

A photograph of a smartphone displaying a QR code. A red line is drawn across the QR code. The background is blurred, showing what appears to be a modern office or building interior.

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Stepped Up Enforcement Against Inadequate Negative Option/Automatic-Renewal Disclosures

Negative options have been defined by the FTC as commercial transactions in which sellers interpret a customer's failure to take an affirmative action, either to reject an offer or cancel an agreement, as assent to be charged for goods or services. Common forms include continuity plans or the automatic renewal of subscription services pursuant to which a company extends on a payable basis a risk-free trial subscription, or renews a subscribed service by charging a consumer's credit card or telephone service unless the consumer has affirmatively cancelled the service or the continued delivery of products.

Consumer complaints to the FTC and state enforcement agencies have risen dramatically since the growth of the Internet. Consumers often claim that they are not adequately informed about, or have not agreed to, automatic renewals or the payable continuation of free trials, price increases on renewal, how to cancel, and/or have not received full refunds upon cancelling the service or delivery of further goods. This has led to increased federal and state enforcement agency actions, state legislation, and, more recently, consumer class actions. Accordingly, companies engaged in selling goods or services on a negative option or automatic-renewal basis should be careful to comply with applicable FTC and state statutory requirements.

The FTC issued a Trade Regulation Rule in 1973 establishing basic requirements for companies engaging in the practice. Over the years, the FTC has brought actions challenging companies alleged to have failed to comply with its Negative Option Rule or otherwise: (i) by not disclosing the material terms of an offer before consumers have incurred a financial obligation; (ii) by not making such disclosures clearly or conspicuously or in an understandable manner; (iii) by not obtaining a consumer's affirmative consent to the offer; and (iv) by impeding the effective operation of cancellation procedures.

A recent form of alleged abuse occurs when a company sends text messages to consumers promising free gift cards or rewards upon entering personal information, such as a mobile phone number or PIN. According to the FTC, the consumer often is either given no notice or inadequate notice that confirming his or her number leads to continuous monthly charges for "Premium" text messaging services. But the risks can apply to any automatic-renewal offer when the full terms are not disclosed clearly and conspicuously.

Increasing the legal risks, a number of states have recently passed statutes addressing negative option/automatic renewal practices, and even adding further obligations beyond those imposed under the FTC Negative Option Rule. Such states include California, Connecticut, Colorado, Florida, Georgia, Hawaii, Illinois, Louisiana, and North Carolina.

The state statutes usually provide that a violation will also constitute an unfair or deceptive trade practice, thereby allowing for remedies such as restitution of payments made by consumers and recovery of attorneys' fees. Some states also provide—as does the FTC—that products delivered after

notice of cancellation are to be considered free gifts to the consumer. As a result of these statutory developments, consumer class actions have started to be brought—particularly in California—claiming violations of the applicable state statutes and seeking restitution for members of the alleged classes.

In the current environment, companies offering goods or services with negative options or other forms of automatic renewals should review the federal and state obligations to help avoid consumer suits. A company generally can comply with the federal and state laws by doing the following:

- > Provide clear and conspicuous disclosure of the full terms of the offer upfront.
- > Obtain unambiguous, affirmative consent from the consumer for any automatic charge or renewal.
- > Provide timely reminders to the consumer prior to charging for any auto renewal, including clear and conspicuous written notice of cancellation rights prior to the end of a free or low-rate initial period.
- > Provide an easy-to-use cancellation mechanism, such as a toll-free telephone number and/or email address for cancellation.

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