

# Turning Your Negative Option Offer into a Positive

Brought to you by Venable's Autorenewal Solutions Team (VAST) Co-Chairs

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# Agenda

- Federal and State Laws
- Requirements for Automatic Renewal Programs
- Ways to Reduce Risk

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# Federal & State Laws

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# Current Landscape

Continuing and aggressive law enforcement to protect consumers, including state attorneys general, FTC, and CFPB

New state laws targeting specific areas of concern

Ongoing onslaught of class action lawsuits to enforce state laws that are subject to varying interpretations by the courts

Allegations of violations of general deception laws accompanying alleged automatic renewal law violations

# Federal Law

Restore Online Shoppers' Confidence Act (ROSCA)

Telemarketing Sales Rule

Section 5 of the FTC Act

Electronic Funds Transfer Act (EFTA)

Consumer Financial Protection Act

Violations punishable by injunctive relief or monetary relief (refunds, disgorgement, rescission of contracts, statutory penalties of \$51,744 per violation).

**NEW:**  
**Federal Trade Commission  
Proposed Changes to Negative  
Option Rule—Including  
Expansion to Autorenewals and  
Subscriptions**

# FTC Proposed Updates to Negative Option Rule

## WHAT does this apply to?

- Automatic Renewals
- Continuity Plans
- Free-to-pay conversions or Fee-to-pay Conversions
- Pre-notification negative option plans

## HOW must this be disclosed?

- The proposed rule heightens disclosure requirements (including “clear and conspicuous” standard).

## WHAT consent is required?

- Imposes specific consent requirements (“unambiguously affirmative consent”).

## WHERE is a cancellation mechanism required?

- Mandates acceptable cancellation options.

## HOW many times can we use a “save” attempt?

- Limits the ability of a company to attempt to “save” the customer.

## WHEN is this going to be in effect?

- Unknown but may be later in 2024.

# The FTC's Proposed Updates

- The FTC could seek monetary penalties for violations of the rule (\$51,744 per violation), including allegedly false claims or material omissions.
- Creates an **independent violation for general misrepresentations or omissions** unrelated to the negative option offer itself.
  - *False or unsubstantiated claims for products sold on a negative option basis?*
  - *Failure to disclose material connections for endorsements or on social media?*
- Could encompass **business-to-business** service providers.



# Summary

Clear and  
Conspicuous  
Disclosures

Affirmative Consent

Order Confirmation

Simple Cancellation  
Mechanism

Renewal Reminders

Material Changes to  
the Offer



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# Clear and Conspicuous Disclosures

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# What to Disclose

Must clearly and conspicuously disclose **all material terms** of the transaction before obtaining the consumer's billing information. This includes:

- That the subscription agreement will continue until the consumer cancels
- The description of the cancellation policy that applies to the offer, including the deadline by which to cancel
- The amount of recurring charges, including that if the price changes after a trial offer, the amount that will be charged when the trial ends
- The payment method that will be used for charges
- The length of the subscription term (e.g., weekly, monthly, annually, etc.)
- Minimum purchase obligation, if any
- Other material terms: for example, disclosure of an early termination fee



# How To Disclose

In a clear and  
conspicuous manner

Before obtaining  
consumer's billing  
information

For subscriptions with an  
initial term of 1 year or  
more, disclosures must  
appear in **boldface** type  
(Vermont only)

# What's Coming Down the Pike

- If the FTC's Proposed Update goes into effect, here are the additional requirements for clear and conspicuous disclosures:
  - ❑ *Unavoidable*
  - ❑ Easily understandable by ordinary consumers
  - ❑ Made through the same means as the communication (visual disclosure for visual claim). **In both visual and audible communications, such as a television ad, the disclosure must be presented simultaneously in both the visual and audible portions of the communication *even if the representation requiring the disclosure is made in only one means.***
  - ❑ No hyperlinks
  - ❑ Must be delivered at a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, the definition of “ordinary consumers” includes members of that group.

# Where to Disclose

If *directly* related to the negative option feature, **immediately adjacent** to the means of recording the consumer’s consent for the negative option feature.



