

New Laws and Requirements for Automatic Renewal Programs: What Businesses Need to Know in 2022

Ellen T. Berge

Partner | 202.344.4704 | ETBerge@Venable.com

Shahin O. Rothermel

Partner | 202.344.4550 | SORothermel@Venable.com

VENABLE_{LLP}

1

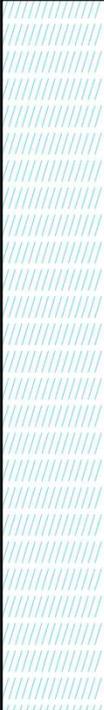
Federal Law

- 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
- Telephone sales covered by FTC's Telemarketing Sales Rule
- Section 5 of the FTC Act prohibits unfair or deceptive sales practices

VENABLE_{LLP}

2

2



State Laws

- Significant laws in: California, New York, Virginia, Vermont, District of Columbia
- New laws in Colorado, Delaware, and Illinois (effective Jan. 1, 2022)
- New California amendments (effective July 1, 2022)
- Offers made through all channels (online, telephone, in-person, etc.)

State Laws Address the Details:

- Specific disclosures
- “Clear and conspicuous” standard for disclosures
- Order confirmations
- Cancellation policies and mechanisms
- Notices of renewal
- Notice of material changes

VENABLE_{LLP}

3



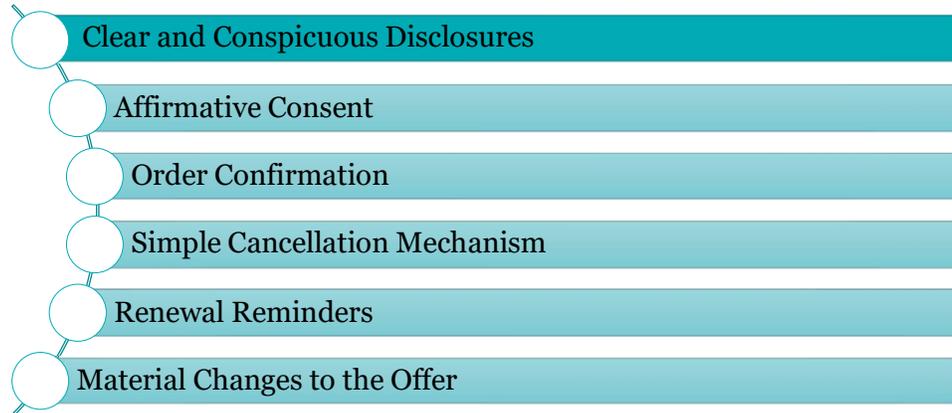
Compliance Requirements

VENABLE_{LLP}

4

4

Summary



VENABLE_{LLP}

5

5

Disclosures

What to Disclose:

1. That the subscription agreement will continue until the consumer cancels
2. The description of the cancellation policy that applies to the offer, including the deadline by which to cancel
3. The amount of recurring charges, including that if the price will change after a trial offer, the amount that will be charged when the trial ends
4. The length of the subscription term (e.g., weekly, monthly, annually, etc.)
5. Minimum purchase obligation, if any

FTC: Disclose **all** material elements of the automatic renewal offer. (MoviePass case)

How to Disclose:

- In a clear and conspicuous manner before obtaining the consumer's billing information
- Vermont: For subscriptions with an initial term of 1 year or more, disclosures must appear in **boldface** type.

VENABLE_{LLP}

6

6

“Clear and Conspicuous”

- Larger type than 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
- If audio disclosure:
 - In a volume and cadence sufficient to be readily audible and understandable
 - In temporal proximity to the request for consent

VENABLE_{LLP}

7

7

Morrell v. WW International, Inc. (S.D.N.Y. 2021)

Digital Buy 6, Get 9 Months

Plan and membership [Edit](#)

Digital, Buy 6, Get 9 Months

Price Breakdown

Standard 3 Months Fee	\$62.85
Starter Fee	\$0.00
Free 3 Months	-\$62.85
First 3 Months Total	\$0.00

Payment [Edit](#)

Billing address [Edit](#)

Required: By checking this box, you acknowledge that you have read and agree to be bound by the terms above, including the Membership Agreement.

PLEASE NOTE: Early termination fee will be applied in the event of cancellation prior to completion of full term.

