

The Unsung Changes in the FTC's New Negative Option (“Click to Cancel”) Rule and California's Amended Autorenewal Law

Brought to You by Venable's Autorenewal Solutions Team (VAST)

Shahin O. Rothermel

Partner | +1 202.344.4550 | sorothermel@Venable.com

Ari N. Rothman

Partner | +1 310.229.9909 | anrothman@Venable.com

Ellen T. Berge

Partner | +1 202.344.4704 | etberge@Venable.com

[Venable.com/VAST](https://www.venable.com/VAST)

VENABLE LLP

Agenda

- FTC's Negative Option Final Rule
- Challenges to the Negative Option Rule: What's Next?
- Changes to California's Amended Autorenewal Law



FTC Negative Option Final Rule: An Overview

Negative Option Final Rule: An Overview

Expanded Scope to Autorenewals and Subscriptions

Updated Definition of “Clear and Conspicuous” Disclosures

Prohibition on misrepresenting any “material fact” when using a negative option feature and requirement to disclose all “material” terms, regardless of whether they directly relate to the “negative option feature”

Updated requirements surrounding “express informed consent”

Updated requirements for cancellation mechanism (“Click to Cancel”)

Violations punishable by injunctive relief or monetary relief (refunds, disgorgement, rescission of contracts, statutory penalties of \$51,744 per violation)

Expanded Scope

- A “Negative Option Feature” is a provision of a contract under which the consumer’s silence or failure to take affirmative action to reject a good or service or to cancel the agreement is interpreted by the negative option seller as acceptance or continuing acceptance of the offer, including, but not limited to:
 - (1) an automatic renewal;
 - (2) a continuity plan;
 - (3) a free-to-pay conversion or fee-to-pay conversion; or
 - (4) a pre-notification negative option plan.



Expanded Scope

- Applies to upsells and bundled service offers
- **Does not** apply to installment contracts

Updated Definition of “Clear and Conspicuous” Disclosures

Easily noticeable (i.e., difficult to miss) and easily understandable by ordinary consumers, including in all of the following ways:

1. In any communication that is solely visual or solely audible, the disclosure must be made ***through the same means*** through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, 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 such that ordinary consumers can easily hear and understand it.

Updated Definition of “Clear and Conspicuous” Disclosures

4. In any communication using an interactive electronic medium, such as the Internet, mobile application, or software, the disclosure must be unavoidable.
5. The disclosure must use **diction and syntax that are understandable to ordinary consumers** and must 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, older adults, or the terminally ill, “ordinary consumers” includes members of that group.

Hyperlinks?



The Final Rule ***deleted*** the sentence: “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.”

According to the FTC: This prohibition would have made effective space-constrained disclosures of the terms required by the Final Rule difficult if not impossible. However, a clear and conspicuous disclosure still must be “unavoidable.” By this requirement, consumers are protected from buried or inconspicuous disclosures. Sellers, on the other hand, can make disclosures “unavoidable” even if the consumer must take some action to see it.

Prohibition on Misrepresenting Any “Material Fact” and Requirement to Disclose All “Material” Terms

Disclose all “Material” terms immediately adjacent to the consent mechanism:

1. That the customer will be charged for the subscription service, or 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 customer takes timely steps to prevent or stop such charges.
2. Each deadline (by date or frequency) by which the customer must act to prevent or stop the charges.
3. The amount (or range of costs) the customer will be charged and, if applicable, the frequency of the charges the customer will incur unless the customer takes timely steps to prevent or stop the charges.
4. The information necessary for the customer to find the simple cancellation mechanism (required pursuant to the Rule, as discussed below).
5. ***All other “material” terms, regardless of whether those terms directly relate to the negative option feature.***

Obtain “Express Informed Consent”

How to obtain “express informed consent”:

1. Obtain the consumer’s unambiguously affirmative consent to the negative option feature offer **separately from any other portion of the transaction**;
2. Exclude any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent to the negative option feature; and
3. Keep or maintain verification of the consumer’s consent for at least three years.