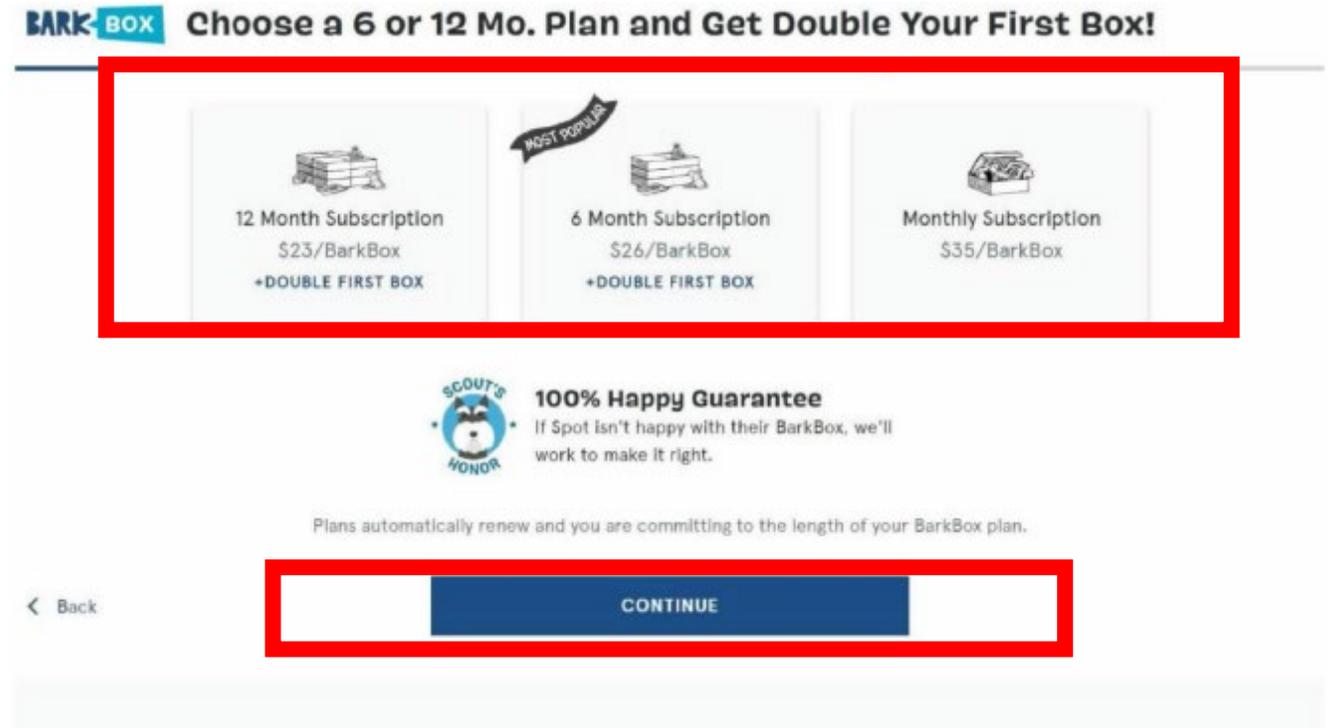
If *not directly* related to the negative option feature, the disclosures must appear **before consumers decide to buy** (e.g., before they “add to shopping cart”).



All communications, regardless of media, must not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to read, hear, see, or otherwise understand the disclosures.

# Where Did It Go Wrong (and Why)?

- The court denied a motion to dismiss claims under California’s ARL.
- Disclosures on the website were not “clear and conspicuous” because “the message is printed in text that is smaller and lighter in color than all other information on the page, and it does not in any other way call attention to itself.”



# Where Did It Go Wrong (and Why)?

- **TECHNICAL VIOLATIONS MATTER!**
- The court denied a motion to dismiss claims under North Carolina’s ARL.
  - **The language was not presented in bold**, as required by North Carolina law: “If the terms of the contract will change upon the automatic renewal of the contract, disclose the changing terms of the contract clearly and conspicuously on the notification in at least 12-point type and in bold print.”
- The Bright Side?
  - The court held that the subscription checkout page “can fairly be characterized as free of visual clutter and containing limited text.” The page includes a short, four-sentence paragraph above the “Purchase Subscription” button and, on the right side of the page, five paragraphs, each containing one or two sentences.



The image shows a screenshot of a subscription checkout page for 'The New York Times'. A red circle highlights the 'BASIC DIGITAL ACCESS' section, which states: 'Enjoy unlimited articles, podcasts, videos and more on NYTimes.com and the NYTimes app.' Below this, the 'PAYMENT INFORMATION' section is highlighted with a red box. It states: 'Your payment method will be automatically charged \$4.00 every 4 weeks for the first year (\$1.00 per week). It will then be automatically charged \$17.00 every 4 weeks thereafter, starting on April 5, 2021 (\$4.25 per week). Your subscription will continue until you cancel. You can cancel anytime. Sales tax may apply.' The total amount is shown as \$17.00 and \$4.00. A red arrow points from the 'Purchase Subscription' button to the 'PAYMENT INFORMATION' section. Another red arrow points from the 'PAYMENT INFORMATION' section to the 'TOTAL' amount. A third red arrow points from the 'TOTAL' amount to the 'BASIC DIGITAL ACCESS' section. A fourth red arrow points from the 'BASIC DIGITAL ACCESS' section to the 'Purchase Subscription' button.

