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ALERT

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FTC's Final 'Click to Cancel' Rule on Negative Option Programs: What You Need to Know

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On October 16, 2024, the Federal Trade Commission (FTC) announced its Final Rule revising its Negative Option Rule, now known as the Rule Concerning Recurring Subscriptions and Other Negative Option Programs (the Rule). The Rule applies to all negative option programs for both B2C and B2B transactions in any media, including online, telephone, print and in-person. This includes prenotification and continuity plans, automatic renewals and free trial offers.

In short, the Rule prohibits sellers from:

- **Making any material misrepresentations** while marketing using a negative option feature.
- **Failing to clearly and conspicuously disclose material terms** prior to obtaining a consumer's billing information in connection with a negative option feature.
- **Failing to obtain a consumer's express informed consent** to the negative option feature before charging the consumer.
- **Failing to provide a simple mechanism to cancel** the negative option feature and immediately halt charges.

Prohibition on Misrepresentations of Material Fact

"Material" is defined by the FTC to mean "likely to affect a person's choice of, or conduct regarding, goods or services." While a non-exhaustive list, potential misrepresentations include the cost, purpose, efficacy, and health or safety of the product or service you are selling.

Mandatory Disclosures

The Rule requires that negative option sellers must clearly and conspicuously disclose all material terms before obtaining the consumer's billing information. To that end, sellers must disclose:

- That consumers will be charged and, if applicable, that those charges will increase after any trial period ends and will recur unless the consumer takes steps to stop them.
- The deadlines, by date or frequency, by which a consumer must act in order not to be charged. If a consumer is enrolled in multiple negative option programs with different deadlines, each deadline must be disclosed.
- The amount of costs, or reasonably approximated range of costs, that the consumer will be charged.
- The information necessary to find the simple cancellation method.

For the material terms to be "clearly and conspicuously" disclosed, they must be "unavoidable." They must appear immediately before and adjacent to the means of recording the consumer's express consent.

Express Informed Consent

Under the Rule, a seller is required to obtain a consumer's unambiguous affirmative consent before charging them. Notably, this must be done separately from any other portion of the transaction and should be presented in a manner that does not distract the consumer with other information or otherwise undermine the consumer's ability to provide their express informed consent. The Rule also requires that sellers maintain records of consumers' consent for at least three years unless the seller can show that it uses a process that would not allow the consumer to complete the transaction without the required consent. In addition, if the seller obtains the required consent through a checkbox, signature or other substantially similar method, which the consumer must affirmatively select or sign, this remains a gold standard and satisfies the recordkeeping requirement.

Simple Cancellation

Sellers are required to provide a simple way for consumers to cancel (hence, "Click to Cancel"). In short, the cancellation mechanism should be as simple to use as the enrollment mechanism. The cancellation method must be:

- In the same medium as used during enrollment.
- At least as easy to use as the consent mechanism at enrollment.
- Easy to find.

If the consumer did not interact with a live or virtual representative when they consented to the negative option program (for example, enrollment was completely online), then the Rule prohibits a seller from requiring the consumer to do so when attempting to cancel.

For cancellations by telephone, the device accessed via a telephone number must be able to record messages, be made available during normal business hours, and be no costlier to use than when the consumer enrolled. If enrollment was in person, the in-person cancellation method must also provide an online or telephonic option to cancel.

What Now?

The Rule takes effect 180 days after its publication in the *Federal Register* (with the prohibition against misrepresentation of material facts going into effect 60 days from publication), leaving sellers a relatively short window to come into compliance. This is all the more important as violators of the Rule can be liable for redress and civil penalties. Significantly, the Rule does not preempt state laws that require greater protection for consumers, so it is equally important to stay abreast of state requirements.

Of note, in the wake of the *Loper Bright* decision, the Rule is already getting challenged in court and suits have been filed seeking vacatur of the Rule on grounds that include arguments that the Rule is "arbitrary, capricious and an abuse of discretion…" and is "unsupported by substantial evidence." Thus far, suits have been filed by the Michigan Press Association and the National Federation of Independent Businesses in the Sixth Circuit and by NCTA – The Internet & Television Association, and the Interactive Advertising Bureau and the Electronic Security Association in the Fifth Circuit. Similar suits are sure to follow, leaving the future of the Rule uncertain and a reason for sellers to closely follow any challenges to the Rule. In the meantime, sellers are best served to heed the Rule and prepare for compliance given the short time frame for its effectiveness compared to the lengthy time frame that is common for court dispute resolutions.

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