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FTC Finalizes Negative Option Rule Governing Subscriptions and Trial Offers

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The Federal Trade Commission (FTC) has released its long-anticipated Negative Option Rule. The rule defines a negative option feature as "a provision of a contract under which the consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement is interpreted by the negative option seller as acceptance or continuing acceptance of the offer." This includes not only automatically renewing subscriptions, but also offers with free or discounted trial periods that automatically convert to new payment obligations after a set time. With limited exception, the rule covers all business-to-consumer (B2C) and business-to-business (B2B) transactions with negative option features promoted or sold by US sellers or foreign sellers that transact with US consumers. The rule does not apply to entities that are otherwise exempt from the FTC Act, such as banks and certain types of nonprofits and financial institutions.

Given the broad scope of the rule and the FTC's recent focus in this space, every company offering a subscription or other contractual arrangement with a negative option feature should note these new requirements. Most provisions of the rule will go into effect 180 days from publication in the Federal Register, likely in April 2025.

Important highlights

- The FTC has finalized a new rule that governs negative option features, such as automatically renewing subscriptions and free trial offers that automatically convert to paid plans.
- The rule creates new compliance obligations for most companies that market or sell goods or services with a negative option feature. Under the rule, such companies:
    - Are prohibited from making a wide range of misrepresentations.
    - Must provide certain disclosures to consumers.
    - Are required to obtain informed consumer consent in a manner that meets specific criteria.
    - Must make it as easy for consumers to cancel as it was to enroll.
- To comply with the rule, companies may need to modify their current practices – including updating their marketing materials and the processes by which they allow consumers to purchase and cancel automatically renewing subscriptions and trials.

Express informed consent

The rule is consistent with prior FTC guidance requiring express informed consent. It requires "unambiguously affirmative" consent to the negative option feature separate from consent to any other part of the transaction. The rule explains that sellers can use a "check box," "signature," or other substantially similar mechanism, placed immediately adjacent to the disclosure of the negative option feature terms.

The rule also requires sellers to "keep or maintain verification of the consumer's consent for at least three years," unless the seller can show that "no consumer can technologically complete the transaction without consent."

Disclosures

The seller must disclose "all material terms" – even terms that do not relate to the negative option feature – before obtaining a consumer's billing information. Under the rule, a term is "material" if it is "likely to affect a person's choice, or conduct regarding, goods or services." This creates a broad disclosure requirement for any offer with a negative option feature that goes well beyond describing the terms of the subscription or trial.

Additionally, at least the following terms must be disclosed "immediately adjacent to" and "before" "the means of recording the consumer's consent" to the negative option feature:

- That the consumer will be charged on a recurring basis unless the consumer cancels (along with any price increase that will occur after a trial or discount period ends).
- The amount of the charges.
- The deadline by which the consumer must "act to prevent or stop" the charges, expressed either as a date or "frequency."
- How to find the cancellation mechanism.

These disclosures must be "clear and conspicuous" – that is, easily noticed and understood and presented in a manner that "by its size, contrast, location, [] and other characteristics, [] stands out from any accompanying text."

For offers made online or on mobile apps, a clear and conspicuous disclosure must be "unavoidable." Disclosures that are only viewable if a user opens a caret or clicks on a link may be insufficient, unless a consumer must first view those disclosures (i.e., through a link that cannot be bypassed) before accepting the terms of a negative option feature.

For offers made through solely visual or solely audible means, such as on the radio or in print, the disclosures must be made through the same means the offer is presented. If the offer is presented via an audiovisual medium, such as on television or social media/video platforms, the disclosures must be presented audibly and visually at the same time.

Finally, the rule prohibits sellers from including any information that contradicts or confuses the terms of the negative option feature.

Simple cancellation (aka 'click-to-cancel' functionality)

The rule requires sellers to provide consumers with a "simple mechanism" to cancel the negative option feature, which:

- Must be "at least as easy to use as the mechanism the consumer used to consent."
- Must be easy to find.
- Must be available through the "same medium the consumer used to consent."
- Cannot require interaction "with a live or virtual representative," including chatbots, unless that is how the consumer originally made the purchase.

