

February 7, 2024

**Submitted via Regulations.gov**

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Ave. NW  
Washington, DC 20580

**Re: Trade Regulation Rule on Unfair or Deceptive Fees R207011, No. FTC-2023-0064**

*Comments of the UC Berkeley Center for Consumer Law & Economic Justice, the Consumer Law Advocates, Scholars & Students (CLASS) Network, and 7 Student-Led Consumer Advocacy Organizations*

## CONTENTS

I.	To Best Protect Low-Income And Vulnerable Consumers, The Commission Should Broadly Ban Junk Fees Across All Industries.....	2
II.	The Commission Should Not Limit Covered Entities To Particular Enumerated Industries. ....	4
A.	Rental Housing Must Be Included.....	4
B.	Payday Loans and Cash Advance Programs Must Be Included.....	6
C.	Gift Card Companies Must Be Included.....	7
D.	Tax Preparation Services Must Be Included.....	8
III.	The Commission Should Require Businesses To Clearly State The Purpose Of Any Additional Fees. ....	9
A.	The Array of Abstract “Environmental Fees” Epitomizes The Need for Clear Characterization of Hidden Fees.....	10
B.	A Clear Characterization of All Charges Promotes Competitive Markets.....	12
IV.	The Proposed Rule Satisfies The First Amendment’s Requirements for Regulation of Commercial Advertising. ....	13
V.	The Commission Should Strengthen Its Requirements To Disclose Mandatory Fees.....	15
VI.	A Broad-Based Rule Will Complement State Efforts to Fight Junk Fees.....	17
VII.	Conclusion. ....	19
	Appendix.....	21

Dear Chair Khan and Commissioners:

The Center for Consumer Law and Economic Justice at the University of California, Berkeley, School of Law; the national Consumer Law Advocates, Scholars & Students (CLASS) Network, and the CLASS-affiliated student-led chapters at the law schools of George Washington University; Stetson University; the University of California, Berkeley; University of California, Irvine; University of Maryland, Baltimore; University of Michigan, and University of Montana submit this comment in response to the Commission’s request for comments on its proposed Trade Regulation Rule on Unfair or Deceptive Fees, amending 16 C.F.R. pt. 464.<sup>1</sup>

The Center, the CLASS Network, and our affiliated chapters strongly support the proposed Rule. This comment explains the basis for that support and provides here and in the Appendix examples that we have identified of deceptive junk fees in multiple industries. Specifically, we offer the following recommendations for the Commission to ensure strong and robust federal protections against misleading fees:

- Adopt the proposed Rule’s broad and unlimited definition of a covered “business,” rather than limit the definition to specific industries, which would likely leave out many industries that impose hidden fees that are harmful particularly to low-income and vulnerable consumers.
- Adopt the proposed Rule’s requirement that businesses clearly disclose the “identity” and “nature and purpose” of junk fees they impose, particularly in light of the rise of ambiguous characterizations of such charges like “environmental fees.”
- Strengthen its ban on misrepresenting whether a fee is mandatory or optional.

We also explain why, in our view, the proposed Rule advances the Commission’s mandate to prevent unfair or deceptive acts or practices and unfair methods of competition, accords with the First Amendment, and will complement state efforts to combat junk fees.

We thank the Commission for its work in producing a broad and urgently needed Rule.

## **I. To Best Protect Low-Income And Vulnerable Consumers, The Commission Should Broadly Ban Junk Fees Across All Industries.**

We strongly recommend that the Commission maintain the non-industry-specific nature of its Rule and adopt its proposed unrestricted definition of a covered “business” as *any* “individual, corporation, partnership, association, or any other entity that offers goods and services.”<sup>2</sup> In other words, absent an explicit exemption, the Rule should cover all industries and all sellers.<sup>3</sup>

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<sup>1</sup> 88 Fed. Reg. 77,420 (FTC Nov. 9, 2023).

<sup>2</sup> 16 C.F.R. § 464.1(b) (proposed); *see* General Questions for Comment Nos. 11-15, 88 Fed. Reg. at 77481.

<sup>3</sup> 16 C.F.R. § 464.1(b) (proposed).

Junk fees impact the lives of consumers from birth to death. As the Commission has recognized,<sup>4</sup> junk fees are ubiquitous in all sectors of the economy, particularly for essential goods and services. Popular media attention has largely highlighted fees in the live entertainment, hotel, and restaurant sectors—sectors that the Commission extensively studied with respect to the economic effects of the proposed rule.<sup>5</sup> Yet as our research demonstrates, some of the most pernicious hidden fees are found in less prominent segments of the economy that affect the most vulnerable populations in our society. These fees now quietly inflate the costs of essential consumer products and services. Because they are essential to everyday life, they are often unavoidable. And once consumers are finally informed of the full cost of the products, including the hidden fees that businesses sneak in after people have agreed to make their purchases, they are so far along into the purchasing process that (as these businesses are fully aware) they are unlikely to terminate the transaction. The burden is heaviest on low-income families, who may have to extend already stretched budgets to cover the full cost of products that are higher than anticipated, and who may even need to choose between which essential products—paying for groceries versus paying the rent—they can afford.

Consumers—including the authors of this comment—are confronted with hidden fees at both online and at brick-and-mortar establishments. These fees are most likely to be imposed on people who are already especially vulnerable to fraud and deception, or who are at some of the most vulnerable points in their lives. For example, parents cannot escape having to pay additional fees to a third-party private business, MySchoolBucks, so that their school-age children can pay for lunch at their public schools. App. § 5.<sup>6</sup> Elderly residents and their families must budget an extra sum to cover the hidden fees at assisted living facilities.<sup>7</sup> Private money transfer businesses charge families of people who are incarcerated up to 37 percent of the money to wire their loved ones money for basic commissary expenses.<sup>8</sup> Even cemeteries charge surprise fees.<sup>9</sup>

The list of other industries that we describe below and/or in the Appendix includes:

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<sup>4</sup> See 88 Fed. Reg. at 77,431 (noting that drip pricing schemes are “prolific and occur across industries affecting a large majority of the population”).

<sup>5</sup> 88 Fed. Reg. at 77,453-77.

<sup>6</sup> See *Story v. Heartland Payment Sys., LLC*, No. 19-cv-724-TJC (M.D. Fla.).

<sup>7</sup> See, e.g., Jordan Rau, *Extra Fees Drive Assisted Living Profits*, Daily Montanan (Nov. 23, 2023), <https://dailymontanan.com/2023/11/23/extra-fees-drive-assisted-living-profits/> (finding that “These highly profitable facilities often charge \$5,000 a month or more and then layer on fees at every step. Residents’ bills and price lists from a dozen facilities offer a glimpse of the charges: \$12 for a blood pressure check; \$50 per injection (more for insulin); \$93 a month to order medications from a pharmacy not used by the facility; \$315 a month for daily help with an inhaler.”).

<sup>8</sup> See Stephen Raher & Tiana Herring, *Show me the money: Tracking the Companies that have a lock on sending funds to incarcerated people*, Prison Policy Initiative (Nov. 9, 2021), <https://www.prisonpolicy.org/blog/2021/11/09/moneytransfers/> (finding electronic money transfer rates to wire money to prisoners ranged from 5 percent to 37 percent of the amount transferred, averaging 19 percent for a \$20 transfer and 12 percent for a \$50 transfer; by comparison, Venmo charges no fees for immediate money transfers, and PayPal charges 30 cents plus 2.9 percent from a debit or credit card).

<sup>9</sup> See, e.g., Alecia Milano, *6 Cemetery Fees and Charges No One Talks About*, Milano Monuments (Nov. 14, 2023), <https://www.milanomonuments.com/blog/6-hidden-cemetery-costs-you-need-to-know-about>.

- Rental housing, *infra* § II.A. and App. § 4;
- Payday lending and cash advance companies, *infra* § II.B;
- Gift cards, *infra* § II.C;
- Tax preparation services, *infra* § II.D.
- Vehicle rentals and auto mechanics, *infra* § III.A and App. § 7;
- Restaurants, *infra* § V and App. §§ 6-8;
- Groceries and meal delivery, App. §§ 1-2;

The wide variety of industries in which businesses obscure the full cost of their products militates for a broad, comprehensive Rule to address hidden and deceptive fees. Such a broad-based default Rule is crucial to ensure that all communities, especially low-income communities, are protected and best effectuates the purpose underpinning Section 5 of the FTC Act: to “stop any deception at its incipency.”<sup>10</sup>

A broad Rule is also forward-looking and would allow the Commission to challenge future predatory fee schemes by new industries. In a rapidly evolving economy, new products emerge every day—and so do new forms of fraud and deception. *See, e.g.*, App. § 3 (identifying variable fees charged at the end of a transaction by Coinbase, a cryptocurrency exchange). Limiting the Rule to industries, and fraud, that are well-established today would implicitly invite junk fees in new industries and would hamstring the Commission from identifying and stopping the innovative junk fee schemes of tomorrow.

## **II. The Commission Should Not Limit Covered Entities To Particular Enumerated Industries.**

To best protect the interest of low-income consumers, we urge the Commission to jettison its alternative suggestions to narrow the definition of covered “Business” to specific sectors of the economy, and to reject any similar counter-proposals from commenters.<sup>11</sup> The Commission asks whether it should limit the definition to short-term lodging or live-ticketing industries or to carve out segments like small businesses, financial products, online goods and services, and restaurants. It should not. To take one example: Many small businesses that cater to vulnerable communities charge hidden and deceptive fees. Restricting the Rule to particular industries would exclude some of the most critical sectors that low-income people especially rely on, thereby leaving them vulnerable to further fraud and abuse. Some instances of those critical sectors include—but are hardly limited to—the rental housing market, tax preparation services, payday lenders, and gift card merchants, as discussed below.

### **A. Rental Housing Must Be Included.**

The proposed Rule’s definition of covered entities would apply to rental housing companies, an industry that routinely engages in drip pricing-type deception to charge tenants

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<sup>10</sup> *Regina Corp v. F.T.C.*, 322 F.2d 765, 768 (3d Cir. 1963) (emphasis added); *see also F.T.C. v. Cinderella Career & Finishing Schs., Inc.*, 404 F.3d 1308, 1311 (D.C. Cir. 1968) (noting the “broad purpose of the [FTC] Act”).

<sup>11</sup> *See* General Questions for Comment Nos. 12-15, 88 Fed. Reg. at 77,481.

more than their expected rent. Exempting landlords from the Rule as other commenters have proposed<sup>12</sup> 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.

For low- and moderate-income renters and their families, housing that suits their needs may already reach the limits of their monthly budget. According to a study based on U.S. Census Bureau data for 30.9 million renter households, *one hundred percent* of those households with annual incomes less than \$30,000, and 81 percent of households with incomes between \$30,000 and \$44,999, already cannot afford the costs of other essential goods after they pay for their housing.<sup>13</sup> Additional mandatory fees, such as charges for amenities that tenants do not need, may push their family over the edge. The National Consumer Law Center (NCLC) found that landlords had levied junk fees on clients served by every one of the ninety-five housing advocates it surveyed.<sup>14</sup> The most common type of fee, an application fee, poses an especially serious harm for low-income renters. Typically described as an additional charge by the landlord to conduct a credit or criminal record search, the costs associated with this practice have become instead a distinct profit center for landlords.<sup>15</sup> In the most egregious cases, landlords collect applications grossly beyond the number required to re-lease the unit, pocket the accompanying fees, and in many cases do not even run the report that the fees claim to justify.<sup>16</sup> One housing advocate in Montana reported that a landlord that was able to collect over 100 application fees, totaling \$5,000 collected in fees, to relet a single unit.<sup>17</sup> Once low-income renters move into their unit, they are likely to face additional unanticipated and deceptive fees. One common type of junk fee covers those associated with the “amenities” that a renter never requested but is now saddled with paying for. Examples range from a \$4.50 mail sorting fee,<sup>18</sup> to mandatory “technology package fees” that can cost up to \$100.<sup>19</sup> Advocates in Montana and Colorado have described these fees as “random” and “unconnected to the actual cost of doing anything,” highlighting the lack of any economic value provided to renters.<sup>20</sup>

Not only do junk fees in rental housing raise the cost of already unaffordable rents, but the consequences to tenants who cannot pay them can be dire. In 2022, a court in California found that a large landlord conglomerate unlawfully charged mandatory additional fees to Section 8 tenants to use in-unit laundry machines and media packages and to purchase renters’

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<sup>12</sup> See, e.g., Comment of N.J. Apartment Ass’n, FTC-2023-0064-3172 (Feb. 7, 2024); Comment of Houston Apartment Ass’n, FTC-2023-0064-3111 (Feb. 6, 2024).

