



**OLA**  
Online Lenders Alliance

**INSIGHTS AND STRATEGIES FOR  
PAYMENTS IN TODAY'S  
ECONOMY**

**COMPLIANCE UNIVERSITY**

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**Outline of Today's Discussion**

1. Background resources
2. Current trends
3. Future regulatory landscape

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## Background resources

1. EFTA
2. Regulation E
3. NACHA Rules and Guidelines
4. Card Rules
5. CFPB Guidance
6. Others

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## Law Enforcement

- Consumer protection and bank regulators (CFPB, FTC, OCC, DOJ, FDIC, state attorneys)
- Banks and processors are gatekeepers and “chokepoints”
- Banks and processors are uniquely positioned to spot red flags when underwriting and monitoring
- Banks and processors are the “deep pockets” for consumer redress

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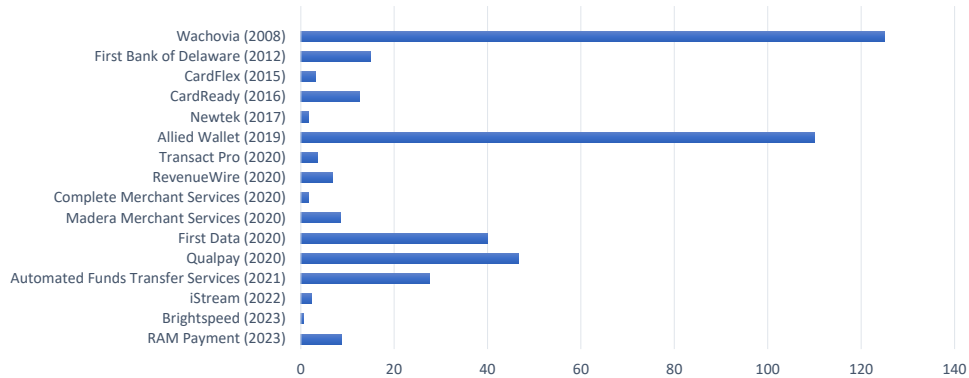
## Typical “Chokepoint” Lawsuit

Theories of Liability	Remedies Sought	Common Settlement Terms
<ul style="list-style-type: none"> <li>• The processor intentionally facilitated fraud</li> <li>• The processor turned a blind eye to fraud</li> <li>• The processor provided substantial assistance to a person that violated telemarketing rules</li> <li>• The processor is jointly and severally liable with the merchant for the full volume of sales processed</li> </ul>	<ul style="list-style-type: none"> <li>• Injunctive relief</li> <li>• Rescission of contracts</li> <li>• Disgorgement of ill-gotten gains</li> <li>• Redress to consumers (total amount of sales processed, less refunds and chargebacks)</li> <li>• Liability for individuals (company officers, directors, managers) (sometimes)</li> </ul>	<ul style="list-style-type: none"> <li>• Ban on operating as a processor (extreme cases)</li> <li>• Ban on servicing certain industries or merchants using certain sales practices</li> <li>• Merchant screening and monitoring requirements more restrictive than industry standard</li> <li>• Payment of a monetary penalty</li> <li>• Sales agent onboarding and monitoring requirements</li> <li>• Notices to bank, ISO, and other partners</li> <li>• Ongoing government oversight and compliance reporting</li> </ul>

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## Monetary Penalty (\$ Millions)



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## Latest Trends in Enforcement

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## Chargeback Mitigation Services

- *FTC and State of Florida v. Chargebacks911* (filed April 12, 2023)
- Allegations:
  - Disputed chargebacks filed against its merchant-clients with misleading information
  - Submitted false web site screen shots to banks
  - Manipulated chargeback rates

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## Merchant of Record Model

- *FTC v. Nexway, Inc.* (filed April 17, 2023)
- Sales for allegedly fraudulent tech support scammers processed through the merchant account of a third party
- Alleged violations of Telemarketing Sales Rule card laundering prohibitions
- Other potential concerns with MoR model: customer service confusion, unlawful/unlicensed money transmission

