

Testimony of CFPB Senior Advisor Brian Shearer on Junk Fees

Before the Pennsylvania House of Representatives Consumer Protection, Technology, and Utilities Committee

April 13, 2023

Thank you, Chair Matzie, Chair Member Marshall, Representative Pisciotano, and committee members for inviting me to speak today about the important issue of junk fees in the US economy. My name is Brian Shearer, and I serve as a Senior Advisor to the Director of the federal Consumer Financial Protection Bureau (CFPB), Rohit Chopra. I am also the CFPB's delegee on the White House's Competition Council, an important body made up of federal agencies convened by President Biden to focus on issues of fair competition, including the junk fee problem.

The CFPB is an independent bureau of the Federal Reserve System that is responsible for policing the marketplace for consumer financial services, including mortgages, credit cards, student loans, car loans, credit reports, bank accounts, and other markets that touch how American families borrow money, store money, and make payments. Congress charged the CFPB with ensuring that the consumer-finance market is fair, transparent, and competitive. We pursue those goals by enforcing several federal consumer financial laws, including the Truth-in-Lending Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the prohibition on unfair, deceptive, or abusive acts or practices. My remarks today reflect only the views of the CFPB and not the rest of the Federal Reserve System.

A major focus of our recent work has been rooting out the many sorts of "junk fees" that people are routinely compelled to pay to access consumer financial services. In my testimony today, I will describe the CFPB's work on junk fees, and I will discuss the important role that states can play in tackling these kinds of fees.

Before I turn to junk fees, I want to say a few words about the role of states in consumer protection more generally. The federal government does not have a monopoly on protecting American families from unlawful and unscrupulous business practices. The federal and state governments can, do, and should work cooperatively on consumer protection. In fact, states are often the first—and in some cases the only—line of defense for consumers that are harmed by illegal business practices. States have unique insight into how they can protect their own citizens, and they can often tailor their laws and rules more precisely and act more swiftly than the federal government can.

To be candid, the federal government has not always been receptive to sharing these responsibilities. Most notably, in the lead-up to the financial crisis of 2007-2008, the states were first to recognize that predatory mortgage lending was causing immense harm to people all across the country. While the federal government was largely uninterested, many states tried to sound the alarm and Attorneys General across the country were focusing substantial attention to the problem of predatory mortgage lending. And some states tried to legislate. But instead of heeding this warning, federal officials did the opposite, often by using the tool of preemption to displace protective state laws. Studies have shown that this federal pushback against state efforts contributed to the depths of pain and harm that the financial crisis caused.

We at the CFPB have tried to learn from this history, and today we welcome the opportunity to work hand-in-hand with our state partners. For example, we have teamed up with state Attorneys General from across the country to enforce violations of federal consumer financial laws, and we have also encouraged states to bring such actions on their own, both under their own laws and under the federal Consumer Financial Protection Act. We have issued guidance explaining how state Attorneys General and bank regulators can use the Federal laws under our jurisdiction to stop illegal conduct in their states. And we also issued guidance in areas ranging from the credit reporting of medical debt to Truth In Lending

disclosures for small businesses explaining that states have flexibility to enact legislation that is more protective than federal consumer financial law.

On that note, I appreciate the opportunity to testify about junk fees. As I mentioned, junk fees have been at the forefront of our work at the CFPB. The term “junk fees” is a phrase we have been using to describe any unnecessary, unavoidable, or surprise charge that inflates prices while adding little to no value. These charges go by many names—“service fees,” “convenience fees,” or “processing fees,” for example—but what they have in common is that they are part of the price of the product masquerading as fees in order to shield it from the competitive process. These junk fees, often buried in fine print or never disclosed at all, can obscure the true price of products and dilute market competition. Sometimes a junk fee purports to be a fee for an “add-on,” but the add-on is useless, the add-on is something that everyone needs to pay for, or the fee far exceeds the value of the add-on. In some cases, the total amount of junk fees for a good or service can be comparable to, or even exceed, the advertised price.

The CFPB has found that junk fees are prevalent in banking and consumer finance and can take many forms: to name a few, consumer finance companies commonly charge high late fees, overdraft fees, returned deposited item fees, and pay-to-pay fees. These kinds of fees arise outside the financial sector too. Some well-known fees, for example, are “resort fees” to stay at hotels and “service fees” to buy concert tickets.

