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Trade Regulation Rule on Unfair or Deceptive Fees

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Comment from National Restaurant Association

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General Comment

Please see the attached PDF for the National Restaurant Association and Restaurant Law Center Comments on Unfair or Deceptive Fees Notice of Proposed Rulemaking, R-207011.

Attachments

National Restaurant Association FTC Unfair and Deceptive Fees NPRM Comments_020724



February 7, 2024

Via electronic filing: <https://www.regulations.gov/docket/FTC-2023-0064>

The Honorable April Tabor
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, D.C., 20580

Re: The National Restaurant Association and Restaurant Law Center Comments on Unfair or Deceptive Fees Notice of Proposed Rulemaking, R-207011

Dear Secretary Tabor,

The National Restaurant Association and the Restaurant Law Center appreciate the opportunity to provide comments in response to the Federal Trade Commission's (FTC's) "Trade Regulation Rule on Unfair or Deceptive Fees" Notice of Proposed Rulemaking (NPRM)¹. While we share the Commission's goal of providing price transparency for consumers, the NPRM's blanket prohibition on "hidden" and "misleading" fees as applied to the restaurant industry is unwarranted, unlawful, and would create significant unintended consequences for consumers. Thus, any final rule should exclude the restaurant industry. As we detail, restaurant operators utilize value-added and well-defined fees which must not be altered by the FTC.

Founded in 1919, the National Restaurant Association ("the Association") is the leading business association for the restaurant industry, which comprises more than 1 million restaurant and foodservice outlets and a workforce of 15.5 million employees. Together with 52 State Associations, we are a network of professional member organizations dedicated to serving every restaurant through advocacy, education, and food safety.

The Restaurant Law Center ("the Law Center") is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. Its expressed purpose is to promote laws and regulations that allow restaurants to continue growing, creating jobs, and contributing to a robust American economy. The Law Center's goal is to protect and to advance the restaurant industry and to ensure that the views of America's restaurant and foodservice industry (the "Industry") are taken into consideration by giving its members a stronger voice, particularly in the regulatory arena and the courtroom. The Law Center files comments and pursues cases of interest to the restaurant industry. The Law Center joins these comments to emphasize that the FTC lacks the legal authority to establish and

¹ "Trade Regulation Rule on Unfair or Deceptive Fees," Federal Trade Commission, Federal Register / Vol. 88, No. 216 / Thursday, November 9, 2023, at <https://www.govinfo.gov/content/pkg/FR-2023-11-09/pdf/2023-24234.pdf> (hereinafter "NPRM").

implement the proposed regulation as drafted and defers to the Association on the public policy arguments raised in these comments.

Restaurants are fundamental to the American experience. The oldest operating restaurant in the U.S.— the White Horse Tavern in Newport, R.I. — opened in 1673², more than 100 years before the Colonies declared their independence from Great Britain. Restaurants were at the crux of communities in the Westward expansion and fundamental to the immigrant experience as the country grew. Today, restaurants are the cornerstone of communities – providing economic support in the form of jobs and taxes, and nourishment for both the body and the soul.

Between 2000 and 2023, restaurant sales in the U.S. grew from \$379 billion to just over \$1 trillion. This is because a majority of adults (60%) say restaurants are essential to their lives and nearly 9 in 10 people enjoy the experience of going to a restaurant³. Even in our current economy, people spend more than half of their food dollar away from home⁴. This kind of enjoyment and reliance on the industry has fueled growth, and there are now more than 1 million restaurant outlets that employ more than 15.5 million people⁵, making the industry the nation’s second-largest private employer.

And while it may feel or sound like restaurants are ubiquitous, the industry is made up of hundreds of thousands of small businesses⁶, running on slightly different business models. Seven in 10 restaurants are single unit operations and most restaurant locations (90%) employ fewer than 50 people⁷. The industry is highly competitive and constantly changing in response to trends and economic pressures.

While every type of restaurant could be impacted by the proposed NPRM, independent table service restaurants are most likely to be impacted by customer reactions to the menu changes required to comply with the proposed rule and would bear the brunt of the projected \$3.5 billion price tag of executing the change.

Restaurants can’t easily absorb or pass on cost increases. The typical small business restaurant runs on a 3-5% pre-tax margin⁸. Food and labor costs are the two most significant line items for a restaurant, each accounting for approximately 33 cents of every dollar in sales. Other expenses— typically non-controllable costs like credit card swipe fees and occupancy costs – generally represent about 29% of sales⁹. For most restaurant operators, the costs in these three categories have increased significantly in recent years. In 2023 alone, food was up 5.7% and labor increased 5.9%¹⁰. And as costs for restaurants have continued to rise, consumers too are feeling inflationary pressures. This— and the reality that diners have extensive choices when eating out – means that consumers are sensitive to any menu price increases.

According to analysis by the National Restaurant Association, in 2019, pre-tax income represented approximately 5% of sales for a typical restaurant. For the average restaurant with annual sales of

² <https://whitehorsenewport.com/history/>

³ “2024 State of the Industry Report,” National Restaurant Association, February 28, 2023, available at <https://restaurant.org/research-and-media/research/research-reports/state-of-the-industry/>

⁴ U.S. Department of Agriculture, Food Expenditure Series, available at <https://www.ers.usda.gov/data-products/food-expenditure-series/>

⁵ <https://restaurant.org>

⁶ U.S. Census Bureau, Economic Census, available at <https://www.census.gov/programs-surveys/economic-census.html>

⁷ <https://restaurant.org/research-and-media/research/research-reports/state-of-the-industry/>

⁸ *Restaurant Operations Report 2016 Edition*

⁹ <https://restaurant.org/research-and-media/research/economists-notebook/analysis-commentary/bottom-line-impact-of-rising-costs-for-restaurants/>

¹⁰ <https://data.bls.gov/cgi-bin/dsrv?ce>

\$900,000, this translated to pre-tax income of \$45,000. If a restaurant today is making a total of \$900,000, then they are suffering a pre-tax loss of -12.3%¹¹.

Restaurant Fees and Surcharges

Restaurant operators have been using fees and surcharges to relate to diners added value or added services for decades. From delivery fees to service fees to credit card surcharges, restaurant operators make significant efforts to ensure these fees and surcharges are evident and identifiable before consumers receive the check. And unlike many other industries, restaurant operators are also typically willing to remove a surcharge from a customer's final bill, when requested.

According to the National Restaurant Association 2024 State of the Restaurant Industry report, only 16% of all restaurants are adding surcharges¹². The Commission itself notes within the NPRM that the same report in 2023 found "15% of restaurants (13% of limited-service restaurants and 17% of full-service restaurants) are adding fees to bills."¹³ The 1% rise shows the slow rate at which operators are adopting new surcharges.

One of the most common surcharges diners see in restaurants across the country are service fees. These are typically added to large party checks and in states where the tip credit has been eliminated by law. Seven states, D.C., and Chicago have undertaken the process of eliminating the tip credit, and in many of those places, lawmakers or regulators have provided rules to restaurant operators on when and how they can add service fees. These situations are both well understood by diners and the surcharges in these experiences are expected.

Since the 1980's, it's been legal for business owners to charge credit card transaction fees or provide a cash discount. In that time, the economy has shifted away from cash payments toward credit and debit card payments at an accelerated speed, especially since the pandemic. An estimated 7 in 10 restaurant transactions are currently paid by customers using either a credit or debit card, which is up from less than 5 in 10 a decade ago. Pummeled by the pandemic and now managing historic-high food costs and rising labor costs, restaurant operators have chosen to be more transparent about the rising cost of accepting credit cards by adding credit card surcharges to their checks.

Restaurant food delivery provides the ultimate convenience for consumers and many place a high value on the ability to have their favorite meals brought to them. Offering delivery is an important source of growth and retention for operators, and they make significant investments in delivery-ready menus, packaging, food safety, and product integrity. A delivery fee to cover these costs and to ensure the quality and convenience of food delivery is a common and accepted business practice understood by consumers.

The Association and the Law Center together argue that the fees and surcharges that restaurants pass onto consumers should not be included within the scope of a final rule, just as they were not included within the scope of the Commission's Advanced Notice of Proposed Rulemaking (ANPR)¹⁴. To this end, the Association and the Law Center provide a detailed argument in the following section as to why its NPRM is unlawful and thus should be rescinded in its entirety.

