



Pricing in the Cost of Compliance

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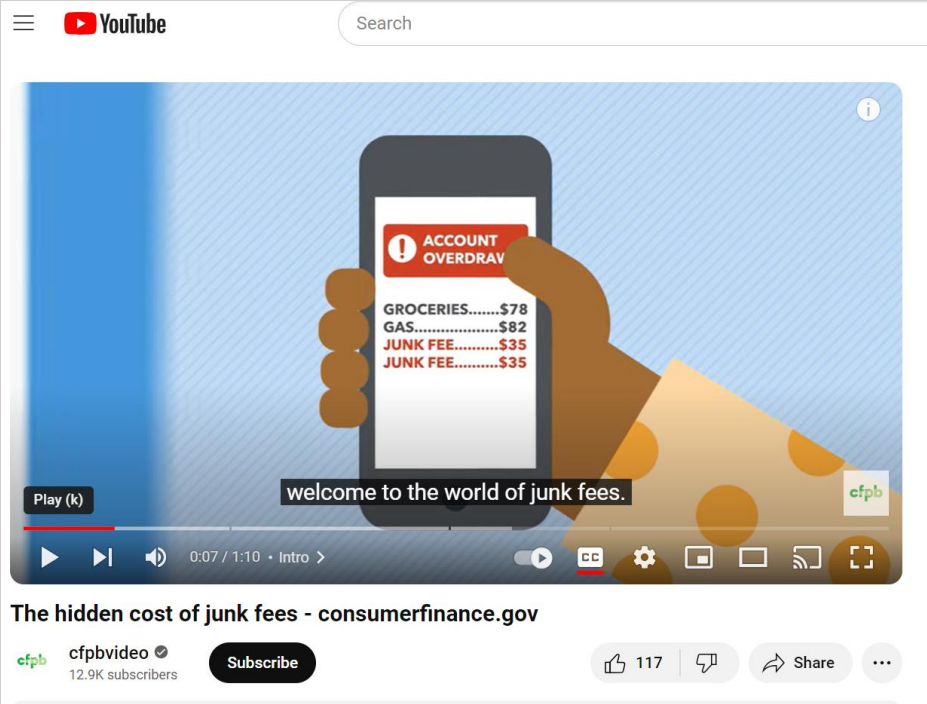
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Agenda

1. Introduction
2. FTC Rule on Unfair or Deceptive Fees
3. CFPB New Rules
4. State Laws
5. Surcharging, Service Fees, and Convenience Fees
6. Best Compliance Practices



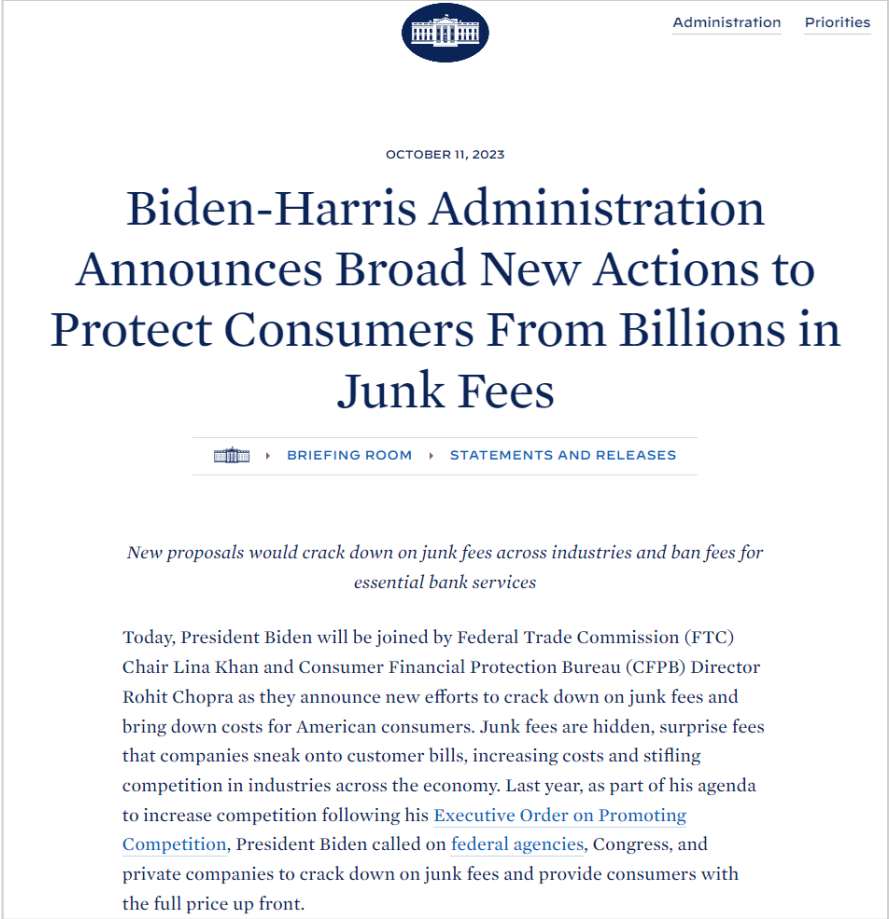
The War on “Junk Fees”