Junk fees are a threat to fair competition. Competitive markets depend on fair and transparent pricing, where consumers can easily compare prices among several different providers. But junk fees make it difficult, if not impossible, for consumers to make these kinds of comparisons. Companies have become adept at hiding the true price of their products by funneling more and more costs into junk fees. As a result, consumers are often enticed to pay more for a product than they expected or planned. And because junk fees are an easy way to inflate prices and maximize profits, companies have a strong incentive to innovate new fees rather than to compete on price and quality.

We at the CFPB have been using every tool at our disposal to fight junk fees, including rules, guidance, enforcement, and supervision. To name some recent examples, we have proposed a rule that would reduce credit card late fees by \$9 billion a year, we took an enforcement action in which we ordered a bank to pay nearly \$200 million in relief for charging its customers illegal surprise overdraft fees, and we released a report on our findings of junk fees in confidential examinations. We have also released guidance explaining how the law prohibits certain surprise overdraft fees, pay-to-pay fees, and returned deposited item fees.

Our work is part of a broader federal effort against junk fees. This administration has prioritized fair competition in the economy, as evidenced by the creation of a Competition Council in 2021. Junk fees have been a focus of many members of that council. For example, the Federal Trade Commission recently issued a proposed rule to address junk fees that are deceptive or unfair, the Federal Communications Commission adopted a rule requiring broadband companies to provide consumers with an easy-to-understand label disclosing the costs and fees of their service, and the Department of Transportation proposed a rule that would require airlines to make upfront disclosures of common fees, including baggage and cancellation fees.

As I mentioned, however, states are integral to consumer protection, and that is particularly true with respect to combating junk fees. Because junk fees have crept into all aspects of the economy, it will take an all-out effort from all levels of government to protect consumers. We’d be interested in hearing from you about ways that we can strengthen our partnership, and in particular about opportunities for the federal government to help or at least avoid hindering state efforts. For example, our recent work to explain how state Truth in Lending Laws involving small businesses were not preempted by federal law received valuable input from the state of California in the public comment process.

I want to highlight one important measure that states can take on junk fees. Many states, including Pennsylvania, have enacted statutes that generally prohibit unfair or deceptive acts or practices (UDAP). Because many junk fees are likely to be unfair or deceptive under these laws, states can attack junk fees under existing statutes.

However, state UDAP statutes commonly also include an enumeration of specific acts or practices that are prohibited. These lists of illegal practices convey bright line prohibitions that may already fall within the general standard. But they can have more deterrent effect, provide more useful guidance to industry, and are often easier to enforce by private plaintiffs and government enforcers. In the CFPB's view, it is prudent for states to include junk fees in these lists of prohibited practices. These kinds of laws would make explicit what is often already illegal under the general UDAP statutes, and they could make it easier for state Attorneys General and consumers to enforce these statutes against junk fees.

We need both federal and state efforts to address the rising junk fee problem in the US. State legislation is a powerful tool to protect American families. The CFPB is ready to help Pennsylvania in any way it can.

Thank you. I would be happy to answer any questions.

**Prepared Statement of Katherine Van Dyck
in Support of House Bill No. 636**

**Before The Pennsylvania House of Representatives Consumer Protection,
Technology, and Utilities Committee**

April 13, 2023

I. Introduction

Thank you, Chair Matzie, Chair Member Marshall, Representative Pisciotano, and all the committee members here today for the honor of testifying before this Consumer Protection, Technology and Utilities Committee about junk fees and the recently introduced House Bill No. 636, otherwise known as the “Pay What You See” bill, which is designed to stop them.

II. Background

The views presented in this Statement are informed by over a decade of experience that I have gained as an antitrust and consumer protection lawyer. I am senior legal counsel at the American Economic Liberties Project, an independent nonprofit research and advocacy organization that works to promote competition, combat monopolistic corporations, and advance economic liberty for all. Prior to joining Economic Liberties, I represented consumers, small businesses, and employees in false advertising, product defect, antitrust, and wage and hour class actions across the country. I have observed firsthand the power corporations exercise over our economy. Left to their own devices, companies will always put profit over transparency, safety, and competition on the merits, so clear legislation creating a strong incentive for compliance is critical to combatting that behavior.

III. Junk Fees Explained

Sellers have developed two tried and true methods—drip pricing and partitioned pricing—to conceal junk fees from consumers and lure them in with deceptively low prices. With the first tactic, *drip pricing*, an advertisement discloses only the baseline cost for a product to lure in buyers. Then, as the buyer proceeds through the online checkout process, the merchant tacks on what we call junk fees, additional costs with vague names like “resort fee”, “service fee”, “fulfillment fee”, “transaction fee”, “processing fee”, and “ancillary fee” that are ill defined and not clearly tied to any particular commodity or service. With the second tactic, *partitioned pricing*, the ad discloses the existence of additional fees but not the final price. For example, an advertisement will promise “\$25 plus fees” or “\$25 (+\$17 service fee).” As shown below, drip pricing and partitioned pricing create a confusing marketplace for buyers, and their existence structurally harms competition. They have enabled the proliferation of junk fees in transactions, so consumers cannot take advertised prices at face value or comparison shop with any efficiency.