# Where Did It Go Wrong?

Choose plan | Review details | Checkout

**\$25 off per week for the first 4 weeks**  
Discount automatically applied at checkout.

## Best plan for you

You will not be charged until you've been matched with a provider. Switch plans or cancel anytime after subscribing.

**\$99/week**  
Your price: \$74 (you save \$25)

**Live Therapy**  
4 Live Session/month (45 min)  
Live sessions

Select plan

**\$69/week**  
Your price: \$44 (you save \$25)

**Messaging Therapy**  
Text, video & audio messaging  
Guaranteed Daily Responses 5 days/week

Select plan

**\$129/week**  
Your price: \$104 (you save \$25)

**Live + Messaging Therapy**  
4 Live Session/month (45 min)  
Live sessions +  
Text, video and audio messaging. Guaranteed  
Daily Responses 5 days/week.

Select plan



Choose plan | Review details | Checkout

## Review your therapy plan

You're ready to begin!

Apply a coupon

SPACE

Subscription plan [Change](#)

**Live Therapy, Monthly**  
4 Live Session/month (45 min)  
Live sessions

This is a secure SSL encrypted payment.

**Summary**

Live Therapy (4x\$74)	\$396
First charge promo SPACE	-\$100

**Your savings** - \$100

**Total due on match** \$296

You will not be charged until you've been matched with a provider.



Choose plan | Review details | Checkout

**Your savings** - \$100

**Total due on match** \$296

## Payment details

Enter payment details for pre-authorization. You will not be charged the full amount until you've been matched with a provider.

Email

Card number

Expiration  CVC

Country  ZIP

By providing your card information, you allow Talkspace to charge your card for future payments in accordance with their terms.

This is a secure SSL encrypted payment



## (And Why?)

- **BE EXPLICIT WHEN EXPLAINING THAT THE CHARGES AUTOMATICALLY RENEW!**
- Plaintiff alleged
  - Neither the Checkout Page nor any of the previous webpages mention anything about automatically renewing charges.
- The company fails to adequately disclose its renewal scheme or purposefully misrepresents it in at least the following ways:
  - **Prices are shown and calculated in weekly increments even though the term of the automatic renewal is monthly;**
  - Company fails to describe the plan as an automatically renewing subscription plan;
  - Company fails to present the terms of the automatic renewal plan in contrasting text of a distinct size or color;
  - The Checkout Page - on which consumers enter their credit card number and authorize Company to charge their credit card – fails to mention or reference anything about a subscription or automatic monthly renewal program; and
  - No cancellation policy is identified
- The Checkout Page makes a vague mention of “future payments” above the “Authorize my credit card” button - this language is in a lighter color and smaller font than the rest of the text on the page and does not say anything about an automatically recurring subscription plan.

# Where Did It Go Right (and Why)?

- The court granted a motion to dismiss claims under Oregon’s ARL.
  - The page states that the subscription “will renew automatically every month,” that users can “cancel anytime in Settings,” along with a hyperlink to “learn more,” the price of the recurring monthly charge, and the length of the renewal term.
- Plaintiff alleged that defendant failed to disclose the specific details of the 7-day refund policy.
  - Court held that a “description” of the cancellation policy does not mean the complete policy, i.e., the refund policy.

**Complete your purchase**

Music Premium Membership Free trial

Monthly charge \$9.99/mo  
Billing starts: Jun 20, 2022

Google Pay [Redacted] >

Billing starts on Jun 20, 2022, the end of your free trial, and will renew automatically every month. Payments won't be refunded for partial billing periods. Cancel anytime in Settings. [Learn more.](#)

