Antitrust® Chronicle

APRIL · SPRING 2023 · VOLUME 1(2)

Junk Fees

CPI COMPETITION POLICY® INTERNATIONAL

TABLE OF CONTENTS

04 **Letter from the Editor**

06 **Summaries**

07 **What's Next?**
Announcements

08 **JUNKYARD DOGS: THE LAW AND ECONOMICS OF "JUNK" FEES**
By Howard Beales & Todd Zywicki

17 **THE WAR ON SO-CALLED "JUNK FEES": WHO'S FIGHTING AND WHAT'S AT STAKE?**
By Donnelly McDowell & Andrew Stivers

23 **JUNK FEES AND CABLE TV: LESSONS FROM THE TELEVISION VIEWER PROTECTION ACT**
By Harold Feld

29 **PRESIDENT BIDEN JOINS FEDERAL AGENCIES FIGHTING AGAINST SURPRISE FEES HARMING AMERICAN CONSUMERS**
By Ed Mierzwinski

38 **THE COST OF PRICE REGULATION**
By Sean Heather & Curtis Dubay

Editorial Team

Chairman & Founder
David S. Evans

Senior Managing Director
Elisa Ramundo

Editor in Chief
Samuel Sadden

Senior Editor
Nancy Hoch

Latin America Editor
Jan Roth

Associate Editor
Andrew Leyden

Junior Editor
Jeff Boyd

Editorial Advisory Board

Editorial Board Chairman
Richard Schmalensee - *MIT Sloan School of Management*

Joaquín Almunia - *Sciences Po Paris*

Kent Bernard - *Fordham School of Law*

Rachel Brandenburger - *Oxford University*

Dennis W. Carlton - *Booth School of Business*

Susan Creighton - *Wilson Sonsini*

Adrian Emch - *Hogan Lovells*

Allan Fels AO - *University of Melbourne*

Kyriakos Fountoukakos - *Herbert Smith*

Jay Himes - *Labaton Sucharow*

James Killick - *White & Case*

Stephen Kinsella - *Flint Global*

Ioannis Lianos - *University College London*

Diana Moss - *American Antitrust Institute*

Robert O'Donoghue - *Brick Court Chambers*

Maureen Ohlhausen - *Baker Botts*

Aaron Panner - *Kellogg, Hansen, Todd, Figel & Frederick*

Scan to Stay Connected!
Scan or click here to sign up for CPI's **FREE** daily newsletter.

LETTER FROM THE EDITOR

Dear Readers,

It is conventional wisdom that economies worldwide have become overrun with so-called "junk fees." This term classically refers to unexpected charges (often hidden in the fine print) that a lender imposes at the closing of a mortgage. Increasingly, however, it has come to refer to fees in various other products and services, including credit card late fees, bank overdraft fees, excessive event fees, airline family ticketing fees, early termination fees for telecom or TV services, hidden hotel booking fees, and surprise resort fees, to name but a few.

The issue has entered the limelight again of late, due in large part to U.S. President Biden's recent initiative to eliminate them for consumers, as again highlighted in his latest State of the Union address. The articles in this Chronicle address some of the antitrust (and other policy) implications of the war against junk fees as it plays out in the U.S. and worldwide. Nobody believes that junk fees can be eliminated forever, but lessons can be learned from past and ongoing initiatives by both consumer groups and policymakers to at least mitigate their impact and reduce the possibility (and incentives) for service providers to attempt to impose them. On the other hand, dissenting voices note that some fees commonly categorized as "junk" reflect legitimate forms of pricing that allow for greater consumer choice by enabling them to opt in or out of certain aspects of products or services that they may not wish to purchase.

Employing the colorful metaphor of "Junkyard Dogs," **Howard Beales & Todd Zywicki** open this Chronicle by highlighting recent efforts by the U.S. Consumer Financial Protection Bureau ("CFPB"), the Federal Trade Commission ("FTC"), the Department of Transportation ("DoT"), and the Federal Communications Commission ("FCC"), the latter of which notably has proposed "broadband nutrition label" requiring various disclosures about broadband pricing. So, which fees are in fact "junk?" The current definition focuses on the "purpose" of the fee, defining as "junk" fees those that are "designed to either confuse or deceive consumers or to take advantage of lock-in or other forms of situational market power." The question is where to draw the line between legitimate charges for extra services and those that simply take advantage of a consumer's naïveté. This and other questions will be key in the debates to come.

Appropriately enough, **Donnelly McDowell & Andrew Stivers** ask the foundational question of what regulators really mean when they refer to "junk fees" and whether they as bad as they sound? Their 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. It also considers the potential economic consequences of a far-reaching regulation that would significantly curtail the use of fees. The authors argue that 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.

Taking a similarly contemporary perspective, **Harold Feld** picks up on the Biden Administration's efforts, in both an Executive Order and the State of the Union address, to eliminate junk fees. The Biden Administration has singled out cable and internet services as an industry that uses junk fees and has called on both Congress and the FCC to act. Even prior to this, Congress attempted to address the cable and broadband industry through the Television Viewer Protection Act of 2019 ("TVPA"). This legislation requires providers to give consumers the total price, inclusive of all fees, for a subscription to cable and/or broadband services at the point of sale and prohibits charging equipment fees for internet service where the customer provides their own. However, the author argues that experience shows that neither the TVPA nor competition from streaming services has reduced the use of junk fees by cable providers.

Taking a satellite view, **Ed Mierzwinski** places the issue in a broader context, noting how 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 both the oldest consumer agencies – the FTC – and the newest – the CFPB, which was established in 2010 following the 2008 economic crisis. The author provides a review of junk fee flashpoints from a consumer advocacy perspective, with an emphasis on the agencies' legal defenses against them. As the author notes, laws and rules often grow out of patterns and practices of earlier unfair or deceptive actions.

By contrast, **Sean Heather & Curtis Dubay** underline that decades of economic study and experience confirm that market pricing is a pillar of a functioning free market. In their view, the Federal Trade Commission's "Trade Regulation Rule on Unfair or Deceptive Fees" would risk imposing an economy-wide rule that would unduly burden business, confuse consumers, reduce product offerings, and ultimately raise prices for many consumers by forcing them to pay for services that they neither want nor need.

However current trends culminate, it is clear that the debate will be fascinating. In a sense, this is a game of three-dimensional chess, involving shifts in corporate, consumer, and regulatory approaches. How the game will evolve is anyone's guess, but it is clear that more eyes than ever are observing it keenly.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

08

JUNKYARD DOGS: THE LAW AND ECONOMICS OF "JUNK" FEES

By Howard Beales & Todd Zywicki

The notion of "junk" fees is a fine piece of rhetoric, but useless as an analytical tool. Many fees identified as junk impose costs on consumers who generate those costs – rather than forcing others to subsidize their behavior. For example, credit card late fees deter late payments and their associated costs while only world travelers pay foreign currency transaction fees. There is no reason for ordinary consumers to subsidize either group. Because information is costly, consumers rationally focus on the elements of price that are most important in their own circumstances. Requirements to disclose everything everywhere will only interfere with this process. Both the structure of pricing, and the level of prices, should be determined by competition in the marketplace. As we observe, the result is detailed fee structures for some products and services, and bundled pricing for others. Attempts to regulate pricing structures by requiring itemized prices increased the costs of real estate settlements. Regulating components of credit card pricing structures led to increases in other fees and reductions in credit availability. Competition over pricing structures is far more likely to satisfy consumer preferences than an inevitably overbroad set of regulatory requirements.

17

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.

23

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

By Harold Feld

In both an Executive Order and the State of the Union, the Biden Administration has announced a campaign to eliminate "junk fees." The Biden Administration has singled out cable and internet services as an industry that uses junk fees and has called on Congress and the FCC to take action against these fees. Prior to the Biden Administration, Congress attempted to address the specific problem of junk fees in the cable and broadband industry through the Television Viewer Protection Act of 2019. The TVPA requires providers to give consumers the total price, inclusive of all fees, for a subscription to cable and/or broadband service at the point of sale and prohibits charging an equipment fee for internet service where the customer provides their own equipment. Analysis shows neither the TVPA or competition from streaming services has reduced the use of junk fees by cable providers. To the contrary, competition from streaming services may actually increase the incentive to use junk fees. The problem is made more complicated by the offering of bundled services, further obscuring the true price of service. This limited natural experiment suggests that eliminating junk fees will require direct regulation and not merely disclosure obligations.

29

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

By Ed Mierzwinski

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.

SUMMARIES

THE COST OF PRICE REGULATION

By Sean Heather & Curtis Dubay

The Biden Administration is using recent inflationary pressure as an excuse to push a progressive price regulation agenda that would harm consumers, businesses, and ultimately the U.S. economy. Although decades of economic study and experience confirms that market pricing is a pillar of a functioning free market, the Federal Trade Commission is proposing a "Trade Regulation Rule on Unfair or Deceptive Fees" that would impose an economy-wide rule to regulate and prohibit so-called "junk fees." If adopted, this rule would unduly burden business, confuse consumers, reduce product offerings, and, worst of all, raise prices for many consumers by forcing them to pay for services that they neither want nor need.

WHAT'S NEXT?

For May 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **Healthcare**; and (2) **Foreign Subsidies**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2023, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES June 2023