¹¹ <https://restaurant.org/research-and-media/research/economists-notebook/analysis-commentary/bottom-line-impact-of-rising-costs-for-restaurants/>

¹² <https://restaurant.org/research-and-media/research/research-reports/state-of-the-industry/>

¹³ NPRM, 52

¹⁴ <https://www.federalregister.gov/documents/2022/11/08/2022-24326/unfair-or-deceptive-fees-trade-regulation-rule-commission-matter-no-r207011>

The FTC Lacks the Legal Authority to Establish and Implement its Unfair and Deceptive Trade Regulation

The proposed rule states that Section 18 of the Federal Trade Commission Act “permits the Commission to promulgate, modify, or repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce,”¹⁵ and cites the FTC’s Section 5 authority to stop “(1) practices that misrepresent the total costs by omitting mandatory fees from advertised prices, and (2) practices that misrepresent the nature and purpose of fees or charges.”¹⁶ However, the Association and the Law Center argue that the Commission’s attempt to establish and implement its NPRM is potentially unlawful for a multitude of reasons briefly outlined below.

The Proposed Rule Implicates the Major Questions Doctrine

In 2022, the U.S. Supreme Court decision in *West Virginia v. Environmental Protection Agency* reaffirmed that federal agencies can act only within their constitutional and statutory authority¹⁷, particularly when agencies claim to have authority to resolve a matter of great “political significance,” or attempt to regulate “a significant portion of the American economy” by requiring “billions of dollars in spending,”¹⁸ which is known as the “major questions doctrine” (MQD). The NPRM implicates the MQD in the following ways:

1. An Economy-Wide Rule on “Unfair and Deceptive Fees” Has Major Economic and Political Significance. By prohibiting any “business that offers goods or services” from “offering, displaying, or advertising an amount a consumer may pay without clearly and conspicuously disclosing the Total Price,”¹⁹ the rule would effectively require a huge swath of the economy to overhaul multi-component pricing and well-established employment compensation models to adopt an “all-in” pricing model. In fact, the NPRM projects a \$3.5 billion price tag for restaurant industry compliance alone²⁰, a number that will balloon exponentially when requiring economy-wide compliance. This concern is echoed by former Commissioner Christine S. Wilson’s dissenting statement in response to the FTC’s ANPR when she asserts that this one-size-fits-all rule “could impact billions or even trillions of dollars in commerce . . . [and] regulate the way prices are conveyed [to] millions of consumers and companies . . . across nearly every sector of the economy.”²¹ And because the NPRM itself acknowledges that it “is sector neutral and economy-wide [and that] all firms will be affected to some degree,”²² we share Commissioner Wilson’s trepidation that such a proposal “appears . . . to be exercising a claim of authority that concerns an issue of ‘vast economic and political significance’ and thereby could implicate the Major Questions Doctrine.”²³
2. There Is No Clear Congressional Authorization for Comprehensive “Unfair and Deceptive Fees” Rulemaking. The FTC is required to “point to ‘clear congressional authorization’” when it seeks

¹⁵ NPRM, 1

¹⁶ NPRM, 12

¹⁷ *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2002).

¹⁸ https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2022-2023/january-february-2023/the-major-questions-doctrine/

¹⁹ NPRM, 23

²⁰ NPRM, 56

²¹ “Dissenting Statement of Commissioner Christine S. Wilson Regarding the Advance Notice of Proposed Rulemaking on Junk Fees” at https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-dissenting-statement-junk-fees-anpr.pdf, 1 (hereinafter “Wilson”)

²² NPRM, 29

²³ Wilson, 2

to establish a rulemaking that implicates “major questions.”²⁴ However, the NPRM does not provide sufficient evidence of the express Congressional authority needed to craft a rule that regulates multi-component pricing practices and employment compensation models on an “economy-wide” basis. Instead, the Commission justifies its issuance of the proposed rule as merely a tool to “deter deceptive and unfair acts or practices involving fees, to promote a level playing field that enables comparison shopping and allows honest businesses to compete, and to expand the available remedies where such practices are uncovered.”²⁵ As such, the Association and the Law Center agrees with Commissioner Wilson’s concern that the Commission lacks any “precedent [that] would support the perspective that Congress has clearly empowered the FTC to promulgate a rule that would regulate pricing disclosures for the breadth of good and services identified”²⁶ within the proposed rule.

The Proposed Rule Fails to Meet Magnuson-Moss Rulemaking Requirements

In addition to implicating the MQD, the proposed rule also fails to meet the rulemaking requirements set forth in Section 18 of the FTC Act—also known as the “Magnuson-Moss” rulemaking process—for the reasons outlined below:

1. The Commission Has Not Met the “Prevalence” Standard. In order to embark on this type of rulemaking, the Commission must first “have reason to believe (in the form of FTC cease and desist orders or other evidence of widespread conduct) that the practices are prevalent.”²⁷ While the Commission insists that this criterion has been met in the form of public comments to its ANPR and its history of enforcement,²⁸ the NPRM lacks sufficient evidence of prior enforcement actions that reveals a “widespread” pattern of the specific unfair and deceptive fees within the scope of the proposed rule. It should also be noted that neither Congress nor the courts have sought to require large swaths of the economy to provide all-in pricing models. With respect to the restaurant industry specifically, the Commission itself notes within the NPRM that only “15% of restaurants (13% of limited-service restaurants and 17% of full-service restaurants) are adding fees to bills.”²⁹ However, our 2024 State of the Industry Report indicates that only 16% of restaurant operators have now added some kind of fee or surcharge to bills since last year. The Association does not find that a 1% growth in these fees meets the threshold of what is considered “prevalent” under the FTC’s Section 18 authority, especially when a significant percentage of these surcharges are service fees, standard large party fees, credit card surcharges, and delivery fees that are known and generally accepted by customers.
2. The Commission Has Not Met the “Specificity” Standard. Section 18 also requires the Commission to prescribe “rules which define with specificity acts or practices which are unfair or deceptive.”³⁰ However, the NPRM seeks to prohibit both “hidden fees” and “misleading fees” without providing specific, concrete definitions of either fee type, and thus does not appropriately scope out the parameters of a potential rule. Even the terms that are explicitly defined (like “Total

²⁴ *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2609 (2002).

²⁵ NPRM, 19

²⁶ Wilson, 2

²⁷ <https://www.kelleydrye.com/viewpoints/blogs/ad-law-access/the-ftcs-magnuson-moss-rulemaking-process-still-an-uphill-climb>

²⁸ NPRM, 1

²⁹ NPRM, 52

³⁰ <https://www.ftc.gov/about-ftc/mission/enforcement-authority>

Price” and “Ancillary Good or Service”) contain ambiguities around what the Commission would consider to be “mandatory” fees and “optional” fees, while other terms like “bait-and-switch pricing”³¹ merely describe practices that may be concerning but do not help define which fees are to be prohibited. At the same time, the NPRM inquires whether a final rule ought to prohibit “fees that provide little or no value to consumers and fees that are excessive,” yet it also acknowledges that “a rule prohibiting ‘worthless’ and ‘excessive’ fees could incur additional costs for industry to determine whether a fee qualified as worthless or excessive under the rule.”³² This confusing and inconsistent rhetoric throughout the NPRM only creates further uncertainty around what, if any, surcharges or fees can be levied and when, and suggests that the FTC itself has trouble providing the necessary degree of specificity regarding the types of fees covered by the proposed rule. As such, the Association argues that the Commission fails to meet the requirements set forth by the Magnusson-Moss rulemaking process because the NPRM ultimately only seeks to expand the FTC’s own ability to reach conduct it can’t already reach in its enforcement actions³³.

The Proposed Rule Does Not Contain an Adequate Cost-Benefit Analysis

Finally, the Commission fails to provide a sufficient preliminary regulatory analysis assessing the costs and benefits of the proposed rule, acknowledging that because “the proposed rule applies to the entire economy . . . we cannot forecast all potential consequences and costs.”³⁴ This is particularly true for the restaurant industry, where the Commission again acknowledges that it “lack[s] data to quantify several of these benefits and costs,” and instead appears to rely mostly upon ANPR comments, assumptions, and anecdotal evidence to arrive at its “estimate[d] compliance costs and . . . break-even level of benefit.”³⁵ In fact, the NPRM provides Table 14 – dedicated to a “Summary of Key Uncertainties” – that demonstrate just how complex pricing practices for the restaurant industry can be³⁶.

