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Docket: FTC-2023-0064
Trade Regulation Rule on Unfair or Deceptive Fees

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

Document: FTC-2023-0064-3248
Comment from DC Jobs With Justice

Submitter Information

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Government Agency Type: Local
Government Agency: DC Jobs With Justice

General Comment

Please see the attached comments submitted by the undersigned members of the Fair Price, Fair Wage Coalition in strong support of the proposal by the Federal Trade Commission (FTC) addressing unfair and deceptive practices relating to fees. While we support this rule and its industry-neutral application, our comments focus on the restaurant industry, as our coalition specifically seeks to combat the recent proliferation of deceptive and confusing restaurant service charges in the District of Columbia, which harm consumers and threaten to reduce workers’ pay. We welcome this proposal and encourage the FTC to adopt a final rule that mandates transparent pricing, promotes informed consumer choice, and provides protections for workers who often lose income due to these deceptive fees. We fully support the FTC’s approach to ending hidden and misleading fees.

We review the key arguments underlying our support for this rulemaking in the attached comments.

Thank you for your consideration.

Signed by the following members of the Fair Price, Fair Wage Coalition:

DC Jobs With Justice
Jews United for Justice
Metro DC Democratic Socialists of America
National Women’s Law Center
Restaurant Opportunities Center of DC
United Planning Organization
Max Hawla, consumer and tipped worker
Trupti Patel, consumer and tipped worker

Attachments

Fair Price Fair Wage coalition comments - FTC R207011 (2.7.24)

February 7, 2024

Submitted via www.regulations.gov

Janice Kopec & Stacy Cammarano
Division of Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

RE: Unfair or Deceptive Fees NPRM, R207011

Dear Ms. Kopec & Ms. Cammarano:

These comments are submitted by the undersigned consumers, tipped professionals, grassroots organizations, policy organizations, and advocates in the District of Columbia that form part of the District of Columbia Fair Price, Fair Wage coalition and stand firmly behind tipped professionals, consumers, and voters in DC. We appreciate the opportunity to comment on the Federal Trade Commission's (FTC or Commission) Notice of Proposed Rulemaking (NPRM) addressing unfair and deceptive practices relating to fees, following its Advance Notice of Proposed Rulemaking (ANPR) in October 2022. While we support this rule and its industry-neutral application, our comments focus on the restaurant industry, as our coalition specifically seeks to combat the recent proliferation of deceptive and confusing restaurant service charges in the District of Columbia, which harm consumers and threaten to reduce workers' pay. We welcome this proposal and encourage the FTC to adopt a final rule that mandates transparent pricing, promotes informed consumer choice, and provides protections for workers who often lose income due to these deceptive fees.

I. Current service charge practices in the D.C. restaurant industry clearly demonstrate the need for the FTC's proposed rule.

Currently, some D.C. restaurants charge a mandatory, default fee—often described as a “service charge” or “service fee”—that is added to a customer's check as a percentage of the total bill. The fees are sometimes small (e.g., 3%), but they often are 20% or even more. These fees are a prime example of “drip pricing,” in that the specific amount a consumer will owe is not made clear until payment is due. In addition, as the FTC heard in numerous comments in response to its advance notice of proposed rulemaking (ANPR) on this subject,¹ restaurants often fail to clearly disclose the nature or purpose of these fees—and while such fees may help restaurant operators pay for a range of operational costs, they do not actually reflect the provision of any additional services for consumers. Like other deceptive fees that the FTC proposes to restrict in this rulemaking, restaurant service fees make it difficult for consumers to accurately compare prices; a consumer examining menus online before making a decision about where to eat, for example, may be misled into thinking that a \$14 burger at a restaurant with a 20% service charge is less expensive than a \$16 burger at a restaurant with no added

¹ 88 Fed. Reg. 77,426 (Nov. 9, 2023).

fees, when the final cost for the diner is higher in the former scenario. This predictable consumer behavior is, in fact, a primary reason that restaurants employ service fees.

The adoption of service charges in D.C. restaurants appears to have accelerated following the passage of a ballot measure known as “Initiative 82” in November 2022, which phases in a “one fair wage” policy in D.C.; that is, it increases the minimum cash wage that employers are required to pay tipped workers (before tips) in annual increments until it matches the District’s regular minimum wage in 2027. While voters resoundingly approved Initiative 82 (74% voted in favor), some restaurant operators vocally opposed the initiative because it requires them to pay higher base wages to their tipped staff. Rather than simply raising menu prices to help cover the modest increase in labor costs, some restaurants have turned to service charges (even going so far as to call them an “Initiative 82 fee” or “One Fair Wage fee”) to obfuscate their price increases and mislead diners.