Federal and state agencies have been investigating junk fees for at least a decade. In 2012, the FTC hosted a conference “to examine the theoretical motivation for drip pricing and its impact on consumers, empirical studies, and policy issues pertaining to drip pricing.”¹ In 2016, the Obama Administration’s National Economic Council published a paper examining the economic impact of “hidden fees” and

¹ Fed. Trade Comm’n, *The Economics of Drip Pricing* (May 21, 2012), available at <https://www.ftc.gov/news-events/events/2012/05/economics-drip-pricing> (last visited Apr. 6, 2023).

pressing state and federal agencies to “enact rules that require any mandatory, or de facto mandatory fee be included *in any advertised price*.”² In 2019, the FTC held a workshop regarding junk fees in online ticket sales, and in a remarkable display of consensus, enforcers, economists, and ticket sellers agreed that legislation or regulations requiring “all-in” pricing for ticket sales, coupled with robust enforcement, was the best approach.³ The CFPB launched its own initiative related to junk fees in financial products last year.⁴ And the White House followed recently, with President’s Biden using his State of the Union to denounce them.⁵ The problem of junk fees is, in short, well documented.

The ubiquity of deceptive junk fees and deceptive pricing practices is not only a matter of protecting the individual buyer from deception, though. Threats to competition and to consumers include:

² Nat’l Econ. Council, *The Competition Initiative and Hidden Fees* (“*NEC Hidden Fees Report*”), at 15 (Dec. 2016) (emphasis added), available at https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf (last visited Apr. 6, 2023).

³ Fed. Trade Comm’n, “*That’s the Ticket*” *Workshop: Staff Perspective*, at 4-5 (May 2020), available at https://www.ftc.gov/system/files/documents/reports/thats-ticket-workshop-staff-perspective/staffperspective_tickets_final-508.pdf (last visited Apr. 6, 2023).

⁴ Consumer Fin. Prot. Bureau, *The Hidden Cost of Junk Fees* (Feb. 2, 2022), available at <https://www.consumerfinance.gov/about-us/blog/hidden-cost-junk-fees/> (last visited Apr. 6, 2023).

⁵ The White House, *Remarks of President Joe Biden – State of the Union Address as Prepared for Delivery* (“*Biden State of the Union*”) (Feb. 7, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/>.

(1) systematic transfers of wealth from low information consumers to more educated ones;⁶

(2) a consumer's increased willingness to pay junk fees that flows from a perception that abandoning a purchase after spending one's time in the purchasing process would result in some sort of loss;⁷

(3) consumer confusion around advertised prices that makes it harder for competitors with genuinely lower prices to compete with those who shroud their prices with hidden junk fees;⁸ and

(4) tacit collusion in the form of parallel decisions to make certain junk fees a standard part of the purchasing process.⁹

Clearly, combating the prevalence of junk fees and deceptive pricing practices is not only a matter of protecting the individual buyer from deception but also preserving competitive marketplaces overall.

⁶ See *NEC Hidden Fees Report*, *supra* note 2, at 9; Fed. Trade Comm'n, *Economics at the FTC: Drug and PBM Mergers and Drip Pricing* ("FTC Drip Pricing Report"), at 15 (Dec. 2012), available at http://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-drug-and-pbm-mergers-and-drip-pricing/shelanskietal_rio2012.pdf (last visited July 20, 2022) (noting evidence that "there are regressive welfare consequences of shrouding because the welfare losses are likely to be borne by consumers with low levels of economic literacy").

⁷ Steffen Huck & Brian Wallace, *The impact of price frames on consumer decision making: Experimental evidence*, at 3 (Oct. 15, 2015), available at <https://www.ucl.ac.uk/~uctpbwa/papers/price-framing.pdf> (last visited July 20, 2022); *NEC Hidden Fees Report*, *supra* note 2, at 9. There are multiple behavioral explanations for this phenomenon. One is called the "endowment effect", which "can cause consumers to feel as if they own the good as soon as they initiate the buying transaction." *FTC Drip Pricing Report*, *supra* note 6, at 20. Another is "anchoring", whereby consumers "focus[] on the base price and adjust incompletely when the additional charges are revealed." *Id.* These "loss aversions" wipe out 22% of consumer surplus. *Id.*; Huck & Wallace at 1, 2.

