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FTC Announces Final “Click-to-Cancel” Recurring Subscriptions and Memberships Rule

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On October 16, 2024, the Federal Trade Commission announced sweeping changes to the Negative Option Rule. The final “click-to-cancel” rule will require sellers to make it as easy for consumers to cancel their enrollment as it was to sign-up. Most of the final rule’s provisions will go into effect 180 days after it is published in the Federal Register. Provisions relating to disclosures, consent and cancellation will go into effect within 180 days of publication in the Federal Register. Provisions prohibiting misrepresentations will take effect within 60 days of publication in the Federal Register.

“Too often, businesses make people jump through endless hoops just to cancel a subscription,” said FTC attorney and Commission Chair Lina M. Khan. “The FTC’s rule will end these tricks and traps, saving Americans time and money. Nobody should be stuck paying for a service they no longer want.”

The FTC’s “Click to Cancel” Rule is intended to help the FTC get money back to consumers that are misled and addresses some common problems, such as sellers that do not tell the truth or leave out necessary information, consumer that get billed when did not agree to pay, and sellers that make it difficult or impossible to cancel.

Under the FTC’s amended Negative Option Rule, important information must be truthful, clear and easy to find. Consumers have to know what they are agreeing to before they sign-up. Sellers have to be able to establish that consumers knew what they agreed to before they signed-up. There must always be a way to cancel that is as quick and easy as it was to sign-up (e.g., sign-up online/click-to-cancel, in person sign-up/cancel online or over the phone).

The final rule applies to any person who sells, offers, charges or otherwise markets a good or service with a “negative option feature,” which includes automatic renewals, continuity plans, free-to-pay conversions, prenotification negative option plans and others. The final rule applies to negative option marketing in all forms, including, but not limited to, the Internet, telephone, print materials, or in-person transactions. It also applies to B2B transactions.

Violators can be held liable for redress and civil penalties, including for material misrepresentations unrelated to the negative option transaction itself (e.g., in a privacy policy). Marketing a product or service with a negative option feature is enough to trigger the final rule. Sellers are covered by the final rule if they sell, offer, charge for, or otherwise market goods or services that have negative option features.

The FTC's updated rule will apply to almost all negative option programs in any media. Importantly, the rule also will prohibit sellers from misrepresenting any material facts while using negative option marketing; require sellers to provide important information before obtaining consumers' billing information and charging them; and require sellers to get consumers' informed consent to the negative option features before charging them.

The final rule significantly expands the Negative Option Rule to cover any goods or services involving a negative option or automatic renewal plan, including free trials, subscriptions and repeat delivery offers. It is part of the FTC's ongoing review of its 1973 Negative Option Rule, which the agency is modernizing to combat unfair or deceptive practices related to subscriptions, memberships and other recurring-payment programs in an increasingly digital economy where it is easier than ever for businesses to sign up consumers for their products and services.

The FTC vote approving publication of the final rule in the Federal Register was 3-2, with Commissioners Melissa Holyoak and Andrew N. Ferguson voting no. Commissioner Rebecca Kelly Slaughter issued a separate statement and Commissioner Holyoak issued a separate dissenting statement. Commissioner Ferguson's dissenting statement is forthcoming.

FTC approval and publication follows the March 2023 announcement of a notice of proposed rulemaking which resulted in more than 16,000 comments from consumers and federal and state government agencies, consumer groups and trade associations.

While negative option marketing programs can be convenient for sellers and consumers, the FTC receives thousands of complaints about negative option and recurring subscription practices each year. According to the agency, the number of complaints has been steadily increasing over the past five years and in 2024 the FTC states that it received nearly 70 consumer complaints per day on average, up from 42 per day in 2021.

The final rule has similar requirements to the Restore Online Shoppers' Confidence Act. However, ROSCA applies to Internet sales practices. Consequently, the final rule broadens the number of negative option offerings subject to the FTC's requirements. The final rule also goes beyond ROSCA by enumerating methods of disclosures, consent and cancellation. For example, the final rule is broader than ROSCA in that it providing guidance on where disclosures must be placed (e.g, immediately adjacent to the consent mechanism and prior to obtaining consent). Additional information communicated by a seller cannot interfere with, detract from, contradict, or otherwise undermine the ability of consumers to read, hear, see or understand disclosures. The final rule's specific cancellation requirements also go beyond ROSCA.

The final rule does not preempt consistent state legal regulations that provide greater protection

Takeaway: The final rule will provide a consistent legal framework by prohibiting sellers from: (i) misrepresenting any material fact made while marketing goods or services with a negative option feature; (ii) failing to clearly and conspicuously disclose material terms prior to obtaining a consumer's billing information in connection with a negative option feature (for example and without limitation, that consumers will be charged for the product or service, that the charges will increase, that the charges occur on a recurring basis, the deadline by which consumers must act to stop recurring charges, the amount the consumer will be charged and the frequency of those charges, and the information necessary for the consumer to find the cancellation mechanism); (iii) failing to obtain a consumer's express informed consent to the negative option feature before charging the consumer (the final rule requires separate consent for a negative option feature and establishes a safe harbor for companies obtaining consent through a "check box, signature, or other substantially similar method" provided that the consumer affirmatively selects it and it relates only to the negative option feature and no other portion of the transaction); and (iv) failing to provide a simple mechanism to cancel the negative option feature and immediately halt charges. Following an evaluation of public comments, the FTC voted to adopt a final rule with certain changes, most notably dropping a requirement that sellers provide annual reminders to consumers of the negative option feature of their subscription, and dropping a prohibition on sellers telling consumers seeking to cancel their subscription about plan modifications or reasons to keep to their existing agreement without first asking if they want to hear about them. The final rule significantly changes marketing, consent, disclosure and recordkeeping requirements for negative options.

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