



Request for Comments: Proposed Rule on Unfair or Deceptive Fees

**Federal Trade Commission
Docket No. FTC- 2023-24234**

Response of the Coalition for App Fairness

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I. Introduction

The Coalition for App Fairness (CAF) welcomes the opportunity to submit comments to the Federal Trade Commission (FTC) on its proposed rule to prohibit junk fees.¹ We urge the agency to issue a final rule that bans the business practices that Apple and Google use to extract tens of millions of dollars in junk fees on an annual basis. The agency can do so, in part, by clarifying that the prohibitions on “hidden fees” and “misleading fees” apply in the context of business-to-business relationships (i.e., where businesses are charged such fees in their role as consumers of another business’s goods and services). Despite court rulings and new laws in Europe, and elsewhere, that declare some of Apple’s and Google’s conduct illegal, the platforms

¹ Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77420 (proposed Nov. 9, 2023), <https://www.federalregister.gov/documents/2023/11/09/2023-24234/trade-regulation-rule-on-unfair-or-deceptive-fees>.

continue to abuse their parallel monopolies over their respective app store ecosystems to charge developers, and in turn, consumers large and unjustified fees in exchange for nothing of value.²

CAF is an independent non-profit organization that was formed to protect consumer choice, foster competition, and create a level playing field for all app and game developers globally.³ The Coalition’s vision is to ensure a level playing field for businesses relying on platforms like the Apple App Store and the Google Play Store to reach consumers and a consistent standard of conduct across the app ecosystem.⁴ CAF has rapidly grown from 13 to over 70 members since launching in September 2020.

II. Overview of the App Store Ecosystem

The vast majority of smartphone users in the United States purchase devices that run on Apple (iOS) or Android (Google) operating systems, with over 60% of U.S. smartphone users operating an iOS-run device and about 38% operating an Android-run device in 2024.⁵ Apple keeps iOS proprietary (i.e., it can only be run on Apple hardware), while Google licenses the Android operating system to smartphone manufacturers like Samsung and Motorola.

Apple and Google control the sale of third-party apps on these devices through their “app stores” – the Apple App Store and the Google Play Store, respectively. Very few consumers own both Android and iOS devices; this is, in part, because users incur high costs to switch from one ecosystem to the other. These switching costs include: the cost of buying a new smartphone and peripheral hardware, the challenge of learning a different operating system, the time to transfer data, and the costs of obtaining new apps because iOS apps do not work on Android, and vice versa. Consistent with this, only about 2% of iPhone users switch to Android each year.⁶

It is important to consider Apple’s App Store within the context of the company’s broader business model. Apple is one of the most profitable companies in the world. As of the end of FY

² As is common with junk fees in other circumstances, Apple and Google describe the up to 30% fees that they charge developers for the mandated use of in-app purchase (IAP) in vague terms as a “commission” or “service fee.” See, e.g., *Service Fees*, Google, <https://support.google.com/googleplay/android-developer/answer/112622?hl=en&sjid=14083536458801113512-NC> (last visited Feb. 7, 2024). In comparison, payment processing fees are typically about 3%. See, e.g., Sebastian Klovig Skelton, *Developers Say Apple and Google Are Running App Store Monopolies*, ComputerWeekly.com (Apr. 5, 2023), <https://www.computerweekly.com/news/365534673/Developers-say-Apple-and-Google-are-running-app-store-monopolies> (quoting app developer as stating, “We could be paying Stripe 3%. So 15% versus what we would call a market rate of 3% feels completely egregious”) (internal quotation marks omitted).

³ Coalition for App Fairness, <https://appfairness.org> (last visited Feb. 7, 2024).

⁴ *Our Vision For The Future*, Coalition for App Fairness, <https://appfairness.org/our-vision/> (last visited Feb. 7, 2024).

⁵ StatCounter Global Stats, *Mobile Operating System Market Share United States of America: Jan. 2023 – Jan. 2024*, <https://gs.statcounter.com/os-market-share/mobile/united-states-of-america>.