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## Telemarketing

- Telemarketing Sales Rule (TSR): One of FTC's most powerful law enforcement tools
- Specific provisions targeting debt relief services, negative option marketing, investment opportunities, use of preacquired account information
- Makes it unlawful to provide "substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates" core TSR provisions

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## Digital Dark Patterns

- Manipulative tactics that induce consumers to complete an action they would not have otherwise completed if they understood what they were acting on at the time
- Drive unwitting consumers to purchase items, share information, and agree to legal terms without intending to do so
- **Bringing Dark Patterns to Light – FTC Staff Report, September 2022**
  - Design Elements that Induce False Beliefs
  - Design Elements that Hide or Delay Disclosure of Material Information
  - Design Elements that Lead to Unauthorized Charges
  - Design Elements that Obscure or Subvert Privacy Choices

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## Digital Dark Patterns - Examples

Please enter your details to reserve your item(s)

Title :

First name \* :

Last name \* :

Email \* :

Phone number \* :

Please do not send me details of products and offers from Currys.co.uk

Please send me details of products and offers from third party organisations recommended by Currys.co.uk

- “Trick Questions”
- A series of checkboxes are shown
- The meaning of the checkboxes is alternated, so that ticking the first one means "opt out" and the second means “opt in.”

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## Digital Dark Patterns - Examples

What will you do with your domain name?

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**We've added privacy. Here's why.**

When you register a domain, your name, address, email address and phone number are automatically published for the world to see. Protect yourself from spam and scams with GoDaddy Privacy Protection, which replaces your personal information with ours. [See Example](#)

We highly recommend domain privacy, but it is an optional feature.

Select plan

- Privacy Protection** \$9.99/domain per year  
[View Details](#)
- Ultimate Protection & Security** \$14.99/domain per year ~~\$27.98~~  
[View Details](#)
- No Thanks**

- “Sneak into Basket”
- Extra item added to the cart automatically
- May trick users into adding an item by defaulting to a choice

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## Digital Dark Patterns - Examples

Order Subtotal	\$50.98
Standard Delivery	\$14.99
<b>Care &amp; Handling</b>	<b>\$2.99</b>
Tax	\$4.56
<b>Total</b>	<b>\$73.52</b>
Savings Today	\$9.00

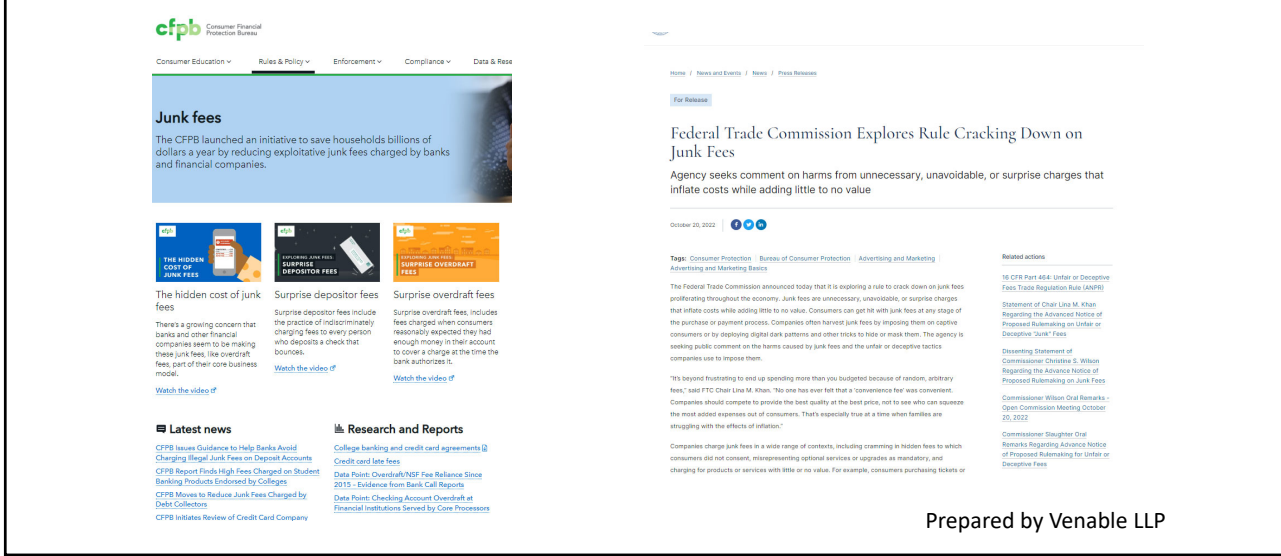
- “Hidden Costs”
- Unexpected costs appear late in the check out process
- Cost may be disclosed only after payment details are filled out

