

CLIENT ALERT | July 11, 2025

Eighth Circuit Vacates FTC's Click-to-Cancel Rule Days Before Compliance Deadline

Although the entire Rule has been vacated, businesses offering negative option programs should remain aware of general unfair and deceptive advertising principles and applicable state law requirements.

Key Points:

- On July 8, the US Court of Appeals for the Eighth Circuit vacated the entirety of the Federal Trade Commission's (FTC or the Commission) Negative Option Rule (the Rule or the click-to-cancel rule) due to procedural deficiencies in the FTC's rulemaking process.
- Holding that the FTC's request for a party-specific vacatur is not feasible, the Court vacated the Rule days before its most onerous requirements were scheduled to go into effect.
- Companies that would have been subject to the Rule are now relieved of its specific compliance requirements, but are still subject to laws targeting negative option programs. These include the Restore Online Shoppers' Confidence Act (ROSCA) and state autorenewal laws, as well as Section 5 of the FTC Act and analogous state unfair and deceptive trade practices (UDAP) laws.

On July 8, 2025, the US Court of Appeals for the Eighth Circuit issued a per curiam opinion in *Custom Communications, Inc. v. Federal Trade Commission*.¹ In doing so, the Eighth Circuit vacated the Rule in its entirety, which the FTC was poised to start enforcing in full on July 14, 2025. Despite acknowledging support for the FTC's efforts to eradicate the use of unfair and deceptive practices in negative option marketing, the Court found that the FTC's failure to conduct a preliminary regulatory analysis during the rulemaking process (which is required for any proposed rule with an estimated annual economic effect of at least \$100 million) was a fatal, prejudicial error, necessitating complete vacatur.

As detailed in our January [Client Alert](#), the Rule introduced requirements for B2C and B2B companies offering negative option terms to consumers that would have impacted marketing, disclosure, consent, and cancellation practices. The Rule was issued on October 16, 2024, and came into effect on January 14, 2025, but ultimately the FTC deferred the compliance deadline for certain provisions to July 14, 2025, in view of the "complexity of compliance" and "burdens" associated with these requirements.² The FTC's statement did not acknowledge the other likely cause of the deferral — the multiple pending lawsuits challenging the Rule that were filed by several businesses and industry associations in various circuit courts. Those cases were consolidated under *Custom Communications, Inc. v. Federal Trade*

Commission in front of the Eighth Circuit, which has now issued its final ruling just days before the Rule was set to take full effect.

The petitioners collectively challenged the Rule on multiple grounds, including that the Commission failed to issue a preliminary regulatory analysis, thereby depriving the petitioners the opportunity to “dissuade the FTC from adopting the Rule as proposed.”³ The Eighth Circuit accepted this argument and, therefore, did not reach the other more substantive grounds in its decision.

The Commission originally estimated that the Rule’s annual economic effect would not exceed \$100 million, and so did not perform the preliminary regulatory analysis required for proposed rules that surpass that amount.⁴ However, during informal hearing sessions before an Administrative Law Judge (ALJ), the ALJ determined that the compliance burden would be greater than \$100 million annually.⁵

The Eighth Circuit ruled that following the ALJ’s determination, the FTC could (and should) have issued the preliminary analysis at that time. Because the Commission instead proceeded with its final rulemaking, the Court found that the petitioners could not engage with the Commission on the potential alternatives to the Rule or the anticipated compliance burden.

Finding that the petitioners demonstrated prejudicial error as a result of this procedural noncompliance, the Court vacated the Rule in its entirety.⁶

What Comes Next?

As a formal legal matter, the Commission has the option to petition the Supreme Court to review the decision, on or before October 6, 2025. Whether the Commission will seek review is not clear. While in the minority during the prior Administration, two of the three current Commissioners, Melissa Holyoak and Chairman Andrew Ferguson, dissented to approving the final Rule largely on procedural, non-substantive grounds. Businesses should, however, keep in mind that the principles for disclosure and consent have received bipartisan support and generally align with the views of the Consumer Protection Division, including current leaders.

As a result, companies offering negative option features should not consider the vacatur decision an opportunity to reduce pro-consumer consent and disclosure features. Online businesses with automatic renewal and other covered practices are still subject to the FTC’s broader authority under Section 5 to police unfair and deceptive practices, which the Commission originally stated were “widespread in the marketplace” of negative option programs and “a persistent source of consumer harm for decades,”⁷ prompting development of the Rule. The current Commission continues to investigate and enforce ROSCA and Section 5 violations in connection with autorenewal, subscription, and free-to-paid conversion terms and practices. Indeed, the vacation of the click-to-cancel rule certainly does not lower, and, in fact, more likely raises risk of enforcement under traditional Section 5 principles, which have the flexibility to reach many of the same categories of user interfaces and experiences supporting the policy rationale for the click-to-cancel rule.

Companies that already took steps to comply with the now-abandoned Rule should not necessarily roll back modifications or revert to less transparent or consent-based interfaces, at the risk of case-by-case FTC enforcement. Companies that would have been subject to the Rule, but did not fully prepare for the July 14 compliance deadline, may now have more breathing room to assess their programs for potential weaknesses and be better prepared to align their interfaces with modern FTC perspectives, as informed by the principles if not the letter of the Rule.

Moreover, automatic renewal laws in California, New York, and other states contain many of the same disclosure, consent, and cancellation requirements as the Rule and reflect the same policy objectives of disclosure and express affirmative consent to automatic renewal or continuous service terms. Some of these policy objectives are covered in our October 2024 [Client Alert](#). In fact, just before the Eighth Circuit decision was published, New York Attorney General Letitia James expressed support for the Negative Option Rule in a July 8 [Consumer Alert](#), encouraging New Yorkers to take advantage of the Rule's consumer benefits. Given that New York also recently amended its existing laws affecting automatic renewal programs to include new affirmative consent, cancellation, and disclosure requirements, the Attorney General may be more inclined than ever to pursue businesses that engage in unlawful negative option practices.

In short, notwithstanding the Eighth Circuit vacating the FTC's Negative Option Rule in its entirety, companies preparing for operational compliance still face a patchwork of regulations, state laws, and enforcement trends. As noted in the conclusion of our May 2025 [Client Alert](#), companies may wish to adopt lowest-common-denominator compliance practices that consider all sources of applicable law. Latham lawyers are positioned to help B2C and B2B companies navigate these state laws and anticipate federal agency developments.

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Endnotes

¹ *Custom Commc'ns v. FTC*, No. 24-3137, 2025 WL 1873489 (8th Cir. July 8, 2025).

² FTC, [Statement of the Commission Regarding the Negative Option Rule](#) (May 9, 2025).

³ *Custom Commc'ns*, 2025 WL 1873489, at *8.

⁴ 15 U.S.C. § 57b-3(b)(1)(B)-(C).

⁵ *Custom Commc'ns*, 2025 WL 1873489, at *4.

⁶ 15 U.S.C. § 57a(e)(3), adopting 5 U.S.C. § 706 (the court “shall hold unlawful and set aside” an agency action that is “without observance of procedure required by law”).

⁷ Negative Option Rule, [89 Fed. Reg. 90476](#) (Nov. 15, 2024).