The Association and the Law Center take issue with nearly every cost assumption made about the industry. First and foremost, the NPRM estimates that an “average” restaurant not in compliance with the rule would need to spend \$4,818 to redesign its menu, and “between 0% and 50% of full-service restaurants and bars would have to replace printed menus, at an average cost of \$2.60 per menu.”³⁷ However, these estimates do not account for common supply chain issues that may cause certain food items to increase or decrease in price, nor do they consider the thousands of restaurants that offer varying seasonal menus with completely different offerings. The problem presented by these estimates becomes further compounded by the Commission’s incorrect assumption that printing two different menus for large parties and small parties “would not affect menu printing costs since restaurants could select the number of each type of menu according to their established seating arrangements.”³⁸

Because restaurant patronage can vary by the day, week, and month of the year, it would be extremely challenging for any operator to avoid paying for extra menus to ensure compliance with the rule. In fact, the Association is concerned that operators wouldn’t be able to rest on their laurels by merely printing different menus for small and large parties—they would potentially be forced to print separate menus for

³¹ NPRM, 2, 13

³² NPRM, 23

³³ <https://www.kelleydrye.com/viewpoints/blogs/ad-law-access/the-ftcs-magnuson-moss-rulemaking-process-still-an-uphill-climb>

³⁴ NPRM, 34

³⁵ NPRM, 52

³⁶ NPRM, 57

³⁷ NPRM, 54

³⁸ NPRM, 54, footnote 352

takeout offerings, delivery offerings, and for customers using credit cards versus cash. This is because the proposed rule would require operators to print different menus that “clearly and conspicuously disclose the total price” for each of these unique scenarios. Utilizing the estimated menu price formula provided by the NPRM, we anticipate that it will cost the average restaurant upwards of \$28,908 to reprint menus alone, which does not include the costs associated with digital menu boards, website maintenance, mobile app and technology updates, and QR code menus.

The NPRM vastly underestimates both the amount of time and the costs associated with reoptimizing menu prices as well as the legal advice required to come into compliance. Given the aforementioned complexities around seasonal offerings, varying in-store traffic and remote orders, changing QR code and/or digital menu board service providers, and intermittent supply chain issues, we estimate that restaurant operators require at least 20 hours a year to reoptimize menu prices, which quadruples the low-cost estimate made within the NPRM. Additionally, a basic Google search indicates that the average hourly fee attorneys charged in 2022 was \$313,³⁹ which can fluctuate further depending on whether the attorney charges a retainer, where the attorney lives, and other factors. This figure more than triples the hourly wage rate assumed by the NPRM.

Due to the NPRM’s implication of the Major Questions Doctrine, the Commission’s lack of express Congressional authority, its subversion to its Section 18 rulemaking requirements, lack of relevant enforcement history, and insufficient economic analysis, the Association and the Law Center believe that the Commission’s “Trade Regulation Rule on Unfair or Deceptive Fees” NPRM is unlawful and should be rescinded in its current form.

If a Final Rule is Issued, Fees that are Value-Adding and Transparent Must be Preserved

Imagine walking into a restaurant and the person at the desk asks you how you’re going to be paying that evening. This would become an uncomfortable reality in a world where restaurants can’t use surcharges and are forced to have menu for large parties, one for smaller parties, one for people paying with credit cards, one for takeout, and one for delivery.

This is why if restaurants are not excluded from the final rule, the Association and the Law Center urge the Commission to permit restaurants to utilize service fees, credit card surcharges, and delivery fees so long as they meet certain notice and disclosure requirements that provide appropriate pricing transparency and shopping comparison abilities for consumers. The following Sections I-III focus on how service fees, credit card surcharges, and delivery fees provide tangible customer benefits with transparent and defined value, and thus should be preserved. Section IV provides an outline for a potential “Transparency Test” in lieu of a final rule, and Section V provides direct answers to the questions posed within Section X⁴⁰ of the NPRM.

I. Service Charges Must be Preserved in Any Final Rule

The restaurant industry is the second-largest private sector employer in the U.S. with a workforce of 15.5 million employees. Overall employment returned to pre-pandemic levels in late 2023, but the recovery from mandatory government-imposed shutdowns was uneven. While staffing levels in the limited-service

³⁹ <https://www.forbes.com/advisor/legal/how-much-lawyers-cost/>

⁴⁰ NPRM, 61

(+14%) and quick service (+3%) segments were higher than February 2020 readings, full service restaurant employment was 245,000 jobs (-4%) below pre-pandemic levels in February 2020⁴¹.

Eliminating service charges will change existing federal law and hurt employee compensation

The application of a mandatory service charge to help compensate staff is fully compliant with existing law from the Internal Revenue Service (IRS). Under *IRS Rev. Rul. 2012-18*, “...to the extent any portion of a service charge paid by a customer is distributed to an employee it is wages for FICA tax purposes.”⁴² In *Announcement 2012-25*, the IRS directed examiners to “ensure that distributed service charges, including auto gratuities described in the Revenue Ruling, are properly characterized as wages and not tips.”⁴³ If service charges are no longer permitted and these costs were to be absorbed into menu prices, an employee’s federal income tax would likely see a decline. This significant cost to federal government revenue is not illustrated within the FTC’s proposed rule but would need to be extensively understood in any final rule.

Under the *Fair Labor Standards Act* (FLSA), the U.S. Department of Labor specifically says, “A compulsory charge for service, for example, 15% of the bill, is not considered a tip under the FLSA.”⁴⁴ Additionally, the FLSA illustrates how these sums are part of the employee’s total compensation and must be included in the regular rate of pay for computing overtime. Not only would the FTC’s proposal reduce employee base wages, but it would also have a “double negative” effect of reducing an employee’s overtime wages when eligible for time-and-a-half pay.

Mandatory service charges help employees and employers navigate fast-moving regulations

The FTC’s proposal acknowledges that seven states, Guam, D.C., and some major localities like the city of Chicago, have either eliminated the tip credit system or are transitioning away from it. These regulatory changes pose enormous hurdles for small and independent full service restaurants. As restaurants balance an average 3-5% margin – which can quickly evaporate during economic shifts like food price inflation – the tip credit ensures that tipped servers have an earning potential far above the minimum wage.

Additionally, the FLSA provides strong protections for workers and ensures that tipped employees never earn less than the local minimum wage. However, waitstaff at full service restaurants generally earn far more than a minimum hourly wage. Nationally, tipped servers make a median of \$27 an hour and the highest paid tipped servers make \$41.50 an hour⁴⁵.

When a jurisdiction eliminates its tip credit system, baseline wages for tipped workers change dramatically. As the hourly wages shift to being paid entirely by the restaurant operator, their labor costs increase, and a restaurant operator must choose to 1) overhaul menu prices or limit menu selections, 2) dramatically slash opportunities in employee benefits and available shifts, 3) eliminate server positions, or 4) apply a mandatory service charge to help offset new wage requirements. Given customer aversion to increased menu prices or across-the-board menu changes and the long-term consequences of limiting

⁴¹ <https://restaurant.org/research-and-media/research/economists-notebook/economic-indicators/total-restaurant-industry-jobs/> (February 7)

⁴² Section 3121—Tips Included for Both Employee and Employer Taxes, Internal Revenue Service, at p. 4, available at <https://www.irs.gov/pub/irs-drop/rr-12-18.pdf>

⁴³ Interim Guidance on Rev. Rul. 2012-18, Internal Revenue Service, at p. 1, available at <https://www.irs.gov/pub/irs-drop/a-12-25.pdf>

⁴⁴ <https://www.dol.gov/agencies/whd/fact-sheets/15-tipped-employees-flsa>

⁴⁵ <https://restaurant.org/nra/media/downloads/pdfs/advocacy/tip-credit.pdf>

opportunity for waitstaff, restaurant operators need the ability to apply a service charge. When faced with intense regulatory pressures at the local level, small and independent operators need flexibility in how to manage the “new normal.”

