

## Just in Time for the Holidays: Developments in Automatic Renewal Laws

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## Agenda

- Background
- Applicable Laws, Rules, and Regulations
- General Requirements
- Enforcement Actions

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## Types of Subscription-Based Offers

- “Negative option”:
  - 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.
  
- Negative option marketing includes:
  - Subscription programs
  - Automatic renewal programs
  - Trial offers followed by recurring shipping/billing
  - Membership clubs
  - Continuity programs



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3

## Background: Negative Option Offers

- Who is viewing these offers?
  - Consumers
    - Businesses can be consumers under certain state laws.
  - Law Enforcement
  - Class Action Attorneys
  - Competitors



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4

## Background: Negative Option Offers

- Overarching Principles:
  - Disclose the charges.
    - What is being charged, when it is being charged, and for what.
    - Disclose before obtaining payment information, and send a confirmation after the transaction is complete.
    - Provide periodic reminders.
  - Obtain consent.
  - Make it easy to cancel.



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5

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## Applicable Laws, Rules, and Regulations

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6

## Applicable Law



- Federal Law
  - Restore Online Shoppers Confidence Act (ROSCA) (Internet only)
  - Negative Option Rule (\*FTC Issued a Notice of Proposed Rulemaking and Request for Comments)
  - Telemarketing Sales Rule (telephone only)
  - Electronic Funds Transfer Act
  - Section 5 of the FTC Act (all channels) (prohibits unfair and deceptive marketing practices)
- State Law
  - Automatic renewal laws in various states (*e.g.*, California, Hawaii, Illinois, North Dakota, Oregon, Vermont, Virginia, D.C.)
  - State notification laws (renewal notices)
  - “Mini FTC Acts”

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7

## Federal Restore Online Shoppers’ Confidence Act (“ROSCA”)

- Requires online merchants selling a product or service on a negative option basis to:
  - Provide a text that clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer’s billing information;
  - Obtain the consumer’s express informed consent before charging the consumer’s credit card, debit card, bank account, or other financial account for products or services through such transaction; and
  - Provide simple mechanisms for the consumer to stop recurring charges from being placed on the consumer’s credit card, debit card, bank account, or other financial account.

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8

## Negative Option Rule (Rule Concerning the Use of Prenotification Negative Option Plans)

- Currently, limited to prenotification plans
  - *E.g.*, book-of-the-month clubs, where the seller sends notice of a book to be shipped and charges for the book only if the consumer takes no action to decline the offer, such as sending back a postcard or rejecting the selection through an online account.
  - **Does not include:**
    - Negative option programs as typically defined to encompass continuity plans,
    - Automatic renewals, or
    - Free-to-pay or nominal-free-to-pay plans, where a trial period rolls into an automatic renewal program

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9

## Negative Option Rule (Rule Concerning the Use of Prenotification Negative Option Plans)

- Sellers must disclose clearly and conspicuously the specific details of the offer terms
- In addition, sellers must follow certain procedures, including:
  - Abide by particular time periods during which sellers must send introductory merchandise and announcements identifying merchandise the seller plans to send;
  - Give consumers a specified period to respond to announcements;
  - Provide instructions for rejecting merchandise in announcements; and
  - Promptly honor written requests to cancel from consumers who have met any minimum purchase requirements

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10

## Negative Option Rule; Advance Notice of Proposed Rulemaking; Request for Public Comment

- FTC has requested comments and identified problems with the current Negative Option Rule, and noted that the FTC receives thousands of complaints annually related to negative option marketing.
- The current Rule does not cover common practices such as continuity plans, automatic renewals, and trial conversions.
- ROSCA and the Telemarketing Sales Rule (TSR) do not address negative option plans in all media.
  - Current framework does not provide clarity.

