

February 7, 2024

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Mail Stop H-144 (Annex J)
Washington, DC 20580

Via Federal eRulemaking Portal
Re: Unfair or Deceptive Fees NPRM, R207011

On behalf of the undersigned U.S.-based nonprofit performing arts stakeholders, we submit these comments in response to the proposed rule published by the Federal Trade Commission (FTC) in 88 FR 77420, FR 2023-24234 (November 9, 2023) to promulgate a trade regulation rule entitled “Rule on Unfair or Deceptive Fees,” which would prohibit unfair or deceptive practices relating to fees for goods or services, specifically, misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees.

While the FTC has taken an “industry neutral” approach to the proposed Rule, the FTC’s analysis includes conclusions and questions related to the live events industry. Pre-pandemic Form 990 data compiled by SMU DataArts, the National Center for Arts Research at Southern Methodist University, found that the live events industry in the United States includes more than 14,500 nonprofit performing arts entities. By way of these comments, the undersigned organizations offer perspectives on how proposed regulatory action may impact the unique aspects of the nonprofit ticket sales models in use in communities nationwide.

- SMU DataArts found that, on average, total earned revenue (ticket sales and other forms of earned revenue combined) accounted for 39% of gross annual revenue for nonprofit performing arts organizations nationwide, before the onset of the COVID-19 pandemic. In order to support their creative workforce and fulfill their nonprofit missions, these entities rely on an essential combination of earned revenue (including from ticket sales), charitable contributions, and governmental support. The financial impact of the extreme decline in attendance in live events throughout the pandemic is still being felt, and ticket-buying patterns are highly variable during the ongoing recovery period.
- Many nonprofit performing arts organizations operate on a season basis and offer a wide variety of subscription-based sales packages consisting of multiple tickets to a number of shows, in addition to single-ticket sales.
- In an effort to maximize public participation in the nonprofit performing arts, organizations often offer flexible ticketing options that allow attendees to commit to a number of performances in advance, while choosing the specific performances at a later date. These models, as well as subscription packages, can often entail generous return policies that allow ticket-buyers to exchange tickets in the course of a season.
- Audience members often engage with nonprofit performing arts organizations simultaneously as ticket-buyers and charitable donors. Because revenue from ticket sales is only a portion of the income that supports the artists and production costs involved in live events, the ticket sales process is often coupled with opportunities to

cultivate charitable donations.

- Ticket sales platforms and promotional and marketing material are often shared across multiple performing arts organizations and the venues in which live events are hosted. A relatively small portion of the nation’s nonprofit performing arts organizations will own and operate their own venue, and most will engage vendors to facilitate online ticket sales. Often these are specialized vendors, rather than the more familiar firms that provide primary ticketing services for most large pop music and team sports events.
- Nonprofit performing arts entities use a variety of methods for promoting access to live events, including online, phone, and print media and communications. Ticket sales happen through a combination of online platforms and in-person box office purchases.

Implementation of Proposed Rule

Transparency in pricing is essential for consumer confidence, and nonprofit performing arts organizations rely on trusted relationships with ticket-buyers to support and advance increased access to live performing arts events. The Rule requires disclosure of the total price a consumer will pay clearly, conspicuously, and prominently in any offer, display, or advertisement that contains an amount a consumer may pay. The Rule also requires clear and conspicuous disclosure, before the consumer consents to pay, of the nature and purpose of any amount a consumer may pay that is excluded from the Total Price, including the refundability of such fees and the identity of any good or service for which fees are charged.

- The Rule specifies that “The Commission anticipates the possibility of providing certain exclusions from the proposed rule, including for some financial products where the Total Price cannot practically be determined.” As the Commission considers circumstances in which total price cannot be practically determined, we ask for consideration for season-based and flexible ticket packages in which multiple and variable options are available to ticket-buyers, and the total price will vary based on selection. While it is practical to state the total price for components available to consumers, and a range of total prices, it may not be possible to state every possible total price configuration.

The Commission asks, “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?”

