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Update on Legal and Card Rule Compliance Issues for CNP Recurring Billing Programs

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Agenda

- Federal
 - Restore Online Shoppers Confidence Act
 - Review of Telemarketing Sales Rule
 - Negative Option Enforcement Policy Statement
 - Negative Option Rule NPR
- State Updates
- Card Association Rules
- Recent Cases

ROSCA

- Enacted in 2010 to address “aggressive, deceptive and unfair online marketing practices”
 - Prohibits
 - Data sharing between merchants in upsell offers
 - Requirements for negative option offers
 - Clear and Conspicuous Disclosure of auto renewal terms
 - Obtain consumer express consent
 - Allow an easy way to cancel
- Applies to online offers only
- No private right of action

Telemarketing Sales Rule

- **Advanced Notice of Proposed Rulemaking – April 28, 2022**
 - Seeks comments on whether telephonic sellers of negative option programs should provide consumers (i) with advance notice of an upcoming renewal with instructions on how to cancel to avoid the charge, (ii) an easy way to cancel the subscription.
- Comments were due 60 days after posted in the Federal Register
- Also . . . Proposed enhanced telemarketing record keeping requirements
 - Extremely onerous

FTC Negative Option Policy Statement

- [Enforcement Policy Statement Regarding Negative Option Marketing – Oct. 28, 2021](#)
 - https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf
- Warned companies that it will be ramping up its enforcement *"in response to a rising number of complaints about the financial harms caused by deceptive sign-up tactics, including unauthorized charges or ongoing billing that is impossible cancel."*
- Put companies *"on notice that they will face legal action if their sign-up process fails to provide clear, up-front information, obtain consumers' informed consent, and make cancellation easy."*

FTC Negative Option Policy Statement

- **Clear and conspicuous disclosure of all material offer terms**
 - Cost of the product/service,
 - When a consumer must cancel to avoid future charges,
 - The amount and frequency of such charges if not cancelled, and how to cancel,
 - Accurate information about the characteristics of and how consumers may use the advertised product/service.
- **Consumer express informed consent to be charged**
 - Sellers should obtain a consumer's affirmative, informed consent before charging them for the purchased product/service. This consent "*includes obtaining the consumer's acceptance of the negative option feature separately from any other portion of the entire transaction.*"
- **Easy and simple cancellation**
 - Provide purchasers the ability to cancel by means that are at least as easy as those used to enroll or purchase the product or service.

FTC Neg Option Rule - Notice of Proposed Rulemaking

- Use of Prenotification Negative Option Plans (aka “Negative Option Rule”) 16 CFR 425
 - Promulgated 1973
 - Narrow Scope
- 2009 Review/Rulemaking
 - Some changes, FTC declines to expand Rule, ROSCA recently enacted...wait and see
- Advance Notice of Proposed Rulemaking (ANPR)
 - Published September 2019
 - Expand scope, fill gaps, harmonize ROSCA and TSR
- Notice of Proposed Rulemaking (NPR) March 23, 2023
 - Comments were due June 2023

NPR – Purpose

- Current laws not sufficient/gaps
 - Section 5, TSR, ROSCA, EFTA/Reg E
 - No rulemaking authority under ROSCA
- Prevalence of Deceptive Practices Generally
- Offer terms not clearly and conspicuously disclosed
- Free trials that convert to paid programs
 - Asking for cc for s&h/processing to be used for ongoing charges
- Absence of notice requirements
 - Order confirmation/renewal/material changes
- Confusing and difficult cancel path

NPR Proposals

- Replaces old Rule - Expanded Scope
- Definition of “Clear and Conspicuous”
- Prohibits all misrepresentations in a negative option offer
- Consent....”separate from any other portion of the transaction”
 - Recordkeeping
- Simple cancellation “click-to-cancel”
- Saves – must ask permission
- Annual reminder notices for all digital programs regardless of billing interval
- No state law pre-emption

Replaces Old Rule – Expanded Scope §425.1

- Complete overhaul and name
 - “Rule Concerning Recurring Subscriptions and Other Negative Option Plans”
- Applies to all forms of negative option plans in all media
 - Prenotification
 - Continuity
 - Automatic renewals
 - Free Trials
- Codifies prior guidance in a Rule, triggering civil penalties for *all* violations
 - Enforcement Policy Statement
 - Notice of Penalty Offenses

