**Podcast Transcript**

# AD Nauseam: Negative Option Rule

**Date:** December 3, 2024

**Guest:** Amy Mudge, Daniel Kaufman **Host:** Randall Rubenking

**Run Time:** 20:43

**For questions and comments contact:**


**Amy Ralph Mudge**

Partner
Washington. D.C.
T: +1.202.861.1519 | amudge@bakerlaw.com



**Daniel Kaufman**

Partner

Washington. D.C.

T: +1.202.861.1523 | dkaufman@bakerlaw.com


Rubenking: Thank you for joining us for another episode of BakerHosts' AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Randall Rubenking and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. On today's episode of AD Nauseum, Amy and Daniel talk about the new FTC Negative Option Rule. With that welcome to AD Nauseam, and let's turn it over to Amy and Daniel.

Mudge: Welcome back to AD Nauseam, everyone. We are excited to talk about what everyone has been buzzing about and that is the FTC's new rule on negative option marketing. Now, Daniel, on our last episode, we talked about transition and some predictions for the new FTC in 2025 and whether this rule would survive in whole or in part with this change of administration. But today we're going to talk about this rule as it exists now, because right now you can't run, you can't hide, and we've had some pretty big changes in the subscription marketing area. And barring anything crazy, it is going to be effective soon. The rule was, it's got to be published in the Federal Register, and it did manage to get its publication date. So, so far, at least part of the rule, the part on misstatements, becomes effective January 14, and then the rest of the rule for everything else is scheduled to become effective May 14.

Kaufman: Yeah. And look, notably that January date is before the inauguration. So, again, there is a lot of activity. We'll talk about it, but it might still be premature to put those dates in your calendar maybe, but before we get to the heart of the matter, Amy, holiday season is fast approaching. What is the worst holiday gift you have ever received or witnessed?

Mudge: Oh, my gosh. There's been so many, Daniel. There have been so many. I'm not sure if my mother-in-law listens to this podcast. I love her dearly and her heart is always in the right place. She actually gave me the same gift three Christmases in a row. You remember those immersion blenders? The ones you can stick in to mash up your gravy or whatnot? Yeah, I'm not sure, she really, really wanted to make sure I had one of those, one or two or three, and every year I had to appear to be very surprised.

Kaufman: You can make a really good soup with that though. I mean, it is…

Mudge: You can, no. You make great soup, but I, how am I going to make three soups at the same time, Daniel? I only got two arms.

Kaufman: That is true.

Mudge: And I might have regifted some of them, but I think I gave them to my kids. Maybe not the worst. Actually, it is the best. We all love Barefoot Contessa in my house. We, but one year we also, all of us gave the same Barefoot Contessa cookbook to each other. I think there were five copies bought and unwrapped and each of us, yeah. We all, I'm happy to give Ina lots of money though. How about you?

Kaufman: So, I mean one that has always haunted me was one holiday season, it was just the worst box of half-off discounted drinking glasses that my ex got me. It was just, really it was, there was nothing appealing about it. It was just, it was an odd gift. Put it that way. And I still joke about it to this day, about the gift of the drinking glasses, which I don't know.

Mudge: Is this why said person was an ex?

Kaufman: Other reasons for that.

Mudge: Was it the drinking glasses?

Kaufman: Other reasons for that.

Mudge: Okay. Alright. So, alright, drinking glasses did not put it over the edge, but maybe contributed. Alright, so how about a little bit less negativity, Daniel, around the holidays? What treats are you looking forward to? What are your holiday traditions?

Kaufman: So, I would say, and I know this friend of mine is not listening to this podcast, so perhaps a friend in common will do this, I would like to get some of Kim's treats this year. I miss the sugar cookies and the cornflake treats and all that stuff. So, I am due for some Kim treats this year.

