

FTC Finalizes Click to Cancel and Negative Option Rule

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by Dustin Berger

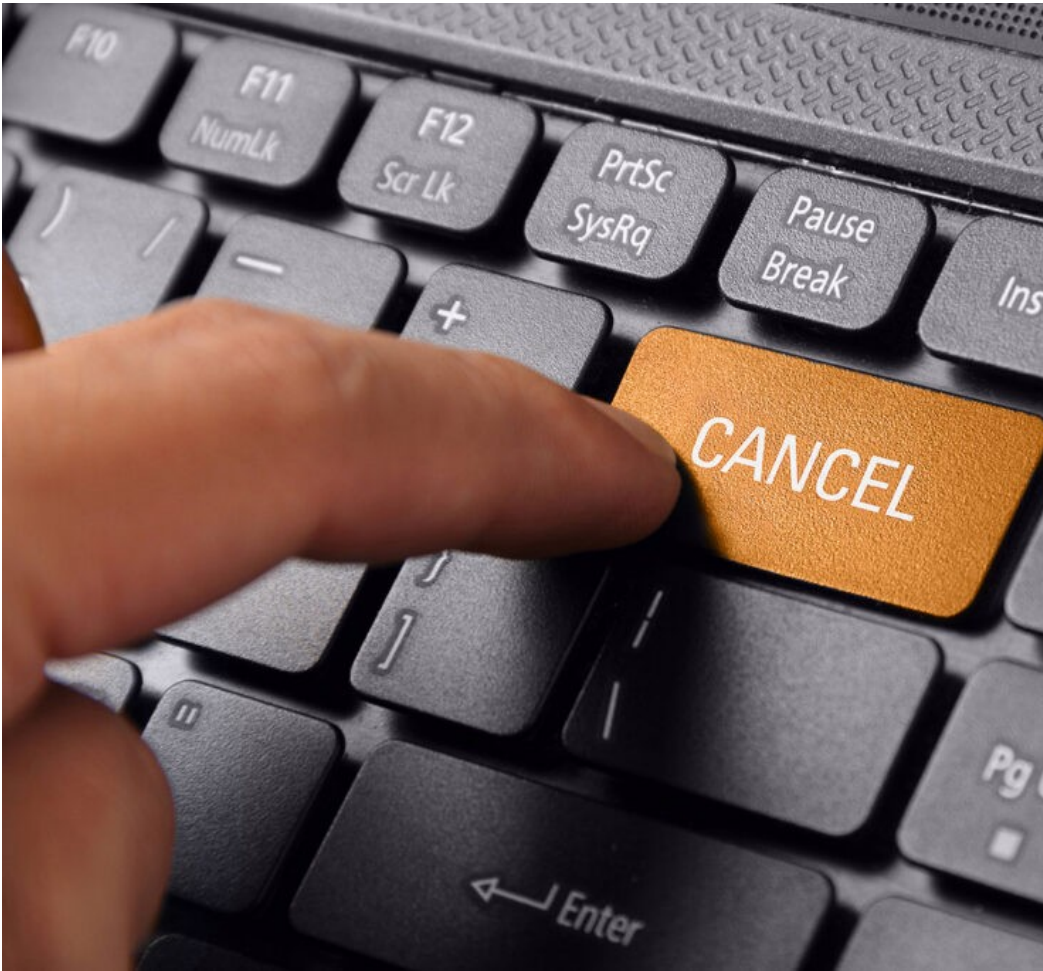
On October 16, 2024, the Federal Trade Commission (FTC) announced a revision to its negative option rule. The rule, formally entitled the “Rule Concerning Recurring Subscriptions and Other Negative Option Programs,” is a robust governmental intervention into the marketing and sales of products or services that involve “negative option features.” A “negative option feature” exists if seller provides a contract “under which the consumer’s silence or failure to reject goods or services or to cancel the agreement is interpreted by the [] seller as acceptance or continuing acceptance of the offer.” 16 C.F.R. 425.2. Although the revised negative option rule does not prohibit negative option programs, it imposes certain requirements on sellers using them.

