International Center for Law & Economics

<u>VIA ELECTRONIC SUBMISSION</u>

August 4, 2026

Samuel A. A. Levine
Commissioner
New York City Department of Consumer and Worker Protection
42 Broadway
New York, New York 10004

Re: Comment Letter on Proposed Rules Regarding Junk Fees, Ref. No.: 2026 RG 027

Dear Mr. Levine:

I write on behalf of the International Center for Law & Economics (ICLE), a nonprofit, nonpartisan research center that uses law-and-economics analysis to evaluate law, regulation, and public policy. ICLE has written extensively on "junk fee" regulation, including comments to the Federal Trade Commission on proposed rules governing rental-housing fees and online food-delivery fees.[1] We submit these comments to the Department of Consumer and Worker Protection's ("DCWP" or "the Department") proposed rule relating to junk fees, codified at proposed § 5-16 of Title 6 of the Rules of the City of New York ("Proposed Rule").

The underlying problem is real, but uncommon, and does not justify this rule. When a business advertises one price and later reveals additional mandatory charges, consumers may pay more than they expected or choose a product they would not have chosen with full information up front. Economists call this "drip pricing" or "partitioned pricing," and there is credible evidence that some firms have an incentive to obscure mandatory add-on charges from price-sensitive shoppers, even in competitive markets.[2] ICLE does not dispute that this kind of deception harms consumers or that DCWP has the authority to police it. Our concern is that the Proposed Rule, as drafted, will impose costs on New York City businesses and consumers well beyond any transparency it delivers, for four reasons.

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[1] Eric Fruits & Daniel J. Gilman, *Comments on FTC Unfair or Deceptive Rental Housing Fee Practices*, ANPRM (Project No. R207011), Int'l Ctr. for L. & Econ. (Apr. 9, 2026), https://laweconcenter.org/wp-content/uploads/2026/04/FTC-Rental-Housing-Fee-Practices-2026.pdf; Brian Albrecht, Eric Fruits, Daniel J. Gilman & Geoffrey A. Manne, *ICLE Comments to FTC on Online Food-Delivery Service Fees*, Int'l Ctr. for L. & Econ. (May 18, 2026), https://laweconcenter.org/wp-content/uploads/2026/05/FTC-Delivery-Fees-2026.pdf.

[2] *See* Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505 (2006).

1. The rule's core terms are too vague to give businesses a predictable standard.

The Proposed Rule defines a "mandatory fee" partly by reference to whether it is "reasonably avoidable" by the consumer or covers something "a reasonable person would expect" to be included in a purchase. These are not settled economic or legal concepts and therefore invite case-by-case, after-the-fact adjudication.

Consider a restaurant that charges $5 for delivery. That fee is not obviously avoidable or unavoidable. A customer can often skip it by picking up the order, which makes the fee look avoidable. But delivery is *the* service the customer is buying from a delivery service, so a "reasonable person" could just as easily expect that cost to be built into the advertised price. Nothing in the words "reasonably avoidable" or "a reasonable person would expect" tells the restaurant which reading DCWP will adopt. Whether the charge is a "mandatory fee" therefore turns not on any objective feature of the fee, but on how an enforcer later construes an open-ended standard—a call the business cannot make when it sets its price, and DCWP will make only after the sale.

A restaurant, retailer, or service provider faces the same uncertainty about a processing fee or an "optional" upgrade, as well as a delivery charge.

Law-and-economics research on mandated disclosure finds that mandatory disclosure regimes routinely fail on their own terms: consumers lack the literacy, time, and capacity to analyze complex terms, while firms fulfill their legal requirements by flooding consumers with fine print and boilerplate caveats that convey little useful information.[3] A vague standard provides little consumer protection while imposing a hidden tax on every business that must guess at its content. That hidden tax is ultimately passed on to consumers through higher prices or reduced product variety.

2. The reversed evidentiary presumption punishes honest uncertainty, not just deception.

The Proposed Rule requires businesses to maintain records "sufficient to establish the basis for" each fee. If a business cannot produce such records on DCWP's request, the Department's factual allegations are presumed true. This is a significant departure from ordinary consumer-protection enforcement, which requires the government to prove its case.

Economically, the reversed presumption converts every ambiguous compliance judgment into a standing strict-liability risk. Because a business cannot know today which fee will be second-guessed years from now, it faces a permanent incentive to over-document, or simply to abandon pricing structures that are convenient for consumers, such as optional add-ons, tiered service levels, or bundled subscriptions, because they are harder to justify to DCWP's future satisfaction. Smaller businesses, which lack in-house counsel and compliance staff, will bear this cost disproportionately.

The delivery fee illustrates the point. To avoid the burden of documenting and defending a separate delivery charge, a restaurant can drop the charge, advertise "free delivery," and raise the price of every item to cover the cost. That restructuring complies with the rule because a bundled

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[3] *See* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011).

price contains no separate fee to disclose. It also leaves consumers worse off. Customers who pick up their own orders would then subsidize those who receive delivery, and a single bundled price would conceal the delivery cost rather than reveal it. The restaurant may further narrow the area over which it offers "free" delivery, cutting off customers it once served. The rule would then have relocated the opacity into a pooled price and trimmed consumer choice, rather than delivering the transparency it promises.

