

# THE WAR ON SO-CALLED “JUNK FEES”: WHO’S FIGHTING AND WHAT’S AT STAKE?



**BY DONNELLY MCDOWELL & ANDREW STIVERS<sup>1</sup>**



<sup>1</sup> Donnelly McDowell is a Partner in the Washington, D.C. office of Kelley Drye & Warren LLP where he focuses on advertising and consumer protection matters, including representing clients before the Federal Trade Commission, Consumer Financial Protection Bureau, and state attorneys general. Dr. Andrew Stivers is Associate Director in the Washington, D.C. office of NERA Consulting. Prior to joining NERA, Dr. Stivers was a senior official in the U.S. Federal Trade Commission's Bureau of Economics, where he oversaw economic analysis of all consumer protection and privacy matters.

# CPI ANTITRUST CHRONICLE

## APRIL 2023

### JUNKYARD DOGS: THE LAW AND ECONOMICS OF “JUNK” FEES

By Howard Beales & Todd Zywicki



### THE WAR ON SO-CALLED “JUNK FEES”: WHO’S FIGHTING AND WHAT’S AT STAKE?

By Donnelly McDowell & Andrew Stivers



### JUNK FEES AND CABLE TV: LESSONS FROM THE TELEVISION VIEWER PROTECTION ACT

By Harold Feld



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

By Ed Mierzwinski



### THE COST OF PRICE REGULATION

By Sean Heather & Curtis Dubay



## THE WAR ON SO-CALLED “JUNK FEES”: WHO’S FIGHTING AND WHAT’S AT STAKE?

By Donnelly McDowell & Andrew Stivers

It’s easy to decry “junk fees,” and both the Federal Trade Commission (“FTC”) and the Consumer Financial Protection Bureau (“CFPB”) have done just that by launching multi-faceted regulatory initiatives to prohibit or regulate the use of such fees. President Biden himself has spoken multiple times about the need to regulate fees and proposed the Junk Fee Prevention Act to regulate fees in certain contexts. But what do regulators really mean when they refer to “junk fees” and are they as bad as they sound? This article provides an overview of the FTC’s and CFPB’s efforts to regulate junk fees and the substantive and procedural requirements that they need to meet to do so under their respective statutory authorities. We also consider the potential economic consequences of a far-reaching regulation that would significantly curtail the use of fees. While prohibiting fees altogether may seem popular in the abstract, the real-life consequences of doing so may be less beneficial for the typical consumer, particularly when the fee is conditioned on some consumer activity that is avoidable.

Visit [www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com) for access to these articles and more!

CPI Antitrust Chronicle April 2023

[www.competitionpolicyinternational.com](http://www.competitionpolicyinternational.com)

### Scan to Stay Connected!

Scan or click here to sign up for CPI's FREE daily newsletter.



As a consumer, it's easy – and rational – to complain about “junk fees.” The name itself presupposes that the fee does not serve a legitimate purpose and operates only to increase costs to consumers without any benefit.

Of course, defining what constitutes a “junk fee” and why they are problematic from a legal or economics standpoint is far more complicated. Even the most aggressive regulator would agree that some fees are legitimate and consistent with the law and consumer expectations. As such, the war against so-called junk fees, which is being waged by the Consumer Financial Protection Bureau (“CFPB”), the Federal Trade Commission (“FTC”), and President Biden himself,<sup>2</sup> is as much about the meaning of the term as it is about any specific law or policy.

In this article, we discuss current proposals under consideration by the CFPB, FTC, and Congress – and the potential legal effects and limitations of those initiatives. We then consider the economics behind fees and analyze the potential unintended consequences of far-reaching bans and other prescriptive regulations.

## I. THE CFPB LEADS THE WAY

While the term “junk fees” has been used in certain contexts for years, the current initiative began in earnest in January 2022 when the CFPB issued a Request for Information (“RFI”) regarding fees imposed by providers of consumer financial products or services.<sup>3</sup> The RFI characterized the initiative as an effort to reduce “exploitative junk fees charged by banks and financial companies” and requested information related to “excessive and exploitive fees, whether predictable and transparent to the customer or not” associated with consumers’ bank, credit union, prepaid or credit card account, mortgage, loan, or payment transfers, including:

- Fees for things people believed were covered by the baseline price of a product or service;
- Unexpected fees for a product or service;
- Fees that seemed too high for the purported service; and
- Fees where it was unclear why they were charged.

