

FTC Announces Final “Click to Cancel” Rule for Subscriptions, Memberships

The Federal Trade Commission (“FTC”) has just announced the final version of its “Click to Cancel” Rule for consumer subscriptions. The Rule will go into effect 180 days after it is published with the Federal Register. This Rule will directly apply to all SaaS, digital health, tech, and non-tech companies selling on a subscription basis to consumers.

Full Text of FTC Rule

The full text of the FTC Rule is linked here, at pages 222-230.

Fact Sheet of FTC Rule

The FTC has also made available a fact sheet which briefly summarizes key provisions of the “Click to Cancel Rule,” which is attached here.

Key Provisions of the FTC Rule

According to the FTC announcement, the “Click to Cancel” Rule will apply to “almost all negative option programs in any media.” The key provisions of the FTC Rule will prohibit:

- misrepresenting any material fact made while marketing goods or services with a negative option feature;
- failing to “clearly and conspicuously disclose” material terms prior to obtaining a consumer’s billing information in connection with a negative option feature;
- failing to obtain a consumer’s express informed consent to the negative option feature before charging the consumer; and

- failing to provide a simple mechanism to cancel the negative option feature and immediately stop the charges.

Revisions to Final Version of the FTC Rule

Also according to the FTC announcement, the FTC dropped from its final Rule an annual reminder requirement that would have required vendors to provide annual reminders to consumers advising them of the negative option feature of their subscription, as well as a requirement that vendors had to ask canceling consumers for approval before a vendor could tell a canceling subscriber about reasons to keep the existing agreement or of possible modifications that could be made without canceling the subscription.

Reasons for Adoption of the Rule

Why did the FTC adopt a Click to Cancel Rule? According to the FTC Announcement, the FTC was receiving 70 consumer complaints per day over negative option programs, and this number was “steadily increasing over the past five years.”

The FTC’s announcement follows a recent California enactment of a more comprehensive “Click to Cancel” law.

Does the FTC Rule Supersede California Law?

The FTC Rule should not supersede California’s more comprehensive law; in fact, the Rule specifically states in its text that the Rule will not be construed to supersede any State statute, regulation or order “except to the extent that it is inconsistent with the provisions of this part, and then only to the extent of the inconsistency.” The expected impact of the FTC Rule is primarily to bring federal regulatory law closer to California regulatory law as it pertains to subscriptions and memberships.

What do SaaS, Digital Health, Tech, and other Companies Utilizing the Subscription Model Need to do in Response to this Announcement?

All companies utilizing a subscription model should revise consumer contracts and processes to comply with the FTC Rule over the next 180 days. Companies utilizing the subscription model with a business-focused customer base should similarly consider what changes to make to their contracts and processes as public policy will likely change regarding subscriptions generally along with the new FTC Rule and California law changes.

If you have questions or concerns about how new FTC “Click to Cancel” Rule or the new California “Click to Cancel Law” will impact your digital health company, please schedule a consultation at <https://calendly.com/prinzlawoffice>.

Kristie Prinz to Speak at Upcoming Practicing Law Institute Program

Silicon Valley Tech Business Lawyer Kristie Prinz of The Prinz Law Office will be speaking at an upcoming one-day Practicing Law Institute Program to be held on October 9, 2024 at the PLI headquarters in San Francisco, California.

Kristie will be speaking on “Drafting Privacy Policies for Devices with No User Interface – What Do You Do?”, along with Peter McLaughlin of Rimon, P.C. The presentation will examine the challenges of managing legal and privacy terms with IOT devices.

The one-day program is titled “Advanced Internet of Things 2024: Deeper Dive, Practical Wisdom” and will also feature presentations by Leonard Naura of Flatiron Law Group, LLP, Ian Ballon of Greenberg Traurig, LLP, Kate Downing of the Law Office of Kate Downing, Megan Ma of Stanford University, and John Yates of Morris, Manning & Martin, LLP. For more information and to register to attend this event, visit the Practicing Law Institute website at this link.

California Adopts “Click to Cancel” Law to Regulate Consumer Subscriptions

California has just adopted the new “click to cancel” law that will regulate consumer subscriptions, along with memberships and other autorenouncing or continuous service arrangements with consumers.

AB 2863 amends California’s existing autorenouncement law to add additional protections for consumers with respect to autorenouncing or continuous billing charges.

SaaS, digital health, tech and other consumer-focused companies need to be aware of this new law and its potential to impact contracts and customer relationships, particularly in light of the currently slow tech and life sciences market.

Text of AB 2863

To view the full text of AB 2863, please **click here**. The law goes into effect in 2025, and applies to all contracts entered into, amended, or extended after its effective date.

