

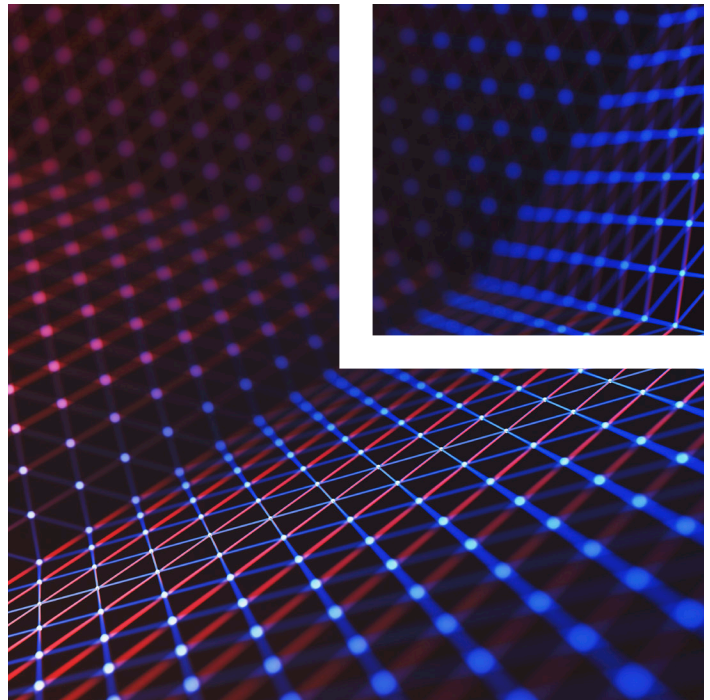
## FTC, States Continue Focus on Negative Option Marketing and Autorenewals

The Federal Trade Commission (FTC) recently issued guidance for businesses engaging in negative option marketing practices to help them avoid misleading consumers into taking actions they didn't intend. In an [Oct. 28 policy statement](#), the FTC outlined its interpretation of various statutes and FTC regulations that apply to negative option marketing. The guidance covers a range of online advertising practices known as "dark patterns," which have the potential to manipulate consumers into inadvertently buying products or services or consenting to the use or sale of their personal data. (To learn more about dark patterns, view our latest In the Know video, "Shining the Light on Dark Patterns," [here](#) and watch our recent webinar [here](#).)

The FTC's policy statement is part of a larger trend focusing on consumer protection, the regulation of the online consumer experience and, in particular, negative options and autorenewals. In 2022, at least four states—California, Colorado, Delaware and Illinois—have enacted or will be enacting new laws or amendments to existing laws around autorenewals.

### Key Takeaways

- The FTC guidance identifies issues related to disclosures, consent and cancellation, and details the obligations of businesses in these areas under Section 5 of the FTC Act and the Restore Online Shoppers' Confidence Act (ROSCA).
- The guidance specifically lists the type of information that is considered material to negative options, including dates for charges and deadlines for cancellations.
- The guidance gives particulars about what makes visual and audio disclosures clear and conspicuous, including where, when and how these disclosures must be made.



- Examples of what constitutes the required clear and simple mechanism for cancellation, including by website, app and telephone, are delineated in the guidance.
- Applicable state laws may add another layer of requirements to those imposed by the FTC, including specific timing requirements for notifying consumers about deadlines and charges.

### Negative Option Marketing

The use of negative option marketing online is widespread but can harm consumers when marketers fail to make proper disclosures, bill customers without their consent or make cancellation of a subscription difficult or even impossible. As part of a Better Business Bureau study, the attorneys general of 22 states indicated that over a 10-year period ending in 2019 misleading free trial offers cost consumers more than \$1.3 billion.

The FTC targets unfair or deceptive negative option practices, particularly when the practices result in recurring payments for unwanted products and services. A 2019 survey of retail websites identified nearly 2,000 incidents of purported dark patterns on more than 1,200 websites.

*Attorney Advertising*

The penalties for businesses that engage in misleading negative option marketing tactics can be considerable. In 2020, the FTC levied a \$10 million civil penalty against an online children's learning company, Age of Learning Inc., which it accused of hiding its autorenewal features and using confusing cancellation prompts and user flow to keep subscribers on the hook. Late last year, the agency imposed a \$21 million fine on a California background report provider and its CEO for allegedly deceiving consumers with "teaser background reports" by implying that the reports may contain arrest, criminal and sexual offender records, in order to lead consumers to sign up for difficult-to-cancel, autorenewing subscriptions that would allow them to view those records. And just this month, the FTC announced a settlement with business credit reporting company Dunn & Bradstreet Inc., which the agency asserts used deceptive autorenewal practices that included moving small-business customers into much more expensive tiers of service on renewal price without clear notice of the change. While the proposed settlement doesn't include a civil penalty, it does require Dun & Bradstreet to give many current customers the opportunity to cancel their subscriptions and get refunds. It also requires Dunn & Bradstreet to make clear and conspicuous disclosures about the nature of its services and prohibits the company from using autorenewal to transfer subscribers into different services or to charge a higher price for the same service without giving customers clear and detailed notice of the change and information on how to cancel before the autorenewal takes effect.

The various forms of negative option marketing all include "a term or condition under which the seller may interpret a consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement as acceptance or continuing acceptance of the offer," according to the FTC.

