

CLIENT ALERT: FTC Proposes Changes to Automatic Renewal Rule, Including Online Cancellation Requirement

CLIENT ALERT | 03.2023

Andrew Lustigman and Morgan Spina

The Federal Trade Commission (“FTC”) has been interested in pursuing amendments to the Negative Option Rule for several years. In 2019, the FTC published an Advance Notice of Proposed Rulemaking (“ANPR”), soliciting public comment on certain issues related to negative options and automatic renewal contracts, including disclosures, consent, and cancellation. Following receipt of such comments, the FTC issued an Enforcement Policy Statement Regarding Negative Option Marketing in 2021. Now, in its latest and potentially most impactful effort, the FTC has issued a Notice of Proposed Rulemaking (“NPRM”), proposing several specific changes to the Negative Option Rule, as the existing rule was woefully out of date.

The proposed rule, retitled the “Rule Concerning Recurring Subscriptions and Other Negative Option Plans” (the “Proposed Rule”), purports to resolve the “patchwork of laws and regulations,” both on the federal and state levels. While the media has focused on the online cancellation option requirement, there are a number of other important proposed changes that marketers should be tracking.

Key provisions of the Proposed Rule are outlined below:

- **Coverage:** The Proposed Rule would apply to all forms of negative option marketing, including pre-notification and continuity plans, automatic renewals, and free trial offers, in addition to covering offers made in all mediums, including Internet, telephone, in-person, and printed materials.
- **Clear disclosure of important information:** The Proposed Rule would require sellers to provide the following information to consumers prior to obtaining their billing information: 1) that consumers’ payments will be recurring, if applicable, 2) the deadline by which consumers must act to stop charges, 3) the amount or ranges of costs consumers may incur, 4) the date the charge will be submitted for payment, and 5) information about the

PROFESSIONALS

Andrew B. Lustigman

Morgan E. Spina

PRACTICE AREAS

Brand Management & Protection

CLIENT ALERT: FTC Proposes Changes to Automatic Renewal Rule, Including Online Cancellation Requirement

mechanism consumers may use to cancel the recurring payments.

- **Express informed consent:** The Proposed Rule would require sellers to obtain the consumer's "unambiguously affirmative consent to the Negative Option Feature offer separately from any other portion of the transaction." The Proposed Rule specifies that such consent may be obtained through a check box, signature, or other similar method that relates only to the Negative Option feature and not the any other part of the transaction.
- **"Click-to-Cancel" online cancellation:** The Proposed Rule would require sellers to provide a simple method of cancellation. At a minimum, cancellation must be offered in the same medium by which consumers can sign up to a Negative Option Feature, and therefore where a consumer can sign up online, they must be able to cancel online.
- **The use of "saves":** The Proposed Rule also addresses the use of "saves" that are sometimes offered by sellers when a consumer attempts to cancel Negative Option Features. The Proposed Rule states that before making a "save" pitch, the seller must first ask if the consumer is open to receiving such offers. If the consumer does not give their unambiguous affirmative consent to receive a "save" offer, then the seller must proceed with the cancellation.
- **Annual reminders for subscriptions not involving physical goods:** The Proposed Rule states that sellers that are involved in the sale of Negative Option Features that do not involve physical goods must send reminders to consumers, at least annually, identifying the product or service that is the subject of the Negative Option Feature, the frequency and amount of changes, and the cancellation process.
- **Relationship to state laws:** Unfortunately, the Proposed Rule would not supersede, alter, or affect any state laws, except to the extent there is an inconsistency. Further, a state statute would not be inconsistent if it provided greater protection to the consumer than the Proposed Rule.

Comments are due 60 days after the NPRM is published in the Federal Register.

Note: The FTC's formal comment period has now begun with the publishing of the proposed amendments in the Federal Register – 88 FR 24716. Written comments must be received by the FTC on or before June 30, 2023.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys listed below if you would like to discuss further or have questions.

This publication is issued by Olshan Frome Wolosky LLP for informational purposes only and does not constitute legal advice or establish an attorney-client relationship. In some jurisdictions, this publication may be considered attorney advertising.

Copyright © 2023 Olshan Frome Wolosky LLP. All Rights Reserved.