Ancillary Goods or Services, or any other itemized or totaled fee or charge, including Total Price and the final amount of payment.

Final § 464.3 prohibits misrepresentations about material pricing terms of a transaction. The nature, purpose, amount, and refundability of fees or charges and the identity of the good or service for which they are imposed are material characteristics that affect the value to consumers of the Covered Goods or Services being offered and Businesses' ability to compete on price. As the Commission noted in the NPRM, whether a consumer is required to pay a charge, the amount of the charge, and what goods or services they will receive in exchange for the charge, is necessarily material information that affects a consumer's choice about whether to consent to a charge.[347] Other characteristics included in the nature, purpose, and amount of a charge, such as whether it is refundable, are also material.

Under final § 464.3, Businesses cannot misrepresent the nature, purpose, amount, or refundability of fees or charges and the identity of the goods or services for which they are imposed.[348] For example, it would be a misrepresentation to characterize fees as mandatory when they are optional, or to characterize fees as optional when they are

[347] NPRM, 88 FR 77432; *Deception Policy Statement*, 103 F.T.C. 110, 175, 182–183, 183 n.55 (listing, respectively, "misleading price claims" among those that the FTC has found to be deceptive, and claims or omissions involving cost among those that are presumptively material); *see also FTC v. FleetCor Techs, Inc.*, 620 F. Supp. 3d 1268, 1303–04 (N.D. Ga. 2022) (finding that representations about transaction fees and discounts were material).

[348] As the Commission noted in the NPRM, if a delivery application includes an invitation to tip a delivery driver without disclosing that a portion of the tip is allocated to offset the delivery driver's base wages or benefits, it would violate § 464.3 in addition to other laws or regulations relating to the distribution of tips. *See* Complaint ¶¶ 50–51, *In re Amazon.com, Inc.* ("*Amazon Flex*"), No. C-4746 (FTC June 9, 2021) (alleging respondents falsely represented that 100% of tips would go to the driver in addition to the pay respondents offered drivers).

mandatory or consumers are automatically opted-in to pay them.[349] Representations that fees are for identified goods or services when those goods or services are not provided would also be a misrepresentation. Further, although the rule does not govern how Businesses set their prices, if a Business represents that it is charging a fee for a specific good or service, but the amount of the fee does not reflect the cost of that good or service, that may be evidence that the Business has misrepresented the nature or purpose of the fee.

Misrepresentations can result from failing to disclose material conditions or limitations relating to fees and charges, for example, material conditions or limitations that would affect consumers' ability to purchase Covered Goods or Services at advertised prices.[350] Describing a good or service as fully refundable without disclosing material limitations on refundability (e.g., refunds are only accepted for a specified amount of time) would also be misleading.

The American Hotel & Lodging Association expressed the concern that Businesses may use inconsistent descriptions of similar fees and confuse consumers in disclosing the nature and purpose of fees or the identity of the goods or services for which fees are imposed.[351] Using vague language or fee descriptions (e.g., unspecified

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[349] *See* discussion of optional and mandatory fees *supra* Parts III.A.1 and III.A.8.a; *see also, e.g.*, Fed. Trade Comm'n, *Bringing Dark Patterns to Light: Staff Report* 9, 15, 15 n.122, 22 (stating "companies must not mislead consumers to believe that fees are mandatory when they are not" and describing the use of pre-selected checkboxes as a dark pattern that tricks consumers into buying unwanted goods and services) (Sept. 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf*; Stipulated Order for Permanent Injunction, Monetary Judgment, and Other Relief as to Defendants Rhinelander Auto Grp. LLC, et al., *FTC v. Rhinelander Auto Ctr., Inc.*, No. 3:23-cv-00737-wmc (W.D. Wis. Nov. 6, 2023) (settling allegations that defendants misrepresented that consumers were required to purchase add-on products to purchase, lease, or finance a vehicle and, among other provisions, enjoining defendants from misrepresenting whether charges, products, or services are optional or required), *https://www.ftc.gov/system/files/ftc_gov/pdf/18-ConsentJudgmentEnteredastoRAGRMGandTowne.pdf*.

[350] *See, e.g.*, cases cited *supra* note 111.

[351] FTC-2023-0064-3094 (American Hotel & Lodging Association).

service or convenience fees) that do not accurately inform consumers of the nature or purpose of fees or charges or the identity of the good or service for which the fee or charge is imposed misrepresents those fees. In addition, it would be misleading if a Business conflates fees so that consumers are unable to determine their nature, purpose, or the identity of the goods or services for which the fees are charged. Whether fee descriptions are adequate to avoid misrepresenting their nature, purpose, or the identity of goods or services for which they are charged will be case specific and may depend on the context.

Another commenter argued that the rule would unfairly hold online travel agencies and other intermediaries liable for fee misrepresentations when only travel service providers can know whether representations about the nature and purpose of fees are accurate.[352] As discussed in section III.B.1.f, complying with the rule would require Businesses that sell or advertise Covered Goods or Services through platforms to provide the platforms with accurate pricing information. Contractual relationships and the rule's application to B2B transactions should ensure that Businesses that rely on other parties for pricing information receive accurate pricing information.

One commenter argued that charging consumers for "speculative tickets" in the live-event sector is deceptive because it is tantamount to "charging consumers for something that doesn't exist," and suggested the rule should "prohibit sellers or resellers from charging the consumer for buying something the seller doesn't own, or that does not even exist."[353] The Commission notes that the final rule does not directly address the sale

[352] FTC-2023-0064-3293 (Travel Technology Association).
[353] FTC-2023-0064-3108 (Christian L. Castle, Esq.; Mala Sharma, President, Georgia Music Partners; and Dr. David C. Lowery, founder of musical groups Cracker and Camper Van Beethoven, and a lecturer at the University of Georgia Terry College of Business).

of speculative tickets. However, a Business that represents that tickets are in fact available when they are not may violate §§ 464.2(c) and 464.3 by failing to disclose Clearly and Conspicuously, and by misrepresenting, the identity of the good or service for which fees or charges are imposed.

Commenters opposed the misrepresentation provision in the context of negotiated contracts because negotiations arguably allow consumers to seek clarification about fees.[354] The Commission, however, has not identified any justification for excluding contracts from the misleading fees provision. Truthful fee disclosures in contract negotiations are material to consumers. One commenter recommended providing a safe harbor from the misleading fees provision if Businesses clearly and conspicuously disclose fees and make either no statement or an accurate statement about the nature and purpose of fees.[355] The Commission declines to grant a safe harbor from the misleading fees provision when Businesses make affirmative disclosures. Whether disclosures are adequate, Clear and Conspicuous, and not misleading are issues that may depend on the specific facts and circumstances of the transaction.

The NPRM identified and sought comment on the proposed rule's intersection with existing Federal rules and regulations containing prohibitions on misrepresentations: the Business Opportunity Rule,[356] the Mortgage Acts and Practices Advertising Rule

[354] *See*, *e.g.*, FTC-2023-0064-2918 (Elite Catering + Event Professionals opposed the misrepresentations provision for private food services contracts because "[t]hroughout the contracting process, there are ample opportunities for the customer to seek clarification or negotiate the applicability of the price and fees.").
[355] FTC-2023-0064-3016 (National Federation of Independent Business proposed modifying the rule as follows: "(a) . . . [I]t is an unfair and deceptive practice . . . for a Business to: (i) misrepresent the total cost of a good or service by omitting a mandatory fee from the advertised price of the good or service; or (ii) misrepresent the nature and purpose of such a mandatory fee." The commenter also proposed exempting any business from that requirement if it discloses the fee Clearly and Conspicuously "before a consumer becomes obligated to pay the fee" and "either makes no statement about the nature and purpose of the fee or makes an accurate statement of the nature and purpose of the fee.").
[356] 16 CFR part 437.

(Regulation N),[357] the Mortgage Assistance Relief Services Rule (Regulation O),[358] the amendments to the Negative Option Rule, [359] and the Telemarketing Sales Rule.[360] The Commission did not receive substantive comments about overlap or conflict with these rules. [361] The Commission is not aware of any evidence that there is a conflict between these rules and the final rule. The Commission believes it is possible for Businesses to comply with each of them, as applicable.

D. § 464.4 Relation to State laws

Proposed § 464.4 addressed preemption and the proposed rule's relation to State statutes, regulations, orders, or interpretations, including State common law (hereinafter "State law"). Proposed § 464.4(a) provided that the rule would not supersede or otherwise affect any State law unless the State law is inconsistent with the rule, and then only to the extent of the inconsistency. Proposed § 464.4(b) specified that a State law providing consumers with greater protections than the rule does not, solely for that reason, make the State law inconsistent with the rule. When a State law offers greater (or, in some circumstances, even lesser) protection than the rule, if Businesses can comply with both, they are not inconsistent. Thus, as commenters noted, the rule would establish a regulatory floor rather than a ceiling.[362] After reviewing the comments, the Commission adopts the provision as proposed in the NPRM.

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[357] 12 CFR part 1014.
[358] 12 CFR part 1015.
[359] Promulgation of Trade Regulation Rule and Statement of Basis and Purpose: Rule Concerning Recurring Subscriptions and Other Negative Option Programs, 89 FR 90476 (Nov. 15, 2024), *https://www.federalregister.gov/documents/2024/11/15/2024-25534/negative-option-rule*.
[360] 16 CFR part 310.
[361] In addition, the added definition of "Covered Goods or Services" removes any potential overlap between the final rule and Regulations N and O.
[362] *See, e.g.*, FTC-2023-0064-3150 (Attorney General of the State of California "appreciate[d] that the FTC's rule respects the states' role in protecting consumers from deceptive price advertising, and the rule's

The Commission finds it has the authority to promulgate regulations that preempt inconsistent State laws under section 5 of the FTC Act. Even without an express preemption provision, Federal statutes and regulations preempt conflicting State laws. Under the Supreme Court's conflict preemption doctrine, a Federal statute or regulation impliedly preempts State law when it is impossible for the regulated parties to comply with both the Federal and the State law, or when a State law is an obstacle to achieving the full purposes and objectives of the Federal law.[363] "Federal regulations have no less pre-emptive effect than [F]ederal statutes."[364] Accordingly, the rule preempts a State law only to the extent it is inconsistent with the rule and compliance with both is impossible, or it is an obstacle to achieving the full purposes and objectives of the rule. To provide a clear explanation of the Commission's intent and the rule's scope of preemption, the rule includes an express preemption provision at § 464.4.[365]

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clear intent to create a federal floor, rather than a ceiling, for consumer protection."); FTC-2023-0064-3212 (TickPick, LLC).

[363] *See, e.g.*, Cong. Rsch. Serv., R45825, *Federal Preemption: A Legal Primer* 23 (2023), *https://crsreports.congress.gov/product/pdf/R/R45825/3*.

[364] *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

[365] Many FTC regulations, including regulations promulgated under section 18 of the FTC Act, include provisions addressing State laws and preemption. *See, e.g.*, Funeral Rule, 16 CFR 453.9 (exempting from preemption State laws that "afford[] an overall level of protection [that] is as great as, or greater than, the protection afforded by" the FTC's Rule); Rule Concerning Cooling Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429.2(b) (exempting laws and ordinances that provide "a right to cancel a door-to-door sale that is substantially the same or greater than that provided in this part"); Business Opportunity Rule, 16 CFR 437.9(b) ("The FTC does not intend to preempt the business opportunity sales practices laws of any state or local government, except to the extent of any conflict with this part. A law is not in conflict with this Rule if it affords prospective purchasers equal or greater protection . . . ."); Mail, Internet, or Telephone Order Merchandise Rule, 16 CFR 435.3(b) ("This part does supersede those provisions of any State law, municipal ordinance, or other local regulation which are inconsistent with this part to the extent that those provisions do not provide a buyer with rights which are equal to or greater than those rights granted a buyer by this part."); Franchise Rule, 16 CFR 436.10(b) ("The FTC does not intend to preempt the franchise practices laws of any state or local government, except to the extent of any inconsistency with part 436. A law is not inconsistent with part 436 if it affords prospective franchisees equal or greater protection . . . ."); Labeling and Advertising of Home Insulation, 16 CFR 460.24(b) (preemption of "State and local laws and regulations that are inconsistent with, or frustrate the purposes of, this regulation").

Numerous commenters supported proposed § 464.4(b)'s targeted approach of preempting only inconsistent parts of State laws.[366] Some commenters, however, stated that the rule should completely preempt all State laws to provide greater consistency and clarity and to lower compliance costs,[367] particularly when State laws provide greater protections.[368] However, if a Business subject to both the rule and a State law that imposes greater protections does not want to use different practices for that State versus the rest of the country, it can choose to comply with both by using a single set of practices consistent with the greater protections afforded under the applicable State law. Nothing in the rule prohibits Businesses from giving consumers greater protections than the rule requires. Another commenter expressed concern that some State laws create loopholes that allow businesses to mischaracterize fees as government charges that they then can exclude from Total Price.[369] The Commission discusses issues related to the rule's treatment of Government Charges in section III.A.5 and notes here that final

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[366] *See, e.g.*, FTC-2023-0064-3150 (Attorney General of the State of California commented that consumer protection is also a state concern, so, "it is appropriate, then, that the rule does not preempt a state law unless the rule and the state law conflict and then only to the extent of the inconsistency."); FTC-2023-0064-3215 (Attorneys General of the States of North Carolina and Pennsylvania, along with Attorneys General of the States or Territories of Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Michigan, Minnesota, New Jersey, New York, Oklahoma, Oregon, Vermont, Washington, and Wisconsin, supported the rule's preemption provision because it "recognizes and preserves the interest that individual states have in combatting unfair or deceptive acts or practices committed in our respective jurisdictions."); FTC-2023-0064-3275 (Berkeley Center for Consumer Law and Economic Justice et al. commented that the rule is "an invaluable complement to state and private actions to challenge hidden and deceptive pricing practices."); FTC-2023-0064-3293 (Travel Technology Association); FTC-2023-0064-3262 (Skyscanner); FTC-2023-0064-3266 (StubHub, Inc.); FTC-2023-0064-3212 (TickPick, LLC); FTC-2023-0064-3267 (National Retail Federation).
[367] *See, e.g.*, FTC-2023-0064-2886 (American Gaming Association); FTC-2023-0064-3094 (American Hotel & Lodging Association); FTC-2023-0064-3122 (Vivid Seats); FTC-2023-0064-3204 (Expedia Group); FTC-2023-0064-3137 (Chamber of Progress); FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3233 (NCTA—The Internet & Television Association); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-2856 (National Football League).
[368] *See, e.g.*, FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[369] FTC-2023-0064-3137 (Chamber of Progress).

§ 464.3 would prohibit misrepresenting that a fee is a Government Charge, or otherwise misrepresenting the nature, purpose, amount, or refundability of any fee or charge.

Other commenters suggested that the Commission provide compliance guidance that addresses when State law differs from the rule and identify which State laws are not preempted.[370] Some commenters suggested that existing State and local industry regulations can make the rule unnecessary, duplicative, and confusing due to conflicting requirements.[371] The Commission reiterates that a State law is preempted only to the extent it conflicts with the rule's requirements and complying with both is impossible, or it is an obstacle to achieving the full purposes and objectives of the rule. A State law can provide greater protections and, solely for that reason, will not be inconsistent with the rule; a Business can comply with both. A Business also can comply with both when the State law provides lesser protections, although Businesses still would have to comply with the greater protections of the rule. Only if a State law provides conflicting requirements, and a Business cannot comply with both, or it is an obstacle to achieving the full purposes and objectives of the rule, will the State law be preempted, and then only to the extent of that conflict or obstacle.

Moreover, preemption furthers a primary goal of the final rule, discussed in section V.A: to provide a uniform, minimum standard for pricing disclosures for Covered Goods or Services that is easy for Businesses and consumers to understand. The

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[370] *See, e.g.*, FTC-2023-0064-3244 (Vacation Rental Management Association); FTC-2023-0064-3206 (Motor Vehicle Protection Products Association et al.); FTC-2023-0064-3143 (ACA Connects—America's Communications Association).

[371] *See, e.g.*, FTC-2023-0064-3152 (Building Owners & Managers Association et al.); FTC-2023-0064-3133 (National Multifamily Housing Council and the National Apartment Association); FTC-2023-0064-3115 (National Association of Residential Property Managers); FTC-2023-0064-3116 (Manufactured Housing Institute); FTC-2023-0064-3172 (New Jersey Apartment Association); FTC-2023-0064-3289 (Zillow Group).

Commission also determines, as discussed in section V.B, that declining to issue this final rule and continuing to rely solely on State laws and piecemeal adjudication would be less effective. The Commission believes the final rule's establishment of nationwide minimum standard will functionally reduce many variations among State laws,[372] because Businesses will have to conform their practices to meet the rule's standards for Covered Goods or Services to the extent those standards exceed or directly conflict with State law requirements. Moreover, to the extent State law is not inconsistent with the final rule, additional State authority and resources will only serve to further protect consumers and competition. To that end, the Commission will continue to work with its State law enforcement partners in battling unfair and deceptive pricing disclosure practices.[373] For the reasons stated herein, the Commission adopts § 464.4 as proposed.

E. § 464.5 Severability

The Commission includes a severability clause at final § 464.5, which provides that, if any provision of the final rule is held to be invalid or unenforceable either by its terms, or as applied to any person, industry, or circumstance, or stayed pending further agency action, the provision shall be construed to continue to give the maximum effect to the provision permitted by law. It further provides that any such invalidity shall not affect

[372] The Commission has made similar findings in previous regulations. *See, e.g.*, Final rule: Non-Compete Clause Rule, 89 FR 38342, 38453–54 (May 7, 2024) (finding that the Non-Complete Clause Rule sets a Federal floor that will reduce the variations in a patchwork of State regulations); Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose: Cooling-Off Period for Door-to-Door Sales, 37 FR 22934, 22958 (Oct. 26, 1972) (finding that, when State laws "give the consumer greater benefit and protection . . ., there seems to be no reason to deprive the affected consumers of these additional benefits," but when State laws do not, "the rule would supply the needed protection or be construed to supersede the weak statute to the extent necessary to give the consumer the desired protection.").

[373] *See, e.g.*, Final Trade Regulation Rule: Trade Regulation Rule; Funeral Industry Practices, 47 FR 42260, 42287 (Sept. 24, 1982) (codified at 16 CFR part 453) (noting the purpose of the rule's provision addressing relation of the rule to State law is "to encourage federal-state cooperation by permitting appropriate state agencies to enforce their own state laws that are equal to or more stringent than the trade regulation rule").

the application of the provision to other persons, industries, or circumstances, or the validity or application of other provisions. Final § 464.5 also states that, if any provision or application of the final rule is held to be invalid or unenforceable, the provision or application shall be severable from the final rule and shall not affect the remainder thereof. This provision confirms the Commission's intent, as discussed herein, that the final rule be given the maximum effect permitted by law even if a reviewing court stays or invalidates any provision, any component of any provision, or any application of the rule, in whole or in part, to any person, industry, or circumstance.

In issuing this final rule, as discussed in section II.A and II.B, the Commission finds bait-and-switch pricing tactics and misleading fee practices to be unfair and deceptive because they deceive consumers about the true cost of goods and services, prevent price comparison, and harm competitors that do accurately disclose true cost. The Commission also finds such practices to be widespread and to affect many types of consumer purchasing transactions, particularly with respect to Covered Goods or Services. The Commission adopts this rule to comprehensively address the practices and to provide a consistent, administrable standard with respect to Covered Goods or Services. The Commission finds in section V.E that, for Covered Goods or Services, the benefits of the rule exceed its costs.

At the same time, the Commission finds that each of the provisions, components of the provisions, and applications of the final rule operate independently, and that the evidence and findings supporting each stand independent of one another. The Commission finds that realizing the benefits of the rule does not require the joint adoption or operation of each provision. In addition, while the Commission believes

applying the same restrictions to all pricing representations would provide even greater overall benefits, as explained in Parts II.B and V.B, the Commission finds the benefits of the final rule exceed the costs as to Covered Goods or Services, both overall and with respect to each substantive provision of the rule. For Covered Goods or Services, as discussed in section V.E, ample data show the rule would have positive quantified net benefits, including by reducing search costs, as well as unquantified reductions in deadweight loss and consumer frustration. Similarly, consumers would benefit from the misleading fees prohibition even if the requirement to disclose Total Price were stayed or invalidated. The benefits would also justify the costs if the Total Price provision were further limited to either just the live-event ticketing or just the short-term lodging industry.

Based on the available data, the Commission concludes that, even if the rule were more limited in scope or if it applied to a more limited set of transactions, such as to a single industry or to particular circumstances, it would still achieve some of the Commission's objectives and the benefits of the rule would still exceed the costs. Although a more limited scope or application would change the magnitude of the overall benefit of the final rule, it would not undermine the valid and measurable benefit of, and justification for, the remaining provisions or applications of the final rule. Thus, were a court to stay or invalidate any provision, any component of any provision, or any application of the rule, the Commission intends the remainder of the rule to remain in force.

As described in section V.B, the Commission considered alternatives to the final rule that would have applied the rule to other transactions or industries or expanded it to

all goods and services within the Commission's jurisdiction. The Commission finds that each such alternative would be an appropriate exercise of the Commission's authority under sections 5 and 18 of the FTC Act as stand-alone regulations because disclosure of Total Price in any type of transaction or industry—whether or not the same is required in other transactions or industries—mitigates the harms caused by the unfair or deceptive pricing tactics in those transactions or industries to which the rule does apply. At the same time, as discussed in Parts I and II.A, the Commission finds bait-and-switch pricing tactics and misleading fee practices are widespread and potentially growing. As a result, the Commission may later find that a rule of expanded or even general applicability, to the extent of its jurisdiction, would be appropriate and would result in benefits to consumers and competition that are greater in magnitude than a rule with more limited applicability. However, such findings do not invalidate this final rule's quantifiable positive benefits, in whole or in part.

Accordingly, the Commission considers and intends each of the provisions adopted in the final rule to be severable, within each provision, from other provisions in Part 464, and as applied to different persons, industries, or circumstances. In the event of a stay or invalidation of any provision, any component of any provision, or of any provision as it applies to certain persons, conduct, or industry, the Commission's intent is to otherwise preserve and enforce the final rule to the fullest possible extent. Therefore, if a reviewing court were to stay or invalidate a particular application of the final rule, or a provision thereof, as to certain persons, industries, or circumstances, other Businesses that remain covered by the rule should be required to comply with the applicable provisions of the final rule that remain in effect.

IV. Challenges to the FTC's Legal Authority to Promulgate the Rule

As explained in the NPRM and section II, this rule is consistent with decades of FTC adjudications and enforcement actions addressing the standards governing unfair or deceptive pricing practices.[374] The Commission issues this rule to prevent prevalent unfair or deceptive acts or practices and to promote compliance in a manner that accounts for and balances the needs of consumers and regulated entities. The rule falls squarely within the Commission's legal authority, is based on substantial evidence in the rulemaking record, and clearly defines specific unfair and deceptive practices regarding fees or charges.

The Commission received comments supporting, discussing, or questioning its authority to promulgate the final rule. Commenters supporting the Commission's authority noted the rule falls squarely within the Commission's mandate to prevent unfair and deceptive acts and practices through rulemaking under sections 5 and 18 of the FTC Act.[375] Commenters questioning the Commission's rulemaking authority typically advanced one of three arguments. First, some commenters argued that requiring

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[374] *See, e.g.*, *In re Filderman Corp.*, 64 F.T.C. 427, 442–43, 461 (1964), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-64/ftcd-vol64january-march1964pages409-511.pdf*; *In re Resort Car Rental Sys., Inc.*, 83 F.T.C. 234, 281–82, 300 (1973), *https://www.ftc.gov/system/files/ftc_gov/pdf/Resort%20Car%20Rental%20System%2C%20Inc.%2083%20FTC%20234%20%281973%29.pdf*, *aff'd sub. nom. Resort Car Rental Sys., Inc. v. FTC,* 518 F.2d 962, 964 (9th Cir. 1975); Opinion of the Commission at 28–30, 47–50, *In re Intuit Inc*., No. 9408 (FTC Jan. 22, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/d09408_commission_opinion_redacted_public.pdf; In re George's Radio & Television Co.*, 60 F.T.C. 179, 193–94 (1962), *https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-60/ftcd-vol60january-june1962pages107-211.pdf* (collecting cases involving false savings claims); cases cited *supra* notes 61–62 (collecting FTC enforcement actions alleging, respectively, that bait-and-switch pricing tactics concerning hidden fees and misrepresentations regarding the nature and purpose of fees violated section 5); NPRM, 88 FR 77435–37 (section III.C ("*Law Enforcement Actions and Other Responses*")). *See also supra* note 115 (collecting cases holding that later disclosures cannot cure deceptive door openers).

[375] *See, e.g.*, FTC-2023-0064-2883 (District of Columbia, Office of the People's Counsel); FTC-2023-0064-3104 (Truth in Advertising, Inc.); *see also* FTC-2022-0069-6077 (ANPR) (Institute for Policy Integrity, New York University School of Law).

disclosures related to pricing is a major question that Congress has not given the Commission authority to address.[376] Second, some commenters argued that if the rule was in fact consistent with the Commission's authority under sections 5 and 18 of the FTC Act, Congress had impermissibly delegated this authority to the Commission.[377] Third, some commenters argued that the disclosures required by the rule violate the First Amendment.[378] In addition to these arguments, one commenter asserted that the rule is invalid because the Commission is unconstitutionally structured.[379] Finally, some commenters asserted the Commission has not complied with the Administrative Procedure Act ("APA").[380]

Most of the commenters challenging the Commission's authority represent Businesses that offer goods or services other than Covered Goods or Services. Thus, the concerns raised by these commenters may not be relevant to the narrowed scope of the final rule. Further, the NPRM's industry-neutral approach was central to nearly all of the critiques of the rule that raised questions regarding the Commission's authority to promulgate the rule; while the Commission disagrees with such critiques, they are not applicable to this final rule, which focuses on two industries, live-event tickets and short-

[376] FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3152 (Building Owners & Managers Association et al.); FTC-2023-0064-3202 (TechNet); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3251 (National RV Dealers Association); FTC-2023-0064-3263 (Flex Association); FTC-2023-0064-3294 (International Franchise Association).
[377] FTC-2023-0064-3233 (NCTA—The Internet & Television Association); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3294 (International Franchise Association).
[378] FTC-2023-0064-3016 (National Federation of Independent Business, Inc.); FTC-2023-0064-3028 (Competitive Enterprise Institute); FTC-2023-0064-3233 (NCTA—The Internet & Television Association); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3267 (National Retail Federation).
[379] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[380] *See, e.g.*, *id.*; FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3152 (Building Owners & Managers Association et al.); FTC-2023-0064-3263 (Flex Association); FTC-2023-0064-3294 (International Franchise Association).

term lodging. Notably, the vast majority of comments from businesses offering live-event tickets and short-term lodging and their direct representatives did not raise challenges to the Commission's authority to promulgate the rule.[381] Nevertheless, the Commission has considered the comments challenging its authority and explains in this section why it disagrees with those.

A. Major Questions Doctrine

Some commenters invoked the major questions doctrine to argue that the Commission lacks authority to adopt the rule. Commenters argued the rule raises a major question because addressing consumer fees and pricing across industries is of vast political and economic significance.[382] Some commenters also argued that the rule is broader than the agency's prior rules, based on the assertion that the rule regulates pricing.[383] Commenters concluded that Congress has not authorized the Commission to promulgate the rule.[384]

The major questions doctrine, as the Supreme Court recently explained in *West Virginia v. EPA*, 597 U.S. 697 (2022), applies to "'extraordinary cases' . . . in which the

[381] The International Franchise Association, which represents franchised businesses offering short-term lodging, raised challenges to the Commission's authority to promulgate the rule. IFA's comment, however, primarily focused on the NPRM's industry-neutral scope and its implications for franchised businesses that do not offer Covered Goods or Services. Regarding the short-term lodging industry specifically, IFA's comment challenged certain aspects of the Commission's estimate of compliance costs, which are addressed in section V. *See* FTC-2023-0064-3294 (International Franchise Association).
[382] *See, e.g.*, FTC-2023-0064-3263 (Flex Association); FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3152 (Building Owners & Managers Association et al.); FTC-2023-0064-3202 (TechNet); FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP). While commenters suggested that the rule would have "political and economic significance," no commenters pointed to any specific political significance.
[383] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3127 (U.S. Chamber of Commerce).
[384] FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3152 (Building Owners & Managers Association et al.); FTC-2023-0064-3202 (TechNet); FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association).

'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[385] When an agency claims a "'transformative expansion in [its] regulatory authority,'" it "must point to 'clear congressional authorization' for the power it claims."[386]

Having considered the factors that the Supreme Court has used to identify major questions, the Commission, as discussed herein, concludes that the final rule does not implicate the major questions doctrine. The FTC does not claim a transformative change in its rulemaking authority. The final rule comports with the history and breadth of prior rules that the FTC has promulgated pursuant to its existing rulemaking authority, which Congress conferred to allow the Commission to address prevalent unfair or deceptive practices. Even if the major questions doctrine did apply, the Commission concludes that Congress provided clear authorization for the Commission to promulgate this rule.

1. The Rule Does Not Address a Major Question

a) The Commission has a long history of addressing unfair or deceptive acts or practices related to pricing information

Identifying unfair or deceptive acts or practices related to the disclosure of the price and purpose of goods and services is at the core of the Commission's mandate under section 5.[387] The Commission has the authority to address these unfair or deceptive acts or practices both through case-by-case enforcement, either administratively or in Federal court, or through rulemaking if the unfair or deceptive practices are prevalent as

[385] *West Virginia v. EPA*, 597 U.S. at 721 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).
[386] *Id.* at 723–24 (quoting *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).
[387] *See generally supra* section II.B; NPRM, 88 FR 77432, 77434.

established by the rulemaking record. The Commission may choose case-by-case adjudication or rulemaking at its discretion.[388]

The Commission's authority to promulgate rules to define with specificity unfair or deceptive acts or practices under section 18 of the FTC Act, 15 U.S.C. 57a, is not extraordinary and is undisputed, resting on firm historical footing.[389] Indeed, when consumers have faced bait-and-switch tactics in the past, including being unable to get accurate material information about what they must pay and what they will receive in return, the Commission has repeatedly issued rules that define unfair or deceptive acts or practices related to the disclosure of that material information.[390] For example, the Commission initiated the rulemaking resulting in the Rule on Retail Food Store Advertising and Marketing Practices (the "Unavailability Rule"), 16 CFR part 424, based

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[388] *Cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (holding that "the Board is not precluded from announcing new principles in an adjudicative proceeding," that "the choice between rulemaking and adjudication lies in the first instance within the Board's discretion," and that the agency's choice between adjudication and rulemaking was "entitled to great weight"); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

[389] Congress added section 18, 15 U.S.C. 57a, to the FTC Act in 1975, and that section provides the process the Commission must follow to promulgate rules defining unfair or deceptive acts or practices. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, sec. 202, § 18, 88 Stat. 2183, 2193 (1975) (hereinafter "Magnuson-Moss Warranty Act"); *see also Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 967 (D.C. Cir. 1985) (summarizing the historical backdrop to the Commission's authority to prevent unfair or deceptive acts or practices including the adoption of the Magnuson-Moss Warranty Act, which codified section 18 of the FTC Act and confirmed the Commission's authority to promulgate rules defining acts or practices that are unfair or deceptive).

[390] *See, e.g.*, Franchise Rule, 16 CFR 436.2(a), 436.5(e)–(f) (defining as an unfair or deceptive act or practice to fail to provide prospective franchisees with the franchisor's disclosure document, which includes, among other things, disclosure of "initial fees"—i.e., "all fees and payments, or commitments to pay . . . whether payable in lump sum or installments" and of "all other fees that the franchisee must pay to the franchisor or its affiliates"); Business Opportunity Rule, 16 CFR 437.4(d) (defining as an unfair or deceptive act or practice to "[f]ail to notify any prospective purchaser in writing of any material changes affecting the relevance or reliability of the information contained in an earnings claim statement before the prospective purchaser . . . makes a payment"); Business Opportunity Rule, 16 CFR 437.6(h) (defining as an unfair or deceptive act or practice to "[m]isrepresent the cost . . . of the business opportunity or the goods or services offered to a prospective purchaser"); Funeral Rule, 16 CFR 453.2(a)–(b) (defining as an unfair or deceptive act or practice to "fail to furnish accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies" and requiring funeral providers to provide specific price lists in writing).

in part on findings in a Commission report that items priced at or below the advertised price were frequently unavailable and that in "a very substantial majority of the instances of the deviations, the prices marked on the items were higher than the advertised price."[391]

As discussed in Parts I and II, there is nothing new about businesses using bait-and-switch tactics to reel in and deceive consumers, just as there is nothing new about the Commission exercising its authority to limit such tactics and the harms they cause.[392] This rule is tailored to address practices squarely within the scope of the Commission's core work to protect consumers: bait-and-switch pricing tactics, including drip pricing, and misrepresentations regarding a material term. As described in section II.A and II.B, the Commission adopts this rule now because bait-and-switch tactics, including drip pricing, and misrepresentations as to the nature and purpose of fees and charges are prevalent and continue to harm consumers. This is precisely what section 18 of the FTC Act envisions and is consistent with the Commission's exercise of the same authority in the past.

b) Commenters' claims about the scope of the acts or practices covered by the rule are inapplicable or overstated

Commenters suggested that the major questions doctrine is implicated simply

[391] Statement of Basis and Purpose: Retail Food Store Advertising and Marketing Practices, 36 FR 8777, 8777–78 (May 13, 1971) (citing a Bureau of Economics staff report titled "Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco"). Similarly, when the Commission later amended the Unavailability Rule, it again stressed that food retailers must not engage in bait and switch advertising—where the seller advertises an unavailable good at a low price to get the consumer in the door—or deception regarding availability of advertised goods. Final amendments to trade regulation rule: Amendment to Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices, 54 FR 35456, 35462–63 (Aug. 28, 1989).

[392] *E.g.*, *In re Filderman Corp.*, 64 F.T.C. 427, 442–43, 461 (1964); *Resort Car Rental Sys.*, 83 F.T.C. at 281–82, 300 (1973); Complaint ¶¶ 12, 46–49, *In re LCA-Vision*, No. C-4789 (FTC Mar. 13, 2023); Opinion of the Commission at 37–40, 47–50, *In re Intuit Inc.*, No. 9408 (FTC Jan. 22, 2024). *See generally supra* section I.A.–I.C (discussing the comment and hearing record in response to the ANPR and NPRM); section II.A (discussing the prevalence of the practices that the rule addresses).

because the rule proposed by the NPRM was industry-neutral.[393] The Commission disagrees. Congress authorized the Commission to prevent unfair or deceptive practices in or affecting commerce across the economy while specifying a limited number of industries, activities, or entities that are exempt.[394] These comments are inapposite, however, because the final rule is limited to Covered Goods or Services: live-event ticketing and short-term lodging.

Commenters also contended that the rule implicates a major question because it regulates pricing practices broadly or supposedly will have effects on a wide array of pricing strategies.[395] The Commission disagrees. The rule focuses on hidden mandatory fees or charges that obscure the Total Price of a Covered Good or Service and misrepresentations about the nature, purpose, amount, and refundability of fees or charges. The rule has no effect on many pricing practices and strategies, including a Business's fundamental decision about what price to charge consumers for its goods or services.[396] Nor does the rule affect a Business's ability to use dynamic pricing, to offer or use sales, discounts, rebates, or special offers, or to truthfully itemize fees and costs so

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[393] *See, e.g.*, FTC-2023-0064-3263 (Flex Association); FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3152 (Building Owners & Managers Association et al.); FTC-2023-0064-3202 (TechNet); FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association).

[394] 15 U.S.C. 45.

[395] Commenters did not argue or provide substantive support for any argument that a major question was raised by proposed § 464.3(a), which would have prohibited any Business from misrepresenting the nature and purpose of any amount a consumer may pay, including its refundability and the identity of any good or service for which it is charged. The Commission is finalizing § 464.3 more narrowly to prohibit any Business, in any offer, display, or advertisement for a Covered Good or Service, from misrepresenting any fee or charge, including its nature, purpose, amount, or refundability, and the identity of the good or service for which it is imposed.

[396] *See supra* section I ("The discretion to set prices remains squarely with businesses; the rule simply requires that they tell consumers the truth about those prices.").

long as the Business accurately describes the Total Price upfront.[397] With respect to mandatory fees, the rule does not prevent Businesses from continuing to charge such fees as a pricing strategy, itemizing them in addition to stating the Total Price, or from providing non-misleading information about those fees. Indeed, a number of commenters have misunderstood the rule to act as a prohibition or limitation on itemization; as explained in section III, truthful itemization is not prohibited.

In sum, the rule does not address a major question because it focuses on traditional types of unfair or deceptive acts or practices that have long been the subject of Commission rulemaking and enforcement activity and targets only those acts or practices.

2. Congress Provided the Commission with a Clear Grant of Authority to Promulgate This Rule

Even if the final rule did present a major question, the FTC Act provides clear authorization for the rule. In cases involving major questions, courts expect Congress to "speak clearly" if it wishes to assign the disputed power.[398] In the FTC Act, Congress vested the Commission with enforcement powers and the authority to promulgate rules to carry out the Commission's mandate to prevent unfair or deceptive acts or practices.[399] Rather than trying to define all unfair or deceptive acts and practices, Congress empowered the Commission to respond to changing market conditions and to identify conduct that is unfair or deceptive.[400]

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[397] *See supra* section III.A.8.c ("The rule neither requires, nor prohibits, the itemization of mandatory fees that must be included in Total Price."); section III.B.1.d–e (responding to comments about dynamic pricing, rebates, bundled pricing, and other discounts).

[398] *West Virginia v. EPA*, 597 U.S. at 716, 723 (quoting *Util. Air*, 573 U.S. at 324).

[399] 15 U.S.C. 45, 57a.