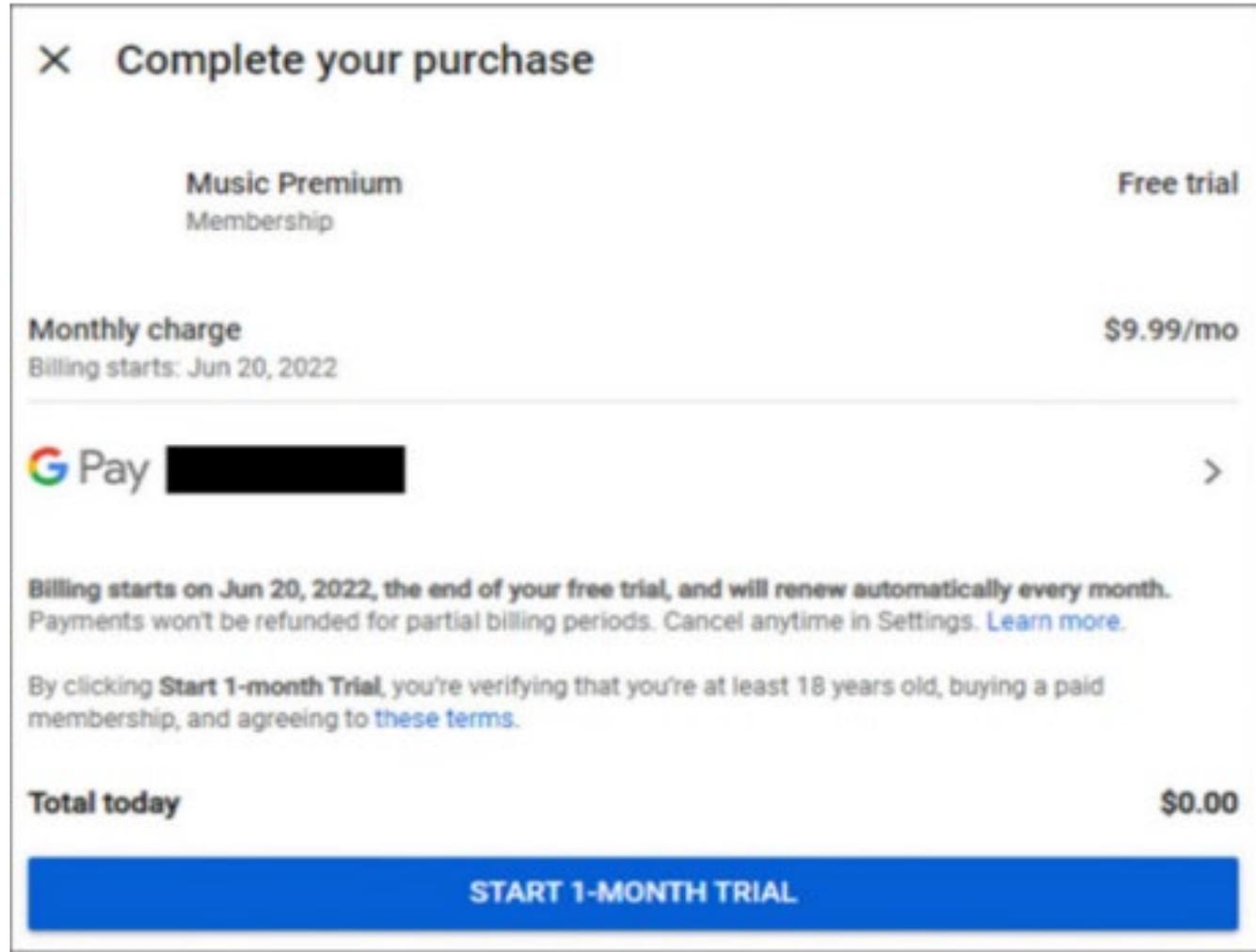
By clicking **Start 1-month Trial**, you're verifying that you're at least 18 years old, buying a paid membership, and agreeing to [these terms](#).

Total today \$0.00

**START 1-MONTH TRIAL**

# Where Did It Go Right (and Why)?

- The text also satisfied the clear and conspicuous requirement by using text with **contrasting type as the surrounding text**. The key offer terms are featured in bold font, and a gray line divides the page to further demarcate the terms.



# Where Did It Go Right (and Why)?

- District court found the disclosure on the “checkout summary” sufficient.
  - Directly above the “Continue to Payment” button, the disclosure stated (partially in bold): “Your **subscription will automatically renew** every 12 months, unless you terminate your contract at least 28 days before the end of the initial term or any renewal term.”
- Ninth Circuit affirmed:
  - “Gershfeld was put on notice, both initially and thereafter, of the automatic renewal and the terms thereof; he was informed of the software subscription price, the price increase upon renewal, the cancellation policy, and the cancellation process.”