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11

## Negative Option Rule; Advance Notice of Proposed Rulemaking; Request for Public Comment

- The FTC has requested comments on multiple questions including the following:
  - What modifications, if any, should the FTC make to the Rule?
  - Is there a need for new regulatory provisions addressing negative option plans not covered by the current Rule?
  - What costs of compliance has the Rule imposed on businesses?
  - What modifications should the FTC make to the Rule to reduce the costs on businesses?
  - Should the Rule define “clearly and conspicuously”?
- Potential to significantly expand the Rule.
- **Comments must be received on or before December 2, 2019**

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**DEADLINE**

12

## Federal Telemarketing Sales Rule (TSR)

- Applies to telemarketing and sales made on the telephone.
- Must truthfully, clearly, and conspicuously disclose:
  - The nature of the goods or service.
  - The fact that the customer's account will be charged unless he or she takes an affirmative action — such as canceling — to avoid the charge.
  - The dates on which the charges will be submitted for payment.
  - The specific steps the customer must take to avoid the charges.
- Obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number.
- Recordkeeping requirements.



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## Electronic Funds Transfer Act (EFTA)

- Specific requirements for debit cards
- Confirmation Requirements
- Notices of material changes
- Recordkeeping requirements



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14

## Federal Trade Commission Act

- Prohibits unfair or deceptive acts or practices in or affecting commerce.
- FTC has highlighted Section 5 requirements that negative option marketing must follow to avoid deception.
  - Marketers must disclose the material terms of a negative option offer, before consumers agree to the purchase.
  - Disclosures must be clear and conspicuous.
  - Marketers must obtain consumers' consent to such offers.
  - Marketers must not impede the effective operation of promised cancellation procedures, and should honor cancellation requests that comply with such procedures.
- The Commission has indicated that billing consumers without consumers' express informed consent is an unfair act under the FTC Act.

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15

## State Law Requirements



- Definitions of “clear and conspicuous”
  - Text in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language.
  - In visual proximity to the request for consent
  - Font type, formatting, and size requirements
- Additional requirements for consent
- Renewal reminders
- Cancellation requirements
- Notice and consent requirements for trial programs
- Enforced by state attorneys general, class action plaintiffs, and district attorneys (the California Autorenewal Task Force)

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16



## Updates to Card Brand Rules: MasterCard

### Revised Standards—High-Risk Negative Option Billing Merchant Requirements

Mastercard is revising the Standards announced in the article "AN 2202—Revised Standards—High-Risk Negative Option Billing Merchant Requirements."

#### Overview of Revised Standards

Customers should review the revisions to the publication(s) in this document and revise appropriate plans to support the revised Standards.

Effective Date	Changes to Standards in...	Will be Published in...
11 April 2019	IPM Clearing Formats	Chapter 7—Data Element Definitions; Chapter 8—Private Data Submission Definitions

- Effective April 12, 2019
- Applies to non-face-to-face transactions for subscriptions to receive physical product (cosmetics, healthcare products, vitamins, etc.).
- Merchant must be registered with MasterCard.
- Acquirers (banks, processors) must verify compliance with all applicable laws and regulations.
- Trial offers:
  - Once trial period expires, must provide disclosures and obtain explicit consent before charging the consumer again.
  - Provide direct link to online cancellation procedure.

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17

## Updates to Card Brand Rules: Visa

- Effective April 18, 2020
- Applies to physical and digital products.
- Merchants must electronically send the cardholder, at the time of enrollment, the terms and conditions of the subscription services—even if the cardholder is not being billed at that time.
- Merchants will be required to provide an easy way to cancel the subscription or payment method online, regardless of how the cardholder initially interacted with the merchant.
- Additional notice requirements, including specific information to be provided on transaction receipts

#### Mark Your Calendar: 18 April 2020

- New or expanded requirements related to subscription merchants take effect
- Dispute rights for issuers expanded under Condition 13.5—Misrepresentation

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18

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## General Requirements

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## Summary of Requirements

- Clear and Conspicuous Disclosures
- Affirmative Express, Informed Consent
- Order Confirmation
- Simple Cancellation Mechanism
- Renewal Reminders
- Material Changes to the Offer

