

Seller Beware: Avoiding Negative Attention on Your Negative Option Contracts

January 31, 2023 | [Justin B. Hosie](#) and [K. Dailey Wilson](#)

Remember that magazine you subscribed to years ago that comes once a month and usually winds up in the recycling bin? You probably didn't think you were subscribing to the magazine for the rest of your natural life but here you are, and you have no idea how to cancel the subscription. It's happened to us all and federal and state regulators are taking note.

On January 19th, the CFPB issued [CFPB Circular 2023-01](#) providing guidance on transactions that "automatically renew," including lease-to-own transactions, credit card add-on products, service contracts, and credit monitoring products. The Circular is the latest in a long string of federal guidance regarding these "negative option" contracts, including a [2009 FTC Report](#), the [Restore Online Shoppers Confidence Act](#) ("ROSCA"), the [Telemarketing Sales Rule](#) and [Rule on the Use of Prenotification Negative Option Plans](#), numerous federal consent orders, a [2021 FTC Enforcement Policy](#), and a [2022 FTC Staff Report](#). Negative option contracts are also a hot button issue for state legislatures, with several states, including California, Colorado, Tennessee and Virginia, amending existing laws or adopting new legislation that impose numerous substantive requirements on such transactions.

By and large, the idea behind the varying requirements is that key terms should be explained to consumers clearly and conspicuously before they give payment information, consumers should provide express informed consent before being charged, and that there should be simple ways to cancel and stop the recurring charges. From a consumer perspective, those requirements seem reasonable for an agreement that could debit your bank account in perpetuity. However, when you're trying to comply with consumer protection laws, the devil is in the details. Terms like "clear and conspicuous," "express informed consent," and "simple" opt-out can be used and interpreted in a variety of ways. Add in varying disclosure requirements from state to state, and compliance really gets complicated.

And now, in addition to legislation in an increasing number of states and FTC scrutiny, the CFPB is getting into the action. The Circular states that persons engaged in negative option marketing can violate the federal prohibition on unfair, deceptive or abusive acts or practices, often called UDAAP. According to the CFPB, a "covered person" or "service provider" may violate the prohibition on UDAAP where they:

- misrepresent or fail to clearly and conspicuously disclose the material terms of a negative option program;
- fail to obtain consumers' informed consent; or

- mislead consumers who want to cancel, erect unreasonable barriers to cancellation, or fail to honor cancellation requests that comply with its promised cancellation procedures.

These three standards sound similar, but not identical, to longstanding standards. Interestingly, the Circular says that the CFPB is "generally in alignment with the FTC's approach." But, there are some notable distinctions of which to be aware.

For example, while ROSCA requires "express, informed consent" for online commerce, the CFPB appears to only require "informed consent." However, the CFPB did not explain its rationale for requiring "informed consent" rather than "express, informed consent." In addition, the CFPB requires the following material terms to be disclosed:

- 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.

Because there are slight differences between these disclosures and those outlined in the FTC's policy statement companies must carefully review these requirements, along with each piece of federal and state legislation, rulemaking, and guidance to confirm they are providing all necessary points of information.

As for cancellation, the CFPB is less prescriptive than many state laws, but cautions against misrepresenting cancellation policies, attempting to persuade consumers not to cancel, erecting barriers to cancellation, and failing to honor cancellation requests that comply with promised cancellation procedures.

If you use negative option contracts in your business, what should you do next? Start by having compliance counsel review your customer onboarding experience to confirm you are providing the necessary disclosures and obtaining the required disclosures in a compliant manner. You should also review your cancellation policies and procedures to make sure the process complies with state law and is not unduly burdensome for the consumer. These steps can help to avoid the negative attention of both state and federal regulators and make sure your negative option contracts are a positive for consumers.

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