<sup>13</sup> Whitney Airgood-Obrycki et al., “*The Rent Eats First*”: *Rental Housing Unaffordability in the United States*, 33 Housing Policy Debate 1273, 1279-80 (2023), <https://www.tandfonline.com/doi/full/10.1080/10511482.2021.2020866>.

<sup>14</sup> Nat’l Consumer Law Ctr. et al. (NCLC), *Too Damn High: How Junk Fees Add to Skyrocketing Rents* 8 (Mar. 2023).

<sup>15</sup> Eric Dunn, *The Case Against Rental Application Fees*, Geo. J. Poverty L. & Pol’y, 21, 29 (2022).

<sup>16</sup> *Id.* at 29.

<sup>17</sup> *Id.* at 31-32.

<sup>18</sup> NCLC, *supra* note 14, at 19.

<sup>19</sup> *Id.* at 26.

<sup>20</sup> *Id.* at 16.

insurance.<sup>21</sup> The landlord treated the fees as rent that, if unpaid, would be grounds for eviction.<sup>22</sup> As the court recently explained, the certified class of Section 8 tenants “never bargained for the benefits of nor decided to purchase the services; instead, they had no choice but to pay the disputed amounts if they wanted to continue renting the apartments.”<sup>23</sup> Section 8 tenants have also successfully challenged landlords that treated month-to-month fees and excessive maintenance fees as mandatory rental charges.<sup>24</sup> And just last month, a proposed class of tenants in Colorado sued the apartment company Greystar for charging mandatory pest control, valet trash, and billing fees that were not included in the advertised rent but were included in the actual rent. Greystar threatened tenants with eviction if they did not pay the additional fees.<sup>25</sup>

The broadly written proposed Rule would require landlords like these and others who charge additional fees for mandatory services to clearly state that the fees are included in the overall rent, which means “the tenant’s total expense for the use of land during the term of occupancy.”<sup>26</sup> An alternative definition that would exclude rental housing companies (which may, for example, be small businesses and/or brick-and-mortar stores) could allow landlords to continue levying hidden fees on renters and then to extract additional profits from renters under the threat of eviction if the renters are unable to keep up with the mounting fees.

### **B. Payday Loans and Cash Advance Programs Must Be Included.**

To protect low-income consumers, we urge the Commission to use the final Rule to assert the full extent of its jurisdiction over nontraditional financial products such as check cashing, cash advance, and payday loan services to ensure that all of their costs are made clear to consumers upfront. Accordingly, the invitation to exempt from coverage any “businesses to the extent that they offer or advertise credit, lease, or savings, or . . . extend . . . [those] products to consumers” should be declined.<sup>27</sup>

One of the biggest contributors to the fee burden on low-income consumers is short-term loan and cash advance products, which inflict enormous financial harm on their disproportionately vulnerable user base. While these such products also fall within the authority of the Consumer Financial Protection Bureau (CFPB), the Commission has regularly brought enforcement actions of its own against deceptive and unfair providers.<sup>28</sup> Ensuring that the final

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<sup>21</sup> *United States ex rel. Terry v. Wasatch Advantage Grp., LLC*, 2022 WL 1718388, at \*7-9 (E.D. Cal. Nov. 23, 2022).

<sup>22</sup> *Id.*

<sup>23</sup> *Terry*, 2024 WL 382139, at \*3 (E.D. Cal. Feb. 1, 2024).

<sup>24</sup> *Velez v. Cuyahoga Metro. Hous. Auth.*, 795 F.3d 578, 585-86 (6th Cir. 2015) (finding “no rational legal or economic reason to consider the [additional undisclosed] fees as separate from rent”); *Sager v. Hous. Comm’n*, 957 F. Supp. 2d 627, 631-33 (D. Md. 2013) (observing that “public housing tenants are a particularly vulnerable group” that “ha[s] few practical housing alternatives”).

<sup>25</sup> Compl. ¶¶ 9-10, 37, *Collins v. GREP Sw., LLC* (Colo. Dist. Ct., Denver Cty., filed Jan. 5, 2024), <https://towardsjustice.org/wp-content/uploads/2024/01/2024.01.05-Collins-v.-Greystar-FINAL.pdf>.

<sup>26</sup> *Velez*, 795 F.3d at 585.

<sup>27</sup> See General Question for Comment No. 14(d), 88 Fed. Reg. at 77,481.

<sup>28</sup> FTC, *FTC Acts to Stop FloatMe’s Deceptive ‘Free Money’ Promises, Discriminatory Cash Advance Practices, and Baseless Claims around Algorithmic Underwriting* (Jan. 24 2024),

Rule addresses cash advance products within its purview would reaffirm and solidify the Commission's existing authority.

Nontraditional financial products routinely charge per-transaction service fees that look minimal in isolation but rapidly snowball into sizable sums over the course of many repeat transactions. For example, it is widely known that “payday loan interest rates are presented as fees [to] trick borrowers into agreeing to pay APRs that are significantly higher than what most credit cards charge,” even when each individual fee is often only a dollar or two.<sup>29</sup> As a result, payday lending has been formally banned or rendered effectively impossible via interest rate caps in eighteen states.<sup>30</sup> In the remaining states, disproportionately low-income consumers are being strapped with over \$2.2 billion in payday loan “fees” each year.<sup>31</sup> Similarly, if each of the 1.3 million unbanked U.S. households that regularly use check cashing services “cashes two checks a month for \$4 each,” those fees alone would amount to “a collective \$125 million per year.”<sup>32</sup> Applying similar assumptions to the 2 million households that regularly rely on non-bank money orders to pay bills adds an additional \$46 million in annual fees

Multiple analyses have indicated that the costs and usage rates associated with all of these products combined are so high that “unbanked and underbanked Americans spent \$189 billion in fees and interest on financial products in 2018.”<sup>33</sup> Such sums can inflict severe financial harm on the consumers they target: “using the FDIC’s estimate that some 63 million Americans are unbanked or underbanked, that would be an average of \$3,000 in annual costs per person.”<sup>34</sup>

### **C. Gift Card Companies Must Be Included.**

A broad Rule will also ensure that the Commission retains the authority to tackle the myriad fees charged by gift card providers. Although some gift card products also fall under the jurisdiction of the CFPB or the Office of the Comptroller of the Currency, the Commission has successfully “brought enforcement actions against several companies for deceptive marketing of

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<https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-acts-stop-floatmes-deceptive-free-money-promises-discriminatory-cash-advance-practices-baseless> (announcing a \$3 million dollar settlement with FloatMe for violations of “the FTC Act, the Restore Online Shoppers’ Confidence Act, and the Equal Credit Opportunity Act”); *see also* FTC, Payday Lending, <https://www.ftc.gov/news-events/topics/consumer-finance/payday-lending> (listing a dozen other FTC enforcement actions against payday lenders).

<sup>29</sup> Rebecca Stumpf, *Payday Loan Interest Rates: What You Need to Know*, Debthammer.org (Dec. 27, 2023), <https://debthammer.org/payday-loan-interest-rates/>.

<sup>30</sup> Pew Trusts, *How Well Does Your State Protect Payday Loan Borrowers?* (Jul. 26, 2022), <https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2022/how-well-does-your-state-protect-payday-loan-borrowers>.

<sup>31</sup> Ctr. for Responsible Lending, *Debt Trap Drives the Fee Drain: Payday and Car-Title Lenders Drain Nearly \$3 Billion in Fees Every Year* (Jun. 15, 2023), <https://www.responsiblelending.org/research-publication/debt-trap-drives-fee-drain-payday-and-car-title-lenders-drain-nearly-3>.

<sup>32</sup> *See* Elizabeth Renter, *The Costs of Being Unbanked (and How to Minimize Them)*, Nerdwallet (May 16, 2023), <https://www.nerdwallet.com/article/banking/data-unbanked>.

<sup>33</sup> Emily Guy Birken, *The Costs Of Being Unbanked Or Underbanked*, Forbes (Dec. 2, 2022), <https://www.forbes.com/advisor/banking/costs-of-being-unbanked-or-underbanked/>.

<sup>34</sup> *Id.*

gift cards” in the recent past, in part due to those companies’ imposition of junk fees of exactly the kind that this Rule addresses.<sup>35</sup> While gift and prepaid debit cards represent a relatively small share of the financial services market, they are used by millions of consumers in over \$300 billion of transactions each year.<sup>36</sup> Despite the common assumption that such cards are usually used for discretionary spending, roughly 2 million unbanked U.S. households primarily use prepaid cards to pay essential household bills.<sup>37</sup>

Prepaid gift and debit card products frequently come with extensive fee schedules that vary considerably from one product to the next. Some products charge only for cash withdrawals from out-of-network ATMs. Others charge fees for all ATM transactions (including balance inquiries), adding funds, not using the card regularly, and even making purchases beyond a limited monthly quota.<sup>38</sup> However, analysts have found that even assuming “one type of fee levied once per month — a single \$2.50 ATM fee for accessing an out-of-network cash machine... could equate to \$59 million each year” in fees across all card users.<sup>39</sup> Moreover, “a less conservative (but far from excessive) estimate — adding a monthly account fee — would bring that total to more like \$176 million.”<sup>40</sup>

#### **D. Tax Preparation Services Must Be Included.**

A comprehensive Rule would also prohibit drip pricing by tax preparation services, “one of the few consumer services in the United States for which consumers cannot obtain a price for the services before they incur them.”<sup>41</sup> Over half of all low-income people still file their taxes using a paid preparation service; although they may not owe any income tax, they nevertheless must file a tax return to receive tax credits like the Earned Income Tax Credit.<sup>42</sup> The cost of

<sup>35</sup> FTC, *Gift Cards*, <https://www.ftc.gov/news-events/topics/truth-advertising/gift-cards>.

<sup>36</sup> *United States Gift Card Markets Report 2022-2027*, ResearchAndMarkets.com Business Wire (Apr. 06, 2022), <https://www.credenceresearch.com/report/u-s-gift-card-market> (indicating that over \$300 billion were transacted through gift cards in 2022, a figure that has been steadily increasing year-over-year since at least 2018).

<sup>37</sup> See Renter, *supra* note 32 (discussing an FDIC survey showing that a third of the estimated 5.9 million unbanked U.S. households routinely use pre-paid debit cards, and “bill paying is the most common reason for their use (78%)”).

<sup>38</sup> According to Joshua Dorsey, assistant professor of marketing at California State University, Fullerton, “some cards have monthly fees, where if you don’t use it every month, then it might take \$3 or \$5, or even a small percentage away from the balance that remains on that card... Some have per-use fees. When you use it, it might take a dollar per use.” Tony Cabrera, *Giving a gift card this holiday season? Watch out for hidden fees*, ABC 7 News (Dec. 1, 2019), <https://abc7news.com/gift-cards-card-fees-holiday-shopping-ideas/5724651/>. See also Wex, *rapid! PayCard Visa Payroll Card*, <https://www.worksiteemployee.com/wp-content/uploads/2021/03/Rapid-PayCard-Schedule-of-Fees.pdf> (sharing a real world example of a fee schedule).

