

July 7, 2021

U.S. Federal Trade Commission Office of the Secretary 600 Pennsylvania Avenue NW

¹ pursuant to 16 C.F.R. § 1.9 and 5 **C.S**§ 553(e), hereby petitions the Federal Trade Commission ("FTC" or the "Commission") **proportion** drip pricing.

Drip pricing is "the practice of adverting only part of a produt's price upfront and revealing additional charges latercommsumers go through the buying processt is a category of partitioned pricing, a practice in which "settedivide an offering's total price into two or more mandatory components such advase price and a surcharge pecifically, drip pricing "describes a narrower partitioned pricing scenthiat adds the element of delay in posting separate, mandatory prices by withholding key pricing information from consumers until they have already taken steps towards pleting a transaction, sellers engaged in drip pricing cause consumers to expend additional time on their purchasing decision and make it difficult for

¹ Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship ie felds of administrative law, economics, and public policy. This document does not purport to present the views, if any, of New York University School of Law.

² Mary W. Sullivan, Fed. Trade Comm'n, Economic Analysis Of Hotel ResortFees v (2017).

³ David A. Friedman *Regulating Drip Pricing*, 31 STAN. L. & POL'Y REV. 51, 53 (2020) (internal quotation marks omitted).

⁴ *Id.* 1n

consumers to comparison shop.⁵ Further, "empirical studies suggest that such pricing strategies may systematically make consumers pay more for goods and services" than they would have

practices." The FTC can justify drip pricing rules under three distinct sources of authority. First, drip pricing is a deceptive practice because it involves material representations (incomplete opening prices) and omissions (hidden mandatory fees) that are likely to mislead consumers acting reasonably under the circumstances. Second, drip pricing is an unfair practice because it "causes or is likely to cause substantial injury to consumers"—including increased search times

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PROPOSED REGULATORY LANGUAGE

"It is an unfair or deceptive act or practice and unfair method of competition to advertise or solicit the sale of a product or service without prominently disclosing the entire price to be paid by the customer inclusive of all unavoidable fees and service charges (excluding government taxes). Although unavoidable fees and charges included within the single total price disclosed may also be stated separately from the total price, such statement of fees and charges may not be false or misleading and may not be presented more prominently or in the same or larger size as the total price. In addition, all other fees or service charges that might foreseeably be assessed in connection with the sale of the product or service, including additional fees for optional services, must be conspicuously disclosed in the advertisement or solicitation."

REGULATORY BACKGROUND

By this petition, Policy Integrity requests action from the FTC to address a practice that has already drawn the Commission's ire.

In 2012, the FTC hosted "The Economics of Drip Pricing," a conference that brought together economists and marketing experts "to examine the theoretical motivation for drip pricing and its impact on consumers, empirical studies, and policy issues pertaining to drip pricing." At this conference, FTC Chairman Jon Leibowitz asked consumers to share their drippricing experiences with the Commission. Based on complaints shared with the FTC, the Commission "warned 22 hotel operators that their online reservation sites may violate [Section 5 of the Federal Trade Commission Act] by providing a deceptively low estimate of what

¹⁰ FED. TRADE COMM'N, THE ECONOMICS OF DRIP PRICING (2012), https://www.ftc.gov/news-events/events-

consumers can expect to pay for their hotel rooms." 12 Upon issuing these warnings, Chairman

emphasized that consumers deserve honest pricing, and asserted that JustFly is "in the hidden fee business." 19

In addition to litigation, some regulatory action has already been taken at the federal and state levels with respect to drip pricing. At the federal level, the FTC can look to the Department of Transportation's 2011 "full fare" regulation as a potential model for rulemaking. The DOT rule provides that "any advertising or solicitation" will be considered "an unfair and deceptive practice [] unless the price stated is the entire price to be paid by the customer." ²⁰

to the final purchase screen, I did a double take—the all-in price was almost a third more than the listed price for the tickets I had selected. At that point, I was committed, so I grudgingly clicked purchase. ... I honestly did feel deceived.²²

example, a study on StubHub ticket sales showed that consumers who were subject to drip pricing spent 19.5% more than those w

a law-enforcement or regulatory solution." ³³ Two years later, ticket sellers have not ceased drip pricing of their own accord. Drip pricing continues to impose costs upon consumers and undermine market competition. Thus, an FTC rule banning drip pricing is warranted.