[400] *See* S. Rep. No. 75-221, at 2 (1937) (report on Amendments to the Federal Trade Commission Act (S.1077), explaining Congress's reasoning in granting the Commission authority in 1914 to define specific unfair methods of competition, and then applying the same reasoning to the proposed grant of authority to prohibit unfair or deceptive acts or practices: "The committee gave careful consideration to the question as

When the Commission was created by the FTC Act in 1914, the Act prohibited "unfair methods of competition" in section 5 and granted the Commission authority to promulgate rules to effectuate the Act's provisions in section 6(g), including the prohibition on unfair methods of competition.[401] The Act did not expressly prohibit deception. While deception could qualify as an unfair method of competition, courts required the Commission to show harm to competition or rivals in each instance; harm to consumers alone was insufficient to meet the standard.[402] In response, Congress amended the FTC Act in 1938 to include a prohibition, not just against unfair methods of competition, but against unfair or deceptive acts or practices as well.[403]

Congress affirmed the Commission's authority to issue rules like the one here through amendments to the FTC Act in 1975 and 1980. First, in the Magnuson-Moss Warranty Act of 1975, Congress added section 18 of the FTC Act, 15 U.S.C. 57a, confirming the Commission's authority to issue rules that "define with specificity acts or practices which are unfair or deceptive acts or practices," and requiring the Commission to follow specific procedures for promulgating rules.[404] Among the substantially

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to whether it would attempt to define the many and variable unfair practices . . . or whether it would by a general declaration . . . condemn[] unfair practices, leav[ing] it to the Commission to determine what practices were unfair." The Committee "concluded that the latter course would be the better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others."); *see also* H.R. Rep. No. 93-1606, at H 12060 (1974) (Conf. Rep.) (report on Consumer Product Warranty and Federal Trade Commission Improvement Act, stating: "[section 18] is an important power by which the Commission can fairly and efficiently pursue its important statutory mission." Further, "[b]ecause the prohibitions of section 5 of the Act are quite broad, trade regulation rules are needed to define with specificity conduct that violates the statute and to establish requirements to prevent unlawful conduct.").

[401] Federal Trade Commission Act, Pub. L. No. 63-203, §§ 5, 6(g), 38 Stat. 717, 719, 722 (1914).

[402] *FTC v. Raladam Co.*, 283 U.S. 643, 647–49 (1931) ("The paramount aim of the [FTC] act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree. . . . Unfair trade methods are not per se unfair methods of competition.").

[403] Federal Trade Commission Act Amendments of 1938 (Wheeler-Lea Act), Pub. L. No. 75-447, sec. 3, § 5, 52 Stat. 111, 111 (1938).

[404] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, sec. 202, § 18, 88 Stat. 2183, 2193 (1975) (codified at 15 U.S.C. 57a).

completed rules at the time were the Rule on the Preservation of Consumers' Claims and Defenses [405] and the Mail Order Rule,[406] which proposed to define as an unfair or deceptive act—and upon promulgation did so define—certain conduct that the rulemaking record showed was causing harm across various industries. As Congress added procedural requirements to the Commission's rulemaking authority through section 18, Congress did not limit these existing cross-industry rules targeting unfair or deceptive acts or practices, but instead created an exception under which the Commission could finalize them without following section 18's procedural requirements.[407]

Congress again confirmed the Commission's authority to promulgate rules defining unfair and deceptive acts or practices in 1980 when it enacted section 22 of the FTC Act, 15 U.S.C. 57b-3(b), as part of the Federal Trade Commission Improvements Act of 1980.[408] Section 22 imposes certain additional procedural requirements the Commission must follow when it promulgates any "rule," including rules promulgated under section 18. Section 22(b) contemplates the FTC's authority to promulgate rules that are substantive and economically significant by requiring, for example, that the Commission conduct a cost-benefit analysis.[409] In addition, section 22(a) imposes the same requirements on amendments to existing rules if they may "have an annual effect on

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[405] Promulgation of Trade Regulation Rule and Statement of Basis and Purpose: Preservation of Consumers' Claims and Defenses (Holder Rule), 40 FR 53506 (Nov. 18, 1975).

[406] Promulgation of Trade Regulation Rule and Statement of Basis and Purpose: Mail Order Merchandise, 40 FR 51582 (Nov. 5, 1975).

[407] Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, sec. 202, § 18(c)(1), 88 Stat. 2183, 2198 (1975) (Specifically, section 18(c)(1) provided that "[a]ny proposed rule under section 6(g)" with certain components that were "substantially completed before" section 18's enactment "may be promulgated in the same manner and with the same validity as such rule could have been promulgated had this section not been enacted.").

[408] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, sec. 15, § 22, 94 Stat. 374, 388 (1980) (codified at 15 U.S.C. 57b-3).

[409] 15 U.S.C. 57b-3(b).

the national economy of $100,000,000 or more," "cause a substantial change in the cost or price of goods or services," or "have a significant impact upon" persons and consumers.[410] Thus, Congress explicitly authorized the Commission to issue rules and amendments that address major economic questions, so long as the rulemaking complies with section 22.

The Commission has exercised its authority to promulgate numerous rules and rule amendments defining unfair or deceptive acts or practices pursuant to sections 18 and 22.[411] Central to many of these rules is a rulemaking record establishing that businesses misrepresent or fail to disclose certain material terms in a transaction, including information related to price, and that these practices are unfair or deceptive.[412] Unlike in *West Virginia v. EPA*, courts have upheld Commission rules similar to the one here—that prohibit misrepresentations, define unfair or deceptive conduct, and require specific disclosures to avoid deception—against a myriad of legal challenges.[413]

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[581] 15 U.S.C. 57b-3(a).

[411] *See, e.g.*, Franchise Rule, 16 CFR part 436; Business Opportunity Rule, 16 CFR part 437; Funeral Rule, 16 CFR part 453; Negative Option Rule, 16 CFR part 425; Cooling Off Rule, 16 CFR part 429; *see also* discussion *supra* section IV.1.a.

[412] *See, e.g.*, 16 CFR 437.6(d), (h), (i) (The Business Opportunity Rule provides that it is an "unfair or deceptive act or practice" to misrepresent, among other information, "the amount of sales, or gross or net income or profits a prospective purchaser may earn"; "the cost, or the performance, efficacy, nature, or central characteristics of the business opportunity or the goods or services offered"; or "any material aspect of any assistance offered to a prospective purchaser"); 16 CFR 436.9(a), (c) (The Franchise Rule provides that it is an "unfair or deceptive act or practice" to "[m]ake any claim or representation . . . that contradicts" the required disclosures, which include certain pricing information and fees, or to "[d]isseminate any financial performance representations to prospective franchisees unless the franchisor has a reasonable basis and written substantiation for the representation[.]").

[413] *See, e.g.*, *Harry & Bryant Co. v. FTC*, 726 F.2d 993, 999–1001 (4th Cir. 1984) (holding that petitioners challenging Funeral Rule were not denied procedural due process, and that the rule was within the Commission's statutory authority and supported by substantial evidence); *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 983–88, 991 (D.C. Cir. 1985) (holding that the FTC did not exceed its authority when promulgating the Trade Regulation Rule on Credit Practices under sections 5 and 18 of the FTC Act, and that the rule was supported by substantial evidence and not arbitrary, capricious, or an abuse of discretion); *Consumers Union of U.S., Inc. v. FTC*, 801 F.2d 417, 422, 426 (D.C. Cir. 1986) (denying petition for review of FTC Used Car Rule and holding that Commission's decision to omit a proposed disclosure requirement from the rule had evidentiary support under both the FTC's substantial evidence test and the

In sum, this is a far cry from a situation where Congress "conspicuously and repeatedly" declined to grant the agency the claimed power.[414] Quite the opposite—Congress has conspicuously and repeatedly confirmed that promulgating a rule like this final rule is precisely how Congress expects the Commission to use its rulemaking authority. For these reasons, even if the final rule involves a major question, Congress has clearly delegated to the Commission the authority to address that question.

B. Non-Delegation Doctrine

One commenter contended that the Commission's issuance of the rule violates the non-delegation doctrine.[415] The commenter argued that, given the rule's breadth, section 5 lacks an intelligible principle if it authorizes the Commission to promulgate the rule. The commenter asserted that the rule regulates pricing economy-wide and that Congress has not made "the necessary fundamental policy-decision" underlying the rule. The commenter also asserted that the Commission's authority to promulgate the rule is an unconstitutional delegation under a "history and tradition test," citing to a dissenting opinion in *Gundy v. United States*, 588 U.S. 128 (2019).[416] The Commission disagrees. The Commission notes that this commenter's argument that the proposed rule violated the non-delegation doctrine was predicated on its assertion that the proposed rule regulated "the disclosing and collecting [of] consumer fees for all businesses."[417] Since the focus of the final rule is narrowed to Covered Goods or Services, the comment may

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APA's arbitrary and capricious test, which are one and the same as to the requisite degree of evidence); *Pa. Funeral Dirs. Ass'n v. FTC,* 41 F.3d 81, 92 (3d Cir. 1994) (denying petition for review of Funeral Rule and finding that Commission decision to regulate casket handling fees was not arbitrary or capricious and was supported by substantial evidence).

[414] *West Virginia v. EPA*, 597 U.S. at 724.

[415] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).

[416] *Id*. (citing *Gundy*, 588 U.S. at 159 (Gorsuch, J., dissenting, joined by Roberts, C.J. and Thomas, J.)).

[417] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).

not be relevant to the final rule. Nevertheless, the Commission addresses the arguments herein.

"Only twice in this country's history has the Court found a delegation excessive, in each case because 'Congress had failed to articulate *any* policy or standard' to confine discretion."[418] Article I of the Constitution vests the Federal government's legislative powers in Congress, and Congress may not delegate those powers to an executive agency absent an intelligible principle to guide the exercise of discretion.[419] The "intelligible principle" standard is "not demanding."[420] This is because of the practical understanding that "'in our increasingly complex society, replete with ever changing and more technical problems,' . . . 'Congress simply cannot do its job absent an ability to delegate power under broad general directives.'"[421] For that reason, the Supreme Court has repeatedly held that "a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'"[422]

As described throughout section IV.A, Congress, the Commission, and the courts have long understood the Commission's mandate to prevent both unfair and deceptive acts or practices as providing intelligible principles to guide the exercise of the Commission's discretion. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court observed that conduct that fell within the ambit of section 5 of the FTC Act was "to be determined in particular instances, upon evidence, in the light of

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[418] *Gundy*, 588 U.S. at 130 (plurality op.) (quoting *Mistretta v. United States*, 488 U.S. 361, 373 n.3 (1989)).
[419] U.S. Const. art. I, sec. 1; *see also, e.g.*, *Mistretta*, 488 U.S. at 372.
[420] *Gundy*, 588 U.S. at 146.
[421] *Id*. at 135 (quoting *Mistretta*, 488 U.S. at 372).
[422] *Id*. (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (brackets in original).

particular competitive conditions and of what is found to be a specific and substantial public interest."[423] The Court ultimately concluded that Congress properly delegated authority to the FTC under the FTC Act based, among other things, on the subject matter and procedural requirements Congress placed on the Commission—which involves "notice and hearing," "appropriate findings of fact supported by adequate evidence," and "judicial review."[424]

FTC rulemaking under section 18 features similar procedural safeguards to FTC adjudication and thus comports with the nondelegation doctrine for the same reasons. For example, section 18's rulemaking process requires the Commission to: (1) notify Congress; (2) publish multiple public notices of the proposed rulemaking; (3) provide all interested persons the opportunity to "submi[t] . . . written data, views, or arguments"; (4) consider all submissions; (5) provide the opportunity for an informal hearing; (6) determine, based on all available information, that the unfair or deceptive acts or practices are prevalent; and (7) determine, based on the rulemaking record, that the final rule is appropriate. In addition, once the rule is finalized, it is subject to judicial review in a court of appeals.[425] The rulemaking process thus "may actually be fairer to regulated parties than total reliance on case-by-case adjudication" because the process allows all interested parties the opportunity to weigh in by submitting data, views, and arguments

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[423] *A.L.A. Schechter*, 295 U.S. at 532–33. In so holding, the Supreme Court in *A.L.A. Schechter* referred to cases in which both unfair and deceptive practices were determined to be unfair methods of competition. 295 U.S. at 532–33 (citing *FTC v. R.F. Keppel*, 291 U.S. 304 (1934) and *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934)). Congress later clarified in the Wheeler-Lea Act of 1938 that unfair and deceptive practices are unlawful under the FTC Act independent of any effect they may have on competition. 52 Stat. 111. Accordingly, the *A.L.A. Schechter Court's* conclusion that Congress's grant of authority to the Commission is guided by intelligible principles applies equally to the Commission's authority to identify unfair or deceptive acts or practices and to the Commission's authority to identify unfair methods of competition.

[424] *A.L.A. Schechter*, 295 U.S. at 533–36.

[425] 15 U.S.C. 57a(b)(1)–(2). Section 18 requires both an advance notice of proposed rulemaking and a notice of proposed rulemaking to engage with and solicit comment from interested parties.

and by participating in a hearing.[426] In this rulemaking, interested parties had numerous opportunities to be heard by the Commission, including through ninety-day public comment periods on both an advance notice of proposed rulemaking and a notice of proposed rulemaking, as well as an informal hearing. These procedures helped to ensure that the Commission properly applied its statutory mandate when adopting the rule to prevent prevalent unfair and deceptive practices concerning hidden and misleading fees.

Like the FTC's Act's procedural requirements, the subject matter requirements that apply to the FTC's statutory authority are well established. With respect to unfairness, Congress articulated in section 5(n) of the FTC Act the factors the Commission must apply.[427] For deception, virtually all courts have adopted the three-part test put forward by the Commission in its Deception Policy Statement: (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.[428] For decades, courts have reviewed and upheld the Commission's application of unfairness and deception authority in enforcement actions and rules. Moreover, the Supreme Court has recognized the ability of regulators, courts, and regulated entities to distinguish deceptive from nondeceptive claims or advertisements under section 5 of the FTC Act.[429] In sum, the subject matter requirements of the FTC Act's statutory authority as to unfair and deceptive practices are well settled.

[426] *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 681–83 (D.C. Cir. 1973).
[427] 15 U.S.C. 45(n).
[428] Fed. Trade Comm'n, *FTC Policy Statement on Deception*, 103 F.T.C. 174, 175 (1984) (sent by letter to Congress on October 14, 1983 and appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984) (hereinafter "*Deception Policy Statement*"), *https://www.ftc.gov/system/files/ftc_gov/pdf/Cliffdale-Assocs-103-FTC-110.pdf*.
[429] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 645–46 (1985).

Finally, the Supreme Court has not adopted the commenter's suggested "history and tradition test" as the applicable standard for determining whether congressional delegation of authority is constitutional. The intelligible principle test is binding precedent on that question, and the final rule complies with the intelligible principle test.

C. First Amendment

Some commenters argued that § 464.2 impermissibly prohibits and compels speech in violation of the First Amendment.[430] The Commission disagrees. The rule addresses unfair and deceptive conduct and does not otherwise affect Businesses' ability to express truthful and accurate price information.

1. Comments

Some commenters argued the rule's disclosure requirements compel speech in violation of the First Amendment. Some commenters also contended that § 464.2 would prohibit businesses from advertising aspects or parts of truthful and accurate price information. They argued that conditioning the ability to provide some truthful information—such as a partial price without including certain fees—on Total Price being disclosed violates the First Amendment.[431] Commenters asserted that consumers are not injured where a business presents a price that omits fees or fails to add up the fees for the consumer. They argued that this type of price information is useful and truthful even if it

[430] *See, e.g.*, FTC-2023-0064-3028 (Competitive Enterprise Institute); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3233 (NCTA—The Internet and Television Association); FTC-2023-0064-3016 (National Federation of Independent Business). In opposing § 464.2, the commenters did not argue that § 464.3, which simply prohibits misrepresentations related to prices and fees, implicates the First Amendment.

[431] *E.g.*, FTC-2023-0064-3028 (Competitive Enterprise Institute provided examples of pricing information it argued was not unfair or deceptive that involve drip pricing with disclaimers, contingent pricing, and partition pricing.) The Commission addresses in section III.B.1 when and to what extent the rule covers these types of information and also explains why the omission of Total Price is unfair and deceptive in those circumstances.

is only partial. A commenter argued that how the price of goods and services is displayed is a message under the First Amendment and the rule's requirement that Total Price be displayed clearly and conspicuously is unconstitutional compelled speech.[432] One academic commenter supported the rule and argued it does not unconstitutionally compel speech because it only requires disclosure of factual, non-controversial information, without which the prices disclosed or advertised would be misleading.[433]

Some commenters argued the requirement to disclose Total Price clearly and conspicuously should be subject to strict scrutiny,[434] while others argued it should be reviewed under a heightened scrutiny standard[435] or intermediate scrutiny.[436] One commenter argued that the rule is a content-based regulation subject to strict scrutiny because, where a business presents any type of price information, it is required to display Total Price and in a particular way—i.e., clearly, conspicuously, and prominently.[437] The commenter argued that the Commission failed to demonstrate the rule directly advances any compelling government interest. Another commenter argued that price information is commercial speech subject to intermediate scrutiny and that the rule fails to meet the standard because, even if some price displays without Total Price are deceptive, not all such displays are deceptive.[438]

Some commenters asserted that the rule's application to credit card surcharges and Government Charges violated the First Amendment. An industry commenter interpreted

[432] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[433] FTC-2023-0064-3275 (Berkeley Law Center for Consumer Law & Economic Justice et al.).
[434] FTC-2023-0064-3028 (Competitive Enterprise Institute); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[435] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[436] FTC-2023-0064-3016 (National Federation of Independent Business).
[437] FTC-2023-0064-3028 (Competitive Enterprise Institute).
[438] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).

the rule to require all credit card surcharges to be included in Total Price. The commenter argued that this amounts to a ban on presenting credit card surcharges to consumers, which is regulation of commercial speech that violates merchants' First Amendment rights. The commenter cited to several State laws banning credit card surcharges or fees, but allowing cash discounts, that were struck down by Federal courts of appeals.[439] Two commenters argued that the rule's allowance for Government Charges to be excluded from Total Price—while other fees or charges cannot be excluded—amounts to content-based regulation of speech that provides preferential treatment to the government.[440] One commenter argued that the rule would allow businesses to conceal Government Charges and shows favoritism for government speech to assist it in raising tax revenues; the commenter proposed the alternative of marginally raising the tax rate.[441] The commenter also argued that the rule is underinclusive because Total Price does not include Government Charges, arguing that consumers suffer the same harm of being surprised by government fees as with non-Government Charges required to be included in Total Price. Finally, other commenters recommended that the Commission adopt a rule that only prohibits deceptive conduct without requiring specific affirmative disclosures.[442]

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[439] FTC-2023-0064-3128 (Merchants Payments Coalition).

[440] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3233 (NCTA—The Internet & Television Association).

[441] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP "assume[d]" that in allowing government charges to be excluded from Total Price, the Commission aims to "rais[e] tax revenues" because the Commission believes "disclosing a tax upfront will lead to fewer people making purchases, resulting in a decline in revenue"). The commenter did not address the fact that the Commission does not have authority over taxation, or whether the commenter's proposed alternative of raising marginal tax rates would fulfill the Commission's goal in this rulemaking of preventing unfair or deceptive conduct related to mandatory fees and charges. The Commission finds that marginally raising the tax rate is not a viable alternative because the Commission does not have taxing authority and raising the tax rate would not achieve the Commission's stated goal of preventing unfair or deceptive conduct.

[442] FTC-2023-0064-3016 (National Federation of Independent Business); FTC-2023-0064-3028 (Competitive Enterprise Institute).

2. Legal Standard

The Commission finds that Businesses' First Amendment rights are adequately protected because § 464.2's compelled disclosures are in a commercial context and meet the longstanding legal standards governing commercial speech. Courts apply one of two standards in the context of commercial speech. In *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563–64 (1980), the Supreme Court established the analytical framework for determining the constitutionality of a regulation of commercial speech that is not misleading and does not involve illegal activity. Under that framework, described as intermediate scrutiny, the regulation must: (1) serve a substantial governmental interest; (2) directly advance this interest; and (3) not be more extensive than necessary to serve the government's interests.[443] The third prong does not require the government to adopt the least restrictive means. Instead, it simply calls for a "'fit' between the legislature's ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable."[444]

The Supreme Court's "precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts," such as in commercial speech, as set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).[445] Contrary to commenters' assertions, compelled speech in the commercial context is neither unequivocally prohibited nor subject to strict scrutiny under the First Amendment. Rather, the First Amendment permits required disclosures that are: (1) factual and

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[443] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.
[444] *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal citations omitted).
[445] *Zauderer*, 471 U.S. at 650–53; *Nat'l Inst. of Family & Life Advocates v. Becerra* ("*NIFLA*"), 585 U.S. 755, 768 (2018); *see also Milavetz, Gallop & Milavetz P.A. v. United States*, 559 U.S. 229, 249–50 (2010) (applying "the less exacting scrutiny described in *Zauderer*" and upholding a requirement that advertisements include a disclosure "intended to combat the problem of inherently misleading commercial advertisements").

uncontroversial; (2) reasonably related to the government's interest—here, preventing unfair and deceptive commercial practices that harm consumers; and (3) not "unjustified or unduly burdensome."[446] The final rule's disclosure requirements satisfy these parameters.

3. The Rule's Disclosure Requirements Are Constitutional Under *Zauderer*

Section 464.2 applies to speech that is, at its core, commercial—the disclosure and advertising of the price for goods and services.[447] It requires precisely the type of disclosure the Supreme Court has confirmed is constitutional under *Zauderer*.[448] In *Zauderer*, the Supreme Court considered a challenge to government-compelled

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[446] *Zauderer*, 471 U.S. at 653; *see also Am. Meat Inst. v. USDA*, 760 F.3d 18, 22–23 (D.C. Cir. 2014) (*en banc*) (holding *Zauderer* applies to compelled commercial speech in service of government interests in addition to preventing and correcting deception); *CTIA—The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir. 2019) (holding *Zauderer* applies to compelled commercial health and safety disclosures if they further a substantial government interest) (citing *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 564; *NIFLA*, 585 U.S. at 768, 775)); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310, 310 n.8 (1st Cir. 2005) (clarifying that the application of *Zauderer* is not limited to cases in which the compelled disclosure prevents deception and upholding compelled commercial disclosures based on government interests in preventing deception and "increasing public access to prescription drugs"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) (applying *Zauderer* to compelled commercial disclosure even though it "was not intended to prevent 'consumer confusion or deception' per se, . . . but rather to better inform consumers about the products they purchase") (internal citation and quotation marks omitted) (citing *Zauderer*, 471 U.S. at 651).

[447] *See Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017) (reviewing State law regulating disclosure of differentiation of prices for credit card versus other types of payment and remanding for determination of whether the statute "is a valid commercial speech" regulation); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) ("Most of the appellee's mailings consisted primarily of price and quantity information, and thus fell within the core notion of commercial speech—speech which does 'no more than propose a commercial transaction.'") (cleaned up) (citing *Bolger v. Young's Prods. Corp.*, 463 U.S. 60, 66 (1983)); *see generally Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561 (referring to commercial speech as "expression related solely to the economic interests of the speaker and its audience"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (commercial speech includes speech that does "no more than propose a commercial transaction" (internal citations omitted)); *see also Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) ("the advertiser knows his product and has a commercial interest in its dissemination"; "any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability.").

[448] *Zauderer*, 471 U.S. at 651–53; *see also NIFLA*, 585 U.S. at 768–69 (restating the *Zauderer* standard, noting that "purely factual and uncontroversial information about the terms under which . . . services will be available . . . should be upheld unless they are unjustified or unduly burdensome" (internal citations omitted)).

commercial speech in an advertisement by an attorney. The advertisement stated that certain types of cases were handled on a contingent fee basis for which the client owed no legal fees if the lawsuit was unsuccessful. The State required such advertisements to disclose that clients may be liable for litigation costs even if their lawsuit is unsuccessful. The attorney argued such a requirement was compelled speech in violation of the First Amendment. The Supreme Court disagreed. Noting that the disclosure applied to commercial advertising, the Court held that an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[449] The Court concluded, "The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed."[450] The Court also noted that attorneys were not prevented from conveying information to the public—they were merely required "to provide somewhat more information than they might otherwise be inclined to present . . . in order to dissipate the possibility of consumer confusion or deception."[451]

Section 464.2 satisfies all prongs of *Zauderer*. First, § 464.2 only requires Businesses to disclose factual and noncontroversial pricing information, by incorporating known mandatory fees or charges into Total Price, with exceptions, and by disclosing certain other customary pricing information before a consumer consents to pay. As described in section II.B, the purpose of the rule is to ensure that consumers know the

[449] *Zauderer*, 471 U.S. at 651.
[450] *Id.* at 653.
[451] *Id.* at 650–51 (internal quotation omitted).

total amount they will have to pay because this information is material to consumer decision making.

Second, Parts II.B and III lay out in detail how the rule is reasonably related to—and, in fact, directly advances—the government's interest in preventing unfairness and deception in the marketplace. Preventing unfair and deceptive conduct is the Commission's mandate under sections 5 and 18 of the FTC Act.[452] And based on voluminous comments from the public as well as significant empirical evidence, the Commission finds that consumers seeking to purchase Covered Goods or Services are likely to be deceived and harmed if the required disclosures are not made.

Finally, § 464.2 is neither unduly burdensome nor unjustified. The Commission set forth the justification for the required disclosures in Parts II and III, including the harms to consumers and to competition from drip or partitioned pricing. Further, the rule does not impose an undue burden; Businesses offering Covered Goods or Services are simply required "to provide somewhat more information than they might otherwise be inclined to present." [453] The rule merely requires Clear and Conspicuous display of Total Price if other Pricing Information is displayed, and requires certain pricing and informational disclosures before the consumer consents to pay. As described in detail in section III, the final rule permits Businesses to exclude from Total Price certain mandatory fees or charges that industry commenters stated would be impractical or burdensome for inclusion in Total Price.

The Commission disagrees with a commenter who seemed to argue that because the rule imposes disclosure requirements as to "how" Total Price is displayed, the rule

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[452] 15 U.S.C. 45, 57a.
[453] *Zauderer*, 471 U.S. at 650.

"offends the First Amendment" by compelling speech.[454] In so arguing, the commenter cited to *303 Creative, LLC v. Elenis*, 600 U.S. 570 (2023). The Supreme Court in *303 Creative* considered an as-applied challenge to the Colorado Anti-Discrimination Act ("CAD") by a sole proprietor who designed individualized websites the Court concluded "qualify as pure speech," with each website being an "original, customized creation."[455] While the Court in that case held that the CAD violated the First Amendment as applied to the plaintiff, the rule here is distinguishable from the facts of *303 Creative.* First, both price and how price is displayed (here, how Total Price is displayed) relate solely to proposing a commercial transaction and to the economic interests of the speaker and its audience.[456] Second, the Court based its decision in *303 Creative* on the unique nature of the plaintiff's work, noting the plaintiff "does not seek to sell an ordinary commercial good."[457] In comparison, the rule merely requires the display of the Total Price of a Covered Good or Service—live-event tickets and short-term lodging—which is core commercial speech.

Therefore, the Commission finds that the disclosure requirements are consistent with the compelled speech analysis under *Zauderer*. Clear, conspicuous, and prominent disclosure of Total Price in advertisements, displays, or offers, and the disclosure of complete pricing information of Covered Goods or Services before the consumer consents to pay, directly advance the Commission's interest in preventing deception and harm. The rule's requirements enable consumers to receive the information they need to

[454] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[455] *303 Creative*, 600 U.S. at 587–88.
[456] *See* cases cited *supra* note 447 (defining commercial speech).
[457] *303 Creative*, 600 U.S. at 593–94.

make informed purchasing decisions about live-event tickets and short-term lodging based on complete and truthful information.

4. The Rule Does Not Prohibit Truthful Speech

Commenters asserted that the rule amounts to a prohibition on the display of truthful price information in violation of the First Amendment because the rule prohibits certain information (like partial prices without mandatory fees) from being displayed without displaying Total Price. Commenters also asserted that, because the rule prohibits certain displays of price, like parts of prices without fees, it should be evaluated under *Central Hudson*. The Commission disagrees. First, the commenters "overlook[] material differences between disclosure requirements and outright prohibitions on speech."[458] The rule does not prevent Businesses from conveying information to the public and, in particular, it does not prohibit the disclosure of the components of Total Price. Businesses remain free to describe, disclose, or convey price, fee, and charge information.[459] Put differently, the rule permits any truthful pricing claims an advertiser wants to make; what it forbids is half-truths that omit Total Price.

Section 464.2 does require a Business that displays certain pricing information about Covered Goods or Services to also provide factual and non-controversial information in the form of Total Price. Although Total Price may be "somewhat more information than they might be otherwise inclined to present," such a requirement is allowed by *Zauderer*.[460] With the rule's requirement that Total Price be clear,

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[458] *Zauderer*, 471 U.S. at 650.
[459] Of course, Businesses offering, displaying, or advertising a Covered Good or Service cannot misrepresent the nature, purpose, amount, or refundability of any fee or charge under § 464.3; this requirement is consistent with the First Amendment. *See Ibanez v. Fla. Dep't of Bus. & Prof'l. Regul.*, 512 U.S. 136, 142 (1994) ("false, deceptive, or misleading commercial speech may be banned" (citations omitted)). Commenters did not argue § 464.3 violates the First Amendment.
[460] *Zauderer*, 471 U.S. at 650.

conspicuous, and prominent, the Commission balances industry commenters' stated desire to display other price information with its finding that Total Price is a necessary piece of price information for consumers if any other price information is displayed.[461]

Because the rule does not restrict truthful speech, and because the conduct the rule addresses (advertising prices without mandatory fees) is deceptive, the Commission need not apply the *Central Hudson* factors. Nevertheless, the rule would meet them. Under *Central Hudson*, the regulation must serve a substantial governmental interest, must directly advance that interest, and must not be more extensive than necessary to serve the government's interest.[462] As outlined in Parts II and III, the rule serves the substantial governmental interest of providing material price information to consumers purchasing live-event tickets and short-term lodging to allow them to make accurate price comparisons and informed purchasing decisions, and to allow Businesses to compete on price in a level playing field. And consistent with the third prong of *Central Hudson*, the rule is no more extensive than necessary to serve the government's interests in preventing unfairness, deception, and harm, as the rule simply requires clear, conspicuous, and prominent display of Total Price. *Central Hudson* acknowledges that the government can regulate the format of advertising, including by requiring a disclosure.[463]

The Commission also disagrees with commenters arguing the rule violates is overinclusive and would prohibit some displays of partial price that are not deceptive or

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[461] Indeed, the *Zauderer* Court noted that "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'" *Id.* at 651 (citation omitted).

[462] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

[463] *See id.* at 570–71 ("To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future.").

unfair without the display of Total Price. Again, because truthful itemization of price components is not prohibited by the rule, commenters' contention that the rule is a prohibition on speech misses the mark. The Commission finds, however, that the display of the price of a good or service without disclosing Total Price clearly, conspicuously, and prominently is unfair and deceptive and harms consumers and honest competitors. Because the third prong of *Central Hudson* does not require the government to use the least restrictive means necessary to advance its interest, the rule would be constitutional even if it prohibited displaying partial price in instances that, in isolation, may not be unfair or deceptive. The same is true under *Zauderer*, where the Court held that the State's "assumption that substantial numbers of potential clients would be . . . misled" about the possibility that they would be responsible for litigation costs—in contrast to proving that all potential clients would be misled—was sufficient to meet the standard.[464]

The Commission addresses in section III commenters who argued that it should adopt alternative policies, such as prohibiting misrepresentations and allowing businesses to disclose amounts or fees as they wish. As relevant here, commenters argued that the Commission should adopt those alternatives because they would not violate the First Amendment. The Commission finds that the rule, including § 464.2, does not violate the First Amendment. Given the Commission's finding that failure to disclose Total Price is unfair and deceptive, the rule's affirmative disclosure requirements are needed to achieve the Commission's goal of preventing this unfair and deceptive conduct.

[464] *Zauderer*, 471 U.S. at 652–53.

5. The Rule's Treatment of Credit Card Fees and Government Charges Does Not Violate the First Amendment

The rule does not violate the First Amendment in its treatment of credit card fees and Government Charges. First, as noted in section III.B.1.c, the rule does not prohibit a Business from charging or passing through credit card fees if otherwise allowed by law. The rule also does not affect State laws that prohibit credit card surcharges. Whether credit card charges must be included in Total Price depends on whether a Business makes such fees mandatory. If a Business offers consumers multiple viable payment methods for the offered transaction, so that paying with a credit card is optional, then credit card fees are not for a "mandatory Ancillary Good or Service" under the rule and need not be included in Total Price. In addition, where credit card fees are mandatory, the rule does not prohibit Businesses from itemizing them as long as they are also included in Total Price. Accordingly, there is no merit to commenters' concerns that consumers will not understand the impact of costs affecting Businesses, since Businesses can itemize those costs under the rule.

The Commission also disagrees with commenters' argument that § 464.2 violates the First Amendment as a content-based regulation because it does not require Businesses to include Government Charges in Total Price. One commenter, who argued the point in detail, relied on *Barr v. American Ass'n of Political Consultants, Inc.*, 591 U.S. 610 (2020), in which the Supreme Court held that an exclusion for collectors of government debt from the Telephone Consumer Protection Act ("TCPA"), which generally prohibits robocalls, violated the First Amendment. A majority agreed that the exclusion for collectors of government debt was severable—the prohibition on robocalls was upheld.

The exclusion provision in the TCPA addressed in *Barr* is distinguishable from the final rule in several ways. At the outset, the rule does not favor Government Charges unequivocally. While the rule allows Businesses to exclude Government Charges from Total Price, it does not require Businesses to do so. Businesses have a choice—they may include Government Charges in Total Price. Second, the commenter makes specific and erroneous assumptions about the Commission's reasoning for excluding Government Charges from Total Price, such as that the Commission's interest in adopting the rule includes favoring taxes and increasing tax revenue. Tax revenues have no bearing on the Commission's decision to adopt this rule. As noted in section III.A.5, consumers have come to understand and expect sales tax to be added at the end of a purchase, and there are other Federal, State, and local laws that have specific requirements about disclosing taxes and other Government Charges. In addition, in many online transactions, Businesses are unable to fully calculate certain components of Government Charges until a consumer provides their location information. Thus, the Commission has good reason to allow Businesses to exclude Government Charges from Total Price if they choose.[465]

D. Commission Structure

One commenter argued the Commission is unconstitutionally structured because the Commissioners are shielded from removal and asserts that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), either no longer applies or was wrongly decided by the Supreme Court.[466] The same commenter asserted that the Commission's

[465] The Commission modifies the definition of "Government Charges" from those fees or charges "imposed on consumers" to those "imposed on the transaction" to limit the potential distinction between fees and charges imposed directly on consumers and those imposed on Businesses. *See supra* section III.A.5.
[466] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).

administrative law judges are unconstitutionally appointed by the Commission Chair and are unconstitutionally shielded from removal.[467] The Commission disagrees.

In *Humphrey's Executor*, the Supreme Court addressed the crux of the commenter's first argument and concluded that the Commission's structure is constitutional. In that case, President Roosevelt sought to remove a Commissioner without cause. The Court held that the FTC Act authorized removal of Commissioners only on the grounds specified in the statute ("inefficiency, neglect of duty, or malfeasance in office") and that this limitation on the President's removal power was constitutional given the "character of the [C]ommission and the legislative history which accompanied and preceded the passage of the act."[468] The commenter's arguments that *Humphrey's Executor* is no longer applicable are unavailing. The Supreme Court's decision is not rendered any less binding because Congress has refined the Commission's authorities during the course of its more than 100-year tenure.[469] The key policy rationale underlying *Humphrey's Executor* remains valid today. The Commissioners collectively act as an adjudicatory body, and the for-cause removal standard ensures that they are free from "suspicion of partisan direction" or "political domination or control."[470] Congress has similarly provided for-cause removal standards for the members of many other non-Article III tribunals composed of multiple members who perform adjudicatory functions as an expert body within a specific area of the law.[471]

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[467] *Id.*
[468] *Humphrey's Executor*, 295 U.S. at 624–32.
[469] *See FTC v. Am. Nat'l Cellular, Inc.*, 810 F.2d 1511, 1513–14 (9th Cir. 1987) (enactment of section 13(b) of the FTC Act did not render *Humphrey's Executor* inapposite).
[470] *Humphrey's Executor*, 295 U.S. at 625.
[471] *See Collins v. Yellen*, 594 U.S. 220, 250 n.18 (2021); *Wiener v. United States*, 357 U.S. 349, 353 (1958).

Next, the commenter incorrectly asserted that administrative law judges are appointed by the Chair and are unconstitutionally shielded from removal. The commenter argued that under *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), administrative law judges must be appointed by the full Commission and that the appointment process for administrative law judges at the FTC is unconstitutional because administrative law judges are appointed by the Commission Chair alone.[472] The commenter is mistaken. The Commission voted in December 2023 to approve the appointment of Administrative Law Judge Jay L. Himes.[473] The Chief Presiding Officer—here, the Chair pursuant to 16 CFR 0.8—then selected Judge Himes to be the presiding officer for this rulemaking, and Judge Himes was properly designated as the presiding officer in the Commission's notice of informal hearing.[474]

In response to the commenter's contention that the removal protections for the Commission's administrative law judges are unconstitutional, the Commission notes that the Supreme Court has recognized in recent decisions that Congress may constitutionally restrict the President's at-will removal power with regard to inferior officers.[475] In *Collins v. Yellen*, 594 U.S. 220 (2021), for example, the Court declined to "revisit . . . prior decisions allowing certain limitations on the President's removal power,"[476] which include the "good cause" protections for inferior officers "with limited duties and no

[472] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[473] Press Release, Fed. Trade Comm'n, *FTC Announces Appointment of Jay L. Himes as New Administrative Law Judge* (Mar. 12, 2024), *https://www.ftc.gov/news-events/news/press-releases/2024/03/ftc-announces-appointment-jay-l-himes-new-administrative-law-judge*.
[474] Initial notice of informal hearing; final notice of informal hearing; list of Hearing Participants; requests for submissions from Hearing Participants: Trade Regulation Rule on Unfair or Deceptive Fees, 89 FR 21216 (Mar. 27, 2024); *see also* 16 CFR 0.8, 1.13.
[475] *See, e.g.*, *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133–36 (9th Cir. 2021) (holding that administrative law judge removal protections are constitutional).
[476] *Collins,* 594 U.S. at 250–51 (discussing *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020)).

policymaking or administrative authority" described by the Court in *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020).[477] In *Free Enter. Fund,* the Court held removal protections for Public Company Accounting Oversight Board members unconstitutional and contrasted the duties of those members with the lesser duties of administrative law judges: "[U]nlike members of the [Public Company Accounting Oversight] Board," administrative law judges (1) "perform adjudicative rather than enforcement or policy making functions," or (2) "possess purely recommendatory powers."[478] The FTC's administrative law judges fit squarely within both of those descriptions.