The video player shows a hand holding a smartphone displaying a bank statement with the following items:

ACCOUNT OVERDRAV	
GROCERIES.....	\$78
GAS.....	\$82
JUNK FEE.....	\$35
JUNK FEE.....	\$35

Below the video, the title reads "The hidden cost of junk fees - consumerfinance.gov". The channel is "cfpbvideo" with 12.9K subscribers. The video has 117 likes and a share button.



Biden-Harris Administration
Announces Broad New Actions to
Protect Consumers From Billions in
Junk Fees

OCTOBER 11, 2023

Administration | Priorities

BRIEFING ROOM | STATEMENTS AND RELEASES

New proposals would crack down on junk fees across industries and ban fees for essential bank services

Today, President Biden will be joined by Federal Trade Commission (FTC) Chair Lina Khan and Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra as they announce new efforts to crack down on junk fees and bring down costs for American consumers. Junk fees are hidden, surprise fees that companies sneak onto customer bills, increasing costs and stifling competition in industries across the economy. Last year, as part of his agenda to increase competition following his [Executive Order on Promoting Competition](#), President Biden called on federal agencies, Congress, and private companies to crack down on junk fees and provide consumers with the full price up front.

FTC Rule on Unfair or Deceptive Fees

16 CFR 464

“Junk” Fees and Drip Pricing

- Regulators refer to “junk” fees as fees that are unnecessary, unavoidable, or surprise charges that inflate prices while adding little to no value
 - “Not all fees that consumers are charged are junk fees; some are legitimate fees for additional products or services that consumers value.” – White House, *How Junk Fees Distort Competition* (2022)
- Drip pricing refers to the practice where businesses advertise only part of a product’s price and reveal other charges later as the customer goes through the buying process
 - The additional charges can be mandatory charges, such as hotel resort fees or fees for optional upgrades and add-ons
 - One study found that consumers are likely to spend 14 percent more when drip pricing is utilized rather than all-inclusive pricing

FTC Rule on Unfair or Deceptive Fees

- In November 2023, the FTC released its Proposed Rule targeting what it calls unfair and deceptive fees. The Proposed Rule would cover any business selling in physical locations and online. There is one exception for motor vehicle dealers, which is addressed in the CARS Rule (addressed later)
- The Proposed Rule would apply to businesses regardless of whether they are providing the goods or services themselves (e.g., an online travel agent advertising for a hotel chain)
- The FTC broadly identified two practices that it intends to regulate: (1) omitting mandatory charges and fees from advertised prices; and (2) misrepresenting the nature and purpose of the charges or fees
- Comment period closed February 7, 2024

Two Prongs: Hidden and Misleading Fees

- **Hidden Fees Prohibited**

- a) It is an unfair and deceptive practice and a violation of this part for any Business to offer, display, or advertise an amount a consumer may pay without Clearly and Conspicuously disclosing the Total Price.
- b) In any offer, display, or advertisement that contains an amount a consumer may pay, a Business must display the Total Price more prominently than any other Pricing Information.

- **Misleading Fees Prohibited**

- a) It is an unfair and deceptive practice and a violation of this part for any Business to misrepresent the nature and purpose of any amount a consumer may pay, including the refundability of such fees and the identity of any good or service for which fees are charged.
- b) A Business must disclose Clearly and Conspicuously before the consumer consents to pay the nature and purpose of any amount a consumer may pay that is excluded from the Total Price, including the refundability of such fees and the identity of any good or service for which fees are charged.

