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FTC Continues Aggressive ROSCA Enforcement Agenda Against Negative Option Sellers

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In June 2024, the US Federal Trade Commission (FTC) and the Department of Justice jointly filed a complaint under the Restore Online Shoppers' Confidence Act (ROSCA) in the US District Court for the Northern District of California, naming Adobe and two company executives as defendants. This represents the latest ROSCA matter for the FTC, reflecting continued FTC focus on the provision of online consumer subscription offerings.

ROSCA governs, in part, the marketing and sale of "negative option features" on the internet. Negative option features are understood under ROSCA to mean, in connection with "an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." Pursuant to ROSCA, online negative option sellers are required to make clear and conspicuous disclosures of all material terms of each transaction before collecting billing information, obtain the consumer's express informed consent to be charged, and provide a simple cancellation mechanism that can be used to stop future charges.

The complaint alleges violations of Section 4 of ROSCA related to Adobe's "Annual, Paid Monthly" (APM) subscription plan. Under this plan, the FTC claims that users agree to a one-year term and pay a monthly fee during that term. Users who cancel an APM plan during the first year allegedly incur an early termination fee (ETF) equal to 50% of the remaining payments due during the one-year term. The FTC alleges that Adobe, in violation of ROSCA, failed to adequately disclose material terms of the subscription transaction to consumers during the enrollment process for the APM plan, including details related to the ETF, and employed an "onerous and complicated cancellation process" to "[deter] cancellations."

As discussed below, this enforcement action reinforces several prominent themes from the FTC's recent scrutiny of negative option features:

1. A focus on clear and conspicuous disclosure of material terms to consumers.
2. Emphasis on simple cancellation mechanisms that allow consumers to prevent future charges without delay or frustration.
3. Reliance on the subjective experiences of consumers, as expressed through complaints, as evidence to support allegations of ROSCA violations.
4. The continued targeting of individuals and company executives.

Clear, conspicuous disclosure of material terms

The FTC alleges that Adobe and company executives violated ROSCA by failing to clearly and conspicuously disclose the material terms of APM subscription transactions (meaning, in a manner difficult for the consumer to miss). The complaint focuses on how the terms of the ETF are allegedly disclosed to consumers. The FTC alleges that the defendants do not adequately disclose what triggers the ETF, how the amount of the ETF is calculated or the time period during which the fee can be incurred. According to the complaint, even in situations where required disclosures are made, the defendants at times use "small inconspicuous font […] which Adobe knows many consumers do not notice or read" and, other times, they allegedly make certain disclosures only available by clicking hyperlinks, even though they allegedly "[know] most consumers do not click [the hyperlink] before enrolling in an APM plan."

This scrutiny of how material terms are presented or delivered is consistent with recent ROSCA enforcement matters the FTC has pursued. The FTC has emphasized the importance of not only providing the information a consumer needs to adequately evaluate an offer, but also providing those disclosures in a manner that the consumer will reasonably notice and understand.

Simple cancellation mechanisms

The complaint also alleges that the available cancellation mechanisms for online subscriptions are challenging for consumers to navigate and unreasonably delay consumer attempts to cancel. For cancellations requested via the company's website, the complaint claims that "consumers have generally had to navigate numerous pages with multiple options, much of which is wholly unnecessary to honor consumers' cancellations requests." For cancellations requested through customer service by phone or chat, the complaint alleges that "[m]any subscribers attempting to cancel via phone or chat have been subjected to a time-consuming and burdensome process" that often includes delays and interruptions.

These allegations reflect the principles articulated in recent ROSCA matters and past FTC guidance concerning best practices for subscription cancellation processes. In a 2021 enforcement policy statement, the FTC stated that, as a guiding principle, "negative option sellers should provide cancellation mechanisms that are at least as easy to use as the method the consumer used to initiate the negative option feature." Further, the FTC suggested that sellers should "provide their cancellation mechanisms at least through the same medium (such as website or mobile application) the consumer used to consent to the negative option feature" and should not "impose unreasonable delays on consumers' cancellation efforts." These principles have consistently underscored the FTC's recent enforcement actions related to negative option features.

Reliance on subjective consumer experience as evidence of violations

As support for its ROSCA claims, the FTC relies on allegations that the defendants received and were aware of a significant volume of complaints regarding the terms of the APM plan and the process for canceling subscriptions. The complaint alleges that the defendants "monitored numerous complaints received directly from consumers and from other sources like the [Better Business Bureau], and they know that consumers are often confused about or misunderstand the terms of the APM plan, including its one-year commitment and ETF." The FTC also alleges that the defendants were similarly aware of consumer complaints about difficulty canceling subscriptions.

The FTC regularly presents subjective consumer experience as evidence of alleged ROSCA violations. To assess consumer sentiment, the FTC commonly relies on publicly available reviews posted by consumers, as well as direct communications between consumers and negative option sellers. The FTC argues that if consumers are regularly confused by or unaware of material terms of negative option features, disclosures may not have been sufficiently made. Similarly, the FTC suggests, through its enforcement efforts, that if consumers are often frustrated by the process to cancel their negative option features, the cancellation process may not be sufficiently simple. Negative option sellers may want to consider investigating consumer complaints and the experiences consumers report with respect to enrollment in and cancellation of their negative option features.

Targeting of company executives

The complaint names as defendants two company executives, a senior vice president focused on "Go to Market & Sales" and the president of "Digital Media Business." The discussion of these individuals in the complaint is heavily redacted, but it appears the FTC believes these individuals may have had some strategic control and/or decision-making power over components of Adobe's subscription services. Specifically, the complaint alleges that these executives supervised and participated in allegedly unlawful practices.

In recent ROSCA matters, the FTC has aggressively pursued individual liability for alleged violations. Companies and their executives who violate ROSCA can incur steep civil monetary penalties of up to $51,744 per violation, substantial liability for consumer redress payments, and the imposition of nonmonetary obligations. Precedent indicates that the FTC commonly seeks joint and several liability for ROSCA violations against executives and other company individuals with alleged knowledge of unlawful conduct, the ability to control that conduct, and/or participation in the conduct. In an October 2022 statement, FTC Chair Lina Khan explained the current FTC philosophy on individual liability, stating that "[o]verseeing a big company is not an excuse to subordinate legal duties in favor of other priorities," and that by holding executives liable, the FTC can "further ensure that firms and the officers that run them are better incentivized to meet their legal obligations."

Looking ahead

In addition to the enforcement trends described above, the FTC is pursuing a rulemaking process that would consolidate existing rules on negative option features (including ROSCA) into a single “negative option rule.” The stated intentions of the proposed rule include creating a consistent legal framework and providing clearer guidance to negative option sellers. Former FTC Commissioner Christine Wilson, however, has criticized the rule as an unreasonable expansion of the FTC’s authority. Wilson has argued that the rule would sweep in conduct unrelated to negative option features and, in the process, expand the FTC’s ability to seek monetary penalties for certain types of conduct.

The specific details of the proposed rule have yet to be finalized, but regardless of the outcome, all signs point toward continued FTC focus on online subscriptions and the sellers that offer them.

Register now to join us on **Thursday, July 18, 2024, from 1:00 – 2:00 pm EDT**, for a Cooley webinar that will take a deep dive into autorenewal and subscription services, including an overview of relevant legal and compliance requirements and areas of focus for regulators. We also will cover recent enforcement actions to better understand how companies can build a compliant program.

Cooley law clerk Dana Levin also contributed to this alert.

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