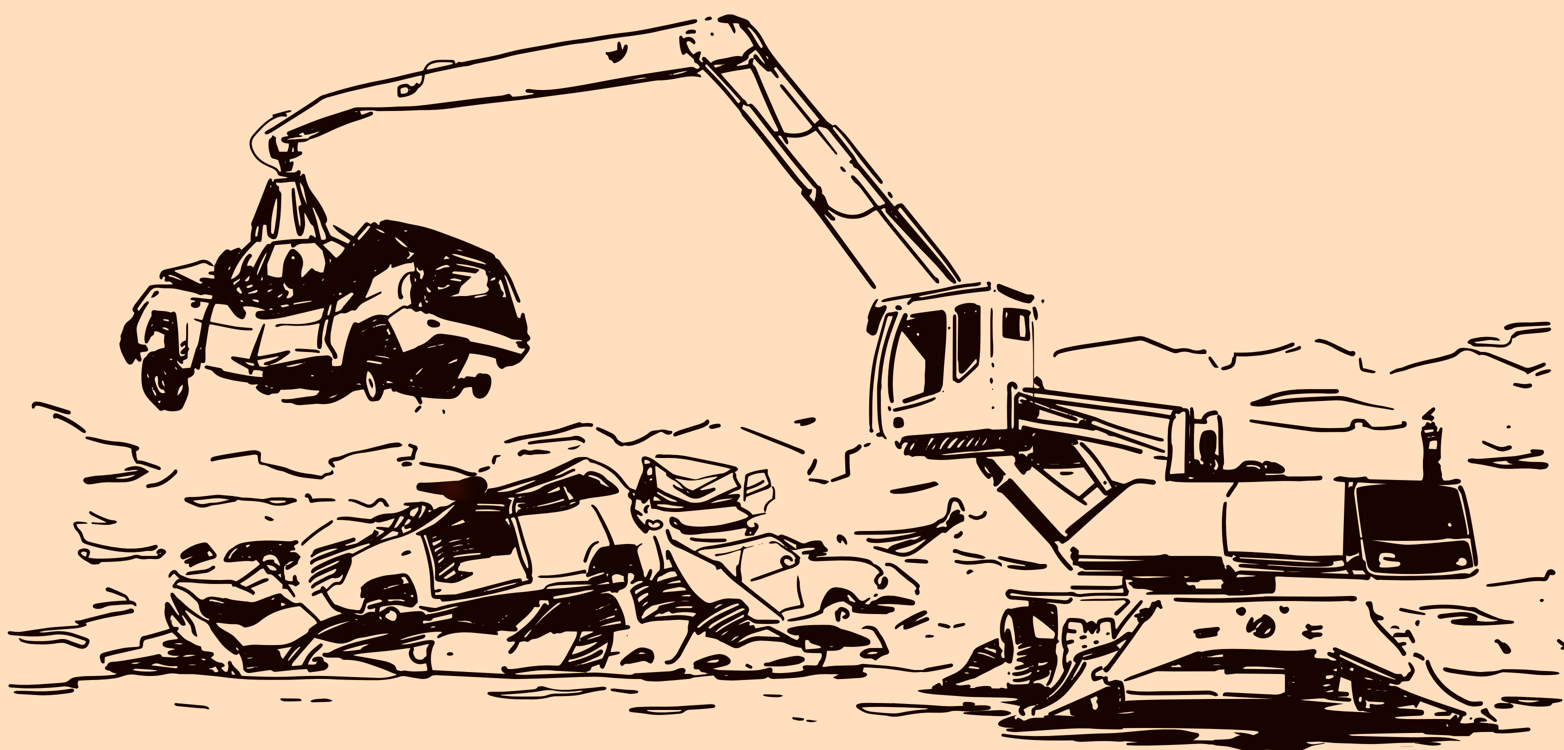
For June 2023, we will feature an Antitrust Chronicle focused on issues related to (1) **Online Advertising**; and (2) **Algorithmic Bias**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

JUNKYARD DOGS: THE LAW AND ECONOMICS OF "JUNK" FEES



BY HOWARD BEALES & TODD ZYWICKI[1]

1 Howard Beales is Emeritus Professor of Strategic Management and Public Policy, George Washington School of Business and was a member of the Taskforce on Federal Consumer Financial Law. Todd Zywicki is George Mason University Foundation Professor of Law, Antonin Scalia School of Law, and was chairman of the Taskforce on Federal Consumer Financial Law.

As part of its agenda of advancing "competition," the Biden Administration has launched a regulatory assault on "junk" fees. Last January, the Consumer Financial Protection Bureau ("CFPB") published a request for information regarding fees for financial services.[2] It also issued a circular on unexpected overdraft fees, a compliance bulletin on returned deposit item fees, an advisory opinion on debt collection pay to pay fees, in addition to an enforcement action against Region Bank for "surprise" overdraft fees,[3] and most recently, issued a proposed rule reducing late fees for credit cards.[4] In July, the Federal Trade Commission (FTC) cited "junk" fees as part of the rationale for its proposed Motor Vehicle Dealers Trade Regulation Rule,[5] and in November, it published an Advance Notice of Proposed Rulemaking to address junk fees for all firms subject to its jurisdiction.[6] The Department of Transportation has proposed a rule requiring upfront disclosure of airline fees, including baggage and charges for changing a ticket. And the FCC has proposed a "broadband nutrition label" requiring various disclosures about broadband pricing.[7]

Of course, sellers frequently offer additional goods or services for an additional price. The Administration recognizes that a pizza seller can charge for additional ingredients, and a hotel can charge extra for a room with a better view. So which fees are "junk?" The Administration's definition focuses on the "purpose" of the fee, defining as junk fees that are "designed to either confuse or deceive consumers or to take advantage of lock-in or other forms of situational market power."[8] One could certainly argue, however, that charges for extra pizza ingredients take advantage of "situational market power" – no one is going to shop elsewhere for onions to add to their pizza. Similarly, the hotel fortunate enough to have a view would seem to have "situational market power" – there is no other way to acquire the view. The FTC's definition is similarly vague, identifying as "junk" fees "for goods or services that have little or no added value to the consumer" and fees disclosed at a later stage of the purchasing process "whether or not the fees are described as corresponding to goods or services that have independent value to the consumer."[9] The former would seem to lead to arguments about whether the extra pizza ingredient had "little or no added value," and the later would seem to reach the hotel's offer to upgrade the view at check-in.

The economics literature addresses two different kinds of fees, both of which the Biden Administration seems to regard as junk. Some pricing structures are based on partitioned fees, where an overall price is divided into separate prices for separate components (e.g. a separate price for shipping and handling). Others are based on what is known as "drip" pricing, in which one price is featured initially but costs of other components are revealed later in the buying process (e.g. a rental car base price with charges for optional insurance revealed at the time of the contract). Pricing structures may combine these features, as when shipping and handling charges are only revealed at checkout. However, we are not aware of anyone in the law and economics literature who regards all fees of either type as problematic. Instead, careful analysis recognizes that while certain price structures may pose problems for consumers in some circumstances, both structures are efficient in some cases. Separate prices for additional pizza ingredients is surely an efficient use of partitioned pricing, and separate prices for printers and ink or toner cartridges is likely an efficient use of drip pricing. In other situations, however, disclosing fees only on the back-end of a transaction or unnecessarily unbundling prices into multiple parts might provide no consumer benefit and instead might be designed to confuse consumers into paying a higher price, to raise search costs to finding the best deal, or to extract consumer surplus from consumers who have already made an investment of time or energy into shopping.

Rather than reflecting a *lack* of competition, we argue that observed pricing structures are the *outcome* of competition. Just as we rely on competition to determine the right price for goods and services, we should rely on competition to establish the structure of prices. Absent clear evidence of a market failure, regulatory fiats to change these structures are likely to reduce consumer welfare.

I. PRICING STRATEGIES ARE MARKET DETERMINED

A key choice for any seller concerns its pricing strategy, the subject of numerous courses in marketing and economics. Sellers can choose simple unit pricing, a multi-part tariff, offering different versions at different prices, bundling products in different ways, and a host of variations of each

2 https://www.regulations.gov/document/CFPB-2022-0003-0001.

3 See https://www.consumerfinance.gov/rules-policy/junk-fees/.

4 https://www.consumerfinance.gov/rules-policy/notice-opportunities-comment/credit-card-penalty-fees-regulation-z/.

5 https://www.regulations.gov/document/FTC-2022-0046-0001.

6 https://www.regulations.gov/document/FTC-2022-0069-0001.

7 Brian Deese, Neale Mahoney & Tim Wu, The President's Initiative on Junk Fees and Related Pricing Practices, October 26, 2022, https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/. ("White House Initiative").

8 White House Initiative.

9 FTC ANPRM.

strategy. One factor driving these choices is that different consumers assign different values to the various elements of a product or service. A single price may cost sales to some consumers who attach less value to the product; a more complex pricing structure may enable a firm to sell both to consumers with high and low valuations of the product.

Most relevant to junk fees is that sellers must balance consumers' desire to pick-and-choose what they pay for against the simplicity of an all-inclusive price. "Pick and choose" pricing can result in a bewildering list of seemingly small "ticky-tack" fees. One-size fits-all-pricing requires some consumers to pay for services they don't actually use. And, of course, sellers must recover their costs.

In many industries, pricing is all in – a single upfront price entitles us to the full range of what may be a complicated bundle of services. Typical pricing plans for cable TV, cell phone service, or internet service providers are examples. Consumers choose the package they want up front and pay a price up front.

In other industries, sellers offer an upfront price for the basic service, with a variety of additional, optional fees for other services. Air transportation is one example. We pay one price for a seat on the plane, and additional fees if we want to check baggage or purchase food or beverages. Some markets have a combination of some firms providing all-in and others unbundled pricing, such as the airline industry where many airlines charge fees for flight changes and baggage while Southwest offers free bags and schedule changes all for one price, a phenomenon most likely explained by the differential elasticity of demand of Southwest flyers versus the business flyers who are willing to pay more for more amenities and convenience on other airlines.[10] Similarly, we can purchase an all-in vacation package, or we can choose a separate hotel and build our own package.

Unbundled pricing is particularly attractive when only some consumers choose certain services because unbundling allows those who want additional services to obtain it without shifting the costs to others who do not. The all-in vacation is likely a particularly bad deal for someone who does not drink, because the upfront price must cover the often-significant alcohol consumption of those who do.

Similarly, separate behavior-based fees are often designed to impose costs on consumers who generate them – rather than forcing others to subsidize their behavior. Credit card late fees deter late payments and their associated costs (including the elevated risk of subsequent delinquency and default) while only world travelers pay foreign currency transaction fees. A single upfront price would require the rest of us to subsidize both delinquents and globe trotters, hardly an equitable outcome. Government use of gasoline excise taxes that impose the costs of road maintenance on those who use roads the most is similar, as are user fees for a variety of regulatory "services."

The effects of separate fees on consumer behavior may also reduce the cost on providing a product or service, leading to lower prices for all consumers. Cancellation fees, for example, reduce consumer abuse of cancellation policies, and late checkout fees reduce overstays that can increase costs.[11]

Absent regulatory intervention, different pricing plans are the result of competitive markets. Before airline deregulation, for example, airline prices were all in, including baggage handling, food, and often a first run movie. When competition was finally allowed, current pricing plans developed because they offered benefits, particularly to those who just wanted low-cost transportation without the need to subsidize baggage handling for those who needed it. Competition can also lead to upfront pricing, if that is what consumers prefer. For example, early cell phone pricing schemes were complex, with separate prices for incoming calls, outgoing calls, text messages, and various other features. Competitive pressure to attract consumers who found such plans confusing, along with changes in technology, led to the much simpler pricing plans that prevail today.[12]

The term "junk fees" defies easy definition. But it is imperative to distinguish "junk fees" that are designed to extract rents and consumer surplus from consumers from efficient, behavior-based fees. Welfare-reducing "junk" fees are most likely to emerge only under a relatively narrow set of market conditions — particularly those markets with few repeat customers where consumers are less likely to learn of the hidden fees, where consumers are effectively locked-in and unable to avoid paying the fee when it is imposed, or where such fees may be atypical and thus consumers are not alert to them.

10 See Geoffrey Manne & Todd J. Zywicki, *Uncertainty, Evolution, and Economic Theory*, 10 J. L., Econ. & Pol'y 555 (2014).

11 Ancarani, F., Gerstner, E., Posselt, T., & Radic, D. (2009). Could higher fees lead to lower prices? *Journal of Product & Brand Management, 18*, 297–305. doi:10.1108/10610420910972828.

12 E. Miravete & I. Palacios-Huerta, Consumer Inertia, Choice Dependence, and Learning from Experience in a Repeated Decision Problem, 96 Review of Economics and Statistics 524-537 (2014).

