

# Retailers: Beware Legislator And Regulator Junk Fee Focus

By **Stephanie Sheridan, Meegan Brooks and Emily Jaye Johnson** (November 9, 2023)

For many months, President Joe Biden has been leading the so-called war on junk fees, a campaign to restrict surcharges spanning across industries — from airline seating upcharges, to hotel resort fees, to extra service charges tacked on to concert tickets.

Now, the president's focus on fees has led to a series of significant developments that stand to affect retailers across the country, including a new California law banning such surcharges, a proposed rule from the Federal Trade Commission, and the still-pending bill to enact a federal Junk Fees Prevention Act.

Below, we summarize what retailers need to know to stay ahead of this myriad of fee legislation.

## Biden's Comments

The Biden administration's efforts to end surprise fees are long-standing, yet have continued to evolve:

On July 9, 2021, Biden signed an executive order encouraging the Federal Communications Commission to improve price transparency. On Sept. 26, 2022, the president called out airlines and cellphone providers when speaking at the Meeting of the White House Competition Council.

In his State of the Union Address on Feb. 7, Biden announced the Junk Fee Prevention Act, a bill combatting credit card fees, concert ticket surcharges, and resort fees on hotel rooms, among other industries.

On June 15, Biden again called for transparent pricing on ticketing sites, capitalizing on the blowback from anti-competitive practices in the ticketing industry, following the Taylor Swift-Ticketmaster controversy.

Most recently, on Oct. 31, the Biden administration's latest effort to crack down on hidden surcharges targeted retirement plan providers, claiming that the industry's hidden costs of financial conflicts in retirement plans amount to junk fees.

While the Biden administration's focus began with select industries — such as online ticketing, banks and cable providers — it has since expanded.

Now, the administration has defined junk fees to include hidden costs in all industries. These fees allegedly harm consumers — and particularly, low-income consumers — by weakening market competition and making comparison shopping more difficult, thus purportedly resulting in Americans overpaying for various goods and services.

The Biden administration has not specifically called out retailers, which for years have been



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targeted for charging shipping and handling fees, and, amidst recent challenges, have imposed other fees, such as supply chain surcharges.

### **California's S.B. 478**

Likely in response to recent attention from the Biden administration, on Oct. 7, California became the first state to ban fees that are not disclosed until check-out.

Effective July 1, 2024, S.B. 478 amends the Consumers Legal Remedies Act by explicitly prohibiting companies from "advertising, displaying, or offering a price for a good or service that does not include all mandatory fees or charges."

The law does not prohibit retailers from charging "taxes and fees imposed by a government" or "reasonably and actually incurred" postage or shipping charges. However, to the extent retailers charge supply chain fees, service fees, employee health care surcharges or other related fees that are not disclosed until check-out, they may run afoul of this new prohibition.

S.B. 478's legislative history notes that although deceptive fees have always been prohibited under California law — likely referencing the Unfair Competition Law, which more generally prohibits any unfair or fraudulent conduct that causes economic injury to consumers — the amendment will alert consumers to the final price at the outset, lessening the potential of harm to consumers.

Notably, based on the plain language of the Consumer Legal Remedies Act, consumers still cannot bring claims unless they actually "suffer[ed] any damage as a result of" the alleged unlawful practice — here, the fees. Thus, plaintiffs should not be able to manufacture claims simply by paying alleged junk fees, where they understood the nature of the fee and agreed to pay it anyway in order to bring a lawsuit.

The CLRA provides for actual damages — with a \$1,000 minimum in class actions — injunctive relief, restitution and punitive damages. The CLRA also allows for an additional statutory award of up to \$5,000 to senior citizens or disabled persons where the trier of fact finds that:

- The consumer has suffered substantial physical, emotional or economic damage resulting from the defendant's conduct;
- One or more of the factors set forth in Section 3345(b) of the California Civil Code is present; and
- An additional award is appropriate.

Before pursuing damages, potential plaintiffs must provide a 30-day notice to the business of the alleged violation so that the business has an opportunity to provide the requested relief in advance of a suit.

### **The Federal Trade Commission's Proposed Measure**

On Oct. 11, just days after California enacted its law, the FTC announced a notice of proposed rulemaking on a trade regulation rule on unfair or deceptive fees — the Biden administration's highly anticipated effort to restrict junk fees at a federal level.

Similar to S.B. 478 in California, the proposed rule bars "[o]ffering, displaying, or advertising an amount a consumer may pay without adequate disclosure of the Total Price." Like the California rule, it has narrow carveouts for shipping charges and government charges like taxes, among other exclusions, such as for financial products where the total price cannot be feasibly determined.

The FTC's proposed rule would also impose several additional provisions:

1. First, it would prohibit "[m]isrepresentations regarding the nature and purpose of any amount a consumer may pay and requires disclosures of the nature and purpose of any amount a consumer may pay that is excluded from the Total Price. This includes disclosing the refundability of such fees, and the identity of any good or service for which fees are charged."
2. The proposed rule would also require affected businesses, including retailers, to display the total price more prominently than any other pricing information.
3. Finally, where a fee or surcharge is displayed, the disclosure must also specify the nature, purpose or amount of the respective fees.

