

Unsubscribed! FTC Proposes Substantial Amendments to the Negative Option Rule To Cover All Autorenewals, including B2B Services, and Add New Disclosure, Consent, and Cancellation Requirements

April 2023

In late March, the Federal Trade Commission (FTC or Commission) released its Notice of Proposed Rulemaking, Negative Option Rule (Rule), which proposes to substantially amend the existing Negative Option Rule and set higher standards for autorenewal promotions and sales than under existing federal or state laws and regulations. If promulgated, the revised Rule will apply to many more businesses and scenarios than are currently subject to autorenewal regulation. Once the proposed Rule is published in the Federal Register, which will be shortly, interested parties have 60 days after the date of publication to comment on the proposed Rule, which covers all forms of so-called “negative option” marketing and sales in all media, including negative options sold in a business-to-business (B2B) context (think about autorenewal terms in business services contracts), for month-to-month auto-renewing terms (think about “no contract” cell, internet, media or entertainment services, and even autorenewing monthly residential and commercial real estate tenancies) and for both the sale of goods and services. Other notable additions include enhanced disclosure, consent, and cancellation requirements, as well as a powerful misrepresentation prohibition and annual reminders.

As to negative options, the FTC’s enforcement power rests in several laws and rules, beyond the existing ‘70s era Rule, such as [Section 5 of the FTC Act](#), the [Restore Online Shoppers’ Confidence Act](#) (ROSCA), and the [Telemarketing Sales Rule](#) (TSR). ROSCA’s scope is limited and only applies to goods and services purchased online. The TSR applies to the sales of goods and services by telemarketing, with several notable exemptions, including exempting B2B calls, unless they involve the sale of nondurable goods and cleaning supplies, or solicit sales or charitable contributions from employees. This proposed Rule greatly expands that power, consolidating the principles and requirements found in Section 5, ROSCA, TSR, and the [Electronic Funds Transfer Act](#) (EFTA), into one comprehensive regulatory scheme for all types of negative options.

Scope

The existing Rule applied to prenotification plans (sellers provide periodic notices offering goods to participating consumers and send and charge for those goods if the consumers take no action to decline the offer) and only covered goods (not services). The proposed Rule now covers all types of negative option marketing and sales, including but not limited to prenotification plans, continuity plans (consumers agree in advance to receive periodic shipments of goods or provisions of services, until they cancel), automatic renewals (sellers automatically renew subscriptions when they expire, unless consumers affirmatively cancel), and trial marketing (consumers receive a free or discounted trial, and then the sellers automatically begin charging the full fee unless the consumers cancel or return the goods or services).



It also covers negative option offers made in any and all media, including in-person, online, telephone, and through printed materials. Notably, the proposed Rule applies to business-to-business negative options, not just consumers acting in an individual or household context. The Rule applies not just to plans that renew annually, but to month-to-month negative option plans and plans with other renewal terms. As a result, many, many businesses that have escaped federal and state negative option regulation, will need to examine and likely change their practices. And, of particular note, the cancellation process must be no more complicated than the subscription process, a requirement the FTC describes as “click to cancel” to illustrate the point.

Prohibition on Misrepresentations

The misrepresentation additions are noteworthy, and Commissioner Wilson, in her dissent, encourages “the public to address [related due process] issues in their comments in response to this Notice.” Indeed, Section 5 of the FTC Act already prohibits deception, but obtaining civil penalties for deception can be an onerous task. Under the proposed Rule, sellers are prohibited “from misrepresenting, expressly or by implication, any material fact regarding the *entire* agreement—not just the facts related to the negative option feature.” Thus, this prohibition covers any misrepresentation made about the good and service if that good or service is sold with a negative option feature, not just deceptive descriptions of the negative option process. The reason for the broad scope in the Rule is pretty clear, at least [according to Commissioner Wilson’s](#) dissent, the Commission can obtain civil penalties and/or consumer redress under Section 19 of the FTC Act for violation of the Rule, which is not the case under a Section 5 action.

Thus, this would create a difference between the same deceptive product claims regarding the same product sold with or without a negative option, the former being subject to civil penalties and the latter not. In Commissioner Wilson's view, not only does the Notice of Proposed Rulemaking "sweep far more conduct than previously anticipated" and goes "far beyond practices for which the [Advance Notice of Proposed Rulemaking] rulemaking record supports a prevalence of unfair or deceptive practices," this is the FTC's attempted "end-run around the Supreme Court's decision in *AMG [Capital Mgmt., LLC v. FTC]*, 141 S. Ct. 1341 (2021)) to confer *de novo* redress and civil penalty authority on the Commission for Section 5 violations unrelated to deceptive or unfair negative option practices." A public comment raising the due process argument may carry significant weight and may result in a basis for challenging this aspect of the rulemaking.