Even if the appointment procedures and removal protections of administrative law judges were unconstitutional because of their role as inferior officers under Article II, the constitutionality of the rule would not be in question because presiding officers under section 18 are not "officers" under Article II. Notably, while the presiding officer in the Informal Hearing for this rulemaking happened to be an administrative law judge, neither section 18(c)(1)(B) nor the Commission's rules implementing that provision require an administrative law judge to preside over section 18 informal hearings.[479]

Instead, the presiding officer is a specific, temporary designation made under section 18(c) and its implementing rules, 16 CFR 1.11–1.13. The Supreme Court's framework for distinguishing between officers and employees asks whether an individual "exercise[s] significant authority pursuant to the laws of the United States" and occupies a position that is "continu[ous] and permanent."[480] For presiding officers, neither is true.

[477] *Seila Law*, 591 U.S. at 217–18.
[478] *Free Enter. Fund*, 561 U.S. at 507 n.10.
[479] 15 U.S.C. 57a(c)(1)(B); 16 CFR 1.13.
[480] *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (in the "Court's basic framework for distinguishing between officers and employees[,] . . . an individual must occupy a 'continuing' position established by law to qualify as an officer . . . [and] 'exercise[] significant authority pursuant to the laws of the United States'" (citations omitted)).

As relevant here, the role of the presiding officer in section 18 rulemakings—assisting in the collection of necessary information for the rulemaking to proceed, ensuring hearings proceed methodically, and maintaining the rulemaking record[481]—is not policymaking; that role is reserved for the Commission.[482] Moreover, an administrative law judge, whether or not he or she is serving as a presiding officer, cannot initiate a rulemaking, decide its subject, decide whether a rule should issue, or establish its content. The Commission performs all of these functions.[483]

As an initial matter, the Commission determines whether an informal hearing will be conducted; presiding officers do not have discretion over whether the hearing will occur. The presiding officer simply "presides over the rulemaking proceedings" and, when appropriate, makes a "recommended decision based upon the findings and conclusions of such officer."[484] The presiding officer's powers in the conduct of the hearing are also limited. For example, the officer may not extend the time allotted for the informal hearing beyond a certain period "unless the Commission, upon a showing of good cause, extends the number of days for the hearing."[485] The commenter is correct that the presiding officer is initially chosen by the "chief presiding officer," who is the Chair of the FTC under 16 CFR 0.8. However, the formal assignment of that presiding officer to a particular hearing is in the initial notice of informal hearing, which is issued by vote of the Commission. Although the presiding officer reports to the chief presiding officer, again, the powers of the two together amount to no more than conducting the

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[481] 15 U.S.C. 57a; 16 CFR 0.14.
[482] 16 CFR 1.13.
[483] 16 CFR 1.9, 16 CFR 1.13(i), 16 CFR 1.14, 16 CFR 1.25, 16 CFR 1.26(d).
[484] 15 U.S.C. 57a(c).
[485] 16 CFR 1.13(a)(2)(ii).

informal hearing and making a recommended decision based on the presiding officer's findings to the Commission.[486] All substantive decisions are made by the Commission. These are temporary assignments that begin and end with the informal hearing process.

Accordingly, neither the Commission's structure nor the role of the presiding officer in section 18 violates the Constitution.

E. Administrative Procedure Act

Several commenters asserted the Commission has not complied with the APA.[487] The Commission disagrees. The Commission complies with the APA's requirements, including by explaining the rule's relationship to the unfair and deceptive conduct the Commission seeks to prevent and by responding to all significant comments.[488] As explained herein, the Commission also complies with the additional requirements of sections 18 and 22 of the FTC Act.

Commenters claimed that the rule is arbitrary and capricious because it is not based on sufficient facts or data, and lacks a rational connection between the facts and the regulatory choices.[489] These commenters argued that the factual record does not support the Commission's decision to promulgate an industry-neutral rule or to apply the rule to

[486] 16 CFR 1.13.

[487] FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3152 (Building Owners & Managers Association et al.); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3263 (Flex Association); FTC-2023-0064-3294 (International Franchise Association).

[488] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983) (holding that an agency must articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choices made." (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).

[489] *See, e.g.*, FTC-2023-0064-3294 (International Franchise Association); FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3152 (Building Owners & Managers Association et al.); FTC-2023-0064-3263 (Flex Association).

particular industries.[490] One commenter criticized various substantive aspects of the rule including its breadth, consideration of alternatives, and costs.[491] The commenter also argued that the rule is duplicative and could lead to regulatory confusion.[492]

The Commission has carefully reviewed and considered the comments and information it received in this rulemaking. As a preliminary matter, the NPRM engaged in extensive discussion concerning the comments received in response to the ANPR and followed up with additional questions and requests for empirical data and proposed rule text. Likewise, the analysis contained throughout this SBP, particularly Parts III–VII, similarly engages with and considers the additional significant comments and information received in response to the NPRM. Commenters raising questions regarding APA compliance primarily critiqued the industry-neutral nature of the proposal advanced in the NPRM. The Commission disagrees with these critiques. The Commission, however, has determined to limit this final rule to Covered Goods or Services and need not address arguments regarding the application of the rule to a wide range of industries at this time. Further, both the NPRM and this SBP explain in detail the factual record and its relationship to the provisions finalized in the rule. While empirical data is not required, the Commission in section V presents an analysis for the final rule, identifying benefits, such as reductions in consumer search cost time and deadweight loss, and quantifying compliance costs. Finally, in section V.E.2.d, the Commission finds that the rule's benefits to the public will exceed its costs.

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[490] *See, e.g.*, FTC-2023-0064-3294 (International Franchise Association); FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3152 (Building Owners & Managers Association et al.); FTC-2023-0064-3263 (Flex Association).
[491] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[492] *Id*.

V. Final Regulatory Analysis Under Section 22 of the FTC Act

Under section 22 of the FTC Act, when the Commission promulgates any final rule as a "rule" as defined in section 22(a)(1), it must include a "final regulatory analysis." 15 U.S.C. 57b-3(b)(2). The final regulatory analysis must contain: (1) a concise statement of the need for, and objectives of, the final rule; (2) a description of any alternatives to the final rule that were considered by the Commission; (3) an explanation of the reasons for the Commission's determination that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; (4) an analysis of the projected benefits, any adverse economic effects, and any other effects of the final rule; and (5) a summary of any significant issues raised by the comments submitted during the public comment period in response to the Preliminary Regulatory Analysis, and the Commission's assessment of such issues. 15 U.S.C. 57b-3(b)(2)(A)–(E). The Commission analyzes each of these components in the following final regulatory analysis.

The Commission has the authority to promulgate this rule under section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1). In explaining the need for, and objectives of, the rule, the Commission observes that a clear rule is the best way to accomplish its goals of: (1) ensuring that consumers receive truthful, timely, and transparent information about price to permit them to comparison shop effectively and (2) leveling the playing field for honest competitors. In addition, a clear rule would deter the defined unfair or deceptive pricing practices by enabling the Commission to more readily obtain monetary relief and

civil penalties. The Commission carefully considered several alternatives to the rule, including terminating the rulemaking and pursuing a broader, industry-neutral alternative. The Commission determined that the alternative of terminating the rulemaking would not accomplish these objectives. As explained in section II, the Commission finds that bait-and-switch pricing and misleading fees and charges are prevalent economy-wide, but chooses to begin by tackling these practices in the live-event ticketing and short-term lodging industries, where the Commission first began evaluating drip pricing more than a decade ago and which have a long history of harming consumers and businesses. The final rule will attain its objectives of promoting truthful, timely, and transparent pricing, comparison shopping, and fair competition in the live-event ticketing and short-term lodging industries in a manner consistent with applicable law. The Commission will rely on its existing section 5 authority in pursuing case-by-case enforcement actions against Businesses in other industries that engage in the specific unfair and deceptive pricing practices that are the subject of the industry-specific coverage in this rule.

The Commission's final regulatory analysis indicates that adoption of the rule will result in benefits to the public that exceed the costs. As described further herein, the rule will not only result in significant benefits to consumers but also improve the competitive environment in the live-event ticketing and short-term lodging industries, particularly for small, independent, or new firms. One such benefit is that the final rule will reduce deadweight loss. "Deadweight loss" is a term used to describe the loss of efficiency or economic welfare, a cost to society, that occurs when resources are not used as efficiently as possible. At a competitive equilibrium, in which the marginal benefit for consumers equals the marginal cost for firms, there is no deadweight loss. When firms, including

those in the live-event ticketing and short-term lodging industries, engage in bait-and-switch tactics, consumers purchase more goods and services than they would otherwise because they do not understand the full price. In other words, in such cases, consumers overconsume beyond the quantity necessary for competitive equilibrium. This overconsumption is a deadweight loss because, if they had full information, consumers would shift their spending toward more beneficial and efficient spending patterns that reflect their true preferences. Deadweight loss is discussed more fully in section V.E.2.a.ii.

The rule provides a net benefit to society if its benefits exceed its costs. The Commission quantifies the incremental benefits for the live-event ticketing and short-term lodging industries and shows that the rule's benefits exceed the costs in these industries.

The Commission reviewed the comments relating to its Preliminary Regulatory Analysis, some of which challenged the Commission's estimation of the rule's potential costs and benefits. In response to these comments, the Commission herein clarifies its analysis and adds a sensitivity analysis to the baseline estimation. The Commission concludes that these comments do not affect the Commission's finding that the potential benefits of the rule exceed the potential costs.

A. Concise Statement of the Need for, and Objectives of, the Final Rule

The Commission believes the final rule is needed to ensure that consumers receive truthful, timely, and transparent information about the total price of goods or services, including the nature, purpose, and amount of any fees or charges imposed on the transaction, so that they can effectively comparison shop and budget their spending dollars when deciding what live-event tickets to purchase or where to stay when

traveling. Although bait-and-switch pricing and misleading fees are already unlawful unfair or deceptive acts or practices under section 5 of the FTC Act, the Commission concludes that a clear rule is the best way to accomplish its goal of preventing the rule's defined, specific unfair and deceptive pricing practices in the live-event ticketing and short-term lodging industries while fostering a level playing field for honest competitors to be able to compete truthfully and fairly based on price. In addition, the final rule aims to increase deterrence of the defined unfair or deceptive pricing practices in these industries by enabling the Commission to more readily obtain redress for injury to consumers through section 19(a)(1) of the FTC Act, 15 U.S.C. 57b(a)(1), and by allowing courts to impose civil penalties where appropriate. The Commission believes that the rule will accomplish these goals without significantly burdening Businesses and will provide significant benefits to consumers and honest competitors.

The record of this rulemaking is replete with comments from consumers, consumer groups, industry members, academics, and policy organizations, as well as officials and agencies across all levels of government, emphasizing the importance of consumers' ability to effectively comparison shop and businesses' ability to honestly compete against each other based on price. Regardless of industry, consumers want to comparison shop when deciding where to purchase their goods or services from among various competing offers. In many instances, consumers have found it increasingly difficult, if not impossible, to effectively comparison shop because businesses fail to provide the total price when they display a purported amount a consumer will pay for a good or service. Consumers are also misled as to the nature, purpose, amount, and refundability of fees and charges, and are unable to make informed choices about the

value of the fee or charge, or the good or service it represents, because their understanding of the fee or charge is predicated on deceptive omissions or false or misleading information. As a result, consumers are harmed because they consume more goods or services, pay more for a good or service, and incur higher search costs than they otherwise would have if they had been presented with the total price upfront and truthful, timely, and transparent information regarding fees and charges. Businesses that honestly present the total price of a good or service and accurately disclose the nature, purpose, and amount of fees and charges are at a competitive disadvantage to those that mislead consumers by presenting purportedly lower prices and inaccurate information about fees and charges. As explained in section II, the record, as well as the Commission's law enforcement actions, outreach, and other engagement with businesses and consumers, support a finding that these practices pervade the economy across industries. Fundamentally, the rule will help consumers make informed decisions when comparison shopping and level the playing field for honest businesses in the live-event ticketing and short-term lodging industries, two industries that have a long history of bait-and-switch pricing and misrepresentations regarding fees and charges.

In addition, the final rule is necessary to allow the Commission to recover redress more efficiently in cases where there is quantifiable consumer harm resulting from bait-and-switch pricing and misleading fees and charges. The final rule will also deter live-event ticketing and short-term lodging businesses from engaging in these practices by allowing for the imposition of monetary relief in the form of consumer redress and civil penalties.

In 2021, the Supreme Court in *AMG Capital Mgmt., LLC v. FTC,* 593 U.S. 67, 82 (2021), held that section 13(b) of the FTC Act[493] did not authorize the Commission to seek, or a court to order, equitable monetary relief for consumers such as restitution or disgorgement. The *AMG* ruling has made it significantly more difficult for the Commission to return money to injured consumers, particularly in cases that do not involve rule violations.[494]

Since *AMG*, the primary means for the Commission to return money unlawfully taken from consumers has been through section 19 of the FTC Act, 15 U.S.C. 57b, which provides two paths for consumer redress. One path, under section 19(a)(2), typically requires the Commission to first conduct an administrative proceeding to determine whether the respondent violated the FTC Act; if the Commission finds that the respondent did so, the Commission can issue a cease-and-desist order, which might not become final until after the resolution of any appeals. To obtain monetary relief, the Commission then must initiate a separate action in Federal court under section 19 and, in that action, the Commission must prove that the violator in the administrative action engaged in objectively fraudulent or dishonest conduct.[495]

The more efficient path to monetary relief is under section 19(a)(1), which allows the Commission to recover redress in a single Federal court action for violations of a Commission rule relating to unfair or deceptive acts or practices.[496] Under the rule, the

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[493] 15 U.S.C. 53(b).
[494] *See* NPRM, 88 FR 77436–38, nn.122, 211, 232 (discussing *AMG*).
[495] *See* 15 U.S.C. 57b(a)(2) ("If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.").
[496] Certain statutes, such as the Restore Online Shoppers' Confidence Act, 15 U.S.C. 8401 through 8405, include provisions that treat violations of the statute as a violation of a rule for purposes of section 19(a)(1). *See, e.g.*, 15 U.S.C. 8404(a).

Commission will now be able to use the section 19(a)(1) pathway to obtain redress for losses attributable to the specific unfair or deceptive practices the rule defines and prohibits.

In addition, the final rule will allow courts to impose civil penalties under section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A). Civil penalties will provide the deterrence necessary to incentivize compliance with the law, even in cases when it is difficult to quantify consumer harm.

Overall, the rule's prohibition of bait-and-switch pricing tactics, including drip pricing, and misleading fees in the live-event ticketing and short-term lodging industries expands the Commission's enforcement toolkit and allows it to deliver on its consumer protection mission by stopping and deterring harmful conduct in these industries and making consumers whole when they have been harmed. The unfair or deceptive acts or practices involving bait-and-switch pricing and misleading fees encompassed by this final rule are prevalent and harmful to consumers and honest competitors. Thus, the unlocking of additional remedies through this rulemaking—particularly, the ability to obtain redress for consumers injured by misconduct and civil penalties against violators, where appropriate—will allow the Commission to more effectively police and deter unfair or deceptive pricing practices in these industries.

B. Alternatives to the Final Rule the Commission Considered, Reasons for the Commission's Determination that the Final Rule Will Attain Its Objectives in a Manner Consistent with Applicable Law, and the Reasons the Particular Alternative Was Chosen

In analyzing the potential costs and benefits of the proposed rule, the Commission considered several alternatives, including terminating the rulemaking and a broader rule alternative. As the Commission observed in the NPRM, one potential alternative is to

terminate the rulemaking and rely instead on the Commission's existing tools to combat unfair or deceptive practices relating to pricing, such as consumer education and enforcement actions brought under sections 5 and 19(a)(2) of the FTC Act. However, terminating the rulemaking would deprive consumers of live-event tickets and short-term lodging of quantifiable time savings, and unquantifiable benefits including reduced frustration, less consumer stress, and improved economic efficiency through a reduction of deadweight loss, as outlined in section V. Implementation of the rule also strengthens the Commission's enforcement program against unfair or deceptive pricing practices in the live-event ticketing and short-term lodging industries.

As noted in the NPRM, given the strong indicators that bait-and-switch pricing, including drip pricing, and misleading fees and charges are prevalent and worsening across industries, the Commission considered adopting a final rule that would have applied to all industries nationwide. The Commission declines to adopt such an industry-neutral rule at this time and instead chooses, in its discretion, to use its rulemaking authority incrementally. The Commission's rule first targets the two industries where the Commission first began evaluating drip pricing more than a decade ago and where consumer harm has been longstanding and continues to be pronounced. As noted in section II, most transactions in the live-event ticketing and short-term lodging industries occur online, where bait-and-switch pricing and misleading fees and charges have the highest potential to thwart the rule's stated objectives, namely price transparency and timeliness, as well as comparison shopping. In addition, consumers are often presented with identical offers (as is the case with live-event ticketing) or near-identical offers (as is

the case with short-term lodging), and as such, price is the most salient feature for consumers in these transactions.

The NPRM also discussed, and the Commission also considered, a small business exemption. Small businesses, which may have smaller profit margins, may be disproportionately affected by initial compliance costs associated with § 464.2's disclosure requirements. On the other hand, a rule exempting small businesses would fail to accomplish the rule's core objectives of transparency in pricing and facilitating comparison shopping because consumers would continue to be subject to a mix of pricing disclosures in the live-event ticketing and short-term lodging industries that could include bait-and-switch pricing and misleading fees. As one commenter noted, "Small businesses will benefit from the rule because it eliminates the deceptive practices that keep consumers from being able to comparison shop."[497] The commenter also stated that a small business "exception will undermine the ability of consumers to make purchasing decisions based on transparent and honest information."[498] A small business exemption could also reduce consumer benefits arising from increased price transparency across markets and lower consumer confidence regarding whether the rule applies to specific purchases.

Excluding small businesses could also harm honest competition because such an exemption might impose more uncertainty and compliance costs for businesses to determine whether the rule applies to them. In addition, as noted in section III, some industry commenters favored a rule that applied equally to all industry members, to facilitate comparison shopping and avoid the creation of competitive advantages.

[497] FTC-2023-0064-3302 (Public Citizen).
[498] *Id*.

Some commenters, as noted in section III, expressed frustration with fees or charges they described as "excessive" or "worthless." As discussed in the NPRM, an alternative to the final rule could be to explicitly prohibit excessive or worthless fees or charges in the live-event ticketing and short-term lodging industries. This alternative may benefit consumers who pay excessive amounts for goods or services in these industries or for fees or charges that provide them little to no value, allowing them instead to save their money or spend it elsewhere.

The Commission declines to adopt an alternative rule prohibiting worthless or excessive fees or charges, because doing so may raise additional questions for these industries and for the Commission regarding how to assess the value of fees or charges. In addition, the final rule may already accomplish some of the benefits of such an alternative. For example, the final rule requires Total Price to include all mandatory fees or charges (with limited exceptions for Government Charges and Shipping Charges). Transparency and competition on price could then disincentivize live-event ticketing and short-term lodging businesses from incorporating such fees into their pricing schemes altogether. In addition, consumer confusion related to the purpose or value of fees or charges would be addressed by the final rule's requirement to disclose the nature, purpose, and amount of any fees or charges lawfully excluded from Total Price, as well as the prohibition against misrepresenting any fees or charges.

In sum, the rule accomplishes the Commission's objectives in the areas of live-event ticketing and short-term lodging consistent with applicable law, while providing the Commission additional time to consider further action. As explained in section V.E, the Commission believes the rule's benefits exceed the costs of the rule. Notably, the

Commission believes, as detailed in Parts II, III, and V, that the rule also will result in additional tangible benefits from consumers' ability to accurately comparison shop for live-event tickets and short-term lodging. Therefore, the Commission finds in this final regulatory analysis that adoption of the rule will result in benefits to the public that exceed the costs.

C. The NPRM's Preliminary Regulatory Analysis

In the Economic Analysis of Costs and Benefits of the Proposed Rule in section VII.C of the NPRM (hereafter, "Preliminary Regulatory Analysis"), the Commission described the anticipated effects of the proposed rule and quantified the expected benefits and costs to the extent possible. For each benefit or cost quantified, the analysis identified the data sources relied upon and, where relevant, the quantitative assumptions made. The Preliminary Regulatory Analysis measured the benefits and costs of the proposed rule against a baseline in which the Commission did not promulgate a rule addressing the unfair or deceptive practices of presenting incomplete or inaccurate pricing information that obscures Total Price and misrepresenting the nature and purpose of fees. Several of the benefits and costs were quantifiable for specific industries, but the Commission found that benefits at the economy-wide level were not quantifiable. The Preliminary Regulatory Analysis discussed the bases for uncertainty in the estimates.

In the Preliminary Regulatory Analysis, the Commission performed a break-even analysis under various assumptions to determine the required benefits necessary to justify the estimated costs. Under the assumptions of high-end compliance costs and a 7% discount rate, the Commission found that if the average benefit to consumers from the proposed rule exceeded $6.65 per year over ten years, then the proposed rule's benefits would exceed its quantified economy-wide compliance costs. The expected benefit could

be a result of reduced consumer search time, of increased consumer surplus from more efficient purchasing decisions, or a combination of the two. The Commission found in the Preliminary Regulatory Analysis that if the proposed rule resulted in savings from reduced search time that exceeded 15.82 minutes per consumer per year over ten years, then the benefits from reduced search time alone would exceed quantified compliance costs under the assumption of high-end costs and a 7% discount rate.

D. Significant Issues Raised by Comments, the Commission's Assessment and Response, and Any Changes Made as a Result

In this section, the Commission summarizes its assessment of, and response to, the major concerns, comments, and suggestions raised by commenters about the Preliminary Regulatory Analysis. The Commission received comments about the Preliminary Regulatory Analysis from industry groups, law firms, consumer advocacy groups, think tanks, consumers, and business owners. Section V.D.1 addresses comments about the Commission's cost estimates, section V.D.2 addresses comments about the Commission's the benefits estimates, and section V.D.3 addresses comments specific to the economy-wide break-even analysis.

1. Comments on Costs

In section V.D.1.a–d, the Commission addresses four major comments regarding the NPRM's cost estimates: (a) the estimated costs are too low; (b) there are unquantified costs to firms; (c) there are unquantified costs to consumers; and (d) there are unquantified costs to third parties. Section V.D.1.e addresses commenter concerns about costs that may stem from applying the rule to variable, dynamic, or contingent fees.

a) *Public Comments: Estimated Costs Are Too Low*

Commenters from members and representatives of the live-event ticketing and short-term lodging industries, among others, argued that estimated costs in the NPRM were too low because the analysis underestimated the number of attorney, data scientist, and web developer hours needed to comply with the proposed rule.[499] These commenters contended that some businesses will require more time than the assumed average estimates of labor hours used in the Preliminary Regulatory Analysis. The Commission acknowledges the possibility that some Businesses will incur a greater number of hours to comply with the final rule, but notes that this is consistent with the Preliminary Regulatory Analysis because the employee hour estimates used represent averages. These estimates capture the fact that some Businesses will require more time than the average and some will require less. The Commission received additional comments with similar concerns about the Commission's compliance hours estimates as they apply to other specific industries such as movie theater ticketing, delivery apps, restaurants, bowling, and cable and broadband, which are no longer subject to the final rule.[500] However, the Commission's argument that the compliance hours represent averages holds more broadly.

Two commenters in the live-event ticketing industry provided alternative estimates of average employee hours necessary to comply with the rule. Vivid Seats

[499] FTC-2023-0064-2856 (National Football League); FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3238 (Gibson, Dunn, & Crutcher LLP); FTC-2023-0064-3122 (Vivid Seats); FTC-2023-0064-3094 (American Hotel & Lodging Association); FTC-2023-0064-3292 (National Association of Theatre Owners); FTC-2023-0064-3293 (Travel Technology Association); FTC-2023-0064-3294 (International Franchise Association).
[500] FTC-2023-0064-3263 (Flex Association); FTC-2023-0064-3300 (National Restaurant Association); FTC-2023-0064-3217 (Bowling Proprietors' Association of America); FTC-2023-0064-3233 (NCTA—The Internet & Television Association).

stated that, from its experience implementing upfront pricing as a ticket seller in three states, the Commission underestimated the employee hours needed for live-event ticket sellers by at least a factor of five.[501] Conversely, another live-event ticket seller, TickPick, commented that, for the most part, live-event ticketing companies would incur an immaterial cost to implement all-in pricing because "the technology already exists within ticketing platforms to eliminate drip pricing and would simply need to be applied to events in the U.S."[502] Again, the Commission notes that the estimated employee hours reflect an average and, as these commenters stated, it is possible that firms like Vivid Seats may require more hours, while others, like TickPick, may require fewer.

The National Restaurant Association stated that it would take restaurants at least twenty hours a year to reoptimize menu prices because the Commission's estimates did not account for supply chain issues that may change prices or consider that some restaurants may offer seasonal menus.[503] The Preliminary Regulatory Analysis omitted these costs because they are not a result of the rule; restaurants will face supply chain fluctuations and seasonal changes to their menus regardless of the rule.[504] However, this is no longer a concern in the final rule, which does not apply to restaurants.

The Office of Advocacy of the United States Small Business Administration ("SBA Office of Advocacy") argued that costs estimated in the Preliminary Regulatory

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[501] FTC-2023-0064-3122 (Vivid Seats).
[502] FTC-2023-0064-3212 (TickPick, LLC).
[503] FTC-2023-0064-3300 (National Restaurant Association).
[504] *See, e.g.*, *id*. (National Restaurant Association commented that there are "common supply chain issues that may cause certain food items to increase or decrease in price" and "thousands of restaurants . . . offer varying seasonal menus with completely different offerings"); FTC-2023-0064-2992 (Individual Commenter who owns a restaurant commented that complying with the rule would not be complex for restaurants because "[t]hey reprice and change dishes frequently"); FTC-2023-0064-3219 (Georgia Restaurant Association also referred to "rising food costs [and] supply chain disruptions"); FTC-2023-0064-3180 (Independent Restaurant Coalition commented about "increasing food costs"); FTC-2023-0064-3078 (Washington Hospitality Association referred to supply chain issues, inflation, and other rising costs).

Analysis are too low because data scientist and web developer hours should be ongoing costs, rather than one-time costs.[505] It argued that "the FTC should assume a percentage of firms that in the previous year were in compliance will not be the following year." The Commission does not believe that these ongoing costs are attributable to the rule. Once firms have adjusted to the rule, making sure new pricing strategies comply with the rule is considered a part of the normal course of business, as is ensuring compliance with other existing laws and regulations.

Some commenters identified purported costs that were either already captured in the economic analysis or would not be affected by the rule. The U.S. Chamber of Commerce and SBA Office of Advocacy argued that the Preliminary Regulatory Analysis did not account for the time needed to train staff to provide new upfront prices to customers for in-person, online, and phone sales.[506] The Commission believes training time, to the extent that it exists, is already captured in the assumed range of data scientist and web developer hours, which the Commission has noted serves as a proxy for any rule-associated costs from adjusting pricing strategies and displaying prices to consumers. Another commenter argued that businesses would need to "hire graphic designers to make advertisements look appealing and web designers or software engineers to rebuild entire websites."[507] In addition, it argued that the Preliminary Regulatory Analysis did not account for costs needed to replace physical ads, subway ads, and billboards and speculated that would take "thousands of hours." The final rule

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[505] U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC-2023-0064-0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf*.
[506] *See, e.g., id.*; FTC-2023-0064-3127 (U.S. Chamber of Commerce).
[507] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).

has no bearing on a firm's decision to engage graphic designers to ensure its advertisements are "appealing," and the Commission does not believe—and commenters have failed to cite evidence demonstrating—that the need to update prices will require rebuilding entire websites. Moreover, as discussed in more detail in section V.E.3.a, the estimated range of web developer time is a proxy for any costs associated with changing price displays to comply with the rule.

Two commenters argued that the Preliminary Regulatory Analysis underestimated costs because the wage rates for attorneys and data scientists were too low and were not the same as, for example, attorneys fees.[508] One commenter stated that the estimated wages did not account for overhead costs or reflect the higher costs of hiring outside counsel and data scientists and suggested using $306 in attorney wages and $59 in data scientist wages to reflect these higher costs.[509] In response to these suggestions, the Commission conducted a sensitivity analysis that multiplied wage rates by two to reflect overhead and hiring costs for the short-term lodging and live-event ticket industries. The results of the sensitivity analysis are provided in section V.E.3.b.i and do not impact the Commission's assessment that the benefits exceed the costs. The Commission received two additional comments with similar concerns about the Commission's wage estimates as they apply to the restaurant industry and the innovation economy, which are no longer subject to the final rule.[510]

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[508] *Id.*; U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC-2023-0064-0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf*.

[509] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).

[510] FTC-2023-0064-3300 (National Restaurant Association); FTC-2023-0064-3202 (TechNet).

b) Public Comments: Unquantified Costs to Firms

The NPRM noted that there are unquantified costs of the rule, primarily in the form of unintended consequences to consumers as they adjust to upfront pricing. In addition, commenters identified additional types of unquantified costs to firms.

An academic commenter argued that there may be unintended consequences to firms from partial compliance.[511] The commenter stated that no firm would want to be the first in its market to comply, and the resulting "partial or uneven compliance would cause compliant firms to lose business to firms that ignored the rule. Implementing coordinated compliance for the entire economy would be difficult with the [Commission's] limited resources." The Commission believes that the partial compliance described by this commenter is the current status quo in the absence of a rule. Currently, some firms impose drip pricing, and these firms may have a competitive advantage over those that do not impose drip pricing. Under the rule, the Commission expects all firms in the short-term lodging and live-event ticket industries to provide Total Price, which is an improvement relative to the status quo. If, as the commenter argues, some degree of partial compliance remains, the potential competitive advantage from non-compliance would be similar to the status quo, with the additional risk to non-compliant firms of law enforcement actions with potential exposure to consumer redress and penalties. In other words, even with some degree of partial compliance after the final rule, such an equilibrium would still result in more benefits for consumers than a world without the final rule. The commenter's concern that implementing coordinated compliance for the whole economy may be difficult is mitigated in the final rule, which only applies to two

[511] FTC-2023-0064-2891 (Mary Sullivan, George Washington University, Regulatory Studies Center).

industries. In addition, while the Commission may have limited enforcement resources, it expects consumer behavior regarding fees to adjust over time due to the final rule. Once upfront pricing becomes the new norm, consumers will expect to see Total Prices displayed upfront and will be more likely to punish firms that ignore the rule by taking their business elsewhere. Therefore, any partial compliance is likely to be temporary.

Nine commenters stated the NPRM's assertion that the rule will provide a harmonized legal framework for all States is incorrect because, as discussed in section III, the rule only preempts State laws if they are inconsistent with the rule.[512] Commenters noted that an added layer of regulation is an additional cost for businesses as they determine whether they are compliant with the various rules to which they are subject. The Commission updates the final regulatory analysis to reflect this concern as it applies to Covered Goods or Services, but notes that the cost was already captured by the assumption that all firms within the live-event ticketing and short-term lodging industries will spend on average one hour to determine whether the rule applies to them.

One commenter asserted that "[t]he Commission erroneously disclaims the possibility of losses to producer surplus."[513] The commenter argued that the Commission's statement that consumer surplus is reduced due to consumer search costs under drip pricing ignores the countervailing increase of producer surplus. The commenter further contended that the Preliminary Regulatory Analysis omits that, under drip pricing, consumers purchase more expensive products, which amounts, in part, to a

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[512] FTC-2023-0064-2856 (National Football League); FTC-2023-0064-2887 (Progressive Policy Institute); FTC-2023-0064-3122 (Vivid Seats); FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3143 (ACA Connects—America's Communications Association); FTC-2023-0064-3233 (NCTA—The Internet & Television Association); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3258 (National Taxpayers Union Foundation).

[513] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).

transfer of surplus from consumers to sellers. The Commission acknowledges the transfer of surplus due to higher prices. However, the commenter incorrectly assumes that the movement of surplus from consumers to producers will be a one-to-one transfer and presupposes that there will be no increase in consumer search time or deadweight loss. As is discussed in section V.E.2.a.i, the increased, unnecessary consumer search time due to drip pricing results in a net cost to society—no one benefits from the additional hours consumers collectively spend searching for price information and then being surprised with a higher final amount at the time of purchase. In addition, as is discussed in section V.E.2.a.ii, inefficient overconsumption under drip pricing generates a deadweight loss. Inefficiently high spending under drip pricing thus results in a cost to society in the form of higher search costs and a deadweight loss in addition to a transfer of surplus from consumers to sellers in the form of higher seller revenue. Overall, this results in a net loss to society.

Lastly, some commenters representing the communications services industry noted that there are unquantified costs to cable, broadband, and wireless providers due to similar upfront pricing requirements from the FCC.[514] The Commission's decision to narrow the final rule to Covered Goods or Services renders these comments inapplicable.

c) Public Comments: Unquantified Costs to Consumers

The NPRM noted that there may be unquantified costs of the rule in the form of consumer confusion as consumers adjust to upfront pricing. Commenters argued there were several additional unquantified costs to consumers. One commenter suggested that

[514] FTC-2023-0064-2884 (NTCA—The Rural Broadband Association); FTC-2023-0064-3143 (ACA Connects—America's Communications Association); FTC-2023-0064-3233 (NCTA—The Internet & Television Association); FTC-2023-0064-3234 (CTIA—The Wireless Association).

consumers would experience higher search time if companies limit or eliminate price advertising to avoid the regulatory risk of providing an inaccurate Total Price.[515] The Commission reiterates that the rule does not require firms to eliminate price advertising; rather the rule requires covered firms to present Total Price to consumers whenever Businesses offer, display, or advertise any price of a Covered Good or Service. The Commission believes that unnecessarily high consumer search time and anticompetitive effects resulting from different pricing strategies are already a problem absent the rule, where firms advertise a mix of dripped prices, upfront prices, and no prices. The commenter did not provide evidence for why, under the rule, some firms are, or would be, unable to advertise Total Price or why it would result in higher search time and a less competitive equilibrium than the status quo. The Commission received two additional comments with similar concerns as they apply to the telecommunications and rental housing industries, which are no longer subject to the final rule.[516]

Two commenters also suggested there might be potentially higher consumer search time if businesses unbundle previously bundled options in an effort to reduce the advertised price in response to the rule, stating that hotels, for example, may make amenities such as wi-fi, gym access, and parking pay-per-use.[517] The Commission acknowledges that some Businesses may unbundle previously bundled options but reiterates that the rule prohibits Businesses from treating features as optional if they are necessary to render the good or service fit for its intended use. The Commission also

[515] FTC-2023-0064-3127 (U.S. Chamber of Commerce)
[516] FTC-2023-0064-3143 (ACA Connects—America's Communication Association; FTC-2023-0064-3296 (Bay Area Apartment Association).
[517] FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).

notes that consumers are likely to punish firms that unbundle features that they expect to be included in Total Price by taking their business elsewhere. A commenter also speculated that there may be an increase in deadweight loss if businesses set inefficiently high prices as they reoptimize prices or seek to cut costs by reducing the quality of goods and services.[518] The Commission believes this is unlikely. Under the rule, there will be competitive pressure to adjust both price and product quality to more efficient levels when firms must present Total Price. As discussed in section V.E.1.b, drip pricing sometimes leads consumers to underestimate the total price of a good or service. The result is that consumers start transactions not understanding that the final amount of payment will be higher than what they are willing or able to pay. For example, consumers may book premium seats to a concert believing they could afford the purchase, only to realize afterward that the total price was understated. Had they understood the final amount of payment, they would have selected seats at a lower price point or skipped the concert altogether. The final rule will help ensure that consumers' preferences, both in terms of cost and quality, can be realized.

One industry group argued that because intermediary travel websites rely on short-term lodging firms for accurate price information, the proposed rule may incentivize these firms to charge intermediaries a premium for accurate pricing information, "knowing that the intermediaries face significant regulatory risk without access to such information."[519] The commenter suggested that these additional costs could be passed onto consumers without adding any value. As explained in section III, the Commission reiterates that the rule requires Businesses that sell or advertise through

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518 FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
519 FTC-2023-0064-3293 (Travel Technology Association).

intermediaries to provide the intermediaries with accurate pricing information (including about mandatory and optional fees). The rule's coverage of business-to-business transactions protects consumers when they purchase goods or services, the sellers that do business with intermediaries, and the intermediaries themselves. The Commission further notes that hotels are already free to charge travel websites and intermediaries money in exchange for pricing information, yet they do not because these travel websites and intermediaries allow the hotels to reach more consumers. In addition, under the status quo, intermediaries already contend with different fee practices across short-term lodging firms and are required to ensure they consistently disclose pricing information to consumers; the final rule should obviate the need for intermediaries to deal with inconsistent fee practices moving forward. Therefore, the final rule should not change any incentives relative to the status quo, and it is unlikely that hotels will change their behavior in this respect as a result of the rule.

A commenter disagreed with the Commission's statement that consumer confusion will be a temporary cost as prices adjust.[520] The commenter also argued that consumers may inefficiently under-consume when confronted with higher upfront prices. The Commission believes that consumers who may inefficiently under-consume due to the rule because they are anticipating hidden fees are the same consumers who are accurately accounting for hidden fees and efficiently consuming under the status quo. The percentage of consumers who expect and anticipate hidden fees is likely to be very small because, as discussed in the NPRM, empirical and theoretical models consistently show that consumers strongly and systematically underestimate the full price they will pay

[520] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).

when faced with drip pricing, and they pay more than they otherwise would in a transparent marketplace.[521] Therefore, if these consumers are savvy enough to adjust their expectations and accurately account for hidden fees under the status quo, then it is likely that they will quickly adjust their expectations after the final rule becomes effective and any under-consumption will be temporary.

