

PRESIDENT BIDEN JOINS FEDERAL AGENCIES FIGHTING AGAINST SURPRISE FEES HARMING AMERICAN CONSUMERS



BY ED MIERZWINSKI¹



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The fight over junk fees has escalated in the last few years. Corporate efforts to maximize revenue by hiding price increases have drawn opposition from one of our oldest consumer agencies – the 1914 Federal Trade Commission – and our newest – the Consumer Financial Protection Bureau, established in 2010 following the massive 2008 economic collapse brought on by risky bank lending practices. A review of junk fee practices and junk fee flashpoints from a consumer advocacy perspective, with an emphasis on the agencies’ strong legal defenses against unfair, deceptive or abusive corporate practices. The paper describes how laws and rules often grow out of a pattern and practice of earlier unfair or deceptive actions.

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I. WHAT IS A JUNK FEE?

My colleague, PIRG Consumer Watchdog Teresa Murray, explains:²

“There are three solid definitions of a junk fee:

1. Mandatory charges that aren’t disclosed up front. It could be a “resort fee” slid in just before you book a hotel room, a required company charge added to monthly cell phone bill, or a service fee you can’t avoid when purchasing an event ticket. Many companies are guilty of “drip-pricing” – prices that don’t include everything you must pay.
2. Optional charges that are portrayed as mandatory or are given official-sounding names to deceive consumers or discourage them from questioning the fees.
3. Mandatory fees or charges buried in an unreasonably long terms and conditions document. You might expect a 10-page document for a car loan, but not to book an airline ticket.”

II. PRESIDENT TAKES NOTICE OF JUNK FEES, FTC AND CFPB LEAD THE RESPONSE

The junk fee explosion was preceded by an increase in unfair or deceptive practices, which led to enhanced regulatory, Congressional and even presidential interest in taking action.

Recent efforts to fight junk fees certainly attracted President Biden’s attention. His 2021 Executive Order on Competition urged agencies to investigate and act on “hidden fees,” “early termination fees” and “airline ancillary fees,” among others.³ His recent State of the Union address called for passage of a Junk Fee Prevention Act. The president specifically excoriated airlines for their practices, including the imposition of family seating fees that treat ‘your child like a piece of luggage.’⁴ The president’s senior National Economic Council staff explained further:

These so called “junk fees” are not just an irritant – they can weaken market competition, raise costs for consumers and businesses, and hit the most vulnerable Americans the hardest.⁵

They then differentiated junk fees from reasonable fees.

There is nothing wrong with a firm charging reasonable add-on fees for additional products or services. In the interests of customization, firms should be free to charge more to add mushrooms to your pizza or to upgrade you to a hotel room with an ocean view. However, in recent years we’ve seen a proliferation of “junk fees” – a category of fees that serve a different purpose. They can be defined as fees designed either to confuse or deceive consumers or to take advantage of lock-in or other forms of situational market power.⁶

2 Murray, Teresa, blog, “Junk Fees: How To Avoid Them or Fight Them,” PIRG, undated, last visited on March 22, 2023, available at <https://pirg.org/edfund/resources/junk-fees-how-to-avoid-them-or-fight-them/>.

3 President Joe Biden, Executive Order on Promoting Competition in the American Economy, July 9, 2021, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

4 White House, “President Biden’s State of the Union Address,” February 7, 2023, available at <https://www.whitehouse.gov/state-of-the-union-2023/>.

5 Deese, Mahoney and Wu, White House Blog, “The President’s Initiative on Junk Fees and Related Pricing Practices,” October 26, 2022, available at <https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/>.

6 *Id.*

The president's request for a Junk Fee Prevention Act was answered in the Senate in March.⁷

Enter FTC and CFPB. Both agencies have launched high-profile campaigns against junk fees and are facing down powerful special interests.

Banks, in particular, backed by their phalanx of outside law and PR firms, rail against the characterization of their “regulated” fees as “junk” fees. While the CFPB is examining numerous fees, opposition to its inquiries into checking account overdraft fees and credit card late fees has united the often-feuding big Wall Street banks, the small community banks, and the consumer-owned credit unions, to boot.⁸

The FTC is looking at the non-financial sector junk fees, including hotel and travel fees, concert and sports ticket fees, and cancellation fees, among others. The Department of Transportation is looking at airline fees. Junk fees are a death of a thousand cuts for strapped U.S. consumers.

