

FTC Announces New “Click-to-Cancel” Rule for Subscription Providers

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Today, the Federal Trade Commission (FTC) released a much-anticipated update ^[1] of its Negative Option Rule ^[2] which implements new rules for negative option programs and marketing. ^[3] The final rule seeks to modernize the 1973 Negative Option Rule to account for internet-based subscriptions, memberships, and other recurring payment programs that have become ubiquitous online. Colloquially referred to as the “Click-to-Cancel” rule, the final rule, among other things, now requires sellers to offer a simple mechanism to cancel subscriptions. Brands that offer memberships or subscriptions should closely review their processes for cancelling subscriptions to ensure that they comply with the new rule, which is set to go into effect in 2025. Brands should also be aware that some states, most notably California, ^[4] have their own rules for negative option offers that may be more stringent than those set forth in the FTC’s updated rule.

Click-to-Cancel

The final Negative Option Rule codifies “click-to-cancel,” which requires sellers to provide a “simple mechanism” for consumers to cancel or avoid being charged any increased amount for their negative option program. A simple mechanism “must be at least as easy to use as the mechanism the consumer used to consent to the Negative Option” and “easy to find when the consumer seeks to cancel.” Therefore, the cancellation mechanism cannot be hidden away in a hard-to-reach webpage.

The rule also requires that the cancellation mechanism be available “through the same medium the consumer used to consent to the Negative Option.” In simple terms: if consumers can sign up for a negative option program through a website, they must also be able to cancel the program through a website. Brands cannot require consumers to call or interact with a chatbot to cancel, unless they also signed up for the negative option program through those methods.

Disclosures and Consent

Consistent with requirements that were put in place by Congress through the Restore Online Shoppers’ Confidence Act ^[5] (ROSCA), the final Negative Option Rule also requires sellers to obtain “express informed consent,” to the Negative Option offer. This express informed consent must be obtained “separately from any other portion of the transaction” and prohibits sellers from including in the request for consent: “any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent.” The rule states that a seller complies with this requirement if it uses a “check box” that the consumer must “affirmatively select.”

Like ROSCA, the final Negative Option Rule also requires that sellers disclose all material terms of the negative option before purchase. Unlike ROSCA, the final Negative Option Rule provides more specificity regarding these disclosure requirements. Specifically, the rule requires that the following

disclosures be provided “immediately adjacent to the means of recording the consumer’s consent for the negative option feature:”

- That consumers will be charged on a recurring basis, charges after any trial periods, and steps required to stop such charges;
- The deadlines, by date or frequency, by which the consumer must act to stop the charges;
- The amount and frequency of charges the consumer will incur; and
- Information necessary for the consumer to find the simple cancellation mechanism.

While initial proposals would have provided that a disclosure is not clear and conspicuous “if a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it,” the final rule notably *does not* include this language. This is an important exclusion, since it may have made compliance impossible where disclosures are space-constrained (e.g., on an app). However, the final Negative Option Rule does require that these disclosures be “unavoidable.” The final rule does *not* include a proposed requirement to provide an annual notice of the negative option or a prohibition on sellers providing consumers with information about subscription modifications or other reasons to keep the subscription during the cancellation process without first seeking consent to provide that information.

All Material Misrepresentations Are Prohibited

The final Negative Option Rule also prohibits sellers from “misrepresenting any material fact made while marketing goods or services with a negative option feature.” The scope of this prohibition is notable because it does not apply only to misrepresentations that relate solely to the negative option feature (e.g., subscription costs or frequency). Instead, this prohibition applies to any material claims about the underlying product or service as well. This is a critical aspect of the rule, because the FTC’s ability to seek monetary relief was severely limited by the Supreme Court’s 2021 decision in *AMG Capital Management, LLC v. FTC*.

Because this new rule covers *all* material misrepresentations made in marketing a product or service with a negative option feature—not only where the misrepresentation is related to the negative option feature itself—the FTC may now seek civil penalties of up to \$50,120 per violation for a wide range of potential misrepresentations. Given the potential for these substantial penalties, brands should ensure not only compliance with the disclosure, consent, and cancellation requirements in the Negative Option Rule, but also that all marketing materials, particularly for products with a negative options feature, are truthful and not misleading.

[1] https://www.ftc.gov/system/files/ftc_gov/pdf/p064202_negative_option_rule.pdf.

[2] 16 CFR Part 425.

[3] A “negative option” program (e.g., subscription or membership) allows a seller to continue shipping or providing a good or service on a recurring basis, along with recurring charges, unless the customer acts to cancel the agreement.

[4] Cal. Bus. & Prof. Code § 17602.

[5] 15 U.S.C. §§ 8401-8405.