Obtain “Express Informed Consent”

- *Is a checkbox required?*
- The Final Rule **revised** the requirements for disclosures needed next to the consent mechanism
 - Information “directly related to the negative option feature ... must appear immediately adjacent to the means of recording the consumer’s consent for the negative option feature.”
 - Information not directly related to the negative option feature must appear before obtaining consumers’ consent to the negative option.




Annual Reminders

The Final Rule *deleted* the requirement for annual renewal reminders.

Updated Cancellation Requirements

- Must be provided through the same medium used to consent to the negative option feature.
- Must be at least as easy to use as the mechanism the consumer used to consent.

Updated Cancellation Requirements

- For cancellation through an “Interactive Electronic Medium,” the simple cancellation mechanism must be easy to find when the consumer seeks to cancel. In no event shall the customer be required to interact with a live or virtual representative (such as a chatbot) to cancel if the customer did not do so to consent to the Negative Option Feature.
-  “Interactive Electronic Medium”: Any electronic means of communicating (except via telephone calls), including Internet, mobile application, text, chat, instant message, email, software, or any online service.
- Mirror cancellation—including mobile app vs. browser enrollment!
- For cancellation by phone, the seller must promptly effectuate cancellations requested by the customer via a telephone number that is answered or records messages, made available during normal business hours, and not more costly to use than the telephone call the customer used to consent to the Negative Option Feature.



Save Attempts under the Final Rule

- The proposed rule would have prohibited sellers from presenting save attempts without first obtaining consumers' unambiguously affirmative consent.
 - ***The FTC declined to adopt this provision but stated that it plans to seek further comment through a supplemental NPRM.***
- The Final Rule removed the “one-click cancellation” requirement.
- ***NOTE*** New York opinion in *NY v. SiriusXM*: Court held that Sirius violated ROSCA's requirement to provide a “simple method of cancellation”
 - Sirius required customers to contact a live agent to cancel despite allowing customers to enroll online. As a result, callers faced lengthy wait times.
 - Customers were subjected to multiple retention attempts before the cancellation request was honored.
 - Court cited the FTC's 2021 Negative Option Policy Statement.

Challenges to the Negative Option Rule: What's Next?

