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Comment from Independent Restaurant Coalition

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General Comment

See attached file(s)

Attachments

IRC Response to Notice of Proposed Rulemaking Trade Regulation Rule on Unfair or Deceptive Fees 16 CFR 464

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February 7, 2024

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

Re: Response to Notice of Proposed Rulemaking, Trade Regulation Rule on Unfair or Deceptive Fees, 16 CFR 464

Dear Commissioners,

I write today in my role as Executive Director of the Independent Restaurant Coalition (IRC) to implore you to rethink your recent Proposed Rulemaking on Unfair or Deceptive Fees as it applies to restaurants. The rule, while well-intentioned, ignores many of the emerging trends in the independent restaurant space and would significantly curtail progress restaurants have made to fairly and properly pay their workers.

The IRC represents more than 150,000 independent restaurants and bars across the United States that are integral to the economic, social, and cultural fabric of local communities. These small businesses are the lifeblood of their communities – on Main Street in Delaware, to the local diner in Oklahoma, to a neighborhood in Los Angeles, to the internationally known dining scene in New York. Independent restaurants help set the rhythm of local life, provide unique venues for social and business interaction, and embrace and share tradition. They help to revitalize neighborhoods, stimulate economic activity in other local businesses, contribute to public programs through generation of large sales taxes, and foster civic pride.

More importantly than the community they provide for their customers, independent restaurants are also a conduit for employees to achieve their American Dream: the restaurant industry is home to many who had their first (and last) job experience in a restaurant, have found opportunity and/or stability in the industry, and have overcome personal or professional barriers to capitalize on dreams of becoming a chef or owning and managing their own restaurants[1].

Independent restaurants directly employ 12.5 million people across the country and indirectly support over five million jobs throughout their supply chains, which are largely comprised of various small businesses, such as farms, dairies, fisheries, and vineyards, amongst others[2]. Further, as mainstays of regional, local, and ethnic cuisine, independent restaurants also drive domestic and international travel and tourism to all parts of the country, from big cities (e.g., Miami) to smaller locales (e.g., Portland, Maine). Food culture and food tourism have become ingrained in the American economy and underpin the travel, leisure and hospitality sector. Foreign and domestic travelers spend hundreds of billions annually in U.S. restaurants.

[1] National Restaurant Association (May 2019) "Restaurants are filing all rungs on the career ladder"

[2] Eric Amel, Darin Lee, Erin Secatore, and Ethan Singer (June 2020) Independent Restaurants are a nexus of Small Businesses in the United States and Drive Billions of Dollars of Economic Activity that is at risk of being lost due to the COVID19 Pandemic

The IRC appreciates the Commission's efforts to address issues related to unfair or deceptive fees and urge you to reconsider and modify the proposed rule, specifically with regard to the language surrounding the use of service fees in restaurants. The current proposal to eliminate the service fees that are finally providing predictable wages and benefits for employees does not fully recognize the nuances of the restaurant industry, where the ability to utilize a variety of compensation models i crucial for equitable and predictable employee compensation.

Historically, the restaurant business model has relied on a tipped minimum wage, with employees depending on tips to supplement their income. However, recent studies have exposed the complications of this model and the challenges posed by the pandemic-induced labor shortage have prompted restaurant owners and operators to explore alternative business practices, such as service charges. According to a February 2023 study produced by One Fair Wage entitled Racism in the Restaurant Industry[3], Black women working in restaurants in New York earn $3.01 an hour less than their white male counterparts This race -wage gap may be correlated to implicit bias in tipping and results in a total loss of $6,280.80 per year for a full-time worker. The table below indicates that wage disparity extends to Asian and Latinx workers as well.

TABLE 2

Wage Gap of Tipped Restaurant Workers in New York

	WAGE AND SALARY INCOME		WAGE AND SALARY INCOME
White Men	$17.54	Men	$17.93
Black Women	$14.53	Women	$13.99
White Women	$13.63	Black Women	$14.04
White Men	$17.64	Black Men	$18.48
Asian & Pacific Islander Women	$14.10	Two Major Races Women	$11.79
Asian & Pacific Islander Men	$17.83	Two Major Races Men	$13.96
Hispanic Women	$15.64		
Hispanic Men	$23.69		

Source: All calculations are the total sum of wages per category divided by the number of people in that category, divided by 26 pay periods, divided by 40 hours per week. Sources of income in Wage and Salary income include wages, salaries, commissions, cash bonuses, tips, and other money income received from an employer. OFW Analysis of of American Community Survey data 2016-2020 gathered from IPUMS 2023.

In November 2019, the Center for American Progress analyzed a wide range of income sources described in the Survey of Income and Program Participation (SIPP)[4]. Survey results noted that workers who indicate that they receive tips at one or more of their jobs have lower wages than workers who do not receive tips, controlling for race/ethnicity and gender. The median monthly income of a Hispanic or Latina tipped worker is 65 percent less than that of the median monthly income of a non-tipped white, non-Hispanic man. Only examining tipped workers, tipped Hispanic or Latina workers make 30 percent less than tipped white, non-Hispanic men and 23 percent less than tipped white, non-Hispanic.