The RFI did not purport to define or contextualize how a fee would be determined to be “excessive” or “too high for the purported service.” The Bureau received over 50,000 comments on the RFI, including comments from members of Congress, industry groups such as the Chamber of Commerce and the Online Lenders Alliance, state attorneys general, and consumer groups such as Consumer Reports. Many comments pointed to the substantive limitations of the Bureau’s authority to regulate fees. For example, while the Truth in Lending Act (“TILA”) and Consumer Financial Protection Act of 2010 (“CFPA”) confer the Bureau with authority to prescribe certain disclosures and promulgate rules that prohibit unfair, deceptive, and abusive acts and practices (“UDAAP authority”) in connection with consumer financial products and services, they do not generally confer authority for the Bureau to set maximum rates and fees, nor do they authorize the Bureau to determine when fees are “excessive.” To that effect, comments submitted on behalf of a group of seventeen attorneys general asserted that the RFI “fails to acknowledge that in many cases, state law appropriately regulates fees and expenses in consumer financial products or services, potentially rendering additional federal oversight duplicative.”<sup>4</sup>

The CFPB, however, remains undeterred – taking two significant regulatory actions to limit fees since the RFI.<sup>5</sup> First, in June 2022, the Bureau issued an advisory opinion stating its position that Section 808 of the Fair Debt Collection Practices Act (“FDCPA”) prohibits debt collectors from imposing payment fees, such as convenience processing fees to make a payment online or over the phone, unless the fee is explicitly authorized by the agreement creating the debt or expressly “permitted by law.”<sup>6</sup> The opinion notably conflicts with certain court precedent finding

---

2 In his State of the Union address on February 7, 2023, President Biden vowed to “tak[e] on ‘junk’ fees, those hidden surcharges too many businesses use to make you pay more.” President Biden specifically cited a number of perceived problematic fees, including airline fees, overdraft fees, credit card late fees, resort fees, early termination fees, and ticket fees.

3 Notice and Request for Comment Regarding Fees Imposed by Providers of Consumer Financial Products or Services, 87 Fed. Reg. 5801 (Feb. 2, 2022).

4 Comment from Attorneys General from Utah, Texas, Alabama, Arizona, Arkansas, Idaho, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, South Dakota, and West Virginia (April 11, 2022), available at: <https://www.regulations.gov/comment/CFPB-2022-0003-2543>.

5 In addition to these regulatory initiatives, the Bureau also brought an enforcement action against Regions Bank for allegedly charging consumers for surprise “authorized-positional overdraft fees” based on transaction posting order. The settlement requires the bank to pay a civil penalty of \$50 million and to refund consumers at least \$141 million based on alleged harm. In re Regions Bank, No. 2022-CFPB-0009 (Sept. 28, 2022).

6 CFPB Moves to Reduce Junk Fees Charged by Debt Collectors, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-moves-to-reduce-junk-fees-charged-by-debt-collectors/> (hereafter “CFPB RFI”).

that debt collectors can permissibly enter into a separate contract with consumers to authorize convenience processing fees.<sup>7</sup> Moreover, while the opinion itself is limited to debt collectors subject to the FDCPA, the rationale used in the opinion could be used to justify CFPB enforcement under its UDAP authority where convenience processing fees are not expressly contemplated under the initial debt.

Second, in February 2023, the Bureau issued a far-reaching proposed rule to amend Regulation Z, which implements TILA, to significantly limit the amount of late fees that could be charged in connection with credit accounts, including by: (1) presumptively capping late fees at \$8, rather than the current \$41 limit, unless a company can establish that a higher late fee is necessary to cover incurred costs; (2) eliminating automatic annual inflation adjustments to the presumptive late fee amount; and (3) capping late fees at 25 percent of the required minimum payment for the account.<sup>8</sup> Comments are currently due on the proposed rule by May 3, 2023.

