

Consumer Finance Monitor (Season 6, Episode 38): Shining a Bright Light on Digital Dark Patterns

Speakers: Alan Kaplinsky, Michael Gordon, Ed Rogers, and Andrew Nigrinis

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly podcast show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program. For those of you who want even more information, don't forget about our blog, Consumer Finance Monitor. We've hosted our blog since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us to ballardspahr.com.

And if you like our podcast show, please let us know about it. Leave us a review on Apple Podcasts, Google Play, Spotify, or wherever you obtain your podcasts. Also, please let us know if you have ideas for other topics that we should consider covering or speakers that we should consider as guests on our show. Today's episode is a repurposing of a webinar that we presented on August 16th called Shining a Bright Light on Digital Dark Patterns. So the Federal Trade Commission's lawsuits against Amazon and Publishers Clearinghouse alleging that the companies use dark patterns to enroll consumers or to sell products are part of this massive ongoing effort by the Federal Trade Commission and the Consumer Financial Protection Bureau to combat what the agency's view is.

An intolerable rise of digital dark patterns that are being used to deceive, steer, or manipulate consumers into behavior that's profitable for companies, but often very harmful to consumers or contrary to the intent of consumers. The Amazon and publishers Clearing House lawsuits underscore the need for all companies that are subject to CFPB and/or FTC enforcement jurisdiction to understand the agency's theory of dark patterns so that they can take a fresh look at their digital interfaces with consumers to assess their vulnerability to challenges under the Consumer Financial Protection Act, the Federal Trade Commission Act or other laws, and then make necessary changes.

And toward the end of our webinar today, we are going to share with you what we would be putting on our to-do list if we were advertising on the internet or on apps and things that ought to be done to make sure you don't get into the cross-hairs of the CFPB or the FTC with respect to this issue. So let me introduce our presenters today. First of all, Mike Gordon. Mike is a partner in our consumer financial services group based in our Washington DC office. He's a former senior CFPB official with over two decades of experience in consumer financial services law. He focuses on enforcement defense compliance and exam readiness. When he was at the CFPB, he was a senior assistant to then director, Richard Cordray. Then is Ed Rogers. Ed is a partner in the litigation department at our firm.

He's a member of the Antitrust and Competition Practice Group for much of his 30-year career at Ballard Spahr Ed specialized in complex business litigation with particular focus on the antitrust laws as well as federal and state disclosure laws and unfair and deceptive trade practice claims. I've worked with Ed over the years in defending many class actions including a class action that got filed several years ago against major credit card issuers, challenging under the antitrust laws, their right to assess foreign currency conversion fees in connection with the use of credit cards overseas. And then certainly last but not least, our good friend Andrew Nigrinis. This is his inaugural appearance on our webinar program, but he will be no stranger to any of you that listened to my interview of Andrew on our podcast show a few months ago. Andrew was a pioneer. I guess that's the way I would best put it.

That is he joined the CFPB not long after it was stood up, and he served as the, I didn't say 'a', the sole enforcement economist at the CFPB and he led the bureau's economic analysis and evaluation in more than 70 enforcement investigations. He really is steeped in this topic that we're talking about today, namely the dark patterns. And I guess you could say, although Andrew didn't invent the term, he figured out how to apply it in the consumer financial services area to companies that were

using the internet and using various apps that they had created in order to get consumers to take some kind of action. To purchase, to sign up for a loan or to open up a deposit account or to willingly give away private information about themselves. And Andrew is going to enlighten you today and give you a lot of very good insight about the thinking of the CFPB in this area. So without further ado, I am going to turn the program over to Mike. Let's get the thing on the road, Mike, and go ahead.

Michael Gordon:

Thanks, Alan. This is an introductory slide here just to set the table for what dark patterns are, what are we talking about? And for me it's a little bit reminiscent of the junk fees initiative. For those who have been following junk fees is another one of these terms that's pejorative and perhaps vague, but that has become in vogue and it's seen as a useful way to frame certain issues by, in this case, federal regulators primarily. And so dark patterns doesn't have a universal definition, but it's an attempt to address an array of practices. And we're going to keep hearing about it because it's become now embedded in certain state statutes and lots of guidance at the federal level. And so the regulators are going to continue to use it as a lens and it refers to generally speaking, efforts to significantly influence or interfere with consumer decision making.

