



Hudson Cook Enforcement Alert: Eighth Circuit Vacates FTC's Negative Option Rule

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HIGHLIGHTS:

- The U.S. Court of Appeals for the Eighth Circuit vacated the FTC's Negative Option Rule in its entirety, just days before the Commission was set to begin enforcement.
- The Rule was set to impose enrollment and cancellation requirements on businesses offering automatically renewing subscriptions.
- The court held that procedural deficiencies in the rulemaking process deprived interested parties the opportunity to comment on the economic estimate and alternatives to the Rule.

CASE SUMMARY:

On July 8, 2025, the Eighth Circuit issued an opinion that vacated the FTC's Negative Option Rule in its entirety. The FTC's compliance deadline for the Rule, which had been extended once, was set to go into effect on July 14th. The Eighth Circuit vacated the Rule based on procedural deficiencies in the rulemaking process.

The FTC finalized the Negative Option Rule on November 15, 2024. Shortly after the FTC finalized the Rule, various industry associations and businesses challenged the rule in four circuit courts of appeals. The Rule required sellers to obtain, and maintain records of, unambiguous affirmative consent to the negative option feature and to provide a simple mechanism for cancellation that was as easy to use as the mechanism the consumer used to consent to the subscription.

The Eighth Circuit held that the FTC erroneously determined that the national economic effect of the proposed rule would be under \$100 million, and, on that basis, declined to conduct a preliminary regulatory analysis describing and analyzing the reasonable regulatory alternatives to the proposed rule. In January and February 2024, the FTC held informal hearings before an ALJ, who observed that unless each business used fewer than twenty-three hours of professional services at the lowest end of the spectrum of estimated hourly rates, the Rule's compliance costs would exceed \$100 million. The ALJ found that this estimate was "clearly unrealistically low" and that the Rule would have an annual effect on the national economy that exceeded the \$100 million threshold.

The court held that this failure deprived businesses and other interested parties of the opportunity to engage with the FTC's cost-benefit estimates during the rulemaking process. The court determined that the procedural deficiencies in the rulemaking process caused prejudice to the interested parties and—given the breadth of the Rule's coverage—vacated the entire Rule.

The FTC's Negative Option Rule has been vacated in its entirety, and it is unclear whether the FTC, now under new leadership, will seek Supreme Court review or re-initiate the rulemaking process. The FTC may bring enforcement actions under other statutory provisions if it determines that a company's auto-renewal practices are unfair or deceptive. In addition, several states have implemented their own negative option rules that are similar to the requirements in the FTC's vacated Rule. As state attorneys general are increasingly focused on enforcement, companies should review their policies to ensure compliance with state laws.

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