“Clear and Conspicuous” §425.2(c)

Online

- Required disclosures must be “*Easily noticeable and easily understandable by ordinary consumers*”
- Notably, does not adopt CA definition but consistent with conceptual standard
- Visually “must stand out” from other accompanying text on the page
 - By size, contrast, location, length of time of appearance
- Must be unavoidable... not behind a link or hover over

Audible

- Including telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

“Clear and Conspicuous” §425.2(c)

- In any communication **that is solely visual or solely audible**, the disclosure must be made through the same means through which the communication is presented.
- In any communication **made through both visual and audible means**, such as a television advertisement, the disclosure **must be presented simultaneously in both the visual and audible portions** of the communication **even if the representation requiring the disclosure is made in only one means**.
- “Communication” undefined in proposed new Rule
 - Ad banner? TV or radio teaser?
 - No guidance in NPR
- Offers made on television and via online videos will need to present material disclosures both onscreen and in voiceover.

Prohibition on Misrepresentations §425.3

- Would make any “*misrepresentation of a material fact*” in a negative option a violation of the Rule
 - Subject to \$50,120 civil penalty per violation
- What is “material?” FTC examples:
 - “Costs, product efficacy, free trial claims, processing or shipping fees, billing information use, deadlines, consumer authorization, refunds, cancellation”
- Very concerning given broad coverage
- Must carefully review every claim in an offer to avoid violations
- Dovetails with recent Notice of Penalty Offenses authority
 - Unsubstantiated claims, Deceptive Endorsements, Money Making claims, Education
- Strong Dissent from (outgoing) Commissioner Christine Wilson
 - Outside scope of negative option rule rulemaking – was not included in ANPR
 - Compensating for loss of penalty authority under SCOTUS 2021 AMG Capital Mgmt

Disclosure of Important Information §425.4

- Generally tracks ROSCA, TSR and most state law requirements
 - Payments will be recurring, if applicable
 - Deadline to cancel to avoid charges
 - Amount or ranges of costs
 - The date charges will be submitted for payment
 - Unclear on whether exact date is required or “every thirty days” “every month”
 - If unable to identify a date, use language that provides context and expectation
 - “You will be charged today and every month thereafter...”
- Placement
 - Disclosures that **directly relate** to the Negative Option Feature must appear immediately adjacent to the method used to capture consent (i.e., submit button or check box)
 - No “waterfalling” or layered disclosures
 - Disclosures that **do not** directly relate to the Negative Option Feature must appear before consumers make a decision to buy (e.g., before they “add to shopping cart”).
 - Will apply to “other misrepresentations” about the offer

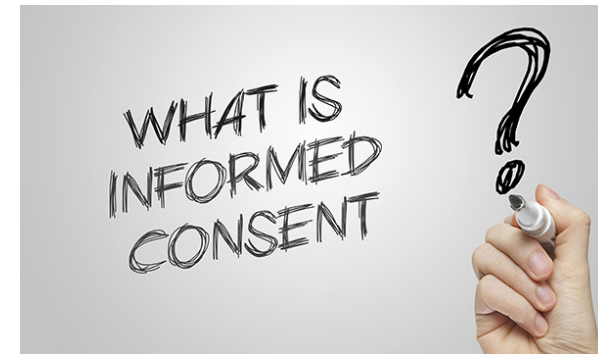
Disclosure of Important Information §425.4

- §425.4 (b) (3)
 - “Other Information: **All communications, regardless of media**, must not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to read, hear, see, **or otherwise understand the disclosures**, including any information not directly related to the material terms and conditions of any Negative Option Feature.”
 - Applies to ads advertising the subscription?
 - Also applies to other (non NOF) claims

Consent §425.5

“Express Informed Consent”

- “Obtain the consumer’s unambiguously affirmative consent to the Negative Option Feature offer **separately from any other portion of the transaction**” §425.5(a)(1)
 - Need for a check box? Not expressly required in the new Rule.
 - Suggested in Enforcement Policy Statement (not force of law)
 - Current Check Box Requirements
 - Vermont (year or longer initial term) and DC (free trials)
 - Required in regulatory various settlements
- But also have to get consent to **the rest of the transaction** §425.5(a)(3)
 - Suggests there’s more?
 - What if there is no other part of the transaction?
 - More on this in Recordkeeping Section §425.5(c)



