
Regulatory Agencies Focus on “Junk Fees”

DECEMBER 2, 2022

The Biden Administration [announced](#) a crackdown on “junk fees” on October 26, led by the Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC), with the goal of “saving Americans, collectively, billions of dollars in unfair fees.” The term “junk fees” has been used by regulators broadly to refer to allegedly unfair or surprise fees or fees for unexpected or unwanted services that provide little to no benefit to the consumer. Common examples include overdraft fees, service fees, processing fees, booking fees, cleaning fees, late fees and termination fees. President Biden asserted that junk fees are not simply an irritant—they “weaken market competition, raise costs for consumers and businesses, and hit the most vulnerable Americans the hardest.” President Biden’s announcement builds on aggressive rulemaking and enforcement efforts by the FTC and CFPB, and there is every indication that those efforts will intensify.

FTC Rulemaking and Enforcement

Rulemaking efforts by the FTC include an [Advance Notice of Proposed Rulemaking \(ANPR\)](#), published on October 20, seeking public comment on junk fees, which the FTC defines as “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.”

The ANPR references prior enforcement actions relating to merchandise fees, account fees and resort fees, and provides examples of other alleged junk fees, such as resort fees at hotels, service fees from ticket sellers and booking fees from airlines. The FTC uses these examples to assert that junk fees are both unfair or deceptive and “prevalent,” a finding required by the [Magnuson-Moss Act](#) for the FTC to promulgate rules proscribing unfair or deceptive acts or practices. The ANPR seeks public comment on the ubiquity of certain fee and disclosure practices as well as justifications for those practices. Specifically, the FTC requests public comment on unnecessary charges for worthless, free or fake products or services; unavoidable charges imposed on captive consumers; and surprise charges that secretly push up the purchase price.

Commissioner Wilson, in her [dissenting statement](#), agreed that the FTC should work to ensure consumers are fully informed when making purchases and that consumers should not be charged for products or services they did not intend to purchase. However, Wilson expressed concern that the ANPR “is untethered from a solid foundation of FTC enforcement; relies on flawed assumptions and vague definitions; ignores impacts on competition; and diverts scarce agency resources from important law enforcement efforts.” She also questioned whether, given the breadth of its coverage, it is of such “vast economic and political significance” that it would be subject to the Major Question Doctrine articulated in the Supreme Court’s recent decision [West Virginia v. EPA](#).

The ANPR comes in the wake of the FTC’s \$3.3 million [settlement](#) with Passport Automotive Group in which the FTC alleged the company “deceive[d] consumers by tacking hundreds to thousands of dollars in illegal junk fees onto car prices” for vehicle reconditioning and inspections. FTC Chair Lina Khan described Passport Auto as “a quintessential junk fee case,” yet she noted that a “forward-looking rule classifying certain junk fees as unfair or deceptive” is necessary for the Commission to “seek penalties against violators or readily get financial compensation for victims” in light of the Supreme Court’s holding in [AMG Capital](#) that Section 13(b) of the FTC Act does not authorize the Commission to obtain equitable monetary relief.

Since issuing its ANPR, the FTC [announced](#) on November 2, 2022, that it entered into a [consent order](#) with Vonage, an internet phone service provider, under which Vonage agreed to pay \$100 million to settle allegations that it charged consumers junk fees and used “dark patterns” to prevent consumers from canceling their service. Under the consent order, Vonage will be required to obtain express informed consent before billing consumers and simplify its cancellation process. Notably, Vonage is prohibited from using dark patterns during cancellation—the first time the FTC has used and defined that term in an order.

CFPB Announcements and Enforcement Actions

In addition to the FTC, the CFPB also has focused resources on junk fees. We expect fees to remain a top priority for the Bureau.

Most recently, the CFPB issued a new edition of its [Supervisory Highlights](#) in which it addressed so-called junk fees in several places. The CFPB found that “pay-to-pay” or “convenience” fees charged by mortgage servicers for making payments in a particular way, such as by telephone or online, were abusive. Mortgage servicers, the CFPB found, charged undisclosed fees of up to \$15 per transaction to customers paying by phone through customer service representatives. The CFPB concluded that these fees took “unreasonable advantage of . . . a lack of understanding on the part of the consumer of the material risks, costs, or conditions” of the service. The CFPB also signaled that general disclosures, such as disclosing that customers “may” incur a fee, are inadequate and do not fully inform the customer of the material costs.

