

Unpacking the FTC's New Negative Option Rule, Its Legal Challenges, and Future Uncertainty

The rule impacts both B2B and B2C subscription autorenewals and other negative option programs; however, significant legal challenges could impact the rule's implementation.

Key Points:

- The FTC's new Negative Option Rule — also known as the “**click-to-cancel**” rule — introduced a host of new requirements for both B2B and B2C companies offering negative option terms to consumers (e.g., automatic renewals, prenotification plans, continuity plans, and free trial conversion offers). Companies seeking to comply with the Final Rule should review their marketing, disclosure, consent, and cancellation practices to ensure compliance and avoid enforcement actions and civil penalties. This Alert provides detailed insights into these new requirements.
- Notwithstanding these new requirements, significant legal challenges could impact the rule's implementation. Pending lawsuits, the transition of presidential administrations, and the Congressional Review Act could each lead to the rule's complete or partial abrogation. This Alert offers in-house counsel and compliance professionals a list of key challenges to monitor in order to effectively advise their companies.
- For companies offering B2B negative option terms, adherence to the new FTC rule alone may not ensure compliance with applicable state requirements. In particular, this Alert highlights that the FTC specifically declined to include after-sale notifications in its new rule; however, certain state jurisdictions may still require such notifications for B2B negative option plans.
- Given these complexities and potential legal challenges, it is crucial for in-house legal departments and compliance professionals to consciously design and document user interfaces which meet or exceed applicable requirements.

Major Changes Under Negative Option Rule 16 CFR Part 425: Final Rule

On October 16, 2024, the Federal Trade Commission (the Commission or FTC) issued a final “click-to-cancel” rule (the Final Rule) as part of its ongoing efforts to modernize its 1973 “Negative Option Rule”¹ to curb “unfair or deceptive practices related to subscriptions, memberships and other recurring-payment programs in an increasingly digital economy.”² The Final Rule significantly expands the original rule's marketing, disclosure, consent, and cancellation requirements and encompasses a broader definition of negative options programs.

The main takeaways of the Final Rule are listed below. For direct review, the text of the Final Rule, the rule's Statement of Basis and Purpose (SBP), and final regulatory analysis have been recently [published in the Federal Register](#).³ The prohibition on "Misrepresentations" and certain other procedural provisions become effective on January 14, 2025, but the key compliance provisions requiring businesses to disclose material terms, obtain consumers' express informed consent, and provide simple cancellation processes will go into effect on May 14, 2025, unless a court or the new Commission (once in place) takes action to disrupt or delay enforcement.⁴

- Scope.** The Final Rule applies to all negative option programs, regardless of media (i.e., whether the offer appears online, on the phone, or in person) and regardless if the transaction is business-to-business (B2B) or business-to-consumer (B2C).⁵ Under the Final Rule, negative option programs include any program with a provision that interprets a "consumer's silence or failure to take affirmative action to reject . . . or to cancel" as an acceptance of the offer, including, without limitation, automatic renewals, continuity plans, free trials (i.e., free-to-pay or nominal fee-to-pay conversions), and prenotification plans.⁶ This scope differs from the FTC's prior negative option rule which only applied to prenotification plans.⁷ This scope also differs from most state automatic renewal laws since it applies to both B2B and B2C transactions, whereas the vast majority of states with automatic renewal laws only apply such laws to B2C transactions.
- Misrepresentations.** The Final Rule adopts truth-in-advertising principles by prohibiting misrepresentations of any material fact while marketing a good or service using a negative option feature, whether related to the negative option feature, the underlying product or service, or other aspects of the transaction.⁸ In short, any misrepresentation that a negative option seller makes — whether related to the negative feature or not — would be a violation of the Rule, for which the FTC could seek civil penalties. (Following the Supreme Court's decision in the *AMG* case, the FTC is not able to seek civil penalties in Court for first-time violators under general Section 5 unfair and deceptive trade practice authority, except when the conduct violates a specific regulation or cease-and-desist warning).⁹
- Disclosures.** The Final Rule updates existing requirements to disclose all material terms clearly and conspicuously before obtaining consumers' billing information and before obtaining consumers' consent to the negative option feature.¹⁰ Additionally, four specific disclosures enumerated by the Final Rule must be disclosed directly adjacent to the means of recording consumer consent to the negative option feature.¹¹ Those four disclosures are (1) the charges will be recurring unless the consumer cancels and, for trials, that charges will increase after the trial period, (2) the deadline to stop charges, (3) the amount and frequency of the charges, and (4) how to find the cancellation mechanism. No other information can be included that undermines consumers' ability to understand those four disclosures.¹²
- Clear and Conspicuous.** Consistent with longstanding FTC guidance and practice, the Final Rule states that a required disclosure is "Clear and Conspicuous" if it is "easily noticeable", "difficult to miss" (e.g., a visual disclosure must "stand out from any accompanying text or other visual elements"), and easily understandable by ordinary consumers".¹³ In addition to these general standards, the Final Rule also provides (i) medium-specific prescriptions for disclosures made via audio, visual, audiovisual, or electronic media, and (ii) that when a business targets a specific audience (e.g., children, elderly, or terminally ill) the members of that group will be judged to be the "ordinary consumers".¹⁴ Of the medium-specific prescriptions, most notable is that disclosures made through the internet, a mobile app, or other "Interactive Electronic Medium" must be "unavoidable".¹⁵

