

FTC Seeks Comment on Updates to Negative Option Marketing Rule

March 13, 2026

The Federal Trade Commission (FTC) announced on March 11, 2026 that it is seeking public comment on an Advance Notice of Proposed Rulemaking (ANPRM) regarding the agency's Negative Option Rule (formally known as the Rule Concerning the Use of Prenotification Negative Options Plans). The ANPRM seeks comment on "negative option" practices, where consumers are charged on an ongoing basis unless they take some affirmative consumer action to cancel. It also seeks comment on whether to revive some portions of the amended Negative Option Rule adopted by the previous Administration – often called the "Click-to-Cancel" Rule – that was struck down in court last year, and broadly addressed disclosure and cancellation requirements for automatic renewals and subscription services. The new ANPRM asks for information related to the marketplace for negative option programs, negative option practices, methods to address unlawful practices, whether an amended rule is necessary, and if so, how the agency should handle requests for exemption. Comments are due on **April 13, 2026**.

The Current Legal Framework Has Supported Robust Enforcement

As noted in the ANPRM, the FTC has used several existing legal authorities to aggressively enforce against allegedly unlawful practices involving subscription and automatic renewals, even after the amended Rule was struck down last year. Those authorities include the Restore Online Shoppers Confidence Act (ROSCA), the Telemarketing Sales Rule (TSR), and Section 5 of the FTC Act.

- ROSCA generally prohibits online sellers of goods and services from charging a consumer's account unless the seller has (a) disclosed certain material terms of the transaction, and (b)

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Practice Areas

FTC and Consumer Protection

obtained the consumer's express informed consent to the charge. It also requires sellers to provide a "simple" mechanism to stop recurring charges.

- The TSR requires parties marketing goods or services over the phone to make disclosures of certain material information to consumers before charging the consumer. The TSR also prohibits sellers from making misrepresentations about goods and services and the terms of the transaction, imposes limits on the times of day that sellers may engage in telemarketing, requires sellers to honor consumer do-not-call requests, and imposes payment restrictions for the sale of particular goods and services.
- Section 5 of the FTC Act generally prohibits entities from engaging in unfair or deceptive acts or practices in or affecting commerce. The FTC has also used its Section 5 authority to define specific acts or practices that are unfair or deceptive, including certain acts or practices pertaining to the sale of subscription services. Notably, however, the Supreme Court determined in *AMG Capital Management, LLC v. FTC* that the FTC does not have authority to obtain monetary relief under Section 5.

Using these authorities, the FTC has brought at least five new cases in this area since the beginning of 2025.

The Canceled "Click to Cancel" Rule

In October 2024, the FTC adopted amendments to the Negative Option Rule, also called the "Click to Cancel" Rule, to expand the scope of the Rule to cover negative option programs across all media. The amended rule regulated both sign-up and cancellation processes for subscriptions or other recurring charges, including requiring companies to make cancellation as easy as signing up and requiring companies to make cancellation available via the same medium customers used to enroll (e.g., online, telephone).

Shortly before these new requirements were set to come into effect, the U.S. Court of Appeals for the Eighth Circuit issued a decision vacating the amended Negative Option Rule on July 2, 2025.^[1] That ruling was largely based on procedural grounds and did not address the substantive merits of the proposed amendments. Specifically, the court held that the FTC failed to conduct a preliminary regulatory analysis during the course of the rulemaking process, which is required under Section 22 of the FTC Act for proposed rules with an estimated annual effect of at least \$100 million. The ANPRM tees up the agency's next attempt at regulating a broader scope of negative option practices.

Scope of Information Requested

The ANPRM seeks information related to "practices that prevent consumers from understanding the terms of the negative option program, enroll consumers without their express informed consent, or impede consumers from canceling their enrollments." The Commission also seeks information about whether to address these practices and ways to do so, including through adopting provisions of the Rule. Notably, the ANPRM also considers how to handle industry requests for exemptions from the requirements of a new rule. Specifically, the Commission requests insight on what procedures and criteria the agency should use to decide requests for exemptions, and how broadly the Commission should grant exceptions to any new rule.

The ANPRM also seeks considerable information about the costs and burdens of imposing new requirements, which addresses the reasons the Eighth Circuit struck down the previous amended Rule. Among other things, the ANPRM asks how implementing certain aspects of the Rule would impose new costs on consumers and on businesses that would need to comply with the Rule; what modifications the FTC should make to reduce costs and burdens on businesses; whether compliance with the Rule would interfere with certain legitimate business practices; and whether the Rule's requirements interfere or conflict with any existing federal, state, or local laws. The ANPRM also asks for businesses to provide separate estimates for each cost component with respect to each provision of the Rule.

Specific Industries and Practices Highlighted in the ANPRM

The ANPRM broadly seeks comment on subscription service and cancellation issues across all industries, while highlighting a few specific issues worth noting:

- In-person and mail-order sales. Unfair and deceptive sales through these methods are not covered by ROSCA or the TSR's negative option rule. Although they are covered by Section 5 of the FTC Act, that law does not authorize monetary relief like ROSCA or the TSR. Covering these sales would add civil penalty authority.
- Bundled services. The ANPRM discusses bundled offers, where sellers package two products or services together.
- Possible small business exemption. The ANPRM asks, "[w]hat modifications, if any, should the Commission make to the requirements to reduce the costs imposed on businesses, particularly small businesses?"
- Applicability to business-to-business transactions. The FTC is authorized to propose rules defining unfair or deceptive acts or practices when the Commission "has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent."^[2] On this point, the ANPRM asks whether unfair or deceptive acts or practices are not prevalent in the context of negative option transactions between businesses.

Wiley's FTC Regulation Practice has substantial experience advocating before the FTC in rulemakings and representing clients in matters related to the Negative Option Rule, ROSCA, and subscription services. Our team includes former FTC staff attorneys and managers and routinely advises on all aspects of FTC enforcement and regulation. Please reach out to any of the authors with questions.

[1] *Custom Commc'ns, Inc. v. FTC*, 142 F.4th 1060 (8th Cir. 2025).

[2] 15 U.S.C. 57a(b)(3).