The screenshot shows a checkout summary titled "Product Choice". It contains a table with the following data:

Quantity		Price / month	Price / year
1	TeamViewer Business Subscription Contract period: 05-Jan-2021 - 04-Jan-2022	US\$ 49.00	US\$ 588.00
Net price			US\$ 588.00
0% Sales Tax			US\$ 0.00
Invoice Total			US\$ 588.00

Below the table, a disclosure states: "Your **subscription will automatically renew** every 12 months, unless you terminate your contract at least 28 days before the end of the initial term or any renewal term." A blue button labeled "Continue to Payment" is positioned directly below this disclosure.

The screenshot shows a "Payment Method" selection page. It features three radio button options: "PayPal (What is PayPal?)", "Credit Card", and "Invoice". To the right of these options are logos for PayPal, Mastercard, VISA, and American Express. Below the options, a message reads: "You will receive your licenses immediately after purchase and can start working with TeamViewer right away." A checked checkbox is next to the text: "I order according to the TeamViewer End-User License Agreement." At the bottom, there is a blue button labeled "Proceed to Checkout" and a security icon with the text "Your order is safe and secure".



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# Affirmative and Express Informed Consent

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# How to Obtain Consent?

**To recap:** 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 or ambiguous response ≠ consent

**Informed consent:** Having been appropriately informed of the offer disclosures, the consumer provides consent.

# What is “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): **Must agree to autorenewal separately!**
    - The consent mechanism should be in “*visual proximity*” to the request for consent.
  - Disclosures and checkboxes should not be muddled with other disclosures.
  - Create at least paragraph separation; use headers to distinguish text.



# 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.**



# What's Coming Down the Pike?

- The FTC's Proposed Rule would create additional obligations for obtaining consent:
  - **The seller must separately obtain “unambiguously affirmative consent” for the rest of the transaction.**
  - The consent language must not include any information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to provide their express informed consent.
- **The negative option disclosures must appear immediately adjacent to the request for the consumer's consent for the negative option feature.**
- The rule states that a seller “will be deemed in compliance” with the requirements if the seller obtains the required consent through a check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign to accept the negative option feature and no other portion of the transaction.



# Is a Checkbox Required? Regulators Say Yes

- ***California Autorenewal Task Force (CART):***

- Requires the company to obtain consent through an express act by the consumer through a checkbox, signature, express consent button, or other substantially similar mechanism that the consumer must affirmatively select to give consent to the automatic renewal offer terms.
- The mechanism cannot relate to consent for anything other than the offer terms (such as final payment or completion of the transaction).
- Immediately adjacent to the consent mechanism, the automatic renewal offer terms must be disclosed clearly and conspicuously.

- ***FTC Enforcement Statement:***

- 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;
- 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.

# Is a Checkbox Required? These Courts Say No

- **Walkingeagle (D. Ore. June 2023)**

- Oregon ARL does not require a checkbox to satisfy affirmative consent.
  - As long as consumers have the necessary information to make an informed decision to commence the free trial and automatic renewal plan.
    - (1) When reading the page top to bottom, consumers first encounter the automatic renewal offer terms.
    - (2) Then the description of additional terms.
    - (3) Finally, the agreement confirmation button.

- **Viveros (W.D. Wash. Oct. 2023)**

- California ARL requires conspicuous disclosure of renewal policies in plain language. **It does not, however, require a separate checkbox indicating consent to the automatic renewal terms.**
- California task force cases' orders? *None of those orders cite or purport to interpret California's ARL.*

- **Daly (W.D. Wash. Feb. 2023)**

- Rejected the argument that the defendant violated California ARL because “defendants do not at any point during the checkout process require consumers to read or affirmatively agree to any terms of service associated with their  subscriptions, e.g., by requiring customers to select or click a ‘checkbox’ next to the automatic renewal offer terms to complete the checkout process.”



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# Order Confirmation

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# Order Confirmation / Acknowledgment— Increasing Area of Class Actions

- More states are passing laws requiring companies to send an order acknowledgment—“in a manner that is capable of being retained by the consumer” with the material terms of the offer.
- Include:
  - Terms of autorenewal – **clearly and conspicuously**
  - Cancellation policy, information about how to cancel and hyperlink to cancel
  - If offer is a free gift or trial, disclose how to cancel before consumer begins paying
- “GOTCHAs” by class action plaintiffs:



**Be explicit** → language like “modify” and “change” is insufficient! A court rejected: “[r]eview your subscription by visiting [company] settings” or “[t]o learn more or make changes, manage your [] membership.”

