

TO: ULC Study Committee on Recurring Charges
FROM: Prentiss Cox
DATE: December 9, 2021
RE: Supplemental Memo

The most significant development since the Initial Memo in April 2021 was the issuance by the Federal Trade Commission (FTC) of an *Enforcement Policy Statement Regarding Negative Option Marketing* (“the Statement”) on October 28, 2021. Attached with this memo are the majority, dissent and concurrence views on the Statement.

The Statement includes this definition of the problem: “negative option arrangements include, but are not limited to, automatic renewals, continuity plans, free-to-pay or fee-to-pay conversions, and prenotification plans.” This scope is consistent with the discussion in the Initial Memo of the possible scope of this project, which notes each of these terms in Part I.

The issuance of the Statement makes a stronger case for a ULC project moving forward, for three reasons. First, issuance of an enforcement policy makes it more likely the FTC will handle these problems on a case by case basis, which means a rulemaking is less likely. The dissent and concurrence statements make this point. I also confirmed this opinion of the impact of the Statement with a knowledgeable person.

Second, we now have a detailed outline of how the FTC is thinking about these problems. That means we are far less likely to wander into territory that is directly contrary to anything the FTC does if it restarts its rulemaking process. If we draft a uniform law that codifies in state law the express FTC enforcement policy, the result will reinforce consistent rules for the market. If the ULC drafting process leads to a discrepancy with FTC policy, we will have knowledge of the difference. This should give us comfort that we are not wandering into territory that will create conflicts with the FTC’s interpretation of federal consumer protection laws, or if we do so, it will be a conscious decision.

Third, the Statement gives us much better guidance about where state law can address gaps in the federal enforcement system. It lays out three forms of conduct of concern: disclosures, consent and cancellation. As to *cancellation*, the statement imposes method equivalence for consumer communications about sale and cancellation; i.e., if you sell it through X method, you have to allow the consumer to cancel it through X method.¹ The statement also is quite clear and comprehensive about *disclosures* and *consent*, but only at the time of the negative option contract origination. As to disclosures and re-affirmation of consent at the time the negative option expires, the statement is silent. In contrast, as described in the Initial Memo, existing state laws focus substantially on this second stage of disclosures and consent. I think that gives us a roadmap about where state law could make a significant contribution in this area.

¹ In addition to online equivalent methods for sale and cancellation, the statement has this rather strict requirement about telephone cancellation: “If the seller also provides for telephone cancellation, it should provide, at a minimum, a telephone number, and answer all calls to this number during normal business hours, within a short time frame, and ensure the calls are not lengthier or otherwise more burdensome than the telephone call the consumer used to consent to the negative option feature.”