

Consumer Financial Protection Circular 2023-01

Unlawful negative option marketing practices

January 19, 2023

Question presented

Can persons that engage in negative option marketing practices violate the prohibition on unfair, deceptive, or abusive acts or practices in the Consumer Financial Protection Act (CFPA)?

Response

Yes. “Covered persons” and “service providers” must comply with the prohibition on unfair, deceptive, or abusive acts or practices in the CFPA.¹ Negative option marketing practices may violate that prohibition where a seller (1) misrepresents or fails to clearly and conspicuously disclose the material terms of a negative option program; (2) fails to obtain consumers’ informed consent; or (3) misleads consumers who want to cancel, erects unreasonable barriers to cancellation, or fails to honor cancellation requests that comply with its promised cancellation procedures.

Background on Negative Option Marketing

As used in this Circular, the phrase “negative option” refers to 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.

Negative option programs are common across the market, including in the market for consumer financial products and services, and such programs can take a variety of forms. For example, in

¹ 12 U.S.C. 5481(6), (26), 5531, 5536. For simplicity, the remainder of this Circular refers to covered persons and service providers as “sellers.” The CFPB notes, however, that entities and individuals can be covered persons or service providers (and thus subject to liability under the CFPA) even if they do not themselves engage in “selling” a consumer financial product or service with a negative option feature.

automatic renewal plans, consumers' subscriptions are automatically renewed when they expire unless consumers affirmatively cancel their subscriptions by a certain date. In continuity plans, consumers agree in advance to receive a product or service, which they continue to receive until they cancel the agreements. In trial marketing plans, consumers receive products or services for free (or for a reduced fee) for a trial period. After the trial period, consumers are automatically charged a fee (or a higher fee) on a recurring basis unless they affirmatively cancel.

Negative option programs can cause serious harm to consumers who do not wish to receive the products or services for which they are charged. Harm is most likely to occur when sellers mislead consumers about terms and conditions, fail to obtain consumers' informed consent, or make it difficult for consumers to cancel. The Consumer Financial Protection Bureau (CFPB) has received consumer complaints, including complaints from older consumers, about being repeatedly charged for services they did not intend to buy or no longer want to continue purchasing. Some consumers have reported that they were enrolled in subscriptions without knowledge of the program and its cost.² Consumers have also complained about the difficulty of cancelling subscription-based services and about charges made to their credit card or bank account after they requested cancellation.³

In recent decades, the Federal Trade Commission (FTC) has brought numerous enforcement cases challenging harmful negative option practices using its authority under Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices.⁴ The FTC's enforcement cases have also frequently relied on the Restore Online Shoppers' Confidence Act (ROSCA)⁵ and the Telemarketing Sales Rule (TSR).⁶ The FTC recently summarized its enforcement work regarding negative option marketing in a policy statement, which noted that its cases have "involve[d] a range of deceptive and unfair practices, including inadequate disclosures of hidden

² See *Consumer Response Annual Report* at 25 (CFPB Mar. 2018), https://files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2017.pdf; *Monthly Complaint Report* at 16 (CFPB May 2017), https://files.consumerfinance.gov/f/documents/201705_cfpb_Monthly_Complaint_Report.pdf.

³ See *Consumer Response Annual Report* at 67 (CFPB Mar. 2022), https://files.consumerfinance.gov/f/documents/cfpb_2021-consumer-response-annual-report_2022-03.pdf; *Consumer Response Annual Report* at 88 (CFPB Mar. 2021), https://files.consumerfinance.gov/f/documents/cfpb_2020-consumer-response-annual-report_03-2021.pdf.