Typically in an online way. It's sort of a new name for trickery in consumer interactions, it may be relatively new to the regulatory lexicon, but for decades the FTC has been combating deceptive practices that could be characterized as dark patterns. And of course the CFPB for a decade has been going after practices, it perceives to be deceptive. And so deception is a big piece of this, although I would say it's deception plus because I don't think deception covers all permutations of what a dark pattern is. One definition that we've seen, I put up here, practices that mislead or manipulate consumers into taking actions that do not reflect their true intent, choices or consent. And I think that regulators, when they look at the online environment, and maybe this is particularly true for consumer financial products, they see companies with a lot of ability to affect how that environment looks and how the consumer interacts and they've become increasingly concerned, I think, that choices are being steered and that consumers may be frustrated in their ability to express their true intent and choices in that online environment.

In a moment, Andrew's going to go through a taxonomy that's kind of helpful based on what the FTC has put out with different types of dark patterns. I would say maybe I would reduce it to four big buckets of types of practices and then I'll tell you what those are and then I'll turn it over to Andrew to get more specific. But one is dark patterns are designed to induce false beliefs. So things like making a neutral, making it look like there's a neutral comparison shopping site or information, but it's actually based on something like the compensation paid by the providers of the product or service. Second would be hiding or delaying disclosure of material information such as bearing key terms until after you buy it, buy whatever the thing is.

A third bucket could be practices that lead to unauthorized charges in a whole bunch of different ways. And you're going to hear today a lot about that and particularly about negative option products and recurring subscription charges, which are a big focus of dark patterns. And the fourth is obscuring or subverting privacy choices. Making those choices difficult to understand or access or not allowing consumers to definitively reject data collection or use. There's a lot of this law is being built up in the privacy and data area, so we'll address that as well. But the stage is now set for I think what will only be increased regulator focus on this at the federal and state level through legislation, rulemaking and enforcement efforts. So it is a good theme to familiarize yourself with, and with that I'm going to hand it over to Andrew to speak in a little more detail.

Andrew Nigrinis:

Hi everyone. Before we start, I just want to say that I'm honored to have been invited by the Ballard Spahr team and I appreciate it and I'm humbled for the opportunity to hopefully enlighten you on this topic and it's definitely a growing topic. So the taxonomy, the taxonomy we're taking is from the FTC report, bringing dark patterns to light, clever name, from September 2022 and they broke this taxonomy, I would like to emphasize that this is not an exclusive list, this is just what they produce in 2022. The first is endorsement and social proof. So endorsement, think of the FTX lawsuits endorsing a product online, social proof pressure, everyone is doing it, why aren't you? Scarcity and urgency, we've all seen this, the baseless countdown timer, obviously an exception to this is if you're in a timed auction, that countdown timer is actually meaningful, or the classic exploding offer.

Obstruction: They really like to throw the term around Roach motel. It's easy to get in, it's hard to get out, and this has caused a lot of activity in the negative option marketing, which we can go into later. Also, another thing that comes under this

category is price comparison prevention, sneaking and hiding information, sneaking things into the basket. So for instance, this can be done by pre-checking boxes and if the consumer doesn't notice it, then it ends up in the basket for checkout. Hiding the price or the auto renewal. This ties into what was just mentioned into the whole junk fees. Hidden information. So I saw this really interesting article on an app that I won't name, where the person writing the article found that it was really easy to use the app, but when this person tried to cancel the app, the instructions were only available on the website.

So here the information is not consistent with the platform that's being used. Hidden costs, drip pricing, so drip pricing was a big focus of the FTC quite a few years back. I like to say everything old is new again. Drip pricing, the most classic example of this is the checkout process and extra fees are put on, for instance, when you're checking out from a hotel or resort or you're booking a hotel or resort. A new one that I actually don't have experience with but is really interesting and would like to see it in action is the use of an intermediate currency. So for instance, requiring you to buy a token or a digital currency, so kind of an intermediate currency is a way to hide the true cost of things. Interface interference, so misdirection, this is classic where the option they want you to pick is in a bright button and the one that says no thanks is very small.

This actually came up in the Credit Karma case, which will be spoken about more later. Course action, nagging, or one that really gets to me is forcing the creation of an account in order to go further and then asymmetric choice. So confirm shaming, the text that says, "So you don't want to save \$10?" Trick questions.

And of course the one that is really being emphasized these days and you see it a lot, is subverting privacy choices. Now I just want to say that that's the taxonomy of the FTC, but the basis for this is behavioral economics. It's the fundamental assumption that's driving a lot of the CFPB and it's the... To keep in mind is without behavioral economics, a rational consumer with full information can make choices on their own. Behavioral economics is showing that there are mistakes being made. So, common theories of behavioral economics, the default bias, people stick with their choices, scarcity bias, that's how you get things like the countdown timers. The third one that's very common is loss aversion. So that's straight from the work of Kahneman and Tversky's Nobel prize winning papers. We value losses three to five times more than we value gains.