**Include a hyperlink to cancel** → Court found insufficient an acknowledgment stating, “instructions on how to cancel are located in the Help section of the [WW] site” because it does not describe a “timely and easy-to-use cancellation mechanism” and simply directed customers to the “Help” page (without a hyperlink).



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# Simple Cancellation Mechanism

Online Cancellation for Online Enrollments

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# 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, CO, DC, DE, FL, IL, LA, ME, NY, NC, ND, OR, TN, VA, & VT**).

# California's Restrictive Cancellation Requirements



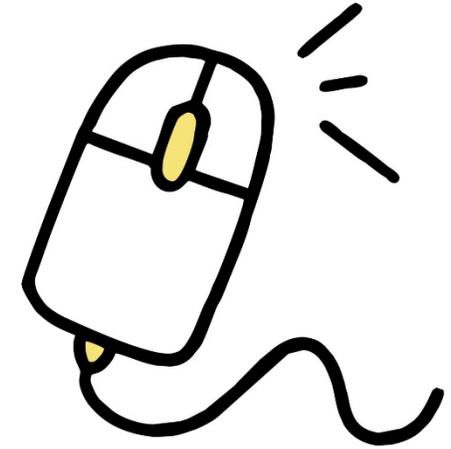
- If a consumer accepts an offer online, the consumer must be allowed to terminate exclusively online, at will, ***and without engaging in any further steps that obstruct or delay the consumer's ability to terminate immediately.***
- The business must provide a method of termination online, either:
  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.

# The FTC's Position on How to Cancel

- The FTC Negative Option Enforcement Policy Statement reads requirements into ROSCA beyond those in the statute's text itself:
  - The cancellation mechanism must be **“at least as easy to use [i.e., the same method] as the method the consumer used to initiate the negative option feature.”** (If a business offers subscriptions online, the seller should, at a minimum, provide a simple cancellation method over the same website or web-based application the consumer used to purchase the subscription.)
  - Cancellation procedures must also be effective, and requests must be honored promptly.
  - Do not thwart or hinder consumer's cancellation efforts.
  - Avoid subjecting consumers to additional sales pitches or “save offers” if such offers impose an unreasonable delay on a consumer's cancellation efforts.

# The FTC's Proposed Rule: "One Click Cancellation" & "Mirror Cancellation Rule"

- The updated Rule would require a "one-click cancellation" mechanism that mirrors the customer's enrollment method.
- The cancellation must:
  - Be at least as easy as the enrollment mechanism;
  - Be provided through the same medium that the consumer used to enroll (same website or web-based application the consumers used to purchase the subscription).
- After receiving the cancellation request, the seller must "immediately cancel," unless the seller obtains the consumer's unambiguously affirmative consent to receive a save prior to cancellation. Such consent must apply only to the cancellation attempt in question and not to subsequent attempts.



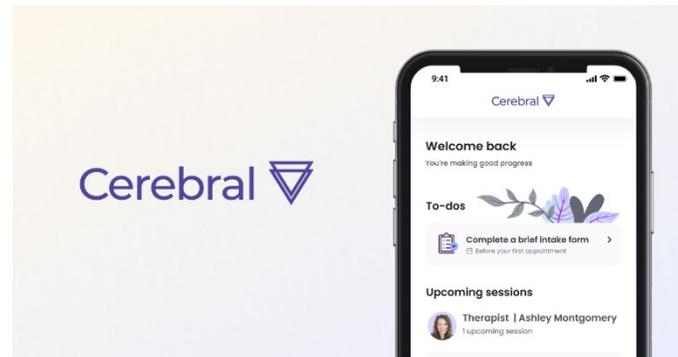
# The FTC's Proposed Rule: Save Attempts



- What is a “save”?
  - The proposed rule defines “saves” as an attempt by a seller to present additional offers, modifications to the existing agreement, reasons to retain the existing offer, or similar information when a consumer attempts to cancel.
  - Before making sales pitches, the seller must first ask consumers whether they would like to consider such offers or modifications (e.g., “Would you like to consider a different price or plan that could save you money?”).
  - If consumers decline, the seller must stop presenting save offers and cancel the negative option arrangement immediately.
  - If they accept, the seller can pitch the alternative offers. The preamble also states that consumers could disengage during the “save” attempt (e.g., by hanging up, closing the browser, or disconnecting the chat) and avail themselves of the easy cancellation.
    - ***Hang-ups and disconnections must be presumed to be cancellations.***