In its proposal, the FTC says that restaurant operators who have adopted mandatory service charges would have to “return to the traditional tipping model.”⁴⁶ However, for thousands of operators in the areas where the tip credit has been eliminated, this essentially puts them in a position where they have no choice but to damage their business or eliminate jobs for hardworking staff. In this case, a national one-size-fits-all national mandate will not work for operators, employees, or patrons.

In addition to maintaining service fees in states that have eliminated the tip credit, the final rule must maintain service charges that are in place because of a collective bargaining agreement (CBA). Many restaurant operators and foodservice companies engage in a CBA with their staff. These contracts typically take months to negotiate, ratify, and implement. One foodservice company, who negotiated a new contract after the pandemic, reported that a CBA took nearly a year to be signed.

The CBA often features a server compensation percentage of the total contract, permitting the foodservice employees working an event to receive a 15-20% service charge on the total transaction. If the FTC restricts this added service charge it would force an end to the CBA terms, requiring the company and workers to engage in new contract negotiations and creating more uncertainty for restaurant employees. Once again, implementing this required change would dramatically exceed the “high end” estimate of the “lawyer hours” needed to comply⁴⁷ with the proposed rule.

Large party service charges: long-standing restaurant practice to protect employee compensation

The FTC recognizes large party service charges, commonly for dining parties of five or more patrons, are “widespread and well-established” and have enjoyed “long-standing usage” among customers⁴⁸. These large party service fees ensure waitstaff assigned to parties that exceed normal service receive commensurate compensation for work performed. The fee safeguards a server’s income for a single check versus multiple dining parties with different check sizes providing a combined tip income. Additionally, large dining party service requires extra time, attention, and skill, often requiring the most experienced and highest-earning servers to forego opportunity of more tables with a higher earning potential for a single party.

While large party fees are generally well-established, restaurants also make great effort to ensure that parties that will incur the fee are aware in advance of ordering that a service fee will be added to their final check. Generally, this is posted on the menu and website, and shared when the reservation is made. However, the NPRM essentially directs restaurants to mislead customers by hiding this understood fee in the prices of a “special” large party menu, incurring thousands of dollars in new costs for a business practice that isn’t broken.

Banquet/catering practices and contracts must be protected from FTC’s overreach

Catering is the natural, off-premises extension of a restaurant operator’s business, providing customers the restaurant experience at a location special to them. This opportunity generally provides an enormous customer value while incurring higher costs for the restaurant owner in goods and services like transportation, fuel, cookware, kitchen equipment, cutlery, linens, food, beverages, dishes, serving trays,

⁴⁶ NPRM, 53

⁴⁷ NPRM, 54

⁴⁸ NPRM, 52

and other supplies. These transactions typically include a catering fee to reflect the added costs. The Association requests the FTC to explicitly exclude catering fees or any other fee for a contracted service (banquets, catering, off-site event management, servers, and bartenders, etc.) from the final rule.

II. Credit Card Surcharges Must be Preserved and the FTC Must Better Regulate Swipe Fees Established by Card Networks

The proposed rule also seeks to require small, independent restaurant operators to eliminate “non-service-related fees, such as credit card usage fees” by increasing menu prices to include credit card processing costs⁴⁹. While the FTC acknowledges that in response to its November 2022 ANPR it received comments highlighting consumer sentiment regarding financial services fees that are “charged in connection with bank accounts, credit cards, and other financial products [that] are excessive and not adequately disclosed,”⁵⁰ the Commission appears to have chosen not to address these fees. Instead, it has proposed to eliminate one of the very few tools that small business owners must inform consumers about the excessive “swipe” fees paid by them and U.S. businesses on the millions of electronic payment transactions that occur every day.

This choice to specifically target restaurant credit card surcharges while altogether neglecting the root cause of this phenomenon—the unfair and hidden swipe fees promulgated by the dominant global credit card networks—suggests that the Commission lacks a comprehensive understanding of today’s U.S. payments ecosystem, the expansive history of credit card surcharging, and the overwhelmingly harmful impact swipe fees have upon restaurant operators and their customers. While credit card surcharges are not restaurant operators’ first preference for how to deal with excessive credit card transaction fees, they are a symptom of a broken payment ecosystem and are one of the limited mechanisms restaurants and other merchants rely on to legally manage exorbitant swipe fees. For this reason and others detailed below, the Association urges the Commission to altogether exclude credit card surcharges from its final “Trade Regulation Rule on Unfair or Deceptive Fees” rule. Further, the Association suggests that the FTC partner with other federal agencies to better protect consumers from the significant harms caused by the excessive and hidden credit card swipe fees imposed by Visa and Mastercard.

The U.S. Payments Ecosystem and the Visa/Mastercard Duopoly

A restaurant owner typically pays several different fees for every credit card transaction: 1) an interchange fee paid to the customer’s card-issuing bank; 2) a network fee paid to the card network that facilitates the transaction; and 3) an acquirer’s fee paid to the restaurant’s merchant bank. Together, these fees are colloquially referred to as swipe fees, which can total over 4%⁵¹ of any given purchase depending upon the nature of the transaction, the type of credit card presented for payment, and the restaurant’s specific rate offered by its payment processor to facilitate card payments.

While the cost of debit transactions has been regulated for over a decade via the Federal Reserve’s Regulation II⁵², there are currently no federal laws or regulations that govern the cost of credit card

⁴⁹ NPRM, 53

⁵⁰ NPRM, 10

⁵¹ *Methodology*: Non-qualified Visa credit interchange is typically the highest, sitting at 3.15% + \$0.10 ([Wells Fargo](#), pg. 48); network fees for a given Visa credit transaction will be 0.14% + \$0.0195 ([Wells Fargo](#), pgs. 1-2); based on public filings and Nilson report data, we estimate that the average processor margin is around 0.60%. Using this data, the cost for a \$40 transaction would be: (1) Interchange Fee at 3.15% + (\$0.10/40) = 3.40%; (2) Network Fee at 0.14% + (\$0.0195/40) = 0.19%; (3) Average Processor Margin = 0.60%, which equates to a total value of 4.19%

⁵² <https://www.federalreserve.gov/paymentsystems/regii-about.htm>

transactions within the U.S. payments ecosystem. This lack of regulation has resulted in a power vacuum that enables the Visa/Mastercard duopoly control of over 80%⁵³ of the credit card marketplace, forcing U.S. merchants to pay the highest interchange fees in the industrialized world at an average of 2.24%⁵⁴. These rates become particularly alarming when compared to places like Europe, Australia, and Canada, where credit card interchange fees have been capped at 0.3%⁵⁵, 0.5%⁵⁶ and 0.95%⁵⁷ respectively.

This comparison begs the question: why are credit card swipe fees so much higher in the U.S. than almost anywhere else in the world? The answer is simple: the federal government has failed to intervene in a broken market to prevent the anticompetitive and price-fixing practices that have allowed the Visa/Mastercard duopoly to continue to thrive. These two dominant card brands dictate the interchange fee rates that are adopted by virtually every one of the hundreds of banks that issue their cards. Rather than competing to offer the lowest fees and therefore hold down costs for merchants and prices for consumers, the two card giants compete against each other to set the highest interchange fees. Doing so means more revenue for the banks and encourages them to issue cards from whichever of the two card networks has the more lucrative interchange fees.

In addition to the interchange rates that are solely established by the two card companies, Visa and Mastercard earn a separate network fee for the millions of credit card transactions that take place every day. From a macroeconomic perspective, merchants paid \$93.2 billion in swipe fees on Visa- and Mastercard-branded credit card transactions alone in 2022 (a 20% increase over 2021), and a total of \$160.7 billion in swipe fees for all credit and debit card transactions (up 16.7% from the year prior and up 142% over the previous decade).⁵⁸ Increases in Visa and Mastercard swipe fees are often coordinated to take place in April and October of every year. In fact, another swipe fee increase reported late last summer has already gone into effect and is projected to result in business owners across many U.S. sectors paying \$502 million more in fees⁵⁹, and the Association anticipates further increases will be made in 2024.

