



KEEPING THE INTERNET
OPEN • INNOVATIVE • FREE

www.cdt.org

CENTER FOR DEMOCRACY
& TECHNOLOGY

1634 I Street, NW
Suite 1100
Washington, DC 20006

P +1-202-637-9800

F +1-202-637-0968

E info@cdt.org

ONLINE SUBSCRIPTIONS UPSELLING WORKING GROUP BEST PRACTICES GUIDE

February 27, 2012

I. Background

In recent years, there has been increasing attention given to the issue of online subscription upselling, the practice of marketing subscription offers to consumers while they are engaged in other separate ecommerce transactions. For example, a consumer purchasing a book from an online vendor might see an offer for an unrelated “shoppers’ club membership” from an unknown third party while completing the first transaction. Some first-party vendors and third-party subscription upsellers have employed practices that created misunderstandings and consumer complaints as they presented additional offers to consumers engaged in purchasing goods and services. There has also been concern that some vendors and upsellers have not presented consumers with clear and effective means to obtain refunds and discontinue subscription services. The Senate Commerce Committee and several state Attorneys General have launched investigations into some of these practices.

Online subscription upselling is a relatively new practice without clear standards and guidelines for companies to follow in presenting consumers with subscription upselling offers in a clear, consistent, and fair fashion. Companies should be able to advertise and offer add-on services to consumers engaged in ecommerce transactions, as a consumer may judge that the additional promoted service is worth the advertised price. This can be true for services offered directly by the first-party vendor as well as for a new third-party seller who advertises on the first-party website. Because of the increased chance of confusion due to multiple offers, subscription upsellers — and any first-party vendors that work with subscription upsellers — should abide by a set of best practices to present consumers with legitimate, readily understood offers and meaningful consumer protections.

II. Background Materials

Senate Commerce Committee reports on subscription upselling and financial data pass:

- Aggressive Sales Tactics on the Internet and Their Impact on American Consumers, November 17, 2009
http://commerce.senate.gov/public/?a=Files.Serve&File_id=594bd7e1-c14b-42ac-b473-0ef90330efea
- Supplemental Report on Aggressive Sales Tactics on the Internet, May 21, 2010
http://commerce.senate.gov/public/?a=Files.Serve&File_id=439184c5-0965-4bb9-aa98-4a114b00a42e.

Restore Online Shoppers' Confidence Act (recently passed law that places limitation on data pass and post-transaction marketing): <http://www.ftc.gov/ogc/stat3/online-shoppers-enrolled.pdf>

S.B. 340, Advertising: automatic renewal and continuous service offers (recently passed California law on negative option marketing):
<http://www.aroundthecapitol.com/billtrack/text.html?bvid=20090SB34091CHP>

FTC Prenotification Negative Option Rule (regulation regarding the marketing of certain negative option offers): <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=0417041cc29498ba3e5d89b56943914b&rgn=div5&view=text&node=16:1.0.1.4.47&idno=16>

FTC's "Dot Com Disclosures": (guide for disclosures of material terms in online marketing):
<http://www.ftc.gov/bcp/edu/pubs/business/e-commerce/bus41.pdf>

FTC Guide Concerning the Use of the Word "Free" and Similar Representations:
<http://www.ftc.gov/bcp/guides/free.htm>

III. Definitions

"First-party vendor" or "vendor" shall mean any person who operates an ecommerce web site where consumers may purchase or agree to purchase goods or services using a credit card, debit card, bank account, or other financial account.

"Subscription upseller" or "upseller" mean any person who during the course of another ecommerce transaction advertises or offers a separate subscription service to a consumer.

"Third-party" shall mean with regard to a first-party vendor that the person is not under common control with the first-party vendor.

"Action button" shall mean any interface on a web page that a consumer can click on to signify his or her choice with regard to a marketing offer.

"Advertising network" or "ad network" shall mean a third-party service that supplies advertisements from a number of other companies on a first-party vendor's website.

“Free-to-pay” shall mean with regard to a subscription service that it is advertised or offered to consumers on an initially free (or proportionately very low cost) basis and converts to a paid subscription after some determinate period of time.

“Infrequently billed subscription” shall mean any subscription for which a consumer is billed and/or charged once per year or less often.

IV. Marketing Best Practices

Disclosure of Material Terms. Any subscription upselling offer should clearly and prominently disclose all material terms of the subscription, including all cost and financial obligations that the consumer may incur as a result of accepting the offer, as well as how to later cancel the subscription. Such disclosure should be presented in a manner such that an ordinary consumer would notice and understand the terms. These material terms should be placed in close proximity to any action button within the offer indicating assent to or interest in the offer, and should not be hidden among other less material language on the advertisement or offer.

