April 11, 2022

By electronic submission to FederalRegister.comments@cfpb.gov

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services Docket No. CFPB-2022-000

Dear Sirs and Madams:

The Online Lenders Alliance (OLA) welcomes the opportunity to respond to the Bureau's ***Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services.***

OLA agrees that markets work best when consumers understand the full price of a good or service when they are making their purchase decision. If consumers only see the upfront price, and are not informed about add-on charges, they may not choose the product with the best value, which can undermine competition and have serious ripple effects on working families' finances.

However, the Bureau's RFI paints a misleading view of the financial services marketplace. The RFI is not grounded in substantive, independent research to back up its assertions; fails to take into account the full regulatory and legal parameters under which the industry currently operates; and does not reflect the realities of today's market.

OLA wishes to take this opportunity to address the assertions and presumptions in the RFI.

About OLA

OLA represents the growing industry of innovative companies that develop and deploy pioneering financial technology, including proprietary underwriting methods, sophisticated data analytics and non-traditional delivery channels, to offer online consumer loans and related products and services. OLA's members include online lenders, vendors and service providers to lenders, consumer reporting agencies, payment processors and online marketing firms.
Fintech companies are at the vanguard of innovative online tools that reach new customers, prevent, and mitigate fraud, manage credit risk, and service loans.

As technology evolves and the public's comfort with online financial transactions grows, protecting consumers will be more important than ever. OLA is leading the way to improve consumer protections, with a set of consumer protection standards to ensure that borrowers are fully informed, fairly treated, and using lending products responsibly. To accomplish this, OLA members voluntarily agree to hold themselves to a set of Best Practices, a set of rigorous standards above and beyond the current legal and regulatory requirements. These are standards that OLA members, the industry, and any partners with whom OLA members work use to stay current on the changing legal and regulatory landscape. OLA Best Practices cover all facets of the industry, including advertising and marketing, privacy, payments, and mobile devices. Most importantly, OLA Best Practices are designed to help consumers make educated financial decisions by ensuring that the industry fully discloses all loan terms in a transparent, easy-to-understand manner.[1]

Much of the innovation undertaken by OLA members has given consumers greater control over their financial future. This is especially the case when it comes to access to capital. Whether purchasing a home, starting a business, financing an education, or even paying for auto repairs, the ability to find and secure credit is often a determining factor in a consumer's financial wellbeing. Online lenders provide benefits to consumers, particularly those in underserved communities, with fast, safe, and convenient choices that simply are not available through traditional lending markets.

CFPB Authority to Regulate Fees

The Bureau's RFI implies that it has the statutory authority to regulate fees. Yet such an authority was not a part of the Bureau's objectives as authorized by the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203). It is important to note that, unlike the Department of Justice and the Federal Trade Commission, the Bureau does not have antitrust authority; the ability to impose price controls is completely absent from its authorizing statue. While there have been past efforts by Congress to direct agencies to impose price controls,[2] the Bureau is expressly barred in statue from establishing a national interest rate cap.

The CFPB claims its authority for pursuing an effort to engage on what it believes to be noncompetitive fees stems from its authority to ensure consumers have access to markets and that financial markets for consumer products and services are fair, transparent, and competitive.[3] In fact, the Bureau's authority is to implement and where applicable enforce federal consumer financial laws consistently[4]; it has no authority to wade into the antitrust arena.

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[1] Online Lenders Alliance Best Practices https://onlinelendersalliance.org/best-practices/
[2] Most notably the Federal Reserve
[3] https://files.consumerfinance.gov/f/documents/cfpb_fees-imposed-by-providers-of-consumer-financial-products-services_rfi_2022-01.pdf
[4] 12 U.S.C 5562-11 https://www.law.cornell.edu/uscode/text/12/5511

The Bureau also argues that its authority to make sure consumers get timely and understandable information gives it the ability to regulate fees. However, this assertion is not borne out by the information provided in the RFI. Instead, the Bureau appears to be attempting to stretch one of its designated purposes to allow it to enter an area where no authority currently exists. Even under this tenet, the RFI provides very little justification on how the efforts outlined in the RFI would focus on risks to consumers.

The RFI is Predicated on Flawed Research and an Outdated View of the Regulatory History

Regulations are only as good as the data on which they are based. Congress delegates regulatory power to federal agencies in part so that subject matter experts can use the facts available to appropriately reflect congressional intent. It is, therefore, incumbent on federal agencies to ensure that they are basing rulemakings and other regulatory activity on relevant facts. Unfortunately, much of the research upon which the RFI is predicated has little relevance – and, in some cases, no direct applicability – to current financial markets.