Notably, neither of the CFPB's two recent efforts to regulate fee practices address mandatory fees that are assessed unwittingly on consumers without choice. Consumers may affirmatively elect to pay convenience processing fees to pay off a debt. And late fees are already required to be disclosed under TILA and Regulation Z along with information on how consumers can avoid incurring such fees.<sup>9</sup> In other words, the Bureau's recent efforts mark a clear policy shift to go beyond requiring companies to clearly and conspicuously disclose fees and obtain consent to such fees, and instead regulate the existence and extent of fees in the first place.

## II. THE FTC'S PATHWAY TO A MORE FAR-REACHING FEES RULE

While the CFPB's authority is limited to consumer financial products and services, the FTC is empowered more broadly to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices" ("UDAP authority")<sup>10</sup> and to "include requirements prescribed for the purpose of preventing such acts or practices."<sup>11</sup> As such, it is the FTC – and not the CFPB – that could potentially promulgate a more far-reaching rule that would address many of the fees cited by the Biden administration and consumer groups as predatory and deceptive or unfair, including ticket surcharges, hotel or resort fees, and early termination fees for non-financial products and services.

The FTC seemingly took the first step in doing just that in issuing an Advance Notice of Proposed Rulemaking ("ANPR") on October 20, 2022 "exploring a rule to crack down on junk fees proliferating throughout the economy."<sup>12</sup> The ANPR seeks comments on a host of issues related to the prevalence and justification for certain fee and disclosure practices, including:

- The prevalence of failing to disclose in advertisements or at the initial stages of the customer experience the total cost for a good or service;
- The prevalence of failing to disclose whether certain fees, interest, charges, or costs are reasonably avoidable and/or mandatory to the consumer;
- The capacity to require "all-in-pricing" in advertisements and at every stage of the customer experience, and whether such "all-in-pricing" should include taxes in addition to fees; and
- The need for a new rule addressing fees and disclosure practices and whether a one-size fits all approach works across industries.<sup>13</sup>

As an Advance Notice of Proposed Rulemaking, the ANPR is the first in a series of steps required to promulgate a rule under the FTC's Magnuson-Moss rulemaking authority and does not propose specific requirements or restrictions. At the same time, the rationale underlying the questions and issues presented in the ANPR underscores that the FTC is considering both prohibiting certain fees altogether and/or prescribing detailed disclosure requirements.

<sup>7</sup> See e.g. *Turner v. PHH Mortg. Corp.*, No. 8:20-CV-137-T-30SPF, 2020 WL 1517927 (M.D. Fla. Feb. 24, 2020).

<sup>8</sup> Proposed Rule, Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. 18,906 (Mar. 29, 2023).

<sup>9</sup> 12 C.F.R. § 1026.6(b)(2)(viii).

<sup>10</sup> Unlike the CFPB, the FTC does not also have authority to regulate and bring enforcement against "abusive" acts and practices

<sup>11</sup> 15 U.S.C. § 57a(1)(B).

<sup>12</sup> Federal Trade Commission Explores Rule Cracking Down on Junk Fees, <https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-explores-rule-cracking-down-junk-fees> (Oct. 20, 2022) (hereafter, "Junk Fee ANPR").

<sup>13</sup> Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011, 87 Fed. Reg. 67,413, 67,420-21 (Nov. 8, 2022).

Comments closed on the ANPR on February 8, 2023 – with over 12,000 comments submitted. While the FTC certainly seems committed to moving forward expeditiously, there are significant procedural and substantive hurdles in its way. The FTC can only proceed to the next step, a proposed rule, if “it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are *prevalent*.”<sup>14</sup> The term “prevalent” is not defined by law and has not been tested in court, but clearly evidences congressional intent that the FTC’s rulemaking authority be circumscribed to avoid imposing undue burden on industries not engaging in widespread unfair or deceptive acts or practices. In support of the FTC’s initial suggestion of prevalence, the ANPR cites certain categories of cases including mobile cramming cases against mobile carriers involving unauthorized charges, connection and maintenance fees on prepaid phone cards, account maintenance and inactivity fees, hotel “resort” fees, “hidden” fees for academic publishing, and membership programs.<sup>15</sup> Of course, the existence of a fee does not mean that the fee is illegal under the FTC Act and the cases relied upon by the FTC in the ANPR generally involve allegations that a company failed to clearly and conspicuously disclose a fee.

