

FTC Seeks to Expand Scope of “Negative Option Rule” to Apply to Subscriptions

The FTC has just filed a complaint against a Silicon Valley software company over its “Annual Paid Monthly” subscription contract. The FTC has separately also sought the expansion of its “Negative Option Rule” to amend the provisions to specifically apply to subscriptions by adding a “Click to Cancel” provision. A copy of the FTC notice of proposal is linked [here](#).

What is the FTC’s Negative Option Rule?

The Negative Option Rule was adopted by the FTC in 1973, to address “negative option offers,” which the FTC defines as offers containing “a term or condition that allows a seller to interpret a customer’s silence, or failure to take an affirmative action, as acceptance of an offer.”

According to the FTC, negative option marketing utilizes four types of offers: prenotification plans, continuity plans, automatic renewals, and free trial conversion offers.

However, the FTC’s original Negative Option Rule only pertained to prenotification plans, excluding the continuity plans, automatic renewals and free trial offers that have become commonplace in 2024. Also, in the case of the original Negative Option Rule, prenotification plans were limited to the sale of goods, where sellers provided periodic notices to participating customers and then sent and charged for those goods only if the consumers took no action to cancel and decline the offer (i.e. the example of a wine club).

Also, the Negative Option Rule required clear and conspicuous disclosure of certain terms before a subscription agreement

was reached. According to the FTC, those terms were as follows:

- how subscribers must notify the seller if they do not wish to purchase the selection;
- any minimum purchase obligations;
- the subscribers' right to cancel;
- whether billing charges include postage and handling;
- that subscribers have at least ten days to reject a selection;
- that if any subscriber is not given ten days to reject a selection, the seller will credit the return of the selection and postage to return the selection, along with shipping and handling; and
- the frequency with which announcements and forms will be sent.'

Finally, under the existing Negative Option Rule, sellers were required to define particular periods for sending merchandise, to give consumers a defined period to respond, to provide instructions for rejecting merchandise, and to promptly honor written cancellation requests.

What is "Click to Cancel"?

What would change with the FTC's newly proposed "Click to Cancel" amendment?

Under the FTC's proposed "Click to Cancel" rule change, the scope of the Negative Option Rule would be increased to make it pertain to not only prenotification plans but also to continuity plans, automatic renewals, and free trial conversion offers. Also, the proposed "Click to Cancel" rule provisions would mandate the following:

- Businesses would be required to make cancelling a subscription or membership at least as easy as it was to start it;
- Businesses would have to ask consumers if they want to

hear new offers when they ask to cancel before they would be able to pitch new offers;

- Businesses would be required to provide an annual reminder if enrolled in a negative option program involving anything other than physical goods, before they are automatically renewed.

Another “Click to Cancel” change is that the under the new provisions any misrepresentation of a material fact related to any of the four negative option offers, whether expressly or by implication, would constitute a violation of not only the Negative Option Rule but also an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act.

What is the Potential significance of “Click to Cancel” to the SaaS, Tech, and Digital Health Industries?

The potential significance of the “Click to Cancel” change to the average SaaS, tech, and digital health company is that, if this proposed rule is adopted, SaaS, tech, and digital health companies who sell directly to consumers will need to update consumer contracts and terms of service to confirm that they are compliant with the requirements of the Negative Option Rule, as amended.

If your company is concerned about its compliance with “Click to Cancel” please schedule a consultation today at <https://calendly.com/prinzlawoffice>.

Recent Class Actions Provide Valuable Lesson on Why SaaS Contracts Should Be Drafted to Fit A Company's Business Model

If your company is like most, you may be using a software agreement that has nothing to do with your company's business practices or business model. Why is this a bad idea? Well, several recent class action suits provide a recent example of why this can be very problematic for a software company. The Silicon Valley Software Law Blog addresses this issue in the following blogpost:

<http://www.siliconvalleysoftwarelaw.com/recent-software-class-actions-provide-valuable-lesson-on-why-saas-contracts-should-be-drafted-to-fit-companys-business-model/>