New Requirements for Consumer Subscriptions

Under the new California law, it will now be unlawful for any company in the state that makes an autorenewal or continuous service offer to a consumer in the state to do any of the following:

- Fail to present the terms of the offer in a clear and conspicuous manner in visual proximity to the request for consent of the offer, which includes if there is a free gift or trial, a clear and conspicuous explanation of the price that will be charged when the trial ends;
- Charge the consumer's credit or debt card or any third party account for the automatic renewal or continuous service without first obtaining affirmative consent from the consumer to the automatic renewal or continuous service agreement;
- Fail to provide an acknowledgement that includes the automatic renewal offer terms or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that the consumer can retain, and if the offer contained a free gift or trial, the acknowledgement must include a disclosure of how to cancel and must permit the consumer to cancel before the consumer pays for the goods or services;
- Fail to obtain express affirmative consent from a consumer to the automatic renewal or continuous service offer terms;
- Include terms in a contract that interfere with, detract from, contradict, or otherwise undermine the ability of consumers to provide their affirmative consent to automatic renewal or continuous service terms;
- Fail to maintain verification of consumer's affirmative consent for at least three years, or one year after the contract is terminated, whichever is longer;
- Misrepresent expressly or by implication a material fact related to the transaction;

- Fail to provide consumer with a notice, before confirming the consumer's billing information that clearly and conspicuously states:
 - The service will automatically renew unless the consumer cancels;
 - The length and any additional terms of the renewal period;
 - The amount or range of costs consumer will be charged and the frequency of those charges, unless consumer stops the charges;
 - One or more methods which consumer can cancel the autorenewal or service;
 - If sent electronically, the notice must include a link that directs consumer to the cancellation process, or another electronic method that directs the consumer to cancellation; and
 - Contact information for the business.

New Requirements for Gifts and Trials

In addition, companies offering free gifts or trials at promotional or discount prices that last for more than 31 days in conjunction with an automatic renewal or continuous service offer will now be mandated to provide the same kind of clear and conspicuous notice no less than 3 days before and no more than 21 days before the expiration of the gift or trial. The only exception to this requirement is in cases of contracts that are not electronic, where the business has not collected or maintained the consumer's valid email address, phone number, or other means of notifying the consumer electronically. "Free gifts" for the purpose of this law does not apply to a gift that is different than the subscribed product or service.

New Requirements for Contracts or Offers with Initial Term of One Year or Longer

If the contract or service offer was for an initial term of

one year or longer, companies will now be required to provide the specified notice at no less than 15 days and no more than 45 days before the offer renews.

Online “Click to Cancel” Requirement

Companies that sign-up or subscribe consumers online will be required to provide one of two methods to allow consumers to cancel at will by either (a) a prominent link or button within the customer account or profile or within device or user settings, or (b) an immediately accessible termination email formatted and provided by the business that a consumer can email to the business without any additional requirement.

Direct Billing Requirement

Companies that direct bill consumers on an automatic renewal or continuous offer basis will be required to provide a toll-free telephone number, email address, and postal address or “another cost-effective, timely, and easy-to-use mechanism for cancellation” that is described in the acknowledgement. If a telephone number is provided as the mechanism for termination, the business is required to answer calls promptly during normal business hours without obstructing or delaying the ability to cancel. If a voice mail is left by the consumer requesting cancellation, the company shall be required to either process the requested cancellation in one business day or call the customer back regarding the request within one business day.

Customer Retention Offer Requirement

Companies will still be permitted to make customer retention offers, provided that they must first clearly and conspicuously inform the consumer that they may complete the cancellation process at any time by stating they want to “cancel” or similar words to that effect. Once the consumer states their intention to “cancel” or uses similar words, the company must promptly process the cancellation without obstruction or delay. Companies making online customer

retention offers will be required to display a simultaneous, prominently and proximately located and continuously displayed direct link or button labeled “click to cancel” alongside the offer. Once the consumer clicks on the button, the business is required to promptly process the cancellation.

Requirement for Material Term Changes

Companies who materially change terms that have already been accepted by a consumer in the state will be required to provide to the consumer a clear and conspicuous notice of the material change and to provide information on how to cancel. If the change involves a fee that was already accepted, the companies will be required to provide at least 7 days (and no more than 30 days) prior clear and conspicuous notice of the fee change and information on how to cancel.

Requirement for Annual Reminder

Companies will be required to send an annual remind to consumers who have entered into annual automatic renewal agreements or continuous service agreements in the same medium that the agreement was activated or in the same medium by which the consumer is interacting with the business. If the medium was in-person or voice-based then the company may submit the reminder via telephone, mail, or another internet-based communication. The notice is required to disclose the product or service to which the agreement applies; the frequency and amount of charges; and the means to cancel.

Implications of Requirements

While these new rules apply only to automatic renewal agreements and continuous service agreements with consumers, they may be applied to companies in cases where they are run by sole proprietors. Also, they may be applied in other contexts to companies on public policy grounds, where the terms of service or contract terms in effect are not at least as good as what is required now by law in the case of consumers.

What does this mean for SaaS, Digital Health, Tech and other Companies Operating on a Subscription Basis?

Companies need to start reviewing and updating their contracts and terms of service, as well as their practices and procedures. Given there are so many changes, most companies who serve a consumer client base will need to rethink their terms and practices and procedures, and companies who serve a business client base will also want to consider whether or not their current agreements and practices and procedures are aligned with the new law.

If you have questions or concerns about how this new law will impact your company, please schedule a consultation today at <https://calendly.com/prinzlawoffice>.