



Price Advertising in an Era of Increasing Complexity and Increasing Scrutiny

What Sellers Need to Know to Avoid Pricing Pitfalls



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Melissa Steinman focuses on advertising and marketing, promotions, consumer protection, antitrust, trade regulation, and consumer product safety. In addition to counseling and compliance, she also actively represents clients in government investigations and defends clients against class actions. Melissa represents a broad array of clients, including consumer products and hospitality brands, media and tech companies, retailers, gaming and software companies, start-ups, celebrities, producers, charities, and trade associations. She is particularly well known for her deep knowledge of promotions law, including sweepstakes, contests, gift cards, loyalty programs, and charitable promotions, and she speaks and writes frequently on the topic in the United States and internationally.



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Ryan Lapine is an accomplished litigator with a demonstrated history of first-chair trial success in complex federal and state court matters. Clients call on Ryan to handle their most complex, high-stakes disputes, regardless of subject matter. He has significant experience in insurance recovery, intellectual property, trust and estate, and complex business disputes, with a thorough understanding of entertainment, cryptocurrency, and cannabis industry issues.

Agenda

1. Introduction
2. FTC and State Deceptive Pricing Laws
3. Comparison Pricing
4. Dynamic, Algorithmic Pricing
5. Drip Pricing and “Junk” Fees
6. Best Practices for Sellers



Introduction

- Retailers today have grown increasingly sophisticated in how they collect and use sales data and price their merchandise to optimize sales, revenue, and profits
- Many retailers now use systems that automatically price their goods and services based on various factors, allowing them to respond to data inputs in real time
- But federal and state laws may restrict or even prohibit such uses, and there has been increasing enforcement and litigation in this area
- As retailers battle for consumers' attention and wallets, they will need to be mindful of potential pitfalls that can occur without oversight and compliance measures

Federal and State Deceptive Pricing Laws

- The Federal Trade Commission (FTC), Better Business Bureau (BBB)/National Advertising Division (NAD), and the states have various laws, regulations, and guidance relating to the advertising of price and savings claims
- For example, these laws and regulations govern:
 - Savings and low-price claims
 - “Free” goods and gift advertising; Two For One and “Buy One Get One Free” offers
 - Coupons and rebates
 - Reference Price Advertising
 - Former or Regular Price Advertising
 - Future price advertising (introductory offers)
 - Comparisons to competitors’ prices



Disclosures and Savings Claims

- An advertisement must clearly and conspicuously disclose the basis of any comparison that is being used, as well as any material terms and restrictions on an offer
- Any comparative price must not appreciably exceed the price at which substantial sales of identical (or substantially similar) products or services have been made in the trade area for which the claim is made for a reasonably substantial period of time, in the recent, regular course of business
- Where a savings claim (for example, “save up to 40%”) covers a group of items with a range of savings, the top and bottom of the range must be disclosed (in equal prominence), and the number of items available at the maximum savings must constitute a significant percentage – generally 10%–of all the items in the offering
 - The extent to which an offer is limited in time, eligibility, etc. must be disclosed.
 - Avoid “perpetual sales prices” that could negate the validity of a “former price,” and confirm that “list prices” or “original prices” are valid

Free Gifts, Coupons, and Rebates

- Free Gifts
 - 16 CFR 251: FTC Guides Concerning the Use of the Word “Free” and Similar Representations
 - Any conditions on “free” offers/merchandise must be clearly and conspicuously disclosed
 - It is only a “gift” when it is truly free – and it’s not free if the regular price (i.e., the price at which significant sales or bona fide offers were made for the period immediately preceding the sale) is raised, or if quality or quantity is diminished
 - Duration of offer must be time limited, and should not occur more than 6 months out of a 12-month period; 30 days should elapse between offers
- Coupons: Be cognizant of line between coupons and gift cards; watch for trading stamp laws.
- Rebates:
 - CT and RI require instant rebate if price net of rebate is advertised, and NY requires that intermediate price be advertised as well as net
- ME requires that rebate forms be available onsite



Vizcarra v. Michaels Stores, Inc. (N.D. Cal. 2024)

NY AG v. Michaels (2011): Retailer agreed to a \$1.8 million settlement with New York’s Attorney General, over its 50% off framing coupons that were advertised as a sale product for at least 104 consecutive weeks

2023 Pricing Allegations:

- Involved Michaels’ in-store and sitewide discount code advertising in connection with its arts, crafts, and home décor products.
- The store’s entire inventory was alleged to be always 20% off the “regular” listed prices on their website for over two years.
- The wording of the 20% off sale was alleged to change from month to month, but the sale was alleged to remained.

