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FTC's Negative Option Rule Adds Some New Wrinkles

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The Federal Trade Commission recently released their Final Rule updating the Negative Option Rule. And the Final Rule has some important changes that will affect many businesses.

The Negative Option Rule is an amendment of a current rule, but the FTC found the current rule was not broad enough to adequately protect consumers.

The current rule only applied to "prenotification plans". These plans required sellers to "provide periodic notices offering goods to participating consumers and then send – and charge for – those goods only if the consumes take no action to decline the offer."

The Negative Option Rule expands the prohibited actions from just "prenotification plans" to a new defined term, "Negative Option Feature". A Negative Option Feature is defined as:

A provision of a contract under which the consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement is interpreted by the negative option seller as acceptance or continuing acceptance of the offer, including but not limited to:

- an automatic renewal;
- a continuity plan;
- a free-to-pay conversion or fee-to-pay conversion; or
- a pre-notification negative option plan.

This newly defined term encompasses significantly more contracts than the current rule, including contracts with automatic renewals. Additionally, the FTC stated the update Negative Option Rule applies to both business-to-consumer contracts as well as business-to-business contracts.

For example, if your current contract has a 12 month initial term that auto-renews, then your contract is now subject to this rule.

What is required if a contract has a Negative Option Feature?

A contract that has a Negative Option Feature must list all required material terms to the agreement prior to obtaining the customer's billing information. Material terms include, but are not limited to:

- That consumers will be charged for the good or services, or the charges will increase after any applicable trial period ends, and, if applicable, that the charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such charges;
- Each deadline (by date or frequency) by which the consumer must act to prevent or stop the charges;
- The amount (or range of costs) the consumer will be charged and, if applicable, the frequency of the charges a consumer will incur unless the consumer takes timely steps to prevent or stop those charges; and
- The information necessary for the consumer to find the simple cancellation mechanism.

Negative Option Rule also prohibits the following acts or practices:

1. Misrepresentation of “any Material fact” regarding the Negative Option Feature;
2. Failing to clearly and conspicuously any required disclosures “prior to obtaining the consumer’s Billing Information”;
3. Failing to obtain the consumer’s express informed consent to the Negative Option Feature “before Charging the consumer”; and
4. Failing to “provide a simple mechanism for a consumer to cancel the Negative Option Feature; avoid being Charged, or Charged an increased amount, for the good or service; and immediately stop any recurring Charges.”

The updated Negative Option Rule will go into effect on April 11, 2025. It’s clear from the FTC’s commentary and the updated rule that all contracts with Negative Option Features will need to be reviewed including contracts with current automatic renewals.

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