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Trade Regulation Rule on Unfair or Deceptive Fees

Comment On: FTC-2023-0064-0001
Trade Regulation Rule on Unfair or Deceptive Fees

Document: FTC-2023-0064-3212
Comment from TickPick LLC

Submitter Information

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General Comment

Attached, please find TickPick LLC's comment letter in response to the unfair or deceptive fees NPRM, R207011.

Attachments

TickPick LLC Comment Letter - Unfair or Deceptive Fees NPRM - R207011



Via Federal E-rulemaking Portal <https://www.regulations.gov/>

ATTN: Janice Kopec and Stacy Cammarano
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Mail Stop H-144 (Annex J)
Washington, DC 20580

Re: Comment Letter in Response to Unfair or Deceptive Fees NPRM, R207011

Dear Ms. Kopec and Ms. Cammarano,

This letter is submitted on behalf of TickPick, LLC (“TickPick”) in response to the Federal Trade Commission’s (the “FTC” or the “Commission”) request for public comment regarding its Notice of Proposed Rulemaking (“NPRM”) for a Trade Regulation Rule on Unfair or Deceptive Fees (“the Rule”).¹ TickPick supports a rule restricting the practice of charging hidden and/or misleading fees in the live-event ticketing industry, and below we offer the following perspective as an industry participant.

About TickPick

TickPick is a secondary ticket marketplace connecting buyers and sellers of tickets for events held in the United States. We differentiate ourselves by being a transparent and customer-focused marketplace: the only marketplace that shows all-in pricing for all events in every state. The first price our customers see is the price they pay for their tickets. No hidden fees. We also provide a Best Price Guarantee for every ticket sold on our site, ensuring competitively priced, valid tickets for everyone. We are proud our marketplace provides a highly valuable, transparent purchasing experience to consumers.

TickPick Supports and Favors Expanding the Proposed Rule

TickPick supports the Commission using its authority under Section 18 of the FTC Act² to address unfair and deceptive acts or practices involving hidden and misleading fees. In our previous comment on the Commission’s Advance Notice of Proposed Rulemaking (“ANPR”),³ TickPick advocated for a rule mandating that a secondary ticketing marketplace only display the “all-in” price, or what the NPRM calls the “Total Price,” to a customer, and that this Total Price also be disclosed from the first time a price is displayed, at every stage of the transaction, and in all advertising and marketing materials.

In the NPRM, the Commission proposes a broad, industry-neutral rule that (1) requires any offer, display or advertisement of an amount a consumer may pay (presumably including any itemized

¹ 88 Fed. Reg. 77420 (Nov. 9, 2023).

² 15 U.S.C. § 57a.

³ 87 Fed. Reg. 67413 (Nov. 8, 2022).

portion of the Total Price) be coupled with a more prominent, Clear and Conspicuous disclosure of the Total Price;⁴ and (2) prohibits misrepresenting “the nature and purpose of any amount a consumer may pay,” itemized or included within the Total Price.⁵

TickPick commends the Commission for proposing to curb the widespread deceptive practice of bait-and-switch pricing. As applied to the secondary ticketing industry specifically, however, TickPick maintains that the final rule must prohibit the itemization of fees and charges that make up the Total Price (other than breaking out government taxes and shipping fees) in order to prevent harm from hidden and/or misleading fees for the reasons set forth below. Outside the secondary ticketing industry, TickPick proposes revising proposed Section 464.3 to require that any display of an itemized amount have adequate substantiation, consistent with Section 5 of the FTC Act and the Commission’s Policy Statement Regarding Advertising Substantiation.⁶

I. The Commission Should Prohibit Itemization of the Total Price of a Ticket

In the secondary ticketing industry, any and all itemization of the Total Price of a ticket is arbitrary, including the “base price” of the ticket and service fees (under various other names). Marketplaces manipulate the base price and additional fees and charges to trick consumers into paying more, inhibit competition, and increase revenue. While mandating that any itemization be coupled with a more prominent disclosure of the Total Price would undoubtedly be an improvement to the prevailing industry practices (TickPick excluded), it still leaves room for marketplaces to utilize itemization in unfair and deceptive ways.

Due to the arbitrary nature of the components that make up the Total Price of a ticket, any secondary ticketing marketplace that itemizes mandatory fees and charges is arguably misrepresenting the “nature and purpose of any amount a consumer may pay.” As neither the ticket amount nor the fees directly correspond with costs actually incurred by the ticket marketplace, there is no benefit “a consumer can reasonably expect” from an additional fee, and no fees are “necessary for the intended use of the primary purchase.” Thus, this information is not “necessary for a consumer to understand what they are purchasing and to decide whether to consent to the charge.”