- **Consent.** The Final Rule requires businesses to obtain a consumer’s “express informed consent” to the negative option feature before charging the consumer.¹⁶ Consent must be obtained separately from any other portion of the transaction, and except in a few specific circumstances, the consent mechanism may be a check box, signature, or other substantially similar method.¹⁷ Verification of consent must be maintained for at least three years unless a seller can demonstrate by a preponderance of the evidence that “no consumer can technologically complete the transaction without consent”, in which case the records maintenance requirement is lifted.¹⁸ The consent request must be presented in a clear, unambiguous, and non-deceptive manner, and free of any information not directly related to the consumer’s acceptance of the negative option feature.¹⁹
- **Cancellation.** Very notably, the Final Rule requires a simple mechanism to cancel the negative option feature and immediately halt further charges that is “at least as easy” as the sign-up process.²⁰ Not only must the simple cancellation mechanism be in the same medium a consumer used to consent, but also, depending on the medium used for consent — electronic, telephone, or in-person — specific additional requirements must be met.²¹ Specifically, for cancellation through the internet or a mobile app, the cancellation mechanism must be easy to find and a consumer should not be required to interact with a live or virtual representative to cancel if the consumer did not interact with such representative to consent.²² In the Final Rule’s SBP, the FTC emphasized that the simple cancellation mechanism concerns only the negative option feature; nothing in the Final Rule prohibits other provisions in a contract from being subject to different cancellation and termination terms.²³
- **Preemption.** The Final Rule does not preempt state laws that require more protection for consumers, such that if any state laws impose additional requirements, businesses must also comply with those state regulations.²⁴
- **Exemptions.** Upon successful petition, the Commission may issue partial or full exemptions to the Final Rule, but may condition exemptions on compliance with alternative requirements.²⁵

Major Differences Between the Proposed Rule and the Final Rule

Over the past year, a lot of ink has been spilled over the requirements that the FTC originally proposed in its [2023 Notice of Proposed Rulemaking](#) (the 2023 NPRM or the Proposed Rule). However, not every issue covered by the 2023 NPRM landed in the Final Rule. Most notably:

- **Number of Required Consents.** The Proposed Rule originally required a seller to obtain two separate consents: (1) a consent to the negative option feature, separate from any other portion of the transaction, and (2) another consent to the “rest of the transaction”.²⁶ Ultimately, the FTC did not adopt the second requirement for a separate consent to the “rest of the transaction” because it viewed such second consent as unnecessary, potentially confusing, and potentially hard to implement.²⁷ In practical terms, a company seeking to comply with the Proposed Rule might have implemented two checkboxes: one to agree to the negative option terms, and a second to agree to the rest of the transaction. However, the Final Rule only requires the former.
- **Annual Reminders.** As we have seen in ROSCA “fencing in” terms demanded in stipulated settlements and judgments with the FTC, the Proposed Rule required businesses to provide annual reminders to consumers for non-physical goods sold with a negative option feature through the same medium the consumer used to consent to the negative option feature.²⁸ However, the Commission determined it needed additional information before putting this requirement in the Final Rule, and that it will consider issuing a Supplemental Notice of Proposed Rulemaking (SNPRM) to seek additional comment.²⁹ The FTC cited the difficulty of consumers to track all their negative option services such

that an entire subscription management industry has arisen as good evidence that some sort of reminder requirement is necessary, and that even an annual cadence may be insufficient to mitigate the harm of negative option practices.³⁰

