



Rule Summary

On October 16, 2024, the Federal Trade Commission (FTC) issued its final “Negative Option” (also known as “Click-to-Cancel”) Rule (“Rule”).

The Rule applies to “negative option” marketing, whereby goods or services are procured through processes including automatic renewals, continuity plans, and free-to-pay trial subscriptions. The Rule applies to offers online, on the phone, and in person, and covers both business-to-consumer and business-to-business transactions.

The final Rule significantly deviated from the mandate FTC Commissioners agreed to on a bipartisan basis in 2019 to fill in any existing gaps “when marketers fail to make adequate disclosures, bill consumers without their consent, or make cancellation difficult or impossible.”¹ Such a rule would have likely been welcomed by consumers and the business community alike because it would have provided greater clarity around what particular practices are prohibited.

Instead, the final Rule subjects businesses to a new liability for any “misrepresentations” not just related to negative option features, but to any material fact when a negative option feature is offered, whether or not the buyer uses the negative option.

While this provision may sound reasonable at first glance, as Commissioner Melissa Holyoak observed in her [dissenting statement](#), “what constitutes a misrepresentation can sometimes be in the eye of the beholder (that is, a Commissioner). Even honest businesses will have reason to reconsider the use of negative option billing now that it means subjecting themselves to potential civil penalties for misreading Commission tea leaves.”

The Rule, supporters contend, addresses this by allowing businesses to seek an “exemption” from the FTC for application of the Rule, essentially having their sales processes approved by the government. This turns the regulatory process on its head, forcing companies to spend time and money seeking government pre-approval in order to limit future civil liabilities.

As Commissioner Holyoak also noted, “the Rule is nothing more than a back-door effort at obtaining civil penalties in any industry where negative option is a method to secure payment.”

Negative Effects on Growth & the Economy

The expansive and uncertain civil liability regime created by the Rule will discourage businesses from offering automatic renewal, trial subscriptions and other negative-option contracting methods that consumers find valuable.

¹ 84 Fed. Reg. 52393, 52394



This will result in less choice for consumers and greater friction in the provision of goods and services. Imagine going to your favorite streaming service and having to re-enroll before watching a program because auto-renew was no longer available, thanks to the liability risk created by the Rule.

If businesses try to maintain negative option contracting methods, they will incur compliance costs associated with implementing the Rule's disclosure, consent, and cancellation requirements or obtaining an "exemption" from the FTC. This will increase costs for consumers.

Additional Background

In addition to the substantive problems, the FTC subverted at least three special rulemaking requirements that Congress set out in Section 18 of the FTC Act:

1. The FTC dramatically expanded the scope of the proposed rule only *after* issuing the ANPRM required by law. As a result, interested parties were deprived of the opportunity to provide "suggestions or alternative methods for achieving" the objectives addressed by the final rule. As Commissioner Holyoak observed, the FTC thereby "cut itself off from valuable public comments at important early stages (especially as to regulatory alternatives) and ignored the rulemaking guardrails that Congress carefully established to forestall nondelegation concerns that might otherwise exist."
2. Congress also provided in Section 18 that the FTC must "prescribe ... rules which define with specificity acts or practices which are unfair or deceptive acts or practices." Instead, the Negative Option Rule includes a broad prohibition of "**any** Material fact" made in connection with the sale or promotion of "**any** good or service with a Negative Option Feature.
3. The FTC ignored Congress's mandate to propose rules "only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent." The FTC failed to establish the enforcement record necessary to justify a rule under the law.

Recommend CRA Disapproval

A repeal of this Rule would have the effect of restoring the agency's longstanding (and lawfully promulgated) rule governing prenotification negative option plans. The FTC could then pursue a narrower, more tailored rule that would benefit consumers and businesses alike.