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The FTC sinks its teeth into subscription sales

The Federal Trade Commission is using the Restore Online Shoppers Confidence Act (“ROSCA”) to crack down on companies using online subscriptions in their business model. Specifically, we’re seeing the FTC pursuing companies with negative option features.

Negative options are “provisions in an offer or agreement to sell or provide goods or services under which the customer’s silence or failure to take affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.” In other words, any recurring/subscription charges that continue until the customer takes action to discontinue them constitutes a negative option.

Negative option features are not new. They feature prominently in traditional membership businesses such as gyms and clubs. ROSCA, however, takes on the ever-growing field of online subscription services. Whether vending online entertainment, meal kits, cosmetics, or other consumer goods or services, online businesses must take note of ROSCA’s requirements.

ROSCA requires that any company that uses negative option features must:

1 Provide text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information;

2 Obtain a consumer's express informed consent before charging the consumer's credit card, debit card, bank account, or other financial account for products or services through such transaction; and

3 Provide simple mechanisms for a consumer to stop recurring charges from being placed on the consumer's credit card, debit card, bank account, or other financial account.

As you can see, ROSCA's requirements require interpretation, and insuring compliance is key. Drafting of language for customer enrollment flows for negative option features must be done thoughtfully because they must clearly state the terms and conditions, specifically the recurring nature. Customers must affirmatively choose to be charged for the specific negative option. Methods for cancelling must be simple, and easy to use. Likewise, cancellation options must be clear and accessible. All businesses want the opportunity to save subscribers, or otherwise gather information about customers' reasons for cancellation. These are reasonable business goals and they can be achieved while maintaining compliance with ROSCA if implemented with care.

A number of public actions by the FTC demonstrate the agency's willingness to flex its muscles using ROSCA. Companies have been targeted for all of the following:

1 Free trial offers that automatically converted to paying accounts;

2 Only offering cancellation via phone and not online or via email;

3 Offering cancellation methods that were "difficult, costly, confusing, or time consuming";

4 Using a "block of small-print gray text against a white background" to disclose terms and conditions;

5 Requiring consumers to click on a separate link online to view terms of service;

6 Under-staffing their customer service department;

7 Long response times for customer service calls;

8 Placing the return policy within "densely worded, hyperlinked web pages";

9 Using links with titles like "Terms and Conditions" for material cancellation and refund terms.

FTC investigations and enforcement actions can be costly. Online retailer AdoreMe agreed to return over US$1.3m to consumers as part of a settlement with the FTC at the end of last year, in addition to penalties, fees, and costs from a related state-level enforcement action. More recently, the FTC filed a lawsuit in July against Triangle Media Corporation, after having received a temporary restraining order halting much of Triangle's subscription business and freezing their assets.

Hogan Lovells advises consumer businesses in numerous industries, both in maintaining compliance with ROSCA and responding to FTC and related state-level investigations and inquiries.

To discuss how you can best avoid running afoul of the FTC and related state statutes, contact:

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