Mudge: I don't even want to talk about Kim not listening to our podcast. We will take that up on that. Kim, Kim, we're coming for you. Alright. You're going to be an AD Nauseam subscriber. So, I love, mine are easier because I can buy them. I love Frango mints. They were from the old Marshall Fields in Chicago. And now that Macy's owns that, they still make them and my whole family gets, just gets so excited when that green box comes out. And then the thing that kicks off our holidays every year that I love so much is The Jinkx and Dayla Holiday Show, which this year is coming to D.C. right after Thanksgiving. So, I will be in the holiday spirit for sure as soon as I see my two favorite drag queens.

Kaufman: Ah, that should be amazing. Okay, so let us turn now to a brand new FTC rule. It has been finalized. It's been published in the Federal Register. Its effective dates are set, So, what is there to talk about? Well, quite a lot, but let's start with the obvious question. Why does the FTC need this rule when it has ROSCA? And what is the core difference between ROSCA and this rule?

Mudge: So, Congress passed ROSCA, or the Restore Online Shoppers Confidence Act. Doesn't that sound like a yes, please do that? It was a while ago. It is 15 years or so ago, and it is a very tersely-worded statute and there is no rulemaking. The FTC and the states are given authority to enforce it, but no rulemaking authority was issued. So, for quite some time, the FTC is using the ROSCA statute, which does apply penalties for violations which makes it exciting to go after subscription services, but it only applies to online services, okay. And then when it came to cancellation requirements, all ROSCA says is there has to be a simple method of cancellation. And look, the FTC's issued all sorts of statements and guidance about what those words mean. We get a lot of its views through its settled enforcement actions. But at the end of the day, those aren't rules and when we're left with courts needing to interpret those, those four words. So, after *Loper Bright*, we don't, courts are probably not going to be as deferential to FTC interpretations of ROSCA's limited words. Enter a new rule.

Kaufman: Yeah. There have been a lot of questions about the pretty general language in ROSCAs. So, in 2019, the FTC decided to dust off its old Negative Option Rule, which was seldom used and no longer applicable to modern subscriptions that we think of.

Mudge: And that was the old Columbia Record and Tape Club type, right?

Kaufman: Exactly, yeah. So, that was the old rule. The FTC decided to kick off a new rulemaking to expand the old rule in order to cover, for example, offline practices and to add some specificity. So, that was kicked off in 2019 during the first Trump administration. And then few years later in 2023, a new rule was proposed which was met with lots of concern from companies that use subscription and a lot of comments were filed raising concerns about the rule. To be clear, lots of comments were also filed highly supportive of the rule.

Mudge: Now, I know there were tons of those. Let me just real quick. You said that the dusting off of the old Negative Option Rule happened under the first Trump FTC. But of course, we've talked a lot about thinking the second Trump FTC is not going to focus so much on rules. Was this, well, when they looked at this in 2019, was that just one of the regularly scheduled, every 10 years we take a look at our rules, kicking the tires review?

Kaufman: I think it was a little bit broader than that. They definitely were looking at, there are a lot of different areas where subscriptions and negative options come into play and there was a focus on harmonizing it to some degree. You've got the Telemarketing Sales Rule has some issues there, the FTC Act, ROSCA. So, it was a broader look, but certainly one of the concerns that is being raised about the current revised rule is that the breadth of it really wasn't teed up fully in 2019. So, that is actually one of the issues that is being raised.

Mudge: Oh yeah, let's start with the positive. Okay, I'm a glass-is-half-full girl and the FTC did have to slog through, sift through all of those comments that they received, but when we did get that final rule, there were some material differences from the original proposed rule, and a big one was the original rule would have limited or maybe even cut out completely the ability for companies to do a save-a-sale when people tried to cancel. So, things like, hey, no, no, no, don't leave us today. We'll give you a better deal, which arguably should be good for consumers, and that would have been significantly curtailed. Now those provisions were stricken. The FTC is still warned that you got to be careful about not overdoing save-the-sales. You can't have it be really a bar to actual cancellation. And of course we've got state issues. I think the new California law touches on that as well, but definitely some movement in the rule based on industry comments, which to my mind is good government.