- We seek further information from the Commission regarding how charitable contributions made concurrent with ticket sales may be treated under the provision related to “any amount a consumer may pay that is excluded from the Total Price, including the refundability of such fees and the identity of any good or service for which fees are charged.” Nonprofit performing arts organizations comply with current Internal Revenue Service (IRS) requirements regarding the substantiation and disclosure of charitable gifts, including the recordkeeping rules, contemporaneous written acknowledgement requirements, and written disclosure statements detailed in [IRS Publication 1771: Charitable Contributions – Substantiation and Disclosure Requirements](#) and relevant sections of the Internal Revenue Code. Consideration of how new FTC requirements may intersect with established IRS rules should helpfully confirm that IRS substantiation and disclosure requirements satisfy FTC rules, particularly as the concept of “refundability” is not common in charitable giving.

- The Rule notes the relation to state laws. Entities currently subject to state requirements will need assistance in understanding the additional compliance requirements prompted by new FTC rules, and specifically whether current state rules provide greater protections to consumers than new federal rules.

In summarizing the cost implications of the proposed rule, the FTC states that entities “may also incur costs to adjust how they display price information in order to disclose the full price whenever a price is quoted, and add required disclosures regarding refundability of fees not included in Total Price (e.g., fees for optional goods and services). For example, firms may need to reprogram websites, reprint advertisements, or redesign menus to comply with the proposed rule.”

- The FTC notes at page 77457 that the Commission has, “some uncertainty about the number of live event ticket-sellers that would be affected by the rule.” The Commission considered estimates taking into account entities under NAICS codes 561599, “All Other Travel Arrangement and Reservation Services” and 7113 “Promoters of Performing Arts, Sports, and Similar Events” before opting to use the number of “online ticket selling entities” reported by IBISWorld for 2022. The Commission has omitted consideration of NAICS 7111, “Performing Arts Companies.” To be fully inclusive of costs and to fully consider the range of entities subject to the new rules, the Commission should take into consideration performing arts organizations that engage in ticket sales, and also acknowledge that all performing arts organizations engaged in marketing and promoting events for which tickets are sold will be subject to compliance with the disclosure requirements in the new rules. The Commission may consider referring to the U.S. Census Bureau’s County Business Patterns data to assess the number of entities, taking into consideration data for NAICS codes 561599, 7111, and 7113.
- The intended timeframe for implementation of the Rule will have a significant impact on the compliance costs for nonprofit performing arts organizations, and particularly for those that operate on a season-based, seasonal, or subscription basis. For these entities, promotion of ticket sales takes place both online and through extensive print material, well in advance of planned performances. A sufficient on-ramp will be required to provide time for entities to both administer required changes and also to obtain answers to compliance questions from the FTC, which may not be fully anticipated in advance of the final Rule.
- Direct mail promotion of live events through print material remains a significant marketing strategy among nonprofit performing arts entities. For instance, for a season of performances beginning in the early fall, it is common practice for print material to be mailed and otherwise distributed at the start of the calendar year, with season materials mailed and in possession of ticket-buyers by February. These marketing materials are durable promotional documents used throughout the course of a season and would entail a substantial cost to replace, should new FTC rules apply retroactively to material already in circulation.

Additional Areas of Consideration

The Rule seeks information about the prevalence of problematic practices regarding live events, including “unfair” dynamic pricing, lack of transparency regarding ticket holdbacks, lack of transparency regarding speculative tickets, and the use of bots. We offer the following considerations on how these topics relate to nonprofit entities.

Dynamic Pricing

As any future consideration to rules related to dynamic pricing may be taken into consideration, we encourage the FTC to carefully consider how dynamic pricing is defined, with an awareness of the ways these strategies are used that are beneficial to both consumers and the live events industry workforce. It would be harmful to paint all dynamic pricing strategies as “unfair.”

Nonprofit performing arts organizations often use variable pricing strategies to both maximize the earned revenue that supports the nonprofit performing arts workforce, as well as to offer reduced or free-of-charge ticketing options for community-based partners.

Ticket Holdbacks

Among nonprofit performing arts organizations, a number of practices are in place that adjust ticket availability as live performance events near. Season subscribers and contributors are often offered early access to seating choices. In order to provide the best possible artistic experience, seats are often made available first for areas closest to the stage, with additional seating opened if demand warrants a larger availability. A selection of tickets might be held in reserve for specific access by community and educational partners, or for specific audiences, such as students. Any new rules that may be considered regarding limiting “holdbacks” or implementing new related disclosure requirements should take into account the full range of ticket availability strategies that benefit attendees and artists alike.