<sup>39</sup> See Renter, *supra* note 32.

<sup>40</sup> See *id.*

<sup>41</sup> David Rothstein, *Improving Tax Preparation With a Model Fee Disclosure Box*, Policy Matters Ohio (2013), [https://www.policymattersohio.org/wp-content/uploads/2013/06/FeeDisclosure\\_Jun2013.pdf](https://www.policymattersohio.org/wp-content/uploads/2013/06/FeeDisclosure_Jun2013.pdf) (also finding that “consumers cannot comparison shop or predict how much tax preparation will cost them”).

<sup>42</sup> Tax Policy Ctr., *Briefing Book: Why Do Low-Income Families Use Tax Preparers?* (2020), <https://www.taxpolicycenter.org/briefing-book/why-do-low-income-families-use-tax-preparers>.



paying the tax preparer, which comes out of a filer’s refund or credit, therefore diminishes the value of low-income consumers’ benefits.

Commercial preparers have received considerable scrutiny and criticism for charging deceptive and fraudulent fees that take advantage of consumers and prevent meaningful choice and competition.<sup>43</sup> In particular, even as many on-line tax preparation services purport to offer free or inexpensive filing options, most do not disclose their full filing charges until the very last step before a taxpayer submits their return—i.e., after the consumer has spent hours painstakingly entering all of their tax information.<sup>44</sup> Some platforms also offer “optional” cost-added services at this point, such as the ability for a taxpayer to pay the filing service’s fees out of their forthcoming refund, which adds as much as \$40 to the base filing fee.<sup>45</sup> Furthermore, most of the biggest online platforms increase their fees considerably within a single tax season, nominally to “encourage early filing”—but they provide no advance notice of when the fees increase or by how much.<sup>46</sup> In other words, according to one tax law professor, “there’s zero transparency with respect to tax prep fees.”<sup>47</sup>

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When every single dollar counts, unexpected charges that whittle away tax refunds, biweekly earnings, or other income to pay essential household bills can be especially harmful. Consumers, particularly low-income consumers, deserve protection against these kinds of deceptive practices that unfortunately span the gamut of businesses. The proposed Rule, which imposes no condition or qualification on how it defines businesses that must disclose their fees, promises to help provide that protection.

### **III. The Commission Should Require Businesses To Clearly State The Purpose Of Any Additional Fees.**

We recommend that the Commission adopt its proposed requirement that businesses clearly and conspicuously state at the point of sale “the identity of any good or service for which fees are charged” and the “nature and purpose” of those fees.<sup>48</sup> As our research shows, many businesses characterize their hidden and unexpected fees using vague or anodyne language that

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<sup>43</sup> Staff of Sen. Elizabeth Warren, *Tax Maze: How the Tax Prep Industry Blocks Government from Making Tax Day Easier* (2016) [https://www.warren.senate.gov/files/documents/Tax\\_Maze\\_Report.pdf](https://www.warren.senate.gov/files/documents/Tax_Maze_Report.pdf); FTC, *FTC Sues Intuit for Its Deceptive TurboTax “free” Filing Campaign* (Mar. 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/03/ftc-sues-intuit-its-deceptive-turbotax-free-filing-campaign>.

<sup>44</sup> See Rothstein, *supra* note 41.

<sup>45</sup> Susan Tompor, *Tax Refund Processing Fees: You Can Avoid Them. Here's How*, *Detroit Free Press* (Apr. 14, 2018), <https://www.freep.com/story/money/personal-finance/susan-tompor/2018/04/14/turbotax-refund-processing-fee-taxes/508124002/>. See also Julia Glum, *I Was Almost Duped by This \$40 TurboTax Fee. Here's How to Avoid It*, *MONEY.COM* (Apr. 10, 2018), <https://money.com/turbotax-refund-processing-fee/>;

<sup>46</sup> See Julia Glum, *Doing Your Taxes Online? The Price Is About to Go Up*, *MONEY.COM* (Feb. 13, 2020), <https://money.com/tax-prep-fees-increase/>.

<sup>47</sup> See *id.*

<sup>48</sup> 16 C.F.R. § 464.3(a)-(b) (proposed).

fails to succinctly explain to the consumer exactly what the fee is for. In other instances, businesses may describe these fees as socially desirable or, at the very least, a necessary evil. In all these cases, the consumer’s understanding is usually an afterthought—if it is considered at all.

### **A. The Array of Abstract “Environmental Fees” Epitomizes The Need for Clear Characterization of Hidden Fees.**

Requiring a business to disclose the true nature and purpose of a hidden fee before the consumer consents to pay will prevent companies from justifying their hidden costs through misleading statements.<sup>49</sup> For instance, the Appendix contains multiple examples of a confusing or hidden “environmental fee” that serves no apparent environmental sustainability or conservation purpose but does significantly increase the customer’s bill in a manner that they have no way to anticipate or contest. *See, e.g.*, App. §§ 6-7. These 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. In these examples, the environmental fees are added at the very last moment before payment becomes due, long after the consumer had selected the product on the basis of the—deceptively low—price listed by each establishment. For example, restaurants and bars add “environmental fees” to orders on the receipt or menu without clearly stating what these fees are used for, or if they are to offset a particular state or local tax. App. § 6. A less deceptive way of presenting these charges would be to include them in the stated prices of the items offered for sale. If all businesses in an industry are required to take this step, then there will be no competitive disadvantage for an honest business that wants to disclose upfront to consumers the full amount their meal or product or service will cost. *See id.*

Vehicle rental companies, auto shops, and car dealerships also include hidden environment fees in invoices without prior notice or explanation to the consumer. App. § 7. In some cases, an explanation of the fee is available—just not anywhere that the consumer can easily access at the point of sale. U-Haul, for example, charges an environmental fee that is disclosed after a customer initiates the checkout process for a transaction. *Id.* An explanation of this charge is then provided in a separate pop up on the company’s website, including a broad list of ways the company applies funds to be sustainable. *Id.* Penske Truck Rental charges a \$9 environmental fee on an invoice without an upfront disclosure or explanation of the fee’s purpose. *Id.* Only by going to the company’s website can a consumer learn that this fee allegedly covers the costs of operation for the proper disposal and handling of materials that may harm the environment.<sup>50</sup> Absent a clear explanation of the fee, the consumer is left burdened with an additional cost and no meaningful way to know the genuine environmental purpose, if any, to which their fee is being applied.

Environmental fees also can blur the key line between fees charged to offset government taxes and those charged simply to boost a business’s profits. Some industries—such as the auto mechanic and electronics sectors—are in fact subject to a government-imposed hazardous waste disposal fee that is often passed onto the consumer; other less transparent businesses may opt to

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<sup>49</sup> 16 C.F.R. § 464.3(b) (proposed).

<sup>50</sup> *See* Penske, *Commercial Truck Rental FAQ* (accessed Feb. 5, 2024), <https://www.pensketruckrental.com/commercial-truck-rental/resources/faq/>.

inflate mandatory fees far beyond reasonable limits, or include other costs in those fees apart from what they are required to charge.<sup>51</sup> Nor should an environmental fee put towards disposal of oil byproducts in compliance with legal standards be buried in the transaction process and framed as promoting a “sustainable practice,” rather than what they actually represent—a mandatory tariff.<sup>52</sup> The lack of clarity around these fees can give rise to further manipulation by businesses in other industries that are *not* subject to these taxes, like restaurants. By labeling a fabricated fee the same way as environmental fees that car mechanics and electronics vendors are required to charge by law, these vendors may even be attempting to piggyback on statutory requirements that do not apply to them to make consumers believe that such fees are mandated by the government.<sup>53</sup>

This kind of deceptive pricing constitutes a form of deceptive environmental advertising that the Commission warns against in its Green Guides. While businesses may introduce environmental fees as an affirmative reflection of their commitment to protect the environment, in reality they are often simply shifting the cost of harmful environmental practices onto the consumer. When companies justify this fee as a commitment to “sustainable . . . business operations,” *see* App. § 7, consumers may be misled into believing their funds are being put towards sustainability measures or environmental impact abatement beyond just the status quo legal requirements. The Commission’s Green Guides recognize the risks of marketing that mislead consumers about the environmental quality or benefits of a product.<sup>54</sup> The Guides recommend that businesses substantiate their environmental benefit or lack of negative environmental impact<sup>55</sup>; accordingly, any fee that is claimed to have some environmental impact without explanation is likely deceptive. Companies and consumers alike have benefited from the Green Guides and the clarity they provide when selecting a product. This guidance however, does not sufficiently extend to customers as they move through the purchasing process. The proposed Rule will help fill that gap.

Requiring that businesses explain the actual purpose and identity of their fees, as the proposed Rule does, will help prevent businesses from describing fees in a vague, confusing, and deceptive way, like the example of “environmental fees” demonstrates. Once a consumer has likely already gone through the trouble of selecting between products and committing to the one they intend to purchase, being confronted with a vague “environmental fee” is likely not going to stop them. The proposed Rule will ensure that the actual cost of goods and services are

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<sup>51</sup> *See, e.g.* John Matarese, *How a \$14 oil change can end up almost \$50*, WCPO 9 (Feb. 25, 2016), <https://www.wcpo.com/money/consumer/dont-waste-your-money/how-a-14-oil-change-can-end-up-almost-50> (describing how a consumer attempting to use a voucher for a \$14.99 oil change was ultimately charged \$50 for the service, due to “a \$34.99 additional charge for disposing of the oil’ and other things,” such as “filter disposal” and “shop supplies,” many of which were clearly not subject to any regulatory fees).

<sup>52</sup> *See, e.g.*, Cal. Health & Saf. Code § 25215.25 (“a California battery fee shall be imposed on a person for each replacement lead-acid battery”); Cal. Code Regs. tit. 16, § 3357 (“An automotive repair dealer may charge a customer for costs associated with the handling, management and disposal of toxic wastes or hazardous substances under California or federal law which directly relate to the servicing or repair of the customer’s vehicle”).

<sup>53</sup> *See id.*

<sup>54</sup> 16 C.F.R. pt. 260.

<sup>55</sup> 16 C.F.R. § 260.4(b)-(c).

communicated to consumers and why they are being asked to pay more than what they might otherwise anticipate.

### **B. A Clear Characterization of All Charges Promotes Competitive Markets.**

Prohibiting misrepresentation of the identity and nature of fees further serves the Commission’s mandate to promote fair business practices and competition.<sup>56</sup> The proposed Rule squarely addresses two types of deceptive and anti-competitive practices that the Commission is well-equipped to challenge: (1) hiding the true cost of goods and services until a consumer has already committed to a purchase, and (2) mischaracterizing the nature and purpose of fabricated fees to make them appear beyond a vendor’s control. The practices described here prevent consumers from being able to meaningfully compare different vendors’ offerings, which in turn has dangerously anti-competitive effects. For example, any reasonable consumer trying to choose between two different car service shops of similar reputation will likely choose the shop that offers the cheapest price. But if one shop’s advertised price includes all required disposal fees while the other shop’s price does not, prospective consumers are deprived of the apples-to-apples pricing information that they need to make rational economic decisions. By deceptively hiding the true cost of its services within fabricated fees that are disclosed only when the final bill comes due, the second shop unfairly tilts the competitive landscape in its favor, while the consumer pays the price. In fact, the second shop may be able to attract more customers than the first shop while also charging more for the same services, because most consumers will assume that both shops charge similar fees. One company that provides marketing for auto shops expressly warns its clients that charging standalone environmental fees could make them less attractive against competitors.<sup>57</sup>

Such outcomes are not merely theoretical. One empirical study of online ticketing systems found that “websites that incorporate ‘hidden fees’ that are only revealed at checkout are making more money than they would if they chose to honestly display all fees upfront.”<sup>58</sup> Specifically, “StubHub users who weren’t shown fees until checkout spent about 21% more on tickets and were 14% more likely to complete a purchase compared with those who saw all-inclusive prices from the start.”<sup>59</sup>

The proposed Rule forces vendors to internalize and accurately represent the actual costs of the goods and services they sell, which is an essential element of a healthy competitive marketplace. Opponents of the rule have argued that it is impossible to accurately estimate all fees in advance of providing a complex service, or that some fees may represent voluntary

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<sup>56</sup> 15 U.S.C. § 45(a)(2); *see* General Question for Comment Nos. 3-4, 88 Fed. Reg. at 77,480.

