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Trade Regulation Rule on Unfair or Deceptive Fees

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Trade Regulation Rule on Unfair or Deceptive Fees

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Comment from High Road Restaurants (One Fair Wage subsidiary)

Submitter Information

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General Comment

See attached file(s)

Attachments

FTC Response

I am writing on behalf of [High Road Restaurants](#), a subsidiary of [One Fair Wage](#), and a community of restaurant owners who seek to eliminate the sub-minimum wage across the country, improving wages, benefits and equity across the hospitality industry. We conducted a [survey](#) of over 150 current owner/operators, who run mostly independent, full-service restaurants, to determine some of the potential impacts of this rule. The questions answered below are in accordance with this survey and the responses we received. If you'd like to discuss any of this in more detail, we'd love to schedule a follow up conversation.

(1) Should the Commission finalize the proposed rule as a final rule? Why or why not? How, if at all, should the Commission change the proposed rule in promulgating a final rule?

Regarding restaurant service charges, no, the commission should not finalize the proposed rule.

We acknowledge that there has been a great deal of consumer confusion around restaurant service charges, and that there is room for improvement in the disclosure and regulation of these charges, but the current rule would have severe unintended consequences on the industry, and more specifically, its employees.

Historically, the restaurant business model has been structured around the existence of a "tipped minimum wage," which continues to be only \$2.13/hour at the Federal level. The employees earning these wages have relied on tips to make up a bulk of their take home pay - and the practice of tipping varies widely from one restaurant, and restaurant employee, to the next. There have been numerous studies exposing the complications with this model, especially as it contributes to [racial](#) and [gender](#) wage gaps.

In a post-pandemic world, as our industry seeks to reconcile its labor shortage many operators have turned to service charges as a potential solution - often using these charges to guarantee a higher wage, pay stability, benefits and improved equity across all of their employees.

Of the 74 respondents who assess service charges, 68% said they used it to pay higher wages, 63% said it helped improve equity across their hourly employees, and 46% reported improving benefits. Less than 25% said they used the charge to help offset operating costs.

When asked what the potential long-term impact of this proposed rule might be on the hospitality industry, 66% of respondents said "lower wages and benefits" and 62% said "less equity."

We understand the intention of this proposed rule, but believe that efforts should be focused on the transparency and education of these charges, rather than their elimination. When asked whether or not they would be willing to adopt guidance similar to that [issued by the DC Attorney General](#), respondents overwhelmingly (73 of 74) said yes.

The independent restaurant industry has faced many setbacks in recent years, and many have attempted to adapt, re-imagine their business models, and build a better industry for all.

There is still much work to be done, but until the Federal minimum wage is raised (and the sub-minimum wage eliminated entirely) service charges are one of the few tools operators have available to improve the standards of our industry.

(2) Please provide comment, including relevant data, statistics, consumer complaint information, or any other evidence, on each different provision of the proposed rule. Regarding each provision, please include answers to the following questions:

(a) What is the provision's impact (including any benefits and costs), if any, on consumers, governments, and businesses, both those existing and those yet to be started?

Although there are certainly some implementation costs to consider, our bigger concern is the impact to the wages across employees - from one respondent:

"We would not be able to retain staff if service charges were banned. Service charges allow us to pay wages that are competitive with other industries. Without them, we would see many of our cooks moving away from restaurants and into different industries"

(b) What alternative provision(s) should the Commission consider?

We believe that there is room to regulate the disclosure language utilized for service charges, similar to [this guidance](#) provided by the Washington DC Attorney General.

There may also be space to consider a re-classification of service charges, under IRS tax code, to replicate the current classification of tips (only if/when service charges are 100% paid out to employees), but that would likely be beyond the scope of the FTC and require further inter-agency collaboration.

(3) Would the proposed rule, if promulgated, benefit consumers and competition? Provide all available data and evidence that supports your answer, such as empirical data, statistics, consumer-perception studies, and consumer complaints.