## Disclosures: What to Disclose

DISCLOSE



- That the subscription agreement will continue until the consumer cancels
- Pricing plans / program offers (length of term, price, features)
- The amount of recurring charges
- The length of the subscription term (*e.g.*, weekly, monthly, annually, etc.)
- Minimum purchase obligation, if any
- The description of the cancellation policy that applies to the offer
- **For trial offers:** When the trial ends, that the pricing changes once the trial ends, and the price that will be charged after the trial ends

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21

## Disclosures: How to Disclose

DISCLOSE



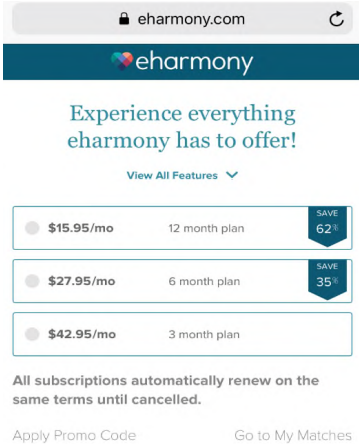
- Disclosures must be made:
  - In a “clear and conspicuous” manner before obtaining the consumer’s billing information.
  - In visual or temporal proximity to the request for consent to the offer.
- Written disclosures: in a larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language.
- Oral disclosures: in a volume and cadence sufficient to be readily audible and understandable.
- Additional requirements under specific state laws (*e.g.*, bold, minimum font sizes for specific programs)

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22

## Disclosures: How to Disclose?

- *California v. eHarmony*



eharmony.com

eharmony

Experience everything eharmony has to offer!

View All Features

- \$15.95/mo 12 month plan SAVE 62%
- \$27.95/mo 6 month plan SAVE 35%
- \$42.95/mo 3 month plan

All subscriptions automatically renew on the same terms until cancelled.

Apply Promo Code      Go to My Matches

Credit Card    PayPal

Alex      Last Name

United States      20001

Card Number


01      2018      CVV

**Plan Terms**  
 I agree that I will be charged \$63.80 today and 2 subsequent monthly payments of \$63.80 each, for a total of \$191.40 for a 12 month term; my subscription will automatically renew on these same terms until I cancel; I authorize eharmony to charge my card now and upon each monthly payment and each renewal; and a cancellation will be effective on the next renewal date of my subscription.

I agree to the **Plan Terms** and the **Terms of Service**, and acknowledge the notice below.

Subscribe Now







Notice of Right to Cancel




Post-settlement eHarmony.com order path

23

## Summary of Requirements

-  Clear and Conspicuous Disclosures
-  Affirmative Express, Informed Consent
-  Order Confirmation
-  Simple Cancellation Mechanism
-  Renewal Reminders
-  Material Changes to the Offer



24

## Consent: How to Obtain It

- Must obtain the customer's affirmative, express informed consent before obtaining the consumer's credit card, debit card, bank account, or other financial account.
- Express consent: must be the affirmative/explicit agreement of the consumer to enroll.
  - Consumers must unambiguously articulate their consent.
  - Silence is not tantamount to consent, nor does an ambiguous response from a consumer equal consent.
- Informed consent: having been appropriately informed of the offer disclosures, the consumer provides consent.

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25

## Consent: How to Obtain It

- Affirmative consent: an affirmative action opting in to the automatic renewal provision.
  - Regulators prefer a distinct method, such as a check box, signature, or similar method, which the consumer must affirmatively select to accept the negative option terms, and no other portion of the offer.
  - Consent mechanism directly adjacent to the material terms of the offer.
  - Disclosures and checkbox should not be muddled with other disclosures.

I understand to ensure uninterrupted service my subscription will renew every 1 months beginning on 04/12/2019 at a rate of \$59.99 unless cancelled before the end of the term by emailing support@jdate.com.

I agree to the [Cancellation Rights](#) and the [Terms & Conditions of Purchase](#).

