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Autorenewals and other Negative Option Business Models

A new rule proposed by the FTC to address negative options, including autorenewal business models, will establish a significant set of new requirements in the ecommerce space. See the new FTC rule published on March 23, 2023 at https://www.ftc.gov/system/files/ftc_gov/pdf/p064202_negative_option_nprm.pdf.

A "negative option" in the context of ecommerce subscription programs means that the service provider is equating a subscriber's failure to affirmatively reject a good/service or to affirmatively cancel a subscription agreement as acceptance and/or continuing acceptance. Negative options apply, among others, to automatic renewals and free trial conversions to paid subscriptions.

At a high level, the new rule codifies some common-sense principles to be followed by ecommerce companies offering subscription programs with negative options, such as the following:

- Make sure subscribers understand and agree to what they are subscribing to/buying
- Allow subscribers to cancel easily their subscriptions (offer a "Click to Cancel" cancellation option)
- Prior to obtaining the consumer's billing information, disclose to the consumer any material term related to the underlying good or service, regardless of whether that term directly relates to the negative option

But in practice, the rule prescribes very specific rules to be followed that may not be trivial to implement operationally throughout a B2C cloud-based platform. For example, the ecommerce vendor must obtain from the prospective subscriber "unambiguously affirmative consent" to the negative option, separately from any other portion of the transaction, before charging the consumer. Additionally, the vendor must keep records of the consumer's consent to the negative option for at least three years, or one year after the contract is otherwise terminated, whichever is longer.

A key operational requirement in the new rule would require ecommerce companies to make cancellation of a subscription equally easy to the initial subscription process. Here is a direct quote from the FTC: *"The proposal also requires sellers to provide a simple cancellation mechanism through the same medium used to initiate the agreement, whether, for instance, through the Internet, telephone, mail, or in-person. On the Internet, this "Click to Cancel" provision requires sellers, at a minimum, to provide an accessible cancellation mechanism on the same website or web-based application used for sign-up."*

Subscription programs with negative options are already subject to a number of Federal regulations in the US, including:

- Restore Online Shoppers' Confidence Act (ROSCA). ROSCA addresses consumer disclosures, consent and cancellations. Note that ROSCA does not prescribe specific steps for compliance.
- Section 5(a) of the FTC Act. This has been the core consumer protection statute enforced by the FTC. That section addresses "unfair or deceptive acts or practices" (UDAP). Note that Section

5(a) does not specifically address negative options, but the FTC subsequently issued guidance specifying five requirements that negative option marketing must follow to avoid deception.
- Electronic Fund Transfer Act ("EFTA") and the Unordered Merchandise Statute, which also address negative options. EFTA prohibits sellers from imposing recurring charges on a consumer's debit cards or bank accounts without written authorization. The Unordered Merchandise Statute provides that mailing unordered merchandise, or a bill for such merchandise, constitutes an unfair method of competition and an unfair trade practice in violation of Section 5 of the FTC Act.
- Telemarketing Sales Rule ("TSR"), which prohibits deceptive telemarketing acts or practices, including those involving negative option offers. Note that the TSR only applies to negative option offers made over the telephone, so this is not usually relevant to ecommerce companies.

Beyond Federal regulations, there are other US regulatory frameworks that apply to ecommerce subscription programs and negative options, including:

- Visa's new rules requiring businesses to provide an "easy way to cancel the subscription" online, similar to unsubscribing from an email distribution list.
- Laws in 18+ states, including California's recent rule mandating an easy-to-use cancellation mechanism online, such as a termination email.

While more regulations are always a concern for the ecommerce space, the specifics of this rule promulgated by the FTC are helpful by listing the specific requirements to be followed to achieve compliance. Some ambiguity remains, but overall, this rule includes practical steps that ecommerce companies must take to achieve Federal compliance for autorenewals and other negative option business models. Overall, this rule is definitely a vast improvement over the previous Federal patchwork of regulations and guidelines applicable to negative options.

Compliance with this rule will require ecommerce companies to implement some specific steps, as specified in the rule. Unfortunately, beyond this Federal rule, ecommerce companies are still left in the US with some inconsistent requirements between industry rules and 18+ state legislative frameworks. Nevertheless, we are seeing a clear trend towards national uniformization of ecommerce regulations, coupled with more clarity for service providers. That is a welcome development for the ecommerce industry.