LOEB & LOEB LLP

FTC Seeks Input on Proposed Negative Option Rule Updates to Simplify Recurring Payment Cancellation

Nerissa Coyle McGinn
David G. Mallen
Client Alerts/Reports March 2023

The Federal Trade Commission (FTC) wants to make canceling recurring payment plans easier for consumers as part of proposed updates to its Negative Option Rule. The agency announced on March 23 it is seeking public comment on potential changes to the Negative Option Rule by providing, among other things, a "click to cancel" provision that would require sellers to make canceling a plan enrollment as simple as it was to sign up.

Currently, the FTC relies on a patchwork of laws and regulations to address negative option marketing abuses. Section 5(a) of the Federal Trade Commission Act (FTCA) broadly addresses "unfair or deceptive acts or practices," although it does not specifically address negative option marketing. Laws that do target negative option marketing have a narrow focus—the Restore Online Shoppers' Confidence Act (ROSCA) only applies to online shopping while the Telemarketing Sales Rule applies solely to telemarketing. Proposed changes to the Negative Option Rule, however, would apply to all forms of negative option marketing across all media. It would also provide for civil penalties and redress for wronged consumers.

The notice of proposed rulemaking will be published in the *Federal Register* and provide instructions for submitting public comments.

In this alert:

Key Takeaways:

- The proposed changes to the rule would include requiring businesses to make cancellation of a subscription at least as easy as it was to sign up for it, to obtain the consumer's consent before pitching additional offers during the cancellation process, and to give consumers an annual reminder before their enrollment is automatically renewed for subscriptions for anything other than physical goods.
- The proposed amendments would allow the FTC to seek civil penalties and consumer redress, remedies not currently available to the commission.
- Businesses that want to get a jump on compliance should review their cancellation, sign-up and pre-renewal communications to ensure that they comply with the new amendments.

Negative Option Rule Provisions

The FTC first implemented the Negative Option Rule in 1973 to discourage unfair or deceptive practices that result in recurring charges for products or services consumers do not want and are unable to cancel without difficulty. In 2019, the FTC published an Advance Notice of Proposed Rulemaking that solicited public comment. Based on the comments received, the agency issued an enforcement policy statement on Oct. 28, 2021, outlining its interpretation of various statutes and FTC regulations that apply to negative option marketing.

According to the policy statement, the defining feature of negative option marketing is "a term or condition under which the seller may interpret a consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement as acceptance or continuing acceptance of the offer." Negative option marketing can take a variety of formats, including:

- Automatic renewals, such as a magazine subscription service
- Continuity plans, in which goods are periodically shipped

- Free trial marketing, which gives customers the opportunity to receive goods or services for free or a nominal fee during a trial period that automatically converts into a paid program with a new, higher fee
- Prenotification plans, in which a seller sends periodic notices offering a product to participating consumers, for example, in a book-of-the-month club, and then sends the product and charges for it if the consumer takes no action to decline the offer

Proposed Rule Amendments

In its March 23 announcement, the FTC outlined proposed changes that would implement the following:

A simple cancellation mechanism. The proposed rule would require businesses to make it at least as easy to cancel a subscription as it was to sign up for it. For example, consumers who sign up for a subscription online must be able to cancel on the same website, in the same number of steps.

Obtaining consent before making additional offers. While the proposed rule would allow businesses to pitch additional offers when a consumer initiates the cancellation process, the business must first ask consumers whether they want to hear about the offers. If the consumer declines, the business must immediately proceed to the cancellation process.

New requirements about reminders and confirmations. The proposed rule would require businesses to give an annual reminder to consumers enrolled in negative option programs involving anything other than physical goods, before their enrollment is automatically renewed.

The proposed amendments would allow the FTC to seek civil penalties and consumer redress where those remedies are currently unavailable. Examples include deceptive or unfair practices involving negative option marketing in traditional print materials and face-to-face transactions, for example, in media not covered by ROSCA or the Telephone Sales Rule (TSR) and misrepresentations that are not expressly covered by ROSCA.

