

Advertising + Marketing

FTC To Focus on Subscription Services – Hints at Taking Action Against “Dark Patterns”

The Bottom Line

- Negative option sellers should review their practices (including website flows, consent disclosures, and cancellation methods) to ensure compliance with this updated guidance.
- Most importantly, companies should determine whether the consumer consent being obtained is consistent with the new policy statement.
- The patchwork of applicable state laws continues to evolve – come July 2022, companies offering certain auto-renewing and continuous service subscriptions in California will be subject to enhanced notice and cancellation requirements.
- Companies should think about any “dark patterns” they may be employing.

The FTC has issued a new Enforcement Policy Statement Regarding Negative Option Marketing (Policy Statement), generally warning companies about their compliance obligations relating to negative option programs and against using website design features to deceive consumers into signing up for subscription services (i.e. by using “dark patterns”).

The Policy Statement was released in light of an uptick in the number of consumer complaints citing harm caused by deceptive recurring subscription practices, such as billing consumers for unauthorized charges or making it difficult for consumers to cancel a subscription.

Subscription Programs Grow in Popularity

Negative option programs include automatic renewals, continuity plans, free-to-pay or fee-to-pay conversions and prenotification plans. These subscription-type programs have become increasingly popular in recent years, especially as retailers and other service providers have recognized that significant revenues can be earned from them. Subscription-based programs exist for everything from home fitness to dog food, and they are widely recognized as being the future of retail.

Negative Option Programs

While the structure of these arrangements vary, a hallmark feature of negative option programs is the ability for a seller to interpret a consumer’s silence (or failure to take an

affirmative action to reject or to cancel) as an acceptance or continuing acceptance of the negative option offer. Examples of potentially unfair or deceptive negative option practices noted by the FTC include:

- Inadequate disclosures of hidden charges in ostensibly “free” offers and other products or services;
- Enrollment without appropriate consent; and
- Inadequate or overly burdensome cancellation and refund procedures.

Three FTC Requirements to Know

As such, the Policy Statement includes FTC guidance regarding three key requirements to help sellers avoid an enforcement action:

1. All material terms of a product or service must be clearly and conspicuously disclosed (i.e., practically unavoidable by ordinary consumers). Material terms include:
 - How much the product or service costs;
 - Deadlines by which the consumer must act to stop further charges;
 - The amount and frequency of such charges;
 - How to cancel; and
 - Information about the product or service itself that is needed to stop consumers from being deceived about the characteristics of the product or service.
2. Sellers must obtain the consumer’s express informed consent before charging them for a product or service. Importantly, in a notable departure from current industry practice, the FTC’s position is that such consent must be obtained separately from any portion of the entire transaction. Note that disclosures should not include information that interferes with, detracts from, contradicts or otherwise undermines the consumer’s ability to provide their express informed consent.
3. Sellers must provide easy and simple cancellation methods to the consumer. These must be at least as easy to use as the method the consumer used to buy the product or service initially.

While this statement is non-binding guidance, it generally tracks the Restore Online Shoppers’ Confidence Act (which applies to negative option programs), and is indicative of the FTC’s

interpretation of existing law as it applies to negative option practices. Moreover, the FTC is currently conducting rulemaking on negative option marketing and operating, and has noted that it will continue closely monitoring compliance with applicable rules and laws.

For More Information

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