One example is the growing practice of merchants imposing credit card "surcharge" fees on consumer retail transactions.[13] Under this scheme, merchants can post a lower price up-front while a consumer invests time and energy in shopping then can charge a consumer a higher price during the check-out process. At that point a consumer planning to pay by card has the option of abandoning the transaction and starting over at a new merchant or simply paying the higher price.[14] This practice would be expected to be most common in locations such as tourist areas where most consumers are not repeat customer and so are unable to learn until it is too late.

This ability to extract economic wealth from consumers in these situations likely explains merchants' preferences for imposing credit card surcharges rather than offering cash discounts which are mathematically identical in effect, but do not provide these same opportunities for wealth extraction.[15] The key question is whether consumers know about the charge before they have incurred costs assuming that they can use a credit card. Many gas stations, for example, post the cash price and add an additional amount per gallon if the consumer uses a credit card. But consumers know both prices at the time they decide how to pay, and before they have pumped any gas.

Consider, for example, the "resort fee" charged by some hotels, widely alleged to be a pricing technique to raise consumer's search costs and thereby increase the amount the hotel can charge.[16] If that were the case, we might expect that such fees are nearly universal. In fact, however, only 7 percent of U.S. hotels charge resort fees, and they are mostly used by resort hotels in resort markets, such as Orlando or Las Vegas.[17] Booking sites provide lists of both the amount of the fees and the hotels that do not charge them – including many well-known hotel brands.[18] Search costs are only increased if the products offered by competing hotels are all the same, and the whole point of resort fees is that they are not. An experimental study found that consumers in fact pay more attention to attributes that have a separate price than when prices are bundled.[19] A separate price for the amenities arguably makes it easier to consumers to determine whether they are worth the cost. And it surely isn't surprising that amenities are more important for resort properties in resort destinations.

On the other hand, mandatory resort fees could be problematic. They are most prominent in resort areas where consumers are unlikely to be repeat customers. While the room fee is clearly disclosed and assessed at the time of booking, resort fees may not be disclosed until they are assessed at the property, by which time it is too late for the consumer to avoid paying them (especially if the room is prepaid, which is often the case). A separate fee disclosed up front does not have this drawback, even if it is stated separately from the room rate rather than added it.

II. THE COSTS OF INFORMATION

Effective competition, of course, depends on adequate information in the hands of consumers. Information, however, is costly. Consumers must spend time and cognitive effort to determine how the various components of a pricing structure will affect the ultimate cost of the purchase to them. That cost depends not only on the pricing structure, but also on how a particular consumer will use the product. The cost of ink cartridges, for example, is a significant component of the cost of a printer, but the relative importance of ink costs and the initial purchase price depends on how much a consumer is likely to print over the useful life of the printer. Indeed, charging more for ink and less for the printer allows the seller to charge more to the heavy users who print a great deal, while still selling to household users who need a printer but do not use it often. Similarly, the significance of overdraft fees on a deposit account depends on how often the consumer makes purchases exceeding the available funds.

Because information is costly, it will not pay for consumers to acquire full information. Instead, they will acquire more information only until the benefits of additional information just equal the incremental cost. Because usage patterns differ, some consumers will rationally pay more attention to certain components of the price than will others. For the light printer user, the payoff to additional information about the price of ink is less than it is for the heavy user. The consumer who maintains a significant balance or closely monitors the balance is similarly less likely to

13 See Todd J. Zywicki, Geoffrey A. Manne, and Kristian Stout, *Behavioral Economics Goes to Court: The Fundamental Flaws in the Behavioral Law & Economics Arguments Against No-Surcharge Laws*, 82 Missouri L. Rev. 769 (2017).

14 See id.; see also Helene Bourguignon, Renato Gomes, & Jean Tirole, *Card Surcharges and Cash Discounts: Simple Economics and Regulatory Lessons*, 10 Competition Pol'y Int'l 12 (2014).

15 Zywicki, et al., *Behavioral Economics, supra* note.

16 See e.g. Mary Sullivan, Economic Analysis of Hotel Resort Fees, Bureau of Economics, Federal Trade Commission, January 2017.

17 John O'Neill and Donna Quadri-Felitti, "Resort Fees and Service Fees in the U.S. Hotel Industry: Context and Concepts Related to Partitioned Pricing," ICHRIE Research Reports: Vol. 2: Iss. 1, Article 1, 2017. Available at https://via.library.depaul.edu/ichrie_rr/vol2/iss1/1.

18 See e.g. https://www.lasvegasjaunt.com/resort-fees/. Hotels with no fees in January 2023 include several Marriott and Wyndham properties, and hotels generally promoted as "economy" brands such as Embassy Suites or Travelodge.

19 Bertini, M., & Wathieu, L. (2008), Attention arousal through price partitioning. Marketing Science, 27(2), 236–246.

seek out, or pay attention to, information about overdraft fees. Consumers who regularly pay their credit cards in full will seek information about rewards, not finance charges; those who regularly carry a balance will be far more interested in the interest rate.

Markets can achieve competitive outcomes even though some consumers are not informed, because sellers will compete for those who do seek out information. As long as the informed minority is large enough to be worth competing for, the result is the same outcome that would prevail with full information for all consumers.[20]

Disclosure may help to address part of the search problem, but it cannot eliminate the problem of costly information. At best, a disclosure might list the components of the pricing structure, but it cannot identify which component is, or should be, most important to an individual consumer. Consumers must still choose which components of the price are most significant to them. A disclosure giving equal emphasis (e.g. the same size font) to each component of price may make things worse, if it falsely suggests that all components are equally significant. In any event, particularly in the internet era information is readily available. The harder question for consumers is which information they should pay attention to, a task that disclosures are ill-suited to address. Opening a new deposit account requires a stack of paperwork, often topped with a voluntary summary disclosure that does not itself comply with the regulatory requirements.[21] No wonder many consumers may miss important terms such as fees for overdrafts or insufficient funds. Nonetheless, competitive incentives are strong and competition is possible, as the recent moves by major banks to reduce or eliminate overdraft fees demonstrate.

Even worse, disclosures may misdirect attention, if they imply that consumers should pay attention to information that has no real significance for them. For example, an FTC study found that disclosure of the yield spread premium in a mortgage transaction reduced the fraction of consumers who could identify the lowest price mortgage, because they mistakenly focused on an item of information that did not affect the cost.[22]

For disclosure to have an impact, consumers must be exposed to the information, pay attention to it, understand it correctly, accept it, and remember it.[23] Because information is more likely to be used when it is provided in timely fashion, an important consideration is where and when to disclose.[24] Ideally, the information should be available at the time and in the place where the interested consumer is most likely to need the information. Thus, for example, the price of an optional feature should be available when the consumer decides whether to purchase that option. Earlier disclosure is simply a distraction. If many consumers are likely to make purchase decisions based on advertising alone, disclosure in advertising may be necessary and appropriate. Often, however, information is more useful if it is provided somewhere other than in advertising. This is particularly true for more complex products or services. Although the rulemaking petition that led to the FTC's ANPRM on fees argues for disclosure of all price components in advertising, few consumers are likely to remember the details of a pricing structure based on their inevitably brief exposure to an advertisement, perhaps days or even months before they actually make a purchase decision. Instead, advertising serves to motivate search, and disclosure policies should be designed not to replace search but rather to make sure that adequate information is available before purchase.[25]

Sellers have strong incentives to tailor the information they provide to attract the consumers' interest. Of course, each seller will cast its offering in the best possible light, but other sellers with different advantages also have incentives to point out the differences. Because different consumers use credit cards differently, for example, card issuers have an incentive to develop marketing materials that seek to attract the right consumer to the right card. Rewards are likely of more interest to consumers who pay their balances regularly, who may have little concern about the interest rate. That will be of far more interest to consumers looking to roll over an existing balance, who may have little concern about other card features. Consumers are quite able to make appropriate choices: In an experiment by a large bank that offered a choice between a card with an annual fee and a lower interest rate or a higher rate with no fee, on average consumers made the cost-minimizing choice. Of course, some consumers made mistakes, but they corrected those mistakes, especially when the errors were large.[26]

---

20 Alan Schwartz & Louis L. Wilde, "Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis," 127 U. PA. L. REV. 630-682 (1979).

21 Novantas Research, Understanding Consumer Choice: A Review of Consumer Overdraft Behaviors (2015), at 18.

22 James M. Lacko & Janis K. Pappalardo, *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment*, BUREAU OF ECONOMICS STAFF REPORT (2004), available at https://www.ftc.gov/reports/effect-mortgage-broker-compensation-disclosures-consumers-competition-controlled-experiment.

23 For a fuller discussion of the information processing literature, see THOMAS A DURKIN AND GREGORY ELLIEHAUSEN, TRUTH IN LENDING: THEORY, HISTORY, AND A WAY FORWARD (Oxford University Press, 2011). An alternative formulation of the sequence of using information is that consumers must find it, read it, understand it, use it, use it appropriately. See OMRI BEN-SHAHAR AND CARL E. SCHNEIDER, MORE THAN YOU EVER WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE, 34 (2014).

24 See William L. Wilkie, Affirmative Disclosure at the FTC: Communication Decisions, 6 Journal of Public Policy & Marketing 33 (1987).

25 See Michael B. Mazis, Richard Staelin, Howard Beales, & Steven Salop, A Framework for Evaluating Consumer Information Regulation, 45 Journal of Marketing 11-21 (1981).

26 Sumit Agarwal et al., *Do Consumers Choose the Right Credit Contracts,* 4 REVIEW OF CORPORATE FINANCE STUDIES 239-257 (2015).

The marketing of many financial services also makes clear sellers' willingness to provide information, even absent regulatory requirements. Many providers offer features such as low-balance alerts that are designed to help consumers avoid fees. Others offer apps to monitor credit card transactions for common errors such as a transaction mistakenly submitted twice or a wildly disproportionate tip.

III. THE COSTS OF REGULATING PRICING STRUCTURE

Of course, sellers cannot be allowed to misrepresent their prices, or to charge consumers for services they did not agree to purchase. But an overly detailed or comprehensive list of potentially relevant prices and options, particularly at early stages of the search process such as in advertising, is more likely to obscure information than to enhance it. Consumers must still decide which information is worth paying attention to. Seller's incentives to provide the information that consumers value most facilitates that process.

We consider two examples of attempts to regulate pricing structure and their consequences. The regulatory structure for real estate settlements requires itemization of prices in great detail, even when the consumer has no choice about whether to pay that amount. The result has been more fees, not fewer, and higher cost for real estate settlements. In contrast, regulatory requirements for credit and debit cards have attempted to regulate particular components of the price. The result has been increases in unregulated fees, and unintended adverse consequences for consumers least able to afford them.