The special interests have punched back hard, including with ad hominem attacks on both the FTC chair Lina Khan⁹ and the CFPB director Rohit Chopra.¹⁰ Predatory lenders have led existential judicial attacks on the CFPB's independence.¹¹

Yet, both agencies' authority over junk fees is strongly rooted in authority granted by Congress in their organic statutes. The FTC Act's core section 5 authority over unfair and deceptive practices (“UDAP”)¹² is also enforceable by other agencies, including the prudential bank regulators.¹³ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 established the CFPB in its Title 10, the Consumer Financial Protection Act. The act's Section 1036 also added an “abusive” prong to the new agency's UDAP authority, giving it powers over unfair, deceptive, or abusive practices (“UDAAP”).¹⁴

III. CFPB HAS FOCUSED ON LATE FEES AND OVERDRAFT FEES

Banks began relying on fees following early 1980s deregulation. One early flashpoint concerned deceptive interest rate payments on savings accounts. Banks claimed, for example, that they didn't have to pay interest on required reserves held by the Federal Reserve of around 7 percent, so advertised rates of interest were effectively deflated to only 93 percent. The Truth In Savings Act of 1991 prohibited a variety of flavors of this unfair practice.¹⁵

Since then, it's been a constant game of whack-a-mole with surprise and unfair fees.

7 Release, Sen. Richard Blumenthal, “Blumenthal & Whitehouse Introduce Junk Fee Prevention Act to End Unfair Surprise Costs for Consumers,” March 22, 2023, available at <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-and-whitehouse-introduce-junk-fee-prevention-act-to-end-unfair-surprise-costs-for-consumers>.

8 Release, American Bankers Association, “Joint Trades Statement on CFPB Request for Information on Fees,” January 26, 2022, available at <https://www.aba.com/about-us/press-room/press-releases/joint-trades-statement-on-cfpb-request-for-information-on-fees>.

9 “Under Ms. Khan's leadership, the unchecked FTC wreaks immeasurable havoc on the private sector and the products that everyday Americans enjoy, as it continually oversteps its authority and circumvents Congress.” in Mackowiak, Matt, Op-ed, “Chairwoman Lina Khan's FTC is out of control, and Congress must act,” The Washington Times, February 27, 2023, available at <https://www.washingtontimes.com/news/2023/feb/27/ftc-is-out-of-control-and-congress-must-act/>.

10 “Unfortunately, under Director Chopra, the CFPB is more out of control than ever before. It's once again pursuing a subversive far-Left agenda by abusing—and exceeding—its authorities.” in Sen. Pat Toomey, Opening Statement, “Toomey: Under Chopra, CFPB is More Out of Control Than Ever Before,” Senate Banking Committee, April 29, 2022, available at <https://www.banking.senate.gov/newsroom/minority/toomey-under-chopra-cfpb-is-more-out-of-control-than-ever-before>.

11 While the Supreme Court has already agreed to hear a 5th Circuit challenge to the CFPB's constitutionality, on 23 March 2023, the 2nd Circuit found the CFPB constitutional. The “Second Circuit panel said on Thursday that it “cannot find any support for the Fifth Circuit's conclusion” in Supreme Court precedent, the Constitution's text or the history of the appropriations clause,” in Hill, Jon, “BREAKING: 2nd Circ. Says CFPB Funding Structure Is Constitutional,” Law360, March 23, 2023, available at <https://www.law360.com/articles/1589276>.

12 Report, “Unfair or Deceptive Acts or Practices (UDAP) Enforcement Authority Under the Federal Trade Commission Act,” Congressional Research Service, November 4, 2022, available at <https://crsreports.congress.gov/product/pdf/IF/IF12244>.

13 Prudential regulators are the Federal Reserve Board of Governors (over Fed member state-chartered banks), the Federal Deposit Insurance Corporation (“FDIC”) (over non-Fed member state-chartered banks), and the Office of the Comptroller of the Currency (“OCC”) over all nationally-chartered banks and thrifts (S&Ls).

14 Pub.Law No. 111-203, The Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, <https://www.congress.gov/bill/111th-congress/house-bill/4173/text>.

15 TISA was incorporated into the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L.No.102-243. But note that continued bank carping led to 1996 legislation requiring the Fed to pay interest on reserves. See <https://www.federalreserve.gov/monetarypolicy/reserve-balances.htm>.

When the CFPB was established in 2010, it was designed to protect consumers in all financial transactions at both banks and non-banks. Congress gave the CFPB greater enforcement authority and penalty powers than it had given the FTC. It gave it independent funding as all the prudential bank regulators also have, to protect it from industry pressure.¹⁶ It gave the CFPB its greatest powers, including supervisory authority, over banks greater than \$10 billion in assets and over non-bank mortgage companies and servicers, private student lenders and payday lenders of any size.¹⁷ It also gave CFPB the ability to further bootstrap full supervisory or examination authority over larger participants in other markets.¹⁸

CFPB began its “larger participant rulemakings” with the credit bureaus and debt collectors. Why? For one thing, these are dead-end markets.¹⁹ A consumer can vote with their feet or move their money to a new bank but is stuck with the credit bureaus and debt collectors.

