



Comments of the Center for Economic Justice

To the NAIC E-Commerce Working Group

Regarding Proposed Framework of Issues and Actions for Working Group Activity

March 23, 2023

The Center for Economic Justice offers the following comments to the E-Commerce working group regarding the E-Commerce Framework exposed for comment on February 21, 2023.

Generally, CEJ supports efforts to promote e-commerce in ways that assist consumers to obtain the insurance products and services they want and have contracted for with the insurer. We suggest that a key factor in promoting e-commerce is to ensure consumers have confidence and trust in the e-transaction.

Another general comment is that many of the items on the industry wish list are not directly related to facilitating e-commerce, but relate to broader complaints about lack of uniformity across the states or to significant public policy issues more appropriately address in the subject-matter working groups and not by the E-commerce working group.

Another important factor to consider in e-commerce is the significant difference between paper and digital disclosure and consent. One feature of a paper disclosure and wet signature consent is that the disclosure is fixed and uniform across consumers, allowing for ease of regulatory oversight for unfair, deceptive or obscure terms, language or presentation. Digital disclosures can be qualitative different because the screen for viewing a digital disclosure may vary from the size of the screen of a mobile phone to a tablet to a laptop to a desktop monitor of varying sizes. In addition, digital disclosures and consent can be manipulated in a variety of ways that are not possible with paper disclosures. Digital manipulation or dark patterns in e-commerce have seen growing scrutiny by legislators and financial regulators around the world. Attached to these comments is a recent presentation by CEJ on dark patterns, providing a detailed explanation of the potential harms associated with digital manipulation in e-commerce.

The actual and potential use of dark patterns should inform the working group's consideration of each e-commerce proposal and the safeguards needed to provide consumers with the protection and confidence to engage in e-commerce with insurers. Please consider this general comment about dark patterns to apply to each specific e-commerce proposal.

E-Signature

Wet Signatures

Electronic signatures have great potential to facilitate e-commerce for the benefit of consumers. However, the default should not be opt-in, as proposed by insurers. Consent to e-signatures involves significant disclosures, terms and conditions. Consumers should not be obligated to terms and conditions absent their consent. Further, some consumers may simply be incapable of utilizing e-commerce because of physical or cognitive condition. If opt-in were the default, consumer protection requires regulatory review and approval of the terms and conditions for such implied consent as well as safeguards against forced opt-in for consumers unable to understand the implications of the opt-in.

RON

We support promotion of RON. The use of RON means that the consumer has already engaged in e-commerce to the point of deciding to enter into a transaction. A clear disclosure to a consumer articulating the safeguards and any potential dangers from the use of RON should be developed and employed to ensure consumer confidence in the transaction as well as disclose the responsibilities of the other parties to the RON transaction. In addition, consent to RON must not include overly broad terms of consent. For example, in one RON transaction in which CEJ Director Birnbaum participated, the RON procedure involved a video link for the title agent to observe the signature. The original consent form included a provision that, by consenting to RON and the use of video, Mr. Birnbaum would agree to give the title agent the right – in perpetuity – to use the video or any likeness from the video for any purpose. While Mr. Birnbaum was able to insist on modifying the consent to limit the use of the video to purposes of the transaction only, such an expansive consent should never have been included and particularly in situations in which the seller or provider can insist on onerous terms or threaten to withhold the product or service.

Eliminate Notarization Requirement

CEJ supports this in concept, but the specifics of the intended situations are critical for a meaningful discussion. Further, in situations where the purposes of a notarization need to be fulfilled, there must be provisions in place to ensure those purposes are met. For example, if there is concern about a fraudulent signature by an impersonator, any relaxation of notarization requirements must have as strong anti-fraud safeguards in place and those safeguards must be communicated to the consumer to ensure their confidence in the transaction.

E Notices

Wet Signatures

See our earlier comments on wet signatures and general comments about dark patterns.

Lapse/Termination Notices

Generally, the delivery of lapse/termination notices should be something for which the consumer has affirmatively opted-in – along with other types of communication from the insurer. However, the opt-in agreement for digital delivery of lapse/termination notices should be affirmatively renewed annually by the consumer because of the critical importance of such notices and changes that can occur over time, such as a change in e-mail address. We suggest it is good practice for insurers to annually communicate with consumers to remind consumers of the types of electronic communications being used.