Automatic Renewal and Cancellation: You agree that your membership automatically renews at the end of your initial payment plan and you will be charged at the standard monthly fee (currently \$20.95 plus tax where state and local sales tax apply) until you cancel. You can cancel at any time by visiting the [Cancellation Policy](#).

Terms and Conditions: You understand that your membership is governed by the Membership Agreement. You acknowledge our [Privacy Policy](#) and [Notice of Privacy Practices](#).

[Submit](#)

VENABLE_{LLP}

Plaintiff's Allegations

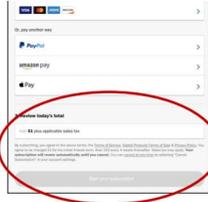
- Inadequate disclosure did not meet “clear and conspicuous” standard and not in close proximity to request for consent
- Text smaller than text used to show transaction details
- Text in gray font color that is same size, color, and font as surrounding block of text; blends with the background
- Text is buried between three other disclosures

Court:

- Disclosures provided sufficient notice of automatic renewal, cancellation policy, and recurring charge amount
- Disclosure set out in its own paragraph with boldface text and hyperlinked text that sufficiently contrasted
- Requiring consumer to click a button to consent to terms and submit order was enough
- **BUT court held that confirmation email was insufficient:**
 - However, the defendant fails to provide any information about the cancellation policy in the Acknowledgement Email and merely states “instructions on how to cancel are located in the Help section of the [WW] site.”

8

Jordan v. Washington Post. (N.D. Cal. 2020)



3. Review today's total

\$10 \$1 plus applicable sales tax

By subscribing, you agree to the above terms, the [Terms of Service](#), [Digital Products Terms of Sale](#) & [Privacy Policy](#). You agree to be charged \$1 for the initial 4-week term, then \$10 every 4 weeks thereafter. Sales tax may apply. **Your subscription will renew automatically until you cancel.** You can [cancel at any time](#) by selecting "Cancel Subscription" in your account settings.

Start your subscription

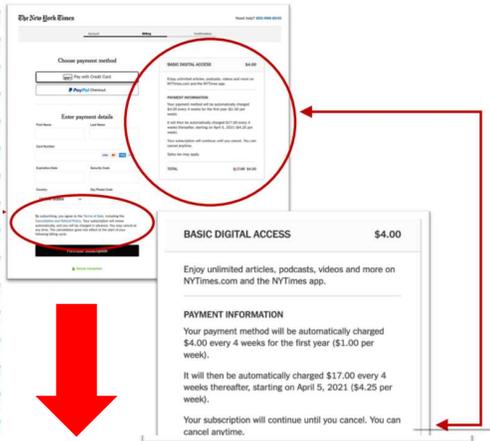
VENABLE LLP

Plaintiff's Allegations

- Checkout page fails to disclose that the method of cancellation available to a particular consumer varies depending on the medium through which that consumer initially purchased and/or enrolled in her subscription
 - Does not disclose that those who purchased their digital-only subscriptions directly through the website “can go to [their] Account Profile to cancel”
- The checkout page does not state that the consumer “must cancel [her] subscription before it renews each Billing Period to avoid billing of the next Billing Period’s subscription fees to [her] Payment Method,” or that “when [the subscriber] cancel[s], [she] cancel[s] only future charges associated with [her] subscription, and [she] will not receive a refund for the current Billing Period”
- (Also alleged no affirmative consent)

9

Moses v. New York Times (S.D.N.Y. 2020)



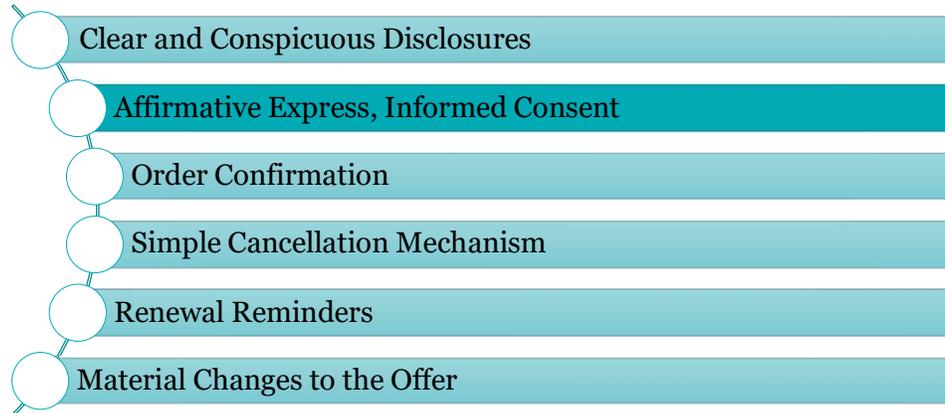
By subscribing, you agree to the [Terms of Sale](#), including the [Cancellation and Refund Policy](#). Your subscription will renew automatically, and you will be charged in advance. You may cancel at any time. The cancellation goes into effect at the start of your following billing cycle.