The broad grant of powers to CFPB was necessitated largely due to failures of the prudential regulators. Conflicts of interest caused them to look the other way as problems in the mortgage market festered. This regulatory failure, concomitant regulatory capture and race to the regulatory bottom was exacerbated by the dual responsibilities of the regulated. Their incentives didn’t match those of bank customers:

- If an agency granted more powers it attracted more banks and more regulatory fees to its bank charter class, making the agency’s castle on the Potomac bigger.²⁰
- If a bank’s unfair fees made it more profitable, didn’t that mean it wouldn’t fail, so wouldn’t enforcing consumer laws run counter to the agency’s bank prudential efforts?

The CFPB has used its authority granted in both the Consumer Financial Protection Act and the 19 consumer financial protection statutes where authority was transferred to CFPB from other regulators, primarily the Federal Reserve, to find solutions to junk fees. The CFPB and FTC share authority over non-banks, but CFPB has primary rulemaking authority.²¹

A. Patterns and Practices of Unfair Practices Before Action: the Credit CARD Act

It’s important to understand that many new laws and regulations grow out of a pattern and practice of earlier unfair or deceptive actions.

For example, I explain the two-decade-long runup of unfair or deceptive practices that led to passage of the Credit Card Accountability, Responsibility and Disclosure Act (“CARD Act”) of 2009 here²² and here.²³

Short TL;DR version: Credit cards had long been the most profitable form of consumer lending, according to the Federal Reserve’s Annual Reports to Congress. But consolidation of monoline credit card companies into larger banks brought new pressures on credit card chiefs to make even more money, every year. They first ratcheted down the thumbscrews on late pays, adding penalty interest rates to late fee charges. They then tricked more consumers into paying late by changing due dates or making bills due on a Sunday but late on Monday. They then invented universal default to dun consumers who’d never been late with their payments. Finally, the banks invoked the “we can change the rules at any time, for any reason, including no reason” clauses. The CARD Act passed overwhelmingly.

16 The CFPB is an independent bureau of the Federal Reserve Board; the OCC is an independent bureau of the U.S. Treasury Department. Both are headed by single directors. The CFPB’s structure was modeled after OCC’s, with authority over both banks and non-banks and a singular mission, to protect consumers.

17 CFPB, “Institutions subject to CFPB supervisory authority,” available at <https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/>.

18 See Consumer Financial Protection Act, Section 1024.

19 “In these markets, consumers typically cannot choose the company they work with, and when problems arise they often cannot get answers, leaving them frustrated with nowhere to turn. When we see such problems, it is our job to make sure that consumers are treated fairly.” in Cordray, Richard, Speech, “Prepared Remarks of CFPB Director Richard Cordray at University of Michigan Law School,” CFPB, October 24, 2014, available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-university-of-michigan-law-school/>.

20 The CFPB’s independent funding does not come from fees, but directly from the Federal Reserve.

21 See <https://www.consumerfinance.gov/rules-policy/final-rules/code-federal-regulations/> for a list of the implementing regulations the CFPB has responsibility over. Each year, the FTC and CFPB update a memorandum of understanding over their shared jurisdictions. See <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-federal-trade-commission-pledge-to-work-together-to-protect-consumers/>.

22 Mierzwinski, Edmund, “Colston E. Warne Lecture: Consumer Protection 2.0—Protecting Consumers in the 21st Century,” JOURNAL OF CONSUMER AFFAIRS, Vol. 44, Issue 3, 578-597 (2010).

23 Mierzwinski, Ed, panelist video (skip to 36m10sec) in CFPB field hearing, “Live from Chicago, Illinois!,” October 9, 2013, available at <https://www.consumerfinance.gov/about-us/blog/live-from-chicago-illinois/>.

Of course, until the dawn of the CFPB, the prudential bank regulators rarely used the FTC's UDAP authority or other enforcement authorities.