A fourth is the endowment effect. We value things more when we have them than when they're being proposed to us. Hence a lot of language is saying it's yours, don't lose it. Now it's really important to emphasize is that behavioral economics is highly content specific. There is no general theory. I can give you a dataset and that dataset says by this analysis, therefore behavioral theory X is happening. What you do find instead is do you find that the data is consistent with the behavioral theory. But research has shown that sometimes the same data can have different behavioral explanations. Now, I'm not trying to downplay behavioral economics, it's a great innovation and a major step forward in understanding of economic behavior, but because these things are context specific, it's not a proof and it's something that can be argued and litigated and it's something through the use of an outside counsel and with economists is something that you can bring up when you're in the situation of dealing with the government.

So what is new about dark patterns? Well, increased frequency, I mean it should be no surprise. Digital platforms are ubiquitous. They're everywhere. They handle things from consent, credit card originations and communications. And as will be discussed later, there's been a large increase in cases and it's not just one page or form that you need to worry about, but think about it as the process flow. So how the different webpage interact with each other. What's really interesting is I saw there's a case in Italy through the data financial... I don't remember the Italian exactly, but there was a fine there and there's proposed dark patterns laws going on in Korea, so it's something that's growing internationally, so it's not likely to go away anytime soon. Increased effectiveness, well, it's technology, but I would like to say the increased effectiveness comes from two sources. The first is increased knowledge of human behavior.

There's a famous book by a behavioral economist called Daniel Ariely where he says it's called Predictably Irrational. Irrational shows that behavioral mistakes can be induced, that are profitable to the firm, that are hurtful to the consumer and predictable. It's reliable. It means that you can build a business model on this and it can be premised on mistakes. When those two come together, you can see very... Business models that can be premised on behavioral mistakes. The second is empirics, technology has made AB testing, and for those of you who haven't heard of AB testing, don't worry about it. It's very much a term that comes from engineering. It simply means you're presented version A or version B, and which one gets more engagement? Is it more likes, accept, hitting the button? Whatever your metric is that you define engagement. It's very popular in user experience design.

Now why does it matter? Well, it matters because the experiments drive design to be more engaging. They're cheap and they're easy to run and as a result they're very standard across the industry. However, this data is sitting there and can be discovered in discovery. The Credit Karma case, which will be talked about later, is a good example of this. They explicitly mention AB testing in the consent agreement or the complaint. Agency resources are limited, so almost every company in your engineers have tons of AB testing, not to say that the sky is falling, but agency resources are limited. In my advice, is that through outside counsel, data should be reviewed ideally by an economist to assess the possibility of legal exposure. Now, based on that last thing, I just want to emphasize all my legal advice is based on an economics training.

Keep that in mind, but a lot of this data sitting there and it's the process that has made web design so powerful and effective may also create potential liabilities and then increase attention from regulators. Well, the FTC emphasizes four points. The first are dark patterns to induce false beliefs. The second is hiding information or disclosures. The third is our unauthorized charges, which we like to call junk fees. And the fourth is obscuring and subverting privacy choices. And there was a big Google case about that recently. I would add two extra points. It seems that there's going to be a big emphasis on discrimination via artificial intelligence machine learning. So this is really important for the FinTech space. A second is negative option marketing. It's a large part of the Amazon filing and it was part of the Vonage case that had a hundred million dollars settlement.

I believe those were in October of 2022. And then once you have the governments attention, they will issue a CID, and this is your time to start a dialogue and they will ask for data. And the kind of data they want will be on direct engagement, supplemental data, like quick data and usage statistics, other things like AB records and survey data, they may have done. I believe the goal is to have a well thought out economic report to convince that no violation has occurred or to define the negotiation space to make a deal or a consent agreement. Ideally, you should be doing this through outside counsel in order to get all the benefits of privilege. If this does go further, I can later discuss the actual litigation process. But what makes dark pattern special is data, data, data. And this particularly has a big emphasis on the FinTech space because everything you do in FinTech, is creating a data footprint.

Ed Rogers:

Thank you, Andrew. I want to welcome everybody. I'm Ed Rogers. I'm an antitrust lawyer with a focus on consumer finance and it's work I've done for some time now. I just want to preview what will come later in the presentation about the way that antitrust law figures into the mix and should be of concern to people in the industry, both lawyers and business people. As Andrew noted, the FinTech sector is growing rapidly and is often the prime interface that a consumer has with consumer financial services, whether it's a digital payment platform or a buy now pay later plugin. These are growing vehicles and techniques and the digital market and they exist in the digital space. Antitrust traditionally has not been very good about dealing with digital markets and figuring out how competition gets affected in digital markets, but that is changing and we'll be getting into that in a bit more detail in a few minutes.