Plaintiff's Allegations

- Although the Checkout Page states that the customer’s “subscription will continue until [the customer] cancel[s,]” it nevertheless fails to comply with the ARL because it is placed in the block of text positioned near the top right of the webpage, while the “Purchase Subscription” button appears toward the bottom left of the webpage
 - It is therefore not “in visual proximity to the request for consent” to the automatic renewal offer
 - Moreover, it is presented in the same size, color, and font as that of the surrounding block of text, and it is placed alongside other, unrelated disclosures without distinction from the surrounding text of the same size in any manner that calls attention to the language. In other words, the disclosure was presented in such a way that it could be, and was, easily overlooked, and is therefore not “clear and conspicuous”
- (Also alleged failure to obtain affirmative consent)

10

Summary of Requirements



VENABLE_{LLP}

11

11

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
- 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

VENABLE_{LLP}

12

12

Consent: How to Obtain It

- Affirmative consent: an affirmative action opting in to the automatic renewal provision
 - Some regulators prefer a distinct method, such as a checkbox, signature, or similar method, which the consumer must affirmatively select to accept the negative option terms, and no other portion of the offer
 - Vermont law (when initial term is 1 year or longer and renewal term is 30 days or longer): opt-in mechanism must be different from the mechanism used to complete the actual purchase
 - Not all courts agree; see *Weight Watchers* case
 - Consent mechanism should be directly adjacent to the material terms of the offer
 - The terms should be presented adjacent to the checkbox, not only via a hyperlink
 - Disclosures and checkbox should not be muddled with other disclosures; create at least paragraph separation; use headers to distinguish text

VENABLE_{LLP}

13

13

Additional Consent in Program-Specific Offers

- For a **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 the trial period expires, seller must provide disclosures and obtain explicit consent before charging the consumer again
- Annual Programs:
 - Vermont law: In addition to accepting the contract, the consumer must take an affirmative action to opt in to the automatic renewal provision

VENABLE_{LLP}

14

14

Turnier v. Bed Bath & Beyond (S.D. Cal. 2020)

- Plaintiff challenged Bed Bath & Beyond’s BEYOND+ membership program, including the failure to obtain affirmative consent
- Court:
 - The autorenewal terms must be in “visual proximity . . . to the request for consent”
 - **The terms themselves—not the access point to them—need to be in visual proximity to the request**
 - **The required terms do not appear on the webpage that contains the request for consent**
 - Even if “it is common to use a hyperlink to terms and conditions, and that practice is sufficient to form a valid contract . . . it does not change what is required under [the California Automatic Renewal Law] (the disclosure of terms in a specific manner and location).”
- **But** plaintiff failed to allege causation

Billing Address

First Name Last Name

Company (Optional)

Country

Street Address

Apt/Suite/Floor (Optional)

City State Zip Code

Contact Information

Phone Number, maximum 10

Terms and Conditions

I accept the [terms and conditions](#) of the program

Review

BEYOND+ 1 Year Membership

15

Robbins v. PlushCare, Inc. (N.D. Cal. May 2021)

4 of 5

Dr. Lita Ashe
★★★★★ 47
December 27th 2021 3:15 PM EST

Create profile.

If you are booking for someone else, please have that person create an account.

Name First Last

Date of Birth

Gender Female Male

Mobile

Email

Password

Booking Center: you are agreeing to the PlushCare Terms of Use, Privacy Policy, & Network Contract

Already have an account? [Sign in](#)

4 of 4

Provide payment details

Dr. Marika Holte
5.0
April 28th 2021 3:30 PM PDT

Choose how you'll pay

With insurance

Without insurance

Payment

Card number MM / YY CVC

REBATE CODE

Reason for visit

If this is an emergency please call 911 or go to the nearest emergency room.

I have a sore throat and cough.

Pop-up:

Monthly Membership

30-day FREE trial

\$14.99 billed after 30 days.