The commenter also misinterpreted the results of a study conducted in the live-event ticketing market, Blake et al. (2021) (the "Blake Study"), in an effort to support the claim that seeing Total Price will deter consumers from making efficient and economically desirable purchases.[522] The Blake Study found that providing an upfront total price reduces both the quantity and quality of purchases relative to the inefficiently high levels of quantity and quality purchased under dripped prices. In other words, when consumers do not have truthful, timely, and transparent information about the final price, they purchase goods of higher quality and make more purchases than they would if they had full information. The commenter incorrectly implied that this reduction amounts to inefficient underconsumption when, in fact, it represents a return to an efficient level and quality of consumption compared to drip pricing. The authors explicitly concluded: "Our empirical results support our hypotheses: price obfuscation distorts both quality and quantity decisions."[523]

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[521] Tom Blake et al., *Price Salience and Product Choice*, 40 Mktg. Sci. 619 (2021), *https://doi.org/10.1287/mksc.2020.1261*; Michael R. Baye et al., *Search Costs, Hassle Costs, and Drip Pricing: Equilibria with Rational Consumers and Firms* (Nash-Equilibrium.com Working Paper, 2019), *http://nash-equilibrium.com/PDFs/Drip.pdf*; Alexander Rasch et al., *Drip Pricing and its Regulation: Experimental Evidence*, 176 J. Econ. Behav. & Org. 353 (2020), *https://doi.org/10.1016/j.jebo.2020.04.007*.

[522] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP, discussing Blake, *supra* note 521).

[523] Blake, *supra* note 521.

Five industry groups identified what they incorrectly labeled as three additional types of unquantified costs for consumers. The "costs" identified actually are either transfers from consumers to producers (resulting in no net loss for society) or reflect misunderstandings of the rule. These commenters claimed that prices would increase as businesses pass compliance costs onto consumers,[524] that prohibiting businesses from displaying partitioned pricing would decrease transparency for consumers,[525] and that forcing businesses to display all optional fees upfront would overload and confuse consumers with often irrelevant information.[526] None of these are true costs resulting from the final rule. First, increased prices that result from the sellers' increased compliance costs are a transfer of consumer surplus to producer surplus and do not result in a cost to society. Second, the rule does not prohibit itemization. As long as Total Price is Clear and Conspicuous and most prominent, Businesses are free to display the components of Total Price if they so choose. Finally, the rule does not require Businesses to display all optional fees upfront. Rather, Businesses must disclose Clearly and Conspicuously, before the consumer consents to pay, the nature, purpose, and amount of any fee or charge imposed on the transaction that been excluded from Total Price.

One policy organization commented on the study[527] cited in the NPRM that shows partitioned pricing decreases consumers' ability to accurately recall total costs and increases their demand.[528] The commenter argued that the conclusion cited in the NPRM does not follow from the study because participants who recalled a lower price could

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[524] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3033 (The Rebel Lounge et al.).
[525] FTC-2023-0064-3028 (Competitive Enterprise Institute); FTC-2023-0064-3208 (FreedomWorks).
[526] FTC-2023-0064-3127 (U.S. Chamber of Commerce).
[527] Vicki G. Morwitz et al., *Divide and Prosper: Consumers' Reactions to Partitioned Prices*, 35 J. Mktg. Rsch. 453 (1998), *https://doi.org/10.1177/002224379803500404*.
[528] FTC-2023-0064-3028 (Competitive Enterprise Institute).

have known the total cost but misunderstood the question to be asking for the base price excluding the fees. This interpretation is incorrect because there was no ambiguity in the study question at issue; it explicitly asked for the total cost inclusive of all fees.

d) Public Comments: Unquantified Costs to Third Parties

One commenter argued that, as consumer expectations adjust to upfront prices, inefficiently low spending may affect other businesses in the supply chain such as manufacturers, packagers, shippers, and warehouses.[529] The commenter also argued that lower spending may affect live-event venues and ticket resellers due to decreased sales in food, drinks, and merchandise. In addition, the commenter claimed that lower spending will lead to lower sales tax revenue for State and local governments, causing them to borrow more money at high interest rates, raise taxes, or eliminate services. As discussed in detail in section V.E.2.c, the Commission believes that any inefficient underconsumption due to consumer confusion is likely to be temporary, as are any resulting costs to third parties.

e) Public Comments: Costs from Incorporating Contingent Fees into Total Price

Several commenters, including industry groups, policy organizations, and an academic, expressed concern that it would be difficult for firms to display Total Price in cases where Total Price is unknown because it depends on consumer conduct or choices.[530] In cases where price is determined through customization, Total Price may not

[529] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[530] *See, e.g.*, *id*.; FTC-2023-0064-3140 (Merchant Advisory Group); FTC-2023-0064-3180 (Independent Restaurant Coalition); FTC-2023-0064-3300 (National Restaurant Association); FTC-2023-0064-3202 (TechNet); FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-3173 (Center for Individual Freedom); FTC-2023-0064-3258 (National Taxpayers Union Foundation); FTC-2023-0064-2891 (Mary Sullivan, George Washington University, Regulatory Studies Center); FTC-2023-0064-3293 (Travel Technology Association); FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3296 (Bay Area Apartment Association).

be known until after consumers have finalized their selection of options. The Commission addresses contingent fees in section III.

2. Comments on Benefits

Section V.D.2.a addresses the concern of some commenters that the NPRM's benefit calculations are too high, and section V.D.2.b outlines several unquantified benefits identified by commenters.

a) Public Comments: Benefits Are Too High

One commenter argued that benefits are too high because the Preliminary Regulatory Analysis overestimated consumer search costs that result from drip pricing.[531] It argued that consumers benefit from seeing an advertisement with dripped fees compared to their position before seeing any advertisement. The Commission believes this is not the correct comparison to make when determining whether consumer search time will change as a result of the rule; a more apt comparison considers consumer benefit when faced with Total Price versus drip pricing. The Commission expects that the rule will decrease consumer search time, because consumers will spend less time searching for Total Price under the rule's framework versus a dripped pricing framework.

A commenter argued that the rule's estimated benefits are too high because the value-of-time estimate of $24.40 is too high.[532] The $24.40 figure is calculated by taking 82% of the 2022 mean hourly wage from the Bureau of Labor Statistics. A meta-analysis of eleven studies conducted between 2004–2015 finds that the value of time as a percentage of mean wage is about 82% in the United States.[533] In addition, previous

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[531] FTC-2023-0064-3028 (Competitive Enterprise Institute).
[532] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[533] Daniel S. Hamermesh, *What's to Know About Time Use?*, 30 J. Econ. Surv. 198 (2016), *https://doi.org/10.1111/joes.12107*.

studies indicate that, over time, people's time has become more valuable as a fraction of what they earn.[534] So, it is possible that the current percentage in 2024 may actually be higher than 82%. The final regulatory analysis in section V.E updates the value of time using the same method but with the more recent 2023 mean hourly wage.

The commenter further asserted that it would be more accurate to calculate the value of time as a percentage of the median hourly wage instead of the mean hourly wage, stating that "the mean wage is driven by a few outliers."[535] Relying on the median hourly wage, however, would be incorrect and reflects a misunderstanding of how the value of time is calculated. The value of time initially was calculated as an absolute dollar amount per hour in the studies reviewed by the Hamermesh (2016) paper, and then expressed as a percentage of the mean hourly wage at that time. That percentage can be applied to the current mean hourly wage to calculate an updated value of time. If the Commission expressed the value of time as a percentage of the median wage, this would not be a "more accurate" calculation of the value of time as the commenter suggests, but simply a different way of expressing the same value of time estimated by Hamermesh (2016).

The commenter also argued that the Commission's valuation of time estimate is inaccurate because some consumers may have lower valuations of time, such as consumers who earn no wages or lower wages, and consumers who "enjoy shopping" and may not believe they incur costs from searching.[536] These concerns are consistent with the Commission's estimated value of time, which captures an average of a representative

[534] *Id.*
[535] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[536] *Id*.

group of American consumers across eleven studies; some individuals will have lower valuations of time, and some will have higher.

Furthermore, the Commission distinguishes between efficient and inefficient searching by consumers. Consumers, based on their preferences, may find some amount of search, or comparison shopping, to be beneficial to their consumption choices. A consumer will naturally choose an efficient level of search such that the marginal benefit of discovering an additional different price or comparable good equals the marginal cost of the time and effort to perform the additional search. The Commission recognizes the purpose of this efficient level of search and does not count it as a harm. When consumers face drip pricing, they must spend additional time and effort to acquire full pricing information allowing them to properly comparison shop. This additional time and effort results in an inefficient level of search that harms consumers with no countervailing benefit. In the Commission's final regulatory analysis, the estimate of cost savings through reduced search time is based on the estimated difference between consumer search time under drip pricing and consumer search time under upfront pricing; that is, the estimate is based solely on the estimate of the inefficient level of search.

Finally, another commenter argued that benefits are too high in the short-term lodging calculation because the Preliminary Regulatory Analysis estimated the reduction in listings viewed as a result of the proposed rule using data from a study done in the live-event ticketing market.[537] However, the Commission's base number of listings viewed under the status quo was taken from studies conducted in the short-term lodging industry. The live-event ticketing study provided a scaling factor that the Commission used to

[537] FTC-2023-0064-3127 (U.S. Chamber of Commerce).

estimate a percentage reduction in listings viewed in response to the rule. The commenter neither demonstrated why the Commission's method overestimated the reduction in listings viewed nor provided the Commission with additional data.

b) Public Comments: Unquantified Benefits

The NPRM identified the rule's unquantified benefits, primarily a reduction in deadweight loss as consumers make more efficient purchasing decisions. Several comments from consumer and worker protection groups identified additional unquantified benefits of the rule to low-income households,[538] incarcerated people and their families,[539] and to restaurant workers.[540] Although these comments no longer apply to the final rule, the Commission acknowledges that the broader rule was likely to positively impact some vulnerable populations like those discussed in the comments and may have had second-order effects on housing security and the labor market.

One commenter also recommended that the Commission further explain or quantify why the rule would result in enforcement resource savings as stated in the NPRM.[541] The Commission does not quantify the net effect of the rule on enforcement resources due to a lack of data, but discusses in detail the rule's enforcement benefits in section V.A. Based on its experience, the Commission finds that the resources it needs to expend under the two-step pathway pursuant to section 19(a)(2) are typically greater because the Commission needs to initiate two separate proceedings.

[538] FTC-2023-0064-2883 (District of Columbia, Office of the People's Counsel).
[539] FTC-2023-0064-3283 (National Consumer Law Center, Prison Policy Initiative, and advocate Stephen Raher).
[540] FTC-2023-0064-3248 (DC Jobs With Justice on behalf of Fair Price, Fair Wage Coalition).
[541] FTC-2023-0064-3146 (Institute for Policy Integrity, New York University School of Law).

3. Comments on the Economy-Wide Break-Even Analysis

In this section, the Commission addresses comments specific to the economy-wide break-even analysis of the Preliminary Regulatory Analysis. Section V.D.3.a addresses comments that argued the Commission's break-even analysis contained incorrect assumptions or errors; section V.D.3.b addresses comments that claimed a break-even analysis is not enough to justify an economy-wide rule; and section V.D.3.c addresses a comment that argued the break-even analysis is satisfactory and recommended further analysis to strengthen it.

a) Public Comments: Break-Even Analysis Has Incorrect Assumptions or Contains Errors

Three commenters argued that the Commission's assumption that 90% of firms are already in compliance with the proposed rule was inaccurate.[542] This comment does not apply to the final rule, which no longer contains an economy-wide analysis. However, the Commission reaffirms its break-even calculation in the Preliminary Regulatory Analysis, and acknowledges uncertainty regarding the number of firms in the economy that currently employ unfair or deceptive fees or charges and that would need to incur additional costs to comply with the rule. To address the uncertainty, the Preliminary Regulatory Analysis provided both the break-even benefits required if 90% of firms in the economy are already compliant with the rule, as well as the break-even benefits required if 50% of the firms were already compliant with the rule.

One commenter also argued that the $6.65 average annual per-consumer benefit number in the Preliminary Regulatory Analysis is too low because the Commission

[542] FTC-2023-0064-3233 (NCTA—The Internet & Television Association); FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP); FTC-2023-0064-3294 (International Franchise Association).

calculated the necessary break-even benefit level by dividing estimated costs by all U.S. adults, rather than only consumers who make live-event ticket and short-term lodging purchases.[543] The Commission emphasizes that the $6.65 figure from the Preliminary Regulatory Analysis is an average per-person benefit. In the same way that the estimated attorney hours assumes that some small businesses will not hire an attorney to ensure compliance, the benefit per consumer figure reflects the fact that some adults will not encounter dripped fees. The Commission does not dispute that some consumers will see much higher benefits than others. The same argument applies to the final rule, where the Commission recalculates the average annual per-consumer break-even benefit level using only the costs from Covered Goods or Services.

Finally, the same commenter contended that both the one-time and annual costs for the high-end estimates in Table 2 of the Preliminary Regulatory Analysis were calculated incorrectly.[544] This comment no longer applies to the final rule, which does not contain an economy-wide break-even analysis.

b) Public Comments: Break-Even Analysis Is Not Enough to Justify an Economy-Wide Rule

Some commenters disagreed that the rule should apply to the whole economy when the Preliminary Regulatory Analysis quantifies a net benefit for two industries and relies on a break-even analysis for the remainder of the economy.[545] Other commenters similarly stated that the Preliminary Regulatory Analysis should include an industry-by-

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[543] FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP).
[544] *Id*.
[545] *See, e.g.*, *id.;* FTC-2023-0064-3127 (U.S. Chamber of Commerce); FTC-2023-0064-2891 (Mary Sullivan, George Washington University, Regulatory Studies Center); FTC-2023-0064-3173 (Center for Individual Freedom); FTC-2023-0064-3208 (FreedomWorks); FTC-2023-0064-3143 (ACA Connects—America's Communications Association); FTC-2023-0064-3258 (National Taxpayers Union Foundation).

industry cost-benefit analysis.[546] The final rule is limited to only Covered Goods or Services, which are offered by the live-event ticketing and short-term lodging industries.

The Commission emphasizes that a break-even analysis is encouraged by OMB Circular A-4 when there are unquantifiable costs or benefits, and affirms that its break-even analysis in the Preliminary Regulatory Analysis is consistent with OMB guidance.[547] In the final regulatory analysis, the Commission identifies some of the unquantified benefits to the rule and provides a similar break-even analysis for the live-event ticketing and short-term lodging industries. The Commission also provides benefit-cost analyses demonstrating that the quantified benefits exceed the quantified costs.

c) Public Comments: Break-Even Analysis Is Satisfactory

Conversely, another commenter noted that the Commission's break-even analysis is satisfactory and suggested the Commission provide further analysis to support the conclusion that time savings resulting from the rule are likely to exceed the break-even threshold.[548] Although this comment no longer applies to the final rule, which focuses on addressing hidden and misleading fees in the live-event ticketing and short-term lodging industries, the Commission acknowledges that there is economic support for a broader rule.

E. Economic Regulatory Analysis of the Final Rule's Costs and Benefits

The Commission has narrowed the application of the final rule to a limited set of Covered Goods or Services, which comprise live-event ticketing and short-term lodging.

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[546] *See, e.g.*, FTC-2023-0064-3133 (National Multifamily Housing Council and National Apartment Association); FTC-2023-0064-3143 (ACA Connects—America's Communications Association); FTC-2023-0064-3258 (National Taxpayers Union Foundation); FTC-2023-0064-3197 (American Beverage Licensees).
[547] Office of Mgmt. & Budget, Circular A-4 (Sep. 17, 2003) (hereinafter, OMB Circular A-4), *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/*.
[548] FTC-2023-0064-3146 (Institute for Policy Integrity, New York University School of Law).

This in turn necessitates revisions to the Preliminary Regulatory Analysis. The final regulatory analysis no longer includes the economy-wide break-even analysis. The Commission provides the per-consumer break-even benefit levels for the live-event ticketing and short-term lodging industries, as well as quantified benefits and costs for these industries. After incorporating these revisions and updating numbers based on recent data releases, the Commission confirms in the final regulatory analysis that the benefits of the rule exceed the costs. Specifically, the Commission estimates that the quantified benefits of the rule will exceed its quantified costs, and the Commission believes that the total benefits of the rule (quantified and unquantified) will outweigh its total costs (quantified and unquantified).

The Commission discusses in the final regulatory analysis the projected impact of the rule's prohibition on offering, displaying, or advertising any price of a Covered Good or Service without Clearly and Conspicuously disclosing Total Price, as well as the rule's prohibition on misrepresentations regarding any fee or charge, including the nature, purpose, amount, or refundability of any fee or charge, and the identity of the good or service for which the fee or charge is imposed. The Commission's analysis also assesses the impact of the rule's required disclosures of the nature, purpose, and amount of any fee or charge imposed on the transaction that has been lawfully excluded from Total Price, the identity of the good or service for which the fee or charge is imposed, and the final amount of payment. When possible, the Commission quantifies the benefits and costs and notes where some potential benefits and costs are unquantified. If a benefit or cost is quantified, the sources of the data relied upon are indicated. If an assumption is needed, the Commission makes clear which quantities are being assumed.

The Commission uses ten years for the time period of analysis because the Commission's trade regulation rules are subject to review every ten years. Tables 1 and 2 summarize the main findings of the final regulatory analysis. Table 1 presents the potential costs, benefits, and resulting net benefits for the live-event ticketing and short-term lodging industries. Quantified benefits in these industries derive from time savings consumers would experience due to greater price transparency, leading to more efficient shopping processes. Quantified costs derive from the costs firms would incur to comply with the rule.

The quantified net benefits for the live-event ticketing and short-term lodging industries are positive. There are also unquantified benefits, which may arise from a reduction in deadweight loss as consumers experience greater price transparency and make fewer mistake purchases. Unquantified costs may stem from potential adjustment costs or consumer confusion as expectations adjust under the rule.

For both quantified benefits and costs, the final regulatory analysis provides a range representing the set of assumptions that result in a "low-end" or "high-end" estimate. These estimates are calculated as present values over a ten-year period. Benefits and costs are more valuable to society the sooner they occur. A discount rate (3% or 7%) is used to adjust estimated benefits and costs for differences in timing; a higher discount rate is associated with a greater value for benefits and costs in the present.[549]

[549] We use 3% and 7% for the discount rate, consistent with Office of Management and Budget's guidance. OMB Circular A-4, *supra* note 547.

Table 1 – Summary of Potential Benefits and Costs of Rule by Industry

		Present Value Over a 10-Year Period	
		Low-end Estimate	**High-end Estimate**
Live-Event Ticketing			
Quantified Benefits (Time Savings)	7% discount rate	$184,665,001	$2,462,200,015
	3% discount rate	$224,277,302	$2,990,364,023
Quantified Costs (Compliance)	7% discount rate	$15,137,956	$142,181,566
	3% discount rate	$15,137,956	$154,247,939
Unquantified Benefits	Reduced Deadweight Loss (e.g. efficient quality/quantity purchased, fewer mistake purchases)		
Unquantified Costs	Unintended Consequences (e.g. adjustment costs, consumer confusion as expectations adjust)		
		(Low Benefits – High Cost)	(High Benefits – Low Cost)
Net Benefits (10 Years)	7% discount rate	$42,483,435	$2,447,062,058
Net Benefits (10 Years)	3% discount rate	$70,029,362	$2,975,226,066
Short-Term Lodging			
Quantified Benefits (Time Savings)	7% discount rate	$4,931,159,488	$7,171,936,592
	3% discount rate	$5,988,937,469	$8,710,381,378
Quantified Costs (Compliance)	7% discount rate	$153,306,202	$460,582,520
	3% discount rate	$153,306,202	$489,905,783
Unquantified Benefits	Reduced Deadweight Loss (e.g. efficient quality/quantity purchased, fewer mistake purchases)		
Unquantified Costs	Unintended Consequences (e.g. adjustment costs, consumer confusion as expectations adjust)		
		(Low Benefits – High Cost)	(High Benefits – Low Cost)
Net Benefits (10 Years)	7% discount rate	$4,470,576,968	$7,018,630,389
Net Benefits (10 Years)	3% discount rate	$5,499,031,686	$8,557,075,175
Aggregated Benefits and Costs for Live-Event Ticketing and Short-Term Lodging			
Quantified Benefits (Time Savings)	7% discount rate	$5,115,824,490	$9,634,136,606
	3% discount rate	$6,213,214,771	$11,700,745,400
Quantified Costs (Compliance)	7% discount rate	$168,444,159	$602,764,086
	3% discount rate	$168,444,159	$644,153,722

		(Low Benefits – High Cost)	(High Benefits – Low Cost)
Net Benefits (10 Years)	7% discount rate	$4,513,060,403	$9,465,692,448
Net Benefits (10 Years)	3% discount rate	$5,569,061,048	$11,532,301,242

Note: "Low-End Estimate" reflects all scenarios that jointly result in lower estimates of benefits or costs and "High-End Estimate" reflects all scenarios that jointly result in higher estimates of benefits or costs.

As discussed in more detail in section V.E.3, the Commission only quantifies benefits from reductions in consumer search costs. However, the Commission notes there are likely additional consumer benefits in the form of reduced deadweight loss. Since the Commission is unable to quantify all of the final rule's potential benefits, the final regulatory analysis instead calculates the minimum value for the average consumer that the final rule would need to generate in order for its benefits to outweigh its quantified costs. Table 2 presents low-end and high-end estimates of the total quantified costs and the necessary "break-even benefit" per consumer. Under the high-end cost assumptions with a 7% discount rate, the Commission's analysis finds that each consumer would need to experience a benefit of $0.33 per year over ten years for the rule's benefits to exceed its quantified compliance costs. Under the low-end cost assumptions with a 3% discount rate, that per-consumer amount is $0.08 per year over ten years. As noted, the Commission believes that the necessary break-even benefit per consumer is likely between $0.08 and $0.33 per year over ten years, depending on which set of assumptions is used.

Table 2 – Summary of Quantified Costs and Break-Even Benefits of Rule

	Present Value Over a 10-Year Period	
	Low-end Estimate	**High-end Estimate**

Total Quantified Costs	7% discount rate	$168,444,159	$602,764,086
Total Quantified Costs	3% discount rate	$168,444,159	$644,153,722
Break-even Benefit Per Consumer Per Year	7% discount rate	$0.09	$0.33
Break-even Benefit Per Consumer Per Year	3% discount rate	$0.08	$0.29

Note: "Low-End Estimate" reflects all scenarios that jointly result in lower estimates of benefits or costs and "High-End Estimate" reflects all scenarios that jointly result in higher estimates of benefits or costs.

1. Economic Rationale for the Final Rule

The final rule addresses the economic problem of incomplete and insufficient price information by businesses that shroud the full price from the consumer during parts of the purchasing process, which harms both consumers and honest competitors. Not including mandatory fees in the full price when consumers start the purchasing process for a good or service may result in a market failure. Firms may shroud the full price to the consumer through the practice of "drip pricing," which is "a pricing technique in which firms advertise only part of a product's price and reveal other charges later as the customer goes through the buying process."[550] Discovering the lowest full price prior to a final purchase by going through the checkout process with multiple firms is inefficient and involves additional consumer search costs. In some cases, taking the time to search for the full price from one firm may result in the consumer losing the opportunity to purchase the product from another firm. Drip pricing and the resulting imposition of

[550] Howard A. Shelanski et al., *Economics at the FTC: Drug and PBM Mergers and Drip Pricing*, 41 Rev. Indus. Org. 303 (2012), *https://doi.org/10.1007/s11151-012-9360-x*.

additional search costs make it more difficult for consumers to compare prices across platforms, which may soften price competition in the market.[551]

A market failure may also occur when firms shroud full price through non-aggregated partitioned pricing, in which all of the components of the full price (base price, fees, etc.) are presented to consumers without the full price itself.[552] Non-aggregated partitioned pricing, like drip pricing, imposes costs on consumers by requiring them to spend additional time to calculate the full price for themselves. Consumers tend to underestimate the full price when faced with partitioned pricing, and this underestimation leads to an increase in demand. The increased demand from erroneous price calculations, in turn, leads to inefficient overconsumption by consumers.

a) Shrouded Pricing as a Cause of Market Failure

A well-functioning market depends, in part, on consumers having accurate information regarding the price, and other attributes, of the goods or services being offered. Firms that engage in drip pricing or employ partitioned pricing create a friction in the operation of the market by imposing costs on consumers to acquire price information. Several economic harms may arise from this friction. First, holding consumer choices and prices fixed, the added search cost to acquire price information harms consumers with no countervailing benefit to firms. Second, because shrouded prices make comparison shopping more difficult, consumers might make suboptimal consumption decisions. In fact, consumers may find it too costly to search for full and

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[551] White House, *How Junk Fees Distort Competition* (Mar. 21, 2023), *https://www.whitehouse.gov/cea/written-materials/2023/03/21/how-junk-fees-distort-competition/*; Brian Deese et al., White House, *The President's Initiative on Junk Fees and Related Pricing Practice* (Oct. 26, 2022), *https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/*; Glenn Ellison, *A Model of Add-On Pricing*, 120 Q.J. Econ. 585 (2005), *https://www.jstor.org/stable/25098747*.
[552] Morwitz, *supra* note 527.

accurate price information for some or all goods or services under consideration. The lack of full price information may lead consumer demand to become less sensitive, i.e., less elastic, to changes in price, and consumers will accept higher (quality-adjusted) prices than they would if they were fully informed with clear and upfront pricing. This, in turn, leads to a third effect: since shrouded prices make it harder for consumers to compare prices, some firms may gain market power that allows them to raise prices or decrease quality.[553] Firms may further distort the market outcome by changing the products they offer to consumers relative to a market where prices are transparent.

The Commission discusses further the first of these effects, the added search costs incurred by consumers to acquire complete price information, in section V.E.2.a.i and quantifies these costs in the live-event ticketing and short-term lodging industries in section V.E.3.c and V.E.3.d. The Commission discusses the welfare impact of the second of these effects, the distortion of consumers' decisions due to lack of full information, in this section. The third effect, firms increasing their market power in response to increases in search costs, would exacerbate any welfare losses caused by the distortion of consumers' decisions due to the lack of full price information. However, the Commission lacks the data to quantify or distinguish their effects on deadweight loss.

The distortion of consumers' decisions due to the lack of full price information, the second effect discussed in the previous paragraph, can be illustrated through a simple model of supply and demand. For simplicity of exposition, the analysis assumes that there are many firms, each selling a homogeneous product (i.e., good or service). The

[553] Baye, *supra* note 521.

analysis further assumes that firms can adjust their prices and pricing strategies, but that the quality of the product is fixed.[554]

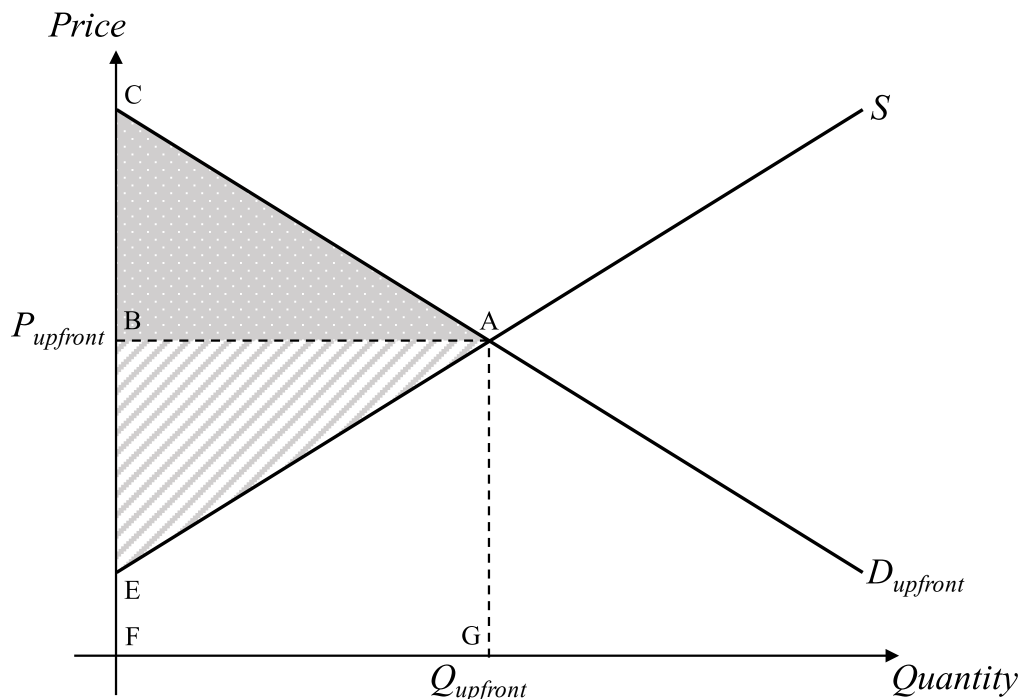
A useful starting point is to consider the baseline market outcome where consumers are fully informed; that is, consumers know the full price upfront (either because firms state the full price upfront or because consumers can fully and correctly predict any add-on prices). Since all firms sell the same product, competition will lead all firms to set equal prices at marginal cost. Figure 1 illustrates the baseline market outcome. The curve $D_{upfront}$ represents consumers' demand when they are fully informed. The supply curve S represents the marginal cost to firms of producing a given quantity of the product. The intersection of $D_{upfront}$ with S, denoted by point A, at quantity $Q_{upfront}$ and price $P_{upfront}$, represents the outcome. The analysis will refer to this as the "fully informed outcome." At point A, the marginal benefit to consumers from consuming one additional unit is equal to the marginal cost to firms from the production of one more unit of the product.

As long as there are no externalities (i.e., impacts on third parties beyond the consumers and firms under consideration) from the consumption of the product, this outcome is efficient; that is, point A represents the consumption level of the product that provides the greatest benefit to society. The benefit to society is measured by the sum of the benefit to consumers, called consumer surplus, and the benefit to firms, called producer surplus or profit. Consumer surplus is the net benefit consumers experience from consuming the product after accounting for their expenditure on the product.

[554] These assumptions are made for exposition purposes to abstract from the issues of market power in pricing and strategic interactions between firms. The general ideas from this simple framework extend to differentiated products and strategic interactions between a smaller number of firms.

Consumer surplus is given by the difference between the area of trapezoid *ACFG*, the value to consumers from consuming $Q_{upfront}$ units of the product, and the area of rectangle *ABFG*, the total expenditure on the product ($P_{upfront}$ * $Q_{upfront}$); thus, consumer surplus is given by the area of triangle *ABC*. Producer surplus is the net benefit to firms from selling the product after accounting for their costs to provide the product. Producer surplus is given by the difference between rectangle *ABFG*, the total revenue from the product, and the area of trapezoid *AEFG*, the cost to firms from producing $Q_{upfront}$ units of the product; thus, producer surplus is given by the area of triangle *ABE*. The net benefit to society is then given by the area of triangle *ACE*.

Figure 1– Fully Informed Outcome



As previously discussed, shrouded pricing makes it more difficult for consumers to ascertain the full price of the product. In the case of drip pricing, consumers will see the base price before seeing additional mandatory price components such as convenience

fees. Consumers may or may not be unaware of the additional fees at the time they make a purchase decision. If consumers are fully aware of the additional fees, or anticipate them correctly, the outcome remains point *A*, which is efficient. However, there is evidence that consumers respond differently to a change in the base price offered upfront than to changes in the fees disclosed separately from the base price. Specifically, economic studies provide evidence that consumers react less to price changes through fees than they do to price changes through the base price.[555] That is, consumer demand is less elastic to the fee component of the full price than it is to the base price. One possible rationale for this phenomenon is that consumers are fully aware of base prices but are not, or only partially, aware of fees.

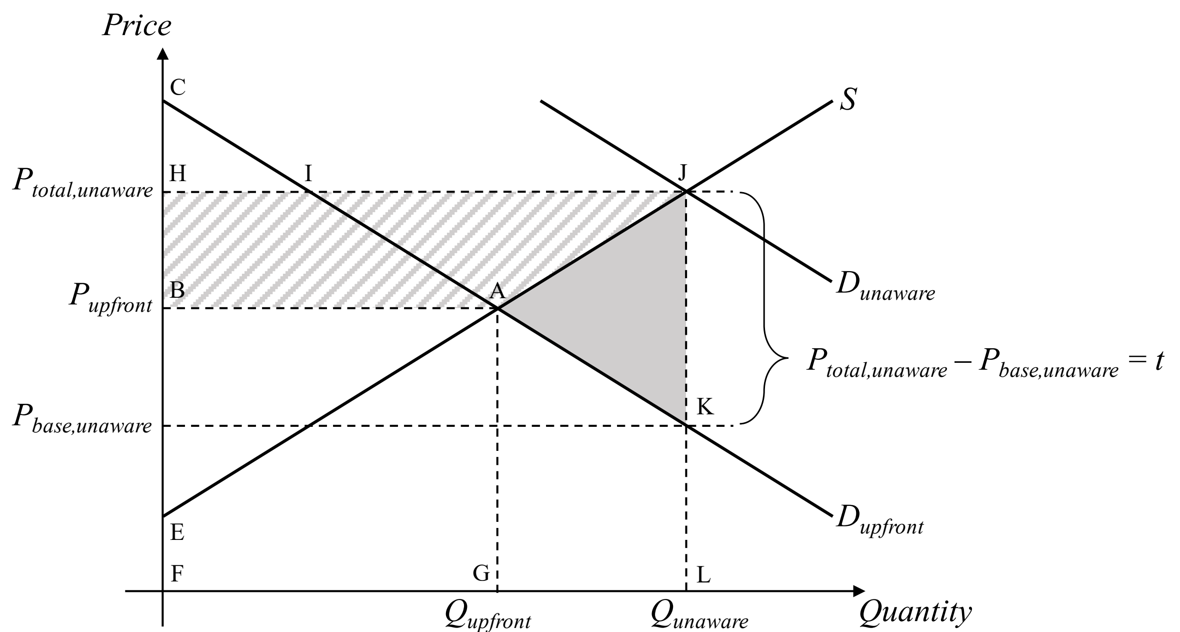
The Commission analyzes the impact drip pricing has on market outcomes in the previous framework in two stages. The analysis starts by examining the case where consumers are completely unaware of the additional fees, namely, they assume that the base price offered upfront is the full price. The analysis then examines the case where consumers are aware that a fee might be added later but do not correctly estimate the size of this fee. Note that this case may arise under a variety of circumstances. For example, all consumers could be partially aware of the fees, some consumers could be fully aware of the fees while others are totally unaware, or there could be a mixture of consumers exhibiting different degrees of awareness.

In the first stage of the analysis, $P_{base,unaware}$ denotes the base prices firms offer upfront, and $P_{total,unaware}$ denotes the full price firms charge, which is equal to the base price plus t, the sum of mandatory per unit fees not included in the base price: $P_{total,unaware}$

[555] Blake, *supra* note 521; Raj Chetty et al., *Salience and Taxation: Theory and Evidence*, 99 Am. Econ. Rev. 1145 (2009), *https://doi.org/10.1257/aer.99.4.1145*.

$= P_{base,unaware} + t$.[556] Consumers determine their consumption according to $P_{base,unaware}$, unaware that they are actually going to pay $P_{total,unaware}$. This difference between the price consumers believe they are paying and the price firms are actually charging leads to an expansion in consumer demand relative to demand when consumers are fully informed. Specifically, as illustrated by Figure 2, the firms' deception causes an upward shift in demand equal to the price difference, t, from $D_{upfront}$ to $D_{unaware}$. The intersection of $D_{unaware}$ with S, illustrated by point J, at quantity $Q_{unaware}$ and price $P_{total,unaware}$, represents the outcome when consumers are unaware of the fee and only observe the base price.[557]

Figure 2 – Market Distortion Caused by Shrouded Pricing when Consumers are Fully Unaware



Consumer surplus is now equal to the area of triangle *CHI* minus the area of triangle *IJK*. Relative to the fully informed outcome, consumer surplus decreases by the

[556] For simplicity of exposition, the analysis assumes that all firms follow the same shrouding strategy and set the same *t*.
[557] This shift is entirely analogous to the shift that would occur from a government subsidy. When a subsidy is provided, the price consumers pay is lower than the price charged by firms.

area of trapezoid *ABHI*, the decrease in consumer surplus due to the price increase, and the area of triangle *IJK*, the decrease in consumer surplus due to the deceptive pricing strategy. Producer surplus is now equal to the area of triangle *EHJ*. It increases, relative to the fully informed outcome, by the area of trapezoid *ABHJ*. This trapezoid illustrates the transfer of surplus from consumers to firms due to the deceptive practice of shrouded pricing. The net effect on society is now the area of triangle *ACE* minus the area of triangle *AJK*. Relative to the fully informed outcome, the benefit to society decreases by the area of triangle *AJK* (the combined change in consumer and producer surplus). This decrease in social surplus is the harm, also referred to as deadweight loss, caused by the full shrouding of the fee.

The analysis now turns to the case where consumers are aware of the possibility of additional fees but do not fully anticipate their magnitude. As previously discussed, academic research suggests that this might be the case.[558] This reduced salience would increase quantity demanded and incur a deadweight loss compared to the fully informed outcome (illustrated in Figure 1), although both the increase in quantity demanded and the deadweight loss would be smaller than in the case where consumers were fully unaware of the fees (illustrated in Figure 2). Essentially, the aggregate demand curve will lie somewhere between the upfront demand curve in Figure 1 and the fully shrouded demand in Figure 2. This aggregate demand can come from (the same) partial awareness by all consumers or a mixture of different degrees of awareness by different consumers. A technical appendix in section V.E.6 provides a more detailed model of the impact of consumers' partial awareness.

[558] Blake, *supra* note 521; Chetty, *supra* note 555.

In summary, the shrouding of prices distorts the market outcome by leading consumers to consume more than they would if they were fully aware of the full price. The overconsumption by consumers leads to a social cost in the form of deadweight loss because the resources used to produce the product would have been put to better use if consumer demand had not been distorted in this manner. The deadweight loss from the inefficient consumption level is one component of the welfare loss generated by drip pricing, in addition to the increase in consumer search costs and the possible shift in pricing and product offerings due to increased market power. Collectively, these effects represent a market failure.