Complete Purchase

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California v. Spark Networks Post-settlement website

26

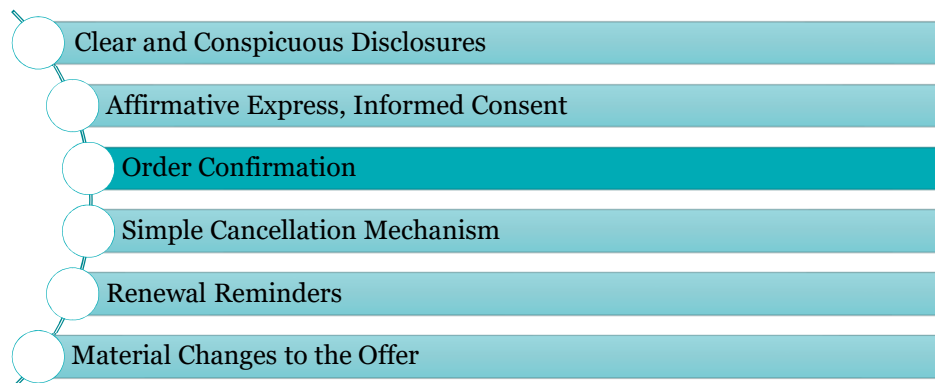
## Additional Consent in Trial or Promotional Offers

- For free trial of a good or service with a term of one month or more, where the contract automatically renews at the end of the free trial period, the seller must:
  - Notify the consumer of the automatic renewal between one and seven days before the free trial period ends, and
  - Notwithstanding the consumer's consent to the free trial, obtain the consumer's affirmative consent to the automatic renewal before charging the consumer for the automatic renewal.
  - **This consent must be obtained even if the company already obtained the consumer's affirmative consent to the free trial.**
  
- Card Brand Rules: Once trial period expires, seller must provide disclosures and obtain explicit consent before charging the consumer again.

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27

## Summary of Requirements



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28

## Confirmation / Order Acknowledgment

- Sending a written order confirmation repeating offer disclosures is required in some states.
  - The required format depends on the state.
  
- Requires that merchants send an acknowledgment – “in a manner that is capable of being retained by the consumer” – with specific offer terms.
  
- If the automatic renewal offer or continuous service offer includes a free gift or trial, the business shall also disclose in the acknowledgment how to cancel, and allow the consumer to cancel, the automatic renewal or continuous service before the consumer pays for the goods or services.

