

Advertising + Marketing

From Record Clubs to Retail Subscriptions: FTC Proposes Significant Expansion of Negative Option Rule

The Bottom Line

- The FTC is seeking public comment on sweeping proposed revisions to the Negative Option Rule that could significantly update the rule to govern negative option offers in all forms of media.
- The FTC is hyper-focused on the subscription economy. E-commerce sellers, telemarketers and direct-mail marketers should review the proposed rule and audit compliance practices.
- Post-AMG, the FTC is continuing to expand its ability to seek significant civil penalties and consumer redress in the event of noncompliance.

Negative option offers – such as prenotification plans, continuity programs, automatic renewals and free-to-pay conversions – allow a seller to interpret a customer's silence, or failure to take an affirmative action, as acceptance of an offer.

The FTC created the Negative Option Rule in 1973 to specifically govern prenotification plans (e.g., book-of-the-month and record clubs). Now, most modern negative option marketing is regulated through a patchwork application of Section 5 of the FTC Act (which prohibits unfair or deceptive practices), the Restore Online Shoppers' Confidence Act (ROSCA), which governs internet transactions with a negative option feature, and the Telemarketing Sales Rule (TSR), which applies to negative option offers made over the telephone.

Moreover, virtually every state has an automatic renewal law. These vary in applicability and scope, but generally require companies to provide certain material disclosures, written acknowledgments, renewal reminders, as well as simple cancellation mechanisms, when offering such programs.

Following its 2019 Advance Notice of Proposed Rulemaking and 2021 [Enforcement Policy Statement Regarding Negative Option Marketing](#), the FTC is seeking public comment on sweeping proposed revisions to the Negative Option Rule. The proposed revisions aim to significantly update the rule to govern negative option offers in all forms of media (e.g.,

telephone, internet, print media and in-person transactions). In fact, the FTC even proposed changing the name of the rule to the [Rule Concerning Recurring Subscriptions and Other Negative Option Plans](#).

FTC's Proposal Addresses

Misrepresentations

The proposed rule prohibits any person from misrepresenting, expressly or by implication, any material fact *regarding the entire agreement* - not just facts related to the negative option feature. These deceptive practices may involve misrepresentations related to costs, product efficacy, free trial claims, processing or shipping fees, billing information use, deadlines, consumer authorization, refunds, or cancellation.

Disclosures

Consistent with ROSCA, marketers would be required to disclose any material terms necessary to prevent deception *prior* to obtaining the consumer's billing information, including:

1. if the consumer's payment will be recurring,
2. any deadlines by which consumer must act to stop any charges,
3. the amount or range of costs that consumers could incur,
4. the date that charges will be submitted for payment and
5. information about the mechanism the consumer may use to cancel any recurring payment.

These disclosures must be difficult to miss or unavoidable, easily understandable by average consumers and should not contain any other information that interferes with, detracts from or contradicts these disclosures.

Consent

Marketers would need to obtain a consumer's express informed consent to the entire transaction before charging the consumer, and maintain verification of consent for at least three years. In-line with the Enforcement Policy Statement, this consent would need to be obtained *separately from the rest of the offer and other parts of the transaction*. By way of example, the proposed rule notes that separate consent could be obtained via "check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign."

“Click to Cancel”

Marketers would need to offer a cancellation mechanism that is as *simple as the mechanism to sign up* for the services. At a minimum, cancellation must be able to be effectuated through the same medium that the consumer used to sign up for the service. For example, consumers who purchase recurring subscriptions via the internet must be able to easily “click to cancel” on the same website or web-based application used for sign-up. For services purchased over the phone, marketers must provide a telephone number and ensure that calls are answered during normal business hours.

Attempts to “Save” Consumer before Cancellation?

The FTC acknowledged that, during cancellation attempts, marketers may try to “save” (i.e., pitch additional offers to) the consumer. To avoid consumers from entering into a protracted series of such offers, the proposed rule requires that sellers first obtain a consumer’s *unambiguously affirmative consent* to receive additional offers before confirming their cancellation (e.g., “Would you like to consider a different price or plan that could save you money?”). If consumers do not provide consent, the marketer cannot attempt more “saves” and must cancel the negative option arrangement immediately. If consumers accept, the marketer can pitch the alternative offers.

Reminders and Confirmations

Marketers will be required to send annual reminders in connection with subscriptions and other negative option arrangements for services (e.g., data security monitoring) and non-physical goods (e.g., streaming services).

Expanded Scope

The proposed rule would also be applicable to any misrepresentations regarding the underlying product or service, even if wholly unrelated to the negative option feature. Notably, the rule would expand the FTC’s reach under ROSCA and the TSR by allowing the FTC to seek civil penalties and consumer redress in media outside of telemarketing and/or the internet. This is particularly important following [the AMG Capital decision](#), which limited the FTC’s authority to obtain consumer redress under Section 13(b) of the FTC Act.

Note that this expansion of the Negative Option Rule is not without controversy. Commissioner Wilson, [in dissent](#), posited that the proposed rule could apply to a dietary supplement marketed with a continuity plan that is advertised to relieve joint pain, if such claims are alleged to be deceptive and unsubstantiated. Similarly, the rule could apply to a grocery delivery service

offered via subscription that asserts that the consumer's shopping lists will not be shared, but in fact the service does share the information for advertising purposes – despite the fact that this privacy misrepresentation is unrelated to the subscription aspect of the service.

What Lies Ahead

If enacted, the rule will not preempt state automatic renewal laws, except to the extent that compliance with state law is inconsistent with the provisions of the rule. Any state statute that affords greater protection to the consumer (and is consistent) will remain in effect. So, marketers will likely still need to comply with a patchwork of state laws.

Interested parties can publically comment on the rule within 60 days of the proposed rule's publication in the Federal Register. We expect that the rule will be published shortly, and we are available to assist in preparing and submitting comments.

For More Information

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