Defense:

- Michaels argued, among other defenses, that the alleged advertisements could not be misleading because, while discounts may be available, that does not mean all consumers were aware or take advantage of them

Outcome: Court denied Michaels’ motion to dismiss; litigation ongoing



FTC – Guides Against Deceptive Pricing

16 CFR Part 233

The Federal Trade Commission (FTC) has issued Guides Against Deceptive Pricing that prohibit various types of deceptive reference price comparisons or offers when advertising, such as:

- Comparing the sale price to –
 1. Former price
 2. Competitors' price
 3. Suggested retail price
 4. Deceptive bargain offers
 5. Miscellaneous price comparisons



FTC – Former Pricing

16 CFR § 233.1.

- Prohibits using a “fictitious” former price
- Former prices are “bona fide” when they are:
 - Offered to the public
 - On a regular basis
 - For a reasonably substantial period of time
 - Honestly and in good faith



FTC – Competitor Pricing

16 CFR § 233.2

- Prohibits using a fictitious, higher competitor price for same product
- Requirements–
 - The price cannot “appreciably exceed” the competitors’ price
 - The price is based off:
 - Substantial sales of the product
 - The sales must be in the advertiser’s trade area
 - The price must also be reasonably certain
- It must be made clear when the competitor price includes similar or competing products



FTC – Suggested Retail Pricing

16 CFR § 233.3

- Prohibits using a fictitious “manufacturer’s list” price or “suggested retail” price (another term is “list price”)
- Requirements for non-deceptive use of MSRP or similar:
 - Must correspond to a price at which a substantial number of sales of the same product were made
 - The sales must be in the advertiser’s trade area
 - Price should be set in good faith
 - Recognition that it may be difficult to investigate a large trade area.
- Applies to:
 - National/regional manufacturers and distributors, including mail-order and catalog distributors
 - Local retailers
 - Local retailers should look to principal retail outlets pricing in their area for reference

FTC – Bargain Offers

16 CFR § 233.4

- Examples of bargain offers:
 - “Buy One – Get One Free,” “2-For-1 Sale,” “Half Price Sale,” “1¢ Sale,” “50% Off,” etc.
 - “Free gift” offers have specific rules under FTC Guide Concerning the Use of the Word Free and Similar Representations, 16 C.F.R. 451
 - Prohibits using bargain offers where:
 - The regular price of the product to be purchased is increased
 - The quantity of the product is decreased
 - The quality of the product is decreased
 - Other strings are attached (other than requiring purchase of the initial product)
- Requirement:
 - All terms and conditions of the offer must be clear at the outset

FTC – Other Miscellaneous Pricing

16 CFR § 233.5

- Prohibits:
 - Listing a “retail” price as the “wholesale” price
 - Listing a “factory” price, unless it is the price paid when the product was purchased directly from the manufacturer
 - Offering imperfect or irregular merchandise for a discount, without mentioning the higher comparative price is typical for perfect merchandise
 - Offering an advance sale (i.e., “price is going up next month”), unless offered with a good faith expectation of an incoming price increase
 - Making a “limited-time offer” without specifying time limit or even having one
 - Any similar variation of the deceptive practices that have been mentioned

State laws

Considerable variation in state/federal and state/state can lead to conflicts/violations

- **Georgia:**
 - Georgia Attorney General's Consumer Protection Division - "Unlawful activities that are prohibited by the Fair Business Practices Act include..." advertising an item for sale when that item "has been offered at that price **for the past month**"
- **Connecticut:**
 - Connecticut Regulation of Agencies (§ 42-110b-12a) - It is unfair or deceptive to make "any price comparison based upon a price...unless: (1) the price is a price at which such property or services were actually sold by the seller **in the last ninety days** immediately preceding the date on which the price comparison is stated in the advertisement" or advertisement discloses the time when such sales were made
- **Missouri:**
 - A seller shall not make a price comparison to a former price, unless it is actual, bona fide, and not illusory, and is a price at which reasonably substantial sales were made to the public by the seller in the regular course of business and on a regular basis in the immediate, recent period preceding the advertisement. **There shall be a rebuttable presumption that the seller has not complied unless it can show sales of ten percent (10%) or more of the total sales of the product not less than thirty days nor more than twelve months**

