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FTC’s Latest Proposed Rulemaking Would Impose Significant New Requirements and Risks on Sellers Using Negative Option Offers

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On March 23, 2023, the Federal Trade Commission (“FTC”) issued a Notice of Proposed Rulemaking (“NPRM”) to significantly expand legal requirements for sellers that use negative option offers.[1] Negative option offers allow a seller to interpret a consumer’s silence or inaction as acceptance of an offer and include prenotification and continuity plans, automatic renewal plans, and free trial offers that convert into automatic renewal plans unless canceled before the end of the trial period. The NPRM was published in the Federal Register on April 24, 2023, and the comment deadline is June 23, 2023.

The FTC’s stated objective is to create enforceable performance-based requirements for all negative option offers across all media pertaining to: misrepresentations, disclosures, consents, and cancellation methods.[2] But the proposed Rule would extend beyond the offer’s negative option features to “any material fact related to the [offer’s] underlying good or service.”[3] Consequently, negative option sellers could face substantial civil penalties for violations of the proposed Rule for any allegedly deceptive facet of the broader consumer transaction.

The proposed Rule could be finalized by the end of the year. Companies should consider how this Rule might impact their business and consider submitting a comment to the NPRM addressing: (i) the prevalence of the alleged deceptive and unfair conduct relating to negative option features; (ii) empirical evidence concerning compliance costs, and the degree to which they would outweigh anticipated benefits; (iii) negative consequences to consumers that might arise from the Rule; and (iv) potential exemptions to the rules, including for industries subject to billing and notice requirements under separate federal or state legal regimes, such as the telecommunications or energy industries.

The Proposed Rule Would Significantly Broaden Requirements and Risks For Sellers Using Negative Option Features.

The proposed Rule would replace regulations that apply only to prenotification negative option plans for physical goods with more expansive requirements that would be applicable to all media containing any type of negative option feature. The proposed Rule would also incorporate negative option rules contained in other laws and regulations, such as the Restore Online Shoppers’ Confidence Act (“ROSCA”) and the Telemarketing Sales Rule (“TSR”) to “establish a comprehensive scheme for regulation of negative option marketing in a single rule… — [a] one-stop regulatory shop[.]”[4] The FTC asserts that the existing ROSCA and TSR rules are insufficient to protect consumers and serve as a deterrence because misrepresentations concerning negative options continue to be prevalent in the marketplace.[5]

The proposed requirements include the following:

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- **Disclosures of Material Terms**: Sellers must disclose clearly and conspicuously all material terms related to both the negative option feature *and* the underlying good or service prior to collecting billing information from the consumer. Material terms include: (i) the nature and amount of charges to be imposed, including any future increases or recurring payments; (ii) deadline(s) for a consumer to affirmatively object to charges; (iii) the date(s) charges will be submitted for payment; and (iv) information on how to cancel a negative option feature.[6]
- **Broad Prohibition on Misrepresentations**: Sellers must not misrepresent, expressly or by implication, any material fact related to the transaction, including the negative option feature, or those related to the underlying good or service.[7]
- **Easy Cancellation Methods**: Sellers must provide consumers with a cancellation method that is at least as easy as the method used to initiate the negative option feature. For instance, if consumers enter into a negative option feature on a seller's website, they should be able to cancel the negative option feature through the same or an easier process on the seller's website. If a consumer consented to the feature in-person, the seller must offer a simple cancellation option by phone and/or on its website in addition to, where practical, a similar in-person cancellation method. Sellers cannot require consumers who signed up via their website to call a phone number in order to cancel their negative option agreement.[8]
- **Consent to Negative Option Feature**: Sellers must obtain consumers' express, informed consent to a negative option feature separately from any other part of a transaction and prior to charging them. Sellers cannot obtain simultaneous consent to charges for an instant purchase and to accept a negative option feature. Sellers must retain records of these consents for three years, or one year after the negative option ends, whichever is longer.[9]
- **Requirement for Immediate Cancellation Upon Consumer Request**: Sellers must immediately cancel the negative option feature upon request from a consumer, unless the seller obtains the consumer's unambiguous affirmative consent to receive a save prior to cancellation. Sellers cannot present additional and alternative offers during a cancellation attempt, unless a consumer first expressly consents to receive information about offers. Sellers must retain records of these consents for three years, or one year after the negative option ends, whichever is longer.[10]
- **Annual Reminders**: At least annually, sellers must send consumers reminders describing the product or service, the frequency and amount of charges, and the means to cancel. This provision does not apply to negative option agreements involving the delivery of physical goods.[11]