A. Service charges harm both consumers and workers—particularly women, who make up the majority of tipped workers.

Typically, restaurant employers retain income from service charges and can use that income as they see fit—but they often describe the charge as “going entirely to our staff” or use similar language that makes the charge sound like a tip, even when the employer is actually using these amounts to pay base wages.² In other cases, language describing the service charge is very vague, leaving consumers to wonder about its purpose. Thus, as observed by the DC Office of the Attorney General (DC OAG) and by the FTC in the proposed rule, many consumers are likely to assume that a restaurant “service fee” serves the same purpose as a tip,³ particularly when it is a percentage similar to a standard tip calculation, and that “regardless of how restaurants employing mandatory service fees are using or distributing these fees, consumers likely view these larger fees as tip replacements.”⁴

When consumers think they paid a service charge that functioned as a tip, they are less likely to tip as generously, or at all, on top of the check—which in turn threatens to reduce workers’ income from tips, which many still heavily rely on to supplement their base pay. Because service charges add a layer of confusion to the complicated ways restaurants collect money and distribute it to workers, they also increase the risk of wage theft; for example, some restaurant employers might claim that service fees do in fact go to workers as a gratuity, but fail to distribute them as promised.

The federal tipped minimum wage is only \$2.13 per hour, and tipped workers—who are disproportionately women and people of color—experience poverty at far higher rates than the workforce overall, especially in states where employers can pay less than the minimum wage

² Many consumers in D.C. have taken to reddit and other social media platforms to attempt to figure out whether a service fee replaces a tip or not. See, e.g., RazzmatazzHaunting47, “I was asked to tip in addition to 20% service fee” (22 July 2023), online: *Reddit*, <https://www.reddit.com/r/washingtondc/comments/156w1dc/i_was_asked_to_tip_in_addition_to_20_service_fee/>.

³ *Supplemental Business Advisory on Restaurant Fee Disclosure Requirements in the District of Columbia*, D.C. OFFICE ATT’Y GEN., at 3 (Aug. 9, 2023), <https://oag.dc.gov/sites/default/files/2023-08/OAG%20Supplemental%20Guidance.pdf> [hereinafter DC OAG Guidance].

⁴ 88 Fed. Reg. 77,472 (Nov. 9, 2023).

before tips.⁵ Many also face unpredictable, unstable work hours and limited workplace benefits.⁶ Restaurant service charges thus threaten to reduce income for workers who already face a heightened risk of economic insecurity.

- B. *While D.C. has attempted to restrict the deceptive use of restaurant service charges, federal regulation is necessary to ensure business compliance and consumer awareness.*

Recognizing the ways in which service charges can mislead consumers, the DC Consumer Protection Procedures Act (DC CPPA) and interpretative guidance from the DC OAG allow such fees only if restaurants disclose the fee to consumers before diners place their orders—such as by displaying the fee prominently on the menu—and adequately disclosing to consumers how the restaurant will use the service fee (i.e., whether the fee will be retained by the restaurant or passed on to workers like a tip).⁷

Despite the DC OAG’s guidance on service fee disclosure, many restaurants continue to confuse and surprise customers with service charges. Take, for example, the menu at the DC restaurant El Sol. In September 2023, a service fee was listed at the bottom of the menu cover, not in proximity to the menu items and prices, and the description was simply “20% service charge will be included.” Consumer aggravation with the wide range of fees that have appeared on their checks, and confusion over whether such fees are meant to replace gratuities, has led to the development in D.C. of a crowdsourced spreadsheet attempting to track and clarify the fees that appear in local establishments.⁸

The DC OAG reports that it has received hundreds of complaints and questions from local consumers about restaurant service fees,⁹ and the service fees at two D.C. restaurant groups have been the subject of recent lawsuits alleging violations of the DC CCPA.¹⁰ But many more remain unchallenged, even as diners’ frustration grows. A clear, universally applicable federal ban on the deceptive use of service fees—as the FTC has proposed—will greatly improve consumer awareness of, and business compliance with, requirements for fair and transparent pricing practices in the restaurant industry.

⁵ See generally *One Fair Wage: Women Fare Better in States with Equal Treatment for Tipped Workers*, NWLC (Feb. 2021), <https://nwlc.org/resource/one-fair-wage/>; *Why the U.S. Needs at Least a \$17 Minimum Wage*, ECON. POLICY INST. (Jul. 2023), <https://www.epi.org/publication/why-17-minimum-wage/>.

⁶ See, e.g., Brooke LePage, *Women’s Jobs Are Being Added Back to the Economy—But Many Need Improving*, NWLC (May 2022), <https://nwlc.org/wp-content/uploads/2022/06/Leisure-and-Hospitality-2022-v2.pdf>.

⁷ See DC OAG Guidance, *supra* note 3.

⁸ Jessica Sidman, *These Helpful Tools Are Tracking Every Restaurant Fee Across D.C.*, WASHINGTONIAN (Jan. 11, 2024), <https://www.washingtonian.com/2024/01/11/these-helpful-tools-are-tracking-every-restaurant-fee-across-dc/>.