Shrouded pricing likely cannot be mitigated by competitive forces alone once it has become pervasive in a market. Although consumers would prefer upfront full prices, it is unlikely that an individual firm in a market with shrouded prices could increase its market share by providing its full price upfront. Under the expectation of shrouded prices, consumers may inadvertently interpret such a firm's upfront full price as a higher base price, with fees added separately, leading the firm to lose, rather than gain, business. The distortion of consumer expectations caused by shrouded pricing thus prevents a shift to upfront pricing through competition.

In many markets, goods and services are differentiated, with higher quality items selling at higher prices. In such markets, drip pricing may lead to outcomes characterized by inefficiently high qualities in addition to the inefficiently high quantities previously discussed.[559] Consumers may respond to fully disclosed prices in these markets by

[559] This phenomenon has been observed, for example, in the live-event ticketing industry. *See* Blake, *supra* note 521.

purchasing goods or services of lower, more efficient quality in addition to purchasing lower, more efficient quantities of goods or services.

b) Shrouded Pricing as a Source of Biased Expectations

As explained in section V.E.1.a, firms have incentives to distort consumer demand toward an inefficient equilibrium. This inefficiency may also arise in a behavioral context.[560] By shrouding full prices through drip or partitioned pricing, a firm may bias its consumers' price expectations. For example, consumers may respond to dripped prices by anchoring their beliefs on the base price and, thus, systematically underestimate the price of the good or service.[561] This underestimation, whether by all consumers, or a subset of consumers, leads to a similarly inefficient equilibrium in which the good or service is overconsumed and society suffers a deadweight loss.

Several studies show how consumer behavior changes because of drip pricing. One study found that when optional surcharges are dripped, individuals are more likely to select a more expensive option (after including surcharges) than what they would have chosen under upfront pricing.[562] Even when the participants became aware of the additional fees, they were reluctant to restart the purchase process because they perceived high search costs from doing so and inaccurately assumed that all firms charge the same fees. A different economics experiment found that consumers encountering drip pricing are more likely to make purchasing mistakes if they are uncertain about the extent of the drip pricing.[563]

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[560] David Laibson, Harvard U., Drip Pricing: A Behavioral Economics Perspective, Address at the FTC (May 21, 2012), *https://www.ftc.gov/sites/default/files/documents/public_events/economics-drip-pricing/dlaibson.pdf*.
[561] Morwitz, *supra* note 527.
[562] Shelle Santana et al., *Consumer Reactions to Drip Pricing*, 39 Mktg. Sci. 188 (2020), *https://doi.org/10.1287/mksc.2019.1207*.
[563] Rasch, *supra* note 521.

Another prominent study looked at how consumers respond to the salience of sales tax on goods, which affects the full price of a product.[564] In this study, when the grocery store displayed the full price of each item on shelves as part of a field experiment, people purchased fewer goods relative to the control scenario in which sales tax was added at checkout, despite knowing that the final price being charged had not changed. In 2014, StubHub conducted an experiment in which some consumers were presented with upfront prices inclusive of fees while other consumers were presented a base price upfront with fees hidden until checkout. This experiment revealed that presenting consumers with full prices upfront reduced both the quantity and quality of tickets purchased relative to presenting consumers with dripped prices.[565]

2. Economic Effects of the Final Rule

The model of incomplete price information, described in section V.E.1.a, provides a framework for assessing the potential costs, benefits, and transfers associated with the final rule in the live-event ticketing and short-term lodging industries. The rule will result in positive net benefits if it allows consumers to learn Total Price more easily, improves consumer comprehension of fees and charges as they relate to Total Price, facilitates comparison shopping, reduces search costs, or otherwise allows consumers to make choices that increase net welfare. The Commission believes the rule will accomplish these goals in the live-event ticketing and short-term lodging industries.

The Commission finds in section V.E.1 that consumer demand in the live-event ticketing and short-term lodging industries is distorted by incomplete price information—in simple terms, consumers respond to lower base prices even if fees are revealed or

[564] Chetty, *supra* note 555**.**
[565] *See* Blake, *supra* note 521.

added up later in a transaction. Thus, if a seller in these industries uses hidden fees, that seller may acquire a larger market share by advertising lower initial prices than other sellers not using hidden fees. Absent the rule, competitive forces will drive other firms in these industries to also use hidden fees, as has become evident as noted in section II.B. If firms do not use hidden fees, they may have to accept a lower market share, even though their full prices to consumers are similar to (or lower than) their competitors. Thus, the Commission finds that with the final rule, firms that currently do not use drip pricing will no longer face the competitive pressure to employ hidden fees and may experience higher revenue if consumers can more easily compare prices across firms. The Commission also finds that the rule will generate costs as firms that currently employ hidden or misleading fees adjust how they convey prices to consumers.

Overall, the Commission expects the rule will increase economic efficiency through improved consumer price calculations, resulting in reduced deadweight loss and reduced consumer search time that exceeds the costs to firms of providing more transparent pricing. It may also facilitate price comparison by consumers, increase competition among sellers, and put downward pressure on prices. Due to a lack of data, it is difficult to fully quantify all the potential effects of the final rule. Where there may be impacts that the Commission is unable to quantify, it provides a qualitative description.

a) General Benefits of the Final Rule

Consumers will benefit from the rule in several ways. In addition to reductions in search costs and deadweight loss, which are described in greater detail herein, the Commission expects there to be unquantified benefits for consumers from the rule, including reduced frustration and consumer stress associated with surprise fees that distort the purchasing process.

i. Reductions in Search Costs

Consumers will save time searching for the Total Price of live-event tickets and short-term lodging as a result of the rule. In a well-functioning market, consumers find it beneficial to comparison shop for low prices. When mandatory fees are obscured or misrepresented, however, consumers learn the full price at the end of the process and may need to re-assess whether they wish to purchase at a higher price than originally expected or to look for other options. Consumers incur longer search times to discover full prices and make informed purchasing decisions. The final rule will eliminate the need for additional, inefficient amounts of time to determine Total Price from sellers that do not already provide Total Price upfront. The Commission quantifies the reduction in search costs in the live-event ticketing and short-term lodging industries.

ii. Reductions in Deadweight Loss

As discussed in section V.E.1.a, incomplete pricing information may distort consumer demand. This distortion will lead to an inefficient market equilibrium and generate deadweight loss, which results from consumers purchasing higher quantities of the good or service than they would if fully informed. Under the final rule, consumers will learn Total Price upfront. Thus, the rule will likely mitigate distorted consumer demand and prevent welfare-reducing transactions. Resources supporting overconsumption will become available for better societal use, and the deadweight loss will be reduced or eliminated.

The disclosure of Total Price may also reduce mistake purchases with respect to product quality. Drip pricing can lead consumers to purchase goods of inefficient quality; the final rule will allow consumers to choose more efficient levels of quality. The

Commission does not quantify the reduction in deadweight loss but finds that it is a positive benefit to the final rule.

b) Welfare Transfers

The Commission expects that prices in the live-event ticketing and short-term lodging industries will adjust in response to the transparency facilitated by the rule. These price adjustments transfer welfare from one side of the market to the other; consumer welfare will increase, and producer profits will decrease by the same amount. Typically, transfers of welfare from one set of people in the economy to another are documented in a regulatory analysis, but do not change net social welfare.[566] Consequently, while it is likely that the rule will result in transfers of welfare, the Commission does not attempt to estimate these transfers.

c) General Costs of the Final Rule

Firms in the live-event ticketing and short-term lodging industries will likely do a basic regulatory review to determine how the rule applies to them.[567] Firms that are not already in compliance with the rule may incur additional costs to re-optimize the price of goods and services. These firms may also incur costs to adjust how they display pricing information to disclose Total Price whenever the price of a good or service is displayed. For example, firms may need to update websites or reprint advertisements to comply with the rule.

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[566] *See* OMB Circular A-4, *supra* note 547 ("Transfer payments are monetary payments from one group to another that do not affect total resources available to society. A regulation that restricts the supply of a good, causing its price to rise, produces a transfer from buyers to sellers." Even though a "net reduction in the total surplus (consumer plus producer) is a real cost to society, [] 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.").

[567] This basic regulatory review also captures the time it takes for firms to determine how a nationwide rule interacts with any state-level regulations to which they are already subject.

In addition, the Commission notes that there may be other indirect short-term costs that the Commission cannot quantify. For instance, consumers who are used to an existing pricing structure that separately discloses mandatory fees at the end of the purchase process may mistakenly make inefficient purchases while adjusting to the new regime of upfront Total Price. Specifically, consumers accustomed to dripped live-event ticketing fees may initially under-consume when shopping for tickets with upfront Total Price. The societal cost of such inefficiencies would be temporary and decrease as consumers adjust to the truthful, timely, and transparent pricing required by the rule.

While the rule allows Businesses to exclude Shipping Charges from Total Price until the point at which a consumer may consent to pay, the rule requires any internal handling costs that were previously disclosed at the end of the purchase process to be incorporated in Total Price. Since shipping and handling charges are sometimes combined, Businesses may have to change how they account for handling costs and how they advertise shipping and handling costs to comply with this provision.

3. Quantified Welfare Effects

This section quantifies the potential benefits and costs of the final rule for the live-event ticketing industry and the short-term lodging industry. The Commission provides quantitative estimates where possible for these industries, and it describes benefits and costs that can only be assessed qualitatively. The Commission estimates that the quantified benefits will exceed the quantified costs, and the Commission believes that the total benefits (quantified and unquantified) will outweigh the total costs (quantified and unquantified) of the rule.

a) *Quantified Compliance Costs*

The Commission quantifies the compliance costs for both industries utilizing assumptions about the number of hours required to determine and, if necessary, come into compliance with the final rule. The Commission expects that, in response to the final rule, firms will initially determine whether and how the rule applies to their current pricing and fee disclosure practices. The Commission assumes firms with current practices that align with the final rule will incur, at most, one hour of lawyer time to confirm compliance. This hour of lawyer time is a proxy for the average amount of time firms will need to determine whether the final rule applies to them. For example, some firms may not employ an attorney at all but may instead have a staff member review the rule.

The Commission does not have data on the exact costs noncompliant firms will incur to comply with the final rule. Some firms already may have developed tools to comply with the rule because they operate in jurisdictions, such as California, with existing similar all-in pricing requirements. Coming into compliance with the rule should be relatively easy for these firms. For other firms, complying with the final rule may require additional time and costs. To capture both the variation and uncertainty of costs across the two industries, the analysis includes a series of low- and high-end assumptions about the number of hours required to comply with the rule.[568] For example, the Commission's analysis assumes that firms not presently compliant will employ a low end

[568] The Commission requested additional information on potential compliance hours in the NPRM, but it did not receive consistent data. Therefore, the Commission uses the same set of assumptions on hours as used in the NPRM but notes that the live-event ticketing and short-term lodging industries are likely to have already established systems necessary to comply with the final rule due to operating in jurisdictions with similar regulations.

of five hours and a high end of ten hours of lawyer time to determine necessary steps to comply with the rule. While some firms may forgo legal advice, this range of lawyer time serves as a proxy for any costs associated with understanding and preparing to comply with the rule.

The final rule's requirement to display Total Price may lead to shifts in consumer demand and, consequently, market equilibria. In response, firms transitioning away from drip pricing may need to determine new optimal prices. The Commission's analysis assumes that these price re-optimizations will require firms to incur a one-time, upfront cost of data scientist time to perform this work. The analysis assumes firms not presently compliant will employ a low-end of forty hours and a high-end of eighty hours of data scientist time. Similar to the use of lawyer hours in estimating compliance costs, this range of data scientist time serves as a proxy for any costs associated with adjusting pricing strategies in response to the rule.[569]

The Commission expects that the drip pricing employed by firms not presently compliant with the rule is, in many cases, manifested in online sales. In such cases, firms also will need to adjust advertised prices as well as purchase processes for online sales, and the analysis assumes these adjustments require firms to incur a one-time, upfront cost of web developer time. The analysis assumes firms not presently compliant will employ a low end of forty hours and a high end of eighty hours of web developer time to become

[569] It is possible that presently compliant firms would also need to reoptimize prices in response to shifts in market equilibria. That is, the shift in an industry's equilibrium resulting from the rule could be significant enough that all firms in the industry, compliant or not, would need to adjust prices. Firms regularly reoptimize prices in response to market shifts, but it is possible that this price adjustment would require already compliant firms to incur additional costs. The Commission solicited, but did not receive, the data necessary to quantify this potential cost to firms.

compliant with the final rule.[570] Once firms are compliant with the rule, any future changes to pricing displays or purchasing systems are not a direct consequence of the rule. Since the rule will not take effect for four months, some of these pricing display and advertising updates may come at no additional cost to certain firms. Many firms regularly update their pricing displays and advertisements. Any firms that would, in their normal course of business, update their displays and advertising during the four month window prior to the rule taking effect would not incur the additional one-time cost of updating their displays and advertisements in response to the rule. Because the Commission lacks data on these business practices, the Commission conservatively assumes that all firms not presently compliant with the rule will incur these costs. As such, the Commission's analysis likely represents an overestimate of compliance costs.

It may be the case that once the firm incurs the one-time transition costs, there are no additional costs. For a low-end estimate of costs, the Commission's analysis assumes annual costs are $0 because there are zero additional hours of labor. However, it may be the case that, as firms transition into compliance with the final rule, firms need to reevaluate their pricing policies to ensure continued compliance by employing additional lawyer time on an annual basis. Available data do not allow the Commission to estimate the exact annual compliance costs firms may incur as various industries adapt to the final rule. For the high-end cost estimate, the Commission's analysis assumes firms require an average of ten hours of lawyer time for annual compliance checks. The Commission recognizes some firms may not utilize lawyer time but may delegate compliance to non-

[570] The U.S. Department of Transportation also uses an assumption of 80 hours of time to reprogram flight quotation websites for the Enhancing Airline Passenger Protections II rule. U.S. Dep't Transp., *Preliminary Regulatory Analysis: Enhancing Airline Passenger Protections II* (May 24, 2010), *https://www.regulations.gov/document/DOT-OST-2010-0140-0003* ("Consumer Rule II").

attorney employees and still incur annual compliance costs. Data on non-lawyer compliance costs are not available, and these potential annual compliance costs are proxied with lawyer time with the implicit assumption that non-attorney employee hourly wages are lower than lawyer wages.

Table 3 presents the total compliance costs as the sum of the industry-specific compliance costs described in more detail in section V.E.3.c and V.E.3.d. The cost of employee time is monetized using wages obtained from the Bureau of Labor Statistics' May 2023 National Occupational Employment and Wage Estimates for the live-event ticketing industry.[571] For the short-term lodging industry, the analysis uses industry-specific wages associated with the North American Industry Classification System ("NAICS") codes.

Table 3 – Total Compliance Costs

	Firms that Already Comply with Final Rule	**Firms that Do Not Already Comply with Final Rule**	
One-time Hours for Regulatory Familiarization or Compliance		**Low-end Estimate**	**High-end Estimate**
Lawyer Hours	1	5	10
Data Scientist Hours	0	40	80
Price Display Adjustment Hours	0	40	80

[571] U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, *May 2023 National Occupational Employment and Wage Estimates United States* (May 2023), *https://www.bls.gov/oes/current/oes_nat.htm* ("OEWS National"); U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, *Occupational Employment and Wages, May 2023: 15-2051 Data Scientists* (May 2023), *https://www.bls.gov/oes/current/oes152051.htm* ("OEWS Data Scientists") (providing the hourly wages for data scientists); U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, *Occupational Employment and Wages, May 20231: 15-1254 Web Developers* (May 2023), *https://www.bls.gov/oes/current/oes151254.htm* ("OEWS Web Developers") (providing the hourly wages for web developers); U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, *Occupational Employment and Wages, May 2023: 23-1011 Lawyers* (May 2023), *https://www.bls.gov/oes/current/oes231011.htm* ("OEWS Lawyers") (providing the hourly wages for lawyers). This assumption is valid if hours spent in compliance activities would otherwise be spent in other productive work-related activities, the social value of which is summarized by the employee's wage. To the extent that these activities can be accomplished using time during which employees would otherwise be idle in the absence of a rule, our estimates will overstate the welfare costs of the final rule.

Lawyer Hours	0	0	10
Total @ 7% Discount Rate	$30,495,217	$137,948,942	$572,268,869
Total @ 3% Discount Rate	$30,495,217	$137,948,942	$613,658,505
Total @ 7% Discount Rate		$168,444,159	$602,764,086
Total @ 3% Discount Rate		$168,444,159	$644,153,722

Table 4 presents the ten-year per-firm annualized compliance costs for the live-event ticketing and short-term lodging industries, separated by firms already in compliance, which incur a one-time compliance check, and firms not presently in compliance, which incur both one-time and recurring costs. Compliance costs for the short-term lodging industry are further disaggregated into costs for U.S. hotels and U.S. home share hosts. Costs to foreign hotels and home share hosts are discussed in section V.E.3.d.ii.

Table 4 – Per Firm Annualized Compliance Costs

	Firms that Already Comply with Final Rule	**Firms that Do Not Already Comply with Final Rule**	
Live-Event Ticketing		**Low-End**	**High-End**
Annualized Compliance Cost Per Firm @ 7% Discount Rate	$84.84	$648	$2,144
Annualized Compliance Cost Per Firm @ 3% Discount Rate		$534	$1,916
Short-Term Lodging (Hotels - U.S. Only)		**Low-End**	**High-End**
Annualized Compliance Cost Per Firm @ 7% Discount Rate		$527	$2,011

Annualized Compliance Cost Per Firm @ 3% Discount Rate		$434	$1,825
One-Time Cost (Firms Already in Compliance)	$95.60		
Short-Term Lodging (Home Share Hosts)		**Low-End**	**High-End**
One-Time Cost of Price Re-Optimization		$30.42	$91.27

b) Break-Even Analysis

To have a positive net benefit, the final rule's benefits must outweigh its costs. The Commission calculates the break-even benefit per consumer based on the quantified costs presented in section V.E.3.b.[572] That is, the Commission determines the minimum value the final rule would need to generate for the average consumer for its total benefits to outweigh its quantified costs. The rule's benefits may include reduced search costs, reduced deadweight loss, and reduced psychological distress or frustration from surprise fees. For this analysis, the Commission considers costs in annualized terms—the average discounted cost of compliance per year over 10 years.[573] As such, the analysis expresses the break-even benefit as an average benefit per consumer per year over ten years.[574]

From Table 3, under the assumption that firms and consumers discount future years at 3%, the Commission's analysis estimates that the final rule may result in costs as high as $644 million over 10 years. Assuming instead a discount rate of 7% for future years, the analysis estimates that the final rule may result in costs as high as $603 million

[572] In section V.E.3.c and V.E.3.d, the Commission quantifies the final rule's net social benefits for the live-event ticketing and short-term lodging industries.

[573] For purposes of discounting and annualizing costs, the analysis assumes that firms incur one-time costs immediately, at the beginning of year 1, and potential costs of annual compliance checks at the end of each year.

[574] Benefits to consumers, such as reductions in search costs, will accrue continually over time. For simplicity, the break-even analysis assumes that annualized benefits accrue all at once at the end of each year. As such, the break-even analysis may overestimate the benefits required to outweigh costs.

over ten years. To determine the break-even benefit, the Commission's analysis begins with the total present value of total costs and calculates the annualized total costs across both industries.[575] Next, the Commission calculates what the break-even benefit would be per consumer, according to the following formula:

Per Consumer Annualized Benefits ≥ (Annualized Quantified Compliance Costs / Population)

Table 5 presents the results of this break-even analysis. According to the 2020 Census, there are 258,343,281 adults living in the United States. Thus, the analysis divides the estimates of annualized costs by the number of U.S. adults to find the average consumer benefit per year for 10 years required to exceed quantified compliance costs. For example, if the final rule results in an average benefit to consumers that exceeds $0.33 per year over ten years, then the final rule's benefits exceed its quantified compliance costs under the high-end assumption and an assumed 7% discount rate.

Table 5 also provides the break-even benefit per consumer in terms of minutes saved as a result of the final rule. According to the Bureau of Labor Statistics' Occupational Employment Statistics, the average hourly wage of U.S. workers in 2023 was $31.48, and recent research suggests that individuals living in the U.S. value their non-work time at 82% of average hourly earnings. Thus, the value of non-work time for the average U.S. worker would be $25.81 per hour.[576] If the analysis divides the break-even dollar benefit per consumer, using the high-end assumptions and a discount rate of 7% ($0.33), by the value of saved search time ($25.81/hour) and converts to minutes, the

[575] While total costs are higher with a smaller discount rate, annualized costs are higher with a larger discount rate due to higher upfront costs and lower recurring costs.

[576] *See* OEWS National, *supra* note 571 (providing the mean hourly wage); Hamermesh, *supra* note 533 (providing the value of consumer time).

break-even saved search time per consumer is 0.77 minutes. That is, if the final rule results in savings from reduced search time that exceed 0.77 minutes per consumer per year over ten years, then the benefits solely from reduced search time will exceed quantified compliance costs.[577] Although the Commission acknowledges that benefits of the final rule may vary across consumers, as some consumers may be more likely than others to consume live-event tickets and/or short-term lodging, the Commission finds it highly likely that consumers would experience average search time savings of this amount.

Table 5 – Break-Even Analysis

Break-Even Benefit Per Consumer ($)	**Low-End Estimate**	**High-End Estimate**
Live-Event Ticketing and Short-Term Lodging		
Total @ 7% Discount Rate	$0.09	$0.33
Total @ 3% Discount Rate	$0.08	$0.29
Break-Even Time Savings Per Consumer (Minutes)		
Live-Event Ticketing and Short-Term Lodging		
Total @ 7% Discount Rate	0.22	0.77
Total @ 3% Discount Rate	0.18	0.68

There are a few important caveats to this break-even analysis. This analysis may overestimate the number of noncompliant firms in the live-event ticketing and short-term lodging industries. In that case, this assumption leads to an overestimate of both costs and necessary break-even benefits. On the other hand, there may be more firms not already in compliance with the final rule, in which case this assumption results in an underestimate of both costs and break-even benefits.

[577] Assuming a 3% discount rate and the high-end assumptions, the break-even time saved per consumer per year would be 0.68 minutes.

The Commission cannot forecast all potential consequences and costs. This break-even analysis does not account for any unquantified benefits or costs due to unintended consequences. However, if the benefits from reduced deadweight loss caused by consumers' incomplete price information, reduced search time, and beneficial unintended consequences outweigh the costs from compliance and harmful unintended consequences, then the rule results in positive net social benefits. The Commission believes benefits will exceed the costs.

i. Sensitivity Analysis: Assume Higher Wage Rates

The Commission received comments regarding the wage rates used in the cost estimation. To address these comments, this section provides the break-even analysis described in section V.E.3.b using rates that are double the average wage rate obtained from the Bureau of Labor Statistics May 2023 National Occupational Employment and Wage Estimates.[578] Specifically, the wage rates used for this analysis are $169.68 for lawyer time to review compliance, $114.46 for data scientist time to re-optimize pricing, and $91.90 for web developer time. Using these higher wage rates, the break-even benefit required to exceed quantified compliance costs is provided in Table 6.[579]

Table 6 – Break-Even Sensitivity Analysis (Doubled Wages)

Break-Even Benefit Per Consumer ($)	**Low-End Estimate**	**High-End Estimate**
Live-Event Ticketing and Short-Term Lodging		
Total @ 7% Discount Rate	$0.16	$0.59

[578] *See* sources cited *supra* note 571, including OEWS National (providing the mean hourly wage); OEWS Data Scientists (providing the hourly wages for data scientists); OEWS Web Developers (providing the hourly wages for web developers); and OEWS Lawyers (providing the hourly wages for lawyers).
[579] Wages are doubled in this sensitivity analysis, but the break-even benefit per consumer does not exactly double because not all costs depend on wages. One component of the cost calculation in the short-term lodging industry is the cost to home share hosts of re-optimizing prices. This cost is evaluated using an estimate of hosts' hourly value of time rather than wages, which is not doubled. Therefore, the break-even benefits per consumer presented in Table 6 are slightly less than double those in Table 5.

Total @ 3% Discount Rate	$0.13	$0.52
Break-Even Time Savings Per Consumer (Minutes)		
Live-Event Ticketing and Short-Term Lodging		
Total @ 7% Discount Rate	0.37	1.36
Total @ 3% Discount Rate	0.31	1.21

The break-even analysis under the assumption of doubled wages implies that if the final rule results in an average benefit to consumers that exceeds $0.59 per year over ten years, then the final rule's benefits exceed its quantified compliance costs under the high-end assumption and an assumed 7% discount rate. In terms of minutes saved per consumer, the high-end cost assumptions with doubled wages and a 7% discount rate imply that if the final rule results in savings from reduced search time that exceed 1.36 minutes per consumer per year over ten years, then the benefits solely from reduced search time will exceed quantified compliance costs.

c) Quantified Benefits and Costs: Live-Event Ticketing Industry

This section analyzes the final rule's quantified benefits and costs in the live-event ticketing industry. Quantified benefits are limited to the expected reductions in search costs to consumers. Since there is an additional, unquantified benefit of reduced deadweight loss, which is discussed conceptually in section V.E.2.a.ii, the net benefit estimated in the following analysis is conservative. The Commission finds that the quantified benefits and costs indicate that the rule will have a positive net benefit, even without accounting for the unquantified benefit of reducing deadweight loss.

Consumers in the live-event ticketing industry are often surprised by mandatory fees at the end of the purchase process.[580] In 2022, online event ticket sales were reported

[580] *E.g.*, White House, *How Junk Fees Distort Competition*, *supra* note 551.

to be $8.1 billion.[581] Live events include concerts (30.3%), sporting events (33%), and dance, opera, and theater productions (12.4%).[582] For many consumers, there are no close substitutes for the specific product that they wish to purchase: a ticket to attend a live event. Thus, when consumers are presented with surprise mandatory fees, the consumer either pays the full price including the fees, spends time searching for a new option such as a different seat or a different seller, or forgoes the purchase entirely.

The live-event ticketing industry is unique relative to other industries because there is a large and robust secondary market. A given ticket to an event may be sold in the primary market, and then resold multiple times in the secondary market. It is difficult to fully quantify how many live-event ticket purchases are made in the U.S., how many involve mandatory fees, and the typical amount of the fee. Many live-event ticket sellers appear to include some kind of fee, although the size and type of the fees vary across sellers.[583] In a non-generalizable sample, the GAO found live-event ticketing fees in primary and secondary ticket markets averaged 27% and 31% of the ticket's price, respectively.[584]

Following White House and Congressional calls for disclosure of hidden fees, and after the ANPR was announced, some ticket sellers pledged to show all-in prices when

[581] Michal Dalal, *Online Event Ticket Sales in the US*, IBISWorld (May 2023) ("Ticket Sales Industry Report").
[582] *Id.*
[583] Numerous commenters from the live-event ticketing industry recognized the pervasiveness of various ticketing fees. *See, e.g.*, FTC-2023-0064-3212 (TickPick, LLC observed the "widespread" deceptive practice of bait-and-switch pricing); FTC-2023-0064-3230 (Future of Music Coalition commented that they have worked to "deal[] with the scourge of junk fees in various parts of the economy," including live touring); FTC-2023-0064-3105 (Charleston Symphony affirmed that "requiring sellers to disclose the total price clearly and conspicuously[] addresses a pressing issue in the nonprofit performing arts sector").
[584] U.S. Gov't Accountability Office, Event Ticket Sales: Market Characteristics and Consumer Protection Issues, (Apr. 12, 2018), ("GAO Report"), *https://www.gao.gov/products/gao-18-347*.

the consumer begins the purchase process.[585] However, absent the final rule, market forces would likely return to the equilibrium of hidden mandatory fees. In fact, the National Association of Ticket Brokers and StubHub, Inc. submitted comments to the ANPR in support of a rule requiring all-in pricing, but commented that such a rule would only be effective if applied to all ticket sellers and rigorously enforced.[586] As discussed in section III.B.1.b, the Commission received similar comments in response to the NPRM emphasizing that the benefit of the rule requires industry-wide coverage so that no single seller is allowed to charge surprise fees at the end of the transaction. If any seller utilizes hidden fees, they may capture a larger market share by advertising lower initial prices. Absent a Federal rule applying to all sellers, competitive forces might drive ticket sellers to return to the use of hidden fees. Thus, the Commission's analysis quantifies benefits and costs relative to the baseline equilibrium where sellers do not disclose Total Price upfront.

In this final live-event ticketing net benefit analysis, the Commission updates firm counts, wage rates, any inflation-adjusted values, value of time, and 10-K live-event ticket revenue information to reflect the most recent available data. The Commission was unable to update any numbers from IBISWorld Reports.

i. Live-Event Ticketing: Estimated Benefits of the Final Rule

[585] *See, e.g.*, White House, *President Biden Recognizes Actions by Private Sector Ticketing and Travel Companies to Eliminate Hidden Junk Fees and Provide Millions of Customers with Transparent Pricing* (Jun. 15, 2023) *https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/15/president-biden-recognizes-actions-by-private-sector-ticketing-and-travel-companies-to-eliminate-hidden-junk-fees-and-provide-millions-of-customers-with-transparent-pricing/*. Some ticket sellers, such as TickPick, LLC, have never used hidden fees; S. Comm. on Commerce, Sci., & Transp., TICKET Act, *https://www.commerce.senate.gov/services/files/071401A3-D280-414C-AEDB-A9B57F276067*.

[586] FTC-2022-0069-6089 (ANPR) (National Association of Ticket Brokers); FTC-2022-0069-6079 (ANPR) (StubHub, Inc.).

(a) Consumer Time Savings When Shopping for Live-Event Tickets

The final rule requires disclosure of Total Price inclusive of all fees or charges that a consumer must pay in order to use the good or service for its intended purpose. Required disclosure of Total Price and prohibitions on misrepresentations save consumers time when shopping for a live-event ticket by requiring the provision of salient, material information upfront and eliminating time spent pursuing ticket offers priced above the amount the consumer is willing to spend, also known as the consumer's reservation price.

The Commission's analysis assumes that, as a result of the rule, the total time spent by a consumer conducting the transaction will decrease, because some consumers will reduce the number of ticket listings they view prior to making a ticket purchase. For example, the Blake Study examined an experiment on StubHub where fees were presented upfront to some consumers and at the end of the purchase to others.[587] The experiment found that the percentage of consumers who only view one listing is 74% when fees are presented at the end of the transaction versus 83% when fees are presented upfront. Using the distribution of listings viewed by consumers as reported in the Blake Study, the analysis calculates that the reduction in the average number of listings a consumer views when fees are displayed upfront is 0.1525 listings.

To calculate the reduction in consumer search time resulting from upfront pricing, the Commission requires information on the length of time a consumer spends viewing a single listing. The Commission is not aware of any data available on this. However, many ticket sellers utilize a "countdown clock" where the selected tickets in the consumer's shopping cart expire and are returned to the marketplace. During this countdown clock, a

[587] Blake, *supra* note 521.

consumer who was unhappy with the revealed Total Price could search for another ticket without losing the original ticket. The Commission uses this range of countdown clock time as a proxy for a low-end and high-end estimate of the time spent viewing a listing. These countdown clocks range from five to ten minutes per ticket transaction.[588] Multiplying the assumed length of a ticket transaction of five or ten minutes by the estimated reduction in viewed listings from the Blake Study results in a search time savings of 0.7625 to 1.525 minutes per consumer transaction.[589]

Next, the Commission's analysis estimates the number of consumer purchases of live-event tickets. Live Nation (which owns Ticketmaster) reported selling over 329 million fee-bearing tickets in the primary and secondary markets using the Ticketmaster system in its 2023 10-K SEC filing.[590] However, this figure combines North American and international ticket sales. Live Nation also reported that slightly more than two-thirds of concert events were in North America, so the analysis applies that proportion to the total combined ticket sales and assumes that Ticketmaster sold more than 221 million tickets in North America. To estimate the number of tickets sold solely in the U.S., the analysis then also adjusts the number of tickets by the share of North American GDP

[588] Ticketmaster states that the amount of time it imposes varies by event but references a five-minute purchasing period. *FAQ's: Why does Ticketmaster enforce a time limit when making purchases online?*, Ticketmaster.com.au, *https://www.ticketmaster.com.au/h/faq.html*. Based on a small, non-representative sample of ticket purchase attempts, StubHub appears to generally offer ten minutes to complete a ticket purchase.

[589] *See also* Consumer Rule II, *supra* note 570, at 39. The Preliminary Regulatory Impact Analysis for Consumer Rule II assumed airfare consumers would save five minutes of search and estimation time if all websites provided full-fare information upfront.

[590] Live Nation Entm't Inc., Annual Report (Form 10-K) (Feb. 22, 2024) ("Live Nation 10-K"), *https://investors.livenationentertainment.com/sec-filings/annual-reports/content/0001335258-24-000017/0001335258-24-000017.pdf*.

attributable to the U.S. (0.87 in 2023), which results in an estimated 192 million tickets sold in the primary and secondary markets by Ticketmaster in the U.S.[591]

To find the total number of tickets sold in the U.S. by all live-event ticket sellers, the Commission's analysis extrapolates from Ticketmaster's ticket sales using its market share. However, Ticketmaster's market share is uncertain. In 2010, the Department of Justice found that Ticketmaster had maintained a market share of more than 80% for the previous fifteen years.[592] If the Commission's analysis assumes that Ticketmaster still has an 80% share of the live-event ticket market (which includes both primary and secondary ticket markets), it can estimate the total number of tickets sold in the U.S. by dividing Ticketmaster's ticket sales in the U.S. by 80%. This provides a low-end estimate of the number of tickets sold in the U.S. of 240 million tickets.

However, Ticketmaster did not begin selling in the secondary market until after it merged with Live Nation. Based on publicly available information, the Commission is uncertain of Ticketmaster's market share in the secondary market for tickets.[593] If Ticketmaster does not have 80% of the ticket market (both primary and secondary), the number of tickets sold in the U.S. would exceed the low-end estimate of 240 million tickets. To generate a high-end estimate of the total number of tickets sold in the U.S., the

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[591] U.S. GDP in 2023 was estimated to be $27.36 trillion and GDP for North America was estimated to be $31.4 trillion. *IMF DataMapper United States Datasets*, IMF.org, *https://www.imf.org/external/datamapper/profile/USA*; *IMF DataMapper North America Datasets*, IMF.org, *https://www.imf.org/external/datamapper/profile/NMQ.* The Commission's analysis adjusts North American tickets (221 million) by 87% to estimate the number of tickets sold in the United States, resulting in 192 million.

[592] *See* Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, *Remarks at the South by Southwest Conference: The TicketMaster/Live Nation Merger Review and Consent Decree in Perspective* (Mar. 18, 2010), *https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective*.

[593] The Live Nation 10-K, *supra* note 590, does not separate out tickets sold by Ticketmaster in the primary versus secondary markets. Ticketmaster now sells tickets on the secondary market, which includes several other sellers such as StubHub, Inc., Vivid Seats, TickPick, LLC, Ace Ticket, Alliance Tickets, Coast to Coast Tickets, and others.

Commission's analysis uses the reported revenue for the full online ticket sales industry provided by the private research firm IBISWorld and calculates Ticketmaster's revenue share of the industry. IBISWorld reports the online ticket sales industry, including both primary ticket sellers and ticket resellers, earned $12.5 billion in revenue in 2023.[594] The Live Nation 10-K reported ticketing revenue of $3 billion in 2023, which suggests that Ticketmaster has a 24% revenue share of the online ticketing industry.[595] The Commission's analysis extrapolates a high-end estimate of the total number of tickets sold in the U.S. by dividing Ticketmaster ticket sales in the U.S. by 24%, which results in an estimate of 801 million live-event tickets sold in the U.S.

Lastly, the reduction in search time of 0.7625 to 1.525 minutes is per consumer purchase, not per ticket purchase. The Commission's analysis assumes that the average consumer purchase is between 1.5 and 3 tickets.[596] Thus, the total number of tickets sold is divided by 1.5 or 3 to arrive at an estimated range for the number of consumer purchases. The analysis estimates the range of live event consumer purchases in the U.S. to be 80 million on the low end and 534 million on the high end.

When multiplied by the number of transactions per year, the reduction in minutes spent viewing ticket listings will generate a total time savings of 1.02 million to 13.6

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[594] *See https://www.ibisworld.com/industry-statistics/market-size/online-event-ticket-sales-united-states/.*

[595] Assuming Ticketmaster's market share is equivalent to its revenue share (of the primary and secondary markets) also assumes that the average price of a ticket sold by Ticketmaster is the same as (or lower than) the average price of a ticket sold by the rest of the industry. If, however, the average price of a ticket sold by Ticketmaster is higher than average prices in the rest of the industry, then Ticketmaster's revenue share is higher than its ticket share, and the extrapolation understates the total number of tickets sold in the U.S.

[596] The Commission does not currently have information on the average number of tickets purchased in a transaction. However, there is reason to believe the average would be greater than one because most venues limit the number of tickets that can be purchased in a given transaction, suggesting that there is consumer demand for purchases of more than a single ticket. The limit is dependent on the event. Ticketmaster, *Why is there a ticket limit?*, *https://help.ticketmaster.com/hc/en-us/articles/9781245025937-Why-is-there-a-ticket-limit*.

million hours per year. Using the value of non-work time for the average U.S. worker of $25.81 per hour, the Commission's analysis estimates that the total benefit from time savings for completed transactions is roughly $26.3 million to $350.6 million per year, depending on how conservative its assumptions are. Table 7 presents the expected benefits of time savings over the next ten years in present value.