Kaufman: Yeah, I had the same reaction. I was really glad to see some of the changes, but to be clear, the changes were not sufficient to get a unanimous vote of the Commission. There was a 3-2 vote for the rule on party lines. Now, it is worth noting, we've talked in the past about the rule on reviews. That was unanimous, this one not so. So, Commissioner Ferguson hasn't issued a statement thus far, but Commissioner Holyoke did, and she laid out in some detail all of the concerns she has about the rule, from concerns about the FTC exceeding the scope of its authority to concerns about the rule creating bad incentives in the subscription market.

Mudge: Well, yeah. And she also, I mean, she was a little bit wonky, but it was very thoughtful in terms of her dissent, and I know, Daniel, you always go to those dissents first. That is the first, but anything new happens, you go right to the dissent. She had a lot of concerns just procedurally as well, harkening back to the, our administrative law classes, that the rule was broader than the Advanced Notice of Proposed Rulemaking, and that the rule just wasn't specific enough. There was just not a lot of specificity around the actual practices that were unfair or deceptive. And then there was not a showing that whatever those practices were that they were, they were prevalent. In addition, there was not an appropriate look at balancing the good that can come from negative options. And many consumers find those valuable, so she had a lot to say.

Kaufman: So, is there a core aspect of the rule that you think is particularly raising the concerns of Commissioner Holyoke and likely Commissioner Ferguson?

Mudge: Well, look, I know it is called fat ROSCA, which in some ways makes me, I don't like to say that. It sounds like we're fat-shaming ROSCA. It is just, but it does roll off the tongue. But the big issue in fat ROSCA is that it goes so well beyond subscription issues and the rule bans any material misrepresentations, not only related to the subscription features, but any misstatements related to the product you are selling or service you're selling on an ongoing basis. And that is the kind of thing that sweeps in a whole bunch of stuff just because a company happens to be selling on a negative option basis that I really think was the big bugaboo.

Kaufman: Yeah, I think Amy, the other thing that Commissioner Holio talks about is, on the one hand, obviously companies shouldn't be making misrepresentations. This rule, of course, would subject them to massive civil penalties. And there are misreps that you and I and everyone would agree, yeah, that is a misrep. But there is a whole sliding scale, and this is going to disincentivize the subscription model because of potential enormous penalties based upon what happens here. So, we've got a rule that both Republican commissioners have dissented on, an upcoming change in administration, and we haven't even discussed the fact yet that so far four separate actions have been filed in courts of appeal throughout the country, challenging the rule. Of course, the misrep part of the rule is scheduled to come into effect before the inauguration, with the negative option parts coming into effect in May. So, what is a company to do? It reminds me of the uncertainty we experienced a few months back when the FTC's Non-Compete Rule was being challenged in multiple courts and we were getting closer and closer to the effective dates, and companies were really wrestling with when and how to come into compliance with this newly enacted really significant rule that was likely to get undone by the courts.

Mudge: Yeah. No, look, there is certainly a lot of uncertainty here. The transition, we're going to see some movement on this rule, but it is not going to happen on January 21. They've got other stuff going on. We need to have a Republican majority at the FTC to get the votes, really, to make material changes. So, this is one that companies can ignore this to their peril, and it is something that is important to take, right now, to take a really close look at your practices for marketing and advertising, any subscription services, and how easily consumers can cancel those services, if and when they decide they're done with them. I don't think there are really massive changes to what ROSCA had required, but it is a really good time to take stock and regardless of what happens with this rule, there is still going to be enforcement in this space. The states are still going to be bringing cases. The class action bar is still going to be active. So, even if this rule gets tweaked, negative options are still going to be under a microscope.

Kaufman: That is a really good point, Amy. And look, I really wrestle a lot with this cancellation concept. What does it really mean to have a simple method of cancellation? And over time, the FTC has layered quite a lot over those few words. But at the end of the day, there are a lot of ways to achieve that simple standard. But that said, this is absolutely an area where caution is important. Whether something is simple may be in the eye of the beholder and might not be worth the battle with the FTC when they have in the new rule, provided certainly a more robust description of what the agency at the moment thinks simple means.