⁹ Anna Spiegel, *How D.C. Restaurants Should Disclose Service Fees*, AXIOS D.C. (Aug. 9, 2023), <https://www.axios.com/local/washington-dc/2023/08/09/dc-service-fees-guidelines>.

¹⁰ See Jessica Sidman, *Clyde’s Restaurant Group Sued Over Alleged “Junk Fees,”* WASHINGTONIAN (Nov. 8, 2023), <https://www.washingtonian.com/2023/11/08/clydes-restaurant-group-sued-over-alleged-junk-fees/>; Jessica Sidman, *Mi Vida, Succotash Among DC Restaurants Sued for Allegedly Deceptive Menu Fees*, WASHINGTONIAN (Jan. 18, 2024), <https://www.washingtonian.com/2024/01/18/mi-vida-succotash-among-dc-restaurants-sued-for-allegedly-deceptive-menu-fees/>.

II. If finalized, the FTC’s proposal will benefit consumers and workers in D.C. and nationwide.

The FTC is right to call service fees “junk fees” and to propose banning the way some restaurants in D.C. and beyond are currently using them. If implemented, the proposed rule will prevent restaurants from taking up deceptive service charges as a way to make their menu prices seem lower than they actually are, benefiting consumers. It will also benefit workers by disincentivizing the practices that have threatened to reduce their take-home pay.

A. The proposed rule will promote informed consumer choice.

Restaurant service charges often exemplify both hidden fees (because the total amount a diner must pay is not clear until they get their bill) and misleading fees (because the nature and purpose of the fee are not evident from its description). The FTC’s proposed rule addresses both types of fees, effectively barring the ways that restaurants typically use service charges today.

The rule bars hidden fees by requiring all industries to display the “Total Price” for any item or service, including any fees that a customer cannot reasonably avoid—which, in the restaurant context, includes service fees. Instead, restaurants will be required to display the full cost of their offerings prominently on their menus, without any surprise fees added to consumers’ checks. If a restaurant still chooses to charge a service fee and display a price without the fee included on the menu, the Total Price including fees must be displayed more prominently. In addition, if a restaurant chooses to list a service fee as a separate component of the total price, the proposed rule’s bar on “misrepresent[ing] the nature and purpose of any amount a consumer may pay” should ensure that restaurants identify, for example, whether the service fee will be transferred directly to the server as a tip, or retained by the employer to cover labor and/or other costs.

Taken together, these requirements will strongly disincentivize the current use of service fees in restaurants. Consumers will know when and whether any gratuity is included in the price they pay for their meal, and be able to make an informed decision about how much to tip on top of their bill. They will also be able to make informed choices about where they want to eat out, since they will be able to accurately compare menu prices across dining options.

B. The proposed rule will protect workers and One Fair Wage policies.

More jurisdictions are moving towards adopting “One Fair Wage” policies and requiring restaurant operators to pay full minimum wage before tips. Following the passage of Initiative 82 in DC, Chicago passed a One Fair Wage ordinance in October 2023, and the states of Illinois, Maryland, New York, Connecticut, Michigan, Massachusetts, and others are also considering requiring employers to pay tipped workers the full minimum wage with tips on top. The states of Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington have had One Fair Wage policies in place for decades, and tipped workers in these states are far less likely to experience poverty than their counterparts in states with lower cash minimum wages for tipped workers.¹¹

¹¹ See *One Fair Wage: Women Fare Better in States with Equal Treatment for Tipped Workers*, *supra* note 5; *Why the U.S. Needs at Least a \$17 Minimum Wage*, *supra* note 5.

The proliferation of deceptive restaurant service charges, however, threatens to undermine the intent of these policies—i.e., to provide tipped workers with a fair minimum wage plus tips on top—by creating confusion for consumers that can lead to reduced tips (as described above). In jurisdictions where One Fair Wage is in place or being phased in, the restaurant industry has even attempted to work with legislators to adopt policies incentivizing the use of service charges; for example, in D.C., a pending bill would explicitly allow restaurants to add service charges of up to 22% to diners' checks, which can be used to pay base wages, and allow the income from those charges to be excluded for purposes of tax and rent calculations, encouraging restaurants to capture more income as service charges and less as standard menu prices.¹² The FTC's proposal, however, would require service fees to be included in total menu prices, making their use far less appealing to restaurant operators. By banning deceptive restaurant practices around service fees, the FTC's proposed rule will thus have the additional benefit of ensuring that One Fair Wage policies have their intended impact and that workers receive customary tips in addition to higher base wages.