But for present purposes, what's important to know is that there's a focus both at the FTC and also the CFPB, which has expanded its focus to include enforcing the competition laws in recent years. There is a focus on digital markets, how they are structured and how they can become more competitive and consumer friendly. And a lot of this is the result of our current share of the FTC Lena Khan, who was among the earliest people to focus on digital markets and how they affect competition way back when she was in law school, which actually in her case, wasn't that many years ago, but she has brought that to her portfolio at the FTC, and we'll be talking about this a little more concretely later. I now want to turn back to Mike so that we can talk about the focus of federal regulators on dark patterns. And then I will be back a little bit later on to talk about why antitrust law is a particular concern.

Michael Gordon:

Thanks, Ed. So let's try to provide a little bit of the legal framework for how the federal regulators are approaching dark patterns because dark patterns is a new concept with a lot of different meanings, but many of those practices that are of concern or dark patterns have been the subject of attention for years. So it's a combination of different kinds of legal theories and statutory bases that we see utilized. So let's begin with the FTC on the consumer protection side. I'll let Ed handle the antitrust side in a moment. But on the consumer protection side, the main authority that the FTC uses for consumer

protection matters is section five. They're unfair and deceptive acts and practices authority, but that's not the only authority. There are a variety of others. I've listed ROSCA here, which is the Restore Online Shoppers Competence Act.

This has provisions relating to negative option features. Negative options are those where the seller interprets the consumer silence or inaction as acceptance or continuing acceptance, and that's an area that is addressed specifically by ROSCA and often comes up in the dark patterns world. And ROSCA requires clear and conspicuous disclosure of material terms. If you're going to be making a negative option offer, you have to disclose those terms before obtaining any billing information. You also have to ensure you get expressed consent before charging the consumer, and you have to have simple mechanisms for the consumer to stop recurring charges. So a lot of the enforcement activity and a lot of the guidance activity by federal regulators has to do with negative options. ROSCA is one of those statutes that has specific requirements around negative option. Other statutes that I didn't list here but that have been or could be utilized to attack dark patterns include the telemarketing sales rule for phone call for deceptive practices and phone calls, the Truth and Lending Act, which requires a lot of disclosure for certain loan and credit transactions.

The CAN-SPAM Act, which is an acronym, but that basically it sets all bunch of rules around commercial emails. For children, for products that are impacting children, which isn't normally the case in the consumer financial world, but there's the Children's Online Privacy Protection Act or COPPA, which provides certain data protections for children. And so certain dark patterns are relevant there. Even some other statutes like the Electronic Funds Transfer Act, which prohibits imposing certain types of recurring charges for debit cards or bank accounts without written authorization. There are a variety of statutory bases, but I would say so far we've seen the FTC rely on a teed app authority and ROSCA primarily. Other FTC pronouncements that demonstrate the increased and accelerating interest in this topic are the staff report that Andrew discussed a moment ago.

And there are a number of rulemakings that touch in one way or another on what could be called dark patterns. There is a negative option rulemaking where the FTC proposed a rule in the spring of this year, and the proposal includes requirements for making it easy to click to cancel a subscription, for example. Junk fees, there's an ANPR or advanced notice of proposed rulemaking that the FTC announced last fall around junk fees and where the FTC talks about a concern about unnecessary avoidable or surprise charges that can inflate costs while adding little to no value.

There's also a separate ANPR that the FTC announced last fall targeting product reviews and endorsements that could be relevant here because it includes concepts like fake reviews or suppressing negative reviews or paying for positive reviews, which can fit into the dark patterns rubric as well. In addition, there's the commercial surveillance and data security. That was another ANPR from last fall from the FTC, which has some relevant provisions here, including the collection and monetizing of consumer data where the FTC specifically noted that there concern that dark patterns can be used in the collection of that kind of data such as by burying privacy settings behind multiple layers of user interface.

The CFPB for its stead has UDAP authority, which is the principle authority that it uses in the enforcement context generally. And certainly that will be true for dark patterns, but like I mentioned, there are lots of other statutes that the Bureau enforces that could relate to dark patterns conduct like the Truth and Lending Act, the AFTA Electronic Funds Transfer Act, also ECOA, which is a fair lending statute, a fair credit statute that has been used in certain enforcement activity that relates to fees or costs that were hidden and impacted certain groups disproportionately. Their abusiveness policy, I mean, abusiveness has been kind of a lightning rod within the Bureau's authorities from the get-go. It was a new authority that Congress gave the Bureau and the Dodd-Frank Act. It has a statutory definition, which sounds like it might be getting at some of these dark patterns things, and I wouldn't be surprised to see the Bureau use that tool more in the future.