II. Drip Pricing Falls Squarely Within the FTC's Authority to Regulate Deceptive, Unfair, and Anticompetitive Trade Practices.

Under the Federal Trade Commission Act ("FTCA"), the FTC is the primary government agency entrusted with preventing deceptive and unfair trade practices and, along with the Justice Department, unfair methods of competition.³⁴ The FTC envisions a "vibrant economy characterized by vigorous competition and consumer access to accurate information." To achieve that vision, the Commission should take action to regulate drip pricing. It has three distinct sources of authority for doing so: Drip pricing is deceptive, unfair to consumers, and an unfair method of competition under Section 5 of the FTCA.³⁶

A. Drip Pricing Constitutes a Deceptive Practice Within the Meaning of Section 5 of the FTCA.

To justify a Section 5(a) deceptive practices rule, the FTC must make three findings: "(1) there is a representation, omission, or practice that," (2) "is likely to mislead consumers acting reasonably under the circumstances," and (3) "the representation, omission, or practice is material." ³⁷

i. Drip Pricing Involves Incomplete Representations and Meaningful Omissions.

Drip pricing meets the first element required to invoke the FTC's authority to regulate deceptive practices, as it involves incomplete representations and meaningful omissions.

Imagine an online ticket seller advertises theater tickets for \$200, but when a consumer clicks through a few pages and proceeds to enter payment information, the consumer sees the price total is now \$250 due to a \$50 processing fee. The initial \$200 listing is an incomplete representation because it does not reflect a genuine offer to complete the transaction. The \$50 processing fee is a meaningful omission of information that would have allowed consumers to more effectively vet ticket prices and avoid psychological biases that might push them towards transactions on unfavorable terms. Along these lines, the FTC's 2012 warning letter to 22 hotel operators identified how drip pricing involves notable omissions that make the initial price presented incomplete and misleading.³⁸

ii. Drip Pricing Is Likely To Mislead Consumers Acting Reasonably Under the Circumstances.

By advertising an incomplete price for the relevant service or product, drip pricing schemes are likely to mislead consumers who are acting reasonably under the circumstances. In interpreting this prong of the deceptive-practices test, courts have instructed the FTC to consider the "net impression" ³⁹ that an advertisement or solicitation is likely to give to "the average member of the public." ⁴⁰ Furthermore, the FTC can construe ambiguous statements against the

sophisticated seller.⁴¹ Notably, in evaluating this effect, seller intent is not relevant: "The deception need not be made with intent to deceive; it is enough that the representations or

against telemarketers "who misrepresented that calls were from, or made on behalf of, companies with which consumers had done business, such as banks and credit card companies"; 46 (3) prohibiting a rental ca6we,

A product's true price undoubtedly meets this standard, as a reasonable consumer would be concerned with a product or service's true price. Indeed, one recent study found that cost is "the most influential decision driver, with nearly half of the respondents [in the survey] considering it as one of the top three factors for selecting a product or service." The FTC has recognized product price as an example of a material term, 52 and as noted above, the agency has successfully pursued enforcement action in cases in which price was misrepresented at the outset, such as against Dollar-a-Day. 53

Because drip pricing involves material representations and omissions that mislead reasonable consumers, the FTC should issue a rule banning drip pricing under its authority to regulate deceptive practices.