As mentioned above, the form and content of the electronic notice should be guided by concern over digital manipulation.

Proof of Delivery

This is a challenging issue. We would point to more recent NAIC model laws – like the Travel Insurance Model law – which defines proof of electronic delivery in terms of evidence of the notice being sent. Section 7C3 of the Travel Insurance model law, regarding the conveyance of fulfillment materials, states:

For the purposes of this section, delivery means handing Fulfillment Materials to the policyholder or certificate holder or sending Fulfillment Materials by postal mail or electronic means to the policyholder or certificate holder.

To be clear, this type of provision provides no proof of delivery. In the case of travel insurance, the fulfillment materials are sent electronically soon after the consumer purchases the travel insurance via e-commerce – so there is high confidence that the e-mail address provided has not changed or is incorrect. For proof of delivery of documents – like a lapse notice – that might come many months or years after the original provision of an e-mail address, the above method of “proof of delivery” would not be appropriate.

Replacement Questions

Our comments about dark patterns above are particularly crucial for this issue. In addition, consumers should be able to print or save the exact text of the questions and answers to any application or consent form that is electronically employed to permit the consumer to review the questions and responses following the transaction as well as provide documentation for the consumer.

The issue of electronic information for life insurance replacement has additional considerations because of the potential for life insurers to claim fraudulent misrepresentation for what might be a non-material error or discrepancy by the consumer and because the life insurance replacement decision involves a lot of interpretation of information to determine if a replacement is in the best interest of the consumer – again, reinforcing the need for regulatory oversight of the design of digital interfaces for e-commerce.

Policies

State Variations in Policy Requirements

CEJ generally supports uniform disclosure requirements – as long as those requirements represent substantial and effective consumer protection. We would strongly oppose any uniform requirements that omit important consumer protections.

We also suggest that the types of disclosure mentioned for this item – as well as any disclosure intended to empower a consumer to make an informed decision – should be designed by subject matter experts – experts in consumer financial disclosure design – and tested for effectiveness. It is important for regulators to understand that disclosures are just as much a regulatory tool as, say, a rule or regulation and require relevant expertise for developing the disclosure.

Remaining Issues in This Topic Area

Several of the remaining issues raise complaints about state variation in certain requirements or permissions or absence of states adopting a NAIC model. Insurance is primarily regulated at the state level – specifically intended to recognize differences among states. A more detailed description of the insurers' concerns for the remaining issues is needed for substantive comment, but we suggest general complaints about lack of uniformity among the states regarding policy or enrollment forms should not be a high priority for the work of the E-Commerce working group.

Claims

Claims Processing – Use of Drones

This is a data privacy / digital rights issue and can easily be addressed by insurers obtaining up-front consent for the use of data about the consumer or the consumer's vehicle, property or person – including consumer-generated data from vehicle or home telematics or wearable devices.

We also don't understand why provisions for the use of drones cannot be included in policy forms, such that regulators would be in a position to review and approve the terms of such use and not permit the use of such technology on terms unfair to the consumer.

We would have great concern over any provision in law or regulation that simply authorizes the use of drones – or any new technology – without guidelines and guardrails for such use. For example, if there were a claims dispute between the insurer and the claimant, the insurer utilized a drone to gather information and that information supported the claimant's position, would the insurer be required to share the drone video footage?

Minimize Licensing Requirement for Claims Adjustment

Three items are identified here. The first is “allow digital adjustment of claims.” We've seen the share of digital claim settlements skyrocket as the pandemic unfolded and that share of claims settlements has remained high. It is unclear what permission is sought or needed in this regard.

The second item – eliminate licensing requirements for adjuster – seems to be contrary to efforts around the country to license adjusters for a variety of reasons.

As with several other items in the industry wish list, the E-commerce working group does not seem to be the appropriate forum for some of the adjuster licensing proposals.

Other

Use of Artificial Intelligence

This proposal verges on the nonsensical. First, it is unclear what AI means in this context. Second, it is unclear what prohibitions currently exist preventing insurers from using whatever they mean by AI. Third, there is widespread concern – as reflected in NAIC AI principles – over insurers' use of AI and big data. Consequently, a blanket carte-blanche authorization is simply preposterous.