Examples of these deficiency include a study cited in the RFI entitled, *"The Impact of Price Frames on Consumer Decision Making Experimental Evidence,"*[5] which examines consumer selections based on differences between advertised and actual prices. The study finds that consumers are unlikely to abandon purchases when additional fees are disclosed late in the sales process. The study focuses on consumer habits when purchasing products like hotel rooms, airfare and concert tickets. Unfortunately, it covers nothing pertaining to financial services sector, making its relevance to the "junk fees" arguments put forth in the RFI extremely limited.

The RFI also cites a 2016 Obama administration National Economic Council Study, *"The Competition Initiative And Hidden Fees,"*[6] which also looks at consumer behavior when the advertised price does not disclose additional fees added at the end of the transaction. The report highlights the need for "all-in pricing."[7] While that approach may work for products like airfares, concert tickets or hotel rooms, its applicability to financial services transactions is not nearly so simple. It is certainly true that for transactions with APR disclosures, "all-in pricing" is an option; that is what the Truth in Lending Act and the Truth in Savings Act already provide, allowing an all-in price that shows the yield of a savings account.

But this concept of "all-in pricing" cannot be applied across the board, particularly in the case of accounts with fees that vary depending on how the consumer uses the account. This makes it very difficult to have all-in-pricing and problematic to apply the "junk fee" analysis attempt in the RFI.

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[5] https://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf

[6] https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf

[7] All-in pricing comprises the entire cost of a financial transaction or business operation, including all taxes and fees such as closing costs, origination fees, or commissions. Loans and credit card companies present the annual percentage rate (APR) to display the all-in costs as an interest rate.

With any discussion of fees, it is important to note the history of regulation in this area. The RFI seemingly ignores the long track record of federal regulation of fees in the financial services space, overlooking current disclosure requirements when it characterizes fees as “hidden” and failing to acknowledge the substantive limitations on fees imposed at the federal and state levels. The CFPB has also labeled these fees disparagingly as “nominally voluntary,” suggesting that they are not meaningfully avoidable or negotiable across the board.

Furthermore, by not acknowledging existing disclosure requirements and legal limitations, the CFPB ignores significant data included in its own reports. A 2021 Bureau report notes the fact that credit card industry fees declined in 2021 and that other fees in the credit card market have steadily declined since 2008.[8] Yet none of these findings are mentioned in the RFI.

By seemingly ignoring disclosure requirements, substantive limitations, and prior Bureau data, the RFI offers an incomplete picture of the fee landscape facing consumers, resulting in the unsupported assertion that fees are only disclosed in fine print contained in standard contracts. This argument ignores all the application disclosures and other disclosures provided in the Truth in Lending Act, Truth in Savings Act, and the Electronic Funds Transfer Act. Furthermore, Congress certainly has the broad ability to enact or amend laws to achieve the goal of improved disclosures for financial products and services.

The RFI Applies One-Size-Fits-All Approach to Consumer Fees

The Bureau, in its request for information, paints this picture of a pervasive emerging "fee economy," in which the CFPB maintains that businesses are charging “fees that far exceed the marginal cost of the service they purport to cover”, implying that companies are not just shifting costs to consumers, but rather taking advantage of a captive relationship with the consumer to drive excess profits.

The issue of hidden fees was raised in a July 9, 2021, Executive Order promoting competitiveness in American economy. That Executive Order directed the Departments of Transportation and Commerce to study hidden fees. It also suggested that the CFPB look to enforcement prohibitions of unfair, deceptive, or abusive acts and practices “to ensure that actors engaged in unlawful activities do not distort the proper functioning of the competitive process or obtain an unfair advantage over competitors who follow the law.”[9]

However, none of the arguments presented in the RFI as justifications fit into any of the categories that would qualify as unfair, deceptive, or abusive acts and practices. The inference that misrepresentations, omissions, or practices that might mislead consumers somehow are pervasive ignores the existing legal regime covering disclosures and agreements.

[8] https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf

[9] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

In the RFI, the Bureau states it is seeking comments on fees that it asserts are not subject to the competitive process. The RFI appears to assume that all fees are the same, when in fact they are not. In examining fees, it is important to differentiate between three distinct types of fees:

- ***Mandatory Fees.*** Mandatory fees are charged regardless of how the consumer uses the account. They include monthly service fees and account closure fees. Mandatory fees are all fully disclosed. It is difficult to make an argument that such fees, which are clearly identified, are part of the supposed problem.

