FTC Proposes Negative Option Rulemaking for Comment

October 21, 2019

Advertising and Consumer Protection

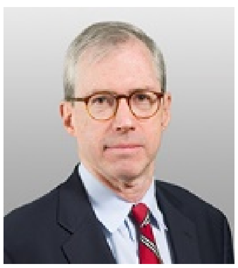
The Federal Trade Commission ("FTC") has published a request for public comment on "ways to improve its existing regulations for negative option marketing." 84 Fed. Register 52393 (October 2, 2019). The FTC acknowledges that negative option plans, such as prenotification negative option plans, continuity plans, and free trial and conversion plans, "can provide benefits to both sellers and consumers," but the agency nevertheless continues to receive complaints from consumers about such plans. Among the steps the FTC is considering is whether to amend the existing "Rule Concerning the Use of Prenotification Negative Option Plans" ("Negative Option Rule" or "Rule"), or simply to issue additional business and consumer guidance. The FTC's Federal Register notice lists 25 separate questions on which it invites comment. The agency is particularly interested in empirical evidence on experience with these plans, and consumer understanding of their terms. Public comments can be submitted for 60 days, until December 2, 2019. Because the proposed rulemaking may affect the use of many widely-used marketing plans in the U.S., industry stakeholders should consider submitting a comment providing their perspectives to the FTC regarding the proposed rulemaking.

The FTC's notice, styled as an Advance Notice of Proposed Rulemaking, acknowledges several sources of FTC authority in this area, including Section 5 of the FTC Act, ROSCA, the Telemarketing Sale Rule, and the Negative Option Rule itself. According to the FTC, however, this "patchwork" of existing law does not provide a consistent and comprehensive framework covering different marketing media and types of plans. Different rules apply, according to the FTC, depending on the medium for the transaction (e.g., in print, online, by mail) and the type of negative option at issue (e.g., automatic renewals, pre-notification plans for the sale of goods). The FTC notes that the current Negative Option Rule, for example, fails to "reach most modern negative option marketing."

The Negative Option Rule regulates sales where a periodic notice offering goods is provided, and the business sends and charges for those goods if the consumer does not take an action to decline the offer, such as a book of the month club. However, a number of other types of negative options are not covered by the Rule, such as: (1) automatic renewal clauses, which allow providers of goods or services to bill consumers periodically without obtaining express consent before each billing cycle; (2) continuity plans, whereby a consumer receives a regular shipment until they cancel; and (3) free-trial periods, after which the consumer is charged unless they affirmatively cancel. Separately, The FTC also has noted that the current Negative Option Rule and related rules lack specificity about how to implement measures required by the law. For example, ROSCA requires a "simple mechanism" for the consumer to stop recurring charges, but the FTC points out that ROSCA lacks clarity as to how such a mechanism should be constructed.

The statements by the FTC indicate that the Commission is considering expanding the scope of the Negative Option Rule through Section 18 rulemaking to include other types of marketing such as subscription meal plans, video streaming, and free-trial offer for a product or service. Such rulemaking, the FTC suggests, could also add additional specificity with respect to requirements for negative option plans, such as the type of notice, consent, and control mechanisms a business must provide consumers. Finally, it appears likely that the FTC would be interested in providing consumers with additional avenues for recourse, whether through FTC enforcement or the ability for consumers to challenge a charge from a negative option plan.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Advertising and Consumer Law practice:



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