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## Junk Fees

- “Unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value.” (FTC, Oct. 20, 2022)
  - Cramming hidden fees to which consumers did not consent
  - Misrepresenting optional services or upgrades as mandatory
  - Charging for products or services with little or no value
- Examples:
  - Add-on fees for telecommunications services and live entertainment
  - Booking a hotel room or purchasing tickets and finding a surprise fee at checkout (e.g., “resort fee”)
  - Ancillary products in conjunction with loans, auto financing, or another complicated transaction, ending up on the final bill without the consumer’s awareness or consent

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The CFPB launched an initiative to save households billions of dollars a year by reducing exploitative junk fees charged by banks and financial companies.

**Junk fees**

The Federal Trade Commission announced today that it is exploring a rule to crack down on junk fees proliferating throughout the economy. Junk fees are unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value. Consumers can get hit with junk fees at any stage of the purchase or payment process. Companies often harvest junk fees by imposing them on captive consumers or by displaying digital dark patterns and other tricks to hide or mask them. The agency is seeking public comment on the harms caused by junk fees and the unfair or deceptive tactics companies use to impose them.

“It’s vexed frustrating to end up spending more than you budgeted because of random, arbitrary fees,” said FTC Chair Lina M. Khan. “No one has ever felt that a ‘convenience fee’ was convenient. Companies should compete to provide the best quality at the best price, not to see who can squeeze the most added expenses out of consumers. That’s especially true at a time when families are struggling with the effects of inflation.”

Companies charge junk fees in a wide range of contexts, including cramming in hidden fees to which consumers did not consent, misrepresenting optional services or upgrades as mandatory, and charging for products or services with little or no value. For example, consumers purchasing tickets or

**Tags:** Consumer Protection, Bureau of Consumer Protection, Advertising and Marketing, Advertising and Marketing Basics

**Related actions:**

- 16 CFR Part 464- Unfair or Deceptive Fees Trade Regulation Rule (UNFFR)
- Statement of Chair Lina M. Khan Regarding the Advanced Notice of Proposed Rulemaking on Unfair or Deceptive “Junk” Fees
- Dismissing Statement of Commissioner Christine S. Wilson Regarding the Advance Notice of Proposed Rulemaking on Junk Fees
- Commissioner Wilson Oral Remarks - Open Commission Meeting October 20, 2022
- Commissioner Sleight Oral Remarks Regarding Advance Notice of Proposed Rulemaking for Unfair or Deceptive Fees

**Latest news**

- CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Depositor Accounts
- CFPB Report Finds High Fees Charged on Student Banking Products Endorsed by Colleges
- CFPB Moves to Reduce Junk Fees Charged by Debt Collectors
- CFPB Initiates Review of Credit Card Company

**Research and Reports**

- College banking and credit card agreements @ Credit card late fees
- Debit Points: Overdraft/NDF Fee Balance Since 2015 - Evidence from Bank Call Reports
- Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors

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## Pay-to-Pay: Surcharges, Service Fees, Convenience Fees

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## Card Network Definitions

- **Surcharge** – A fee added to a transaction for the acceptance of payment by credit card. Not allowed for debit card transactions. A surcharge is generally defined to mean any increase in the price or cost of goods or services that is imposed on a customer paying by credit card, that is not imposed on a customer paying by cash, check, or other means. Card brands currently cap surcharges to the lesser of the merchant discount rate or 3% (Visa) or 4% (Mastercard).
- **Convenience Fee** – A fee added to a transaction that is charged for a bona fide convenience to the cardholder (e.g., an alternative channel outside the merchant's customary payment channel) that is not charged solely for the acceptance of a credit card.
- **Service Fee** – A separate fee (i.e., not included in a single transaction) assessed to a cardholder that uses a credit card for transactions in certain permitted merchant categories.