“Prevailing Market Price”

Cal. Bus. & Prof. Code § 17501:

- “For the purpose of this article the worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in the locality wherein the advertisement is published”
- “No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement”
- In other words, the retailer must ensure that the “original price” being referenced was the “prevailing market price” within the three months prior to the publication of the advertised price or some other disclosed period

California v. Overstock.com Inc. (Cal. 2014)

State Attorneys General Allegations:

- Violation of California’s False Advertising Law (FAL), Unfair Competition Law (UCL), and Consumer Legal Remedies Act (CLRA)
- Plaintiffs argued that they perceived each product’s “Compare” price as referring to the “prevailing market price” for an identical product
- These advertised referencing prices (ARPs) were either:
 - The highest prices Overstock employees could find from other retailers or
 - An arbitrary multiplier of Overstock’s wholesale cost

Outcome:

- The court imposed an injunction which:
 - Prohibited using the multiplier or highest price as the ARP without disclosure
 - Required a hyperlink defining any term used associated with an ARP
 - Required good faith effort in determining prevailing market price
 - Set 90-day limit on ARPs before needing to be validated as the posted price
- Overstock was fined \$6.8 million in civil penalties



Spann v. J.C. Penney Corp (C.D. Cal. 2015)

Pricing Allegations:

- JCP advertised discounts for its private and exclusive branded apparel and accessories. Plaintiff alleged that the product's "original" and "regular" prices were misleading because JCP hardly, if ever, offered, sold, or intended to sell its merchandise at those prices
- Internal documents showed 13 of over 1,000 items were never offered at the purported "regular" price

Outcome:

- J.C. Penney settled the class action for over \$50 million



Broomes v. FullBeauty Brands Operations, LLC **(N.D. Cal. 2024)**

Pricing Allegations:

- Eloquii's products were offered on the website at a sale or discounted price from a higher reference price. The products consist entirely or almost entirely of Eloquii's in-house branded clothing
- Those prices were alleged to be false, misleading, and inflated comparison reference prices to deceive customers into a belief that the sale price is a discounted bargain price.
- Because the reference price is an allegedly falsely inflated price because Defendant allegedly rarely, if ever, lists or sells items at the reference price, consumers are allegedly misled into thinking that they are receiving a substantial markdown or discount.

Outcome:

- Litigation ongoing

FULLBEAUTY BRANDS®

ELOQUII

Faux Leather Moto Jacket

~~\$149.95~~

40% OFF* with code: EQLONGWKND

\$89.97 with code

★★★★☆

Chester et al. v. The TJX Companies, Inc. (C.D. Cal. 2015)

Pricing Allegations:

- Price tags contained “T.J. Maxx” price and a significantly higher “Compare At” price
- T.J. Maxx website provided the following “Compare At” price explanation:
 - *The “compare at” price is our buying staff’s estimate of the regular, retail price at which a comparable item in finer catalogs, specialty or department stores may have been sold*
- Plaintiffs contend that they, like other reasonable consumers, did not interpret a “Compare At” reference price to be merely an estimate of what a “comparable” product “may” have sold for. Instead, they assumed that the “Compare At” tags list “prices at which the “principal retail outlets” in California have sold, or are selling, those products in any substantial volume



Outcome:

- T.J. Maxx settled for \$8.5 million

Horosny et al. v. Burlington Coat Factory of California LLC (C.D. Cal. 2015)



Pricing Allegations:

- Labeled products with “Our Low Price”
- Labeled alleged higher competitor prices as the “Compare” prices
- Other product labels listed a “retail,” “suggested retail,” or “MSRP” price
- Plaintiffs believed that the Compare prices “represented the prices that they would expect to pay for the same products at other retailers in their general area.”
 - But these prices were not representative of substantial sales of those product in the trade area



Outcome:

- Burlington settled for \$27.5 million

Missouri Merchandising Practices Act

Allegations:

- Plaintiff sought damages under the **Missouri Merchandising Practices Act** (MMPA), Mo. Rev. Stat. § 407.025, and alleged that Defendants did not sell a substantial quantity of products at the regular price for a substantial period of time prior to selling them at the sale price
 - The MMPA declares unlawful “[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce.”
 - For a private plaintiff to prevail they must show, among other things, that they suffered an **ascertainable loss**