- 40% off future visits
- Same day appointments
- In-app messaging

Recurring billing at \$14.99. Cancel anytime.

[Learn More](#)

Learn More:

Membership Benefits

- 40% off future visits
Get 40% off every visit you book.
- Same day appointments
Get fast and easy access to 15-minute care.
- In-app messaging
In-app messaging with your Primary care physician and care team.

Your membership continues until cancelled. If you do not wish to continue to pay per month, you may cancel anytime by visiting Your Profile > Payment and Insurance and adjusting your membership settings.

United States

You can get limited access to PlushCare medical services with no member services mentioned above by calling us at 800-221-8463.

Services

Doctor's visit \$99

100% money-back guarantee

Total today \$99

100% money-back guarantee. Cancel anytime.
[View Terms of Service](#)

Payment

Card number MM / YY CVC

REBATE CODE

Reason for visit

If this is an emergency, please call 911 or go to the nearest emergency room.

I have a sore throat and cough.

If you can't make your appointment, you will have to cancel or reschedule at least 24 hours in advance of your appointment date from the email app.

PlushCare is powered by your device and protected.

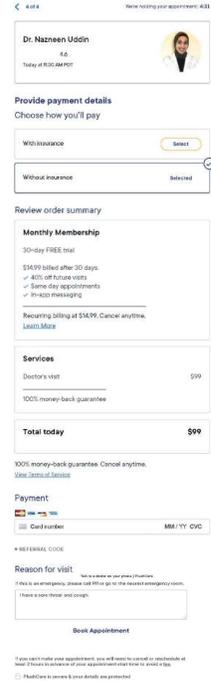
16

Robbins v. PlushCare, Inc. (N.D. Cal. May 2021)

Plaintiff's Allegations:

- Booking process was deceptive because it surprised consumers with monthly membership “free” trial offer, just before consumers thought they would be checking out with just “Book Appointment”
 - None of the pages informed consumers that by clicking “Book Appointment,” they would be automatically enrolled in the membership
 - Disclosures lacking and not in visual proximity to request for consent to the offer and the disclosure was not in visual proximity to “Book Appointment”
 - No affirmative consent to the automatic renewal offer provided
- Court:**
- The offer terms were not “in visual proximity to the request for consent”

VENABLE LLP



17

Summary of Requirements

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

VENABLE LLP

18

18

Confirmation / Order Acknowledgment

- Some states require that merchants send an acknowledgment—“in a manner that is capable of being retained by the consumer” (CA, NY, VA, CO, others)
- Best practice everywhere
- Include:
 - Terms of offer
 - Cancellation policy
 - Information about how to cancel
 - If offer is a free gift or trial, disclose how to cancel before consumer begins paying

VENABLE_{LLP}

19

19

Morrell v. WW International, Inc. (S.D.N.Y. 2021)

- Court held that the acknowledgment email did not provide the cancellation policy and merely states: “instructions on how to cancel are located in the Help section of the [WW] site.”
 - The acknowledgment email simply directs customers to the ‘Help’ page, without any clear means of accessing the cancellation policy.”
 - The “Help” section is not hyperlinked; and no summary of, or clear means of accessing, the cancellation policy
- The court held the plaintiff stated a claim under California’s automatic renewal law:

Above is a summary of your first transaction. If you have any questions about this summary, please contact [customer service](#).

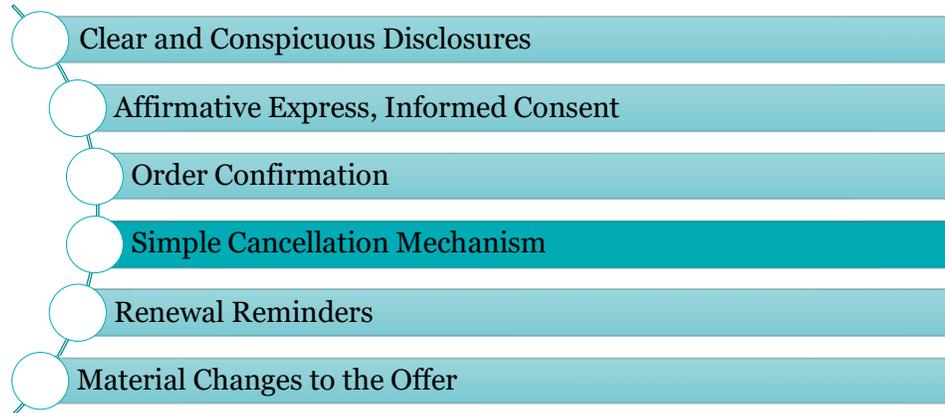
If you’ve switched from one Weight Watchers plan to another, you’ll receive a refund for your previous plan. Questions? Please see our [refund policy](#).