B. Drip Pricing Constitutes an Unfair Practice Within the Meaning of Section 5 of the FTCA.

The FTC also has the authority to regulate drip pricing as an unfair act or practice under Section 5(a) of the FTCA.⁵⁴ Congress specified when an act or practice should be considered unfair in Section 5(n),⁵⁵ which was enacted in 1994 to codify the FTC's 1980 Policy Statement on Unfairness.⁵⁶ Under Section 5(n), an act or practice is unfair if it (1) "causes or is likely to cause substantial injury to consumers," (2) "which is not reasonably avoidable by consumers themselves," and is (3) "not outweighed by countervailing benefits to consumers or to

⁵¹ Indika Jayasinghe, Consumer Decision Making Criteria and the Importance of Price, MEDIUM (Oct. 24, 2016), https://medium.com/stax-insights/consumer-decision-making-criteria-and-the-importance-of-price-1783d5589a8e.

⁵² Deception Policy Statement, *supra* note 37, at 5.

⁵³ See supra note 47 and accompanying text.

⁵⁴ 15 U.S.C. § 45(a)(2).

⁵⁵ *Id*. § 45(n).

⁵⁶ FED. TRADE COMM'N, POLICY STATEMENT ON UNFAIRNESS

competition." ⁵⁷ Courts have declined to apply additional factors, finding that these three elements are sufficient for a finding of unfairness. ⁵⁸ Drip pricing meets all three prongs of the unfairness test and accordingly constitutes an unfair practice under Section 5(

consumers to engage in transactions that they would forgo if made aware of the full price upfront. Consumers thus bear a monetary cost when faced with drip pricing. And these monetary injuries are substantial, in both relative and absolute terms. As mentioned, StubHub consumers increased their spending by nearly 20% when faced with drip pricing. In addition, an experiment by Huck and Wallace (2015) found that drip pricing reduced consumer surplus by 22%. And in 2017, the hotel industry made \$2.7 billion on resort fees. Not only can drip pricing lead to large harms to individual consumers, but also in the aggregate it leads to very large monetary injuries.

Drip pricing also imposes search costs on consumers, who, in order to make accurate price comparisons across vendors, must spend time looking past the advertised price in order to find the true price. In *FTC v. Amazon*, a federal district court found that time spent seeking a refund on an in-app purchase constituted injury to Amazon's customers. ⁶⁶ Similarly in the case of drip pricing, consumers who spend time searching for full prices suffer an injury. Given the prevalence of drip pricing, consumers' aggregated search times add up to a substantial injury.

ii. The Consumer Harm from Drip Pricing Is Not Reasonably Avoidable.

Drip pricing also meets the second prong of the unfairness test, as consumers cannot reasonably avoid the injury imposed.⁶⁷ When faced with drip pricing, consumers must choose to either incur search costs or make a decision with incomplete information. Additionally,

them to spend more on products than they otherwise would. We do not, however, request that the FTC's drip pricing ban extend to sales taxes.

⁶³ Blake et al., *supra* note 26, at 16.

⁶⁴ Huck & Wallace, *supra* note 26, at 2.

⁶⁵ Shelle Santana et al., Consumer Reactions to Drip Pricing, 39 MARKETING Sci. 188, 189 (2020).

⁶⁶ Amazon, 2016 U.S. Dist. LEXIS 55569, at * 17.

⁶⁷ See Orkin Exterminating Co. v. FTC, 849 F.2d 1354, 1365 (11th Cir. 1988) (outlining standard).

consumers confronted with drip pricing fall victim to heuristics and biases that lead them to engage in transactions that they would forgo if fully informed at the outset.

A consumer cannot reasonably avoid incurring search costs when making a purchase if the consumer intends to make an informed decision. For example, by separating the rate of the room from the resort fee, hotels necessarily force the consumer into suffering an injury: either the consumer must spend additional time searching for full pricing information to engage in comparison shopping, or must make an uninformed decision. Therefore, consumers confronted with drip pricing cannot reasonably avoid injury altogether.