The Restaurant Perspective

For restaurant owners and operators, accepting debit and credit cards is an absolute imperative to best serve their customers, and ultimately, to stay in business. However, accepting card payments is one of the highest costs borne by an operator, often behind only labor and food. Because restaurant operators in 2023 juggled a 5.7% increase in food costs and a nearly 6% increase in payroll expenses, it is difficult to truly quantify the profoundly negative impact credit card swipe fees have upon the industry. Worse yet, they act as an inflation multiplier given that they are paid as a percentage of every single transaction. For this reason, Visa has gone so far as to publicly deem inflation as a “net-net positive” for its business.⁶⁰

⁵³ Board of Governors of the Federal Reserve System, “Report to the Congress on the Profitability of Credit Card Operations of Depository Institutions,” November 2020, at p. 7, *available at* <https://www.federalreserve.gov/publications/files/ccprofit2020.pdf>.

⁵⁴ *The Nilson Report*, Issue 1237, March 2023, “Fees Paid by Merchants in the U.S. – 2022,” *available at* <https://nilsonreport.com/newsletters/1237/> (hereinafter “Nilson Report”).

⁵⁵ <https://cms.law/en/bgr/publication/eu-cap-on-interchange-fees-for-card-based-payments201>

⁵⁶ <https://www.rba.gov.au/payments-and-infrastructure/review-of-card-payments-regulation/q-and-a/card-payments-regulation-qa-conclusions-paper.html#interchange-fees-q3>

⁵⁷ <https://www.canada.ca/en/innovation-science-economic-development/news/2023/12/government-of-canada-announces-finalized-agreements-with-visa-and-mastercard-to-lower-credit-card-transaction-fees-for-small-businesses.html>

⁵⁸ Nilson Report

⁵⁹ <https://www.wsj.com/finance/visa-mastercard-prepare-to-raise-credit-card-fees-ed779be1>

⁶⁰ <https://pirg.org/articles/mastercard-visa-and-banks-all-profit-inflation-without-doing-anything/>

Unfortunately, restaurants are essentially forced into a “take it or leave it” position because the card companies aren't required to negotiate credit card swipe fees, nor can merchants seek out alternative payment processing options. This is blatantly counter to the NPRM's objectives “to promote a level playing field that enables comparison shopping and allows honest businesses to compete.”⁶¹

It's also worth noting the unique “partnership” between merchants and Visa and Mastercard. It is the only business relationship in which the service provider takes a definitive cut of the business' profit and where the terms between the two parties are completely non-negotiable. Given that the typical table service restaurant makes an average of 3-5% pre-tax margin, and since credit card swipe fees amount to an average of 2.24% for each transaction, it starts to become clear as to why restaurants are incentivized to offer cash discounts, and at other times, are presented with no other choice but to pass on a credit card processing fee to customers in the form of a surcharge.

It should also be noted that the swipe fees set by Visa and Mastercard vary drastically according to the type of card, type of transaction, and the size of merchant, with hundreds of combinations possible. That makes the cost of a swipe difficult to track even for payments experts, and often means merchants don't know how much they are paying for a transaction at the time of purchase. When combined with swipe fee increases year-over-year, it becomes extremely challenging for restaurant operators to budget their card processing costs on a monthly or annual basis, and all but impossible to bake the cost into one “Total Price” for every menu item.

Further compounding this issue is the sheer volume of credit card transactions restaurant operators are seeing in a post-pandemic world. Today, an estimated 7 in 10 restaurant transactions are paid by customers using either a credit or debit card, which is up from less than 5 in 10 a decade ago. Given the simultaneous increases in both fees and volume, operators are unable to absorb these growing costs and are choosing to transparently include this cost for their customers.

The last key aspect of restaurants' payment acceptance practices to understand is the massive growth of card-not-present (CNP) transactions. During the pandemic, restaurants were forced to adjust their business models to support off-premises dining by accepting orders made online, through mobile applications, third-party delivery services, or via contactless payments during curbside pickup. In 2021, 67% of the average restaurant's revenue came from food orders placed either online or over the phone, and QSRs on average generated as much as 75% of their sales from CNP transactions⁶².

Despite these dramatic shifts in market innovation and consumer spending preferences prior to and throughout the pandemic, restaurants and other merchants are still required to pay significantly higher fees to accept CNP transactions compared to card-present (CP) transactions. Thankfully, the Federal Reserve recently issued a clarification of Regulation II⁶³ holding that CNP debit card transaction processing must be enabled on at least two unaffiliated payment card networks, which will help to drive down CNP debit costs. But, because credit card swipe fees remain unchecked, restaurants are paying significantly more in fees to accept CNP credit transactions^{64, 65}. We note and appreciate that the Commission was attuned to this issue and submitted comments in support of the Fed's clarification⁶⁶.

⁶¹ NPRM, 19

⁶² [PYMNTS-Restaurant-Readiness-Index-July-2021.pdf](https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20221003a2.pdf)

⁶³ <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20221003a2.pdf>

⁶⁴ <https://www08.wellsfargomedia.com/assets/pdf/small-business/merchant/interchange-plus.pdf> (p. 11-12)

⁶⁵ <https://www08.wellsfargomedia.com/assets/pdf/small-business/merchant/merchant-passthrough-fees.pdf>

⁶⁶ https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-board-governors-federal-reserve-system-docket-no-r-1748-rin-7100-ag15-debit-card/fed_board_staff_comment_p859910.pdf

However, restaurants and other merchants who have embraced CNP transactions as a core aspect of their business continue to hold the bag when it comes to credit card swipe fees.

Consumer Impact

Perhaps more importantly, the dominant card networks' control over the credit market is just as harmful to consumers across the country. Economists estimate that in 2022, credit card swipe fees cost the average American family over \$1,000⁶⁷, and consumers are becoming increasingly aware that swipe fees drive up the prices of their spending. According to a recent survey from the Merchants Payments Coalition, 65% of likely voters support swipe fee reform, including 69% of Democrats, 66% of independents, and 60% of Republicans⁶⁸. As a result, consumer advocacy groups like the American Economic Liberties Project, Americans for Financial Reform, the Institute for Self-Reliance, Center for Responsible Lending, and Small Business Rising are calling for swipe fee reform as well⁶⁹.

Under the proposed rule, the Commission recommends that restaurants incorporate credit card processing fees within a "Total Price" for each menu item, but doing so would raise prices significantly for everyone. This would have an unfair impact on low-income, low credit score consumers who do not use credit cards for restaurant purchases. According to the Federal Reserve, 6% of U.S. adults were "unbanked" and 16% of U.S. adults were "underbanked" in 2019⁷⁰, and we believe that the proposed rule as drafted would have the unintended consequence of forcing these lower income consumers to effectively subsidize higher income households' spending, particularly with respect to credit card rewards programs. A recent economic analysis from the Federal Reserve all but confirms this assertion, which found that "credit card rewards might, to some extent, be funded by cash and debit card users who pay higher prices without receiving any rewards to compensate," resulting in "an annualized redistribution of \$15.1 billion induced by credit card rewards [that] transfer income from less to more educated, from poorer to richer, and from high- to low-minority areas, thereby widening existing spatial disparities."⁷¹ Requiring restaurants to pass on these fees to these types of customers within a "Total Price" seems counterintuitive to the NPRM's core tenet.

In addition to this potential expansion of income inequality, the Association also argues that the proposed rule would create less price transparency for consumers when it comes to credit card processing fees. Today, restaurants that pass on a credit card surcharge to customers must meet certain disclosure requirements created by the card networks, including in-store signage and a separate line item on receipts⁷². Our industry strives to create price transparency for diners, but the proposed rule as drafted would prevent them from fully understanding how credit card fees impact the restaurant and are completely outside of the operator's control. When a credit card surcharge is properly disclosed via in-store signage, on the menu, and on the receipt, customers have a clear understanding that the fee is a product of the card companies, not the restaurant. In fact, the Commission's proposal would effectively create a "reverse-Robin Hood" effect by further enabling the Visa/Mastercard duopoly to hide their

⁶⁷ <https://merchantspaymentscoalition.com/merchants-call-for-action-as-swipe-fees-rise-again/>

⁶⁸ <https://merchantspaymentscoalition.com/wp-content/uploads/2023/09/Survey-2023-09-18.pdf>

⁶⁹ <https://www.economicliberties.us/wp-content/uploads/2023/09/Letter-Supporting-Credit-Card-Competition-Act-1.pdf>

⁷⁰ <https://www.federalreserve.gov/publications/2020-economic-well-being-of-us-households-in-2019-banking-and-credit.htm>

⁷¹ <https://www.federalreserve.gov/econres/feds/files/2023007pap.pdf>

⁷² <https://usa.visa.com/content/dam/VCOM/download/merchants/surcharging-faq-by-merchants.pdf>

exorbitant swipe fees behind a veil of increased menu prices, allowing Wall Street goliaths to continue ransacking Main Street businesses and consumers alike without fear of legal liability or public backlash.