Two prudential bank regulators, the infamous, now-eliminated Office of Thrift Supervision and its sister Office of the Comptroller of the Currency -- now presiding over both national banks and national S&Ls -- had instead largely spent the 2-decade run-up to the 2007-2008 collapse preempting state laws and municipal ordinances targeted at unfair and deceptive bank practices -- from checking account and ATM fees to the mortgage practices that ultimately triggered the economic collapse leading to the Great Recession. When OCC leaders tired of retail actions, they announced wholesale field preemption rules in 2004.²⁴

The OCC did, however, in 2000, use its UDAP authority over a then-Top Ten credit card issuer that aggressively advertised “no annual fees,” but collected millions in monthly fees instead.²⁵ At the time, it was my view, and that of others, that the captured and pliant OCC was only shamed into action by the pesky San Francisco district attorney's office, which led earlier investigations into Provident Bank. The old OCC famously rooted for the banks.²⁶ The CFPB was given only one job: to root for consumers, all day, every day.

B. Growth of Unfair Overdraft Schemes Leads to Regulation

In pre-CFPB 2009, over a decade of growing overdraft fee complaints finally forced the Federal Reserve and other agencies to regulate so-called “standard overdraft protection.”²⁷

Historically, overdrafts had been discouraged and treated as parking tickets. “Traditional” overdraft protection allowed a customer to automatically transfer funds from savings or triggered a loan. So, a small one-time transfer fee or nominal interest on a small loan prevented the larger overdraft fee.²⁸

In the 90s and early 00s, bank consultants convinced small banks first, but later all banks, to take advantage of “checkhold limits” in the check availability system. Studies had shown that nearly all consumers, after an account had been open for six months, were good for making all their checks whole even if on a second presentment. The legal hold times on releasing deposited checks to consumers far exceeded the (basically overnight) availability of funds to the bank.

In the late 1990s, banks also had an “aha” moment. As they converted ATM cards into dual use debit cards, usable at point of sale, they switched the default from off to on, making it much more likely that small debit transactions would result in big overdraft fees. The CFPB explains:

Before debit card use grew, overdraft fees on check transactions formed a greater portion of deposit account overdrafts. Debit card transactions presented consumers with markedly more chances to incur an overdraft fee when making a purchase because of increased acceptance and use of debit cards for relatively small transactions (e.g. fast food and grocery stores). Over time, revenue from overdraft increased and began to influence significantly the overall pricing structure for many deposit accounts, as providers began relying heavily on back-end pricing while eliminating or reducing front-end pricing (i.e. “free” checking accounts with no monthly fees). [citations omitted]²⁹

So, changing the default switch for approving point-of-sale payments on debit cards to “always on” allowed overdrafts of \$15-20 (at first) on small transactions with debit cards.

24 See Wilmarth, Arthur, “The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection,” Wilmarth, Arthur E., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, October 20, 2004, available at SSRN: <https://ssrn.com/abstract=577863>.

25 Release, OCC, “Provident to Cease Unfair Practices, Pay Consumers Minimum of \$300 Million Under Settlement with OCC and San Francisco District Attorney,” June 28, 2000, available at <https://occ.treas.gov/news-issuances/news-releases/2000/nr-occ-2000-49.html>.

26 See Martin, Andrew, “Does this Bank Watchdog Have a Bite,” March 28, 2010, *New York Times*, available at <https://www.nytimes.com/2010/03/28/business/28dugan.html>.

27 Release, “Federal Reserve announces final rules prohibiting institutions from charging fees for overdrafts on ATM and one-time debit card transactions,” Federal Reserve Board of Governors, November 12, 2009, available at <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20091112a.htm>.

28 Burnette, Margarette, “How Overdraft Protection Transfers Work,” September 26, 2022, *NerdWallet*, available at <https://www.nerdwallet.com/article/banking/overdraft-protection-transfers>.

29 CFPB Circular, “Consumer Financial Protection Circular 2022-06: Unanticipated overdraft fee assessment practices,” October 26, 2022, available at https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf.

Then, the banks aggressively marketed the new product. They called it “standard” overdraft protection. Of course, they said it was intended to protect consumers from embarrassment.

Hypothetical: “We’ll cover your overdrafts so you can avoid the embarrassment of your debit card being declined by a barista, (*unspoken*: but, of course, you’ll pay an overdraft protection fee of about the same amount as an overdraft fee itself, each time. To make you feel better), we’ll label it as a convenience fee (after all, it’s convenient to the bank).”³⁰

Overdraft fee or overdraft protection fee? You say tomato, I say . . .