This line of reasoning is supported by case law. For example, in *FTC v. Amazon*, Amazon claimed that consumers could reasonably avoid an injury from in-app purchases by seeking a refund. The U.S. Court for the Western District of Washington rejected this claim, finding that the time that consumers spent seeking the refund constituted an injury in and of itself.⁶⁹ Just as Amazon's claim that consumers could reasonably avoid an injury by taking on another injury failed, so too does the argument that consumers can avoid uninformed decisions by incurring search costs.⁷⁰

In addition to being unable to reasonably avoid the search costs caused by drip pricing, consumers also cannot reasonably avoid the harm of spending more on drip-priced products and services than they would on transparently-priced equivalents, due to biases and heuristics.

Studies show that buyers alter their decisionmaking when prices are revealed late in the buying

process compared to when the full price is advertised upfront. Even consumers with experience navigating drip-pricing schemes end up spending more under them. For example, the Chetty et al. (2009) study found that advertising the full price upfront, as opposed to revealing an additional fee at the register, decreased demand by 7.6%.⁷¹ The study observed this effect even though most consumers were aware of the fee when surveyed—indeed, in that survey the additional fee was the government sales tax, which had long been imposed in the jurisdiction.⁷²

Consumers act this way in large part because drip pricing exploits common cognitive biases and heuristics, leading consumers to make decisions that they otherwise would not make if provided full pricing information upfront. Several theories exist as to why consumers act differently when the full price is not revealed until late in the purchasing process. The leading theory involves the anchoring and adjustment heuristic, which posits that buyers anchor or attach themselves to the base price and insufficiently adjust to the new price. This causes consumers to underestimate the total price.

A second theory involves the endowment effect, the human tendency to overvalue what one already has. (The endowment effect is, in turn, a function of loss aversion—the preference to forgo a gain rather than experience a loss.)⁷⁴ When consumers start to purchase a product or service, they experience a shift in their reference point, and discarding the product or service by

⁷¹ Chetty et al., *supra* note 26, at 1159.

⁷² *Id.* at 1165 (finding that 75% of those surveyed answered within 0.5% of the true tax rate of 7.375%, and 97% answered within 6.75% and 8.75%); *see also* Rasch et al., *supra* note 26, at 367 (finding that consumers not aware of the magnitude of the hidden fee made non-optimal decisions 21% of the time as opposed to 13% for those that were aware of the magnitude of the hidden fee). As previously stated, we do not ask that the FTC apply the proposed drip-pricing regulation to sales taxes.

⁷³ Gorkan Ahmetoglu et al., *Pricing Practices: A Critical Review of Their Effects on Consumer Perceptions and Behaviour*, 21 J. RETAILING & CONS. SERVS. 696, 697 (2014); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124, 1128 (1974).

⁷⁴ Huck & Wallace, *supra* note 26, at 32 ("[T]he data suggest that consumers who see a low base price and do not yet know that the effective price will go up through 'shipping and handling' charges experience an increase in their

not completing the transaction is perceived as a loss.⁷⁵ In order to avoid that loss, consumers may be willing to pay a higher price than they would have just moments earlier, if they had been informed of the full price before mentally investing in the purchase.⁷⁶

Consumers also may be susceptible to the sunk-cost fallacy, which counsels that individuals may irrationally continue on an endeavor because they have already invested time, effort, or money and do not want that investment to be wasted. With regard to drip pricing, consumers invest time and effort into finding the full price and engaging in the transaction.

Whether the cause of consumers' purchasing decisions is a result of the anchoring heuristic, the endowment effect, the sunk cost fallacy, or a combination of these biases and heuristics, the result is the same: Consumers do not possess the ability to reasonably avoid the harm brought about by drip pricing. These biases and heuristics affect many people, not just a few unsophisticated consumers. Tversky and Kahneman state that "reliance on heuristics and the prevalence of biases are not restricted to laymen" but in fact "[e]xperienced researchers are also prone to the same biases." The experienced researchers can fall victim to these biases, the average consumer cannot be expected to avoid the harms caused by drip pricing.

The FTC has acknowledged that certain sales techniques can prevent consumers "from effectively making their own decisions," and at that point "corrective action may then become necessary." This corrective action is brought in order to prevent seller behavior that "takes advantage of an obstacle to the free exercise of consumer decisionmaking." For example, the

⁷⁵ *Id*.