# Class Actions

- Class action plaintiffs’ attorneys have filed lawsuits challenging similar practices as the FTC, including:
  - Continuing to charge customers after they attempted to cancel
  - Failing to disclose that a customer must cancel during a certain period in advance of the next renewal for cancellation to be effective;
  - Chat bots’ inability to process plain-language requests for cancellation;
  - “Adopting complex cancellation procedures to increase the friction in the subscription cancellation process” by requiring people to navigate through a multi-step cancellation process online and refusing to honor customers’ telephonic cancellation requests.
- Providing a simple, well-disclosed, and effective cancellation mechanism can help defend claims:
  - ***Debono v. Cerebral Inc.* (N.D. Cal. Jan. 18, 2023)**
    - “Plaintiffs allege that Cerebral made it difficult for them to cancel their subscriptions. This unfair-business-practices theory isn't well pleaded because two of the named plaintiffs don't allege that they complied with Cerebral’s cancellation policy—which may have been the true source of their difficulties—and the third named plaintiff, who did follow the process, was promptly able to cancel. These allegations don't plausibly support that Cerebral engaged in unfair business practices.”



# New York Attorney General: Cerebral

- NY AG alleged Cerebral created a "long and burdensome" cancellation process and continued to charge consumers after they tried to cancel their subscriptions.
- Told subscribers they could cancel via email but then made consumers "jump through hoops" to cancel, such as requiring them to take a multi-question survey.
- If the subscriber's billing date fell between the request to cancel and the cancellation date, Cerebral would charge for another subscription period.
- The settlement requires Cerebral to establish a "click-to-cancel" process and to refrain from making more than one attempt to retain subscribers once they indicate an intent to cancel.



The screenshot shows the official website of the New York State Attorney General, Letitia James. The header includes the state seal and the text "Office of the New York State Attorney General" and "Letitia James, New York State Attorney General". A search bar and a "Translate" button are visible. The main content area features a press release titled "Attorney General James Secures \$740,000 from Online Mental Health Provider for its Burdensome Cancellation Process". The press release text states: "OAG Investigation Found Mental Health Provider, Cerebral, Took Days to Process Cancellation Requests and Charged Patients for Services Never Provided. Cerebral Required to Pay \$540,000 in Restitution to Over 16,500 New Yorkers and Establish a Simple 'Click-to-Cancel' Process".



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# Renewal Reminders

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# Renewal Reminders

- Additional notices must be sent, depending on the contract's initial term and renewal term
  - Some states require notice if the initial term is 12 months or more and automatically renew for a term of one month or more.
    - **North Dakota** imposes notice requirements for automatic renewal periods longer than six months (North Dakota prohibits automatic renewal periods 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

# 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.***



# California Requirements for Notices

**21 days**  
before the  
expiration of the  
predetermined  
period of time

- Consumer accepted a free gift or trial, lasting for more than 31 days, that was included in the offer \*Free gift does not include promotional items unrelated to the subscribed product/service
- Consumer accepted an automatic renewal at a promotional or discounted price, and the applicability of that price was more than 31 days

**At least 15 days  
and not more  
than 45 days**  
before the offer  
renews

- Consumer accepted an automatic renewal offer with an initial term of one year or longer, and that automatically renews unless consumer cancels



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# Material Changes to the Offer Terms

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# Material Changes to the Offer

## Notice

- 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

- Price changes are material; significant changes to what the consumer is receiving are material

## Best Practice

- Best practice is to obtain consumers' affirmative consent to the changes

# Other Notable State Laws



- 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**.

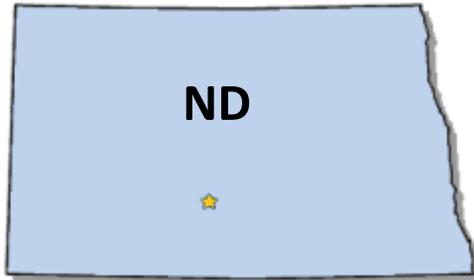


- Must provide a simple, cost-effective, timely, easy-to-use cancellation mechanism. A business complies if it offers:
  - A one-click online cancellation link on the website or available to consumers after they complete a reasonable authentication mechanism to log in to their account.
  - An in-person mechanism for cancelling at a physical location where the consumer regularly uses any goods or services that are subject to the automatic renewal contract



- Notify the consumer between 15 and 30 days before the expiration of a free trial period, and obtain consent before the end of any trial period with a renewal term of one month or more.

