February 8, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B)
Washington, DC 20580
By electronic submission to https://www.regulations.gov/document/FTC-2022-0069-0001

Re: Request for Information Regarding Unfair or Deceptive Fees ANPR, R207011
Document ID FTC-2022-0069-0001

Dear Sirs and Madams:

The Online Lenders Alliance (OLA) welcomes the opportunity to respond to the Federal Trade Commission's (FTC) advance notice of proposed rulemaking (ANPR) "*Request for Information Regarding Unfair or Deceptive Fees.***"**

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 serous ripple effects on working families' finances.

Much of the FTC's ANPR focuses on "drip pricing," the practice of advertising only part of a product's price upfront and revealing additional charges later as consumers go through the buying process. Although this is generally an issue outside the financial services sector and pertains more to products like entertainment tickets, car rentals and hotel reservations, OLA wishes to take this opportunity to provide for the record information on fees as they pertain to financial services and products.

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, thwart fraud, manage credit risk, and service loans.

As technology evolves and the public's consumer 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, 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.

Sound Data and Research Key to the Regulatory Process

Regulations are often 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 base rulemakings and other regulatory activity on relevant facts.

Several studies have been highlighted in the discussion over hidden fees. While they have some bearing on fee structure in many commercial areas, their relevance to the financial services industry is much more limited. One often-cited study entitled, *"The Impact of Price Frames on Consumer Decision Making Experimental Evidence,"*[2] 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.

[1] Online Lenders Alliance Best Practices, https://onlinelendersalliance.org/best-practices/

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

Also often cited is a 2016 Obama administration National Economic Council Study, *"The Competition Initiative And Hidden Fees,"*[3] 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."[4] 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 credibly across the board, particularly in the case of accounts with fees that vary depending on how the consumer uses the account, or with certain loan products that have short durations. This makes it very difficult to have all-in-pricing in the financial service industry.

With any discussion of fees, it is critical to note the history of regulation in this area. There is a long track record of regulation of fees in the financial services space, including current disclosure requirements. OLA would like to stress for the record the substantive limitations on fees that these guidelines imposed at the federal and state levels.

In addition, there exists significant disclosure requirements and legal limitations governing fees in the financial services sector, much of which is backed up by current data. For example, a 2021 report by the Consumer Financial Protection Bureau (CFPB) notes that credit card industry fees declined in 2021 and that other fees in the credit card market have steadily declined since 2008.[5]

It is important that these studies be included in the discussion on fees to demonstrate the impact that disclosure requirements, and substantive limitations, on fees have had in the financial services industry. These studies help provide a complete picture of the fee landscape facing consumers, as opposed to the unsupported assertions that are often offered that fees are disclosed only in fine print contained in standard contracts, a claim that ignores all the application disclosures and other protections provided in the True in Lending Act, Truth in Savings Act and the Electronic Funds Transfer Act.

Any Attempts to Regulate Fees Should Not Employ a One-Size-Fits-All Approach

The narrative around fees, particularly in the financial services sector, often paints a picture of a pervasive emerging fee economy, in which businesses charge fees that far exceed the marginal cost of the service they purport to cover. The implication is that companies are not just shifting costs to consumers, but in fact taking advantage of a captive relationship with the consumer to drive excess profits.

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

[4] 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.

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

The issue of hidden fees was raised in the July 9, 2021, "*Executive Order on Promoting Competition in the 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."[6]

However, in the Request For information (RFI) issued by the Bureau on January 25, 2022, none of the arguments presented 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 is pervasive or even occasional ignores the current regime of disclosures and agreements.

Nothing in the RFI or corresponding materials provided by the Bureau describe any practices that could be labeled as "abusive." Furthermore, there are no actions identified that could be characterized as interfering with the consumer's ability to understand the terms of their products or services. The RFI provides no evidence of abusive acts taking place. In the end, there appears to be little more than an attempt by the Bureau to use its position of power to impose its views about fees onto to the market.

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 kinds 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 under the Prepaid Rule. 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

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

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 baseless 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" would be, as the Bureau fails to propose any solutions. What is quite clear is that the CFPB is not applauding misconduct fees, but 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 examines 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 simply not a workable solution based on 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, late fees incentivize the borrower to pay their loan on time. If the Bureau's position is that there should be no charge for any of these services, the funds to cover these costs will more than likely come in the form of increased interest rates for everyone. That is not a good way to make loans more affordable for more Americans.

- ***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 the 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 for use of bill-pay services. Lenders often incur costs from the use of a third party that facilitates these services. 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 for the moment 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 enhanced services should be offered at no cost to the consumer. If lenders were barred from charging fees for such services, what will more than likely evolve is an environment where lenders no longer offer these options, exposing the consumer to increased risk of being subject to late fees.

Conclusion

When discussing fees, consumer advocates often appear to be describing an environment that has not existed for more than two decades. There was a time when consumers were subject to a plethora 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. As federal regulators look to regulate fees, an important part of these discussions must be the recognition that the expanded regulatory burden resulting from the Dodd/Frank Act has contributed significantly to increasing the cost of lending.

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

It is also crucial to recognize the role that the robust market has played in keeping fees down. For proof, all one need 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. In examining this issue, regulators need to address the real issues related to lending and should avoid approaches that could result in consumers ignoring disclosures and other information that educates them about a product’s pricing. Such an approach will result in fewer and more costly financial products for consumers.

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

Respectfully submitted,

Michael Day
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Online Lenders Alliance