In order to justify a finding of prevalence, the Commission would need to extrapolate from these cases or other evidence to define “with specificity” the prohibited unfair or deceptive act or practice. Given the number of substantive and procedural hurdles, Magnuson-Moss rulemaking usually takes years – with the last four rules taking between five to nine years. There is also the very real possibility that any rule would be challenged in court, including but not limited to in connection with the Major Questions Doctrine discussed in the Supreme Court’s recent decision in *West Virginia v. EPA*.<sup>16</sup>

### III. CONGRESS AS THE END GAME?

Of course, Congress could obviate the regulatory hurdles facing the CFPB and the FTC by passing legislation in its own right to address any or all of these practices. To that end, the Junk Fee Prevention Act (“the Act”) introduced in both the Senate and House would both directly substantively regulate how certain fees are charged and empower the FTC and the Federal Communications Commission (“FCC”) to take further action.<sup>17</sup> Specifically, the Act would require companies to clearly and conspicuously disclose the total price of a good or service, including any mandatory fees a consumer would incur during the transaction, when a price is first shown to consumers.

The Act would also prohibit companies from imposing “excessive” mandatory fees and empower the FTC to promulgate rules regarding the disclosure and imposition of excessive and hidden fees. The legislation directs the FTC to consider the following factors in determining whether a fee is excessive: (1) whether the fee is reasonable and proportional to the cost of the good or service provided; (2) the reason for which the covered entity charges the fee; and (3) any other factors determined appropriate by the FTC or a court.

The Act would also prohibit companies from imposing excessive or unreasonable early termination fees and require the FCC to commence a rulemaking procedure related to the disclosure of fees for covered communications services. As with the FTC and CFPB proposals under consideration, the Act would take a multi-faceted approach to regulating fees – both in requiring certain disclosures and prohibiting fees determined to be “excessive or unreasonable” altogether.

### IV. HOW AND WHEN DO FEES HARM CONSUMERS, AND ARE CURRENT EFFORTS TARGETING THE RIGHT PROBLEMS?

As with any regulatory activity, effective policymaking requires clearly articulating the goal of regulation, and the mechanism for harm that is being addressed. For the purposes of the proposals under consideration by the CFPB, FTC, and Congress, the threshold question must of course be what are “junk fees”? As noted above, junk fees seem to be most easily defined as the fees that consumers complain most about. Nobody likes to pay more without a clear benefit from doing so, and often an additional fee, on top of a base price they have already paid, seems at best, in the words of the FTC, “unnecessary.”<sup>18</sup> This is especially true if consumers view them to be “unexpected” or “too high.”<sup>19</sup>

---

14 15 U.S.C. § 57a(b)(3).

15 87 Fed. Reg. at 67,415.

16 142 S. Ct. 2587 (June 20, 2022).

17 H.R.2463 - Junk Fee Prevention Act, 118th Congress; S.916 - 118th Congress (2023-2024): Junk Fee Prevention Act.

18 See Junk Fee ANPR.

19 See CFPB RFI.

But at least some of the fees cited by President Biden in his State of the Union address serve real purposes, whether or not they are considered unexpected or too high from a subjective consumer expectation standpoint. Overdraft fees and late fees deter consumers from shorting a creditor or bank, or simply using those services in ways that would make them unprofitable to the firms providing them. Early termination fees make it possible to provide better long-term, or introductory pricing, because a high enough termination fee could block some customers from both taking the better deal and not sticking around long enough for the firm to make the lower pricing profitable. On the other hand, resort fees or ticket fees are often just part of the total price that all consumers pay, and may be separated out from an initial base price as a way to soften price competition and/or induce greater overall payment from consumers. These uniformly applied fees may be harder to justify from an economics standpoint – as well as from a legal standpoint if they are not clearly and conspicuously disclosed to consumers upfront.