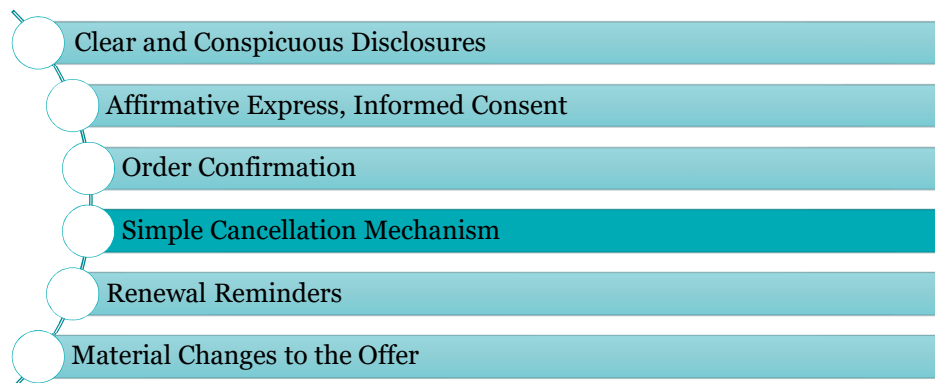
ACKNOWLEDGMENT



29

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## Summary of Requirements



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30

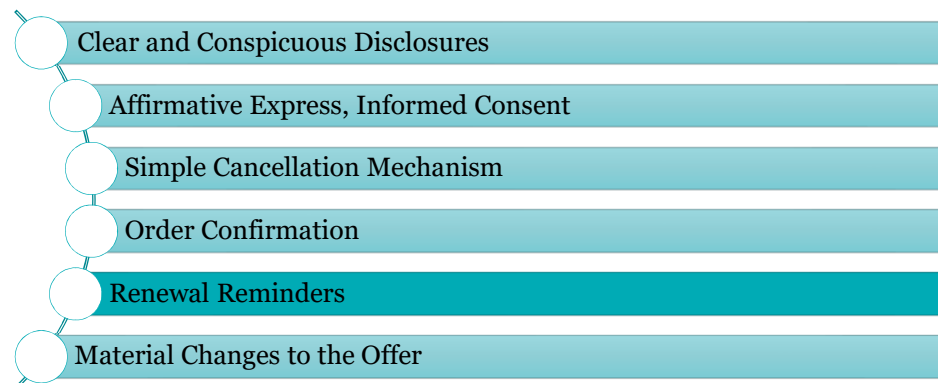
## Simple Cancellation Mechanism

- Provide a simple mechanism for a consumer to stop recurring charges.
- Provide a toll-free telephone number, email address, postal address (if the seller directly bills the consumer), or other cost-effective, timely, and easy-to-use mechanism that the consumer can use to cancel.
- Consumers who accept an automatic renewal offer online must be allowed to cancel the offer online.
- Additional laws and rules require companies to provide a weblink to permit online cancellation.

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31

## Summary of Requirements



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32



## Renewal Reminders

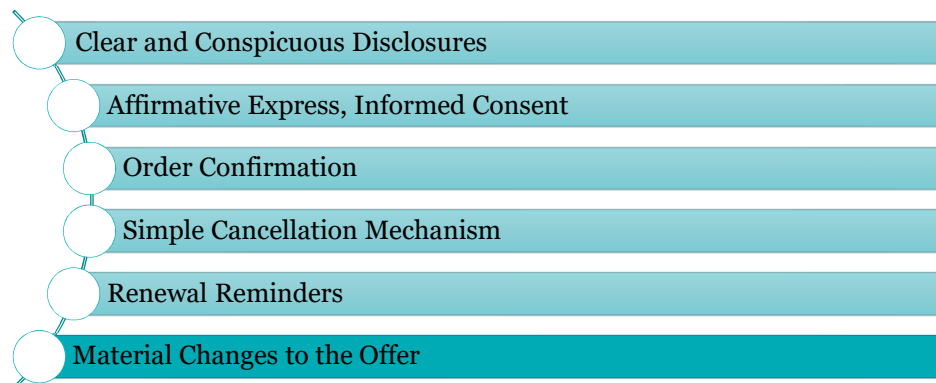


- Additional notices must be sent, depending on the contract's initial term and renewal term.
  - (For example, if the initial term is 12 months or more, and automatically renews for a term of one month or more).
  - Notice must include specific disclosures.
- Laws vary regarding the timing of this notice, but timing is generally based upon: (a) the automatic renewal date, (b) the termination date, or (c) the deadline by which the consumer must provide notice to cancel the contract.
- Should be provided in a format that is capable of being retained by the consumer.

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33

## Summary of Requirements



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34

## Material Changes to the Offer

- Provide current consumers with a clear and conspicuous notice of the change, and information regarding how to cancel.
  - Provided in a manner that is capable of being retained by the consumer.
- If a company charges a consumer a different amount than the amount stated in the original disclosures and confirmation notice, the company must send the consumer a written notice with specific disclosures.
- If the price or nature of the product or service changes, obtain consumers' affirmative consent to the changes.

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35

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## Enforcement Actions

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36

## ROSCA Enforcement

Recent focus of enforcement:

1. The marketer failed to disclose the terms and conditions of an auto-renew offer or failed to disclose the terms *adequately* under the “clear and conspicuous” standard.
2. Failure to adequately disclose how to stop recurring charges.
3. Did not provide a simple cancellation mechanism



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37

## ROSCA Enforcement – Allegedly Insufficient Disclosures

*FTC v. Urthbox* (Settlement May 2019)

