

Nutrisystem: A Close Look at Nutrisystem’s Online Auto-Delivery Feature; Lack of Conspicuous Disclosures Regarding Cancellation Fee and Difficulty in Canceling Could Run Afoul of ROSCA and FTC Act

Company Update

Nutrisystem offers customers prepackaged meals and weight loss counseling through a variety of diet plans sold on the internet, over the phone, and in retail locations. While customers can elect to purchase single-month Nutrisystem weight-loss plans online, the online default—and significantly lower-priced—product is a recurring monthly subscription. Nutrisystem’s most recent [10-K](#) provides that the direct channel—which consists of online and telephone sales—represented 91% of Nutrisystem’s revenue in 2016, and the majority of Nutrisystem’s new customers buy products via its website.

Cancellation procedures. Customers who enroll in the recurring subscription plan have complained about the lack of disclosures surrounding a \$125 cancellation fee that customers incur if they cancel the automatic subscription plan more than 14 days after receiving the first shipment but before paying for the second. Customers are given 14 days to cancel their subscription and return non-frozen products for a full refund, minus shipping costs. Those customers who miss the 14-day deadline, but do not want to order a second shipment, are charged the \$125 fee.

In this article, we examine the terms and disclosures associated with Nutrisystem’s recurring monthly subscription, and in particular the disclosures regarding the cancellation fee. We also evaluate the current state of FTC law, including recent enforcement actions, regarding disclosures for automatically renewing subscriptions (known as negative option plans), and assess whether Nutrisystem’s disclosures might violate those laws.

Possible penalties. Based on our analysis of the law and consumer complaints, and the company’s prior history with the FTC, Nutrisystem’s negative option offer may run afoul of the FTC Act and the Restore Online Shopper’s Confidence Act (ROSCA), putting the company at risk of further scrutiny from the agency. In the event of FTC action, possible remedies could include restitution, disgorgement of ill-gotten gains, and injunctive relief requiring changes in marketing practices that could hamper Nutrisystem’s future sales and marketing efforts. ROSCA also enables the FTC to seek monetary penalties of up to \$16,000 per violation.

For this article, we spoke with several lawyers who are experts on FTC enforcement action, negative options, and ROSCA. We also received a response to a FOIA request submitted to the FTC’s Consumer Sentinel Network for complaints against Nutrisystem. Finally, to examine Nutrisystem’s product, marketing, and disclosures, we purchased a Nutrisystem subscription and documented the checkout process.

We reached out to Nutrisystem for comment and received the following response: “Nutrisystem offers all customers a 14-day money-back guarantee, no questions asked, on their first four-week order. We remind customers each month before their next month of food is processed and shipped, which gives them the opportunity to customize their order, delay their order or cancel. Nutrisystem has an A+ rating with the Better Business Bureau and complies with all applicable rules, regulations and disclosure requirements.” An FTC spokesperson declined to comment.

Current FTC Law

The FTC [defines](#) negative options broadly as “commercial transactions in which sellers interpret a customer’s failure to take an affirmative action, either to reject an offer or cancel an agreement, as assent to be charged for goods or services.” The FTC currently has two legal mechanisms to protect consumers that are harmed by negative options, particularly in cases where the consumer is not made aware of the terms of the negative option plan.

FTC Act and ROSCA. Section 5(a) of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” Previously, the FTC has brought actions under Section 5 (a) alleging that defendants have failed to adequately disclose to consumers the material terms and conditions of product offers.

ROSCA was signed into law in 2010, and the FTC has recently used the statute on behalf of consumers whom the agency determines to have been harmed by negative options. Section 4 of [ROSCA](#) “generally prohibits charging consumers for goods and services sold in transactions effected on the Internet through a negative option feature... unless the seller: 1.) clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer’s billing information; 2.) obtains a consumer’s express informed consent before charging the consumer; and 3.) provides simple mechanisms for a consumer to stop recurring charges.”

ROSCA is additive and not mutually exclusive with Section 5. In previous complaints involving negative option sales, the FTC has alleged violations of both Section 5 of the FTC Act and ROSCA. According to Terri Seligman, co-chair of the Advertising, Marketing & Public Relations Group at Frankfurt Kurnit Klein + Selz, many ROSCA-type violations likely could have been prosecuted as unfair business practices under Section 5 before ROSCA was enacted. However, according to Seligman, ROSCA provides the FTC with a specific tool that can be used to deal with disclosures violations in negative option cases.

Nutrisystem’s Practices and Disclosures

Online purchase experience. We purchased a basic Nutrisystem subscription called the Basic Plan for Women (total price \$276.98) and [documented](#) the online purchase process. When going through the process, consumers can only access information regarding Nutrisystem’s online cancellation fee at one point in the checkout process.

