

Ferris and Ketterer in Ad Age: FTC ‘Click-To-Cancel’ Rule Is Dead — But Risk for Brands Isn’t

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Following the United States Court of Appeals for the Eighth Circuit vacating the Federal Trade Commission's click-to-cancel rule, Haynes Boone attorneys [Tiffany Ferris](#) and Emily Ketterer authored an article for *Ad Age* detailing the outcome and what comes next.

Read an excerpt below.

In a July 8 ruling, the United States Court of Appeals for the Eighth Circuit vacated the Federal Trade Commission's recently promulgated update to its 1973 Negative Option Rule, also known as the “click-to-cancel” rule, days before it was set to take force.

The modernized rule would have obligated businesses to make canceling subscriptions easier for consumers and addressed seller behaviors with respect to negative option programs such as internet-based subscriptions, memberships and other recurring payment plans.

The Eighth Circuit's action also eliminated the FTC's ability to seek monetary civil penalties from rule violators. However, subscription providers would be remiss to believe that they are free to do as they wish, considering the FTC's other enforcement avenues and the eagerness of several U.S. states to legislate and enforce on behalf of their consumers in the automatic renewal space.

Vacated on a technicality

While the rule could have provided federal-level guidance for businesses on best practices for subscriptions, it faced staunch resistance from some industry groups, ranging from gym franchises and financial companies to news organizations and entertainment providers.

Ultimately, the Eighth Circuit decided to vacate the rule based on a procedural deficiency rather than on its substance. It held that the FTC's failure to conduct a “preliminary regulatory analysis,” which would have included a review of alternatives to the rule and a cost-benefit analysis of each, violated the statutorily prescribed rule-making process with which it had to comply.

Petitioners who challenged the rule, including industry organizations such as the U.S. Chamber of Commerce, claimed that this failure deprived them of the opportunity to be heard, which could have impacted the scope of the final rule. The Eighth Circuit agreed.

Not a free pass

While some subscription sellers may feel that an expected new compliance hurdle has been eliminated, for those brands with wider geographic reach, certain compliance measures are still advisable. Several states have stepped into the legislative fray. Businesses may find themselves needing to comply with, for example, California's stringent automatic renewal law, which largely mirrors the FTC's now-vacated rule; Massachusetts regulations slated to go into effect on Sept. 2; and New York laws with respect to automatic renewals that take effect in November.

Other states are following suit, such as Pennsylvania, which just advanced a bill on July 8. As we have seen in areas such as data privacy and artificial intelligence, many states are quick to fill a void left by the absence of an on-point federal scheme. If we are reading the tea leaves in the click-to-cancel cup, that seems likely to be the case here.

To read the full article from *Ad Age*, click [here](#).