

# Consumer Finance Monitor (Season 6, Episode 49): The Biden Administration's "Junk Fees" Initiative Continues: What the Latest Actions Mean for the Consumer Financial Services and Rental Housing Industries, Part I

Speakers: Alan Kaplinsky, Reid Herlihy, Kristen Larson, John Culhane, Mike Gordon, and Roger Winston

Alan Kaplinsky:

Welcome to the award winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer finance and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr law firm. I'm your host, Alan Kaplinsky, 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, [consumerfinancemonitor.com](http://consumerfinancemonitor.com). 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 at [ballardspahr.com](http://ballardspahr.com). And if you like our podcast, 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.

I'm very pleased to tell our listeners today that our podcast show on November 30 of this year was ranked by Good to Be Social, a very prominent consultant that focuses on social media and law firms, it was ranked as the number one podcast among law firm podcast show in the United States devoted exclusively to consumer financial services, and we were ranked number 11 overall among all types of podcast shows presented by law firms. And we are extremely gratified by this recognition from one of the country's leading social media consultants for law firms.

This is part one of a two-part podcast series of a repurposed webinar we did on Tuesday, November 28th, entitled The Biden Administration's Junk Fees Initiative Continues: what the latest actions mean for the consumer financial services industry and the rental housing industry.

In just a moment, I'm going to introduce our presenters for today's program, but let me just say a couple things about the topic, and then going to turn it over to my colleague John Culhane, who's going to provide more of a discussion of the genesis of this whole concept of junk fees. I mean, why all of a sudden did it happen? And John will explain why.

So anyway, this was launched in January 2022. It's a Biden administration initiative and it's part of a task force that the White House created that is laser focus on this issue. And it's not limited to consumer finance by any means. It's a focus on all kinds of fees that consumers pay in conducting their life, in conducting business. It affects the cable industry, the hotel industry, housing rental industry. And we're going to be very focused on that today because one of my colleagues is an expert in that area, Roger Winston, who I will introduce a little more fully in a moment.

So before I talk about the agenda, I would say in the consumer finance world there are two new words, or it's really more than two. It's four new words that have become part of our lexicon as consumer finance lawyers. And those four words are junk fees and dark patterns, and sometimes they are connected to one another, as you will find out a little bit later in our program. But we're really going to cover the waterfront, but with particular focus on consumer finance and rental housing, so-called junk fees.

So before we dive into our program, let me introduce my colleagues. And I have five of them today to introduce. First of all, Roger Winston, and Roger is the leader of our firm's mixed use condominium and multifamily development team. He's in the

Washington DC office, and of course he is part of the real estate department, and he has been very, very heavily involved in counseling our housing rental clients, clients that rent out apartment buildings and other types of rental housing, because that is very much a target of the Federal Trade Commission.

So also want to introduce Kristen Larson. Kristen is in our consumer financial services group. She came to us from having practice for many years in-house at a couple of banking institutions, where one of her focuses was on various fees charged by banks to deposit account holders, particularly checking account holders. So we're going to be talking, and Kristen will be discussing what's going on in the world of overdraft fees and fees that are related to overdraft fees.

John Culhane is no stranger to any of you. He's probably been on more webinars than any of us probably other than myself. John is a very experienced consumer financial services lawyer, has practiced for decades with me. And whenever I introduce John, I hesitate to say what he specializes in or focuses on because it's really everything in the consumer finance world, and junk fees is just part of his, I guess you could say, expertise that he has.

And then Michael Gordon. Michael is one of the more recent people that has joined us, although Michael's been with us for well over a year. He came to us after having spent quite a bit of time at the Consumer Financial Protection Bureau, where he reported directly to Richard Cordray. He had a very senior position there and has brought to our clients the expertise and the experience he's had with the CFPB, and most importantly how the CFPB thinks about things like junk fees.

And last but not least is Reid Herlihy. Reid is in our mortgage banking group, and Reid also is focused is very much on various kinds of fees that are charged by mortgage originators and servicers. A lot of fees that the regulators don't happen to like.