⁴ See, e.g., *FTC v. Vonage Holdings Corp.*, No. 3:22-cv-6435 (D.N.J. 2022); *FTC v. Age of Learning, Inc.*, No. 2:20-cv-07996 (C.D. Cal. 2020); *FTC v. Apex Capital Group, LLC*, No. 2:18-cv-09573 (C.D. Cal. 2018); *FTC v. Triangle Media Corp.*, No. 3:18-cv-01388 (S.D. Cal. 2018); *FTC v. AdoreMe, Inc.*, No. 1:17-cv-09083 (S.D.N.Y. 2017); *FTC v. RevMountain, LLC*, No. 2:17-cv-02000 (D. Nev. 2017); *FTC v. Health Formulas, LLC*, No. 2:14-cv-01649 (D. Nev. 2016); *FTC v. JDI Dating, Ltd.*, No. 1:14-cv-08400 (N.D. Ill. 2014); *FTC v. Complete Weightloss Center*, No. 1:08-cv-00053 (D.N.D. 2008); *FTC v. Consumerinfo.com*, No. 05-cv-801 (C.D. Cal. 2005); see also 15 U.S.C. 45.

⁵ 15 U.S.C. 8401 *et seq.*

⁶ 16 CFR part 310.

charges in ostensibly ‘free’ offers and other products or services, enrollment without consumer consent, and inadequate or overly burdensome cancellation and refund procedures.”⁷

Since it began enforcement in 2011, the CFPB has brought enforcement actions to halt a variety of harmful negative option practices, which have primarily relied on the CFPB’s prohibition on unfair, deceptive, and abusive acts or practices.⁸ For example, the CFPB has brought multiple enforcement actions involving optional “add-on” products offered to credit card users, such as debt protection and identity protection products, which featured recurring fees that continued until consumers affirmatively cancelled.⁹ In other enforcement actions involving negative option practices, the CFPB has found or alleged that consumer reporting companies,¹⁰ debt relief companies,¹¹ credit repair companies,¹² payment processors,¹³ and service providers¹⁴ have engaged in unfair, deceptive, and abusive acts or practices.

The CFPB has also relied on other Federal consumer financial laws that it enforces to address certain harmful negative option marketing practices. The Electronic Fund Transfer Act (EFTA) and Regulation E prohibit preauthorized electronic fund transfers from a consumer’s bank account without written authorization.¹⁵ The TSR also prohibits deceptive acts or practices by

⁷ Enforcement Policy Statement Regarding Negative Option Marketing, 86 FR 60822, 60823 (Nov. 4, 2021) (hereafter, FTC Policy Statement).

⁸ 12 U.S.C. 5531, 5536.

⁹ See *CFPB v. Sterling Jewelers, Inc.*, No. 1:19-cv-00448 (S.D.N.Y. 2019); *First National Bank of Omaha*, File No. 2016-CFPB-0014 (Aug. 25, 2016) (consent order); *Citibank, N.A.*, File No. 2015-CFPB-0015 (July 21, 2015) (consent order); *Synchrony Bank, f/k/a GE Capital Retail Bank*, No. 2014-CFPB-0007 (June 19, 2014) (consent order); *Bank of America, N.A.*, File No. 2014-CFPB-0004 (Apr. 9, 2014) (consent order); *American Express Centurion Bank*, File No. 2013-CFPB-0011 (Dec. 24, 2013) (consent order); *Discover Bank*, File No. 2012-CFPB-0005 (Sept. 24, 2012) (joint consent order with FDIC); *Capital One Bank, (USA) N.A.*, 2012-CFPB-0001 (July 18, 2012) (consent order). For a description of consumer protections applicable to credit card add-on products and the CFPB’s compliance expectations regarding such products, see *Marketing of Credit Card Add-on Products*, CFPB Bulletin 2012-06 (July 18, 2012).

¹⁰ *CFPB v. Transunion*, No. 1:22-cv-01880 (N.D. Ill. 2022); *Equifax Inc.*, File No. 2017-CFPB-0001 (Jan. 3, 2017) (consent order); *Transunion Interactive, Inc.*, File No. 2017-CFPB-0002 (Jan. 3, 2017) (consent order).

¹¹ *CFPB v. Student Financial Aid Services, Inc.*, No. 2:15-cv-00821 (E.D. Cal. 2015).

