

February 8, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

***Re: 16 CFR Part 464, Unfair or Deceptive Fees Trade Regulation Rule Commission
Matter No. R207011***

Dear Chair Khan:

The American Financial Services Association (AFSA)¹ appreciates the work that the Federal Trade Commission (FTC) engages in to protect American consumers, workers, and small business. Our members strongly support the mission of the FTC to ensure that consumers have access to markets that are fair and transparent, while at the same time balancing the needs of industry and enhancing economic stabilization and competition. We do not believe that the FTC’s Advance Notice of Proposed Rulemaking (ANPR)² on fees advances that mission.

In the ANPR, the FTC presents twenty-one questions, most of which rely on the assumption that the fees described in the ANPR as “junk fees” are “unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer.”³ Our response addresses this misconception, provides detail on why the FTC should allow consumers to determine what benefits are valuable to them, and emphasizes that the ANPR removes competition from the market, harming the very Americans the FTC seeks to protect.

Many of the ANPR’s questions are misleading. For example, the first eleven questions begin with “how widespread is the practice of...” Our answer, in the financial services industry, is not at all. Questions 12 and 13 ask about whether the practices described in Questions 1 – 11 cause injury or are not unfair or deceptive. Because we do not believe the practices outlined in Questions 1 – 11 are occurring in the financial services industry, we decline to answer these two questions. Question 14 asks if there is a need for new regulatory provisions to prevent the practices described in Questions 1 – 11. For the financial services industry, the answer is “no.” We answer this question in detail below. Questions 15 – 19 and 21 then ask about how such a rule should be written. As we do not believe a rule is necessary, we decline to answer these questions as well. In Question 20, the FTC asks about publishing additional educational material. We believe the FTC’s current consumer resources are sufficient.

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² 16 CFR Part 464, Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011.

³ *Ibid*, p. 1.

Question #14: Is there a need for new regulatory provisions to prevent the practices described in Questions 1 through 11? If yes, why? If no, why not?

No one likes to pay fees. That is precisely the reason one of the most appealing messages in marketing materials is “free.” Politicians and administrative agencies well understand the public prefers not to pay. In response to this messaging, and the specific questions that the ANPR poses, AFSA reiterates that there is no need to regulate fees in the consumer credit marketplace because there is already robust competition for consumers’ business and broad consumer choice in the market. First, the administration’s definition of “junk fees” is misleading, and the referenced fees are already highly regulated. Second, the FTC is not responsible for deciding whether a consumer finds value in a service offered to them. Third, this proposed rule would limit ability of businesses to lawfully provide consumers with benefits for an additional fee and could negatively restrict competition and raise prices for consumers. Finally, the ANPR seems to violate portions of its rulemaking authority.

I. Misnamed “Junk Fees” are already highly regulated.

While the pejorative term “junk fees” is assured to get headlines, the fees referenced in the financial services industry are already required to be disclosed, negating the need for new regulatory provisions. Both the White House and the CFPB announced *The President’s Initiative on Junk Fees and Related Pricing Practices*⁴ and the ANPR⁵ broadly reference “junk” and “hidden” fees without differentiating between which marketplace fees are already subject to significant regulatory oversight and strict disclosure requirements. Within the consumer financial services market, the Truth in Lending Act (TILA) requires disclosure of finance charges and other fees.⁶ The consumer protections created in TILA has been expanded several times since its enactment in 1968 through the Real Estate Settlement Procedures Act (RESPA),⁷ the Truth in Savings Act (TISA),⁸ and the Consumer Financial Protection Act of 2010 (CFPA).⁹

Collectively, these Congressional actions have created a robust set of protections for consumers, as well as a competitive arena for financial institutions. These disclosures allow customers to compare the upfront and transactional prices of products, which allows customers to choose products that will suit their needs and their expectation of how they will use the product. The ANPR appears to overlap or conflict with these already existing protections. Additionally, the ANPR does not clearly state how these duplicative requirements would interact with the Motor Vehicle Dealers Trade Regulation Rule,¹⁰ proposed by the FTC on July 23, 2022, which focuses on pricing practices and fee disclosures in the automobile industry.

⁴ *Ibid.*

⁵ 16 CFR Part 464, Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011.

⁶ Pub. L. No. 90-321.

⁷ Pub. L. No. 93-533.

⁸ Pub. L. No. 102-242.

⁹ Pub. L. No. 111-203.

¹⁰ 87 FR 42012.

II. American consumers know what services are of value to them.

Fees for goods and services are a fact of life. The Administration's *Initiative* and the FTC's ANPR fail to distinguish between price and value—the latter a personal and subjective matter.¹¹ For example, the Administration is seemingly shocked that categories of airline seating or baggage are subject to a fee. The marketplace dictates how people will behave and passengers decide if the cost of special seating is worth an additional charge or whether a carry-on bag will suffice for a shorter trip. Similarly, in the financial marketplace, consumers should be able to decide the value of additional benefits for their own situation. To paraphrase the renowned economist Milton Friedman, the free market works best for all members of society, it engenders prosperity and solves problems where other approaches fail.¹² The proposed government regulation will not only remove a benefit but will shift the costs to where they may not be avoidable by the consumer and will be borne by all consumers.

