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Insight

Marketers Must Remain Vigilant Following ‘Click to Cancel’ Death

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The rule commonly referred to as “click to cancel” has been the subject of much debate. With the final form of the rule being vacated, companies must reevaluate their compliance obligations and may find that many of the requirements set forth in the now-vacated rule are still applicable on both the state and federal levels.

The US Court of Appeals for the Eighth Circuit vacated the Federal Trade Commission’s “click to cancel” rule in its entirety last month, forcing companies to reconsider their subscription and automatic renewal models.

According to the court, the FTC failed to comply with its procedural obligations during the rulemaking process when it was considering the Rule Concerning Recurring Subscriptions and Other Negative Options Programs, and that such deficiencies were “fatal.”

Rule's History

The FTC introduced its “Negative Option Rule” in 1973, when marketers were employing “book of the month” subscription models in which subscribers would receive advance notice of an upcoming publication. If they failed to affirmatively reject the offer, the marketer would send the publication to the subscriber, who would be responsible for paying for it.

In a purported effort to update the Negative Option Rule to better address contemporary subscription models, the FTC in 2019 issued an Advance Notice of Proposed Rulemaking seeking comment on the Negative Option Rule. In 2021, the FTC published its Enforcement Policy Statement Regarding Negative Option Marketing. Two years later, the FTC issued a notice of proposed rulemaking to amend the existing Negative Option Rule.

While the “click to cancel” aspect received the most publicity, the proposed rule was notable for several reasons—including a prohibition against misrepresenting any material fact made in marketing that happened to contain a negative option feature.

In other words, if a business included a negative option feature in its sales process, the FTC’s penalty powers (currently in excess of \$50,000 per violation) could apply to a material misrepresentation unrelated to the negative option feature itself. As it related to negative option features themselves, the proposed rule contained many of the elements found in existing state laws, such as those in effect in New York and California.

After holding an informal hearing, the FTC finalized the rule at the end of 2024. Notably, both Republican commissioners at the time, Melissa Holyoak and now-Chairman Andrew Ferguson, dissented. Against the backdrop of the Supreme Court ruling in *AMG Capital Mgmt. LLC v. FTC*, limiting the FTC’s ability to obtain civil penalties, Holyoak asserted the rule was “nothing more than a back-door effort at obtaining civil penalties in any industry where negative option is a method to secure payment.”

Most of the rule’s substantive requirements were set to go into effect May 14. However, less than a week before that date, the FTC released a statement announcing that the effective date had been pushed back to July 14. With the court’s decision in hand, the question remains how the FTC will treat such subscription programs moving forward.

Requirements and Enforcement

Regardless of the Eighth Circuit’s striking down the rule in its entirety, marketers that offer subscriptions and automatic renewals nationally must continue to keep up to date with the constantly changing landscape of state automatic renewal laws. State legislatures are continuing to introduce and pass legislation governing this type of marketing on a statewide level, including requirements related to consent, cancellation, and renewal notices.

Moreover, marketers are still subject to nationwide automatic renewal requirements. In particular, the Restore Online Shoppers' Confidence Act, which requires negative option marketers to provide "simple mechanisms for a consumer to stop recurring charges." The FTC's enforcement policy statement also remains in effect.

Despite the rule being vacated, the FTC has continued to prosecute cases against companies pertaining to their subscription practices, even under the Trump administration and Ferguson. The FTC is engaged in litigation against Amazon.com Inc. regarding its Prime program and associated automatic renewal enrollment and cancellation processes. Although this case was instigated under previous FTC Chair Lina Khan, current FTC commissioners haven't sought to discontinue the case under.

The FTC also initiated a case against Uber Technologies Inc. and Uber USA LLC, alleging that Uber charged customers for its Uber One subscription absent receipt of the appropriate consent and that Uber failed to deliver on its "cancel anytime" promises.

The class action bar continues to bring actions against marketers whose enrollment or cancellation practices fail to comply with applicable state laws. For example, Amazon's Audible Inc. program is the subject of a class action in Washington State federal court based on allegations of inadequate enrollment disclosures and difficulty in being able to cancel.

Separate from its enforcement actions, the FTC may decide to appeal the court's decision. If it decides against an appeal or it does pursue an unsuccessful appeal where the vacatur is upheld, the FTC may decide to reignite the rulemaking process to finalize a presumably lesser version of the rule.

Due to the existing compliance obligations and the FTC's clear continued interest in this type of marketing, companies engaged in subscription and automatic renewal programs shouldn't be so quick to rejoice at the news of the court's decision. Instead, companies should take the time to ensure compliance with the changing and complex web of existing obligations.

The case is Custom Communications Inc., et al v. Federal Trade Commission, 8th Cir., 24-03469, decided 7/8/25.

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