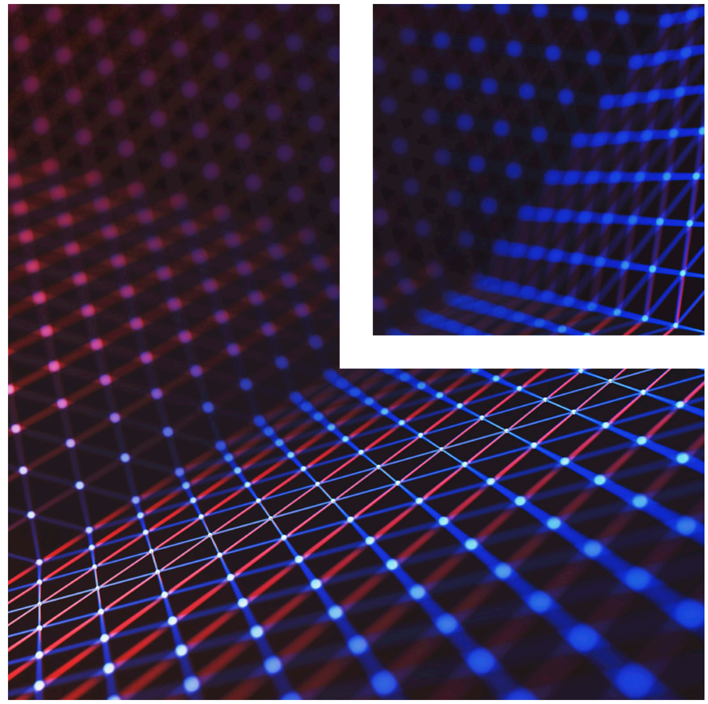
Advertising & Media Alert

October 2024

'Click to Cancel' – FTC Releases Final Rule for Subscriptions



The Federal Trade Commission (FTC) announced its final rule for negative options, dubbed the "click to cancel" rule because of the focus on cancellation methods. But the FTC's new rule covers more than just requirements for easy cancellation.

What (and who) does the rule apply to?

The new rule broadly applies to all negative option plans, in any media. This includes automatic renewal programs (commonly referred to as subscriptions), continuity plans, free-to-pay conversion or fee-to-pay conversions (such as free trials or promotional offers), and pre-notification negative option plans. Sellers of any of these negative option plans must comply with the rule – whether the plan is being sold to a consumer (B2C) or to another business (B2B).

What does the new rule require?

The new rule is intended to protect consumers against unfair and deceptive negative option practices.

Below are a few of the rule's requirements:

- **No misrepresentations** – the new rule prohibits sellers from misrepresenting any material fact while marketing a negative option plan.
- **Provide important information before collecting billing information** – the new rule requires sellers to provide important information prior to obtaining the consumers' billing information and charging the consumer (or using any saved account information to charge the consumer).
- **Obtain consent** – under the new rule, sellers must obtain consumers' unambiguously affirmative consent to the negative option plan prior to charging them.
- **Simple cancellation** – sellers must provide consumers with simple cancellation methods that will immediately stop all recurring charges.

What does simple cancellation or 'click to cancel' really mean?

The new rule requires sellers to provide a simple mechanism for a consumer to cancel their negative option plan that will immediately stop any recurring charges and prevent the consumer from being charged (or charged an increased amount). The "simple cancellation mechanism" must be at least as easy to use as the process the consumer used to consent to the negative option. For online (or in-app) cancellation, the cancellation mechanism must also be easy to find when the consumer is looking to cancel.

While the final rule does not have any restrictions on "save" offers (e.g , discounted plans), sellers cannot use these offers to unnecessarily impede the cancellation process – in fact, requiring the consumer to click through too many save offers could violate the easy cancellation requirement. Additionally, sellers cannot prolong the cancellation process by requiring the consumer to interact with a live agent or chatbot to cancel their plan (provided the consumer did not need to talk to a live agent or chatbot to consent to the plan).

What is the new consent requirement?

When trying to enroll a consumer, sellers must obtain the consumer's express informed consent before charging the consumer for the negative option plan. While the new rule does not formally define "express informed consent," the FTC does say that express informed consent does not necessarily require a checkbox or a signature (however, merely disclosing the material terms of a negative option will not be sufficient to establish consent).

With respect to consent, the new rule requires that sellers:

- Obtain the consumer's unambiguously affirmative consent to the negative option offer separately from any other portion of the transaction.
- Do not include any information that interferes with, detracts from, contradicts or otherwise undermines the ability of consumers to provide their express informed consent to the negative option offer.
- Keep records of the consumer's consent for at least three years. (If the seller can demonstrate by a preponderance of the evidence that its user flow makes it technologically impossible to complete the transaction without consent, then the seller does not have to maintain consent records for individual consumer transactions.)

How is this final rule different from the proposed rule?

The proposed rule included a handful of additional restrictions that the FTC declined to include in its final rule, either because it didn't think implementing those provisions would adequately protect consumers, or because the FTC wants to study those issues further.

For example, the proposed rule included a requirement that sellers must provide annual reminders to consumers who enrolled in a negative option plan – that notice requirement does not appear in the final rule (although we see similar reminder requirements in state laws). Sellers also are not required to (1) include the date (or dates) on which each charge for the automatic renewal will be submitted for payment, or (2) obtain a separate consent to enroll a consumer in a free trial or promotional offer.Perhaps most notably, the proposed rule would have prohibited sellers from trying to provide save offers to a consumer when the consumer wanted to cancel their plan, unless the consumer consented to receiving these offers. The final rule does not include this restriction, and the FTC has said that it wants to seek additional comment. According to the FTC, the proposed save provision did not achieve the right balance between protecting consumers from unfair tactics and allowing sellers to provide necessary and valuable information about cancellation.

When does the final rule become effective?

The new requirements around disclosures and misrepresentations will become effective 60 days after the rule is published in the *Federal Register*, and the requirements around consent and simple cancellation will take effect 180 days after the rule is published in the *Federal Register*.

How does this new FTC rule affect state law?

Where a state law governing negative option requirements is inconsistent with the new FTC rule, the FTC's rule will control. However, where the state law provides more protection to consumers or includes additional requirements not included in the new FTC rule, the state law remains (those additional state law requirements are not considered "inconsistent"). This essentially means that the FTC's new negative option rule sets the "floor" for compliance – but companies must still comply with individual state automatic renewal laws (particularly where those state laws include more requirements than the FTC's new rule).

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