So for those who don't remember, the abusive acts are defines as those that materially interfere with the ability of a consumer to understand a term or condition of a product or service or take unreasonable advantage of a consumer, either of their consumer's reasonable reliance by the consumer on the cover person to act in the interest of the consumer or of the ability or the lack of understanding on the part of the consumer of the costs or risks or conditions of the product or of the inability of the consumer just to protect their interests in selecting a product or service. And we saw in a policy statement that the Bureau put out about abusive acts of practices a few months ago, a specific mention of dark patterns saying that dark patterns affect that first prong of the abusiveness definition. They say dark patterns materially interfere with the ability of a consumer to understand a term or a condition of a consumer financial product or service.

So the bureau is concerned about that, and they specifically called out certain practices that may interfere with the consumer's ability to understand, such as using a popup or dropdown boxes or multiple click-throughs or other actions that make material terms less accessible or salient. There was also a circular on negative option marketing practices the Bureau put out that sounded a lot of the same themes that the Bureau has, I mean that the FTC has been sounding about dark patterns, and we are going to address in a moment enforcement by both the FTC and CFPB, but that's sort of a rundown of, I don't even think it's an exhaustive list, but it's a pretty inclusive list of the types of authorities and policy statements where the regulators are addressing their concerns about dark patterns. Some examples, and there could have been dozens of cases or more that I could have put on this page to talk about because like I said, for decades there have been deception cases brought by the FTC and for many years by the CFPB that address patterns that now fit within this notion of dark patterns.

But I wanted to highlight just a few to give you a flavor of the kinds of allegations that we see. The Credit Karma case was a consent order with the FTC in 2022. It's worth noting that even though there was a consent order, credit Karma issued a pretty resounding statement that noted that they disagreed with the FTC's allegations in the press release and thought that some of these allegations went beyond... They weren't admitting to anything here, and there's a lot of dispute about the facts. So I mean, I'll tell you what the FTC alleged and why they thought that this might fall within dark patterns. But as a result of the consent order, the Credit Karma was required to pay \$3 million to the FTC, and the case revolved around how Credit Karma was drawing in consumers through different approaches.

According to the FTC, Credit Karma was saying that consumers were pre-approved, individual consumers would get something saying they were pre-approved for a credit card. And they had tested this again internally, in a way that Andrew referred to earlier I think as AB testing, they tested this pre-approved language and how successful that would be for getting the interest of the consumer with just saying they had excellent odds. So pre-approved versus excellent odds. And they tested that and the pre-approved thing got a much higher click rate and Credit Karma used it. But the FTC alleged that this was a false claim, that pre-approval didn't really mean pre-approval, that folks who got that notice sometimes were not in fact approved. But it's an example of that kind of design experimentation and a regulator using that fact pattern of design experimentation in building its case against the company. The Amazon case, this is the case from June of this year where the FTC sued Amazon alleging the use of manipulative, coercive or deceptive interface designs around enrollment in the Amazon Prime program.

Amazon is fighting this and has denied the allegations, but the FTC has alleged that Amazon use these deceptive user interface designs to trick consumers into enrolling and automatically renewing prime subscriptions. They used an unfairness claim. There was also a ROSCA claim for failure to clearly and conspicuously disclose all the material terms before getting billing information and failing to get express consent and failing to provide a simple cancel mechanism. In fact, the cancel mechanism was a significant part of the allegations where the FTC alleges that Amazon made it much harder to cancel than to enroll. And there was a long labyrinthine process that included lots of off-ramps like warnings about missing out on benefits and other things that were seen as manipulative that were put in the way of the consumer and could derail the cancel process. So there were a variety of different dark patterns that the FTC identified in this, in its allegations.

One was forced action, forcing consumers to choose to enroll before completing a purchase or some forced action in conducting the cancel process. Interface interference where revealed material terms were revealed only once and only in a small easy to miss font that was determined to be interface interference according to the FTC. Obstruction was another one where they made the option to decline enrollment very difficult to locate, and also made the cancel process difficult. Misdirection where asymmetric choices represented, which made it much easier to enroll than not according to the FTC, with less prominent links for the decline option. Sneaking where they failed to clearly and conspicuously disclose primes terms and conditions during checkout. And finally, confirmation shaming where use of emotive wording or to guilt consumers into choosing disfavored options. So a real variety of allegations about different kinds of dark patterns.

And then the Publisher's Clearinghouse case is also from this year, just a couple months ago, and it's a proposed consent order that would require company to pay 18 and a half million dollars to consumers. And the allegations here were that the company used dark patterns to mislead customers about how to enter the sweepstakes drawings. And according to the FTC, they mislead consumers into believing that a purchase was necessary to win or to increase their chances of winning the sweepstakes and allegations here, the legal allegations were both deception as well as a CAN-SPAM violation. Junk fees is listed here. There are many cases, both FTC and CFPB that could be listed here.

