

The FTC is Drilling Down on Negative Option Marketing Practices

The Bottom Line

- *While the FTC's action against Match plays out in court, it is worth noting that the FTC last initiated a regulatory review of the Negative Option Rule over a decade ago in 2009. When the FTC completed that review in 2014, it concluded that amendments were not warranted because the enforcement tools provided by the TSR and, especially, ROSCA, which had only recently become effective, might prove adequate.*
- *It remains to be seen whether the FTC will reach the same conclusion again — although in light of evolving media and technology, and the proliferation of subscription practices, it seems likely that significant changes to negative option marketing will be coming down the pipeline.*

On the same day that the Federal Trade Commission (FTC) filed a complaint against Match Group, Inc., the owner of Match.com and other online dating websites, including OKCupid and Tinder, the FTC announced a request for public comment on its existing regulations governing negative option marketing. These comments may pave the way for the FTC to use its authority under the FTC Act to significantly expand the scope and coverage of the existing Negative Option Rule.

The Current Framework

Negative option is an increasingly common form of marketing whereby the absence of affirmative consumer action constitutes consent to be charged for goods or services. In recent years, the FTC has increasingly sought to regulate the various forms of negative option marketing through individual law enforcement cases as well as through various regulations, including the FTC's current Negative Option Rule and the Telemarketing Sales Rule (TSR). The FTC also relies on the federal Restore Online Shoppers' Confidence Act (ROSCA) to address online negative option practices and protect consumers from being billed on a recurring basis for products they did not intend to purchase — and cannot easily cancel.

In its request for public comment, the FTC stated that this “existing patchwork” of laws and regulations does not provide the industry and consumers with a consistent legal framework that can be applied across different media and types of plans. For instance, the FTC noted that the current Negative Option Rule applies only to “prenotification plans” for the sale of goods (e.g. “book of the month” clubs) and does not cover other common forms of modern negative option marketing, such as continuity plans, automatic renewals and trial conversions. Further, ROSCA and the TSR do not address negative option plans in all media, with ROSCA applying only to online negative option marketing and the TSR applying only to telemarketing programs.

The FTC emphasized that, under the current regulatory framework, different rules apply depending on whether a negative option offer is made online, over the phone or in some other medium such as in print or through the mail.

Moreover, in the FTC's opinion, current regulations may lack the specificity necessary to deter advertisers from engaging in deceptive negative option practices. In particular, the FTC noted that ROSCA does not provide specific direction with respect to cancellation procedures and the placement, content and timing of cancellation-related disclosures but, instead, only requires that marketers provide a "simple mechanism" for consumers to stop recurring charges.

What the FTC Is Seeking

The FTC acknowledged in its request for public comment that negative option marketing is "widely used" and that it "can provide benefits to both sellers and consumers." As such, the FTC is seeking public comment on ways to improve the existing regulatory requirements, including whether the Negative Option Rule should now be expanded to better address "prevalent unfair or deceptive practices involving negative option marketing."

In particular, the FTC is seeking feedback on the following issues:

- Modifications, if any, the FTC should make to increase the Negative Option Rule's benefits to consumers and businesses;
- Whether any of the Negative Option Rule's requirements are no longer needed;
- The costs the Negative Option Rule has imposed on businesses and whether it should be amended to reduce those costs;
- Whether the Negative Option Rule should define "clearly and conspicuously," given that it requires marketers to make certain disclosures clearly and conspicuously; and
- How the Negative Option Rule overlaps or conflicts with other federal, state or local laws or regulations.

The balance of the specific questions in the FTC's request for public comment relate to the remaining 'patchwork' of laws and regulations governing negative option practices.

These include:

- Considering if there are potentially unfair or deceptive practices concerning the marketing of negative option plans not covered by the Negative Option Rule that are occurring in the marketplace;
- Whether current marketing of negative option plans causes consumer injury;
- How existing laws and regulations covering negative options affect consumers and businesses;
- Whether there is a need for new regulatory provisions "to prevent deception by addressing negative option plans not covered" by the Negative Option Rule;
- If new regulatory provisions are necessary, whether they should treat various types of negative option marketing differently;
- The specific modifications, if any, that should be added to the Negative Option Rule to better address prenotification negative option marketing, continuity plans, trial conversions and/or automatic renewals; and
- Whether current or impending changes in technology or market practices affect whether and how the Negative Option Rule should be modified.

Comments must be received on or before **December 2, 2019**. While it remains to be seen what specific action the FTC will take after this time, one thing is certain — the FTC is making it clear that negative option marketing practices are an enforcement priority.

FTC's Lawsuit Against Match

It is perhaps no coincidence that on the same day the FTC released its request for comment on the Negative Option Rule, it filed a 26-page complaint in the U.S. District Court for the Northern District of Texas against Match Group, Inc. (Match), the owner of Match.com, Tinder, OKCupid, PlentyOfFish and other dating sites, alleging that the company used fake love interest advertisements to trick hundreds of thousands of consumers into purchasing paid subscriptions on Match.com.

The FTC alleged that, until mid-2018, Match sent consumers misleading advertisements that touted communications from persons it had reason to believe were “scammers,” and led consumers to believe that the communications were from persons interested in establishing a dating relationship with them. Because consumers were prohibited from responding to these messages without upgrading to a paid subscription, many consumers purchased subscriptions because of these deceptive advertisements.

Further, once consumers had purchased a paid subscription, Match issued communications “guaranteeing” certain consumers a free six-month subscription renewal if they did not “meet someone special” but failed to adequately disclose the requirements of its “guarantee” — for example, that consumers must message five unique Match.com subscribers per month to be eligible for the “guarantee.”

Importantly, the FTC also asserted that Match violated ROSCA by failing to provide a simple method for consumers to stop recurring charges from being placed on their card or other financial account. In particular, the FTC alleged that Match misled consumers with a “confusing and cumbersome cancellation process” that caused consumers to believe they had canceled their subscriptions when they had not. In the words of the FTC, “each step of the online cancellation process... confused and frustrated consumers and ultimately prevented many consumers from canceling their Match.com subscriptions.”

In light of the concerns raised in the FTC’s complaint, it is perhaps no surprise that the FTC is now seeking comment on whether more specificity under ROSCA with respect to cancellation procedures may help deter such practices in the future.

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