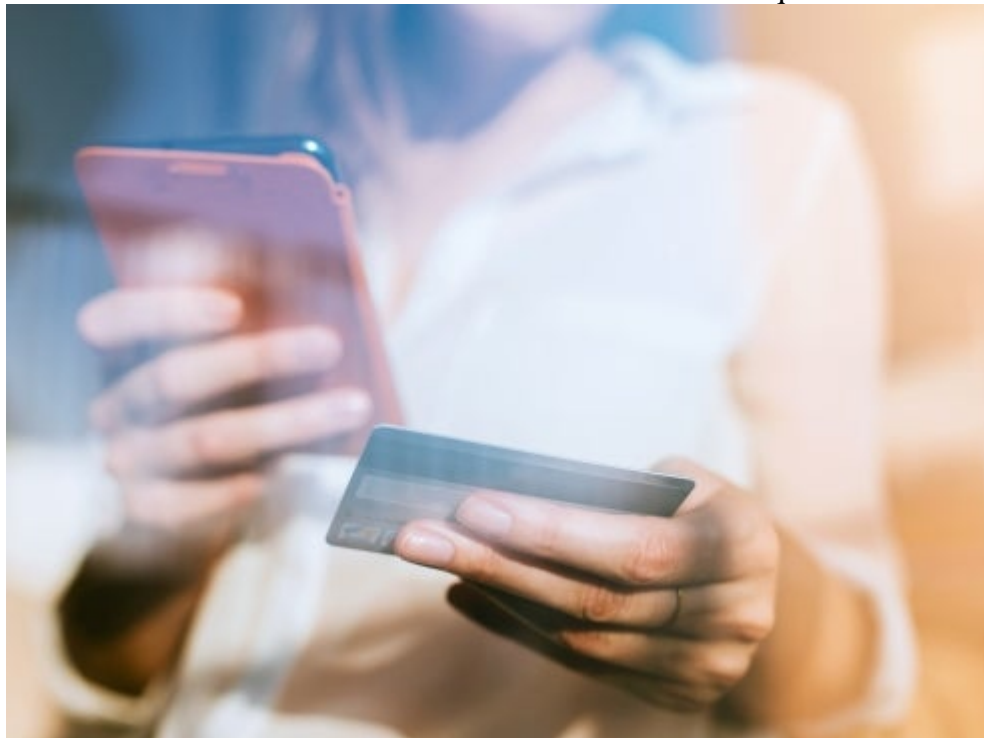


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November 06, 2024

FTC Finalizes “Click To Cancel” Rule With Substantial Requirements for Recurring Subscription Programs



The Federal Trade Commission (FTC) [announced](#) its [final Negative Option Rule](#) (the Rule)—which the FTC often refers to as the “Click to Cancel” rule—for automatically renewing subscriptions, free trials that convert to paid subscriptions, and recurring product shipments on October 16, 2024. The *final* Rule retains most of the *proposed* rule (discussed [here](#)) and imposes significant requirements on recurring subscriptions. Violators of the Rule can be subject to up to \$51,744 in civil penalties per violation, as well as consumer refunds and damages.

Scope of the Rule

The Rule applies to “negative options”—contracts where a consumer’s silence or failure to take affirmative action is construed as acceptance or ongoing acceptance of an offer. The definition includes recurring subscriptions and product shipments, as well as free trials that convert into paid subscriptions.

Sellers must comply with the Rule if they offer, sell, charge for, or market a product or service with a subscription or negative option feature. While the federal Restore Online Shoppers’ Confidence Act (ROSCA) and the Telemarketing Sales Rule (TSR) already regulate subscriptions, ROSCA applies solely to subscriptions offered over the internet, and the TSR applies solely to those by phone. By contrast, the Rule applies regardless of where the offer is made (*e.g.*, internet, phone, print, or in-person) and imposes far more detailed and prescriptive requirements.

Key Requirements

Prohibition on Any Misrepresentations of Material Facts

The Rule prohibits express and implied misrepresentations of any material fact in connection with promoting or offering any product or service with a subscription. Importantly, the prohibition applies to material facts about the recurring subscription (*e.g.*, the intervals at which it renews or when a free trial expires) and the underlying product or service.