⁶ *Epic Games, Inc. v. Apple Inc.*, No. 20-cv-05640, Rule 52 Order After Trial on the Merits, at 52 (N.D. Cal. Sept. 10, 2021), <https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/Epic-v.-Apple-20-cv-05640-YGR-Dkt-812-Order.pdf>.

2023, Apple hit annual sales of \$383.28 billion, profits of \$97 billion,⁷ and, as of February 2024, a market capitalization of \$2.898 trillion.⁸ Apple initially built its reputation on the sale of iconic products, such as the iPhone, the iPad, and the Apple Mac. However, as growth in sales of hardware devices slowed, Apple leveraged its position, and it is now capitalizing on its iOS mobile ecosystem as an important source of revenue. For instance, in FY 2023, developers generated a record \$85 billion in revenue through their apps distributed on the App Store, out of which Apple typically kept a 30% cut (reduced to 15% in some circumstances).⁹ In a competitive market, Apple's inflated fees would dissipate, but for app developers the App Store represents the only way to distribute their apps to iOS users. While Apple is subject to competition from Android device makers at the product level, once users have acquired an iPhone, the App Store is the only conduit between users and app developers. It is this situation that gives Apple its gatekeeper power.

Similarly, Google Play should be viewed within the context of Google's broader business model. Google (Alphabet) is also one of the most profitable companies in the world with annual sales of \$297.13 billion and profits of \$73.79 billion in 2023,¹⁰ and a market capitalization of \$1.793 trillion as of February 2024.¹¹ Since capturing the market for online search, Google has expanded into adjacent markets. Google acquired the Android mobile operating system in 2005 and has consistently promised that it would be the basis for an "open" ecosystem.¹² The Google Play Store is the default and dominant app store on Android devices. Although Google does, technically, permit users to install alternative app stores, it imposes restrictions and actively discourages consumers from downloading apps outside of the Google Play Store with warnings and other obstacles.

In 2023, developers generated \$47 billion in revenue through their apps distributed on the Google Play Store.¹³ Google previously kept up to a 30% cut of revenue from developers, but, under intense regulatory and public scrutiny, it agreed to lower its commission to 15% in certain

⁷ George Glover, *Apple Regains a \$3 Trillion Market Cap and Is on Track to End the Year as the World's Most Valuable Company for the 5th Time in a Row*, Business Insider (Dec. 6, 2023), <https://markets.businessinsider.com/news/stocks/apple-stock-price-market-analysis-trillion-dollar-company-magnificent-seven-2023-12>; Jitender Miglani, *Apple Sales and Profits Analysis for FY 2023 – Top 10 Insights*, Forrester (Nov. 21, 2023), <https://www.forrester.com/blogs/apple-sales-and-profits-analysis-for-fy-2023-top-10-insights/>.

⁸ *Apple*, CompaniesMarketcap.com, <https://companiesmarketcap.com/apple/marketcap/> (last visited Feb. 7, 2024).

⁹ Miglani, *supra* note 7.

¹⁰ *Alphabet Announces Fourth Quarter and Fiscal Year 2023 Results*, Alphabet (Jan. 30, 2024), <https://abc.xyz/assets/95/eb/9cef90184e09bac553796896c633/2023q4-alphabet-earnings-release.pdf>.

¹¹ *Alphabet (Google)*, CompaniesMarketcap.com, <https://companiesmarketcap.com/alphabet-google/marketcap/> (last visited Feb. 7, 2024).

¹² See, e.g., *Andy Rubin's Email to Android Partners*, The Wall Street Journal (Mar. 13, 2013), <https://www.wsj.com/articles/BL-DGB-26394>.

¹³ David Curry, *Google Play Store Statistics (2024)*, Business of Apps (last updated Feb. 6, 2024), <https://www.businessofapps.com/data/google-play-statistics/>; Stefan Larson, *Google Play Store Revenue, Ratings & Subscriptions Stats 2024*, Priori Data (Jan. 7, 2024), <https://prioridata.com/data/google-play-revenue-statistics/>.

circumstances.¹⁴ While this represents an improvement, this does not change the fact that Google’s control over Android and the Google Play Store allows it to impose terms and conditions on developers that it would not otherwise be able to extract in a competitive market. While Google is subject to competition from Apple at the product level, once users have acquired an Android device, the Play Store is still the only practicable conduit between users and app developers. It is this situation that gives Google its gatekeeper power.