Design Element Requirements

Industry seeks uniform standards to allow companies to follow well-defined rules and departments to enforce violations.

Putting aside the fundamental issue of variation among state requirements in a state-based system of insurance regulation, we support strong consumer protection standards for digital interfaces between insurers (or any of their agents or representatives) and consumers for any consumer-facing phase of the insurance life cycle. See our earlier comments about dark patterns and about the need to employ experts in consumer financial information and disclosures.

Advertising Approval

We oppose the proposal for removing regulatory oversight of long term care insurance disclosures. In addition to our earlier comments about variations in a state-based system of insurance regulation, uniformity should be seen as a tool for enhanced consumer protection – not a goal in and of itself. We also repeat our earlier comment that this should not be a priority – or even a topic – for the E-Commerce working group.

Use of Telematics

Telematics – whether vehicle-based, property-based or individual wearable device-based – holds great promise for promoting loss prevention and enabling more availability and affordability of critical insurance coverages. But, telematics is a great example of how effective regulation to protect consumer digital rights and privacy and to ensure symmetric use of telematics data by insurers and consumers and to protect consumers from unwanted and unapproved uses of the data are critical to improve consumer confidence to embrace the new technology. As mentioned with several other items, blanket carte-blanche authorizations of a particular technology is a ridiculous proposal.

For more information on consumer protections needed for improving consumer confidence and consumer protection in telematics, see the 2021 Consumer Federation of America report at <https://consumerfed.org/wp-content/uploads/2021/05/Insurance-Auto-Telematics-White-Paper-5-26-21.pdf>.

CFA has recently requested the NAIC develop specific guidance for telematics or consumer-generated data repeating a request made by CEJ in August 2016:

Develop a model law regarding ownership and licensing of data generated by consumers, vehicles or properties and used by insurers, including, but not limited to, data generated by vehicle telematics, home or property telematics, mobile phones and wearable devices by the 2017 Fall National Meeting. The model law shall declare that such data is owned by the consumer and shall include provisions for licensing of such data by consumers to insurers in a manner that balances consumer protection and sovereignty with insurer and public needs for access to such data loss prevention and mitigation and innovation in insurance products and insurer-consumer interaction. Such licensing provisions shall include, but not be limited to:

- a. consumer-tested disclosure to consumers of the sources and uses of the consumer generated data;
- b. affirmative agreements – opt-in – by the consumer for collection of the data and for each intended use of the data;
- c. prompt access to the consumer-generated data by the consumer upon request with provision of the data by the insurer to the consumer in a format and medium which, among other things, allows consumers to take the data to another insurer;
- d. prohibition against use of the consumer-generated data by the insurer for any purpose other than those agreed to by the consumer;
- e. prohibition against sale of the consumer-generated data by the insurer to any third-party without affirmative consent by the consumer and compensation to the consumer by the insurer; and
- f. standards for all-industry databases of specific types of consumer-generated data.

The need for the NAIC to develop consumer protection guidance for telematics is even greater today than CEJ's request nearly seven years ago.



Dark Patterns: Manipulative Digital Design

NAIC Consumer Liaison

March 21, 2023

Birny Birnbaum
Center for Economic Justice

The Center for Economic Justice

CEJ is a non-profit consumer advocacy organization dedicated to representing the interests of low-income and minority consumers as a class on economic justice issues. Most of our work is before administrative agencies on insurance, financial services and utility issues.

On the Web: www.cej-online.org

About Birny Birnbaum

Birny Birnbaum is the Director of the Center for Economic Justice, a non-profit organization whose mission is to advocate on behalf of low-income consumers on issues of availability, affordability, accessibility of basic goods and services, such as utilities, credit and insurance.

Birny, an economist and former insurance regulator, has worked on racial justice issues for 30 years. He has been involved with and studied insurance consumer disclosures for over 30 years as a regulator, consultant and consumer representative. He has served for many years as a designated Consumer Representative at the National Association of Insurance Commissioners and is a member of the U.S. Department of Treasury's Federal Advisory Committee on Insurance, where he co-chairs the subcommittee on insurance availability.