Disclosing the “Total Price” for Goods and Services

- Under the Proposed Rule, businesses would be required to disclose the “**Total Price**” Clearly and Conspicuously (i.e., it must be difficult to miss and easily noticeable) in any offer, display, or advertisement. The Total Price must be disclosed more prominently than any other pricing information
- The “Total Price” is the **maximum total** of all fees or charges a consumer must pay for a good or service and any **mandatory Ancillary Good or Service**
 - Except where **Shipping Charges** and **Government Charges** may be excluded



Disclosing the “Total Price” for Goods and Services - cont.

Included in the Total Price

- **“Mandatory Ancillary Goods or Services”**
 - Any additional good(s) or service(s) offered to a consumer as part of the same transaction that a consumer **cannot avoid paying** at the completion of the transaction
- **“Maximum Total”**
 - Allows businesses to apply discounts and rebates after disclosing the Total Price

Excluded from the Total Price

- **“Optional Ancillary Goods or Services”**
 - Any additional good(s) or service(s) offered to a consumer as part of the same transaction that a consumer **has the option to purchase** at the completion of the transaction
- **Shipping Charges**
 - Fees or charges that reasonably reflect the amount a Business incurs to send physical goods to a consumer through the mail, including private mail services
- **Government Charges**
 - All fees or charges imposed on consumers by a federal, state, or local government agency, unit, or department

Government and Shipping Charges

Government Charges

- Covers only fees or charges imposed by the government on consumers and does not encompass fees or charges that the government imposes on a business and that the business chooses to pass on to consumers

Shipping Charges

- Does not include delivery through couriers, such as those in mobile delivery applications. Included shipping charges are limited to the amount that reasonably reflects what a Business incurs to send goods

Optional vs. Mandatory Ancillary Goods and Services

Optional

- If a hotel offers a consumer the option to purchase or decline trip insurance with a room reservation
- A car rental service offers the option to add baby seats, satellite radio, or navigation systems
- Tipping or gratuity

Mandatory

- A housing rental agreement includes a fee that the consumer cannot reasonably avoid for a trash valet service
- A “processing” or “service” fee charged by a concert venue in order to complete the transaction
- A telecommunications company charging mandatory licensing fees

Disclosing the “Nature and Purpose” of Charges and Fees

- When listing any charges or fees, a business would be prohibited from categorizing different charges or fees under the same label **if they serve distinctly different purposes**
- Relatedly, the FTC addressed several comments that complained of the use of labels such as “convenience fees,” “improvement fees,” and “economic impact fees,” which are often used as **catchall terms for multiple fees**
- Example: A meal delivery application could not charge both a fee to compensate its drivers and a fee to run the service under the same label or line item and instead must list the two fees separately
 - The same business must also disclose the allocation of fees, for example, if a portion of an additional gratuity is used to offset the driver’s wages or benefits. If any charges or fees are refundable, that information must also be disclosed

FTC CARS Rule

- Applies generally to car dealerships
- Mandates certain disclosures relating to pricing, add-ons, and fees
 - Clear and conspicuous
- Forbids add-on charges without the consumer's express, informed consent
- Prohibits certain misrepresentations as unfair and deceptive practices
 - Advertising and marketing
 - Pricing, payment, and financing
 - Consumer reviews, affiliation, and sweepstakes
- Recordkeeping requirements



Consumer Financial Protection Bureau

Overdraft Loans, NSF Fees, and Credit Card Late Fees

CFPB Overdraft Loans Proposed Rule

Who Does it Cover?

- Applies to insured financial institutions with more than \$10 billion in assets, which covers approximately the 175 largest depository institutions in the country

What Does the Proposed Rule Regulate?

- An overdraft loan allows access to a small amount of money to help cover an overdraw on a consumer's account
- Would close a loophole that exempts overdraft lending services from long-standing provisions of the Truth in Lending Act and other consumer financial protection laws
 - For example, financial institutions would be required to disclose interest rates and fees on overdraft loans
- The CFPB expects the Proposed Rule would become effective October 1, 2025

CFPB NSF Fee Proposed Rule

Who Does It Cover?

- Applies directly to “very large financial institutions,” defined as insured depository institutions or insured credit unions that have total assets of more than \$10 billion, and their affiliates, which is any person controlled by or under common control of the insured depository institution

What Fees are Regulated?

