HINSHAW

FTC to Increase Enforcement Against Illegal Dark Patterns Targeting Consumers with Subscription Schemes

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On October 28, 2021, the FTC issued an enforcement policy statement warning companies against utilizing illegal dark patterns that trick or trap consumers into subscription services. Dark patterns apply deceptive techniques that can lure online consumers into unwanted subscriptions (e.g., multi-click unsubscribe options). The policy statement builds on prior enforcement actions taken by the FTC and other law enforcement agencies against various illegal subscription practices.

A good illustration of dark pattern techniques is provided by popular weight-loss app Noom, which is currently facing a $100 million dollar class action alleging it employs a subscription renewal scheme that lures customers with deceptive promises of "low cost" or "zero cost" trial periods that are difficult to cancel and result in customers being involuntarily trapped in costly auto-recurring plans.

The Requirements

The FTC will require businesses to follow three key requirements or be subject to law enforcement action, including civil penalties:

1. Disclose clearly and conspicuously all material terms of the product or service, including how much it costs, deadlines by which the consumer must act to stop further charges, the amount and frequency of such charges, how to cancel, and information about the product or service itself that is needed to stop consumers from being deceived about the characteristics of the product or service;
2. Obtain the consumer's express informed consent before charging them for a product or service. This includes obtaining the consumer's acceptance of the negative option feature separately from other portions of the entire transaction, not including information that interferes with, detracts from, contradicts, or otherwise undermines the consumer's ability to provide their express informed consent; and

3. Provide easy and simple cancellation to the consumer. Marketers should provide cancellation mechanisms that are at least as easy to use as the method the consumer used to buy the product or service in the first place.

The Takeaways

The FTC has made it clear that tricking consumers into signing up for subscription programs or trapping them when they try to cancel is against the law and will not be tolerated. Companies will face legal action if their sign-up process does not provide clear, up-front information, obtain informed consent from consumers, and make cancellation easy.

Related Capabilities

Data Privacy, AI & Cybersecurity