Please note: your subscription will be automatically renewed at the end of your payment plan at the standard monthly rate (plus tax for New York) until you cancel. (Instructions on how to cancel are located in the Help section of the site.) You can review your membership details at any time by visiting your [account status](#) page.

VEN

20

Summary of Requirements



VENABLE_{LLP}

21

21

Simple Cancellation Mechanism

- Provide a simple, cost-effective, easy-to-use, and readily accessible 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 (required in CA, IL, NY, CO, VA, other states)

VENABLE_{LLP}

22

22

New California Cancellation Requirements

Effective July 1, 2022

- If a consumer accepts an offer online, the consumer must be allowed to terminate exclusively online, at will, ***and without engaging any further steps that obstruct or delay the consumer's ability to terminate***
- The business must provide a method of termination online, either:
 1. In a prominently located direct link or button (which may be located within a customer account or profile) or within device or user settings; or
 2. By an immediately accessible termination email formatted and provided by the business that a consumer can send without additional information
- The business can require consumers to enter account information or otherwise authenticate their identity online before termination, but a consumer who is unwilling or unable to enter account info or otherwise authenticate online before termination shall not be precluded from authenticating or terminating using another method

VENABLE_{LLP}

23

FTC v. MyLife (C.D. Cal. 2021)

- The FTC alleged that the company's cancellation mechanism violated ROSCA because it was not "simple." According to the court:
 - MyLife primarily offered only one method of cancellation: telephone. When consumers sent an email request for cancellation to MyLife's member support address, they would often receive an automated response directing the consumer to contact Customer Care by phone
 - High abandonment rate
 - When customers did reach an agent on the phone, they were faced with a six-part retention sales script with the goal of convincing customers not to cancel
 - MyLife instructed its call agents to inform customers seeking a refund that the subscriptions were nonrefundable under MyLife's terms and conditions
 - Call agents were also instructed to always assume the caller wanted automatic renewal to remain on, to not question the caller about the status of automatic renewal, and to not ask if the caller wanted automatic renewal disabled

VENABLE_{LLP}

24

24

FTC v. ABCMouse (September 2020)

- Alleged that customers thought they were signing up for a 12-month plan but were enrolled in a negative option plan
- Material terms of the offer were disclosed via a separate hyperlink
- FTC challenged representations about the ease of cancellation because the website did not disclose how people could cancel
- FTC alleged that the company made it difficult to cancel
 - Did not post a customer service telephone number or email address that customers could use to contact, long wait times, confusing online cancellations, did not honor cancellation requests

VENABLE LLP

The screenshot displays a promotional banner for a 'Special Offer' of a 38% OFF Annual Membership for \$59.95 for 12 months. Below the banner is a 'Payment Option' section offering 4 equal monthly installments of \$19.95 (a 17% savings). A 'Click Here' link is provided to check if the offer is a gift. Below this is a testimonial from a parent stating that 85% of 5,000 surveyed parents reported a significant positive impact on their children's learning. The bottom of the banner mentions 'Award-Winning Curriculum!' with several award icons.

To the right is the 'Easy Enrollment!' form, which is divided into three numbered steps:

- 1 Create Your Family Account:** Includes fields for Email, Confirm Email, Password, and Confirm Password.
- 2 Enter Your Payment Information:** Includes fields for Cardholder Name, Credit Card Number, Expiration Date (MM/YY), CVV, and Billing Zip/Postal Code. It also features logos for Visa, Mastercard, PayPal, and Amazon Pay.
- 3 I agree to the Terms & Conditions:** A checkbox for agreement and a 'Submit' button.

 An 'Easy Cancellation' note states that if the family does not absolutely love ABCMouse, they can cancel at any time, and their information is safe and protected.