The History and Origin of Credit Card Surcharging

The proposed rule characterizes swipe fee surcharges as “generally not well established,”⁷³ but this assertion implies that the Commission has chosen not to examine the expansive history of this practice before issuing the NPRM. According to Professor Adam Levitin’s research on credit card merchant restraints, the companies that would eventually become Visa and Mastercard “adopted network-wide no-surcharge and no-discount rules at some point after 1970... [in order to] insulate the card networks from having to compete with each other on point-of-sale price to consumers.”⁷⁴ Coincidentally, the emergence of interchange fees within the credit card system occurred around the same time in 1971. According to Levitin, interchange fees were originally “designed to increase issuer compensation at a time when issuers could not charge higher interest rates... [thereby] chang[ing] the economics of early card issuance and help[ing] cement it as a profitable undertaking by allowing issuers to get far higher returns than they could with usury restrictions.”⁷⁵ But the viability of the interchange fee at the time ultimately hinged upon the existence of the no-surcharge rule, because “otherwise, interchange would appear to be an indirect charge on consumers by issuers that might trigger state usury law violations.”⁷⁶

Another key piece of the puzzle affecting the evolution of interchange fees and credit card surcharging was the Truth-in-Lending Act of 1968 (TILA), which established numerous disclosure requirements for lenders, including credit card issuers, around annual percentage rates (APR) and the differences in cost between cash and credit⁷⁷. While TILA helped to establish some of the consumer protections in the financial services sector that still exist today, it also effectively required networks to maintain their no-surcharge and no-discount rules to avoid potential violations of the law⁷⁸. However, “[c]onsumer advocacy groups saw no-surcharge and no-discount rules as negatively affecting cash consumers,” and therefore “pressed Congress to amend TILA to allow for cash discounts by not including the discount in the APR.”⁷⁹ In response, Congress amended TILA to exempt cash discounts of up to five percent from the APR in 1974, but went on to further amend the law in 1976 to specifically prohibit credit card surcharging for an additional three years⁸⁰.

After renewing the federal ban on credit card surcharging again in 1978, Congress let the prohibition temporarily expire in 1981, but quickly moved to pass the Cash Discount Act, “which eliminated the five percent limit on cash discounts but reinstated the surcharge ban for a further three years.”⁸¹ Once again, consumer groups were outspoken in their opposition to this surcharge ban revival, but this time were joined by several key government agencies in opposing the prohibition⁸². Most notably, the FTC itself was among this group of agencies against the ban, as illustrated within the below excerpt from a letter to Senator William Proxmire from then-FTC Chairman Michael Pertshuk:

⁷³ NPRM, 53

⁷⁴ Adam J. Levitin, “Priceless? The Economic Costs of Credit Card Merchant Restraints,” 55 UCLA Law Review 1, 53, 40 (2008) (hereinafter “Levitin”)

⁷⁵ Levitin, 57, 60

⁷⁶ Levitin, 60

⁷⁷ Levitin, 56-7

⁷⁸ Levitin, 57

⁷⁹ Levitin, 61-2

⁸⁰ Levitin, 62

⁸¹ Levitin, 63

⁸² Levitin, 64

“In theory, a discount and a surcharge are equivalent concepts, but one is hidden in the cash price and the other is not. From a practical standpoint, the surcharge seems easier to implement and more likely to ensure that the price credit card users pay reflects the cost of accepting credit cards. If the goal of this legislation is to ensure that cash customers are not required to absorb the extra costs of accepting cards, and thereby subsidize credit card users, then elimination of the current prohibition on surcharges would seem to be one of the most effective methods of obtaining this goal.”⁸³

Congress ultimately allowed the federal prohibition on credit card surcharging to expire permanently in 1984, which transitioned this fight to the state level⁸⁴.

Almost All U.S. States Permit Credit Card Surcharging

Following the expiration of the federal prohibition on credit card surcharging, networks and issuers lobbied state legislatures heavily to adopt similar surcharge bans. While the financial services industry found some success at the state level in the 1980s⁸⁵, most of these prohibitions have since been reversed by court orders^{86, 87}. Some states and local jurisdictions have recently established new disclosure requirements for credit card surcharging⁸⁸, but the fact remains that this practice is currently legal in almost every U.S. state^{89, 90}:



⁸³ Levitin, 66

⁸⁴ It should also be noted that the global card networks are now required to permit credit card surcharging as part of the 2013 “Payment Card Interchange Fee and Merchant Discount Antitrust Litigation” settlement (see [Visa surcharging rules](#) and [Mastercard surcharging rules](#)). To be clear, the Association does not find that today’s card brand surcharging rules provide helpful clarity or flexibility for operators, but merely point to their existence as further proof that credit card surcharging practices are in fact “well-established.”

⁸⁵ Levitin, 64

⁸⁶ *R.R. Supply v. Bondi*, 807 F.3d 1235 (11th Cir. 2015), *reh’g en banc denied* 809 F.3d 1282 (11th Cir. 2016), *cert. denied* 137 S. Ct. 1452 (2017)

⁸⁷ *Italian Colors Restaurant v. Becerra*, 878 F.3d 1165 (9th Cir. 2018).

⁸⁸ <https://www.natlawreview.com/article/new-york-will-soon-require-merchants-provide-additional-credit-card-surcharge>

⁸⁹ <https://www.lawpay.com/about/blog/credit-card-surcharge-rules/>

⁹⁰ <https://www.paystand.com/blog/passing-credit-card-fees-to-customers-a-state-by-state-guide>

Given the legality of credit card surcharging across the nation, the Association takes issue with the proposed rule's ban on this practice despite its provision holding that it "will not be construed as superseding, altering, or affecting any State statute, regulation, order, or interpretation relating to unfair or deceptive fees or charges."⁹¹ Because only two states (Massachusetts and Connecticut) expressly prohibit restaurants and other businesses from passing on a credit card processing fees to their customers, the Association argues that the proposed rule as drafted would conflict with the clear legal precedence established by the vast majority of states regarding credit card surcharges.

While we appreciate the Commission's recent Consent Agreement⁹² that ordered an end to Mastercard's illegal business tactics that prevented merchants from using competing networks to process CNP debit payments⁹³, the unfortunate reality is that not enough has been done enough to curb the hidden swipe fees that continue to cause significant harm to restaurant operators, their customers, and the economy at large. However, rather than imposing a one-size fits all ban on surcharges – including credit card transaction fees – there are several ways the FTC could work in concert with other federal agencies to better protect restaurant operators and their customers from these hidden swipe fees. For instance, the FTC's Bureau of Competition could partner with the Department of Justice Antitrust Division to investigate the antitrust implications and barriers to competition posed by the Visa/Mastercard duopoly's price-fixing practices and their overly restrictive network rules. The FTC could also collaborate with the Consumer Financial Protection Bureau to better inform consumers about the undisclosed interchange and network fees that consumers unknowingly pay when using a credit card. And finally, the FTC could utilize its Section 5 authority to establish more robust disclosure requirements to achieve this same goal.

The Association understands that the Commission does not have regulatory jurisdiction over card-issuing banks or credit unions themselves, but for the reasons discussed above, we insist that the Commission should not prohibit one of the very few legal and generally accepted mechanisms that restaurant operators have to combat the highest swipe fees in the industrialized world. As such, we urge the FTC to exclude credit card surcharges from the scope of the final rule, and also request that the credit card swipe fees dictated by the two dominant global card networks be further addressed by the FTC and other partnering federal agencies.