Birny served as Associate Commissioner for Policy and Research and the Chief Economist at the Texas Department of Insurance. Prior to TDI, Birny was the Chief Economist at the Texas Office of Public Insurance Counsel, a state agency dedicated to representing consumers before the TDI.

Birny was educated at Bowdoin College and the Massachusetts Institute of Technology. He holds Master's Degrees from MIT in Management and in Urban Planning with concentrations in finance and applied economics. He holds the AMCM certification.

Why CEJ Works on Insurance Issues

Insurance Products Are Financial Security Tools Essential for Individual and Community Economic Development:

CEJ works to ensure ***fair access*** and ***fair treatment*** for insurance consumers, particularly for low- and moderate-income consumers.

Insurance is the Primary Institution to Promote Loss Prevention and Mitigation, Resiliency and Sustainability:

CEJ works to ensure insurance institutions maximize their role in efforts to reduce loss of life and property from catastrophic events and to ***promote resiliency and sustainability*** of individuals, businesses and communities.

What is a Dark Pattern?

“Dark patterns are user interface techniques that benefit an online service by leading consumers into making decisions they might not otherwise make. Some dark patterns deceive consumers, while others exploit cognitive biases or shortcuts to manipulate or coerce them into choices that are not in their best interests.”

As documented in several research studies, consumers may encounter dark patterns in many online contexts, such as when making choices to consent to the disclosure of personal information or to cookies, when interacting with services and applications like games or content feeds that seek to capture and extend consumer attention and time spent, and in e-commerce, including at multiple points along a purchasing journey.

Source: <https://freedom-to-tinker.com/2022/08/10/recommendations-for-updating-the-ftcs-disclosure-guidelines-to-combat-dark-patterns/>

“At their core, dark patterns are a specific type of choice architecture in website and app design that interfere with user autonomy and choice. Dark patterns modify the presentation of choices available to users or manipulate the flow of information so that users make selections that they would not otherwise have chosen—to their own detriment and to the benefit of the website or app provider. [Hallmarks](#) of dark patterns include imposing asymmetric burdens to achieve competing choices, restricting the choices available at the same time (or at all), and hiding information or presenting information deceptively.”

“Dark patterns can exist when one option is more aesthetically prominent or attractive, or when the alternative is hidden or arduous to select. For example, a website may offer a popup with only a “yes” button, but leave out a “no” button and/or require more clicks to achieve the “no” option. Or, a button may have undesired consequences, as when closing a popup banner functions as acceptance rather than rejection.”

Source: <https://www.bytebacklaw.com/2022/03/how-do-the-cpra-cpa-and-vcdpa-treat-dark-patterns/>

Dark User Experience is Different from Bad User Experience

Bad UX is accidental. It is a bad design from a lack of knowledge in design. Whereas, dark UX is intentional and purposely designed to promote the brand's best interests at the user's expense.

- Bad UX: Confusing checkout processes.
- Dark UX: Purposefully making it difficult to find “x” that closes a pop-up.

Brands that use dark UX know exactly what they're doing. They are well aware of the UX concepts that make websites great and use that knowledge to manipulate their users.

Source: <https://medium.com/galaxy-ux-studio/how-do-dark-ux-patterns-affect-users-e74a4496c06e>

What are Examples of Dark Patterns Techniques?

From Jamie Liguri published in “Shining a Light on Dark Patterns.”

Nagging: Repeated requests to do something the firm prefers

Confirmshaming: Choice framed in a way that makes it seem dishonorable or stupid.

Forced Action: Requiring opt-out of optional services, manipulative extraction of personal information and information about other users

Social Proof: False/misleading notices that others are purchasing or offering testimonials

Roach Motel: Asymmetry between signing up and canceling

Price Comparison Prevention: Difficulty in understanding and comparing prices

Hidden Information / Aesthetic Manipulation: Important information visually obscured

From the European Consumer Organization, “Fast Track to Surveillance”
<https://www.beuc.eu/fast-track-surveillance>

“During this signup process, which involves consumers taking important decisions about how Google will process their personal data, the tech giant uses a combination of deceptive design, unclear language, misleading choices and missing information:

- With only one step (“express personalisation”), the consumer activates all the account settings that feed Google’s surveillance activities. Google does not provide consumers with the option to turn all settings ‘off’ in one step.
- If consumers want to try to protect their privacy, it requires “manual personalisation”: five steps with ten clicks and grappling with information that is unclear, incomplete, and misleading

Consider the consent for use of cookies on most websites. In almost every case, one click is required to accept all cookies. If you want to avoid sharing your personal information, it requires many clicks.

