



The Federal Trade Commission's Notice of Proposed Rulemaking for the Negative Option Rule: What It Means for Marketers

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Overview of Proposed

- Applies to: (1) automatic renewals; (2) continuity plans; (3) a free-to-pay conversions or fee-to-pay conversions; and (4) pre-notification negative option plans.
 - Any provision under which consumers' silence or failure to take affirmative action is interpreted as acceptance or continuing acceptance of the offer.
- Heightens disclosure requirements including the “clear and conspicuous” standard.
- Imposes specific consent requirements (“unambiguously affirmative consent”).
- Mandates acceptable cancellation options.
- Limits the ability of a company to attempt to “save” the customer.

Notice of Proposed Rulemaking: An Overview

- The FTC could seek monetary penalties for violations of the rule (\$50,120 per violation), including allegedly false claims or material omissions.
- Creates an **independent violation for general misrepresentations or omissions** unrelated to the negative option offer itself.
 - *False or unsubstantiated claims for products sold on negative option basis?*
 - *Failure to disclose material information?*
- The FTC will likely use this to target business-to-business service providers, like payment processors.

Restore Online Shoppers' Confidence Act (ROSCA)

ROSCA already permits for civil penalties under a separate statutory framework, but the rule would expand ROSCA's requirements and scope beyond negative option terms like pricing.

ROSCA prohibits any person from charging any consumer for goods or services sold in an Internet-based transaction through a negative option feature unless the person:

1. Provides text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information;
2. Obtains a consumer's express informed consent before obtaining the consumer's credit card, debit card, bank account, or other financial account for products or services sold through such transaction; and,
3. Provides a simple mechanism for a consumer to stop recurring charges from being placed on the consumer's credit card, debit card, bank account, or other financial account.

Summary

Clear and Conspicuous Disclosures

Affirmative Consent

Simple Cancellation Mechanism

Renewal Reminders

“Clear and Conspicuous” Disclosures

Disclosures: What to Disclose

1. That consumers will be charged for the good or service, (that those charges will increase after any applicable trial period ends), and if applicable, that the charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such charges;
2. The deadline (by date or frequency) by which the consumer must act in order to stop all charges;
3. The amount (or range of costs) the consumer will be charged and, if applicable, the frequency of such charges a consumer will incur unless the consumer takes timely steps to prevent or stop those charges;
4. The date (or dates) each charge will be submitted for payment; and
5. The information necessary for the consumer to cancel.

Disclosures: How to Disclose “Clearly and Conspicuously”

- “Clear and Conspicuous” means that a required disclosure is easily noticeable (difficult to miss) and easily understandable by ordinary consumers, including in all the following ways:
 - 1. In any communication solely visual or solely audible, the disclosure must be made through the same means as the communication. In both visual and audible communications, such as a television ad, the disclosure must be presented simultaneously in both the visual and audible portions of the communication *even if the representation requiring the disclosure is made in only one means.***
 2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.
 3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.
 4. In any communication using an interactive electronic medium, such as the Internet, phone app, or software, the disclosure must be unavoidable.

Disclosures: How to Disclose “Clearly and Conspicuously” (Continued)

- Clear and Conspicuous means that a required disclosure is easily noticeable (i.e., difficult to miss) and easily understandable by ordinary consumers, including in all of the following ways:
 5. The disclosure must use diction and syntax understandable to ordinary consumers and appear in each language in which the representation that requires the disclosure appears.
 6. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.
 7. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.
 8. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes members of that group.
- FTC: this covers all the concepts provided in California and D.C. laws’ “clear and conspicuous” definition.
- **No hyperlinks: “A disclosure is not Clear and Conspicuous if a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it.”**

Disclosures: Where to Disclose

- **If directly related to the negative option feature, immediately adjacent to the means of recording the consumer’s consent for the negative option feature.**
 - *What flexibility remains for marketers?*
- **If not directly related to the negative option feature, the disclosures must appear before consumers decide to buy (e.g., before they “add to shopping cart”).**
- All communications, regardless of media, must not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to read, hear, see, or otherwise understand the disclosures.



Consent

Consent: How to Obtain It

- Requires “express informed consent,” meaning:
 - **The seller must obtain “unambiguously affirmative consent” to the negative option separately from any other portion of the transaction.**
 - **The seller must separately obtain “unambiguously affirmative consent” to the rest of the transaction.**
 - The consent language must not include any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent.
 - The consent request must be presented in a manner and format that is clear, unambiguous, non-deceptive, and **free of any information not directly related to the consumer’s acceptance of the negative option.**

What Consent Is Needed?

- **The negative option disclosures must appear immediately adjacent to the request for the consumer’s consent for the negative option feature.**
- The rule states that a seller “will be deemed in compliance” with the requirements if the seller obtains the required consent through a check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign to accept the negative option feature and no other portion of the transaction.
 - The rule does not explicitly require a checkbox.
- **What is sufficiently separate from the rest of the transaction?**
- **What is “the rest of the transaction?” (i.e., terms and conditions, other policies?)**

Cancellation

“One Click Cancellation”

“One Click Cancellation” & “Mirror Cancellation Rule”

- The cancellation must:
 - Be at least as easy as the enrollment mechanism;
 - Be provided through the same medium that the consumer used to enroll (same website or web-based application the consumers used to purchase the subscription).
- After receiving the cancellation request, the seller must “immediately cancel,” unless the seller obtains the consumer’s unambiguously affirmative consent to receive a save prior to cancellation. Such consent must apply only to the cancellation attempt in question and not to subsequent attempts.
 - *“Immediate”? User authentication, cancellation confirmation requests, questions about cancellation reasons?*

Cancellations and Saves

- What is a “save?”
 - The proposed rule defines “saves” as an attempt by a seller to present additional offers, modifications to the existing agreement, reasons to retain the existing offer, or similar information when a consumer attempts to cancel.
 - Before making sales pitches, the seller must first ask consumers whether they would like to consider such offers or modifications (e.g., “Would you like to consider a different price or plan that could save you money?”).
 - If consumers decline, the seller must stop presenting save offers and cancel the negative option arrangement immediately.
 - If they accept, the seller can pitch the alternative offers. The preamble also states that consumers could disengage during the “save” attempt (e.g., by hanging up, closing the browser, or disconnecting the chat) and avail themselves of the easy cancellation.
 - ***Hang-ups and disconnections are presumed to be cancellations.***



Renewal Reminders for Digital Goods and Services

Renewal Reminders for Digital Goods and Services

- For negative options that do not involve the automatic delivery of physical goods, sellers must provide consumers reminders, at least annually, identifying the product or service, the frequency and amount of charges, and the means to cancel.
- At a minimum, such reminders must be provided through the same medium (such as Internet, telephone, or mail) the consumer used to enroll.
- For in-person sales, the seller must provide the reminder through the Internet or by telephone in addition to, where practical, an in-person method similar to that the consumer used to consent to the negative option feature.

Next Steps

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- FTC will publish the Notice of Proposed Rulemaking in the Federal Register.
- Stakeholders will have 60 days to submit comments.
- The rule could be modified after comments or finalized in its current form.
- Potential for companies to challenge the rule in litigation after the final rule takes effect.

Next Steps: Risk Reduction

- Begin updating user experience, disclosures, consent, cancellation processes
- Conduct compliance audit: desktop, mobile “test shopping” of current offer presentation(s)
- Review and revise customer service policies
- Review refund policy
- Review and reduce complaints

Questions? Contact Us



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