Part of the challenge with service charges is that only a minority of restaurants are currently implementing them - if they were absorbed into restaurant prices, it would be challenging for these restaurants to compete in their respective markets, and they would likely need to revert back to a traditional tipping model, paying the sub-minimum wage.

(4) What are the relevant sources of data that reflect the benefits to consumers and competition from the proposed rule, if promulgated? Provide all available data, statistics, and evidence.

N/A

(5) What are the relevant sources of data that reflect the average search time saved for consumers as a result of the proposed rule? Provide all available data, statistics, and evidence.

N/A

(6) What are the relevant sources of data that reflect the compliance costs that may apply to businesses from the proposed rule, if promulgated? Provide all available data, statistics, and evidence.

(a) What are the relevant sources of data that reflect the number of firms that will be affected by the proposed rule? Provide all available data, statistics, and evidence

(b) What are the relevant sources of data that reflect the number of lawyer hours a firm in each industry would need to review compliance with the rule? Provide all available data, statistics, and evidence.

(c) What are the relevant sources of data that reflect the number of data scientist hours a firm in each industry would need to comply with the proposed rule? Provide all available data, statistics, and evidence.

(d) What are the relevant sources of data that reflect the number of web developer hours a firm in each industry would need to comply with the proposed rule? Provide all available data, statistics, and evidence.

(e) What are the relevant sources of data that reflect other possible costs that have not already been considered that may apply to businesses, consumers, or workers from the proposed rule, if promulgated? Provide all available data, statistics, and evidence.

Of our respondents, nearly 90% claimed their staff is in support of these charges. We have not yet released a report that we are able to cite, but our survey indicates that these charges are often directly benefiting workers. So, their removal would cost workers in the form of reduced consistency and compensation.

(f) What are the relevant sources of data that reflect the number of firms in each industry that use third-party services to display pricing information that would reduce the costs of compliance? What are the relevant sources of data that reflect how much such services would cost in order to comply with the proposed rule? Provide all available data, statistics, and evidence.

(7) Would the proposed rule, if promulgated, have a significant economic impact on a substantial number of small entities? If so, how could it be modified to avoid a significant economic impact on a substantial number of small entities?

According to this survey, yes. 98% of our survey respondents are independent owners/operators, 61% with only 1 location, 35% with fewer than 5 locations. We do not have data to prove that publicly traded restaurant companies are less likely to adopt service charges, but anecdotally, that has been our finding - it is the small, independent restaurants who are leading the charge on improving wages and equity in the sector.

(8) How would the proposed rule, if promulgated, intersect with existing industry practices, norms, rules, laws, or regulations? Are there any existing laws or regulations that would affect or interfere with the implementation of the proposed rule?

The proposed rule would likely codify the practice of tipping - and the continued perpetuation of the sub-minimum wage, across the country.

This may have some unintended consequences on the consumer side as well - there have been many reports around “tipping fatigue” and “tip creep” - [this excerpt from the NY Times](#) describes the phenomenon: ‘On social media, there are complaints that “tipping culture has gotten out of control,” with consumers venting about being asked to leave a little extra in places they never did before.’

If we were to consider a wider, more far-reaching change to how service charges are assessed, distributed, and taxed, there may be another potential solution that would require some cross-department collaboration (if not the participation of the legislature). According to current tax code, service charges are considered restaurant revenue, which requires that sales tax be paid by consumers, and any of this charge that is then paid to workers is subject to payroll taxes, workers comp increases, and overtime pay increases (none of which are impacted when those payments are in the form of a tip). In other words, paying employees this way is actually quite expensive for the operator. One proposed solution, to help with transparency, and help ensure these charges end up in the hands of workers, would be to re-classify service charges under IRS tax code to be treated the same way tips are - if and only if they are distributed to their employees on top of a base wage (a base wage that is the full minimum wage, not the tipped wage - so, for example, at the federal level this would be \$7.25, not \$2.13). This would alleviate some of the tax burden on operators, help consumers identify these charges as a replacement for tipping, and ensure workers are paid better, more stable, more equitable wages. We know there’s a lot to unpack, so would be happy to discuss this idea in more detail.