⁷⁶ See id. ("This loss can be avoided by purchasing the product despite an increased price.").

⁷⁷ Friedman, *supra* note 3, at 55 n.13.

⁷⁸ Tversky & Kahneman, *supra* note 73, 1130.

⁷⁹ Policy Statement on Unfairness, *supra* note 56.

⁸⁰ *Id*.

FTC Policy Statement on Unfairness imagines a situation in which a seller withholds price data from the consumer, making it more difficult for the consumer to make an informed decision.⁸¹

Drip pricing is exactly the sort of practice contemplated by the Commission in that Policy Statement, as the seller withholds price information until the end of the purchasing process and consumers are thus required to choose between incurring search costs or making uninformed decisions. Additionally, drip pricing takes advantage of consumers' biases and heuristics that prevent them from making optimal decisions. Accordingly, consumers cannot reasonably avoid injuries caused by drip pricing.

iii. Those Substantial Injuries Are Not Offset by Countervailing Benefits.

The last prong of the unfairness test requires the FTC to conclude that the injuries caused by a practice "are not outweighed by countervailing benefits to consumers or to competition." 82 Where the practice in question generates no such benefits, this test is easily satisfied. 83 Such is the case with drip pricing.

As detailed above, consumers face substantial monetary and search costs as a result of drip pricing. In exchange for these increased costs, consumers receive nothing of value. To the contrary, Huck and Wallace's study found that consumer surplus decreased by 22% when consumers were faced with drip pricing.⁸⁴ Furthermore, a study by Rasch et al. found that drip pricing leads to higher prices in the market as a whole, inflicting monetary harm upon consumers without any corresponding product or service benefit.⁸⁵

⁸¹ *Id.* ("Sellers may adopt a number of practices that unjustifiably hinder . . . free market decisions. Some may withhold or fail to generate critical price or performance data, for example, leaving buyers with insufficient information for informed comparisons.").

^{82 15} U.S.C. § 45(n).

⁸³ FTC v. J.K. Publ'ns, Inc., 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000).

⁸⁴ Huck & Wallace, *supra* note 26, at 2.

⁸⁵ Rasch et al., supra note 26, at 363.

In the specific area of hotel resort fees, hotels have argued that drip pricing allows them to bundle their services, leading to cheaper prices for consumers. But this argument is unresponsive to criticisms of drip pricing: While bundling may reduce the price of certain services, withholding those prices from consumers using drip pricing does not. This is analogous to the FTC's decision in *Orkin Exterminating Company, Inc.*, in which a company breached its contract that stated that it would not increase its annual fee. The FTC found that since the increase in the annual fee was not accompanied by an increa

other antitrust laws," but instead encompasses a broad range of anticompetitive conduct. 91 This power is known as the Commission's "standalone" Section 5 authority.

Moreover, the FTCA amendments that made unfair or deceptive acts or practices in commerce unlawful were "not intended to modify [the] previous provision [declaring] 'unfair methods of competition in commerce' unlawful, but rather enlarged the scope of [the] Commissions' jurisdiction." ⁹² This power was recently reaffirmed in a 2019 joint statement by FTC Commissioners Rebecca Slaughter and Rohit Chopra. ⁹³

Although the Supreme Court has not set clear bounds on the standalone power, it has provided some guidance on the scope of this authority. In particular, the Court explained that under Section 5's prohibition on unfair methods of competition, a seller "may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their

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⁹¹ Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021),

https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf. See also Transcript of Fed. Trade Comm'n Workshop, Section 5 of the FTC Act as a Competition Statute 137 (Oct. 17, 2008), available at http://www.ftc.gov/bc/workshops/section5/transcript.pdf (Commissioner J. Thomas Rosch) ("[Sperry & Hutchinson], in my judgment, is alive and well, notwithstanding the trilogy of appellate cases decided in the early '80s, that rejected the Commission's decisions challenging conduct as unfair methods of competition under Section 5."); id.

