

Regulators Continue to Focus on “Dark Patterns” in Negative Option Marketing

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These days, consumers can obtain everything from newspapers to meal kits to credit monitoring services through subscriptions. The prevalence of these services, and the ease with which consumers can sign up, have gotten the attention of regulators who are concerned that some negative option marketing might confuse or trick consumers. The CFPB, FTC, and state AGs have been particularly vocal about practices they deem “dark patterns,” and continue to focus on the area.

Today, the CFPB put out [guidance](#) warning covered companies and service providers that “dark patterns” surrounding negative option marketing violate the Consumer Financial Protection Act’s prohibition on unfair, deceptive, or abusive acts or practices. As the circular makes clear, the CFPB has already brought enforcement actions alleging deceptive practices around negative options (see [this case](#) against a consumer reporting agency, and [this case](#) against a company that provided registration and payment services to organizers of events and races). The announcement also notes that the CFPB’s approach to negative option “dark patterns” is generally harmonized with that of the Federal Trade Commission (the FTC put out its own [Enforcement Policy Statement Regarding Negative Option Marketing](#) in October 2021). The guidance highlights the need for companies using negative option marketing to ensure that consumers: 1) understand the material terms of the negative option; 2) provide informed consent before being charged; and 3) are able to easily cancel recurring charges.

Negative option marketing encompasses a variety of products, such as automatic renewals, continuity plans, and free-to-pay conversions. Per the CFPB, it’s vital that consumers understand the material terms of these products before signing up. Material terms that must be disclosed include:

- The fact that a consumer is being enrolled in, and will be charged for, a product or service;
- The amount the consumer will be charged;
- The fact that the charge will be recurring, unless the consumer takes affirmative steps to cancel; and
- For free or reduced cost trial periods, that charges will start or increase at the end of the trial period, unless the consumer takes affirmative steps.

In addition to clearly disclosing material terms, companies must also obtain informed consent from consumers before they can be charged for the product and service. Companies will not be deemed to have obtained consent if they are found to have mischaracterized any feature of the negative option, or provided any contradictory or misleading information.

Finally, companies need to be sure that they do not misrepresent their cancellation policies, make it unreasonably difficult to cancel, or fail to honor cancellation requests made using the company’s stated procedures. The ease of cancellation has been a priority not just for federal regulators, but for

the state AGs and self-regulatory bodies as well (see our coverage of the NAD's Blue Apron decision [here](#)). Many of these cases have stressed that companies should ensure that the means of cancelation is as easy as the method to sign up for the negative option.

While the CFPB's interest in this area isn't new, today's guidance serves as a reminder to companies to review their practices surrounding negative options, as they will continue to face heightened scrutiny from regulators.