III. The FTC Must Preserve Delivery Fees

Delivery is a popular and well-established business channel for many types of restaurants, and along with it, so is the delivery fee. The proposed rule, however, would force restaurants to create separate menus that hide this cost from the consumer, robbing them of price transparency. Restaurant operators have invested in their own delivery services for decades, bearing the cost of insurance, GPS-enabled systems, vehicles, gasoline, and driver training for quality assurance. When a restaurant operator decides to provide a dedicated delivery service, customers are widely aware of the defined benefit and expect an extra fee for this added service.

Additionally, restaurant meal delivery is more essential in today's post-pandemic world than it ever has been before. Sixty-five percent of restaurant operators say delivery represented a higher proportion of sales in 2023 than it did in 2019. Only 15% of restaurant operators say delivery was a lower proportion of

⁹¹ NPRM, 65

⁹² https://www.ftc.gov/system/files/ftc_gov/pdf/2010011C4795MastercardDurbinOrder.pdf

⁹³ <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-approves-final-order-requiring-mastercard-stop-blocking-use-competing-debit-payment-networks>

their total sales⁹⁴. The FTC should not fundamentally overturn the pricing and structure of well-established meal delivery just as this practice has reached new importance for thousands of small and independent restaurant operators.

Importance of delivery continues to rise

Restaurant operators' reporting of their delivery sales (as a % of total sales) in 2023 compared to 2019⁹⁵.

Delivery as a % of total sales	All restaurants	Full service restaurants	Limited-service restaurants
Higher proportion than 2019	65%	58%	72%
Lower proportion than 2019	15%	19%	11%
About the same proportion as 2019	20%	23%	17%

Base: Restaurants that offer delivery now and in 2019

Source: National Restaurant Association 2023 State of the Restaurant Industry Report

Requiring the inclusion of delivery fees in the total price paid by a customer: menu challenges for restaurants, confusion for customers

If the FTC requires delivery fees to be included in the total price paid by a customer for a restaurant meal, restaurant operators will be required to produce a separate “delivery menu” to comply. In this separate “delivery menu,” the restaurant operator will need to allocate the fees it charges to provide delivery services across all the restaurant’s individual menu items. This will be challenging for restaurant operators, namely because delivery fees are often not the same for each customer’s order. Instead, delivery fees are often based on the specific customer’s order and may depend on such factors as the order volume or the distance of the customer from the restaurant location.

In addition, the operating costs for providing delivery services are not static. Delivery is frequently provided by third party providers, who may increase or decrease the cost of providing delivery services based on market conditions at the time of the order. As a result, restaurant operators who want to reasonably allocate their costs associated with delivery will need to invest significant time and capital into technology and other resources to help them create a mechanism whereby they can produce a dynamic “delivery menu” on their paper, website, and app-based menus to account for the specifics of customer orders, as well as the consistently changing delivery cost landscape. Not only will this create a substantial ongoing cost to restaurant operators, but it also has the impact of harming those restaurant operators who have already invested time, money, and resources into customer education around disclosing existing delivery fees separate from menu pricing. Further, this change will likely result in substantial disruption in customer understanding and confidence – customers would not only see increased prices, but they may also see specific menu item prices fluctuate based on the volume and details of their order.

As a result of these additional costs and the likely confusion to customers, it is possible that instead of pursuing a dynamic pricing model where the specifics of a customer’s order and delivery costs are taken into account, restaurant operators likely will instead elect to increase the price of all menu items to offset the cost of providing delivery services to all customers. The consequences of this are that delivery

⁹⁴ “2023 State of the Industry Report,” National Restaurant Association, February 28, 2023, at <https://restaurant.org/research-and-media/media/press-releases/2023-national-restaurant-association-state-of-the-industry-report-a-new-normal/> (hereinafter “2023 SOI Report”)

⁹⁵ 2023 SOI Report

customers will be charged increased prices, which may not necessarily correspond to the actual cost of delivery to the specific customer. The below example is illustrative:

Under the current menu and delivery fee structure, a customer orders 10 hamburgers at \$5 each and 10 cheeseburgers at \$6 each. Based on the customer's volume, location and market conditions, the delivery fee is calculated at \$8 based on a scaled-up order size. The total order price is \$118. However, following the FTC proposed rule, the restaurant operator increases prices by 15% to cover the cost of delivery to all customers at all times. The same customer now orders 10 hamburgers at \$5.75 each and 10 cheeseburgers at \$6.90 each. There is no delivery fee charged. The total price is \$126.50, or \$8.50 more than what the customer would have paid under the current delivery fee structure.

This is inconsistent with current practice in the industry and customer expectations, where customers are accustomed to paying less as their order reaches a certain volume. It also is unfair to many customers as the actual cost of delivery to each particular customer is not reflective of the cost of each customer's meal, and many customers will pay more for their meals as a result of the proposed change.

There is an opportunity to correct the uncertainty created by the NPRM. The proposed rule excludes from the "Total Price" disclosure of any "Shipping Charges" – 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." Like "Shipping Charges," delivery fees should be excluded from the "Total Price" requirement since local or national advertising may feature the cost of the food item but cannot reasonably predict how regional market conditions will alter the price of delivery. For example, while a franchised restaurant may operate under the same brand or trademark, each franchised restaurant is an independently owned business that controls menu prices and delivery fees. By separating the delivery fee from the "Total Price," an independent restaurant operator can assess the specific customer's order and adjust based on volume, location, and other market conditions.

The NPRM's definition of "Shipping Charges" should therefore be modified to include language that demonstrates delivery charges also fall within the exclusion. As drafted, the definition offers a contradiction in sequential sentences, excluding the direct delivery of a meal from the "Shipping Charge" exemption while explaining a business must show the amount that reasonably reflects its delivery costs. Meal delivery requires a dynamic pace from kitchen-to-customer with added costs on packaging, safety and proper hygiene, product integrity, all while meeting expectations of temperature and quality. Restaurant meal delivery charges demonstrate all the costs and investments of "Shipping" and then exceeds this expectation. As such, the FTC should simply include delivery charges under the "Shipping Charges" exclusion to the "Total Price" disclosure.

Furthermore, the customer who assumes a delivery fee will be added to their order – as is tradition – will likely be alarmed when menu selections for delivery are higher than menu selections within the restaurant. Customers will be extremely frustrated and confused, as the FTC again would reduce transparency by hiding the delivery fee in a new menu. Restaurant operators will take the brunt of this customer frustration and will likely have to spend time, effort, and expense to educate customers as to why government regulation necessitates delivery menus with higher prices.

Customers like meal delivery the way it is

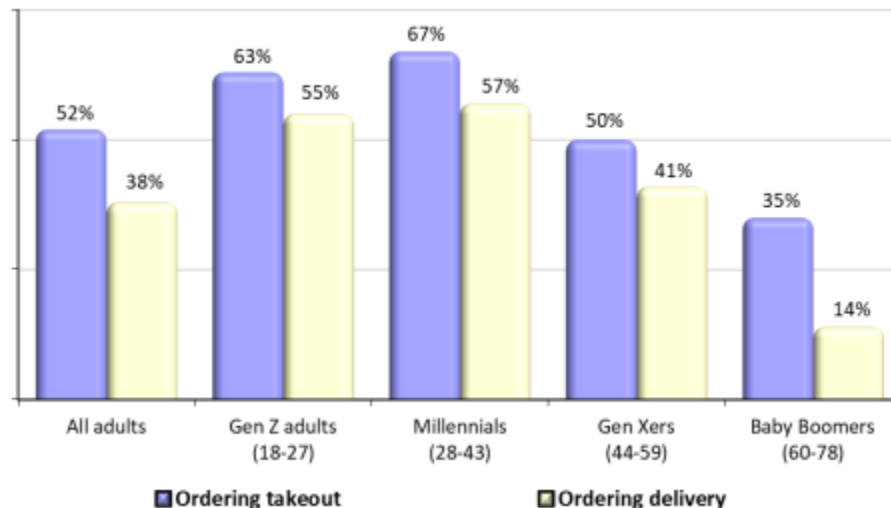
Restaurant operators have made unprecedented investments in off-premises meal transactions over the past four years starting in the government-ordered pandemic shutdowns affecting on-premises dining. As a result of those investments⁹⁶:

1. Restaurant operators across all six major dining segments said their off-premises sales represented a higher proportion of average daily sales than in 2019.
2. Six in 10 of operators expect off-premises sales to remain as strong as last year.
3. More than 4 in 10 restaurant operators are increasing investments in equipment and technology, including online ordering and digital payment options, to expand efficiency and productivity.

