



Lina Khan, Not Activist Judges, Killed the Click To Cancel Rule

by Andy Jung

Former Federal Trade Commission (FTC) Chair Lina [Khan](#) has disparaged the U.S. Court of Appeals for the Eighth Circuit for [striking](#) down the amended Negative Option Rule, known as the Click to Cancel Rule. She calls for the Commission to reissue it. Republicans leading the Commission, however, have no interest in reissuance—largely because of Khan's involvement.

Realistically, proponents of the Rule have two options going forward: case-by-case enforcement, or codification by Congress.

The Short-Lived Click to Cancel Rule

In late 2024, the FTC [issued](#) the Click to Cancel Rule, which regulated recurring subscriptions by requiring sellers, including online vendors, "to obtain ... express informed consent" before starting a new subscription for a customer and "to provide a simple mechanism to cancel ... and immediately halt charges."

Last month, however, the U.S. Court of Appeals for the Eighth Circuit [vacated](#) the Rule, holding that the FTC had committed a "fatal" procedural error during the rulemaking.

In response, former Chair Khan [claimed](#): "We were exhaustive in our rulemaking process." She [added](#): "now a court has tossed it out, claiming industry didn't get enough of a say." Blaming pro-industry bias, however, misrepresents the Eighth Circuit's rationale for vacating the Rule. Far from being exhaustive, the Khan FTC skipped an important step required by Congress.

Procedural Deficiencies in the Rulemaking

The Eighth Circuit [struck](#) down the Click to Cancel Rule because "the Commission failed to follow procedural requirements under § 22 of the Federal Trade Commission Act ('FTC Act')[.]" The fault lies with the former Chair.

"[W]hen the Commission publishes a notice of proposed rulemaking, it also must issue a 'preliminary regulatory analysis,'" the court [explained](#). The FTC Act [requires](#) this for rules that "will have an annual effect on the national economy of \$100,000,000 or more[.]" Instead, the Commission [jumped](#) straight to a notice of proposed rulemaking (NPRM), which "'preliminarily determined' that the [Rule] ... would not have the requisite \$100 million effect on the national economy that would trigger the requirement for that analysis." The FTC "therefore declined to provide a preliminary regulatory analysis."

An Administrative Law Judge (ALJ) for the FTC, however, "[found](#) that the proposed rule ... surpass[ed] the \$100 million threshold." Despite "the ALJ's decision, the Commission did not issue a

preliminary regulatory analysis. Instead, it proceeded to finalize the Rule.”

The FTC Act [provides](#) that “a court ... may set aside [a] rule if the Commission has failed entirely to prepare a regulatory analysis.” Thus, the Eighth Circuit [concluded](#): “While we certainly do not endorse the use of unfair and deceptive practices in negative option marketing, the procedural deficiencies of the Commission’s rulemaking process are fatal here.”

In sum, the “[plain text](#) of the FTC Act” requires a preliminary regulatory analysis for rules with significant economic impact. The FTC acknowledged this statutory requirement but deliberately skipped it when issuing the Click to Cancel Rule.

The Eighth Circuit’s ruling highlights the importance of following proper process. As Chair, Khan [bragged](#) about cutting procedural corners: “We streamlined internal processes to allow our teams to move more quickly. And we revised our process for issuing consumer protection rules, eliminating self-imposed red tape that had no basis in the law. We completed over half a dozen new rules from start to finish in a fraction of the time that skeptics had predicted.”

Now, the FTC is paying the price for rushing the rulemaking process, with [taxpayers](#) footing the bill. Earlier this year, the Fifth Circuit [vacated](#) the Combating Auto Retail Scams Trade Regulation Rule because the Commission failed to issue an advance notice of proposed rulemaking. That marks two rules vacated in six months, both issued under Khan’s leadership.

Unfortunately, the Federal Communications Commission appears poised to follow the FTC’s example by [skipping](#) mandatory rulemaking steps. Instead, agencies should learn from the FTC’s mistake: They must strictly follow administrative procedure, erring on the side of engaging the public when in doubt as to what the law requires.

New Rulemaking Unlikely

Former Chair Khan and former Commissioner Rebecca [Slaughter](#) have [called on](#) the FTC to reissue the Click to Cancel Rule. That simply is not going to happen under current FTC leadership.

In theory, the FTC could appeal the Eighth Circuit ruling. The Commission could argue that the court misinterpreted the procedural requirements or that skipping the preliminary regulatory analysis was harmless, although the Eighth Circuit rejected the harmless error argument, [noting](#) that “[e]xcusing the Commission’s noncompliance with § 22 could open the door to future manipulation of the rulemaking process.”

An appeal, however, is unlikely. Three Republican commissioners currently lead the Commission, including Chair Andrew [Ferguson](#) and Commissioner Melissa [Holyoak](#), both of whom voted against the issuance of the Rule, with Holyoak [dissenting](#). The third Commissioner, Mark [Meador](#), [blamed](#) the “Biden FTC” for “cut[ting] corners and [not] follow[ing] the law[,]” adding: “Process matters.” FTC leadership has not indicated a change of heart or interest in appealing the Eighth Circuit’s decision.