Okay, so this slide is basically trying to show you that there is no one consistent definition of a junk fee. Every time I turn around I see an agency coming up with a different definition. I'm going to be talking in a moment about the Federal Trade Commission, and they probably have come the closest to actually defining it in some kind of intelligible way and workable way. The Biden administration has not done that, because one of the fees they've singled out as a junk fee is a late fee on a credit card and there's nothing hidden about a late fee on a credit card by any means. And it's not a surprise fee. It's disclosed upfront. And to label that as a junk fee is just I think pandering to the politics involved, because nobody likes to pay any kind of a fee, be it a late fee or over limit fee, et cetera. And with that, I'm going to turn it over to John, who's going to tell us how did this all happen? John?

John Culhane:

Thanks, Alan. I don't know if we can pinpoint the exact genesis at which the notion of going after fees in different industries rose to the level that it's at or rose to the White House docket, but we did talk in our prior webinar about some of the events that had occurred and some of the pronouncements that had come out of the White House. Alan, you alluded to them, the focus on competition, the creation of a competition council.

More recently, as if there were any doubt, there was a White House press event/campaign rally around Biden's efforts in this area. And here it's clear that this has reached a level I think that we hadn't appreciated before because the efforts here to address fees charged by companies in various industries are now clearly part of what the president referred to as Bidenomics. That is the Biden economic policy of promoting the American dream for all consumers.

And there were a couple of interesting comments that came out of this, the press release and the accompanying statement. One of them is not just the conflating of competition and junk fees, but the notion that the failure to deliver a good or service or anything less than perfect delivery of a good or service seems to now result in the fee for that good or service being deemed to be a junk fee. It's certainly been swept up in the rhetoric here, and there are examples that the White House has given of situations like that, that it considers to have been addressed as part of this junk fee initiative.

I mentioned that the White House issued a statement relating to the junk fee initiative, reviewing agency actions. We're going to talk a little bit more about CFPB, FTC, and HUD actions. So I just want to note that the president emphasized actions by the FCC to create what are now referred to as broadband nutrition labels. That is labels that identify all costs and fees associated with internet service is the final rule promulgated by the FTC. And there's a proposed rule that's come out of the FTC that would essentially do the same thing for cable providers, basically requiring cable providers to display all in prices.

Some specific directives were announced at this event, and in particular, a direction to all executive agencies to consider the impact of competition on any regulations they developed and guidance that was issued by the Office of Information and Regulatory Affairs at the OMB that specifically provides sort of a step-by-step guidebook for agencies to follow in order to account for competitive effects when developing and analyzing regulatory actions.

We've included a link to the guidance. I think it's worth reviewing when you have time. It sets out a list of questions for the agencies to go through, but as you drill through the questions and the discussions you see without a specific emphasis of consumer financial services, a focus on comparison friction, that is actions that companies take that allegedly make it difficult for consumers to compare the costs of products and services. And it's clear that this is a notion that's going to be developed by the CFPB because it deals with high costs of discovering information about products, complexity, clarity, and also information asymmetry, where the provider of the product knows more about the fees and charges that may be assessed through the course of the lifecycle of the product than the consumer could know.

An additional consideration noted in factors that influence market policies and something the CFPB has been focused on in a couple of the markets it supervises is the notion of switching costs. That is, costs imposed that make it difficult or make it impossible for consumers to switch providers of goods or services. Apparently there now is somewhere an unfettered right for consumers to do that and anything that impedes that is something that is going to be viewed as an impermissible action.

And in particular, there's a clear statement that markets will be more competitive when it's easier for consumers to switch among providers of goods and services in order to find a more desirable provider. I think that's sort of an overview of some interesting aspects of the White House event, and let me turn it back to Alan to talk about some particulars with FTC initiatives.

Alan Kaplinsky:

Thank you, John. So I'm going to dig into this FTC rule. First of all, a lot of clients and other people have asked me, why is it that the FTC decided to do a rule here, but the CFPB, they've said a lot about junk fees, but they haven't provided any indication that they're going to do a special rule on junk fees. We do believe that we heard today that before the end of the year they're going to propose a rule dealing with overdraft fees, and of course they consider that, the agency considers that a junk fee. The industry certainly does not.