For many younger consumers, meal delivery is a now permanent and well-understood fixture of their lives. Fifty-three percent of consumers – including 67% of millennials and 63% of Gen Z adults – say ordering takeout from a restaurant is an essential part of their lifestyle⁹⁷. Most millennials (57%) and Gen Z adults (55%) feel similarly about delivery⁹⁸.

Younger consumers rely on off-premises options

Percentage of consumers who say ordering takeout or delivery from a restaurant is an essential part of their lifestyle⁹⁹



Source: National Restaurant Association 2023 State of the Restaurant Industry Report

Sixty-six percent of consumers say they are now more likely to order takeout than they were prior to the pandemic¹⁰⁰.

Customers are familiar with a delivery fee and willing to accept the known cost in exchange for an additional, separate service. The delivery fee does not meet the “hidden” criteria as it is prominently displayed and widely understood. The delivery fee does not meet the “deceptive” criteria as it is a fee

⁹⁶ 2023 SOI Report

⁹⁷ 2023 SOI Report

⁹⁸ 2023 SOI Report

⁹⁹ 2023 SOI Report

¹⁰⁰ 2023 SOI Report

with a defined benefit that is desired and valued by the customer. The FTC must allow delivery fees to be disclosed separately from the “Total Price” under its final rule.

Delivery driver tips – mandatory disclosure of federal labor law is unwarranted

The preamble to the proposed rule states that the rule would be violated “[i]f a delivery application includes an invitation to tip a delivery driver without disclosing that a portion of the tip is allocated to offset the delivery driver’s base wages or benefits.”¹⁰¹

However, this interpretation of FTC authority exceeds not only the Commission’s jurisdiction but seemingly questions or calls out existing federal labor law¹⁰². Not only does it go beyond the FTC’s presumed focus on junk fees, but also causes more disruption to have a federal labor code statute inserted into a restaurant meal delivery tip transaction. Restaurant operators typically include a tipping functionality as part of their online and app-based ordering platforms. However, the proposed one-size-fits-all disclosure of federal labor law will confuse and add new compliance burdens for restaurants operating in state or localities which do or do not have the tip credit. This is another issue – forcing the restaurant operator to indicate to the customer when and where the employer is utilizing the tip credit on base wages – where the FTC did not include an analysis of cost burden and legal support.

If the FTC expects a level of specificity that includes the amount of any tip credit, many restaurant operators could be in the position of removing online tipping functionality and tipping-related communications to customers given the tip credit allowance or variation from location to location, especially for those restaurants operating under the same brand and trademark using a common delivery platform. The NPRM’s prohibition on “misleading” or “hidden” fees as drafted would ultimately have a negative impact on tips received by employees who provide delivery services as well.

IV. Evaluating a Potential Transparency Test to Replace the Proposed Rule

Restaurant operators strive to be open with their customers, and the Association shares the FTC’s mission to improve pricing transparency and competition¹⁰³. However, the proposed rule’s attempt to foster more pricing transparency by altogether banning any kind of fee or surcharge is a massive overcorrection that, as we have noted throughout our comments, would result in less transparency for consumers.

In a restaurant context, many of the fees and surcharges covered by the proposed rule are transparent, expected by customers, and already factored into their purchasing decisions. They are not designed to obscure, confuse, or manipulate consumers, but instead serve as tools that allow operators to comply with relevant federal, state, or local laws, or otherwise cover costs that are outside the operator’s control. In most cases, these fees enable value-adding services for customers, like delivering pizza for the big game, providing exemplary service to large parties, and earning credit card rewards. Fees related to each of these services allow restaurants to remain competitive while providing customers with a positive dining experience.

While restaurant operators already make significant efforts to ensure that these fees and surcharges are evident and identifiable before consumers receive the check, they also typically provide customers with the option to remove a surcharge from their final bill. These practices differentiate our industry from the

¹⁰¹ NPRM, 21

¹⁰² [Tipped Employees Under the Fair Labor Standards Act \(FLSA\)](#),” U.S. Department of Labor.

¹⁰³ NPRM, 1

others outlined within the NPRM, and at the same time appear to address the proposed rule's concerns around the refundability of such fees¹⁰⁴.

In sum, the Association remains opposed to the blanket prohibition on fees and surcharges outlined within the NPRM. However, we are open to working directly with the Commission to establish a "Transparency Test" or another set of notice and disclosure requirements to accommodate the fees and surcharges necessary to maintain the business viability of restaurants. We believe that guidelines could be a workable solution for the industry while also accomplishing the FTC's goal of eliminating misleading pricing practices to create more price transparency for consumers.

V. Association Responses to the NPRM's Questions Provided in Section X

(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?

The National Restaurant Association strongly opposes the FTC's proposed rule and believes it must sever the restaurant industry from any inclusion in a final rule. Specifically, the final rule should not portray the following restaurant practices as "hidden or misleading fees" subject to prohibition:

- ☐ Credit card processing fees
- ☐ Delivery fees
- ☐ Mandatory service fees for employee compensation, including:
 - ☐ Large party service fees
 - ☐ Banquet and Catering fees
 - ☐ Contracted service fees between a 1) restaurant/foodservice operator and a customer, or a 2) collective bargaining agreement which provides a dedicated service fee for employees.

(3) Would the proposed rule, if promulgated, benefit consumers and competition?

Restaurant consumers would experience less transparency if the FTC forced operators to absorb all fees rather than show what is being paid by the customer. It would lead to massive confusion, as consumers and restaurant workers would have to navigate various menu types based on dining party size, delivery orders, type of payment, off-site events, or contracted food services. Costs will increase across-the-board as the restaurant industry attempts to absorb a \$3.5 billion fee from the FTC.

(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?

Specific IRS and DOL laws recognizing mandatory service charges as forms of compensation for employee wages are overturned by the NPRM. Additionally, 48 of 50 states currently permit credit card surcharging in some capacity.

¹⁰⁴ NPRM, 65

(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 § 464.2(b)? If so, how should “Covered Businesses” be defined?

Nearly three-quarters of restaurants are single-unit operations which commonly run on 3-5% pre-tax margins. However, even larger restaurant groups operate in distinct and dispersed geographic markets where the opportunity to “scale” on contract pricing or labor supply is unavailable. Given the unique footprint of the restaurant industry, which is mostly decentralized rather than centralized like an online product clearinghouse, a standalone franchised restaurant operates as a local single-unit enterprise even if its brand is the same as a national franchisor. For these reasons, a “covered business” should not include smaller restaurant companies or any other restaurant company.

(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)?

Yes, as well as limited-service and full service restaurants that are larger than the SBA size standards.

(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)”?

Yes, as explained above – this exception would protect employee compensation, help restaurant operators navigate regulatory changes, comply with existing federal law, reduce harm to large party dining experiences, avoid cost escalation in contracts and catering operations, and avoid the obstruction of collective bargaining agreements.

(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?

No, as detailed above, the definition of “Shipping Charges” must include restaurant meal delivery charges. Restaurant meal delivery must meet consumer expectations on time, temperature, and safety which adds costs to the business providing the service. Excluding meal delivery from the definition of “Shipping Charges” does not make sense as it is a value-added, transparent, and clearly customer-desired service.

Conclusion

While the National Restaurant Association and the Restaurant Law Center appreciate the Commission’s aim to provide increased price transparency for consumers, the NPRM ultimately fails to achieve this objective. An economy-wide, one-size-fits-all prohibition on “hidden” and “misleading” fees is both unworkable and unlawful, and we therefore urge the Commission to exclude the restaurant industry from any final rule of similar nature and scope.

Sincerely,

A handwritten signature in black ink, appearing to read "Brennan Duckett", with a long horizontal stroke extending to the right.

Brennan Duckett
Director, Technology & Innovation Policy
National Restaurant Association

A handwritten signature in blue ink, appearing to read "Amador", with a stylized, cursive script.

Angelo I. Amador
Executive Director
Restaurant Law Center