Secondary Market, Speculative Tickets, and Bots

The artists, venues, and audiences in the nonprofit performing arts sector are all threatened by predatory practices in secondary ticket sales. Relief from predatory activity on the secondary market is urgently needed.

- Websites using deceptive URLs and logos steer ticket-buyers away from primary nonprofit ticket sellers. Some organizations purchase ads on search engines in order to elevate their own sites, as a means to prevent ticket buyers from following these deceptive sellers. This practice incurs significant additional costs to the organizations to deter this threat.
- Inflated prices and fraudulent ticket sales brokered on the secondary market erode audience confidence in the ticket-buying process, steer resources away from the artists and arts workers engaged in live performance events, and lead to wasted resources as box office professionals and volunteer ushers respond to disappointed audience members holding fake tickets.
- Despite persistent efforts to create secure ticketing platforms, nonprofit performing arts organizations have reported an unprecedented wave of costs associated with activity in both the primary and the secondary market, prompting consumers to seek refunds for tickets fraudulently purchased with stolen credit card data. As the Commission considers action related to refund practices, secondary market activity, and bot-driven concerns, new approaches to addressing this fraudulent activity should be implemented. These “charge-back” requests that must be accommodated by the primary seller can amount to tens of thousands of dollars in unexpected costs to a single nonprofit performing arts organization. Absorbing these unanticipated and uncontrollable expenses directly impacts the capacity of these organizations to meet their nonprofit artistic missions and a remedy is urgently needed.
- As any measures are considered to address predatory activity on the secondary market, the Commission should consider how secondary ticket sales activity is defined. Ticketing

exchanges happen at a very high volume by primary sellers that operate on a season basis, and ongoing flexibility is needed for how primary sellers handle these exchanges. The generous ticket exchange opportunities offered by season-based nonprofit performing arts organizations can result in a high volume of tickets returned and resold by primary sellers. Any effort to restrict predatory secondary sales activity should ensure that these resales by primary sellers are considered primary, and not secondary sales. Any consideration of new transferability restrictions or requirements should also take this legitimate activity into consideration.

- Relatedly, nonprofit arts organizations may employ restrictions or limitations on transferability of tickets for a range of reasons. These include some of the same reasons that transferability restrictions sometimes exist in the general pop music marketplace—to try to keep prices affordable and events accessible to patrons from a range of economic backgrounds, to discourage reselling at inflated prices on the secondary market for popular events, to discourage fraud, and to address security and logistical considerations. There are also specific ticketing practices used by nonprofit arts organizations that may be less common in other parts of live events. Flexibility to employ reasonable resale restrictions allows nonprofit organizations to offer discounted admission to specific populations, for example, by offering a grant-funded program offering subsidized admission to students or young audiences. Such a program’s mission would be rendered useless if these subsidized tickets were resold for profit to a general audience not in the targeted demographic. All of these practices ultimately help us serve audiences and sustain diverse artistic expression. The FTC should reject efforts by secondary platforms and brokers to paint reasonable limitations and restrictions on resale and transferability as “anti-consumer.”

We have sought to briefly illustrate in these comments how the proposed rule will impact the nonprofit performing arts sector’s engagement in ticket sales. Should future workshops be assembled related to ticket sales, or specific guidance on implementation of new rules be shaped, we ask that the Commission specifically seek participation by representatives of the nonprofit performing arts sector. We stand ready to be of assistance in further informing the Commission of opportunities to prevent unfair and deceptive practices in the ticket market while also supporting the vitality of the nonprofit performing arts sector. Thank you for the opportunity to comment on this proposed rule.

Signatories

Association of Performing Arts Professionals (APAP)

Carnegie Hall

Dance/USA

Folk Alliance International

Future of Music Coalition

League of American Orchestras

National Performance Network

OPERA America

PAVA - Performing Arts Venues Alliance

Performing Arts Alliance

Theatre Communications Group