(9) Is the proposed rule adequate to address the two practices identified as prevalent, misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees? Are there additional provisions necessary to prevent these practices in specific industries?

The existence of the tipping system and the tipped wage have long misrepresented the total costs of goods and services - this is not a new problem.

(10) Are the proposed definitions clear? Should any changes be made to any definitions? Are additional definitions needed?

N/A

(11) Should the scope of any of the proposed definitions be expanded or narrowed, and if so, how and why?

N/A

(12) Should the proposed definition for “Business” exclude certain businesses, and if so, why?

N/A

(13) The proposed definition for “Business” contains an exclusion for “motor vehicle dealers that must comply with 16 CFR 463, requiring motor vehicle dealers to disclose the full cash price for which a dealer will sell or finance the motor vehicle to any consumer, and prohibiting motor vehicle dealers from making misrepresentations.” Is this definition clear and understandable? Is this definition ambiguous in any way? How, if at all, should this definition be improved? This exception would only apply if the proposed Motor Vehicle Dealers Rule is finalized and in effect and not subsequently narrowed, altered, or otherwise not in effect. Is having such an exclusion appropriate?

N/A

(14) Should a new definition of “Covered Business” be added to narrow the Businesses covered by specific requirements of the rule, in particular the preventative requirements in Section 464.2(b)? If so, how should “Covered Businesses” be defined?

(a) Should the definition of “Covered Business” be limited to businesses in the live-event ticketing and/or short-term lodging industries? i. If so, how should Businesses in the live-event ticketing industry be defined? If they are defined as “any Business that makes live-event tickets available, directly or indirectly, to the general public,” is that definition clear and understandable? Is it ambiguous in any way? How, if at all, should that definition be improved? ii. If so, how should Businesses in the short-term lodging industry be defined? If they are defined as “any Business that makes temporary sleeping accommodations available, directly or indirectly, to the general public,” is that definition clear and understandable? Is it ambiguous in any way? How, if at all, should that definition be improved?

N/A

(b) Should the definition of “Covered Business” exclude small businesses? If so, how should “small businesses” be defined? i. If “Covered Business” is defined to “include all of the following: (1) any Business that does not satisfy both the Small Business Administration’s definition of a small business concern (13 CFR 121.105) and the Small Business Administration’s Table of Size Standards (13 CFR 121.201); (2) any Business, regardless of size, that offers goods or services in the live-event ticketing industry; and (3) any Business, regardless of size, that offers goods or services in the short-term accommodations industry,” is that definition clear and understandable? Is it ambiguous in any way? How, if at all, should that definition be improved? Are there industries other than live-event ticketing and short-term accommodations that should be subject to all the

proposed requirements of the rule, regardless of size? ii. What are the relevant sources of data that reflect the costs and benefits that the proposed rule would have on Covered Businesses if this definition is added to the proposed rule?

Although it's our belief that mostly small businesses are implementing service charges, we hope that eventually larger businesses will also shift their business models, to improve wages and benefits at scale.

(c) Should a definition of "Covered Business" exclude businesses to the extent that they offer or advertise credit, lease, or savings products, or to the extent that they extend credit or leases or provide savings products to consumers? In the alternative, should the definition exclude certain of these businesses or products from only certain provisions? If so, specifically, which businesses and products, which provisions of the proposed rule, and why and how, or why not?

N/A

(d) Should a definition for "Covered Business" be limited to businesses that offer goods or services online and in mobile applications? Why or why not? i. If so, how should such businesses be defined? 148 ii. What are the relevant sources of data that reflect the costs and benefits that the proposed rule would have on Covered Businesses if they are defined in this way? iii. What are the relevant sources of data that reflect differences in costs for online versus brick-and-mortar stores? Provide all available data, statistics, and evidence.