Notwithstanding card definitions, many companies and third party servicers add on convenience fees, service fees, support fee, handling fee, care fee, and fees by any other name. **Disclosure is Key.**

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## Legal Considerations

- Laws do not generally distinguish between surcharges, convenience fees, service fees
- Federal law does not currently prohibit a merchant from passing through credit card processing fees
- Talk to counsel about state law issues. Example issues:
  - Only Connecticut, Maine, and Puerto Rico continue to have surcharge prohibitions in full force and effect.
  - In Massachusetts, the Division of Banks indicated that surcharges can only be imposed by the third-party payment processor.
  - In New York, merchants must post the surcharge price alongside the credit card price.
  - In Colorado:
    - Surcharge must be either two percent of the transaction value or the actual amount the merchant pays to the payment processor for processing the transaction.
    - A merchant may not impose a surcharge if the customer elects to pay by cash, check, debit card, debit payment, or gift card.

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## How Will Consumer Protection Regulators View Surcharges and Fees?

- Are surcharges, convenience fees, and service fees “junk fees”?
- Are they surprise charges subject to dark pattern claims?

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## Current Trends

- Payment authorizations (application / lead generation phase) – are consumers authorizing payments without knowing the amount, dates, and total of payments?
- Convenience fee permissibility – are they allowed and are they authorized by contract?
- Convenience fee servicing – Is it truly a third-party fee? Is the consumer reminded of free options?

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## Data Use & Misuse (Privacy)

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## CFPB Circular on Data Security

< [Newstroom](#)

### CFPB Takes Action to Protect the Public from Shoddy Data Security Practices

Financial companies may be held liable for unfairly putting customers' data at risk

AUG 11, 2022

SHARE & PRINT

WASHINGTON, D.C. – The Consumer Financial Protection Bureau (CFPB) confirmed in a circular published today that financial companies may violate federal consumer financial protection law when they fail to safeguard consumer data. The circular provides guidance to consumer protection enforcers, including examples of when firms can be held liable for lax data security protocols.

"Financial firms that cut corners on data security put their customers at risk of identity theft, fraud, and abuse," said CFPB Director Rohit Chopra. "While many nonbank companies and financial technology providers have not been subject to careful oversight over their data security, they risk legal liability when they fail to take commonsense steps to protect personal financial data."

The CFPB is increasing its focus on potential misuse and abuse of personal financial data. As part of this effort, the CFPB circular explains how and when firms may be violating the Consumer Financial Protection Act with respect to data security. Specifically, financial companies are at risk of violating the Consumer Financial Protection Act if they fail to have adequate measures to protect against data security incidents.

Failure to implement the following may trigger liability:

- Multi-factor authentication
- Adequate password management
- Timely software updates

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## Future regulatory landscape

- Increased Use of Novel Enforcement Tools
  - Notice of Penalty Offenses
  - FTC Rulemakings to Enforce
    - Customer Reviews
    - Junk Fees
    - Negative option rulemaking
    - Business Opportunities and Earnings Claims
    - Endorsements and Testimonials
- Increased interest in Contempt Investigations and Proceedings
- CFPB use of new enforcement methods



## Future regulatory landscape

- CFPB/FTC: Continued focus on large financial institutions / Big Tech; Junk Fees
- State AGs: Ever-growing threat

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## Future regulatory landscape

- State credit and mini FDCPA laws - impact on convenience fees
- Payment authorization choices - RCC issues, credit card issues – are these real alternatives to a PEFT?

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