Disclosures

In addition to the expanded scope (all negative options, in all mediums and all goods and services) of the Rule, it also requires sellers to clearly, conspicuously and proximately make certain disclosures before obtaining the consumer's billing information. Sellers must disclose that consumers' payments will be recurring (if applicable), the date by which consumers must act to stop charges, the costs the consumers may incur, the date the consumer will be charged for the negative option, and how to cancel the recurring payments. ROSCA currently requires online negative options sellers to disclose all material terms prior to obtaining the billing information. The EFTA also requires disclosures to be made prior to payment being processed, but does not require such specific disclosures and only applies to certain types of payment.

Consent

Sellers now must obtain express, informed consent from the consumer prior to charging the consumer for the negative option. The consumer must unambiguously, affirmatively consent to the negative option feature separately from any other portion of the transaction (i.e., a specific acceptance of the negative option feature on top of the purchase of the good or service generally), and must unambiguously affirmatively consent to the entire offer. The seller must refrain from including any information that "interferes with, detracts from, contradicts, or otherwise undermines" the consumer's ability to provide express informed consent. Finally, the seller must maintain verification of this consent for three years or a year after cancellation, whichever is longer.

Cancellation Requirements

Expanding on California's Automatic Renewal Law, the proposed Rule proposes to require, at a minimum, sellers to offer cancellation via the same medium (e.g., online, telephone, mail, or in person) through which the seller sold the consumer the negative option. Cancellation must be simple and as easy as it is to subscribe (e.g., a link a consumer can click to cancel the negative option). Negative options sold online must allow cancellation online, and the seller must provide, at a minimum, the cancellation mechanism on the same website or application the consumer used to purchase the negative option.

Negative options sold over the phone must allow for cancellation over the phone during normal business hours, and be no more costly (if there is any cost) than the call to consent to the negative option (i.e., toll-free). Negative options sold in person (e.g., month-to-month cellphone plans sold in a store), must allow for cancellation by phone or online, and in person (where practical). The Commission also set its sights on retention offers many sellers use to both retain customers and offer customers a discount or better price – these "save" offers are prohibited unless the consumer first consents (and the consent is only valid for that cancellation attempt) to receive the retention offers.

Annual Reminders

Except for negative options that involve the delivery of physical items, all negative option sellers must provide consumers with reminders, at least annually, via the same medium the consumer used to consent to the negative option. Like the cancellation requirement, consumers who purchased negative options in person must be reminded through a telephone call or online, and in person (where practical). The reminder must include the product or service, the frequency of the plan, the cost and instructions on how to cancel. Under this new section, sellers should be prepared to remind customers of their negative options at least every year, including when that customer visits the seller's store. This new requirement fails to address those consumers that have elected to receive their bills, receipts and communications via email or mail after consenting to the plan – the annual reminder has to be sent through the medium through which the consumer consented to the negative option (e.g., telephone). This is not practical and is another area ripe for public comment.

Effect on State Law

The Rule only preempts state law where it is not possible to comply with both the Rule and the state regulation, or where the state regulation would frustrate the purposes of the Rule. State automatic renewal laws requiring renewal notices to be sent out a certain number of days before the effective date appear to remain unscathed, as does [Vermont's](#) requirement that the auto-renewal provision appear in boldface type in the contract.



What Is Next?

The Commission's proposed revisions to the Negative Option Rule impose significant new obligations on sellers of negative option plans for goods and services, including business-to-business plans previously exempted by many state laws and federal law. Once the proposed Rule is published, interested parties have 60 days to submit comments to the Commission. The FTC will then need to review those comments, and afterwards it will likely either (1) amend the Rule based on the comments (there will then be a new public comment period of 60 days, and this will happen as many times as the FTC amends the proposed Rule), or (2) proceed with the Rule without amendment. The Commission may also decline to issue the Rule, but that seems unlikely, based on past statements and enforcement actions on subscription plans. Once the final revised Rule is promulgated, it is typically effective in no less than 30 days, but the effective date may be sooner if the agency determines it is necessary (unlikely in this case since the changes are substantive). If the Commission determines to promulgate the final Rule, it will adopt a statement of basis and purpose to accompany the rule, which must include (1) a statement regarding the prevalence of the acts or practices treated by the rule; (2) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (3) a statement as to the economic effect of the rule, taking into account the effect on small businesses and consumers. When the Commission publishes the final Rule in the Federal Register, any person or company may seek review in the DC Court of Appeals within 60 days, mainly to challenge the sufficiency of the rulemaking procedure under Magnuson-Moss Warranty Federal Trade Commission Improvements Act. The court may (1) direct the FTC to consider additional submissions, (2) set aside the Rule if it is not supported by "substantial evidence," or (3) set aside the Rule if the Commission's limits on evidence precluded disclosure of material facts. The DC Court of Appeals' decision is final, and subject only to Supreme Court review.

We are currently working with clients and their trade organizations to consider making public comments and to assess the impact on their business practices. For more information, please contact the authors.

Contacts

Kyle Dull

Senior Associate, New York and Miami
T +1 212 872 9867
E kyle.dull@squarepb.com

Alan Friel

Partner, Los Angeles
T +1 213 689 6518
E alan.friel@squarepb.com

Katy Spicer

Partner, Washington DC
T +1 202 457 6000
E katy.spicer@squarepb.com