Negative option marketing formats can include the following:

**Automatic renewals.** A subscription service, such as a magazine publisher, unilaterally renews customers' subscriptions when they expire—unless the consumer affirmatively cancels the subscription by a certain date.

**Continuity plans.** A seller encourages customers to agree in advance to receive periodic shipments of goods or provisions of services, such as bottled water delivery, which continue until the customer cancels the agreement.

**Free trial marketing.** Also known as free-to-pay conversions, free trial marketing gives customers the opportunity to receive goods or services for free or at a nominal fee during a trial period. Once the trial period ends, sellers automatically begin charging a fee or increase the fee unless the customer affirmatively cancels the arrangement.

**Prenotification plans.** A seller sends periodic notices offering a product to participating consumers—for example, a book-of-the-month club. The seller then sends the product and charges for it if the consumer takes no action to decline the offer.

## Compliance Actions

To avoid an FTC enforcement action, which can include potential civil penalties, a business must follow the FTC's guidance on the disclosure of a negative option, receive express consent to the negative option and have a simple cancellation procedure. Under Section 5 of the FTC Act and ROSCA, the latter of which was enacted in 2010 to address problems with negative option marketing, businesses must:

1. Clearly and conspicuously disclose all material terms of the product or service. This includes how much the product or service costs, deadlines by which the customer must act to stop further charges, the amount and frequency of such charges, how to cancel, and adequate information about the product or service to avoid deceiving customers. These material terms must be stated up front, generally as prominently as the deal offer itself, according to Section 5.

The enforcement policy further defines "clear and conspicuous" disclosure for visual and audio communication, providing guidance including the following:

- In any communication that is solely visual or audible, the disclosure should be made through the same means the communication is presented. In communication made through both visual and audible means, such as a television advertisement, the disclosure should be presented simultaneously in both the visual and audible portions of the communication, even if the representation requiring the disclosure is made in only one format.
- A visual disclosure, by its size, contrast, location, the length of time it appears and other characteristics, should stand out from any accompanying text or

other visual elements so that it is easily noticed, read and understood.

- An audible disclosure, including by telephone or streaming video, should be delivered in a volume and cadence and at a speed sufficient for ordinary consumers to easily hear and understand it.
  - In any communication using an interactive electronic medium, such as the internet or software, the disclosure should be unavoidable. A disclosure is not clear and conspicuous if a consumer needs to take any action such as clicking on a hyperlink or hovering over an icon to see it.
  - Disclosures related to the negative option feature should appear immediately adjacent to the means of recording the consumer's consent for the negative option feature. Disclosures not related to the negative option feature should appear before a consumer makes a decision to buy.
2. Obtain the customer's express, informed consent before charging them for a product or service. The enforcement policy states that to secure express, informed consent, the seller should:
- Obtain the consumer's acceptance of the negative option feature offer separately from the rest of the transaction.
  - Omit information that interferes with, detracts from, contradicts or otherwise undermines the ability of the customer to provide express, informed consent to the negative option feature.
  - Obtain the customer's unambiguously affirmative consent to the negative option feature.
  - Be able to verify the consumer's consent.
3. Provide clear and simple cancellation mechanisms that are at least as easy to use as the method the customer used to buy the product or service in the first place.

The Enforcement Policy requires negative option sellers to provide a simple, reasonable way for customers to cancel their contracts. To ensure compliance with this requirement, negative option sellers should not subject customers to new offers or similar attempts to save the negative option arrangement that impose unreasonable delays on consumers' cancellation efforts.

Negative option sellers also should provide cancellation mechanisms through the same medium, such as a website or mobile app, that the customer used to consent

to the negative option feature. If the seller also allows telephone cancellation, it should provide, at a minimum, a telephone number; answer all calls during normal business hours, within a short time frame; and ensure the calls are not lengthier or otherwise more burdensome than the telephone call the consumer used to consent to the negative option feature.

Similarly, a seller should not impede promised cancellation procedures in a negative option arrangement and should honor cancellation requests that comply with such procedures. To implement effective cancellation procedures, sellers should not, among other actions, place customers who call to cancel on hold for an unreasonably long time, provide false information about how to cancel or misrepresent the reasons for delays in processing consumers' cancellation requests.

## 2022 State Laws and Amendments

The FTC's policy statement is particularly timely. In 2022, at least four states—California, Colorado, Delaware and Illinois—have enacted or will be enacting new laws or amendments to existing laws around negative option marketing.

**California.** Legislation effective July 1 updates existing cancellation and notice requirements and requires a reminder notice to be sent three to 31 days before the expiration of a free trial of more than 31 days.

**Colorado.** Legislation that took effect Jan. 1 requires sellers to give notice 25 to 40 days before each renewal of 12 or more months. For a renewal period less than 12 months, sellers must provide notice 25 to 40 days before any renewal that extends the contract beyond the first 12 months and any additional 12-month period.

**Delaware.** The state's first automatic renewal law took effect Jan. 1 and subjects sellers to requirements that are similar to those of California's new law. It also requires sellers to give 30 to 60 days' notice before renewing beyond 12 months.

**Illinois.** Also taking effect on Jan. 1 are amendments to Illinois' existing automatic renewal law to mandate cost-effective and easy-to-use cancellation mechanisms.

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## Related Professional

Nerissa Coyle McGinn . . . . . nmcginn@loeb.com

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