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The FTC takes a new swipe at autorenewal programs

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Use of California's Auto Renewal Law as a predicate for UCL, FAL or CLRA claims has been a hotbed of consumer class action litigation. Now, the FTC has added a federal arrow to the consumer protection quiver by expanding its Negative Option Rule to reach autorenewal and other similar marketing programs. Among other things, the recently finalized amended FTC Rule requires companies to make their cancellation process as easy as their enrollment process.

Negative option marketing is a sales technique where a consumer's silence or failure to take affirmative action is treated as acceptance of an offer. Negative option plans typically fall into one of four categories: prenotification plans, continuity plans, automatic renewal plans, and free trial to paid product conversion plans. The FTC's 1973 Negative Option Rule (16 C.F.R. part 425) applied only to prenotification plans, or plans where the seller provides periodic notices offering goods to participating consumers and then sends and charges for those goods if the consumer takes no action to decline the offer (think Columbia House). The recent amendments, however, expand the reach of the Rule to "all media," including continuity plans, automatic renewal plans, and free trial to paid product conversion plans and takes specific aim at eliminating "undue burden" at cancellation by requiring sellers to make it as easy for consumers to cancel their enrollment as it was for them to sign up. For those in the online space, this means that federal law now requires consumers who sign up with a "click" to be able to cancel with a "click."

The amended regulates negative option marketing by prohibiting four categories of conduct:

- misrepresenting any material fact made while marketing goods or services with a negative option feature;
- failing to clearly and conspicuously disclose material terms prior to obtaining a consumer's billing information in connection with a negative option feature;
- failing to obtain a consumer's express informed consent to the negative option feature before charging the consumer; and
- failing to provide a simple mechanism to cancel the negative option feature and immediately halt charges.

Based on public comment, the FTC opted not to include the following at this time:

- a requirement that sellers provide annual reminders to consumers of the negative option feature of their subscription; and
- an "upsell/save" prohibition, which would have prohibited sellers from telling cancelling subscribers about plan modifications or reasons to keep to their existing subscription without first obtaining

the consumers' unambiguous consent to hear them.

The FTC, however, intends to revisit these provisions through a subsequent Notice of Proposed Rulemaking.

The amended Negative Option Rule adds to an existing federal statutory framework directed at various aspects of negative option marketing, including the Restore Online Shoppers' Confidence Act ("ROSCA"), 15 U.S.C. § 8401-8405, the Telemarketing Sales Rule ("TSR"), 16 CFR part 310, the Postal Reorganization Act (*i.e.*, the Unordered Merchandise Statute), 39 U.S.C. § 3009, and the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693-1693r. The amended Negative Option Rule fills gaps in these statutes by establishing a specific set of marketing requirements and making them applicable across all four categories of negative option marketing.

The amended Rule will go into effect 180 days after publication in the Federal Register. Accordingly, businesses have time to review their disclosures and cancellation practices and revise them if necessary.