

What Cos. Should Know About Proposed Auto Renewal Rule

By **Meegan Brooks and Stephanie Sheridan** (April 11, 2023)

On March 23, the Federal Trade Commission published an 83-page notice of proposed rulemaking regarding a proposed amendment to the FTC's negative option rule concerning subscription services.[1]

The notice follows from its 2019 advanced notice of proposed rulemaking[2] and the 2021 enforcement policy statement regarding negative option marketing.[3]

If finalized in its current form, the proposed rule — retitled the rule concerning recurring subscriptions and other negative option plans — would significantly expand the scope and requirements of the current version.

However, many of its requirements are already codified, at least to some extent, in state or federal law, or have previously been reflected in existing FTC guidance.

The rule does, however, propose several unusually strict disclosure, consent and cancellation requirements. For example, it would:

- Require that disclosures relating to a subscription program be immediately adjacent to the request for consent;
- Require express informed consent to automatic renewal features that must be separate from any other consent, such as placing an order;
- Restrict save efforts when a consumer attempts to cancel; and
- Mandate annual reminders for negative option features not involving physical products.



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The most notable aspect of the notice is not with respect to its requirements, but with the cost of noncompliance: The rule would allow the FTC to seek civil penalties of up to \$46,517 per violation, which could potentially mean per automatic renewal order, and per customer.

These penalties could potentially apply to any alleged misrepresentations arising from a subscription program, such as the offered products, or even as to the company itself — regardless of whether the misrepresentations relate to the subscription feature itself.

Proposed Rule Streamlines Federal Regulatory Framework, But Wouldn't Preempt State Law

The FTC's enforcement mechanisms relating to negative option programs — wherein a company charges customers for goods or services after the customer fails to take an affirmative action, such as rejecting an offer or canceling an agreement — are currently scattered across a series of authorities, each of which applies in a different context.

Most relevant here, the Negative Option Rule has, since it was first published in 1973, only applied to one form of negative option marketing: prenotification negative option plans. Under such plans, e.g., book-of-the-month clubs, 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.

Section 5(a) of the FTC Act, Title 15 of the U.S. Code, Section 45(a), broadly addresses unfair or deceptive acts or practices, but does not specifically address negative option marketing.

Enacted in 2010, the Restore Online Shoppers' Confidence Act applies to negative option programs offered online.

The Telemarketing Sales Rule prohibits deceptive acts or practices and requires certain disclosures for negative option offers made over the telephone in the context of telemarketing, as that term is defined in the rule.

The rule aims to provide one-stop regulatory shopping by consolidating existing negative option-specific provisions in one location.

Specifically, it will cover all forms of negative option marketing, including prenotification and continuity plans, automatic renewals and free trials that convert into ongoing subscriptions.

Additionally, the rule covers offers made in all media, including internet, telephone, in-person and printed material.

Notwithstanding the FTC's interest in simplifying compliance for businesses, the rule specifies that it would not supersede, alter or affect state statutes or regulations relating to negative option marketing, except in cases where compliance with both state and federal requirements is not possible.

Potential Penalties for Misrepresentation of Any Material Fact Related to the Transaction

The rule's most notable expansion is that it would prohibit — and provide steep penalties for — any misrepresentation arising from a transaction that involves a negative option feature, including express or implied misrepresentations concerning any material fact related to the underlying good or service.

In other words, even if a company perfectly complied with every requirement relating to negative option programs, it could still be subject to significant penalties if it misrepresented the efficacy of the product or service being sold.

FTC Commissioner Christine Wilson, who resigned March 31, issued a dissenting statement expressing concern that this provision exceeds the commission's authority, and characterized the rule as an "end-run around the [U.S.] Supreme Court's decision in [AMG Capital Management LLC v. FTC]," referencing the court's holding that equitable monetary relief cannot be recovered in cases brought under the FTC's Section 5 authority.

While this new language may outwardly appear to reflect an expansion of existing law, for nearly two years, the FTC has taken the position that ROSCA covers, and provides penalties for, deceptive conduct relating to products sold in a negative option contract.

On June 7, 2021 — less than three months after the AMG Capital decision — the FTC

reached a resolution with MoviePass Inc., and its parents and principles, in a case alleging ROSCA violations arising from MoviePass's alleged misrepresentations concerning the volume of movies available under the subscription.

Notice, Consent and Cancellation Requirements

When it comes to actual subscription-related requirements, the rule purports to focus on more clearly articulating many of the standards already set forth in ROSCA.

The rule also adopts several requirements that have existed for years in California's automatic renewal law, and which have been more recently enacted in other states, such as New York, Virginia and the District of Columbia.

At the same time, however, the rule includes several new requirements.

Expanded Disclosure Requirements

The rule requires sellers to disclose "any material terms related to the underlying good or service that is necessary to prevent deception" regardless of whether it relates to the negative option feature.

This requirement arguably requires more than ROSCA, which requires sellers to clearly and conspicuously disclose "all material terms of the transaction [rather than the underlying goods] before obtaining the consumer's billing information."

The rule goes a step further by specifying the details that must be included in the disclosure.