¹² *CFPB v. Prime Marketing Holdings, LLC*, No. 2:16-cv-07111 (C.D. Cal. 2016).

¹³ *CFPB v. ACTIVE Network, LLC*, No. 4:22-cv-00898 (E.D. Tex. 2022).

¹⁴ *CFPB v. Affinion Group Holdings, Inc.*, No. 5:15-cv-01005 (D. Conn. 2015); *CFPB v. Intersections Inc.*, No. 1:15-cv-835 (E.D. Va. 2015).

¹⁵ See 15 U.S.C. 1693e(a); 12 CFR 1005.10(b); see also *CFPB v. Student Financial Aid Services, Inc.*, No. 2:15-cv-00821 (E.D. Cal. 2015). The CFPB described these requirements in more detail in a 2015 compliance bulletin. See *Requirements for Consumer Authorization for Preauthorized Electronic Fund Transfers*, CFPB Compliance Bulletin 2015-06 (Nov. 23, 2015).

telemarketers, including failing to disclose the material terms of a negative option feature of an offer and misrepresenting the total cost to purchase goods or services.¹⁶

Recently, the CFPB and FTC have taken action to combat the rise of digital dark patterns, which are design features used to deceive, steer, or manipulate users into behavior that is profitable for a company, but often harmful to users or contrary to their intent.¹⁷ Dark patterns can be particularly harmful when paired with negative option programs, causing consumers to be misled into purchasing subscriptions and other services with recurring charges and making it difficult for consumers to cancel and avoid such charges.¹⁸

Analysis

The CFPB is issuing this Circular to emphasize that covered persons and service providers who engage in negative option marketing are required to comply with the CFPA's prohibition on unfair, deceptive, and abusive acts or practices.¹⁹ The CFPB further emphasizes that its approach to negative option marketing is generally in alignment with the FTC's approach to section 5 of the FTC Act as set forth in its recent policy statement. In particular, the CFPB shares the view that a seller offering a negative option program risks violating the law if the seller (1) does not clearly and conspicuously disclose the material terms of the negative option offer to the consumer, (2) does not obtain the consumer's informed consent, or (3) misleads consumers who wish to cancel, erects unreasonable barriers to cancellation, or impedes the effective operation of promised cancellation procedures.²⁰

Disclosure. Sellers may violate the CFPA's prohibition on deceptive acts or practices if they misrepresent or fail to clearly and conspicuously disclose the material terms of an offer for a product or service with a negative option feature. Under the CFPA, a representation or omission is deceptive if it is likely to mislead a reasonable consumer and is material.²¹ A "material" representation or omission "involves information that is important to consumers and, hence,

¹⁶ 16 CFR 310.3(a)(1)(vii), (2)(i); see also *CFPB v. Prime Marketing Holdings, LLC*, No. 2:16-cv-07111 (C.D. Cal. 2016); *Citibank, N.A.*, File No. 2015-CFPB-0015 (July 21, 2015) (consent order); *CFPB v. Student Financial Aid Services, Inc.*, No. 2:15-cv-00821 (E.D. Cal. 2015).

¹⁷ See, e.g., *FTC v. Age of Learning, Inc.*, No. 2:20-cv-07996 (C.D. Cal. 2020); Statement of CFPB Director Rohit Chopra on Complaint Against ACTIVE Network (Oct. 18, 2022), <https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-complaint-against-active-network/>.

¹⁸ See *Bringing Dark Patterns to Light* at 11-15 (FTC Sept. 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf.

¹⁹ Sellers should also comply with other consumer protection laws enforceable by the CFPB that may apply to their conduct, such as EFTA, Regulation E, and the TSR.

²⁰ See FTC Policy Statement, 86 FR at 60823-25.