Ignoring the already in-place oversight of financial institutions, the ANPR categorization of certain consumer benefits as “junk fees” steers consumers away from purchasing protections that they might both want to evaluate and need. In the case of financial services providers, fees for useful services range from convenience fees to make a payment via credit card or by phone to avoid a late charge, credit life insurance, credit disability insurance, GAP waivers to ensure the consumer is not underwater after a catastrophic car accident, or honoring a check inadvertently written with insufficient funds. These fees and costs are typically transparent in their value. Each of those services provides benefits to the consumer and are fully disclosed. Suggesting they are “junk fees” it is an insult to the consumer and takes away consumer choice. The FTC should not be in the business of regulating whether or not a consumer can ascribe value to a market set price. Instead, the FTC should be focusing its efforts on definitively deceptive pricing, in cases where a portion of the total cost is disclosed late in the process or deceptively.

III. The ANPR would cool competition and raise prices.

Any rule limiting the ability of businesses to lawfully provide consumers with benefits for an additional fee could negatively restrict competition. The ANPR fails to consider that many fees are transactional fees that result from customer choice and behavior and which the costs of are clearly disclosed and are avoidable by the consumer. For example, customers can avoid late fees, overdraft fees, nonsufficient fund fees, convenience or surcharge fees, out-of-network ATM fees, *etc.*, by either paying on time or not choosing the service incurring a fee. Additionally, they may choose to not obtain credit life insurance, and the resulting premium, to pay off a loan because they already have a life insurance policy. Moreover, these fees are allowed by state law and have been considered by the state legislatures. Conversely, if a lender can no longer charge a fee for

¹¹ As the noted Austrian economist Carl Menger noted: “When I discussed the nature of value, I observed that value is nothing inherent in goods and that it is not a property of goods. But neither is value an independent thing. There is no reason why a good may not have value to one economizing individual but no value to another individual under different circumstances. The measure of value is entirely subjective in nature, and for this reason a good can have great value to one economizing individual, little value to another, and no value at all to a third, depending upon the differences in their requirements and available amounts. What one person disdains or values lightly is appreciated by another, and what one person abandons is often picked up by another.” Menger, C. (n.d.). *Principles of Economics*. Ludwig von Mises Institute.

¹² Free to Choose, a Personal Statement; Milton & Rose Friedman (1980).

service, the service may no longer be offered as it cannot be continued at no cost. It must be remembered that fees allow companies to offset costs associated with certain customer actions and to mitigate the risk associated with certain product features. Additionally, fees can also result from products that help the consumer avoid serious default consequences that result from life events that prevent them from paying on a loan, such as the above-mentioned credit life insurance. Without the fees for those that choose the option, it would have to be built into the overall cost, requiring those that do not use the option to incur the cost. This is both unfair to consumers and increases the cost of financing.

Consumer advocates have used rhetoric that the consumer must receive some value from all fees charged. It is our contention that many fees result from products or services that do provide value, including in the peace of mind of knowing they have protection even if the product never has to be used. These advocates also ignore the fact that many legitimate fees are intended to compensate the financial services provider for being placed in a worse position as a result of a subsequent consumer action. In particular, late fees, non-sufficient funds fees, and collection costs are provided for in loan agreements to compensate the lender or subsequent holder for increased risk and expense. For instance, late fees compensate the lender or holder for increased default risk and the expenses associated with collecting missed payments, *i.e.* late fees put the lender roughly in the position they would be in had the borrower paid on time. Similarly, non-sufficient funds fees are intended to offset the expenses associated with collecting and/or re-presenting the now-missed payment and rerunning the accounting on the loan, which may require manual intervention. If lenders are not compensated for these costs, it can not only increase the cost of credit across the board impacting customers that pay responsibly but result in limiting the availability of credit to those same customers.

IV. The ANPR questions indicate a fishing expedition.

The FTC has to follow certain specific guidelines for trade rules that declare an act or practice unfair or deceptive. In this ANPR, the FTC's line of questioning shows that it is engaging in a fishing expedition, rather than clear and appropriate rulemaking. As part of the rulemaking process that the FTC must undertake, it is required that the FTC find that the "unfair or deceptive acts or practices are prevalent."¹³ However, the first eleven questions of the ANPR are asking "how widespread"¹⁴ the practice of misrepresenting fees in different scenarios is. This seems to indicate that the FTC seems to have a solution in search of a problem. Additionally, the FTC can determine that an act or practice is "unfair" only if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits."¹⁵ Once again, the FTC's own line of questioning indicates that they have not identified concrete examples of harm to consumers. Question 12 reads: "For any practices discussed in Questions 1 through 11, above, does the practice cause consumer injury? *If so*, what type of consumer injury does it cause?"¹⁶ The FTC should focus on identifying these widespread patterns itself, as is proper rulemaking procedure, rather than ask commentators for individual instances.

¹³ 15 U.S.C. S 57a(b)(3).

¹⁴ 16 CFR Part 464, Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011.

¹⁵ 15 U.S.C. § 45(n).

¹⁶ 16 CFR Part 464, Unfair or Deceptive Fees Trade Regulation Rule Commission Matter No. R207011.

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AFSA appreciates the work that FTC, the Administration and the CFPB have engaged in to safeguard a fair and transparent marketplace for consumers, however the ANPR as drafted conflicts with both federal consumer financial laws that AFSA members are already subject to, removes consumer autonomy, and encourages a decrease in competition which would only harm consumers. Should you need additional information or have any questions, please feel free to contact me at cwinslow@afsamail.org or (202) 776-7300.

Sincerely,



Celia Winslow
Senior Vice President
American Financial Services Association