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FTC Proposes Amendments to Negative Option Rule on Auto-Renewal Programs

Automatic renewal programs continue to be a hot topic for businesses, consumers, and regulators. See [February 2023 GT Advisory](#). Consistent with this trend, the Federal Trade Commission (FTC) on March 23 announced a [notice of proposed rulemaking](#) that would codify a number of requirements at the federal level, as well as broaden application of the FTC's existing 1973 Negative Option Rule to cover virtually every type of subscription program.

Key points in the proposal include the following:

- **Disclose material terms before obtaining the consumer's billing information:** The following terms are considered material: (1) that charges will be recurring, (2) the deadline by which consumers must act to stop the charges, (3) costs the consumer may incur, (4) the date the charge will be submitted for payment, and (5) how to cancel the recurring payments.
- **Obtain separate affirmative consent to (1) the auto-renewal feature and (2) the entire transaction:** For example, a seller may obtain express informed consent through a check box or signature that the consumer must affirmatively select or sign to accept the auto-renewal feature.
- **Make cancellation at least as easy as signing up:** This means, at a minimum, providing a simple cancellation mechanism via the same medium by which the consumer enrolls (such as online, telephone, postal mail, in person, etc.), at no cost to the consumer, and with no more steps than the

process to enroll. In the case of online enrollment, the cancellation mechanism must be available via the same website in the same number of steps as the enrollment, a process referred to in the draft rule as “Click to Cancel,” which suggests an expectation that a single click is the ideal mechanism, but subject to the general principle that the cancellation must be at least as easy (and available via the same medium) as the method to enroll.

- **Obtain consent before making additional offers in connection with cancellation:** Sellers can include additional offers or modifications when a consumer tries to cancel only if the consumer affirmatively expresses that they want to hear such offers. Absent such consent, the seller must cancel the auto-renewal program immediately.
- **Provide annual reminders before the automatic renewal of subscriptions not involving physical goods:** These reminders should identify the product or service, the frequency and amount of each charge, and how to cancel.

The proposal is consistent with several state laws and existing FTC guidance regarding automatic renewals,¹ which generally call for clear disclosure of all material terms prior to enrollment, separate and affirmative acceptance of the auto-renewal feature, confirmation of terms, notice before each renewal period, and easy cancellation methods.

The proposed codification of these principles into a formal rule would enable the FTC to seek civil penalties and/or consumer redress under Section 19 of the Federal Trade Commission Act (FTC Act) for violations of the rule. The proposed codification is part of a broader pattern of similar steps by the FTC in other areas (e.g., the “Made in USA” regulations issued in 2021²) since the Supreme Court restricted the agency’s ability to seek restitutionary damages under Section 13(b) of the FTC Act.³

Interested parties can submit public comments on the proposed rulemaking within 60 days of publication in the *Federal Register*, expected sometime in April or early May.

Given the FTC’s focus in this area, marketers should consider the following practices for auto-renewal and other subscription-based programs:

- Auto-renewal terms should be clear and conspicuous at the time and place where the consumer enrolls.
- Consent to the auto-renewal terms should be separate from any other terms or portion of the transaction.
- The mechanism used to seek consent (check box, signature, express consent button, etc.) must appear immediately adjacent to the auto-renewal terms.
- Do **not** use a pre-checked box for acceptance.
- Do **not** rely on terms in a linked set of general Terms of Service/Use to set forth the auto-renewal terms.

¹ See, e.g., Cal. Bus. & Prof. Code § 17602; D.C. Code § 28A-203; N.Y. Gen. Bus. Law § 527-a; FTC, *Bringing Dark Patterns to Light*, pp. 11-15 (September 2022).

² Made in USA Labeling Rule, 86 Fed. Reg. 37,032 (July 14, 2021) (to be codified at 16 C.F.R. pt. 323).

³ See *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021). See also, e.g., FTC Press Release, *FTC Issues Rule to Deter Rampant Made in USA Fraud* (July 1, 2021).

- Make cancellation as easy as enrollment, including an easy-to-use “click to cancel” option in any online context.
- Avoid any “upsells” or other efforts during a cancellation request that might be viewed as an effort to thwart the consumer’s decision to cancel.
- Follow state and federal rules to provide advance notice of when a person’s free trial period will roll into a paid subscription, as well as when a paid period is scheduled for renewal, in all cases accompanied by an easy-to-use cancellation option. Note that time periods for notices may vary in some states.

Those seeking assistance developing or reviewing the terms of an auto-renewal program should consult with experienced legal counsel.

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