N/A

(15) Should a definition for "Covered Business" exclude limited-service and full-service restaurants that satisfy both the Small Business Administration's definition of a small business concern (13 CFR 121.105) and the Small Business Administration's Table of Size Standards (13 CFR 121.201)?

No, we believe that any rule regarding the regulation of these fees and pricing models, if adopted, should apply to all businesses, regardless of size. As mentioned in our previous answers, we would prefer adjustments to the rule, which would make adoption, implementation, and compliance easier for businesses of all sizes.

(16) Should the proposed definition for "Total Price" contain an exception for "mandatory charges by restaurants for service performed for the customer in lieu of tips, as defined by the Department of Labor (29 CFR 531.52)"?

There is likely some additional work and language that needs to be considered in order to make an exemption like this one, but we are in support of re-classifying the portion of mandatory service charges that are distributed directly to employees. There are also a handful of financial

implications to consider, including but not limited to: sales tax, payroll taxes, overtime calculation and workers compensation premiums.

(17) Does the proposed definition for “Total Price” provide sufficient clarity for industries that calculate charges based on increments of time? Why or why not?

N/A

(18) The proposed definition of Total Price allows Shipping Charges to be excluded. Shipping Charges are defined as “the 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” § 464.1(f). Is this provision clear and understandable? Is this provision ambiguous in any way? How, if at all, should this provision be improved?

a) Does the proposed definition of “Shipping Charges” effectively allow Businesses to pass along reasonable costs of shipping to consumers without permitting artificial inflation of such costs?

N/A

(b) How would this provision impact the assessment and calculation of shipping costs across industries, and in particular industries?

N/A

(c) What are the relevant sources of data that reflect the manner in which firms calculate shipping costs? Provide all available data, statistics, and evidence.

N/A

(19) Does the proposed definition of Total Price provide sufficient clarity for industries that “all fees or charges a consumer must pay for a good or service and any mandatory Ancillary Good or Service” includes (1) all fees or charges that are not reasonably avoidable and (2) all fees or charges for goods or services that a reasonable consumer would expect to be included with the purchase?

N/A

(20) Section 464.2(a) of the proposed rule states, “[i]t 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.” Is this prohibition clear and understandable? Is this prohibition ambiguous in any way? How, if at all, should this prohibition be improved?

N/A

(21) Section 464.2(b) of the proposed rule states, “[i]n 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.” Is this prohibition clear and understandable? Is this prohibition ambiguous in any way? How, if at all, should this prohibition be improved?

N/A

(22) Should the proposed rule address the itemization of fees and charges that make up the “Total Price?” If so, how should the proposed rule address itemization and why?

N/A

(23) By requiring mandatory fees to be included in the Total Price, does the requirement in 464.2(a) effectively eliminate fees that provide little or no value to the consumer in exchange for the charge? Why or why not? Are there any such fees that would not be eliminated by the proposed rule?

The assumption that restaurant service charges provide little or no value seems flawed. As mentioned in previous answers, there may be room to further guarantee that these charges are being communicated transparently, and distributed appropriately.

(24) Should the proposed rule explicitly prohibit fees that provide little or no value to the consumer in exchange for the charge? Why or why not? Should such a rule apply to optional fees? Why or why not? What should the Commission consider in determining if a fee provides little or no value to the consumer?

N/A

(25) Should the proposed rule prohibit fees that are excessive? Why or why not? How would such a rule define excessive fees?

N/A

(26) Section 464.3(a) of the proposed rule states, “[i]t 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.” Is this prohibition clear and understandable? Is this prohibition ambiguous in any way? How, if at all, should this prohibition be improved?

(a) Does Section 464.3(a)’s provision prohibiting misrepresentations regarding “the nature and purpose of any amount a consumer may pay” provide sufficient clarity that it includes any amount included in the Total Price if that amount is also itemized separately from the Total Price?