- ***Misconduct Fees.*** Misconduct fees are assessed for consumer behavior inconsistent with the requirements to which consumers have agreed. The RFI references these types of fees extensively, but they cannot be placed in the "all-in fee" disclosure category because they are wholly dependent on customer actions.

  With these types of fees, it is important for regulators and the industry to consider when and how to disclose them. Standard practices and policies help consumers avoid actions that trigger these fees, such as providing a grace period or giving customers a warning that the fee will be assessed if they do not correct a negative balance by a certain date.

  In addition, the amount lenders are allowed to charge for items like late fees are often specified under state laws and agency requirements, and the amounts often are specifically outlined in servicing guidelines. All this demonstrates that these types of fees are already heavily regulated.

  The Bureau's rationale for labeling them as "junk fees" is the incorrect claim that these accounts would only be profitable if/when the consumer misuses the product, and thus they are hidden fees embedded in the total cost that could be dealt with in a better way. It is unclear what the "better way" that the Bureau references would be, as the Bureau does not propose any solutions. While it is understandable that the CFPB would not advocate for misconduct fees, that in and of itself does not mean that they should be considered "junk fees." The RFI seems to be venturing into safety and soundness issues when it looks at these types of fees aimed at preventing delinquencies and defaults on loans and credit products.

  The Bureau further appears to believe that financial institutions should not levy fees for consumer actions like late or missed payments. However, that is just not a realistic solution based on the costs and regulatory requirements. The decision to impose many of these fees results from consumer actions, and the lender often has an obligation under regulations or state law to act. Furthermore, the prospect of incurring late fees encourages the borrower to pay their loan on time. If it is the Bureau's position that there should be no charge for any of these services, it would be only reasonable to expect higher levels of delinquencies and new pressure to cover those costs in the form of other fees and/or higher interest rates for consumers. That does not make loans more affordable for more people going forward.

- ***Enhancement Fees.*** Enhancement fees are levied for optional services. As with the other fee types, their nature does not make them fit into the "junk fee" category as insinuated by the RFI. The Bureau seems to assert that fees assessed for services and products beyond the baseline price are excessive but provides no basis for this assertion.

  The reality is that, as with other fees, enhancement fees must be disclosed at a meaningful point and time prior their assessment in order to give the consumer an option to agree or decline; in many cases, they are disclosed at the front end before the transaction begins. There are legitimate questions about whether consumers are receiving adequate value for the service the fees provide, but that is a very different question than what the RFI attempts to address.

  One example that the RFI references as a "junk fee" is the cost to consumers for making payments over the phone, online or even for use of bill-pay services. Lenders often incur costs from the use of a third party that facilitates the service. The RFI argues that such fees are unfair because the consumer often is looking to use the alternative payment services to avoid a late fee. Putting aside the fact that in many instances, lenders provide some form of grace period on late payments before a charge is incurred, the Bureau appears to believe that such services should be offered at no cost to the consumer. If lenders were barred from charging fees for such services, what will likely evolve is the lenders will no longer offer these options, exposing the consumer to increased risk of being subject to the late fees.

Conclusion

There was a time when consumers were subject to a much larger array of miscellaneous and undisclosed fees, but today a host of state laws and federal agency actions have created a regulatory regime that protects consumers from hidden and unpredictable fees. The RFI appears to describe an environment that has not existed for more than two decades. The Bureau discounts current practices and the significant changes regulators have made, and it fails to acknowledge the increased regulatory burden resulting from the Dodd/Frank Act that has significantly increased the cost of lending.

There is no doubt that regulation of financial markets is important. But if the Bureau is truly concerned about the cost of lending, it should perhaps reconsider the regulatory burden created by Dodd/Frank and other rules, which have made borrowing significantly more expensive for American consumers.

The RFI also fails to recognize the role that the robust market has played in keeping fees down. For proof all one needs to do is survey the plethora of ads for lending companies to see the multitude of choices that borrowers have. This competition keeps fees low.

OLA and its members oppose deceptive fee practices, as evidenced by its Best Practices. We believe that fees should be made as transparent as possible, as early in the transaction as possible. However, the Bureau's RFI does not address the real issues related to lending. Worse, it appears to endorse an approach that would allow consumers to ignore disclosures and information that inform them about a product's pricing without consequences. Such an approach will result in fewer and more costly financial products for consumers.

We appreciate the opportunity to provide input on this important and constructive initiative. If you have question or need additional information, please feel free to contact me at mday@OLADC.org.

Respectfully submitted,

Michael Day
Policy Director
Online Lenders Alliance