Consent §425.5 Check box continued...considerations from the NPR

- FTC NPR: For “written offers, sellers **may** obtain express informed consent through a check box, signature or substantially similar method...” (more on this in Recordkeeping)
 - Not “must”
- FTC: *“In addition, consistent with ROSCA, judicial decisions applying Section 5, and cases brought by the Commission, the seller **should** obtain the consumer’s acceptance of the negative option feature offer separately from any other portion of the entire transaction.”* (NPR at 14).
 - Not “must”
- FTC: *“This approach should protect consumers and marketers alike. **Consumers are assured they pay for only the goods and services they choose, and marketers can opt for the certainty of avoiding liability by adhering to the Commission’s proposed means of compliance.** Alternatively, marketers are free to innovate as long as they meet the express informed consent standard.”* (NPR at 49).
- FTC rejects AG and TINA suggestions for consumer consent to be charged after a trial
 - But also asks for comments on this proposal...ruh roh

Consent §425.5

- Other Copy in Neg Op Authorization?
 - “Not include any information that interferes with, **detracts from**, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent to the Negative Option Feature” §425.5(a)(2)
 - Unclear whether “detracts from” prohibits any other copy in a consent authorization.
 - No guidance in NPR
 - Use caution in drafting.
- Recordkeeping §425.5(a)(4)
 - Keep/maintain consent verifications for the longer of: 3 years and 1 year following termination of the subscription
 - Challenging for all acceptances...even if cancelled during free trial.
 - Considerations for third party platforms billing the subscription

Consent §425.5

- Telemarketing Sales §425.5(b)
 - Make and maintain an audio recording of the entire telemarketing transaction. 16 CFR § 310.5
 - Free trial with pre-acquired account information – obtain and record, at a minimum, the last four (4) digits of the account number to be charged. 16 CFR § 310.4(a)(7)(i)
- Documentation of Unambiguously Affirmative Consent for Written Offers §425.5(c)
 - “A Negative Option Seller will be deemed in compliance with the requirements of **paragraph (a)(3)** of this section for all written offers (including over the Internet or phone applications), if that seller obtains the required consent through a check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign to accept the Negative Option Feature and no other portion of the transaction.”

Paragraph (a)(3) is the ***the entire transaction***

No reference to Negative Option Feature only?

But wait...Safe Harbor? “*will be deemed in compliance?*”

Simple Cancellation §425.6

- Allow for a “simple mechanism to cancel” §425.6(a)
- Simple Mechanism *must be as easy to use* as the method to enroll §425.6(b)
 - aka “click to cancel”
- Simple Mechanism *must be the same way as enrolled* §425.6(c)
 - For online cancel, at a minimum, must be over the same website or web-based application the consumer used to enroll. §425.6(c)(1)
 - Third party billing platforms?
 - For telephone cancel, at a minimum, provide a telephone number that is answered *promptly* during normal business hours and is not more costly than the telephone call the consumer used to enroll. §425.6(c)(2)
 - “promptly” not defined
 - For in person sales, cancel method may be online or by telephone in addition to, where practical, the in-person method used to enroll. §425.6(c)(3)

Simple Cancellation §425.6 “Click to Cancel”

- The NPR offers little guidance on how “Click to cancel” must work.
- Provides flexibility in lieu of prescribing specific requirements, “[t]he lack of detailed requirements affords businesses flexibility in meeting the proposed Rule’s simple cancellation standard.” (NPR at 51).
- FTC rejected comments suggesting a prohibition against additional steps, such as imposing security requirements, e.g., log in to account.
- Cancellation only applies to the Negative Option Feature and future recurring charges. Neither the Rule nor language in the NPR suggests a cancellation request to be interpreted to require immediate termination of the agreement.
 - But consider consumer expectations. Use care with online and phone scripting.