Outcome:

- The court ruled that “[Plaintiff] alleged no facts supporting the claim of a higher represented value other than the false assertion that the advertised former price was in fact the represented value. . . she failed to allege ascertainable loss.”
- Under MMPA, an advertised prior comparison price does not create an ascertainable loss because **a plaintiff’s disappointment over not receiving an advertised discount at the time of purchase is not an ascertainable loss**

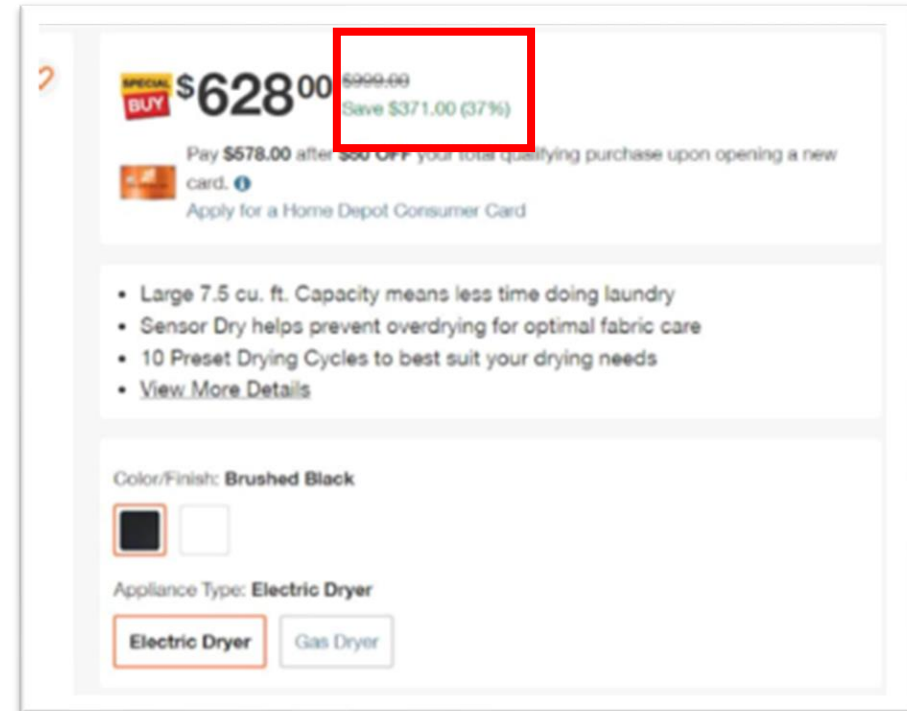
Berger et al. v. The Home Depot U.S.A., Inc. (N.D. Ga. 2024)

Pricing Allegations:

- Brought under **Georgia’s Fair Business Practices Act**, which prohibits “mak[ing] false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions.”
- Many products sold online were sold at an allegedly false “sales” price
- The original “strikethrough” price had not been offered for many of those products for at least three months, with some never being sold at the original price

Outcome:

- Litigation ongoing



Dynamic, Algorithmic, and Personalized Pricing

- Dynamic pricing, defined as fully or partially automated pricing changes based on shifts in demand, customer behavior patterns, and other factors, was already common prior to the pandemic
 - Following data about customer habits and preferences allows company selling the product to lower and increase prices in a way that helps them retain the margins that they need
- Currently under microscope by regulators as retailers increasingly turn to software to help determine what they charge consumers
 - One large e-commerce retailer, for example, [reportedly](#) changes the prices for millions of items every few minutes
 - It's also used by airlines, hotels, and ride-sharing platforms.
 - One estimate says 15%-20% of sellers are using it
 - Issues:
 - Practical: Consumers may take offense due to perceived or real discrimination
 - Legal: Potential violation of deceptive pricing/antitrust/privacy laws

Algorithms: Dynamic and Personalized Pricing

“Algorithms are the new frontier” – Department of Justice and Federal Trade Commission

Dynamic Pricing

- Where prices vary with market conditions (e.g., supply and demand)
 - Airline tickets, rideshare applications, hotels, event venues

Personalized Pricing – *Personalized Pricing in the Digital Era, OECD*

- Personalized pricing involves the use of data analytics to provide distinct prices to consumers based on personal characteristics and behaviors
- Online merchants can access web browsing habits and other data sources to glean the likely gender, income, and age of an individual, and offer a personalized price based on this information