The CFPB has also indicated that other “surprise” fees and fees for services that provide little or no value to the customer will receive scrutiny. In September, the CFPB announced that it entered a consent order with Regions Bank to pay \$141 million to consumers and a \$50 million fine to the CFPB. The Bureau found that Regions charged consumers “surprise” overdraft fees on certain ATM

withdrawals and debit purchases that were authorized when a customer had a positive available balance but settled into a negative balance—commonly known as “authorize positive, settle negative” fees. The Bureau subsequently issued guidance warning banks that such overdraft fees, as well as other and unexpected fees, such as depositor fees for bounced checks, are likely illegal, and indicating that it will bring enforcement actions under its unfairness authority against businesses that impose these fees on unsuspecting consumers.

The CFPB also recently announced that it sued a payments platform for using alleged “dark patterns” to deceive customers into unknowingly signing up for a negative option trial membership that automatically converted to a paid membership, even though customers thought they were simply registering for an event. CFPB Director Rohit Chopra characterized the lawsuit as addressing what the Bureau views as deceptive dark patterns and junk fees.

While the parameters of what the Bureau considers a junk fee are not entirely clear, the CFPB provided some further information about how it will address that question in its [Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services](#) (RFI) published earlier this year. The CFPB described the fees on which the RFI is focused as “fees that are not subject to competitive processes that ensure fair pricing” and fees that are hidden because they “are mandatory or quasi-mandatory fees added at some point in a transaction after a consumer has chosen the product or service based on a front-end price.” The fees in question, the CFPB said, could include:

penalty fees such as late fees, overdraft fees, non-sufficient funds (NSF) fees, convenience fees for processing payments, minimum balance fees, return item fees, stop payment fees, check image fees, fees for paper statements, fees to replace a card, fees for out-of-network ATMs, foreign transaction fees, ACH fees, wire transfer fees, account closure fees, inactivity fees, fees to investigate fraudulent activity, [and] ancillary fees in the mortgage closing process.

Key Takeaways

If the specifics of the regulators’ theory and how (and whether) it differs from established law are not entirely clear, the overall thrust of the initiative is—they are seeking to eliminate, or at least significantly reduce, fees imposed on consumers. We recommend that companies pay attention to these efforts and consider these four points.

First, companies should carefully consider how and when they disclose mandatory fees to consumers. Companies should review their product purchase cycle and consider whether all costs and fees are disclosed in a timely and clear and conspicuous manner. The FTC’s and CFPB’s actions to date suggest that they will take the position that consumers should be informed of the full purchase price of the goods or services they are purchasing early in the purchasing process. Companies should consider also whether to have consumers provide express informed consent—e.g., via check boxes—for fees.

Second, companies should assess whether they charge fees in circumstances where

regulators may take the position that customers may not reasonably expect them or could not readily avoid them, even if the possibility of the fees is plainly disclosed. For example, if the existence of the situation that triggers a fee is itself hard for a customer to understand or outside the customer's control, the resulting fee may be subject to scrutiny.

Third, companies should consider reviewing their policies and procedures with respect to subscriptions, sign-ups, and cancellations, including any obstacles consumers may face in attempting to cancel or unsubscribe. Companies should also ensure that policies and procedures are regularly updated and strictly followed by employees and service providers. They should also pay attention to customer complaints about customer service, difficulty with cancellation or unauthorized charges and investigate to make sure operations are matching their promises to consumers.

Finally, companies should pay close attention to the current rulemaking agenda. The FTC's ANPR, if adopted, would bring sweeping changes that could fundamentally alter how fees are displayed in advertising and across the entire consumer experience. The text of the FTC's Advance Notice of Proposed Rulemaking, titled "Unfair or Deceptive Fees Trade Regulation Rule" can be found [here](#). Interested parties are encouraged to submit comments to the Proposed Rule by January 9, 2023.

Authors



Frank Gorman

PARTNER

✉ frank.gorman@wilmerhale.com

☎ +1 202 663 6036



John C. Wells

PARTNER

✉ john.wells@wilmerhale.com

☎ +1 202 663 6352

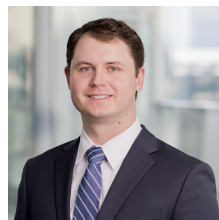


Reade Jacob

COUNSEL

✉ reade.jacob@wilmerhale.com

☎ +1 202 663 6330



Blake Sweat

SENIOR ASSOCIATE

✉ blake.sweat@wilmerhale.com

☎ +1 202 663 6035