<sup>57</sup> AutoShop Digital, *Should You Charge An Environmental Fee for Disposals?*, <https://www.autoshopdigital.com/environmental-fee-disposals> (suggesting that one “downside[] to charging an environmental fee” is that “If you’re in an area where other shops are “hiding” or simply not charging environmental fees, you may find yourself not bringing in many customers referrals or new clientele”).

<sup>58</sup> Morgan Foy, *Buyer beware: Massive experiment shows why ticket sellers hit you with last-second fees*, Berkeley Haas Newsroom (Feb. 9, 2023), <https://newsroom.haas.berkeley.edu/research/buyer-beware-massive-experiment-shows-why-ticket-sellers-hit-you-with-hidden-fees-drip-pricing/>.

<sup>59</sup> *Id.*

choices on the part of consumers that vendors have no way to anticipate.<sup>60</sup> These concerns are easily resolvable with minimal effort and creativity on the part of vendors. Ticketing websites and other digital systems can easily be programmed to instantly add all applicable fees to the running cost of selected products and options, even if those fees are percent multipliers of the subtotal.<sup>61</sup> Products such as gift cards can standardize their fee schedules in a visual format that is easily comparable across brands and not buried in terms and conditions that are only available once the gift card has been purchased. Vendors who are at a loss as to how to price their custom services need only go to their local pizza restaurant, where thousands of custom permutations are offered for sale with pricing schemes that make clear the financial implication of each choice.<sup>62</sup> Plainly, the marketplace can—and in many places already has—come up with ways to accurately advertise pricing for even complex and custom products well before a consumer has made any firm decisions.

By contrast, the only way consumers can retain any kind of bargaining power in an economy permeated by junk fees is to spend an enormous amount of time, energy, and money executing test transactions against every vendor, documenting what fees each vendor charges, and then somehow aggregating and sharing that information with other consumers. The proposed Rule forces vendors to internalize and accurately represent the actual costs of the goods and services they sell, which is an essential element of a healthy competitive marketplace.

#### **IV. The Proposed Rule Satisfies The First Amendment’s Requirements for Regulation of Commercial Advertising.**

Requiring that businesses clearly and conspicuously state the nature and purpose of all fees charged within the total price also accords with the First Amendment. Other commenters who have argued that proposed 16 C.F.R. § 464.3 impermissibly compels speech misread the requirements of the Free Speech Clause.<sup>63</sup> First, advertising prices is “quintessentially commercial,”<sup>64</sup> so laws compelling full price disclosure are accorded the more lenient level of scrutiny applied for regulation of commercial speech.<sup>65</sup> The Commission’s Rule requiring

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<sup>60</sup> See Chris O’Malley, *Subjective Aspects of FTC’s ‘Junk Fee’ Rule Likely to Cause Legal Departments Fits*, Law.com (Oct. 17, 2023), <https://www.law.com/corpcounsel/2023/10/17/subjective-aspects-of-ftcs-junk-fee-rule-likely-to-cause-legal-departments-fits/?sreturn=20240106122825> (arguing that “Some products also have optional components, government-set fees, or shipping charges that are impossible to estimate for purposes of a single advertisement in which the specific product configuration sought by the consumers is as yet unknown”); see also Comment of U.S. Chamber of Commerce, FTC-2023-0064-3127 (Feb. 7, 2023).

<sup>61</sup> Compare Zenni Optical, <https://www.zennioptical.com/orderGlasses?productId=19100&skuId=1910021&skuIsBundled> (offering a wide array of customization options whose prices are clearly shown at the point each decision is offered and immediately incorporated into the cost of the overall configuration as soon as each choice is made).

<sup>62</sup> See, e.g., Mod Pizza, <https://modpizza.com/menu/>; Prince Pizzeria, <https://www.princerestaurant.com/in-house-menu/#famous-prince-pizza>.

<sup>63</sup> See, e.g., Comment of Competitive Enterprise Inst. FTC-2023-0065-2038 (Jan. 26, 2024); Comment of Nat’l Fed. of Indep. Businesses, FTC-2023-0064-3016 (Jan. 24, 2024)

<sup>64</sup> *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012).

<sup>65</sup> *Bd. of Trustees v. Fox*, 492 U.S. 469, 478 (1989) (upholding commercial speech restrictions “so long as they are narrowly tailored to serve a significant governmental interest”).

disclosure of the total price, including hidden fees, before the consumer consents to purchase the product “concerns purely factual and uncontroversial information” about prices, thereby invoking a still more relaxed constitutional scrutiny.<sup>66</sup> And the Rule readily withstands that scrutiny, since it is “reasonably related to a substantial government interest” of preventing consumer deception and is “not unjustified or unduly burdensome” to the businesses involved.<sup>67</sup>

The Rule’s requirement of an accurate and unequivocal statement of the purpose and nature of junk fees also meets that same relaxed level of scrutiny because it merely requires businesses to disclose the facts of how they use those fees. Disclosure of the fees amounts to a simple “truthful statement[]”; it does not require the business to communicate how the fee might affect its revenue, a viewpoint or opinion about the fees themselves, or any disputed information.<sup>68</sup> Nor does disclosing the fee “prevent the merchant from conveying additional truthful information” about how the fees might be used; for example, for salutary sustainability reasons in the case of the environmental fees discussed above.<sup>69</sup> And prohibiting businesses from misrepresenting their price hardly forces them to “take sides in a heated political controversy.”<sup>70</sup>

Nor are the proposed Rule’s transparency pricing requirements “unduly burdensome” to businesses.<sup>71</sup> The required disclosures here resemble those upheld in *Spirit Airlines*, in which the D.C. Circuit ruled that a Department of Transportation rule that required airlines to “prominently” disclose all government taxes and fees and the “total, final price” was constitutional under *Zauderer*.<sup>72</sup> The court concluded that disclosing the total, final price, “[t]hrough limiting the manner in which airlines may advertise information . . . neither prohibits nor significantly burdens airlines’ ability to provide that information.”<sup>73</sup> Likewise here, the Commission’s proposed rule does not prohibit businesses from “separately alerting the public to the taxes imposed” on them, and businesses “can even call attention to taxes and fees” that they

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<sup>66</sup> *Zauderer v. Off. of Disciplinary Counsel*, 471 U.S. 626, 651-52 (1985); see, e.g., *Am. Bev. Ass’n v. City & Cty. of S.F.*, 916 F.3d 749, 756 (9th Cir. 2019) (en banc) (“*Zauderer* provides the appropriate framework to analyze a First Amendment claim involving compelled commercial speech . . . [by] warnings to prevent the deception of consumers”).

<sup>67</sup> *Nat’l Inst. of Family & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (quoting *Zauderer*, 471 U.S. at 651); accord *Nat’l Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1275 (9th Cir. 2023); *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 21-22 (D.C. Cir. 2014) (en banc).

<sup>68</sup> *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 104 (2d Cir. 2017); compare *Am. Bev. Ass’n*, 916 F.3d at 761 (Ikuta, J., concurring) (observing that the “factual accuracy” of a public health warning about sugar-sweetened beverages was “disputed” and “controversial”).

<sup>69</sup> *Expressions Hair Design*, 877 F.3d at 104; see also *New York State Rest. Ass’n v. New York City Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009) (“[T]he First Amendment does not bar the [government] from compelling such ‘under-inclusive’ factual disclosures” (quoting *Zauderer*, 471 U.S. at 651 n.1)).

<sup>70</sup> *CTIA-The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 848 (9th Cir. 2019) (upholding disclosure about dangers of cell phone radio frequency under *Zauderer*); see also *Am. Meat Inst.*, 760 F.3d at 34 (Kavanaugh, J., concurring) (concluding that a required label “cannot be considered controversial given the factually straightforward, evenhanded, and readily understood nature of the information”).

<sup>71</sup> *Nat’l Inst. of Family & Life Advoc.*, 138 S. Ct. at 2372 (quoting *Zauderer*, 471 U.S. at 651).

<sup>72</sup> *Spirit*, 687 F.3d at 411, 415.

<sup>73</sup> *Id.* at 414.

must add to their final bill.<sup>74</sup> The proposed Rule also avoids burdening businesses by mandating *how* the total price, including hidden and deceptive fees, is meant to be displayed.<sup>75</sup>

Finally, no one can seriously dispute that preventing consumer deception is a legitimate and substantial interest of the Federal Trade Commission.<sup>76</sup> The examples described here of the vague and unclear “environmental fees” demonstrate that the “likelihood of deception” caused by these fees is “hardly speculative.”<sup>77</sup> Furthermore, mandating that businesses provide the total price, including the purpose of any additional fees, will “better inform consumers about the products they purchase.”<sup>78</sup> It will also promote fairer competition. “[Consumers] want to make informed choices, but the lack of price transparency is one of the biggest hurdles they face in navigating [goods and services] market[s] to find the best value.”<sup>79</sup> The First Amendment presents no obstacle to a rule that ensures that packaging, displays, and advertisements exhibit the actual price of a product; it is, indeed, the purpose of the First Amendment to ensure that “the stream of commercial information flow cleanly as well as freely.”<sup>80</sup>

## **V. The Commission Should Strengthen Its Requirements To Disclose Mandatory Fees.**

However, we recommend that the Commission strengthen its proposed Rule to require more explicit clarification of “mandatory” versus “optional” fees.<sup>81</sup> Currently the Rule defines the total price disclosed to include “mandatory Ancillary Good or Service” charges.<sup>82</sup> The Rule does not require businesses to distinguish fees that are optional but that, through deception, intense sales tactics, or social pressure, appear compulsory for all purposes. As our research shows, the restaurant and retail industry have become particularly egregious perpetrators of this kind of deception by using point-of-sale technology that invites consumers to add a tip, including in service industries where tipping is not historically expected. *See* App. § 8. Restaurants sometimes add extra charges with vague descriptions like “kitchen appreciation” or “healthcare surcharge,” which are not clearly outlined on the menu or explained prior to ordering. This lack of transparency in fee descriptions misleads consumers by obscuring the actual cost of dining. For customers who budget based on the advertised prices, these unexpected fees can push the total bill beyond their planned expenditure, leading to financial strain or discomfort at the time of payment. Additionally, these opaque fees create a layer of confusion for patrons, leaving them

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<sup>74</sup> *Id.*

<sup>75</sup> *See Am. Beverage Ass’n*, 916 F.3d at 754-57 (invalidating sugar-sweetened beverage ordinance that required a health warning label occupying at least 20 percent of the advertisement and set off with a rectangular border).

<sup>76</sup> 15 U.S.C. § 45(a)(2); *see e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 253 (2010).

<sup>77</sup> *Spirit*, 687 F.3d at 413 (quoting *Milavetz*, 559 U.S. at 251); *see id.* (“The rule aims to prevent consumer confusion about the total price they have to pay, and it goes without saying that requiring the total price to be the most prominent number is reasonably related to that interest”).