Currently, due to the Negative Option Rule's limited scope, the FTC brings individual actions alleging negative option marketing abuses under the FTCA, ROSCA or the TSR, as applicable. But the volume of complaints suggests that case-by-case enforcement may not protect consumers sufficiently, the agency said in a [blog post on the proposed amendments].

Majority's Statement

The FTC voted 3-1 to approve publication of the notice of proposed rulemaking in the *Federal Register*.

FTC Chair Lina M. Khan and commissioners Rebecca Kelly Slaughter and Alvaro M. Bedoya issued a statement in support of the proposed rule. The commissioners noted that the original Negative Option Rule targeted only prenotification plans, while later laws, including ROSCA and TSR, only apply to online shopping and telemarketing, respectively.

Meanwhile, the commissioners noted, the use of negative option marketing continues to increase and more companies are employing deceptive practices, such as dark patterns, to keep consumers from canceling a product or service. “If adopted, this rule would enable more efficient enforcement. It would create a more powerful deterrent by introducing the risk of civil penalties. And it would allow the Commission to return money to wronged consumers.”

Commissioner’s Dissent

Commissioner Christine S. Wilson voted against approving the notice of proposed rulemaking and issued a dissenting statement.

According to Wilson, the proposed rule covers not only negative option marketing, but any misrepresentation made about the underlying good or service sold with a negative option feature. “Consequently, marketers using negative option features in conjunction with the sale of a good or service could be liable for civil penalties or redress under this Rule for product efficacy claims or any other material representation even if the negative option terms are clearly described, informed consent is obtained, and cancellation is simple.”

Further, Wilson believes that the FTC does not have the authority to seek civil penalties in de novo cases under Section 5 of the FTCA or to seek consumer redress under Section 13(b) of the FTCA following the U.S. Supreme Court’s 2021 decision in *AMG Capital Mgmt., LLC v. FTC.*

Senators Propose Consumer OPT-IN Act

As a complement to the FTC's proposed negative options rule amendments, Sens. Jack Reed (D-R.I.) and Chris Van Hollen (D-Md) have introduced the Consumer Online Payment Transparency and Integrity (Consumer OPT-IN) Act aimed at making it easier for consumers to avoid “free trial” scams and to cancel ongoing subscriptions.

The bill would require businesses to:

- Obtain express informed consent from consumers before converting free trials into auto-renewal contracts and charging consumers

- Notify consumers of the first automatic renewal and get express informed consent from consumers before automatically renewing long-term contracts
- Obtain express informed consent from consumers annually for contracts that automatically renew on a short-term basis
- Obtain a consumer's express informed consent to continue billing, when the business has knowledge that a consumer hasn't use the products or service for six months, and allow the consumer to request a refund for the remaining portion of the contract

The proposed bill also gives the FTC rulemaking authority over negative option contracts, automatic renewals and dark patterns, and permits the agency to provide consumers with refunds for violations.

What Should Businesses Do Now?

To get prepared for the proposed changes to the Negative Option Rule, businesses should:

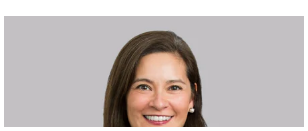
- Review their cancellation processes to ensure they meet the new simple cancellation requirements. Businesses that have only a call-in method to cancel an online subscription or one that requires users to click through several screens before canceling will need to update or add cancellation methods.
- Review sign-up processes to ensure they clearly and conspicuously inform users of the subscription and cancellation terms.
- Review business communications prior to auto-renewal to ensure they are timely and contain the information required by the new rule.

Click here to download a PDF of the full alert.

RELATED SERVICES

Advertising & Media
Advertising Disputes

RELATED PROFESSIONALS



Nerissa Coyle McGinn

(she/her)
Partner

+1.312.464.3130 nmcginn@loeb.com

David G. Mallen

Co-Chair, Advertising Disputes; Chair, Retail & Consumer Brands

+1.212.407.4286 dmallen@loeb.com