Any third-party subscription upselling offer should clearly and prominently disclose that the seller is not affiliated with the first-party vendor and should clearly and prominently display the name (either corporate name or d/b/a) of the company making the subscription upselling offer. This name should be the same as is later used by the upseller on billing statements and any correspondence (see “Transparency” and “Notice of Billing” below) with consumers.

Clear choices. In presenting any subscriptions upselling offer, the initial offer should not use words such as “next,” “continue,” “purchase,” or “complete” on any action button, or any other language that could lead an ordinary consumer to confuse the subscription upselling offer with the original purchase through the first-party vendor, even if clicking on such a button would not necessarily result in the consumer being charged but would only take the consumer to a screen containing more information about the upselling offer. The action button should read “Learn More” or similar language, and clicking on such an action button should take the consumer to an information page or purchase page. That information page or purchase page should clearly and conspicuously describe the separate subscription upselling offer and/or gives the consumer the opportunity to accept the offer. On any page from which the consumer can agree to the terms of a subscription upselling offer, any cost or financial obligation to be incurred by the consumer shall be clearly, conspicuously, and proximately placed near any consent action button.

Any action button to decline a subscription upselling offer should be of at least the same size, as prominently placed, and as clearly presented as any action button to accept or proceed to a screen containing more information about the upselling offer.

Email addresses for certain subscription upselling offers. For subscription upselling offers that are offered on a free-to-pay basis, the subscription upseller should obtain an email address from the consumer prior to purchase in order to later provide the consumer with contemporary notice in advance of the consumer being charged (see “Notice of billing,” below). Upsellers may also offer consumers the option to be notified by other means, such as by telephone or letter, instead of or in addition to by email; however, consumers should always have the option to

receive email notifications. The free-to-pay subscription upselling offer should indicate that the company will notify the consumer in advance of the consumer initially being charged at the end of the free (or proportionately very low-cost) period reminding the consumer that he or she will be charged for the subscription if the consumer does not act.

For offers for infrequently billed subscriptions, the subscription upseller should obtain an email address from the consumer prior to purchase in order to provide the consumer with contemporaneous notice in advance of the consumer being charged for subscription charges after the initial charge (see “Notice of billing,” below). Upsellers may also offer consumers the option to be notified by other means, such as by telephone or letter, instead of or in addition to by email; however, consumers should always have the option to receive email notifications. These subscription upselling offers should indicate that the company will notify the consumer in advance of the consumer being charged for any infrequently billed subscription charges reminding the consumer that he or she will be charged for the continuing subscription if the consumer does not act.

First-party vendor responsibility for third-party subscription upsellers’ offers. First-party vendors have a general responsibility to their consumers to protect them from deceptive practices and illegal marketing while shopping on the vendor’s web site. However, a first-party vendor cannot always be held strictly responsible for any third-party content that is displayed on its site. For example, if a third-party subscription offer was placed on a vendors’ site through a banner ad supplied by an advertising network, the first-party vendor should not necessarily be held responsible for the content on that ad. However, first-party vendors should exercise reasonable diligence in selecting any advertising network to display ads on their sites, and should investigate any consumer complaints about inappropriate or misleading ads being served to the site by a third-party advertising network and where appropriate, take action (see “Responsibility to respond to complaints,” below).

If the first-party vendor has a direct contractual relationship with a third-party subscription upseller, the vendor bears more responsibility for the content of any third-party subscription upselling offer. Any contract between the parties related to the third-party’s subscription upselling offers being shown on or displayed from the first-party vendor’s site should require that the third-party subscription upseller abide by practices at least as stringent as laid out in this document.

If the first-party vendor hosts a third-party upselling offer or advertisement itself or directly incorporates the ad or offer into its own content, or directly receives compensation based on the success of the ad (such as a percentage commission or bounty for each successful conversion), the vendor should review and approve the content of the subscription offer or advertisement before allowing the offer or advertisement to be shown or displayed from the vendor’s site (including pop-up ads, redirects, interstitials, or other screens triggered from the vendor’s site).

V. Data Transfer Best Practices

First party vendors should not transfer credit card information, debit card information, bank account information, or any other financial account information to a third-party subscription upseller for the purpose of charging the consumer for an upsold subscription service, commonly

known as “data pass”. (Since the interim version of this document was released in late 2010, Congress passed the Restore Online Shoppers’ Confidence Act which prohibits this type of data pass.) A third party subscription upseller must obtain the consumer’s financial account information directly from the consumer in order to charge the consumer for any upsold subscription service. Third-party subscription upsellers should not seek to obtain a customer’s or potential customer’s financial account information for the purpose of billing the consumer from the first-party vendor or from any other party.