In sum, Apple and Google have significant (if not absolute) market power in their respective mobile ecosystems: they control the supply of the two main mobile operating systems (iOS and Android, respectively), as well as mobile app distribution (through their operation of the App Store and the Play Store). Competition within and between Apple’s and Google’s mobile ecosystems is extremely limited.¹⁵ As a result, Apple and Google act as digital gatekeepers for businesses trying to reach American consumers. This gatekeeper role allows the platforms to control businesses’ access to end consumers, giving the platforms substantial power over businesses, as well as end users. Although both platforms claim that their motive for maintaining and doubling down on their “walled garden” business model is to protect user privacy, Apple and Google have not hesitated to exploit it for their own benefit.¹⁶

III. Google and Apple Hide Their Junk Fees Under the Guise of “Guidelines” and “Policies”

Apple and Google abuse their gatekeeper power over mobile app distribution to establish “Guidelines” and “Policies” that force developers, and in turn, consumers to pay large and unjustified fees to the platforms. In exchange for these excessive fees, the platforms provide no added value. Quite the opposite: adding insult to the injury of inflated prices, Apple’s and Google’s mandatory use of IAP (through which the platforms forcibly interpose themselves between app developers and users) often result in a worse experience for developers and users.¹⁷

¹⁴ Daisuke Wakabayashi, *Google Plans to Lower the Cut It Takes In Its App Store to 15 Percent*, N.Y. Times (Oct. 21, 2021), <https://www.nytimes.com/2021/10/21/technology/google-app-store-developer-fees.html>.

¹⁵ Several studies of the app store ecosystem have reached the same or a similar conclusion. *See, e.g.*, Competition & Markets Authority, *Mobile Ecosystems: Market Study Interim Report* at 63, Dec. 14, 2021, <https://www.gov.uk/cma-cases/mobile-ecosystems-market-study#interim-report>; Australian Competition & Consumer Commission, *Digital Platform Services Inquiry: Interim report No. 2 – App marketplaces* at 5, Mar. 2021, <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf>.

¹⁶ *See, e.g.*, Thomas Germain, *Apple Is Tracking You Even When Its Own Privacy Settings Say It’s Not*, *New Research Says*, Gizmodo (Nov. 8, 2022), <https://gizmodo.com/apple-iphone-analytics-tracking-even-when-off-app-store-1849757558#:~:text=According%20to%20a%20new%20report.how%20the%20privacy%20protection%20works.&text=The%20iPhone%20Analytics%20setting%20makes%20an%20explicit%20promise> (“An independent test suggests Apple collects data about you and your phone when its own settings promise to ‘disable the sharing of Device Analytics altogether.’”); Ben Wolford, *Google’s Privacy Sandbox is Privacy Quicksand*, Proton (Sept. 15, 2023), <https://proton.me/blog/google-privacy-sandbox> (describing Google’s Privacy Sandbox as follows: “Chrome blocks third-party cookies while continuing to monitor people’s web browsing. Instead of letting websites watch you, Google does the watching.”).

¹⁷ For additional details on how Apple disintermediates app developers from their users when IAP is used, as well as the harmful effects of this, see Damien Geradin, *Coalition for App Fairness*, *Apple’s In-App Purchase (“IAP”) as a*

