

WHAT THE FTC'S PROPOSED EXPANSION OF ITS ENFORCEMENT POWERS OVER AUTORENEWAL SUBSCRIPTION PROGRAMS MEANS FOR YOUR BUSINESS

Apr 06, 2023

On March 23, the Federal Trade Commission [announced](#) proposed changes to its [Negative Option Rule](#). This latest announcement appears to be another move by the Commission in its recent flurry of activities to ramp up its enforcement powers in the wake of SCOTUS's opinion in the AMG Capital Management case, which [gutted](#) the Commission's decades-long use of Section 13(b) of the FTC Act to obtain monetary relief. If the changes reflected in the Commission's [Notice of Proposed Rulemaking](#) are adopted and implemented as a formal Rule – which could take a considerable period of time – the Commission will be able to file civil suits in federal district court to seek either civil penalties or restitution and consumer redress for violations.

While the term “negative option” is fairly broad and covers a variety of types of programs whereby a customer's silence is deemed assent and they are billed for something because they didn't take affirmative action to stop it, the existing Negative Option Rule only covers one specific type – the old “book of the month club” type of prenotification plan through which the seller sends a periodic notice telling the customer what the next offering will be and then actually sends the item and bills the customer if the customer doesn't decline. Under the proposed Rule, any type of program through which the seller will at some point begin charging the customer at prescribed intervals *unless and until the customer takes affirmative action to pause, cancel, or terminate the arrangement* would be covered.

The Commission has published a [Fact Sheet](#) summarizing its view on the current landscape and the rationale for the proposed changes, but a reading of the proposed changes indicates that, for the most part, this proposed update would modernize the Negative Option Rule to bring it in line with some of the stricter state autorenewal statutes currently in place (e.g., California, Colorado, et al.), including clarifying that the updated Rule would apply to autorenewing subscriptions in *all media* (as opposed to the current federal coverage under [ROSCA](#), the Restore Online Shoppers' Confidence Act, which covers online programs only), and building in some specific requirements around simple cancellation methods and the need for renewal reminders under some circumstances. If your subscription program already complies with ROSCA and with all of the

applicable state laws, the proposed updates to the Negative Option Rule generally shouldn't require significant changes to your program.

However, four important considerations stand out in the proposed updated Rule: (1) it would expand the FTC's enforcement powers and permit suits to be brought in connection with activities for which the Commission could not previously seek financial penalties; (2) the scope of what might violate the Rule is not limited to misrepresentations about the autorenewal features, but also extends to misrepresentations about the underlying product or service; (3) it specifically addresses sellers' efforts to "save" customers who attempt to cancel, permitting the seller to offer alternatives to cancellation only if the customer affirmatively consents to hearing about them; and (4) it would require annual reminder notices except in the case of subscription services for *physical goods*.

While these proposed changes may not seem earth-shattering in and of themselves, they should serve as a strong nudge for you to perform an in-depth review and assessment of all of the elements of your autorenewal programs – how you advertise and promote them; how your sign-up flow works; when and how you send confirmations, notices, and reminders; your cancellation policy, how it's operationalized, and how your customer service team manages cancellation requests; and your complete Terms of Service – so that you can course correct as needed to bring them into compliance and future-proof your programs to the fullest extent possible.

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