<sup>78</sup> *Personal Elec. Mfgs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001).

<sup>79</sup> *Am. Hosp. Ass’n v. Azar*, 468 F. Supp. 3d 372, 378, 393-96 (D.D.C. 2020) (upholding under *Zauderer* a Department of Health & Human Services rule requiring hospitals to publish five types of standard charges).

<sup>80</sup> *Va. State Bd. of Pharma. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976).

<sup>81</sup> *See* General Questions for Comment No. 26(b), 88 Fed. Reg. at 77,482.

<sup>82</sup> 15 U.S.C. § 464.1(g).

uncertain whether these charges are a form of tip, an additional cost on top of tips, or allocated for a different purpose altogether. The ambiguity around these fees poses a significant challenge for consumers, especially those with limited budgets, who might inadvertently commit to expenses they were not prepared for. Even when these fees are optional and can be removed at the customer's request, it can lead to awkward and uncomfortable situations, exacerbating feelings of financial constraint or isolation for patrons already conscious of their spending limits.

Also, digital Point-of-Sale systems like Toast allow merchants to preselect a default tip. *See App. § 8.* The chosen tip amount is preselected on the transaction screen, and only a signature is required to complete the transaction. This setup is misleading and particularly unfair to non-tech-savvy patrons, such as the elderly or those less familiar with digital interfaces, who may not realize they can change the tip amount or may find it difficult to navigate the system to do so. Allowing restaurants to preselect a tip amount in the user interface forces tips that might be substantially greater than what customers would otherwise intend. This practice may lead consumers to believe that the suggested tip is a standard or necessary part of the transaction, causing them to spend more than they otherwise would have. The design not only takes advantage of behavioral biases and a lack of digital literacy, but also compromises the customer's agency in deciding how much to tip, effectively removing the discretionary nature of tipping. By coercing customers to tip more than they intended, preselected tips add undue financial pressure on those already managing tight budgets by confronting them with an additional charge that is difficult and awkward to opt out of.

To address these problems resulting from the ambiguous mandatory/optional distinction, we endorse the follow recommendations proposed in the comment filed by the Consumer Federation of America and 51 other national and state consumer advocacy groups:

1. Make clear that the “prohibited misrepresentations” provision in § 464.3(a) applies to mandatory *and* optional fees—not just the “nature and purpose” disclosures in § 464.3(b);
2. Revise the definition of “Ancillary Good or Service” in § 464.1(a) 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”;
3. Revise the definition of “Total Price” in § 464.1(c) to mean “the maximum total of all mandatory fees or charges a consumer must pay for a good or service, except that Shipping Charges and Government Charges may be excluded”;
4. Add a new definition of “Mandatory Fee” in § 464.1: “Mandatory fee includes but is not limited to: (1) Any fee or surcharge that must be paid in order to purchase the advertised good or service; (2) A fee or surcharge that is not reasonably avoidable; or (3) A fee or surcharge for any good or service that a reasonable consumer would expect to be included with the purchase of the advertised good or service”; and



5. Revise § 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.”<sup>83</sup>

## **VI. A Broad-Based Rule Will Complement State Efforts to Fight Junk Fees.**

Finally, we recommend that the Commission adopt as proposed its disclaimer that the regulation supplements, not preempts, any state laws that afford consumers greater protections.<sup>84</sup> The Commission’s Rule should be viewed as an invaluable complement to state and private actions to challenge hidden and deceptive pricing practices. Over thirty states and the District of Columbia explicitly incorporate federal interpretations of Section 5 in their own local unfair and deceptive acts and practices laws.<sup>85</sup> Because the proposed Rule is an enforceable regulation interpreting Section 5 of the FTC Act, these states and the District of Columbia will be able to invoke the Rule in their own enforcement actions against junk fees—thereby multiplying the effectiveness of the Rule.

The Commission’s attention to this critical economic justice issue will also inspire states to enact local legislation prohibiting deceptive pricing. Some states in fact have already acted; now with an enforceable federal Rule on the matter, more will likely follow. One significant state legislative action to promote price transparency that complements the proposed Rule is the enactment last year of California Senate Bill 478 (2023), authored by state Senators Chris Dodd and Nancy Skinner. SB 478 amended the California Legal Remedies Act (CLRA), which prohibits specified unfair and deceptive practices in transactions involving goods and services, to expressly outlaw “[a]dvertising, displaying, or offering a price for a good or service that does not include all mandatory fees or charges.”<sup>86</sup> The provision broadly applies to all industries whose products would otherwise fall within the ambit of the CLRA, except for those that SB 478 expressly excludes: broadband internet services, particular financial transactions, rental cars, lease contracts, air transportation services, and auctions.<sup>87</sup> Like the Commission’s proposed Rule, SB 478 also exempts government taxes, fees and assessments; shipping charges; and motor vehicle dealers.<sup>88</sup> By enacting SB 478 Legislature intended to “specifically prohibit drip pricing” and “regulate how prices are advertised, displayed, or offered.”<sup>89</sup>

The drafters of SB 478 wisely chose to broadly require transparent pricing of mandatory fees in all industries except in enumerated industries, rather than limit the scope of the law to particular suspect sectors. One legislative analysis of the bill particularly emphasized the importance of a broad-based rule to address the systemic nature of junk fees:

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<sup>83</sup> Comment of Consumer Fed. of Am. et al. at 10-17, FTC-2023-0064-3160 (Feb. 7, 2024).

<sup>84</sup> 16 C.F.R. § 464.4 (proposed)

<sup>85</sup> Charles A. Byrd, *A 50-State Survey of Consumer Protection Acts and Their Connections to the Federal Trade Commission Act* (Mar. 13, 2019), <https://protesolutio.com/2019/03/13/a-50-state-survey-of-consumer-protection-acts-and-their-connections-to-the-federal-trade-commission-act/>; see, e.g., Fla. Stat. § 501.204(2); 815 Ill. Comp. Stat. § 505/2; Tex. Bus. & Com. Code § 1746(c)(1).

<sup>86</sup> 2023 Cal. Legis. Serv. Ch. 400 § 3 (amending Cal. Civ. Code § 1770).

<sup>87</sup> *Id.* §§ 3-12.

<sup>88</sup> *Id.*

<sup>89</sup> 2023 Cal. Legis. Serv. Ch. 400 § 1(a).

*The problem is that there is not a specific statute outlawing junk fees. Instead, the illegality of particular junk fees must be demonstrated on a case-by-case basis . . . by using specific statutes that address particular transactions, such as disclosure of rental car fees. Neither approach adequately addresses the systemic nature of junk fees.*<sup>90</sup>

SB 478 therefore provides blanket stability and predictability across the marketplace. As the same legislative analysis pointed out, “By making this practice illegal, the bill would seek to bring price transparency to all sectors of the state’s economy at once, rather than through piecemeal litigation or lawmaking.”<sup>91</sup> The law was also intended to promote market competition by “[e]nabling direct, apples-to-apples price comparison” and “[e]nsuring that businesses compete on the basis of price and value offered, rather than on their ability to deceive consumers into paying junk fees.”<sup>92</sup>

The deleterious effects of junk fees on low-income Californians was also on the minds of the legislators when they passed SB 478. As the executive director of the California Low-Income Consumer Coalition (and the undersigned), which co-sponsored SB 478, told *CalMatters*: “For many Californians, hidden fees . . . are the difference between whether a person can make it through the month and pay for the necessities of life.”<sup>93</sup> Attorney General Rob Bonta, who also co-sponsored the bill, also declared that “Working families are dealing with enough in life—they shouldn't have to waste their time trying to figure out what goods and services will really cost them and which advertised prices are false.”<sup>94</sup>

Legislation like SB 478, and other laws like it that states nationwide are adopting, offer stronger tools to tackle junk fees. Yet in today’s nationalized economy, an array of state laws with divergent levels of coverage alone is not sufficient. Indeed, as one travel industry group opposed to SB 478 put it:

*A patchwork of varying state regulations, with different regulations for and possible penalties on, the lodging providers and the technology platforms will translate into a significant compliance burden for the travel industry. But most importantly, it will also be a source of great confusion for consumers to know whether they are covered by their state regulations or the regulations of the state where their lodging choice is located.*<sup>95</sup>

The solution need not be “either/or.” The Commission’s proposed Rule, in concert with other emerging federal and state efforts, will help provide the clarity necessary on a national level in

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<sup>90</sup> Cal. Bill Analysis, Assemb. Comm. on Privacy & Consumer Protection, S.B. 478, 2023-2024 Reg. Sess. (2023).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> John Woolfolk, *Room Rate Was \$249, But Didn’t Mention \$90 In Fees. California Bill Aims To Stop That* (May 22, 2023), [mercurynews.com/2023/05/22/room-rate-was-249-but-didnt-mention-90-in-fees-california-bill-aims-to-stop-that](https://www.mercurynews.com/2023/05/22/room-rate-was-249-but-didnt-mention-90-in-fees-california-bill-aims-to-stop-that).

<sup>94</sup> Cal. Bill Analysis, S.B. 478, *supra* note 90.

<sup>95</sup> *Id.*

the market to help protect consumers, especially those consumers who are most vulnerable to exploitation and deception.

## **VII. Conclusion.**

We applaud the Commission for its efforts to protect consumers from hidden and misleading fees. As outlined in the Appendix that follows, businesses in a variety of industries seek to maximize profits and harm consumers by infecting their prices with junk fees and confusing pricing schemes. We believe that the final Rule can be a powerful tool for the Commission and other enforcement agencies to combat drip pricing and protect consumers.

We welcome the Commission's initiative and appreciate the opportunity to provide these comments. If you have any questions or if we can provide further information, please do not hesitate to contact us.

Sincerely,

Seth E. Mermin, Esq.

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*Public Comment of the Berkeley Center for Consumer Law & Economic Justice et al.  
Docket No. FTC-2023-0064*

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*The UC Berkeley Center for Consumer Law & Economic Justice works to establish equity and fairness in the marketplace. We believe that building economic justice means developing and enforcing laws that fight fraud and deception, that protect low-income communities and communities of color, and that promote financial security and empowerment. Through research, advocacy, policy, and teaching, the Center strives to apply robust consumer protection laws in places, and among people, where those laws have not been used before, and to create a society in which economic, racial, and social justice are available to all. We regularly submit comments on important proposed regulations that affect consumers.*

*The Consumer Law Advocates, Scholars & Students (CLASS) Network is a nationwide initiative spearheaded by the Center for Consumer and Economic Justice and the National Association of Consumer Advocates dedicated to developing consumer law and economic justice curriculum, experiential opportunities, and coordinated projects at law schools around the country. Our network comprised of law students, professors, and advocates is made up of 15 law schools with student organizations that hold events and participate in pro bono research and advocacy projects with our partners in government and non-profit organizations, as well as 15 law school clinics that provide experiential consumer and economic justice law.*