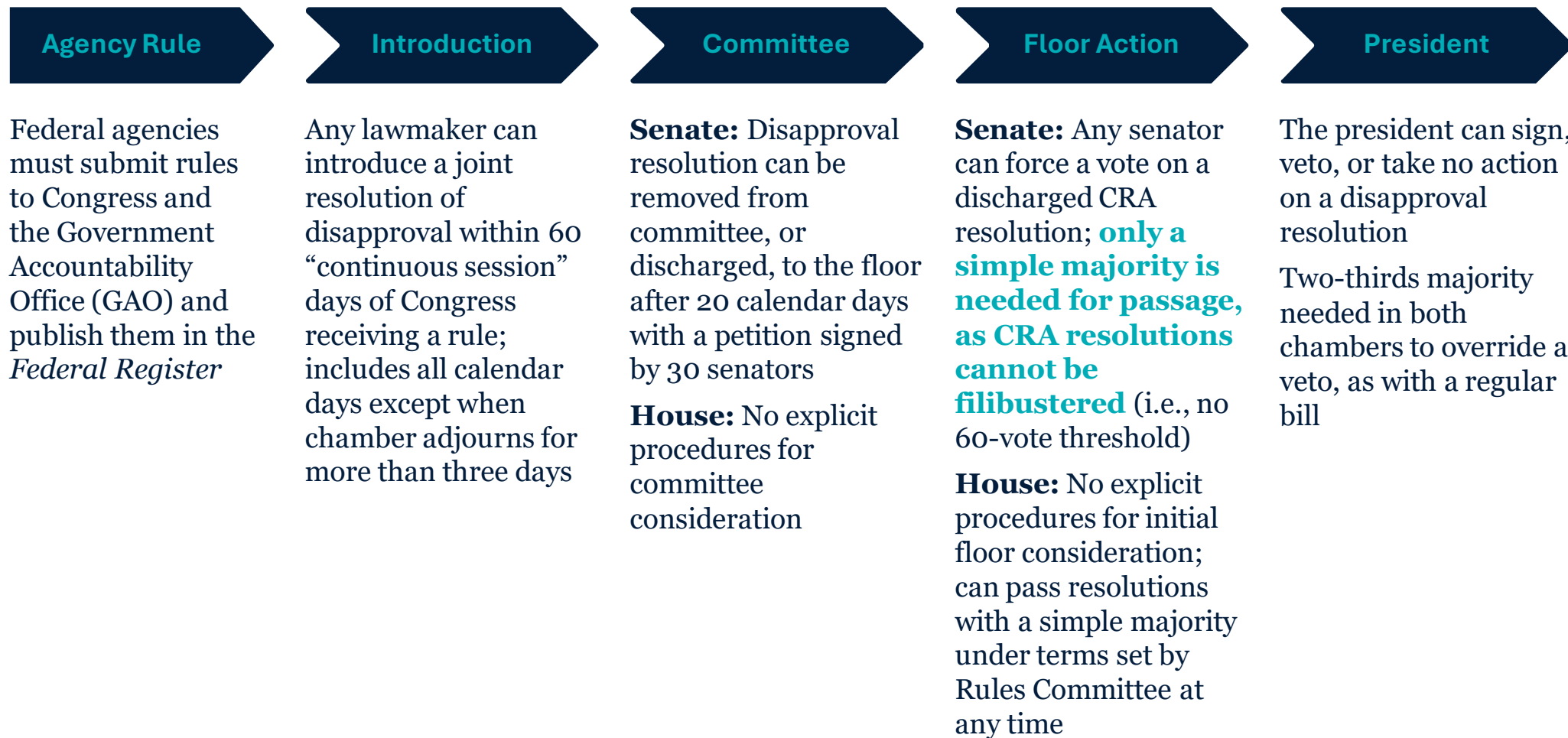
Pending Challenges to FTC Negative Option Rule

- *Michigan Press Association v. FTC* and *Custom Communications, Inc. v. Federal Trade Commission* pending in Eighth Circuit. Petitioners allege:
 - The Rule is arbitrary, capricious, and an abuse of discretion;
 - The Rule was an abuse of discretion under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*;
 - The Rule is unsupported by substantial evidence, 15 U.S.C. § 57a(e)(3)(A);
 - The Rule is based on determinations that “precluded disclosure of disputed material facts which w[ere] necessary for fair determination . . . of the rulemaking proceeding taken as a whole.”
 - The Rule is in excess of the FTC’s statutory authority, in violation of the U.S. Constitution, and otherwise contrary to law.
- If successful, the Rule could be stayed or set aside, rendering it unenforceable.

Congressional Review Act

- ***The Congressional Review Act is a way for Congress to repeal or block agency actions.***
- Agency actions subject to the CRA are usually final rules that have gone through the formal rulemaking process, but the CRA is broad in its scope, covering anything “of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy” (5 U.S.C. §551).
- The CRA is a blunt instrument, applying to final rules in their entirety. The CRA cannot be used to block parts of rules.
- Agencies cannot issue a new rule in “substantially the same form” if a CRA resolution is successful. What constitutes “substantially the same” is not defined.
- Rules disapproved of under the CRA cease to have effect immediately, or never go into effect if the CRA resolution becomes law before the rule’s start date.

The Basic CRA Process



The CRA Lookback Window

CRA timing is calculated differently at the end of a Congress and at the start of a new one.

The new Congress can use the CRA to overturn rules issued during the previous Congress if those rules were issued in a certain “lookback window,” which restarts the CRA clock.



Any rule finalized in the last 60 days of a congressional session can be subject to a new 60-day window in the next Congress. ***The House calculates using legislative days, the Senate uses session days.*** A rule can therefore be subject to different lookback windows in the two chambers simultaneously.