25

Private Lawsuits

- *Moses v. New York Times* (S.D.N.Y.)
 - Alleged that, although one page of the New York Times website states that consumers can cancel their subscription via chat, 'the chat facility is only available in-office hours (07:00 AM-10:00 PM) on weekdays and 07:00 AM-03:00 PM on weekends, and most of the time and days, their chat facility is unavailable due to excessive chat from customers.'
- *Jenkins v. j2 Global* (C.D. Cal.)
 - Court denied motion to dismiss under California's automatic renewal law:
 - "Plaintiffs have adequately alleged that j2 Global frustrated this right through its customer service representatives by making it difficult for Plaintiffs to cancel their services."
 - Plaintiff alleged he made several unsuccessful attempts to cancel his account through the online chat feature; unsuccessfully tried to call the company twice and could not reach a customer service representative until weeks later.
 - During that call, the representative told plaintiff that he would have had to cancel his subscription prior to its renewal to avoid the annual fee.
 - Representatives told the plaintiff he would be entitled to a refund if he cancelled within 15 days of service plan renewal but later denied his request for refund because the request was not made within 15 days of the renewal date
 - Plaintiff alleged that j2 Global provides its employees with monetary incentives not to cancel accounts or issue refunds by paying them on a commission basis

VENABLE LLP

26

Summary of Requirements

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

VENABLE_{LLP}

27

27

Renewal Reminders

- Additional notices must be sent, depending on the contract's initial term and renewal term
 - Some states require notices if the initial term is 12 months or more, and automatically renews for a term of one month or more
 - North Dakota imposes notice requirements for automatic renewal periods of longer than six months (North Dakota prohibits automatic renewal periods of greater than 12 months)
 - Notice must include (CA standard):
 - That the automatic renewal will renew unless cancelled by the consumer
 - Length of renewal period
 - One or more methods by which the consumer can cancel
 - Contact info for the business

VENABLE_{LLP}

28

28

Renewal Reminders

- 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
- ***Because state laws regarding timing vary, a one-size-fits-all approach might not work***

VENABLE_{LLP}

29

29

New California Requirements for Notices (Effective July 1, 2022)

Renewal notice required if:

<p>Consumer accepted a free gift or trial, lasting for more than 31 days, that was included in the offer</p> <p><small>* Free gift does not include promotional items unrelated to the subscribed product/service</small></p>	<p>Consumer accepted an automatic renewal at a promotional or discounted price, and the applicability of that price was more than 31 days</p>	<p>Consumer accepted an automatic renewal offer with an initial term of one year or longer, and that automatically renews unless consumer cancels</p>
<p>Provide renewal notice at least three days before and at most 21 days before the expiration of the predetermined period of time for which the free gift or trial, or promotional or discounted price, applies</p>		<p>Provide renewal notice at least 15 days and not more than 45 days before the offer renews</p>

VENABLE_{LLP}

30

New Colorado Requirements for Notices

(Effective Jan. 1, 2022)

- Must send a notice informing the consumer that the contract will automatically renew
- Notice must include clear and accurate information about the identity of the sender and provide the process for cancelling
- Notice must be sent by physical mail, email, or other easily accessible form of communication, such as a text message or mobile phone app, if the consumer specifically authorizes the sending of renewal notices by text

	Initial Term of 12 months or longer:	Initial Term of less than 12 months:
▪ When to send:	Send at least 25 days and no more than 40 days before first automatic renewal and each renewal thereafter	Send at least once in the period between 25 and 40 days directly preceding the first automatic renewal that would extend the contract beyond a continuous 12-month period; and at least once in the period between 25 and 40 days directly preceding any automatic renewal that extends the contract beyond any additional consecutive 12-month period

VENABLE_{LLP}

31

Summary of Requirements



VENABLE_{LLP}

32

32

Material Changes to the Offer

- Provide current consumers with a clear and conspicuous notice of the change and information regarding how to cancel
 - Provide in a manner that is capable of being retained by the consumer
 - Hyperlink to cancellation mechanism
- Price changes are material; significant changes to what the consumer is receiving are material
- Best practice is to obtain consumers' affirmative consent to the changes

VENABLE_{LLP}

33

33

Other Notable State Laws

- Vermont
 - Provide a separate opt-in mechanism for the auto-renew terms, separate from the general offer acceptance or general terms and conditions
 - If the initial term is one year or longer, disclosures must appear in **bold**
- District of Columbia
 - Notify the consumer between 15 and 30 days before expiration of a free trial period, and obtain consent (again) before the end of any trial period with a renewal term of one month or more
- Colorado: Must provide a simple, cost-effective, timely, easy-to-use cancellation mechanism. A business complies if it offers:
 - A one-click online cancellation link on the website or available to consumers after they complete a reasonable authentication mechanism to log in to their account
 - An in-person mechanism for cancelling at a physical location where the consumer regularly uses any goods or services that are subject to the automatic renewal contract
- North Dakota: prohibits automatic renewal periods of more than 12 months
- Safe Harbor (i.e., California, Delaware): If a business complies with the provisions in good faith, it shall not be subject to civil remedies.