The rules that took effect in 2010 required consumers to affirmatively opt-in to the protection program, but didn’t adequately regulate program marketing, or the re-ordering or frequency of checks or debits subject to the fees. And while the rules have had an impact on the number of consumers opting in, aggressive marketing efforts have kept too many consumers opting in.³¹ And paying and paying.³²

The CFPB has taken action against TCF Bank’s overdraft practices; according to the CFPB complaint, its then-CEO named his boat ‘The Overdraft.’³³ And, while you may not recall CFPB’s Regions Bank overdraft action, you may recall Wells Fargo Bank’s fake accounts scandal. Many of its fake accounts were overdraft protection accounts. Managers gave out bonuses for selling them.³⁴

C. CFPB Gives Companies Plenty of Warning, Has Plenty of Authority

The CFPB’s actions against unfair or “surprise” overdraft fees were preceded by warnings and explanations to banks. According to the CFPB, in the late fee, overdraft and other surprise fee instances, consumers were harmed, “Consumers could not reasonably avoid the substantial injury, irrespective of account-opening disclosures.”³⁵

The CFPB’s Junk Fees Supervisory Highlights explains:

An act or practice is unfair when: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.³⁶

For example, in its proposed rules on credit card late fees, CFPB first makes it clear that the 2009 Credit CARD Act made late fees that weren’t reasonable and proportional illegal. Unfortunately, however, the CARD Act was first enforced by the Federal Reserve Board, which declared that any late fees that followed its regulation fell within an immunity safe harbor ringed by an automatic inflation escalator clause.

The CFPB says that all the big credit card banks now cluster around the current safe harbor limits of \$30 for a first offense and \$41 for a continuing violation. Those safe harbor immunity limits had risen annually due to the Fed’s automatic inflation adjustment; the CFPB now seeks to reduce late fees to as little as \$8.³⁷

³⁰ The banks, of course, also figured out how to change the ordering of deposited checks and debits, so even more deposited items would be subject to fees.

³¹ “Even after public outcry over the years, big banks have made it common practice to charge about \$35 for overdraft fees, sometimes three to six times a day. That can add up to more than \$200 in just one day.” in Release, “U.S. PIRG helps reintroduce Rep. Maloney’s Overdraft Protection Act,” U.S. PIRG, June 30, 2021, available at <https://pirg.org/media-center/statement-u-s-pirg-helps-reintroduce-rep-maloney-overdraft-protection-act/>.

³² I discuss this overdraft history in greater detail here. Mierzwinski, Ed, Blog post, “CFPB Finds So-Called Overdraft Protection Costs Some \$450/Year,” PIRG, August 8, 2017, available at <https://pirg.org/articles/cfpb-finds-so-called-overdraft-protection-costs-some-450-year/>.

³³ Release, “CFPB Sues TCF National Bank for Tricking Consumers Into Costly Overdraft Service,” CFPB, January 19, 2017, available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-tcf-national-bank-tricking-consumers-costly-overdraft-service/>.

³⁴ The Regions and Wells Fargo cases are discussed in detail in a recent CFPB report, “Supervisory Highlights: Junk Fees Special Edition,” Issue 29, Winter 2023, March 8, 2023, available at <https://www.consumerfinance.gov/data-research/research-reports/supervisory-highlights-junk-fees-special-edition-issue-29-winter-2023/>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ “Specifically, the proposed rule would lower the immunity provision for late fees to \$8 for a missed payment as well as end the automatic annual inflation adjustment. The proposed rule would also ban late fee amounts above 25% of the consumer’s required payment.” in Release, “CFPB Proposes Rule to Rein in Excessive Credit Card Late Fees: Proposed rule seeks to close loophole exploited by companies to hike fees with inflation,” February 1, 2023, available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-rein-in-excessive-credit-card-late-fees/>.

D. The Poor Still Pay More

One concern, of course, is that the bulk of the revenue from both late and overdraft fees comes from low-income, or deep sub-prime, consumers. The poor still pay more.³⁸ The CFPB has calculated that the most affluent consumers pay an average of \$11/year on credit card late fees, but the poorest consumers, with deep sub-prime credit scores, pay \$138 per account.³⁹ Similarly, the CFPB has found that low-income consumers who opt-in to standard overdraft protection pay \$450/year more than similar consumers who chose not to opt-in.⁴⁰

It's expensive to be poor. The poor also pay a disproportionate number of fees to access government benefits administered by banks on debit cards. Access to food stamps, covid benefits, etc. are all affected by bank and other surprise fees.⁴¹

IV. THE FTC TAKES ACTION ON JUNK FEES

Pre-CFPB, the Federal Reserve Board of Governors had primary responsibility for writing rules affecting insured depository institutions (banks). The FTC enforced the same laws over non-banks, but had little money or power. Following its late 1970s investigations into firms ranging from insurance companies to funeral homes to tobacco companies, and its effort to regulate children's television advertising, it had been shackled by limits on its rulemaking authority, cuts to its funding and limits on its remedial powers.⁴²

The FTC Act grants a "free first bite of the apple" to wrongdoers. The FTC generally can only impose penalties on a wrongdoer found in violation of an existing consent order.⁴³ Nevertheless, even with one hand tied behind its back, and its own phalanx of opponents, the FTC is pushing back hard on junk fees and other unfair marketplace practices.

