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FTC Alleges Amazon Prime Subscription and Cancellation Screens Violate Federal Law

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ALERTS

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The recent suit filed by the Federal Trade Commission (FTC) represents the latest guidance in the rapidly evolving patchwork of federal and state laws that govern online subscription models. Any company offering subscription services should take note. In addition to increased activity by federal and state regulators regarding subscription services, plaintiff firms representing consumers remain incredibly active in filing lawsuits and demanding substantial settlement payments when customer-facing sites do not strictly comply with the emerging requirements for subscription-based services.

Background

The FTC sued Amazon for violating the FTC Act and the Restore Online Shoppers' Confidence Act (ROSCA) over Amazon's use of so-called "dark patterns" during the Prime subscription enrollment and cancellation flows. Under ROSCA, companies must a) clearly and conspicuously disclose all material terms of the transaction before obtaining the consumer's billing information; b) obtain the consumer's express informed consent before making the charge; and c) provide simple mechanisms to stop recurring charges. The FTC alleged that Amazon violated the first two requirements by 1) burying the fact that Prime is a subscription service below the "Get FREE Two-Day Delivery with Prime," which consumers could not see without scrolling; and 2) not disclosing Prime's price on the order page. As to ROSCA's requirement that cancellation be simple, the FTC complaint references Prime's "four-page, six-click, fifteen-option" cancellation flow, as compared to the one or two-click process to sign up for Prime. It also takes issue with the fact that, although consumers could enroll in Prime through Amazon FireStick and Fire TV, they could not cancel through those same technologies.

Alleged Manipulative Designs (So-Called "Dark Patterns")

The complaint spells out what the FTC believes to be specific "manipulative" designs or "dark patterns" in the enrollment and cancellation flows:

- Forced Action. The complaint takes issue with Amazon requiring consumers to choose whether to enroll in Prime *before* allowing them to complete their purchases and forcing them to click through multiple screens before allowing customers to cancel their membership.
- Interface Interference. The complaint states that "Interface Interference" manipulates users by privileging certain specific information relative to other information. Amazon allegedly violated this principle by emphasizing "free shipping" options over the terms and conditions of Prime and emphasizing options that would continue the consumer's enrollment over cancellation.
- Obstruction. The FTC alleged that Amazon made both the option to decline enrollment in Prime and the cancellation instructions difficult to locate.
- Misdirection. The FTC alleged that Amazon used "misdirection" by presenting asymmetric choices.

- Sneaking. The FTC alleged that Amazon engaged in "sneaking" by hiding or disguising the auto-renewal features and price of Prime.[1]

Significance of Action

The case is significant because it signals increased scrutiny of subscription services at both the state and federal level. While this case has been brought by the FTC, it is likely that plaintiffs bringing consumer class action lawsuits under state automatic renewal laws will be tracking this case closely. The requirements of ROSCA and automatic renewal law statutes are similar, but not identical.

At the federal level, this case follows on FTC ROSCA cases against companies like Vonage (where the company settled for $100 million), as well as a rulemaking proceeding in which the FTC is proposing even more stringent rules involving subscription services with negative option features. The complaint against Amazon is itself noteworthy in its inflammatory language, citing "dark patterns," "manipulative design elements," and "coercive" practices. The press release accompanying the complaint calls out Amazon for "sabotaging" consumer attempts to cancel and "cancellation trickery." The complaint, while not naming individuals in the caption, includes paragraphs of allegations against identified individuals. And public reports suggest that the FTC filed the complaint without giving Amazon the opportunity to meet with Commissioners, as is customary in FTC matters. All of these factors are consistent with the FTC's aggressive posture on disclosures associated with subscription services.

Practical Takeaways

To mitigate risks of regulatory scrutiny, companies may want to consider the following practices when advertising subscription services with negative option features:

- Keep subscription terms "above the fold." Include material terms, including the subscription price, before customers need to scroll down or before the subscribe button.
- Present neutral options to customers. Subscribe buttons and options to proceed without a subscription, or different subscription options should be presented in the same colors and with the same prominence.
- Make cancellation easy. Allow customers to easily unsubscribe, with as few clicks as possible. Provide a cancellation method on the same devices, apps, or websites consumers use to sign up.

For more information on federal requirements for subscription services, please contact Maneesha Mithal, Khoury Trombetta, or another member of the firm's privacy and cybersecurity practice. For state laws in this area, please contact Dale Bish, Amit Gressel, or another member of the firm's litigation group.

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[1]The FTC also alleges "confirm shaming," the practice of using emotive wording around a disfavored option to "guilt" users into selecting the favored option, but the specific allegations on this point are redacted.