- Regulates how financial institutions may charge the consumer an insufficient funds fee (sometimes referred to as an “NSF fee”)
 - An NSF is a charge assessed by a financial institution for declining a consumer’s attempt to withdraw, debit, pay, or transfer funds from their account due to insufficient funds
- The Proposed Rule focuses on transactions that are instantaneously declined
 - Such fees include declined debit card purchases and ATM withdrawals, as well as some declined peer-to-peer payments (as opposed to when an ACH or check is declined)
- Would not apply to overdraft fees that may also be charged when a consumer’s account has insufficient funds, but where the transaction is not declined by the financial institution

CFPB Bans Excessive Credit Card Late Fees, Lowers Typical Fee from \$32 to \$8

Final rule closes 2010 loophole exploited by credit card giants

MAR 05, 2024

- The Final Rule applies to the largest credit card issuers, those with more than 1 million open accounts. These companies account for more than 95% of total outstanding credit card balances
- Original immunity provision allowed card companies to charge a \$25 fee, adjusted for inflation
- New Rule sets immunity level at \$8
- Automatic annual inflation adjustment for the \$8 late fee threshold eliminated
- Larger card issuers will be able to charge fees above the threshold, so long as they can prove the higher fee is necessary to cover their actual collection costs

State Fee Disclosure Laws

California, Massachusetts, New York, Pennsylvania

California Law Targeting Drip Pricing - SB 478

- Effective July 1, 2024
- Amends the California Consumers Legal Remedies Act (CLRA) to generally prohibit “junk fees” and “drip pricing” by making “unlawful advertising, displaying, or offering a price for a good or service that does not include all mandatory fees or charges other than taxes or fees imposed by a government on the transaction”
- Penalties include actual damages of at least \$1,000 per violation, an order enjoining the violative business practice, restitution, punitive damages, and attorney fees



New York SB 9461 – Ticket Sellers

- New York Arts and Cultural Affairs Law § 25.07(4)
- Requires ticket sellers, resellers, online ticket platforms, and entertainment venues that facilitate the sale of tickets to disclose the total cost of a ticket, including all fees that must be paid to purchase the ticket
- Total cost to purchase must be displayed in the ticket listing prior to the ticket being selected for purchase
 - Disclosure of the total price only in the final steps of the checkout process will not be sufficient under the new law
- Ticket sellers must also clearly and conspicuously state how much of the ticket price represents a service charge or other fee
- No exception for dynamically priced tickets



Cammayo v. 1AND8 Inc. (S.D.N.Y 2024)

Allegations

- Total Price was not disclosed throughout the checkout process
- Fees only “flashed” after a museum-goer selects her ticket, and if and only if a museum-goer clicks the question mark icon next to “Taxes & Fees”

Order Summary

The screenshot shows a checkout page titled "3 CHECKOUT" powered by Peek.com. The user is Jane Doe, with email janedoe@gmail.com and phone +1 800-555-5555. The order summary includes:

Item	Amount
Ticket	\$42.00
Taxes	\$3.73
Service Fee	\$9.50
Total	\$55.23

Below the summary, there is a "CVC" field with a red arrow pointing to it. The ticket details are: NYC General Admission: Available starting from January 18th. Ticket prices may vary based on demand and availability. Wednesday, Jan 24th - 4:00PM - 5:00PM. 1x General Admission \$42.00. A "Change information" link is at the bottom.

Other States Considering Fee Disclosure Action

Massachusetts - Proposed Regulations 940 C.M.R. 38.00: Unfair And Deceptive Fees

- Would prohibit “misrepresenting or failing to disclose Clearly and Conspicuously, at the time of the initial presentation of the price of any Product, or any subsequent presentation thereafter, the Total Price of that Product; and
- Misrepresenting or failing to disclose Clearly and Conspicuously, at the time of the initial presentation of the price of any Product, or any subsequent presentation thereafter”

Pennsylvania - Pay the Price You See Act, House Bill 636.

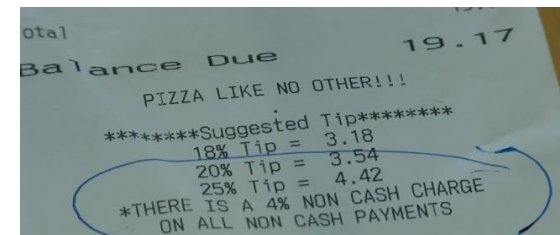
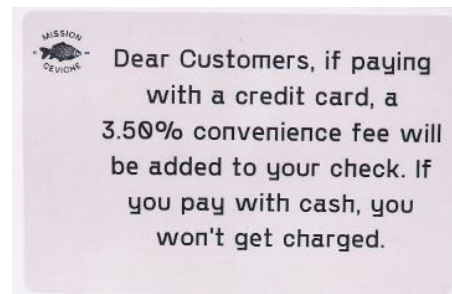
- Would prohibit any “advertising, displaying or offering a price . . . that does not clearly and conspicuously display the total price at the point in the shopping experience when the consumer is first shown the product or service, including each mandatory fee or charge that does not vary by consumer choice, or that does not clearly or conspicuously display each mandatory fee or charge associated with the sale of the product or service prior to purchase, except for taxes imposed by a government entity.”