Cancellation - Saves §425.6(d)

- Intentionally included in the Simple Cancel Section...expectation is to honor cancellation without saves.
 - NPR: “*many businesses have created unnecessary and burdensome obstacles in the cancellation process, including forcing uninterested consumers to listen to multiple upsells before allowing cancellation, **that are not outweighed by countervailing benefits to consumers or competition.***” (NPR at 53).
- Novel requirement...without peer in any state law or card association rules.
- Sellers must **immediately** cancel a Negative Option Feature upon request from a consumer, unless the seller **obtains the consumer’s unambiguously affirmative consent** to receive a Save prior to cancellation.
 - FTC NPR: “*Would you like to consider a different price or plan that could save you money?*”
 - If declined, must desist from presenting such offers and cancel the negative option arrangement immediately.
- Consent only applies to the cancellation attempt in question and not to subsequent attempts.
- Must maintain verification of the consumer’s consent for the longer of three years and one year after the contract is terminated.

Annual Reminder Notices §425.7

- For all non-physical product programs/subscriptions (e.g., audio/video streaming, software subscriptions, membership buying clubs) **sellers must send consumers a reminder, *at least annually***, identifying the product or service, the frequency and amount of charges, and the means to cancel.
- Must be provided **through the same medium** (such as Internet, telephone, or mail) the consumer used to enroll. For in-person sales, must provide the reminder through online or by telephone in addition to, where practical, an in-person method similar to enrollment.
 - How applied to phone sales...a telephone call?
 - Silent on allowing consumers to choose how to receive notices.
- Applies regardless of billing frequency -- monthly, quarterly, semi-annually
 - Similar to recent Colorado and Delaware laws

No State Law Pre-emption §425.8

- Would not pre-empt, supersede, or affect any state law, regulation, order, or interpretation relating to negative option requirements, except to the extent inconsistent with the New Rule, and then only to the extent of the inconsistency.
- Any greater protections afforded consumers by state law would not be considered to be inconsistent with the Rule.
 - Multiple renewal notices

Timing

- Comments were due June 23, 2023
- Staff reviews comments and makes recommendations
- Commission can
 - Issue Final Rule and Statement of Basis and Purpose
 - Publish a further NPR
- Final Rule Becomes effective following publication in Code of Federal Regulations
 - Typically 60 days from publication

Current State Laws – Common Elements

- Offer Terms
 - Must be presented “clearly and conspicuously”
 - Specifically defined in CA, HI, ND, OR
- Consumer Agreement
 - Consumer must take an affirmative action to agree to the offer terms
 - Special requirements in VT, DC, GA
- Notices
 - Order acknowledgment
 - Renewal notices
 - Typically 30-60 days before
 - Link to cancel option/instructions
 - Change in terms
- Cancellation
 - Must provide an “easy” way to cancel
 - Trend toward allowing online cancel options
 - Regulators concerned with confusing and burdensome phone/IVR options

New State Laws

Connecticut SB 5314

- Effective October 1, 2023
- Supplements, does not replace, existing law [Conn. Gen. Stat. Ann. § 42-126b](#)
- Generally mirrors California ARL re “C&C” definition, allow online cancel option for online buyers.
- Allow seller to verify consumer identify before cancel
- Notice of material change
- **NEW**: Notice prior to end of free/introductory trial
 - >31 days... notice 3-21 days prior
 - >year....notice 15-45 days prior
- Request for Written Invoices. Requires sellers who bill customers by electronic invoice the ability to request and receive these invoices in paper form.

New State Laws

Georgia HB 528

- Signed May 3, 2023, effective January 1, 2024
- Replaces existing state auto renewal law [Ga. Code Ann., §§ 13-12-2 – 13-12-3](#)
- Generally mirrors California ARL
- No private right of action
- AG enforces
- Good faith defense

New State Laws

Idaho HB 116

- Signed into law March 21, 2023, effective July 1, 2023.
- Amends current law [48-603g](#).
- Repeals requirement to have two methods of cancellation, to now just require a single *“cost effective, timely, and easy-to-use online mechanism that may include a termination email formatted and provided by the seller, all at no cost to the consumer.”*
- Expressly prohibits private right of action
- No civil penalties where good faith effort to comply

New State Laws

Illinois SB 328

- Signed into law June 9, 2023. Amends current Automatic Contract Renewal Law [815 ILCS 601/1](#).
- Prescribes particular disclosures that must be made to consumers prior to enrollment
- Defines “clear and conspicuous” similar to the California ARL
- Requires an order acknowledgment that includes the auto renewal terms, cancellation policy and information regarding how to cancel (which could be a link to instructions) in a manner that may be retained by the consumer
- If an offer includes a free gift or trial, how to cancel before the consumer pays for the goods or services associated with the offer.