Noncompliance with any of these requirements would be considered an unfair or deceptive practice in violation of Sections 5 and 19 of the FTC Act, subject to civil penalties, currently up to $50,120 per day for ongoing violations.[12]

Former Commissioner Christine Wilson wrote a five-page dissent stating that the proposed Rule went "far beyond practices for which the rulemaking record supports a prevalence of unfair or deceptive practices."[13] Among other problems, Commissioner Wilson noted that the proposed Rule "is not confined to negative option marketing" and "covers any misrepresentation made about the underlying good or service sold with a negative option feature," notwithstanding that the Commission did not include and seek comments about such general misrepresentations in its Advance Notice of Proposed Rulemaking.[14] Because the proposed Rule would allow the FTC to invoke Section 19 of the FTC Act to obtain civil penalties or consumer redress, she explained, marketers could be liable for civil penalties for product-efficacy claims "even if the negative option terms are clearly described, informed consent is obtained, and cancellation is simple."[15]

Commissioner Wilson also stated that the breadth of the proposed Rule would evade the Supreme Court's decision limiting the FTC's authority to seek disgorgement in cases enforcing the general prohibition on unfair or deceptive practices in Section 5 of the FTC Act.[16] In addition, she said that the breadth of the proposed Rule is inconsistent with the FTC's cases under ROSCA, and "will treat marketers differently for purposes of potential Section 5 violations, depending on whether they sell products or services with or without negative option features."[17] We anticipate that there will be a significant number of comments submitted that raise similar arguments, potentially among others, in opposition to the proposed rulemaking, and if the rulemaking is finalized, similar legal challenges are likely to be raised in courts.

Gibson Dunn attorneys are closely monitoring these developments and available to discuss these issues as applied to your particular business and assist in preparing a public comment for submission on this proposed Rule.

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[1] Negative Option Rule NPRM, Fed. Trade Comm'n (Mar. 23, 2023). The Commission voted 3-1, along party lines, to publish the NPRM. Chair Khan and Commissioners Slaughter and Bedoya released a joint statement in support of the proposed Rule. *See* Joint Statement, Fed. Trade Comm'n (Mar. 23, 2023). Former Commissioner Wilson dissented. *See* Dissenting Statement of Commissioner Christine S. Wilson, Fed. Trade Comm'n (Mar. 23, 2023).

[2] *Id.* at 3.

[3] *Id*. at 77-78 (the proposed Rule's requirements pertaining to misrepresentations and disclosures).

[4] *Id.* at 42.

[5] *Id.* at 10-12.

[6] *Id.* at 77-78.

[7] *Id.* at 77.

[8] *Id.* at 80-81.

[9] *Id.* at 78-80.

[10] *Id.* at 81.

[11] *Id.* at 82.

[12] FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2023, Fed. Trade Comm'n (Jan. 6, 2023).

[13] Dissenting Statement of Commissioner Christine S. Wilson, pg. 1, Fed. Trade Comm'n (Mar. 23, 2023).

[14] *Id.* at 2.

[15] *Id.*

[16] *Id.* at 2, 5; *see also AMG Capital Mgmt*., *LLC v. FTC*, 141 S. Ct. 1341 (2021).

[17] *Id.* at 5.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. Please contact the Gibson Dunn lawyer with whom you usually work, any member of Gibson Dunn's Privacy, Cybersecurity and Data Innovation, Public Policy, and Administrative Law and Regulatory teams.

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