



**Junk Fees: Policy Antecedents in the Work of the Federal Trade Commission  
White House Convening on the Economic Case for Junk Fee Policies  
March 21, 2023**

William E. Kovacic<sup>1</sup>

My initial comments for today's workshop seek to situate the current discussion about junk fees in the context of policy initiatives undertaken by the Federal Trade Commission (FTC) since the early 1960s. My observations draw upon my experience in public office. From 2001 to 2004, I was the FTC's General Counsel. I was a member of the Commission from 2006 to 2011 and chaired the agency from March 2008 to March 2009. From 2013 to 2022, I was a Non-executive Director on the board of the United Kingdom's Competition and Markets Authority (CMA). The experience of the FTC and other agencies (such as the CMA) with a dual consumer protection and competition mandate has provided intellectual and policy foundations on which current discussions about junk fees might build.

A substantial part of the FTC's work (in the form of law enforcement, rulemaking, research, and the convening of public events to discuss commercial developments and scholarly work) has reflected insights from behavioral economics.<sup>2</sup> Four major themes emerge from this body of work.

First, the proper functioning of markets involving consumer goods and services depends crucially on the ability of the buyer to understand the terms of the transaction.<sup>3</sup> The incorporation of

---

<sup>1</sup> Global Competition Professor of Law and Policy, George Washington University Law School; Visiting Professor, King's College London.

<sup>2</sup> See, e.g., Federal Trade Commission, Proceedings of the Conference on Behavioral Economics and Consumer Policy (Apr. 20, 2007), at [ftc.gov/news-events/events/2007/04/conference-behavioral-economics-consumer-policy](https://www.ftc.gov/news-events/events/2007/04/conference-behavioral-economics-consumer-policy); Joseph P. Mulholland, Federal Trade Commission, Summary Report of the FTC Behavioral Economics Conference (Sept. 2007), at [ftc.gov/reports/summary-report-ftc-behavioral-economics-conference](https://www.ftc.gov/reports/summary-report-ftc-behavioral-economics-conference).

<sup>3</sup> For decades, this principle has guided the agency's deliberations and anchored discussions about the application of its competition and consumer protection powers. See, e.g., Office of Policy Planning, Federal Trade Commission,

“shrouded terms” in sales agreements, or the sheer complexity of a contractual instrument, can obscure important conditions underpinning the transaction and deny the buyer the ability to make well-informed choices.<sup>4</sup>

Second, some terms that become elements of routine contracting by reason of a special exigency (for example, a fuel surcharge imposed to address price increases caused by severe supply shortages) may persist in sales agreements well beyond the period of the exigency that inspired them.

Third, consumers vary significantly in the ability to comprehend the terms of sales agreements. Highly sophisticated buyers may be able to master the intricacies of a standard contract, or to pose questions that require the seller to illuminate specific features of the transaction. By contrast, unsophisticated buyers may be overwhelmed by the apparent complexity of sales agreements. Other circumstances, such as severe economic disadvantage or physical affliction, can create vulnerabilities that prevent certain buyers from understanding the terms of a transaction.

Fourth, competitive forces that ordinarily would press firms to offer consumers useful information about key contract terms, or to eliminate charges no longer necessary to address exigent commercial circumstances, sometimes may exert little discipline on market actors. Rivalry may not drive firms to eliminate charges that impose costs without offering offsetting benefits to consumers.

The considerations I have sketched above have at least two important implications for the application of the FTC’s law enforcement authority and related responsibilities. First, in a number of instances, well-informed intermediaries can play a valuable role in providing information and guidance that helps a wide range of consumers make better choices and prompts commercial actors to eliminate terms that do not improve consumer well-being. Competition law enforcement can play a useful role in

---

Readings in Economic Analysis of Consumer Protection Issues (Sept. 1981); Staff Report, Federal Trade Commission, *Anticipating the 21<sup>st</sup> Century: Consumer Protection Policy in the New High-Tech, Global Marketplace: Volume II* (May 1996).

<sup>4</sup> For an early farsighted treatment of these issues by one of the FTC’s researchers, see Richard Craswell, *Tying Requirements with Imperfect Information and Other Unfair Contracts* (FTC Policy Planning Issues Paper, Office of Policy Planning, Sept. 1981).

ensuring that firms do not take steps (such as boycotts) to deny these intermediaries the information they need to serve consumer interests.

Second, the FTC and other public bodies also can perform a useful service by continuing to allocate resources to study the origin and impact of shrouded terms and other suspect contract features. The FTC's research agenda also might include continued attention to policy responses (including the design of remedies) that can serve to improve consumer decision making. One major focus of such research, consistent with past FTC work, would address the effectiveness of mandated contractual disclosures.<sup>5</sup>

---

<sup>5</sup> See, e.g., James M. Lacko & Janis K. Pappalardo, Federal Trade Commission, Bureau of Economics, Staff Report on Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms (June 2007).