New State Laws

Kentucky SB 30

- New law. Signed March 23, 2023, effective January 1, 2024.
- Terms. Disclose enrollment terms clearly and conspicuously (same definition as California ARL).
- Order Acknowledgement. Reiterate the terms and how to cancel.
- Material Change. Send notice of material change.
- Cancellation. Toll-free telephone number, sending an email, mailing a letter via USPS (if a bill is sent), or another cost-effective, timely, and easy-to-use mechanism. Online cancel for online enrolment.

New State Laws

North Dakota HB 1228

- Signed into law April 7, 2023. Effective July 31, 2023.
- Expands the scope of the existing auto renewal law [N.D. CENT. CODE ANN. § 51-37-02](#) from the sale of “merchandise” to include services.
- Only applies to contracts entered into after July 31, 2023.

New State Laws

Tennessee SB 1449

- Signed into law March 21, 2023, effective January 1, 2024.
- Expands the number of entities exempt from the current [auto renewal law](#) to include, among others, companies offering motor vehicle extended service contracts, road hazard contracts, dent removal contracts, or motor vehicle key fob replacement contracts.

New State Laws

Virginia SB 1540

- Signed into law March 23, 2023, effective July 1, 2023.
- Amends the current auto renewal law at [§ 59.1-207.46](#)
- Defines “clear and conspicuous” similar to the California ARL.
- Includes a number of new exemptions from the law.

Pending State Bills

[New York S382](#) [New York A3245](#)

[Pennsylvania HB 116](#)

[Rhode Island. S.B. 171](#)

[Massachusetts H 545](#)

[Missouri HB 1029](#)

[New Jersey A526](#)

[Texas HB 2165](#)

[Utah HB 382](#)

Mastercard Rules – Effective September 22, 2022

- [Revised Merchant rules](#) – “announced September 2021”
- Applies to “digital goods” (as well as services)
- Terms Disclosure
 - At the point of payment
 - Card entry area, order summary
 - Not in Terms of Use or behind a link
 - Price that will be billed and the frequency of the billing.
 - Mastercard: “You will be billed USD 9.95 per month until you cancel the subscription.”
 - Free trial terms, including any initial charges, the length of the trial period, and the price and frequency of the subsequent subscription charges.
 - Mastercard: “You will be billed USD 2.99 today for a 30-day trial. Once the trial ends, you will be billed USD 19.99 each month thereafter until you cancel.”

Mastercard Rules – September 22, 2022

Notices – to be sent electronically, e-mail or SMS (ruh roh)

- Free trial longer than 7 days
 - 3-7 days prior, instructions on how to cancel
- Order Confirmation
 - Reiterate order details, including cancel instructions
- Renewal
 - For subscriptions 6 months or longer, 7-30 days prior to renewal
 - Consider state laws that require 30-60 prior notice
 - Price and date of charge, cancel instructions
- Transaction receipt - optional
 - After charge, cancel instructions

New Mastercard Rules – September 22, 2022

- Cancel options
 - Must provide an online or electronic cancellation method (similar to unsubscribing from email messages or any other electronic method), OR
 - Clear instructions on how to cancel that are easily accessible online
 - Mastercard: "Manage Subscription" or "Cancel Subscription" link on the merchant's page

Lessons from Relevant Cases

- NYT Decision Under North Carolina Law
 - Undefined "clear and conspicuous" less stringent than CA ARL
- Be mindful of "clear and conspicuous" disclosures
 - Consider proximity to agree button
- Review Terms of Use
 - Dispute resolution provision (mandatory arbitration/class action waiver)
 - Must be "clear and conspicuous" – "inquiry notice"
 - Consider a check box
- Changes to Terms
 - May require affirmative consumer acknowledgement and agreement
 - See Bumble and Dropbox
- Easy cancellation
 - Heightened class action and regulatory concerns

Thank you!

Don't forget to submit your
session evaluation!

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