Airline fees may have more nuance. Flat airport fees may be charged to all customers, regardless of how they choose to fly, similar to resort fees. However, if those fees are imposed by and due to a third party – the airport – the airline may benefit from separating them out to deflect or call out blame for the additional cost. This is analogous to how most retail businesses present sales tax as a separate “fee” to the posted price. Baggage fees may encourage some flyers to pack more lightly, which could affect fuel costs, or simply allow the airline to more profitably serve both value and convenience fliers by charging them different total prices.

The CFPB’s two policy initiatives described above help illustrate two different kinds of fees, both of which go beyond well-understood deceptive and unfair authorities, but one that at least arguably has a hook to traditional UDAP authorities. Similarly, the FTC relies primarily on cases alleging a failure to adequately disclose fees in its ANPR, but suggests that it is considering remedies both related to disclosure (e.g. all-in-one pricing) and more subjective determinations of fees that are “unnecessary,” or that have “little to no added value.”<sup>20</sup>

### ***A. The Easier Case: Fixed, Mandatory, and Hidden Fees***

Fees that are fixed and mandatory for all purchasers are relatively straightforward cases of what economists would call “drip” or “partitioned” pricing, where the total price paid by consumers is presented as a base price plus some fee or fees that are presented separately, often later in the purchase process than the base price such that they can reasonably be characterized as “hidden.”

FTC economist Mary Sullivan has analyzed the practice by some hotels of advertising a flat room rate upfront but then later adding a mandatory “resort fee” that results in a significantly higher total price.<sup>21</sup> This practice has also been prevalent in other short term rental markets that primarily advertise on online search platforms, often in the form of unavoidable service and/or cleaning fees.<sup>22</sup> In both cases, the primary motivation appears to stem from the competition induced when search platforms rank listing by room price. As in the classic prisoners’ dilemma game, while all parties might better off advertising a total price, any individual seller may benefit by separating its price into a lower advertised base that moves it up the ranking, and then imposing a separate fee on all customers who click through that listing and make the purchase. Once one seller does so, all other sellers have strong incentives to follow. Competition through price-ranked search can incentivize this kind of partitioned pricing across a wide-range of products, including retail banking products and credit cards.

This kind of fee structure, which may serve only to impose costs on customers through additional effort and time to find and compare total price, is generally harmful to the extent that firms are separating out and *hiding* material information – such as total price – from consumers. From the growing body of economic literature on drip-pricing and partitioned-pricing, we know that dividing total price into base-plus-fee can have significant effects on consumer behavior. For example, in a study of the effect of sales tax on consumer purchasing behavior in a grocery store, the authors found that including sales tax in the shelf price of goods reduced demand by eight percent.<sup>23</sup> A similar effect is likely to hold for the examples of mandatory, fixed fees cited by President Biden and the enforcement agencies, like “resort fees” or “service fees” that all customers pay for a particular product or service. And both the CFPB and the FTC have well-established tools for analyzing and pursuing cases where material information – in this case the total price – is obscured or omitted in a manner that results in reasonable consumers likely to be misled.

In the case of the FTC’s ANPR, the Commission highlights that separating out total price into pieces may result in parts of that price that are more salient to consumers than others. Practices that cause consumers to overlook part of that price when they make their market choices

---

20 87 Fed. Reg. at 67,413.

21 See Mary W. Sullivan, “Economic Analysis of Hotel Resort Fees” FTC Economic Issue Paper. January 2017. <https://www.ftc.gov/reports/economic-analysis-hotel-resort-fees> (hereafter “Sullivan”).

22 See Sally French, “Airbnb Has a Plan to Fix Cleaning Fees” Jan 30, 2023 <https://www.nerdwallet.com/article/travel/airbnb-has-a-plan-to-fix-cleaning-fees>.

