FEDERAL TRADE COMMISSION

Trade Regulation Rule on Unfair or Deceptive Fees	Docket No. 2023-24234

COMMENT OF
THE ANTITRUST DIVISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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The Antitrust Division of the United States Department of Justice ("Antitrust Division") respectfully submits this comment in response to the Federal Trade Commission's ("FTC") request for public comment on its notice of proposed rulemaking to promulgate a trade regulation rule entitled "Rule on Unfair or Deceptive Fees," as described in its Federal Register Notice published on November 9, 2023.[1]

The Antitrust Division supports the FTC's exercise of its rulemaking authority to address unfair and deceptive mandatory fees and ensure price transparency to better enable consumers to compare products and services. The FTC's rule, if finalized, would enable consumers to more easily compare actual prices of products and services, which is likely to result in more competitive pricing, an increase in consumers' knowledge of the nature and purpose of any disclosed fees, and a reduction in consumers' costs of searching for the actual price and reasons for any fees. The Antitrust Division offers this comment to describe the Antitrust Division's own experience with free and fair competition, which adds support to the reasons for the rulemaking set forth by the FTC in the notice of proposed rulemaking.

I. INTEREST OF THE ANTITRUST DIVISION

The Antitrust Division, along with the FTC, is entrusted by the American people with promoting competition through the enforcement of the federal antitrust laws. These laws reflect a legislative judgment that "[t]he heart of our national economic policy long has been faith in the value of competition."[2] Protecting competition is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[3]

The Antitrust Division has experience and expertise in taking enforcement actions to prevent anticompetitive conduct—including the imposition of mandatory, opaque fees that drive up prices.[4] When consumers lack choice and information, and are saddled with mandatory hidden fees, the benefits of the competitive process break down. First, companies that impose mandatory hidden fees have an unfair advantage over honest brokers. Second, consumers cannot adequately choose between competitors based on the important considerations of price and what, exactly, the consumer is purchasing. In the worse case, consumers may be deceived by such practices. Curtailing mandatory hidden fees by firms with market power is essential to ensuring free and fair competition in the United States.

[1] Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77,420 (Nov. 9, 2023).

[2] *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)).

[3] *N. Carolina State Bd. Of Dental Examiners v. FTC*, 574 U.S. 494, 502 (2015) (quoting *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)).

[4] *See* Compl., United States v. Visa Inc. and Plaid Inc. ¶¶ 28-31, 61, 71, 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020) (proposed merger could increase debit fees for merchants and consumers).

II. THE BENEFITS OF TRANSPARENCY TO COMPETITIVE MARKETS

Transparency can help promote competition in open, vibrant markets. Price transparency can benefit both the competitive process and consumers because it can help overcome information asymmetries between buyers and sellers, allowing consumers to more easily and accurately compare prices, while reducing their search costs. In practice, price transparency around mandatory fees provides consumers with simple and low-cost ways to compare products and services, and to compare prices and features of bundled and unbundled products.

The Division is aware of a substantial body of economic research regarding the potential benefits of pricing transparency, including how pricing transparency lowers costs for consumers.[5] The Division also has studied the substantial economic literature suggesting that when firms cloak pricing through the practice of "drip pricing"—advertising one price up front and then revealing additional mandatory charges later in the buying process—consumers may be induced to pay higher prices.[6] The Division's review of this research suggests that facilitating transparent comparison shopping can reduce consumers' information asymmetry and help them use that information to obtain the lowest price or most desired bundle of services.

[5] *See*, *e.g.*, Zach Y. Brown, *Equilibrium Effects of Health Care Price Information*, 101 REV. ECON. & STATS. 699 (2019) (MRI prices after introduction of a cost-comparison tool found that those using the tool could see reductions in out-of-pocket prices by as much as 11%, but only a small minority of patients used the tool); Florian Zettelmeyer; Fiona Scott Morton, and Jorge Silva-Russo, *How the Internet Lower Prices: Evidence from Matched Survey and Auto Transaction Data*, 46 J. MARKETING RESEARCH 168 (2006) (combined information and referral effects lowered new car prices by 1.5 percent, corresponding to 22 percent of dealers' average gross profit margin per vehicle); Michael R. Baye, John Morgan, and Patrick Scholten, *The Value of Information in an Online Consumer Electronics Market*, 22 J. PUB. POL. & MARKETING 18 (2003) (online comparison-shopping site saved consumers an average of 16 percent compared to those purchasing from a representative online store); Jeffrey R. Brown and Austan Goolsbee, *Does the Internet Make Markets More Competitive? Evidence from the Life Insurance Industr*y, 110 J. POL. ECON. 481–507 (2002) (ability to search across many insurance companies online and list results on one page led prices to fall by 8 to 15 percent); Erik Brynjolfsson and Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 MGMT. SCI., 563–585 (2000) (books and CD prices were 9 to 16 percent lower on the Internet than in brick-and-mortar bookstores, depending on whether taxes, shipping, and shopping costs are included in the price); Fiona Scott Morton, R. Craig Romaine, and Spencer Graf, *Benefits of Preserving Consumers' Ability to Compare Airline Fares* (Charles River Associates, Project No. D20563-00) (May 19, 2015) (study considering the benefits of preserving competition and consumers' ability to compare airline fares in the market for air travel); Florian Zettelmeyer, Fiona Scott Morton, and Jorge Silva-Russo, *Cowboys or Cowards: Why are Internet Car Prices Lower?* (Nat'l Bureau of Econ. Research Working Paper No. 8667) (2001) (use of an Internet price referral service that had access to many dealers reduced transaction prices for automobiles by 2.2 percent).

