

Feds Should Clear The Air Around 'Junk Fees'

By **Kristen Larson** (July 24, 2023)

For over a year, lawful fees charged by consumer financial service providers have been under attack by the Biden administration, the Consumer Financial Protection Bureau and the Federal Deposit Insurance Corp.

Many of these fees are both lawful and clearly disclosed, thus not meeting the CFPB's definition or the elements for an unfair, deceptive or abusive act or practice, or UDAAP.

The Federal Trade Commission and the Office of the Comptroller of the Currency have jumped into the barnstorming against the amorphously labeled "junk fees," as well. The resulting uncertainty that the agencies have created as to which fees can be assessed without carrying substantial regulatory or litigation risk creates a significant challenge for consumer financial service providers.



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Well-publicized recent examples of so-called hidden fees only serve to underscore that the president and his administration are conflating vastly divergent business dynamics in a well-intentioned but deeply flawed campaign.

In fact, this recent attention — as with much of the brouhaha over hidden fees — stemmed from exorbitant concert ticket prices and fees charged by live entertainment companies.[1]

One can understand why the administration would undertake a campaign to score political points with concertgoers and other consumers, but federal agencies should distinguish between what is truly "junk" and what is lawful, disclosed and appropriate.

The campaign against junk fees began in January 2022, when the CFPB issued a request for information regarding fees imposed by providers of consumer financial products or services, which it described as "an initiative to save households billions of dollars a year by reducing exploitative junk fees charged by banks and financial companies." [2]

The CFPB describes these so-called junk fees as hidden mandatory or quasi-mandatory fees added at some point in a transaction after a consumer has selected the product or service based on a front-end price.

Similarly, in October 2022, the Federal Trade Commission issued an advance notice of proposed rulemaking, seeking public comment on "the harms stemming from junk fees and associated junk fee practices and on whether a new rule would better protect consumers." [3]

In an October 2022 press conference attended by CFPB Director Rohit Chopra and FTC Chair Lina Khan, President Joe Biden announced that his administration was taking action to eliminate all junk fees, and encouraged banks to reduce the fees they charge to consumers across-the-board.

Biden continued the offensive on fees in his 2023 State of the Union address, announcing that his administration "is also taking on 'junk fees,' those hidden surcharges too many businesses use to make you pay more."

While the request for information and the advanced notice of proposed rulemaking have solicited comments from financial institutions and consumers regarding their experience with junk fees, the CFPB, FTC and Biden administration's united agenda appears to leave little room for consideration of comments that would challenge their attack as indiscriminate and unwarranted.

Nor would it appear to leave room for comments that raise the concern that this attack on fees could reduce competition by forcing some financial institutions that are unable to charge banking services fees out of business and cause greater consumer harm by financial institutions imposing monthly account maintenance fees for all accounts.

The CFPB has provided inconsistent definitions of junk fees in policy statements, speeches and supervisory highlights. In its March supervisory highlights, the CFPB stated that

Junk fees are unnecessary charges that inflate costs while adding little to no value to the consumer. These[] unavoidable or surprise charges are often hidden or disclosed only at a later stage in the consumer's purchasing process or sometimes not at all.[4]

In its most recent definition provided by CFPB Advisor Brian Shearer in an April testimony, junk fees are described as "any unnecessary, unavoidable, or surprise charge that inflates prices while adding little to no value." [5]

Various fees have been labeled as junk, such as:

- Late fees;
- Overdraft fees;
- Automated clearing house wire fees;
- Wire transfer fees;
- Foreign transaction fees;
- Card replacement fees;
- Check image fees;
- Fees for paper instruments;
- Return item fees;
- Minimum balance fees;
- Stop payment fees;
- Pay-to-pay fees;
- Out-of-network ATM fees;
- Account closure fees;
- Inactivity fees;
- Fees to investigate fraudulent activity; and
- Ancillary fees in the mortgage closing process.

The CFPB undoubtedly wants financial institutions to eliminate junk fees. However, many fees under fire are clearly disclosed and lawful, thus not meeting the CFPB's definition of UDAAP.

For example, recent Office of the Comptroller of the Currency and FDIC guidance on overdraft fees for authorize-positive and settle-negative transactions shares the CFPB's apparent view that these fees are unfair regardless of how clearly and conspicuously they are disclosed to consumers.

Credit card late fees have also been labeled as junk fees, although such fees fail to meet any of the CFPB's junk fees definitions, as Regulation Z requires card issuers to disclose late fees in their account-opening documents for credit cards and periodic statements. As a result, these fees cannot reasonably be considered hidden fees, and cardholders can easily avoid late fees by paying the minimum payment on time.

Despite its apparent preference to avoid rulemaking, the CFPB is compelled to engage in rulemaking in order to reduce the current credit card late fee safe harbor amounts in Regulation Z as contemplated by its recent notice of proposed rulemaking.[6]

Nevertheless, the CFPB ignored both Small Business Regulatory Enforcement Fairness Act requirements that would have mandated convening a small business review panel before issuing the notice of proposed rulemaking and the Regulation Z mandate to make inflationary adjustments to the late fee safe harbor amounts in 2022.

Time will tell whether the CFPB will reconsider its junk fees agenda to substantially slash the credit card late fee safe harbor to \$8 after reviewing the more than 225 comment letters it received in response to the notice of proposed rulemaking.

With the exception of credit card late fees, the CFPB's approach to junk fees has consisted of policy statements and regulation through enforcement rather than rulemaking pursuant to the Administrative Procedure Act. In its policy campaign against junk fees, the CFPB relies solely on the unfairness prong of UDAAP to conclude these lawfully charged fees are unfair.

Under UDAAP, an act or practice is unfair if it causes or is likely to cause substantial injury to consumers, if the injury is not reasonably avoidable by consumers, and if the injury is not outweighed by countervailing benefits to consumers or to competition.

However, most fees that the CFPB has labeled junk fees are reasonably avoidable by consumers.

When the CFPB is unable to meet the elements of unfairness, we expect it to rely on the abusiveness standard, a supervisory approach that allows the CFPB wide discretion to find during an examination that a fee it disfavors is abusive, and thus a UDAAP violation, regardless of how prominently and clearly the fee has been disclosed.

Because the Biden administration has now made junk fees an overtly political issue, the CFPB, FTC, FDIC and OCC will continue their heightened scrutiny on fee practices of consumer financial service providers.

Additionally, the plaintiffs bar will continue to use the regulators' rhetoric as a basis to bring claims against financial institutions. Institutions should mitigate risk by taking a practical approach to reviewing consumer financial services fees and disclosures.

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[1] <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/15/remarks-by-president-biden-on-protecting-consumers-from-hidden-junk-fees/>.

[2] <https://www.federalregister.gov/documents/2022/02/02/2022-02071/request-for-information-regarding-fees-imposed-by-providers-of-consumer-financial-products-or>.

[3] <https://www.federalregister.gov/documents/2022/11/08/2022-24326/unfair-or-deceptive-fees-trade-regulation-rule-commission-matter-no-r207011>.

[4] https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf.

[5] https://www.pahouse.com/files/Documents/Testimony/2023-04-12_123405__HB636testimony.pdf.

[6] https://www.govinfo.gov/content/pkg/FR-2023-03-29/pdf/2023-02393.pdf?utm_medium=email&utm_campaign=subscription+mailing+list&utm_source=federalregister.gov.