Table 7 – Live-Event Ticketing: Estimated Benefits of Time Savings for Completed Transactions

		Low-End Benefit Estimate	High-End Benefit Estimate
Completed Transactions			
Minutes Viewing Live-Event Ticket Listing		5	10
Reduction in Average Number of Listings Viewed		0.1525	0.1525
Minutes Saved per Transaction		0.7625	1.525
Number of Tickets Sold in the United States		240,441,841	801,472,804
Average Number of Tickets in a Purchase		3	1.5
Number of Consumer Purchases		80,147,280	534,315,203
Hours Saved Per Year		1,018,538	13,580,511
Value of 1 hour of non-work time		$25.81	
Total $ Saved per year		$26,292,142	$350,561,889
Abandoned Transactions		***Unquantified***	***Unquantified***
Reductions in Deadweight Loss		***Unquantified***	***Unquantified***
Total Quantified Benefits (10 Years)	**7% Discount Rate**	$184,665,001	$2,462,200,015
Total Quantified Benefits (10 Years)	**3% Discount Rate**	$224,277,302	$2,990,364,023

Note: Benefits have been discounted to the present value at both 3% and 7% rates. The total number of tickets sold in the U.S. market is estimated using the reported number of tickets sold in the primary and secondary market in the 2023 Live Nation 10-K.[597] This number of tickets is adjusted first by the proportion of North American events, and then by the share of North American GDP attributable to the U.S. Lastly, the total number of

[597] Live Nation 10-K, *supra* note 590.

tickets is estimated by dividing the tickets sold by TicketMaster by the market share of TicketMaster. Wage rates are taken from the U.S. Bureau of Labor Statistics and adjusted by the consumer value of time reported in Hamermesh (2016).[598] The Commission relied upon publicly available sources of data in its calculations.

(b) Additional Unquantified Benefits: Reductions in Deadweight Loss and Abandoned Transactions

Due to the incomplete price information problem described in section V.E.1, the final rule requiring ticket sellers to show Total Price of tickets upfront will likely result in a reduction of deadweight loss. Recent research suggests that when consumers know Total Prices for tickets upfront, consumers are better able to find the tickets that match their desired quantity and quality (seat type or location).[599] The analysis does not quantify the reduction in deadweight loss, but such a reduction is a positive benefit of the rule.

Another unquantified benefit to the final rule is a potential decrease in abandoned transactions. For example, in some cases, once the additional information impacting full price is revealed, consumers may fully abandon the transaction (i.e., not purchase any ticket). Although the Commission solicited comment in the NPRM on the frequency of, and the reasons for, abandoned transactions in the live-event ticket market to help quantify this benefit, it did not receive this data and cannot determine the quantity of such abandoned transactions and the amount of time spent pursuing them. As a result, this benefit is unquantified.

ii. Live-Event Ticketing: Estimated Costs of the Final Rule

[598] OEWS National, *supra* note 571; Hamermesh, *supra* note 533.
[599] Blake, *supra* note 521. Live-event tickets are an example of a differentiated product; there are higher quality tickets (e.g., better views, more comfortable seats, cover from the elements) that are associated with higher price tiers. Blake et al. find that consumers who face drip pricing purchase more expensive, higher quality tickets than they would if provided with upfront pricing.

This section describes the potential costs of the final rule's provisions and provides quantitative estimates where possible. For live-event ticketing, the cost of employee time is again monetized using wages obtained from the Bureau of Labor Statistics' May 2023 National Occupational Employment and Wage Estimates.[600] Because live-event ticketing is not associated with a specific NAICS code, the Commission uses wages at the national level rather than the industry-specific wages that are used to calculate costs for the short-term lodging industry.

The costs to sellers from the rule include a review of whether the rule applies, and, if the firm is not currently compliant with the rule, one-time costs to comply with the rule, as well as recurring annual costs to review and ensure ongoing compliance. The Commission's analysis presents two cost scenarios corresponding to different assumptions of how many hours are required to comply with the rule and how many firms would be affected by the rule. The analysis presents these as low-end and high-end cost scenarios.

To estimate costs for the entire live-event ticket-selling industry, the Commission's analysis calculates the cost per seller and multiplies that by the number of sellers in the industry. There is some uncertainty about the number of live-event ticket sellers that would be affected by the rule because, while the NAICS classification system does not define a classification solely for ticket sellers, two different NAICS codes might include ticket sellers. The GAO Report used the NAICS code 561599, which is "All Other Travel Arrangement and Reservation Services." [601] This NAICS category includes

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[600] OEWS National, *supra* note 571.
[601] NAICS code 561599 "comprises establishments (except travel agencies, tour operators, and convention and visitors bureaus) primarily engaged in providing travel arrangement and reservation services." U.S.

1,442 firms; some live-event ticket sellers, such as Tickets.com and Vivid Seats, use this classification.[602] Other live-event ticket sellers, such as Ticketmaster and StubHub, however, are classified as NAICS code 7113, which is "Promoters of Performing Arts, Sports, and Similar Events," and includes 7,998 firms.[603] As a high-end estimate of the number of live-event ticket sellers, the Commission's analysis uses the sum of the firms within these two NAICS code and assumes there are 9,440 firms potentially impacted by the final rule.[604]

The 9,440 figure is potentially over-inclusive, as many firms within NAICS code 561599 and 7113 do not directly sell tickets or charge mandatory fees, and thus would not be impacted by the final rule. The private research firm IBISWorld estimated that the number of firms in the online live-event ticket selling industry was 3,326.[605] The Commission's analysis uses the 3,326 figure as a low-end estimate of the number of firms.

Next, the Commission's analysis estimates the number of hours a firm would spend complying with the rule. As with assumptions regarding the number of firms, the following estimation utilizes low-end and high-end values for the number of hours necessary for compliance. Because many ticket sellers operate in other countries that currently have requirements similar to the final rule (Canada, Australia, the United

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Census Bureau, North American Industry Classification System, *561599 All Other Travel Arrangement and Reservation Services* (2022), *https://www.census.gov/naics/?input=561599&year=2022&details=561599*.

[602] U.S. Census Bureau, 2021 SUSB Annual Datasets by Establishment Industry (Dec. 2023), https://www.census.gov/data/datasets/2021/econ/susb/2021-susb.html.

[603] *Id*.

[604] Note that some live-event ticket sellers may be organized as non-profit entities and thus could fall outside of the Commission's jurisdiction. The Commission did not find data on the proportion of ticket sellers that are non-profits and thus uses the full number of firms. If a non-trivial number of ticket sellers are outside the jurisdiction of the Commission and not subject to the provisions of the rule, then the total costs to ticket sellers is overestimated.

[605] Ticket Sales Industry Report, *supra* note 581.

Kingdom, and the European Union member states), ticket sellers already may have incorporated any changes required by the final rule to their operating practices. The websites already may be programmed; the lawyers already may be prepared to advise on compliance with the rule; and the data scientists already may have determined the optimal pricing strategy. Thus, sellers would have relatively low costs to transition to all-in pricing in the U.S.[606]

In this low-end cost scenario, because live-event ticket sellers already are prepared to advertise Total Prices to consumers, the one-time, upfront cost of determining optimal prices and updating the purchase systems in terms of the number of required hours is negligible. The Commission's analysis assumes five hours of lawyer time to determine if the rule applies, forty hours of data scientist time to re-optimize pricing strategy, and forty hours of web developer time to edit and reprogram the website to display upfront prices. For the low-end cost scenario, the analysis also assumes there are no annual costs after the firm has incurred the one-time transition costs.

In the high-end cost scenario, the Commission's analysis assumes that ticket sellers have not laid the groundwork to comply with the rule. The high-end cost scenario assumes sellers require twice the number of hours to determine optimal prices, re-program the website to include Total Price, and review and confirm compliance. Thus, the one-time costs include 10 hours of lawyer time, 80 hours of data scientist time, and eighty hours of web developer time. For the high-end cost estimate, the analysis assumes

[606] FTC-2023-0064-3212 (TickPick, LLC commented: "For the most part, ticketing marketplaces would incur an immaterial cost to implement all-in pricing. Internationally, major ticket marketplaces are already required to comply with true all-in pricing in Canada and the United Kingdom. The technology to display tickets inclusive of fees in the form of a toggle is a widely available functionality. Put differently, the technology already exists within ticketing platforms to eliminate drip pricing and would simply need to be applied to events in the U.S.").

there are recurring annual costs of ten hours of lawyer time per year to review and confirm compliance.[607]

Table 8 presents the low-end and high-end cost estimates for the live-event ticketing industry.

Table 8 – Live-Event Ticketing: Estimated Costs of Compliance

	Low-End Cost Estimate	**High-End Cost Estimate**
Number of Live-Event Ticket Sellers	3,326	9,440
Hours to Determine Optimal Pricing (Data Scientist Hours)	40	80
Hours to Update Purchasing Systems to Reflect Total Price (Website Developer Hours)	40	80
Hours to Determine how Rule Applies (Lawyer Hours)	5	10
Hourly Wage Rate Data Scientist	$57.23	$57.23
Hourly Wage Rate Website Developer	$45.95	$45.95
Hourly Wage Lawyer to Review Compliance	$84.84	$84.84
One-Time Fixed Cost to Include Fees Upfront	**$15,137,956**	**$85,930,432**
Hours for Reviewing Rule and Compliance (Annual)	0	10
Hourly Wage Lawyer to Review Compliance	$84.84	$84.84
Total Costs per year	**$0**	**$8,008,896**

[607] FTC-2023-0064-3122 (Vivid Seats commented: "We believe that the FTC is underestimating the amount of employee time required by at least a factor of five."). The Commission notes that other commenters stated the transition to upfront pricing for ticket sellers would be as simple as a toggle switch and that most ticket sellers already have the capability to provide Total Price due to existing regulations in other countries. *See, e.g.*, FTC-2023-0064-3212 (TickPick, LLC); FTC-2023-0064-0132 (Individual Commenter who purchased tickets from GameStop and StubHub noted that "on all of these sites the fees are not explained until the final page unless you go find the toggle to include fees as you are looking for tickets"); FTC-2023-0064-3207 (Consumer Reports noted a consumer who commented: "While I appreciate that TM [Ticketmaster] now has the option to view all your fees up front as part of the price if you toggle that option, its totally insane that fees can be 25% of the cost at LEAST."); FTC-2022-0069-6162 (ANPR) (Recording Academy noted that "StubHub allows the consumer to toggle 'Show prices with estimated fees' filter during the ticket search"). The Commission did not receive any definitive data on the number of hours this change would take and thus retains the low-end and high-end hours estimates presented in the NPRM.

Total Quantified Costs (10 Years) (One-Time + Annual)	**7% Discount Rate**	**$15,137,956**	**$142,181,566**
Total Quantified Costs (10 Years) (One-Time + Annual)	**3% Discount Rate**	**$15,137,956**	**$154,247,939**
Annualized Compliance Cost Per Firm	7% Discount Rate	$648.02	$2,144.43
Annualized Compliance Cost Per Firm	3% Discount Rate	$533.56	$1,915.53

Note: Costs have been discounted to the present at both 3% and 7% rates. The high-end estimate of firms is the sum of the number of firms in NAICS code 561599 and NAICS code 7113 reported by the U.S. Census Bureau.[608] The Commission relied upon publicly available sources of data in its calculations.

iii. Live-Event Ticketing: Net Benefits

In Table 9, the Commission's analysis presents net benefits using the quantified benefits and costs discussed in section V.E.3.c.i and V.E.3.c.ii. To calculate the low-end of the range for net benefits, the analysis subtracts the total quantified costs using the high-end cost assumptions from the total quantified benefits using the low-end benefit assumptions. For the high-end of the range for net benefits, the analysis subtracts the low-end estimate of total quantified costs from the high-end estimate of total quantified benefits.

Table 9 – Live-Event Ticketing: Estimated Net Benefits

		10-Year Period	
		Low-End Estimate	**High-End Estimate**
Total Quantified Benefits	7% Discount Rate	$184,665,001	$2,462,200,015
Total Quantified Benefits	3% Discount Rate	$224,277,302	$2,990,364,023
Total Quantified Costs (One-Time + Annual)	7% Discount Rate	$15,137,956	$142,181,566

[608] U.S. Census Bureau, *2021 SUSB Annual Datasets by Establishment Industry, supra* note 602. Hourly wages are from the Bureau of Labor Statistics. *See* sources cited *supra* note 571, including OEWS Data Scientists (providing the hourly wages for data scientists); OEWS Web Developers (providing the hourly wages for web developers); and OEWS Lawyers (providing the hourly wages for lawyers).

Total Quantified Costs (One-Time + Annual)	3% Discount Rate	$15,137,956	$154,247,939
		(Low Benefits – High Cost)	**(High Benefits – Low Cost)**
Net Benefits (10 Years)	7% Discount Rate	$42,483,435	$2,447,062,058
Net Benefits (10 Years)	3% Discount Rate	$70,029,362	$2,975,226,066

Note: Benefits have been discounted to the present at both 3% and 7% rates.

Using various assumptions, the quantified benefits and costs imply that the rule will have a positive net benefit, even without accounting for the additional benefit of reducing deadweight loss.

iv. Live-Event Ticketing: Uncertainties

The Commission's ability to precisely estimate benefits and costs is limited due to uncertainties in key parameters. The quantified benefits and costs for the live-event ticketing industry rely on a set of assumptions, based on the best available public information. When the data are unclear, the analysis relies on assumptions that generate a range of low-end and high-end estimates. In Table 10, the analysis summarizes those key assumptions and their effect on the resulting estimate of quantified benefits and costs.

Table 10 – Live-Event Ticketing: Summary of Key Uncertainties

Assumption or Uncertainty in Benefits Calculation	**Impact on Benefits**
The analysis assumes that Ticketmaster sales of tickets in North America are proportional to events in North America.	Adjusting total Ticketmaster tickets sold (North America + International) by the proportion of events in North America may overestimate or underestimate tickets sold in North America.
The analysis assumes that the total tickets sold in the U.S. are proportional to Ticketmaster share of ticket market revenue.	Market share extrapolation based on revenue share may underestimate or overestimate the total number of tickets sold in the U.S.

The analysis assumes the number of tickets purchased in the average consumer transaction (1.5 or 3 tickets per consumer).	Adjusting the total tickets sold by the number of tickets in the average transaction may overestimate or underestimate the total number of consumer transactions.
The analysis assumes that reduction in consumer search due to upfront pricing is estimated by the Blake Study that shows a reduction of 0.16 listings viewed on StubHub with upfront pricing.	Assuming that upfront pricing will lead to exactly 0.16 fewer listings viewed may underestimate total search time reduced, because it does not account for consumers using other purchasing systems (ticket selling competitors).
The analysis assumes that consumers spend between five to ten minutes viewing a listing. This assumption is based on shopping cart clocks from Ticketmaster and StubHub sale pages.	Assuming consumers use the full timer clock to view a listing may overestimate transaction time, which would overestimate the benefits of reduced search time.
Assumption or Uncertainty in Costs Calculation	**Impact on Costs**
The analysis assumes that the number of firms selling tickets is the sum of firms in potential NAICS codes.	The analysis may overestimate total number of firms affected if a large proportion of firms in these NAICS codes are not subject to the final rule.
The analysis assumes that the number of firms selling tickets is the number provided in the IBISWorld Ticket Sales Industry Report.	The analysis may underestimate total costs if there is a meaningful number of firms selling tickets offline.
The analysis assumes that the number of hours to comply with the rule is comprised of specified hours of lawyer time, data analyst time, and web developer time.	The analysis may overestimate costs per firm if many firms either already comply or have the systems in place to easily comply with the rule. Also, the analysis may underestimate costs if compliance requires a greater number of hours.

d) *Quantified Benefits and Costs: Short-Term Lodging Industry*

Businesses in the short-term lodging industry, which include both traditional hotels[609] as well as home share options like Airbnb and VRBO, often charge a variety of

[609] Throughout this section, we use "hotel" as an umbrella term for hotels, motels, inns, short-term rentals, vacation rentals, traditional bed and breakfasts, hostels, and other places of lodging.

mandatory add-on fees. These fees are typically either disclosed upfront but separately from the base price (a practice known as partitioned pricing), or revealed just before payment, after the consumer has clicked through multiple pages of a listing (a practice known as drip pricing). Sometimes, these fees are not disclosed at all or are disclosed only when a consumer checks out at the conclusion of their stay. These fees may include mandatory surcharges referred to by hotels as "resort fees," "amenity fees," or "destination fees." Hotels often justify charging these fees as necessary to cover the costs of amenities that are not reflected in the base rate, such as Wi-Fi, pool and gym access, towels, parking, or shuttle services. Home share websites like Airbnb and VRBO may include mandatory fees such as "cleaning fees," "service fees," or "host fees." These fees are mandatory and do not depend on the consumer's use of the amenities or services.

Consumer behavior studies have shown that both partitioned pricing and drip pricing cause consumers to underestimate the full price of the product, even when all components of the price are disclosed upfront.[610] As a result, disclosing mandatory surcharges separately from the room rate without more prominently disclosing Total Price is likely to harm consumers by increasing search costs and reducing consumer surplus.[611] These fees may reduce consumer surplus if consumers respond by booking a room that is more expensive than the room they would have chosen under upfront total pricing. Partitioned pricing and drip pricing may also increase search costs if consumers spend more time looking at additional listings in search of a cheaper hotel.

[610] Shelanski, *supra* note 550.
[611] Mary Sullivan, Fed. Trade Comm'n, *Economic Analysis of Hotel Resort Fees* 4 (2017), *https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf*.

One industry group states that 6% of U.S. hotels charge mandatory fees, which amounts to over $2.5 billion paid in resort fees annually by U.S. consumers.[612] This number underestimates how much U.S. consumers pay in mandatory fees because it does not include fees from finding accommodations on the home share market through websites like Airbnb and VRBO, or fees incurred from booking at foreign hotels with U.S.-facing websites. Resort fees in the U.S. average 3.9% of the per-night cost of a room, and can exceed 20% of the per-night cost, especially at lower cost hotels.[613]

This section analyzes the final rule's quantified benefits and costs in the short-term lodging industry. Quantified benefits are limited to the expected reductions in search costs to consumers. Since there is an additional, unquantified benefit of reduced deadweight loss, which is discussed conceptually in section V.E.2.a.ii, the net benefit estimated in the following analysis is conservative. The Commission finds that the quantified benefits and costs indicate that the rule will have a positive net benefit, even without accounting for the unquantified benefit of reducing deadweight loss.[614]

i. Short-Term Lodging: Estimated Benefits of the Final Rule

As a result of the final rule, the Commission expects that the time consumers spend searching for short-term lodging will decrease because prices will be easier to

[612] FTC-2023-0064-3094 (American Hotel & Lodging Association); Bjorn Hanson, U.S. Lodging Industry Fees and Surcharges Forecast to Increase to a New Record Level in 2018—$2.93 Billion, and Another Record Anticipated for 2019—the Newest Emerging Category is "Resort Fees" for Urban Luxury and Full Service Hotels (Aug. 27, 2018), *https://bjornhansonhospitality.com/fees-%26-surcharges*.

[613] Sally French & Sam Kemmis, *How to Avoid Hotel Resort Fees (and Which Brands Are the Worst)*, NerdWallet (updated Aug. 1, 2024, 11:53 a.m. PDT), *https://www.nerdwallet.com/article/travel/hotel-resort-fees*.

[614] In this final short-term lodging net benefit analysis, the Commission updates firm counts, wage rates, any inflation-adjusted values, value of time, and 10-K hotel revenue information to reflect the most recent available data. The Commission was unable to update any numbers from IBISWorld Reports.

compare within and across websites. Some consumers will reduce the number of short-term lodging listings they view prior to booking or spend less time understanding and assessing the full price.[615] In its analysis, the Commission makes the conservative and simpler assumption that the time spent viewing a listing remains the same, and that consumers reduce the number of listings they view. Table 11 quantifies the benefits of such time savings and provides low- and high-end estimates to account for uncertainty in the available statistics.

The Commission's analysis focuses on the benefits that accrue to consumers who book rooms from within the United States on any U.S.-facing website, which can include bookings at both domestic and foreign short-term lodgings. Short-term lodgings include both traditional hotels as well as rooms booked through home share websites like Airbnb and VRBO. In this section, the Commission outlines how it calculates the benefits listed in Table 11 as well as the assumptions made. The table reports a set of basic search statistics used in the calculation, the savings per year for consumers who book at U.S. short-term lodgings, the savings per year for consumers who book at foreign short-term lodgings with U.S.-facing websites, and the combined total savings for all U.S. consumers per year.

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[615] The drip pricing literature suggests that, because time to view one listing is lower under upfront pricing, a subset of consumers may view more listings rather than fewer because the cost of viewing an additional listing has decreased. Sullivan, *supra* note 611. It is unclear how this affects total search time. If the higher number of listings viewed is offset by the lower time it takes to view each listing, the total search time will be lower under upfront pricing for this subset of consumers. If total time increases, it can be classified as "good" search time for this subset of consumers because it results in consumers purchasing their preferred hotel room. Alternatively, another group of consumers could view fewer listings because upfront prices allow consumers to compare rooms more easily and select their preferred hotel room more quickly. Blake, *supra* note 521. The total search time for these consumers will decrease. The Commission's analysis focuses on the latter group of consumers because the change in their search time represents a decrease in "bad" or unnecessary searches caused by drip pricing.

Although not all short-term lodgings charge resort fees, the lack of a unified standard of upfront pricing across listings makes comparing prices difficult and time consuming for consumers. Even a single short-term lodging website can vary in whether listings have hidden fees. Different hotel brands belonging to the same larger hotel company may impose hidden fees for listings in some cities but not in others. Some listings may note whether resort fees are included in the base price, but in very fine print under the listed price. Some listings may not say anything, requiring consumers to click through the listing to learn whether there are hidden fees at the end of the booking process. Given that a minimum of 6% of hotels[616] impose drip or partitioned pricing, and the average hotel shopper visits seventeen travel websites before booking,[617] consumers are likely to encounter at least one website that imposes dripped or partitioned pricing in their search for a hotel. Even if consumers complete their whole search and booking process without visiting any websites that impose hidden resort fees, the fact that there could be hidden fees creates uncertainty and may cause consumers to click through more listings than they otherwise would have to learn if the initial price is truly the final price. Therefore, the Commission quantifies the benefits for all U.S. consumers who book a room in a given year, regardless of whether they interacted with a website that imposed dripped or partitioned pricing.

[616] FTC-2023-0064-3094 (American Hotel & Lodging Association).
[617] Chris Anderson & Saram Han, *The Billboard Effect: Still Alive and Well,* 17 Cornell Hosp. Rpt. 1 (2017), *https://hdl.handle.net/1813/70982*. The Commission calculates the average number of websites visited by summing the average number of OTAs, Hotel Sites, TripAdvisor, and Other Meta websites visited sixty days prior to reserving a room.

(a) Search Statistics

The Commission uses two different studies to calculate low- and high-end estimates for the average number of minutes it takes to view one listing. On the low end, the analysis uses statistics on Airbnb user search behavior collected by Fradkin (2017) to calculate that consumers spend 9.48 minutes to view one listing.[618] On the high end, the analysis uses a hotel search cost model developed by Chen and Yao (2016) to calculate the average search cost per listing.[619] Using this average search cost, the Commission estimates that consumers spend 14.18 minutes viewing one listing. Appendix B in section V.E.7 contains calculation details for both estimates. Using the estimates from each study as low- and high-end estimates ensures that the analysis captures user search behavior when shopping on home share websites like Airbnb and when shopping for a traditional hotel.

To estimate the reduction in average listings viewed due to dripped or partitioned pricing, the Commission's analysis uses results on the average reduction in listings viewed under upfront pricing from an experiment in the live-event ticket industry.[620] That study found that the average reduction in listings viewed under upfront pricing was 10.6% of the mean listings viewed under drip pricing. For the low-end estimate, the analysis applies the same proportion to the mean listings viewed by Airbnb users in Fradkin (2017) (2.367 listings, proxied by number of contacts) and finds a reduction of 0.25 listings. On the high end, the Commission applies this to the mean listings viewed

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[618] Andrey Fradkin, *Search, Matching, and the Role of Digital Marketplace Design in Enabling Trade: Evidence from Airbnb* (MIT Initiative on the Digit. Econ., Working Paper, 2017), *https://ide.mit.edu/wp-content/uploads/2017/07/SearchMatchingEfficiency.pdf*.
[619] Yuxin Chen & Song Yao, *Sequential Search with Refinement: Model and Application with Click-Stream Data*, 63 Mgmt. Sci. 4345 (2016), *https://doi.org/10.1287/mnsc.2016.2557*.
[620] Blake, *supra* note 521.

by hotel searchers in Chen and Yao (2016), 2.3 listings, and finds a reduction of 0.24 listings.[621]

Multiplying these numbers by the minutes to view one listing results in 2.39 to 3.47 minutes saved per transaction. These are likely conservative estimates, given that they assume consumers only view one website before booking a room. As previously stated, one study suggested that consumers visit an average of seventeen websites before booking.[622] The average reduction in listings viewed may also underestimate benefits from eliminating dripped and partitioned pricing because it is more difficult to adapt to the wide variability of fees in the short-term lodging industry than it is in the live-event ticketing industry, where listings have the same percentage fee. Short-term lodgings have different fees, and the number of lodgings with such fees will vary across markets.

Finally, as is described in detail in section V.E.3.b, the Commission's analysis uses $25.81 as the value of one hour work time.

(b) U.S. Hotels and Home Shares

Next, the Commission calculates the total savings per year for U.S. consumers who book at U.S. short-term lodgings, which includes both U.S. hotels and home shares.

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[621] Although the Commission is basing its estimate about reduction in listings on data that comes from the ticketing industry, this method results in the most conservative reduction of viewed listings compared to other methods. The most relevant study from the hotel search cost literature estimates that improvements in hotel rankings (which may be loosely comparable to removing drip pricing) reduces search costs by $11.50. *See* Raluca M. Ursu, *The Power of Rankings: Quantifying the Effect of Rankings on Online Consumer Search and Purchase Decisions*, 37 Mktg. Sci. 530 (2018), *https://doi.org/10.1287/mksc.2017.1072*. Given the Commission's estimates of the time to view one listing (between 9.48 and 14.18 minutes), this suggests an average reduction of between 2.95 and 1.95 listings viewed, which is implausible given that various papers find the average number of listings viewed at baseline to be between 2 and 3. Thus, while some papers find substantially higher search costs than the Commission's method, these findings reinforce that, if anything, the benefits estimates presented here are likely conservative.

[622] *See* Anderson & Han, *supra* note 800. It is unclear whether the relationship between websites viewed and time saved is linear, as consumers may save less time on the fifteenth website they view than they do on the first. As such, it is difficult to extrapolate from the Commission's estimates to the total time saved for consumers who view multiple websites. Therefore, to remain conservative in its estimate of benefits, the Commission's analysis assumes that consumers visit only one website.

The Commission's analysis finds the total number of nights booked in the U.S. in 2022 by dividing the total revenue the U.S. short-term lodgings industry earned from rooms by the average daily rate ("ADR").[623] The ADR is the average revenue per room-night booked in the U.S. The total number of nights booked in the U.S. in 2022 that would potentially be affected by this rule is about 1.29 billion.

Dividing the total number of nights booked by the average number of nights per booking gives 715 million total bookings.[624] About 91.8%, or 657 million, of these bookings are made by U.S. consumers.[625] Finally, the Commission calculates the total savings for U.S. consumers per year by multiplying the number of bookings made by U.S. consumers by the minutes saved per transaction and the value of time for consumers. This results in total savings ranging from about $674 million to $980.3 million.

(c) Foreign Hotels and Home Shares with U.S.-Facing Websites

To estimate the number of foreign short-term lodging bookings made by U.S. consumers, the Commission uses the fact that 96% of all trips taken by U.S. consumers are domestic.[626] Multiplying the number of bookings made by U.S. consumers by ((1 –

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[623] Revenue equals about $192.23 billion. Alexia Moreno Zambrano, *Hotels & Motels in the US*, IBISWorld (Jan. 2023) ("Hotels & Motels Industry Report"); Thi Le, Bed & Breakfast & Hostel Accommodations in the US, IBISWorld (Jan. 2023) ("Bed & Breakfast Industry Report"). The ADR is about $149. *STR: U.S. hotel ADR and RevPAR reached record highs in 2022*, STR (Jan. 20, 2023), *https://str.com/press-release/str-us-hotel-adr-and-revpar-reached-record-highs-2022*.

[624] Consumers book on average 1.8 nights per booking. Jordan Hollander, *75+ Hospitality Statistics You Should Know (2024)*, Hotel Tech Report (updated July 9, 2024), *https://hoteltechreport.com/news/hospitality-statistics*.

[625] How much do U.S. hotels depend on international guest stays?, CBRE Econometric Advisors' Blog (Oct. 10, 2017), *https://www.cbre-ea.com/public-home/deconstructing-cre/2017/10/10/how-much-do-u.s.-hotels-depend-on-international-guest-stays*.

[626] Adrian, U.S. Travel & Tourism Statistics 2020-2021, Tourism Academy Blog (Sep. 15, 2021 12:39:18 PM), *https://blog.tourismacademy.org/us-tourism-travel-statistics-2020-2021*.

0.96)/0.96)) gives 27.4 million foreign bookings. The total savings for this category ranges from about $28.1 to $40.8 million.

(d) All Hotels and Home Shares

Together, U.S. and foreign bookings amount to about 683.9 million bookings per year. This corresponds to between 27.2 and 39.6 million hours saved by U.S. consumers per year, and between $702.1 million and $1.02 billion total savings per year. Table 11 presents the expected benefits of time savings over the next ten years in present value.

Table 11 – Short-Term Lodging: Estimated Benefits of Time Savings for Completed Transactions

	Low-end Benefit Estimate	**High-end Benefit Estimate**
Search Statistics		
Minutes to View Listing	9.48	14.18
Reduction in Average Number of Listings Viewed	0.25	0.24
Minutes Saved Per Transaction	2.39	3.47
Value of 1 hour of Non-work Time	$25.81	$25.81
U.S. Hotels and Home Shares		
Total Number of Nights Booked	1,287,361,938	1,287,361,938
Average Nights Per Booking	1.8	1.8
Number of Bookings	715,201,077	715,201,077
Number of Bookings Made by U.S. Consumers	656,554,589	656,554,589
Total Savings Per Year	**$674,002,727**	**$980,277,525**
Foreign Hotels and Home Shares		
Number of Bookings Made by U.S. Consumers	27,356,441	27,356,441
Total Savings Per Year	**$28,083,447**	**$40,844,897**
All Hotels and Home Shares		
Total Bookings	683,911,030	683,911,030
Hours Saved by U.S. Consumers Per Year	27,198,305	39,557,536
Total $ Saved Per Year	**$702,086,174**	**$1,021,122,422**
Abandoned Transactions	***Unquantified***	***Unquantified***
Reductions in Deadweight Loss	***Unquantified***	***Unquantified***

Total Quantified Benefits Over 10-Year Period	**7% Discount Rate**	**$4,931,159,488**	**$7,171,936,592**
Total Quantified Benefits Over 10-Year Period	**3% Discount Rate**	**$5,988,937,469**	**$8,710,381,378**

Note: Benefits over ten years have been discounted to the present at both 3% and 7% rates. The value of time for hotel consumers is the mean hourly wage and adjusted by the consumer value of time reported in Hamermesh (2016).[627] Average nights per booking is from Hotel Tech Report.[628]

(e) Additional Unquantified Benefits: Reductions in Deadweight Loss and Abandoned Transactions

As is discussed in section V.E.2.a.ii, the final rule requiring short-term lodgings to display Total Price of rooms will likely result in a reduction of deadweight loss. When consumers are not provided Total Price at the beginning of the booking process, sellers likely are able to charge higher prices than under the final rule. The rule's Total Price requirement may provide consumers with more complete pricing information so that they can make informed decisions about short-term lodging reservations, thus reducing deadweight loss. The Commission does not quantify the reduction in deadweight loss but acknowledges that it is a positive benefit to the final rule.

In some cases, once Total Price is provided, consumers may fully abandon the transaction (i.e., not book any room). Since lodging cost is only a part of overall trip cost, abandoning a transaction may be less likely for short-term lodging than other industries. In that case, the unquantified benefit is likely to be small. The Commission solicited comment in the NPRM on the frequency of, and reasons for, abandoned transactions in the short-term lodging industry to help quantify this benefit, but did not receive adequate information in response, so this benefit remains unquantified.

[627] OEWS National, *supra* note 571; Hamermesh, *supra* note 533.
[628] Hollander, *supra* note 624.

ii. Short-Term Lodging: Estimated Costs of the Final Rule

The Commission herein describes the final rule's potential costs to the short-term lodging industry and, where possible, provides quantitative estimates of those costs. The costs to hotels from the final rule include a review of whether the rule applies and, in cases of noncompliance with the final rule, one-time costs to come into compliance and recurring annual costs to ensure ongoing compliance. The cost of employee time is monetized using wages obtained from the Bureau of Labor Statistics' National Industry-Specific Occupational Employment and Wage Estimates.[629] The Commission uses wages specific to the Traveler Accommodation industry (associated with NAICS code 721100). This industry includes traditional hotels and motels, casino hotels, bed and breakfast inns, hostels, and home share platforms.[630] The Commission also quantifies the cost to individual home share hosts in the form of a one-time cost to adjust prices on home share listings.

Table 12 outlines the estimated costs of the final rule. Panel A shows the costs for U.S. hotels and home share hosts; Panel B shows the costs for foreign hotels and home

[629] U.S. Bureau Lab. Stat., Occupational Employment and Wage Statistics, May 2023 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 721100 - Traveler Accommodation (May 2023), *https://www.bls.gov/oes/current/naics4_721100.htm* ("OEWS Traveler Accommodation").

[630] NAICS code 721100 does not capture intermediary travel websites, which display pricing information and offer booking options for various short-term lodging firms. Because these intermediaries constantly update pricing information obtained directly from short-term lodging firms (*see, e.g.*, FTC-2023-0064-3293, Travel Technology Association), and do not need to reoptimize prices or drastically change displays themselves, the Commission believes that intermediary firms will not face additional compliance costs from the rule.

share hosts who post listings on U.S.-facing websites;[631] and Panel C shows the total combined costs for both groups.

(a) Panel A: U.S. Hotels and Home Share Hosts

There are 49,216 U.S. hotels associated with the "Traveler Accommodation" NAICS code. Of these firms, 6% impose resort fees, bringing the high-end number of U.S. firms affected to 2,953. The low-end number of firms affected is 2,948 after removing Marriott International, Inc., Omni Hotels Management Corporation, Choice Hotels International, Inc., Hilton Worldwide Inc., and Hyatt Hotels Corporation to account for the possibility that these hotels will eliminate dripped and partitioned pricing from their websites regardless of this rule to comply with any existing or forthcoming settlements with various State Attorneys General.[632]

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[631] The Commission's analysis includes costs to foreign hotels with U.S.-facing websites because complying with the rule may cause them to pass through some costs to U.S. hotel shoppers. The Commission is unable to quantify what percentage of costs will be passed through; to be conservative, the analysis includes all costs to foreign hotels and home share hosts.

[632] In 2021, Marriott agreed to a settlement with the Commonwealth of Pennsylvania, Office of the Attorney General, in which Marriott agreed to include mandatory resort fees in the base rate of its hotel rooms on the first page of the booking process. Assurance of Voluntary Compliance, *Commonwealth v. Marriott Int'l, Inc.,* No. GD-21-014016 (Pa. Ct. C.P. Nov. 16, 2021). In 2023 and 2024, Marriott entered into similar settlements with the Offices of the Attorney General in both the State of Nebraska and the State of Texas. Assurance of Voluntary Compliance, *Texas v. Marriott Int'l, Inc.,* No. 2023-CI09717 (Tex. Dist. Ct. May 16, 2023); Order Approving Assurance of Voluntary Compliance, *Nebraska v. Marriott Int'l, Inc.*, No. CI 23-3860 (Neb. Dist. Ct. Jan. 18, 2024). In 2023, Omni and Choice Hotels both agreed to similar multi-state settlements with the Offices of the Attorney General in the State of Colorado, the Commonwealth of Pennsylvania, and the State of Nebraska. *See, e.g.*, Assurance of Discontinuance, *In re Choice Hotels Int'l Inc. Resort Fees* (Colo. Sept. 21, 2023); Assurance of Discontinuance, *In re Omni Hotels Mgmt. Corp. Resort Fees* (Colo. Nov 9, 2023); Assurance of Voluntary Compliance, *Commonwealth v. Omni Hotels Mgmt.*, GD-23-013056 (Pa. Commw. Ct. Nov. 9, 2023); Assurance of Voluntary Compliance, *Commonwealth v. Choice Hotels Intl., Inc.*, GD-23-011023 (Pa. Commw. Ct. Sept. 21, 2023); Order Approving Assurance of Voluntary Compliance, *Nebraska v. Choice Hotels Int'l, Inc.*, No. CI 23-3269 (Neb. Dist. Ct. Sept. 27, 2023); Order Approving Assurance of Voluntary Compliance, *Nebraska v. Omni Hotels Mgmt. Corp.*, No. CI 23-3641 (Neb. Dist. Ct. Oct. 27, 2023). Choice Hotels agreed to an additional settlement with the Oregon Department of Justice. Assurance of Voluntary Compliance, *In re Choice Hotels, Int'l, Inc.*, No. 23-CV-39128 (Or. Cir. Ct. Sept. 21, 2023). In 2024, Hilton Hotels agreed to a settlement with the State of Nebraska, Office of the Attorney General. Final Consent Judgment, *Nebraska v. Hilton Dopco, Inc.*, No. CI 19-2366 (Neb. Dist. Ct. Jan. 29, 2024). Finally, Hyatt Hotels faces an ongoing lawsuit filed in 2023 by the State of Texas, Office of the Attorney General, which seeks to require Hyatt to display full prices in the initial advertised price of any hotel room. Plaintiff's Original Pet., *Texas v. Hyatt Hotels Corp.,* No. C2023-0884D (Tex. Dist. Ct. May 15, 2023).

Next, the Commission's analysis estimates the number of hours a U.S. hotel would spend complying with the final rule. The analysis assumes all hotels that do not impose dripped or partitioned pricing will spend one hour of lawyer time determining if the final rule requires any changes to their advertising. Hotels that are not presently compliant with the rule will incur additional costs to come into compliance. In the low-end estimate, the analysis assumes that, because many hotels have websites facing other countries that already have similar requirements to the final rule (e.g., Canada, Australia, and the European Union member states), hotels already may have the experience and infrastructure required to incorporate the necessary changes to their operating practices. In this scenario, hotels have relatively low costs to transition to all-in pricing for their U.S.-facing websites. The analysis assumes five hours of lawyer time to determine how the final rule applies to the firm, forty hours of data scientist time to re-optimize the pricing strategy, and forty hours of web developer time to edit the website to display Total Prices and make other requisite disclosures.