Importantly, to access the disclosure, the customer must click a hyperlink simply labeled “Auto-Delivery,” at which point they are shown pop-up text explaining the auto-delivery offer, the money-back guarantee, and the cancellation terms. There is nothing to draw a consumer’s attention to the fact that the hyperlink contains important information regarding a cancellation fee. If a consumer did not click on the hyperlink, they would be able to complete the purchase without being made aware of the cancellation fee.

Complaints reveal consumers not aware of cancellation fee; difficulty canceling. We sent a FOIA request to the FTC’s Consumer Sentinel Network regarding complaints about Nutrisystem from December 22, 2013 to May 5, 2017. In response, we received a [spreadsheet](#) containing 458 customer complaints, of which a few appeared to be duplicates.

Our review of the FTC’s complaint database, BBB complaints, and complaints on other websites and social media revealed that a significant number of consumers were confused by Nutrisystem’s cancellation fee, and felt that it had not been adequately disclosed. A large number of other complaints related to difficulties with Nutrisystem’s telephone cancellation process, including reports from customers who were unable to complete the cancellation or who were billed despite being told that their subscription was canceled.

Legal Risks of Nutrisystem’s Disclosures and Cancellation Policy

Nutrisystem’s product is a negative option; cancellation fee is likely a material term. In our interviews, several lawyers indicated that Nutrisystem’s “Auto-Delivery” food subscription product falls under the FTC’s definition of a negative option.

Nutrisystem’s cancellation policy includes a 14-day money back guarantee. However, if customers cancel after those 14 days have passed, but before they have paid for their second monthly order, they receive no refund, and are also charged an additional \$125 fee. Stakeholders should note the amount of the fee has increased several times in recent years, but the \$125 fee is current as of the date of publication.

Susan Brienza, a shareholder at Ryley Carlock & Applewhite with twenty years of experience advising companies on food product disclosure law and FTC compliance, said that Nutrisystem’s \$125 cancellation fee would likely qualify as a material term of the transaction under ROSCA, meaning that Nutrisystem would be required to clearly and conspicuously disclose the fee.

Other lawyers we contacted declined to comment on Nutrisystem specifically, but several said that a cancellation fee qualifies as material term, as long as a typical customer would consider the amount of the fee significant. According to Braden Perry, a former federal enforcement attorney with extensive regulatory compliance experience and a partner at Kennyhertz Perry, “If I was a consumer, and I knew that if I had to cancel something I would be paying a substantial fee, I would consider that to be a material fact that I would want to know in advance.”

As the cancellation fee likely constitutes a material term, were the FTC to find that the disclosures of the fee are inadequate, the agency could bring an enforcement action under either Section 5 of the FTC Act, ROSCA, or both.

Hyperlinked disclosures are insufficient. Richard Lawson, former director of the Consumer Protection division for the Office of Florida’s Attorney General and a partner at Manatt Phelps & Phillips with a primary focus on deceptive advertising regulatory investigations and enforcement actions, warned against the use of hyperlinks to disclose purchase information. “Hyperlinks for disclosing costs and dollar values—that’s always a very tricky business. That can arouse regulator and enforcer interest.” According to Lawson, “disclosures need to find the consumer, rather than the other way around.” Terri Seligman voiced similar concerns about hyperlinked disclosures, stating that “something might not be considered clear and conspicuous if it’s hidden behind a hyperlink.”

The FTC’s own guidance suggests that disclosing important purchase information behind a hyperlink is insufficient to meet the “clear and conspicuous” statutory standard. In a March 2013 [revision](#) to *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, the agency states “Disclosures that are an integral part of a claim or inseparable from it should not be communicated through a hyperlink. Instead, they should be placed on the same page and immediately next to the claim, and be sufficiently prominent so that the claim and the disclosure are read at the same time, without referring the consumer somewhere else to obtain this important information. This is particularly true for cost information or certain health and safety disclosures.”

This disclosure standard is also evidenced by the FTC’s enforcement actions. In its suit against DirecTV, the agency filed a [brief](#) in January 2016 where it described the problem with the company’s disclosures: “The material terms of the negative option . . . are buried behind inconspicuous and nondescript hyperlinks.”

The FTC also raised concerns with DirecTV’s practices because a customer could proceed through the entire online purchase process without ever seeing the disclosure in question. “Moreover, DIRECTV ignores a long line of FTC Act cases holding that advertisements including hard-to-read disclosures—such as those placed at the bottom of a webpage or behind hyperlinks—did not comply with the FTC Act.”

Cancellation procedures risk. According to an [article](#) by Richard Lawson and Marc Roth of Manatt Phelps & Phillips, “ROSCA – as enforced – reveals substantially more onerous requirements than are called for by the simple language of the statute itself.”

While the statute does not require a negative option seller to provide any specific method of cancellation, in its 2016 settlement with NutraClick the FTC mandated that the company must offer an online cancellation option. And while it is not specifically required under the law, the FTC has required that companies include a check-box as part of the order path to obtain consumers’ express informed consent to enroll in a negative option program. Nutrisystem only allows cancellation by phone, and the website does not include a check-box to provide consent to the negative option program.