Alternatively, the FTC could restart the rulemaking process, but a new Click to Cancel proceeding would be lengthy. While the Restore Online Shoppers’ Confidence Act (ROSCA) gives the FTC explicit authority over online shopping, it differs from other such statutes enforced by the FTC in that it does not authorize standard notice-and-comment rulemaking. Consequently, the FTC would have to follow the heightened rulemaking requirements of the Magnuson-Moss Act: issuing an advance notice of proposed rulemaking, which will inform an NPRM, including adequate opportunities for public comment, followed by the preliminary regulatory analysis the Commission skipped the first time around, resulting in a final regulatory analysis, and likely concluding with hearings on disputed issues of material fact. The process could take more than a year depending on

the amount of public input and the complexity of the analysis. Here, too, current FTC leadership has shown no interest.

Case-by-Case Enforcement Possible

In her dissenting statement opposing issuance of the Rule, Commissioner Holyoak [endorsed](#) bringing enforcement actions “using clear legal authorities like” ROSCA and the Telemarketing Sales Rule (TSR). ROSCA [prohibits](#) online vendors from using an undisclosed, unconsented “negative option feature”—[defined](#) by the TSR as “a provision under which the customer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.”

Holyoak cited enforcement actions against [Care.com](#) and [Legion Media](#), both of which illustrate how the Commission could use ROSCA to effectuate many, though not all, of the goals of the Rule.

The FTC [charged](#) Care.com with using a “negative option feature” without “clearly and conspicuously disclos[ing] all material terms of the transaction[.]” as well as “fail[ing] to provide a simple mechanism for a consumer to stop recurring charges[.]” The company agreed to a [settlement](#) and paid the Commission \$8.5 million to refund consumers harmed by its unwanted subscriptions. In June 2025, the FTC [sent](#) more than \$8.1 million to consumers harmed by Care.com’s deceptive practices.

In [Legion Media](#), the FTC charged defendants “with defrauding consumers nationwide by enrolling them, without their knowledge, into continuity plans where they are shipped and charged repeatedly for personal care products that they did not agree to purchase.” In September 2024, the Commission settled the complaints, requiring the defendants to pay approximately \$40 million to defrauded consumers.

The FTC could bring similar ROSCA enforcement actions against companies that sign customers up for recurring subscriptions without consent or without providing a simple cancellation method. Earlier this month, [Match Group](#), which owns various online dating sites, [agreed](#) to pay the Commission \$14 million to settle [allegations](#) that it “charged consumers for goods or services sold in transactions effected on the Internet through a negative option feature ... [without] providing simple mechanisms for a consumer to stop recurring charges[.]”

But there are [limits](#) to what the FTC can do with its existing authority. ROSCA applies only to online transactions and does not “address negative option programs in all media”—like in-person gym membership enrollment, which “may require cancellation via certified mail or in person[.]” The failed Rule also mandated more specific requirements than ROSCA, which “lacks specificity about cancellation procedures and the placement, content, and timing of cancellation-related disclosures.” Although ROSCA “requires marketers to provide ‘simple mechanisms’ for the consumer to stop recurring charges[.]” it does not provide “guidance about what is simple.” ROSCA adequately addresses “blatant violations, [but] it makes law enforcement actions much more difficult for closer calls, even when these practices cause significant harm.”

Although case-by-case enforcement would avoid a lengthy rulemaking proceeding, it would be less efficient than a broad rule addressing widespread practices — expending even more FTC resources.

Congress Could Codify the Rule

The Click to Cancel saga has prompted a bipartisan legislative response. Citing the Eighth Circuit's ruling, Senators John Kennedy (R-LA) and Brian Schatz (D-HI) [introduced](#) the [Unsubscribe Act of 2025](#) on July 10. The bill would "require companies to be more transparent about their subscription-based business models and make it easier for consumers to cancel their subscriptions once their free or reduced-price trial period has ended." Rep. Mark Takano (D-CA) will introduce companion legislation in the House.

Two weeks later, Reps. Chris Deluzio (D-PA), Brad Sherman (D-CA), and Seth Magaziner (D-RI) [introduced](#) the [Click to Cancel Act](#), which "would codify the FTC Negative Option rule into statute and require companies to: 1. Provide a simple, direct mechanism to cancel a subscription and immediately stop charges. 2. Obtain clear and informed consumer consent before enrolling anyone in an auto-renewal program. 3. Clearly disclose all material terms before collecting any billing information." Senator Ruben Gallego (D-AZ) introduced companion legislation in the Senate. Former Chair Khan [expressed](#) gratitude to Representative Deluzio.

So far, though, Senator Kennedy is the only Republican in support of codifying the Rule. With Republicans holding a majority in both the House and the Senate, proponents of the Rule must increase bipartisan support for Congress to pass either bill.

To do so, the Commission could engage directly with lawmakers to pass a statute, just as it did in 2003 when two federal district courts [ruled](#) against the implementation of the Do Not Call Registry. In response to the courts, then-FTC-Chair Timothy [Muris](#) worked with [Congress](#) and the [White House](#) to "swiftly" [pass](#) legislation authorizing the registry.

Congress can pick up where the FTC left off with the Click to Cancel Rule. Although former Chair Khan has made herself the face of the Rule, Republicans should not allow her disregard for procedure to kill a policy that was [popular](#) with the public. When it comes to reissuing the cancelled Rule, a statute is the only non-negative option.