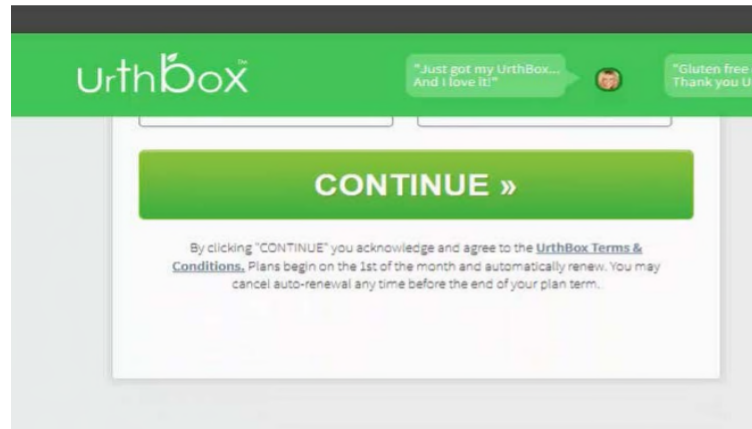
 A screenshot of the Urthbox checkout page. The page has a green header with the Urthbox logo and navigation links: "Box Type", "Monthly Plan", "Checkout", and "Confirmation". Below the header, there's a promotional banner: "You're Getting A Free UrthBox!". The main content area is divided into "SHIPPING" and "BILLING" sections. The "SHIPPING" section includes fields for First Name, Last Name, Address 1, Address 2, City, State, Zipcode, and United States. The "BILLING" section includes fields for First Name and Last Name. On the right side, there's an "ORDER SUMMARY" table showing "SMALL CLASSIC - FIRST BOX FREE - JUST \$5.99" and "SHW" for \$5.99, with a total of \$5.99. Below the order summary, there are payment options (VISA, MASTERCARD, AMERICAN EXPRESS, DISCOVER) and a "Need Help?" section with contact information.

- FTC alleged that the defendants failed to
  - Clearly and conspicuously disclose all material terms of the negative option feature before obtaining the consumer's billing information; and
  - Obtain consumers' express informed consent to the negative option feature before charging the consumers' credit or debit card.

38

## ROSCA Enforcement – Allegedly Insufficient Disclosures

*FTC v. Urthbox* (Settlement May 2019)



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39

## ROSCA Enforcement – Allegedly Inadequate Cancellation Mechanism

*FTC v. Match Group Inc.*



- FTC alleged that Match.com misled consumers with a confusing and cumbersome cancellation process.
  - Multiple “save” attempts before a customer could cancel his or her membership.
- Alleges that the cancellation flow was “hard to find, tedious, and confusing. Members often think they’ve cancelled when they have not and end up with unwanted renewals. The current process takes over 6 clicks”
- Similar to the allegations in the FTC’s *AdoreMe* complaint

FEDERAL TRADE COMMISSION'S COMPLAINT

40

## Disclosures: How Not to Disclose

- FTC alleged that the following disclosure, provided using an IVR, was inadequate:
- **OFFER DETAILS:** Here's how your free trial works. Today we're sending you a full size product to try free for 2 weeks. Try it for 2 weeks and if you're not completely satisfied, just send it back and risk nothing. If you like it and decide you want to continue using it, you don't have to do anything else. After 14 days, we'll simply bill you the discounted rate of just \$69.95 for your initial supply. And we'll continue to ship you a fresh supply every month for the same discounted rate plus shipping and handling for as long as you want. And you'll always have the option to cancel, skip, or delay any future shipments by calling the customer service number in your package. That number is 1-888-501-6333. **PROMPT:** So, do you agree to start your free trial?
- What's wrong with this disclosure?