Clear and Conspicuous Disclosure of Material Terms

Subscription marketers and sellers must disclose all material terms before obtaining a consumer's billing information (or confirming the use of account information previously provided). Material terms include (1) that consumers will be charged for the product or service on a recurring basis unless a consumer cancels (and that charges will increase after any applicable trial period ends); (2) each deadline by which consumers must act to prevent or stop charges; (3) the amount or range of costs that consumers will incur; and (4) information consumers need to find the cancellation mechanism. That list is nonexhaustive, though, as "material terms" are any terms that are likely to affect a person's choice of, or conduct regarding, goods or services.

The Rule requires that these disclosures be clear and conspicuous, with the material terms enumerated above appearing "immediately adjacent" to the means of recording the consumer's consent for the negative option feature. Any other required disclosures must appear "before" obtaining the consent required by the Rule. The Rule includes detailed requirements for what counts as "clear and conspicuous." Further, the requirement to disclose all material terms is not limited to terms about the recurring subscription and extends to terms about the underlying product or service.

Express Affirmative Consent

"Separate" consent. Subscription sellers must obtain the consumer's "unambiguously affirmative consent" to the recurring subscription feature. This must be done separately from any other part of the transaction. Consent can be obtained through an unchecked checkbox, signature, or other substantially similar method. The consent request must be presented in a clear and unambiguous manner and include no information that interferes with, detracts from, contradicts, or otherwise undermines consumers' ability to provide consent.

Records. Subscription sellers must either (1) maintain a record of the consumer's consent for three years after sign-up or (2) demonstrate that no consumer can technologically complete the transaction without providing consent.

Simple Cancellation

The Rule requires a simple cancellation mechanism. This means the cancellation process must be (1) at least as simple as the one used to initiate the charge or series of charges and (2) through the same medium (*e.g.*, if online, then on the website or app) used to initiate the original subscription agreement. For digital methods, the cancellation mechanism must be easy to find when the consumer tries to cancel, and the consumer cannot be required to interact with a live or virtual representative if they did not do so to agree to the subscription at sign-up. Additional requirements apply for cancellation by phone and for agreements initiated with in-person consent.

Key Changes From Proposed Rule

The final Rule made a number of changes from the proposed rule, such as:

- **Reminders.** The proposed rule would have required an annual reminder for recurring subscriptions that do not include delivery of physical products. The FTC explained that it requires more information about the value of annual reminders and the particulars of when they should be issued.
- **“Saves.”** The proposed rule would have required subscription sellers to obtain a consumer’s consent before making retention offers or providing information about the benefits of the subscription during the cancellation process (aka “saves”). The FTC explained that its proposal did not strike the right balance between protecting consumers and giving opportunities to businesses to make offers and provide information that could be valuable to consumers.

However, the FTC has said it is still considering rulemaking on these issues and plans to issue a supplemental notice of proposed rulemaking to address them.

Takeaways

The Rule will significantly affect how recurring subscriptions and free trials can be marketed, offered, and sold in the United States. Further:

Expect more FTC enforcement. In recent years, recurring subscriptions have been a frequent target for the FTC and state attorney general enforcement and consumer class actions. The Rule expands the FTC’s ability to seek potentially hefty civil penalties and consumer redress, so brands should continue to expect attention from the FTC on subscription practices, including subscription offers and disclosures and the clarity and ease of cancellation mechanisms.

Pay attention to state requirements—they still apply. The Rule does not preempt state laws that provide greater protections for consumers. Brands must therefore still pay attention to the more than 25 applicable state laws. See, for example, the [California Auto-Renewal Law](#), which was recently expanded.

Consider B2B transactions, too. The FTC explained that the Rule applies to both business-to-business and business-to-consumer transactions. Although the FTC highlighted its particular concern for protecting small businesses, the Rule is drafted to cover transactions with businesses regardless of their size or sophistication.

Dissent and court challenges. Commissioner Melissa Holyoak issued a [dissent](#) arguing that the Rule is legally deficient. Shortly after the Rule was announced, several trade associations filed court challenges to the Rule. Whatever the outcome of these challenges, it is the FTC’s position that many of the Rule’s requirements apply via ROSCA, the TSR, and/or Section 5 of the FTC Act.

Brands should review their recurring subscription procedures for compliance, including disclosures, consent mechanisms, and cancellation procedures. The Rule’s requirements generally go into effect 180 days after publication in the *Federal Register*, though the prohibition on misrepresentations takes effect 60 days after publication in the *Federal Register*.

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