Cooley

FTC Enhances Scrutiny of Subscriptions and Negative Option Features Under ROSCA

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Recent Federal Trade Commission (FTC) activities (see, e.g., proceedings against **Wealthpress**, **Publishers Clearing House** and **Amazon**) demonstrate that the FTC is pursuing alleged violations of the Restore Online Shoppers' Confidence Act (ROSCA), 15 USC 110. These actions are part of an aggressive FTC agenda focused on "negative option features" or "negative option offerings."

In September 2023, the **FTC filed an amended complaint** in a US district court alleging that Amazon violated ROSCA's negative option feature rule by enrolling consumers in Amazon Prime subscriptions without consent and by employing "dark patterns." The FTC alleges that Amazon designed a deceptive onboarding process intended to trick consumers into enrolling in subscriptions and a complicated cancellation process intended to make it exceedingly difficult for consumers to cancel their subscriptions. In the amended complaint, the FTC claims that "[Amazon] and its leadership have knowingly duped millions of consumers into unknowingly enrolling in its Amazon Prime service ("Nonconsensual Enrollees" or "Nonconsensual Enrollment") … [using] manipulative, coercive, or deceptive user-interface designs known as 'dark patterns' to trick consumers into enrolling in automatically-renewing Prime subscriptions," and that "… the primary purpose of the Prime cancellation process was not to enable subscribers to cancel, but rather to thwart them."

In October 2023, stemming from alleged violations of ROSCA's negative option feature rule, the **FTC filed a proposed stipulated order** in a US district court against F9 Advertising, its sole owner and affiliated companies. The **FTC alleged** that the defendants, who offered monthly skin care product subscriptions, "charged consumers a nominal trial cost without telling them they would be charged for the full cost of the product and for monthly auto-shipments unless consumers took action to cancel." The FTC's proposed stipulated order requests that the court approve a $34 million penalty against the defendants and permanently restrain and enjoin them from offering any products or services pursuant to a negative option feature.

The FTC renewed its focus on ROSCA enforcement – and the inclusion of individuals in ROSCA complaints – in January 2024, filing a **complaint** and **settlement order** against FloatMe and the company's two co-founders. The complaint alleges that FloatMe, a provider of cash advances, violated ROSCA's negative option feature rule by misrepresenting the availability of cash advances to induce consumers to enroll in subscription plans, as well as charging consumers without consent and employing dark patterns to thwart consumer attempts to cancel their subscriptions. The settlement order includes $3 million in consumer redress, for which the company and the co-founders are jointly and severally liable.

These actions represent only a subset of the FTC's recent efforts to enforce ROSCA's negative option feature rule, and these efforts appear likely to continue in the coming year.

What is a negative option feature?

ROSCA incorporates the definition of "negative option feature" from the Telemarketing Sales Rule, which provides that a negative option feature is:

> “[A]n offer or agreement to sell or provide any goods or services, a provision under which the customer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer” 16 USC 310(w).

The FTC has treated this definition as including “automatic renewals” and “free-to-pay” or “fee-to-pay” conversions. In an automatic renewal, a seller unilaterally renews a consumer’s subscription until that consumer takes affirmative action to cancel the subscription. In a free-to-pay conversion, a seller offers a good or service for a trial period at no cost (or, in a fee-to-pay conversion, at a reduced cost). Upon conclusion of the trial period, the seller automatically charges the consumer a periodic recurring fee until the consumer takes affirmative action to cancel the agreement.

How do companies comply with ROSCA?

Section 4 of ROSCA has three key elements. Failure to comply with any one element is considered a violation of the statute. Any person who charges or attempts to charge consumers for goods or services sold in a transaction effected on the internet through a negative option feature, must:

1. Provide text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer’s billing information (required disclosures).
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 (express informed consent).
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 (simple cancellation mechanism).

Required disclosures

The FTC has taken an expansive view of what constitutes a “material [term] of the transaction.” It has asserted that the material terms that must be disclosed go beyond purely transactional terms – such as price and the frequency of charges – and include the material terms of the underlying product or service. The result is that, for negative option sellers, making inaccurate claims about material features of underlying products or services, or failing to disclose the material limitations of those products or services, could result in allegations of ROSCA violations by the FTC.

Informed consent

The FTC also has contended that companies failed to obtain express informed consent when consumers were unknowingly enrolled in negative option features, such that their consent was not “express,” or when companies have failed to provide the required disclosures, including material disclosures relating to the underlying product or service, such that consumer consent was not sufficiently “informed.”

Simple cancellation

The FTC’s enforcement history and public guidance do not clearly set forth requirements for a simple cancellation mechanism. The FTC has stated, however, that to provide a simple cancellation mechanism, sellers should provide cancellation mechanisms that are at least as easy to use as the methods consumers use to enroll in each negative option feature. This can include making cancellation mechanisms available via the same medium (such as a website or mobile application) that consumers use to enroll and responding promptly to consumer inquiries related to cancellation. The FTC further cautions that sellers should not impose unreasonable delays on consumer attempts to cancel negative option features.