Risks of Algorithmic Pricing

Risk of Price Discrimination

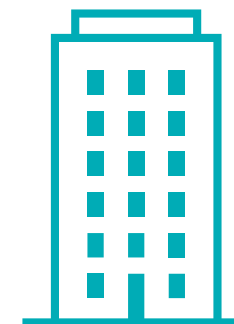
- Concern that if merchants personalize price based on factors such as race, religion, gender, or national origin, it could violate antidiscrimination laws

Risk of Price Fixing

- Concern about merchants “knowingly sharing their competitive information with, and then relying on pricing decisions from, a common human pricing agent who competitors know analyzes information from multiple competitors. **The same prohibition applies where. . .the common pricing agent is a common software algorithm.**” – Statement of Interest on behalf of the United States [DOJ and FTC] in *Cornish-Adebiyi v. Caesars Entertainment*, 1:23-CV-02536 (D.N.J. Mar. 28, 2024)
- This was an issue before algorithms, but interest has intensified

Hotel Chains Hit with Room Price-Fixing Suit

- Allegations state that plaintiffs paid higher prices for certain hotel rooms because of an agreement between the hotel chains to share competitively sensitive information about their prices, supply, and future plans through an intermediary
- “The agreement to regularly exchange detailed and non-public information about current supply and pricing suppressed competition between the defendants”
 - “The information exchanges allowed defendant hotel operators to compare their prices and occupancy with their competitors and to raise prices when they were lower than competitors”



FTC Subpoena Announcement and Industry Response

- On July 23, 2024, the FTC announced it sent subpoenas to eight “intermediaries” seeking information regarding surveillance pricing, using the Commission’s Section 6(b) authority to issue subpoenas to conduct market studies
- What information are they seeking?
 - The pricing products and services these companies offer;
 - The data these companies collect, including customer and sales information; and
 - How the data is used to target consumers, and how it impacts consumers and prices
- FTC Chair Lina Khan:

Americans deserve to know whether businesses are using detailed consumer data to deploy surveillance pricing, and the FTC’s inquiry will shed light on this shadowy ecosystem of pricing middlemen
- Subpoena recipients include: Mastercard; JPMorgan; Goldman Sachs Merchant Banking Division’s Revionics; Task Group Holdings Ltd.; PROS Holdings Inc.; Bloomreach Inc.; and McKinsey & Co
 - Intended to capture cross section of industries they work with: retail, hospitality, travel, finance, dollar-store chains, home goods, and quick-service restaurants



Be Mindful:

Intermediaries and sellers should be mindful of:

- Potential use of sensitive, third-party data without consent;
- Use of such data to collude to set prices using non-public information;
- Consulting with an intermediary that is collecting non-public information to inform pricing strategies;
- Use of data in a discriminatory manner, e.g., civil rights or Robinson-Patman Act, which FTC is trying to revive;
- Use of the data to create pricing strategies that otherwise violate pricing laws (e.g., reference pricing laws)

BUT, these risks aren't likely to include the use of price crawlers, tools that aggregate publicly available pricing information from retailers' websites

Minimum Advertised Price

Another issue with setting price—modern e-commerce sometimes results in a “rush to the bottom,” which manufacturers try to stop by setting the minimum price that can be charged by retailers

- While minimum resale price maintenance or vertical price agreements are now analyzed under the “rule of reason” (rather than being *per se* illegal) under federal and most state laws—which means the defendant usually wins—a few states still say it is illegal *per se* (e.g., Maryland)
- It may be possible to try a *Colgate* policy (announce and then don’t take complaints), but those are notoriously hard to enforce
- Instead, most manufacturers will use a MAP Policy and set the minimum *advertised* price
 - Still important not to take complaints, particularly if you are vertically integrated
 - Importance of written policies and communications
 - Online sellers in particular must watch for overbroad policies (e.g., see price in cast); consider whether you want a different online vs. B&M policy
 - Have a clear termination policy and follow-through
 - Have one clear point of contact

Item Pricing Laws and Deceptive Pricing

- Recent case brought against major national retailer where plaintiff alleged numerous small discrepancies between the prices advertised on retailer's shelves and the prices actually charged at the cash register violated deceptive pricing laws
- Such conduct is generally regulated under state item pricing laws as well
- Retailer argued that the price discrepancies were not material because the consumer could check their receipts which would show the price they paid
- The panel rejected that argument, stating that “merely providing a receipt is insufficient to dispel the deception created by inaccurate shelf prices”
 - “First, [the retailer] provides receipts to its customers only after their transactions have concluded[.]
 - Second, [the retailer's] and the district court's reasoning would require unreasonable efforts by consumers to protect themselves from the deception. . .”