It has taken a series of actions against non-bank junk fees, primarily in the travel and entertainment sectors as well as against unfair online subscription practices.⁴⁴ Again, entrenched fees often result from UDAP practices. Low-balling the cost of a hotel or airfare or concert ticket⁴⁵ is enabled by both dark patterns⁴⁶ and/or DRIP fees⁴⁷ and/or what the FTC calls "associated junk fee practices."

38 David Caplovitz, *THE POOR PAY MORE*, Free Press, 1967. See also https://en.wikipedia.org/wiki/The_Poor_Pay_More.

39 Release, "CFPB Finds Credit Card Companies Charged \$12 Billion in Late Fee Penalties in 2020, Largest credit card issuers expected to hike fees further," CFPB, March 29, 2022, available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-credit-card-companies-charged-12-billion-in-late-fee-penalties-in-2020/>.

40 I discuss this overdraft history in greater detail here. Mierzwinski, Ed, Blog post, "CFPB Finds So-Called Overdraft Protection Costs Some \$450/Year," PIRG, August 8, 2017, available at <https://pirg.org/articles/cfpb-finds-so-called-overdraft-protection-costs-some-450-year/>.

41 "Lower-wage workers, consumers of color, and other consumers struggling economically pay a disproportionate share of these fees. These consumers are located in communities that bear a higher fee burden on average than do predominantly white communities. Sophisticated algorithmic models may steer consumers to high-cost, subprime products instead of a wide array of competitively priced credit options with low fees," in release, "Consumer Advocates Urge CFPB to Protect Consumers From "Junk Fees," National Consumer Law Center, May 2, 2022, available at <https://www.nclc.org/consumer-advocates-urge-cfpb-to-protect-consumers-from-junk-fees/>.

42 "When the Senate takes up an FTC funding bill next month, a proposal will be considered to sharply curtail the commission's powers in the inquiry. In fact, the Senate Commerce Committee already has sent to the Senate an amendment to the funding bill that effectively would terminate the commission's rulemaking proceeding," in Brown, Merrill, "Head of FTC Withdraws From Kidvid Investigation," Washington Post, February 8, 1980, available at <https://www.washingtonpost.com/archive/business/1980/01/08/head-of-ftc-withdraws-from-kidvid-investigation/9bebb3f7-ed9e-4318-a440-074850b8515c/>.

43 National Law Review, "On Notice: Procedural Overview of the FTC's Section 5 Penalty Offense Authority," October 29, 2021, available at <https://www.natlawreview.com/article/notice-procedural-overview-ftc-s-section-5-penalty-offense-authority>.

44 Mierzwinski, PIRG blog, "FTC investigates consumer junk fees, especially by hotels, ticket sellers," October 20, 2022, available at <https://pirg.org/updates/ftc-investigates-consumer-junk-fees-especially-by-hotels-ticket-sellers/>.

45 Concert ticket add-on fees have been a flashpoint since the band Pearl Jam tried to fight back in the 1990s. More recently, Bruce Springsteen, Taylor Swift and British band The Cure have fought back. See Holpuch, Amanda, Article, "The Cure Says Ticketmaster Will Issue Refunds After Fee Complaints: The band said it wanted to make its North American tour "affordable for all," but after tickets went on sale this week, fans said that fees had ratcheted up the price," The New York Times, March 17, 2023, available at <https://www.nytimes.com/2023/03/17/arts/ticketmaster-cure-ticket-refund.html>.

46 Release, "FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers: Tactics Include Disguised Ads, Difficult-to-Cancel Subscriptions, Buried Terms, and Tricks to Obtain Data," September 15, 2022, available at <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers/>.

47 Release, Event on "The Economics of Drip Pricing," FTC, May 21, 2021, available at <https://www.ftc.gov/news-events/events/2012/05/economics-drip-pricing/>.

