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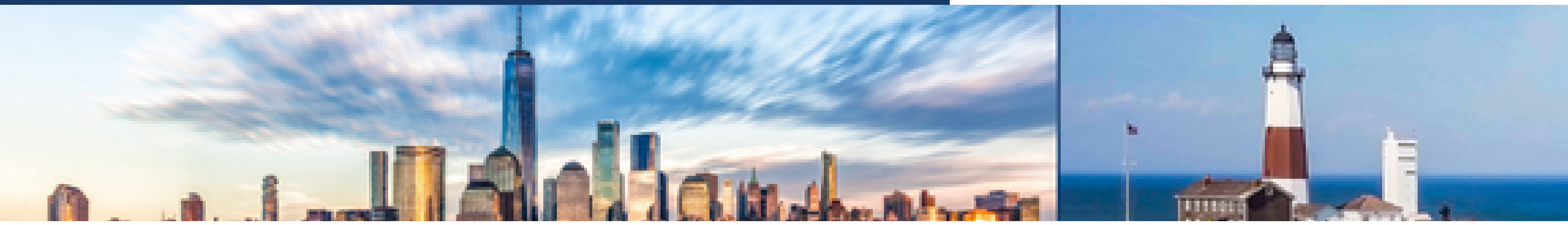

Even Though You Should Probably Keep it, a New Law May Make It Easier to Cancel Your Gym Membership (As Well As Other Subscriptions)

Have you ever forgotten to cancel a gym membership and ended up paying for months of workouts you never did? Too often, consumers are stuck with subscriptions to products or services they no longer want, or worse, did not even realize they were subscribing to. In today's digital market, with just a few clicks, you could be signed up for an automatically renewed subscription under the guise of a free trial. These subscriptions take many forms, including online meal kits, gym memberships, streaming platforms, and much more. The worst part is that canceling is never as easy as signing up. Instead of the two minutes it took to sign up, canceling often requires navigating cumbersome websites or spending hours on automated phone lines.

On October 16, 2024, the Federal Trade FTC (FTC) announced a "Click-to-Cancel" rule aimed to address this consumer issue. This new rule is intended to make canceling a subscription just as easy as it was to sign up and provide other consumer protections around negative option programs, (e.g. a subscription program that requires a consumer to specifically decline the service in a very un-user-friendly way). This new rule is intended to save consumers time and money.

Seller Obligations Under the Current Rule

Under the current rule, sellers have close to free rein to engage in deceptive negative option programs, as sellers are merely prohibited from engaging in unfair practices, which is loosely defined. Negative option features refer to an agreement which permits sellers to take a consumer's silence or failure to take an affirmative action as an acceptance to an offer. These negative option programs generally fall into four categories: (1) prenotification plans; (2) continuity plans; (3) automatic renewals; and (4) free-to-pay offers.

In a prenotification plan, a seller sends an advertisement notice offering a product, and if the consumer does not expressly reject the offer within a set time, the seller then ships the product and charges the consumer. Continuity plans are similar to prenotification plans, except the consumer agrees, in advance, to receive the product periodically. However, if the consumer does not cancel their subscription, they will continue to receive the product. An automatic renewal plan in essence is a subscription that never ends, as once a subscription expires, the seller may automatically renew and charge the customer, unless the consumer cancels it. Finally, free-to-pay offers are analogous to free trial offers. A consumer receives a product or service for free or pays for a nominal fee, but once the trial period is over, the seller charges a fee for the product or service. Where a nominal fee is paid before the trial period is up, the seller charges a significantly higher fee. A free-to-pay offer is only terminated once the customer cancels and in some cases requires the consumer to return the product or service.

These programs make it extremely difficult for consumers to end subscriptions and do not require informed consumer consent to bind them to recurring subscriptions. Under the current framework, consumers are often left spending hours canceling a subscription that took less than a minute to sign up for. Some consumers even incur more fees canceling or returning unwanted products. The FTC has received a steady increase of complaints concerning negative option programs over the past five years, and in 2024, it received an average of 70 complaints per day.

Proposed Rule vs. the Final Rule

The FTC initially published a notice of proposed rulemaking on March 23, 2023 which received over 16,000 comments from the public. The proposed rule focused on four main areas of consumer protection with respect to negative option programs by (1) prohibiting sellers from misrepresenting key facts when marketing a product or service with a negative option feature; (2) requiring sellers to clearly and conspicuously disclose material terms of an agreement prior to collecting a consumer's billing information for a product or service with a negative option feature; (3) mandating that consumers give informed and express consent to a negative option feature before being charged; and (4) requiring sellers to provide a clear and simple way for customers to immediately cancel a negative option feature.

However, the final rule does differ from the initial proposed rule as two previously considered provisions will not be included in the final rule. First, under the proposed rule the FTC considered prohibiting 'save' options, defined under the proposed rule as a seller's attempt to advertise reasons to retain the existing offer or modifications to the existing agreement as consumer tried to cancel. After considering extensive commentary addressing confusion and difficulty of implementing the rule, the FTC has declined to include it in the final rule. The proposed rule also had a provision on annual reminders that did not survive the final rule. Under the proposed rule, where products purchased are not physical products, such as streaming services, sellers had to provide an annual reminder to consumers that specifies the frequency of charges and identifies simple means to cancel. It also required that the reminders take the same medium as how the contract was initiated. For example if a customer called in to order a subscription, their annual reminder about the subscription would also have to be a phone call. The FTC received a broad range of comments asking for clarification, modification, and even exemption of this section of the rule. Ultimately, the FTC determined it needed additional information on the particularities of the annual reminder requirement. It is likely the FTC will seek additional comments on these two issues through a supplemental notice of proposed rule making at a later date.

Conclusion

This rule is a massive shift in the current framework and provides expansive consumer protections with respect to negative option programs. While many states have enacted laws to protect consumers from unfair and deceptive practices, this rule is the first extensive regulation making specific requirements for sellers with respect to negative option programs. Based on the extensive commentary and the FTC's own hesitation to implement all of the proposed rules, much is left to wonder regarding annual notices and save options. The rule is nonetheless set to take full effect 180 days after it is published in the Federal Registrar. The FTC has also created a fact sheet that highlights the major changes to the rule.

For more information on how this new rule may affect your business, please reach out to:

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