VENABLE_{LLP}

34

34

Enforcement

VENABLE_{LLP}

35

35

Redress and Penalties Sought

- Injunctive relief
 - “Follow the law” provisions and additional requirements
- Monetary relief
 - Refunds
 - Rescission of contracts
 - Disgorgement
 - Penalties
 - FTC statutory penalty (\$46,517)
 - State statutes authorize civil penalties (California authorizes a penalty of \$2,500 per violation)

VENABLE_{LLP}

36

36

Recent Enforcement Trends

- Disclosures of the automatically recurring charges:
 - Business will automatically enroll subscribers in subscriptions that automatically renew unless the subscriber affirmatively acts to cancel his or her subscription
- Disclosures of the total costs and frequency of charges:
 - Where the total cost of a multi-month subscription will be due in a lump sum rather than monthly installments
- Failure to provide simple cancellation mechanism:
 - Subscribers who wished to cancel their subscriptions could only do so by an undisclosed cancellation deadline
 - Subscribers who call customer service line to cancel their subscriptions will be prevented or discouraged from doing so by unavailable or uncooperative customer service agents
 - Put on hold for 30 minutes or more; being terminated or disconnected before they can talk to an agent
 - Inability to cancel online, challenges in reaching customer service because defendants understaffed customer service phone line, confusing and inconsistent instructions about how to cancel

VENABLE_{LLP}

37

37

Recent Enforcement Trends: “Dark Patterns” and the FTC’s Enforcement Statement

- The FTC set forth required disclosures:
 - Any material terms related to the underlying product or service that are necessary to prevent deception, regardless of whether that term directly relates to the terms of the negative option offer;
 - That consumers will be charged for the good or service, or that those charges will increase after any applicable trial period ends, and, if applicable, that the charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such charges;
 - Each deadline (by date or frequency) by which the consumer must act in order to stop the charges;
 - The amount (or range of costs) the consumer will be charged or billed and, if applicable, the frequency of such charges a consumer will incur unless the consumer takes timely steps to prevent or stop those charges;
 - The date (or dates) each charge will be submitted for payment; and
 - All information necessary to cancel the contract
- “[T]he legality of a particular negative option depends on an individualized assessment of the advertisement’s net impression and the marketer’s business practices”

VENABLE_{LLP}

38

38

Recent Enforcement Trends: “Dark Patterns” and the FTC’s Enforcement Statement

- The FTC set forth required elements to obtain valid consent:
 - obtain the consumer’s acceptance of the negative option feature offer separately from any other portion of the entire transaction;
 - not include any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent to the negative option feature;
 - obtain the consumer’s unambiguously affirmative consent to the negative option feature;
 - obtain the consumer’s unambiguously affirmative consent to the entire transaction; and
 - be able to verify the consumer’s consent
 - A “pre-checked box” does not constitute affirmative consent. In addition, the seller should clearly disclose the name of the billing entity authorized by the consumer’s consent.

VENABLE_{LLP}

39

39

Recent Enforcement Trends: “Dark Patterns” and the FTC’s Enforcement Statement

- The FTC set forth required elements for “simple” cancellation mechanisms:
 - Cancellation mechanisms that are at least as easy to use as the method the consumer used to initiate the negative option feature
 - Provide the cancellation mechanisms at least through the same medium (such as website or mobile application) the consumer used to consent to the negative option feature
 - A simple mechanism over the same website or web-based application the consumer used to purchase the negative option feature
 - If the seller also provides for telephone cancellation, it should provide, at a minimum, a telephone number, and answer all calls to this number during normal business hours, within a short time frame, and ensure the calls are not lengthier or otherwise more burdensome than the telephone call the consumer used to consent to the negative option feature
 - Sellers should not impede the effective operation of promised cancellation policy
 - Marketers should not, among other things: hang up on consumers who call to cancel; place them on hold for an unreasonably long time; provide false information about how to cancel; or misrepresent the reasons for delays in processing consumers’ cancellation requests