[6] *See e.g.*, Santana Shelle, Steven Dallas, and Vicki Morwitz, *Consumer Reactions to Drip Pricing*, 39 MARKETING SCI., 188 (2020) (consumers exposed to drip pricing tend to ultimately select the lower base price but higher total price option, even after being exposed to the total price and given the opportunity to change their selection, and even though they are relatively dissatisfied with the price); Tom Blake, Sarah Moshary, Kane Sweeney, and Steve Tadelis, *Price Salience and Product Choice*, 40 MARKETING SCI. 619-636 (2021).

Without pricing transparency around mandatory fees, by contrast, firms may be able to price above the competitive level, harming consumers as a result. By hiding mandatory fees from the advertised cost, a firm can thwart the competitive process irrespective of whether the firm has obtained market power. For markets that are oligopolistic or dominated by a single firm, the ability to impose mandatory fees through deceptive and unfair advertising that withholds the total price is especially concerning. Effective regulations are an efficient and transparent tool for addressing this market failure.[7]

III. THE FTC'S PROPOSED TRADE PRACTICE REGULATION PROMOTES COMPETITION

The FTC's proposed trade practice regulation would require businesses to disclose all mandatory fees in the total cost of a good or service.[8] As proposed, the rule could help to address the potential competition and consumer harm-focused issues that arise out of opaque pricing because the proposed regulation's clear and full disclosure requirement would enable consumers to better compare total mandatory prices between competing firms earlier in their shopping process. At the same time, it provides competitively neutral, easily-administrable requirements on sellers.

Required disclosure of all mandatory fees would enable consumers to compare products and services across multiple dimensions of competition including total price, quality, and type of good or service being offered. By reducing asymmetric pricing information, the required disclosure would force rival firms to offer more competitive pricing.[9]

Consumers would also benefit from reduced search costs. Absent regulation, firms may shroud mandatory fees and only disclose mandatory fees when the consumer is on the precipice of purchasing a good or service. Consumers seeking to compare competing products or services that are subject to latent mandatory fees likely need to dedicate significant time searching for and comparing products.[10] Reducing the cost of search by making information transparent, easily available, and comparable, will promote competition between competing suppliers.[11]

[7] *See* Philippe Gugler, *Transparency and Competition Policy in an Imperfectly Competitive World*, in JENS FORSSBÆCK, AND LARS OXELHEIM (EDS), THE OXFORD HANDBOOK OF ECONOMIC AND INSTITUTIONAL TRANSPARENCY 144 (2014), https://doi.org/10.1093/oxfordhb/9780199917693.013.0006.

[8] Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77,420.

[9] *See supra* note 5; OECD, POLICY ROUNDTABLES: PRICE TRANSPARENCY 22-23 (2001), https://www.oecd.org/competition/abuse/2535975.pdf.

[10] OECD, *supra* note 9 at 23.

[11] Scott Morton, *supra* note 5.

The Antitrust Division also notes that the FTC's proposed rule does not affect companies' ability to offer consumers a choice whether to buy unbundled features that do not impose mandatory fees. Competition between companies that offer bundled and unbundled pricing for core products and value-added features can play an important role in preserving consumer choice in many industries. This is because unbundled pricing can empower consumers who prefer to pay only for what they value. In contrast to hidden, mandatory fees, these options can promote competition for both the ancillary products and services and for the underlying products and services they relate to by increasing the transparency of prices offered for distinct aspects of a bundle. The Antitrust Division recognizes the value to competition that may be gained through unbundled products or services. When companies use unbundled offerings to disguise mandatory fees, they undermine the value to competition of that unbundled option.

IV. CONCLUSION

The Antitrust Division applauds the FTC's efforts to address unfair and deceptive mandatory fees and promote pricing transparency. Among other benefits, the FTC's rulemaking will promote competition. The Antitrust Division, based on its experience and expertise, agrees with the FTC that requiring firms to disclose mandatory fees to consumers will promote competition between firms by arming consumers with the ability to compare competing offers and reducing consumer search costs.

Respectfully Submitted,

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