FTC's focus on individuals and companies

Both companies and certain individuals at those companies can be held jointly and severally liable for ROSCA violations. To support a finding of individual liability for monetary relief pursuant to a ROSCA violation, an individual typically needs to have knowledge of the conduct giving rise to the violation, and either the authority to control that conduct or direct participation in the conduct.

In recent ROSCA matters, the FTC has taken an aggressive approach to holding individuals liable, irrespective of company size. For example, in the September 2023 amended complaint filed against Amazon, the FTC named both the company and three senior executives as defendants. Despite Amazon's size and the dispersed responsibility that likely exists in a company of that size, the FTC alleged that the named executives were aware of and responsible for the conduct at issue in the complaint.

Individual risk can arise not only from violations of ROSCA, but also from failure to comply with FTC investigations into possible ROSCA violations. In November 2023, the **Department of Justice announced an indictment against Jason Cardiff** for, among other things, witness tampering related to a ROSCA investigation. The FTC had previously issued a civil investigative demand (CID) to Redwood Scientific Technologies, allegedly owned and operated by Jason Cardiff and Eunjung Cardiff, related to the company's marketing and sales practices for certain consumer health products. The indictment alleges that Jason Cardiff engaged in witness tampering by ordering company employees to destroy documents responsive to the CID.

Public statements by FTC commissioners also affirm the approach that the FTC has taken toward individual liability in enforcement actions. In an **October 2022 statement**, FTC Chair Lina Khan asserted that, "Overseeing a big company is not an excuse to subordinate legal duties in favor of other priorities," and that by holding executives liable, the FTC can "further ensure that firms and the officers that run them are better incentivized to meet their legal obligations." Between recent enforcement actions and public statements, such as the one from Khan, the FTC appears to view pursuing individual liability as an important source of both general and specific deterrence.

What are the penalties for violating ROSCA?

Companies that violate ROSCA can incur steep civil monetary penalties and damages for consumer redress, as well as the imposition of nonmonetary obligations. Consumer redress may, in part, be measured by the amount of money that has flowed from consumers to the company attributable to the ROSCA violation. Therefore, depending on how central the conduct at issue is to a company's business, consumer redress can result in significant disgorgement of company revenue.

Why is the FTC increasingly pursuing ROSCA violations?

The ability to seek equitable monetary relief for ROSCA violations is a unique tool in the FTC's arsenal, which may help explain why it has shown increasing enforcement interest in this area.

In 2021, the US Supreme Court's decision in the matter of ***AMG Capital Management, LLC v. FTC*** significantly restricted the FTC's ability to seek equitable monetary relief. Before this case, the FTC typically relied on Section 13(b) of the Federal Trade Commission Act, 15 USC 53, to obtain equitable monetary relief for violations of Section 5 of the FTC Act. In its decision on the *AMG* matter, the Supreme Court found that the FTC lacks the authority to seek equitable monetary relief under Section 13(b). Rather, the Supreme Court found that Section 13(b) only permits the FTC to seek injunctive relief. Traditionally, the FTC has heavily relied on the broadly construed provisions of Section 5 to provide the basis for enforcement against actors allegedly engaged in a wide range of unfair or deceptive acts or practices, including misleading advertising and false product claims. Without the ability to obtain equitable monetary relief, however, the FTC's Section 5 enforcement powers have been significantly weakened.

By contrast, for violations of ROSCA, the FTC can obtain equitable monetary relief in civil actions by relying on Section 19 of the FTC Act, 15 USC 57b. Whereas Section 19 remedies could, in theory, be available for Section 5 violations, obtaining Section 19 remedies for Section 5 violations requires additional procedural steps that often make this approach impractical. For ROSCA violations, however, the FTC has contended that these additional steps are not required, and so it is significantly more empowered to obtain monetary relief. Given this consideration, the FTC may be inclined to divert enforcement resources from Section 5 violations to ROSCA violations.

Looking ahead

The FTC has shown its intention to seek expanded authority to regulate negative option features, in a form that would provide it with the ability to obtain equitable monetary relief in the same manner as under ROSCA. In April 2023, the FTC published a **notice of proposed rulemaking** that aims to consolidate its various rules on negative option features (that exist in ROSCA and elsewhere) into a single "negative option rule." Former FTC Commissioner Christine Wilson **strongly critiqued this proposed rule**, claiming that it would sweep in conduct currently regulated under Section 5 and unrelated to negative option features in order to enhance the FTC's ability to seek monetary relief where this ability was limited by the decision in the *AMG* matter. According to Wilson, the proposed negative option rule "attempts an end-run around the Supreme Court's decision in *AMG* to confer *de novo* redress and civil penalty authority on the Commission for Section 5 violations unrelated to deceptive or unfair negative option practices."

While the specific details of the final rule remain to be determined, companies should expect the FTC to continue exercising its enforcement powers to pursue violations of existing negative option feature rules.

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