The Seventh Circuit ultimately reversed the lower court ruling which had dismissed plaintiff's claim, stating, “Plaintiff plausibly alleges that the retailer's inaccurate shelf pricing is a deceptive act or practice within the meaning of the Illinois Consumer Fraud and Deceptive Business Practices Act”

The Algorithmic Arms Race....

The Seventh Circuit noted the following regarding the increasing trend of retailers to rely on data and algorithmic pricing:

“To maintain its profit margins in highly competitive retail markets, [retailer] compete in an “arms race” with other large retailers ... ‘to hire mathematicians and statisticians to analyze the results of instore experiments and to develop behavioral modeling algorithms from their troves of data.’”

- Van Loo, *Helping Buyers Beware*, 163 U. Pa. L. Rev. at 1331.



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 - 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

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
- 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

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 a ticket for \$42.00, taxes of \$3.73, and a service fee of \$9.50, totaling \$55.23. A red arrow points to the "Taxes & Fees" section, which has a question mark icon next to it. Below the summary, there is a "CVC" field and a "Change information" link.

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

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

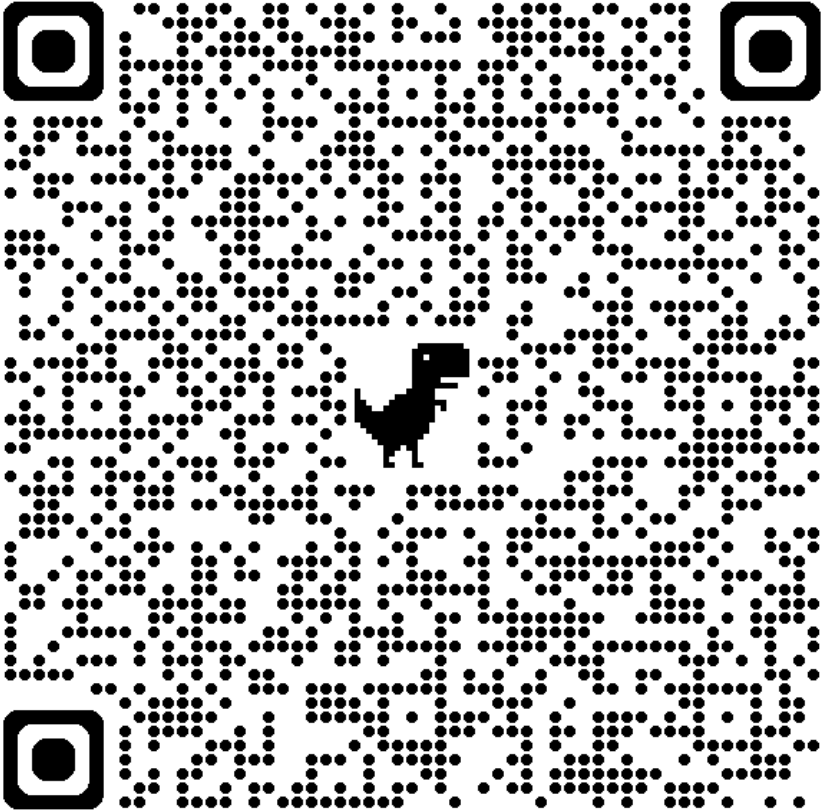
[← Change information](#)

Best Practices for Sellers

- Monitor federal and state laws governing disclosures to ensure compliance and be aware of the patchwork of legislation, rules, and regulations
- Offer discounts based off a product's usual selling price
- If offering a sale for a "limited time," make sure it truly is limited, that sale is at least 10% off of "regular" price, and there is a "regular" price to start with
- Keep records of previous sales that have been offered and review this before creating new sales.
- Since state laws may vary, advertisers should consider:
 - Creating a uniform sale that complies with all jurisdictional rules, or
 - Carefully enacting state-specific sales promotions that comply with the relevant rules
- 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

Scan For CLE Credit

The Codeword is “pitfalls2024.”





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