But why the FTC? Well, the answer is actually pretty simple, and it's answered in the supplementary information that was issued by the FTC in connection with the issuance of the proposed rule. They pointed out that because of a US Supreme Court decision in a case called AMG Capital Management versus the Federal Trade Commission, and that's a 141 Supreme Court 1341, an opinion from about a couple of years ago. The FTC really got its ears pinned back by the Supreme Court, or I guess you could maybe say they got defanged to a certain extent, because they were told that they couldn't obtain restitution unless there was an existing rule that they were relying upon that they claimed had been violated.

And so basically the answer is without using a very awkward procedure to obtain restitution civil money penalties, the easiest way for the FTC to proceed was through rulemaking. And once they finalize a rule in this area, then if they come after you with an enforcement action based upon the rule, they will be able to directly seek restitution and civil money penalties.

So it all began with an advance notice of proposed rulemaking, which the agencies don't always do, but they did. They launched it in October of 2022, and you'll see they saw comments on basically all kinds of fees and charges. They wanted to get opinions of the many stakeholders as to what kinds of fees were being charged in a variety of different industries, not just consumer finance? What were considered unnecessary charges, unavoidable charges, surprise charges? Bait and switch was the phrase very commonly used, where somebody thinks they're getting a product for a certain price but before the end of the day and they consummate the transaction, they're getting a different product altogether.

So let's now look at the actual proposed rule that they issued on October 11th. And there are two things that the rule does. First of all, but let me say at the outset, if you are representing or if you are with a bank, a savings and loan association, or a credit union, you are exempt from FTC jurisdiction. So this rule will not directly apply to you. There are other entities that are exempt under the FTC Act, that aren't subject to FTC jurisdiction, such as anybody involved in the business of insurance or common carriers, and nonprofit organizations are not subject to FTC jurisdiction.

However, if you are an affiliate of any of these other entities, you very well might be subject to FTC jurisdiction and this rule could apply to you. But even if you're sure of yourself, you are a bank, credit union, savings and loan association and you think, well, I don't have to worry about this rule, I think that would be a unwise course of action because the other agencies are certainly looking at what the CFPB is doing here.

The CFPB has its own UDAP authority that is even broader than what the FTC has because the FTC, under the FTC Act, the Act prescribes unfair deceptive acts or practices under the Consumer Financial Protection Act. The CFPB also has the ability to go after so-called abusive acts or practices. So I would not at all be surprised if the CFPB in situations where they have concurrent jurisdiction with the FTC or maybe even where they have exclusive jurisdiction, that the CFPB wouldn't bring an enforcement action based on the FTC rule. It would be based on their UDAP authority, but you could be sure that they will point to the FTC rule. So as a practical matter, I think if you're giving advice to a client, whether you're in-house counsel or outside counsel, the approved course to take is that it all applies.

So there are two main components to this rule that's covered in about 200 pages of text, covering the supplementary information. The rule itself is only a few pages, but it takes a long time to explain all the comments and the areas that need a fuller development or explanation. First of all is the so-called bait and switch prawn here, and that is offering, displaying, or advertising an amount a consumer may pay without clearly and conspicuously disclosing the total price. In any offer, display, or advertisement, a business must display the total price more conspicuously than any other pricing information. So if you are required, to try to put this as simply as I can, if you are buying an item or if you're borrowing money, you're going to be required to purchase some other, an ancillary product, or you're going to be charged another fee maybe for a payment processing.

Anything that is mandatory, that has to all be lumped in to the total price in connection with the offer, display, or advertising of a good or service. Not a lot of discussion in the rule about what constitutes and offer, display, or advertising.

We did a, I should say I very recently did a podcast show with an FTC staff person, which I'll mention in a moment. So you certainly are going to want to listen to that because you're going to hear the views of an FTC staffer. I was told that it would also cover contracts, the actual contract itself, not just an offer entered into a contract or an ad. Not clear to me that the rule actually does that, but I think that's going to be something that a lot of people are going to be commenting on.

The other prawn of the test, one is everything that's mandatory gets included in the total price. Then the so-called misleading fees. If you misrepresent the nature or purpose of any amount a consumer could pay, including the refundability of fees and the identity of any goods or services for which fees are charged, then that's another problem. So you can't just come up with names for fees and you can't call something just a service fee or something very general that's not very explanatory. You're going to have to explain what the purpose of the fee is.

