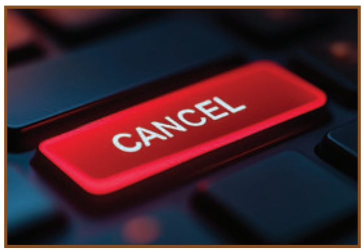
Negative Option Rules

Remain in compliance by allowing 'click to cancel'

by: Greg Goldberg, BTA General Counsel



How many times have you looked at a credit card statement and noticed a charge for a subscription you cannot remember signing up for? Did you cancel it right away? Could you do so easily without talking to a person? Did you have to search online for a customer service phone number? Did you give up, thinking, "It is not very much money," and you may want to use the product or service at some point in the future?

Whether you are streaming videos from Netflix, buying razors from Dollar Shave Club or ordering meal kits from Hello Fresh, chances are you are paying for many more subscriptions now than you were a decade ago. And in today's economy, where companies worship at the altar of monthly recurring revenue, those subscriptions are likely to renew indefinitely, until the business goes under or you take affirmative steps to cancel.

Because subscription-based service providers have an economic incentive to make signing up easier than canceling, federal and some state regulators have enacted rules to help level the playing field. So-called Negative Option Rules, also known as the "click-to-cancel" rules, require subscription-based service providers to offer streamlined cancellation processes that are no more complicated than signing up.

Compliance with Negative Option Rules may be important for BTA members because they may be applied broadly to any business-to-business transactions with automatic renewal provisions, including equipment leases, service agreements, SaaS contacts, etc. This month, Legal Perspective breaks down the current state of Negative Option Rules and provides best practices for remaining compliant.

At the federal level, the Federal Trade Commission's (FTC's) Negative Option Rule includes three primary components:

(1) Disclosure of Material Terms: Businesses must clearly and conspicuously disclose all material terms of a negative option offer before a consumer agrees to the purchase. This includes the existence of the negative option, its cost and how to cancel. In other words, during the sales process, businesses must tell prospective subscribers that the subscription will automatically renew, how much the subscription will cost and how to cancel.

(2) Affirmative Consent: Sellers must also obtain consumers' unambiguous, affirmative consent before charging them for a negative option feature. This means consumers must actively agree to the terms, not just passively accept them. In practice, it is best to include a separate signature line, initials line or online checkbox where the prospective subscriber provides a specific consent separate from the primary signature line.

(3) Simple Cancellation: The rule mandates that businesses provide consumers with a simple and easy way to cancel their enrollment in any negative option plan. Cancellation should be as easy as signing up and, preferably, offered through the same channel. For instance, if a customer can sign up for a subscription online without speaking to a salesperson, the customer should also be able to cancel online without having to pick up the phone or send an email.

Close watchers of the federal courts will note that, last month, the U.S. Court of Appeals for the Eighth Circuit vacated the FTC's Negative Option Rule just days before it was set to go into effect. Accordingly, it remains to be seen whether or when the final rule will be implemented. Because the Eighth Circuit's decision was based on the procedure the FTC followed to enact the rule — not the substance of the rule itself — the FTC may restart the rulemaking process.

Individual state laws regarding negative option agreements remain effective. For example, California Assembly Bill 2863, which went into effect in July, goes even further than the FTC's Negative Option Rule. In addition to disclosing negative option terms, obtaining separate consent and providing matching cancellation methods, California businesses are also required to retain verification of subscribers' consent and send annual reminders to subscribers regarding renewal frequency, the amount charged and instructions for cancellation.

Although the final fate of the FTC's Negative Option Rule remains in legal limbo, it is always a best practice to stay ahead of the regulatory curve rather than play catch up. Besides, if your business is in a state like California that enacts a strict negative option rule, compliance may be compulsory sooner than later. Sample contract language compliant with federal and state laws is available upon request. ■

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