In addition to hotels, the final rule also would affect individuals who participate in the home share market by listing their properties for short-term rentals on websites like Airbnb and VRBO. The Commission's analysis estimates the total number of home share hosts in the U.S. by starting with the number of Airbnb hosts in the U.S. who post home share listings (not including larger bed and breakfast or hostel establishments) and extrapolating to the full U.S. market using Airbnb's U.S. market share.[633] On the low-end,

[633] *See* Clark Shultz, *Airbnb increases market share in latest read from M Science*, Seeking Alpha (June 6, 2022 1:32 PM ET), *https://seekingalpha.com/news/3846023-airbnb-increases-market-share-in-latest-read-from-m-science* (providing Airbnb's market share); Thibault Masson, *Airbnb Host Data: Who are Airbnb hosts? Why are individual hosts more important than professional ones?*, Rental Scale-Up (updated Dec. 19, 2020), *https://www.rentalscaleup.com/airbnb-host-data-who-are-airbnb-hosts-why-are-individual-*

the analysis assumes that each host will take one hour to reprice each listing. Hosts have, on average, 1.18 listings, resulting in 1.18 hours of time per host.[634] The value of time comes from the same source as in Table 11.

In the high-end cost scenario, the Commission's analysis assumes that hotels have not laid the groundwork for upfront pricing. The analysis assumes under this scenario that hotels require twice the number of hours to determine optimal prices, re-program the website to include Total Price, and review and confirm compliance. Thus, the one-time costs for hotels include ten hours of lawyer time, eighty hours of data scientist time, and eighty hours of web developer time. The analysis further assumes home share hosts spend three hours repricing each listing, resulting in 3.5 hours per host.

In addition to the one-time costs, the Commission's analysis also assumes hotels incur annual costs of between zero to ten hours of lawyer time per year to review and confirm compliance with the final rule.[635] The total costs, which include both the one-time fixed cost and the annual costs for the next ten years in present value, range from $35.9 million to $107.8 million using a 7% discount rate, and from $35.9 million to $112

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hosts-more-important-than-professional-ones/ (providing the statistics used to estimate the number of Airbnb home share hosts in the U.S.). The estimated total number of home share hosts in the U.S. is 675,603, which is calculated as 504,000/.746, where 504,000 is the number of Airbnb home share hosts in the U.S. and .746 is Airbnb's U.S. market share. The number of Airbnb home share hosts is calculated as 560,000 * .9 = 504,000, where 560,000 is the number of Airbnb hosts in the U.S., and 90% of these hosts are individual hosts (people who rent individual rooms or entire primary homes rather than traditional bed and breakfasts or hostels; traditional bed and breakfasts or hostels are already captured in the hotel firms defined by Traveler Accommodation NAICS code 721100).

[634] The average number of listings per host is calculated from the total number of U.S. listings and the total number of U.S. hosts. Steve Deane, *2022 Airbnb Statistics: Usage, Demographics, and Revenue Growth*, Stratos Jet Charters, Inc. Blog (Jan. 4, 2022), *https://www.stratosjets.com/blog/airbnb-statistics/* [*https://web.archive.org/web/20220219093345/https://www.stratosjets.com/blog/airbnb-statistics/*] (providing the total number of U.S. listings); Masson, *supra* note 633 (providing the total number of U.S. hosts).

[635] Since home share hosts are not operating large, sophisticated firms and will likely not spend additional time ensuring compliance beyond year one, the analysis assumes home share hosts do not incur annual costs due to the rule.

million using a 3% discount rate. The Commission also finds that the per firm annualized cost to U.S. hotels that are not presently compliant with the rule ranges from $527 to $2,011 using a 7% discount rate, and from $434 to $1,825 using a 3% discount rate. Home share hosts in the U.S. incur an average one-time cost between $30.42 to $91.27.

All ranges of lawyer, data scientist, web developer, and home share host time used in the analysis serve as proxies for any costs associated with reviewing and ensuring compliance, adjusting pricing strategies, ensuring consumers are presented with Total Price, and re-evaluating home share listings, respectively, in response to the final rule.

(b) Panel B: Foreign Hotels and Home Share Hosts

The Commission acknowledges that non-U.S. firms and home share hosts with U.S.-facing websites may bear compliance costs from the final rule that may be passed on to consumers. Therefore, the Commission estimates these costs using the best available data. Estimating costs for foreign hotels and home share hosts using the same method in Panel A would be difficult because there are no reliable estimates for the number of foreign hotels and home share hosts or for the relevant international wage rate for lawyers, data scientists, and web developers. The Commission's analysis instead estimates foreign costs by extrapolating from the estimated U.S. costs in Panel A. Since the U.S. hotel industry's global market share is about 14.5%,[636] the one-time and annual costs for foreign hotels each can be calculated by multiplying the one-time and annual costs for U.S. hotels by (1 - 0.145)/0.145. This method captures the cost of all foreign

[636] The U.S. hotel industry's global market share in 2022 is calculated by adding the revenues reported in the IBISWorld Reports for "Hotels and Motels in the US," "Casino Hotels in the US," and "Bed and Breakfast and Hostel Accommodations in the US," and dividing it by the global revenue found in IBISWorld Global Hotels & Resorts Industry Report. Hotels & Motels Industry Report, *supra* note 623; Bed & Breakfast Industry Report, *supra* note 623; Demetrios Berdousis, *Casino Hotels in the US*, IBISWorld (Jan. 2023).

hotels, including ones that will not be subject to the final rule because they do not have U.S.-facing advertising. Therefore, the costs to foreign hotels may be overestimated.

The Commission's analysis uses the percentage of Airbnb's U.S. revenue (43%)[637] as a proxy for the U.S. home share market's global market share. Using this proxy, the analysis estimates the one-time cost for foreign home share hosts to be equal to the total one-time cost for U.S. home share hosts multiplied by (1 - 0.43)/0.43. The total one-time and annual foreign hotel and home-share costs for the next ten years in present value range from $117.4 million to $352.8 million using a 7% discount rate, and from $117.4 million to $377.9 million using a 3% discount rate. The Commission is unable to provide the per firm annualized cost for foreign hotels and non-U.S. home share hosts because the number of foreign hotels and home share hosts is not known.

(c) Panel C: All Hotels and Home Share Hosts (US + Foreign)

The total cost for all affected hotels and home share hosts over ten years in present value is estimated to be from $153.3 million to $460.6 million using a 7% discount rate and from $153.3 million to $489.9 million using a 3% discount rate.

Table 12 – Short-Term Lodging: Estimated Costs of Compliance

	Low-End Cost Estimate	**High-End Cost Estimate**
Panel A: U.S. Hotels and Home Share Hosts		
A.1. U.S. Hotels and Home Share Hosts: One-Time Costs		
Number of U.S. Hotels	49,216	49,216
Hotels That Impose Drip Pricing (6% of Total)	2,948	2,953
Hours to Determine Whether Rule Applies (Non-Drip Price Firms) (Lawyer Hours)	1	1

[637] Airbnb, Inc., Annual Report (Form 10-K) (Feb. 16, 2024) ("Airbnb 10-K"), *https://investors.airbnb.com/financials/sec-filings/sec-filings-details/default.aspx?FilingId=17283799*.

Hours to Determine Whether Rule Applies (Drip Price Firms) (Lawyer Hours)		5	10
Hours to Determine Optimal Pricing (Data Scientist Hours)		40	80
Hours to Update Purchasing Systems to Reflect Total Price (Website Developer Hours)		40	80
Hourly Wage Rate - Lawyer		$95.60	$95.60
Hourly Wage Rate - Data Scientist		$41.36	$41.36
Hourly Wage Rate - Website Developer		$39.31	$39.31
Total One-Time Fixed Cost for Hotels		**$15,344,827**	**$26,302,999**
Home Share Hosts in the U.S.		675,603	675,603
Hours to Determine Optimal Pricing for Home Share Listing		1.18	3.54
Per Hour Value of Time		$25.81	$25.81
Total One-Time Fixed Cost for Home Share Hosts		**$20,553,992**	**$61,661,977**
Total One-Time Fixed Cost for Hotels + Home Share Hosts		**$35,898,819**	**$87,964,977**
A.2. U.S. Hotels and Home Share Hosts: Annual Costs			
Hours for Reviewing Rule and Compliance (Annual)		0	10
Hourly Wage - Lawyer		$95.60	$95.60
Total Annual Costs		**$0**	**$2,823,030**
A.3. U.S. Hotels and Home Share Hosts: Total Costs			
Total Costs Over 10-Year Period (One-Time + Annual)	**7% Discount Rate**	**$35,898,819**	**$107,792,756**
Total Costs Over 10-Year Period (One-Time + Annual)	**3% Discount Rate**	**$35,898,819**	**$112,045,993**
A.4 U.S. Hotels and Home Share Hosts: Per Firm and Per Host Costs			
Annualized Cost Per Firm	7% Discount Rate	$527	$2,011
Annualized Cost Per Firm	3% Discount Rate	$434	$1,825
One-Time Cost Per Home Share Host		$30.42	$91.27
Panel B: Foreign Hotels and Home Share Hosts			
B.1. Foreign Hotels and Home Share Hosts: One-Time Costs			
Total Cost for Foreign Hotels		$90,447,636	$155,038,835
Total Cost for Foreign Home Share Hosts		$26,959,747	$80,879,242

Total One-Time Fixed Costs		**$117,407,383**	**$235,918,077**
B.2. Foreign Hotels and Home Share Hosts: Annual Costs			
Total Annual Costs		**$0**	**$16,639,899**
B.3. Foreign Hotels and Home Share Hosts: Total Costs			
Total Costs Over 10-Year Period (One-Time + Annual)	**7% Discount Rate**	**$117,407,383**	**$352,789,764**
Total Costs Over 10-Year Period (One-Time + Annual)	**3% Discount Rate**	**$117,407,383**	**$377,859,790**
Panel C: All Hotels and Home Share Hosts (U.S. + Foreign)			
Total One-Time Fixed Costs		$153,306,202	$323,883,053
Total Annual Costs		$0	$19,462,929
Grand Total Costs Over 10-Year Period (One-Time + Annual)	**7% Discount Rate**	**$153,306,202**	**$460,582,520**
Grand Total Costs Over 10-Year Period (One-Time + Annual)	**3% Discount Rate**	**$153,306,202**	**$489,905,783**

Note: Costs over ten years have been discounted to the present at both 3% and 7% rates. The number of U.S. hotels is from the U.S. Census Bureau NAICS code 721100.[638] The statistic that 6% of U.S. hotels impose drip pricing comes from a hotel industry commenter to the NPRM.[639] All hourly wages come from the U.S. Bureau of Labor Statistics.[640] The value of time for home share hosts is the hourly wage rate adjusted by the consumer value of time.[641] The total cost for foreign hotels is calculated by extrapolating from the total cost for U.S. hotels using the U.S. global market share of the short-term lodging industry from IBISWorld Industry Reports.[642] The total cost for foreign home share hosts is calculated by extrapolating from the total cost for U.S. home share costs using Airbnb's U.S. revenue as a percentage of its total revenue, as reported in Airbnb's 2023 10-K Filing.[643]

iii. Short-Term Lodging: Net Benefits

Table 13 presents the net benefits of the final rule in the short-term lodging industry using the quantified benefits and costs discussed in section V.E.3.d.i and

[638] U.S. Census Bureau, *2021 SUSB Annual Datasets by Establishment Industry, supra* note 602.
[639] FTC-2023-0064-3094 (American Hotel & Lodging Association).
[640] OEWS Traveler Accommodation, *supra* note 629.
[641] *See* OEWS National, *supra* note 571 (providing the mean hourly wage); Hamermesh, *supra* note 533 (providing the value of time).
[642] *See infra* section V.E.3.d.ii.b (describing the calculations).
[643] Airbnb 10-K, *supra* note 637.

V.E.3.d.ii. To calculate the low-end of the range for net benefits, the Commission's analysis subtracts the total costs using the high-end cost assumptions from the total benefits using the low-end benefit assumptions. For the high-end of the range for net benefits, the analysis subtracts the total costs using the low-end cost assumptions from the total benefits using the high-end benefit assumptions.

The quantified benefits and costs imply that the final rule will have a positive net benefit, even without accounting for the unquantified benefit of reducing deadweight loss.

Table 13 – Short-Term Lodging: Estimated Net Benefits Over 10-Year Period

		Low-End	**High-End**
Total Benefits	**7% Discount Rate**	$4,931,159,488	$7,171,936,592
Total Benefits	**3% Discount Rate**	$5,988,937,469	$8,710,381,378
Total Costs (One-Time + Annual)	**7% Discount Rate**	$153,306,202	$460,582,520
Total Costs (One-Time + Annual)	**3% Discount Rate**	$153,306,202	$489,905,783
		(Low Benefits – High Cost)	**(High Benefits – Low Cost)**
Net Benefits	**7% Discount Rate**	$4,470,576,968	$7,018,630,389
Net Benefits	**3% Discount Rate**	$5,499,031,686	$8,557,075,175

Note: Benefits have been discounted to the present at both 3% and 7%.

iv. Short-Term Lodging: Uncertainties

The Commission's ability to precisely estimate benefits and costs is limited due to uncertainties in key parameters. The quantified benefits and costs for the short-term lodging industry rely on a set of assumptions based on the best available public information. When the data are unclear, the analysis uses sets of assumptions that would

generate a range of low- and high-end estimates. Table 14 summarizes the key assumptions and how they may affect the resulting estimate of quantified benefits and costs. When possible, the analysis underestimates benefits and overestimates costs in order to conservatively estimate net benefits.

Table 14 – Short-Term Lodging: Summary of Key Uncertainties

Assumption or Uncertainty in Benefits Calculation	**Impact on Benefits**
The analysis assumes that reduction in average listings viewed is proportional (as a percentage of the baseline mean) to the reduction in average tickets viewed in the Blake Study.	This likely underestimates benefits because, unlike tickets on a ticketing platform, short-term lodgings vary substantially both within and across locations in the magnitude of the resort fees they charge. In addition, the hotel search cost literature finds search cost savings from improved hotel ranking (which may be comparable to removing drip pricing) that are very large and imply bigger reductions in average listings viewed.
The analysis assumes that because 96% of all trips taken by U.S. consumers are domestic, 96% of all rooms booked by U.S. consumers are located in the U.S.	Trips taken does not necessarily equal rooms booked, and it is likely that only some subset of trips taken by U.S. consumers also correspond to a room booking. If the true percentage of domestic bookings is greater than 96%, the estimate of the number of foreign hotel bookings will be too small, resulting in underestimated benefits. If it is less than 96%, the estimate of foreign hotel bookings will be too large, resulting in overestimated benefits.
The analysis assumes consumers only visit one travel website before booking a room.	If consumers visit more than one website before booking, the average reduction in listings viewed in response to the rule may be larger than estimated, resulting in underestimated benefits.
Assumption or Uncertainty in Costs Calculation	**Impact on Costs**

The analysis assumes 6% of all firms in the short-term lodging industry impose drip pricing.	The American Hotel & Lodging Association commented that "only 6% of hotels nationwide charge a mandatory resort/destination/amenity fee." The analysis assumes that this means that 6% of firms, not 6% of all establishments (physical hotel buildings), impose drip pricing. If actually 6% of all establishments impose drip pricing, then the estimate likely overestimates the number of firms that impose drip pricing, leading to inflated costs. For example, if all chain hotels impose drip pricing for at least one of their establishments and none or very few independent hotels do, the number of firms would be much smaller than 6% of all firms.
The analysis assumes that the number of hours to comply with the final rule is comprised of specified hours of lawyer time, data analyst time, and web developer time.	The analysis may overestimate costs per firm if many firms either already comply or have the systems in place to easily comply with the rule. Also, the analysis may underestimate costs if compliance requires a greater number of hours.
The analysis assumes Airbnb's market share in the U.S. home share industry is the same as its share of total hosts in the U.S.	If Airbnb's share of hosts is smaller than its market share, then the extrapolation to give the number of home share hosts in the U.S. (and therefore their total costs) will be underestimated. It will be overestimated if Airbnb's share of hosts is larger than its market share.
The analysis assumes the number of hours each Airbnb host spends repricing listings due to the final rule.	Costs may be overestimated if hosts spend less or no time repricing. Costs may be underestimated if hosts spend more time repricing.
The analysis assumes that the U.S. hotel industry's global market share by revenue is the same as its global market share by cost.	Costs for foreign hotels may be underestimated if the U.S. hotel industry's true global cost share is smaller and overestimated if the U.S. hotel industry's true global cost share is bigger.
The analysis assumes that the percentage of revenue Airbnb made in the U.S. is the same as the U.S. home share market's global market share.	Costs for hosts outside of the U.S. may be underestimated if the U.S. home share market's true global market share is smaller and overestimated if the U.S. home share market's true global market share is bigger.

The analysis assumes that 100% of all costs to foreign hotels with U.S.-facing advertising will be passed onto U.S. consumers.	The analysis includes costs to foreign hotels with U.S.-facing advertising because complying with the rule may cause them to pass through some costs to U.S. hotel shoppers. The Commission is unable to quantify what percentage of costs will be passed through. Although it may be trivial, to be conservative, the analysis includes all costs to foreign hotels and home share hosts. This inflates the cost estimates, resulting in a smaller, more conservative net benefit.

4. Economic Evaluation of Alternatives

As an alternative to the rule, the Commission considered not pursuing rulemaking and instead relying on its existing tools of enforcement actions and consumer education. This approach is equivalent to a no-action baseline and would result in no incremental benefits or costs. The prevalence of drip pricing and hidden mandatory fees would persist.

The Commission also alternatively considered, as discussed in the Preliminary Regulatory Analysis, promulgating an industry-neutral version of the rule. The Commission was unable to quantify economy-wide benefits and provided a break-even analysis using quantified compliance costs for the entire economy.[644] The economy-wide break-even analysis implied there would be positive net benefits to the rule if the benefit per consumer was at least $6.65 per consumer per year over a ten-year period assuming a 7% discount rate or at least $5.95 assuming a 3% discount rate. The Commission estimated that per firm annualized costs for an economy-wide rule would be between

[644] The break-even analysis provided in the Preliminary Regulatory Analysis utilized the same set of assumptions regarding the high-end and low-end numbers of hours required for firms to comply with the proposed economy-wide rule. The preliminary break-even analysis also made a set of assumptions about what proportion of the economy currently complied with the provisions of the proposed rule.

$691 and $2,010 assuming a 7% discount rate and between $569 and $1,803 assuming a 3% discount rate.

The Commission sets forth additional alternatives to the final rule that it considered in section V.B but does not have sufficient data to prepare a quantitative analysis of those alternatives.

5. Summary of Results

The Commission's final regulatory analysis catalogs and, where possible, quantifies the incremental benefits and costs of the final rule for the live-event ticketing and short-term lodging industries. The Commission estimates that the quantified benefits of the rule will exceed its quantified costs, and the Commission believes that the total benefits of the rule (quantified and unquantified) will outweigh the total costs (quantified and unquantified). The Commission estimates that the benefits of the final rule over the next ten years accruing solely from reduced consumer search costs in the live-event ticketing industry range from $184 million to $2.46 billion under an assumed 7% discount rate, and $224 million to $2.99 billion using an assumed 3% discount rate. The Commission estimates compliance costs for live-event ticketing firms over the ten-year period to be between $15 million and $142 million using a 7% discount rate, and between $15 million and $154 million using a 3% discount rate.

For the short-term lodging industry, the Commission estimates ten-year benefits to consumers from reduced search costs to range from $4.93 billion to $7.17 billion using a 7% discount rate, and between $5.99 billion and $8.71 billion using a 3% discount rate. The Commission estimates compliance costs for short-term lodging firms for the ten-year period to be between $153 million and $461 million using a 7% discount rate and between $153 million and $490 million using a 3% discount rate.

The Commission also provides a break-even analysis using quantified compliance costs that are aggregated for the live-event ticketing and short-term lodging industries. The break-even analysis demonstrates that there are positive net benefits to the rule if the benefit per consumer is at least $0.33 per consumer per year over a ten-year period using a 7% discount rate. The break-even analysis does not account for costs from unintended consequences of the rule or the potential benefits from reducing deadweight loss by providing consumers with full information.

6. Appendix A: Model of Market Distortion Caused by Drip Pricing

Measuring the deadweight loss, the surplus transfer from consumers to firms, and the shift in quantity demanded requires a quantification of consumers' aggregate level of awareness. Academic research provides a model that relates consumers' partial awareness to the resulting shift in aggregate demand.[645] Specifically, the model assumes, based on empirical evidence, the elasticity of demand with respect to the fee equals the elasticity of demand with respect to the base price scaled by a factor of θ, where $0 < \theta < 1$. This factor, θ, serves as a measure of consumers' awareness of the fee. When consumers are fully aware of the fee, $\theta = 1$; when consumers are completely unaware, $\theta = 0$. As a working example, if demand is given by the equation $Q(P_{\text{base}}, t) = a + bP_{\text{base}} + ct$, where a, b, and c are constants, the previous assumption implies that $c = \theta b$. At $\theta = 1$, shrouding the fee has no effect, and the demand function simplifies to $Q(P_{\text{total}}, t) = a + bP_{\text{total}}$. At $\theta = 0$, shrouding the fee leaves consumers completely unaware of it, and demand is solely a function of the base price: $Q(P_{\text{base}}, t) = a + bP_{\text{base}}$. Assuming $0 <$

[645] Chetty, *supra* note 555.

$\theta < 1$, instead, one may note that, for any given change in the base price and the corresponding change to the quantity demanded, a larger change in the fee would be needed to effect the same change in quantity, reflecting consumers' partial awareness of, and decreased sensitivity to, the fee.

As seen in Figures 1 & 2, D_{upfront} represents the inverse demand function, P_{total} as a function of Q, when $t = 0$, that is, when $P_{\text{total}} = P_{\text{base}}$. For this inverse demand function, changes to the full price, P_{total}, occur only through changes in the base price, P_{base}. For the working example, the inverse demand function is given by $P_{\text{total}}(Q) = -\frac{a}{b} + \frac{1}{b}Q$. For example, when there is no fee and the full price of the product is P_0, demand is $Q(P_0, 0)$, as illustrated by point A in Figure 3. To consider how demand responds to changes in the fee, one may fix P_{base} and let t vary. With the base price fixed at P_0, D_{fee,P_0} represents the inverse demand function relating quantity demanded and the full price when changes in the full price occur only through changes in the fee. That is, as t increases, demand moves up and to the left along D_{fee,P_0}. For the working example, D_{fee,P_0} is given by $P_{\text{total}}(Q) = -\frac{a}{\theta b} - \frac{1-\theta}{\theta} P_0 + \frac{1}{\theta b}Q$. One may note that D_{fee,P_0} is steeper than D_{upfront}, i.e., the slope of D_{fee,P_0}, $\frac{1}{\theta b}$, is greater in magnitude than the slope of D_{upfront}, $\frac{1}{b}$, since $0 < \theta < 1$. This difference in slopes graphically captures the difference in consumers' elasticities relative to the fee and to the base price. If the fee is set to t_0, then demand decreases from $Q(P_0, 0)$, point A, to $Q(P_0, t_0)$, point B.

If the fee is then fixed at t_0, one may consider changes in demand as the base price varies once again. In Figure 3, D_{partial,t_0} represents the inverse demand function when $t = t_0$. For the working example, D_{partial,t_0} is given by $P_{\text{total}}(Q) = -\frac{a}{b} + (1 - \theta)t_0 +$

$\frac{1}{b}Q$. For this example, one may note that D_{partial,t_0} equals D_{upfront} shifted up by $(1-\theta)t_0$, and it runs through point B. When $\theta = 1$, e.g., consumers are fully aware of the fee, D_{partial,t_0} coincides with D_{upfront}. That is, the partitioning of the full price into a base price and a fee has no impact on demand. When $\theta = 0$, e.g., consumers are completely unaware of the fee, D_{partial,t_0} coincides with D_{unaware}. Outside of these extreme cases, D_{partial,t_0} lies between the upfront demand curve and the fully shrouded demand curve, and θ quantifies the shift in aggregate demand caused by shrouded fees.

Figure 3 – Demand Shift Caused by Shrouded Pricing when Consumers are Partially Unaware

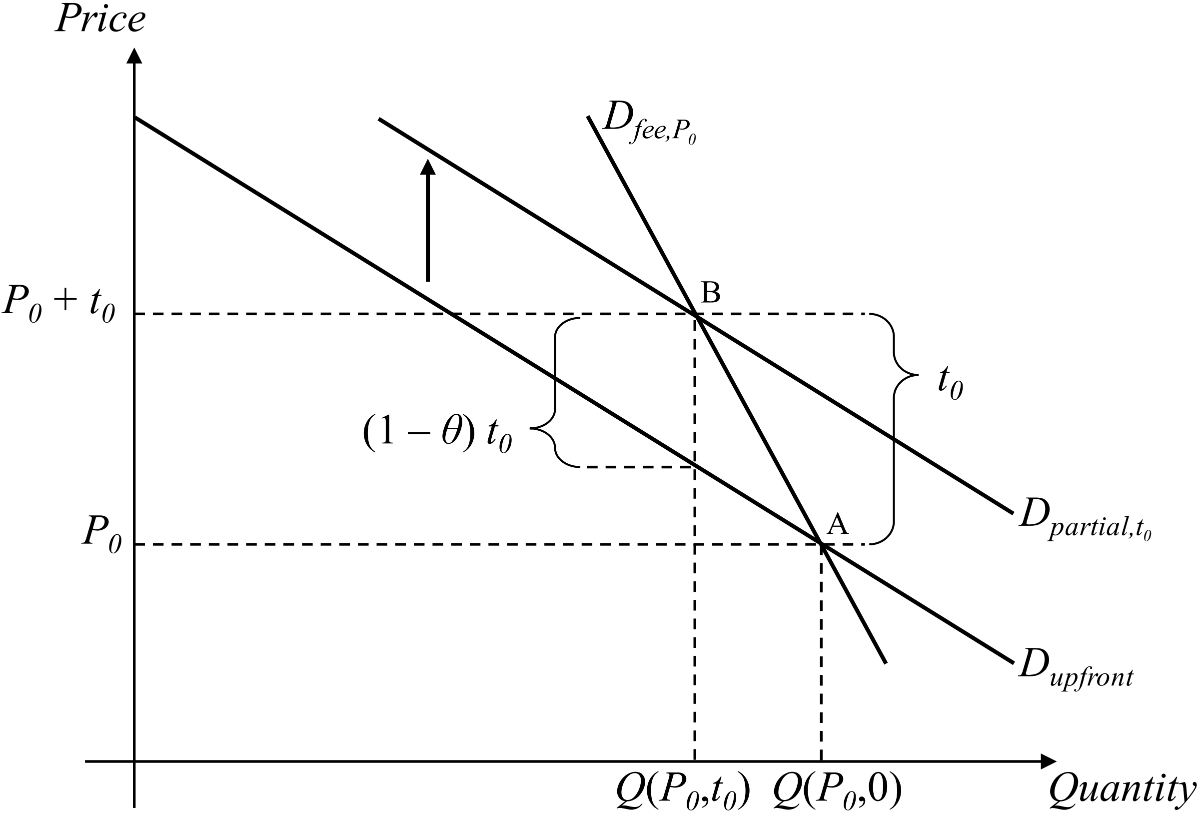
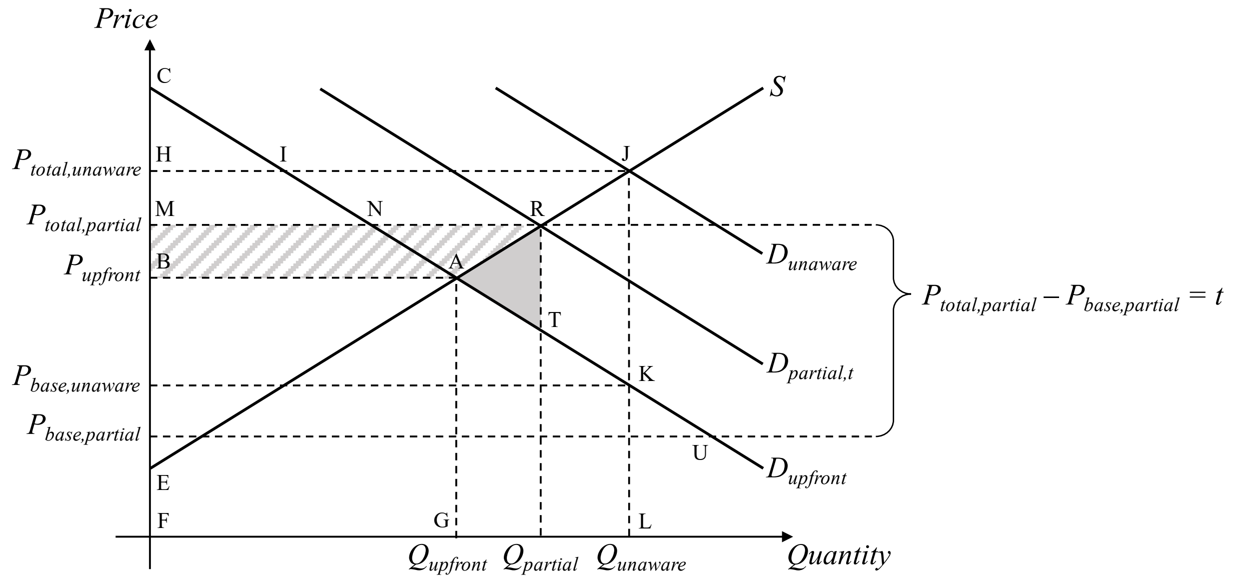


Figure 4 illustrates how consumers' partial awareness of fees impacts the effect of shrouded pricing on consumer and producer surplus. The intersection of D_{partial} with S, illustrated by point R, at quantity Q_{partial} and price $P_{\text{total,partial}}$, represents the outcome

when consumers are partially aware of the fee. In this figure, $D_{\text{fee},P_{\text{base,partial}}}$ (not shown) would go through point U (equivalent to point A in Figure 3) and point R (equivalent to point B in Figure 3). For comparison, in the case of complete unawareness ($\theta = 0$), $D_{\text{fee},P_{\text{base,unaware}}}$ (not shown) would go vertically through point K (equivalent to point A in Figure 3) and point J (equivalent to point B in Figure 3). As illustrated in Figure 4, the more consumers are aware of the fee, i.e., the larger the θ, the smaller the market clearing full price and, hence, the base price, must be. As an additional example, when consumers are fully aware of the fee ($\theta = 1$), the market clearing full price under shrouded pricing equals the market clearing price under upfront pricing, P_{upfront}, and the base price, $P_{\text{base,aware}}$ (not shown), is lower than $P_{\text{base,partial}}$.

Consumer surplus is now equal to the area of triangle CMN minus the area of triangle NRT. Producer surplus is now equal to the area of triangle EMR. The deceptive shrouding of the price leads to a transfer of surplus from consumers to firms equal to the area of trapezoid $ABMR$ as well as an additional decrease in consumer surplus not captured by firms, the deadweight loss, equal to the area of triangle ART. The surplus transfer from consumers to firms and the deadweight loss are both smaller in this case of partial awareness relative to the case where consumers are completely unaware of the fee. That is, the harm caused by the firms' deception is mitigated by the extent to which consumers are aware of and account for the fee.

Figure 4 – Market Distortion Caused by Shrouded Pricing when Consumers are Partially Unaware



7. Appendix B: Short-Term Lodging Industry Minutes per Listing Calculations

a) *Low-End Estimate of Minutes per Listing Calculation*

The Commission's analysis uses the Airbnb user search statistics reported in Fradkin (2017)[646] to obtain a low-end time estimate to view one listing after clicking on it. The paper provides data on a random sample of users who searched for short-term rentals on Airbnb in a large U.S. city. It reports search behavior separately for all searchers and for searchers who contacted the host, either to inquire about a listing or to book it. The analysis uses those numbers to calculate search behavior for the group of searchers who did not send a contact. The relevant statistics for these three groups are summarized in Table B.1.

[646] Andrey Fradkin, *Search, Matching, and the Role of Digital Marketplace Design in Enabling Trade: Evidence from Airbnb*, (MIT Initiative on the Digit. Econ., Working Paper, 2017), *https://ide.mit.edu/wp-content/uploads/2017/07/SearchMatchingEfficiency.pdf*.

“Average unique listings seen” includes all listings users see on a search result page, including listings users do not click on. “Average time spent browsing” includes entering search parameters, scrolling through results, and viewing listings after clicking on them. “Average number of contacts” is the average number of times searchers contacted a host for a listing. Since contacting the host requires users to click on the listing, the analysis uses this as a proxy for number of clicked-on listings.

Table B.1

	(1) **All Searchers**	**(2)** **Searchers who sent at least one contact**	**(3)** **Searchers who did not send a contact**
Observations	12,241	4,426	7,815
Average unique listings seen	68.53	87.81	57.61
Average time spent browsing (min)	35.77	57.87	23.25
Average number of contacts (proxy for clicks)		2.37	

From the third column, we calculate:

Time to view each listing without clicks = Average time spent browsing / Average unique listings seen = 23.253/57.61 = .40 minutes per listing.

Because the average time spent browsing for the group in column (2) is inclusive of the amount of time spent sending contacts, not just viewing listings that were not contacted, we use the preceding value calculated from the group in column (3) to estimate the following that applies to searchers in column 2:

Time spent viewing listings without clicks = Time to view each listing without clicks * Average unique listings seen = .40 * 87.812 = 35.44 minutes

and

Average total time viewing listings after clicking = Average time spent browsing - Time spent viewing listings without clicks = 57.874 - 35.44 = 22.43 minutes.

Finally, we calculate time to view one listing:

Time per listing = Average total time viewing listings after clicking / Average number of contacts = 22.43/2.367 = 9.48 minutes per listing.[647]

b) High-End Estimate of Minutes per Listing Calculation

The Commission's analysis uses the hotel search cost model developed by Chen and Yao (2016)[648] to calculate a high-end estimate of minutes to view one listing. The paper uses data from consumer search behavior when booking hotels in four major international cities on an anonymous major U.S. online travel website.

A search is defined as a listing click-through, and the search cost for a listing is specified as:

$$c_{ij} = c_i(TimeConstraint_i, Slot_j) = \exp(\gamma_{i0} + \gamma_{i1}TimeConstraint_i + \gamma_{i2}Slot_j)$$
$$= \exp(3.07 - .05 * TimeConstraint_i + .01 * Slot_j)$$

where $TimeConstraint_i$ is the number of days between consumer i's search and her check-in. $Slot_j$ is the slot position of the j-th search. The exponential operator ensures that the costs are positive. The gammas are mean levels of cost coefficients.

[647] The numerator of "Time per listing" is an underestimate because "Time spent browsing without clicks" may capture some time spent viewing clicked-on listings that did not result in a contact. The denominator of "Time per listing" is also an underestimate because the number of listings clicked on is proxied using the number of listings users inquire about or book. Users may click on more listings than just the ones they want to inquire about or book. The two values are related. If the true denominator is higher than estimated, then the true numerator also will be higher. Higher listing clicks beyond those that resulted in a contact means more time spent viewing clicked-on listings that did not result in a contact. The ratio should remain about the same.

[648] Yuxin Chen & Song Yao, *Sequential Search with Refinement: Model and Application with Click-Stream Data*, 63 Mgmt. Sci. 4345 (2016), *https://doi.org/10.1287/mnsc.2016.2557*.

Using this formula, the analysis can find that the mean search cost per listing when 30 days in advance (the sample average) is exp(3.07 – (.05*30)) = $4.81 per listing. The inflation adjusted value is $6.10.

The resulting total search cost is then $6.10 per listing * 2.3 searches on average = $14.04. This total cost can be conceptualized as the number of minutes of viewing listings multiplied by the consumer's value of time. Using $25.81 per hour as the value of time, the time spent viewing listings is ($14.04 / $25.81 per hour) * 60 minutes per hour = 32.62 minutes.

The minutes to view one listing is then calculated as 32.62 minutes / 2.3 searches = 14.18 minutes per listing.

VI. Paperwork Reduction Act

The Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501–3520, requires Federal agencies to seek and obtain OMB approval before collecting information directed to ten or more persons. The term "collection of information," as used in the PRA, includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.[649] The PRA analysis requires an estimate of the burden associated with a collection of information.[650]

Upon publication of the NPRM, the Commission submitted an associated clearance request with a Supporting Statement to OMB for review under the PRA. In response, OMB filed a comment on December 11, 2023 (OMB Control No. 3084-0176), requesting that the Commission resubmit the clearance request upon the finalization of

[649] 44 U.S.C. 3502(3); 5 CFR 1320.3(c).
[650] 5 CFR 1320.8(a)(4).

the proposed rule.[651] Accordingly, simultaneously with the publication of this final rule, the Commission is resubmitting its clearance request and a Supplemental Supporting Statement to OMB for review under the PRA. For the reasons discussed below, the Commission has made adjustments to its initial burden analysis. The Commission's updated burden analysis follows.

A. Disclosures Related to Final § 464.2(a) through (c)

Final § 464.2(a) through (c) provide clarity as to how Businesses should disclose Total Price, optional exclusions from Total Price, and the final amount of payment. This information is readily available to Businesses, and many Businesses already disclose this information in the course of their regular business activities. However, the Commission is aware that in some instances the requirements in final § 464.2(a) through (c) may require some Businesses to display readily available information more clearly. OMB guidance is unclear regarding whether, and to what extent, requiring displays of information to be clearer amounts to a collection of information. The Commission is of the view that the rule's requirements regarding disclosure of Total Price, exclusions from Total Price and the final amount of payment are unlikely to qualify as collections of information. Nevertheless, the Commission includes this analysis out of an abundance of caution and not because it concedes that such standard pricing disclosures constitute collections of information.