Surcharging, Service Charges, and Convenience Fees

What Is a Surcharge?

Surcharge – A fee added to a transaction for the acceptance of payment by credit card (not allowed for debit card). A surcharge is generally defined to mean any increase in the price or cost of goods or services that is imposed on a customer paying by credit card that is not imposed on a customer paying by cash, check, or other means



Card Brand Rules for Surcharging

(Visa, Mastercard)

- Merchant must notify the card brands and its processor of an intent to surcharge at least 30 days prior to imposing any surcharging (For Visa, need only notify the acquiring bank / processor)
- May only impose the surcharge if permitted to do so by all other payment networks whose cards the merchant accepts
- Surcharge can be fixed or variable (e.g., percentage-based)
- Merchants must include disclosures at points of entry and sale (first web page that references cards brands accepted and checkout page):
 - Exact amount or percentage of surcharge
 - A statement that the surcharge is being imposed by the merchant and is applicable only to credit card payments
 - A statement that the surcharge is not greater than the amount paid by the merchant to process the transaction
- Max surcharge: 3% (Visa) or 4% (Mastercard)
- The surcharge must be included in the transaction amount and identified within the transaction data

Federal and State Law

- Federal law does not prohibit surcharging
- Surcharging by sellers not permitted in Connecticut, Maine, Massachusetts, Puerto Rico
- Surcharging is allowed in most, but not all, states because either:
 - The state law does not prohibit surcharging or
 - The state's surcharge prohibitions were found to be an unconstitutional restriction on speech
- Surcharging is risky in some states unless done in accordance with the state's or the prevailing court's interpretation of what is permissible

New York Surcharge Law

- Effective February 2024
- Any seller imposing a surcharge must “clearly and conspicuously post the total price for using a credit card in such transaction, inclusive of [the] surcharge[.]”
- Any such surcharge may not exceed the amount of the surcharge charged to the business by the credit card company for such credit card use
- Does not prohibit merchants from offering a two-tier pricing system, which is defined as the posting of two different prices in which the credit card price, inclusive of any surcharge, is posted alongside the cash price



Other State Law Restrictions (Examples)

State	Summary
California, Kansas, Texas, Oklahoma (via AG opinion)	Surcharging permitted with single-sticker pricing disclosure (e.g., “\$10 + 3% for credit card” or “10 + \$.30 for credit card”)
Colorado	Allows surcharges of either 2% of transaction value or the actual amount the merchant pays to the payment processor; must post notice with specific language
New Jersey	Surcharges capped at actual cost to seller to process the credit card payment; imposes disclosure requirements (e.g., for website, must be disclosed on checkout page)
Massachusetts	Surcharging by merchants is prohibited, but third-party payment processors may impose a surcharge, subject to requirements
Minnesota	Surcharges capped at 5%, and disclosure requirements apply

Service Fees, Processing Fees, Convenience Fees, etc.

- **Visa and Mastercard Recognize Two Other Types of Fees:**
 - **Convenience Fee** – A fee added to a transaction that is charged for a bona fide convenience to the cardholder (e.g., an alternative channel outside the merchant’s customary payment channel) that is not charged solely for the acceptance of a credit card
 - **Service Fee** – A separate fee (i.e., not included in a single transaction) assessed to a cardholder that uses a credit card for transactions in certain permitted merchant categories
- In reality, merchants add a variety of fees – processing fee, service charge, convenience fee, transaction fee, etc. – to their transactions to help cover transaction processing costs, add profit, and other reasons.
 - **Clear and conspicuous disclosure is key**

Best Compliance Practices

Compliance Tips

- Monitor federal and state laws governing disclosures to ensure compliance and be aware of the patchwork of legislation, rules, and regulations
- Assess your company's fee structure and how and when it is disclosed to consumers to avoid unnecessary regulatory risk
- Review company advertising, including third-party advertisers
- Review training, compliance, and recordkeeping systems
- Track litigation that might alter the effective dates or how courts interpret the governing laws and regulations

Questions? Contact Us!



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