VENABLE_{LLP}

40

40

Settlement Amounts (Examples)

FTC	California Attorneys General	Class Actions
<ul style="list-style-type: none"> • <i>ABC Mouse</i> (2020): \$10 million • <i>AdoreMe</i> (2017): \$1,378,654 • <i>Urthbox</i> (2019): \$100,000 • <i>RevMountain</i> (2018): \$92 million • <i>Triangle Media</i> (2019): \$48.1 million • <i>MyLife</i> (December 2021): \$21 million <p>Other settlements over \$20 million – \$120 million</p>	<ul style="list-style-type: none"> • <i>j2 Global</i> (2019): \$1.2 million (\$585,000 in restitution plus penalties) • <i>AdoreMe</i> (2018): \$600,000 in civil penalties, a minimum of \$200,000 in restitution, \$250,000 in <i>cy pres</i> • <i>Guthy-Renker</i> (2019): \$1.2 million in penalties and up to \$7.3 million in restitution • <i>Care.com</i> (2020): \$1 million (\$700,000 in civil penalties and \$300,000 in restitution) • <i>DropBox</i> (2018): \$1.7 million in civil penalties and \$500,000 in restitution • <i>Box.com</i> (2020): \$274,000 in penalties, costs, and restitution <p>• Other cases involved penalties over \$1 million and over \$7 million in restitution</p>	<ul style="list-style-type: none"> • <i>Bumble</i>: \$22.5 million • <i>Synapse</i>: \$4.9 million • <i>Yahoo</i>: Structured restitution and \$300,000 in attorneys’ fees • <i>New York Times</i>: \$3.9 million in access codes and \$1.25 million in attorneys’ fees • <i>Washington Post</i>: \$6.8 million in cash and noncash benefits to class members <p>Other settlements over \$16 million – over \$22 million</p>



Card Brand Requirements



Visa Requirements

- Effective April 18, 2020
- Free trials or introductory offers
- Send terms of subscription via email at time of enrollment
- Send email notification before initiating a recurring transaction
- Provide online cancellation mechanism

Trial Subscription Updates



Visa is updating conditions for subscriptions using introductory trials/promotions



To enable greater transparency, choice, and control for customers, from **18 April 2020** Visa is updating its rules related to transactions as merchants that offer free trials or introductory offers as part of an ongoing subscription service.

For more information, see the Quick Reference card on the following page or contact your acquirer.

Subscription Merchant Transaction Policy Updates

The changes are designed to:

1. Provide an enhanced customer experience.
2. Enable cardholders & issuers to clearly identify these transactions.
3. Bring more specificity and clarity to the dispute requirements. With these changes, cardholders will be provided clearer information enabling them to identify, recognize, and take action on subscription transactions, reducing the need for disputes.

Specifically, cardholders will benefit from:

- Opportunities to expressly acknowledge the ongoing subscription agreement
- Immediate confirmation from the merchant of the terms of the agreement
- Proactive notification of future transactions
- Easier cancellation

Merchant Obligations

From **18 April 2020**, globally, merchants selling both physical and digital goods and services who offer free trials or discounted introductory offers as part of a subscription (hereinafter "services") must comply with the updated requirement. Following is a Quick Reference card with a summary of the requirement.



VENABLE LLP

43

Mastercard Requirements

Effective September 2022

- Disclosures: prior to enrolling consumers, must disclose the subscription terms (including price and frequency) and obtain the customer's affirmative acceptance
- Disclosures must appear at the point of payment; requiring a consumer to click a link, expand a message box, or scroll down the page will not satisfy

Effective March 2022

- Must send an enrollment confirmation immediately following enrollment by email or other electronic means; must include offer terms again
- After each billing for the subscription, must send a receipt for the billing by email or other electronic means
- If the period between billings is six months or longer, must send a subscription reminder 3-7 days before the card is automatically charged
- Must provide an online or electronic cancellation mechanism

VENABLE LLP

44



Questions? Contact Us

Ellen T. Berge
Partner | + 1 202.344.4704 | ETBerge@Venable.com

Shahin O. Rothermel
Partner | + 1 202.344.4550 | SORothermel@Venable.com

VENABLE_{LLP}

45



© 2022 Venable LLP.
This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

VENABLE_{LLP}

46