Final § 464.2(a) provides it is an unfair and deceptive practice for a Business to offer, display, or advertise any price of a Covered Good or Service without Clearly and

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[651] *See* Office of Info. and Regul. Aff., Office of Mgmt. and Budget, OMB Control Number History for OMB Control Number 3084-0176, *https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=3084-0176#*.

Conspicuously disclosing Total Price, which is defined in final § 464.1 to permit the exclusion of Government Charges, Shipping Charges, and fees or charges for any optional Ancillary Good or Service. While Businesses may exclude these charges from Total Price in offers, displays, and advertisements, final § 464.2(c) provides that, before a consumer consents to pay for any Covered Good or Service, a Business must disclose Clearly and Conspicuously (i) the nature, purpose, and amount of any fee or charge imposed on the transaction that has been excluded from Total Price and the identity of the good or service for which the fee or charge is imposed and (ii) the final amount of payment for the transaction. Final § 464.2(b) relatedly provides that in any offer, display, or advertisement that represents any price of a Covered Good or Service, Total Price must be disclosed more prominently than any other Pricing Information; however, where the final amount of payment for the transaction is displayed, it must be more prominent than, or as prominent as, Total Price. As discussed in section III, the Commission is not finalizing the proposed affirmative refundability disclosure requirement.

As part of the NPRM, the Commission assumed that, except for the proposed affirmative refundability disclosure requirement, the Commission's proposal was limited to disclosure activities that Businesses already perform in the course of their regular business activities. However, following its review of the comments,[652] the Commission

[652] *See, e.g.*, FTC-2023-0064-3238 (Gibson, Dunn & Crutcher LLP argued that businesses would need to hire, among other professionals, web designers or software engineers "to rebuild entire websites." In addition, it argued that the Preliminary Regulatory Analysis did not account for costs needed to replace physical ads, subway ads, and billboards and speculated that would take "thousands of hours."); FTC-2023-0064-2856 (National Football League called on the Commission to reexamine the estimated compliance costs because it did not adequately take into account "the additional legal, developer, and data personnel time that would be required from live-event industry participants – and especially industry participants dealing in large volumes of live-event ticket sales in complying with a final rule."); FTC-2023-0064-3122 (Vivid Seats commented: "We believe that the FTC is underestimating the amount of employee time required by at least a factor of five.").

determines that, although many Businesses already make the disclosures required by final § 464.2(a) through (c) in the usual course of their regular business activities, it is possible that some Businesses in the live-event ticketing and short-term lodging industries may nonetheless incur incremental labor costs in ensuring that their disclosure activities are fully aligned with the requirements that are set forth in final § 464.2(a) through (c). As a result, out of an abundance of caution, the Commission updates its burden analysis in recognition of these comments. As described in section VI.A.5, however, the estimated costs may be overestimated.

1. Number of Respondents

The Commission estimates that there are 12,393 entities that may incur additional incremental labor costs to refine their disclosure activities so that they are fully compliant with final § 464.2. This estimate of 12,393 entities takes the high-end estimate of the number of firms in the United States in the live-event ticketing industry (9,440 firms) and the number of firms in the United States in the short-term lodging industry (2,953) that will incur additional compliance costs related to disclosure activities.

2. Estimated One-Time Hour Burden

In section V.E.3, the Commission estimates the cost of adjusting the presentation of advertised prices and the purchase process for online sales. The final regulatory analysis in section V assumes live-event ticketing and short-term lodging firms not presently compliant with the final rule will employ a low end of forty hours and a high end of eighty hours of web developer time to become compliant with the final rule. For purposes of this PRA analysis, the Commission uses the midpoint of the range of web developer hours presented in section V.E.3; that is, the Commission assumes sixty hours of web developer time will be necessary to adjust advertised prices and purchase

processes to comply with final § 464.2's disclosure requirements.[653] Once firms adjust advertised prices and purchase process displays to be compliant with the final rule, any future changes to pricing displays or purchasing systems are part of the regular course of business and are not a direct consequence of the rule. The Commission finds that any ongoing additional costs associated with these activities are de minimis. Thus, the Commission estimates the total web developer hours to adjust price displays and purchase processes is 743,580 hours (12,393 firms × 60 web developer hours per firm).

3. Estimated One-Time Labor Costs

The estimated one-time labor cost that live-event ticketing and short-term lodging firms may incur to comply with final § 464.2's disclosure requirements is $32,990,931. This total is calculated by summing the labor costs for the live-event ticketing and short-term lodging industries. The labor cost for the live-event ticketing industry is calculated by applying the hourly wage for web developer time in the live-event ticketing industry of $45.95 to the estimate of 60 hours of web developer time multiplied by the number of U.S. firms in the live-event ticketing industry that incur additional compliance costs ($45.95/hour × 60 hours per firm × 9,440 firms) resulting in $26,026,080.[654] The labor cost for the short-term lodging industry is calculated by applying the hourly wage for web developer time in the short-term lodging industry of $39.31 to the estimate of sixty hours of web developer time multiplied by the number of U.S. firms in the short-term lodging industry that incur additional compliance costs ($39.31/hour × 60 hours per firm × 2,953

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[653] Brick-and-mortar firms that do not currently comply with the rule would update the price presentation and purchase process by printing new price displays, revising advertising campaigns, adding required disclosures, and potentially updating websites. The Commission uses web developer hours as a proxy for any costs associated with updating the price presentation and purchase process to become compliant with the final rule.

[654] The estimated mean hourly wages for a web developer are $45.95. OEWS Web Developers, *supra* note 571.

firms) resulting in $6,964,851.[655] The total for the two industries is $32,990,931 ($26,026,080 + $6,964,851).

4. Estimated One-Time Non-Labor Costs

The capital and start-up costs associated with the final rule's disclosure are de minimis. Any disclosure capital costs involved with the final rule, such as equipment and office supplies, would be costs borne by Businesses in the normal course of business.

5. Projected Labor Costs Likely Overestimated

In preparing its burden estimate for compliance with final § 464.2(a) through (c), the Commission considered comments noting that some Businesses may incur incremental labor costs to come into compliance with the rule, though commenters did not submit specific data for the Commission to evaluate this contention. As a result, the Commission's updated burden calculation relies in part on cost assumptions from its final regulatory analysis in section V. Applying these cost assumptions as one-time fixed costs in this burden analysis likely generates an overestimate of incremental labor costs for a number of reasons. First, the number of respondents that will have to make changes to their price displays and offers is likely to be significantly inflated. Since the Commission announced its NPRM, California's Honest Pricing Law, SB 478, which was amended by SB 1524, went into effect, making it illegal for businesses to advertise or list prices that do not include all mandatory fees or charges other than certain government taxes and shipping costs. As such, many national firms doing business in California, including live-event ticketing and short-term lodging firms, will already have incurred costs to develop the capabilities to comply with the Commission's rule even if they are currently only

[655] The estimated mean hourly wages for a web developer are $39.31 in the short-term lodging industry. OEWS Web Developers, *supra* note 571.

fully deploying such capabilities in California. Similar legislative and regulatory efforts have been enacted in New York, Massachusetts, North Carolina, Minnesota, Tennessee, Connecticut, Maryland, and Colorado.[656] Second, to the extent that live-event ticketing and short-term lodging firms opt to present all-inclusive Total Prices that obviate the need for the disclosures set forth in final § 464.2(b) through (c), such firms will require less web developer time to comply, and the Commission is likely overestimating total labor hours.

B. Prohibited Misrepresentations Under Final § 464.3

Final § 464.3, which the Commission proposed in similar form as § 464.3(a), sets forth that in any offer, display, or advertisement for a Covered Good or Service, it is an unfair and deceptive practice for a Business to misrepresent any fee or charge, including its nature, purpose, amount, or refundability, and the identity of the good or service for which the fee or charge is imposed. Consistent with the NPRM's discussion of proposed § 464.3(a), the Commission notes that final § 464.3 does not impose any information collection requirement for the purpose of the PRA. Rather than imposing any affirmative disclosure, reporting, or recordkeeping obligations,[657] final § 464.3 merely prohibits Businesses from making certain misrepresentations that are already prohibited under section 5 of the FTC Act. As noted in the NPRM, any additional costs that might be associated with these prohibitions are de minimis.[658]

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[656] *See, e.g.,* N.Y. Arts & Cult. Aff. Law sec. 25.01–25.33 (McKinney 2023) (Effective Jun. 30, 2022); An Act Ensuring Transparent Ticket Pricing, H. 259, 193rd Gen. Court (Mass. 2023); S. 607 (2023–2024 Session) (N.C. 2023) (Enacted July 9, 2024); 2023 Minn. H.B. 3438 (Enacted May 20, 2024) (Minn.); H.B. 1231 (113th G.A.) (Tenn.) (Enacted May 24, 2023); Conn. Gen. Stat. § 53-289a (2023); S.B. 329 (2024 Reg. Sess.) (Md.); S.B. 329 (2024 Reg. Sess.) (Md.) (Enacted May, 9, 2024); H.B. 23-1378 (2024 Reg. Sess.) (Colo.) (Enacted June 5, 2024).

[657] *See* 5 CFR 1320.3(c) (definition of the term "collection of information").

[658] *See* NPRM, 88 FR 77478.

VII. Regulatory Flexibility Act—Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to provide an Initial Regulatory Flexibility Analysis ("IRFA") and Final Regulatory Flexibility Analysis ("FRFA") of any final rule subject to notice-and-comment requirements, unless the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.[659] In developing the final rule, the Commission carefully considered whether the rule would have a significant impact on a substantial number of small entities. The Commission continues to believe that the final rule's impact will not be substantial for most small entities and, in many cases, will likely positively impact small businesses by enabling them to compete fairly in the marketplace with larger players. However, the Commission cannot fully quantify the impact the final rule will have on such entities. Therefore, in the interest of thoroughness and an abundance of caution, the Commission has prepared the following FRFA for this final rule.

In the NPRM, the Commission provided an IRFA and solicited comments on the burden on any small entities that would be covered.[660] The Commission received comments in response to the IRFA.[661] The Commission received comments from two industry groups requesting that the Commission conduct a Small Business Regulatory

[659] 5 U.S.C. 603–605.
[660] NPRM, 88 FR 77479–80.
[661] *See, e.g.*, FTC-2023-0064-3251 (National RV Dealers Association); FTC-2023-0064-2367 (Small Business Majority). The Small Business Administration, Office of Advocacy raised similar criticisms of the proposed rule. *See* U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC-2023-0064-0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf*. The Commission addresses that comment *infra* section VII.C.

Impact Analysis to analyze the impact of small businesses in particular industries.[662] The Commission also received comments from small business owners and industry groups in support of the rule and its impact on small businesses, as well as from commenters concerned about potential costs to small businesses. Consistent with the requirements of the FRFA, the Commission has considered the comments received, and the final rule's impact on small entities, including alternatives to the final rule.

The Commission thoroughly considered the feedback it received from the SBA Office of Advocacy, the Small Business Majority, and other commenters in developing the final rule. The Commission modifies the proposed rule in response, in part, to such feedback. The Commission will continue to engage with small business stakeholders to facilitate implementation of, and compliance with, the final rule and other guidance as necessary to assist small entities in complying with the rule.

Based on the Commission's expertise, and after careful review and consideration of the entire rulemaking record—including the more than 60,800 comments the Commission received in response to the NPRM, empirical research on how bait-and-switch pricing tactics, including drip pricing and partitioned pricing, harm consumers and honest competitors, and the Commission's Final Regulatory Analysis in section V—the Commission adopts this final rule focused on Covered Goods or Services with certain additional revisions to reduce compliance burdens on small businesses and other entities. To begin with, because this final rule is limited to Covered Goods or Services, many industries that have significant small business participants are no longer covered. Second,

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[662] FTC-2023-0064-3269 (IHRSA—The Health & Fitness Association); FTC-2023-0064-3294 (International Franchise Association). The Commission notes that the final rule is limited to Covered Good or Services, which does not include the health and fitness industry.

the Commission adopts an extended compliance date—120 days—to ensure that small businesses have adequate time to come into compliance with the rule's requirements.[663] Third, as discussed in section III, in response to feedback from commenters representing the interests of small businesses, the Commission clarifies in this SBP that Businesses may exclude from Total Price pass-through credit card or other payment processing fees if they give consumers a viable payment alternative without a fee (e.g., cash is accepted). In addition, as discussed in section III, the final rule adopts definitions of Government Charges to increase flexibility for Businesses, including small businesses.

A. Statement of the Need for, and Objectives of, the Rule

The Commission describes the need for, and objectives of, the rule in section V.A. The legal basis for the rule is section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

B. Significant Issues Raised by Comments, the Commission's Assessment and Response, and Any Changes Made as a Result

Commenters, including the Small Business Majority, argued that the IRFA failed to appropriately assess the impact of the proposed rule on small businesses.[664] The NPRM assumed that of the total estimated firms in the United States (6,140,612),[665] only a small fraction (818,178 or about 13%) would incur additional costs beyond the initial

[663] A 120-day compliance date after publication in the *Federal Register* complies with the requirements of the Congressional Review Act that a "major rule" may not take effect fewer than sixty days after the rule is published in the Federal Register. 5 U.S.C. 801(a)(1)(3).
[664] FTC-2023-0064-3251 (National RV Dealers Association); FTC-2023-0064-2367 (Small Business Majority).
[665] The number of firms used in the NPRM was provided by the United States Census Bureau's Statistics of United States Businesses. U.S. Census Bureau, *2020 SUSB Annual Datasets by Establishment Industry* (Mar. 2023), ***https://www.census.gov/data/datasets/2020/econ/susb/2020-susb.html***.

one-hour compliance review to comply fully with the proposed rule. Commenters, including the Small Business Majority, argued that the IRFA failed to appropriately assess the impact of the proposed rule on small businesses.[666] For the purpose of the IRFA, the Commission concluded that the proposed rule would not have a significant economic impact on a substantial number of small entities and solicited comment on its analysis, including the submission of supporting or contradictory empirical data. The Commission did not receive any data or other evidence to suggest that the number of firms incurring additional costs should be higher. The Commission anticipates that modifications made in the final rule will reduce the number of Businesses that are likely to incur additional costs.

These commenters further asserted the rule's proposed economic analysis underestimated the cost of attorneys' fees and ongoing costs to comply with the rule.[667] The Commission addresses comments and concerns related to its economic analysis in section V, including estimates for attorneys' fees and ongoing compliance costs.

The same commenters also noted that the Commission's IRFA failed to appropriately consider alternatives to the proposed rule for small businesses.[668] The Commission disagrees. The NPRM stated that the Commission had considered alternatives, including: (1) a rule that would exempt small businesses from the proposed rule; (2) a rule that would apply to online-only businesses; (3) alternatives that would otherwise narrow the scope of the proposed rule, including limiting application of the rule

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[666] FTC-2023-0064-3251 (National RV Dealers Association); FTC-2023-0064-2367 (Small Business Majority).

[667] FTC-2023-0064-3251 (National RV Dealers Association); FTC-2023-0064-2367 (Small Business Majority).

[668] FTC-2023-0064-3251 (National RV Dealers Association); FTC-2023-0064-2367 (Small Business Majority).

to Covered Businesses as defined in the NPRM; or (4) terminating the rulemaking entirely. Consistent with the NPRM, the Commission declines to exempt small businesses, including those that offer live-event ticketing and short-term lodging, from the rule to avoid creating uncertainty across Businesses as to whether the rule applies to them, to avoid creating unfair competitive advantages for those Businesses that engage in bait-and-switch pricing and misrepresent fees, and to ensure maximum consumer benefits from increased price transparency. The NPRM also invited comment on questions and concerns related to small businesses, including the estimated number of small businesses and the impact on those businesses, as well as alternatives to the rule for small businesses. The Commission's FRFA includes further discussion of the alternatives considered in section V.B.

The Small Business Majority noted that many small businesses lack access to legal staff and "run the risk of occupying a substantial amount of time to understand how exactly they need to adjust their pricing models to comply with the new rule."[669] As a result, the Small Business Majority encouraged the Commission to provide guidance to small businesses, including through outreach, education, and compliance guidance, as well as working directly with small businesses, to help small businesses comply with the final rule.[670] The Commission highlights and discusses herein that, in response to the comments, the final rule both narrows the NPRM proposal as well as clarifies it in certain respects, thereby decreasing the burden on small businesses. The SBP also discusses various pricing scenarios raised by commenters, and the Commission believes that such

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[669] FTC-2023-0064-2367 (Small Business Majority).

[670] *Id.*; *see also* U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC-2023-0064-0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf*.

discussion will aid Businesses, including small businesses, in complying with the final rule. Finally, the Commission routinely provides guidance and conducts outreach to businesses on complying with the FTC Act and regulations that it enforces and, as required by law, the Commission will publish a small entity compliance guide to assist small businesses in complying with the rule.

The Commission received numerous comments from industry groups and individual small business owners, including comments highlighting the benefits of the proposed rule on small businesses, as well as comments identifying certain concerns about application of the proposed rule to small businesses. The Commission addresses many of these comments in other parts of the SBP, including section III, and accordingly incorporates that analysis into its FRFA, and addresses the remainder of these comments herein.

Some commenters argued that fees help small businesses offset rising costs and staff salaries and benefits, especially for small businesses operating on thin margins.[671] One industry group argued that the rule might place small businesses at a competitive disadvantage compared to larger businesses.[672] As discussed in Parts III and V, the Commission narrows the scope of the rule to address concerns affecting small businesses by, for example, modifying the definition of Government Charges and addressing factual scenarios and questions concerning application of the rule to small businesses, including related to credit card surcharges and contingent fees. In making these clarifications and modifications, the Commission narrows the Total Price requirement for, and thereby

[671] *See*, *e.g.*, FTC-2023-0064-3033 (The Rebel Lounge et al.); FTC-2023-0064-3078 (Washington Hospitality Association); FTC-2023-0064-2367 (Small Business Majority).
[672] FTC-2023-0064-3292 (National Association of Theater Owners).

reduces the compliance burden on Businesses, including small businesses, offering Covered Goods or Services. As discussed in section VII.C, the Commission is also adopting an extended 120-day compliance date to allow more time for Businesses, including small businesses, to assess and come into compliance with the final rule.

Conversely, other commenters noted that bait-and-switch practices and misleading fees harm small businesses, and that the rule will help small businesses.[673] One State representative asserted that the final rule would help small businesses because small businesses that advertise the entire price of their goods and services are at a competitive disadvantage compared to larger businesses that advertise lower prices and only disclose fees at the end of a transaction.[674] Consumer advocacy groups urged the Commission not to exempt small businesses, arguing that consumers and small businesses alike will benefit from greater pricing transparency and a prohibition on deceptive pricing.[675] The Commission also received numerous individual comments, including from small business owners, expressing support for the rule, because it would benefit small businesses.[676]

The Commission notes that the final rule does not prohibit any Business offering live-event ticketing or short-term lodging from charging consumers fees or raising prices to support necessary operating costs, such as labor costs or rising expenses. The final rule instead requires that such charges and fees be incorporated in Total Price and that they not be misleading.

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[673] FTC-2023-0064-2840 (Indie Sellers Guild); FTC-2023-0064-2341 (New Hampshire State Representative Lindsay Sabadosa); FTC-2023-0064-3302 (Public Citizen); FTC-2023-0064-3160 (Consumer Federation of America); FTC-2023-0064-3141 (Coalition of Franchisee Associations).
[674] FTC-2023-0064-2341 (New Hampshire State Representative Lindsay Sabadosa).
[675] FTC-2023-0064-3302 (Public Citizen); FTC-2023-0064-3160 (Consumer Federation of America).
[676] *See, e.g.*, FTC-2023-0064-0105 (Individual Commenter); FTC-2023-0064-2422 (Individual Commenter); FTC-2023-0064-2697 (Individual Commenter).

C. *Comment by the Small Business Administration, Office of Advocacy, the Commission's Assessment and Response, and Any Changes Made as a Result*

The SBA Office of Advocacy filed a comment requesting that the Commission "prepare a supplemental initial regulatory flexibility analysis that fully considers the economic impact of the proposed rulemaking on small entities and alternatives that may reduce that burden," as well as "clarify that this rulemaking will not apply to small non-profit organizations."[677] The SBA Office of Advocacy argues that the Commission's IRFA did not comply with the requirements of the Regulatory Flexibility Act because it "fail[ed] to provide an accurate description of the small entities to which the proposed rule will apply," and failed to provide "an accurate description of the costs associated with the compliance requirements."[678] According to the SBA Office of Advocacy, the Commission also "failed to consider significant alternatives that would minimize any significant economic impact of the proposed rule on small businesses."[679] The Commission has considered this comment, which it further summarizes herein, and responds as follows.

The SBA Office of Advocacy recommended that the Commission count small businesses using NAICS-code specific thresholds defined by the SBA, rather than using a threshold of 500 employees.[680] In response to this comment, the Commission now uses the NAICS-code specific thresholds set by the SBA to determine the number of small businesses in the Final Regulatory Flexibility Analysis contained in section VII.D.

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[677] U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC-2023-0064-0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf*.
[678] *Id*.
[679] *Id*.
[680] *Id*.

The comment further contended that "there are other alternatives that the FTC should have considered in its IRFA," such as "exempting certain sectors of small businesses or imposing a limit on certain fees" and "allowing businesses more time to comply with the rule.[681] The Commission did consider such alternatives and narrows the scope of the final rule to Covered Goods or Services, thereby limiting the rule's application to only those Businesses, including small businesses, that offer, display, or advertise such goods or services. The Commission declines, however, to impose a limit on the amount of fees, so long as they are disclosed and not misleading in accordance with the rule's requirements, including as discussed in section III.

As to the suggestion to give businesses more time to comply with the rule, the Commission adopts a compliance date of 120 days after publication of the final rule in the Federal Register. The final rule will go into effect, and compliance with the final rule will be required, on that date. This extended timeline considers comments received from the SBA Office of Advocacy and small businesses, underscoring the time it might take to come into compliance with the final rule. For example, some small businesses may decide to seek outside guidance about whether they need to make adjustments to come into compliance, while others will conduct their own compliance review.[682] The Commission finds 120 days should be enough time even for small businesses conducting their own compliance review, and that a 120-day period between publication in the

[681] *Id.*
[682] *See, e.g.*, *id.* (SBA urged the Commission to consider "allowing small businesses more time to comply with the rule" and to provide clear compliance guidance); FTC-2023-0064-2367 (Small Business Majority urged the Commission to issue comprehensive guidance and commented: "[M]any small businesses do not have access to legal staff or consultants, and without clear and specific disclosure requirements provided by industry, small businesses run the risk of occupying a substantial amount of time to understand how exactly they need to adjust their pricing models to comply with the new rule.").

Federal Register and the rule's compliance date appropriately balances the interests of small businesses with the interests of protecting consumers. Further, in addition to guidance in this SBP, the Commission also will publish a small entity compliance guide to assist small businesses in complying with the rule.

Finally, the SBA Office of Advocacy "encourages the FTC to clarify that this rulemaking will not apply to non-profits."[683] The final rule can be enforced to the full scope of the Commission's jurisdiction. Congress empowered the Commission to "prevent persons, partnerships, or corporations" from engaging in "unfair or deceptive acts or practices in or affecting commerce."[684] To fall within the definition of "corporation" under the FTC Act, an entity must be "organized to carry on business for its own profit or that of its members."[685] These FTC Act provisions, taken together, have been interpreted in Commission precedent[686] and judicial decisions[687] to mean that the Commission lacks jurisdiction to prevent section 5 violations by a corporation not organized to carry on business for its own profit or that of its members. The Commission stresses, however, that both judicial decisions and Commission precedent recognize that not all entities claiming tax-exempt status as non-profits fall outside the Commission's jurisdiction.[688] "Congress took pains in drafting § 4 [15 U.S.C. 44] to authorize the

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[683] U.S. Small Bus. Admin., Office of Advocacy, Re: Trade Regulation Rule on Unfair or Deceptive Fees FTC-2023-0064-0001, *https://advocacy.sba.gov/wp-content/uploads/2024/03/Comment-Letter-Trade-Regulation-Rule-on-Unfair-or-Deceptive-Fees.pdf*.

[684] 15 U.S.C. 45(a)(2). The Commission herein focuses on coverage of "corporations."

[685] 15 U.S.C. 44.

[686] *In re Coll. Football Ass'n*, 117 F.T.C. 971, 994 (1994).

[687] *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 766–67 (1999); *Cmty. Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1019 (8th Cir. 1969); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1214 (11th Cir. 1991).

[688] The Commission has determined that "[r]ulings of the Internal Revenue Service are not binding upon the Commission, . . . but a determination by another Federal agency that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded." *In re Am. Med. Ass'n*, 94 F.T.C. 701, 990 (1979) (citing *In re Ohio Christian Coll.*, 80 F.T.C. 815, 848 (1972)).

Commission to regulate so-called nonprofit corporations, associations and all other entities if they are in fact profit-making enterprises."[689]

D. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply

The final rule covers Businesses that offer short-term lodging and live-event tickets. Small businesses that currently comply with the final rule will have a relatively trivial cost of assessing whether they are currently in compliance, and the Commission assumes these firms will require at most one hour of lawyer time to confirm compliance. Small businesses that offer Covered Goods or Services and currently do not disclose Total Price will incur additional costs to adjust advertised prices, their marketing campaigns, and the consumer purchase process to comply with the rule.

Using the size standards set by the SBA,[690] the Commission calculates that there are potentially as many as 9,034 small firms in the U.S that may sell tickets for live events.[691] For the economic regulatory analysis in section V, the Commission assumes all live-event ticketing firms will incur additional costs to adjust advertised prices, their marketing campaigns, and the consumer purchase process to comply with the rule. The

[689] *Cmty. Blood Bank*, 405 F.2d at 1018; *see also, e.g.*, *FTC v. Nat'l Comm'n on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975); *In re Coll. Football Ass'n*, 117 F.T.C. at 998.

[690] *See* U.S. Small Bus. Admin., Table of Small Bus. Size Standards, *https://www.sba.gov/document/support-table-size-standards*.

[691] The Commission uses the latest data available from the Census Bureau's Statistics of U.S. Businesses database, available based on firm revenue and firm size. U.S. Census Bureau, Stat. of U.S. Bus. (last revised July 9, 2024), *https://www.census.gov/programs-surveys/susb.html*. The calculation of 9,034 live-event ticketing firms is likely an overestimate of the number of small businesses due to data incompatibility and the use of the high-end assumption regarding how live-event ticketing firms are categorized using NAICS codes. The U.S. SBA sets different revenue thresholds for different NAICS codes. However, the Statistics of U.S. Businesses does not necessarily report the number of firms with earnings under those particular thresholds. Therefore, the Commission calculates there may be as many as 3,094 firms in NAICS code 711310 with receipts under the SBA threshold of $40 million, 4,358 firms in NAICS code 711320 with receipts under $25 million (an overestimate given the SBA threshold of $22 million for NAICS code 711320), and 1,582 firms in NAICS code 561599 with receipts under $35 million (an overestimate given the SBA threshold of $32.5 million for NAICS code 561599).

Commission notes that there may be some live-event ticket sellers that are currently in compliance and will therefore have a trivial cost of compliance with the final rule.

For the short-term lodging industry, the Commission separately estimates there are as many as 675,603 home share hosts in the U.S. The Commission assumes that these home share hosts are all considered small entities. Using the NAICS-code specific thresholds set by the SBA, the Commission calculates that there are potentially as many as 2,798 small firms within NAICS code 7211 ("Accommodation").[692]

E. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

The final rule contains no reporting or recordkeeping requirements; however, the final rule imposes disclosure obligations. Only small entities that offer, display, or advertise Covered Goods or Services must comply with the rule and, therefore, will incur compliance costs. To comply with the final rule, small entities that offer, display, or advertise any price of a Covered Good or Service are required to disclose the Total Price Clearly and Conspicuously and, generally, more prominently than any other Pricing Information. Small entities must also disclose other imposed fees and charges before a consumer consents to pay and must not misrepresent any fee or charge. For firms that already comply with the final rule, the one-time indirect cost per firm is assumed to be, at most, one hour of lawyer time for regulatory familiarization. This cost is excluded from

[692] *Id*. The calculation of 2,798 small hotels firms is likely an overestimate of the number of small businesses due to data incompatibility. The U.S. SBA sets a revenue threshold of $9 million for NAICS code 721191 and NAICS code 721199. However, the Statistics of U.S. Businesses does not report number of firms for those particular thresholds. Therefore, the Commission calculates there are as many as 42,186 firms in NAICS code 721110 with receipts under the SBA threshold of $40 million, 101 firms in NAICS code 721120 with receipts under the SBA threshold of $40 million, 2,960 firms in NAICS code 7211191 with receipts under $10 million (an overestimate given the SBA threshold), and 1,384 firms with receipts under $10 million (an overestimate given the SBA threshold).

the Regulatory Flexibility Analysis since such familiarization is not a compliance requirement.

For small businesses subject to the rule that are not currently in compliance with the rule's requirements, the Commission has determined that firms will need to adjust advertised prices, marketing campaigns, and the purchase process to comply with the rule. These firms may also incur recurring annual costs of additional lawyer time to assess and confirm annual compliance. As discussed in more detail in section V, the Commission estimates that direct compliance costs in the live-event ticketing industry, over a ten-year period, would result in annualized costs of $648–$2,144 per firm assuming a 7% discount rate or $534–$1,916 per firm assuming a 3% discount rate. U.S. home share hosts would incur one-time costs re-optimizing prices of $30.42–$91.27. The Commission also estimates direct compliance costs for U.S. hotels, over a ten-year period, would result in annualized costs of $527–$2,011 per firm assuming a 7% discount rate or $434–$1,825 per firm assuming a 3% discount rate. These estimates, however, are for firms of all sizes; the Commission has not separately estimated the costs for small businesses specifically.

F. Discussion of Significant Alternatives the Commission Considered That Would Accomplish the Stated Objectives of the Final Rule and That Would Minimize Any Significant Economic Impact of the Final Rule on Small Entities

The Regulatory Flexibility Act requires that agencies include a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and the other significant alternatives to the rule considered by the agency which affect the

impact on small entities was rejected.[693] Statutory examples of "significant alternatives" include different requirements or timetables that take into account the resources available to small entities; the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; the use of performance rather than design standards; and an exemption from coverage of the rule, or any part thereof, for small entities.[694]

In the NPRM, the Commission sought comment on various potential alternatives to the proposed rule, including alternatives that were tailored to the needs of small businesses and that addressed the impact (including costs) that would be incurred by businesses to comply with the proposed rule.[695] Specifically, the Commission sought comment on the estimated number and the nature of small business entities for which the proposed rule would have a significant economic impact, whether the proposed rule would have a significant economic impact on a substantial number of small entities, and if so, how it could be modified to avoid such an impact, as well as whether the proposed definition for "Business" should exclude certain businesses, including small businesses meeting the SBA's definition of a "small business concern" and the SBA's Table of Size Standards, or simply certain limited-service and full-service restaurants meeting such requirements.[696] The Commission also inquired as to whether the "Total Price" definition should exclude mandatory charges by restaurants for service performed for the customer in lieu of tips, as defined by the Department of Labor.[697] The Commission also

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[693] 5 U.S.C. 604(a)(6).
[694] *See* 5 U.S.C. 603(c).
[695] NPRM, 88 FR 77479–83.
[696] *Id*.
[697] *Id*., 88 FR 77481.

considered alternatives that would otherwise narrow the scope of the proposed rule, including limiting application of the rule to "Covered Businesses" as defined in the NPRM, ultimately adopting a variation of this approach in the final rule.

The Commission requested this information to minimize the final rule's burden on all Businesses, including small entities. As explained through this SBP, the Commission has considered the comments and alternatives proposed by the commenters, including the SBA Office of Advocacy, and finds that the final rule will not create a significant impact on small entities. Indeed, the type of deception that will be unlawful under the final rule is already unlawful under the FTC Act, but the final rule would allow the Commission to obtain monetary relief more efficiently than it could solely under section 19(a)(2) of the FTC Act (i.e., without a rule violation), thereby deterring current and would be violators of the FTC Act.

In its Preliminary Regulatory Analysis, the Commission described an alternative to the proposed rule, namely, to terminate the rulemaking and rely instead on the Commission's previously existing tools, such as consumer education and enforcement actions brought under sections 5 and 19 of the FTC Act, to combat the specified unfair or deceptive pricing practices. The Commission believes that promulgation of the rule will result in greater net benefits to the marketplace while imposing no additional burdens beyond what is required by the FTC Act. As the Commission describes further in section V, the rule will not only result in significant benefits to consumers but also improve the competitive environment, particularly for small, independent, or new firms. Therefore, the rule appears to be superior to this alternative for small entities.

As discussed herein, the Commission narrows the rule by adding a definition for "Covered Good or Service" that is limited to (1) Live-event tickets or (2) Short-term lodging. The Commission also modifies the definition of Government Charges to replace the language that included only those Government Charges levied "on consumers," with language clarifying that any Government Charge "imposed on the transaction" may be excluded from Total Price. Finally, the Commission addresses in section III how the rule would apply to credit card processing fees and contingent fees charged by small businesses.

The Commission notes that it has designed the final rule to minimize compliance costs for all Businesses. As stated in section V, the Commission estimates that direct compliance costs in the live-event ticketing industry, over a ten-year period, would result in annualized costs of $648–$2,144 per firm assuming a 7% discount rate or $534–$1,916 per firm assuming a 3% discount rate. U.S. home share hosts would incur one-time costs re-optimizing prices of $30.42–$91.27. The Commission also estimates direct compliance costs for U.S. hotels, over a ten-year period, would result in annualized costs of $527–$2,011 per firm assuming a 7% discount rate or $434–$1,825 per firm assuming a 3% discount rate. Based on the available evidence, the Commission does not believe that the analysis in section V is fundamentally different for small entities. For this reason, the Commission is not creating an exception for small entities or creating different regulatory requirements for small entities.

The Commission also is not delaying the effective date of the final rule solely for small entities. The final rule's effective date is 120 days after publication in the *Federal Register* on [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE

FEDERAL REGISTER]. In the Commission's view, the rule's effective date of [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*] will afford small entities sufficient time to comply with the final rule, and commenters have not provided evidence that more time is necessary. The Commission declines to set different effective dates for small businesses and larger businesses because the final rule's core objectives include promoting comparison shopping for consumers and leveling the playing field for honest competitors. For all of the reasons stated, these objectives would be thwarted in a marketplace where certain Businesses must comply with the rule's requirements for a period of time while others have more time to continue engaging in unfair or deceptive pricing practices.

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as a "major rule," as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 464

Advertising, Consumer protection, Trade practices.

For the reasons set forth above, the Federal Trade Commission adds part 464 to chapter I of title 16 of the Code of Federal Regulations to read as follows:

PART 464—RULE ON UNFAIR OR DECEPTIVE FEES

Sec.
464.1 Definitions.
464.2 Hidden fees prohibited.
464.3 Misleading fees prohibited.
464.4 Relation to State laws.
464.5 Severability.

Authority: 15 U.S.C. 41 through 58.

§ 464.1 Definitions.

Ancillary Good or Service means any additional good(s) or service(s) offered to a consumer as part of the same transaction.

Business means an individual, corporation, partnership, association, or any other entity that offers goods or services, including, but not limited to, online, in mobile applications, and in physical locations.

Clear(ly) and Conspicuous(ly) means a required disclosure that is easily noticeable (*i.e.,* difficult to miss) and easily understandable by ordinary consumers, including in all of the following ways:

(1) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

(2) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(3) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

(4) In any communication using an interactive electronic medium, such as the Internet, a mobile application, or software, the disclosure must be unavoidable.

(5) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

(6) The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

(7) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(8) When the representation or sales practice targets a specific audience, such as children, older adults, or the terminally ill, "ordinary consumers" includes members of that group.

Covered Good or Service means:

(1) Live-event tickets; or

(2) Short-term lodging, including temporary sleeping accommodations at a hotel, motel, inn, short-term rental, vacation rental, or other place of lodging.

Government Charges means the fees or charges imposed on the transaction by a Federal, State, Tribal, or local government agency, unit, or department.

Pricing Information means any information relating to an amount a consumer may pay.

Shipping Charges means the fees or charges that reasonably reflect the amount a Business incurs to send physical goods to a consumer, including through the mail, private mail and shipping services, or by freight.

Total Price means the maximum total of all fees or charges a consumer must pay for any good(s) or service(s) and any mandatory Ancillary Good or Service, except that

Government Charges, Shipping Charges, and fees or charges for any optional Ancillary Good or Service may be excluded.

§ 464.2 Hidden fees prohibited.

(a) It is an unfair and deceptive practice and a violation of this part for any Business to offer, display, or advertise any price of a Covered Good or Service without Clearly and Conspicuously disclosing the Total Price.

(b) In any offer, display, or advertisement that represents any price of a Covered Good or Service, a Business must disclose the Total Price more prominently than any other Pricing Information. However, where the final amount of payment for the transaction is displayed, the final amount of payment must be disclosed more prominently than, or as prominently as, the Total Price.

(c) A Business must disclose Clearly and Conspicuously, before the consumer consents to pay for any Covered Good or Service:

(1) The nature, purpose, and amount of any fee or charge imposed on the transaction that has been excluded from Total Price and the identity of the good or service for which the fee or charge is imposed; and

(2) The final amount of payment for the transaction.

§ 464.3 Misleading fees prohibited.

In any offer, display, or advertisement for a Covered Good or Service it is an unfair and deceptive practice and a violation of this part for any Business to misrepresent any fee or charge, including: the nature, purpose, amount, or refundability of any fee or charge; and the identity of the good or service for which the fee or charge is imposed.

§ 464.4 Relation to State laws.

(a) *In general.* This part will not be construed as superseding, altering, or affecting any State statute, regulation, order, or interpretation relating to unfair or deceptive fees or charges, except to the extent that such statute, regulation, order, or interpretation is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.

(b) *Greater protection under State law.* For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part.

§ 464.5 Severability.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person, industry, or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law and such invalidity shall not affect the application of the provision to other persons, industries, or circumstances or the validity or application of other provisions. If any provision or application of this part is held to be invalid or unenforceable, the provision or application shall be severable from this part and shall not affect the remainder thereof.

By direction of the Commission, Commissioner Ferguson dissenting.

Joel Christie,

Acting Secretary.