It's often a component of CFPB enforcement to attack fees that the bureau believes were charged without proper authorization or disclosure. I think of overdraft cases as maybe one of the paradigm kind of cases for this, where there was a particular case against a bank a number of years back for charging overdraft fees for debit purchases and ATM withdrawals without consent, and it required a millions of dollars in restitution and civil money penalties.

And the allegation was that the bank had tested this and the testing showed that the rate of opt-in for the overdraft program doubled when the bank asked for opt-in at the same time that the bank was asking the consumer to agree to other things they were required to agree to in order to open the account. And so they pushed that overdraft opt-in to that part of the process. And the bureau took issue with that in what I think today would've been called an alleged dark pattern. So there are, like I said, many, many cases and different fact patterns that could be fit in here, but that gives you a sense of enforcement activity at the federal level in recent years that addresses so-called dark pattern activity.

Ed Rogers:

Thank you, Mike. I'm now going to... We've obviously heard a great deal about the different types of dark patterns, the thinking behind imposing dark patterns and some of the ways that federal agencies are attempting to police dark patterns. I'd now like to overlay that with a brief discussion of competition law and why it is of particular concern and why it frankly raises the stakes for companies in this area. So let me start by saying that the Biden administration has made competition law a priority. The president issued an executive order early in his term, calling for a whole of government approach to competition issues. And we've seen increased scrutiny of the level of competition in the consumer finance industry over the past couple of years, in part due to the creation within the CFPB of the Office of Competition and Innovation. And there is of course a statutory basis for this, which is that the purpose, the enabling statute for the CFPB includes enforcing laws for the purpose of ensuring that markets for consumer financial products and services are fair, transparent, and competitive.

And CFPB director Chopra has been particularly interested in the competition mandate that the statute provides and that is going to continue with policy pronouncements, with various inquiries and enforcement actions. And we don't have time to cover those in detail today, but I think it is fair to say that both the CFPB and the FTC are increasingly interested in using the competition laws and particularly the antitrust laws as a new weapon against dark patterns. This comes up in the context of junk fees and in fact, the White House has recently issued a guide to states on how they can help crack down on junk fees. And it's worth reading just a couple of excerpts. Competitive markets says the guide depend on fair and transparent pricing where consumers can easily compare prices across products and choose the one that yields to the best value.

That's the essence of capitalism. Junk fees make it difficult, if not impossible, for consumers to comparison shop and they take advantage of circumstances in which consumers don't have the power to shop around. And this is essentially what is at the root of the concern about dark patterns. And why is this an antitrust law? Well, because ultimately why is this an antitrust issue? Ultimately, antitrust is a consumer protection vehicle. It's been used over the century plus since the Sherman Act was enacted in various ways that have benefited small competitors against dominant firms. But ultimately it's about competition. There's a famous Supreme Court case that says the antitrust laws are about protecting competition, not about protecting competitors and what that means in the context of dark patterns. And they think the FTC Amazon case is a particularly good example, is that dark patterns because of all of the, what I'll call the psychological power of these techniques, as Andrew and Mike have described, to steer consumers in a particular direction to a particular service and product, has the effect from an antitrust perspective of enhancing the market power of a dominant firm.

So for example, Amazon Prime is, I think most would agree the dominant player in an element of online shopping that, in this case, that involves a subscription service for free shipping. And the dark patterns are used not just to drive demand for the product and steer consumers away from competing product or in this case services, but they also act indirectly to deprive consumers of information to choose among various competitive options by not only emphasizing the virtues of the particular option that is the subject of the dark pattern, but also with what I would call consumer retaining techniques. In other words, auto-renewals, negative options, tools like that, that essentially keep the consumer in the fold, keep him buying your particular service. And the key statute here from an antitrust perspective, there are really two, there's the FTC Act, section five, which is a very broad grant of power to the FTC, to bring enforcement actions protecting against unfair competition.

But also, and this is what really raises the stakes here, chairman Act claims, many of those will be section two monopolization claims, others will be section one conspiracy claims. And by way of example, to make this a little bit more concrete, I want to

talk briefly about the foreign currency conversion fee litigation that I was involved in some years back. This was a federal lawsuit, and it's a good object lesson because it involved two categories of claims. Claims under the antitrust laws, which were that credit card issuers had colluded to set a price and agree on a price for foreign currency conversion. In the case of the issuers, that was a 2% fee. And in the case of the association's Visa and MasterCard was a 1% fee. The Truth and Lending Act claims, which are really among the bedrock consumer finance statutory claims that are brought in class action litigations.

