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CFPB Reiterates Position on ‘Negative Option’ Programs



By [Mercedes Kelley Tunstall](#)
Partner | Financial Regulation

This week, the [Consumer Financial Protection Bureau](#) issued a [Consumer Financial Protection Circular](#) reminding financial institutions that are covered persons that negative option marketing, when not done correctly, can be a violation of the Consumer Financial Protection Act, pursuant to the CFPB’s authority to address unfair, deceptive or abusive acts or practices.

So-called negative option programs are those that have “a term or condition under which the seller may interpret a consumer’s silence, failure to take an affirmative action to reject a product or service, or failure to cancel an agreement as an acceptance or continued acceptance of the offer.” In other words, any program that has an automatic renewal feature is considered a negative option program. To pull in the dark patterns aspect, the CFPB focuses upon how such “dark patterns can be particularly harmful when paired with negative option programs, causing consumers to be misled into purchasing subscriptions and other services with recurring charges and making it difficult for consumers to cancel and avoid such charges.” In addition, the CFPB focuses upon negative option marketing plans that include a trial period, where “consumers receive products or services for free (or for a reduced fee) for a trial period” and then are automatically charged a fee on a recurring basis until they affirmatively cancel.

While the CFPB has brought enforcement actions that include negative option marketing issues, the Federal Trade Commission, the CFPB’s sister consumer protection federal agency, has been most active in the space, issuing this [Policy Statement Regarding Negative Option Marketing](#) in 2021. While neither agency forbids negative option marketing, both emphasize that the programs must be set up in a manner that is consistent with these principles:

- clear and conspicuous disclosure of the material terms of the negative option offer to the consumer;

- consumer’s informed consent is obtained (*i.e.*, the consumer has affirmatively checked or clicked something to accept the trial period, or recurring charge), and
- cancellation methods are easy for the consumer to utilize, without unreasonable barriers to cancellation, or anything that would “[impede] the effective operation of promised cancellation procedures.

Specifically, the CFPB calls out the following material terms of a negative option offer that must be disclosed clearly and conspicuously:

- a statement “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.
- information that charges will occur on a recurring basis *unless* the consumer takes affirmative steps to cancel the product or service; and
- the period of time for any trial period, and the date on which charges will begin (or increase) after the trial period.

In terms of cancellation methods, conservative advice is that there should be symmetry between the medium through which the consumer signs up and the medium through which the consumer is required to cancel. In other words and for example, if consumers can sign up for the negative option program online, then consumers should be able to cancel online; if they can sign-up for the negative option program through the mobile app, then they should be able to cancel through the mobile app. Failure to have symmetry in this fashion is not immediately an unfair, deceptive or abusive act or practice, but it will cause the regulator to look more closely at the program.