A. Mandatory Use of IAP

Apple and Google assess an up to 30% app tax for most purchases made on apps that are downloaded from the App Store or Google Play Store (e.g., subscriptions, in-game purchases, etc.). Similar to other companies that charge junk fees, like in the ticketing and food delivery context, Apple and Google refer to these fees in vague terms as a “commission” or “service fee.” While other payment processors charge approximately 3% for payment processing, the gatekeeper platforms force consumers to pay junk fees of up to 27% more for their “monopoly markup.” Developers have no choice but to use Apple’s and Google’s respective payment systems or face other significant obstacles imposed by the gatekeeper platforms. In addition, the obligation to use Apple’s and Google’s proprietary in-app payment systems has been discriminatorily imposed only on sellers that the gatekeeper platforms, in their complete and sole discretion, deem to sell “digital” goods.¹⁸

As a result of these excessive fees, combined with other restrictions, consumers are effectively forced to pay higher prices for the same products and services that they would otherwise be able to purchase at a lower price. For example, Proton’s end-to-end encrypted and privacy-focused email service is available both on and off the App Store. The service is identical, but if it is purchased through the App Store, it costs approximately 30% more.¹⁹

The excessive app tax inflates prices and pads the profits of Apple and Google—costing consumers more money and taking money away from developers that they could use to grow their business and invest in product improvements to better and more efficiently serve their customers.

B. Gag Rules that Block Consumer Access to Information

Apple and Google abused their monopoly power to force developers to agree to gag rules whereby developers could not tell their own customers about the availability of a better price for their services outside the App Store and Google Play Store. Absent Apple’s and Google’s strict and oppressive rules on the information that developers can share with users, consumers would have been aware of their options to take their business elsewhere. These rules have been highly effective at keeping users locked into Apple’s and Google’s app store ecosystems and in the dark

Disintermediation Tool (May 2021), <https://appfairness.org/wp-content/uploads/2021/05/CAF-IAP-as-DisintermediationTool.pdf>.

¹⁸ For example, Apple has complete discretion in deciding whether an app enables the purchase of “digital” goods or services and thus must use IAP, or whether it enables the purchase of “physical” goods or services and thus does not have to use IAP. The distinction it draws is not always objective or logically founded, and it is difficult to understand why it considers some services as being consumed “within the app” while similar services are considered to be consumed “outside of the app.” Comparing, for example, Uber, an app which connects two people for a ride in the physical world, to Tinder, an app which connects two people for a date in the physical world, one is somehow deemed by the gatekeepers to be physical while the other is deemed digital.

¹⁹ How App Store Monopolies Hurt Consumers, Coalition for App Fairness, https://appfairness.org/wp-content/uploads/2023/03/221213_Consumer-Harm-One-Pager_FINAL.pdf.

about their ability to switch to lower-priced options. Notably, a U.S. Court of Appeals issued a ruling in April 2023, affirming the district court’s finding that Apple’s gag rules blocked consumers from making informed purchasing decisions and getting lower prices.²⁰

In mid-January, Apple responded to the court ruling with sham compliance. Apple updated its App Store policy in a way that technically allows developers to link to alternative payment methods, but the platform will still collect a 27% fee on all transactions (12% for small developers).²¹ Developers will need to apply for an “entitlement” for Apple to release them from the gag rule and free them to share information with users about lower-cost options. Regardless, developers will still be required to offer Apple’s IAP as an option.

In a similar move, Google has offered up “user-choice billing” (UCB) as part of a pilot program in the United States. UCB technically allows eligible developers to offer an additional billing system alongside Google Play’s billing system for their users in select markets. The program comes with significant restrictions, however, and Google will still charge developers a 26% fee for not processing payments.

As the FTC is well aware, given its mission to enhance informed consumer choice and public understanding of the competitive process, markets do not work when consumers are denied access to accurate information about pricing and other terms.²² Apple’s and Google’s gag rules stand squarely in the way of price transparency and, in doing so, cause significant harm to

²⁰ Press Release, Rob Bonta, Att’y Gen. of Cal., Attorney General Bonta: Epic v. Apple Decision is a Win for California Law Protecting Consumers and Competition (Apr. 24, 2023), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-epic-v-apple-decision-win-california-law-protecting> (citing Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, (9th Cir. 2023), *cert. denied*, No. 23-337, 2024 WL 156473 (U.S. Jan 16, 2024)).