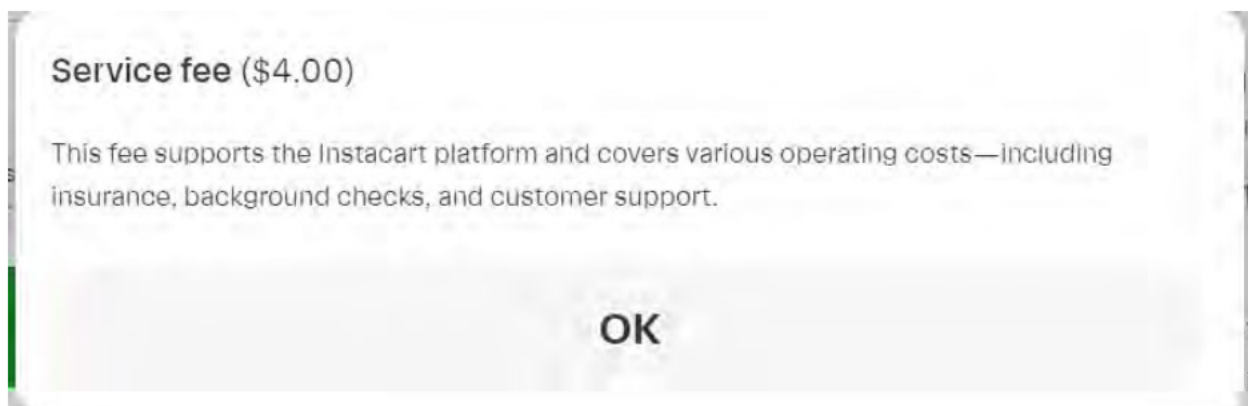
*The above-mentioned organizations at the law schools at George Washington University; Stetson University; the University of California, Berkeley; University of California, Irvine; University of Maryland, Baltimore; University of Michigan, and University of Montana are student-run chapters of the CLASS Network dedication to the promotion of consumer law and consumer protection.*

## Appendix

1. Grocery delivery .....	21
2. Convenience Fee for Cash Back.....	22
3. Coinbase (Cryptocurrency Exchange) .....	23
4. Rental Housing “Convenience Fees” .....	24
5. School Lunch Fees .....	26
6. Environmental Fees at Bars and Restaurants.....	26
7. Vehicle Environmental Fees .....	28
8. Restaurant and Retail Tipping Charges .....	31

### 1. Grocery delivery

The screenshot displays the Instacart checkout interface. On the left, the 'Delivery Instructions' section includes a text input field for 'Add access code, best entrance, etc.', a checkbox for 'Leave at my door', and a green 'Save and continue' button. Below this is the 'Delivery time' section, featuring a 'Priority' option for 4:42pm-5:25pm with a +\$8 charge, and a promotional banner for '\$20 off your first year of Instacart+' with a 'Join' button. On the right, the 'Place order' section shows a '100% satisfaction guarantee' and a 'Delivery Tip' of \$2.42 with options for 5%, 10%, 15%, 20%, and 'Other'. A summary table lists: Item subtotal (\$48.37), Delivery fee (\$7.99), Service fee (\$4.00), Priority fee (\$2.00), Estimated taxes and fees (\$3.12), and Delivery tip (\$2.42). At the bottom right, another '\$20 off your first year of Instacart+' banner is visible with a 'Join Instacart+' button.



Instacart is a grocery delivery service. Instacart+ is a subscription that charges users a monthly fee for benefits like free delivery. Both Instacart and Instacart+ users are charged a vague service fee that “helps support the Instacart platform and covers a range of operating costs including shopper operations, insurance, background checks, and customer support.”<sup>1</sup> Instacart+ subscribers pay lower service fees.<sup>2</sup> Additionally, the fee varies depending on the location of the subscriber and the items in subscriber is attempting to purchase.<sup>3</sup> Furthermore, the total service fee amount may change after delivery if items are substituted.<sup>4</sup> This fees poses a significant risk to low-income consumers who use the Instacart delivery service while living paycheck to paycheck.

## 2. Convenience Fee for Cash Back



Ralphs Supermarkets, a subsidiary of Kroger, imposes a 50-cent convenience fee for customers using the cash back option at the register.<sup>5</sup> This fee poses an added burden, particularly for

<sup>1</sup> Instacart Fees and Taxes, <https://www.instacart.com/help/section/360007902791/360039164252> (last viewed Jan. 4, 2024).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

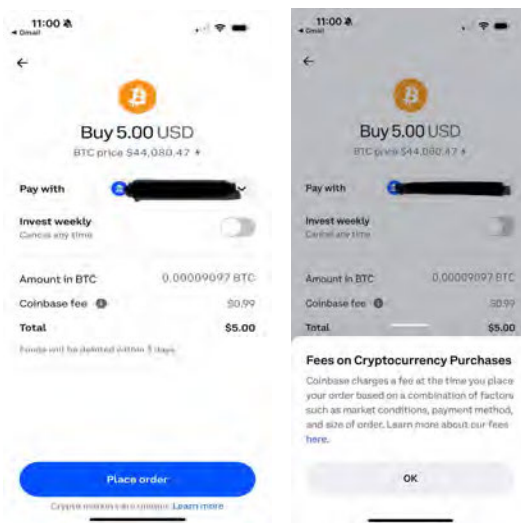
<sup>4</sup> *Id.*

<sup>5</sup> David Lazarus, *Column: Ralphs is now charging 50 cents for cash back at the register*, Los Angeles Times (Dec 20, 2019, 6:00 AM), <https://www.latimes.com/business/story/2019-12-20/ralphs-cash-back-fee#:~:text=little%20extra%20cash,-.Ralphs%20joined%20other%20Kroger%20chains%20this%20month%20in%20rolling%20out.in%20imposing%20such%20a%20fee>; Screenshot of Reddit Post by Cleverwabbit5, *Ralphs is now charging*

individuals in low-income communities who may lack convenient access to traditional banking services. The extra charge for cash back disproportionately affects those who rely on affordable cash transactions, as they may not have convenient access to ATMs or banks without incurring additional fees. For many, finding alternative transportation to an institution that does not impose a convenience fee upon discovering the cashback charge may prove impractical or more expensive. This situation is further exacerbated for individuals living paycheck to paycheck or with limited financial resources, enhancing further financial strain.

Consumers have not been accustomed to paying cashback fees at grocery stores for decades, and they may not be aware of this new charge.<sup>6</sup> With Ralphs Supermarkets operating 184 grocery stores across 112 cities in California, low-income communities served by a Ralphs Supermarket will bear a disproportionate burden due to the cash back convenience fee, amplifying the financial impact of every expense.<sup>7</sup> Addressing this issue is essential to ensure equitable access to essential services for all customers, regardless of their financial circumstances.

### 3. Coinbase (Cryptocurrency Exchange)



When a cryptocurrency transaction occurs on Coinbase’s platform, variable fees are charged to users at checkout.<sup>8</sup> Coinbase has stated that these fees are calculated using vague factors such as “chosen payment method, order size, market conditions, jurisdictional location,

---

*service fees to get cash back from debit card with groceries*, available at [Ralphs is now charging service fees to get cash back from debit card with groceries. : r/LosAngeles \(reddit.com\)](https://www.reddit.com/r/LosAngeles) (last visited Jan 4, 2024).

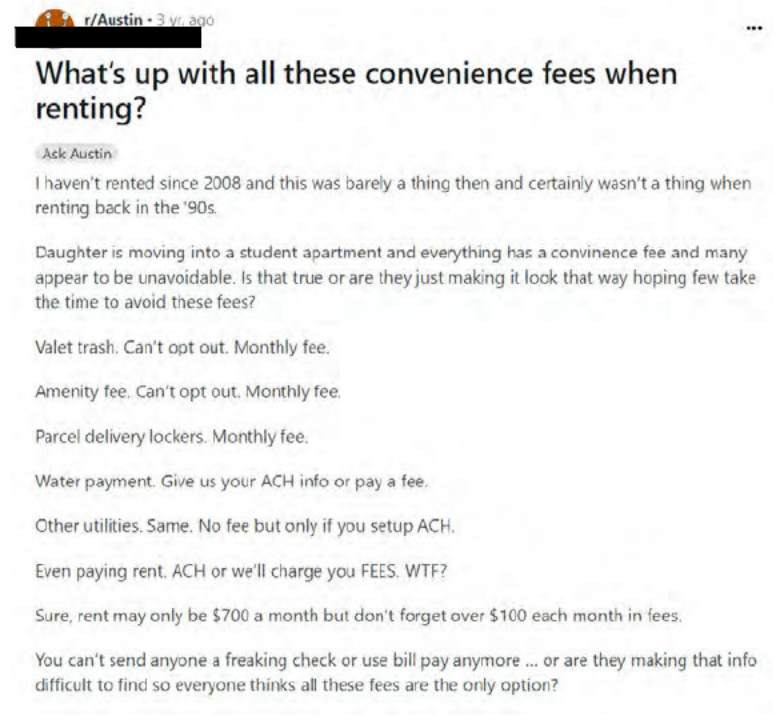
<sup>6</sup> Id.

<sup>7</sup> *Store Locator*, Ralphs, available at <https://www.ralphs.com/stores/grocery/ca> (last viewed Jan 4, 2024).

<sup>8</sup> Coinbase pricing and fees disclosures, <https://help.coinbase.com/en/coinbase/trading-and-funding/pricing-and-fees/fees>, (last viewed Jan. 4, 2024).

and other costs we incur to facilitate your transaction.”<sup>9</sup> These fees are not charged to users who are subscribed to the Coinbase One subscription service.<sup>10</sup> Coinbase also has stated that they occasionally test changes to fees.<sup>11</sup> These fees are obscured in the checkout window through placement in a drop-down menu. Rival trading platforms such as Robinhood do not charge any fees beyond taxes and regulatory fees.<sup>12</sup>

#### **4. Rental Housing “Convenience Fees”**



A screenshot of a post by a Reddit user<sup>13</sup> shows multiple fees like “valet trash”, “amenity fee,” “parcel delivery lockers,” “water payment,” and “other utilities” adding up to over \$100 in extra fees. This user seems to not have expected the additional fees on top of rent.

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<sup>9</sup> *Id.*

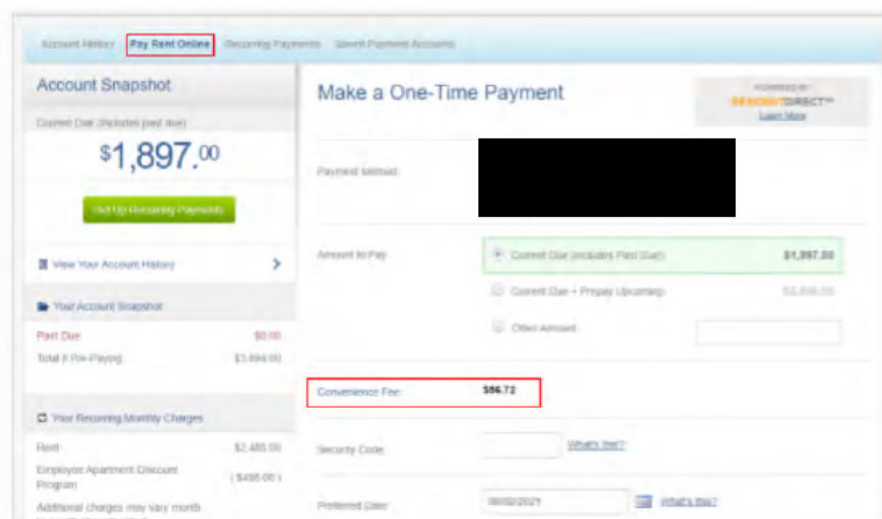
<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Trading fees on Robinhood, <https://robinhood.com/us/en/support/articles/trading-fees-on-robinhood/>, (last viewed Jan. 4, 2024).

<sup>13</sup> Convenience Fees when Renting [https://www.reddit.com/r/Austin/comments/juu0uc/whats\\_up\\_with\\_all\\_these\\_convenience\\_fees\\_when/](https://www.reddit.com/r/Austin/comments/juu0uc/whats_up_with_all_these_convenience_fees_when/) (Last viewed January 5th, 2024)





The Irvine Company LLC headquartered in Newport Beach, California has a vast real estate portfolio of long-term ownership and operations encompassing 129 million square feet.<sup>14</sup> The company boasts over 590 office buildings, 125 apartment communities featuring 65,000 units, 40 retail centers, a coastal resort, three golf courses, and five marinas.<sup>15</sup> When residents living in an Irvine Company apartment make their monthly rent payments online, they are faced with a convenience fee for credit card transactions, the amount of which varies depending on the community.<sup>16</sup> On the other hand, there is no fee associated with using an e-check. Unfortunately, this policy can significantly impact individuals, families, and groups experiencing financial challenges, as it imposes an additional burden on those struggling to pay rent with available funds.