Regardless of how the Total Price of a ticket is made up, the Total Price is what consumers are required to pay, and any additional itemization is inherently misleading, serving only as a distraction that may increase consumer costs without any benefit. By eliminating itemization for the ticketing industry, the FTC need not burden itself with going down the rabbit hole of defining what fees provide “little or no value” to consumers or are “excessive” in order to prohibit them.

Although as currently drafted the Rule is industry neutral, the FTC could accomplish the specific prohibition of itemization in the secondary ticketing industry by inserting such a statement in the Statement of Basis and Purpose published with the final rule. If needed, the Commission may subsequently elaborate on how the rule applies to the secondary ticketing industry by publishing

⁴ See proposed 16 C.F.R. § 464.2.

⁵ See proposed 16 C.F.R. § 464.3.

⁶ Appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

an industry guide similar to those contained in Chapter I, Subchapter B of the FTC’s regulations,⁷ a detailed “commentary” on how the rule is being interpreted,⁸ and/or informal interpretations such as those formerly provided by the Premerger Notification Office regarding the Hart-Scott-Rodino Act. Additionally, the Commission may choose to publish an Official Interpretation or Official Commentary as a supplement or appendix to the final rule that specifically addresses the itemization of mandatory fees as applied to the secondary ticketing industry. The Consumer Financial Protection Bureau⁹ and Federal Reserve¹⁰ have published such interpretations/commentaries in conjunction with rulemakings covering complex issues or multiple industries.

II. The Commission Should Require Substantiation for Permissible Itemization

For industries where itemization of the Total Price is permissible, TickPick proposes revising the prohibition of misleading fees in proposed Section 464.3 to define any breakdown of the amounts that a consumer may pay as a representation that requires adequate substantiation, consistent with Section 5 of the FTC Act and the Commission’s Policy Statement Regarding Advertising Substantiation. This would require a seller that displays an itemization of the Total Price to have a reasonable basis to support any claim that each itemized component of the Total Price corresponds with a cost actually incurred by the seller. While TickPick supports the goal of proposed Section 464.3 as currently constituted, we are concerned that the “nature and purpose” of an amount will require additional clarification to be enforceable across industries.

III. Responses to General Questions for Comment Identified in the NPRM

In addition to the overarching views expressed above, TickPick offers responses below to several questions posed in the NPRM from the lens of the secondary ticketing industry.

A. Questions About Benefits to Consumers (Nos. 2, 3, 4, 5)

If promulgated, the proposed rule would significantly benefit consumers and competition in the live-event ticketing industry. As the FTC recognized in both the ANPR and the NPRM, and as TickPick has previously commented, in the live-event ticketing industry, widespread use of hidden and/or misleading fees harms consumers and market competition. Advertising an artificially lower “base price” and hiding additional fees until after the customer has seen the first ticket price deceptively drives up consumer demand. These “bait-and-switch” tactics, per the NPRM, provide an unfair advantage to ticket marketplaces that utilize them over those marketplaces that display the all-in price upfront. Further, consumers end up paying more for tickets because they “cannot effectively comparison-shop to find the best value or must devote

⁷ 16 C.F.R. §§ 20-260 (2023).

⁸ FTC has occasionally published “commentaries” interpreting and explaining how it will enforce certain statutes or guidelines it has previously issued. *See e.g.*, Commentary on Fair Credit Reporting Act (1990) (rescinded after creation of the Consumer Protection Financial Bureau); Commentary on the Horizontal Merger Guidelines (2006).

⁹ *See, e.g.*, Consumer Financial Protection Bureau, Supplement I to Part 1026 – Official Interpretations (Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)).

¹⁰ *See, e.g.*, Federal Reserve, Appendix A to Part 235 – Official Board Commentary on Regulation II (Debit Card Interchange Fees and Routing).

an undue amount of time to making cost-appropriate decisions.”¹¹ Major ticketing marketplaces often require consumers to enter their credit card or other payment information prior to disclosing mandatory fees. On these marketplaces, the full purchase price is only disclosed after payment information is collected.

One way such “undue amount of time” or harm can be measured is in the number of clicks that a consumer must make before the total cost of a ticket is displayed. Consumers make zero additional clicks to see the total cost of a ticket on TickPick: the first price a consumer sees for a ticket on TickPick is the price charged for that ticket.¹² By contrast, on StubHub’s website for example, a consumer can be required to click 12 times after being shown the first price before being shown the total price they will pay.

B. Questions about Compliance Costs (No. 6)

For the most part, ticketing marketplaces would incur an immaterial cost to implement all-in pricing. Internationally, major ticket marketplaces are already required to comply with true all-in pricing in Canada¹³ and the United Kingdom.¹⁴ The technology to display tickets inclusive of fees in the form of a toggle is a widely available functionality. Put differently, the technology already exists within ticketing platforms to eliminate drip pricing and would simply need to be applied to events in the U.S.