trade." ⁹⁴ This aptly describes drip pricing, which involves the dishonest practice of omitting critical pricing information and causes sellers that do not engage in the practice to risk losing market share to competitors that do. The GAO described this problem in its report on event ticket sales:

In 2014, the largest secondary market ticketing company began using all-in pricing, with its listings displaying a single total price that incorporated fees. However, the company soon discontinued all-in pricing as the default because, it told us, it put the company at a competitive disadvantage with other secondary market providers whose fees were not included in the initial ticket price displayed to consumers. ⁹⁵

banning drip pricing among airlines without providing a specific implementation deadline, "[t]he first airline to implement actually said afterwards that it lost five percent of consumer traffic to its website while it waited for the other companies to comply." 99 This anecdote aligns with a key finding from a study conducted by the UK Office of Fair Trading: "Because consumers focus on the headline price and choose a trader based on the cheapest advertised price, traders which include all the compulsory components in the headline price will be at a competitive disadvantage compared with traders that leave out compulsory charges." 100

Furthermore, the FTC need not show the "practice it condemns has totally eliminated competition in the relevant market," as it is sufficient for the Commission to find the "practice in question unfairly burdened competition for a not insignificant volume of commerce." ¹⁰¹ The Commission can point to the numerous consumer complaints made to the Commission, ¹⁰² the lawsuits filed by state attorneys general to halt drip-pricing practices, ^{103,susm(mw 12 0e.88 T 12 2843.28 13.8 refBT0 g0.106 Tc -0.00 pricing practices).}

COST-BENEFIT ANALYSIS

This final section offers advice to the Commission on how to conduct a cost-benefit analysis for this rule, including what categories of benefits and costs to include. A strong cost-benefit analysis can both help inform the Commission's rulemaking and provide support to the Commission in defending the regulation against legal challenge. While a reasonable analysis will very likely show that the benefits of this proposal far outweigh the costs, 105 the Commission should nonetheless be careful to conduct its analysis appropriately and avoid common pitfalls.

The FTC must assess the "economic effect of [any] rule" regulating unfair or deceptive acts or practices, 106 and, for unfair practices specifically, must determine that the benefits of the regulation are "not outweighed

While a "formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value" is not required under either the APA¹¹¹ or the FTCA,¹¹² the APA's arbitrary-and-capricious standard imposes certain obligations on the FTC to reasonably assess and weigh beneficial and adverse regulatory impacts. For one, the agency cannot disregard reasonably foreseeable adverse impacts, particularly adverse economic effects that are of central relevance under the FTCA.¹¹³ The Commission should seek to "quantify the certain costs" of the rule to the extent practicable, or else "explain why those costs could not be quantified." ¹¹⁴

Moreover, agencies must reasonably balance regulatory costs and benefits. ¹¹⁵ In balancing costs and benefits, the FTC should "look beyond the direct benefits and direct costs of [its] rulemaking and consider any important ancillary benefits and countervailing risks" that may result from the rule. ¹¹⁶ And the agency should remember that even if not all impacts can be

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 $^{^{111}}$ Id. at 759 ("We need not and do not hold that the law unambiguously required the Agency, when making this preliminary estimate, to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value.").

¹¹² Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 986 (D.C. Cir. 1985) (explaining that, under the FTCA, "a highly quantitative benefit/cost analysis may not be appropriate in each and every individual case," as the statute rather requires the FTC to "summarize its best estimate of" the regulation's economic impact) (internal quotation marks omitted).