[3] Food Labor Research Center at University of California Berkeley and One Fair Wage (February 2023)Racism in the Restaurant Industry

[4] Lily Roberts and Galen Hendricks (November 2019) The Center for American Progress: Short -Changed: How Tipped Work Exacerbates the Pay Gap for Latinas

While some progressive jurisdictions like Washington, D.C. have done away with the tipped minimum wage[5], the shift to service fees has allowed restaurants nationwide to provide their teams with higher wages, consistency, and benefits, thereby improving earnings for the entire staff. An Austin restaurateur who prominently displays the service charge on their website and menu said, "We implemented a 20% service charge in May 2020, which allowed us to increase pay from $8 -10 per hour to $16-20 for Front of House while Back of House wages increased from $15 to $21 per hour. "

Amanda Cohen, chef/owner of Michelin-starred Dirt Candy in New York, instituted a no-tipping model in 2015 and said "The national movement away from tipping is gaining momentum during the pandemic. It's really changing the way people think about work," she said. "Restaurants are coming up with new ways to compensate employees that don't privilege one group over another. Every little breakdown in the system helps."

The restaurant industry operates in a highly competitive environment with extremely thin margins. With increasing food costs, increasing labor costs, and tireless competition, operators have razor-thin margins. Data from Upserve says that most Full-Service Restaurants (FSRs) average a 3–5% profit margin. Many destination restaurants have tried to implement an all-inclusive model, where menu prices include the full cost of service, and failed. Since 2013, many critically acclaimed restaurants, including the popular Dahlia Lounge and the Walrus and the Carpenter in Seattle; Bar Agricole, in San Francisco; and eleven of Danny Meyer's Union Square Hospitality Group restaurants in New York attempted a service included model only to quietly return to accepting gratuities. Joe's Crab Shack, a stalwart of casual dining, tried eliminating tipping at 18 of its locations in 2015, only to restore the practice at 14 of them half a year later. In each and every instance, these businesses found losing tips meant losing business. And in the ultra-competitive, low-margin restaurant industry, consumers talk.

Mandating a service-included model will not only result in customer loss and jeopardize the ability of restaurants to survive, it puts employees at risk, as well. In a survey conducted by High Road Restaurants in December 2023, 66% of restaurant owners indicated the long-term impact of banning service charges would result in lower wages and benefits. The IRC believes that the proposed rule should explicitly acknowledge and accommodate the practice of using service charges for employee wages and benefits, recognizing the positive impact it has on the industry's workforce. Approximately 95% of every dollar earned in a restaurant is spent on food, labor and operating costs.

The Proposed Rule will create less price transparency by preventing diners from understanding the costs that are impacting the operation of restaurants and require that restaurants create approximately nine distinct menus to reflect the fee structure that impacts various service types including delivery, credit card usage, hospitality and large parties. In the Commission's proposal, it suggests printing separate menus, however doing so for each of the classes of transactions above is not practical and happens at a different time of the restaurant-diner interaction, making it impossible and a tremendous tax on resources. Clearly and prominently displaying any fees promotes transparency and fairness as well as allowing restaurants to meet the needs of their workers and customers.

The Commission notes that less than 20 percent of restaurants and bars have implemented a service fee. However, in a survey conducted among independent

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[5] Jessica Sidman (November 2022) The Washingtonian [Initiative 82 has passed. How 5 restaurant owners plan to adapt](#).

restaurants and bars, 52.7 percent have considered implementing a service charge to create wage stabilization. While the IRC understands the intention behind the proposed rule, we firmly believe that it will have a negative impact on one of the nation's largest private sector employers—the restaurant industry.

David Nayfeld, chef/owner of the critically acclaimed Che Fico in San Francisco , implemented a 10% service charge upon reopening after the peak of the pandemic and said, “The service charge gives our guests a very clear understanding of our costs to provide them with service in the restaurant. It is clearly stated at the time of booking as well as on our menu before the guests order their food. It has allowed us to increase wages that have typically been below the living wage in California. We have also added a 401k with a 4% match and profit sharing to our compensation model. Our employees have been able to work a single job rather than two or three. Hourly employees have moved into management positions that have given them more opportunities for growth. Ultimately, our employees don’t rely on public services the way that they would if we were unable to utilize a service charge.”

The IRC is fully committed to fostering transparency and ensuring that diners are fully aware of the use of service charges in their chosen establishment. We propose guidance that mandates clear communication regarding service charges to patrons. Currently restaurants that utilize the service charge disclose this charge on their website, menu, in restaurant signage, on the receipt and verbally during service with statements such as: “*A 22% service fee will be added to your bill. The entirety of these charges is distributed to all non-management employees in the form of wages and benefits. We believe this compensation model creates equity, stability and consistency for all employees across our kitchen and dining room. We have included an optional tip line, should you choose to acknowledge exceptional hospitality. Tips go into a "tip -pool" and are distributed amongst all hourly employees who work throughout the day to create your dining experience. Thank you for the continued support of our team.”*

We commend the Commission for having this conversation now. We appreciate the Commission's consideration of our concerns and request that modifications be made to the Proposed Rule to reflect the unique dynamics of the restaurant industry. The IRC is open to engaging in further discussions to provide additional insights and collaborate on a solution that ensures fair practices while sustaining the vitality of independent restaurants and bars across the country.

We hope you will consider this feedback and create a rule that allows restaurants to take care of their workforce while also protecting consumers.

Sincerely,

Erika Polmar

Erika Polmar
Executive Director
Independent Restaurant Coalition