

Emerging Issue

Negative Option Marketing



Negative option offers come in a variety of forms, but generally these offers contain 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.

These types of offers can be made in several different ways, including:

- Pre-notification negative option plans, whereby sellers send periodic notices offering goods. If consumers take no action, sellers send the goods and charge consumers.
- Continuity plans, under which consumers agree in advance to receive periodic shipments of goods or provision of services, charged at regular intervals until they cancel the contract.
- Automatic renewals, which permit a company to automatically renew (and charge for) a consumer's subscription when it expires, unless the consumer affirmatively cancels the subscription.
- Free-to-pay trial offer conversions, under which consumers receive goods or services for free during a trial period. After the trial period, sellers automatically begin charging a fee, unless consumers affirmatively cancel.



Federal Law

FTC's Rule Concerning the Use of Prenotification Negative Option Plans (16 C.F.R. § 425.1) (the "Negative Option Rule")

The Negative Option Rule requires sellers to clearly and conspicuously disclose the material terms of any negative option plan for the sale of goods before consumers subscribe. Under this rule, consumers must be notified of upcoming merchandise shipments and have a set period to decline the shipment. Under this rule, Sellers may interpret a customer's silence, or failure to take affirmative action, as acceptance of an offer.

- In late 2019, the FTC took public comment on potentially amending the Negative Option Rule. While the FTC has yet to take any further action on the proposed rule, in its recently released Enforcement Policy Statement For Negative Option Marketing (below), one Commissioner dissented to the issuance of the Statement, noting that the FTC is in the process of conducting rule making on this topic.

Restore Online Shoppers' Confidence Act (15 U.S.C. §§ 8401-8405) ("ROSCA")

ROSCA prohibits sellers' use of negative option features in online sales, unless (i) prior to charging the consumer, the seller clearly and conspicuously discloses the material terms of the transaction, (ii) obtains the consumer's express informed consent before charging the consumer, and (iii) provides "simple mechanisms" for a consumer to stop recurring charges. ROSCA also places other specific requirements on other Internet-based sales, including post-transaction sales by third parties and prohibiting data pass procedures (i.e. retails disclosing credit, debit, or other financial account numbers to a post-transaction third party seller for use in Internet-based sales).

FTC's Telemarketing Sales Rule (16 C.F.R. §§ 310.1 to 310.9) ("TSR")

The TSR applies to all forms of negative option marketing that occurs over the telephone. Notably, the TSR includes specific requirements for pre-acquired account information transactions involving "free-to-pay conversion" offers, as consumers may otherwise mistakenly believe that they cannot be charged at the end of a free trial because they have not provided their account information.

State Law

The majority of U.S. states either have an automatic renewal law or are currently considering proposed automatic renewal laws. The requirements of these state laws vary with respect to the goods and services to which the laws apply and the requirements for negative option plans. Recent state regulations generally have focused on the disclosures made to a consumer when he or she chooses to sign up for an ongoing service or subscription.

California

(Cal. Bus. & Prof. Code § 17600 et. seq.) (as amended)

California's state statute is among the most stringent state automatic renewal laws, and applies to both automatic renewal plans, as well as "continuous services" (i.e. a plan where a subscription or standing purchase agreement continues until the consumer cancels the service). Courts have found that this law also applies to loyalty programs, where consumers pay a membership fee to receive price and shipping discounts.



Under the statute, any offer that includes a free trial must also contain a clear and conspicuous explanation of the price that will be charged after the trial ends or the manner in which the subscription or purchasing agreement pricing will change upon conclusion of the trial. The statute also prohibits a business from charging a consumer's credit or debit card for an automatic renewal or continuous service that is made at a promotional or discounted price for a limited period of time and that will later increase, without first obtaining the consumer's consent to the non-discounted price prior to billing.

Further, if offering a free trial, a business is required to disclose how to cancel, and allow the consumer to cancel, the automatic renewal or continuous service before the consumer pays for the goods or services.

For automatic renewal programs, companies are required to present automatic renewal terms clearly and conspicuously before the agreement is fulfilled and in visual proximity to the request for consent to the offer, which includes:

- That the subscription or purchasing agreement will continue until the consumer cancels.
- The description of the cancellation policy that applies to the offer.