¹¹³ Cf. Nat'l Family Farm Coal. v. United States EPA, 960 F.3d 1120, 1142 (9th Cir. 2020) ("FIFRA requires the EPA to consider, as part of a cost-benefit analysis, any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs

quantified or monetized, "qualitative and non-monetized" impacts are nonetheless significant and merit close consideration.¹¹⁷

Executive guidance from the Office of Management and Budget ("OMB") provides further insights on what regulatory impacts should be considered as benefits and costs. OMB's

Circular A-4 explains that "[b]enefit and cost estimates should reflect real resource use,"
meaning that regulatory benefits increase "total resources available to society" whereas
regulatory costs decrease total societal resources. As OMB explains in additional guidance,
"revealed preference studies... based on actual market decisions by consumers" provide the
best methodology for monetizing regulatory costs and benefits, particularly when "the market
participant is well-informed and confronted with a real choice," and properly processes
information. Accordingly, studies on how consumers behave when they are well-informed—as
opposed to when they are faced with a drip-pricing scheme that delays the provision of critical
pricing information—enable the FTC to assess the impacts of a drip-pricing regulation.

On the cost side, likely the most substantial cost of a drip-pricing regulation¹²⁰ is the "[p]rivate-sector compliance cost[]" that sellers will incur to modify their solicitations and online ticket portals.¹²¹ Although precise estimates of compliance costs are likely unavailable, the FTC may wish to commission its own study or consult with economists or industry experts on the

¹¹⁷ Circular A-4, *supra* note 116, at 3; *see also Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1219 (D.C. Cir. 2004) ("The mere fact that the magnitude of [an effect] is *uncertain* is no justification for *disregarding* the effect entirely.").

¹¹⁸ Circular A-4, *supra* note 116, at 38.

¹¹⁹ OMB, *Regulatory Impact Analysis: A Primer* 9 (2011), *available at* https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impa

measure time saved "both in terms of hours saved and to the extent feasible, in terms of monetary equivalents" through "a measure of the value of that time." ¹²⁶ For instance, the FTC can use the average U.S. hourly wage as a proxy for the monetary value of each hour of time saved. Once again, the FTC should be open to refining its projections based on the information received through the notice-and-comment process.

Additionally, a regulation on drip pricing is likely to produce a decrease in inefficient transactions, which the FTC should view as an economic benefit. As OMB explains, both "inadequate or asymmetric information" and "mistakes in information processing" sometimes cause "markets [to] overreact" and cause consumers to purchase goods or services that they in fact (when given adequate information that they can properly process) value less than the sale or production price. As detailed above, for instance, one study found that a drip-pricing scheme caused consumers to increase their transaction rate by 14.1% thus, it is likely that a prohibition on drip pricing will result in a reduction in consumer purchasing. This should be considered an economic benefit of the rule, as the transactions being forgone are presumptively inefficient transactions, meaning that the consumer values the product less than the seller's marginal cost. The FTC should attempt to quantify this surplus increase to the extent feasible.

Because some of the benefits of a drip-pricing regulation are likely difficult to precisely quantify, the FTC may wish to make use of "break-even analysis" to justify its regulation. In break-even analysis, an agency estimates the costs of the rule (here, as detailed above, the compliance and administrative costs) and then assesses whether the rule's benefits are likely to

exceed those costs.¹²⁹ A break-even analysis allows the FTC to precisely estimate costs only—which, in this case, appear easier to estimate than benefits—and then consider whether the rule is net-beneficial without fully monetizing the benefits.¹³⁰ For instance, the FTC could determine how many consumer-hours would need to be saved for the rule to be net-beneficial. Then, using information or reasonable assumptions about the prevalence of drip pricing and the time lost to engage in comparison shopping, the Commission could determine whether the regulation is likely to produce at least that level of benefit.

and to what extent firms "retain . . . the profits from drip-pricing fees." ¹³⁴ Once again, the FTC should quantify these distributional effects to the extent feasible, and if that is not feasible, should qualitatively assess these impacts. ¹³⁵ Though neither a cost nor a benefit, this distributional impact can nonetheless help justify a regulation. ¹³⁶

In short, a rigorous assessment of regulatory costs and benefits—whether a full costbenefit analysis or a break-even approach—can provide strong analytical support for any regulation of drip pricing.

CONCLUSION

For the foregoing reasons, Policy Integrity respectfully requests that the Commission initiate rulemaking to ban drip pricing as a deceptive practice, unfair practice, and unfair method of competition.

Respectfully Submitted,

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