Now, if optional fee, it doesn't have to be included in the total price, that still doesn't mean that you don't have to worry about the second part of this FTC rule dealing with misleading fees. Even if it's an optional fee, you're going to have to describe what the fee is all about. The only thing that you can exclude from having to describe are government charges or shipping charges. Or actually, I misstated something. While those fees are not in the total price, you will have to still disclose shipping fees and governmental charges and voluntary gratuities and invitations to tip, et cetera.

This is the definition of a business, which is another key thing. I already indicated that certain entities like banks, credit union, savings associations are exempt. So you're basically talking about non-banks, but what this definition is telling you is no matter how you deal with the business, whether you go into bricks and mortar, into a physical location, whether you are going online, whether you've got a mobile app that you're using, all of it's covered, none of that is excluded.

The only real significant carve out that I mentioned on this slide is that if you're a motor vehicle dealer, and if the FTC gets around to finalizing the motor vehicle dealer's trade regulation rule before this new rule gets finalized, then the motor vehicle dealers will only have to comply with the motor vehicle rule. They won't have to comply with this rule. But if the motor vehicle rule never gets finalized or it gets delayed beyond the finalization of this junk fee rule, then motor vehicle dealers are very much subject to this rule.

Let me at this point comment on an area that I think is going to have to require a lot of focus by the industry in commenting to the FTC, and that is lenders that lend to consumers are already subject to a lot of other consumer protection statutes that require all kinds of numerical disclosures, such as the Truth in Lending Act, the Truth in Savings Act, and there are other

statutes, both federal and state statutes that require disclosures. This rule does not purport to override any of these other statutes or regulations issued by the CFPB under the other statutes. It couldn't do that. A rule such as this couldn't override anything in the Truth in Lending Act or Regulation C or the Truth in Savings Act.

But I don't think that a lot of studying has yet been done about how this rule that requires the disclosure of the so-called total price is going to relate to something like the Truth in Lending Act, which uses other nomenclature. And if you've got a closed end disclosure you're giving under the Truth in Lending Act, you know everything has to be in the Schumer box. And the finance charge has to include all kinds of, not just the rate of interest, but also any mandatory fees that are being charged. And under this FTC rule, that's going to have to be included in the total price, I would think, and the total price is supposed to be more conspicuous than the finance charge, but yet that can't be the case either because under the Truth in the Lending Act, the terms finance charge and APR have to be more conspicuous. Well, as I said, we're not going to resolve that issue today. It's very complicated.

The other thing, if I haven't scared you already with what's in this FTC rule, it could get worse because they're seeking comments among other things on whether they should prohibit so-called excessive fees, should they prohibit the charging of certain kinds of fees. They haven't proposed that yet, but believe me, they're thinking about it. So with that, I want to now turn it over to my colleague Roger Winston, who as I mentioned is our resident expert in the area of housing fees, represents many owners of apartment complexes that charge rent to consumers. And the FTC is also very focused on that area. So Roger, take it over.

Roger Winston:

Thank you very much, Alan, and thanks to you and John for such a comprehensive background of where we are today and how we got here. In terms of rental housing, the federal interference or engagement in rental housing began in January of this year, when without any particular provocation, the White House issued something called a Renter's Bill of Rights. It wasn't an administrative action, it was a white paper. It listed five components of things that the White House, the administration felt perhaps needed attention to protect renters.

And one of those items, the item number two, was a requirement or an objective for clear and fair leases, that the leases should be honest and that they should avoid exorbitant fees and gouging. And so the promulgation of this bill of rights, it came out, people kind of scratched their head and said, "What does this mean? Do we have to, landlords, our clients that own properties, invest in rental properties, is there anything we need to do?" And it really wasn't clear at all.

But then other things started happening. At the local level, at state and local level, we started seeing a lot of new laws regulating what landlords could charge for rent. And the commonality between those laws and this junk fee proposal is if they were both based upon sort of a lot of innuendos and war stories. Some of the comments that we see here on this slide, the National Consumer Law Center, the Private Equity Stakeholder Project, kind of an interesting name. You read it, you think, oh, this is a group of people that represent private equity interests. Well, it's just the opposite. They're adverse to private equity interest.

