

# Publications

October 21, 2024 • Updates

## FTC’s “Click-to-Cancel” Rule on Subscriptions and Renewals

### *What’s Happening?*

On October 16, 2024, the Federal Trade Commission (“FTC”) finalized a rule that, once effective, requires businesses to provide their customers with an easy method of cancelling or terminating “negative option programs” (or automatic renewal programs).

### *What is a “Negative Option”?*

A “negative option” is a contractual clause generally found in recurring or subscription-based contracts that allows a business to treat a customer’s silence or inaction as a continuing acceptance of the original contractual terms agreed to by the customer. Accordingly, negative options allow a business to continuously re-enroll or automatically renew a customer’s contract or subscription service (often with variable pricing terms) until the customer actively cancels the subscription or takes other affirmative action to terminate the contract. Some of the most common negative option programs are designed as prenotification plans, continuity plans, automatic renewals, or free trials (which convert into paid engagements).

### *The Click-to-Cancel Rule (16 CFR Part 425)*

Broadly, 16 CFR Part 425 (the “Rule”) targets businesses that operate as a “Negative Option Seller.” A Negative Option Seller is a person who sells, offers, charges for, or otherwise markets a good or service with a Negative Option Feature. Negative Option Features are not per se illegal under the Rule; rather, they become “unfair or deceptive” in violation of Section 5 of the FTC Act when accompanied by the following acts or omissions:

- Misrepresenting (whether express or implied) any Material fact made while promoting or offering the sale of goods or services (Sec. 425.3);
- Failing to clearly and conspicuously disclose Material terms before obtaining a consumer’s Billing Information, regardless of whether the terms directly relate to the Negative Option Feature (Sec. 425.4);
- Failing to obtain a consumer’s express informed consent to the Negative Option Feature before Charging the consumer (Sec. 425.5); and

### Related People

- Adam A. Garcia
- Reece Clark

### Related Capabilities

- Privacy & Cybersecurity
- Corporate & Transactional

- Failing to provide a simple mechanism to cancel the Negative Option Feature, avoid being Charged, and immediately stop recurring Charges (Sec. 425.6).[1]

## **Further Analysis**

*Obtaining and Maintaining Express Informed Consent.* The Rule lists out specific obligations a Negative Option Seller must satisfy when obtaining express informed consent. First, the customer must unambiguously consent to the Negative Option Feature, and this consent must be separate from other portions of the transaction. For example, Sellers can obtain consent by asking customers to accept the Negative Option Feature by clicking a check box or providing a signature. Second, a Negative Option Seller cannot include any distracting information that undermines or detracts from the customer's ability to consent to the Negative Option Feature. Sellers, for instance, should avoid burying the terms of a Negative Option Feature in lengthy paragraphs or connecting them to unrelated provisions. Lastly, Negative Option Sellers must maintain the customer's consent for at least three (3) years (unless the Seller shows customers always technologically complete the transaction with consent).

*Material Terms:* Negative Option Sellers must make all "Material" terms available to customers before the customer provides their billing information. The Rule has defined "Material" as "likely to affect a person's choice of, or conduct, regarding, goods or services." If a term is likely to influence a customer's choice in subscribing or purchasing a good or service, the term is material. Under this guidance, Negative Option Sellers must disclose (in a clear and conspicuous manner) terms such as price, frequency of charges, when free trials end, and how to cancel the subscription or withdraw from the program.

*Simple Cancellation:* Negative Option Sellers must provide customers with a simple way that is "at least as easy to use as the mechanism the customer used" to give consent. When announcing the final Rule, the FTC advised businesses should factor "in time, burden, expense, and ease of use" when evaluating its cancellation method. For instance, a customer who signed up online should not have to talk to a live or virtual representative, or customers who signed up in person should be given a method to cancel online or over the phone.

*Applies to B2B Transactions:* According to the FTC's explanation and analysis, the Rule also applies to business-to-business transactions. This means any business that offers a Negative Option Feature to another business is subject to this Rule. For example, an organization that subscribes to a premium newsletter or similar subscription service must be allowed to terminate its subscription as would a private individual. (Notably, the FTC addressed negotiated B2B agreements and noted that (i) B2B customers are still free to individually negotiate a Negative Option Feature and cancellation mechanism and the (ii) Rule does not pertain to terms in a negotiated B2B agreement that does not relate to the Negative Option Feature).

## **Looking Ahead**

Most provisions of the new Rule are scheduled to go into effect 180 days after it is published in the Federal Register, which may be as early as March or April of 2025. While opponents of the Rule are likely to challenge it in federal court, businesses should begin developing compliance plans to reduce risk of civil liability, penalties or reputational harm amongst their customers. Businesses should begin to evaluate their current practices and proactively make changes in order to ensure compliance. Below is a non-exhaustive list of recommended steps to take:

- Review the FTC's one-page fact sheet for the FTC's brief recommendations to comply with the Rule.

- Identify any automatic subscription, renewal, or Negative Option Features the business uses and review the corresponding terms.
- Research your state's law to determine if other laws or regulations apply (the Rule **does not** preempt state laws, so other laws that provide customers with additional protections still apply).
- Develop and implement simple ways for customers to cancel or terminate their subscription or program.
- Develop methods and processes to obtain a customer's express informed consent *and* maintain records of that consent.
- Consult with your Polsinelli attorney to evaluate all legal risk and options.

[1] Capitalized terms are defined terms within the Rule.