23 Chetty, Raj, Adam Looney & Kory Kroft. “Salience and taxation: Theory and evidence.” *American economic review* 99, no. 4 (2009): 1145-1177. See Sullivan for a thorough review of the literature.



could raise traditional UDAP issues. While more complicated, in part because of the avoidability issue discussed above, the CFPB's advisory on "convenience fees" could also arguably be linked to an initial "failure to disclose" the possibility that such fees might be assessed.

### ***B. The Harder Case: "Unnecessary" or "Too High" Fees***

By contrast, the CFPB's proposal to cap late fees is not based on fees being mandatory, unexpected, or separated from a base price. The Regulation Z rulemaking in particular appears to require both a determination that fees are inappropriately high unless tied specifically to the costs of administering the late fee and a presumption that such costs are not outweighed by the positive economic deterrent effect on consumers.

As such, regulators' rationale to restrict or prohibit altogether these fees is necessarily different from the rationale for regulating fixed, mandatory fees discussed above. Rather than a traditional case where information – in this case total price – may be actively hidden from consumers in a way that may meet the longstanding definition of "deception" or "unfairness," these cases may be relying on behavioral biases where consumers discount the cost of future, uncertain costs like overdraft or late fees when entering into a contract.<sup>24</sup> That is, consumer behavior bias, or simply limited attention, means that consumers may effectively hide those costs from themselves. Enforcement agencies may argue that even if fees are disclosed at the time of purchase, consumers do not fully account for the cost of such fees when choosing to use a particular banking or credit service, allowing firms both to accurately disclose fees upfront and charge fees that are deemed by consumers to be "too high" once consumers are already committed to a particular service.<sup>25</sup>

The FTC is also hinting that it may take a more proscriptive approach when it believes that consumers cannot fully account for separate fees with requirements for all-in-one pricing. In addition to its ANPR on junk fees, the FTC issued an ANPR separately to require such pricing in auto sales in June of 2022. The FTC explained in its press release that "the proposal would require dealers to make key disclosures to consumers, including providing a true 'offering price' for a vehicle that would be full price a consumer would pay, excluding only taxes and government fees."<sup>26</sup>

## **V. CONCLUSION**

In sum, pricing with separate fees can be harmful to consumers and competition, particularly where those fees are not adequately disclosed to consumers upfront. On the other hand, such fees can also serve legitimate purposes in incentivizing or deterring costly consumer behavior. When such fees are adequately disclosed, a blanket prohibition could detrimentally impact consumers and the marketplace by raising prices for all irrespective of how a consumer uses a product or service.

Similarly, imposing blanket prohibitions on "excessive" or "too high" fees may require subjective determinations that do not fit neatly within either the FTC's or the CFPB's existing authority, and could have unintended consequences for the broader market. Absent unexpected action by Congress given the divided chambers, the CFPB and FTC will continue to take the lead in the war on "junk fees," but will need to use their existing weapons and statutory authority to justify their proposals.

---

24 See, for example, Mullainathan, S. & Thaler, R.H., 2000. Behavioral economics. NBER Working Paper 7948 [https://www.nber.org/system/files/working\\_papers/w7948/w7948.pdf](https://www.nber.org/system/files/working_papers/w7948/w7948.pdf) or, Grubb, Michael D. "Failing to choose the best price: Theory, evidence, and policy." *Review of Industrial Organization* 47 (2015): 303-340.

25 Grubb, Michael D. "Selling to overconfident consumers." *American Economic Review* 99.5 (2009): 1770-1807 (showing that that overconfidence among cell phone users resulted in low upfront charges and relatively high marginal charges for additional use, and suggested that such incentives may also apply to fee structures in rental markets and loans).

26 Federal Trade Commission "FTC Proposes Rule to Ban Junk Fees, Bait-and-Switch Tactics Plaguing Car Buyers" June 23, 2022. <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-proposes-rule-ban-junk-fees-bait-switch-tactics-plaguing-car-buyers>.

## CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit [competitionpolicyinternational.com](http://competitionpolicyinternational.com) today to see our available plans and join CPI's global community of antitrust experts.