- **After-Sale Notification of Material Changes in Terms.** Given the importance of providing notice of material changes to negative option contracts, the FTC sought comment on the issue. But neither the Proposed Rule nor the Final Rule included any such notice requirement.³¹ The Commission's current position is that determining whether a seller's failure to notify a consumer of any after-sale material changes is unfair or deceptive could be heavily fact-dependent; therefore, rather than draw a universal bright-line rule, the issue is better suited for case-by-case enforcement action.³²
- **Use of "Saves" at Time of Cancellation.** A "save" is when — at the time a consumer attempts to cancel a negative option feature — a seller presents to the consumer additional offers, modifications to the existing plan, or reasons to retain the existing offer (e.g., loss of preferred rate), or other similar information.³³ The Proposed Rule would have prohibited sellers from forcing consumers to receive saves without first obtaining their unambiguous affirmative consent to receive saves during that specific cancellation attempt.³⁴ Ultimately, the FTC removed this requirement in its Final Rule as it did not strike the right balance between protecting consumers and allowing sellers to provide valuable information at the time of cancellation.³⁵ Like with the annual reminder requirement, the Commission will consider issuing an SNPRM in the future, but it expressed a desire to be clear that it did not want its failure to place prohibitions on saves in the Final Rule to be interpreted as a license to erect unreasonable and unnecessary barriers to cancellation.³⁶

Takeaways for B2B Transactions With Negative Option Terms

While the FTC acknowledges it received comments that the Final Rule should not apply to B2B transactions, the Commission disagreed.³⁷ In declining to limit the scope of the rule, the Commission cited its "longstanding view that Section 5 of the FTC Act protects business consumers as well as individual consumers".³⁸ Notwithstanding the FTC's broad approach, the Commission was careful to explain it is neither the purpose nor outcome of the Final Rule to prevent the ability of sophisticated business consumers to negotiate bespoke B2B negative option terms.³⁹

In short, a B2B consumer who individually negotiates a negative option term can also individually negotiate the cancellation mechanism.⁴⁰ Moreover, the Commission pointed to the fact that it has not used its consumer protection authority in large individually negotiated B2B transactions that do "not tend adversely to affect the public." Therefore, the Commission felt the Final Rule adequately preserved the rights and needs of sophisticated business consumers to negotiate B2B terms.⁴¹

As of the date of this Alert, businesses that offer B2B negative option terms and that comply with the Final Rule are likely to comply with the small handful of non-federal jurisdictions whose automatic renewal laws expressly or potentially cover B2B relationship (the B2B Jurisdictions). The only circumstance in which this general compliance rule-of-thumb appears to be definitively *not* true is in respect of after-sale notifications. As discussed above, the Final Rule did not include annual reminders and did not include notices for material changes to term.

Consequently, B2B companies offering negative option terms must continue to comply with the laws of any B2B Jurisdictions that require after-sale reminders or notices. (Should you have any questions on compliance with the Final Rule and any automatic renewal laws of B2B Jurisdictions, please contact one of the authors of this Alert.)

Legal Challenges to the Final Rule

While the Final Rule has significant importance simply as providing insight into FTC staff enforcement approach and expectations, formally, the rule attracted significant legal challenges in federal court and could face additional legal and administrative challenges prior to its implementation. In-house counsel and other compliance professionals responsible for advising their company clients on compliance with the Final Rule should monitor the following, each of which are discussed further below:

- The federal multidistrict litigation consolidated in the Eighth Circuit that is challenging the Final Rule, and whether any nationwide injunctions halting enforcement of the Final Rule are issued.
- Current Republican Commissioner Andrew Ferguson will become chair of the FTC under incoming President Trump, whose announced nominee Mark Meador, a former Senate counsel, will join the Commission once confirmed (as expected). The third Republican Commissioner, Melissa Holyoak, published a strongly worded dissent to the rule in October 2024.⁴² Thus, there may be three votes to delay or disrupt enforcement of the Final Rule.