IV. RESPA: THE FAILURE OF ITEMIZED PRICING

One frequently cited source of many junk fees is a real estate closing. The settlement paperwork lists numerous fees, for vaguely described services of uncertain value. Ironically, these junk fees appear to be the result of Congressional dissatisfaction with the pricing structure of settlement services. The result was the Real Estate Settlement Procedures Act of 1974, substantially amended in 1975. Concerned about the high cost of real estate settlements and payments between the various service providers, Congress adopted a disclosure approach, under which each individual fee must be itemized, hoping to promote "transparency" and encourage price competition as better informed consumers shopped for the lowest cost service providers.[27]

It didn't work. Although the evidence is limited, one study examined closing documents for a sample of loans originated between 1994 and 2007. It found that the cost of closing as a percentage of the loan amount rose substantially compared to the 1972 baseline Congress considered when it enacted RESPA, over 400 percent for all loans and almost 200 percent for purchase money loans. Moreover, the number of fee types doubled, in part because of the unbundling of origination and title-related fees.[28]

The reason for failure is the high costs of information. Lenders require borrowers to use certain service providers for some services. Because these costs are simply passed through to borrowers, lenders have little incentive to bargain for the lowest possible price. For other services, borrowers may choose to shop on their own, but many find it easier to rely on referrals from the lender or a real estate agent. Consumers in the midst of purchasing or refinancing a home have numerous demands on their attention, such as interest rates, the need to provide various financial documentation, and how to manage the down payment. Shopping for settlement services is likely far down the list of decisions requiring attention.

When neither borrowers nor lenders have strong incentives to find the lowest price, inefficient service providers can persist, protected from effective competition. Instead of competing on the cost of services, settlement service providers compete for the lenders' attention, hoping to win a place in the list of providers to whom they refer borrowers. The one limitation on this competition is Section 8 of RESPA, which prohibits "kickbacks," which have been defined to include a service provider's payment to the lender for referrals.[29] Unfortunately, that provision also makes it difficult for an originator or a lender to "bundle" settlement services into a single price, because any payments between service providers and the bundler can be challenged as kickbacks.

A far better approach would be to allow the bundled provision of settlement services at a fixed price. Providers might be lenders, originators, brokers, or new entrants into the market, who would arrange suppliers for the needed services and offer them all to consumers at a fixed price. In 2002, HUD proposed an amendment to the RESPA rules that would have allowed just such a package, which they estimated would

27 Elizabeth Renuart & Jen Douglas, The Limits of RESPA: An Empirical analysis of the Effects of Mortgage Cost Disclosures, 21 Housing Policy Debate 481-528 (2011).

28 Renuart & Douglas.

29 12 C.F.R. § § 1024.14(b) and (f).

save each borrower approximately $1,000.[30] Faced with substantial opposition from the business beneficiaries of the uncompetitive market for settlement services, the proposal was eventually withdrawn. Nevertheless, it seems clear that a competitive market for settlement services would produce a far better outcome for consumers than the forced unbundling that we have today. The Taskforce on Federal Consumer Financial Law also recommended that the CFPB remove the regulatory barriers that prevent bunding.[31]

Sadly, the FTC's Motor Vehicle Dealers NPRM seems to follow the RESPA path. Under the proposal, the dealer's first response to any question about a specific vehicle must state an "offering price," which is the cash price of the vehicle with no dealer add-ons. If the consumer declines to purchase at this price, on a signed, dated form, the dealer can then offer an itemized list detailing all add-ons and their prices (or price ranges). The Commission simply assumes, without offering basis, that this convoluted bargaining process will somehow save consumers three hours per transaction.[32] As with RESPA, it seems far more likely to complicate and extend the already complex process of shopping for a car and its financing.

V. CREDIT CARDS: THE FAILURE OF PRICE STRUCTURE REGULATION

Another frequently cited product allegedly subject to junk fees, and a particular focus of the CFPB's Request for Information, is credit cards. Card issuers charge interest on outstanding balances, but they also charge annual fees, late fees, overlimit fees, and foreign transaction fees, to name only a few. Federal efforts to regulate these fees began in 2008 when the Federal Reserve Board adopted rules prohibiting some price structures as unfair or deceptive, which were effective in 2010. These rules restricted double cycle billing, regulated the allocation of payments, and restricted certain repricing practices when a cardholder's apparent credit risk change. In 2009, Congress passed the CARD Act., which, in addition to codifying some of the Fed's rules, limited fees for violations of the terms of the account (e.g. late fees, returned payment fees, overlimit fees) to amounts that are "reasonable and proportional" to the violation.[33] Card issuers can either set fees based on an elaborate, annual evaluation of their costs on a fee by fee basis, or they can take advantage of safe harbors established in the original rule allowing fees no more than a specified dollar amount, currently $30, adjusted for inflation.[34] Unsurprisingly to any student of industrial organization and the regulatory process, it appears that most issuers charge essentially the maximum safe harbor amount.[35]

Faced with restrictions on one component of a complex pricing structure, firms have an obvious incentive to adjust their prices on other components of the package.[36] A Pew Trust study found that although regulated fees declined, on average annual fees and interest rates increased, along with cash advance fees and penalty interest rates.[37] A CFPB assessment similarly found a 230 basis point increase in the average APR on purchases and an increase in unregulated cash advance fees.[38] To whatever extent high late fees were subsidizing other credit card users, we now have other users subsidizing those who do not pay their bills on time.

The Fed's rules and the CARD Act also had substantial adverse effects on credit availability, reductions concentrated on subprime borrowers, with little impact on prime borrowers.[39] Penetration of credit cards fell significantly, particularly among lower income consumers.[40]

30 James Gattuso & Ronald Utt, The Case for RESPA Reform, The Heritage Foundation Report, June 19, 2003, available at https://www.heritage.org/government-regulation/report/the-case-respa-reform.

31 Taskforce on Federal Consumer Financial Law Report, Volume 2, Section 3.5 (2021).

32 FTC Motor Vehicle Dealer NPRM.

33 15 USC 1665d.

34 See 12 CFR 1026.52(b).

35 See Remarks of CFPB Director Rohit Chopra on Credit Card Late Fees ANPR Press Call, June 22, 2022, available at https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-director-chopra-on-credit-card-late-fees-anpr-press-call/.

36 For a summary of the CARD Act's effects on credit availability and other credit card contract terms, see Thomas A. Durkin, Gregory Elliehausen, & Todd J. Zywicki, *An Assessment of Behavioral Law and Economics Contentions and What We Know Empirically About Credit Card Use by Consumers*, 22 Sup. Ct. Econ. Rev. 1 (2014); see also Consumer Financial Protection Bureau, Taskforce on Federal Consumer Financial Law Report, Vol. 1, pp. 596-604 (2021).

37 See Nick Bourke & Ardie Hollfield, Two Steps Forward: After the Credit Card Act, Credit Cards Are Safer and More Transparent—But Challenges Remain, Report of the Pew Health Group, Pew Trusts (July 2010).

38 Consumer Financial Protection Bureau, CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Market (Oct 2013).

39 Yiwei Dou, Julapa Jagtiani, Joshua Ronen, & Raman Quinn Maingi, *The Credit Card Act and Consumer Debt Structure*, Fed. Res. Bank of Phila. Research Dept. Working Paper, WP 20-32 (Aug. 2020).

40 The share of households in the lowest income quintile with a credit card fell 11 percentage points between 2008 and 2010, compared to a 1-point drop for the highest quintile. See Glenn B. Canner & Gregory Elliehausen, *Consumer Experiences with Credit Cards*, Fed. Res. Bulletin 10, Table 2 (2013).

Subprime borrowers were less likely to receive credit offers, and the offers they received were for lower credit limits at higher interest rates than before.[41] Credit availability effects are likely more due to the Act's restrictions on repricing, which made the prior practice of offering low initial rates and later raising rates for those who turned out to be worse risks than expected far more difficult.

Some studies find little effect of the CARD Act,[42] but these studies fail to account for the impact of the very similar Federal Reserve regulations. When the CARD Act passed, issuers had made substantial changes to comply with the substantially similar rules.[43] Studies that ignore these early compliance steps will understate the impact of the restrictions.

The CFPB's NPRM on Late Fees seeks to revisit the original implementing rules for the CARD Act. The rule would reduce the safe harbor for late fees from $30 to $8, based on an analysis of the costs imposed by late payments that deliberately excludes collection costs after a debt is charged off and that includes no recognition of fixed costs. Moreover, the proposal would end the automatic adjustment of the safe harbor amount based on inflation. In essence, the Bureau only considers variable costs to establish late fees, presumably as a proxy for marginal costs. In general, of course, prices above marginal cost generate consumer welfare losses because consumers purchase less of the product or service. In the context of late fees, however, fewer purchases means that more consumers pay their bills on time. It is difficult to see significant welfare losses because too many consumers pay on time. Late fees do in fact lead more consumers to pay on time, which implies that consumers are in fact aware that the fees exist and do have a deterrent effect.[44] Because late fees are also correlated with a cardholder's risk,[45] reducing late fees with increase overall losses to cardholders resulting in higher costs for all borrowers. In short, late fees are designed to impose the cost of late payments and higher risk on those consumers that pay late and to deter further late payments, rather than enabling late-payers to externalize those costs onto other borrowers, particularly subprime borrowers. As a result, late fees appear to be the antithesis of so-called "junk fees."

Moreover, card issuers also face substantial fixed costs, which they must recover in markups over marginal cost for some components of their product portfolio. There is no reason all markups should be the same. A higher markup on late fees than on other components of the product is particularly appropriate given the increased incentives to pay on time.

The CARD Act requires that rules consider the deterrent effect of late fees, but the Bureau's proposal essentially dismisses deterrence, arguing that some deterrent remains. That is, of course, true; the late fee is not zero and there are other consequences of late payments. But it seems obvious that the deterrent effect of a $30 fee is greater than that of an $8 charge. Moreover, the Bureau exaggerates the impact of other costs by converting one-time costs in a 30-day billing cycle to an annual percentage rate. That rate is irrelevant unless the consumer is planning to continue late payments for a year. That, however, is exactly what late fees are intended to deter.

The Fed's original rule provided that costs of collection for purposes of establishing late fees could not include as costs "losses and associated costs (including the cost of holding reserves against potential losses and the cost of funding delinquent costs)."[46] The Bureau now proposes to "clarify" that no costs incurred after chargeoff can be included in the analysis, based on the sophistry that "any cost in collecting amounts owed to a card issuer that are incurred post-charge-off is related to mitigating a loss as opposed to the cost of a violation of the account terms."[47] Any attempt to collect amounts due, however, no matter when it occurs, is an effort to mitigate losses. There is simply no meaningful economic distinction. The Fed's original distinction, between collection costs and the losses themselves (i.e. the amounts uncollected) is a sensible one, but it is lost in the proposed revision.

Not surprisingly, the Bureau notes that card portfolios with more subprime borrowers are more dependent on late fee revenue, because subprime borrowers are less likely to pay on time. The inability to recover costs from those borrowers who are in fact late will increase the costs to those who pay on time. Moreover, like the restrictions on repricing discussed above, it will likely lead to restrictions on credit availability to all subprime borrowers, since an issuer cannot identify ex ante those who will pay on time.

41 See Song Han, Benjamin J. Keys, & Geng Li, *Unsecured Credit Supply, Credit Cycles, and Regulation*, 31 Review of Fin. Studies 1185 (2018).

42 See e.g. Sumit Agarwal, et al., Regulating Consumer Financial Products: Evidence from Credit Cards, 130 Q. J. Econ. 111 (2015).

43 For example, Dou et al. find significant market effects of reductions in credit availability to non-prime consumers at each stage of the progression from the initial proposal of the Federal Reserve regulations, the passage of the CARD Act, and enactment of the final implementing regulations.

