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Eighth Circuit Cancels FTC's "Click-to-Cancel" Rule

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On July 8, the United States Court of Appeals for the Eighth Circuit vacated the Federal Trade Commission's Negative Option Rule, also referred to as the "Click-to-Cancel" rule (the "Rule"), determining that the FTC sidestepped a requirement to engage in preliminary regulatory analysis before finalizing it.

The Rule, which was set to take effect on July 14, required retailers to include detailed disclosures before checkout, obtain consumer consent to the terms before checkout, and maintain easy cancellation mechanisms. It expanded upon the previous regulation, referred to as the "1973 rule," which imposed much less specific requirements (e.g., sellers were required to "provide periodic notices offering goods to consumers and then send and charge for those goods if the consumer does not decline the offer"), with the goal of protecting consumers from signing up and being charged for automatically renewable subscription programs without their knowledge.

Overview of Petitioners' Claims

Almost immediately after the Rule was announced, several industry associations and businesses ("Petitioners") filed petitions to review the rule in an effort to stop its enforcement.[1] Each petition claimed that the Rule is "arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act; unsupported by substantial evidence; based on determinations that 'precluded disclosure of disputed material facts which w[ere] necessary for fair determination . . . of the rulemaking proceeding taken as a whole,'; and in excess of the FTC's statutory authority, in violation of the U.S. Constitution, and otherwise contrary to law[.]'" (Internal citations omitted.)

The Petitioners challenged the Rule on three grounds. First, they argue that the Rule does not satisfy the FTC Act's "specificity and prevalence" requirements. Second, they argue that the Rule must be vacated because the FTC never issued the required preliminary regulatory analysis. The FTC responds to that argument, saying that even if they did need to perform the preliminary analysis (which they contend they did not), the error was ultimately harmless. Third, they argue that the Rule is arbitrary and capricious because it is overbroad.

The petitions were consolidated by the Judicial Panel on Multidistrict Litigation under the case name *Custom Communications, Inc. v. Federal Trade Commission*, and the Eighth Circuit was randomly selected to review. Oral arguments were held on June 10, 2025.

Overview of the Decision

The Court's order, issued July 8, focused on the second issue: whether the FTC had engaged in the requisite preliminary regulatory analysis. Because it held that the rulemaking process was procedurally insufficient, it did not need to rule on the Petitioners' substantive challenges.

The FTC Act requires that the FTC conduct a preliminary regulatory analysis of a proposed rule when it publishes notice of that proposed rulemaking. This analysis must contain "'a description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule' and for the proposed rule and each alternative, 'a preliminary analysis of the projected benefits and any adverse economic effects and any other effects, and of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule.' 15 U.S.C. § 57b-3(b)(1)(B)-(C)." This requirement does not apply to amendments to the rule when the estimated economic effect of the amendment is under $100 million.

Click-to-Cancel amends the FTC's 1973 Rule on negative option plans. The relevant question for the Court, then, concerned the monetary effect of the rule.

At the time of the notice of the proposed rulemaking in April 2023, the FTC determined that the effect of the Rule would be less than $100 million, such that a regulatory analysis was not required. In January and February 2024, the FTC held informal hearing sessions before an Administrative Law Judge (ALJ) "to resolve disputed issues of material fact about costs of the proposed rule"; the ALJ ruled that compliance with the rule *would* surpass the $100 million threshold. By then, however, the FTC contended that the preliminary analysis was no longer required because a year had passed since the notice of proposed rulemaking, and the FTC Act does not explicitly provide that the preliminary regulatory analysis was still required at this stage. The Eighth Circuit disagreed, stating that "deviating from [the] sequence of events is not statutorily prohibited."

The FTC also argued that even if it should have conducted the preliminary regulatory analysis, its failure to do so was ultimately harmless. The Court disagreed, explaining that if the FTC had provided alternatives to the proposed rule and a cost-benefit analysis of each alternative, as required, then that could have created an opportunity for Petitioners to explain how "less burdensome alternatives could provide comparable benefits." Because the petitioners were never informed of potential alternatives, they missed an opportunity to dissuade the FTC from adopting the rule as proposed. The Court further noted that the noncompliance could "open the door to future manipulation of the rulemaking process."

Conclusion

Though the Eighth Circuit ultimately struck down the Rule, the Court emphasized that its decision is based on procedural grounds alone: "While we certainly do not endorse the use of unfair and deceptive practices in negative option marketing, the procedural deficiencies of the FTC's rulemaking process are fatal here."

To be clear: this new decision does not leave subscription programs unregulated. The FTC can still regulate unfair trade practices, including those relating to subscriptions, through the Restore Online Shopper's Confidence Act (ROSCA) and its Section 5 authority. ROSCA has proven to be an

effective mechanism for the FTC to protect consumers against dark patterns and negative option programs. (See, e.g., here.) Moreover, many states have stricter automatic renewal requirements. As we've discussed previously, California's Automatic Renewal Law (ARL) appears to have inspired many of the provisions in the struck-down FTC Rule, and several other states have similar requirements. Retailers should therefore evaluate their subscription practices to confirm that they are protected, even in the midst of this welcome decision.

[1] Custom Communications, Inc., doing business as Custom Alarm (8th Circuit, October 22, 2024); The Chamber of Commerce of the United States of America; The Georgia Chamber of Commerce (11th Circuit, October 22, 2024); Michigan Press Association; National Federation of Independent Business, Inc. (6th Circuit, October 22, 2024); Electronic Security Association; Interactive Advertising Bureau; NCTA-The Internet & Television Association (5th Circuit, October 23, 2024).