N/A

(b) Does Section 464.3(a)’s provision prohibiting misrepresentations regarding “the nature and purpose of any amount a consumer may pay” provide sufficient clarity that it

includes any amount excluded from the Total Price such as Shipping Charges, Government Charges, optional charges, voluntary gratuities, and invitations to tip?

N/A

(27) Section 464.3(b) of the proposed rule states, “[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.” Is this prohibition clear and understandable? Is this prohibition ambiguous in any way? How, if at all, should this prohibition be improved?

(a) Section 464.3(b) of the proposed rule requires certain disclosures “before the consumer consents to pay.” Should the proposed rule instead require Businesses to disclose Clearly and Conspicuously the nature and purpose of any amount a consumer may pay that is excluded from the Total Price “before the consumer consents to pay and before obtaining a consumer’s billing information”?

(b) Section 464.3(b) of the proposed rule requires disclosures regarding “the nature and purpose of any amount a consumer may pay that is excluded from the Total Price.” Does this provision provide sufficient clarity that it includes Shipping Charges, Government Charges, optional charges, voluntary gratuities, and invitations to tip?

(28) What are the relevant sources of data that reflect the frequency of, and reasons for, abandoned transactions in the live-event ticket market? Provide all available data, statistics, and evidence.

N/A

(29) What are the relevant sources of data that reflect the total annual number of live-event ticket purchases? What are the relevant sources of information that separate total annual ticket purchases into primary and secondary ticket sales? Provide all available data, statistics, and evidence.

N/A

(30) What are the relevant sources of data that reflect the number of live-event ticket sellers currently charging hidden mandatory fees? Provide all available data, statistics, and evidence.

N/A

(31) The comments identified additional problematic practices regarding live events, including unfair dynamic pricing, transferability restrictions, lack of transparency regarding ticket holdbacks, lack of transparency regarding speculative tickets, and the use of bots. 1How prevalent are these acts and practices and should the proposed rule be modified to address any

of these practices? Provide all available data and evidence that supports your answer, such as empirical data, statistics, consumer-perception studies, and consumer complaints.

N/A

(32) What are the relevant sources of data that reflect the frequency of, and reasons for, abandoned transactions in the short-term lodging industry? Provide all available data, statistics, and evidence.

N/A

(33) What are the relevant sources of data that reflect the number of hotel firms that impose resort fees or other similar mandatory fees? Provide all available data, statistics, and evidence.

N/A

(34) What are the relevant sources of data that reflect the number of individual home share hosts in the US? Provide all available data, statistics, and evidence.

N/A

(35) What are the relevant sources of data that reflect the number of restaurants currently charging mandatory fees?

Our sample size is small, and because we are mostly engaged with restaurants who are actively working to improve wages and benefits across the restaurant sector, likely skewed to show a higher percentage than what is true industry-wide. That being said, of the 137 owners and operators we surveyed, 52% assessed a service charge. This does not include other miscellaneous fees, like delivery fees.

(36) What are the relevant sources of data that reflect the number of restaurants that charge each type of fee (such as credit card surcharge fees, kitchen fees, economic impact or inflation fees, mandatory service fees in lieu of tips, or mandatory service fees that do not replace tips) being used by restaurants?

Of the 74 respondents who are currently implementing a service charge, 54% assess a charge of 15% or higher, which leads us to believe that these charges are mostly being used to replace tipping in some capacity. Only 5 of the 74 respondents (less than 7%) chose “to offset operational costs” as the sole reason for implementing a service charge.

(37) What are the relevant sources of data that reflect the number of restaurants that have moved away from the traditional tipping model? Provide all available data, statistics, and evidence. (a) What are the relevant sources of data that reflect the number of such restaurants that do not request tips? (b) What are the relevant sources of data that reflect the number of

such restaurants that impose on customers, regardless of the size of the party, mandatory charges for service performed for the customer in lieu of tips?