Mudge: Hey, but, Daniel, you know what we haven't done?

Kaufman: What, Amy? What have we not done today?

Mudge: Well, other than the misrepresentations provision and a little bit of chatter about cancellation, we haven't really talked about, too much about what is actually in the rule.

Kaufman: Okay, that is an excellent point. But look, at the end of the day, I also think this podcast would be incredibly boring if all we did was spend the whole time talking about what is in a new rule that might possibly have an expiration date, but you're totally right. Amy, give it to us. What are we seeing in the new rule?

Mudge: Alright, you just have my heart aflutter. The big, my biggest panic is having a boring podcast. Alright, I don't, now I want to juggle when I share these provisions. I get, well, I guess we're not video yet, so nobody can see my lack of juggling skills. But yeah, and it is hard to make these things sexy, but they're important. So, alright, let's boil it down to its essence. Disclosure of all material terms, and again at least for now, that is going to be whether those terms relate to the negative option feature or not, but the final rule specifies at minimum that certain terms have to be disclosed. The fact that consumers will be charged or that charges will increase after any trial period, and that consumers will be charged on an ongoing or recurring basis. You have to disclose the deadline by date or frequency by which a customer must cancel to avoid future charges, and then the amount of the cost or range and frequency of the charges and then we've also got to give consumers the information necessary to understand how they find the ability to cancel. The rule has an express affirmative consent obligation that sellers must get unambiguous affirmative consent to the negative option features before a consumer is charged. And then that simple cancellation requirement. The definition of that is that the cancellation has to be as easy as a method used to provide consent to the negative option feature, and then the rule goes on to specify certain methods that must be offered in different channels. If you sign up online, got to be able to cancel online. If you sign up in person, okay, you can have cancellation in person, but you have to have another. You have to have another means as well, either a phone or an online. So, lots more specificity around cancellation.

Kaufman: Thank you for tackling that and for entertaining us with that discussion.

Mudge: That was not entertaining, Daniel. Alright.

Kaufman: But okay, needless to say, these are really important provisions, and they are described in even more detail in the rule. And of course, the Federal Register notice has well over 200 pages of discussion about the rule and how the FTC landed at the language that is currently in the rule. It is really good nighttime reading material.

Mudge: Yeah. If you want to fall asleep, it is excellent. I know you tackled that right away. You just dove in. You gnawed at that. I don't know how many other people have read all 200 pages, but it is there, certainly if you run out of other reading material, but there is lots of uncertainty. There are multiple legal challenges. I think there is four that are ongoing right now in courts and there are dissents and we don't know who is going to be in charge in January. So, Daniel, bring us home. What is a company to do?

Kaufman: Okay, you've got to, no matter what, develop a plan and make sure you are ROSCA compliant. The FTC has several big ROSCA cases in litigation right now, and we know there are more ROSCA cases in the pipeline. However, how you market and deal with cancellations in subscription services is really more important than ever, regardless of what happens to the rule. We will of course keep you informed about how all of this plays out on AD Nauseam and also in our blog, and you can sign up for updates at www. adventures-in-law.com. That is adventures-in-law.com.

Mudge: Oh Daniel, I love a cross-marketing opportunity.

Kaufman: Thank you.

Mudge: And you know what? You can subscribe to Adventures in Law, but you don't have to pay anything. So, I think we get to avoid ROSCA compliance because we give you a free trial that is free in perpetuity. But with that, thank you so much for joining us on another issue of AD Nauseam.

Rubenking: Thank you, Amy and Daniel. If you have any questions for Amy or Daniel, their contact information is in the show notes. For more information on the latest developments in ad law, visit our Adventures in Law blog at www.adventures-in-law.com and check out all AD Nauseam episodes by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

those of the firm. For more information about our practices and experience, please visit bakerlaw.com.