One associated junky practice is making it easy to sign up for a recurring subscription, but hard to cancel. The FTC wants to “make it as easy to cancel enrollment as it was to sign up.”⁴⁸ In 2021, we joined consumer groups urging the FTC to make it easier to cancel Amazon Prime; we argued it used dark patterns to make it harder to cancel.⁴⁹ A similar remedial bill, the Consumer Online Payment Transparency and Integrity Act, was introduced in 2021 by U.S. Sen. Van Hollen (MD) and Rep. Yvette Clark (NY).⁵⁰

From the FTC’s junk fee inquiry announced in October:⁵¹

The FTC is concerned that junk fees are common in many sectors of the U.S. economy. The advance notice of proposed rulemaking announced today seeks public comment on the harms stemming from junk fees and associated junk fee practices and on whether a new rule would better protect consumers. The types of junk fees the FTC is seeking comment on include:

- Unnecessary charges for worthless, free, or fake products or services. . . .
- Unavoidable charges imposed on captive consumers. . . .
- Surprise charges that secretly push up the purchase price. . . .”

The FTC’s recent actions suggest a welcome acceleration of its efforts to battle junk fees and other unfair marketplace practices.

V. AIRFARE JUNK FEES

Consumers face airfare costs and related practices that are hard to figure out. The Department of Transportation’s (“USDOT”) efforts to improve matters have long been stymied by the powerful airline lobby, which has inserted major roadblocks into the agency’s rulemaking efforts over the years.⁵² USDOT has been trying to pass ancillary fee transparency and other airline consumer rules for years.⁵³

The problem is worsened due to total federal preemption of airline consumer protection, even of state authority over unfair fee advertising. Consumers have only the USDOT to protect them.⁵⁴

While USDOT has fumbled on strengthening consumer rights, some airline business models have increasingly relied on add-on fees, which frequently are deceptively added late in the purchase process, through DRIP pricing.

Further, while airfares are subject to a 7 percent federal excise tax, add-on, or so-called ancillary fees, from baggage to seat selection

48 “A second reason why the FTC is asking for your feedback about proposed changes to the Rule is because problematic negative option practices continue to inflict consumer injury.” in Release, “Federal Trade Commission Proposes Rule Provision Making it Easier for Consumers to “Click to Cancel” Recurring Subscriptions and Memberships: Proposal seeks to make it as easy to cancel enrollment as it was to sign up,” FTC, March 23, 2023, available at <https://www.ftc.gov/news-events/news/press-releases/2023/03/federal-trade-commission-proposes-rule-provision-making-it-easier-consumers-click-cancel-recurring/>.

49 Mierzwinski, Article, “FTC escalates inquiry of Amazon Prime cancellation process,” PIRG, September 22, 2022, available at <https://pirg.org/updates/ftc-escalates-inquiry-of-amazon-prime-cancellation-process/>.

50 See S3298 and its identical companion, HR 6103. <https://www.congress.gov/bill/117th-congress/senate-bill/3298/> and <https://www.congress.gov/bill/117th-congress/house-bill/6103/>.

51 FTC Release, “Federal Trade Commission Explores Rule Cracking Down on Junk Fees: Agency seeks comment on harms from unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value,” October 20, 2022, available at <https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-explores-rule-cracking-down-junk-fees/>.

52 Here’s a typical dilatory filing in a consumer protection proceeding filed by the airline lobby Airlines for America: Petition, DOT Airline Ticket Refunds and Consumer Protections Docket, December 20, 2022, Airlines For America, available at <https://www.regulations.gov/comment/DOT-OST-2022-0089-5300>.

53 See the number of related withdrawn, suspended and delayed consumer rules. Web page, “Proposed and final aviation rules,” USDOT, undated, available at <https://www.transportation.gov/airconsumer/aviation-rules>.

54 “Americans are justifiably frustrated that federal government agencies charged with overseeing airline consumer protection are unable or unwilling to hold the airline industry accountable and to swiftly investigate complaints submitted to the US DOT,” Bipartisan letter from 38 state and territorial attorneys general, National Association of Attorneys General, August 31, 2022, available at https://naagweb.wpenginepowered.com/wp-content/uploads/2022/08/NAAG-Policy-Letter-Airline-Accountability-and-Increased-Consumer-Protection-Final_38-AGs.pdf.

fees, are not.⁵⁵ The favorable (to airlines) tax treatment of ancillary fees has contributed to their rising use – the airfares themselves are deceptively low-balled but ancillary fees added-on – and added confusion for consumers.

Starting in 1928, airline fares and schedules have been public. Yet, dripping the ancillary fees out at the last minute allows airlines to hide the true cost of a fare, prevents consumers from shopping around and stymies competition.⁵⁶

VI. CONCLUSION

As I noted above, surprise junk fees are a death of a thousand cuts for consumers. This brief treatment does not even discuss in detail many other fees.