Promptly after its issuance, lawsuits challenging the Final Rule were filed in several circuit courts, including in the Fifth,⁴³ Sixth,⁴⁴ Eighth,⁴⁵ and Eleventh⁴⁶ Circuits. Those challenges argue, among other things, that the Final Rule (or parts thereof) is overbroad, arbitrary, and capricious, and therefore should be enjoined. Due to the similar arguments in each lawsuit, the Judicial Panel on Multidistrict Litigation issued a consolidation order, packaging the cases together and transferring them to the Eighth Circuit.⁴⁷ This set of consolidated cases will no doubt impact if, when, and how the Final Rule goes into effect.⁴⁸

In addition to challenges raised in court, the Final Rule may be vulnerable as a result of the impending transition in presidential administrations. First, and most notably, the membership of the commission is expected to change. In December, President-elect Trump announced that Commissioner Andrew Ferguson will serve as the new chair of the FTC. Because Commissioner Ferguson is an existing commissioner and has already been appointed with the advice and consent of the Senate, his elevation to chair will be automatic. Commissioner Ferguson — along with Commissioner Melissa Holyoak, the other Republican member of the FTC — voted against the Final Rule, with Commissioner Holyoak issuing a dissent stating that the Final Rule is “an ill-disguised political maneuver . . . in the form of a rule, one rushed to publication to advance the prospects of [Chairwoman Lina Khan’s] preferred presidential candidate”.⁴⁹ With a Republican commissioner who already once voted against the Final Rule leading the Commission, future administrative challenges to rollback, further amend, revoke, or simply not enforce the Final Rule are plausible.

Notwithstanding Commissioner Ferguson’s appointment to the chair, current Chairwoman Lina Khan may continue serving on the commission until her replacement is properly appointed. Under 15 U.S.C. §41, at the end of a commissioner’s term, they may continue to serve until their successor is appointed and qualified. The practical result is that, unless Chairwoman Khan resigns, Commissioner Ferguson may, temporarily, be chairman of a Commission where the Democratic commissioners still hold the majority 3-2. Therefore, any administrative challenges to the Final Rule could be delayed until Trump’s announced nominee Mark Meador is (presumably) confirmed. Whether and how the new Commission, once constituted, will approach the click-to-cancel rule remains to be seen, necessitating continued monitoring and prudential gap analysis of current user interfaces and consents as against the federal and state requirements.

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Endnotes

¹ Negative Option Rule, [89 Fed. Reg. 90476](#) (Nov. 15, 2024) (to be codified at 16 C.F.R. Part 425).

² FTC, Press Release: Federal Trade Commission Announces Final "Click-to-Cancel" Rule Making It Easier for Consumers to End Recurring Subscriptions and Memberships (October 16, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/10/federal-trade-commission-announces-final-click-cancel-rule-making-it-easier-consumers-end-recurring>.

³ The FTC has also developed a [fact sheet](#) summarizing the changes to the rule.

⁴ Negative Option Rule, [89 Fed. Reg. 90476](#) (Nov. 15, 2024) (to be codified at 16 C.F.R. Part 425).

⁵ *Id.* at 90537 (§425.1 of the Final Rule).

⁶ Under a prenotifications plan, a seller provides periodic notices offering goods to participating consumers and will send and charge for those goods only if the consumers take no action to decline the offer (e.g., book-of-the-month club). Under a continuity plan, consumers agree in advance to receive periodic shipments of goods or provision of services until the agreement is canceled (e.g., bottled water delivery). In automatic renewals, sellers automatically renew the contract when they expire, unless the consumer affirmatively cancels (e.g., credit-monitoring service). Finally, in free-to-play plans, consumers received goods/services for free (or a nominal fee) for a trial period, after which the seller automatically begins charging a fee unless consumers affirmatively cancel. *Id.* at 90477. See also *id.* at 90538 (§425.2 of the Final Rule).

⁷ *Id.* at 90477.

