

FTC Finalizes “Click to Cancel” Rule; Brings Vast Changes and New Risks to Subscription Plans, Repeat Delivery Offers

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Last year, we [wrote](#) about the FTC’s proposal to massively expand 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.

That proposal is now embodied in a 230-page [final Rule](#), announced today, which retains most (but not all) provisions included in the 2023 proposed rule. Should it survive likely judicial challenge, the new Rule would significantly change marketing, consent, disclosure, and recordkeeping requirements for negative options while providing the agency with authority to seek redress and civil penalties for violations, including for misrepresentations completely unrelated to the negative option transaction itself.

The new 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, and free-to-pay conversions, among others. It broadly applies to negative option marketing in all forms, whether effectuated through the internet, phone, print materials, or in-person transactions. FTC Staff also made clear that the Rule applies to business-to-business transactions – rejecting comments that the Rule should be limited to consumers based on differing sophistication levels and/or lack of documented harm in B2B transactions.

We also note, as an initial matter, that the Rule doesn’t require consumers to actually avail themselves of a negative option in order to trigger the Rule’s applicability; only that the good or service in question be marketed or sold “with” a negative option feature. This may create ambiguity for companies offering goods or services that could be purchased either with a negative option feature or without.

The Rule’s far-reaching requirements include:

(1) Prohibition on Misrepresentations: The final Rule prohibits sellers from misrepresenting any Material fact while marketing using negative option features—even if that fact is wholly unrelated to the negative option feature. The final Rule includes a new definition of “Material” intended to provide clarity, though businesses are unlikely to find much relief given the similarly amorphous nature of a fact “likely to affect a person’s choice, or conduct regarding, goods or services.”

The Rule provides four examples of such “material facts”: (a) the existence of the negative option feature or any of its terms; (b) the cost of the underlying good or service; (c) the purpose or efficacy of the underlying good or service; (d) health or safety. While these examples do provide some clarity, subsection (e) of the provision broadly adds, “or. . . any other material fact,” leaving open the possibility that many other types of misrepresentations could be interpreted as “material” and thus trigger a rule violation. In comments to the Rule, some commenters queried whether technical misrepresentations in privacy policies, for example, could trigger a violation under the Rule.

In response, the Commission confirms that a material misrepresentation in a privacy policy could indeed be a violation of the Rule. The Commission justifies this expansive provision by pointing to its recent interpretation of ROSCA as covering any material misrepresentations of an underlying product or service, arguing that the new Rule “promotes clarity consistent with ROSCA and Commission precedent.” The Commission does not acknowledge that its ROSCA expansion has, in and of itself, proven controversial and has yet to be tested in court.

(2) Mandatory Disclosures: The Rule requires negative option sellers to clearly and conspicuously disclose all “Material terms,” regardless of whether those terms directly relate to the negative option feature. The Rule includes a non-exhaustive list of terms that must be disclosed, including: (a) the fact that consumers will be charged for the good or service, that the charges will increase, if that is the case, or that the charges occur on a recurring basis; (b) the deadline by which consumers must act to stop recurring charges; (c) the amount the consumer will be charged and the frequency of those charges; and (d) the information necessary for the consumer to find the cancellation mechanism. While the FTC expressly declined to limit the provision to only material information related to the negative option offer, they removed a specific requirement to disclose “the date (or dates) each charge will be submitted for payment” as impractical, and modified the requirement to permit the disclosure of each deadline (by date or frequency) in an attempt to be more flexible. The Rule requires that these disclosures be clear and conspicuous, that they occur prior to obtaining consumers’ billing information, and that they appear immediately next to and before the means of recording consumers’ consent to the negative option (discussed below). For companies for which consumers have previously elected to save their billing information, the disclosures must be made before the consumers provide consent to use the saved account information.

In light of the rule’s applicability to goods and services “with a Negative Option Feature,” as discussed above, it is difficult to determine if companies offering consumers services with and without negative options would need to make these same disclosures in all instances, including when consumers select a non-automatically renewing option. Presumably, disclosures such as the deadline by which consumer must act to stop recurring charges or information necessary for cancellation would only be relevant to consumers actually selecting a negative option, but the Rule does not appear to make this distinction.

(3) Express Affirmative Consent: The Rule requires sellers to obtain consumers’ “unambiguously affirmative consent” to the negative option feature. The consent (a) must be separate from any other portion of the transaction; (b) cannot include any information that interferes with or undermines the ability of the consumer to consent; and (c) must occur before the consumer is charged. Moreover, the Rule requires that sellers maintain records of consumers’ consent for three years unless the seller can show that it uses a process that would not allow the consumer to complete the transaction without the required consent.

In a potential minor consolation to some industry members, the Rule removes the requirement from the proposed rule that sellers also obtain separate, unambiguously affirmative consent to the “rest of the transaction,” as opposed to the “negative option feature” itself. The rule establishes a safe harbor for companies obtaining consent through a “check box, signature, or other substantially similar method” as long as the consumer affirmatively selects it and it relates only to the negative option feature and no other portion of the transaction.

(4) Simple Cancellation (“Click to Cancel”): Sellers are required to provide a “simple mechanism” for a consumer to cancel the negative option feature or avoid being charged. The Rule requires that this “simple mechanism” be at least as easy to use as the mechanism the consumer used to consent to the negative option feature.

For electronic cancellations, the Rule requires that the simple cancellation method be easy to find. The method cannot require the consumer to interact with a live or virtual representative (i.e., chat bot) to cancel if the consumer did not have to do so when she consented to the negative option feature.

For telephonic cancellations, the seller must effectuate the cancellation request using a telephone number that is answered during normal business hours. The number cannot be more costly than the phone number the consumer used to sign up for the negative option feature.

For in-person cancellations, the seller must offer, where practical, an in-person method of cancellation similar to the process the consumer used to sign up. The seller also must provide simple cancellation electronically or via phone.

In addition to the modifications referenced above, the final Rule differs from the proposed rule in two ways. First, the proposed Rule would have required sellers of non-physical goods to provide annual reminders to consumers of the negative option feature. It also would have made it unlawful for sellers to try to “save” a consumer without first obtaining their express consent to hear a save. Following an evaluation of public comments, the FTC decided to exclude these requirements from the final Rule—but noted that it plans to seek further comments on them through supplemental NPRMs. Per the FTC, it is “keep[ing] the record open on these issues.”

The final rule received a 3-2 vote along party lines, with Commissioner Holyoak issuing a spirited [dissent](#) arguing, among other things, that the majority allegedly failed to follow the Magnusson-Moss rulemaking process, that the new rule incentivizes companies to avoid negative options by raising risks associated with such features, and that the Commission missed an opportunity to make needed changes to the prior version of the Rule that are within Commission authority and could withstand judicial scrutiny. These concerns largely mirror issues raised in former Commissioner Wilson’s dissent to the NPRM, which we also discussed in our prior blog.

Should it go into effect, the Rule will significantly expand the agency’s ability to impose monetary redress in the wake of the AMG Capital decision, which determined that such relief was not permitted under Section 13(b). It will also allow the FTC to impose civil penalties for first-time deception violations when companies use negative option features – a significant expansion in authority.

The final rule takes a bifurcated approach to the effective date. Provisions relating to disclosures,

consent, and cancellation will go into effect within 180 days of publication in the Federal Register. The provisions prohibiting misrepresentations will take effect within 60 days of publication in the Federal Register.

While the Rule will likely face some legal challenges, companies should evaluate whether their current practices comport with the new requirements in the Rule, along with additional state requirements that may overlap with and at times go farther than the new Rule, which we will continue to cover here.