Likelihood of FTC Action; Potential Penalties Against Nutrisystem

FTC enforcement action could be costly for Nutrisystem. In addition to possible monetary penalties, injunctive relief requiring the company to more conspicuously disclose the cancellation fee could make potential customers less likely to enroll, as they would be more aware that they might find themselves forced to choose between paying the fee or buying a second month of food.

Increased risk of enforcement due to prior FTC action, consumer complaints. In 1993, the FTC entered into a [consent order](#) with Nutrisystem limiting the company’s advertising claims and requiring additional disclosures, including “all mandatory fees or a list of the additional products or services consumers will need to purchase.” That consent order expired in December 2013. The lawyers we spoke with indicated that prior enforcement action against a company increases the likelihood that the FTC will pursue another action against that company.

The FTC could also be more likely to take action against Nutrisystem due to the complaints Nutrisystem customers have submitted to the FTC. According to Amy Mudge, partner in the Regulatory and Advertising and Marketing Practice Groups at Venable who regularly represents clients before the FTC, the FTC takes consumer complaints very seriously. Mudge stated that the FTC “is going to prioritize going after companies where they see a lot of complaints.” Kennyhertz Perry Partner Braden Perry concurred: “If customers are complaining to the FTC or the CFPB, the company is on the radar.” Perry also stated “the first thing I tell my clients when conducting a compliance audit is ‘let me see your complaint file.’”

Nutrisystem’s advertising practices have also faced scrutiny. In January 2015, David Zetony of Bryan Cave filed a [petition](#) to investigate Nutrisystem, alleging that the company’s ads make deceptive and misleading claims. “To the extent that Nutrisystem has interpreted the scheduled sunset of its consent order as license to mislead consumers, the FTC should consider initiating a proceeding in federal court to permanently enjoin future deception.” According to Terri Seligman, questionable advertising practices and problems with the cancellation process by any advertiser are two factors that can increase the likelihood that the FTC would get involved.

Other legal experts we spoke with agreed, noting that evidence of other problems outside of disclosure issues would significantly increase the risk of FTC action. A number of the consumer complaints we reviewed relate to issues

with Nutrisystem's cancellation process, including lengthy hold times, inability to reach a representative by the money-back deadline, and new charges and product deliveries after cancellation. As ROSCA also requires negative option sellers to provide "simple mechanisms for a consumer to stop recurring charges," complaints about the cancellation procedure, when combined with potential advertising and disclosure issues, may provide additional incentive for the FTC to take action.

Increased risk of enforcement because FTC has acted against other companies for similar violations. In September 2016, the agency announced a [settlement](#) with NutraClick. In the FTC's complaint, the agency alleged that NutraClick's negative option marketing practices violated ROSCA and Section 5 of the FTC Act. The settlement states, "In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable. A disclosure is not Clear and Conspicuous if a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it."

Since 2014, the agency has filed complaints against dozens of companies (see examples [1](#), [2](#), [3](#), [4](#), and [5](#)), many in the health and weight loss industries, for violating ROSCA's negative option disclosure rules. As mentioned previously, the FTC's argument against DirecTV also cited the inadequacy of hyperlinked disclosures. In both the NutraClick and DirecTV cases, the Commission's vote to authorize the complaint was unanimous. This could suggest that Maureen Ohlhausen, who was appointed acting FTC chair by President Trump and is a candidate for permanent chair, may continue to prioritize strong negative option enforcement under ROSCA.

Possible penalties. The FTC can seek a wide variety of remedies for violations of the FTC Act or ROSCA. Braden Perry stated that, generally, "Any FTC remedies will include disgorgements of unlawful gains and restitutions to consumers that have been injured in the process."

Further, ROSCA adds another tool on top of the remedies available for violations of the FTC Act: the statute gives the FTC the ability to impose significant civil penalties of up to \$16,000 per violation under 15 U.S.C. § 8404, which allows for civil penalties for the violation of FTC regulations. Perry noted that if one begins analyzing what constitutes a violation and how many consumers may have been affected, "that can skyrocket pretty quickly." However, it should be noted that the FTC has not yet used this civil penalty authority in its ROSCA cases, many of which have resulted in settlement.

While the FTC's leadership evidently believes in enforcement regarding negative options, there may be disagreements about the strength of any monetary penalties. In the DirecTV case above, Commissioner Terrell McSweeney filed a letter disagreeing with the reported proposed settlement and argued that the "current offer of monetary relief does not adequately compensate consumers for the harm caused by the deceptive advertising practices challenged in this case." This suggests that while Ohlhausen may believe in enforcement action against negative option products under ROSCA, she may not support pursuing the strictest possible remedies.