C. Questions about Existing Laws (No. 8)

Several states have passed laws attempting to address drip pricing in the live-event ticketing industry. New York was the first U.S. state to pass a law, which took effect on August 29, 2022.¹⁵ Following New York’s lead, in 2023 other laws went into effect in New York City,¹⁶ Connecticut,¹⁷ and Tennessee.¹⁸ California passed the “Consumer Legal Remedies Act”¹⁹ set to go into effect in July 2024.

Unfortunately, marketplaces across the industry have not interpreted the New York, Connecticut, or Tennessee laws as requiring all-in pricing and drip pricing continues to exist in those states.

For example, in Tennessee, the first price consumers see on competitor ticket marketplaces is still an artificially lower price without mandatory added fees. *See Adam Friedman, Lawmakers say the spirit of Tennessee’s ticket price transparency law isn’t being followed, TENNESSEE*

¹¹ ANPR, 87 Fed. Reg. 67413 (Nov. 8, 2022).

¹² The “all-in price” displayed by TickPick throughout the course of a transaction excludes any Government Charges, as defined under the NPRM, as well as any Shipping Charges, which apply to a de minimis percentage of paper ticket sales.

¹³ The Competition Act, R.S.C., 1985, c. C-34.

¹⁴ The Price Marking Order 2004, S.I. 2004/102.

¹⁵ S.B. 9461 (N.Y. 2022) (enacted).

¹⁶ N.Y.C. Admin. Code § 20-881.

¹⁷ C.G.S.A. § 53-289b.

¹⁸ T. C. A. § 47-50-121.

¹⁹ S.B. 478 (Cal. 2023) (enacted).

LOOKOUT (Oct. 20, 2023), <https://tennesseelookout.com/2023/10/20/lawmakers-say-the-spirit-of-tennessees-ticket-price-transparency-law-isnt-being-followed/>. Rep. Caleb Hemmer (D-Nashville), one of the sponsors of Tennessee’s ticketing transparency legislation commented that TickPick’s competitors are “[d]efinitely not” following the spirit of the law. *Id.*

Absent the implementation of a federal rule providing a clear, consistent standard governing hidden and/or misleading fees in the live-event ticketing industry, it can be anticipated that well-intentioned state laws will continue to enable deceptive practices. A strong federal rule would provide valuable new protections for all U.S. consumers. That federal rule would serve as a “floor” that permits states to enact their own laws, as long as such laws are equivalent to or more protective of consumers than the federal regulations.

D. Questions about the Definition of “Covered Business” (Nos. 12, 14a)

TickPick’s position is that a rule requiring the disclosure of all-in pricing for the secondary ticketing industry is needed. If the Commission chooses to add a new definition of “Covered Business” to narrow the businesses covered by specific requirements of the rule, TickPick supports inclusion of the live-event ticketing industry as a “Covered Business” and is comfortable with the proposed definition of “businesses in the live-event ticketing industry” the Commission sets forth in question 14(a)(i) (“any Business that makes live-event tickets available, directly or indirectly, to the general public”). TickPick reiterates, however, that the Commission should make clear, as applied to the secondary ticketing industry, the Rule would be interpreted to prohibit the itemization of mandatory components of the Total Price as an unfair or deceptive act or practice.

E. Questions about Industry Specific Practices (No. 30-31)

Hidden mandatory fees exist on every major ticketing marketplace for the majority of primary and secondary tickets sold in the U.S., with TickPick being the notable exception.

In addition to being steadfast in our support of eliminating drip pricing from the live-event ticketing industry, TickPick supports consumer-friendly reforms of other problematic practices in the live event industry, including restrictions on a consumer’s right to the resale of a ticket. The unmitigated control of the live-event ticketing industry resulting from the merger between Ticketmaster and Live Nation fosters a widespread anti-consumer environment, rendering the industry ripe for regulation.

However, given the high public interest in eliminating junk fees and the rapidly evolving regulatory landscape affecting such fees, TickPick does not feel the proposed Rule can simultaneously address other problematic practices in the ticket industry while also maintaining a broad, industry-neutral prohibition of hidden and misleading fees. TickPick appreciates the FTC’s attention to the issues regarding the live-event ticketing industry and looks forward to the agency proposing additional rules specifically focusing on the live-event and/or secondary ticketing industry.

Thank you for your consideration of these comments. TickPick appreciates the opportunity to share our views on these important issues and welcomes engagement with the Commission as it proceeds with efforts to prevent the use of junk and hidden fees in the live-event ticketing industry and other industries where such practices are prevalent.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Brett Goldberg", is positioned above a solid horizontal line.

Brett Goldberg
Co-Chief Executive Officer

cc: Michele Rusnak, Chief Financial and Administrative Officer, TickPick
Craig Saperstein, Partner, Pillsbury Winthrop Shaw Pittman LLP
Michael Sibarium, Partner, Pillsbury Winthrop Shaw Pittman LLP
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