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FTC Issues New Advance Notice of Proposed Rulemaking on Negative Option Marketing

March 20, 2026

On March 11, 2026, the Federal Trade Commission (FTC) issued a request for public comment on an advance notice of proposed rulemaking (ANPRM) regarding its "Rule Concerning the Use of Prenotification Negative Option Plans," more commonly known as the "Negative Option Rule." The FTC is inviting consumers and industry members to share their experiences with negative option marketing to help it decide whether and how to amend the current rule.

Background

The ANPRM is the latest signal of the FTC's focus on negative option marketing and its push to modernize the regulatory framework. In recent years, the FTC's enforcement in this space centered on the Restore Online Shoppers' Confidence Act (ROSCA), which governs the marketing and sale of negative option features online. But the FTC also sought to update the Negative Option Rule itself. Since being adopted in 1973, the Negative Option Rule has applied only to prenotification plans, arrangements where a seller periodically sends merchandise to consumers unless they affirmatively decline in advance.

In October 2024, the FTC amended the Negative Option Rule to cover negative option plans initiated online more generally and to add specific requirements governing misrepresentations, disclosures, consent and cancellation. That amended rule was short-lived; in July 2025, the US Court of Appeals for the Eighth Circuit vacated the amended rule in its entirety, finding that the FTC skipped required procedural steps before promulgating the rule.

Citing a high volume of consumer complaints, the FTC has now restarted the rulemaking process with this ANPRM.

Key highlights of the ANPRM

1. **Four core requirements from the vacated rule**

The FTC notes it may draw on portions of the vacated rule in proposing a new rule. The vacated rule had four key requirements:

i. A prohibition against misrepresenting material facts in connection with negative option offerings.
ii. A requirement to obtain consumer consent to the negative option feature separately from other portions of the transaction and to maintain records verifying consent for three years.
iii. A requirement to disclose important information about the negative option feature immediately next to the means of obtaining the consumer's consent.
iv. A requirement to provide a simple cancellation mechanism that is "at least as easy to use" as the mechanism used to obtain the consumer's consent to the negative option feature.

The ANPRM seeks detailed cost-benefit input on each of these provisions, including how compliance costs may vary by industry, business size and over time.

2. **The "Saves" question**

One notable question in the ANPRM is whether it is unfair or deceptive to offer discounts or other incentives – referred to as "Saves" – to keep consumers enrolled in a negative option program rather than promptly processing a cancellation request. The FTC is seeking economic data on the proportion of consumers who accept Saves, the cost savings they provide and how they affect consumers' ability to cancel. More broadly, the

FTC wants to understand the impact of Saves on competition in the negative options marketplace.

3. **Exemptions**

The FTC also invites comments on whether a new rule should include exemptions. Possible approaches include adopting a petition process similar to that from the vacated rule, supplementing that process with additional requirements, exempting particular market segments or applying new requirements only to industries where unlawful practices are most prevalent.

Looking ahead

The comment period is now open, and comments must be received by April 13, 2026.

Regardless of how the rulemaking plays out, ROSCA remains fully in force for online negative option offerings, and the FTC can continue to bring enforcement actions under Section 5 of the FTC Act. Since January 2025 alone, the FTC has initiated five cases and approved six settlements related to alleged negative option misconduct. Even in the absence of an updated rule, businesses using negative option features online should make sure they comply with ROSCA and Section 5, as well as overlapping requirements of state automatic renewal laws.

If you have questions about the FTC's ANPRM or its implications for your business, please contact any member of the Cooley team listed below.

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