Those claims were dismissed relatively quickly based on various legal doctrines that were widely accepted in the federal court, such as the reliance requirement and others. But the case went on for 10 years, strictly as an antitrust case, and ultimately reached... The parties reached a settlement of \$336 million, which today would be a far bigger number. This settlement is about 10 to 15 years old. Today, I think the Foreign Currency Conversion Act case might well be a dark pattern case because there would be, in fact, are, ways that credit card issuers interact with consumers and talk about benefits of their particular card and don't always provide all of the details and all of the fees that are being paid. One of the critical elements of the foreign currency case was the agreement, the alleged agreement, not to disclose these conversion fees on credit card statements. And that was used in service of the antitrust claim, not just the Truth and Lending Act claim, but you're gone at that point.

The Truth and Lending Act claim was based on disclosure documents and was straightforward and as I say was dismissed. But the non-disclosure, what we today might call a dark pattern, was viewed as sort of the vehicle by which the price fixing conspiracy was carried out because consumers just got a line item explaining how much the necktie they bought in France cost in US dollars on their statement. It didn't say, "Well, we converted the currency at so many francs or so many", it was then Francs, today it'd be Euros, "to the dollar and then we tacked on a 2% fee". It didn't say that. So that was a key element of the case. And from a very practical perspective, not only are we talking about significant exposure, but we're talking about long and costly litigation. Okay, so this is document antitrust. Let me just back up a minute. Consumer class action litigation, and I've been involved in that particularly involving payment posting practices and things of that sort, are often brought under the Truth and Lending Act or under State UDAP claims are not document intensive cases.

There are form documents, they're very short, they're sent to consumers and they either do or don't comply with the Truth and Lending Act and or the relevant regulations, reg Z or the others, and in antitrust context, the plaintiffs. And by the way, these tend to be very sophisticated, well-funded class action firms given the substantial exposure and therefore potential attorney's fees at stake. We'll go deep into the bowels of the corporation looking for emails and business plans, and then there'll be experts, there'll be economists that will be hired to opine on market definition. There will be other economists who are hired to talk about class certification and there may be industry experts.

All of this adds up along with the legal fees and as you might expect an in terrorem effect on defendants who end up being incented to settle these cases at what might be argued to be overly generous terms. So that's the reason that it's important to think about potentially antitrust liability and how dark patterns can be parlayed into the basis for an antitrust claim. And with that, I want to turn it back to Mike to talk about state regulation of dark patterns and then the best practices, which obviously is of critical importance now that we've identified all these potential minefields.

Michael Gordon:

Thanks, Ed. So we're getting short on time, so I'll cover the state activity quickly. There have been a number of states that have in recent years explicitly injected the notion of dark patterns into their state statutory regimes. And it has come up in state privacy laws. California has with many things took the lead here. And for example, the California Privacy Rights Act provides a definition of dark patterns as a user interface, designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision making or choice. And so the concern here in that statutory context is consumers privacy rights under state law and a similar definition has been adopted by a number of states and at least six have statutory definitions of dark patterns embedded into their state privacy laws with the notion being that consent that is obtained through dark patterns isn't consent after all.

So if that's the way you're getting someone to sign up for to waive their privacy rights or to make some choices, that will not be considered under the law to be valid consent. Other states that have relevant provisions, some with specific dark pattern definitions and others not include Oregon, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Maine, Minnesota, Montana, Texas, and Virginia. All of these have some state statutory restrictions that could be viewed as part of attack on dark patterns. And other states that aren't on that list have specific laws they've enacted to address certain types of

practices that are a big focus of dark patterns. For example, New York is among the states that has requirements for businesses that make an offer for automatic renewal requiring things that are echoes of what the FTC has said and ROSCA and other contexts presenting terms in clear and conspicuous manner, providing information on how to cancel and making cancel relatively easy.

So evolving and varied state laws kind of require all of us to consistently reevaluate which laws and regulations apply and whether the website designs that we're utilizing are compliant. With that, let's go to best practices. And here as with all things, having a good compliance management system and policies and controls will greatly reduce your risk in this area. And particularly for those of you who are subject to examination by the CFPB, there's going to be an expectation by that regulator that you have something that looks like a compliance management system that they're familiar with, and that includes a governance issues and top of the house responsibility for compliance matters, as well as the policies and procedures and controls to implement the various and ensure that you're preventing compliance problems and when they arise, you're addressing them in an appropriate way. I'd like to turn it over to Andrew, who's got perhaps a more detailed and nuanced appreciation for some of the testing and data-driven activities that can be best practices.