Such supply responses are the ordinary economics of regulation, and the literature measuring them is more than half a century old. A compliance obligation is a tax on covered transactions, whether or not any money changes hands, and part of any such tax is borne by consumers through higher prices and narrower choices. The evidence dates back to Sam Peltzman's 1973 evaluation of the 1962 drug amendments, which required sellers to document their claims to regulators' satisfaction before selling. The mandate was designed to protect consumers from ineffective drugs. It sharply reduced the flow of new drugs instead, and Peltzman found the losses to consumers exceeded the gains.[4] The pattern holds in modern data with modern methods. When federal ability-to-repay rules exposed mortgage lenders to liability for loans a regulator might later second-guess, lenders raised prices barely at all. Instead, they eliminated roughly 15% of the affected market.[5]

The general lesson is that rules that look costless because they "merely" require disclosure or recordkeeping still change the incentives facing regulated businesses, and those changes can hurt the consumers the rule is meant to help, for example, by pushing smaller, independent businesses out of the New York City market and leaving consumers with fewer choices.[6]

3. The rule duplicates existing federal, state, and City total-price requirements without a matching gain in protection.

New York City consumers are not unprotected today. The Federal Trade Commission's Rule on Unfair or Deceptive Fees requires businesses that offer, display, or advertise prices for live-event tickets or short-term lodging to clearly and conspicuously disclose an all-in "total price"—inclusive of all mandatory fees—more prominently than other pricing information, nationwide.[7] These are two of the sectors most associated with drip pricing.

As proposed in 2023, the FTC's rule would have applied to all industries nationwide, just as the Proposed Rule would reach every business in New York City.[8] After more than 60,800 public comments, the Commission declined to adopt an industry-neutral rule, choosing instead "to use its rulemaking authority incrementally," beginning with the two industries where it had

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[4] Sam Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*, 81 J. POL. ECON. 1049 (1973)

[5] Anthony A. DeFusco, Stephanie Johnson & John Mondragon, *Regulating Household Leverage*, 87 REV. ECON. STUD. 914 (2020).

[6] *See* Lloyd Dixon, Susan M. Gates, Kanika Kapur, Seth A. Seabury & Eric Talley, *The Impact of Regulation and Litigation on Small Businesses and Entrepreneurship: An Overview*, *in* IN THE NAME OF ENTREPRENEURSHIP? 17 (Susan M. Gates & Kristin J. Leuschner eds., 2006).

[7] 90 Fed. Reg. 2066 (Jan. 10, 2025) (effective May 12, 2025) (codified at 16 C.F.R. pt. 464).

[8] 88 Fed. Reg. 77420 (Nov. 9, 2023); see 90 Fed. Reg. at 2119.

documented consumer harm for more than a decade.[9] The agency with the deepest record on this question could not justify economy-wide coverage in quantitative terms, and the Department's own hotel rule already follows its incremental template.

New York State requires "all-in" ticket pricing for places of entertainment.[10] New York City's Department of Consumer and Worker Protection has separately adopted a hotel "junk fee" rule, making it a deceptive practice to advertise a room rate without clearly and conspicuously disclosing the total price of the stay, including all mandatory fees, effective February 21, 2026.

Layering a fourth, city-specific, industry-neutral definition of "total price" and "mandatory fee" on top of these existing regimes means a business operating in New York City must reconcile several overlapping, non-identical compliance standards for what is fundamentally the same disclosure obligation. This is a clear case of duplicative regulation. Because the FTC, state, and city already address a large share of the highest-profile drip-pricing conduct, the marginal consumer-protection benefit of a new, broader rule is small. In contrast, the marginal compliance cost, spread across every other industry now newly covered, is not.

It is also worth remembering that itemized, multi-part pricing is not itself evidence of deception; it often reflects legitimate cost recovery and consumer choice among service levels. A rule that treats ordinary itemization with suspicion, on top of regimes that already police true deception, risks discouraging efficient pricing practices without producing real transparency.

4. DCWP's existing enforcement authority is a better-targeted tool than a broad new rule.

DCWP already has authority under the City's consumer-protection law to act against businesses that conceal mandatory fees or misrepresent their nature, amount, or refundability, which is the precise conduct the Department identifies as most harmful.

Targeted enforcement, built on a developed evidentiary record of actual deception, would allow DCWP to address genuine bad actors without imposing the same compliance burden on the much larger number of businesses that already itemize their fees honestly. If the Department nonetheless proceeds with a generally applicable rule, we respectfully urge it to: (a) narrow "mandatory fee" and "reasonably avoidable" to concrete, administrable standards rather than open-ended reasonableness tests; (b) eliminate or substantially limit the reversed evidentiary presumption in proposed § 5-16(f); and (c) harmonize the definition of "total price" with the FTC's existing rule and New York's own ticket- and hotel-fee laws so that New York City businesses face one workable standard rather than four.

We appreciate DCWP's attention to consumers' concerns, and we share the Department's goal of ensuring that New York City consumers can see, before they buy, what they will actually pay. But a rule built on vague standards, a reversed burden of proof, and a duplicative, city-specific set of

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[9] 90 Fed. Reg. at 2119; id. at 2068 (comment count).

[10] N.Y. Arts & Cult. Aff. Law § 25.07(4) (requiring disclosure of the total ticket cost, inclusive of all ancillary fees, prior to selection for purchase).

definitions is likely to raise prices and reduce the range of pricing options available to New York City consumers and businesses alike, without a matching improvement in transparency.

We respectfully urge DCWP to withdraw the Proposed Rule in its current form or, at a minimum, to revise it substantially along the lines described above before it moves to adoption.

Thank you for your consideration. Please do not hesitate to contact us with any questions.

Respectfully submitted,

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