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I. Negative Option Programs

The FTC explains that many negative option programs fall into one of four familiar categories:

- Prenotification plans, such as book-of-the-month clubs, where “sellers provide periodic notices offering goods to participating consumers and then send—and charge for—those goods only if the consumers take no action to decline the offer.”
- Continuity plans, where “consumers agree in advance to receive periodic shipments of goods or provision of services . . . which they continue to receive until they cancel the agreement.”
- Automatic renewal plans, common in the magazine subscription context, where sellers “automatically renew consumers’ subscriptions when they expire, unless consumers affirmatively cancel the subscriptions.”
- Free-to-pay plans, in which “consumers receive goods or services for free . . . for a trial period” but afterward “sellers automatically begin charging a fee (or a higher fee) unless consumers affirmatively cancel or return the goods or services.”

II. Requirements for Negative Option Programs

Regardless of the form of the negative option program, the FTC’s new rule, which is set to go into effect in part on January 14, 2025, and in full on May 14, 2025, imposes four principal requirements on all negative option programs, whether offered online or via

more traditional channels. The FTC considers any negative option program that fails to meet each of the four requirements to be a per se violation of section five of the Federal Trade Commission Act, and the FTC may seek civil penalties for each violation.

A. No Misrepresentations; Information Requirements

The first two requirements are closely related. The first requirement prohibits the misrepresentation of any material fact related to the transaction, including facts about the negative option feature and the underlying goods or services. The second requirement is that sellers clearly and conspicuously disclose all material terms related to the negative option feature. These material terms include: (1) “[t]hat consumers will be charged for the good or service, or that those charges will increase after any applicable trial period ends, and, if applicable, that the charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such charges; (2) [t]he deadline (by date or frequency) by which the consumer must act in order to stop all charges; (3) [t]he amount (or range of costs) the consumer will be charged and, if applicable, the frequency of such charges a consumer will incur unless the consumer takes timely steps to prevent or stop those charges; (4) the date (or dates) each charge will be submitted for payment; and (5) the information necessary for the consumer to cancel the negative option feature.” The prohibition on misrepresentation takes effect on January 14, 2025, while the second requirement relating to the disclosure of material terms (along with the other requirements discussed below) take effect on May 14, 2025. 16 C.F.R. § 425.3 to § 425.4.

B. Consent

The third requirement is that a seller promoting or offering goods or services with a negative option feature must “obtain the consumer’s unambiguously affirmative consent to the negative option feature offer separately from any other portion of the transaction,” “not include information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent,” and to maintain records regarding that consent for three years, unless consumers cannot complete a transaction without providing such consent. 16 C.F.R. § 425.5.

C. Click to Cancel

The final requirement is the so-called “click to cancel” component of the rule. It requires that a seller offering a negative option program provide a “simple mechanism” for cancellation. 16 C.F.R. § 425.6(a). The cancellation mechanism must be “at least as simple” as the sign-up process and must be offered “through the same medium” as the sign-up. 16 C.F.R. § 425.6(b) and (c). For online negative option programs, consumers cannot be required to “interact with a live or virtual representative . . . to cancel if the consumer did not do so” to sign-up. 16 C.F.R. § 425.6(c)(1). And, for in-person programs, the seller must offer both an in-person cancellation option “where practical” as well as a telephonic or online option. 16 C.F.R. § 425.6(c)(3).

III. Challenges

The negative option rule has been challenged by a number of industry groups. The litigation challenging the Rule was subsequently consolidated under *Custom Communications Inc., v. FTC*, 8th Cir, No. 24-3137. The challengers are seeking a stay of the rule prior to certain provisions taking effect on January 14, 2025. Additionally, there has been speculation as to whether the new administration will continue to support the negative option rule. The rule was passed by the FTC on a 3-2 party-line vote, with the recently named FTC Chair, Andrew Ferguson, voting against the rule. Stay tuned for more from the TMCA as the rule progresses through the courts and the Federal Trade Commission under the new administration.

IV. More Information

The FTC has made a [fact sheet about the revised negative option rule](#) available and provided a [plain language description of the rule](#).