²¹ Chance Miller, *Apple Revises US App Store Rules to Let Developers Link to Outside Payment Methods, But It Will Still Charge a Commission*, 9to5Mac (Jan. 16, 2024), <https://9to5mac.com/2024/01/16/apple-revises-us-app-store-rules-to-let-developers-link-to-outside-payment-methods-but-it-will-still-charge-a-commission/#:~:text=Apple%20is%20updating%20its%20App%20Store%20guidelines%20to,app%20doesn%E2%80%99t%20also%20use%20Apple%E2%80%99s%20In-App%20Purchase%20system;DistributingApps%20in%20the%20U.S.%20That%20Provide%20an%20External%20Purchase%20Link,Apple:AppleDeveloperSupport,https://developer.apple.com/support/storekit-external-entitlement-us/> (last visited Feb. 7, 2024).

²² See also Lina M. Khan, Chair, Fed. Trade Comm’n, Remarks of Chair Lina M. Khan Regarding the White House Announcement of New Actions to Protect Consumers from Hidden Junk Fees (Oct. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/khan-remarks-regarding-junk-fees.pdf (“By hiding the true cost, these junk fees make it harder for people to choose the best product or service.”); Noah Joshua Phillips, Comm’r, Fed. Trade Comm’n, Keynote Address at the Baker Forum National Press Club, The FTC and the Digital Marketplace: Highlights From the Last Year (Mar. 3, 2020), https://www.ftc.gov/system/files/documents/public_statements/1568101/phillips_-_baker_forum_remarks_03_03_2020_final.pdf (“First, free markets rely upon effective competition An essential element of effective competition is the availability of information that consumers can use to evaluate competing products to make the best possible choices. Second, competition in the marketplace can be distorted when consumers do not receive accurate and material information.”).

consumers and other businesses' ability to compete with Apple and Google on a level playing field.²³

IV. Apple's and Google's App Tax Amounts to a Junk Fee that Should be Prohibited by the FTC's Final Rule

In sum, Apple's and Google's app tax of up to 30% amounts to a hidden and bogus fee that can inflate prices for consumers by up to 27%. When consumers buy an iPhone or Android mobile phone, they do so at a significant cost. There is no disclosure up front that once a user makes this purchase, Apple and Google will impose restrictions on app developers and app distribution that lock consumers into a single and closed (or effectively closed) app store ecosystem. In turn, they will have no choice but to pay inflated prices to enjoy the full functionality of their phones. In the case of Apple, after securing record breaking revenue from consumers' iPhone purchases, the company abuses its monopoly power over app distribution to extract tens of millions of additional dollars on an annual basis in excessive fees for no added value.

Notably, the up to 30% fees do not reflect the value of any services provided. They represent a supra-competitive commission that can only be imposed by Apple and Google because of the market power they have over app distribution. In this regard, after an exhaustive trial on the merits in Epic Games' suit against Apple, U.S. District Court Judge Gonzalez Rogers concluded that Apple set its commission at 30% in an arbitrary manner, without regard to operational costs or benefits for users or developers.²⁴ Judge Gonzalez Rogers further determined that the amount of the up to 30% commission bears no relationship to the costs of running the App Store or the value offered to app developers; rather, it was a historic gamble that allowed Apple to reap supra-competitive margins.²⁵

Apple's and Google's purported solutions to rulings and legislation that made some of the above-conduct illegal drive home two points: (1) the gatekeeper platforms are confident that they have sufficient market power to impose unfair terms and conditions on app developers (and their users), who have no choice but to comply; and (2) they are entirely comfortable charging junk fees (i.e., fees for *not* providing services).

²³ Google's and Apple's disintermediation and restrictions on developers' ability to communicate with their customers raise additional concerns regarding consumers' ability to understand what they are being charged for and to work with developers directly to resolve concerns about fees. *See, e.g.*, Josephine Trzaska, Comment Submission to the Fed. Trade Comm'n on the Unfair or Deceptive Fees Advanced Notice of Proposed Rulemaking, 87 Fed. Reg. 67413 (proposed Nov. 8, 2022), <https://www.regulations.gov/comment/FTC-2022-0069-5760> ("When making purchases via Apple on the iPhone (app subscription, etc) there is no way to tell from the posted charges what the product was that you purchased. . . . If you think you may not have made this purchase and wish to receive a refund, Apple will tell you to seek the refund with the app itself, which is not possible if you do not know what the purchase was for.").