Andrew Nigrinis:

I do have a more detailed, but we are running out of time, so I'm just going to hit the key points and trust me, there's a lot more than what I'm just going to say. So let's start off with understanding your choice architecture. The first thing is how is information presented are things like fees clearly stated in consumer finance, there's the Truth and Lending Act, but in other types of like for instance, short installment lending, you have buy now, pay later, this TELA does not apply. This has become very prominent, especially in the recent Google case. Note if you have pre-checked boxes. As a general rule of thumb, the best thing to do in web design is symmetry. Pre-check boxes, highlighting can be seen as a recommendation. And this is clearly a problem if you're seen as an expert giving a recommendation because it could be seen as you're pushing people.

I'm surprised I have to say this, but it comes up quite a bit. Keep all links to disclosures active. Often the solution to many problems is more disclosures or more disclosures, at a minimum make it easy to get to the disclosures. Now, if you need consent, the FTC and the CFPB in their recent cases seem to be pushing in the direction of specialized boxes. So the idea is to get the consumers to stop and truly understand what they're consenting to. This was part of a Google settlement when it came to the tracking data. They now have a pop-up box and you have to explicitly say you're okay with location tracking. Focusing on key decision points, presentation and material. Cases are increasingly about process and the flow through multiple contact points. If you're going through a particular route, like for instance an app or webpage, try to make it all inclusive.

Let's see, terms of service agreements when you're signing up for services, again, is consent really there? It's really becoming a big issue. Now, there's one thing I've seen that doesn't get much attention is the issue of subpopulations. The most obvious subpopulation to deal with are children. Because if you target children, you're going to be into the world of the COPPA, Children's Online Privacy Protection Act, which has already been discussed and they're the lawyers, they're much more experts about that. And it could be the vehicle to file a complaint in the Epic Games Fortnite litigation, the DOJ was involved in that litigation, not just the FTC mainly because of the violation of COPPA, but in Publisher's Clearinghouse, if you look at the consent order, they refer to targeting elderly and low income people. I mean, these are adults, but they're still forming a subclass.

And you have to talk to your outside counsel to decide whether you want to form a subclass as a way of just dealing with this particular issue or whether it's you don't want to do that at all. The pros and benefits of it. It's not a big leap to see a future where you're going to start seeing protected classes as the next step. So example are, especially if you're in the FinTech space, are you making offers equally to certain demographic groups? So for instance, indirect variables like geography, income, et cetera. You might be replicating a race variable and you might be opening yourself up to a discrimination. Hiring people or doing internal. Obviously I'm a little biased here. I always say obviously you should hire the Economist because the money you spend on the Economist is money well spent. But anyways, a statistical analysis, regardless who can do it, who does it, can help define the exposure you're potentially seeing.

And then finally, third party testing through the outside counsel. It's good to hire a statistical economic analysis team to see what kind of exposures and possible liability you're facing. It's hard to give general advice, and so much of this is context specific, but an actual analysis can help you determine your exposure to litigation, your potential to liability, and the kind of

defensive or design measures you can go forward to help reduce your liability. And of course, there's always strategies that are used by the government. I like to put them in two groups. One is empirics and the other one is theory.

Empirics will try to say that the data shows that your dark patterns are effective. Your theory is getting a behavioral economist or some sort of neuroscientist to tell you that this design pattern is hitting a particular behavioral bias or that I mentioned earlier. Independently, they can be very good strategies to go against a firm. But when you combine them together, usually in the same expert, it becomes a really strong argument because you have data showing that the data is consistent with the behavioral pattern. And then you have some PhD professor telling you that, no, no, this behavioral pattern is exactly... The data's showing exactly what you would expect. I've seen a lot of litigations go down that way. There are ways to, like I said, it's context specific, just because they say it's true doesn't mean it is. And now I'm going to pass it on to the next person to talk about common mistakes.

Michael Gordon:

Well, I think I'll just close with this, which is to say, we routinely advise companies on how their user interface appears, what the process flow is for consumer financial products and services with all the federal statutes and restrictions, including dark patterns online. So I encourage you to reach out if you have any questions or concerns based on what we said today. But the one thing that I didn't mention that I do see as a common mistake across the board is paying not enough attention to your own consumer complaints. These are an early warning system for you about anything consumers may be confused about or concerned about in your processes. And you can bet that the bureau is going to be reading them if they ever come knocking, and you should be reading them and reacting to them too and learning from them. And it's a really great way to spot problems early and resolve them before they affect a lot of folks.

Andrew Nigrinis:

May I jump in for a second? There's also the Bureau's consumer complaint webpage, and that does receive a lot of attention.

Michael Gordon:

And with that, I'll hand it over to Alan to conclude.

Alan Kaplinsky:

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