- “Legislative days” refers to a daily session between gaveling in and adjourning. If there is no adjournment at the end of the calendar day, the legislative day continues into the next calendar day until there is an adjournment.
- At the other extreme, there could be multiple adjournments in the same calendar day, leading to multiple legislative days passing.

Regulations finalized during the lookback period are treated as having been submitted on the 15th legislative day of the new session and restart the regular 60-day CRA review period.

Changes to California's Amended Autorenewal Law

Clarified Scope

- The amended law clarifies that “Automatic renewal” means a plan or arrangement plan, arrangement, or provision of a contract **that contains a free-to-pay conversion** or in which a paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term.
- “Free-to-pay conversion” means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if they do not take affirmative action to cancel before the end of that period.
- (No real change based on current case law)



Updated Consent Requirements

- Companies must obtain “the consumer’s **express** affirmative consent” to the automatic renewal or continuous service offer terms.
 - Amended law added “***express***”
 - A prior version of the bill stated that companies must obtain “the consumer’s affirmative consent to the automatic renewal or continuous service separately from any other portion of the contract.”
 - ***Is a checkbox required?***

Updated Consent Requirements

- The amended law prohibits companies from including any information in the contract that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their affirmative consent to the automatic renewal or continuous service.
- Requires companies to maintain verification of the consumer's affirmative consent for at least three years, or one year after the contract is terminated, whichever period is longer.

Updated Cancellation Requirements

Mirror Cancellation

- The ability to cancel or terminate shall be available to the consumer in the same medium that the consumer used in the transaction that resulted in the activation of the automatic renewal or continuous service, or the same medium in which the consumer is accustomed to interacting with the business, including, but not limited to, in person, by telephone, by mail, or by email.
 - A business that allows a consumer to accept an automatic renewal or continuous service offer online shall allow a consumer to terminate the automatic renewal or continuous service exclusively online, at will, and without engaging any further steps that obstruct or delay the consumer's ability to terminate the automatic renewal or continuous service immediately. The business **shall** provide a method of termination that is online, in the form of either of the following:
 - A prominently located direct link or button, which may be located within either a customer account or profile, or within either device or user settings.
 - By an immediately accessible termination email formatted and provided by the business that a consumer can send to the business without additional information.

Updated Cancellation Requirements: Saves and Retention Efforts

- Providing a discount offer or other consumer benefit or informing a consumer of the effect of the cancellation shall not be considered an obstruction or delay, provided that the consumer remains able to cancel or terminate the automatic renewal or continuous service, as follows:
 - (1) If a consumer conveys a request to cancel by telephone, the business may present the consumer with a discounted offer, retention benefit, or information regarding the effect of cancellation, provided that the business first clearly and conspicuously informs the consumer that they may complete the cancellation process at any time by stating that they want to “cancel” or words to that effect. If the consumer states their intention to “cancel” or words to that effect, the business shall promptly process the cancellation and shall not otherwise obstruct or delay the consumer’s ability to cancel.
 - (2) If a consumer conveys a request to cancel by an online system, the business may display a discounted offer, retention benefit, or information regarding the effects of cancellation, provided that the business simultaneously displays a prominently located and continuously and proximately displayed direct link or button titled “click to cancel,” or words to that effect, with the presentation of the discounted offer, other consumer benefit, or information. If the consumer uses this direct link or button, the business shall promptly process the cancellation and shall not otherwise obstruct or delay the consumer’s ability to proceed to cancellation.

Cancellation by Telephone

- If the activation was by telephone, the business must provide a telephone number that is capable of being retained by the consumer for the consumer to cancel.
 - The telephone number shall be clearly and conspicuously displayed on the company's website, if applicable.
- If a business provides a mechanism for cancellation by toll-free telephone number, it shall answer calls promptly during normal business hours and shall not obstruct or delay the consumer's ability to cancel the automatic renewal or continuous service.
- If a consumer leaves a voicemail with a business requesting cancellation, the business shall, within one business day, either process the requested cancellation or call the consumer back regarding the cancellation request.



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