



FedFin Daily Briefing

Thursday, January 19, 2023

CFPB Circular Tightens UDAAP Grip On Negative-Option Marketing

Building on recent [enforcement actions](#) targeting “digital dark patterns,” the CFPB today issued a [circular](#) taking aim at negative-option programs that it believes mislead consumers into unwanted, automatic subscription renewals. The circular stipulates that such practices are against the law and may constitute UDAAP violations ([see FSM Report CONSUMER39](#)). Behaviors the Bureau says risk CFPA violation or qualify as UDAAP include failures of disclosure and informed consent when negative option programs are in place as well as “unreasonable” impediments to cancellation requests. The circular does not mention specific products and services, but would appear to have an immediate impact on banks with overdraft-fee negative options, essentially prohibiting them despite prior Fed rules allowing them ([see FSM Report OVERDRAFT6](#)). The circular thus provides brief analyses of disclosure standard materiality, criteria for informed consent, and barriers to plan cancellation that violate the law. Material terms of a negative option offer include enrollment and charges for a product or service, the amount or range of amounts a consumer will be charged, existence of recurring charges without affirmative cancellation, and charges that commence automatically following completion of a trial marketing plan. Even where negative option feature disclosures are made, the Bureau argues that they are deceptive if they are displayed inconspicuously. Absence of informed consent occurs when providers mischaracterize or conceal negative option features or interfere with consumer understanding of an agreement.

Recent Files Available for Downloading

The following reports and analyses have been sent to retainer clients recently. Copies are also available to retainer clients on the Archives section of Federal Financial Analytics’ website: www.fedfin.com or clients may obtain the reports/analyses by e-mailing info@fedfin.com giving the requested item name, firm, and e-mail address. To learn more about *GSE Activity Reports*, click [here](#).

- [CONSUMER48](#): Building on its proposed nonbank registry related to enforcement orders, the CFPB is now also proposing a public registry requiring posting of provisions in consumer-finance contracts the agency believes threaten consumer legal or free-speech rights when issued by supervised nonbanks.
- [GSE-011923](#): We will shortly send clients an in-depth analysis of the CFPB’s latest controversial [proposal](#) which would establish a public registry on which supervised nonbanks would file a lot of data on any form contracts they require which includes covered provisions the Bureau thinks unfairly and even dangerously lead consumers to abandon important protections.
- [CRYPTO38](#): Karen Petrou’s [memo](#) earlier this week and her comments to the [American Banker](#) about Silvergate have sparked many client questions.
- [GSE-011123](#): As the Fed has hiked interest rates, mortgage rates have of course also gone up, sending a sudden chill through the residential market and putting home ownership even more out of reach for all

but those for whom the home equity they still have after prices correct suffices for long-term wealth accumulation.

- **[GSE-010523a](#)**: FHFA's latest [scorecard](#) for Fannie, Freddie, and CSS reiterates Director Thompson's overarching objectives for Fannie and Freddie in the new era of equitable finance, CRT, and capital compliance.
- **[GSE-010523](#)**: As we previously [noted](#), the U.S. banking agencies will finally, finally, finally get around to proposing their version of the Basel IV capital rules more recently dubbed the "end-game" standards.
- **[CRYPTO37](#)**: The Basel Committee has finalized its second try at global standards governing bank cryptoasset exposures, laying out a path that U.S. agencies plan quickly to implement even as Congress continues to wrestle with this fast-changing sector.
- **[DEPOSITINSURANCE117](#)**: In the wake of increasing instances in which customers are confused and even misled about the extent to which fintech and cryptoasset holdings are insured deposits, the FDIC is proposing new standards addressing this problem as well as ways to modernize IDI representations of their own FDIC-insured offerings in branches and through the fast-changing array of retail banking delivery channels.
- **[LIBOR9](#)**: Shortly before its statutory year-end deadline, the Federal Reserve finalized its proposal defining legacy-contract benchmarks when there is no clear, practicable contractual fallback rate.
- **[CONSUMER47](#)**: The CFPB is proposing to create a public registry of certain enforcement actions that would initially cover nonbanks (including BHCs) with a goal of drawing public and enforcement-agency attention to what the Bureau's director calls "serial offenders."
- **[GSE-122122](#)**: Finally taking what was supposed to be an "interim" [final rule in 2009](#), FHFA yesterday finalized a variation on Mark Calabria's 2020 new-product [proposal](#).
- **[CONSUMER46](#)**: In this report, we provide an in-depth assessment of the CFPB's unprecedented \$3.7 billion [settlement](#) earlier today with Wells Fargo (WFC).