Service Best Practices

Transparency. All upsold subscriptions services should be clearly billed such that the name of the company (either corporate name or d/b/a) appears on the customer’s credit card, debit card, bank account, or other financial institution statement next to any charges along with, if practicable, a toll-free customer service number at which the upseller can be reached. Such name should be the same as was originally provided to the consumer when the subscription upselling offer was made.

Any subscription upseller should maintain a website associated with the name provided to the consumer when the subscription upselling offer was made where a reasonable consumer could easily find information about the subscription services offered by the company.

Right to cancel. Any subscription upseller should offer consumers an easily accessible mechanism to cancel any subscription on its website via an automated means, through mail, and through a toll-free number. At a minimum, any subscription upseller should provide a toll-free phone number on its front page, or a prominent link reading “Customer Service,” “Help,” “How to Cancel,” “Refund Request,” or similar language that goes to a dedicated page that prominently displays the automated means for cancellation and a toll-free phone number that a consumer can call to cancel the subscription.

Automatic cancellation. If a consumer fails to take advantage of an upsold subscription for over 12 months, the subscription upseller should cancel the consumer’s membership and cease billing the consumer for the services. The upseller may contact the consumer to inform the consumer that if no action is taken, the consumer’s membership will be canceled, and request that the consumer consent to renew the subscription; however, the consumer must affirmatively act in order to renew the subscription. This provision should not be interpreted as prohibiting an upseller from cancelling an unused subscription sooner than 12 months from the time the consumer purchases the subscription. However, this section shall not apply to insurance subscriptions or similar subscription products where a consumer would not reasonably be expected to engage with the product on a regular basis. Those companies, however, have a heightened responsibility to ensure that consumers remain aware of the fact of the subscription and that they make easily cancel the service if they so desire (see “Right to cancel,” above).

Refunds. Subscription upsellers should offer full refunds to consumers who complain that they did not knowingly authorize a charge within 60 days of the consumer being billed for the first time for the subscription, and within 30 days of the consumer being billed for subsequent billings for the subscription. However, for infrequently billed subscriptions, the subscription upseller should offer full refunds to consumers who complain that they did not knowingly authorize any subscription charge within 60 days of the consumer being billed.

Notice of billing. For upsold subscriptions that are offered on a free-to-pay basis, the subscription upseller should send an email to the consumer between 10 and 30 days before the first time the consumer will be charged at the end of the free (or proportionately very low cost) period indicating that the consumer will be charged for the subscription unless the consumer acts (provided however, that when the free period is less than 10 days, the upseller shall immediately upon the consumer's agreeing to the free-to-pay transaction send email notification indicating that the consumer will be charged for the subscription unless the consumer acts). This email notification should clearly and conspicuously describe to the consumer the amount he or she will be charged, all material terms of the subscription, and the fact that the consumer's credit card, debit card, or other financial account will be charged without any additional action or assent by the consumer. Such notification should also clearly and conspicuously disclose that a consumer may cancel the subscription without being charged and provide a hyperlink to a web page that permits the consumer to cancel the subscription via an automated means. The notification should clearly and prominently include the name of the product bought and provide a link to website that includes more information about the subscription. The subject line of such a message should read "Your account will be charged," or similar language such that a reasonable consumer would understand that he or she may incur a financial obligation, and the sender field of the email should contain the name of the company (either corporate name or d/b/a) previously shown to the consumer during the initial subscription upselling offer. If a consumer has opted to receive notice of billing in another way, such as by telephone call or letter, the upseller may deliver notice via that means in lieu of sending the email message, as long as the alternative means conveys the information described in this paragraph. For insurance subscription products (or similar subscription products where a consumer would not reasonably be expected to engage with the product on a regular basis) which are exempted from the automatic cancellation provisions above (see "Automatic Cancellation, *supra*), the upseller should also send notice that the consumer is going to be charged for the subscription by mail, in a clear and conspicuous manner such that an ordinary consumer would notice and understand.

For upsold infrequently billed subscriptions, the subscription upseller should send an email to the consumer between 10 and 30 days before each time the consumer would be charged indicating that the consumer will be charged for the subscription unless the consumer acts. This email notification should clearly and conspicuously describe to the consumer the amount he or she will be charged, all material terms of the subscription, and the fact that the consumer's credit card, debit card, or other financial account will be charged without any additional action or assent by the consumer. Such notification should also clearly and conspicuously disclose that a consumer may cancel the subscription without being charged and provide a hyperlink to a web page that permits the consumer to cancel the subscription via an automated means. The notification should clearly and conspicuously include the name of the product bought and provide a link to website that includes more information about the subscription. The subject line of such a message should read "Your account will be charged," or similar language such that a reasonable consumer would understand that he or she may incur a financial obligation, and the sender field of the email should contain the name of the company (either corporate name or d/b/a) previously shown to the consumer during the initial subscription upselling offer. If a consumer has opted to receive notice of billing in another way, such as by telephone call or letter, the upseller may deliver notice via that means in lieu of sending the email message, as long as the alternative means conveys the information described in this paragraph. For insurance subscription products (or similar subscription products where a consumer would not reasonably be expected to engage with the product on a regular basis) which are exempted

from the automatic cancellation provisions above (see “Automatic Cancellation, *supra*), the upseller should also send notice that the consumer is going to be charged for the subscription by mail, in a clear and conspicuous manner such that an ordinary consumer would notice and understand.