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## State Law Enforcement

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## State Regulators

- California Automatic Renewal Task Force has brought cases against:
  - DropBox
  - J2 Global
  - AdoreMe
  - eHarmony
  - Spark Networks
  - Stamps.com
- New York Attorney General case against AdoreMe
- Multi-state action against SiriusXM

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43

## *People of the State of California v. Dropbox, Inc.*

(May 15, 2018)

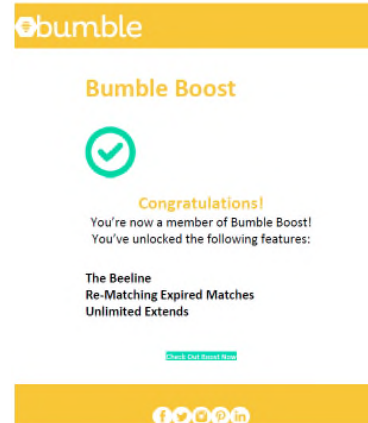
- Lawsuit and settlement filed by Alameda County District Attorney and the district attorneys of San Francisco, Sonoma, and San Diego counties.
- Alleged violations of California law by failing to present automatic renewal offer terms in a clear and conspicuous manner before the purchasing agreement was fulfilled and in visual proximity to the request for consent.
- Also alleged unfair, deceptive, or misleading advertising by failing to disclose “Dropbox Pro” service was intended for business use and not personal use.
- Settlement included injunctive relief, payment of a \$500,000 restitution fund, and \$1.7 million in civil penalties.

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44

## Private Class Actions: *King v. Bumble (N.D. Cal.)*

- Plaintiff challenged Bumble’s Bumble Boost subscription program, alleging:
  - Bumble failed to disclose the mandatory automatic renewal offer terms before California consumers purchased their subscriptions to Bumble Boost.
  - Bumble did not obtain affirmative consent because there was no mechanism that required California consumers to affirmatively consent to the autorenewal terms.
  - Bumble failed to provide California consumers with an acknowledgement that satisfies any of the requirements of the California law.



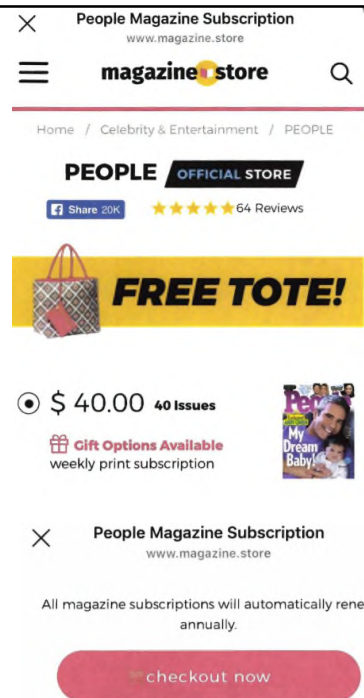
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45

## Private Class Actions: *Hall v. Time Inc. (C.D. Cal.)*

- Plaintiff challenged magazine subscription program, alleging that it did not clearly and conspicuously disclose the material terms of the offer.
- Court granted motion to dismiss, holding that defendants presented plaintiff with the automatic renewal terms in a clear and conspicuous.
  - When plaintiff first saw the subscription offer on her social media, that offer was coupled by a notice clearly stating that “[a]ll magazine subscriptions will automatically renew annually.”
  - Another notice was placed directly above the “checkout now” button, which plaintiff clicked to proceed with her subscription.

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5


## Private Class Actions: *Hall v. Time Inc. (C.D. Cal.)*

- Plaintiff confronted another automatic renewal notice providing additional detail about the automatic renewal service.
  - This notice appeared just before the “submit order” button, and was highlighted yellow with the words “Automatic Renewal Notice” bolded.
- The court: “From this, it’s clear Plaintiff was adequately informed of Defendants’ automatic renewal notice in plain and conspicuous terms.”

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✕ People Magazine Subscription  
www.magazine.store

**Automatic Renewal Notice:** After your initial term, your magazine subscriptions will automatically renew annually until you tell us to stop. You will receive a reminder of the renewal approximately 30 days in advance. Your credit card or method of payment will be charged at the time of purchase and before the start of each new annual term, at the rate stated in the notice. You can contact [customer service](#) or cancel, at any time.



**REVIEW YOUR ORDER:**

- 40 Issues of PEOPLE (Print) \$40.00

**SUBTOTAL: \$40.00**

✕ People Magazine Subscription  
www.magazine.store

submit order

47

## Questions? Contact Us

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