But all of their comments were, "Hey, something's amiss here. We are kind of hearing about consumers, tenants having to pay for fees that are high, that aren't disclosed, that are misleading, but there was nothing presented." Just again, similar to the rent control. There were a lot of stories. Oh, I heard somebody's rent went up 40%, but nobody ever bothered to gather empirical data. And that is partly what the FTC is trying to do perhaps here now is that they're requesting, and we'll talk about this in a little bit, but they're seeking comments, like what's really going on out there? But more importantly, the comments that they're looking on and what we're working with clients and some trade associations on is how do we comply with these laws, and what are the costs associated with complying with the laws, and what are the consequences of complying with these laws?

There happen to be three cases pending before the Supreme Court. One deals with regulation of property rights and the other two relate to rent control specifically. The Supreme Court as of now has not granted tertiary or denied tertiary for those cases. We monitor those cases on a weekly basis, but particularly the case that involves regulation of property rights might have some bearing on what can and can't be done with the regulation of these junk fees.

So here, this is something that this same National Consumer Law Center put out, and again, this was a survey of somebody, I guess of tenants that they happened to find, and it shows what respondents told them in terms of fees that they're being

assessed in rental housing. When I saw this the first time, some of the fees certainly sounded familiar, but then some of them, like convenience fees, insurance fees, 60%, 50% fees charged by corporate landlords, when I talked with some of our clients about that, they had no idea what was there.

And then conspicuously absent were other kind of fees that are pretty normal in the real estate industry, pet fees, fees for the tenant damaging the unit, having to repair damage and clean the unit if the tenant didn't take good care of the unit. On the higher end project, amenity fees, fees for using the spa, the fitness center, the concierge, parking fees. Again, these vary from project to project. And again, the challenge in looking at how to regulate this is really, again, what does that mean when some of these fees are discretionary, some of them are included in the rent, and some of them are separate items, cable TV and internet. Properties sometimes will purchase those services in bulk and pass the savings on to the tenants.

But there are just a lot of things that are pretty typical. They seem to be widely accepted, but now there's a bit of turmoil being introduced about how a landlord has to disclose these fees and what the consequences are of not doing so. One of the proposals is that certain fees with potential of invalid per se fees, that the FTC would identify certain fees and say you just can't charge those fees. And again, what does that mean? Does that mean that certain goods and services aren't going to be offered at the property by landlords, or does it mean that those fees are going to have to be included in the rent, that people will pay for them whether they use those services or whether they want to use those services or not?

This first item at the top, providing the total price of rental housing, that's interesting in the rental housing context because generally speaking, landlords don't advertise the rent for their units. In fact, looking at how this segment of the industry is being regulated or perhaps overregulated, there was recently this real page class action suit and followed by a number of local attorney general action suits that are going after landlords for price fixing, saying that these programs that landlords use, similar to what airlines use, hotel uses, which is based upon demand. If the plane is full, the airline charges you more. If the apartment project only has one or two vacant units, then the price may vary, may be more for the remaining units. Well, that's being attacked separately. But putting that in the context of junk fees, this requirement that you provide the total price of the rental housing up front is going to be something challenging for people to deal with.

And then finally, what the next steps are. The FTC is asking for comments. We're working with a couple of industry groups to respond to this request for comments. And the comments unfortunately aren't related to demonstrating why this is perhaps overburdensome or why it's not going to be good for landlords or tenants. It is, assuming you have to comply with these things, what's going to be the cost for doing that? How many lawyers are you going to need to hire? How many hours are they going to have to spend for you to comply with it? This is in their specific request for comments. How much time are you going to have to pay your web designer to update your property information to comply with this request?

So that's where we are right now. Again, we're in a position of having to pull this data together for purposes of demonstrating the compliance costs, but hopefully that maybe will give us an opportunity to soften the otherwise significant blow that this may have on the rental housing industry.

Alan Kaplinsky:

My thanks to all of my colleagues today who spoke on the program. To make sure you don't miss any of our future episodes, subscribe to our show on your favorite podcast platform, Apple Podcasts, Google Play, Spotify, or whatever platform you regularly use.

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