How Effective are Dark Patterns?

From Liguri and Strahilivetz Testing:

Condition	Acceptance Rate	Adjusted Acceptance Rate (treats drop-outs as declines)
Control Group	11%	11%
Mild Dark Pattern	26%	25%
Aggressive Dark Pattern	42%	37%

“Normative Take-aways” from Liguri and Strahilivetz

- The mild dark patterns are the most insidious. They significantly increased acceptance of a program with dubious benefits without alienating consumers or causing large numbers of them to log off
- Less educated subjects were particularly vulnerable to dark patterns
- Effects of dark patterns swamp effects of price changes
- Dark patterns vary substantially in terms of potency
- Dark patterns have proliferated because they work

Legislative and Regulatory Actions on Dark Patterns

- California Consumer Privacy Act
 - (I) “Dark pattern” means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decisionmaking, or choice, as further defined by regulation.

And

Hovering over, muting, pausing, or closing a given piece of content does not constitute consent. Likewise, agreement obtained through use of dark patterns does not constitute consent.

Source: https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?division=3.&part=4.&lawCode=CIV&title=1.81.5

- Colorado Privacy Act
 - "DARK PATTERN" means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making, or choice

Source: https://leg.colorado.gov/sites/default/files/2021a_190_signed.pdf#page=4

- Connecticut Personal Data Privacy Act
 - "Dark pattern" (A) means a user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decision-making or choice, and (B) includes, but is not limited to, any practice the Federal Trade Commission refers to as a "dark pattern".

Source: <https://www.cga.ct.gov/2022/ACT/PA/PDF/2022PA-00015-R00SB-00006-PA.PDF#page=2>

- Federal Legislation: Senate Bill 1084 – Deceptive Experiences to Online Users Reduction Act
 - (1) IN GENERAL .—It shall be unlawful for any large online operator
 - (A) to design, modify, or manipulate a user interface with the purpose or substantial effect of obscuring, subverting, or impairing user autonomy, decision-making, or choice to obtain consent or user data;
 - (B) to subdivide or segment consumers of online services into groups for the purposes of behavioral or psychological experiments or studies, except with the informed consent of each user involved;

Source: <https://www.congress.gov/116/bills/s1084/BILLS-116s1084is.pdf>

Federal Trade Commission Enforcement Using Authority to Regulate “Unfair and Deceptive Practices.”

“The Federal Trade Commission issued a new [enforcement policy statement](#) warning companies against deploying illegal dark patterns that trick or trap consumers into subscription services. The agency is ramping up its enforcement in response to a rising number of complaints about the financial harms caused by deceptive sign up tactics, including unauthorized charges or ongoing billing that is impossible cancel.

The FTC’s policy statement puts companies on notice that they will face legal action if their sign-up process fails to provide clear, up-front information, obtain consumers’ informed consent, and make cancellation easy.”

Source: <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap-consumers-subscriptions>

Consumer Financial Protection Bureau

“Today, the Consumer Financial Protection Bureau (CFPB) is filing a lawsuit against TransUnion, two of its subsidiaries, and longtime executive John Danaher for violating a 2017 law enforcement order. The order was issued to stop the company from engaging in deceptive marketing, regarding its credit scores and other credit-related products. After the order went into effect, TransUnion continued its unlawful behavior, disregarded the order’s requirements, and continued employing deceitful digital dark patterns to profit from customers.