This extra fee of up to \$100 especially affects individuals facing financial hardship by penalizing them for using a credit card, which may result in subsequent interest charges. Often, tenants are unaware of the credit card fee until they find themselves in a situation where using a credit card becomes their only option for paying rent. At this point, they are left with no choice but to accept the charge, further compounding their financial difficulties. This policy not only places an undue financial burden on residents who are particularly vulnerable but also lacks transparency, leaving tenants unaware of potential fees until they are already in a challenging financial position.

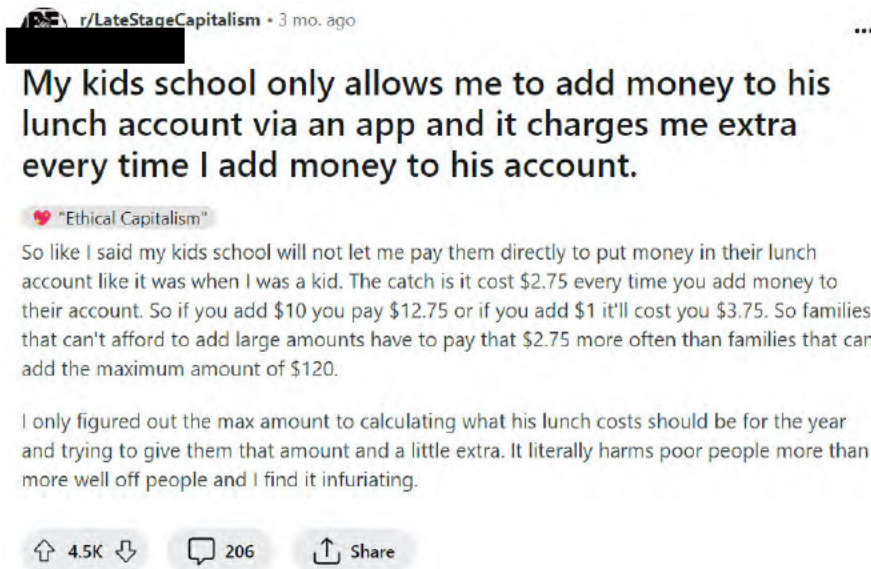
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<sup>14</sup> *Our Story*, Irvine Company, <https://www.irvinecompany.com/about/our-story/> (last visited Jan 4, 2024).

<sup>15</sup> *Id.*

<sup>16</sup> *Irvine Company's Guide to Online Rent Payment* 9 [Guide to Online Rent Payment - New \(irvinecompanyapartments.com\)](https://www.irvinecompanyapartments.com) (last visited Jan 4, 2024).

## 5. School Lunch Fees



This user on Reddit reports that they were charged an additional fee of \$2.75 to add money to their child's lunch account.<sup>17</sup> This would disproportionately impact low-income consumers as they would have to pay this extra fee for school lunch.



In the same thread, another user specified that the fee is charged by MySchoolBucks, but there is an option (more strenuous) to avoid the fee.

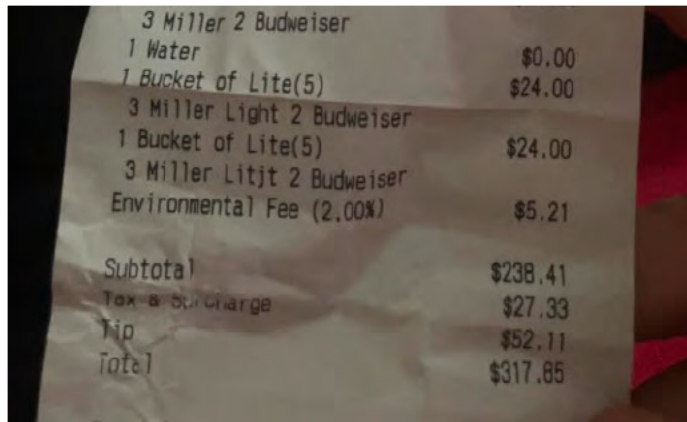
## 6. Environmental Fees at Bars and Restaurants

Restaurants and bars add "environmental fees" to orders. It is not clear on the receipt or menu if these fees are intended to offset a state or local tax or serve some other purpose. As shown below, these fees can be added in line with the items a customer orders, further implying

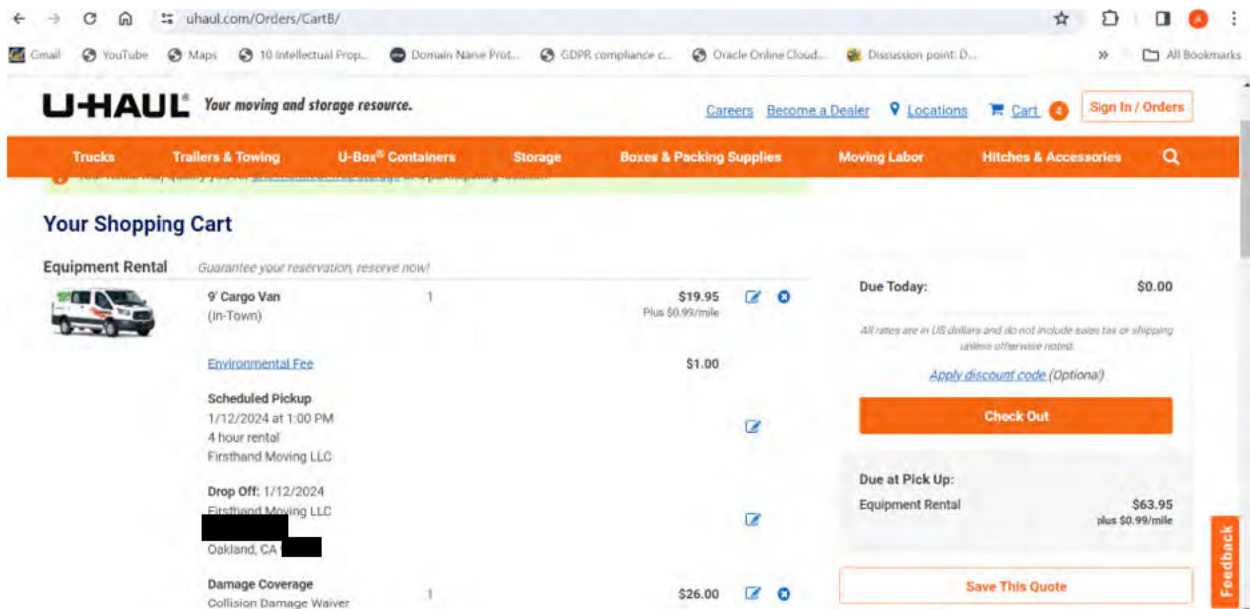
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<sup>17</sup> School lunch hidden fee  
[https://www.reddit.com/r/LateStageCapitalism/comments/16rc73e/my\\_kids\\_school\\_only\\_allows\\_me\\_to\\_add\\_money\\_to\\_his/](https://www.reddit.com/r/LateStageCapitalism/comments/16rc73e/my_kids_school_only_allows_me_to_add_money_to_his/) (Last viewed Jan. 5, 2024).

they are not a required tax. Nor is there any consistency in the amount of the text. The following two examples are from restaurants in the same jurisdiction: Chicago, Illinois.



## 7. Vehicle Environmental Fees



The screenshot shows the U-Haul website's shopping cart page. The cart contains one item: a 9' Cargo Van (in-Town) with a scheduled pickup on 1/12/2024 at 1:00 PM and a drop-off on 1/12/2024. The total price is \$63.95 plus \$0.99/mile. An environmental fee of \$1.00 is listed as a separate line item. The page also shows a 'Check Out' button and a 'Save This Quote' button.

Item	Quantity	Price
9' Cargo Van (in-Town)	1	\$19.95 Plus \$0.99/mile
Environmental Fee		\$1.00
Damage Coverage (Collision Damage Waiver)	1	\$26.00

**Due Today:** \$0.00  
**Due at Pick Up:** Equipment Rental \$63.95 plus \$0.99/mile

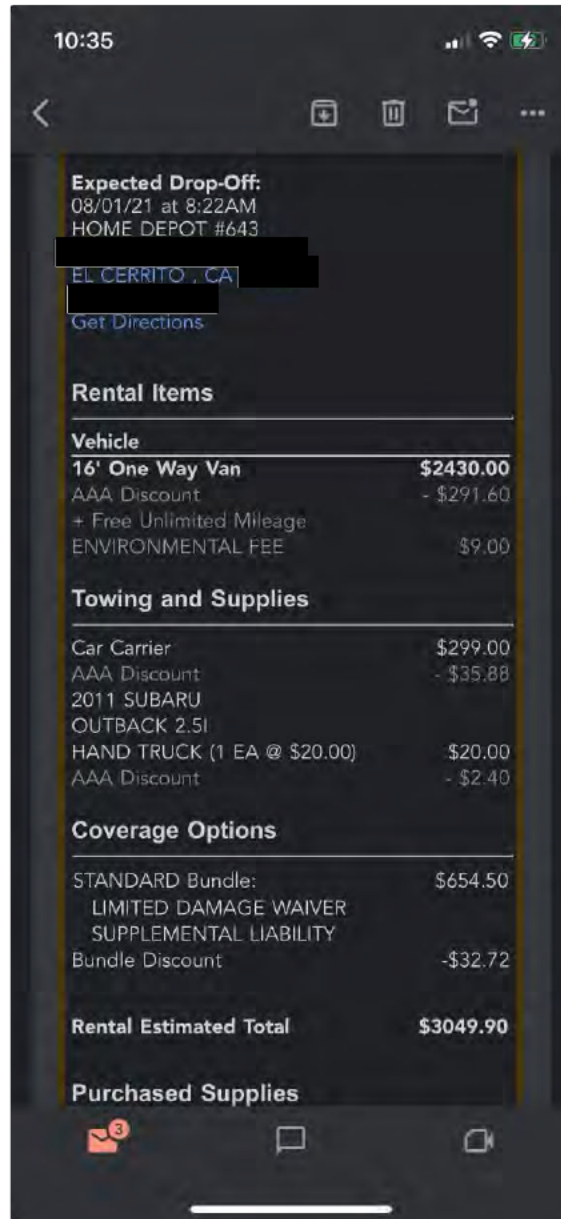
### What does U-Haul do with the money collected as an environmental fee?

Since 1945, the U-Haul Companies ('U-Haul') have helped families move to a better future.

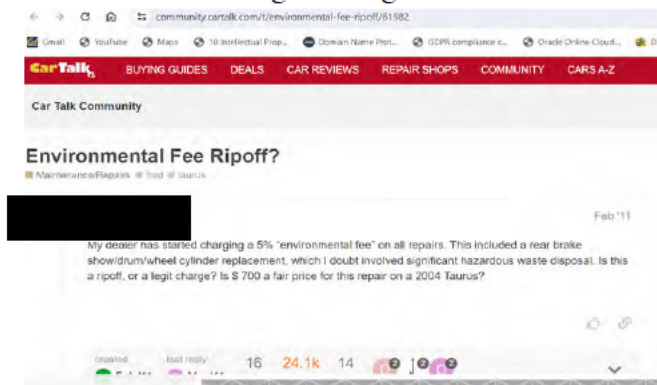
The Customer money collected as an environmental fee is used to support and foster the development and maintenance of sustainable U-Haul business operations. For example, operations that directly benefit our customers include, but are not limited to, the use of aerodynamic fuel-saving truck skirts, the fuel economy gauge, CNG and propane trucks, storage re-use centers, and an expanding alt-fuel propane infrastructure. The fee also partially covers operations that indirectly benefit our customers, such as energy-efficient lighting and HVAC retrofits, waste-oil heaters, water recycling units, van-body storage units, permeable ground cover and other water/energy saving projects.

