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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

A Closer Look At Auto Renewal Risk Post-CFPB Guidance

By **Christopher Leach, Tori Shinohara and Kerri Webb**
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Christopher Leach

Tori Shinohara

Kerri Webb

The Consumer Financial Protection Bureau recently published guidance highlighting that negative option marketing practices, which include products such as subscription plans and other products and services that rely on automatic renewal, are on the bureau's radar as a subject for potential investigations and enforcement actions.

On Jan. 19, the CFPB issued Circular 2023-01,[1] providing guidance on when so-called negative option marketing practices may violate the prohibition against unfair, deceptive or abusive acts or practices, or UDAAP, in the Consumer Financial Protection Act, or simply CFPA.

According to the CFPB, negative options are terms or conditions "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." Negative options are also commonly referred to as subscription plans, automatic renewal plans, continuity plans and trial marketing plans.

The CFPB noted that the circular "is generally in alignment" with the Federal Trade Commission's 2021 policy statement on negative option practices.[2]

Indeed, the circular appears to reflect the CFPB's attempt to enforce certain practices prohibited by the Restore Online Shoppers' Confidence Act, which is not within the bureau's authority to enforce, as well as violations of the prohibition against UDAAPs under the CFPA, which is within the bureau's authority to enforce.

ROSCA, which is enforced by the FTC and state attorneys general, requires disclosure of all material terms before payment information is obtained, an expression of informed consent and an easy means of cancellation.

As detailed below, the circular focuses on similar themes and describes acts and practices that could be considered unfair or deceptive. Businesses engaged in negative option marketing should also review the FTC's policy statement, which outlines several additional requirements for compliance with ROSCA.

The CFPB's guidance highlighted three negative option marketing practices that, in the bureau's view, may violate the CFPA's prohibition against UDAAPs.

1. Failing to clearly and conspicuously disclose the material terms of the negative option offer

The CFPB specified that a covered person may violate the law if they fail to disclose the following material terms of the negative option offer itself:

- That the consumer is enrolling in and will be charged for the product or service;
- The amount that will be charged;
- That charges will be on a recurring basis unless the consumer takes affirmative steps to cancel the product or service; and
- If there is a trial marketing plan, charges will begin or increase after the trial period unless the consumer takes affirmative action.

In the past, the CFPB has brought an enforcement action against a covered person who, for example, allegedly advertised a "free" trial when consumers were automatically enrolled in a subscription program with a monthly fee unless they canceled and did not clearly and conspicuously disclose the fee.

The CFPB also initiated an enforcement action against a covered person who allegedly did not adequately inform consumers about the cost of add-on products.

2. Failing to obtain informed consumer consent

According to the CFPB, consumer consent is not informed if the covered person mischaracterizes or conceals the negative option feature, provides contradictory or misleading information, or otherwise interferes with the consumer's understanding of the agreement.

The CFPB has brought actions against covered persons who allegedly falsely represented to consumers that they were agreeing to receive information about an add-on product when, in reality, the consumers were purchasing the product.

3. Misleading consumers who wish to cancel, erecting unreasonable barriers to cancellation, or impeding the effective operation of promised cancellation procedures

Similar to views expressed in the FTC's 2021 policy statement, the CFPB noted that covered persons may violate the law if they fail to honor cancellation requests or otherwise prevent consumers from canceling, such as by hanging up on consumers, placing them on hold for an unreasonably long time, providing false information about how to cancel, or misrepresenting the reasons for delaying cancellation requests.

Prior enforcement actions by the CFPB include actions against covered persons who allegedly required consumers to repeatedly demand cancellation despite informing consumers that they could cancel immediately and misrepresenting the costs and benefits of products and services in an attempt to persuade consumers not to cancel.

Notably, in the circular, the CFPB is less aggressive on this front than the FTC, which, relying on ROSCA's requirements for a simple means of cancellation, has said that companies must allow cancellation in the same manner as sign-up, i.e., internet sign-ups cannot be required to cancel by phone.

Though unstated, the likely reason for this discrepancy is that the CFPB lacks authority to enforce ROSCA itself and thus is trying to retrofit its UDAAP authorities to the extent possible to cover the same subject matter.

The circular warns that a person who fails to comply with the requirements for negative option marketing risks violating the prohibition against UDAAPs under the CFPA as well as the Electronic Fund Transfer Act and its implementing regulation, Regulation E, which prohibit preauthorized electronic fund transfers from a consumer's bank account without written authorization.

The circular also reminds companies that the CFPB may also bring actions related to negative option marketing under the Telemarketing Sales Rule, which prohibits deceptive acts or practices by telemarketers specifically.

In addition to the CFPB's authority to enforce violations related to negative option marketing, the FTC can also bring enforcement actions under Section 5 of the Federal Trade Commission Act, ROSCA and the Telemarketing Sales Rule.

The circular is only the latest in a series of efforts by the Biden administration, the CFPB and the FTC to combat purported junk fees and so-called dark patterns, the latter of which is a term the agencies have started using to refer to deceptive practices not related to the product or service itself.

Last year, for example, the CFPB issued a request for information on junk fees,[3] which it defines as mandatory or quasi-mandatory fees added at some point in the transaction after a consumer has chosen the product or service based on a front-end price, and published fee-related guidance for debt collectors[4] and depository institutions.[5]

And the FTC recently published an extensive report on dark patterns, which it describes as "design practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm."[6]

The circular specifies that negative option programs and dark patterns can be particularly harmful when combined, as they may cause consumers to be misled into purchasing services with recurring charges and make it difficult to cancel or otherwise avoid those charges.

The CFPB also highlights that it has received consumer complaints about these negative option programs, including from older Americans.

Businesses that offer subscription plans or similar services should consider taking a careful look at their current practices and options. These plans continue to be an area of focus for the CFPB and FTC, and both agencies can impose significant monetary and injunctive penalties for violations of law.

Christopher Leach is a partner at Mayer Brown LLP. He's a former attorney with the Federal Trade Commission's Division of Financial Practices.

Tori Shinohara is a partner at the firm.

Kerri Webb is an associate at the firm.

[1] CFPB, Circular 2023-01, Unlawful Negative Option Marketing Practices (Jan. 19, 2023), https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2023-01-unlawful-negative-option-marketing-practices/#6.

[2] FTC, Enforcement Policy Statement Regarding Negative Option Marketing (Oct. 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf.

[3] CFPB, Request for Information Regarding Fees Imposed by Providers of Consumer Financial Products or Services (Jan. 26, 2022), https://files.consumerfinance.gov/f/documents/cfpb_fees-imposed-by-providers-of-consumer-financial-products-services_rfi_2022-01.pdf.

[4] CFPB, Advisory Opinion, Debt Collection Practices (Regulation F); Pay-to-Pay Fees (June 29, 2022), https://files.consumerfinance.gov/f/documents/cfpb_convenience-fees_advisory-opinion_2022-06.pdf.

[5] CFPB, Circular 2022-06, Unanticipated Overdraft Fee Assessment Practices (Oct. 26, 2022), https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf.

[6] FTC, Bringing Dark Patterns to Light (Sept. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf.