

FTC Relaunches Negative Option Rulemaking with New Questions, New Branding

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Eight months after the Eighth Circuit vacated the FTC's 2024 "Click to Cancel" Rule, the Commission is starting over by issuing a new [Advance Notice of Proposed Rulemaking](#) ("ANPRM") yesterday that seeks public comment on whether and how to modernize the Negative Option Rule. Comments are due 30 days after publication in the *Federal Register*. As [we previously discussed here](#), the Eighth Circuit's decision last July invalidated the revised and expanded rule on procedural grounds ("Vacated Rule") and reinstated the original 1973 version of the Negative Option Rule, which only covers prenotification plans.

The ANPRM released yesterday covers many of the same issues and themes of the Chair Khan-era Rule, though with some new questions and a difference in tone, language, and branding (seemingly no longer the "Click to Cancel" Rule). Nonetheless, the same overriding limitation serves as the impetus for the new ANPRM: the 1973 rule "does not reach most modern negative option marketing," including continuity plans, automatic renewals, and free-trial conversions. Having decided not to appeal the Eighth Circuit's decision, the Commission is building a fresh rulemaking record from scratch, though it does solicit input on many aspects from the Vacated Rule.

Familiar Ground and Continued Source of Enforcement

At a high level, the ANPRM covers familiar territory. The Commission is once again asking whether it should expand the longstanding Negative Option Rule beyond prenotification plans to cover automatic renewals, continuity plans, and trial conversions, with potential requirements related to disclosure, consumer consent, and cancellation mechanisms. The ANPRM asks commenters whether it should retain the current rule, adopt provisions from the Vacated Rule, use different provisions, or pursue alternatives like consumer and business education.

The enforcement narrative is also consistent. The ANPRM released yesterday notes that the Commission has brought five litigated enforcement actions and six separate settlements since January 2025 related to negative option plans, and asserts that complaint rates have "steadily risen from at least 33 per day in late 2020 to more than 90 per day in 2025."

Where the ANPRM Breaks New Ground

The ANPRM is not simply asking whether to revive the vacated 2024 rule wholesale. The four core requirements of that rule are specifically called out as possible building blocks: prohibiting misrepresentations, requiring disclosure of material terms, obtaining express informed consent, and providing a simple cancellation mechanism. But the Commission also seeks a variety of new

information and data.

Building a deeper economic and data record. The Commission is not just asking whether negative option practices are a problem, but rather requesting quantitative data to evaluate whether the “prevalence” standard required by Section 18 of the FTC Act is met. Specifically, the ANPRM requests enrollment volumes, cancellation times broken down by method and percentile, total revenue figures, average program pricing, and data on how much consumers spend “on negative option programs that go unused, including after they attempt to cancel.”

On the cost side, the Commission asks for itemized compliance cost projections covering “costs to read and understand the rule, costs to update procedures and train personnel on compliance, costs to revise web pages and apps for compliance, costs to modify existing contracts and subscriptions, costs to update disclosures, [and] costs for record keeping.” This emphasis on empirical data appears designed to build the kind of regulatory record the Eighth Circuit found lacking the first time around.

The role of service providers. The Commission also requests information about the role that third-party service providers play in enrollment and cancellation. Payment processors, subscription management platforms, and customer relationship management providers are all specifically mentioned. The ANPRM asks how these intermediaries affect a seller's ability to comply with disclosure, consent, and cancellation requirements. The Vacated Rule did not specifically address these dynamics, which are particularly acute for subscriptions sold through app stores.

Retention and “save” offers. After initially proposing to do so, the final 2024 rule did not restrict save offers so long as they did not undermine the simple cancellation mechanism. The ANPRM reopens the question, asking: “Is it unfair or deceptive to offer discounts or other incentives to remain enrolled in a negative option program (‘Saves’) instead of promptly honoring a consumer's request to cancel?” The Commission is also seeking data on acceptance rates, consumer savings, delays in the cancellation process, and the impact of state laws like California's that regulate save attempts.

Competitive effects. The ANPRM asks new questions about how unfair or deceptive negative option practices affect competition among businesses, including whether firms that do not engage in such practices face a competitive disadvantage, and whether the effects differ for small businesses.

Exemptions. Neither the 2019 ANPRM nor the vacated rule meaningfully engaged with industry-level exemptions. The 2026 ANPRM dedicates an entire section to the topic and asks whether “exemptions [should] be limited to individual businesses or should [they] cover entire industries,” whether “a new rule [should] apply to certain industries only,” and whether unfair or deceptive practices are “not prevalent for negative option transactions between certain types of parties,” giving the example of “B2B transactions between sophisticated business entities.” Notably, the FTC took the position that the Vacated Rule covered B2B transactions and made them subject to the same requirements as consumer transactions.

Looking Ahead

No new requirements take effect today, and this ANPRM does not guarantee that a new rule will ultimately emerge. It took roughly five years from the 2019 ANPRM to the final rule that the Eighth Circuit ultimately vacated. In the meantime, negative option practices remain squarely in the FTC's (and state AGs') crosshairs and a priority for investigations and enforcement. And as we have [covered](#), state automatic renewal laws continue to proliferate and impose a sometimes conflicting

patchwork of requirements with prescriptive timeframes for reminder notices and other requirements.

The comment window is a meaningful opportunity for businesses to help shape whatever rule may follow. Companies and trade associations that want a workable framework should consider weighing in. For questions about the ANPRM or assistance preparing comments, please reach out to the authors.