U-Haul's explanation for the environmental fees "to support and foster the development and maintenance of sustainable U-Haul business operations" appears as a pop up on the webpage.

Below are other examples of environmental fees charged by rental vehicle companies and online complaints about such fees.



Penske truck rental environmental fee charge in August 2021.





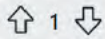
6 yr. ago



## Equipment rental charging taxes on environmental fee, delivery fees.

So this company will rent equipment for a day/week/month and then send an invoice. When it delivers to the job site, it charges an environmental fee and a delivery fee, and then rolls those fees into the subtotal.

Is it just at the discretion of a company what they are gonna charge taxes on? For example, Amazon charges a tax on Prime memberships, but their rationale is the tax is there because they have to pay tax on their shipping.



1



1



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Is this valid dealer charge? \*Haz Environmental Service Fee\* [→ Jump to Latest](#)

charge dealer environmental fee haz service valid [Follow](#)

3K views 8 replies 9 participants last post by Phalanx Aug 6, 2018

**[Redacted]** Discussion starter  
[Redacted] - Joined 2011

#1 · Aug 4, 2018

I had the dealer replace evap purge valve because of P0442, P0496 codes.

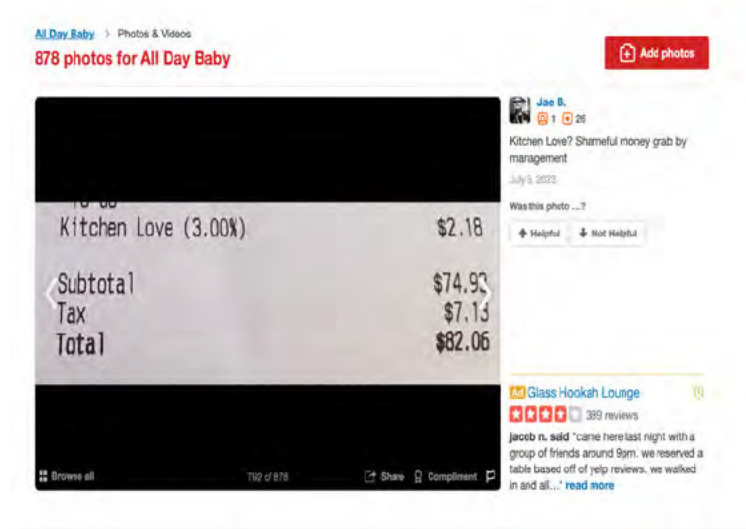
Bill comes with a "Haz Environmental Service Fee " attached for \$14.97. Of course service was closed by the time I could pick up the vehicle to dispute.

Was never told of the fee on the phone when I was quoted my service bill. I'm none too happy.

[Redacted]

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## 8. Restaurant and Retail Tipping Charges

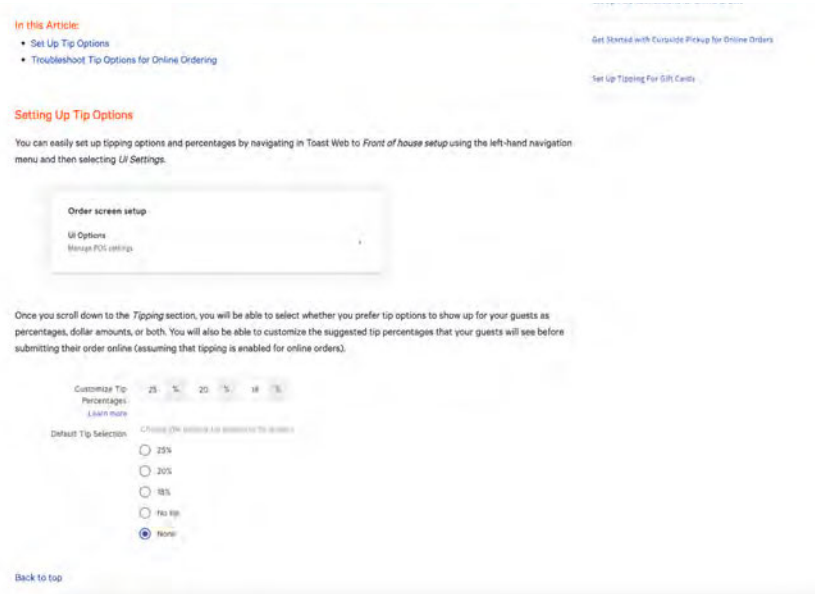


Screenshots of receipts with ambiguous and vague “Healthy LA”<sup>18</sup> and “Kitchen Love”<sup>19</sup> surcharge.<sup>20</sup>

<sup>18</sup> Photograph of Guest Receipt from Agnes, Imgur, available at <https://imgur.com/HPmdPhd> (last viewed December 28, 2023).

<sup>19</sup> Photograph of Guest Receipt from All Day Baby, Yelp, available at [https://www.yelp.com/biz\\_photos/all-day-baby-los-angeles-4?select=ZKHm5drCib43LUB2NkC7Q&utm\\_content=photo&utm\\_source=oshare](https://www.yelp.com/biz_photos/all-day-baby-los-angeles-4?select=ZKHm5drCib43LUB2NkC7Q&utm_content=photo&utm_source=oshare) (last viewed December 28, 2023).

<sup>20</sup> List of Los Angeles Restaurants with Surcharges, Google Sheets, available at [https://docs.google.com/spreadsheets/d/1EEPzeytrva770H2xPFFPDUUNdpnL\\_VQL4vzbFph-jus/edit#gid=0](https://docs.google.com/spreadsheets/d/1EEPzeytrva770H2xPFFPDUUNdpnL_VQL4vzbFph-jus/edit#gid=0) (last viewed December 28, 2023); Redditors Compile List of Restaurants with Added Fees, Los Angeles Times, August 14, 2023, available at <https://www.latimes.com/business/story/2023-08-14/la-redditors-compile-list-of-restaurants-with-added-fees> (last viewed December 28, 2023); Reddit Users Are Tracking Which Los Angeles Restaurants Are Adding Sneaky Service Charges, KTLA, available at <https://ktla.com/news/local-news/reddit-users-are-tracking-which-los-angeles-restaurants-are-adding-sneaky-service-charges/> (last viewed December 28, 2023).



A screenshot from Toast’s website explaining how merchants can set up the user interface to display preselected default tips on digital point of sale systems.<sup>21</sup>



An example of what the POS interface looks like to a consumer when the merchant has preselected a default tip.<sup>22</sup>

<sup>21</sup> *Setting Up & Troubleshooting Tip Options for Online Ordering*, Toast Central, <https://central.toasttab.com/s/article/Setting-Up-Troubleshooting-Tip-Options-for-Online-Ordering> (last viewed December 28, 2023).

<sup>22</sup> *Receipts Display Suggested Tip Amounts*, Toast Central, available at <https://central.toasttab.com/s/article/Receipts-Display-Suggested-Tip-Amounts> (last viewed December 28, 2023).



### Bullcity restaurants charging hidden fees?

I recently ate at Rose's Noodles, Dumplings & Sweets and was surprised by my bill. When I looked at my receipt later I noticed a 4% "Happy Workplace" fee and felt that that was very underhanded. The fee also wasn't advertised anywhere. Why not just increase the prices of their goods instead? I'm tipping on my meal and this is adding an additional 4% to that tip!

That being said I have seen posts in other groups regarding restaurants adding fees like this. I was wondering if y'all have noticed any other restaurants in the area/the triangle adding hidden fees like this?

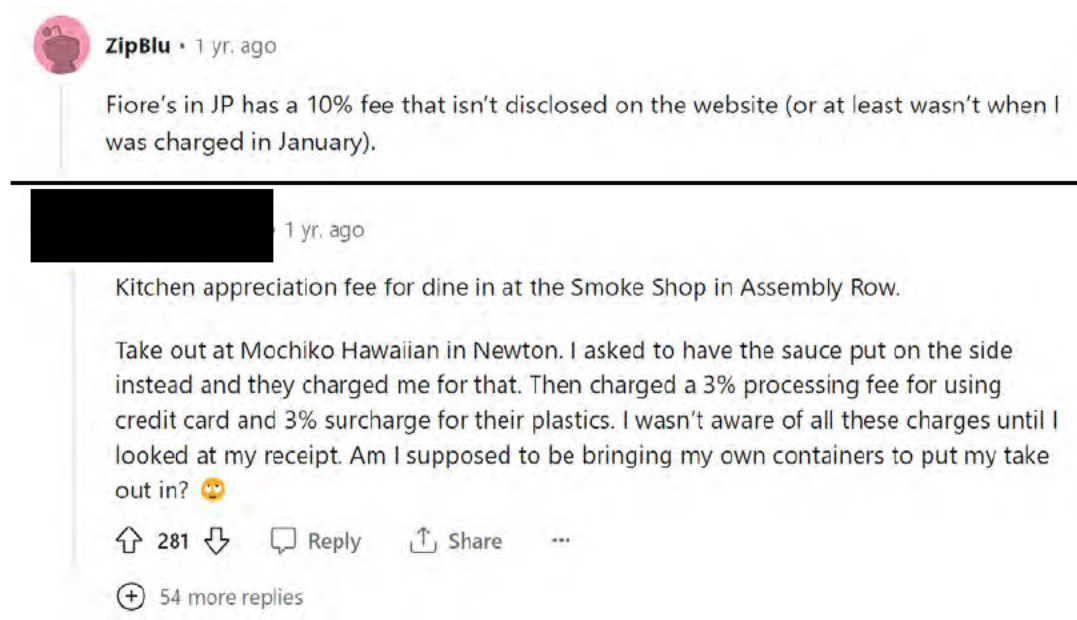
73 117 Share

A screenshot of a post by a Reddit user<sup>23</sup> shows that a restaurant in Durham, NC, Rose's Noodles, Dumplings & Sweets, that charges a "Happy Workplace" fee that the consumer expressed was "underhanded" and "wasn't advertised anywhere." This misleading fee would disproportionately affect low-income consumers, as it is an additional charge from the sticker price + the tip, which typically consumers are not aware of.



These receipts from restaurants in Oakland, California, both charged the customer unexplained "Operations Fees" of 4% at the very end of the bill.

<sup>23</sup> Durham, NC Restaurant "Happy Workplace" Fee  
[https://www.reddit.com/r/bullcity/comments/14jkgvi/bullcity\\_restaurants\\_charging\\_hidden\\_fees/](https://www.reddit.com/r/bullcity/comments/14jkgvi/bullcity_restaurants_charging_hidden_fees/) (Last viewed January 5th, 2024).



These two screenshots above are from a Reddit page asking about “kitchen fees” for an article in the *Boston Globe*.<sup>24</sup> One consumer writes that Fiore’s charged a 10% fee that was not disclosed on their website, and another talks about an extra fee for using plastics which they were not aware of. Both of these fees would disproportionately harm low-income consumers, as they are extra fees that are uncommon and that they did not expect to pay.

<sup>24</sup> Boston Restaurant Fees [https://www.reddit.com/r/boston/comments/1127ijp/kitchen\\_fees/](https://www.reddit.com/r/boston/comments/1127ijp/kitchen_fees/) (Last viewed January 5th, 2024).