²⁴ Epic Games, Inc. v. Apple Inc., No. 20-cv-05640, Rule 52 Order After Trial on the Merits, at 144 (N.D. Cal. Sept. 10, 2021), <https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/Epic-v.-Apple-20-cv-05640-YGR-Dkt-812-Order.pdf>.

²⁵ *Id.* at 92, 163.

With Apple’s and Google’s latest actions, the gatekeeper platforms are demanding payment for phantom services that they are expressly and admittedly not providing. As CAF Executive Director Rick VanMeter recently stated about Apple’s response to the Ninth Circuit’s finding that its gag rules were illegal: “Apple’s approach to ‘compliance’ with the District Court’s decision will not benefit developers and consumers. The new 27 percent commission on payments it does *not* process defies the intention of the District Court’s injunction and undermines competition.”²⁶ Similarly, VanMeter responded to Apple’s proposed Digital Markets Act (DMA) compliance plan, by stating, “Apple clearly has no intention to comply with the DMA. Apple is introducing new fees on direct downloads and payments they do *nothing* to process, which violates the law.”²⁷ In the case of Google’s UCB program, Google is charging developers a fee *not* to process payments.

V. Recommendation

CAF appreciates the opportunity to submit its response to the FTC’s Request for Comments on its proposed rule. CAF urges the agency to issue a final rule that bans the business practices that Apple and Google use to extract tens of millions of dollars in junk fees from consumers and small businesses on an annual basis. To achieve this, the agency should clarify that the rule’s prohibitions on “hidden fees” and “misleading fees” apply in the context of business-to-business relationships, where businesses occupy the role of consumers of another business’s goods and services.

Given the ongoing and substantial harm to consumers and businesses, the agency should utilize all available tools to promptly bring an end to this conduct.²⁸ CAF urges the FTC to investigate and consider bringing an action to challenge this conduct as a violation of Section 5 of the Federal Trade Commission Act, which prohibits “unfair or deceptive acts or practices,” as well as “unfair methods of competition.”²⁹ In accordance with the FTC’s Policy Statement Regarding the Scope of Unfair Methods of Competition, Apple’s and Google’s conduct meets the criteria of being (i) a method of competition that is (ii) unfair, as the agency defines it, “meaning that the conduct goes beyond competition on the merits.”³⁰

²⁶ CAF Admin, *CAF Statement on Apple’s Specious Compliance with Ninth Circuit Ruling as Upheld by SCOTUS*, Coalition for App Fairness (Jan. 16, 2024) (emphasis added), <https://appfairness.org/caf-statement-on-apples-specious-compliance-with-ninth-circuit-ruling-as-upheld-by-scotus/>.

²⁷ CAF Admin, *CAF Statement on Apple’s DMA Non-Compliance Plan*, Coalition for App Fairness (Jan. 25, 2024) (emphasis added), <https://appfairness.org/caf-statement-on-apples-dma-non-compliance-plan/>.

²⁸ Although the U.S. Department of Justice reportedly has imminent plans to sue Apple for illegal monopolization, FTC action via rulemaking or under its Section 5 authority to investigate and bring an enforcement action would be complementary.

²⁹ Fed. Trade Comm’n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

³⁰ *Id.*

In addition to agency action, CAF continues to advocate for Congress to pass the Open App Markets Act (OAMA).³¹ CAF strongly believes that this bipartisan and widely supported legislation is an indispensable measure to level the playing field for app developers who rely on Google and Apple to reach consumers and ensure a consistent standard of conduct across the app ecosystem.

Respectfully Submitted,

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³¹ Open App Markets Act, S. 2710, 117th Cong. (2021).