These requirements would formalize the policies in the 2021 policy statement, and largely mirror those of the telemarketing sales rule and the California automatic renewal law, among other similar state laws. Specifically, companies would need to disclose:

- That customers will be charged on a recurring basis until they cancel;
- The amount that will be charged;
- The date of each charge;
- The frequency of such charges;
- The deadline to cancel; and
- The cancellation policy.

Consistent with the FTC's policy statement, the proposed amendments would require that the terms above be clearly and conspicuously displayed — defined to mean difficult to miss, or, if online, unavoidable, i.e., no click-throughs or hovers.

Disclosures that are directly related to the negative option feature must appear immediately adjacent to the means of recording the consumer's consent — such as a checkbox, button, etc. Other disclosures must appear before consumers decide to buy — e.g., before they click submit order.

The rule's requirement for immediate adjacency has been included in past FTC settlements — in addition to those reached by California's Automatic Renewal Taskforce, or CART — but is stricter than the plain language of California's automatic renewal law.

In practice, most retailers place their automatic renewal disclosure immediately above the check-out button, thereby satisfying both requirements.

Consent

Under the rule, sellers must obtain the consumer's express informed consent before charging the consumer. This requirement is consistent with ROSCA's basic express informed consent requirement while providing more guidance on how to comply.

As a point of comparison, California requires affirmative consent, though CART has required check boxes or similar devices and other forms of express consent in their settlement agreements.

This request for consent must be "separate from any other portion of the transaction," such as through a "check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign to accept the Negative Option Feature and no other portion of the transaction."

This requirement is not unlike Vermont's law, which — for subscriptions with renewal terms of a year or longer — requires that companies obtain one consent to the contract itself, and a second consent to the automatic renewal clause.

Additionally, the seller should not present any distracting or contradictory information.

The seller must obtain the consumer's unambiguously affirmative consent to the rest of the transaction, and maintain verification of each customer's consent for three years, or a year after the customer cancels, whichever is longer.

Cancellation

The notice expands upon ROSCA's requirement that sellers provide simple mechanisms for the consumer to stop recurring charges by providing new requirements for cancellation of negative options, several of which are drawn from the policy statement.

Specifically, cancellation must be at least as simple as the method the consumer used to sign up. At minimum, cancellation must be offered through the same medium used to sign up, whether through the internet, telephone, mail or in person.

Although the rule's click-to-cancel requirement has received the most attention, it is actually less stringent than California's current law, which, has required sellers to provide an easy-to-use mechanism for online cancellation, in the form of either a prominently located direct link or button, or a preformatted and immediately accessible termination email that a consumer can send to the business without additional information.

Online cancellation for online subscriptions has been required in California since 2018.

The rule imposes a more unique requirement with respect to companies' efforts to save a customer's business before effectuating a cancellation.

Specifically, sellers may not try to dissuade a customer from canceling — for example, through lowered prices, or other offers — without first obtaining the consumer's unambiguously affirmative consent to receive an option to save prior to cancellation.

Would you like to consider a different price or plan that could save you money? If the consumer says no, the seller cannot attempt any more saves, and must immediately process the cancellation.

Sellers currently complying with California's automatic renewal law should already be covered given that since July 2022, California's automatic renewal law, has prohibited sellers from "engaging any further steps that obstruct or delay the consumer's ability to terminate the automatic renewal or continuous service immediately," which can be read as restricting save attempts.

Annual Reminders for Nontangible Goods

The FTC recognizes that when customers receive goods on a recurring basis, they likely realize they are being charged. For that reason, the rule imposes annual notice reminders only for subscriptions that do not involve delivery of physical goods.

In these instances, sellers would have to provide reminders, at least annually, identifying "the product or service, the frequency and amount of charges, and the means to cancel." The reminder must be provided in the same medium the consumer used to consent.

Significantly, a number of state laws already require annual reminders for all subscriptions with renewal periods lasting a year or more, including those for tangible goods.

Many of these state laws set forth timing requirements for when the notice must be provided, in addition to what specifically must be disclosed.

Now Is the Time To Affect the Final Rule

At this stage, the proposal is just that — a possible approach for which the FTC is soliciting feedback. Once the notice^[4] is published in the Federal Register, the public will have 60 days to comment.^[5]

This is therefore the prime opportunity for companies that offer subscription programs to be heard by submitting comments to potentially affect the final rule.

Regardless of what ultimately transpires with the rule, the FTC's continued focus on negative option programs makes clear that businesses that employ such platforms must remain diligent.

Class actions and CART show no sign of slowing down, and the FTC is clearly ramping up.

Given the detailed nuances involved, businesses using any type of automatic renewal sales process should stay on top of all the new requirements coming down the pike.

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[1] <https://www.ftc.gov/legal-library/browse/federal-register-notices/negative-option-rule-nprm>.

[2] <https://www.federalregister.gov/documents/2019/10/02/2019-21265/rule-concerning-the-use-of-prenotification-negative-option-plans>.

[3] https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf.

[4] <https://www.ftc.gov/legal-library/browse/federal-register-notices/negative-option-rule-nprm>.

[5] <https://www.ftc.gov/news-events/news/press-releases/2023/03/federal-trade-commission-proposes-rule-provision-making-it-easier-consumers-click-cancel-recurring>.