²¹ See *CFPB v. Gordon*, 819 F.3d 1179, 1192-93 (9th Cir. 2016).

likely to affect their choice of, or conduct regarding, a product.”²² Where a seller makes a partial disclosure about the nature of a product or service, its failure to disclose other material information may be deceptive.²³ In assessing the meaning of a representation or omission, the CFPB looks to the overall, net impression of the communication, meaning that it considers the context of the entire advertisement, transaction, or course of dealing rather than evaluating statements in isolation.²⁴

The material terms of a negative option offer would typically include the following, to the extent applicable:

- That the consumer is enrolling in and will be charged for the product or service.
- The amount (or range of amounts) that the consumer will be charged.
- That charges will be on a recurring basis unless the consumer takes affirmative steps to cancel the product or service.
- That, in a trial marketing plan, charges will begin (or increase) after the trial period unless the consumer takes affirmative action.²⁵

A seller would likely violate the CFPB by misrepresenting or failing to adequately disclose these material terms, as the CFPB’s enforcement cases illustrate. For example, the CFPB found that consumer reporting agencies deceptively represented that credit-related products were “free” when, in reality, consumers who signed up for a “free” trial were automatically enrolled in a subscription program with a recurring monthly fee unless they cancelled.²⁶ In those cases, disclosures about the negative option feature were often displayed in fine print, in low contrast, and were generally placed in a less prominent location, such as the bottom of a web page, grouped with other disclosures. Thus, the disclosures were neither clear nor conspicuous. Similarly, in several credit card add-on cases, the CFPB found that credit card issuers engaged in

²² *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000) (quoting *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984)).

²³ *See, e.g., Sterling Drug Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984) (drug company’s failure to disclose that its drug only contained ordinary aspirin was misleading when its advertisements implied that the drug did not contain aspirin); *see also F.T.C. v. Bay Area Business Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005) (“[T]he omission of a material fact, without an affirmative misrepresentation, may give rise to an FTC Act violation.”).

²⁴ *See, e.g., CFPB v. Aria*, 54 F.4th 1168, 1173 (9th Cir. 2022); *Gordon*, 819 F.3d at 1193; *see also FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 631 (6th Cir. 2014); *Fanning v. FTC*, 821 F.3d 164, 170 (1st Cir. 2016).

²⁵ This list is not exhaustive, and additional terms of a negative option offer may be material depending on the facts and circumstances.

²⁶ *Equifax Inc.*, File No. 2017-CFPB-0001 (Jan. 3, 2017) (consent order); *Transunion Interactive, Inc.*, File No. 2017-CFPB-0002 (Jan. 3, 2017) (consent order).

deceptive marketing and enrollment practices where they did not adequately inform consumers that they were purchasing add-on products or misrepresented the cost of the add-on products.²⁷

Consent. Sellers engaged in negative option marketing would likely violate the CFPB where they fail to obtain the consumer's informed consent before charging the consumer.²⁸ Consent will generally not be informed if, for example, a seller 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 deception and unfairness claims under the CFPB where sellers failed to obtain consumers' informed consent.²⁹

With respect to deception, as noted, a representation is deceptive if it is likely to mislead a reasonable consumer and is material.³⁰ In the credit card add-on cases, the CFPB found that credit card issuers engaged in a deceptive practice when the card issuers falsely represented to consumers that they were agreeing to receive information about an add-on product rather than purchasing the product.³¹

With respect to unfairness, an act or practice is unfair if it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers and the injury is not outweighed by countervailing benefits to consumers or to competition.³² Applying that standard, the CFPB alleged that a debt relief company engaged in an unfair practice by charging consumers on an automatic, recurring basis where the recurring charges were not clearly explained or disclosed to consumers at the time of purchase.³³

²⁷ See, e.g., *First National Bank of Omaha*, File No. 2016-CFPB-0014 (Aug. 25, 2016) (consent order); *Synchrony Bank, f/k/a GE Capital Retail Bank*, No. 2014-CFPB-0007 (June 19, 2014) (consent order); *Bank of America, N.A.*, File No. 2014-CFPB-0004 (Apr. 9, 2014) (consent order).