Violators would be subject to penalties of up to \$50,120 per violation, which includes the FTC's ability to require companies to refund harmed consumers.

As part of its rulemaking process, the FTC has requested comments on the NPRM from the public and impacted industries. Comments may be submitted online or via mail and will be due 60 days from publication in the Federal Register, which is expected to occur in the coming weeks.

### **Other Developments: Federal Junk Fees Prevention Act and the Hotel Fees Transparency Act**

Congress is also taking action against fees, in the form of two proposed federal laws that, so far, have seen limited traction.

On April 4, Reps. Ruben Gallego, D-Ariz., and Jeff Jackson, D-N.C., introduced the Junk Fees Prevention Act. If passed, the bill would require the total prices of goods and services to be provided upfront and would eliminate allegedly excessive fees.

Per the statute, in evaluating whether a given mandatory fee is excessive, the FTC or court must consider: "(1) whether the fee is reasonable and proportional to the cost of the good or service provided; (2) the reason for [the] fee; and (3) any other factors determined appropriate by the FTC or the court."

The Junk Fee Prevention Act would also prohibit early termination and cancellation fees for internet service providers, as well as eliminating hidden fees by companies across industries. Although the bill specifically targets providers of short-term lodging and ticketing services, such as within entertainment, airlines, rental cars and hotel sectors, it is not specifically limited to these industries.

This bill would also apply to "any other entity determined appropriate by the [FTC]" and thus impact retailers that do not "clearly and conspicuously display ... the total price of the good or service provided by the covered entity."

While the draft legislation does not provide for a private right of action, it explicitly provides enforcement mechanisms for the FTC and state Attorneys General, including for injunctive relief and damages or restitution.

On July 26, Sens. Amy Klobuchar, D-Minn., and Jerry Moran, R-Kan., introduced the Hotel Fees Transparency Act. This bill, aimed directly at the lodging sector, would establish federal guidelines for pricing transparency by requiring hotels and rentals to always display the full fee-inclusive cost to customers. The bill would also put in place legislation for the FTC to track down violations and allow for civil actions.

The Junk Fees Prevention Act was referred to the House Subcommittee on Innovation, Data and Commerce on April 14, while the Hotel Fees Transparency Act was referred to the Committee on Commerce, Science, and Transportation on the same day that it was introduced.

### **The Litigation Landscape is Expected to Expand**

Fees have been a ripe area for litigation since well before the Biden administration took aim at this issue.

Over the past decade, dozens of retailers, restaurants, and hotels have been targeted by claims that they deceived consumers and acted unfairly by charging fees not disclosed until check-out — including supply chain fees, health care surcharges to cover employee benefits, and resort fees. These cases have had varying levels of success.

Recently, several major hotel operators such as Hilton, MGM Resorts International and Marriott International, have been hit with consumer class actions over junk fees, coming on the heels of some hotel operators reaching settlements with state attorneys general related to the hotel operators allegedly charging customers mandatory fees without initial disclosure with the advertised room rates.

By specifically prohibiting most fees not disclosed until check-out, the California law — as well as the proposed FTC Rule — delivers new fodder for potential litigants.

Although shipping fees are exempted under S.B. 478 and the FTC's proposed rule, retailers should review their shipping and handling fees to ensure they are actually reasonable and actually incurred. In a series of cases filed several years ago, plaintiffs specifically targeted retailers who charged flat-rate shipping, on behalf of customers that made very small and low-weight purchases.

For example, *Reider v. Electrolux* in the U.S. District Court for the Central District of California in 2017 involved a customer who paid a flat-rate \$7.99 shipping charge for a single vacuum cleaner bag, valued at \$1.99, even though other customers would pay the same rate for buying three vacuum cleaners.

The court in *Reider* ultimately granted the retailer's motion to dismiss, on the basis that the consumers saw the fees before placing their orders and thus agreed to pay that charge.

The FTC has also brought fee-related actions, even though its proposed rule has not been enacted.

On Oct. 30, the FTC announced it would be facilitating nearly \$100 million in refunds to

389,106 consumers who lost money as a result of internet phone service provider Vonage imposing junk fees, and creating obstacles to those who tried to cancel their service.

The FTC alleged that customers who were able to access the cancellation line were told they would have to pay an unexpected early termination fee that was not clearly disclosed when they signed up for Vonage service. In some cases, these fees were in the hundreds of dollars.

## **Conclusion**

The rapid developments in legislation aimed at transparency around fees at both the federal and state levels require businesses across all industries to assess their current advertising and marketing methods.

Eliminating misleading and hidden fees via junk fee legislation poses the potential for significant penalties for companies found not in compliance.

As is frequently the case in such areas, retailers and the hospitality industry will be easy targets for both government enforcers and the plaintiffs bar and businesses in such industries should make it a priority to ensure that their practices and disclosures are in line with all of the new legislation coming down the pike.

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