Negative Option Marketing

Cite

CFPB, Circular, Unlawful Negative Option Marketing Practices

Recommended Distribution:

Marketing, Policy, Legal, Government Relations

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Impact Assessment

- Negative-option product design will need to ensure informed consent as the CFPB defines it to limit legal, reputational risk.
- Consumers accustomed to continuing service via existing programs may object to new sign-in obligations, although there would be enhanced protection against abuse.
- Financial institutions could become liable to CFPB enforcement if third-party sellers offering what the CFPB alleges are abusive options rely on their payment or lending products.

Overview

Using one of its controversial edicts to set what some consider a new rule, the CFPB has opined that negative-option or "subscription" marketing of consumer-financial products or services may be unfair, deceptive, or abusive (UDAAP) and thus subject to significant sanction for both the provider and any third parties with which it works.[1] Although the circular does not prohibit negative-option marketing, these sanctions and the sometimes-vague nature of stipulated safeguards may lead some financial companies simply to eschew subscription marketing. The circular is unclear as to the extent of a financial company's liability for supporting sales via a third-party vendor whose practices fall short of CFPB expectations.

1 See **CONSUMER39**, Financial Services Management, March 22, 2022.

Impact

Often also called "subscription" marketing, negative-option offers are those that continue absent affirmative consumer action to cancel or that change these terms and conditions at disadvantage to the consumer after a trial period. The Bureau believes that harm which may constitute UDAAP is likely in these plans not only if firms mislead consumers, but also if consumer consent is not informed and/or cancellation proves difficult. The Bureau has previously taken enforcement action against these practices, most notably with credit-card "add-on" products and, when it comes to UDAAP, also to practices from firms such as credit-repair companies, credit-reporting agencies, and some payment processors.

More recently, the Bureau in concert with the FTC has spotted what they consider to be "dark patterns" that deceive, steer or mislead consumers into products profitable to the provider but possibly harmful to the consumer. While the circular does not ban negative-option marketing per se and focuses on dark patterns, it expressly applies to all subscription marketing, not just to that driven by algorithms. Dark patterns powered by algorithms or other AI/ML techniques are also already covered elsewhere by new CFPB standards covering digital marketing, at least when it comes to product offers.[2]

Much in the circular suggests that ensuring that a product or service meets CFPB expectations may be difficult to square with what firms believe to be effective, non-abusive marketing. Further, any existing subscription services will clearly need to be reoffered if initial consumer consent is not considered "informed" as detailed below.

The Bureau's circular expressly covers only negative-option marketing of consumer-financial products and services. However, statements accompanying it from the Bureau and its director sharply chastise subscription marketing in general. It is unclear if the Bureau believes that financial services offered in tandem with a subscription product – e.g., monthly billing, payment-shortfall loans – would come under this circular if the product in question is not itself financial. However, given the scope of the Bureau's current reach, financial companies may wish to review third-party firms with which they provide such services.

What's Next

This circular was issued on January 19; it binds action going forward and the practices that companies may already have in place, should they not be promptly revised or discontinued.

[2] See **FINTECH30**, Financial Services Management, August 15, 2022.

Analysis

A. Definition

Negative options are a term or condition under which a seller may interpret a consumer's silence, failure to take an affirmative action to reject a product or service, or failure to cancel an agreement as acceptance or continued acceptance of the offer. Terms expressly included are:

- automatic renewals;
- continuity plans; and
- 'trial" marketing without a firm regardless of consumer action.

B. UDAAP Violations

These may occur with:

- misrepresentation or failure clearly and conspicuously to disclose material product terms and conditions. Materiality is based on what is important to a consumer and likely to affect conduct or choice. The circular also details materiality considerations;
- failure to obtain informed consent prior to charging the consumer. Consent would be considered uninformed if negative-option features are misleading or inconspicuously presented;
- "unreasonable" cancellation barriers.