44 See Daniel Grodzicki, Alexei Alexandrov, Ozlem Bedre-Defolie, & Sergei Koulayev, Consumer Demand for Credit Card Services, J. of Fin. Services Res. (2022), https://doi.org/10.1007/s10693-022-00381-4; see also S. Agarwal, J. C. Driscoll, X. Gabaix & D. Laibson, Learning in the Credit Card Market, NBER Working paper 13822 (February 2008), finding that paying a fee in the current month reduces the likelihood of paying a fee next month by 40 percent.

45 See Nadia Massoud, Anthony Saunders, & Barry Scholnick, *The Cost of Being Late? The Case of Credit Card Penalty Fees*, 7 J. of Fin. Stability 49 (2011).

46 Official Interpretation of 12 CFR 1026.52(b)(1)(i).

47 Late Fees NPRM at 30.

Congress also regulated the intricacies of pricing structures in the Dodd Frank Act, passed in 2010. A provision known as the Durbin Amendment established price controls on the prices debit card issuers can charge for interchange fees, which must be "reasonable and proportional" to the costs of a particular transaction, not including the costs of issuing a card, operating bank branches, account acquisition, or general customer support. Interchange fees are paid by merchants rather than consumers, but they are a key component of the pricing of debit cards. When the Federal Reserve's implementing regulations became effective in 2011, interchange fees fell from an average of $0.51 per transaction to $0.24, where they have largely remained.[48]

As with a balloon, squeezing one component of a pricing structure is likely to lead fees to increase elsewhere. Before price controls, interchange revue transformed the economics of checking accounts. Fewer than 10 percent of bank accounts offered free checking before 2001; by 2009, 76 percent of bank accounts were free checking accounts.[49] Free checking typically required a minimum account balance. In 1999, the required minimum averaged $562, an amount that had fallen to $109 by 2008. Price controls led the required minimum to explode to $723 in 2012.[50] Monthly maintenance fees for accounts that were not free roughly doubled.[51] By one estimate, fee increases offset 90 percent of the interchange revenue loss.[52] These costs were disproportionately borne by lower income consumers, who are much less likely to maintain balances that qualify for free checking. According to one estimate, 70 percent of those in the lowest income quintile experienced higher fees, compared to 5 percent of those in the highest quintile.[53]

VI. CONCLUSION

The notion of junk fees is a fine piece of rhetoric, but useless as an analytical tool. Both the structure of pricing, and the level of prices, should be determined by competition in the marketplace. As we observe, the result is detailed fee structures for some products and services, and bundled pricing for others. But marketplace competition over pricing structures is far more likely to satisfy consumer preferences than an inevitably overbroad set of regulatory requirements.

As the experience with RESPA and the credit card market makes clear, regulatory intervention creates a considerable risk of adverse effects for consumers. Each fee is different, serving different economic functions, and raising industry and fee-specific questions about what information consumers need at what point in the purchasing process. Undoubtedly, there are "fees" where regulatory intervention seems appropriate. The FTC's example of fees for automotive add-ons for worthless "products" such as nitrogen filled products is a good example. The problem, however, is not the fees, but the fraudulent claim that the product does something. Disclosing the fee earlier in the purchase process would not address that problem at all. Worse, it may distract consumers from bargaining over the price of the car and its financing.

48 See Todd J. Zywicki, Geoffrey A. Manne, & Julian Morris, *Unreasonable and Disproportionate: How the Durbin Amendment harms Poorer Americans and Small Businesses*, International Center for Law and Economics (Apr. 25, 2017).

49 See Todd J. Zywicki, Geoffrey A. Manne, & Julian Morris, *Price Controls on Payment Card Interchange Fees: The U.S. Experience* 5, ICLE Financial Regulatory Research Program White Paper 2014-2 (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446080.

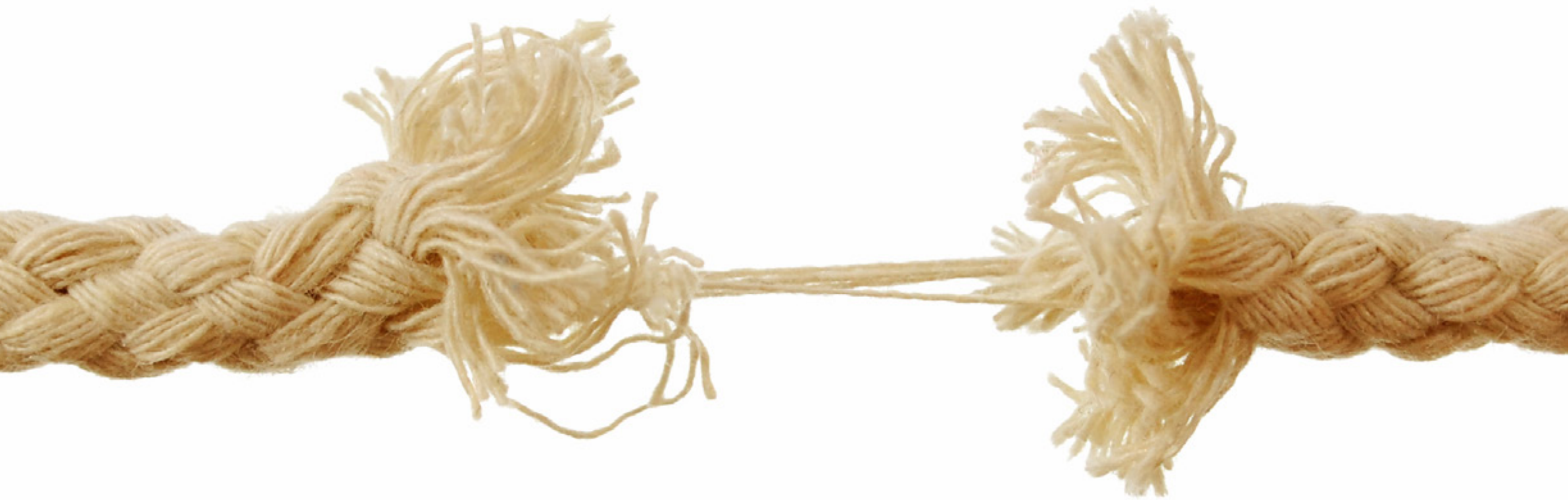
50 Vladimir Mukharlyamov & Natasha Sarin, *Price Regulation in Two-Sided Markets: Empirical Evidence from Debit Cards* (Dec. 2019).

51 Zywicki et al., Price Controls.

52 See Benjamin S. Kay, Mark D. Manuszak, & Cindy M. Vojtech, *Competition and Complementarities in Retail Banking: Evidence form Debit Card Interchange Regulation*, 34 J. Fin. Intermediation 91, 92 (2018).

53 Mukharlyamov & Sarin, *supra* note 50.

THE WAR ON SO-CALLED "JUNK FEES": WHO'S FIGHTING AND WHAT'S AT STAKE?



BY DONNELLY MCDOWELL & ANDREW STIVERS[1]

1 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.

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,[2] 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.[3] 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."[4]

The CFPB, however, remains undeterred – taking two significant regulatory actions to limit fees since the RFI.[5] 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."[6] 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-positive 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.[7] 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 UDAAP 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.[8] 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.[9] 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")[10] and to "include requirements prescribed for the purpose of preventing such acts or practices."[11] 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."[12] 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.[13]

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.

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

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

9 12 C.F.R. § 1026.6(b)(2)(viii).

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

11 15 U.S.C. § 57a(1)(B).

12 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").

13 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 certain 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*."[14] 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.[15] 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 of 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*.[16]

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.[17] 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."[18] This is especially true if consumers view them to be "unexpected" or "too high."[19]

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."[20]

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.[21] 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.[22] 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.[23] 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.[24] 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.[25]

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." [26]

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 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.

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

BY HAROLD FELD[1]

1 JD Boston University Law School, AB Princeton University. The author is the Senior Vice President of Public Knowledge, a non-profit digital consumer advocacy organization based in Washington D.C.

President Biden has made the elimination of "junk fees" a prominent initiative. Initially introduced as part of his Executive Order on Competition in July of 2021,[2] the President highlighted its anti-junk fees campaign as part of the 2023 State of the Union Address[3] and in a White House statement on advancing equity for Black Americans[4] as part of Black History Month. In all these statements, President Biden singled out the cable and internet providers as using junk fees to overcharge subscribers and thwart competition.[5] The President called on the FCC to take specific steps to address carrier junk fees in the Competition EO[6] and indicated in the SOTU that he intended to include provisions to target carrier junk fees in legislation he planned to propose.

Congress previously took limited action against carrier junk fees in the Television Viewer Protection Act of 2020[7] ("TVPA"). The TVPA adopted the most common prescription for dealing with junk fees, requiring full disclosure of the bottom-line price inclusive of all fees.[8] This negates what most scholars and advocates identify as the primary purpose of junk fees – hiding the true price from purchasers when they evaluate whether or not to buy the product of service. The TVPA therefore provides an opportunity to see how effective this disclosure strategy will be if adopted as the primary remedy for junk fees. While data is limited, two studies by Consumers Reports suggests that, at least in the specific context of cable and broadband services, disclosure did not have a material impact on the prevalence of junk fees in the cable industry. Extrapolating from this, it seems unlikely that the "broadband consumer label" mandated by Section 60504 of the Infrastructure Investment and Jobs Act of 2021[9] will have significant impact on the prevalence of junk fees in the broadband access industry.

I. WHAT ARE JUNK FEES?

In a blog post, the White House described what President Biden means by "junk fees." The blog post cited a technical definition proposed by the Federal Trade Commission ("FTC") in its pending proceeding on junk fees,[10] but generally broke these fees down into four broad categories: (1) mandatory fees designed to hide the full price (for example, an additional "service fee" added to a ticket price); (2) surprise fees consumers only learn about after the purchase (such as a 'family seating fee' for airline tickets when a parent requests seating next to a minor child); (3) exploitive or predatory fees that take advantage of the lack of choices available to the customer (such as a high early termination fee ("ETF") to prevent a customer from discontinuing service); and, (4) fraudulent fees (such as advertising a "no fee" bank account but in fact subject to significant fees described as "charges" or some other name).

All these fees serve to harm consumers and injure competition by making it difficult or impossible to accurately gauge the true price of a product or service. This does more than trick consumers into buying these they otherwise would not. By disguising the true price, the provider makes it impossible for consumers to accurately compare prices thus frustrating competition. Without the ability to compare prices, consumers cannot reward providers of lower-price goods and require competitors to lower their prices. In some markets, a provider may try to compete on simplifying the bill and providing an accurate bottom-line price. For example, certain mobile providers offer (or at least claim to offer) a clear

2 Promoting Competition in the American Economy, EO 14036 of July 9, 2021, 86 Fed. Reg. 36987 ("Competition EO").

3 Speech as drafted available at https://www.whitehouse.gov/state-of-the-union-2023/. ("SOTU").

4 The White House, "FACT SHEET: The Biden-Harris Administration Advances Equity and Opportunity for Black Americans and Communities Across the Country" (February 27, 2023) ("WH Fact Sheet"). Available at: https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/27/fact-sheet-the-biden-%E2%81%A0harris-administration-advances-equity-and-opportunity-for-black-americans-and-communities-across-the-country/.