A clearly labeled cancellation button on an account or user settings page of a website or app may satisfy these requirements. Authenticating a consumer's account information before allowing them to cancel and confirming their intent to cancel may still be acceptable under the rule, but only if these steps do not create unreasonable barriers to completing the cancellation process.

The FTC declined to include a provision that would have required sellers to first obtain consent to present any "save tactics" – such as requests to confirm cancellation, offering future discounts in exchange for not cancelling, reminding the consumer of the product or service's benefits before letting them cancel or requiring the consumer to complete surveys before cancelling. However, the FTC has made clear that "aggressive" save tactics that create barriers to cancellation are prohibited.

The rule also requires sellers that offer cancellation over the phone to:

1. Make the telephone line available during normal business hours.
2. "Promptly" honor requests to cancel made over the phone.
3. Not make telephonic cancellation more costly to the consumer than any option to enroll over the phone.

Where a consumer consented to a negative option feature in person, the seller must offer a similar in-person cancellation option ("where practical"), as well as a simple cancellation option online or over the phone.

Misrepresentations

The rule prohibits sellers from making misrepresentations when marketing or offering a product or service with a negative option feature, regardless of whether the misrepresentation relates to the negative option feature itself. The FTC cannot currently seek civil penalties in many of the false advertising and deceptive practices cases it

brings – and is instead limited to imposing changes to business practices. The rule will significantly expand the FTC's civil penalty options by making penalties of up to $51,744 available for any material misrepresentation or failure to disclose a material term connected to a transaction that involves a negative option feature.

In contrast to the provisions discussed above, this prohibition comes into effect 60 days from the date the rule is published in the Federal Register (likely in June 2025).

B2B contracts are in scope

The FTC press release highlights that the rule will apply to "business-to-business transactions." The FTC defends this scope by explaining, "the Commission has a long history of protecting businesses, particularly small business, in their role as consumers." This contrasts with many state automatic renewal laws, which are limited to B2C contexts. There are no exceptions even for individually negotiated contracts between large enterprises. However, the FTC has explained that "[a] B2B consumer who consents to a negative option feature through an individually negotiated term of an agreement can also individually negotiate the cancellation mechanism." Additionally, the FTC has suggested that enforcement of the rule in connection with "large individually negotiated B2B transactions" will not be a priority.

Other laws may remain in effect

The rule does not preempt state laws that "afford[] any consumer greater protection than provided under" the rule, including under state automatic renewal laws and unfair and deceptive acts and practices (UDAP) statutes. This means that state laws with additional or more onerous requirements will remain in effect. Companies will still need to understand the complicated patchwork of state law requirements that apply across all the jurisdictions where they do business.

As a further example, Consumer Financial Protection Act (CFPA) prohibitions against unfair, deceptive and abusive conduct have been used to target similar negative option practices. In January 2023, the Consumer Financial Protection Bureau (CFPB) issued Circular 2023-01, stating that such practices do implicate the CFPA, and that:

> Negative option marketing practices may violate [the CFPA] where a seller (1) misrepresents or fails to clearly and conspicuously disclose the material terms of a negative option program; (2) fails to obtain consumers' informed consent; or (3) misleads consumers who want to cancel, erects unreasonable barriers to cancellation, or fails to honor cancellation requests that comply with its promised cancellation procedures.

Notably, in that circular, the CFPB specifically referenced its congruence with the FTC's treatment of negative option features, explaining that the CFPB's approach "is generally in alignment with the FTC's approach to section 5 of the FTC Act."

Looking ahead

Stakeholders – including FTC Commissioner Melissa Holyoak – have speculated that the rule will face legal challenges. Because the outcomes of any such challenges are uncertain, companies that make offers with negative option features should carefully review their practices and consumer-facing communications.

Cooley is well versed in the federal laws and regulations governing negative option features and can help companies navigate these new requirements, as well as the existing state law frameworks that also will continue to govern subscriptions and trials.

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