²⁸ Cf. *FTC v. Kennedy*, 574 F. Supp. 2d 714, 721 (S.D. Tex. 2008) (defendant engaged in unfair practice in violation of section 5 of the FTC Act by imposing charges on consumers' telephone bills without obtaining their informed consent).

²⁹ A seller offering a negative option program must also comply with 12 U.S.C. § 5531(d), which provides that an act or practice is abusive if it (1) materially interferes with a consumer's ability to understand a term or condition of a consumer financial product or service or (2) takes unreasonable advantage of the consumer's (a) lack of understanding of the material risks, costs, or conditions of the product or service; (b) inability to protect their interests in selecting or using a consumer financial product or service; or (b) reasonable reliance on a covered person to act in the consumer's interests.

³⁰ See *Gordon*, 819 F.3d at 1192-93.

³¹ *Fifth Third Bank*, File No. 2015-CFPB-0025 (Sept. 28, 2015) (consent order); *Bank of America, N.A.*, File No. 2014-CFPB-0004 (Apr. 9, 2014) (consent order).

³² 12 U.S.C. 5531(c).

³³ *CFPB v. Student Financial Aid Services, Inc.*, No. 2:15-cv-00821 (E.D. Cal. 2015). Specifically, the CFPB alleged that the company's practice caused injuries by subjecting consumers to charges they did not authorize or bargain

Cancellation. It is understandable that sellers will generally prefer to retain their existing customers, but they must do so in a manner that complies with the CFPA. For purposes of the prohibition on deception, certain types of representations are presumed to be material, including express representations and representations regarding costs.³⁴ Consistent with that principle, the CFPB found that a credit card issuer engaged in a deceptive practice when it represented that consumers could cancel an add-on product “immediately” and with “no questions asked” but then directed sales representatives to repeatedly rebut requests to cancel, with the result that consumers were often unable to cancel unless they demanded cancellation multiple times in succession.³⁵ The CFPB has also found that sellers engaged in deceptive practices by making misrepresentations about the costs and benefits of their products and services in order to persuade consumers not to cancel.³⁶

In addition, the CFPB agrees with the FTC that sellers would likely violate the law if they erect unreasonable barriers to cancellation or fail to honor cancellation requests that comply with their promised cancellation procedures. Such conduct would include, for example, “[h]ang[ing] up on consumers who call to cancel; plac[ing] them on hold for an unreasonably long time; provid[ing] false information about how to cancel; or misrepresent[ing] the reasons for delays in processing consumers’ cancellation requests.”³⁷ Depending on the facts and circumstances, such conduct may constitute an unfair, deceptive, or abusive act or practice in violation of the CFPA.

for, those injuries were not reasonably avoidable because the fact of the recurring charges and negative option feature were not clearly explained or disclosed to consumers, and the injury was not outweighed by any countervailing benefits to consumers or competition.

³⁴ See *Novartis Corp.*, 223 F.3d at 786.

³⁵ *First National Bank of Omaha*, File No. 2016-CFPB-0014 (Aug. 25, 2016) (consent order).

³⁶ *Citibank, N.A.*, File No. 2015-CFPB-0015 (July 21, 2015) (consent order); *Capital One Bank, (USA) N.A.*, 2012-CFPB-0001 (July 18, 2012) (consent order).

³⁷ FTC Policy Statement, 86 FR at 60823, 60826.

About *Consumer Financial Protection Circulars*

Consumer Financial Protection Circulars are issued to all parties with authority to enforce federal consumer financial law. The Consumer Financial Protection Bureau (CFPB) is the principal federal regulator responsible for administering federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other "enumerated consumer laws," 12 U.S.C. 5481(12). However, these laws are also enforced by state attorneys general and state regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.*, 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with \$10 billion or less in assets). Some federal consumer financial laws are also enforceable by other federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4). *Consumer Financial Protection Circulars* are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.*, 12 U.S.C. 5552(b) (consultation with CFPB by state attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the CFPB's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce federal consumer financial law. They do not restrict the CFPB's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.