5 Because the largest cable providers are also the largest providers of home internet access, this article will refer to these collectively as "carriers" unless the distinction matters.

6 Competition EO, *supra* note 2, 88 Fed. Reg. at 36998-99.

7 The Television Viewer Protection Act of 2019, Pub. L. No. 116-94, 133 Stat. 2534 (2019). The TVPA was enacted as Title X of the "Further Consolidated Appropriations Act, 2020" (H.R. 1865, 116th Cong.).

8 TVPA § 1004(a), codified at 47 U.S.C. § 562.

9 Pub. L. 117-58, Div. F, Title V, § 60504, codified at 47 U.S.C. § 1753.

10 "Unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer, including goods or services that consumers would reasonably assume to be included within the overall advertised price; the term also encompasses 'hidden fees,' which are fees for goods or services that are deceptive or unfair, including because they are disclosed only at a later stage in the consumer's purchasing process or not at all, whether or not the fees are described as corresponding to goods or services that have independent value to the consumer." Brian Deese, Neale Mahoney, Tim Wu, "The President's Initiative on Junk Fees and Related Pricing Practices," White House Blog (Oct. 26, 2022) ("Junk Fees Blog"). Available at https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/.

bottom-line price without hidden fees.[11] But the entire point of hidden fees is that everyone claims to offer a bottom-line price, making true comparison impossible. Consumers have no way to know who offers a "real" bottom line price and who is hiding the real price until after making the purchase, recapitulating the problem.

Because the FCC currently defines broadband as a Title I "information service," its authority to regulate charges directly is highly limited. Even when the FCC exercised authority over broadband as a Title II telecommunications service, giving it direct authority to prohibit any "unjust or unreasonable" charges,[12] direct regulation of broadband prices was highly controversial politically. Scholarship cited by the Biden Administration recommends requiring that providers be required to state the full price, inclusive of all fees upfront, as requiring a provider to show the all-inclusive price helps consumers choose lower cost products.[13] As part of its initiative against junk fees and to promote competition, the Administration urged the FCC to initiate a rulemakings designed to increase price transparency in broadband pricing.[14] Congress mandated that the FCC create a "broadband consumer label" providing an all-inclusive price as part of the Infrastructure Investment and Jobs Act of 2021.[15] The FCC completed the initial rulemaking to require the broadband consumer label in November 2022.[16]

II. TELEVISION VIEWER PROTECTION ACT OF 2019

The broadband consumer label is not the first effort by Congress to require transparency in the communications marketplace in response to the proliferation of junk fees. Congress passed the Television Viewer Protection Act of 2019 ("TVPA")[17] as part of the Further Consolidated Appropriations Act of 2020.[18] The House Report states that Congress intended the TVPA to "protect consumers throughout the media market and when purchasing MVPD or broadband service."[19] The law requires that any provider of a cable service[20] disclose the all-inclusive fee at the time of purchase – including the amount of any discount and the length of time covered by the discount. Where the consumer buys the service as part of a bundle, the provider must break out the cost of the cable service separately. Subsequent bills must include a clear list of all charges, the date on which the contract ends, and the date on which any discount ends. Finally, the TVPA prohibits a carrier from charging a subscriber for any equipment, including a broadband modem and Wi-Fi router, that customers provide themselves. The law went into effect on December 20, 2020.[21]

III. THE TVPA HAS HAD NO VISIBLE IMPACT ON JUNK FEES

The FCC does not collect pricing or billing information on cable providers, making it difficult to assess the effectiveness of the TVPA in any formal way. One year after the law went into effect, the FCC's Media Bureau issued a Public Notice seeking comment on the implementation of the TVPA and its overall effectiveness.[22] In response, Consumer Reports submitted the results of a survey of 350 of its members.[23] Separately, in November 2022, Consumer Report released a study of approximately 22,000 consumer bills from ISPs collected between July 2021 and April

11 See "What are the fees and taxes associated with my Mint Mobile plan?" available at: https://www.mintmobile.com/help/what-are-the-fees-and-taxes-associated-with-my-mint-mobile-plan/.

12 47 U.S.C. § 201(b).

13 Junk Fees Blog *supra* note 10.

14 Competition EO, 88 Fed. Reg. at 36998-99.

15 IIJA note 9 *supra*.

16 Empowering Broadband Consumers Through Transparency, *Report and Order and Further Notice of Proposed Rulemaking*, CG Docket No. 22-2 (rel. Nov. 17, 2022) ("Broadband Consumer Label Order").

17 Codified at 47 U.S.C. § 562.

18 Pub. L. 116-94.

19 H.R. Rep. No. 116-329, 116th Cong., 1st Sess. 2019 at 7.

20 The statute includes all multichannel video programming distributor ("MVPD") services, a term that includes direct broadcast satellite but does not include streaming services, as "covered services" subject to the TVPA. See 47 U.S.C. § 562(d)(3). The term "cable service" is used for convenience.

21 Implementation of Section 1004 of the Television Viewer Protection Act of 2019, MB Docket No. 20-61, Order, 35 FCC Rcd 3008 (MB 2020).

22 Public Notice, Media Bureau Seeks Comment on Implementation of the Television Viewer Protection Act of 2019, 36 FCC Rcd 17809 (MB 2021).

23 Reply Comments of Consumer Reports, MB Docket No. 21-501 (filed March 7, 2022) ("CR Reply Comments").

2022.[24] Although the second study focused on internet rather than cable service, the 2022 Report observed that because most providers (especially the largest providers) offer bundled services, it is frequently impossible to break out junk fees assigned to one service or the other – despite the requirement of the TVPA that a provider of bundled service distinguish between charges associated with cable service and other charges.[25] Additionally, increases in cable rates and fees are the subject of press coverage, providing some basis for analysis.

Based on these sources, it does not appear that the TVPA has had significant impact on the elimination of junk fees. As an initial matter, as reported in the Consumer Report response to the Public Notice, compliance with the TVPA has been varied. This is confirmed by the analysis of bills in the 2022 Report, which indicates that many providers of bundled services do not distinguish between the fees for cable services and broadband. Even where carriers do break out these fees, carriers offering bundles can simply move fees from one service to the other. Carriers providing cable service can therefore simply shift hidden fees designed to disguise the full price to the broadband portion of the bill.[26] This practice will, to some degree, be addressed with the introduction of the broadband consumer label next year.

But further analysis of the fees, particularly cable fees, indicates that even more accurate break fee disclosure and inclusion of a more honest all-inclusive price will have significant impact on the persistence of junk fees. Cable operators disclose a wide range of fees which are essentially a list of operating costs broken out as separate fees. Comcast, for example, imposes both a "broadcast TV fee," a "regional sports network fee."[27] Customers cannot elect not to receive either the broadcast programming or the regional sports networks, making them part of the programming bundle for which customers already pay the subscription price. As one article observed: "Comcast's statement would be like a restaurant telling customers that they have to pay for the food that goes into your meal."[28] Additionally, while it is possible to buy modems and Wi-Fi routers for internet service, it is impossible to buy a set-top box to receive cable programming. Customers must therefore rent the equipment from the cable operator, allowing the cable operator to raise the rental rate on a regular basis.

IV. JUNK FEES MAKE IT EASIER TO RAISE PRICES FOR SUBSCRIPTION SERVICES AND CREATE ADDITIONAL REVENUE STREAMS

There are several reasons why cable operators continue to charge junk fees even when forced to disclose them and provide an all-inclusive price. Notably, they make raising the price over the course of the contract much easier. They also allow a carrier to disguise a large cumulative price increase by breaking the cost into relatively smaller pieces. Carriers have several reasons for pursuing this strategy. In some cases, carriers offer to sell a fixed-rate multiyear contract, but the fixed rate does not include the additional fees. Previous research by Consumer Report found that junk fees accounted for nearly a third of the total cost of service. [Reply Comments]

Carriers have incentive to bill this way for several reasons. Some carriers offer fixed-rate multiyear contracts. Raising fees allows them to effectively raise the rate while purporting to adhere to the letter of the contract.[29] But even absent a fixed term contract, carriers have incentive to hide the true price of the product for several reasons. Carriers can raise rates multiple times in the same year by first raising the rate for the cable service, then raising the fees, and then raising the rate for the internet service.[30]

It is important to note that the presence of competition from streaming services has not appeared to decrease the incentive to create junk fees. To the contrary, competition may actually increase the incentive to use junk fees to raise prices. As customers increasingly "cut the cord" and abandoned cable for streaming services, [31] cable operators have additional incentive to use junk fees to increase revenue. Using junk

---

24 Jonathan Schwantes, "Broadband Pricing: What Consumer Reports Learned from 22,000 Internet Bills," Consumer Reports (Nov. 17, 2022) ("Broadband Pricing Report).

25 *Id.* at 3-4.

26 *Id.*

27 Daniel Kline, "Comcast Lists One Cable Price, Charges Another: Here's Every Fee," The Street (Feb. 27, 2023). Available at: https://www.thestreet.com/technology/comcast-lists-one-xfinity-cable-price-charges-another-heres-every-fee.

28 *Id.*

29 Jessy Edwards, "Cox Class Action Alleges Company Increases Monthly Rate During Fixed-Rate Term Contracts," Top Class Actions (September 7, 2022). Available at: https://topclassactions.com/lawsuit-settlements/money/fees/cox-class-action-alleges-company-increases-monthly-rate-during-fixed-rate-term-contracts/.

30 Philip Swann, "Charter's Spectrum TV Raising Broadcast TV & Package Prices," The TV Answer Man (January 6, 2023) available at: https://tvanswerman.com/2023/01/06/charters-spectrum-raising-broadcast-tv-package-prices/ (noting previous increases of video subscription price and internet service price).

31 James Brumley, "Cord-Cutting Claims Another 1.4 Million Cable Customers in Q4," The Motley Fool (March 2, 2023). Available at: https://www.msn.com/en-us/money/companies/cord-cutting-claims-another-14-million-cable-customers-in-q4/ar-AA1881Nn.

fees to raise rates after a customer is already subscribed helps to reduce cancellation of service because of the ability to obscure the true annual increase and reduce "bill shock" by spreading out the cost. Since customers must call their cable service to cancel, cable operators can attempt to retain customers by lowering the inflated fees for a limited period (and frequently locking customers into a new long-term contract).

V. THE NEW BROADBAND CONSUMER LABEL SEEMS UNLIKELY TO MATERIALLY IMPACT THE USE OF JUNK FEES IN BROADBAND

In November of 2022, the FCC adopted preliminary rules for the "broadband consumer label" as required by the IIJA.[32] The initial rules adopted by the FCC are fairly similar to those mandated by the TVPA.[33] Providers must clearly display an all-inclusive price for any broadband service as a standalone service. The provider must break out and clearly list all fees, and state whether the rate is an introductory rate or the standard rate (and, if an introductory rate, when the introductory rate expires and the all-inclusive price for the full rate). Providers may offer bundled services and make that information available through a link to the provider's website rather than as part of the label. Providers must make the label available at the point of sale, but not as art of any subsequent bill.

