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B-336892

December 5, 2024

The Honorable Maria Cantwell
Chair
The Honorable Ted Cruz
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Cathy McMorris Rodgers
Chair
The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Federal Trade Commission: Negative Option Rule*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Federal Trade Commission (FTC) entitled “Negative Option Rule” (RIN: 3084-AB60). We received the rule on November 22, 2024. It was published in the *Federal Register* on November 15, 2024. 89 Fed. Reg. 90476. The stated effective date of the rule is January 14, 2025.

This rule amends FTC’s trade regulation “Rule Concerning Use of Prenotification Negative Option Plans,” retitled “Rule Concerning Recurring Subscriptions and other Negative Option Programs.” The rule now applies to all negative option programs in any media. Among other things, the rule (1) prohibits misrepresentations of any material fact made while marketing using negative option features; (2) requires sellers to provide important information prior to obtaining consumers’ billing information and charging consumers; (3) requires sellers to obtain consumers’ unambiguously affirmative consent to the negative option feature prior to charging them; and (4) requires sellers to provide consumers with simple cancellation mechanisms to immediately halt all recurring charges.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The rule was published in the *Federal Register* on November 15, 2024, and was received by the House and the Senate on November 20, 2024. 89 Fed. Reg. 90476; Email from Attorney, FTC, to CRA Rules, GAO, *Subject: Another rule from the FTC* (Nov. 22, 2024). The rule has a stated effective date of January 14, 2025, though regulated entities will have until May 14, 2025, to comply with sections 425.4 through 425.6. Therefore, the stated effective date is less than 60 days from November 20, 2024.

Enclosed is our assessment of FTC's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Joel Christie
Attorney
Federal Trade Commission

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
FEDERAL TRADE COMMISSION
ENTITLED
“NEGATIVE OPTION RULE”
(RIN: 3084-AB60)

(i) Cost-benefit analysis

The Federal Trade Commission (FTC) prepared an analysis of the costs and benefits for this rule. See 89 Fed. Reg. 90518–90533 (Nov. 15, 2024). FTC estimated the present discounted value of quantified benefits over ten years, using a two percent discount rate, will range between \$6.1 billion and \$49.3 billion. *Id.* at 90519. FTC estimated the present discounted value of quantified costs over ten years, using a two percent discount rate, will range between \$100.9 million and \$826.2 million. *Id.*

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

FTC certified that this rule will not have a significant economic impact on a substantial number of small entities. See 89 Fed. Reg. 90534.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

As an independent regulatory agency, FTC is not subject to the Act.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

As an independent regulatory agency, FTC is not subject to the Act.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On April 24, 2023, FTC published a proposed rule. 88 Fed. Reg. 24716. FTC stated that it received comments from various interested parties. See 89 Fed. Reg. 90480. FTC responded to comments in the rule. *Id.* at 90481.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

FTC determined that this rule contains information collection requirements under the Act. 89 Fed. Reg. 90536.

Statutory authorization for the rule

FTC promulgated this rule pursuant to 15 U.S.C. § 57a and 5 U.S.C. § 533.

Executive Order No. 12866 (Regulatory Planning and Review)

As an independent regulatory agency, FTC is not subject to the Order's regulatory review procedures.

Executive Order No. 13132 (Federalism)

As an independent regulatory agency, FTC is not subject to the Order.