The FTC notes its assumption in the NPRM that its proposed rule “would lead any restaurants that have adopted mandatory service charges in lieu of tipping to return to the traditional tipping model, which in turn could “have the unintended consequence of increasing racial gender disparities in the waitstaff labor market” due to evidence that Black employees tend to receive lower tips than white employees, and women tend to receive lower tips than men—disparities that cannot be explained by differences in service quality.¹³ We do not dispute the existence of these inequities, and agree that the traditional tipping model can allow consumer biases to unfairly influence worker pay; restaurants that have adopted automatic gratuities in lieu of tipping can indeed provide more equitable pay for their workforce. However, for restaurants that wish to use a model with an included gratuity to ensure equitable pay for their staff, the FTC's rule should not pose a barrier. A restaurant can include the total price, with gratuity, on its menu, and explain clearly that gratuity is included. This would benefit workers and is far superior from a consumer perspective to a vague “service charge” that creates confusion around whether a tip is still expected.

III. The FTC should amend its proposal to ensure that the final rule achieves the desired transparency for consumers.

The FTC's proposed rule requires mandatory fees to be included in the Total Price, and it asks whether its Rule sufficiently clarifies that the Total Price 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. The answer to both questions is “no,” and we suggest changes to ensure better protection from deceptive practices in optional fees.

¹² Bill 25-0280, Workers and Restaurants Are Priorities Act of 2023, 25th Council (2023), <https://lirms.dccouncil.gov/Legislation/B25-0280> (District of Columbia). See also Bill 25-0056, Restaurant Revitalization and Dram Shop Clarification Amendment Act of 2023, 25th Council (2023), <https://lirms.dccouncil.gov/Legislation/B25-0056>, amendment in the nature of a substitute (Feb. 6, 2024), https://lirms.dccouncil.gov/downloads/LIMS/52129/Bill_Amendment/B25-0056-Bill_Amendment.pdf?Id=184308 (incentivizing use of service charges by allowing restaurants to exclude service charges from sales for purposes of rent calculation).

¹³ 88 Fed. Reg. 77,475 (Nov. 9, 2023).

Specifically, the FTC should amend the proposed rule to prohibit businesses from automatically adding a fee, such as a restaurant service fee, through a default selection. The final rule should make clear that fees for ancillary goods or services included by default are not reasonably avoidable.

Defaults have a significant impact on consumer behavior and lead many consumers to accept the default option without recognizing it as truly optional. In the example of restaurant service charges, many consumers will reasonably presume that a charge automatically added to their bill is one they must pay, and will not ask for it to be removed from their bill. Moreover, even if such a fee is clearly identified as optional, in practical terms it is not reasonable to expect that a diner will feel comfortable asking their server to remove a charge that is ostensibly for “service.” It is important that the final rule not create a loophole for restaurants to continue excluding service charges from total menu prices by adding them to diners’ checks by default but claiming they are “optional.”

In addition, we recommend that in the final rule—or at least in guidance implementing the final rule—the FTC make clear that even if a restaurant is in compliance with the ban on hidden fees by disclosing the Total Price of its menu items, it must also comply with the bar on misleading fees. For example, if a restaurant that displays a Total Price most prominently on its menu in compliance with the rule decides to also denote, for example, that “menu prices include a 20% service charge,” the restaurant must also disclose whether it is retaining the service charge or passing it on directly to employees as a tip. If the restaurant will retain the fee, it should be required to clearly state that the fee is not a tip.

IV. The FTC should not grant broad exemptions in the final rule.

The FTC has asked whether it should consider limiting the rule to certain industries or granting broad exemptions for certain types of businesses. We strongly urge the FTC to maintain its industry neutral approach to this rule, so that all businesses are required to comply. This approach is necessary to achieve market-wide goals such as informed consumer choice and reduced consumer frustration and confusion.

If the final rule were to exempt restaurants and/or small businesses, it would effectively grant the exempted businesses a license to engage in the deceptive conduct that forms the basis for the rule. For all the reasons explained above—and given the consumer frustration with service charges documented in response to the ANPR as well as the in response to this NPRM—the FTC should not consider excluding restaurants from the final rule, and there is no reason to exclude other small businesses, either. The modest disclosure requirements established by the rule do not present a hardship for a business of any size from a compliance perspective, and a universal standard makes the rule easier for the FTC to enforce and for consumers to understand while creating a level playing field for businesses.

* * *

We fully support the FTC's approach to ending hidden and misleading fees. We also do not believe that there are any disputed issues of material fact to be resolved in this rulemaking. To the extent that the FTC does identify such disputed issues, the undersigned would welcome the opportunity to participate in any informal hearing to support the FTC's efforts to ensure that this proposed rule becomes a final regulation.

Signed by the following members of the Fair Price, Fair Wage Coalition:

DC Jobs With Justice

Jews United for Justice

Metro DC Democratic Socialists of America

National Women's Law Center

Restaurant Opportunities Center of DC

United Planning Organization

Max Hawla, consumer and tipped worker

Trupti Patel, consumer and tipped worker