For example, consumers are deluged by debt collector pay-to-pay fees;⁵⁷ surprise medical billing fees triggered by out-of-network treatment;⁵⁸ the dozens of fees imposed on tenants by some landlords;⁵⁹ purported “inflation adjustment” fees at some restaurants;⁶⁰ fees charged by correctional facilities;⁶¹ campus fees to access student loans and grants;⁶² tax preparer fees;⁶³ and many others. Finally, it would be remiss of me not to call out the telephone and cable guys; anti-competitive oligopolies that pioneered the use of deceptive fees and services.⁶⁴

Congress, federal agencies and the president have joined the fight against unfair, deceptive and even illegal fee practices. It’s a bad look for companies to hit their customers in the wallet with surprise fees. It’s time to cut the death of a thousand cuts.

55 “Ancillary fees—a multi-billion-dollar source of revenue—currently escape excise taxation, depriving the Airport & Airway Trust Fund (AATF) of resources needed to maintain critical infrastructure.” In letter from consumer groups, including U.S. PIRG, to Congressional leaders, National Consumers League, “Consumer and Passenger Rights Organizations’ Priorities for the 2023 FAA Reauthorization Legislation, July 5, 2022, available at <https://nclnet.org/consumer-and-passenger-rights-organizations-send-letter-to-congress-urging-inclusion-of-airline-reforms-in-2023-faa-reauthorization/>.

56 See the slide deck I presented to the Department of Transportation’s Aviation Consumer Protection Advisory Committee in Mierzwinski, blog, “As the summer of airline delays and cancellations peaks, DOT considers better info to help passengers,” PIRG, June 30, 2022, available at <https://pirg.org/articles/summer-airline-delays-and-cancellations-peaks-dot-considers-better-info-help/>.

57 Release, “CFPB Moves to Reduce Junk Fees Charged by Debt Collectors: Advisory opinion explains that most “pay-to-pay” fees charged by debt collectors violate federal law,” CFP, June 29, 2022, available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-moves-to-reduce-junk-fees-charged-by-debt-collectors/>.

58 Kelmar, Patricia, Article, “Patient Guide: Surprise medical billing protections you can use now,” PIRG, March 3, 2023, available at <https://pirg.org/edfund/articles/patient-guide-surprise-medical-billing-protections-you-can-use-now/>.

59 Comment letter, NCLC & NHLP Comments to the Consumer Financial Protection Bureau Regarding Fees Imposed by Providers of Consumer Financial Products or Services, National Consumer Law Center, April 22, 2022, available at <https://www.nclc.org/resources/nclc-nhlp-comments-to-the-consumer-financial-protection-bureau-regarding-fees-imposed-by-providers-of-consumer-financial-products-or-services/>.

60 Moore, Jack, “Deceptive fee tacked onto your restaurant bill? DC attorney general issues consumer alert,” WTOP News, March 8, 2023, available at <https://wtop.com/dc/2023/03/deceptive-fee-tacked-onto-your-restaurant-bill-dc-attorney-general-issues-consumer-alert/>.

61 “Incarcerated people and their families are really the only ones in America who pay to send and receive email. An email “stamp” costs around 50 cents per message... with some as high as \$1.25.” in an excellent overview of junk fees across all markets. See Dayen, David, “The Junk Fees Biden Hasn’t Talked About: Hidden and deceptive fees are seen across consumer transactions, from rental housing to prisons,” The American Prospect, February 27, 2023, available at <https://prospect.org/power/2023-02-27-biden-junk-fees/>.

62 Mierzwinski, Ed, Statement, “New CFPB report raises concerns about banking cards on U.S. campuses,” PIRG, October 13, 2022, available at <https://pirg.org/media-center/statement-new-cfpb-report-raises-concerns-about-banking-cards-on-u-s-campuses/>.

63 Tax preparers had a good deal going for many years; they convinced the IRS to let them run a “Free File” program for lower-income taxpayers, advertised it on the IRS’s own website, convinced Congress not to let other taxpayers file online directly, and used the relationship to sell ancillary products to the “free” filers. The programs were largely funded from the taxpayers’ Earned Income Tax Credits (EITC). The non-profit investigative website ProPublica has looked into the Free File program and several tax preparers. See Elliott Justin, Release, “The FTC Is Investigating Intuit Over TurboTax Practices: The probe, spurred by ProPublica reporting, centers on whether Intuit tricked customers into paying for tax filing when they should have been able to file for free,” ProPublica, September 8, 2020, available at <https://www.propublica.org/article/the-ftp-is-investigating-intuit-over-turbotax-practices>.

64 Fact sheet, “Consumer Deception and Fraud,” Federal Communications Commission, December 7, 2015, available at <https://www.fcc.gov/general/consumer-deception-and-fraud-0>.

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