## Other Notable State Laws (cont'd)



- Prohibits automatic renewal periods of more than 12 months.



- If the terms of the contract will change upon the automatic renewal, disclose the changing terms of the contract clearly and conspicuously **in at least 12-point type and in bold print.**



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# Ways to Reduce Risk and Prepare a Defense

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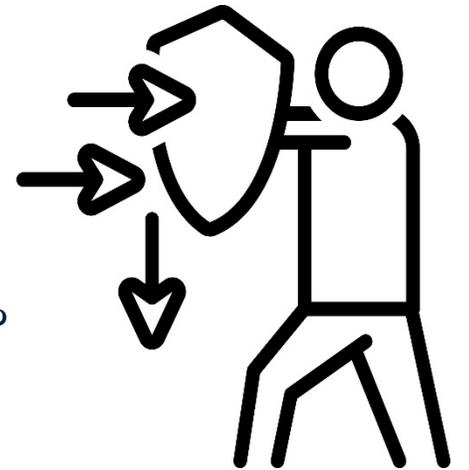
# Ways to Reduce Risk

- ❑ Review and update customer-facing messaging: desktop, mobile “test shopping” of current offer presentation(s)
  - How often? At least two times per year.
- ❑ Audit customer service policies and procedures
  - Pressure test! Audit your customer representatives’ responses to irate, confused, and unhappy customers
- ❑ Audit your cancellation policy → the easier, the better
- ❑ Adopt a generous refund policy → Customers who receive a refund are less likely to complaint to a regulator
- ❑ Monitor and address complaints → Review your BBB profile, gripe websites.
- ❑ Look at your metrics! If you collect cancellation reasons, why are people cancelling?
  - Evaluate trends and correct problems.



# Ways to Prepare a Defense

- ❑ Document and retain the offer funnels that customers viewed
- ❑ Document and retain evidence that customers agreed to your terms and conditions, mandatory arbitration, and class action waiver.
- ❑ Retain documentation of your compliance
  - Customer service policies and procedures
  - Updates to your offer pages, acknowledgments, renewal reminders, and cancellation policies.
- ❑ Evaluate the complainant's experience
  - What was their enrollment experience?
  - Did they try to cancel? If so, how?
  - Did they receive a refund?
  - Did they use the product (i.e., sign in for a digital subscription multiple times)?
  - Did they interact with the company demonstrating that they knew they were auto-renewed?
- ❑ Analyze defenses to a class action!
  - Was the named plaintiff's experience similar to the class they want to represent?





# Arbitration Provision and Class Action Waiver

- ❑ Include a mandatory arbitration provision and class action waiver in your terms and conditions.
- ❑ Obtain consent to the hyperlinked terms and conditions.
  - ❑ Checkbox and scroll-through are lowest-risk
  - ❑ Make the notice of the terms and conditions unavoidable.
  - ❑ Make the font sufficiently large and contrasting from the background.
  - ❑ Require consumers to click a checkbox agreeing to the terms.
  - ❑ Blue, underlined hyperlinks
  - ❑ Label hyperlinks consistently → “Terms of Service” vs. “Terms and Conditions”
- ❑ Make your terms and conditions are enforceable.
  - ❑ Comply with state laws regarding limitations of liability
  - ❑ Include procedural protections for arbitration.

# Thank you!



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A co-chair of Venable's Autorenewal Solutions team, Shahin Rothermel is an experienced counselor and defender who helps advertisers, retailers, merchants, and marketers advance their business goals while reducing legal and regulatory risks. Shahin provides clients with up-to-date, practical insights into the constantly evolving advertising, marketing, and e-commerce regulations, which allows her clients to make informed decisions. She has achieved successful resolutions, dismissals, and full walkaways in court, saving clients millions of dollars. She takes a pragmatic approach as a counselor, considering the implications of her advice for her clients' marketing campaigns and their bottom lines.



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A co-chair of Venable's Autorenewal Solutions team, Ari Rothman focuses his nationwide practice on all legal facets of advertising and marketing, telemarketing, and payment processing. Ari represents advertisers, nutritional supplement and food companies, affiliate networks, lead generators, advertising agencies, payment processors, independent sales organizations (ISOs), and others in contract negotiations and compliance reviews. He also represents such clients in investigations before the Federal Trade Commission (FTC) and state attorneys general, in class action and business-to-business litigation, and before the National Advertising Division (NAD) of the Better Business Bureau (BBB).



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