⁸ *NEC Hidden Fees Report*, *supra* note 2, at 9.

⁹ *Id.*

If deceptive junk fees are allowed to persist, we will have markets that reward companies and sellers who put their entrepreneurial energies into finding clever ways to add unlisted fees, “optional” services, and other add-on costs to the final price of what they are selling.¹⁰ Honest businesspeople—who make investments and innovations to grow their companies, provide consumers with better and cheaper services, and expand their workforce—should be the ones to get ahead in a fair marketplace.

Unfortunately though, under the consumer protection laws that exist today, consumers are left with little recourse when saddled with junk fees. Courts frequently reject claims that drip pricing and partitioned pricing are deceptive, because the purchaser is advised of their existence before incurring a binding financial obligation.¹¹ The “Pay What You See” bill would eliminate this loophole by mandating

¹⁰ Heidhues, Paul, Botond Kőszegi, and Takeshi Murooka. *Exploitative innovation*. *American Economic Journal: Microeconomics* (Feb. 2016), available at <https://www.aeaweb.org/articles?id=10.1257/mic.20140138> (last visited Apr. 5, 2023)

¹¹ See, e.g., *Washington v. Hyatt Hotels Corp*, No. 19-cv-04724, 2020 U.S. Dist. LEXIS 101118, at *13 (N.D. Ill. June 9, 2020) (“a customer booking a room through Defendant’s website or app would have necessarily noticed a price discrepancy between the initial price quote and the final charges before committing to the transaction”); *id.* at *17 (the plaintiff “could have avoided paying the modest resort fees by, among other things, choosing a different hotel or opting for an Airbnb”); *Ford v. Hotwire, Inc.*, No. 07-cv-1312, 2008 U.S. Dist. LEXIS 108584, at *10 (S.D. Cal. Feb. 25, 2008) (“Nothing about Hotwire’s alleged [drip pricing] practices prevent consumers from independently researching hotels or making reservations by contacting the hotels directly.”).

what is known as “all-in pricing.” Its passage would (1) clarify that junk fees are unfair and deceptive, even when disclosed just before a buyer incurs a financial obligation; (2) protect buyers from predatory advertising that lures them into a purchase before they know their full cost; and (3) create a more competitive and transparent marketplace.

Economic Liberties fully supports the broad approach of HB 636. Yes, junk fees in certain industries – concert tickets, food delivery, hotels, and air travel – have received significant public attention.¹² But any attempt to narrowly address one specific deceptive pricing practice is likely to result in its replacement by another, similarly deceptive practice. For example, ad studies show that consumers consistently underestimate the total price of whatever they’re purchasing, so partitioned pricing has the same effect of drip pricing.¹³ Thus, allowing advertisers to use generic phrases like “plus fees” to partition the displayed price into the base cost and fees is insufficient. The decision to wrap the ban on junk fees into Pennsylvania’s existing Unfair Trade Practices and Consumer Protection Law also has the added benefit of subjecting the practice to a robust public and private enforcement

¹² *Biden State of the Union*, supra note 5; White House Council of Econ. Advisors, *How Junk Fees Distort Competition* (Mar. 21, 2023), available at <https://www.whitehouse.gov/cea/written-materials/2023/03/21/how-junk-fees-distort-competition/> (last visited Apr. 6, 2023).

¹³ With partitioned pricing, an advertisement discloses the existence of additional fees but not the final price. For example, an advertisement will promise “\$25 plus fees” or “\$25 (+\$17 service fee)”. “Empirically, the effects of deceptive drip pricing and partitioned pricing are the same.” *FTC Drip Pricing Report*, supra note 6, at 13.

mechanism that has already been tested in the courts and allows for injunctive relief, restitution, civil penalties, and statutory damages.¹⁴

IV. Conclusion

Junk fees are a serious threat to the health of our economy. Whether implemented through drip or partitioned pricing, they are deceptive advertising practices that significantly distort the marketplace for competitors and consumers alike. Consumers cannot rely on advertised prices because the true cost of most goods and services is concealed, and comparison shopping has become a time-consuming and confusing process. The “all-in” rule created by HB 636 is a simple but effective approach to combat junk fees, ensure fair competition, and protect consumers. Thank you for addressing this problem in a serious and thoughtful manner.

¹⁴ 73 Pa. Stat. Ann. §§ 201-1, *et seq.*