- The recurring charges that will be charged to the consumer's credit or debit card or payment account with a third party as part of the automatic renewal plan or arrangement, and that the amount of the charge may change, if that is the case, and the amount to which the charge will change, if known.
- The length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer.
- The minimum purchase obligation, if any.
- Affirmative consumer consent to the agreement containing the offer terms is required before a company can charge a consumer's account for an auto renewal offer.

Companies must also provide consumers with an acknowledgement of the auto renewal offer terms, the cancellation policy and information regarding how to cancel (which cancellation procedure must be cost-effective, timely and easy to use).

Consumers who entered into an automatic renewal program online to also be able to cancel their participation in that program fully online.

For automatic renewal offers that include a free gift, trial, or promotional pricing, sellers must notify consumers about how to cancel the auto-renewal before charging the consumer and explain to consumers the price that will be charged after the free trial or promotion ends. Under the updated law, if the initial offer is at a discounted price that will increase later, the seller must obtain the customer's consent to the non-discounted price prior to billing.

The law has recently been amended. Effective July 1, 2022, all businesses that make automatic renewal or continuous services offers to California consumers must:

- Provide notice 3- 21 days before the expiration of the period for which the free gift or trial, or promotional or discounted price, when a consumer accepts a free gift or trial lasting more than 31 days that was included in an automatic renewal or continuous service offer or accepted an automatic renewal or continuous service offer at a promotional or discounted price that applies for more than 31 days.
- Provide notice 15 - 45 days before the automatic renewal offer or continuous service offer renews, when the consumer accepts an automatic renewal or continuous service offer with an initial term of 1 year or longer that automatically continues unless the consumer cancels.

- In either case, the notice must clearly and conspicuously:
 - State that the subscription will automatically renew unless the consumer cancels.
 - Disclose the length and any additional terms of the renewal period.
 - Describe one or more methods by which the consumer can cancel before renewal.
 - Include contact information for the business.
- If delivered in electronic form, the notice must include either a link that directs the consumer to the cancellation process or, if no links exists, another reasonably accessible electronic method that directs the consumer to the cancellation process.
- Allow consumers who accept an automatic renewal or continuous service offer online to terminate the service exclusively online, “without engaging in any further steps that obstruct or delay the consumer’s ability to terminate the automatic renewal or continuous service immediately.”
 - The online cancellation mechanism must be either a prominently located direct link or button, or an immediately accessible termination email formatted and provided by the business that a consumer can send to the business without additional information.

New York

(NY CLS Gen Bus § 527)

The key requirements under the new law are very similar to California’s ARL and include the following:

- Offer terms must be presented to consumers in a clear and conspicuous manner, in close proximity to where a consumer’s consent is being requested.
- Offer terms must clearly disclose material terms such as the continuing nature of the agreement, details around the charges to be made to the consumer’s card or other payment method, and the marketer’s cancellation policy.
- No charges may be made to the consumer without the consumer’s prior affirmative consent to offer terms.



- In the event a marketer sends any goods or performs any services without first obtaining the affirmative consent of the consumer, such goods and/or services will be deemed to be an “unconditional gift” to the consumer, for which the consumer shall bear no cost or expense.
- Marketers must provide consumers, “in a manner that is capable of being retained by the consumer”:
 - An acknowledgement that includes the offer terms, cancellation policy, and information on how the consumer may cancel the agreement; and
 - To the extent applicable, notice of any material changes to the terms and conditions originally agreed to by the consumer, as well as information on how to cancel such amended terms.

Vermont and Washington, DC

(9 V.S.A. § 2454a) and (DC Law 22-235).

Vermont and Washington, DC enacted automatic renewal laws in 2019.

These laws are similar in most respects to California’s automatic renewal law. However, the Vermont and DC laws do contain certain important distinctions:

- Both Vermont and DC laws require that companies issue consumers a 30 – 60 day notice prior to renewals of 12 months or more.
- Vermont’s law also requires that: (i) automatic renewal terms for a subscription term of 12 months or longer be in bold face type, and (ii) consumers must affirmatively opt-in to automatic renewals in addition to accepting the underlying contract and other terms.



For More Information

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