Source; <https://www.consumerfinance.gov/about-us/newsroom/cfpb-charges-transunion-and-senior-executive-john-danaher-with-violating-law-enforcement-order/>

Critical for Regulators to Understand and Address Dark Patterns

- Insurance regulatory disclosures are based on and designed for paper, not digital interfaces. What does it mean to “prominently display” certain information or provide in a “10-point” font when the disclosure and consent are done on a computer or mobile phone?
- Paper disclosures are static. Digital disclosures are dynamic and change based on the particular consumer, the method of consumer interaction and the choices by the consumer during the process.
- There has been a massive and rapid increase in digital interactions in place of paper or face-to-face interactions between consumers and insurers. Consider digital claim settlements as well as interactions involving insurance application and receipt of policy and other information.

How Should Regulators, D Committee, NAIC Address Dark Patterns?

- Learn -- Train Analysts and Examiners to Recognize Dark Patterns and Manipulative Digital Design.
- Compile Resources on Manipulative Digital Design.
- Review Existing Disclosure Requirements – Do They Make Sense for a Digital Interface and Protect Against Dark Patterns?
- Update Guidance in Regulations as Needed – Not Just Revisions in Disclosures and Disclosure Requirements, but Articulating Dark Patterns as an Unfair and Deceptive Trade Practice.
- Develop Relevant Methods of Regulatory Review / Update the Market Regulation Handbook.

Additional Resources

Liguri and Strahilivetz, “Shining a Light on Dark Patterns”
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3431205

“Warning Signals about Dark Patterns in Insurance Marketing”
<https://www.ethicsandinsurance.info/warning-signals-about-dark-patterns-in-insurance-marketing/>

FTC Report Shows Rise in Sophisticated Dark Patterns Designed to Trick and Trap Consumers: Tactics Include Disguised Ads, Difficult-to-Cancel Subscriptions, Buried Terms, and Tricks to Obtain Data.
<https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-report-shows-rise-sophisticated-dark-patterns-designed-trick-trap-consumers>

“FTC Action Against Vonage Results in \$100 Million to Customers Trapped by Illegal Dark Patterns and Junk Fees When Trying to Cancel Service”
<https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-action-against-vonage-results-100-million-customers-trapped-illegal-dark-patterns-junk-fees-when-trying-cancel-service>

CFPB Issues Guidance to Root Out Tactics Which Charge People Fees for Subscriptions They Don’t Want: *New circular addresses dark patterns and other tricks used by companies to confuse and deceive consumers enrolled in subscription services*
<https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-root-out-tactics-which-charge-people-fees-for-subscriptions-they-dont-want/>

CFPB Charges TransUnion and Senior Executive John Danaher with Violating Law Enforcement Order: TransUnion deployed digital dark patterns to dupe Americans into subscription plans
<https://www.consumerfinance.gov/about-us/newsroom/cfpb-charges-transunion-and-senior-executive-john-danaher-with-violating-law-enforcement-order/>

“German Authority and EU Bodies Target "Dark Patterns" in Trading Apps and Online Interfaces”
<https://www.mayerbrown.com/en/perspectives-events/publications/2023/01/german-authority-and-eu-bodies-target-dark-patterns-in-trading-apps-and-online-interfaces>

The Regulatory Review, “Dark Patterns Cannot Stay in the Dark”
<https://www.theregreview.org/2022/05/28/saturday-seminar-dark-patterns-cannot-stay-in-the-dark/>

Harry Brignull’s Deceptive Design Website: <https://www.deceptive.design/>

CHOICE (Australia), “Consumers being harmed by “dark patterns” in web design”
<https://www.choice.com.au/consumers-and-data/data-collection-and-use/how-your-data-is-used/articles/dark-patterns-cprc>

Squire, Patton Boggs LLP, “Dark Patterns are Focus of Regulatory Scrutiny in the United States and Europe”
<https://www.natlawreview.com/article/dark-patterns-are-focus-regulatory-scrutiny-united-states-and-europe>

European Data Protection Board, “Dark patterns in social media interfaces: How to recognize and avoid them”
https://edpb.europa.eu/system/files/2022-03/edpb_03-2022_guidelines_on_dark_patterns_in_social_media_platform_interfaces_en.pdf

“5 Online Tricks Retailers Use to Trick Us,” <https://www.msn.com/en-us/money/other/5-online-tricks-retailers-use-to-manipulate-us/ss-AA183Cea>