Based on the experience with the TVPA, it seems that – contrary to the hope of the Biden Administration – the broadband consumer label will do little to eliminate junk fees for broadband services. The same incentives for carriers to use junk fees to obscure price increases on a going-forward basis exist for broadband. The ability of carriers to offer bundled services without the benefit of the consumer label breaking out a per-service price under the bundle (and to distribute junk fees between different services) further enhances the ability of carriers to obscure rate increases through fees, and to do so in a staggered manner so as to disguise the total annual fee increase.

This is not to say that the transparency required by the consumer label is worthless. To the extent that consumers have available to them competing broadband providers, greater transparency at the point of sale helps consumers comparison shop. The broadband consumer label also eliminates initial surprise fees. But the TVPA experience suggests that transparency at the point of sale has sharp limits. Certainly it will not, as the Biden Administration apparently hopes, significantly reduce the use of junk fees in the cable and broadband industries.

VI. CONCLUSION: ELIMINATING JUNK FEES FOR CABLE AND BROADBAND WILL REQUIRE NEW, DIRECT FEDERAL AUTHORITY

Eliminating junk fees will require both direct prohibition on the use of junk fees and significant enforcement action. The FCC can invest itself with the necessary authority by reclassifying broadband as a "telecommunications service" subject to Title II of the Communications Act. The FCC has direct authority to eliminate any "unjust or unreasonable rates and practices" in the provision of telecommunications services.[34] The decision by the Trump FCC to reclassify broadband as an "information service" severely limited the FCC's authority over broadband services.[35] The FCC's 2017 reclassification order identified state consumer protection authority as a limit on carriers,[36] but the FCC in the same order asserted undefined preemption of state authority to the extent it contradicted what the reclassification order identified as a federal "policy of deregulation" on broadband.[37] Federal courts have reached conflicting results on the extent of this preemption.[38]

Additionally, even if the FCC reclassified broadband access as a Title II service, this would not provide the FCC with specific authority to address cable junk fees. Certainly the FCC could adopt rules to better enforce the TVPA. As part of the Cable Competition and Consumer

32 Broadband Consumer Label Order *supra* note 16.

33 See FCC, "Broadband Consumer Labels," available at: https://www.fcc.gov/broadbandlabels. The FCC also sought additional comment on more detailed proposals – such as information on a carrier's privacy practices.

34 47 U.S.C. § 201(b).

35 Restoring Internet Freedom, *Declaratory Ruling, Report and Order and Order*, WC Docket No. 17-108 (rel. January 4, 2018).

36 *Id.* at ¶¶ 140-154.

37 *Id.* ¶¶ 194-204.

38 Compare *ACA Connects – America's Communications Assoc. v. Bonta*, 24 F.4th 1233 (9th Cir. 2022) (no preemption because FCC reclassification stripped FCC of authority to preempt) with *NY Telecommunications Assoc. v. James*, 544 F. Supp.3d 269 (EDNY. 2021) (finding NY law requiring low-cost plan for low-income residents preempted).

Protection Act of 1992, Congress charged the FCC to regulate cable rates to ensure they were "reasonable,"[39] but Congress largely repealed this authority in the Telecommunications Act of 1996.[40] Any effort to directly address junk fees for cable subscription services would require either new authority or new theories on how to use existing authority.

The Biden Administration has promised to propose a bill to address junk fees. This bill would provide the ideal vehicle to empower the FCC to address junk fees rather than simply increase transparency over junk fees. Under the current law, it appears highly unlikely that the Biden Administration can achieve its goal of eliminating junk fees in either cable or broadband access service. Given the importance of broadband to our modern lives, allowing such a failure can only be considered highly unfortunate.

39 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 § 3 (codified at 47 U.S.C. § 453).

40 Telecommunications Act of 1996, Pub. L. 104-104 § 301(b).

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

BY ED MIERZWINSKI[1]

1 Ed Mierzwinski is senior director, federal consumer programs, at the Public Interest Research Group ("PIRG"). PIRG and our network of state organizations have a 50-year track record of bringing people together around solutions that work, and not stopping until we get real results.

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 ("FTC") – and our newest – the Consumer Financial Protection Bureau ("CFPB"), established in 2010 following the massive 2008 economic collapse brought on by risky bank lending practices.

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 Khan[9] 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 here[22] 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 Providian 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, "Providian 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-maloneys-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 ticket[45] is enabled by both dark patterns[46] and/or DRIP fees[47] 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-ftc-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.

THE COST OF PRICE REGULATION

BY SEAN HEATHER & CURTIS DUBAY[1]

1 Respectively Senior Vice President, International Regulatory Affairs & Antitrust, U.S. Chamber of Commerce; Chief Economist, Economic Policy Division at the U.S. Chamber of Commerce.

Prices are a pillar of functional markets. As any economist knows through study, and any business knows through experience, prices send signals to all market participants – businesses, and consumers – about what to make, how much to produce, and how much to buy. It sounds simple in practice, but properly set prices set off an invisible set of intricately coordinated activities that result in the right amount of production of all the goods and services in an economy, as well as providing signaling where to invest in new products.

Study and experience also teach that, when governments interfere in the market's setting of prices, those intrusions can cause enormous harm. When allowed to function freely, prices are the mechanism that allows for the greatest possible expansion of standards of living because they lead to the best-possible allocation of a society's scarce resources. When governments interfere with the setting of prices, they limit how much the economy can expand, and taken too far, can drive an economy to ruin.

In recent months, there has been a growing push across the administration and from some in Congress to have the government exert more control over prices and pricing practices routinely used in the economy. We have seen efforts to politicize inflation, supply chain shortages, energy prices, and food prices. There have also been misleading attempts to blame industry concentration for a supposed decline in competition and higher prices. Others want to revitalize the disastrous Robinson-Patman Act.

Against a backdrop of inflation that U.S. consumers haven't seen since the 1970s, some policymakers are turning to price regulation as a way to shift blame to the private sector. As the Washington Post's Editorial Board explained,

> President Biden is facing mounting criticism for inflation's rise to its highest level since 1982. Unfortunately, the White House's latest response is to blame greedy businesses. Economists across the political spectrum are rightly calling out the White House for this foolishness. Even some within the White House are questioning this approach.
>
> Inflation, which was relatively low for years, did not suddenly rise in recent months because businesses decided now was the ideal time to squeeze their customers. What actually happened is that demand soared for many products as the economy recovered. Often, there were not enough products to meet it, thanks to supply chain hiccups and labor shortages, so prices went up.[2]

During the past two years the White House, against the advice of its economists, has repeatedly and cynically blamed so-called "corporate profiteering" for high prices[3]. As part of this effort, the White House issued an *Executive Order on Promoting competition in the American Economy*[4]. The order references "price" no less than 18 times, targeting multiple sectors of the economy and baselessly claiming that prices are too high, wages too low, and profits too big. Since the executive order, the White House has announced "new actions" and "fact sheets" to address the price of rent,[5] food,[6]ocean shipping,[7]meat and poultry,[8] drug prices,[9] and broadband services.[10]

In late October 2022, less than two weeks ahead of the general election, the White House announce a new initiative to combat "junk fees."[11] In concert, the Consumer Financial Protection Bureau, the Federal Trade Commission ("FTC"), the Department of Transportation, and the Federal Communication Commission are now moving to put in place new regulatory controls and enforcement measures to combat legitimate pricing practices that use fees.

---

2 Wash. Post, "The White House again offers a bizarre explanation on inflation" (Jan. 10, 2022), at https://www.washingtonpost.com/opinions/2022/01/10/white-house-again-offers-bizarre-message-inflation/.

3 Inflation strategy at White House fuels debate - The Washington Post.

4 Executive Order on Promoting Competition in the American Economy | The White House.

5 https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/25/fact-sheet-biden-harris-administration-announces-new-actions-to-protect-renters-and-promote-rental-affordability/.

6 https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/11/fact-sheet-president-biden-announces-new-actions-to-address-putins-price-hike-make-food-more-affordable-and-lower-costs-for-farmers/.

7 https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping/.

8 https://www.whitehouse.gov/briefing-room/blog/2021/09/08/addressing-concentration-in-the-meat-processing-industry-to-lower-food-prices-for-american-families/.

9 https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/14/executive-order-on-lowering-prescription-drug-costs-for-americans/.

10 FACT SHEET: President Biden and Vice President Harris Reduce High-Speed Internet Costs for Millions of Americans | The White House.

11 https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/.

Setting aside legal concerns with these proposed controls, the ideas would needlessly burden both business and consumers, prevent prices from scaling with the cost of the goods or services purchased, and paradoxically result in higher prices for many consumers.

I. BACK TO BASICS: WHY PRICES MATTER

Prices are the mechanism that makes an economy function efficiently, and they do that by sending signals. The countless interactions between businesses and consumers, businesses and businesses, and businesses and financial markets that occur each day send just as many signals to all those market participants about what the market demands and at what prices. Those signals then tell all those participants how to act accordingly. The more signals that prices are able to send, the more information the market has to work on, thereby increasing efficiency and the well-being of consumers and businesses. The Biden administration wants to interfere in the market and decrease the number of signals it sends.

To better understand why more price signals, help consumers, and how limiting their transmission would hurt them, let's look back at the humble widget from Econ 101 textbooks. The price consumers are willing to pay for a certain number of widgets, for instance, tells a retail store whether it is worth stocking the widgets, given that they will take room on the retailer's shelves that would otherwise go to a different product. If retailers stock the widgets, that sends a signal to the widget producers that there is a market for widgets.

Just because there is demand for widgets at a certain price point that makes sense for the retailer to sell them does not ensure on its own a supply of widgets will come to market. For that, the widget maker needs to determine if it can make an acceptable return on making widgets, given that it can make other items instead. In other words, it needs to consider the *opportunity* cost of producing widgets.

Further, prices determine whether the business makes widgets at all. Prices could tell it that it can make a profit making them, but if that profit does not equate to an adequate return for the risks involved, including its fixed costs, then the business will hold on to its capital for a more promising venture in the future. This process, which happens countless times every day in a modern market-based economy, is dependent on an enormous number of different prices and the information they transmit to all the various market actors. Each of those prices incapsulate the preferences of countless individuals, businesses, and other market participants.

The old textbook example of how important price are to widgets can be applied to the Biden administration's attempt to limit certain fees and other variable pricing mechanism used by some businesses. If this effort were to go into effect, it would decrease the number of price signals sent throughout the economy. This would prevent consumers from telling businesses the types of products they want and what they are willing to pay for them. This in turn would reduce the number of products and offerings from businesses, which would reduce the well-being of consumers and the profitability of businesses.

Fees are often a business's attempt to unbundle the price of their product. For certain types of offerings, there are multiple components that make up the cost. Not all consumers want to pay for all those various components though. In this scenario, businesses have two choices: 1) they can bundle all the components into a one-size-fits-all product; or 2) they can break the product down to its various components and offer consumers the ability to purchase the components they want. Businesses use fees to offer product choices to consumers.

