Cooley

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On November 3, 2022, the Federal Trade Commission (FTC) announced a $100 million settlement with Vonage, a provider of Voice over Internet Protocol (VoIP) services to residences and small businesses. The FTC alleges that Vonage violated the FTC Act and the Restore Online Shoppers' Confidence Act by making it difficult for customers to cancel their VoIP subscriptions.

Specifically, the FTC alleges that Vonage:

- Required customers to speak with a live agent to cancel services they set up online.
- Made it hard to locate the correct department to initiate cancellations.
- Did not complete promised callbacks.
- Subjected customers to long hold times.
- Used aggressive sales tactics to retain customers once they did reach a live agent.
- Disconnected calls, requiring customers to restart the cancellation process.
- Used hidden early termination fees to further dissuade customers from cancelling.

The FTC alleges that these practices illegally caused customers to continue making payments for services they no longer wanted. In its announcement, the FTC noted "[t]his record-breaking settlement should remind companies that they must make cancellation easy or face serious legal consequences."

B2B transactions are not immune

Notably, the FTC targeted not only Vonage's practices in connection with residential consumers, but also its business-to-business (B2B) sales practices. While many state laws governing automatically renewing subscriptions apply only to offers of goods or services acquired for personal, family or household purposes, the FTC views its enforcement authority more broadly. Companies should take heed that the FTC may enforce the federal laws governing negative option offers even in the context of pure B2B transactions – particularly those involving small-business purchasers.

Understanding the FTC's negative option guidance

The Vonage litigation is the latest in a long line of FTC enforcement actions involving automatically renewing subscriptions (also known as negative option plans). In October 2021, the FTC updated its guidance in a new Enforcement Policy Statement Regarding Negative Option Marketing. This policy statement sets out specific principles the FTC contends companies should follow when offering automatically renewing subscriptions. The FTC's guidance falls into three buckets:

Disclosures

The FTC tasks companies with "clearly and conspicuously" disclosing the "material terms" of any subscription offer. While companies should refer to the full guidance, this includes stating in clear language that the consumer will be charged on a recurring basis unless they cancel, that such charges may increase after a trial period, the amount of such charges, the deadline for cancellation, and the date of future charges. These disclosures also must include "all information necessary to cancel" the subscription.

The FTC further explains that such disclosures must be "difficult to miss" and "easily understandable." Among other things, this means the disclosures should visually stand out from accompanying text, cannot be in smaller text, and cannot be hidden behind a hyperlink or expandable text field. These disclosures also must appear "immediately adjacent" to the button a user clicks to accept the terms of the subscription agreement (or adjacent to another mechanism for giving consent to the sales contract). The FTC sets out additional specific requirements regarding disclosures, including for audio offers, in its policy statement.

Consent

The FTC contends that companies must "obtain the consumer's acceptance of the negative option feature offer separately from any other portion of the entire transaction." This guidance arguably means that to avoid FTC scrutiny, companies need to secure consent to the terms defining the consumer's automatically renewing payment obligation separately from any consent to the overall transaction – for example, by having customers check a box in a purchase flow that indicates they agree to the subscription terms, in addition to clicking a button to confirm the entire transaction. While the FTC's guidance is not clear, this requirement appears particularly applicable where the transaction involves both an automatically renewing component and a one-time purchase bundled together. More generally, companies must secure unambiguous affirmative consent, as further detailed in the FTC's policy statement.

Cancellation

Most relevant to the Vonage litigation, the FTC tasks companies with providing "simple, reasonable means for consumers to cancel" that are "at least as easy to use as the method the consumer used to initiate" the subscription. Among other things, the FTC policy statement prohibits sellers from subjecting consumers to multiple retention offers while they are trying to cancel their services or otherwise imposing delays on cancellation. Companies also must provide cancellation options through the same medium they allow customers to use to sign up – for example, companies that enroll new customers online also must offer an online cancellation mechanism. Where a company offers cancellation by telephone, it "should provide, at a minimum, a telephone number, and answer all calls to this number during normal business hours, within a short time frame, and ensure the calls are not lengthier or otherwise more burdensome than the telephone call the consumer used to consent to the negative option feature." Companies must then honor any attempts to cancel through these mechanisms.

California's automatic renewal law

In addition to the FTC, dozens of states regulate automatically renewing subscriptions in what can be a daunting patchwork of different statutory requirements. California's law is among the most prescriptive, and it continues to be a robust source of public enforcement actions and private class action litigation. Here's a summary of California's requirements, including the most recent changes that took effect in July 2022.

Vonage settlement signals FTC focus on "dark patterns"

While the Vonage settlement focuses particularly on improper hurdles to cancelling services, it reflects a broader FTC concern with so-called digital dark patterns, a term that refers to design practices that trick or manipulate users into making choices they would not otherwise have made and that may cause harm. This September, the FTC issued a report titled "Bringing Dark Patterns to Light," which details dozens of tactics the FTC contends are harmful to customers. For example, the report condemns dark pattern ads disguised as independent news articles, deceptive design elements of webpages and user interfaces that hide material disclosures or create undue urgency in purchasing decisions, marketing tactics that increase the risk of users inadvertently paying for goods or services they do not want, website flows that obscure privacy choices and, as seen in the Vonage settlement, roadblocks to cancelling subscriptions. The Vonage settlement may be a sign of things to come, as the agency will likely continue looking for cases it can use to target more specific practices highlighted in the report. Companies should police their advertising, purchase flows and cancellation processes accordingly.

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