Renewals: If the upsold subscription was sold to a customer as a fixed-term subscription (e.g., a membership at \$10 per month for one year, or \$50 for a six-month membership), the subscription upseller should not renew the customer’s membership without the express affirmative consent of the customer. Upsellers should not offer consumers a negative option for renewal and presume acceptance of the renewal offer unless the consumer acts to cancel the renewal.

Responsibility to respond to complaints. If a subscription upseller receives a significant number of complaints from consumers that the upseller’s advertising and offering of subscription services is confusing — or that consumers do not understand why they have been charged or have not consented to being charged— the upseller should investigate the complaints and, where appropriate, revise its subscription upselling advertising and offers to provide more clear and conspicuous disclosure. A number of complaints may be significant even if it represents a very low percentage of overall subscription upselling transactions, especially if consumer engagement with the subscription is also low.

If a first-party vendor receives a significant number of complaints from consumers about third-party subscriptions upselling advertising and offers generated from the first-party vendor’s site that the upseller’s advertising and offering of subscription services is confusing — or that consumers do not understand why they have been charged or have not consented to being charged— the vendor should investigate the complaints and inform the partner responsible for placing the offers on the first party vendor’s site about the complaints (whether the actual party responsible for the offer or an advertising network that delivers the offers). Where appropriate, the first-party vendor should insist upon changes to the subscription upselling advertising and offers to provide more clear and conspicuous disclosure (or, in the case of an ad network, charges to advertiser or advertisement vetting and/or approval), and if the third party refuses to make appropriate changes, the vendor should sever the relationship with the third party with all deliberate speed. If the relationship continues and the first-party vendor continues to receive a significant number of complaints even after the third party has implemented the changes, the vendor should sever the relationship with the third party with all deliberate speed. A number of complaints may be significant even if it represents a very low percentage of overall subscription upselling transactions or other transactions on the first party vendor’s site.

Customer Support: Any subscription upseller, as well as any first-party vendor who has a direct relationship with a subscription upseller (as opposed to a vendor who may happen to display subscription upselling ads served by an ad network) should provide reasonable customer support to consumers who may be confused about subscription upselling. This customer support should consist of, at least, a toll-free telephone number, easily accessible from the company’s website, that is answered by a customer support representative within a reasonable period of time. In addition to a toll-free number, the customer support should also offer an electronic customer support interface, such as an online chat interface that is answered with a reasonable period of time, and/or an online form or customer support email address. Customer support should respond to online forms or emails with a confirmation of receipt within 24 hours of a customer’s sending a complaint stating that the company will respond within 72

hours of the email being sent and which also contains a copy of the customer's complaint. The company should then reply substantively to the consumer's complaint within 72 hours of the subscription upselling complaint being sent.

Payment processors. Payment processors, such as credit card payment processors or acquirers, who have a contractual relationship with a subscription upseller should investigate subscription upsellers who result in a significant number of complaints or chargeback requests to the processor. Where appropriate, the payment processor should insist that the upseller revise its business practices, and if the upseller refuses to make appropriate changes, the payment processor should sever the relationship with the upseller with all deliberate speed. If the relationship continues and the payment processor continues to receive a significant number of complaints or chargebacks even after the upseller has implemented the changes, the payment processor should sever the relationship with the upseller with all deliberate speed. A number of complaints may be significant even if it represents a very low percentage of the payment processor's transaction with the subscription upseller.

Payment processors, such as credit card payment processors or acquirers, who have a contractual relationship with a subscription upseller should in their contractual terms with first-party vendors prohibit vendors from passing financial data to other third parties for the purpose of charging the consumer for a new product or service. If the payment processor receives a complaint that an upseller is passing financial data to other third parties for the purpose of charging a consumer for a new product or service, the processor should investigate the complaints and inform the upseller about the complaints, and should insist that the upseller cease such practice. If the upseller refuses to make appropriate changes, or continues to pass financial data to other third parties for the purpose of charging consumers for new products or services, the payment processor should fine, suspend, or sever the relationship with the upseller with all deliberate speed.