It is the later scenario that the Biden administration wants to stop when it proposes to outlaw certain fees. However, this approach yields considerable benefits for consumers and businesses when those fees are visible and known. Hidden fees are bad, but those that are upfront can make the market work better.

For consumers, they can buy those parts of a service they want the most and not pay for those they are not interested in. For instance, some flyers are willing to pay extra fees to check more bags, or to sit in preferred seats, or to board early. The market would function less efficiently if these flyers couldn't pay more for the services that they want. Similarly, in the banking sector, consumers may opt for a credit card that requires them to pay a fixed annual fee in exchange for the right benefits, whether that is cashback rewards or discounts at their favorite retailers.

This market dynamic ultimately makes everyone better off by growing the number of products in the economy and allowing customers to pay for what they want. How much customers buy and how much they are willing to pay for the various services sends signals to businesses. These signals tell businesses what different customers want and allows them to further expand their product offerings to match their customers' preferences. This increase of product offerings expands the well-being of customers because there are more things they desire, at prices they are willing to pay, in the market.

Businesses can also compete based on how they unbundle and charge for their respective services. Customers will gravitate to the businesses that offer the combinations they like the best. This will simultaneously bring the best mix of offerings to the market at the best price.

Unbundling can also be good for businesses because it allows them to better target their products to a fragmented market. This can improve profitability because they can target services to customers most willing to pay for them.

For this process to be beneficial to everyone, fees and what they apply to must be fully known to everyone. A hidden price cannot send a signal. But the Biden administration is not looking to make fees more visible. It is seeking to eliminate some altogether.

If the Biden administration gets its way, all businesses would essentially be forced into option 1, which is bundling all their offerings. This would cause many consumers to pay higher prices for an array of services they do not want. It would curtail competition among businesses because it would cut off an avenue for business to compete on. And by suppressing more price signals in the economy, it would lessen the growth of products that consumers could benefit from.

II. FEES & THE FEDERAL TRADE COMMISSION

Among the agencies, the FTC is leading the charge toward more widespread price regulation. The FTC has proposed a "Trade Regulation Rule on Unfair or Deceptive Fees" that would impose an economy-wide rule to regulate and prohibit so-called "junk fees" and "hidden fees." The FTC claims, without evidence, that "junk fees . . . facilitate inflation." What are those fees? A more neutral term is "variable pricing." The Commission defines "junk fees" as any fees "that have little or no added value to the consumer," but rather one might say that such a "junk fee" is anything that *the Commission* deems offers little or no added value, regardless of what consumers think or how they behave.

In any event, a proposed rule could affect wide swaths of the economy. It would broadly cover all types of "fees, interest, charges or costs" and comprehensively regulate the advertising of all prices. According to recently departed FTC commissioner, Christine Wilson, the rule could "regulate the way prices are conveyed to consumers across nearly every sector of the economy" and impact "billions or even trillions of dollars in commerce, as well as millions of consumers and companies."[12] For example, the proposal would affect the timing and placement of pricing disclosures and displays of all-in pricing in economic sectors as diverse as

As a matter of economic theory, this proposed rule offends basic notions of a free market. A company's strategy for setting, advertising, and marketing prices is a core component of a functioning market and encompasses nearly every aspect of consumer-facing economic activity. Although a free market assuredly requires pricing transparency so that consumers know how much they are paying and for what, courts have not held that disclosing fees "later" in the shopping and purchasing process, but before purchasing, is unfair or deceptive. Nor have courts required companies to provide all-in pricing in all transactions.

In practice, this proposed rule would harm both business and consumers. Widespread government-mandated disclosures would impose a significant burden on businesses and prove confusing and burdensome for consumers. Think of all the paperwork associated with a mortgage, an auto loan, or a trip to the doctor – how many consumers would want to wade through a pile of paperwork for every routine purchase? And would such requirements serve any effective purpose or merit the costs?

The FTC provides no reason to think that variable pricing is necessarily deceptive or unfair across all industries and sectors of the economy. The proposed rule gives short shrift to the many contexts in which such variable pricing policies may benefit consumers, such as by allowing ultimate prices to scale with the price of the goods or services purchased. For instance, airlines charge more for a variety of things that consumers value, such as early seating and preferred seats, including seats in first class or in the exit row. Movie theaters may soon charge different prices for different seats. These sorts of pricing strategies allow customers to pay for what they value and provide businesses with useful information about what to sell and where to invest.

In contrast, the proposed rule would have significant downsides. Charging everyone the same fee, regardless of how much or how little they purchase, would misallocate resources and mute those critical price signals. It could also be considered "unfair" – an important term of art thus providing the FTC the means to prohibit it. With one price, some consumers would receive windfalls (e.g. the most popular seats) even

12 Wilson dissent, at https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-dissenting-statement-junk-fees-anpr.pdf.

as other consumers pay for more than what they actually receive (e.g. the least popular seats). In fact, consumers today expect that their end prices will reflect the volume or quality of goods they have purchased. As a result, regulatory proposals that would require businesses to disclose, upfront, all-in pricing likely would be difficult to implement and unclear to consumers in many contexts.

Such a rule would also prove expensive. Extensive upfront fee disclosures would impose prohibitive costs on many businesses. Those burdens would pass to consumers through higher fees (to recoup costs) or through the downstream consequence of fewer goods or services. In some cases, an upfront fee requirement could prove unduly burdensome or entirely unworkable, so some companies could abandon certain goods or services altogether if the regulatory costs render the venture unprofitable or impractical.

Finally, there are significant practical issues with the FTC's attempt to impose a one-size-fits-all directive to all industries and companies about how they must present prices to consumers. For instance, the rule also does not distinguish between fees that are fixed and determinable upfront versus fees that vary based on consumer choice. Any rule of this scope will necessarily impose unintended consequences on legitimate business practices, and in many cases reduce consumer choice. When it comes to online orders, consumers often have several shipping and delivery options, which may vary in price due to speed, delivery date, and other factors. Until the consumer has finalized their product selection, the company will not know the amount of the fees, and in some cases, whether they apply at all.

Perhaps worst of all, the proposed rule could start an avalanche of federal efforts to control prices. Already, the FTC is looking to revive a dormant law, the Robinson Patman Act, that effectively discourages price cuts in the name of fairness for small retailers.[13] Other policymakers are calling for federal intervention to control the price of housing[14] and other necessities.

Instead of moving toward price controls, policymakers should explore other avenues to encourage competition and lower prices for consumers. Policies that make it easier for markets to increase supply could ease inflation: reducing tariffs, and relaxing regulations would allow the business community to serve the needs of consumers more efficiently.

History has conclusively shown, and economic theory has confirmed, that government attempts to regulate price reduce investment, cause shortages, and harm consumers. Prices should be transparent, but market competition, coupled with existing consumer protection laws, are the best ways to protect consumers while ensuring that businesses retain the necessary incentives to provide the goods and services that consumers want – and to invest in new ones.

13 See https://www.uschamber.com/finance/antitrust/antitrust-legislation-the-robinson-patman-mistake-all-over-again.

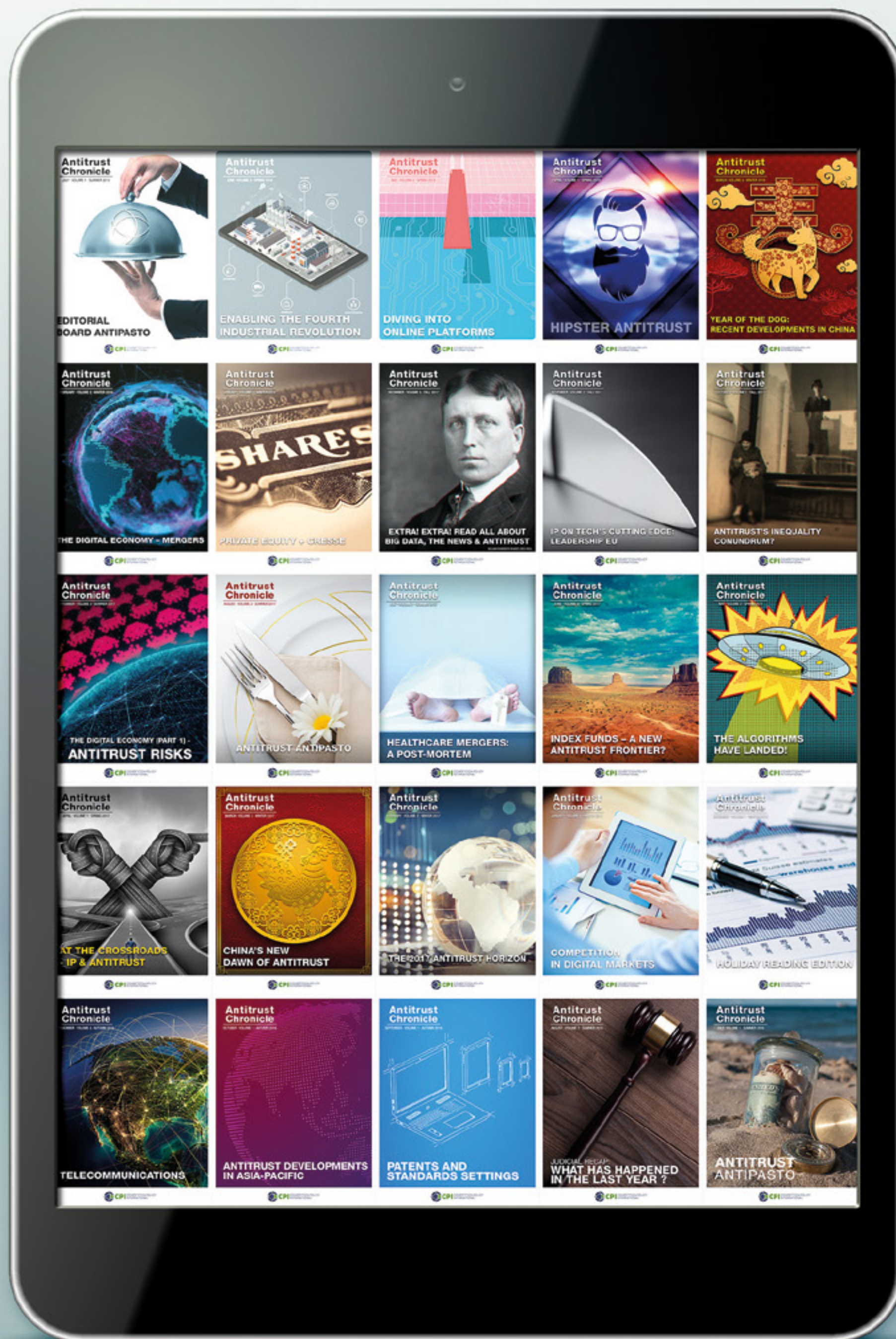
14 See https://www.wsj.com/articles/nationwide-rent-control-congress-democrats-progressives-housing-president-biden-11674233540.

CPI COMPETITION POLICY® INTERNATIONAL

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 today to see our available plans and join CPI's global community of antitrust experts.



CPI COMPETITION POLICY® INTERNATIONAL