

Eighth Circuit Vacates FTC's Negative Option Rule

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On the metaphorical eve of the July 14 effective date for the FTC's Negative Option Rule, the Eighth Circuit released an opinion Tuesday vacating the Rule in its entirety. The economy-wide notice, consent, cancellation, and other requirements in the Rule have been nullified by the [Eighth Circuit's decision](#).

The court's decision is based on procedural grounds: the FTC erroneously determined that the national economic effect of the proposed rule would be under \$100 million, and on this basis declined to conduct a preliminary regulatory analysis that would have identified alternative approaches, along with estimates of their costs and benefits. The court held that this failure deprived businesses and other interested parties of the opportunity for informed participation in the rulemaking process. The court determined that the relevant provisions of the FTC Act required the court to set aside the entire Rule.

So what's next for federal enforcement? In the short term, barring any emergency relief that the FTC could seek as part of an appeal of the panel's decision, the Negative Option Rule will not become enforceable on July 14. In the longer term, it is unlikely that the FTC under its current leadership will attempt to resurrect the Rule, either by petitioning for review of the panel's decision or beginning a new rulemaking process. Chairman Ferguson and Commissioner Holyoak dissented from the FTC's decision to adopt the Rule, citing not only a flawed rulemaking process but also its unnecessarily broad and prescriptive requirements. However, the FTC can [and does](#) bring enforcement actions against specific companies to stop automatic renewal practices that are unfair or deceptive under Section 5 of the FTC Act, or that violate ROSCA or the Telemarketing Sales Rule. The FTC may obtain civil penalties under ROSCA and TSR (but not under Section 5).

And keep a close eye on the states. State automatic renewal laws and state UDAP laws are unaffected by this decision. In the past several months alone, several automatic renewal laws have been enacted or amended, including in [New York](#), [California](#), Connecticut, [Massachusetts](#), Maryland, and Arkansas. As recent enforcement [actions and press from the New York AG](#) have made clear, autorenewal programs are under scrutiny, and AGs across the country will continue to look closely at automatic renewal plans especially to enforce their new laws and protect against any perceived gaps arising out of vacating the Rule.

As a reminder, state autorenewal laws' requirements are similar to, and sometimes exceed, the now-invalidated Negative Option Rule. Given the variation among state laws, state-by-state compliance may require close attention to specific requirements.

Typical requirements include:

- Clear and conspicuous up-front disclosures of specific automatic renewal terms in visual

proximity to consent

- Post-purchase acknowledgement containing specific autorenewal terms
- Reminder notices
- Notices of material changes to the autorenewal terms
- Cost effective, timely, and easy-to-use cancellation (and simple mechanism, as states can also enforce ROSCA)

Beyond this, some states also:

- Require cancellation mechanisms to be in the same medium as consent
- Giving consumers the ability to cancel automatically renewing plans immediately
- Require businesses to obtain affirmative consent to the automatic renewal terms
- Restrict the presentation of “save” offers, such as discounts, that are intended to convince consumers not to cancel their automatically renewing plans

We will watch closely for any further developments concerning the Negative Option Rule, as well as state regulatory and enforcement developments in this space.