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- ⁸ *Id.* at 90538 (§425.3 of the Final Rule).
- ⁹ *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021).
- ¹⁰ *Id.* (§§425.4(a), 425.4(b)(1), and 425.4(b)(2)(ii) of the Final Rule).
- ¹¹ *Id.* (§425.4(b)(2)(i) of the Final Rule).
- ¹² *Id.* (§425.4(b)(3) of the Final Rule).
- ¹³ *Id.* (§425.2 of the Final Rule).
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ *Id.* at 90538, 90539 (§425.5(a) of the Final Rule).
- ¹⁷ *Id.* (§§425.5(a)(1), 425.5(c) of the Final Rule).
- ¹⁸ *Id.* at 90538, 90539 (§425.5(a)(3) of the Final Rule).
- ¹⁹ *Id.* at 90538 (§425.5(b) of the Final Rule).
- ²⁰ *Id.* at 90539 (§§425.6(a)-(b) of the Final Rule).
- ²¹ *Id.* (§425.6(c) of the Final Rule).
- ²² *Id.* (§425.6(c)(i) of the Final Rule).
- ²³ *Id.* at 90490.
- ²⁴ *Id.* at 90539 (§425.7 of the Final Rule).
- ²⁵ *Id.* (§425.8 of the Final Rule).
- ²⁶ Negative Option Rule, [88 Fed. Reg. 24716](#), 24735 (April 24, 2023) (§425.5(a)(1), (a)(3) of the Proposed Rule).
- ²⁷ Negative Option Rule, [89 Fed. Reg. 90476](#), 90502 (Nov. 15, 2024) (to be codified at 16 C.F.R. Part 425).
- ²⁸ Negative Option Rule, [88 Fed. Reg. 24716](#), 24736 (April 24, 2023) (§425.7 of the Proposed Rule).
- ²⁹ Negative Option Rule, [89 Fed. Reg. 90476](#), 90514 (Nov. 15, 2024) (to be codified at 16 C.F.R. Part 425).
- ³⁰ *Id.*
- ³¹ Negative Option Rule, [88 Fed. Reg. 24716](#), 24730-24731 (April 24, 2023); Negative Option Rule, [89 Fed. Reg. 90476](#), 90515-90516 (Nov. 15, 2024) (to be codified at 16 C.F.R. Part 425).
- ³² Negative Option Rule, [89 Fed. Reg. 90476](#), 90515 (Nov. 15, 2024) (to be codified at 16 C.F.R. Part 425).
- ³³ Negative Option Rule, [88 Fed. Reg. 24716](#), 24734 (April 24, 2023) (§425.2(f) of the Proposed Rule).
- ³⁴ *Id.* at 24736 (§425.6(d) of the Proposed Rule).
- ³⁵ Negative Option Rule, [89 Fed. Reg. 90476](#), 90512 (Nov. 15, 2024) (to be codified at 16 C.F.R. Part 425).
- ³⁶ *Id.*
- ³⁷ *Id.* at 90488.
- ³⁸ *Id.* at 90489.
- ³⁹ *Id.*
- ⁴⁰ *Id.*
- ⁴¹ *Id.* (referencing 16 C.F.R. §2.3, “The Commission acts only in the public interest and does not initiate an investigation or take other action when the alleged violation of law is merely a matter of private controversy and *does not tend adversely to affect the public.*”) (emphasis added).
- ⁴² Commissioner Holyoak provided the following reasons for her dissent: “First, this rulemaking did not follow the FTC Act’s Section 18 requirements for rulemaking ... Second, the Rule’s breadth incentivizes companies to avoid negative option features that honest businesses and consumers find valuable. Third, the Rule represents a missed opportunity to make useful amendments to the preexisting negative option rule within the scope of the Commission’s authority.” Negative Option Rule, [89 Fed. Reg. 90476](#), 90545 (Nov. 15, 2024) (to be codified at 16 C.F.R. Part 425).
- ⁴³ *Electronic Security Association, et al. v. FTC*, No. 24-60542 (5th Cir. filed Oct. 23, 2024).
- ⁴⁴ *Michigan Press Association, et al v. FTC*, No. 24-3912 (6th Cir. filed Oct. 22, 2024).
- ⁴⁵ *Custom Communications, Inc. v. FTC*, No. 24-03137 (8th Cir. filed Oct. 22, 2024).
- ⁴⁶ *Chamber of Commerce of the U.S., et al. v. FTC*, No. 24-13436 (11th Cir. filed Oct. 22, 2024).
- ⁴⁷ [Consolidation Order](#), *In re: Federal Trade Commission, Negative Option Rule*, MCP No. 192 (J.P.M.L. filed Nov. 21, 2024) (order consolidating multiple petitions to the Eighth Circuit).
- ⁴⁸ *Electronic Security Association, et al. v. FTC*, No. 24-60542 (5th Cir. filed Oct. 23, 2024) (“Petitioners seek review of the order issuing the Final Rule on the grounds that it is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*...”); *see also Chamber of Commerce of the U.S., et al. v. FTC*, No. 24-13436 (11th Cir. filed Oct. 22, 2024); *Michigan Press Association, et al v. FTC*, No. 24-3912 (6th Cir. filed Oct. 22, 2024).

⁴⁹ Negative Option Rule, [89 Fed. Reg. 90476](#), 90545 (Nov. 15, 2024) (to be codified at 16 C.F.R. Part 425).